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ARTICLES

THE LEGAL STATUS OF THE MONTANA UNIVERSITY SYSTEM UNDER THE NEW MONTANA CONSTITUTION

Hugh V. Schaefer*

INTRODUCTION

This article discusses the impact of Article X of the New Montana Constitution on the legal status of higher education in Montana. In order to facilitate analysis the article is divided into parts. Part 1 gives a brief comparison between Article XI of the "old" and Article X of the "new" constitution. The discussion in Part 1 dwells primarily on the changes in language between the two articles as well as an overview of the most obvious or literal changes in the structure of higher education by the adoption of the new Montana Constitution. Part 2 is a review of the preconvention debate over the appropriate status that should be accorded higher education in Montana by a new constitution. Part 3 analyzes the debate over the education article in the constitutional convention as it related to higher education with a view towards developing an understanding of the intent in proposing Article X to the citizens of Montana for adoption. Part 4 is an analysis of decisions from jurisdictions whose constitutions most closely parallel Montana on the status of higher education with special emphasis on the interrelation of higher education with other branches of state government. The article concludes with findings.1

The degree of recognition of higher education in state government in the United States has been debated extensively throughout the history of this nation. Unfortunately, the exact legal status accorded higher education has not been consistent or uniform. The spectrum of the variations in this status range from total and complete dependence of higher education on the legislative assembly or the executive in some states to virtual autonomy tantamount to making higher education a so-called "fourth branch" of state government in other states. The type of entity that controls higher education in the various states is equally varied. Single state superintendents, public corporations, public trusts, boards or commissions, appointed by either governors, legislatures or elected by the people exist today with varying degrees of autonomy throughout the fifty states. Perhaps the reason for such variance may

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1 This article is based upon research done by the writer for the Board of Regents of Higher Education and the Honorable Lawrence K. Pettit, Commissioner of Higher Education. Any views and opinions expressed herein are those of the writer and do not necessarily reflect the position or view of the Board of Regents, its members, or the Commissioner.
be that higher education involves a substantial portion of state revenues and expenditures and as in other areas of state government, the wisest way to insure responsibility for these funds is an ongoing process of constant change.

The exact legal status with which to clothe higher education in Montana was debated extensively and thoroughly in the sessions of the recent Montana Constitutional Convention. That substantial and far reaching changes were intended is evident even from a casual comparison between the old and the new constitution. The debate in the Montana Constitutional Convention reflected the ongoing national debate over the structure of higher education in America educational history.

PART 1

The old Montana Constitution Art. XI, § 11 provided as follows:

The general control and supervision of the state university and the various other state educational institutions shall be vested in a state board of education, whose powers and duties shall be prescribed and regulated by law.

The new Constitution Art. X, § 9 provides:

(1) There is a state board of education composed of the board of regents of higher education and the board of public education. It is responsible for long-range planning, and for coordinating and evaluating policies and programs for the state’s educational systems. It shall submit unified budget requests. A tie vote at any meeting may be broken by the governor, who is an ex officio member of each component board.

(2) (a) The government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system and shall supervise and coordinate other public educational institutions assigned by law.

(b) The board consists of seven members appointed by the governor, and confirmed by the senate, to overlapping terms, as provided by law. The governor and superintendent of public instruction are ex officio nonvoting members of the board.

(c) The board shall appoint a commissioner of higher education and prescribe his term and duties.

(d) The funds and appropriations under the control of the board of regents are subject to the same audit provisions as are all other state funds.

(3) (a) There is a board of public education to exercise general supervision over the public school system and such other public educational institutions as may be assigned by law. Other duties of the board shall be provided by law.

(b) The board consists of seven members appointed by the governor, and confirmed by the senate, to overlapping terms as provided by law. The governor, commissioner of higher education and state superintendent of public instruction shall be ex officio nonvoting members of the board.

The most obvious change brought about by the new Constitution is the creation of separate boards, one for the control of higher edu-

\[^{2}\text{MONT. CONST. art. XII § 11 (1889).}\]

\[^{3}\text{MONT. CONST. art. IX (1972).}\]
cation and the other for the control of elementary and secondary education. Both boards together comprise a "super board" of education with limited functions. This state board of education is required to act as a budget-clearinghouse for all educational budgets in the state as well as coordinating and planning educational policies for the state. The old board of education had responsibility for both the public school system and the higher education system known as the Montana university system. This latter function was conferred upon the state board by the Legislature in 1971.4

Under the new Constitution, however, the board of regents for the Montana university system has been transformed from a purely legislative creation to a constitutional department. This transformation of the status of the board of regents represents another and perhaps the most significant change in the structure and control of higher education in the state. Under the old constitution the board of education, although a constitutional entity, nevertheless was completely dependent upon the legislature for its powers and duties. Until the legislature passed laws which implemented the constitutional mandate, the board was virtually powerless.

In an early decision the Montana Supreme Court ruled that the constitution reserved broad powers to the legislature and its control was superior and illimitable as long as it did not infringe upon the constitution.5 The court further declared in that case, that the state board of education, because of its dependence on the legislature, was simply just another agency of state government and a part of the executive department.6 In examining corresponding language in the new constitution with regard to the power and duties of the board of regents, the language of the old constitution subjecting their definition to legislative control is no longer present. "Full power of responsibility and authority to supervise, coordinate, manage and control . . ." is vested in the board of regents.7

The full legal effect of such language will be dealt with in more detail later in this article, but it seems evident even from the briefest reading that the function of defining powers and duties of the board has shifted from one of absolute legislative prerogative to that of the board limited only by the express language of the constitution and reasonable interpretations that common understanding would infer from such language. Under the new constitution the role of the legislature in higher education has been narrowed from one of defining all powers and duties of the board to only the functions of appropriation, audit, setting by statute the terms of office of members of the board and

4 REVISED CODES OF MONTANA, § 75-8501 (1947) [hereinafter cited as REVISED CODES MONTANA 1947].
6 Id. at 208.
7 See note 3, supra.
assigning additional educational institutions to the control of the board. The senate has the added but exclusive function of confirming gubernatorial appointments to the board.\textsuperscript{8}

Further evidence of the intent of the framers of the constitution as to who has what powers and duties is found when the provisions of Art. X § 9 dealing with the board of regents are contrasted with other provisions of Art. X § 9 dealing with the powers and duties of the state board of public education. In Art. X § 9 (3)(a) there is the express provision that while general supervision over the public school system rests in that board, the legislature has the prerogative to provide other duties to the board. No such language is found in any of the provisions dealing with the board of regents.

Other significant differences between the old and new provisions include giving the board of regents the power to appoint a commissioner of higher education and the power and duty to define his term and duties. This power was actually part of legislative control under the old constitution, but was delegated to the board of education by legislative enactment.\textsuperscript{9} The new post of commissioner of higher education succeeds the office of executive secretary under former legislation. While the governor and superintendent of public instruction remain ex officio members of each component board, the attorney general is no longer an ex officio member of either board under the new constitution. However, the function of the governor is limited to making appointment to both boards with senate approval, for terms prescribed by law. The governor has the prerogative to vote to break a tie vote at a meeting of the state board of education. Article X of the new constitution is silent as to who presides over the meetings of either board of the state board of education. However, for reasons which will be discussed later, the power to elect its own chairman is inherent in the type of board that the new constitution has created as a necessary and proper function to be implied from the powers assigned to the board by the constitution.

The new constitution does not expressly place the board of regents under any branch of state government for administrative purposes. However, this matter was treated at some length in the Montana Constitutional Convention and has received judicial scrutiny in other jurisdictions. Parts 3 and 4 of this report will include a discussion of this question. Merely contrasting language distinctions may resolve general differences between the old and the new constitutions, but the overall inquiry must resolve the fundamental and basic question raised by the debate over the legal status of higher education. Simply stated this question is: How independent is the board of regents? As stated above this issue has been subjected to judicial scrutiny and was fully debated

\textsuperscript{8}Mont. Const. art. X, § 9(2)(a) and (b).

\textsuperscript{9}R.C.M. 1947, § 75-8501.
in the Constitutional Convention of 1972. As a matter of fact many theories about the structure of higher education and its treatment under the new constitution were offered in advance of the convention. The next part of this report is a brief resume of these proposals to provide historical depth to the inquiry.

**PART 2**

In 1968 the Montana Legislative Council prepared a report on the need for a constitution convention to repeal the old constitution. In discussing Art. XI of the old constitution the council recommended that the new constitution repeal Art. XI in its entirety and replace it by statute, if necessary. The effect of such recommendation if adopted would be essentially a retention of the status quo under the old constitution. This proposal was advanced apparently after the legislative council had received the so-called “Durham report” which was prepared for the council also in 1968. The Durham report recommended that there should be a separate and independent board of regents for higher education constituted as a “body corporate and politic and its establishment, with all the rights, immunities, franchises, and endowments heretofore granted or conferred are hereby perpetuated” unto it under the general control and supervision of the regents. The Durham proposal received consideration by the education committee of the convention but it did not adopt it per se.

In his article appearing in the Winter 1972 issue of the Montana Law Review Lawrence R. Waldoch offered a proposal for a constitutional article on education. In essence the proposal would have vested “governmental control of academic, financial and administrative affairs of the University of Montana System” in a board of regents with the duty to govern the same as a “public trust in a manner consistent with the general laws of Montana. The legislature shall pass no law which infringes upon, diminishes or transfers to another body any of the authority provided by this section.” This proposal was considered by the education committee but it was not adopted per se. The final pre-convention proposal was contained in a legal research report prepared by three law students at the University of Montana which recommended

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11 Id.

12 Id.


14 Waldoch, Constitutional Control of the Montana University System: A Proposed Revision, 33 Mont. L. Rev. 76 (1972).

15 Id. at 95.
that the Constitutional Convention provide for a board of regents as a
body corporate vested with the exclusive management and control of
the Montana University System.16

After reviewing these proposals and hearing the testimony of 100
witnesses, the majority of the committee proposed the following pro-
vision, inter alia, to the convention:

There shall be a board of regents of higher education, a bodycorporate, which shall govern and control the academic, financial
and administrative affairs of the Montana University System.17

While the foregoing provision was contained in a majority report, the
minority report limited its report to matters not germane to this inquiry
and offered no minority proposal regarding the structure of the board
of regents.18 Therefore, the foregoing provision was a unanimous pro-
posal of the committee to the convention. After the report reached the
floor of the Constitutional Convention various amendments were offered
which changed the language of the majority proposal.

The Convention debate over the education article provides a source
from which to determine the intent of the framers of the new con-
stitution. The following part of this report is a discussion of some of
the significant arguments raised during the convention concerning the
status of the board of regent under the constitution. Part 3 will con-
centrate primarily on a discussion of the significant amendments and
motions that were offered rather than the many random comments which
were often made. This direction is preferable since the ensuing votes
of the delegates affords concrete evidence of the will of the Convention.
However, selection of these passages was done only after a reading and
analysis of the entire transcript of the Convention debate on the edu-
cation article.

PART 3

At the time the majority report of the education and public lands
committee of the Convention was introduced the tone of the report was
established by the remarks of its Chairman, Delegate Champous: He
stated that direct legislative control under the old system had proven
unworkable.19 "There was a need for autonomy and relief from state
administrative bureaucracy."20 He further stated that higher education
must be something more than simply another state service.21
During the course of the debate numerous amendments to the majority report were offered which suggested a retention of the old structure for higher education. These include a proposal which essentially vested control of the higher education system in a commissioner of education whose duties would be prescribed by law.22 This amendment was later withdrawn by its proponent.23 Then an amendment proposed that the general control and supervision of the state university be vested in a state board of education whose powers and duties will be prescribed and regulated by law.24 During the debate on this amendment another amendment was offered which was basically similar to the one pending except as to the manner of appointment.25 The latter amendment was defeated by a roll call vote 66-29;26 the former was also defeated by roll call vote 54-38.27 Later on in the debate another amendment was offered which proposed to place the general control and supervision of the state university and various other state educational institutions in the superintendent of schools and one or more state boards of education whose duties shall be prescribed and regulated by law.28 This amendment was defeated by roll call vote 59-34.29 Another amendment proposing that administrative responsibilities of the board of regents be placed in the board of education30 was likewise defeated by roll call vote, 66-18.31

At this juncture it is clear that the will of the convention was to change substantially the legal structure of higher education in Montana as it then existed. The majority report proposed a new degree of independence for the board of regents so as to free the board from excessive legislative control. The debate in the convention then turned to the degree of independence the board should have. Throughout the debate the delegates recognized that the board's activities would involve three general areas, academic, financial and administrative. Extensive discussion occurred as to whether all of these functions should be entrusted to the board or be regulated by law. Various amendments were offered in an attempt to either narrow, limit or change legal responsibility for these functions.

To place this aspect of the convention debate in perspective it is necessary to consider an amendment to the majority report which was passed by the convention. This amendment changed the majority pro-
posal to provide that the “Regents shall have full power, responsibility and authority to supervise, manage and control the University System.” The word “coordinate” was inserted after the word “supervise” by a voice vote of the convention. Thereupon the [above] amendment was passed by a roll call vote of the convention 82-14. Two amendments were subsequently offered purporting to vest in the legislature control over some of the functions of the board. One amendment proposed that “powers and duties over financial affairs be regulated by law, the regents to have control over the administrative and academic functions.” This proposal was defeated by a roll call vote of the convention 52-40. Thereupon another amendment was offered limiting the power of the board of regents to academic matters only, financial and administrative powers to be prescribed by law. This amendment was defeated by roll call vote 58-33.

These amendments were offered near the close of the convention debate on education and culminated a lengthy floor debate on the relationship of the board of regents to other areas of state government. The rejection of these amendments indicates that the majority of the delegates intended that the board of regents should no longer be dependent upon the legislature for the definition of their power and duties and no longer subject to various administrative and executive departments of state government. The debate leading to the rejection of the last two amendments produced very few formal motions or amendments but those delegates who spoke against them specifically mentioned that the majority report sought to make the board of regents autonomous from administrative regulations and procedures that apply to other state departments. The majority report stated that this would be insured by making the board of regents a constitutional department of the state, free from the power of the legislature to prescribe its power and duties.

To complete the picture of this phase of the convention debate over the relationship of the board to other departments of state government certain other amendments that were offered should be discussed. The convention approved by voice vote an amendment which in effect

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To give some examples of the probable intent of the convention with respect to the degree of independence that the delegates felt the board should have, the following statements were made during the sessions involving the education article. It is important to note, however, that these references were not amendments or motions but only explanations, discussions, and clarifying statements made by the delegates pro and con as to the majority report and amendments offered thereto.
subjected the board of regents to both legislative as well as executive audit of their funds. As mentioned above however, the record indicates that no pre-audit was intended by the adoption of this amendment. Another amendment was offered proposing to insert the word “accounting” before the “audit.” The stated purpose of this amendment was to place the board under a unified or statewide governmental accounting system applicable to other departments or agencies. After substantial debate the proposal was defeated by roll call vote 52-40. Those who spoke in opposition to this proposal stated that it would erode and hamper the power of the board to govern itself and to determine the policies and procedures which work best for it.

Two other matters which occurred during the convention debate should be noted. The words “body corporate” were deleted from the majority proposal. This phrase was deleted from the majority proposal at the time an amendment vesting the board of regents with full power, responsibility and authority to supervise, manage and control the University System was offered. In the debate that followed, the deletion of the words “body corporate” was necessary so that the board could not escape audit of their expenditures. Those who favored the use of

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<td>1.) Governor nonvoting member of both boards. Power of appointment of board members only:</td>
<td>Vol. VIII, p. 6324.</td>
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<td>2.) Governor to receive unified budget of entire state education system:</td>
<td>Vol. VIII, p. 6324.</td>
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<td>3.) Board not subject to architectural supervision by state architect and state board of examiners:</td>
<td>Vol. VIII, pp. 6326-6328.</td>
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<td>4.) Board of Regents has power to eliminate intranuit competition for courses:</td>
<td>Vol. VIII, p. 6355.</td>
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<td>5.) Budgets not subject to review by State Department of Administration:</td>
<td>Vol. VIII, pp. 6388-6390.</td>
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<td>6.) Units of the University system must submit budgets to the Board of Regents who will in term submit to Board of Education for review and approval and submission by the latter to the governor and the legislature:</td>
<td>Vol. VIII, p. 6392.</td>
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<td>7.) Board not subject to state budget director or Department of Administration:</td>
<td>Vol. IX, pp. 6491-6492.</td>
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<td>8.) No executive department power over expenditures:</td>
<td>Vol. IX, p. 6501.</td>
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<td>10.) No intention to establish a separate branch of state government:</td>
<td>Vol. IX, p. 6509.</td>
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<td>11.) Board must be relatively independent from executive branch of government:</td>
<td>Vol. IX, p. 6515.</td>
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<td>12.) Board must administer its own affairs and will not be subject to state purchasing agent unless the board chooses to be:</td>
<td>Vol. IX, pp. 6541-6544.</td>
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<td>13.) Board not subject to internal accounting procedures established by State Department of Administration:</td>
<td>Vol. IX, p. 7871.</td>
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"TR. Vol. IX, p. 6499.
"Supra note 39, item 9.
"TR. Vol. XI, p. 7917.
"TR. Vol. IX, p. 6480.
"TR. Vol. IX, p. 6486.
"TR. Vol. IX, p. 6481."
these words conceded that they were not necessary since the amendment offered would still guarantee the autonomy that the board should have saved for the audit requirements. Elsewhere it was stated that the use of these words was copied from the Michigan Constitution and the Michigan system was what the majority report was seeking.

Also there was discussion in the record about an unsigned letter which had been circulated on the floor of the convention on letterhead of the State Department of Administration urging the delegates not to accept the majority report since if adopted, it would confer too much autonomy in the board of regents. No specific action was taken with regard to the letter, but it was discussed by the delegates. Finally, the delegates discussed the fact that the "power of the purse" plus audit was the only control that they intended the legislature to have over their appropriations for education. Since the legislature has constitutional control over state funds, it should be necessary for the board to draw these funds through the state treasurer.

To briefly summarize it seems that the convention intended that the board of regents should be a quasi-independent state department subject only to indirect legislative control through appropriation, audit, confirmation of gubernatorial appointments and assignment of other educational institutions for their supervision. The executive branch would likewise indirectly control the board only through the power of appointment of its members, and the ex officio membership of the governor on the board. Since the constitution requires the governor to submit a budget of proposed revenues and expenditures of the state the board of education would be obligated to submit its budget for all education in the state to the governor as well as to the legislature. Furthermore, § 15 of the article empowers the governor to request and obtain information in writing under oath from all officers and managers of state institutions.

Of course, this inquiry would not be complete without an analysis of important judicial decisions from Montana and other jurisdictions which have interpreted similar language to determine the power and authority of the various boards charged with the responsibility of administering higher education in the United States. The next part of this report will explore the most significant decisions.

**PART 4**

The litigation that has occurred over the issue of the degree of autonomy contained in constitutional and legislative enactments has

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\(^{10}\)TR. Vol. VIII, p. 6355.
\(^{11}\)TR. Vol. IX, p. 6473.
\(^{12}\)TR. Vol. VIII, p. 6289.
\(^{13}\)TR. Vol. VIII, p. 6291.
\(^{14}\)Mont. Const. art. VI, § 9.
\(^{15}\)Id. art. VI, § 15.
been voluminous. In the interest of economy and relevancy this discussion will explore cases from those jurisdictions which have constitutional provisions on education parallel or similar to Montana. Those states which expressly and entirely relegate the board to a mere creature of statute or expressly subject it to a specific executive department will be discussed only briefly.

At the outset it should be stated that a reading of significant decisions of all fifty states indicates that Montana’s new constitution has made the board of regents virtually autonomous subject only to the express proscriptions contained in the constitution itself as stated above. The decisions which were reviewed interpreted language basically similar to the Montana Constitution and reached conclusions consistently favoring autonomy from state legislative and executive control and supervision.

In California, the state supreme court has ruled that the legislature is prohibited by the constitution from dictating the form and character of the Hastings College of Law as this is the sole and exclusive prerogative of the regents. In 1913 a California appellate court ruled that

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\[\text{People v. Kewin, 69 Cal. 215, 10 P. 393 (1886).}\]
legislative exemptions from state health standards did not apply to the California University system. In the case of Hamilton v. Regents, the California Supreme Court held that since the board of regents of California held a constitutional grant of control, their rules and regulations have the same power as law as long as they are concerned with University affairs. As late as 1967, the autonomy of the board of regents was confirmed in the case of Goldberg v. Regents which upheld the board’s suspension of students who violated university regulations governing demonstrations.

The Georgia Constitution has language similar with the Montana Constitution. It provides “there shall be a board of regents of the University system of Georgia and the government, control and management of the University system of Georgia . . . shall be vested in said board of regents . . . .”

The decision of the regents to operate a laundry facility on the campus of one of the units of the University system over the objection of a group of laundry and dry cleaning business operators was upheld in Villyard et al v. Regents. The court said that the powers granted the regents by the constitution are broad and it is necessary to look for express limitations on that power rather than authority to do specific acts.

Louisiana, usually regarded as a state where higher education has been subject to direct legislative control (because of special constitutional provisions not found in Montana’s constitution) recently litigated the question of the power of the board of regents. The Louisiana Supreme Court ruled that the legislature has no power to establish limits on fines for parking violations on the Baton Rouge campus of Louisiana State University; this function was the sole prerogative of the board of regents.

The state of Michigan is generally regarded as having the most autonomous system of higher education and it has undergone numerous tests in the courts to define that autonomy. In a series of cases dating back as far as 1856, the legislature attempted to establish a college of homeopathic medicine. After numerous court battles, the issue was resolved in favor of the regents in the leading American decision of Sterling v. Board of Regents. The Michigan Supreme Court ruled that

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*219 Cal. 683, 28 P.2d 355 (1934).*
*248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (Ct. App. 1967).*
*GA. CONST., art. I, § 1, par. 3 (1945).*
*204 Ga. 517, 50 S.E.2d 313 (1948).*
*Id. at 315.*
*Board of Regents of L.S.U. v. Student Gov. Assoc. of L.S.U., 262 La. 849, 264 So.2d 916 (1972).*
*110 Mich. 69, 69 N.W. 253 (1896).*
to give the legislature this power would impliedly authorize them to
dismember the institution at their will.\textsuperscript{66} The court reaffirmed an earlier
decision which found that the board is a constitutional body charged
with the entire control of the University.\textsuperscript{66} The court further stated
that since both the board of regents and the legislature derived their
power from the same supreme authority, the legislature is not in a
dominant position to the board.\textsuperscript{67} To hold otherwise would reduce the
board to mere ministerial officers functioning only to execute the will
of the legislature.\textsuperscript{68} The court determined that the constitution does not
bear that construction.\textsuperscript{69}

In two very significant decisions, the power of the board of regents
to operate free of any restrictions attached by either the legislature or
the state auditor-general was confirmed. In the case of \textit{Board of Agriculture v. Auditor-General}\textsuperscript{70} the legislature attached a condition to its appro-
priation to Michigan A & M College that the expenditure of such funds
must be supervised by the state administrative board.\textsuperscript{71} The board
attempted to secure the funds free of such restriction but when the
state auditor-general refused to use the warrants the board of regents
filed suit. The Michigan Supreme Court ordered the auditor-general
to issue the warrants finding that the conditioning of the appropriation
was an unconstitutional incursion into the constitutional prerogative of
the board.\textsuperscript{72} In the case of \textit{Board of Regents v. Auditor-General} the court
held that the auditor-general had no prerogative to question the pro-
priety of an expenditure after the board had authorized it.\textsuperscript{73} The court
stated that once the appropriation had been made and the expenditure
sanctioned the auditor-general could not question it.\textsuperscript{74}

In 1972, the power of the board was interpreted in \textit{Sprik v. Regents}.\textsuperscript{75}
An intermediate court of appeals of Michigan upheld the power of the
board of regents to collect rent increases it imposed on student housing
and pay them over to a local school district in lieu of property taxes
even though the property was tax exempt because it was used for Uni-
versity purposes.\textsuperscript{76} Since this decision is only an intermediate appellate
decision, it should be observed with some reservation because of the
possibility of appeal to the Supreme Court of Michigan. The decision
raises a serious question as to whether the regents have exceeded their

\textsuperscript{66}Id. at 258.
\textsuperscript{67}Id. at 256.
\textsuperscript{68}Id. at 257.
\textsuperscript{69}Id. at 258.
\textsuperscript{70}226 Mich. 417, 197 N.W. 160 (1924).
\textsuperscript{71}Id.
\textsuperscript{72}Id.
\textsuperscript{73}167 Mich. 444, 132 N.W. 1037 (1911).
\textsuperscript{74}Id.
\textsuperscript{75}43 Mich. App. 178, 204 N.W.2d 62 (1972).
\textsuperscript{76}Id.
constitutional authority when they spend funds for what appears to be a non-university purpose. However, the case did cover some other issues which appear consistent with earlier Michigan decisions concerning the relationship between the board and the legislature. The court held that funds generated from the internal operation of the University were not subject to any legislative supervision whatsoever. The legislature may condition its appropriations only to the extent that the conditions in no way infringe upon the board’s constitutional duties and powers. Legislative conditioning may not in any way constitute an attempt to manage the University.

The Intermediate Court of Appeals of Michigan recently held unconstitutional an act of the Michigan legislature which: (1) prohibited expenditures of state funds for instructors or students who had been found guilty, either by the courts or school officials, of interfering with university operations or damaging university property; (2) prohibited letting of contracts by board of regents for construction of self-liquidating projects without just submitting a schedule for liquidation of debt to appropriate legislative committee; (3) imposed minimum teaching hours on each faculty member; (4) conditioned appropriation of public funds on number of out-of-state students. The Michigan Court of Appeals determined the legislation to be an unwarranted and constitutionally impermissible intrusion by the legislature into the management of internal affairs which is the sole prerogative of the board of regents under the Michigan Constitution. The opinion reviewed every past decision in Michigan dealing with the board of regents and determined that these decision as well as the opinions of the state attorney general clearly establish the independent authority of the state’s universities to be free from legislative interference in their operations.

Numerous decisions in Minnesota have conferred autonomous status on the board of regents. The Minnesota Supreme Court has ruled that the board of regents is not a mere agency of the state and is not subject to the administrative regulations of the state treasurer. In State ex rel. University v. Chase, the court held that the regents are exempt from a law subjecting state agencies to supervision and control of expenditures by the state commission of administration and finance. The court specifically found that the power to control university finances is really the power to dictate academic policy making a constitutionally inferior agency the final arbiter of university policy. In 1931, the

\[\text{id.}\]
\[\text{id.}\]
\[\text{id.}\]
\[\text{at 885-886.}\]
\[\text{Gleason v. Univ. of Minn., 104 Minn. 359, 116 N.W. 650 (1908).}\]
\[\text{175 Minn. 259, 220 N.W. 951 (1928).}\]
Minnesota Supreme Court held in the case of *Fanning v. University of Minnesota* that the planning, financing and erection of a dormitory were the sole prerogative of the board and did not need special legislative approval.\(^8\)

The case of *State ex rel. Sholes v. University* exempted the board from the state administrative procedures act on the theory that the board is something more than a mere administrative agency, its genesis being in the constitution not in the legislature as is the case with administrative agencies.\(^8\) As recently as 1971 the Minnesota Supreme Court passed on the power of the board in *Bailey v. University of Minnesota* when it held that even the courts cannot interfere with the board as long as the board is properly exercising its function.\(^7\) Of course, any improper exercise of functions can become subject to court scrutiny.\(^8\)

The latter interpretation was recognized in the state of Nevada. Although Nevada does not grant constitutional autonomy to the board of regents the Nevada Supreme Court has concluded that the legislature has. In *State ex rel. Richardson v. Board of Regents of University of Nevada* the board had discharged a faculty member after he acquired tenure without observing the board's own rules of procedure for hiring and promoting faculty members.\(^9\) The court held autonomy did not imply that excesses of jurisdiction could not be subject to judicial review.\(^9\) In an earlier decision the Nevada Supreme Court ruled that the power of the legislature to appropriate funds to the University of Nevada did not imply that the legislature was given the power to dictate the use of the funds.\(^9\) The court said that the appropriation process was clearly distinct from the control process.\(^9\) The court also refused to allow the legislature to create an advisory board to the board of regents on the grounds that such legislation would infringe upon the constitutional prerogative of the regents.\(^9\)

The state of Oklahoma has recently made some constitutional changes with regard to the board of regents. Oklahoma has a rather elaborate structure for higher education. Separate boards exist for each state university, one board for its liberal arts colleges and still another for its "A & M" colleges. However, all of these boards are subject to a superior board known as the Oklahoma State Regents for Higher Education.\(^9\) The power of this board to dictate policy to the other boards

\(^{18}\) Minn. 222, 236 N.W. 217 (1931).

\(^{28}\) Minn. 452, 54 N.W.2d 122 (1952).

\(^{39}\) Minn. 359, 187 N.W.2d 702 (1971).

\(^{40}\) Id. at 704.

\(^{50}\) Id. at 517.

\(^{60}\) King v. Board of Regents, 65 Nev. 533, 200 P.2d 221 (1948).

\(^{70}\) Id. at 227.

\(^{80}\) Id. at 238.

throughout the educational system was recently upheld in the case of Board of Regents for A & M Colleges of Oklahoma v. State Regents of Higher Education. The state board had overruled the "A & M" board and radically restructured the educational program at one of the A & M Colleges in the state. The Oklahoma Supreme Court ruled that this was their constitutional prerogative. Earlier Oklahoma decisions have affirmed board decisions to bypass state board of public affairs' approval of construction contracts, Trapp v. Cook Construction Company as well as prevented the legislature from directly appropriating funds to specific institutions or units of the system and by-passing the allocation powers of the state board. The United States Supreme Court has even been involved in judicial review of Oklahoma board actions. In Pyatte v. Board of Regents, the court refused to enjoin the board from enforcing student housing regulations requiring students to live on campus.

In all of the foregoing states, the decisions have consistently upheld the autonomy of the board when it became involved in disputes with the legislature and various administrative departments of state government. The rationale behind this consistency is that these states have conferred constitutional status on the board and have not granted any constitutional powers over the governance of higher education to legislatures and executive departments. However, only a few states have done this and a majority of states have clearly vested control in other state departments. Rather than review decisions from these jurisdictions, it is fair to conclude that this distinction exists because the power over higher education has been clearly delegated to other state agencies in those states. The courts have been qualitatively consistent in maintaining that power as their constitutions direct.

Even though the new Montana constitutional provisions represent a significant change in the control over higher education from that which existed under the old constitution, some earlier Montana decisions indicate that even though the legislature had the constitutional power to prescribe powers and duties of the board of education, nevertheless once the legislature had acted, the board had some measure of autonomy and the Montana Supreme Court interpreted these legislative grants broadly. However, implicit in these decisions is the suggestion that the legislature could further define and limit these powers.

In the decision of State ex rel. Veeder v. State Board of Education, the Montana Supreme Court found in legislation granting general powers
and duties to the board the intent to vest the board with a substantial measure of autonomy. They upheld the board's desire to charge special student fees for the purpose of debt retirement of building bonds issued for construction of campus improvements. The court stated:

... the members of the board cannot circumscribe the legislative powers of their successors, but as business managers they may exercise their powers in the same way and under the same rules as control a business corporation under like circumstances.

The Montana Supreme Court has also held that the state board of education, even though subject to the legislature, was nevertheless sufficiently independent to be sued for breach of contract without specific state consent. Regulations of the board have the force and effect of law. Under the "old" Constitution the Montana Supreme Court, in interpreting the quantum of power delegated to the board in specific legislation, has found that legislative grants of authority to the board carry with them implied powers to do all things necessary and proper to the general power conferred by the legislature. It seems improbable that a similar rule of construction would not be applied in interpreting constitutional grants of power.

It should be noted that in those jurisdictions which vest legislative control over higher education systems, once the legislature grants such power, the courts of these are inclined to interpret the grants broadly and similarly to the rulings of the Montana Supreme Court. In a very recent decision of the Massachusetts Supreme Court, the Board of Trustees of the Massachusetts State University system was exempted from a statute requiring leases of state property to be approved by the state superintendent of buildings, commissioner of buildings, or the governor, because the act creating the board conferred powers of governance and supervision on the board. The Idaho board of regents are exempt from state nepotism laws. Employees of the Arizona University system are not subject to the state civil service law. The Arizona state auditor has no discretion over the issuance of warrants for expenditures of state funds. However, later decisions in Arizona have indicated that the Fairfield decision was not intended to remove all auditing powers of the state auditor. In Colorado, the board of regents are not subject to the Public Utility Commission and do not need to obtain that agency's approval prior to conducting an intra-system bus service for students.

103Id. at 523.
107In re Opinion of Justices to the Governor, ... Mass. ... , 294 N.E.2d 346 (1973).
111Board of Regents v. Frohmiller, 69 Ariz. 50, 208 P.2d 833 (1949).
However, there are certain areas to which even constitutionally created boards must be subservient. In the general area of social welfare, civil rights and health codes, the courts regard the board as subservient to this type of legislation. Such things as workmen's compensation laws, minimum wage laws, employment security laws, anti-discrimination laws, and the like are binding on systems of higher education systems.\textsuperscript{113}

\textit{PART 5}

In conclusion, it seems apparent the Montana, subject only to executive and legislative audits (audits meaning no pre-audit). It is entirely free of the usual administrative regulations of other constitutionally inferior state departments. Whether the board of regents desires to submit its internal operations to these other agencies, is the board's prerogative, neither the legislature's nor the governor's. The broad grant of power and responsibility conferred in Article X should not be interpreted as entirely precluding the board from electing to secure management assistance from other state agencies, but what it clearly means in light of convention debate and decisions from other jurisdictions operating systems similar to Montana is that other state agencies or departments do not have the power to impose their regulations on the board. It is the board that makes that decision.

A word of caution nevertheless seems appropriate. In other states, the establishment of these theories has come through litigation which has not been resolved except by decisions in the highest tribunals of the state. That possibility cannot be ruled out in Montana. However, with the vast amount of precedent present, litigating virtually every aspect of autonomy seems more remote today. As a result of constitutional independence in the board, many of the statutes passed by the state legislature in 1971 specifically concerned with the powers and duties of the board, administrative officers of the units of the University system, unit academic programs or curricular matters and other enactments of similar nature are now beyond legislative prerogative and are no longer necessarily binding on the board. It is the board's prerogative to reaffirm, alter, or repeal these legislative enactments as it deems appropriate.

The following list of statutes details exactly which laws are tentatively repealed or altered by the new Constitution, save repromulgation, as a result of the adoption of the new Constitution.

\textsuperscript{113} See Waldoch, supra note 14 at 93.
The 1973 Montana legislative session passed several acts, some of which appear to be repetitive of Article IX of the “new” Constitution and some of which appear to be unconstitutional since they appear to infringe upon the power of the Board of Regents to govern the university system. A listing of these acts is hereinafter set forth. The repetitive acts are superfluous since they are merely a restatement of language already contained in Article IX of the “new” Constitution. Presumably, all such legislation was designed to provide smooth transition during the changeover from operating under the “old” Constitution to operating under the new and there was intent to permanently bind the regents to such enactments.114


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All other statutes which in any way purport to dictate policy within the scope of the constitutional powers conferred on the board are likewise tentatively repealed pending board action as to their status or content.