



Decisions of the Montana Supreme Court and the Federal courts for the District of Montana and their effect upon postsecondary education
by Michael August Devich

A thesis submitted in partial fulfillment of the requirements for the degree of Doctor of Education
Montana State University
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Abstract:

This study of the decisions of the Montana Supreme Court and the Federal courts for the District of Montana was performed to examine the effects of the courts' decisions upon postsecondary education.

The study was delimited to three areas: (1) control and governance; (2) faculty and staff; and (3) students. Two central research questions directed the focus of the study; (1) what was the impact of judicial decisions upon the article providing for postsecondary education in the Montana Constitution of 1889; and, (2) what was the impact of judicial decisions upon the article providing for postsecondary education enumerated in the Montana Constitution of 1972? A literature review and a study of postsecondary education law presented the general development of the law as it applied throughout the United States and Montana. All of the cases involving postsecondary education which were presented to the Montana Supreme Court and the federal courts for the District of Montana were presented in chronological order in the three areas. The facts of the case, the court's opinion, and the reasoning for the court's decision were presented for each case.

The cases showed that the Montana Supreme Court was guided by several principles in its deliberations: (1) upholding the constitutionality of the state Constitution; (2) a reasonable presumption in favor of a legislative action; (3) what constituted "due process" in actions involving faculty and students; and (4) the doctrine of "academic abstention" under which the court would not interfere with the discretion of school officials in matters which the law had conferred to their judgment unless there was a clear abuse of this discretion, or arbitrary or unlawful action.

Under the Constitution of 1889 the Court ruled that control of the University System could be exercised by the legislature. The Constitution of 1972 removed the legislature from control and created a constitutional Board of Regents to manage postsecondary education. The Montana Supreme Court has upheld the power of the regents to manage and control the operations of postsecondary education in Montana.

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COURTS FOR THE DISTRICT OF MONTANA AND THEIR
EFFECT UPON POSTSECONDARY EDUCATION

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ABSTRACT

This study of the decisions of the Montana Supreme Court and the Federal courts for the District of Montana was performed to examine the effects of the courts' decisions upon postsecondary education.

The study was delimited to three areas: (1) control and governance; (2) faculty and staff; and (3) students. Two central research questions directed the focus of the study: (1) what was the impact of judicial decisions upon the article providing for postsecondary education in the Montana Constitution of 1889; and, (2) what was the impact of judicial decisions upon the article providing for postsecondary education enumerated in the Montana Constitution of 1972?

A literature review and a study of postsecondary education law presented the general development of the law as it applied throughout the United States and Montana. All of the cases involving postsecondary education which were presented to the Montana Supreme Court and the federal courts for the District of Montana were presented in chronological order in the three areas. The facts of the case, the court's opinion, and the reasoning for the court's decision were presented for each case.

The cases showed that the Montana Supreme Court was guided by several principles in its deliberations: (1) upholding the constitutionality of the state Constitution; (2) a reasonable presumption in favor of a legislative action; (3) what constituted "due process" in actions involving faculty and students; and (4) the doctrine of "academic abstention" under which the court would not interfere with the discretion of school officials in matters which the law had conferred to their judgment unless there was a clear abuse of this discretion, or arbitrary or unlawful action.

Under the Constitution of 1889 the Court ruled that control of the University System could be exercised by the legislature. The Constitution of 1972 removed the legislature from control and created a constitutional Board of Regents to manage postsecondary education. The Montana Supreme Court has upheld the power of the regents to manage and control the operations of postsecondary education in Montana.

CHAPTER 1

INTRODUCTION

Purpose of Study

The purpose of this study was to review, analyze, and delineate how the decisions of the Montana Supreme Court and the Federal courts for the District of Montana have affected postsecondary education in Montana. The study was delimited to three areas: (1) control and governance; (2) faculty and staff; and (3) students. Two central research questions directed the focus of this study: (1) What was the impact of judicial decisions upon the article providing for postsecondary education set forth in the Montana Constitution of 1889; and (2) What is the impact of judicial decisions upon the article providing for postsecondary education enumerated in the Montana Constitution of 1972? These questions established the parameters of the central questions:

1. What guided the courts in the issuance of their opinions that determined how the constitutional provisions concerning postsecondary education were to be interpreted?
2. What aspects of postsecondary education did the decisions of the court affect?
3. What group, or groups, were affected by the decisions of the court?

Study Methods and Procedures

Data Collection

This study examined and reviewed data obtained from primary and secondary sources. A primary source is one prepared by an individual who was a participant in or a direct witness to the event being described while a secondary source is a document prepared by an individual who was not a direct witness to the event, but who obtained his or her description of the event from someone else (Cohen & Manion, 1985).

Data collection of the relevant court decisions involved a multi-step process. Initially, the Montana Digest and the Pacific Digest, both containing a listing of all decisions of the Montana Supreme Court reported in the Montana Reporter and the Pacific Reporter, were researched to provide a chronicle of the court's decisions which were considered to involve postsecondary education. As part of this process the Federal Digest, containing a listing of all of the decisions of the Federal courts reported in the Federal Supplement for District Courts opinions and the Federal Reporter for the opinions of the Courts of Appeals, was researched to produce all decisions of Federal courts which involved postsecondary education in Montana. The cases thus produced were then examined to determine if the postsecondary education issues reported in the cases were the primary focus of the court's opinion or were incidental in nature. If the educational issues were directly related to the purposes of this study, determination of the import attached to the decisions by the courts was the next step in the inquiry. This inquiry, using Sheppards Montana Citations, was undertaken to ascertain if the decision of a court was

used in a later decision by the court itself or by any other court. Additionally, this inquiry was conducted to determine if the opinion of a court had been modified, changed, or overruled by later decisions. After all of the cases had been researched to determine if they had been cited in any manner in a later case by any court, any case so cited was researched to determine what effect, if any, the later decision had upon the original opinion. The process culminated in the production of the court opinions which will be presented in Chapter 2, "Control and Governance;" Chapter 3, "Faculty and Staff;" and Chapter 4, "Students."

Primary Sources

This study examined and reviewed data obtained from the following primary sources: the Montana constitutions of 1889 and 1972 as they relate to postsecondary education and the decisions of the Supreme Court of Montana, the Federal District Court for the District of Montana, and the Federal Court of Appeals for the Ninth Circuit as they relate to postsecondary education in Montana. This research contains the written opinions of the courts for their decisions, including concurring and dissenting opinions. The opinions include the statement of facts, precedents followed in deciding the outcome of the case, the decision of the court and the reasoning of the court for reaching its opinion.

Records of the Montana Constitutional Convention of 1972 which consist of the verbatim transcripts of the convention delegates during their discussions, debates, and votes on the provisions of the Montana Constitution of 1972 as it relates to postsecondary

education were reviewed to determine the impact of court decisions and the Convention's response to the impact of these opinions.

The Policy and Procedures Manual of the Montana University System; Board of Trustees Policy Manual and Collective Bargaining Agreement of Flathead Valley Community College; Collective Bargaining Agreement, and Bylaws of the Academic Senate of Montana State University-Billings; Faculty Handbook of Montana State University-Bozeman; and the Personnel Policies, Collective Bargaining Agreement, 1997-1998 University Catalog, School of Law Bulletin, and Law Student Handbook of the University of Montana were examined to determine the effect of the court decisions upon the control and governance, faculty and staff, and students at these institutions.

Secondary Sources

The literature review for this research examined areas of studies previously conducted in order to avoid duplication and present the results from research efforts which had been previously conducted. Sources for the review included journal articles, textbooks, legal treatises, and legislative and judicial documents that deal with postsecondary education issues similar to those found in Montana, legal indexes and case reports.

Review of the Literature

Postsecondary Education Law in the United States

During their formation in the twelfth and thirteenth centuries the concept of autonomy for universities was established when it was stated “[t]hey appealed to king or council against pope, to pope against king or bishop, and to kings and popes alike against truculent town government” (Edwards & Nordin, 1979). Being a nation of laws the legal rights and responsibilities of universities in America developed from three sources: constitutions, statutes and court decisions (Alexander & Solomon, 1972).

Within the United States postsecondary education has developed not with extensive central direction from the federal government, but on a state-by-state basis. Until the creation of the Department of Education during the administration of President Carter there was no national ministry controlling or directing the system of postsecondary education (Hobbs 1978). Since each state’s political system is different, the impact of its legal scheme varies widely (Young, 1981).

Initially, there were few legal requirements governing the educational administrator’s functions, and those that existed were not an important factor in many administrative decisions. Postsecondary education operated best by operating autonomously and it thrived on the privacy afforded by such autonomy. It was considered delicate and complex, so much so that an outsider would not understand its operations, especially lawyers and judges.

The special environment of postsecondary education carried over to its personnel. The faculties and administrators had knowledge and training beyond that of the general populace, and, as such, were responsible for guarding that knowledge for future generations. This special expertise, combined with their special mission—often at a financial sacrifice—produced the perception that outside monitoring was unnecessary.

To a great extent the law reflected such attitudes. There was not extensive federal and state regulation of postsecondary education. Legislatures and administrative agencies imposed few legal obligations and provided few opportunities for their activities to be legally challenged.

Historically, American courts viewed postsecondary education as a unique enterprise and accorded it great autonomy. This independence included virtually all employment, admission, teaching, and research activities. This doctrine of “academic abstention” reflected the basis of academic autonomy and freedom established during the formation of universities in medieval times and rested on the foundation of the special expertise of the academician (Kaplin & Lee, 1995). As part of this doctrine courts generally deferred their judgment to that of the institution in matters of student qualifications, faculty qualifications, student substantive rights, faculty substantive rights, and discovery of information (Leas, 1991).

In matters concerning students, the courts using the *in loco parentis* doctrine, permitted the institutions to exert almost untrammelled authority over students’ lives.

While predominately a phenomenon of elementary and secondary education, *in loco parentis* had a strong legal basis in postsecondary education. The leading postsecondary education case adopting this theory was a 1928 Kentucky case which said: “[C]ollege authorities stand *in loco parentis* concerning the physical and moral welfare and mental training of the pupils, and . . . may make any regulation for . . . betterment of their pupils that a parent could for the same purpose” (Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913)). This theory placed the school in the place of the parent and afforded school control over students commensurate with that of the parent in all matters pertaining to functions of the school.

Courts began to intervene in traditional university internal discretionary matters after the Second World War, specifically in the area of the First Amendment. It was not until after the Second World War that anyone invoked court action to bring academic freedom under its protection. It was also during this period that First Amendment freedoms were extended to students as well as to faculty (Brubacher, 1971).

Beginning in the 1960’s courts substituted a constitutional standard for the relationship between the university and the student for the previous standard of *in loco parentis* (Millington, 1979). The key case in forging new student status was Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.) (1961). The court in this case rejected the notion that education in state schools is a “privilege” to be dispensed on whatever conditions the state in its sole discretion deems advisable; it also implicitly

rejected the *in loco parentis* concept. The court held that the student had a right to notice and a hearing in university disciplinary proceedings when the charges could lead to suspension or expulsion. The Dixon approach became a part of U. S. Supreme Court jurisprudence in cases such as Tinker v. Des Moines School District, Healy v. James and Goss v. Lopez.

The involvement of the federal government in postsecondary education law continued to reflect social movements in postsecondary education and in the world outside the campus: Viet Nam, equality, civil rights, consumerism, and issues on a college education as "Necessary" (Chambers, 1964). Although the federal Constitution has no specific provision related to education it does have a number of provisions that directly affect postsecondary education. Three amendments of the Constitution are of particular concern: the First, Fourth, and the Fourteenth Amendments. The First Amendment provides for freedom of religion, speech, press and assembly. The Fourth Amendment provides protection against unreasonable searches and seizures. The Fourteenth Amendment provides for equal protection under the law and requires due process of law. Using the federal Constitution and these amendments, Congress has enacted statutory provisions dealing with postsecondary education including aliens and nationality (Immigration and Nationality); commerce and trade (Toxic Substances Control); education (Teaching of Agricultural, Trade, Home Economics and Industrial Subjects; Foreign and Exchange Students; Higher Education Resources and Student Assistance; Basic Education for Adults; General Provisions Concerning Education; Education of

Individuals with Disabilities; Discrimination Based on Sex or Blindness; Vocational Education; Career Education and Career Development); labor (Fair Labor Standards; Age Discrimination in Employment; Vocational Rehabilitation and Other Rehabilitation Services; Employee Retirement Income Security Program; Family and Medical Leave); public contracts (Drug Free Workplace); public health and welfare (Elective Franchise [The Voting Rights Act]; Civil Rights; Religious Freedom Restoration; Equal Opportunity for Individuals with Disabilities [American with Disabilities Act]); the Civil Rights Act of 1964; and Section 504 of The Rehabilitation Act of 1973 (Levin, 1997). The growth of college athletic programs has resulted in courts reviewing the nature of athletic scholarships and the relationship between universities and student athletes (Davis, 1991).

Prior to 1965, the courts had adjudicated only thirty-two landmark cases affecting student development in postsecondary education (Barr, 1983). Since that time, issues involving student discipline, student press, admission standards, liability of administration in supervision of activities, and provision of health and counseling services have led to a dramatic increase in litigation in postsecondary education.

In 1972-1974, the United States Supreme Court decided four highly significant cases in postsecondary education, more decisions on postsecondary education than it had made in the previous two decades (Edwards & Nordin, 1979). Two of these decisions, Healy v. James, 408 U.S. 169 (1972) and Vlandix v. Kline, 412 U.S. 441 (1973) dealt with students' rights of expression and association under the First Amendment in the

former case and with residency status and its attainment in the latter case. The other two cases, Perry v. Sinderman, 408 U.S. 553 (1972) and Vlandis v. Kline, 412 U.S. 441 (1973) dealt with the rights of faculty members, both tenured and non-tenured, to procedural due process under the Fourteenth Amendment.

The legal relationship between a college and its faculty has essentially three characteristics: (a) individual rights or freedoms; (b) statutory requirements; and (c) contractual conditions of employment (Alexander & Solomon, 1972).

The first of these, individual rights or freedoms, involves the wide range of individual freedoms guaranteed by both federal and state constitutions. Intertwined with these freedoms is the concept of academic freedom which presumably bestows upon a teacher the additional freedom of intellectual thought, learning, and teaching, a freedom which cannot be restricted or abrogated by institution or government. The idea of academic freedom as we now view it was formulated in Germany during the nineteenth century and is summed up by the words *Lernfreiheit* and *Lehrfreiheit*, the freedom to learn and the freedom to teach (Harvard Law Review; 1968). *Lehrfreiheit* allowed the professor to conduct research and convey his findings to his students without fear of retribution.

In the United States academic freedom differs from its predecessor in Germany because of the differences in individual rights. In Germany, *Lehrfreiheit* and *Lernfreiheit* were extended to only faculty and students in the university, while in the United States the

individual freedoms granted by the Constitution of the United States guarantees all persons *Lehrfreiheit* and *Lernfreiheit* regardless of whether they are in universities or not. Accordingly, the proposition that academic freedom should be considered a right has not been generally accepted as a legal principle in the United States (Tisdell, 1968).

Loyalty oaths have involved many legal battles between teachers and the state. While the justification for loyalty oaths seems quite simple, the Supreme Court of the United States has in recent years gradually diminished most of the content of such oaths. In 1971, in Connell v. Higgenbotham, 91 S.Ct. 1772, the Court held that a teacher could not be summarily dismissed from public employment for failure to sign a loyalty oath. And in Keyishian v. Board of Regents of University of State of New York, 385 U.S. 589 (1967), the Court had limited the state's power to restrict a teacher's freedom of association and pronounced the relationship between academic freedom and constitutional rights within the loyalty oath context.

Within the context of political activity teachers in colleges are frequently restrained from participation in political activities. Relatively few cases have reached the courts; however, those that have do give some insight as to the teacher's constitutional right to participate in politics.

In Pickering v. Board of Education, 391 U.S. 563 (1968), the Supreme Court held that a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.

In addition to the constitutional protections, teachers also possess statutory and contractual protections against dismissal or other specified sanctions by a governing board or administrator. Tenure is not peculiar to education; federal judges have tenure for life and federal and state employees are generally protected by some type of tenure system after serving designated probationary periods. Generally, tenured faculty can only be dismissed by following certain statutory procedural steps and any deviation from the procedure invalidates the dismissal. Additionally, a teacher can only be dismissed for statutorily specified reasons including such causes as incompetency, insubordination, and immorality.

Incompetence is the most frequently stated cause for dismissal and is probably the most difficult to define. The Supreme Court has broadly defined the teacher's standard of fitness in Beilan v. Board of Public Education of Philadelphia, 357 U.S. 399 (1958).

Insubordination is more specific than incompetency and is generally considered to constitute repeated refusal to abide by rules or regulations of the organization or to follow reasonable directions of a superior. Immorality or immoral conduct is activity inconsistent with moral rectitude.

Because of the unique development of education on a state by state basis court decisions affecting governance have been limited with most cases involving the power and authority of the governing boards. In several states the university governing board is constitutionally made subject to legislative intervention in any or all of its affairs. Prior to 1972, Idaho and Montana were the only two states making the state Board of Education

the governing board of all postsecondary educational institutions (Elliott & Chambers, 1936).

Postsecondary Education Law in Montana

Prior to 1972 the Montana Supreme Court had given little effect to Article XI, Section 11 of the Montana Constitution of 1889 which vested the general control and supervision of the state university in the Board of Education. Generally the court decisions said that the Board of Education was a part of the executive branch of state government (Waldoch, 1972).

Under the Constitution of 1972 the Board of Regents for the Montana University System was transformed from a purely legislative creation to a constitutional department (Schaefer, 1974).

Definition of Terms

1. Board of Regents was established in the Montana Constitution of 1972 and vested with the governance and control of the Montana University System. It has full power, responsibility, and authority to supervise, coordinate, manage and control the Montana University System and other public educational institutions assigned by law. The board consists of seven members appointed by the governor, and the governor and superintendent of public instruction are ex officio non-voting members of the board.

2. Constitutional Convention was the meetings of the delegates from January 17, 1972 through March 24, 1972, to draft a new state constitution to replace the Montana Constitution of 1889.

3. Federal Circuit Court of Appeals for the Ninth Circuit encompasses the states of Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, and Hawaii and the territory of Guam, with twenty-eight judges holding court in San Francisco, Los Angeles, Portland, and Seattle. Its jurisdiction consists of appeals from all final decisions of the district courts within the circuit.

4. Federal District Court for the District of Montana consists of one judicial district with three judges holding court at Billings, Butte, Glasgow, Great Falls, Havre, Helena, Kalispell, Lewistown, Livingston, Miles City and Missoula. It exercises original jurisdiction in all civil actions arising under the Constitution, laws or treaties of the United States, any Act of Congress regulating commerce or trade, and civil rights.

5. Postsecondary Education is divided into two systems. Higher Education, defined by the Montana Legislature in 1995 and codified in the Montana Code Annotated in §20-25-201, is entitled the Montana University System and divided into two elements. One element is the University of Montana with facilities at Missoula, Butte, Dillon, and Helena. The other element is Montana State University with facilities at Bozeman, Billings, Havre, and Great Falls. Community Colleges, codified in the Montana Code Annotated in Chapter 15 of Title 20, Education, is entitled Community College Districts

and deals with the organization of the community college system. The elements of this system are located in Glendive, Miles City, and Kalispell.

6. Montana State University-Billings began operations in 1928 as the Eastern Montana Normal School in Billings. In 1949 it became Eastern Montana College of Education, in 1965 its name was changed to Eastern Montana College, and in 1995 it assumed its present title.

7. Montana State University-Bozeman, commenced operations in Bozeman in 1893, as the Montana College of Agriculture and Mechanic Arts. In 1897 its name was changed to the Montana State College of Agriculture and Mechanic Arts. In 1921 its name was changed to Montana State College. In 1965 it was changed to Montana State University, and in 1995 it assumed its present title.

8. University of Montana-Dillon began operations in 1907 as Montana State Normal College. In 1948 its title was changed to Western Montana College of Education. In 1965 it was changed to Western Montana College, and in 1995 it assumed its present title.

9. The State Board of Education in the Montana Constitution of 1889 was given the general control and supervision of the state University and the various other state educational institutions. The board consisted of 11 members to include the governor, state superintendent of public instruction, the attorney general, and eight members appointed by the governor. The powers and duties of the board were prescribed and regulated by law.

10. The Supreme Court of Montana consists of one chief justice and six associate justices. It is the highest state court having appellate jurisdiction from lower state courts and may issue, hear, and determine writs and exercises original jurisdiction to issue, hear, and determine writs of habeas corpus.

11. University of Montana-Missoula began operations in 1895 in Missoula as the University of Montana. In 1913 the title was changed to State University of Montana; in 1935 it became Montana State University; in 1965 its name was changed to The University of Montana; and in 1995 it assumed its present title.

Organization of the Study

Chapter 1. Outlines the background and nature of the problem.

Chapter 2. The second chapter, "Control and Governance," discusses and analyzes the impact of the court's opinions upon the administration of postsecondary education under the Montana Constitution of 1889 including the constitutional and statutory provisions for control. The chapter reviews funding and the receipt, control, and disposition of property and funds. Also, under the Constitution of 1889, court interpretation of the power of governing boards and officers was developed. The chapter then discusses the changes in the governing of postsecondary education as a result of the Constitutional Convention and looks at how the courts have interpreted the constitutional provisions contained in the Montana Constitution of 1972. It then focuses attention on

the powers and liabilities enumerated for the University System and lastly, presents and discusses the power of governing boards and officers as defined by the courts.

Chapter 3. "Faculty and Staff" begins with a general discussion of the decisions which the courts have rendered involving members of the professoriate in academic areas. The majority of the opinions of the courts have been rendered in areas dealing with employment, tenure, termination, and compensation. Accordingly, the balance of the chapter is devoted to an analysis of these opinions and their effect upon the professoriate.

Chapter 4. This chapter investigates the impact of the judiciary upon students involved in postsecondary education within the state. The majority of the opinions handed down in cases in this area have been presented by the United States Supreme Court and are outside the scope of this discussion; consequently, the cases presented for this study are concerned with issues involving admission, suspension, contracts, domicile, and conduct.

Significance of the Study

The significance of this study lies in the indisputable fact that law remains an indispensable consideration in all activities within postsecondary education. Legal issues, arising on and off campuses, continue to be heard not only on campus, but also in other forums. Litigation has extended into every area of educational activity involving students, faculty, administrators, and governing officials.

Students have sued for cancellation of classes, failure to graduate, admission to graduate school, the right to participate in various campus activities, scholarship selection, and testing (Barr, 1983). Faculty members have sued because of class size increases, salary structure, hiring, tenure, selection, sex discrimination, and sexual harassment (Kaplin & Lee, 1995).

Increasingly, courts are entering into educational areas in which they traditionally deferred. The passage of new laws and regulations and the generation of new issues have resulted in expanded judicial interpretation and influenced the way in which faculty, administrators, and governing boards do their jobs. With this perceived encroachment into the academic domain has come criticism of the law's role on the campuses. Much of the criticism concerns the cost in money, time, and energy expended in dealing with legal issues that divert postsecondary education from its primary mission of teaching and scholarship.

While these criticisms continue we must not look only to the financial expenditures but consider a number of other questions. Are the issues raised frivolous or are they justified? Is the University system providing adequate mechanisms for dealing with claims and complaints, thus avoiding the necessity of turning to outside forums? Are the courts looking at the mission of postsecondary education when they render their opinions or devise remedies? And in those cases where the law has appeared to conflict with the interests of the campus community, how has education responded?

The challenge of the law is to keep pace with education's changing mission.

Concurrently, the challenge of postsecondary education is to understand and respond to the changes in the law while focusing on its many purposes and constituencies.

CHAPTER 2

CONTROL AND GOVERNANCE

Introduction

Between its admission to the Union on November 8, 1889, and the approval and passage by voters of a new constitution in 1972, postsecondary education in Montana was provided for in Section 11, Article XI, Montana Constitution of 1889. This article provided: "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 cases presented below will indicate that the Montana Supreme Court had given little effect to this article during the eighty-four years it was used to control and supervise postsecondary education. They will also show that while the court had protected postsecondary education from encroachment upon the statutory authority which it had been granted by the legislature there were no cases in which the legislature had been limited in its direction of postsecondary education.

Following World War II the changing roles of local, state, and federal governments, citizen activism, and the uncertainties of the mid-twentieth century began to bring about an evaluation of our governmental framework and seemed to indicate that

major constitutional changes would have to be made in the Montana Constitution. During the latter part of the 1960's, the Forty-first Legislative Assembly created a Constitution Revision Commission to study methods of revising the Constitution. At the conclusion of its study the body recommended that a constitutional convention be called.

Following passage of Referendum 67, calling for a constitutional convention, the Forty-second Legislature established a Constitutional Convention Commission. The Convention first met on January 17, 1972, and completed its deliberations on March 24, 1972. During the Convention five proposals were introduced by delegates concerning postsecondary education and its control and supervision. The delegates rejected one proposal, adopted the intent of two proposals and incorporated in part two of the proposals into the educational provisions of the new constitution. Recognizing that the educational system and its administration were fundamentally different in 1972 than 1889, delegates drafted the educational provisions of the new constitution to provide for a board of public education and a board of regents. As additional reasoning for establishing the separate boards the delegates stated that postsecondary education was not simply another state service and could not be considered as an ordinary state agency (Constitutional Convention, Vol. 1, 8). Accordingly, control and supervision of postsecondary education in Article X, Section 9 (2) (a), of the Constitution of 1972 provides: "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"

The Constitution of 1972 resulted in the changing of the focus of the cases presented to the Montana Supreme Court for determination. Now the court would be called upon to decide what powers were conferred upon the Board of Regents and the limitations upon these powers.

The cases affecting postsecondary education can be segmented into four time frames: statehood through War I; from World War I through World War II; end of World War II through 1972; and, the new constitution.

Statehood through World War I

Control of Funds

In October, 1895, less than six years after statehood, the Montana Supreme Court was called upon to render its first decision on the authority of the Board of Education. In State v. Wright (1895) the treasurer of the agricultural college brought an action against the state treasurer to compel him to turn over the proceeds derived from the sale of bonds sold by the land commissioners under authority of the political code of 1895. Sections 1635 and 1636 of the code provided that immediately upon the receipt of the money, the state treasurer was to turn over to the treasurer of the agricultural college the proceeds which were to be used to erect, furnish and equip buildings for the use and benefit of the agricultural college in Bozeman under the general supervision of the state Board of Education.

The court, in a one paragraph decision, stated the state treasurer was required to turn over the money to the treasurer of the agricultural college immediately upon receipt. While the court did not delve into the authority of the Board of Education its decision gave notice of the broad authority given the board to carry out its constitutional duties.

In State v. Collins (1898) the court was called upon to render a decision involving the payment of warrants issued by a building commission created by the legislature in 1895 providing for the erection, completion, furnishing and equipment of the buildings for the University of Montana. The building commission issued a warrant to the contractor which was presented to the state treasurer who refused to pay the warrant claiming that it had not been approved by the state Board of Examiners.

The court discussed the statute providing for the sale of the bonds, creating the "University Bond Fund," and creating the building commission whose duties were to contract, supervise, and pay the contractors for their work out of this fund. It went on to state that the act of the legislature providing for the erection of the university buildings did not contemplate that claims arising under the terms of the contracts for the building should be subject to examination or approval by the state Board of Examiners. Their rationale for this determination was that the University Bond Fund was a trust fund entirely different from one arising from taxation, and not a state fund over which the Board of Examiners would have control. The court also noted in its decision the legislature had provided that the building commission should report from time to time to the state Board of Education on the progress of the work and the expenditures therefore.

The authority of the Board of Education to control university funds came into question again in 1901 in State v. Barret (1901). Peter Koch, Treasurer of the Executive Board of Montana State College of Agriculture and Mechanic Arts filed an action to force the state treasurer to pay a warrant drawn upon him as the Treasurer of the Executive Board. He alleged that the funds in the hands of the state treasurer had been derived from rents of lands leased by the state land commission belonging to the grant of lands made by the United States government in aid of the agricultural college. The state treasurer answered that the legislature had not appropriated the money for the maintenance of the agricultural college, and there was no law authorizing the payment to Koch of money derived from the leasing of land donated to the state of Montana for the use and support of the agricultural college.

The court entered into a lengthy discussion of the "Enabling Act" approved as an Act of Congress on February 22, 1889, providing for the admission of Montana into the Union as a state. Under the provisions of this act there were granted to the state certain lands for the use and benefit of state agricultural colleges. These lands were to be sold and the proceeds invested to form a permanent endowment fund; and the interest was to be devoted to the support of the colleges established pursuant to the declared purpose of the grant. Article XI, Section 12, of the Montana Constitution required funds derived from the sale of lands in the grants to be preserved for the purposes for which they were dedicated, but directed that the interest be devoted to maintenance and perpetuation of the institutions to which the grants belonged.

The court then discussed the powers and duties of the Board of Education as created by the legislature. These included (1) the general control and supervision of the state university and the various state educational institutions; (2) the adoption of rules and regulations for its own government, necessary for the execution of the powers and duties conferred upon them by law; (3) to prescribe rules and regulations for the government of the various state educational institutions; . . . and (10) to receive any and all funds, incomes and other property to which any of the said institutions may be entitled, and to use and appropriate the same for the specific purpose of the grant or donation, and to have general control of all receipts and disbursements of any of said institutions.

The authority of the Board of Education to control university funds was again upheld when the court stated that the board was vested with the exclusive power to receive, invest, manage and control the funds derived from the sale of the lands granted to the state for the use and support of the agricultural college, and that the income therefrom is subject to the orders of the board to meet the current expenses of the institution.

Quoting from its decision in State v. Collins (1898), above, the court held that the legislature, in defining the powers and duties of the Board of Education, with a view of following the spirit and intention of the act of congress creating the trust, intended that this board should be endowed with the special and exclusive power of executing it free from the limitations and restrictions of the constitution as to the expenditure of the ordinary revenues of the state.

The Court was again called upon in State v. Rice (1906) to consider the constitutionality of a law to enable the Normal School Land Grant to be utilized to provide additional building and equipment for the Montana State Normal College in Dillon. The act authorized the state Board of Land Commissioners to issue bonds and apply the proceeds for the erection, furnishing, and equipment of an addition to the Montana State Normal College building at Dillon and pledged as security for the payment of the bonds the lands granted by section 17 of the Enabling Act which provided lands to the state for the state normal school.

The court discussed Section 12 of Article XI of the Constitution providing that the funds of the State University and of all other institutions of learning, from whatever source, should remain inviolate; and, that only the interest of the funds, together with the rents from leased lands or premises, should be devoted to the maintenance and perpetuation of the respective institutions. It reasoned that if the funds must be invested to draw interest, then the principal could not be used to pay off the principal or interest on the bonds which the legislature had authorized. Additionally, since the interest from the Normal School Land Grant could only be devoted to the maintenance and perpetuation of the normal school, the legislature's act, in diverting the moneys received from the sale of normal school lands, or the sale of timber therefrom, to pay the bonds, was void.

Completing the rationale for its decision the court stated that it seemed that early sessions of the legislature understood that Congress meant for the state to build the

buildings for a state normal school out of its own funds and that the trust lands were to be an endowment for the maintenance and perpetuation of such school for all time.

Donations and Bequests

The last case which the court was called upon to decide during this period was In re Beck's Estate (1912). Josiah Beck died in Silver Bow county in 1909, leaving an estate valued at approximately \$80,000. After bequests to his wife and others he left the residue of his estate to the "Orphans Home" located at Twin Bridges, Montana. A controversy arose as to the power of the state to receive the bequest which Beck had provided. In its decision affirming that the law did not allow the state to be the beneficiary of the bequest because under the law only natural persons and corporations formed for scientific, literary or solely educational purposes could receive property through testamentary disposition and the "Orphans Home" did not fall into any of these categories. The court then turned its attention to an analysis of who could receive property under the statute and the powers conferred upon them by statute.

The court first considered the state Board of Education, setting out the composition of its members, then its control over the State University. It went on to state that while not specifically authorized to accept gifts, devises and bequests for the benefit of the university, the implication was that the board may do so and that any person contributing not less than \$15,000 could have the privilege of endowing a professorship, or any department of it, subject to the power of the board to designate the name and object of the gift.

The act creating the State School of Mines declared it to be a body corporate, with power to sue and be sued, and to take and hold real and personal property by gift, bequest, devise or purchase from the state, and dispose of the same when authorized by law to do so. The court went on to state that all of the state educational institutions were later declared to be under the exclusive control of the state Board of Education.

Accordingly, the control of the funds belonging to the state educational institutions, from whatever source derived or from whatever they may be derived, was vested in the board with the power to authorize and regulate all expenditures by any of the institutions.

The power of the state Board of Education to accept gifts of land and money to aid in the purchase of a site for the agricultural college and establishing the experimental station was recognized as well as the law establishing the normal school which authorized bequests to be made to the state board of education for the benefit and exclusive use of the school. The court concluded that, but for these specific provisions conferring the power to receive property upon the different agencies, they would be governed by the general law and unable to receive testamentary dispositions.

Summary

While the results of these early decisions do not specifically mention the authority of the Board of Education with regards to postsecondary education the language of the court would seem to indicate that the constitutional provisions relating to their authority was broad and very extensive. The board had the authority to receive and disburse the proceeds of the sale of bonds; was exempted from having its warrants approved by the

Board of Examiners; was the exclusive manager of income from the lands granted to establish an agricultural college; and, by implication, had the authority to accept gifts, devises and bequests for the benefit of the state university.

In each of these cases it is also apparent that the court was influenced in its determination of the scope of authority of the board because legislative enactments granted such authority.

End of World War I through World War II

Postsecondary Education and its Purpose

It was not until 1926 that the court was again called upon to render a decision concerning postsecondary education. The case was State v. Erickson (1926) and arose when a taxpayer brought an action to have the court declare that the proceeds from a state tax levy should be used exclusively for the support, maintenance and improvement of the four teaching units of the University of Montana and to enjoin the use of the funds for any other purpose by the state Board of Examiners.

The initiative which proposed the levy stated that its purpose was for the support, maintenance and improvement of the State University at Missoula, the State College of Agriculture and Mechanic Arts at Bozeman, the Montana State School of Mines at Butte, and the Montana State Normal College at Dillon, which comprised the University of Montana, and that the Board of Examiners had declared that the Agricultural Experiment

Station and the Agricultural Extension Service were parts of the agricultural college and entitled to share in the levy.

What was termed "The Greater University" was created by law and from July 1, 1913, the State University at Missoula, the College of Agriculture and Mechanic Arts at Bozeman, the Montana State School of Mines at Butte, and the Montana State Normal College at Dillon, and such departments of said institutions as thereafter organized, constituted the University of Montana. Prior to this time each of these units existed as separate and distinct institutions created by law, and each had been placed under the supervision and control of the Board of Education.

The inception of agricultural colleges was found in an act of congress approved July 2, 1962. The Agricultural Extension Service was created by an act of congress approved May 8, 1914. The work of the extension service was to give instruction and practical demonstrations in agriculture and home economics to persons not attending or resident in agricultural colleges carried on by mutual agreement between the Secretary of Agriculture and the state agricultural college.

The experiment stations were provided for by acts of congress approved March 2, 1887, and March 16, 1906. The scope of work of this "department," disseminated to persons not attending or resident in the colleges, consisted of research work and scientific experiments for the purpose of discovering the cause of, and remedy for, diseases in plants and animals. The supervision of the stations was vested in the United States Secretary of Agriculture.

In 1893, the legislature passed an act providing for the Agricultural College of the State of Montana and an agricultural experimental station in connection therewith. The first six sections of this act provided for the site, management, organization, and the supervision and control by the Board of Education. The act, in Sections 7 and 8, then provided for the establishment of the experiment station. By providing for the creation of the two in separate parts of the act the court reasoned that the legislature indicated its intention that the experiment station should not be a part of, or a department in, the agricultural college. Additionally, it reasoned that since the Secretary of Agriculture had control and direction of the extension service it was not a part of the agricultural college. The court then ruled that the extension service and experiment station were not part of the "Greater University" and could not share in the proceeds of the levy.

In Mills v. Stewart (1926) the court stated that an appropriation of money to encourage education by means of public schools and colleges is for a public purpose and that whatever contributes to make that system of education effective is also a public purpose.

The case arose when George Rietz was injured while a student at the university at Missoula. He registered and was assigned a room on the second floor of the "South Hall" dormitory. On this floor near his room were two doors about two feet apart, one of which led into the bathroom and the other into the elevator shaft; neither door was locked and neither one was marked or labeled. The hall was dimly lighted, and in attempting to enter the bathroom he instead opened the door leading into the elevator shaft. He fell to the

bottom of the shaft and sustained serious, permanent injuries. To partially compensate Reitz for his injuries the legislature passed a law providing that if he presented a claim to the state Board of Examiners within three months of the passage of the act, he could collect damages, not exceeding \$7,500, as a claim against the state of Montana.

In upholding the act the court stated that in order to encourage education the state had provided money to assist in defraying the traveling expenses of students attending any of the units of the university and provided free textbooks to children attending the public schools, and both were considered to be a public purpose. It reasoned that compensating a student who, while attending the university, was seriously injured through the negligence of the state, contributed directly to encourage attendance at such institutions. The court declared that whether an act of the legislature was wise or unwise was a matter for legislative decisions and not one which was open to consideration by the court and that it was not in the province of the court to run a race of opinion with the legislature upon questions of policy or expediency.

Authority of the Board

State v Brannon (1929) was the first case in which the court, clarifying its earlier decisions on the powers of the Board of Education, declared the board to be a part of the executive department of state government and one of its agencies, and, as such, subject to legislative control.

In 1927 the legislature passed a law which provided for the collection of fees from gasoline dealers, required the Public Service Commission to enforce the law, and

designated the head or chairman of the Department of Chemistry of the State College of Agriculture and Mechanic Arts as the state chemist and directed him to analyze and test gasoline samples for quality and strength. The act further provided that the chemist was to receive no compensation for his services, nor charge any fee, for the tests. During the month of August, 1929, the commission presented samples to the chemist which he refused to analyze.

The court stated that the legislature could have created another bureau or department to perform the analyses but it did not do so and, instead, it created as state chemist the Head of the Department of Chemistry at the state college. The Board of Education argued that the university was established by the Montana Constitution, and since the management of the university was vested in the board by the Montana Constitution, the legislature was without power to impose a noneducational and antagonistic function upon one of the university units and also asserted that it was "within the scope of its functions, coordinate and equal with the legislature." After setting forth Section 11 of Article XI of the Montana Constitution: "The general control and supervision of the state university . . . shall be vested in a state board of education, whose powers and duties shall be prescribed and regulated by law." the court denied both contentions stating that the powers of the government of the state were divided into three distinct departments: the legislative, executive and judicial. Further it ruled that the Board of Education was a part of the executive department, and that the legislature may describe the extent of the powers and duties to be exercised by the board and could broaden the

functions of the university, or any of its units. It went on to state that a law may be enacted by the people exercising the initiative or by the people acting through the legislature and in either case the power to enact a law was illimitable. The legislature could require research and experimental work to a greater degree than was being carried on, and for the public benefit could require the discharge of functions in new fields, or in other words, the state could extend, and add power to, its developmental arm.

Although the court was correct to reject the argument that the board was "equal with the legislature" in its decision, it failed to consider whether the legislature, in designating the Head of the Chemistry Department as state chemist, had infringed upon the authority of the Board of Education to control and supervise the state university.

The court's analysis also presents the question of whether the legislature was prescribing the powers and duties of the board, or controlling and supervising the university. Arguably, the legislature's power to prescribe the duties of the board did not include the power to carry out these duties by assigning specific duties to a professor.

Another factor which the court failed to consider was that by placing so much emphasis on the authority of the legislature to dictate the duties and responsibilities of the board it could have had the effect of eliminating the clause granting the board "general control and supervision" from the Montana constitution. If this clause was not present in the Montana constitution, the legislature would have had the authority to create a state university and the board to administer it. However, the constitutional provision creating a state university and providing for its control acted as a restraint upon the authority of the

legislature to create a state university and a board to administer it without restraint. And, under such a situation there would be no restraint upon the legislature in prescribing or even eliminating the authority of the board which it had created.

Campus Expansion

Barbour v. State Board of Education (1932) was the first of a series of cases arising out the "Great Depression" of the 1930's. The court was called upon to decide the authority of the board to erect buildings to be used for residence halls upon the campuses at Missoula and Butte. The legislature enacted a law which included the borrowing of money with the security for repayment to be the pledging of the net revenue from the operation of the residence halls, together with the net revenue from residence halls already erected and in use. The complaint alleged this was an unconstitutional delegation of power by the legislature.

The court reasoned that the act only authorized the board to carry out the expressed will of the legislature, even though the procedural directions and the things that needed to be done were specified only in general terms and therefore it was not a delegation of legislative power.

The court placed emphasis on the fact that the faith and credit of the state was not involved in the issuance of the bonds and the taxpayers of the state would never be burdened or called upon to undertake to repay the obligations which were to be created.

State v. State Board of Education (1934) (Veeder) was an action to stop the Board of Education from erecting and maintaining a students' union building at the

university in Missoula. In 1933, the legislature, during the Extraordinary Session of 1933-34, enacted a law to take advantage of the "National Recovery Act," which permitted the advance of federal funds for the construction of public works. Under the state law the Board of Education was empowered to erect student union buildings on the various campuses with all principal and interest payable solely from funds from the operation of the buildings and from income derived from student fees.

The university had always exacted from the students matriculation, registration and certain other fees, and, in 1929, the student body at Missoula voted to increase the student fees by \$1 a quarter for the purpose of creating a fund with which to erect a students' union building. The fee had been collected for several years and was being held in a special fund for that purpose.

The Board of Education completed a plan to erect a building at Missoula financed by a loan of \$240,000 from the federal government, for which the board would issue bonds amortized over a thirty-year period, and a grant of \$60,000 from the government. To pay for the upkeep of the building, payment of the interest, and the creation of a sinking fund for the retirement of the bonds at maturity, the board established a student union building fee of \$5.00 per student per year to be in effect as long as the bonds were outstanding.

It was contended that the board had no authority to charge a student union fee, or, if such authority existed, that it could not be done without the consent of the student body. The authority granted the board by the legislature for the control and supervision of

the institutions included the right to receive from the United States and from state boards or persons funds, income, and property to which the institutions were entitled and to have general control and supervision over all receipts and disbursements of the institutions.

While the legislative grant contained no direct authorization to the board to impose fees of any kind upon the student, it does contain the restriction that "tuition shall ever be free to all students who shall have been residents of the state for one year.

The court reasoned that the power to manage and control the business and finances of the institutions carried with it the implied power to do all things necessary and proper in the exercise of the general powers, to include the exaction of fees, if the fees were necessary to the conduct of the business of the institutions. Also, unless these fees were for "tuition" they were no different than the fees already charged and required no vote of the student body for their enactment. Accordingly, the provision respecting free tuition did not bar the state board from collecting the fee as a condition precedent to entry into the university.

As for the argument that the board could not bind its successors the court stated that all governing boards exercised two distinct classes of powers: the one legislative and governmental, the other proprietary, or in the nature of business managers for the public they serve. In the exercise of the first class of powers, a board could not bind its successors, but in the second it could enter into valid contracts extending far beyond the term of office of the members. The members were acting as a board and not as individual

members, and the fact that the term of office of the individuals would expire before the termination of their contract did not in any way affect the validity of the contract.

The court also ruled that the \$1.00 fee "Student Union Building Fund" collected each quarter and held in a "special fund" in the custody of the president and business manager of the university was in the nature of a gift, or grant, or donation to the institution of which the board was the trustee and the board could use or appropriate this fund for the purpose for which it was raised and no other. Since there was no difference in the use of the money for the purpose of erecting a building and in using it to repay money borrowed for the immediate construction of the building, the board had authority to pledge this fund along with the future fees to be paid by the students to pay for the bonds issued to construct the building.

State v. State Board of Education (1934) (Blume) raised the question of the authority of the Board of Education to issue bonds for the erection and construction of buildings for Eastern Montana State Normal School in Billings. These funds were to provide for two buildings: one housing administration offices, classrooms, laboratories, and the library; and the other housing the auditorium and gymnasium. The act, passed during the Extraordinary Session of 1933-34, specifically provided that the state would not be liable for payment of the bonds and that they were payable solely from the Eastern Montana State Normal School fund.

The court noted that the site for the campus was purchased by citizens of Billings and donated to the state and that no buildings had been erected during the seven years that

the school had been in existence. The court then ruled, using the reasoning set forth in State v. State Board of Education (1934) (Veeder), State v. Barret (1901), and Barbour v. State Board of Education (1932), that the law did not violate the provisions of the constitution.

State v. State Board of Education (1936) (Wilson), presented the court with the question of the authority of the Board of Education to act under a law passed by the legislature during the Extraordinary Session of 1933-34, and utilize funds of the Federal Emergency Administration of Public Works to construct a journalism building at the university in Missoula. The action arose when a university student brought an action to enjoin the board from pledging the income from the federal land grant to the state of Montana as security for a loan. The court reasoned that while the legislative act did not specifically say in so many words just what things were necessary for its purpose, the broad language used justified the belief that the authority was given to the board to do the lesser things required to do the major things. While the act did not say the board could borrow money or issue bonds, these two things were necessary steps that had to be taken before construction. It stated that everyone knew the purpose of the university was to educate the youth of Montana and that in order to achieve this purpose, buildings, laboratories, equipment, and teachers were necessary. And, quoting its previous decisions in State v. State Board of Education (1934)(Veeder) and State v. State Board of Education (1934) (Blume), the court again made reference to the fact that the state of

Montana would not be liable for the bonds, and that the board had complete and final authority over the income in the funds established with the federal land grants.

The last case dealing with construction, State v. State Board of Education (1936) (Dragstedt), again called into question the authority of the Board of Education to construct and equip a chemistry-pharmacy building at the university in Missoula using a loan and grant from the Federal Emergency Administration of Public Works under a law passed by the legislature during the Extraordinary Session of 1933-34.

The court noted that the legislature did not provide by a specific act for the erection of a chemistry-pharmacy building, as it did for the erection of the student union building State v. State Board of Education ((1934) (Veeder) and the journalism building State v. State Board of Education (1936) (Wilson) in Missoula, and the buildings at Eastern Montana State Normal School State v. State Board of Education (1934) (Bloom). Quoting from its decision in State v. Brannon (1929) the court stated that the board is a governmental agency and, therefore, the loan was within its powers. It upheld the authority of the board to issue the bonds since their repayment did not involve an obligation of the state of Montana.

Regulations of the Board

In State v. Ayers (1939) the court was asked to rule on several issues involving the reinstatement of Philip O. Keeney to his position as Librarian and Professor of Library Economy at the university in Missoula. The issue with which we are concerned in this chapter deals with the authority of the Board of Education to adopt rules. In particular,

the board had adopted regulations, which had been in force for approximately twenty-one years, providing that reappointment of a professor after three years of service was deemed a permanent appointment.

The court stated the regulations adopted by the board were within its authority under Article XI, Section 11, Constitution of Montana and the provisions of the revised codes of Montana. Additionally, the court ruled that the regulations of the Board of Education, made within its jurisdiction, have the force of law, and become part of the contracts that were made thereunder.

The case of State v. Ford (1944) again involved the regulations of the board, and again, the status of a faculty member. Within the context of this chapter we are only concerned with the authority of the board and its officers. Paul C. Phillips, Professor of History and Political Science, delivered his letter of resignation from his position to the president of the university in Missoula, on October 2, 1937. On December 12, 1937, Phillips signed a withdrawal of his resignation. It was delivered to President Simmons on December 12, one day prior to the meeting of the Board of Education. On December 13, 1937, the board accepted his resignation.

The court ruled that the relationship between the board and Phillips was that of employer and employee and that he held his position under what was known as permanent tenure. It also ruled that under a provision of the regulations of the board in force, the president acted as a medium of communication between the board and the officers and organization of the university and that it was his duty to convey the withdrawal to the

board before it acted on the resignation. Further, the court ruled that the president, under the regulations of the board, could only make nominations and reports of appointments, promotions, salaries, transfers, suspensions, dismissals and resignations of administrative officers, members of the instructional and scientific staffs and other employees of . . . the university. Accordingly, as far as resignations were concerned the president must report them to the board, and he had no authority to accept them.

Summary

The period from World War I through World War II was one of change in postsecondary education. Based on its decisions during earlier years in cases involving the authority of the Board of Education it would have been thought the court would have, at a minimum, maintained the status quo of the authority of the board. Instead, the court declared the authority of the board to be only that which was bestowed upon it by the legislature, no more and no less. This period saw the court affirm that postsecondary education was a public purpose of the state, define college and university, and provide for the interpretation of the rules and regulations of the board as law. During the "Great Depression" the court played an instrumental part in upholding the emergency powers granted to the Board of Education by the legislature resulting in the expansion of existing campuses and providing for a new campus for the Eastern Montana State Normal School in Billings.

The cases show that while the court had held the Board of Education was merely an agency of the government and not a separate entity it still gave effect to the authority

