North Dakota Law Review

Volume 54 | Number 4 Article 1

1977

Constitutional Autonomy and the North Dakota State Board of Higher Education

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CONSTITUTIONAL AUTONOMY AND THE NORTH DAKOTA STATE BOARD OF HIGHER EDUCATION

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I. INTRODUCTION

The principle of legal autonomy in American higher education dates back at least to the famed Dartmouth College case in 1819,[1] in which the United States Supreme Court held that any action by the New Hampshire Legislature inconsistent with the College charter granted by the British crown in 1769 would be an impairment of the obligation of contract in violation of article I, section 10 of the United States Consitution.

It was in this tradition, amplified by their own dissatisfaction with a politically controlled educational system, that the people of North Dakota approved an amendment to article 54 of their state constitution in 1938, establishing a State Board of Higher Education with "full authority" over several state institutions assigned to its "control and administration." An observer of the North Dakota scene some forty years later would find very little judicial clarification of the degree of autonomy granted by this charter.

There have been several notable conflicts and recent court decisions in states geographically close to North Dakota, however, regarding the relative authority of the legislatures or executive agencies and the constitutionally established governing boards of higher education in those states. These decisions define several major principles of governing board automony which will be applied in an evaluation of certain measures approved by the 1977 session of the North Dakota Legislature regarding the State Board of Higher Education and the institutions under its jurisdiction.

II. CONSTITUTIONAL AUTHORITY OF THE NORTH DAKOTA STATE BOARD OF HIGHER EDUCATION

A. ADOPTION OF ARTICLE 54

The establishment of the North Dakota State Board of Higher Education was a result of the state's first fifty years of experience in operating a state-wide system of public schools and colleges. The particular form given to the Board as a constitutionally autonomous body grew out of the highly charged political atmosphere brought about in the state during its fourth and fifth decades by the activities of William "Wild Bill" Langer and the Nonpartisan League.

The constitution approved by the people of North Dakota upon attaining statehood in 1889 directed the first session of the state legislature to provide for a "uniform system of free public schools . . . up to and including the normal and collegiate course."[2] The

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1. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat) 518 (1819).

2. N.D. CONST. § 148 (1889, amended 1968). The legislative discretion to establish

1889 constitution also gave the legislature the responsibility of providing for the maintenance of such schools[3] and of taking other appropriate steps for the educational benefit of the State's citizens.[4] Finally, the constitution expressly stated that, "All colleges, universities, and other educational institutions . . . shall remain under the absolute control of the state."[5]

The legislature exercised these constitutional responsibilities by establishing a State Board of Education for the control of high schools,[6] several boards of trustees (one for the state normal schools and one for each of the other institutions of higher education),[7] and, later, a single Board of Regents for all of the higher education institutions.[8]

This system of legislative control of public education endured for some thirty years until its demise following the 1918 general election. When N. C. MacDonald, the Nonpartisan League candidate for Superintendent of Public Instruction was defeated in that election by a woman educator named Minnie Nielson, Governor Lynn Frazier (also a member of the NPL and a close political associate of MacDonald) retaliated.[9] He persuaded the 1919 session of the legislature to assign the functions of the State Board of Education and the Board of Regents to a new Board of Administration, with responsibility for all penal, welfare and educational institutions in the state.[10] While the Superintendent of Public Instruction was given a seat on the board, along with the Commissioner of Agriculture, control of the board was held by three members appointed by the Governor.

This transfer of educational responsibility for the state's educational system from the legislative to the executive branch was made complete when the Board of Administration proceeded to name N. C. MacDonald as its executive director, thus making Minnie Nielson, who had defeated him for the superintendent's office, effectively subordinate to him.[11]

These developments set the stage for an even greater political

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such schools was somewhat restricted, however, by other sections of the constitution that required the location of certain state schools and institutions at particular cities in the state. *Id.* §§ 215-216.

3. *Id.* § 147.
4. *Id.* § 151.
5. *Id.* § 152.
6. 1913 N.D. Sess. Laws ch. 149 (repealed 1919).
7. 1891 N.D. Sess. Laws ch. 89 (repealed 1915)(normal schools); 1890 N.D. Sess. Laws ch. 158 (repealed 1915)(science school); 1890 N.D. Sess. Laws ch. 160 (repealed 1915)(agricultural college); 1883 N.D. Sess. Laws ch. 40 (repealed 1915)(university). While the boards thus created were given different names, e.g., "board of education," "board of directors" and "board of trustees," they all were referred to as board of trustees in the state's next codification of laws. 1895 N.D. REV. CODES §§ 876, 907, 924, 935.
8. 1915 N.D. Sess. Laws ch. 237 (repealed 1919).
9. A. GEELAN, THE DAKOTA MAVERICK 40 (1975).
10. 1919 N.D. Sess. Laws ch. 71 (repealed 1939).
11. A. GEELAN, *supra* note 9, at 41.

conflict that was to lead to the establishment of the State Board of of Higher Education and hopefully a more secure system of education in North Dakota. In 1937 "Wild Bill" Langer was the Governor and three of the five Board of Administration members were his appointees. That year the Board instituted what was to be called "The A. C. Purge" by firing seven faculty and staff members at the North Dakota Agricultural College, including the state county agent leader. The Board also relieved the Director of the Experiment Station and Extension Service from his duties and accepted the resignation of the College president. The stated reasons for the actions were "economy and efficiency," but many people believed they were intended to give Langer control of Experiment Station and Extension Service funds and appointments, including the ability to allocate about $20,000,000 per year in benefit payments to farmers under the Agricultural Adjustment Act and to use farm and home demonstration agents for political purposes.[12]

Public protest of the Board's actions increased following the decision in April 1938 of the North Central Association of Colleges and Secondary Schools to remove the N.D.A.C. from its list of accredited schools, on the grounds that there had been "undue interference" by the Board in the internal administration of the college, that faculty morale had declined to the point that the quality of instruction was "seriously jeopardized," and that the legal structure and organization of the Board of Administration provided no assurance of a "stable and constructive leadership" or of a "sufficient degree of autonomy" for the N.D.A.C. and the other institutions of higher education in the State.[13]

Public dissatisfaction with the Board's role in bringing about this disaster found an obvious outlet in the form of support for an initiated measure placed on the June 1938 primary election ballot. The measure called for the transfer of control over higher education institutions in North Dakota from the Board of Administration to a constitutionally independent State Board of Higher Education. Following its approval by a vote of 93,156 to 71,448, the measure was adopted as article 54 of the Amendments to the North Dakota Constitution.[14]

B. PROVISIONS OF ARTICLE 54

Both the membership of the State Board of Higher Education and its powers as defined in article 54 were designed to assure freedom from the kind of political interference that had characterized

12. *Id.* at 84; L. GEIGER, UNIVERSITY OF THE NORTHERN PLAINS 396 (1958); W. HUNTER, BEACON ACROSS THE PRAIRIES 146 (1961).
13. W. HUNTER, *supra* note 12, at 153-54.
14. 1939 N.D. Sess. Laws, p. 499 (approved June 28, 1938).

the Board of Administration.[15] Although the Governor was given the power under article 54 to appoint the seven members of the new Board, his discretion in filling any open position was limited to choosing from a list of three nominees unanimously selected by the President of the North Dakota Education Association, the Chief Justice of the State Supreme Court, and the Superintendent of Public Instruction, and his appointment was subject to confirmation by the Senate.[16] Furthermore, the Governor's ability to influence Board members after their appointment was limited by provisions that they serve seven-year terms (compared to the two-year term then in effect for the Governor)[17] and that they could be removed only by impeachment.[18]

The autonomy and independence of the new Board was further assured by several broad grants of authority in article 54:

> 1. A board of higher education, to be officially known as the State Board of Higher Education, is hereby created for the *control and administration* of the following state educational institutions. . . .[19]
>
> 6(b). The said State Board of Higher Education shall have *full authority over the institutions under its control* with the right, among its other powers, to prescribe, limit, or modify the courses offered at the several institutions . . . . [and] shall have full authority to organize or re-organize *within constitutional and statutory limitations,* the work of each institution under its control, and do each and everything necessary and proper for the efficient and economic administration of said State educational institutions.
>
> (e). The said State Board of Higher Education shall have the *control of the expenditure of the funds belonging to, and allocated*

15. Within a month of its organization in 1939, the board unanimously approved a resolution declaring the following: "It will be the plea and purpose of the state board of higher education to clearly and definitely divorce the institutions of higher learning from so called 'political' domination or interference." W. HUNTER, *supra* note 12, at 161.

16. N.D. CONST. art. 54, § 2(a).

17. N.D. CONST. art. 71. The Governor's term of office has subsequently been changed to four years. 1965 N.D. Sess. Laws ch. 475 (approved June 30, 1964).

18. N.D. CONST. art. 54, §§ 2(a), 3.

19. The list of institutions, as amended by N.D. CONST. art. 90, now reads as follows:

> (1) The State University and School of Mines, at Grand Forks, with their substations.
>
> (2) The State Agricultural College and Experiment Station, at Fargo, with their substations.
>
> (3) The School of Science, at Wahpeton.
>
> (4) The State Normal Schools and Teachers Colleges, at Valley City, Mayville, Minot, and Dickinson.
>
> (5) The School of Forestry, at Bottineau.
>
> (6) And such other state institutions of higher education as may hereafter be established.

1971 N.D. Sess. Laws ch. 623, § 2; 1973 N.D. Sess. Laws ch. 526.

> *to such institutions and also those appropriated by the legislature,* for the institutions of higher education in this State. . . .[20]

The only allowance in article 54 for legislative involvement in the affairs of the institutions under the Board's jurisdiction appears to be the language in Section 6(b) granting to the Board the authority to organize or re-organize the work of such institutions "within constitutional and statutory limitations." The right of the legislature to become involved in the state system of higher education thus appears to be limited to its already-existing authority to approve statutes. Other provisions of the North Dakota Constitution grant this authority in general terms by vesting the "legislative power of the state" in the legislature,[21] by directing the legislature to "pass all laws necessary to carry into effect the provisions of this constitution,"[22] and by providing that each house of the legislature "shall have all other powers necessary and usual in the legislative assembly of a free state."[23]

The state constitution is more specific regarding the legislature's authority over financial matters. Section 148, for example, which directs the legislature to "provide for a uniform system of free public schools throughout the state," was amended in 1968 to allow the legislature to "authorize tuition, fees, and service charges to assist in the financing of public schools of higher education."[24]

Another specific grant of legislative authority over higher education funds was provided in the following language of a 1970 amendment to section 153 of the constitution:

> All property, real or personal, received by the state from whatever source, *for any specific educational or charitable institution, unless otherwise designated by the donor,* shall be and remain a perpetual trust fund for the creation and maintenance of

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20. N.D. CONST. art. 54, §§ 1, 6(b),(e) (emphasis added). Article 54 also includes the following provisions regarding the authhority of the board:

> 6(a) . . . As soon as said board is established and organized, it shall assume all the powers and perform all the duties now conferred by law upon the board of Administration in connection with the several institutions hereinbefore mentioned. . . .
>
> . . . .
>
> (d) It shall be the duty of the heads of the several State institutions hereinbefore mentioned, to submit the budget requests for the biennial appropriations for said institutions to said State Board of Higher Education; and said State Board of Higher Education shall consider said budgets and shall revise the same as in its judgment shall be for the best interests of the educational system of the State; and thereafter the State Board of Higher Education shall prepare and present to the State Budget Board and to the legislature a single unified budget covering the needs of all the institutions under its control.

N.D. CONST. art. 54.

21. N.D. CONST. § 25.

22. *Id.* § 68.

23. *Id.* § 48.

24. *Id.* § 148 (amended 1966).

> such institution, and may be commingled only with similar funds for the same institution. Should a gift be made to an institution for a specific purpose, without designating a trustee, such gift may be placed in the institution's fund; provided that such a donation donation may be expanded as the terms of the gift provide.
> The interest and income of each institutional trust fund held by the state shall, unless otherwise specified by the donor, be appropriated by the legislative assembly to the exclusive use of the institution for which the funds were given.[25]

It thus appears that donors of property to the institutions under the State Board of Higher Education may designate the manner in which the property is to be used as well as the allocation of any interest or income therefrom. In the absence of any such donor restrictions, however, the property is considered to be an institutional trust fund, with the legislature responsible for appropriating any resulting interest or income for the exclusive use of the recipient institution.

Section 186 gives the legislature additional authority to control the allocation of public moneys through its appropriation power:

> All public moneys, from whatever source derived, shall be paid over monthly by the public official, employee, agent, director, manager, board, bureau, or institution of the State receiving the same, to the State Treasurer, and deposited by him to the credit of the State, and shall be paid out and disbursed only pursuant to appropriation first made by the Legislature. . . .[26]

Since this appropriation power extends to all "public moneys," the degree to which it effectively authorizes legislative control of higher education expenditures depends on the definition of "public moneys." It would obviously include all state general funds derived from the state's exercise of its taxation powers, and it would seem likely that it also includes the student tuition, fees, and service charges that the legislature can authorize under section 148 of the constitution. It is doubtful, on the other hand, that the reference to "public moneys" in section 186 includes funds derived from institutional operations that are exclusively under the jurisdiction of the State Board of Higher Education, such as income from institutional activities and federal grants. With regard to these funds, the provisions of 186 have to be reconciled with the language of article 54, which assigns to the Board "[t]he control of the expenditure of

25. *Id.* § 153 (amended 1970) (emphasis added).
26. *Id.* § 186(1).

the funds belonging to, and allocated to such institutions *and also those appropriated by the legislature,* for the institutions of higher education in this State. . . ." (emphasis added)[27]

The emphasized language clearly implies the existence of two kinds of funds under the board's control: those "belonging to" the institutions and those "appropriated by the legislature." The North Dakota Attorney General has indicated that there would thus "appear to be considerable question under the North Dakota Constitution" as to the effect of the legislature's appropriation to the board of funds already "belonging to" the institution.[28]

Another article 54 limitation on the section 186 appropriation power requires that, "[t]he legislature shall provide funds for the proper carrying out of the functions and duties of the State Board of Higher Education."[29] The effect of this language is to prohibit the appropriation power from being used to deny the Board the funds necessary for its operations and those of the institutions under its jurisdiction. In *State ex rel. Walker v. Link,*[30] the Supreme Court of North Dakota described the effect of this mandate in article 54 as follows: "Neither the legislature nor the people can, without a constitutional amendment, refuse to fund a constitutionally mandated function."[31] Referring to the possibility of a legislative failure to appropriate funds for a constitutional function, the court indicated that the necessary appropriation could be considered to be made by the constitution, as a self-executing provision.[32]

C. JUDICIAL INTERPRETATION OF ARTICLE 54

The Walker case is one of just four North Dakota Supreme Court decisions involving article 54 which provide an interesting background for an analysis of the constitutional autonomy of the State Board of Higher Education, although none of them deal directly with that issue.

In the first of these cases, *Posin v. State Board of Higher Education,*[33] the court was asked to review the action of the State Board

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27. N.D. CONST. art. 54, § 6(e).

28. Letter from Allen I. Olson to Robert Peterson (Jan. 6, 1977), *citing* Regents of Univ. of Mich. v. State, 47 Mich. App. 23, 208 N.W.2d 871 (1973); Bd. of Regents of Higher Educ. v. Judge, 168 Mont. 433, 543 P.2d 1323 (1975); State *ex rel.* Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974).

29. N.D. CONST. art. 54, § 5.

30. 232 N.W.2d 823 (N.D. 1975).

31. State *ex rel.* Walker v. Link, 232 N.W.2d 823, 826 (N.D. 1975). In addition, the institutions of higher education assigned to the board's jurisdiction by article 54 and thus described by the *Walker* court as "constitutionally mandated" are also listed in sections 215 and 216 of the constitution as "public institutions of the state" to be "permanently located" at specified locations. The *Walker* opinion makes no mention, however, of these alternative grants of constitutional status.

32. *Id., citing* Ford Motor Co. v. Baker; 71 N.D. 298, 300 N.W. 435 (1941); Langer v. State, 69 N.D. 129, 284 N.W. 238 (1939); State v. Baker, 65 N.D. 190, 262 N.W. 183 (1934); State v. Hall, 44 N.D. 459, 171 N.W. 213 (1919).

33. 86 N.W.2d 31 (N.D. 1957).

of Higher Education in discharging four faculty members of the North Dakota Agricultural College. The plaintiff faculty members argued that the board had failed to comply with certain provisions of the college constitution regarding discharge of employees. The court ruled that the college constitution, even though it may be considered a rule or regulation approved by the Board, does not and cannot, have the effect of diminishing, limiting, restricting, or qualifying the power and authority vested in the Board by article 54 and certain state statutes which provided the following:

> The state board of higher education shall have all the powers and perform all the duties necessary to the control and management of the institutions described in this chapter, including the following:
>
> 1. To elect and remove the president or other faculty head, and the professors, instructors, teachers, officers and other employees of the several institutions under its control. . . .[34]

The court held that this reference to the power and authority of the Board to "elect and remove" is a legislative designation of one of its specific powers and is included in the "full authority" granted to it by the North Dakota Constitution.

Nord v. Guy[35] involved a challenge to the constitutionality of a legislative act which provided for the issuance by the state of bonds and appropriated the proceeds of the bonds to the State Board of Higher Education "for use in the construction and equipping of facilities . . . at state institutions of higher education as determined by the Board and in accordance with such schedule of priorities as may be prescribed by such Board."[36]

The plaintiff's argument was that this language provided for an unconstitutional delegation of legislative power to the Board, and this raised the question as to whether the Board's own constitutional authority under article 54 was broad enough to include the functions described in the act. The court then interpreted the Board's article 54 grant of power for the "control and administration" of the educational institutions to mean in general terms "the management and supervision thereof."[37] The court held that this authority was not the

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34. N.D. REV. CODE § 15-1017 (1943) (current version at N.D. CENT. CODE § 15-10-17 (1971)).

35. 141 N.W.2d 395 (N.D. 1966).

36. 1965 N.D. Sess. Laws ch. 155, § 19.

37. Prior to reaching this conclusion, the court reviewed dictionary definitions of "control" and "administration" as follows:

> The word "control" is defined as a "power of authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee." See Black's Law Dictionary, Third Edition. Webster's Third New International Dictionary Unabridged defines the word "control" as to "exercise restraining

kind of legislative power that the act attempted to delegate by authorizing the Board to provide facilities at various state educational institutions without specifying the institutions where such facilities were to be constructed or the priority and cost of the facilities.[38]

Having thus interpreted article 54 to not grant legislative authority to the State Board of Higher Education, the court held that the Higher Education Facilities Bond Act was unconstitutional because it attempted to delegate legislative powers to the Board in violation of Section 25 of the North Dakota Constitution, which vests the legislative power of the state in the legislature. *Nord*, therefore, deals with the problem caused by a legislative attempt to delegate legislative authority to the State Board of Higher Education, rather than a legislative attempt to interfere with the management authority of such a board, which is the focus of this article.

Zimmerman v. Minot State College[39] involved a claim by a college instructor that she had not been given twelve month notice of the termination of her appointment, as provided by the tenure policy that had been adopted by the State Board of Higher Education. The Board defended the case in part by arguing that the plaintiff had been given sufficient notice of termination under the provisions of section 15-47-27 of the North Dakota Century Code, which provided the following:

> Any teacher who has been employed by . . . (the) state board of higher education in this state during any school year, shall be notified in writing by the . . . board not later than the fifteenth day of April in the school year in which he or she has been employed to teach, of the board's determination not to renew the teacher's contract for the ensuing school year. . . .

The court responded by first determining that the board's policy statement on tenure had been promulgated pursuant to its duties of management and supervision granted by article 54 and section 15-10-17(1) of the North Dakota Century Code. Rather than identifying any constitutional issue, however, the court simply handled the case as one involving a statutory conflict between sections 15-10-17(1)

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or directing influence over: regulate, dominate, rule: have power over" and "power or authority to guide or manage: directing or restraining domination." The word "administration" is defined as "performance of executive duties: management, direction, superintendence." See Webster's Third New International Dictionary Unabridged.

Nord v. Guy, 141 N.W.2d 395, 402 (N.D. 1966).

38. The court also held that the mandate in article 54 that the board "shall assume all the powers and perform all the duties now conferred by law upon the Board of Administration in connection with the several institutions hereinbefore mentioned . . ." did not vest the State Board of Higher Education with any legislative powers. *Id.*

39. 198 N.W.2d 108 (N.D. 1972).

and 15-47-27. In resolving the conflict, the court applied the rule of statutory construction favoring more specific provisions over general provisions,[40] and held that the authorization in section 15-10-17(1) for the Board to promulgate rules was more specific to the situation than the general notice provisions in sections 15-47-27. Therefore, the case does not stand for the proposition that a policy of the Board adopted pursuant to its constitutional authority prevails over a legislative directive involving the same matter, although the result in the case is consistent with that principle.

Finally, in *State ex rel. Walker v. Link*[41] the North Dakota Supreme Court was asked to review the action of the state's Emergency Commission in authorizing withdrawal of funds directly from the state treasury for the operation of the University of North Dakota after the legislature's biennial appropriation to the university was apparently "suspended" under section 25 of the state constitution by the filing of a referendum petition.

The court found that the provisions of section 25 that would appear to "suspend" a legislative appropriation until the referendum election were in conflict with the requirements in article 54, section 5 that "[t]he legislature shall provide adequate funds for the proper carrying out of the functions and duties of the state board of higher education."

The court then held that such a conflict had to be resolved by finding the more specific and more recent provisions of article 54 to be controlling. Again, it is important to note the lack of any conflict between the Board and the legislature; the case simply holds that the legislature's appropriation of funds, in accordance with article 54, to institutions under the Board's jurisdiction may not be suspended by the referendum process provided in the state constitution.

III. RECENT AUTONOMY CASES IN OTHER STATES

The fact that none of these North Dakota Supreme Court decisions deals directly with the issue of the State Board of Higher Education's autonomy vis-a-vis the legislature leaves an interesting void in the interpretation of article 54.

The autonomy issue has arisen or been litigated recently in several neighboring states with constitutional provisions similar to article 54. Because of their direct relevance to the North Dakota situation, these developments in Nebraska, Minnesota, South Dakota, Montana, and Michigan should be examined closely.

40. N.D. CENT. CODE § 1-02-07 (1975).
41. 232 N.W.2d 823 (N.D. 1975).

A. NEBRASKA

In July of 1977 the Supreme Court of Nebraska, in *Board of Regents of University of Nebraska v. Exon*,[42] decided a declaratory judgment action that had been brought by the Regents against the Governor (Exon), the State Director of Administrative Services, and the State Director of Personnel. The purpose of the litigation was to determine the validity of several actions of the Nebraska Legislature under Article VII, section 10 of the Nebraska constitution, which states as follows: "The general government of the University of Nebraska shall, under the direction of the legislature, be vested in . . . the Board of Regents. . . . Their duties and powers shall be prescribed by law. . . ."

Both the state district court which first heard the case and the state supreme court on appeal ruled that the phrase "under the direction of the legislature" did not give the legislature the power to direct the "government" of the university, but only the manner in which it shall "be vested" in the Board of Regents. The result, according to the supreme court, was that, "[i]t is the duty of the legislature to implement the constitutional provision by enacting legislation which vests the general government of the University in the Board of Regents."[43] With regard to the constitutional language requiring that the Regents' "duties and powers shall be prescribed by law," the court ruled that the legislature could set forth the powers and duties of the Regents, but only in a manner consistent with the Regents' control over the general government of the university. The court stated the following:

> [A]lthough the legislature may add to or subtract from the powers and duties of the Regents, the general government of the University must remain vested in the Board of Regents and powers or duties that should remain in the Regents cannot be delegated to other officers or agencies. . . .
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> . . . In prescribing the powers and duties of the Regents a legislative act must not be so detailed and specific in nature as to eliminate all discretion and authority on the part of the Regents as to how a duty shall be performed.[44]

The court then applied these principles in determining the validity of each of the following challenged legislative actions:

First, provisions in the 1975 and 1976 appropriations bills adopted

42. 199 Neb. 146, 256 N.W.2d 330 (1977).
43. Bd. of Regents of Univ. of Neb. v. Exon, 199 Neb. 146, ——, 256 N.W.2d 330, 332-33 (1977).
44. *Id.* at ——, 256 N.W.2d at 333.

by the legislature directing the Board of Regents or employees of the university to take certain actions.[45] The trial court had held that the legislature did not have the authority to do this, so that the statements would have to be construed as only advisory in nature. Although this question was not appealed, the Nebraska Supreme Court indicated that it agreed with the trial court, stating that, "The legislature can not use an appropriation bill to usurp the powers or duties of the Board of Regents and to give directions to the employees of the University. The general government of the University must remain vested in the Board of Regents."[46]

Second, a standing provision that money accruing to the university cash fund, which consists of money derived from the operation of the university (such as student fees, sales of commodities raised by the university, and medical center fees) shall become available "when appropriated by the legislature."[47] In affirming the trial court's holding that an annual appropriation by the legislature was not required, the court cited a previous decision in which it had held that a legislative appropriation was not required in order for the Board of Regents to expend funds donated to the University by the federal government.[48] The court reasoned that university funds which are not derived from state taxes have a different status than the general fund monies, since such funds are equivalent to trust funds which can only be expended by the Board of Regents for the benefit of the university, rather than being available to the legislature for general governmental purposes. As an example of legislative recognition of the Board of Regents' control over such funds, the court cited a longstanding state law which declared that, "[a]ll money accruing to the university funds is hereby appropriated to the use of the state university."[49] It is significant that the court did not rely upon this statute as evidence that the institutional income had already been appropriated by the legislature, but instead used it to indicate the unique status of the university's non-appropriated funds.

Third, provisions in the 1975 appropriation bill adopted by the legislature requiring the approval of the Governor (in the case of personal property) or the Governor and the legislature (in the case of real property) before acceptance of any gift, bequest or devise of property in excess of $10,000 to the state, including the university.[50] The court held that these provisions unlawfully delegated the constitutional authority vested in the Board of Regents.

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45. 1976 Neb. Laws 690, 972.
46. 199 Neb. at ——, 256 N.W.2d at 333.
47. NEB. REV. STAT. § 85-125 (1976).
48. State *ex rel.* Spencer Lens Co. v. Searle, 77 Neb. 155, 108 N.W. 1119, 109 N.W. 770 (1906).
49. NEB. REV. STAT. § 85-131 (1976).
50. 1976 Neb. Laws 603, 605.

Fourth, provisions fixing and determining the manner in which raises are to be given to employees of the Board. The trial court had held that the legislature had the authority to determine such raises, but the supreme court overruled that finding and held that, "[t]he determination of salary schedules and the compensation to be paid to the employees of the Board of Regents is an integral part of the general government of the University."[51] On a closely related issue, the supreme court held that the State Director of Personnel had no authority over university employees who had not been placed under the state personnel system by the Board of Regents.

Fifth, provisions prescribing certain requirements concerning planning, design, and construction of new facilities and the modification or repair of existing facilities.[52] The supreme court held that these laws could not apply to the Board of Regents or the university because they would result in an unlawful delegation of the regents' constitutional authority.

Sixth, provisions making the University subject to the Central Data Processing division of the State Department of Administrative Services.[53] These were also found to be invalid by the supreme court as an unlawful delegation of authority.

Seventh, provisions making the university subject to a centralized purchasing and disposal program for property used by the state and its agencies.[54] The supreme court held that these provisions would unlawfully delegate the board's authority if held applicable to the university.

Following the *Exon* decision, the Board of Regents at its September, 1977, meeting adopted a general policy of continuing existing relationships with state agencies until recommendations for change were proposed to the Board. Within a week of this action, the university administration established a task force composed of nine key administrators who were charged with "the responsibility of listing all of the issues and procedures which may cause some concern" in light of the court decision.[55]

The task force issued its final report and recommendations in December,[56] including an outline analysis of 199 areas of university policy or procedure that might be affected by the Exon decision.[57]

51. 199 Neb. at ——, 256 N.W.2d at 335.
52. NEB. REV. STAT. § 81-1108.41-43 (Supp. 1977).
53. *Id.* § 81-1117 (Supp. 1977).
54. *Id.* § 81-153 to 162 (Supp. 1977).
55. Letter from William F. Swanson, Vice Pres., Univ. of Neb., to task force members (Sept. 15, 1977).
56. University Task Force on Response to the July, 1977 Nebraska Supreme Court Ruling on University Governance, Final Report and Recommendations (1977).
57. *Id.* Attachment IV.

In addition, the report identified nineteen critical areas of concern.[58] Finally, the task force made the following recommendations:

> — That a specific timetable for development of policies and procedures for an adequate personnel system be developed by the University's administrative staff as quickly as possible.
>
> — That each of the nineteen critical areas of concern referred to above be assigned to a university office or staff team for design of timetables and approaches to be used in development of appropriate policies, procedures, and state agency interfaces and relationships, required to bring the university into compliance with the *Exon* ruling.
>
> — That ongoing cooperation with other state agencies be maintained by the assignment of specific liaison responsibilties to university administrators.
>
> — That administrative responsibility should also be assigned for improved development and management of administrative policies.
>
> — That ongoing legislative support be achieved by assigning the responsibility for informing legislators of the impact of any bills introduced in response to the action of the Nebraska Supreme Court.[59]

These activities and conclusions of the task force are important because they underscore the significance and impact of the *Exon* decision. Along with a guarantee of freedom from legislative interference in university governance, it implies a broad scope of responsibility that the Board of Regents must be willing to assume for managing the institution, not the least of which is the continued maintenance of a good relationship with various state agencies that used to be more involved in supervising university affairs and could still have a significant effect on its well-being. The task force emphasized the effect of the decision in both principle and practice by stating that it recognized the *Exon* ruling

> as not only a one-time incident of mere operational significance to the university, but also as a major guidepost of the

58. *Id.* Exhibits A & B. The nineteen areas were: (1) gifts, (2) personnel, (3) new facilities, (4) data processing, (5) purchasing, (6) ceilings controls, (7) financial transaction processing, (8) budget requests, (9) grants and contracts, (10) purchasing, (11) capital construction, (12) statewide coordination of higher education, (13) authority of collegiate faculties, (14) legislative approval for new colleges, (15) Department of Education approval of courses for VA certification, (16) state agency review of nonstate grant proposals, (17) clarification of ag-related Nebraska statutes to conform to contemporary expectations, names, titles, activities, etc., in IANR and other agriculture agencies and bodies, (18) academic staff—accountability to state agencies for activities, external income, etc., and (19) professional certification. *Id.*

59. *Id.* at 1-3.

> State of Nebraska, reflecting its public policy for the relationship between state government and higher education through the twentieth century. As such, the task force offers the solemn admonition that the university and each of its employees build upon this increased clarity in public policy to *improve* cooperation between the university and other state agencies, and to *improve* the operational effectiveness of the university, in ways and amounts that may have been more difficult to establish before this clarification was available.[60]

It is, of course, too early to tell whether or not the principle of autonomy will actually survive as Nebraska's "public policy for the relationship between state government and higher education through the twentieth century." Any thought that the Board of Regents would no longer have to worry about legislative involvement in educational policy-making must have been dispelled by the action of the 1978 session of the Nebraska Legislature in approving two comprehensive measures regarding postsecondary education,[61] both over Governor Exon's veto. One of these acts provided for a "uniform information system for all public post-secondary education systems and institutions" in the state.[62] Several broad purposes were stated in the act, including the provision of "timely and accurate information concerning the programs, personnel, students, finances, and facilities" of the educational systems and institutions, and the establishment of "an information base to support state level planning, budgeting, and performance evaluation activities for postsecondary education."[63]

The legislature's intent to be involved in education policy-making was even more directly stated in a second measure approved during the 1978 session.[64] That act established "statements of role and mission" for the state's postsecondary education systems and institutions in order to provide for a "coordinated state system," and to "limit unnecessary program and facility duplication through coordinated planning."[65] The act also established a legislative review process to ensure that the institutions complied with the role and mission statements and that the statements would be updated when necessary.[66] Further enforcement was provided for in a section of the act which prohibits the expenditure of "funds generated or received from a general fund appropriation, state aid assistance program,

60. *Id.* at 2.
61. *See generally* Jacobson, *Takeover in Nebraska*, THE CHRONICLE OF HIGHER EDUC. at 3 (Apr. 10, 1978).
62. Neb. Leg. Bill 897 (1978).
63. *Id.* § 1.
64. Neb. Leg. Bill 756 § (1978).
65. *Id.* § 1(2)(4) (1978).
66. *Id.* § 1(6).

or receipts from a mill levy authorized by statute . . . in support of programs or activities which are in conflict with the role and mission assignments.[67]"

In language that appears to be both self-contradictory and inconsistent with the *Exon* ruling, the act declares that, "[t]he legislature acknowledges the provisions of sections 10 and 13 of article VII of the Nebraska Constitution. The provisions of this act reflect the philosophy of the State of Nebraska and shall be acknowledged as such and implemented by the Board of Regents of the University of Nebraska. . . ."[68] The Board of Regents is also directed to "adopt and promulgate policies and procedures necessary to assure compliance" with the act and the role and mission assignments for the University of Nebraska system and its campuses.[69]

These directives are indeed very difficult to square with the principles of the Regents' constitutional autonomy enunciated in *Exon*. Only time will tell whether the Nebraska Supreme Court's ruling will have any lasting effect or whether the fiscal power of the legislature will give it effective control of even those educational policy matters that have been determined to be legally within the scope of the Regents' constitutional authority.

B. MINNESOTA

Within a month of the Nebraska decision, the Minnesota Supreme Court held in *Regents of University of Minnesota v. Lord*[70] that an act of the state legislature requiring a state designer selection board to select designers for university buildings did not unduly infringe upon the authority over the "government" of the University of Minnesota that was vested in its Board of Regents by the state constitution. The case grew out of a controversy that began when the 1974 session of the Minnesota Legislature enacted a state designer selection board act that was expressly made applicable to the University of Minnesota as well as to other state agencies and departments.[71] The act established a citizen board appointed by the governor with the responsibility for selecting the primary designer for state building projects with estimated costs exceeding $250,000 or planning projects with estimated fees greater than $20,000.

During the same session of the Minnesota Legislature, $30,000 was appropriated to the Board of Regents for planning the first phase of a learning resources center at the University's St. Paul campus.[72] The university proceeded to select a primary designer

67. *Id.* § 17.
68. *Id.* § 56.
69. *Id.* § 19.
70. ——Minn.——, 257 N.W.2d 796 (1977).
71. MINN. STAT. ANN. § 16.821-27 (West 1977).
72. 1974 Minn. Laws ch. 516.

for the project without going through the state designer selection board. When it requested payment from the state for the designer's planning services, the state Commissioners of Administration and Finance, under the direction of the State Treasurer, refused payment because of the university's failure to comply with the state designer selection board act.

The 1976 session of the Minnesota Legislature added another dimension to the controversy by making its $4,897,489 appropriation to the university for completion of the learning resources center expressly conditional upon the university's compliance with the designer selection board act.[73]

The Board of Regents then brought an action in state district court, seeking a declaration that the designer selection board act violated the Regents' authority under the Minnesota Constitution, and an injunction against the withholding of construction project appropriations from the university for its failure to comply with the act.

The basis for the Regents' challenge was a section of the Minnesota Constitution which states as follows: "All the rights, immunities, franchises and endowments heretofore granted or conferred are hereby perpetuated unto the . . . university . . . ."[74] This language had earlier been held by the Minnesota Supreme Court in *State ex rel. University of Minnesota v. Chase*[75] to carry forward the authority of the Board of Regents for the "government" of the university under its original charter, with the power and duty "to enact laws for the government of the university."[76]

The district court granted a summary judgment to the Regents, holding that both the state designer selection board act and the condition requiring the university's compliance with it in the learning resources center appropriation measure were in violation of the autonomy granted the university under the constitutional provisions regarding the Board of Regents.

The state appealed the case to the Minnesota Supreme Court, which reversed the district court by a 5-4 vote, holding that the requirement that the state designer selection board select designers for university buildings is a valid exercise of legislative authority over appropriations made to the university, since the legislature has the power to impose reasonable conditions on the use of appropriated funds.

In its analysis of the "reasonableness" of the condition requiring

73. 1976 Minn. Laws ch. 348.
74. MINN. CONST. art. 13, § 3.
75. 175 Minn. 259,.220 N.W. 951 (1928).
76. State ex rel. Univ. of Minn. v. Chase, 175 Minn. 259, ——, 220 N.W. 951, 955 (1928), *citing* 1851 Minn. Laws ch. 3, §§ 4, 9.

compliance with the designer selection board act, the court began by quoting from the *Chase* opinion as follows: "At the one extreme, the legislature has no power to make effective, in the form of law, a mere direction of academic policy or administration. At the other extreme it has the undoubted right within reason to condition appropriations as it sees fit."[77]

While the *Chase* opinion contemplated the possibility of valid legislative conditions in appropriations to the university, the actual holding in that case invalidated a legislative act. The measure in question had authorized the State Auditor "to supervise and control" expenditures by all "departments, and agencies of the state government and of the institutions under their control."[78] The act also required the approval by the State Commission of Administration and Finance of an "estimate" before any appropriation to a unit of the state could become "avaliable for expenditure."[79] When the commission disapproved an expense incurred by the Regents for a preliminary survey of an employee group insurance plan, the Regents brought a mandamus action, and the Minnesota Supreme Court affirmed the district court's judgment for the Regents, holding that the act was an unconstitutional attempt by the legislature to interfere with the independent management authority of the Board of Regents.

This holding was distinguished by the court in *Lord* as involving a "direct attempt to control all university expenditures, rather than the limited conditions imposed by the designer selection board act."[80] In stating the question to be resolved, the court also emphasized the need to examine the impact of the measure on the discretion and power of the Regents over the internal management of the university.

The court then discussed the purposes of the state designer selection board act. Its primary intent, according to the court, was "to avoid the conflicts of interest which arise when members of a state agency select a firm in which they have an interest, be it financial or otherwise."[81] The university was perhaps uniquely affected by this objective because of the fact noted earlier in the court's opinion that the university had entered into several contracts with architectural firms which included faculty members in the university's School of Architecture.

Second, the court indicated that the provisions in the act defining the membership of the designer selection board to include represent-

77. 175 Minn. at 261, 220 N.W. at 952.
78. 1925 Minn. Laws ch. 426, art. 3, § 3.
79. *Id.* § 5.
80. Regents of Univ. of Minn. v. Lord, ——Minn ——, ——, 257 N.W.2d 796, 802 (1977).
81. *Id.*

atives of engineering, architecture, and the arts were designed to insure competency in the selection process.

Third, the court noted the act's requirement that selection criteria be made public and that the selection process follow certain defined procedures.

The purpose of the act, according to the court, was "to promote the general welfare and to prevent conflicts of interest and fraudulent acts."[82] Considering also the application of the act to all public agencies in the state, and not just the university,[83] the court found the requirement to be a reasonable and limited condition for the legislature to impose.

The court noted, however, that the act would not apply to the university if it "were providing all funds for the construction of a building from its own revenues. . . ."[84]

Moreover, the court held that the Board of Regents must be consulted during the negotiations between the designer selection board and the designer ultimately selected for a university project, and that the contract with the designer must be specifically approved for both form and content by the Regents before it can be executed. Furthermore, the court ruled that the university "certainly has the right to direct his actions [the designer's] and to reject any design it finds unsuitable."[85]

While the validity of legislative action was basically upheld by the court, it was actually subject to the condition in the opinion that the final authority of the Regents (and their exclusive authority, in the case of projects funded by the university's own revenues) be accomodated in a manner not specifically provided for in the act.

C. SOUTH DAKOTA

The most recent ruling of the South Dakota Supreme Court on the question of constitutional autonomy occurred in 1975, in *Board of Regents v. Carter*.[86] That case was brought by the Board of Regents as a challenge to the authority of the state Commissioner of Labor and Management Relations (Carter) to rule on the definition of appropriate employee representation units and certify the designation

82. *Id.*

83. This is significant because of the court's earlier reference to an apparent principle that ". . . legislation aimed at a university alone or against an activity peculiar to the university would be invalid." *Id.*, *citing* Peters v. Mich. State College, 320 Mich. 243, 30 N.W.2d 854 (1948) (by implication).

84. ——Minn. at——, 257 N.W.2d at 803. While not cited as authority at this point, a case referred to earlier in the court's opinion, Fanning v. Univ. of Minn., 183 Minn. 222, 236 N.W. 217 (1931), directly supports this principle. That case upheld the university's right to use rental proceeds from campus buildings and earnings from the university press to finance the construction of a dormitory on the campus without securing legislative appropriation of the funds or approval for the construction.

85. ——Minn. at ——, 257 N.W.2d at 803.

86. ——S.D.——, 228 N.W.2d 621 (1975).

or selection of representative units under the state's collective bargaining act for public employees.[87]

The Regents argued that such a legislative grant of authority was inconsistent with their charter in the state constitution, which specified that all state-supported educational institutions "shall be under the control of a board of five members appointed by the Governor and confirmed by the senate under such rules and restrictions as the legislature may provide."[88] According to the Regents, the legislature's power under this section only extended to placing rules and restrictions on the appointment and confirmation process.

The court disagreed directly with this last contention, stating that it has consistently recognized the "rules and restrictions" phrase to also modify the word "control," so that it authorized some legislative restraint of the Board's constitutional power of control over the institutions.[89] The court indicated that such restraint was itself limited and that the legislature's "rules and restrictions" could not "erase" the Board's control or remove all of its power.[90]

Proceeding then to an analysis of the public employee bargaining law, the court noted that it only required the Board to negotiate in good faith with a representative employee unit. Since this obligation was defined in the law to mean providing a rationale for any position taken during negotiations, and not the making of a concession or necessarily agreeing to any proposal, the court interpreted this to mean that the Regents' power "to unilaterally set salaries, discharge employees, or establish employment qualifications is left intact." The court concluded that the Regents' "basic right of control" was therefore "left untouched," so it held that the act was "a permissable restriction on the exercise of that control."[91]

Another question in *Carter* was raised by the state attorney general who intervened to protest the Regents' action of hiring independent legal counsel in the case. While the court acknowledged the constitutional authority of the attorney general as the legal officer

87. S.D. COMPILED LAWS ANN. ch. 3-18 (1974).

88. S.D. CONST. art. XIV, § 3.

89. Board of Regents v. Carter, ——S.D.——, ——, 228 N.W.2d 621, 627 (1975), *citing* Worzella v. Bd. of Regents of Educ., 77 S.D. 447, 43 N.W.2d 411 (1958); Boe v. Foss, 76 S.D. 295, 77 N.W.2d 1 (1956); State College Dev. Ass'n v. Nissen, 66 S.D. 287, 281 N.W. 907 (1938); State v. Dailey, 57 S.D. 554, 234 N.W. 45 (1931); Johnson v. Jones, 52 S.D. 64, 216 N.W. 584 (1927).

90. ——S.D. at ——, 228 N.W.2d at 628.

91. *Id.* The dissenting opinion by Justice Wollman, joined by Justice Winans, argues that the board's control could in fact be invaded to an unconstitutional extent by a provision in the law directing the department of manpower affairs to issue a binding order after its investigation and hearing of an unresolved employee grievance. The concurring opinion by Justice Bregelmeier indicates that the decision of the regents, after having heard the employees' position, "is not subject to further review, regulation or any other of the restrictions in S.D.C.L. 3-18, *which of necessity include those mentioned in the dissent.*" *Id.* at ——, 228 N.W.2d at 630 (emphasis added). Since three of the five Justices thus objected to the binding order procedure, *Carter* should not be read to uphold the constitutionality of that provision.

of the state, it pointed out that such authority had to be reconciled with the legislature's power to make rules regarding the form of the Regents' control. Since one of those rules was a statute giving the Board of Regents the power to sue and be sued,[92] the court held that such power necessarily includes the power to hire its own attorney, even without the consent of the attorney general.

This ruling of the South Dakota Supreme Court regarding the constitutional autonomy of the state's Board of Regents thus makes it clear that the Board's authority is subject to legislative definition as well as limitation, although neither may be so expansive as to interfere with the basic right of the Board to "control" the educational institutions under its jurisdiction.

In addition to the public employee negotiation process involved in *Carter*, a more recent lower court decision in South Dakota found another area of legislative authority to not be violative of the constitutional autonomy of the Board of Regents. In *Hines v. DeZonia*,[93] a state circuit court held that the Board (and hence the University of South Dakota School of Medicine under its jurisdiction) is a state "agency" subject to the state Administrative Procedures Act.[94] The court accordingly enjoined the School from dismissing the medical student who brought the case until such time as the School promulgated rules for academic dismissals in accordance with the Act. The significance of this case may be somewhat diminished by the fact noted in the court's opinion that the Board's own regulations on student discipline and academic standing required that any rules of implementation be promulgated in accordance with the provisions of the Administrative Procedures Act.

Another conflict in South Dakota surfaced at the August 1977 meeting of the Board of Regents. Inspired by the *Exon* decision in their neighboring state, and frustrated by the increasing involvement of South Dakota state agencies in campus affairs, the Regents unanimously directed their attorney to draft a lawsuit resolution for their consideration.[95] A specific point of contention at the time involved a decision by the state Personnel Bureau to re-audit the institutions of higher education in the fall, and the Commissioner of Higher Education was reported to have stated that the Personnel Bureau auditors would be escorted off the campuses if they tried to conduct another audit.[96] Within a week of the Board of Regents' meeting, the state attorney general was quoted as saying that the Regents were subject to the authority of executive agencies and

92. S.D. COMPILED LAWS ANN. § 13-49-11 (1975).
93. S.D. Cir. Ct. (1st Jud'l. Cir. 1976).
94. S.D. COMPILED LAWS ANN. ch. 1-26 (1974). *Accord*, Assoc. Students of Boise State Univ. v. Idaho State Bd. of Educ., Case No. 57554, Idaho Dist. Ct., (4th Jud'l. Dist. 1976).
95. Fargo Forum, Aug. 20, 1977, at 20, col. 6.
96. Fargo Forum, Aug. 24, 1977, at 13, col. 6.

that he didn't think "anybody will be escorting anybody any place."[97] The Regents subsequently decided to defer any further consideration of a lawsuit until an attempt had been made to resolve their differences with state agencies through legislation.[98]

D. MONTANA

The legal status of the state governing board for higher education in Montana was changed significantly by the adoption of a new state constitution in 1972. Under the old constitution the "general control and supervision" of the state education institutions was vested in a state board of education "whose powers and duties shall be prescribed by law."[99] The new constitution describes the responsibility of the board in much broader terms:

> 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 and shall supervise and coordinate other public educational institutions assigned by law.[100]

In contrast to the old constitution, the only reference in the new chapter to a legislative role in higher education is the following provision, which is quite limited: "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."[101]

These provisions of the new constitution were considered by the Montana Supreme Court in *Board of Regents of Higher Education v. Judge*,[102] an action brought by the Board seeking a declaratory judgment regarding the constitutionality of several measures approved by the Montana Legislature in 1975.

The measures in question required that the Board secure the approval of the Legislative Finance Committee before expending in excess of amounts appropriated or making certain other budget amendments,[103] and certify to the budget director compliance by the institutions with certain conditions related to the use of the appropriated funds.[104]

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97. *Id.*
98. Letter from David Figuli, Ass't. Att'y Gen., S.D. Bd. of Regents, to the author (Nov. 29, 1977).
99. MONT. CONST. art. XI § 11 (1889).
100. MONT. CONST. art. X § 9(2)(a). *See* Schaefer, *The Legal Status of the Montana University System under the New Montana Constitution*, 35 MONT. L. REV. 189 (1974).
101. MONT. CONST. art. X § 9(2)(d).
102. 168 Mont. 433, 543 P.2d 1323 (1975).
103. Mont. H.B. 271, § 1(3) (1975); Mont. S.B. 401, § 2 (1975).
104. Mont. H.B. 271, § 12 (1975).

In considering the budget amendment approval question, the court deemed it necessary to identify the funds subject to the appropriation power. The court thus considered provisions in the 1972 constitution that call for a governor's budget to be submitted to the legislature "setting forth in detail for all operating funds the proposed expenditures and estimated revenue of the state"[105] and that require the legislature to "insure strict accountability of all revenue received and money spent by the state."[106] The result, according to the court, is that the legislature's appropriation power "extends beyond the general fund and encompasses all those public operating funds of state government" except for "private funds received by state government which are restricted by law, trust agreement or contract."[107]

Having thus clarified one limitation of the appropriation power, the court created another by holding that the budget amendment approval process approved by the legislature was an unconstitutional delegation of its power to the Finance Committee.[108]

The court related the certification question to the power of the legislature to make line item appropriations, since the certification requirement at issue was preceded by a statement of legislative purpose "to restrict and limit . . . the amount and conditions under which the appropriations can be expended."[109] Although the Board of Regents had argued that its constitutional autonomy precluded appropriations from being restricted on a line item basis, the court held otherwise, stating that the legislative exercise of control over expenditures goes "hand in hand" with the appropriation power. The court acknowledged, however, that line item appropriations would be impermissible if they involved such a degree of legislative control over expenditures as to infringe upon the Regents' authority to "supervise, coordinate, manage and control" institutions under its jurisdiction.

Following the same line of reasoning, the court also held that the legislature had the authority to impose certain conditions on its appropriations and to require certification of compliance with those conditions, so long as the conditions "do not infringe on the constitutional powers granted the Regents."[110] The court then scrutinized each of the conditions imposed by the 1975 legislature and held the following to be unconstitutional:

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105. MONT. CONST. art. VI, § 9.
106. *Id.* art. VIII, § 12.
107. Board of Regents of Higher Educ. v. Judge, 168 Mont. 433, ——, 543 P.2d 1323, 1331 (1975).
108. *Id.*, *citing* State *ex rel.* Judge v. Legislative Fin. Comm., 168 Mont. 470, 543 P.2d 1317 (1975).
109. Mont. H.B. 271, § 12 (1975).
110. 168 Mont. at ——, 543 P.2d at 1333.

First, a requirement that "[a]ll moneys collected or received by university system units subject to this act from any source whatsoever, including federal grants for research and operations, and any moneys received from a foundation shall be deposited in the state treasury. . . ."[111] This provision was in conflict with the general principle discussed earlier that private moneys restricted by law, trust agreement or contract are not subject to appropriation.

Second, a prohibition of more than a five percent salary increase for university presidents and the commissioner of higher education during each year of the biennium.[112] The court reasoned that control of such salaries was not a "minor" matter, but rather an effort to dictate personnel policy in violation of the Board's authority.

Third, a requirement that "[t]he Regents shall grant classified university employees salaries in accord with House Joint Resolution 37. . . ."[113] An inherent responsibility of the Board under its constitutional powers is the determination of priorities in higher education, according to the court, and this attempted legislative condition impaired the Regent's power to function effectively by establishing policies and determining priorities related to the hiring and retention of competent personnel.

The holdings in *Judge* affirming the legislative power to make line item appropriations and conditional appropriations mean that the Montana Legislature can be expected to exercise a great deal of influence on the university system in the state. The case reveals a considerable amount of judicial respect for the broad scope of control and authority granted to the Board of Regents under the 1972 constitution, however, and the appropriation power will accordingly have to be exercised with some restraint in order to avoid any further challenge.

E. MICHIGAN

In October 1975, the Supreme Court of Michigan added another significant decision to a long line of opinions regarding the constitutional autonomy of higher education institutions in that state.[114] *University of Michigan v. State*[115] was a declaratory action brought by the constitutionally established universities to determine the validity of several provisions of the State Higher Education Appropriation Act of 1971,[116] and the Michigan State Board of Education intervened as a defendent to raise the question of its constitutional authority

111. Mont. H.B. 271, § 12(4) (1975).
112. *Id.* at 6.
113. *Id.*
114. *See* cases cited *infra* notes 132, 137, 142 and 150.
115. 395 Mich. 52, 235 N.W.2d 1 (1975), *reviewed in* Note, *Regents v. State of Michigan: A Matter of Politics and Power*, 111 DET. C.L. REV. 593 (1976).
116. 1971 Mich. Pub. Acts ch. 122.

with respect to the universities. The constitutional language relied upon by the universities stated that each of their governing boards "shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds."[117]

Several of the appropriation act provisions challenged by the universities made it an express "condition" of the appropriation that the number of out-of-state students be limited in certain respects,[118] that none of the appropriated funds be used to construct buildings not authorized by the legislature,[119] and that the general fund subsidy appropriated for an institution be automatically reduced by the amount of any tuition or student fee revenue not reported for budget purposes.[120]

Both the trial and appellate courts had found these conditions to be an unconstitutional infringement of the universities' autonomy,[121] but the Michigan Supreme Court noted that the statement of express "conditions" in the 1971 act had been changed in subsequent appropriations acts to declarations of "legislative intent." Since the legislature clearly has the right to merely state its intent or wishes, according to the court, no constitutional conflict existed at the time of the decision, and the court declined to rule on the questions raised by the universities regarding the "conditions."[122]

Another appropriation act provision challenged by the universities prohibited their letting of any construction contract for a self-liquidating project unless they had first submitted "schedules for the liquidation of the debt for the construction and operation of such project"[123] to the appropriate legislative committees. The court described this as a "mere reporting measure" and noted that there was no requirement of legislative supervision or control. Given also the legitimacy of the legislature's interest in the information, the provision was held by the court to be constitutional.

The final appropriation act question considered by the court was a prohibition of the use of the appropriated funds to "pay for the construction, maintenance or operation of any self-liquidating projects."[124] The court refused to rule on that question, due to the lack of any specific facts or impasse that would provide a contest for its

117. MICH. CONST. art. 8, § 5.
118. It is a condition of this appropriation that no college or university having an enrollment of out of state students in excess of 20% of their total enrollment shall increase their enrollment of out of state students in either actual number or percentage over the actual numbers and percentages that were enrolled in the 1970-71 school year. 1971 Mich. Pub. Acts ch. 122, § 13.
119. *Id.* § 20.
120. *Id.* § 26.
121. Regents of Univ. of Mich. v. Michigan, 47 Mich. App. 23, 208 N.W.2d 871 (1973).
122. *Id.*
123. 1971 Mich. Pub. Acts ch. 122, § 20.
124. *Id.*

decision. In very strong language, however, the court indicated that the universities "would be wise to comply" with the "perfectly proper" expression of the legislature's desire to separate the funding of self-liquidating and state-funded projects. Because of the power of the purse held by the legislature, the court warned the universities of the "understandable legislative reaction" that would result from their disregard of the provision. Rather than a legal question that could be judicially resolved, therefore, the court described the matter as "one of power and politics" from which it should abstain.

The question raised by the State Board of Education required a reconciliation of the constitutional grant of autonomy to the universities with the following grant of constitutional authority to the Board:

> Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board of education. It shall serve as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith.
>
> . . . The power of the boards of institutions of higher education provided in this constitution to supervise their respective institutions and control and direct the expenditure of the institutions' funds shall not be limited by this section.[125]

Since the universities were excepted from the Board's "general supervision" by the express terms of this provision, the court analyzed the impact of the other designated responsibilities of "leadership," "general planning and coordination," and advising the legislature. In light of the specific language negating any limitation of the university boards' powers of supervision and control, the court held that the State Board of Education could act as an advisory body to the universities, but without any power to veto their programs. In order for the Board to properly fulfill its constitutional mandate of advising the legislature, the court noted that the universities must inform the Board of any proposed programs and their financial requirements.

A very important element of this decision by the Michigan Supreme Court is its recognition of the significance of the political factors involved.[126] In addition to its acknowledgement of the legislative power of the purse, the court indicated in the following paragraph the necessity for mutual respect between the legislature and

125. MICH. CONST. art. 8, § 3.
126. *See* 111 DET. C.L. REV., *supra* note 115, at 593.

the university governing boards in their exercise of overlapping responsibilities:

> This case arises because two important elements of our government, the legislature and the universities, are zealous to perform well their constitutional missions in the service of the people. The legislature has taken certain action pursuant to its responsibilities to supervise properly the spending of the people's money. The universities seek to maintain their constitutional integrity to manage funds given into their charge in order best to perform their educational mission. It is obvious that these two functions can touch or overlap each other. Therefore understanding and good will is necessary that the people whom both elements represent be served.[127]

Following the state supreme court decision in *Regents*, the Michigan Court of Appeals was asked to resolve a question regarding the constitutional autonomy of public community and junior college boards in that state. *Kowalski v. Board of Trustees of Macomb County Community College*[128] held that the constitutional language indicating that such colleges "shall be supervised and controlled by locally elected boards"[129] meant that the boards had the authority to set tuition rates in excess of a legislatively prescribed schedule. The court reasoned that this language was "almost identical" with the constitutional language considered in *Regents* and that, although the supreme court's opinion did not address the issue, the court of appeals decision in that case had held that the Board of Regents had the authority to establish tuition rates.[130]

IV. PRINCIPLES OF AUTONOMY AND THEIR APPLICATION TO NORTH DAKOTA LEGISLATION

In comparison with the grants of constitutional authority involved in the cases reviewed from neighboring states, the North Dakota Board of Higher Education seems to be granted powers by article 54 that are at least as broad and independent.[131] The principles established in those cases thus have some significance in North Dakota as well, especially in light of the relatively little judicial interpretation of article 54 to date. Having been described in more detail during the discussion of those cases, the principles will now be summarized and illustrated.

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127. University of Mich. v. State, 395 Mich. 52, ——, 235 N.W.2d 1, 12 (1975).
128. 67 Mich. App. 74, 240 N.W.2d 272 (1976).
129. MICH. CONST. art. 8, § 7.
130. Regents of Univ. of Mich. v. Michigan, 47 Mich. App. 23, 208 N.W.2d 871 (1973).
131. The language of article 54 may be compared with the similar constitutional provisions of those other states by examining the text accompanying notes 19 and 20 (article 54), 42 (Nebraska), 74 and 75 (Minnesota), 88 (South Dakota), 100 (Montana), and 117 (Michigan).

A. REASONABLE CONDITIONS OF LEGISLATIVE APPROPRIATIONS

First, the courts agree that the legislature may attach reasonable conditions to its appropriations of state general funds to a constitutional board or an institution under its jurisdiction.[132]

Several examples of legislative action in accordance with this principle can be found in the measures approved by the 1977 session of the North Dakota Legislature. For example, the following expression of "legislative intent" in the appropriations bill approved for the institutions of higher education would appear to qualify as a reasonable condition, since it is directly related to the extent and manner in which the funds are to be used:

> SECTION 10. LEGISLATIVE INTENT. It is the intent of the legislative assembly that if the department of vocational education has funds available to fund the admission counselor II position at the state school of forestry on a fifty percent ratio basis with the state, upon receiving such funds from the department of vocational education, the state school of forestry shall return to the general fund fifty percent of the general fund appropriation included in its budget to fund the admission counselor's position.[133]

The appropriations bill for the Board of Higher Education itself also contains a "reasonable condition," given its close relationship to the use of the appropriated funds:

> SECTION 2. APPROPRIATION. The moneys appropriated in accordance with budget categories for salaries and wages pertaining to workload change, different services, or added facilities shall be made available only after certification to the executive office of the budget that such changes, services, or facilities have been added, or that newly anticipated employees are actually in the employ of the state.[134]

B. LEGISLATIVE EXERCISE OF POLICE POWER

Given the deference by the Minnesota Supreme Court in *Lord*[135] to the public purposes of the state designer selection board act and the affirmance by the Sourth Dakota Supreme Court in *Carter*[136] of a public employee bargaining act, a second principle of the educational autonomy cases might be that a constitutionally established

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132. Regents of Univ. of Mich. v. State, 395 Mich. 52, 235 N.W.2d 1 (1975); Regents of Univ. of Minn. v. Lord, ——Minn.——, 257 N.W.2d 796 (1977); *Accord*, State Bd. of Agriculture v. State Admin. Bd., 226 Mich. 417, 197 N.W. 160 (1924); Board of Regents v. Auditor Gen., 167 Mich. 444, 132 N.W. 1037 (1911).

133. 1977 N.D. Sess. Laws ch. 24.

134. *Id.* ch. 25.

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

136. Board of Regents v. Carter, ——S.D.——, 228 N.W.2d 621 (1975).

governing board will be subject to a legislative exercise of its police power to ensure the public health and welfare, even if the act is not related to any appropriation of funds.[137]

One example of permissible legislation under this principle was the action taken by the North Dakota Legislature in 1977 to ensure appropriate marking of parking spaces provided by public agencies for motor vehicles operated by physically handicapped persons.[138] Another example from the 1977 session was the legislature's approval of an act requiring designation of a no-smoking area "for the comfort and health of the persons not smoking" in every place of public assembly.[139] Both of these measures apply to all public agencies in the state, including those under the State Board of Higher Education.

Other bills that apparently would have been constitutional exercises of legislative authority in accordance with this principle, although they were not approved by the 1977 legislature, would have authorized public employee bargaining[140] and required equal employment opportunity in both public and private sectors.[141]

C. LEGISLATIVE INVASION OR DELEGATION OF MANAGEMENT AUTHORITY

The legislative powers of appropriation and public policy must be balanced against the constitutional powers of governing boards, which leads to a third principle of the autonomy cases. This third principle is that the legislature may not invade the management authority of a constitutional board, or delegate such authority to another officer or agency.[142]

An example of a legislative action that may violate this principle can also be found in the 1977 appropriations act for the institutions of higher education:

> SECTION 11. LEGISLATIVE INTENT. The forty-fifth legislative assembly hereby expresses its intent that the board of higher education take such actions and direct expenditures

137. *Accord*, Regents of Univ. of Mich. v. Michigan Employee Relations Comm'n, 389 Mich. 96, 204 N.W.2d 218 (1973) (public employee bargaining act); Regents of Univ. of Mich. v. Labor Mediation Bd., 18 Mich. App. 485, 171 N.W.2d 477 (1969) (public employee bargaining act); Branum v. State, 5 Mich. App. 134, 145 N.W.2d 860 (1966) (legislative waiver of immunity); Peters v. Michigan State College, 320 Mich. 243, 30 N.W.2d 854 (1948) (affirmance of workmen's compensation act by an equally divided court).

138. N.D. CENT. CODE § 39-01-15 (Supp. 1977).

139. *Id.* § 23-12-10.

140. N.D. H.B. 1471 (1977).

141. N.D. S.B. 2045 (1977).

142. Regents of Univ. of Minn. v. Lord, ——Minn.——, 257 N.W.2d 796 (1977); Board of Regents of Higher Educ. v. Judge, 168 Mont. 433, 543 P.2d 1323 (1975); and Board of Regents v. Carter, 228 N.W.2d 621 (1975); *Accord*, Associated Students of Univ. of Colo. v. Regents of Univ. of Colo., ——Colo.——, 543 P.2d 59 (1975); State Bd. of Agric. v. State Admin. Bd., 226 Mich. 417, 197 N.W. 160 (1924); Bd. of Regents v. Auditor Gen., 167 Mich. 415, 129 N.W. 713 (1911); Sterling v. Regents of Univ. of Mich., 110 Mich. 369, 68 N.W. 253 (1896); Weinberg v. Regents of Univ. of Mich., 97 Mich. 246, 56 N.W. 605 (1893); Kowalski v. Bd. of Trustees of Macomb County Community College, 67 Mich. App. 74, 240 N.W.2d 272 (1976); State *ex rel.* Univ. of Minn. v. Chase, 175 Minn. 259, 220

> to coordinate and correlate the work in the different institutions under its control and direction to prevent wasteful duplication and to develop cooperation among the institutions in the exchange of instructors and students as required by subsection 9 of section 15-10-17 of the North Dakota Century Code. The board of higher education shall prepare a report which sets forth the method and procedure by which unnecessary duplication within the colleges and universities under the board's control will be eliminated. This report shall be submitted to the forty-sixth legislative assembly.[143]

However understandable the legislative concern may be, its expression like this in the form of a mandate that the Board "take . . . actions and direct expenditures . . . to prevent wasteful duplication" appears to be an unconstitutional attempt to exercise the management authority of the Board. The attempt is even more questionable in light of the specific provision in section 6(b) of article 54 that the Board "shall . . . do each and everything necessary and proper for the efficient and economic administration of said state educational institutions."

And, while the simple requirement of a report to the legislature may be sufficiently removed from the Board's management authority to qualify as a "reasonable condition," the report in this case must set forth "the method and procedure by which unnecessary duplication . . . *will be eliminated.*"[144] This appears to tie the report so closely to the management action requirement that both may be invalid. Although the entire expression of "legislative intent" may thus be unconstitutional as a directive, it should be noted that it may retain some practical utility as an advisory statement to the Board.[145]

A related declaration of legislative intent in the same bill provides an interesting comparison:

> SECTION 12. LEGISLATIVE INTENT. It is the intent of the legislative assembly that the board of higher education study and determine whether the number of educational institutions under its control and direction exceeds the needs of higher education in this state. It is the intent of the legislative assembly that the board of higher education prepare a report which sets forth their findings and submit the report to the forty-sixth legislative assembly.[146]

N.W. 951 (1928). *See* Regents of Univ. of Mich. v. State, 395 Mich. 52, 235 N.W.2d 1 (1975); and Regents of Univ. of Mich. v. Michigan Employee Relations Comm'n, 389 Mich. 96, 204 N.W.2d 218 (1973).

143. 1977 N.D. Sess. Laws ch. 24.

144. *Id.* (emphasis added).

145. *Accord*, Regents of Univ. of Mich. v. State, 395 Mich. 52, 235 N.W.2d 1 (1975); Board of Regents of Univ. of Neb. v. Exon, 199 Neb. 146, 256 N.W.2d 330 (1977).

146. 1977 N.D. Sess. Laws ch. 24.

While this statement directs the board to "study and determine" if there are more institutions than necessary and to prepare and submit a report of its findings, it does not direct the Board to exercise any of its management authority to resolve the problem. This provision thus appears to be more defensible than the previous one.

Another measure before the North Dakota Legislature in 1977 would have infringed upon the authority of the State Board of Higher Education in a much different and more significant manner. Senate Bill 2286 proposed an amendment of the statutory powers and duties of the Board to prohibit it from granting tenure to any faculty member or other employee hired after January 1, 1977. The bill's sponsor indicated that his concern was to ensure that the Board had the ability to reduce the number of faculty at institutions suffering a decline in student enrollments.[147] That concern can certainly be related to the amount of appropriated funds that the Board would authorize such institutions to request from the Legislature. Approval of the measure would have been a clear invasion of the Board's "full authority over the institutions under its control," however, and the fact that the bill failed to pass the Senate only for lack of a constitutional majority (on a 24-24 vote) is an indication of the lack of legislative appreciation for the scope of the Board's autonomy on such matters.

Another example of a lack of legislative understanding of the Board's authority was an act sponsored by 51 members of the North Dakota House of Representatives and approved by the 1969 Legislature that required all of the institutions "under the direction and control" of the Board, except the University of North Dakota, to adopt the quarter system of academic terms.[148] Although several years old, the act is mentioned here because it continues to present a problem for the Board and the institutions under its jurisdiction. At its January 1978 meeting the Board authorized the preparation of a bill that would amend the 1969 act to permit the Board to designate the academic term for each institution.[149]

D. LEGISLATIVE APPROPRIATION OF INSTITUTIONAL EARNINGS

A fourth principal to be derived from the autonomy cases is that earnings from institutional operations constitute a trust fund under the control of a constitutional board, and are not subject to legislative appropriation or limitation.[150]

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147. Fargo Forum, Jan. 28, 1977, at 14, col. 2.
148. 1969 N.D. Sess. Laws ch. 197.
149. North Dakota State Bd. of Higher Educ., Minutes of Jan. 12, 1978 at 12.
150. Regents of Univ. of Minn. v. Lord, ——Minn.——, 257 N.W.2d 796 (1977); Board of Regents of Univ. of Neb. v. Exon, 199 Neb. 146, 256 N.W.2d 330 (1977); *Accord*, State Bd. of Agric. v. Fuller, 180 Mich. 349, 147 N.W. 529 (1914); Fanning v. Univ. of Minn., 183 Minn. 222, 236 N.W. 217 (1931); State *ex rel.* Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974). *Cf.* Board of Regents of Higher Educ. v. Judge, 168 Mont. 433,

Contrary to this principle, the practice of the 1977 legislature was to include such institutional earnings in appropriation bills. In the measure appropriating funds to the institutions of higher education, for example, the following statements are made:

> SECTION 1. APPROPRIATIONS. There is hereby appropriated the sums herein specified, derived from institutional income and institutional collections, and derived from rent, interest, or income from land, money or property donated or granted by the United States and allocated to the institutions of higher learning under the terms of the Enabling Act and the state constitution. . . .
>
> . . . .
>
> MEDICAL CENTER REHABILITATION HOSPITAL
> There is hereby appropriated out of any moneys not otherwise appropriated, derived from gifts, grants, contracts sales, services, and other income from the University of North Dakota medical center rehabilitation hospital . . . to pay the general expenses, operation, maintenance, and equipment for the biennium. . . .
>
> . . . .
>
> Any additional income not required by law to be deposited in the operating fund in the state treasury . . . is hereby appropriated."
>
> . . . .
>
> SECTION 7. APPROPRIATION. Any federal funds which can be used for the purpose of providing equal opportunities in programs as mandated by Title IX that may become available to the institutions of higher education . . . are hereby appropriated.[151]

In addition, the appropriations act for the extension division and experiment stations includes a provision that, "[a]ny additional income including funds from the federal government and gifts and donations from private sources received by the North Dakota main experiment station, branch stations, and the cooperative extension division . . . are hereby appropriated for the purpose designated in the gift, grant, or donation. . . ."[152]

While the practical effect of such "appropriations" of institutional income in violation of the autonomy principle may simply be that they were unnecessary, there were also instances in which the legislature attempted to restrict the Board's control over such funds in apparent violation of its constitutional authority. For example, the experiment station appropriations act states that,

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543 P.2d 1323 (1975). *See also* State *ex rel.* Ledwith v. Brian, 84 Neb. 30, 120 N.W. 916 (1909); State *ex rel.* Spencer Lens Co. v. Searle, 77 Neb. 155, 109 N.W. 770 (1906).

151. 1977 N.D. Sess. Laws ch. 24.

152. *Id.* ch. 25, § 1.

> . . . [p]ublic *moneys from local sources,* which shall include receipts from sale of grains, personal services, dairy products, livestock, and other agricultural products at the North Dakota main experiment station, branch experiment stations, and cooperative extension division, *may be expended in excess of that specifically appropriated* through biennial appropriations bills of the legislative assembly *only in the event that an authorization has first been received* from the subcommittee on budget of the legislative council.[153]

Finally, the following provisions of the institutional appropriations act are examples of legislative action that is justifiable to a certain extent as a "reasonable condition" on the use of appropriated general funds, but which is also subject to challenge to the extent that it restricts the Board's use of institutional income:

> SECTION 5. LEGISLATIVE INTENT. It is the intent of the legislative assembly that the colleges and universities pay special assessments from their plant improvement moneys. Notwithstanding the provisions of section 40-23-22, no funds shall be expended to pay special assessments on projects that do not directly serve a state institution and are not located on or contiguous to a state institution, wherever located in the state.[154]

> SECTION 6. LEGISLATIVE INTENT. The legislative assembly recognizes the need for flexibility in coordination of the use of appropriated funds and nonappropriated funds for the development of the medical school; however, it is the intent of the legislative assembly that any proposed departure from the priorities established for development of the medical school residency program be approved by the budget section of the legislative council prior to implementation.[155]

The autonomy cases reviewed in this article would support the right of a legislature to require that a particular line item appropriation to be used for payment of certain kinds of special assessments, and the legislative prerogative to approve priorities for the use of state general funds in the development of a medical school would also seem clear. To the extent that the legislative conditions attempt to restrict the Board from allocating institutional income for the payment of special assessments or medical school development, how-

153. *Id.* (emphasis added).

154. *Id.* ch. 24. City of Fargo v. State, 260 N.W.2d 333 (N.D. 1977), held that this section did not make an appropriation as required by section 186 of the constitution for payment of the assessment in question, but the court did not indicate whether its holding assumed that this section was limited in scope and application to state general fund monies. That would be a logical assumption, however, given the autonomy principle discussed in this section.

155. 1977 N.D. Sess. Laws ch. 24.

ever, the autonomy cases indicate that there has been an invalid infringement of the Board's constitutional authority to control and administer the institutions.

V. CONCLUSION

The vote of the citizens of North Dakota in 1938 to establish the State Board of Higher Education as a constitutional body was clearly intended to remove higher education from the political sphere. Since that time, there have been only a few decisions by the North Dakota Supreme Court regarding the authority of the Board under article 54 of the state constitution, and these have not dealt with the relative authority of the Board and the legislature regarding the institutions assigned to the Board's control and administration by article 54. In nearby states with similar constitutional provisions, however, there have been several recent judicial decisions that define the scope of constitutional autonomy granted to higher education governing boards.

These decisions indicate that a grant of autonomy is significant, and the constitutional authority of a governing board to control, manage, administer, or supervise the institutions under its jurisdiction may not be invaded or interfered with by a state legislature. At the same time, the courts make it clear that the appropriation and police powers of a legislature remain intact and may be exercised with considerable influence on the operation and activities of the institutions governed by a constitutionally autonomous board. Depending on the specific provisions of the state constitution, the courts also appear to agree that the legislative appropriation power only extends to state general funds derived from taxation and not to income generated by institutional operations and thus already under the control of the governing board.

The holdings in these cases leave a great deal yet to be decided regarding the overlapping responsibilities of governing boards and state legislatures, and some of them may give a misleading impression of the practical significance of constitutional autonomy, given the very real dependence of public institutions of higher education upon state appropriated funds for their continued quality and success.[156] Nevertheless, the cases are clearly supportive of an important tradition of independence in American higher education, and they underscore the need for legislative understanding of the coexistent authority of a constitutionally established governing board of higher education.

156. *See generally*, L. GLENNY & T. DALGLISH, PUBLIC UNIVERSITIES, STATE AGENCIES, AND THE LAW: CONSTITUTIONAL AUTONOMY IN DECLINE (1973); Jacobson, *Who Controls the Universities*, THE CHRONICLE OF HIGHER EDUC., Sept. 6, 1977, at 7, col. 1.