

IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 21-0605

BOARD OF REGENTS OF HIGHER EDUCATION OF THE STATE OF
MONTANA,

Petitioner and Appellee,

v.

STATE OF MONTANA, by and through Austin Knudsen, Attorney General of the
State of Montana in his official capacity,

Respondent and Appellant.

BRIEF OF *AMICUS CURIAE*
ASSOCIATED STUDENTS OF THE UNIVERSITY OF MONTANA

On Appeal from the Montana First Judicial District Court, Lewis and Clark
County, The Honorable Michael McMahon Presiding

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INTRODUCTION

It is apt that on the eve of the 50th anniversary of the 1972 Montana Constitutional Convention we must be increasingly vigilant to guard against the most political branch of Montana government --the Montana Legislature-- from encroaching on an overtly politic-free zone established in the Montana Constitution. Today's political environment is significantly more partisan, more polarized, more inflammatory, with less moderation and compromise than in the past fifty years.¹ We must be wary lest this unusually virulent strain of politics infect protected areas of the law. One such area is the authority granted by the Montana Constitution to the Board of Regents of Higher Education of the State of Montana (hereinafter "BoR").

The Associated Students of the University of Montana (hereinafter "ASUM") is an unincorporated association of students of the University of Montana.² The ASUM Constitution provides that ASUM is a representative body

¹ Michael Dimock and Richard Wike, *America Is Exceptional in the Nature of Its Political Divide*, Pew Research Center, Nov. 13, 2020, <https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide/> (last visited Mar. 15, 2022).

² *Associated Students of the Univ. of Mont. v. The City of Missoula*, 261 Mont. 231, 234, 862 P.2d 380, 381 (1993).

of the University of Montana students, and its “primary responsibility is to serve as an advocate for the general welfare of the students.”³

ASUM recognizes that the University of Montana student body is extremely diverse, with individual members having widely varying opinions on the wisdom and propriety of the possession of guns on the University campuses. In the role of *amicus curiae* in this matter, ASUM will not argue that particular policy issue. Rather, this brief will elucidate upon the rationale behind and significance of the BoR’s unique authority over the Montana system of higher education, and by extension over the day-to-day lives of Montana University System students.

ARGUMENT

A. BoR – Student Relationship

ASUM was formed in 1906 as a critical component of the University of Montana and the Montana University System as a whole.⁴

Since the BoR was established by the Montana Constitution in 1972, the relationship between it and ASUM has developed into a collaborative one, part of a

³ ASUM Const. Art. 2, §§ 1, 4.

⁴ The University of Montana’s student body and faculty “felt the need of a strong centralized organization for the control of student activities”, and the purpose of ASUM was for the “control of all matters of general student concern.” Office of the President, *University of Montana Report of the President 1905-1906*, at 20 (Jan. 1, 1907).

system commonly known as ‘shared governance’. The Constitutional authority granted to the BoR over the Montana University System necessitated the development of a working system of shared governance which provides for a large role for students. ASUM, other student associations, and individual students consistently participate in this system of governance in a variety of ways. A seat on the BoR is reserved for a student within the Montana University System. Each campus sends a delegation of student leaders to the bi-monthly board meetings. The BoR and those students carve out time to meet separately and informally at every meeting. ASUM and the other student associations often propose amendments to policies, fee proposals, and initiatives. Students are thereby integral to the policy processes at the BoR.⁵ Institutional BoR autonomy over day-to-day affairs is of critical importance to the student purpose and experience in higher education and constitutes one of the distinguishing features of American higher education.⁶

⁵ There are many examples of the collaborative relationship in BoR policy and Montana law, including but not limited to: Changes in tuition or fees, Policy 940.12.1(D), Montana Board of Regents of Higher Education Policy and Procedures Manual (rev. May 24, 2018). Consultation with ASUM regarding regulation of firearms. Mont. Code Ann. § 20-25-324.

⁶ Neal H. Hutchens, *Preserving the Independence of Public Higher Education: An Examination of State Constitutional Autonomy Provisions for Public Colleges and Universities*, 35 J.C. & U.L. 271, 278 (2009) (citing Robert O. Berdahl et al., *The Contexts of American Higher Education*, in *American Higher Education in the*

This collaborative ‘shared governance’ relationship is not feasible between students and the Montana Legislature. By its very nature, meeting only once every two years and with restricted public access, the Legislature is unable to collaborate with students in any meaningful way regarding Montana University System policy.⁷ The only means to ensure that student voices are heard *and* considered on gun policy, or any policy, is to adhere to the BoR system of shared governance over the Montana University System contemplated by the 1972 Constitutional convention delegates.⁸

B. History of BoR

The BoR has Constitutional autonomy that represents a distinctive governance mechanism in public higher education.⁹ The history of the BoR demonstrates that choice of mechanism was intentional and for a well-defined purpose.

Twenty-First Century: Social, Political, and Economic Challenges 1, 5-8 (Philip G. Altbach et al. eds 1999).

⁷ In fact, public access to the Legislative policy process may be diminishing. *Associated Press, et. al. v. Barry Usher*, 2022 MT 24 (2022).

⁸ “Once issues rise to the level of the governor and legislature, political as opposed to educational values tend to dominate the debate.” EDUCATION COMMISSION OF THE STATES Postsecondary Education Structures Handbook (1994), at 40.

⁹ Hutchens, *supra* note 4, at 274.

1. 1889 Constitution

When Montana was pursuing statehood its Constitution, approved by the United States Congress in 1885, created a Board of Regents with independent supervision over the Montana University System. The express purpose of this independent authority was to exclude political influence.¹⁰

In 1889, however, the Constitution was amended to do away with the Board of Regents. The Montana Legislature, via a Board of Education, was thusly given control over all things higher education.¹¹

Between 1889 and 1972 this Board of Education model failed so spectacularly that Montana higher education became one of the most politically controversial and poorest-quality systems in the United States.¹² The Legislature repeatedly and thoroughly mismanaged Montana higher education, seemingly paying no attention to what the University students and faculty wanted or

¹⁰“No stronger guarantees could have been devised . . . to prevent our schools . . . from falling into the hands or under the influence of any sect, or creed, or political party.” (discussing the 1884 constitutional provision creating a Board of Regents to oversee the University System). Edward B. Chenette, *The Montana State Board of Education: A Study of Higher Education in Conflict, 1884-1959* (1972) (unpublished Ed.D. dissertation, University of Montana) at 24 (citing Joseph K. Toole, et al., Committee on Address, *An Address to the Voters of the Territory of Montana*, February 9, 1884).

¹¹ 1889 Mont. Const. art. XI § 11, 1972 Mont. Const. art. X, § 9(2)(a).

¹² David Aronofsky, *Voters Wisely Reject Proposed Constitutional Amendment 30 to Eliminate the Montana Board of Regents*, 58 Mont. L. Rev. 333, 334 (1997).

needed.^{13, 14, 15} The political whims of the Legislature wreaked such havoc on Montana Universities during that time that nearly three-fourths of Montana high school graduates who attended college chose to do so out of state.¹⁶

2. 1972 Constitution

The (re-)creation of the BoR in the 1972 Constitution was an intentional and explicit repudiation of the prior system of Legislative control over higher education in Montana. The Legislature's authority over higher education was eradicated by establishing the BoR as a constitutional entity with the "full power, responsibility and authority to supervise, coordinate, manage and control the Montana university system."¹⁷

¹³ In 1929, the Montana Supreme Court upheld the validity of a 1927 law requiring the Bozeman campus to do free chemical testing of oil products for other state agencies and the Board was powerless to stop it. *See State ex rel. Pub. Serv. Comm'n v. Brannon*, 86 Mont. 200, 283 P. 202 (1929). The Court found that, because of the Board's dependence on the legislature, it was simply another agency of the state government and a part of the executive department subject to legislative control. *Id.* at 209.

¹⁴ Despite the Depression, the Legislature approved two new State Universities even though the existing four institutions were desperately hurting for money. "Two less wise decisions, in view of the times, could not have been made by Montana's legislators. The state's four institutions of higher education, already established, were languishing for want of adequate funds." Chenette, *supra* note 7, at 314.

¹⁵ "The Legislature passed a bill abolishing the chancellor position in response to Chancellor Brannon's public criticism of the Legislature's refusal to fund the campuses." *Id.* at 351.

¹⁶ *Id.* at 314, 471-477.

¹⁷ Mont. Const. art. X. § 9(2)(a).

“It seems evident even from the briefest reading that the function of defining powers and duties of the board has shifted from one of absolute legislative prerogative to that of the board limited only by the express language of the constitution and reasonable interpretation that common understanding would infer from such language...[The] role of the legislature in higher education has been narrowed from one of defining all powers and duties of the board to only the functions of appropriation, audit, setting by statute the terms of office of members of the board and assigning additional educational institutions to the control of the board.”¹⁸

Various amendments were discussed at the Constitutional Convention regarding the relationship of the BoR to the state government. Throughout, the majority of the delegates held steadfast to their belief that the authority over the higher education system “should no longer be dependent upon the legislature for the definition of their power and duties and no longer subject to various administrative and executive departments of state government.”¹⁹

¹⁸ Hugh V. Shaefer, *The Legal Status of the Montana University System under the New Montana Constitution*, 35 Mont. L. Rev. 189, 191 (1974). The Montana Constitution provides in Art. X § 9 that the legislature has the power to assign other duties to the state board of education *exclusively* in the context of the K-12 public school system. There is no corresponding limiting language found in any of the provisions regarding the Board of Regents via a vis the legislature’s power. *Id.* at 192.

¹⁹ *Id.* at 196. One amendment, however, was approved: The Board of Regents would be subjected to both legislative as well as executive audit of their funds. *Id.* at 197. The other explicit controls that the delegates granted the legislature were through appropriation, confirmation of gubernatorial appointments, and assignment of other educational institutions for their supervision *Id.* at 198.

The framers of the Montana Constitution unequivocally sought to keep the University System separate from outside political pressure.²⁰ Delegate Richard Champoux’s statements on March 11, 1972 are emblematic of those efforts, expressing concern that higher education have an authority protected from the “growing power of the centralized bureaucratic state”:

And I want to put that on the record as the intent of this committee - that this unit would tend to put the house of our higher education in proper order. A Board of Regents empowered to carry out its informed judgments would be an important force for efficiency in the higher educational system.

Our centers for teaching and learning must always be immune to outside politics and ideologies for the sake of our academic integrity.

A healthy post-secondary educational system must have freedom from political changes of fortune, while still maintaining its responsibility and accountability to the state. The institutions themselves, the centers of teaching and learning, must be immune from external political or ideological pressures.

The unique character of the college and university stands apart from the business-as-usual of the state. Higher learning and research is a

²⁰ “A review of the 1972 constitutional convention debate over MONT. CONST. art. X, § 9, is helpful in determining the intent of the framers regarding the bounds of the BoR’s authority; namely to place the Montana University System beyond the political influence of the legislature.” *Sheehy v. Comm’r of Pol. Prac. for State*, 2020 MT 37, ¶ 33, 399 Mont. 26, 37, 458 P.3d 309, 315 (J. McKinnon specifically concurring).

sensitive area which requires a particular kind of protection not matched in other administrative functions of the state.²¹

3. 1996 Constitutional Referendum

Proposed Constitutional Amendment 30 (C-30) was an effort by the Montana Legislature to control higher education by once again abolishing the BoR. C-30 would have replaced the constitutionally autonomous BoR with a much weaker Education Commission directed by a gubernatorial employee with powers set solely by the Montana Legislature.

On November 5, 1996, Montana voters made one of the most significant higher education policy decisions in the state's history by resoundingly rejecting C-30 by a margin of 37-63 percent.²²

4. Learning from the Past

Montana history is replete with evidence of legislative mismanagement of higher education.²³ The body politic of the Legislative branch of government

²¹ Montana Constitutional Convention: Verbatim Transcript (Volume VI), 2053-2057 (Mar. 1972), https://courts.mt.gov/external/library/mt_cons_convention/vol6.pdf (last visited Mar. 15, 2022).

²² Aronofsky, *supra* note 9, at 333.

²³ Material shifts in academic decision-making authority from a state's public governing board to its political officials seems to almost guarantee more political criteria will be used to guide this authority than desirable educational values." *Id.*

makes it inherently inept at managing a system of higher education.^{24, 25}

Fortunately the language in the Montana Constitution, informed by the express intent of the framers, could not be more clear: The BoR has *full* power and authority to manage and control the Montana university system.²⁶

at 371. “[A]cademics and statesmen have long recognized that one of the guarantors of freedom itself is the freedom of inquiry which the university must, by its very nature, espouse. It follows that the autonomy of the university, i.e., its ability to govern itself and to protect itself from external pressure and manipulation, is an essential condition of its very existence. In fact, the institutional support of academic freedom is so important that . . . truly . . . the academic community cannot be free if the institution is not free.” *Id.* at 391 (citing Governor Thomas H. Kean, Address to the New Jersey State Legislature (Jan. 8, 1985)).

²⁴ “State higher education leadership is the most complex, difficult balancing act in state government. There are no simple answers, no absolutes. While lessons can be drawn from other states, there is no perfect model. Conflicts are the reality. The challenge is to resolve these conflicts as close to the operating level (e.g., at the campus level or through cooperation among campuses) and as close to the real problems as possible. *Once issues rise to the level of the governor and legislature, political as opposed to educational values tend to dominate the debate.*”

EDUCATION COMMISSION OF THE STATES Postsecondary Education Structures Handbook (1994), *supra* at 40 (emphasis added).

²⁵ “The Board of Regents has successfully stabilized Montana’s higher education system while at the same time eliminating significant political controversies (notwithstanding the C-30 debate) such as: those which drive so many Montanans to other states for university educations and those which caused faculty to work in fear, find other employment outside of Montana, or never come to Montana at all. Moreover, the Board has done so despite a lack of solid financial support for public higher education in Montana which has made Montana one of the country’s most poorly funded public campuses.” Aronofsky, *supra* note 9, at 366.

²⁶ Mont. Const art X §9(2)(a).

CONCLUSION

Two rationales for the BoR's Constitutional authority are discussed herein; ASUM's participation in a system of shared governance, and insulating higher education from control by a political branch of government.

First, guns on campus is but one example of the myriad of policy work which ASUM has a long history of hashing out with the BoR. By comparison, the Montana Legislature does not have a collaborative relationship with ASUM and thus students are systematically excluded from any legislative higher education policy-making.²⁷

Second, the American political divide has rarely been as contentious and polarized as it is today.²⁸ The issue of guns on university campuses is an appropriately controversial example of the current political environment. The issue has become a broad political agenda far beyond that of a mere health and safety regulation or policy.²⁹ The historical lessons of politically charged legislative control make it abundantly clear why the 1972 Constitutional Convention

²⁷ See also the 2021 Legislature's efforts to regulate a myriad of other student behavior on University campuses, from voter registration (HB 319, 67th Leg.) to student groups (HB 349, 67th Leg.) to gender identity (HB 112, 67th Leg.).

²⁸ Dimock and Wike, *supra* note 1.

²⁹ Evidenced by the content in many of the amicus briefs filed in this matter.

endeavored to keep Montana’s political branch of government from permeating high education.³⁰

One final historical note: In 1824 James Madison, author of the second amendment to the United States Constitution, and Thomas Jefferson, author of the Declaration of Independence, sought to enact a policy regarding guns on the fledgling University of Virginia campus. Rather than enact legislation to force behavior on a system of higher education, however, they approached the University Board to argue for a rule prohibiting firearm possession and use by students at the University.³¹ The merit of that policy aside, their choice of *process* is the best proven system for managing higher education. Therefore, the BoR rightfully has Constitutional “full power, responsibility, and authority”³² to make that policy decision.

WHEREFORE, ASUM supports this Court denying the appeal by the State of Montana and affirming the District Court’s grant of summary judgment to the BoR.

³⁰ “The general experience is that academic life, with its emphasis on the rational, on tolerance, and on the measured examination of what is true, does not mix well with the passionate and urgent advancement of what some member of the community considers to be ‘for the good’ in the political arena.” Clark Kerr & Marian L. Gade, *The Guardians: Board of Trustees of American Colleges; What they Do and How Well They Do It*, 89-90 (1989).

³¹ Olivia Li and The Trace, “When Jefferson and Madison Banned Guns on Campus, *The Atlantic*, May 6, 2016.

³² Mont Const., *Ibid*.

RESPECTFULLY SUBMITTED this 21st day of March, 2022.

ASUM Legal Services



By: _____
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CERTIFICATE OF COMPLIANCE

The undersigned, Louis C Villemez, certifies that the foregoing complies with the requirements of Rules 11 and 14(9)(b), Mont.R.App.P. The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman font typeface consisting of 14 characters per inch. The total word count is less than 4,000 *including* caption, table of contents, table of authorities, index of exhibits, signature blocks and certificate of compliance. The undersigned relies on the word count of the word processing system used to prepare this document.



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