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A Responsive and Responsible Twentieth Century Legislature

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A RESPONSIVE AND RESPONSIBLE TWENTIETH CENTURY LEGISLATURE

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PREFACE

Many years ago this writer was asked a question by a student which made a deep impression on him. It was the last day of a course in state government. The student asked, "Is there anything good about state government?" Only a brief moment of reflection was necessary to see what was on the student's mind. On the one hand state governments were functioning in a tolerable manner while on the other hand, the text book in chapter after chapter had laid down some grievous charges.

There is a danger that teaching, writing and speaking about a topic will give an impression that everything is wrong or, in some cases, that everything is right. The truth of the matter actually lies somewhere in between.

The writer wishes to make it clear at the outset that, on the whole, the Constitution of North Dakota is not a completely obsolete document and the government of the state is run in a reasonably efficient manner.

To back up his contention, especially in relation to the legislative provisions of the North Dakota Constitution, which is the focus of this section, the writer would like to point out a recent study of state legislatures.

According to this study group "every citizen should expect his legislature to be [FAIR]: *functional, accountable, informed, independent,* and *representative.*"[1] Using a system of evaluation which measured staffing compensation, length of session, committee structure, facilities, leadership, rules and procedures, the Legislative Assembly of North Dakota was placed in twenty-second position—average. Minnesota was tenth, South Dakota seventeenth and Montana forty-first.

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1. J. BURNS, THE SOMETIMES GOVERNMENTS: A CRITICAL STUDY OF THE 50 AMERICAN LEGISLATURES 40 (1971).

North Dakota, as far as state legislatures go, is, therefore, not all bad, but there is room for improvement. Wise men can make a *poor* constitution work well, but wise men can reach even greater heights with a *good* constitution.

PART I

In the forward of a recent book, John W. Gardner states:

> It is ironic that a people who will fight and die for the principle of self-government are so negligent in maintaining the vitality of the instruments through which that self-government is provided. Yet that is precisely what we have done.[2]

In the first chapter of the book the author states:

> We have an overwhelming array of public problems that could occupy our united energies for decades to come: pollution, poverty, health, education, transportation, crime, drugs, discrimination. Yet instead of confronting these problems, we confront each other—often directly and violently, in the streets. We seem increasingly less inclined to try to settle our differences and "solve" our problems through the political process and through our institutions of government.[3]

The author then asks "why?". He answers by quoting pollsters who state the people "have voted—have voted—have voted" and "nothing happens to take care of the things they think are going wrong."

A major portion of the blame for the inability to "solve" problems must be laid at the doors of legislatures. In recent years many studies have been made which substantiate this conclusion. Two of these will be used as examples.

In 1953 the Commission on Intergovernmental Relations, which had been appointed by President Eisenhower, made its report. They had been given this assignment by the President:

> [T]o study the proper role of the Federal Government in relation to the States and their political subdivisions' with respect to fields which may be the primary interest and obligation of the states, but into which the Federal Government has entered. . . .[4]

Among their conclusions they state:

> Early in its study, the Commission was confronted with

2. *Id.* at VII.
3. *Id.* at 1.
4. *Preface* to COMMISSION ON INTERGOVERNMENTAL RELATIONS, REPORT TO THE PRESIDENT FOR TRANSMITTAL TO THE CONGRESS at V (1955).

> the fact that many state Constitutions restrict the scope, effectiveness, and adaptibility of state and local action. These self-imposed constitutional limitations make it difficult for many states to perform all the services their citizens require, and consequently have been the underlying cause of state and municipal pleas for federal assistance.
>
> It is significant that the Constitution prepared by the Founding Fathers, with its broad grants of authority and avoidance of legislative detail, has withstood the test of time far better than the constitutions later adopted by the states. A due regard for the need for stability in government requires adherence to basic constitutional principles until strong and persistent public policy requires a change. A dynamic society requires a constant review of legislative detail to meet changing conditions and circumstances.
>
> The Commission finds a very real and pressing need for the states to improve their constitutions.[5]

The second study is that of the Committee for Economic Development (CED). The membership of this study group reads like a Who's Who of American Business. Its report was released in July, 1967. It was entitled *Modernizing State Government* and received much favorable mention in all news media.

The CED pointed out, as did the Eisenhower Commission, that "profound social and economic changes" which pose challenges at all levels in America have occurred. In assessing reasons for the failure of the states, the CED added a dimension not stressed by the Eisenhower study group:

> Substantively, trends toward grand-scale nation-wide organizational networks in industry, communication, finance, commerce, labor, and transportation—together with greater mobility of population and associated social phenomena—have impaired the ability of states to cope with the consequences. Their resources and geographic jurisdictions are limited in dealing with urgent problems emerging in congested and deteriorating central cities, in impoverished and depopulated rural areas, and in suburbs frustrated by failures to match rising expectations. Archaic tax systems make it hard to finance state operations.[6]

The CED went on to point out that most state governments are "structurally. . . poorly organized to fulfill their growing responsibilities and to perform the functions clearly within their province."[7]

The CED quoted with approval, a now frequently mentioned statement from the inaugural address of Governor Evans of Washington.

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5. *Id.* at 37, 38.
6. COMM. FOR ECONOMIC DEV., MODERNIZING STATE GOVERNMENT 9, 10 (1967).

> *State governments are unquestionably on trial today. If we are not willing to pay the price, if we cannot change where change is required, then we have only one recourse. And that is to prepare for an orderly transfer of our remaining responsibilities to the federal government.*[8]

The CED made recommendations for increasing the authority of the chief executives, reorganization of the judicial branches of state government with appointed judges, and interstate cooperation. However, it is their proposals for the legislatures which concern us here. They recommended:

> 1. State constitutional revision should have highest priority in restructuring state governments to meet modern needs. *Stress should be placed on repealing limitations that prevent constructive legislative and executive action,* on clarifying the roles and relationships of the three branches of government. . . in both rural and urban areas, and on eliminating matters more appropriate for legislative and executive action. (emphasis added).
>
> 2. In our judgement, no state legislature should have more than 100 members in total; smaller states would be better served by still fewer members. In all states, sessions should be annual, without time limitations for adjournment. Committees should be few in number, organized along broad functional lines, supplied with strong staff support. Public hearings should be held on all major legislation. Legislators should serve four-year terms and receive salaries commensurate with their responsibilities and equal to at least half of that of the governor.[9]

Thus far what have the studies been trying to tell us? First, we have many problems which the states have been unable to "solve" with a resulting trend for the national government to take over. Second, one of the major reasons for the inability to "solve" problems must be laid at the doors of the legislatures. Third, one of the reasons for legislative inability is in the self-imposed constitutional restrictions on the legislative power.

Therefore it is incumbent upon us, as our delegates are preparing for the Constitutional Convention, to understand how we came to this condition. A brief look at the history of constitutional government is necessary if one is to get a clear picture of what it is that our delegates must accomplish if the legislature is to be restored to a position which allows it to cope with present-day problems.

The first historical fact to be noted is that our first thirteen

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7. *Id.* at 10.
8. *Id.*
9. *Id.* at 19-20.

states were established and functioning for over a decade before the Constitution of the United States was adopted. What was the nature of these early state constitutions? They were for the most part modifications of their colonial charters. The modifications were in the direction of curbing the powers of the office of governor. The Royal Governors both because of their actions and as symbols of the hated King George III were on the minds of the men who drafted our first state constitutions.

Lacking trust in the office of governor, the former colonists put their faith in the lower houses of their legislative assemblies and endowed them with liberal powers to govern.

The second historical fact to be noted is that the leaders of the states soon discovered that a war for independence could not be won by each state acting independently. Thus, the first constitution of the United States, the Articles of Confederation, was written and adopted. In this constitution the states transferred some of their powers to a National Congress which was to act as a coordinator of their affairs. Under the Articles each state claimed to retain its sovereignty, and the Congress was severly restricted in its powers and likewise in its procedures.

This device worked well enough to win the war for independence and to receive very favorable terms of peace in the treaty with Great Britain, but each year that followed it seemed to work less well, especially in the realm of economics. Therefore, the call was made to send delegates to Philadelphia, and the Constitution of the United States was written.

Perhaps one of the most significant changes from the Articles of Confederation to the Constitution was deletion of article II:

> Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation *expressly delegated* to the United States, in Congress assembled.[10] (emphasis added).

The tenth amendment to the Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people.[11]

By this provision the national government thereby had its power increased and the state governments had their power decreased, but

10. ARTICLES OF CONFEDERATION art. II.
11. U.S. CONST. amend X.

it still gave the states a large area of jurisdiction which would allow them to legislate for the needs of their people.

The third historical fact which we should take note of is what happened to this large area of power which the people retained for their state governments. As noted above, the drafters of early state constitutions curbed the power of the governors and put their faith in the legislative chambers. Their trust soon proved to be ill-founded.

In the period from 1800 to 1850 the people began to doubt the integrity of their legislators, especially in the areas of spending, taxes and the granting of corporate charters. One mechanism open to the people was the amendment procedure. Restraints on the state legislatures in the form of debt limitations and tax assessments were imposed in the constitutions by the people of the states.

After the Civil War, state government, especially in the Reconstruction States, but in the North as well, was almost universally corrupt and inefficient. The people in an effort to protect themselves started to enact statutory material into state constitutions. This is the origin of the phrase "self-imposed restrictions" which one reads about so often in articles critical of state government.
For example in Louisiana:

> In a single, 40-page, section the Constitution sets up a general highway fund and specifies minutely the license fee private automobiles are to pay each year, the tax to be imposed on gasoline and other motor fuels, the amount of bonds that may be issued and the rate of interest they may bear, the proportion of the fund to be used for improving gravel roads and, finally, the places at which bridges and paved highways were to be built. Lest there be misunderstanding on the last point, a map showing the highway routes to be paved was attached and made an official part of the section.[12]

It is at this stage of development, the distrust of legislative bodies, that we must take note of our fourth historical fact: the drafting of the constitution and North Dakota's entry into the Union.

In his *History of North Dakota,* Colonel Lounsberry records:

> [T]he delegates [to North Dakota's convention] had access to charters and constitutions of all the states. . . There are a few original provisions in the constitution adopted. It is a compilation of the best provisions of existing constitutions modified to conform to the conditions in the state. From the Omnibus Bill was mainly culled the compact between the state and the United States. From Illinois the provision for county courts. From Minnesota, the provision relating to

12. R. DISHMAN, STATE CONSTITUTIONS: THE SHAPE OF THE DOCUMENT 15-16 (1960).

> the sale of public school lands, and the investment of moneys derived from the sale. . . From New Hampshire, provisions as to amendments to the constitution. From the Williams constitution [prepared by Prof. Thayer of Harvard Law School] came the preamble, and many of the legislative provisions. From California, some material for taxing of railroads. . . .[18]

What this long quote attempts to illustrate is that North Dakota's "founding fathers" copied, with modifications, their Constitution of 1889 from existing constitutions, which in turn were based on: (1) Fear and hatred of Royal Governors; and (2) Distrust of state legislative assemblies. Thus North Dakota joined the ranks of the states that placed restrictions on legislative bodies and governors. In all fairness though, it should be noted that as far as constitutions go, North Dakota's is far from being the worst.

Still it is true to say that North Dakota's founding fathers enshrined principles and statutory material into their Constitution of 1889, just as reform movements were being born to revise state constitutions in the direction of improving the executive authority of the governors and removing restrictions on legislative assemblies.

Thus, while reform groups in Oregon in 1909, New York in 1910, and Illinois in 1917 sought to revamp their constitutions, North Dakota did not catch the reorganization spirit until 1931 when a Governmental Survey Commission was created which dealt primarily with taxation and cost of government. Drought and depression caused this study to be shelved.

Upon the recommendations of Governor Moses, the 1941 Legislative Assembly created a Governmental Survey Commission which was aimed primarily at improving operational procedures of the administrative side of government. The Commission hired the Public Administration Service of Chicago to undertake a technical survey of North Dakota government and to make changes.

Though World War II interfered with the recommendations proposed, one of its recommendations eventually resulted in legislation in 1959. This legislation established the Department of Accounts and Purchases.

This modest beginning in administrative reform encouraged the Thirty-Eighth Legislative Assembly of North Dakota to direct the Legislative Research Committee to begin a study leading to recommendations for constitutional revision. The work was assigned to the Subcommittee on Constitutional Revision. The Committee was to be a joint legislative and citizen venture.

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18. C. LOUNSBERRY, HISTORY OF NORTH DAKOTA 409 (1916).

The work started in 1963 and the following, seemingly modest, changes in the legislative article were recommended.

1. *Apportionment*: Keeping the apportionment decisions of the United States Supreme Court in mind, the senate was to have forty-nine members and the house no more than ninety-eight. The districts were to be apportioned according to population following the taking of the federal census.

2. *Sessions*: The legislative assembly was given the power to provide for annual sessions and to call itself into special session at the request of two-thirds of all its members. Provisions were also recommended which would permit an extension of the session by not more than ten legislative days.

3. *Initiative and Referendum*: Recommendations were made to eliminate two major difficulties which had developed in the use of the initiative and referendum:

a) the increasing irregularity bordering on outright fraud in securing signatures;

b) the two-thirds vote required in each house of the legislative assembly to amend or repeal a statute passed by the initiative procedure.[14]

To correct the latter problem, the Committee recommended that after an initiated measure had been in effect for five years, the legislative assembly could amend or repeal it by majority rather than by two-thirds vote.

To correct the problem of fraud in signature gathering, a companion bill (not in the constitution itself) was passed and would go into effect if the revision of the constitution was accepted by the people.

The provisions of the Bill:

1. Set up procedures for gathering signatures.

2. Put teeth into the law by providing penalties for fraud.

3. Changed the requirement for initiative signatures from ten thousand to eight per cent of the number of votes cast for the Office of Governor at the last preceding election and from seven thousand to five per cent for the referendum.[15]

These proposals for constitutional change were submitted to the electorate in November 1966 along with recommendations for judicial and executive change. All the proposals failed.

The legislative changes recommended were primarily procedural and did not remove the so-called strait-jackets. The only exception

14. REPORT OF THE NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE 16-38 (1965).
15. N.D. SESS. LAWS ch. 162 (1965).

would have been the increase in legislative power by allowing it to amend or repeal initiated measures by majority rather than two-thirds vote after they had been in force for five years.

In 1968 the people of North Dakota permitted the legislative assembly to have an organizational meeting in December and thereby allowed the legislators to make better use of the sixty day biennial session.

On the initiative of the legislative assembly, and with the approval of the electorate of North Dakota, delegates have been at work preparing for the plenary meeting of the Constitutional Convention set for January, 1972. It is time to examine the issues with which they will be confronted with regard to the legislative article.

PART II

One of the most frequent criticisms of present-day constitutions is that they are too long. This is simply another way of stating that statutory material has found its way into documents that should consist only of general principles. One could also state that constitutions are long in direct proportion to the citizens' distrust of legislative bodies.

If the above is true, one could propose the model solution—a one sentence legislative article: "Until otherwise provided by law, all legislative power shall be exercised by the Legislative Assembly of North Dakota which shall be selected and function as at present." This article would meet the criteria of brevity and indicate full faith in our governmental institutions.

The distrust of legislative bodies has been with us too long for the above proposition to be proposed seriously. What then should an ideal legislative article contain? Let me recommend the following:

Powers

> The legislative power of the state shall be vested in the legislature.[16]

This simple statement taken from the Model State Constitution has the merit of brevity. Furthermore, it can be inserted into a document which in all likelihood will offer alternative courses of action to the electorate with regard to the issue of bicameralism versus unicameralism. Actually, the original North Dakota constitutional provision is almost identical to that of the Model State

16. NAT'L. MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION art. IV, § 4.01 (6th ed. revised 1968).

Constitution provision. It reads "the legislative power shall be vested in a senate and a house of representatives."[17]

This clause is perhaps the most vital point confronting the delegates to the Convention. All of the literature critical of present-day constitutions which refers to "manacles," "strait-jackets," "self-imposed restrictions," and "hand-cuffs" centers on it. Any restraints on this clause should be permitted only after the most serious thought.

It should be remembered that under the Constitution of the United States all the powers, not delegated to the national government or forbidden to the states, belong to the states. If our future legislators are to "solve" the serious and complex problems confronting the people of North Dakota, the fewer the restrictions on legislative powers, the greater the probability of success.

This does not mean that there should not be any restrictions. Some types of restrictions are favored by reformers. For example, sections 69 and 70 of the North Dakota Constitution provide an elaborate list of restrictions with regard to special legislation:

> The legislative assembly shall not pass local or special laws in any of the following enumerated cases, that is to say:
>
> 1. For granting divorces.
>
> 2. Laying out, opening, altering or working roads or highways, vacating roads, town plats, streets, alleys, or public grounds.
>
> 3. Locating or changing county seats.
>
> 4. Regulating county or township affairs.
>
> 5. Regulating the practice of courts of justice.
>
> 6. Regulating the jurisdiction and duties of justices of the peace, police magistrates or constables.
>
> 7. Changing the rules of evidence in any trial or inquiry.
>
> 8. Providing for change of venue in civil or criminal cases.
>
> 9. Declaring any person of age.
>
> 10. For limitation of civil actions, or giving effect to informal or invalid deeds.
>
> 11. Summoning or impaneling grand or petit juries.
>
> 12. Providing for the management of common schools.
>
> 13. Regulating the rate of interest on money.
>
> 14. The opening or conducting of any election or designating the place of voting.

17. N.D. CONST. art. II, § 25 (1889).

15. The sale or mortgage of real estate belonging to minors or others under disability.

16. Chartering or licensing ferries, toll bridges or toll roads.

17. Remitting fines, penalties or forfeitures.

18. Creating, increasing or decreasing fees, percentages or allowances of public officers.

19. Changing the law of descent.

20. Granting to any corporation, association or individual the right to lay down railroad tracks or any special or exclusive privilege, immunity or franchise whatever.

21. For the punishment of crimes.

22. Changing the names of persons or places.

23. For the assessment or collection of taxes.

24. Affecting estates of deceased persons, minors or others under legal disabilities.

25. Extending the time for the collection of taxes.

26. Refunding money into the state treasury.

27. Relinquishing or extinguishing in whole or in part the indebtedness, liability or obligation of any corporation or person to this state, or to any municipal corporation therein.

28. Legalizing, except as against the state, the unauthorized or invalid act of an officer.

29. Exempting property from taxation.

30. Restoring to citizenship persons convicted of infamous crimes.

31. Authorizing the creation, extension or impairing of liens.

32. Creating offices, or prescribing the powers or duties of officers in counties, cities, township, election or school districts, or authorizing the adoption or legitimation of children.

33. Incorporation of cities, towns or villages, or changing or amending the charter of any town, city or village.

34. Providing for the election of members of the board of supervisors in townships, incorporated towns or cities.

35. The protection of game or fish.

In all other cases where a general law can be made applicable, no special law shall be enacted; nor shall the legislative assembly indirectly enact such special or local law by the partial repeal of a general law, but laws repealing local or special acts may be passed.[18]

18. N.D. CONST. art. II, §§ 69, 70.

The constitutions of most states contain comparable provisions. While *special legislation* is considered contrary to sound governmental action, there is very little to gain from listing the areas of prohibition in the constitution. Despite the enumeration of the prohibited practices, the North Dakota Supreme Court still had to be brought into the procedure of interpretation of the list in many specific cases.

It is recommended, therefore, that sections 69 and 70 be deleted and the following statement from the Model State Constitution be substituted for it:

> The legislature shall pass no special or local act when a general act is or can be made applicable, and whether a general act is or can be made applicable shall be a matter for judicial determination.[19]

Another restriction on the power of the legislators in the present Constitution of North Dakota is the initiative and referendum. Highly praised by populist-type reformers in the early twentieth century, its abuse has somewhat tarnished its reputation.

This writer feels that there is great public support for the initiative and referendum. Furthermore, if the *self-imposed* restrictions on legislative powers are removed, the people will certainly feel more at ease in having the safeguard of the initiative and referendum. Therefore, only the abuse should be removed.

The recommendations of the Legislative Research Subcommittee cited above are still valid. Percentages of votes cast rather than requirement of specific numbers of signatures on petitions permit flexibility. However, the Convention delegates should remember that the electorate will be increased by a significant amount, estimated at a potential of 35,600 new voters in the coming presidential election.

Actually, there are very compelling reasons why the number of signatures required should be raised. With improved methods of communication and transportation coupled with the growth of large shopping centers, collection of signatures is much more easily accomplished than when the original provisions for the initiative and referendum were adopted in the early 1900s.

The principles of the initiative and referendum with a percentage of signatures required should remain in the constitution. The procedures for circulating the petitions and the method of voting, together with criminal penalties for fraud, should be confined to statutes. The provision for a majority vote to amend or repeal

19. NAT'L. MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION art. IV, § 4.11 (6th ed. revised 1968).

instead of two-thirds vote, after five years, is reasonable and should be placed as a principle in the constitution.

Structure of the Legislative Assembly

Once a decision has been reached as to the power of the legislature, its shape becomes important. It was Winston Churchill who suggested that the shape of a building shapes our thinking. While he was thinking primarily of the shape of a room, his suggestion is applicable to the issue of bicameralism versus unicameralism.

The tradition of bicameralism is strong. Our founding fathers inherited the concept from Great Britain where for all practicable purposes it is no longer used. Nebraska, Canadian Provinces, councils of cities with many times the population of North Dakota—all attest to the fact that unicameralism can be effective.

The principle of bicameralism was adopted for the Constitution of the United States out of necessity. The first constitution of the United States, the Articles of Confederation, established a unicameral Congress.

The search for compromise by the writers of the Constitution led them to the re-acceptance of the principle of bicameralism wherein each state would be represented equally in the Senate, but according to population in the House of Representatives. Bicameralism, today taught in all schools under the rubric of *checks and balances*, is now established as an essential protection against *hasty* judgment by the legislature. It was George Washington who, when asked why we needed a second house, answered by pouring some hot coffee from his cup to his saucer and explained how by blowing one could cool it. So the second house was deemed essential.

Bicameralism is a strong concept in the United States today and only a vote of the people on the alternatives of bicameralism or unicameralism can be recommended.

Qualifications

Once the problem of removing restrictions and the question of bicameralism-unicameralism is solved, the next issue which arises is the qualification of members of the legislature. The present constitution states that both senators and representatives must be qualified electors in their districts and must have resided in North Dakota for two years immediately prior to their election. Senators and representatives must have achieved the age of twenty-five and twenty-one respectively. In addition, any legislator who has been expelled for corruption, or any person convicted of bribery, perjury, or infamous crime is declared to be ineligible for legislative office.

It is very unlikely that anyone convicted of bribery, perjury, or infamous crime or one who has been expelled from the legislature would be nominated or elected, and that provision could be eliminated. The only decisions confronting the delegates is with regard to age and residence.

The overwhelming number of states, forty-two, requires state residency, and forty-seven require prior district or county residency.[20] North Dakota's requirement of state residency two years immediately prior to election does not appear to be unduly restrictive, and its requirement of qualified elector in the district is easily met.

Controversy might arise with regard to age requirements. If bicameralism is adopted it would not be unusual to have different minimum ages for each chamber. At present, a number of different age requirements prevail throughout the United States.[21]

With the reduction of the voting age to eighteen, there will be much support and pressure for reducing the age requirement, especially in the lower houses of state legislatures. Upper chambers are usually pictured as occupied by *elder* statesmen in the description of the checks and balance system. It is to be hoped that the members of the Constitutional Convention will see fit to reduce the age requirements in both chambers, if bicameralism is adopted, or in the one chamber if unicameralism is decided upon, as a recognition of the ability of the young citizens of North Dakota.

In addition to the above qualifications, section 37 of the North Dakota Constitution states:

> No judge or clerk of any court, secretary of state, attorney general, register of deeds, sheriff or person holding any office of profit under this state, except in the militia or the office of attorney at law, notary public, or justice of the peace, and no person holding any office of profit or honor under any foreign government, or under the government of the United States, except postmasters whose annual compensation does not exceed the sum of $300, shall hold any office in either branch of the legislative assembly or become a member thereof.[22]

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20. ILLINOIS CONSTITUTIONAL CONVENTION, LEGISLATIVE ARTICLE: COMPARATIVE INFORMATION, Comparative Language, § 3, at 1 (1970).

21. *Id.*

House	*Senate*
38 require 21	13 require 21
3 require 24	1 requires 22
1 requires 22	1 requires 24
5 require 25	23 require 25
2 with no requirement	1 requires 26
	1 requires 27
	7 require 30
	2 with no requirement

22. N.D. CONST. art. II, § 37.

Many state constitutions have comparable sections.[23] The Model State Constitution recommends merely that "Each member of the legislature shall be a qualified voter of the state and shall be at least ____ years of age."[24]

This provision would eliminate the residence requirement both in the state and in the district. The supporters of this provision apparently feel that it is up to the people to decide whether or not a recent resident will represent them. Should the delegates decide to maintain the limitations in section 37 of the North Dakota Constitution, it is recommended that a general statement without specific enumerations be developed as a substitute. In actuality, section 37 should be eliminated and the people of the state given the opportunity to decide whether or not some national, state, or local official should also have the opportunity to become a legislator in the normal nomination and election procedure.

Compensation

There is almost universal acceptance now among reformers that the amount of compensation, including expenses, should be ascertained by law and not embedded in the constitution. Section 45 of the North Dakota Constitution sets the compensation of the legislators at five dollars a day and transportation at ten cents a mile. At present the constitutions of other states contain various provisions.[25]

The Model State Constitution recommends that:

> The members of the Legislature shall receive an annual salary and such allowances as may be prescribed by law but any increase or decrease in the amount thereof shall not apply to the legislature which enacted on the same.[26]

This provision is recommended to the members of the Constitutional Convention.

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23. ILLINOIS CONSTITUTIONAL CONVENTION, LEGISLATIVE ARTICLE: COMPARATIVE INFORMATION, Comparative Language, § 21, at 1 (1970).

12 prohibit office-holding with foreign governments
43 forbid holding a job with the national government
38 forbid state government employment
3 forbid county government employment
3 ban city employment

24. NAT'L. MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION art. IV, § 4.02 (6th ed. revised 1968).

25. ILLINOIS CONSTITUTIONAL CONVENTION, LEGISLATIVE ARTICLE: COMPARATIVE INFORMATION, Comparative Language, § 21, at 1 (1970).

28 states specifically permit setting of legislators' salaries by statute;
23 state that no legislator may receive salary increases during the term for which they are elected;
38 provide for payment of some form of legislators' expenses.

26. NAT'L. MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION art. IV, § 4.07 (6th ed. revised 1968).

Length of Sessions

Sections 55 and 56 of the North Dakota Constitution limit regular sessions of the legislative assembly to biennial sessions of sixty days. The 86th amendment permits the legislature to meet in December preceding the regular session for the purpose of organization.

One lawyer reported to the 1963 Legislative Research Subcommittee that his clients were almost pathologically unnerved during a normal sixty-day biennial session. They were prepared to live with existing legislation, but the possibility of a change in a law affecting their interest upset them. They were "normal" persons only after the session ended.

There is the added fear on the part of some that annual sessions may keep able individuals from seeking nomination and election to the legislature. In addition, there is always a strong feeling among many citizens that if annual sessions are held, Parkinson's Principle will come into effect, i.e., work will be found to fill in the time allocated whether or not the work or the time is actually needed.

The organizational pre-session now permitted, the streamlining of procedure (especially if unicameralism were adopted), the work of the Legislative Council between sessions, and the provision for special sessions may allow the assembly to complete its work in sixty days. It would be wise, and it is recommended, that provision be made in the constitution for the legislature to call itself into special session. The call should be supported by a substantial percentage of the membership. The recommendations of the Subcommittee on Constitutional Revision that the legislative assembly could call itself into special session at the request of two-thirds of all its members may have been set too high, but a comparable provision should be placed into the new constitution.

Procedure

The legislative article of the Constitution of North Dakota is replate with procedural details which have no place in a constitutional document. If sixty-day biennial sessions are favored by the delegates, every encumbering procedure possible should be removed from the constitution. In addition, some unenforceable or unnecessary provisions should likewise be removed. For example:

Section 40

> If any person elected to either house of the legislative assembly shall offer or promise to give his vote or influence in favor of, or against any measure or proposition pending

> or proposed to be introduced into the legislative assembly, in consideration, or upon conditions, that any other person elected to the same legislative assembly will give, or will promise or assent to give, his vote or influence in favor of or against any other measure or proposition, pending or proposed to be introduced into such legislative assembly, the person making such offer of promise shall be deemed guilty of solicitation of bribery. If any member of the legislative assembly, shall give his vote or influence for or against any measure or proposition, pending or proposed to be introduced into such legislative assembly. . . or in consideration that any other member hath given his vote or influence for or against any other measure or proposition in such legislative assembly, he shall be deemed guilty of bribery. And any person, member of the legislative assembly or person elected thereto, who shall be guilty of either such offenses, shall be expelled and shall not thereafter be eligible to the legislative assembly, and on the conviction thereof in the civil courts, shall be liable to such further penalty as may be prescribed by law.[27]

This section attempts to eliminate the practice of *log-rolling* by making it an offense which would result in the explusion of the offending members. The provision is unrealistic in that it ignores the basic political process and is unenforceable.

Section 54

> In all elections to be made by the legislative assembly, or either house thereof, the members shall vote viva voce, and their votes shall be entered in the journal.[28]

Both chambers of the present legislature have adequate, efficient electric voting devices which make section 54 unnecessary.

Section 57

> Any bill may originate in either house of the legislative assembly, and a bill passed by one house may be amended by the other.[29]

This section probably arises from the desire of the founders to differentiate North Dakota's practice from that of the Congress of the United States where revenue bills, by constitutional fiat, must originate in the lower house. The principle need not be stated in a document. In practice, agreements develop wherein, in bicameral sit-

27. N.D. CONST. art. II, § 40.
28. *Id.* at § 54.
29. *Id.* at § 57.

uations, the houses take turns in introducing revenue and appropriations bills.

Sections 58 *and* 61

> No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed.[30]
>
> No law shall be passed, except by a bill adopted by both houses, and no bill shall be so altered and amended on its passage through either house as to change its original purpose.[31]

These sections attempt to prevent the addition of *riders* to other pieces of legislation. On the surface the sections state their purpose with great clarity. Unfortunately, what is considered *one* subject may turn out to be a highly debateable topic, given the variety and complexity of present day legislation, especially of the regulatory type.

Language of or similar to the Model State Constitution is to be preferred:

> The legislature shall enact no law except by bill and every bill except bills for appropriations and bills for the codification, revision or rearrangement of existing laws shall be confined to one subject. All appropriation bills shall be limited to the subject of appropriations. Legislative compliance with the requirements of this section is a constitutional responsibility not subject to judicial review.[32]

Lest there be panic, especially over the last clause of the above provision, the drafters of the Model State Constitution make the following comment:

> While there is little disagreement over the desirability of limiting each bill to a single subject, a great body of highly technical decisional law has grown up explaining what is a "single subject." In its most restrictive applications, the so-called single subject rule has resulted in the invalidation on essentially extraneous if not frivolous grounds of perfectly sound legislation which misled neither the legislators nor the people. In order to create what appears to be a desirable balance between the necessity of affirming the value of the single subject rule and the undesirability of having the rule operate as a basis for the invalidation of sound legis-

30. *Id.* at § 61.
31. *Id.* at § 58.
32. NAT'L. MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION art. IV, § 4.14 (6th ed. revised 1968).

lation on merely technical grounds, the last sentence has been added. It is not part of any state constitution. It provides that legislative compliance with the technical requirements of this section is not subject to judicial review, though it remains a subject to judicial review, though it remains a constitutional responsibility of the legislature. In effect, this means that the legislature will have to police the single subject rule in the first instance and, if abuses should occur, then the governor's veto might be the proper remedy in response to public pressure or on the basis of information received from the state legislature itself.[33]

Section 43

> Any member who has a personal or private interest in any measure or bill proposed or pending before the legislative assembly, shall disclose the fact to the house of which he is a member, and shall not vote thereon without the consent of the house.[34]

Actually, this section is not entirely out of place in a constitution. However, the consent necessary is so easily obtainable as to make it unnecessary as a constitutional principle. It should be part of the procedure established by rules which the legislature prescribes for its own procedure.

Section 63

> Every bill shall be read two separate times, but the first and second readings may not be upon the same day, and the first reading may be by title of the bill only, unless upon such first reading, a reading at length is demanded. The second reading shall be at length. No legislative day shall be shorter than the natural day.[35]

This section provides a modern twist, at least for the first reading, wherein the requirement is satisfied by merely reading the title. Provisions for readings in full date back to days when only single, handwritten copies were available. Modern technology in speed printing make readings in full (or at length) unnecessary and time-consuming. The provision for readings to take place on separate days, and the definition of a legislative day should be maintained.

Section 68

> The legislative assembly shall pass all laws necessary to carry into effect the provisions of this constitution.[36]

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33. *Id.* at 59.
34. N.D. CONST. art. II, § 43.
35. *Id.* at § 63.
36. *Id.* at § 68.

No one else can pass the laws, thus this provision is unnecessary.

Section 62

> The general appropriation bill shall embrace nothing but appropriations for the expense of the executive, legislative and judicial departments of the state, interest on the public debt, and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject.[37]

This section may actually expedite legislative procedure by permitting *non-controversial* appropriations to be taken care of as they arise. However, this item of procedure could be stipulated in the rules established by the legislature itself and be omitted as a constitutional principle.

Section 60

> No bill for the appropriation of money, except for the expenses of the government, shall be introduced after the fortieth day of the session, except by unanimous consent of the house in which it is sought to be introduced.[38]

This section is a procedural matter and should be placed in the rules of procedure established by the legislature.

Sections 41 *and* 53

> The term of service of the members of the legislative assembly shall begin on the first Tuesday in January, next after their election.[39]
>
> The legislative assembly shall meet at the seat of government at 12 o'clock noon on the first Tuesday after the first Monday in January, in the year next following the election of the members thereof.[40]

These two brief sections, can, for the sake of those who like brevity, be merged into one.

Section 65

> No bill shall become a law except by a vote of a majority of all the members-elect in each house, nor unless, on

37. *Id.* at § 62.
38. *Id.* at § 60.
39. *Id.* at § 41.
40. *Id.* at § 53.

its final passage, the vote be taken by yeas and nays, and the names of those voting be entered on the journal.[41]

This provision should remain in the constitution, but attention should be drawn to the fact that the procedure in some instances requires more than a simple majority vote. There is no objection to the so-called "roll-call majority" provided it is so understood.

PART III

The delegates to the North Dakota Constitutional Convention have met, organized, and are hard at work preparing for the plenary session in January. Thus far they have demonstrated a deep interest in their tasks as they gather background information from published material and from public hearings. They have demonstrated great unity in purpose, but as their work goes on differences of opinion both on basic principles and precise rhetoric will surely arise. For this reason this writer wishes to end his article by citing goals which others have established for a legislature which can solve twentieth century problems with twentieth century tools.

1. Robert B. Dishman on What is Fundamental:

> A proposition is fundamental if it reflects the more or less fixed convictions or sentiments of the vast majority of the people as to what kind of a society they want. Almost needless to say, the only propositions likely to command such widespread and deeply rooted popular acceptance are those which are stated in general rather than specific terms and deal largely with ends, not means. In every state, then, it should be possible to point to a number of propositions which by general agreement are considered fundamental. No doubt these fundamentals would vary somewhat from state to state or region to region, but it seems likely that everywhere they would reflect the same basic ideology of a limited and balanced democratic government.
>
> A more difficult problem is to decide which fundamentals belong in a constitution. Some, obviously, can be left out because they are not directly relevant to the problem of governing, as, for example, the proposition that parents have an obligation to support their children. Others can be omitted because nothing is to be gained by their inclusion. Religious freedom is no doubt strengthened by a constitutional guarantee, but not the right, which is already secure in the common law tradition, to engage in any lawful trade. Similarly, the right to a fair trial, guaranteed in various ways by every American constitution, is a real boon to the person accused of crime, but not the largely meaningless admonition found

41. *Id.* at § 65.

in the Rhode Island constitution that every man is to be presumed innocent until proven guilty. Men may differ—and frequently do—as to whether a particular provision is appropriate to a constitution, but they should never be at odds as to what purpose a constitution should serve. "A constitution states or ought to state," Justice Cardozo once wrote, "not rules for the passing hour but principles for an expanding future."

The early state constitutions met this test admirably. They delineated the functions that the government was to perform and the political and personal liberties that it was not to invade, but that, for the most part, was all. In time, however, most state constitutions departed from the early models, federal and state, and took on, in Chief Justice Marshall's phrase, "the prolixity of a legal code." Instead of merely organizing the governmental machinery, the New York Inter-Law School Committee has pointed out that:

'The constitutions delimited power with an exactitude that left virtually no further room for its being used, let alone abused. Instead of embodying a ripened philosophy capable of projection into the future regardless of the surface changes that inevitably occur in a growing society, the constitutions tended to embody their sponsors' ideas concerning the issues of the fleeting moment, and thus took on the appearance of statute books.'[42]

2. John H. Romani on Apportionment:

Western democratic theory generally holds that legislators should represent approximately the same number of people, that districts should be compact and contiguous, and that apportionment be undertaken at regular intervals to insure that the standards of equality of representation are met.[43]

3. Patricia Shumate Wirt on Democratic Legislatures:

The ideal legislature meets several tests:

1) it is responsive to the needs of the state and endowed with sufficient power to formulate necessary policy;

2) its seats are distributed according to the principle of "one man, one vote";

3) it has a high "visibility" performing its duties responsibly and in such fashion that the public can oversee and judge its actions;

4) its rules permit majority rule while protecting against arbitrary action;

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42. DISHAN, *supra* note 12, at 13, 14, 15.

43. Romani, *Legislative Representation*, in SALIENT ISSUES OF CONSTITUTIONAL REVISION 35, 36 (J. Wheeler ed. 1961).

5) it has sufficient time and resources for informed deliberations;

6) competent citizens are attracted to and honored by legislative service.[44]

4. John Burns on the Functional Legislature:

If it is going to represent its people and make authoritative decisions on their behalf, a legislature must carry on a number of basic activities: It must put programs together, evaluate on-going programs, deliberate on various problems and proposals, reach accommodations among contending views, educate the public and itself on important questions, and, by doing all these things, make public policy. No legislature can do these things unless it has:

—enough time and the means to make good use of its time;

—staff aides for leaders and individual members beyond the more specialized staff of clerks or research offices;

—adequate facilities, including chambers, committee rooms, and offices;

—manageable size, in terms of the total number of members, the number of committees, and the number of committee assignments per member;

—an organizational structure and a set of procedures that speed, rather than impede, the flow of work;

—some method for ensuring continuity between legislative sessions and coordination between the houses of the legislature; and

—an orderly atmosphere, a sense of decorum and dignity of office that enables the legislature to conduct its business without undue delay or disruption, and with a sense of competence and authority.[45]

44. Wirt, *The Legislature,* in SALIENT ISSUES OF CONSTITUTIONAL REVISION 68, 69 (J. Wheeler ed. 1961).
45. BURNS, *supra* note 1, at 57.