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The North Dakota Supreme Court: A Century of Advances

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THE NORTH DAKOTA SUPREME COURT: A CENTURY OF ADVANCES

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Lawyers use history, mostly legal precedents, to help guide their clients in their lives and businesses. But not all legal history gets collected and published in appellate opinions, or even in news accounts. History is often scattered in ways that are difficult to follow, and facts are frequently obscured by the fogs of memory.

As lawyers, though, we should keep track of the people, politics, and developments that shaped our judicial system, particularly our North Dakota Supreme Court. Whether good, bad, or indifferent, the current conditions of the Court and of the judicial system it governs certainly affect how we lawyers practice our profession. Consider these glimpses of how our Court and judicial system came to where they are today.

I. LEAVING THE NINETEENTH CENTURY

A. THE TERRITORIAL COURTS

Before statehood, written appellate review in this region began when the 1861 federal act for Dakota Territory created a three-judge supreme court. President Abraham Lincoln appointed the first three justices of the Territorial Supreme Court: Chief Justice Philemon Bliss of Ohio; George P. Williston of Pennsylvania; and Joseph L. Williams of Tennessee.[1] In the next twenty-eight years, later presidents appointed five successor chief justices and twenty-one successor associate justices.[2] An additional justice was authorized in 1879, two more in 1884, and another two were authorized in 1888.[3]

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1. *See* I COLONEL CLEMENT A. LOUNSBERRY, NORTH DAKOTA HISTORY AND PEOPLE 271 (1917). "The town of Williston, N.D. was named in honor of Judge Williston, who was greatly admired by Mr. James J. Hill, the great railroad builder." *Id.* at 274. There is confusion over Judge Williston's first name. Colonel Clement A. Lounsberry, founder of the *Bismarck Tribune*, called him "Lorenzo Parsons," but 1 DAKOTA REP. III listed him as "Geo. P.," while the STATE OF NORTH DAKOTA LEGISLATIVE MANUAL 72 (1897) listed him as "S.P. Williston." Should we wonder why Williston moved west?

2. *See* A HISTORICAL SKETCH OF THE SUPREME COURT OF THE DAKOTA TERRITORY AND NORTH DAKOTA SUPREME COURT 1889-1989, at 1-2 (compiled by Marcella Kramer, partly from material assembled by law clerk David L. Peterson in 1969, and with editorial assistance from Penny (Barry) Miller, then Chief Deputy Clerk of the Supreme Court) (North Dakota Supreme Court 1988) [hereinafter SKETCH]. Ara Bartlett was appointed twice, as an associate justice in 1864 and as chief justice in 1865. *See id.* Jefferson Kidder was appointed and served twice. *See id.* Additionally, Allan A. Burton declined his nomination and did not serve and Frank Sperry had his nomination withdrawn. *See* II BERNARD FLOYD HYATT, A LEGAL LEGACY FOR STATEHOOD: THE DEVELOPMENT OF THE TERRITORIAL JUDICIAL SYSTEM IN DAKOTA TERRITORY, 1861-1889, at 680, 683 (1987). The thesis is divided into two volumes: volume one includes pages 1-372 and volume two includes pages 373-707. Hyatt also wrote his Master's thesis, *The Frontier Judicial System of Dakota Territory*, 1861-1873, (Thesis at University of North Dakota for M.A., 1976) looking at the early days of the Dakota Territory courts.

3. *See* Act of June 19, 1878, 45th Cong., ch. 329, 20 Stat. 194 (enacted); Act of July 4, 1884, 48th Cong., ch. 182, 23 Stat. 101 (enacted); 25 Stat. 823 (1888).

The first three Territorial Justices "were also judges of the United States District Court for the Territory and acted as trial judges within the various judicial districts; hence there was the anomalous situation of the judges sitting in review of their own decisions."[4]

> In the case of People v. Wintermute, 1 Dak. 60 [1875], an appeal in a manslaughter case, Shannon, Chief Justice, was the trial judge. An opinion reversing his decision was written by Kidder Associate Justice, and Chief Justice Shannon dissented. Not to be outdone, the other Associate Justice, Justice Barnes, wrote a separate opinion attacking the dissent of Chief Justice Shannon.[5]

Eventually, a 1888 federal enactment "prohibited a judge from sitting as a member of the appellate court in a matter wherein he had an interest or had presided as trial judge."[6]

The first three justices "were all men learned in the law, and of excellent character."[7] But, according to other research, later "territorial judges were political appointees from the eastern states, unfamiliar with local conditions," were often called "political hacks," and one chief justice "had no prior judicial or legal experience when appointed."[8] Statehood brought some improvements.

B. A CAPITOL RAILROAD JOB

Amid much legal and political maneuvering, one historically significant decision of the Supreme Court of Dakota Territory approved relocating the territorial capitol from Yankton to Bismarck.

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4. J.H. Newton, *Appellate Practice and Procedure in North Dakota*, 27 N.D. L. REV. 155 (1951) [hereinafter Newton, *Appellate Practice*]. A footnote explains: "This article is a digest of a series of three lectures delivered at the University of North Dakota Law School to the class of 1950." *Id.* The authors of this history fortuitously received apparent carbon copies of the actual lectures from Minot lawyer Roger O. Herigstad, who found them among papers preserved by his father, longtime Minot lawyer O. B. Herigstad, who died in 1951. The law review article abridged the actual lectures, which contain more extensive explanations of some details. Quoted material from Mr. Newton's lectures, as distinct from his law review article, are here identified as Newton Lecture number 1, 2, or 3, followed by the page number of that lecture. These lecture notes are now held by the North Dakota Supreme Court Law Library.

5. J.H. Newton, Lecture No. 1 at the University of North Dakota School of Law, at 2 (1950) (lecture notes available in the North Dakota Supreme Court Law Library).

6. Newton, *Appellate Practice*, *supra* note 4, at 155; 25 Stat. 823 (1888).

7. LOUNSBERRY, *supra* note 1, at 274.

8. Hon. Robert Vogel, *Looking Back on a Century of Complete Codification of the Law*, 53 N.D. L. REV. 225, 228 (1976). Justice Vogel (1973-1978), after a career as a practitioner at Garrison, McLean County states attorney, seven years as United States Attorney for North Dakota, and 12 more years of practice at Mandan, was appointed to the Court in 1973 by Governor Art Link to succeed Justice Alvin C. Strutz, who died in office on June 16, 1973. *See* SKETCH, *supra* note 2, at 53, 58.

The 1883 Dakota Territory Assembly acted to remove the capitol from Yankton by authorizing a named commission to select its new site.[9] Governor Nehemiah G. Ordway signed the act into law on March 8, 1883.[10] The act directed the commission to "select a suitable site for the seat of government of the Territory of Dakota, due regard being had to its accessibility from all portions of the Territory, and its general fitness for a capital, when at least . . . $100,000 . . . shall be paid or guaranteed in money" by the town selected, and it had also conveyed at least 160 acres of land for the "capital buildings" and for other development.[11]

Each member of the relocation commission had to file a $40,000 bond approved by a justice of the Supreme Court.[12] The commissioners had to qualify and to meet at Yankton to organize within thirty days after the enactment, and they had to select the new location by July 1, 1883.[13]

A Yankton group soon challenged the legality of the act in court in an apparent attempt to delay action by the commission until after the July 1 deadline for its decision.[14] Acting in his district court capacity, Chief Justice Alonzo J. Edgerton granted a temporary restraining order against the commission.[15] But the commissioners all somehow evaded service of process long enough to qualify before Justice Jefferson P. Kidder and to file their bonds with the territorial Treasurer at Yankton.[16] The commissioners then discreetly boarded a special train at Sioux City, and organized on it while stopped in Yankton.[17] The commission thus timely began its work.

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9. *See* LAWS OF DAKOTA ch. 104, at 217 (1883). Among the nine members named to the commission was Alexander McKenzie. *See id.* § 2.

> Although McKenzie could scarcely write his own name, the Northern Pacific chose him as its political agent in northern Dakota, and he came to represent the powerful interests of Minneapolis and St. Paul, which held the region as a colony. McKenzie was to be Republican national committeeman for North Dakota until 1908; he was to become "Alexander the Great, Boss of North Dakota"; he was to die a millionaire and, even though he never held a state office, to be given a funeral in the state capitol at Bismarck.

ELWYN B. ROBINSON, HISTORY OF NORTH DAKOTA 200 (1966) (quoting Kenneth J. Carey, Alexander McKenzie, Boss of North Dakota, 1883-1906 (1949) (unpublished M.A. thesis, University of North Dakota)).

10. *See* LAWS OF DAKOTA ch. 104, at 222 (1883).

11. *Id.* § 4, at 218. The act was "decided by nearly a two-thirds vote to change the seat of government to some more central and accessible locality." LOUNSBERRY, *supra* note 1, at 374. GEORGE W. KINGSBURY, II HISTORY OF DAKOTA TERRITORY 1301-08 (1915) has a detailed account of the enactment of this measure and the proceedings of the relocation commission.

12. *See* LAWS OF DAKOTA ch. 104, § 3, at 218 (1883).

13. *See id.* §§ 3, 4.

14. *See* Hyatt, *supra* note 2, at 533.

15. *See id.*

16. *See id.*

17. *See id.*

At the request of Yankton forces, Chief Justice Edgerton issued a *quo warranto* writ near April 3, 1883, to determine whether the capitol-relocation commission law was valid.[18] Then, too, a territorial grand jury began probing allegations of bribery and corruption of the legislators who passed the capitol-relocation law.[19] After the commissioners appeared before Chief Justice Edgerton on May 2, he set their civil case for trial during a special court term at Yankton scheduled to begin July 2, the day after the commission had to complete its work.[20] Also, May 8, the grand jury indicted many legislators for bribery and corruption on the capitol-relocation act.[21] "No warrants, however, were ever issued for their arrest."[22]

"Before making its choice, the commission visited many aspiring towns. It was entertained extravagantly at Bismarck."[23] The commission met at St. Paul, Minnesota, during the last days of May to make its decision, and then traveled to Fargo in Dakota Territory.[24] There, on June 2, they announced their selection of Bismarck for the new capitol.[25] "The Northern Pacific [Railroad] furnished the required 160-acre tract, . . . [and i]n September, 1883, Henry Villard, president of the Northern Pacific, laid the cornerstone of the new capitol."[26]

Meanwhile, on July 25, Chief Justice Edgerton began hearing the *quo warranto* case against the commissioners.[27] He finished the trial on July 28 and, on August 27, decided against the commission.[28] He ruled the commission members were appointed illegally, and ousted them from office.[29] He did not file a written opinion then, gave no reasons, and really said nothing about the legality of relocating the capitol.[30]

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18. *See* Territory *ex rel* Smith v. Scott, 3 Dakota 357, 20 N.W. 401 (1884).

19. *See* HYATT, *supra* note 2, at 533.

20. *See* HYATT, *supra* note 2, at 533-34.

21. *See* HYATT, *supra* note 2, at 534. "To discredit Governor Ordway, Yankton parties caused his arrest and fixed his bond at $50,000. McKenzie furnished that amount of currency for his bail, which was reduced to a reasonable sum and nothing every came of the prosecution." LOUNSBERRY, *supra* note 1, at 377.

22. *See* HYATT, *supra* note 2, at 534

23. ROBINSON, *supra* note 9, at 201.

24. *See* HYATT *supra* note 2, at 534.

25. *See* HYATT *supra* note 2, at 534. The vote was five to four. *See* ROBINSON, *supra* note 9, at 201.

26. *See* ROBINSON, *supra* note 9, at 201.

27. *See* HYATT, *supra* note 2, at 534.

28. *See* HYATT, *supra* note 2, at 534; Territory *ex rel* Smith v. Scott, 3 Dakota 357, 388, 20 N.W. 401, 402 (1884). "Edgerton's decision was made public on September 15 . . . ." HYATT, *supra* note 2, at 534.

29. *See Scott*, 3 Dakota at 388, 20 N.W. at 402.

30. *See* HYATT, *supra* note 2, at 534-35.

At a later day, Judge Edgerton filed his opinion in the case, a lengthy document, covering the numerous points in the case completely, which was highly commended by the bar and press as one of the ablest decisions rendered from the Dakota bench.

The commission appealed Chief Justice Edgerton's ouster decision to the Supreme Court of Dakota Territory, which heard it on May 15, 1884.[31] "The case was fought primarily on . . . [whether] the Territory Assembly had . . . authority to delegate its power to the capital commission."[32] Barely a week later, on May 23, 1884, a three-justice majority of the Dakota Supreme Court reversed Chief Justice Edgerton's judgment and directed the trial court to enter judgment on the pleadings upholding the commissioners.[33]

The opinion by Justice Church for the majority was filed nearly four months later on September 20, 1884.[34] The majority ruled that the relocation act was a lawful delegation and exercise of legislative authority that had properly designated the commissioners by name.[35] The decision meant that the capitol of Dakota Territory had been lawfully moved to Bismarck.[36] "The Dakota Supreme Court, however, continued to meet at Yankton as required by Territory statutory law."[37]

Not surprisingly, Chief Justice Edgerton, in reviewing his own decision, wanted to affirm it and so dissented.[38] The majority included two justices appointed after the enactment of the relocation law, Justices William E. Church and Cornelius S. Palmer, along with Justice Sanford H. Hudson.[39] "Governor Ordway . . . appears to have had a hand in the

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KINGSBURY, *supra* note 11, at 1323.

31. *See* Hyatt, *supra* note 2, at 535.

32. *See* Hyatt, *supra* note 2, at 535.

33. *See Scott*, 3 Dakota at 417, 20 N.W. at 415.

34. *See id.* at 357, 20 N.W. at 401.

35. *See id.* at 391-417, 20 N.W. at 403-15.

36. During a debate in the second of the three constitutional conventions held in South Dakota before statehood, on a proposed clause to require the state Supreme Court's sessions "to be held at the seat of government," delegate Moody complained: ". . . our Capitol was stolen from us." I DAKOTA CONSTITUTIONAL CONVENTION 258 (Huron, S.D., Huronite Printing Co. 1907). South Dakota held three constitutional conventions; in 1883, 1885, and 1889. *See id.* at 6, 46; II South DAKOTA CONSTITUTIONAL CONVENTION 1258 (Huron, S.D. Huronite Printing Co. 1907). Additionally, a territorial convention for statehood, including delegates from all parts of Dakota Territory, met in 1887 to request Congress for "enabling legislation" permitting Dakota to enter the Union as a state. *See* STATEHOOD FOR DAKOTA: PROCEEDINGS OF THE TERRITORIAL CONVENTION HELD AT THE CITY OF ABERDEEN, BROWN COUNTY, DAKOTA TERRITORY, DECEMBER 15, A.D. 1887 (Gibson Bros. Printers 1888), *reprinted in* XXI SOUTH DAKOTA HISTORICAL COLLECTIONS (South Dakota State Historical Society compiler, Hipple Printing Co. Pierre, S.D. 1942).

37. Hyatt, *supra* note 2, at 383. The Dakota Supreme Court did, however, begin holding some sessions at Bismarck in 1884. *See* Hyatt, *supra* note 2, at 383. The 1885 Assembly attempted to transfer the Supreme Court from Yankton to Bismarck, but "John R. Gamble of Yankton, . . . Chairman of the Council's Judicary Committee, . . . was able to defeat the attempt." Hyatt, *supra* note 2, at 383. The 1885 Assembly did enact a law directing three separate annual sessions of the Supreme Court in Bismarck, Deadwood, and Yankton. *See* Hyatt, *supra* note 2, at 383. Yet, "confusion as far as Supreme Court sessions would remain throughout the Pre-Statehood Era." Hyatt, *supra* note 2, at 383.

In the 1887 Assembly, a bill "moving [the] Yankton[ ] term to Redfield passed both houses of the Assembly; it, however, was [physically] lost. A duplicate of it was again [passed] by the Council, but it was allowed to die in the House. No further session tampering occurred." Hyatt, *supra* note 2, at 384.

38. *See Scott*, 3 Dakota at 417-44, 20 N.W. at 425-28 (Edgerton, C.J., dissenting).

39. *See* HYATT, *supra* note 2, at 683.

appointment of W.E. Church . . . . Ordway and Alexander McKenzie led the successful fight for the Governor's land speculating and county organizing partner—C.S. Palmer—to replace [deceased Justice] Kidder."[40]

Accusations against Territory Governor Ordway, Alexander McKenzie, and others allied with the Northern Pacific Railroad, for improper tampering with the legislative and judicial processes, haunted the proceedings.[41] Among the accusations were that Northern Pacific operatives had directly contacted individual justices in the short time after the Supreme Court had heard the appeal and before it quickly ruled.[42] "At least eight newspapers agreed that [Justices] W.E. Church, Palmer, and Hudson's votes in this case were controlled by the Northern Pacific Railroad's Ordway-McKenzie political machine."[43]

The Yankton forces quickly appealed to the United States Supreme Court, but their efforts to advance the case on that docket were futile.[44] Their appeal inexplicably languished at the U.S. Supreme Court for five years without being heard or decided.[45] Statehood in 1889 eventually mooted and ended the litigation.[46]

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40. *See* HYATT, *supra* note 2, at 536.

41. *See* HYATT, *supra* note 2, at 531-32, 535-37. Yankton forces

> broadcast accounts of Ordways' corrupt dealings (he had, they said, offered positions as county commissioners for sale to the highest bidder); they charged that he had received thirty thousand dollars in cash for his part in moving the capital to Bismarck. President Chester Arthur finally removed Ordway as territorial governor in June, 1884, but the capital remained in Bismarck.

ROBINSON, *supra* note 9, at 201.

"During the 1885 Assembly, an attempt was made to remove the Territory capital from Bismarck to Pierre. The Assembly enacted a bill making the move; Governor Gilbert A. Pierce, however, vetoed it and the Assembly was unable to override the veto." Hyatt, *supra* note 2, at 383.

42. HYATT, *supra* note 2, at 536-37. Compare today's standard of judicial responsibility: "A judge shall not initiate, permit, or consider ex parte communication, or consider other communication made to the judge outside the presence of the parties concerning a pending or impending proceeding," except in a few specifically defined circumstances. NORTH DAKOTA RULES OF JUDICIAL CONDUCT Canon 3 (B)(7) (2000); *see also* NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT Rule 3.5 (2000) ("A lawyer shall not: (a) seek to influence a judge . . . or other official by means prohibited by law including ex parte communications concerning pending or impending proceedings.").

43. *See* HYATT, *supra* note 2, at 537.

> One of the harsh realities of North Dakota life was the power of the railroads.
>
> . . .
>
> . . . The federal government had given [the Northern Pacific Railroad] 10,700,000 acres of land in what was to become North Dakota. The land grant, 24 percent of the state's area, gave the Northern Pacific a huge economic stake in the government.

ROBINSON, *supra* note 9, at 198 (citing Robert S. Henry, *The Railroad Land Grant Legend in American History Texts*, XXXI MISS. VALLEY HIST. REV., Sept. 1945, at 194).

44. *See* HYATT, *supra* note 2, at 537

45. *See* HYATT, *supra* note 2, at 537.

46. *See* HYATT, *supra* note 2, at 537.

This "politically charged" litigation was "among the most important ever to have been considered by Dakota courts," Hyatt declared.[47] As he concluded, this decision of the Dakota Territory Supreme Court loomed large "became the removal of the capital from Yankton and the selection of Bismarck along the right way of the Northern Pacific Railroad . . . was one of the primary reasons for the division of Dakota at statehood."[48] The separate statehood of North Dakota thus may well be attributable to the political impact of the Northern Pacific Railroad and its allies upon the composition and conduct of the Supreme Court of Dakota Territory.[49]

C. THE 1889 JUDICIAL ARTICLE

When our new state needed a Supreme Court, the 1889 Constitutional Convention shaped it like the three-judge Territorial Court, but the justices were to be "elected by the qualified electors of the state at large," rather than appointed.[50] The 1889 Constitution also set basic qualifications for election to the Court: A U.S. citizen learned in the law,

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47. *See* HYATT, *supra* note 2, at 531.

48. *See* HYATT, *supra* note 2, at 538-39.

49. Lounsberry effusively credited Ordway with a great deal of influence in Congress on bringing about statehood for North Dakota. Lounsberry noted Ordway's prior 12 years as sergeant-at-arms and paymaster in the United Stated House of Representatives, and says Ordway used this "Long and intimate acquaintance with the older and controlling members in both Houses of Congress" to bring "in the two Dakotas as the same time . . . " *See* LOUNSBERRY, *supra* note 1, at 371, 375. Lounsberry also credits McKenzie, "even more than . . . Governor Ordway," with "the successful efforts in Congress to secure the division of Dakota and the admission of North Dakota as a state." LOUNSBERRY, *supra* note 1, at 377.

Yet, Robinson believed the railroads generally opposed statehood:

> They preferred the lenient territorial railroad laws, and could influence or control territorial appointments from Washington. After his removal, the Northern Pacific sent Nehemiah G. Ordway to Washington as a lobbyist against statehood. . . . McKenzie and the Bismarck leaders opposed statehood, preferring that Bismarck remain the capital of a large territory.

ROBINSON, *supra* note 9, at 202.

However, after the 1888 presidential campaign when the national Republican Party platform had called for admission of two states, "Ordway and the Dakota Democrats finally dropped their single-state bill. Both Republicans and Democrats voted for the Omnibus [Statehood] Bill of February 22, 1889, authorizing the framing of constitutions in North Dakota, South Dakota, Montana, and Washington." ROBINSON, *supra* note 9, at 203.

Were McKenzie and Ordway good lobbyists, or what?

50. N.D. CONST. art. IV., § 90 (repealed 1976).

at least thirty years old,[51] and three-years residency in the state or territory.[52]

The 1889 judicial article vested the judicial power of the state in the Supreme Court, district courts, county courts, justices of the peace, and other courts that the legislature might create for municipalities.[53] The judicial article gave the Supreme Court power to issue original and remedial writs, to hear appeals "co-extensive with the state," and to exercise superintending control over all other courts "under such regulations and limitations as may be prescribed by law."[54]

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51. [T]he original draft of the constitution was changed so as to make the minimum age limit thirty, rather than thirty-five, in order that Judge Corliss might qualify if elected. At least that is the reason generally given for the change in age requirements, and Judge Corliss was only slightly over thirty years of age when he qualified.

Newton, *supra* note 5, at 4-5.

52. *See* N.D. CONST. art. IV, § 94 (repealed 1976). The length of the residency requirement was debated in the Convention.

> The [Convention] committee on the judiciary department . . . submitted majority and minority reports. The majority report recommended the establishment of a Supreme Court, to consist of three members, and prescribed that no one unless learned in the law, of thirty years of age, and a resident of the territory for five years next preceding his election, should be eligible to the office. Guy C.H. Corliss, of Grand Forks, who aspired to the Supreme Court, was ineligible, by reason of his residence qualification. He came to Bismarck, together with John M. Cochrane, a notable lawyer of Grand Forks, and they jointly persuaded the delegates to limit the residency qualification to three years. Mr. Corliss was elected to the Supreme bench.

LOUNSBERRY, *supra* note 1, at 396-97. John M. Cochrane (1903-1904), too, was later elected to the Court, after serving as Reporter for the Supreme Court from 1894 through 1902. *See* NORTH DAKOTA CENTENNIAL BLUE BOOK 1889-1989, at 465 (1989); SKETCH, *supra* note 2, at 27.

In the Convention debates on the residency requirement, one delegate blamed the change from five years to three on lobbying by an unnamed "gentleman here who desired the change for his own benefit, and not for the good of the State." OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE FIRST CONSTITUTIONAL CONVENTION OF NORTH DAKOTA 223-24 (1889). The purpose of the residency requirement was to block "any carpet baggers in our Supreme Court." *Id.* at 222. After another delegate argued, "What we desire on the Supreme Bench is as much ability as possible," a floor amendment to fix the requirement at three years, instead of five, was adopted by a vote of 30 to 19. *Id.* at 224-25. After another delegate questioned any need to distinguish between the length of residency for voting and eligibility for the Court, a motion to delete the residency requirement altogether was indefinitely postponed. *See id.* at 226-27.

53. *See* N.D. CONST. art. IV, § 85 (repealed 1976).

54. *See id.* §§ 86, 87 (repealed 1976). Section 86, as well as other sections in the 1889 judicial article, may have been drawn from ones proposed by convention delegate Erastus A. Williams in his model draft, File 106, prepared from models secretly supplied to him by persons acting for the Northern Pacific Railroad. *See* Herbert L. Meschke & Larry Spears, *Model Constitution (Peddrick Draft #2, 1889)*, 65 N.D. L. REV. 415, art. XIII, §§ 8, 9 at 455, 486 annots. (suggesting that the statement of the Court's powers may have been derived from the proposed Montana Constitution: "Mon., VI.2" and "Mon., VI.3"). *See generally* Herbert L. Meschke & Lawrence D. Spears, *Digging for Roots: The North Dakota Constitution and The Thayer Correspondence*, 65 N.D. L. REV. 343 (1989). "The constitution finally adopted by the convention followed the phrasing of [Harvard Professor] Thayer's draft in many places." ROBINSON, *supra* note 9, at 209.

D. OUR FIRST SUPREME COURT

The statewide election on October 1, 1889, to adopt the first state constitution also chose the first three justices who took office on November 4, 1889: Alfred Wallin of Fargo, Guy C.H. Corliss of Grand Forks, and Joseph M. Bartholomew of LaMoure.[55]

Justice Bartholomew had a primary part in starting the machinery of state government. When the newly elected state officials gathered in Bismarck on November 4, 1889, they were briefly baffled about how to begin their offices.

After the October election results were certified to President Benjamin Harrison, a formal presidential proclamation of statehood was needed. President Harrison signed the proclamations for both North and South Dakota at 3:40 p.m. on Saturday afternoon, November 2. Secretary of State James G. Blaine immediately telegraphed the news of the signing of the proclamation to Bismarck, advising that "North and South Dakota entered the Union at the same moment."[56]

The official copy of the proclamation reached Bismarck on Monday, November 4, 1889, where the elected state officials waited. Then:

> They were confronted by a dilemma as to how they were to be sworn in. The territorial officials had been put out of office by the proclamation creating the state, whereas there were as yet no state officials. Justice Bartholomew solved the problem by sending for a notary public. W.T. Perkins was brought in and administered the oath to Justice Bartholomew.[57]

A newspaper account continued:

> Justice Bartholomew . . . then went to the assembly room, where the officers and a number of citizens were in waiting.
>
> [Territorial] Governor [and Governor-elect of South Dakota] Mellette here introduced Justice Bartholomew stating that but one act remained to set the state machinery of North Dakota in motion, and that Secretary Richardson would now read the list of officials who would be sworn in.[58]

Justice Bartholomew then swore in the other first officials of the State of North Dakota.[59]

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55. *See* LOUNSBERRY, *supra* note 1, at 445. Appendix A lists all the Justices and the years they served the North Dakota Supreme Court.

56. W.B. HENNESSY, HISTORY OF NORTH DAKOTA 93 (1910).

57. *Id.* at 93-94.

58. *They Swear*, BISMARCK TRIB., Nov. 5, 1889, at 3.

59. *See* HENNESSY, *supra* note 56, at 94.

After taking the oath and "having cast lots for length of term of office as prescribed by the Constitution of the State," the first official action of the Court was to appoint R.D. Hoskins as clerk of the Court,[60] as the new Constitution authorized.[61] Their second official action set their first term of court to be held on the second Tuesday of January 1890 at Fargo.[62]

E. THE FIRST JUSTICES

Chief Justice Corliss (1889-1898) was born in New York state in 1858, studied law there in a lawyer's office, and joined the New York bar in 1879.[63] At age thirty-one, he became North Dakota's youngest justice ever. Justice Bartholomew (1889-1900) was born in Illinois in 1843, studied law with a lawyer in Iowa after service in the Union army in the Civil War, and began practice in Iowa in 1869.[64] Justice Wallin (1889-1902) was born in New York state in 1836, obtained his legal education at the University of Michigan, and joined the Illinois and Michigan bars in 1862.[65] All three first justices came to northern Dakota Territory in 1883.[66]

The first three justices were apparently scholars.[67] Their Court was described as "one of great ability" by Lounsberry.[68] He declared:

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60. *See* Minutes of the Supreme Court of North Dakota vol. A (Nov. 4, 1889) (on file with the clerk of the North Dakota Supreme Court) [hereinafter Supreme Court Minutes].

61. *See* N.D. CONST. art. IV, § 93 (repealed 1976) ("There shall be a clerk . . . who shall hold . . . office[] during the pleasure of said judges, and whose duties and emoluments shall be prescribed by law and by rules of the supreme court not inconsistent with law."). The judicial article, as amended and revised in 1976 (see chapter 599 of 1977 North Dakota Laws), no longer mentions a clerk of the Supreme Court, but the statutes still direct appointment of one and specify the duties of the office. *See* N.D. CENT. CODE § 27-03-01 (1991). The revised judicial article now directs appointment of a court administrator, and says "the powers, duties, qualifications, and terms of office of the court administrator, and other court officials, shall be as provided by rules of court," "[u]nless otherwise provided by law." N.D. CONST. art. VI, § 3.

62. *See* Supreme Court Minutes, *supra* note 60.

63. *See* SKETCH, *supra* note 2, at 22.

64. *See* SKETCH, *supra* note 2, at 23. Justice David Morgan (1901-1911), a former Devils Lake practitioner and 11-year district judge, was elected in 1900 to succeed Justice Bartholomew. *See* SKETCH, *supra* note 2, at 26. Ill health caused Justice Morgan to retire. *See* SKETCH, *supra* note 2, at 26.

65. *See* SKETCH, *supra* note 2, at 24. Mr. Newton asserted "none of the first three judges elected was a law school graduate, and while all were learned men, their formal education was not extensive." Newton, *supra* note 5, at 5.

66. *See* SKETCH, *supra* note 2, at 22-24. There may be some question whether Chief Justice Corliss resided in northern Dakota Territory continuously from 1883. *See* LOUNSBERRY, *supra* note 1, at 396-97. Or did Lounsberry confuse the effect of the residency requirement on Corliss with that of the age requirement? *See* Newton, *supra*, note 5, at 4-5.

67. "Although these three were learned men, none of them was a law school graduate." Newton, *Appellate Practice*, *supra* note 4, at 156.

68. LOUNSBERRY, *supra* note 1, at 449. Mr. Newton adds: "Judge Corliss . . . was a great student of Shakespeare and many of the first graduates of the University of North Dakota tell of his Shakespearian Lectures and portrayal of the characters in Shakespeare's plays." Newton, *supra* note 5, at 5.

"Perhaps it would not be extravagant or beyond the bounds of truth to say it was one of superior ability," reasoning that the "frequent reference to their decisions, as clear interpretations of the law, found in the reports of other states is proof of this."[69]

Justice Corliss drew a three-year term, the shortest of the staggered terms, when the justices "cast lots for length of term of office as prescribed by the Constitution" after they took office.[70] "By a unique [1889 constitutional] provision [Section 93]—and one peculiar to North Dakota—no chief justice was to be elected by the people," Lounsberry explained, "but the judge having the shortest term to serve, not holding his office by appointment or election to fill a vacancy, should be" the Chief Justice.[71]

Thus, the comparatively young Justice Corliss became the first Chief Justice by sheer chance. The mechanical method of designating the justice with the shortest term to be Chief Justice continued virtually unchanged for over seventy-five years.

F. TERMS OF COURT

The first Supreme Court rode a circuit. Lounsberry described it as "a 'migratory' court" that "had no legal home from its organization until 1909."[72] The 1889 judicial article directed three terms be held annually, one each at Bismarck, Fargo, and Grand Forks unless otherwise directed by law.[73] The 1909 legislature directed otherwise by requiring the Court to hold two general terms each year in April and in October at the "seat of government" in Bismarck.[74]

Later, the North Dakota Revised Code of 1943 directed the Court to hold "general terms" monthly at the state capitol, except in July and August.[75] In recent times, the Supreme Court has heard appellate arguments nearly continuously from the first of September through the end of June each year at its courtroom in the state capitol. In the last two decades, the Court has sometimes scheduled additional one-day terms elsewhere at schools and colleges for educational purposes, especially

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69. LOUNSBERRY, *supra* note 1, at 449.

70. *See* Supreme Court Minutes, supra note 60; *see also* N.D. CONST. art. IV, § 92 (repealed 1976).

71. LOUNSBERRY, *supra* note 1, at 444.

72. LOUNSBERRY, *supra* note 1, at 446.

73. *See* N.D. CONST. art. IV, § 88 (repealed 1976)

74. *See* LOUNSBERRY, *supra* note 1, at 446; 1909 N.D. Laws ch. 72, at 64.

75. N.D. REV. CODE § 27-0206 (1943) (derived from N.D. SUP. CT. PRAC. R. 2, and repealed by 1981 N.D. Laws ch. 316, § 2, at 854).

some arguments each October at the Law School in Grand Forks.[76] The Court should hold more educational terms around the state.[77]

G. LEGAL EDUCATION

The first three justices were born and educated in the law elsewhere, like their successors for over thirty years.[78] Not until 1923, when Justice William Nuessle (1923-1950) took office, did any justice complete a legal education in this state. While Justice Nuessle had been born in New York state in 1878, he moved in childhood to Dakota Territory and received his law degree from the University of North Dakota in 1901.[79] Since 1922 more than two-thirds of the justices have been trained in a law office in this state[80] or educated at the UND Law School, although there has never been a Court with all members educated in the law in North Dakota.[81]

Chief Justice Corliss in August 1898 became the first to leave the Court, when he returned to Grand Forks to practice and to teach law.[82] With the encouragement of Webster Merrifield, then president of the young University of North Dakota, ex-Justice Corliss organized the Law School and became its Dean in October 1899.[83]

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76. "[Dean W. Jeremy] Davis said the Supreme Court has been visiting UND during Homecoming for at least 20 years [to hear two cases a year]. Previously, the court would make its visit to the law school in the spring." Darrel Koehler, *N.D. Supreme Court Hears Cases at UND*, GRAND FORKS HERALD, Oct. 15, 1999, at 4C.

77. Fully 61 percent of the people surveyed [by the ABA recently] said they wanted to learn more about the justice system. Of that number, 75 percent said that they wanted to learn directly from judges. These results show that the public is aware of knowledge gaps and is willing to be educated, preferably by the judges they are shown to hold in high esteem.

Philip S. Anderson, *Time to Open the Electronic Eye*, A.B.A. J., June 1999, at 8.

78. *See* SKETCH, *supra* note 2, at 28-41.

79. *See* SKETCH, *supra* note 2, at 42. "One member of the first class [at the Law School in 1899] . . . was William Nuessle, who was later to become a prominent figure in the state's judicial history." Charles L. Crum, *The History of the University of North Dakota School of Law*, 35 N.D. L. REV. 5, 6 (1959).

80. *See* SKETCH, *supra* note 2, at 11-13. For a brief account of how a Supreme Court Justice occasionally acted as a mentor for someone "reading the law," see Hon. Gail Hagerty, *Reading the Law*, GAVEL (Journal of N.D. State Bar Ass'n), June/July 1998, at 16-17. This account tells how Justice James Morris (1935-1964) mentored Orville A. Schulz (later Judge Schulz) in the study of law.

81. *See* generally SKETCH, *supra* note 2.

82. *See* SKETCH, *supra* note 2, at 22. Governor Devine appointed a Bathgate lawyer, Newton C. Young (1898-1906), to replace Justice Corliss. *See* SKETCH, *supra* note 2, at 25. Justice Young resigned in 1906 to practice law in Fargo. *See* SKETCH, *supra* note 2, at 25.

83. *See* Fifth Biennial Report of the President of the Board of Trustees of the University of North Dakota (For the Fiscal Period Ending June 30, 1898), *in* PUBLIC DOCUMENTS OF THE STATE OF NORTH DAKOTA, Public Document No. 13, at 4 (1899). When Justice Corliss left the Court, he also joined the executive committee that began the State Bar Association in 1899. Minutes of Executive Committee Meeting (Dec. 28, 1899), *in* PROCEEDINGS OF THE NORTH DAKOTA BAR ASSOCIATION (W.H. Thomas compiler & ed., 1905).

> Corliss was a man of great professional ability, striking appearance, and a personal charm reflected in the writings of those who came in contact with him. He had served as the first Chief Justice of the North Dakota Supreme Court, holding that position from 1889 to 1898. However, his bid for re-election failed—a great loss, since during his tenure on the bench he had authored a series of opinions still notable for their clarity, incisiveness, and grasp of legal principle—and he returned to Grand Forks about the time the school opened to resume private practice. The circumstance of his availability, plus his distinguished background made him the logical and natural choice for the deanship of the new school.
>
> His tenure as dean was relatively brief, from 1899 to 1903. Judge Corliss was engaged in private practice when he assumed the deanship, and found it desirable to continue. This proved to be a factor militating against his administrative effectiveness, and most of the day-to-day work of running the school fell on the youthful shoulders of John E. Blair.[84]

At first, graduation from the UND Law School "carried with it the consequences of automatic admission to the bar—a concession designed to encourage attendance at the school. . . ."[85] But in 1905, upon recommendation by Dean Bruce, "the diploma privilege, whereby every graduate secured automatic admission to the bar, was abolished in place of the far more appropriate system of independent examinations conducted under the aegis of a State Bar Board."[86]

> This was a reform of very considerable moment to the legal profession of the state, for it applied not only to students of the school but also to those who were taking the alternate route of entering practice by the older method of office study. It meant that former lax practices in regard to the admission of such students could be gradually tightened.[87]

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84. Crum, *supra* note 79, at 7-8.

> Corliss . . . continued his association with the school for several years longer, alternating between the classroom and a busy practice. He then moved to Oregon, able to look back with satisfaction on a career which had given him the experience of being both the first Chief Justice of the State of North Dakota and the first dean of the state's law school. He had organized the school, he had seen it through the difficult opening years, he had found a competent man [professor A.A. Bruce] to continue the work of development on the full-time basis that was necessary; all in all, he had made no small contribution.

Crum, *supra* note 79, at 7-8.

85. Crum, *supra* note 79, at 7.

86. Crum, *supra* note 79, at 9-10.

87. Crum, *supra* note 79, at 10.

Since 1895, applicants for admission to the bar had been examined in open court or by a committee of not less than three members appointed by the Court.[88] The 1905 legislature established a Board of Bar Examiners appointed by the Supreme Court.[89] "No appropriation was made for [the] Board but per diems and expenses of the Board were paid for out of the examination fees."[90]

The Supreme Court, in 1905, appointed UND Law School Dean Andrew A. Bruce of Grand Forks, practitioner John Burke of Devils Lake, and practitioner Emerson H. Smith of Fargo to the Bar Board.[91] Except for the period from 1919 to 1923, when the governor of the state was authorized to appoint Bar Board members,[92] the Supreme Court has continued to appoint the Board.[93]

As the legal educations of at least two of the first three justices illustrate, not all applicants for admission to the bar attended a law school; some studied law with a judge or lawyer as a mentor. The last justice to obtain his legal learning by "reading the law" was Thomas J. Burke (1939-1966), who "received his legal training studying under Usher L. Burdick and his father, John Burke."[94] "Reading the law" is no longer allowed; since 1983, a juris doctor or equivalent degree from an accredited law school has been required for admission to the bar.[95]

H. USUALLY UNDERPAID

Justice Corliss's resignation in 1898 was the only change on the Court before the turn of the century. Justice Corliss left the Court, Lounsberry reported, "mainly because of the inadequacy of the compensation allowed to the judges."[96] To begin, their annual pay was only $4,000 each.[97] From the start, the justices have been usually underpaid. The 1903 legislature increased a justice's pay to $5,000 annually,[98] but that was hardly enough. When Justice Edward Engerud (1904-1907)

88. *See* J.H. Newton, *The North Dakota Bar Board*, 35 N.D. L. REV. 220, 220 (1959) ("No examination fee seems to have been required but legend has it that it was the duty of the successful candidates to entertain the examiners in a fitting manner.").

89. *See* 1905 N.D. Laws ch. 50, § 1, at 80.

90. Newton, *supra* note 88, at 220.

91. *See* Newton, *supra* note 88, at 220.

92. *See* Newton, *supra* note 88, at 220-21; *see also* 1923 N.D. Laws ch. 134, at 103; 1919 N.D. Laws ch. 69, at 80.

93. *See* Newton, *supra* note 88, at 220-21.

94. SKETCH, *supra* note 2, at 49.

95. *See* ADMISISION TO PRAC. R. 1(A)(4). See the 1984 edition of the North Dakota Court Rules for commencement date of the requirement.

96. LOUNSBERRY, *supra* note 1, at 449-50.

97. *See* SKETCH, *supra* note 2, at 19; 1895 REV. CODE, § 379.

98. *See* SKETCH, *supra* note 2, at 19; 1903 N.D. Laws ch. 194, § 2, at 267.

resigned to return to practice,[99] Lounsberry again reported "he made known the fact that financial considerations largely controlled," and "[n]o doubt the meager remuneration paid by the state . . . contributed also to the decision."[100]

The legislature approved very few salary increments for justices during the first half of the twentieth century.[101] A 1917 increase to $5,500 annually was repealed by a depression-era initiated measure in 1932 that put future judicial salaries back to $5,000 each.[102] Litigation took place in 1918 over an additional $500 annually appropriated for unvouchered expenses, but it was constitutionally upheld as "additional compensation."[103] The practice of appropriating some form of additional compensation, besides the statutory salary for justices and judges, persisted for a long time, but it did not help a great deal.[104]

Not until 1944 was a justice's salary restored to $5,500.[105] In 1949, the legislature added a helpful retirement pension for judges and justices who paid five percent of their salary into a special Judicial Retirement Fund and who retired after age seventy with eighteen years of service.[106] Under that plan, a retiring judge who qualified was to receive a pension "equal to one-half of the salary provided by law for his office at the time of his retirement."[107] In 1959, this retirement plan was amended to qualify a judge retiring at age sixty-five with over twenty years of service, or older and with fewer years of service, up to age seventy, with

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99. *See* SKETCH, *supra* note 2, at 28. Justice Engerud had been appointed to replace Justice Cochrane (who died in office), and had been elected to serve the remainder of Justice Cochrane's term. *See* SKETCH, *supra* note 2, at 28. Justice Engerud was succeeded by Justice Burleigh F. Spaulding (1907-1914), who was appointed by the governor, elected in 1908, but defeated in the 1914 general election. *See* SKETCH, *supra* note 2, at 31.

100. LOUNSBERRY, *supra* note 1, at 454. Not only poor pay but also poor working conditions may have contributed to the early departure of justices from the Court in those years. In 1908, D.M. Slattery, Superintendent of the State Capitol Building, in a "Memorandum of Needed Repairs" with his Report "To The Honorable Board of Trustees of Public Property," complained about the condition of the Law Library:

> Judges' chambers need awnings over windows. Plate glass windows needed, as ordinary windows will not stand the high winds. Several windows have been blown in and in two instances judges were injured by the flying glass. The plaster is continually falling and unless something is done the books are bound to be damaged—many already have been.

SEVENTH BIENNIAL REPORT OF THE SECRETARY OF STATE OF NORTH DAKOTA (1908). Fortunately, the Court's working conditions have improved since 1908.

101. *See* SKETCH, *supra* note 2, at 19.

102. *See* 1917 N.D. Laws ch. 224, § 1, at 311; 1933 N.D. Laws, at 503.

103. North Dakota *ex rel.* Langer v. Kositzky, 166 N.W. 534, 537 (N.D. 1918).

104. *See* 1967 N.D. Laws ch. 52, § 1, at 68 (authorizing $500 each for January 1, 1967 to June 30, 1967, "for expenses . . . without the filing of any itemized voucher or statement"); 1969 N.D. Laws ch. 276, § 1, at 534 (authorizing $2,000 annually); 1971 N.D. Laws ch. 295, § 1, at 684 (authorizing "additional salary" of $4,000 annually).

105. *See* 1944 N.D. Laws ch. 33, § 1, at 37.

106. *See* 1949 N.D. Laws ch. 206, §§ 1-2, at 267 (codified as amended at N.D. CENT. CODE §§ 27-17-01, 27-17-02 (1991)).

107. *Id.* § 4.

ten years of service. The amendment also redefined the pension amount with an escalator clause: "equal to fifty percent of the annual salary payable from time to time to judges of the classification the retired judge last had" before retirement.[108]

Then, the 1973 legislature authorized $10,000 yearly "additional salary" for each justice and district judge, but also tinkered with the existing retirement plan.[109] The judges and justices appreciated the long overdue and much needed raise, but some worried about potential cutbacks in their retirement pay.[110]

The 1973 legislation moved all new judges to the Public Employee Retirement System that still covers retirement of trial judges and justices.[111] That legislation also re-worded the escalator clause of the 1949 pension plan to say that a vested incumbent judge reelected after July 1, 1973, would receive a pension "equal to fifty percent of the annual salary payable to judges of the classification the retired judge had at the time he retired. . . ."[112] As incumbent judges with over ten years of service were reelected in elections after 1973, the changed wording in the escalation clause cast doubt on escalation of their future pay during retirement.

Eventually, five long-term district judges, and a widow of another, all of whom had been reelected after 1973, brought a class action for all judges similarly situated to resolve the uncertainty, to clarify the statute still authorized post-retirement escalation of their retirement pay, and to defend their promised retirement benefits from diminishment.[113] In August 1979, these judges got a judgment, "for all judges of the supreme court and of the district court . . . similarly situated by reason of commencement of service as judge prior to July 1, 1973, reelection as judge after July 1, 1973, and subsequent retirement," that declared the statute still authorized post-retirement escalation of their retirement benefits.[114] Although not named as parties, two Supreme Court justices were beneficiaries of this class judgment that preserved their future

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108. 1957 N.D. Laws ch. 210, § 1, at 430.

109. 1973 N.D. Laws ch. 246, § 2, at 610 (authorizing "additional salary" of $10,000 annually); § 3 (redefining retirement rights); §§ 4-15, at 611-15 (additional amendments). For background, see 1973 REPORT OF THE NORTH DAKOTA LEGISLATIVE COUNCIL 147-54.

110. *See* Judicial Council Minutes 216 (June 20, 1973) (on file with North Dakota Supreme Court Administrator's Office).

111. *See* 1973 N.D. Laws ch. 246, §§ 1(2), 10, at 610, 613; N.D. CENT. CODE § 54-52-06.1 (1989 & Supp. 1999).

112. 1973 N.D. Laws ch. 246, § 3, at 610; N.D. CENT. CODE § 27-17-01(3) (1991).

113. *See* Complaint, Ilvedson v. North Dakota (4th Jud. Dist. N.D. Aug. 14, 1979) (Civ. No. 28558) (on file with Burleigh County Clerk of District Court, Bismarck, N.D.).

114. *See* Judgment, *Ilvedson* (No. 28558) (on file with Burleigh County Clerk of District Court, Bismarck, N.D.).

retirement benefits, even though their regular salaries remained abysmally low.[115]

The stingy attitude of the legislature toward its co-equal branch of government is shown by this sorry trend of appropriations for judicial compensation in this state. While some substantial salary increases have been made in recent years,[116] North Dakota justices and judges remain, sadly, among the lowest paid in the nation.[117]

I. OFTEN OVERWORKED

Despite poor pay, justices often have been among the hardest-working lawyers in the state. In 1917, Lounsberry relied on an unnamed "citizen of Bismarck who investigated the matter" to depict the extraordinary efforts of the Court at that time: "Worked like horses in harvest! They work unremittingly to keep up the calendar and avoid the delay which is incident to appellate practice!"[118]

The Supreme Court had written and published 221 opinions in 1915, and then 243 in 1919.[119] Still, those demanding levels of effort went unmatched for quite awhile. After 1919, the work of the Court tapered off and became less burdensome for over half a century. As one example, the 1947 Court wrote and published only thirty-eight opinions.[120]

The justices during part of the mid-century time, according to Supreme Court lore, also displayed a different mien than do members of the modern Court.

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115. The outcome of the lawsuit also could affect retirement benefits for at least two other judges now serving in the state, although neither is named as a plaintiff in the case. They are Supreme Court Chief Justice Ralph Erickstad and Supreme Court Justice William Paulson. Both began their judicial service prior to 1973 and have been re-elected since 1973.

Hal Simons, *N.D. Judges Sue Over Pension Cuts*, FARGO FORUM, June 30, 1979, at 9. Before 1979, the last pay increase had set a justice's annual salary at only $36,800 and a district judge's at only $34,500. *See* 1977 N.D. Laws ch. 255, at 598. No judicial salary increase had been authorized by the 1979 legislative assembly.

116. 1999 North Dakota Laws chapter 2, section 7 increased a justice's salary to $83,807 annually beginning July 1, 1999, and to $85,483 beginning July 1, 2000. Currently, federal appellate judges on the comparable United State Courts of Appeal receive $145,000 annually. *See* 5 U.S.C.A. § 5332, sch. 7 (West Supp. 2000). A North Dakota justice gets less than 60% of that corresponding level of compensation.

117. *See* 25 SURVEY OF JUDICIAL SALARIES 1 (Spring 1999). The national average salary for a state supreme court justice is $107,905 and the median is $109,842. *See id.*

118. LOUNSBERRY, *supra* note 1, at 446.

119. Search of West's North Dakota Law on Disk (database containing only North Dakota Supreme Court decisions) (search for records containing 1915 in DATE field).

120. Search of West's North Dakota Law on Disk (database containing only North Dakota Supreme Court decisions) (search for records containing 1919 in DATE field); Search of West's North Dakota Law on Disk (database containing only North Dakota Supreme Court decisions) (search for records containing 1947 in DATE field).

> They filed in and took their seats. The Chief Justice nodded to the appellant's attorney who made his argument without a comment or question from the bench. When that attorney sat down, the Chief Justice nodded to the appellee's attorney, who also argued without interruption and sat down. After a nod and an uninterrupted rebuttal, the Chief Justice announced the case would be taken under advisement, the only words spoken from the bench before they filed out.

Reportedly, too, one justice did not read the briefs before oral argument, allegedly to avoid prejudging the case.[121]

No doubt there have been some active and vigorous justices among the members of nearly every Court. But it is evident that today's justices typically have better habits of preparing thoroughly, probing extensively at oral argument, and producing their opinions with more dispatch than during some past times.

During the last two decades, the Court again has had a heavier workload to decide the increasing number of appeals and to supervise a judicial system with burgeoning caseloads.[122] Since 1981, the Court has produced and published more than 200 opinions every year, peaking at 273 written opinions in 1994.[123]

Justices continue to be often overworked and usually underpaid.

J. CONTINUITY

The Supreme Court has been favored with superior service from its personnel and members.

There have been only four clerks of the Supreme Court in over a century: Robert D. Hoskins (1889-1917); John Henry Newton (March 1917 to October 1968); Luella Dunn (October 1968 to July 1992); and Penny Miller (July 1992 to the present).[124] All except Luella Dunn were

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121. Compare today's standards. "Competent representation [by a lawyer] requires the legal knowledge, skill, *thoroughness and preparation* reasonably necessary for the representation." NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT Rule 1.1 (2000) (emphasis added). A justice or judge, who is but a lawyer placed in a position of public responsibility and power, has an equivalent obligation of competence and diligence. *See* NORTH DAKOTA CODE OF JUDICIAL CONDUCT Canon 3 (1980) ("A judge shall perform the duties of judicial office . . . diligently.").

122. Besides hearing appeals and writing opinions, the current Court holds a weekly conference to deal with and determine numerous other matters, including procedural motions in pending appeals, petitions for writs, petitions to supervise trial courts, recommendations for discipline of attorneys and judges, petitions and recommendations for procedural changes, personnel and policy matters for the judicial system, and similarly related and subsidiary work. Extensive reading, research, and review is often required to prepare for this weekly conference.

123. Search of West's North Dakota Law on Disk (database containing only North Dakota Supreme Court decisions) (search for records containing 1981 in DATE field and a separate search for each year thereafter).

124. Records of the Clerk of the Supreme Court of North Dakota.

lawyers. Including his prior time from April 1, 1913 as a deputy clerk,[125] Newton served fifty-five years in the clerk's office; and including her time as a deputy from September 1947, Dunn served the Court nearly forty-five years.[126]

Five justices served on the Court for more than a quarter century each: Justice Adolph M. Christianson (1914-1954, thirty-nine years and one month); Justice James Morris (1935-1964, thirty years); Justice Ralph J. Erickstad (1963-1992, thirty years); Justice William Nuessle (1922-1950, twenty-eight years); and Justice Thomas J. Burke (1939-1966, twenty-seven years, three months).[127]

This continuity by justices and staff has contributed to the institutional stability of the Court and the judicial system, where continuity and stability are valuable assets.[128]

K. OTHER PUBLIC SERVICE

Each long-serving justice had a noteworthy career. But some served the public in ways besides direct service on the Court.

For one, Justice Christianson, while on the Court, played an important role in administering the national relief program in North Dakota during the Depression.

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125. [Y]ours truly came to Bismarck in April 1913 to become deputy clerk under Mr. Hoskins and served as such until March, 1917, when upon the resignation of Mr. Hoskins I was appointed clerk and have served until the present time. The clerk serves during the pleasure of the Court and in some way or other I do not seem to have incurred their displeasure.

Newton, *supra* note 5, at 5-6.

126. Luella Dunn became a national leader in her field. She was a charter member of the National Conference of Appellate Court Clerks, served on its Executive Committee (1973-74), and served as its president (1982-83). *See Lu Dunn to Retire*, GAVEL (Journal of N.D. State. Bar Ass'n), April/May 1992, at 24. She was a member of the National Conference of Bar Examiners and served on its Executive Committee and as Treasurer in 1978. *See id.*

Penny Miller, Luella Dunn's successor, is similarly taking on a national leadership role with the National Conference of Appellate Court Clerks, having been elected Vice-President in 1999, placing her in position to become its president in 2001.

127. *See* SKETCH, *supra* note 2, at 6-10, 18.

128. Until 1968, when the first deputy was added to the Clerk's office, the staff of the Court mainly consisted of the Clerk and the secretaries for each of the five justices. *See* Figures compiled by North Dakota Supreme Court Administrator's Office (on file with North Dakota Supreme Court Administrator). Since then five more positions have been added in the Clerk's office. *See id.* In 1971, the Court Administrator's office began, and 15 positions have been added there. *See id.* Among the judicial secretaries and clerical staff for the Clerk and Administrator's office, there have been a number who served the Court continuously for many years. *See id.* Those remembered with 25 years or more of service include: Rosaleen Fortune began 1959 and retired 1990 as a judicial secretary; Evaleen Klaudt began 1965 and retired 1995 as a judicial secretary; Mary Lee, Administrator's staff, began 1972 and retired 1997, but still works part-time; and Mary Lou Splonskowski, Administrator's staff, began 1974 and still there in 1999. *See id.* Two others still working at the court have nearly 25 years of service: Marla Laxdal began in the Clerk's office in 1975, and Marcella Kramer began in the Library in 1976. *See id.* Elmer J. DeWald served as bailiff, librarian, and reporter from 1962 to April 1990. *See id.*

> By the end of 1932 the counties and private charity could no longer carry the relief burden. In January, 1933, Governor Langer appointed a state emergency relief committee with Supreme Court Judge A.M. Christianson as chairman. The 1933 legislature appropriated no money for relief, but [Justice] Christianson's committee, working feverishly in the crisis, borrowed $492,000 from the Reconstruction Finance Corporation and organized county relief committees to distribute the funds. On June 1, 1933, the committee began to receive its money from the Federal Emergency Relief Administration (F.E.R.A.), headed by Harry L. Hopkins.[129]

Justice Christianson "established a close personal relationship with President Roosevelt's highest confidant, Mr. Harry Hopkins [and] . . . [f]unds from the FERA were turned over to [Justice] Christianson to administer . . . to assist North Dakota farm families. . . ."[130] In late 1934, Justice Christianson's committee incorporated the North Dakota Rural Rehabilitation Corporation to extend credit to farmers and ranchers who could not get credit elsewhere, and the Corporation carried on other rural rehabilitation projects.[131] Justice Christianson served as president of this Rural Rehabilitation Corporation while on the Court from October 1934 until he passed away in February 1954.[132]

Luella Dunn became secretary, treasurer and a member of the board of directors of the Rural Rehabilitation Corporation while serving as Clerk of the Supreme Court and continues to hold this corporate position after retirement.[133] Another Supreme Court Justice, Obert Teigen (1959-1974), also served as a director of the Rural Rehabilitation Corporation while on the Court.[134] Justice Robert Vogel (1973-1978) became a director shortly after he retired and currently continues in that capacity.[135]

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129. ROBINSON, *supra* note 9, at 406.

130. G. LEONARD DALSTED, HISTORY OF THE NORTH DAKOTA RURAL REHABILITATION CORPORATION 2 (July 1996).

131. *See id.* at 3, 8.

132. *See id.* at 31.

133. *See Lu Dunn To Retire*, *supra* note 126, at 24.

134. *See* DALSTED, *supra* note 130, at 36. Justice Teigen was appointed in January 1959 to replace Justice Gudmundur Grimson, who resigned. *See* SKETCH, *supra* note 2, at 52. Justice Teigen had been a Devils Lake practitioner, F.B.I. agent, states attorney, and a district judge for five years. *See* SKETCH, *supra* note 2, at 52.

135. *See* DALSTED, *supra* note 130, at 37.

Justice Christianson's welfare work and his Rural Rehabilitation Corporation were unique in the Court's history.[136]

II. MEANDERING INTO THE TWENTIETH CENTURY

For the first two-thirds of the twentieth century, the institutional character of the Supreme Court and the judicial system did not change much, and the few important changes came randomly and slowly.

A. NO-PARTY BALLOT

At first, candidates for election to the Supreme Court were nominated by each political party's convention. Events changed this.

In August 1906, Governor E.Y. Sarles named Justice John Knauf (1906) to the position[137] opened by the resignation of Justice Newton C. Young (1898-1906) to return to practice in Fargo.[138] Justice Knauf had already been nominated by the Republican convention for election to that position. The story of Justice Knauf's nomination seems best told by former Congressman Usher L. Burdick in his 1956 biographical summaries of *Great Judges and Lawyers of Early North Dakota*:[139]

> The Republican Convention at Jamestown in 1906, was largely controlled by Alex McKenzie and Judson LaMoure, and John Knauf was not their choice for the Supreme Court position. Both registered their opposition and it was because John Knauf had had several cases against the N.P. Railroad and was very successful in those cases.
>
> The first choice of these two political leaders was Tracy Bangs of Grand Forks, but the Republicans in the Convention would not stand for Bangs, as he was too prominent in the Democratic party, and, in fact, was all there was to the Democratic party. Several friends of Knauf canvassed the delegates and Knauf was nominated against the opposition of these political leaders.[140]

According to historian Lounsberry (however confusingly), Knauf had been nominated over Charles J. Fisk, a Democrat and district judge

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136. Query whether, today, this kind of extra-judicial public service might provoke questions of proper judicial conduct and separation of powers. Compare today's standards. *See* NORTH DAKOTA CODE OF JUDICIAL CONDUCT Canon 4(c)(2) (2000); Judicial Conduct Comm'n v. Grenz, 534 N.W.2d 816 (N.D. 1995) (censuring former trial judge for uncompensated membership on board of municipal airport authority and for legal services to it while holding judicial office).

137. *See* LOUNSBERRY, *supra* note 1, at 452.

138. *See* SKETCH, *supra* note 2, at 25.

139. *See* USHER L. BURDICK, GREAT JUDGES AND LAWYERS OF EARLY NORTH DAKOTA (1956).

140. *Id.* at 4.

at Grand Forks, despite efforts of the "bar in the northern part of the state [who] clamor[ed] for the nomination of Fisk and to take the judiciary out of politics."[141] In any event, Justice Fisk (1907-1916) defeated Knauf at the November 1906 election.[142]

Knauf was defeated by false reports "that he was a boozer and a libertine," Burdick's book submits, although he "did not then, nor has not since, used intoxicating liquors of any character."[143] "His personal life was then, and always continued to be, exemplary. . . . Here is a case where misstatements, intentional falsehoods and vicious political opposition, fanned into a state-wide hysteria, defeated one of the great men of North Dakota." [144]

After this nasty political contest, Lounsberry concluded, "[p]ublic sentiment was then ripe for a non-partisan judiciary."[145] A non-partisan-judiciary law was enacted by the 1909 legislature to forbid any references about party affiliation in petitions for nominating judges and to formulate a separate "Judiciary Ballot" to list candidates without party designation.[146] Since 1910, all judges in the state have been placed on the ballot without designation of party affiliation, and all judges have been elected on a no-party ballot.[147]

Still, as we will see, election on a no-party ballot has not always prevented political endorsements of justices.[148]

B. FIVE-MEMBER COURT

The 1889 judicial article authorized the legislature to increase the number of justices to five whenever the population of the state "shall equal 600,000."[149] Before that happened, the legislature proposed a constitutional amendment to increase the number of justices to five.[150] In 1908, while rejecting a companion proposal to increase a justice's term of office from six years to ten,[151] the people approved expanding the Court to five justices.[152]

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141. LOUNSBERRY, *supra* note 1, at 452.
142. *See* SKETCH, *supra* note 2, at 30.
143. BURDICK, *supra* note 139, at 4.
144. BURDICK, *supra* note 139, at 6.
145. LOUNSBERRY, *supra* note 1, at 452.
146. *See* 1909 N.D. Laws ch. 82, at 82; *see also* LOUNSBERRY, *supra* note 1, at 447.
147. *See* N.D. CENT. CODE §§ 16.1-06-08, 16.1-11-08 (1997 & Supp. 1999).
148. Except to campaign for their own election, judges today are also generally barred from any political activity. *See* NORTH DAKOTA CODE OF JUDICIAL CONDUCT Canon 5 (2000).
149. N.D. CONST. art IV, § 95 (repealed 1976).
150. *See* 1907 N.D. Laws, at 410; 1905 N.D. Laws, at 351.
151. *See* LOUNSBERRY, *supra* note 1, at 447.
152. *See* N.D. CONST. art. IV § 89 (repealed 1976); 1907 N.D. Laws, at 410.

To fill the two new positions thus created, Governor John Burke, the first Democratic governor of the state, appointed John Carmody (1909-1910) of Hillsboro, the second Democrat to serve on the court, and Sidney E. Ellsworth (1909-1910) of Jamestown.[153] In the November 1910 election, however, two sitting district judges, Edward T. Burke (1910-1916) of Valley City and Evan B. Goss (1910-1916) of Minot, were elected to replace the appointed ones.[154]

C. GOVERNOR-JUSTICE BURKE

Governor John Burke himself, after an illustrious political career, became a justice of the Supreme Court:

> Burke's dream was to be judge of the state's supreme court, but in 1906 he was selected by his brother Democrats to make the race for governor, and his former ambition was sublimated. The old-guard Republicans had overplayed their political hands at the Jamestown convention where the minority Republicans were ridden-over roughshod by the McKenzie machine, and that was the main reason that, with the announcement of "Honest John" for governor, the minority Republicans flocked over to him in such large numbers that he was elected. Burke's was a double triumph, because the state was overwhelmingly Republican. Further triumphs were on the way, because in 1908 and again in 1910 he was re-elected, thus establishing a new record in America, at that time, of being a Democratic governor for three successive terms in a strong Republican state.
>
> As Governor, John Burke gave the people an honest and able administration, so when President Woodrow Wilson called him to the office of United States Treasurer, the appointment met with the universal approval of his many friends in North Dakota.[155]

Burke later returned to North Dakota to practice law and, in 1924, was elected to the position vacated by Justice Harrison A. Bronson (1918-1924), who left at the end of his term to become Counsel for the State Mill and Elevator.[156] Justice John Burke (1925-1937) died in

153. LOUNSBERRY, *supra* note 1, at 455; SKETCH, *supra* note 2, at 32-33.

154. *See* LOUNSBERRY, *supra* note 1, at 455; SKETCH, *supra* note 2, at 34-35.

155. BURDICK, *supra* note 139, at 14.

156. *See* SKETCH, *supra* note 2, at 41, 44. Bronson also went to a private practice, lectured at the University of North Dakota School of Law, and authored four books on property law. *See* SKETCH, *supra* note 2, at 41.

office on May 14, 1937,[157] and P.O. Sathre was appointed to replace him.[158] Justice Sathre (1937-1938) was defeated for the position in the 1938 election by Justice John Burke's son, Justice Thomas J. Burke (1939-1966).[159]

D. THE NPL ELECTS JUSTICES

Perhaps the most colorful (and political) chapter in the chronicles of the Court came after "nonpartisan" elections to the expanded Court began.

The rising Nonpartisan League's political convention in March 1916 at Fargo endorsed three candidates for the three Supreme Court positions up for election:[160]

> Luther Birdzell, professor in the law school of the state university and a former member of the State Tax Commission, known to be a "single-taxer"; Richard H. Grace, a lawyer of Mohall having Socialist inclinations; [He was later to become a stanch Harding man.] and James E. Robinson, Fargo law partner of William Lemke, a League attorney and one of the inner circle of League leaders. Robinson was an elderly gentleman [age 75] with a flowing gray beard, known to be rather eccentric, though prominent as a crusader for judicial reforms.[161]

Historian Robert L. Morlan described the context of the election:

> With Lynn Frazier and most of his associates on the [League's] state ticket looking more and more like "sure things" in November, the campaign during the fall months boiled down for the most part to a single issue. The Good Government League and the opposition press decided to concentrate their efforts on keeping control of the state Supreme Court, and the

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157. *See* SKETCH, *supra* note 2, at 44. Also see ERLING NICOLAI ROLFSRUD, NOTABLE NORTH DAKOTANS 46-50 (1987) ("Mister Clean"), for another biographical sketch of Justice John Burke. Rolfsrud reported that a monument to Justice Burke was placed in Statuary Hall in the nation's Capitol at Washington, D.C.

158. *See* SKETCH, *supra* note 2, at 48.

159. *See* SKETCH, *supra* note 2, at 49.

160. Our research of Bismarck Tribune newspaper microfilms for the period from January 1 through June 1916, turned up no reports that other political parties endorsed candidates for the state Supeme Court. The Tribune reported a convention by the Progressive Republicans on January 18, the Nonpartisan League on March 31, and the Democrats in April of 1916. Only the League was reported to have endorsed Supreme Court candidates, but the May 28, 1916, Bismarck Tribune, in a story, "More petitions have been filed," listed "E.B. Goss, Bismarck, Supreme Court Justice" under the heading of "Republicans" who had filed their nominating petitions, and listed "C.J. Fisk, Bismarck, Chief Justice of the Supreme Court" under the heading of "Democrats" who had filed. BISMARCK TRIB., May 28, 1916, at 13.

161. ROBERT L. MORLAN, POLITICAL PRAIRIE FIRE 52-53 (1955) (recounting the ascent of the Nonpartisan League between 1915 and 1922 as a political force in this state).

> three League candidates were subjected to both abuse and ridicule. . . . Since the judges were elected on a separate nonpartisan judicial ballot, the chances were good that it would be neglected by many voters. The other three candidates for the positions on the five-man court were incumbents and on the basis of past decisions the League was certain that they would be counted upon to join with their old colleagues to strike down any "radical" acts of a League legislature.
>
> Throughout the fall months almost the entire political emphasis of the [Nonpartisan League] *Leader* was upon the absolute necessity of electing the League judicial candidates if the work of the legislature was not to be thwarted.[162]

On September 11, 1916, the Supreme Court decided a challenge to an initiated constitutional measure after a 1914 constitutional amendment authorized popularly initiated amendments. The Court ruled the new amending procedure was not intended to be self-executing and needed to be implemented by the legislature, particularly to set the number of legal voters above twenty-five percent needed to initiate a proposed amendment.[163] Because the decision "dealt a body blow to League hopes for speedy constitutional amendments regarding public ownership after the fall elections[,] . . . the net result was probably at least a further stimulus to the campaign for the election of the League candidates for the court."[164] "New judges could reverse the decision; the election of League candidates would remove both judicial and constitutional obstacles to the League program. The *Nonpartisan Leader* said: 'We've got to have a Supreme Court that will hold constitutional the laws we pass in the legislature.'"[165]

The ensuing campaign focused almost entirely on the League's endorsed judicial candidates.

> [T]he three League candidates were given the opportunity in the *Leader* to air their views on the function of the judiciary, and the result was a highly unusual exposition of jurisprudential thinking for the times. Birdzell viewed the courts as political bodies which must of necessity keep pace with modern thought and human progress, Robinson discussed his favorite theme of preference for the substance of justice over legal technicalities, and Grace propounded a doctrine of the equality

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162. *Id.* at 83.
163. *See* North Dakota *ex rel.* Linde v. Hall, 159 N.W. 281, 289 (N.D. 1916).
164. MORLAN, *supra* note 161, at 84.
165. ROBINSON, *supra* note 9, at 337.

> of the branches of government as opposed to a superiority of the courts.[166]

In November, candidates Birdzell, Grace, and Robinson handily defeated Justices C.J. Fisk, E.T. Burke, and E.B. Goss.[167] But the election brought discord to the Court.[168]

E. THE NPL AND COURT DISCORD

The three new justices asserted their terms began on December 4, 1916, apparently because "[s]everal important cases were to be decided during the month of December, and it was generally assumed that the League was eager to utilize its new majority."[169] The attorney general quickly petitioned the Supreme Court for an "orderly determination . . . of the rights of the respective contenders."[170] The three defeated justices disqualified themselves from the case, and the remaining justices called three district judges to sit for those disqualified.[171] On December 9, 1916, that temporary Supreme Court issued a per curiam opinion explaining the Court had taken jurisdiction, the remaining two justices had also decided to step aside, and two more district judges had been summoned to participate in the case.[172]

After a hearing on December 7, with four of the selected district judges present, the temporary Court also issued its decision on December 11, 1916. The Court held the term of an elected justice begins the first Monday in January of the year after they are elected.[173] The "old" Court continued to decide cases throughout December,[174] but in January 1917 the "new" Court received several petitions for rehearing those decisions. The petitions were denied.[175] One denial drew a harsh dissent from Justice Robinson, the only "new" justice to participate in the rehearings: "The case is a travesty on the administration of justice."[176]

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166. MORLAN, *supra* note 161, at 84.

167. *See* MORLAN, *supra* note 161, at 87.

168. *See* ROBINSON, *supra* note 9, at 339 ("[E]ven members of the state supreme court were not all on speaking terms with each other."). Ex-Justice Vogel believes Justice A.M. Christianson was the only justice of this era who remained on speaking terms with each of his colleagues. *See* Hon. Robert Vogel, Highlights of North Dakota Legal History, Faculty Lecture Series 1981-82 (Video copy held by Hon. Robert Vogel, Grand Forks, N.D.).

169. MORLAN, *supra* note 158, at 94.

170. North Dakota *ex rel* Linde v. Robinson, 160 N.W. 512, 512 (N.D. 1916).

171. *See id.* at 512.

172. *See id.* at 514.

173. *See id.* at 520.

174. *See* MORLAN, *supra* note 161, at 94.

175. *See* MORLAN, *supra* note 161, at 94.

176. Youman v. Hanna, 161 N.W. 797, 806 (N.D. 1917) (Robinson, J., dissenting).

F. THE NPL'S JUSTICE ROBINSON

Justice Robinson was a vivid figure who enjoyed a distinctive career on the Court. He "was a veteran of the Civil War and was seventy-five years of age when he took office. He had a full beard and looked like an Old Testament prophet."[177] "He was a large man, with flowing beard and an erect carriage."[178]

"In [Justice Robinson's] first year on the court, when he wrote the amazing total of forty-eight opinions of the court, thirty-one dissents with opinions, and twenty-nine concurrences with opinions (a total of one hundred and eight written opinions), only eight contained citations to case law."[179] He had a "colorful style," "wrote with abandon, striking out in all directions, and wrote entertainingly."[180] "[H]e was well read and had an analytical mind and was well grounded in law. . . ."[181]

> He was also well versed in the classics and the Bible, and often quoted both in his opinions. He decried the writing of long opinions and citation of a long list of authorities. He used to take pride in the fact that his opinions rarely exceeded in length over two legal size pages of typewriter paper.[182]

Yet, his eccentricities got him in trouble with his colleagues.

> Justice Robinson, . . . much to the dismay of his judicial brethern inaugurated the novel practice of publishing a weekly "Saturday Night Letter," in which he freely discussed the doings of the court in much the style of a "Personals" column of a country weekly. His comments upon the merits and demerits of his colleagues were often annoying, and his habit of publicly prejudging cases before the court resulted in numerous clashes, particularly with [Justice] Bruce. [Justice] Robinson's rather queer and certainly unjudicial letters were not infrequently a source of some embarrassment to the

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177. Hon. Robert Vogel, *Justice Robinson and the Supreme Court of North Dakota*, 58 N.D. L. REV. 83, 84 (1982). The *1919 Legislative Manual*, containing "Historical, Statistical, and Political Information" and "Published Under the Direction of Thomas Hall, Secretary of State," said of Justice Robinson, at page 558: "Elected as judicial reformer by highest vote ever given in the state, and gives the press every Saturday evening an account of the court proceedings during the week. He advocates simplifications of court proceedings and that every appeal should be decided within thirty days after it is filed."

178. Newton, *supra* note 5, at 8.

179. Vogel, *supra* note 177, at 85.

180. Vogel, *supra* note 177, at 91, 96.

181. Newton, *supra* note 5, at 8.

182. Newton, *supra* note 5, at 8.

> League as well, but the old gentleman was not to be dissuaded from proving to the world that the state now had a truly democratic court in which pomp and ceremony had presumably given way to the substance of justice and a sort of neighborly informality.[183]

When Justice Robinson felt an oral argument had gone too long, according to Supreme Court lore, he would put his hat on and turn his chair around so the speaker could only see the back of it with his hat above.[184] Other justices have been too courteous to do that, even if they sometimes thought of it.

At its 1919 annual meeting, the State Bar Association acted on resolutions, offered by a "committee appointed to take into consideration the question of a pronouncement . . . upon public questions involving the status of the legal profession in our state and other kindred questions."[185] While the resolutions did not name Justice Robinson, they clearly censured his eccentric judicial conduct:

> We desire to place upon record the condemnation of this association, of the unethical acts of one of the judges of the supreme court, in publishing his opinions in the newspapers, long before the case is decided and before the official opinion of the court is filed in regular form.[186]

The proposed resolutions drew a lengthy speech from Justice Bronson, the only justice present.[187] Although "somewhat impressed with the temperate manner in which the resolutions have been drawn," he protested:

> [I]t does hurt you and it hurts the bench when you hear band[i]ed about the thought, in the words loosely said, that the

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183. MORLAN, *supra* note 161, at 99.

184. Luella Dunn attributes this anecdote to her predecessor as Clerk, John Henry Newton. Former-Justice Vogel described Justice Robinson's courtroom behavior a little differently: "He is reputed to have worn his hat regularly in the courtroom and to have walked out of the courtroom in the middle of arguments if he thought he had heard enough from the lawyer arguing the case." Vogel, *supra* note 177, at 85 (citing BURDICK, *supra* note 139, at 8).

185. Report to the Members of the Bar Association (Aug. 21, 1919), *in* PROCEEDINGS OF THE BAR ASSOCIATION OF NORTH DAKOTA 47.

186. *See id.* at 48-49.

187. According to the *1919 Legislative Manual*, Justice Bronson had been appointed to the Court in December 1918 "to fill the vacancy occasioned by the resignation of Chief Justice Bruce," but also had been, "[i]n November 1918, with the endorsement of the Nonpartisan League, and of Organized Labor, . . . elected Judge of the Supreme Court." *See* NORTH DAKOTA BLUE BOOK 558 (1919) (containing *1919 Legislative Manual*). Justice Andrew A. Bruce (1911-1918), after serving as dean of UND Law School from 1902 to 1911, was appointed to the Court by Governor John Burke. *See* SKETCH, *supra* note 2, at 36. He resigned from the Court on December 1, 1918, to return to teaching law. *See* SKETCH, *supra* note 2, at 36. In 1922, he went to Northwestern University law School, where he taught until his death on December 6, 1934. *See* SKETCH, *supra* note 2, at 36.

> bench of this state are not upholding the ethics of the profession or pursuing the high ideals well known in American and English jurisprudence.[188]

Justice Bronson declined to vote on the resolutions, but they were "duly adopted" after a "somewhat extended discussion."[189]

Justice Robinson (1917-1922) was defeated for re-election in 1922.[190] Justice Grace (1917-1922) retired then.[191] Justice Birdzell (1917-1933) was reelected in 1922 and 1928, but resigned November 1, 1933 to become general counsel for the Federal Deposit Insurance Corporation.[192] Notwithstanding some political overtones, these three Justices certainly left a colorful legacy for the Court.

G. THE NPL'S CONSTITUTIONAL LEGACY

Still, the Nonpartisan League left an even more significant heritage for the Court. The League sponsored a constitutional amendment that still confines the Court's traditional power to declare legislation unconstitutional.

The amendment came from a raft of constitutional changes in a single resolution introduced in the 1917 House of Representatives that was controlled by the Nonpartisan League. The League feared a Supreme Court, dominated by justices linked to its opponents, might invalidate important parts of its measures to aid farmers against business interests seen as antithetical.[193] Among the organic changes introduced by the League, one was designed to prevent any legislation from being declared unconstitutional "unless at least four of the judges shall so decide."[194] The omnibus resolution passed the House by a vote of 81 to 28.[195]

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188. *See* Report to Members of the Bar Association, *supra* note 183, at 49, 51.

189. *See* Report to Members of the Bar Association, *supra* note 183, at 52.

190. *See* SKETCH, *supra* note 2, at 40. Justice Robinson was defeated by Justice Sveinbjorn Johnson (1923-1926). *See* SKETCH, *supra* note 2, at 43. Justice Johnson left the Court in 1926 to become legal counsel and professor of law at the University of Illinois, ran unsuccessfully for Illinois Attorney General in 1944, and then practiced law in Chicago. *See* SKETCH, *supra* note 2, at 43.

191. *See* SKETCH, *supra* note 2, at 39. Justice William Nuessle, who had practiced at Goodrich, been state's attorney of McLean County, and served as a district judge for 10 years, was elected to succeed Justice Grace. *See* SKETCH, *supra* note 2, at 42.

192. *See* SKETCH, *supra* note 2, at 38. The *1919 Legislative Manual*, says Justice Birdzell, "[u]pon America's entrance into the World War [I] and the inauguration of the Selective Service System, . . . was appointed chairman of the District Board for North Dakota, in which capacity he served until the final disposition of the draft organization, some three months after the signing of the armistice." NORTH DAKOTA BLUE BOOK 557 (1919) (containing *1919 Legislative Manual*).

193. *See* MORLAN, *supra* note 161, at 101-08.

194. *See* MORLAN, *supra* note 161, at 103.

195. *See* MORLAN, *supra* note 161, at 104.

While the League controlled the House, the League's opponents controlled the Senate. The Senate killed the House's omnibus proposal three days later by a vote of twenty-nine to twenty, although four non-League senators voted for it.[196] But non-League senators soon offered individual resolutions for a number of the proposed changes.[197]

Among the separate amendments submitted to voters was the one controlling how the Court could declare a law unconstitutional.[198] At the general election in November 1918, the people approved the amendment prohibiting any "legislative enactment or law of the state of North Dakota be[ing] declared unconstitutional unless at least four of the judges shall so decide."[199] Despite later revision of the judicial article in other details, this limitation remains in the Constitution.[200]

In some instances, this limitation has saved a law that a majority of the Court believed unconstitutional although two of the five justices did not. In a recent case, a majority of the Court ruled: "Because only three members of this Court have joined in this opinion, the statutory method for distributing funding for primary and secondary education in North Dakota is not declared unconstitutional by a sufficient majority."[201]

H. CREATING THE JUDICIAL COUNCIL

Beginning at least in 1924, an active State Bar Association encouraged establishment of a judicial council to be "charged with the duty of ascertaining the state of judicial business, gathering statistical information [on] the work of the courts, examining rules of procedure, suggesting changes in administration, studying work of law enforcement officials and suggesting improvement, equalizing trial work, revising rules, and considering complaints against courts and their officers."[202] In

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196. *See* MORLAN, *supra* note 161, at 104.

197. *See* MORLAN, *supra* note 161, at 105.

198. *See* 1917 N.D. Laws ch. 93, at 103. Another memorable change, woman suffrage, also grew out of the omnibus resolution in the 1917 session:

> Success came after the Nonpartisan League put woman suffrage in its platform. In 1917 the legislature gave women the right to vote in local and presidential elections, and in 1919 the legislature ratified the federal woman-suffrage amendment. On November 2, 1920, the women of North Dakota had the full right to vote for the first time.

ROBINSON, *supra* note 9, at 259; *see also* 1917 N.D. Laws ch. 254, at 405 (women's suffrage amendment).

199. N.D. CONST. art. IV, § 89 (repealed 1976); 1919 N.D. Laws art. XXV, at 503; 1917 N.D. Laws ch. 93, at 103.

200. *See* N.D. CONST. art. VI, § 4.

201. Bismarck Pub. Sch. Dist. v. North Dakota, 511 N.W.2d 247, 250 (N.D. 1994). Query, though, whether this state constitutional constraint would apply to an adjudication that a law contravenes the United States Constitution, since the Supremacy Clause makes it superior to any state constitution?

202. I N.D. B. BRS. 7 (Dec. 1924); *see also* I N.D. B. BRS. 4 (Aug. 1925) (District Judge A.G. Burr, chair of a Bar Committee, presented a plan "for the establishment, by legislative enactment, of a

1926, Chief Justice A.M. Christianson called such a meeting of all Supreme Court and district judges.[203]

This first judicial assembly took place in Bismarck in May 1926. The State Bar Association heralded the

> great advantage in having a permanent official body organized to make a continuous study of the organization, rules, methods and practices of the courts of the state, the work accomplished and the results produced, to investigate the means adopted for the improvement of judicial administration [elsewhere], to devise such changes in procedure as appear suited to our needs and as may be given effect without legislative action, and to recommend to the legislative assembly such remedial legislation as is believed necessary to assure the more efficient administration of justice. . . . The interchange of ideas alone should be helpful in making for greater uniformity in practice of the trial courts and in settling uncertainty as to government rules.[204]

The 1927 legislature formally authorized a Judicial Council to assemble twice a year to evaluate suggestions for improvement of the administration of justice, to recommend changes in procedures, and to coordinate continuing judicial education.[205]

The 1985 legislature changed the assembly's name to the Judicial Conference.[206] However, the legislature did not adequately fund the activities of the Judicial Council for its first half a century until Chief Justice Erickstad persuaded legislators to do so beginning in 1975.[207]

By then, the Judicial Council had become instrumental in improving the judicial system.

I. TEN YEAR TENURE

The 1889 Constitution set six-year terms for Supreme Court justices.[208] One effort to extend the terms to ten years was rejected by

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Judicial Council"); II N.D. B. BRS. 1 (Feb. 1926). Later in December 1926, Judge Burr was appointed to the Supreme Court to succeed Justice Sveinbjorn Johnson. SKETCH, *supra* note 2, at 45.

203. *See* II N.D. B. BRS. 1 (May 1926).

204. *See id.*

205. *See* 1927 N.D. Laws ch. 124, §§ 1, 4, 5, 8, at 155 (codified as amended at N.D. CENT. CODE ch. 27-15 (1991 & Supp. 1999)).

206. 1985 N.D. Laws ch. 333, § 2, at 1287.

207. In his 1975 *State of the Judiciary* message to a joint session of the legislature, Chief Justice Erickstad repeatedly referred to the need for funds to continue studies begun with funding from other sources, like the State Emergency Commission, the Combined Law Enforcement Council, State Highway Department, and Law Enforcement Assistance Administration. *See* STATE OF NORTH DAKOTA, JOURNAL OF THE HOUSE 58-65 (44th Leg. 1975).

208. *See* N.D. CONST. art. IV, § 91 (repealed 1976).

the people in 1908.[209] The 1929 legislature, however, proposed an amendment to extend all Supreme Court terms to ten years beginning with the 1934 general election.[210] At the 1930 primary election, the people approved the ten-year terms that remain today.[211] The longer terms significantly aid judicial independence.

J. JUSTICE MORRIS: NAZI WAR CRIMES JUDGE

Like Justice Christianson, some other justices served additional public interests while on the Court. Justice James Morris gained national repute and helped develop international law by temporarily leaving the Court to judge a War Crimes trial in Germany not long after World War II.[212]

Justice Morris was born in a sod house outside Bordulac, North Dakota, but finished his high school, college and law school educations at Cincinnati, Ohio, before coming back to Carrington, North Dakota to practice law.[213] After military service in World War I, he returned to his Carrington law office, served as Foster County States Attorney for four years, and later moved to Jamestown to practice.[214] After election and service as North Dakota Attorney General from 1929 through 1932, he ran for the Supreme Court in 1934 against Justice George Moellring (1933-1934).[215] Justice Morris won the election to begin three decades on the Court.[216]

In 1947, Justice Morris took a leave of absence for a year to serve at Nuremberg,[217] Germany, on an American War Crimes Tribunal for the trial of twenty-three officials of I.G. Farben Industries.[218] Farben, a

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209. *See* LOUNSBERRY, *supra* note 1, at 447.

210. *See* 1929 N.D. Laws ch. 98, at 115.

211. *See* 1931 N.D. Laws art. 46, at 578; *see also* N.D. CONST. art. VI, § 7.

212. *See* Hon. James Morris, *Major War Crimes Trials in Nurnberg*, 25 N.D. B. BRS. 97 (1949).

213. *See* SKETCH, *supra* note 2, at 47. After his father died and when Morris was 16, his mother moved back to where "her people" lived in Cincinnati. *See* Ken Rogers, *Dakota Man's Contribution to Nuremberg's Legacy*, BISMARCK TRIB., Dec. 24, 1995, at C1.

214. *See* SKETCH, *supra* note 2, at 47.

215. *See* SKETCH, *supra* note 2, at 46. Justice Moellring had been appointed to replace Justice Birdzell when he resigned to become general counsel for the Federal Deposit Insurance Corporation. *See* SKETCH, *supra* note 2, at 46.

216. *See* SKETCH, *supra* note 2, at 47.

217. Nuremberg and Numberg are varied spellings of the same place. Getty Research Institute, *Thesaurus of Geographic Names* (last updated June 26, 2000) <http://shiva.pub.getty.edu/tgn_browser>. Nurnberg seems to have been more commonly used in 1948 and 1949; Nuremberg more common in recent times. *See id.* Other variants are sometimes used.

218. When Justice Morris left for Germany to sit at the [Nuremberg] trials, most of the cases were decided by the remaining four Judges instead of calling a district judge. I recall how eagerly the other justices supported [Justice] Morris' request for a leave of absence, even though his absence put an additional burden on them.

Letter from Lu Dunn, retired Clerk, North Dakota Supreme Court, to Herbert Meschke, author (Apr.

giant industrial cartel with holdings of "more than 880 firms throughout Europe, Africa, North and South America, [and] east and west Asia," manufactured chemicals and munitions for Hitler's war machine.[219] After World War II, the victorious Allies charged twenty four directors and officers of Farben with War Crimes.

All the Farben officials were charged with crimes against peace by preparing and waging an aggressive war against other countries and by conspiring to do so; with war crimes by plundering property and deporting people from occupied countries; and with crimes against humanity by enslaving, mistreating and murdering civilians conscripted to operate its factories at concentration camps, including Auschwitz with its deadly crematoriums.[220] Four Farben officials were also charged with membership in the "SS," an organization declared criminal by the prior International Military Tribunal.[221]

Justice Morris was named a War Crimes judge by President Truman and assigned by General Lucius D. Clay, American Military Governor in Germany, to the panel of judges on American Military Tribunal No. VI for the Farben trial.[222] "He [felt] especially fortunate to be assigned to the Farben case, which he [felt would] be a landmark in international jurisprudence."[223]

One of the lead prosecutors in the case, Josiah E. DuBois, Jr.,[224] wrote a book about this trial, *The Devil's Chemists*. DuBois was an American lawyer who had seven years prior experience, mostly at the U.S. Treasury Department, in dealing with Farben through seizure of its assets in the western hemisphere during the war.[225] DuBois's book was critical of the outcome and of Justice Morris's impact on the trial.[226]

16, 1999) (on file with co-author). In a September 10, 1947, letter from Nuremberg to her Fortnightly Club in Bismarck, N.D., Amelia Morris explained part of her husband's arrangement for his absence from the Court: "Jim receives no salary from the State of North Dakota while on leave from the Court there, and the salary here, while larger, doesn't go very far." (From copy of five-page letter held by Lois K. Erickstad, Bismarck, N.D.).

219. JOSIAH E. DUBOIS, JR., THE DEVIL'S CHEMISTS 11 (1952).

220. *See id.* at 345-46; *see also* Morris, *supra* note 212, at 99 (defining crimes by quoting Control Council Law No. 10 enacted by the military governors of the four occupying powers in Germany on December 20, 1945), 101 (describing the offenses charged against the Farben defendants).

221. *See* Morris, *supra* note 212, at 101.

222. *See* Morris, *supra* note 212, at 100, 108.

223. Letter from Amelia Morris, wife of Justice James Morris, to Fortnightly Club, Bismarck, N.D. (Sept. 10, 1947) (on file with Lois K. Erickstad, Bismarck, N.D.).

224. DuBois was Deputy Chief Counsel of an eleven-member prosecution team. *See* VII TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS—"THE I.G. FARBEN CASE" 6 (U.S. Gov. Printing Office, 1949-1953) [hereinafter THE I.G. FARBEN CASE]. This 15 volume set, *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, encompasses 12 cases. Volumes VII and VIII are a selective but incomplete record of case no. 6: *U.S. v. Krauch (I.G. Farben case)*. The North Dakota Supreme Court Library holds volume 3 and 5-15 of this set.

225. *See* DUBOIS, *supra* note 219, at 15.

226. According to Joseph Borkin, the author of *The Crime and Punishment Farben of I.G.*, as DuBois left the courtroom after the decision, he declared: "I'll write a book about this if it's the last

The prosecutor's opening statement outlined the case they hoped to prove against the Farben officials:

> In 1940 the defendants as officers and managers of the huge I.G. Farben industrial empire, planned the construction of a fourth synthetic rubber plant which was vitally necessary if the war was to be long continued. The site selected was Oswiecim, Poland, known to the Germans as Auschwitz. Here one of the largest, if not the largest concentration camp had been erected by Himmler. They desired the use of concentration camp inmates to provide the labor for building and operating the plant. Himmler for a price furnished the inmates of his camp who slaved and died to build the buna rubber factory. It is a revolting story of brutality, starvation and murder. In 1945 I.G. Farben had more than 100,000 slave laborers assigned to it. This represents the number used at a given time and does not take into consideration the tremendous turnover brought about by death and exchange. I.G. Farben built its own concentration camp with SS guards and all the usual trappings. They received their slaves from the notorious Rudolf Hoess, Commandant of the Auschwitz Concentration Camp, who personally estimated that at least 2,500,000 inmates were executed in its gas chambers and destroyed in its crematories, and that another half million died of starvation and disease. Farben officials were familiar with and acquiesced in the program. The life span of a slave worker averaged three months. They included Norwegians, British, Dutch and many other nationalities. It is estimated that Farben's concentration camp and the buna plant alone claimed the lives of 25,000 persons. Exhaustion, malnutrition, freezing and atrocious brutality were the main causes of death. Those sustaining serious injuries or slow healing incapacities were selected for gassing. These are only some of the things that I.G. Farben and other industrialists did. It is for such offenses and

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thing I ever do." JOSEPH BORKIN, THE CRIME AND PUNISHMENT OF I.G. FARBEN 155 (1978) (citing DUBOIS, *supra* note 219, at [346]). DuBois actually wrote two books, although the second seems identical except for its title. *See* DUBOIS, *supra* note 219; JOSIAH E. DUBOIS, JR., GENERALS IN GREY SUITS (1953).

> atrocities that the industrialists have been called upon to defend themselves in a Tribunal administering international law.[227]

The prosecutors were not entirely successful in their proof.

From the start of the trial on August 27, 1947, DuBois felt particularly irritated by Justice Morris.

> His gray head half a plane above [presiding] Judge Shake and a full plane above the other two judges (who bent studiously over the bench), Judge Morris' attention wandered from one dark-paneled wall to the other. Still, I had seen judges who took in evidence while they gave every appearance of being asleep. When on rare occasions the Tribunal had paused to look over a document in open court, Morris finished before the others; then his head would snap up and he would look for a moment as if someone had just seen him sit on a cocklebur. A justice of the supreme court of North Dakota, Morris was a judge's judge in many ways, used to reading summaries prepared by assistants, and probably several years removed from the slow exasperating drama of trials at this level.[228]

DuBois complained that Justice Morris repeatedly questioned the pace of the prosecutors' presentations and the relevancy of much of their evidence.[229]

It was a long and ponderous trial.

> The trial finally ended on May 12, 1948, after having exhausted all concerned in 152 trial days. There had been 189 witnesses. The transcript was almost 16,000 pages long. Over

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227. Hon. Edward F. Carter, *The Nurnberg Trials: A Turning Point in the Enforcement of International Law*, 28 NEB. L. REV. 370, 383-84 (1949) (citation omitted). Carter, an associate Justice of the Nebraska Supreme Court, served on an American Military Tribunal for a different "Industrialist" case. He summarized the Farben prosecutor's opening to illustrate the charges in each of the three so-called "Industrialist cases" where "[t]he indictments . . . charge[d] the defendants with wholesale enslavement of conscripted foreign labor, plunder and murder." *Id.* at 383 (quoting THE I.G. FARBEN CASE, *supra* note 224, at 100-05). He explained the importance of those trials:

> The Nurnberg trials may not provide a sufficient deterrent to international crime, but they have provided more than has existed in the past. It is my hope, and that of the other Nurnberg judges as well, that, by interpreting, declaring and giving effect to existing principles of the international law of war, the beginnings of an international enforcement system of common law crimes has been planted.

Id. at 384.

228. DUBOIS, *supra* note 219, at 82. Since the North Dakota Supreme Court had no law clerks or legal staff before 1965, DuBois was wrong to assume Justice Morris was "used to reading summaries prepared by assistants."

229. *See* DUBOIS, *supra* note 219, at 82, 87, 88, 93, 95, 131, 142, 148, 195, 314-16. In contemplating DuBois's criticism, one should remember Justice Morris had ample experience as a prosecutor, both as a states attorney for four years and as Attorney General of North Dakota for four years. *See* SKETCH, *supra* note 2, at 47.

> 6000 documents and 2800 affidavits had been introduced into evidence. In addition, there had been a multitude of briefs, motions, rulings, and other legal instruments incidental to such a proceeding.
>
> An intellectually divided and emotionally drained court faced the task of carving from the huge record a legally valid and historically meaningful decision. On July 29, 1948, almost a year after the trial began, the court convened to read its opinion, render its verdict, and sentence the guilty.[230]

The Tribunal majority (presiding Judge Shake, a former Indiana Supreme Court Justice, and Justice Morris) acquitted all twenty-three defendants (one was too ill for trial) of complicity in carrying on an aggressive war;[231] acquitted the few defendants accused of membership in a criminal organization;[232] and acquitted ten defendants of all crimes.[233] The Tribunal majority found eight guilty only of plundering; four guilty only of slavery; and found one guilty of both plundering and slavery.[234] The third judge, Judge Hebert, Law School Dean at Louisiana State University, announced that he "differed on many points," and "added that he would file separate opinions later, including a dissent on the slave-labor count."[235] The Tribunal majority sentenced those convicted to imprisonment for periods varying from one and one-half years to eight years.[236]

The prosecutors were immediately irate: "The sentences were light enough to please a chicken thief, or a driver who had irresponsibly run down a pedestrian."[237] Prosecutor DuBois believed: "It was clear now that, from the first, the court had been split in two, with Morris and Shake on one side, Hebert and [alternate Judge] Merrell on the other."[238]

More than four months later, after all the judges had returned home, and with help from alternate Judge Merrell, an Indiana lawyer,[239] who

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230. BORKIN, *supra* note 226, at 149 (footnote omitted).

231. *See* DUBOIS, *supra* note 219, at 339.

232. *See* MORRIS, *supra* note 212, at 102.

233. *See* MORRIS, *supra* note 212, at 102.

234. *See* DUBOIS, *supra* note 219, at 345-46; *see also* MORRIS, *supra* note 212, at 102.

235. DUBOIS, *supra* note 219, at 345.

236. *See* DUBOIS, *supra* note 219, at 346. "[T]ime in confinement before and during the proceedings counted as time served," and "John McCloy, the American high commissioner, pardoned the last of them in 1951." PETER HAYES, INDUSTRY AND IDEOLOGY: I.G. FARBEN IN THE NAZI ERA 377, xii (1987).

237. DUBOIS, *supra* note 219, at 339.

238. DUBOIS, *supra* note 219, at 347.

239. Clarence F. Merrell brought another North Dakota connection to the Farben War Crimes trial because he began his legal career here. *See Bench and Bar: Memorials—Clarence F. Merrell*, 30 N.D. L. REV. at 171-72 (1954):

> Mr. Merrell was admitted to the North Dakota Bar on December 9, 1912, and practiced

participated in the trial but not the judgment, Judge Hebert filed a separate 114-page opinion, concurring and dissenting.[240] Judge Hebert explained his partial concurrence:

> I concur in the acquittals on charges of planning and preparation of aggressive war. I concur, though realizing that on the vast volume of credible evidence, a contrary result might as easily be reached by other triers of the facts who would be more inclined to draw the inferences usually warranted in criminal cases. The issues of fact are truly so close as to cause genuine concern whether or not justice has actually been done.
>
> While concurring in the acquittals, I cannot agree with the factual conclusions of the Tribunal. I do not agree with the majority's conclusion that the evidence falls far short.[241]

In his dissent, Judge Hebert explained he would have convicted most of the officials of slavery:

> Utilization of [slave] labor [by Farben] was approved as a matter of corporate policy. To permit the corporate instrumentality to be used as a cloak to insulate the principal corporate officers who approved and authorized this course of action from any criminal responsibility therefor is a leniency in the application of principles of criminal responsibility which, in my opinion, is without any sound precedent under the most elementary concepts of criminal law. . . . The evidence shows Farben's willing cooperation in the utilization of forced foreign workers, prisoners of war and concentration-camp inmates as a matter of conscious corporate policy.[242]

Justice Morris summarized the effect of this split decision on the most controversial charge, slavery:

> [T]he members of the tribunal were unable to agree upon the inferences of guilt to be drawn from the fact of [board of directors] membership and authority . . . . [W]e were not able to agree whether necessity and the lack of opportunity to exercise moral choice was available as a defense or could only be considered in mitigation of the use of slave labor. The result [on the slave-labor count] was the unanimous conviction

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at Fargo for about two years, being an associate of the firm of Watson, Young & Lawrence. News of his death [at Indianapolis, Indiana on February 10, 1954] was received by Chief Justice Morris with whom he served on a military tribunal for the trial of war criminals at Nuernburg, Germany.

240. *See* THE I.G. FARBEN CASE, *supra* note 224, at 1211-1325.

241. DUBOIS, *supra* note 219, at 354 (quoting Judge Hebert).

242. THE I.G. FARBEN CASE, *supra* note 224, at 1313-15.

> of five defendants, including four members of the [board of directors], the unanimous acquittal of three defendants, and the acquittal of fifteen members [of the board] by a vote of two to one, Judge Hebert dissenting.[243]

The prosecutors thought Justice Morris was preoccupied with the looming "Russian menace," rather than concerned with the culpability of Nazi cohorts.[244] DuBois believed the majority was unduly swayed by this growing fear of Russian Communism: "[W]hy had Judges Shake and Morris reacted as they did? I concluded that the reason must have been fear—their own great fear of the trend of events in 1948."[245]

But DuBois frankly confessed, "while the prosecution couldn't understand Judge Morris' failure to grasp the evidence, we had our own doubts."[246] DuBois also said, after the trial, he "grew more tolerant of the two judges who went to Nurnberg more or less uninitiated. No doubt they were influenced somewhat by our foreign policy" at that time, again referring to the sway of Russian Communism.[247]

Despite DuBois's "petty personal criticisms," Justice Morris felt vindicated by DuBois's description of the trial and its outcome. Justice Morris explained why in a virtually unpublished letter to DuBois shortly after his book was published:[248]

> No longer need I apologize for or explain my part in the Nurnberg trials. You have, perhaps unwittingly, done me a great favor by furnishing a written record which, though erroneous and misleading in many details presents an over-all picture which I regard as highly complimentary.
>
> . . . .
>
> I am glad, too, that your book recognizes my appreciation of the Russian menace . . . .

By this remark, though, Justice Morris seems to confirm his *Farben* decision was affected by the prevalent foreign policy of that time, containing Russian Communism.

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243. *See* Morris, *supra* note 212, at 102.
244. *See* DUBOIS, *supra* note 219, at 95, 338.
245. DUBOIS, *supra* note 219, at 355.
246. DUBOIS, *supra* note 219, at 88.
247. DUBOIS, *supra* note 219, at 357.
248. A signed copy of Justice Morris's unpublished letter of March 26, 1953 to DuBois was made available by being bound into the copy of *The Devil's Chemists* held by the Bismarck State College library. The source of the copy is not known, but it was likely furnished for binding by Justice Morris himself.

Justice Morris's letter continued with another remark about "not creating dangerous precedents which would have been an impediment to the future foreign policy of our country":

> I know that you were greatly disappointed in the judgment and the sentences meted out. It would seem, however, that your disappointment was not well grounded since the defendants receiving the longer sentences were released long before those sentences expired and, as you point out in your book, pardon had terminated all sentences by 1951. It would seem, therefore, that the tribunal was entirely in step with the progress of history in the making and that we were wise in not creating dangerous precedents which would have been an impediment to the future foreign policy of our country. . . . The intervening years have proved that the Farben judgment was wise and just. I am indeed proud to have been one of the majority that brought about its rendition. Despite petty personal criticism, your book points out my position and my responsibility with regard to the decision. For that I am grateful.[249]

Justice Morris was proud of the Farben decision and its precedential importance for international criminal law. He believed the trial "will have some significance in the future development of international criminal law," even though he urged "codification of an international criminal law."[250]

Unquestionably Justice Morris's vote to convict some corporate officers of crimes against humanity contributed significantly to development of international law, whatever the fate of those guilty might have been. With war crimes again in today's headlines from events in eastern Europe, Justice Morris's precedent may have renewed relevance for the rule of international law in our times.

K. THE FARBEN WAR CRIMES CASE DEBATE

The small disagreement over the outcome of the *Farben* case framed by DuBois's 1952 tirade and Justice Morris's nearly private response smoldered silently for over twenty-five years. But scholarly histories published in the last two decades have kindled a larger debate. It is anyone's guess why it took so long to subject the *Farben* trial to

249. Letter from James Morris to Josiah E. DuBois, Jr. (Mar. 26, 1953) (copy within binding of *The Devil's Chemist* at Bismarck State College, Bismarck N.D.).

250. Morris, *supra* note 212, at 109.

more scholarly scrutiny. But, for those who want to examine it in more detail, we briefly review the available literature on the *Farben* case.[251]

The *Farben* trial got negligible attention in law reviews apart from Justice Morris's own straight-forward account in 1949, *Major War Crimes Trials in Nurnberg*.[252] Besides DuBois's 1952 polemic, *The Devils's Chemists*, republished in 1953 as *Generals in Grey Suits*,[253] at least three books and a graduate thesis have sought to assess the historical meaning of the *Farben* case.

Thirty years after the trial, Joseph Borkin wrote *The Crime and Punishment of I.G. Farben*.[254] Borkin had an indirect North Dakota association. In 1934, he went to work for a United States Senate Special Committee chaired by Senator Gerald P. Nye of North Dakota. The Committee was investigating the munitions industry. Borkin's first job there was to investigate a deal between Standard Oil Company, New Jersey, and Farben.[255]

Borkin backed DuBois. His chapter titles illustrate this: "3. I.G. [Farben] Prepares Hitler for War"; "4. The Marriage of I.G. [Farben] and Standard Oil under Hitler"; "6. Slave Labor and Mass Murder"; "9. I.G. [Farben] Wins the Peace"; "10. Corporate Camouflage." His compact twenty-one-page chapter 8, "I.G. [Farben] at Nuremberg," is a much more succinct account of the trial than DuBois's. Yet Borkin certainly recognized Justice Morris "voiced his irritation with the proceedings" when he scolded the prosecutor: "This trial is being slowed down by a mass of contracts, minutes and letters that seem to have such slight bearing on any possible concept of proof in this case."[256]

Intriguingly, Borkin implies in a foreleaf that General Eisenhower's postwar experience with Farben gave shape to President Eisenhower's famous pronouncement on leaving the presidency in 1961:

> In the councils of Government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential

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251. For a first-person account of life at the Auschwitz camp by one of relatively few survivors who was a slave-laborer at the buna factory being built by Farben see PRIMO LEVI, SURVIVAL IN AUSCHWITZ (1985) (republication of a book first published in Italy in 1958, and first translation published by The Orion Press in 1960).

252. *See* Morris, *supra* note 212. Also see Maximilian Koessler, *American War Crimes Trials in Europe*, 39 GEO. L.J. 18-112 (1950), for a broad overview of the American War Crimes Trials. It only passingly mentions the Farben and Industrialist trials, but it contains an extensive discussion of the procedures used, the legal theories of the prosecutions, and the legal theories of the defendants.

253. *See* DUBOIS, *supra* note 219; DUBOIS, *supra* note 226.

254. *See* BORKIN, *supra* note 226.

255. *See* BORKIN, *supra* note 226, in preface.

256. BORKIN, *supra* note 226, at 141.

> for the disastrous rise of misplaced power exists and will persist. We must never let the weight of this combination endanger our liberties or democratic processes.[257]

Borkin followed up on that by describing General Eisenhower's investigation, recommendation, and decision "that [Farben's] strategic position in the German economy must be broken as 'one means of assuring world peace.'"[258]

Nearly a decade later in 1987, Peter Hayes wrote *Industry and Ideology: I.G. Farben in the Nazi Era,*[259] portraying Farben as carelessly stumbling into disgrace by "opportunistically and defensively" associating with Nazi policies and military conquests.[260] From extensive research, Hayes concluded Farben selected Auschwitz for a manufacturing plant before the possibility of using inmate labor developed, but that its "decision to occupy the site, however unintended and unforseeable the consequences, contributed mightily to the camp's expansion and its eventual evolution into a manufacturer of death."[261]

Hayes minimized Farben's plundering of facilities in occupied countries: "There was no 'rape of the European chemical industry.' Only in Austria and Czechoslovakia did [Farben's] takeover account for more than 5% of any subject country's chemical output."[262] By this, Hayes seems to imply Farben officials were only a "little bit" guilty of War Crimes. Perhaps that is a possible view of the modest punishment imposed on them, but Hayes goes on to damn the Farben convicts far more with his faint justification:

> Farben's leaders acted as they thought their calling required. They disagreed cautiously with the trend of events from time to time but sooner or later sought to benefit from it. Their sense of professional duty encouraged them to regard every issue principally in terms of their special competences and responsibilities, in this case to their fields and stockholders. In obeying this mandate, they relieved themselves of the obligation to make moral or social judgments or to examine the overall consequences of their decisions.[263]

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257. Pres. Dwight D. Eisenhower, Farewell Address to the Nation (Jan. 17, 1961), *reprinted in* DWIGHT D. EISENHOWER 1890-1969: CHRONOLOGY-DOCUMENTS-BIBLIOGRAPHICAL AIDS 141, 143 (Robert I. Vexler ed., 1970).

258. BORKIN, *supra* note 226, at 157.

259. *See* HAYES, *supra* note 236.

260. HAYES, *supra* note 236, at 218.

261. HAYES, *supra* note 236, at 351.

262. HAYES, *supra* note 236, at 216.

263. HAYES, *supra* note 236, at 382.

In other words, Hayes said politely, Farben officials acted for prosaic reasons of profit. Hayes certainly does not excuse them; rather he smoothly condemns them for unmitigated greed.[264]

In 1988, Raymond G. Stokes wrote *Divide and Prosper: The Heirs of I.G. Farben Under Allied Authority, 1945-1951*. In brief summaries of the *Farben* trial,[265] Stokes concluded "the results of the trial bore astonishingly little relation to the alleged crimes," and "[o]ne could sympathize with chief [sic] prosecutor Josiah DuBois in his bitter assessment of the sentences as 'light enough to please a chicken thief.'"[266]

Stokes speculated on why the punishment was so mild "[d]espite the gravity of the offenses."[267] He discounts Borkin's theory, "in his book length indictment of the entire history of the firm," "that the emergence of the Cold War between the United States and the Soviet Union influenced the majority of the court, [because] it is difficult to imagine the precise mechanism through which this might have taken place."[268] Stokes believed "[m]ore readily apparent explanations are at hand [for the short prison sentences], although we will never know for certain."[269] Stokes felt "the mild punishment fit with the American judicial tradition of light sentences for 'white-collar crime.'"[270] He thought an "even more compelling" reason was that, "strategically, the prosecution conducted its case poorly at times," particularly by not emphasizing the horrors of Auschwitz more.[271]

Stokes mainly charted how the Farben cartel was divided by the Allies after the war to lessen its military-industrial influence, and how the three separate companies, BASF, Bayer, and Hoechst, were not stunted, but thrived. Stokes concluded:

> The irony is that the same creativity and adaptability that allowed German industrialists to embrace autarky and to prepare Hitler's armies with the tools needed for aggression—qualities often exercised by the very same men—were responsible for the success of West German

264. "We cannot say that a private citizen shall be placed in the position of being compelled to determine in the heat of war whether his government is right or wrong, or, if it starts right, when it turns wrong." HAYES, *supra* note 236, at 332 (citing Morris, *supra* note 210) *The I.G. Farben Case*, *supra* note 224, at 1126, reported that part of the judgment and included this quote. That Hayes chose to quote Justice Morris for that item, rather than the judgment itself, is intriguing.

265. *See* RAYMOND G. STOKES, DIVIDE AND PROSPER: THE HEIRS OF I.G. FARBEN UNDER ALLIED AUTHORITY, 1945-1951 at 54-55, 151-55 (1988).

266. *Id.* at 54-55.

267. *Id.* at 152.

268. *Id.* at 152-53.

269. *Id.* at 153.

270. *Id.*

271. *Id.*

> chemical manufacturing under the new conditions of the postwar period.[272]

In 1994, Mark H. Foster submitted a thesis on the *Farben* case to the University of North Dakota in partial fulfillment of requirements for a graduate degree.[273] Foster drew on a "collection . . . of . . . relatively complete Nuremberg trial document[s]" that included "not only a full set of prosecution documents, but also of the defense documents as well."[274]

Foster's 244-page thesis assayed existing publications on the *Farben* case. "Authors who have utilized the Nuremberg documentary record to focus specifically on IG Farben have taken differing views on the question of the firm's guilt."[275] Foster categorized DuBois at "one extreme," and Hayes at the "other pole."[276] Foster listed an extensive bibliography of unpublished works, published works, books, and articles that gives plenty of material for further study.[277]

Foster concluded that "justice was indeed served in the Farben Case."[278] He reasoned: "The leadership of IG Farben was never a willing accessory to the Nazi regime."[279] Noting a few examples of kindnesses to certain individual employees by some defendants, Foster concluded "the leaders of IG Farben acted reasonably and fairly to defend the good name of their firm as well as they felt they could safely do when impinged upon by a government and revolutionary party gone mad with racism and pride."[280] "[I]t is entirely possible that they indeed did act heroically, sacrificing their reputation in order to lessen actual harm."[281]

Bleakly, Foster rationalizes the "relatively light" sentences for those found guilty of crimes against humanity as "well in the range of what one might serve on a manslaughter charge after inadvertently

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272. *Id.* at 208-09.

273. Mark H. Foster, IG Farben and the Road to Auschwitz: Failed Ethics In An Early High-Technology Enterprise (1994) (unpublished M.A. thesis, University of North Dakota) (on file with the University of North Dakota Chester Fritz Library).

274. *Id.* at 3 n.2. This collection was assembled by Dr. Howard Russell, who had been a professor of English Language and Literature at UND during the 1930s, while he served as Secretary General of the American Military Tribunals at Nuremberg from May 1948 to December 1949. Dr. Russell placed those unpublished materials at the University of North Dakota, and Foster dedicated his thesis to him. *See id.* at i.

275. *Id.* at 24.

276. *Id.*

277. *See id.* at 245-49. But, curiously, Foster's bibliography does not list Justice Morris's law review article as a source. *See id.*

278. *Id.* at 239.

279. *Id.* at 236.

280. *Id.* at 240.

281. *Id.* at 242.

striking down a pedestrian while speeding or driving under the influence,"[282] but he does not compute or weigh the number of "pedestrians" wiped out at Auschwitz. Foster thought the sentences were meant "to deter others, out of sheer fear of the possibility of prison, from taking risks on the road which can, on rare occasions, result in manslaughter."[283] In his view, the convictions did "represent a deterrent against allowing any outside forces from manipulating a firm into accepting slave labor on its premises or into participating in a venture associated in any way with a forced labor camp which could possibly become the next Auschwitz."[284]

The belated and ongoing controversy over Justice Morris's role at Nuremberg illustrates how judging, often, can be difficult. Still, by his vote to convict some corporate officers of complicity in crimes against humanity, North Dakota's Justice Morris demonstrated leadership. His experience at Nuremberg presaged his influence on the North Dakota Supreme Court a decade later when he helped bring about modernization of civil procedure.

L. JUSTICE GRIMSON: PRISON REFORM

Some justices brought a large history of public service with them to the Court.[285] Justice Grimson was one of those.

At age seventy, Justice Gudmunder Grimson (1949-1958) was appointed to the Court in September 1949 to succeed retired Justice Alexander Burr (1926-1949).[286] Justice Grimson served as a district judge from 1926 to 1949, but he had previously won national acclaim as a crusading lawyer who brought about "reform of prison laws in many parts of the United States."[287]

> During the early 1920s, Gudmundur Grimson gained national attention by virtue of his activities against the penal system in Florida. In 1922 a neighbor came to Mr. Grimson with some evidence indicating that his son had been flogged to death in a Florida lumber camp. Mr. Grimson investigated and found

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282. *Id.* at 239.

283. *Id.* at 239-40.

284. *Id.* at 240.

285. Another justice, Justice Paul M. Sand (1974-1984), before becoming a justice, had "served as assistant staff judge advocate of the U.S. Berlin District, and also headed a War Crimes Team in the British Zone of the Army of the Rhine in Germany [before his discharge as lieutenant colonel in 1947]. The team's duty was to obtain evidence and data for use at the Nuremberg War Crimes Trials." Lucille Hendrickson, *Justice Sand Dies of Heart Failure*, BISMARCK TRIB., Dec. 9, 1984, at A1; *see also* SKETCH, *supra* note 2, at 60.

286. *See* SKETCH, *supra* note 2, at 50, 45. Justice Burr retired at the age of 78 "due to disability." SKETCH, *supra* note 2, at 45.

287. ROLFSRUD, *supra* note 157, at 62, 67.

> evidence that a system existed in that state whereby sheriffs were paid a bounty for delivering to slave camps prisoners who were without funds to pay their fines. The North Dakota boy was one of the victims of that system and while his parents had wired the sheriff the money to pay the fine, the sheriff returned the money and retained his bounty. The boy fell prey to a sadistic boss who apparently enjoyed flogging his victims of excessive labor. The North Dakota boy died under these floggings. Mr. Grimson's extensive investigation which lasted more than two years, lead to publicity in a New York newspaper, action by the Legislature of North Dakota and eventually action by the authorities in Florida. The result was that the penal system of Florida and other states which had similar oppressive procedures, was modified. The sadistic boss was indicted and convicted although upon a subsequent re-trial was acquitted, and the boy's family received a substantial monetary settlement.[288]

Justice Grimson had also "[s]pearheaded reform in judicial procedures followed in sentencing juveniles" and had "negotiated air service between the United States and Iceland and Denmark" in 1932.[289]

Still, Justice Grimson, who first became a justice at age seventy, was not the oldest person to serve on the Supreme Court.

M. AGE AND ACTION

In December 1934, the average age of the justices surpassed sixty-three,[290] and the average became even older several times after that. Not long after Justice Grimson came to the Court in 1949 at age seventy,[291] Justice P.O. Sathre (1937-1938, 1951-1962), who had earlier served on the Court at age sixty-one for thirteen months, rejoined the Court in January 1951 at age seventy-five.[292] Thus, by 1954, the average age of the sitting justices reached seventy years, with three of them over age

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288. North Dakota Supreme Court, *In Memoriam—Hon. Gudmunder Grimson & Hon. Thomas J. Burke*, 43 N.D. L. REV. 582, 586 (1967). His friend, Clyde Duffy, a former State Senator and notable Devils Lake practitioner, summarized Justice Grimson's earlier campaign for penal reform. *See id.* at 585.

289. ROLFSRUD, *supra* note 157, at 67.

290. *See* SKETCH, *supra* note 3.

291. *See* SKETCH, *supra* note 2, at 50.

292. *See* SKETCH, *supra* note 2, at 48.

seventy.[293] Age may have affected the work of the Court during this mid-century interval.

Between 1934 and 1964, the workload of the Court withered with a depression-dampened economy that, for the Court at least, and perhaps for much of the state, persisted well past World War II.[294] In the earlier World War I era, the Supreme Court had several times written over 200 published opinions a year, peaking at 243 in 1919.[295] Thereafter, the number of published decisions gradually dwindled, reaching only ninety-four in 1934.[296] As depression-related conditions continued, the Court did as few as forty-one opinions in 1944, thirty-eight in 1947, and forty-five in 1960.[297] The output of published opinions did not again exceed one hundred for four decades until it reached 124 in 1974.[298]

During that middle third of the century, the age factor may have affected the pace of the Court's opinions despite the reduced volume. In the memory of the senior author of this account, the Court in the 1950s and early 1960s sometimes did not produce a written opinion in a case for over a year after the oral argument.[299] After 1964, however,

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293. *See* SKETCH, *supra* note 2, at 48 (stating that Justice Sathre was born February 7, 1876), 37 (stating that Justice Christianson was born August 11, 1877), 50 (stating that Justice Grimson was born November 20, 1878), 47 (stating that Justice Morris was born January 2, 1893), 49 (stating that Justice Thomas Burke was born October 24, 1896).

294. In 1950, Supreme Court Clerk John Henry Newton reported a contemporaneous slackening in trial work as well.

> There has during the past twenty years been a decided falling off in trial work. In many counties of the state, up till the late twenties and early thirties, it was no uncommon thing to have a term continue for as long as six or seven weeks with continuous jury work. . . . Many factors have combined to produce this lack of trial work. Among others the Workmen's Compensation Act has eliminated much of the personal injury work which used to clog the court calendars. So too the Employers' Liability Act has eliminated many lawsuits . . . [by] railway employees; the carrying of liability insurance . . . and the settlement by the insurance carriers of claims without suit, even though the liability be doubtful; the building of overpasses and under passes, thus eliminating the grade crossing accidents, all are facts that have contributed to the falling off of jury work in the field of civil actions. Repeal of the national and state prohibitory laws have played their part in the falling off of criminal practice. . . . Now, even in some of the more populous counties the terms so far as jury work is concerned, will often be concluded in a matter of three or four days . . . .

J.H. Newton, Lecture No. 2 at the University of North Dakota School of Law, at 1-2 (1950) (lecture notes available in the North Dakota Supreme Court Law Library).

295. Search of West's North Dakota Reporter CD-ROM Cases database (database containing only North Dakota Supreme Court decisions).

296. *See id.*

297. *See id.* (search for records containing 1944, 1947, and 1960 in DATE field).

298. *See id.*

299. "A judge shall perform the duties of office . . . diligently." NORTH DAKOTA CODE OF JUDICIAL CONDUCT Canon 3 (2000). Commentary to Canon 3(B)(8) on "Adjudicative Responsibilities" explains: "Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and *expeditious in determining matters under submission*, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end." (emphasis added).

when an opinion was not completed in a reasonable time by the assigned justice, the Court often re-assigned the case to another justice to get it completed without greater delay.[300]

Obviously, not all persons over age seventy lose their capacities to study, think, or write effectively, but common experience certainly implies that age increases the likelihood of reduced productivity. In apparent reaction to the perceived adverse effects of aging on the Court, the 1959 legislature imposed a penalty on any justice of the Supreme Court (and any district judge, too) who was appointed or elected after July 1, 1960, and who did not retire before age seventy-three. This enactment declared a judge who delayed retirement past his seventy-third birthday would "automatically waive all retirement benefits" and receive only the "judicial retirement assessment" the judge had personally contributed towards retirement.[301]

The justices' ears are still ringing from that legislative cuffing;[302] no justice since 1960 has chosen to stay in office past age seventy-two. The adverse effects of aging on performance should not affect the Court again.

In January 1963, a state senator from Devils Lake, Ralph J. Erickstad, was first elected to the Court at the relatively young age of forty,[303] and the average age of justices dropped below sixty years for the first time in three decades. By 1981, however, the number of published opinions went over 200 again, where it has been every year since.[304]

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300. *See, e.g.*, State v. Glavkee, 138 N.W.2d 663 (N.D. 1965) (opinion of the Court by Strutz, J., on reassignment); Bismarck Baptist Church v. Wiedemann Indus. Inc., 201 N.W.2d 434 (N.D. 1972) (opinion of the Court by Strutz, C.J., on reassignment). During that eight-year period, at least 42 opinions were issued "on reassignment" by a full court without a dissent or concurrence, where the reassignment does not appear to have been made for another possible reason. Search of West's North Dakota Reporter CD-ROM Cases database (database containing only North Dakota Supreme Court decisions) (search for records containing "on reassignment"). Some other opinions on reassignment may reflect divided views on the Court or the belated absence of one or more justices due to disqualification or vacancy.

301. 1959 N.D. Laws ch. 254, § 1, at 424. Also see continued codification of the age penalty at section 27-17-01(1) of the North Dakota Century Code for judges "eligible for retirement *hereunder*." (emphasis added). All Supreme Court justices in office today, however, qualify for retirement under the public employee retirement system (P.E.R.S.) rather than under section 27-17 of the North Dakota Century Code.

302. A like penalty for failure to retire by age 73 had been imposed on judges and justices under P.E.R.S., *see* 1973 N.D. Laws ch. 246, § 12, but was quietly repealed, *see* 1977 N.D. Laws ch. 499, § 17. The main incentive to retire under P.E.R.S. lies in the diminished multiplier after twenty years of judicial service. *See* N.D. CENT. CODE § 54-52-17(4)(b)(1) (1989).

303. *See* SKETCH, *supra* note 2, at 54.

304. Search of West's North Dakota Reporter CD-ROM Cases database (database containing only North Dakota Supreme Court decisions).

N. PUBLICATION OF OPINIONS

The 1889 judicial article directed the legislature to provide "for the publication and distribution of the decisions of the supreme court."[305] The Court regularly published the North Dakota Reports beginning in 1891.[306]

At the August 1953 State Bar convention, President E.T. Conmy reported that Chief Justice James Morris had "reminded" him

> that a serious problem exists in the publication of our North Dakota Reports. The expense of publication has greatly increased and sales have greatly decreased. Sale decrease is probably due to the fact that most lawyers now buy only the Northwestern Reporter. It is the opinion of some, not of all by any manner or means, that publication of the North Dakota Reports should be discontinued altogether.[307]

President Conmy suggested appointing a committee "to study this problem and make its definite recommendations as soon as possible for the consideration of the Supreme Court."[308]

In 1954, chair Carroll E. Day, reporting for the State Bar Association's Judiciary Committee, recommended the Bar ask the legislature to give the Supreme Court "much wider discretion in the publication of the reports or in discontinuing such publication."[309] He explained:

> For some reason only about 10 percent of North Dakota lawyers purchase North Dakota Reports.

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305. N.D. CONST. art IV, § 93 (repealed 1976).

306. 1 N.D. (1891). As authorized by the 1889 North Dakota Constitution, section 93, the Court regularly appointed a Reporter to aid in publication of the reports. They have been:

1889-1890,	Edgar W. Camp	(b.1860-d.1943);
1891-1893,	R.D. Hoskins	(b.1861-d.1946);
1894-1902,	John M. Cochrane	(b.1859-d.1909);
1903-1903,	R.M. Carothers	(b.1859-d.____);
1903-1911,	F.W. Ames	(b.1851-d.1925);
1912-1918,	H.A. Libby	(b.1859-d.1943);
1919-1923,	Joseph Coghlan;	
1923-1955,	Edwin J. Taylor	(b.1869-d.1956);
1956-1957,	Wallace M. Ferguson;	
1957-1960,	Thomas W. Nielsen;	
1960-1961,	Theodore W. Camrud;	
1962-1990,	Elmer J. DeWald.	

See NORTH DAKOTA CENTENNIAL BLUE BOOK, 1889-1989, at 465 (1989).

307. *Report of 1953 Annual Convention of the State Bar Association,* 29 N.D. L. REV. 377, 429 (1953) [hereinafter *1953 Annual Convention*].

308. *Id.* at 429-30.

309. *Report of 1954 Annual Convention of the State Bar Association*, 30 N.D. L. REV. 333, 407 (1954) [hereinafter *1954 Annual Convention*].

> [They] no longer include reference to the briefs and publication is necessarily delayed many months after the published opinions are available in the reporter system. . . . Vol. 78 will cost approximately $7,500. Under the circumstances this expense in the opinion of the Committee is not justified.[310]

The 1955 legislature proposed to amend Sec. 93 of the 1889 N.D. Constitution to read: "The decisions of the supreme court shall be published or recorded in the manner and form prescribed by the legislative assembly."[311] The people rejected that amendment at the 1956 primary election in one of those occasional cascades of rejections of ballot measures.[312]

Still, the Court had actually suspended publication of the North Dakota Reports after September 30, 1953,[313] but the Court did not get around to saying so publicly or to designating the popular North Western Reporter, published by West Publishing Co., as the official reporter until December 19, 1980, when the Court did so both prospectively and retroactively.[314] By 1980, of course, a 1976 amendment of the judicial article had wholly eliminated any constitutional duty to publish its opinions.[315]

O. PROLOGUES TO PROGRESS

Those few organic changes of significance in the first half of this century, (increasing the size of the Court, extending the length of elected terms on the Court, and limiting its constitutional powers), plus creation of the Judicial Council, were prologues to the extensive modernization of the Court and judicial system that took place in the last half of this century.

III. MODERNIZING IN THE TWENTIETH CENTURY

After drifting through much of this century with few real changes, the North Dakota Supreme Court began modernizing the state's judicial system shortly after mid-century, but it went slowly even then. Modernization came largely with two parallel and progressive developments: Procedural rules were reformed by the Court, rather than by the legisla-

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310. *Id.*

311. 1955 N.D. Laws ch. 362, at 643.

312. 1957 N.D. Laws, at 783.

313. The last decision reported in the North Dakota Reporter was *Gust v. Wilson*, 79 N.D. 865 (1953), which was decided September 30, 1953.

314. *See* Order Designating Official Report (N.D. Sup. Ct. Dec. 19, 1980) (on file with North Dakota Supreme Court) (retroactive to Sept. 30, 1953).

315. *See* N.D. CONST. art IV, 93, *repealed by* 1977 N.D. Laws Ch. 599, at 1378-80.

ture, and the judicial system became unified with a single-level trial court statewide and governed by the Supreme Court headed by an elected administrative Chief Justice.

A. REFORMATION OF PROCEDURAL RULES

1. *1868: Origins of Civil Rules*

By the middle of the twentieth century, the Code of Civil Procedure, sometimes called the Practice Code and codified in the North Dakota Revised Code of 1943, had long whiskers. These procedural statutes went back to one of the Field codes actually adopted in New York state in 1848,[316] through the Dakota Territorial legislature's adoption of the Field code of civil procedure in 1868.[317] It carried over to our state because the transition schedule for the 1889 N.D. Constitution directed: "All laws now in force . . . not repugnant to this Constitution . . . remain in force until they expire by their own limitations or be altered or repealed."[318]

Much of the territorial practice code remained in force and survived later state statutory revisions, including major ones in 1895, 1913, and 1943. It was still the current civil procedure after the North Dakota Revised Code of 1943 was completed.[319] By the middle of the twentieth century, most of the practice procedure in use in this state was over a century old.

2. *1926: Reform Desirable*

Procedural reform by the Court was urged by the State Bar Association as early as 1926. That year, a report of a State Bar Association of North Dakota committee on "work . . . during the last three years" quoted from a national article about rule-making to advance one important reason for creating a judicial council:

> To be required to run to the Legislature, however, for every needed change, so as to conform rules and methods to needs, would be not only dil[a]tory, confusing, and uncertain of results, but would be confession that the profession, which above all others, is the expert in this field is incompetent to take

316. *See* Bonde v. Stern, 14 N.W.2d 249, 251-52 (N.D. 1944); Hon. James Morris, *Some Historical Origins of Statutory Law and Judicial Decisions in North Dakota, in* ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER 101, 103 (1966).

317. *See id.*

318. N.D. CONST. sched., § 2 (repealed 1978).

319. *See* N.D. REV. CODE titles 27-32 (1943).

charge of the situation, as well as conceding to the Legislature part of the functions of the Judicial Department.[320]

3. *1941: Reform Authorized*

The Supreme Court, though, seemed deterred from making its own rules by the constitutional restraint on the Court's control over other courts that was delegated only "under such regulations and limitations as may be prescribed by law."[321]

The 1919 legislature authorized the Supreme Court to make rules of pleading, practice and procedure.[322] But the Court only sparingly used the power. Before 1957, those procedural rules that the Court published in the North Dakota Reports merely supplemented statutory procedures for appeals.[323] Eventually, though, the 1941 legislature expressly authorized the Court to alter or amend procedural statutes and established a process to publish public notice and to hold a hearing on any proposed "new rule."[324]

The Court was in no hurry to change procedures. It did not move on procedural reform until years after mid-century. One scholar later tried to explain this disinclination:

> Explanations for this reluctance to move are not difficult to suggest. For one thing, in the hands of the Court the Field Code of Civil Procedure ha[d] served this state extremely well, and a sense of tradition and stability ha[d] come to surround it. Most of the problems connected with it ha[d] been passed upon by the Court and the judges of the state [were] all thoroughly familiar with its principles. It is also possible that the members of the Court felt they were being asked to undertake an essentially legislative task; a majority of the justices felt that

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320. *Report of Annual Meeting of the State Bar Association of North Dakota on September 9-10, 1926*, 3 N.D. B. BRS. 133-34 (1926). It is noteworthy that A.G. Burr chaired and reported for the committee. *See id.* at 134. On December 1, 1926, Alexander G. Burr, a district judge since 1908, was appointed to the Supreme Court by Governor Sorlie to succeed Justice Sveinbjorn Johnson who resigned to become legal counsel and professor of law for the University of Illinois. *See* SKETCH, *supra* note 2, at 43, 45.

321. N.D. CONST. art. IV, § 86 (repealed 1976). This language is verbatim from the model constitution suggested for the 1889 Constitutional Convention by Professor Thayer. According to the annotations with *Peddrick's Model Draft #2*, art. XIII, § 8, it came from "Ark., Colo., Mon., VI, 2." *See* Meschke & Spears, *supra* note 54, at 415, 454-60, 486-87. Much of what Prof. Thayer recommended for the judicial article seems to have been drawn from the constitution prepared for Montana's statehood. *See* Meschke & Spears, *supra* note 54, at 380.

322. *See* 1919 N.D. Laws ch. 167, § 6, at 284 (codified as amended at N.D. CENT. CODE § 27-02-08 (1998)).

323. *See* N.D. vols. 3, 6, 10, 23, 29, 41, 76.

324. *See* 1941 N.D. Laws ch. 238, at 389-91 (codified as amended at N.D. CENT. CODE § 27-02-09 (1998)).

> way, it will be remembered, when the Legislative Assembly placed the Committee on Code Revision under their jurisdiction . . . . [I]t is not at all surprising that a Court with a fine tradition of procedural effectiveness should feel no sense of urgency when asked to depart from a settled path.[325]

But the Court did eventually veer from the "settled path" of the past towards modernity.

In 1953, the North Dakota Senate Judiciary Committee sponsored an amendment of the 1941 rule-making statute to make a few minor modifications in the process and to shift from a generally published notice to one mailed to all judges and lawyers with "a copy of the proposed new rule."[326] That modest move opened the way for modernizing civil practice.

4. *1953: Revision Begins*

During 1953, the Judicial Council authorized a committee of Judge Eugene A. Burdick of Williston, practitioner Norman Tenneson of Fargo, and practitioner Frank F. Jestrab of Williston to prepare proposed rules of civil procedure modeled on the existing Federal Rules of Civil Procedure.[327] The 1953 annual meeting of the State Bar Association authorized appointment of a like committee to similarly study use of the Federal Rules of Civil Procedure.[328] State Bar Association President Vernon Johnson of Wahpeton appointed a nine-member committee, chaired by practitioner Roy A. Ilvedson of Minot, consisting of seven practitioners, Judge Eugene Burdick, and Justice James Morris.[329]

The two committees began coordinating their work in January 1954.[330] On May 10, 1954, the Judicial Council approved a committee recommendation that a draft be made with a joint committee from the State Bar Association.[331] The Chief Justice appointed five members of the proposed Joint Committee: Judge Eugene A. Burdick; Judge A.J. Gronna of Minot; Frank F. Jestrab; Norman Tenneson; and Law School Dean O.H. Thormodsgard.[332]

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325. Charles Liebert Crum, *The Proposed North Dakota Rules of Civil Procedure*, 32 N.D. L. REV. 88, 91-92 (1956).

326. 1953 N.D. Laws ch. 201, § 1, at 322-23 (codified at N.D. CENT. CODE § 27-02-11, *repealed by* 1981 N.D. Laws ch. 317, § 1, at 855).

327. *See 1954 Annual Convention*, *supra* note 309, at 345.

328. *See 1953 Annual Convention*, *supra* note 307, at 395-96.

329. *See 1954 Annual Convention*, *supra* note 309, at 345, 348.

330. *See 1954 Annual Convention*, *supra* note 309, at 345.

331. *See 1954 Annual Convention*, *supra* note 309, at 346-48.

332. *See 1954 Annual Convention*, *supra* note 309, at 348.

At the 1954 annual meeting of the State Bar Association, chair Ilvedson, speaking for "The Rules of Civil Procedure Committee," recommended the Bar join in forming the Joint Committee to complete the draft of new rules and submit it to the Supreme Court for hearing and adoption.[333] Ilvedson reported the recommendation had "been approved by all members of the committee," except that "Hon. James Morris is not sure it should be adopted by the [Court] [or] ruled on by the legislature."[334] During discussion, Ilvedson clarified by reading Justice Morris's letter explaining, "whether it is advisable to proceed through the Supreme Court or through the Legislature has not been definitely determined."[335] Bar president Johnson ruled, "it is a proper matter for consideration whether we would rather have the Supreme Court in its rule making power adopt the rules or whether we would submit it to the legislat[ure]." E.T. Conmy of Fargo urged: "I think we went to a lot of trouble to get power in the Supreme Court and as far as I'm concerned the Supreme Court is by far a better body to pass on rules than the legislature. It is the most competent body to do it. . . ."[336] A future justice, Alvin C. Strutz of Bismarck, echoed Conmy's sentiments, no one advocated going through the legislature, and the recommendations of the Bar's Committee were adopted.[337]

Besides the five members of the Joint Rules Committee appointed by the Chief Justice from the Judicial Council, the new Bar president, John Zuger, appointed six members: E.T. Conmy of Fargo; Senator Carroll E. Day of Grand Forks; Senator Clyde Duffy of Devils Lake; Roy A. Ilvedson of Minot; H.A. Mackoff of Dickinson; and Herbert G. Nilles of Fargo.[338] Frank F. Jestrab became chair of the Joint Committee on Rules of Civil Procedure.[339] This committee was clearly the earliest predecessor of the current Joint Procedure Committee.

The presence of State Senator Carroll E. Day on the committee may have recognized his prior legislative role as a catalyst for reforming the rules. He had been chairman of the Senate Judiciary Committee that sponsored the 1953 amendment of the statutory process for adopting new rules to require a copy of any proposed rule to be noticed to each judge and lawyer.[340] A distinguished practicing lawyer,[341] Senator Day

333. *See 1954 Annual Convention, supra* note 309, at 347-48.
334. *1954 Annual Convention, supra* note 309, at 348.
335. *1954 Annual Convention, supra* note 309, at 349.
336. *1954 Annual Convention, supra* note 309, at 349.
337. *See 1954 Annual Convention, supra* note 309, at 349.
338. *North Dakota Rules of Civil Procedure Governing Procedure in the District Courts,* at xiii (West 1957) [hereinafter Hardcover 1957 Rules].
339. *See id.*
340. *See* STATE OF NORTH DAKOTA, SENATE AND HOUSE RULES AND COMMITTEES, at 23-S.R. (1953).
341. Senator Day had been a lecturer at the Law School on practice and procedure from 1936 to

was killed in an airplane crash on March 3, 1956, before fruition of his efforts.[342]

Judge Burdick and Frank Jestrab, both located in Williston, did most of the preliminary drafting.[343] Judge Burdick was not only the principal draftsman of the 1957 Civil Rules but also, as we will see, he later became the chief draftsman of many other new rules and revisions.

5. *1957: New Civil Rules*

The Joint Committee submitted its draft to the Court on December 15, 1954.[344] In an addendum to the petition, Senator Clyde Duffy said he signed it "because [he] believe[d] an excellent job ha[d] been done of integrating the federal rules into North Dakota law and practice," but he was "not prepared to recommend the substitution of the federal rules for the rules heretofore prevailing in this state."[345] Chair Jestrab was hopeful "that the court [would] move promptly," since "[i]t would be helpful to the profession. . . ."[346]

The proposed rules were noticed to judges and lawyers.[347] The Court held the hearing on June 1-2, 1955,[348] where retired Justice William Nuessle (1923-1950)[349] vigorously resisted the new rules.[350] Alvin C. Strutz, who was later appointed to the Court, reversed his support for new rules voiced at the 1954 annual meeting of the Bar, and wrote to oppose them:

> If these proposed rules are adopted, then all of the decisions which we have in North Dakota touching upon the Statutes or rules of our Courts, are of no further benefit to us and we must start all over again interpreting the new rules. We do not believe that conditions require such a sweeping change . . . .[351]

1948, while practicing in Grand Forks. *See* Crum, *supra* note 79, at 20, 23, 33 (1959).

342. *See Bench and Bar*, 32 N.D. L. REV. 281, 286-87 (1956).

343. Interview with retired Judge Burdick (Summer 1999).

344. *See* Hardcover 1957 Rules, *supra* note 338, at xiii.

345. *See* Addendum to Petition to Amend Proposed Rules of Civil Procedure (on file with the office of the clerk of the North Dakota Supreme Court, File 7514).

346. *See* Justice Morris's copy of letter from Frank F. Jestrab to Roland Heringer, Vice-President, North Dakota Bar Association (Dec. 30, 1954) (copy of letter on file with the office of the clerk of the North Dakota Supreme Court, File 7514).

347. *See* Hardcover 1957 Rules, *supra* note 338, at xv. West Publishing Company printed 800 pamphlet copies of the proposal "as a public service" for use in notifying judges and lawyers. Letter from West Publishing Company to J.H. Newton, Clerk, North Dakota Supreme Court (Apr. 1, 1955) (on file with the office of the clerk of the North Dakota Supreme Court, File 7514).

348. *See* Hardcover 1957 Rules, *supra* note 338, at xviii.

349. *See* SKETCH, *supra* note 2, at 42.

350. Interview with retired Judge Burdick (Summer 1999).

351. Letter from Alvin C. Strutz to Hon. Thomas J. Burke, Chief Justice, North Dakota Supreme Court (May 18, 1955) (on file with the office of the clerk of the North Dakota Supreme Court, File 7514).

Several other written objections, including one by a district judge, argued the statutes authorizing the Court to make rules and to supersede inconsistent statutes were "an unconstitutional and improper delegation of legislative power to the Supreme Court. . . ."[352]

On June 18, 1955, the Joint Committee, "[p]ursuant to leave granted," filed a supplemental petition suggesting changes to a number of the proposed rules, evidently responding to questions and suggestions at the hearing.[353] Late in 1955, Chief Justice Thomas Burke still assumed "[i]t [was] going to take considerable time for the Court to go over these rules."[354] It did.

Two years later, despite the opposition from past and future justices, the Court unanimously adopted the new rules on April 25, 1957, effective July 1, 1957.[355] The Court "made such amendments and changes therein as in the judgment of the Court are desirable to accomplish the[ir] purposes. . . ."[356] By then, the statutory rotation system had replaced Chief Justice Burke with Chief Justice G. Grimson,[357] who demonstrated leadership.

North Dakota thus became the thirteenth state to follow the federal pattern,[358] in the vanguard of the long procession of states that followed suit. After being frozen in place for nearly a century, the Court's glacial pace of modernization began to move with this watershed event.

6. *Connections and Contrasts*

The new rules were more compact than the existing statutory procedure. They contained seventy-nine separate rules but superceded 183 statutes, "thereby eliminating a very considerable amount of excess wordage as well as simplifying much statutory language."[359] While the 1957 Civil Rules embraced simplification, a cynic might suggest that

352. Wm. R. Reichert & W.F. Reichert, Objections to Proposed Rules of Civil Procedure (on file with the office of the clerk of the North Dakota Supreme Court, File 7514).

353. Petition to Amend Proposed Rules of Civil Procedure (June 17, 1955) (on file with the office of the clerk of the North Dakota Supreme Court, File 7514).

354. Letter from J.H. Newton, Clerk, North Dakota Supreme Court on November 23, 1955, to the senior writer of this article when he was a brash young associate in a Minot law firm. Mr. Newton's letter responded to a telephone inquiry about status of the proposed rules. Mr. Newton's letter elaborated: "Judge Burke . . . states that at the present time no time has been set for final consideration of these rules. A large list of accumulated cases awaits decision of the Court and each month brings additional matters for the Court's consideration."

355. *See* Hardcover 1957 Rules, *supra* note 338, at xviii.

356. *See* Hardcover 1957 Rules, *supra* note 338, at xviii.

357. Besides Chief Justice Grimson, the members of that Court were Justices Thomas Burke, Nels Johnson, James Morris, and P.O. Sathre. *See* SKETCH, *supra* note 2, at 8.

358. *See* Hardcover 1957 Rules, *supra* note 338, at vii.

359. Crum, *supra* note 325, at 93.

purpose was not always respected in the outpouring of rules from the Court that followed later.

How much did this turning point alter the practice landscape?

The 1957 Civil Rules were the existing Federal Rules of Civil Procedure "adapted, insofar as practicable, to state practice."[360] They marked "the first comprehensive change in civil procedure in North Dakota since the adoption of the Field Code by the Territorial Legislature in May of 1862."[361] They were designed to be "a modern, integrated, cohesive body of procedure," "there [was] much that [was] new," but "much of the old remain[ed]."[362]

The "old" included parts of the federal rules previously imported into North Dakota statutes after the federal rules had appeared in 1938. For example, the pretrial-conference device had come into the state Code, "acting on the recommendation of a committee under the leadership of Mr. Justice Grimson."[363] Also, because the federal rules "benefitted substantially from Field Code principles in their original drafting," the new rules did "not represent a departure from the procedural heritage of this state so much as an enrichment of it."[364]

Yet, the 1957 Civil Rules contained much that was in fact new here, even if commonplace in today's practice.

> Third-party practice, broader joinder of claims and parties, deposition and discovery, summary judgment, and the demand for jury trials [were] among the new. Demurrers [had] been abolished, artificial restriction on joinder [had] been eliminated and motion practice [had] been made more elastic and functional. None of these things [were] experimental. They [had] been tested and approved by a productive experience in the Federal Courts and the state courts which [had] adopted the Federal Rules.[365]

The "new" material thus made available more modern and useful procedures.

The historical significance of adoption of the 1957 Civil Rules, however, lies more in how it was done, by the Court, than in the scope of the changes.

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360. *See* Hardcover 1957 Rules, *supra* note 338, at vii.

361. Hardcover 1957 Rules, *supra* note 338, at vii. In the foreword, joint committee chairman Jestrab was a little off on his Dakota Territorial legislative date; it was 1868. *See* Bonde v. Stern, 14 N.W.2d 249, 251 (N.D. 1944); Morris, *supra* note 316.

362. Hardcover 1957 Rules, *supra* note 338, at vii.

363. Crum, *supra* note 325, at 92. Ten other sections of the North Dakota Revised Code of 1943 had incorporated items from the federal rules. *See* Crum, *supra* note 325, at 92 n.16.

364. Crum, *supra* note 325, at 93.

365. Hardcover 1957 Rules, *supra* note 338, at vii.

7. *Revision of Rules Continues*

Having implemented its own comprehensive practice rules for the first time, the Court seemed poised to make reformation of rules the ongoing process it ought to be. But it took yet another decade for the next stage to get going.

At a Judicial Council meeting in June 1967, Chief Justice Obert C. Teigen suggested a committee be created jointly with the State Bar Association to develop new rules of criminal procedure.[366] The Council set up the committee. That study and others were undertaken, sometimes by separate committees for different sets of rules.

Continuing the course of the Joint Committee for the 1957 Civil Rules, the 1967 committee for criminal rules, first chaired by then Justice Erickstad, eventually evolved into a "Special Procedure Committee" (1976), and then a "Joint Procedure Committee of the Judicial Council and State Bar Association" (1977). Finally, it became the "Joint Procedure Committee" (1980) known today.[367]

Judge Burdick was on the committee for criminal rules, too, and he continued on all the successive joint committees until retiring from the Joint Procedure Committee in 1991.[368] Besides the 1957 Civil Rules, Judge Burdick was the principal draftsman of the first North Dakota Rules of Court (1962-63), the first pattern jury instructions (1964-66), and the revised pattern jury instructions (1984-86).[369] His careful craftsmanship remains visible in many of our current rules and in the comments published with them.

If Judge Burdick became the master draftsman of rules and revisions, Justice Erickstad became the master navigator of modernization for the courts. As soon as Justice Erickstad became the Chief Justice in mid-1973, he urgently championed comprehensive written rules for governing the whole of the judicial system.

From that point on, the Court's rule-making thrived. The Court adopted and published procedural rules for criminal practice (1973), evidence (1977), appellate practice (1979), and rules of court (1981);

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366. *See* Judicial Council Minutes 124 (June 22, 1967) (on file with North Dakota Supreme Court Administrator's Office).

367. *See* Records of Joint Procedure Committee (on file with North Dakota Supreme Court Law Library).

368. *See* Resume of Hon. Eugene A. Burdick, *available at* <home1.gte.net/eburdick/biography.htm>.

369. *See id.* Judge Burdick also became one of North Dakota's Commissioners for Uniform State Laws in 1959, and attained leadership positions in that national organization: Chair of the executive committee (1969-71), president (1971-73), and then chair of its committee on style for over 25 years since 1974. *See id.*

also rules of conduct for judges and lawyers, including a code of judicial ethics (1977), rules for judicial discipline (1977), standards for continuing professional education of lawyers (1977), and standards for lawyers' disciplinary sanctions (1988); as well as rules of professional responsibility for lawyers (1977), procedures for lawyer discipline and disability (1977), disciplinary board procedures (1977), and procedures for admission to law practice (1980).[370] Once published, the rules were frequently revised on recommendations from the continuing Joint Procedure Committee chaired by Justices Robert Vogel from 1973 to 1975; Paul M. Sand from 1975 to 1984; H.F. Gierke III from 1985 to 1991; Beryl J. Levine from 1992 to 1996; and Dale Sandstrom from 1996 to present.[371] But the process was constantly encouraged by Chief Justice Erickstad.

With Chief Justice Erickstad's guidance, the Court also began the use of written Administrative Orders (O.A.s) and Administrative Rules (A.R.s). In October 1974, the Court's first Administrative Order designated, for each of the six judicial districts, a presiding district judge who had responsibility for assigning cases to, and requiring reports from, all other judges within that district.[372] The seven presiding judges later began meeting as a Council of Presiding Judges, with one named by the Chief Justice as a Chief Presiding Judge, to set policies for the trial courts.[373] In 1992, the Administrative Rules were amended to authorize the trial judges to elect their own presiding judge in each district, and later the Chief Justice became the presiding officer of the Council of Presiding Judges.[374]

The Joint Procedure Committee continues to study rules and regularly recommends revisions that the Supreme Court usually adopts, sometimes with changes the Court chooses to make. By continuing this process of regular revision of existing rules, the Supreme Court keeps the system up to date.

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370. *See* NORTH DAKOTA RULES OF COURT (West 1981 & later editions).

371. *See* Joint Procedure Committee Minutes (Dec. 19, 1973; Apr. 28, 1975; Mar. 28-29, 1985; Oct. 29-30, 1992; Apr. 25, 1996) (on file with North Dakota Supreme Court Law Library).

372. *See* Lois Katherine Erickstad, Administration of the North Dakota Judicial System 16 (June 1983) (unpublished Public Administration graduate thesis, University of North Dakota) (citing Admin. Order No. 1 (1974)).

373. *See* N.D. SUP. CT. ADMIN. R. 2 (approved September 7, 1976). In 1992, North Dakota Supreme Court Administrative Rule 2 was amended to allow trial judges to elect the presiding judge for their district, instead of an appointment by the Chief Justice. *See also* N.D. SUP. CT. ADMIN. R. 22 (governing the Council of Presiding Judges).

374. *See* N.D. SUP. CT. ADMIN. R. 22(2)(c) (effective September 13, 1995).

8. *Publishing Rules*

The eruption of rules during the 1970s brought from the Court a separate loose-leaf notebook for each set to every practitioner's desk. This accumulation provoked some grumbling from practitioners who preferred the familiar and simpler past to a proliferation of new rules.

Before long, West Publishing Company solved the accumulation difficulty by publishing an annual pamphlet, beginning in 1981, that collected all the administrative and procedural rules in a single reference.[375] West continues to publish an annual rulebook and, in 1990, Michie Publishing Co., now Lexis Law Publishing, publisher of the North Dakota Century Code, began to publish an annual Code supplement containing the rules and annotations to related cases.[376] Thus, every practicing lawyer can (and should) have a rulebook at his or her fingertips to consult conveniently.[377]

9. *Appellate "Trial Anew" Repealed*

One of the more remarkable reforms was repeal of the statutory procedure for a "trial anew" in appeals from non-jury cases to the Supreme Court. Curiously, even after the Court's power to supersede procedural statutes had been enacted in 1941[378] and exercised effectively in 1957, this important reform came by legislative action, not by Supreme Court action.

The "trial anew" review, sometimes called "trial de novo," did not come directly from the Field code as had most of our civil procedures. The concept originated in ancient Roman law.[379] "In the hearing in the higher court new facts and new proofs could be adduced and new points and objections urged without limit. There was a complete rehearing of the cause *de novo*."[380] In the middle ages, the ecclesiastical courts of Europe borrowed this Roman scope of appellate review.[381] France and other civil law countries inherited the procedure this way.[382] De novo review reached the English ecclesiastical courts, too, where American equity practice came from.[383]

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375. *See* NORTH DAKOTA RULES OF COURT (West 1981 & later editions).

376. *See* Court Rules, N.D. CENT. CODE (1991 & later editions).

377. Also, all rules are accessible without cost through the North Dakota Supreme Court's web site at <http://www.court.state.nd.us>.

378. 1941 N.D. Laws ch. 238, at 389-91.

379. *See* ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 6-9 (1941).

380. *Id.* at 8.

381. *See id.* at 9-11.

382. *See id.* at 11-14.

383. *See id.* at 67-71.

An appeal is a process of civil law origin. In England it was in a great measure confined to equity, ecclesiastical, and admiralty jurisdictions, where trial by jury was unknown.

As appellate review developed in this country during the nineteenth century, since "an appeal in equity was a hearing of the case *de novo*, a party was not precluded from taking a ground in the higher court which he had not suggested below."[384] An equitable decree "was open to review on the facts, no less than on the law."[385]

"Trial anew" came to North Dakota after statehood, but early in its history, when lawyer Seth Newman sponsored Chapter 82 of the 1893 North Dakota Laws in his single session as a legislator. Newman had been born, studied law, and admitted to practice in 1860 in the state of New York.[386] He practiced for a time in Iowa before coming to Fargo, North Dakota in 1879.[387] He was politically active here, served a term as mayor of Fargo, a term as Fargo City Attorney, and in the 1893 legislature.[388]

Newman was highly regarded by his peers, unanimously elected as the first president of the State Bar Association in 1899, and twice re-elected for one year terms.[389] Indeed, the original organizational meeting of the Bar Association of North Dakota grew out of "an informal meeting of the members of the bar" at the Grand Forks courthouse, who assembled "at the request of Honorable Seth Newman, representing the . . . Fargo Bar Association . . . ."[390] The Bar Association's memorial characterized him as "the Nestor of the legal profession of North Dakota,"[391] an admiring comparison to the "wisest and oldest of the Greeks in the Trojan War."[392] Newman surely was among North Dakota's "oldest and wisest" lawyers of his time.

Newman's biography in the early records of the State Bar Association gave him credit for the statute on "trial anew" review:

> Mr. Newman was the author of the law changing the method of trial of equity causes, . . . under which equity causes are reviewed on appeal on the merits and final judgment rendered instead of being reviewed on error and new trial granted.[393]

As originally used, it removed the entire cause to the superior court, subjecting both law and fact to retrial.

Christianson v. Farmers' Warehouse Ass'n, 5 N.D. 438, 445, 67 N.W. 300, 302 (1896).

384. POUND, *supra* note 379, at 298.

385. POUND, *supra* note 379, at 300.

386. *See* PROCEEDINGS OF THE NORTH DAKOTA BAR ASSOCIATION FOR THE YEARS 1904-1905 AND 1905-1906, at 90-91 (W.H. Thomas compiler & ed., 1907) [hereinafter PROCEEDINGS 1904-1906].

387. *See id.*

388. *See id.* at 91.

389. *See* PROCEEDINGS OF THE NORTH DAKOTA BAR ASSOCIATION FROM SEPTEMBER 19, 1899, TO SEPTEMBER 21, 1904, at 7, 9 (W.H. Thomas compiler & ed., 1905) [hereinafter PROCEEDINGS 1899-1904].

390. *See id.* at 11.

391. PROCEEDINGS 1904-1906, *supra* note 386, at 89.

392. RANDOM HOUSE DICTIONARY 960 (1967).

393. PROCEEDINGS 1899-1904, *supra* note 389, at 9.

The 1893 legislative enactment required "trial anew" review by the Supreme Court in virtually all non-jury civil cases.[394]

As early as 1916, this extensive review had been criticized by one North Dakota historian as "inconsistent and conflict[ing] with . . . appel[l]ate jurisdiction" because it converted the Supreme Court into "a trial court" compelled to "wade through a voluminous record, containing usually a tangled mass of relevant and irrelevant testimony which the court below was powerless to exclude."[395] Historian Lounsberry declared this "innovation" "should be relegated to the 'scrap heap' and [all] cases be reviewed the same . . . ."[396] "Trial anew" appellate review was an archaic and clumsy device.

Going into the twentieth century, notions of appellate review began changing.

> [T]he rules with respect to review of findings of fact by juries, the pressure of work in appellate courts in the last half of the nineteenth century, and a feeling that the primary work of those courts was to find and declare the law, led many [other state] courts to [hold] that a reviewing court would give a finding of fact by a judge or chancellor the force of a [jury] verdict.[397]

Different state courts variously modified this form of review, but Dean Pound tells us: "More generally it was [held] that [a] finding would not be disturbed unless it was clearly wrong."[398] By 1941, there had "been a steady progress [the last forty years] to get away from consequences of regarding a proceeding for review as a new proceeding . . . ."[399]

Dean Pound gave "trial anew" the most damning criticism: "To pile one oral trial or hearing upon another is expensive and wasteful. . . . New trials ought to be avoided whenever the materials of assured application of law to facts fully and fairly ascertained have been provided at the first trial."[400]

But "trial anew" review was not modified when the Court adopted the 1957 Civil Rules from the federal pattern even though Federal Rule 52(a) stated the modern standard for review: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the

394. *See* 1893 N.D. Laws ch. 82, at 198-99; *see also* N.D. REV. CODE § 28-2732 (1943).
395. LOUNSBERRY, *supra* note 1, at 449.
396. LOUNSBERRY, *supra* note 1, at 449.
397. POUND, *supra* note 379, at 300.
398. POUND, *supra* note 379, at 301.
399. POUND, *supra* note 379, at 375.
400. POUND, *supra* note 379, at 5.

witnesses."[401] In 1954, the Joint Committee on Rules of Civil Procedure for North Dakota proposed the "clearly erroneous" standard in its recommended Rule 52(a), but did not put section 28-2732 of the 1943 North Dakota Revised Code (the Newman Law), into the proposed appendix of statutes superseded.[402] However, in their supplementary petition shortly after the hearing, the Joint Committee proposed an appendix of Special Statutory Proceedings to be excepted from the rules under Rule 81, "insofar as they are inconsistent or in conflict with the procedure and practice provided by these rules."[403] That proposed appendix excepted section "28-2732 . . . Trial De Novo in Supreme Court."[404] Still, the Committee did not suggest changing the recommended Rule 52(a) language that directed "[f]indings of fact shall not be set aside unless clearly erroneous."[405]

In adopting the proposed Civil Rules in 1957, the Court evidently saw the ambiguity and remodeled Rule 52(a). The Court deleted the "clearly erroneous" standard, as well as the instruction to consider "the special opportunity of the trial court to judge the credibility of the witnesses who appeared personally before it."[406] The Court then did not supersede the "trial anew" statute, but rather listed it in Table A as an excepted Special Statutory Proceeding under Rule 81(a).[407] The ancient "trial anew" review thus survived the 1957 movement to modernize rules of practice.

Former Justice William S. Murray (1966), ruminating on his short career on the Court,[408] despaired of changing "trial anew" review: "This 'Newman Law' places the North Dakota Supreme Court, in a sense, in the role of a jury . . . . It is unlikely that it will ever be repealed."[409]

In 1970, Justice Erickstad urged repeal of the "trial de novo" statute as one way to overcome congestion and delay, recognizing that "delay in the rendering of decisions has perhaps been the greatest

401. FED. R. CIV. P. 52(a).

402. *See* Proposed Rules of Civil Procedure For the District Courts of North Dakota (on file with the office of the clerk of the North Dakota Supreme Court, File 7514).

403. *See* Petition to Amend Proposed Rules of Civil Procedure (June 17, 1955) (on file with the office of the clerk of the North Dakota Supreme Court, File 7514).

404. *Id.*

405. *Id.*

406. *See* Hardcover 1957 Rules, *supra* note 338, at 68.

407. *See* Hardcover 1957 Rules, *supra* note 338, at 107.

408. Justice Murray served only nine months when he was defeated for election to the position after being appointed by Governor William Guy to replace Justice Thomas Burke, who died in office on March 20, 1966. *See* SKETCH, *supra* note 2, at 56, 49. Justice William Paulson (1966-1983) was elected to the position that Justice Murray left. *See* SKETCH, *supra* note 2, at 57.

409. Hon. William S. Murray, *Through the Looking Glass or How to Be a Judge in Ten Easy Lessons*, 43 N.D. L. REV. 423, 425 (1967).

criticism . . . directed at the supreme court . . . ."[410] "[T]o try anew the questions of fact . . . is very time-consuming and frustrating," he argued.[411] Even after "trial anew" review was repealed in 1971, one scholar advocated amending the judicial article to prevent the legislature from ever reinstating it![412]

More than a decade after the reformation of civil procedure in 1957, on April 17, 1970, the Judicial Council approved a draft bill "to repeal the statute providing for trial de novo" and agreed to submit the proposed bill to the legislature.[413] Again on January 11, 1971, the Judicial Council approved a draft bill "to repeal section 28-27-32" for submission to the legislature.[414] Both motions were made by Judge Burdick.

Senators Robert Chesrown of Linton, Howard Freed of Dickinson, and Donald Holand of Fargo, all lawyers, sponsored Senate Bill 2252 to repeal "trial anew" review and to delete a reference to it from another section on appellate procedure.[415] The bill was supported at the 1971 Senate hearing by district Judge Adam Gefreh of Linton ("N.Dak. is the only state that has such a trial de novo statute"), and Justice Strutz ("justice would be done if a court appeal would be treated [like] a jury case"), and opposed only by attorney Fred Saefke of Bismarck ("the present law is the best protection litigants have").[416] The Senate Judiciary Committee unanimously endorsed the bill, and the North Dakota Senate passed it without a single vote against it.[417]

The measure had a more difficult course in the North Dakota House of Representatives. Again, the bill was supported by Judge Gefreh and Justice Strutz, as well as by Judge Burdick ("loads the court unnecessarily") and attorney Hugh McCutcheon of Minot ("Appellate

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410. Hon. Ralph J. Erickstad, *Thoughts on Ways of Expediting the Work of Our Supreme Court*, 46 N.D. L. REV. 409 (1970).

411. *See id.* at 411-12.

412. Richard R. Kuhns, *Revising A State Judicial Article: Issues for the North Dakota Constitutional Convention*, 48 N.D. L. REV. 219, 233 n.66 (1972):

> It would . . . be desirable for the constitution to eliminate the possibility for *de novo* supreme court review of the entire record of a case. . . . Since the legislature apparently has the power to provide for a *de novo* supreme court review, [under article IV, section 86 of the North Dakota Constitution], and since it has exercised this power in the past, [under section 28-27-32 of the North Dakota Century Code] (repealed 1971), it would be appropriate for the constitution to state explicitly that the supreme court's appellate jurisdiction does not include *de novo* review. (citation omitted)

413. *See* Judicial Council Minutes 164 (Apr. 17, 1970) (on file with North Dakota Supreme Court Administrator's Office).

414. *See* Judicial Council Minutes 173 (Jan. 11, 1971) (on file with North Dakota Supreme Court Administrator's Office).

415. S.B. 2252, 42d Leg. (N.D. 1971).

416. Minutes of 1971 Senate Judiciary Committee (Feb. 3, 1971).

417. STATE OF NORTH DAKOTA, JOURNAL OF THE SENATE 425 (42d Leg. 1975).

court should not become trial court.").[418] But the measure drew serious opposition from other lawyers: Wm. R. Pearce of Bismarck ("This is a step backward"); Fred Saefke again; and Al Wolf of Bismarck ("May cut down on the work of the supreme court but people of N.Dak. are entitled to this.")[419]

On the motion of longtime Representative Earl Rundle, the House Judiciary Committee voted 8 to 4 to recommend the bill be indefinitely postponed.[420] When the Committee recommendation reached the floor of the House, however, committee member Representative Donald Moore moved to place S.B. 2252 on the calendar instead, and his motion prevailed.[421] On March 3, 1971, S.B. 2252 passed the House by a 60 to 35 vote.[422] "Newman's Law" was repealed, and appellate review was finally ready for a modern procedural standard.[423]

In August 1971, the Court amended NDRCivP 52(a) to incorporate the "clearly erroneous" standard for reviewing a trial court's findings of fact.[424] It is well accepted today that factual findings by an appellate court from a complex written record are generally less reliable than ones made by a trial judge from direct observations of all participants at the trial while the record was developed, unless the findings are clearly erroneous.[425]

Even though the "trial anew" concept is largely gone from our appellate practice, a few remnants remain in our Code.[426] Still, the replacement of trial-de-novo review with the modern standard more deferential to the fact-finding efforts of the trial court was an important step in modernizing our judicial system in the last third of this century.

10. *Favored Appellate Finality Forgotten?*

In the process of repealing "trial anew" review, however, another feature of Newman's law was left out of the discussions, apparently

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418. Minutes of House Judiciary Committee (Mar. 1, 1971).

419. *Id.*

420. *See id.*

421. *See* STATE OF NORTH DAKOTA, JOURNAL OF THE HOUSE 1073 (42d Leg. 1975).

422. *See id.* at 1101-02.

423. *See* 1971 N.D. Laws ch. 311, § 2, at 720, *repealing* N.D. CENT. CODE § 28-27-32.

424. Letter from Gerhard Raedeke, Staff Attorney, Joint Procedure Committee, to Herbert L. Meschke (Mar. 24, 1999) (on file with author) (citing minutes of a March 29-30, 1979 committee meeting that recommended deletion of this sentence from the Explanatory Note: "In 1971, the rule was amended by the addition of the scope of review by the Supreme Court of findings of fact of a trial court, in compliance with the federal rule.").

425. "In all systems the history of appellate procedure shows the importance of separating ascertainment of the facts, as a process, from ascertainment of the applicable law and application of the ascertained law to the facts." POUND, *supra* note 379, at 4.

426. *See* N.D. CENT. CODE § 27-20-56(1) (1991) (on review of juvenile court decisions); Anderson v. K.S., 500 N.W.2d 603, 605 (N.D. 1993).

inadvertently, and has been nearly overlooked. Newman's Law also directed the reviewing Court, in appeals from "all actions tried by the district court without a jury," to "render final judgment therein, according to the justice of the case."[427] In early applications of Newman's law, the N.D. Supreme Court valued this feature.

> The statute . . . requires us to render final judgment, and thus, by its mandate, forever terminate the particular litigation. . . . [T]o the legislative mind it doubtless suggested a means of terminating litigation in a manner that should at once possess the strongest probability of absolute justice with the least expenditure of time and money. It avoids the delay and expense of a second trial, and the risk of further errors that might necessitate a second appeal. If these legislative objects can really be accomplished, the value and propriety of the statute cannot be doubted.[428]

Dean Pound, in his classic 1941 work for the National Conference of Judicial Councils, *Appellate Procedure in Civil Cases*, reviewed twentieth-century improvements and reported "there ha[d] been a steady progress toward winding up controversies in one proceeding and with a minimum of retrial and successive appeal."[429] In his concluding chapter, "Toward an Effective System of Review," Dean Pound recommended "courts of review should be empowered and required to make a complete final disposition of the whole proceeding brought before them."[430]

The North Dakota Supreme Court has been hesitant and uncertain in using the principle favoring appellate finality where possible.[431] The

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427. 1893 N.D. Laws, ch. 82, at 198-99; N.D. CENT. CODE § 28-27-32 (1970), *repealed by* 1971 N.D. Laws, ch. 311, at 720.

428. Christianson v. Farmers' Warehouse Ass'n, 5 N.D. 438, 445, 67 N.W. 300, 302 (1896) (reversing the trial court's decision and remanding for entry of a final judgment of foreclosure for the appellants); *see also* Taylor v. Taylor, 5 N.D. 58, 65, 63 N.W. 893, 895 (1895) (reversing a trial court's decision denying a divorce for condonation and remanding with thorough-going directions for entry of final judgment to give the appellant-spouse custody of two children, grant her title to specified property, and order the respondent-spouse to pay specified child support).

429. POUND, *supra* note 379, at 373.

430. POUND, *supra* note 379, at 387. "[A]ppeal upon appeal ought not to be allowed. One trial and one appeal in one case should be regarded as the normal course of litigation." POUND, *supra* note 379, at 392.

431. For a recent example, see *Goff v. Goff*, 1999 ND 95, 593 N.W.2d 768, where Justices Kapsner and Neumann voted to reverse a trial court decision denying a custodial parent permission to relocate to another state with the children, concluding the trial court's findings "were clearly erroneous because they were based on an erroneous interpretation of the law" but, instead of making a final disposition, voted to "remand for the trial court's determination on [the custodial parent's] motion for relocation applying a proper [legal] analysis . . . ." *Id.* at 773. Justice Maring concurred that the trial court's findings were clearly erroneous but dissented from the remand for extensive further proceedings. *See id.* She wanted to "remand with instructions the trial court enter a judgment

Court should carefully consider the expansive language in rule 35(b) of the North Dakota Rules of Appellate Procedure as adopted in 1979 from a statute that originated from 1887 territorial legislation.[432] Appellate Rule 35(b) describes broadly the power of the Court on review in civil cases.

The last sentence of rule 35(b) of North Dakota Rules of Appellate Procedure twice emphasizes "final judgment," while the second and third sentences of that subsection condition a remand for "some issue . . . [that] has not been tried, or if tried has not been determined by the trial court" on whether "it is necessary or desirable to proper disposition of the case on appeal."[433] The direction in the fourth sentence of rule 35(b), ("In all cases the supreme court shall remit its final judgment or decision to the court from which the appeal was taken to be enforced accordingly . . . ."), should be read to embody and continue the most worthwhile, but overlooked, feature of the Newman

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permitting the move and establishing an appropriate visitation schedule for the two minor children and their [other parent]," the only real loose end left to wrap up. *See id.* at 774. Because the fifth justice, Justice Sandstrom, would have affirmed and dissented entirely for that reason, Chief Justice VandeWalle, who largely agreed with Justice Maring, reluctantly concurred "in the result reached by Justice Kapsner to reverse and remand to permit the trial court to apply the proper [legal] analysis . . . ." *See id.* at 773, 774. The Chief Justice explained he did so because, otherwise, there would not be the required constitutional "'concurrence of a majority of the judges.'" *See id.* The potential effect of rule 35(b) of North Dakota Rules of Appellate Procedure evidently was neither cited to nor considered by the Court.

432. The Explanatory Note to North Dakota Rules of Appellate Procedure rule 35(b) says: "Subdivision (b) is a restatement of former § 28-27-29." North Dakota Century Code section 28-27-29 originated in section 25 of an enactment of the 1887 session of Dakota Territory's legislature. That twenty-seven section act provided "the Method of Appeals to the Supreme Court of the Territory of Dakota." 1887 Dakota Laws ch. 20, § 25, at 61. The state's 1891 legislative assembly adopted a very similar enactment "Regulating Appeals In Civil Actions," consisting of 29 sections. 1891 N.D. Laws ch. 120, at 304-11. It contained virtually identical wording in section 26. That language became section 5628 of the 1895 Revised Codes of North Dakota, entitled "Power of Court. Rehearing. What clerk transmits," and then became section 7844 of the 1913 Compiled Laws of North Dakota. The first and fourth sentences of North Dakota Rules of Appellate Procedure 35(b) are nearly verbatim from these enactments.

The 1927 legislative assembly amended this "Power of Court" section to add two sentences authorizing the Court to remand, "without relinquishing jurisdiction of the appeal," for determination of an issue that "has not been tried, or if tried has not been determined," if "it is necessary or desirable to a proper disposition on appeal." 1927 N.D. Laws ch. 214, § 1, at 369-70. Those two sentences became sentences two and three of North Dakota Century Code section 28-27-29 on "Power of Supreme Court on Appeal," and then later became sentences two and three of North Dakota Rules of Appellate Procedure rule 35(b).

The "necessary or desirable" standard for directing remand "without relinquishing jurisdiction," in conjunction with the emphasis in the concluding sentence of Rule 35(b) on entering a "final judgment" on remand, implies a strong presumption in favor of finality in an appellate disposition whenever possible. For nearly 80 years, these provisions were so interpreted and applied in conjunction with the direction of Newman's law to "render final judgment" in all appeals from non-jury judgments "according to the justice of the case." That long tradition should continue to shape today's interpretation of the "final judgment" language in North Dakota Rules of Appellate Procedure rule 35(b).

433. Note that the second sentence of North Dakota Rules of Appellate Procedure rule 35(b) contemplates a remand to determine a "necessary" issue would be "without relinquishing jurisdiction of the appeal."

law reflected in the "final judgment" language in Rule 35(b) and its statutory predecessors.

The Court should seek to carry on that traditional appellate objective of final disposition in reviewing final judgments after a full trial in non-jury cases. Doing so would fulfill the basic goal of all procedure stated in Rule 1 of North Dakota Rules of Civil Procedure "to secure the just, speedy, and inexpensive determination of every action."

11. *The Largest Advance*

Reformation of procedural rules by the Court itself was the first real step since statehood towards modernizing the judicial system.

B. COURT UNIFICATION

The other major development in modernizing the judicial system was trial court unification.

The characteristics of a unified system were advocated to the legislature as early as 1975 by Chief Justice Erickstad by quoting the American Bar Association's Standards of Judicial Administration. Simplified here, those standards called for a judicial system with (a) uniform jurisdiction; (b) simple jurisdictional divisions; (c) uniform dispensation of justice through systemized rules of administration and procedure, continuing judicial conferences and education, and consistent policy administration; (d) clearly vested policy-making authority; and (e) clearly established administrative authority.[434] A few years later, praising the people's 1976 approval of the new judicial article authorizing a unified judicial system, Chief Justice Erickstad explained: "A unified judicial system is intended to be a single provider of court services. A unified system is one that is accountable for quality services delivered in an efficient and effective manner."[435] Those precepts clearly guided Chief Justice Erickstad's enormous efforts to improve the entire system.

1. *1961: Abolishing Justices of the Peace*

Changing the structure of the trial courts actually began earlier when the 1959 legislature abolished justices of the peace.[436] Justices of the peace had been instituted in the 1889 Constitution, which also

434. *See* Chief Justice Erickstad's State of the Judiciary Address, STATE OF NORTH DAKOTA, JOURNAL OF THE HOUSE 63 (44th Leg. 1975).

435. Chief Justice Erickstad's State of the Judiciary Address, STATE OF NORTH DAKOTA, JOURNAL OF THE HOUSE 94 (46th Leg. 1975).

436. *See* 1959 N.D. Laws ch. 268, § 1, at 437.

empowered the legislature to abolish the positions.[437] Justices of the peace had limited jurisdiction, were rarely law trained, and were paid from the fees they collected, a practice the United States Supreme Court had condemned as unconstitutional three decades before.[438]

Effective July 1, 1961, the legislature replaced justices of the peace with several categories of law-trained county judges, including county justices and county judges with increased jurisdiction.[439]

2. *1967: Electing the Chief Justice*

Another major step in unification was the legislature's change of the method for selecting the Chief Justice from a regular rotation among all the justices to an election by all the judges in the system.

The 1889 Constitution directed that the Supreme Court "judge having the shortest term to serve, not holding his office by election or appointment to fill a vacancy, shall be chief justice . . . ."[440] When the Court was expanded from three to five members by a constitutional amendment in 1908, three judges had to be elected in 1910 for identical six-year terms. Anticipating these three justices would have identically short terms between 1914 and 1916, the 1909 legislature directed the Chief then be selected by the justices from among themselves, but that law otherwise left the rotation system in place.[441]

Later, all justices' terms were extended from six years to ten years and also staggered by a 1930 constitutional amendment implemented with the 1934 general election.[442] The rotation method of selecting the Chief Justice worked again and remained in place.[443]

After an interim study on amending the judicial article, the Legislative Research Committee (LRC) recommended the 1965 legislature amend the relevant section of the Constitution to say: "The Chief Justice shall be selected as provided by law."[444] The LRC Report also submitted a companion bill to authorize the Judicial Council to select the Chief Justice because the Committee "believed that these individuals would have better knowledge of the qualifications of the judges for this position."[445] The membership of the Judicial Council comprised "all

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437. *See* N.D. CONST. art. IV, § 112 (repealed 1976).

438. *See* Tumey v. Ohio, 273 U.S. 510, 523, 531 (1927).

439. *See* 1959 N.D. Laws ch. 268 §§ 2-5, at 437-39. *See generally* James P. White, *The New North Dakota County Justice Court*, 36 N.D. L. REV. 246 (1960).

440. N.D. CONST. art. IV, § 92 (repealed 1976).

441. *See* 1909 N.D. Laws ch. 71, at 63; LOUNSBERRY, *supra* note 1, at 447.

442. *See* 1931 N.D. Laws art. 46, at 578.

443. *See* N.D. REV. CODE § 27-0201 (1943).

444. 1965 REPORT OF THE NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE 45.

445. *See id.* at 48; *see also* 1965 N.D. Laws ch. 225, at 435-41.

of the active and retired supreme and district court judges; one county judge; the attorney general; the dean of the School of Law; and five members of the State Bar Association."[446]

When the proposed 1965 amendment to the Constitution failed,[447] the next interim LRC Report recommended the 1967 legislature authorize the Judicial Council to "appoint" the Chief Justice. The 1967 report explained why:

> When the position revolves every two years, there is a lack of experience and the possibility exists that the duties of such office are not carried out or performed in the most skillful manner. The Committee believes that if the position is made more permanent a more effective administration will occur.[448]

Without explaining how that fit with the constitutional direction to rotate the position among the justices, the 1967 legislature authorized the judges of the supreme and district court to appoint the Chief Justice "from the members of the supreme court . . . ."[449]

In October 1967, the judges selected Justice Obert C. Teigen to be Chief Justice.[450] In 1971, the judges named Alvin C. Strutz Chief Justice (1959-1973) in his place.[451] After Chief Justice Strutz died in office in June 1973, the judges elected Chief Justice Ralph J. Erickstad.[452] He was regularly reelected every five years thereafter until he retired at the end of 1992 with nearly twenty years as Chief Justice.[453]

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446. 1965 REPORT OF THE NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE 48.

447. S. Con. Res. "P", 1965 N.D. Laws ch. 481 at 473-74, defeated in 1966 general election, 1967 N.D. Laws, ch. 512 at 1214-15.

448. 1967 REPORT OF THE NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE 35.

449. 1967 N.D. Laws, ch. 245, § 1, at 508 (codified as amended at N.D. CENT CODE § 27-02-01). The law is now clearly constitutional because, after the 1976 amendment, the judicial article now directs one of the five justices "shall be designated chief justice in the manner provided by law." N.D. CONST. art. VI, § 2.

450. *See* Judicial Council Minutes 129 (Oct. 20, 1967) (on file with North Dakota Supreme Court Law Library). Justice Teigen was appointed to the Court to succeed Justice Grimson, who resigned in December 1958. *See* SKETCH, *supra* note 2, at 52. Teigen had practiced law at Devils Lake, had been Ramsey County State's Attorney for eight years, and had been district judge from 1954. *See* SKETCH, *supra* note 2, at 52. After his retirement in 1974, Justice Teigen became an Administrative Law Judge with the Social Security Administration until ill health forced his resignation from that position in February 1978. *See* SKETCH, *supra* note 2, at 52.

451. *See* Minutes of Joint Meeting of the Supreme and District Court Judges (Oct. 23, 1970) (on file with North Dakota Supreme Court Administrator's Office) (showing Justice Strutz elected, effective January 1, 1971). Justice Strutz was appointed in April 1959 to replace Justice Nels Johnson (1954-1958), who died in office. *See* SKETCH, *supra* note 2, at 51, 53.

452. *See* Minutes of Meeting of Supreme and District Court Judges 1 (June 20, 1973) (on file with North Dakota Supreme Court Administrator's Office).

453. *See* Judicial Council Minutes 4 (Nov. 23-24, 1987) (on file with North Dakota Supreme Court Administrator's Office); Minutes of Meeting of Supreme and District Court Judges (June 14, 1977 & Nov. 23, 1982) (on file with North Dakota Supreme Court Administrator's Office).

The modernizing move of electing the Chief Justice was made by the legislature, not the Court, much like procedural reform was begun. These legislative measures set the stage for amendment of the judicial article that implicitly approved the goal of improving the judicial system and enabled the Supreme Court to proceed with more modernization on its own.

3. *1972: Futile Efforts*

The eventual amendment of the judicial article in the North Dakota Constitution grew out of legislative studies on general constitutional revision that began in the 1960s led by State Senator William R. Reichert of Dickinson, a lawyer.[454] During 1963 and 1964, an interim LRC committee studied ways to improve the judicial article and recommended a proposal to submit to the people.[455] All proposed constitutional measures, "while receiving very substantial support, were narrowly defeated," which the 1965-1966 LRC found "heartening."[456] The 1967 legislature therefore continued to seek substantial revision of the judicial article, but it was again rejected.[457]

The 1969 legislature submitted the question of calling a Constitutional Convention "for the purpose of revising the Constitution of the State" to a popular vote, and the people voted for a Convention.[458] As directed by a companion 1969 act,[459] ninety-eight delegates were elected at the 1970 general election, and they convened at Bismarck on April 6, 1971.[460]

The Judicial Council quickly met and, on a motion by Judge Burdick, decided to draft a new judicial article "for the purpose of cooperating with the Constitutional Convention . . . ."[461] At a later meeting in 1971, the Judicial Council agreed to propose six points to the Convention for the new judicial article: (1) a Court of seven justices; (2)

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454. Senator Reichert chaired the Constitutional Revision subcommittees of the Legislative Research Committee for 1963-1964 and 1965-1966. *See* 1965 REPORT OF THE NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE 2; 1967 REPORT OF THE NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE 11.

455. *See* 1965 REPORT OF THE NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE 45-54.

456. 1967 REPORT OF THE NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE 11; S. Con. Res. "P", 1965 N.D. Laws, ch. 481, at 973-74, defeated at the 1966 general election, 1967 N.D. Laws ch. 512, at 1214-15

457. *See* S. Con. Res. "UU", 1967 N.D. Laws, ch. 517, at 1230-34, defeated at the 1968 primary election, 1969 N.D. Laws ch. 585, at 1244-48.

458. *See* H. Con. Res. 16, 1969 N.D. Laws, ch. 595, at 1278-79; approved at the 1970 primary election, 1971 N.D. Laws ch. 617, at 1333.

459. 1969 N.D. Laws ch. 462, at 991-95.

460. NORTH DAKOTA CONSTITUTIONAL CONVENTION, INTERIM REPORT vi (1972).

461. *See* Judicial Council Minutes 177 (Apr. 16, 1971) (on file with North Dakota Supreme Court Adminstrator's Office).

panels of three to decide "routine" cases; (3) "strong supervisory and disciplinary powers over lower courts" in the Supreme Court; (4) continue nonpartisan elections; (5) place authority in the Court to "redistrict the state"; and (6) make retirement at age seventy mandatory.[462] Later at the same meeting, the Council studied at length a "working draft prepared by the staff of the North Dakota Constitutional Convention for the Committee on Judicial Functions and Political Subdivisions," and the Judicial Council recommended numerous technical changes.[463]

The Convention's committee on "Judicial Functions and Political Subdivisions" recommended a draft article for the "Judicial Department" that called for a five member Supreme Court, a unified judicial system, with power to "make rules for the government of all courts and for the procedures applicable therein."[464] Including this new article, the Constitutional Convention recommended a complete remake of the 1889 Constitution in 1972,[465] but several controversial features led the people at a special election on April 28, 1972 to roundly defeat the proposed revision.[466] Wholesale revision of the Constitution was out.

4. *1976: A New Judicial Article*

Before 1972 ended, the Judicial Council began studying a proposed new judicial article, prepared by the ubiquitous Judge Burdick, to ask the 1973 legislature to submit for a separate vote.[467] Still, it took awhile. Nothing of much importance came out of the 1973 session.[468]

Overriding Chief Justice Erickstad's plea for even more study,[469] the 1975 legislature adopted a resolution jointly sponsored by Representative William Kretchmar (a lawyer from Ashley who had also been a Constitutional Convention delegate) that salvaged the judicial article proposed by the Convention, modified it somewhat, and submitted it for

462. *See* Judicial Council Minutes 183 (Oct. 15, 1971) (on file with North Dakota Supreme Court Adminstrator's Office).

463. *See id.* at 186-89.

464. NORTH DAKOTA CONSTITUTIONAL CONVENTION, INTERIM REPORT 67 (1972).

465. *See* 1973 N.D. Sess. ch. 529, at 1389-1418.

466. *See id.* at 1418 (stating that the provision was disapproved 64,073 to 107,643).

467. *See* Judicial Council Minutes 207-08 (Dec. 19, 1972) (on file with North Dakota Supreme Court Administrator's Office).

468. *See* 1973 North Dakota Laws ch. 533, at 1422, House Concurrent Resolution No. 3017, proposed an addition to the judicial article to authorize the legislature to "provide for the retirement, discipline and removal of judges of the supreme court and district court[s]," besides use of impeachment. The people approved this overwhelmingly at the 1974 general election. *See* 1975 N.D. Laws ch. 606, at 1582. This authorization was also carried forward in the 1976 judicial article amendment. *See* N.D. CONST. art. VI, § 12.

469. *See* Erickstad, *supra* note 372, at 27.

a separate vote.[470] Chief Justice Erickstad actively and publicly promoted passage of this proposal.[471] At the 1976 primary election, after more than a decade of repeated efforts, the people approved a new judicial article.[472]

The new article vested the judicial power of the state in a unified judicial system headed by a five-member Supreme Court with an administrative Chief Justice selected "in the manner provided by law."[473] Length of residence was eliminated from the qualifications for a seat on the Court,[474] and the Court was given complete power over procedure "to be followed by all the courts of this state."[475] Finally, the judicial system could be renovated to fit modern expectations.

5. *1981: Unifying the Courts*

The 1977 legislature, in a resolution sponsored by Senator Frank Wenstrom of Williston (who had presided over the 1972 Constitutional Convention),[476] called for a moratorium on structural changes to the judicial system while an interim study was made of "the state's entire judicial system" for the 1979 legislative session.[477] The interim Legislative Committee headed by Senator Howard Freed, a lawyer from Dickinson, and a Judicial Council committee worked jointly to propose legislation for the 1979 session. Lawyer Richard McGee from Minot headed a Citizen's Advisory Committee that participated in the study.[478] The proposal called for state funding of a single-jurisdiction trial court organized by districts.[479]

Chief Justice Erickstad urged the 1979 session to implement the unified system with state funding in five phases: (1) statewide trial courts; (2) juvenile court personnel; (3) clerks of court; (4) jurors and indigent

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470. *See* 1975 N.D. Laws ch. 615, at 1598; Erickstad, *supra* note 372, at 27.

471. *See* Erickstad, *supra* note 372, at 27-28; *see also* Judicial Council Minutes 7 (June 19, 1975) (on file with North Dakota Supreme Court Administrator's Office); Judicial Council Minutes 2 (Nov. 24, 1975) (on file with North Dakota Supreme Court Administrator's Office).

472. *See* 1977 N.D. Laws ch. 599, at 1378-80.

473. N.D. CONST. art. VI, §§ 1-3.

474. "Supreme court justices and district court judges shall be citizens of the United States and residents of this state, shall be learned in the law, and shall possess any additional qualifications prescribed by law." N.D. CONST. art. VI, § 10. The three year residency requirement for a position on the Supreme Court is gone.

475. N.D. CONST. art. VI, § 3: "The supreme court shall have authority to promulgate rules of procedure, including appellate procedure, to be followed by all the courts of this state; and, unless otherwise provided by law, to promulgate rules and regulations for the admission to practice, conduct, disciplining, and disbarment of attorneys at law." This plain language gives the Court complete power over all procedure.

476. *See* NORTH DAKOTA CONSTITUTIONAL CONVENTION, INTERIM REPORT vii (1972).

477. 1977 N.D. Laws, S. Con. Res. No. 4021, at 1546; *see also* Erickstad, *supra* note 372, at 29.

478. *See id.* at 29-30.

479. *See id.*; 1979 REPORT OF THE NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE 105-12.

defense; and (5) incentives to improve trial court facilities.[480] When the appropriations bill to fund statewide district courts was defeated in the Senate, "basically through opposition of the State Association of Counties," the 1979 legislature decided to study unifying the system for another two years.[481] Structural unification was delayed yet again.

The 1981 legislature began unifying the trial courts by appropriating state funds for district judges, jurors, indigent defense, and juvenile court[482] and, effective January 1, 1983, by replacing the multi-formed county courts with a single-level county court with uniform jurisdiction and law-trained judges throughout the state.[483] Practice and procedure for county courts was made the same as for district courts, with direct appeals from the county courts on the record to the Supreme Court.[484] While a number of county judges served more than one rural county, and some urban counties had more than one county judge, each had the same substantive jurisdiction.[485]

Substantial restructuring of the system had finally happened more than two decades after the first attempts to do so.

6. *1981: Judicial Nominating Committee*

Since statehood, all interim judicial vacancies had been filled by appointment of the Governor at his sole discretion.[486] For some time, the State Bar Association often informally made recommendations on the qualifications of known candidates to assist the Governor in filling a vacancy.[487]

The 1976 judicial article sought to formalize this nominating procedure. It directed a judicial nominating committee be established by law, and required the Governor to fill a vacancy from a list of

480. Chief Justice Erickstad's State of the Judiciary Address, STATE OF NORTH DAKOTA, JOURNAL OF THE HOUSE 95-96 (46th Leg. 1975).

481. Erickstad, *supra* note 372, at 31-32; 1979 N.D. Laws, S. Con. Res. 4089, at 1963.

482. *See* 1981 N.D. Laws ch. 36, at 61-62. Clerks of court and courthouse facilities were left for continued funding by the counties.

483. *See* 1981 N.D. Laws ch. 319, at 857-72, codified at N.D. CENT. CODE § 27-07.1, *repealed by* 1991 N.D. Laws ch. 326, § 203, at 974-1044.

484. *See* N.D. CENT. CODE § 27-07.1-21, *repealed by* 1991 N.D. Laws ch. 326, § 203 at 974-1044.

485. *See* N.D. CENT. CODE § 27-07.1-17, *repealed by* 1991 N.D. Laws ch. 326, § 203 at 974-1044. Twenty-six new county court judgeships resulted. "[Forty-two] counties joined fourteen multi-county agreements to share county court services. Of these, there [were] four two-county judgeships, six three-county judgeships, and four four-county judgeships." Erickstad, *supra* note 372, at 34.

486. *See* N.D. CONST. art. IV, § 98 (repealed 1976).

487. In 1922, State Bar Association President Tracy R. Bangs suggested the Association poll its members "in a fair and impartial manner without politics entering into these recommendations" on judicial candidates for election. ANNUAL MEETING OF THE BAR ASSOCIATION 47 (Sept. 14-15, 1922).

candidates nominated by the committee, unless the Governor chose to call a special election for the position.[488]

The legislature was in no hurry. Not until 1979 did it act. Then it passed House Bill 1067 creating a nine-person committee, with three members to be appointed by each of the Chief Justice, president of the State Bar Association, and the speaker of the House of Representatives.[489] Governor Arthur A. Link vetoed it.[490]

The Governor explained the 1977 legislature had failed to establish the committee as the Constitution directed, but that he had carried out "the intent of the Constitution by creating judicial nominating committees by executive act when vacancies occurred in the offices of a district judge and a supreme court justice."[491] Governor Link's reference to filling a Supreme Court vacancy was his appointment of then First Assistant Attorney General Gerald W. VandeWalle (elected Chief Justice in 1993) on August 15, 1978, to replace Justice Robert Vogel, who had resigned to move to Grand Forks to teach and practice law.[492] Governor Link declared H.B. 1067 "not acceptable because the Governor has been excluded from the bill as an appointing authority for members of the nominating committee."[493]

Finally, in 1981, the legislature got it right by establishing a six-person committee to recommend candidates for judicial vacancies. Two members of the committee are appointed by each of the Governor, the Chief Justice, and the president of the State Bar Association, and each official also appoints an additional temporary member from the affected judicial district to nominate candidates for a district-judgeship vacancy.[494]

Since 1981, appointments from a committee-recommended list of qualified candidates have been made by successive Governors Allen I. Olson,[495] George Sinner,[496] and Edward T. Schafer.[497] But the Novem-

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488. *See* N.D. CONST. art. VI, § 13.

489. *See* 1979 N.D. Laws ch. 659, at 1630.

490. *See* Veto Message, 1979 N.D. Laws, at 1628-29.

491. *Id.* at 1629.

492. *See* SKETCH, *supra* note 2, at 58, 62.

493. Veto Message, 1979 N.D. Laws, at 1629.

494. *See* 1981 N.D. Laws ch. 330, at 942-44 (codified as amended at N.D. CENT. CODE §§ 27-25-01 TO 27-25-09)

495. Governor Olson appointed Justice H.F. "Sparky" Gierke III (1983-1992) to the position left by the retirement of Justice William Paulson (1967-1983). *See* SKETCH, *supra* note 2, at 57, 63. While on the Court, Justice Gierke served as the first Vietnam Era State Commander of the N.D. American Legion, 1983-84. *See* SKETCH, *supra* note 2, at 63. In that organization he also attained national leadership positions: as National Vice-Commander of the American Legion, 1985-86, and the first Vietnam Era National Commander of the American Legion, 1988-89. *See* SKETCH, *supra* note 2, at 63.

496. Governor Sinner appointed Justice Beryl J. Levine (1985-1996) to the position left by the death of Justice Paul M. Sand (1975-1984), *see* SKETCH, *supra* note 2, at 60, 64; Justice Herbert L. Meschke (1985-1998) to the position left by retirement of Justice Vernon R. Pederson (1975-1985),

ber 1984 election of Governor Sinner over sitting Governor Olson precipitated conflict over appointments to fill two vacancies that came soon after the election.

7. *1985: Dueling Governors*

In early 1985, the Judicial Nominating Committee wisely sidestepped a dispute between the two Governors over filling two sudden vacancies.

Soon after the November 1984 general election, Justice Vernon R. Pederson announced his retirement effective January 7, 1985.[498] As the Committee began accepting applications for nomination to that post, Justice Paul M. Sand died on December 8, 1984.[499] The Judicial Nominating Committee invited applications and scheduled its meeting to interview applicants for both positions on Thursday, January 3, 1985.[500]

Governor Sinner filed his oath of office on December 31, 1984, and asserted his term began on January 1, 1985. Governor Olson, who had filed his oath of office four years before on Monday, January 6, 1981, claimed his term of office extended to the first Monday in January of 1985, the seventh day of the month, since the Secretary of State's Certificate of Election declared Sinner elected Governor for a four-year term "commencing on the first Monday in January 1985."[501]

On January 2, 1985, the newly elected Attorney General, Nicholas Spaeth, asked the Supreme Court to exercise its original jurisdiction to decide which one was truly Governor that week.[502] With the Committee expected to report its nominations on January 3 or 4, the Court scheduled an immediate hearing for the morning of Friday, January 4 to resolve the dispute over which governor had the constitutional authority to fill both vacancies on the Supreme Court.[503] Justices Pederson, VandeWalle, and Gierke disqualified themselves, and four presiding

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see SKETCH, *supra* note 2, at 61, 65; and Justice J. Philip Johnson (1974 and 1992) to the position left by Justice Gierke, who resigned in 1992 to accept a presidential appointment to the U.S. Court of Military Appeals. Along with Justice Sathre, Justice Johnson shares the distinction of having served on the Court two different times, rather than continuously. For a second time, Justice Johnson was defeated for election after serving less than a year, and again returned to law practice in Fargo.

497. Governor Schafer appointed Justice Mary Muehlen Maring (1996-present) to the position left by Justice Levine's retirement; and Justice Carol Ronning Kapsner (1998-present) to the position left by Justice Meschke's retirement.

498. *See* SKETCH, *supra* note 2, at 61.

499. *See* SKETCH, *supra* note 2, at 60.

500. *See* Kevin Whalen, *Court Candidates Trimmed to 8*, BISMARCK TRIB., Jan. 4, 1985, at A1.

501. North Dakota v. Olson, 359 N.W.2d 876, 877-78 (N.D. 1985).

502. *See id.* at 877.

503. *See* Greg Sellnow, *Spaeth Asks Justices for Fast Decision*, BISMARCK TRIB., Jan. 4, 1985, at A1.

district judges were called to sit temporarily on the Supreme Court with Chief Justice Erickstad to decide the case.[504]

On the morning of January 4, the Nominating Committee, chaired by Owen Anderson, a professor at the North Dakota Law School, delivered a list of eight candidates for the Court to both Governors Olson and Sinner. Since the statutes authorized two to seven nominees for each vacancy, and allowed combined lists for multiple vacancies,[505] the Committee recommended eight candidates:[506] J. Philip Johnson of Fargo;[507] Ward Kirby of Dickinson; Beryl J. Levine of Fargo; James Maxson of Minot; Herbert L. Meschke of Minot; Vern Neff of Williston; District Judge William Neumann of Rugby;[508] and Rolf Sletten of Bismarck.

During the day on January 4, the Supreme Court held the hearing and issued a unanimous opinion.[509] The Court ruled "the term of office for which Olson was elected in 1980 commenced on January 1, 1981, and terminated on December 31, 1984," and that "George A. Sinner is currently, and has been since the first moment of January 1, 1985, the Governor of the State of North Dakota."[510] On January 17, 1985, Governor Sinner appointed Justices Levine and Meschke, and they took office in early February.[511]

8. *Election and Selection*

Two members of the current Court, Justices William Neumann and Dale Sandstrom, were elected in 1992 without having gone through the Nominating Committee procedure for those positions.[512] Two members of the current Court were appointed by Governor Schafer from candidate lists recommended by the Nominating Committee. He appointed Justice Mary Muehlen Maring to replace Justice Levine who retired in 1996. Justice Maring was elected in 1996 to complete that term, and in 1998 reelected to a ten year term. To replace Justice Meschke, who

504. *See Olson*, 359 N.W.2d at 884.

505. *See* N.D. CENT. CODE §§ 27-25-02(4), 27-25-03 (1991).

506. *See* Whalen, *supra* note 500, at A1.

507. Johnson had served six months on the Court before, when he had been appointed by Governor William Guy in 1974 to fill the seat vacated by Justice Obert Teigen, but had been defeated for election. *See* SKETCH, *supra* note 2, at 59.

508. Neumann was later elected to the Court in 1992.

509. *See Olson*, 359 N.W.2d at 884.

510. *Id.*

511. *See* SKETCH, *supra* note 2, at 64-65.

512. Justice Neumann replaced Chief Justice Erickstad who retired. Justice Sandstrom won the position occupied by Justice Johnson. But Justice Neumann had been nominated by the committee in 1985 for other vacancies. *See* discussion, *supra* note 508.

retired in 1998, Governor Schafer appointed Justice Carol Ronning Kapsner.[513]

Under the law establishing the Nominating Committee, its duty is to seek out and recommend "the most highly qualified" judicial candidates after inquiring into their "legal knowledge and ability, judicial temperament, experience, and moral character . . . ."[514] Since the formal inception of the Nominating Committee procedure, six of eight new justices have been selected from lists of candidates recommended by the Committee. The process has worked well.

9. *Reporting to its Constituencies*

Chief Justice Alvin C. Strutz started the important practice of communicating directly to the legislature.[515] His "brief report" to a joint legislative assembly in 1973 remarked on the role of the judiciary as the third branch of government, deplored "the low salaries being paid to our judges," and warned about the increasing workload for the judicial system.[516]

Chief Justice Erickstad augmented and continued the legislative message as a major means of communicating with the coordinate legislative branch of government. He made a "State of the Judiciary" address to a joint legislative assembly in 1975 and to each succeeding biennial session during his tenure.[517] His messages became extensive reports on the condition of the judicial system, on efforts to find solutions to its problems, and on legislation recommended as desirable. Chief Justice VandeWalle has continued the practice.[518]

While occasionally a Chief Justice or Justice had addressed the State Bar Association as far back as the turn of the century,[519] it was Chief

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513. Under a 1998 amendment to the judicial article, "[a]n appointment must continue for at least two years", and "the judge shall continue in the position until the next general election immediately following the service of at least two years." N.D. CONST. art. VI, § 13(2), as added by an amendment approved June 9, 1998 (1999 N.D. Laws ch. 566, at 2103-04).

514. N.D. CENT. CODE § 27-25-05 (1991).

515. *See* STATE OF NORTH DAKOTA, JOURNAL OF THE HOUSE 66-68 (43d Leg. 1973).

516. *Id.*

517. *See* STATE OF NORTH DAKOTA, JOURNAL OF THE HOUSE 58-65 (44th Leg. 1975); 89-98 (45th Leg. 1977); 93-99 (46th Leg. 1979); 129-36 (47th Leg. 1981); 123-29 (48th Leg. 1983); 118-28 (49th Leg. 1985); 159-70 (50th Leg. 1987); 76-83 (51st Leg. 1989); 87-92 (52d Leg. 1991).

518. *See* STATE OF NORTH DAKOTA, JOURNAL OF THE HOUSE 92-95 (53d Leg. 1993); 77-84 (54th Leg. 1995); 66-69 (55th Leg. 1997); 57-63 (56th Leg. 1999).

519. Former Chief Justice Bartholomew addressed "[b]oth branches of the general assembly and a large concourse of lawyers and citizens assembled at the capitol in Bismarck," on February 4, 1901, to commemorate Justice John Marshall Day. PROCEEDINGS 1899-1904, *supra* note 389, at 38-46. He made one particularly striking statement: "An active, accurate, studious bar will not long tolerate an inefficient court." PROCEEDINGS 1899-1904, *supra* note 389, at 46.

Justice Bronson reported to the Bar Association's annual meeting at Minot on August 22, 1919, on legislation affecting the Court, the currency of the Court's docket, and administration of the courts.

Justice Erickstad who began and annualized the practice of formally reporting to the State Bar Association in 1975.[520] Chief Justice VandeWalle has continued this equally important practice of regularly reporting to the Court's principal constituency.[521]

Direct and regular communications with the legislature and the legal profession became important instruments for modernizing the Court and the judicial system. They will continue to be instrumental in those ongoing relationships.

10. *Erickstad Era Progress*

Many people helped modernize the system. Early on, leaders and members of the State Bar Association and some Justices spurred and pursued progressive changes. Still, looking back, one can see the meaningful changes came slowly, with much difficulty, and with great effort by key persons on and off the Court.

Modernization was largely accomplished by the Court obtaining complete power to make and revise rules and through implementing the constitutional change to unify the system. The contributions of one person in particular to these parallel developments stand out. The bulk of the progress took place during the three decades that Justice Ralph J. Erickstad served on the Court, and mostly during his leadership decades as Chief Justice.

Justice Erickstad backed rule-making efforts from the day he joined the Court in January 1963. He was instrumental in the second significant rule-making stage, formation of the committee to write new criminal rules in 1967. He served on that committee for the six years it took to write those rules. He chaired the criminal rules committee for nearly all of its work. Then, as Chief Justice, Erickstad presided over adoption of the rest of the new rules, as well as their ensuing improvements, refinements, and revisions.

ANNUAL MEETING OF THE BAR ASSOCIATION 54-57 (Aug. 21-22, 1919). Chief Justice Birdzell addressed the Bar's annual meeting in Minot on September 14, 1922, on the subject of "The Constitution and Modern Police." ANNUAL MEETING OF THE BAR ASSOCIATION 51 (Sept. 14-15, 1922). In 1931, Chief Justice A.M. Christianson "gave an able address on the work of the North Dakota Judicial Council" to the Bar's annual meeting at Jamestown, August 18-20, 1931: "All the members of the Supreme Court . . . were in attendance and participated actively in the discussion." The Annual Meeting of the State Bar Association of North Dakota, III DAKOTA LAW REVIEW 421-22 (1931).

520. 52 N.D. L. REV. 236 (1975). Later addresses may be found at: 53 N.D. L. REV. 133 (1976); 54 N.D. L. REV. 139 (1977); 55 N.D. L. REV. 133 (1978); 56 N.D. L. REV. 133 (1979); 57 N.D. L. REV. 116 (1980); 58 N.D. L. REV. 150 (1981); 59 N.D. L. REV. 126 (1982); 60 N.D. L. REV. 174 (1983); 61 N.D. L. REV. 147 (1984); 62 N.D. L. REV. 117 (1985); 62 N.D. L. REV. 302 (1986); 63 N.D. L. REV. 434 (1987); 64 N.D. L. REV. 468 (1988); 65 N.D. L. REV. 270 (1989); 66 N.D. L. REV. 80 (1990); 67 N.D. L. REV. 403 (1991); 68 N.D. L. REV. 831 (1992).

521. 69 N.D. L. REV. 705 (1993); 70 N.D. L. REV. 748 (1994); 71 N.D. L. REV. 912 (1995); 72 N.D. L. REV. 864 (1996); 73 N.D. L. REV. 611 (1997); 74 N.D. L. REV. 642 (1998); 75 N.D. L. REV. 710 (1999).

Justice Erickstad was on the Court when legislative studies of constitutional revision began in 1963. Even more, when the proposed wholesale revision of the constitution, with its modern judicial article, was defeated in 1972, Chief Justice Erickstad became a forceful figure in rescuing the judicial article, in influencing the legislature to submit it to the people separately, and in campaigning publicly to approve it. When the people did approve the new judicial article that he championed, his patient efforts with the legislature gradually brought about implementation of the kind of unified judicial system that had been long sought by many.

Still, Chief Justice Erickstad did more than make rules and unify a jumbled system. He began, championed, and fostered many other worthwhile improvements during his stewardship of the judicial branch. Chief Justice Erickstad presided over equipping the court to do more work and to do it more efficiently; opening the Court and the judicial system to greater public accessibility; and elevating the statures of the Court, its members, and the trial court judges.

During the Erickstad Era, the Court took a number of steps to better equip itself and the system: The Court obtained funding for and recruited law clerks,[522] and sought funding for law clerks for the trial courts.[523] The Court developed the constitutional position of State Court Administrator, and staffed that office.[524] The Court hired a Central

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522. In 1953, the president of the State Bar Association, E.T. Conmy, reported: "[T]he Association could not for the coming year wholly finance the salary of a Supreme Court Law Clerk as was done last year," but had agreed to contribute $1,500 towards "half-time help from a Law Clerk selected and it is hoped that the legislature will make a sufficient appropriation so that the Court will have the services soon of a full-time clerk." *Annual Convention of SBAND at Fargo on August 6-8, 1953*, 29 N.D. L. Rev. 377, 427 (1953). Apart from that brief, futile effort, there is no record or memory of regular law clerks before 1965.

After Justice Erickstad arrived at the Court, he advocated law clerks:

> [T]he clerkship program should be placed high in priority. In 1963, the North Dakota Supreme Court had no clerkship program and there was very little interest in such a program by the members of that court . . . . In 1965, our court appeared before the Legislature requesting appropriation for five clerks; but, perhaps because of the newness of the program, the Legislature decided to start on a more modest basis and thus gave us two clerks. We have had appropriations for two clerks ever since. It is this writer's personal view that the work of the court could be greatly expedited if the Legislature would provide each interested judge with a clerk. In other words, the clerkship program would be much more successful if it were on a basis of one to one, rather than two to five.

Hon. Ralph J. Erickstad, *Thoughts on Ways of Expediting the Work of Our Supreme Court*, 46 N.D. L. REV. 409, 410-11 (1970). See Appendix B for a year by year list of law clerks who have served the Justices.

523. Currently seven law clerks assist the district court judges throughout the state.

524. There have been three State Court Administrators: Calvin Rolfson (1971-1975), William Bohn (1975-1991), and Keith Nelson (1992-present), according to records in the Court Administrator's office.

Legal Staff of lawyers to assist justices in preparing opinions,[525] and hired law-trained, professional librarians to assist in obtaining law-related materials and researching the law.[526] The Court improved and increased judicial education.[527] The Court fostered computerization of the judicial system for research, record-keeping, and communication.[528] The Court established a commission to continuously study, prepare and publish pattern jury instructions.[529]

During the Erickstad Era, the Court took steps to make the judicial processes more open to public access and scrutiny: The Court established docket currency standards for both itself and the trial courts.[530] The Court allowed cameras into courtrooms, first at the Court and then extended that full media access to the trial courts, too.[531] The Court authorized collection of interest on lawyers' trust accounts to fund civil legal services for the poor, public education on the legal system, and improvement of the administration of justice.[532] The Court created a broad-based committee on state and tribal court relations,[533] that bridged

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525. Central Legal Staff began in 1979 with permanent employment of L. David Gunkel, who had been a law clerk in 1977-78, to assist the Court with appeals, motions, and petitions. *See* Chief Justice Ralph J. Erickstad, State of the Judiciary, at the Joint Session of the 47th Legislative Assembly (January 7, 1981), at 24 (condensed version appears in STATE OF NORTH DAKOTA, JOURNAL OF THE HOUSE 129-36 (47th Leg. 1981). In July 1983, David Lee, who had been a law clerk in 1974-75, was added. In August 1983, Don Rysavy and Dennis Dockter, who had been law clerks previously, both joined the staff. In 1985, Jim Harris, a former law clerk and staff lawyer for the Joint Procedure Committee for three years, joined the staff for appellate work. Gary Raedeke, while serving as staff attorney for the Joint Procedure Committee, also assists with appellate work.

The following have served as staff attorneys for the Joint Procedure Committee and its predecessors: Jon Nelson, Duane Houdek, Joel Gilbertson, Keith Magnusson, David Lee, Jim Harris, DeNae Kautzmann, Keithe Nelson, and Gerhard Raedeke.

526. Joanne Dugan, hired in 1993, was the first librarian trained in law and library administration. She was succeeded in 1995 by Ted Smith. The law librarian, and other library staff, assist not only court personnel, but also government officials, attorneys and public patrons conducting legal research.

527. The Court secured a grant from the State Justice Institute to begin an annual in-state Judicial Training Institute in 1991, instead of sending judges to the National Judicial College at Reno so much.

528. Chief Justice Ralph J. Ericksatd, State of the Judiciary, Joint Session of the 48th Legislative Assembly (January 5, 1983), at 8 (condensed version appears in STATE OF NORTH DAKOTA, JOURNAL OF THE HOUSE 123-39 (48th Leg. 1983): "We are presently installing a computer as part of a pilot case management program here in the South Central Judicial District, under Presiding Judge Benny Graff." Access to computer-assisted legal research was implemented in 1989 for any trial judge who desired it. Today every justice and trial judge has a computer, at least one, if not a laptop as well.

529. N.D. SUP. CT. ADMIN. R. 23 (effective July 1, 1987).

530. N.D. SUP. CT. ADMIN. R. 12 (effective July 1, 1980).

531. N.D. SUP. CT. ADMIN. R. 21 (effective July 1, 1984 and amended to extend to trial courts effective September 1, 1988).

532. N.D. SUP. CT. ADMIN. R. 24 (effective July 1, 1987); N.D. SUP. CT. ADMIN. R. 24.1 (adopted May 25, 1988); N.D. SUP. CT. ADMIN. R. 24.2 (adopted May 25, 1988).

533. Administrative Rule 37 was effective May 18, 1994, after Chief Justice Erickstad retired, but resulted from ground work laid by him while on the Court. He has chaired the committee continuously since its creation.

a chasm between two cultures in this state and that led directly to adoption of a rule for recognition of tribal court orders and judgments.[534]

Each of these progressive steps helped the status of the Court and judges, but Chief Justice Erickstad instigated other significant steps to improve the status of our courts. On his initiative, the Court began to hold public ceremonies to invest new judges and justices, focusing attention on the gravity of undertaking new public responsibilities.[535] The Court obtained authorization for, got funding for, and built a new judicial wing on the state capitol building.[536] This new judicial wing not only modernized the physical facilities of the Court, it also gave the Court more space for necessary staff to adequately administer the growing judicial system. Perhaps of equal importance, the new judicial wing brought symbolic balance in placing the judicial branch on the same physical plane in the capitol and in its own wing comparable to the other coordinate branches, executive and legislative. The judiciary thus became a visibly recognized coordinate component of government.

Our listing of other modernizing improvements is necessarily incomplete, but it illustrates the impressive extent of modernization that Chief Justice Erickstad accomplished during his leadership of the judicial system.

11. *The Moving Force*

How did Chief Justice Erickstad achieve so much? He did it by long hours and hard work, on low pay and with dedication, and by graciously and patiently seeking out people to help improve the judicial system.

Before election to the Court, Chief Justice Erickstad had been a State Senator from Devils Lake. He communicated well with other legislators. He did so both privately by inviting legislative leaders of

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534. *See* N.D. R. CT. § 7.2.

535. Justice Robert Vogel's investiture ceremony was held in the Chambers of the House of Representatives at the North Dakota State Capitol in Bismarck on Wednesday, September 5, 1973. Since then, a similar ceremony has been held to invest each new justice, soon after each one took office.

536. *See* 1977 N.D. Laws ch. 139, at 314-16, "Construction of State Office Building," authorizing the board of university and school land to invest up to 8 million dollars to build an office building on the capitol grounds that would "conform substantially to the architecture of existing capitol buildings . . . ." *Id.* § 2. Section 8 "allocated a minimum of twenty-one thousand usable square feet within the office building" to the Supreme Court, and directed the building "be designed in a manner which will allow for future expansion of the building for additional supreme court space if necessary." The 1979 session authorized another $2.5 million for unspecified "additional square feet of floor space, and other fixtures, equipment, and improvements for the judicial wing and state office building." 1979 N.D. Laws ch. 203, § 1, at 446. The judicial wing on the east side of the capitol building was completed, and the Supreme Court moved into it, in 1981. Dedication ceremonies were held December 15, 1981.

both parties to his home to visit, and publicly by carefully prepared messages, communications, and committee presentations. He reached out to citizens, lawyers, and legislators to join court-related committees that were constantly encouraged to study distinct problems, to assess alternatives for solution, and to recommend actions that Chief Justice Erickstad then insisted be respectfully considered and promptly acted on by the Court.

Chief Justice Erickstad enlisted people from all over the state to improve the system. He became a consensus builder. And he then saw to it that the product of Court committees became beneficial laws, orders, and rules to run the judicial system.

Chief Justice Erickstad once explained his philosophy of public participation in a message to the legislature:

> [These] standards are the product of an open and cooperative effort of judges, attorneys, and members of the public . . . . The public was represented on the committee and it was invited to participate, not only in hearings before the committee, but also before our Court prior to the adoption of the standards. We are committed to encouraging broad public interest and participation in improving court services, and we are very pleased with the contributions which these committees have made. The new open Supreme Court rulemaking process . . . is working well, considering its innovative nature. Experience with it, and further study of it by our Court Service Administration Committee will, no doubt, result in some amendments to it. It has moved us forward in our rulemaking area of endeavor.[537]

This broad public participation did indeed move the Court forward in modernizing judicial services during Chief Justice Erickstad's stewardship.[538]

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537. *See* Chief Justice Erickstad's State of the Judiciary Address, STATE OF NORTH DAKOTA, JOURNAL OF THE HOUSE 134 (47th Leg. 1981).

538. To illustrate this reliance on committee work, the forepart of Chief Justice Erickstad's printed 1989 *State of the Judiciary* message to the legislature, at vii, listed 17 advisory boards, commissions, and committees for the Supreme Court: Council of Presiding Judges, chaired by Chief Presiding Judge Benny Graff, Bismarck; Judicial Planning Committee, chaired by Justice Beryl J. Levine, Fargo; Joint Procedure Committee, chaired by Justice H.F. "Sparky" Gierke, Bismarck; Attorney Standards Committee, chaired by Vern C. Neff, Williston; Judiciary Standards Committee, chaired by Jane C. Voglewede, Fargo; Court Services Administration Committee, chaired by William A. Strutz, Bismarck; Personnel Advisory Board, chaired by William G. Bohn, Court Administrator, Bismarck; N.D. Legal Council for Indigents Commission, chaired by Judge Gail Hagerty, Bismarck; Coordinating Committee on Computer Installation and Programming, chaired by Justice Gierke, Bismarck; Advisory Committee on Cameras in the Courtroom, chaired by Justice Gierke, Bismarck; Civil Legal Services to Indigents Committee, chaired by Judge Joel D. Medd, Grand Forks; Joint Committee on Civil Legal Services to the Poor, chaired by Melvin Webster, Bismarck; Constitutional

Often certain persons make things happen in history. Chief Justice Erickstad was one of those. He brought the institutions of the Supreme Court and the judicial system fully into the twentieth century.[539] More than any other single person, Chief Justice Erickstad must be credited with modernizing the North Dakota Supreme Court and the judicial system it serves.

IV. PREPARING FOR THE TWENTY-FIRST CENTURY

A. INTERMEDIATE COURT OF APPEALS

In January 1975, Chief Justice Erickstad warned the legislature that a steadily increasing number of appeals "may possibly require the creation of an Intermediate Court of Appeals," noting that twenty-seven states had established such a court "to relieve the pressures on the supreme court."[540] The number of appeals did increase substantially.

Celebration Committee, chaired by Justice Herbert L. Meschke, Minot; North Dakota Pattern Jury Instruction Committee, chaired by Judge Allen L. Schmalenberger, Dickinson; State Bar Board, chaired by John D. Kelly, Fargo; Disciplinary Board, chaired by Michael L. Halpern, Glen Ullin; Judicial Conduct Commission, chaired by Janet Maxson, Minot.

His 1989 message also listed eight committees of the Judicial Conference: Program Planning Committee, chaired by Judge Jonal H. Uglem, Hillsboro; Committee on Legislation, chaired by Justice Meschke; Committee on Salary and Retirement, chaired by Justice Gierke; Committee on Courts of Limited Jurisdiction, chaired by Judge Harold B. Herseth, Jamestown; Committee on Judicial Training, chaired by Judge Larry M. Hatch, Linton; Committee on Juvenile Court Procedures, chaired by Judge Norman J. Backes, Fargo; Committee on Judicial Immunity, chaired by Judge Kirk Smith, Grand Forks; Judicial Ethics Advisory Service Study Committee, chaired by Judge Lee A. Christofferson, Devils Lake. *See id.* at vi.

539. Chief Justice Erickstad became a nationally recognized figure in his field, too.

> He served five years as a member of the Executive Council of the National Conference of Chief Justices and is past president of the Conference of Chief Justices and past president of the National Center for State Courts. On July 2, 1987, he was appointed by President Reagan as a member of the board of directors of the State Justice Institute, serving until June 1990.

Fifty Year Members Reflect on Their Careers, GAVEL (Journal of N.D. State Bar Ass'n), April/May 1999, at 8.

> In November 1987, he received the North Dakota National Leadership Award of Excellence from Governor George Sinner, and in June 1988, was presented with the Distinguished Service Award by the State Bar Association of North Dakota. In May 1989, he received the Distinguished Service Award from the National Center for State Courts for his contributions to improve court administration both nationally and in the state of North Dakota. On December 3, 1992, he received from the American Judicature Society its Herbert Harley Award for "his exceptional contributions to the improvement of the administration of justice" in the state and the nation.

Id. at 9.

540. Chief Justice Erickstad's State of the Judiciary Address, STATE OF NORTH DAKOTA, JOURNAL OF THE HOUSE 61 (44th Leg. 1975). Even earlier, Chief Justice Erickstad had advocated study of an intermediate appellate court. "[Another] way suggested for avoiding congestion and delay is in the creation of an *Intermediate Appellate Court*. This should be recommended for study now so that it might, if feasible, become a reality later." Erickstad, *supra* note 410, at 413.

By 1981 the Court was writing over 200 opinions per year, as it has done every year since.[541]

The 1983 legislature endorsed a resolution, sponsored by Representatives Tish Kelly of Fargo and William Kretschmar of Ashley and by Senators Rolland Redlin of Minot and Frank Wenstrom of Williston, for an interim study of "the present and projected North Dakota Supreme Court caseload and methods for the appropriate structure and administration of appellate court services in the interest of justice."[542] In May 1983, the LRC declined the study and instead suggested the judicial system do it.[543] The Court Services Administration Committee of the Supreme Court created a subcommittee to study Future Appellate Court Services, and Representative William Kretschmar agreed to chair it.[544]

In November 1984, the Judicial Council supported an intermediate appellate court, and Chief Justice Erickstad's 1985 *State of the Judiciary* message to the legislature lobbied vigorously for it.[545] In January 1985, the Court's Future Appellate Court Services Study Subcommittee recommended creation of an intermediate appellate court.[546] A parallel committee of the State Bar Association indecisively "acknowledged the existence of the workload problem, but urged . . . all other possible solutions be attempted prior to the creation of an intermediate appellate court."[547] Not surprisingly, the 1985 legislature then gave the Court no safety valve for the relentless buildup of work.

In 1987, the legislature finally authorized a court of appeals to ease the Supreme Court's workload.[548] Whenever the Supreme Court decides over 250 cases in a year, the Court may establish panels of three from among retired judges and active trial judges to hear specific cases referred by the Court.[549]

The Court has established a screening process. One of the clerk's staff (often the clerk), a staff lawyer, and one of the justices (in rotation) recommend cases for reference to the appeals panel whenever the Court decides it needs help with its caseload. From the inception of the court

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541. Search of West's North Dakota Reporter CD-ROM Cases database (database containing only North Dakota Supreme Court decisions).

542. Chief Justice Ralph J. Ericksatd, State of the Judiciary, Joint Session of the 49th Legis. (Jan. 5, 1985), at 4 (condensed version appears in STATE OF NORTH DAKOTA, JOURNAL OF THE HOUSE 118-28 (49th Leg. 1985).

543. *See id.*

544. *See id.*

545. *See id.* at 5-6.

546. *See* STATE OF NORTH DAKOTA, JOURNAL OF THE HOUSE 163 (50th Leg. 1987).

547. *Id.* at 163-64

548. *See* 1987 N.D. Laws ch. 374, at 931-34; N.D. CENT. CODE § 27-02.1.

549. *See* N.D. CENT. CODE § 27-02.1-02(1).

of appeals in 1987, only sixty-five cases have been referred to, heard by, and decided by panels of this temporary court of appeals.[550]

But this legislation came with a sunset clause that has been continuously extended, most recently in 1999 to expire at the end of the year 2003.[551] This intermediate appellate division has been carefully used by the Court, has functioned well, and has been especially necessary when the Court has been temporarily short-handed from an illness or vacancy.

Out of respect for the separation of powers, the legislative branch ought to permanently authorize temporary panels for the intermediate court of appeals. Alternatively, since it only involves assignment of existing judicial personnel, the Court should implement it by rule under its constitutional power to govern appellate procedure "to be followed by all of the courts of this state. . . ."[552] An intermediate appellate division will be a critical tool for the twenty-first century to cope with additional surges of appeals that are likely.

B. TRIAL COURT CONSOLIDATION

Further implementing the unified system, the 1991 legislature abolished county courts, merged county and district judgeships into a single trial court, and sought greater efficiency.[553] The measure directed the gradual reduction of trial court-judgeships to begin in 1995, decreasing from fifty-three judges in 1991 to forty-two by January 1, 2001.[554]

In December 1997, at the Court's request, the National Center for State Courts (NCSC), after study of weighted caseloads, reported that measuring the then-existing number of forty-six trial judgeships and 6.8 referees (including part-timers) against the caseload indicated a quantitative surplus of 3.84 judicial bodies. There are nagging worries, however, about the extent of the judicial reductions dictated by the legislature (although never recommended by the Supreme Court) because the NCSC study did not "quantify" significant intangibles and varying factors, like accidental deaths or severe disabilities, long absences or vacancies, and caseload surges in particular localities.[555]

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550. Search of West's North Dakota Reporter CD-ROM Cases database (database containing only North Dakota Supreme Court decisions). The Court, though often petitioned for review, has only reviewed and reversed a single case decided by the Court of Appeals. *See* McAdam v. Dynes, 442 N.W.2d 914 (1989).

551. *See* 1999 N.D. Laws ch. 277, at 1171.

552. N.D. CONST. art. VI, § 3.

553. *See* 1991 N.D. Laws., ch. 326, at 974-1044; *see also* N.D. CENT. CODE § 27-05-02.1.

554. *See* 1991 N.D. Laws ch. 326, § 86, at 1006-07; 1993 N.D. Laws ch. 316, § 1, at 1108-10; 1993 N.D. Laws ch. 317, § 1, at 111-12.

555. *See Matter of Judicial Vacancy*, 1998 ND 25, 574 N.W.2d 199, 200-03 (Meschke, J. & Maring J., dissenting).

With helpful guidance from Justice William Neumann, a former trial judge, the Supreme Court has carried out the orderly reduction of the number of judgeships through gradual attrition from deaths, resignations, and decisions not to seek reelection. Only a single judgeship remains to be vacated before the end of 2000 to reach the dictated efficiency of forty-two trial court judges.[556]

Chief Justice VandeWalle explained the effect of unifying the court system to the 1999 legislature: "[T]oday we have only one level of trial courts instead of the three that previously existed. The result was a change from a system of literally hundreds of part-time and full-time judges, to a point where, by [century's] end, we will have [42] full-time law trained trial judges."[557] This unified system has streamlined administration while making the system responsive to another perceived public need, that of reducing governmental expenditures for the justice system.[558]

But without any significant decrease in workloads in sight, most trial courts are already clearly overloaded. It remains to be seen whether this dictated "efficiency" is worth the associated costs to the public from justice delayed.

C. COMPUTER PUBLICATIONS

To facilitate wider access to its opinions, the Supreme Court in 1997 adopted a generic numbering system (e.g., 1999 ND 1) for its opinions. The Court now requires use of the generic cite in all trial and appellate briefs.[559]

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556. In September 1999, the Court conducted consultations with trial judges and lawyers of each of five judicial districts with judgeships up for election in 2000 to aid in deciding which judgeship to eliminate. *See* Notice of Consultation (N.D. Sup. Ct. July 28, 1999) (Sup. Ct. No. 990224) (on file with North Dakota Supreme Court). On December 2, 1999, the Court issued its Order abolishing judgeship number five in the Southwest Judicial District with chambers in Bowman, effective at the end of 2000. *See* 1999 ND 226, 603 N.W.2d 57,

557. Chief Justice VandeWalle's State of the Judiciary Address, STATE OF NORTH DAKOTA, JOURNAL OF THE HOUSE 58 (56th Leg. 1999).

558. A prior attempt to complete unification by integrating the clerks of court into the unified system was ineffective. *See* N.D. CENT. CODE § 11-17-11 (1995) (repealed 1999) (giving counties the option to "transfer responsibility for funding for the clerk of district court to the state"). But, the 1999 legislature authorized integration while assuring continued court services in every county, beginning April 1, 2001. *See* 1999 N.D. Laws ch. 278, at 1172-1210. A movement by clerks from some of the smaller counties to refer that measure to a popular vote failed to garner enough petition signatures to file with the Secretary of State. *See News from the North Dakota Supreme Court* <http://www.court.state.nd.us/Court/News/M7_1999.htm>.

The primary duty of clerks of court is to keep judicial records orderly and securely. These largely clerical positions have little or no policy responsibilities anymore, if they ever did. The positions should not be elective, but auxiliary to the judicial system.

559. N.D.R. CT. § 11.6.

By installing an Internet web site in 1996,[560] the Court again entered the publishing field. Now, by posting its opinions on the web site the same day they are issued, the Court makes new opinions more quickly available to the legal profession.

The Court's web site came principally through Justice Dale Sandstrom's efforts for the Court. This advance gives the public and practitioners easy and inexpensive access not only to all court opinions issued since 1991, but also to daily news about Court-related activities, a helpful directory of licensed lawyers, and extensive links for legal research.

The American Association of Law Libraries acclaimed the Court's web site as the best judicial web site in the nation.[561] In 1999, the N.D. Court's website was named the number one judicial website worldwide by CTC6, a worldwide court technology conference of 3,000 participants sponsored by the National Center for the State Courts.[562]

D. A CENTURY OF ADVANCES

The first woman to serve on the Court, Beryl J. Levine of Fargo, was appointed by Governor George Sinner in 1985. Since she retired in 1996, Governor Schafer appointed two more women to fill vacancies on the Court, Justice Mary Muehlen Maring from Fargo and Justice Carol Ronning Kapsner from Bismarck, both of who were active private practitioners.[563]

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560. *See North Dakota Supreme Court* News <http://www.court.state.nd.us/court/news/NEW1.HTM>.

561. *See American Association of Law Libraries* <http://www.bc.edu/bc_org/avp/law/lawlib/aallwg/bestjud.htm>

562. *See Results for the CTC6 Top Ten (or so) Web Site Competition* <http://CTC6.ncsc.dni.us/sites/topten.html>

563. The Court has taken a number of steps to squelch gender bias in the judicial system. By Administrative Order 7, *see* Admin. Order 7, *reprinted in* 72 N.D. L. REV. [1343] (1996), on March 5, 1997, the Court created a Gender Fairness Implementation Committee, chaired by Justice Maring, to evaluate, implement, and monitor the work of a prior Commission on Gender Fairness in Courts, chaired by Justice Levine, whose final report was published in 72 N.D. L. Rev. [1113] (1996). Acting on recommendations of the Gender Fairness Committee, the Court has referred a number of specific recommendations to other appropriate committees to implement. Chief Justice VandeWalle, State of the Judiciary Message to Annual Meeting of State Bar Association of North Dakota 12 (June 9-11, 1999). The Joint Committee on Attorney Standards, acting on one of these referrals, has recommended amending Rule 8.4 of the North Dakota Rules of Professional Conduct, to specify it is professional misconduct for a lawyer to "manifest, by words or conduct in connection with a judicial or administrative proceeding, bias or prejudice, including bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation, against parties, witnesses, counsel or others, except when those words or conduct are legitimate advocacy when race, sex, religion, national origin, disability, age, or sexual orientation is an issue in the proceedings. . . ." Increased civility in the profession is a valid administrative goal, while leaving unimpaired the constitutional freedoms of speech and association. The proposed amendments to Rule 8.4 were sent back to the committee by the Court in October 1999, and the outcome is not yet known.

Those two, along with Justice William Neumann, a former practitioner and trial judge from Bottineau; Justice Dale Sandstrom, a former assistant attorney general and public official from Bismarck; and Chief Justice Gerald VandeWalle,[564] a former assistant attorney general, make up the current Supreme Court. They are the beneficiaries of over a century of efforts to advance and improve the judicial branch of government and, as stewards of the system's future, they are reasonably well prepared to carry a sound system forward into the twenty-first century.

V. CONCLUSION

These glimpses of the history of the North Dakota Supreme Court and judicial system show how difficult it was to improve those institutions during the twentieth century. However, with the substantial modernization and unification achieved during the last third of this century, the Supreme Court seems well positioned to maintain a just and stable legal climate in North Dakota far into the twenty-first century. Still: "Just as freedom and justice are not free, justice is not easily attainable, nor is it enduring without continuous effort and personal dedication on the part of those who serve the justice system and those who would uphold and preserve it."[565]

The Court's future will certainly be favorably affected by the advances made in the twentieth century, but the Court will need more of the kind of continuous effort and personal dedication exhibited by leaders like former Chief Justice Ralph J. Erickstad to uphold and preserve it.

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564. Chief Justice VandeWalle has also become a national leader. On August 5, 1999, he was unanimously named president-elect of the National Conference of Chief Justices at the Conference's 50th anniversary meeting held at Williamsburg, Virginia. He became president of the Conference of Chief Justices in August 2000.

565. Chief Justice Erickstad's State of the Judiciary Address, STATE OF NORTH DAKOTA, JOURNAL OF THE HOUSE 92 (52d Leg. 1991).

APPENDIX A

NORTH DAKOTA SUPREME COURT JUSTICES
(SINCE STATEHOOD)

GUY C. H. CORLISS	OCTOBER 1889	AUGUST 15, 1898
JOSEPH BARTHOLOMEW	OCTOBER 1889	DECEMBER 31, 1900
ALFRED WALLIN	OCTOBER 1889	DECEMBER 31, 1902
NEWTON C. YOUNG	AUGUST 1898	JULY 1906
DAVID MORGAN	JANUARY 1901	AUGUST 31, 1911
JOHN M. COCHRANE	JANUARY 1903	JULY 20, 1904
EDWARD ENGERUD	AUGUST 1904	JANUARY 10, 1907
JOHN KNAUF	AUGUST 1, 1906	DECEMBER 1906
CHARLES FISK	JANUARY 1907	JANUARY 10, 1907
	JANUARY 31, 1907	DECEMBER 31, 1916
BURLEIGH F. SPALDING	JANUARY 31, 1907	DECEMBER 31, 1914
SIDNEY E. ELLSWORTH	JANUARY 15, 1909	DECEMBER 31, 1910
JOHN CARMODY	JANUARY 15, 1909	DECEMBER 31, 1910
EVAN B. GOSS	JANUARY 1911	DECEMBER 31, 1916
EDWARD T. BURKE	JANUARY 1911	DECEMBER 31, 1916
ANDREW A. BRUCE	OCTOBER 1911	DECEMBER 1, 1918
ADOLPH M. CHRISTIANSON	JANUARY 1915	FEBRUARY 11, 1954
LUTHER E. BIRDZELL	JANUARY 1917	NOVEMBER 1, 1933
RICHARD GRACE	JANUARY 1917	DECEMBER 31, 1922
JAMES ROBINSON	JANUARY 1917	DECEMBER 31, 1922
HARRISON A. BRONSON	DECEMBER 1918	DECEMBER 31, 1924
WILLIAM NUESSLE	JANUARY 1923	DECEMBER 31, 1950
SVEINBJORN JOHNSON	JANUARY 1923	DECEMBER 1, 1926
JOHN BURKE	DECEMBER 1, 1926	MAY 14, 1937
ALEXANDER BURR	DECEMBER 1, 1926	SEPTEMBER 19, 1949
GEORGE MOELLRING	DECEMBER 1, 1933	DECEMBER 1934
JAMES MORRIS	JANUARY 1935	DECEMBER 31, 1964
P.O. SATHRE	DECEMBER 1937	DECEMBER 31, 1938
	JANUARY 1951	DECEMBER 31, 1962
THOMAS J. BURKE	JANUARY 1939	MARCH 20, 1966
GUDMUNDER GRIMSON	SEPTEMBER 19, 1949	DECEMBER 1958
NELS JOHNSON	APRIL 1954	DECEMBER 1958
ALVIN C. STRUTZ	JANUARY 1959	JUNE 16, 1973
OBERT C. TEIGEN	JANUARY 1959	JUNE 1974
RALPH J. ERICKSTAD	JANUARY 1963	DECEMBER 31, 1992
HARVEY B. KNUDSON	JANUARY 1965	JANUARY 1975

WILLIAM S. MURRAY	APRIL 1, 1966	DECEMBER 31, 1966
WILLIAM PAULSON	JANUARY 1967	OCTOBER 1, 1983
ROBERT VOGEL	JUNE 27, 1973	AUGUST 15, 1978
J. PHILIP JOHNSON	JULY 1974	JANUARY 1975
	FEBRUARY 11, 1992	DECEMBER 31, 1992
PAUL M. SAND	JANUARY 6, 1975	DECEMBER 8, 1984
VERNON R. PEDERSON	JANUARY 6, 1975	DECEMBER 8, 1984
GERALD W. VANDEWALLE	AUGUST 15, 1978	PRESENT
H.F. GIERKE III	OCTOBER 1, 1983	NOVEMBER 20, 1991
BERYL J. LEVINE	FEBRUARY 1, 1985	MARCH 1, 1996
HERBERT L. MESCHKE	FEBRUARY 1, 1985	OCTOBER 1, 1998
WILLIAM A. NUEMANN	JANUARY 1, 1993	PRESENT
DALE V. SANDSTROM	JANUARY 1, 1993	PRESENT
MARY MUEHLEN MARING	MARCH 1996	PRESENT
CAROL RONNING KAPSNER	NOVEMBER 1998	PRESENT

APPENDIX B

NORTH DAKOTA SUPREME COURT LAW CLERKS

1965-66	PETER A. QUIST FRANK E. WOHLETZ
1966-67	JEROME L. LARSON EDWIN M. ODLAND JOHN D. OLSRUD
1967-68	GARYLLE B. STEWART JOHN A. GRAHAM
1968-69	DENNIS A. SCHNEIDER DAVID L. PETERSON
1969-70	DAVID M. AXTMANN William G. Engelter
1970-71	ROBERT O. WEFALD ROBERT W. WIRTZ
1971-72	ROBERT W. HOLTE MERVIN D. NORDENG
1972-73	JOHN P. BAILEY MARVIN M. HAGER ROBERT E. LANE TOMAS B. TUDOR
1973-74	MIKE HINMAN GREGORY R. SCHWANDT MARK STENEHJEM ROBERT E. LANE JON O. NELSON
1974-75	JON O. NELSON DUANE HOUDEK DAVID O. LEE ALAN J. LARIVEE ROLF P. SLETTEN
1975-76	LAWRENCE DOPSON CHRISTINE HOGAN DUANE LILLEHAUG DAVID SOGARD KEITH WOLBERG
1976-77	LARRY M. BAER JANE C. HEINLEY ILLONA A. JEFFCOAT-STACCO KEITH JONES DENNIS O'TOOLE
1977-78	PATRICIA L. BOSSERT L. DAVID GUNKEL BRIAN D. NEUGEBAUER BLAINE L. NORDWALL MARGARET A. RUSSELL
1978-79	JOHN M. KONECK DANIEL S. KUNTZ BRUCE D. QUICK KATHRYN SAUGSTAD ALFSON SCOTT J. SCHNEIDER
1979-80	SCOTT E. BOEHM GERRI L. GILLUND TWOMEY DANIEL L. HOVLAND PAUL K. SANDNESS PATRICK J. WARD
1980-81	JIM HARRIS JERRY EVENSON KENT REIERSON DENNIS BITZ ROBIN SJAASTAD
1981-82	CRAIG R. CAMPBELL TOM A. DICKSON JOHN R. KENNELLY DON L. RYSAVY JEREL SCHIMMELPFENNIG CEANN WIKENHEISER JIM HARRIS
1982-83	JO NOACK CYNTHIA NORLAND JIM HARRIS LORNA BROWN NORMAN ANDERSON DENNIS DOCKTER DAVE REICH

1983-84	TOBY ANDERSON SCOTT GRAHAM BRUCE T. LEVI KATHRYN URBONYA JOY L. WEZELMAN
1984-85	CAROLE J. HUSEBY BRUCE T. LEVI MICHAEL P. MASUDA JOHN R. SHOEMAKER JOY L. WEZELMAN
1985-86	LYNN M. BOUGHEY ANNA M. FRISSELL MICHAEL P. MASUDA CHRISTIAN A. PREUS JOY L. WEZELMAN
1986-87	ERIK ASKEGAARD SCOTT BREHM DAVID E. CLINTON DELORES DILLMANN ROBERT STROUP III
1987-88	JEAN V. FAULCONBRIDGE DAVID J. HOUGE TODD D. KRANDA LARRY D. ORVIK NANCY J. SOONPAA
1988-89	KATHRYN HINDS KATHLEEN DETTMANN TODD D. KRANDA BOBBIE RASMUSSON MICHAEL WANGER
1989-90	DAVID HAGLER JULIE EVANS ELAINE AYRES MALCOLM PIPPIN MARK MAICHEL
1990-91	JON JENSEN SUSAN ROARK WALDRON DENAE KAUTZMANN GENE OLSON SCOTT LANDA
1991-92	TAG ANDERSON JOE BIALKE LESLIE BAKKEN OLIVER GENE OLSON DEE DEE RUUD
1992-93	THOMAS G. HOLUM LANCE E. ISAAC MICHAEL S. JAHNER CINDA L. SMITH CARY R. STEPHENSON
1993-94	JENNIFER S. CLARK JAMES C. FLEMING DOUGLAS L. HOLLOWAY KATHRYN RAND MONTE L. ROGNEBY
1994-95	STEVE BALABAN GERALD (JUD) DELOSS SHARI M. GIANARELLI DOUG W. NESHEIM TIM J. WAHLIN
1995-96	MICHAEL A. BOSH JON P. BURGESS ANGELA ELSPERGER LORD MICHAEL J. HABURG TRACY L. KOLB
1996-97	ALANA BASSIN TRACY MOLICK MICHAEL SCHAFF MARGARET SCHNEIDER JAMES SMITH
1997-98	AARON DORRHEIM BRENDA FOYT JOEL FREMSTAD LISA MCEVERS DANIEL TRAYNOR
1998-99	JENNIFER MATTSON DICK KARI STONELAKE-HOPKINS PAUL ODEGAARD ANTHORY WEILER CLINT BOGDEN
1999-2000	DELVIN LOSING REID A. BRADY JESSICA PALMER LEAH KOPSENG COGHLAN MICHAEL DILLINGER
2000-2001	MARYBETH HEGSTAD CONSTANCE N. HOFLAND NOEL EVANS MARK A. FRIESE JENNIFER M. KLEMETSRUD