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# DIGGING FOR ROOTS: THE NORTH DAKOTA CONSTITUTION AND THE THAYER CORRESPONDENCE

BY HON. HERBERT L. MESCHKE  
AND LAWRENCE D. SPEARS

The states of North Dakota, South Dakota, Montana, and Washington came into the Union through The Enabling Act, signed by President Grover Cleveland on February 22, 1889.<sup>1</sup> This omnibus act authorized each new state to hold a convention to form a constitution and state government.<sup>2</sup> The Enabling Act authorized the people of the new North Dakota to develop their own constitution with only the few restraints applicable to all the new states.<sup>3</sup>

These restraints included that the "Constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."<sup>4</sup>

As authorized by The Enabling Act, North Dakota elected delegates to its constitutional convention on May 14, 1889.<sup>5</sup> The convention convened on July 4 at Bismarck and concluded its work on August 17, recommending a constitution of 215 sections.<sup>6</sup> The

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† Justice Herbert L. Meschke graduated from Jamestown College (1950) and the University of Michigan Law School (1953). He practiced law at Minot, North Dakota with the law firm of Pringle & Herigstad (1954-1985). He served in the North Dakota House of Representatives (1965) and in the North Dakota Senate (1967 and 1969) where he was Minority Leader. In 1985, Governor George Sinner appointed Meschke to the North Dakota Supreme Court, and he was reelected in 1986. Justice Meschke chairs the Constitutional Celebration Committee. See *infra* note 12.

‡ Lawrence D. Spears graduated from Stanford University (1965) and the University of Chicago Law School (1971). He has been Assistant State Court Administrator of the North Dakota Judicial System since 1976. He provides staff assistance to the Constitutional Celebration Committee.

1. Act of Feb. 22, 1889, ch. 180, 25 Stat. 676, reprinted in N.D. CENT. CODE vol. 13 at 63-76 (1981). [hereinafter The Enabling Act].

2. *Id.* § 4.

3. *Id.*

4. *Id.* The Enabling Act's reference, "except as to Indians not taxed," parallels a reference, "excluding Indians not taxed," in Article I, Section 2 of the United States Constitution on apportioning direct taxes and representation in the United States House of Representatives. U.S. CONST. ART. I, § 2. This reference was carried forward in the Fourteenth Amendment, Section 2, which was ratified on July 9, 1868. U.S. CONST. ART. XIV, § 2.

5. See The Enabling Act, *supra* note 1 at § 3.

6. JOURNAL OF THE CONSTITUTIONAL CONVENTION FOR NORTH DAKOTA HELD AT BISMARCK, THURSDAY, JULY 4 TO AUG. 17, 1889, 353-400. (Bismarck, North Dakota; Tribune, State Printers and Binders). [hereinafter JOURNAL].

people of North Dakota approved it on October 1.<sup>7</sup> North Dakota became a state on November 2, 1889.<sup>8</sup>

The sources of the North Dakota constitution have not been authoritatively traced. Apart from the Journal<sup>9</sup> and Official Report<sup>10</sup> of the convention, little has been written about the derivation of provisions of the North Dakota Constitution.<sup>11</sup>

In 1985, at the initiative of Chief Justice Ralph J. Erickstad, the North Dakota Supreme Court, acting in cooperation with Governor George Sinner, established a Constitutional Celebration Committee.<sup>12</sup> The Committee undertook to coordinate the North Dakota celebration of the bicentennial of the United States Constitution during 1987-1991 and the celebration of the centennial of the North Dakota Constitution in 1989.

As a part of its efforts, the Committee explored ways to expand the documented history of the North Dakota Constitution. This effort turned up a then-unpublished study by Robert Vogel, written more than a decade ago, titled "Sources of the 1889 North Dakota Constitution."<sup>13</sup> Professor Vogel had examined existing

7. 13 N.D. CENT. CODE 77 (1981).

8. Jamestown Daily Alert, Nov. 4, 1889, at 1 col. 1.

9. JOURNAL, *supra* note 6.

10. OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE FIRST CONSTITUTIONAL CONVENTION OF NORTH DAKOTA, ASSEMBLED IN THE CITY OF BISMARCK, JULY 4TH TO AUG. 17TH, 1889 (R. M. Tuttle, Official Stenographer; Bismarck, North Dakota; Tribune, State Printers and Binders; 1889). [hereinafter OFFICIAL REPORT].

11. North Dakota State Archives, a division of the State Historical Society of North Dakota and housed in the North Dakota Heritage Center, Bismarck, holds a folder of records from the 1889 convention, consisting of committee reports, drafts of proposed articles, and notes. *See also* Boughey, *An Introduction to North Dakota Constitutional Law*, 63 N.D.L. REV. 157, 243-51 (1987).

12. Members of the Constitutional Celebration Committee include: Eugene A. Burdick, Surrogate Judge, Williston; Richard R. Dobson, Minot; Jean Guy, Bismarck; Robert W. Holte, County Court Judge, Stanley; Maurice R. Hunke, Presiding District Judge, Dickinson; J. Philip Johnson, Fargo; Tish Kelly, State Representative, Fargo; Francis A. Larson, Bismarck; Herbert L. Meschke, Supreme Court Justice, Minot, (Chair); Lloyd Omdahl, Lieutenant Governor, Bismarck; Jane Sinner, First Lady, Bismarck; Barry Vickrey, Grand Forks; Jerry Waldera, State Senator, Dickinson; Frank A. Wenstrom, State Senator, Williston; and Janet Wentz, State Representative, Minot. Larry Spears, Assistant State Court Administrator, Bismarck, provided staff assistance to the Committee.

The Committee's activities in celebrating the centennial of the North Dakota Constitution have included sponsorship of the Government Day celebration of the North Dakota Constitution on February 22, 1989 in a Joint Session of the North Dakota Legislature and the Great Hall of the State Capitol, and co-sponsorship of the North Dakota Constitution Traveling Exhibit, "Equally Free and Independent," in 24 community libraries in North Dakota, in cooperation with the North Dakota Centennial Commission, the North Dakota State Historical Society, and the North Dakota Humanities Council.

13. Vogel, *Sources of the North Dakota Constitution*, 65 N.D.L. REV. — (1989). Robert Vogel, a native of McLean County, North Dakota, practiced law there from 1943 to 1954. He served as United States Attorney for North Dakota from 1954 to 1961, practiced in Mandan from 1961 to 1973, and was a Justice on the North Dakota Supreme Court from 1973 to 1978. In 1978 he became a Professor at the School of Law, University of North Dakota, Grand Forks.

Professor Vogel continues to practice with the Vogel Law Firm in Grand Forks.

information about the legendary roots of the 1889 North Dakota Constitution, concluding that writers of standard North Dakota histories were substantially mistaken about its origins.<sup>14</sup>

## I. THE LEGEND

Historians have attributed to officials of the Northern Pacific Railroad the hiring of Professor James B. Thayer of the Harvard Law School to prepare a "model" constitution for North Dakota.<sup>15</sup>

Indeed, a suggested constitution was introduced in the North Dakota constitutional convention on July 20, 1889, by delegate Erastus Williams, who did not reveal its authorship or sponsorship, although it was known that it was not his work.<sup>16</sup> In 1904, at a ceremony honoring Professor Thayer at Harvard Law School, Henry W. Hardon disclosed Thayer's previously unknown role in preparing a draft constitution which was submitted for the North Dakota convention.<sup>17</sup> According to Hardon, Henry Villard of the Northern Pacific Railroad commissioned Thayer to create the constitution.<sup>18</sup>

Three North Dakota historians have linked Thayer's effort to Williams' anonymous submission to the 1889 convention.<sup>19</sup> They have concluded that Professor Thayer planted the seeds from which the 1889 North Dakota Constitution grew. In the most recent standard North Dakota history, published in 1966, author Elwyn Robinson gave a legendary quality to this thesis: "Thayer's draft was a carefully constructed model constitution, not a dishonest effort to create a government favorable to the railroads."<sup>20</sup>

14. *Id.* at \_\_\_\_.

15. I. C. LOUNSBERRY, *North Dakota: History and People* 394 (1917); I. L. CRAWFORD, *History of North Dakota* 327 (1931); E. ROBINSON, *History of North Dakota* 209 (1966); BLACK, *History of the State Constitutional Convention of 1889*, in 3 COLLECTIONS OF THE STATE HISTORICAL SOCIETY OF NORTH DAKOTA 138-39 (Libby ed. 1910).

16. JOURNAL, *supra* note 6, at 65-113.

17. C. LOUNSBERRY, *supra* note 15, at 395. Hardon was self-described as "the only survivor of the two young men who were engaged in the preliminary work [on the constitution] under Professor Thayer's direction." *Id.*

18. *Id.* at 394.

19. *Id.* at 394-96; L. CRAWFORD, *supra* note 15, at 327; E. ROBINSON, *supra* note 15, at 209.

The first writer of history to record Thayer's role in North Dakota's constitution-making was R.M. Black. Black, *supra* note 15, at 138-39. Black gives his source as a story in the Grand Forks Herald on March 21, 1905. The Herald attributed its story to John E. Blair of the College of Law at the University of North Dakota, "who is now located at Spokane." In a letter to The Herald, Blair sent a copy of Henry W. Hardon's remarks at Harvard Law School about Professor James Bradley Thayer and about his work in anonymously drafting a form of constitution for the North Dakota constitutional convention. *Id.*

20. E. ROBINSON, *supra* note 15, at 209.

## II. THE QUESTIONS

In his article, "Sources of the 1889 North Dakota Constitution," Professor Vogel reviewed the evidence and questioned the legend about the sources of the 1889 Constitution.<sup>21</sup> He suggested that the Williams' draft was inconsistent with the claim that Professor Thayer was its author.<sup>22</sup> He argued that the Williams' draft was too detailed and too long to fulfill Thayer's belief that a constitution should be a brief expression of a few fundamental principles.<sup>23</sup>

Professor Vogel suggested, alternatively, that someone else authored the Williams' draft, that someone modified Thayer's work, or that Thayer was persuaded by railroad officials to violate his principles in preparing a draft constitution that met their wishes.<sup>24</sup> Professor Vogel did not speculate on which explanation was more likely. He went on to demonstrate that Williams' draft reflected interests of the Northern Pacific Railroad and that it was hardly a "model" constitution.<sup>25</sup> Professor Vogel recognized that the Williams' draft was, however, one source of North Dakota's initial constitution: "In a great many respects [the North Dakota Constitution] is identical to the Williams draft."<sup>26</sup>

Vogel's study left us with questions. How was Williams' draft assembled? Could it be traced to Thayer at Harvard? How about their respective working papers? Could the roots of our North Dakota Constitution be located?

## III. THE SEARCH

The Constitutional Celebration Committee endeavored to expand the documentation of the history of North Dakota's Consti-

21. Vogel, *supra* note 13, at \_\_.

22. *Id.* at \_\_.

23. *Id.* at \_\_. Professor Vogel's inference paralleled thoughts expressed by Thayer's son, E.R. Thayer, also quoted by Lounsberry:

"I doubt, also, whether my father's work is represented in the North Dakota Constitution to the extent which Mr. Harden [sic] thinks; certainly that constitution differs much (although not so much as the constitution of some other states) from my father's ideal of a constitution. He believed earnestly that it should consist of a brief enunciation of a few fundamental principles, leaving the Legislature a free hand, . . ."

C. LOUNSBERRY, *supra* note 15, at 395.

24. Vogel, *supra* note 13, at \_\_.

25. *Id.* at \_\_.

26. *Id.* at \_\_. Another historian stated, "[T]he Williams constitution was distinctly conservative, containing no clauses not in force in another state." J. HICKS, *The Constitutions of the Northwest States*, 35 n.4 (1923). This gives a hint about additional reference material available for interpretation of the North Dakota Constitution. This account seeks to develop that idea.

tution and initiated a search among archived papers of those persons who may have contributed to that history. Those "digs" turned up some fascinating "roots."

The search for the origin of the Williams draft led to Harvard University. The Harvard Law School Library had preserved some original papers of Professor James B. Thayer. From those papers, correspondence during April, May, June and July of 1889 was located.<sup>27</sup> This Thayer correspondence tells about constitutional drafting which preceded the 1889 constitutional convention in North Dakota. The correspondence, published with this article, sheds new light on the legend of the origins of the 1889 North Dakota Constitution.

#### IV. THE COLLECTION

The Thayer correspondence consists of 34 letters between Professor James B. Thayer of Harvard Law School and representatives of the Northern Pacific Railroad, principally Henry Villard, chairman of its board of directors, and the railroad's lawyers, Charles Beaman and W.F. Peddrick. Their common interest in the spring of 1889 was the preparation of a model constitution for the new states, or, as it turned out, particularly for North Dakota.

The letters show that the parties began work on a constitution for North Dakota out of a cordial acquaintance of mutual respect. In following months, misunderstandings caused their relationships to deteriorate.

Only the covering correspondence survives in the Thayer collection at the Law School Library of Harvard University. The various draft documents described in the correspondence were not located there. Later, copies of draft documents were located in the archives of the State Historical Society in Bismarck. We believe these draft documents are among those documents identified in the Thayer correspondence.

We review this newly discovered correspondence, as well as the recently discovered draft documents. We summarize the correspondence, describe its context, and suggest some of its implica-

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27. Thayer Correspondence, 65 N.D.L. REV. *Thayer Correspondence* (1989). (James Bradley Thayer (1831-1902) Papers available in Manuscript Box 18, Folder 15, Manuscript Box 19, Folders 5 & 7, Harvard Law School Library, Langdell Hall, Cambridge, Massachusetts. Photocopies of the Harvard Law School Library correspondence are on file with the North Dakota Historical Society, North Dakota Heritage Center, Bismarck.) With gratitude, we recognize the assistance of Mrs. Judith W. Mellins, Manuscript Associate, Harvard Law School Library, Langdell Hall, Cambridge, Massachusetts in locating the correspondence.

tions for the constitutional history of North Dakota. We consider some of the contributions of the draft documents to our knowledge about sources of the 1889 North Dakota Constitution.

Briefly, we believe that the correspondence and draft documents authenticate some aspects of the legend. Several of Professor Vogel's conclusions, separately arrived at, are also confirmed. The letters and documents answer many questions, clarify the legend, and are an authoritative legacy.

## V. THE WRITERS

### A. JAMES B. THAYER

Professor James B. Thayer taught at Harvard University Law School from 1874 to 1902.<sup>28</sup> He is credited as an early champion of the case method of teaching law, begun in the 1860's at New York University Law School and advanced at Harvard during the 1870's.<sup>29</sup> He became a leading authority on constitutional law and on the law of evidence.<sup>30</sup> He authored a number of books, including *A Western Journey with Mr. Emerson* (1884), *The Origin and Scope of the American Doctrine of Constitutional Law* (1893), and *A Preliminary Treatise on Evidence at the Common Law* (1898).<sup>31</sup>

### B. HENRY VILLARD

Henry Villard *was* the Northern Pacific Railroad. Villard had an unlikely background for a railroad magnate. He was born at Speyer, Bavaria, Germany in 1835 as Ferdinand Heinrich Gustav Hilpard. He immigrated to the United States in 1853 and changed his name to avoid being forced to return for military service. He was a journalist and served on the staffs of the New York newspapers *Staats-Zeitung* (1858), the *New York Herald*, and the *New York Tribune* (1861-1863).<sup>32</sup>

Villard then sought to establish a monopoly of transportation facilities in the Pacific Northwest.<sup>33</sup> He formed a financial pool which bought control of the Northern Pacific Railroad about

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28. WEBSTER'S BIOGRAPHICAL DICTIONARY 1457 (1976) [hereinafter WEBSTER'S]. One of his sons, Ezra Ripley Thayer was also a lawyer, educator, and dean of Harvard Law School from 1910-1915. *Id.*

29. L. FRIEDMAN, *A History of American Law* 612-16 (2d ed. 1985); WEBSTER'S, *supra* note 28, at 1457.

30. 1 WHO WAS WHO IN AMERICA, 1897-1942, 1226 (1942)[hereinafter WHO WAS WHO].

31. *Id.*

32. WEBSTER'S, *supra* note 28, at 1522.

33. *Id.*

1879.<sup>34</sup> He served as president of that railroad (1881-1884) and as chairman of its board of directors (1888-1893).<sup>35</sup> Although he finally failed to establish his railroad monopoly, he was for a time an important railroad promoter.<sup>36</sup>

Villard maintained his interest in journalism by buying control of the New York Evening Post in 1881.<sup>37</sup> Villard is also credited with aiding Thomas A. Edison financially and with founding the Edison General Electric Company in 1889.<sup>38</sup>

Reminders of Villard's links to North Dakota remain. A street still carries his name in the city of Dickinson, located on what was then the main line of the transcontinental Northern Pacific Railroad.<sup>39</sup> A territorial district of Villard existed in 1886, covering parts of the present Billings, Stark and Slope counties, and including the present towns of Medora, Fryburg, Belfield, Southheart, and Amidon.<sup>40</sup> In 1883, Villard, while president of the Northern Pacific, laid the cornerstone of the new territorial capital of Dakota at Bismarck.<sup>41</sup>

Villard knew Professor Thayer personally, and did not approach him simply as a recommended expert.<sup>42</sup> The first letter from Villard to Thayer declared, "Knowing of no one more com-

34. *Id.*; 2 MEMOIRS OF HENRY VILLARD: JOURNALIST AND FINANCIER, 284-337 (1904)[hereinafter MEMOIRS]. "The transcontinental Northern Pacific Railroad, chartered in 1864, did not reach the Missouri River until 1873 and was then promptly halted by the collapse of Jay Cooke's financial empire and the resulting panic of 1873. The railroad was not completed until 1883." Hutton, "Fort Desolation": *The Military Establishment, the Railroad, and Settlement on the Northern Plains*, 56 NORTH DAKOTA HISTORY 21, 23 (1989).

35. C. LOUNSBERRY, *supra* note 15 at 394; WEBSTER'S, *supra* note 28, at 1522. Henry W. Hardon, quoted in Lounsberry, described Villard as "chairman of the finance committee of the Northern Pacific Railway. . . ." *Id.*

36. WEBSTER'S, *supra* note 28, at 1522. Hicks suggests that one of the most important problems of the new states of the northwest was regulating railroads. J. HICKS, *supra* note 26, at 98. "[T]he railroads were the strongest single factor to be dealt with. Unregulated, they had practically the power of life and death over new communities whose only connection with the outside world was through them." *Id.*

37. WEBSTER'S, *supra* note 28, at 1522.

38. *Id.*; MEMOIRS, *supra* note 34, at 325-26.

39. Dickinson, North Dakota City Directory, 257 (1988). Villard, the first settlement in McHenry County, was also named for Villard in 1882, but when a railroad failed to reach the site, it declined as a townsite and the post office there was finally closed in 1911. D. WICK, NORTH DAKOTA PLACE NAMES 201 (1988).

40. (North Dakota Portion Of The) Official Railroad Map of Dakota (issued by the Railroad Commissioners, November 1st, 1886 and published by the North Dakota Public Service Commission, January 1889).

41. MEMOIRS, *supra* note 34, at 311. The removal of the territorial capital from Yankton to Bismarck to meet the desire of the Northern Pacific Railroad to have the capital on the main rail line is considered the first political coup of Alexander McKenzie, the sheriff of Burleigh County and political agent of the Northern Pacific Railroad, who became known as "the boss of North Dakota." ROBINSON, *supra* note 15, at 200-01.

42. MEMOIRS, *supra* note 34 at 273. Thayer had been counsel for Villard in early railroad bond negotiations for German investors. *Id.*



petent . . . than yourself. . . ."<sup>43</sup> Later, Villard sent Thayer a "statement of your account with me, showing balance of \$331.64 in my favor. . . ."<sup>44</sup> The accompanying account referred to dividends on a stock investment which Villard held for Thayer's account.<sup>45</sup> Thus, before their mutual undertaking on a model organic law, a personal and business relationship existed between Villard and Thayer.

During parts of the period covered by the correspondence, Villard was in poor health or away. In April, he mentioned particularly "rheumatism and inflammation of the eyes" while dictating correspondence from his bed.<sup>46</sup> He was also gone part of the time. During June 1889, he traveled over his rail line to the west coast.<sup>47</sup> This illness and travel may account for some of the delays in discussions of documents and in the resulting misunderstandings among the individuals.

### C. W. F. PEDDRICK

Washington F. Peddrick was a lawyer for the Northern Pacific Railroad with the firm of Evarts, Choate and Beaman in New York City.<sup>48</sup> Most of the discovered correspondence is from the pen of Peddrick, addressed to "My dear Professor" or "My dear sir," obviously referring to Professor Thayer. In his opening letter to Thayer, Villard reported "a beginning in engaging Mr. Peddrick, in the office of Messrs. Evarts, Choate & Beaman, whom you perhaps know. . . ."<sup>49</sup> Peddrick was apparently subordinate to Charles

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43. Letter from Henry Villard to James Thayer (April 6, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989). (All citations to letters in this article refer to those found in the James Bradley Thayer (1831-1902) Papers at Harvard Law School Library and reproduced in 65 N.D.L. REV. *Thayer Correspondence* (1989)). See *supra* note 27.

44. Letter from Villard to Thayer (July 11, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

45. *Id.*, 65 N.D.L. REV. *Thayer Correspondence* (1989).

46. Letter from Villard to Thayer (April 15, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

47. Letter from Villard to Thayer (May 29, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989). Villard left Dobb's Ferry, New York on Wednesday, May 29 for the Pacific Coast. *Id.* He had apparently returned by June 29. See letter from Villard to Thayer ("29/6 1889"), 65 N.D.L. REV. *Thayer Correspondence* (1989). An account of this trip and its importance to Villard is given in his Memoirs. MEMOIRS, *supra* note 34, at 330-32.

48. *The "Memorial Book" and Mortuary Role of the Association of the Bar of the City of New York*, 94-95 (1896)[hereinafter MEMORIAL BOOK]. W.F. Peddrick was among the secretaries to the delegation from the United States in the Alabama Claims Case in which William M. Evarts was Counsel for the United States and C.C. Beaman was solicitor for the United States. C. Cushing, *The Treaty of Washington: Its Negotiation, Execution and the Discussions Relating Thereto* 95, 97 (1970).

49. Letter from Villard to Thayer (April 6, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

Beaman in the law firm and on this project.<sup>50</sup>

Peddrick was first admitted to the Philadelphia bar.<sup>51</sup> He served as chief clerk to United States Attorney General William M. Evarts, and later as secretary to Evarts when Evarts was counsel for President Andrew Johnson in his impeachment trial in 1868.<sup>52</sup> Peddrick later was secretary to the American Commissioner of the French-American Claims Commission, which completed the arbitration in 1885 of claims primarily of French citizens arising out of the American Civil War.<sup>53</sup> Peddrick joined the law firm of Evarts, Choate and Beaman in 1887 and was elected to the Association of the Bar of the City of New York in 1888.<sup>54</sup>

While Peddrick was the most active lawyer in working with Thayer, there was no relationship between them before their collaboration on the constitutional project for Villard. In his letter of May 7, 1889, to Thayer, Peddrick remarked on his pleasure in meeting Thayer on May 4.<sup>55</sup> Later, Peddrick expressed pleasure in his working relationship with Thayer and gratitude for Thayer's hospitality during their working sessions in Cambridge.<sup>56</sup> Their relationship was warm until its abrupt deterioration in July.<sup>57</sup>

#### D. CHARLES BEAMAN

Charles Beaman was a senior partner in the New York law firm of Evarts, Choate and Beaman where Peddrick was associated.<sup>58</sup> Beaman was born in Maine in 1840, graduated from

50. Letter from W.F. Peddrick to James Thayer (June 10, 1889) and letter from Charles Beaman to James Thayer (July 25, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

51. MEMORIAL BOOK, *supra* note 48, at 95.

52. *Id.*; C. BARROWS, WILLIAM M. EVARTS: LAWYER, DIPLOMAT, STATESMAN 170 (1941).

53. FRENCH AND AMERICAN CLAIMS COMM'N, H.R.EXEC. Doc. No. 235, 48th Cong., 2d Sess.

54. MEMORIAL BOOK, *supra* note 48, at 95.

55. Letter from Peddrick to Thayer (May 7, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

56. Letters from Peddrick to Thayer (May 24, May 30, June 7, and June 10, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

57. Letter from Thayer to Peddrick (July 20, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

58. WHO WAS WHO, *supra* note 30, at 73. Beaman apparently assisted William Maxwell Evarts as counsel for the United States before the tribunal of arbitration on the "Alabama" claims. J.C.B. DAVIS, MR. FISH AND THE ALABAMA CLAIMS: A CHAPTER IN DIPLOMATIC HISTORY 85 (1969).

Evarts, grandson of Declaration of Independence signer Roger Sherman, was Attorney General of the United States under President Andrew Johnson (1868-1869), Chief Counsel for President Johnson in the impeachment proceeding in 1868, Secretary of State under President Rutherford B. Hayes (1877-1881), and United States Senator from New York (1885-1891). BIOGRAPHICAL DIRECTORY OF THE UNITED STATES 1774-1984, 977 (1989); see C. BARROWS, *supra* note 52, at 170-71. Peddrick's letter to Thayer of May 24 identified Senator Evarts as the source of constitutional documents from Congressional records.

Harvard University in 1861, and left Harvard Law School in 1865.<sup>59</sup> He served as a solicitor for the United States before the famous Alabama Arbitration Tribunal at Geneva, Switzerland in 1872, and as an examiner of claims for the Department of State in Washington, D.C.<sup>60</sup> He died in 1900.<sup>61</sup>

A handwritten, undated note on the first letter from Villard suggests that Thayer agreed to the constitutional project in association with Charles Beaman or his law firm.<sup>62</sup> Beaman had personal contacts with Thayer and wrote several of the last letters in the correspondence. References to seeing Thayer on July 9 and 10, 1889, and breakfasting with him then, while Thayer was meeting with Peddrick in New York, suggest a close social association, as well as a professional one, between Thayer and Beaman.<sup>63</sup>

#### E. JAMES MCNAUGHT

Little is known about James McNaught, except that he was a lawyer for the Northern Pacific Railroad and was located in St. Paul, Minnesota.<sup>64</sup> The Thayer collection ends with a letter from McNaught to Beaman, forwarded by Beaman to Thayer, which attempts to explain what happened to the work of Peddrick and Thayer as it moved west to North Dakota.<sup>65</sup>

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Letter from Peddrick to Thayer (May 24, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

Beaman married Evarts' daughter and joined him as a partner in the New York law firm of Evarts, Choate and Beaman. DICTIONARY OF AMERICAN BIOGRAPHY 215-18 (1931); C. BARROWS, *supra* note 52, at 227, 425.

Evarts and Beaman participated in the international arbitration of the accumulated maritime grievances of the United States against Great Britain which centered around the Confederate Cruiser "Alabama." The Alabama, which was built and equipped in neutral England, destroyed 68 Union commerce ships in 22 months during the Civil War, before it was sunk off Cherbourg, France in 1864. 1 THE NEW ENCYCLOPEDIA BRITANNICA 180-81 (1980).

Evarts was counsel for the United States and Beaman was named solicitor "and did excellent service." J.C.B. DAVIS, *supra*. America demanded that Britain pay for the commercial damage caused by the Alabama but agreed to submit the matters to arbitration by the Treaty of Washington (1871). The Alabama claims settlement was a major precedent for resolving international disputes by arbitration. It is considered a triumph for diplomacy and the role of international law. 1 THE NEW ENCYCLOPEDIA BRITANNICA, *supra*; 2 MAJOR PEACE TREATIES OF MODERN HISTORY 1648-1967 803-42 (F. Israel ed. 1967).

59. WHO WAS WHO, *supra* note 30, at 73.

60. *Id.*

61. C. BARROWS, *supra* note 52, at 492.

62. Letter from Villard to Thayer (April 6, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

63. Letter from Beaman to Thayer (July 25, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

64. See signature on the letter from James McNaught to Charles Beaman (July 29, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

65. Letter from Beaman to Thayer (July 31, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

## VI. OTHER PEOPLE

Other people are identified in the letters although they did not contribute to the correspondence.

## A. JAMES BRYCE

In the first letter of April 6, 1889, Villard anticipated "the cooperation of a number of competent and eminent friends, including our mutual friend, James Bryce."<sup>66</sup> In his third letter to Thayer, Villard remarked on "a letter from Mr. Bryce, who expresses great eagerness to assist in the work."<sup>67</sup>

James Bryce was a British scholar who traveled through America three times (1870, 1881 and 1883-84) and wrote a three-volume work of 1800 pages on American political and governmental institutions, *The American Commonwealth*.<sup>68</sup> In this work, Bryce dealt with state constitutions and governments in America.<sup>69</sup> The first edition of this work appeared in 1888, on the eve of the birth of four new northwest states. However, there is nothing in the correspondence or in other sources to suggest that Bryce made any actual contribution to Thayer's project.

Bryce was well-acquainted with "[o]ther notables of the Northeast," including President Charles W. Eliot of Harvard University, Oliver Wendell Holmes, Jr., and Thomas M. Cooley.<sup>70</sup> Judge Cooley addressed the North Dakota constitutional convention on July 17, 1889.<sup>71</sup> He stressed, as did Thayer, the desirability of short and simple constitutions.<sup>72</sup>

66. Letter from Villard to Thayer (April 6, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

67. Letter from Villard to Thayer (April 15, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

68. 1 J. BRYCE, *THE AMERICAN COMMONWEALTH*, (L. Hacker ed. 1959); M. Keller, *James Bryce and America*, 12 WILSON Q. 86-95 (1988).

69. J. BRYCE, *supra* note 68, at 104.

70. Keller, *supra* note 68, at 89.

71. OFFICIAL REPORT, *supra* note 10, at 65.

72. *Id.* In remarks to the convention delegates Judge Cooley said:

[I]f I were to drop a single word of advice — although I scarcely feel that it is within my province to do that — it would be simply this: In your Constitution-making remember that times change, that men change, that new things are invented, new devices, new schemes, new plans, new uses of corporate power. And that thing is going to go on hereafter for all time, and if that period should ever come which we speak of as the millenium, I still expect that the same thing will continue to go on there, and even in the millenium people will be studying ways whereby, by means of corporate power, they can circumvent their neighbors. Don't, in your constitution-making, legislate too much. In your Constitution you are tying the hands of the people. Don't do that to any such extent as to prevent the Legislature hereafter from meeting all evils that may be within the reach of proper legislation. Leave something for them. Take care to put proper restrictions upon them, but at the same time leave what properly

The mention of James Bryce, with his great reputation, suggests an exciting dimension to the intellectual environment of this project and reflects the importance attributed to it by the participants.

#### B. J.C. BULLITT, JR.

John Christian Bullitt, Jr. was an 18-year-old student employed by the Northern Pacific Railroad at Bismarck during the summer of 1889.<sup>73</sup> He was apparently the local recipient of the draft constitutions sent west by Peddrick in July 1889, according to McNaught's letter to Beaman of July 29.<sup>74</sup> Despite his age, Bullitt appears to have been one of the actors on behalf of the railroad in events at Bismarck. Bullitt was the son of a well-known Philadelphia lawyer. His father, J.C. Bullitt, Sr. represented Jay Cooke and Company when a financial panic occurred in 1873. Bullitt secured the appointment of a trustee and committee of creditors to successfully administer the firm's assets. The Cooke firm had invested heavily in bonds of the Northern Pacific Railroad. When the Railroad defaulted on the bonds, J.C. Bullitt, Sr. creatively brought about its reorganization under its old corporate charter, an accomplishment which received congressional recognition at the time. Thus, the Bullitt name and Villard were linked by the rehabilitation of the Northern Pacific Railroad.<sup>75</sup>

We surmise that, in gratitude to Bullitt, Sr., Villard made possible a summer tour of the frontier for young Bullitt. Like another member of a prominent eastern family, Theodore Roosevelt, young Bullitt was apparently taking his turn on the frontier. If so, McNaught's reference to young Bullitt in the letter to Beaman of July 29 may be no more than a gratuitous gesture in corporate politics, rather than reflecting Bullitt's true role in the constitutional deliberations in Bismarck.

J.C. Bullitt, Jr. went on to graduate from the University of Pennsylvania in 1892 and its medical school in 1895. He briefly practiced medicine in Philadelphia, and later served as a justice of the peace in Norwood, Pennsylvania. He died in 1925.<sup>76</sup>

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belongs to the field of legislation, to the Legislature of the future. You have got to trust somebody in the future and it is right and proper that each department of government should be trusted to perform its legitimate function.

*Id.* at 66-67.

73. Letter from McNaught to Beaman (July 29, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

74. *Id.*

75. THE NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 422-23 (1898).

76. *Id.*

## C. ERASTUS A. WILLIAMS

Erastus A. Williams was a lawyer and a Republican delegate from Burleigh County to the 1889 North Dakota constitutional convention.<sup>77</sup> Born in 1850 in Connecticut, Williams received his legal training at the University of Michigan and was admitted to the bar in Illinois in 1870.<sup>78</sup> Williams moved to Yankton in Dakota Territory and became an assistant U.S. District Attorney there in 1871.<sup>79</sup> He joined the firm of Burleigh & Keith, a company constructing railroad track for the Northern Pacific Railroad, as a land surveyor and agent.<sup>80</sup> In 1872, he moved to the future site of Bismarck, then a railroad camp known as Edwinton.<sup>81</sup> He became the first lawyer to hang out a shingle in what would later become Bismarck, and represented that area in the Territorial Legislature.<sup>82</sup>

Williams was one of 25 lawyer delegates to the constitutional convention.<sup>83</sup> Williams served as chairman of the Committee on the Legislative Department, one of 23 standing committees.<sup>84</sup> He was also named chairman of the special "committee . . . on rules and methods of procedure."<sup>85</sup> Thus, he occupied a respected and powerful position in the convention.<sup>86</sup>

The draft constitution introduced by Williams, printed as File

77. OFFICIAL REPORT, *supra* note 10, at 4.

78. G. Camp, biographical sketch contained in "Erastus Appleman Williams Papers" (unpublished collection inventory, State Historical Society of North Dakota, 1986): The State Historical Society obtained the Williams papers from Mrs. Roy S. Towne at an unknown date. Nearly all of these papers are from 1892 and after. See 2 L. CRAWFORD, *supra* note 15, at 510.

79. 2 L. CRAWFORD, *supra* note 15, at 510.

80. *Id.*

81. Camp, *supra* note 78; 2 L. CRAWFORD, *supra* note 15, at 510.

82. 2 L. CRAWFORD, *supra* note 15, at 510.

83. OFFICIAL REPORT, *supra* note 10, at 4.

84. *Id.* at 1 (List of Standing Committees of the North Dakota Constitutional Convention).

85. C. LOUNSBERRY, *supra* note 15, at 389.

86. *Id.* Williams' role in the convention was described by Lounsberry:

On July 20th, Mr. Williams introduced a complete constitution, known as file 106, which was read the first time and printed in the JOURNAL.

This document excited much speculation and comment, not so much as to the matter contained therein, but as to its authorship. It was excellently arranged under the heads, The State, The People, The Government, Alteration of the Constitution, and The Schedule, and its provisions were expressed in clear, pertinent and apt language. It was, as one newspaper expressed it, 'A marvel of strength, sense and diction.' Many of its provisions were incorporated in the constitution framed by the convention. It was suspected of railroad origin, or prepared at the cost and suggestion of the cattle barons of the Missouri slope. Williams disclaimed its authorship, and did not reveal the source from which it came, nor its author beyond the statement that he received it from a Bismarck attorney, and that it had been prepared by an eastern attorney.

*Id.* at 393-94.

106, was one of over 140 proposals formally filed with the convention.<sup>87</sup> Historian Clement Lounsberry tells us that it was one of two complete constitutions before the convention.<sup>88</sup> The other constitution was apparently the South Dakota proposal of 1885 identified in The Enabling Act.<sup>89</sup> The South Dakota Constitution was not printed as a File, since a copy of it was placed upon the desk of each member.<sup>90</sup> Thus, Williams File 106 was one of two important resources for North Dakota Convention delegates.

Lounsberry also tells us that, Delegate Williams has prepared and placed on the member's desks "abstracts of 'Hough's American Constitution,' covering twenty topics. . . ."<sup>91</sup> This reference parallels the comment in Villard's letter to Thayer of April 18, 1889, where he relates that Peddrick had located "the second volume in the work of Franklin B. Hough" which analyzed all state constitutions up to 1870.<sup>92</sup> It is possible that Williams obtained the abstract of *Hough's American Constitutions* from Peddrick.<sup>93</sup>

After the convention, Williams served in the North Dakota House of Representatives at various times through 1915 and as

87. JOURNAL, *supra* note 6, at 65.

88. C. LOUNSBERRY, *supra* note 15, at 392.

89. The Enabling Act, *supra* note 1, at § 4. Southern residents of Dakota Territory had held a constitutional convention in 1883, evidently planning separate statehood while ignoring inhabitants of the less-populated northern regions of the Territory. J. Hicks, *supra* note 26, at 11-13. They did so without authorization from either Congress or the Territorial Governor, who had vetoed a bill authorizing a convention. *Id.* Two years later, in 1885, a second constitutional convention was held in southern Dakota Territory, with concurrent approval of the Territorial Legislature, the Territorial Governor, and a vote of the people, but again without authorization by the United States Congress. *Id.* (Hicks suggested, "One of the reasons for the growth in popularity of the statehood movement in South Dakota was the desire to secure freedom from the domination of the Northern Pacific. Chicago Tribune, Oct. 1, 1885, p. 9." *Id.*, at 14, n. 29.) Congress identified this 1885 proposed Constitution for South Dakota in The Enabling Act. The Enabling Act, *supra* note 1, at § 5. The Enabling Act required South Dakota voters to approve this constitution "with such changes only as relate to the name and boundary of the proposed state, to the reapportionment of the judicial and legislative districts, and such amendments as may be necessary in order to comply with the provisions of this act. . . ." *Id.* With ratification of this available constitution, South Dakota was to become a state in 1889. *Id.*

90. C. LOUNSBERRY, *supra*, note 15, at 392-93, 409.

91. *Id.* at 409.

92. Letter from Villard to Thayer (April 18, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

93. The references are to B. HOUGH, AMERICAN CONSTITUTIONS (1872). The title page of each volume describes the works: "Comprising the Constitution of Each State in the Union, and of the United States, with the Declaration of Independence and Articles of Confederation; Each Accompanied by a Historical Introduction and Notes, Together with a Classified Analysis of the Constitutions, According to Their Subjects, Showing by Comparative Arrangement, Every Constitutional Provision Now in Force In the Several States; With References to Judicial Decisions, and an Analytical Index. Illustrated by Carefully Engraved Fac-similes of the Great Seals of the United States, and of Each State and Territory." Volume I contains 876 pages; Volume II contains 941 pages. The "Analysis of American Constitutions," grouping like sections under common headings, is found at pages 543-866 of Volume II.

Speaker of the House in 1896.<sup>94</sup> In 1890, President Benjamin Harrison appointed Williams to the position of United States Surveyor-General for North Dakota and he served in that capacity until 1894.<sup>95</sup> Williams died in Bismarck in 1930, at the age of 79.<sup>96</sup>

#### D. SAMUEL WILLISTON

The correspondence strongly implies that the well-known legal scholar, Samuel Williston, contributed to the story of the North Dakota Constitution. The several references to "Mr. Williston" in the correspondence appear to identify Samuel Williston.<sup>97</sup>

Williston was an editor of Volume 1 of the Harvard Law Review in 1887 and graduated from Harvard Law School in 1888.<sup>98</sup> After his graduation, Williston served as secretary to Justice Gray of the United States Supreme Court and practiced law for a short time in Boston before beginning his career as a teacher of law.<sup>99</sup> In 1890, he was serving on the faculty of Harvard Law School.<sup>100</sup> Felix Frankfurter described Williston as a colleague of Thayer.<sup>101</sup>

A prolific scholar, Williston is best known for his treatise, *Williston on Contracts*.<sup>102</sup> He served as Reporter for the *American Law Institute's Restatement of the Law of Contracts* and as an Advisor on the *Restatement of Restitution*.<sup>103</sup> Williston taught law until 1938, when he was 76 years old, and wrote his last article for the Harvard Law Review in 1950, when he was 88.<sup>104</sup> He died in 1963.<sup>105</sup>

In the June 7, 1889 letter, following a visit with Thayer at Cambridge, Massachusetts, Peddrick asked Thayer to "put me in communication with the gentleman you commended so highly,"

94. Camp, *supra* note 78, at 2; 2 L. CRAWFORD, *supra* note 15, at 511.

95. Camp, *supra* note 78, at 2; L. CRAWFORD, *supra* note 15, at 511; C. LOUNSBERRY, *supra* note 15, at 412.

96. Camp, *supra* note 78, at 2.

97. Letters from Peddrick to Thayer (June 7, 10, 12 and 29, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

98. See 1 HARV. L. REV. 399 (1888)(Masthead listing the Editorial Board).

99. Scott, In Memoriam: Samuel Williston, 76 HARV. L. REV. 1330, (1963).

100. Griswold, In Memoriam: Samuel Williston, 76 HARV. L. REV. 1324, (1963).

101. Frankfurter, In Memoriam: Samuel Williston, 76 HARV. L. REV. 1321, (1963).

102. *Id.*, at 1323. The first edition of Williston's treatise was published in 1920. See 1 S. WILLISTON, WILLISTON ON CONTRACTS (3d ed. 1957).

103. Scott, Book Review, 54 HARV. L. REV. 352, 353 (1940)(reviewing S. Williston, LIFE AND LAW (1940)).

104. Williston, The Law of Sales in the Proposed Uniform Commercial Code, 63 HARV. L. REV. 561 (1950).

105. Griswold, *supra* note 100.



for the purpose of "getting some more help."<sup>106</sup> In the letter of June 10, Peddrick reported to Thayer, I "have written at length to Mr. Williston. . . . [A]s I will very much need his assistance."<sup>107</sup> Peddrick added that he had "referred Mr. Williston to [Thayer], both for advice and also that [Williston] may have recourse to the material in [Thayer's] hands."<sup>108</sup>

Other letters show that Williston helped. In Peddrick's letter to Thayer of June 12, he stated: "I received a satisfactory note from Mr. Williston this morning, and am very glad that we are to have the benefit of his services."<sup>109</sup> In Peddrick's report to Thayer of June 29, he said:

Mr. Williston will supply you if he has not already done so, with drafts of

1. Local Government.
2. Taxation and Revenue.
3. Public Property.
4. Schools and School Lands.<sup>110</sup>

This suggests the possible scope of Williston's contribution to the North Dakota Constitution.

These references to "Mr. Williston" and Williston's biographical chronology come together in corroborating his assistance to Thayer and Peddrick in 1889, between graduating from law school and beginning his career on the faculty of Harvard Law School. Thayer evidently reviewed and supervised Williston's drafting work.<sup>111</sup>

Some of Williston's work, which may have been incorporated in the draft approved by Thayer, nevertheless may not have wound up in Williams' draft. The part on taxation was one of the divisions credited to Williston by Peddrick.<sup>112</sup> However, McNaught's letter to Beaman of July 29 reported that "all the provisions relating to corporations and taxation" were stricken in Bismarck, and substituted, "to a very great extent," with the

106. Letter from Peddrick to Thayer (June 7, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

107. Letter from Peddrick to Thayer (June 10, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

108. *Id.*

109. Letter from Peddrick to Thayer (June 12, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

110. Letter from Peddrick to Thayer (June 29, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

111. *Id.*

112. *Id.*

provisions of the Wisconsin Constitution.<sup>113</sup> The discovered draft documents bear out significant changes and omissions in the article on taxation in the Williams draft.<sup>114</sup>

## VII. THE LOCATIONS

The correspondence shows that the people working on the drafts communicated by letters, telegrams, and meetings while working from diverse locations: Thayer from Cambridge, Massachusetts, and from an apparent summer home at Bar Harbor, Maine; Beaman and Peddrick from New York City; McNaught from St. Paul, Minnesota, though he went to New York City in mid-July; and J. C. Bullitt, Jr. and Erastus Williams from Bismarck, North Dakota. Mr. Villard worked from a home in New York City and "summer quarters" at Dobb's Ferry, New York.<sup>115</sup> During June 1889, Villard was traveling by railroad to the West coast and was absent.<sup>116</sup>

The diversity of locations of the actors, combined with slower communications and clumsier mechanics of preparing complex documents in those days, made timely delivery of the documents in Bismarck uncertain.

## VIII. THE LETTERS

The Thayer correspondence consists of 34 letters, telegrams, and notes written between April 6, 1889 and July 31, 1889. The major writers were Villard, Thayer and Peddrick with later contributions by Beaman and McNaught.

To begin, Villard wrote Thayer on April 6, 1889.<sup>117</sup> Villard expressed an intent "to take a hand in the Constitution making of the new States along the line of the Northern Pacific, *viz.*, Dakota, Montana and Washington."<sup>118</sup> For an unspecified "liberal *honorarium*," Villard asked Thayer "to take a leading part" in "produc-

113. Letter from McNaught to Beaman (July 29, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

114. See Williams File 106, Art. XV, JOURNAL, *supra* note 6, at 104; compare Peddrick draft No. 2, 65 N.D.L. REV. *Thayer Correspondence* (1989).

115. Letter from Villard to Thayer (May 29, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989); Telegram from Villard to Thayer (July 8, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989); Letter from Peddrick to Thayer (July 3, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

116. Letter from Villard to Thayer (May 29, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989). Villard's account of this trip can be found in his MEMOIRS, *supra* note 34, at 330-32.

117. Letter from Villard to Thayer (April 6, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

118. *Id.*

ing” “a model organic law.”<sup>119</sup>

From Villard’s next letter, we learn that Thayer had pledged his “cooperation” by a response on April 9.<sup>120</sup> A copy of Thayer’s response was not located, nor were any of his other responses until the culminating exchanges in late July 1889. A handwritten note at the top of Villard’s April 6 letter suggests Thayer agreed to “do it with Beaman.”<sup>121</sup>

During the first weeks of the correspondence, there appears to have been an alteration in the expectation for Thayer’s performance. Initially, on April 6, Villard asked Thayer to make a first draft to be circulated to others for comment.<sup>122</sup> However, by the time of the May 16 letter from Peddrick to Thayer, the major drafting role appears to have shifted to Peddrick, who sought Thayer’s cooperation and suggestions to expedite the work.<sup>123</sup> Peddrick’s letter to Thayer on May 24 further reflects Thayer’s transition to an advisory role.<sup>124</sup>

In early April, Peddrick began the work. Peddrick’s first assignment, according to Villard, was “to prepare a comparative collation or synopsis of the provisions of the constitutions of the several States.”<sup>125</sup> By April 18, Villard told Thayer in a letter:

Mr. Peddrick has discovered that the work he has undertaken for me is practically existing, at least as far as the constitutions up to 1870 are concerned, in the analysis of the constitutions forming the last part of the second volume in the work of Franklin B. Hough, which, of course, you know. So all we have to do will be to complete Hough’s analysis from 1870 up to the present time.<sup>126</sup>

Despite the time constraints, it appears that the background analysis was systematically undertaken.

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119. *Id.*

120. Letter from Villard to Thayer (April 11, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

121. Letter from Villard to Thayer (April 6, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

122. *Id.*

123. Letter from Peddrick to Thayer (May 16, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

124. Letter from Peddrick to Thayer (May 24, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

125. Letter from Villard to Thayer (April 6, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

126. Letter from Villard to Thayer (April 18, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

On May 24, Peddrick reported to Thayer about existing constitutions:

About a week ago I wrote to Washington for a copy of the proposed Constitution for Dakota. I have not yet received it; but yesterday I found at the Columbia Law College, not only that constitution, but also one which has been framed for Montana. I immediately wrote to Senator Evarts asking him to send me three or four copies of these instruments which are contained in Congressional Documents. . . . you may find access to them in Boston. . . . From these I infer that a similar instrument has been prepared for Washington Terr[itor]y.<sup>127</sup>

The reference to "the proposed Constitution for Dakota," located at Columbia Law College by Peddrick, was evidently the constitution developed in anticipation of statehood which The Enabling Act required to be submitted to the voters of South Dakota.<sup>128</sup>

Peddrick reported during May that he was analyzing nine recent state constitutions.<sup>129</sup> Throughout June 1889, Peddrick submitted working drafts of various parts of the proposed constitution to Thayer. He mentioned the following divisions: Bill of Rights, Departments of Government, Definition of Terms "Office" and "Employment," Formation and Change of Counties, Public Schools, Legislative, Executive and Judicial Divisions, Right of Suffrage, Elections, the Militia, Public Institutions, Public Officers Generally, Amendments, Local Government, Taxation and Revenue, Public Property, Schools and School Lands, Corporations, and "The Schedule."<sup>130</sup>

## IX. THE MEETINGS

The participants took time for several meetings. In view of

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127. Letter from Villard to Thayer (May 24, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

128. See *supra* note 89.

129. Letter from Peddrick to Thayer (May 7, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

130. Letters from Peddrick to Thayer (June 7, 10, 14, 28, and 29, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989). Bryce stated the function of the schedule:

The Schedule, which contains provisions relating to the method of submitting the Constitution to the vote of the people, and arrangements for the transition from the previous Constitution to the new one which is to be enacted by that vote. Being of a temporary nature, the schedule is not strictly a part of the Constitution.

J. BRYCE, *supra* note 68, at 111.

the important purpose of preparing a "model" constitution, the work was hurried, completed in three months from April 6 to mid-July 1889. Notwithstanding the initial proposal by Villard that Thayer "make a first draft . . . [which] would be circulated among the co-workers for critical examination and amendment," most of the actual work was done by Peddrick in New York and mailed to Thayer at Cambridge, Massachusetts for his review, editing and approval.<sup>131</sup> But, there were also meetings at Cambridge and New York.<sup>132</sup>

Villard apparently met early with Peddrick on April 12.<sup>133</sup> Villard asked Thayer to come to New York in April.<sup>134</sup> On May 7, Peddrick refers to the pleasure of meeting Thayer "on Saturday last," May 4, which implies that Thayer had been to New York.<sup>135</sup> Villard separately conferred with Peddrick in New York several times, on May 23 and again on May 29.<sup>136</sup> After traveling to the west during June, Villard again met with Peddrick on Thursday, July 4 (the day that the North Dakota Constitutional Convention began) or July 5.<sup>137</sup>

Shortly after June 1, Peddrick journeyed from New York to Cambridge to meet with Thayer.<sup>138</sup> Later in June, Peddrick apparently traveled again to Cambridge.<sup>139</sup> Thayer planned to travel from Cambridge to New York to meet with Villard and Peddrick in late June, but Thayer's illness prevented the meeting.<sup>140</sup>

On July 5, Peddrick telegraphed Thayer urging him to come to New York "at once with all papers."<sup>141</sup> On July 6, Villard tele-

131. See Letter from Villard to Thayer (April 6, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989); Letters from Peddrick to Thayer (May 24, 1889 and June 7, 10, 12, 14, 28, and 29, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

132. See Letters for Peddrick to Thayer (May 16, 24, and 30, 1889 and June 7 and 14, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989); Telegrams from Villard to Thayer (July 5, 6, and 8, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

133. See Letter from Villard to Thayer (April 11, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

134. Letter from Villard to Thayer (April 15, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

135. Letter from Peddrick to Thayer (May 7, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

136. See Letters from Peddrick to Thayer (May 24 and 30, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

137. See Letter from Peddrick to Thayer (July 3, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

138. See Letter from Peddrick to Thayer (June 7, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

139. See Letter from Peddrick to Thayer (June 14, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989). Peddrick did not write Thayer again for two weeks.

140. See Letter from Villard to Thayer ("29/6 1889"), 65 N.D.L. REV. *Thayer Correspondence* (1989).

141. Telegram from Peddrick to Thayer (July 5, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

grammed Thayer "to come as soon as possible; otherwise danger of being too late."<sup>142</sup>

Indeed, the correspondence reflects the pressure of time was mounting. On June 10, Peddrick told Thayer that Villard had communicated "to the effect that the conventions will meet a little earlier than was anticipated."<sup>143</sup> On June 29, Peddrick wrote Thayer that he had "received a telegram from St. Paul inquiring whether the draft was completed, and stated that it would be needed very soon."<sup>144</sup> Again on July 3, Peddrick reported that he had "received a telegram to send draft, etc., to Wash. Terr[itory] and to St. Paul."<sup>145</sup>

Confirming that Thayer had responded to the telegram of July 5, Peddrick telegraphed again on July 6 that he would "expect [Thayer] tuesday or wednesday," July 9 or 10.<sup>146</sup> There follows an enigmatic, but peremptory telegram, dated July 8, from Villard to Thayer: "Report at office tuesday."<sup>147</sup> Since the constitutional convention for North Dakota had commenced on July 4, their sense of urgency is understandable.

A meeting between Villard, Peddrick and Thayer evidently took place about July 9.<sup>148</sup> Thayer later confirmed that there was a "document which I approved & of which I brought home a printed draft."<sup>149</sup> Thus, the Thayer draft constitution was completed before mid-July.

## X. THE DISAVOWAL

For Villard's and for Peddrick's purposes, it was evident that Thayer's work was complete. A private secretary, presumably Villard's, sent Thayer a "cheque in payment of your bill" on July

142. Telegram from Villard to Thayer (July 6, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

143. Letter from Peddrick to Thayer (June 10, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

144. Letter from Peddrick to Thayer (June 29, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

145. Letter from Peddrick to Thayer (July 3, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

146. Telegram from Peddrick to Thayer (July 6, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

147. Telegram from Villard to Thayer (July 8, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

148. See Telegrams from Peddrick to Thayer (July 5 and 6, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989); Telegrams from Villard to Thayer (July 6 and 8, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989); Letter from Thayer to Peddrick (July 20, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989); Letter from Villard to Thayer (July 25, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

149. Letter from Thayer to Peddrick (July 20, [1889]), 65 N.D.L. REV. *Thayer Correspondence* (1989).

16.<sup>150</sup> On July 18, Peddrick wrote Thayer listing dates of recent state constitutions and sending “a copy of the latest edition of the constitution.”<sup>151</sup>

The mention of a “latest edition” caused Thayer to react vehemently. A copy of Thayer’s letter to Peddrick of July 20 acknowledged receiving “the last Edition of the Constitution” from Peddrick, but complained that it had “considerable parts which I rejected” and “an arrangement which I had rejected.”<sup>152</sup> Having brought home his approved “printed draft” after their July 9 meeting, Thayer disavowed this “latest edition” in replying to Peddrick:

I must disavow the instrument in its present shape and request, if I am to have any responsibility for it or to be in any way connected with it, that it be restored to the shape in which I left it. These changes of form and substance are important, and they are not approved by me as they were not authorized by me. Indeed they *were* distinctly *rejected*.

I say all this upon the supposition that this is put forward as in any way the document which I assented to.

If it be something new, — your own, — then, of course, my remarks have no application. But in that case why is the paper sent to me as the ‘last Edition?’ It is the first Edition which has met my eye.

I telegraph you today that I disapprove of this form; and the same also to Mr. Villard; for it must not go out as mine.<sup>153</sup>

A copy of Thayer’s telegram to Villard on July 20 stated: “I disapprove Peddrick’s changes . . . and had rejected them. . . . I disavow this.”<sup>154</sup>

150. Letter from C.A. Spafford to James Thayer (July 16, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989). C. A. Spafford wrote the letter to Thayer on July 16 with the payment. *Id.* This apparently finished the financial and working relationship among the correspondents.

151. Letter from Peddrick to Thayer (July 18, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

152. Letter from Thayer to Peddrick (July 20, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

153. *Id.*

154. Copy of telegram penned to the bottom of the letter from Thayer to Peddrick (July 20, 1889), 65 N.D.L. REV. at *Thayer Correspondence* (1989). See Letter from Villard to Thayer (July 2[, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989). At this point, we find the first of copies of Thayer’s communications. This suggests that Thayer considered his earlier correspondence with Peddrick and Villard, reflected only in their letters, as relatively unimportant. Here, he finally made sure a copy was kept with his papers,

## XI. THE EXPLANATIONS

The remaining correspondence took place in the closing week of July 1889. These letters sought to explain what happened to Thayer's approved "first Edition" and what was used in Bismarck.

The final parts of the collection include a long explanation from Peddrick to Thayer about the changes and several soothing messages from Villard.<sup>155</sup> Another long letter from Peddrick's senior partner, Beaman, explained to Thayer how the various versions went west and were used.<sup>156</sup> Finally, a letter from McNaught in St. Paul to Beaman described events in Bismarck.<sup>157</sup> Modifying the legend of a "model" constitution created in a scholarly atmosphere for North Dakota, the letters sketch a commonplace episode of a major corporation seeking to affect its own legal environment through political processes.

Villard promptly responded to Thayer's disavowal saying, "I am sorry this dissonance has occurred in the last stages of our work."<sup>158</sup> The letter went on:

I know only that certain changes have been made, but I do not know what they are, because Mr. Peddrick had them made by the printer and sent the amended constitutions to the West without my having seen them. I have had a copy at home for two days, but have not found time to make the comparison. I have not seen Mr. Peddrick at all, but I learn from Mr. Beaman that he is very much taken aback by your letter.<sup>159</sup>

Peddrick responded on July 25 to Thayer's disavowal.<sup>160</sup> Peddrick claimed that he "did all in my power to put in good shape

suggesting that he suddenly considered his communications very important. The letter from Villard to Thayer of July 2[ ] indicating the deteriorated relations between Thayer and Peddrick was incompletely dated, but was clearly contemporaneous with the correspondence of July 25-26 and was found at this placement in the sequence of the correspondence.

155. Letters from Villard to Thayer (July 2[ ] and 26, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

156. Letter from Beaman to Thayer (July 25, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

157. Letter from McNaught to Beaman (July 29, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

158. Letter from Villard to Thayer (July 2[ ], 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

159. *Id.*

160. Letter from Peddrick to Thayer (July 25, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989). There are two copies of this letter in the correspondence. The first version (65 N.D.L. REV. *Thayer Correspondence* (1989)) was labeled "copy" and was less complete than the second (65 N.D.L. REV. *Thayer Correspondence* (1989)). All future references are to the second version of the letter from Peddrick to Thayer of July 25, 1889.



and to expedite the printing of the draft which you approved."<sup>161</sup> He insisted that he "sent copies to the west under instructions."<sup>162</sup> But, he also acknowledged that one or more changed drafts went west as well. Peddrick disclaimed any effort by himself or, "to my knowledge, by any one else, to substitute one of these drafts for the other."<sup>163</sup> Peddrick confirmed that his own draft, his "'last edition of the constitution,'" did go west.<sup>164</sup> However, Peddrick sought to avoid personal responsibility: "[M]y business with the papers ceased when they left my hands, and I made no representation whatever in forwarding them."<sup>165</sup> Peddrick's apology is befuddling.

Additionally, Peddrick here corroborated the legendary secrecy surrounding the entire effort. In the design to create a "model," "it was clearly understood that their origin should at least for a while be kept private."<sup>166</sup> This secrecy extended west to Bismarck where Williams submitted his draft without disclosing its origin.

Coinciding with Peddrick's letter of July 25 was another of the same date from Beaman to Thayer.<sup>167</sup> Beaman referred to seeing Peddrick's letter "of today's date" and to discussing it with Peddrick.<sup>168</sup> Beaman confirmed that Peddrick sent copies "of the constitution which I supposed [Thayer] had approved," "the Thayer draft," to McNaught at St. Paul and to Mr. Paul Schultze at Tacoma, Washington on July 10.<sup>169</sup> Beaman recounted that he had seen a "press copy" of Peddrick's transmittal letter to the west, which said "that in a few days [Peddrick] would send [McNaught and Schultze] substantially a new constitution 'arranged according to the plan I prepared' and of which *I sent you some copies.*"<sup>170</sup> (Emphasis added). This suggests that, either with or before sending Thayer's approved draft, Peddrick sent "some copies" of his own version west.<sup>171</sup>

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161. *Id.*, at paragraph 3.

162. *Id.*

163. *Id.*, at paragraph 5.

164. *Id.*

165. *Id.*, at paragraph 4.

166. *Id.*

167. Letter from Beaman to Thayer (July 25, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

168. *Id.*, at paragraph 1.

169. *Id.*, at paragraph 2.

170. *Id.*

171. *Id.* On July 3, Peddrick had reported to Thayer that he had "sent the analysis and volumes, but not the draft" in response to a request from the west "to send draft, & c[opy] to Wash. Terr[itor]y and to St. Paul." Letter from Peddrick to Thayer (July 3, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

Beaman disclosed that the "Peddrick draft No. 1" was printed and shipped west to McNaught and Schultze on July 13.<sup>172</sup> Beaman told Thayer: "This new constitution as I understand it, is in effect the draft constitution which Mr. Peddrick originally submitted for your approval and which in some particulars you rejected and which in general arrangement you disapproved," but which also "embodied some of the suggestions which had been made by you in the Thayer draft."<sup>173</sup>

But tampering with Thayer's draft didn't stop there. Beaman revealed that after sending "Peddrick draft No. 1" on July 13, Peddrick met with McNaught "who suggested certain changes."<sup>174</sup> McNaught then telegraphed both St. Paul and Tacoma "in effect countermanding the use of any copies already sent them, making no distinction so far as I know between the Thayer draft and Peddrick draft No. 1."<sup>175</sup> Thus the earlier drafts, including Thayer's approved draft, were set aside and a "Peddrick draft No. 2" was produced.

Notice that Beaman emphasized that "Peddrick draft No. 2," to which Mr. Peddrick had added "his synopsis and his table of authorities," was "a new print [of the Peddrick draft No. 1]."<sup>176</sup> We infer that McNaught's suggestions were incorporated in "Peddrick draft No. 2."

Beaman wrote: "These Peddrick drafts No. 2 were sent off . . . to St. Paul, Bismarck, and Tacoma on Wednesday the 17th, without any special message or letter of which any copy has been kept."<sup>177</sup> After the "countermanding" telegrams, the lack of any "message or letter" with the "last edition" is remarkable.

Beaman said that, "[i]mmediately when I discovered the facts," he took Peddrick to meet with Villard.<sup>178</sup> Beaman insisted that he "found that Mr. Villard apparently had no more knowledge than I that there were two distinct draft constitutions. . . ."<sup>179</sup> Beaman translated:

Mr. Villard has not had any intention, as I understand it, of saying to any convention, who was responsible for or

172. Letter from Beaman to Thayer (July 25, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

173. *Id.*, at paragraph 3.

174. *Id.*, at paragraph 3, 4.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*, at paragraph 4.

179. *Id.*

who had drafted these constitutions, but he undoubtedly did intend that the draft constitution that was presented should have in a general way your approval. Of course he knew that the changes that were made here by Mr. McNaught did not have your approval, or rather were made without your knowledge.<sup>180</sup>

Beaman concluded, “[i]t has now probably happened that your draft constitution has not been presented to any convention, and that the Peddrick draft No. 2 is the only draft constitution that has been presented.”<sup>181</sup>

If the explanations stopped there, all would conclude that it was probably Peddrick’s last draft, not Thayer’s, that was given to the constitutional convention in North Dakota. But more explanations were made, tangling the constitutional roots we are exploring.

Villard acknowledged authorizing changes to Thayer’s draft. Villard wrote Thayer apologetically on July 26.<sup>182</sup> He recognized that Thayer had been “offended at the few and not important changes that I authorized McNaught to make in the constitution you had approved.”<sup>183</sup> Since the changes were McNaught’s suggestions which Villard authorized and since they were incorporated in “Peddrick draft No. 2,” one can easily infer Villard’s approval of all the changes made for “Peddrick draft No. 2.”<sup>184</sup>

Villard blamed Peddrick: “I cannot help saying that he acted most presumptuously & in bad faith towards yourself. . . .”<sup>185</sup> Villard complained: “The worst feature of [Peddrick’s] performance is that it is likely to defeat entirely our object by the confusion the reception of three constitutions must have necessarily created. Is it not a queer business?”<sup>186</sup>

On July 27, Thayer wrote Beaman, graciously conceding that he “never believed that [“any of Mr. Villard’s Western men”] would take our draft without changes.”<sup>187</sup> Thayer excused Villard and thanked Beaman for putting “in a clean light — this matter of

180. *Id.*

181. *Id.*, at paragraph 5.

182. Letter from Villard to Thayer (July 26, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

183. *Id.*, at paragraph 1.

184. See letter from Villard to Thayer (July 26, 1889), 65 N.D.L. REV. at \_\_ (1989).

185. *Id.*, at paragraph 1.

186. *Id.*, at paragraph 2.

187. Letter from Thayer to Beaman (July 27, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

Mr. Peddrick's."<sup>188</sup> But Thayer remained troubled: "But surely it was a very surprising & quite inexplicable thing to find that Mr. Peddrick had composed a constitution *of his own* and sent it out with no authority from Mr. Villard and without one word of conference with me."<sup>189</sup>

Two more things are noteworthy about Thayer's letter. First, he recognized that even his approved draft was "not the sort of thing which I believe in, i.e. a very short and simple instrument," but it "was merely as good a draft — as I could shape out of the material furnished in the time allowed."<sup>190</sup> Second, and we think significantly for tracing which draft was used by "Mr. Villard's Western men," Thayer complained that "Peddrick did not annotate [Thayer's approved] draft No. 1, but proceeded to annotate his own work. . . ."<sup>191</sup>

The available correspondence concludes with a short letter from Beaman to Thayer on July 31.<sup>192</sup> Beaman enclosed a letter from McNaught about "what has taken place at St. Paul."<sup>193</sup> From McNaught's rendition of events, Beaman reversed his earlier conclusion and now surmised that "the 'Thayer draft' was the only one that was presented in the *South Dakota Convention*."<sup>194</sup> (Emphasis added). This reference to "South Dakota" appears to be inadvertent, a typical Easterner's confusion of North Dakota and South Dakota that persists until today. McNaught's references to Bismarck and the "Williams Constitution" make it plain that he wrote about events in North Dakota.

In his letter to Beaman on July 29, McNaught explained at length:

The draft of the constitution containing the amendments suggested by me reached Bismarck too late to be presented to the Convention. Mr. J. C. Bullitt, Jr. acting for the N[orthern] P[acific] in connection with Mr. Williams, a member of the Convention, and two or three other lawyers, prior to the receipt by Mr. Bullitt of the first draft sent by Mr. Peddrick, changed the same by

188. *Id.*, at paragraph 1.

189. *Id.*, at paragraph 4.

190. *Id.*, at paragraph 2.

191. *Id.*, at paragraph 5.

192. Letter from Beaman to Thayer (July 31, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

193. Letter from McNaught to Beaman (July 29, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

194. Letter from Beaman to Thayer (July 31, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

striking out of it all the provisions relating to corporations and taxation, and inserted therein, to a very great extent, the provisions of the Wisconsin Constitution, and had the pages so inserted reprinted, using, with these exceptions, the original draft of the constitution sent by Mr. Peddrick. Mr. Bullitt's impression after reading your letters, is that the draft of the constitution used by him and his associates, is the Thayer draft. It was used by them because it was shorter, and they could eliminate objectionable portions from it and reprint the same with less expense, and complete the revision quicker than by using the other. Mr. Bullitt will send me, within two or three days, a copy of the draft of the constitution used by him and his friends. The draft of the constitution as last sent out by Mr. Peddrick would have been very satisfactory to the convention had it arrived in time, but so much of the work had already been completed, and provisions differing a little in phraseology agreed upon, that although the Williams Constitution, as it is called here, will be considered by the Convention tomorrow, we are quite satisfied that the convention, having passed upon and settled by vote so many of the provisions, that it will now not undo the work it has done.

Our friends in the Convention are using to their great advantage the index, synopsis and other material furnished by Mr. Peddrick.<sup>195</sup>

We believe McNaught's reference to "[o]ur friends in the Convention . . . using to their great advantage the index, synopsis and other material furnished by Mr. Peddrick" is meaningful. Whatever draft was used in Bismarck, the synopsis and annotations attached to Peddrick draft No. 2 were beneficial to convention delegates.

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195. Letter from McNaught to Beaman (July 29, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989). Our research does not bear out that the sections on Corporations and Taxation in the Wisconsin Constitution were substituted in Williams File 106 as indicated in McNaught's letter to Beaman of July 29. The principal sentence of Section 1 of Article XV on *Taxation and Revenue* of Williams File 106 is identical to the single sentence of Section 1 of Article VIII on *Finance* of the Wisconsin Constitution: "The rate of taxation shall be uniform and taxes shall be levied upon such property as the [Legislative Assembly] shall prescribe." Compare with Wis. Const. reprinted in *The Blue Book of the State of Wisconsin*, 21-23 (1891).

There is little similarity between these documents in the remaining sections on either subject.

## XII. THE POSSIBILITIES

To summarize what the correspondence tells us, at least three, and perhaps four, draft constitutions were shipped west by Peddrick. We review, chronologically, the documents sent west.

There is a possibility that a preliminary draft constitution was sent west before Thayer's work was completed. Peddrick mentioned to Thayer on June 29, and again on July 3, about being pressed by telegrams to send drafts to St. Paul.<sup>196</sup> Peddrick said on July 3 that he "sent the analysis and volumes, but not the draft."<sup>197</sup> But, on July 25, Beaman reported that in a letter on July 10 sending Thayer's draft west Peddrick had said "that in a few days he would send . . . substantially a new constitution 'arranged according to the plan I prepared' and of which I sent you some copies."<sup>198</sup> This last allusion, coupled with the demanding circumstances, indicates that Peddrick may have sent an earlier draft of his own, either with or before sending Thayer's draft.

Thayer's draft went west on July 10 or 11.<sup>199</sup> Peddrick reported to Thayer on July 25 that he had "expedite[d] the printing of the draft which you approved. I sent copies to the west . . . and handed you one or two on . . . the 11th when you called."<sup>200</sup> Beaman reported to Thayer on July 25 that the Thayer draft constitution was sent west on July 10.<sup>201</sup> Beaman further confirmed that Thayer had "rejected a certain form of synopsis or plan of arrangement . . . proposed by Mr. Peddrick."<sup>202</sup>

"Peddrick draft No. 1" was sent west on July 13, according to Beaman.<sup>203</sup> This draft was the one "Peddrick originally submitted for [Thayer's] approval and which in some particulars [Thayer] rejected and which in general arrangement [Thayer] disapproved."<sup>204</sup> It did, however, embody "some of the suggestions which had been made . . . in the Thayer draft."<sup>205</sup>

196. Letters from Peddrick to Thayer (June 29, 1889 and July 3, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

197. Letter from Peddrick to Thayer (July 3, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

198. Letter from Beaman to Thayer (July 25, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

199. *Id.* See Letter from McNaught to Beaman (July 29, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

200. Letter from Peddrick to Thayer (July 25, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

201. Letter from Beaman to Thayer, at paragraph 3, (July 25, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

202. *Id.*, at paragraph 2.

203. *Id.*, at paragraph 3.

204. *Id.*

205. *Id.*

"Peddrick draft No. 2" was sent to Bismarck on July 17, according to Beaman.<sup>206</sup> This draft contained those changes suggested by McNaught on July 13, as well as those made by Peddrick after Thayer's approval on July 10.<sup>207</sup> As the draft Thayer received from Peddrick on July 19, it had been "recast" with an arrangement and form which Thayer "had definitely and repeatedly declined to adopt," with a "synopsis" which Thayer "had rejected for any purpose," and with "considerable parts which [Thayer] rejected," "changes of form and substance . . . not approved . . . [and] not authorized" by Thayer.<sup>208</sup> It was "to this new print [that] Mr. Peddrick added his synopsis and his table of authorities."<sup>209</sup>

Thus, three, and perhaps four, draft constitutions went west. With so many printed versions shipped west, did some survive? Some did!

### XIII. THE DRAFTS

Late in our efforts to assemble this account, we discovered three of the drafts in the archives of the State Historical Society, stored in a box labelled "Constitutions." The Society has no record of how or when it received these documents.<sup>210</sup> But, the appearance and contents of the documents evidence their identity as draft constitutions described in the Thayer correspondence.

There are three discovered drafts.

206. *Id.*

207. *Id.*

208. Letter from Thayer to Peddrick (July 20, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

209. Letter from Beaman to Thayer (July 25, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

210. The draft constitutions were located in the same box as printed "booklets" of Williams File 106. These "booklets" appear to be copies of File 106 circulated at the 1889 Constitutional Convention. Since File 106 was printed in the JOURNAL, its contents have been known and accessible. JOURNAL, *supra* note 6, at 65-113. Therefore, the discovery of additional printed copies is not remarkable.

Speaking about File 106, R.M. Black reported in 1910 that "A set of these booklets is now in the custody of the State Historical Society at Bismarck." Black, *supra* note 15, at 136 n.1. See note 6, *supra*. Whether the draft constitutions were also then in the custody of the State Historical Society nearly 80 years ago, or have come into its hands since then, cannot be ascertained.

Since Erastus Williams' records are archived at the State Historical Society, it seems possible that these drafts came out of his files, even though the Historical Society has no record of this connection, and these drafts were not inventoried with his papers. The State Archivist, Gerald Newborg, in a letter of April 6, 1989, said: "We strongly suspect that they came to us with the Williams Papers and were separated without documentation. I would say this is not only possible, but likely, although the proof simply does not exist." A subsequent comparison by Newborg of the handwritten marginal notes in the copy of Thayer's draft found in the box with known samples of Williams' handwriting indicates that the marginal notes are Williams'. This further ties the box, including the drafts, to Williams. Letter from Gerald Newborg to Larry Spears (Nov. 21, 1989).

## A. THAYER DRAFT

The first document is a 60-page version, headed in capital letters "CONSTITUTION."<sup>211</sup> The facing page below continues with another large heading, "PREAMBLE," followed by a three-line text in the same words as the Williams' draft, which was adopted as North Dakota's preamble.<sup>212</sup> Following that, on the first page, is the designation of ARTICLE I on "Declaration of Rights" and 4 of that article's 37 sections. A bottom line on the facing page says "[First Draft]" in smaller but darker print.<sup>213</sup>

With occasional pen-written marginal notes, this 60-page draft is a form for a state constitution, with blank spaces for the name of the state to be inserted. The constitutional text has 338 numbered sections, grouped in 8 titled articles, plus a "SCHEDULE" of 21 sections. It has no "synopsis" and has a different arrangement than the other drafts. From its appearance and contents, in relation to the correspondence and to the other drafts, we believe it is the Thayer draft.<sup>214</sup>

## B. PEDDRICK DRAFT NO. 1

The facing page of the second draft constitution, a 72-page version, is like the facing page of the Thayer draft but there are important differences in detail. Above the capitalized title, "CONSTITUTION," is a line in smaller, darker print: "[Form of Constitution. — First Draft.]" There is no similar line at the bottom of the facing page as appears on the Thayer draft. The facing page also presents a substantially different format and organization. Below the same Preamble, starting at the left margin and in bold face print, is a heading: "Part I.—The State." An "ARTICLE I" on "DESIGNATION OF THE STATE" follows with all of the first two sections and part of a third section of that article on the balance of the facing page.<sup>215</sup>

This 72-page draft is also a form for a state constitution, again with blank spaces for the name of the state. It has 385 sections

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211. The Thayer draft is stored in the same box as the Williams File 106 in the custody of the State Historical Society. [hereinafter Thayer draft].

212. Thayer draft at 1. See OFFICIAL REPORT, *supra* note 10, at 357-60. The preamble is: "We, the people of North Dakota, grateful to Almighty God for the blessings of civil and religious liberty, do ordain and establish this constitution." N.D. CONST. PREAMBLE. 13 N.D. CENT. CODE 89 (1981).

213. Thayer draft, *supra* note 211.

214. *Id.*

215. The Peddrick draft No. 1 is stored in the same box as the Williams File 106 in the custody of the State Historical Society. [hereinafter Peddrick draft No. 1].



grouped in 30 titled articles, plus a "Schedule" of 21 sections. It is structured under five parts:

Part I. — The State

Part II. — The People

Part III. — The Government

Part IV. — Alteration of the Constitution

Part V. — Schedule.

These five parts largely echo the general divisions in state constitutions that James Bryce outlined in his 1888 commentary on political and governmental institutions in America.<sup>216</sup>

The two longer parts, Parts II and III, are further structured with Chapter headings and Title headings. Part II on "The People" is structured:

CHAP. I. - Individuals

CHAP. II. - Organizations

Title I. - Public Organizations

Title II. - Private Organizations

Similarly, Part III on "The Government" is structured:

CHAP. I. - State Government

Title I. - Frame of State Government

Title II. - Support of State Government

Title III. - State Institutions and Public Works

CHAP. II. - Local Governments

Title I. - Frame of Local Government

Title II. - Support of Local Government.

This structured arrangement is a strikingly different format from the Thayer draft, but this draft has similarities to the Thayer draft. It lacks the "SYNOPSIS" and table of "AUTHORITIES" of Peddrick draft No. 2, but is otherwise very similar in arrangement and content to Peddrick draft No. 2. From its appearance and content, in relation to the correspondence and to the other drafts, we conclude that this is Peddrick draft No. 1.

### C. PEDDRICK DRAFT NO. 2

The third draft constitution is the gem in the trove from the State Historical Society. In addition to 71 pages of constitutional text, it begins with a cover page, entitled "FORM OF CONSTITUTION," in large letters, followed by slightly smaller, but still capitalized, words in descending, staggered order: "SYNOPSIS,"

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216. J. BRYCE, *supra* note 68, at 111.

“CONSTITUTION,” and “CITATIONS.”<sup>217</sup> Below the titling on the cover page, again in smaller but darker print, is the line: “[First Draft.]”<sup>218</sup>

This third draft form of constitution contains an unnumbered four-page “SYNOPSIS” (an index without pagination), listing by number and heading each Part, Chapter, Title and Article, as well as subheadings in some Articles.<sup>219</sup> Its 71 pages of constitutional text are arranged and designated very like Peddrick draft No. 1, though subheadings in some Articles vary. It contains 382 sections grouped in 30 titled articles, plus a schedule of 21 sections.

Of greatest interest, in the back, there is another section, made up of nine separately numbered pages, entitled “AUTHORITIES”. These pages list sources for each section of the proposed constitution, by specific citations to provisions in other state constitutions and statutes.<sup>220</sup>

Beaman stated in his letter to Thayer on July 25 that “to this new print Mr. Peddrick added his synopsis and his table of authorities.”<sup>221</sup> The “index, synopsis and other material” were acknowledged with approval by McNaught in his letter to Beaman of July 29.<sup>222</sup>

There is little doubt that this document is Peddrick draft No. 2.

#### XIV. THE NEW TOOLS

Due to its potential importance, Peddrick draft No. 2 is published as an appendix to this article.<sup>223</sup> Its close correlation with portions of the original North Dakota constitution can be traced through Williams File 106.<sup>224</sup> Its accompanying table of “AUTHORITIES” takes us to its sources in other state constitutions.<sup>225</sup> These features make it useful for future research on antecedents of specific provisions of our North Dakota Constitution.

Williams File 106 is much like Peddrick draft No. 1 and Peddrick draft No. 2, but Peddrick’s drafts are not quite identical. The

217. Peddrick draft No. 2, 65 N.D.L. REV. *Model Constitution* (1989).

218. *Id.*

219. *Id.*

220. *Id.*

221. Letter from Beaman to Thayer (July 25, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

222. Letter from McNaught to Beaman (July 29, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

223. Peddrick draft No. 2, 65 N.D.L. REV. *Model Constitution* (1989).

224. JOURNAL, *supra* note 6, at 65.

225. Peddrick draft No. 2, 65 N.D.L. REV. *Model Constitution* (1989).

differences are mostly in arrangement of phrases within sections and arrangement of sections within articles. Close comparison of the drafts with Williams File 106, particularly section numbering, suggests that Williams used Peddrick draft No. 1 as his primary model for File 106, but Williams changed it in several ways.

First, Williams omitted some sections found in Peddrick draft No. 1, but not in Peddrick draft No. 2. These include: Section 4 of Article IV which would have voided a waiver by an employee of an employer's liability to the employee for injuries during employment.<sup>226</sup> Section 14 of Article IX would have withheld the power of eminent domain from a railroad until it became a "body corporate pursuant to . . . laws of this state."<sup>227</sup> Section 14 of Article XV would have declared "All laws exempting property from taxation other than the property before mentioned . . . void."<sup>228</sup> And, Section 3 of Article XXIV would have provided for annual appointment to a three-year term of one of three school trustees by the county commissioners.<sup>229</sup> These changes from the apparent model suggest that Williams gave attention to the revisions in Peddrick draft No. 2, used those he considered worthwhile, and ignored the others.

Second, Williams File 106 differs significantly from both Peddrick drafts on about 25 items. These differences include: A section on selecting the seat of government was omitted.<sup>230</sup> A sentence was omitted which authorized the legislature to allow a civil jury verdict by not less than nine out of a jury of twelve.<sup>231</sup> A proviso was added making just and reasonable compensation for railroads a judicial question to be determined by the courts.<sup>232</sup> A section prohibiting railroads from giving free passes to legislators was omitted.<sup>233</sup> Language about apportioning legislators after each census was dropped from the legislative article.<sup>234</sup> A new section prohibiting sale of coal lands owned by the State was added.<sup>235</sup> A sentence limiting sheriffs, county treasurers and the State Treasurer to two successive terms in office was added.<sup>236</sup> A number of changes, five of them omissions, were made in the arti-

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226. Peddrick draft No. 1, *supra* note 216, at art. IV, § 4.

227. *Id.*, at art. IX, § 14.

228. *Id.*, at art. XV, § 14.

229. *Id.*, at art. XXIV, § 3.

230. Peddrick draft No. 2, art. I, § 3, 65 N.D.L. REV. *Model Constitution* (1989).

231. Peddrick draft No. 2, art. III, § 16, 65 N.D.L. REV. *Model Constitution* (1989).

232. Williams File 106, art. IX, § 10, JOURNAL, *supra* note 6, at 77.

233. Peddrick draft No. 2, art. IX, § 13, 65 N.D.L. REV. *Model Constitution* (1989).

234. Peddrick draft No. 2, art. XI, §§ 5 & 11, 65 N.D.L. REV. *Model Constitution* (1989).

235. Williams File 106, art. XII, § 62, JOURNAL, *supra* note 6, at 93.

236. Williams File 106, art. XIV, § 9, JOURNAL, *supra* note 6, at 101.

cle on "Taxation and Revenue."<sup>237</sup> And, three articles were omitted altogether, those on "Educational Institutions," "Penal and Reformatory Institutions," and "Benevolent Institutions."<sup>238</sup> Williams did not accept Peddrick's products uncritically.

In many of the changes from the Peddrick drafts, Williams File 106 differed from Thayer's draft as well. However, Thayer's draft, like Williams File 106, did not include articles or sections on "Educational Institutions," "Penal and Reformatory Institutions," or "Benevolent Institutions."<sup>239</sup>

In some instances, the changes in Williams File 106 coincide with scribbled marginal notes of an unknown hand in the copy of the Thayer draft that we found. For example, such notations can be found on the copy of Thayer's draft next to two provisions about reapportionment of legislators after each census, as well as next to three sections on taxation.<sup>240</sup> This appearance, coupled with the changes from Peddrick's drafts, implies that Williams pondered all three drafts in preparing his own version.

A careful comparison of Williams File 106 with the Thayer draft, Peddrick draft No. 1, and Peddrick draft No. 2 discloses numerous other minor changes. These include changes in singulars, plurals, prepositions, and punctuation, as well as addition or omission of a word or two here and there. Some seem typographical, some merely fussy, and some soundly editorial. Some may have been intended to have a substantive significance which we have not immediately identified.

Rather than the confusion which Villard feared, the profusion of forms seems to have given the author of Williams File 106 greater local latitude for modification.

The introductory paragraph to the table of "AUTHORITIES," at the back of the draft that we identify as Peddrick draft No. 2, is an important part of the evidence connecting the three discovered drafts to the Thayer correspondence.<sup>241</sup> This paragraph reads:

The following is a list of some of the authorities used

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237. Williams File 106, art. XV, JOURNAL, *supra* note 6, at 104; compare Peddrick draft No. 2, Art. XV, Sections 1, 2, 9, 12 and 13, 65 N.D.L. REV. *Model Constitution* (1989).

238. Peddrick draft No. 2, art. XVIII, XIX and XX, 65 N.D.L. REV. *Model Constitution* (1989).

239. Thayer draft, *supra* note 211; compare Williams File 106, JOURNAL, *supra* note 6, at 65.

240. Thayer draft, art. V, §§ 5, 11 and art. VIII, §§ 56, 57, 64 and 69, *supra* note 211, at 10-12 and 46-48; compare Williams File 106, art. XV, JOURNAL, *supra* note 6, at 104. See the observations of the State Archivist, *supra* note 211.

241. Peddrick draft No. 2, 65 N.D.L. REV. *Model Constitution* (1989).

in this work. The object has been to cite one or more constitutions for each provision; but all the State Constitutions were examined in making up this draft. In a few instances no authority is cited. Here the provision is either original or the authority has been mislaid *in the haste of preparation*. In many cases the provisions of different constitutions have been embodied in the same section, in others the language has been changed. (Emphasis added).<sup>242</sup>

The references to "all the State Constitutions [being] examined" and to "the haste of preparation" are forceful evidence of the connection to the Thayer correspondence.<sup>243</sup>

The table of "AUTHORITIES" contains references to specific provisions of the constitutions of 39 other states and proposed states.<sup>244</sup> The referenced proposed state constitutions include that intended for South Dakota, as well as those for Montana and Washington Territory.<sup>245</sup> There is at least one reference to a section apparently derived from a state's laws, "Ind[iana] El[ection] Laws 1889," for Article V, Section 13, on the secret ballot at all elections.<sup>246</sup> There is also a reference to a "Montana Ordinance."<sup>247</sup> There are frequent references to "and others" after citing one or more specific constitutions; and there are many references only to "Constitutions generally." Occasionally, a citation is preceded by "based on," declared "combined from many," or followed by "modified." Several short articles show all sections came from a single state's provisions.<sup>248</sup> Only one short article lacks any citations.<sup>249</sup> The table of Authorities seems to be a comprehensive annotation of antecedents.<sup>250</sup>

The discovery of these drafts late in our project has not

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*, at art. II, § 3 (Dakota); art. III, § 27 (Montana); art. III, 18 (Washington Territory), 65 N.D.L. REV. *Model Constitution* (1989).

246. *See id.*, art. V, § 13, Peddrick draft No. 2, 65 N.D.L. REV. *Model Constitution* (1989) and at Authorities.

247. *Id.* 65 N.D.L. REV. *Model Constitution* (1989) and at Authorities. *See* art. II, § 5, 65 N.D.L. REV. *Model Constitution* (1989); *see* 1889 Ind. Laws ch. LXXXVII & *id.*, § 40.

248. *Id.* 65 N.D.L. REV. *Model Constitution* (1989) and at Authorities. *See* art. XXIV and XXIX, 65 N.D.L. REV. *Model Constitution* (1989).

249. *Id.* 65 N.D.L. REV. *Model Constitution* (1989) and at Authorities. *See* art. XXVI, 65 N.D.L. REV. *Model Constitution* (1989).

250. It appears that the compilation of Authorities may have been prepared by more than one person. Note the variations in referring to "Montana," "Mont. draft," and "Mon.," to "Ohio" and "O.," and to "Oregon" and "Oreg." Or, this may simply evidence the haste of preparation. *Id.* 65 N.D.L. REV. *Model Constitution* (1989) and at Authorities.

allowed us the opportunity to trace many of the specific provisions adopted in North Dakota back through this table of "AUTHORITIES" to the wording of the source section in another state. However, it is clearly possible to do so.

Many sections of the constitution of North Dakota, including the present Article I on Declaration of Rights, can be traced through our original constitution to Williams File 106 and to Peddrick draft No. 2.<sup>251</sup> On several sections in the Declaration of Rights, Peddrick's table of "AUTHORITIES" refer us to specific sources.<sup>252</sup> For example, our present Article I, Section 15, proscribing imprisonment for debt, is similar to Article III, Section 25 of Peddrick draft No. 2.<sup>253</sup> The cited authority for this section is "Colorado, XI, 13; Montana, I, 23." Thus, the history and interpretations of comparable Colorado and Montana provisions become useful study material for our own provisions.

Peddrick cited "Constitutions generally" as his source for

251. The following table charts this correlation between our constitution and Peddrick draft No. 2:

Present North Dakota Constitution	1889 North Dakota Constitution	Williams File 106	Peddrick Draft No. 2
*A.I, § 1	A.I, § 1	A.III, § 1	A.III, § 1
A.I, § 2	A.I, § 2	A.III, § 7	A.III, § 7
A.I, § 3	A.I, § 4	A.III, § 2	A.III, § 2
A.I, § 4	A.I, § 9	A.III, § 6	A.III, § 6
A.I, § 5	A.I, § 10	A.III, § 35	A.III, § 33
A.I, § 6	A.I, § 17	_____	_____
A.I, § 7	A.I, § 23	_____	_____
A.I, § 8	A.I, § 18	A.III, § 16	A.III, § 35
A.I, § 9	A.I, § 22	A.III, § 25	A.III, §§ 22&28
A.I, § 10	A.I, § 8	A.III, § 14	A.III, § 12
A.I, § 11	A.I, § 6	A.III, §§ 10,11,&21	A.III, §§ 9,10,11&18
A.I, § 12	A.I, § 13	A.III, §§ 17,18,19&20	A.III, §§ 14,16&32
A.I, § 13	A.I, § 7	A.III, § 18	A.III, § 16
A.I, § 14	A.I, § 5	A.III, § 13	A.III, § 34
A.I, § 15	A.I, § 15	A.III, § 28	A.III, § 25
A.I, § 16	A.I, § 14	A.III, § 30	A.III, § 27
A.I, § 17	A.I, § 19	A.III, §§ 8&9	A.III, §§ 8&15
A.I, § 18	A.I, § 16	A.III, §§ 15,23&24	A.III, §§ 13,20&21
A.I, § 19	A.I, § 12	A.III, § 34	A.III, §§ 30&31
A.I, § 20	A.I, § 24	_____	_____
A.I, § 21	A.I, § 20	_____	_____
A.I, § 22	A.I, § 11	_____	_____
A.I, § 23	A.I, § 3	A.II, § 1	A.II, § 1
A.I, § 24	A.I, § 21	_____	_____

\*A. represents Article.

In some cases exact language is carried through the four documents. In other cases the correlated provisions reflect changes, deletions and additions.

252. Peddrick draft No. 2, 65 N.D.L. REV. *Model Constitution* (1989), and at Authorities, see art. III (1989).

253. Peddrick draft No. 2, 65 N.D.L. REV. *Model Constitution* (1989). See art. III, § 25. Compare N.D. Const., art. I, § 15, 13 N.D. CENT. CODE (1981).

most of the traceable sections in his Declaration of Rights. This is also a meaningful reference because it opens up a great depth of study material. In some instances, we can then trace our constitutional roots back to the very source of constitutionalism itself — the Magna Carta.<sup>254</sup>

Another particular illustration may be useful. The source of the specific restraints against local or special laws, now Article IV, Section 43 of the North Dakota Constitution, can be traced to comparable provisions in Pennsylvania and Montana.<sup>255</sup> Except for subsection 6 which has since been repealed, 30 of its first 32 subsections are identical to Peddrick draft No. 2, and all of its first 32 subsections are identical to Peddrick draft No. 1.<sup>256</sup> The table of "AUTHORITIES" cites "Penna., III, 7; Montana, IV, 26" as the sources of this detailed section.<sup>257</sup> While these citations cannot be located in Hough, *American Constitutions, Vol. II*, which contains the Pennsylvania state constitution of 1838 with amendments to 1864, there is presumably a later Pennsylvania constitution.<sup>258</sup> Presumably, too, the reference to Montana is to a constitution prepared in anticipation of statehood, which is several times identified in the table of "AUTHORITIES," as well as in the correspondence.<sup>259</sup>

254. Peddrick draft No. 2, 65 N.D.L. REV. *Model Constitution*. See art. III, §§ 1-3, 6-10, 12-16, 19, 21-23, 28, 30-37, 65 N.D.L. REV. *Model Constitution* (1989). The Magna Carta, "The Great Charter of Liberties, Granted at Runnymede, June 15, A.D. 1215, by King John, in the Seventeenth year of his Reign" is found in the N.D. Cent. Code, Vol. 13, at 1-9.

Like similar provisions in other state constitutions, several provisions of our Declaration of Rights are traceable to the Magna Carta. A.E. DICK HOWARD, *The Road from Runnymede: Magna Carta and Constitutionalism in America* (1968), App. N and O, at 479-87.

See N.D. CONST., ART. I, § 12 (formerly art. I, 13): "No person shall . . . be deprived of life, liberty or property without due process of law." All fifty states have the same or similar provisions. Howard, *supra*, at 479-82.

See N.D. CONST., ART. I, 9 (formerly art. I, 22): "All courts shall be open and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Most state constitutions have some or all of these provisions.

HOWARD, *supra*, at 483-86.

See N.D. CONST., ART. I, 12 (formerly art. I, 13): "In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel." Forty-five states have the same or a similar provision in their constitutions. HOWARD, *supra*, at 486-87.

255. N.D. CONST., ART. IV, 43. See Authorities art. XI, § 46, Peddrick draft No. 2, 65 N.D.L. REV. *Model Constitution* (1989).

256. Compare art. XI, § 46, Peddrick draft No. 1, *supra* note 216 at 28, with art. XI, § 46, Peddrick draft No. 2, 65 N.D.L. REV. *Model Constitution* (1989). This is further evidence that Williams used Peddrick draft No. 1 as his main model. The two subjects omitted from Peddrick draft No. 2 were "For the assessment or collection of taxes" and "Exempting property from taxation."

257. Peddrick draft No. 2, 65 N.D.L. REV. *Model Constitution* (1989).

258. 2 HOUGH, AMERICAN CONSTITUTIONS, *supra* note 93, at 222.

259. Peddrick draft No. 2, 65 N.D.L. REV. *Model Constitution* (1989) at Authorities.

While the scope of this article does not allow amplification of all of the possibilities, it is plain that the draft constitutions and the table of "AUTHORITIES" from Peddrick draft No. 2 furnish a rich research resource. The correspondence, drafts, and table of "AUTHORITIES" are new tools for tracing some antecedents of our North Dakota constitution.

With the discovery of the Thayer Correspondence and Peddrick draft No. 2, the interpretation and analysis of a current provision of the North Dakota Constitution may often require, in addition to analysis of the antecedent provision of the 1889 Constitution, careful consideration of the appropriate citations in the table of "AUTHORITIES" of Peddrick draft No. 2. Use of an appropriate citation can uncover an ancestral section of the constitution or statute of another state and the subsequent interpretation by the appellate courts of that state.

The rule for construing a constitutional provision which comes from another state is the same as the rule for construing a statute which comes from another state.<sup>260</sup> When resource materials in this state are insufficient, it is important to look for guidance in similar provisions in other state constitutions and in their constructions, particularly when the constitutional provisions are linked historically.<sup>261</sup> The well-reasoned construction of a like constitutional provision by another state is highly persuasive. The table of "AUTHORITIES" in Peddrick draft No. 2 furnishes new tools for finding interpretive guidance in other state constitutions and decisions.

We leave that research to the judges, lawyers, and scholars who will find it productive.

## XV. CONCLUSION

Digging for and through the Thayer correspondence and the related draft documents has made some of the roots of the North Dakota Constitution more visible. Without the Thayer correspondence to open the history of constitution-making in 1889, we would not have been able to see the significance of the draft constitutions languishing in the State Historical Society archives.

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260. 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 52.04 (4th ed. 1984).

As the North Dakota Supreme Court has said, "[w]hile we are not compelled to interpret our statute in the same way as the State from which our law is derived, such decisions are highly persuasive." *Estate of Zins by Kelsch v. Zins*, 420 N.W.2d 729, 731 (N.D. 1988). See also *Furlong Enterprises v. Sun Exploration & Prod.*, 423 N.W.2d 130, 138 n.27 (N.D. 1988).

261. See SINGER, *supra* note 260; HOUGH, *supra* note 93.



We now know that the historical legend of the making of North Dakota's constitution from a "model" contains some myth. Modifying the legend of a "model" constitution created in a scholarly atmosphere for North Dakota, the letters sketch a commonplace episode of a major corporation seeking to affect its own legal environment through political processes. As Villard himself remarked on the meddling of his men: "Is it not a queer business?"<sup>262</sup>

Only further pursuit, research, and study can fully assess the contemporary value of our harvest of history. Oliver Wendell Holmes, Jr. once wrote, "A page of history is worth a volume of logic."<sup>263</sup> This page of North Dakota's constitutional history guides us to new tools for the work of digging for roots of our North Dakota Constitution.

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262. Letter from Villard to Thayer (July 26, 1889), 65 N.D.L. REV. *Thayer Correspondence* (1989).

263. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).