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THE CASE FOR CONSTITUTIONAL REVISION IN NORTH DAKOTA

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As the urbanization and industrialization of society has escalated interdependence in the American society, great concern has been expressed over the ability of the states to respond vigorously and effectively to the challenges consequential to strong nationalizing currents, given constitutions designed for an agrarian nineteenth century. Problems completely unforseen by pioneer constitution writers have loomed on the twentieth century horizon which, if unresolved, will result in new allocations of power between the state and national levels of the federal republic. To the chagrin of numerous champions of a state-centered federalism, many state responsibilities have already moved to the national sector. Inflexible state constitutions, unresponding in an environment alien to their power concepts, have contributed to this flow upward.

Because a vigorous society is not static, the future promises to be as challenging to the states as the past. Writing in *The Nation*, Harold Norris suggests that state government will continue to be on trial in the decades ahead:

> Technological, population, financial, human relations and other problems abound. In the next ten years, New York, Michigan and the nation will change more than they did in the last fifty. Government must be able to respond sensitively and precisely. Genuine representation, and the clear-cut accountability of those with power, will help bring about the prompt and peaceful change necessary to democratic growth and survival.[1]

In response to mounting pressures of the modern era, efforts to rewrite state constitutions have become greatly accelerated in recent years. Professor Albert Sturm, America's chief chronicler

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1. Norris, *Constitutions: The Politics of Power*, 230 THE NATION 473-474 (Nov. 7, 1956).

of state constitutional revision, reported on this new drive for constitutional relevance:

> It is especially noteworthy that the last 20 years have witnessed far more relative change in the states' organic laws than the average for their entire operative life. At the end of 1969, the average age of all state constitutions was approximately 85 years. Total average number of amendments ratified in the fifty states was 98.6; of these, 50.9, or more than half, were added during the last 20 years. These figures reflect both the growing inadequacy of state constitutions to fulfill modern needs and an accelerating effort to modernize these documents by the piecemeal amendment method.[2]

As Sturm indicates, alarm over the need for modernizing state constitutions is spreading. When the North Dakota Legislature realized that piecemeal amendment had failed to keep pace with the changing demands on government, it authorized a constitutional study commission in 1963 to begin an article-by-article revision. Unfortunately, the proposals of the commission were defeated in the legislature before submission or killed at the polls. Knowing that the need for revision continued unmitigated, previous decisions of the legislature and the electorate notwithstanding, the legislature submitted a proposal for a constitutional convention which was approved by the electorate in 1970. This same concern over archaic constitutional provisions is being demonstrated by new activity in most of the states of the Union. A majority of states have had revision commissions functioning during the past decade. Conventions, once oddities, are now becoming commonplace.

But merely acknowledging that state constitutions need revision hardly pinpoints the specific inadequacies of the North Dakota document. Weaknesses of state constitutions have become subjects of exhaustive research by political scientists, good government organizations, and constitutional study commissions. A survey of the published research indicates that there is consensus among scholars on the inadequacies of state constitutions. At the same time, there is also an admission that labeling those inadequacies can be highly subjective. After all, constitutions do reflect the aspirations of competing groups and philosophies. What may appear to be an inadequacy to one will be construed to be a strength by another. With the subjectivity of the undertaking recognized at the outset, this article will attempt to describe the most salient weaknesses

2. Address by Albert Sturm, National Conference on Government, Portland, Oregon, August 25, 1970.

of the North Dakota Constitution to which substantial consensus could probably be claimed.

1. *Document of Distrust*

Most critics of state constitutions seem to suffer from an irresistable compulsion to begin immediately with the classification of trees before considering the general composition of the forest. "Detail," they diagnose in unison, is the major evil of state constitutions and they almost always initiate all discussion from that one point. But detail in state constitutions is merely a symptom of a more serious malady that saps the vigor of state governments. Detail is a symptom of an inadequate philosophy of government.

The philosophy that undergirds state constitutions exudes with pervading distrust of man as a rational, honorable being. Penned with an abiding suspicion of man's inherent wickedness, state constitutions have been passed down as sad commentaries on human nature and monuments to the awesome memories of King George III. To keep oppressive officials from subverting public power for their own greedy purposes, state constitutions have been designed to imprison and manacle every officeholder, assumed to be nothing more than a potential tyrant.

In the *National Civic Review*, James Miller observed:

> The basic fact to appreciate about state constitutions is that they are designed not to help government officials govern but to prevent them from picking the taxpayer's pockets. The reason? Many of today's constitutions were drafted in the era between the Civil War and the turn of the century—the period of the Robber Barons, The Boss Tweeds, "the shame of our cities." During these years, more than half of the states wrote their present constitutions, designed specifically to force honesty in government.[3]

Emanating from this inherent distrust of all government generally and state government specifically are a series of provisions that impair responsiveness in state governments. North Dakota founders shared this distrust as they drafted the state's basic document; it is replete with evidence.

Section 25 provides for the initiative and referendum on the basic assumption that the legislators elected to determine public policy either would not pass the good laws demanded by the citizenry or they would pass bad ones from which citizens must protect

8. Miller, *Dead Hand of the Past*, 57 NAT'L. CIVIC REV. 183 (April, 1968).

themselves. Further, for fear that a legislative majority would circumscribe the power of the initiative and referendum, the section is made self-executing with the proviso that "laws may be enacted to facilitate its operation, but no laws shall be enacted to hamper, restrict or impair the exercise of the rights herein reserved to the people."[4]

Section 39 provides that no legislator may hold an office, the emoluments of which had been increased by the legislature, on the presumption that corrupt legislators would flock en masse to reap the profits of their own actions.

Section 45 sets legislative salaries at five dollars per day—on the assumption that, if left to the legislature, it would abscond with the public treasury. It also provides that they be paid 10 cents per mile of necessary travel "on the most usual route" to the state capitol. The insertion of the phrase "on the most usual route" strongly suggests that legislators would travel by very circuitous routes merely to increase their travel allowances.

Section 56 provides that "no regular sessions of the legislative assembly shall exceed 60 days"[5]—on the theory that legislators would probably loiter in Bismarck in order to receive their excessive emoluments of five dollars per day for service.

Section 71 vests the "executive power" in the governor but proceeds to fragmentize this power in sections 72 and 82 with numerous independent officials—all elected—since no one person could be trusted with power on the state level.

Section 90 provides for the election of judges—on the premise that the power of appointment by the executive and or legislature would lead to a corrupt judiciary.

Article 33 provides for opportunities to recall public officials before their terms expire—since many of them could not be trusted to act responsibly even until the next election occurred.

Even the electorate is not beyond suspicion. To prevent the injudicious use of his vote, the citizen must be protected from his ignorance with the incorporation of minimum residence and age qualifications for public offices lest voters be led astray by the compelling flute of some recent immigrant or the hypnotic appeal of a youthful firebrand. In some states, constitutions even limit the number of terms officials may serve since the electorate is too incompetent to know when it has had enough.

4. N.D. CONST. art. II, § 25.
5. N.D. CONST. art. II, § 56.

Since much of the impetus for state constitution reform emanates from the shift of power to the national government, it is appropriate at this juncture to contrast the philosophy reflected in the Federal Constitution with that found in the states. Without question, the miracle of this millenium was the constitutional convention that sweltered out the summer of 1787 in Philadelphia. Even though the members had personally experienced the ravages of tyrannical monarchy, the framers of the United States Constitution were able to reason out a philosophy of man and frame a government that would be functional for over 180 years.

In a spirited defense of the new constitution which vested considerable power in national officials, James Madison used *Federalist* No. 10 to spell out the philosophy that justified the new constitution. He said that citizens should not be unduly alarmed with the broad delegation of power to the new government because the effect of this representative government was to "refine and enlarge the public views by passing them through a medium of a chosen body of citizens, whose wisdom may discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."[6]

No such trust is found in state constitutions. "Wisdom to discern . . . patriotism . . . love of justice . . ." none of these abstract, illusive generalities were given a shred of validity in state documents.

It is true that there was no unanimity in the land in 1787 for placing this much trust in public officials. To this attack on the Constitution, James Madison responded in *Federalist* No. 55:

> Were the pictures which have been drawn by the political jealousy of some among us faithful likenesses of the human character, the inference would be, that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.[7]

Fortunately, the arguments of Madison prevailed: the Constitution was ratified. The states and the national government went their separate ways, charting their courses on their particular assessments of whether or not man could be trusted with power sufficient to govern. While the leaderless states, with public officials cautiously hobbled, have drifted ineffectively, history has exonerated Madison's confidence in man. Only on rare occasions have national officeholders subverted the national good for selfish pur-

6. THE FEDERALIST No. 10, at 77 (New American Library ed. 1961) (Madison).
7. THE FEDERALIST No. 55, at 364 (Mod. Library ed.) (Madison).

poses. Less than 15 impeachments—most of them minor judicial officials—have been initiated by Congress against the whole federal establishment in 180 years. And the only one launched against a President was the result of malicious trickery. In exchange for these rare blemishes, the discretion accorded national officials has enabled the national government to rise time and again to cope with scores of foreign and domestic crises.

On the other hand, states have been well rewarded for their suspicions. Constitutional prohibitions notwithstanding, they have suffered from blatant graft and corruption. By distributing power to numerous officials, they have blurred accountability and nurtured a breeding ground for malfeasance in office. While the innumerable good public servants have bowed respectfully to the constitutional limitations and declined from doing the good that demanded doing, the unscrupulous have paid little regard to constitutions as they rode roughshod over responsible government.

There is no escaping the logical sequence that evolves from the theory that most officeholders will be corrupt. Distrust breeds restriction; restriction impairs action. If the 1971-72 North Dakota Constitutional Convention adheres to the same philosophy of public officials that prevailed in the 1889 assembly, then a similar number of restrictions will reappear in the new draft to be submitted to the citizenry in 1972. In the final analysis, the responsiveness of the proposed state government will be contingent primarily on how the delegates perceive the nature of man.

2. *Fundamentals Lost*

The second major criticism of state constitutions is that while they should confine themselves to the fundamental principles of government, they are infested with countless decisions that are legislative in nature. A good portion of the legislative matter found in constitutions can be traced back to the lack of confidence constitution writers demonstrated in legislative assemblies. Rather than trust some new gathering to make decisions that appeared rational to them, they proceeded to fill the constitutions with legislative decisions.

As a member of the 1870 Illinois Constitutional Convention is alleged to have said to his colleagues: "It is assumed that when we depart from this hall all the virtue and all the wisdom of the state will have departed with us."[8]

In addition to an abiding distrust of the competence of succeed-

8. Quoted by W. DODD, STATE GOVERNMENT 96 (1928).

ing legislatures, this mania for legislating in constitutions is fed by an ignorance of the functions of a constitution. Distinguishing the "fundamental" from the "legislative" is difficult for constitutional scholars, let alone forcing the duty of defining them upon a lay convention called upon to piece together basic documents with only a few short months of study.

Scholars have sought to clarify the distinction in this fashion: "A constitution is analogous to a topographical map: it charts the political terrain on which the battles of policy are fought."[9]

Robert Dishman, writing in the National Municipal League series on state constitutions, suggested that "in the broadest sense, a subject may be regarded as fundamental if it reflects the more or less fixed convictions of the vast majority of a state's citizens as to what kind of society it wants."[10]

Dishman also quotes Justice Benjamin N. Cardozo as writing that "a [good] constitution states or ought to state not rules for the passing hour but principles for an expanding future."[11]

In *The Drafting of State Constitutions,* Frank P. Grad warns of the consequences of inserting temporary matters into constitutions:

> The enduring qualities of a provision of the state constitution may protect a desirable policy from frivolous changes by the legislature, or it may delay or prevent the change to a new and better policy from one embedded in the constitution which is no longer responsive to current needs.[12]

In spite of these repetitious exhortations to the contrary, even the newer state constitutions fail to acknowledge the distinction between *legislative* and *fundamental.* "The truth is that constitutions," one writer commented, "particularly those of the states, contain many provisions which fall far short of being fundamental in character."[13]

State constitutions are filled with examples. The constitutions of Illinois, Florida, Michigan, Pennsylvania, Tennessee and Washington flatly prohibit lawmakers from adopting a graduated income tax; in Alabama, 87 per cent of all state revenue is constitutionally

9. W. CRANE & M. WALTS, STATE LEGISLATIVE SYSTEMS 109 (1968).
10. R. DISHMAN, STATE CONSTITUTIONS: THE SHAPE OF THE DOCUMENT 26 (1968).
11. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 24 (1921), quoted in DISHMAN, *supra* note 10, at 28, 29.
12. F. GRAD, THE DRAFTING OF STATE CONSTITUTIONS 6 (1967).
13. Walker, *Myth and Reality in State Constitution Development,* in STATE CONSTITUTIONAL REVISION 13 (W. Graves ed. 1960).

earmarked for specific purposes;[14] the Louisiana Constitution names two bridges spanning the Mississippi after Huey Long and declares his birthday to be forever a holiday; no unmarried woman under 14 may constitutionally engage in sexual intercourse in South Carolina; public schools are required to teach "elements of agriculture, horticulture, stockfeedings, and domestic science" in Oklahoma; the Texas legislature is authorized to define and punish "barratry"; and the California Constitution permits the legislature to define and punish "bucketing."[15]

The North Dakota Constitution bears the imprint of legislative policy-making. Section 26 fixes the exact size of the senate at 49 members, making reapportionment most difficult for succeeding legislative assemblies. Section 66 requires the presiding officer to sign bills in the presence of the house. Some legislators would contend that a good deal of the present legislative article, prescribing procedures, constitutes legislation better left to the assembly itself.

Article VII, encompassing sections 131-146, delves into the regulation of private corporations while article IX details the administration of the public school lands with over 2,250 words. The detail in article IX has forced six different amendments through the years.

Constitutional regulation of the debt limits of political subdivisions (section 183) has caused difficulty for scores of local governments with the repeal of the personal property taxes.

Section 186 details the handling of public funds, excepts operating funds for certain proprietary-type functions, and then proceeds to exempt a score of special occupational licensing bodies from financial control.

Sections 215 and 216 name and locate the institutions of the state. Amendments have been necessary on several occasions in history to make changes dictated by the times.

These are but a few examples of those sections that could be construed as the most undebatable usurpation of legislative decisions by constitutional provisions. Depending on an individual's interpretation of *fundamental* and *legislative*, another 20 or 30 provisions could be added to this abbreviated listing.

"The consequences of inflexibility and the resulting loss of adapt-

14. Armbister, *The Octopus in the State House*, THE SATURDAY EVENING POST, Feb. 12, 1966, at 71.
15. DISHMAN, *supra* note 10, at 31.

ability to change is obsolescence," Frank P. Grad advises. "In turn, the inflexibility and obsolescence of constitutional provisions will diminish the power and the freedom of the government to deal with new situations, and will, by the same token, decrease its responsibility for consequences it has no power to control."[16]

3. *The Structural Derangement of Government*

Two of the functions of a state constitution are to (1) provide the framework of government and (2) allocate the powers necessary to enable the mechanism to function in harmony. The wisdom with which state constitutions perform these two functions has come under widespread criticism because most state constitutions provide for what Walter Lippmann has called the "derangement" of power.

In his book, *The Public Philosophy,* Lippmann contends that "the executive is the active power in the state, the asking and the proposing power. The representative assembly is the consenting power, the petitioning, the approving and the criticizing, the accepting and the refusing power."[17]

"The two powers," he continues, "are necessary if there is to be order and freedom. But each must be true to its own nature, each limiting and complementing the other. The government must be able to govern and the citizens must be represented in order that they shall not be oppressed. The health of the system depends upon the relationship of the two powers. If either absorbs or destroys the functions of the other power, the constitution is deranged."[18]

It is generally agreed that state constitutions are deranged in that the state executive is not given the constitutional authority to govern. Structurally, state constitutions tend to provide for a number of executives and independent administrative units.

The Kestnbaum Commission of the 1950's observed in its report to President Eisenhower that "the American System of separation of powers works best when all branches of government are strong, energetic and responsible."[19]

"Today," the report continued, "few states have an adequate executive branch headed by a governor who can be held generally accountable for executing and administering the laws of the state.

16. GRAD, *supra* note 12, at 21.
17. W. LIPPMAN, THE PUBLIC PHILOSOPHY 30 (1955).
18. *Id.*
19. COMMISSION ON INTERGOVERNMENTAL RELATIONS, REPORT TO THE PRESIDENT FOR TRANSMITTAL TO THE CONGRESS 42 (1955).

State constitutions provide in principle for three equal branches of government, but most of these constitutions and numerous laws based on them include provisions that tend to undermine this principle."[20]

Only four states have one elected official—Maine, New Jersey, New Hampshire, and Tennessee. But Maine elects a 7-member executive council to share the governor's appointing powers and New Hampshire has five councilors elected by counties to share in the governor's appointing powers. Hawaii and Alaska each have two executive officials elected on a joint ballot.[21] From this point, states skew out in all directions, electing any variety of public officials and members of constitutional boards and commissions.

In response to this fragmentation of the state executive, Dawn Metsch, writing for the Illinois Constitutional Convention, observed that "the overwhelming weight of scholarly opinion supports the thesis that effective American state government requires a single, strong, popularly elected executive with adequate powers to serve as the principal spokesman for and leader of the broadest possible public interest."[22]

The National Municipal League proposes that the executive power be vested in the governor with the argument that "[a]ll authorities on executive organization agree with the position embraced by the *Model State Constitution* for more than 40 years that administrative power and responsibility should be concentrated in a single popularly elected chief executive."[23]

Even Alexander Hamilton, in *Federalist* No. 70 subscribed to this *good government* principle in his defense of a single national executive.

"A feeble executive implies a feeble execution of the government," he argued. "A feeble execution is but another phrase for bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government."[24]

Some 180 years later, a body of the nation's most outstanding businessmen organized as the Committee for Economic Development, proposed: "Governors should become chief executives in fact as well as name."[25]

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20. *Id.*
21. Netsch, *The Executive,* in CONSTITUTIONAL RESEARCH GROUP, CON-CON: ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION 157 (1970).
22. *Id.* at 148.
23. NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION 65 (1968).
24. THE FEDERALIST No. 70, at 423 (New American Library ed. 1961) (Hamilton).
25. COMMITTEE ON ECONOMIC DEVELOPMENT, MODERNIZING STATE GOVERNMENT 20 (1967).

"Except for a jointly elected lieutenant-governor," they recommended, "the governor should be the state's only elective executive official. He should have a four-year term, and freedom to seek re-election without restriction as to the number of terms."[26]

The proposal to convert elective officials to appointive administrators has been successfully thwarted in most states in which it has been proposed. Not only do the elected office-holders rigorously defend their independent status but many citizens have become so imbued with the fear of stronger executives that they choose not to support the election of modern "dictators."

To analyze the effect of such proposed changes on the legislative-executive interrelationship, Deil S. Wright conducted an extensive study of 933 department and agency heads in the 50 states. In reporting his findings, Wright discounted the validity of the cry "dictatorship" to proposals to strengthen the governor in the administration:

> We may conclude that the net effect of structural reform and reorganization at the state level has not been to elevate the governor as the master of administrative management. Rather, the effects of strengthening the governor, based on the data from states where governors are stronger, has been to give him about an even chance in competing with the legislature for influence over the courses of action taken by state administrations.[27]

"Our findings show that even in states where governors are the strongest," he continued, "they are far from having dictatorial, monoply, or predominant control in the eyes of the top state administrators."[28]

While North Dakota has managed to confine the number of constitutional agencies to the board of higher education, the board of university and school lands, the pardon board, and the board of equalization (fewer such creations than many state constitutions) the state ranks in the "top ten" when it comes to elected administrators. In addition to the governor, in whom is theoretically vested by section 71 the "executive power," the constitution provides for the separate election of the lieutenant governor (section 74). By providing for a separate lieutenant governor, the structural division is often compounded by partisan division in that a lieutenant governor of the opposite party may well be holding the office.

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26. *Id.* at 20, 21.
27. Wright, *Executive Leadership in State Administrations,* 11 MIDWEST J. POL. SCI. 13 (Feb., 1967).
28. *Id.*

Section 82 provides for further fragmentation of the executive by calling for the election of "a secretary of state, auditor, treasurer, superintendent of public instruction, commissioner of insurance, three public service commissioners, an attorney general, a commissioner of agriculture and labor, and a tax commissioner . . ."[29] The section also permits the legislature to divide the office of commissioner of agriculture and labor, which was done with the labor commissioner also elective.

Writing in *The Nation,* Harold Norris argues that "the overriding problem in state constitution making is that of creating a mechanism of government that is responsive and responsible to the people's sovereign power. Responsiveness and responsibility can be attained only when power is both perceptible and accountable."[30] The dispersal of responsibility in North Dakota is hardly perceptible or accountable. The executive function is rendered structurally ineffective and state government is deranged as a consequence.

4. *Need for Constant Amendment*

While the North Dakota Constitution does not even approach the massive volume of Louisiana's 240,000 words or Alabama's 80,000 words, it still consists of over 25,000 words—some five times longer than the U. S. Constitution. The more detail in which a constitution is written, the more it tends to attach itself to a specific point in time. Then as time changes, the provisions become obsolete.

Wordiness not only leads to lengthy, avoidable litigation but it requires a constant effort to amend the document to keep it relevant. David Fellman, author and constitutional scholar, observed:

> It is the fate of a long constitution that in the very nature of things it must grow longer, for there is simply more to amend. A wordy constitution must be changed frequently, which makes it wordier still.[31]

Professor Albert Sturm has documented the extensive revision efforts that have been made through the years. In 49 states[32] a total of at least 7,965 amendments were proposed before January 1, 1971, or an average of over 162 per constitution. In the 50 states, 4,974 were adopted for an average of 99.5 per constitution.

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29. N.D. CONST. art. III, § 82.
30. Norris, *supra* note 1, at 475.
31. Fellman, *What Is A Good State Constitution?*, in CONTEMPORARY APPROACHES TO STATE CONSTITUTIONAL REVISION 6-7 (A. Clem ed. 1970).
32. Delaware was not included because the Delaware state legislature has the power to amend the state constitution without submission of the changes to the electorate.

In the two decades covered between 1950-1970, 3,836 were proposed (average 78.3 per document); 2,670 were adopted (average 53.4 per document). At the end of 1970, the average age of state constitutions was 85.4 years.[33]

With an 82-year-old constitution, North Dakota is neither better off or worse off than other states—with 90 amendments adopted out of 156 submitted since approval of the original document.

5. *Unrealistic Demands on Citizens*

While a state constitution must formulate the basic framework of government and provide basic ground rules for the conduct of elections to assure a democratic system, the design should ideally be such that the citizenry can maintain effective control over the government. To effect control, citizens must be able to identify those in the system who exercise power and to make the decisions that are critically related to the policy output and performance of the government. To scholars and *good government* advocates, this suggests the *short ballot*—the concept that the democratic processes are most effective when confined to a small number of critical recurring decisions on the part of the electorate.

The election of large numbers of officials and direct decision-making on numerous policy matters via the initiative and referendum impose a staggering responsibility on citizens who cannot and do not devote long hours to studying the implications of their electoral decisions. V. O. Key, Jr., one of the nation's most outstanding scholars on electoral problems, properly dubbed it the "lottery of the long ballot."[34]

In making his selections from long lists of candidates for administrative offices of all types, the voter has few criteria to guide him. As a consequence, he votes blindly more often than he would care to admit. If he feels any pangs of partisanship, he will vote for his 10 or 12 state party nominees in a straight party vote. For offices not on the party ballot, he must resort to nationality or familiarity of names or, just as legitimately, the position of the name on the ballot. Random voting, conducted with the same abandon of a gambler selecting choices on a punchboard, is substituted for thoughtful decision-making.

When the voter comes to an initiated or referred measure, unless the measure deals with a single salient issue that has been

33. Sturm, *Effective State Governments Need Modern Constitutions*, 60 NAT'L. CIVIC REV. 66-67 (Feb., 1971).
34. V. KEY, AMERICAN STATE POLITICS 198 (1965).

widely debated, the voter is compelled to make his decision at the polls where he is confronted with the issue for the first time. If the first few phrases strike his fancy, he will vote for it; if he had burnt toast for breakfast, he will vote against it.

Because studies indicate widespread random (irrational) voting and *voter fatigue* (they simply quit voting after the first few names), the campaign for a short ballot has been pressed forward but with little success.

In Key's words, "the anachronistic multiple executive remains and becomes at times a block to effective administration; at others, a haven for incompetence; and, on occasion, a means of obstructing the evident majority will."[35]

By dispersing governmental authority to a large number of elected officials and making policy decisions on the ballot, accountability is greatly skewed. As a consequence, it is impossible for citizens to hold their government responsible for undesirable or inadequate performance. Thus, while the election of large numbers of officials ostensibly is supposed to result in the most ideal democracy, in reality it defies democracy because the citizens lose control of their government when they are unable to pinpoint blame. To control a government requiring such a large number of decisions to maintain, the citizen must become a professional political observer.

The decisions imposed on citizens by the North Dakota Constitution are formidable. Because the document reflects a basic distrust of officeholders, it was written in considerable detail and has required frequent amendment—more frequent than the citizenry has been able to master. Because the articles submitted to the people in the 1960's were largely misunderstood, they were defeated and a constitutional convention became imperative to bring the document up to date.

Section 25 provides for the processes of the initiative and the referendum, both forcing citizens to make sophisticated policy decisions. In many cases, the implications of these issues are not readily discernable, making manipulation by private interest groups a constant threat to the integrity of the direct legislation process.

Section 74, providing for the separate election of the governor and lieutenant governor, requires citizens to understand the implications of a split leadership at the top of the ticket while section 82, providing for the election of the long list of state administrators, requires that the citizen understands (1) the duties of each office; (2) the qualifications needed to fill the office; (3) the names and

35. *Id.*

qualifications of all competitors for the office; and (4) the ones most deserving of his vote.

Sections 90 and 104 calling for the election of supreme and district court judges require that the electorate assess the professional qualifications of the attorneys who are candidates for those positions and decide who are most qualified for the positions, all without the aid of party designation.

In addition, section 173 calls for the election of a county register of deeds, county auditor, treasurer, sheriff, states attorney, county judge and clerk of the district court, with some modifications for the smaller counties of the state. Here again, in order for the voter to control his officeholders and select the best candidates, he must be intimately acquainted with the offices and the candidates.

The selection of large number of officeholders with a nonpartisan ballot creates a serious problem for an electorate whose primary electoral orientation is partisan. It is a documented fact that "partisanship is the most important single influence on political opinions and voting behavior."[36] Without the reference of party to assist voters in overcoming their lack of information about offices, random voting is rampant in the nonpartisan contests. The benefit of nonpartisanship is thus traded for the evil of blind voting in which nationality and name familiarity become paramount to qualifications.

In summary, the North Dakota Constitution imposes an unbearable burden on the citizen. As a consequence, he has lost control of much of his government and its policies.

6. *Perpetuating Archaic Government*

Not willing to rely on the wisdom of succeeding legislative assemblies, the original constitutional conventions have overdone their task of framing the government by providing for numerous levels and units by constitutional fiat. As a consequence, the passing of time has made some of these structures anachronistic and even hostile to responsive decision-making.

While some state constitutions prescribe in great detail such constitutional bodies as game and fish commissions, highway boards, and numerous other such state units, the North Dakota Constitution has avoided this particular pitfall. It provides for the university and school lands board (section 156); a pardon board (section 76) which could be considered somewhat legitimate because it deals with the sharing of judicial power by the executive branch of government; a constitutionally independent board of higher education (article 54);

36. W. FLANAGAN, POLITICAL BEHAVIOR OF THE AMERICAN ELECTORATE 35 (1968).

a designation and location of the institutions of higher learning, which has probably impaired integration of the state's education system (section 215); and the designation and location of the charitable and penal institutions (section 216).

In addition, it provides for "a clerk and also a reporter of the supreme court"[37] (section 93) and carves the state into six judicial districts which cannot be changed without a two-thirds vote of the legislative assembly. Sections 110-113, providing for county courts, justices of the peace and police magistrates, limit the flexibility of the legislature in providing for a more orderly judicial system.

Some scholars would argue that provision for the election of a large number of state and county administrators also constitutes the perpetuation of archaic government in that such provisions prevent the legislature from consolidating offices as workloads change. Section 170 permits the legislature to provide for alternate forms of government under which such offices may be consolidated, thus leaving consolidation a matter of local option with each county. However, section 170 requires an unusual majority of 55 per cent in order for a county to adopt a new form of government. The same majority is required in section 167 for the consolidation of counties, making such an effort futile.

The definition of archaic in relation to some of the state and local units discussed is highly subjective and may well constitute a very debatable point of view. At issue here, however, is not the existence of such units so much as the provision of them in a constitution beyond the reach of legislative alteration. If they continue to serve useful functions, it is highly unlikely that a legislature would arbitrarily abolish them.

7. *Violating the United States Constitution*

The United States Constitution establishes the supreme law of the land as "this constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States. . . any thing in the constitution or laws of any state to the contrary notwithstanding."[38]

Technically, it is not possible for state constitutions to harbor provisions effectively contrary to the supreme law of the land but, from a very practical standpoint, state constitutions violate the federal document until the unconstitutional provisions are struck down through litigation in the courts. Until such litigation is forthcoming,

37. N.D. CONST. art. IV, § 93.
38. U.S. CONST. art. VI.

the provisions, though contrary to the supreme law of the land, prevail.

Scores of provisions in state constitutions fell with the historic one man-one vote decisions of the United States Supreme Court in the 1960s. Sections in the North Dakota Constitution, such as section 29 fixing senatorial districts permanently as of 1960 and section 35 requiring that each county have at least one representative, were declared contrary to the supreme law of the land.

Other unconstitutional provisions in the North Dakota document likely will not be enforced but still do not conform to changes at the federal level. Section 121 specifies the age of electors to be 21 years of age while the new 26th amendment to the United States Constitution now specifies 18; the residence requirement of one year for state elections has been successfully challenged in a federal court in Minnesota and may well be set aside as a violation of the Equal Protection Clause of the 14th amendment unless a compelling state purpose can be demonstrated. Section 127 authorizes an educational test for voting, yet a 1970 federal elections law set aside literacy tests in all states.[39]

Section 128 permits women to vote in school elections and would be unconstitutional if used to prevent women from voting in other elections as provided by the 19th amendment to the Federal Constitution. Article 33 authorizes the use of the recall against incumbent congressmen and would be declared unconstitutional if ever used because the Federal Constitution provides that "each house shall be the judge of the elections, returns and qualifications of its own members."[40] Consequently, the seating of congressmen is beyond the jurisdiction of a state.

Sections of article VII regulating railroad companies would probably be ruled an unconstitutional interference in interstate commerce.

8. *Protecting Interest Groups*

The institutionalization of concessions and benefits for special interest groups is common in many state institutions. Some state constitutions provide tax privileges to organizations and corporations that were influential in the drafting of the new document; others seek to regulate private and corporate conduct in such a fashion so as to benefit one interest over another.

By and large, North Dakota has avoided the more blatant forms

39. 42 U.S.C.A. § 1973 (Supp. 1971).
40. U.S. CONST. art. I, § 5.

of special interest protection. Of such provisions now in the North Dakota Constitution, impressive arguments could be rallied for either inclusion or exclusion. Their listings here should not be construed, therefore, as a prima facie presumption of guilt.

Hidden in the subtleties of section 23 is a restriction on the rights of unions to bargain for union or closed shops.

Sections 215 and 216 could be construed as a permanent *pork-barreling* of state institutions to the benefit of those cities having constitutional designations for the various institutional plums.

Article 50 earmarks a one mill statewide levy for maintenance of the state medical center at Grand Forks thereby assuring minimum support for that particular function.

To some, article 54 providing for the constitutionally independent board of higher education constitutes the protection of the special interests of higher education. (Whether that is adverse to the interests of the public at large is subject to debate.)

The exemption of "property used exclusively for schools, religious, cemetery, charitable or other public purposes"[41] from property taxes is regarded by some local officials, concerned over the narrowing tax base, as an unjustifiable tax shelter.

On the whole, the North Dakota Constitution is relatively innocent of the common indictment of "special interest" protection.

9. *Meaningless Verbiage*

Poor draftsmanship, a changing federal jurisdiction and the passage of time have all left state constitutions burdened with meaningless phrases, sections and articles that do nothing but *lumber up*[42] the state's fundamental law.

At least one-third of the present North Dakota Constitution could be removed as superfluous without altering the effect or meaning of a single provision.

A major category of "excessive verbiage" includes those sections that make legislative action permissive. Since it is a principle of state constitutional law that a state legislature has the power to enact all legislation not prohibited by the state constitution, all provisions providing that the legislature *may* enact certain laws are extraneous.

Most of the language in the article on Declaration of Rights could be construed as superfluous in the light of United States Supreme

41. N.D. CONST. art. XI, § 176.
42. A term used with abandon during the debates in the 1889 North Dakota Constitutional Convention to identify meaningless language.

Court decisions bringing almost all of the Bill of Rights to protect citizens from their state governments as well as their national government. Such matters as excessive bail, cruel and unusual punishment, freedom of speech, freedom of the press, peaceable assembly, public trials, subpoena, double jeopardy, due process, unreasonable search and seizure have all been dealt with in Supreme Court decisions. Language going beyond the present guarantees offered by present United States Supreme Court decisions would be appropriate, however.

Another series of extraneous sections was necessary only for implementation of changes and are no longer relevant. Section 92 implemented the organization of the state supreme court in 1889; section 104 implemented change in district courts; section 82 refers to the 1940 electoral changes for the office of public service commissioner; the 2,500 words making up most of article XVI provides details for division of responsibilities with South Dakota; section 214 prescribes the geography of the various legislative districts for the first state assembly; the 26 sections making up the *schedule* and consisting of 3,600 words can be deleted.

Another category of excess verbiage could be called *unenforceable generalities*. In this classification, we would have to place: 1) Section 2 which states that people have a right to alter or reform their government "whenever the public good may require;"[43] 2) Section 3 which states: "the state of North Dakota is an inseparable part of the American Union and the constitution of the United States is the supreme law of the land."[44] This section needlessly recognizes the results of the Civil War; 3) Section 147 which states: "a high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary."[45] It then proceeds to establish a public school system; and 4) Section 149, widely quoted by students of state constitutions around the United States, provides: "[I]n all schools instruction shall be given as far as practicable in those branches of knowledge that tend to impress upon the mind the vital importance of truthfulness, temperance, purity, public spirit, and respect for honest labor of every kind."[46]

The final category of excess verbiage would include the *ridiculous miscellanea*. Here would be included: 1) Section 50 which provides that all sessions of the legislature should be open "unless the business is such as ought to be kept secret";[47] 2) Section 69 which provides that the legislature may not pass special or local laws on

43. N.D. CONST. art. I, § 2.
44. N.D. CONST. art. I, § 3.
45. N.D. CONST. art. VIII, § 147.
46. N.D. CONST. art. VIII, § 149.
47. N.D. CONST. art. II, § 50.

35 subjects; 3) Section 70 which states: "[I]n all other cases where a general law can be made applicable, no special law shall be enacted";[48] and 4) Section 75, making the governor commander-in-chief of the naval forces of the state. There are numerous others.

10. *Retarding State Response*

The sum result of a state constitution framed in distrust, heavily infested with legislative detail, providing for a deranged power structure, requiring constant amendment, demanding unrealistic levels of citizen interest, perpetuating archaic structures, violative of the supreme law of the land, protecting interest groups, and encumbered with meaningless verbiage is a state government that is unable to respond to the challenges of the twentieth century. The vacuums created by inaction at the state level are inevitably and eventually filled by a level of government free to respond. In most cases, this has been the national government. As a consequence, a major shifting of power from the state to the national government has been occurring with relentless persistence during the recent decades.

In the assessment of Richard Leach, a student of federalism: " '. . . the single most inhibiting factor preventing the development of the states as full partners in the federal system is the handicap that state constitutions place upon them'."[49]

Unless state constitutions can be sufficiently modernized and reorganized to deal more deftly with the problems of today's society, it is likely that the federal government will continue to grow in importance in public problem-solving at the expense of the states. While the North Dakota Constitution is better equipped to cope with the problems of the 1970's than are some state constitutions, it still requires extensive revision if it is going to provide for a truly responsive, democratic government.

48. N.D. CONST. art. II, § 70.
49. Leach, *Preface* to COMPACTS OF ANTIQUITY: STATE CONSTITUTIONS (1969), quoted in D. MORGAN & S. KIRKPATRICK, CONSTITUTIONAL REVISION: CASES AND COMMENTARY 5 (1970).