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SOURCES OF THE 1889 NORTH DAKOTA CONSTITUTION

BY ROBERT VOGEL

I. INTRODUCTION

The states of North Dakota, South Dakota, Montana, and Washington were admitted to the Union as a result of Congressional passage of "The Enabling Act," approved February 22, 1889.¹ The same Act authorized each of the four new states to hold constitutional conventions to draft constitutions.²

South Dakota, however, was required to submit to its voters a constitution approved by the voters of the Dakota Territory in 1885 but not approved by Congress, "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; . . ."³ Intending to become a state, residents of the southern part of Dakota Territory held a constitutional convention in 1883, despite lack of authorization from Congress or the Territorial Governor who had vetoed a bill authorizing such a convention. Subsequently, a constitutional convention was held in 1885, this time with the approval of the Territorial Legislature and the Governor, but without authorization by Congress. The Enabling Act referred to this 1885 Constitution.⁴

North Dakota was not limited in the drafting of its Constitution, except by the few restrictions contained in The Enabling Act. These restrictions included requirements 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

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1. The Enabling Act, ch. 180, 25 Stat. 676 (1889)(codified at N.D. CENT. CODE vol. 13, 63 (1981)). The Enabling Act provided that Dakota be divided into two states and allowed "North Dakota, South Dakota, Montana, and Washington to form constitutions and state governments." *Id.*

2. *Id.*

3. N.D. CENT. CODE, vol. 13 at 66 (1981).

4. N.D. CENT. CODE, vol. 13 at 67.

States and the principles of the Declaration of Independence.”⁵

Because the limitations were few and the opportunities for new language almost unlimited, it was interesting to examine the sources of the Constitution ultimately adopted.

II. NORTH DAKOTA LOOKED TO OTHER CONSTITUTIONS

North Dakota, as one of the later states to enter the Union, had the advantage of scrutinizing prior constitution-making. However, it is noteworthy that only two complete draft constitutions (one being South Dakota's constitution) were submitted to the convention when North Dakota's document was drafted.⁶ The other draft of a complete constitution presented to the convention was the so-called Williams Constitution, submitted by Delegate Erastus A. Williams of Burleigh County, who admitted that he was not the author.⁷ He would not state the author's name, but only admitted that he received the draft from a Bismarck lawyer who had received it from an eastern lawyer.⁸ The authorship of the Williams Constitution remained secret for many years, when it was learned that the author was Professor James Bradley Thayer of the Harvard Law School.⁹ Mr. Henry Villard, chairman of the finance committee of the Northern Pacific Railway (the most important corporation operating in the Territory) had asked Thayer to write a constitution.¹⁰

I.C. Lounsberry tells of how the authorship became known:

5. *Id.* at 64. In addition, The Enabling Act required, “by ordinances irrevocable without the consent of the United States and the people of said states:” 1) “perfect toleration of religious sentiment” be secured, and no inhabitant of the States “shall ever be molested in person or property on account of his or her mode of religious worship;” 2) the States’ residents agree to certain disclaimers as to federal and Indian tribal lands and uniform taxation of lands of nonresidents; 3) the debts and liabilities of the Territory be assumed and paid by the new States; and, 4) “provisions shall be made for the establishment and maintenance of systems of public schools” open to all children of the States and “free from sectarian control.” *Id.* at 64-65. These agreements in section 4 of The Enabling Act were reworded to apply to the individual States of South Dakota and North Dakota in section 203 of the North Dakota Constitution. N.D. CONST. art. XIII, § 1.

6. 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, 99 [hereinafter OFFICIAL REPORT]. Presumably, it was the 1885 version of the South Dakota Constitutional draft that was considered by the North Dakota Convention on July 20, 1889. The South Dakota Convention did not finish its 1889 version until August 5, 1889. See *Constitutional Debates*, South Dakota, 1889, pages 535-50.

7. 1 I.C. LOUNSBERRY, HISTORY OF NORTH DAKOTA 393-94 (1917) [hereinafter LOUNSBERRY].

8. *Id.* at 394.

9. *Id.*

10. *Id.*

'In 1889, the Territory of Dakota was about to be admitted to the Union as two states. Mr. Henry Villard was at that time chairman of the Finance committee of the Northern Pacific Railway, the most important corporation operating in that territory. He was sincerely desirous that the two new states should start right, that they should have the best constitution which could be framed for them, and with that purpose in mind he consulted Mr. Charles G. Beaman, then one of the leaders of the New York bar. Mr. Beaman advised him that if he could get Professor Thayer to draft a constitution for the new states, they would have the benefit of all that expert knowledge and sound judgment could accomplish in that respect. Professor Thayer undertook the task. His draft-constitution was submitted to the two conventions, and was in large part adopted by them. The legislative article in the Constitution of North Dakota, for example, is substantially word for word the language of Professor Thayer's draft.

'It rarely happens to a teacher or to a lawyer to accomplish a piece of constructive work of this kind, a piece of work affecting so widely the interests of so large a community, affecting them not merely for the present but for the future.

'You may think it singular that the authorship of a work of this importance should wait until this time for public disclosure. The fact is, that it seemed prudent when the work was done to conceal its authorship. Though Mr. Villard was moved only by a single-hearted desire to promote the welfare of the two new states, it was feared that a draft-constitution prepared by an eastern college professor, under the direction of a Wall Street lawyer and at the instance of the head of the largest corporation in the territory, might fail of adoption if its authorship were known; that the people whom it was designed to benefit might entertain a suspicion that a constitution so prepared, however fair upon its face, concealed some sinister attack upon their property rights. The two constitutions have now been in force some fifteen years. Their merits have been proved in that time. But two amendments have been made to the North Dakota Constitution, and one of these incorporates a clause from Professor Thayer's draft omitted by the Con-

stitutional Convention. The principal actors in this scheme to help the people of the Dakotas are now all dead, and I am the only survivor of the two young men who were engaged in the preliminary work under Professor Thayer's direction. The occasion for concealment of the origin of these constitutions has now passed, and the facts I have narrated should not be lost for lack of a record.' — From a speech of Henry W. Hardon, Esq. From E.R. Thayer, Dean of Law School, Harvard University: 'I enclose a copy of what Mr. Hardon said in 1904, when my father's portrait was presented to the Law School. His remarks may be found in the printed volume containing the proceedings.

'I think, however, that Mr. Hardon's memory is defective in some points. I do not believe that Mr. Villard consulted my father on Mr. Beaman's advice; Mr. Villard and my father had long been personal friends and I think that Mr. Villard came to him of his own motion, because of this friendship and my father's long study of constitutional law in the Harvard Law School. Mr. Beaman was, I believe, Mr. Villard's regular counsel, and Mr. Villard sought the advice of both my father and him. But while Mr. Beaman and my father were friends, and no doubt consulted together in this matter, I think their operations were in a sense independent.

'I doubt, also, whether my father's work is represented in the North Dakota Constitution to the extent which Mr. Hardon 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, subject to these principles, to exercise governmental powers in the broadest way, and he was utterly opposed to the belittling restrictions on legislative power to be found in state constitutions. This is a criticism to which I feel sure he would have thought the North Dakota Constitutional also subject.'¹¹

It is apparent that Hardon, E.R. Thayer, and Lounsberry are in error in several respects. First of all, it is evident that Professor

11. *Id.* at 394-95.

Thayer's draft constitution, if made in 1889, could have had little or no effect upon the constitution of the State of South Dakota, which was largely drafted in 1883¹² and modified in 1885, with few and minor changes made in 1889.¹³ A comparison of the Williams draft submitted to North Dakota in 1889 and the South Dakota Constitution makes this evident. The similarities probably occur in sections copied by Thayer from the South Dakota Constitution or adapted by him from the South Dakota Constitution. A comparison of the Williams draft with the North Dakota Constitution, as well as a comparison of the South Dakota Constitution with the North Dakota Constitution, shows that the North Dakota Constitution is far more similar to the Williams draft than to the South Dakota Constitution."¹⁴

Secondly, the claim that James Bradley Thayer was the author of the Williams draft is inconsistent with the claims that Thayer believed in a short constitution enunciating "a few fundamental principles" and "he was utterly opposed to the belittling restrictions on legislative power to be found in state constitutions."¹⁵

The author of the Williams draft could not have had the aforementioned beliefs without betraying them because the Williams draft contains much more than a brief enunciation of a few fundamental principles, and it is replete with belittling restrictions on legislative power.¹⁶

James Bradley Thayer's son, E.R. Thayer, attempted to explain the discrepancy by doubting that his father's work was represented in the North Dakota Constitution as much as Mr. Hardon thought it was.¹⁷ This explanation is correct only if someone else authored the Williams draft, which no one has suggested, or someone else modified the Williams draft, which did not occur with language containing the "belittling restrictions on legislative power."¹⁸

The inconsistencies might be explained, however, if the senior Thayer was persuaded by Northern Pacific Railroad officials to vio-

12. H. SCHELL, *HISTORY OF SOUTH DAKOTA* 215 (1968). "Aside from a greatly refined and expanded section on corporations, the new [1885] Constitution was virtually a replica of the 1883 document." *Id.*

13. *Id.* at 215, 222. The 1889 constitutional convention for South Dakota "confined its work to specific changes required by Congress." *Id.* at 222.

14. *Compare* N.D. CONST. ch. IX, §§ 153-65 *with* S.D. CONST. ch. VII.

15. LOUNSBERRY, *supra* note 7, at 395.

16. *Id.*

17. *Id.*

18. *Id.*

late his principles in preparing a draft constitution at their request, a possibility upon which I express no opinion.

It is certain that the Williams draft was not short. It was printed in 49 pages of the Journal of the 1889 Convention, while the 1889 Constitution, as adopted, spans only 46 pages of the debates of the Constitutional Convention.¹⁹ Both the Journal and the Debates were printed in book form by the Bismarck Tribune in 1889 and appear to use the same typeface.²⁰

The standard history of North Dakota, by Elwyn B. Robinson,²¹ uncritically accepted some of Lounsberry's errors and added others, calling Thayer's draft "a carefully constructed model constitution, not a dishonest effort to create a government favorable to the railroads."²² Furthermore, Robinson stated that the Constitution finally adopted provided "a defective framework of government."²³ Robinson criticized the 1889 Constitution as trying "unsuccessfully to control corporations in the public interest," failing to fully make the governor the head of the executive department, restricting "the governor's power of leadership," evidencing "distrust of . . . the [legislative] assembly,"²⁴ imposing too many limitations on taxation and debt, and placing "crippling curbs on the governor and the legislative assembly."²⁵ Robinson's criticism of the Constitution and praise of the Williams draft as a "model constitution" are absolutely irreconcilable because substantially all of the provisions criticized came from the Williams draft. Lounsberry and L.F. Crawford²⁶ are at least consistent. They fulsomely praised both the Williams draft and the final constitution. Only Robinson praised the draft and criticized the constitution, even in areas where the draft and the constitution were identical, or nearly so.

The third major error lies in the easy assumption that the Williams draft was not designed to serve the interests of the Northern Pacific Railroad that arranged to have the draft written.

The most extensive original section of the North Dakota Con-

19. JOURNAL OF THE CONSTITUTIONAL CONVENTION FOR NORTH DAKOTA HELD AT BISMARCK, THURSDAY, JULY 4 TO AUG. 17, 1889 III-XLIX [hereinafter JOURNAL].

20. See OFFICIAL REPORT, *supra* note 6; JOURNAL, *supra* note 19.

21. E.B. ROBINSON, HISTORY OF NORTH DAKOTA (1966).

22. *Id.* at 209.

23. *Id.* at 212.

24. *Id.*

25. *Id.* at 215.

26. L.F. CRAWFORD, HISTORY OF NORTH DAKOTA, vol. 1-3, (1931) [hereinafter CRAWFORD].

stitution is Article VII.²⁷ In all other areas, the North Dakota Constitution was more nearly comparable to the Williams draft than to any other source. In a great many respects it was identical to the Williams draft.

III. THE RAILROAD'S ROLE IN FORMING CONSTITUTIONS

In examining the question of whether the Northern Pacific Railroad was serving its own interests in having the Williams draft written and submitted to the North Dakota Constitutional Convention, we must look to the drafters of the North Dakota Constitution in 1889. A study determined the questions deemed important to the constitution makers of the late 1880's and early 1890's.²⁸ John B. Hicks, in his admirable *The Constitutions of the Northwest States*, analyzed the constitution of six northwest states that all had similar problems and had adopted constitutions at approximately the same time.²⁹ By comparing these six constitutions, Hicks cast light on the problems of the time as seen by hundreds of pioneers who knew they were creating a form of government for the future.³⁰ Hicks' paper suggested that the five most serious problems were: 1) taxation;³¹ 2) debt limits on government;³² 3) the use of free passes by railroads to influence government;³³ 4) regulation of railroad rates,³⁴ and 5) discrimination by railroads in rates and service.³⁵

A mere listing of the clauses drafted to regulate the industry indicated how powerful the railroads were at a time when vast areas of the West were being opened by railroad building.³⁶ The listing also indicated that the railroads had reason to be vitally interested in the provisions of the constitutions and suggested that that interest might not be entirely unselfish,³⁷ as stated by Lounsberry.

To discover whether the interest of the Northern Pacific Rail-

27. See N.D. CONST. art. VIII. §§ 147-52 (relates to education).

28. See generally, J.B. HICKS, *THE CONSTITUTION OF THE NORTHWEST STATES* (1923) [hereinafter HICKS] (contains discussion of historical development of the constitutions of the northwest states).

29. *Id.* at 9-25.

30. *Id.* at 36-37.

31. *Id.* at 121.

32. *Id.*

33. *Id.* at 106.

34. *Id.* at 99.

35. *Id.* at 104.

36. *Id.* at 99.

37. *Id.* at 90.

road in the North Dakota Constitution was as public spirited as our historians believe, consider the debates of the North Dakota Constitutional Convention on the five topics identified by Professor Hicks.

A. RAILROAD WAS INTERESTED IN LOW TAXES

Obviously, Northern Pacific Railroad, as the largest landowner in North Dakota, would have been interested in keeping taxes low. Furthermore, it had been given an exemption from property taxation in Territorial days, and there was a question about whether the exemption would continue after statehood.³⁸ In fact, at the time of the Constitutional Convention for North Dakota, litigation was pending challenging the constitutionality of gross revenue taxes imposed by the Territory of Dakota.³⁹ Ultimately the litigation was decided, after statehood, in favor of the tax.⁴⁰ With the uncertainty created by the litigation, the delegates to the North Dakota Constitutional Convention reluctantly included a provision allowing taxation of gross revenues of railroads.⁴¹ As J. Hicks said, "[T]he provision was swallowed with undisguised reluctance" and it was approved only in the last days of the convention.⁴² This provision was not included in the Williams constitution, but was supported by delegates who were "spokesmen for the railroads."⁴³ Those spokesmen included Parsons of Morton County whose occupation was "railroading," and Erastus A. Williams, who came to North Dakota as an employee of a contractor who built fifty miles of track for Northern Pacific.⁴⁴ Several farmer constitutional convention delegates strenuously objected to the gross earnings provision on the grounds that farmers had to pay taxes on real estate regardless of whether they made or lost money.⁴⁵

B. RAILROAD HAD AN INTEREST IN THE STATE'S DEBT LIMITS

Large taxpayers, like the railroad, preferred to keep debts and

38. OFFICIAL REPORT, *supra* note 6, at 616-17.

39. *See McHenry v. Alford*, 168 U.S. 651, 652-57 (1898).

40. *Id.*

41. HICKS, *supra* note 28, at 129-30.

42. *Id.* at 130 (citing OFFICIAL RECORDS, *supra* note 6, at 465-69, 616-17).

43. *Id.* at 130.

44. 2 L.F. CRAWFORD, HISTORY OF NORTH DAKOTA 509-10 (1931). Williams was an assistant United States district attorney in Dakota Territory for a short time. *Id.* at 510. He moved to Yankton and became district attorney in 1871. *Id.* In 1872, he joined Burleigh & Keith, the company constructing the track, and subsequently Williams moved to Bismarck. *Id.*

45. HICKS, *supra* note 28, at 130.

accompanying interest payments to governmental agencies low. The Williams constitution, at art. 16, section 1, had a provision for limitation of debt, but left the amount blank.⁴⁶ The amount was filled in by the Convention to provide for a maximum debt limit of the State of \$200,000.⁴⁷ Debt limits in South Dakota and Montana were \$100,000;⁴⁸ Washington, \$400,000;⁴⁹ Idaho, one and one-half percent of valuation,⁵⁰ and, Wyoming, one percent of valuation.⁵¹ The Williams constitution provided for a maximum state tax levy of one percent, or ten mills.⁵² The North Dakota Constitution had a maximum state tax levy of four mills, the same as Wyoming.⁵³ South Dakota's limitation was two more mills to be applied on indebtedness;⁵⁴ Montana, three mills, unless a referendum authorized an increase, which was unlimited;⁵⁵ Idaho, three mills, with a limitation of 10 mills;⁵⁶ and Washington, no limitation.⁵⁷

C. SUSPICION THAT RAILROAD PASSES INFLUENCED CONVENTION DELEGATES

The conventions exhibited a strong suspicion that the free passes given by the railroad to delegates were intended to influence their votes.⁵⁸ The Williams draft had no limitation on passes nor any reference to them at all.⁵⁹ The State of Washington prohibited corporations from giving such passes and members of the South Dakota Legislature were required to take an oath indicating they would not accept passes, money, or other valuables from corporations.⁶⁰ Idaho's convention adopted a provision that a delegate traveling on a free pass would receive a reduced mileage allowance.⁶¹ After much debate, North Dakota did nothing about passes, leaving the railroads free to give them.⁶² One North Dakota delegate claimed the distinction of being "the only member of this Convention who was foolish enough to send back his

46. JOURNAL, *supra* note 19, at 105.

47. HICKS, *supra* note 28, at 121 & n.1.

48. *Id.*

49. *Id.*

50. *Id.* at 121 & n.1.

51. *Id.*

52. JOURNAL, *supra* note 19, at 104.

53. HICKS, *supra* note 28, at 124.

54. *Id.*

55. *Id.*

56. *Id.* at 124-25.

57. *Id.* at 125.

58. HICKS, *supra* note 28, at 106-07.

59. OFFICIAL REPORT, *supra* note 6, at 424, 645.

60. HICKS, *supra* note 28, at 107.

61. *Id.*

62. OFFICIAL REPORT, *supra* note 6, at 424, 645.

pass."⁶³

Of all five states, only North Dakota allowed continued use of passes by railroads to gain favor with public officials.⁶⁴

D. DELEGATES BELIEVED THE RAILROAD INTERESTS PREVAILED IN NORTH DAKOTA ON THE ISSUE OF RATE REGULATION

After a long struggle incited by the Granger Movement, it had become established law that legislatures could fix railroad rates.⁶⁵ The constitutions of Idaho, Montana, South Dakota, and Washington, put no qualification on the right to regulate rates.⁶⁶ Only in North Dakota was the right restricted, and the restriction was traced directly to the Williams constitution, which provided that "the determination of what is a just and reasonable compensation shall be a judicial question to be determined by the courts."⁶⁷ Section 142 of the North Dakota Constitution provided that the Legislative Assembly shall have power to enact laws regulating and controlling the rates or charges for transportation and also provided "that appeal may be had to the courts of this state from the rates so fixed; but the rates fixed by the legislative assembly or board of railroad commissioners shall remain in full force pending the decision of the courts."⁶⁸ The debates on this subject were bitter and impassioned, and many delegates considered railroad interests victorious.⁶⁹

E. NORTH DAKOTA WAS THE ONLY STATE OF SIX STATES NOT TO ADDRESS RATE ABUSE AND DISCRIMINATION

The South Dakota and Washington constitutions required the Legislatures to correct abuses and discrimination in the rates of freight and passenger traffic.⁷⁰ The Montana and Idaho constitutions guaranteed everyone equal rights in the transportation of their goods over common carriers, adopted the "Long and Short

63. *Id.*

64. *Id.*; HICKS, *supra* note 28, at 107.

65. HICKS, *supra* note 28, at 99-100; OFFICIAL REPORT, *supra* note 6, at 378-97, 381-82, 385, 389.

66. OFFICIAL REPORT, *supra* note 6, at 378-97, 381-82, 385, 389. HICKS, *supra* note 28, at 100.

67. HICKS, *supra* note 28, at 100; *see also* OFFICIAL REPORT, *supra* note 6, at 381-82, 385, 389; JOURNAL, *supra* note 19, at 77-78.

68. N.D. CONST. art. XII, § 13.

69. HICKS, *supra* note 28, at 100; OFFICIAL REPORT, *supra* note 6, at 381-82, 385, 389.

70. HICKS, *supra* note 28, at 104.

Haul" clause of the Interstate Commerce Act, and forbade special preferences in furnishing cars or motive power.⁷¹ Washington also adopted the "Long and Short Haul" clause;⁷² and Wyoming and Washington required railroads to transport each others' passengers, tonnage, and cars without delay or discrimination.⁷³ Apparently, only North Dakota had none of these provisions in its Constitution.⁷⁴ None were suggested in the Williams constitution. Thus, of the six states, only North Dakota did nothing about perceived discriminatory practices of railroads.

IV. LIMITATIONS ON SPECIAL LAWS

In the continuing debate about the preferability of long or short constitutions, one of the evils of a long constitution was considered to be the prohibition of special legislation. Apparently North Dakota, of all the states, has the longest list of subjects, thirty-five on which the Legislature may not legislate specially.⁷⁵ South Dakota has only eleven such subjects in its comparable section.⁷⁶ Of the thirty-five prohibited subjects in North Dakota, thirty-two of them are copied verbatim from the Williams constitution.⁷⁷

V. HOW MUCH REFORM IN THE CONSTITUTION?

It is surprising to read in Robinson, that the Constitutional Convention of 1889 in North Dakota was in fact dominated by reform ideas.⁷⁸ The proof came from the statement that many reforms were considered, but not adopted, including a unicameral legislature, woman's suffrage, compulsory arbitration of labor disputes, prohibition of passes for public officials, and reform of the jury system.⁷⁹ Reform ideas can scarcely be considered dominant if they are supported only by minorities and not enacted into law or constitution.

Actually, about the only reform provisions in the Constitution are in article seventeen entitled "MISCELLANEOUS," which discusses the labor of children under 12 years old in mines, factories,

71. *Id.*

72. *Id.* at 104 & n.55.

73. *Id.* at 104 & n.56.

74. *Id.* at 104.

75. L.M. Friedman, A HISTORY OF AMERICAN LAW 305 (1973).

76. S.D. CONST., art. III, § 23.

77. Compare N.D. CONST., art. II, § 69, with Williams draft, § 46, JOURNAL, *supra* note 19, at 84-85.

78. ROBINSON, *supra* note 21, at 209.

79. *Id.* at 209-10.

and workshops; the title to flowing waters and natural water-courses; the exchange of blacklists between corporations; and the property of a woman acquired before marriage.⁸⁰ The provision that the state's "coal lands" should never be sold was adopted on the motion of Williams.⁸¹ The provision was in the Williams draft.⁸² We may speculate either that the provision was a public-spirited suggestion or that it was designed to remove state coal lands from the market to eliminate a competitor of the Northern Pacific which also had coal lands to sell. Whatever the reason, the State benefitted in the long run.

Robinson said that the Constitution "usurped the powers of the Governor and Legislature by placing a huge mass of legislation in the Constitution itself."⁸³ This probably is true, but practically all of that "huge mass" came from what Lounsberry called the "model constitution" thoughtfully provided by the Northern Pacific Railroad.

VI. CONCLUSION

In summary, it appears that the writings of North Dakota history seriously mis-attribute the origins of the 1889 North Dakota Constitution, most of which is still in effect. The standard works underestimate the influence of the Northern Pacific Railroad on the Constitution, as well as neglect the benefits that the Northern Pacific expected to receive, and no doubt did receive from the provisions of that Constitution. The constitutional provisions were much more favorable to railroads than the provisions of similar constitutions adopted about the same time in five other Northwest states.

80. See N.D. CONST., art. XVII.

81. 1 L.F. CRAWFORD, HISTORY OF NORTH DAKOTA 339 (1931).

82. JOURNAL, *supra* note 19, at 93.

83. ROBINSON, *supra* note 21, at 210.