



## CONSTITUTIONAL CONSIDERATIONS FOR LEGISLATIVE DRAFTERS

### INTRODUCTION

A drafter of legislation needs to understand basic principles about the legislative function and several constitutional provisions that have a direct bearing on the drafting of legislative documents. Many of the principles discussed in this memorandum are of a general nature, but a number of them provide specific requirements that must be adhered to in the drafting of bills for introduction into the North Dakota Legislative Assembly.

### SEPARATION OF POWERS Three Branches

The constitutions of both the United States and our state provide for three branches of government--legislative, executive, and judicial. Each of these three branches has powers separate and distinct and, as far as practical, independent of each other. *State v. Kromarek*, 78 N.D. 769, 52 N.W.2d 713 (1952). Article III, Section 1, of the Constitution of North Dakota, provides that the legislative powers of this state are vested in the Legislative Assembly consisting of a Senate and House of Representatives, except that that power is shared with the people through the powers of the initiative, the referendum, and the recall. In *State ex rel. Eckroth v. Borge*, 69 N.D. 1, 283 N.W. 521 (1939), the North Dakota Supreme Court said the constitutional power of the initiative made the Legislative Assembly and the people coordinate legislative bodies with coextensive legislative power, and a law enacted by one is not superior to a law enacted by the other.

#### Distribution of Powers

A statement of general distribution of powers was added to the constitution in 1982 with the following sentence in Section 26 of Article XI: "The legislative, executive, and judicial branches are coequal branches of government."

As stated by the North Dakota Supreme Court in *Verry v. Trenbeath*, 148 N.W.2d 567 (N.D. 1967):

The legislative branch deliberates upon and decides the policies and principles to be adopted for the future and enacts them into law. The executive branch administers the law so enacted. The judicial branch construes the law, passes on its constitutionality, and determines, in accordance with the law, the rights and interests of the individual citizen.

This tripartite division of powers is a fundamental theory in state and federal government. . . .

#### Grants and Limitations

In any discussion of the separation of powers doctrine, an understanding of the constitutional relationship between the branches of government is essential. The North Dakota Supreme Court, in *State ex rel. Johnson v. Baker*, 74 N.D. 244, 21 N.W.2d 355 (1945), said all governmental sovereign power is vested in the Legislative Assembly, except such as is granted to the other departments of government or expressly withheld from the Legislative Assembly by constitutional restrictions. The court further said constitutional provisions are in the nature of grants of powers to the executive and judiciary, but are limitations upon the power of the Legislative Assembly. In *State ex rel. Agnew v. Schneider*, 253 N.W.2d 184 (N.D. 1977), the court said the Legislative Assembly has plenary powers except as limited by the state constitution, the United States Constitution, and congressional Acts in matters in which the federal government is supreme. The court stated the principle more simply in *Stark v. City of Jamestown*, 37 N.W.2d 516 (N.D. 1949), explaining: "When it is asserted that action which is authorized by a legislative enactment is forbidden by the constitution, we do not look in the constitution for a grant of power to the legislature to enact such law, we look only to ascertain if it inhibited the legislature from enacting the law."

It should be emphasized, however, that the powers of the Legislative Assembly are not without limitation. In *Ex parte Corliss*, 16 N.D. 470, 114 N.W. 962 (1907), the North Dakota Supreme Court said that because the Constitution of North Dakota provides for the election of a Governor and an Attorney General, "[i]t seems too obvious

for discussion that the framers of the Constitution, in providing for the election of these officers by the people, thereby reserved unto themselves the right to have the inherent functions theretofore pertaining to said offices discharged only by persons elected as therein provided." In *State v. Erickson*, 72 N.D. 417, 7 N.W.2d 865 (1943), the North Dakota Supreme Court relied on this language and held that the Legislative Assembly had no constitutional power to abridge the inherent powers of the Attorney General.

A 1994 North Dakota Supreme Court decision struck down the doctrine of sovereign immunity for the state even though the constitution provides that suits may be brought against the state "in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct." The court said this language merely authorizes the Legislative Assembly to waive or modify the common law doctrine of sovereign immunity. See *Bulman v. Hulstrand Construction Co., Inc.*, 521 N.W.2d 632 (N.D. 1994). As stated by Chief Justice Gerald W. VandeWalle in his dissent, "the majority arrogates to itself the authority to set aside the North Dakota Constitution because 'that doctrine no longer meets the needs of time.'"

In addressing whether an item veto by the Governor was valid, the North Dakota Supreme Court upheld an item veto that vetoed a directive or condition on expenditure of funds appropriated in a line item in another section of an appropriation bill. In *North Dakota Legislative Assembly v. Burgum*, 916 N.W.2d 83 (2018), the court stated "[t]he Legislative Assembly may not insulate an item from veto by including it within a larger appropriation, funding that larger appropriation from multiple special funds, or failing to identify the funding source for the item."

### Implied Exclusion

Because the branches derive their authority from the same constitution, there is an implied exclusion of each branch from the exercise of the functions of the others. *City of Carrington v. Foster County*, 166 N.W.2d 377 (N.D. 1969). In that case, the court struck down a law in which the Legislative Assembly attempted to give district court judges the power to appoint annexation officials, which is an executive function. In *State ex rel. Spaeth v. Meiers*, 403 N.W.2d 392 (N.D. 1987), the court said it exercises great restraint when requested to intervene in matters entrusted to the other branches of government.

North Dakota is not unique in separating the powers of the three branches of government and in prohibiting one branch from entrenching upon the powers of the other branches of government. The United States Supreme Court has on at least two occasions struck down unconstitutional congressional actions that infringed upon the role of the executive branch. In *I.N.S. v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983), the United States Supreme Court found unconstitutional a section of the Immigration and Nationality Act which authorized one house of Congress, by resolution, to invalidate decisions of the executive branch of the federal government relating to certain immigration matters. In that case, the Court said legislative action must be performed by the constitutional requirements of passage of a measure by a majority of both houses and presentation to the President for possible veto. In *Bowsher v. Synar*, 478 U.S. 714, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986), the Court considered a case involving the legislation popularly known as the Gramm-Rudman-Hollings Act, which was intended to eliminate the federal budget deficit. The legislation required certain across-the-board budget cuts if the federal deficit exceeded certain maximums allowed by the law. The legislation gave considerable authority to the Comptroller General, an official nominated by the President from a list of three individuals recommended by the Speaker of the House of Representatives and the President Pro Tempore of the Senate and confirmed by the Senate. However, the Comptroller General was removable only at the initiative of Congress. The Court said:

To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws. . . . The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.

The United States Supreme Court concluded that, because Congress had retained removal authority over the Comptroller General, that official could not be entrusted with executive powers. The Court said Congress could control the execution of its enactment by passing new legislation, but Congress could not retain control over the execution of the legislation passed by Congress and, therefore, Congress had intruded into the executive function.

In *American Crystal Sugar Company v. Traill County Board of Commissioners*, 714 N.W.2d 851 (N.D. 2006), the North Dakota Supreme Court said taxation of property is a legislative function, not a judicial function, and the court's review of a local governing body's assessment of value for tax purposes is limited by the doctrine of separation of powers. The court held that "[A] reviewing court may not reverse the Board's decision simply because it finds some of the evidence more convincing; rather, the reviewing court may reverse only where there is such an absence of evidence or reason that the Board's decision is arbitrary, capricious, or unreasonable."

## DELEGATION OF LEGISLATIVE POWER

### Making Policy Versus Execution of Policy

The issue of an unlawful delegation of legislative power arises whenever a law attempts to give someone else, usually in the executive branch, the authority to make policy decisions without adequate guidelines. The Legislative Assembly must declare the policy of the law and must definitely fix the legal principles that control the action taken. See *MDU v. Johanneson*, 153 N.W.2d 414 (N.D. 1967).

A 1971 North Dakota Supreme Court decision provides a good review of the general law on the subject of delegation of legislative power. In *Ralston Purina Company v. Hagemeister*, 188 N.W.2d 405 (N.D. 1971), the authority of the Poultry Improvement Board to establish license fees was challenged as an unlawful delegation contrary to Article X, Section 3, of the Constitution of North Dakota. The board was given the authority to reduce the maximum license fees established by law if the board determined that any or all of such fees or charges were excessive or unduly burdensome, or that a lesser schedule of fees would produce all the income necessary.

The court's analysis of delegation of powers is instructive:

It is elementary that except in those instances where it is expressly authorized to do so by the Constitution, as, for example, in the case of municipalities, **the Legislature may not delegate purely legislative powers to any other board, body, commission, or person.** However, although it may not delegate purely legislative power, it has been held that the Legislature may authorize others to do certain things and to exercise certain powers which are not exclusively legislative and which the Legislature itself might do but cannot because of the detailed nature of the things to be done. . . .

Thus the power to ascertain certain facts, which will bring the provisions of a law into operation by its own terms, is not a delegation of legislative power. **If the law sets forth reasonably clear guidelines which will enable the administrative board to ascertain the facts, so that the law takes effect on such facts under its own provisions and not according to the discretion of the administrative board, the power so delegated is not legislative.** . . .

Society in recent years has become more and more complex, and the courts have held that the vesting in other bodies of some powers ordinarily exercised by the Legislature so that this complex society may function, is not unconstitutional so long as the Legislature itself retains the right to revoke the power which it delegates. The power to make a law is legislative, but the conferring of authority as to its execution, which authority is to be exercised under the provisions of the law itself, as enacted by the Legislature, may be delegated. **The true distinction between the powers which the Legislature may delegate and those which it may not is to be determined by ascertaining whether the power granted gives authority to make a law or whether the power pertains only to the execution of the law which was enacted by the Legislative Assembly.** *Ralston Purina Company*, 188 N.W.2d at 408. (emphasis supplied)

On petition for rehearing, the court determined the license fee was a tax and upheld the law. Concerning the delegation of power question, the court stated:

Pure legislative power never may be delegated by the Legislature to a public officer, board, or commission. Legislative power which may not be delegated includes a determination of whether the law should be enacted, the fixing of a time when the law shall take effect, and a designation of the persons to whom the provisions of the law shall apply. In other words, legislative power which may not be delegated is the power to make a complete law. However, if the law as enacted by the Legislative Assembly furnishes a reasonably clear policy or standard of action which will guide and control the public officer, commission, or board in determining the facts or situations to which the provisions of the law shall apply, so that the law will take effect upon the existence of such facts or situations by virtue of its own terms and not according to the whim, notion, or fancy of the administrative officer, commission, or board, then the power which is delegated by the Legislature to such officer, commission, or board is not legislative, but is administrative. . . .

. . . It is only where a statute purports to vest arbitrary discretion in a public officer, commission, or board, without establishing rules for the guidance of such public officer, commission, or board, that a statute will be declared unconstitutional. *Ralston Purina Company*, 188 N.W.2d at 408.

In *Nord v. Guy*, 141 N.W.2d 395 (N.D. 1966), the North Dakota Supreme Court found a 1965 Act of the Legislative Assembly authorizing the construction of buildings on college campuses but leaving it up to the State Board of Higher Education to determine where those buildings would be built to be an unlawful delegation of legislative authority.

The North Dakota Supreme Court has also recognized stated "that even though there are three branches of government, government cannot be divided into 'watertight compartments,' and administrative agencies often perform acts which are partly legislative, partly executive, and partly judicial. . . ." *Southern Valley Grain Dealers Assn. v. Board of County Commissioners*, 257 N.W.2d 425 (N.D. 1977).

The North Dakota Supreme Court implied that a statute giving the Game and Fish Department authority to determine whether to recognize another state's suspension of hunting privileges to suspend a person's hunting privileges in this state may be an unlawful delegation of legislative power. *Gray v. North Dakota Game and Fish Department*, 706 N.W.2d 614 (N.D. 2005).

### **Modern View on Delegation**

In 1985 the North Dakota Supreme Court upheld a statute granting the State Historical Board the authority to put historical sites on a registry. In *Stutsman County v. State Historical Soc. of North Dakota*, 371 N.W.2d 321 (N.D. 1985), the court held this power did not give the board the authority to make law but only to execute the law.

In *North Dakota Council of School Administrators v. Sinner*, 458 N.W.2d 280 (N.D. 1990), the North Dakota Supreme Court indicated that this state now follows the modern view that recognizes, in a complex area, it may be necessary and appropriate to delegate in broad and general terms if adequate standards and procedural safeguards exist. This case, which involved the interpretation of a statute that gives the Director of the Budget authority to control the rate of expenditures by state agencies through a system of allotments, upheld the constitutionality of the statute. The court held that the statute requires the Director of the Budget to determine that one or more of four enumerated factors is present before an allotment reducing an appropriation may be made. However, a specially concurring opinion noted that the present statute is "so broad and vague as to be alarmingly close to the edge of what is a legally acceptable delegation of legislative authority." The specially concurring opinion points out that the statute allows the Director of the Budget to make allotments based upon estimated revenues, but there are no standards by which the Director of the Budget is guided as to the extent of the reductions or the obligation to restore those reductions if revenue estimates improve.

The North Dakota Supreme Court concluded it was an unlawful delegation to give one person (an incumbent senator placed in a legislative district with another incumbent) the power to stop an election from being required. *Kelsh v. Jaeger*, 641 N.W.2d 100 (N.D. 2002).

### **Delegation to a Legislative Committee**

In the 2018 *North Dakota Legislative Assembly v. Burgum*, 916 N.W.2d 83 decision, the North Dakota Supreme Court concluded a delegation to the Budget Section of the authority to approve Water Commission transfers of funds was a violation of the nondelegation doctrine because the delegation lacked any guidelines. A minority of the justices also asserted the delegation was a separation of powers violation because the "Legislative Assembly was not attempting to delegate its core legislative power to the executive branch, but to retain control over executing a law after it is enacted by delegating power to a committee of its own members." Those justices further stated fact finding and discretionary decisionmaking with respect to administering appropriated funds after the law is enacted is an executive function.

## **STATE CONSTITUTIONAL REQUIREMENTS**

### **Background**

A number of provisions of the Constitution of North Dakota provide specific requirements relating to the drafting of legislation. For the most part, these provisions are found in Article IV, the legislative article. Many of the provisions of Article IV relating to bill drafting are found in Section 13, which contains seven paragraphs.

### **Bills Versus Resolutions**

One provision of Section 13 provides that no law may be enacted except by a bill passed by both houses. This provision is significant in that only a bill, as contrasted to a resolution, may become law in this state. One of the constitutional checks and balances is the veto power of the Governor provided in Sections 9 and 10 of Article V. In some states and the federal government, certain types of resolutions must be subject to approval or veto by the executive branch and have the force of law. The following definition of the word "resolution" appropriately describes the distinction in this state:

The chief distinction between a "resolution" and a "law" is that the former is used whenever the legislative body passing it wishes merely to express an opinion as to some given matter or thing and is only to have a temporary effect on such particular thing, while by a "law" it is intended to permanently direct and control matters applying to persons or things in general. *Black's Law Dictionary, 5th Ed. Rev.*, "Resolution," at p. 1178 (1979).

Thus, if the intent is to compel action, a bill should be used instead of a resolution. An exception is matters dealing only with operation of the legislative branch, such as a resolution directing the Legislative Council to conduct a study or a resolution establishing the compensation of legislative session employees.

### **Enacting Clause**

Prior to approval of the revision of Article IV in 1984, one of the most important constitutional provisions from the standpoint of the bill drafter was Article IV, Section 34, which provided for a constitutional enacting clause. A bill that lacked the enacting clause was constitutionally defective. Although no longer required by the constitution, an enacting clause is still required by House and Senate Rules 404.

### **General Subject Matter**

Section 13 also provides that no bill may be amended to change its general subject matter.

### **Single Subject Rule**

Another provision of Section 13 which has received a good deal of attention by the North Dakota Supreme Court is the sentence that provides: "No bill may embrace more than one subject, which must be expressed in its title; but a law violating this provision is invalid only to the extent the subject is not so expressed." The general rule deducible from the court decisions is that the Act is valid if all the provisions of an Act are germane to the subject expressed in the title. See *Sunbehm Gas, Inc. v. Conrad*, 310 N.W.2d 766 (N.D. 1981); *Kessler v. Board of Ed. of City of Fessenden*, 87 N.W.2d 743 (N.D. 1958).

Stated differently, this rule means that legislation may include any matter naturally and reasonably connected with the subject of the Act as expressed in the title. *Lapland v. Stearns*, 54 N.W.2d 748 (N.D. 1952); *State ex rel. Gammons v. Shafer*, 63 N.D. 128, 246 N.W. 874 (1933); *Thompson Yards v. Kingsley*, 54 N.D. 49, 208 N.W. 949 (1926).

The North Dakota Supreme Court has established rules to be followed in construing the constitutional requirements for bill titles:

1. The law will not be declared unconstitutional on account of the defect pointed out in the title, unless it is clearly so.
2. The title will be liberally construed, and not in a strict or technical manner.
3. If the provisions of the Act are germane to the expressions of the title, the law will be upheld.
4. Conflict with the constitutional provision must be clear and palpable, and, in case of doubt as to whether the subject is expressed in the title, the law will be upheld. See *City of Mandan v. Nichols*, 62 N.D. 322, 243 N.W. 740 (1932); *State ex rel. Poole v. Peake*, 18 N.D. 101, 120 N.W. 47 (1909).

The purpose of the title requirements of the constitution has been described as to apprise the public, as well as the members of the Legislative Assembly, of the purpose and object of the legislation. See *Dornacker v. Strutz*, 71 N.D. 449, 1 N.W.2d 614 (1941).

Titles of bills are important for practical reasons. For example, they are used by the press for short press items regarding bills introduced and committee hearings. They are also used as a basis for indexing purposes in the bill status reporting system. Most importantly, they are used by legislators and the public to gain an understanding of a bill's contents.

Perhaps the importance of this constitutional provision was best expressed by the North Dakota Supreme Court in the 1978 case of *North American Coal Corp. v. Huber*, 268 N.W.2d 593, in which the court said: "We are limited in our interpretation of the Act to those subjects expressed in the title." Thus, the drafter should be sure there are no major omissions in a title. However, this should not necessarily lead to a detailed list of everything in the bill, but may motivate the drafter to use general language rather than specific language. In Michigan, a state with a similar constitutional provision, the Michigan Supreme Court stated the title of an Act is not required to be an index of all its provisions. *Computer Tax Ass'n of Metropolitan Detroit v. Detroit*, 311 N.W.2d 449 (Mich. 1981).

The Minnesota Court of Appeals, in a 1999 case, held a provision requiring certain school construction projects to follow a prevailing wage act violated that state's single subject and title requirements. The provision was included in an omnibus tax bill that covers 185 pages in that state's session laws. The drafters attempted to cover the title requirement by including the general description "relating to the financing and operation of state and local

government" in the 890-word title. The court said the purpose of the title requirement is to prevent surprise upon the people and the legislature. *Associated Builders and Contractors v. Carlson*, 590 N.W.2d 130 (Minn. App. 1999). On appeal, the Minnesota Supreme Court affirmed and said the single subject clause requires that the legislature not fold wholly unrelated and potentially unpopular provisions into larger more popular bills. *Associated Builders and Contractors v. Ventura*, 610 N.W.2d 293 (Minn. 2000).

### **Incorporation by Reference**

Article IV, Section 13, of the Constitution of North Dakota, also provides that no bill can be amended, extended, or incorporated in any other bill by reference to its title only, except in the case of definitions and procedural provisions. It should be emphasized that this constitutional requirement refers to the incorporation by reference of one bill in another bill. (Note emphasis on word "bill.") This should not be confused with the incorporation by reference of another law or regulation of this state or another governmental entity. See *State v. Julson*, 202 N.W.2d 145 (N.D. 1972), holding that the Legislative Assembly may adopt by reference an existing law or regulation of the United States. On the other hand, the Legislative Assembly does not have the authority to adopt future amendments by reference, except in the case of future amendments to federal income tax laws, as specifically provided by the 1966 amendments to Article X, Section 3, of the Constitution of North Dakota.

### **Effective Dates**

In the revision of Article IV in 1984, Section 13 provided for an effective date for laws of July 1 or 90 days after filing with the Secretary of State, whichever came later. Prior to 1986, all laws took effect on July 1 after the close of a legislative session, which could have resulted in effective dates nearly a year after passage if a session were held after July 1 of any year. The 90-day language for effective dates was first recommended by the 1972 Constitutional Convention to ensure that bills would not become effective before the 90-day period for referral had run. The questions that previously existed concerning the effective date of special session bills are also answered by language that provides that laws enacted in a special session take effect on the dates specified in the Acts. As a result, every special session bill must contain an effective date clause.

During the 1987 legislative session, concern was expressed by legislators because the new effective date language resulted in appropriation bills and bills changing tax rates becoming effective at different dates during the month of July. As a result of that concern, an amendment to Article IV, Section 13, was approved by the people at a special election in March 1987. The new language to Article IV, Section 13, which was added in 1987, provided that appropriation measures and tax measures that change tax rates take effect on July 1, or on a subsequent date if specified in the law, unless the measure is an emergency measure.

As the result of confusion concerning the various effective dates of measures due to the 90-day provision, a constitutional amendment was again placed on the ballot and was approved by the voters in November 1992 that changed the effective date for measures passed during regular sessions to August 1 and, for any measures filed between August 1 and January 1, the effective date is now 90 days after filing. No changes were made in the provision concerning appropriation measures and tax measures.

To further clarify the issue, North Dakota Century Code Section 1-02-42 was enacted in 1995 to provide:

#### **1-02-42. Effective dates of legislation - Rules of construction.**

In determining the effective date of any law enacted by the legislative assembly, a "measure" includes the entire contents of a legislative act, unless the legislative assembly specifically provides within the act that only a portion of the act is an emergency, appropriation, or tax measure. Unless a different date is specified in a measure, the measure takes effect on July first after its filing with the secretary of state if:

1. Any portion of the measure provides an appropriation for support and maintenance of state departments and institutions; or
2. Any portion of the measure:
  - a. (1) Provides for an enforced contribution for public purposes which is not dependent upon the will or consent of the person taxed;
  - (2) Imposes a fee for any purpose; or
  - (3) Authorizes a public official or entity to determine the level of a fee for any purpose; and
  - a. Changes any statutory factor that determines the amount of a taxpayer's liability for the contribution or fee, including a full or partial exemption or credit.

### Emergency Clauses

Section 13 requires two-thirds of the members elected to each house to declare a bill an emergency, and an emergency measure takes effect upon filing with the Secretary of State or on a date specified in the measure.

### Special or Local Laws

Prior to 1986, Article IV, Section 43, provided a list of certain types of special or local laws that the Legislative Assembly could not pass. For example, the Legislative Assembly could not pass a special law granting someone a divorce or laying out a specific highway. Section 44 provided that in all other cases when a general law could be made applicable, no special law could be enacted, nor could the Legislative Assembly indirectly enact such special or local law by the partial repeal of a general law, but laws repealing local or special acts could be passed. These two sections were replaced with the following sentence in Section 13:

Except as otherwise provided in this constitution, no local or special laws may be enacted, nor may the legislative assembly indirectly enact special or local laws by the partial repeal of a general law but laws repealing local or special laws may be enacted.

This constitutional provision was used as one of the challenges to the state's Sunday closing law in *Best Products Co., Inc., et al. v. Spaeth*, 461 N.W.2d 91 (N.D. 1990). The court said the special laws language constrains laws relating only to particular persons or things of a class, as distinguished from a general law that applies to all things or persons of a class. The court held the Sunday closing law as it existed at that time had the required uniform effect because every business of a certain type and every commodity of a certain kind was regulated in order to achieve an accepted legitimate governmental purpose. Thus, the court concluded that the Sunday closing law was not a special law prohibited by the constitution.

The court has stated that the "common inquiry in our special law cases is whether statutory classifications are written in general terms, rather than applying to particular persons or things, and if written in general terms, whether the classification **'close[s] the door against accessions to the class.'**" *Teigen v. State*, 749 N.W.2d 505 (N.D. 2008). (emphasis supplied)

A statute that limits the liability of ski facility operators does not violate the local and special law prohibition because the statute applies to all persons operating a skiing facility within the state. *Bouchard v. Johnson*, 555 N.W.2d 81 (N.D. 1996).

Another limitation of the authority of the Legislative Assembly to enact bills is found in Section 10 of Article XII, which prohibits legislation to construct and operate street railroads and certain utilities in cities without the consent of local authorities.

### Supersession by Court Rules

A constitutional provision in the Judicial Article, Section 3 of Article VI, provides that the Supreme Court has authority to promulgate rules of procedure to be followed by all the courts of this state. That section has been used to invalidate a statute that conflicted with a procedural rule. *State v. Hanson*, 558 N.W.2d 611 (N.D. 1996).

### Appropriation Requirements

Section 12, Article X, of the Constitution of North Dakota, provides that all public moneys are to be paid out and disbursed only pursuant to appropriation first made by the Legislative Assembly. The North Dakota Supreme Court has interpreted the word "appropriation" as used in the constitution to mean "the setting apart of a definite sum for a specific object" and has determined if there is not a specific and direct appropriation of a definite sum there is no appropriation. *Menz v. Coyle*, 117 N.W.2d 290 (N.D. 1962); *Campbell v. Towner County*, 3 N.W. 822, 71 N.D. 616 (1941). Based on these decisions, appropriations must be carefully drafted to meet this constitutional test. However, in *Gange v. Clerk of Burleigh County District Court*, 429 N.W.2d 429 (N.D. 1988), the court held a continuing appropriation to be a valid appropriation and that a continuing appropriation does not bind future legislatures because it is continuing only if future legislatures choose not to repeal or modify it.

## FEDERAL CONSTITUTIONAL PROVISIONS

### General - Reservation Clause

The legislative drafter must be aware of federal constitutional provisions. Each of the rights guaranteed under the Bill of Rights and other relevant constitutional amendments are examples of general constitutional limitations of which every legislative drafter must be aware. Perhaps most important is the 10<sup>th</sup> Amendment, which provides that all powers not delegated to the United States nor prohibited to the states are reserved to the states.

### **Supremacy Clause**

An important limitation on state legislatures found in the United States Constitution is found in Article 6, which contains the following language:

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, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding.

This provision is known as the supremacy clause. In *Consolidated Telephone v. Western Wireless*, 637 N.W.2d 699 (N.D. 2001), the North Dakota Supreme Court said an express preemption of state law occurs when Congress specifically declares in a statute that it intends to preempt state law in a particular field. In *Northwest Airlines, Inc. v. State Bd. of Equalization*, 358 N.W.2d 515 (N.D. 1984), the court did not cite the supremacy clause but still held that a state statute was preempted by a federal law. The North Dakota Supreme Court has identified three forms of federal preemption--express preemption, field preemption, and conflict preemption. *State ex rel. Stenehjem v. Freeeats.com*, 712 N.W.2d 828 (N.D. 2006).

### **Powers Granted to Congress**

Section 8 of Article 1 lists those powers granted to Congress. There is an implied limitation on the power of the states to enact laws in those areas in which powers are granted to the federal government. Included in this list are such items as the regulation of interstate commerce, bankruptcy, and immigration.

### **Full Faith and Credit**

Article 4 requires that each state give full faith and credit to the laws and judicial proceedings of other states. In addition, this article requires that each state give all privileges and immunities to citizens of other states. This article also provides for extradition proceedings between states upon the demand of a state's governor, and guarantees to every state a republican form of government.

### **Limits on State Sovereignty**

The United States Constitution contains a number of express limitations on state sovereignty. Article 1, Section 10, declares that no state shall:

1. Enter into any treaty, alliance, or confederation.
2. Grant letters of marque and reprisal.
3. Coin money.
4. Emit bills of credit.
5. Make anything but gold and silver coin a tender in payment of debts.
6. Pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.
7. Grant any title of nobility.
8. Without consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.
9. Without consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war.

### **Congressional Elections**

Article 1, Section 4, limits state control of elections for United States senators and representatives by requiring that state legislation be subject to such regulations as Congress may pass. Article 6 places additional limitations on the ability of states to determine qualifications of senators and representatives in Congress by providing that no religious test shall ever be required as a qualification to any office or public trust under the United States.