

4-1-1934

# A New Constitution for North Carolina

M. T. Van Hecke

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

## Recommended Citation

M. T. Van Hecke, *A New Constitution for North Carolina*, 12 N.C. L. REV. 193 (1934).Available at: <http://scholarship.law.unc.edu/nclr/vol12/iss3/2>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

# A NEW CONSTITUTION FOR NORTH CAROLINA

M. T. VAN HECKE\*

For the first time since 1868 and for the second time in the history of the state, North Carolina has been presented with a general revision of her Constitution, subject to the approval of the electorate next November. It is the work<sup>1</sup> of a Commission of three judges,<sup>2</sup> four lawyers,<sup>3</sup> an editor<sup>4</sup> and a state fiscal officer,<sup>5</sup> as amended by the General Assembly of 1933.<sup>6</sup> In substance the changes made by the Commission and the legislature consist of a series of amendments to the basic law now in force. In form these changes have been synchronized with what remains of the old instrument to make a new constitution. The entire document will be voted upon as a whole.

## TAXATION

Under the present North Carolina Constitution, the poll tax is limited to two dollars in the case of the state and one dollar in the case of cities and towns. The income tax is limited to six per cent. The total of the state and county tax on property is limited to fifteen cents, unless levied for a special purpose with the special approval of the General Assembly and/or unless levied for the six months school term. All taxation of property except home loans must be by

\* Dean of the School of Law, University of North Carolina.

<sup>1</sup> THE REPORT OF THE NORTH CAROLINA CONSTITUTIONAL COMMISSION (1932) may be obtained from the Legislative Reference Librarian, Raleigh. It was published in full in (1932) 11 N. C. L. Rev. 5-50. The Commission was appointed by Governor O. Max Gardner, in June, 1931. It organized in October, 1931, and reported to the Governor November 26, 1932. Its minutes, which have not been published, include some 400 pages of reports of investigations made at the request of the Commission by the law schools of Wake Forest College, Duke University and the University of North Carolina. Statements made in this paper, where no specific reference to other material is given, are largely based upon those reports. Charles B. Aycock, of Raleigh, served as Secretary of the Commission.

<sup>2</sup> W. P. Stacy, Chief Justice, Supreme Court of North Carolina, *chairman*; John J. Parker, Senior Circuit Judge, United States Circuit Court of Appeals, Fourth Circuit; Michael Schenck, Judge of the Superior Court of North Carolina.

<sup>3</sup> George E. Butler, Clinton; J. O. Carr, Wilmington; Burton Craige, Winston-Salem; Lindsay Warren, Member of Congress, Washington, N. C.

<sup>4</sup> Dr. Clarence Poe, *The Progressive Farmer*, Raleigh.

<sup>5</sup> Allen J. Maxwell, State Revenue Commissioner, Raleigh.

<sup>6</sup> P. L., 1933, c. 383. This statute embodies the entire proposed new constitution.

uniform rule and on an ad valorem basis. The proposed new constitution removes all of these limitations and substitutes four new ones: (1) The taxing power must be exercised in a just and equitable manner and only for public purposes;<sup>7</sup> (2) local taxes may only be levied in accordance with general laws and under state supervision of local budgets and tax levies;<sup>8</sup> (3) taxes for debt service are to be diminished by new limitations upon the creation of state and local indebtedness;<sup>9</sup> and (4) the Governor is given the veto power<sup>10</sup> over all legislation, including tax laws, not subject to popular vote.

This is not the place to discuss whether all of the present limitations upon taxation have or have not been observed in practice. Nor is it important to recall that the people in the past have not approved at the polls proposed constitutional amendments authorizing classification of property for purposes of taxation. For these proposals have never been coupled with or subjected to a proposed veto power in the Governor. Nor were they connected with a completely new realignment of the taxing power; they were patches on an already outmoded and distrusted fiscal system. It is, however, important to see what can be gained by the new provisions, and at what risk.

Under the new arrangement, a relatively unfettered legislature may, in conjunction with a Governor having the veto power and a new constitutional responsibility for the biennial budget, more adequately adjust the fiscal policy of the state to meet the needs and the resources of the state as economic conditions change. With the membership of the legislature elected every two years and a Governor unable to succeed himself, the General Assembly and the Governor remain accountable to public opinion for these fiscal policies. This co-operation between the executive and the legislature will, it is believed, more effectively shape the tax legislation of the future than rigid, mechanical constitutional limitations imposed by one generation upon another.

It is simply because these restrictions, such as the requirement of uniformity upon an ad valorem basis, have become out of joint with the conditions which have developed since they were put into the Constitution that they have been removed. A constitutional requirement of uniformity assumes that all property should be treated

<sup>7</sup> ART. V, §1. (All references to articles and sections in this paper relate to the proposed new constitution, unless otherwise indicated.)

<sup>8</sup> ART. V, §4.

<sup>9</sup> See below, under *Debt Limitations*.

<sup>10</sup> ART. II, §21.

alike and that all property can in practice be equally uncovered and assessed for purposes of taxation. This may have been so in the day when the life of the state was primarily rural in character. Under the complex commercial and industrial organization of modern economic life, with numerous new types of property, it never has been so. Income from investments in stocks and bonds, for example, cannot in fact be discovered, and because the uniform ad valorem tax would take half or more of the income, the investors do not return it voluntarily for taxation. And, in the depression, it is impossible because of the uniformity requirement to afford relief to unproductive property, for example, without similarly relieving every other form of property, regardless of its ability to pay.

Constitutional requirements of uniformity were inserted in the state constitutions after the war between the states at a time when the changes that were already taking place in the business world made such restrictions wholly artificial. The result in other states has been a steady march away from the requirement of uniformity and toward a power in the legislature to adjust taxation to the actual facts. It is interesting to note that the new proposal for North Carolina is a throwback to the constitution of 1776, as it remained until the carpet-bagger convention of 1868 transplanted a uniformity provision from one of the middle western states to hamstringing the reconstructed legislature of North Carolina. It also parallels the equally free taxing power of Congress, within its Federal jurisdiction.

The question is not whether North Carolina should immediately classify property for purposes of taxation. The arguments and the evidence, pro and con, are too complicated to be discussed in the short space available here. It is significant, however, that the 1928 Report of the Tax Commission recommending such a plan and that the Report of the Constitutional Commission proposing removal of the uniformity requirement, are based on careful studies of these arguments and of experience in other states. It is also significant that all other forms of taxation in North Carolina except the property tax, indeed all of the taxes which support the state government, such as those upon income, inheritance, sales, licenses and franchises, have long been levied on a classified basis. Rather, the question is whether we shall remove a constitutional limitation which forbids the General Assembly to consider those arguments and data in formulating from time to time its property tax program. Those who fear that arbitrary and discriminating legislative action may take place under the

proposed new constitution should keep in mind the fact that the courts in other states have been able to handle the question whether those in the same situation have been treated alike, under the due process and equal protection clauses of the federal and state constitutions. The new limitation that "the power of taxation shall be exercised in a just and equitable manner" invokes this protection. That this will give rise to new legislative and judicial problems of no inconsiderable factual difficulty, is not to be denied. That these difficulties are not prohibitive is evident from our experience with taxes levied on sources other than property.

#### DEBT LIMITATIONS

Debt limitations, under the existing Constitution, are tied up with the assessed valuation of property for purposes of taxation. Thus, with certain exceptions not now important, the total state debt is limited to seven and one-half per cent of the assessed valuation of the taxable property within the state as last fixed for taxation. Admittedly, assessed valuation bears too fluctuating a relation to actual value and is too incomplete to form a basis for debt limitations. The creation of local indebtedness is limited mainly by the requirement of a popular vote. The alternative, that the debt or tax must be "for the necessary expenses" of the county, city or town, simply gives to the courts a sporadic and delayed veto power. The proposed new constitution forbids new state and local debts in excess of a certain proportion of the amount by which the outstanding indebtedness has been reduced, unless authorized by popular vote. In the case of the state, this proportion is two-thirds of the reduction during the preceding biennium.<sup>11</sup> In the case of the local communities, it is one-half of the reduction the previous year.<sup>12</sup> And the majority of the popular vote by which this limitation can be exceeded in the counties, cities and towns must be equal to one-fourth of the votes cast in that county, city, town or municipal corporation, as the case may be, for Governor at the last gubernatorial election.<sup>13</sup>

These limitations are reflective of the current depression. Certainly they will operate to hold down new debts—not, however, in proportion to pressing needs which future generations may face, nor in proportion to the ability of those future generations and their descendants to pay, but in proportion to the accidental coincidence of

<sup>11</sup> ART. V, §2.

<sup>12</sup> ART. V, §5.

<sup>13</sup> ART. V, §5.

maturities of bond issues floated in the past.<sup>14</sup> The amounts of new debts possible depend not only upon these haphazard maturities but upon the totals of bonds actually paid. So far as the present writer knows, this type of debt limitation is not in force in any other state. As a method of gradually reducing the aggregate old and new indebtedness, the plan is excellent. The only question is whether it will prove sufficiently elastic to permit of expansion through necessary borrowing.

This is an unpopular subject now, but we are making a constitution for a long time. The escape from the debt limitation through popular vote may easily be overrated. The state as a whole will not approve bond issues unless for a dramatic purpose such as a soldiers' bonus. The ease, however, of obtaining popular approval within a particular county, city or town or other municipal corporation for a bond issue to cover a supposed local need became so notorious that the Constitutional Commission wisely provided that the majority of those voting must represent a respectable proportion of the electorate. It will not be so easy to obtain that degree of popular approval. The disgraceful spectacle of hundreds of North Carolina local government units in default on their bonds explains too why their future borrowings are restricted to one-half the debts retired the previous year, as compared with two-thirds of those retired the previous two years, on the part of the state. Would it not have been wiser in the long run to adopt instead a constitutional provision that the debt shall not exceed a given proportion of the average tax income over a period of, say, the previous five years? Then the basis would be the ability and willingness to pay.

#### THE VETO

North Carolina has long been the only state in the Union to withhold from her Governor the power to veto legislation enacted by the General Assembly. And the new constitution contains the first proposal for a veto power to come from any legislature, constitutional convention or commission in the history of the state.

The general scheme of the veto proposal is as follows:<sup>15</sup> The veto is not to be applicable to legislation which has to be submitted to a

<sup>14</sup> The table of annual maturities up to 1972 published by the State Tax Commission in its 1932 *Report* at page 227 shows maturities ranging from \$5,150,000 to \$7,185,000 between 1932 and 1947; \$4,700,000 in 1949; \$8,180,000 in 1950; \$3,807,000 in 1951; \$1,060,000 in 1963; \$11,523,000 in 1964; \$50,000 in 1965; and so on.

<sup>15</sup> ART. II, §21.

vote of the people for adoption. The General Assembly may repass legislation over the Governor's vote by the vote of a majority of the entire membership of each House. If the Governor approves the general purpose of any bill but disapproves any part or parts thereof, he may return it with recommendations for its amendments to the House in which it originated. A majority of the members present in each House may then dispose of the recommended amendments. Whether these are adopted or rejected, the bill then goes back to the Governor and he may act upon it as if it were there before him for the first time. The vote necessary to overcome a veto and the vote on suggested amendments must be votes of record. During the session, the Governor is given five days within which to consider whether to sign or to veto a bill. If at the end of that time he has done neither, the bill becomes a law automatically. After adjournment, the Governor is given ten days in which to determine what to do with the bills passed during the last five days of the session. But he cannot veto after adjournment any bill presented to him 48 hours before adjournment. If a bill has not been signed or vetoed ten days after adjournment, it automatically becomes a law. The so-called "pocket veto" has no place in the scheme.

The last state in the Union to consider the adoption of the veto, North Carolina has been given an opportunity to profit by the experience in other states. The proposed veto provision differs in four particulars from the constitutions elsewhere, namely, in respect to: (1) the authorization of the Governor to recommend amendments, (2) the 48-hour limitation on vetoes after adjournment, (3) the rejection of the item veto, and (4) the vote required to override a veto.

(1) Three states, Alabama, Virginia and Massachusetts, authorize the Governor, in connection with the exercise of the veto power, to propose amendments to legislation referred to him for approval or disapproval during the legislative session. In Virginia, the provision applies when the Governor approves the general purpose of the bill, but frowns upon a particular part. The bill must then go back to the Governor, whether the amendment is adopted or not, for approval or veto. The Alabama and Massachusetts plans differ slightly in detail. All three of these provisions have been widely praised as desirable affirmative controls of legislation. The North Carolina proposal follows that of Virginia.

(2) The reason for the denial of power to veto after adjournment bills presented to the Governor 48 hours prior to adjournment is this:

In Congress and in nearly all of the state legislatures the great bulk of the legislation, especially the most controversial legislation, is enacted during the closing days of the session and does not reach the chief executive until after adjournment. Actually, therefore, as to bills enacted in the end-of-the-session rush, the executive veto, in Congress and in nearly all of the states, is absolute for lack of a legislature in session to re-enact rejected measures. The limitation under discussion was probably inserted by the Constitutional Commission to minimize the Governor's exercise of such an absolute veto. Even if that result is desirable, it is doubtful whether 48 hours is an adequate time within which a governor may discharge his responsibility. He may desire to secure advice from the Attorney General, to consult department and institutional executives, to hold public hearings and otherwise to prepare himself for his decision. The Governor is given such a short period of time as this in no other Constitution. California, New York and Pennsylvania give him 30 days.

One paragraph of a recent opinion<sup>16</sup> of Chief Justice Hughes, upholding a presidential power to veto or sign bills after adjournment, is of interest in connection with the problem now facing North Carolina:

"Regard must be had to the fundamental purpose of the constitutional provision to provide appropriate opportunity for the President to consider the bills presented to him. The importance of maintaining that opportunity unimpaired increases as bills multiply. The Attorney General calls attention to the fact that at the time here in question, that is, between February 28, 1931, and noon of March 4, 1931, 269 bills were presented to the President for his consideration, 184 of which were presented to him during the last twenty-four hours of the session. No possible reason, either suggested by constitutional theory or based upon supposed policy, appears for a construction of the Constitution which would cut down the opportunity of the President to examine and approve bills merely because the Congress had adjourned. No public interest would be conserved by the requirement of hurried and inconsiderable examination of bills in the closing hours of a session, with the result that bills may be approved which on further consideration would be disapproved or may fail although on such examination they might be found to deserve approval."

(3) In all but ten states the Governor may veto specific items of appropriation bills. In Massachusetts and California, he may either veto or reduce such items. The Pennsylvania Governor has this re-

<sup>16</sup> *Edwards v. United States*, 286 U.S. 482, 493, 52 Sup. Ct. 627, 76 L. ed. 1239 (1932).



duction power by virtue of judicial construction of the item veto clause. In North Carolina, by statute, the Governor and Budget Commission may reduce appropriations to meet the revenue at any time during the biennium. In Washington and South Carolina, the Governor's veto extends to any section or any part of any bill. A similar provision was withdrawn in Ohio in 1912 after nine years' experience. No provision for an item veto has been made by the Constitutional Commission. During the session, the proposed power of the Governor to submit amendments would enable him thus to suggest modifications in particular appropriation items. But the trouble is that the appropriation bill is usually passed just at the close of the session.

(4) The veto provision adopted by the Commission required a vote of "two-thirds of that House" to override a veto. The General Assembly, adopting Dr. Clarence Poe's alternative suggestion, changed this to read: "a majority of the entire membership of that House". Here lies one of the principal storm areas relating to the new constitution. With all mechanical restrictions upon taxation removed and with the veto the only substitute limitation, a number of people fear this apparent weakening of the effectiveness of the veto. It is true that the new provision is found in but a few states. Thirty-four states require a two-thirds vote to overcome a veto. In twelve of these that means two-thirds of those present and voting; twenty-two require two-thirds of the membership. Five others require a three-fifths vote. Only one speaks of three-fifths of those voting; four require three-fifths of the membership. Only eight states require a bare majority. One of these specifies a majority of those voting; seven require a majority of the membership. These states are Alabama, Arkansas, Indiana, Kentucky, New Jersey, Tennessee and West Virginia. The proposed new North Carolina provision falls in this latter group.

Instead, however, of apparently weakening the veto by a drop in the number of votes required to override it from two-thirds to a majority, the General Assembly may have strengthened it by raising this vote from two-thirds of those present and voting if there is a quorum to a majority of the entire membership, or from 41 to 61 in the House and from 18 to 26 in the Senate. This view, however, is not altogether free from difficulty. The Commission demonstrated that it knew the difference between the total membership and the members present and voting. In connection with overruling the veto,

the Commission spoke of "two-thirds of that House." In the same paragraph, in connection with approval of gubernatorial amendments, the Commission spoke of "a vote of a majority of the members present in each". By "two-thirds of that House" the Commission, therefore, might by contrast be held to have intended to say two-thirds of the membership of that House. On the other hand, Judge John J. Parker, a member of the Commission, has stated<sup>17</sup> that "The recommendation of the Commission was that the veto power of the Governor might be overridden only by a two-thirds vote of both Houses of the legislative branch, as in the case of the Constitution of the United States." The Supreme Court of the United States has held that the phrase, "two-thirds of that House", in the Federal Constitution means two-thirds of those present and voting if there is a quorum and not two-thirds of the entire membership.<sup>18</sup> The Supreme Court of South Carolina has made the same construction of a similar requirement in the Constitution of that state.<sup>19</sup> And the Supreme Court of North Carolina has stated *arguendo* that the phrase, "three-fifths of each House", in Article 13, Section 2 of our present Constitution relating to legislative submission of amendments means three-fifths of those present and voting if there is a quorum and not three-fifths of the entire membership.<sup>20</sup> Perhaps these are among the reasons for Judge Parker's additional statement:<sup>21</sup> "When it is considered that the two-thirds provision permits the overriding of the veto by two-thirds of those voting, whereas the proposed provision requires a majority of the actual membership, it will be seen that there is little difference in the two proposals."

As a matter of fact, the significance of the change from "two-thirds of that House" to "a majority of the entire membership of that House" will depend upon the number present and voting. On ordinary legislative measures, this is unpredictable. On tax measures, with a record vote required, and with an aroused public interest forcing legislative attention, there is likely to be a pretty full attendance, even though the members have scattered to their homes before the veto message is delivered. Say there are 100 present and voting in

<sup>17</sup> Address, *The Proposed Constitution* (1933) 35 REPORTS N. C. BAR ASSOC. 133, 141.

<sup>18</sup> *Mo. Pac. R. Co. v. Kansas*, 248 U. S. 276, 39 Sup. Ct. 93, 63 L. ed. 239 (1919); note (1919) 2 A. L. R. 1593.

<sup>19</sup> *Smith v. Jennings*, 67 S. C. 324, 45 S. E. 821 (1903).

<sup>20</sup> *Cleveland Cotton Mills v. Commissioners of Cleveland County*, 108 N. C. 678, 13 S. E. 271 (1891).

<sup>21</sup> *Supra*, note 17.

the House and 40 in the Senate, when the question arises of overriding the veto. Under the Commission's reported provision, 67 votes would have been required in the House; now 61 will suffice. In the Senate 27 would have been required; now 26 will suffice. The effectiveness of the veto then would have been weakened to that extent.

There need be no serious fear, however, of the prospect of a majority of the entire membership overriding a gubernatorial veto. With the legislators elected every two years and a Governor unable to succeed himself, the General Assembly and the governor are directly accountable to public opinion for their acts. The North Carolina governorship has increased enormously in authority and in prestige. Against the effects upon public opinion of a Governor's veto message, publicized through the press and the radio, it will be a desperate opposition which can muster 61 votes in the House and 26 in the Senate. And if it can, that decision ought to prevail if representative government is to continue.

In any event, the veto will serve as a check upon hastily drafted and ill-advised legislation. Much of the obviously unconstitutional special legislation now enacted by every legislature can be stopped at the source immediately, instead of in the courts years later, by vetoes based upon Attorney General's opinions. And constitutional authority for the Governor's active participation in law making will assure the effectiveness of his leadership and will bring the executive and the legislative departments into a closer relationship.

### THE JUDICIARY

The adjustability of the business of the judiciary has been facilitated by six changes, as follows: (1) The General Assembly is authorized to increase the number of Supreme Court justices and of Superior Court judges.<sup>22</sup> (2) The General Assembly is given power to create solicitorial districts distinct from the judicial districts.<sup>23</sup> (3) The constitutional necessity for the Justice of the Peace has been removed. (4) The Chief Justice of the Supreme Court is given an executive control of the distribution of the facilities of the Superior Court,<sup>24</sup> a power now exercised by the Governor. (5) A council of the Supreme Court justices and of the Superior Court judges is authorized to regulate the practice and procedure of the courts,<sup>25</sup> a

<sup>22</sup> ART. IV, §§3, 6.

<sup>23</sup> ART. IV, §10.

<sup>24</sup> ART. IV, §6.

<sup>25</sup> ART. IV, §8.

function now in the hands of the legislature. (6) The Supreme Court is authorized to sit in divisions.<sup>26</sup>

(1, 2, 3). Under the present Constitution, the Supreme Court's membership is limited to five, the Chief Justice and four associate justices. The Court is obviously overburdened. The new provision would permit additional associate justiceships as conditions may warrant without resort to constitutional amendment but by legislative action. At present, the General Assembly is free to increase the number of Superior Court judges, but only through the creation of additional judicial districts "for each of which a judge shall be chosen". And, under another section of the present Constitution, "a solicitor shall be elected for each judicial district." Thus new judgeships mean the automatic creation of new solicitorships, regardless of need. Hence the proposal enabling solicitorial districts to meet the demand for prosecuting officers separately and without reference to the condition of the civil docket. This proposal has been before the voters for adoption as a constitutional amendment several times in recent years but has failed each time, largely because of the lack of a systematic effort to interest the public. If the number of Superior Court judges could have been easily increased back in 1919 and since, the state might have been spared the haphazard growth of legislation setting up Municipal Recorder's Courts, General County Courts, Civil County Courts, County Civil Courts, District County Courts, County Criminal Courts and various other local courts, whose jurisdiction in large measure has duplicated that of the Superior Court and from whose decisions under *Rhyne v. Lipscombe*<sup>27</sup> appeals have first had to go to the Superior Court. These complications of an originally simple judicial system have given rise to unnecessary jurisdictional questions, expense, double appeals, delay and inefficiency. To some extent these new courts have been the result of dissatisfaction with the constitutionally necessary Justice of the Peace. That the framers of the new constitution hoped to encourage a general overhauling by the General Assembly of the courts inferior to the Superior Court is evident not only from the elimination of the Justice of the Peace as a constitutional officer but also from these new provisions:<sup>28</sup> "The General Assembly shall provide by general laws for the creation and jurisdiction of courts inferior to the Superior Courts with appeals

<sup>26</sup> ART. IV, §3.

<sup>27</sup> 122 N. C. 650, 29 S. E. 57 (1898).

<sup>28</sup> ART. IV, §9.

therefrom to the Superior Courts; but shall pass no special or local laws with relation to such courts. Courts of special or limited jurisdiction now existing in North Carolina, including courts of Justices of the Peace, shall be continued until otherwise provided by the General Assembly as a result of the passage of General Laws under this section."

(4) The shift from the Governor to the Chief Justice of the power to assign Superior Court judges in aid or in lieu of the judge regularly assigned to a particular district because of the illness or incapacity of the latter or when the public interest so requires, is a commendable step toward a unified judicial system under the executive direction of the Chief Justice. This development will be further strengthened by the functioning of the new Judicial Council, presently to be noted as to its rule-making powers. If the example of the Federal Judicial Conference and the judicial councils in various states be followed, much can be accomplished in the direction of a more efficient dispatch of judicial business by co-operative judges under the leadership of an enterprising Chief Justice.

(5) The transfer from the General Assembly to a Judicial Council of the power<sup>29</sup> "to make, alter and amend all rules relating to pleading, practice and procedure in the several courts of the state except in the Supreme Court, the practice and procedure of which shall be prescribed by the rules of the Court," will provoke much discussion from the bar. Heretofore, the General Assembly has been doing this under a constitutional provision that it "shall . . . regulate by law when necessary the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court." And each biennial session has produced a patchwork of unrelated and ill-planned changes in the detail of judicial practice and procedure. The Supreme Court, however, has handled its own rules well. The argument in favor of the new plan is obvious. Two or three objections may be noted. That the Supreme Court has been unwilling to revise upward its rules relating to standards for admission to the bar, with the result that the General Assembly of 1933 transferred this power to the new incorporated State Bar,<sup>30</sup> is not an argument against the proposed regulation of practice and procedure by judicial rule-making, for there the Court was dealing with the semi-political issue of educational policy affecting entrance to the legal profession and not with the machinery of court administration. Nor should the fact that the

<sup>29</sup> ART. IV, §8.

<sup>30</sup> P. L., 1933, c. 210, 331.

1931 General Assembly felt called upon to abolish the old statutory Judicial Conference<sup>31</sup> deter the adoption of the new constitution. That Conference was too large and unwieldy. It included the justices of the Supreme Court and the Superior Court judges, who are to constitute the new Council, but it also included the Attorney General and one practicing lawyer from each of the twenty judicial districts.<sup>32</sup> Its powers were entirely advisory and the General Assembly largely ignored its recommendations. The new Council has direct legislative power. If criticisms of the work of the old Conference were justified, they do not carry over to the potentialities of a wholly responsible, self-governing judiciary. Moreover, the Conference was abolished under a mistaken notion that the new Law Improvement Commission<sup>33</sup> created by the General Assembly of 1931 was designed to do the same job. Nor should the failure of some ten appellate courts to exercise to any great extent rule-making powers conferred either by constitutional provision or by statute, discourage us. For the successful exercise of such powers by the High Court of Justice in England, by the Supreme Court of the United States in the Equity Rules of 1912, and by such state courts as those in Connecticut and New Jersey indicate what can be accomplished when the judges having the power take their duties seriously.<sup>34</sup>

(6) Similarly, the bar will be greatly interested in the proposed authority to the Supreme Court to sit in divisions. This provision reads as follows:<sup>35</sup> "The Supreme Court shall have power to sit in divisions, when in its judgment this is necessary for the proper dispatch of business, and to make rules for the distribution of business between the divisions and for the hearing of cases by the full Court. No decision of any division shall become the judgment of the Court unless concurred in by three justices;<sup>36</sup> and no case involving a construction of the Constitution of this State or of the United States shall be decided except by the Court *in banc*. All sessions of the Court shall be held in the City of Raleigh." The Constitutional Com-

<sup>31</sup> P. L., 1931, c. 451.

<sup>32</sup> P. L., 1925, c. 244.

<sup>33</sup> P. L., 1931, c. 98.

<sup>34</sup> See DODD, *STATE GOVERNMENT* (2d ed., 1928) 337-338.

<sup>35</sup> ART. IV, §3.

<sup>36</sup> If the membership of the Court is increased to seven, decisions of a minority of three will then become the judgment of the Court. This, however, is not because of a clerical error. Rather, with the administration of the divisional plan subject to the Court's own rules and the executive control of the Chief Justice, it was believed that the unanimous decision of a division should prevail.

mission adopted this provision after study of the experience under similar plans in other states. Fortunately, the data considered by the Commission are available to the bar in the June, 1932, issue of this Review,<sup>37</sup> and need not be repeated here. Authorized either by constitutional provision or by statute in Alabama, California, Colorado, Florida, Georgia, Iowa, Kansas, Louisiana, Mississippi, Missouri, Oklahoma, Oregon, Virginia and Washington, the plan has been rejected only in California, Kansas, Louisiana and Oklahoma. The reason for this rejection in California centered around the availability there of intermediate appellate courts. Oklahoma has never tried the plan. After its use for several years had enabled the Court to catch up with its docket, Kansas and Louisiana abandoned it, because of dissatisfaction by the bar. But the reports from the ten other states indicate not only that the divisional court plan is working effectively but that both lawyers and judges commend it.

Unfortunately, the General Assembly so modified the Commission's proposed new constitution as to deprive future legislatures of the power to consider whether in their discretion it might not be appropriate at some future time to make five other changes in the judicial system: (1) The Commission<sup>38</sup> made the rotation of judges among the judicial districts optional with the General Assembly and eliminated the old prohibition against a judge's holding court in any one county oftener than once in four years. The General Assembly<sup>39</sup> deprived its successors of power to abolish rotation of judges and restored the old four-year limitation. (2) The Commission<sup>40</sup> required indictments by a grand jury only in capital cases and authorized the legislature to provide otherwise for offenses less than capital. The General Assembly<sup>41</sup> required grand jury indictments in all felonies, and authorized the legislature to provide otherwise only in misdemeanors. (3) The Commission eliminated all references to the sex of jurors. The General Assembly<sup>42</sup> restored the present provision requiring juries in criminal cases to consist of "good and lawful men". (4) The Commission<sup>43</sup> required unanimous jury verdicts only in capital cases. For lesser offenses, the General Assembly could "authorize trial by the judge in cases where the defendant waives jury trial, and may permit a verdict upon less than a unanimous vote

<sup>37</sup> Sharp, *Supreme Courts Sitting in Divisions* (1932) 10 N. C. L. REV. 351.

<sup>38</sup> REPORT, ART. IV, §6.

<sup>39</sup> ART. IV, §6.

<sup>40</sup> REPORT, ART. I, §9.

<sup>41</sup> ART. I, §9.

<sup>42</sup> ART. I, §10.

<sup>43</sup> REPORT, ART. I, §10.

of the jurors." The General Assembly<sup>44</sup> changed these provisions so as to require unanimous verdicts in all criminal cases except petty misdemeanors, and eliminated the clause relating to trial by the judge in the event of a jury waiver. (5) The Commission<sup>45</sup> authorized the General Assembly to provide for verdicts of less than a unanimous vote of the jurors in civil cases, but the legislature's redraft<sup>46</sup> deprived future General Assemblies of that power. It is a curious commentary upon democratic institutions that one legislature should so distrust its successors. However, if the new constitution is adopted, the state will not be harmed by these conservative restrictions upon the Commission's daring; at the most, we have lost only the opportunity to experiment.

#### LOCAL GOVERNMENT

The organization and management of local government have been made the province of statute law. There is no separate article in the proposed new constitution, as there is in the present, on Municipal Corporations. The provisions of the Judicial Department article of the old Constitution establishing the offices of sheriff and coroner have been dropped. That the General Assembly is to control local budgets and tax levies by general laws has already been noted, as have the proposed new sections transferring to the legislature the control of local courts and the fate of the Justice of the Peace. Substantially the only self-executing constitutional regulation of local government remaining in the new instrument is that previously discussed, imposing limitations upon new local indebtedness. Instead, taking their cue from Article 8, Section 4 of the old Constitution, the framers of the new basic law have proposed:<sup>47</sup> "The General Assembly shall provide by general laws for the organization and government of counties, cities, towns, and other municipal corporations, but shall pass no special or local law relating thereto. Optional plans for the organization and government of counties, cities and towns may be provided by law, to be effective when submitted to the legal voters thereof and approved by a majority of those voting thereon."

Some have thought that these changes will sweep away a constitutional status heretofore enjoyed by counties and townships, and by sheriffs, coroners, treasurers, registers of deeds, surveyors, county commissioners, and township officers. Except as to sheriffs and coro-

<sup>44</sup> ART. I, §10.

<sup>45</sup> REPORT, ART. I, §16.

<sup>46</sup> ART. I, §16.

<sup>47</sup> ART. II, §18.



ners, this is a misapprehension. For the last section of the old article on Municipal Corporations authorized the legislature "to modify, change or abrogate any and all of the provisions of this article, and substitute others in their place, except sections seven, nine and thirteen." And the courts have held that this could be accomplished by local and special laws.<sup>48</sup> The exempted sections required a public vote on local debts except for necessary expenses; required local taxes to be levied uniformly and on an ad valorem basis; and prohibited payment of debts incurred in aid of "the rebellion". These items have been disposed of by other provisions of the new constitution, most of which have already been noted in this paper. Thus, the new instrument does away with the incongruity of a tentative constitutional status for local government, subject to piece-meal legislative action, and puts the whole matter directly into the hands of the General Assembly. If it can overcome the deeply entrenched vested interests of the local government officers, the General Assembly will now be free to set up and to modify from time to time a system of local government more responsive to the social and economic conditions of today and of the future.

Local government will be directly affected by several new limitations upon the power of the General Assembly to pass special and local legislation. The curse of the excessive bulk of this sort of statute law enacted by the North Carolina General Assembly has not been so much that it substantially invades the time that ought to be put on state-wide law making, for everyone knows that these special and local bills are passed perfunctorily while the two Houses are marking time waiting for committee reports, often in a skeleton session safeguarded by an agreement that no one will raise the question of a quorum. Rather, the evil has been that many important problems of local government are delegated by the responsible local officers not to the General Assembly, but in practical effect to the particular county's delegation in the House and Senate. The new changes, although in the writer's opinion not as extensive as they might have been, will go far to remedy this situation, first, by removing some of the opportunity and necessity for special and local legislation; second, by substituting state administrative control for legislative action where adjustability is needed; and, third, by making enforcement of constitutional limitations more effective through the application of the veto. This whole matter has been discussed in detail in the

<sup>48</sup> *So. Audit Co. v. McKenzie*, 147 N. C. 461, 61 S. E. 283 (1908).

February, 1933, issue of this Review.<sup>49</sup> Two or three illustrations will suffice here: (1) The new constitutionally created State Board of Education is to have complete charge of the school system, and is<sup>50</sup> "to divide the state into a convenient number of school districts without regard to township or county lines." Presumably, the new clause removes this function from the General Assembly, which is still, as formerly, to be without power to pass any special or local legislation "establishing or changing the lines of school districts." (2) The old Constitution banned such legislation "relating to the establishment of courts inferior to the Superior Court." The courts held that this did not prohibit special legislation which modified a particular local court's jurisdiction. The new provision<sup>51</sup> says that the General Assembly "shall pass no special or local laws *with relation* to such courts." (3) The old Constitution specifically authorized special legislation expressing legislative approval of county property taxes in excess of the constitutional rate of fifteen cents on the hundred when levied for special purposes. By judicial construction, it permitted, as has been seen, special legislation relating to the items dealt with in the article on Municipal Corporations. These sections have been omitted from the new instrument.<sup>52</sup> Instead, special and local legislation relating to the organization and government of counties, cities, towns and municipal corporations is forbidden, and general laws are required on the subject of local budgets and tax levies.<sup>53</sup> Originally, the Constitutional Commission<sup>54</sup> set up a permanent administrative agency to supervise local taxation and finance, somewhat similar to the Local Government Commission. The General Assembly

<sup>49</sup> Spruill, *The Proposed Constitution and Private, Special and Local Legislation in North Carolina* (1933) 11 N. C. L. Rev. 140. This article was printed before the legislature's amendments of the Commission's proposed constitution were enacted. Thus, the author's statement at the top of page 145 relating to the requirement of a state agency to control local government finance is not now appropriate, for the General Assembly deleted this clause.

<sup>50</sup> *Ibid.* at 142.

<sup>51</sup> *Ibid.* at 142.

<sup>52</sup> *Ibid.* at 144-146.

<sup>53</sup> Query, is *Kornegay v. Goldsboro*, 180 N. C. 441, 105 S. E. 187 (1920) still to control? That case held that similar language in ART. VIII, §4 of the present Constitution did not invalidate a statute authorizing municipalities in Wayne County to sell bonds at less than par. Notice that neither the Commission nor the General Assembly forbade local or special legislation in this connection. In the *Kornegay* case the Court held that the requirement of general laws in relation to local finance imposed only a moral obligation on the legislature to refrain from special legislation.

<sup>54</sup> REPORT, ART. V, §4.

deleted<sup>55</sup> this, but left future legislatures free to continue and to strengthen centralization in this connection.

#### MISCELLANEOUS

Executive and judicial salaries are made subject<sup>56</sup> to "tax levies common to others" as an exception to the provision that these compensations shall neither be increased nor diminished during their terms of office. Members of the General Assembly are made ineligible during the time for which they were elected for appointment to any civil office under the authority of the State, which shall have been created or whose emoluments shall have been increased during their period of service.<sup>57</sup>

Absentee voting was limited by the Commission<sup>58</sup> to "persons physically disabled or absent from home in the service of the State or of the United States". The General Assembly<sup>59</sup> changed this to read: "persons physically disabled or absent from the county in which they are entitled to vote."

The old Constitution is continued in force as statute<sup>60</sup> law by the clause that "the provisions of the prior Constitution and its amendments not embodied herein shall, except as inconsistent with the provisions of this constitution, remain in force as statutory law, subject to the power of the General Assembly to repeal or modify any or all of them."

That the power of the General Assembly is limited only by constitutional restrictions is clarified by a new last section in the Bill of Rights:<sup>61</sup> "This enumeration of rights shall not be construed to limit or restrict other rights of the people not mentioned in this article;" and by the first sentence of the first section in the article dealing with the legislative department:<sup>62</sup> "The legislative authority, which shall be full and complete except as limited in this Constitution, shall be vested in two distinct branches, both dependent on the people, to wit, a Senate and a House of Representatives." Under the last section of the Bill of Rights of the old Constitution there had been some doubt<sup>63</sup> as to whether the legislature was not operating under a grant of powers because of the clause: "This enumeration of rights shall

<sup>55</sup> ART. V, §4.

<sup>56</sup> ART. III, §15; ART. IV, §12.

<sup>57</sup> ART. II, §22.

<sup>58</sup> REPORT, ART. VI, §1.

<sup>59</sup> See Van Hecke, *Legislative Power in North Carolina* (1923) 1 N. C. L. REV. 172.

<sup>60</sup> ART. VI, §1.

<sup>61</sup> ART. XII, §3.

<sup>62</sup> ART. I, §34.

<sup>63</sup> ART. II, §1.

not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people."

#### CONCLUSION

The closing paragraphs of the address<sup>64</sup> on the same subject delivered before the North Carolina State Bar Association last summer by Judge John J. Parker of the United States Circuit Court of Appeals, and a Republican member of the Constitutional Commission, constitute a fitting conclusion for this paper. With very nearly all that he says the present writer finds himself in full accord.

"There are other important changes proposed by the new Constitution which I have not time to dwell upon—changes providing for unified control of the educational system and the more effective administration of the State's charities and its developmental program. I have covered only those which I deem of fundamental importance and which in my judgment not only justify, but make it a matter of supreme importance, that the new Constitution be adopted by the voters of the State.

"In saying this, I would not have you misunderstand me. I would have made a great many more changes than the proposed Constitution makes. I would have changed the constitutional requirements as to jury trial, so as to improve the efficiency of our courts of justice by permitting a verdict upon less than a unanimous vote of the jurors in all except capital cases. I would have abolished the antiquated system of rotation of Superior Court Judges so as to center responsibility for the administration of justice in each judicial district in the Judge resident in that district. I would have required a two-thirds vote of the Legislature to override a gubernatorial veto. I would have permitted the Governor to be elected for more than one term so that the people might have the benefit of his experience in office if they desired it. I would have centered the power and responsibility of the executive department in the Governor by permitting him to appoint the members of his official family, as the President does. To my mind the new Constitution ought to do all of these things. It does none of them. But I am going to support it, not because I think it ideal, but because I think it a tremendous improvement over the present Constitution.

"Let me urge that you approach the study of the proposed Constitution in the same spirit of compromise in which I make this statement. All great improvements in government have resulted from

<sup>64</sup> *Supra* note 17, at 147.

this sort of compromise. We must respect the views of those who differ from us and work with them to produce a plan on which all may unite. If every man insists that the fundamental law incorporate all of his ideas, no Constitution could ever be adopted or amended. The work of compromise, of adjustment of ideas, has been done by the Commission and by the General Assembly. The instrument submitted is a great constructive improvement over the present Constitution. It strikes the shackles from the Legislature and makes it possible for the people's representatives to work out an enlightened taxing system for the State, which will encourage agriculture, forestry and home ownership and promote honesty in the administration of the tax laws. It gives greater power to the Governor in guiding the policies of government, and makes him in truth the leader of the people in directing the State's affairs. It unifies our judicial system under the supervision of the Chief Justice and places in the hands of the judiciary the regulation of procedure in the courts. And, last but not least, it makes possible the revamping of local government along lines of economy and efficiency. I commend it to every forward looking citizen of the State."