Prepared by the North Dakota Legislative Council staff for the Higher Education Committee
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CONSTITUTIONAL ISSUES RELATED TO PROPOSALS UNDER CONSIDERATION BY THE HIGHER EDUCATION COMMITTEE

BACKGROUND

The Constitution of North Dakota adopted in 1889 directed the Legislative Assembly to create a uniform system of free public schools up to and including "the normal and collegiate course." Article VIII, Section 4. Several statutory boards of trustees were originally created to govern the state's institutions of higher education. A separate board of trustees was named for each of the two universities and one for the normal schools.

This system of governments was in existence until 1915 when a single board of regents was created to govern all of the state's higher education institutions. In 1919 the Board of Regents was abolished and control of the institutions of higher education was assigned to the State Board of Control, a three-member board appointed by the Governor with the consent of the Senate and which was later named the State Board of Administration.

An initiated constitutional measure was passed in 1938 creating the State Board of Higher Education.

CONSTITUTIONAL PROVISIONS - BOARD OF HIGHER EDUCATION

Section 6 of Article VIII of the Constitution of North Dakota provides that the State Board of Higher Education has "full authority over the institutions under its control with the right, among its other powers, to prescribe, limit, or modify the courses offered at the several institutions." That section further provides that the board has "full authority to organize or reorganize within constitutional and statutory limitations, the work of each institution under its control . . . ." Section 6 also contains several provisions related to financial matters:

> The legislature shall provide adequate funds for the proper carrying out of the functions and duties of the state board of higher education. (Subsection 5)
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> . . .
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> Said board shall prescribe for all of said institutions standard systems of accounts and records and shall biennially, and within six (6) months immediately preceding the regular session of the legislature, make a report to the governor, covering in detail the operations of the educational institutions under its control. (Subsection 6(c))
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> It shall be the duty of the heads of the several state institutions hereinbefore mentioned, to submit the budget requests for the biennial appropriations for said institutions to said state board of higher education; and said state board of higher education shall consider said budgets and shall revise the same as in its judgment shall be for the best interests of the educational system of the state; and thereafter the state board of higher education shall prepare and present to the state budget board and to the legislature a single unified budget covering the needs of all the institutions under its control. . . . The appropriations for all of said institutions shall be contained in one legislative measure. The budgets and appropriation measures for the agricultural experiment stations and their substations and the extension division of the North Dakota state university of agriculture and applied science may be separate from those of state educational institutions. (Subsection 6(d))
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> The said state board of higher education shall have the control of the expenditure of the funds belonging to, and allocated to such institutions and also those appropriated by the legislature, for the institutions of higher education in this state; provided, however, that funds appropriated by the legislature and specifically designated for any one or more of such institutions, shall not be used for any other institution. (Subsection 6(e))

Subsection 7 of Section 6 of Article VIII of the Constitution of North Dakota also provides for a commissioner of higher education:

> 7. a. The state board of higher education shall, as soon as practicable, appoint for a term of not to exceed three (3) years, a state commissioner of higher education, whose principal office shall be at the state capitol, in the city of Bismarck. Said commissioner of higher education shall be responsible to the state board of higher education and shall be removable by said board for cause.
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> b. The state commissioner of higher education shall be a graduate of some reputable college or university, and who by training and experience is familiar with the problems peculiar to higher education.
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> c. Such commissioner of higher education shall be the chief executive officer of said

state board of higher education, and shall perform such duties as shall be prescribed by the board.

As noted previously, Section 6 of Article VIII of the Constitution of North Dakota provides that the State Board of Higher Education is to have full authority over the institutions under its control. That section also provides that the State Board of Higher Education is to have full authority to organize or reorganize, within constitutional and statutory limitations, the work of each institution under its control. Section 6 of Article VIII is the comprehensive section that creates the State Board of Higher Education. Sections 12 and 13 of Article IX of the Constitution of North Dakota list public land grant institutions and provide the acreage allotted to each under the grants of land by Congress. The last paragraph of Section 13 of Article IX, following a listing of certain public institutions (including the higher education institutions referred to above), reads:

> No other institution of a character similar to any one of those located by article IX, section 12, or this section shall be established or maintained without an amendment of this constitution.

NAMES OF HIGHER EDUCATION INSTITUTIONS

There are eight constitutional institutions of higher education in North Dakota. Each of these institutions is mentioned twice in the constitution--once in Section 6 of Article VIII and once in either Section 12 or Section 13 of Article IX. The following list reflects the names of each institution as referred to in statutes or appropriations bills or by action of the State Board of Higher Education and the constitutional references to names and locations of those institutions:

1. The University of North Dakota, referred to as the "state university and the school of mines, at Grand Forks, with their substations" in Section 6 of Article VIII and as the "state university and the school of mines at the city of Grand Forks, in the county of Grand Forks" in Section 12 of Article IX.
2. North Dakota State University, referred to as the "state agricultural college and experiment station, at Fargo, with their substations" in Section 6 of Article VIII and as the "North Dakota state university of agriculture and applied science at the city of Fargo, in the county of Cass" in Section 12 of Article IX.
3. The State College of Science, referred to as the "school of science, at Wahpeton" in Section 6 of Article VIII and as "a school of science or such other educational or charitable institution as the legislative assembly may prescribe, at the city of Wahpeton, in the county of Richland" in Section 13 of Article IX.
4. Valley City State University, referred to as one of the "state normal schools and teachers colleges" in Section 6 of Article VIII and as a "state normal school at the city of Valley City, in the county of Barnes" in Section 12 of Article IX.
5. Mayville State University, referred to as one of the "state normal schools and teachers colleges" in Section 6 of Article VIII and as a "state normal school at the city of Mayville, in the county of Traill" in Section 12 of Article IX.
6. Minot State University, referred to as one of the "state normal schools and teachers colleges" in Section 6 of Article VIII and as a "state college at the city of Minot in the county of Ward" in Section 13 of Article IX.
7. Dickinson State University, referred to as one of the "state normal schools and teachers colleges" in Section 6 of Article VIII and as a "state college at the city of Dickinson in the county of Stark" in Section 13 of Article IX.
8. Minot State University - Bottineau, referred to as the "school of forestry, at Bottineau" in Section 6 of Article VIII and as a "school of forestry, or such other institution as the legislative assembly may determine, at such place in one of the counties of McHenry, Ward, Bottineau, or Rolette, as the electors of said counties may determine by an election for that purpose" in Section 13 of Article IX.

The language in Section 13 of Article IX to the effect that no other similar institutions to those named could be established or maintained without a constitutional amendment was for many years viewed as a limitation of the power of both the Legislative Assembly and the State Board of Higher Education to make substantial changes in the roles of the institutions. That is the reason a constitutional amendment was used to change the name of the North Dakota Agricultural College to North Dakota State University of Agriculture and Applied Science in 1960. However, the Attorney General issued an opinion on January 28, 1983, to the effect that the name of an educational institution can be either established by the Legislative Assembly or the State Board of Higher Education. The Attorney General said:

> Accordingly, it is my opinion that the Legislature and the State Board of Higher Education have, through longstanding practice and action, established that the name of an institution of higher education, its character in terms of the curriculum offered and the degrees granted, is set not by the Constitution but by the

> Legislature and the State Board of Higher Education. Accordingly, it is my opinion that the Legislature can change the name of Minot State College and that it can use the word "university" or whatever name it chooses to use for that institution located in the city of Minot as required by Article IX, Section 13(5) of our Constitution.

It is significant that this opinion quoted, but did not discuss the relevance of, the last paragraph of Section 13 of Article IX, which provides that no other institution of a character similar to any of those listed in Section 12 or 13 could be established or maintained without an amendment to the constitution.

LUMP SUM APPROPRIATIONS

One proposal under consideration by the Higher Education Committee is for a lump sum appropriation to the State Board of Higher Education rather than individual appropriations to each institution under the control of the board. This proposal calls into question a number of issues relating to the separation of powers between the branches of government, the delegation of authority by the Legislative Assembly to the State Board of Higher Education, and specific constitutional provisions relevant to this issue.

The Constitution of North Dakota provides for three branches of state 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). 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."

The appropriation of state funds is generally recognized to be a prerogative of the legislative branch of state government. Section 12 of Article X of the Constitution of North Dakota provides, in part:

> All public moneys, from whatever source derived, shall be paid over monthly . . . to the state treasurer, and deposited by him to the credit of the state, and shall be paid out and disbursed only pursuant to appropriation first made by the legislature . . . .

Concerning the power of the Legislative Assembly to appropriate funds, the North Dakota Supreme Court in *Verry v. Trenbeath*, 148 N.W.2d 567 (N.D. 1967), said:

> Because the State Constitution does not confer power on the legislature, but is a limitation on power and therefore the legislature may enact any law not expressly or impliedly forbidden by the Constitution of the State or prohibited by the Constitution of the United States, the legislature may in the exercise of its power appropriate and expend money for whatever purpose it pleases unless its action violates a limitation found, either expressly or impliedly, in the Constitution.

As stated previously, the Constitution of North Dakota provides for three coequal branches of state government. In addition, the Constitution of North Dakota gives considerable autonomy to the State Board of Higher Education which originated in the adoption of an initiated measure in 1938 and is now found in Section 6 of Article VIII of the Constitution of North Dakota. That provision gives the State Board of Higher Education broad authority over the governance of the institutions of higher education in the following language:

> The said state board of higher education shall have full authority over the institutions under its control with the right, among its other powers, to prescribe, limit, or modify the courses offered at the several institutions.

However, the Legislative Assembly plays a considerable role in the constitutional framework concerning higher education, particularly insofar as the appropriation of funds is concerned. The following provisions of Section 6 of Article VIII are relevant:

1. Subsection 5 provides that the Legislative Assembly "shall provide adequate funds for the proper carrying out of the functions and duties of the state board of higher education."
2. Subsection 6(b) provides that the State Board of Higher Education "shall have full authority to organize or reorganize **within constitutional and statutory limitations**, the work of each institution under its control, and do each and everything necessary and proper for the efficient and economic administration of said state educational institutions." (emphasis supplied)
3. Subsection 6(d) provides that it is the duty of the heads of the several state institutions to submit budget requests to the State Board of Higher Education, and the board is to "prepare and present to the state budget board and to the legislature a single unified budget covering the needs of all the institutions under its control."
4. Subsection 6(d) also provides that the appropriations for all of the institutions of higher education are to be contained in one legislative measure.
5. Subsection 6(e) provides that the State Board of Higher Education is to have "the control of the expenditure of the funds belonging to, and allocated to such

> institutions and also those appropriated by the legislature, for the institutions of higher education in this state; provided, however, that funds appropriated by the legislature and specifically designated for any one or more of such institutions, shall not be used for any other institution."

The language in Section 6(6)(e) giving the State Board of Higher Education control of the expenditure of funds of the institutions can be used to make the argument that the board has considerable leeway over the expenditure of appropriated funds, which could lead to the conclusion that the Legislative Assembly could make a lump sum appropriation for allocation by the board. On the other hand, the language that funds appropriated and specifically designated for any one or more of the institutions cannot be used for any other institution might lead to the conclusion that it is intended that the Legislative Assembly is to designate the institutions for which funds are appropriated.

Although there have been no precedents concerning the issue of a lump sum appropriation for salaries, the Legislative Assembly in 1965 attempted to authorize the construction of buildings on college campuses and leave it to the discretion of the State Board of Higher Education to determine which facilities and at which locations the buildings were to be constructed. That legislation was challenged and taken to the North Dakota Supreme Court.

Nord v. Guy, 141 N.W.2d 395 (N.D. 1966), involved a North Dakota resident, the father of two University of North Dakota students, who sued when his children were required to pay a facility fee instituted pursuant to 1965 Session Laws Chapter 155. Chapter 155 authorized the issuance of $10 million of general obligation bonds for the sole purpose of providing and equipping facilities at the state-supported institutions of higher education as determined by and in accordance with priorities set by the board. Facilities included buildings used for classrooms, libraries, laboratories, workshops, administration and maintenance, and other purposes. The court recognized the issue as:

> Does the legislature, in the Act, 'declare the policy of the law and fix the legal principles which are to control,' and is the administrative body invested only with power 'to ascertain the facts and conditions to which the policy and principles apply'?

The plaintiff argued Section 19, which allowed the proceeds of the bonds to be used for constructing and equipping of facilities authorized by the Act as determined by the board and in accordance with priorities prescribed by the board, was an unconstitutional delegation.

In addressing this issue, the State Board of Higher Education asserted its status as a constitutional entity and its control and administration of the institutions to support its authority to prescribe the use of the bond funds. Following a lengthy discussion of this assertion, the court determined that the State Board of Higher Education was not vested with legislative powers:

> We must examine [Article VIII, Section 6] of the Constitution to determine whether it grants to such Board jurisdiction to carry out the functions attempted to be delegated to such Board under Section 19 of the Act. This [Section] grants to the State Board of Higher Education power for the "control and administration" of the institutions described therein. . . .
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> Thus it becomes clear that the Board is created for the 'control and administration' of the said educational institutions, which in general terms means the management and supervision thereof.
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> Section 6(a) . . . incorporates by reference the existing powers of the State Board of Administration as they existed at the time of the adoption of [Section 6]. . . . The State Board of Administration was created by Chapter 71, Session Laws of 1919, 'for the general supervision and administration of all State Penal, Charitable, and Educational Institutions of the State, and the General Supervision of . . . the public and common schools of the State.' The State Board of Administration possessed no legislative powers. Their powers were supervisory and administrative only.
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> **Thus the State Board of Higher Education in assuming the powers of the State Board of Administration was not vested with legislative powers**.
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> We now examine Sections 6(b) through 6(e) in the light of the declaration of purpose that the Board is created for the 'control and administration' of the State institutions of higher education. It is clear that these powers vested in the State Board of Higher Education are administrative. **The constitutional provision does not create a 'miniature legislature.'** The State Board of Higher Education became a part of the executive branch of government. (emphasis supplied)

Consequently, the State Board of Higher Education did not receive any additional deference in the determination of delegation of legislative power due to its status as a constitutional entity.

In *Nord v. Guy*, the Supreme Court employed previously stated standards found in *State ex rel. Kaufman v. Davis*, 229 N.W. 105 (N.D. 1930), and *Wilder v. Murphy*, 218 N.W. 156 (N.D. 1928). In *Nord* the court quoted language in *Kaufman* which the court used in comparing *Kaufman* with *Wilder*:

> The statute under consideration here is strikingly different from that involved in *Wilder*. . . . Under the act there involved the board of administration was authorized to enter into arrangements with holding associations for the construction of dormitories at any or all of the educational institutions of the state, without any limit as to the number of dormitories, or amount to be expended in the construction of each. There was no pretense of a legislative determination that there existed any necessity for a dormitory at any of such institutions, and **no rule was formulated by the legislature to guide the board of administration in determining whether there was such necessity**; but the board of administration was vested with practically unlimited and arbitrary power as regards the construction of dormitories under the act. **So far as the provisions of that act were concerned the board of administration might have granted permission to construct a dormitory at one institution and denied the right to construct a dormitory at another institution under an identical state of facts. It might even have granted the right to construct a dormitory at one institution and denied the right to construct a dormitory at another institution even though there was a greater necessity for a dormitory at the latter institution.** The act under consideration here is different. Here there is a specific statement as to the number of dormitories to be constructed and a limit of the cost of each dormitory. It is in effect a legislative determination that a necessity exists justifying the construction of any or all of the buildings specified in the act upon the conditions therein prescribed; and the board of administration is granted power to perform, and charged with the corresponding duty of performing, the acts prescribed by the law. In short, the legislation involved in *Wilder* . . . delegated to the board of administration the power to make law; whereas, in the statute involved here, 'the legislature itself has passed upon the expediency of the law, and what it shall be,' and the board of administration 'is entrusted with no authority or discretion upon these questions.' (emphasis supplied)

Although the court had found sufficient guidelines in *Kaufman* because the Legislative Assembly had specified the number of dormitories to be constructed and a limit on the cost of each, the court found no such guidelines existed in the legislation under consideration in *Nord*. The court said:

> In this case the Legislature has not determined the question of the necessity of any particular type of building, at any particular institution, nor laid down any rule to guide the Board of Higher Education in determining these questions. It has authorized the construction of facilities at some or all of the institutions. It has attempted to delegate to the Board the power to determine what facilities shall be constructed at the different institutions, and the amount, if any, to be expended at each. This, we find, is an unconstitutional delegation of legislative authority. The Board of Higher Education is granted the power to 'declare the policy of the law and fix the legal principles which are to control.' This is a legislative function.

Therefore, *Nord v. Guy* found the 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 was an unlawful delegation of legislative authority. 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 are to control the action taken. See *MDU v. Johanneson*, 153 N.W.2d 414 (N.D. 1967).

Ralston Purina Company v. Hagemeister, 188 N.W.2d 405 (N.D. 1971), was a case in which the authority of the Poultry Improvement Board to establish license fees was challenged as an unlawful delegation of legislative authority. 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 said:

> It is elementary that . . . 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. . . .
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> 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. (emphasis supplied)

. . .

. . . **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.** (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.** (emphasis supplied)

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 *County of Stutsman v. State Historical Soc. of North Dakota*, 371 N.W.2d 321 (N.D. 1985), the court found this power did not give the board the authority to make law but only to execute the law.

In 1990 the North Dakota Supreme Court in *North Dakota Council of School Administrators v. Sinner,* 458 N.W. 2d 280, stated that the court now follows the modern view that recognizes that "in a complex area, it may be necessary and appropriate to delegate in broad and general terms, as long as there are adequate standards and procedural safeguards." In that case, the Supreme Court concluded that the Legislative Assembly's delegation of authority to the director of the budget to make allotments reducing appropriations was not an unconstitutional delegation of the authority of the Legislative Assembly. Thus, it is clear that the Legislative Assembly may delegate certain responsibilities to other governmental entities if there are adequate standards and procedural safeguards. However, there is a specially concurring opinion in which two of the justices pointed out that the statute under consideration 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 notes that there are no standards by which the director of the budget was guided as to the extent of the reductions or the obligation to restore those reductions if revenue estimates improved. The specially concurring opinion concludes with the following caveat:

> I am concerned the majority opinion will be relied upon to expand the delegation of legislative authority in this troublesome area of appropriations. I suggest that while affirming the denial of the writ of mandamus in this instance, we ought to sound a warning that the current statute contains legal pitfalls which could result in a contrary conclusion in other circumstances.

As can be seen from these cases, the key to whether there has been an unlawful delegation of legislative authority is whether the law provides reasonably clear guidelines that provide adequate standards and procedural safeguards so that it is clear that it is the Legislative Assembly, and not anyone charged with administering the law, who decides what the law is. It should be emphasized that the key is in guidelines that are provided in the law enacted by the Legislative Assembly which guide the administrators in carrying out the law. Provisions that might require actions that follow the enactment of the law, such as requiring accountability on the part of administrators, do not make any difference in resolving whether there has been an unlawful delegation of legislative authority.

In addition to the delegation of legislative authority question, another point that is essential to this

question is that the Supreme Court has held, in *State ex rel. Walker v. Link*, 232 N.W.2d 823 (N.D. 1975), that neither the Legislative Assembly nor the people can, without a constitutional amendment, refuse to fund a constitutionally mandated function. Therefore, delegating to the State Board of Higher Education the authority to determine which institutions are to receive appropriated funds cannot be used in a manner that results in not funding one of the constitutionally created institutions.

If the Legislative Assembly passes an appropriation bill that contains a lump sum appropriation for institutions of higher education, there will be a presumption of constitutionality that will apply to that enactment. The Supreme Court has repeatedly and consistently held that all enactments of the Legislative Assembly are presumed to be constitutional. See *Benson v. N.D. Workmen's Comp. Bureau*, 283 N.W.2d 96 (N.D. 1979). So long as legislative enactments do not infringe upon constitutional rights and privileges, expressly or necessarily implied, the legislature's will is absolute. *State v. Moore*, 286 N.W.2d 274 (N.D. 1979). In describing the presumption of constitutionality which applies to every legislative Act, the North Dakota Supreme Court, in *Menz v. Coyle*, 117 N.W.2d 290 (N.D. 1962), said every legislative enactment will be upheld unless it is manifestly in violation of the state or federal constitution. The court further said that the presumption is conclusive unless the statute is clearly shown to contravene some provision of the state or federal constitution. Citing previous cases, the court said that the courts will not declare a statute void unless its invalidity is, in the judgment of the court, beyond a reasonable doubt. Also, a legislative enactment may not be declared unconstitutional unless at least four of the five members of the Supreme Court agree that the enactment violates the constitution. See Section 4 of Article VI of the Constitution of North Dakota.

CONTINUING APPROPRIATIONS

Another proposal under consideration is to remove institutional income, in addition to the state general fund appropriation, from the appropriation process. The appropriation of state funds is a prerogative of the legislative branch of state government. Section 12 of Article X of the Constitution of North Dakota provides, in part:

> All public moneys, from whatever source derived, shall be paid over monthly . . . to the state treasurer, and deposited by him to the credit of the state, and shall be paid out and disbursed only pursuant to appropriation first made by the legislature . . . .

This constitutional provision also contains several specific exceptions, such as for the financial transactions of the Bank of North Dakota, payments under the workers' compensation program, and refunds of taxes. It is also relevant that Section 6(6)(e) of Article VIII of the Constitution of North Dakota provides that the State Board of Higher Education has control of the expenditure of funds belonging to, and allocated to the institutions and "also those appropriated by the legislature."

As a general rule, continuing appropriations have not been favored. In *Menz v. Coyle*, 117 N.W.2d 290 (N.D. 1962), the North Dakota Supreme Court was asked to decide whether a 1947 law violated the state constitution. The law provided for an increase of various court filing fees and provided that "all funds received by the state bar association as herein provided shall be used for legal research and education, and the supervision and improvement of the judicial system of the state of North Dakota." Citing the case of *Campbell v. Towner County*, 71 N.D. 616, 3 N.W. 822 (N.D. 1941), the court said an "appropriation," as the word is used in the constitution, is "the setting apart of **a definite sum for a specific object** in such a way that the public officials can use the amount appropriated, and no more than the amount appropriated." (emphasis supplied). Because there was no specific and direct appropriation of a definite sum, the court found there was no valid appropriation of the moneys in question.

The North Dakota Supreme Court upheld a continuing appropriation in *Gange v. Clerk of Burleigh County District Court*, 429 N.W.2d 429 (1988). The following quotes from that decision are relevant.

> Gange claimed that Chapter 14-06.1 also violates Article X , § 12 of the state constitution apparently because the fees are not required to be paid to the State Treasurer at the outset and because the Legislature cannot constitutionally "bind future Legislatures" through a continuing appropriation. These assertions are without merit.
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> Article X, § 12 requires that "[a]ll public moneys, from whatever source derived, shall be paid over monthly by the public official . . . receiving the same, to the state treasurer, and deposited by him to the credit of the state, and shall be paid out and disbursed only pursuant to appropriation first made by the legislature." Section 14-06.1-15, N.D.C.C., specifically directs the clerks of court to pay the marriage dissolution fee to the State Treasurer for deposit in the state's displaced homemaker account.
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> Nor does Chapter 14-06.1 "bind future Legislatures" through a continuing appropriation. Continuing appropriations are nothing new to the legislative process [see *State v. Sorlie*, 56 N.D. 650, 219 N.W. 105 (1928)], and we agree with those courts which

have held under similar state constitutional provisions that continuing appropriations are a valid "appropriation first made by the legislature." *See, e.g., In re Continuing Appropriations*, 18 Colo. 192, 32 P. 272 (1893), *State v. Burdick*, 4 Wyo. 272, 33 P. 125 (1893). Moreover, a continuing appropriation is "continuing" only if future legislative assemblies choose not to repeal or modify it. *See State ex rel. Lesmeister v. Olson*, 354 N.W.2d 690, 700 (N.D. 1984). This appropriation does not violate Article X, § 12 or unconstitutionally bind future legislatures.

It could be argued that the language in Section 6(6)(e) of Article VIII providing that the State Board of Higher Education has the control of the expenditure of funds belonging to and allocated to the institutions constitutes a self-executing appropriation. In *State ex rel. Walker v. Link*, 232 N.W.2d 823 (N.D. 1975), the North Dakota Supreme Court pointed out that the court has twice held that appropriations may be made by the constitution and may be self-executing. The court quoted *Langer v. State*, 69 N.D. 129, 284 N.W. 238 (1939), and *Ford Motor Company v. Baker*, 71 N.D. 298, 300 N.W. 435 (1941). In the *Langer* case, the court pointed out that the appropriations in Section 12 of Article X for the state hail insurance fund, the state bonding fund, the start fire and tornado fund, and the workmen's compensation fund were limited to certain definite purposes, and there was no appropriation, for instance, for administrative purposes. Therefore, the court said legislative appropriations were necessary in the carrying on of the activities of the funds in question. The following quote from this case points out some of the requirements of a self-executing constitutional appropriation:

> Attention is called to the general rule that 'constitutional provisions are not to be construed as themselves making appropriations unless they are clearly so intended.' 59 C.J., p. 237. It is true, it is rather unusual to make appropriations in a constitutional provision. Ordinarily, appropriation is a matter for the Legislature. But, if the people determine to make an appropriation in a constitutional provision, and manifest that determination by what is said in the provision, that is an end of the matter.
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> In *Ford Motor Company*, the court quoted this material from *Langer* and pointed out that constitutional provisions, if specifically appropriating particular funds or sums for designated purposes, may be self-executing appropriations. The court went on to find the specific language "there is hereby appropriated" in the constitutional provision for the appropriation of refunds under the state income tax law operated to appropriate moneys for the payment of a judgment rendered against the state prior to the adoption of this provision in the constitution.

COMMISSIONER OR CHANCELLOR

Section 6 of Article VIII of the Constitution of North Dakota provides that the State Board of Higher Education is to appoint a commissioner of higher education who is to be the chief executive officer of the board and who is to perform duties as prescribed by the board. During the 1989-90 interim, the Legislative Council's Higher Education System Review Committee met several times with the State Board of Higher Education as the board was developing the first statutorily mandated seven-year plan. Based on the seven-year plan, the State Board of Higher Education began implementing a one-university system headed by a chancellor.

The Higher Education System Review Committee recommended 1991 House Concurrent Resolution No. 3005, which proposed a constitutional amendment to remove the restriction on the transfer of funds between higher education institutions and to replace references to the commissioner of higher education with a chief executive officer position, with the idea the board could call the chief executive officer a chancellor.

House Concurrent Resolution No. 3005 was heard by the Joint Constitutional Revision Committee and was defeated on the House floor after the committee recommended do not pass. The minutes reflect opposition from legislators representing districts with smaller institutions of higher education.

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INSTITUTIONS OF HIGHER EDUCATION IN NORTH DAKOTA - CONSTITUTIONAL AND STATUTORY BASES

This memorandum was requested to provide information on the constitutional and statutory bases for the institutions of higher education in North Dakota and the authority of the State Board of Higher Education concerning the missions of those institutions.

There are eight constitutional institutions of higher education in North Dakota. Each of these institutions is mentioned twice in the Constitution of North Dakota. The following list reflects the names of each institution as established by law or by action of the State Board of Higher Education and the constitutional references to names and locations of those institutions:

1. The University of North Dakota, referred to as the "state university and the school of mines, at Grand Forks, with their substations" in Section 6 of Article VIII and as the "state university and the school of mines at the city of Grand Forks, in the county of Grand Forks" in Section 12 of Article IX.

2. North Dakota State University, referred to as the "state agricultural college and experiment station, at Fargo, with their substations" in Section 6 of Article VIII and as the "North Dakota state university of agriculture and applied science at the city of Fargo, in the county of Cass" in Section 12 of Article IX.

3. The State College of Science, referred to as the "school of science, at Wahpeton" in Section 6 of Article VIII and as "a school of science or such other educational or charitable institution as the legislative assembly may prescribe, at the city of Wahpeton, in the county of Richland" in Section 13 of Article IX.

4. Valley City State University, referred to as one of the "state normal schools and teachers colleges" in Section 6 of Article VIII and as a "state normal school at the city of Valley City, in the county of Barnes" in Section 12 of Article IX.

5. Mayville State University, referred to as one of the "state normal schools and teachers colleges" in Section 6 of Article VIII and as a "state normal school at the city of Mayville, in the county of Traill" in Section 12 of Article IX.

6. Minot State University, referred to as one of the "state normal schools and teachers colleges" in Section 6 of Article VIII and as a "state college at the city of Minot in the county of Ward" in Section 13 of Article IX.

7. Dickinson State University, referred to as one of the "state normal schools and teachers colleges" in Section 6 of Article VIII and as a "state college at the city of Dickinson in the county of Stark" in Section 13 of Article IX.

8. Minot State University - Bottineau, referred to as the "school of forestry, at Bottineau" in Section 6 of Article VIII and as a "school of forestry, or such other institution as the legislative assembly may determine, at such place in one of the counties of McHenry, Ward, Bottineau, or Rolette, as the electors of said counties may determine by an election for that purpose" in Section 13 of Article IX.

Section 6 of Article VIII is the comprehensive section that creates the State Board of Higher Education. Sections 12 and 13 of Article IX both list public land grant institutions and provide the acreage allotted to each under the grants of land by Congress.

Section 6 of Article VIII provides that the State Board of Higher Education is created for the control and administration of the eight institutions listed above and "such other state institutions of higher education as may hereafter be established." This section further provides the constitutional basis for the authority of the State Board of Higher Education over the institutions under its control is the following language:

> The said state board of higher education shall have full authority over the institutions under its control with the right, among its other powers, to prescribe, limit, or modify the courses offered at the several institutions. . . . The said state board of higher education shall have full authority to organize or reorganize within constitutional and statutory limitations, the work of each institution under its control, and do each and everything necessary and proper for the efficient and economic administration of said state educational institutions.

The last paragraph of Section 13 of Article IX, following a listing of certain public institutions (including the higher education institutions referred to above), reads as follows:

> No other institution of a character similar to any one of those located by article IX, section 12, or this section shall be established or maintained without an amendment of this constitution.

North Dakota Century Code Section 15-10-01 lists the institutions to be administered by the State Board of Higher Education. This listing includes 11 institutions of higher education, the eight constitutionally established institutions plus junior colleges and off-campus educational centers in Bismarck, Devils Lake, and Williston. The statute provides:

> **15-10-01. State board of higher education - Institutions administered by board.** The state board of higher education shall have the control and administration of the following state educational institutions:
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> 1. The state university and the school of mines at Grand Forks, with their substations.
>
> 2. The North Dakota state university of agriculture and applied science and the agricultural experiment state at Fargo, with their substations or centers.
>
> 3. The school of science at Wahpeton.
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> 4. The Valley City state university, Mayville state university, Minot state university, and Dickinson state university.
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> 5. The school of forestry at Bottineau.
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> 6. The following junior colleges and off-campus educational center: Bismarck state college, university of North Dakota - Lake Region, and the university of North Dakota - Williston center.
>
> 7. And such other state institutions of higher education as may be established.

Bringing the three junior colleges under the jurisdiction of the State Board of Higher Education was accomplished by the enactment of Senate Bill No. 2073 in 1983. An initiated measure was placed on the general election ballot in 1984 to require the State Board of Higher Education to give up control and financial responsibility over those three colleges. The initiated measure was disapproved by a vote of 107,357 to 182,989. The 1983 Legislative Assembly also passed House Bill No. 1500, which provided a change of name of Minot State College to Dakota Northwestern University. That bill was referred and disapproved by the voters at the 1984 primary election by a vote of 41,234 to 51,080.

The 1987 Legislative Assembly enacted House Bill No. 1300, which provided for a change of name from Bismarck Junior College to Bismarck State College. In the appropriation bill for higher education in that year, House Bill No. 1003, the names of the state

normal and teachers colleges were changed to Valley City State University, Mayville State University, Minot State University, and Dickinson State University. That legislation also changed the name of Lake Region Community College to University of North Dakota - Lake Region.

Although the name of the North Dakota Agricultural College in Fargo was changed to North Dakota State University of Agriculture and Applied Science by constitutional amendment in 1960, the Attorney General issued an opinion on January 28, 1983, to the effect that the name of an educational institution can be either established by the Legislative Assembly or the State Board of Higher Education. The Attorney General said:

> Accordingly, it is my opinion that the Legislature and the State Board of Higher Education have, through longstanding practice and action, established that the name of an institution of higher education, its character in terms of the curriculum offered and the degrees granted, is set not by the Constitution but by the Legislature and the State Board of Higher Education. Accordingly, it is my opinion that the Legislature can change the name of Minot State College and that it can use the word "university" or whatever name it chooses to use for that institution located in the city of Minot as required by Article IX, Section 13(5) of our Constitution.

It is significant that this opinion quoted, but did not discuss the relevance of, the last paragraph of Section 13 of Article IX, which provides that no other institution of a character similar to any of those listed in Sections 12 or 13 could be established or maintained without an amendment to the constitution.

Several statutes that required that specific courses be taught at specific institutions were repealed by the Legislative Assembly in 1991. Although some of these statutes had been in effect since territorial days, it was generally agreed that the authority to prescribe courses belongs to the State Board of Higher Education under the language in Section 6 of Article VIII that the board has "full authority over institutions under its control with the right, among its other powers, to prescribe, limit, or modify the courses offered at the several institutions."