Can American State Legislatures Keep Pace?

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The great industrial and technological advance of our society has been founded upon the assumption that a product or a process can be improved. The same assumption has seldom been applied to the product or the process of government. This juxtaposition has often led to the easy conclusion that we should apply industrial techniques and scientific method to the governmental function. Without a doubt the cold application of such methods to government would produce many improvements; but so long as government is founded upon representative concepts, criticisms of inefficiency, bureaucracy, incompetence, and ineffectiveness must meet the challenge that if the people really want improvement they have the capacity to achieve it.

There are other obstacles, too. The scientists may control their experiments in the laboratory, but the lawyers and the social scientists have no testing ground but society itself, and if their predictions are inaccurate the entire society feels directly and immediately the consequences of their errors. Thus, caution on their part is understandable and resistance to accept change is but a product of the law of self-preservation.

Scientists fought against this same traditionalism in their fields and emerged victorious; but with few exceptions lawyers and social scientists have preferred the quieter waters and have seldom ventured into the turbulence of governmental reorganization and reform. Nevertheless, there has been a recurrent demand for change in governmental processes and particularly those which involve the legislative function.

The proposals which have received the greatest popular support have been those which have sought to restrain government. The great constitution-making and amending period, from 1850 to 1880 saw provision after provision inserted for the express purpose of limiting governmental and primarily legislative power. This popular distrust of government is a characteristic and healthy attribute of American society, but it can well be questioned after one hundred years of experience whether these restrictions have helped or hindered the cause of popular control of government. In the last decade a resurgent interest in "improving the legislative process" has found expression in legal periodical literature, the political science journals, in government reports, and in statutory and constitutional enactments.

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Most of these proposals have received little public support; most of them have been formal and structural; most of them fail to recognize that the legislature is an integral part of a total governmental process; most of those which have been adopted have had little or no effect upon the legislative process or its product. Thus, to add to this literature is an uninviting and hazardous task. Consequently, the material which follows is presented not as tailor-made solutions but rather as a series of issues to be considered before any change is contemplated.

The defect of most proposals for change has been the assumption that alteration either in the composition of the legislature or in its procedure will produce important and substantial improvements in the legislative product. This improvement will not occur unless there is a deep-seated and firm conviction in society that the legislative department is responsible for and capable of making the change, that such change is desirable, and that it is worth while to make the attempt. No proposal will succeed unless it has the vigorous and whole-hearted support of the leadership of a particular state. Even a poor proposal will succeed if a majority has the determination to make it successful. In short, if a state believes that its governmental processes should and can be improved, almost any change will succeed; but if the change is made without popular support and upon the assumption that failure is inevitable, that surely will be the result.

If change is desired a catalog of legislative experiments will be a useful tool for those who believe that improvements are possible. These experiments can be more effectively classified in terms of their objectives rather than in terms of their mechanics. So stated they are:

1. Leadership is the greatest legislative need.
2. The legislative function cannot be exercised properly with sessions limited in time.
3. Legislative procedure prevents the enactment of necessary legislation, or permits the passage of undesirable legislation.
4. The legislature attempts to regulate too much.
5. The absence of complete records makes the legislative process unreliable.

The resolution of these questions can be achieved only by detailed studies within a given state—not by logic, law or science. In government as nowhere else, the popular will, not perfection, is the ultimate yardstick.

**Leadership**

The success of any organization, private or governmental, depends upon its ability to maintain leadership. Critics of the legislative process often suggest that new methods for the selection of representatives be adopted or that new and better persons be attracted as
candidates, thereby implying that present personnel is inadequate for the task of representing the people. These proposals usually recommend redistricting, reducing the number of legislators, an increase in legislators' salaries, or the extension of social security to legislators. None of these proposals attacks the fundamental issue: Is present legislative leadership insufficient? All of the evidence indicates that the responsible committee chairmen, the political leaders of the legislature, possess equal leadership ability with men in comparable positions in industry, the judiciary, and the professions.

The real issue is the direction of leadership which we expect of our legislators. Many believe that the most desirable legislative goals are inaction, on the assumption that inaction keeps down taxes, reduces bureaucracy, and achieves a Spencerian simplicity in government and society which they philosophically desire. Others believe legislative inactivity reduces party responsibility and thus lessens the risk of defeat in future elections. Others feel that legislative leadership implies the serious and continuous review of all governmental operations and the responsibility for change as social and economic conditions require. Thus, on fundamental policy questions the issue of legislative responsibility is usually not one involving the quality and ability of legislators but rather it is one of political philosophy and political responsibility.¹

Legislative leadership, however, involves many questions besides the basic policy issues which society itself must determine. Frequently, the demand for improved legislative personnel reflects the need for improvement in the quality of statutes and in legislative procedure. These demands assume that improvement must come from the legislators personally. This is almost always untrue. Legislators can provide only the leadership, and the appropriations, to achieve these results. An elected representative, no matter what his qualifications may be, cannot be an expert on all of the complicated and technical problems that are presented to the legislature. Indeed, the more expert he is on one subject the less likely he is to be expert on all others, for indeed that is the very nature of specialization. Thus, to demand that the elected representatives be experts is to demand both an unattainable and an undesirable goal. The qualities that the legislator should have are courage, leadership, common sense, a desire to represent his constituents, and an awareness that expert assistance is necessary if he is to successfully discharge his responsibility.

No one expects the judge or lawyer to be an expert on matters of medicine, engineering, agriculture or business practice; but every-

¹For a detailed exploration of the problem see the brilliant article by Marx, Legislation, Representation, and the Party System, 14 U. of Prrr. L. Rev. 151 (1953).
one expects the lawyer to present expert witnesses and the judge to consider carefully all expert testimony. No more and no less should be expected of the legislator.

But legislative leadership may often be effectively expressed through the selection of the non-elected legislative personnel. They have three functions: (1) providing protection and communication for the elected members, (2) providing technical aid for the procedures of the two houses, and (3) giving expert opinion on legislative proposals. The first function involves relatively unskilled appointees such as pages, doorkeepers, receptionists and mail clerks. They are usually appointed for personal or patronage reasons and inasmuch as their work does not materially affect the ultimate legislative product, further discussion of their part in the legislative operation is unnecessary.

Personnel for the second function is also selected, as a general rule, on a patronage basis. They include the secretaries, typists, proofreaders, and journal clerks. Considering that their employment is for but a few months in each biennium it is amazing that persons of any competence can be acquired at all. Their acquisition for so short a period and for such modest compensation is a real tribute to the legislative process and to the political parties which procure them.

There are areas, however, where the legislative process would be materially improved by more skilled personnel. The average house journal is a sketchy summary of action taken or refused. Complete transcripts of legislative debates are unrecorded. Committee hearings go unreported. State legislatures need and should be willing to pay for an adequate corps of secretaries as competent as the best Congressional reporters.

Real leadership requires vision to anticipate need, the courage to fulfill those needs either directly or by delegation, and the assumption of responsibility for the results. Nowhere has legislative leadership failed so universally as in its inability to recognize the need for a highly trained non-elected staff of technical assistants. Unlike Congress where each important standing committee has its own experts, each legislator his own office staff, and each house its own legislative reference bureau and the assistance of the Library of Congress Legislative Reference Service and of all the administrative agencies, the average state legislature has only one over-worked and under-paid legislative reference bureau.

In most states the legislative reference bureau² is inadequate. A

²In Colorado, for example, the bureau is placed in the Attorney General's offices. It is composed of a director and a secretary and not to exceed five stenographers. Colo. Stat. Ann. c. 74, §§ 20-29 (Vol. 3A 1952). Appropriations for each of the past two fiscal years for personal services have averaged slightly in excess of.
majority of its staff is employed only for the duration of the legislative session. Inasmuch as it is traditional that the bureau's services are available to every legislator, it is either deluged with trivial requests for unimportant bills or it is ignored. Major policy bills where the bureau could render invaluable service if properly staffed are seldom if ever referred to the bureau unless it is for "courtesy clearance." As a result, except for Wisconsin, the legislative reference idea has never made significant and sustained contributions to the quality of state legislation.

Other state services are also at the disposal of the legislature. Either by statute or tradition the attorney general's office has provided part time legislative assistance. Although this has been valuable on questions of constitutionality, it has not contributed expert aid to the formulation of important policy decisions. Subject matter experts are seldom available in the attorney general's office, and thus it should be expected to provide no more than "legal opinions."

To provide adequate time for the technical study of proposed legislation and to procure qualified experts, some states have established legislative councils. The membership of the council is usually divided equally between representatives of the house and senate with bi-partisan participation assured. The council serves as an interim committee to study the potential problems facing the next session of the legislature. Although this organization seems to insure legislative leadership of a high order, the results, with a few notable exceptions, have been disappointing.

The uncertainty that its members will be reelected to the next legislature has often been advanced as the reason for the legislative council's limited effectiveness. Usually this explanation is untrue. The real reason usually is that the leadership potential of those who have served on the council is so great that they quickly overshadow their fellow legislators who have not had the opportunity to acquire the specialized knowledge available from the intensive studies of specific state problems.

This fear of the power of the council members has resulted in the appropriation of such modest sums that few if any intensive studies are possible. Likewise some council members fail to appreciate the $10,000 and is nearly $15,000 for the current year. Although appropriations are increasing they still are grossly inadequate if the duties specified in Section 26, supra, are to be successfully performed.

In Colorado, however, the creation of the bureau was to "... relieve the attorney general's staff as it is now constituted, from the undue interference with its regular functions. . . ." Colo. Stat. Ann. c. 74, § 20 (1935).


The appropriation in Colorado for 1953 for "personal services, maintenance and operation, capital outlays and other expenses" was but $12,500. Colo. Laws 1953, c. 9.
need for thorough studies by experts, believing that an “inspection” by committee members or a report prepared by an agency will provide all the information necessary. There is also the fear that the public will view with suspicion any appropriation of money for “studies”—a fear not without foundation if previous appropriations have gone for “expense accounts” and if the “experts” employed have no qualifications other than their political affiliation. In short, the desire to maintain political equilibrium between the two houses and among their members, coupled with fear of appropriating money has prevented the legislative council from leading the way toward effective research into important legislative problems.

The suggestion has been made that if interim commissions composed of non-legislative members were substituted the political difficulties might be removed. Such a proposal, however, would be unsatisfactory to both political parties. Ideally, the collection and analysis of data by experts should have no political implications; but realistically, such activity can challenge party programs, endanger administrations, and defeat prospective legislators. Where such non-elected commissions have existed, it is noteworthy that they have been either inactive or have limited their studies to non-controversial studies in the political sense.

Thus, in general, state legislatures, except for the assistance which lobbyists provide, decide the important issues of legislation without the aid of economists, public administrators, lawyers, or the experts in the innumerable subject matters with which legislatures must deal. Not until the public insists upon and supports legislation based upon full knowledge and experience, will the state legislatures achieve a position of respect comparable to that of the Congress.

An untapped resource for such assistance is the expert personnel in the colleges and universities. The services of such experts, however, have been sought in the past without remuneration and without reducing full time obligations already incurred by this personnel. Furthermore, legislative leaders have failed to protect the experts from the pressures and abuse of politics. It is therefore understandable that the experts have been unwilling to offer their services when their only compensation has been personal attack and vilification.

The reasons for this situation are understandable. They result from a failure to distinguish between the job of the expert and the job of the legislator. It is for the expert to determine the facts, to draw conclusions, and to evaluate and to recommend. It is not the job for the expert to determine policy. It is the job of the legislator to decide the policy questions and to protect the expert if he has stayed out of politics. In this situation the legislator has the obligations of a judge. He must hear the evidence, weigh the conflicting
claims, and determine the policy on the basis of informed expert opinion balanced against the political considerations which society expects. If there is leadership enough in the legislature, then the expert function and the policy function can be kept separate, and the public assured that ultimate decisions and ultimate responsibility rests with its elected representatives.

Finally, if courageous legislative leadership is available, the lobbyist can be an invaluable aid to the success of the legislative process. Made responsible for his statements and opinions, he provides interest group representation without a formal and undesirable change in the basis of selecting legislative representatives. The responsible lobbyist will provide in committee hearings the facts and data necessary for the proper development of a sound legislative program if the legislative committee insists upon the presentation of reliable evidence. Thereafter, the committee’s staff must determine its reliability and the committee must decide its relevance and persuasiveness. Thus if the legislator has the wit and the courage of leadership he can synthesize all the skills and opinions necessary to make the legislative process a dynamic force in government and society. Without that leadership no statute, no constitutional provision will improve or strengthen the legislative process.

**LENGTH OF SESSIONS**

Traditionally American state legislative sessions have been biennial with a constitutionally fixed date for convening, a session of fixed length or, alternatively, fixed compensation for legislators on the assumption that for lack of funds they will adjourn and go home in a reasonable length of time. All of these provisions reflect popular and historic distrust of legislators and legislatures. Yet as Luce observed three decades ago:

> Putting on a time limit is perhaps the most preposterous device men ever conceived for the remedy of political ills. No railroad, banking, or manufacturing corporation would be so silly as to try to improve an inefficient directorate by a vote compelling directors’ meetings to adjourn after two hours or restricting such meetings to two months in the year. . . . In the ordinary affairs of life when we find work is not being thorough done, we demand that more time and thought and energy shall be put into the work. That is precisely what we should demand of men who undertake to legislate for us.7

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6 "In 1946 only six states—California, Massachusetts, New Jersey, New York, Rhode Island and South Carolina—employed annual sessions. By 1953, four additional states—Arizona, Colorado, Maryland and Michigan—had instituted the annual session, and the trend was continuing. Twenty state legislatures in 1952-53 considered the matter: . . ." Legislative Reorganization Since World War II, 27 State Gov't 33 (1954). See also a table on the length of sessions, 10 Council of State Government, Book of the States 106-107 (1954-1955).

7 Luce, Legislative Assemblies 145 (1924).
Colorado and a number of other states have in response to increasing governmental demands amended their constitutions to provide for annual sessions, with the session in even numbered years limited to bills "raising revenue, those making appropriations, and those designated in writing by the Governor during the first ten days of the session." It is too soon to judge whether these annual sessions will result in better consideration of the problems of state, more carefully prepared legislation, or whether any effect upon the legislative process will result.

Other methods of extending the session are possible. Much work can be done immediately prior to the convening of the session. Interim committees can work continuously from the adjournment of one session until the convening of another. These activities presumably can be extended without constitutional amendment. Although bills are customarily introduced by legislators they usually are prepared by others. Indeed, historically, bills presented to the Curia Regis, were almost always presented by non-members. Colorado, with a long tradition of popular legislation through the initiative and referendum, would not find the idea so foreign to its tradition as would many states. Such bills could be presented during the month preceding a legislative session to the clerk of the appropriate house or to a special interim committee on assignment. As soon as the house was organized, bills could be read by title and assigned to committee, and if the house so desired a week or more of legislative time might be saved. Committee work could begin immediately. Luce recommended a somewhat similar practice, observing that it was as foolish for a legislature to convene without preliminary work as it would be for a manufacturer to call his employees to work before he had procured his raw materials.

Much of the committee work on important bills not only could be done, but should be done, by interim committees in advance of the legislative session. But neither this nor pre-introduction and assignment will succeed unless the legislature and the people are willing to support it.

**Procedure**

Although rules of procedure contribute but little to the quality of the legislative product, they are necessary for the orderly and efficient operation of a legislative body. They are intended to insure

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*COLO. CONST. Art. V, § 7 (1950 Amend.)*.

*"The committees of the general assembly, unless otherwise provided by the general assembly, shall expire on the convening of the first regular session after a general election." COLO. CONST. Art. V, § 7, as amended, COLO. CONST. Art. V, § 7 (1950).*

**COLO. CONST. Art. V, § 1 (1876).**

**LUCE, LEGISLATIVE PROCEDURE 66 (1922).**
fair treatment of the minority, prevent hasty and ill-considered enactment, and require the maintenance of a record for public inspection. Most legislative bodies adopt their own rules for the furtherance of these objectives. Nevertheless, there is a constant demand for constitutional amendments to more fully insure the achievement of these purposes. The record of constitutional provisions already existing gives little hope that more constitutional requirements will improve either the fairness of the legislative process or the quality of its product.

The Colorado constitution contains few constitutional limitations on procedure. Principally they are: (1) each house shall keep a journal,\(^1\) (2) bills on introduction shall be read by title and thereafter read at length on two different days in each house unless dispensed with by unanimous consent,\(^2\) (3) bills must be referred to a committee,\(^3\) (4) bills must be printed and "all substantial amendments" must be printed before final vote,\(^4\) and (5) the vote on passage or concurrence in amendments of the other house must be by aye and nay vote entered in the journal.\(^5\)

If the journal requirement is in the nature of a policing device conferring upon the judiciary a supervisory authority over legislative procedure, then clearly it is legally the most important constitutional provision. If on the other hand it is a directive designed only for the keeping of a record for subsequent political evaluation, then its legal significance is considerably reduced. State courts have differed widely on this question, and thus it seems wise to reserve judgment upon it until the other procedural requirements of the constitution have been assessed.

Colorado, like most other states, requires that bills be read in each house during the course of their consideration. The Colorado provision that a bill may be read by "title only" on introduction is unusual.\(^6\) There is much to recommend the requirement, however. In the early Parliaments, with no committee system, it was customary to present a petition requesting that a bill be introduced. Then the whole house considered whether it wished to accept the bill. Thus, the reading of the entire bill was necessary. Today, however, no consideration of a bill occurs on introduction. It is assigned immediately to committee. Consequently, if any reading on introduction is justified, reading the title of the bill certainly is sufficient.

The Houses of Congress have adopted the practice that introduction and first reading is accomplished by delivering a bill to the clerk.

\(^1\)COLO. CONST. ART. V, § 13 (1876).
\(^2\)Ibid., § 22.
\(^3\)Ibid., § 20.
\(^4\)Ibid., §§ 20 and 22 (1950 Amend.).
\(^5\)Ibid., § 23.
\(^6\)For constitutional provisions in other states see 1 SUTHERLAND, STATUTORY CONSTRUCTION § 903 (3d ed. 1943).
This practice is desirable where bills are printed automatically upon introduction. The reading requirement, a necessity when literacy even among legislators was low, now serves only as a delaying device to assure that those in opposition have an opportunity to recall their members from committee meetings, organize their forces and prepare for crucial voting. This objective is, however, more effectively assured by the calendar practices of all legislatures. The three reading requirement has outlived its usefulness, and where permitted by the constitution, and even where it is not, it is dispensed with by the consent of the members.  

The requirement that a bill be printed is the modern version of the reading requirement. Indeed if it were not for the procedural delays that the reading requirements achieve, it might well be argued that the printing of the bill satisfies the constitutional requirement of "reading."

Although the Colorado constitution requires that the bill be printed and that "all substantial amendments" be printed prior to final vote, it merely confirms the practice of all legislative bodies. Without constitutional requirements most legislatures for their own convenience not only print bills upon introduction, but order a second and third printing if the bill is important and is changed substantially in the course of enactment. Not only in the case of printing but in many other procedural matters the legislatures have established standards of order, responsibility, and fairness far beyond the constitutional necessities.

The Colorado constitution also requires that bills be assigned to committee. This is the universal practice with or without constitutional direction. The enforcement of its purpose is impossible without the acquiescence of the legislature. Assignment to committee and reporting back to the house can take but a few minutes if that is the desire of the house. Assignment in other words does not guarantee careful study, an opportunity for public hearing, and full committee consideration. This requirement is as futile as those requiring the committee to report every bill back to the house. It is similar to the

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18Colo. Const. Art. V, § 22 (1950 Amend.): "Every bill shall be read by title when introduced, and at length on two different days in each house; provided, however, any reading at length may be dispensed with upon unanimous consent of the members present." Cf. Rules of Colo. Senate, 59th Gen. Assembly, Rule XI (1953): "Unless a member shall request the reading of a bill in full when the bill is being considered by the Committee of the Whole or on Third and Final Reading, it shall be read by title only, and the unanimous consent of the members present to dispense with the reading of the bill in full shall be presumed."


21See note 14 supra.
constitutional provisions that judges shall prepare written opinions. The writing of opinions can be required, but the constitutional fiat does not insure that judges will write good opinions.

One constitutional provision of real merit requires a ye and nay vote recorded in the journal both on final passage and on concurrence to amendments adopted in the other house. Although the judicial enforcement of this provision may raise delicate problems, its basic postulate is indisputable. It insures the electorate that its representatives can be held accountable for their individual votes. Accountability to the electorate is the very essence of representative democracy and the extension of the ye and nay vote to the adoption of conference committee reports by the 1950 Colorado amendment is to be commended. The principle of “stand up and be counted” is the cornerstone of responsible government.

The enforcement of these constitutional provisions by the courts has raised delicate problems of inter-departmental relations. If the courts are to affirmatively police legislative procedure, delve into every legislative decision, survey every legislative record, they will indeed take over a great share of the legislative function. They will in effect have a veto more powerful than that of the governor, for there is no over-riding. But it is argued that if judicial review of legislative procedure is not provided, then the constitution will be a dead letter and the legislature will be uncontrolled. This argument of course assumes that the legislators do not take their constitutional oath seriously, that legislators are knaves and fools, that as an institution the legislature is irresponsible. The record belies this conclusion. In the “enrolled bill” states where the courts refuse to look behind the signatures of the presiding officers to determine whether the constitutional procedures have been followed, there is no evidence that the legislative process is less responsible than it is in the states which follow the “journal entry rule.”

Colorado falls between these two groups with a rule founded in part on the “extrinsic evidence” theory and in part on the “affirmative contradiction” rule, that is, unless the journal shows “affirmatively” that the constitutional requirements have not been complied with, the presumption is that the bill has been properly enacted. None of the rules guarantee compliance with the constitution. The clerks

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26 See note 16 supra. And the rule has been strictly enforced by the courts. People ex rel. Manville v. Leddy, 53 Colo. 109, 123 Pac. 824 (1912); In re Roberts, 5 Colo. 525 (1881); Fry, Constitutional Regulation of Legislative Procedure in Colorado, 3 Rocky Mt. L. Rev. 28 (1930).

23 To so hold would leave the constitutional requirements touching the mode of passing bills, binding only in conscience upon members of the legislature.” In re Roberts, 5 Colo. 525, 529, 530 (1881). Cf. Wairous v. Golden Chamber of Commerce, 121 Colo. 521, 218 P.2d 498 (1950).

24 See 1 Sutherland, Statutory Construction §§ 1404, 1405 (3d ed. 1943).
who prepare the journal, or the presiding officers who certify that the bill has duly passed can falsify the record, act negligently, or fail to make proper entries.\textsuperscript{25}

The journal entry rule and its deviates have merely given gratuitous causes of action to those who have not been injured, and do not even allege that they have been injured by failures to comply with constitutional procedure, but who object to the substance of the legislation enacted.

Where the plaintiff relies upon a failure to comply with constitutionally required legislative procedure but cannot show that he, or anyone in the same class, has been injured, it is difficult to understand why legislative policy should be defeated by declaring the Act unconstitutional. Courts have recognized this when the constitutional attack has come many years after the statute was enacted.\textsuperscript{26} Time should not be the only criterion of validity. Professor Freund proposed that a short statute of limitations should be imposed on such litigation.\textsuperscript{27} New Jersey gives the governor, or two interested citizens, a one year period in which to assert constitutional procedural violations.\textsuperscript{28} Other limitations might require the action to be brought by a legislator who voted against the bill or by a person who could prove injury by the legislature's failure to comply with the constitutional procedure. Such limitation would restrict litigation to those who were actually harmed. Even actions by legislators might be excluded on the ground that they raised political issues better corrected at the polls than in the courts. Judicial enforcement of these constitutional requirements is more likely to create rather than alleviate legislative problems, as the Supreme Court discovered in Christoffel v. United States.\textsuperscript{29}

Many desirable improvements in legislative procedure may be achieved without constitutional amendment. Perhaps the most im-

\textsuperscript{25}This is not to suggest that clerks would in fact act in this manner, but rather to emphasize that if a hostile attitude is taken toward the legislative process then hypothetical instances may be surmised that would require a withdrawal of confidence from anyone connected with the legislative process. Anyone acquainted with political responsibility and political ambition knows that what is conjecturally possible is realistically restrained by the future political aims of the participants.

\textsuperscript{26}Neshit v. People, 19 Colo. 441, 36 Pac. 221 (1894); Meister v. Carbaugh, 310 Ill. 486, 142 N.E. 189 (1923); Cameron v. Chicago M. & St. P. Ry., 63 Minn. 584, 65 N.W. 652 (1896); Weston v. Ryan, 70 Neb. 211, 97 N.W. 347 (1903); Mitchell v. Campbell, 19 Ore. 198, 24 Pac. 455 (1890); Notes, 34 Col. L. Rev. 1495 (1934); 48 Harv. L. Rev. 988 (1935).

\textsuperscript{27}FREUND, STANDARDS OF AMERICAN LEGISLATION 156 (1917); see Note, 59 W. Va. L. Q. 70, 75 (1932).


\textsuperscript{29}88 U.S. 84 (1949); reversed in effect by United States v. Bryan, 339 U.S. 323 (1950), wherein Mr. Justice Jackson, concurring, said "It is plain we are not following the Christoffel decision and so I think we should candidly over-rule it."
A similar rule once applied to the courts, but today all civil matters pending before a court continue from session to session until they are disposed of, withdrawn, or dismissed. A great deal of lost legislative motion—reintroduction, reassignment to committee, re-hearing—would be avoided if the judicial practice was adopted by the legislatures. The Supreme Court of the United States strongly hinted in the Pocket Veto Cases that at least between sessions of the same Congress no pocket veto would result if the houses of Congress kept their calendars open and bills remained on the calendar of the second session at the same place they were on the adjournment of the first session. The new Georgia constitution specifically authorizes its legislature to continue the calendar after adjournment but within the same session. To date legislative assemblies have been reluctant to accept these invitations. Perhaps tradition is too strong, but there are no specific constitutional obstacles to this practice. Its adoption would save a great deal of legislative time, remove the expense of reintroduction and reprinting of bills previously introduced, and would correct the popular impression that all bills introduced at a given legislative session were "new."

The practice would create the danger that bills having completed all the legislative steps at a previous session except third reading and vote might be hastily passed at the next session without sufficient deliberation and consideration. But when thorough reconsideration is necessary at a succeeding session it hardly can be assumed that a motion to re-commit for further committee consideration would not receive a favorable vote. If necessary consideration was not given, the governor might veto the bill in order to insure adequate deliberation.

The "open calendar" system has worked well in the judicial department. It has much to recommend it in legislative procedure, but it will not succeed unless legislators want it to succeed. Its policy may be defeated either by disposing adversely of all matters pending at

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81GA. CONST. § 2-1603 (1945): "All business pending in the Senate or House at the adjournment of any regular session may be considered at any later regular session of the same General Assembly as if there had been no adjournment."
the end of a session or by refraining from calling from the calendar matters pending before a prior session.

The place of the committee system in legislative procedure has received the greatest attention from those who wish to improve the legislative process. Generally these proposals have recommended a reduction in the number of committees in each house or the establishment of a joint committee organization.82

Traditionally every legislator is "entitled" to membership on at least one committee, and in some states, to be chairman of one committee. Nevertheless, a relatively few committees do the lion's share of the work. The elimination of committees that do not meet and have no bills referred to them will have no actual effect on legislative procedure. The selective reduction in the number of "major" committees would have the undesirable effect of placing greater power in a smaller number of committee chairmen.83

Ideally, the establishment of a joint committee system is desirable. It substitutes a single hearing for dual hearings and thus reduces the burden on individual legislators. It achieves a kind of unicameralism without losing the advantages of bicameral organization.84 It saves time for lobbyists, witnesses, and administrators. But it is a proposal that seems doomed to failure, because it challenges the independence of each house. If the senate is given equal representation on joint committees, its position in relation to the house is too dominant. If the senatorial representation is proportionate to the size of the senate, its position is one of perpetual minority.

Although the committee system has become the heart of the American legislative process, little has been done to adjust procedure to its importance. This is particularly true in the state legislatures where limited sessions seldom give committees adequate time to do their work. In from four to seven weeks they must hold hearings, interrogate witnesses, evaluate evidence, and make their reports. The more important the committee, the more probable it is that its membership is composed at least in part of legislators who are also members of other important committees. Thus meetings are difficult to schedule and full attendance is almost impossible.

The extremely short time within which committees can operate, together with the lack of the seniority system, may account for the relatively ineffective work of state legislative committees as compared

82 "Too many committees, it has been pointed out, result in conflicts of meetings, inadequate notice and publicity of hearings, and assignment of individual legislators to more committees than they can serve effectively." Legislative Reorganization Since World War II, 27 State Gov't 33, 34 (1954).
83 Woodrow Wilson characterized our government as "a government by the chairmen of the Standing Committees of Congress." In general see 1 Sutherland, Statutory Construction c. 10 (3d ed. 1943).
84 Horack, Bicameral Legislatures are Effective, 14 State Gov't 79 (1941).
with those of Congress. Another contributing factor is the smaller number of state representatives. The number of important committees in the average state legislature is about the same as in Congress; but the number of representatives in the average state is about one-sixth the number in the federal House of Representatives; and state senators are only about one-third as numerous as those in the United States Senate. The significance is in the quorum requirements. Legislatures hesitate to recess for fear their constituents will think that they are not working; nor do they like to hold daily sessions with the floors of the two houses nearly deserted. In consequence much committee work is not done at all, hurriedly done, or done in the evenings under surroundings less than judicial, in order that a semblance of a program on the floor of the two houses can be presented. In an attempt to keep both the committees and a house calendar functioning, legislators subject themselves to greater mental and physical strain than any other group of public officials. For this the legislators have themselves to blame. They must educate the public to the fact that half-day sessions, frequent recesses, or the split legislative session is necessary if the committee system is to have the time necessary for its work.

THE LEGISLATIVE PRODUCT

The character and amount of legislation enacted by a legislature depends primarily upon its evaluation of the legislative function. The constitution, of course, prohibits legislative intervention in some fields, but essentially the character of the statutes is determined more by the legislative judgment of what it should do than by the constitutional limitations on what it cannot do.

In assessing the legislature's discharge of its responsibility, lawyers too frequently consider only the constitutional obligations and the private law, just as the political scientists tend to overweigh the importance of governmental organization and procedure. Both must be considered because ultimately it is the legislature which is responsible for the achievement of satisfactory social, economic, and political conditions within the state.

8 The purpose of the split session was to permit introduction of bills in the first half of the session so that the legislators could return home and determine the will of their constituents. This objective was not achieved, but the device would be invaluable to the proper functioning of the modern committee system. To be effective, however, bills could not be introduced or substantially amended in the second session. Colorado already has such provisions. COLO. Const. Art. V, § 17 (no alteration in original objective), Watrous v. Golden Chamber of Commerce, 121 Colo. 521, 218 P.2d 498 (1950); COLO. Const. Art. V, § 19, as amended, COLO. Const. Art. V, § 19 (1959) (no introduction by title only).

9 I.e., Civil rights, ex post facto laws, bills of attainder, and all provisions intended to protect the individual against the action of government. Other limitations are placed on subject matter in an attempt to improve legislative efficiency and responsibility—principally prohibitions on special legislation, appropriation and revenue measures, and the grant of public funds.
If the legislative attitude is passive, that is, it will consider only those proposals which are submitted to it, then there will be no legislative leadership; and unless the governor comes forward with a program there will be no leadership at all. Affirmative exercise of responsibility requires that the legislature inform itself on the entire state of the law, both public and private, determine whether the laws are being faithfully executed, whether the administrative personnel is competent, whether the judicial system is adequate, and whether the political subdivisions of the state are functioning properly. It is because the Congress of the United States so interprets its constitutional obligation that it has been a more powerful force in the national government than the legislatures have been in the states. In general state legislatures have exhausted their time and personnel on legislation of limited importance and have delegated uncritically to administrative agencies and to political subdivisions extensive legislative power on the assumption that by such delegation they discharge their obligation and thus escape further responsibility. No conclusion could be more erroneous. Only if the delegation produces results satisfactory to society is the obligation satisfied.

A society judges government in terms of its programs and their enforcement. Thus, if municipalities receive power but not the financial ability to act, or having both, they do not act, the responsibility remains with the legislature. The electors think in terms of highway programs, new school legislation, mental health proposals, laws relating to agriculture, labor, mining, public assistance. Only if the enactment of the law produces the expected consequences are they satisfied that their government is performing its function.

These larger issues always involve taxation and the disbursement of revenue. Every legislator knows that the real pressures come both from those who pay the taxes and from those who benefit by the disbursements. Generally state legislatures have been convinced that the pressures for lower taxes are more powerful than those for great governmental expenditures. Congress has made the opposite assumption. It has operated on the principle that society will not resist taxation if the money is spent for the governmental goods which a majority of society wants. The consequences of this assumption have alarmed a great many people. They point particularly to the concentration of power in Washington. Not infrequently this concentration of power has been more the consequence of state inaction than of affirmative federal action. Adequate provision for residential housing is a case in point. After World War II every city was faced with terrific housing shortages. Only a few states provided, or authorized their municipalities to provide, low cost public-financed housing. Even fewer provided cities with the necessary financial power. As a result,
cities and many of the very citizens who oppose centralization used all their efforts to get the federal government into the housing business. New relationships between the federal government and the citizens were created which seriously challenge the position of the states, primarily because the states would not affirmatively meet the expectations of their people.

For legislators to be popular or for legislatures to discharge their duty it is not necessary that they engage in large scale give-away programs. Far from it. But they must not ignore the vast changes that have occurred in rural and urban living. They cannot assume that a little patch-work on the "cities and towns laws" and a few special acts for the counties will take the place of a wholesale re-examination of local government in its modern setting.

This is but one of many areas where state legislatures have failed to act. The legislature cannot be tested by the form of the statutes it enacts, or by their number. The legislative product must be the composite of many things: sound preparation of data; adequate public hearing to test the popular sentiment; excellence in drafting; sanctions sufficient to achieve the policy; legislative interest in the achievement of its policy; and a willingness to study, investigate and enact additional legislation until the objective is actually achieved. In short, the legislative product is not the statute but the results the statute produces.

RECORDS

Better record keeping seldom has been suggested as a means of improving the legislative process, yet it is probably the most meritor-

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2The movement, of course, began during the last year of President Hoover's administration when he proposed and Congress enacted The Emergency Relief and Construction Act of 1932. Although public housing is not directly involved in the current Senate investigation of the F.H.A., the investigation discloses that Congress, unlike most state legislatures, seriously undertakes the discharge of its Constitutional responsibility to see that "the laws be faithfully executed." See Sen. Res. 214, 229, authorizing the investigation and appropriating $250,000 for its conduct. 100 Cong. Rec. 4952-3 (83d Cong. 2d Sess., April 19, 1954).

3Statutory form may contribute, nevertheless, importantly to the effectiveness of the law. A poorly drafted law, however, may be effective if it receives vigorous administration and general public support. But drafting remains an important and neglected area.

The effect of the introduction of a large number of bills in producing ill-considered and inadequate legislation is probably exaggerated. . . . If we take from the statutes passed the local and special acts and the appropriation acts, the criticism which can be usually made as to the residue is not so much its volume, but that much of it shows, entirely apart from the wisdom of the policy which it is desired to express, the haste with which the statute was prepared and the lack of consideration given to the adequacy of its provisions to effectuate its purpose." Report of the Special Committee on Legislative Drafting, 38 A.B.A. Rep. 622, 651 (1918).

4Independence in any organization is isolation; and isolation is weakness. . . . It is an interesting conclusion in political dynamics that a body which stands jealously apart and avoids partnership of any intimate sort in the conduct of affairs, declines the opportunity to rule and gets only an opportunity to bargain. If it is strong enough to rule, partnership will bring it supremacy; if it is not strong enough to rule, it can make little out of compromises and bargains." Woodrow Wilson, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 101 (1907).
ious proposal. Every lawyer is aware of the importance of records to the judicial process. They provide the basis upon which the profession and the public judge the success and failure of the courts. Nothing comparable exists in the state legislative system.

In Congress the Congressional Record, the full printed transcripts of committee hearings, the carefully prepared majority and minority committee reports, the Statutes at Large, and the United States Code provide complete and accurate records of every important legislative activity. Their controlling effect in federal litigation is in sharp contrast to the ill-concealed contempt with which some state courts have treated their legislative products.

In most states only house journals and session laws are published. A few have official or semi-official codes. The journals are minimum records of motions made, amendments passed and failed, and yea and nay votes recorded. Floor debates are seldom printed. Except in two or three states committee hearings and committee reports are never printed. It is little wonder then that state legislatures are generally ignored.

The existence of complete records would have many salutary effects on the state legislative process. Accurate committee reports would give a more reliable basis for legislative action. The printed reports and hearings would refute much of the folklore which currently circulates concerning undue influence brought to bear upon the committees. Complete reporting of debates would support the political sanction of recording the yea and nay vote in the journal. In short, record keeping by the legislature would ultimately produce the same responsibility which it has created in the courts and with responsibility would come respect for the legislative process.

Objections will of course be made to complete record keeping. Printing costs will be substantial. Reporting and secretarial services must be increased both in quantity and quality. With a printed record the need for expert assistance, committee counsel, economic advisers, technical experts will greatly increase. But this is merely another way of saying that the legislature and the public are now receiving an inferior product.

Although an improved product will be more costly, it may well be worth the price. The printed record will encourage committees to demand and to receive the type of information and data which special interest groups can provide. The legislation ultimately enacted will be founded not upon conjecture but upon the most reliable information available. The people primarily through the press, radio, and television will have a much more effective control over their representatives for the "bare bones" of their actions will be constantly
available for public scrutiny. The statutory product should be more reliable and unnecessary litigation thereby reduced.

Thus the one change most likely to improve both legislative procedure and the legislative product is record keeping. It will not be automatic. Constitutional amendment will not insure success. It must come as a matter of legislative pride and tradition. Legislators themselves must assume the leadership necessary to make complete records successful. They must educate the public to its importance. They must resist the fear that they will be criticized because of expense. Congress has kept complete records for three-quarters of a century and no effective movement has ever challenged it for such practice.

Many improvements in state legislative procedure are possible: pre-session introduction of bills, interim study committees, preservation of the calendar from session to session, and limitation on the areas of legislative enactment. However, none of these are as important or as easily achieved as returning the legislature to its original position as a court of record.