THE NORTH DAKOTA CONSTITUTION: AN ORIGINAL APPROACH SINCE 1889

JEROD TUFTE*

ABSTRACT

What has the North Dakota Supreme Court said about its interpretive principles when it decides cases under the North Dakota Constitution? My objective in the discussion below is to defend a descriptive claim. My claim is that the interpretive approach we now call originalism best describes the North Dakota Supreme Court's stated method of interpreting the North Dakota Constitution since statehood. I do not aim to defend here the normative claim that originalism is superior to alternative interpretive approaches or to referee between different interpretive approaches within the family of originalism. My modest claim is that originalism describes how the North Dakota Supreme Court has said it has approached constitutional interpretation. In analyzing the Court's opinions, some readers may well argue that despite what it has said about its methods, the Court has not always in fact applied originalist methods. Determining whether the Court has faithfully applied its stated methods is also beyond the scope of this discussion-not only would it be much more subjective, it would require relitigating the merits of individual opinions without the benefit of briefing and argument. In the discussion below, the Court's application of its stated methodology is considered only for purposes of illustrating what the Court means when it describes the method, as opposed to whether the Court may in a particular opinion describe one approach but apply another.

^{*†}Justice Jerod Tufte was elected to a ten-year term on the North Dakota Supreme Court in 2016. Before joining the Supreme Court, he served as a district court judge and as legal counsel to the Governor of North Dakota. He graduated from Arizona State University College of Law (2002), and Case Western Reserve University (B.S. Comp. Eng'g 1997). For research assistance and helpful comments and suggestions I thank Nicholas Samuelson.

I.	INTRODUCTION: ORIGINALISM AND THE NORTH DAKOTA CONSTITUTION		
II.		DEFINING TERMS: THE EVOLVING DEBATE OVER ORIGINALISM420	
III.	HC	E NORTH DAKOTA SUPREME COURT'S DESCRIPTION OF W IT INTERPRETS THE NORTH DAKOTA CONSTITUTION 425	
	Α.	SEARCH METHODOLOGY	
	B.	FIXATION: EVOLVING STANDARDS OR FIXED MEANING	
	C.	CONSTRAINT	
	D.	WHAT MEANING AND WHOSE INTENT: FRAMERS, DRAFTERS, AND THE PEOPLE WHO VOTED TO ADOPT A PROVISION446	
IV.		LLY DEVELOPING A STATE CONSTITUTIONAL CLAIM 	
	Α.	PROCEDURE AND PRESERVING A CLAIM FOR APPEAL	
	B.	START WITH THE TEXT	
		1. Dictionaries	
		2. Terms of Art	
	C.	TREATISES AND OTHER SECONDARY SOURCES	
	D.	CONVENTION PROCEEDINGS AND DEBATES460	
	E.	STRUCTURAL CONSIDERATIONS	
	F.	HISTORICAL CONTEXT	
	G.	CASELAW AND STARE DECISIS	
	Н.	BRIEFING CHECKLIST FOR PRACTITIONERS IN N.D. COURTS .463	
V.	CO	NCLUSION464	
VI.	APPENDIX		
	Α.	CASES BEFORE 1950465	
	В.	CASES SINCE 1950	
	C.	WESTLAW KEY NUMBERS USED TO SUPPLEMENT THE MOST- CITED SEARCH:	

I. INTRODUCTION: ORIGINALISM AND THE NORTH DAKOTA CONSTITUTION

In North Dakota, we are governed by two Constitutions: the United States Constitution and the North Dakota Constitution. Some advocates forgo an opportunity to fully present arguments under the North Dakota Constitution because they overlook relevant state constitutional provisions or assume these provisions are simply duplicates of similar provisions in the U.S. Constitution. Other advocates cite to the state Constitution without elaborating any substantive argument beyond that made under the U.S. Constitution while asking the Court to provide greater protection under the state Constitution while asking the Court to provide greater protection under the state Constitution to exercise will, not judgment, and they have not been sufficient to persuade the Court to read the state Constitution as providing a scope of protection beyond that of a similar federal provision.

Compared to the U.S. Constitution, the North Dakota Constitution has its origins in a dramatically different historical context. North Dakota adopted its constitution more than 100 years after ratification of the U.S. Constitution, following the Civil War and the significant reconstruction amendments, but before the U.S. Supreme Court incorporated the Bill of Rights against the states.² The Declaration of Rights in article I of the North Dakota Constitution contains several provisions that parallel provisions in the U.S. Constitution's Bill of Rights.³ For example, North Dakota Constitution article I, section 8 is nearly identical to the Fourth Amendment.⁴ The N.D. Declaration of Rights also contains several provisions with no close parallel in the U.S. Constitution. For example, section 25 provides broad protection for the rights of crime victims, and section 7 provides that "[e]very citizen of this state shall be free to obtain employment wherever possible"⁵ The North

^{1.} Cf. City of West Fargo v. Ekstrom, 2020 ND 37, **JJ** 28, 33, 938 N.W.2d 915 (Tufte, J., concurring specially) (noting regular occurrence of undeveloped alternative arguments citing the state constitution).

^{2.} See, e.g., McDonald v. City of Chicago, 561 U.S. 742, 753-66 (2010).

^{3.} For a table cross-referencing provisions in North Dakota's Declaration of Rights by reference to the U.S. Constitution's Bill of Rights, *see, Index by U.S. Constitution*, N.D. CONST., https://www.ndconst.org/doku.php?id=usconst-index (last visited Sept. 5, 2020).

^{4.} *Compare* N.D. Const. art. I, § 8 ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized,"), and U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

^{5.} N.D. CONST. art. I, § 25; id. art. I § 7.

Dakota Constitution shares broad structural characteristics with the U.S. Constitution, including three branches of government having separate powers.⁶ Beyond these similarities, the state Constitution contains many provisions that have no counterpart in the U.S. Constitution, and thus provide more fertile ground for examining the Court's interpretive approach.⁷

This discussion will proceed in three main parts. First, I will briefly define my terms and overview what I understand to be generally accepted characteristics of originalist and nonoriginalist interpretive methods. Second, I will discuss a selection of the North Dakota Supreme Court's cases to assess how the Court has described its interpretive methods since 1889. The Court's description of its methods of constitutional interpretation will be compared with the characteristic features of originalist and nonoriginalist interpretive methods. Third, I will highlight sources and methods the Court has employed and recommend that advocates consider these same sources and methods when raising state constitutional claims. By examining sources the Court has relied on and outlining a framework for originalist argument, I intend to illustrate how legal practitioners might enhance their presentation of claims arising under the North Dakota Constitution to better fit the Court's stated interpretive methods. In doing so, advocates may improve their chances of persuading the Court and also enhance our distinctive and rich legal tradition under the fundamental law governing the citizens and public officials of North Dakota.

II. DEFINING TERMS: THE EVOLVING DEBATE OVER ORIGINALISM

The topic of originalism continues to generate discussion and debate in the academy and the courts.⁸ Originalism is most frequently discussed in reference to interpreting the United States Constitution, but as a method, it is also applicable to interpreting state Constitutions.⁹ Because scholars and commentators employ varying definitions of the term originalism and be-

^{6.} N.D. CONST. art. XI, § 26; N.D. Legislative Assembly v. Burgum, 2018 ND 189, JJ 40-43, 916 N.W.2d 83.

^{7.} See, e.g., N.D. CONST. art. VIII (education); id. art. IX (trust lands); id. art. X (finance and public debt).

^{8.} See Jeremy M. Christiansen, Originalism: The Primary Canon of State Constitutional Interpretation, 15 GEO. J. L. & PUB. POL'Y. 341, 342 n.1 (2017) (collecting references); Michael Ramsey, John McGinnis on Adrian Vermeule on Originalism, ORIGINALISM BLOG (Apr. 11, 2020), https://originalismblog.typepad.com/the-originalism-blog/2020/04/john-mcginnis-on-adrian-vermeule-on-originalismmichael-ramsey.html.

^{9.} See generally Christiansen, supra note 8, at 342-44; see also Mitchell v. Roberts, 2020 UT 34, ¶ 8, 469 P.3d 901, 904 ("The original meaning of the constitution binds us as a matter of the rule of law.").

cause critics of originalism have argued that originalism as a method of interpretation dates back only to the 1980s,¹⁰ it is necessary that I articulate what I mean for purposes of this essay when I employ the term originalism.

Leading scholars of originalism as an interpretive method agree that the meaning of a constitutional provision remains the same until it is properly changed through the amendment process set out in the Constitution.¹¹ As I will use the term "originalism" here, the core requirements are "(1) the meaning of a provision of the Constitution was fixed at the time it was enacted (the 'Fixation Thesis'); and (2) that fixed meaning ought to constrain constitutional decisionmakers today (the 'Constraint Principle')."¹² An originalist determines what meaning is fixed by a text by seeking the "communicative content that it conveyed to the general public at the time of ratification."¹³ Changes in the common meaning of words as a language evolves do not change the legal meaning of a law enacted at an earlier time.¹⁴

As readers, we find the "communicative meaning of a text" initially from "the conventional semantic meaning of the words and phrases as they are composed into larger units by syntax."¹⁵ The context of the communication must also be considered.¹⁶ The central idea of public meaning originalism is that "the participants in the complex process of authorship intended to make the communicative content of the constitutional text accessible to the public at the time the text went through the ratification process."¹⁷

Michael Stokes Paulsen has articulated the following definition of originalism:

The task of constitutional interpretation is to accurately ascertain and then faithfully apply as law the objective original public meaning of the words and phrases of the constitution as a written legal instrument, that is the meaning that the words and phrases would have had to a reasonably informed speaker and reader of the English language at the time and in the political context in which the text

15. Lawrence B. Solum, Originalist Methodology, 84 U. CHI. L. REV. 269, 272 (2017).

^{10.} Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 711-16 (2011).

^{11.} Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 3 (2018).

^{12.} Id. at 3-4.

^{13.} Id. at 4.

^{14.} James Madison acknowledged the problem in "living languages" as early as 1824 when he wrote: "What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense." *From James Madison to Henry Lee*, 25 June 1824, NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/04-03-02-0333 (last visited Sept. 5, 2020); ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 33 (2017) ("[N]o theory of political philosophy . . . would justify accidental and random semantic drift as a legal system's secondary rule of change.").

^{16.} Id.

^{17.} Id. at 275.

was adopted, considering the structure of the document and accounting for any specialized uses of any terms of art.¹⁸

Nonoriginalist interpretive theories have been collectively described as incorporating the "thesis that facts that occur after ratification or amendment can properly bear—constitutively, not just evidentially—on how courts should interpret the Constitution"¹⁹ The use of later-arising facts to influence a judicial interpretation of a constitutional provision would violate the fixation thesis.²⁰ An interpretive theory would also be considered nonoriginalist if it rejects the constraint principle, which is that the original meaning of the constitutional text is binding (at least to the extent that it is clear) on judges and other constitutional actors.²¹

Examples of Nonoriginalist interpretive theories include purposivism and varieties of living constitutionalism.²² Purposivism has been described by Justice Antonin Scalia as a "supposed antonym" of textualism.²³ Arguing that textualism permits consideration of purpose, if it can be gleaned from "close reading of the text," he echoed Justice Felix Frankfurter's caution that an "abstract purpose [not be] allowed to supersede text."²⁴ Some have advanced legal pragmatism as something of an anti-theory, calling for constitutional law to be conducted by "solving legal problems using every tool that comes to hand, including precedent, tradition, legal text, and social policy."²⁵ Although some public discussions of these competing interpretive theories align originalism with the political right and living constitutionalism and

24. Id.

^{18.} Federalist Society, *Showcase Panel IV: Originalism and Precedent [2019 National Law-yers Convention]*, YOUTUBE (Dec. 11, 2019), https://www.youtube.com/watch?v=5H4csaIC7v0.

^{19.} Smith, *supra* note 10, at 722-23 (acknowledging that "most non-originalists treat the original meaning as the starting point for any interpretive inquiry").

^{20.} See Barnette & Bernick, supra note 11.

^{21.} Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice*, 7 (2018) (stating "many nonoriginalists believe that judges have the power to override the communicative content provided by the linguistic meaning of the text in the publicly available context of constitutional communication").

^{22.} Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1237 n.3 (2015) (describing several varieties and summarizing, concluding that "[t]he diversity of varieties of living constitutionalism makes cataloguing impossible").

^{23.} ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 20 (2012).

^{25.} Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1332 (1988) (rejecting "the entire project of providing a theoretical foundation for constitutional law"); Lawrence Solum, *Legal Theory Lexicon: It Takes a Theory to Beat a Theory*, LEGAL THEORY LEXICON (Mar. 29, 2020), https://lsolum.typepad.com/legaltheory/2020/03/legal-theory-lexicon-it-takes-a-theory-to-beat-a-theory.html (describing "the status quo [as] eclecticism—a little precedent, a little originalism, a little instrumentalism, etc.").

other nonoriginalist theories with the political left, there are originalists on the political left²⁶ and nonoriginalists on the political right.²⁷

Taking originalism as a collection of interpretive theories that require, at a minimum, that constitutional actors are constrained by the meaning of the constitutional text as fixed at the time of adoption, we can look for evidence the North Dakota Supreme Court describes its methodology consistent with originalism. My claim that the Court has consistently described its interpretive method in originalist terms will be supported to the extent that the Court has consistently articulated its approach as seeking original meaning, fixed at the time of adoption, and operating to constrain state actors.²⁸ The claim would be undermined if the Court's opinions describe or apply interpretive methods inconsistent with original meaning, fixation, and constraint.

I have conducted broad searches in Lexis and Westlaw using keywords and headnotes to attempt to identify a comprehensive, or at least representative, sample of how the Court describes its approach to interpreting the North Dakota Constitution. Using the results of these broad searches, I will test the claim that the Court's opinions describe an approach that constitutional text should be interpreted consistent with these three requirements. In examining the Court's interpretive methodology since 1889, I also search for opinions that describe interpretive methods that could fairly be classified as a variety of nonoriginalism, such as living constitutionalism or purposivism.

Like every other state, North Dakota has a written Constitution. Written law is in several ways fundamental to how all law works in the American system. Once written and enacted, the law is published so that all who are to be governed by it may have adequate notice of the law's requirements.²⁹ To

^{26.} See, e.g., Smith, supra note 10, at 717-18 (comparing the originalist approaches of Jack Balkin and Randy Barnett); James Ryerson, 'America's Constitution': A Liberal Originalist, N.Y. TIMES (Nov. 6, 2005), https://www.nytimes.com/2005/11/06/books/review/americas-constitution-a-liberal-originalist.html.

^{27.} Adrian Vermeule, Beyond Originalism: The Dominant Conservative Philosophy for Interpreting the Constitution Has Served its Purpose, and Scholars Ought to Develop a More Moral Framework, ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.

^{28.} In the course of invalidating an eminent domain statute under the state constitutional protection against uncompensated takings, the court in Martin v. Tyler, 60 N.W. 392, 395 (N.D. 1894), described its duty quite vividly:

[&]quot;But we must remember, also, that the constitution is the shield which the state, in its sovereign capacity, has provided for the protection of private rights. This protection is necessary. Every period in civilized history, however remote or however recent, but emphasizes the fact that unrestrained legislation is inimical to individual rights. Having provided the shield, the state has created its courts, and charged them with the special duty of seeing that every legislative blow improperly aimed at the life, liberty, happiness, or property of the individual falls harmlessly upon that shield. The court that fails in this duty fails in the purposes of its creation, and should be barred from further participation in governmental affairs."

^{29.} See State v. Mertz, 514 N.W.2d 662, 667 (N.D. 1994) ("The due process clauses of the state and federal constitutions require definiteness of criminal statutes so that the language, when

fulfill that notice requirement, we have to assume that it is possible to discern some generally accepted meaning from the text. Communication is a twosided exercise. There is a speaker and a listener, or a writer and a reader. We are interested in both the meaning intended by the communicator and the meaning understood by the intended audience. The Court has described its "primary duty" as to determine the meaning intended by "the framers and adopters of the constitution."³⁰ Of course, we hope and expect that in nearly all cases, the communication will be successful and those meanings will be the same.

Because the meaning of words and phrases can change as our language evolves over time or as circumstances change, we generally must consider the time and context of a writing to determine whether the public audience at the time the text was written would have understood the meaning differently than would a modern reader. If those understandings appear to differ, it is the original meaning at the time of enactment that an originalist interpretation would consider to be the law. A provision enacted in a Constitution or statute expresses a legal rule or a change in a legal rule. One useful way to think about what a legal enactment means is to consider the state of the law the moment before the effective date of the enactment and the state of the law the moment after the law became effective.³¹ The meaning of the provision is the change that it effected in the law. That change happened at a particular time in a particular context. This is not to say that such legal rules may not be applied to unexpected factual circumstances or require results that may not have been contemplated by either the drafters or the public at the time of enactment.

In the following discussion, I use the term originalism to refer to three central ideas: fixation, constraint, and public meaning. In summary, I use fixation to mean that legal interpretation should be as of the time a law was enacted and that the correct legal interpretation remains the same at all later times unless the law is amended. I use constraint to refer to the principle that the Constitution constrains state officials in all three branches. The constraint principle means that the Constitution is binding law that either mandates or prohibits actions by government officials to the extent the text provides a determinative rule to resolve the issue presented. Depending on the context, I use the term public meaning to reference several formulations used by the Court over the years, including ordinary meaning, plain meaning, common

measured by common understanding and practice, gives adequate warning of the conduct proscribed and marks boundaries sufficiently distinct for judges and juries to fairly administer the law.").

^{30.} State v. Anderson, 427 N.W.2d 316, 317 (N.D. 1988).

^{31.} William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1132-33 (2017).

2020]

understanding, and the intent of a provision's drafters or of the voters who adopted the provision.

III. THE NORTH DAKOTA SUPREME COURT'S DESCRIPTION OF HOW IT INTERPRETS THE NORTH DAKOTA CONSTITUTION

The North Dakota Constitution was adopted by the Constitutional Convention on August 17, 1889, and ratified on October 1, 1889, by vote of the people of the territory that would become the state of North Dakota.³²

From the earliest days of our state's history through today, the North Dakota Supreme Court has, when interpreting the state Constitution, sought to discern the meaning of constitutional text by reference to the intent expressed in the text by the people who drafted it and the people who adopted it. The Court has consistently stated that the meaning of constitutional text is fixed at the time it was adopted. It also has repeatedly articulated that courts and governmental officials are constrained by this fixed, original meaning and the Court has repeatedly rejected calls to adopt expansive interpretations of constitutional text when such calls were thinly veiled (if veiled at all) invitations to simply state that a preferred result was compelled by the state Constitution.

A. SEARCH METHODOLOGY

Any reader not interested in the details of my search methodology may skip to section III(B). To identify an appropriate set of cases to examine, I developed multiple search queries in an effort to objectively identify a broad cross-section of cases referring to the North Dakota Constitution. On Westlaw, I selected the North Dakota Supreme Court Cases database. As of June 2020, this database contains a total of 17,294 reported cases.³³ Using the advanced search feature, I entered the following advanced search queries, sorted the results by "most cited," and then examined each of the top 100 results. My rationale is that the query should find all or nearly all cases that cite to or discuss the North Dakota Constitution, accounting for observed variations in how the Court has referred to the state Constitution.

advanced: ((#state /3 constitution!) ("north dakota" /3 constitution) ("n.d. const.")) & DA(aft 11-01-1889 & bef 01-01-1950)

^{32.} NORTH DAKOTA CONSTITUTIONAL CONVENTION, JOURNAL OF THE CONSTITUTIONAL CONVENTION FOR NORTH DAKOTA: HELD AT BISMARCK, THURSDAY, JULY 4 TO AUG. 17, 1889, 399–400 (Bismarck, North Dakota: Tribune, State Printers & Binders 1889) [hereinafter "JOURNAL"]; JAMES D. RICHARDSON, COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 5455-56 (New York, Bureau of National Literature, Inc. 1897).

^{33.} Author's search of Westlaw for North Dakota Supreme Court reported cases since Nov. 2, 1889.

advanced: ((#state /3 constitution!) ("north dakota" /3 constitution) ("n.d. const.")) & DA(aft 12-31-1949)

These queries are split into two approximately-equal date ranges to guard against any changes over time in how the Court discusses its methodology. Dividing the timeline may also indicate whether older cases are cited more, perhaps because there has been more time after they were decided in which later cases could cite them. Conversely, since 1980, the number of published opinions per year has exceeded 200, compared to about 106 per year before 1950. The tendency for opinions to cite recent decisions rather than very old decisions may skew the number toward more recent cases. Regardless of whether there is a change over time, the most cited cases are chosen because the more a case is cited, the more likely it will reflect the Court's view of an accepted statement of its interpretation principles.

These queries are also intended to address a skeptical reader's concern that the author may have been influenced by confirmation bias or otherwise intentionally or unintentionally selected cases confirming my descriptive claim about the Court's interpretive method. My interest in specifying the search so precisely is to show my work and to enable anyone who is interested to reproduce and validate or critique it.

The results of these queries were exported into a table and re-sorted to identify those cases most cited by the North Dakota Supreme Court. Westlaw's option to sort search results by "Most Cited" sorts cases on the basis of total citations in cases, trial court orders, administrative decisions and guidance, secondary sources, appellate court documents, and trial court documents. Some cases are widely cited by secondary sources or foreign jurisdictions but much less cited by the North Dakota Supreme Court. For example, the most cited pre-1950 case, *State ex rel. Johnson v. Baker*,³⁴ lists 374 citing references, only 28 of which are citations by the North Dakota Supreme Court. The seventh most cited case, *Ness v. Jones*,³⁵ lists 101 citing references, including 56 citations by Pennsylvania courts and only 8 by the North Dakota Supreme Court.³⁶ After identifying how many North Dakota cases cite each of these top 100 cases most-cited by any Westlaw reference,

^{34. 21} N.W.2d 355 (N.D. 1945).

^{35. 88} N.W. 706 (N.D. 1901).

^{36.} Because Ness v. Jones had only eight North Dakota citations, it was excluded from the table of search results. Among the pre-1950 cases, only those having at least fifteen North Dakota citations were retained from the keyword search results. Cases listed in Appendix A having fewer than fifteen North Dakota citations were included only because they were indexed by Westlaw under a relevant keynote, as discussed below. Among the post-1950 cases, only those cases having at least twenty-five North Dakota citations were retained. Because several cases had twenty-five citations, the keyword search results include fifty-five cases. Cases listed in Appendix B having fewer than twenty-five North Dakota citations were included only because they were indexed by Westlaw under a relevant keynote.

I re-sorted the list by North Dakota citations and limited my analysis to the top fifty cases in each time period. For the pre-1950 cases, the fiftieth most-cited case was cited fifteen times by other North Dakota cases. For the cases reported since 1950, the fiftieth most-cited case was cited twenty-five times by other North Dakota cases. The guiding rationale here is that the more a case is cited for any proposition by other North Dakota cases, the more likely it is that what it says about how the Court approaches constitutional interpretation reflects the Court's view of the proper approach as opposed to being an idiosyncratic or outlier of a formulation of the Court's interpretive approach.

I supplemented these advanced keyword searches by adding any cases that Westlaw has annotated with a keynote relating to interpretation or construction of constitutional provisions under Keynote 92, Constitutional Law.³⁷ Although there was some overlap, many of the cases classified by Westlaw under its constitutional interpretation keynotes were not cited widely enough to appear in the initial search. Despite that, their appearance under relevant keynotes provides an independently curated list of cases likely to be referenced by lawyers and judges seeking to determine how the North Dakota Supreme Court interprets the state Constitution.

In examining these cases, I considered whether what the Court says is consistent with originalist interpretive principles both by looking for express statements of agreement with fixation, constraint, and original meaning, and by looking for statements fairly understood as inconsistent with or expressing disagreement with these central premises of originalism. A statement inconsistent with the constraint principle is unlikely to be as direct as Justice Gorsuch's formulation in Ramos v. Louisiana³⁸ contrasting the constraint principle with a hypothetical polar opposite in which constitutional provisions are merely "suggesting fruitful topics for future cost-benefit analyses."39 As discussed below, the Court has not forthrightly stated it did not view the Constitution as binding under the circumstances before it. In a few instances, an opinion has said the Court is free to update the meaning of a provision to suit modern times.⁴⁰ Whether a court is doing something different than it says it is doing is beyond the scope of my claim, which is limited to what the Court has said it is doing. Statements by the Court will be considered inconsistent with originalism if the Court says it is qualifying the fixation principle by permitting changing times and circumstances to influence how a provision should be read in times much different than the time of enactment.⁴¹

^{37.} See infra Appendix C (specific keynotes used in search).

^{38. 140} S. Ct. 1390 (2020).

^{39.} Ramos, 140 S. Ct. at 1402.

^{40.} See infra text accompanying notes 106-118 (discussing Tormaschy and Norton).

^{41.} See infra text accompanying notes 106-118 (discussing Tormaschy and Norton).

There is substantial variation in the extent to which cases citing the North Dakota Constitution engage in interpretation of the provision according to a stated methodology. The Court's modern style is to state, often in a block quote, its interpretive principles or standard of review.⁴² The Court's earliest opinions also regularly stated principles of interpretation before analyzing the words and phrases of a provision at issue.⁴³ For several decades leading up to the 1990s, the Court was much less consistent in stating its interpretive method before proceeding to analysis of the claim before it.44 Some cases do not state interpretive principles but directly apply what the Court views as the plain meaning of a text that requires little or no interpretation.⁴⁵ In topical areas with well-developed doctrine, such as search and seizure or free speech, the Court frequently omits reference to the text of a provision and begins with application of doctrine developed in the extensive case law in that area.⁴⁶ For sound reasons of judicial economy and stare decisis, the Court does not start with a statement of interpretive principles in every case, and as a result, these cases are of little help in discerning what it is the Court says is the proper method when it interprets the Constitution.

B. FIXATION: EVOLVING STANDARDS OR FIXED MEANING

The fixation thesis holds that the meaning of a constitutional provision is fixed at the time of enactment. As applied to the North Dakota Constitution, a provision adopted in 1889 must be interpreted to have a discernible meaning at the time of adoption and that meaning remains the same until that provision is properly amended. Similarly, the fixation thesis would require that an amendment to the Constitution must be interpreted to be fixed at the date the amendment was adopted. Questions of what "meaning" is fixed are discussed in section III(D).

Among the pre-1950 search results, I classify thirteen out of seventyeight cases as including statements that indicate agreement with the fixation principle.⁴⁷ I classify one case⁴⁸ as indicating disagreement with the fixation

^{42.} See, e.g., State v. Blue, 2018 ND 171, ¶ 22-23, 915 N.W.2d 122.

^{43.} See generally, State ex rel. Linde v. Robinson, 160 N.W. 514 (N.D. 1916).

^{44.} See generally, State v. Ricehill, 415 N.W.2d 481 (N.D. 1987); Kitto v. Minot Park Dist., 224 N.W.2d 795 (N.D. 1974).

^{45.} See, e.g., Bronson v. Johnson, 33 N.W.2d 819, 820 (N.D. 1948); Langer v. State, 284 N.W. 238, 243 (N.D. 1939).

^{46.} See, e.g., State v. Rydberg, 519 N.W.2d 306, 310 (N.D. 1994) (declining to extend N.D. CONST. article I, section 8 protections further than Fourth Amendment doctrine in context of garbage search); Beckler v. N.D. Workers Comp. Bureau, 418 N.W.2d 770, 772-74 (N.D. 1988) (applying federal and state due process clauses in parallel); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 265 (N.D. 1994) (Sandstrom, J., dissenting) (applying doctrine developed under Fourteenth Amendment equal protection clause).

^{47.} See infra Apprendix A (cases collected and labeled "Y" under "Fixation").

^{48.} State v. Norton, 255 N.W. 787 (N.D. 1934).

principle. In the other sixty-four cases, I identified no statements by the Court indicating either agreement or disagreement. As a result of the breadth of the search, some of these sixty-four cases reference the state Constitution, but only in passing and not to decide a constitutional issue.⁴⁹ Other cases may not mention whether text is fixed or malleable because the provision at issue in the case was enacted close in time to the events in the case and there would have been no question of whether the ordinary meaning at the time of enactment differed from the ordinary meaning at the time to the court decided the case.⁵⁰

Among the search results for the years since 1950, I classify 13 out of 115 cases as including statements that indicate agreement with the fixation principle.⁵¹ I classify three cases as including statements that indicate disagreement with the fixation principle.⁵² In the other ninety-nine cases, I identified no statement indicating either agreement or disagreement.

An early case discussing fixation of a constitutional provision's meaning is *Barry v. Truax*.⁵³ In 1901, Barry was charged with murder.⁵⁴ After a first jury verdict was set aside and a second trial resulted in a hung jury, the state moved the court to hold the third trial in another county.⁵⁵ On appeal, Barry argued that the statute, "which authorizes a change of place of trial in criminal cases upon the application of the state's attorney," was unconstitutional in violation of the right to trial by jury.⁵⁶ The Court framed the constitutional question as "turn[ing] upon the meaning to be ascribed to the phrase 'right of trial by jury."⁵⁷ After noting that the details of the right were not enumerated in the Constitution itself, the Court sought to interpret the meaning of "the right of trial by jury." It began: "The constitution refers to 'the right of trial by jury' as a right well known and commonly understood at the time of its adoption, and it is the right so understood which is secured by it."⁵⁸ Only

^{49.} See, e.g., Bekken v. Equitable Life Assur. Soc'y of the U.S., 293 N.W. 200, 211 (N.D. 1940) (not deciding constitutional issue); Merchants' State Bank v. Sawyer Farmers' Co-op. Ass'n, 182 N.W. 263, 264 (N.D. 1921) (deciding issue of contract law and mentioning in passing the "right to make lawful contracts" guaranteed by sections 1 and 13 of the North Dakota Constitution); Erickson v. Wiper, 157 N.W. 592, 603 (N.D. 1916) (citing jury trial right and sections 86 and 103 for limited review on appeal of trial errors in a jury case).

^{50.} See, e.g., State v. Blue, 2018 ND 171, J 25, 915 N.W.2d 122 (interpreting victims' rights amendment adopted in 2016); Power v. Kitching, 86 N.W. 737, 739 (N.D. 1901) (interpreting section 61 of the 1889 constitution limiting bills to a single subject).

^{51.} See infra Appendix B (cases collected in table and labeled "Y" under "Fixation").

^{52.} Andrews v. O'Hearn, 387 N.W.2d 716 (N.D. 1986); Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974); Tormaschy v. Hjelle, 210 N.W.2d 100 (N.D. 1973).

^{53. 99} N.W. 769 (N.D. 1904).

^{54.} Barry, 99 N.W. at 769.

^{55.} Id. at 769-70.

^{56.} *Id*. at 770.

^{57.} Id.

^{58.} Id. at 771.

fifteen years removed from its 1889 adoption, the Court interpreted the text as having the "commonly understood" meaning "at the time of its adoption" and reasoned it was "the right so understood" that was secured by the constitutional guarantee.⁵⁹ Further underscoring the Court's determining the meaning of the text in the context of the time of its adoption is its description of seeking to ascertain "the understanding of the framers of the constitution, and the people who adopted it."⁶⁰ The understanding of the framers and voters is necessarily determined as of the time the text was framed and adopted. To ascertain the meaning of this language in 1889, the Court presumed that the people who adopted the Constitution would understand the right of trial by jury by reference to the right provided in territorial law for the previous fourteen years.⁶¹ The Court concluded: "the right of trial by jury had acquired a fixed meaning among the people who adopted our constitution when they adopted it, and it is the right thus understood which was secured, and it is, in fact, merely the right as it existed at the common law."⁶²

Fixation again became a central factor in *Egbert v. City of Dunseith.*⁶³ Adrian Egbert sued the City of Dunseith on behalf of himself and other taxpayers after the City voted to establish a municipal liquor store.⁶⁴ On appeal, he argued that section 185⁶⁵ of the Constitution (the "Gift Clause") prohibited the city from engaging in the liquor business.⁶⁶ At that time, the provision had been most recently amended in 1918 to read in part: "The state, any county or city . . . may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article 20 of the constitution^{°67} Article 20 had been adopted with the original Constitution in 1889, but by separate vote. It read in part: "No person, association or corporation shall within this state manufacture for sale or gift, any intoxicating liquors."⁶⁸ Article 20 had been repealed in 1932.⁶⁹ The 1918 amendment "created a new governmental function—that of engaging in and carrying on commercial and industrial enterprises theretofore considered as private, in competition with private business."⁷⁰ Relying on the change effected by the

- 62. *Id*. at 776.
- 63. 24 N.W.2d 907 (N.D. 1946).
- 64. *Egbert*, 24 N.W.2d at 908.
- 65. Now N.D. CONST. art. X, § 18.
- 66. *Egbert*, 24 N.W.2d at 908.
- 67. Id. at 909.
- 68. Id.
- 69. Id.; Constitutional Amendments, 1932 N.D. Laws 492.
- 70. Egbert, 24 N.W.2d at 909.

^{59.} Id.

^{60.} Id.

^{61.} *Id*.

amendment to the Gift Clause, the Court inferred the intent of "[t]he proponents of the amendment and those who voted for its adoption" was to permit the state to engage in such enterprises.⁷¹ The plaintiffs argued that the reference to the since-repealed article 20 excluded "only one business: the liquor business" without express intent as to what effect the repeal of article 20 should have.72 The City of Dunseith argued that the repeal of article 20 impliedly repealed the exception in section 185 which should "be read as though there were no reference to article 20 in it."73 Finding "room for difference of opinion as to what the people intended," the Court turned to the canons of construction.74 The first canon the Court found applicable was that a specific reference to another provision has the same effect as if the referenced provision "had been incorporated bodily into the adopting statute."75 "Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent or necessary implication."76 Thus, the Court concluded that the "intent and purpose of the people when they adopted the amendment" to section 185 in 1918 was to incorporate the substantive definition of the liquor business at that time described in article 20.77 The subsequent repeal of article 20 in 1932 did not change the meaning of section 185 from the meaning it had when it was adopted in 1918. Now codified at article X, section 18, the Gift Clause still refers to the long-since-repealed article 20, and under Egbert, cities still may not operate liquor stores.

During construction of the interstate highway system, Harold Newman challenged the state highway department's use of the state highway fund to acquire rights to place signs or other forms of advertising within 660 feet of Interstate 94.⁷⁸ Newman argued that this use of the fund violated article 56 and section 186, which appropriated revenue from the fund "solely for construction, reconstruction, repair and maintenance of public highways, and the payment of obligations therefor."⁷⁹ Finding no definition of the disputed terms in the Constitution itself, the Court looked first to the language of the two provisions to "ascertain and give effect to the intention and purpose of the framers and of the people who adopted [them]."⁸⁰

71. Id.

77. Id.

80. Id.

^{72.} Id.

^{73.} *Id*.

^{74.} *Id*. at 910. 75. *Id*.

^{76.} *Id*.

^{78.} Newman v. Hjelle, 133 N.W.2d 549, 552 (N.D. 1965).

^{79.} Id. at 555.

It is a well-settled rule that in placing a construction on a constitutional provision, the court may look to the history of the times and examine the state of being existing when the constitutional provision in question was framed and adopted by the people in order to ascertain the prior law, the mischief, and the remedy.⁸¹

Section 186 had been approved in 1938 and article 56 was approved in 1940.⁸² Deciding the case in 1965, the Court considered publicity pamphlets, other advertisements, and editorial comments leading to adoption of article 56.⁸³ Regarding the mischief to be remedied, the Court described "several occasions the legislature had appropriated most generously for other than highway purposes out of the funds."⁸⁴

To answer the question whether control of advertising adjacent to highways was "considered as a part of a public highway at that time," the Court looked to statutes relating to the highway fund then in effect.⁸⁵ The Court concluded the history and statutes in effect showed an understanding by the people adopting article 56 that the acquisition of signage rights on and abutting the right of way was within the powers of the highway department.⁸⁶ Having determined the powers of the highway department under the existing statutes and assessing the evidence of the intent of the people in adopting the amendment in 1940, the Court concluded on a note of fixation: "the people froze into a constitutional provision a subject already covered by statute."⁸⁷

The Court again interpreted the meaning of provisions of the North Dakota Constitution as of the time they were adopted in the case of *State ex rel*. *Stockman v. Anderson.*⁸⁸ After the people of North Dakota adopted amendments to sections 26, 29, and 35 of the state Constitution in 1960, the U.S. Supreme Court issued its watershed one-person, one-vote apportionment decision in *Baker v. Carr.*⁸⁹ Soon after, two decisions by a three-judge panel of the federal district court in *Paulson v. Meier,*⁹⁰ held sections 26, 29, and 35 of the state constitution unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.⁹¹ The petitioners in *Stockman* brought an original proceeding in the North Dakota Supreme Court

^{81.} Id. at 556.

^{82.} Id.

^{83.} Id. at 557.

^{84.} Id. at 556 (quoting McKenzie Cty. v. Lamb, 298 N.W. 241, 243 (N.D. 1941)).

^{85.} Id. at 557-58.

^{86.} Id. at 558.

^{87.} Id. at 558-59.

^{88. 184} N.W.2d 53 (N.D. 1971).

^{89. 369} U.S. 186 (1962).

^{90. 246} F. Supp. 36 (D. N.D. 1965).

^{91.} Paulson, 246 F. Supp. at 43.

to determine the rights of senators from multi-senatorial districts to hold office.⁹² The Court's decision turned on a question of severability—"whether the people of the State of North Dakota can be held to have intended to approve the second portion of section 29 even though the first portion of that section is invalid."⁹³ "In construing a constitutional provision, all facts which form the background for the adoption of that provision may be considered by the court."⁹⁴ With the background that since 1889 the Legislative Assembly had been apportioned into single-senator districts, the Court asked itself, "[C]an it be said that the people of North Dakota, in adopting the amendments to section 29 and section 35, could have foreseen the subsequent decisions of the United States Supreme Court . . .? We think not."⁹⁵ Concluding the intent of the people in 1960 was to adopt the two provisions of section 29 as a unit, the Court answered the severability question in the negative: "the section as a unit must fall[.]"⁹⁶

Continuing into the modern era, the Court in *State ex rel. Heitkamp v*. *Hagerty*⁹⁷ considered the question of whether the attorney general was permitted to retain private attorneys under contingent fee agreements without violating North Dakota Constitution article X, section 12. This section requires: "All public moneys ... shall be paid ... to the state treasurer ... and shall be paid out and disbursed only pursuant to appropriation."⁹⁸ This opinion illustrates the Court's early-1990s return to expressly stating principles of interpretation in its opinions before applying them to the issues presented. The Court introduced its interpretation:

When interpreting constitutional sections, we apply general principles of statutory construction. Our overriding objective is to give effect to the intent and purpose of the people adopting the constitutional statement. The intent and purpose of a constitutional provision is to be determined, if possible, from the language itself.⁹⁹

And continued:

If the intentions of the people cannot be determined from the language itself, we may turn to other aids in construing the provision. We may look at "the background context of what it displaced. In construing a constitutional amendment, 'we look first to the historical context of that amendment.' 'A contemporaneous and

^{92.} Stockman, 184 N.W.2d at 54.

^{93.} Id. at 56.

^{94.} Id. at 57 (citing State v. Lohnes, 69 N.W.2d 508 (N.D. 1955)).

^{95.} Id.

^{96.} Id. at 58.

^{97. 1998} ND 122, 580 N.W.2d 139.

^{98.} Hagerty, 1998 ND 122, JJ 10-12 (quoting N.D. CONST. art. X, §12(1)).

^{99.} Id. ¶ 13 (citations omitted).

longstanding legislative construction of a constitutional provision is entitled to significant weight when we interpret the provision.' A constitution 'must be construed in the light of contemporaneous history—of conditions existing at and prior to its adoption. By no other mode of construction can the intent of its framers be determined and their purpose given force and effect.' To determine the intent of the people adopting what is now Art. X, § 12, N.D. Const., we look at constitutional provisions, statutes, and decisions about spending, the Attorney General, and attorney fee agreements providing the historical context existing when it was adopted in 1938.¹⁰⁰

In applying these principles, the Court relied on the publicity pamphlets circulated in association with the initiated petition to amend section 186.¹⁰¹ The Court concluded from the text and history of the amendment's adoption in 1938 that there was no "intention to limit the Attorney General's authority to control litigation prosecuted on behalf of the State and to control the appointment and method of compensation of special assistant attorneys general."¹⁰²

Although its references to fixation have been infrequent, the Court's consistent approach is to read provisions of the state Constitution as having a meaning fixed at the time of adoption. This approach continued in the Court's

^{100.} Id. ¶ 17 (citations omitted).

^{101.} Id. ¶ 24.

^{102.} Id. JJ 24-25.

opinions through the years from 1889 to 1950¹⁰³ with one exception discussed below. The thirteen cases indicating agreement with the fixation principle since 1950¹⁰⁴ contrast with three exceptions¹⁰⁵ during that time period.

104. In addition to the Newman, Stockman, and Hagerty cases discussed above, see State ex rel. Sanstead v. Freed, 251 N.W.2d 898, 905 (N.D. 1977) ("Both sections were adopted at the same time by a vote of the electorate of the State of North Dakota in 1889. Neither section has since been amended so as to alter its meaning pertinent to the issues presented in this proceeding."); State ex rel. Agnew v. Schneider, 253 N.W.2d 184, 196 (N.D. 1977) ("[Section 85] also 'locks' the supreme and district courts into the constitution, and in this respect the legislature is limited."); McCarney v. Meier, 286 N.W.2d 780 (N.D. 1979) ("All rules of construction are subservient to this duty to ascertain and give effect to the intent and purpose of the framers and the people who adopted the Constitution. Expediency has no application nor does public clamor, majority desire, or apparent need.") (citations omitted); Haggard v. Meier, 368 N.W.2d 539, 541 (N.D. 1985) ("Where constitutional and statutory provisions are clear and unambiguous, it is improper for the courts to attempt to construe the provisions so as to legislate additional requirements or proscriptions which the words

^{103.} State ex rel. Ohlquist v. Swan, 44 N.W. 492, 493 (N.D. 1890) ("That convention, with full knowledge of the past legislation, crystalized what it believed to be the desire of the people of North Dakota into article 20 of the proposed constitution "); State ex rel. Moore v. Archibald, 66 N. W. 234, 236 (N.D. 1896) ("They were placed there to give this court original jurisdiction, if for any purpose whatever; and we cannot, in effect, expunge them from the constitution by construction."); Christianson v. Farmers' Warehouse Ass'n, 67 N.W. 300, 302 (N.D. 1896) ("And when, in the latter section, it is declared that the district courts shall have 'such appellate jurisdiction as may be conferred by law,' it is not meant that the legislature may define appellate jurisdiction, and make it mean one thing in one case, and a different thing in another case."); Ex parte Corliss, 114 N.W. 962, 964 (N.D. 1907) ("If . . . it is desirable to provide for other officers to perform such duties, the remedy is with the people. They may amend the Constitution . . . "); Malin v. County of LaMoure, 145 N.W. 582, 586 (N.D. 1914) ("We are quite satisfied, however, that prior to the adoption of the North Dakota Constitution the meaning had extended its original boundary, and that the provisions which are to be found in the Constitutions of all of the states were aimed, not merely against the selling of justice by the magistrates, but by the state itself."); State ex rel. City of West Fargo v. Wetz, 168 N.W. 835, 839 (N.D. 1918) ("This was an expression of the belief prevalent at the time of the adoption of the Constitution"); State ex rel. Twichell v. Hall, 171 N.W. 213, 227 (N.D. 1918) (Birdzell, J., concurring) ("To have done so would have been to adopt by reference" for all time the existing provisions of law relative to publication."); State v. State Bd. of Canvassers, 172 N.W. 80, 110 (N.D. 1919) (Robinson, J., dissenting) ("A Constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written Constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion.") (quoting THOMAS COOLEY, A CONSTITUTIONAL LIMITATIONS 89 (7th ed. 1903)); State ex rel. Langer v. Olson, 176 N.W. 528, 538 (N.D. 1920) (Robinson, J., dissenting) ("While it is true that the words of the section have always the same literal meaning, yet they have not always the same application."); Dyer v. Hall, 199 N.W. 754, 756 (N.D. 1924) ("Their powers and duties, now fixed by statute and subject to legislative modification at any time, will become embodied in the Constitution, not subject to alteration by amendments inconsistent therewith, except by constitutional change, if this proposed amendment be ratified."); Anderson v. Byrne, 242 N.W. 687, 690 (N.D. 1932) ("Their powers and duties, now fixed by statute and subject to legislative modification at any time, will become embodied in the Constitution, not subject to alteration by amendments inconsistent therewith, except by constitutional change, if this proposed amendment be ratified.") (quoting Dyer, 199 N.W. at 756)); State ex rel. Cleveringa v. Klein, 249 N.W. 118, 124 (N.D. 1933) ("Whether this be wise or unwise, whether it may now be said that the people at the time of the adoption of the Constitution could not foresee the emergency which exists, are matters of judgment for the people themselves to determine in any movement to alter or change these provisions. Until so changed, they are constitutional limitations on the power of the Legislature, the members of which took an oath to support this Constitution."); Dawson v. Tobin, 24 N.W.2d 737, 745 (N.D. 1946) ("The rule is sometimes stated more completely that a constitutional provision which is positive and free from all ambiguity must be accepted by the court as it reads.").

Prior to 1950, the notable exception to the Court's consistent expression of fixation as an element of its interpretive principles is the 1934 case of *State* v. *Norton*.¹⁰⁶ In the case, the Court said:

The Constitution is a living, breathing, vital instrument, adaptable to the needs of the day, and was so intended by the people when adopted. It was not a hard and fast piece of legislation, but a declaration of principles of government for the protection and guidance of those upon whose shoulders the government rested.¹⁰⁷

This is as clear a statement of living constitutionalism as one is likely to find anywhere. Considering how unusual this statement is in comparison to the Court's other statements about constitutional interpretation, the context in which the statement appears and how the Court analyzes the provision at issue are worth examining to aid in understanding what the Court meant by this.

of the provisions do not themselves provide."); State v. Ringquist, 433 N.W.2d 207, 217 (N.D. 1988) (VandeWalle, J., concurring specially) ("Although I agree we need not merely echo the United States Supreme Court in applying our own constitutional provisions which are identical to the Federal Constitution, I cannot agree that the interpretation and application of those provisions should merely reflect the philosophy or views of the particular justices who happen to be sitting at the time the issue of the application and interpretation of our State Constitution is raised."); State ex rel. Bd. of Univ. & Sch. Lands v. City of Sherwood, 489 N.W.2d 584, 588 (N.D. 1992) ("We conclude that the Legislature's contemporaneous enactment of the alternative procedure, and the long acquiescence in that construction, are strong indications that it was the intent of the people in adopting the 1912 constitutional amendment to authorize a separate procedure for acquisition of school trust lands for public purpose without requiring a sale by public auction."); State v. Herrick, 1999 ND 1, J 22, 588 N.W.2d 847 ("[T]he constitution must be interpreted in light of the rights and liberties it was created to uphold, and not the philosophical viewpoints of the judiciary who hold the responsibility of interpretation."); City of Bismarck v. Fettig, 1999 ND 193, ¶ 7, 601 N.W.2d 247 ("[T]he North Dakota Constitution 'preserves the right of trial by jury as it existed at the time of the adoption of our state constitution."); Riemers v. Eslinger, 2010 ND 76, J 26, 781 N.W.2d 632 ("We hold to our prior jurisprudence, that the right of trial by jury is determined by the laws as they existed at the time the Constitution of North Dakota was adopted.... [T]he people of North Dakota may change this right if they choose."); State v. Strom, 2019 ND 9, 9 6, 921 N.W.2d 660 (applying statutory construction principle, "Absent an applicable definition, words enacted in statutes carry the plain, ordinary, and commonly understood meaning as of the time of enactment.").

^{105.} Tormaschy v. Hjelle, 210 N.W.2d 100, 103 (N.D. 1973) ("A Constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the community. The terms and provisions of constitutions are constantly expanded and enlarged by construction to meet the advancing affairs of men.") (quoting State ex rel. State Railway Comm. v. Ramsey, 37 N.W.2d 502, 506 (Neb. 1949))); Johnson v. Hassett, 217 N.W.2d 771, 779 (N.D. 1974) ("In constitutional law, as in other matters, times change and doctrines change with the times."); Andrews v. O'Hearn, 387 N.W.2d 716, 723 (N.D. 1986) ("Section 9 never has been constructed as an absolute right; indeed, this court once stated that the provision must be interpreted in light of the 'superior rights of the public and the necessities of the occasion."").

^{106. 255} N.W. 787 (N.D. 1934).

^{107.} Norton, 255 N.W. at 792.

Like *Barry v. Truax*,¹⁰⁸ *Norton* is about the right to trial by jury.¹⁰⁹ Norton was convicted by a jury of nine men and three women.¹¹⁰ On appeal, Norton argued that the state constitutional provision restricted jury service to men.¹¹¹ Stating "it is the *right* of trial by jury which is to remain inviolate, not the qualification of jurors," the Court reasoned that the "essential features" of number, impartiality, and unanimity were required and that restriction of jury duty to men as was the case in 1889 was not required by the Constitution.¹¹² Instead, the Court reasoned that the right to jury trial was a right to trial by a jury of peers having the same legal status, notwithstanding the use of the word "men," and the later expansion of the electorate to include women permitted the legislature to expand the qualifications for jury service in the same manner.¹¹³

In three post-1950 cases, the Court expressed a certain interpretive flexibility that appears inconsistent with the principle that the Court is constrained by a fixed original meaning of the Constitution. In *Tormaschy v*. *Hjelle*,¹¹⁴ the Court said: "A Constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the community. The terms and provisions of constitutions are constantly expanded and enlarged by construction to meet the advancing affairs of men."¹¹⁵ The Court interpreted the term "right of way" in the takings provision of the North Dakota Constitution¹¹⁶ to include land to be used for highway rest areas.¹¹⁷ It is unclear to what extent the Court's analysis may have relied on the statement quoted above, which it quoted from a Nebraska court.¹¹⁸ But regardless of whether it applied this concept, the Court's assertion that constitutional terms may be "expanded and enlarged by construction" is not consistent with the terms having a fixed meaning.¹¹⁹

111. Id.

112. Id. at 791.

114. 210 N.W.2d 100 (N.D. 1973).

115. *Tormaschy*, 210 N.W.2d at 103 (quoting State ex rel. State Ry. Comm. v. Ramsey, 37 N.W.2d 502, 506 (Neb. 1949)).

116. Then N.D. CONST. art. I, § 14, now N.D. CONST. art. I, § 16.

117. Tormaschy, 210 N.W.2d at 102.

118. Id. at 103.

119. This passage of the opinion invokes the difference between interpretation and construction but appears to state that the zone in which construction is proper overlaps with the zone in which the Court is engaging in interpretation. *See* THOMAS COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 69-70 (Boston: Little, Brown, & Co, 5th ed. 1883); *see generally* Barnett &

^{108. 99} N.W. 769 (N.D. 1904).

^{109.} Norton, 255 N.W. at 788.

^{110.} Id.

^{113.} *Id.* at 792 ("We interpret the word 'men' in the thought of the convention and of the people of the day as meaning those persons who possessed the qualifications of jurors at that time, with no thought of sex.").

In Johnson v. Hassett,¹²⁰ the Court again expressed a fluid, rather than fixed, approach to determining meaning in constitutional provisions: "In constitutional law, as in other matters, times change and doctrines change with the times."¹²¹ Finally, in Andrews v. O'Hearn,¹²² the Court said: "Section 9 never has been construed as an absolute right; indeed, this court once stated that the provision must be interpreted in light of the 'superior rights of the public and the necessities of the occasion."¹²³ Although the Court said this in rejecting an invitation to engage in an expansive reading of the clause to provide a "guarantee of justice," interpreting a provision in response to the "necessities of the occasion"- in contrast to applying a fixed meaning to new circumstances- is contrary to the fixation principle, because as circumstances relevant to interpretation change over time, so will meaning.

To summarize the Court's statements on whether the meaning of a provision is fixed at the point it is adopted or can change according to later circumstances, the large majority of the Court's opinions that speak to the issue say the meaning is fixed and not subject to later evolution.

C. CONSTRAINT

Professor Lawrence Solum has summarized the Constraint Principle as follows: "Constitutional practice, including the elaboration of constitutional doctrine and the decision of constitutional cases, should be constrained by the original meaning of the constitutional text. At a minimum, constraint requires that constitutional practice be consistent with original meaning."¹²⁴ Elaborated a bit, an originalist might say constitutional doctrine and decisions in constitutional cases must be consistent with the propositions of law that express the communicative content of the constitutional text.¹²⁵

We now consider whether the North Dakota Supreme Court has stated its interpretive principles for the North Dakota Constitution consistent with the constraint principle. The Court's opinions would be consistent with the constraint principle if they state that the Court must act-and require coordinate branches to act-within the limits of the original meaning of the constitutional text, including any of the Court's doctrines or implementing rules that are fairly traceable to the original meaning of the text. Opinions stating inter-

Bernick, *supra* note 11; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013).

^{120. 217} N.W.2d 771 (N.D. 1974).

^{121.} Johnson, 217 N.W.2d at 779.

^{122. 387} N.W.2d 716 (N.D. 1986).

^{123.} Andrews, 387 N.W.2d at 723.

^{124.} Solum, supra note 15, at 293-94.

^{125.} Solum, supra note 21, at 20.

pretive principles permitting decisions contrary to the legal propositions expressed in the constitutional text, doctrines, or implementing rules fairly traceable to the original meaning of the constitutional text would tend to show the Court has qualified or disagreed with the constraint principle.

I again look at what the Court has said about its methods. I make no attempt to infer what interpretive principles the Court applies when it does not state principles of interpretation, and I also do not try to assess whether the Court has fairly applied its stated method. My descriptive claim is intentionally superficial: what does the Court say it is doing or should be doing? As shown below, there are numerous examples of opinions in which the Court articulates some form of the constraint principle. In its simplest form, the constraint principle articulates that the Constitution-at least to the extent the text provides a determinative rule to resolve the issue presented-is binding law that constrains government officials. Statements contrary to the constraint principle would treat the rules expressed by the Constitution as aspirational statements of principles or as nonbinding guidance. Likewise, contrary statements may express a free-ranging authority to craft exceptions to otherwise clear text. A statement directly contradicting the constraining nature of constitutional text would seem much more likely to come from an academic than a court.¹²⁶ As described below, the Court has consistently stated that its duty is to constrain its reasoning and decisions to the meaning of the text intended by those who wrote and ratified the text.

I have found no opinions in which the Court has expressed forthrightly that a government actor could act in conflict with what it recognized to be the meaning of the Constitution. Of course I have not read each of the Court's approximately 11,000 published opinions, so I cannot say with certainty that there is no such case.¹²⁷

Among the pre-1950 search results, I classify thirty-eight out of seventyeight cases as including statements that indicate agreement with the constraint principle.¹²⁸ I classify one case as indicating disagreement with the constraint principle.¹²⁹ The other thirty-nine cases include no statements indicating either agreement or disagreement. As a result of the breadth of the

^{126.} For a scholarly discussion describing interpretation of the U.S. Constitution in this way, see generally David A. Strauss, *Does the Constitution Mean What it Says?*, 129 HARV. L. REV. 1 (2015).

^{127.} In place of reading every opinion, I examined what I believe to be a representative sample of cases selected by the objective search criteria described above in section III(A) with particular attention to those that might be taken as undermining my claim. If there are contrary published opinions, they either refer to the state Constitution in an unusual way that eluded my search parameters, or they are cited by other decisions too few times to satisfy the search criteria.

^{128.} See infra Appendix A (cases collected in table and labeled "Y" under "Constraint").

^{129.} State v. Norton, 255 N.W. 787 (N.D. 1934).

search, some of these thirty-nine cases lacking any statements relating to constraint do not contain any constitutional analysis but rather reference the state Constitution only in passing and not to decide a constitutional issue.¹³⁰

Among the search results for the years since 1950, I classify 29 out of 115 cases as including statements that indicate agreement with the constraint principle.¹³¹ I classify one case as including a statement that indicates disagreement with the fixation principle.¹³² In the other eighty-five cases, I identified no statement indicating either agreement or disagreement.

In the 1903 case of *State ex rel. Board of University & School Lands v. McMillan*,¹³³ the Court declared unconstitutional a statute authorizing investment of the permanent school fund in certain state bonds:

Briefly stated, counsel contends that they are bonds of the state for the purpose of sustaining them as a constitutional investment of the permanent school fund under section 162, and contends they are not state bonds or evidences of a state indebtedness for the purpose of avoiding the condemnation of section 182, which limits state indebtedness to \$ 200,000. This contention cannot be sustained.¹³⁴

The Court understood that the legislative purpose underlying the statute at issue was to allow the investment, but held the Board was in error to follow the statute: "When the Constitution speaks, its voice is supreme, and its mandates are to be obeyed by all departments and all officers of the state government."¹³⁵ Quoting Cooley, the Court stated:

The true rule is stated in Cooley's Const. Lim. 83, as follows: "Contemporary construction * * * can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries. * * * Acquiescence for no length of time can legalize a clear usurpation of power where the people have plainly expressed their will in the Constitution, and appointed tribunals to enforce it."¹³⁶

^{130.} *See, e.g.*, Olander Contracting Co. v. Gail Wachter Invs., 2002 ND 65, **J** 8, 643 N.W.2d 29; Buchholz v. Buchholz, 1999 ND 36, **J** 7, 590 N.W.2d 215; City of Fargo v. Thompson, 520 N.W.2d 578, 580 (N.D. 1994).

^{131.} See infra Appendix B (cases collected in table and labeled "Y" under "Fixation").

^{132.} Kelsh v. Jaeger, 2002 ND 53, 641 N.W.2d 100.

^{133. 96} N.W. 310 (N.D. 1903).

^{134.} McMillan, 96 N.W. at 318.

^{135.} Id. at 324.

^{136.} Id. at 323.

2020]

In *Ex parte Corliss*,¹³⁷ the Court read North Dakota Constitution, article 20, relating to alcohol prohibition, "[w]ith and in the light of the other provisions of [the Constitution] . . . [without] doing unwarranted violence to the obvious intent of the framers."¹³⁸ The Court went on:

[I]n construing a constitution, the same must be construed in the light of contemporaneous history—of conditions existing at and prior to its adoption. By no other mode of construction can the intent of its framers be determined and their purpose given force and effect. In other words, *the spirit, as well as the letter* of the instrument, must be given effect.¹³⁹

At issue was the right of Corliss to enter a grand jury proceeding under the authority of his status as a deputy enforcement commissioner empowered to enforce the prohibition law.¹⁴⁰ The Court held the authorizing statute was invalid to support Corliss' entry into the grand jury proceeding.¹⁴¹ The reason was that by providing for elected sheriffs and state's attorneys, the necessary implication of the Constitution was to disallow the Legislature from providing by statute for other officials appointed by the Governor to carry out duties inherent to offices the Constitution specified were to be elected.¹⁴² "The foregoing opinion fully sustains what we have heretofore said to the effect that, the Constitution having named certain officers, the functions essentially and inherently connected with such offices must be discharged by these constitutional officers and none others."¹⁴³ The Court concluded:

We think article 20 must be construed in connection with and in the light of the other provisions of that instrument, and when thus construed it is apparent that all that was intended by the use of this language was that the legislative assembly shall prescribe such regulations, etc., not inconsistent with the other provisions of the constitution. To say that under the power to prescribe regulations the legislative assembly may create new offices in contravention of the whole scheme of government provided for by other provisions of the constitution is, we think, doing unwarranted violence to the obvious intent of the framers of that instrument.¹⁴⁴

^{137. 114} N.W. 962 (N.D. 1907).

^{138.} Corliss, 114 N.W. at 976.

^{139.} Id. at 967 (emphasis added).

^{140.} Id. at 962.

^{141.} Id. at 976.

^{142.} Id. at 964-66.

^{143.} Id. at 970.

^{144.} Id. at 976.

The Court regularly restates and applies the language of the constraint principle. In *Riemers v. Eslinger*,¹⁴⁵ the Court interpreted the right to a jury trial guaranteed by article I, section 13 to encompass a non-criminal municipal traffic citation punishable by a twenty-dollar fine.¹⁴⁶ Article I, section 13, states: "The right of trial by jury shall be secured to all, and remain inviolate."147 Starting with the principle that government actors are constrained by this provision, the Court quoted Barry v. Truax: "This provision deprives the legislature and courts of all authority 'to destroy by legislation or by judicial construction any of the substantial elements of the right of jury trial."148 Relying in part on the meaning of the word "remain" in section 13, the Court exercised its duty to interpret the provision as carrying the same meaning as when it was adopted in 1889.149 Thus interpreted, the Court concluded that the district court must apply the jury trial right to the non-criminal traffic violation at issue.¹⁵⁰ This result was reached despite concerns that the purchasing power of \$20 had changed significantly since 1889 and that the cost to the city and inconvenience to jurors was out of proportion to the significance of the municipal citation.¹⁵¹ Concluding the jury trial right applied, the Court reversed and remanded to the municipal court for proceedings consistent with that interpretation of the right.¹⁵²

A divided Court in *McCarney v. Meier*¹⁵³ agreed on the applicable interpretive rules but disagreed as to their application.¹⁵⁴ In *McCarney*, a bill appropriating money to purchase the Cross Ranch was referred to a vote of the people under article 105 of the Constitution.¹⁵⁵ The Secretary of State rejected 1,150 signatures for having an incomplete "post-office address," which article 105 required, and concluded the petition lacked the required number of signatures to be placed on the ballot.¹⁵⁶ In stating the applicable principles of construction, the Court acknowledged, "It is the duty of the court to discover and give effect to the intention of the people without doing violence to the words employed."¹⁵⁷ The ultimate and overriding goal was to

152. Id. ¶ 27.

153. 286 N.W.2d 780 (N.D. 1979).

156. Id.

^{145. 2010} ND 76, 781 N.W.2d 632.

^{146.} Riemers, 2010 ND 76, J 1.

^{147.} N.D. CONST. art. I, § 13.

^{148.} Riemers, 2010 ND 76, § 8 (quoting Barry v. Truax, 99 N.W. 769, 770 (1904)).

^{149.} *Id*. ¶¶ 8-11.

^{150.} *Id*. ¶ 27.

^{151.} Id. JJ 25-26 (rejecting rationale of South Dakota Supreme Court interpreting same clause).

^{154.} *McCarney*, 286 N.W.2d at 788 (Erickstad, C.J., dissenting) ("[T]he majority of our court correctly states principles of constitutional construction").

^{155.} Id. at 782.

^{157.} Id. at 783 (citing State v. Amerada Petroleum Corp., 49 N.W.2d 14 (1951)).

determine the "intent and purpose of the framers and the people who adopted the Constitution."¹⁵⁸ Rejecting the suggestion the Court had discretion to do anything but follow this constitutional command, the Court said: "Expediency has no application nor does public clamor, majority desire, or apparent need."¹⁵⁹

Applying these principles, the majority explained that the phrase "postoffice address" was not defined in the Constitution.¹⁶⁰ The Court placed significant reliance on the sample provided to signers with the petition forms, which "misled the signer to believe that city and state (i.e., 'Bowman, N.D.') was a sufficient designation of post-office address."¹⁶¹ The majority held that under such circumstances where petition signers were presented with a misleading sample showing only city and state, such signatures were "sufficient compliance" to satisfy the purpose of the referendum petition requirements.¹⁶² Chief Justice Erickstad, dissenting, analyzed the historical background differently and would have read the post-office address requirement more strictly to serve what he identified as an anti-fraud purpose.¹⁶³ Whether the majority or Chief Justice Erickstad had the better of the arguments, both sides considered the Court and the Secretary of State to be constrained by the meaning of the provision, properly interpreted. Chief Justice Erickstad differed not as to constraint, but as to the proper interpretation.

In *State ex rel Langer v. Olson*,¹⁶⁴ the Court expressed the constraint principle in more expansive terms, emphasizing the constraining duties the Constitution imposes on both the Court and the legislative assembly:

The Constitution, however, is the supreme law of this land. Its provisions are equally obligatory upon the court and upon the legislature. It is the duty of this court to uphold the Constitution in its plain words and meaning, so long as this court has imposed upon it the sworn duty to uphold the Constitution. In this Constitution the people of the state have placed restrictions and checks upon the exercise of legislative powers. In it the people of this state have reserved to themselves the right to approve or reject legislative powers exercised by the legislative assembly. The plain mandates of the Constitution must be followed. . . . [F]ollowing its sworn duty concerning the inviolability of constitutional provisions, rules of expediency, or

^{158.} Id.

^{159.} Id. (citing State v. Olson, 176 N.W. 528, 534 (1920)).

^{160.} Id. at 786.

^{161.} Id.

^{162.} *Id.* at 786-87.

^{163.} *Id.* at 790-91.

^{164. 176} N.W. 528 (N.D. 1920).

of impropriety concerning constitutional provisions, have no application. Neither may public clamor, majority desire, present apparent need, if any, unreasonableness of constitutional provisions as particularly applied, influence or swerve the court in following its sworn duty.¹⁶⁵

Through the decades, the Court has repeatedly acknowledged that the Constitution is a constraint on governmental action. In 1960, it said: "The constitution of the state is its paramount law. It is a self-imposed restraint upon the people of the state in the exercise of their governmental sovereign power, either by themselves through the initiative or by their agency, the legislature."¹⁶⁶ In 1949: "When it is asserted that action which is authorized by a legislative enactment is forbidden by the constitution . . . we look only to ascertain if it inhibited the legislature from enacting the law."¹⁶⁷

I have identified only one decision before 1950 and one after 1950 which may be read as inconsistent with the principle that the commonly understood meaning of the Constitution constrains the government. The first statement appears in *State v. Norton*,¹⁶⁸ in which Norton challenged the constitutionality of the composition of the jury that had tried and convicted him.¹⁶⁹ The jury included three women.¹⁷⁰ Norton argued that women were constitutionally ineligible for jury duty because they were not eligible under territorial law when article I, section 7 of the North Dakota Constitution was drafted and adopted.¹⁷¹ He further emphasized the text of section 7, which stated in part, "[B]ut a jury in civil cases, in courts not of record, may consist of less than twelve men, as may be prescribed by law."¹⁷²

Rejecting Norton's arguments, the Court made two statements that appear inconsistent with the constraint principle. First, it said: "Legislation must of necessity take into consideration the change in conditions and in applying the established principles to these changes must make changes in the application from time to time. This is done without sacrifice of principle and makes legislation compatible with the state of society of the day."¹⁷³ The Court went on to say:

^{165.} Olson, 176 N.W. at 534.

^{166.} Northwestern Bell Tel. Co. v. Wentz, 103 N.W.2d 245, 252 (N.D. 1960).

^{167.} Stark v. City of Jamestown, 37 N.W.2d 516, 531 (N.D. 1949).

^{168. 255} N.W. 787 (N.D. 1934); *see also supra* text accompanying note 106 (discussing *State v. Norton* in the context of the Fixation principle).

^{169.} Norton, 255 N.W. at 787-88.

^{170.} Id. at 788.

^{171.} Id. at 789.

^{172.} Id. at 787.

^{173.} Id. at 791.

445

The Constitution is a living, breathing, vital instrument, adaptable to the needs of the day, and was so intended by the people when adopted. It was not a hard and fast piece of legislation, but a declaration of principles of government for the protection and guidance of those upon whose shoulders the government rested.¹⁷⁴

This passage appears to echo the advice Justice Cooley gave to the Constitutional Convention:

In your constitution-making remember that times change, that men change, that new things are invented, new devices, new schemes, new plans, new uses of corporate power. And that thing is going to go on hereafter for all time, and if that period should ever come, which we speak of as the millennium, I still expect that the same thing will continue to go on there, and even in the millennium people will be studying ways whereby-by means of corporate power-they can circumvent their neighbors. Don't in your constitution-making legislate too much. In your constitution you are tying the hands of the people. Don't do that to any such extent as to prevent the legislature hereafter from meeting all evils that may be within the reach of proper legislation. Leave something for them. Take care to put proper restrictions upon them, but at the same time leave what properly belongs to the field of legislation, to the legislature of the future. You have got to trust somebody in the future and it is right and proper that each department of government should be trusted to perform its legitimate functions.¹⁷⁵

Reading the opinion as a whole, it is apparent that the decision did not depend on the Court rejecting the constraining power of the Constitution. But to be sure, stating that the Constitution is "a living, breathing, vital instrument, adaptable to the needs of the day" does not sound like a significant constraint if the Court can interpret it as a mere "declaration of principles."¹⁷⁶ The Court's analysis in *Norton* did not say it was demoting the jury trial right to mere "principle" or "guidance," but instead reaffirmed its prior holding that the jury right was adopted in the Constitution as it existed in 1889.

Norton presented a question of specificity versus generality in determining the scope of the right to a jury trial. The Court held the essential features taken from the jury trial right as known in 1889 that the Constitution guarantees shall "remain inviolate" did not include the details or limitations on juror

^{174.} Id. at 792.

^{175.} *The Convention: Judge Cooley's Remarks*, BISMARCK WKLY. TRIB., July 19, 1889, at 8 (emphasis added).

^{176.} Norton, 255 N.W. at 792.

qualification at that time.¹⁷⁷ The Legislature could expand juror qualifications to the defendant's legal peers consistent with the jury trial right, which did not include the right to limit the jury pool to those who were eligible in 1889. In short, despite also making a statement to the contrary, the Court's reasoning assumed the jury trial right was a constraint on the government and not merely a declaration of principles forming the basis for further common law development.

The second statement apparently in conflict with the constraint principle appears in Kelsh v. Jaeger,¹⁷⁸ in which the Court interpreted North Dakota Constitution article IV, section 4, which provides: "Senators and representatives must be elected for terms of four years."179 The 2001 legislative redistricting plan placed two incumbent senators in the same district, one who had been elected in 1998 and one who was elected in 2000.180 According to the redistricting plan, the four-year term of the senator elected in 2000 was truncated.¹⁸¹ That senator challenged the constitutionality of the statutory redistricting plan.¹⁸² The Court reasoned: "If we were to construe N.D. Const. art. IV, section 4, in a literal sense as absolutely prohibiting the Legislature, under any circumstances, from truncating the term of a senator to less than four years, the Legislature would be severely hampered in accomplishing [other constitutional requirements]."183 Here, in interpreting this provision, the constraint principle gave way when the Court qualified the clear requirement "must be elected for terms of four years." The Court reasoned that it had to qualify this simple, clear mandate of the Constitution in order to reconcile it with the mandatory redistricting and one-person, one-vote principles required by other provisions.¹⁸⁴ The Court concluded that one provision had to give way in part to another in order to give meaning to both.

D. WHAT MEANING AND WHOSE INTENT: FRAMERS, DRAFTERS, AND THE PEOPLE WHO VOTED TO ADOPT A PROVISION

The broad topic of what is "meaning" is a legal and linguistic debate well beyond the scope of this article. The concepts of fixation and constraint require us to consider fixation *of what* and constraint *by what*. For purposes of this discussion, we can limit ourselves to the two theories of meaning that are most commonly reflected in North Dakota Supreme Court opinions: author's

^{177.} Id. at 792-93.

^{178. 2002} ND 53, 641 N.W.2d 100.

^{179.} Kelsh, 2002 ND 53, 9 6; N.D. CONST. art. IV, § 4.

^{180.} Kelsh, 2002 ND 53, § 6.

^{181.} Id.

^{182.} Id.

^{183.} *Id*. ¶ 13.

^{184.} Id.

intent and reader's understanding. These should ordinarily be the same because "competent users of language rarely make severe mistakes about what their audience will understand."¹⁸⁵ The Court's cases express a consistent effort to interpret constitutional provisions according to the intent of the people who adopted it, the framers who drafted the provision, or both. I have found no North Dakota cases that suggest finer distinctions that might be made between possible varieties of original intent, such as intended meaning, intended applications, or intended purpose.

I am aware of no case that concludes there was a meaning intended by the framers that was different from the ordinary meaning that would have been understood by the public at the time of adoption.¹⁸⁶ Without a clear failure of communication between the speaker and the audience, or the framers who adopt the provision and the public who form a common understanding by reading it, the Court has not had to confront the issue of which would control, although it has said that the Framers' intent is an aid to determining the understanding of the voters.¹⁸⁷

Among the pre-1950 cases, thirty-five of the seventy-eight opinions state the aim is to determine the intent of either the drafters or of the people who voted to adopt the constitutional provision.¹⁸⁸ Of these, eighteen cases referred to determining the intent of the people who adopted the provision, and twenty-four cases referred to determining the intent of the drafters, framers, or makers of the constitutional provision. Some opinions referred to both. Among the cases since 1950, 39 of 115 cases stated an interpretive objective of determining the intent of the drafters or of the people who voted to adopt the provision.¹⁸⁹ Of these, twenty referred to the intent of the voters or people who adopted the provision, and thirteen referred to the intent of the drafters, framers, or makers of the constitutional provision. Again, there were some cases which referred to both.

There has been little change over time from early cases to later cases. Until 1920, the Court said it was seeking the intention of "[t]he framers of the Constitution, and the people of this state when they adopted it" according to how the "common mind" would understand its "plain language."¹⁹⁰ In 1890, in only its second published opinion, the North Dakota Supreme Court rejected an argument that would have interpreted article XX (which prohib-

^{185.} Baude & Sachs, supra note 31, at 1090.

^{186.} *Id.* at 1091 ("[T]he legal system can't limit itself to successful communications. It has to be able to handle unsuccessful ones too.").

^{187.} State ex rel. Miller v. Taylor, 133 N.W. 1046, 1049 (N.D. 1911).

^{188.} See infra Appendix A.

^{189.} See infra Appendix B.

^{190.} State ex rel. Bd. of Univ. & Sch. Lands v. McMillan, 96 N.W. 310, 318 (N.D. 1903).

ited alcohol and directed the Legislature to prescribe regulations for enforcement and "suitable penalties") to impliedly repeal all prior alcohol regulation and leave the matter unregulated until the legislature had fulfilled its constitutional mandate.¹⁹¹ Rejecting this argument as contrary to the clear intent of the framers and the voters who adopted the provision, the Court stated:

Such a conclusion is so at variance with all past legislation on the subject, so at variance with the declared wish of the voters of the state, so at variance with the intent and expectation of the framers of our constitution, that this court ought not to reach it, unless forced thereto by the clear rules of construction, or the obvious meaning of the language employed.¹⁹²

Other notable early examples interpreting the state Constitution to determine the meaning its words would carry to the framers and voters include *Barry v*. *Truax*,¹⁹³ where the Court described "the right of trial by jury' as a right well known and commonly understood at the time of its adoption . . ." and described its "[d]uty in this case is therefore to ascertain . . . the understanding of the framers of the Constitution, and the people who adopted it"¹⁹⁴ Again interpreting a provision to determine what was the common understanding of the people at the time, Chief Justice Christianson in *Daly v*. *Beery*¹⁹⁵ described the interpretive effort as follows: "Words or terms used in a constitution, being dependent on ratification by the people, must be understood in a sense most obvious to the common understanding at the time of its adoption."¹⁹⁶

The Court's statements that it was seeking the original meaning of the text continued into the 1930s and 1940s. In one formulation, it said: "We must presume, of course, that the words used by the framers of the Constitution were used in their ordinarily accepted sense unless the contrary clearly appears."¹⁹⁷ In another, "it is a cardinal rule of construction that a Constitution must be so construed as to give effect to the intention of the people who adopted it."¹⁹⁸ The Court also said: "We must look to the entire section to

^{191.} State ex rel. Ohlquist v. Swan, 44 N.W. 492, 493 (N.D. 1890).

^{192.} Id.

^{193. 99} N.W. 769 (N.D. 1904).

^{194.} Barry, 99 N.W. at 771.

^{195. 178} N.W. 104 (N.D 1920).

^{196.} Daly, 178 N.W. at 114 (Christianson, C.J., concurring specially).

^{197.} State ex rel. Olson v. Langer, 256 N.W. 377, 384 (N.D. 1934).

^{198.} Egbert v. City of Dunseith, 24 N.W.2d 907, 909 (N.D. 1946) (quoting Barry v. Traux, 99 N.W. 769, 772 (N.D. 1904)).

determine the purpose manifested by the people in adopting it and to its various provisions in order to give the utmost effect to the means prescribed for making that purpose effective."¹⁹⁹

Continuing on to the 1950s through the 1970s, the Court continued to hold, "[The] constitution must be construed so as to give effect to the intention of the people who adopted it.... [P]rimarily from the language of the constitution itself."²⁰⁰ If the meaning intended is ambiguous,

[R]esort may be had to the debates of the convention which framed and submitted the Constitution, as an aid in determining their meaning; and for the same purpose the interpretation placed upon such provisions by several sessions of the legislative assembly and by the people in voting thereon is entitled to great weight; and the intent, if it can be gathered from such proceedings, without doing violence to the words employed, is controlling.²⁰¹

Frequent reference was made to the intent of the framers in drafting a provision, most often interchangeably with the intent of the people who adopted the provision or amendment.²⁰²

In recent years, the Court has remained consistent in seeking the intent of the people who adopted a provision. A decision interpreting the 2016 crime victims' rights amendment sought the intent of the people as expressed in the ordinary meaning of the language used in the Constitution:

'Principles of construction applicable to statutes are generally available to construction of the Constitution.' In *Kelsh v. Jaeger*, ... we outlined several principles for construing constitutional provisions:

When interpreting the state constitution, our overriding objective is to give effect to the intent and purpose of the people adopting the constitutional statement. The intent and purpose of a constitutional provision is to be determined, if possible, from the language itself. We give words in a constitutional provision their plain, ordinary, and commonly understood meaning. When interpreting constitutional provisions, we apply general principles of statutory construction. We must give effect and meaning to every provision and reconcile, if possible, apparently inconsistent provisions. We presume the people do not

^{199.} State ex rel. Morris v. Sherman, 245 N.W. 877, 879 (N.D. 1932).

^{200.} State v. Feist, 93 N.W. 2d 646, 649 (N.D. 1958).

^{201.} State ex rel. Rausch v. Amerada Petroleum Corp., 49 N.W.2d 14, 21 (1951) (quoting State ex rel. Miller v. Taylor, 133 N.W. 1046, 1046 (N.D. 1911)).

^{202.} *Id.*; State ex rel. Stockman v. Anderson, 184 N.W. 2d 53, 56-57 (N.D. 1971) ("[G]ive effect to the intention and purpose of the framers and of the people who adopt such constitutional provision."); N.W. Bell Tel. Co. v. Wentz, 103 N.W.2d 245, 252-53 (N.D. 1960) ("[A] constitution must be so construed as to give effect to the intention of the people who adopted it.").

intend absurd or ludicrous results in adopting constitutional provisions, and we therefore construe such provisions to avoid those results.²⁰³

This formulation is characteristic of the Court's modern style in stating the proper approach to interpreting state constitutional provisions.²⁰⁴

One might fairly ask whether these statements seeking the intent of the people who adopted the provision articulate a view that the proper inquiry is to seek the original meaning of the words of a provision as they would have been understood at the time of adoption. At times, the Court says it is seeking the meaning intended by the drafters, framers, or makers of the constitutional provision. Of course, it is possible the framers and the voters would have understood a provision differently. In addition, by the Court saying it is seeking the "intent" of either the framers or the voters, one might argue the proper interpretive inquiry is to ascertain the ordinary meaning of the words in view of, and perhaps limited by, the intended real-world results. If the people adopt a provision that they hope and expect will have the real-world effect of furthering policy X, but in fact the real-world effect of the provision is contrary to that policy, one interpretive approach might have the "spirit" or the intended outcome supersede the letter of the provision. The reported opinions do not appear to address what a court should do if the original, commonly understood meaning differs in terms of real-world effects from the original expected results.

Only one opinion located in my research suggests the possibility of a different understanding of meaning between the drafters of a provision and the people who adopted it. In *State ex rel. Miller v. Taylor*,²⁰⁵ the Court explained that if the intent or understanding of the framers and the voters differ, it is the understanding of the people who adopted the provision that controls.²⁰⁶ The discernible intent of the framers is helpful to the extent it aids in determining what the voters would have understood the provision to mean.²⁰⁷ The Court explained:

^{203.} State v. Blue, 2018 ND 171, J 22, 915 N.W.2d 122 (quoting Thompson v. Jaeger, 2010 ND 174, J 7, 788 N.W.2d 586)).

^{204.} Paving Dist. 476 Group v. City of Minot, 2017 ND 176, ¶ 24, 898 N.W.2d 418; MKB Management Corp. v. Burdick, 2014 ND 197, ¶ 25, 855 N.W.2d 31; Haugland v. City of Bismarck, 2012 ND 123, ¶ 25, 818 N.W.2d 660; RECALLND v. Jaeger, 2010 ND 250, ¶ 8, 792 N.W.2d 511; Thompson v. Jaeger, 2010 ND 174, ¶ 7, 788 N.W.2d 586; Kelsh v. Jaeger, 2002 ND 53, ¶ 7, 641 N.W.2d 100; City of Bismarck v. Fettig, 1999 ND 193, ¶ 8, 601 N.W.2d 247; State ex rel. Heitkamp v. Hagerty, 1998 ND 122, ¶¶ 13, 17, 580 N.W.2d 139; N.D. Comm'n on Med. Competency v. Racek, 527 N.W.2d 262, 266 (N.D. 1995); Bulman v. Hulstrand Constr. Co., 521 N.W.2d 632, 636 (N.D. 1994).

^{205. 133} N.W. 1046 (N.D. 1911).
206. *Taylor*, 133 N.W. at 1049.
207. *Id*.

The intent of the convention is not controlling in itself; but, as its proceedings were preliminary to the adoption by the people of the Constitution, the understanding of the convention as to what was meant by the terms of this provision goes a long way toward explaining the understanding of the people when they ratified it.²⁰⁸

In summary, the North Dakota Supreme Court has consistently said it interprets the Constitution in an effort to determine the ordinary meaning as it would have been understood by the people who voted to adopt the provision and by the people who drafted it. In the one instance where the Court said which would control if the two understandings appeared to differ, it is the understanding of the sovereign people who voted to adopt the provision that controls. The Court has also consistently said this meaning must, if possible, be gleaned from the words used in the provision. The Court often employs close grammatical reading, dictionaries, reading the provision in the context of surrounding provisions, and canons of statutory construction appropriate to interpreting the text. If there is an ambiguity, the intent of the people adopting the provision may be determined by reference to the historical context.

IV. FULLY DEVELOPING A STATE CONSTITUTIONAL CLAIM

The findings above suggest a course of action for advocates. By recognizing these expressed preferences of the Court, an advocate before the Court best serves a client by presenting the arguments and supporting authorities that the Court's originalist interpretations have relied on. This section brings together a list of the sources the Court's opinions have drawn from to determine original meaning, along with suggestions inspired by more recent scholarship. This section is not intended to encompass legal writing or appellate briefing in general, but rather to highlight several often-overlooked areas that have influenced the Court's discussion of state constitutional issues in the past. It concludes with a concise checklist for advocates briefing state constitutional claims to the North Dakota Supreme Court.

A. PROCEDURE AND PRESERVING A CLAIM FOR APPEAL

If an advocate's aim is to determine the original public meaning of a constitutional provision, whether out of a belief that it is the correct method of interpretation or only because such an argument is likely to persuade the Court, the advocate must first preserve the argument at trial and sufficiently

208. Id.

develop the argument before both the trial and appellate courts.²⁰⁹ An argument not presented to the trial court ordinarily may not be argued on appeal.²¹⁰

An advocate accomplishes at least two things by fully developing an argument in the trial court. First, it may persuade the trial court and obtain relief for one's client from which the state does not appeal. Second, an advocate who raises an issue in the trial court will more often develop the necessary factual record for an appellate court to decide the claim on appeal. The North Dakota Supreme Court does not generally consider arguments raised for the first time on appeal.²¹¹

An argument must be presented to the trial court in sufficient detail to describe the claim and the authority or reasoning supporting it. In exceptional cases when the grounds for an objection are apparent in context, constitutional arguments have been preserved with only a cursory statement that the party objects.²¹² In a criminal case, Rule 51 of North Dakota Criminal Procedure further describes what is required to preserve a claim.²¹³ The claim should be raised in sufficient detail so that the opposing party has a fair opportunity to respond and the district court has a fair opportunity to rule on the issue.²¹⁴

To challenge the constitutionality of a state statute on appeal, a party must also comply with Rule 44 of North Dakota Appellate Procedure. Rule 44 requires "[w]ritten notice to the attorney general immediately upon the filing of the record or as soon as the question is raised."²¹⁵ A similar statutory rule applies to constitutional challenges to municipal ordinances:

In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party, and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must

^{209.} Errors that are forfeited by failure to bring them to the attention of the district court are ordinarily reviewed only for obvious error. *See*, *e.g.*, State v. Morales, 2019 ND 206, **J**J 14, 24–26, 932 N.W.2d 106 (stating structural errors must affect substantial rights and are never harmless).

^{210.} State v. Craig, 2019 ND 123, 94, 927 N.W.2d 99 ("It is well-established that issues which are not raised before the district court, including constitutional issues, will not be considered for the first time on appeal.") (quoting State v. Kieper, 2008 ND 65, 916, 747 N.W.2d 497).

^{211.} Edwardson v. State, 2019 ND 297, ¶ 11, 936 N.W.2d 376.

^{212.} State v. Thomas, 2019 ND 194, J 12, 931 N.W.2d 192; State v. Klem, 438 N.W.2d 798, 799–800 (N.D. 1989).

^{213.} N.D. R. CRIM. P. 51(a) (2020) ("A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party").

^{214.} Viscito v. Christianson, 2015 ND 97, ¶ 13, 862 N.W.2d 777.

^{215.} N.D.R. App. P. 44 (2020).

be served with a copy of the proceeding and is entitled to be heard. 216

These rules only apply to so-called "facial challenges," which claim the challenged statute is void as if never enacted because the statute itself conflicts with a restriction in the Constitution.²¹⁷

B. START WITH THE TEXT

The Court often says that constitutional provisions are interpreted according to the same interpretive canons as statutes.²¹⁸ When interpreting statutes, the Court starts with the text of the statute.²¹⁹ What does it mean to begin with the text? A constitutional provision is part of a legal document written in a particular historical and legal context. The words and phrases carry some meaning and thereby implement some change in the law compared to the moment before the provision was adopted.²²⁰ The words and phrases chosen to express this linguistic meaning are put in the Constitution to convey that meaning to the people of the state. The Court generally refers to "plain meaning" or "ordinary meaning."221 Textual analysis may focus on the meaning of an individual word.²²² The Court may also focus on the meaning conveyed by the grammar and punctuation of a provision.²²³ The proper unit of analysis may turn out to be a phrase that, in context, carries a particular meaning as a term of art or by carrying with it prior interpretations of that phrase.²²⁴ Courts must put the words, phrases, and clauses into the context of the section, article, or Constitution, as a whole.²²⁵ When the text is ambiguous, the historical

^{216.} N.D. CENT. CODE § 32-23-11 (2019).

^{217.} See In re S.B., 2014 ND 87, \P 10-11, 845 N.W.2d 317 (excusing failure to notify attorney general by construing statute to avoid constitutional infirmity); State v. Clark, 367 N.W.2d 168, 169 (N.D. 1985) ("It is well established that unconstitutional legislation is void and is to be treated as if it never were enacted.").

^{218.} See, e.g., Johnson v. Wells Cty. Water Res. Bd., 410 N.W.2d 525, 529 (N.D. 1987) ("Generally, principles of construction applicable to statutes are applicable to constitutions.") (citing McCarney v. Meier, 286 N.W.2d 780 (N.D. 1979); State ex rel. Sanstead v. Freed, 251 N.W.2d 898, 908 (N.D. 1977) (same).

^{219.} Verry v. Trenbeath, 148 N.W.2d 567, 573-74 (N.D. 1967).

^{220.} Baude & Sachs, supra note 31, at 1132-33.

^{221.} Thompson v. Jaeger, 2010 ND 174, ¶ 7, 788 N.W.2d 586 ("The intent and purpose of a constitutional provision is to be determined, if possible, from the language itself. We give words in a constitutional provision their plain, ordinary, and commonly understood meaning." (quoting Kelsh v. Jaeger, 2002 ND 53, ¶ 7, 641 N.W.2d 100)).

^{222.} Husebye v. Jaeger, 534 N.W.2d 811, 813–14 (N.D. 1995) (interpreting "day" in art. III, section 5); Matter of Adoption of K.A.S., 499 N.W.2d 558, 563 (N.D. 1993) (interpreting "privilege" in article I, section 21); Tormaschy v. Hjelle, 210 N.W.2d 100, 102 (N.D. 1973) (interpreting "right-of-way" in article I, section 14 (now article I, section 16)).

^{223.} See, e.g., N.W. Bell Tel. Co. v. Wentz, 103 N.W.2d 245, 253-54 (N.D. 1960).

^{224.} See, e.g., Riemers v. Eslinger, 2010 ND 76, J 9, 781 N.W.2d 632 (interpreting "right of trial by jury"); Martin v. Tyler, 60 N.W. 392, 398 (N.D. 1894); COOLEY, supra note 119, at 64.

^{225.} See, e.g., Kelsh v. Jaeger, 2002 ND 53, J 19, 641 N.W.2d 100.

context may be relevant to determine what the text would have been understood to mean at the time of its adoption.²²⁶

1. Dictionaries

Courts often appear to apply judicial intuition and simply start with the premise that judges know what a word means.²²⁷ After all, judges make their living with the written word and have substantial professional training in reading and writing in the English language. But direct application of the Court's familiarity with word usage may pose risks in some circumstances. Sometimes we must remind ourselves to look for unknown unknowns— things that we don't know we don't know.²²⁸ If the constitutional provision the Court is interpreting was adopted long ago, a judge may rely on an intuitive understanding of the word or phrase's meaning, but unknown to the judge, the words used may have evolved in meaning, a concept known as "linguistic drift."²²⁹ Alternatively, the provision may include terms that would have been understood as terms of art that carry more than simply their literal meaning.

An advocate may help the Court check its judicial intuition as to the meaning of a word or phrase by citing appropriate dictionary definitions. The Court has often consulted dictionaries, but generally does not explain why a particular dictionary was consulted or why one definition among several was chosen.²³⁰ Sometimes, it may appear that a dictionary was selected without considering whether it is an appropriate reference to define the word at issue and was selected simply because it was within arm's reach.²³¹ If we assume

229. See Lawrence B. Solum, Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record, 2017 B.Y.U. L. REV. 1621, 1645 (2017).

230. See, e.g., Grand Forks Homes, Inc. v. Grand Forks Bd. of Cty. Comm'rs, 2011 ND 50, \P 14, 22, 795 N.W.2d 381 (citing BLACK'S LAW DICTIONARY 235 (6th ed. 1990) and AMERICAN HERITAGE DICTIONARY 260 (2d College ed. 1985) in aid of interpreting "charitable" in N.D. CONST. art. X, § 5, originally enacted in 1889); Grand Forks Homes, Inc. v. State ex rel. State Bd. of Equalization, 2011 ND 65, \P 11, 795 N.W.2d 335 (citing BLACK'S LAW DICTIONARY (6th ed. 1990) and MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003) for constitutional terms "assessment" and "exemption" first enacted in 1889).

^{226.} State v. Hagerty, 1998 ND 122, JJ 16-17, 580 N.W.2d 139.

^{227.} Langer v. State, 284 N.W. 238, 243 (N.D. 1939).

^{228.} As Defense Secretary Donald Rumsfeld memorably put it: Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns, that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones. *DoD News Briefing – Secretary Rumsfield and Gen. Myers*, U.S. DEP'T DEF. (Feb. 12, 2002, 11:30 AM), https://archive.defense.gov/Transcript/TranscriptID=2636.

^{231.} Haugland v. City of Bismarck, 2012 ND 123, \P 34, 818 N.W.2d 660 (citing MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY 167 (11th ed. 2005) to define the term "business" added to N.D. CONST. art X, § 18 in 1918).

that dictionaries vary in the definitions they include, and this is hard to dispute, we can confidently assert that neither the Court nor an advocate should simply reach for the 20-year-old edition of *Webster's* College Dictionary that was received as a gift before entering upon undergraduate education. Because there are many dictionaries to choose from and we would like to avoid the appearance that an advocate or the Court simply examines dictionaries until locating a definition that supports the preferred result, we should consider what criteria are relevant to selecting a dictionary most appropriate to the issue at hand.

Dictionaries can be prescriptive or descriptive: they can describe how words should be used or how words are in-fact used.²³² A legislator or drafter of a constitutional provision may consult a dictionary to select a word that carries a precise linguistic meaning to the people of the state. Alternatively, a voter confronted with a proposed amendment may consult a dictionary to determine (or confirm) the meaning of a term in the proposed amendment. Written communication is a two-sided activity with writers and readers who, for the system to have legitimacy, should understand the meaning the same way. To select a dictionary, both advocates and judges should consider a dictionary close in time to when the provision was enacted. Before citing a dictionary, an advocate may wish to consult the editorial material in the dictionary to understand how it is put together and in what order definitions appear. It is a common misconception that the first definition is the most common and thus most reflective of ordinary meaning.²³³

For example, North Dakota Constitution article XI, section 7, was approved June 26, 1962.²³⁴ It relates to continuity of government in the event of "disaster[s] caused by enemy attack."²³⁵ To determine what was meant by "disaster," one might consider a dictionary to be a sort of recipe book in which the drafters of the House concurrent resolution that originated this amendment would look to select the word that carried their intended meaning. In that case, to interpret the provision, a modern advocate would need to consult a dictionary that was published in the years prior to 1962, as the dictionary would describe how words were used during that period and might well have been on the desk of the drafters. Alternatively, one might consider

^{232.} Until the early 1960s, dictionary usage was predominately "prescriptive." Dictionaries described a word's proper usage and pronunciation. In 1961, Merriam-Webster published *Webster's Third New International Dictionary*, which, unlike its predecessors, was "descriptive." Its editor-in-chief stated "the dictionary's purpose was to report the language, not prescribe what belonged in it." Samuel A Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 242–43 (1999).

^{233.} See id. at 274–76 (describing the difficult task of choosing one definition when many are given).

^{234.} Constitutional Measures, Approved, ch. 445, 1962 N.D. Laws 879.

^{235.} N.D. CONST. art. XI, § 7.

a dictionary as it would have been used by the public that voted to approve the proposed amendment. Such a voter might consult a dictionary in June 1962 to confirm or reject a possible reading of words appearing in the text. Dictionaries published today are primarily backward-looking.²³⁶ They describe how words are being used as of the publication of the dictionary. Accordingly, that is how a reader wanting to confirm scope of a word would use it. That is how a writer wanting to convey a particular meaning uses it to select the word that will carry the intended meaning to the voting public. Of course, both readers and writers must still consider context to determine which definition of multiple definitions is relevant to the situation.

When considering provisions dating to the original 1889 Constitution, a thorough advocate will want to examine dictionaries published within a few years of 1889. Fortunately, all such dictionaries are out of copyright and many are freely available online.237 Both general-use dictionaries such as Webster's as well as law dictionaries may be helpful.²³⁸ Some evidence of what dictionaries were in common use may be gleaned from the published opinions of the North Dakota Supreme Court. For example, Bouvier's Law Dictionary was cited by the North Dakota Supreme Court at least sixty times before 1935.239 Black's Law Dictionary and others also have been cited regularly by the Court.²⁴⁰ General-use dictionaries have been cited often for use in interpreting constitutional terms under the assumption they reflect the "ordinary and accepted meaning."241 In a 1934 case interpreting the meaning of "disability" in the Constitution's gubernatorial succession provision, the Court consulted Webster's New International Dictionary to obtain a "reasonably definite meaning" of the word as it was used by the framers of the provision.242

^{236.} This was not always so. Prescriptive dictionaries were more common prior to publication of *Webster's Third* in 1961. The introductory material in a dictionary will often explain the methodology employed in compiling a dictionary. *See, e.g., Preface*, MERRIAM-WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 6a–7a (1971).

^{237.} Several potentially useful dictionaries are collected on ndconst.org. Other historical dictionaries and treatises may be found on books.google.com and other free sources.

^{238.} See generally Gregory E. Maggs, A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution, 82 GEO. WASH. L. REV. 358-93 (2014).

^{239.} Author search of Lexis Advance for "bouv! /3 dict!" in cases prior to Jan. 1, 1935. https://advance.lexis.com/api/permalink/7fcd195c-9ff6-432e-be48-bd61d1979f73/?con-text=1000516.

^{240.} See, e.g., Dawson v. Tobin, 24 N.W.2d 737, 746-47 (1946) (citing law dictionaries by Bouvier, Abbott, and Black for definition of "repeal" in N.D. CONST. § 25); Grand Forks Homes, Inc. v. State ex rel. State Bd. of Equalization, 2011 ND 65, J 11, 795 N.W.2d 335 (citing BLACK'S LAW DICTIONARY (6th ed. 1990) and MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003) for constitutional terms "assessment" and "exemption"); Bulman v. Hulstrand Constr. Co., 521 N.W.2d 632, 637 n.5 (N.D. 1994) (citing *suits*, BLACK'S LAW DICTIONARY (6th ed. 1991).

^{241.} State ex rel. Olson v. Langer, 256 N.W. 377, 383–84 (N.D. 1934). 242. *Id.*

To conclude, when citing a dictionary, an advocate should prefer dictionaries published close in time to the date on which the term at issue was enacted. Pay attention to whether a dictionary is descriptive or prescriptive and how it ranks definitions, and avoid citing a dictionary for information it expressly states it does not contain.²⁴³ Explain whether a legal dictionary or a general dictionary was selected and why the chosen definition was selected over other definitions.²⁴⁴

2. Terms of Art

When interpreting legal texts, especially constitutional provisions, one must consider whether any words or phrases are terms of art that would be understood as having legally significant meaning in context.²⁴⁵ Terms in the Constitution may also carry meaning derived from prior authoritative interpretations. When a provision is adopted from the Constitution of another state or from the U.S. Constitution, the Court has said it presumptively carries the nuanced meaning of prior authoritative interpretations given to it by the courts of that jurisdiction as of the date it was enacted in our Constitution.²⁴⁶

Those prior interpretations may answer questions that arise later about how the rule enacted by our provision applies to a circumstance that had been presented and resolved in the source jurisdiction. Terms of art may also come from existing practices under the law of Dakota Territory, as in the case of North Dakota's jury trial provision. Article I, section 13 provides: "The right of trial by jury shall be secured to all, and remain inviolate."²⁴⁷ The scope of the "right of trial by jury" has been interpreted by reference to the provision's mandate that it "remain" inviolate.²⁴⁸ To determine what this means, the Court has examined the scope of the jury trial right under territorial laws because they supply the necessary context for how the adopting public would have understood the term of art "trial by jury."²⁴⁹

Terms of art, like other terms, should be interpreted as of the time they were adopted. Subsequent development in other jurisdictions interpreting the

^{243.} See generally Jeffrey L. Kirchmeier & Samuel Thumma, Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century, 94 MARQ. L. REV. 77 (2011).

^{244.} See Maggs, supra note 238, at 374.

^{245.} SCALIA & GARNER, supra note 23, at 74-77.

^{246.} State ex rel. McCue v. Blaisdell, 119 N.W. 360, 365 (N.D. 1909) ("Courts in construing constitutional or statutory provisions which have been taken from another state almost invariably hold that the Legislature or the Constitution makers are presumed to have adopted it with knowledge of the construction or interpretation given it by the courts of the state whence it comes, and therefore to have adopted such construction or interpretation.").

^{247.} N.D. CONST. art. I, § 13.

^{248.} Riemers v. Eslinger, 2010 ND 76, 99 8-10, 781 N.W.2d 632.

^{249.} *Id.* 26 ("We hold to our prior jurisprudence, that the right of trial by jury is determined by the laws as they existed at the time the Constitution of North Dakota was adopted").

same terms of art may be persuasive, but the Court has consistently stated it is not bound to interpretations that post-date our provision.²⁵⁰

If an advocate has reason to believe that the provision at issue was derived from another jurisdiction, the advocate should provide the Court with certain information. The information should include any available evidence identifying the source jurisdiction and that the source of the provision was not only known to the drafters of the provision, but also that the knowledge of the source was available to the voting public that adopted the provision. It may not be fair to say that the voting public bound itself to an interpretation if the source, and thus the baggage associated with that source, was not publicly known.²⁵¹

C. TREATISES AND OTHER SECONDARY SOURCES

At the time of the adoption of the North Dakota Constitution in 1889, Thomas Cooley was widely regarded as the leading scholar on state Constitutions.²⁵² Cooley's treatise, *Constitutional Limitations*, has been cited hundreds of times by the U.S. Supreme Court.²⁵³ The North Dakota Supreme Court has also cited Cooley's *Constitutional Limitations* hundreds of times.²⁵⁴ At the time the North Dakota Constitution was adopted in 1889, the most recent edition of *Constitutional Limitations* was the Fifth Edition, published in 1883. A searchable PDF of the Fifth Edition is available in the growing collection of North Dakota Constitution references maintained by the author at ndconst.org.²⁵⁵ In 1859, Cooley was one of three founding faculty

252. Paul D. Carrington, *The Constitutional Law Scholarship of Thomas McIntyre Cooley*, 41 AM. J. LEGAL HIST. 368 (1997).

^{250.} *Id.* ¶¶ 23-26; City of West Fargo v. Ekstrom, 2020 ND 37, ¶ 938 N.W.2d 915 (Tufte, J., concurring specially); State v. Hendrickson, 2019 ND 183, ¶ 23, 931 N.W.2d 236; State v. Jacobson, 545 N.W.2d 152, 153 (N.D. 1996) (VandeWalle, C.J., concurring specially) (stating that it is one thing to conclude the framers of the North Dakota Constitution meant to adopt the existing interpretation of the Fifth Amendment, but emphasizing that "[i]t is something else to 'buy-in,' in 1974 or now, to a future and as yet unannounced construction").

^{251.} Cf. Herbert L. Meschke & Lawrence D. Spears, Digging for Roots: The North Dakota Constitution and the Thayer Correspondence, 65 N.D. L. REV. 343 (1989) (describing the drafting history of the North Dakota constitution and revealing its sources in a draft table of authorities); but see generally Nicholas S. Samuelson, Digging for Roots in All the Wrong Places: Rethinking the Use of Hidden Drafting Documents in Interpreting the North Dakota Constitution, 95 N.D. L. REV. 493 (2020) (arguing the secret drafting history of the North Dakota constitution and table of authorities should be disregarded as interpretive tools).

^{253.} Id. at n. 9.

^{254.} A Lexis search conducted on Feb. 25, 2020, on North Dakota Supreme Court opinions yielded 391 results for the following query, designed to exclude references to unrelated individuals and also to cooley's tax and tort law treatises: cooley AND NOT name(cooley) AND NOT negaard-cooley AND NOT "v. cooley" AND NOT "charles cooley" AND NOT "charles m. cooley" AND NOT "charles m. cooley" AND NOT (cooley /7 tax!) AND NOT (cooley /7 torts) AND NOT (cooley /2 texas) AND NOT (cooley /7 insurance).

^{255.} See North Dakota Constitution, N.D. CONST., https://www.ndconst.org/reference (follow "Thomas M. Cooley, Treatise on Constitutional Limitations (5th ed. 1883)" hyperlink) (last visited

members at the University of Michigan Law School, where he taught for nearly forty years.²⁵⁶ From 1865 to 1885, he also served as Justice of the Michigan Supreme Court.²⁵⁷ He addressed North Dakota's Constitutional Convention on July 18, 1889.²⁵⁸ As a highly regarded constitutional scholar of his era who was well-known to North Dakota's delegates, Cooley's treatises may be particularly relevant to determining how the people of 1889 would have understood the meaning and legal implications of constitutional provisions adopted at that time.

Writing in the Fifth Edition of his treatise, Cooley articulated interpretive principles that would now be described as originalist. He described as a "cardinal rule" that as written instruments, constitutions "are to receive an unvarying interpretation" such that the "meaning of the constitution is fixed when it is adopted."²⁵⁹ Anticipating the objection that the people of one time should not be ruled by the dead hand of those in a prior time, Cooley responded that "the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion."²⁶⁰ The only job for the court is "to declare the law as written" and rather than interpret the Constitutional rules, to leave to the people to amend the Constitution if changes are required.²⁶¹

Cooley's description of interpretive principles have been repeatedly invoked by the North Dakota Supreme Court as the proper method.²⁶² In light of Cooley's prominence as a judge and recognized scholar of state constitutions, his interpretive principles would be the backdrop against which the drafters of the Constitution would have written. A Constitution writer drafts provisions for the people who will vote on them and in anticipation of how judges will interpret them. It would therefore be natural for a constitutionmaker writing in a legal system dominated by living constitutional theorists to write differently than one who expects the written words to be interpreted

Sept. 26, 2020); see also Google Books, GOOGLE, https://www.google.com/books/ (search "A Treatise on the Constitutional Limitations") (last visited Sept. 26, 2020).

^{256.} WILLIAM DRAPER LEWIS, GREAT AMERICAN LAWYERS: THE LIVES AND INFLUENCE OF JUDGES AND LAWYERS WHO HAVE ACQUIRED PERMANENT NATIONAL REPUTATION, AND HAVE DEVELOPED THE JURISPRUDENCE OF THE UNITED STATES; A HISTORY OF THE LEGAL PROFESSION IN AMERICA 446-48 (1908).

^{257.} Id. at 455.

^{258.} JOURNAL, *supra* note 32, at 52 (noting "Judge Cooley addressed the Convention"); *The Convention: Judge Cooley's Remarks*, BIS. WKLY. TRIB., July 19, 1889, at 8 (reprinting Cooley's remarks to the convention).

^{259.} COOLEY, supra note 119, at 67-68.

^{260.} Id.

^{261.} Id.

^{262.} E.g., State v. Blue, 2018 ND 171, J 23, 915 N.W.2d 122; State ex rel. Sanstead v. Freed, 251 N.W.2d 898, 905 (N.D. 1977); State ex rel. Syvertson v. Jones, 23 N.W.2d 54, 64 (N.D. 1946); State v. Robinson, 160 N.W. 514, 516 (N.D. 1916).

by purposivists or originalists. The provisions drafted in 1889 and the early years of statehood would have been drafted against a background expectation that their meaning would be determined according to the interpretive principles dominant at that time.

Treatises, like dictionaries, may be more persuasive if the material cited is relevant to the time period from which the relevant language originated and was fixed. Cooley discusses many of the substantive provisions in the North Dakota Constitution, including the right to bail and the right to a speedy trial. Cases cited by Cooley in regard to substantive provisions may illuminate what the Framers and adopters of the North Dakota Constitution would have understood such terms to mean as of that time. A thorough advocate should bring any relevant authority to the court's attention, and should not overlook treatises and other references that would have been prominent at the time the provision at issue was drafted.

D. CONVENTION PROCEEDINGS AND DEBATES

The proceedings and debates of the 1889 Constitutional Convention are rather sparse.²⁶³ Detailed debate happened largely in committees with only modest discussion in the proceedings of the convention as a whole.²⁶⁴ The daily and weekly newspapers covered the convention extensively and provided the voting public with some information about the convention.²⁶⁵ For example, the official proceedings contain Judge Cooley's remarks,²⁶⁶ and they were reprinted in the newspaper making them more available to the voting public.²⁶⁷ The draft Constitution was published in the official newspapers for review by the people of North Dakota.²⁶⁸ When seeking the original public meaning, both the official proceedings and the contemporaneous press, along with any other evidence of public understanding of the provisions when they were voted on, should be consulted.

^{263.} Meschke & Spears, *supra* note 251, at 344 ("Apart from the Journal and Official Report of the convention, little has been written about the derivation of provisions of the North Dakota Constitution.").

^{264.} See State v. Taylor, 133 N.W. 1046, 1049 (N.D. 1911) (explaining that the details of the provision had not been discussed in the convention but "details and interpretations had been considered in caucuses and committees, and no record preserved").

^{265.} The Bismarck Weekly Tribune, among others, published weekly summaries of convention proceedings, see *Newspapers Published During Constitutional Convention*, N.D. CONST., https://www.ndconst.org/newspapers (last visited Sept. 27, 2020).

^{266.} OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE FIRST CONSTITUTIONAL CONVENTION OF NORTH DAKOTA, ASSEMBLED IN THE CITY OF BISMARCK, JULY 4TH TO AUG. 17TH, 1889 65-67 (Bismarck, North Dakota, Tribune, State Printers & Binders 1889).

^{267.} The Convention, BISMARCK WKLY. TRIB., July 19, 1889, at 8.

^{268.} See, e.g., Constitution of North Dakota, 1889, BISMARCK WKLY. TRIB., Aug. 23, 1889, at 2; Constitution of North Dakota, 1889, DICKINSON PRESS, Aug. 24, 1889, at 5; Constitution of North Dakota, 1889, WAHPETON TIMES, Aug. 29, 1889, at 5.

For example, in *State v. Hagerty*,²⁶⁹ the Court considered the text and history of article X, section 12(1).²⁷⁰ The provision at issue was adopted in 1938, and in determining what the people intended by adopting the provision, the Court considered the publicity pamphlets published by the Secretary of State in connection with the election describing the initiated measure.²⁷¹ The pamphlets provided voters with an explanation for the amendment, which was used to aid the Court in its determination of the understanding the public would have had of the amendment.²⁷²

Cooley's view was that the meaning one might infer from the proceedings of the Constitutional Convention was useful insofar as it may point to the mischief to be remedied or purpose of a provision.²⁷³ But as between original intent of the drafters reflected in the convention records and the original public meaning of the text adopted, Cooley's view was that the ordinary meaning of the text controlled:

And even if we were certain we had attained to the meaning of the convention, it is by no means to be allowed a controlling force especially if that meaning appears not to be the one which the words would most naturally and obviously convey. For as the constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.²⁷⁴

The practical difficulty of determining the original public meaning of a longago adopted provision is readily apparent in contrast to determining the meaning of a more recent amendment. In 2016, the people of North Dakota approved an amendment to the state Constitution protecting rights of crime victims.²⁷⁵ Considering how recently this amendment was enacted, a court faced with a constitutional claim under one of its provisions would not have any concerns with a change in the meanings of the words used over that short span of time. To interpret an initiated amendment to the Constitution, there would be no convention references to consult. Regardless of whether a provision was enacted in 1889 or 2016, an advocate should present any available

^{269. 1998} ND 122, 580 N.W.2d 139.

^{270.} Hagerty, 1998 ND 122, JJ 12, 17-25.

^{271.} *Id*. ¶ 24.

^{272.} Id.

^{273.} COOLEY, supra note 119, at 79-80.

^{274.} Id. 80.

^{275.} N.D. CONST. art. I, § 25.

contemporaneous newspaper coverage or other evidence of the public's understanding of the meaning. The public statements of both supporters and opponents of the measure may also shed light on how the people voting on the measure understood the meaning expressed in the terms of an amendment. For a recently-enacted amendment like the 2016 victims rights amendment, such sources should be quite readily available.

E. STRUCTURAL CONSIDERATIONS

Constitutions, like other legal documents, are read as a whole to give meaning to all their parts.²⁷⁶ An advocate should not overlook the context of surrounding sections and interrelated provisions.²⁷⁷ A term used in one clause may have been intended to carry the same meaning as in another clause. Likewise, different but similar terms may inform the Court as to the intended breadth each term was meant to carry.²⁷⁸

F. HISTORICAL CONTEXT

When the tools used to determine ordinary meaning of the text fail to supply the answer to an interpretive question, the Court has considered the "history of the times" when a provision was framed and adopted to determine what was the prior law and the mischief to be addressed by the provision.²⁷⁹ Prior to the 1960s, the Bill of Rights had not been enforced against the states through the Fourteenth Amendment.²⁸⁰ For that reason, a state provision having the same or similar text may have been intended to provide the same protection against the state government that the Bill of Rights was understood at that time to provide against the federal government. Each provision of the state Constitution, whether one of the guarantees of individual rights in article I or the various structural and other limitations on state government, will have its own historical context. The state Constitution has been amended more than 160 times since 1889.²⁸¹ Each time, there was a reason the people were persuaded to vote for an amendment, and the amendment resulted in specific changes to one or more constitutional provisions in service of those reasons.

^{276.} McCarney v. Meier, 286 N.W.2d 780, 785 (N.D. 1979).

^{277.} See, e.g., State ex rel. Stockman v. Anderson, 184 N.W.2d 53, 56-57 (N.D. 1971) (harmonizing two conflicting constitutional provisions).

^{278.} Tormaschy v. Hjelle, 210 N.W.2d 100, 103 (N.D. 1973) (interpreting "right of way" in section 14 by reference to the breadth accorded to "roadway" in section 179).

^{279.} Newman v. Hjelle, 133 N.W.2d 549, 556 (N.D. 1965).

^{280.} Donaldson v. City of Bismarck, 3 N.W.2d 808, 816 (N.D. 1942) ("The Supreme Court of the United States has said 'it is elementary' that the Fifth Amendment to the Constitution of the United States 'operates solely on the national government, and not on the states.").

^{281.} For an index of all North Dakota constitutional amendments, see *Amendments to the North Dakota Constitution*, N.D. CONST., https://www.ndconst.org/amendments (last visited Sept. 27, 2020).

If the historical record reveals evidence of those reasons, it may aid the Court to properly interpret that provision.

G. CASELAW AND STARE DECISIS

Of course, if there are prior interpretations of the constitutional provision at issue in your case, as an advocate, you should assume the Court will stand by its prior interpretation of the provision absent a persuasive argument that it was mistaken. Many state constitutional provisions have been interpreted by reference to doctrine developed under related federal provisions.²⁸² The Court has repeatedly recognized it is not bound by these federal cases and is open to de-coupling interpretations of state provisions from federal case law if given a sufficiently persuasive argument to do so.²⁸³

H. BRIEFING CHECKLIST FOR PRACTITIONERS IN N.D. COURTS

To close this section, I offer a short checklist for practitioners arguing state constitutional claims in North Dakota courts.

1. Consider the apparent ordinary meaning of the text to a contemporary reader.

2. Identify when the clause or provision at issue was adopted or last amended.

3. Consider whether any words or phrases may have had a different ordinary meaning at the time of adoption. Reference dictionaries or treatises published around the time the provision was adopted.

4. Consider whether the provision contains any terms of art or was adopted in whole or in part from another jurisdiction that may lead to relevant prior interpretations.

5. If the provision is similar to a provision in the federal Constitution or another state Constitution, consider whether any textual differences may be relevant to application of the North Dakota provision in the case before you.

6. If the provision at issue is identical or nearly identical to a provision in the federal Constitution or another state Constitution and it has been interpreted consistently with the other jurisdiction's provision, determine whether

^{282.} E.g. State v. Ringquist, 433 N.W.2d 207, 212 (N.D. 1988) (adopting as a matter of state constitutional law the federal Fourth Amendment doctrine for assessing probable cause to issue a search warrant).

^{283.} City of West Fargo v. Ekstrom, 2020 ND 37, ¶ 31, 938 N.W.2d 915 (Tufte, J., concurring specially) (citing State v. Hendrickson, 2019 ND 183, ¶ 23, 931 N.W.2d 236 (Crothers, J., specially concurring)); State v. Jacobson, 545 N.W.2d 152, 153 (N.D. 1996) (VandeWalle, C.J., concurring specially); *but see* State v. Ringquist, 433 N.W.2d 207, 212 (N.D. 1988) (acknowledging authority to adopt independent interpretation but declining to chart an independent course under article I, section 8).

there are matters of territorial, legal, and constitutional history, structural differences, or matters of unique state traditions or concerns that may support an independent interpretation of the North Dakota provision.²⁸⁴

V. CONCLUSION

The North Dakota Supreme Court has consistently said that the objective when interpreting the North Dakota Constitution is to ascertain and put into effect the meaning of the provision as understood by the people who adopted it at the time it was adopted. The Court has consistently stated its agreement with the principles that meaning is fixed at the time of enactment and that meaning does not change except by proper amendment. The Court has also consistently said that it and other governmental actors are constrained in their official duties by this fixed, original public meaning. Although the Court has sometimes said it sought the original intent of the drafters and sometimes the original intent of or meaning understood by the voters, both original intent and original meaning are varieties of originalism. The Court has said that where the original intent of the drafters and the meaning understood by the public differ, it is original public meaning that controls. I conclude as a descriptive matter, that the Court has applied originalist interpretive methods since 1889 and may properly be characterized as having adopted the principle, consistent with originalism, that the "overriding objective is to give effect to the intent and purpose of the people adopting the constitutional statement"²⁸⁵ when interpreting the North Dakota Constitution.

^{284.} See State v. Schwartz, 2004 S.D. 123, 9941-54, 689 N.W.2d 430 (describing four factors the Court considers when developing an independent state constitutional interpretation); State v. Gunwall, 106 Wash. 2d 54, 60–62, 720 P.2d 808, 811–13 (Wash. 1986) (describing six criteria considered when developing independent state constitutional interpretations).

^{285.} RECALLND v. Jaeger, 2010 ND 250, § 8, 792 N.W.2d 511.

A. CASES BEFORE 1950

Total Cites	ND Cites	Title	Cite	Date	Interp. Principles	Fixation	Constraint	Orig. meaning
113	90	State ex rel. Linde v. Taylor	156 N.W. 561	1916-02-05	Y	N	Y	N
103	83	Erickson v. Wiper	157 N.W. 592	1916-03-06	N	N	N	N
52	48	Christianson v. Farmers' Warehouse Ass'n	67 N.W. 300	1896-04-30	Y	Y	Y	Y
74	45	State v. First State Bank of Jud	202 N.W. 391	1924-12-31	N	N	Y	Y
80	37	State ex rel. Moore v. Archibald	66 N.W. 234	1896-02-20	N	Y	Y	Y
104	36	Asbury Hosp. v. Cass County	7 N.W.2d 438	1943-01-02	N	N	Y	N
52	36	State ex rel. Johnson v. Broderick	27 N.W.2d 849	1947-04-28	N	N	N	N
77	35	State v. Nelson County	45 N.W. 33	1890-04-21	N	N	N	Y
111	35	Lang v. City of Cavalier	228 N.W. 819	1930-01-15	N	N	N	Y
57	34	Vermont Loan & Trust Co. v. Whithed	49 N.W. 318	1891-07-14	N	N	N	N
56	32	Martin v. Tyler	60 N.W. 392	1894-09-11	Y	N	Y	Y
83	32	Langer v. State	284 N.W. 238	1939-01-28	N	N	Y	Y
42	31	Baker v. Lenhart	195 N.W. 16	1922-12-30	N	N	N	Y
51	30	O'Laughlin v. Carlson	152 N.W. 675	1915-04-16	Y	N	N	N
55	28	Donovan v. Allert	91 N.W. 441	1902-06-03	N	N	Y	N
373	28	State ex rel. Johnson v. Baker	21 N.W.2d 355	1945-05-26	Y	N	N	Y
63	27	Bryan v. Miller	16 N.W.2d 275	1944-11-01	N	N	Y	N
38	26	Beggs v. Paine	109 N.W. 322	1906-05-15	N	N	N	N
44	26	State v. Milhollan	195 N.W. 292	1923-08-20	N	N	N	N
55	25	Erickson v. Cass County	92 N.W. 841	1902-11-12	N	N	Y	Y
74	25	Donaldson v. City of Bismarck	3 N.W.2d 808	1942-03-16	N	N	N	N
76	24	Bigelow v. Draper	69 N.W. 570	1896-11-11	N	N	Y	N
88	24	Schillerstrom v. Schillerstrom	32 N.W.2d 106	1948-04-07	N	N	N	N
45	23	State ex rel. Goodsill v. Woodmanse	46 N.W. 970	1890-10-20	N	N	N	N

61 23 State ex rel. McCae v. Blaisdel 119 N. Y.30 1990-01-16 N N N Y 90 23 State v. Wetz 168 N.W.83 1918.06-14 N Y Y Y Y 63 22 Barry v. Truax 90 N.W.760 1921.03-12 N N N N N 40 22 Ford Motor Co. v. State 231 N.W.88 1920.08-05 N N N N N N 61 21 Edmonds v. Herbrandom 50 N.W.970 1891-12.05 N									
63 22 Barry v. Truax 99 N.W. 769 1904-05-21 Y Y Y 49 22 State v. Fazier 182 N.W. 545 1921-03-12 N N N N 40 22 Ford Motor Co. v. State 231 N.W. 883 1930-08-05 N N N N N 61 21 Edmonds v. Herbrandson 50 N.W. 970 1891-12-05 N N N N N 38 20 Glaspell v. City of Jamestown 88 N.W. 1023 1902-01-04 N N N N 42 20 Wirtz v. Neatos 200 N.W. 524 1924-09-20 N N N N N 57 19 Power v. Kitching 86 N.W. 737 1901-05-17 N N N N N 52 19 State v. Conwell 9N.W.24914 1940-214 N N Y Y 68 19 Malin v. La Moure County 145 N.W.558 1955-02 02	61	23	State ex rel. McCue v. Blaisdell	119 N.W. 360	1909-01-16	N	N	N	Y
49 12. No.	90	23	State v. Wetz	168 N.W. 835	1918-06-14	N	Y	Y	Y
A A A A A A A A A A A A 40 22 Ford Motor Co. v. State 231 N.W. 83 1930-08-05 N N N N N 61 21 Edmonds v. Herbrandson 50 N.W. 970 1891-12-05 N N N N N N 38 20 Glaspell v. City of Jamestown 88 N.W. 1023 1902-01-04 N N N N N 42 20 Wirtz v. Nestos 200 N.W. 524 1924-09-20 N N N Y N 57 19 Power v. Kitching 86 N.W. 737 1901-05-17 N Y Y Y Y Y Y Y Y Y	63	22	Barry v. Truax	99 N.W. 769	1904-05-21	Y	Y	Y	Y
Image: Constraint of the sector of	49	22	State v. Frazier	182 N.W. 545	1921-03-12	N	N	N	N
And And And And And And And 38 20 Glaspell v. City of Jamestovn 88 N.W. 1023 1902-01-04 N N N N 42 20 Wirtz v. Nestos 200 N.W. 524 1924-09-20 N N Y N 99 20 State v. Cronwell 9 N.W.2d 914 1943-06-05 Y N N Y Y 57 19 Power v. Kitching 86 N.W. 737 1901-05-17 N N N N N 72 19 State v. Nyhas 124 N.W.71 1909-12-10 N N N N N 68 19 Malin v. La Moure County 145 N.W.582 1914-02-14 N Y N Y 55 19 State ex rel. Sathre v. Moodie 258 N.W.583 1935-02-02 N N Y Y 50 18 State v. Hall 159 N.W.281 1916-09-11 Y N Y <	40	22	Ford Motor Co. v. State	231 N.W. 883	1930-08-05	N	N	N	N
A. A.<	61	21	Edmonds v. Herbrandson	50 N.W. 970	1891-12-05	N	N	Y	N
- $ -$ <td>38</td> <td>20</td> <td>Glaspell v. City of Jamestown</td> <td>88 N.W. 1023</td> <td>1902-01-04</td> <td>N</td> <td>N</td> <td>N</td> <td>N</td>	38	20	Glaspell v. City of Jamestown	88 N.W. 1023	1902-01-04	N	N	N	N
$$ $ $	42	20	Wirtz v. Nestos	200 N.W. 524	1924-09-20	N	N	Y	N
12 19 Stern v. City of Fargo 122 N.W. 403 1909-06-19 N N N N 52 19 State v. Nyhus 124 N.W. 71 1909-12-10 N N N N 46 19 State ex rel. Johnson v. Clark 131 N.W. 715 1911-05-02 N N Y Y 68 19 Malin v. La Moure County 145 N.W. 582 1914-02-14 N Y N Y 55 19 State ex rel. Sathre v. Moodie 258 N.W. 558 1935-02-02 N N Y Y 50 18 State ex rel. Standish v. Boucher 56 N.W. 142 1893-05-09 N N Y Y 20 18 State v. Hall 159 N.W. 281 1916-09-11 Y N Y Y 21 18 State v. Robinson 35 N.D. 417 1916-12-11 Y N Y Y 22 18 State v. Rapio Bottling Works 124 N.W. 387 1910-01-07 N	99	20	State v. Cromwell	9 N.W.2d 914	1943-06-05	Y	N	Y	Y
52 19 State v. Nyhus 124 N.W. 71 1909-12-10 N N N N 46 19 State ex rel. Johnson v. Clark 131 N.W. 715 1911-05-02 N N Y Y 68 19 Malin v. La Moure County 145 N.W. 582 1914-02-14 N Y N Y 55 19 State ex rel. Stathre v. Moodie 258 N.W. 558 1935-02-02 N N Y Y 50 18 State ex rel. Standish v. Boucher 56 N.W. 142 1893-05-09 N N Y Y 37 18 State v. Hall 159 N.W. 281 1916-09-11 Y N Y Y 29 18 State v. Robinson 35 N.D. 417 1916-12-11 Y N Y Y 92 18 State v. Robinson 124 N.W. 387 1910-01-07 N N N N 41 17 State v. Eargo Bottling Works 124 N.W. 387 1910-01-07 N	57	19	Power v. Kitching	86 N.W. 737	1901-05-17	N	N	N	N
Image: Constraint of the state of	72	19	Stern v. City of Fargo	122 N.W. 403	1909-06-19	N	N	N	N
$$ $ $	52	19	State v. Nyhus	124 N.W. 71	1909-12-10	N	N	N	N
1 <td>46</td> <td>19</td> <td>State ex rel. Johnson v. Clark</td> <td>131 N.W. 715</td> <td>1911-05-02</td> <td>N</td> <td>N</td> <td>Y</td> <td>Y</td>	46	19	State ex rel. Johnson v. Clark	131 N.W. 715	1911-05-02	N	N	Y	Y
$$ $$	68	19	Malin v. La Moure County	145 N.W. 582	1914-02-14	N	Y	N	Y
$$ $$	55	19	State ex rel. Sathre v. Moodie	258 N.W. 558	1935-02-02	N	N	Y	Y
- $ -$ <td>50</td> <td>18</td> <td>State ex rel. Standish v. Boucher</td> <td>56 N.W. 142</td> <td>1893-05-09</td> <td>N</td> <td>N</td> <td>Y</td> <td>Y</td>	50	18	State ex rel. Standish v. Boucher	56 N.W. 142	1893-05-09	N	N	Y	Y
Image: Constraint of the state of	37	18	State v. Hall	159 N.W. 281	1916-09-11	Y	N	Y	Y
41 17 State v. Fargo Bottling Works Co. 124 N.W. 387 1910-01-07 N N N N 35 17 Merchants' State Bank v. Sawyer Farmers' Co-op. Ass'n 182 N.W. 263 1921-03-17 N N N N N 105 17 Bekken v. Equitable Life Assur. Soc. of U.S. 293 N.W. 200 1940-05-16 N N N N N 40 16 State v. Packard 160 N.W. 150 1916-11-14 Y N N Y 27 16 Wood v. Byrne 60 N.D. 1 1930-09-25 N N Y N 66 16 Herr v. Rudolf 25 N.W.2d 916 1947-01-22 N N Y N 46 15 Nind v. Myers 109 N.W. 335 1906-05-15 N N N N	29	18	State v. Robinson	35 N.D. 417	1916-12-11	Y	N	Y	Y
Co. Co. N N N 35 17 Merchants' State Bank v. Sawyer Farmers' Co-op. Ass'n 182 N.W. 263 1921-03-17 N N N N 105 17 Bekken v. Equitable Life Assur. Soc. of U.S. 293 N.W. 200 1940-05-16 N N N N 40 16 State v. Packard 160 N.W. 150 1916-11-14 Y N N Y 27 16 Wood v. Byrne 60 N.D. 1 1930-09-25 N N N N 66 16 Herr v. Rudolf 25 N.W.2d 916 1947-01-22 N N Y N 46 15 Nind v. Myers 109 N.W. 335 1906-05-15 N N N N	92	18	State ex rel. Cleveringa v. Klein	249 N.W. 118	1933-06-12	Y	Y	Y	N
35 17 Merchants' State Bank v. Sawyer Farmers' Co-op. Ass'n 182 N.W. 263 1921-03-17 N N N N 105 17 Bekken v. Equitable Life Assur. Soc. of U.S. 293 N.W. 200 1940-05-16 N N N N N 40 16 State v. Packard 160 N.W. 150 1916-11-14 Y N N Y 27 16 Wood v. Byrne 60 N.D. 1 1930-09-25 N N N N N 66 16 Herr v. Rudolf 25 N.W.2d 916 1947-01-22 N N Y N 46 15 Nind v. Myers 109 N.W. 335 1906-05-15 N N N N	41	17		124 N.W. 387	1910-01-07	N	N	N	N
105 17 Bekken v. Equitable Life Assur. Soc. of U.S. 293 N.W. 200 1940-05-16 N N N N 40 16 State v. Packard 160 N.W. 150 1916-11-14 Y N N Y 27 16 Wood v. Byrne 60 N.D. 1 1930-09-25 N N N N 66 16 Herr v. Rudolf 25 N.W.2d 916 1947-01-22 N N Y N 46 15 Nind v. Myers 109 N.W. 335 1906-05-15 N N N N	35	17	Merchants' State Bank v. Sawyer	182 N.W. 263	1921-03-17	N	N	N	N
40 16 State v. Packard 160 N.W. 150 1916-11-14 Y N N Y 27 16 Wood v. Byrne 60 N.D. 1 1930-09-25 N N N N N 66 16 Herr v. Rudolf 25 N.W.2d 916 1947-01-22 N N Y N 46 15 Nind v. Myers 109 N.W. 335 1906-05-15 N N N N	105	17	Bekken v. Equitable Life Assur.	293 N.W. 200	1940-05-16	N	N	N	N
66 16 Herr v. Rudolf 25 N.W.2d 916 1947-01-22 N N Y N 46 15 Nind v. Myers 109 N.W. 335 1906-05-15 N N N N N	40	16		160 N.W. 150	1916-11-14	Y	N	N	Y
46 15 Nind v. Myers 109 N.W. 335 1906-05-15 N N N	27	16	Wood v. Byrne	60 N.D. 1	1930-09-25	N	N	N	N
	66	16	Herr v. Rudolf	25 N.W.2d 916	1947-01-22	N	N	Y	N
67 15 Ex parte Corliss 114 N.W. 962 1907-10-23 Y Y Y Y	46	15	Nind v. Myers	109 N.W. 335	1906-05-15	N	N	N	N
	67	15	Ex parte Corliss	114 N.W. 962	1907-10-23	Y	Y	Y	Y
47 15 State v. Watland 201 N.W. 680 1924-11-15 N N N N	47	15	State v. Watland	201 N.W. 680	1924-11-15	N	N	N	N

39	15	State v. Nagel	28 N.W.2d 665	1947-08-14	N	Ν	N	N
19	14	Bronson v. Johnson	76 N.D. 122	1948-09-10	N	Ν	N	N
35	13	Baird v. Burke County	53 N.D. 140	1925-08-11	Y	N	Y	Y
15	12	State ex rel. Ohlquist v. Swan	1 N.D. 5	1890-01-01	Y	Y	Y	Y
18	12	State v. State Board of Canvassers	44 N.D. 126	1919-01-31	N	N	Y	Y
23	12	Becker County Sand & Gravel Co. v. Wosick	62 N.D. 740	1932-09-30	N	N	Y	Y
31	11	Anderson v. Byrne	62 N.D. 218	1932-05-28	N	Y	Y	Y
47	10	Dawson v. Tobin	24 N.W.2d 737	1946-10-22	Y	Y	Y	Y
18	10	Great Northern Ry. Co. v. Duncan	42 N.D. 346	1919-06-03	N	Ν	Y	N
22	9	State v. Hall	44 N.D. 459	1918-10-05	Y	N	Y	Y
28	9	State v. Houge	67 N.D. 251	1937-02-19	N	Ν	Y	N
21	9	State ex rel. Stutsman v. Light	68 N.D. 513	1938-10-20	N	N	N	Y
29	9	Stark v. City of Jamestown	76 N.D. 422	1949-04-26	N	N	Y	N
23	9	State ex rel. Frich v. Stark County	14 N.D. 368	1905-06-16	N	N	Y	N
91	8	Green v. Frazier	44 N.D. 395	1920-01-02	N	N	N	N
18	8	State v. Norton	64 N.D. 675	1934-06-09	Y	D	Y	Y
57	8	Egbert v. City of Dunseith	24 N.W.2d 907	1946-03-16	Y	Y	Y	Y
19	8	State ex rel. Eckroth v. Borge	69 N.D. 1	1939-01-16	N	N	N	Y
20	8	Engstad v. Grand Forks County	10 N.D. 54	1900-11-22	N	N	Y	N
52	7	Preckel v. Byrne	62 N.D. 356	1932-07-25	N	N	Y	N
23	5	State ex rel. Larabee v. Barnes	3 N.D. 319	1893-05-09	N	N	N	N
7	5	Dyer v. Hall	51 N.D. 391	1924-08-05	N	Y	Y	Y
8	5	Ex parte Aipperspach	63 N.D. 358	1933-04-22	N	N	N	N
7	4	Roesler v. Taylor	3 N.D. 546	1894-03-03	N	N	N	Y
17	4	State v. Taylor	22 N.D. 362	1911-12-11	Y	N	Y	Y
18	4	State v. Olson	44 N.D. 614	1920-01-16	Y	Y	Y	N
22	4	State ex rel. Syvertson v. Jones	74 N.D. 465	1946-05-20	Y	N	Y	Y

21	3	State ex rel. Wineman v. Dahl	6 N.D. 81	1896-10-08	N	Ν	N	N
12	3	Ford Motor Co. v. Baker	71 N.D. 298	1941-10-22	N	Ν	N	N
11	2	Doherty v. Ransom County	5 N.D. 1	1895-03-15	N	N	Y	Y
9	2	State v. Sherman	63 N.D. 9	1932-12-13	Y	N	N	Y
25	2	Larkin v. Gronna	69 N.D. 234	1939-03-22	N	N	N	N
7	1	State v. Towner County	68 N.D. 629	1938-12-13	N	Ν	N	N
5	0	Schmidt v. Gronna	68 N.D. 488	1938-07-29	N	Ν	N	N
3	0	State ex rel. Reese v. Mooney	64 N.D. 620	1934-05-26	N	Ν	N	Y

2020] THE NORTH DAKOTA CONSTITUTION

B. CASES SINCE 1950

Total Cites	ND Cites	Title	Cite	Date	Interp. Principles	Fixation	Constraint	Orig. meaning
376	216	Power Fuels, Inc. v. Elkin	283 N.W.2d 214	1979-08-22	N	N	Y	N
302	116	Stutsman County v. State Historical Soc. of North Dakota	371 N.W.2d 321	1985-07-11	N	N	Y	N
233	87	Andrews v. O'Hearn	387 N.W.2d 716	1986-05-07	N	D	N	N
192	72	Buchholz v. Buchholz	590 N.W.2d 215	1999-02-23	N	N	N	N
120	68	City of Fargo v. Thompson	520 N.W.2d 578	1994-08-24	N	N	N	N
130	54	Southern Valley Grain Dealers Ass'n v. Board of County Com'rs of Richland County	257 N.W.2d 425	1977-08-18	N	N	N	N
137	52	van Oosting v. van Oosting	521 N.W.2d 93	1994-09-07	N	N	N	N
158	51	Kitto v. Minot Park Dist.	224 N.W.2d 795	1974-12-05	N	N	N	Y
143	48	State v. Ringquist	433 N.W.2d 207	1988-12-06	N	Y	N	N
143	45	First Nat. Bank of Crosby v. Bjorgen	389 N.W.2d 789	1986-06-19	N	N	N	N
156	43	State v. Orr	375 N.W.2d 171	1985-10-01	N	N	Y	N
118	43	State v. Schwalk	430 N.W.2d 317	1988-10-18	N	N	N	N
288	43	Hurt v. Freeland	589 N.W.2d 551	1999-01-27	N	N	N	N
153	43	Olander Contracting Co. v. Gail Wachter Investments	643 N.W.2d 29	2002-04-16	N	N	N	N
162	42	In re G.R.H.	711 N.W.2d 587	2006-03-29	N	N	N	N
174	41	State v. DeCoteau	592 N.W.2d 579	1999-04-27	N	N	N	N
162	40	Heckelsmiller v. State	687 N.W.2d 454	2004-10-12	N	N	N	N
123	39	State v. Carpenter	301 N.W.2d 106	1980-12-19	N	N	N	N
126	39	Beckler v. North Dakota Workers Compensation Bureau	418 N.W.2d 770	1988-02-01	N	N	N	N
122	38	Kuntz v. State Highway Com'r	405 N.W.2d 285	1987-04-29	N	N	N	N
142	38	Livingood v. Meece	477 N.W.2d 183	1991-11-12	N	N	N	N

470

NORTH DAKOTA LAW REVIEW

116	37	State v. Ricehill	415 N.W.2d 481	1987-11-19	N	N	N	N
136	36	Johnson v. Hassett	217 N.W.2d 771	1974-03-29	Ν	D	N	N
141	36	Hughes v. State Farm Mut. Auto. Ins. Co.	236 N.W.2d 870	1975-12-17	Ν	N	N	N
130	36	State v. Gregg	615 N.W.2d 515	2000-08-18	Ν	N	N	N
142	35	State v. Kitchen	572 N.W.2d 106	1997-12-19	Ν	N	N	N
116	34	State v. Rydberg	519 N.W.2d 306	1994-07-18	Ν	N	N	N
143	34	Heck v. Reed	529 N.W.2d 155	1995-02-28	Ν	N	N	N
134	34	Kelly v. Kelly	640 N.W.2d 38	2002-02-21	Ν	N	N	N
248	33	Hanson v. Williams County	389 N.W.2d 319	1986-06-06	Ν	N	N	N
134	33	State v. Winkler	552 N.W.2d 347	1996-07-18	Ν	N	N	N
113	33	State v. Klose	657 N.W.2d 276	2003-03-05	Ν	N	N	N
246	33	State v. Birchfield	858 N.W.2d 302	2015-01-15	Ν	N	N	N
555	32	Arneson v. Olson	270 N.W.2d 125	1978-08-11	Ν	N	N	N
132	32	State v. Steffes	500 N.W.2d 608	1993-05-26	Ν	N	N	N
146	32	Lire, Inc. v. Bob's Pizza Inn Restaurants, Inc.	541 N.W.2d 432	1995-12-27	Ν	N	N	N
129	32	McCoy v. North Dakota Dept. of Transp.	848 N.W.2d 659	2014-06-24	Ν	N	N	N
100	32	In re Jensen's Estate	162 N.W.2d 861	1968-11-14	N	N	N	N
222	31	Mauch v. Manufacturers Sales & Service, Inc.	345 N.W.2d 338	1984-02-02	Ν	N	N	N
139	31	Continental Cas. Co. v. Kinsey	499 N.W.2d 574	1993-04-27	N	N	N	N
125	29	Fox v. Fox	592 N.W.2d 541	1999-04-12	N	N	N	N
185	29	Garcia v. State	678 N.W.2d 568	2004-04-13	N	N	N	N
114	29	State v. Hernandez	707 N.W.2d 449	2005-12-20	N	N	N	N
133	28	State v. Cummings	386 N.W.2d 468	1986-04-23	N	N	N	N
177	28	Anderson v. Meyer Broadcasting Co.	630 N.W.2d 46	2001-07-10	N	N	N	N

THE NORTH DAKOTA CONSTITUTION

471

							1	1
169	27	Williams v. State	405 N.W.2d 615	1987-05-04	Ν	N	N	N
141	26	Bulman v. Hulstrand Const. Co., Inc.	521 N.W.2d 632	1994-09-13	Y	N	N	Y
141	26	Zimmerman v. North Dakota Dept. of Transp. Director	543 N.W.2d 479	1996-02-13	Ν	N	N	N
145	26	State v. Mitzel	685 N.W.2d 120	2004-08-04	Ν	N	N	N
148	26	Flanagan v. State	712 N.W.2d 602	2006-04-19	Ν	N	N	N
115	25	Wahl v. Morton County Social Services	574 N.W.2d 859	1998-03-05	Ν	N	N	N
132	25	DeCoteau v. State	586 N.W.2d 156	1998-11-19	Ν	N	N	N
150	25	Aamodt v. North Dakota Dept. of Transp.	682 N.W.2d 308	2004-06-30	Ν	N	N	N
131	25	Laib v. State	705 N.W.2d 845	2005-11-09	Ν	N	N	N
62	24	First Am. Bank & Trust Co. v. Ellwein	198 N.W.2d 84	1972-04-12	Ν	N	N	N
88	23	State ex rel. City of Minot v. Gronna	79 N.D. 673	1953-06-05	Ν	N	N	Y
131	23	Matter of Adoption of K.A.S.	499 N.W.2d 558	1993-04-27	Ν	N	N	N
83	23	State v. Herrick	567 N.W.2d 336	1997-08-11	Ν	N	Y	N
73	20	City of Bismarck v. Fettig	601 N.W.2d 247	1999-10-20	Y	Y	Y	Y
36	19	State ex rel. Rausch v. Amerada Petroleum Corp.	78 N.D. 247	1951-08-09	Y	N	Y	Y
61	19	Johnson v. Wells County Water Resource Bd.	410 N.W.2d 525	1987-08-12	Y	N	Y	Y
58	18	Newman v. Hjelle	133 N.W.2d 549	1965-03-04	Y	Y	N	Y
55	18	Verry v. Trenbeath	148 N.W.2d 567	1967-02-13	N	N	Y	Y
51	18	State ex rel. Sanstead v. Freed	251 N.W.2d 898	1977-02-21	Y	Y	Y	Y
73	17	Northwestern Bell Telephone Co. v. Wentz	103 N.W.2d 245	1960-03-04	Y	N	Y	Y
36	17	Abbey v. State	202 N.W.2d 844	1972-11-29	Ν	N	N	N
118	17	State v. Hagerty	580 N.W.2d 139	1998-06-08	Y	Y	Y	Y

NORTH DAKOTA LAW REVIEW

77	16	State v. Wanzek	598 N.W.2d 811	1999-08-25	Ν	N	Y	N
63	15	State ex rel. Link v. Olson	286 N.W.2d 262	1979-11-06	Y	N	Y	Y
36	15	Paluck v. Board of County Com'rs, Stark County	307 N.W.2d 852	1981-07-09	Ν	N	N	N
56	15	North Dakota Com'n on Medical Competency v. Racek	527 N.W.2d 262	1995-02-08	Y	N	N	Y
29	14	State ex rel. Vogel v. Garaas	261 N.W.2d 914	1978-01-23	Ν	N	Y	Y
47	14	In re Disciplinary Action Against McGuire	685 N.W.2d 748	2004-08-31	Ν	N	N	N
19	13	Federal Land Bank of Saint Paul v. Gefroh	418 N.W.2d 602	1988-02-01	Y	N	N	Y
76	13	State v. Anderson	427 N.W.2d 316	1988-06-28	Y	N	Y	Y
98	13	State v. Herrick	588 N.W.2d 847	1999-01-06	Ν	Y	Y	N
31	12	State ex rel. Lyons v. Guy	107 N.W.2d 211	1961-01-18	Y	N	N	Y
21	12	Permann v. Knife River Coal Min. Co.	180 N.W.2d 146	1970-09-24	Ν	N	N	N
39	12	McCarney v. Meier	286 N.W.2d 780	1979-12-12	Y	Y	N	Y
62	12	Haggard v. Meier	368 N.W.2d 539	1985-05-22	Ν	Y	Y	N
22	12	Northwestern Imp. Co. v. Morton County	78 N.D. 29	1951-04-12	Ν	N	N	N
39	11	State ex rel. Agnew v. Schneider	253 N.W.2d 184	1977-04-28	Ν	Y	Y	N
29	11	Souris River Telephone Mut. Aid Corp. v. State	162 N.W.2d 685	1968-11-14	Ν	N	N	N
23	10	State ex rel. Walker v. Link	232 N.W.2d 823	1975-07-15	Ν	N	N	N
38	10	Kelsh v. Jaeger	641 N.W.2d 100	2002-03-28	Y	N	D	Y
44	9	State ex rel. Olson v. Bakken	329 N.W.2d 575	1983-01-14	Ν	N	N	Y
19	9	Haugland v. Meier	339 N.W.2d 100	1983-10-17	N	N	N	Y
30	9	State ex rel. Board of University and School Lands v. City of Sherwood	489 N.W.2d 584	1992-08-04	Y	Y	N	Y

THE NORTH DAKOTA CONSTITUTION

25	8	Cowl v. Wentz	107 N.W.2d 697	1961-02-23	Ν	N	N	N
17	8	Tormaschy v. Hjelle	210 N.W.2d 100	1973-08-13	Ν	D	N	Y
22	8	Timm v. Schoenwald	400 N.W.2d 260	1987-01-27	Ν	N	N	Y
37	8	Pelkey v. City of Fargo	453 N.W.2d 801	1990-03-27	Y	N	N	Y
21	8	Thompson v. Jaeger	788 N.W.2d 586	2010-09-07	Y	N	Y	Y
48	8	Haugland v. City of Bismarck	818 N.W.2d 660	2012-07-06	Y	N	Y	Y
11	8	State v. Timm	146 N.W.2d 552	1966-11-21	Ν	N	N	N
31	7	State ex rel. Lein v. Sathre	113 N.W.2d 679	1962-03-09	Ν	N	N	Y
232	7	Bismarek Public School Dist. No. 1 v. State By and Through North Dakota Legislative Assembly	511 N.W.2d 247	1994-01-24	N	N	N	N
37	7	State v. Kordonowy	867 N.W.2d 690	2015-08-06	Ν	N	Y	N
21	6	State v. Lohnes	69 N.W.2d 508	1955-02-18	Ν	N	N	N
23	6	Dawson v. Meier	78 N.W.2d 420	1956-09-18	Ν	N	N	N
15	6	State ex rel. Stockman v. Anderson	184 N.W.2d 53	1971-02-22	Y	Y	N	Y
31	6	Fisher v. City of Minot	188 N.W.2d 745	1971-06-23	Ν	N	N	N
91	6	Southeast Cass Water Resource Dist. v. Burlington Northern R. Co.	527 N.W.2d 884	1995-02-08	N	N	N	Y
28	6	Grand Forks Homes, Inc. v. State ex rel. State Bd. of Equalization	795 N.W.2d 335	2011-03-22	Ν	N	N	N
45	6	Capps v. Weflen	855 N.W.2d 637	2014-10-31	Ν	N	N	N
23	6	Olson v. Levi	870 N.W.2d 222	2015-10-13	Ν	N	Y	N
28	6	Schoon v. North Dakota Department of Transportation	917 N.W.2d 199	2018-09-13	N	N	N	N
10	5	State v. Feist	93 N.W.2d 646	1958-12-18	Y	N	N	Y
15	5	State ex rel. Paulson v. Meier	127 N.W.2d 665	1964-04-18	Ν	N	N	N
18	5	State v. Strom	921 N.W.2d 660	2019-01-15	Y	Y	Y	Y

NORTH DAKOTA LAW REVIEW

		1		1 1				
43	5	Husebye v. Jaeger	534 N.W.2d 811	1995-07-27	Ν	N	Y	Y
35	4	Cardiff v. Bismarck Public School Dist.	263 N.W.2d 105	1978-02-16	Y	N	Y	Y
6	4	State v. Kainz	321 N.W.2d 478	1982-07-01	Ν	N	Y	N
18	4	State v. M.B.	780 N.W.2d 663	2010-04-06	Ν	N	N	N
6	3	RECALLND v. Jaeger	792 N.W.2d 511	2010-12-21	Y	N	N	Y
19	2	State v. Loh	780 N.W.2d 719	2010-04-06	Ν	N	Y	N
15	2	Riemers v. Eslinger	781 N.W.2d 632	2010-05-11	Ν	Y	Y	Y
13	2	State v. Blue	915 N.W.2d 122	2018-07-11	Y	N	Y	Y
20	2	North Dakota Legislative Assembly v. Burgum	916 N.W.2d 83	2018-07-30	Ν	N	Y	N
21	2	Northern Pac. Ry. Co. v. Warner	77 N.D. 721	1950-11-24	Ν	N	Y	N
8	1	State ex rel. Backes v. A Motor Vehicle Described as a Pawling and Harnishefeger (P & H) 655, 37 1/2 Ton Crane With a 100 Foot Boom, Serial No. 16789	492 N.W.2d 595	1992-11-24	Y	N	N	Y
7	1	Evangelical Good Samaritan Soc. v. NDDHS	862 N.W.2d 794	2015-04-28	Ν	N	N	N
17	0	Paving District 476 Group v. City of Minot	898 N.W.2d 418	2017-07-12	Y	N	N	Y
2	0	Owego Township v. Pfingsten	908 N.W.2d 123	2018-03-08	Y	N	Ν	Y

C. WESTLAW KEY NUMBERS USED TO SUPPLEMENT THE MOST-CITED SEARCH:

92k500-504 (Nature and Authority of Constitutions); (Adoption 92k505 of Constitutions: In General); (Adoption 92k507-510 of Constitutions: State Constitutions); 92k515-519 (Amendment and Revision of Constitutions: In General); 92k525-574 (Amendment and Revision of Constitutions: State Constitutions);

92k580-624 (Construction and Operation of Constitutional Provisions)