DIGGING FOR ROOTS IN ALL THE WRONG PLACES: RETHINKING THE USE OF SECRET DRAFTING DOCUMENTS IN INTERPRETING THE NORTH DAKOTA CONSTITUTION

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ABSTRACT

When the North Dakota Supreme Court interprets the North Dakota Constitution, it aims to give effect to a provision as it would have been understood by those who adopted it. Why then does the Court sometimes upend its stated practice of searching for original understanding of the adopters, instead considering sources intentionally kept secret from the framers and ratifiers of the North Dakota Constitution? In 1989, former North Dakota Supreme Court Justice Herbert Meschke and Assistant State Court Administrator Lawrence Spears unearthed correspondence between the Constitution's secret drafters detailing its preparation. They also discovered a draft constitution with a table of authorities. Meschke and Spears published these documents alongside their influential 1989 article, *Digging for Roots: The North Dakota Constitution and the Thayer Correspondence*, in which they argued the newly discovered sources would become useful tools for constitutional interpretation. In this Article, I examine the Court's stated interpretive principles, and I conclude that the source documents suggested by Meschke and Spears are not useful tools for interpreting the North Dakota Constitution.

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I. INTRODUCTION

On February 22, 1889, President Grover Cleveland signed The Enabling Act,[1] which paved the way to statehood for North Dakota, South Dakota, Montana, and Washington. From July 4 to August 17, 1889, convention delegates met in Bismarck to prepare a constitution for the new state of North Dakota.[2] The people of North Dakota approved the State's Constitution at the

1. Enabling Act, ch. 180, 25 Stat. 676 (1889).

2. JOURNAL OF THE CONSTITUTIONAL CONVENTION FOR NORTH DAKOTA, HELD AT BISMARCK, THURSDAY JULY 4 TO AUG. 17, 1889 353–400 (Bismarck, North Dakota; Tribune, State Printers and Binders) [hereinafter JOURNAL].

polls on October 1, 1889,[3] and North Dakota was admitted to the Union on November 2, 1889.[4]

Much of the final constitution adopted by the people can be traced to a draft introduced to the convention by delegate Erastus Williams on July 20, 1889.[5] Williams concealed the authorship of the draft constitution to the other delegates. Truthfully, Professor James B. Thayer and New York attorney Washington F. Peddrick authored the draft, and the Northern Pacific Railroad financed its preparation.[6] Distrust for the Northern Pacific and other large corporations was pervasive in Dakota Territory, so the origin of Williams' draft constitution was kept secret.[7]

In 1989, North Dakota Supreme Court Justice Herbert Meschke and Assistant State Court Administrator Lawrence Spears published an article which examined correspondence between Professor Thayer and representatives of the Northern Pacific Railroad regarding the preparation of a model constitution for the new states, with particular attention paid to North Dakota.[8] Meschke and Spears concluded by suggesting Peddrick draft No. 2 and its accompanying table of authorities would serve as useful tools for interpretation and analysis of the North Dakota Constitution by shedding light on its antecedents.[9] This Article will counter that suggestion by Meschke and Spears, arguing that the Peddrick draft materials are not valid tools for constitutional interpretation under the North Dakota Supreme Court's stated interpretive scheme.

In Part II, I briefly describe the historical background surrounding the introduction of Williams' draft constitution and why he refused to reveal its source. I then discuss Meschke and Spears' 1989 article, "*Digging for Roots*," and its influence on the North Dakota Supreme Court's interpretation of the North Dakota Constitution. In Part III, I note some flaws in Meschke and Spears's statutory interpretation analogy, and I argue the North Dakota Supreme Court's use of the Peddrick draft materials is inconsistent with the Court's own stated principles for constitutional interpretation. Finally, in Part IV, I conclude that the Peddrick draft materials are not useful tools for constitutional interpretation, and they should no longer be used in interpreting the North Dakota Constitution.

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3. Bismarck Wkly. Trib., Oct. 4, 1889, at 1, col. 1.

4. JAMES D. RICHARDSON, COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 5455-56 (New York, Bureau of National Literature, Inc. 1897).

5. JOURNAL, *supra* note 2, at 65–113.

6. Herbert L. Meschke & Lawrence D. Spears, *Digging for Roots: The North Dakota Constitution and the Thayer Correspondence*, 65 N.D. L REV. 343, 362 (1989).

7. *Id*. at 366.

8. *Id*. at 347.

9. *Id*. at 375–81.

II. BACKGROUND

For North Dakota's first 100 years, the proceedings of its Constitutional Convention were sparsely documented apart from the Journal and Official Report.[10] Until 1989, the source of North Dakota's Constitution had not been authoritatively traced and was the subject of rumor and speculation.[11] In celebration of the centennial of the North Dakota Constitution in 1989, North Dakota Supreme Court Justice Herbert Meschke and Assistant State Court Administrator Lawrence Spears settled the mystery when they published an article titled *Digging for Roots: The North Dakota Constitution and the Thayer Correspondence*.[12]

A. HISTORICAL BACKGROUND

A brief history of the lead-up to North Dakota's Constitutional Convention will demonstrate the importance of Williams' decision to keep the source of his draft constitution secret.

Congress organized Dakota Territory in 1861, but North and South Dakota did not achieve statehood until 1889.[13] From 1861 to 1889, Dakota was subjected to outside control because of its status as a territory.[14] Though the territorial legislature was elected locally, territorial governors were appointed by the president.[15] The territorial governors and other high-ranking government officials were often well-connected men from the eastern United States and several had ties to the major railroads.[16] Many living in Dakota Territory were skeptical of the railroads because the railroads colluded with Minneapolis grain millers to fix false weights and excessive dockage, among other fraudulent practices.[17]

By the early 1880s, many people living in the territory began to unite against the corruption of the territorial system and began advocating for statehood.[18] Historian Elwyn Robinson described Dakota's territorial condition as "colonial" and "dependent."[19] Likewise, he described the statehood movement as a "revolt" against Dakota's colonial and dependent status.[20]

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10. *Id*. at 344.
11. *Id*.
12. *Id*. at 343.
13. ELWYN B. ROBINSON, HISTORY OF NORTH DAKOTA 197 (1966).
14. *Id*.
15. *Id*.
16. *Id*. at 198, 199.
17. *Id*. at 202.
18. *Id*. at 198-99.
19. *Id*.
20. *Id*.

The statehood movement in Dakota culminated in Congress's passage of the Enabling Act.[21] On February 22, 1889, President Grover Cleveland's signature set into motion the process of admitting to statehood the territories of Montana, Washington, and Dakota—which was to be "divided on the line of the seventh standard parallel" to form North and South Dakota.[22] The Enabling Act directed those living in the proposed states to hold constitutional conventions for the preparation of new state constitutions.[23] The Act further provided that each new state's constitution "[s]hall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."[24]

The voters of the soon-to-be state of North Dakota elected seventy-five delegates to its Constitutional Convention.[25] The delegates convened in Bismarck, Dakota Territory on July 4, 1889, and began their work.[26] On July 20, 1889, delegate Erastus A. Williams, a lawyer from Bismarck, introduced a complete draft constitution which appeared in the convention record as "File 106."[27] The File 106 constitution was praised by many for its clarity. One newspaper called it "[a] marvel of strength, sense and diction."[28] The newspaper went on to say "[i]t will, if adopted, be looked upon as one of the very best organic laws ever enacted."[29] A testament to the document's strength, much of the File 106 constitution was adopted by the convention for a vote of the people and was approved by the people at the polls.[30]

Williams was not the author of the File 106 constitution and refused to reveal its true source to the convention.[31] The mystery of File 106's authorship excited speculation as to its true source.[32] At least one newspaper reported that some suspected Judge William M. Evarts of New York was the author.[33] However, there is no evidence that anyone at the time was aware of File 106's true author.[34]

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21. Enabling Act, ch. 180, 25 Stat. 676 (1889).
22. *Id*. § 2.
23. *Id*.
24. *Id*. § 4.
25. ROBINSON, *supra* note 13, at 206.
26. JOURNAL, *supra* note 2, at 1.
27. *Id*. at 65–113; CLEMENT A. LOUNSBERRY, EARLY HISTORY OF NORTH DAKOTA: ESSENTIAL OUTLINES OF AMERICAN HISTORY 392 (1919).
28. M.H. Jewell, BISMARCK WKLY. TRIB., Aug. 2, 1889, at 4.
29. *Id*.
30. JOURNAL, *supra* note 2, at 399.
31. LOUNSBERRY, *supra* note 27, at 398.
32. *Id*. at 393-94.
33. M.H. Jewell, BISMARCK WKLY. TRIB., Aug. 2, 1889, at 4.
34. The first public account of Professor Thayer's authorship of the File 106 constitution was in 1910: twenty-one years after adoption of the North Dakota Constitution. R.M. BLACK, HISTORY OF THE STATE CONSTITUTIONAL CONVENTION OF 1889 30-31 (1910).

Professor James B. Thayer of the Harvard Law School was the true author of the File 106 constitution.[35] Thayer was assisted by attorney William F. Peddrick, who apparently did much of the substantive research and drafting.[36] Thayer and Peddrick's work on the North Dakota Constitution was solicited by Henry Villard, who was the Chairman of the Finance Committee of the Northern Pacific Railway at the time.[37] Allegedly, Villard's efforts in shaping North Dakota's Constitution were motivated by benevolence, not a cynical plot to create a government favorable to railroad interests.[38] But the Northern Pacific had a tremendous financial stake in the governance of Dakota Territory because Congress had given it 10,700,000 acres, or 24 percent, of all the land in what would become North Dakota through the land grant program.[39] Villard, Thayer, Peddrick, and Williams were aware of the public's misgivings about the railroads in Dakota Territory and made a calculated decision to keep the true source of the File 106 draft secret.[40]

B. DIGGING FOR ROOTS

In 1985, the North Dakota Supreme Court, in cooperation with Governor George A. Sinner, formed a Constitutional Celebration Committee in anticipation of the North Dakota centennial in 1989.[41] One goal of the Committee was to expand on the sparse documentation of the history of the North Dakota Constitution and its Convention.[42]

Constitutional Celebration Committee chairman Herbert Meschke, then a Justice of the North Dakota Supreme Court, and Lawrence Spears, an Assistant State Court Administrator, were aware of the then-unconfirmed legend that Williams' draft constitution was prepared by Professor James B. Thayer of the Harvard Law School.[43] Meschke and Spears learned that the Harvard Law School Library had maintained some of Professor Thayer's papers, including correspondence from April to July 1889, between Thayer and representatives of the Northern Pacific Railroad.[44] They examined the correspondence and found several letters relating to the preparation of a model

35. Meschke & Spears, *supra* note 6, at 345.
36. *Id*. at 350–51.
37. *Id*. at 349-50, 362.
38. ROBINSON, *supra* note 13, at 207.
39. *Id*. at 198.
40. Meschke & Spears, *supra* note 6, at 366; *see also* Herbert L. Meschke & Larry Spears, *The Thayer Correspondence: Introductory* Note, 65 N.D. L. REV. 383, 405 (1989) [hereinafter *Thayer Correspondence*] ("Moreover it was clearly understood that their origin should at least for a while be kept private.") (quoting Letter from W.F. Peddrick to James Thayer, Professor (July 25, 1889)).
41. Meschke & Spears, *supra* note 6, at 344.
42. *Id*. at 346–47.
43. *Id*. at 344–45.
44. *Id*. at 345.

constitution for North Dakota.[45] Meschke and Spears also examined a set of draft constitutions located in the archives of the State Historical Society in Bismarck.[46]

One of the draft constitutions, titled "Peddrick draft No. 2" was nearly identical to the File 106 constitution introduced by Erastus Williams at the Constitutional Convention. The most notable feature of Peddrick draft No. 2 is its table of authorities, which cited sources for each constitutional provision from other states' statutes and constitutions. Throughout this Article, I will refer to Peddrick draft No. 2 and its table of authorities collectively as "the Peddrick draft materials."

Meschke and Spears detailed their findings in their influential article, *Digging for Roots: The North Dakota Constitution and the Thayer Correspondence*.[47] Alongside "*Digging for Roots*," Meschke and Spears also published the Thayer correspondence[48] and a transcription of Peddrick draft No. 2.[49]

Of course, the focus of this Article is my criticism of Meschke's and Spears's suggestion that the Peddrick draft materials would serve as useful tools in constitutional interpretation. Meschke and Spears concluded "*Digging for Roots"* with a suggestion that the Peddrick draft materials could help shine light on the secret history of our Constitution.[50] They suggested the same rule for construing a statute that comes from another state.[51] This suggestion has taken hold to some extent, and "*Digging for Roots"* and the Peddrick draft materials are cited from time to time by advocates briefing constitutional issues to the North Dakota Supreme Court and by the Court in its opinions.

C. THE INFLUENCE OF *DIGGING FOR ROOTS* IN NORTH DAKOTA SUPREME COURT JURISPRUDENCE

By my count, the North Dakota Supreme Court has cited *Digging for Roots* or Peddrick draft No. 2 five times in published opinions since its publication in 1989.[52] In four of those cases, the Court has applied Meschke's

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45. *Id*. at 346–48.

46. Herbert L. Meschke & Larry Spears, *Model Constitution (Peddrick Draft #2, 1889)* - Introductory Note, 65 N.D. L. REV. 415, 415 (1989) [hereinafter *Peddrick Draft No. 2*].

47. Meschke & Spears, *supra* note 6.

48. *Thayer Correspondence*, *supra* note 40.

49. *Peddrick Draft No. 2*, *supra* note 46.

50. Meschke & Spears, *supra* note 6, at 375–81.

51. *Id*. at 381.

52. Bulman v. Hulstrand Const. Co., 521 N.W.2d 632, 637 n.3 (N.D. 1994); Southeast Cass Water Res. Dist. v. Burlington N. R. Co., 527 N.W.2d 884, 893 n.6 (N.D. 1995); State v. Jacobson, 545 N.W.2d 152, 155 (N.D. 1996) (Sandstrom, J., concurring); State v. Herrick, 1999 ND 1, ¶ 24, 588 N.W.2d 847; City of West Fargo v. Ekstrom, 2020 ND 37, ¶ 36, 938 N.W.2d 915 (Tufte, J., concurring specially).

and Spears's theory and used the Peddrick draft materials to find hidden meaning in provisions of the North Dakota constitution.[53] A mere five citations over thirty-one years may lead one to underestimate the article's influence. However, since "*Digging for Roots*" was published in 1989, the Court has cited law review articles in only 159 published opinions.[54] In that same time, only two law review articles have been cited more or as often by the Court.[55] Moreover, in that timeframe, the Court has had few opportunities to consider unique questions of interpretation regarding the State Constitution. In only 42 cases since 1989 has the Court dealt with questions interpreting the North Dakota Constitution.[56] With that context, "*Digging for Roots*" has

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53. *Bulman v. Hulstrand Const. Co.*, 521 N.W.2d 632, 637 n.3 (N.D. 1994); *State v. Jacobson*, 545 N.W.2d 152, 155 (N.D. 1996) (Sandstrom, J., concurring); *State v. Herrick*, 1999 ND 1, ¶ 24, 588 N.W.2d 847; *City of West Fargo v. Ekstrom*, 2020 ND 37, ¶ 36, 938 N.W.2d 915 (Tufte, J., concurring specially).

54. Author's search of Westlaw for North Dakota Supreme Court citations to law review articles in opinions published from 1989 through May 27, 2020. Search query: "advanced: ("l rev" l.rev l.j) & DA(aft 12-31-1988 & bef 05-30-2020)". Search yields 183 opinions. Author excluded twenty-four cases involving parties named "L.J." and citing cases involving parties named "L.J.": In re A.W., 2012 ND 153, ¶ 14, 820 N.W.2d 128 (quoting In re L.J., 436 N.W.2d 558, 561 (N.D.1989)); In re A.L., 2011 ND 189, ¶ 9, 803 N.W.2d 597 (citing In re L.J., 2007 ND 74, ¶ 2, 734 N.W.2d 342); In re L.T., 2011 ND 120, ¶ 12, 798 N.W.2d 657 (citing Interest of L.J., 436 N.W.2d 559 (N.D. 1989)); In re K.J., 2010 ND 46, 779 N.W.2d 635 (consolidated on appeal with "In the Interest of L.J."); Bernhardt v. Harrington, 2009 ND 189, 775 N.W.2d 682 (petitioner named L.J. Bernhardt); In re L.J., 2007 ND 74, 734 N.W.2d 342; In re E.G., 2006 ND 126, ¶ 11, 716 N.W.2d 469 (citing Interest of L.J., 436 N.W.2d 558, 561 (N.D. 1989)); In re L.J., 2005 ND 182, 709 N.W.2d 21; In re K.S., 2002 ND 164, 652 N.W.2d 341 (petitioner named L.J. Bernhardt); In re C.H., 2001 ND 37, 622 N.W.2d 720 (petitioner named L.J. Bernhardt); In re A.R., 2000 ND 130, 612 N.W.2d 569 (petitioner named L.J. Bernhardt); In re N.C.C., 2000 ND 129, ¶ 29, 612 N.W.2d 561 (citing Interest of L.J., 436 N.W.2d 558, 563 (N.D. 1989)); Interest of L.F., 1998 ND 129, ¶ 12, 580 N.W.2d 573 (citing Interest of L.J., 436 N.W.2d 559, 560 (N.D. 1989)); Sprunk v. N.D. Workers Comp. Bureau, 1998 ND 93, ¶ 10, 576 N.W.2d 861 ("Sprunk was treated by L.J. Knauf . . . ."); Porth v. Glasoe, 522 N.W.2d 439, 442 (recounting case involving defendant L.J. Williams); Matter of Adoption of J.S.P.L., 532 N.W.2d 653, 664 (N.D. 1995) (citing Interest of L.J., 436 N.W.2d 558, 560 (N.D. 1989)); Bernhardt v. K.R.S., 503 N.W.2d 233 (N.D. 1993) (petitioner named L.J. Bernhardt); Matter of Adoption of K.A.S., 499 N.W.2d 558, 564 (N.D. 1993) (citing Interest of L.J., 436 N.W.2d 558, 561 (N.D. 1989)); Werlinger v. Mutual Service Cas. Ins. Co., 496 N.W.2d 26, 29 (N.D. 1993) (citing Maxim Nordenfelt Guns and Ammunition Co. v. Nordenfelt, [1893] I Ch. 630, 661 (Bowen, L.J.)); Interest of J.H., 484 N.W.2d 482, 484 (N.D. 1992) (citing Interest of L.J., 436 N.W.2d 558, 563 (N.D. 1989); State v. Thill, 473 N.W.2d 451 (N.D. 1991) (concealing identity of child crime victim with initials "L.J."); Giese v. Morton County, 464 N.W.2d 202 (N.D. 1990) (argued by L.J. Schirado); Matter of Adoption of K.S.H., 442 N.W.2d 417, 428 (citing Interest of L.J., 436 N.W.2d 558 (N.D. 1989)); Interest of L.J., 436 N.W.2d 558 (N.D. 1989).

55. *A Hornbook to the North Dakota Criminal Code*, 50 N.D. L. REV. 639 (1974), has been cited ten times by the North Dakota Supreme since 1989; Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA) – A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 75 N.D. L. REV. 301 (1999), has been cited five times by the Court since 1989.

56. Jerod Tufte, *The North Dakota Constitution: An Original Approach Since 1889*, 95 N.D. L. REV. 417, 469-74 (2020) (citing Appendix B. Cases after 1950). According to Tufte's Appendix B, 65 cases published since 1989 have cited state constitutional provisions. Nineteen of these cases merely cite a constitutional provision without any analysis to follow (*e.g.*, stating the source of the Court's jurisdiction or applying corollary federal constitutional provision only). This leaves 42 cases involving constitutional interpretation. The nineteen cases excluded because they do not contain constitutional interpretation are: State v. Birchfield, 2015 ND 6, 858 N.W.2d 302 (no independent

had an appreciable impact on North Dakota Supreme Court jurisprudence. To illustrate, I have summarized the Court's use of the Peddrick draft materials below.

The first time *Digging for Roots* was cited in a North Dakota Supreme Court opinion was in a concurrence by Justice Sandstrom in *State v. Jacobson*.[57] In *Jacobson*, two driving under the influence ("DUI") defendants argued the Double Jeopardy clause of the North Dakota Constitution barred their prosecutions for the crime of DUI after they had already faced administrative license suspension for the same incidents.[58] Apparently, the defendants cited *Digging for Roots* to argue that the Double Jeopardy clause in North Dakota's Constitution granted more protection than the Double Jeopardy clause in the federal Constitution.[59] Justice Sandstrom used the Peddrick draft materials to find that the source of North Dakota's Double Jeopardy clause was "Constitutions generally."[60] He concluded that because no other state had interpreted its own double jeopardy clause to bar criminal DUI prosecution following administrative license suspension, there was no support for the defendants' argument.[61]

In *State v. Herrick* ("*Herrick II*"),[62] the Court was asked whether article I, section 8 of the North Dakota Constitution provided greater protection than its federal counterpart, the Fourth Amendment to the United States Constitution.[63] There, the defendant argued the good-faith exception to the Fourth

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state constitutional claim; Fourth Amendment only); State v. Hernandez, 2005 ND 214, 707 N.W.2d 214 (no state constitutional claim); State v. Mitzel, 2004 ND 157, 685 N.W.2d 120 (Fourth Amendment only); Aamodt v. N.D. Dep't of Transp., 2004 ND 134, 682 N.W.2d 308 (no state constitutional claim); State v. Klose, 2003 ND 39, 657 N.W.2d 276 (no state constitutional claim; Sixth Amendment); Olander Contracting Co. v. Gail Wachter Invs., 2002 ND 65, 643 N.W.2d 29 (statement of jurisdiction); Kelly v. Kelly, 2002 ND 37, 640 N.W.2d 38 (no state constitutional claim); Anderson v. Meyer Broadcasting Co., 2001 ND 125, 630 N.W.2d 46 (no state constitutional claim); Fox v. Fox, 1999 ND 68, 592 N.W.2d 541 (no state constitutional claim); Buchholz v. Buchholz, 1999 ND 36, 590 N.W.2d 215 (statement of jurisdiction); Hurt v. Freeland, 1999 ND 12, 589 N.W.2d 551 (statement of jurisdiction); State v. Winkler, 552 N.W.2d 347 (no state constitutional claim; Fourth Amendment); Zimmerman v. N.D. Dep't of Transp. Dir., 543 N.W.2d 479 (N.D. 1996) (no state constitutional claim); Lire, Inc. v. Bob's Pizza Inn Restaurants, Inc., 541 N.W.2d 432 (N.D. 1995) (no state constitutional claim); Heck v. Reed, 529 N.W.2d 155 (N.D. 1995) (no state constitutional claim); van Oosting v. van Oosting, 521 N.W.2d 93 (N.D. 1994) (statement of jurisdiction); City of Fargo v. Thompson, 520 N.W.2d 578 (N.D. 1994) (statement of jurisdiction); State v. Steffes, 500 N.W.2d 608 (N.D. 1993) ("[S]teffes did not brief this issue under our State Constitution . . . ."); Continental Cas. Co. v. Kinsey, 499 N.W.2d 574 (N.D. 1993) (no state constitutional claim).

57. State v. Jacobson, 545 N.W.2d 152, 155 (N.D. 1996) (Sandstrom, J., concurring) (citing Meschke & Spears, *Digging for Roots: The North Dakota Constitution and the Thayer Correspondence*, 65 N.D. L. REV. 343 (1989)).

58. *Id.* at 152–53.

59. *Id.* at 155 (Sandstrom, J., concurring).

60. *Id.*

61. *Id.* at 155–56.

62. 1999 ND 1, 588 N.W.2d 847.

63. *Herrick*, 1999 ND 1, ¶¶ 21, 23.

Amendment's warrant requirement should not apply to a violation of article I, section 8.[64] Citing Meschke and Spears' article, the Court turned to the Peddrick draft materials, which showed the source of article I, section 8 was "[C]onstitutions generally."[65] The Court considered Pennsylvania case law to be persuasive because Pennsylvania's Constitution predated North Dakota's Constitution and contained a nearly identical provision to article I, section 8 of the North Dakota Constitution.[66] However, the Court ultimately dodged the constitutional question altogether—instead holding that the police violated a statute and not the State or Federal Constitutions.[67]

In *Bulman v. Hulstrand Const. Co., Inc.*,[68] the Court again employed the Peddrick draft table and traced the source of article I, section 9 of the North Dakota Constitution to "Constitutions generally."[69] The Court compared article I, section 9 with an identical provision in the Pennsylvania Constitution and adopted the Pennsylvania Supreme Court's interpretation that its constitutional provision did not prohibit judicial abrogation of sovereign immunity doctrine.[70]

Finally, and most recently, Justice Tufte cited *Digging for Roots* in a special concurrence in *City of West Fargo v. Ekstrom*,[71] explaining how parties might more persuasively brief state constitutional issues in the future.[72] Justice Tufte consulted the Peddrick draft materials which, as in *Jacobson*, revealed the source of the Double Jeopardy clause of the North Dakota Constitution is "constitutions generally."[73]

III. THE NORTH DAKOTA SUPREME COURT SHOULD NOT USE THE PEDDRICK DRAFT MATERIALS IN INTERPRETING THE NORTH DAKOTA CONSTITUTION

I present three main reasons why the North Dakota Supreme Court should not consider the Peddrick draft materials when interpreting the North Dakota Constitution. First, Meschke's and Spears's analogy to statutory interpretation does not translate neatly to constitutional interpretation because of crucial differences between statutes and constitutions. Second, the secrecy of the Peddrick draft materials means the draft materials themselves would not have informed the framers' or ratifiers' understanding of the document.

64. *Id.* ¶ 21.
65. *Id.* ¶ 24; *see also Peddrick Draft No. 2*, *supra* note 46, at 481.
66. *Herrick*, 1999 ND 1, ¶ 25.
67. *Id.* at ¶¶ 26-27.
68. 521 N.W.2d 632 (N.D. 1994).
69. *Bulman*, 521 N.W.2d at 637 n.3.
70. *Id.*
71. 2020 ND 37, 938 N.W.2d 915.
72. *Ekstrom*, 2020 ND 37, ¶ 36 (Tufte, J., concurring specially).
73. *Id.*

Finally, even if accepted as valid, the Peddrick draft materials rarely yield useful results.

A. THE STATUTORY INTERPRETATION ANALOGY IS FLAWED

With the sources of each constitutional provision in the Peddrick draft easily ascertainable through the table of authorities, Meschke and Spears analogized the process of constitutional interpretation to that of interpreting a model or uniform statute.[74] When one state adopts a statute from another state, the adopting state's courts sometimes look to the source jurisdiction's court decisions interpreting the source statute as persuasive authority.[75] In other words, when a state adopts another state's statute, the statute comes with the source state's "baggage." Why shouldn't this reasoning carry over into constitutional interpretation; especially where many of our constitutional provisions are borrowed from other states?

First, there are notable differences between statutes and constitutions that complicate the comparison. In the case of a statute, imputing the source provision's interpretive case law assumes the legal fiction that legislators "do their homework" and study how the law they proposed has been interpreted.[76] Constitutions are notably different than statutes. Constitutions are usually adopted popularly by a vote of the people they govern. Statutes, on the other hand, are subject to the legislative process. Depending on the legislative body, the process can include initial drafting, committee work, review by professional legislative staff, floor debate, and presentment to an executive for final approval.[77] Even if a borrowed bill's source is never explicitly stated, the various steps in the legislative process and review by many sets of highly-trained eyes make it plausible, if not likely, that the source would be discovered before enactment. By contrast, the average constitutional ratifier (*i.e.*,

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74. Meschke & Spears, *supra* note 6, at 381 (citing NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 52.04 (4th ed. 1984)).

75. *See e.g.*, James Vault & Precast Co. v. B&B Hot Oil Service, Inc., 2019 ND 143, ¶ 32, 927 N.W.2d 452 (stating cases interpreting source provision are "[e]ntitled to respectful consideration and should not be ignored."); Kortum v. Johnson, 2008 ND 154, ¶ 22, 755 N.W.2d 432 (quoting Treiber v. Citizens State Bank, 1999 ND 130, ¶ 14, 598 N.W.2d 96 ("[A] statute . . . adopted from another state without change . . . is taken with the construction placed upon it by the courts of that state, and it is presumed the legislature intended that construction.'"); Trinity Medical Center, Inc. v. Holum, 544 N.W.2d 148, 153 (N.D. 1996) ("We often look to interpretive caselaw of other states if our statute has been adopted from the other state's statute, or if both states have adopted a uniform law."); Jahner v. Jacob, 515 N.W.2d 183, 184 (N.D. 1994) ("In construing a statute derived from a uniform act, we seek 'to effectuate its general purpose to make uniform the law of those states which enact it.'") (quoting In Re Conservatorship of Milbrath, 508 N.W.2d 360, 362-363 (N.D. 1993)).

76. *Kortum*, 2008 ND 154, ¶ 22 ("A statute 'adopted from another state without change . . . is taken with the construction placed upon it by the courts of that state, and it is presumed the legislature intended that construction.'") (quoting Treiber v. Citizens State Bank, 1999 ND 130, ¶ 14, 598 N.W.2d 96)).

77. *See* JACK SHELDON, *I'm Just a Bill*, *on* SCHOOLHOUSE ROCK! (SOUNDTRACK) (Rhino Records 1996) (describing the process by which a bill becomes a law).

voter) lacks the resources and expertise to discover a proposed constitutional provision's history and prior interpretations in other states. Rather, the ratifier probably relies on the text of the Constitution alone and perhaps the information published by the Secretary of State in connection with the election at which the provision is adopted.[78] As will be discussed in greater detail in Section III.B., when the North Dakota Supreme Court interprets a provision of the North Dakota Constitution, it is concerned with the understanding of the ratifiers.[79] It is highly unlikely that the average constitutional ratifier is even aware of a proposed constitutional provision's source. It is even more unlikely that the constitutional ratifier is aware of prior judicial interpretation of the source provision in the source jurisdiction. Therefore, if the Court is concerned with what the ratifiers understood a provision to mean, prior judicial interpretation in other states is unlikely to be part of that understanding.

Second, imputing a uniform or model statute's prior interpretive case law serves a purpose not present when interpreting a borrowed constitutional provision. The purpose of enacting a uniform act is to obtain uniformity in an area of law across jurisdictions.[80] Therefore, the North Dakota Supreme Court has said that when interpreting a uniform act, it gives special deference to decisions of courts in other jurisdictions that have interpreted the act.[81] Also, even when a statute is borrowed from another state, the North Dakota Supreme Court has stated it does not presumptively apply the source state's interpretive case law if substantive changes have been made in the North Dakota statute.[82] By contrast, uniformity between jurisdictions is less likely to be a goal in enacting constitutional provisions. Some provisions of the North Dakota Constitution may be based loosely on a source constitution with modifications. Many other provisions of the North Dakota Constitution have been amended since their original enactment. Additionally, many provisions in the Peddrick draft No. 2 table of authorities list several source states or "constitutions generally."[83] In those cases, the different source states may have interpreted their provision differently from each other. If that is the case, which interpretation should North Dakota adopt? The North Dakota Supreme Court

78. *See* State v. Hagerty, 1998 ND 122, ¶ 24, 580 N.W.2d 139 (considering the Secretary of State's publicity pamphlet for an initiated constitutional petition).

79. *See* discussion *infra section III.B*

80. *Jahner*, 515 N.W.2d at 184; *see also* N.D. CENT. CODE § 1-02-13 (2019) ("Any provision in this code which is a part of a uniform statute must be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.").

81. *Jahner*, 515 N.W.2d at 184.

82. Trinity Medical Center, Inc. v. Holum, 544 N.W.2d 148, 153 (N.D. 1996) ("However, even where another jurisdiction's law serves as the basis for our statute, we will not presumptively apply a similar construction if our legislature has made substantive changes in the statute . . . .").

83. State v. Jacobson, 545 N.W.2d 152 (N.D. 1996); Bulman v. Hulstrand Const. Co., 521 N.W.2d 632 (N.D. 1994); City of West Fargo v. Ekstrom, 2020 ND 37, 938 N.W.2d 915.

has said other state courts' opinions interpreting model statutes are of little value when the courts have come out differently on a provision's meaning.[84]

Finally, the statutory baggage analogy becomes untenable under the specific facts underlying the adoption of the North Dakota Constitution. I must acknowledge that the North Dakota Supreme Court has stated the framers of the Constitution are presumed to have been aware of its provisions' sources and their prior judicial interpretations.[85] I do not object to this notion in instances where the framers actually wrote the constitutional provisions. However, in the case of the North Dakota Constitutional Convention, much of the engrossed constitution can be traced to Erastus Williams' File 106 constitution. Even the delegates, sitting in a quasi-legislative role, were deliberately kept unaware of the source of the File 106 constitution and its drafting history. Even ignoring my earlier contention about the differences between statutes and constitutions for the sake of argument, lawmakers cannot adopt a legislative history unknown to them. The legal fiction that lawmakers "do their homework" and are aware of prior court decisions interpreting the source provision falls flat when we know that the source documentation was deliberately kept secret from them.

B. USE OF "SECRET SOURCES" IS AT ODDS WITH THE NORTH DAKOTA SUPREME COURT'S "ORIGINALIST" APPROACH TO CONSTITUTIONAL INTERPRETATION

The North Dakota Supreme Court often begins its analysis with a block quote stating general principles of law.[86] When interpreting the North Dakota Constitution, the Court has consistently stated its objective is to give effect to the intent and purpose of those who adopted the provision at issue.[87] The

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84. *Trinity Medical Center, Inc*., 544 N.W.2d at 153 ("[W]here, as here, the various state laws on a subject 'are known for the extent to which they vary from each other in both application and operation,' caselaw interpreting these varied statutory schemes is of little persuasive authority.") (quoting Nesdahl Surveying & Engineering, P.C. v. Ackerland Corp., 507 N.W.2d 686, 690 (N.D.1993)).

85. State ex rel. McCue v. Blaisdell, 119 N.W. 360, 365 (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.").

86. *See* Tufte, *supra* note 56, at 433-34.

87. *See e.g*., Owego Township v. Pfingston, 2018 ND 68, ¶ 19, 908 N.W.2d 123 ("Our overriding objective in construing a constitutional provision is to give effect to the intention and purpose of the people adopting it.") (quoting Johnson v. Wells Cty. Water Res. Bd., 410 N.W.2d 525, 528 (N.D. 1987)); State v. Anderson, 427 N.W.2d 316, 317 (N.D. 1988) ("Our primary duty is to ascertain and give effect to the intent and purpose of the framers and adopters of the constitution.") (citing Federal Land Bank of St. Paul v. Gehroh, 418 N.W.2d 602 (N.D. 1988); Newman v. Hjelle, 133 N.W.2d 549, 555–56 (N.D. 1965) ("The sole object sought in construing a constitutional provision is to ascertain and give effect to the intention and purpose of the framers and of the people who adopted it, and all rules of construction are subservient to and intended to effectuate such objects.");

Court's use of this interpretive principle can be traced to Justice Thomas Cooley's treatise on *Constitutional Limitations*.[88] The Court's first step in ascertaining the intent and purpose of a provision's adopters is to look to the text of the provision.[89] If the intent and purpose cannot be readily determined from the text alone, the Court then looks to other sources which would inform the understanding of the provision's adopters.[90] With a few exceptions, these principles of interpretation have prevailed in the Court's opinions interpreting the North Dakota Constitution since statehood.[91]

The North Dakota Supreme Court's stated principles of constitutional interpretation can fairly be described as "originalism."[92] Originalism is not a singular theory—but a collection of theories of constitutional interpretation. A common thread among originalist theories is the notion that the act of writing down law fixes its meaning at the time that it was written.[93] However,

State ex rel. Lein v. Sathre, 113 N.W.2d 679, 684 (N.D. 1962) ("This Court has consistently held that a constitution must be construed to give effect to the intention of the people who adopted it."); Egbert v. City of Dunseith, 24 N.W.2d 907, 909 (N.D. 1946) ("[I]t 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.") (quoting Barry v. Traux, 99 N.W. 760, 769 (1904)).

88. State ex rel. Linde v. Robinson, 160 N.W. 514, 516–17 (N.D. 1916) ("The object of construction, as applied to a written Constitution, is to give effect to the intent of the people in adopting it.") (quoting THOMAS M. COOLEY, *Constitutional Limitations* 70 (7th ed. 1903)). Justice Cooley was the leading scholar on the subject of state constitutions at the time of North Dakota's Constitutional Convention. Justice Cooley made an appearance at the Convention and gave brief remarks to the delegates about their job in framing a constitution. *The Convention*, BISMARCK WKLY. TRIB., July 19, 1889, at 8 (reporting Cooley's remarks to the convention).

89. City of Bismarck v. Fettig, 1999 ND 193, ¶ 8, 601 N.W.2d 247 ("Such intent and purpose are to be found in the language of the constitution itself.") (citing Pelkey v. City of Fargo, 453 N.W.2d 801, 804 (N.D. 1990)).

90. *Id*. ("If the intentions of the people cannot be determined from the language itself, we may turn to other aids in construing the provision.") (quoting State v. Hagerty, 1998 ND 122, ¶ 24, 580 N.W.2d 139).

91. *See* Tufte, *supra* note 56, at 424.

92. *Id*. at (145-46).

93. *See* ILAN WURMAN, *A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM*, 16-17 (2017).

through various iterations and years of debate, originalism has concerned itself with original intent of the framers,[94] original understanding of the ratifiers,[95] and more recently, original public meaning.[96] The North Dakota Supreme Court's often-repeated statement of its interpretive principles (*i.e.*, that a constitution must be construed to give effect to the intention of the people who adopted it) most closely fits the "original understanding" model of originalism.[97] Thus, the Court's interpretive task is to seek original understanding of the ratifiers who adopted the Constitution.

The framing of the United States Constitution also had an element of secrecy—though appreciably different from the framing of the North Dakota Constitution. When the framers of the United States Constitution assembled in Philadelphia in May of 1787, they adopted a secrecy rule "that no copy be taken of any entry on the journal during the sitting of the House without the leave of the House, that members only be permitted to inspect the journal, and that nothing spoken in the House be printed, or otherwise published, or communicated without leave."[98] The records remained hidden from the public until 1819, when the federal government finally published the *Journal of the Convention*.[99] Scholars have considered whether, or to what extent, the secret drafting history of the United States Constitution has a place in originalist constitutional interpretation.[100] Because the records of the convention debates were hidden from the ratifiers, some scholars have argued they do not have value as an interpretive tool.[101] Others have argued that the secret

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94. *See e.g.*, William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 699 (1976) (discussing language and intent of the framers of the U.S. Constitution); *compare* Edwin Meese III, Attorney General, Speech to the A.B.A (July 9, 1985), *in* THE FEDERALIST SOC'Y, THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION (Paul G. Cassell ed., 1986); *with* Justice William J. Brennan, U.S. Supreme Court, Speech to the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), *in* THE FEDERALIST SOC'Y, THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION (Paul G. Cassell ed., 1986).

95. *See generally* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing framers of the constitution themselves did not expect future interpreters to resort to "original intention.").

96. *See generally* Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997).

97. *See* Egbert v. City of Dunseith, 24 N.W.2d 907, 909 (N.D. 1946) ("[I]t 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.") (quoting Barry v. Traux, 99 N.W. 769, 772 (N.D. 1904).

98. JOHN P. KAMINSKI, SECRECY AND THE CONSTITUTIONAL CONVENTION 7 (2005).

99. *See* JOURNAL, ACTS, AND PROCEEDINGS OF THE CONVENTION, ASSEMBLED AT PHILADELPHIA, MONDAY MAY 14, AND DISSOLVED, SEPTEMBER 17, 1787, WHICH FORMED THE CONSTITUTION OF THE UNITED STATES (Boston, Thomas B. Wait 1819).

100. *See generally* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 Geo. L.J. 1113 (2003).

101. *Cf.* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1059 n. 80 (1984) (arguing James Madison's notes from the Constitutional Convention should carry little weight as tools of constitutional interpretation).

drafting history of the United States Constitution should be "admissible" as a second-best source of original meaning.[102]

However, there are significant differences between the secret drafting history of the United States Constitution and the secret drafting history of the North Dakota Constitution. The Journal of North Dakota's Constitutional Convention was published in newspapers across the state as the convention happened.[103] But nobody doubts that the debates of the North Dakota Constitutional Convention are "admissible" for constitutional interpretation. Because the North Dakota Convention Journal was publicly available and contemporaneously published during the convention, it answers questions about both the original intent of the framers and the original understanding of the ratifiers. The secret drafting history of the North Dakota Constitution informed neither the understanding of the framers nor the ratifiers.

Though the North Dakota Supreme Court seems to apply a method akin to "original understanding" originalism, it does not matter which brand of originalism the Court uses; the Peddrick draft materials do not inform original intent, original understanding, or original public meaning. If the Court follows its own stated interpretive principles, the Peddrick draft materials ought to be disregarded as tools of constitutional interpretation.

C. THE PEDDRICK DRAFT MATERIALS ARE AN IMPRACTICAL TOOL FOR CONSTITUTIONAL INTERPRETATION

My final argument against the use of the Peddrick draft materials in constitutional interpretation is that its path to the present-day Constitution may not be as clear cut as was suggested in "*Digging for Roots*." To glean any useful insight from Peddrick draft No. 2, the Court must work backward through a five-step process. First, it has to match the present-day constitutional provision to the provision in the 1889 Constitution. A couple obstacles complicate this step. The North Dakota Constitution was renumbered in 1981.[104] For example, the "Anti-Gift clause" is currently codified at article X, section 18, but it originally appeared as article XII, section 185 in 1889. Also, as of 2020, the North Dakota Constitution has been amended 164 times since its initial ratification.[105] Second, once the Court has keyed the present-day provision to the 1889 provision, it must then confirm the 1889 provision

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102. Kesavan & Stokes Paulsen, *supra* note 100, at 1214.

103. *See*, *e.g.*, *North Dakota: Proceedings of the Constitutional Convention*, GRIGGS COURIER, July 12, 1889, at 6; *The Convention Puts in Another Day of Debate and Progresses Slowly*, BISMARCK WKLY. TRIB., Aug. 2, 1889, at 8.

104. Act of Feb. 8, 1979, ch. 481, 1979 N.D. Laws 1223 (enacting N.D. CENT. CODE § 46-03-11.1, which directed the North Dakota Constitution to be renumbered).

105. *Measures Before the Voters*, N.D. LEGIS. BRANCH, https://www.legis.nd.gov/files/resource/library/measuresbeforethevoters.pdf?20150605133037 (last visited Sept. 19, 2020).

matches the proposed provision in the File 106 Constitution. While much of the File 106 constitution was adopted in the engrossed constitution, the engrossed version is not a carbon copy. For example, section 21 of the 1889 Constitution,[106] stating the provisions of the Constitution are mandatory and prohibitory, did not appear in the File 106 constitution or the Peddrick draft No. 2.[107] Third, the Court has to ensure the provision in the File 106 constitution matches the provision in Peddrick draft No. 2. Fourth, the Court may finally consult the table of authorities. Even upon reaching the table of authorities, sometimes little insight can be gained. The source for many provisions is listed as "constitutions generally."[108] "Constitutions generally" is listed as the source in a few of the examples cited earlier in section II.C.[109] Where a source is identified, the fifth and final step is to consult the source jurisdiction's interpretive case law that predates North Dakota's adoption of the provision.[110]

Even assuming for the sake of argument that the Peddrick draft materials are valid tools of constitutional interpretation, the five-step process presents enough stumbling blocks to render them virtually useless almost all of the time. In all the cases in which *Digging for Roots* has been cited, only in *Herrick II* has the Court found a constitutional provision's antecedent.[111]

IV. CONCLUSION

Meschke and Spears should be applauded for their exceptional work expanding upon the documented history of the North Dakota Constitutional Convention. Expanding the documentation of historical literature on the North Dakota Constitutional Convention was a stated goal of the Constitutional Celebration Committee, and Meschke and Spears succeeded in that endeavor.[112] However, despite its value in the historical literature, "*Digging for Roots*" presented a specious suggestion that the drafting sources published alongside the article would be useful primary sources for constitutional interpretation.[113] As I have explained above, it is erroneous for the North Dakota Supreme Court to consider the Peddrick draft materials in interpreting the

106. Now N.D. CONST. art. I, § 24.

107. Compare JOURNAL, *supra* note 2, at 355 (engrossed 1889 constitution for submission to voters), with *Peddrick Draft No. 2*, *supra* note 46, at 419–79.

108. *Peddrick Draft No. 2*, *supra* note 46, at 480–90.

109. *See*, *e.g.*, State v. Jacobson, 545 N.W.2d 152, 155 (N.D. 1996); Bulman v. Hulstrand Const. Co., 521 N.W.2d 632, 637 n.3 (N.D. 1994); City of West Fargo v. Ekstrom, 2020 ND 37, ¶ 36, 938 N.W.2d 915 (Tufte, J., concurring specially); *see also* discussion *supra* section II.C.

110. *See* discussion *supra* section III.A (objecting to the legal fiction of adopting the "baggage" of another state's constitutional provision).

111. State v. Herrick, 1999 ND 1, ¶¶ 24-26, 588 N.W.2d 847.

112. Meschke & Spears, *supra* note 6, at 346–47.

113. *Id.* at 381.

North Dakota Constitution because the Court's stated goal is to ascertain the understanding of those who adopted the Constitution, and Peddrick the draft materials did not inform the framers' or the ratifiers' understanding.

The North Dakota Supreme Court should refrain from consulting Peddrick draft materials in future opinions. Instead, the Court should look to sources that would have informed the ratifiers' understanding of the document and advocates should present arguments based on those sources.[114] Not using the Peddrick draft materials would be more consistent with the Court's precedent on constitutional interpretation.

114. See Tufte, *supra* note 56, at 450-62, for an in-depth discussion on how to develop constitutional claims within the North Dakota Supreme Court's "originalist" method. A collection of historical resources related to the North Dakota Constitution and Constitutional Convention have been compiled. *Additional References*, N.D. CONST., https://www.ndconst.org/reference (last visited Sept. 19, 2020).