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## Originalism and the Montana Constitution

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## ORIGINALISM AND THE MONTANA CONSTITUTION

Tyler M. Stockton\*

### I. INTRODUCTION

We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, quality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution.<sup>1</sup>

The Montana Constitution begins with a declaration that it was enacted by the People of Montana.<sup>2</sup> However, since Montana's Constitution was enacted in 1972, the Montana Supreme Court has relied heavily not on the broad meaning held by the voters, but on the drafter's intent or meaning when interpretive questions arise. In fact, the Court has referred to the transcripts of the 1972 Constitutional Convention at least 164 times between 1972 and 2015.<sup>3</sup> Constitutional Convention delegates have even brought lawsuits claiming their intent should inform the Court's ruling on the meaning of the text.<sup>4</sup> This almost exclusive reliance on delegate intent, however, is not appropriate. Though the delegates wrote the document, they did not enact the document. Instead, as the Preamble notes, it was "we the People of Montana" who ratified the new Montana Constitution.<sup>5</sup> As such, when the plain text is unclear, the original public meaning—as it was understood by the voters at the time of ratification—ought to control over delegate intent. Montana is blessed with a ratification-era history replete with documents that shed light on the understanding the people of Montana had when they enacted the 1972 Constitution. Depending on the distribution, authority, public use, and credibility of those documents, they should inform the meaning the 1972 Constitution's language held at the time of ratification. This framework places the delegate's intent in its proper interpretive order

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\* Tyler M. Stockton, 2016 J.D. Candidate at the University of Montana School of Law. I wish to thank my dear wife, Tia Stockton, for her support in my pursuit of a legal career and my parents, Thomas and Rebecca Stockton, for their lifelong encouragement. I would also like to thank Professor Anthony Johnstone for his comments and suggestions as I drafted this article, Fritz Snyder for the original spark regarding this topic—Fritz Snyder, *The Right to Participate and Right to Know in Montana*, 66 MONT. L. REV. 297, 299–301 (2005)—and the staff and editors of the *Montana Law Review* for their invaluable time and effort.

1. MONT. CONST. pmbl.

2. *Id.* (emphasis added).

3. Westlaw Search: "'constitutional convention' & date (after 1972 & before 2015)."

4. See e.g., *Cross v. VanDyke*, 332 P.3d 215, 216 (Mont. 2014); *Reichert v. State*, 278 P.3d 455, 460 n.2 (Mont. 2012).

5. MONT. CONST. pmbl.

behind the clear text and the intent of the actual lawmakers of Montana: the People of Montana.

Part II of this article outlines the history of the 1972 Constitution through the documents generated and the surrounding events that shaped those documents and publications. Part III examines modern constitutional interpretation and, more particularly, focuses on the interpretive theories in state constitutional law. Part IV examines Montana's constitutional interpretive framework and offers commentary on the process used by the Montana Supreme Court. Part V outlines a proposed series of factors for conducting originalist jurisprudence and applies those factors to the documents available in Montana. Finally, Part VI concludes with an argument that the Montana Supreme Court should apply and use both the suggested framework and the wealth of ratification documents available when examining ambiguous language in the Montana Constitution.

## II. MONTANA'S CONSTITUTION: A DOCUMENTARY HISTORY

The Montana Constitution has had two distinct periods of development: the late 1800s and the 1970s.<sup>6</sup> In 1866, Acting Governor Thomas F. Meagher presided over a Constitutional Convention in Helena that drafted a constitution with hopes of gaining statehood.<sup>7</sup> The document was never presented for ratification and no copy was preserved; only newspapers reference its existence.<sup>8</sup> In 1884, a second proposed constitution fell victim to Congressional politics, which prevented Montana from receiving the approval necessary from Congress and the document was never presented to the voters.<sup>9</sup> Unlike the 1866 document, both the text of the 1884 draft and the 1884 Constitutional Convention records were preserved.<sup>10</sup>

By 1889, Congress reached a compromise over which states could enter the union, prompting Montana to hold another Constitutional Convention.<sup>11</sup> The 1884 draft constitution served as the baseline for the 1889 Constitutional Convention and much of the 1884 document was retained.<sup>12</sup> In

6. LARRY M. ELISON & FRITZ SNYDER, *THE MONTANA STATE CONSTITUTION* 3 (G. Alan Tarr ed., The Oxford Cmts. on the State Constitutions of the U.S., 2011).

7. *Id.* at 4.

8. *Id.*

9. *Id.* at 4-6 (Republicans and Democrats in Congress blocked new states from entering the union to keep from altering the balance of power.).

10. See MONTANA CONSTITUTIONAL CONVENTION, *CONSTITUTION OF THE STATE OF MONTANA, AS ADOPTED BY THE CONSTITUTIONAL CONVENTION OF THE TERRITORY OF MONTANA, AT THE SESSION THEREOF BEGUN, JANUARY 14 AND CONCLUDED SATURDAY, FEBRUARY 9, 1884, TO WHICH IS APPENDED AN ADDRESS TO THE ELECTORS OF THE TERRITORY OF MONTANA (1884)*; MONTANA CONSTITUTIONAL CONVENTION, *RECORDS OF THE MONTANA CONSTITUTIONAL CONVENTION (1884)*.

11. ELISON & SNYDER, *supra* note 6, at 6.

12. *Id.*

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keeping with Montana's primary concern at the time, "[t]he 1889 Constitution was enacted more as a tool to achieve statehood than to provide a well-thought-out structure of governance for the new state."<sup>13</sup> The final document was filled with "minutiae and statutory detail."<sup>14</sup> Like the 1884 documents, the transcripts of the 1889 Constitutional Convention were preserved.<sup>15</sup> Montanans enacted the document by an overwhelming 91.6%, and Montana became a part of the Union on November 8, 1889.<sup>16</sup>

The 1889 Constitution, however, had numerous problems. In response to popular demands for increased government services and programs, the executive branch grew from twenty departments, commissions, and boards to over a hundred, and the limited executive branch designed in 1889 Constitution became large and uncontrollable.<sup>17</sup> Over the next sixty years, the Legislature proposed over 500 amendments to fix the problems in the 1889 Constitution, but most were never enacted.<sup>18</sup>

The 1960s brought dramatic changes to Montana. Legislative reapportionment and other national issues reshaped the Montana political landscape from rural to urban.<sup>19</sup> "A new interest in reforming and improving society and government" was also present and "[n]ever, at least not since the Progressive Era, had Montana seen such widespread popular participation in politics."<sup>20</sup> This popular participation—known as "new activism"—was prominent in the Montana Legislature and the statewide effort for constitutional revision.<sup>21</sup>

In 1967, the Montana Legislature ordered the Legislative Council to evaluate the Montana Constitution.<sup>22</sup> The Legislative Council's report recommended substantial changes to the constitution with a focus on creating an "active, dynamic government."<sup>23</sup> In response, the Montana Legislature created a Constitutional Revision Commission in 1969 to study the Montana Constitution and provide recommendations for improvement. The Commission determined a constitutional convention was necessary, a deci-

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13. *Id.*

14. Richard Roeder, *The 1972 Montana Constitution in Historical Context*, 51 MONT. L. REV. 260, 263 (1990).

15. See MONTANA CONSTITUTIONAL CONVENTION, PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION (1921).

16. ELISON & SNYDER, *supra* note 6, at 7.

17. Roeder, *supra* note 14, at 264; ELISON & SNYDER, *supra* note 6, at 9.

18. ELISON & SNYDER, *supra* note 6, at 8; Roeder, *supra* note 14, at 265–266.

19. ELISON & SNYDER, *supra* note 6, at 10.

20. MICHAEL P. MALONE & RICHARD B. ROEDER, MONTANA: A HISTORY OF TWO CENTURIES 301 (1976).

21. *Id.*

22. ELISON & SNYDER, *supra* note 6, at 10.

23. *Id.*

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sion that was supported by numerous other groups.<sup>24</sup> A referendum for a new constitutional convention passed 133,482–71,643 in November of 1970.<sup>25</sup>

During the period between the referendum and the convention, the Montana Legislature tasked a team of researchers to compile notes and compare other state constitutions to aid the upcoming convention in drafting the proposed constitution.<sup>26</sup> Chaired by Alexander Blewett, this team of researchers was known as the Montana Constitutional Convention Commission. The Commission produced a series of research papers organized into two groups: Constitutional Convention Studies and Research Memorandums.<sup>27</sup> The studies covered various topics, providing background information for modern constitution drafting and the provisions found in other new constitutions across the United States.<sup>28</sup> The memorandums covered topics not worthy of an official report, such as the rules for operating a convention.<sup>29</sup> The researchers compiled over 2,300 pages of materials evaluating constitutions across the United States, the principles of constitutional law, and other various topics.<sup>30</sup>

On January 17, 1972, a hundred delegates elected from across the state met in Helena to begin drafting the proposed constitution.<sup>31</sup> The convention lasted for over two months and the delegates extensively debated each provision in the document. Each delegate's own knowledge and experience—including individual delegate proposals for provisions<sup>32</sup>—the reports prepared by the Montana Constitutional Convention Commission, and the earlier reports by the Constitutional Revision Commission and the Legislative Council Convention informed the Convention debates.<sup>33</sup> The constitution's emphasis on direct participation in governmental decisions was a reflection

24. *Id.* at 11–12. (Elison and Snyder note this list included the Montana League of Cities and Towns, the Montana Association of County Commissioners, the Montana Citizens Committee, the Montana Citizens for Court Improvement, the Judicial Reform Committee of the Montana Bar, the Montana League of Women Voters, and most newspapers.).

25. *Id.* at 12.

26. MONTANA CONSTITUTIONAL CONVENTION COMMISSION, 1971–1972 MEMORANDUM ON CONSTITUTIONAL CONVENTION RULES: MONTANA (1889), HAWAII (1968), MARYLAND (1967), NEW MEXICO (1969), ARKANSAS (1969), ILLINOIS (1970), NEW JERSEY (1947), NEW YORK (1967), PENNSYLVANIA (1967), Memo 1, iii (1971) [hereinafter CONVENTION MEMORANDUMS].

27. *Id.*

28. *See e.g.* MONTANA CONSTITUTIONAL CONVENTION COMMISSION, MONTANA CONSTITUTIONAL CONVENTION STUDIES (1971–1972) (hereinafter CONVENTION STUDIES) (In total, there were numerous reports extensively covering issues across the legal spectrum.).

29. CONVENTION MEMORANDUMS, *supra* note 26, Memo 1, at iii.

30. ELISON & SNYDER, *supra* note 6, at 13.

31. *Id.* at 12.

32. 1 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT, 333–vol. II, 837 (1979) [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT I].

33. ELISON & SNYDER, *supra* note 6, at 13; CONVENTION MEMORANDUMS, *supra* note 26, at Memo. 1, iii.

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of the delegates' populist worldview.<sup>34</sup> As Constitutional Convention President Leo Graybill noted, the Constitutional Convention “overlooked no opportunity to publicize its activities and to encourage public participation.”<sup>35</sup> Every vote and meeting (including all committees) “were open to the public and the press.”<sup>36</sup> This openness created an extensive amount of news coverage and public notice regarding the Convention and the decisions made therein.<sup>37</sup> The delegates signed the proposed constitution on March 24, 1972.<sup>38</sup>

After the Convention approved the proposed constitution, the delegates created a voter education committee to use the remaining funds provided by the Montana Legislature for educational efforts regarding the new constitution.<sup>39</sup> To fund the voter education, the committee planned to spend a remaining \$15,000 from the Legislature's grant to the Constitutional Convention and another \$30,000 from a HUD grant.<sup>40</sup> However, Oscar S. Kvaalen brought a class action suit to bar the committee's educational efforts, arguing the Constitutional Convention's power ended upon its conclusion and therefore it could not conduct the educational initiative.<sup>41</sup> The Montana Supreme Court granted Kvaalen's request:

[W]e hold that the Constitutional Convention itself possesses no power or authority to receive or expend public funds for voter education beyond the specific requirements and authority found in the Enabling Act; that these requirements in the Enabling Act have already been satisfied; and that the Convention lacks power or authority to receive or expend further public funds for voter education in the manner proposed by the committee.<sup>42</sup>

The enabling act for the Constitutional Convention had only authorized the Secretary of State to send out a Voter Information Pamphlet—also called the “explanatory notes” to the proposed constitution<sup>43</sup>—and that was the extent of the power granted by the Montana Legislature.<sup>44</sup> The Court, how-

34. ELISON & SNYDER, *supra* note 6, at 13.

35. CONSTITUTIONAL CONVENTION TRANSCRIPT I, *supra* note 32, at ii (preface remarks from Constitutional Convention President Leo Graybill in 1979).

36. *Id.*

37. Donald E. Larson, *Press Coverage of the Montana Constitutional Convention*, 16 MONT. JOURNALISM REV. 46, 46 (1973); Charles S. Johnson, *The Press and the Constitutional Convention*, 17 MONT. JOURNALISM REV. 53, 56–57 (1974).

38. 7 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT, 3041–3946 (1981) [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT VII].

39. *State ex rel. Kvaalen v. Graybill*, 496 P.2d 1127, 1129 (Mont. 1972).

40. *Id.*

41. *Id.* at 1130.

42. *Id.* at 1135.

43. *Keller v. Smith*, 553 P.2d 1002, 1007 (Mont. 1976).

44. *Kvaalen*, 496 P.2d at 1130.

ever, made it clear that the ruling did not prohibit delegates from pursuing education efforts on their own.<sup>45</sup>

The Voter Information Pamphlet was 24 pages long and provided explanations for each provision in the proposed constitution.<sup>46</sup> The first page of the pamphlet prominently noted it was the “Official Publication of the 1972 Constitution Proposed by the 1971–1972 Montana Constitutional Convention,” its publication was expressly required by “Chapter 206, 1971 Laws of Montana,” and it was financed by an appropriation of the Montana Legislature.<sup>47</sup> The Secretary of State distributed the Voter Information Pamphlet to all registered voters.<sup>48</sup> Due to the Court’s ruling in *Kvaalen*, the Voter Information Pamphlet was the only official explanation of the proposed constitution.<sup>49</sup>

Following *Kvaalen*, the delegates, along with other advocacy groups both for and against the proposed constitution, immediately began funding their own educational efforts across Montana.<sup>50</sup> A group of delegates formed the Concerned Citizens for Constitutional Improvement and funded a pamphlet titled *The Proposed 1972 Constitution for the State of Montana*, which was commonly known as the Roeder Pamphlet because it was drafted by Dr. Richard B. Roeder and Dr. Pierce C. Mullen.<sup>51</sup> The pamphlet was distributed across all of Montana as a newspaper insert.<sup>52</sup> The Roeder Pamphlet contained detailed descriptions of the provisions and explanations of what they meant. It also contained a note at the end that it had been reviewed for “accuracy, style, and objectivity” by Mrs. Margaret S. Warden, Mrs. Thomas Payne, and Mr. Fred Martin.<sup>53</sup>

On the other side of the state, Gerald J. Neely, a Billings lawyer, published a pamphlet titled *A Critical Look: Montana’s New Constitution* and sent it to a distribution list developed during the Constitutional Conven-

45. *Id.* at 1135–1136.

46. *Id.* at 1130; PROPOSED 1972 CONSTITUTION FOR THE STATE OF MONTANA: OFFICIAL TEXT WITH EXPLANATION (1972) [hereinafter VOTER INFORMATION PAMPHLET].

47. VOTER INFORMATION PAMPHLET, *supra* note 46, at 1.

48. *Kvaalen*, 496 P.2d at 1129.

49. *Id.* at 1135.

50. ELISON & SNYDER, *supra* note 6, at 16–18; Rob Natelson, *Documentary History of the Ratification of the Montana Constitution*, WILLIAM J. JAMESON LAW LIBRARY, <http://perma.cc/H6GD-A8J8> (last visited Sept. 12, 2015) [hereinafter DOCUMENTARY HISTORY].

51. CONCERNED CITIZENS FOR CONSTITUTIONAL IMPROVEMENT, PROPOSED CONSTITUTION FOR THE STATE OF MONTANA 11 (1972), available at <http://perma.cc/PSUG-ZPEC> (last visited Sept. 12, 2015) [hereinafter ROEDER PAMPHLET].

52. *Id.* at 1. (It was an insert in the Billings Gazette, Bozeman Daily Chronicle, Montana Standard, Dillon Daily Tribune-Examiner, Great Falls Tribune, Daily Ravalli Republican, Havre Daily News, Helena Independent Record, Kalispell Inter Lake, Lewistown Daily News, Livingston Enterprise, Miles City Star, and the Missoula Missoulian.)

53. *Id.* at 11 (Mrs. Margaret Warden was a renowned librarian in Helena and a delegate, Mrs. Thomas Payne was a delegate, and Mr. Fred Martin was a delegate.).

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tion.<sup>54</sup> Mr. Neely had been a United Press International string reporter throughout the Constitutional Convention and had published a newsletter during the Constitutional Convention known as the *Con Con Newsletter*.<sup>55</sup> The pamphlet contained commentary on what the proposed constitution meant.<sup>56</sup> Neely's commentary has been referred to as a fairly neutral document reflecting on the proposed constitution.<sup>57</sup>

Throughout the Constitutional Convention and the ratification process, Montana newspapers published extensive articles on the proposed document.<sup>58</sup> News coverage came primarily from the Associated Press, the Lee State Bureau, and the Tribune State Bureau.<sup>59</sup> The *Tribune* printed 430 stories covering over 5,300 column-inches between January 17, 1972 and March 24, 1972. The *Missoulian* ran 347 stories for a total of 4,300 column-inches. The *Gazette* ran 271 stories covering 3,200 column inches. Each of these papers also ran numerous editorials: the *Tribune* ran 26, the *Missoulian* 22, and the *Gazette* 13.<sup>60</sup> Newspapers and news agencies dedicated five full-time reporters to the Constitutional Convention: the Associated Press had one, the *Tribune* Capitol Bureau had two, and Lee Newspapers State Bureau (serving the *Gazette*, the *Standard*, the *Missoulian*, and the *Independent Record*) had two.<sup>61</sup> And, although there was no television press assigned to the Convention, Cable TV provided 25 hours of coverage.<sup>62</sup> During the ratification period between the Constitutional Convention and the June 6, 1972, vote, the Associated Press released a ten-article series and the Lee State Bureau carried a 21-article series explaining the new constitution.<sup>63</sup>

Opposition material came primarily from the Farm Bureau Federation, the Taxpayers Association, and some unions.<sup>64</sup> Opponents used newspaper coverage, radio, and television to air their objections.<sup>65</sup> The Associated Press noted "most of the opposition focused on the taxation article."<sup>66</sup> Sup-

54. GERALD J. NEELY, A CRITICAL LOOK: MONTANA'S NEW CONSTITUTION 1, 3 (1972), available at <http://perma.cc/47VN-JHSW> (last visited Sept. 12, 2015) [hereinafter NEELY PAMPHLET].

55. *Id.*

56. *See e.g., id.* at 2–3.

57. Rob Natelson, *Montana Constitution Project Unveiled at UM*, MONT. LAW., May 2008, at 14, 15.

58. Larson, *supra* note 37, at 46. A collection of the articles published between the end of the Constitutional Convention and ratification on June 6, 1972 can be found in the DOCUMENTARY HISTORY, *supra* note 50. R

59. *Id.*

60. *Id.*

61. Johnson, *supra* note 37, at 54. R

62. *Id.*

63. *Id.* at 57.

64. *Id.* at 58; ELISON & SNYDER, *supra* note 6, at 14–15. R

65. Johnson, *supra* note 37, at 57. R

66. *Id.* at 58.



porting the tax opposition was the highway lobby, which included unions, oil companies, and Montana's AAA. Particularly, they disagreed with the proposal to allow the diversion of earmarked highway funds by a three-fifths vote of the Montana Legislature.<sup>67</sup>

Finally, proponents and opponents engaged in a varying array of private correspondence and local advocacy.<sup>68</sup> The AFL-CIO, one of the unions supporting the constitution, produced a flyer debunking rumors about the proposed constitution.<sup>69</sup> The Montana Common Cause endorsed the proposal with a letter hoping for a unicameral legislature, annual legislative sessions, and a strong right to know provision.<sup>70</sup> The Montana League of Cities and Towns penned a letter to one of the delegates noting the proposed constitution was an "excellent document" that would be a "foundation on which Montana can progress in the future."<sup>71</sup> The Montana Farm Bureau opposed the taxing provisions, noting the proposed document would "eliminate the requirement that taxes be collected uniformly."<sup>72</sup> The Associated General Contractors of America published a letter to their members in Montana noting the proposed document had a "watered-down proposal" for the anti-diversion amendment.<sup>73</sup>

Following a brief and intense period after the Constitutional Convention's proposal on March 24, 1972, the voters ratified the new constitution on June 6, 1972, by a thin margin: 116,415–113,883.<sup>74</sup> In 1979, the Montana Legislature, the Montana Legislative Council, and the Constitutional Convention's Editing and Publishing Committee published the entirety of the Constitutional Convention in a series of eight volumes.<sup>75</sup> The series, titled *1971–1972 Montana Constitutional Convention*, contained a brief history of the Convention, the proposals made by individual delegates, the

67. *Id.*

68. As a note, the documents referenced here are merely a representative sample of the incredibly large collection of materials from that period. Most of these materials were somewhat private in nature and were confined to either the members of an association or private correspondence. See DOCUMENTARY HISTORY, *supra* note 50.

69. AFL-CIO, SOS DIDN'T FOOL YOU LAST FALL! DON'T LET MATE FOOL YOU JUNE 6! (1972), available at <http://perma.cc/M3J7-8HV7> (last visited Sept. 13, 2015).

70. Letter from Bryant Hatch & Robin Hatch, Co-Chairmen, Montana Common Cause to Dorothy Eck, Delegate, Mont. Const. Convention (Apr. 14, 1972), available at <http://perma.cc/2KGG-6HNE> (last visited Sept. 12, 2015).

71. Letter from Dan K. Mizner, Executive Director, Montana League of Cities and Towns to Fred Martin, Delegate, Mont. Const. Convention (Mar. 23, 1972), available at <http://perma.cc/N4HH-TB6L> (last visited Sept. 12, 2015).

72. MONTANA FARM BUREAU, THE BIG DECISION "ON OUR CONSTITUTION" 3 (1972), available at <http://perma.cc/2PU8-DZ2D> (last visited Sept. 13, 2015).

73. Letter from Montana Contractors Ass'n to Members and Associate Members of Montana Contractors Ass'n 1 (May 24, 1972), available at <http://perma.cc/2DQR-EYBM> (last visited Sept. 13, 2015).

74. ELISON & SNYDER, *supra* note 6, at 16–18.

75. MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT (1979–1981).

Committee Proposals for each section of the proposed constitution, and a verbatim transcript of the entire Constitutional Convention.

In 2008, Professor Robert Natelson, with the aid of the libraries at Montana State University and the University of Montana, the Montana Historical Society, and various delegates, pulled many of the above noted ratification materials together and digitized the collection. The materials are now available online at the William J. Jameson Law Library at the University of Montana School of Law.<sup>76</sup>

### III. ORIGINAL MEANING & STATE CONSTITUTIONAL INTERPRETATION

The originalist interpretive theory has grown in prominence and support across the ideological spectrum. Although it is sometimes implemented in different ways, originalism is broadly accepted as a basis of constitutional interpretation.<sup>77</sup> As U.S. Supreme Court Justice Elena Kagan noted during her confirmation hearings, today “we are all originalists.”<sup>78</sup>

#### A. *Original Public Meaning*

When the text of a document is not clear, how does one determine what it means? Originalism proposes a solution. Originalism holds that the original public meaning (not the drafter’s subjective intent)<sup>79</sup> of the text is

76. DOCUMENTARY HISTORY, *supra* note 50; Natelson, *supra* note 57.

77. Jack M. Balkin notes “[t]here is by now a large literature on the proper use of history in constitutional argument” and lists extensive scholarship on originalism and its use and implementation. Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 644 (2013); *see also* Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 *FORDHAM L. REV.* 1587, 1592 n.14 (1997) (“‘[A]vowedly originalist’ can be read in two ways: either narrowly, as propounding a commitment to originalism as the one best mode of interpretation, or more broadly, as recognizing that some serious and responsible attempt to recover the original meanings of contested provisions is a necessary and proper element of the interpretive endeavor. A list of those who could be called originalists in one or both of these senses (especially the latter, latitudinal one) would include Bruce Ackerman, Akhil Amar, Chris Eisgruber, Daniel Farber, Martin Flaherty, Michael Klarman, Michael McConnell, Mark Killenbeck, Larry Kramer, Henry Monaghan, and William Treanor. But in truth, the turn to originalism seems so general that citation is almost beside the point.”).

78. *Kagan Originalism, Clip: Kagan Confirmation Hearing, Day 2, Part 1* (C-Span television broadcast June 29, 2010), available at <http://perma.cc/AC88-VTXY>.

79. Originalism, as an interpretive theory, resurfaced in response to, in essence, the application of common law jurisprudence to constitutional interpretive questions and the rise of the “living constitution.” ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 41 (1997). In the latter 20th Century, legal jurists, perhaps most prominently Edward Meese and Ronald Bork, began arguing that the original *intent* of the framers of the constitution ought to control. This view was widely attacked and many declared originalism “dead.” (This conclusion comes from four widely argued criticisms of originalism: (1) it’s impossible to know the aggregate “intent” of the ratifiers and therefore impossible to know the intent at all; (2) the framers themselves didn’t believe in original intent; (3) the original constitution was enacted by white males, not the people as a whole; and (4) the original ratifiers were racist and sexist. RANDY BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 89–91 (2004). The originalism espoused by Meese and Bork was one of *intent*. *E.g.* Edwin

the controlling guide when the text itself is unclear.<sup>80</sup> Constitutions are not detailed documents. Rather than providing mind-numbing detail, they sketch the outline and the framework for the law.<sup>81</sup> Therefore, the context of the document is important. As Justice Antonin Scalia noted: “[I]n textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear.”<sup>82</sup> Preeminent constitutional scholar Akhil Amar<sup>83</sup> echoes Justices Scalia and Kagan.<sup>84</sup> Originalists begin with the document, but often times, the document presents a “wide range of possible applications.”<sup>85</sup> Therefore, Amar concludes, one must study the textual analysis and the enactment history with the goal to “understand what the American People meant and did when We ratified and amended the document.”<sup>86</sup> This inquiry seeks “to braid arguments from text, history, and structure into an interpretive rope whose strands mutually reinforce.”<sup>87</sup>

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Meese III, *A Return to Constitutional Interpretation from Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925, 926 (1996) (“The active role in determining public policy should be with Congress and with the Executive, as the elected branches of government. By contrast, an activist federal judiciary is inconsistent with the intent of the Constitution and is inherently undemocratic. When the federal judiciary honors the intent of the Framers and maintains its proper Constitutional role, the Legislative and Executive branches are free to promote civil rights or any other issue as they see fit.”); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986). However, theorists have largely abandoned “intent” and refined originalism into “original meaning” or “original public meaning.” Original public meaning is *not* original intent. BARNETT, *supra*, at 79. (“Perhaps most important of all, however, is that originalism has itself changed—from original intention to original meaning. No longer do originalists claim to be seeking the subjective intentions of the framers. Now both Robert Bork and Antonin Scalia, no less than Ronald Dworkin and Bruce Ackerman, seek the original meaning of the text.”). “Whereas ‘original intent’ originalism seeks the intentions or will of the lawmakers and the ratifiers, ‘original meaning’ originalism seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.” BARNETT, *supra*, at 79. Originalism examines the text, the surrounding circumstances, and the meaning ascribed to it by those ratifying and voting on the language to interpret the meaning of the text if it is unclear.

80. *E.g.* SCALIA, *supra* note 79, at 38; KEITH WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 35 (1999); Balkin, *supra* note 77, at 645; Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 26 (2000).

81. SCALIA, *supra* note 79, at 37 (citing Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819)).

82. *Id.*

83. Akhil Reed Amar is the Sterling Professor of Law and Political Science at Yale University. He teaches constitutional law at Yale Law School, holds awards from the American Bar Association and the Federalist Society for his work on the United States Constitution, and has been favorably cited over 30 times by the United States Supreme Court. Yale Law School, *Akhil Reed Amar*, <https://perma.cc/PN6G-6BJE> (last visited Nov. 14, 2015).

84. Amar, *supra* note 80, at 26.

85. *Id.* at 28.

86. *Id.* at 28–29.

87. *Id.* at 31.

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This interpretive theory is not new. As John O. McGinnis<sup>88</sup> and Michael Rappaport,<sup>89</sup> the authors of *Originalism and the Good Constitution*, note: “[o]riginalism—the view that the constitution should be interpreted according to its original meaning—has been an important principle of constitutional interpretation since the early republic.”<sup>90</sup> Further, James Madison noted in 1824:

I entirely concur in the propriety of resorting to the *sense* in which the Constitution was accepted and ratified by the nation. In that *sense* alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable . . . exercise of its powers.<sup>91</sup>

In sum, originalism simply looks to the original meaning of a document when resolving textual ambiguities.<sup>92</sup>

Since the theory of originalism was introduced, its use has been defended on various grounds, including: (1) originalism is the most democratic interpretive theory; (2) written text naturally leads to originalism; and (3) originalism supports the supermajoritarian nature of constitutions.

### 1. *Democracy & Originalism*

The democratic defense of originalism argues that originalism trusts and defends the ideals of the democratic process. According to Justice Scalia and Bryan Garner, the current editor of *Black’s Law Dictionary*, argue in their work *Reading Law*, “[o]riginalism is the *only* approach to text that is compatible with democracy.”<sup>93</sup> America’s political structure—both state and federal—is set up so statutes and constitutions are enacted and amended in a structured democratic process. Through this process, the laws and constitutions were supported or opposed based on an understanding regarding their meaning. However, “[w]hen applied to the Constitution, non-originalism limits the democratic process itself, prohibiting (through imaginative interpretation of the Bill of Rights) acts of self-governance that ‘We the people’ never, ever, voted to outlaw.”<sup>94</sup> Any change or interpretation of

88. John O. McGinnis is the George C. Dix Professor of Constitutional Law at the University of Northwestern School of Law. Northwestern School of Law, *John O. McGinnis*, <http://perma.cc/SZT4-SEJ6> (last visited Nov. 14, 2015).

89. Michael Rappaport is the Hugh and Hazel Darling Foundation Professor of Law and Director, Center for the Study of Constitutional Originalism at the University of San Diego School of Law. University of San Diego School of Law, *Michael B. Rappaport*, <https://perma.cc/HB6F-VD66> (last visited Nov. 14, 2015).

90. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 1 (2013).

91. JOHN MADISON, Letter from James Madison to Henry Lee (June 25, 1824), in IX JAMES MADISON, THE WRITINGS OF JAMES MADISON 191 (Gaillard Hunt ed., 1910) (emphasis added).

92. MCGINNIS & RAPPAPORT, *supra* note 90, at 1.

93. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 82 (2012) (emphasis original).

94. *Id.* at 88.

a document that is inconsistent with the original public meaning changes the law as democratically enacted or ratified. As such, any interpretive theory that is not originalist is essentially anti-democratic.

## 2. *Written Text & Originalism*

Some, notably the constitutional scholar Randy Barnett,<sup>95</sup> defend originalism under the theory that, like contracts, “[o]riginal meaning follows naturally . . . from the commitment to a written text.”<sup>96</sup> “[F]rom the Magna Carta onward, there has always been an interest in getting political commitments in writing.”<sup>97</sup> The idea of the constitution as a contract is not new; Social Contract Theory was quite prevalent during the Founding Era.<sup>98</sup> A constitution serves as a “written contract.”<sup>99</sup>

Written contracts are evidence of the agreed-to bargain.<sup>100</sup> “Like a written contract, a written constitution provides good evidence of what terms were actually enacted when later they might be disputed.”<sup>101</sup> As such, they are subject to the amendment provisions in the actual document, the parol evidence rule, and the rules of construction. Like amendment provisions in contracts, the amendment process for constitutions functions to clarify the document’s purpose and to do so in a legally binding manner.<sup>102</sup> The parol evidence rule is also applicable. “Contradicting the explicit provisions of a writing undermines its ability to satisfy the functions of formality in a way that supplementing it when it is incomplete or when it explicitly authorizes supplementation does not.”<sup>103</sup> The objective approach to interpreting a contract “looks to the publicly accessible meaning that a reasonable person would attach to the words in context.”<sup>104</sup> In this way, the expressed meaning is “locked in” and preserved for future generations until the document is amended.<sup>105</sup>

In sum, originalism is contract theory applied to constitutions. Constitutions are the governing law of a land. They are enacted pursuant to various democratic means, and, without fail, have amendment provisions in

95. Randy Barnett is the Carmack Waterhouse Professor of Legal Theory at the Georgetown University School of Law. He teaches constitutional law and directs the Georgetown Center for the Constitution. Georgetown Law, *Randy E. Barnett*, <https://perma.cc/7R8B-FC6X> (last visited Nov. 14, 2015).

96. BARNETT, *supra* note 79, at 100.

97. *Id.* at 101.

98. See THOMAS HOBBS, *LEVIATHAN*, Pt. 1, Ch. 13 (1651); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* Ch. 8 (1689); JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* Bk II, Ch. 4 (1762).

99. BARNETT, *supra* note 79, at 101.

100. *Id.*

101. *Id.*

102. *Id.* at 102.

103. *Id.* at 102–103.

104. *Id.* at 103.

105. BARNETT, *supra* note 79, at 101.

them. Since a contract “locks in” the meaning the parties intended at the time they agreed, a constitution should receive similar treatment: the original meaning of those enacting the agreement should control when the text is unclear.

### 3. *Supermajoritarianism & Originalism*

The supermajoritarian defense of originalism argues that when a document is enacted pursuant to supermajoritarian principles, those principles tend to produce desirable constitutions and, as such, the meaning of the document when it was enacted must control.<sup>106</sup> As John O. McGinnis and Michael B. Rappaport, the authors of *Originalism and the Good Constitution*, note: “[i]n short, it is the supermajoritarian genesis of the Constitution that explains both why the document is desirable and why the desirability requires that it be given its original meaning.”<sup>107</sup> As a broad principle, the supermajoritarian process has a greater chance of producing a good constitution.<sup>108</sup> The supermajoritarian process “create[s] the consensus and non-partisanship necessary for fostering allegiance to a constitution that desirably regulates politics and society.”<sup>109</sup> Supermajorities better (1) aggregate citizen preferences;<sup>110</sup> and (2) aggregate judgments to determine what best promotes public interest.<sup>111</sup> First, supermajoritarian entrenchments (enactments that require supermajorities to remove) best aggregate citizen preferences because they create consensus,<sup>112</sup> inhibit partisanship,<sup>113</sup> and protect minorities.<sup>114</sup> Second, in general, the majority consensus is usually the best decision-making method.<sup>115</sup> A supermajority consensus produces even more accurate decisions than simple majorities because supermajorities require more debate and process to enact.<sup>116</sup> Therefore, decisions made under

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106. MCGINNIS & RAPPAPORT, *supra* note 90, at 11 (The supermajoritarian justification of originalism is a relatively a new defense of originalism.).

107. *Id.*

108. *Id.* at 21.

109. *Id.* at 33.

110. *Id.* at 33, 35.

111. *Id.* at 33, 47.

112. MCGINNIS & RAPPAPORT, *supra* note 90, at 38 (Supermajorities require more than the simple majority, and therefore, end up requiring more individuals to support the provision. As such, there is greater consensus and buy-in, which strengthens the constitution.).

113. *Id.* at 39 (Partisan provisions usually only have a majority support, however provisions supported by a supermajority must draw consent from both (or more) political parties.).

114. *Id.* at 42 (One never knows when they will be in the minority and since entrenched provisions can only be removed by a supermajority, supermajority enactments generally protect minorities due to this “veil of ignorance” about future conditions.).

115. *Id.* at 48.

116. *Id.* at 53–55.

supermajorities generally promote the public interest in the best possible manner.<sup>117</sup>

Documents rooted in proper supermajoritarian principles,<sup>118</sup> like constitutions, ought to be interpreted by the original meaning because *that meaning* is the only meaning reached through the supermajoritarian process. As McGinnis and Rappaport conclude:

A good constitution enacted under supermajority rules should be interpreted according to its original meaning. The beneficence of the good constitution derives from the consensus support it gained among the enactors. In considering whether to support the constitution, the enactors would have voted for or against the constitution based on the meaning they attributed to it. Thus, it is the original meaning, not some other meaning, that has the beneficence conveyed by the supermajoritarian process. The constitution-making process catches that consensus and crystallizes it in a text, like the capture of lightning in a bottle. Originalism then preserves that light for future generations.<sup>119</sup>

### B. State Constitutional Originalism

State constitutional interpretation, in the words of Justice Russell Nigro, is an important, but “often-overlooked aspect of state law.”<sup>120</sup> The United States’ federal structure is unique and poses a unique problem: with dual sovereigns, there must be some departure when the text and history of the two constitutions differ, otherwise there is no reason for the second sovereign. However, how much and in what way is often difficult to determine.

#### 1. State Constitutions are Different

State constitutions are quite different from the federal constitution. State constitutions have different origins; contain different legal premises; and are quite changeable compared to the federal constitution.<sup>121</sup> First, origins of state constitutions vary greatly both from each other and the U.S. Constitution. There are different sets of founders for each state.<sup>122</sup> The

117. *Id.* at 57–58.

118. There can be too strict or too loose supermajority provisions for enacting and amending entrenched documents. The U.S. Constitution manages an appropriate balance of these two extremes. State constitutions are largely enacted with provisions similar to the U.S. Constitution and would, therefore, have similarly acceptable supermajority provisions. MCGINNIS & RAPPAPORT, *supra* note 90, at 62–80.

119. MCGINNIS & RAPPAPORT, *supra* note 90, at 82.

120. Russell M. Nigro, *The Importance of Interpretive Theory in State Constitutional Law*, 73 TEMP. L. REV. 905, 906 (2000) (Justice Nigro was a member of the Pennsylvania Supreme Court.).

121. G. Alan Tarr, *State Constitutional Design and State Constitutional Interpretation*, 72 MONT. L. REV. 7, 9 (2011); *see also* Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions As Unique Legal Documents*, 27 OKLA. CITY U.L. REV. 189, 191 (2002) (“State constitutions are sui generis, differing from the Federal Constitution in their origin, function, and form.”).

122. Tarr, *supra* note 121, at 9.

United States' founders were individuals representing each state at the Philadelphia Convention. In the States, this can be very different. For example, in Montana, conventions are held by those elected in their respective areas.<sup>123</sup> Each state has different social concerns as compared to both each other and the federal level.<sup>124</sup> The Founders at the Philadelphia Convention were not dealing with mining or railroad interests or their later environmental consequences, yet those interests were at the forefront for both the 1889 and 1972 Montana Conventions.<sup>125</sup> Finally, with the passage of time, each state has enacted their constitutions in different political eras, which necessarily reflect different values, priorities, and concerns.<sup>126</sup>

Second, legal premises in state constitutions are quite different from the federal constitution.<sup>127</sup> As G. Alan Tarr<sup>128</sup> noted, the author of *Understanding State Constitutions*, “when legislative power is divided in a federal system, one government must receive grants of power and the other retain residual power.”<sup>129</sup> Such is the situation in the United States: the federal constitution is a grant and the states have retained the remaining rights. In *McCulloch v. Maryland*,<sup>130</sup> the the Court noted the grant of power to Congress contained implied powers, but recognized the grant had limits: it had to be within the “scope of the constitution.”<sup>131</sup> State constitutions, however, approach the question from an entirely different angle. The question is not whether it is *authorized*, but rather whether it is *prohibited*.<sup>132</sup> As Frank Grad,<sup>133</sup> author of *State Constitutions for the Twenty-First Century*, remarked,

123. MONT. CONST. art. XIV, § 4.

124. Tarr, *supra* note 121, at 10–12.

125. See e.g., MONT. CONST. of 1889, art. XV, § 13. (“The legislative assembly shall pass no law for the benefit of a railroad or other corporation, or any individual or association of individuals’ retrospective in its operation, or which imposes on the people of any county or municipal subdivision of the state, a, new liability in respect to transactions or considerations already passed.”); MONT. CONST. art. IX, § 1(1) (“The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.”).

126. Tarr, *supra* note 121, at 11–12.

127. *Id.* at 12–14; Williams, *supra* note 121, at 207 (State constitutions are “often referred to as documents of limitation rather than documents granting powers.”).

128. G. Alan Tarr is the Director of the Center for State Constitutional Studies and Distinguished Professor of Political Science at Rutgers University-Camden. He is the editor of *State Constitutions of the United States* and co-editor of *State Constitutions for the Twenty-First Century*. Rutgers, The State University of New Jersey, Camden, *Center for State Constitutional Studies*, <http://perma.cc/38LN-K6MY> (last visited Nov. 15, 2015).

129. G. ALAN. TARR, UNDERSTANDING STATE CONSTITUTIONS 27 (1998).

130. 17 U.S. 316 (1819).

131. TARR, *supra* note 129, at 7 (quoting *Marbury*, 17 U.S. at 421).

132. *Id.* (noting the Kansas Supreme Court’s discussion of the issue: “When the constitutionality of a statute is involved, the question presented is, therefore, not whether the act is authorized by the constitution, but whether it is prohibited thereby.” *Schneider v. Kennedy*, 587 P.2d 844, 850 (Kan. 1978).)

133. Frank Grad was the Joseph P. Chamberlain Professor Emeritus of Legislation at Columbia Law School. He was the author of numerous works on state constitutional law and participated in drafting the



It must be emphasized that very nearly everything that may be included in a state constitution operates as a restriction on the legislature, for both commands and prohibitions directed to other branches of the government or even to the individual citizen will operate to invalidate inconsistent legislation.<sup>134</sup>

Further, state constitutions often carry mandates, while the federal constitution largely does not.<sup>135</sup> In Montana, for example, the the state and each person must “maintain and improve” a clean environment.<sup>136</sup>

Finally, state constitutions are generally much more amendable.<sup>137</sup> The federal constitution was adopted in 1789 and has only been amended 27 times.<sup>138</sup> Montana’s current constitution was enacted in 1972 and has been amended 31 times to date.<sup>139</sup> The amendment process for state constitutions often includes constitutional initiatives, a form of amendment unavailable in the U.S. Constitution.<sup>140</sup>

These differences mean that state courts ought to interpret their own constitutions on their respective merits.<sup>141</sup> State constitutions are not merely “miniature version[s] of the United States Constitution.”<sup>142</sup> In a nation of dual sovereigns, the principles of federalism demand that, even if the meaning ends up identical, the governing documents of both sovereigns must be interpreted by their own text and their own history. As Tarr remarks, if the documents are not interpreted on their own merits, it “renders states[’] rights superfluous, a dubious result given the deliberate adoption of these guarantees by state constitution-makers.”<sup>143</sup> As such, there has been a trend of judges and scholars who emphasize “principled state constitutional jurisprudence” over result-oriented interpretation.<sup>144</sup>

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Model State Constitution. Columba Law School, *Professor Emeritus Frank Grad ‘49 LL.B., Pioneering Public and Environmental Law Attorney, Dies*, law.columbia.edu, <http://perma.cc/Y89S-ZAMX> (last accessed Nov. 15, 2015).

134. Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 964–965 (1968).

135. Tarr, *supra* note 129, at 14; *see e.g.*, OR. CONST. art. XI (The Oregon legislature shall enact legislation to carry out the State Power Development provisions); HAW. CONST. art. IX, § 1 (“The State shall provide for the protection and promotion of the public health.”); ARIZ. CONST. art. XI, § 1 (“The legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system.”).

136. MONT. CONST. art. IX, § 1(1).

137. Tarr, *supra* note 121, at 14–15.

138. U.S. CONST. amends. I–XXVII.

139. COUNCIL OF STATE GOVERNMENTS, *THE BOOK OF STATES* 10 (2014).

140. Tarr, *supra* note 129, at 25–26; *see e.g.* MONT. CONST. art. XIV, § 2.

141. Tarr, *supra* note 121, at 8–9.

142. *Id.* at 8.

143. Tarr, *supra* note 129, at 182.

144. G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 842 (1991).

## 2. *State Constitutional Originalism*

Interpreting state constitutions as separate documents has led many states to embrace originalism<sup>145</sup> Noting the differences between state and federal constitutions, state jurisprudence has “largely ignored contemporary constitutional theory and espoused an interpretive approach that emphasizes the distinctiveness of state provisions and the intent of their framers.”<sup>146</sup> To break from federal interpretation, jurists have often focused on the “intent of the framers and to the historical circumstances out of which the constitutional provisions arose.”<sup>147</sup> This, in essence, has guided state jurists towards “textualism and original intent.”<sup>148</sup>

State constitutions owe their enactment and authority to the voters in a given state, not to ratifying conventions or national framers.<sup>149</sup> Therefore, the originalist inquiry seeks the meaning held by the voters themselves—not the drafters—since the voters enacted the constitution.<sup>150</sup> In fact, as Frank Grad and Robert Williams note, there are questions regarding whether constitutional convention materials are even relevant in state constitutional interpretation.<sup>151</sup> Instead, the focus falls on the materials provided to the voters when they ratified the constitution.<sup>152</sup>

State originalist constitutional interpretation has a wealth of information unknown to federal interpretive work. State constitutions have developed over time and as of today, only two states have a constitution dating back to the 18th century (Massachusetts and New Hampshire), 26 were enacted in the 19th Century, and 22 have constitutions from the 20th Century.<sup>153</sup> The U.S. Constitution has been amended, but has remained relatively unchanged since its enactment in 1789. Unlike the U.S. Constitution, the developments in communications, reporting, and technology likely mean many state constitutions have far more in-depth ratification records.<sup>154</sup>

145. Tarr, *supra* note 121, at 8.

146. Tarr, *supra* note 144, at 843.

147. *Id.* at 848.

148. *Id.* (When state jurists opt to depart from federal interpretation, they are often criticized as being results oriented and, as such, they often spend a great deal of time defending the legitimacy of their opinions. Again, this means “an emphasis on differences in text and/or generating history—in a word (or in fact two), original intent.” Tarr, *supra* note 144, at 855).

149. Williams, *supra* note 121, at 194; 2 FRANK P. GRAD & ROBERT F. WILLIAMS, STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 76 (2006).

150. GRAD & WILLIAMS, *supra* note 149, at 78.

151. *Id.*

152. Williams, *supra* note 121, at 196.

153. COUNCIL OF STATE GOVERNMENTS, *supra* note 139, at 10.

154. Tarr, *supra* note 144, at 852.

The modern nature of many state constitutions make originalist interpretation particularly relevant.<sup>155</sup> As Tarr notes, “[t]he more recent the constitutional provision, the more likely that there is an extensive documentary record—pre-convention studies, constitutional convention records, voters’ pamphlets, and the like—bearing on its meaning.”<sup>156</sup> The availability of this information makes the originalist inquiry particularly suited to many state constitutions.<sup>157</sup>

#### IV. MONTANA’S INTERPRETIVE FRAMEWORK

The Montana Supreme Court has adhered to a broad principle of separate constitutional interpretation with its regular decisions to not “march lockstep” with the United States Supreme Court.<sup>158</sup> Montana’s interpretive framework is originalist: the Montana Supreme Court attempts to derive meaning from secondary sources when the text is unclear. However, the Court’s approach has two weaknesses. First, the Court sometimes confuses the terminology used and the methodology implemented. Second, the Court usually uses only one source to derive meaning.

##### A. Montana’s Interpretive Framework

For the Montana Supreme Court, Text is the clearest indication of meaning and, as such, interpretation must always begin with the text. As the Court has noted extensively: “[t]he intent of the framers of the Constitution is controlling and that intent must first be determined from the *plain language* of the words used.”<sup>159</sup> Textual construction uses the “plain meaning of the words used and [applies] their usual and ordinary meaning.”<sup>160</sup> This principle is quite old in Montana jurisprudence and predates the current Constitution.<sup>161</sup>

155. *Id.* at 851.

156. *Id.* at 852.

157. *Id.* at 851–852.

158. *E.g.* *Jacobsen v. Allstate Ins. Co.*, 310 P.3d 452, 459 (Mont. 2013) (“Because the Montana version of Rule 23 is identical to the corresponding federal rule, federal authority is instructive, but Montana courts are not required to march lockstep with federal interpretations of Fed. R. Civ. P. 23.”); *Brilz v. Metro. Gen. Ins. Co.*, 285 P.3d 494, 500 (Mont. 2012) (refusing to follow federal pleading standards in Montana).

159. *Cross*, 332 P.3d at 217 (internal citations omitted) (emphasis added).

160. *Id.* (internal citations omitted).

161. *Racicot v. Dist. Ct. of First Jud. Dist. In and For County of Lewis and Clark*, 794 P.2d 1180, 1183 (Mont. 1990); *Butte-Silver Bow Loc. Govt. v. State*, 768 P.2d 327, 330 (Mont. 1989) (The intent of the framers of the provision is controlling.); *Keller*, 553 P.2d at 1006 (“In determining the meaning of a given provision, the intent of the framers is controlling. . . . Such intent shall first be determined from the plain meaning of the words used, if possible, and if the intent can be so determined, the courts may not go further and apply any other means of interpretation.”); *Lloyd v. Silver Bow County*, 28 P. 453, 455–456 (Mont. 1891) (“We are of the opinion that the intent of the framers of the constitution is that

For statutory provisions, the Court consistently looks to the Montana Legislature and the debate surrounding individual bills for guidance on meaning.<sup>162</sup> As the Montana Code notes: “[i]n the construction of a statute, the intention of the legislature is to be pursued if possible.”<sup>163</sup> To do this, the Court examines the legislative history.<sup>164</sup> This makes sense because the debate and conversation surrounding the adoption of the legislation gives insight as to the meaning of the legislation.

For constitutional provisions, the Court “applies the same rules in the construction of the Constitution that it applies in the construction of statutes.”<sup>165</sup> First, the intent of the framers is determined from the “plain language of the words used.”<sup>166</sup> If ambiguity remains, the Court then examines the legislative history, like they do with statutes, to resolve any doubt.<sup>167</sup> For this inquiry, “[t]he rule is well established that, in construction of a constitution, recourse may be had to proceedings of the constitutional convention.”<sup>168</sup>

### B. Commentary on Montana’s Interpretive Framework

The Montana Supreme Court is thoroughly originalist. However, there are two weak points in the Court’s analysis: (1) the use of intent as the interpretive goal while functionally seeking meaning; and (2) the Court’s almost exclusive use of one originalist source for such meaning.

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the salary or emoluments of an officer like that of the sheriff, who was elected in October, 1889, shall be subject to the control of the legislative assembly, and that the power to “fix” carried with it the implied right to increase or diminish the same by amending the statutes which may be in force. This construction gives full life to the proviso.”)

162. *Dunphy v. Anaconda Co.*, 438 P.2d 660, 662 (Mont. 1968) (“In construing a statute, the intention of the Legislature is controlling.”); *State v. Hicks*, 296 P.3d 1149, 1152 (Mont. 2013) (“We seek to implement the legislature’s intent when we interpret a statute. . . . We look first to the plain language of the statute to determine legislative intent.”).

163. MONT. CODE ANN. § 1–2–102 (2013).

164. *In re K.M.G.*, 229 P.3d 1227, 1232 (Mont. 2010) (“When the intent of the legislature cannot be determined from the plain language of the statute, we examine the statute’s legislative history to determine its correct interpretation.”); *see also* *Montanans for Justice v. State*, 146 P.3d 759, 773 (Mont. 2006) (“When the legislative intent cannot be readily derived from the plain language, we review the legislative history and abide by the intentions reflected therein.”); *Thiel v. Taurus Drilling Ltd.* 1980-II, 710 P.2d 33, 35 (Mont. 1985).

165. *Cross*, 332 P.3d at 217; *Martien v. Porter*, 219 P. 817, 819 (Mont. 1923) (“The same rules are applied in the construction of the Constitution as in the construction of statutes.”); *Keller*, 553 P.2d at 1006 (“The same rules of construction apply in determining the meaning of constitutional provisions as apply to statutory construction.”).

166. *Cross*, 332 P.3d at 217; *Racicot*, 794 P.2d at 1183; *Keller*, 553 P.2d at 1006 (“In determining the meaning of a given provision, the intent of the framers is controlling.”).

167. *Cross*, 332 P.3d at 220 (internal citations omitted); *Racicot*, 794 P.2d at 1184–1186; *Reichert*, 278 P.3d 455, 480–481.

168. *School Dist. No. 12 v. Hughes*, 552 P.2d 328, 331 (Mont. 1976); *Bd. of Pub. Ed. v. Judge*, 528 P.2d 11, 14–15 (Mont. 1975).

### 1. *Intent Functioning as Meaning*

The Court's consistent use of *intent* terminology clouds the actual work the Court is doing. In practice, the Court's interpretive framework looks to the plain *meaning*, and if there is ambiguity, the Court examines the drafter's intent. Although seemingly a search for *intent*, the Court uses objective statements by the drafters as a means of determining *meaning*. A few examples are illustrative. In *Cross v. VanDyke*,<sup>169</sup> the Court was tasked with interpreting whether or not Article VII, Section 9 required active practice of law or simply admission to the Montana Bar for the requisite period.<sup>170</sup> In resolving the question, the Court noted:

Given the extensive discussion of the Executive Article and the specific "active practice" requirements for Attorney General, followed by the deliberate decision to adopt a simplified Judiciary Article, the convention transcripts make clear that the delegates *understood* and *intended* the difference between the qualifications for Attorney General and the qualifications for Supreme Court Justice.<sup>171</sup>

Using the Constitutional Convention transcripts, the Court determined "admitted" carried the *meaning* the delegates themselves understood it meant. In *Montana Environmental Information Center v. Department of Environmental Quality*<sup>172</sup> ("*M.E.I.C.*"), the Court used a similar process. *M.E.I.C.* required the Court to resolve how Article II, Section 3 and Article IX, Section 1 should be construed. The environmental rights were either fundamental because they were listed in Article II, Section 3, or not fundamental because Article II, Section 3 was enacted and implemented via Article IX, Section 1.<sup>173</sup> To resolve the question, the Court turned directly to the Constitutional Convention transcripts and examined the delegate's comments for insight into how those dual provisions should be interpreted. The Court held:

We conclude, based on the eloquent record of the Montana Constitutional Convention that to give effect to the rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution they must be read together and consideration given to all of the provisions of Article IX, Section 1 as well as the preamble to the Montana Constitution. In doing so, we conclude that the delegates' intention was to provide language and protections which are both anticipatory and preventative.<sup>174</sup>

Once again, the delegates' statements regarding the provision function as the meaning. How the delegates thought the provisions should work to-

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169. 332 P.3d 215 (Mont. 2014).

170. *Id.* at 216.

171. *Id.* at 222 (emphasis added).

172. 988 P.2d 1236 (Mont. 1999).

173. *Id.* at 1243.

174. *Id.* at 1249.

gether provided the construction of the provisions and therefore, the meaning. The Court uses this process whenever it seeks to resolve ambiguous text.<sup>175</sup>

Legal scholars have thoroughly attacked the use of intent as the touchstone for interpreting ambiguous statutes.<sup>176</sup> And, as noted above, the Court does not really seek “intent” even though that is the language it uses. As is true in all legal realms, changes trickle slowly through the courts. Using secondary sources to derive meaning ensures that the Court avoids the rebuke of being “intentionalist-originalists,”<sup>177</sup>—those who examine intent as opposed to meaning—but may cause some confusion if not closely examined. It is an easy fix for the Court to begin using *meaning* as that is functionally what it already does.

## 2. Use of a Single Originalist Source

The second weakness in the Court’s originalism is the use of just one source to determine the meaning of ambiguous provisions. Since 1972, the Court has cited or referred to the Constitutional Convention transcripts at least 164 times.<sup>178</sup> The Court has referred to only 13 other ratification-era sources and only four of those references come after the transcripts were published.<sup>179</sup>

175. *E.g.* *Racicot*, 794 P.2d at 1182–1187; *Reichert*, 278 P.3d at 480–481; *Sch. Dist. No. 12*, 552 P.2d at 331 (“The rule is well established that, in construction of a constitution, recourse may be had to proceedings of the constitutional convention.”).

176. *E.g.* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) (arguing it is impossible to pool together all the votes given on a piece of legislation or a constitution and know what those voters intended and thought when they voted); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing the framers believe original intent was an unworkable inquiry).

177. Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 41 (2009).

178. See Westlaw Search, *supra* note 3.

179. Searches for “voter guide” or “voter information pamphlet” or “convention notes” and culling out non-responsive documents returns only 13 results. See *e.g.* *Poulson v. Walsh-Groves*, 531 P.2d 1335, 1337 (Mont. 1975) (“As appellant expresses it, the question for decision is whether there is a savings clause under which litigation pending at the time the 1972 Constitution went into effect, reaped the benefit. Appellant urges that by implication Sections 3 and 6 of the Transition Schedule applied the rights granted under Art. II, Sec. 16 retrospectively. Section 3 of the Transition Schedule with the Convention notes reads . . . .”); *State v. Olsen*, 531 P.2d 1330, 1333 (Mont. 1975) (“The new statute and the new constitution went into effect during the time this suit was pending. The language of the new provision is clearly broader than the former law, and ‘necessary costs of litigation’ includes expert witness and attorney fees. The Constitutional Convention notes appended to Art. II, Sec. 29, of the 1972 Montana Constitution, recite . . . .”); *Keller*, 553 P.2d at 1007 (“Perhaps the best indication of the intent of the framers is found in the explanatory notes as prepared by the Constitutional Convention.”); *Yunker v. Murray*, 554 P.2d 285, 288 (Mont. 1976) (“The explanatory notes of the Constitutional Convention following Article VII, Section 8, further indicate that the word ‘incumbent’ appearing therein applies to any judge in office.”); *First Nat. Bank in Bozeman v. Sourdough Land & Cattle Co.*, 558 P.2d 654, 657 (Mont. 1976) (“The Convention Notes indicate . . . .”); *Huber v. Groff*, 558 P.2d 1124, 1131–1132 (Mont. 1976) (“The Convention Notes indicate there was no change between the new and the old provi-

The first problem with the Constitutional Convention transcripts is their lack of public availability during the ratification era and late publishing date. Statewide press covered the Constitutional Convention,<sup>180</sup> but daily transcriptions of the proceedings were not available.<sup>181</sup> Montanans only had access to the Convention through the various news sources or through attendance in person. As Charles Johnson reported, the back and forth nature of the Constitutional Convention meant that

[d]elegates often reversed themselves, killing proposals that had passed and reviving once-dead means. This flip-flopping made it difficult and confusing to write editorials or analytical pieces in advance. Stories written in the morning often were outdated by afternoon.<sup>182</sup>

At best, news coverage during the Constitutional Convention did not cover the details of the back-and-forth seen in the transcripts. The complete transcripts became publicly available in 1981, a full nine years after voters ratified the 1972 Constitution.<sup>183</sup> While the transcripts might provide meaning for what the delegates believed a provision meant, since they were not publicly available, they could not have formed the basis for the broad public meaning.<sup>184</sup>

The second problem with the transcripts is that they only provide insight into—and only if the delegates were unanimous—the meaning ascribed to a provision by a hundred individuals. However, if there is a meaning understood by all the voters, the voters' understanding should trump the delegates' understanding, since the voters were the ones who actually enacted and ratified the document.<sup>185</sup> This is also a limitation on the public meaning that can be drawn from the transcripts.

The Court and legal scholars have echoed these concerns as well. Shortly after voters ratified the 1972 Constitution, the Court in *Keller v. Smith*<sup>186</sup> faced an ambiguous constitutional provision and opted to review

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sion except as to grammar [sic]. It must then be assumed the 1972 Montana Constitution expresses the intent of the framers more precisely. This is significant because there are differences in the wording of the 1889 and 1972 sections. The 1889 section had the word 'absolute' before the word 'control' and the 1972 section adds the word 'private' before person, association, and corporation.”)

180. Johnson, *supra* note 37, at 56–58; Larson, *supra* note 37, at 46.

181. 3 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT preface (1981) (recordings taken were not transcribed until the transcripts were published in 1981) [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT III].

182. Johnson, *supra* note 37, at 55.

183. CONSTITUTIONAL CONVENTION TRANSCRIPT III, *supra* note 181, preface (Recordings taken were not transcribed until the transcripts were published in 1981.).

184. See *infra* Part V(B)(4) for a further explanation of the problems relating to the Convention Transcripts.

185. This has been argued on the federal level as well. See Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239, 1288–1289 (2007) (quoting JACK N. RAKOVE, ORIGINAL MEANINGS 18 (1996)).

186. 553 P.2d 1002 (Mont. 1976).

the original meaning of the provision.<sup>187</sup> Instead of looking to the transcripts of the Convention, the Court looked to the “explanatory notes” prepared by the Constitutional Convention and distributed to all registered voters in Montana before the ratification (actually known as the *Voter Information Pamphlet*).<sup>188</sup> The Court noted that this document was “[p]erhaps the best indication of the intent of the framers.”<sup>189</sup>

When explaining why the Court turned to the Voter Information Pamphlet for meaning as opposed to the transcripts, the Court stated:

We remark in passing that we have not relied on the minutes of the Constitutional Convention proceedings as indicative of the intent of the delegates. We have purposely refrained from using this basis of interpretation as excerpts from various portions of these minutes, among other things, can be used to support either position, or even a third position, i.e. that the delegates simply did not address the specific problem involved in this case. In the final analysis, the collective intent of the delegates can best be determined by application of the preceding rules of construction to the ambiguous language used in subsection (2), Article VII, Section 8, 1972 Montana Constitution, and approved by the delegates.<sup>190</sup>

In 1990, the Court echoed the concerns voiced in *Keller* regarding the Constitutional Convention transcripts.<sup>191</sup> In *Racicot v. District Court of First Judicial District*,<sup>192</sup> the Court, when outlining the process for constitutional interpretation stated: “[t]his Court has warned that excerpted portions of these transcripts can often be used to support almost any position. That appears to be the case here.”<sup>193</sup>

Fritz Snyder, in his 2005 Montana Law Review article examining Montana’s Right to Privacy and Right to Know provisions in Article II, also highlighted these problems.<sup>194</sup> Snyder noted that the Constitutional Convention transcripts are “well-indexed” and “very convenient.”<sup>195</sup> These convenient transcripts made it possible to “infer the presumed intent of the delegates” regarding certain provisions with relative ease.<sup>196</sup> However, as Snyder remarks, this emphasizes the delegates’ meaning of a provision over that of broader “voters of Montana” and, in effect, imputes the meaning

187. *Id.* at 1007.

188. *Id.*; VOTER INFORMATION PAMPHLET, *supra* note 46.

189. *Keller*, 553 P.2d at 1007.

190. *Id.* at 1008.

191. *Racicot*, 794 P.2d at 1184.

192. 794 P.2d 1180 (Mont. 1990).

193. *Id.* at 1184 (internal citations omitted).

194. Fritz Snyder, *The Right to Participate and Right to Know in Montana*, 66 MONT. L. REV. 297, 300–301 (2005).

195. *Id.* at 300.

196. *Id.*



from a hundred people to all the voters when those voters had no access to the transcripts.<sup>197</sup>

The problems with using a single source, however, are addressable. As described in Section II, Montana is blessed with a rich and broad ratification discussion, replete with pamphlets distributed to every voter, inserts in every newspaper, a wealth of media coverage, and a grassroots information campaign. The Court should use these sources more frequently so it can better reach the original public meaning of Montana's Constitution.

## V. MONTANA'S ORIGINAL SOURCES

When the text of the Constitution is unclear, the Court must determine the original public meaning. Once the Court identifies the relevant sources of original meaning, difficult questions surround the weight given to particular documents. The following section outlines a framework used for determining original meaning with federal documents, notes the various resources available surrounding the ratification of the Montana Constitution, outlines what those materials provide for content, and suggests a hierarchy for their use.

### A. Factors for Weighing Originalist Sources

If the text of a document is not clear, courts should go to "second-best" sources (the text being the "first-best" source) to determine meaning. Vasan Kesavan and Michel Paulsen describe the weight and authority given to second-best sources well. "Second-best" sources are

certainly relevant and possibly persuasive sources of constitutional meaning, but [ ] they are not authoritative and hence not conclusive. They are evidence of meaning; they are not *constitutive* of meaning, and hence binding determinations of meaning in their own right.<sup>198</sup>

As indicators of meaning, second-best sources "are not created equal; although they are all admissible sources of meaning, some are more important and relevant than others" and there is a limit to their applicability.<sup>199</sup> For example, second-best sources provide meaning to otherwise ambiguous provisions, but there is no way a secondary source should, for example, allow 16 year-olds to vote in contrast to the clear text in Article IV, Section 2 that one must be 18 years old to vote in Montana.<sup>200</sup>

197. *Id.* at 300–301.

198. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1149 (2003) (emphasis original).

199. *Id.*

200. *Id.*; MONT. CONST. art. IV, § 2 ("Any citizen of the United States 18 years of age or older who meets the registration and residence requirements provided by law is a qualified elector unless he is serving a sentence for a felony in a penal institution or is of unsound mind, as determined by a court.").

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Scholars, when determining which sources to use when interpreting the United States Constitution and how much weight to give them, have developed a series of factors for this process. Broadly stated, these factors, which are examined fully below, are: (1) timeframe of the document; (2) reliance versus contract understanding; (3) timing and distribution of the publication; (4) public versus private understanding; and (5) character of the author.

Founding-era documents carry more weight than post-founding documents.<sup>201</sup> As Kesavan and Paulsen note, this is merely a restatement of the maxim of jurisprudence “*contemporanea exposition est fortissimo in lege*.”<sup>202</sup> Loosely translated, it means contemporaneous interpretation is superior to later interpretation. When weighing second-best sources, those sources that were published prior to or immediately after the date of ratification should be weighed more than those documents that come after the ratification. For example, the U.S. Supreme Court has commented that the “[t]he actions of the First Congress . . . are of course persuasive evidence of what the Constitution means.”<sup>203</sup> These actions are given more weight than, for example, Justice Story’s *Commentaries on the Constitution of the United States*, which was published in 1833.<sup>204</sup> Both speak to meaning, but the First Congress met immediately after the United States Constitution was enacted while Justice Story’s work was published forty years after ratification. When in conflict, the contemporaneous sources should control.

The second factor is whether the document was a “reliance” document or a “contract” document. Reliance and contract theory express two different views of how a document can be used.<sup>205</sup> Reliance theory articulates that one should trust the source because it was *relied upon* by a ratifier.<sup>206</sup> Contract theory holds the Court should trust a given source because it provides the meaning of the document “in context, to ordinary readers, speakers, and writers of the English language, reading a document of this type, at the time adopted.”<sup>207</sup> Generally, reliance theory is the public meaning of something and contract theory is context or private meaning. When weighing the two against each other, a broad reliance understanding of something (“I voted for this after reading that document.”) provides a far surer mean-

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201. Kesavan & Paulsen, *supra* note 198, at 1165.

202. *Id.*

203. Harmelin v. Michigan, 501 U.S. 957, 980 (1991) (noted by Kesavan & Paulsen, *supra* note 198, at 1165).

204. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833).

205. Kesavan & Paulsen, *supra* note 198, at 1152 (The terms “reliance” and “contract” theory are those of David McGowan. Kesavan and Paulsen provided an excellent and concise summary of the theories. David McGowan, *Ethos in Law and History: Alexander Hamilton, the Federalists, and the Supreme Court*, 85 MINN. L. REV. 755 (2001)).

206. *Id.* at 1153–1157.

207. *Id.* at 1156–1157.

ing than a contract understanding (“Based on how this document reads, this is what that document means.”). For example, from these factors, one can compare a private writing of a founder with the public writings of *The Federalist*. The private writings, or letters, demonstrate a contract-theory understanding. They indicate how private parties viewed those words, principles, or ideas in that period. *The Federalist*, however, provided a broader<sup>208</sup> meaning and also demonstrates reliance. It is a public document explaining meaning. Without doubt, both indicate meaning, but one that demonstrates a broader, public understanding of meaning should control over one that provides context, narrow meaning, or a private understanding.

Timing and distribution factors look to the timing of the document’s publication and then to the breadth of its distribution in the given electorate.<sup>209</sup> Once a document has been determined to be “founding-era” as opposed to “post-founding,” one must examine if the document was published in time to actually provide understanding. For example, a document published the day of an election might not have had enough time for people to actually read it before voting. Or, if there is staggered voting (e.g., the United States’ Constitutional ratification) a document might reach only a few voters. Documents prepared and published in time to provide meaning for voters should be weighed more than documents published late that had only a little impact. Similar principles apply to distribution. If one source was only distributed in one small geographic region (a newspaper’s distribution for example) and another source was across the entire state, the source with the widest reach should be weighed heavier than the source limited in geography. *The Federalist* is a good example of the timing and distribution factors.<sup>210</sup> As to timing, as of Delaware’s ratification, *The Federalist* had only published sixteen of 85 essays and a total of eight states ratified the U.S. Constitution before all the essays were published.<sup>211</sup> For distribution, *The Federalist* was only published in sixteen newspapers and one magazine outside of New York City.<sup>212</sup> A document with earlier timing and wider reach than *The Federalist* would carry more interpretive weight.

Whether a document carries a public or private meaning is a factor similar to that of reliance and contract, but it applies directly to the breadth

208. As amply noted by scholars, the distribution of *The Federalist*, while broader than a private letter, was not very widespread. Kesavan & Paulsen, *supra* note 198, at 1155 (citing Elaine F. Crane, *Publius in the Provinces: Where was “The Federalist” Reprinted Outside New York City?* 21 WM. & MARY Q. 589, 590 (1964) (*The Federalist* was published in only 16 newspapers outside New York City, and those newspapers were located in only four states: New York, Massachusetts, Virginia, Pennsylvania, New Hampshire, and Rhode Island. Further, those publications only printed 24 of the total 85 essays.)).

209. Kesavan & Paulsen, *supra* note 198 at 1153–1156.

210. *Id.* at 1153–1154.

211. *Id.*

212. *Id.* at 1154–1155 (citing Crane, *supra* note 208).

and scope of a meaning.<sup>213</sup> If an originalist's goal is to determine the meaning, a broad public understanding of a meaning should control over a private meaning. The former simply has more support than the latter. This is best illustrated by comparing the ratification conventions of the various states to an individual's private writings. Ratifying conventions provide a forum for far more than one person and are often a public occasion, whereas an individual person's private notes are just the opposite. The broader and more public should control over the narrower and more private.

Finally, the character of the author plays a distinct role.<sup>214</sup> Generally speaking, individuals with authority due to education, position, or experience tend to carry more authoritative weight than individuals commenting outside their expertise. Similarly, official publications tend to carry extensive weight because the publications have specific requirements.<sup>215</sup> As an example, David McGowan argues that the U.S. Supreme Court's regular citations to *The Federalist* is an appeal "to the public character of Alexander Hamilton, James Madison, or John Jay to support its conclusion."<sup>216</sup> Government publications on the meaning of the U.S. Constitution were not available during ratification, but such a publication would have carried the same aura of authority.

### B. Sources for Montana Originalist Research

Unlike the Federal Constitution, Montana's 1972 Constitutional ratification history is extensive and well documented. Each of the documents noted in Section II can be evaluated using all or some of the factors outlined above. Jurists and scholars must examine each document and give it its relative weight on the scale when conducting an originalist inquiry.

#### 1. Voter Information Pamphlet

The Voter Information Pamphlet meets each and every factor and carries considerable weight. The Voter Information Pamphlet was the only official, government-sponsored document published regarding the constitution.<sup>217</sup> It was distributed to all registered voters.<sup>218</sup> The pamphlet is also a reliance document indicative of public meaning. The pamphlet outlined the

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213. *Id.* at 1159.

214. McGowan, *supra* note 205, at 758.

215. See e.g., MONT. CODE ANN. § 13-27-401 (2013).

216. McGowan, *supra* note 205, at 758.

217. 1971 Mont. Laws 1232 (The Convention was directed "to compile, prepare and assemble essential information and materials for the delegates, without any recommendation; to disseminate information to the public on the constitution and convention as deemed desirable."); *Kvaalen*, 496 P.2d at 1129-1135.

218. *Kvaalen*, 496 P.2d at 1130.

text of each provision in the proposed constitution and provided an accompanying explanation of that provision. For example, Article II, Section 3's comments provided:

Revises 1889 constitution by adding three rights relating to the environment, basic necessities, and health. The last sentence is also new and provides that in accepting rights people have obligations.<sup>219</sup>

Other notes merely highlighted that grammar had been changed, but no substantive modification had been made. Article II, Section 2's comments noted:

No change except in grammar. Gives Montanans the right to govern themselves and to determine their form of government.<sup>220</sup>

These comments provided a meaning to each and every provision by describing what those provisions did and how they functioned. Voters who read the pamphlet would have used this document as an explanation, therefore relying on it, and voted accordingly. These factors make the Voter Information Pamphlet the best of the second-best sources for determining the meaning of ambiguous provisions.

## 2. *Roeder Pamphlet*

The Roeder Pamphlet meets many of the same factors as found in the Voter Information Pamphlet, with the exception of one: government publication. The Roeder Pamphlet was not an official publication, but it did come from a very reliable source. Dr. Richard Roeder, one of the principle authors of the pamphlet and a convention delegate, was a well-known Montana State University history professor who later co-authored *Montana: A History of Two Centuries*.<sup>221</sup> Further, the pamphlet had extensive distribution across Montana. The pamphlet was inserted into almost every newspaper across the state in time for voters to read and understand.<sup>222</sup> Like the Voter Information Pamphlet, the Roeder Pamphlet went provision by provision through the proposed constitution and explained what each meant. For example, the pamphlet explained that Article II, Section 10

establishes a right of privacy. The courts in Montana have recognized the existence of a right of privacy, but at a time when opportunities for invasion of privacy are increasing in number and sophistication, section 10 emphasizes that this right is essential for the preservation of a free society.<sup>223</sup>

The Roeder Pamphlet pales only in comparison to the Voter Information Pamphlet's government authorship and is an excellent second-best source.

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219. VOTER INFORMATION PAMPHLET, *supra* note 46, at 6.

220. *Id.*

221. MALONE & ROEDER, *supra* note 20.

222. ROEDER PAMPHLET, *supra* note 51, at 1.

223. *Id.* at 2.

### 3. *Neely Pamphlet*

Gerald Neely, a Billings attorney, authored *A Critical Look: Montana's New Constitution*, a document now known as the Neely Pamphlet.<sup>224</sup> During the Constitutional Convention, Neely published a newsletter and worked as a United Press International reporter on the Convention.<sup>225</sup> Although the extent of the pamphlet's distribution is unknown, the subscription nature of it, built through the prior newsletters Neely published during the Constitutional Convention, at least points to a somewhat wide distribution.<sup>226</sup> Neely's status as a recognized attorney and his work as a reporter during the Convention also lends extensive weight to the character of the author. The pamphlet was published in the intervening time between the end of the Convention and the vote, but an exact date is not indicated on the document. Unlike both the Voter Information Pamphlet and the Roeder Pamphlet, Neely's work only explains some provisions instead of going through each and every one. However, the pamphlet does cover the major provisions of the proposed constitution.<sup>227</sup> For example, regarding the discrimination provisions in Article II, Section 4, Neely notes

[t]he provision goes far beyond current state or federal laws in the types of discrimination involved and with respect to whom it applies to . . . Some of the more interesting ramifications come to mind. A Jaycee Club could not ban women, nor could the YWCA ban men. . . assuming each of these were the prevailing reason.<sup>228</sup>

Readers of Neely's pamphlet would have used it as an explanation of what those provisions meant, and it serves as a good second-best source, but questions about distribution lower it slightly below the Roeder Pamphlet.

### 4. *Constitutional Convention Transcripts*

The actual Constitutional Convention transcripts are missing some important factors necessary to give them considerable interpretive weight. While clearly a founding-era document, the transcripts were not available in published form until 1979, well after the ratification.<sup>229</sup> This gives rise to problems with public understanding and reliance theory. The transcripts' lack of availability during ratification means there was very limited public knowledge of the minute-by-minute transcripts and therefore they could not have informed public meaning or been used as a reliance-based document. Instead, this places the transcripts squarely into the contract and private

224. *Id.* at 1–3.

225. *Id.* at 3.

226. *Id.*

227. *Id.* at 7–28.

228. NEELY PAMPHLET, *supra* note 54, at 10.

229. CONSTITUTIONAL CONVENTION TRANSCRIPT I, *supra* note 32.

meaning realms. The transcripts indicate how the delegates viewed the document, and to this end they provide excellent insight, but that insight is quite limited by the problems with timing and broad understanding. As such, the Constitutional Convention transcripts are a second-best source falling behind the Voter Information Pamphlet, the Roeder Pamphlet, and the Neely Pamphlet.

##### 5. *Montana Constitutional Convention Commission Reports*

Similar to the Constitutional Convention transcripts, the Commission Reports, though founding-era documents, had limited availability. The focused nature of the reports—“for the Convention”<sup>230</sup>—implies a very limited distribution. The Commission Reports were published to aid the delegates, not the public, in preparing for the Constitutional Convention.<sup>231</sup> Therefore, the dual lack of reliance and informing public meaning limits their function to informing the delegates themselves. As Fritz and Snyder noted, the delegates heavily relied on the reports in their deliberations, but that appears to be the extent of the reports’ use.<sup>232</sup> The Commission Reports should only be used when there are questions as to what the delegates meant in the transcripts. Beyond that, they provide little public meaning.

##### 6. *1889 Constitution*

The 1889 Constitution has limited, but important, interpretive weight. As Montana’s constitution leading up to the 1972 Constitutional Convention, the 1889 Constitution was a very well-known and thoroughly interpreted document. The 1889 Constitution was a founding-era document, appropriately timed because it was in place until the new constitution was ratified and widely distributed. The Voter Information Pamphlet also created extensive reliance on the 1889 Constitution itself. When provisions in the proposed constitution were left unchanged from the 1889 Constitution or had minor modifications, the Voter Information Pamphlet noted such and provided no further explanation. In effect, the Voter Information Pamphlet imputes its authority and accompanying understanding when it references the 1889 Constitution. For example, Article II, Section 1’s explanation noted that it was “[i]dential to the 1889 constitution.”<sup>233</sup> This reliance by the Voter Information Pamphlet rises whenever the 1889 Constitution, and its meaning in 1972, were referenced by the pamphlet. Likewise, whenever

230. CONVENTION STUDIES, *supra* note 28, at Report 1, iii.

231. *Id.*

232. ELISON & SNYDER, *supra* note 6, at 10–11.

233. VOTER INFORMATION PAMPHLET, *supra* note 46, at 6 (The pamphlet is replete with these references.).

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another document such as the Roeder or Neely pamphlets refers to a change in light of the 1889 Constitution, such authority ought to be imputed as well. Therefore, even though the 1889 Constitution is no longer in force, its meaning as of 1972 still carries weight where appropriate.

### 7. *Ratification Era Newspaper Articles & Opinion Pieces*

Throughout the Constitutional Convention and the ensuing ratification process, newspapers across Montana published various articles regarding the Convention, the proposed constitution, and its meaning.<sup>234</sup> These articles carry the character weight found in journalism and ought to be regarded as reliable sources. Newspaper articles functioned as reliance-based documents that individuals would have used to understand the proposed constitution and therefore would have provided a public meaning on the topics and provisions covered. However, unlike the three pamphlets above, a newspaper's distribution can be limited to its geographic area. In Montana, the major cities each have their own newspaper. As such, each paper, although it may be distributed across the state, is primarily focused on the city it is located in and the surrounding geographic area. However, this changes if various newspapers across the state published the same article or provided the same explanation for a provision in the proposed constitution. For example, the Lee State Bureau's 21-article series appeared in Missoula, Billings, Butte, and Helena, giving it far more geographic reach than an article published only in one area.<sup>235</sup> Therefore, depending on the geographic distribution, newspaper articles should be weighed equal with the statewide pamphlets or below them.

### 8. *Varying Private Documents, Correspondence, or Association Materials*

The Documentary History of the Ratification of the Montana Constitution Collection housed at the Jameson Law Library contains a broad array of newsletters, letters, memorandums, and other correspondence from delegates, private citizens, and various associations both supporting and opposing the 1972 Constitution. Although clearly timely and founding-era documents, most of these materials were quite limited in distribution. Many

234. See DOCUMENTARY HISTORY, *supra* note 50 (The collection has newspapers available from Mar. 22–June 6, 1972.); Larson, *supra* note 37; Johnson, *supra* note 37; ELISON & SNYDER, *supra* note 6, at 14–15. These documents are largely available at the Jamison Law Library, University of Montana, Missoula, Montana in the DOCUMENTARY HISTORY OF THE RATIFICATION OF THE MONTANA CONSTITUTION, available at <http://perma.cc/8VNG-C4U8>.

235. Johnson, *supra* note 37, at 57–58. Lee Enterprises owns newspapers in Helena, Butte, Billings, and Missoula and, as such, the Lee State Bureau provided reporting to those papers. Lee Enterprises, *Markets*, <http://perma.cc/F87U-UBLH> (last accessed Nov. 15, 2015).



were letters within specific advocacy organizations or private correspondence responding to an inquiry. As such, these factors lower the weight of these materials to contract-based understanding or smaller, public meanings. Before using these sources, the Court should give each document its appropriate weight.

### 9. *Opposition Materials*

During the ratification debate, there was significant opposition to the proposed constitution.<sup>236</sup> Opposition largely rallied around taxation issues and was prevalent in newspaper, radio, and television coverage.<sup>237</sup> However, even though the vote was close, the opponents lost. Opponents could have had two major disagreements with the proposed constitution: differences over meaning and impact; or differences over policy choice as a whole. Either way, the opponent's interpretation was not the dominant meaning and the proposed policy choices were rejected. As such, opposition materials ought to be weighed much lower. For meaning-related issues, the slim passage majority denotes that a larger majority thought it meant something different and for the policy questions, again, a majority decided they wanted those policies. Therefore, there is no reliance nor is there public meaning, regardless of how broadly the information was disseminated. Like the Anti-Federalist writings, little weight is accorded the losing side.<sup>238</sup>

## VI. CONCLUSION

Originalism gives a voice to those who enacted a document. Montana is blessed to have the excellent documentary history that illuminates the meaning Montanans understood when they enacted the 1972 Constitution. The Montana Supreme Court is, at its heart, originalist, and could further expand its originalist jurisprudence by embracing the rich history of docu-

236. ELISON & SNYDER, *supra* note 6, at 17–19.

237. Johnson, *supra* note 37, at 57–58.

238. Kesavan & Paulsen, *supra* note 198, at 1152 (citing *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951) (“The fears and doubts of the opposition are no authoritative guide to the construction of legislation.”)). Akhil Amar has also commented on the weight of the Anti-Federalists, noting “we must exercise special caution in using writings of those who opposed the Constitution and lost; their understandings of the meaning of the document may often be inferior to the Federalists’.” But in many cases, Anti-Federalist literature may help 20th century lawyers confirm Federalist readings. For example, leading pamphleteers from the two camps often agreed about what a particular clause (such as the preamble) meant, or whether a given doctrine (such as judicial review) was implicit in the plan; they disagreed only about whether such provisions commended or condemned the document.” Akhil Reed Amar, *Our Forgotten Constitution: A Forgotten Comment*, 97 *YALE L.J.* 281, 289 (1987).

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ments Montana has readily available. A turn to those sources would give true meaning to the Constitution's Preamble: "We the people . . . establish this constitution."<sup>239</sup>

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239. MONT. CONST. pmbl.

