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INTERPRETING THE WISCONSIN CONSTITUTION

DANIEL R. SUHR*

The Wisconsin Constitution is the state's fundamental law and is often the final authority over important issues of public moment. When interpreting a provision in the state constitution, the Wisconsin Supreme Court relies on three primary sources: the plain meaning of the text, the legislative and ratification history surrounding the clause, and construction by the legislature. The second and third sources that the Court uses to resolve constitutional cases are significantly flawed for both practical and jurisprudential reasons.

By contrast, the Wisconsin Supreme Court focuses first and foremost on the text when interpreting statutes. The Court only turns to history when it must to resolve an obstinate ambiguity. This approach avoids the flaws associated with the Court's current method of constitutional interpretation while also advancing positive values for the rule of law. Therefore, the author recommends that in its next constitutional case the Court should set aside its current methodology for constitutional interpretation and instead announce its adoption of its statutory method for constitutional cases as well.

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The challenge to the legislation here requires us to interpret the meaning of a constitutional amendment ratified by voters. Consequently, our task is to construe the amendment “to give effect to the intent . . . of the people who adopted it.” We examine three sources to determine voter intent: “the plain meaning, the constitutional debates and practices of the time, and the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption.” *In contrast with statutory construction, we do not stop with an analysis of the text, even if that analysis reveals unambiguous language.*

—Wisconsin Court of Appeals, *Appling v. Doyle*¹

I. INTRODUCTION

State ex rel. Kalal v. Dane County Circuit Court is a landmark in Wisconsin Supreme Court history.² The outcome of the case was unremarkable—the statute at issue was and remains obscure.³ Rather, *Kalal* is significant because the Court’s discussion of statutory interpretation moved the entire legal system of the state towards textualism and away from more malleable interpretative methods. *Kalal* gave Wisconsin courts a whole new framework for statutory interpretation. The case mandates that a court must first ask whether the statute’s text is ambiguous.⁴ If not, the court should apply the plain meaning of the text. Only if the text is ambiguous may a court resort to extrinsic sources to resolve the ambiguity.⁵ *Kalal* deemphasized legislative history as an unreliable

1. *Appling v. Doyle*, 2013 WI App 3, ¶ 11, 345 Wis. 2d 762, 826 N.W.2d 666 (emphasis added) (citations omitted) (quoting *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 19, 295 Wis. 2d 1, 719 N.W.2d 408) (citing *Busé v. Smith*, 74 Wis. 2d 550, 568, 247 N.W.2d 141, 149 (1976)).

2. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110.

3. WIS. STAT. § 968.02(3) (2011–2012) (providing that a circuit judge may permit the filing of a complaint charging a person with a crime if the district attorney is unavailable or refuses to issue one); *Kalal*, 2004 WI 58, ¶¶ 53, 57 (concluding that “refuses” under section 968.02(3) was clear and unambiguous and affirming the circuit judge’s decision to file a complaint when the district attorney refused to do so).

4. *Kalal*, 2004 WI 58, ¶ 45.

5. *Id.* ¶ 46. Professor Abbe Gluck refers to this as “modified textualism.” Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1750 (2010); see also Adam G. Yoffie, *From Poritz to Rabner: The New Jersey Supreme Court’s Statutory Jurisprudence, 2000–2009*, 35 SETON HALL LEG. J. 302, 311–15, 330 (2011) (discussing textualism and legislative history in the New Jersey Supreme Court through the lenses of Eskridge and Gluck).

guide for the interpretation of statutes.⁶ Instead, Justice Diane Sykes's majority opinion upheld textualist values such as respect for the rule of law and judicial modesty.⁷

Kalal's commitment to textualism began with state statutes,⁸ but its rule has since been extended to other categories of legal texts, including federal statutes,⁹ local ordinances,¹⁰ state administrative rules,¹¹ local administrative rules,¹² and supreme court rules.¹³ Unique among other types of public law, the state constitution is not subject to *Kalal*. When the Wisconsin Supreme Court interprets the Wisconsin Constitution, it instead uses a tripartite methodology first formalized in *Busé v. Smith* in 1974: plain meaning, legislative and popular history, and contemporaneous acts of the legislature.¹⁴ As the Wisconsin Court of Appeals stated in the decision quoted as the epigram of this Article, *Busé* requires courts to go beyond the plain meaning of the constitution's text, even when that meaning is unambiguous.¹⁵

The court's current approach to state constitutional interpretation is flawed because of its dependence on unreliable tools to perform an impossible task—discerning the hidden intent and unexpressed purpose of millions of voters. The *Kalal* framework avoids these pitfalls and advances positive values for the rule of law. As it has already done in other areas of public law, the Wisconsin Supreme Court should extend *Kalal's* methodology to state constitutional interpretation.

6. *Kalal*, 2004 WI 58, ¶¶ 50–52.

7. *Id.* ¶ 52.

8. *Id.* ¶ 53.

9. *Nw. Airlines, Inc. v. Wis. Dep't of Revenue*, 2006 WI 88, ¶ 36, 293 Wis. 2d 202, 717 N.W.2d 280.

10. *Magnolia Twp. v. Town of Magnolia*, 2005 WI App 119, ¶ 9, 284 Wis. 2d 361, 701 N.W.2d 60.

11. *Wis. Dep't of Revenue v. Menasha Corp.*, 2008 WI 88, ¶ 63, 311 Wis. 2d 579, 754 N.W.2d 95.

12. *Nelson & Sons Painting v. Cardenas*, 306 Wis. 2d 449, No. 2007AP645, 2007 WL 2935808, at *2 (Wis. Ct. App. Oct. 10, 2007) (unpublished table opinion).

13. *In re Judicial Disciplinary Proceedings Against Gableman*, 2010 WI 62, ¶¶ 1, 30, 325 Wis. 2d 631, 784 N.W.2d 631 (opinion of Prosser, Roggensack, & Ziegler, JJ.); *State v. Henley*, 2010 WI 12, ¶¶ 1, 11, 322 Wis. 2d 1, 778 N.W.2d 853 (opinion of Roggensack, J.) (sitting as a single Justice).

14. *Busé v. Smith*, 74 Wis. 2d 550, 568, 247 N.W.2d 141, 149 (1976).

15. *Appling v. Doyle*, 2013 WI App 3, ¶ 11, 345 Wis. 2d 762, 826 N.W.2d 666 (citing *Busé*, 74 Wis. 2d at 568).

II. INTERPRETING THE WISCONSIN CONSTITUTION

In the earliest days of the state, the Wisconsin Supreme Court used the same methodology to interpret both constitutional and statutory texts.¹⁶ Until 1974, the court relied on classical principles for all interpretive questions. The court would begin with the plain meaning of the words used.¹⁷ The court looked to the *original* public meaning of the text; “[t]he meaning of the constitutional provision having been once firmly established as of the time of its adoption, such meaning continues forever, unless it is changed or modified by the constitution.”¹⁸ One guide to this public meaning was popular dictionaries.¹⁹ In *Kayden Industries, Inc.*, decided in 1967, the court declared:

Where there is no ambiguity in the literal terms of the [constitutional] provision under consideration there is no room for judicial construction. . . . And the court may not venture outside the plain meaning of a provision in order to create an ambiguity and then resolve the ambiguity by what it finds outside.²⁰

16. *State ex rel. Bond v. French*, 2 Pin. 181, 184 (Wis. 1849) (“In deciding this question, our only guide is the constitution, in construing which we are to be governed by the same general rules of interpretation which prevail in relation to statutes.”); *see also State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 191, 204 N.W. 803, 807 (1925) (“[I]n construing the constitution we are governed by the same rules of interpretation which prevail in relation to statutes.” (citing *Bond*, 2 Pin. at 184)); *Akerly v. Vilas*, 24 Wis. 165, 181 (1869).

17. *Payne v. City of Racine*, 217 Wis. 550, 555, 259 N.W. 437, 439 (1935) (“[I]t is presumed that words appearing in a constitution have been used according to their plain, natural and usual signification and import, and the courts are not at liberty to disregard the plain meaning of words of a constitution in order to search for some other conjured intent.” (quoting approvingly from 6 RULING CASE LAW *Constitutional Law* § 47 (William M McKinney et al. eds., 1929))); *B.F. Sturtevant Co. v. Indus. Comm’n*, 186 Wis. 10, 19, 202 N.W. 324, 327 (1925).

18. *State ex rel. Bare v. Schinz*, 194 Wis. 397, 403, 216 N.W. 509, 511–12 (1927); *see also Borgnis v. Falk Co.*, 147 Wis. 327, 368, 133 N.W. 209, 222 (1911) (Barnes, J., concurring); *id.* at 371–73 (Marshall, J., concurring). *But see id.* at 349 (majority opinion) (“When an eighteenth century constitution forms the charter of liberty of a twentieth century government must its general provisions be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals? Clearly not.”).

19. *Ekern*, 187 Wis. at 194 (looking to a definition from the Century Dictionary and Encyclopedia). *But see State ex rel. Zimmerman v. Dammann*, 201 Wis. 84, 97, 228 N.W. 593, 598 (1930) (“We realize fully that a matter of this kind ought not to be determined wholly upon the basis of dictionary definitions; that what is to be sought is the intent as expressed in the constitution as amended.”).

20. *Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 732, 150 N.W.2d 447, 453–54 (1967) (citing *State ex rel. Neelen v. Lucas*, 24 Wis. 2d 262, 267, 128 N.W.2d 425, 428 (1964) for the first proposition and *Estate of Ries*, 259 Wis. 453, 459, 49 N.W.2d 483, 486 (1951) for the second). Interestingly, both *Neelen* and *Estate of Ries* were statutory interpretation cases, show-

When a constitutional provision was ambiguous, the court sought to follow “the real meaning and substantial purpose of those who adopted it.”²¹ In these cases, the court attempted to effect the purpose of the amendment and the intended meaning of the framers.²² The primary sources used to establish them were the debates at the 1846 and 1848 constitutional conventions.²³ The court also considered past practice by responsible government officials and contemporaneous legislative construction.²⁴ The justices also reviewed analogous constitutional provisions from other states.²⁵ New York, in particular, was accorded a special status because history shows that the Wisconsin drafters looked to the New York Constitution of 1846 as a model,²⁶ although Wisconsin courts were not bound in their interpretation of the Wisconsin Constitution by New York courts’ interpretation of analog New York constitutional provisions.²⁷ These general principles governed interpretation of the state constitution for much of Wisconsin’s history.

The modern era began with *Board of Education v. Sinclair*, decided in October 1974. Interpreting the meaning of “free” in the Wisconsin Constitution’s article on education, the court “look[ed] first to the plain meaning of the word in the context in which it [was] used.”²⁸ Second, the court conducted a “historical analysis of what practices were in existence in 1848 which we [could] reasonably presume were also known to the framers of the 1848 constitution.”²⁹ After doing this, the court

ing that the principle from *French* that constitutional and statutory interpretation were the same remained effective as late as 1967. See also *Kayden Indus., Inc.*, 34 Wis. 2d at 732.

21. *State ex rel. Martin v. Heil*, 242 Wis. 41, 55, 7 N.W.2d 375, 381 (1942).

22. *Kayden Indus. Inc.*, 34 Wis. 2d at 729–30; *Dammann*, 201 Wis. at 96; *Ekern*, 187 Wis. at 184; *State ex rel. Owen v. Donald*, 160 Wis. 21, 81, 151 N.W. 331, 350 (1915).

23. *Heil*, 242 Wis. at 55; *State ex rel. Zilisch v. Auer*, 197 Wis. 284, 289–90, 221 N.W. 860, 862 (1928); *Owen*, 160 Wis. at 81.

24. *State ex rel. Pluntz v. Johnson*, 176 Wis. 107, 114–15, 186 N.W. 729, 730 (1922); *Owen*, 160 Wis. at 111 (quoting *Harrington v. Smith*, 28 Wis. 43, 68, (1871)).

25. *Heil*, 242 Wis. at 53–54 (quoting the constitutions of West Virginia and Nebraska to “illustrate the points made”).

26. *State v. Williams*, 2012 WI 59, ¶ 35 n.11, 341 Wis. 2d 191, 814 N.W.2d 460; *Bablitch & Bablitch v. Lincoln Cnty.*, 82 Wis. 2d 574, 577, 263 N.W.2d 218, 221 (1978); *Heil*, 242 Wis. at 56–57; *B.F. Sturtevant Co. v. Indus. Comm’n*, 186 Wis. 10, 16, 202 N.W. 324, 326 (1925); *Jacobs v. Major (Jacobs I)*, 132 Wis. 2d 82, 101, 390 N.W.2d 86, 92 (Ct. App. 1986); see also Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 Sw. L.J. 951, 955 (1982).

27. *B.F. Sturtevant Co.*, 186 Wis. at 17 (considering and rejecting a rule found by a New York court considering an analog provision); see also *Jacobs I*, 132 Wis. 2d at 101 (restating this principle from *B.F. Sturtevant Co.*).

28. *Bd. of Educ. v. Sinclair*, 65 Wis. 2d 179, 182, 222 N.W.2d 143, 145 (1974).

29. *Id.* at 182–83.

“turn[ed] next to the earliest interpretation of this section of the constitution by the legislature as manifested in the first law passed following the adoption of the constitution.”³⁰

One month later, the court announced in *Busé v. Smith*: “In its interpretation of constitutional provisions[,] this court is committed to the method of analysis utilized in *Board of Education v. Sinclair*.”³¹ This three-step analysis has governed the Wisconsin Supreme Court’s approach to constitutional interpretation in almost every case since its announcement.³² In a later case, the court suggested a fourth step that is not traditionally incorporated alongside the original three: “[W]hen the *Sinclair* and *Busé* rules of constitutional interpretation do not provide an answer, the meaning of a constitutional provision may be determined by looking at the objectives of the framers in adopting the provision.”³³

It has been said on occasion, most recently in *Coulee Catholic Schools v. LIRC*, that the court can end its analysis of a constitutional provision if the meaning of the text is plain;³⁴ however, in the over-

30. *Id.* at 184.

31. *Busé v. Smith*, 74 Wis. 2d 550, 568, 247 N.W.2d 141, 149 (1976). As Professor Gluck points out, statements like this by state supreme courts stand in interesting contrast to the U.S. Supreme Court, where previous decisions do not set binding methodologies for future decisions. *See generally* Gluck, *supra* note 5 (discussing “methodological stare decisis”).

32. There are a handful of individual exceptions where the Wisconsin Supreme Court did not use this methodology. *See, e.g.*, *McConkey v. Van Hollen*, 2010 WI 57, ¶ 44, 326 Wis. 2d 1, 783 N.W.2d 855 (“The general purpose of a constitutional amendment is not an interpretive riddle. Text and historical context should make the purpose of most amendments apparent. A plain reading of the text of the amendment will usually reveal a general, unified purpose. A court might also find other extrinsic contextual sources helpful in determining what the amendment sought to change or affirm, including the previous constitutional structure, legislative and public debates over the amendment’s adoption, the title of the joint resolution, the common name for the amendment, the question submitted to the people for a vote, legislative enactments following adoption of the amendment, and other such sources.”). Also, the court has developed its own line of precedents to which it defaults for particular provisions of the constitution. *See, e.g.*, *State v. Abbott Labs.*, 2012 WI 62, ¶¶ 29–44, 341 Wis. 2d 510, 816 N.W.2d 145 (analyzing the constitutional provision creating a right to a civil jury trial by ascertaining whether a cause of action existed at common law in 1848, and if so, if the cause was recognized as “at law” as opposed to in equity (citing *Vill. Food & Liquor Mart v. H & S Petroleum, Inc.*, 2002 WI 92, ¶¶ 10, 13, 15–16, 254 Wis. 2d 478, 647 N.W.2d 177)).

33. *State v. Beno*, 116 Wis. 2d 122, 138, 341 N.W.2d 668, 676 (1984); *see also* *Davis v. Grover*, 166 Wis. 2d 501, 556, 480 N.W.2d 460, 481 (1992) (Abrahamson, J., dissenting); *Jacobs I*, 132 Wis. 2d 82, 126, 390 N.W.2d 86, 102–103 (Ct. App. 1986) (Gartzke, P.J., concurring).

34. *Coulee Catholic Schs. v. LIRC*, 2009 WI 88, ¶ 57, 320 Wis. 2d 275, 768 N.W.2d 868 (“The authoritative, and usually final, indicator of the meaning of a provision is the text—the actual words used.”); *Jacobs v. Major (Jacobs II)*, 139 Wis. 2d 492, 504, 407 N.W.2d 832, 837 (1987) (“We need go no further than holding that Art. I, sec. 3 has [a] plain, unambiguous

whelming majority of its cases the court considers all three elements.³⁵ When considering the first element, “[t]he plain meaning of the words is best discerned by understanding their obvious and ordinary meaning at the time the provision was adopted.”³⁶ Dictionaries remain standard tools of interpretation.³⁷ Sometimes the words are used elsewhere in the

meaning”); *Jacobs I*, 132 Wis. 2d at 126 (Gartzke, P.J., concurring); *accord* Nat'l Pride at Work, Inc. v. Governor of Mich., 748 N.W.2d 524, 540 (Mich. 2008) (“When the language of a constitutional provision is unambiguous, resort to extrinsic evidence is prohibited”); *see also* State *ex rel.* Kuehne v. Burdette, 2009 WI 119, ¶ 9, 320 Wis. 2d 784, 772 N.W.2d 225 (“To discern the meaning of these provisions, [c]ourts should give priority to the plain meaning of the words of [the] provision in the context used.”) (quoting Dairyland Greyhound Park, Inc. v. Doyle, 2006 WI 107, ¶ 117, 295 Wis. 2d 1, 719 N.W.2d 408)); Erik LeRoy, Comment, *The Egalitarian Roots of the Education Article of the Wisconsin Constitution: Old History, New Interpretation*, Buse v. Smith Criticized, 1981 WIS. L. REV. 1325, 1337–38 (suggesting that the court look to history and legislative action only if plain meaning is absent); *cf In re Jerrell C.J.*, 2005 WI 105, ¶ 73, 238 Wis. 2d 145, 699 N.W.2d 110 (suggesting that plain meaning is the best source for interpretation).

35. Cases list all three elements on an equal footing. *See, e.g.,* Dairyland Greyhound Park, Inc. v. Doyle, 2006 WI 107, ¶ 19, 295 Wis. 2d 1, 719 N.W.2d 408; League of Women Voters v. Walker, 2013 WI 77, ¶ 31, 348 Wis. 2d 714, 834 N.W.2d 393; Thomas *ex rel.* Gramling v. Mallett, 2005 WI 129, ¶ 122, 285 Wis. 2d 236, 701 N.W.2d 523; Schilling v. Wis. Crime Victims Rights Bd., 2005 WI 17, ¶ 16, 278 Wis. 2d 216, 692 N.W.2d 623; Wis. Citizens Concerned for Cranes & Doves v. Wis. Dep't of Natural Res., 2004 WI 40, ¶ 44, 270 Wis. 2d 318, 677 N.W.2d 612; State v. Hamdan, 2003 WI 113, ¶ 64 n.29, 264 Wis. 2d 433, 665 N.W.2d 785; State v. Cole, 2003 WI 112, ¶ 10, 264 Wis. 2d 520, 665 N.W.2d 328; Wagner v. Milwaukee Cnty. Election Comm'n, 2003 WI 103, ¶ 18, 263 Wis. 2d 709, 666 N.W.2d 816; *In re John Doe Proceeding*, 2003 WI 30, ¶ 27, 260 Wis. 2d 653, 660 N.W.2d 260; Vincent v. Voight, 2000 WI 93, ¶ 30, 236 Wis. 2d 588, 614 N.W.2d 388; State v. City of Oak Creek, 2000 WI 9, ¶ 18, 232 Wis. 2d 612, 605 N.W.2d 526; Thompson v. Craney, 199 Wis. 2d 674, 680, 546 N.W.2d 123, 127 (1996); Polk Cnty. v. State Pub. Defender, 188 Wis. 2d 665, 674, 524 N.W.2d 389, 392 (1994); State v. Unnamed Defendant, 150 Wis. 2d 352, 361, 441 N.W.2d 696, 699 (1989); Kukor v. Grover, 148 Wis. 2d 469, 485, 436 N.W.2d 568, 574 (1989); *Beno*, 116 Wis. 2d at 136–37; Zweifel v. Joint Dist. No. 1, Belleville, 76 Wis. 2d 648, 657, 251 N.W.2d 822, 826 (1977); State v. Burke, 2002 WI App 291, ¶ 4, 258 Wis. 2d 832, 653 N.W.2d 922; *see also* State v. Popenhagen, 2008 WI 55, ¶ 209, 309 Wis. 2d 601, 749 N.W.2d 611 (Roggensack, J., dissenting); Kocken v. Wis. Council 40, 2007 WI 72, ¶ 85, 301 Wis. 2d 266, 732 N.W.2d 828 (Roggensack, J., dissenting); State v. Huebner, 2000 WI 59, ¶ 58, 235 Wis. 2d 486, 611 N.W.2d 727 (Prosser, J., concurring) (describing it as “a well-established methodology for interpreting provisions of the Wisconsin Constitution.”); State *ex rel.* Unnamed Petitioners v. Connors, 136 Wis. 2d 118, 165 n.3, 401 N.W.2d 782, 802 n.3 (1987) (Steinmetz, J., dissenting). *But see* State v. Williams, 2012 WI 59, ¶ 65, 341 Wis. 2d 191, 814 N.W.2d 460 (Abrahamson, C.J., concurring) (listing the three sources, Chief Justice Abrahamson noted, “[t]his list of sources for or approaches to constitutional interpretation is not exhaustive”).

36. *Dairyland Greyhound Park, Inc.*, 2006 WI 107, ¶ 117 (Prosser, J., dissenting); *see also* *Burke*, 2002 WI App 291, ¶ 4 (“[W]e may not read our 1848 constitution using modern definitions and syntax.”).

37. *See Dairyland Greyhound Park, Inc.*, 2006 WI 107, ¶¶ 120–21 (Prosser, J., dissenting) (quoting *Noah Webster's An American Dictionary*); *Hamdan*, 2003 WI 113, ¶ 65 (quoting from *Black's Law Dictionary*, *Random House Unabridged Dictionary*, and *The American*

constitution, or earlier cases interpret the same words.³⁸ At times, the Wisconsin Supreme Court looks to the decisions of other state courts when considering how to interpret words in the Wisconsin Constitution.³⁹ In rare instances, a technical term is interpreted in line with its technical definition.⁴⁰

When conducting a historical analysis of text from the 1848 constitution, the court continues to rely primarily on records from the drafting conventions.⁴¹ The court may also consider contemporaneous practices

Heritage Dictionary); *Polk Cnty.*, 188 Wis. 2d at 676 (quoting from *Black's Law Dictionary*); *Bd. of Educ. v. Sinclair*, 65 Wis. 2d 179, 182, 222 N.W.2d 143, 145 (1974) (quoting from *Webster's Third New International Dictionary*, unabridged).

38. *City of Oak Creek*, 2000 WI 9, ¶ 20–24 (looking to earlier cases); *Risser v. Klauser*, 207 Wis. 2d 176, 199, 558 N.W.2d 108, 117 (1997) (“Although the interpretation of a word used in a constitutional provision is not determinative of the word’s meaning in all constitutional provisions, it may prove helpful.”).

39. *Cole*, 2003 WI 112, ¶ 39 (“Our established constitutional analysis includes an examination of the practices in effect at the time the amendment was passed. Following the lead of the legislature, we have looked to the practices and interpretations of other states.”); *Jacobs II*, 139 Wis. 2d at 514–19 (looking at similar cases analyzing cognate provisions from California, Connecticut, Michigan, New York, and Washington). *But see Wagner*, 2003 WI 103, ¶ 54 (“The effort of tracing the evolution of these clauses in other states is not warranted, because, as we have discussed, our state has its own constitutional history that developed the provision we today examine.”).

40. *State ex rel. Allis v. Wiesner*, 187 Wis. 384, 394, 204 N.W. 589, 593 (1925) (“[W]here technical terms were in use prior to the adoption of the constitution, such terms were used in the constitution in the sense in which they were understood at common law.”); *accord Mich. Coal. of State Emp. Unions v Mich. Civil Serv. Comm’n*, 634 N.W.2d 692, 698 (Mich. 2001) (“[I]f a constitutional phrase is a technical legal term or a phrase of art in the law, the phrase will be given the meaning that those sophisticated in the law understood at the time of enactment unless it is clear from the constitutional language that some other meaning was intended.”); *cf State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (“[T]echnical or specially-defined words or phrases [in statutes] are given their technical or special definitional meaning.” (citing *Bruno v. Milwaukee Cty.*, 2003 WI 28, ¶¶ 8, 20, 260 Wis. 2d 663, 660 N.W.2d 656)).

41. *Wagner*, 2003 WI 103, ¶ 61 (“The debates are our best information about the practices at the time the constitution was adopted.”); *City of Oak Creek*, 2000 WI 9, ¶ 27 (quoting from drafters at the 1848 convention); *Thompson v. Craney*, 199 Wis. 2d 674, 685–90, 546 N.W.2d 123, 129–31 (1996) (quoting from several different delegates to the 1846 and 1848 conventions); *State v. Beno*, 116 Wis. 2d 122, 140, 341 N.W.2d 668, 677 (1984) (“To help clarify the meaning of section 16 we look to the constitutional debates.”); *Busé v. Smith*, 74 Wis. 2d 550, 570–71, 247 N.W.2d 141, 150–51 (1976) (quoting Experience Estabrook, chairman of the committee on education, during the convention’s debate on the education article); *see also In re Jerrell C.J.*, 2005 WI 105, ¶¶ 75–78, 238 Wis. 2d 145, 699 N.W.2d 110 (looking to two early Wisconsin Supreme Court cases when the court’s membership included delegates to the drafting convention); *Jacobs I*, 132 Wis. 2d 82, 100, 390 N.W.2d 86, 92 (Ct. App. 1986) (beginning by attempting, and failing, to find any “clues as to the source of or intent of the framers” in the debates of the 1846 and 1848 conventions).

in Wisconsin and other states.⁴²

When looking at amendments to the constitution rather than original text, the court considers legislative history from the amendment's drafting and passage through the legislature as well as popular history from the statewide ratification campaign.⁴³ Wisconsin has few sources of legislative history because the legislature does not transcribe its floor sessions or committee hearings.⁴⁴ Sources of history used by courts in constitutional cases include Legislative Council memoranda and reports;⁴⁵ Legislative Reference Bureau drafting files and analyses;⁴⁶ analy-

42. *State v. Williams*, 2012 WI 59, ¶¶ 18–22, 341 Wis. 2d 191, 814 N.W.2d 460 (describing past practice on the federal level, in Wisconsin, and in Illinois); *Wagner*, 2003 WI 103, ¶¶ 123–25 (Bradley, J., dissenting) (considering past practice in Wisconsin); *id.* ¶ 64 (majority opinion) (looking to an analogous provision from Illinois).

43. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 117, 295 Wis. 2d 1, 719 N.W.2d 408 (“This principle permits courts to consider the debates surrounding amendments to the constitution and the circumstances at the time these amendments were adopted. . . . These concerns are often illuminated by contemporary debates and explanations of the provision both inside and outside legislative chambers.” (citations omitted)); *Schilling v. Wis. Crime Victims Rights Bd.*, 2005 WI 17, ¶ 16, 278 Wis. 2d 216, 692 N.W.2d 623 (“We have broadly understood the second of these sources, the constitutional debates and practices in existence contemporaneous to the writing, to include the general history relating to a constitutional amendment, as well as the legislative history of the amendment.” (internal citations omitted)).

44. MICHAEL J. KEANE, LEGISLATIVE REFERENCE BUREAU, WIS. BRIEFS NO. 06-10, RESEARCHING LEGISLATIVE HISTORY IN WISCONSIN 1 (July 2006), available at <http://www.legis.state.wi.us/LRB/pubs/wb/06wb10.pdf>. But see *Kalal*, 2004 WI 58, ¶ 69 (Abrahamson, C.J., concurring) (listing thirteen different sources of history the court has available for statutory interpretation); WILLIAM N. ESKRIDGE, JR., ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 999–1000 (4th ed. 2007) [hereinafter ESKRIDGE, LEGISLATION] (noting that state legislative history is becoming increasingly accessible to lawyers and judges through online resources).

45. *Williams*, 2012 WI 59, ¶ 54 (considering a report by the Legislative Council); *Dairyland Greyhound Park, Inc.*, 2006 WI 107, ¶ 32; *State v. Cole*, 2003 WI 112, ¶ 36 n.12, 264 Wis. 2d 520, 665 N.W.2d 328 (“While the research done by [the Legislative Council and Legislative Reference Bureau] is not necessarily dispositive in determining legislative intent, their analyses at the time of drafting certainly provides the court with valuable information about the knowledge available to legislators. Further, the legal expertise of these agencies entitles their analysis to some consideration by this court.”); *Wagner*, 2003 WI 103, ¶ 38 (considering a report by the Legislative Council); *In re John Doe Proceeding*, 2003 WI 30, ¶ 34, 260 Wis. 2d 653, 660 N.W.2d 260; *Appling v. Doyle*, 2013 WI App 3, ¶¶ 50, 52, 345 Wis. 2d 762, 826 N.W.2d 666; see also Jeffrey Monks, Comment, *The End of Gun Control or Protection Against Tyranny?: The Impact of the New Wisconsin Constitutional Right to Bear Arms on State Gun Control Laws*, 2001 WIS. L. REV. 249, 280 (2001) (“Because this [Legislative Council] memorandum was read by many legislators and is part of the amendment’s official drafting record, the conclusions in it should be considered a strong indicator of legislative intent.”).

46. *Williams*, 2012 WI 59, ¶ 51 (drafting files); *Dairyland Greyhound Park, Inc.*, 2006 WI 107, ¶¶ 31–32 (drafting files); *Schilling*, 2005 WI 17, ¶¶ 22 & n.7 (analysis); *Cole*, 2003 WI

sis by other legislative staffers;⁴⁷ statements by sponsoring legislators and other drafters and supporters;⁴⁸ other sources used as models or examples by the drafters;⁴⁹ opinions rendered by the attorney general;⁵⁰ the attorney general's explanatory statement;⁵¹ and changes between versions of the amendment under legislative consideration,⁵² including accepted and rejected amendments.⁵³ It is generally accepted that, in reviewing this history, the court should focus on statements by legislators and advocates who framed and favored the amendment.⁵⁴ This is so not

112, ¶¶ 36 & n.12 (drafting files); *Wagner*, 2003 WI 103, ¶ 35 (analysis).

47. *Dairyland Greyhound Park, Inc.*, 2006 WI 107, ¶ 35 (citing a memorandum from the Assembly Democratic Caucus deputy director).

48. *Williams*, 2012 WI 59, ¶¶ 49–51 (considering the report of the Governor's Citizen Study Commission on court reorganization); *Dairyland Greyhound Park, Inc.*, 2006 WI 107, ¶ 210 (Prosser, J., dissenting) (quoting a news release from the governor who called the special session to pass the amendment); *Schilling*, 2005 WI 17, ¶ 22 (quoting a county supervisor who was publicly supportive of the amendment); *Cole*, 2003 WI 112, ¶ 64 (Prosser, J., concurring) (considering statements by sponsoring legislator); *Wagner*, 2003 WI 103, ¶ 62 (quoting anonymous letters to the editor); *Thompson v. Craney*, 199 Wis. 2d 674, 692, 546 N.W.2d 123, 132 (1996) (considering letters written by the superintendent of public instruction concerning an amendment he drafted affecting the position); *id.* at 701–03 (Wilcox, J., concurring) (looking to additional letters from the superintendent); *State ex rel. Swan v. Elections Bd.*, 133 Wis. 2d 87, 94–95, 394 N.W.2d 732, 735–36 (1986) (considering a passage from a treatise written by two members of the Judicial Council concerning the court reorganization amendment); *Appling*, 2013 WI App 3, ¶¶ 49–55 (considering newspaper and press-release quotations from sponsoring legislators); *see also* ESKRIDGE, LEGISLATION, *supra* note 44, at 1018–19 (discussing the use of history generated by the executive branch, interest groups, and law-reform organizations).

49. *Schilling*, 2005 WI 17, ¶ 18 (citing two law review articles that accompanied the senator's drafting request to the Legislative Reference Bureau); *State v. City of Oak Creek*, 2000 WI 9, ¶ 31, 232 Wis. 2d 612, 605 N.W.2d 526 (citing a statute known to have been used by the revisor of Wisconsin's statute).

50. *Dairyland Greyhound Park, Inc.*, 2006 WI 107, ¶ 34; *id.* ¶¶ 145–54, 229–30 (Prosser, J., dissenting).

51. *Wagner*, 2003 WI 103, ¶¶ 36, 40.

52. *Schilling*, 2005 WI 17, ¶ 20; *Cole*, 2003 WI 112, ¶¶ 67–68, 70–71 (Prosser, J., concurring).

53. *Dairyland Greyhound Park, Inc.*, 2006 WI 107, ¶¶ 216–20 (Prosser, J., dissenting); *Schilling*, 2005 WI 17, ¶ 20; *see also* ESKRIDGE, LEGISLATION, *supra* note 44, at 1026 (discussing use of rejected provisions as a type of legislative history). *But see Dairyland Greyhound Park, Inc.*, 2006 WI 107, ¶ 28 n.27 (majority opinion) (“[T]he rejection of this amendment is only one act by the legislature, and does not outweigh the vast majority of other legislative records and news reports . . .”).

54. *State ex rel. Martin v. Heil*, 242 Wis. 41, 55, 7 N.W.2d 375, 381 (1942) (indicating that the court should “find out, if possible, the real meaning and substantial purpose of *those who adopted it.*” (emphasis added)); *Appling v. Doyle*, 2013 WI App 3, ¶ 44 n.10, 345 Wis. 2d 762, 826 N.W.2d 666 (agreeing with plaintiffs that “the views of an amendment's proponents are usually privileged over those of its opponents” (quoting *Martin*, 242 Wis. 41 at 55)); *id.* ¶ 47

only because opposing legislators and groups did not write the amendment, but because they had an incentive to distort its impact in their attempt to defeat it.⁵⁵

The debates and explanations of the provision during the statewide ratification campaign are also used to illuminate a clause.⁵⁶ The court operates on the presumption that, “when informed, the citizens of Wisconsin are familiar with the elements of the constitution and with the laws, and that the information used to educate the voters during the ratification campaign provides evidence of the voters’ intent.”⁵⁷ To discern the voters’ intent, the court uses several sources, primarily newspaper stories,⁵⁸ columns,⁵⁹ and editorials.⁶⁰ It has also looked at public opinion

(“[T]he more reasonable and obvious conclusion is that voters who ended up favoring the amendment were, generally speaking, persuaded by statements of the proponents”); see also *id.* ¶¶ 43–45 (mentioning that opponent statements are relevant only when they “reflect a congruence of views or a common core understanding of the meaning or impact of the amendment” (internal quotation marks omitted)).

55. Monks, *supra* note 45, at 293; see also ESKRIDGE, LEGISLATION, *supra* note 44, at 1021 (“[S]tatements by legislators about bills they oppose are not reliable” (citing *NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964))). Compare *Nat’l Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524, 541 (Mich. 2008) (“[I]t is no more likely that the voters relied on ‘proponents views rather than opponents’ views of the amendment.”), with *id.* at 548 n.35 (Kelly, J., dissenting) (“[I]n determining a law’s meaning, one logically assumes that the statements of its drafters and lead supporters carry more weight than the concerns of those who voted against it.”).

56. *Dairyland Greyhound Park, Inc.*, 2006 WI 107, ¶ 117 (Prosser, J., dissenting); see also Cathy R. Silak, *The People Act, the Courts React: A Proposed Model for Interpreting Initiatives in Idaho*, 33 IDAHO L. REV. 1, 37 (1996) (“It is the voters’ intent, not merely that of the drafters or proponents of the initiative, that the court must ascertain.”). But see Glenn C. Smith, *Solving the “Initiatory Construction” Puzzle (and Improving Direct Democracy) by Appropriate Refocusing on Sponsor Intent*, 78 U. COLO. L. REV. 257, 257–59, 275 (2007) (arguing that courts should deemphasize voter intent and instead focus more on sponsor intent when interpreting statewide initiatives).

57. *Dairyland Greyhound Park, Inc.*, 2006 WI 107, ¶ 37.

58. *State v. Williams*, 2012 WI 59, ¶ 53, 341 Wis. 2d 191, 814 N.W.2d 460 (citing a story from the *Wisconsin State Journal*); *Dairyland Greyhound Park, Inc.*, 2006 WI 107, ¶ 61 n.38 (quoting from a story in the *Milwaukee Sentinel*); *id.* ¶ 234 (Prosser, J., dissenting) (quoting from stories in the *Milwaukee Journal* and *Wisconsin State Journal*); *Appling*, 2013 WI App 3, ¶ 58 (citing a supporter’s quote in a newspaper story). Admittedly, there are other news outlets than newspapers. However, “the print media generally supply the most extensive coverage” of these elections. See Joseph D. Kearney & Howard B. Eisenberg, *The Print Media and Judicial Elections: Some Case Studies from Wisconsin*, 85 MARQ. L. REV. 593, 596 (2002). Moreover,

[I]t is a straightforward (albeit time-consuming) matter to reassemble newspaper and other printed coverage after the fact. By contrast, tracking *all* media coverage—both print and electronic—would require a massive, *ex ante* campaign that covered every moment and media source beginning some time well before the elec-

polling from the ratification campaign.⁶¹

In all events, “[t]he framers’ intent . . . has special significance when we are dealing with a matter which was demonstrably contemplated by the framers.”⁶² Similarly, the court may also consider whether there exists “a long-standing, uniform and continuous interpretation of a constitutional provision” that stretches from the provision’s proposal to the present.⁶³

Looking to contemporaneous or near-contemporaneous legislative constructions of an amendment is usually straightforward. “The legislature’s subsequent actions are a crucial component of any constitutional analysis because they are clear evidence of the legislature’s understanding of that amendment.”⁶⁴

This entire interpretive enterprise is undertaken seeking “to give effect to the intent of the framers and of the people who adopted it . . . [and to construe it] so as to promote the objects for which [it was] framed and adopted.”⁶⁵ This section has traced the historical evolution of the Wisconsin Supreme Court’s approach to interpretation of the state constitution, from the framing era through the *Busé* framework in modern times.

III. THE WEAKNESS OF THE COURT’S CURRENT METHOD

The second prong of the *Busé* methodology looks at history from the

tion and lasting right up to it.

Id. at 597. *But see Appling*, 2013 WI App 3, ¶¶ 59–60 (quoting from the website of an amendment supporter, then quoting from a television appearance by another amendment supporter).

59. *Dairyland Greyhound Park, Inc.*, 2006 WI 107, ¶¶ 40–41 (quoting from a letter to the editor by two senators published in the *Milwaukee Journal* and a column by a *Wisconsin State Journal* writer); *Appling*, 2013 WI App 3, ¶ 58 (quoting from a newspaper op-ed by an amendment supporter published in a University of Wisconsin–Madison student newspaper).

60. *Dairyland Greyhound Park, Inc.*, 2006 WI 107, ¶¶ 41–42 (quoting from editorials in the *Wisconsin State Journal*, *Eau Claire Leader Telegram*, and *Green Bay Press Gazette*).

61. *Id.* ¶ 43; *State v. Hamdan*, 2003 WI 113, ¶ 144, 264 Wis. 2d 433, 665 N.W.2d 785 (Abrahamson, C.J., dissenting); *State v. Cole*, 2003 WI 112, ¶ 44, 264 Wis. 2d 520, 665 N.W.2d 328; *see also* Monks, *supra* note 45, at 284 n.195.

62. *State v. Unnamed Defendant*, 150 Wis. 2d 352, 362, 441 N.W.2d 696, 699 (1989).

63. *Id.* at 362.

64. *Dairyland Greyhound Park, Inc.*, 2006 WI 107, ¶ 45; *see also* *State v. Williams*, 2012 WI 59, ¶ 55, 341 Wis. 2d 191, 814 N.W.2d 460 (considering legislation passed in the session immediately following the amendment’s passage).

65. *Cole*, 2003 WI 112, ¶ 10 (quoting *Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 729–30, 150 N.W.2d 447, 452 (1967)).

amendment's passage through two sessions of the legislature and from the statewide ratification campaign.⁶⁶ Chief Justice Shirley Abrahamson, in her concurring opinion in *Kalal*, wrote, "Legislative history, especially legislative committee reports and the congressional record, has gotten a bad reputation in recent years in federal circles because legislative history may be manufactured by both proponents and opponents of the legislation"⁶⁷ Although she tries to reassure us that the "manufacturing of legislative history is a less well-known and less perfected skill" in Wisconsin,⁶⁸ she provides no support to justify her distinction between federal legislative history, which she poo-poops, and state legislative history, which she positively advocates. Ken Dortzbach observed in 1996 that "state courts do not hear as many politically-charged cases[,] which typically lend themselves to abuse or misuse of legislative history."⁶⁹ Since he wrote that, the court has used legislative history when deciding major constitutional cases dealing with gun rights and gambling, and it may soon do so regarding same-sex unions.⁷⁰ These hot-button issues requiring interpretation of relatively recent amendments offer interested parties the opportunity and incentive to manufacture and manipulate legislative history.

Courts' experience with federal legislative history provides insight into the dangers Wisconsin courts can expect. First, Judge Ken Starr has said that "technocrats, lobbyists and attorneys have created a virtual cottage industry in fashioning legislative history so that the Congress will appear to embrace their particular view in a given statute."⁷¹ Admittedly, not as much legislative history comes out of the state legislature,⁷² but the possibility and incentives are certainly present for legisla-

66. *Busé v. Smith*, 74 Wis. 2d 550, 568–70, 247 N.W.2d 141, 149–51 (1976).

67. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 66, 271 Wis. 2d 633, 681 N.W.2d 110 (Abrahamson, C.J., concurring).

68. *Id.* ¶ 67.

69. Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 MARQ. L. REV. 161, 201 (1996).

70. *Dairyland Greyhound Park, Inc., v. Doyle*, 2006 WI 107, ¶¶ 195–96, 295 Wis. 2d 1, 719 N.W.2d 408 (discussing gambling); *Cole*, 2003 WI 112, ¶ 20 (discussing gun rights); *Appling v. Doyle*, 2013 WI App 3, ¶ 11, 345 Wis. 2d 762, 826 N.W.2d 666 (discussing same-sex unions).

71. Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 377; see also ESKRIDGE, *LEGISLATION*, *supra* note 44, at 983 (discussing the "smuggling in" problem presented by committee reports); *id.* at 1000–01 (discussing intentionally distortive sponsor statements).

72. KEANE, *supra* note 44, at 1.

tors, staff, and lobbyists to mold that which does exist in a particular direction.

Second, once the legislation is passed and its history made, then lawyers and judges are tempted to “find[] in the legislative history only that for which one is looking.”⁷³ Thus, as Chief Justice Abrahamson observed in *Mortier v. Town of Casey*, a judge’s use of legislative history “is akin to ‘looking over a crowd and picking out your friends.’”⁷⁴ She quoted approvingly from an opinion by Judge Alex Kozinski: “[T]he fact of the matter is that legislative history can be cited to support almost any proposition, and frequently is.”⁷⁵ She reiterated this point in *Kalal*, observing that “often every position can be buttressed by something in the federal legislative history.”⁷⁶ And she returned to it nearly a decade later in *State v. Williams*: “[T]here are often different historical narratives, and there is the ever-present danger that history can be read selectively to support a particular result.”⁷⁷

The third problem with legislative history is that even for those without an agenda, simply sorting through it can be a complicated task, and those who undertake the analysis dispassionately often end up with conflicting, vague, or otherwise inconclusive history.⁷⁸ Justices can and often do disagree about the proper implications of legislative history when interpreting a constitutional or statutory provision.⁷⁹

73. Starr, *supra* note 71, at 376. The majority focused on different reasons to oppose legislative history, but did note that more extensive use of legislative history “renders the analysis more vulnerable to subjectivity.” *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 49 n.8, 271 Wis. 2d 633, 681 N.W.2d 110.

74. *Mortier v. Town of Casey*, 154 Wis. 2d 18, 39, 452 N.W.2d 555, 564 (1990) (Abrahamson, J., dissenting) (quoting Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983)); ESKRIDGE, LEGISLATION, *supra* note 44, at 972–73; *see also* Noffke v. Bakke, 2009 WI 10, ¶ 60, 315 Wis. 2d 350, 760 N.W.2d 156 (Abrahamson, C.J., concurring) (“Thus resort to a dictionary can be, as Justice Scalia has written of the use of legislative history, ‘the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends.’” (citing *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring))).

75. *Mortier*, 154 Wis. 2d at 39–40 (quoting *Wallace v. Christensen*, 802 F.2d 1539, 1559 (9th Cir. 1986)).

76. *Kalal*, 2004 WI 58, ¶ 66 (Abrahamson, C.J., concurring).

77. *State v. Williams*, 2012 WI 59, ¶ 85, 341 Wis. 2d 191, 814 N.W.2d 460 (Abrahamson, C.J., concurring).

78. Starr, *supra* note 71, at 378–79.

79. *See, e.g., Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶¶ 225–34, 295 Wis. 2d 1, 719 N.W.2d 408 (Prosser, J., dissenting) (disagreeing with the majority on how to read legislative history regarding the lottery amendments); *Wagner v. Milwaukee Cnty. Election Comm’n*, 2003 WI 103, ¶¶ 89–91, 94–95, 100, 105–07, 263 Wis. 2d 709, 666 N.W.2d 816

Fourth, the use of legislative history to discern the “intent” of the legislative body operates on the mistaken assumption that a single, unified intent exists. Yet this is plainly not so, whether the body under examination is the U.S. Congress with its 535 members or the Wisconsin Legislature with its 132. In either instance, “A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.”⁸⁰ Numerous diverse interests drive legislators to cast their individual votes on a particular bill.⁸¹ No number of committee reports or floor speeches will prove what a majority of the body believed or intended at the time the bill was passed⁸²—only the law itself was the subject of agreement.

Taking all this into account, Chief Justice Abrahamson concluded in *Mortier* that “[c]ourts must use federal legislative history with healthy skepticism.”⁸³ The same should be said of legislative history from the Wisconsin Legislature.

A healthy skepticism should also characterize a court’s approach to popular history from the statewide ratification campaign. Popular history suffers the same four flaws as legislative history. First, it can be strategically created during the campaign to influence later judicial interpre-

(Bradley, J., dissenting) (disagreeing with the majority on how to read statements from delegates to the constitutional conventions); *Thompson v. Craney*, 199 Wis. 2d 674, 701–05, 546 N.W.2d 123, 135–37 (1996) (Wilcox, J., concurring) (disagreeing with the majority on how to read several letters by the drafter of a constitutional amendment); *Grosse v. Protective Life Ins. Co.*, 182 Wis. 2d 97, 117–20, 513 N.W.2d 592, 601–02 (1994) (Steinmetz, J., dissenting) (disagreeing with the majority on how to read legislative history from the state legislature); *Mortier*, 154 Wis. 2d at 41–44 (Abrahamson, J., dissenting) (disagreeing with the majority on how to read legislative history from Congress). See generally Dortzbach, *supra* note 69, at 201–21 (examining conflicting use of legislative history by majority, concurring, and dissenting justices within various cases).

80. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930); see also Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 123 (1995) (“Dating to the work of Max Radin, intent-based statutory interpretation has been the subject of continuous scholarly derision.”).

81. Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 813 (1998); see also ESKRIDGE, *LEGISLATION*, *supra* note 44, at 54–60 (discussing public-choice theory, log-rolling, and coalition creation); Clifford J. Carrubba & Craig Volden, *Coalitional Politics and Logrolling in Legislative Institutions*, 44 AM. J. OF POLITICAL SCI. 261, 262 (2000).

82. Especially because committee and conference reports are usually written by staff and only represent the views of the chairman of the committee or conference from which they emerge, not the legislative body as a whole. Starr, *supra* note 71, at 375–76 & n.14.

83. *Mortier*, 154 Wis. 2d at 40 (Abrahamson, J., dissenting).

tation.⁸⁴

Second, it can be sifted through or manipulated by an advocate or judge to support his or her preferred outcome in a case.⁸⁵ If substantial legislative history is available for an average bill in Congress, imagine the amount of popular history generated by a yearlong statewide campaign across Wisconsin, a state with thirty-one daily newspapers, scores of other newspapers and magazines, hundreds of television and radio outlets,⁸⁶ and multi-million dollar campaigns.⁸⁷

Third, even well-meaning people will likely find much of the popular history confusing or in conflict with itself.⁸⁸ As Professor Jane Schacter, writing while a member of the University of Wisconsin law faculty, has argued, “Judicial immersion in the unwieldy body of images, words, and political slogans that may comprise the media coverage and advertising related to a ballot measure is likely to intensify, not reduce, the problems of indeterminacy that already undermine the search for popular intent.”⁸⁹ It may also be that the popular history was distorted by political forces trying to shape, or misshape, voters’ perception of the amendment.⁹⁰

Fourth and finally, this endeavor starts from the flawed assumption that popular history can provide a guide to the “intent” of the voters.⁹¹

84. Schacter, *supra* note 80, at 145 (“[A]ssigning a central place to media sources invites strategic behavior on the part of partisans in the initiative battle, such as attempts to fill the airwaves and the larger public record with characterizations and claims intended to influence subsequent judicial interpretation.”).

85. See H. Jefferson Powell, *The Uses of State Constitutional History: A Case Note*, 53 ALB. L. REV. 283, 283 (1989).

86. WISCONSIN LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN BLUE BOOK 2011–2012, at 770–84 (2011) (listing media outlets in Wisconsin).

87. See, e.g., *Groups that Weighed in On the 2006 Fall Referendum Questions*, WISCONSIN DEMOCRACY CAMPAIGN (Oct. 31, 2007), <http://www.wisdc.org/referendumgroups2006.php> (estimating that groups for and against the Wisconsin Marriage Amendment spent over \$5 million to affect the statewide ratification referendum).

88. Silak, *supra* note 56, at 41 (“Despite a court’s careful attention to all the extrinsic aids . . . the intent behind an initiative may remain obscure.”).

89. Schacter, *supra* note 80, at 144.

90. *Nat’l Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524, 542 n.24 (Mich. 2008) (“It perhaps can also be discerned that supporters of legislative and constitutional initiatives often tend to downplay the effect of such initiatives during public debate, while opponents tend to overstate their effect.”).

91. Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 18 (1997) (“[I]t seems unlikely that judges can accurately discern the ‘popular intent’ or even that such a clear, monolithic intent actually exists.”); *id.* at 28 (“There is no principled way to impute a clear, consistent, or illuminating intent to the electorate.”); Schacter, *supra*

As Supreme Court Justice Clarence Thomas wryly observed, “[I]nquiries into legislative intent are even more difficult than usual when the legislative body whose unified intent must be determined consists of 825,162 Arkansas voters.”⁹²

In addition to these four problems, popular history from ratification campaigns faces its own unique problems. The Wisconsin Supreme Court relies primarily on newspaper reports, columns, and editorials for the popular history of the ratification campaign. Yet, especially in an era where newspapers are in decline, the reality is that television and radio advertising “take[] on greater importance as the primary means of voter persuasion.”⁹³ But even if the court were to start looking at campaign ads and materials as part of its analysis,⁹⁴ it would find that they are “frequently too diffuse, disparate, indeterminate, or biased to be effective as judicial sources of popular intent.”⁹⁵ Moreover, these campaign materials rarely “traffic in ‘the arcane, albeit potent, details’ of the initiatives they tout or disparage.”⁹⁶

Courts in Wisconsin and elsewhere have recognized the problems inherent in reliance on popular history to discern voter intent. The Supreme Court of Missouri, for instance, has labeled “representations made here and there at large over the state by private individuals and organizations in advocacy of a cause at an election” as “neither conclusive nor persuasive evidence” for interpretation.⁹⁷ The Supreme Court

note 80, at 111 (“First, the popular intent behind an initiative statute is largely illusory and provides an unstable anchor for judicial interpretation.”); *id.* at 124–25 (“[T]he problem of aggregating multiple individual intentions, substantial as it is in the context of the legislative process, is compounded by the daunting scale of direct lawmaking. Even if we granted that *individual* voter intent existed—a dubious premise, I will argue—courts simply could not cumulate what may be millions of voter intentions.”). Thus, courts which seek “some mean intent of the average reasonable informed voter” rely on a “misguided faith.” Stephen Salvucci, Note, *Say What You Mean and Mean What You Say: The Interpretation of Initiatives in California*, 71 S. CAL. L. REV. 871, 877 (1998). Professor Smith finds a “clear consensus of initiatory-construction scholarship” that the search for an “intent of the voters” is “fundamentally bankrupt” because this mythical intent “does not exist.” Smith, *supra* note 56, at 258.

92. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 921 (1995) (Thomas, J., dissenting).

93. Silak, *supra* note 56, at 31; *see also* Schacter, *supra* note 80, at 131, 135.

94. As has been suggested by Christopher R. McFadden, Article, *The Wisconsin Bear Arms Amendment and the Case Against an Absolute Prohibition on Carrying Concealed Weapons*, 19 N. ILL. U. L. REV. 709, 711 (1999).

95. Schacter, *supra* note 80, at 130; *see also* Silak, *supra* note 56, at 29 (“As with any advertising campaign, the meaning and effect of an initiative can be subject to distortion.”).

96. Smith, *supra* note 56, at 275 (quoting Schacter, *supra* note 80, at 158).

97. State *ex rel.* Russell v. State Highway Comm’n, 42 S.W.2d 196, 202 (Mo. 1931); *see*

of Arkansas followed a similar rule, reasoning,

When the debates arose over the question of adoption by the people, the amendment had already been framed by the Legislature and referred to the people; and the opinions expressed during the progress of the campaign did not enter into the shaping of the language of the amendment, so as to shed light on its intended meaning.⁹⁸

Chief Justice Nathan Heffernan, writing for the Wisconsin Supreme Court, similarly declined to ascribe any significance to a brief written by the chief of the Wisconsin Legislative Reference Library in support of a proposed amendment, saying:

[W]e question whether contemporaneously written briefs aimed at garnering political support for a proposed constitutional amendment can ever be considered persuasive when a court later attempts to interpret the constitutional provision that was amended. Even if Witte could accurately be called the drafter of this amendment, the amendment to the constitution was accomplished in the usual manner, including passage by two successive legislatures and approval and ratification by the people of Wisconsin at the general election. Thus, unlike the situation where the court must ascertain legislative intent for a statutory enactment, this contemporaneously written account of what Witte thought the proposed constitutional amendment meant, is not persuasive as to what the amendment actually did.⁹⁹

Today's Wisconsin courts would be wise to recall Chief Justice Heffernan's words, and those of other state high courts, in rejecting the use of popular history as a first resort for interpretation.

In addition to newspaper stories, the other place the court has looked when discerning the intent of the voters is public opinion polling.¹⁰⁰ The experience of the U.S. Supreme Court in citing opinion polls

also St. Louis Cnty. v. State Highway Comm'n, 409 S.W.2d 149, 152 (Mo. 1966); *Missourians for Honest Elections v. Mo. Elections Comm'n*, 536 S.W.2d 766, 775 (Mo. Ct. App. 1976).

98. *Hodges v. Dawdy*, 149 S.W. 656, 659 (Ark. 1912); *see also* ESKRIDGE, LEGISLATION, *supra* note 44, at 1035-43 (discussing post-enactment legislative history).

99. *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 461 n.18, 424 N.W.2d 385, 397 n.18 (1988) (citations omitted).

100. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 43, 295 Wis. 2d 1, 719 N.W.2d 408; *State v. Cole*, 2003 WI 112, ¶ 44, 264 Wis. 2d 520, 665 N.W.2d 328; *State v. Hamdan*, 2003 WI 113, ¶ 144, 264 Wis. 2d 433, 665 N.W.2d 785 (Abrahamson, C.J., dissenting); *see also* *Nat'l Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524, 547-48 (Mich.

reveals the significant problems with judicial reliance on unexamined survey data. In *Atkins v. Virginia*, the U.S. Supreme Court's majority opinion mentioned in a footnote "polling data show[ing] a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong."¹⁰¹ Chief Justice William Rehnquist, in dissent, gave a critique of polling data that the Wisconsin Supreme Court should carefully consider:

An extensive body of social science literature describes how methodological and other errors can affect the reliability and validity of estimates about the opinions and attitudes of a population derived from various sampling techniques. Everything from variations in the survey methodology, such as the choice of the target population, the sampling design used, the questions asked, and the statistical analyses used to interpret the data can skew the results.¹⁰²

Chief Justice Rehnquist also noted that in a previous decision involving the death penalty, the Court had refused to "rest constitutional law upon such uncertain foundations as public opinion polls."¹⁰³ In another

2008) (Kelly, J., dissenting) (discussing a poll on domestic-partnership benefits and same-sex marriage taken in advance of Michigan's statewide vote on a constitutional amendment); *Cnty. of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 407–13, 588 N.W.2d 236, 252–55 (1999) (setting standards of evidence for the admission of polling data to show "community standards of decency" in obscenity cases); Monks, *supra* note 45, at 284 n.195.

101. *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002) (citing Brief of Am. Ass'n on Mental Retardation et al. as Amici Curiae in Support for Petitioner at 3a–7a, *McCarver v. North Carolina*, 548 S.E.2d 522 (N.C. 2001), *cert. dismissed as improvidently granted*, 533 U.S. 975 (2001) (No. 00-1015) (appending approximately twenty state and national polls on the issue), *also appended to Atkins*, 536 U.S. at 328–37 (Rehnquist, C.J., dissenting)).

102. *Atkins*, 536 U.S. at 326–27 (Rehnquist, C.J., dissenting). The Chief Justice further noted that while criteria exist to determine whether surveys possess sufficient scientific merit to justify their use in court, they ought to be introduced at the trial court level where the pollsters can be credentialed as experts, examined, and cross-examined. *Id.* at 327–28. Instead, these polls were submitted as part of an amicus brief, which may raise concerns that the amicus filer was using the polling to advance an agenda. See Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 97 (1993) (examining problems caused by amicus practice). For a broader discussion of the Chief Justice's concerns about polling methodology, see Tracy E. Robinson, *By Popular Demand? The Supreme Court's Use of Public Opinion Polls in Atkins v. Virginia*, 14 GEO. MASON U. CIV. RTS. L.J. 107, 121–37 (2004). For a defense of polling in reply to the Chief Justice's concerns, see David Niven, Jeremy Zilber & Kenneth W. Miller, *A "Feeble Effort to Fabricate National Consensus": The Supreme Court's Measurement of Current Social Attitudes Regarding the Death Penalty*, 33 N. KY. L. REV. 83, 84–85 (2006).

103. *Atkins*, 536 U.S. at 326 (Rehnquist, C.J., dissenting) (quoting *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989)); see also *Roberts v. Louisiana*, 428 U.S. 325, 352 n.5 (1976) (White,

death-penalty case, the Court noted but declined to rely on public opinion polling, saying, “The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely.”¹⁰⁴ The text of the amendment that voters approved is the “objective indicator” of the desires of the people, not opinion polling.

Moreover, the reliability of the pollsters that the Wisconsin Supreme Court has relied upon in the past is widely questioned by expert observers of Wisconsin politics. In *Dairyland Greyhound Park, Inc.*, the court cited polls by St. Norbert College (SNC)/Wisconsin Public Radio and the University of Wisconsin Extension.¹⁰⁵ In *State v. Cole* and *State v. Hamdan*, the justices looked to two polls sponsored by the Public Policy Forum, a non-profit think tank based in Milwaukee.¹⁰⁶ The publicly available polling data on the marriage amendment and its impact on civil unions, cited by then-Attorney General Peg Lautenschlager and University of Wisconsin (UW) Law Professor David Schwartz in their opinion letters on domestic partnerships,¹⁰⁷ come from SNC and the UW Madison Survey Center (UWSC).¹⁰⁸

J., dissenting) (“[N]either the parties here nor *amici* rely on such polls as relevant to the issue before us.”).

104. *Penry v. Lynaugh*, 492 U.S. 302, 334–35 (1989).

105. *Dairyland Greyhound Park, Inc.*, 2006 WI 107, ¶ 43.

106. *State v. Hamdan*, 2003 WI 113, ¶ 144, 264 Wis. 2d 433, 665 N.W.2d 785 (Abrahamson, C.J., dissenting); *State v. Cole*, 2003 WI 112, ¶ 44, 264 Wis. 2d 520, 665 N.W.2d 328; *see also* Monks, *supra* note 45, at 284 n.196 (mentioning Public Policy Forum’s role in conducting polls).

107. Letter from Peggy A. Lautenschlager, Attorney Gen., Wis. Dep’t of Justice, to Michael P. May, City Attorney, City of Madison, 5 (last visited Oct. 17, 2013), www.news.wisc.edu/domesticPartnerBenefits/images/AGOpinion.pdf; Letter from David S. Schwartz, Professor of Law, Univ. of Wis. Law Sch., to James E. Doyle, Governor, State of Wis., 6 (June 4, 2009), <http://web.archive.org/web/20090822184959/http://www.wisgov.state.wi.us/docview.asp?docid=17476> (accessed by entering URL in the Internet Archive).

108. G. Donald Ferree, Jr., Univ. of Wis. Survey Ctr., Badger Poll No. 14, Release No. 5, Courts, Homosexuality, and Gay Marriage, 6–8 (Apr. 12, 2004), <http://www.uwsc.wisc.edu/badg145.pdf>; G. Donald Ferree, Jr., Univ. of Wis. Survey Ctr., Badger Poll No. 10, Release No. 6, Homosexuality and the Law: The View from Wisconsin, 5–9 (Sept. 19, 2003), <http://www.uwsc.wisc.edu/badg106.pdf>; Wendy Scattergood, St. Norbert Coll. Survey Ctr., *Gay Marriage and Civil Unions*, WIS. PUB. RADIO (Spring 2006), <http://www.wpr.org/april-gay-marriage-civil-unions-2006>; Katherine Cramer Walsh, Univ. of Wis. Survey Ctr., Badger Poll No. 22, Release No. 3, Same Sex Marriage, Unions, and Referendum, 1–2 (July 17, 2006), http://www.uwsc.wisc.edu/BP22PressRelease_Death_Samesex.pdf; Katherine Cramer Walsh, Univ. of Wis. Survey Ctr., Badger Poll No. 23, Release No. 1, Wisconsin Statewide Elections November 2006, 18, 30 (Oct. 30, 2006), http://www.uwsc.wisc.edu/BP23PressRelease1_WIaces_111406.pdf. The October 2006 polling memorandum from UWSC references polls taken in December 2003 and January 2005, but the full results from those polls are not available on

Each of these polls surveyed Wisconsin residents generally, not registered or likely voters.¹⁰⁹ Marquette Law School Professor Charles Franklin distinguishes the two, saying that a poll of residents is “a sample that is most representative of the state but not necessarily representative of November voters.”¹¹⁰ Critiquing a similar poll, longtime Wisconsin Democratic political consultant Bill Christofferson wrote sarcastically, “It is customary, when doing a poll to try to find out what’s happening in an election campaign, to ask people who actually intend to vote.”¹¹¹ It is also the goal of the court to find out what the voters, and not merely the people who lived in the state, believed about an amendment at referendum.¹¹² Second, Wisconsin college polls usually are in the field for eleven or twelve days, while professional polls generally take two or three.¹¹³ Mr. Christofferson said one such poll was “a little suspect because [it was] done over a long period of time.”¹¹⁴ Third, because they try to keep costs down, college polls often use relatively small sample sizes,¹¹⁵ resulting in such wide margins of error that Mr. Christoff-

the UWSC website.

109. See John Patrick Hunter, *Survey: Taxes Top Worry, Gaming Views Split*, CAPITAL TIMES, Mar. 30, 1993, at 3A (SNC and UW Extension polls); Jim Stingl, *Gun Amendment Favored by 80% in State, but Only 16% Would Back Law on Carrying Concealed Weapons*, MILWAUKEE J. SENTINEL, Oct. 25, 1998, at 1A (discussing Public Policy Forum polls); see also *supra* note 108 (demonstrating survey methodology of marriage amendment polls).

110. Charles Franklin, *When the Pollsters Matter Most: WI Gov 06*, POLITICAL ARITHMETIK (July 1, 2006, 11:35 AM), <http://politicalarithmetik.blogspot.com/2006/07/when-pollster-matters-most-wi-gov-06.html>.

111. *Hey, Kids, Let's Do a Poll!*, THE XOFF FILES BY BILL CHRISTOFFERSON (Apr. 14, 2006, 9:01 AM), <http://www.wisopinion.com/blogs/2006/04/hey-kids-lets-do-poll.html>.

112. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶¶ 37–44, 295 Wis. 2d 1, 719 N.W.2d 408 (considering perspective of voters when analyzing intent).

113. Daniel, *Most Recent Badger Poll Miserably Flawed*, GOP3.COM: THE TRIUMVIRATE (July 12, 2006, 11:17 PM), <http://web.archive.org/web/20070611101404/http://gop3.com/2006/07/12/badger-poll-timed-trash/> (accessed by entering URL in the Internet Archive) (comparing four Wisconsin college polls with twelve professional polls taken in Wisconsin).

114. *Another Day, Another Poll*, THE XOFF FILES BY BILL CHRISTOFFERSON (Nov. 16, 2005, 11:16 AM), <http://www.wisopinion.com/blogs/2005/11/another-day-another-poll.html>; see also THE XOFF FILES BY BILL CHRISTOFFERSON, *Hey, Kids, Let's Do a Poll!*, *supra* note 111 (saying a SNC poll gives us “blurry photos at best”).

115. See *A Poll You Can Safely Ignore*, THE XOFF FILES BY BILL CHRISTOFFERSON (Dec. 10, 2005, 11:57 AM), <http://www.wisopinion.com/blogs/2005/12/poll-you-can-safely-ignore.html> (describing a small sample used by Edgewood College as “not enough to tell you anything meaningful”); Franklin, *supra* note 110 (saying the SNC poll uses “small samples”); Nate Silver, *Today's Polls: Alaska!*, FIVETHIRTYEIGHT (Apr. 10, 2008, 4:15 PM), <http://www.fivethirtyeight.com/2008/04/todays-polls-alaska.html> (giving “appropriately low weighting” to a SNC poll because it “consists of a small sample of just 400 adults (not even

person labeled one SNC poll “basically a disservice to any rational political discussion.”¹¹⁶ In light of these faults, Mr. Christofferson has criticized the Wisconsin media because they “usually treat all polls equally—one taken by a college class is as good as one taken by one of the country’s top political pollsters.”¹¹⁷ In the past, the Wisconsin Supreme Court has looked to polls taken by a college class;¹¹⁸ it should not do so in the future.

Rather than using college polls with significant reliability issues, the court may be tempted to look at professional polls done by organizations interested in a referendum. These polls, after all, usually have larger samples, screen for likely voters, and are taken over industry-standard polling windows.¹¹⁹ But the court should avoid these polls as well, for three reasons. First, groups interested in the outcome of a referendum have a strong incentive to ask the question in such a way as to lead respondents to a desired answer. A poll that exaggerates support for the group’s position may be used to create a “bandwagon” effect that helps in the poll that really matters on Election Day.¹²⁰ Second, these groups only publicly release polls that show good results; no candidate ever gave the media a poll showing him or her getting crushed. Third, these releases often offer only broad descriptions and bare details—not question wording or order.¹²¹

registered voters”); *see also* John McAdams, *Current St. Norbert College Poll: Good News for Democrats*, MARQUETTE WARRIOR (Oct. 20, 2006, 2:03 PM), <http://mu-warrior.blogspot.com/2006/10/current-st-norbert-college-poll-good.html> (questioning whether the SNC sample has a bias).

116. *Margin of Error Leads all Candidates*, THE XOFF FILES BY BILL CHRISTOFFERSON (Apr. 12, 2006, 11:21 AM), <http://www.wisopinion.com/blogs/2006/04/margin-of-error-leads-all-candidates.html>; *see also* *Candidates, Stop Campaigning! Poll Says You’re Going Backwards*, UPPITY WISCONSIN, (July 15, 2010, 3:11 PM), <http://uppitywis.org/candidates-stop-campaigning-poll-says-youre-going-backwards> (“[The UWSC poll] was conducted over a month’s time, and only 300 likely voters were interviewed, for starters. It simply is not credible.”).

117. *Beware of Candidates Bearing Polls*, THE XOFF FILES BY BILL CHRISTOFFERSON (May 3, 2005, 10:15 AM), <http://www.wisopinion.com/blogs/2005/05/beware-of-candidates-bearing-polls.html>; *see generally* Andrew Alexander, *Margin for Error in Reporting on Polls*, WASH. POST, July 26, 2009, at A17.

118. *See supra* notes 106–08 and accompanying text.

119. Nate Silver, *Methodology*, FIVE THIRTY EIGHT, (Oct. 10, 2013), <http://fivethirtyeight.blogs.nytimes.com/methodology/>.

120. Albert Mehrabian, *Effects of Poll Reports on Voter Preferences*, 28 J. APPLIED SOC. PSYCHOL. 2119, 2119 (1998).

121. *See Beware of Candidates Bearing Polls*, THE XOFF FILES BY BILL CHRISTOFFERSON, *supra* note 117 (“[T]he media would be well advised to be much more skeptical when it is given part of a candidate’s poll. The Walker memo is typical. It shares a

A poll by Fair Wisconsin, the group that opposed the Wisconsin Marriage Amendment, illustrates these problems well. After Governor Doyle released his 2009 budget, which included a domestic-partnership registry for same-sex couples, Fair Wisconsin touted a poll it sponsored on that topic: “[T]he survey found that 77 percent of Wisconsin voters support some recognition of gay couples. Only 20 percent felt that ‘there should be no legal recognition of a relationship between gay and lesbian couples.’”¹²² It would be a significant mistake for a court to consider such a poll as evidence when deciding the “voter intent” behind the Wisconsin Marriage Amendment. The question was worded in such a way as to elicit a particular response that would allow Fair Wisconsin to do exactly what it did: push the poll in news stories as evidence of widespread support for the Governor’s domestic-partnership proposal.¹²³ Chief Justice Rehnquist rightly pointed out that a poll’s sponsorship can “bear on the objectivity of the results.”¹²⁴ To paraphrase Mr. Christofferson’s advice: “Beware of [litigants and amici] bearing polls!”¹²⁵

In sum, polling is a complicated endeavor. As the foregoing section has illustrated, a number of methodological questions must be asked to determine the quality of a poll. Courts, especially those on the appellate level, do not possess the necessary expertise to parse polling data. Judges are not pollsters, and they should not pretend to be. Nor should they use survey data to reinterpret the meaning of the text that the voters approved in the only poll that matters: the ratification vote on election day.

Finally, near-contemporaneous legislative enactments may be a poor guide when seeking the intent of the enacting legislature.¹²⁶ The Wisconsin Marriage Amendment, for instance, was sponsored by Republicans in the legislature.¹²⁷ It passed two successive sessions because Re-

few selected pieces of good news for Walker from a long questionnaire that asked all sorts of other things they are not telling us about.”).

122. Judith Davidoff, *Benefit Brawl*, CAPITAL TIMES, Feb. 25, 2009, at 10.

123. Jack Craver, *Gay Rights Go Mainstream Here*, ISTHMUS, July 9, 2010, at 6.

124. *Atkins v. Virginia*, 536 U.S. 304, 327 (2002) (Rehnquist, C.J., dissenting).

125. *Beware of Candidates Bearing Polls*, THE XOFF FILES BY BILL CHRISTOFFERSON, *supra* note 117.

126. See *Appling v. Doyle*, 2013 WI App 3, ¶¶ 70–73, 345 Wis. 2d 762, 826 N.W.2d 666 (declining to resolve the question of how a changed legislative majority affects the analysis of contemporaneous legislation).

127. S. J. Res. 53, 2005–2006 Leg., Reg. Sess. (Wis. 2006) (listing sponsoring senators); Assemb. J. Res. 66, 2003–2004 Leg., Reg. Sess. (Wis. 2003) (listing sponsoring assemblypersons).

publicans in control of the Assembly and Senate scheduled the measure and saw to its passage.¹²⁸ The people of Wisconsin ratified the amendment in the fall 2006 general election.¹²⁹ On that very same day, voters elected a Democratic majority to the state senate.¹³⁰ Obviously, voters' general preference for Democrats did not include a specific preference for that party's stance on the marriage amendment. Two years later, Wisconsinites elected a Democratic majority in the state assembly while retaining the senate majority.¹³¹ With the governorship also in hand, the new majorities passed a state budget that included domestic-partner benefits for state employees and a statewide domestic-partnership registry.¹³² Should these actions, taken only three years after the amendment's passage, guide the court in applying its language? Obviously not. The legislature that passed those budget provisions was substantially different from the one that passed the amendment—many members had turned over, and more importantly, majority control of both houses had changed parties. This example illustrates that changing circumstances may make near-contemporaneous legislative decisions an unreliable guide for interpreting constitutional provisions.

In sum, the court's current methodology for interpreting constitutional provisions relies on flawed sources. Legislative history can be abused by those who write it in an attempt to shape the interpretation of the law, and by those using it in court, who may select non-representative or misleading sources. Even when honestly evaluated, legislative history can be confusing and inconsistent. Additionally, the entire project begins from the false premise that a unified intent can be divined from anything other than the words that the majority agreed to enact.

Recent scholarship has shown that popular history from the

128. Wis. S. J. Res. 53 (approving the proposed amendment on second consideration and submitting it to the people for referendum); Wis. Assemb. J. Res. 66 (approving the proposed amendment and referring it to the 2005–2006 legislature).

129. Bill Glauber, *State Voters Say 'I Do' to Marriage Amendment*, MILWAUKEE J. SENTINEL, Nov. 8, 2006, at 9A.

130. Patrick Marley & Larry Sandler, *Lehman, Sullivan Lead Takeover for Democrats*, MILWAUKEE J. SENTINEL, Nov. 8, 2006, at 10A.

131. Steven Walters & Patrick Marley, *Democrats Face Election Reality Check*, MILWAUKEE J. SENTINEL, Nov. 7, 2008, at 1B.

132. See 2009 Wis. Act 28, § 773 (codified as amended at WIS. STAT. § 40.02(20) (2011–2012) (including domestic partners in definition of “dependent” under the public employee trust fund)); see also *id.* § 3218 (codified at WIS. STAT. §§ 770.001–770.18) (requiring that county clerk keep “declaration of domestic partnership docket”).

statewide ratification campaign suffers these same flaws. Popular history that relies on newspaper clippings, moreover, prioritizes a source that is quickly losing relevance over a source that affects many more voters—namely, campaign advertising. Yet this source too has problems as an interpretive guide. The court’s other source of voter intent, public opinion polling, varies widely in quality, precision, and objectivity—making it an unreliable signpost for the court. All of these concerns should lead the Wisconsin Supreme Court to stop its current ritual of examining the entrails of a provision’s history when the text is unambiguous.

IV. THE CASE FOR INTERPRETIVE CONSISTENCY

Rather than focus on concerns about intent-based interpretation like those outlined above, the *Kalal* majority sought to advance positive goods associated with the rule of law through its insistence on a text-first approach to statutory interpretation.¹³³ The majority believed that “[a]n interpretive method that focuses on textual, intrinsic sources of statutory meaning and cabins the use of extrinsic sources of legislative intent is grounded in more than a mistrust of legislative history or cynicism about the capacity of the legislative or judicial processes to be manipulated.”¹³⁴ Rather, “[t]he principles of statutory interpretation that we have restated here are rooted in and fundamental to the rule of law.”¹³⁵

What are these “rule of law” values advanced by the majority’s textualism? The court turned to the nation’s foremost champion of textualist interpretation, Supreme Court Justice Antonin Scalia, to explain:

Ours is “a government of laws not men,” and “it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.” “It is the *law* that governs, not the intent of the lawgiver. . . . Men may intend what they will; but it is only the laws that they enact which bind us.”¹³⁶

133. State *ex rel.* *Kalal* v. Circuit Court, 2004 WI 58, ¶¶ 45, 52, 271 Wis. 2d 633, 681 N.W.2d 110.

134. *Id.* ¶ 52.

135. *Id.*; see also *In re* Commitment of Gilbert, 2012 WI 72, ¶ 28 n.11, 342 Wis. 2d 82, 816 N.W.2d 215 (“The dissent . . . undertakes an analysis that is representative of the precise evil that *Kalal* was designed to combat: the use of legislative history in lieu of the language of the statute.”).

136. *Kalal*, 2004 WI 58, ¶ 52 (quoting ANTONIN SCALIA, A MATTER OF

Justice Scalia has made the same point elsewhere in a pithier manner: “[W]e are a Government of laws, not of committee reports.”¹³⁷

The *Kalal* majority briefly referenced two other arguments for its method. First, “[j]udicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute.”¹³⁸ Second, “the words rather than the intent survived the procedures” laid out in the constitution—passage, presentment, and enactment.¹³⁹

Everything that drove the court’s pronouncements in *Kalal* is equally true in the constitutional-interpretation context. It is not the intent of the legislators or voters but the text that they approved that is part of the state’s fundamental law. Judicial deference to the policy choices embodied in a provision requires respect for its language. Only the words of an amendment survived two successive sessions of the legislature and a statewide referendum of the people. The Missouri Court of Appeals had it right when it said,

Regardless of the pre-election intentions of the drafters of the Act, or the views of individual supporters or opponents of the Proposition, or the explanations of the media, the Proposition and its express language became the law of this state when the overwhelming majority of the voters adopted the Proposition. By that law we are bound.¹⁴⁰

The court that relied so willingly on Justice Scalia in *Kalal* should also follow his views on the transitive applicability of textualism. Professor Kevin Stack summarizes them:

INTERPRETATION 17 (1997)). The majority noted elsewhere, “It is the enacted law, not the unenacted intent, that is binding on the public.” *Id.* ¶ 44.

137. *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 621 (1991) (Scalia, J., concurring); see also *Nat’l Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524, 540–41 (Mich. 2008) (“[T]he voters here did not vote for or against any brochure produced by Citizens for the Protection of Marriage; rather, they voted for or against a ballot proposal that contained the actual language of the marriage amendment.”).

138. *Kalal*, 2004 WI 58, ¶ 44.

139. *Id.* ¶ 52 n.9 (quoting Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 430 (1989)); see also Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL’Y 59, 60 (1988) (“After all, Congress votes on the bill, not on the reports. No one can vote against a report, and the President cannot veto the language of a report.”).

140. *Missourians for Honest Elections v. Mo. Elections Comm’n*, 536 S.W.2d 766, 774–75 (Mo. Ct. App. 1976); see also *State ex rel. Evans v. Stewart*, 161 P. 309, 312 (Mont. 1916); *Doyle v. Torrence*, 310 S.W.2d 425, 427–28 (Tenn. 1958).

In Scalia's vision, the Constitution is analogous to a statute, and it should be interpreted in accordance with the same norms and interpretive aims that apply to statutes. Scalia thus embraces a principle of democratic interpretive uniformity under which the enactedness of a legal text determines that it will be interpreted according the same interpretive norms as apply to other democratically enacted texts—textualist originalism.¹⁴¹

In addition to Scalia and several of his brethren on the U.S. Supreme Court, many state courts already use the same methods of construction for both statutory and constitutional cases.¹⁴² Moreover, many state

141. Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1, 14–15 (2004) (citing SCALIA, *supra* note 136, at 37); *see also* SCALIA, *supra* note 136, at 37 (“I wish to address a final subject: the distinctive problem of constitutional interpretation. The problem is distinctive, not because special principles of interpretation apply, but because the usual principles are being applied to an unusual text.”). Stack further notes that Professor William Eskridge uses his “dynamic” approach to interpretation regardless of the type of text (statutory or constitutional) that is subject to analysis. Stack, *supra*, at 15. Stack goes on to critique this position throughout the rest of the article, arguing that different types of legal documents call for different interpretative approaches (based on, for instance, the ease with which they may be amended). *Id.* at 57–58.

142. *Clark v. Container Corp. of Am., Inc.*, 589 So. 2d 184, 190 n.4 (Ala. 1991); *Brooks v. Wright*, 971 P.2d 1025, 1028 (Alaska 1999); *Brewer v. Fergus*, 79 S.W.3d 831, 834 (Ark. 2002); *Thompson v. Dep’t of Corr.*, 18 P.3d 1198, 1200 (Cal. 2001); *Danielson v. Dennis*, 139 P.3d 688, 691 (Colo. 2006); *Ford v. Browning*, 992 So. 2d 132, 136 (Fla. 2008); *Westerberg v. Andrus*, 757 P.2d 664, 666 n.2 (Idaho 1988); *People v. Purcell*, 778 N.E.2d 695, 699 (Ill. 2002); *Rants v. Vilsack*, 684 N.W.2d 193, 199 (Iowa 2004); *Snowton v. Sewerage & Water Bd.*, 6 So. 3d 164, 168 (La. 2009); *Davis v. Slater*, 861 A.2d 78, 81 (Md. Ct. Spec. App. 2004); *Council 23 Am. Fed’n of State, Cnty. & Mun. Emps. v. Civil Serv. Comm’n*, 188 N.W.2d 206, 208 (Mich. Ct. App. 1971); *Clark v. Pawlenty*, 755 N.W.2d 293, 304 (Minn. 2008); *State ex rel. Long v. Justice Court*, 156 P.3d 5, 8 (Mont. 2007); *We the People Nev. ex rel. Angle v. Miller*, 192 P.3d 1166, 1170 (Nev. 2008); *State ex rel. Richardson v. Fifth Judicial Nominating Comm’n*, 160 P.3d 566, 571 (N.M. 2007); *Wendell v. Lavin*, 158 N.E. 42, 44 (N.Y. 1927); *State ex rel. Martin v. Preston*, 385 S.E.2d 473, 478 (N.C. 1989); *Kelsh v. Jaeger*, 641 N.W.2d 100, 104 (N.D. 2002); *State v. Rodgers*, 850 N.E.2d 90, 92 (Ohio Ct. App. 2006); *City of Guymon v. Butler*, 92 P.3d 80, 84 (Okla. 2004); *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 859 P.2d 1143, 1147 n.4 (Or. 1993); *Commonwealth v. McNeil*, 808 A.2d 950, 954 n.2 (Pa. Super. Ct. 2002); *Neel v. Shealy*, 199 S.E.2d 542, 545 (S.C. 1973); *Acreman v. Sharp*, 282 S.W.3d 251, 255 (Tex. App. 2009); *Comm. to Reform Hampshire Cnty. Gov’t v. Thompson*, 674 S.E.2d 207, 211 (W. Va. 2008); *see also Whitcomb v. Young*, 279 N.E.2d 566, 571 (Ind. 1972); *Op. of the Justices*, 484 A.2d 999, 1001 (Me. 1984); *Neske v. City of St. Louis*, 218 S.W.3d 417, 421 (Mo. 2007); *Hall v. Progress Pig, Inc.*, 610 N.W.2d 420, 424 (Neb. 2000). *But see Mich. United Conservation Clubs v. Dep’t of Treasury*, 608 N.W.2d 141, 145 (Mich. Ct. App. 1999); *Kuhn v. Curran*, 61 N.E.2d 513, 517 (N.Y. 1945); *State v. Hance*, 910 A.2d 874, 878 (Vt. 2006); *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 116, 295 Wis. 2d 1, 719 N.W.2d 408 (Prosser, J., dissenting) (attempting to justify the distinction between constitutional and statutory methods of interpretation); *Pierre Schlag, Framers Intent: The Illegitimate Uses of History*, 8 U. PUGET SOUND L. REV. 283, 311–22 (1985) (arguing reasons for different methods of interpretation).

courts use the same methods of construction whether a law was passed by the usual legislative process or by a statewide referendum.¹⁴³

In sum, Justice Diane Sykes and her colleagues in the *Kalal* majority sought to establish a method of statutory interpretation that honored the rule of law in Wisconsin.¹⁴⁴ They placed the court's focus on the text of the statute before them because only the text possesses the force of law.¹⁴⁵ The same noble motives and persuasive reasons should lead the court to adopt a *Kalal* framework for constitutional interpretation.

V. CONCLUSION

When the Wisconsin Supreme Court issued its decision in *Kalal*, a majority of the court decided to adopt a particular method of statutory interpretation for all subsequent decisions by Wisconsin courts.¹⁴⁶ In doing so, the court chose to avoid the problems associated with legislative history, both practical and jurisprudential. Instead, the justices chose to honor the rule of law by focusing first on the enacted text of the law.

The considerations that drove the court's majority in *Kalal* should lead it to reject the current method it uses to interpret the state constitution. The *Busé* methodology relies on flawed sources in a futile attempt to discover a mythical common intent. Moreover, replacing *Busé* with a textualist methodology would advance the rule-of-law values that inspired *Kalal*.

In its next constitutional-interpretation case, the Wisconsin Supreme Court should draw upon *Coulee Catholic Schools v. Labor & Indus. Review Comm'n*¹⁴⁷ to finally and emphatically end the reign of *Sinclair* and

143. *People v. Lopez*, 103 P.3d 270, 272 (Cal. 2005); *Bickel v. City of Boulder*, 885 P.2d 215, 228 n.10 (Colo. 1994); *State ex rel. Jones v. Erickson*, 244 P. 287, 290 (Mont. 1926); *Nevada Tax Comm'n v. Bernhard*, 683 P.2d 21, 23 (Nev. 1984); *Anthony v. Veatch*, 220 P.2d 493, 507-08 (Or. 1950); *Wash. State Dep't of Revenue v. Hoppe*, 512 P.2d 1094, 1096 (Wash. 1973); 1985-1986 MICH. ATT'Y GEN. BIENNIAL REP., at 310, 1986 WL 233309; Jack L. Landau, *Interpreting Statutes Enacted by Initiative: An Assessment of Proposals to Apply Specialized Interpretive Rules*, 34 WILLAMETTE L. REV. 487, 532 (1998); Silak, *supra* note 56, at 3; *see also* Michael M. O'Hear, *Statutory Interpretation and Direct Democracy: Lessons from the Drug Treatment Initiatives*, 40 HARV. J. ON LEGIS. 281, 283 (2003) (reviewing fifty-one cases that confirm Prof. Schacter's conclusion); Schacter, *supra* note 80, at 119 (reviewing fifty-three cases and concluding that judges apply "ordinary rules of interpretation" to laws passed by initiative).

144. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 52, 271 Wis. 2d 633, 681 N.W.2d 110.

145. *Id.* ¶¶ 44-47.

146. *Id.* ¶¶ 44-53.

147. *Coulee Catholic Schs. v. LIRC*, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868.

Busé and to inaugurate the use of the *Kalal* principles in state constitutional cases. Justice Stephen Markman of the Michigan Supreme Court put it well in *National Pride at Work*:

The role of this Court is not to determine who said what about the amendment before it was ratified, or to speculate about how these statements may have influenced voters. Instead, our responsibility is, as it has always been in matters of constitutional interpretation, to determine the meaning of the amendment's actual language.¹⁴⁸

148. *Nat'l Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524, 542 (Mich. 2008). One source that was helpful but not cited elsewhere in this article is John Sundquist, *Construction of the Wisconsin Constitution—Recurrence to Fundamental Principles*, 62 MARQ. L. REV. 531 (1979).