RECOURSE TO SAGES AND SUPERMEN:[1] INTERPRETING THE 1857 OREGON CONSTITUTION IN LIGHT OF THE CONVENTION'S FAILURE TO HIRE AN OFFICIAL REPORTER

by
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The lodestar of Oregon interpretive methodology is "legislative intent," whether it is statutory or constitutional. But discerning that intent is often difficult and it is made even harder when there is a dearth of meaningful history. The Oregon Constitution is one such troublesome document. The Oregon Constitutional Convention of 1857 went against the trend of constitutional conventions in its era and failed to hire a reporter to document its proceedings, leaving that task to newspapers of varying political ideologies. The Oregon delegates, like their contemporaries, relied on four primary considerations: (1) the cost; (2) the importance of immediate publication; (3) the adequacy of newspaper coverage as an alternative; and (4) the value of the debates as a historical interpretive tool. Although the Oregon delegates never so much as put the question to a vote, its contemporaries very much did; Indiana, whose 1851 constitution provides the model for Oregon's, produced more than 2,000 pages of verbatim proceedings, while other conventions produced similar records to inform their citizens and aid future interpretation.

An exploration of subsequent constitutional interpretation in Oregon reveals that, to the limited extent that the courts have relied on the legislative history of the Oregon Constitution, they have either deferred to the early judicial opinions of convention delegates who served on the courts or have looked to the inconsistent newspaper coverage as the only evidence of what was said. The

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[1] Jory v. Martin, 56 P.2d 1093, 1107 (Or. 1936) (Kelly, J., dissenting) ("Only when the [constitution] itself betrays uncertainty or ambiguity may recourse be had to what sages and supermen thought about it.").

lack of objective, unbiased history of the 1857 Convention warrants even greater caution when attempting to discern the intent of the framers of Oregon's original constitution.

INTRODUCTION

"*It is brief in its language, affording less ground for debate or construction than most of such instruments, and has caused less difference of opinion for the courts than almost any organic law with which I am acquainted.*"[2]

Lawyers like to talk. The lawyers at the Oregon Constitutional Convention monopolized so much of the discussion that, 50 years later, the Oregon Supreme

[2] John R. McBride, Address Before the Oregon Historical Society (Dec. 20, 1902) *in* SUPPLEMENT TO THE PROCEEDINGS OF THE OR. HIST. SOC'Y (1906) *reprinted in* THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, at 495 (Charles H. Carey ed., 1926) [hereinafter McBride Address].

Court recalled the convention as having been "composed largely of eminent lawyers"—even though lawyers comprised just over a quarter of the convention delegates.[3] But not all of the delegates were as keen on having their statements written down—or at least not as keen on *paying* to have them written down. That has created a gap in the records of Oregon's Constitutional Convention that has affected Oregon's approach to constitutional interpretation as compared with other states.

In modern times, constitutional interpretation in Oregon follows an established process, much like statutory interpretation.[4] The court considers the wording of a constitutional provision, caselaw interpreting that provision, "and the historical circumstances that led to its creation."[5] Those historical circumstances include what the framers themselves "believed that the provision meant."[6] In doing so, the court's purpose is "to determine the meaning of the constitutional wording, informed by general principles that the framers would have understood were being advanced by the adoption of the constitution," rather than to "fossilize the meaning of the state constitution so that it signifies no more than what it would have been understood to signify when adopted in the mid-nineteenth century."[7]

As the Oregon courts search for the meaning of constitutional provisions, they are sometimes stymied by a basic lack of evidence from the Oregon Constitutional Convention. Before 1882, the courts had only the personal opinions of former delegates.[8] Until 1925, the courts had only the official Journal of the Convention in addition to those personal opinions.[9] And until 2001, the courts had only a collection of the newspaper articles from the *Weekly Oregonian* and *Oregon Statesman*, in combination with the Journal of the Convention, to consult.[10] Even now, although

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[3] State v. Cochran, 105 P. 884, 890 (Or. 1909); THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, at 29 (Charles Henry Carey ed., 1926) [hereinafter OREGON CONSTITUTIONAL PROCEEDINGS].

[4] *See* State v. Gaines, 206 P.3d 1042, 1050–51 (Or. 2009) (setting out method of statutory interpretation).

[5] Priest v. Pearce, 840 P.2d 65, 67 (Or. 1992). The court has also described that practice as "determin[ing] the meaning of the constitutional wording, informed by general principles that the framers would have understood were being advanced by the adoption of the constitution." State v. Mills, 312 P.3d 515, 518 (Or. 2013).

[6] *Priest*, 840 P.2d at 68.

[7] *Mills*, 312 P.3d at 518.

[8] S.J. Res. 6, 12th Reg. Sess. 6, 1882 Or. Laws 197 (authorizing and instructing the Secretary of State to have printed the Journal of the Constitutional Convention in 1882).

[9] OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3.

[10] Claudia Burton & Andrew Grade, *A Legislative History of the Oregon Constitution of 1857—Part I (Articles I & II)*, 37 WILLAMETTE L. REV. 469 (2001); Claudia Burton, *A Legislative History of the Oregon Constitution of 1857—Part II (Frame of Government: Articles III– VI)*, 39 WILLAMETTE L. REV. 245 (2003). Burton and Grade's exhaustive research has expanded the information available to courts, but courts have not used it extensively. The Oregon Supreme Court has used that information, beyond identification of the source of a

researchers have unearthed committee reports and compiled additional newspaper coverage for most of the constitutional provisions, no official—and thus, at least theoretically, neutral—report of the debates and proceedings was created. The two major newspapers that covered the convention had strong political allegiances, meaning that voters who ratified the constitution may well have had wildly differing impressions of what happened there.[11] Though there may be further sources out there, they have yet to be located.[12] And, to the extent that the Oregon courts do examine the legislative history of the 1857 convention, it is most often simply to note that no recorded debate occurred.[13]

The lack of an official historical record of the convention suggests that the "history" of the debates at the convention is not necessarily a reliable tool to interpret the Oregon Constitution. Even where there appears to be some way to reconstruct what the delegates understood their words to mean—through one of the few instances of detailed recorded debate, or the fiction that the delegates had the record of Indiana debates before them—such evidence is patchy at best.[14] There is no concrete evidence that the delegates had the Indiana records before them.[15] The records of Oregon's own debates, where they exist, come primarily from newspapers, each of which had its own particular political agenda and spin.[16] The wide variation in the content of those newspapers should counsel against relying heavily on even what looks like the most complete coverage, or assuming that by consulting multiple newspapers, one can patch together the entire story.

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provision, in four cases. State *ex rel.* Kristof v. Fagan, 504 P.3d 1163, 1170 (Or. 2022); Haugen v. Kitzhaber, 306 P.3d 592, 601 (Or. 2013); State v. Wheeler, 175 P.3d 438, 447 (Or. 2007) (noting minor change in wording of Article I, section 16); State v. Ciancanelli, 121 P.3d 613, 628 (Or. 2005) (quoting letters to the editor in newspaper coverage collected by Burton & Grade).

[11] *See infra* notes 170–197 and accompanying text regarding inconsistencies in newspaper coverage.

[12] For example, see *infra* notes 206–216 and accompanying text regarding Patrick Malone and the search for his stenographic notes. Deady's diaries from 1849 or so to 1871 appear to have been lost. Malcolm Clark, Jr., *Introduction* to PHARISEE AMONG PHILISTINES: THE DIARY OF MATHEW P. DEADY 1871–1892, at xiii (Malcolm Clark, Jr. ed., 1975).

[13] *See* Priest v. Pearce, 840 P.2d 65, 68 (Or. 1992); Monaghan v. Sch. Dist. No. 1, Clackamas Cnty., 315 P.2d 797, 802 (Or. 1957).

[14] *See* Jack L. Landau, *A Judge's Perspective on the Use and Misuse of History in State Constitutional Interpretation*, 38 VAL. U. L. REV. 451, 479 (2004) ("Sometimes the courts employ the fiction that sources from other jurisdictions were, at least in a temporal sense, 'available' to the framers.").

[15] *See infra* text accompanying note 281.

[16] OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 10.

In Parts I–III, I examine the arguments for and against hiring an official reporter in seven different states, focusing particularly on Oregon and Indiana.[17] There were four common themes: (1) the cost of hiring a reporter; (2) the importance of immediately publishing the debates; (3) the adequacy of newspaper reporting as a substitute for an official reporter; and (4) the value of the debates as historical interpretive tools. The other states all chose to hire a reporter while Oregon did not—and never even contemplated publishing the debates contemporaneously.

In Part IV, I discuss the immediate consequences of the failure to hire a reporter in Oregon—biased newspaper coverage as the only record of the convention's discussions—as well as the attempts that were made to remedy it. I then explore the effect on constitutional interpretation of the presence of former convention delegates on the Oregon and Indiana Supreme Courts. I examine the ways in which each state has used the absence or presence of official reports of the debates as interpretive tools.

Ultimately, I conclude that the lack of an official report of the debates and proceedings in Oregon has resulted in the Oregon appellate courts' reduced reliance on the statements of delegates at the constitutional convention—particularly compared to Indiana, where the Indiana Supreme Court routinely cites to the precise statements of various legislators as an interpretive aid.

My conclusion: Oregon courts should be very cautious about relying on the record of debates at the Oregon Constitutional Convention as an aid to interpreting the intent of the constitution's framers. The record is demonstrably incomplete and often internally inconsistent. When the courts look to it in search of the intent of the individuals who framed the constitution, the courts should treat those records with caution and dig further into the ways that issues lurking beneath the surface—the biases of newspaper reporters, the particular allegiances of delegates—may have distorted the image of the framers' statements that we now have.

I. COMMON THEMES FROM THE CONVENTIONS

In this Article, I compare Oregon's Constitutional Convention to the proceedings of six other contemporary constitutional conventions: Indiana, Iowa, New York, Ohio, California, and Wisconsin. Those other state conventions took place in the decade preceding Oregon's own constitutional convention, and each produced an official report of the debates and proceedings.[18] Although it is impossible

[17] An initial note on terminology: there were several *newspaper reporters* present at the convention. The debates concerned whether to hire an *official* convention reporter who would take down the debates verbatim, also called a stenographer at other conventions.

[18] 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA (photo. reprt. 1935) (H. Fowler ed.,

to control for all the various factors that affected the convention proceedings in a particular state,[19] common themes do appear in the records. There are four common themes: (1) the cost of hiring a reporter; (2) the importance of immediate publication of reports; (3) the sufficiency of newspaper reporting; and (4) the historical value of the debates, including to future constitutional interpretation.

First, whether or not the respective legislatures had specifically ordered the hiring of a stenographer, the delegates tended to resist the cost. The delegates in Oregon, Indiana, and Wisconsin were accused of being "penny wise and pound foolish" for objecting to the cost—a particularly pointed criticism in Indiana, where the cost was budgeted into the cost of the convention.[20] Several resistant delegates in Wisconsin and Oregon suggested that the people who wanted to hire a reporter should pay for it, or pay by the word spoken.[21] In Iowa, the delegates suggested using the reported debates as a substitute for the mandatory journal, and argued endlessly over the cost of printing.[22]

Second, sentiment toward concurrent publication varied. Oregon was the only state in which there was *no* sentiment for immediate publication—indeed, it was disclaimed before the debate even began.[23] In California, the committee assigned to the question of hiring a reporter recommended against immediate publication, though they lost that battle and the reports were published bilingually.[24] In Ohio,

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1850), https://indianamemory.contentdm.oclc.org/digital/collection/ISC/id/5349 [hereinafter INDIANA REPORT OF DEBATES 1]; REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK (William G. Bishop & William H. Attree eds., 1846), https://hdl.handle.net/2027/uc2.ark:/13960/t91836k50 [hereinafter NEW YORK REPORT OF DEBATES]; JOURNAL OF THE CONVENTION TO FORM A CONSTITUTION FOR THE STATE OF WISCONSIN (H. A. Tenney, J. Y. Smith, David Lambert & H. W. Tenney eds., 1848), https://hdl.handle.net/2027/hvd.hx4n6x [hereinafter WISCONSIN REPORT OF DEBATES]; REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER, 1849 (J. Ross Browne ed., 1850), https://hdl.handle.net/2027/hvd.32044076907989 [hereinafter CALIFORNIA REPORT OF DEBATES]; 1 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA (W. Blair Lord ed., 1857), https://publications.iowa.gov/7313 [hereinafter IOWA REPORT OF DEBATES]; REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO 1850–51 (J. V. Smith ed., 1851) [hereinafter OHIO REPORT OF DEBATES].

[19] For example, the relative size of each state and its political makeup at the time of the convention, whether it was the constitution upon which statehood would be based, and whether slavery was an issue.

[20] INDIANA REPORT OF DEBATES 1, *supra* note 18, at 9; OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 2, at 60; WISCONSIN REPORT OF DEBATES, *supra* note 18, at 35.

[21] WISCONSIN REPORT OF DEBATES, *supra* note 18, at 200; OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 134.

[22] IOWA REPORT OF DEBATES, *supra* note 18, at 40, 44.

[23] OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 58.

[24] CALIFORNIA REPORT OF DEBATES, *supra* note 18, at 26, 163–64.

the delegates strongly favored publication and spent a great deal of time arguing about how quickly and efficiently they could translate the reports into German so that constituents who did not speak English would be able to understand.[25] The reasons for immediate printing? In Wisconsin, it was so that constituents could "give [the delegates] the benefit of their instruction" during the course of the convention.[26] Iowa's reasoning was similar.[27] In Indiana, it was the explicit expectation that constituents would use the reports of those debates, in addition to the text of the constitution itself, to decide whether to adopt the constitution.

Third, delegates disagreed about the adequacy of newspaper reporters as a substitute for an official stenographer. In Indiana, the chief opponent of hiring a stenographer said that the newspaper reporters could cover everything "essential for [the voters] to know."[28] But part of the argument for publication of official reports in Indiana was that newspaper articles gave only "fragments" of information about the debates.[29] Iowa delegates repeatedly asserted that the newspapers would not fully describe the debates and so were insufficient.[30] Delegates in New York, Wisconsin, and Ohio also complained about inaccuracies in newspaper reporting of their conventions, though the New York delegates made impassioned speeches in favor of newspaper reporters as a superior form of reporter.[31] Oregon, of course, relied entirely on newspaper reporters—and experienced the same problems that concerned the delegates in other states. No one at the Oregon Convention argued that the reporters from the local papers would provide less-biased coverage than an official reporter.[32]

Fourth, delegates disagreed about the utility of the reports when it came to interpreting the text of the constitution itself. In Oregon, two delegates argued that the record of the debates would be the way for future interpreters to understand "the will and intention of the legislators."[33] They also argued passionately that future generations would be glad to have the history of the constitutional convention before them, analogizing to the U.S. Constitution.[34] In New York, one delegate pointed out that the records of the 1821 convention had "served as a guide and

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[25] OHIO REPORT OF DEBATES, *supra* note 18, at 33–34, 77, 125–29.

[26] WISCONSIN REPORT OF DEBATES, *supra* note 18, at 36.

[27] IOWA REPORT OF DEBATES, *supra* note 18, at 25.

[28] INDIANA REPORT OF DEBATES 1, *supra* note 18, at 27.

[29] *Id.* at 50.

[30] *See* IOWA REPORT OF DEBATES, *supra* note 18, at 25.

[31] NEW YORK REPORT OF DEBATES, *supra* note 18, at 61–65, 825, 842, 1080; WISCONSIN REPORT OF DEBATES, *supra* note 18, at 44; OHIO REPORT OF DEBATES, *supra* note 18, at 94, 124, 711.

[32] OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 133–45.

[33] *Id.* at 140.

[34] *Id.*

landmark in the construction of the Constitution."[35] Iowa was even more explicit, with one delegate saying that the record of debates would become "a law book" that would be authority for constitutional interpretation.[36] In Indiana, after the vivid comparison of the constitution to the Ten Commandments, a delegate said that the constitution they created should be so "plain, and simple . . . that any child may understand."[37] A different delegate also pointed to the U.S. Constitution and said that Indiana's debates would be just as important to Indianans.[38] Ohio delegates also analogized the value of their debates to those of the U.S. Constitutional Convention.[39]

Though they included arguments that the debates would be a tool for constitutional interpretation, Oregon and Iowa's conventions appear to be two of the few where delegates argued that they were essentially engaged in the clerical work of copying and pasting various provisions from other states. But Oregon and Iowa's conventions were also seven years later than the other conventions, and so did indeed have a broader array of constitutions to consult.

II. THE OREGON CONSTITUTIONAL CONVENTION OF 1857

It is worth noting at the outset that the question of hiring a reporter was never actually put to a *vote*, only discussed and ultimately abandoned.[40] Oregon's Constitutional Convention raised two of the four common issues: (1) cost; and (2) future historical value. The drafters of the Oregon Constitution consulted other state constitutions and lifted most of its constitutional provisions from those constitutions.[41] The best evidence of that substantive copycat approach is the text of the constitution itself, which draws heavily (if not copies entirely) from other state constitutions.[42] The delegates repeatedly referred to other state constitutions during the debates.[43]

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[35] NEW YORK REPORT OF DEBATES, *supra* note 18, at 62.

[36] IOWA REPORT OF DEBATES, *supra* note 18, at 44 (statement of Delegate W. Penn Clarke).

[37] INDIANA REPORT OF DEBATES 1, *supra* note 18, at 30.

[38] *Id.* at 32.

[39] OHIO REPORT OF DEBATES, *supra* note 18, at 94.

[40] OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 64, 104, 145.

[41] *E.g.*, David Schuman, *The Creation of the Oregon Constitution*, 74 OR. L. REV. 611, 611 (1995) ("172 of its 185 sections were copied from other constitutions."); W.C. Palmer, *The Sources of the Oregon Constitution*, 5 OR. L. REV. 200, 201–14 (1926) (identifying the source of each provision of the Oregon Constitution). *But see* Helen Leonard Seagraves, *Oregon's 1857 Constitution*, 30 REED COLL. BULL. 3, 3 n.1 (1952), *cited in* Schuman, *supra* (critiquing Palmer's methodology).

[42] *E.g.*, Palmer, *supra* note 41, at 201–14.

[43] Burton, *supra* note 10.

Those constitutions included those of California, Delaware, Illinois, Iowa, Massachusetts, Maine, Michigan, Missouri, New Hampshire, New York, Ohio, Pennsylvania, Texas, Virginia, Wisconsin, and, of course, Indiana.[44]

There is also ample evidence that the drafters of the Oregon Constitution were using not only the *text* of other state constitutions, but also the official reports of the debates and proceedings of other constitutional *conventions* to guide both their procedural and substantive approaches to creating a constitution. That was clear from the first moments of the debates in Oregon, when one delegate moved to hire a reporter and explained, "In other bodies of this kind I see it is usual to have a reporter of debates to preserve a record of the why and wherefore members support particular features in a constitution."[45] He went on to add, "The debates that I have examined, or rather the proceedings of conventions that I have examined, have this officer in them."[46] Others specifically identified the debates and proceedings of the Massachusetts Constitutional Convention,[47] the 1821 and 1846 New York Constitutional Conventions,[48] the 1849 California Constitutional Convention,[49] and the 1850 Ohio Constitutional Convention.[50]

To summarize: we know that at least some of the Oregon delegates had consulted the official reports of the debates and proceedings from California, Massachusetts, New York, Ohio, and likely others. We also know that they consulted the constitutions of at least 16 different states, 14 of which had produced official reports of the debates and proceedings at their constitutional conventions.[51] Although the convention delegates do not specifically reference the reports of the Indiana Constitutional Convention, at least one Oregon Supreme Court case has speculated that

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[44] *Id.* (collecting references and page numbers in OREGON CONSTITUTIONAL PROCEEDINGS).

[45] OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 57 (statement of James Kelly).

[46] *Id.* at 60. Kelly didn't specify which proceedings he had reviewed. Between 1820 and 1857, 25 states held constitutional conventions, 18 of which were formally reported. *See infra* Appendix A: State Constitutional Convention Reports, 1820–1857.

[47] OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 61, 97 (George Williams); OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH, 1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS (White & Potter eds., 1853), http://name.umdl.umich.edu/AEW7439.0001.001.

[48] OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 59, 68–69, 73 (John Kelsay, Delazon Smith, and Thomas Dryer).

[49] *Id.* at 75 (statement of W. H. Watkins). See further discussion of the California Constitutional Convention *infra* notes 165 to 169 and accompanying text.

[50] OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 68 (statement of John Kelsay).

[51] OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3.

the delegates may have had those reports before them,[52] and Oregon has treated those reports as fair game when it comes to history.[53]

At the convention, the lawyers among the delegates "monopolized most of the time."[54] Those lawyers were later described as "as among the ablest lawyers of this state and [they] exercised an active and effective leadership in its deliberations."[55] Three—Matthew Deady, Cyrus Olney, and George Williams—were serving on the territorial Supreme Court at the time of the convention.[56] And five others—Reuben Boise, James Kelly, John Kelsay, Paine Page Prim, and Erasmus Shattuck—would go on to serve on the Oregon Supreme Court, interpreting the constitution that they had helped to construct.[57] In fact, nearly one-fifth of the lawyers in Oregon were delegates to the constitutional convention.[58]

The issue of hiring a reporter crossed both professions and party lines.[59] The delegates who favored hiring a reporter made one primary argument: they were engaged in important historical work that should be preserved for future generations and would be useful for future interpretation of the constitution.[60] Unlike other advocates of reporters at other state conventions, future Oregon Supreme Court

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[52] Monaghan v. Sch. Dist. No. 1, Clackamas Cnty., 315 P.2d 797, 802 (Or. 1957).

[53] Armatta v. Kitzhaber, 959 P.2d 49, 57 (Or. 1998) ("Although it is not as helpful as history or case law revealing the intent of the framers of the Oregon Constitution, information that demonstrates the intent of the framers of the Indiana Constitution of 1851 can be instructive when interpreting a provision of the Oregon Constitution patterned after the Indiana Constitution.").

[54] OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 484. The farmers spoke the least even though farmers outnumbered lawyers 30 to 19. George H. Himes, *Constitutional Convention of Oregon*, 15 Q. OR. HIST. SOC'Y 217, 218 (1914). Carey, writing 10 years later, gives the number of farmers at 33 and lawyers at 18. OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 29.

[55] *Monaghan*, 315 P.2d at 802. For a thorough discussion of the biographies and political alliances of the men at the convention, see generally BARBARA S. MAHONEY, THE SALEM CLIQUE: OREGON'S FOUNDING BROTHERS (2017).

[56] Himes, *supra* note 54, at 218.

[57] *Id.*; *Monaghan*, 315 P.2d at 802.

[58] There were 104 lawyers in Oregon in 1860, of 17,735 white men age 20 and over. JOSEPH C. G. KENNEDY, SEC'Y OF THE INTERIOR, POPULATION OF THE UNITED STATES IN 1860 COMPILED FROM THE ORIGINAL RETURNS OF THE EIGHTH CENSUS 400 tbl.1, 405 tbl.6 (1864). There were 18 lawyers at the Oregon Constitutional Convention. OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 29. Assuming a substantial number of lawyers did not leave Oregon between 1857 and 1860, that means that nearly one-fifth of Oregon's lawyers were delegates to the Constitutional Convention.

[59] OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3. The most outspoken advocates for an official reporter were two lawyers and a newspaper editor (James Kelly, Delazon Smith, and Thomas Dryer) while the most outspoken against were a lawyer and a farmer (Thomas Logan and Frederick Waymire).

[60] OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 58, 60, 140–41.

Justice Kelly did *not* want to make the proceedings available immediately to the ordinary voters who would consider the constitution.[61] It is not clear why; perhaps he believed his proposal would be more palatable to the penny-pinching delegates if it did not include the cost of printing as well as reporting. That would be supported by his later complaint, during a discussion of the cost of printing the official *journals* of the convention, that many of the delegates had been unwilling to pay a small amount "for reporting and preserving the debates—a very important part of the proceedings."[62] The attempt to downplay the cost by delaying printing also aligned with Olney's immediate objection that "[i]f we incur the expense of reporting the debates, we must immediately pay the reporter for his services."[63]

Leaving aside the question of when to publish the reports, Kelly focused almost entirely on the argument regarding historical value. He argued, "Such a body as this assembles but once in a lifetime; its proceedings are sought after as a matter of historical record."[64] He identified their "duty to transmit those things to posterity which take place at the birth of a state, to those who may come after us, for their guidance, and for the government."[65] When there was an actual proposal for the price of reporting on the table, he likened the need for reports of their own debates to the desire for a record of the U.S. Constitutional Convention, commenting on just how much Madison's notes had been worth and saying, "It is true the interest does not cluster round us that they were the center of, but it may not be so in aftertimes."[66]

The *Statesman* reported briefly that Kelly thought that the debates were more important than the journal, that people would be more interested, and that "[t]he debates also would be serviceable in construing the constitution."[67] The *Oregonian* covered his argument at length, as follows. He specifically noted "how eagerly men look back to see the motives that prompt men in the formation of a state; what they assign as their reasons for supporting this clause in the constitution, and opposing that."[68]

He warned that the convention journal, which recorded only amendments proposed and votes taken, would not suffice. Rather, "the life and soul of the whole proceedings here [are] . . . our reasons why we have acted thus . . . . The journal will not show them. Perhaps it will never be referred to in them, but it is not so with the

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61 *Id.* at 58.

62 *Id.* at 230. The resolution to print 300 copies of the journal did not pass. *Id.*

63 *Id.* at 58.

64 *Id.* at 60.

65 *Id.* at 141.

66 *Id.* at 140.

67 *Id.* at 145.

68 *Id.* at 60.

debates."[69] He directly linked the records of the convention to future legal interpretation:

> Every one [sic] knows that the spirit of a law is that which entered into its production at the time it was enacted. What reasons demanded it; what was the will and intention of the legislators; what were their motives for passing that law? How will they be gathered? From the record and from the history of the times. But if these be gone, how are we to arrive at the motives of that legislature?[70]

Kelly went on to say that it was the convention's duty to document these proceedings for future generations "for their guidance, and for the government."[71]

Another famous delegate, Delazon Smith, also argued for the intrinsic historical value, saying, "I believe the people now in the country, they who are to pass upon our work, will read with avidity now and hereafter, the proceedings of this convention."[72] He did not consider the journal sufficient either, saying of the proposed reports that future Oregonians "will be pleased to know that they possess the record. We do not publish it now, but in the meantime the manuscript is in their possession; but if this motion does not prevail then it is lost forever."[73] One unfortunate delegate favored hiring a reporter, but the newspaper coverage elides almost everything that he said on any topic.[74]

But concerns about cost animated almost every decision in the making of the Oregon Constitution, and the cost of a reporter was no exception.[75] Part of the

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[69] *Id.* at 140.

[70] *Id.* at 140.

[71] *Id.* at 141.

[72] *Id.* at 138.

[73] *Id.*

[74] The *Oregonian* reported that Marple "followed in a speech of considerable length" in favor of an official reporter but does not summarize it. *Id.* at 143. Likewise, the *Statesman* reports only, "Mr. Marple addressed the convention at length. He closed by announcing that he should support [the motion]." *Id.* at 146. In fact, Marple's statements are rarely discussed in detail. *E.g.*, *id.* at 160 ("Mr. Marple . . . spoke at length but gave way . . . to a motion to adjourn for dinner"), 169, 195, 270. It's possible that the failure to transcribe any of his speeches was because "he succeeded in rendering himself so much disliked by his tendency to indulge in discussion in a very loud voice, and with much violence . . . . His caliber intellectually was small . . . ." McBride Address, *supra* note 2, at 484. Marple had previously convinced a group of 40 men to travel to and settle Coos Bay in 1853, with "gilded and eloquent descriptions, which seemed to be clothed in romance." ORVIL DODGE, PIONEER HISTORY OF COOS AND CURRY COUNTIES, OR., 126 (1898), http://www.orww.org/Coquelle_Trails/References/Dodge_1898.pdf.

[75] Jack L. Landau, *Governing on the Cheap: Penurious Clock-Peddling Yankees, Weeping Jeremiahs and the Founding of the Oregon Constitution*, 69 OR. STATE. BAR BULL. 25, 25–26 (2009), https://www.osbar.org/publications/bulletin/09jun/orcons.html (summarizing debates over hiring costs of convention). Williams and Olney, the two territorial Supreme Court justices,

problem was that the delegates fundamentally disagreed about how much a reporter would cost, with estimates ranging from $400 to over $2,000.[76] Kelly was unimpressed, accusing the men who opposed hiring a reporter of being "penny wise and pound foolish" for complaining about the cost—saying that they were men who would prefer to "allow what is said and done at this convention to pass to oblivion."[77] Unswayed, his opponent warned that the expenses of the convention would already "swallow up the entire revenue of the territory for one year, if not more," and he did not want to add to them.[78] He proposed an alternative option: "[E]ach member shall pay *in proportion to the amount or bulk reported for him*, to be estimated by the reporter and approved by the convention."[79] Smith, perhaps the most verbose of all the delegates, complained, "I think it would break me to have to pay for my much speaking."[80] Smith and Kelly's desire for a reporter was frustrated. The motion to accept the proposal of a potential reporter was ultimately withdrawn. No official record of the debates was created. As a result, the only record of the debates comes from private sources.

III. OTHER STATE CONSTITUTIONAL CONVENTIONS

A. The Indiana Constitutional Convention of 1850

Indiana's delegates focused on three major points when they debated what to do about the reports: (1) the cost of a reporter; (2) importance of immediate publication; and (3) the future value of the debates.

The convention began with an attempt to reduce the number of secretaries from four to two to save money.[81] Immediately, one delegate called "that sort of economy which might be described as 'penny wise and pound foolish'" and pointed to the precedent of other conventions "composed of a much smaller number of Delegates than was here assembled" and yet had five or six secretaries.[82] That same delegate "had the official report of the debates at hand" at the Kentucky Constitutional Convention and had "taken some pains to examine the manner of proceeding

objected on grounds of expense, not historical irrelevance. OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 58, 140, 142.

[76] OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 141. The proposed reporter, Patrick Malone, had offered to work for $10 per "day actually employed in note-taking and making the transcript." *Id.* at 134–35.

[77] *Id.* at 60.

[78] *Id.* at 105.

[79] *Id.* at 134 (emphasis added).

[80] *Id.* at 138.

[81] INDIANA REPORT OF DEBATES 1, *supra* note 18, at 9.

[82] *Id.*

adopted . . . in the different States of the Union."[83] Those states also included Ohio, New York, and Virginia.[84]

Despite the fact that the legislature had actually provided for the employment of a reporter and that other conventions had employed them, one delegate, Milton Gregg, offered a resolution "[t]hat we deem it inexpedient to report and publish the debates of this Convention at the expense of the State, and to this end we respectfully decline the services of a Stenographer tendered us by the Legislature."[85] Gregg was the greatest opponent, arguing that his constituents would see it as "a useless expenditure of money, and the publication of the debates . . . as the consummation of human folly."[86] Gregg argued that "the leading papers of the State . . . will be able to keep their readers well posted up in all matters essential for them to know."[87]

The delegates argued—at length, ironically—over whether employing a stenographer to document their debates would actually *lengthen* the convention itself, thus costing even more money to report.[88] Gregg alluded to the Kentucky convention where (allegedly), "one member alone made 199 speeches, and would have made the even 200 if the previous question had not been sprung upon him."[89] He warned that, of the 150 delegates at the Indiana convention, they were "all deeply imbued with the same perhaps laudable, ambition to do something to immortalize our names, and transmit them to posterity; and it is quite natural that we should seek to avail ourselves of this golden opportunity, now offered us to do so."[90] He proposed that, if there was an official reporter, they would each "set our wits to work, to concoct a speech—no matter on what subject, nor how irrelevant it may be to the subject matter under consideration, so it be of sufficient length, and full of sound and fury, signifying nothing."[91]

In response to Gregg's rather extended dissertation on speechmaking and the role of Democrats at the convention, Daniel Kelso argued that hiring a stenographer

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[83] *Id.* at 14–15. The Kentucky Constitutional Convention had taken place the previous year. *See infra* Appendix A: State Constitutional Convention Reports, 1820–1857.

[84] INDIANA REPORT OF DEBATES 1, *supra* note 18, at 17–18.

[85] *Id.* at 25. Gregg was a fervent Whig who objected to the behavior of the Democratic majority at the convention. *Id.* at 29.

[86] *Id.* at 30.

[87] *Id.* at 27. Later, Gregg would note that the stenographer was also including "speech[es] that [were] never made in this Hall" in the official reports after being supplied with copies by delegates. 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1264 (photo. reprt. 1935) (H. Fowler ed., 1850), https://indianamemory.contentdm.oclc.org/digital/collection/ISC/id/6358/rec/2 [hereinafter INDIANA REPORT OF DEBATES 2]. The issue arose again later. *Id.* at 2056.

[88] INDIANA REPORT OF DEBATES 1, *supra* note 18, at 17, 26–27.

[89] *Id.* at 27.

[90] *Id.* at 26.

[91] *Id.*

would, in fact, shorten the convention because the delegates would be more careful with their words.[92] He said:

> I think [Gregg] will want very few of such cayenne pepper speeches published as the one he has just made, and this, perhaps, will be the last one he will make, for I have no doubt that when he sees what he has said, published, he will be rather ashamed of it.[93]

As part of their debate over the cost of hiring a stenographer—which, keep in mind, the legislature had instructed them to hire[94]—the delegates invoked the current and future value of recording their proceedings. Another delegate, Robert Dale Owen, argued, "The debates which occurred in the Convention that formed the Constitution of the United States, are always read with much interest."[95] He acknowledged, "I will not say that ours will be as valuable as those debates are, but they will be as important to Indiana as those are to the United States."[96] He called the debates themselves "a work which is to remain throughout all time, and to be read at each man's hearthstone, and in every dwelling within the State."[97]

The discussion did touch on the future use of the debates to understand the constitution that they were creating. Owen said, "[T]he reports of our debates . . . will be eminently useful, as a commentary upon the Constitution which we are about to form."[98] Gregg argued fervently against that idea:

> Why, sir, I would as soon think of looking into the Koran of Mahomet, or of consulting the sublime and beautiful vision of John in the Isle of Patmos, for an elucidation of the meaning of the ten commandments—a code of morals that adapts itself to the capacity of every mind, and fully explains itself without the aid of a commentator.[99]

Gregg purported to be optimistic about the clarity of the constitution that they would form. "[M]ay I not hope that our Constitution, when fully digested, will be found so perfectly free from all ambiguity as to require none of those factitious aids

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[92] *Id.* at 30.

[93] *Id.* Kelso also suggested that the attempt to reject the services of a stenographer was not serious; rather, "the gentlemen wanted, merely to get a sly hit at the democratic members in this hall, and sought, rather ingeniously, to whip the democrats over the shoulders of the Stenographer." *Id.*

[94] *Id.* at 25.

[95] *Id.* at 32.

[96] *Id.*

[97] *Id.* at 31.

[98] *Id.* at 31–32.

[99] *Id.* at 30. Perhaps realizing that he'd gone a little over the top, Gregg added, "Not that I would be so irreverent as to compare the crude and imperfect Constitution which we may deliver to the people, for their future governance, with that divine and perfect Constitution delivered to Moses amid the thunderings of Mount Sinai." *Id.*

to render it intelligible?"[100] He did not specifically refer to legal analysis, but that that they should "all labor, with one mind and one spirit, to make it, as it should be, so perfectly plain, and simple, and consistent, in all its parts, that any child may understand it[.]"[101]

The pro-stenographer faction prevailed. The further topic of debate was one that entirely escaped Oregon's delegates: how important it would be for the voters to have not just the proposed constitution, but the debates that had led to it. Recall that at the Oregon Constitutional Convention, even the most fervent advocate for a reporter said at the very beginning that it would not be advisable to publish the reports immediately.[102] By contrast, in a discussion about distributing the proceedings to the Indiana constituents, future Indiana Supreme Court Justice Hovey said that the reports of debates printed and circulated immediately "would be far preferable to the fragments that might reach their constituents through the medium of newspaper press."[103] Kelso argued that the people would be the ones actually voting on the constitution, and so it was "necessary . . . that the people should be advised from day to day of our proceedings and of all the arguments advanced here, for or against such propositions as may be presented to us; so that they may, when the constitution is presented to them, act understandingly in regard to it."[104] Days later, Kelso repeated that their constituents "want to know our reasons for acting this way upon one proposition, and that way on another, so that they may themselves be enabled to pass a correct judgment on the result of our labors."[105] That is, Hovey and Kelso believed that the voters of Indiana could not make a fully informed decision about just what they were adopting unless that had something more than the text of the constitution.

Not all of the delegates shared that viewpoint. William F. Sherrod did believe it would be good for people to know what was happening at the proceedings, but that "the people were not particularly interested in what the peculiar views of this or that gentleman might be upon the various subjects discussed there. They were only interested in the result of their deliberations . . . ."[106] Those results would be "submitted to them in the shape of a Constitution, [and] they would be governed by their own view of right and wrong. They would weigh it in the scales of equal laws and equal rights, and not the opinions of any one man or set of men."[107] There

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100 *Id.*

101 *Id.*

102 OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 58 (statement of James Kelly).

103 INDIANA REPORT OF DEBATES 1, *supra* note 18, at 50.

104 *Id.* at 30–31.

105 *Id.* at 117.

106 *Id.* at 118.

107 *Id.*

were further attempts to fire the stenographer partway through the convention, but they did not succeed.[108]

As noted above, Oregon's Constitution is famously modeled on the Indiana Constitution. The Oregon Supreme Court has rarely consulted the official report of the debates and proceedings of the Indiana Constitutional Convention to shed light on the meaning of Oregon's Constitution, based on the fiction that Oregon's framers had those reports.[109] The infrequency with which the court has done so is somewhat surprising, given how often a particular constitutional provision has been copied from the Indiana Constitution and was not debated at the Oregon Constitutional Convention. In that circumstance, the court might be expected to look to Indiana's report of its debates and proceedings, which spans over 2,000 pages in two volumes.[110]

Oregon and Indiana were far from the only states that faced questions about the wisdom of hiring a reporter and publishing the record of the debates. Five roughly contemporaneous conventions in New York, Wisconsin, California, Ohio, and Iowa touched on the topic, with many of the same issues at play.

B. Iowa (1857)

The Iowa Constitutional Convention of 1857 faced problems like those in Oregon when it dealt with the question of a reporter: (1) the cost; and (2) the historical value of the reports. It provides a useful contrast to Oregon's because both took place during a time of rapidly increasing national tension. Iowa had entered the Union in 1846 with a constitution approved by a bare 456-vote majority.[111] Nine years later, the legislature referred the question of another constitutional convention to the voters, who adopted it and assembled a convention in January of 1857.[112] That convention was required to keep a "journal of its proceedings" and to pay for its publication.[113]

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[108] Gregg led that charge. INDIANA REPORT OF DEBATES 2, *supra* note 87, at 1262, 1265.

[109] *E.g.*, State v. Mills, 312 P.3d 515, 523–24 (Or. 2013) (consulting Indiana debates); Armatta v. Kitzhaber, 959 P.2d 49, 57 (Or. 1998) (consulting Indiana debates). *See supra* notes 45–53 and accompanying text for a discussion of the evidence that the delegates had various constitutional convention proceedings before them.

[110] INDIANA REPORT OF DEBATES 1, *supra* note 18.

[111] STATE OF IOWA GEN. ASSEMB., HISTORICAL TABLES OF THE IOWA LEGISLATURE: 1846 IOWA CONSTITUTIONAL CONVENTION MEMBERS, https://www.legis.iowa.gov/docs/publications/BHT/1047923.pdf. Some of the debates over that 1844 constitution are collected in FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL CONVENTIONS OF 1844 AND 1846 ALONG WITH PRESS COMMENTS AND OTHER MATERIALS ON THE CONSTITUTIONS OF 1844 AND 1846 (Benjamin F. Shambaugh ed., 1900), https://www.legis.iowa.gov/docs/publications/ICNST/961925.pdf.

[112] IOWA REPORT OF DEBATES, *supra* note 18, at ii.

[113] *Id.* at 2 (quoting Act of Jan. 24, 1855, ch. 78, 1855 Iowa Laws § 11).

The Iowa Convention was even smaller than Oregon's, with only 36 delegates—including 14 lawyers and 12 farmers.[114] It promptly took up the question of how to record and distribute copies of the debates.[115] Some delegates preferred to distribute copies of newspapers, while others wanted to distribute official reports of debates to their constituents, saying, "It is not to be supposed that any of our papers will report and publish our debates in full."[116] The purpose of daily distribution of the debates would be to keep constituents informed and give those constituents the opportunity to weigh in on the proceedings.[117] The newspapers would be insufficient; even constituents who read the newspaper had "no [other] means by which they can inform themselves of the doings of this convention" other than the official debates published by the convention.[118] In arguing over how many copies of the printed reports should be given to each delegate to distribute in his district, one emphasized, "I desire to have every side informed upon this matter. I am acquainted with persons of both parties in my district" who could distribute the reports.[119]

Early in the debates, one delegate noted that the choice to hire a reporter was "in accordance with the course pursued by all State Constitutional Conventions in the Union, at least for many years past."[120] The proposed price? Three dollars per page to the reporter.[121] This, the delegate explained, was roughly equivalent to the price of reporting in other states.[122]

When arguing about printing quality, the delegates appealed to the historical value of their debates. One asserted, "This volume should be placed in the State libraries of every State in the Union, and in the libraries of every college and historical society in the United States . . . . It should go into every county and township library in this State."[123] He was optimistic about recouping some of the cost by selling copies of the collected debates.[124] But other delegates did not see the question as settled; they continued to argue about costs. Rather than disputing the quality of the bound copies of debates, they argued that fewer copies should be printed, referring specifically to the number printed in Massachusetts, Ohio, and Indiana.[125]

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114 *Id.* at 4.

115 *Id.* at 25.

116 *Id.*

117 *Id.*

118 *Id.* at 29, 72 ("[N]ewspaper reporting in this city [is] a humbug.").

119 *Id.* at 28.

120 *Id.* at 27.

121 *Id.* at 26. The reporter was expected to pay any necessary "corps of reporters" from that amount. *Id.*

122 *Id.* at 27.

123 *Id.* at 27–28.

124 *Id.* at 28.

125 *Id.* at 41. The delegates did not agree about the number of copies printed in those other states.

That prompted a dispute over whether they would violate their contract with the printer by reducing the number of printings.[126] They also suggested that there was no need to print a 'journal' independent of the report of debates, because the report would capture everything required.[127] One delegate suggested that they could save costs and better inform their constituents by simply having the reporter prepare a synopsis instead.[128]

The Iowa delegates also disagreed about a familiar point from Oregon's debates: the historical value of the record of debates. Like Logan would a few months later, a delegate argued that their constitution-making was a minor activity, saying, "[W]ith the lights we have already before us, with the constitutions of thirty other States shining upon our pathways, we shall not have need to remain here two or three months to revise and re-form our constitution."[129] The response appealed specifically to the usefulness of the record of debates for future court interpretation:

> [E]very gentleman of reading and intelligence will want a copy of this work in his library as a part of the history of the State. In your courts, upon every question of constitutional construction, it will be considered authority for the purpose of ascertaining the intention of the members of the Convention, in adopting any particular clause of the constitution. It then becomes an authority, a law book, and used as such.[130]

By that point, there was no question of whether to have a reporter in the first place—only the perpetual question of how much money to spend on printing and distribution. The Iowa voters formally adopted that constitution in the beginning of August, with 40,311 voting for it and 38,681 voting against.[131]

C. New York (1846)

New York's constitutional convention debates follow some familiar threads: (1) the choice between a reporter and newspaper coverage; and (2) the future historical value of the documentation. The delegates appear to have agreed that the public "should have spread before them the reasons, motives, and objects" of the delegates, as well as "the arguments adduced to sustain them."[132] The dispute arose over how best to ensure that information was available. After one delegate, George A.S. Crooker, moved to appoint two official stenographers, another protested that

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126 *Id.* at 55–59.

127 *Id.* at 41.

128 *Id.* at 44.

129 *Id.* at 42.

130 *Id.* at 44.

131 STATE OF IOWA GEN. ASSEMB., HISTORICAL TABLES OF THE IOWA LEGISLATURE: 1857 IOWA CONSTITUTIONAL CONVENTION MEMBERS, https://www.legis.iowa.gov/docs/publications/BHT/1047924.pdf.

132 NEW YORK REPORT OF DEBATES, *supra* note 18, at 65.

there were already several newspaper reporters who had "most fully and fairly reported" the debates.[133] As he argued, "[t]here was no necessity to pay money out of the Treasury" to get official reports; "it could not possibly induce these gentlemen now engaged to make any better reports than they now publish."[134] Several others agreed that the newspaper reporters were doing an excellent job.[135]

Unlike Oregon's delegates, some of the New York delegates argued that independent newspaper reporters would present a *more objective* depiction of the convention.[136] Some were willing to swear to "the accuracy and faithfulness" of the newspaper coverage so far.[137] They repeatedly made reference to the "fullest and freest kind of competition" and the "fullest and fairest competition without any official preference or patronage" that was provided by the reporting of the newspaper corps.[138] Stenographers employed by the convention, they argued, might feel indebted to certain delegates who had supported their selection and thus be willing to "suppress so and so, and insert so and so; or gloss over, or highly color certain other parts."[139] Instead, "[t]he reporters should remain as they [were] . . . with no inducement to present favorable or unfavorable reports of the proceedings."[140] The chief proponent of a stenographer, however, wanted to "have the reporters of the debates and proceedings made officers of the Convention, and responsible to it for their reports. . . . to insure some additional responsibility in the publication of the important debates."[141]

Like Kelly at the Oregon Convention[142] and Owen at the Indiana Convention,[143] Crooker argued for the present *and* historical value of the reports of the debates and proceedings. Their debates were "vitally important" to the delegates and their constituents in the present "and will be to all our descendants for perhaps a century to come."[144] Like Kelly, he thought that the official convention journal was virtually useless, but that these debates would "form one of the most interesting and valuable books that has ever been published."[145] Crooker envisioned that the record

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133 *Id.* at 61. Those reporters included journalists from the *Albany Argus*, *Albany Atlas*, and *Albany Evening Journal*. *Id.* at 1080.

134 *Id.* at 61.

135 *Id.* at 61–63.

136 *Id.* at 64.

137 *Id.* That would not always be the case. *Id.* at 825, 842 (identifying inaccuracies in newspaper reporting of debates).

138 *Id.* at 64.

139 *Id.* at 64–65.

140 *Id.* at 65.

141 *Id.* at 62.

142 *See supra* notes 60, 65 and accompanying text.

143 *See supra* notes 95–98 and accompanying text.

144 NEW YORK REPORT OF DEBATES, *supra* note 18, at 62.

145 *Id.*

of the debates would be used "as a guide and landmark in the construction of the Constitution," as the record of their previous convention's debates had been.[146]

D. Wisconsin (1848)

Wisconsin's convention focused on: (1) the cost of hiring a reporter; and (2) the purpose. Unsurprisingly, the immediate dispute was over the cost. One delegate noted that the convention had spent a good amount of time discussing "economy since the commencement of the session" and that employing a reporter "was not only inexpedient and the object wholly unattainable, but was a waste of the money of the people, which that body had no right to devote to any such purpose."[147] Another didn't think that the cost was "entitled to any great consideration" because they would save money on other printing.[148] One delegate proposed a resolution that would require the members of the convention who supported the official reporting and printing to "pay for the latter work, out of their own pockets."[149] It was not adopted.[150]

The rather grumpy preface to the Wisconsin Report of Debates notes:

> The work not having been ordered till the business of the convention was considerably advanced, the debates which occurred during the early part of the session, are not as full and complete as they would have been, had the publication of a sketch of the debates, in connection with the journal, been anticipated.[151]

One delegate, George Reed, put forth a resolution to hire "some competent person to report correctly, the proceedings and debates . . . ."[152] He gave the following explanation: "[M]any inaccuracies had crept into the reports published in the papers of this place. His object in offering the resolution was, to secure the services of a reporter who would furnish a sketch of the debates, which could be relied upon hereafter, as entirely accurate."[153]

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146 *Id.*

147 WISCONSIN REPORT OF DEBATES, *supra* note 18, at 35.

148 *Id.*

149 *Id.* at 200. That proposal sounds very much like the proposal at the Oregon Constitutional Convention in that each delegate should have to pay based on the amount that he spoke.

150 *Id.* at 214–15.

151 *Id.* at Reporters' Preface (also noting that "[t]he resolution by which the work was ordered, provided that any member, who should not wish his remarks to be reported for publication, might have them suppressed by giving notice to the reporters. [Certain members] gave notice that they did not wish to have their remarks reported for the volume; which will explain the brief notices taken of the part they took in debate . . . .").

152 *Id.* at 34.

153 *Id.*

The delegates continued arguing over the question, including whether it would even be possible to obtain truly accurate reports. One delegate maintained that "the present reports published in the papers, were full of inaccuracies. . . . [as] the result of carelessness. Resolutions had in some cases, been credited to persons who had not offered them—points of order had been misstated—and the debates were at best but meagre [sic] and unsatisfactory sketches."[154] He argued that in New York, where there was an official convention reporter, the reports had been better.[155]

The importance of keeping constituents informed also played a role in the discussion. "[I]n the incipient stages of [the constitution's] formation, it was of the highest moment that they should be kept constantly advised of the doings of their delegates, in order if they thought proper, to give them the benefit of their instructions."[156] The delegates ultimately were swayed by the argument that "[t]hey were laboring for posterity, and their proceedings were to become a part of the history of the new state of Wisconsin" and there should be "a correct history . . . kept by the authority of the convention."[157] A reporter was hired. [158]

E. Ohio (1850)

Ohio focused on: (1) the importance of printing; and (2) the historical value. Fortunately, the act that called the convention actually mandated the employment of a reporter, which forestalled arguments over the question in Ohio much more effectively than it did in Indiana.[159]

The delegates in Ohio were so concerned with the issue of publication that they spent substantial time debating how much money they should spend to translate those reports into German and publish them in German-language newspapers.[160] As in other states, there were concerns about errors in the publication of unofficial records of the debates in the newspapers.[161] There was also the argument that the newspapers would "not publish a hundredth part of the proceedings."[162]

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154 *Id.* at 44.

155 *Id.*

156 *Id.* at 36.

157 *Id.* at 45–46.

158 Three delegates were outraged by the adoption of a resolution to hire a reporter. One "considered that resolution as directly in violation of all law and precedent. Since its passage he had anxiously and carefully examined every authotity [sic] he could find in the library, but had found nothing that bore the semblance of a precedent to it." *Id.* at 199. He "wished to wash his hands of all participation in the measure" and asked not to have his remarks reported. *Id.*

159 OHIO REPORT OF DEBATES, *supra* note 18, at 18, 33.

160 *Id.* at 33–34, 77, 125–29.

161 *Id.* at 94, 124.

162 *Id.* at 31.

Ohio delegates repeated a familiar refrain: the debates would be important to future interpretation of the constitution, to "ascertain in what spirit this constitution was framed."[163] Appealing to the delegates' respect for the U.S. Constitution, a delegate said, "Who will estimate the value to the American people, of a full report of the debates in the Convention which framed the Constitution of these United States?"[164]

F. California (1850)

At the California Constitutional Convention, the dispute was primarily whether to print the reports that would be created. After the election of the convention president, the first resolution was to elect a number of officers, including a reporter.[165] It was adopted promptly and a reporter subsequently elected.[166] But the committee that had nominated that reporter recommended "against the *publishing* of the proceedings by the Convention."[167] One delegate protested that "questions of the greatest magnitude had been discussed under circumstances of hurry and haste; and . . . the debates, if correctly reported, would leave the members of the Convention in a very unenviable attitude before the country."[168] Ultimately, though, the reports were printed in both English and Spanish.[169]

IV. WHAT HAPPENED NEXT

A. Oregon

1. The Immediate Consequence: Drastically Biased Records

The lack of an official reporter means that there is no neutral record of the convention.[170] This creates several problems when courts attempt to use convention records as interpretive aids for something more than general principles.[171]

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[163] *Id.* at 34.

[164] *Id.* at 94.

[165] CALIFORNIA REPORT OF DEBATES, *supra* note 18, at 18.

[166] *Id.* at 18, 26.

[167] *Id.* at 26 (emphasis added).

[168] *Id.* at 163.

[169] *Id.* at 164.

[170] Schuman, *supra* note 41, at 622 (noting that "[t]he speeches and pet issues of each are fully reported in [each editor's] own paper, while the rival editor's tend to receive less scrupulous attention").

[171] Only in rare cases have courts considered what the failure to hire a reporter means for interpretation—that is, whether the fact that the framers did not bother to spend the money to record their debates for posterity suggests something about whether the framers wanted future courts to use their professed intentions to interpret the constitution at all. *E.g.*, State v. Hemenway, 295 P.3d 617, 633 n.7 (Or. 2013) (Landau, J., concurring).

The newspaper coverage of the convention was certainly not neutral. The two biggest newspapers in the state at the time of the convention, the *Oregonian* and the *Statesman*, were bitter rivals with staunchly opposite political affiliations. The *Oregonian* was a Whig-affiliated newspaper edited by Thomas Dryer, one of the convention delegates.[172] The *Statesman* was known as the "Bible of Oregon Democracy" and "dominated . . . the whole tenor of Oregon politics."[173] The newspaper "went into most of the Democratic homes of Oregon where seldom came an opposing paper to challenge its authority."[174] Indeed, "as a rule the rank and file of Democracy read their own papers [the *Statesman*] as the law and the gospel and read none other. They did not see the Oregonian and the Argus."[175] In other words, the *Statesman* was a Democratic newspaper covering a constitutional convention heavily dominated by Democrats. The *Oregonian* and the *Statesman* viciously attacked each other as a matter of course.[176]

The *Oregonian* and the *Statesman*'s coverage sometimes varied so much that they didn't seem to be covering the same event.[177] They reported the number of votes for president of the convention differently, including whether certain delegates were present or absent.[178] Speeches were sometimes printed only in the *Oregonian* or only in the *Statesman*, at times apparently based on political affiliation. For example, Boise was a close associate of Asahel Bush, the editor of the *Statesman.* In one circumstance, the *Oregonian*, after capturing direct quotes from several members during a debate, then printed, "Mr. Boise made a lengthy speech . . . ."[179] The *Oregonian*'s reporter did add a note stating, "The remainder of the debate upon this question, including Mr. Boise's excellent speech, we are unable to find time to transcribe into long hand at present."[180] In contrast, the Democrat-affiliated *Statesman*

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[172] Flora Belle Ludington, *The Newspapers of Oregon 1846–1870*, 26 Q. OR. HIST. SOC'Y 229, 250–51 (1925); OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 24.

[173] Ludington, *supra* note 172, at 256.

[174] *Id.*

[175] Walter Carleton Woodward, *The Rise and Early History of Political Parties in Oregon-III*, 12 Q. OR. HIST. SOC'Y 123, 151 (1911).

[176] Ludington, *supra* note 172, at 251.

[177] For example, in a debate over liability for stockholders and corporations, one delegate went on an extended tirade against the "effeminacy" and "degenera[cy]" of Massachusetts. OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 250–59. The *Oregonian*'s coverage of the rant lasts multiple columns. By contrast, the *Statesman*'s coverage of the rant is limited to a paragraph. *Id.* at 265.

[178] *Id.* at 77. Further basic discrepancies identified at 78 and 79.

[179] *Id.* at 98.

[180] *Id.* Note that did not mean that the *Oregonian*'s reporter had failed to take full stenographic notes, but only that it was not a priority to convert his notes of Boise's speech into longhand for printing.

lacked the extended direct quotes of the earlier speeches, but did print a summary of the content of Boise's speech as well as the responses of two other delegates.[181]

That was not an isolated incident. Sometimes one paper left out entire delegates or debates. For example, in a discussion about printing the journal and about corporations, the *Oregonian* reported as follows:

> Mr. Grover called up the resolution relative to printing 300 copies of the journals of this convention.
>
> Mr. Kelly inquired what it would cost. Many gentlemen seemed to hesitate the other day about giving three or four hundred dollars for reporting and preserving the debates—a very important part of the proceedings—and he would like to know how much this would cost for he supposed the question would turn entirely upon that.
>
> The resolution was put from the chair and lost.[182]

In contrast, the *Statesman*'s reporting adds Grover's motivation and omits Kelly's complaint about the ongoing failure to hire a reporter.[183] Grover was also a close associate of the *Statesman*'s editor, while Kelly, although a Democrat, was not.[184]

On the question of corporations, the *Oregonian* and the *Statesman* also devoted inconsistent attention to a lengthy discussion. The *Oregonian* noted:

> The convention went into committee of the whole, Mr. Smith in the chair, and took up the report of the committee on corporations and internal improvements.
>
> Mr. Deady moved to strike out general assembly and insert legislative assembly. Carried.
>
> Section one which prohibits the legislature from establishing any bank or banking corporation to put paper money in circulation, was adopted.[185]

It then finished by saying, "After making some further progress in the consideration of the article, the committee rose and the convention adjourned."[186]

The *Statesman* included substantially more information in its coverage, including the statements and positions of Delegates Boise, Grover, Kelly, Marple, McBride, Olney, Packwood, Watkins, Deady, and Williams on the question of what

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[181] *Id.* at 99–100.

[182] *Id.* at 230.

[183] *Id.*

[184] Ludington, *supra* note 172, at 257; George H. Williams, Address Before the Legislative Assembly of Oregon (Feb. 14, 1899) *in* OR. HIST. Q., Vol. 2 (1906) *reprinted in* OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, app. c at 504.

[185] OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 230.

[186] *Id.*

to call the legislature.[187] That included a statement from Packwood that he "had been looking over the constitutions" of other states, including Indiana, and his complaint that the convention was drawing excessively from the Indiana Constitution.[188] Six out of nine of those men omitted from the *Oregonian* were Democrats.

In a subsequent debate over corporations, the *Oregonian*'s coverage is extensive.[189] It includes Deady's references to the Michigan, Missouri, and Ohio constitutions, as well as Packwood's reading of other constitutions, including Michigan.[190] In contrast, the *Statesman*'s coverage is substantially shorter.[191] It attributes one mention of the Missouri Constitution to Kelsay and mentions of Missouri, Indiana, and Illinois to Grover; neither Deady nor Packwood says anything about another state's constitution.[192] The *Statesman* also identifies statements from McBride (the lone Republican), Prim (a Democrat), and Starkweather (a Democrat), none of whom appear in the *Oregonian*'s coverage of that day's debate.[193] On the last day of newspaper coverage, the *Oregonian* printed the full text (more or less) of Deady's closing speech, while the *Statesman* noted only that a state seal had been adopted and the convention had adjourned.[194]

Perhaps most egregious was the difference in the *Statesman* and the *Oregonian*'s reporting on the convention's ultimate vote on the constitution. The *Statesman* reported Smith's truly extensive speech in support.[195] It does not mention any speech against adoption of the constitution. In contrast, the *Oregonian* printed almost word-for-word two lengthy speeches by Dryer and Watkins explaining their opposition to the constitution.[196] Smith's much longer speech in favor was relegated to a single sentence: "Mr. Smith reviewed the constitution at length."[197]

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[187] *Id.* at 231.

[188] *Id.* Packwood complained, rather tongue-in-cheek, that "he had proposed several little amendments at various times and they had all been voted down because they did not conform to the standard, Indiana. . . . He should take pleasure in voting for [use of the term] legislature just because it was different from the Indiana constitution." *Id.*

[189] *Id.* at 232–59.

[190] *Id.* at 240, 248.

[191] *Id.* at 259–65.

[192] *Id.* at 264–65.

[193] *Id.* at 262–63.

[194] *Id.* at 398–99. Ironically, one of the few times that the official Journal took down a speech word-for-word, it differed from the *Oregonian*'s recounting. The journal documents Deady as saying, "I congratulate you upon the conclusion of your labors," while the *Oregonian* adds, "in such short time and with so little consequent expense to the country." *Id.* at 398.

[195] *Id.* at 386–97.

[196] *Id.* at 381–86. Watkin's speech stated that there was "one article which must inevitably prevent my voting in the affirmative here," namely, the portion of the new bill of rights that prevented any Black person from "maintain[ing] any suit." *Id.* at 384–85.

[197] *Id.* at 381. Admittedly accurate.

Although those inconsistencies may seem small, they can be much more significant in later constitutional interpretation. As discussed below, at times the Oregon Supreme Court relied on the fact that the future justices—Kelly, Kelsay, Boise, Prim, and Shattuck (all Democrats but Shattuck)—had been part of the convention's lawmaking.[198] The *Oregonian*'s coverage of the corporation debate, for example, omits all comments from those future Oregon Supreme Court justices, while the *Statesman* includes comments from both Kelsay and Prim.[199] The political divide continued through the question of ratification. The convention vote on the constitution it had drafted "was almost wholly along party lines, the affirmative showing the strength of the Democratic ruling faction."[200] Dryer used the *Oregonian* to oppose the constitution, unsuccessfully.[201]

Further, even once the constitution was ratified, only patchy information was available. The resolution to print 300 copies of the official journal was voted down.[202] As of 1857, the State Law Library had at least some copies of the *Oregon Statesman*, *Pacific Christian Advocate*, *Oregon Weekly Times*, *Democratic Standard*, and *Oregon Sentinel*, though it's unclear which copies—and it did not have the *Oregonian*.[203]

It appears that, until 1882, the only widely available records of the proceedings of the constitutional convention were the memories of its delegates and a few copies perhaps held by Judge Deady or others.[204] In 1882, the legislature ordered the printing of 1,000 copies of the official Journal of the Constitutional Convention, which would be forwarded "one copy thereof to each of the Supreme and Circuit Judges of this State, one copy to each member of the present Legislative Assembly, and one copy to each member of the Constitutional Convention."[205] At that point, the Journal itself—accompanied by any newspaper articles that a particular person had happened to save—was the only objective record of what had happened.

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198 *See* discussion *infra* Section IV.A.2.

199 OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 259, 262. Again, both Democrats.

200 Woodward, *supra* note 175, at 155.

201 *Id.*

202 OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 230.

203 B. F. BONHAM, REPORT OF THE TERRITORIAL LIBRARIAN TO THE LEGISLATIVE ASSEMBLY OF OREGON TERRITORY (1857), https://hdl.handle.net/2027/umn.31951t00024112w.

204 OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 34. As of September 1882, the State Library did not contain a copy of the journal. WILL M. LYLE, BIENNIAL REPORT OF THE STATE LIBRARIAN TO THE LEGISLATIVE ASSEMBLY 31 (1882), https://catalog.hathitrust.org/Record/100597798. However, the librarian noted that there were "piled up in unfinished rooms about 2,000 volumes of miscellaneous books." *Id.* at 3.

205 S.J. Res. 6, 12th Reg. Sess. 6, 1882 Or. Laws 197.

For some years, there was a glimmer of hope that a neutral record *did* exist. Patrick Malone, a reporter for the *Oregonian*, was one of the two individuals identified as possible official reporters for the convention.[206] He was already a study in contradiction—a staunch Democrat, regular contributor to the *Statesman*, and friend of Bush, who was nevertheless writing newspaper articles about the convention for the *Oregonian*.[207] In 1868, Malone supposedly told McBride that "he always intended to put his stenographic notes of the debates in the convention into the hands of the state when they were called for."[208] However, "no one had presented the matter to the legislature and he had never written them up, and should not until some compensation [was] provided [to] him."[209] McBride does not appear to have shared that information with anyone during Malone's lifetime. Malone died in 1875, the legislature having never paid him to provide his stenographic notes.[210] At the time, Malone's son John wrote to Deady, saying that he knew Deady was "an old friend" of Malone and asking for help to find a legal job in Oregon because Malone had died virtually destitute.[211]

McBride related the story of Patrick Malone's notes to the Oregon Historical Society in 1902, urging the "Historical Society [to] make an effort to secure them."[212] Immediately after McBride's exhortation, there were several attempts to locate Malone's notes, including a 1903 letter to his son John Malone. He responded, "Father was not particularly careful about his papers . . . if the notes of the Convention's proceedings remained in his hands after he had made his long-hand transcriptions for publication, he exercised no preservative regard for them, and they probably went into the waste basket or suffered some such ignoble fate."[213]

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[206] OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 134–35; McBride Address, *supra* note 2, at 491.

[207] McBride Address, *supra* note 2, at 491–92; Letters from Patrick Malone to Asahel Bush (on file with the Oregon Historical Society).

[208] McBride Address, *supra* note 2, at 492.

[209] *Id.* at 493.

[210] Letter from John Malone to Matthew Deady (Sept. 14, 1875) (on file with the Oregon Historical Society); *Died at Roseburg*, THE DEMOCRATIC TIMES, Aug. 20, 1875, at 2.

[211] Letter from John Malone to Matthew Deady (Sept. 14, 1875) (on file with the Oregon Historical Society). John Malone apparently did obtain employment in Oregon; according to Mark Twain, Malone "was an apprentice in a weekly little newspaper office in Willamette, Oregon, and by and by Edwin Booth made a one-night stand there with his troupe, and John got stage-struck and joined the troupe, and traveled with it around about the Pacific coast." MARK TWAIN, MARK TWAIN'S AUTOBIOGRAPHY 329–30 (1924). Twain was a pallbearer at his funeral. *Funeral of Actor John Malone*, N.Y. TIMES, Jan. 19, 1906, at 11.

[212] McBride Address, *supra* note 2, at 493.

[213] Letter from John Malone to F.G. Young (Sept. 24, 1903) (on file with the Oregon Historical Society). John Malone suggested contacting other sources, including the *Sacramento Union*, for which Malone had written. I have exhausted the resources of both the Sacramento and State archives; ultimately, one librarian stated that "his notes are likely lost to the ravages of time."

The Historical Society also contacted the families and friends of convention delegates as part of the search. The daughter of Jesse Applegate, Sallie Long, responded that Malone had visited her father in the 1870s.[214] "I heard my father speak of that visit . . . and in connection with it mentioned those notes, it is my impression that the young man was seeking a market for them . . . . I have often heard my father express regret that these notes were never written out."[215] Another contact responded to the inquiry by saying, "I feel confident he never disposed of these, as he would let nothing go that did not bring him a consideration. I have heard him make the remark that the notes would someday make him rich."[216]

If the notes still exist, they are so well-hidden that they cannot supply the current deficiency in the historical record—and, for the reasons discussed in this Article, could not necessarily do so even if discovered.

2. Early Days: "He who made the law knows best how it ought to be interpreted."[217]

In the first few decades after the convention, the delegates tended to consult their own memories and those of their contemporaries to determine the intent of the framers. As discussed above, during that time, there was no official printed copy of the Journal of the Proceedings of the Constitutional Convention.[218] It appears that the justices may have had some access to a record of the proceedings, though not in any centralized location.

Five convention delegates eventually served on the Oregon Supreme Court between 1858 and 1880: Boise, Prim, Shattuck, Kelsay, and Kelly.[219] They took a range of approaches to interpretation. In 1863, Justice Prim decided a case argued on one side by future justice Kelsay and the other Grover.[220] The dispute was over whether Article VII, section 1, authorized the legislature to vest justices of the peace

E-mail from Dean Smith, The Bancroft Libr., U.C. Berkeley, to author (Jan. 9, 2023, 10:20 AM) (on file with author).

[214] Letter from Sallie A. Long to A. Noltuer (August 18, 1903) (on file with Oregon Historical Society).

[215] *Id.*

[216] Letter from A. Noltuer to F.G. Young (July 22, 1903) (on file with the Oregon Historical Society).

[217] State v. Finch, 103 P. 505, 511 (Or. 1909) (quoting JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT (1762)). This sentiment dates to at least the early 14th century, when English judges were fond of saying things like "Do not gloss the statute for we know better than you; we made it" and "We will advise with our companions who were at the making of the statute." THEODORE F. T. PLUCKNETT, STATUTES & THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY 50 (1922) (first quoting Aumeye v. Anon., Y.B. 33 Edw. 1, 82 (1305) (Eng.); then quoting Bygot v. Ferrers, Y.B. 35 Edw. I, 585 (1307) (Eng.)).

[218] OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 34.

[219] *Finch*, 103 P. at 511.

[220] Noland v. Costello, 2 Or. 57, 57 (1863).

with the ability to decide cases up to $250.[221] Prim said simply, "If the framers of the Constitution had intended to limit them to one hundred dollars, they could and certainly would have used different and more appropriate language to embody their intention."[222]

Justice Kelly tended to draw from his own personal experiences, though he was not always clear about the fact that he was doing so. In one case, he suggested that a little re-drafting would have been necessary in another provision: "[The delegates] doubtless would have used the words 'current expenses of the state during the biennial term,' or some other apt words to express that meaning."[223] In another opinion, he used his experiences both as a legislator and as a convention delegate to interpret the single-subject rule of Article 4, section 20.[224] "In the ordinary course of legislation, it is impossible for every member of the legislative body to have the same information, or the same means of knowing what is contained in the bill, as the member who frames or the committee that considers it," he explained.[225] Legislators had "a right . . . to rely on the supposition that there is nothing contained in the body of the bill except what is expressed in the title" or closely-connected matters, and the framers had intended to protect that right by creating the single-subject provision. [226] In passing, he also cited to a "well considered case" by Judge Deady that happened to rely in part on the original committee report.[227]

Kelly turned to records of the convention in *Caples v. Hibernian Savings & Loan Association*.[228] In *Caples*, the court had to interpret Article XI, section 1, of the Oregon Constitution regarding the legislature's power to establish banks or permit the circulation of paper money, and the question turned on the meaning of a semicolon.[229] Kelly embarked on an extended discussion of the convention's intent when it drafted Article II, section 1, specifically referring to the knowledge of "the members of the constitutional convention" and the evil that they sought to prevent.[230]

To support his decision, Kelly stated, "In order to arrive at a correct understanding of what the convention intended by placing that section in the constitution, we have examined its journal and proceedings, and they only tend to confirm

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221 *Id.* at 58.

222 *Id.* Prim did not vote at the convention on the final adoption of the constitution. OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 397.

223 Burch v. Earhart, 7 Or. 58, 66 (1879).

224 Singer Mfg. Co. v. Graham, 8 Or. 17, 20–21 (1879).

225 *Id.* at 21.

226 *Id.*

227 *Id.* (citing Oregon & W. Tr. Inv. Co. v. Rathburn, 18 F. Cas. 764, 766 (C.C.D. Or. 1877) (No. 10,555) ("It is so written in the original report of the legislative committee of the constitutional conventions . . . .")).

228 State *ex rel.* Caples v. Hibernian Sav. & Loan Ass'n, 8 Or. 396 (1880).

229 *Id.* at 399.

230 *Id.* at 400.

the opinions before expressed."[231] But the official Journal was not available at that time. In fact, Kelly had gone to see Deady in search of meaning. Deady's diary for February 29, 1880, notes:

> Judge Kelly called on me at my chambers and consulted me about the construction of the first sec of the Constitution Art 11 in relation to corporations. I had the original report of the Committee, the amendments and engrossed bill as it passed the convention . . . . I let him have the documents and he seemed to think they would settle the question in the supreme court . . . .[232]

The documents that Deady provided did the trick. In Kelly's opinion, he cited to the committee report and an amendment proposed by Williams.[233] He concluded that "the semicolon . . . was a clerical mistake, and that it was not entitled to have the force and effect claimed for it by the respondent."[234]

Justice Boise appeared to call on his own memories of the convention's discussion of the rights of married women against their husband's debt in another case.[235] "The members of the constitutional convention were mostly farmers," he noted, and had obtained their land as settlers; when settlers were married "the wife received from the government an equal share of the land with her husband."[236] As a result, "there was a vast amount of this land, the title to which was in the married women of the county . . . ."[237] Boise stated confidently, "[A] large majority of the members of the convention enacted this clause, supposing that it would protect this property from the debts and contracts of the husband, and they did not think it capable of any other construction."[238] Boise had, in fact, been an active participant in the discussion over that provision.[239]

Ultimately, personal experience both at and beyond the constitutional convention guided much of the justices' interpretation of the constitution that they had helped to write.

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231 *Id.*

232 PHARISEE AMONG PHILISTINES: THE DIARY OF MATHEW P. DEADY 1871–1892, at 300 (Malcolm Clark, Jr. ed., 1975).

233 *Caples*, 8 Or. at 401.

234 *Id.*

235 Rugh v. Ottenheimer, 6 Or. 231 (1877).

236 *Id.* at 234–35.

237 *Id.* at 235.

238 *Id.*

239 The *Statesman* reports that he "was in favor of the provision" and went on to describe his reasoning at the convention. OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 368. The *Oregonian* did not report his contributions on the provision. *Id.* at 367–68.

3. The Next 150 Years: The Hagiographic Treatment of the Framers

After the last of the former delegates left the Oregon Supreme Court in 1880,[240] the trend in constitutional interpretation was to rely on the former justices' own life experiences and the greatness of their intellect—and that of their fellow delegates—to justify certain interpretations of the constitution and ignore the absence of actual records.[241] The court once went so far as to say, "The constitution derives its force and effect from the people who ratified it and not from the proceedings of the convention where it was framed, yet we are permitted to consider some of the circumstances, conditions and personalities present at that time as a source of help . . . ."[242]

Judge Deady's thoughts received particular deference.[243] But he was far from the only one. In a 1909 case involving a challenge to the death penalty, the Oregon Supreme Court appealed to the knowledge and experience of Boise, Prim, Shattuck, Kelly, and Kelsay to support its interpretation.[244] The court focused on "[t]he first test [of constitutional interpretation], and one to which great weight is to be attached, is contemporaneous construction, and long acquiescence by the courts and Legislatures."[245] It noted that, since the enactment of territorial law, the death penalty had been contained in Oregon statutes and applied.[246] The court then turned to a somewhat sideways interpretation of the death penalty by the convention delegates who had later served on the Supreme Court:

> Among the members of the constitutional convention were Judges Boise, Prim, Shattuck, Kelly, Kelsay, and Wait, all of whom were afterwards members of the Supreme Court of this state, and all of whom, excepting Judge Kelly, performed circuit duty. It is part of the judicial history of this state that all of these eminent jurists either pronounced the sentence of death while upon circuit duty, or participated in affirming such judgments when sitting upon the supreme bench.[247]

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[240] ARTHUR F. BENSON, SUPREME COURT HISTORY—JUDGES (1945), https://soll.libguides.com/index/OJD_history.

[241] *See* Jory v. Martin, 56 P.2d 1093, 1095 (Or. 1936).

[242] Monaghan v. Sch. Dist. No. 1, Clackamas Cnty., 315 P.2d 797, 801 (Or. 1957).

[243] Kadderly v. City of Portland, 74 P. 710, 717 (Or. 1903) ("In this view we have the authority of the Honorable Matthew P. Deady, a jurist of distinguished ability, who was the president and an influential member of the constitutional convention."); Olcott v. Hoff, 181 P. 466, 477 (Or. 1919) ("It is a very significant circumstance that Matthew P. Deady, who was the president of the constitutional convention and afterwards became a very eminent jurist, in his code of 1866 employs [a particular] marginal heading" for the disputed section of the constitution.).

[244] State v. Finch, 103 P. 505, 511 (Or. 1909).

[245] *Id.*

[246] *Id.*

[247] *Id.*

Relying on their actions, the Oregon Supreme Court stated, "Rousseau well observes that 'He who made the law knows best how it ought to be interpreted,' and this judicial and legislative recognition of the validity of capital punishment by the very men who framed the Constitution *ought itself to be sufficient answer* to the contention of defendant's counsel."[248] That alone, of course, should not have been sufficient.[249] The delegates cited as authorities did not even agree about adopting the Bill of Rights that contained Section 15; Boise and Kelsay voted for it, Shattuck voted against it, and neither Kelly nor Prim voted at all.[250] Neither Shattuck nor Prim ultimately voted to adopt the constitution and Wait was not a member of the constitutional convention.[251]

In the years that followed, the court repeatedly focused on the qualities of the delegates to guide its interpretation. Again in 1909, in *State v. Cochran*, the court explained, "As before stated, that memorable body [the Constitutional Convention] was composed largely of eminent lawyers, several of whom afterwards sat on the federal, circuit, and supreme benches in this state. They were familiar with the rules of constitutional construction . . . ."[252] In 1910, a dissenting justice justified his own interpretation of a particular section based on the statements of Kelly and Prim, "each of whom sat in the convention and assisted in framing this section . . . . Under these circumstances, the views of these eminent jurists should certainly outweigh the method suggested in the majority opinion, by which to ascertain the intent of the framers of the Constitution . . . ."[253]

As described above, for roughly 70 years after the convention, the Oregon Supreme Court had limited or no access to anything beyond the official Journal of the Convention to guide its understanding of legislative history (and for nearly 30 years, it did not even have access to the journal).[254] During that time, any member of the court who had not actually been present at the convention would have needed to track down an individual issue of a newspaper to determine what the delegates had said about a particular provision of the constitution. It does not appear that the court ever did so.

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[248] *Id.* (emphasis added) (quoting ROUSSEAU, *supra* note 217).

[249] OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 358–59, 364–65 (noting that multiple proposals to ban capital punishment were raised, but ultimately failed).

[250] *Id.* at 343.

[251] *Id.* at 397.

[252] State v. Cochran, 105 P. 884, 890 (Or. 1909).

[253] Sears v. Steel, 107 P. 3, 13 (Or. 1910) (King, J., dissenting). The dissenter tried to explain away the fact that one of the justices had dissented by saying, "[A]s he stated his conclusions only, and not his reasons from which his conclusions were deduced, we have no way of knowing his views on this feature." *Id.*

[254] OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 34.

In 1926, Charles Carey created the single most valuable record of the Convention when he published *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857*.[255] In it, Carey collected the official *Journal of the Proceedings*, the newspaper articles from the *Weekly Oregonian*, and the newspaper articles from the *Oregon Statesman*. He organized these materials by legislative date of proceedings so that the *Oregonian* and the *Statesman* coverage of a particular day was printed along with the journal from the same date—thus making it easy for any researcher to see what each source said about a particular day of proceedings.[256] By doing so, Carey assembled the most comprehensive record of the convention that exists.[257] Thus, when Carey's book was published in 1926, the court would have had access to substantially more information about the convention proceedings.

But the court did not immediately begin to use that source, even where it might have been important. In *Jones v. Hoss*, in 1930, the court relied on its characterization of the early Oregonians, rather than any of the concurrent proceedings, saying, "What did those conservative pioneer citizens have in mind relative to the matter of compensating those who represented them in the Legislature?"[258] It did not identify a source, though there was ample discussion in the *Statesman* and the *Oregonian* coverage that would have supported that particular position. Recourse to the documented *proceedings*, rather than the qualities of the particular delegates, did not occur until 1932 in *Multnomah County Fair Association v. Langley*.[259] The reference was extremely fleeting, but it did cite to both the journal and the collected newspaper coverage.

Jory v. Martin offers one of the clearest examples of deference to the extrajudicial opinions of former convention delegates.[260] In *Jory*, the plaintiff challenged the constitutionality of a statute that set the governor's salary at $7,500. The constitution had originally set the governor's salary at $1,500, and that provision had not been amended.[261] The question was whether the delegates had intended the provision: (1) to set a fixed amount, which the legislature could not increase; or (2) to set a *minimum* salary, which could be increased by the legislature as the legislature felt was appropriate.[262] The court began by considering the text of the constitutional

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255 OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3.

256 Carey created two very useful indexes, one of which indexes the proceedings by subject, Index to the Constitution and the Amendments, *Id.* at 517, and the other of which indexes, among other things, all of the statements attributable to particular delegates, General Index, *Id.* at 527.

257 The book also includes appendices of certain relevant speeches that reflect on the history of Oregon and the Convention itself. *Id.* at 483–511.

258 Jones v. Hoss, 285 P. 205, 206 (Or. 1930).

259 Multnomah Cnty. Fair Ass'n v. Langley, 13 P.2d 354, 358 (Or. 1932).

260 Jory v. Martin, 56 P.2d 1093 (Or. 1936).

261 *Id.* at 1094.

262 *Id.*

provision itself, as compared with other provisions that had very explicitly stripped the legislature of power.[263] It then turned to broad statements about the framers, calling them "far-seeing men who must have visioned that there would be a great future increase in the population of this state," and noting that "some of the ablest lawyers of their time were members of the convention," drawing from those facts that the framers would have used "plain and unmistakable language" if they had intended to prevent the increase of salaries.[264]

The court considered both the official Journal of the Convention and, in a sideways fashion, the newspaper coverage.[265] The court first examined the Journal of the Convention to identify the proposed amendments and eventual form of Article I, section 13, regarding the salaries of judges.[266] It noted that "the proceedings of the convention were published in the two then leading newspapers of the state, the Oregon Statesman and the Oregonian" and so "it would seem to follow that the people, in adopting the Constitution . . . intended to leave the matter of increasing these salaries . . . to the discretion of the Legislature."[267] It considered the responses to the Legislature's 1887 attempt to increase certain salaries in Article I, section 13. Apparently due to questions about the legislature's ability to do so, "the Legislature requested a number of the most distinguished lawyers who had sat in the Constitutional Convention to give them their written opinions upon that question."[268]

The convention delegates had been happy to oblige. Deady, Williams, Prim, Boise, Shattuck, James Kelly, all current or former judges at the time, and former governor Stephen Chadwick responded in detail.[269] After quoting their responses, the court in *Jory* went on to say, "All the men whose opinions are quoted above sat in the convention which framed the Constitution, all were regarded as among the ablest lawyers of the state, and, with the exception of Ex-Governor Chadwick, all had been justices of the Supreme Court of Oregon."[270] As a result:

> [m]anifestly, no other persons at that time were better qualified to express an opinion as to the meaning of the Constitution, or could speak more authoritatively, than these men, and, therefore, their opinions upon the very question which we are now called upon to decide ought not lightly to be disregarded.[271]

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263 *Id.*

264 *Id.* at 1095.

265 *Id.* at 1097. The court cited to pages in *Oregon Constitution and Proceedings* that were reprints of the journal's excerpts for the day.

266 *Id.*

267 *Id.*

268 *Id.*

269 *Id.* at 1097–98.

270 *Id.* at 1098.

271 *Id.*

The court recognized that "the Constitution derives its force from the people who ratified it and not from the convention which framed it," but determined that "these proceedings of the convention and the opinions of the men who took a leading part in framing the Constitution are of great value in interpreting the meaning of the Constitution."[272] In other words, without the aid of a full record of the proceedings, the court turned to the opinions of seven of the convention's sixty delegates, rendered three decades after the convention itself, to decide the constitutional legal question.

Justice Percy Kelly strenuously dissented. He began by pointing out the obvious: "As to contemporary construction, we have no verbatim or stenographic report of the debates."[273] He then went on to castigate the majority for its reliance on the statements of former delegates made three decades after the convention: "The statements of members of the convention as to the construction of this perfectly plain provision of the Constitution . . . made years after its adoption, when memory was bedimmed, and radically changed, personal, political, and official relationships predominated, have far less weight with the writer 'than a bird's egg blown.'"[274] Kelly argued that there was no ambiguity in the constitution on the topic, and "[o]nly when the instrument itself betrays uncertainty or ambiguity may recourse be had to what sages and supermen thought about it."[275]

The court also continued its habit of justifying its interpretation based on the particular qualities of the convention delegates well after Carey's collection was published. A full century after the constitutional convention of the Oregon Constitution, the Oregon Supreme Court again relied on the intellects of the framers to interpret Article III, section 1.[276] The court first echoed *Jory*, saying, "Many of those who sat in the Oregon Convention were regarded as among the ablest lawyers of this state and exercised an active and effective leadership in its deliberations."[277] It waxed rhapsodic over the careers of Deady, Williams, Boise, Prim, Kelsay, Shattuck, and Kelly before saying, "It is difficult to believe that the convention with the leadership and help of men of their professional stature ever suffered [a word] to remain in the section solely to avoid redundancy . . . . They were not children in the field of the proper meaning and use of words."[278] Further, the court went on to point to

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[272] *Id.* This was not the only case to take such a view. In City of Portland v. Welch, 59 P.2d 228, 232 (Or. 1936), the same court noted, "Since the late Chief Justice McBride was one of the principal framers of the Home Rule Amendments (. . . article 4, § 1a), he undoubtedly knew the interpretation intended to be placed upon them."

[273] *Jory*, 56 P.2d at 1006 (Kelly, J., dissenting).

[274] *Id.* at 1106–07.

[275] *Id.* at 1107.

[276] Monaghan v. Sch. Dist. No. 1, Clackamas Cnty., 315 P.2d 797, 801 (Or. 1957).

[277] *Id.* at 802.

[278] *Id.*

the ways in which Article III, section 1, resembled—and differed from—its Indiana counterpart.[279] It then speculated:

> [I]t is not a far-fetched speculation to say that because of the relative closeness of the two conventions in point of time and the dependence of the Oregon Convention upon the Indiana Constitution in its labors that the convention might well have had as a further guide a record of the convention proceedings in the latter state, inasmuch as the official "Report of Debates and Proceedings of the Convention" was in print at that time. If they did, they knew what took place there in framing what was copied in Oregon as Art. III, § 1. It is not difficult to impute that species of thoroughness to some of the able men above named.[280]

After appealing to the talent and authority of those men, however, the court acknowledged that "[t]here is no record which justifies the statement that the Oregon Convention had any part of the record of the proceedings of the Indiana Convention before it when it convened," and that "there exists no record or journal of the day-to-day proceedings of the Oregon Convention to tell us precisely what was done during its deliberations on the acceptance of Art. III, § 1."[281]

In context, the court's statement on that point is odd. The court had already repeatedly cited to Carey's collection of (1) the official convention journal; and (2) all of the newspaper articles published by the *Oregonian* and the *Statesman* describing the proceedings.[282] It did so in the sentence immediately preceding the statement that "[t]here is no record."[283] As a result, the court's statement regarding the lack of a record seems to reject the sufficiency of the newspaper coverage as evidence of what occurred during the Oregon Convention, in favor of suppositions about the thoroughness of the "ablest lawyers of this state."[284]

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[279] *Id.*

[280] *Id.* The court's decision to "impute [the] species of thoroughness" to the convention delegates that would have caused them to review Indiana convention records is a problematic one. *Id. See* State v. Hemenway, 295 P.3d 617, 633 n.6 (Or. 2013) (Landau, J., concurring) ("[T]his court in some cases has attributed to the framers of the Oregon Constitution knowledge of information that there is no evidence they actually possessed.").

[281] *Monaghan*, 315 P.2d at 802.

[282] *Id.* at 800–02; *see* OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 57.

[283] *Monaghan*, 315 P.2d at 802.

[284] *Id.* Or, less generously, the court was using citations presented in the briefing and had not consulted the book itself. The only pages that the court specifically references in Carey's collection are those that demonstrate the source of various constitutional provisions, rather than the official convention journal contained therein or any of the newspaper articles. *Compare id.* at 800–02 *with* OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 468–70.

4. The Modern Era: Preventing the Fossilization of the Meaning of Oregon's Constitution

From 1960 to 1980, the Oregon Supreme Court did not cite *The Oregon Constitution and Proceedings* for anything beyond a perfunctory note that (1) the Oregon Constitution had taken a particular constitutional provision from another state's constitution; or (2) there was no recorded debate on a question.[285] Then, in 1992, the court decided *Priest v. Pearce*, one of the defining cases of Oregon constitutional interpretation.[286] In *Priest*, the defendant had been convicted of assault and sought release on bail while his appeal was pending.[287] The question was whether Article I, section 14, of the Oregon Constitution—the bail provision—applied to defendants whose cases were on appeal.[288]

The court set forth its methodology: "There are three levels on which that constitutional provision must be addressed: Its specific wording, the case law surrounding it, and the historical circumstances that led to its creation."[289] First, the specific wording of the provision, the court concluded, did not support the defendant's interpretation.[290] Neither did "[l]ogic outside the wording of the provision."[291] Turning to the second part of the analysis, the court stated briefly that the caselaw was inconsistent.[292] Then, finally, the court turned to the history of bail itself, beginning with practices that existed in 1641.[293] Only after reviewing the history of the concept of bail did the court turn to the particular issue of what history had to say about whether a person convicted of a crime was entitled to bail on appeal.[294]

In *Priest*, the court found no aid in the history of the bail provision. It recited the article of faith that Oregon's constitutional provision was "based on" the Indiana Constitution, citing to Carey's analysis of the sources of the constitution as well as the law review article reprinted in Carey that said just that.[295] It then said, "Just

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285 *See* Stranahan v. Fred Meyer, Inc., 11 P.3d 228, 238 (Or. 2000) ("*Priest* represented this court's first clear statement of a methodology for ascertaining the intent of the framers and the people."). The court noted that *Priest* wasn't the first case to follow this approach, but the other similar cases cited were decided in 1980 or later. *Id.*

286 Priest v. Pearce, 840 P.2d 65 (Or. 1992).

287 *Id.* at 65–66.

288 *Id.* at 66.

289 *Id.* at 67.

290 *Id.*

291 *Id.*

292 *Id.*

293 *Id.* at 68.

294 *Id.* at 69.

295 *Id.* at 68. *But see* Seagraves, *supra* note 41, at 3 n.1 (discussing flaws in the methodology by which Carey and Palmer determined the origins of various constitutional provisions).

what the Oregon constitutional convention believed that the provision meant is unknown." Finally, it noted the lack of Indiana court cases interpreting Indiana's bail provision that predated Oregon's adoption of a bail provision.[296] That was the sum total of the court's Oregon-specific historical analysis. It is unclear whether the court had consulted Carey's collection to determine the nonexistence of any debate over the provision; it certainly did not say so.

Oregon continued to apply *Priest* as its lodestar for constitutional interpretation, including its use of history. In *Smothers v. Gresham Transfer*, it described the purpose of the *Priest* methodology as "understand[ing] the wording in the light of the way that wording would have been understood and used by those who created the provision," and "apply[ing] faithfully the principles embodied in the Oregon Constitution to modern circumstances as those circumstances arise."[297] To determine the meaning of Oregon's remedy clause, *Smothers* conducted extensive historical analysis—beginning with Coke's commentary on the 1225 Magna Carta, proceeding to Blackstone's commentaries, early rights in the colonies, and early state constitutions.[298] The court then repeated that Indiana's constitution "was the primary source for the Oregon Constitution" and turned to an extensive review of Indiana's admission to the United States and its constitutions of 1816 and 1851.[299] Only after that review of *Indiana's* history did the court note, "We have found no cases construing the Indiana remedy clause before the Oregon Constitution was adopted . . . ."[300]

Finally, the court turned to Oregon's own constitutional convention. It described the process by which the Oregon delegates had developed the wording of its bill of rights, including the remedy clause, and specifically quoted Smith, as reported in the *Oregonian*, extolling the virtues of a bill of rights at length.[301] The court then went on to examine all of the available evidence regarding what the framers might have thought when they "rewrote" Indiana's similar provision for Oregon's Consti-

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296 *Priest*, 840 P.2d at 68.

297 Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 338 (Or. 2001) (first quoting Vannatta v. Keisling, 931 P.2d 770, 781 (Or. 1997); then quoting State v. Rogers, 4 P.3d 1261, 1270 (Or. 2000)), *overruled by* Horton v. Or. Health & Sci. Univ., 376 P.3d 998 (Or. 2016). The court used many of the same sources when it overruled *Smothers* in *Horton*, but interpreted those sources differently. *Id.* at 1005.

298 *Smothers*, 23 P.3d at 340–46.

299 *Id.* at 346–47 (citing OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 28).

300 *Id.* at 347.

301 *Id.* at 350–51 (citing OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 102). The *Statesman's* coverage of Smith's oratory is much shorter and notes primarily that Smith believed that Indiana's bill of rights was "refined gold." OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 105.

tution and recognized that "[e]vidence of the scope of the drafters' intent . . . admittedly is sketchy."[302] Ultimately, its historical analysis of the circumstances preceding Oregon's adoption of the remedy clause, including (1) specific acts by the Oregon framers; and (2) recognition that the record was incomplete, guided the court's decision.[303]

In 2000, the court described its interpretive approach in *Stranahan v. Fred Meyer*.[304] The goal, the court explained, was "to ascertain and give effect to the intent of the framers . . . and of the people who adopted it."[305] That originalist approach would involve heavy reliance on the spotty records of Oregon's Constitutional Convention and whatever other sources might have been theoretically available to the framers at the time. As discussed below, the Oregon Supreme Court has since retreated from a strict search for the framers' intent in using particular words and moved toward a search for the "general principles that the framers would have understood were being advanced."[306]

The court turned even more explicitly to the records of the Oregon Constitutional Convention when it interpreted Oregon's free-speech provision in *State v. Ciancanelli*.[307] After examining the text and Oregon's own caselaw, the court considered both federal and state history leading up to the adoption of the free-speech clause, as well as the constitutions that had been established close in time to Oregon's own.[308] Then, rather than simply noting the lack of debate over the free-speech clause at the Oregon Convention, the court examined the statements of various delegates on a *different*, but related, provision—the libel provision.[309] Those statements published in the *Oregonian* demonstrated "a range of points of view" and a lack of "clear agreement among the delegates."[310] The court went on to explain that "there is no sound basis for placing 'the framers,' as a whole, into one or the

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[302] *Smothers*, 23 P.3d at 351.

[303] *See id.* at 350–51.

[304] Stranahan v. Fred Meyer, Inc., 11 P.3d 228, 237 (Or. 2000).

[305] *Id.* ("[W]hen construing provisions of the Oregon Constitution, it long has been the practice of this court 'to ascertain and give effect to the intent of the framers [of the provision at issue] and of the people who adopted it.'") (alteration in original) (quoting Jones v. Hoss, 285 P. 205, 206 (Or. 1930)).

[306] State v. Mills, 312 P.3d 515, 518 (Or. 2013).

[307] State v. Ciancanelli, 121 P.3d 613, 627 (Or. 2005).

[308] *Id.* at 618–27.

[309] *Id.* at 627–28. Although the court did examine those particular statements contained in OREGON CONSTITUTIONAL PROCEEDINGS, it did not take the additional step of referencing or quoting from the additional statements captured in Burton & Grade's *Legislative History—Part I*, which was available at the time.

[310] *Id.* at 627–28. The journal does not mention any discussion of any of the provisions on that date.

other of those categories" of interpretation, because the convention reporting did show a difference of opinion.[311]

The review of the delegates' statements in *Ciancanelli* reveals a few things worth noting. First, the *Oregonian* was the only one of the three sources contained in Carey to describe those statements; the official Journal of the Convention does not mention any discussion of the libel provision on that date, while the *Statesman's* coverage is limited to saying, "Considerable debate took place upon the section relating to prosecutions for libel."[312] Even in the *Oregonian*, the full discussion was not printed; at one point, the article notes that "[a]fter some further remarks from Mr. Logan and others," Dryer spoke again—it did not reveal the remarks from Mr. Logan or others.[313] After a particularly contentious interaction between Dryer and Deady, the *Oregonian* states, "The debate was continued at great length," with no further information.[314]

Second, the discussion of the libel provision described in the *Oregonian* also demonstrates political and personal sniping—such as when (Judge) Deady referred to Oregon's press as "a running sore on the community," and (editor) Dryer asked what would happen to himself if he stood and said that "the judiciary of the territory was a running sore on the community," demanding that Deady identify the offending newspapers.[315] The *Oregonian* reported Deady's response and then noted that it had been *sotto voce*—though apparently loud enough for the reporter to overhear.[316] Thus, even in a case that examined the positions on both sides of the libel issue, the court's historical discussion was necessarily incomplete because of a lack of full reporting.

As demonstrated in *Ciancanelli,* one of the problems with a purely historical approach is that 'history' demonstrating intent is rarely, if ever, objective and is often incomplete.[317] A recent Oregon Supreme Court case, *Kristof v. Fagan*, demonstrates that the problem persists.[318] In that case, the court considered the existing records of Oregon's convention to determine the meaning of the phrase "resident within"

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311 *Id.* at 630.

312 OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 309–11.

313 *Id.* at 310.

314 *Id.*

315 *Id.* As noted above, this debate was printed in the *Oregonian*, one of the newspapers that Deady called "a running sore."

316 *Id.*

317 *See* Landau, *supra* note 14, at 484 ("[A]part from philosophical debates about the nature of history, there is the fact that it is never certain that the 'facts' ever are fully known. Just when a historian thinks that he or she has collected all the relevant evidence, someone else comes up with additional evidence that challenges prevailing accounts and explanations.").

318 State *ex rel*. Kristof v. Fagan, 504 P.3d 1163, 1168 (Or. 2022).

in Article V, section 2, of the Oregon Constitution.[319] That provision limits eligibility for governorship to those who have been a "resident within" the state of Oregon for at least three years before an election.[320] The court stated that it would interpret the provision under the *Priest v. Pearce* methodology by examining "[i]ts specific wording, the case law surrounding it, and the historical circumstances that led to its creation."[321] Consistent with that methodology, the court first considered the definitions of "resident" contained in a variety of contemporaneous legal dictionaries, and then turned to the internal context—namely, the use of the word "resident" in other articles of the Oregon Constitution.[322] The court determined that those other provisions offered "substantial insight" into the meaning of the word and proceeded to examine three types of history to aid its interpretation: (1) the convention debates themselves; (2) the residency restrictions contained in other constitutions; and (3) the interpretation of the word in other, somewhat contemporaneous caselaw.[323]

The availability of different sources of information regarding the debates may have affected the court's interpretation. The only official source, the Journal, elided all discussion of the provision, saying only, "[T]he committee having had under consideration the article on executive department and administrative department, and report the same back to the convention, with sundry amendments."[324] The *Oregonian* provided minimally more information; its coverage was limited to noting that Starkweather had moved to strike the residency requirement and the motion had failed.[325] As a result, the only meaningful information about the debates comes primarily from the *Statesman*.[326]

The court looked to the statements of two proponents and two opponents of a residency requirement for "insight" into the reason that any kind of residency requirement had been included in the constitution.[327] It did not draw from those statements the specific *meaning* of the word "resident." In fact, its insight was informed by the tenor of the debates, not merely their existence. That is, the fervency and specific examples of those delegates' statements demonstrated that the delegates "understood the . . . requirement to impose a meaningful limit," rather than a mild

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319 *Id.*

320 *Id.*

321 *Id.* (alteration in original) (quoting Priest v. Pearce, 840 P.2d 65, 67 (Or. 1992)).

322 *Id.* at 1168–69.

323 *Id.* at 1169–71.

324 OREGON CONSTITUTIONAL PROCEEDINGS, *supra* note 3, at 221.

325 *Id.*

326 *Kristof* quotes opinions from Kelly, Waymire, and Starkweather by name. Marple, apparently doomed to be erased from history, is simply called "another opponent." *Kristof*, 504 P.3d at 1169–70.

327 *Id.*

procedural obstacle.[328] For example, the court had available to it and quoted Waymire's concerns about bigamy, as well as Starkweather's concerns about "shackles" on the voters.[329] Rather than only Kelly's references to electing someone who had "only just arrived," which might suggest a looser requirement, the court also had Waymire's statements about bigamists, which "suggest[ed] that the requirement was intended to bar office seekers who, despite some Oregon connections, might retain a more significant connection to another state."[330] That's not to say that the convention debates decided the case for the court—they demonstrated only some intent on the part of the proponents of the residency requirement.[331]

Rather, the court ultimately relied primarily on the "legal backdrop" that existed when the constitution was ratified, which showed a near-universal understanding of the word "resident" in political residency requirements.[332] It consulted both roughly contemporaneous legal commentary and caselaw. An important note on the use of contemporaneous caselaw: the court did *not* suggest that Oregon's framers would have been aware of particular cases interpreting the word "resident" at the time that they drafted the constitution.[333] In fact, a number of the cases that it cited had not been decided until several decades after the ratification of Oregon's Constitution. Rather, the court appears to have used those cases in much the same way that courts use contemporaneous dictionaries: to establish the commonly-held understanding of a word's meaning around the time of its use.[334] It also treated the laws "enacted within two decades of ratification and embodying an interpretation of the constitution" as additional evidence of how the constitutional provision was "understood at the time."[335]

Ultimately, *Kristof* provides an excellent warning of the dangers of relying entirely on particular sources of coverage of the debates. As noted above, the Journal, the *Oregonian*, and the *Statesman* provide drastically different levels of information about the delegates' statements. One of the court's sources notes a substantial difference between the way that the *Statesman* and the *Oregon Argus* described one delegate's argument, but the court quoted from both the *Statesman* and the *Argus* as though they were a single source.[336] No one described the reasoning contained in

328 *Id.* at 1170.

329 *Id.*

330 *Id.* at 1169–70.

331 *Id.* at 1170.

332 *Id.*

333 *Id.* at 1171.

334 *Id.* at 1171 (citing cases decided from 1839 to 1889).

335 *Id.* at 1172.

336 *Id.* at 1170 (quoting Burton, *supra* note 10, at 347).

delegate Marple's argument against a residency requirement.[337] The inconsistencies between the official Journal, the *Oregonian*, and the *Statesman* are even more extreme in other places, as noted elsewhere in this Article.[338] Whether or not the court should be considering the articulated intent of the delegates when interpreting the constitution, the inconsistencies of the biased sources of information render them all unreliable sources for such information.

Fortunately, the lack of complete reports and the limit of collected newspaper coverage of the Oregon Constitutional Convention *does* appear to have reduced reliance by the Oregon appellate courts on the convention itself as a historical source. Less than one-third of Oregon Supreme Court opinions that cite Carey or Burton use those sources to establish anything beyond (1) the identity of the constitutional provision from which our own was copied; or (2) the *lack* of any recorded discussion or debate on a provision.[339]

It is vanishingly rare for the court's opinion to turn on the history or debate. To be clear, that does not mean the Oregon Supreme Court does not refer to the framers or their intent in its opinions. But it does mean that the court very rarely focuses on what the delegates *said*, instead considering the text and the historical circumstances surrounding the drafting of the constitution. Such an approach accords with the more recent way that the Oregon Supreme Court has described the purpose of constitutional interpretation: to "identify, in light of the meaning understood by the framers, relevant *underlying principles* that may inform our application of the constitutional text to modern circumstances."[340] It is "not to freeze the meaning of the constitutional provision to the time of its adoption . . . ."[341] Given that purpose, the exact words of any particular delegate matter much less than an overall sense of the principles that motivated the enactment of a particular provision.

B. Indiana: "It was written by statesmen, selected for their wisdom . . . ."[342]

As in Oregon, multiple of the Indiana convention delegates went on to serve on the state's supreme court. Three Indiana delegates did so: Alvin Hovey, John

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337 See *supra* note 74, documenting many instances in which newspapers chose not to describe the contents of Marple's speeches.

338 *See supra* notes 177–197 and accompanying text.

339 Of the 61 Supreme Court cases that the author identified, 19 engage further with those sources beyond simply identifying the origin of a constitutional provision. *See* Appendix B for a list of the 19 cases.

340 State v. Davis, 256 P.3d 1075, 1078 (Or. 2011) (emphasis added).

341 State v. Lane, 355 P.3d 914, 918 (Or. 2015).

342 Spickermon v. Goddard, 107 N.E. 2, 3 (Ind. 1914).

Pettit, and Horace Biddle.[343] Hovey and Biddle each produced several opinions involving constitutional interpretation with methodologies that resemble those of the early framers. Two decades after the convention, Biddle several times expressed that the framers would have written something differently had they meant it the way that a party believed it should be interpreted.[344] Once, he went further. In the same case, he discussed "ascertain[ing] the expressed intention of the framers" by consulting the debates and then said, "The writer of this opinion, speaking for himself only, . . . thinks that this is not only the plain meaning of the words used . . . but that it was also the manifest intention of the framers of the constitution, as ascertained by the proceedings of the convention."[345] He did not refer to any comments of his own regarding that particular provision at the convention.

Hovey served very briefly, but he wrote one of the earliest interpretations of the new constitution, and did so with extensive discussion of what the delegates *would have* known.[346] He was tasked with interpreting Article 4, section 21, of the Indiana Constitution, which governed the method of revising or amending laws.[347] He began by making clear the problem that the convention had sought to remedy: it was "aware of the loose and imperfect manner in which bills were hurried through the general assembly, [and] thought [it] proper to throw several guards around the legislation of the state."[348] Perhaps a little pointedly, he noted that the legislature's actions had "left the statutes so imperfect and ambiguous, that the most able jurists in the state were unable to ascertain their meaning."[349]

Hovey described the facts set forth in the official Journal and the record of debates and then made clear that "[t]hese facts are only alluded to for the purpose of showing that the convention did not intend to make any alteration in the meaning of the section, as first introduced and finally adopted . . . ."[350] Then he offered the explanation for the convention's actions, couched in hypothetical terms: "The delegates, aware by experience, that great men are sometimes lazy, may have thought

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[343] Minde C. Browning, Richard Humphrey, & Bruce Kleinschmidt, *Biographical Sketches of Indiana Supreme Court Justices*, 30 Ind. L. Rev. 329, 331–32, 354–55, 368–69 (1997); INDIANA REPORT OF DEBATES 1, *supra* note 18, at 3–4.

[344] *E.g.*, McCarthy v. Froelke, 63 Ind. 507, 508, 510 (1878) ("If the framers of the constitution had intended to require the same degree of eligibility for a county office that they declared necessary for the office of governor, lieutenant governor, senator and representative, they would doubtless have so declared in plain terms."); Turner v. Wilson, 49 Ind. 581, 581, 584 (1875) ("We must suppose, therefore, that the framers of the constitution so understood and used the words.").

[345] State v. Swift, 69 Ind. 505, 516, 526 (1880).

[346] Langdon v. Applegate, 5 Ind. 327, 332–33 (1854).

[347] *Id.* at 330–32.

[348] *Id.* at 330.

[349] *Id.*

[350] *Id.* at 332.

it advisable to remove every obstruction to a full understanding of bills when being enacted."[351] He went on to explain the practical ways in which Article 4, section 21, would ensure that "full understanding" of those men.[352] Even after Hovey had left the bench, the Indiana Supreme Court treated his opinions on the constitution as particularly valuable, once saying, "it is not improper to say that his position as a distinguished member of the constitutional convention, justly imparted great weight to his opinions on questions of constitutional construction."[353]

In the century that followed the constitutional convention, the Indiana Supreme Court routinely relied on the reports of the debates and proceedings. It sought the framers' purposes, noting that the constitution "was designed for practical use rather than as a declaration of abstract principles. . . . [I]t must be viewed from the standpoint of the statesmen who formulated it, rather than that of lexicographers and philologists who neither participated in the work nor considered its provisions."[354] The depth of the court's consideration did vary widely. For example, in an 1855 case regarding the constitutionality of liquor prohibition law, the court briefly noted, "[T]he question of incorporating into the constitution the prohibitory principle was repeatedly brought before the constitutional convention, and uniformly rejected," citing to pages in the report of debates.[355] It then "strengthened" its opinion that the law was unconstitutional with citations to Herodotus, Pliny, Tacitus, the Song of Solomon, two verses from Psalms, and many other authorities, before concluding, "[T]hese stimulating beverages were created by the Almighty expressly to promote [man's] social hilarity and enjoyment."[356]

Indiana's modern approach to constitutional interpretation continues to focus closely on the text of the constitution, considered in light of the framers. "The language of each provision of the Constitution must be treated with particular deference, as though every word had been hammered into place."[357] When interpreting a provision's meaning, "the intent of the framers of the Constitution is paramount . . . ."[358] To "give life to their intended meaning, [the court] examine[s] the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of [the] constitution, and case law interpreting the

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351 *Id.* at 333.

352 *Id.*

353 Greencastle Twp. v. Black, 5 Ind. 557, 566 (1854).

354 Spickermon v. Goddard, 107 N.E. 2, 3 (Ind. 1914).

355 Herman v. State, 8 Ind. 545, 559 (1855).

356 *Id.* at 560–61.

357 City Chapel Evangelical Free Inc. v. City of S. Bend *ex rel.* Dep't of Redevelopment, 744 N.E.2d 443, 447 (Ind. 2001) (quoting McIntosh v. Melroe Co., 729 N.E.2d 972, 986 (Ind. 2000)).

358 *Id.* (quoting *McIntosh*, 729 N.E.2d at 986).

specific provisions."[359] It also "examine[s] the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief, and the remedy."[360] However, although "[t]he remarks of the delegates during the 1850–51 Constitutional Convention amplify [the] understanding of the framers' purposes, [they] do not alter the literal meaning of the text of these sections."[361]

The application of that rule often involves the reliance on the reports of the debates at Indiana's Constitutional Convention. Though there is not always relevant debate,[362] the Indiana Supreme Court looks to the record of debates in a wide variety of cases, often examining the statements of multiple different delegates as well as noting the *length* of debates to demonstrate the importance of a particular issue. For example, when deciding a certified question regarding a debtor's retirement accounts, the Indiana Supreme Court began its summary of the constitutional history by saying, "The meaning of Section 22 is illuminated by the long and impassioned debate in the convention" of 1850.[363] Nor was that statement an isolated occurrence.[364]

Even in modern times, though, justices will sometimes resort to an appeal to the historical power of a convention delegate or his contemporary. In a 2013 case, *Fry v. State*, the court interpreted the bail provision in the Indiana Constitution and overruled *Heffren*, a case decided 15 years after the constitutional convention.[365] The majority opinion said nothing about the constitutional convention or the debates.

One justice dissented strenuously.[366] The dissenting justice argued that the court was wrong to overrule *Heffren*, pointing to the amendment it was interpreting and to the identities of the men on the court that had originally decided it.[367] He

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[359] *Id.*

[360] *Id.*

[361] *Id.*

[362] Ajabu v. State, 693 N.E.2d 921, 930 n.10 (Ind. 1998) (consulting record of debates and noting, "[t]he dearth of dialogue on this provision was typical of the constitutional protections governing criminal procedure").

[363] *In re* Zumbrun, 626 N.E.2d 452, 453 (Ind. 1993).

[364] *E.g.*, Bayh v. Sonnenburg, 573 N.E.2d 398, 412 (Ind. 1991) ("The Convention discussed what is now § 21 for six days."); N. Ind. Bank & Tr. Co. v. State Bd. of Fin., 457 N.E.2d 527, 529 (Ind. 1983) ("Debate on this issue occupies several hundred pages in the Report on the Debates and Proceedings of the Convention for the Revision of the Constitution.").

[365] *Ex parte* Heffren, 27 Ind. 87, 88 (1866), *abrogated by* Fry v. State, 990 N.E.2d 429 (Ind. 2013).

[366] Fry v. State, 990 N.E.2d 429, 452 (Ind. 2013) (Massa, J., concurring in result and dissenting in part). Although Justice Massa concurred in the result, he dissented in the portion relevant to this Article, so I refer to him as the dissent for clarity.

[367] *Id.* at 453.

pointed to a different, failed amendment that future justice Biddle had voted against at the convention; Biddle had subsequently joined an opinion reaffirming *Heffren*, which the dissenter argued "further evinces the framers' intent."[368] Not only that, the dissent argued, but *Heffren* itself had been decided by men who "knew the framers of Indiana's constitution and were intimately familiar with the discussions and debates of 1850–51."[369] All of that, coupled with the convention debates, demonstrated the framers' intent and established that the court was wrong to overrule *Heffren*.

A concurrence responded directly to the dissent's rationale, explain that when the text was plain, "any contrary views of one or some of the delegates or contemporaneous jurists are irrelevant."[370] The concurrence pointed out something that courts often forget when relying on legislative history: "The separate views of one or a few individual delegates do not necessarily establish the intentions of the majority of the delegates to the [Indiana] Constitutional Convention, and certainly not the understanding of the voters who ratified the Constitution."[371] *Fry* is ultimately an outlier, but it demonstrates the persistence of hagiographic attitudes towards framers beyond the use of a range of recorded statements at conventions.

CONCLUSION

Oregon did not hire an official reporter to create a record of the debates at its constitutional convention. Indeed, the resolution to hire a reporter was never actually put to a vote. Whether that was ultimately due to a desire to save money, a belief that the record would be unimportant, or both, it means that no complete record exists.

The lack of a full historical record is not uncommon, particularly the further back in history that a court tries to look, but it mandates particular caution when searching for the framers' intent as demonstrated by their words. The courts should not infer anything from the convention's apparent failure to discuss their interpretations of any particular provision; as noted above, sometimes none of the newspapers reported the content of a particular delegate's speech and one or the other didn't report the fact that a delegate spoke or that a provision was discussed.[372] As demonstrated above, the newspapers provided inconsistent reporting based on their political viewpoints, and voters from different political parties tended to read only the newspaper affiliated with their party. Nor can a survey of multiple newspapers allow courts to be confident that they have found all the missing pieces. And the failure

368 *Id.*

369 *Id.*

370 *Id.* at 451 (Dickson, C.J., concurring).

371 *Id.*

372 See many references, above, about poor Perry Marple.

to hire a reporter in the first place suggests that at least some of the delegates did not believe that their own statements *should* be used to interpret the constitution later.

Oregon's search for "general principles" embodied in the constitution, rather than reliance on the statements of individual delegates, provides something of a safeguard. But when the courts do turn to the records of the convention, they should take extra measures to evaluate the reliability of those records, including using external sources. What was the political affiliation or angle of the newspaper that reported a particular statement? Do the newspapers of different political affiliations—and not only the *Statesman* and the *Oregonian*—agree about what was said or done, and does that reporting match the official Journal? Do one delegate's speeches tend to appear in only one newspaper?[373] Where one delegate in particular advocated for a provision, what else did the delegate support or oppose? Does the historical record *outside* of the convention reflect anything about a delegate's attitudes or beliefs or allegiances? Beyond the reporting reproduced in Carey's book, what was being printed alongside that reporting—editorials offering more open opinions, for example? All of that information may inform how much the courts can trust the accuracy of newspaper reporting, and if so, how much of the framers' intent—or the general principles they sought to advance—can be drawn from any particular newspaper article.

There are many more questions surrounding interpretation of the Oregon Constitution that merit further exploration. The convention that produced the constitution was controlled by Democrats, and the majority of voters who ratified the constitution were also likely Democrats. Given what we know about readership of Democratic newspapers at the time of ratification, does that mean that only the reporting published in Democratic newspapers should inform the court's understanding of how the voters understood the constitution? The *Oregonian* reported a bitter debate about a libel provision, while the *Statesman* did not reveal any debate. The *Statesman* reported Delazon Smith's speech at the end of the convention, but did not mention the speeches of Dryer or Watkins—does that mean neither Dryer's nor Watkins' speeches should be considered when interpreting the voters' understanding of the constitution? If Malone's stenographic notes of the convention are ever located, could those be treated as accurate, or should their accuracy also be suspect—and even if they are accurate, what effect does that have on an interpretive approach that does not freeze the constitution in its 1857 form?

Constitutional interpretation in Oregon continues to evolve, and as it does, more questions will inevitably arise. The search for the answers to those questions is a matter of not only reliance on the readily available sources that the court routinely uses, but of historical detective work to gain a fuller picture of the circumstances surrounding the adoption of our constitution.

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[373] Carey's index is an especially useful tool to determine this.

APPENDIX A: STATE CONSTITUTIONAL CONVENTION REPORTS, 1820–1857

1. The Debates, Resolutions, and other Proceedings, of the Convention of Delegates, Assembled at Portland on the 11th, and continued until the 29th day of October, 1819, for the Purpose of Forming a Constitution for the State of Maine (Jeremiah Perley ed., 1820), https://hdl.handle.net/2027/uc1.$b263911.
2. Proceedings and Debates of the Virginia Convention, Begun and Held in the City of Richmond, October 5, 1829–January 15, 1830 (Samuel H. Davis ed., 1830), https://hdl.handle.net/2027/mdp.35112203890050.
3. Proceedings and Debates of the Convention of North Carolina, Called to Amend the Constitution of the State, Which Assembled at Raleigh, June 4, 1835 (Joseph Gales and Son eds., 1836).
4. 1 Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania, to Propose Amendments to the Constitution, Commenced and Held at Harrisburg, on the Second Day of May, 1837 (John Agg ed., 1837), https://hdl.handle.net/2027/umn.31951p01104032v.
5. Official Report of Debates in the Louisiana Convention (1845), https://hdl.handle.net/2027/mdp.35112105207585.
6. Missouri Constitutional Convention Debates and Proceedings (1845–1846).
7. Debates of the Texas Convention (WM. F. Weeks ed., 1846), https://tarlton.law.utexas.edu/constitutions/texas-1845-en/debates.
8. Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York (William G. Bishop & William H. Attree eds., 1846), https://hdl.handle.net/2027/uc2.ark:/13960/t91836k50.
9. Journal of the Convention to Form a Constitution for the State of Wisconsin (H. A. Tenney, J. Y. Smith, David Lambert, & H. W. Tenney eds., 1848), https://hdl.handle.net/2027/hvd.hx4n6x.
10. Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Kentucky (R. Sutton ed., 1849), https://louisville.edu/law/library/special-collections/kentucky-constitution-collection.
11. Report of the Proceedings and Debates in the Convention to Revise the Constitution of the State of Michigan (R. W. Ingals ed., 1850), https://hdl.handle.net/2027/mdp.39015071175213.

12. Report of the Debates in the Convention of California on the Formation of the State Constitution, in September and October, 1849, (J. Ross Browne ed., 1850), https://hdl.handle.net/2027/hvd.32044076907989.

13. 1 Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana (photo. reprt. 1935) (H. Fowler ed., 1850), https://indianamemory.contentdm.oclc.org/digital/collection/ISC/id/5349.

14. Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio 1850–51 (J. V. Smith ed., 1851).

15. 1 Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution (William M'Neir ed., 1851), https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/html/conventions2.html.

16. Debates and Proceedings of the Constitutional Convention of the State of Delaware (Richard Sutton ed., 1853), https://hdl.handle.net/2027/njp.32101072369182.

17. Official Report of the Debates and Proceedings in the State Convention, Assembled May 4th, 1853, to Revise and Amend the Constitution of the Commonwealth of Massachusetts (White & Potter eds., 1853), http://name.umdl.umich.edu/AEW7439.0001.001.

18. 1 The Debates of the Constitutional Convention; of the State of Iowa (W. Blair Lord ed., 1857), https://publications.iowa.gov/7313/.

APPENDIX B: SUPREME COURT CASES DISCUSSING CAREY AND/OR BURTON

1880 to 1960

1. Multnomah Cnty. Fair Ass'n v. Langley, 13 P.2d 354, 358 (Or. 1932).
2. Jory v. Martin, 56 P.2d 1093, 1097 (Or. 1936).
3. State v. Merten, 152 P.2d 944, 944–45 (Or. 1944).
4. State *ex rel.* Chapman v. Appling, 348 P.2d 759, 771 (Or. 1960).

1980 to present

1. DeFazio v. Washington Pub. Power Supply Sys., 679 P.2d 1316, 1334 n.15 (Or. 1984).
2. Salem Coll. & Acad., Inc. v. Emp. Div., 695 P.2d 25, 37 (Or. 1985).
3. State *ex rel.* Kane v. Goldschmidt, 783 P.2d 988, 991, 992 n.6 (Or. 1989).
4. Ecumenical Ministries of Oregon v. Oregon State Lottery Comm'n, 871 P.2d 106, 108 n.2 (Or. 1994).
5. State v. Conger, 878 P.2d 1089, 1094–95 (Or. 1994).
6. Armatta v. Kitzhaber, 959 P.2d 49, 57 (Or. 1998) (including discussion of Indiana debates).
7. State v. Rogers, 4 P.3d 1261, 1271 (Or. 2000).
8. Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 350 (Or. 2001).
9. State v. Hirsch, 114 P.3d 1104, 1112 (Or. 2005) (including discussion of Indiana debates).
10. State v. Ciancanelli, 121 P.3d 613, 627 (Or. 2005).
11. State v. Mills, 312 P.3d 515, 523 (Or. 2013) (also examining Indiana debates).
12. State v. Hemenway, 295 P.3d 617, 633 n.7 (Or. 2013) (Landau, J., concurring).
13. Haugen v. Kitzhaber, 306 P.3d 592, 601 (Or. 2013).
14. Horton v. Or. Health & Sci. Univ., 376 P.3d 998, 1006–07 (Or. 2016).
15. State *ex rel.* Kristof v. Fagan, 504 P.3d 1163, 1169–70 (Or. 2022).