

USES OF CONVENTION HISTORY IN STATE CONSTITUTIONAL LAW

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INTRODUCTION

For decades now, scholars have been interested in the reliability of historical evidence surrounding the drafting of the federal Constitution.¹ The intrigue surrounding the records of the federal Constitutional Convention—the Philadelphia Convention, held in 1787²—are nearly worthy of their own Netflix special (though maybe not quite another installation of the *National Treasure* franchise).³ Sources of evidence about the federal Constitutional Convention range from official journals

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1. See, e.g., James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986); John F. Manning, *The Role of the Philadelphia Convention in Constitutional Adjudication*, 80 GEO. WASH. L. REV. 1753 (2012); John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964). Much of the earliest interest surrounded the legitimacy of the Supreme Court’s reliance on extrinsic evidence (historical or not) in interpreting statutes or the Constitution. E.g., Jacobus tenBroek, *Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 CALIF. L. REV. 287 (1938); Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: Debates and Proceedings of the Constitutional and Ratifying Conventions*, 26 CALIF. L. REV. 437 (1938); Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: The History of the Times of the Convention*, 26 CALIF. L. REV. 664 (1938); Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: Contemporary Exposition*, 27 CALIF. L. REV. 157 (1939).

2. See Manning, *supra* note 1, at 1753.

3. NATIONAL TREASURE (Walt Disney Pictures 2004); NATIONAL TREASURE: BOOK OF SECRETS (Walt Disney Pictures 2007); see also *National Treasure: Edge of History* (Disney Plus forthcoming 2022).

to attendees' notes and other communications among the Framers, and most were published in Max Farrand's *Records of the Federal Convention of 1787*.⁴ Yet even before Farrand's publication in 1911, and continuing to the present day, scholars and politicians have pointed to aspects of the sources that spark doubt they shed much light on the Philadelphia Convention at all.⁵ To list a few examples, Robert Yates's notes on the Convention were obtained after Yates's death and published by a French political operator in 1821.⁶ Later, a discovery of a few pages of an original copy revealed that this publisher "omitted half of the material on the sheets and altered every sentence that he published."⁷ Nearly from the moment James Madison's notes on the proceedings were published posthumously in 1840, contemporaries questioned their reliability, and scholars have now demonstrated the extent to which he revised his notes for many years after the fact.⁸

As compared with the material available to federal constitutional law scholars and interpreters, the quantity of historical material pertaining to state constitutions is vast (though not for every state constitution). Next to Farrand's three-volume set, the records of all the state constitutional conventions alone number in the hundreds of volumes, many spanning thousands of pages.⁹ And yet, no comparable literature exists to assess the reliability of those records.¹⁰ At a basic level, state constitutional law

4. 1-3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911).

5. See generally Hutson, *supra* note 1 (discussing the integrity of the sources on the federal Constitutional Convention).

6. *Id.* at 9-10.

7. *Id.* at 12.

8. MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 2-5 (2015); Hutson, *supra* note 1, at 24-25.

9. See Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 HASTINGS CONST. L.Q. 199, 199-201, 220 (2000) ("From New York's 1821 convention and its accompanying *Manual* to the enormous amount of material prepared for delegates to New York's 1894 convention, the trend in constitution-making saw ever-increasing amounts of information placed at the disposal of constitution-makers."); see also J.H. Snider, *Does the World Really Belong to the Living? The Decline of the Constitutional Convention in New York and Other US States, 1776-2015*, 6 AM. POL. THOUGHT 256, 257-58 (noting that there have been approximately 236 state constitutional conventions).

10. One exception is John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. STATE L.J. 1, 43-44 (1988), which does take up briefly some of the incompleteness of Arizona constitutional convention records. There has been some work on the uses of ballot pamphlets as interpretive aids, particularly in California. See Stephen Salvucci, Note, *Say What You Mean and Mean What You Say: The Interpretation of Initiatives in California*, 71 S. CAL. L. REV. 871, 882 (1998). And historical records of state constitutional conventions have of course been of some more interest to scholars interested in the process of state constitution-making, rather than interpretation. *E.g.*, Baum & Fritz, *supra* note 9, at 200; Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. U. L. REV. 65, 101 (2019).

has often suffered from lack of sustained attention.¹¹ This leaves a question: if scholars have criticized courts' reliance on shaky historical evidence to interpret the federal Constitution, to what extent might the same sorts of concerns plague the state records?

Now is an opportune time to consider the production and use of the historical evidence surrounding state constitutions for at least three reasons: First, while much scholarly interest in uses of historical material focuses on originalism as deployed in the Supreme Court, more recent work is starting to engage originalism and uses of history in state and lower federal fora.¹² Second, the Supreme Court's turn in recent federal Constitutional decisions toward "history" and "tradition" may mean more lawyers turn to state constitutions and associated records for evidence of historical understandings of rights and their limits.¹³ And lastly, recent progressive losses in the Supreme Court seem likely to reinvigorate interest in pursuing state constitutional causes of action to protect rights not recognized at the federal level—a move that may likewise trigger renewed interest in state constitutional sources.¹⁴

This Essay begins to examine the records that surrounded the creation of state constitutions, considering their reliability as sources, their emergence as interpretive aids, and their widespread use by judges. It focuses in particular on material from state constitutional conventions: the published journals, debates, and proceedings that purport to chronicle the day-to-day activities of a state constitution's drafters. Although hardly the most frequent way that state constitutions are changed—a distinction that likely goes to legislatively referred amendments—state convention evidence can be helpfully viewed through the critical lens already applied to records of the federal Constitutional Convention. This brief work, informed by scholars' critiques of convention evidence in the federal context, will illustrate some of the problems and possibilities that this material can pose for state constitution interpreters.

11. See Maureen E. Brady, *Zombie State Constitutional Provisions*, 2021 WIS. L. REV. 1063, 1086 (“[M]ost people are unaware that their state has a constitution, and even lawyers routinely seem ignorant of the possibility of state constitutional claims.”) (cleaned up).

12. See Josh Blackman, *Originalism and Stare Decisis in the Lower Courts*, 13 N.Y.U. J.L. & LIBERTY 44 (2019); Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 GEO. J.L. & PUB. POL’Y 341, 342–44 (2017); Ryan C. Williams, *Lower Court Originalism*, 45 HARV. J.L. & PUB. POL’Y 257, 257 (2022).

13. *E.g.*, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2128 (2022).

14. *E.g.*, Becky Sullivan, *With Roe Overturned, State Constitutions Are Now at the Center of the Abortion Fight*, NPR (June 29, 2022, 5:00 AM), <https://www.npr.org/2022/06/29/1108251712/roe-v-wade-abortion-ruling-state-constitutions> [<https://perma.cc/BQF5-QT6N>].

Part I begins by examining the extent to which the evidentiary weaknesses identified by federal Constitutional scholars apply to material produced in conjunction with state constitutional conventions. Part II traces the history of state-court reliance on convention evidence by examining its emergence as an interpretive aid in the first half of the nineteenth century and its acceptance in an increasing number of judicial decisions. Given the frequency with which courts turn to convention evidence, the Conclusion identifies some puzzles and directions for further research on the uses of historical material to shed light on the meaning of state constitutional provisions.

I. STATE CONSTITUTIONAL CONVENTIONS AS SOURCES

Leaving aside questions of whether historical material should have any relevance in the interpretive process, criticisms of the reliability of federal convention evidence tend to cluster along different lines. Some criticisms relate to the secrecy surrounding the Philadelphia Convention. Transcripts of the proceedings were not available to early contemporaries because records and recollections of attendees were published only much later.¹⁵ Given time lags between the framing of the federal Constitution and publication of its related records, the compilation and (in some cases) editing of those records did not occur until years after the fact, leading to documented gaps or errors.¹⁶ Additionally, as the parable of the French political operator suggests,¹⁷ publishers or reporters of convention materials sometimes had political (or other) incentives to edit records substantially before publication.¹⁸ Other critiques focus more generally on difficulties associated with using conventions as sources, such as leveraging them to determine the political posturing of delegates or any additional information about a multimember body beyond what other eighteenth century records might reveal.¹⁹

Essentially every problem with the federal sources applies with equal force to one state constitutional convention or another. To be clear, this Part is an overview of the sorts of problems that one can encounter, not a comprehensive examination of the strengths or weaknesses of every

15. Hutson, *supra* note 1, at 2.

16. *E.g.*, BILDER, *supra* note 8, at 4-5; Hutson, *supra* note 1, at 20, 24-25.

17. *See supra* note 6 and accompanying text.

18. For instance, the reporter of the Maryland and Pennsylvania ratification debates eliminated Federalist speeches, leaving publishers to reconstruct them from other sources. Hutson, *supra* note 1, at 22-23.

19. *See* Manning, *supra* note 1, at 1769-70. Similar criticisms have admonished using accounts of the federal Constitution in state debates. *See id.* at 1766. Furthermore, there is the added problem that different states clearly interpreted pieces of the federal Constitution differently, which suggests searching for any sort of uniform understanding is futile.

state's individual records. It nevertheless gives a sense of the need for cautious use of convention material given both potential issues with the records themselves and, more specifically, the nature of state constitutional conventions.

To begin, consider records published decades after the fact. The journal for Massachusetts's second constitutional convention was published in 1832, though the convention took place in 1779.²⁰ The journal for New Hampshire's constitutional convention in 1791 was first published in 1877.²¹ These delays are not limited to the earliest conventions: Oregon's 1857 convention only received a published journal in 1882,²² the debates and proceedings of Delaware's convention of 1896 to 1897 were published in 1958,²³ and—holding the unflattering record—the proceedings of Connecticut's 1818 convention were published in 1991.²⁴ Perhaps unsurprisingly, delays could lead to losses in the documentary record, just as in the federal context. Massachusetts's own 1832 publication, for instance, contains a footnote observing that a document was distributed for the ensuing discussion, “but is not to be found among the papers of the Convention” held by the state.²⁵ The published report continues for pages with reference to numbers and sections of that document, leaving the reader with no way of knowing the context or relevance of any discussion therein.²⁶ A strange appendix at the end of the journal contains an “important Document, so necessary to explain the Text of the Journal itself.”²⁷ It was not discovered until there was a public newspaper notice about the pending publication of the convention journal, which prompted a lawyer in Medford to provide a copy of some material that he had found “among the papers of his relative” who was a member of the Convention.²⁸ With no time to edit the entire document before publication, it was hastily tacked on to the end of the book.²⁹

Likewise, although most state constitutional conventions were not held in secret (as the federal one was), some proceedings occurred behind

20. JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS BAY 5–6 (1832) [hereinafter JOURNAL OF THE MASSACHUSETTS BAY CONVENTION].

21. *State v. Griffin*, 29 A. 414, 415 (N.H. 1890).

22. Horst Dippel, *The Trap of Medium-Neutral Citation, or Why a Historical-Critical Edition of State Constitutions is Necessary*, 103 LAW LIBR. J. 219, 229 (2011).

23. JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 26 & 298 n.71 (2009).

24. *Id.* at 299 n.78 (recounting other delays).

25. JOURNAL OF THE MASSACHUSETTS BAY CONVENTION, *supra* note 20, at 35.

26. *Id.* at 36–41.

27. *Id.* at 191.

28. *Id.*

29. *Id.* at 35, 191.

closed doors.³⁰ Because Republicans and Democrats could not agree to participate in a single convention,³¹ Minnesota's 1857 constitution was pieced together from two competing documents "in a little over one week" by a ten-member committee operating in total secrecy.³² One of the committee members left the drafting process saying: "This is a dose that has got to go down, and we might as well shut our eyes open our mouth and take it"—not exactly the most confidence-inspiring quote from a framer about the constitutional process.³³

On top of delayed and secret proceedings, other conventions were simply documented poorly. The day-to-day business of a convention was usually recorded in a sometimes-skeletal journal,³⁴ useful in determining what motions passed or failed or what was referred to a committee but lacking substantial detail on any single day's discussion. Some states, but not others, produced a more fulsome source that included the records of delegates' remarks and specific statements during debates.³⁵

Additionally, the decision whether to publish these debates was itself fraught. Although many delegates thought proceedings should be recorded for posterity, numerous delegates to conventions were opposed to the cost of printing their proceedings.³⁶ Other times, delegates' motives in recommending against publication were more disturbing. For instance, delegates to Alabama's 1901 constitutional convention objected to published reports "because they did not want records of their white supremacy preserved," fearing that "Northern papers" or federal courts would later use the evidence to scrutinize their facially neutral laws.³⁷ In still other cases, constitutional convention participants were simply unconvinced their debates offered any value. One California delegate in the 1870s called debates "trashy and worthless," and another in Ohio in that same decade asserted only "two men in the whole of the State of Ohio" had read the proceedings of the last convention; "[o]ne was the proof-reader, and he died shortly afterwards."³⁸ Ohioans must be credited for their dramatic quotes about the value of printed debates. Another Ohioan in 1912 lamented that he could "never pass a tree without

30. See DINAN, *supra* note 23, at 12.

31. William Anderson, *The Need for Constitutional Revision in Minnesota*, 11 MINN. L. REV. 189, 189 (1927).

32. *Id.* at 191.

33. *Id.*

34. See DINAN, *supra* note 23, at 26; see also FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL CONVENTIONS OF 1844 AND 1846 iii (Benjamin F. Shambaugh ed., 1900) (referring to a "bare journal of proceedings").

35. See DINAN, *supra* note 23, at 23–25.

36. *Id.* at 18–19, 22.

37. Brady, *supra* note 11, at 1072–73.

38. DINAN, *supra* note 23, at 19.

feeling ashamed” that it might be cut down to publish deliberative proceedings.³⁹

Other times, publication options might be limited by either available personnel or funding. Wyoming did not hire a stenographer until the fourth day of its convention.⁴⁰ No official record of the debates on Oregon’s constitution in 1857 survived—possibly because in the remote western state, there was simply “nobody qualified to report them.”⁴¹ Payment disputes or appropriations issues held up debate publication in still more states, including Idaho, Kansas, Montana, South Dakota, Virginia, and West Virginia.⁴² As early as 1899, the Colorado Supreme Court noted that “the debates in the constitutional convention were not reduced to writing, or, if they were, the record of the proceedings, as preserved in the office of the secretary of state, does not contain them.”⁴³ It lamented that “[m]uch light that might have been thrown upon the intention of the framers of the various provisions, had these debates been taken down and preserved, is forever lost.”⁴⁴ Whatever the reason, scholar John Dinan suggests that just over half of the state constitutional conventions have no record of the formative debates.⁴⁵

Even where conventions had stenographers, there could still be loss. When the state of Washington failed to appropriate funds to pay the reporters hired to take shorthand notes on the convention, the reporters destroyed their notes.⁴⁶ Two volumes of Pennsylvania’s debates in 1873,

39. *Id.* at 20.

40. *Id.* at 26.

41. Dippel, *supra* note 22, at 229.

42. DINAN, *supra* note 23, at 26 & nn.68–69. *See also Ellis v. State*, 4 Ind. 1, 1 (1852) (resolving a funding dispute between the state’s printer and the state).

43. *Ames v. People ex rel. Temple*, 56 P. 656, 662 (Colo. 1899).

44. *Id.*

45. Dinan has located records of about 114 conventions, although in addition to transcripts of the debates themselves, he includes some that were later produced (sometimes in fragmentary form) from contemporaneous newspapers and other sources. DINAN, *supra* note 23, at 18, 26, 28. *See Ames*, 56 P. at 662 (noting the absence of records of Colorado’s convention in 1875); *State v. Babcock*, 22 N.W. 372, 377 (Neb. 1885) (Cobb, C.J., dissenting) (“[N]o record of the debates of the constitutional convention was preserved.”); *Sands v. Kimbark*, 39 Barb. 108, 118 (N.Y. Gen. Term. 1863) (“The constitution of 1777 was not submitted to the people for ratification. The convention was clothed with full powers to make the constitution, and so far as I am aware, no record was preserved of the debates, if any, which were had at the time of its adoption by the convention.”); *Coombs v. State*, 44 S.W. 854, 857 (Tex. Crim. App. 1898) (“We have not had access to the records of the convention which framed the constitution of 1845 to aid us”); FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL CONVENTIONS OF 1844 AND 1846, *supra* note 34, at iii (noting absence of record of constitutional conventions of Iowa in 1844 and 1846).

46. The foreword to *The Journal of the Washington State Constitutional Convention 1889* charitably notes that “[t]hrough the perverse developments of history these papers were destroyed without being transcribed,” but the logical implication is that

as well as its journal, caught fire before the convention was even over; these were somehow reconstructed (albeit not without bickering over the expense of doing so).⁴⁷ The case of Nebraska is also illustrative. The state held conventions in 1871 and 1875, but the record was not published immediately. Despite some earlier interest in publishing the debates, the director of the Nebraska Historical Society located the shorthand report of the 1871 convention only in 1899 in “one of the vaults of the State House . . . under thirty years’ dust.”⁴⁸ Surviving constitutional delegates were offered the opportunity to provide “correction and comment.”⁴⁹ While that might sound like a less than ideal chain of custody, things could always be worse. The records of the 1875 constitutional convention were last seen in a cracker box held by two statehouse janitors sometime in the 1880s before being lost,⁵⁰ leaving reconstruction of the debates to “the journal, the memories of members, newspaper accounts and letters.”⁵¹ In recounting this history a century later, the Nebraska Supreme Court summarized the fate of its constitutional documents as follows: “[s]ic transit gloria mundi [so passes away the glory of the world]—in a cracker box, somewhere.”⁵²

As the partial reconstruction of Nebraska’s conventions suggests, the absence of official proceedings did not necessarily deter individuals (or courts) desperate for evidence about what was said at a constitutional convention from coming up with creative solutions. Indeed, several published convention proceedings are, in actuality, compilations reconstructed from these sorts of contemporary newspapers, diaries, or other sources.⁵³ This tees up yet another issue that is at once opposite and related: not the absence of records, but their proliferation. On occasion, different newspapers and debate publishers have different accounts of a

the unpaid reporters destroyed the notes. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889 (Beverly Paulik Rosenow ed., 1962) (1999 reprint).

47. 8 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 734–38 (1873).

48. 1 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE NEBRASKA CONSTITUTIONAL CONVENTION 7 (Addison E. Sheldon ed., 1905).

49. *Id.* at 11.

50. *Id.* at 7.

51. *Id.* at 10.

52. *Jaksha v. State*, 385 N.W.2d 922, 925 (Neb. 1986).

53. *See, e.g.*, THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, at 34–35 (Charles Henry Carey ed., 1926); FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL CONVENTIONS OF 1844 AND 1846, *supra* note 34, at iii–iv; 1 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, at 3–4 (Isidor Loeb & Floyd C. Shoemaker eds., 1930) (noting missing volumes of records had been filled in with newspaper accounts and other changes to manuscript); S.S. McKay, *Preface* to DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 (Seth Shepard McKay ed., 1930); *see also* DINAN, *supra* note 23, at 26, 28.

convention's business.⁵⁴ The press sometimes reported "rude remarks," "temper tantrums," and other content that never made it into the official proceedings.⁵⁵ Recent work by Horst Dippel demonstrates illustrates that in Oregon, the enrolled manuscript of the proceedings of the 1857 convention differs in multiple respects from both contemporaneous newspaper coverage and the printed convention journal.⁵⁶ Dippel has even resurfaced issues with the reliability of the canonical 1909 compilation by Francis Newton Thorpe of *The Federal and State Constitutions*.⁵⁷ The publication turns out to be riddled with errors and inconsistent about noting amendments and additions in the correct spots—so much so that one 1910s reviewer eviscerated it as a necessary evil given the difficulty of accessing state constitutions, but concluded Thorpe's work was "untrustworthy and should be used with care."⁵⁸

It is not hard to see how multiple publications and proliferating reports carry risks of introduced error, even with a well-intentioned publisher or editor. This sort of problem came to the fore in a 2010 Georgia case, in which the majority and dissenting opinions fought over how to characterize a contemporary, stenographic report when it differed in some respects from the official journal.⁵⁹ The majority argued that the stenographic report had been treated as a valid and reliable transcript in state constitutional opinions "for over a century,"⁶⁰ while the dissent dismissed it as a "journalist's account."⁶¹ On the other hand, sometimes a multiplicity of reports indicates something more nefarious: editors consciously selecting or changing the material they reported due to political or other biases. No official record of Maryland's 1867 constitutional convention was kept, but it was covered by two newspapers: the *Baltimore Sun (Sun)*, associated with Democrats, and the *American*, associated with Republicans.⁶² The convention itself was *exclusively* attended by Democratic delegates, while Republicans

54. As one example, some of New York's convention proceedings were compiled and published by two different private companies. DINAN, *supra* note 23, at 26.

55. THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, AT iv (John S. Goff ed., 1991).

56. Dippel, *supra* note 22, at 229–30.

57. *Id.* at 222–25 (quoting and citing THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (Francis Newton Thorpe ed., 1909)).

58. W.F. Dodd, Book Review, 4 AM. POL. SCI. REV. 135, 137–38 (1910).

59. *Smith v. Baptiste*, 694 S.E.2d 83, 97 n.12 (Ga. 2010) (Hunstein, C.J., dissenting).

60. *Id.* at 86.

61. *Id.* at 98 (Hunstein, C.J., dissenting).

62. REPUBLICAN PRESS AT A DEMOCRATIC CONVENTION: REPORTS OF THE 1867 MARYLAND CONSTITUTIONAL CONVENTION BY THE BALTIMORE AMERICAN AND COMMERCIAL ADVERTISER i–ii (John J. Connolly ed., 2018).

protested and challenged it on legal grounds (ultimately losing).⁶³ Eventually, the *Sun's* coverage was collected and published as the official record, and Maryland courts have relied on it frequently since then.⁶⁴ But as a recent book by Maryland lawyer John Connolly demonstrates, the *Sun's* coverage differs substantially from the *American's*. To provide a few examples, the published volume—compiled from the *Sun*—omits many racist speeches and remarks promulgated in support of certain provisions, including one “openly advocat[ing] a return to slavery.”⁶⁵ The *American's* coverage of the debates on the constitution’s provision for “thorough and efficient” schools provides some evidence that the goal was to avoid *universal* education, and in particular, the education of Black children.⁶⁶ The *Sun's* coverage, and thus, the printed volume, omitted most of this discussion—yet, Maryland’s high courts have examined that volume closely in construing the state’s educational provision.⁶⁷

The convention proceedings’ publications could be plagued by delays, secrecy, losses, and mistakes. In some states, delegates also levied charges of misquoting and misstatement at convention reporters in real time, often impugning their motives. A Kansas delegate took to the floor in 1859, alleging an “abuse of privilege” when a newspaper reporter misquoted him in recounting the proceedings and subsequently refused to correct it.⁶⁸ In 1851, an Ohioan delegate complained that he had barely spoken at all during the convention, so he questioned: “[H]ow was I reported in the *Cincinnati Enquirer*? By a downright falsehood put into my mouth.”⁶⁹ In Connecticut, just two short years after its constitutional convention, a former delegate sued the local reporter who had published some of the proceedings in the *Connecticut Journal* for libel, after the reporter intimated that the delegate conflated worship of the devil with worship of God in a floor statement.⁷⁰ An Arizona delegate in 1910 heard from reviewers of the preliminary report that his speech sounded “like the insane ravings of a wild man,” leading him to support proposals for a revision committee prior to final publication.⁷¹ In another

63. *Id.*

64. *Id.* at ii–iii.

65. *Id.* at xiv–xv, xvii, xxi, xxiii (explaining that the *Sun* omitted racist remarks from its publication while the *American* did not).

66. *Id.* at xix–xx.

67. *Hornbeck v. Somerset Cnty. Bd. of Educ.*, 458 A.2d 758, 770 (Md. 1983) (“Of particular importance in this connection are the proceedings of the 1867 Constitutional Convention . . .”).

68. KANSAS CONSTITUTIONAL CONVENTION 332 (1920).

69. OFFICIAL REPORTS OF THE DEBATES AND PROCEEDINGS OF THE OHIO STATE CONVENTION 935 (1851).

70. *Stow v. Converse*, 3 Conn. 325, 341–42 (1820).

71. Leshy, *supra* note 10, at 41.

instance, a speech was completely misattributed.⁷² For its part, to fix these problems, the Arizona revision committee randomly crossed out “extensive passages . . . by hand, without explanation,” hand-altered other bits, and repeated others back-to-back with minor modifications, leaving no trace of which was more accurate.⁷³ Maybe the revision committee needed its own revision committee!

Even in the best-case scenario, with perfect reporting, there is still reason to be skeptical that the contents of published proceedings are necessarily the arguments heard by delegates. Printers occasionally sought the aid of delegates in getting the content of speeches right, so they solicited written versions—but there is no guarantee that what the speakers provided was the set of remarks actually uttered on the floor. At one point, records in Kansas indicate that a member submitted some kind of “protest,” but then a parenthetical observes that “[the] protest has not been received by the printer.”⁷⁴ In Arizona, many of the floor speeches were transcribed from written remarks furnished to the convention secretary.⁷⁵ One of the first manuscript publications of the convention record indeed contains the parenthetical “(Speech by [Delegate] sent to him, omitted here)” in dozens of spots.⁷⁶ In a subsequent publication, though, those speeches are included without annotation.⁷⁷ And furthermore, evoking the old “tree-falling-in-the-forest” adage, just because a speech *was* delivered on the floor does not mean anyone was there to hear it (a concern of equal force in the federal context). There is evidence to suggest that delegates sometimes debated by reference to statements made by others according to the newspaper records of the convention’s activity, whether in lieu of or in addition to listening in the hall.⁷⁸

Of course, many of the other criticisms made in the federal context—political posturing, difficulties interpreting the motives of a multimember body, and so forth—apply to extant state convention evidence, too. State constitutional conventions could pose their own distinctive problems,

72. *Id.*

73. *Id.* at 42.

74. KANSAS CONSTITUTIONAL CONVENTION, *supra* note 68, at 474.

75. Leshy, *supra* note 10, at 42.

76. *E.g.*, JOURNALS OF THE CONSTITUTIONAL CONVENTION OF ARIZONA 140, 145, 153, 179, 521, 646 (1925).

77. *Compare id.* at 180 (omitting speeches of Cunningham, Cunniff, Weinberger, and Crutchfield), *with* THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, *supra* note 55, at 260–64 (containing those speeches, though noting that the Weinberger speech was an “[u]nbound manuscript found inserted in one copy of the journal” and the Crutchfield speech has some “words missing”).

78. OFFICIAL REPORTS OF THE DEBATES AND PROCEEDINGS OF THE OHIO STATE CONVENTION, *supra* note 69, at 937.

though. In a particularly unique example, as I have already mentioned,⁷⁹ Minnesota Republicans and Democrats held and reported their own conventions (albeit in different rooms of the same building) and issued separate constitutions.⁸⁰ The respective printers of each of the conventions later got into a legal scuffle that went to the Minnesota Supreme Court over which party had the right to print the “official” version.⁸¹ A final, broader concern makes state conventions quite different than their federal counterpart. While there is limited evidence that the publishers of material pertaining to the federal Constitution—let alone the delegates—knew that judges might turn to their statements as interpretive aids, state records contain ample evidence that delegates knew their speeches or reports would be cited and relied upon by future judges interpreting the provisions under discussion.⁸² As a Pennsylvania delegate put it in 1873, “We ought to have our sets of Debates full. The people desire it. They will be important to lawyers in the interpretation of Constitutional law in the courts because they show the intention of the Convention at the time the Constitution was framed.”⁸³ The next Part turns to the nature and extent of that reliance.

II. COURT RELIANCE ON CONVENTION EVIDENCE

Citations to state constitutional conventions began to appear in the 1820s and 1830s in New York.⁸⁴ Given that few published convention records even existed in those decades, this is a relatively quick

79. See *supra* note 32 and accompanying text.

80. WILLIAM ANDERSON & ALBERT J. LOBB, A HISTORY OF THE CONSTITUTION OF MINNESOTA 85–86 (1921); see *State v. Lessley*, 779 N.W.2d 825, 838 (Minn. 2010) (noting convention was “somewhat of a mess”) (cleaned up).

81. *Goodrich v. Moore*, 2 Minn. 61, 67 (1858); see *In re Medill*, 119 B.R. 685, 690 (Bankr. D. Minn. 1990) (noting that Moore published the Republican report and Goodrich the Democratic).

82. *E.g.*, 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS 1578 (1870) (“I would be glad to see the record of our proceedings contain a construction of this provision, so that the courts hereafter, when they come to construe it, may at least have the aid of the construction given by the Convention to the provision when passing upon it.”); DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, *supra* note 53, at 24 (“The expression of the views [of delegates] . . . would be a guide—and a very useful guide—to the courts in the future, in determining the meaning of the various clauses, and the scope and intent of the Convention in relation to the clauses.”). Aside from judges, there is also evidence that delegates wanted to influence the public meaning of the constitution’s words through publication of debates. See *id.*

83. 8 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA, *supra* note 47, at 738.

84. See, *e.g.*, *People ex rel. Ingersoll v. Garey*, 6 Cow. 642, 648 (N.Y. Sup. Ct. 1827); *Coutant v. People ex rel. Bunn (Coutant I)*, 11 Wend. 511, 513, 517 (N.Y. 1833).

turnaround. The 1810s ushered in a second wave of constitution-making, as some of the earliest states to join the nascent union began considering new constitutions and as states to the west created their own.⁸⁵ New York published a journal containing the debates and proceedings of its 1821 convention in that same year.⁸⁶ The contents of those debates were first mentioned by a judge in a reported decision just six years later.⁸⁷

Shortly after this first appearance, debates got their starring role in the 1833 New York case of *Coutant v. People ex rel. Bunn (Coutant I)*.⁸⁸ The case involved the interpretation of a clause in the state constitution providing that sheriffs and county clerks would be elected “once in every three years, and as often as vacancies shall happen” due to death or removal.⁸⁹ Did this mean that elections for these officials would happen every three calendar years or that each official elected should serve for three years?⁹⁰ Clerks were evidently ineligible for re-election after the expiration of a three-year term, and this distinction between triennial elections and three-year terms came to matter. A clerk—Gilbert Coutant—had assumed office for a year in 1830 due to the death of his predecessor, and with lingering uncertainty about election timing, he nevertheless ran for reelection in 1831 and won a full term (on the triennial clock).⁹¹ A challenger, William Bunn, ran for and won an election for the same position in 1833 (three years after Coutant had assumed office), arguing that Coutant had unlawfully been in office for longer than his three-year term, treating it as having commenced when his predecessor died (instead of when he was elected).⁹² The New York Court for the Correction of Errors was called to resolve the ambiguity.

The Chancellor’s opinion observed that the section of the constitution was “not very clearly expressed” and noted divergent opinions on whether the provision called for triennial elections or fixed three-year terms.⁹³ He concluded, however, that “in reference to certain principles which we may fairly presume to have actuated the framers of the constitution in adopting its several provisions,” each official should

85. See Albert L. Sturm, *The Development of American State Constitutions*, 12 *PUBLIUS* 57, 82–83 (1982).

86. *REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821 (1821); JOURNAL OF THE CONVENTION OF THE STATE OF NEW YORK (1821)*.

87. *Ingersoll*, 6 *Cow.* at 648. Another scholar seems to have missed this citation, placing the first citation of material in the 1833 case of *Coutant I*. Hans W. Baade, “*Original Intent*” in *Historical Perspective: Some Critical Glosses*, 69 *TEX. L. REV.* 1001, 1055–56 (1991).

88. 11 *Wend.* at 513, 517.

89. *Id.* at 512 (citing N.Y. CONST. of 1821, art. IV, § 8).

90. *Id.*

91. *People v. Coutant (Coutant II)*, 11 *Wend.* 132, 133 (N.Y. Sup. Ct. 1834).

92. The facts are better elucidated in *Coutant II*, 11 *Wend.* at 133.

93. *Coutant I*, 11 *Wend.* At 512.

serve for three years, whether elected in a general election or chosen to fill a vacancy due to death or removal.⁹⁴ “[R]eferring to the published debates of convention,” the Chancellor quoted speeches from three different pages in finding that the objective of the constitutions’ drafters was to guard against evils that might tempt these officials if they were eligible for re-election and seeking ingratiation with the populace.⁹⁵ As a result, the *Coutant I* court concluded that the framers intended “the limitation of the term of office to [be] three years.”⁹⁶

From *Coutant I* forward, it became increasingly acceptable to examine convention evidence. Opinions in two other New York cases in 1841—*Clark v. People*⁹⁷ and *People v. Purdy*⁹⁸—extensively quoted from conventions in interpreting constitutional provisions relating to the appointment of justices of the peace and the powers of aldermen.⁹⁹ In *Clark*, Chancellor Walworth and a Senator both cited the 1821 proceedings, with each running through a play-by-play of debate on the relevant provision.¹⁰⁰ In the lower *Purdy* court, dissenting Justice Bronson quoted from the convention, noting that they had rejected the very limitation that the government asked the judges to read into the constitutional text: “We have here the most unequivocal proof—evidence which no man can fail to see, wink as hard as he will—that the framers of the constitution meant precisely what they said.”¹⁰¹ His view prevailed on appeal, with additional references to convention material in the opinion, although at least one of the members of the Court for the Correction of Errors had a bit of anxiety about the use of it.¹⁰²

Each decade of the nineteenth century, state-court judges began making additional use of convention journals, debates, and reports. In the 1840s, the highest courts of five states—Louisiana, Michigan, New York, Ohio, and Virginia—relied on convention debates to construe state constitutional provisions in a total of six majority opinions.¹⁰³ All these

94. *Id.* at 512–13.

95. *Id.* at 513. It appears that all three speeches were uttered by General Erastus Root, and though the Chancellor referred to “he” multiple times, the Chancellor did not identify the speaker. *See* REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821, *supra* note 86, at 27, 331, 384, 388.

96. *Coutant I*, 11 Wend. at 513.

97. 26 Wend. 599 (N.Y. 1841).

98. 2 Hill 31 (N.Y. Sup. Ct. 1841).

99. *Clark*, 26 Wend. at 604–06, 606–10 (Dixon, Ely, Sens., concurring); *Purdy*, 2 Hill at 31–32 (Bronson, J., dissenting).

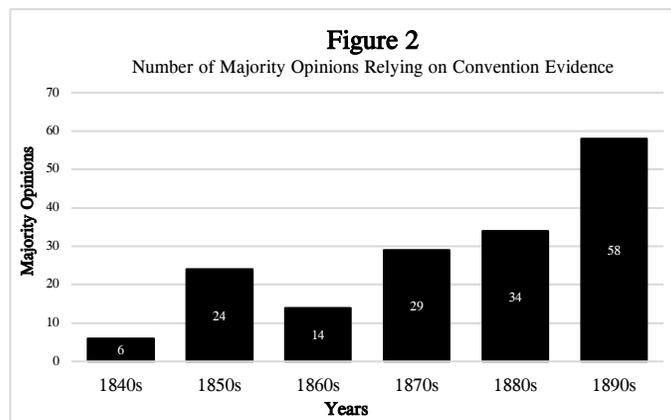
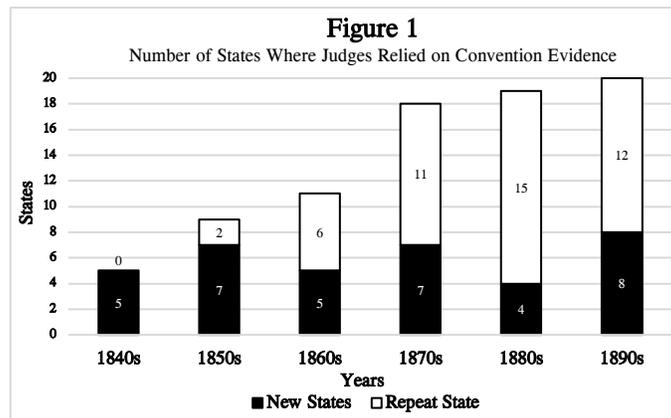
100. *Clark*, 26 Wend. at 604–06; *id.* at 611–12 (Ely, Sen., concurring).

101. *Purdy*, 2 Hill at 37–38 (Bronson, J., dissenting).

102. *See Purdy v. People*, 4 Hill 384, 390–91 (N.Y. 1842); *see also id.* at 397–99 (Paige, Sen., concurring) (using convention evidence yet stating that searching for what the “framers intended” could mark an end to written constitutions).

103. *See Second Mun. v. Duncan*, 2 La. Ann. 182, 186 (1847); *Green v. Graves*, 1 Doug. 351, 364 (Mich. 1844); *Clark*, 26 Wend. at 604–06; *Purdy*, 2 Hill at

numbers increased in subsequent decades.¹⁰⁴ As visualized in the following charts, judges relied on convention evidence in at least twenty-three majority opinions in nine states in the 1850s, fourteen majority opinions in eleven states in the 1860s, twenty-nine majority opinions in eighteen states in the 1870s, thirty-four majority opinions in nineteen states in the 1880s, and fifty-eight majority opinions in twenty states in the 1890s.¹⁰⁵ By the turn of the century, courts in at least thirty-six of the forty-five states had relied on convention evidence in interpretation, including thirty-five state supreme courts.¹⁰⁶



37–38 (Bronson, J., dissenting); *Thacker v. Hawk*, 11 Ohio 376, 383–84 (1842); *Sharpe v. Robertson*, 46 Va. (5 Gratt.) 518, 583–84 (1849).

104. See Appendix 1, <http://www.maureenbrady.com/wp-content/uploads/2022/08/Appendices.pdf> [[https://perma.cc/WRQ2-DPNQ](https://perma.cc WRQ2-DPNQ)].

105. See Appendix 1, *supra* note 104.

106. See Appendix 1, *supra* note 104. Texas is the sole exception among the thirty-six states where the citation came from a forum other than the state supreme court, since the citation to Texas convention evidence came from a federal court. *Hancock v. Walsh*, 11 F. Cas. 403, 407 (C.C.W.D. Tex. 1879). There is evidence that a few additional states followed shortly after the turn of the century. *E.g.*, *State v. McKee*, 46 A. 409, 414 (Conn. 1900); *Roberson v. State*, 63 S.W. 884, 884 (Tex. Crim. App. 1901).

The opinions in these decisions sometimes reference proceedings more abstractly, observing that a journal recounts the rejection of a particular amendment to the wording of a provision, or locating the origin of a change.¹⁰⁷ In other cases, there is extensive quotation from specific delegates' speeches.¹⁰⁸ To give a few snapshots of these uses over time, in 1858, Tennessee's highest court considered whether, in a provision restricting the franchise to "citizen[s] of the county," "citizen" meant "resident" or "United States citizen."¹⁰⁹ Turning to "[t]he journal of the convention, to which we suppose it is admissible to refer," the judges noted that the draft had used "inhabitant" but the word had been replaced, leading them to the conclusion that voters had to be United States citizens.¹¹⁰ It bears noting that courts in different states and times seem to have used convention evidence in distinct ways: to ascertain the intent of the framers, to determine the meaning of a word to the public, or to identify the mischief meant to be addressed by a given provision. In future work, I hope to further look into these different uses, any regional variation, and possible changes over time.

By 1864, Minnesota's highest court consulted its convention proceedings, citing *Coutant II* for its authority to do so.¹¹¹ In 1878, the reporter of a case about whether an entity was exempt from taxation as a "purely public charity" transcribed that Chief Justice Daniel Agnew of the Pennsylvania Supreme Court asked a lawyer whether there was "any discussion in the debates of the constitutional convention in relation to [the] word 'purely.'"¹¹² A *Harvard Law Review* note in 1899 considering the propriety of using legislative history argued that "it has always been held allowable to refer to the debates in the constitutional conventions."¹¹³ Over two decades, the Supreme Court of Nebraska made a veritable habit of complaining that its records were not published.¹¹⁴

107. See, e.g., *Greenwood & Son v. Maddox & Toms*, 27 Ark. 648, 656–57 (1872) (observing movement of provision through committees); *Selden v. Jacksonville*, 10 So. 457, 462 (Fla. 1891) (tracking motions on particular wording); *Commonwealth ex rel. v. Waller*, 10 Pa. C. 111, 115 (C.P. Dauphin Cnty. 1891) (considering inadvertent strike-out of a word); *State ex rel. Barber v. Parler*, 29 S.E. 651, 654 (S.C. 1898) (noting that change originated with style committee).

108. See, e.g., *Wellborn v. Estes*, 70 Ga. 390, 401–02 (1883); *State ex rel. Jameson v. Denny*, 21 N.E. 252, 254 (Ind. 1889).

109. *State v. Closkey*, 37 Tenn. (5 Sneed) 482, 485–86 (1858).

110. *Id.* at 486.

111. *Crowell v. Lambert*, 9 Minn. 283, 291 (1864).

112. *Donohugh's Appeal*, 86 Pa. 306, 306, 308, 317 (1878).

113. Note, *Debates as Aids in Interpreting Statutes*, 13 HARV. L. REV. 52, 52 (1899).

114. See, e.g., *State v. Moores*, 73 N.W. 299, 314 (1897) ("Unfortunately, we have not access to the debates of the constitutional convention . . ."); *In re Appropriations for Deputy State Officers*, 41 N.W. 643, 645 (Neb. 1889) ("It is a matter of regret that the debates in the constitutional convention were not preserved."); *Omaha*

By the end of the century, lawyers and sometimes even judges went to great lengths to consult convention evidence. Where records were not published or did not yet exist, sometimes contemporary newspaper coverage or extant committee reports were cited instead.¹¹⁵ This is impressive, given the obvious point that convention evidence was not as easy to search without the aid of today's technology. Opinions offer glimpses into the difficulties lawyers and judges encountered in consulting—or even accessing—convention material. In 1891, a Pennsylvania court observed that a lawyer had managed to bring them convention evidence “at the expenditure of great labor.”¹¹⁶ In 1896, an exasperated New York appellate court griped about the proceedings’ “lack of a proper index, or slightest clue to any subject-matter,” and gave thanks that “[p]atience, however, has enabled us to lay hold upon this debate, but at a great sacrifice of time.”¹¹⁷ In 1899, a South Dakota tribunal—apparently of its own volition—consulted the “unpublished debates in our own constitutional conventions, on file with the secretary of state.”¹¹⁸

To be sure, evidence from journals, debates, and proceedings was sometimes used with trepidation and other times outright rejected. In multiple decisions, a judge observes that debate evidence supports the court's construction but professes not to rely upon it.¹¹⁹ As late as 1895, a judge of the New York Court of Common Pleas thought that “the relevancy of the debates and proceedings of those who framed it to the intention of those who adopted it is certainly not apparent,” but considered himself bound by precedent in consulting the record.¹²⁰ Many of the judges who rejected or expressed anxiety about convention records identified now-familiar problems associated with using extrinsic evidence

& R. V.R. Co. v. Standen, 35 N.W. 183, 186 (Neb. 1887) (“It is a matter of regret that the proceedings of the constitutional convention were not published . . .”).

115. See *Perry v. Orr*, 35 N.J.L. 295, 299 (1871) (citing report of the debates from the Newark Daily Advertiser); *Bd. of Comm'rs of Converse Cnty. v. Burns*, 29 P. 894, 899 (Wyo. 1892) (“In the absence of the printed debates of the constitutional convention for reference, the address of the designated committee of the convention is a valuable aid, if any is needed, in determining the intent of the framers of our fundamental law.”).

116. *Beaumont v. City of Wilkes-Barre*, 6 LUZERNE LEG. REG. REPS. 103, 107 (Pa. Ct. Com. Pl., 1886).

117. *Medinger v. Brooklyn Heights R. Co.*, 39 N.Y.S. 613, 615 (App. Div. 1896).

118. *Jamieson v. Wiggin*, 80 N.W. 137, 138 (S.D. 1899); see also *People ex rel. Seeley v. May*, 10 P. 641, 650 (Colo. 1886) (considering proceedings “on deposit in the archives of the department of state” and taking “judicial notice” of them).

119. See *Belknap v. City of Louisville*, 36 S.W. 1118, 1121–22 (Ky. 1896); *People ex rel. Davies v. Cowles*, 13 N.Y. 350, 360–61 (1856); see also *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896) (questioning wisdom of using debates generally, but given Mississippi's odd drafting history and process, giving them more weight).

120. *Isola v. Webber*, 34 N.Y.S. 77, 79 (C.P. Gen. Term 1895).

in interpretation. Take, for instance, concerns resulting from process; while drafters proposed and shaped a constitution, the people voted and accepted it. In 1886, a Pennsylvania court rejected the utility of quotes from specific framers, noting that the “large majority” of delegates “did not talk, much less of the mass of our fellow citizens whose votes at the polls gave that instrument the force of fundamental law.”¹²¹ Toward the end of the century, the Wyoming Supreme Court declined to use convention evidence in its interpretation of whether its constitution required voters to be able to read in English, calling the debates an “unsafe guide,” noting that given poor attendance during some portions of the convention, “few may have heard or learned of the remarks referred to.”¹²² One Ohio judge summed up the problems succinctly in a concurrence in 1853, even referencing some of the concerns about the reliability of published proceedings discussed in the previous Part:

[D]ebates of a body that forms a constitution or law are proverbially unsafe guides for its interpretation. Those who speak are generally few compared with those who vote, and among the debaters themselves, there is seldom seen a uniformity of construction. The advocates of a provision are often silent as to some of its necessary results in order to avoid opposition, and its enemies sometimes misconstrue its meaning or exaggerate its consequences, in order to defeat it. Debates are not always listened to, and a speaker is liable to be misunderstood or misreported. A brief speech on the floor sometimes acquires a wonderful length in print; and reasons that the body never heard may first see the light through the agency of the press.¹²³

Further, for all the lawyers and judges that went to great lengths to consult convention evidence, a judge in Pennsylvania just after the turn of the twentieth century disparaged convention evidence as lacking utility, similar to that of a “comparatively rare book.”¹²⁴ Indeed, it is hard even to identify trends within states, with opinions in a single jurisdiction calling debates irrelevant and others extensively quoting from

121. *Commonwealth v. Balph*, 3 A. 220, 229 (Pa. 1886); see *Pike Cnty. v. Rowland*, 94 Pa. 238, 248–49 (1880).

122. *Rasmussen v. Baker*, 50 P. 819, 824 (Wyo. 1897).

123. *Exch. Bank of Columbus v. Hines*, 3 Ohio St. 1, 46–47 (1853) (Thurman, J., concurring); see also *Lehman v. McBride*, 15 Ohio St. 573, 602 (1863) (noting that any inferences drawn from constitutional convention debates are secondary to the interpretation of their terms, since the terms alone are ratified by the people).

124. *Commonwealth ex rel. Att’y Gen. v. State Treasurer*, 29 Pa. C. 545, 585–86 (1904).

them within a matter of a few years.¹²⁵ This probably owes to the persistence of lawyers, who quite clearly continued to bring debate material to the attention of judges (even in states where debate evidence was received with hostility or apathy).¹²⁶

Although not without controversy, this account does suggest that, contrary to some assertions by both contemporary and subsequent scholars, convention evidence was coming into increasingly frequent use in the mid-to-late nineteenth century.¹²⁷ To be sure, given the likely number of cases involving a state constitutional question, it is still true that references to journals, proceedings, and debates occur in a small percentage.¹²⁸ But both contemporary and modern scholars understate the importance and increasing influence of constitutional convention material during this period. Theodore Sedgwick's 1857 treatise on statutory and constitutional interpretation called it "settled in regard to constitutions as to statutes[] that no extrinsic evidence can be received as to their intent or meaning," citing only dicta in a single dissenting opinion from an 1825 Pennsylvania Supreme Court case.¹²⁹ Another scholar has suggested that,

125. *Compare Taylor v. Taylor*, 10 Minn. 107, 126 (1865) ("As well might we resort to the debates in a committee room, as to the debates of either wing of said convention to show what was meant by the language used in the constitution. But we think such debates should not influence a court in expounding a constitution in any case."), *with Crowell v. Lambert*, 9 Minn. 283, 291–92 (1864) (extensively quoting from debates, citing New York's example and an earlier Minnesota case). *Compare Rasmussen*, 50 P. at 824 (stating that convention debates are unreliable sources when interpreting the construction of a particular word or provision of the constitution), *with State ex rel. Sullivan v. Schnitger*, 95 P. 698, 705 (Wyo. 1908) (relying on debates and proceedings of the convention to determine the applicability of the apportionment act in the constitution).

126. *Commonwealth v. Moore*, 66 Va. (25 Gratt.) 951, 962 (1875) ("My great respect for the learned counsel, and the earnestness with which they pressed this view of the subject, has induced me carefully to read the 'Debates' referred to."); *see, e.g., State ex rel. Morris v. Bulkeley*, 23 A. 186, 186 (Conn. 1892); *Delaware R. Co. v. Tharp*, 5 Del. (5 Harr.) 454, 455 (Super. Ct. 1854); *Langford v. Comm'rs Ramsey Cnty.*, 16 Minn. 375, 378–79 (1871); *Allen v. Poole*, 54 Miss. 323, 327 (1877).

127. *See* Appendix 1, *supra* note 104 (showing that the number of cases citing convention evidence increases between 1840 and 1890).

128. Given how many times certain states' cases have been cited with regard to convention evidence and how many cases are heard by state trial courts annually, it is inferred that references to journals, proceedings, and debates occur in a small percentage in comparison to cases heard annually. *Compare* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FAQs: JUDGES IN THE UNITED STATES 3 (2014), https://iaals.du.edu/sites/default/files/documents/publications/judge_faq.pdf [<https://perma.cc/JZ9X-FQKF>] ("More than 100 million cases are filed each year in state trial courts."), *with* Appendix 2, *supra* note 104 ("This table includes the names of all cases where any opinion relied on [convention "debates and proceedings"], including cases in federal court involving the constitution of a particular state, dissents, and concurrences. Citations are included through July 29, 2022.").

129. THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 489 (1857)

after periodic rejection, the publication of Thomas Cooley's treatise on constitutional law in 1868 "settled" disputes over the use of convention material by sanctioning its use in some cases.¹³⁰ By the time Cooley's treatise was published, however, the highest courts of a third of the extant states had examined convention evidence in thirty-seven opinions.¹³¹

It is true that Cooley devoted a page and a quarter to debates and proceedings, suggesting that in doubtful cases "it may be proper to examine the proceedings of the convention which framed the instrument" and citing both New York and Ohio cases to that effect.¹³² He cautioned, however, that members acted as individuals, that they may have understood language differently, and that the intent of the framers mattered less than the understanding of the people who ratified.¹³³ In that regard, proceedings were "less conclusive" in constitutional interpretation than in statutory construction, because proceedings were better suited for divining the intent of legislators than the intent of ratifiers.¹³⁴ The people's understanding could be better gleaned from more abstract sources, like the causes that led to the convention being held and the issues "before the people" when convention delegates were elected.¹³⁵ There is some evidence to support the idea that, with this language, Cooley influenced both the observed spread and skepticism of convention evidence. The Cooley treatise was cited in numerous nineteenth-century cases that either relied on or questioned the use of debates,¹³⁶ and although references to conventions were more common

(citing *Eakin v. Raub*, 12 Serg. & Rawle 330 (Pa. 1825) (Gibson, J., dissenting)); see *Eakin*, 12 Serg. & Rawle at 352 ("A constitution, or a statute, is supposed to contain the whole will of the body from which it emanated; and I would just as soon resort to the debates in the legislature, for the construction of an act of assembly, as to the debates in the convention, for the construction of the constitution.").

130. Baade, *supra* note 87, at 1058-59.

131. Fourteen states' highest courts used convention evidence out of the thirty-seven then in existence. See Appendix 1, *supra* note 104.

132. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 66 (1868) [hereinafter COOLEY, CONSTITUTIONAL LIMITATIONS]. Apart from minor additions to citations, this remained unchanged through multiple editions during the late nineteenth century. Cf. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 101 (7th ed. 1903); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 80 (4th ed. 1878).

133. COOLEY, CONSTITUTIONAL LIMITATIONS, *supra* note 131, at 66.

134. *Id.* at 66-67.

135. *Id.* at 67.

136. *E.g.*, *Mitchell v. Winnek*, 49 P. 579, 582 (Cal. 1897); *Belknap v. City of Louisville*, 36 S.W. 1118, 1121-22 (Ky. 1896); *Matter of Goedel v. Palmer*, 44 N.Y.S. 301, 303 (App. Div. 1897); *Bates v. People's Sav. & Loan Ass'n*, 42 Ohio St. 655, 659-60 (1885); *People v. Petrea*, 92 N.Y. 128, 129-33 (1888) (describing lawyer's argument referencing Cooley); *State ex rel. Barber v. Parler*, 29 S.E. 651, 654 (S.C. 1898)

before his treatise than others have suggested, it is probably accurate to credit him for further acceptance.

One might wonder how the trajectory of uses of convention evidence compares to contemporaneous uses of both (1) federal debates and (2) legislative history. On the federal constitutional side, scholar Hans Baade's article extensively chronicles the use of debate and journal material in the eighteenth and nineteenth centuries.¹³⁷ Federal debates and journals were produced for wider publication at around the same time as some of the first state debates and proceedings: the journal in 1819, Jonathan Elliott's accounts of the state ratifying conventions between 1827 and 1830, and Madison's convention notes in 1840.¹³⁸ Somewhat ironically—given the scrutiny his notes would receive—James Madison wanted his notes published after his death in part because a delay would ensure “the controversial part of the proceedings of its framers could be turned to no improper account,” dismissing the relevance of them as an interpretive guide.¹³⁹ For our purposes, it suffices to say that contemporary lawyers were arguing about the propriety of considering this sort of evidence in both federal and state contexts at roughly the same time.¹⁴⁰ Baade places the first “formal recognition” of Madison's notes by the Supreme Court in 1855, with a couple of scattered and oblique references to the convention by lawyers and in concurring opinions before then.¹⁴¹

(“Reference has also been made by both parties to this controversy, to the propriety of resorting to the journal of the Constitutional Convention to aid us in determining this matter. Mr. Cooley, in his work on Constitutional Limitations, (pages 66 and 67), speaks of this resort to such journal as very helpful.”); *State ex rel. Lamb v. Cunningham*, 53 N.W. 35, 55 (Wis. 1892).

137. Baade, *supra* note 87, at 1033–55.

138. *Id.* at 1041 & n.262. Somewhat ironically—given the scrutiny his notes would receive—James Madison wanted his notes published after his death in part because a delay would ensure “the controversial part of the proceedings of its [F]ramers could be turned to no improper account,” dismissing the relevance of them as an interpretive guide. *Id.* at 1040 (quoting Letter from James Madison to Thomas Richie (Sep. 15, 1821), reprinted in 9 THE WRITINGS OF JAMES MADISON 71 (Gaillard Hunt ed., 1910)).

139. *Id.* at 1040 (quoting Letter from James Madison to Thomas Richie (Sept. 15, 1821), reprinted in 9 THE WRITINGS OF JAMES MADISON 71 (Gaillard Hunt ed., 1910)).

140. Baade's wonderful chronicle is full of great tidbits on the ongoing controversy over the utility of these sources, such as one Founding-era lawyer calling Elliott's Debates “if possible, a more miserable authority” than Madison's notes. *Id.* at 1049 (quoting LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 138 (1845)).

141. *See id.* at 1038 (suggesting that convention proceedings may have been referenced in oral argument in *McCulloch v. Maryland*, 17 U.S. 316 (1819)); *id.* at 1044 (recounting invocation of Madison's Notes by Supreme Court lawyer and in concurring opinion in 1840s). For corroboration and further history, see tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, *supra* note 1, at 164, 175.

Pre-twentieth-century court uses of state legislative history have not been well explored,¹⁴² though as Nicholas Parrillo has pointed out, scholars in the 1940s at least believed state-court uses of state legislative history to be minimal “largely because the state legislatures at the time published so little of it.”¹⁴³ Scholars have spent somewhat more time examining the developing use of *federal* legislative history by federal courts in the nineteenth and early twentieth centuries.¹⁴⁴ For most scholars, the lodestar of statutory interpretation might be the 1892 Supreme Court case *Church of the Holy Trinity v. United States*,¹⁴⁵ which used legislative committee reports to reach a result at odds with the literal interpretation of a statute’s text and often receives credit as the first case to sanction the use of legislative history to discern legislative intent.¹⁴⁶ Others may instead cite the 1860 case of *Dubuque & Pacific Railroad v. Litchfield*,¹⁴⁷ which used legislative history to construe an act granting certain riverfront land to Iowa. Or, perhaps, one of a small number of opinions in the federal period that referenced legislative material may take center stage.¹⁴⁸ Still, a leading casebook in legislation and regulation describes legislative history as disfavored before 1845, cited with increasing frequency but still sporadically from 1860 to 1940, and only accelerating thereafter.¹⁴⁹

142. Exceptions include portions of Baade, *supra* note 87, at 1062–63 (discussing some uses of legislative history in mid-nineteenth-century state courts); Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 945 (2000) (mentioning decisions in several states criticizing or endorsing use of legislative history); Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712, 757 (2018) (citing Virginia case in 1801 examining legislative history to “fill a *blank* line left in the statute book”); Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2, 25–26 (2020) (discussing both federal attorney general opinion on using legislative history as well as an 1816 Connecticut decision using historical material to discern legislative intent behind private act); *id.* at 75 (“[A] scholar trying to learn about historical legal practice using only the federal reporter has given himself an unduly narrowed and idiosyncratic focus. If we want to find out about jurisprudence in early America, we have to study the states.”) (cleaned up).

143. Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L. J. 266, 280 & n.35 (2013).

144. *Id.* at 275–76; *see also* Baade, *supra* note 87, at 1023–29, 1068–79.

145. 143 U.S. 457 (1892).

146. Chomsky, *supra* note 141, at 945–49.

147. 64 U.S. (23 How.) 66 (1860).

148. *See generally* Hillary Chutter-Ames, Note, *From Language to Law: Interpretation and Construction in Early American Judicial Practice*, 114 NW. U. L. REV. 149 (2019).

149. *See also* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 223 (Fourth ed. 2021). Another source

Intriguingly, there is some evidence to suggest that the pathway to increased use of legislative history may have been opened—or at least widened—due to the incursion of debate and journal material in state constitutional cases. Hans Baade also wondered whether increasing acceptance of convention evidence may have greased the skids: “If courts could look to the proceedings of constitutional conventions although these were, in Thomas Cooley’s words, *less* conclusive interpretation aids than legislative proceedings, it seemingly followed by necessity that the latter, being *more* reliable, could also be examined.”¹⁵⁰ Contemporary cases confirm this link. In 1885, two justices concurring in a decision in Maryland’s highest court asked: “Why can we not resort to the proceedings of a Legislature to ascertain the meaning of a doubtful statute? We constantly resort to debates in conventions, both State and national, to ascertain the true meaning of a constitutional provision.”¹⁵¹ In addition, in the 1899 *Harvard Law Review* note considering the propriety of using legislative history to construe statutes, the author observed that “curiously enough,” similar practices were well-accepted in the constitutional context, and there appeared to be “no reason for this distinction.”¹⁵²

Tracking the further spread and use of convention evidence beyond 1900 remains for another day, but preliminary indicators suggest that citations have continued to increase to the present. In some states, consultation of constitutional debate evidence is now a recognized step in the jurisdiction’s interpretive methodology.¹⁵³ As the below table indicates, if we examine just those opinions (majority, concurring, or dissent) that cite convention “Debates and Proceedings”—a search that *only* identifies citations in those states where the published record *bears that title*—there is a clear upward trend.¹⁵⁴ Of course, it is very unlikely that states have consulted this sort of evidence evenly, and as I have already suggested, it remains for further work to determine which states tend to consult more convention material than others.¹⁵⁵ Both historically

corroborates this account, treating legislative history as “rare” until the 1940s. Parrillo, *supra* note 142, at 280.

150. Baade, *supra* note 87, at 1062.

151. *James v. State*, 63 Md. 242, 256 (1885) (Stone, J., concurring); *see also State ex rel. Baker v. Payne*, 29 P. 787, 791 (Or. 1892) (observing in statutory interpretation case the acceptability of convention evidence in constitutional construction).

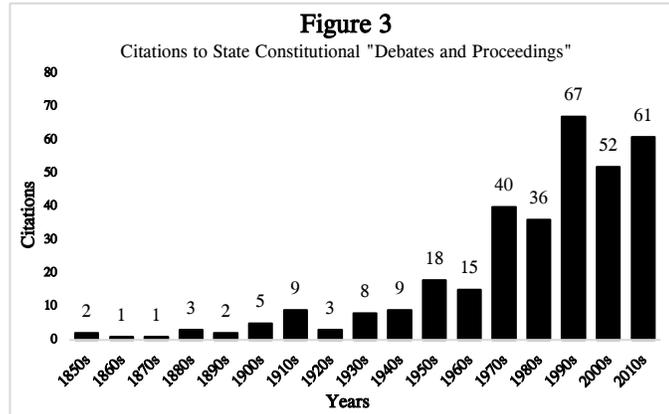
152. Note, *supra* note 112, at 52.

153. *E.g., Dairyland Greyhound Park Inc. v. Doyle*, 719 N.W.2d 408, 447–48 (Wis. 2006).

154. *See* Appendix 2, *supra* note 104.

155. If one searches: “**debates and proceedings**” OR (journal /s const! /s convention) OR (debates /s const! /s convention) OR (record /s const! /s convention) in Lexis, as of October 21, 2022, it returns 73 search results in Alabama cases, 183 in California, and 325 in Michigan.

and recently, there are numerous instances of state courts examining historical convention evidence from another state, usually because that state has a constitutional provision that inspired the provision they are interpreting.¹⁵⁶



To return to the subject of the preceding Part, lawyers and judges are not always aware of potential issues with the underlying source material in their own states (or others). To credit Minnesota courts, although debate evidence from either the Republican or Democratic convention has been used as an interpretive aid in numerous decisions, the state's courts often qualify the evidence, with the Minnesota Supreme Court noting its convention was "somewhat of a mess."¹⁵⁷ In other examples, courts are less circumspect. Arizona's state courts have frequently relied upon and quoted extensively from their published debates, even editions that contain speeches furnished after the fact.¹⁵⁸ A dissenting judge in 1998 in Washington relied on a 1913 master's thesis

156. *E.g.*, *Op. of Judge Appleton*, 44 Me. 521, 532, 537–38 (1857) (considering North Carolina and New York convention debates in offering opinion to Senate on whether free Black citizens have suffrage); *McGill v. State*, 34 Ohio St. 228, 239–40 (1877) (citing convention evidence from California and Iowa); *State ex rel. Martin v. Heil*, 7 N.W.2d 375, 382 (Wis. 1942) (relying on New York convention evidence for interpretation of provision copied from New York to Wisconsin on grounds that "the draft and the debates of the New York constitution were known to the delegates to the Wisconsin convention"); *see also Lobato v. State*, 2013 CO 30, ¶ 100 (Hobbs, J., dissenting) (citing Illinois convention because "[t]wo of the five members of the Colorado Constitution Convention's Committee on Education . . . had previously been high-profile educators in Illinois"); *Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998, 1025 (Or. 2016) (noting absence of helpful evidence from the Indiana 1851 convention).

157. *State v. Lessley*, 779 N.W.2d 825, 838 (Minn. 2010) (citing Douglas A. Hedin, *The Quicksands of Originalism: Interpreting Minnesota's Constitutional Past*, 30 WM. MITCHELL L. REV. 241, 243 (2003)); *see also In re Medill*, 119 B.R. 685, 690 n.7 (Bankr. D. Minn. 1990) (noting the history of the Minnesota Constitutional Convention).

158. *E.g.*, *Kotterman v. Killian*, 972 P.2d 606, 620 (Ariz. 1999); *In re Am. W. Airlines, Inc.*, 880 P.2d 1074, 1079 n.5 (Ariz. 1994); *Hancock v. McCarroll*, 937 P.2d 682, 686 (Ariz. Ct. App. 1996).

on the development of its state constitution that was put together using “information from survivors of the convention and newspapers of that day.”¹⁵⁹ Apart from the rare case where judges disagree about the provenance of convention records,¹⁶⁰ they tend to be used—and increasingly so—with reckless abandon.

CONCLUSION

The account in this Essay illuminates pieces of a larger story of state constitutional interpretation. One key interpretive problem here is not unique: whether historical material should be used in interpretation more generally. I could not plausibly attempt to enter that debate (let alone in a concluding section). My purpose has been to point out that state constitutional material raises all the familiar problems more frequently discussed by scholars of statutory interpretation or federal constitutional law, and judges interpreting state constitutional provisions have long confronted those issues when using or declining to use historical material. Are the statements of a single delegate entitled to any weight?¹⁶¹ What about rejections, omissions, or silence, instead of affirmative statements?¹⁶² Should historical sources be used to identify the “mischief” a constitutional provision was designed to address?¹⁶³ Is it probative if proceedings indicate an effort to draft such that a provision could receive

159. *State v. Foster*, 957 P.2d 712, 735 n.2 (Wash. 1998) (Johnson, J., dissenting).

160. *See, e.g., Smith v. Baptiste*, 694 S.E.2d 83, 97 & n.12 (Ga. 2010) (Hunstein, J., dissenting).

161. *E.g., Commonwealth ex rel. Margiotti v. Lawrence*, 193 A. 46, 48–49 (Pa. 1937) (“[S]tatements must be understood to be merely the personal opinion of individual members of the Convention.”).

162. *See Marine Forests Soc’y v. Cal. Coastal Comm’n*, 113 P.3d 1062 (Cal. 2005) (considering debate evidence of rejections or omissions probative); *Hoffman v. Lehnhausen*, 269 N.E.2d 465, 468 (Ill. 1971) (same).

163. Cases far back into the nineteenth century referenced debates with the explicit aim of identifying the “mischief” the convention was designed to address. *E.g., Dist. Twp. of Dubuque v. City of Dubuque*, 7 Iowa 262, 277 (1858) (discussing the intended purpose of the state Board of Education); *Passamaneck v. Louisville Ry. Co.*, 32 S.W. 620, 621 (Ky. 1895) (finding that a purpose of the constitutional convention was to avoid the deprivation of a decedent’s ability to recover in tort from their wrongdoer); *Second Mun. of New Orleans v. Duncan*, 2 La. Ann. *182, *186 (1847) (discussing the potential consequences of allowing judicial interference in tax assessments); *State ex rel. Mo. State Bd. of Agric. v. Holladay*, 64 Mo. 526, 528 (1877) (reflecting on the constitutional convention discussion limiting appropriations of state funds); *Purvis v. Ross*, 12 Pa. C. 193, 195 (1892) (discussing the “mischief” a similar provision in the Michigan Constitution was designed to prevent).

either the same or a different interpretation than a related federal or state provision has been given in another court?¹⁶⁴

While these are familiar questions, this account raises others that are more unique. How should this material—and its treatment in interpretation—shape how we think about state constitutions? Are they better analogized to the federal Constitution or statutes? Is the use of historical material in this context more like searching for legislative history or original meaning?¹⁶⁵ As I have written elsewhere, “as sources of law, state constitutions exist somewhere on a spectrum” from legislation to the federal Constitution.¹⁶⁶ Like statutes, their content is shaped by direct democracy and can be changed with relative frequency, but like the federal Constitution, state constitutions “apply for long durations and are subject to particular amendment procedures.”¹⁶⁷

The historical context here only adds complexity. Many of the earliest state constitutions were passed by fairly ordinary legislative processes, lacking the hallmarks of what we might now consider constitutional processes (*i.e.*, ratification).¹⁶⁸ Even in states where a popular vote was or is required to finalize the constitution, there could be more post-vote tinkering than we would ever associate with the adoption of the federal Constitution.¹⁶⁹ Some judges have flattened the distinction between legislation and state constitutions, applying identical interpretive rules to each.¹⁷⁰ Others have considered ratification a highly salient difference between ordinary legislation and state constitutional

164. *E.g.*, Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341, 359–60, 359 n.94 (2018).

165. On the federal side, there has been much debate about whether it is possible to endorse the use of history in, say, constitutional interpretation, but eschew its utility in statutory interpretation. *See, e.g.*, William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist But Not Statutory Legislative History*, 66 GEO. WASH. L. REV. 1301 (1998); Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610 (2012).

166. Brady, *supra* note 11, at 1066.

167. *Id.*

168. ROGER SHERMAN HOAR, CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS, AND LIMITATIONS 4 (1917); *see also* *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896) (“[I]t must be remembered that our constitution was never submitted to the people. It was put in operation by the body which framed it, and therefore the question is what that body meant by the language used.”).

169. In 1892, for example, a group of Kentucky voters and taxpayers unsuccessfully sued to enjoin the publication of the constitution because delegates had made so many changes after ratification. *Miller v. Johnson*, 18 S.W. 522, 522–23 (Ky. 1892).

170. *E.g.*, *Ratliff*, 20 So. at 866 (“In construing the constitution, we are to resort to such rules as would aid in the construction of a statute, keeping always in view the fact that, while statutes descend into particulars and details, constitutions deal usually in generalities, and furnish along broad lines the framework of government.”).

provisions, even meriting different treatment of the history of proceedings:

[I]t is highly improper to attach any significance to remarks of delegates to the Constitutional Convention. There is a critical difference between “legislative” history and the record of a constitutional convention. In the legislature, its members debate the design and purposes of proposed legislation. These same members then [sic] enact or adopt the legislation. At a constitutional convention, on the other hand, the delegates merely suggest or recommend the constitutional provisions. The electorate then adopts (or rejects) the provision.¹⁷¹

For whatever it is worth, there is also substantial evidence that delegates to conventions self-consciously considered their role different from that of legislators. Some styled themselves as framers in the federal model; others had still more grandiose self-conceptions, like the Delaware delegate in 1896 who analogized his convention’s discussions to “the discussions of those ancient sages who framed the Twelve Tables of the Roman Law. . . .”¹⁷² In at least one state, delegates criticized proposals to include extensive detail in provisions because specifics were best left to legislative bodies.¹⁷³ And judges, too, considered state “framers” with more reverence than the average legislator. A New York chancellor in 1841 considered it relevant for interpretive purposes that one of the authors of a piece of legislation “was a member of the convention, and himself framed the provision” being evaluated.¹⁷⁴ A Nebraska judge deferred to another’s interpretation of legislative power under the constitution because “one of the judges who concurred in that opinion was a member of the constitutional convention, and [he] must have known what was the import of the constitution, as he listened to, and participated in, the debates and considerations of its different sections”¹⁷⁵

Historical evidence from state conventions presents problems, but also opportunities. One cannot read debates and proceedings (or even opinions) in state constitutional law without seeing the ways that the creators of these documents influenced and borrowed from one

171. *In re Determination of Priority of Comm’n Among Certain Judges*, 427 A.2d 153, 159 (Pa. 1981) (Larsen, J., dissenting).

172. DINAN, *supra* note 23, at 24.

173. 4 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, *supra* note 53, at 208 (“I offer this amendment because it seems to me those words are superfluous, and I hold a matter of legislation.”).

174. *Clark v. People*, 26 Wend. 599, 604 (N.Y. 1841).

175. *Pac. Exp. Co. v. Cornell*, 81 N.W. 377, 380 (Neb. 1899).

another.¹⁷⁶ California's constitution was primarily modeled after Iowa's; the authors of Alaska's constitution in 1955 mentioned the constitutions of forty-five other states (plus Hawai'i's) in drafting their own.¹⁷⁷ Numerous other scholars have studied how state judges rely on other states' constitutional interpretations in approaching their own documents,¹⁷⁸ a problem that has some analogs in the federal context.¹⁷⁹ To what extent, if any, should debate and proceeding evidence be used to identify the relevant regional constitutional culture to which a state belongs?¹⁸⁰ In the nineteenth century, multiple state supreme courts thought that where a constitutional provision's antecedent had been interpreted by the states' courts, that interpretation was presumptively binding unless rebutted by evidence of contrary intent.¹⁸¹ Although there is no longer quite so formal a canon, convention material can tee up puzzles that are similar to the questions of when and whether states are entitled to interpret their constitutions differently from the federal one.

Lastly, state convention evidence is only the tip of the iceberg when it comes to questions about the utility of historical material in state constitutional interpretation. With variation by state, constitutions can be changed in a dizzying variety of ways.¹⁸² Beyond convention evidence, each popular or legislative amendment can generate legislative history, ballot pamphlets, and assorted material provided to voters. And perhaps

176. Maureen E. Brady, *The Domino Effect in State Takings Law: A Response to 51 Imperfect Solutions*, 2020 U. ILL. L. REV. 1455, 1475–76; see *Bourland v. Hildreth*, 26 Cal. 161, 251 (1864) (Sanderson, C.J., dissenting) (“It is apparent from the debates of the Convention that they had before them several if not all of the Constitutions of the other States.”).

177. Brady, *supra* note 176, at 1475–76 (quoting *Diamond v. Bland*, 521 P.2d 460, 465 (Cal. 1974) (Mosk, J., dissenting)).

178. E.g., Patrick Baude, *Interstate Dialogue in State Constitutional Law*, 28 RUTGERS L.J. 835, 846–47 (1997); James N.G. Cauthen, *Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations*, 66 ALA. L. REV. 783, 790 (2003); James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY L. REV. 1245, 1263–68 (2005); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 132–35 (2006).

179. See Posner & Sunstein, *supra* note 178, at 133 (analogizing this issue to the ones posed by “foreign precedents” in the Supreme Court).

180. Pat Baude referred to these sorts of cultures as “local epics, profound in their contribution to identity and meaningful in the world of constitutional interpretation. . . . [T]hey are distinctly less than national in scope.” He identified these regional patterns by examining how states cited other states' constitutions, as opposed to historical evidence of inspiration. Baude, *supra* note 178, at 836–38.

181. See, e.g., *Att'y Gen. ex rel. Werts v. Rogers*, 28 A. 726, 748 (N.J. 1894) (collecting cases); *Chambers v. State*, 25 Tex. 307, 310 (1860); *Nougues v. Douglass*, 7 Cal. 65, 76 (1857) (Murray, C.J., concurring) (“I am aware that when a provision is borrowed from the Constitution or laws of another State, it is supposed to be taken with the judicial interpretation it has received in the Courts of that State . . .”).

182. See Anne Permaloff, *Methods of Altering State Constitutions*, 33 CUMB. L. REV. 217 (2003).

in part because it is so vast, state courts in many states have often turned to this sort of historical evidence to construe state constitutional provisions.¹⁸³ This Essay demonstrates some of the challenges with just one species of constitutional evidence—materials related to state conventions—and to trace the emergence of reliance on that evidence in interpretation. While much further work remains, this account sets an important research agenda for exploring the problems and possibilities that historical material creates in state constitutional law.

183. See *Omaha Nat'l Bank v. Spire*, 389 N.W.2d 269, 279 (Neb. 1986) (considering “words of the initiative petition” and noting permissibility of considering history of amendment process); *City of Tacoma v. Taxpayers of Tacoma*, 743 P.2d 793, 797 (Wash. 1987) (examining past ballot pamphlet sent to voters); *Ramsey v. City of N. Las Vegas*, 392 P.3d 614, 621 (Nev. 2017) (same).

* * *