

Symposium on Tomorrow's Issues in State Constitutional Law

A Judge's Perspective on the Use and Misuse of History in State Constitutional Interpretation

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A JUDGE'S PERSPECTIVE ON THE USE AND MISUSE OF HISTORY IN STATE CONSTITUTIONAL INTERPRETATION

Honorable Jack L. Landau*

Readers should be very attentive to, and critical of, historians, and they, in turn, should be constantly on their guard.¹

As the state constitutional revolution marches forward into a fourth decade, state judges are beginning to exhibit concern not just for whether to give their state constitutions independent significance but also how to do so. In the process, more and more state courts are turning to history to support their decisions as to the meaning of their constitutions.

Most often, history is invoked in the service of ascertaining the "intentions" of the "framers" of the state constitutions. The objective is obvious. State constitutional interpretation must not reflect merely the personal predilections of those who do the interpreting. Instead, constitutional interpretation should be the product of considerations external to the judges involved. History in general, and a jurisprudence of original intent in particular, the theory goes, provides just such a set of external considerations. Resort to history, in other words, provides legitimacy to state constitutional interpretation. As the Supreme Court of Connecticut explained, with some flourish:

This court has never viewed constitutional language as newly descended from the firmament like fresh fallen snow upon which jurists may trace out their individual notions of public policy uninhibited by the history which attended the adoption of the particular phraseology at issue and the intentions of its authors. The faith which democratic societies repose in the written document as a shield against the arbitrary exercise of governmental power would be illusory if those vested with the responsibility for construing and

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¹ POLYBIUS, HISTORY, book XIV.

applying disputed provisions were free to stray from the purposes of the originators.²

The problem is that we state court judges tend to make something of a mess of history in the process. In the name of identifying the intentions of the framers of our state constitutions, we employ research and reasoning that would make practicing historians blush.

Now, I wish to be clear: I am an intermediate appellate court judge, not a professional historian. But my job entails working with American legal history on a fairly frequent basis. And, in the course of that work over the past decade, I have encountered what seem to me practices that are hard to square with basic, uncontroversial principles of responsible historical analysis. One does not have to be a professional historian to understand that there are limits to what reasonably can be asserted as history. My objective in this essay is to address some of the problems that I have observed when judges resort to history.

Among the problems that I address are the practice of resorting to history to answer nonhistorical questions, the problem of determining the appropriate levels of generality at which to describe history, the problem of selective use of source materials, the problem of drawing conclusions from silence in the historical record, the problem of employing fictions to fill in gaps in the historical record, and the failure to recognize the inherent uncertainties involved in describing history. I attempt to pepper the essay with examples from cases in which courts have resorted to history to justify their interpretations of state constitutions. I hope I may be forgiven for reporting a disproportionate number of examples from my own state. I do so not because its judges are especially insensitive to the perils of resorting to history but because Oregon's is the case law with which I am most familiar.

In the end, I suggest that whatever else may be said of a jurisprudence of original intent, it must be recognized that resorting to history unavoidably involves a number of value judgments that cannot be resolved by reference to history itself. Moreover, resorting to history without great care can lead to historical absurdities that, as the saying goes, only lawyers would believe. Failure to recognize candidly the judgments involved and failure to pay attention to details leads to

² *Cologne v. Westfarms Assocs.*, 469 A.2d 1201, 1208 (Conn. 1984).

erroneous history, justifiable criticism, and the undermining of the very legitimacy that resorting to history is supposed to advance.

I. HISTORY, THE SQUARE PEG, AND THE ROUND HOLE

The first—and perhaps foremost—problem concerning the judicial use of history is the very idea that history, by itself, can establish the meaning of a constitutional provision. State courts commonly describe constitutional interpretation in terms of merely identifying what the framers of a disputed provision intended it to mean.³

The Oregon Supreme Court's decision in *Lakin v. Senco Products, Inc.*,⁴ illustrates the practice. In that case, the court addressed the question whether a limitation on noneconomic damages awarded on a negligence claim violated the Oregon Constitution's guarantee that the right of a jury trial shall remain "inviolable."⁵ The court turned to the history of the Oregon Constitution and the intentions of its framers in 1857 to arrive at the conclusion that those framers would have understood that a cap on noneconomic damages would abrogate the constitutional guarantee:

[W]e conclude that the framers of the Oregon Constitution clearly understood the meaning of the right to jury trial in a civil case and that they intended that that right would remain "inviolable," i.e., secure against violation or impairment, in the new State of Oregon. *It follows, therefore, that whatever the right to "Trial by Jury" meant in 1857, it means precisely the same thing today.*⁶

Thus, the Oregon Supreme Court concluded that, having determined what the framers intended, it "therefore" also had determined what the constitution means.

³ A word about my use of the word "framers": Courts tend to use the term loosely to refer to those who drafted a constitution or the people who ratified it or both. I use the term in the same loose fashion. There actually is an interesting question whether the intentions of those who drafted constitutions should matter. See, e.g., *Monaghan v. Sch. Dist. No. 1*, 315 P.2d 797, 801 (1957) ("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 . . ."); see also *infra* note 137.

⁴ 987 P.2d 463 (1999).

⁵ OR. CONST. art. I, § 17.

⁶ *Lakin*, 987 P.2d at 469-70 (emphasis added).

The Wyoming Supreme Court employed similar reasoning in *State v. Campbell County School District*,⁷ in which it invoked the words of Robert H. Bork in defense of what it termed its belief in a “historically rooted” constitution: “Lawyers and judges should seek in the Constitution what they seek in other legal texts: the original meaning of the words . . . [A]ll that counts is how the words used in the Constitution would have been used at the time.”⁸

It is in fact, fairly routine for courts to describe the interpretation of state constitutions as an essentially archeological exercise of exhuming the framers’ intentions. The Iowa Supreme Court, for example, explained that in determining the “actual meaning” of its constitution, “[o]ur polestar in this analysis is the intent of the framers.”⁹ The South Dakota Supreme Court, likewise, stated that “the object of construing a constitution is to give effect to the intent of the framers of the organic law and of the people adopting it.”¹⁰ The Supreme Court of Indiana similarly has concluded that “the intent of the framers of the Constitution is paramount in determining the meaning of a [constitutional] provision.”¹¹

The difficulty, as a number of scholars have pointed out, is that those are two entirely different questions.¹² The first question—what did the

⁷ 32 P.3d 325 (Wyo. 2001).

⁸ *Id.* at 336 (quoting ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144-45 (1990)).

⁹ *State v. Briggs*, 666 N.W.2d 573, 578 (Iowa 2003).

¹⁰ *In re Janklow*, 589 N.W.2d 624, 626 (S.D. 1999).

¹¹ *City Chapel Evangelical Free, Inc. v. City of South Bend ex rel. Dep’t of Redevelopment*, 744 N.E.2d 443, 447 (Ind. 2001). The court added:

In order to give life to their intended meaning, we examine the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions. In construing the constitution, we look to the history of the times, and examine 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. The language of each provision of the Constitution must be treated with particular deference, as though every word had been hammered into place.

Id. (quoting *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 986 (Ind. 2000)).

¹² H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 662 (1987) (“[H]istory has nothing to say to the listener who replies, after hearing the originalist’s evidence, ‘So what?’”). The literature on whether the framers’ intentions are determinative of constitutional meaning is extensive and controversial. For an introduction to the debate,

framers intend?—certainly is one of history. The second question, however—what does the constitution mean?—is different. It concerns the legal significance of the historical fact of what the framers intended. It is by no means obvious that, because we may know what the framers intended a particular constitutional provision to mean, that also defines the extent of its legal significance. Certainly that conclusion does not necessarily follow as a matter of history.

Recall that the usual justifications for a jurisprudence of original intent are not historical, but philosophical. For example, former United States Attorney General Edwin Meese III, who devoted so much energy during the 1980s to justifying a jurisprudence of original intent with respect to the Federal Constitution, explained that:

[t]he Constitution is the fundamental will of the people; that is the reason the Constitution is the fundamental law. To allow the courts to govern simply by what it [sic] views at the time to be fair and decent, is a scheme of government no longer popular; the idea of democracy has suffered.¹³

The argument is one of political theory, not history. Bork, another frequent defender of originalism, similarly has argued that:

[i]f the [United States] Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended. If the Constitution is law, then presumably, like all other law, the meaning the lawmakers intended is as binding upon judges as it is upon legislatures and executives. There is no other sense in which the Constitution can be what article VI proclaims it to be: "Law."¹⁴

Said another way, the thesis is that the framers' intentions are controlling because of the nature of the document that they framed, that

see generally Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

¹³ Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 465 (1986).

¹⁴ BORK, *supra* note 8, at 145.

is, a law. It is thus, an argument of law or political theory, but not history.

That is not to say that arguments about constitutional meaning cannot be cast in historical terms. It certainly can be argued that the framers' intentions should determine constitutional meaning because, as a matter of history, that is what they intended. There are, however, at least two problems with the argument. First, it is circular. To resort to history to ascertain whether the framers intended their intentions to matter assumes the very question at issue, namely, that we should resort to history to justify the reference to framers' intentions in first place. In other words, unless it is assumed that the framers' intentions matter, then it is of no consequence that that is what they intended.¹⁵

Second, assuming that it is appropriate to determine whether the framers of a constitution intended their intentions to matter, the answer to the question—as a matter of history—is in doubt, certainly with respect to constitutions adopted before the Civil War. It is hotly debated whether the framers of the United States Constitution, for example, shared the view that their intentions should control future determinations as to the meaning of that document.¹⁶ Scholars such as H. Jefferson Powell¹⁷ and Hans Baade¹⁸ have suggested that the idea that the framers of the Federal Constitution intended their intentions to count is probably inconsistent with contemporaneous understandings as to proper interpretation of legal instruments. On the other hand, Raoul Berger—among others—has argued rather vociferously that early references to “original intent” in various documents of the founding era suggest the contrary, although he never quite addresses Powell's and

¹⁵ See generally Russel M. Nigro, *The Importance of Interpretive Theory in State Constitutional Law*, 73 TEMP. L. REV. 905, 909 (2000) (“The argument that the drafters' wishes must be followed because they wished it so is viciously circular.”); Powell, *supra* note 12, at 662 (“The argument that the founders' wishes must be followed because they wished it so is viciously circular, as well as arguably based on a historical error.”).

¹⁶ See generally Farber, *supra* note 12.

¹⁷ H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

¹⁸ Hans W. Baade, “Original Intent” in Historical Perspective: Some Critical Glosses, 69 TEX. L. REV. 1001 (1991).

Baade's point that it is necessary to go further and determine what the framers would have understood those references to mean.¹⁹

I do not mean to suggest that a jurisprudence of original intent is untenable. That is a matter for another essay. I do suggest that, having determined what the framers intended a provision to mean, it does not necessarily follow that a court also has determined what the provision means. At the least, some explanation is required to justify resort to history to answer what is arguably a non-historical question. The simple declaration that what a constitutional provision meant in the nineteenth century it must also mean today is misleading.

II. HISTORY AND THE PROBLEM OF GENERALIZATION

A second problem with resorting to history to establish constitutional meaning is a close cousin of the first. It arises when courts are forced to apply constitutional provisions to questions and circumstances beyond the fair contemplation of those who framed them. Particularly in states whose constitutions date back to the eighteenth or nineteenth century, it is common for courts to face constitutional challenges involving circumstances that simply were unimagined at the time their constitutions were adopted. Did the framers of a constitutional right to bear arms intend that citizens of a state have a right to possess AK-47 assault rifles? Did they understand that trials televised from prisons satisfy a constitutional right to a "public" trial? Did they intend that there be an "automobile" exception to the constitutional presumption that warrants are required for searches?

History cannot answer those specific questions. Or, perhaps more precisely, the answer that history will provide in each instance is that the framers simply did not think of the matter. In the face of that fact, however, courts commonly do not abandon the search for an answer in history. They simply rephrase the question in a more generalized way.

The Vermont Supreme Court's decision in *Baker v. State*²⁰ nicely illustrates the practice. The issue in that case was whether a state law making homosexual couples ineligible for a marriage license violated the

¹⁹ Raoul Berger, *The Founders' Views—According to Jefferson Powell*, 67 TEX. L. REV. 1033 (1989); Raoul Berger, "Original Intention" in *Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986).

²⁰ 744 A.2d 864 (Vt. 1999).

state's "Common Benefits Clause."²¹ In determining that the exclusion of same-sex couples from the benefits incident to marriage indeed violated the state constitution, the court resorted to a historical analysis of the clause. Now, considering that the Vermont Constitution has undergone little revision in the last 200 years, it might seem odd to look to history to support a conclusion that discrimination on the basis of sexual orientation is unconstitutional. After all, the State of Vermont, like so many other states in the colonial and revolutionary eras, thought nothing of criminalizing homosexual conduct.²²

The Vermont Supreme Court, however, did not look back on its constitutional history with so sharp a focus. Instead, it said that its duty "is to discover . . . the *core value* that gave life" to the disputed constitutional provision:

Out of the shifting and complicated kaleidoscope of events, social forces, and ideas that culminated in the Vermont Constitution of 1777, our task is to distill the essence, the motivating ideal of the framers. The challenge is to remain faithful to that historical ideal, while addressing contemporary issues that the framers undoubtedly could never have imagined.²³

Having stated the focus of its inquiry so broadly, the court had no difficulty identifying in the state's history support for the conclusion that the "core value" of the Common Benefits Clause was a "principle of inclusion" that, in the absence of persuasive government justification, prohibited discrimination on the basis of sexual orientation.²⁴

There are at least two significant difficulties with using history in this fashion. First, it employs an assumption that such "core values" even exist and can be identified. Such an assumption reflects what

²¹ Chapter I, article 7, of the Vermont Constitution provides "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community." *Id.*

²² Acts and Laws of the State of Vermont (1779).

²³ *Baker*, 744 A.2d at 874.

²⁴ Interestingly, one of the state's arguments was that the long history of official intolerance of homosexuality could not be squared with the court's reading of the Common Benefits Clause. The court's reply was that, among other things, "equal protection of the laws cannot be limited by eighteenth-century standards." *Id.* at 885 (quoting *Brigham v. State*, 692 A.2d 384, 396 (Vt. 1997)).

historian David Hackett Fischer in his classic text, *Historian's Fallacies: Toward a Logic of Historical Thought*,²⁵ calls the "fallacy of essences." Fischer explains that there simply is no such thing as historical essences:

The fallacy of essences is tempting to historians, because many of them begin with an article of faith (which I happen to share) that history happened in the way that it happened and not in any other way. But it does not follow from this premise that there is one "essential" inner reality, which can be hunted and found. There are many factual patterns—an infinite number of them—which can be superimposed upon past events. A historian's task is to find patterns which are more relevant to his problems, and more accurate and more comprehensive than others, but he cannot hope to find that "essential" pattern, any more than he can hope to know all of history, and to know it objectively.²⁶

Essences, in other words, are inventions of the historian, explanatory constructs that are superimposed on past events. The trick is that there always are multiple explanatory patterns that may be imposed on the same past events, all of which fully account for the known facts. Which one is the correct one? It is really a meaningless question. None of them are "correct" in the sense that one accurately describes what actually "happened." And all of them are "correct" in the sense that they all are consistent with known past events.

That leads to the second problem, which is determining the proper level of generalization or abstraction at which to describe the core value or essence that the history supposedly reflects. The same historical events will give rise to any number of defensible generalizations. Yet—and this is the devilishly unavoidable fact—history itself will provide no basis for deciding what is the "correct" level of generalization.

Judges and scholars are not unaware of this problem. But their response commonly is merely to declare that the solution lies in "fairly" selecting the level of generality to comport with the history and text of the constitutional provision at issue. Bork, for example, has argued that "[o]riginal understanding avoids the problem of the level of generality

²⁵ DAVID HACKETT FISCHER, *HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* 70 (1970).

²⁶ *Id.*

... by finding the level of generality that interpretation of the words, structure, and history of the Constitution fairly supports."²⁷ Keith Whittington, one of originalism's most careful and thoughtful defenders, contends in response to the generalization objection that "the search for intention must be guided by the historical evidence itself."²⁸ Such suggestions, however, are less solutions than restatements of the problem. What is the level of generality that the constitutional text and history "fairly" supports? As often as not, there will be more than one, and neither text nor history will determine the better.

Consider, for example, a case from my own court, *Oregon State Shooting Ass'n v. Multnomah County*.²⁹ In that case, the Oregon Court of Appeals addressed the question whether the provision of the Oregon Constitution that guarantees a "right to bear arms in defence [sic] of themselves, and of the State" applied to the possession of assault rifles. A majority of the court, sitting *en banc*, concluded that it did not. The majority – including me, candor impels me to note – struggled to explain what a weapon "of the sort" known in the mid-nineteenth century might include. The majority acknowledged that there existed at the time a repeating rifle known as "the Volcanic," some of which may have made their way to the Oregon Territory before 1857. Yet, the majority ultimately concluded that such a weapon is qualitatively "different" from the sort of semi-automatic assault weapons that were at issue.³⁰ The dissent, on the other hand, thought that the existence of repeating rifles such as the Volcanic was dispositive. They are repeating rifles; so are Beretta AR-70s. Hence, the latter are the same "sort" of weapons that the framers of the Oregon Constitution intended all citizens would have the right to possess.³¹

Note that there was little disagreement as to the historical record. The principal disagreement was determining the level of generality with which to describe it. If the framers thought that citizens should have the right to possess a Volcanic rifle, what is the appropriate "core value" that

²⁷ BORK, *supra* note 8, at 150; see also Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 679 (1991) ("[A] judge should try not to articulate the most general aspect of the original understanding of a constitutional provision at a level of generality any broader than the relevant materials . . . warrant.").

²⁸ KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 187 (1999).

²⁹ 858 P.2d 1315 (Or. App. 1993).

³⁰ *Id.* at 1318-20.

³¹ *Id.* at 1325 (Edmonds, J., dissenting).

may be gleaned from that historical fact? Is it that Oregonians have the right to possess any weapon of personal defense? Any weapon of personal defense that fires a bullet? Any weapon of personal defense that is capable of manual, but not automatic, repetitive firing? There are any number of ways to abstract from the historical fact of the existence of a Volcanic rifle a defensible "core value" for the purposes of constitutional interpretation. And history itself lends nothing in the way of assistance in determining which is the correct one.

The problem of generalization is unavoidable. It arises every time a judge or lawyer attempts to divine the significance of a line of precedent.³² Part of every first-year law student's curriculum, in fact, involves exploring the process by which precedents are described at various levels of generality and by which they are either "distinguished" or declared "on point."³³ And the process commonly is described as entailing judgment, informed by a host of relevant factors, considerations, or policies. The trouble is that when judges take to describing the significance of history, the judgment more often than not gets hidden. The resort to history, after all, is intended to remove the element of personal judgment from the decisional equation. With respect to determining the appropriate level of generality at which to describe history, however, any suggestion that personal judgment is not involved is mistaken.

III. LAW OFFICE HISTORY

Lawyering—or at least the lawyering involved in litigation—is an exercise in advocacy, marshaling authorities, and evidence in support of a stated objective. For lawyers, history often is merely another type of ammunition that may be loaded into a brief or memorandum aimed at establishing a desired rule of law. Scholars even have coined a none-too-flattering term for the problem: "law office history." As historian A.H. Kelly described it, "law office history" refers to "the selection of data favorable to the position being advanced without regard to or concern

³² See generally Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

³³ In my day, the required reading that illustrated the point was Edward Levi's classic account of the development and breakdown of the "inherently dangerous" rule of tort law. See generally EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 9-27 (1949).

for contradictory data or proper evaluation of the relevance of the data offered.”³⁴

To an extent too often underestimated, judging, too, is an exercise in advocacy. And, as a result, judges often resort to history much like lawyers do, as if historical references were like any other rhetorical resources to be put to use in support of an opinion. The United States Supreme Court long has been accused of being a repeat offender. Particularly—although certainly not exclusively—during the Warren Court era, historians and other scholars bemoaned the Court’s tendency to invoke history based on highly selective use of source materials as a basis for departing from established precedents or breaking new doctrinal ground.³⁵ Unfortunately, law office history is not limited to decisions involving federal constitutional law. State court decisions, too, occasionally reflect a penchant for questionable treatment of source materials in several different ways.

A. *History and the Problem of the Cocktail Party*

The late Judge Harold Leventhal famously remarked that resorting to legislative history in the construction of a statute is akin to “entering a crowded cocktail party and looking over the heads of the guests for one’s

³⁴ A.H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13.

³⁵ Mark DeWolfe Howe’s comments on the Supreme Court’s treatment of the religion clauses of the First Amendment are illustrative:

By superficial and purposive interpretations of the past, the Court has dishonored the arts of the historian and degraded the talents of the lawyer. Such dishonoring and degrading may not be of large moment when the history that the court manipulates is mere “legal history” – the story, that is, of the law’s internal growth and development. When, however, the Court endeavors to write an authoritative chapter in the intellectual history of the American people, as it does when it lays historical foundations beneath its readings of the First Amendment, then any distortion becomes a matter of consequence. . . . It may be that as a lawyer I take the Court’s distorting lessons in American intellectual history too seriously. I must remind you, however, that a great many Americans—lawyers and non-lawyers alike—tend to think that because a majority of the justices have the power to bind us by their law they are also empowered to bind us by their history.

MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 4-5 (1965); see also CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (1969); Kelly, *supra* note 34; John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV 502 (1964).

friends.”³⁶ The point is that, we routinely ignore—or perhaps more benignly, simply do not see—what is not familiar or useful to us. It is an unfortunately common complaint about judges, lawyers, and their use of history in constitutional interpretation.

Consider, for example, the Oregon Supreme Court’s decision in *State v. Henry*.³⁷ At issue in that case was whether a statute prohibiting distribution of “obscene” publications ran afoul of the free speech guarantees of the Oregon Constitution. Article I, section 8, of that constitution provides that “[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.” The Oregon Supreme Court interprets that provision to mean that, if a law restrains expression based on the content of that expression, that law is unconstitutional unless “wholly contained” within “an original or modern version of a historically established exception” to the otherwise absolute protections afforded by the constitution.³⁸

Consistently with that rule, the *Henry* court purported to survey the history of the regulation of the distribution of obscene publications from the sixteenth century to the time Oregon’s constitution was adopted in the mid-nineteenth century.³⁹ The court did so by reference to a summary of the history in an American constitutional law text,⁴⁰ to a summary of cases and other relevant materials contained in a dissenting opinion of Justice William O. Douglas,⁴¹ and to a treatise on the law of obscenity by constitutional scholar Frederick F. Schauer.⁴² After reviewing those sources, the court concluded “that restrictions on

³⁶ The oft-quoted remark appears to have been first quoted in Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983). The version I have quoted is taken from *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., dissenting).

³⁷ 732 P.2d 9 (Or. 1987).

³⁸ The basic doctrine of Oregon free speech analysis was first set out in *State v. Robertson*, 649 P.2d 569 (Or. 1982). For an examination of the origins and development of free speech analysis under *Robertson*, see generally William R. Long, Note, *Requiem for Robertson: The Life and Death of a Free-Speech Framework in Oregon*, 34 WILLAMETTE L. REV. 101 (1998).

³⁹ *Henry*, 732 P.2d at 11-14.

⁴⁰ *Id.* at 11-12 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 657 (1978)).

⁴¹ *Id.* at 13-14 (quoting *United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 132-33 (1973) (Douglas, J., dissenting)).

⁴² *Id.* at 14 (citing FREDERICK F. SCHAUER, THE LAW OF OBSCENITY (1976)).

sexually explicit or obscene expression were not well established at the time the early freedoms of expression were adopted.”⁴³

The Oregon court then turned to history more specific to the framers of the Oregon Constitution “to determine if there is any indication that legislation existing at or near the time of the adoption of Article I, section 8, of the Oregon Constitution demonstrates that ‘obscene’ expressions should be included as a historical exception.”⁴⁴ The court conceded that, in 1853 and 1855, the territorial legislature had enacted legislation outlawing the sale, distribution, and possession of obscene writings. The court rejected that statute as evidence of an intention to regard “obscene” publications as a historical exception because the legislature had failed to define the term “obscene.”⁴⁵ The court then concluded, citing no sources whatsoever:

[A]lthough Oregon’s pioneers brought with them a diversity of highly moral as well as irreverent views, we perceive that most members of the Constitutional Convention of 1857 were rugged and robust individuals dedicated to founding a free society unfettered by the governmental imposition of some people’s views of morality on the free expression of others. We conclude as we did in reviewing English and American history that restrictions on sexually explicit and obscene expression between adults were not well established at the time of the adoption of Article I, section 8, of the Oregon Constitution.⁴⁶

Henry is a remarkable example of selective reading of sources of American legal history.⁴⁷ For example, while *Henry* asserted that

⁴³ *Id.*

⁴⁴ *Id.* at 15.

⁴⁵ *Id.* at 16.

⁴⁶ *Id.*

⁴⁷ *Henry* is the only state court decision to conclude, on the basis of history, that obscenity was intended by nineteenth century framers to be constitutionally protected speech. For an interesting contrast, see *Fordyce v. State*, 569 N.E.2d 357, 360-61 (Ind. Ct. App. 1991), in which the Indiana court examined the constitutional provision on which Oregon’s was based and found in the historical record a “consistent tradition of regulating obscenity.” See also *People v. Ford*, 773 P.2d 1059 (Colo. 1989) (finding that the framers of the Colorado free speech provision did not intend to protect obscene publications); *State v. Marshall*, 859 S.W.2d 289 (Tenn. 1993) (concluding that the framers of the Tennessee free speech guarantee did not intend to protect obscene publications).

restrictions on obscene publications were not “well established” by the mid-nineteenth century, the fact is that, before the outbreak of the Civil War, fully two-thirds of the states had enacted legislation prohibiting the distribution of obscene publications, particularly to minors. Those states included Arkansas,⁴⁸ California,⁴⁹ Connecticut,⁵⁰ Indiana,⁵¹ Illinois,⁵² Iowa,⁵³ Louisiana,⁵⁴ Maine,⁵⁵ Maryland,⁵⁶ Massachusetts,⁵⁷ Michigan,⁵⁸ Minnesota,⁵⁹ New Hampshire,⁶⁰ Oregon,⁶¹ Pennsylvania,⁶² Rhode

⁴⁸ ARK. STAT. ch. 51, art. VIII, §§ 1-2 (1856) (prohibiting any person from “exhibiting any obscene or indecent pictures, or figures”).

⁴⁹ CAL. STAT. ch. 271, § 1 (1859) (prohibiting any person from publishing, selling, or exhibiting “any lewd or obscene book, pamphlet, picture, print, card, paper, or writing”).

⁵⁰ CONN. STAT. tit. 21, ch. 9, § 82 (1835) (prohibiting the importation, publication, sale, or distribution of “any book, pamphlet, ballad or other printed paper, containing obscene language, prints or descriptions”).

⁵¹ IND. REV. STAT. ch. 8, § 52 (1852) (prohibiting sale, exhibition or circulation of “any obscene book, pamphlet, print or picture”).

⁵² ILL. REV. STAT. ch. 30, § 128 (1845) (prohibiting the importation or sale of “any obscene book, pamphlet or print”).

⁵³ IOWA CODE tit. 23d, ch. 145, § 2717 (1851) (prohibiting distribution of obscene material “manifestly tending to corrupt the morals of youth”).

⁵⁴ LA. PENAL CODE, Crimes & Punishments, tit. XI, ch. II, art. 340 (1833).

⁵⁵ ME. REV. STAT. ch. 124, § 13 (1857) (prohibiting distribution of obscene material “manifestly tending to corrupt the morals of youth”).

⁵⁶ MD. PUB. GEN. LAWS art. 30, § 78 (1860).

⁵⁷ MASS. REV. STAT. ch. 130, § 10 (1836) (prohibiting distribution of “obscene prints, pictures, figures, or descriptions, manifestly tending to the corruption of the morals of youth”).

⁵⁸ MICH. REV. STAT. tit. XXX, ch. 158, § 13 (1846) (prohibiting distribution of obscene material “manifestly tending to the corruption of the morals of youth”).

⁵⁹ MINN. PUB. STAT. ch. 96, § 11 (1859) (prohibiting the distribution of obscene material “manifestly tending to the corruption of the morals of youth”).

⁶⁰ N.H. REV. STAT. ch. 113, § 2 (1843) (no person may “sing or repeat, or cause to be sung or repeated any lewd, obscene or profane song, or shall repeat any lewd, obscene or profane words; or write or mark in any manner any obscene or profane word, or obscene or lascivious figure”).

⁶¹ OR. STAT. ch. 11, § 10 (1855) (prohibiting the distribution of “obscene prints, pictures, figures or other descriptions, manifestly tending to the corruption of the morals of youth”).

⁶² PA. STAT. LAW art. LX, § 7983 (1920) (P.L. 382, § 40 (March 31, 1860)).

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Island,⁶³ Texas,⁶⁴ Tennessee,⁶⁵ Vermont,⁶⁶ Virginia,⁶⁷ and Wisconsin.⁶⁸ The *Henry* court mentioned the fact that, in the nineteenth century, "several" states had passed obscenity statutes, but, beyond that, the court ignored all of the foregoing statutes save the one enacted by the Oregon Territorial Legislature.

In addition to legislation on the subject of obscenity, there were antebellum court decisions recognizing a common-law action for the distribution of "lewd" or obscene materials.⁶⁹ The *Henry* court mentioned two. Finally, in concluding that the framers of Oregon's mid-nineteenth century constitution "were rugged and robust individuals dedicated to founding a free society unfettered by the governmental imposition of some people's view of morality," the court wholly ignored the widespread regulation of sexual conduct and indecent exposure in the mid-nineteenth century.⁷⁰

⁶³ R.I. STAT. tit. XXX, ch. 216, § 12 (1857) (prohibiting distribution of obscene materials "manifestly tending to the corruption of the morals of youth").

⁶⁴ TEX. PENAL CODE ch. 4, § 399 (1859) (prohibiting the publication of obscene materials "manifestly designed to corrupt the morals of youth").

⁶⁵ TENN. CODE art. II, § 4847 (1858) (prohibiting distribution of obscene materials "into any family, school, or place of education").

⁶⁶ ACTS OF VT. § 23 (1821) (prohibiting publication, sale or distribution of "any lewd or obscene book, picture or print").

⁶⁷ VA. CODE ch. 196, § 11 (1849) (prohibiting distribution of obscene material "manifestly tending to corrupt the morals of youth").

⁶⁸ WIS. REV. STAT. ch. 139, § 11 (1849) (prohibiting distribution of obscene material "manifestly tending to the corruption of the morals of youth").

⁶⁹ See, e.g., *Commonwealth v. Tarbox*, 55 Mass. (1 Cush.) 66 (1848) (publication of obscene materials); *Commonwealth v. Holmes*, 17 Mass. 336 (1821) (upholding conviction for obscene publication); *Barker v. Commonwealth*, 19 Pa. 412 (1852) (indictment for publicly describing men and women in obscene "positions"); *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (Pa. 1815) (upholding indictment for exhibiting obscene painting); *Bell v. State*, 31 Tenn. (1 Swan) 42 (1851) (conviction for uttering obscene words in public).

⁷⁰ *Henry*, 732 P.d at 17; see, e.g., ARK. STAT. ch. 51, art. VIII, § 1 (1858) (prohibiting "obscene exhibition" of a person); CONN. STAT. tit. 21, ch. 9, § 79 (1835) (prohibiting "lascivious" behavior); REV. STAT. ILL. ch. 30, § 127 (1845) (prohibiting "open lewdness, or other notorious act of public indecency"); IND. REV. STAT. § 22 (1852) (prohibiting "notorious lewdness" or other public indecency); STAT. LAWS TERR. IOWA § 86 (1839) (prohibiting "open lewdness, or other notorious act of public indecency"); ME. REV. STAT. ch. 124, § 5 (1857) (prohibiting "open, gross lewdness and lascivious behavior"); MASS. GEN. STAT. ch. 165, § 6 (1864) (prohibiting "open and gross lewdness and lascivious behavior"); OR. GEN. STAT. ch. 48, § 632 (prohibiting "lewdly" exposing a person); PA. LAWS tit. IV, § 44 (1860) (prohibiting "open lewdness, or any notorious act of public indecency"); VT. REV. STAT. ch. 99, § 8 (1846) (prohibiting "open and gross lewdness and lascivious behavior"); VA. CODE tit. 54, ch. 197, § 7 (1849) (prohibiting "open and gross lewdness and lasciviousness"); see also LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT

The California Supreme Court appears to have examined the record of that state's constitutional convention with some selectivity in *People v. Houston*.⁷¹ In that criminal case, the court declined to follow the United States Supreme Court's recent decision in *Moran v. Burbine*,⁷² instead holding that, under the California Constitution, the defendant's confession could not be admitted even though he waived his *Miranda* rights because the police had held the defendant incommunicado, keeping him ignorant of the fact that a lawyer who had been retained by his friends was attempting to consult with him. The court expressly departed from the federal constitutional rule and based its decision on the Declaration of Rights in the California Constitution. In justifying the departure from the federal constitutional rule, the court explained that state constitutions "offer important local protection against the ebbs and flows of federal constitutional interpretation."⁷³

A lone dissenter objected to the court's departure from the federal precedent "with barely a nod" to the recent Supreme Court decision, particularly in light of the fact that the relevant state and federal constitutional provisions were almost identically worded.⁷⁴ The majority responded by noting that, although the wording of the constitutional provisions indeed was similar, "[t]he debates at the constitutional convention of 1849 make quite clear that the language of the Declaration of Rights which comprises article I of the California Constitution was not based upon the federal charter at all, but upon the constitutions of other states."⁷⁵

Ira Reiner and George Glenn Size have argued, however, that the records of the California Constitutional Conventions of 1849 and 1878 contain a good deal of evidence that numerous provisions of the California Declaration of Rights were drawn not from the constitutions of other states, but from the United States Constitution.⁷⁶ According to Reiner and Size, the framers intended to incorporate numerous provisions of the Federal Constitution into the state constitution because,

IN AMERICAN HISTORY 127-28 (1993) ("[T]he republican period carried on a rich, colonial tradition, committed to sexual control (or, more accurately, repression). There was no abrupt break with the past.").

⁷¹ 725 P.2d 1166 (1986).

⁷² 475 U.S. 412 (1986).

⁷³ *Houston*, 724 P.2d at 1174.

⁷⁴ *Id.* at 1180, 1185 (Lucas, J., dissenting).

⁷⁵ *Id.* at 1174 n.13.

⁷⁶ Ira Reiner & George Glenn Size, *The Law Through a Looking Glass: Our Supreme Court and the Use and Abuse of the California Declaration of Rights*, 23 PAC. L.J. 1183 (1992).

at least as of 1849, those federal provisions did not yet apply to the states.⁷⁷ Whether or not Reiner and Size are correct in their assertion that the framers of the California Constitution intended to incorporate wholesale provisions of the Federal Constitution, the fact remains that the record is not nearly as clear as the California court made it out to be.

Consider also the decisions of a number of courts construing what are commonly known as “open courts” clauses of state constitutions. Thirty-eight state constitutions contain such clauses.⁷⁸ Although it is generally agreed that the wording of these clauses traces back to Sir Edward Coke’s commentaries on chapter 29 of the 1225 version of Magna Carta, there is virtually no record of what the framers of the state constitutions had in mind when they adopted it.⁷⁹ Undaunted, state courts have attempted to reconstruct what those framers most likely intended based largely on eighteenth and nineteenth century treatises and case law.

The problem is that no one has done a particularly thorough job. Courts seem content to rush to judgment based on a highly selective reading of sources. In *Berry By and Through Berry v. Beech Aircraft Corp.*,⁸⁰ for example, the Utah Supreme Court concluded that the framers of that

⁷⁷ *Id.* at 1197-1200. Reiner and Size, for example, observe that the record of the 1849 convention includes a colloquy in which one delegate objects to the proposed state Declaration of Rights because they “are literally from the Constitution from the United States,” prompting an explanation from the Chairman of the convention that:

[t]he fact that this is in the Constitution of the United States does us no good here; for it has been decided by the Supreme Court of the United States that these provisions only apply in the United States Courts. It is necessary that we should adopt it here if we desire it to apply in our State courts.

Id. at 1201 (quoting J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER, 1849 at 294 (1850)).

⁷⁸ For a useful overview of the clauses, their history, and the courts’ interpretations of them, see JENNIFER FRIESEN, 1 STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES §§ 6-1 to 6-3 (3d ed. 2000). See generally John H. Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, 26 WAKE FOREST L. REV. 237 (1991); Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279 (1995); William C. Koch, Jr., *Reopening Tennessee’s Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333 (1997); David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197 (1992).

⁷⁹ See, e.g., Bauman, *supra* note 78, at 240 (“The intent of the framers of these state constitutional provisions is usually impossible to ascertain[.]”).

⁸⁰ 717 P.2d 670 (Utah 1985).

state's open courts provision—Article I, section 11, of the Utah Constitution—intended it to limit not just the authority of the courts, but also that of the legislature to alter certain common law remedies. The court's historical analysis, in its entirety, is as follows:

Thirty-seven states have constitutional provisions that are essentially similar to the Utah provision. These provisions, which have no analogue in the federal Constitution, and the better-known due process clauses found in both state and federal constitutions appear to have originated with the Magna Carta and "Sir Edward Coke's Gloss on Chapter 29 of the 1297 Magna Carta [which] is remarkably similar to these remedy provisions."

Provisions such as section 11 have been referred to as "open courts" clauses and "remedies" clauses. In fact, section 11 was designed to accomplish several purposes. The clear language of the section guarantees access to the courts and a judicial procedure that is based on fairness and equality. A plain reading of section 11 also establishes that the framers of the Constitution intended that an individual could not be arbitrarily deprived of effective remedies designed to protect basic individual rights. A constitutional guarantee of access to the courthouse was not intended by the founders to be an empty gesture; individuals are also entitled to a remedy by "due course of law" for injuries to "person property, or reputation."⁸¹

Thus, beyond noting the pedigree of the provision's phrasing, the court made no effort to ground its historical conclusions in even the most rudimentary historical analysis.

The Oregon Supreme Court's decision in *Smothers v. Gresham Transfer, Inc.*,⁸² contains an extended analysis of the origins of Oregon's open courts clause and the historical circumstances surrounding its adoption in support of a similar conclusion that the clause was intended to constrain the authority of the legislature to abolish common-law

⁸¹ *Id.* at 674-75 (citations omitted).

⁸² 23 P.3d 333 (2001).

claims. The court traced the wording of the clause from Magna Carta to Coke to Blackstone to early colonial charters and early state constitutions to nineteenth-century case law construing them.⁸³

As Jonathan Hoffman has shown, however, even then the court's research rested on a number of unsubstantiated assumptions and on a questionable selection of sources.⁸⁴ For example, the court devoted a good deal of attention to open courts clause decisions from the first half of the nineteenth century. Yet the court cited only a small sample of the available case law with no explanation for its selection. Among the cases not cited were several containing declarations that the clause had a much more limited intended purpose than what the Oregon Supreme Court identified.⁸⁵

The point seems plain enough. If a court is going to resort to history, then it should not do so selectively. Failing to report the relevant sources completely and thoroughly only makes clear that it is not history at all that is being reported, but rather, a version of it that has been artificially constructed for the occasion.

B. *All Sources Are Not Created Equal: Evaluating Sources*

A variation on the problem of selectivity is identifying which from among the apparently relevant sources is reliable to support an assertion about the framers' intentions. For example, recall that in *Henry* the Oregon Supreme Court reached a rather emphatic conclusion about the intentions of the framers of the state constitutional free speech guarantee primarily by reference to secondary sources. The first was Laurence Tribe's constitutional law text, which was devoted to federal constitutional law doctrine—specifically, definitions of the term “obscenity”—and did not even address the constitutional history of state obscene libel laws.⁸⁶ The second was a dissenting judicial opinion that

⁸³ *Id.* at 340-52.

⁸⁴ Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L.J. 1005 (2001).

⁸⁵ As one of several examples, Hoffman cited the Tennessee Supreme Court's 1834 decision in *Fisher's Negroes v. Dabbs*, 14 Tenn. (6 Yer.) 119 (1834), in which the court characterized the function of the clause as prohibiting the legislature from improperly interfering with pending cases.

⁸⁶ TRIBE, *supra*, note 40, at 657-58. Tribe's historical summary consisted of two paragraphs tracing the history of obscenity regulation from the sixteenth century to the end of the Civil War. Although he acknowledged that “several” states had enacted obscenity laws in the early nineteenth century, he cited none of them. *Id.*

once again concerned the history of the First Amendment and not state constitutions. The third was Frederick Schauer's work on the law of obscenity, a work devoted to doctrine that contains a four-page introductory history of the definition of "obscenity."⁸⁷ The court made no effort to explain why those sources provided a reliable indication of what the framers of the Oregon Constitution likely thought about the regulation of obscene publications.

In a similar vein, consider *State v. Kessler*,⁸⁸ a case in which the Oregon Supreme Court was called upon to ascertain whether the state constitutional guarantee of the right to bear arms applied to the possession of billy clubs. The court embarked on a history of personal "arms," and on the basis of that history, concluded that the framers would have understood billy clubs to be subject to the constitutional right to bear arms.⁸⁹ The principal source for the history? A 1967 book, *Weapons of War*, a 208-page anecdotal survey of the entire history of weaponry from ancient paleolithic weapons to nuclear bombs, written by an author whose earlier works concentrated primarily on marine archaeology and space travel.⁹⁰

Clearly, just because a court can locate a work purporting to recount the "history" of an event, idea, or other phenomenon does not mean that the work is worthy of reliance as a historical reference. Some care must be brought to the task of evaluating the reliability of sources on which courts rely in support of historical assertions. Typically, historians

⁸⁷ Even then, the court quoted only selectively from the work. The court quoted Schauer as concluding "that early American laws made blasphemy or heresy a crime, but sexual materials not having an antireligious aspect were left generally untouched." *Henry*, 732 P.2d at 14. Schauer did say that, but he did so with respect to colonial-period laws. What the court neglected to note was that Schauer's historical introduction did not stop with early colonial obscene libel laws. Schauer went on to report that, in England, a significant shift occurred not long after and that "[b]y the beginning of the 19th century, however, the common-law crime of obscene libel had matured and was used against works which were purely sexual in content, without the necessity of political or religious implications." SCHAUER, *supra* note 42, at 6. Schauer went on to note that "the period from 1800 to 1860 . . . witnessed the development of a great deal of obscenity law." *Id.* at 7. With respect to the development of obscene libel laws in America, Schauer noted that "[t]he early history of obscenity regulation in the American colonies tends to parallel its development in England," and that, as in England, "[t]he years prior to the Civil War witnessed a proliferation of obscenity and lewdness statutes," although there were relatively few prosecutions. *Id.* at 8, 10.

⁸⁸ 614 P.2d 94 (1980).

⁸⁹ *Id.* at 98-99.

⁹⁰ *Oregon State Shooting Ass'n v. Multnomah Co.*, 858 P.2d 1315, 1319 n.3 (Or. App. 1993); *see also* P. CLEATOR, *WEAPONS OF WAR* 143-52 (1967).

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identify a number of relevant sources, compare them, assess them, look for errors and biases, and evaluate them for their reliability as support for a given proposition. This, of course, is problematic for judges, because most of us are not trained to do that.

I became altogether too aware of that fact when I drafted an opinion on the Oregon Constitution's right to bear arms clause. In *State v. Hirsch*,⁹¹ the issue was the constitutionality of a state statute prohibiting convicted felons from possessing certain firearms. In reaching the conclusion that such statutes do not abrogate a constitutional guarantee of the right to bear arms, I cited a work by historian Michael A. Bellesiles, which recently had been awarded the prestigious Bancroft Prize and which had asserted, among other things, that—contrary to conventional wisdom—gun ownership in America was not widespread until after the Civil War.⁹² What I did not know at the time was that, since the book's publication, a number of scholars had attempted to test some of Bellesiles's claims and found them wanting in support from the sources on which he relied.⁹³ Fortunately, I had cited his work for a fairly uncontroversial point,⁹⁴ but I nevertheless found unsettling the fact that the reliability of an award-winning work of history could be so quickly called into question.

I am aware of one case in which a trial judge actually relied on the testimony of expert witnesses in evaluating the historical evidence as to whether a particular weapon would have been the sort that the framers

⁹¹ 34 P.3d 1209 (2001).

⁹² *Id.* at 1211 (citing MICHAEL A. BELLESILES, *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE* (2000)).

⁹³ The principal bone of contention is Bellesiles' claim that, based on an examination of probate records, gun ownership in the late-eighteenth and early-nineteenth centuries was not as widespread as earlier thought. Several scholars attempted to verify the claim but could not do so. For an account of the controversy over Bellesiles's research, see generally James Lindgren, *Fall from Grace: Arming America and the Bellesiles Scandal*, 111 YALE L.J. 2195, 2197 (2002) ("Since the book's publication, scholars who have checked the book's claims against its sources have uncovered an almost unprecedented number of discrepancies, errors, and omissions."). Bellesiles is not without defenders, however. See, e.g., Kenneth Lasson, *Blunderbuss Scholarship: Perverting the Original Intent and Plain Meaning of the Second Amendment*, 32 U. BALT. L. REV. 127, 134 n.33 (2003) ("Although Bellesiles' table indicating that guns were not prevalent in estates prior to 1800 has been successfully challenged by scholars, his analysis of the rise of the gun culture in America subsequent to the Mexican War, and particularly after the Civil War, has not.").

⁹⁴ I referred to the author's account of colonial governments that confiscated without compensation the arms of those who would not take an oath of loyalty. *Hirsch*, 34 P.3d at 1211 (citing BELLESILES, *supra* note 92, at 214).

of a state constitution would have understood that citizens have a right to possess. In other cases, professional historians have submitted amicus briefs describing the relevant historical context of a disputed legal issue. Such practices obviously are impracticable in most cases. At the very least, however, courts must resist the temptation to rely on whatever source materials seem to fit the bill without taking the time and the effort to evaluate them.

IV. HISTORY AND THE SOUNDS OF SILENCE

There are times when a careful search of the historical record of the framers' intentions as to a disputed constitutional provision reveals nothing. There may have been no debate at all on the entire provision. The free speech guarantee of the Oregon Constitution, for example, was adopted without any recorded debate.⁹⁵ Or there may have been no discussion about a particular issue to which the provision arguably applies. For instance, the Oregon Constitutional Convention debated extensively the provisions of the Oregon Constitution concerning the judiciary. But those debates focused primarily on such matters as the number of judges to serve on the Supreme Court and the length of their terms of office; they reveal no discussion of the issue whether the framers intended to authorize courts to issue advisory opinions.⁹⁶

The question arises what to do in the face of such a historical vacuum. One possibility is simply to report that the historical record offers no evidence of what the framers actually intended. Another, commonly employed by courts, is to mine the silence for historical significance by means of negative inference. The reasoning usually goes something like this: Either the framers intended "X," or they intended "not-X." If there is no evidence that they intended "X," then it is fair to assume that they must have intended "not-X."

A good example is a group of cases involving the question whether the free expression guarantees of state constitutions protect the rights of citizens to distribute political literature on private property such as apartment complexes and shopping malls. The threshold issue in each of those cases is whether the free speech guarantees apply only in the case of "state action." For example, in *Golden Gateway Center v. Golden*

⁹⁵ See generally Claudia Burton & Andrew Grade, *A Legislative History of the Oregon Constitution of 1857 – Part I (Articles I & II)*, 37 WILLAMETTE L. REV. 469, 511-12 (2001).

⁹⁶ Claudia Burton, *A Legislative History of the Oregon Constitution of 1857 – Part II (Frame of Government: Articles III-VII)*, 39 WILLAMETTE L. REV. 245, 400-56 (2003).

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Gateway Tenants Ass'n,⁹⁷ the California Supreme Court addressed the question whether a landlord could enjoin a tenants association from distributing unsolicited newsletters on the premises of the landlord's downtown San Francisco apartment complex. The tenants argued that they had a right to do so guaranteed by the free speech provisions of the California Constitution, which provides that every person has the right to "freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right."⁹⁸ The landlord argued that the free speech provision applies only to laws or other state actions that interfered with rights of free expression and does not apply to merely private action.

The California Supreme Court began by noting, "The breadth of this language . . . suggest[s] an intent to protect the right to free speech against private intrusions."⁹⁹ The court quickly added, however, that "the absence of an explicit state action limitation in article I, section 2, subdivision (a) is not dispositive."¹⁰⁰ The court noted that the state constitution also prohibits any "law" from abridging "liberty of speech," and that that wording "indicates an intent to protect against only state actions."¹⁰¹

The court then turned to the history of the California Constitution for aid in resolving what it thought was an ambiguity in the wording of the free speech provision. What the court found, though, was that the framers of the California Constitution had "adopted this language with *no debate*."¹⁰² That absence of any debate on the free speech provision prompted the court to declare: "Thus, the debates over California's free speech clause give *no* indication that the framers wished to guard against private infringements on speech."¹⁰³ Of course, the debates over California's free speech clause give no indication that the framers wished to guard against only state infringements on speech, either.¹⁰⁴ But that,

⁹⁷ 29 P.3d 797 (Cal. 2001).

⁹⁸ *Id.* at 801 (quoting CAL. CONST. art. I, § 2, subd. (a)).

⁹⁹ *Id.* at 803.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 804.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Indeed, Jennifer Friesen has argued that the silence of the delegates supports precisely the opposite inference. She notes that the wording of the free speech clause is not wording of limitation, but of declaration. "The choice instead to *declare* the existence of broad and affirmative rights," she suggests, "creates at least an inference that private as well as official interference with these rights was meant to be barred." Jennifer Friesen, *Should California's*

interestingly, is not the conclusion that the court chose to draw from the silent record.

In *Cologne v. Westfarms Associates*,¹⁰⁵ the Connecticut Supreme Court addressed a similar issue: whether a regional shopping mall violated state constitutional free speech guarantees when it denied access to a women's political advocacy group attempting to distribute literature and collective initiative petition signatures. The court concluded that the state constitutional free speech provision did not apply in the absence of state action. The court referred to the history of the adoption of the state's bill of rights generally, noting that a number of delegates remarked that the purpose of adopting a bill of rights was to enshrine the basic individual liberties of the people "in a written constitution to ensure their protection from governmental infringement."¹⁰⁶ As to the more specific question whether the framers intended also to ensure their protection from private infringement, the court relied on the silence of the historical record. Referring to the origins of the federal and state bills of rights, the court explained:

There is nothing in the history of these documents to suggest that they were intended to guard against private interference with such rights. Similarly, a review of their origin discloses no evidence of any intention to vest in those seeking to exercise such rights as free speech and petition the privilege of doing so upon property of others.¹⁰⁷

The court identified nothing in that adoption history that suggested that the framers actually discussed whether the Connecticut bill of rights was intended to protect against private infringement, much less identified anything in that history suggesting that they did not intend to protect against private infringement. On that specific question, the court apparently found nothing. But out of that evidentiary nothingness, the court arrived at an unequivocal historical conclusion.

Constitutional Guarantees of Individual Rights Apply Against Private Actors? 17 HASTINGS CONST. L.Q. 111, 119 (1989). This inference, she contends, "is supported by the convention records," in particular, the fact that there was no debate. *Id.*

¹⁰⁵ 469 A.2d 1201 (Conn. 1984).

¹⁰⁶ *Id.* at 1207.

¹⁰⁷ *Id.* at 1208.

The problem with this sort of reasoning should be obvious. In most cases, it is simply not logical. It employs what Fischer calls the “fallacy of the negative proof”: that is, an attempt to sustain a factual proposition simply by negative inference.¹⁰⁸ It assumes that the framers could have had only one of two intentions when, in fact, there is often at least a third possibility, if not others. In the state action cases, for example, the courts assume that the framers of the state free speech guarantees either intended that those provisions apply to state actors only or also to private actors. There is at least a third possibility, namely, that the issue never arose and that they had no real intentions one way or the other.

It may be noted that I qualified my criticism of reasoning from silence by saying that, “[i]n most cases,” doing so is illogical. I include that qualification in recognition of the possibility that in some cases, at least theoretically, all of the logical possibilities as to the framers intentions could be identified and all but one of them could be eliminated. Even then, though, reasoning from silence permits at best a weak inference, an inference that cannot be confirmed or disproved by reference to the historical record.¹⁰⁹

Thus, for instance, in *State v. Conger*,¹¹⁰ the Oregon Supreme Court addressed the meaning of the grand jury provision of the Oregon Constitution, which provides: “A grand jury shall consist of seven jurors chosen by lot from the whole number of jurors in attendance at the court, five of whom must concur to find an indictment.”¹¹¹ The defendant had been indicted by a grand jury consisting of only six members. He challenged the indictment on the ground that it violated the state constitutional requirement that grand juries consist of seven jurors. The state argued that the constitution did not preclude grand juries from operating at less than the full complement of seven members, as long as

¹⁰⁸ FISCHER, *supra* note 25, at 47-48.

¹⁰⁹ See, e.g., MARTHA HOWELL & WALTER PREVENIER, FROM RELIABLE SOURCES: AN INTRODUCTION TO HISTORICAL METHODS 74 (2001). According to Howell and Prevenier:

Of course, an argument from silence can serve as presumptive evidence of the “silenced” event only if . . . the person suppressing the information was in a position to have the information, and was purporting to give a full account of the story from which he omitted the crucial information, and if there were no compelling reasons why he should have omitted the information (other than a wish to conceal).

Id.

¹¹⁰ 878 P.2d 1089 (Or. 1994).

¹¹¹ OR. CONST. art. VII, § 5(2).

five of them concurred in the indictment. A divided Oregon Supreme Court agreed.

The majority's reasoning was almost entirely historical. It first turned to the record of the debates of the 1857 constitutional convention. The court found in that record extensive debates over whether to have grand juries at all and, if so, how large or small they should be. The court noted that various numbers—five, seven, nine, twelve, fifteen, and eighteen—were proposed. Unfortunately, the court said that the record of the constitutional debates provides no direct evidence about whether the number discussed was meant to be a quorum requirement to find an indictment.¹¹²

The court did not stop there. In context, the court suggested, the silence of the debates permits an inference that, if the framers had intended the stated number of jurors to serve as a quorum requirement, they would have said so. The court reached that conclusion for three reasons. First, it noted that elsewhere in the state's constitution—in provisions concerning the legislative branch—a two-thirds quorum requirement was clearly stated. Thus, the court reasoned, the convention certainly knew how to express a quorum requirement. Second, the court noted that the grand jury provisions of the Oregon territorial statutes expressly included quorum requirements; for example, specifying that grand juries shall consist of twenty-three jurors "any sixteen of which shall be sufficient to constitute a grand jury." Third, the court noted that a number of courts in other jurisdictions—although not all of them—had concluded that the number of jurors to be summoned or impaneled was not a quorum requirement.¹¹³

Give the court credit for not merely relying on the silence of the record of debates and calling it a day. The court attempted to construct a basis from which to draw inferences from that silence. The problem is, the best that the court could do is establish a *permissible* inference. The court, in other words, established only that it is *possible* that the framers intended the state constitution not to impose a quorum requirement for grand juries.

¹¹² *Conger*, 878 P.2d at 1096-97. The court went on to note, correctly, that "[o]n the other hand, the materials do not definitively establish that a quorum of seven was *not* intended." *Id.*

¹¹³ *Id.* at 1096-98.

Indeed, as the dissenting opinion in that case pointed out, the same sources on which the court relied also support the opposite inference, that is, that the framers of the constitution intended it to mean precisely what it says: the “grand jury shall consist of seven jurors.”¹¹⁴ The fact that the framers elsewhere in the constitution specified a quorum requirement of two-thirds of each house of the legislature arguably suggests that, if they had intended that something fewer than all of the members of a body is required, they would have said so. Similarly, the fact that the territorial statutes specifically referred to grand jury quorum requirements arguably suggests that, if they had intended something fewer than all seven grand jurors would suffice, they would have said so. Particularly in light of the fact that the express quorum requirements applied to very large bodies, it reasonably could be inferred that the framers reduced the number of grand jurors to only seven so that lesser quorum requirements would be unnecessary.

In other words, in light of all of the circumstantial historical evidence, the silence in the record of debates as to the particular issue at hand supports at least two opposing inferences as to the framers’ intentions. In no way can it fairly be said that, as a matter of responsible history, it is *probable* that they intended one or the other. In the best of circumstances, reasoning from silence is a risky business.

V. HISTORY AND “THE WHOPPER”

Courts employ other strategies in response to a historical record that provides no direct evidence of the intentions of the framers of a state constitution. Often—very often, in fact—courts will employ a series of “presumptions” to fill in the gaps. The California Supreme Court’s decision in the *Golden Gateway* case provides an excellent example. Recall that in that case, upon finding that the free speech provisions of the California Constitution had been adopted with no debate whatsoever, the court commented that “[t]hus, the debates over California’s free speech clause give *no* indication that the framers wished to guard against private infringements on speech.”¹¹⁵

The court did not stop there. It went on to note that the framers of the 1849 constitution had borrowed the wording of California’s free speech guarantees from the state constitution of New York, which had

¹¹⁴ OR. CONST. art. VII, § 5(2); *Conger*, 878 P.2d at 1098-1103 (Unis, J., dissenting).

¹¹⁵ *Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n*, 29 P.3d 797, 804 (Cal. 2001).

been adopted twenty-eight years earlier, in 1821. Relying on a 1985 decision of the New York Court of Appeals, the California court noted that it was clear that the framers of the 1821 New York Constitution had intended that the New York free speech clause protect against only state action and not private conduct. The court then took the following leap: "Because the framers of the California Constitution adopted New York's free speech clause almost verbatim, we reasonably conclude they had the same intent as their New York counterparts."¹¹⁶

State constitutional decisions abound with similar examples. In *Armatta v. Kitzhaber*,¹¹⁷ for instance, the Oregon Supreme Court resorted to the records of the debates on the 1851 Indiana Constitution that served as a template for much of the Oregon Constitution and then imputed to the Oregon delegates in 1857 the same intentions because "we have found nothing to suggest that the framers of the Oregon Constitution had a different understanding or intent."¹¹⁸

Sometimes the courts employ the fiction that sources from other jurisdictions were, at least in a temporal sense, "available" to the framers. In *State v. Cookman*,¹¹⁹ the Oregon Supreme Court confronted the meaning of the state constitutional *ex post facto* clause. The court turned to the historical record, but found that the record of the constitutional convention "does not indicate the convention's intent in adopting the provision."¹²⁰ All was not lost, however. The court observed that the Oregon clause was patterned after the *ex post facto* clause of the 1851 Indiana Constitution, which was substantially similar to a provision in the 1816 constitution of the same state, which, in turn, had been construed in 1822 by the Indiana Supreme Court. The Oregon court then concluded that, in construing the Oregon Constitution, it was entitled to rely on the 1822 Indiana case because the decision "was available to the framers of the Oregon Constitution when they decided to adopt the Indiana *ex post facto* provision in our state constitution."¹²¹

Similarly, in *DeMendoza v. Huffman*,¹²² the Oregon Supreme Court addressed the question whether permitting the state to recover a portion

¹¹⁶ *Id.* at 805-06.

¹¹⁷ 959 P.2d 49 (Or. 1998).

¹¹⁸ *Id.* at 58.

¹¹⁹ 920 P.2d 1086 (Or. 1996).

¹²⁰ *Id.* at 1091.

¹²¹ *Id.* at 1093.

¹²² 51 P.3d 1232 (Or. 2002).

of all punitive damage awards violated the state constitution's remedy clause. In describing the intentions of the framers with respect to the subject of punitive damages, the court noted that two early nineteenth-century treatises were much cited by courts in other states. The court then announced that "we assume that the framers of the Oregon Constitution were familiar with at least some of the many cases dealing with punitive damages that were decided under the principles discussed in those treatises, even if they were not directly familiar with the treatises themselves."¹²³ Apparently aware that it was taking something of a leap there, the court explained that it felt comfortable taking that leap because it had discovered references in Oregon's territorial case law to both treatises, albeit for unrelated propositions of law.¹²⁴

Clearly, the courts are employing fictions to plug the holes that they find in their historical records. The California Supreme Court in *Golden Gateway*, for example, was not saying that the framers of the 1849 California Constitution *actually* intended to adopt the intentions of their New York counterparts. The court did not attempt to demonstrate that the notes of the 1821 New York convention were even available to the California delegates twenty-eight years later, much less that any of the California delegates read those notes and categorically agreed with them.

In the same vein, the Oregon Supreme Court was not suggesting in *Armatta* that the Oregon delegates *actually* knew what the framers of the 1851 Indiana Constitution had said and that they intended to adopt the views of their Indiana counterparts without qualification. Nor was the court suggesting in *Cookman* that the framers of the Oregon Constitution *actually* kept abreast of decisions of the Indiana Supreme Court and that they intended to ratify an 1822 decision when they incorporated the wording of the Indiana Constitution into their own.

Of course the use of fictions is common—even indispensable—in the law.¹²⁵ Intriguingly, in support of its decision to impute the intentions of the New York convention delegates to those of the California convention, the California court cited as authority just such a common fiction of statutory construction, that identically worded provisions are

¹²³ *Id.* at 1239.

¹²⁴ *Id.* at 1239 n.7.

¹²⁵ See generally LON F. FULLER, LEGAL FICTIONS (1967) (describing the nature of various legal fictions and the reasons for their use).

presumed to have been intended to carry identical meaning.¹²⁶ But history is, if nothing else, not supposed to be about fiction.

Moreover, on even limited reflection, some of the fictions that the courts employ to justify assertions of historical fact appear to be outright whoppers. Is it really reasonable to impute intentions from one collective body to another over the span of decades in the absence of any evidence that one was aware of the other's views?

The presumptions also frequently rely on what is known as the "fallacy of elitism," that is, "conceptualizing human groups in terms of their upper strata." Recall that, in *Smothers v. Gresham Transfer, Inc.*,¹²⁷ the Oregon Supreme Court traced the history of the Oregon remedy clause from the Magna Carta, to Sir Edward Coke's *Second Institute*, to Blackstone's *Commentaries*, to early state constitutions and declarations of rights, and to case law construing those constitutions.¹²⁸ Did the court mean to suggest that the mid-nineteenth century framers of the Oregon Constitution were familiar with all of those sources and concepts? At best, the court could suggest that some portion of the delegates were lawyers who might have been familiar with some of the materials that it described.¹²⁹ But it is altogether another matter to impute to everyone else in attendance the knowledge of the elites.

What the resort to such fictions demonstrates is that, when the courts employ them, they are not really describing "history" in the ordinary sense. When they say that the framers "intended X," they are not saying that the framers *actually* intended X. The courts mean only that, within the framework of an artificial, hypothetical, legal "history" in which various rules and presumptions may be taken to apply, the framers so intended. That, of course, is not history at all.

¹²⁶ *Golden Gateway*, 29 P.3d at 806 (citing *Stockton Civic Theatre v. Bd. of Supervisors*, 423 P.2d 810 (Cal. 1967), which invoked the presumption that statutory language taken verbatim from constitutional provision must be given the same meaning as that given the constitutional provision).

¹²⁷ 23 P.3d 333 (Or. 2001).

¹²⁸ *Id.* at 340-51.

¹²⁹ Of the sixty delegates to the 1857 Oregon Constitutional Convention, thirty-three were farmers, eighteen were lawyers, five were gold miners, two were journalists, and one was a civil engineer. THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, 28-29 (Charles Carey ed., 1926).

VI. HISTORY AND THE PROBLEM OF UNCERTAINTY

The final problem—at least the final one that I discuss—in a sense sums up all the others. It is that courts tend to treat history as the systematic examination of facts to determine, in Ranke's famous phrase, "how it actually was." Once determined, those facts are set in precedential concrete.

In Oregon, for example, as I have noted, the Supreme Court in *State v. Henry* concluded that the framers of the constitutional guarantee of free expression were "rugged and robust" individuals who were not concerned with regulating public morality.¹³⁰ Some years after *Henry*, the Oregon Court of Appeals addressed the question whether, in light of that decision, a statute prohibiting the distribution of obscene materials to children violated the state constitution.¹³¹ Relying on *Henry*, a majority of the court held that it did.¹³² I dissented, questioning among other things the accuracy of *Henry's* historical analysis.¹³³ The majority's response was to conclude that, although my analysis was perhaps "more thorough," it was foreclosed by the Supreme Court's reading of the historical record in *Henry*.¹³⁴ The Supreme Court, in other words, had determined "how it actually was," and that was that.

In many cases, however, the idea that history can be so conclusively and permanently nailed down is no more than wishful thinking. All too often, history will not reveal a concrete, objectively undebatable description of, for example, what the framers actually thought. Most of

¹³⁰ See *supra* notes 37-70 and accompanying text.

¹³¹ *State v. Maynard*, 5 P.3d 1142 (Or. Ct. App. 2000).

¹³² *Id.* at 1151-52.

¹³³ *Id.* at 1168-89.

¹³⁴ *Id.* at 1157. In a subsequent case, involving the constitutionality of a statute prohibiting public sexual conduct, I drafted an opinion for a majority of the court, sitting *en banc*, concluding that the statute did not violate the constitutional free expression guarantee. *State v. Ciancanelli*, 45 P.3d 451 (Or. App. Ct. 2002). The dissenting opinion, among other things, took the majority to task for departing from the historical facts as found by the *Henry* court "to spin a different view of history." *Id.* at 474 (Brewer, J., dissenting). The complaint prompted the following rhetorical response from the majority:

That raises an interesting question: When the Supreme Court makes such general comments about American legal history, are lower courts bound by them, even when they are demonstrably incorrect? If, for example, the Supreme Court decides that John Wilkes Booth did not assassinate Abraham Lincoln, are we bound by that "decision" in future cases?

Id. at 463 n.21. The Supreme Court granted review of the decision.

the time, the best that history has to offer is a hypothesis, a *probability* that the framers intended one thing or another, subject always to reevaluation and revision.

Part of the problem is in the nature of the specific endeavor, namely, ascertaining the intentions of framers of a constitutional provision.

First, the very goal—ascertaining the intentions of a collective body—is suspect.¹³⁵ One need not embrace wholesale the suggestions of proponents of public choice theory—that, because of the nature of group decision-making processes, reference to a collective intention is unrealistic¹³⁶—to understand that identifying an understanding of constitutional meaning shared by a group of dozens of individuals who lived as much as 200 years ago is a risky business.¹³⁷

Second, even assuming that the goal is attainable, sources often are scarce. For example, as I have noted, the framers of Oregon's and California's free speech guarantees adopted a constitutional text with no recorded debate. At best, in such cases, we may attempt to reconstruct what those people *probably* were thinking based on a series of inferences drawn from the social, legal, cultural, and other contexts in which they acted.

¹³⁵ For a discussion of some of the inherent difficulties in ascertaining the intentions of a collective body as a matter of history, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 212-17 (1980).

¹³⁶ For an introduction to public choice theory and its implications, see generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991). See also *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

¹³⁷ The problem is further compounded if the focus of the search for original intentions is broadened from the relatively small group of "framers" at a convention to the thousands of people who adopted the constitutional provision. On the question whether ratifier intent is the relevant inquiry, see generally Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT 77, 79 (1988) (ratifier intent "is the original intent in a constitutional sense"); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 n.130 (1981) ("[T]he intentions of the ratifiers, not the Framers, is in principle decisive."); Brest, *supra* note 135, at 215 ("If the intent of the framers is to be attributed to the provision, it must be because the other adopters have in effect delegated their intention-votes to the framers."). See also *McKeigan v. Grass Lake Township Supervisor*, 587 N.W.2d 505, 507 n.2 (Mich. Ct. App. 1998) ("[I]t is clear that it is the intent of the people who adopted the proposed constitution that is controlling, and not the intent manifested in the internal deliberations."); *Monaghan v. Sch. Dist. No. 1*, 315 P.2d 797, 801 (Or. 1957) ("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[.]").

Third, even when sources are available, they often are exasperatingly ambiguous. Recall that the historical evidence in *State v. Conger*, the grand jury quorum case, gave rise to at least two essentially equally plausible interpretations.¹³⁸ In such cases, we are left with the task of attempting to reconstruct what the sources *probably* mean in order, in turn, to infer from that what the framers *probably* intended a given constitutional provision to mean.

Another part of the problem is not specific to the project of ascertaining the original intent of a state constitutional provision. It is inherent in the writing of history generally. History—at least the sort of history that concerns more than the determination of a discrete date or description of an event—does not produce “facts” as judges often think of them. History produces evidence that must be interpreted. And any interpretation of historical evidence is constantly subject to reevaluation and revision. This is so for at least several reasons.

First, the very nature of history itself is subject to constant reevaluation and revision. The history of historiography suggests that our conceptions of what it means to record “history” have changed remarkably from the days of ancient Greeks—when Herodotus and Thucydides departed from the ancient tradition of recording myths and cycles and introduced the idea of rational, critical history—to the twenty-first century, when post-modern historians debate whether ascertaining a historical “fact” is a meaningful conception at all.¹³⁹

Second, apart 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. In my own state, for example, records of the 1857 Constitutional Convention that for years had been thought to be lost were only recently discovered in the library of the Oregon Historical Society.¹⁴⁰

¹³⁸ See *supra* notes 110-14 and accompanying text.

¹³⁹ For surveys of the history of historiography, see generally ERNST BREISACH, *HISTORIOGRAPHY: ANCIENT, MEDIEVAL, & MODERN* (2d ed. 1994); MARK T. GILDERHUS, *HISTORY AND HISTORIANS: A HISTORIOGRAPHICAL INTRODUCTION* (5th ed. 2003); NORMAN J. WILSON, *HISTORY IN CRISIS?: RECENT DIRECTIONS IN HISTORIOGRAPHY* (1999).

¹⁴⁰ Burton & Grade, *supra* note 95, at 469-70. Interestingly, no one knows quite how the documents came to be in the possession of the Historical Society. *Id.* at 470 n.4.

Third, it is in the nature of the historical exercise that the facts are subject to interpretation. This may be a result of the inherent ambiguity in the source materials. Or it may be a result of the historical point of reference from which the account is being written. Some historians, following the hermeneutic tradition of Hans-Georg Gadamer,¹⁴¹ suggest that all history is hopelessly subjective and that descriptions of the past cannot be divorced from the assumptions, prejudices, and expectations of the present. Such reasoning leads to a sort of solipsism that ultimately is not very useful in the real world. But one need not endorse the conclusions of such radical relativists to see the essential truth that facts do look different depending on who is observing them and when the observing is taking place.

History, in other words, is a moving target. As an example of the extremely fluid nature of historical analysis, consider the course of scholarship concerning the law of free expression over the last century. Federal and state judges in the nineteenth century were remarkably hostile to constitutional free speech claims. Relying on Blackstone's eighteenth century commentaries on the English common law, they concluded that the framers would have understood that states retain the authority to regulate speech to the extent that it poses a threat to social order.¹⁴² As late as 1907, Justice Oliver Wendell Holmes opined for the United States Supreme Court that the First Amendment prohibited only prior restraint of speech.¹⁴³

With the advent of World War I and the enactment of criminal syndicalism statutes, progressives began to challenge traditional assumptions about the intended scope of constitutional free speech protections. In 1920, Zechariah Chafee, in a seminal publication, *Freedom of Speech*, suggested that the nineteenth century assumption that constitutional free speech guarantees were intended to reflect Blackstone's reading of the English common law was mistaken.¹⁴⁴ To the contrary, he suggested that the framers intended to overthrow the English conception of free speech rights.

¹⁴¹ See generally HANS-GEORG GADAMER, *TRUTH AND METHOD* (1975).

¹⁴² For an interesting summary of mid- to late-nineteenth century judicial perspectives on free speech claims, see generally DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 129-46 (1997).

¹⁴³ *Patterson v. Colorado*, 205 U.S. 454, 462-63 (1907).

¹⁴⁴ ZECHARIAH CHAFEE, JR., *FREEDOM OF SPEECH* 9-35 (1920).

For decades, Chafee's historical analysis was granted wide acceptance among judges and scholars in the legal community. In 1960, however, revisionist historian Leonard Levy published his groundbreaking work, *Legacy of Suppression*, in which he savagely attacked Chafee's selection and interpretation of the relevant sources and concluded that, in fact, the framers did not intend to depart from the English common law.¹⁴⁵ Levy's views then achieved the wide acceptance that once had belonged to Chafee's.¹⁴⁶ But that, too, changed. In 1985, Levy reevaluated his own work and, in an expanded and revised version, he qualified the bold conclusions of his earlier book.¹⁴⁷ Meanwhile, other scholars have begun to question some of Levy's conclusions.¹⁴⁸ Thus, orthodoxy gives way to revisionism, which becomes a new orthodoxy that, in turn, gives way to new revisionism. That is how history works.

VII. CONCLUSION

Resorting to history in interpreting state constitutions is a much more difficult task than we have made it out to be. To begin with, judges who turn to history must explain what it is that they are doing. Are they saying that history is merely a useful context for understanding the purpose of a disputed provision, or are they saying that identifying the framers' understanding of a provision establishes its meaning? If judges do mean to say the latter, then it strikes me that it is incumbent on them to explain why they are doing so, for, as I have noted, history and meaning are two different endeavors, and the connection between the two not obvious.

Moreover, judges who turn to history must commit themselves to doing it right.¹⁴⁹ It is not necessary to acquire an advanced academic degree to understand that responsible historical analysis means not indulging in selective reliance on sources and invoking questionable

¹⁴⁵ LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960).

¹⁴⁶ See, e.g., Stanley C. Brubaker, *Original Intent and Freedom of Speech and Press*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 82-83 (Eugene W. Hickok, Jr. ed., 1991) ("[S]ince 1960, none has been able to claim plausible" the "romantic" notion that the framers intended to wipe out the common law of sedition).

¹⁴⁷ LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* (1985).

¹⁴⁸ See, e.g., David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 *STAN. L. REV.* 795 (1985).

¹⁴⁹ For a useful list of "rules for originalists," see generally Powell, *supra* note 12.

assumptions and fictions. Judges who want to rely on history must be willing to do their homework.

In a related vein, judges who turn to history must understand its limitations. Historical analysis, even done well, often will fail to establish with anything approximating probability what the framers of a constitutional provision intended. It may even show that there were multiple, and conflicting, intentions. Judges should be prepared to accept that and not try to make history tell us more than it fairly does.

Finally, judges who turn to history must realize that it does not obviate the need to exercise judgment. It is inherent in the nature of historical analysis that those doing it must engage in value judgments in selecting and evaluating sources and in describing their significance. Those who contend that resort to history is necessary to avoid the exercise of personal judgment are kidding themselves. It simply cannot be avoided.

Accepting the limitations of historical analysis in state constitutional interpretation means that, whether or not a court subscribes to an originalist view of the process, it will be tougher to justify interpretive decisions on the basis of history. That does not mean that judges should forswear resorting to history in construing their state constitutions. Even non-originalists recognize that history always provides useful context for ascertaining the meaning of a provision. Constitutions are, after all, historical documents. But courts should abjure the sort of "law office history" that has been employed in the past. It leaves courts open to criticism that jeopardizes the very legitimacy that resorting to history is supposed to serve. In the final analysis, judges may be required to acknowledge more candidly the judgments that are involved in constitutional interpretation. In my view, such candor is much less a threat to legitimacy than is bad history.

