

**A LEGISLATIVE HISTORY OF THE OREGON
CONSTITUTION OF 1857—PART II (FRAME OF
GOVERNMENT: ARTICLES III-VII)**

CLAUDIA BURTON*

INTRODUCTION

1. State Governments in the Nineteenth Century

At the beginning of the nineteenth century in the United States, the legislative branch was the predominant branch of state government.¹ State constitutions imposed few limitations, substantive or procedural, on the power of the legislative branch.² In many states,

* Professor of Law Emerita, Willamette University College of Law; A.B., Oberlin College, 1961; M.A.T., Johns Hopkins University, 1962; J.D., University of California at Los Angeles School of Law, 1968.

I wish to thank the following individuals who have contributed to this portion of the work: Andrew Grade, Marisol Ricoy, Clayton Hill, and Marc Gardner, who provided imaginative and diligent research assistance; Kathy Marbut, faculty secretary extraordinaire, who typed and retyped the transcriptions of the original documents, as we strove to make the transcripts as accurate as fallible mortals could make them; and Richard Breen, Law Librarian of Willamette University College of Law, who made office space in the library available to me and who has continued to support the overall project in many ways.

Part I of this work was authored by Claudia Burton and Andrew Grade and was published as *A Legislative History of the Oregon Constitution of 1857—Part I (Articles I and II)*, 37 WILLAMETTE L. REV. 469 (2001). Part III, covering the remainder of the Oregon Constitution of 1857, will be published in a future issue of the *Willamette Law Review*.

1. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 24 (1950).

2. *Id.*

the legislature selected both judges and the governor.³ Governors had few powers (in particular, lacking a power to veto legislation).⁴

By the middle of the nineteenth century, much of this had changed.⁵ The executive branch had been strengthened by the legitimacy that came from election of executive branch officers by the people⁶ and by the acquisition of a veto power by the governor.⁷ Increasingly, the judiciary was no longer appointed but was elected.⁸ Last, the legislative branch's powers had been circumscribed by substantive and procedural constraints.⁹

Several factors combined to produce these changes. Jacksonian democracy led to a broader franchise and to popular election of many more officeholders.¹⁰ Experience with legislative excesses led to a desire to trim legislative powers:

The persistent theme of the limitations written into state constitutions after the 1840s was the desire to curb special privilege. The trend began with general or detailed prohibitions on the enactment of "special" and "local" legislation. The related fear, that special favors would be sought under cover, was expressed in requirements that every bill bear a title clearly stating its subject matter, and that every bill deal with but one subject. The same fear was behind insistence upon many requirements, hopefully designed to insure full publicity and open deliberation of the merits of legislation, through three readings, reference to committee, recording of the yeas and nays, and the like.

Real, if naïve, public protest spoke through such provisions; its stimulus was in revealed fraud and corruption in public-land dealings and in the getting and granting of franchises, subsidies, and rate privileges for turnpikes, canals, river improvements, toll bridges, and, of course, especially railroads and street railways.

3. *Id.* at 122.

4. See generally Robert F. Williams, *Evolving State Legislative and Executive Power in the Founding Decade*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 43, 48-53 (1988).

5. See generally G. ALAN TARR, *Nineteenth-Century State Constitutionalism*, in UNDERSTANDING STATE CONSTITUTIONS 94-135 (1998).

6. James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 822-23 (1991).

7. See generally John A. Fairlie, *The Veto Power of the State Governor*, 11 AM. POL. SCI. REV. 473 (1917).

8. Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 46 THE HISTORIAN 337 (1983).

9. JAMES WILLARD HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* 83-86 (1977).

10. G. Alan Tarr, *Models and Fashions in State Constitutionalism*, 1998 WIS. L. REV. 729, 736-37.

So also between 1840 and 1880 banking was singled out, either as a wholly prohibited subject of legislation, or at least as one on which there must be no "special laws."¹¹

Given the common practice of borrowing ideas and constitutional provisions from other states, innovations in one state were likely to be adopted by others.¹²

The delegates to the Oregon Constitutional Convention were familiar with developments in other states. One delegate, Paul Brattain, had been a delegate at the Iowa Constitutional Convention of 1844.¹³ Matthew Deady, President of Oregon's Constitutional Convention, received a copy of the proceedings of the New York constitutional conventions of 1826 and 1841 from O.C. Pratt, his former colleague on the territorial supreme court.¹⁴ La Fayette Grover owned a recently published copy of a compilation of state constitutions and apparently used it during the Oregon Constitutional Convention.¹⁵ At least two more delegates, Delazon Smith and William Packwood, likely also possessed such compilations.¹⁶ A

11. HURST, *supra* note 1, at 241-42. See also A. JAMES HEINS, CONSTITUTIONAL RESTRICTIONS AGAINST STATE DEBTS 4-10 (1963); HURST, *supra* note 9, at 84-87.

12. The election of judges provides a striking example of this interstate borrowing: "[A]fter Iowa and New York in 1846 made all judges elective, eleven other states also did so (in whole or in part) over the next four years, and nine more did so in the succeeding decade." G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 52 (1998).

13. JOURNAL OF THE CONVENTION FOR THE FORMATION OF A CONSTITUTION FOR THE STATE OF IOWA, Oct. 8, 1844 (a.m.), at 5 (1845).

14. Letters from O.C. Pratt to Matthew Deady (May 20, 1857 & July 16, 1857) (manuscripts in Oregon Historical Society Library). For information about Pratt's life and judicial career, see Sidney Teiser, *First Associate Justice of Oregon Territory: O.C. Pratt*, 49 OR. HIST. Q. 171 (1948).

15. The book, THE AMERICAN'S GUIDE: COMPRISING THE DECLARATION OF INDEPENDENCE, THE ARTICLES OF CONFEDERATION, THE CONSTITUTION OF THE UNITED STATES, AND THE CONSTITUTIONS OF THE SEVERAL STATES COMPOSING THE UNION (1850), is in the collection of the Oregon Historical Society Library. The flyleaf bears the following inscription: "L.F. Grover Philadelphia 1850. This book was used in the constitutional convention of Oregon in 1857. L.F.G." The handwriting appears, to my eye, to be that of La Fayette Grover. Grover referred during debate to the constitutions of Missouri, Michigan, Indiana, Ohio, Illinois, Virginia, Massachusetts and Maine. THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857 (Charles Henry Carey ed., 1926) [hereinafter OREGON CONSTITUTION AND PROCEEDINGS] at 242, 263-64, 302, 314. See Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 HASTINGS CONST. L.Q. 199 (2000), for a detailed discussion of the use of the compilations of state constitutions by delegates at state constitutional conventions.

16. Delazon Smith referred during debate to the constitutions of New York, Pennsylvania, Delaware, Wisconsin, Texas, Iowa, Indiana, Illinois, and California. OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 15, at 101-02, 318, 320, 395. A copy of *The Constitutions of the Several States of the Union and United States (1857)*, in the Lewis and

number of delegates, in addition to Grover, Smith, and Packwood, referred to the provisions of other states' constitutions in the course of their remarks.¹⁷ Thus, it is not surprising that the articles relating to the departments of government approved by the delegates to the Oregon Constitutional Convention reflect, for the most part, a mid-nineteenth-century view of how these departments should be constituted.

Clark College Library, bears the stamp of Albany College, Albany, Oregon. It is possible that this book was donated to the Albany College Library by Delazon Smith, who was a delegate from Linn County (where Albany, Oregon, is located).

William Packwood apparently consulted a compilation of state constitutions on subjects as varied as the name to be given to the legislature and the best way to deal with corporations. The *Oregon Statesman* reported that Packwood had been "looking over the constitutions" to determine the most common name given to the state legislature. OREGON STATESMAN, Sept. 8, 1857, at 1, reprinted in OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 15, at 231. The *Weekly Oregonian* reported that Packwood "read from several constitutions extracts showing the provisions which they make on the subject of corporations." WEEKLY OREGONIAN, Sept. 26, 1857, at 1, reprinted in OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 15, at 240.

17. OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 15, at 103, 105, 185, 219, 221, 222-23, 240, 242, 244, 246, 248, 255, 264, 318-19, 331, 360, 361. The delegates who made those references were George Williams, Frederick Waymire, William Farrar, James Kelly, William Watkins, Martin Olds, Hector Campbell, Matthew Deady, John Kelsay, Thomas Dryer, A.J. Lovejoy, and Reuben Boise. These delegates made references to the constitutions of Indiana, Michigan, Iowa, Massachusetts, New Hampshire, Illinois, New York, Missouri, and Ohio or to the constitutions of other states, generally.