

ARTICLES

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A LEGISLATIVE HISTORY OF THE OREGON CONSTITUTION OF 1857—PART III (MOSTLY MISCELLANEOUS: ARTICLES VIII-XVIII)

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INTRODUCTION

1. *State Constitutions in the Mid-Nineteenth Century*

Many states formed constitutions in the mid-nineteenth century.¹

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Many people have assisted in this large project. Mary Kim Wood was there at the beginning, as she and I deciphered the faded nineteenth-century script of the original Convention documents. Andrew Grade did much of the initial hard slogging through Oregon Constitution and Proceedings, *infra* note 14, as he and I attempted to draw all the material relating to a particular section of a particular article into one place. The law school's two faculty secretaries—Kathy Marbut and Candace Bolen—performed a number of quite tedious transcription chores cheerfully and expertly. Michael Hallinan, Nicole Hancock, Clayton Hill, Marc Gardner, and—especially—Marisol Ricoy contributed valuable research assistance. Last, Richard Breen, Director, J.W. Long Law Library, Willamette University College of Law, has supported the project in a myriad of ways, from funding the acquisition of photographs of the Convention documents to furnishing me with an office. Thanks to all of you.

1. In the 1840-1860 period, eighteen states adopted original or revised constitutions. Janice C. May, *State Constitutions and Constitutional Revision, 2000-2001*, in 34 THE BOOK

Constitutions reflect the times in which they were created and the people who drafted and approved them. The mid-nineteenth century in the United States was a time of national expansion, of increasing industrialization, of growing tension over the slavery question, and of boom-and-bust economic cycles. State constitutions, which earlier had included little more than directions as to the composition of the various departments of state government, began to expand in length to include provisions on many of the most pressing issues of the day.² Oregon's constitution, for example, included the customary articles on a bill of rights, election and suffrage, distribution of powers, the departments of state government (legislative, executive, administrative, and judicial), and amendments,³ but it also included articles on education and school lands, militia, corporations and internal improvements, state printer, and miscellaneous provisions.⁴

2. *Oregon in the Mid-Nineteenth Century*

Settlement of Oregon by non-native settlers began slowly. In 1829, the Hudson's Bay Company began granting use of land in the part of the Willamette Valley now called French Prairie to some of its retiring employees who wished to stay in Oregon.⁵ Then, beginning in 1834, the Methodist Board of Missions sent several groups of mis-

OF THE STATES 3, 14 tbl.1.1 (2002). The interest in state constitutions was so widespread that several publishers published compilations of the most recent versions of all of the state constitutions. Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 HASTINGS CONST. L.Q. 199, 199-207 (2000). Almost certainly one of these compilations was used in the Oregon Constitutional Convention. The copy of 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) that is in the collection of the Oregon Historical Society Library bears the following inscription on its flyleaf: "L. F. Grover Philadelphia 1850. This book was used in the constitutional convention of Oregon in 1857. L. F. G." La Fayette Grover, delegate to the Oregon Constitutional Convention from Marion County, was a young lawyer living in Philadelphia in 1850. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OREGON, Aug. 18, 1857 (a.m.), at 4 (1882) [hereinafter JOURNAL] (listing delegates and the counties they represented); BIOGRAPHICAL SKETCH OF LA FAYETTE GROVER, OF OREGON 3 (n.d.) (Grover was admitted to the bar in Philadelphia in 1850).

2. G. Alan Tarr, *Models and Fashions in State Constitutionalism*, 1998 WIS. L. REV. 729, 737-39; Helen Leonard Seagraves, *Oregon's 1857 Constitution*, 30 REED C. BULL. 3, 3-6 (1952).

3. Enrolled Constitution articles I-VII, XVII (1857).

4. Enrolled Constitution articles VIII, X, XI, XII, XV (1857).

5. WILLIAM A. BOWEN, THE WILLAMETTE VALLEY: MIGRATION AND SETTLEMENT ON THE OREGON FRONTIER 9 (1978).

sionaries and their families to Oregon.⁶ Not until 1842 did the first wagon train make the trek across the plains to Oregon.⁷ The population of the Oregon Territory grew rapidly in the 1840s and 1850s,⁸ but by the late 1850s, Oregon was still sparsely settled, and most of the residents were recent arrivals. The majority of the immigrants who came in the 1840s and 1850s had most recently lived in the Mississippi River valley states of Missouri, Illinois, and Iowa,⁹ but their roots were further east.¹⁰

The factors that brought immigrants to Oregon were varied. A number of those who came in the 1830s and early 1840s were motivated by religious fervor¹¹ or by a patriotic desire to claim the territory for the United States.¹² Dicken and Dicken give the following description of the motivations of those who came slightly later:

In general, the migration to Oregon was due to a “push-pull” effect. A number of circumstances were tending to push people out of the Middle West and the various descriptions of Oregon were pulling them toward Oregon. The “push” was mostly floods, diseases, and depression. During and following the panic of 1837, crop prices and land values fell and many mortgages contracted during the previous period could not be paid. A series of floods had damaged many farms and led to crop failures. Diseases were

6. *Id.* at 9-10; CHARLES H. CAREY, GENERAL HISTORY OF OREGON 281-99 (3d ed. 1971).

7. SAMUEL N. DICKEN & EMILY F. DICKEN, THE MAKING OF OREGON: A STUDY IN HISTORICAL GEOGRAPHY 72 (1979).

8. The population was 2,110 in 1845, 11,873 in 1850, and 52,456 in 1860. BOWEN, *supra* note 5, at 14, 17 (population in 1845, 1850); University of Virginia Geospatial and Statistical Data Center, *United States Historical Census Data Browser*, University of Virginia (1998) (population in 1860), available at <http://fisher.lib.virginia.edu/census/> (last visited Feb. 6, 2004). In 1860, approximately 74% of Oregon's residents lived in the Willamette Valley. ATLAS OF OREGON 26 (William G. Loy ed., 2d ed. 2001).

9. BOWEN, *supra* note 5, at 29. See also DICKEN & DICKEN, *supra* note 7, at 68-70; Jesse S. Douglas, *Origins of the Population of Oregon in 1850*, 41 PAC. N.W. Q. 95 (1950).

10. Bowen identifies the following states as the “ethnic heartland” of the Oregon population of 1850: Ohio, Kentucky, New York, Virginia, Tennessee, Pennsylvania, Massachusetts, North Carolina, and Maine. BOWEN, *supra* note 5, at 33, 40.

11. See sources cited *supra* notes 5, 6.

12. Both England and the United States claimed portions of the area comprising the Oregon Territory. Not until June 1846, when a treaty between the two nations was signed, was the dispute settled. Treaty with Great Britain, in Regard to Limits Westward of the Rocky Mountains, June 15, 1846, U.S.-Gr. Brit., 9 Stat. 869 (1846). Immigrants to Oregon in the early 1840s claimed to be motivated in part by a patriotic desire to aid in acquiring this land for the United States. John Minto, *Antecedents of the Oregon Pioneers and the Light These Throw on Their Motives*, 5 OR. HIST. Q. 38 (1904). Bowen, however, is skeptical of the claim that patriotism was a significant motivator for the migration. BOWEN, *supra* note 5, at 17.

prevalent in the upper Mississippi Valley. Malaria and ague were common. Tuberculosis took more lives than any other affliction.¹³

3. *Delegates to the Oregon Constitutional Convention*

When the electors of Oregon voted in favor of holding a constitutional convention, they also elected delegates to that convention.¹⁴ The following table gives the geographical origins of the delegates:¹⁵

State of Birth	State of Residence Before Immigrating to Oregon
<p>New England (12) Maine—Elkins, Grover New Hampshire—Farrar Vermont—Shattuck Connecticut—Chadwick, Meigs, Nichols, Starkweather Massachusetts—Boise, H. Campbell, Lovejoy, Olds</p>	<p>New England (3) Massachusetts—Boise, H. Campbell, Farrar</p>
<p>Middle & South Atlantic (20) New York—Babcock, Dryer, Lewis, Olney, Smith, Watkins, Williams Pennsylvania—Kelly, Miller, Peebles, Reed, Short Maryland—Deady Virginia—Crooks, Hoult, Marple, Newcomb, Robbins North Carolina—P. Brattain, Logan</p>	<p>Middle & South Atlantic (5) New York—Chadwick, McCormick, Shattuck, Watkins Pennsylvania—Grover</p>
<p>Mississippi & Ohio River Valleys (26) Ohio—J.H. Brattain, Joseph Cox, Whitted</p>	<p>Mississippi & Ohio River Valleys (47) Ohio—Deady, Elkins, Meigs, Prim Indiana—Babcock, Peebles, Robbins,</p>

13. DICKEN & DICKEN, *supra* note 7, at 70. See also BOWEN, *supra* note 5, at 17-21. In addition, territorial and federal statutes provided that a single man could claim 320 acres of land and a married man 640 acres. Richard H. Chused, *The Oregon Donation Act of 1850 and Nineteenth Century Federal Married Women's Property Law*, 2 LAW & HIST. REV. 44 (1984); Oregon Donation Act, ch. 76, 9 Stat. 496 (1850).

14. Charles H. Carey, *Creation of Oregon as a State*, in THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857 at 5, 21 (Charles Henry Carey ed., 1926) [hereinafter OREGON CONSTITUTION AND PROCEEDINGS].

15. The data to create the table were taken from DAVID ALAN JOHNSON, FOUNDING THE FAR WEST: CALIFORNIA, OREGON, AND NEVADA, 1840-1890, at 358-61 (1992).

State of Birth	State of Residence Before Immigrating to Oregon
Indiana—A.J. Campbell Illinois—Hendershott, Kinney, Moores, Packwood, Scott, Shields Tennessee—Duncan, Prim, Shrum, White Kentucky—Anderson, Applegate, Bristow, Coyle, Fitzhugh, Kelsay Missouri—Burch, Jesse Cox, McBride, Shannon, Waymire, Watts	Shannon, Whitted Illinois—Bristow, Coyle, Crooks, Hoult, Logan, Matzger, Newcomb, Packwood, Short, White Michigan—Olds Missouri—Applegate, Burch, Jesse Cox, Joseph Cox, Fitzhugh, Kelsay, Lewis, Lovejoy, Marple, McBride, Miller, Reed, Shields, Shrum, Watts, Waymire Iowa—Anderson, J.H. Brattain, Paul Brattain, A.J. Campbell, Hendshott, Kinney, Nichols, Olney, Scott, Smith, Williams
Foreign Lands (2) Germany—Matzger Ireland—McCormick	West (5) California—Dryer, Duncan, Kelly, Moores, Starkweather

Half the delegates had lived in the Territory for fewer than seven years.¹⁶ Thirty of the sixty delegates were farmers, and eighteen were lawyers¹⁷ (with the leadership of the Convention drawn from this latter group).¹⁸ Eighteen of the delegates had served in the legislature of the provisional or territorial government¹⁹ and a number went on to

16. *Id.*

17. *Id.*; DAVID D. FAGAN, A HISTORY OF BENTON COUNTY, OREGON INCLUDING ITS GEOLOGY, TOPOGRAPHY, SOIL AND PRODUCTIONS 519 (1885) (occupation of Kelsay).

18. The President of the Convention, Matthew Deady, was a lawyer, as were the men appointed to chair most of the standing committees. Reuben Boise, B.F. Burch, La Fayette Grover, James Kelly, John Kelsay, A.J. Lovejoy, Charles Meigs, J.C. Peebles, Delazon Smith, and George Williams were appointed to chair the various standing committees, and all but Peebles and Burch were lawyers. JOURNAL, *supra* note 1, Aug. 20, 1857 (a.m.), at 16, Aug. 24, 1857 (a.m.), at 23, Sept. 10, 1857 (a.m.), at 57 (appointments to committees); JOHNSON, *supra* note 15, at 358-61 (occupations of delegates); FAGAN, *supra* note 17, at 519 (occupation of Kelsay).

19. Jesse Applegate, Reuben Boise, Hector Campbell, Matthew Deady, Thomas Dryer, Luther Elkins, La Fayette Grover, James Kelly, Robert Kinney, David Logan, A.J. Lovejoy, Richard Miller, Isaac Moores, John Peebles, Levi Scott, Delazon Smith, William Starkweather, and Frederick Waymire had served in the provisional or territorial legislature prior to being selected as delegates to the Oregon Constitutional Convention. CECIL L. EDWARDS, CHRONOLOGICAL LIST OF OREGON'S LEGISLATURES 4, 9, 11-13, 16, 22-25, 27-28, 30, 33-44, 46 (1993).

distinguished public careers after the Convention.²⁰

4. *Convention Procedures*

Each proposed article received three readings: a first reading, for information only; a second reading, when the article was debated and could be amended; and a third reading, when the question was whether the article (as amended at second reading) should be passed.²¹ Typically, the major debates occurred at second reading, either when the article was first debated, section by section, in a committee of the whole, or later, when the Convention again debated the article, considering any amendments to the article adopted by the committee of the whole and considering further amendments.²² The following table gives an overview of when articles VIII-XVIII were taken up by the Convention.²³

20. Matthew Deady was appointed to be the first judge of the United States District Court of Oregon, following Oregon's admission to the Union. BIOGRAPHICAL DIRECTORY OF THE FEDERAL JUDICIARY 1789-2000, at 462 (Bernan Editorial Staff ed., 2001). Reuben Boise, Paine Page Prim, Erasmus Shattuck, John Kelsay, and James Kelly served on the Oregon Supreme Court. OREGON BLUE BOOK 2001-2002, at 323 (Bill Bradbury compiler, 2001). La Fayette Grover and Stephen Chadwick became governor of the state. *Id.* at 319. La Fayette Grover, James Kelly, Delazon Smith, and George Williams were elected to the United States Senate, and La Fayette Grover and James McBride were elected to the United States House of Representatives. *Id.* at 332, 334. George Williams became United States Attorney General and was nominated for the office of Chief Justice of the United States. Sidney Teiser, *Life of George H. Williams: Almost Chief-Justice, Part II*, 47 OR. HIST. Q. 417, 418, 420-30, 433 (1946).

21. Rules 36, 37, 38, 40, Rules and Orders of the Constitutional Convention. JOURNAL, *supra* note 1, Aug. 19, 1857 (a.m.), at 13-14.

22. Rule 40, Rules and Orders of the Constitutional Convention. JOURNAL, *supra* note 1, Aug. 19, 1857 (a.m.), at 13-14.

23. The Convention met Monday through Saturday, typically in a morning and an afternoon session, and thus the dates in the table include, in parentheses, an abbreviation identifying the session as a morning or afternoon session. I give detailed citations to the *Journal* and to contemporary newspaper accounts for each session in the introduction section for each of the eleven constitutional articles discussed below. For example, *see infra* notes **Error! Bookmark not defined.-Error! Bookmark not defined.** for the detailed citations for the sessions at which the Convention dealt with the article on education and school lands.

Article	1st Reading; 2d Reading	2d Reading (Committee of Whole)	2d Reading (Conven- tion)	3d Reading
VIII (Education & School Lands)				
Majority report	8/26 (a.m.); 8/28 (a.m.)	9/11 (aft.)	9/12 (a.m.)	9/15 (a.m.)
Minority report	8/26 (a.m.); 9/2 (a.m.)	9/9 (a.m.)		
IX (Finance)	9/12 (a.m.); 9/14 (aft.)		9/14 (aft.)	9/15(a.m.)
X (Militia)	8/21 (aft.); 8/24 (a.m.)	8/25 (aft.)	8/25 (aft.) 8/26 (aft.) 9/1 (a.m.)	9/3 (a.m.) 9/4 (aft.)
XI (Corporations & Internal Im- provements)	8/24 (a.m.); 8/27 (a.m.)	9/1 (aft.) 9/2 (a.m. & aft.) 9/3 (a.m. & aft.)	9/4 (a.m. & aft.)	9/12 (a.m. & aft.)
XII (State Printer)	9/15 (a.m.); 9/16 (a.m.)	9/16 (aft.)	9/17 (a.m.)	9/17 (aft.)
XIII (Salaries)	9/15 (a.m.); 9/16 (a.m.)	9/16 (aft.)	9/17 (a.m.)	9/17 (aft.)
XIV (Seat of Government)	9/12 (aft.); 9/14 (aft.)	9/14 (aft.)	9/15 (a.m.)	9/16 (a.m.)
XV (Miscellane- ous)	9/15 (a.m.); 9/16 (a.m.)	9/16 (aft.)	9/17 (a.m.)	9/17 (aft.)
XVI (Bounda- ries)				
Original article	8/21 (aft.); 8/24 (a.m.) 9/14 (a.m.)	8/24 (a.m. & aft.)	8/25 (a.m.) 9/16 (a.m.)	9/17 (aft.)
Revised article	9/14 (a.m.);		9/16 (a.m.)	
Minority report	9/14 (a.m.)			
XVII (Amend- ments)	9/15 (a.m.); 9/16 (a.m.)	9/16 (aft.)	9/17 (a.m.)	9/17 (aft.)
XVIII (Schedule)	9/11 (a.m.); 9/15 (a.m.)	9/15 (aft.)	9/16 (a.m.)	9/17 (aft.)

5. *Resources for Understanding How the Convention Delegates and Oregon Voters Understood Various Provisions*

In attempting to understand the delegates' views about a particular section of any given article, we can look at what they did as a body, and we can look at what some of the delegates said individually. We have a documentary record for each article that includes the article, as introduced by the committee, amendments made at second reading (either in the committee of the whole or in convention), and the engrossed article.²⁴ In addition, the *Journal* entry for the session at which the Convention took up the article at second reading will contain the full text of any amendments (both those reported by the committee of the whole and those proposed in convention) and the votes on those amendments.²⁵ Thus we can trace how the language of the section may have changed in the course of deliberations, and we know what proposed amendments a majority of the delegates approved or disapproved. The evidence of what any individual delegate thought about a section is incomplete—many of the delegates seldom spoke, and the newspaper accounts of the debates are severely edited.²⁶

24. The originals of these handwritten documents are in the Oregon Historical Society Library. Archive-quality photographs of these documents and typed transcriptions of them were in the files of the author. These photographs and transcriptions have been transferred to the J.W. Long Law Library at Willamette University College of Law. This documentary record is missing several items: the articles, as introduced, for the articles on finance and boundaries; and the amendments from the committee of the whole for the articles on suffrage and elections, education and school lands, miscellaneous provisions, seat of government, and schedule.

We also have an original enrolled constitution, housed in the Oregon State Archives. A photocopy of this document was in the author's files and has been transferred to the J.W. Long Law Library at Willamette University College of Law. The constitution may be viewed online at <http://bluebook.state.or.us/state/constitution/OGConstitution/ORConstitution/OriginalHeading.htm> (last visited Feb. 6, 2004).

25. For example, see *JOURNAL*, *supra* note 1, Sept. 4, 1857 (a.m.), at 44-49 (consideration of amendments to the article on corporations and internal improvements).

26. The most complete coverage was in the *Weekly Oregonian* and the *Oregon Statesman*. That material is reprinted in *OREGON CONSTITUTION AND PROCEEDINGS*, *supra* note 14. In addition, there were articles in several other territorial newspapers (the *Oregon Argus*, the *Democratic Standard*, and the *Pacific Christian Advocate*) and in two California newspapers (the *Daily Alta California* and the *Sacramento Daily Union*). Photocopies of the articles in the *Oregon Argus*, the *Democratic Standard*, the *Daily Alta California*, and the *Sacramento Daily Union*, and transcriptions of those articles, were in the author's files and have been transferred to the J.W. Long Law Library at Willamette University College of Law.

We do not have a verbatim record of the debates. The Convention rejected a proposal to hire a reporter for the Convention. *JOURNAL*, *supra* note 1, Aug. 22, 1857 (aft.), at 22-23. The

The record is even sketchier with respect to the voters' views of particular provisions in the constitution. The Convention went to some lengths to insure that the voters had the opportunity to read and study the proposed constitution. The Convention authorized the printing and free distribution of five thousand copies of the constitution.²⁷ It also offered to pay to any newspaper in the Territory the sum of fifty dollars if it published the full text of the constitution in a single issue.²⁸ Debate on the proposed constitution was vigorous in the Territory's newspapers during the period between the Convention's adjournment on September 18, 1857, and election day, November 9, 1857.²⁹ Keep in mind, though, that if the voters desired statehood, their only choice was to approve the constitution as a whole, regardless of how much they might disapprove of a particular provision.³⁰

chief objection was the expense. OREGON STATESMAN, Aug. 25, 1857, at 2, reprinted in OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 14, at 145. Patrick Malone, the reporter hired to report the proceedings of the Convention for the *Weekly Oregonian*, was a skilled shorthand reporter and apparently took very complete notes of the debates. John R. McBride, The Oregon Constitutional Convention, 1857, Address Before the Oregon Historical Society (December 20, 1902), reprinted in OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 14, at 483, 492. But since no one ever offered to pay Malone for transcribing his notes, the great bulk of them were not transcribed. *Id.* at 492-93.

27. JOURNAL, *supra* note 1, Sept. 17, 1857 (a.m. & aft.), at 87, 96, Sept. 18, 1857 (a.m.), at 97. The constitution was printed in pamphlet form. One of the pamphlets is in the Oregon Historical Society Library. A photocopy of that pamphlet was in the author's files and has been transferred to the J.W. Long Law Library at Willamette University College of Law. The cover of the pamphlet bears the following words: "CONSTITUTION FOR THE STATE OF OREGON Passed by the Convention, Sept. 18, 1857. SALEM, OREGON ASAHIEL BUSH, PRINTER TO THE CONVENTION 1857." These pamphlets were printed and mailed to the Territory's postmasters and auditors the week of October 13, 1857. OREGON STATESMAN, Oct. 13, 1857, at 2.

28. JOURNAL, *supra* note 1, Sept. 17, 1857 (aft.), at 96, Sept. 18, 1857 (a.m.), at 97-98. The constitution was printed in the following newspapers: *Oregon Weekly Times*, Sept. 26, 1857, Supp.; *Oregon Statesman*, Sept. 29, 1857, at 1; *Democratic Standard*, Oct. 1, 1857, at 1; *Oregon Argus*, Oct. 3, 1857, at 1; *Weekly Oregonian*, Oct. 3, 1857 (Supp.).

29. My diligent research assistants located commentary in the following territorial newspapers: the *Oregon Statesman*; the *Weekly Oregonian*; the *Oregon Argus*; the *Democratic Standard*; the *Occidental Messenger*; and the *Oregon Weekly Times*. They also found commentary in three California newspapers: the *Sacramento Daily Union*; the *Herald*; and the *Daily Evening Bulletin*. Photocopies of these editorials and letters to the editor (and transcriptions of them) were in the author's files and have been transferred to the J.W. Long Law Library at Willamette University College of Law.

30. The one exception to this broad statement was the provision for separate votes on whether to permit slavery in Oregon and whether to permit the immigration of free Negroes into the state. Enrolled Constitution article XVIII, § 2 (1857). See *infra* notes **Error! Bookmark not defined.**-**Error! Bookmark not defined.** and accompanying text.