RALPH JAMES MOONEY*

Remembering 1857

> "We the people of the State of Oregon to the end that Justice be established, order maintained, and liberty perpetuated, do ordain this Constitution."[1]

What a time it must have been! Statehood! To become fully participating citizens of the young and growing nation. To select their own government officials, replacing unpopular presidential appointees from elsewhere. Perhaps even to *become* such an official—governor of the new state, supreme court justice, or even U.S. senator.

On August 17, 1857, sixty elected delegates—thirty-three farmers, eighteen lawyers, five miners, two newspaper editors, and a civil engineer—met in Salem to draft a constitution for what they hoped would become the thirty-third American state.[2] All were recent arrivals—primarily from New England and New York; from Old Northwest states like Ohio, Indiana, and Iowa; or from "border" states like Missouri, Kentucky, and Tennessee.[3]

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1 OR. CONST. pmbl.

2 The breakdown by profession appears in a 1902 address by former delegate John McBride to the Oregon Historical Society. *See* THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, at 483–84 (Charles Henry Carey ed., 1926) [hereinafter THE OREGON CONSTITUTION AND PROCEEDINGS]. McBride, from Yamhill County, was himself a "lonely voice" at the convention—its only Republican, a "forthright opponent of slavery," and "uncompromising" on temperance. DAVID ALAN JOHNSON, FOUNDING THE FAR WEST: CALIFORNIA, OREGON, AND NEVADA, 1840–1890, at 162 (1992).

3 *See* JOHNSON, *supra* note 2, app. 1B at 358–61 (table of delegates' birthplaces, previous residences, occupations, farm acreages owned, political parties, and death dates); *see also* Jesse S. Douglas, *Origins of the Population of Oregon in 1850*, 41 PAC. N.W. Q. 95 (1950); *see generally* John Minto, *Antecedents of the Oregon Pioneers and the Light These Throw on Their Motives*, 5 OR. HIST. Q. 38 (1904).

Most of the sixty were well acquainted with each other. Seventeen had served in either the provisional-government or the territorial legislature; three constituted the territorial supreme court; and most others had become prominent in various other ways, either locally or throughout the territory.[4] Before they finished their work a month later, political and personal rivalries would flare as they debated, sometimes at length, everything from the appropriate governor's salary to the wisdom of including a bill of rights in the constitution. They would pattern much of their final product after the 1851 Indiana Constitution, and would duck altogether the single most divisive issue facing Oregonians in 1857: should they enter the Union as a free state or a slave state?

This brief paper will summarize the background, personalities, and debates of that memorable 1857 convention, as well as certain notable features of the constitution its delegates produced. To the extent possible 150 years later, I shall try to recreate the attitudes and atmosphere, the political and legal concerns, and, yes, the excitement the delegates themselves surely experienced.

As others have written, the three dominant delegate concerns at the convention were politics, finances, and race.[5] Who, and which political party, would emerge from the convention with enhanced prospects? In how many ways could the delegates minimize expenses, both of the convention itself and of the new state? And should Oregonians permit slavery, or free blacks, or even immigrant Chinese, within their borders? Other contentious issues included the new state's boundaries, whether shareholders should be personally liable for corporate debts, whether to allow the legislature to charter

4 JOHNSON, *supra* note 2, at 41 (the convention had a "definite air of familiarity" and was notable for the "number of luminaries in attendance").

5 This paper draws heavily from several excellent accounts of the convention and surrounding events, including Charles Carey's introduction to THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 5–25; ROBERT W. JOHANNSEN, FRONTIER POLITICS AND THE SECTIONAL CONFLICT: THE PACIFIC NORTHWEST ON THE EVE OF THE CIVIL WAR 3–88 (1955); JOHNSON, *supra* note 2, at 139–88; David Schuman, *The Creation of the Oregon Constitution*, 74 OR. L. REV. 611 (1995). In addition, Professor Claudia Burton compiled recently an exceptionally thorough, 800-page "legislative history" of the constitution. Claudia Burton & Andrew Grade, *A Legislative History of the Oregon Constitution of 1857–Part I (Articles 1 & II)*, 37 WILLAMETTE L. REV. 469 (2001) [hereinafter Burton 1]; Claudia Burton, *A Legislative History of the Oregon Constitution of 1857—Part II (Frame of Government: Articles III–VII)*, 39 WILLAMETTE L. REV. 245 (2003) [hereinafter Burton 2]; Claudia Burton, *A Legislative History of the Oregon Constitution of 1857—Part III*, 40 WILLAMETTE L. REV. 225 (2004) [hereinafter Burton 3].

banks, whether to include a bill of rights in the constitution, and, believe it or not, whether to spend $300 for a reporter to record convention proceedings. But first, the backstory.

I
DO WE REALLY WANT TO BECOME A STATE?

Two years after the 1846 U.S. treaty with Great Britain settling the nation's northern boundary,[6] Congress enacted the Oregon Territorial Bill.[7] President Polk appointed Democratic stalwart Joseph Lane of Indiana the first territorial governor, and Lane arrived at Oregon City in early March 1849 to proclaim officially the extension of American law over the region.[8]

Lane's governorship was short-lived, however, because new Whig President Zachary Taylor replaced him almost immediately with fellow Whig John Gaines. Territorial party strife began then in earnest. The majority Democrats resented *any* outsider appointee, but especially a Whig, and most especially a Whig like Gaines who

[6] James Polk, of course, had made "54' 40 or Fight" the centerpiece of his 1844 presidential campaign. Once in office, however, he and Secretary of State James Buchanan agreed, without any fight whatever, to the 49th parallel as the appropriate U.S.-Canada border. *See generally* 29 HUBERT HOWE BANCROFT, THE WORKS OF HUBERT HOWE BANCROFT, HISTORY OF OREGON, Vol. 1, 1834–1848, at 6, 365, 573–99 (1886); CHARLES H. CAREY, GENERAL HISTORY OF OREGON: THROUGH EARLY STATEHOOD 428–65 (3d ed. 1971).

[7] Act of Aug. 14, 1848, § 15, ch. 177, 9 Stat. 323. Southern members of Congress had delayed the bill for two years, objecting to the antislavery clause its drafters had carried forward from the 1787 Northwest Ordinance. *See, e.g.*, WALTER CARLETON WOODWARD, THE RISE AND EARLY HISTORY OF POLITICAL PARTIES IN OREGON 1843–1868, at 37 (1913).

[8] Joe Lane was born in 1801 in North Carolina, grew up partly in Kentucky, and left home as a teenager to seek fame and fortune in Indiana. He became a prosperous farmer and merchant, served in the Indiana legislature, and earned acclaim for bravery in the Mexican War.

Following his brief Oregon governorship, Lane succeeded the deceased Samuel Thurston as territorial delegate to Congress, a position he held until statehood when he became, briefly, one of Oregon's first two U.S. senators. In 1860 he was the vice-presidential nominee on the southern Democratic ticket headed by Kentucky's John Breckinridge. Despite Lane's personal popularity in Oregon, Abraham Lincoln outpolled Breckinridge in the state, 5344 to 5075, with northern Democratic nominee Stephen Douglas trailing at 4131. CAREY, *supra* note 6, at 774–75.

By the time his interim Senate term expired in 1861, Lane's support of the South's right to retain slavery, plus his criticism of Lincoln's determination to maintain the Union by force, had doomed his Oregon political career. He lived quietly his last two decades, in and around Roseburg, surrounded by family but far from public life. *See generally* JAMES E. HENDRICKSON, JOE LANE OF OREGON: MACHINE POLITICS AND THE SECTIONAL CRISIS, 1849–1861 (1967); JOHNSON, *supra* note 2, at 48–65, 153–56, 284–85.

apparently was "[p]ompous and aristocratic in bearing" plus "tactless . . . and overzealous in exerting his authority."[9]

So "The Democracy," as they styled themselves, began slowly to organize and flex their numerical muscle. In the December 1850 legislature, they passed a bill moving the territorial capital from Oregon City to Salem. Governor Gaines declared the bill unlawful,[10] but the following December the Democratic legislators met at Salem anyway while the few elected Whigs convened at Oregon City.[11]

The first notable mention of Oregon statehood occurred in the December 1851 legislature, which (1) petitioned Congress to amend the Territorial Act to allow local election of officials, and (2) called for a statehood plebiscite should Congress fail to do so. Unsurprisingly, Congress declined to amend, but no plebiscite resulted, partly because Democratic ardor for statehood cooled in 1852 as Franklin Pierce's presidential prospects brightened.[12]

Once elected, however, Pierce continued the past practice of appointing non-Oregonians territorial governor and supreme court justice. So the local Democracy resumed its agitation for statehood, and the territory began to divide sharply on the question. Many majority-party Democrats favored it, with several of their leaders eyeing apparently the greater political opportunities it offered them. Whig editor Thomas Dryer of the Portland *Oregonian* led the opposition, principally on the ground of expense: whereas Congress paid territorial expenses, Oregonians themselves would have to finance a new state government.[13] Three times—in 1854, 1855, and

9 WOODWARD, *supra* note 7, at 39.

10 Gaines contended that the bill violated the Territorial Act, which required each territorial law to "embrace but one object . . . expressed in the title." Act of Aug. 14, 1848, § 15, ch. 177, 9 Stat. 323. The bill located not only the capital at Salem, but also the penitentiary at Portland, and a university at Corvallis. WOODWARD, *supra* note 7, at 40; *see generally* Caroline P. Stoel, *Oregon's First Federal Courts, 1849–1859*, *in* THE FIRST DUTY: A HISTORY OF THE U.S. DISTRICT COURT FOR OREGON 1, 29–35 (Carolyn M. Buan ed., 1993).

11 The territorial supreme court followed suit, with Whig appointees William Strong and Thomas Nelson meeting at Oregon City and the lone Democratic holdover, Orville Pratt, sitting alone at Salem! In May 1852, at the urging of territorial delegate Lane, Congress confirmed Salem as the capital. 10 Stat. 146 (1852); *see also* JOHNSON, *supra* note 2, at 401 n.39.

12 Democratic ardor cooled, of course, because Pierce likely would replace Whig territorial officials with fellow Democrats, perhaps even *Oregon* Democrats. For the same reason, however, Oregon Whigs, who had opposed statehood until then, "began to see its merits." WOODWARD, *supra* note 7, at 54.

13 Dryer wrote this in March 1856, for example:

1856—Dryer and others managed to defeat statehood at the polls, convincing narrow majorities that Oregon had neither population nor wealth sufficient to maintain a state government,[14] and that statehood was merely a "scheme" of a "little coterie of [Democratic] politicians."[15]

> [W]e call upon the people to delay the measure until we are extricated from our present great pecuniary embarrassments—until there is a prospect of growing in wealth and strength—until such time as we can assume state government without plunging our Territory into almost overwhelming ruin and bankruptcy—until our people are able to bear the burdens—until the tide of immigration turns its course to our shores and will not be staid. Then, and not until then, will state sovereignty avail us anything—then we may assume a new and independent position amongst the states of our Union—then we can take a stand side by side with the proudest of our sister States.

OREGONIAN, March 29, 1856.

Dryer was a longtime Whig, who throughout the 1850s served as the principal voice opposing Democratic political hegemony in the territory. He in the Portland *Oregonian* and Asahel Bush in the Salem *Statesman* together inaugurated the no-holds-barred "Oregon Style" of journalism. *See generally* GEORGE S. TURNBULL, HISTORY OF OREGON NEWSPAPERS 81–90 (1939). For more on Dryer, see *infra* text accompanying notes 39–40.

[14] The June 1854 vote was 3210 favoring statehood and 4079 opposed; a year later, the numbers were 4420 and 4835; and in April 1856, they were 4186 and 4435. *See* THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 11–20; WOODWARD, *supra* note 7, at 76–79. On financial opposition to statehood, see F.G. Young, *The Financial History of the State of Oregon*, 10 OR. HIST. Q. 263, 264–66 (1909).

Beyond wishing to avoid expense, some in southern Oregon had a different statehood plan altogether. They wanted to unite Jackson, Douglas, and Umpqua counties with part of northern California to create the slavery-friendly territory of "Jackson." That plan gained little traction, however, either in Oregon or in Congress. Coos County delegate Perry Marple would raise it later at the constitutional convention, but few delegates took it seriously. *See generally* THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 13–15; *infra* text accompanying notes 115–16.

[15] WOODWARD, *supra* note 7, at 79. Occasionally, the debate became stridently ad hominem. Dryer in January 1856:

> The little band of *destructionists* who have attended at the slaughter house at Salem during the winter, to witness and learn the art of swinging the party cleaver, as performed by *Delusion* Smith, late leader of the Iowa "'possum-tail' party," and the Bush-*whacker* of the *Statesman*, sided and assisted by a few lesser lights, not content with the injury already done Oregon by their infamous party legislation, are about to consummate at one blow, the death of our future hopes and prospects by the foundation of a State Government.

OREGONIAN, Jan. 26, 1856 (emphasis in original).

And Bush responding in April 1856:

> There has been no attempt to make it a party measure, except by the *Oregonian* who resorts to the miserable expedient of characterizing the movement as a pet of democratic leaders, and then raising a cry of "taxation and ruin." The object is plainly to force those whigs who independent of party considerations would vote for State convention, into the whig ranks against it—and by the cry of "wolf,

Beginning in 1856, however, the slavery issue altered the dynamic dramatically. The "anti-Negro sentiment in Oregon" always had been "emphatic,"[16] but with a mere handful of blacks in the territory, Oregonians had been largely able to ignore the slavery debates raging elsewhere. The 1787 Northwest Ordinance prohibited slavery in the territories, as did the 1848 Oregon Territorial Act.[17] However, Congress's 1854 Kansas-Nebraska Act,[18] the Supreme Court's infamous *Dred Scott* decision,[19] and president James Buchanan's pro-slavery intervention in "Bleeding Kansas"[20] combined, "as by the hand of a magician," to make slavery the "paramount issue in the Territory."[21]

Oregon Democrats generally praised the Kansas-Nebraska Act and *Dred Scott*, hailing them as victories for "popular sovereignty." But organized opposition to slavery was growing, in Oregon as elsewhere. Albany hosted the territory's first antislavery convention in June

> wolf," taxation, bankruptcy, & c., & c., to frighten as many democrats as possible to *pull* and *push* with the whigs against the measure.

OREGON STATESMAN, Apr. 25, 1856 (emphasis in original).

16 WOODWARD, *supra* note 7, at 89; *see infra* text accompanying notes 82–84; *see generally* ELIZABETH MCLAGAN, A PECULIAR PARADISE: A HISTORY OF BLACKS IN OREGON, 1788–1940, at 1–47 (1980).

17 1 Stat. 50 (1789); Act of Aug. 14, 1848, § 15, ch. 177, 9 Stat. 323.

18 The Kansas-Nebraska Act repealed the 1820 Missouri Compromise line of 36º30' between free and slave territory, substituting for it the doctrine of territorial "popular sovereignty" on slavery. 10 Stat. 277 (1854). Among the Act's unintended results were bitter turmoil in Kansas, a major realignment of national political parties, the election of Abraham Lincoln, and, many believe, the Civil War itself. *See generally* DAVID M. POTTER, THE IMPENDING CRISIS, 1848–1861, at 199–224 (1976); JAMES A. RAWLEY, RACE AND POLITICS: "BLEEDING KANSAS" AND THE COMING OF THE CIVIL WAR (1969).

19 Chief Justice Taney's opinion in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), declared, in part, that Congress had no constitutional authority to prohibit slavery in the territories, thereby apparently negating the prohibition in the Oregon Territorial Act. *See generally* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); *id.* at 384 (concluding that Taney's entire opinion was "weak in its law, logic, history, and factual accuracy").

20 Briefly, the Kansas-Nebraska Act creating those two territories neglected to prescribe a term of residence for voting, which allowed many pro-slavery Missourians to cross into Kansas and elect a pro-slavery territorial legislature. Antislavery Kansans responded by establishing a virtual counter-government, which drafted the antislavery Topeka Constitution in late 1855. The territorial legislature then drafted the pro-slavery Lecompton Constitution in 1857. Following two popular votes in the territory, one favoring each constitution, president Buchanan endorsed the Lecompton version, a decision one distinguished historian has characterized as "urging Congress and the country to endorse a fraud" and "one of the most tragic miscalculations any President has ever made." KENNETH M. STAMPP, AMERICA IN 1857: A NATION ON THE BRINK 282 (1990).

21 WOODWARD, *supra* note 7, at 89.

1855,[22] as well as its first official Republican Party meeting in early 1856.[23]

Meanwhile, pro-slavery sentiment also was growing in Oregon, especially among Democrats, raising the grim prospect of a far-west "Bleeding Kansas." Partly in response, Oregonian editor Thomas Dryer moved from neutrality on the issue to opposition, and, simultaneously, from determined opposition to statehood to vigorous support for it. Dryer and others feared a pro-slavery federal intervention in Oregon similar to the one Kansas had experienced: "If the power of the regular army is to be used to crush out freedom in the Territories . . . we had better throw off our vassalage and become a state at once."[24] So with the most influential opponent of statehood having reversed course, Oregonians voted overwhelmingly in early 1857—7617 to 1679—to hold a constitutional convention and become a state.[25]

II

MAJOR PLAYERS AT THE CONVENTION

A handful of the sixty convention delegates dominated much of its drafting and debate. Here are brief sketches of arguably the six most influential.[26]

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[22] Asahel Bush, the foul-penned Democratic editor of the Salem *Statesman*, declined to report the convention's proceedings, characterizing its participants as a "collection of old grannies" and "nigger-struck dames." *Id.* at 93. On Bush generally, see *id.* at 40–46, 57–75, 87–93; TURNBULL, *supra* note 13, at 74–85, 89–90.

[23] Bush headlined his editorial comment on the new party "A Black Republican Party in Oregon—the Face for Next Year." WOODWARD, *supra* note 7, at 95.

[24] *Shall Oregon Become a Free State?*, OREGONIAN, Nov. 1, 1856, *quoted in* WOODWARD, *supra* note 7, at 98.

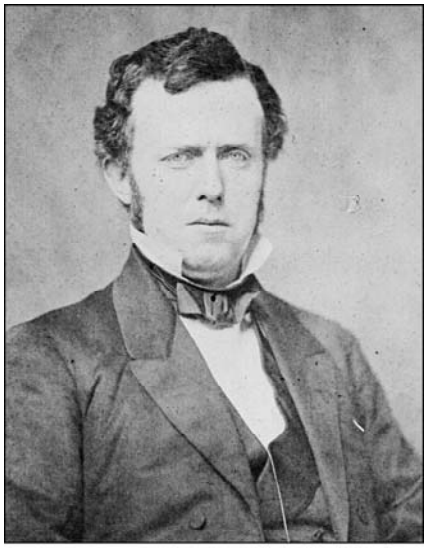
[25] *See* THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 20–26; WOODWARD, *supra* note 7, at 97–99; *see generally* T.W. Davenport, *Slavery Question in Oregon*, 9 OR. HIST. Q. 189 (1908).

[26] Historian David Johnson identified and described these six this way:

> Before the Oregon convention began, it was apparent who would play the central roles; by virtue of reputation and party standing, six men stood out. Four—La Fayette Grover, George Williams, Matthew Deady, and Delazon Smith—were Democrats associated in differing degrees with Asahel Bush and the Salem Clique. Two, Thomas Dryer and David Logan, were similarly expected to speak for what Democrats dismissingly referred to as the "opposition." . . .
>
> From beginning to end these six men had a disproportionate effect on the debates. Aptly, the four Democrats represented their party's rural constituency in Marion, Linn, and Douglas counties, while both of the anti-Democratic leaders came from Portland.

A. Matthew Deady

Born in Maryland in 1824, Matthew Deady grew up partly in Baltimore with his grandparents and partly on his father's southern Ohio farm. He apprenticed four years as a blacksmith, studied law with a local judge in St. Clairsville, Ohio, joined the Ohio bar in 1847, and two years later crossed the plains to Oregon.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Deady emerged quickly as a force in territorial Democratic politics. He was elected to the Assembly in June 1850, to the Council (upper house) the following year, and Council president in 1852. President Pierce rewarded his political efforts by appointing him in 1853 to the territorial supreme court, where he remained until statehood when he became Oregon's first federal district judge, a position he held until his death in 1893.

Throughout the territorial years, Deady was a friend and correspondent of Asahel Bush, Democratic editor of the Salem *Statesman* and powerful leader of the "Salem Clique" that controlled Oregon politics throughout the 1850s. Deady's 1857 campaign for Umpqua County constitutional-convention delegate was notable for being the most publicly proslavery in the territory. Although the delegates elected him convention president, he participated frequently in the debates while others were in the chair during lengthy Committee of the Whole sessions. Years later, delegate John McBride praised Deady's "fairness and impartiality" at the convention, describing him as "large in stature, of impressive manner and bearing, smooth in speech, courteous and affable in intercourse, though he had dignity and firmness as a presiding office[r]."[27]

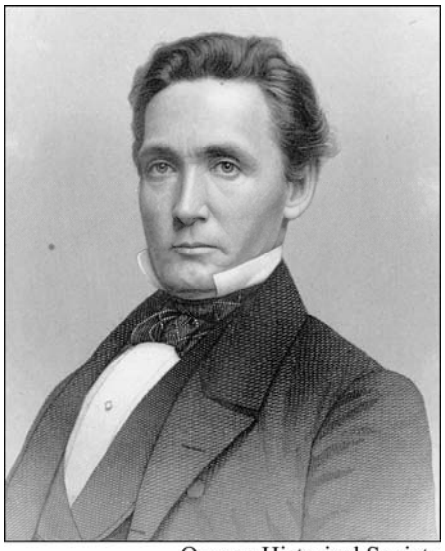
JOHNSON, *supra* note 2, at 144.

27 THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 484.

Following statehood, Deady enjoyed a long and distinguished career on the federal bench. He revered the law, especially the common law, as foundation and guardian of a rational, orderly world. His politics changed from Democrat to Republican during and after the Civil War; his attitude toward minority races also changed dramatically, from disdainful in 1857 to sensitive and respectful by the 1870s; and in his thirty-four years as Oregon's lone federal district judge, he served, with few exceptions, as a model public servant, both on and off the bench.[28]

B. Delazon Smith

Born in New York state in 1816, Delazon Smith attended Oberlin Institute briefly before being expelled for denouncing its leaders as abolitionist and corrupt. He retaliated by writing and publishing a pamphlet entitled "Oberlin Unmasked," charging that (1) both faculty and students engaged in "Negro worship" and "advocated miscegenation," and that (2) male and female students engaged habitually in "practices more erotic than matriculating in the same classes."[29]



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For the next several years, Smith studied and practiced law, and published and edited newspapers in New York and

[28] *See generally* JOHNSON, *supra* note 2, at 152–57; Malcolm Clark, Jr., *Introduction* to 1 PHARISEE AMONG PHILISTINES: THE DIARY OF JUDGE MATTHEW P. DEADY 1871–1892, at xxxi (Malcolm Clark, Jr. ed. 1975); Philip Henry Overmyer, The Oregon Justinian: A Life of Matthew Paul Deady (Aug. 1939) (Ph.D. dissertation, University of Minnesota); 2 HUBERT HOWE BANCROFT, CHRONICLES OF THE BUILDERS OF THE COMMONWEALTH 465–515 (1892) (a reverent fifty-page "biography" that Deady himself wrote); Ralph James Mooney, *Matthew Deady and the Federal Judicial Response to Racism in the Early West*, 63 OR. L. REV. 561 (1984); Ralph James Mooney, *Formalism and Fairness: Matthew Deady and Federal Public Land Law in the Early West*, 63 WASH. L. REV. 317 (1988).

[29] JOHNSON, *supra* note 2, at 158, *quoting* 2 R. CARLYLE BULEY, THE OLD NORTHWEST: PIONEER PERIOD, 1815–1840, at 405–06 (1951).

Ohio. In 1842, President Tyler appointed him commissioner to the Republic of Ecuador, but shortly after arriving in Quito he went walkabout for eleven months, apparently crossing the continent by horseback. Later he settled in Iowa, where George Williams knew him as "an infidel lecturer, a democratic politician and a Methodist preacher."[30] In 1852, Smith and his family moved to Oregon, where he became an active member of the powerful Salem Clique, a territorial assemblyman for two years, and in 1857 a constitutional-convention delegate from Linn County.

Known to friends and supporters as "the Lion of Linn," and to detractors as "Delusion," Smith was renowned for his oratory skills. He became the convention's "acknowledged spokesman of the Oregon Democracy," speaking far more than any other delegate. The first state legislature elected him one of Oregon's first two U.S. senators (with Joseph Lane), but he drew the shorter term and his 1860 reelection bid failed. He died suddenly later that year at age forty-four.

Smith's Oregon contemporaries generally liked and admired him, especially Democrats who "almost revered" him as a party leader.[31] Years later, George Williams described him as a man of "generous impulses and many intellectual gifts," and a "charming and most companionable man."[32] Former delegate John McBride likewise remembered him as "one of Oregon's greatest men."[33]

C. George Williams

George Williams was born in 1823 in New York state, grew up there, and studied law in Pompey, New York, with Daniel Gott, later a member of Congress. In 1844, shortly after joining the New York bar, he headed west to Iowa Territory, where three years later he became one of the new state's first trial court judges. Then, in 1852, president Franklin Pierce appointed him chief justice of Oregon Territory, a position he held with some distinction for five years.

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30 George H. Williams, *Political History of Oregon from 1853 to 1865*, 2 OR. HIST. Q. 1, 28 (1901).

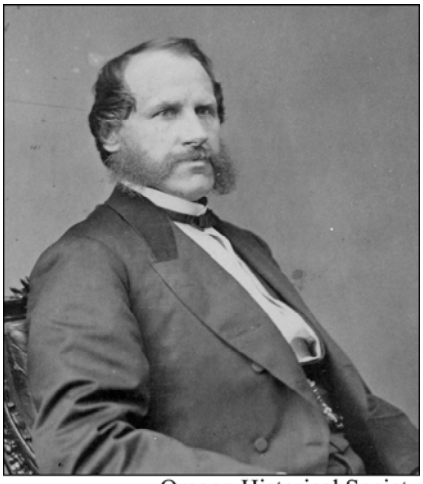
31 JOHNSON, *supra* note 2, at 157–58.

32 Williams, *supra* note 30, at 28.

33 THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 490. Other sketchy sources on Smith include JOHNSON, *supra* note 2, at 157–62, 285–88; *Biographical Sketches: Hon. Delazon Smith, Senator in Congress from the State of Oregon*, 43 U.S. MAG. & DEMOCRATIC REV. 79, 79–86 (1859).

Like fellow justice Matthew Deady, Williams affiliated himself with the Democratic party, though he never became as close as Deady to the ruling Salem Clique. In 1853, on circuit, he rendered one of his first and best-known decisions, *Holmes v. Ford*, freeing three slave children who had been either brought into or born in Oregon. His one-sentence order offered no rationale, but years later he recalled his reasoning as follows:

> [M]y opinion was, and I so held, that without some positive legislative enactment establishing slavery here, it did not and could not exist in Oregon, and I awarded to the colored people their freedom.[34]



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As convention delegate from Marion County, Williams chaired the judiciary committee and made numerous, mostly thoughtful contributions to the debates.

Following statehood, Williams embarked on a long and varied career in both law and politics. He resigned from the territorial bench in 1858 to practice law in Portland. Seven years later Oregonians elected him as a Republican to the U.S. Senate, where he became a prominent member of the Committee for Reconstruction. In 1871, President Grant appointed him attorney general, and two years later nominated him Chief Justice of the United States. The latter position eluded Williams, however, as charges of political and personal improprieties forced him ultimately to withdraw.

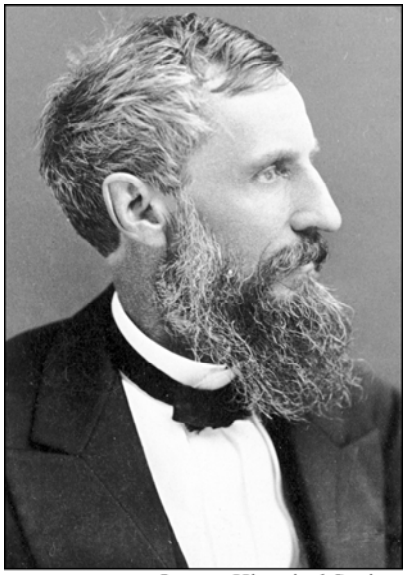
Williams resigned as attorney general in 1875, then practiced law in Washington, D.C., for six years before returning to Portland where he became once again a respected leader of the city's legal and political elite. Nearly three decades later, in 1902, Portlanders elected

[34] Williams, *supra* note 30, at 6; *see also* MCLAGAN, *supra* note 16, at 33–36; Fred Lockley, *The Case of Robin Holmes vs. Nathaniel Ford*, 23 OR. HIST. Q. 111–37 (1922); Stoel, *supra* note 10, at 43–49; Quintard Taylor, *Slaves and Free Men: Blacks in the Oregon Country, 1840–1860*, 83 OR. HIST. Q. 153–70 (1982).

him mayor, and at his death in 1910, he was lauded as the "Grand Old Man of Oregon."[35]

D. La Fayette Grover

Born in 1823 in Bethel, Maine, and educated at Gould Academy and Bowdoin College, La Fayette Grover moved then to Philadelphia where he studied law and was admitted to the bar in 1850. Later that year he headed to Oregon, settling in Salem where he formed a partnership with Benjamin Harding, a future U.S. senator.[36]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In 1853, Salem voters elected Grover to the territorial legislature, and that same year he served as lieutenant under general Joe Lane in the Rogue River Indian War. He was, to some, a "vicious, Democratic partisan," who throughout the 1850s remained "politically inseparable" from Salem Clique leader Asahel Bush. He became territorial-assembly speaker in 1855, and two years later a Marion County delegate to the constitutional convention, where he chaired the bill of rights committee.[37]

Just prior to statehood, Oregonians elected Grover their interim representative to Congress. His term lasted only seventeen days, however, and at its expiration the rapidly widening split within the state's Democratic party prevented his reelection. He returned to practicing law and business in Salem and, beginning a decade later,

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35 For more on Williams, see JOHNSON, *supra* note 2, at 144, 147–52, 173–77, 185–87, 293–99; Sidney Teiser, *Life of George H. Williams: Almost Chief-Justice*, 47 OR. HIST. Q. 417–40 (1946); Oscar C. Christensen, The Grand Old Man of Oregon: The Life of George H. Williams (Aug. 1937) (unpublished M.A. thesis, University of Oregon) (on file with the University of Oregon Library).

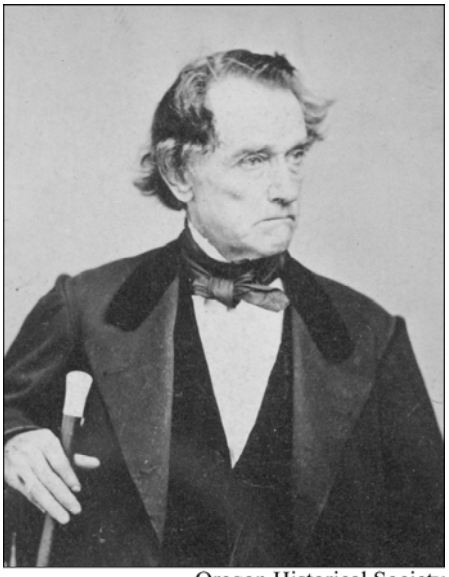
36 Stanley Russell Howe, *Lafayette Grover: Would-Be President Maker*, 28 COURIER (Spring 2004), *available at* http://www.bethelhistorical.org/Lafayette_Grover.html.

37 JOHNSON, *supra* note 2, at 145–46. Grover also was a prominent organizer of the territory's first substantial manufacturing enterprise, the Willamette Woolen Mills in Salem. *Id.* at 146–47.

won elections for governor in 1870 and 1874 and U.S. senator in 1876. He died in Portland in 1910.[38]

E. Thomas Dryer

Thomas Jefferson Dryer was born in 1808 in Canandaigua County, New York, moved to Ohio at age ten, then returned to New York seven years later to work it seems in various newspaper positions for the next sixteen years. In 1849 he decamped for California in search of gold and adventure; instead, he found work as editor of San Francisco's *California Courier*. The following year, two prominent early Portlanders, Stephen Coffin and W.W. Chapman, recruited Dryer northward to edit their new Whig newspaper the *Oregonian*; throughout the next decade, he and his paper furnished much of the public opposition to territorial Democratic politics.[39]



Oregon Historical Society

At the convention, Dryer became the principal voice for Whigs and anyone else dissatisfied with something proposed by the Democratic majority. As John McBride recalled later, Dryer spoke often as the "steady rival of [Delazon] Smith," sometimes simply "for the fun of the thing." Following the convention, he served in the first state legislature, was a Lincoln elector in 1861, then departed for Hawaii as minister to the Kingdom of the Sandwich Islands. He lost that post within a year, however, perhaps for excessive drinking and buffoonery, and returned eventually to Portland "broken down and dispirited." McBride later judged him to be a man of "many amiable

[38] *Id.* at 299–305.

[39] *See id.* at 162–63; *see also* Richard Sheldon Cramer, Thomas J. Dryer: Opposition Editor 3, 4 (June 1952) (unpublished M.S. thesis, University of Oregon) (on file with the University of Oregon Library).

qualities" and one who "deserves to have his memory embalmed as one of the most useful of the pioneers." He died in 1879.[40]

F. David Logan

David Logan was born in Kentucky in 1824, and moved with his family to Illinois when he was about eight. His father was a prominent Springfield attorney, Abraham Lincoln's partner for a time. Logan himself joined the Illinois bar in 1844 and the Whig State Central Committee in 1848, the year his father lost a bid to succeed Lincoln in Congress. The following year he departed for Oregon.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Logan was uncommonly ambitious, even among the many who journeyed west searching for fame and fortune. Unfortunately for his political aspirations, he was a committed Whig in a strongly Democratic territory. Even worse, he had a "compelling thirst" that led him into "moral lapses."[41] In 1851 he campaigned for the legislature against incumbent Matthew Deady, who bested him easily by getting him drunk, which apparently Logan remained throughout the campaign. Deady and he were then enemies for years, especially after 1854 when Deady sent an unsigned letter to the *Democratic Standard* newspaper reporting in detail Logan's drunken rape of an Indian woman at high noon on Jacksonville's main street.[42]

Nonetheless, in 1857 Logan remained one of the territory's two most prominent Whigs (with Thomas Dryer), and Multnomah County voters elected him one of their constitutional convention delegates. Following statehood, he campaigned three times unsuccessfully for

[40] The quotations are from THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 491, and JOHNSON, *supra* note 2, at 289; *see also id.* at 54–56, 162–67, 288–89; TURNBULL, *supra* note 13, at 56–60, 69, 82–84, 110.

[41] MALCOLM CLARK, JR., EDEN SEEKERS: THE SETTLEMENT OF OREGON, 1818–1862, at 270 (1981). Logan's detractors called him the "Mingo Chief" because of his tendencies toward "high oratory and low boozing" shared allegedly with another Logan, the Indian leader celebrated in Thomas Jefferson's *Notes on the State of Virginia*. *Id.*

[42] *See id.* at 270–71; JOHNSON, *supra* note 2, at 167–72.

Congress, though in 1863 he did win election as Portland's mayor. He was, by consensus, an outstanding courtroom lawyer, but, ultimately, a man whose "unfortunate habits blasted [his] bright prospects for future usefulness and distinction."[43]

III
CONVENTION THEMES

Politics, finances, and race dominated most delegates' agendas throughout the monthlong convention. Other, lesser concerns included state boundaries, shareholder liability, bank perfidy, and issues related to a possible bill of rights.

A. Politics

Again, the vast majority of territorial Oregonians were Democrats. Publisher Asahel Bush and his Democratic "Salem Clique" controlled much of Oregon politics until late in the 1850s, when the slavery issue combined with personal rivalries to rend the party asunder; by 1860 it was in such disarray that Republican Abe Lincoln managed to win the state by plurality.[44]

In 1857, however, the Democrats remained firmly in control. Of the sixty convention delegates, more than forty were Democrats, and many of them met in a pre-convention caucus to select officers and determine strategies. They chose Matthew Deady as convention president and Delazon Smith, George Williams, La Fayette Grover, and other Party stalwarts to chair major committees. The 1851 Indiana Constitution would serve as the principal model, with some among the Democrats apparently having already prepared preconvention draft articles.[45]

Delegates excluded from that original caucus, and presumably other informal meetings, naturally resented the Democratic control. Their resentment flared from time to time, given voice usually by the

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[43] Williams, *supra* note 30, at 21; *see also* JOHNSON, *supra* note 2, at 289–92; *22 Letters of David Logan, Pioneer Oregon Lawyer* (Harry E. Pratt ed.), 44 OR. HIST. Q. 253, 260 (1943).

[44] *See generally* JOHANNSEN, *supra* note 5, at 72–83, 128–53; WOODWARD, *supra* note 7, at 128–88.

[45] JOHNSON, *supra* note 2, at 142, 172; THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 27–29. Delegate Chester Terry, recently arrived from Indiana, had brought with him a copy of that state's constitution. *See* Schuman, *supra* note 5, at 619. For a section-by-section analysis of sources, see W.C. Palmer, *The Sources of the Oregon Constitution*, 5 OR. L. REV. 200 (1926).

convention's two most prominent Whigs, Thomas Dryer and David Logan.

Early in the second week, Logan complained he was being relegated to the "tail end of the judicial committee"[46] and excluded from its decisions simply because he adhered not to the "true faith of the democracy." He charged, for example, that the full committee had agreed on a four-justice supreme court, but the Democrats—behind his back—had reduced it to three. "The committee never did me the honor of letting me know of the meeting at which they made that alteration." And later, more of the same: there was "no use," Logan alleged, "for one who holds the political sentiments that we do . . . to offer an amendment" because the majority would call it "trifling, captious, technical and whatnot" and vote it down "with a storm of noes."[47]

Thomas Dryer concurred with his fellow Whig, charging that judiciary committee Democrats were simply throwing out various "feelers" in their report, trying to avoid political responsibility for them. He "disliked this kind of shenanegan and party clap-trap." If the Democrats wanted a constitution the people would ratify, they would have to "treat the little small minority here with the common courtesies of life."[48]

In the end, common sense prevailed, at least on the merits of court size: Dryer's motion to add back a fourth justice passed, by an unrecorded vote. Because the justices would serve also on circuit as trial judges, a four-member court would permit panels of three to consider all appeals. The obvious advantage of three-member appellate panels prevailed ultimately over the financial concern expressed by Democrats, including Grover, Williams, Cyrus Olney, and others, that voters never would approve the expense of four justices. To reassure such voters, perhaps, the delegates next adopted Matthew Deady's amendment limiting the court to five justices until the state's population reached at least 100,000.[49]

One genuinely political issue the delegates did debate was whether to prescribe voting *viva voce* or by secret ballot. During the territorial

46 THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 165.

47 *Id.* at 187. Logan again in the same vein: "If it is to be understood that we are to be excluded from the committees, and if [there is] . . . a secret understanding that our suggestions shall all go unheeded, then let us know it . . . and we will know how to act." *Id.* at 187–88.

48 *Id.* at 188.

49 *Id.* at 186–90.

years, the Democrats had enforced party discipline against a surge of Know-Nothingism by instituting a system of *viva voce* voting in both popular elections and the legislature.[50] They proposed to cement that system into the constitution's article II, Suffrage and Elections, at least until 1865, and thereafter until the legislature "shall otherwise direct."

Unsurprisingly, Thomas Dryer moved to amend the Committee's proposal by requiring paper ballots in popular elections. Not only did Dryer himself "not approve of the viva voce rule," he thought most voters disliked it as well. Including it in the constitution, he urged, "would sink [the constitution] as though it had a mill-stone around its neck." Moreover, it was an "insult to the intelligence and honesty of the people to compel them to show their votes at the polls." William Watkins agreed with Dryer, asserting that fewer than seventy-five of the 700 voters in his county (Josephine) would favor the *viva voce* system.[51]

Delazon Smith and Matthew Deady answered for the Democrats, both praising *viva voce* and contending for its popularity with the voters. Following a lengthy debate that "occupied the attention of the convention nearly all the afternoon," Dryer's motion lost 20–25.[52]

Finally, after two more days of sporadic debate and three more rejected proposals, moderate Democrat James Kelly[53] offered a compromise: *viva voce* voting would continue in popular elections, but only "'until the legislature shall otherwise direct.'"[54] That motion

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[50] *See generally* CAREY, *supra* note 6, at 503; JOHANNSEN, *supra* note 5, at 55; WOODWARD, *supra* note 7, at 68, 75.

[51] THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 325.

[52] *Id.* at 325–26.

[53] James Kerr Kelly was another early Oregonian prominent in both law and politics. He was born in 1819 in Pennsylvania, where eventually he studied law, joined the bar, and became deputy attorney general. In 1849, he joined the gold rush to California, but soon abandoned prospecting for law practice. He moved to Oregon in 1851, helped codify the territorial laws in 1852–53, served in the legislature, 1853–57, and fought in the Yakima Indian War in 1855–56.

Kelly represented Clackamas County at the constitutional convention, then later as a state senator for four years, 1860–64. He was a U.S. senator 1871–77, and Oregon chief justice 1878–82. In 1890 he moved to Washington, D.C., where he practiced law for a time and died in 1903. *See generally* Oregon State Archives, Crafting the Oregon Constitution: Framework for a New State, Biographical Sketch of James K. Kelly, *available at* http://arcweb.sos.state.or.us/exhibits/1857/during/bios/kelly.htm (last visited June 9, 2009); Wikipedia, James K. Kelly, http://en.wikipedia.org/wiki/James_K._Kelly (last visited June 9, 2009).

[54] THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 340.

passed, 23–22,[55] and found its way ultimately into article II, section 15.[56]

In the end, the abiding concern of many delegates over statehood politics seems to have played only a very minor role in actually shaping the constitution. True, several prominent delegates did engage at times in political posturing, no doubt largely because both the territory's leading newspapers were reporting convention proceedings to their readers; and true, the *viva voce* debates had deep roots in territorial politics. However, few, if any, other issues debated at the convention had real political significance. Once the delegates agreed to leave the red-hot slavery issue to the voters (which they did even before convening), most other questions they debated were less matters of political advantage than of personal preference or technical detail.

B. Finances

Nearly all convention delegates were determined that their new state government be thrifty in the extreme. Charles Carey explained this pervasive, "spirit of economy"[57] by describing the delegates as "pioneers, none of whom was wealthy, and many of whom had known the pinch of hard times."[58] Eminent historian Dorothy Johansen put it rather more bluntly: "If the convention distinguished itself in any major respect it was in a penurious thriftiness which burdened a few ill-paid officials with multiple duties."[59]

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[55] *Id.*

[56] *See* Burton 1, *supra* note 5, at 595–600. Later, the delegates prescribed, without debate, *viva voce* voting for the three questions they submitted to the voters: (1) the constitution and statehood; (2) slavery; and (3) free blacks in the state. *Id.*; OR. CONST. art. XVII, § 2.

The Oregon Legislature discontinued popular-election *viva voce* voting in 1872, shortly after Congress required it for all congressional elections. An Act Relating to Elections, Oct. 19, 1872, § 1; *see also* PETER H. ARGERSINGER, STRUCTURE, PROCESS, AND PARTY: ESSAYS IN AMERICAN POLITICAL HISTORY 48 (1992).

[57] THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 56.

[58] Oregon State Archives, Crafting the Oregon Constitution: Framework for a New State, About the Convention Delegates, *available at* http://arcweb.sos.state.or.us/exhibits/1857/during/bios.htm (last visited June 9, 2009).

[59] DOROTHY O. JOHANSEN & CHARLES M. GALES, EMPIRE OF THE COLUMBIA: A HISTORY OF THE PACIFIC NORTHWEST 263 (2d ed. 1967); *see also* Schuman, *supra* note 5, at 611, 622–23 ("Perhaps the most striking feature of the convention and the document it produced was an almost obsessive concern with money."). That "obsessive concern" continues today, of course, to dominate much of Oregon's political discourse. Throughout the five or so decades I've lived in this state, politicians and voters alike seem consistently

One of the first contested issues at the convention was whether to hire a reporter for its proceedings. Delegate James Kelly favored doing so, noting that the expense would be "'comparatively trifling'" and, after all, a gathering such as theirs "'happens only once in an age.'"[60] But George Williams and others objected. There was "no immediate prospect" of federal funds to pay convention expenses, and the delegates should burden Oregon voters with no expense not "absolutely necessary." Kelly tried once more to rally support, but, hearing little, ultimately withdrew his resolution.[61]

Two days later, Delazon Smith raised the matter again, suggesting a committee to seek a reporter who would work "upon the faith of a future appropriation by either congress, or the territorial or state legislature." The delegates authorized such a committee, but limited its mandate to merely seeking, not hiring. The committee reported back three days later that it had located a reporter who would work for ten dollars a day, and Delazon Smith moved that the offer be accepted.[62] But others, including Frederick Waymire, the self-described "bulldog of the treasury,"[63] continued to object. So David Logan proposed instead that any reporter be paid, if at all, by the federal government or by the delegates themselves; and, in a dig at the loquacious Smith, if by the delegates, payments would be "in proportion to the amount of bulk reported for him."[64]

Further wrangling ensued. Kelly reminded delegates how "eagerly the colonial records of every state have been reclaimed from the dust." Logan, in turn, reminded them that Oregonians voting for statehood had been assured that "congress would pay the [convention] expenses." The influential George Williams also continued to object to the expense, believing the cost would far exceed the $300 estimate

to prefer deteriorating schools, crumbling infrastructure, and a desperately underfunded criminal justice system to even a dollar of increased taxes.

60 Oregon State Archives, Crafting the Oregon Constitution: Framework for a New State, An Overview of the Convention Process, *available at* http://arcweb.sos.state.or.us/exhibits/1857/during/process.htm (last visited June 9, 2009) (quoting THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 59–60).

61 THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 58–60. Kelly's second effort included this sentence, persuasive certainly to any historian: "Such a body as this assembles but once in a lifetime; its proceedings are sought after as a matter of historical record, and I do think we ought not to let them pass . . . out of the memory of man when we can preserve them in full at a comparatively small cost." *Id.* at 60.

62 *Id.* at 100, 135.

63 *Id.* at 370.

64 *Id.* at 104, 135. Smith responded, there was "no necessity for burlesquing this proposition." *Id.* at 135.

and that Congress certainly would not pay it. At session's end, Smith withdrew his resolution, Logan withdrew his substitute, and forever after inquiring minds have had to depend almost entirely on contemporary newspaper accounts.[65]

The delegates' treatment of future state officials was similarly tightfisted, as they sought to minimize both the number of offices and the salaries attached to them. Delegates voted initially to combine the offices of governor and treasurer for at least ten years, with Frederick Waymire explaining, "Consolidate the offices, and we decrease the taxes."[66] They reversed themselves the following day, but did eventually require the governor to serve also as school superintendent.[67]

The economy obsession influenced the shape and size of the judiciary as well. The delegates required supreme court justices to serve also as the state's principal trial judges, on circuit twice each year in each county within their respective districts. When opposing the expense of four justices rather than three, Chief Justice George Williams admitted that he himself favored four, but "lawyers and judges, it must be remembered, can not have their own way." Though the territorial system of only three justices might appear "very objectionable to the gentlemen who have practiced in the courts, . . . [p]eople do not look at these things as lawyers do."[68] Indeed, when Williams's judicial colleague Matthew Deady proposed limiting the court to five until the state's population reached 100,000, Williams contended that even *mentioning* a court of five justices would jeopardize voter approval of the constitution. Deady responded that he did not offer his amendment considering whether

65 *Id.* at 140–45.

66 Oregon State Archives, Crafting the Oregon Constitution: Framework for a New State, Executive and Legislative Branch Issues, *available at* http://arcweb.sos.state.or.us/exhibits/1857/during/execleg.htm (last visited June 21, 2009); THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 223.

67 THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 226–29, 331; *see also* OR. CONST. art. VIII, § 1 (governor as superintendent of public instruction). Delazon Smith was the principal opponent of combining the governor and treasurer offices. The "theory of our government," he explained, was that "the purse and the sword should be kept separate." THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 227. But Frederick Waymire, assisted by others, continued to push for economy above all else, explaining that while he might agree to pay a governor-treasurer $2000 a year, if the offices were split he "would not give [the governor] one dollar over $600." *Id.* at 228. Smith replied, "If we can't afford to have a governor, let us adjourn and go home and tell the people they are not able to support a state government." *Id.*

68 *Id.* at 190.

voters would approve or reject the constitution; he offered it because he "thought it right."[69]

The delegates also restricted severely the ability of city, county, and state governments to incur debt. No doubt many recalled, some from personal experience, how earlier in the century many state and local governments had amassed large, unserviceable debts resulting frequently in default and citizen hardship. The delegates thus were "profiting from the disastrous experience of the states of the Middle West during the generation preceding in their state canal and railway building and wildcat banking excesses."[70]

As reported, article XI (Corporations and Internal Improvements), section 5, directed the legislature to "restrict" municipalities' powers of taxation, "borrowing money, contracting debts or loaning their credit." William Farrar moved to prohibit municipalities from contracting any debts at all, explaining that California cities and towns all had incurred debts, some very large, and he wanted their Oregon counterparts to "pay their expenses as they incurred them." Stephen Chadwick, Cyrus Olney, and Matthew Deady all concurred, while, on the other hand, John McBride, James Kelly, and Perry Marple thought cities needed reasonable fiscal flexibility to deal with unusual opportunities or perils. Ultimately, the delegates adopted Farrar's amendment 22–20 while in "committee of the whole," but did not adopt a similar one the following day when in formal convention mode.[71]

The delegates then considered article XI, section 10, which dealt with county debts. James Kelly urged that counties simply be forbidden to incur debts, but George Williams disagreed. The pay-as-you-go doctrine "sounded well," he agreed, but it "could not always be reduced . . . to practice." If the constitution contained such a rigid prohibition, "the necessity of the age would force us to violate it, or

[69] *Id.* at 193.

[70] Young, *supra* note 14, at 269; *see generally* A. JAMES HEINS, CONSTITUTIONAL RESTRICTIONS AGAINST STATE DEBT (1963).

[71] THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 268–72; *see also* Burton 3, *supra* note 5, at 325–29. The delegates' usual procedure was to consider each draft article first in "committee of the whole," presided over typically by the chair of that article's drafting committee. Then, after returning the article to the drafting committee, with amendments if any, the delegates would consider it again in "convention" mode. *See, e.g.*, Burton 1, *supra* note 5, at 471–72.

call another convention and abrogate it." In the end, the delegates limited county debt to $5000.[72]

Finally was the matter of *state* debt, in article XI, section 7. William Packwood moved to prohibit such debt altogether, which motion lost by an unrecorded vote. Then, following a series of various other unsuccessful motions, the delegates decided to limit state debt to $50,000, "except in case of war, or to repel invasion or suppress insur[r]ection."[73] They also prohibited the state, in section 8, from assuming debts of "any county, town, city or other corporation w[h]atever," unless, again, to "repel invasion suppress insurrection or defend the State in war."[74]

The delegates even thought it necessary to cement salaries into the constitution. On September 1, Clackamas County's William Starkweather moved to set the governor's salary at $1200, the secretary of state's at $1000, and a supreme court justice's at $1500. The delegates tabled that motion. Two weeks later, Delazon Smith moved $1500 for governor, and the debate began again.[75] William Farrar contended that in his county, Multnomah, "no man could be found who would pay more than $1,000" to a governor, and "few who would pay that"; he suggested $500.[76] Other delegates, including Thomas Dryer also from Multnomah, preferred $2000 or $2500, with Dryer calling the delegates' obsession with low salaries "poor economy" for the new state. No "competent man" would accept the governorship for less than $1500. California paid its governor $10,000, and only Rhode Island and Vermont paid as little as $1500.[77]

Delazon Smith responded, in typical Lion-of-Linn fashion, "Why quote Rhode Island here? It [is] not as large as Linn County." Besides, a "Yankee in that country . . . would make a dollar go farther than an Oregonian could $20." A New Englander could "live on cohogs and oysters about as cheaply as our Indians."[78] Eventually, Smith's $1500 motion lost, 20–26; his $1400 motion then lost, 21–25; his $1300 motion lost also, 23–24; and the delegates decided finally

72 THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 268–72; *see also* Burton 3, *supra* note 5, at 336–39.

73 Burton 3, *supra* note 5, at 330.

74 *Id.* at 333.

75 THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 331.

76 *Id.* at 369.

77 *Id.*

78 *Id.* at 370.

that day to pay their governor and secretary of state each $1250 a year. The next day, they raised that figure to $1500, with the state treasurer to receive $800.[79]

A similar debate occurred regarding the salary of supreme court justices. James Kelly proposed $2000, saying anything less would draw only underemployed "pettifogger[s]" to the bench. Once again William Farrar and others objected, contending that $1200 would be adequate. Of all people, treasury "bulldog" Frederick Waymire came to the rescue here:

> Mr. Waymire said he had been called the bulldog of the treasury in the legislature, and was the advocate of low salaries, but they . . . [were] so low now that he was ashamed to look at the figures. What sort of judges would you get for $1,200 or $1,500? You might get "weeping Jeremiah" in Clackamas, and Old Thornton above, and a couple of others like them, but who would not be ashamed to go into such a court. And you are going to entrust your rights with such men. Let us pay $2,000 or $2,500 and get good and competent men.[80]

So $2000 prevailed for supreme court justice, barely, 24–21.[81]

C. Race

The racial attitudes of most early white Oregonians were pretty deplorable, at least to modern eyes. Even though the region had very small non-Indian minority populations until nearly 1880, an early and frequent concern among whites was to exclude as many such persons as possible from the region and to deprive those who were present of any meaningful participation in community life. Many, perhaps most, early white settlers opposed slavery, but virtually all opposed even more emphatically any association whatsoever with free blacks.[82]

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[79] *Id.* at 370, 375–76. During the debate, William Watkins offered a resolution, presumably in jest, that "twelve dollars and fifty cents is an ample salary for governor; provided, that after the good old school master fashion, he boards around." *Id.* at 371. The summary "Journal" for that session reported simply, "[D]ecided in the negative." *Id.*

[80] *Id.* at 370.

[81] *Id.* In November 1910, voters amended the constitution to grant the legislature power to set judicial salaries. *See id.* at 445.

[82] Historian Gordon Dodds has summarized white attitudes this way: "[R]acial prejudice came in the baggage of the white agricultural settlers who had feared blacks in the Middle West because of economic competition, miscegenation, and the migration of idle free [n]egroes from the South." GORDON B. DODDS, OREGON: A BICENTENNIAL HISTORY 68 (1977).

The early settlers' 1843 Organic Act, while pledging "utmost good faith" toward the Indians and prohibiting slavery, restricted both the franchise and eligibility for political office to "free male descendant[s] of a white man." As virtually its first item of business the following spring, the new legislative committee excluded blacks and mulattoes from the region, upon pain of "not less than twenty nor more than thirty-nine stripes" every six months.[83]

The first *territorial* legislature, in 1849, also excluded blacks from Oregon, rationalizing in the bill's preamble that because the "people" were "in the midst of an Indian population," it would be "highly dangerous" to allow blacks to live here: they would stir up "feelings of hostility against the white race."[84] A section of the 1854 civil procedure code barred blacks and Indians from testifying in any action brought by or against a white person. And an 1857 law required Chinese miners to obtain monthly two-dollar licenses, a requirement broadened the following year to include all Chinese buying or selling goods.[85] Even Chief Justice George Williams,

[83] The full text of the 1843 Organic Act appears in *The Oregon Archives, 1841–1843*, 60 OR. HIST. Q. 211, 256–62 (David C. Duniway & Neil R. Riggs eds., 1959). The settlers carried forward several of its terms, including those pledging good faith toward the Indians and prohibiting slavery, from the 1787 Northwest Ordinance. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (1789). They substituted "free male descendant of a white man" for the first-draft language "free white male," apparently to grant political rights to sons of white male settlers with Indian wives.

In December 1844, the legislative committee substituted for corporal punishment a procedure for hiring out apprehended free blacks to whomever agreed to remove them soonest from Oregon. *See* J. HENRY BROWN, BROWN'S POLITICAL HISTORY OF OREGON 133–34 (1892). Most historians agree that no one even actually enforced the Exclusion Act, and in any event, the legislative committee repealed it in 1845. *Id.*; CAREY, *supra* note 6, at 342.

Several other states and territories, including Illinois, Indiana, Ohio, Michigan, and Iowa, also passed such laws, either excluding blacks altogether or admitting them only with certified proof of free status and large bonds guaranteeing good behavior. *See* EUGENE H. BERWANGER, THE FRONTIER AGAINST SLAVERY: WESTERN ANTI-NEGRO PREJUDICE AND THE SLAVERY EXTENSION CONTROVERSY 30–51 (1967); LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860, at 66–74 (1961).

[84] 1851 Statutes of a General Nature Passed by the Legislative Assembly of the Territory of Oregon 181–82. Any black apprehended, save those few already present in 1849, was to be ordered removed; if present and apprehended again, he or she was to be "fined and imprisoned at the discretion of the court." *See generally* MCLAGAN, *supra* note 16, at 23–24; *see, e.g.*, Taylor, *supra* note 34, at 163–64.

[85] 1856–57 Or. Laws 13–17 (1857); 1857–58 Or. Laws 48–49 (1858). For California antecedents of the anti-Chinese laws, see ELMER CLARENCE SANDMEYER, THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 34, 41–45 (1939).

author of *Holmes v. Ford*, which freed three slave children,[86] expressed occasionally strong prejudices against nonwhites. In an opinion, he referred to Indians as "drunken savages" and, in his "Free State Letter," to blacks as "naturally lazy" and to black slaves as "ignorant and degraded."[87]

As described earlier,[88] by 1857 the slavery issue was radioactive throughout the territory. Most constitutional convention delegates, however, shared an understanding with their constituents that the voters themselves, and not the delegates, would decide whether Oregon would enter the Union a free or a slave state. Still, throughout the convention, issues of slavery and race never were far from the delegates' minds, as David Johnson has written:

> The issue of race, despite preconvention agreement to leave slavery to the voters, intruded time and again, in the discussion of the schedule, bill of rights, rights of suffrage, and miscellaneous provisions.[89]

Jesse Applegate was the first to raise the slavery issue, introducing a resolution the second day to declare all discussion of it "out of place and uncalled for." He reminded delegates that the vast majority of them had been elected on the understanding that the people, not the delegates, would decide the question, so any discussion of it would be both pointless and likely to "engender bitter feelings among the members of this body."[90]

Most delegates were unpersuaded, however. Delazon Smith agreed that the voters should decide the issue ("I would as soon sever my right hand as to vote for a constitution that would either inhibit or adopt slavery here"), but he refused to "put a padlock upon my lips or upon the lips of any other gentleman."[91] Thomas Dryer concurred with Smith for once, charging that some who favored such a "padlock" were hoping to enhance their own political prospects in the new state by avoiding the slavery issue. Dryer wanted "no man to

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86 *See supra* note 34 and accompanying text.

87 United States v. Tom, 1 Or. 26, 28 (1853); OREGON STATESMAN, July 28, 1857, at 1, *reprinted in The "Free-State Letter" of Judge George H. Williams*, 9 OR. HIST. Q. 254, 261, 268 (1908). For more on the letter, see *infra* note 171.

88 *See supra* notes 16–25 and accompanying text.

89 JOHNSON, *supra* note 2, at 174. Historian Robert Johannsen concurred with this judgment: "Freedom and slavery were the only questions which excited the least interest among the [delegates]." JOHANNSEN, *supra* note 5, at 44.

90 THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 79–80.

91 *Id.* at 80.

steal a senatorial robe on this floor by dodging the nigger question." Discussion of Applegate's resolution continued "ad infinitum," the *Oregonian* reported, "until a late hour."[92]

The following day, the delegates postponed the "padlock" resolution indefinitely and never returned to it. Miffed apparently, Applegate took very little part in convention proceedings thereafter, and ten days later he requested a permanent "leave of absence." Cyrus Olney spoke for many delegates, it seems, when he opposed such a leave because the request originated in a "contempt of this body and a dislike of its proceedings." Applegate's leave request failed 6–46, so he simply went AWOL for most of the rest of the convention.[93]

The slavery question then lay dormant for three weeks. However, a few delegates from around Portland apparently had committed to strive for a free-state constitution.[94] So, one week before adjournment, John McBride from Yamhill County moved to add the following language to article I, The Bill of Rights: "There shall be neither slavery nor involuntary servitude within the state, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted." William Farrar called the question immediately, and

[92] *Id.* at 86, 88.

[93] *Id.* at 208. Contemporary observer T.W. Davenport, writing years later, thought Applegate's resolution "strange" given the widespread agreement that convention delegates would leave the slavery issue to the voters. There was "no accounting for it," unless Applegate, a "noted anti-slavery man," feared that a "trick would be played, as in Kansas, and slavery [would] be forced upon the people of Oregon without their consent." T.W. Davenport, *The Late George H. Williams*, 11 OR. HIST. Q. 279, 280 (1910).

Applegate, from Kentucky via Missouri, moved west partly to escape unfair economic competition from slaveowners. Settling in the southern Willamette Valley, he was active politically for a time and became known as the "Sage of Yoncalla" for his reflective, wide-ranging correspondence. In later life, as family tragedies and financial reversals haunted him, he turned bitter and quarrelsome. *See, e.g.*, Samuel T. Frear, Jesse Applegate: An Appraisal of an Uncommon Pioneer (June 1961) (M.A. thesis, University of Oregon) (on file with the University of Oregon Library); Abner S. Baker III, *Experience, Personality and Memory: Jesse Applegate and John Minto Recall Pioneer Days*, 81 OR. HIST. Q. 229 (1980).

[94] David Logan stated during debate on the Applegate resolution that some counties, such as Washington and Yamhill, had elected delegates "with the express understanding that they shall go for a free state constitution at all events." THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 84. T.W. Davenport concurred: "John R. McBride had promised his constituents that he would exert himself to place a clause in the constitution prohibiting slavery." Davenport, *supra* note 95, at 280.

McBride's motion failed 10–40, with virtually no support other than Portland-area Whig delegates like Thomas Dryer.[95]

On race-related questions other than slavery, the delegates were more united. Halfway through the convention, Luther Elkins from Linn County offered a resolution prohibiting free negroes and mulattoes from "coming into or settling in the state." That resolution, which the *Oregonian* headlined "The Nigger Question," surely would have passed by a large margin, but when George Williams and Delazon Smith responded that virtually all delegates intended to submit that question also to the voters, Elkins withdrew it.[96]

Article I, section 34, as reported initially by the Bill of Rights Committee, granted to resident foreigners property rights equal to those of U.S. citizens. Matthew Deady moved successfully to insert "white" before "foreigners." Article II (Suffrage and Elections), section 1 read as reported, "All elections shall be free and equal." Deady wanted to know what "free" meant; Delazon Smith enlightened him that it "did not mean Chinese or niggers," and that the section was "sufficiently explicit" as drafted.[97]

Article II, section 2 then restricted suffrage to white males, and section 6 reaffirmed that restriction emphatically: "No Negro, Chinaman, or Mulatto shall have the right [of] suffrage." In the debate on section 6, Deady moved to substitute "No persons, other than those of the pure white race, shall have the right of suffrage." When David Logan questioned whether a "quarter-blood negro" would be entitled to vote under that language, Deady moved to add the word "pure" before "white." According to the *Oregonian* report, "some gentleman" then moved to insert the word "Simon" before "pure" (!), and Deady's substitute language failed. Finally, near

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[95] THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 328. Davenport made the interesting point when describing this vote that, had it passed, the antislavery cause nationally might well have suffered:

> Likely Mr. McBride fulfilled his promise to his constituents in opposition to his better judgment, for to have grafted such a clause in the body of the instrument would have turned every pro-slavery voter into an opponent of the constitution as a whole—would have certainly insured its defeat at the polls and kept a free state out of the Union when the political strength of a free commonwealth was badly needed to withstand the forces of rebellion. So it may be seen that any diversion from the well understood, popular course, would have been disastrous to the cause of both union and liberty . . . .

Davenport, *supra* note 96, at 280–81.

[96] THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 266–68.

[97] *Id.* at 317–18.

convention's end, William Watkins from Josephine County urged an addition to article XV ("Miscellaneous") to prohibit Chinese arriving in Oregon after 1857 from owning real estate or holding or working a mining claim. That addition passed, 29–16.[98]

On education, the delegates were somewhat more tolerant and inclusive. During a discussion of article VIII (Education and School Lands), David Logan moved to insert "white" before "children" in the description of who should attend common schools; he said he could "wring in a nigger or an Indian under the provision as it stood." That motion prevailed initially, but later the delegates deleted the sentence altogether.[99]

John Watts moved then to insert "white" before "children" in *another* section of the same article, but that motion failed 20–21 after John Peebles spoke on behalf of "many voters in his county [Marion] whose children had Indian blood." Those voters "paid taxes, and their children ought to enjoy the benefits of common schools."[100]

Three days before adjournment, during a discussion of the black-exclusion referendum to be submitted to the voters, William Watkins moved to add Chinese to the prohibition. If Chinese immigration into southern Oregon continued, he urged, "in five years no white man would inhabit it" because whites "could not compete" with Chinese working for $1.50 or $2 a day.[101] Moreover, "if there were any class of thieves who understood their profession thoroughly it was the Chinamen."[102]

Some delegates expressed support for the *idea* of excluding Chinese as well as blacks from the new state, but wanted either to pose that question in a separate referendum or leave it to the legislature. Matthew Deady, for example, saw "no reason for making a difference between Chinamen and negroes." In fact, the "negro was superior to the Chinaman, and would be more useful." Thomas Dryer also favored exclusion, saying he would vote to exclude "negroes, Chinamen, Kanakas, and even Indians," because associating with those races led to "demoralization" of whites.[103] Even George Williams, author of both *Holmes v. Ford* and the influential "Free

98 *Id.* at 316–24, 369, 371, 375.

99 *Id.* at 331.

100 *Id.*

101 *Id.* at 361.

102 *Id.* at 362.

103 *Id.*

State Letter," urged delegates to "consecrate Oregon to the use of the white man, and exclude the negro, Chinaman, and every race of that character."[104]

The Chinese had but one reported defender: Frederick Waymire favored allowing them into the state because they made "good washers, good cooks, and good servants." Eventually Watkins withdrew his motion, offering a substitute the following day that prohibited any "Chinaman" entering the state after 1857 from owning real property or holding or working a mining claim. That substitute passed, 30–16, and became article XV, section 8.[105]

D. The State's Boundaries

The original "Oregon Country" was a vast region, stretching from the Rockies to the Pacific and from the 42nd parallel (California's northern border) northward indefinitely, or at least to 54° 40′ of north latitude. Thus, it included all of present-day Oregon, Washington, and Idaho, plus parts of Montana, Wyoming, and British Columbia.[106]

In 1848, when Congress declared Oregon an official U.S. territory, it retained three of those expansive boundaries but, by implication, set the northern limit at 49°, pursuant to the 1846 treaty with Great Britain.[107] Then in 1853, Congress created Washington territory, locating Oregon's northern boundary as the Columbia River from its mouth upstream until it intersected the 46th parallel (near Fort Walla Walla), then eastward along that parallel to the Rockies' summit.[108]

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[104] *Id.* On *Holmes v. Ford*, see *supra* note 34 and accompanying text. On the "Free-State Letter," see *infra* text at note 171.

[105] THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 362–69. For more details, including editorial and voter criticism of section 8, see Burton 3, *supra* note 5, at 386–89.

[106] 29 BANCROFT, *supra* note 6, at 1; CAREY, *supra* note 6, at 674–75. At various times, Great Britain, Russia, Spain, and France all claimed all or part of that region. *See generally id.* at 417–65; CLARK, *supra* note 41, at 13–56.

[107] Act of Aug. 14, 1848, § 15, ch. 177, 9 Stat. 323: "[A]ll that part of the Territory of the United States which lies west of the summit of the Rocky Mountains, north of the forty-second degree of north latitude . . . ." For more on the territorial bill, and on Oregon generally during the territorial decade, see 29 BANCROFT, *supra* note 6, at 755–83; CAREY, *supra* note 6, at 466–520.

[108] Act of Mar. 2, 1853, Stat. 172, ch. 90 (1853): "[A]ll that portion of the Oregon Territory lying and being south of the forty-ninth degree of north latitude, and north of the middle main channel of the Columbia river, from its mouth to where the forty-sixth degree of north latitude crosses said river near Fort Walla Walla, thence with said forty-sixth

Several convention delegates, however, arrived at Salem intending to alter Oregon's territorial boundaries in one way or another. Early in the convention, the Committee on Boundaries proposed the following (in paraphrase): beginning where the 42nd parallel intersects the Pacific; northward along the Pacific to the mouth of the Columbia River; eastward up the Columbia to the mouth of the Snake River; southward up the Snake to the mouth of the Owyhee River; due south from there to the 42nd parallel; and back along that parallel to the Pacific.[109] The two notable features of that proposal were (1) it defined the state's eastern boundary as the Snake and Owyhee Rivers rather than the summit of the Rockies, and (2) it would have included within the new state a portion of what by then was Washington territory: the triangular area north of the 46th parallel and south of the Snake, the so-called "Walla Walla Valley," consisting today of Walla Walla, Columbia, Garfield, and Asotin counties in Washington.[110]

Delegate C.R. Meigs urged instead that the state's eastern boundary be established at or near the summit of the Cascades. Thomas Dryer rose quickly in opposition to that idea, pointing out that it would reduce Oregon's size by two-thirds, and charging that it was simply an effort by eastern Oregonians to realize their own "high hopes of becoming governors, judges, and all that sort of thing."[111]

Delazon Smith opposed also, characterizing the Meigs amendment as "madness in the extreme." Settlers already had appropriated much or all the arable land west of the Cascades—the Willamette, Umpqua, and Rogue Valleys—so without the vast territory lying east of the Cascades, the new state's population would remain essentially constant "for many years to come."[112] La Fayette Grover opposed next, by offering size comparisons. Oregon west of the Cascades consisted of only about 23,000 square miles, compared to 60,000 in Iowa, 64,000 in Missouri, and 57,000 in Florida. Moreover, most of the 23,000 were either mountainous or otherwise nonarable. "We

degree of latitude to the summit of the Rocky [Mountains]." *See generally* CAREY, *supra* note 6, at 490–91; EDMOND S. MEANY, HISTORY OF THE STATE OF WASHINGTON (1909).

109 THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 117.

110 *Id.* at 30.

111 *Id.* at 148–49.

112 *Id.* at 148–50. Smith, however, also opposed the committee's own proposal, being "quite satisfied" that including a portion of Washington territory would prove an impediment to Congressional approval, and hence to statehood. *Id.*

would make a very small state," he contended, with only about 8000 square miles of truly arable land.[113]

Meigs responded that (1) "great natural boundaries" like the Cascade Mountains "are to be observed" in cases like this; and (2) his constituents east of the Cascades preferred to be in "vassalage" to the federal government rather than to western Oregonians. He acknowledged, however, that he "[stood] alone" on the matter, unable to convince even the delegate who had promised to second his proposed amendment. When the time came finally to vote, the following day, only Meigs himself and Matthew Deady voted yes, while forty-nine delegates opposed.[114]

There also was the matter of the new state's *southern* boundary. During initial debate on the Meigs amendment, William Watkins revived preconvention efforts to lop off certain southern Oregon counties so they could join with counterparts in northern California to create the (pro-slavery) territory of Jackson.[115] President Deady declared Watkins's amendment out of order at that time, but Perry Marple from Coos County reintroduced it two days before adjournment. By that time, delegate tempers were shortening. David Logan, nasty at times and fond of drink, moved to limit the lop-off to Coos County, stating he was "satisfied this convention would vote unanimously to set off Coos county . . . provided its member here would go with it." The delegates adopted Logan's amendment, "unanimously" according to the *Statesman*'s report, but then the main Marple proposal failed, presumably by a large margin.[116]

The more serious boundary question was what to do in the northeast. Most delegates preferred certainly to include in their new state the area lying south of the Snake River that, inexplicably to them, Congress had given to Washington territory in 1853. La Fayette Grover contended also that Walla Walla Valley residents themselves preferred to become Oregonians. He recounted a

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113 *Id.* at 153.

114 *Id.* at 155–57, 162.

115 This "popular-sovereignty" proposal, as reported in the *Oregonian*, read (somewhat ungrammatically) as follows:

> That whenever the majority of the people south of the Callapooia mountains and between Umpqua and Rogue River form a new organization, by forming a new state of the northern portion of California and southern portion of Oregon, that they be permitted to so do.

Id. at 157.

116 *Id.* at 366.

conversation with an "intelligent settler" from there who had explained that "all their business relations would be with the state of Oregon" and that the existing boundary between Oregon and Washington territories divided the valley unnaturally in half.[117]

However, most delegates also shared Delazon Smith's concern that any attempt in the constitution to annex part of Washington territory might jeopardize Congressional approval of statehood. So, in the end, the delegates voted 30–20 to approve the committee's proposal, but to add a second paragraph to the boundaries article, inviting Congress, if it wished, to "make the said northern boundary conform to the act creating the territory of Washington."[118] Congress accepted the invitation.[119]

E. Corporations

American attitudes toward corporate enterprise always have ranged from worshipful through suspicious to highly critical. Early state governments typically granted corporate charters for specific developmental activities, like operating a mill or a bank, or building a bridge or a turnpike. The various public subsidies often accompanying such charters—land grants, loans, eminent domain powers, tax exemptions, liability limits, and the like—seemed justified to many observers at the time by the firms' fundamentally "public" nature.[120]

By Andrew Jackson's time, however, the special-privilege nature of many such arrangements had begun to appear more clearly. Corporate enterprise, especially banks and railroads, had become by then more demonstrably *private* in nature, created not to perform a community service but instead to produce private wealth. Moreover, as the nineteenth century progressed, railroad and other corporations began increasingly to wield unprecedented economic and political

117 *Id.* at 153–54.

118 *Id.* at 363, 366. Thomas Dryer, among others, opposed inviting Congress to deprive Oregon once again of the Walla Walla Valley: "By some hocus pocus we [were] robbed of a portion of our territory, and the little one-horse territory of Washington was created." Every man in that valley "who did not hold office, or expect to, would today prefer to be reattached to Oregon." *Id.* at 366.

119 Oregon Admission Act of Feb. 14, 1859, ch. 33, 11 Stat. 383 (1859).

120 *See generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 120–39 (3d ed. 2005); Harry N. Scheiber, *Government and the Economy: Studies of the "Commonwealth" Policy in Nineteenth-Century America*, 3 J. INTERDISC. HIST. 135 (1972).

power, often to the detriment of farmers, workers, customers, and competitors. As Lawrence Friedman has written of mid-nineteenth century railroads, "In the space of one short generation, engines of hope and prosperity turned into roaring, smoking black devils."[121]

So by 1857 a great many Americans, including many Oregonians, were seriously skeptical about the heralded advantages of corporate enterprise. They had begun to resent, in part, the unprecedented wealth corporations seemed to be creating for some at the expense of many. Convention delegates debated at length whether to address this perceived injustice, partially at least, by making corporate shareholders responsible individually for the firm's debts.[122]

The committee drafting article XI (Corporations and Internal Improvements) proposed initially making shareholders "individually liable for labor performed" for the corporation and liable "to the amount of their [shares of] stock" for all other corporate debts. Frederick Marple opposed that language, fearing it would prevent investment in the state, particularly outsider investment in a railroad connecting the Willamette Valley with San Francisco:

> Suppose a railroad to be undertaken from Portland to California, it must be undertaken principally by capitalists out of the country. . . . If they find . . . in the constitution of your state that their individual property is liable for the debts and liabilities of that company . . . will it not have a tendency to prevent the investment of capital and thus retard the great enterprise?[123]

Others concurred. S.J. McCormick from Multnomah offered an amendment that shareholder liability not exceed the "whole amount

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121 FRIEDMAN, *supra* note 121, at 334. (It amuses me that Professor Friedman writes such sentences while teaching at Leland Stanford, Jr. University.) *See generally id.* at 223–25, 332–40; JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW (2001); MARVIN MEYERS, THE JACKSONIAN PERSUASION: POLITICS AND BELIEF 3–15, 101–20 (2d ed. 1960).

122 In addition, the delegates (1) required corporations to be formed under "general laws" rather than "special laws" for legislative favorites and (2) prohibited corporations from taking any person's property "without compensation being first made." OR. CONST. art. XI, §§ 2, 4. George Williams praised the "general laws" requirement as follows:

> While I am willing that associated capital should be concerned in the improvement of the country, I am desirous to take the power from the legislature to incorporate a certain number of men and give them certain rights and privileges which are not granted to other persons.

THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 234.

123 THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 232.

of stock subscribed for," and James Kelly proposed setting the limit at "double the amount of their stocks."[124]

Matthew Deady, on the other hand, was no fan of corporations, and "not particularly anxious to encourage this kind of enterprise" in the new state. They often preyed on honest, unsuspecting farmers:

> How are these companies got up? . . . [G]enerally . . . by some smart gentlemen running round among the farmers and representing to them some glittering schemes where hundreds of thousands of dollars may be made. They get the farmers to subscribe; they get themselves elected managers, and they keep managing the concern until everything connected with it is managed into their own pockets or gone to ruins.[125]

Moreover, Deady saw "no good reason" to distinguish between debts for labor performed and all other corporate debts. He thought a person who earned his money by labor, like "sawing logs," then lent some of that money to a corporation was just as worthy as one who actually labored for the corporation.[126]

George Williams agreed essentially, pointing out that unless he had "misread history," it showed that "all corporations take care of themselves." The point, therefore, of any constitutional language relating to them was to protect the "rights of the people from these soulless and irresponsible bodies called corporations." Williams also thought, however, the language reported was correct in preferring labor claims. The type of case Deady had put would be "rare," whereas every stockholder "ought to be individually liable to the laborer for the work which he performed for the corporation." Labor claims, after all, were "comparatively small," and when a corporation fails, typically the "incorporators remain rich, and the laborer is cheated out of his honest dues." Besides, shareholder liability to laborers would cause "these old farmers" to be "a little careful" when subscribing corporate stock, which, in turn, would help spare Oregon from "this reckless spirit of speculation which has cursed almost every new state in the Union."[127]

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124 *Id.* at 233.

125 *Id.* at 233–34.

126 *Id.* at 233. Later, Deady offered a similar example, urging there was no sensible distinction between a "poor man who works to sustain himself and his family" and a "poor widow who, to support herself and her family, keeps shop and brings wool in to sell to the corporation." *Id.* at 240.

127 *Id.* at 234–36.

Frederick Waymire also cared little for corporations. The founders of the Portland Plank Road and Telegraph Company had "fooled him out of $100" and simply disappeared, leaving telegraph wires "trailing along the road so that our wives can't get to church without having their horse's legs tangled in them." He himself had been "going home from the mill one night and the first thing he knew his old horse was standing tied to a tree—tied by the telegraph wire."[128]

Reuben Boise believed it a mistake to favor labor. He had seen corporations in the East, including the Massachusetts Arms Company, whose incorporators' *modus operandi* was to "put in" the "labor" of their friends and cousins at an "enormous rate." Moreover, as Deady had urged, it was "no harder for a man to lose his labor than . . . to lose the money which he has earned by his labor," and, in any event, laborers and material suppliers already were "preferred by the (lien) laws of the land."[129]

William Watkins expressed precisely the opposite view, agreeing with delegates Marple and McCormick. Watkins had "no objection to corporations"; indeed, he "liked to live in a country of plank roads and telegraphs, canals and railroads." Look at all the wealth accumulated in the "old state of Massachusetts," he urged, enough to "buy up a half dozen of the smaller states of the Union." In his view, it was the "genius of our age to incorporate," the very "foundation of the religious and benevolent and natural progress of the United States and of the world."[130]

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[128] *Id.* at 237.

[129] *Id.* at 238. Boise echoed Deady in explaining the typical strategy of corporate organizers when raising capital from farmers:

> They are told if they sign, that it will raise the price of real estate—a telegraph will be the forerunner of a railroad . . . [and will] net them 20 per cent on the amount they subscribe, besides the value to the country and the increase upon real estate.

Id.

Reuben Boise was a prominent early Oregonian, serving a total of thirty-four years on the territorial and state courts. Born on a Massachusetts farm in 1818, he graduated from Williams College in 1843, taught school for two years in Missouri, then returned to his native state to study law. He joined the Massachusetts bar in 1848, departed two years later for Oregon (by way of the Isthmus of Panama), and began practicing law in Portland. He served as a prosecuting attorney, a territorial legislator, and delegate to the constitutional convention, where he chaired the committee on article II, Legislative Department. His judicial career consisted of a year on the territorial court (1857), fifteen years on the state supreme court (1859–70, 1876–80), and eighteen years as circuit judge (1880–92, 1898–1904). *See* www.salempioneercemetery.org/ (last visited June 21, 2009).

[130] THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 242.

La Fayette Grover also objected to unlimited shareholder liability, recalling how neither of Salem's two wool-manufacturing firms had been able to raise any money initially with such a clause in their charters. An investor purchasing even a single share stood potentially to lose all he owned. Moreover, there was "no practical good" in favoring labor-related debts over others because laborers generally were paid weekly.[131]

This longest of all reported convention debates continued for hours. Luther Elkins from Linn County, who spoke rarely, favored full protection of workers. He approved the language as reported, which gave a "guarantee to the laboring man that labors with his hands, that these great monster monopolies shall not cheat him out of his honest earnings." Hector Campbell, also normally quiet, responded by pointing out that Massachusetts had had to *delete* the shareholder-liability term of its constitution when investors reacted by moving "hundreds of thousands of dollars" to other states. Campbell favored corporations, so long as they were not banks.[132]

Then voting began. The delegates first amended the report to delete the shareholder liability for laborer debts: shareholders would be liable for *all* corporate debts only "to the amount of their respective shares." Debate continued, however. Matthew Deady offered an amendment making shareholders liable without limit for all corporate debts, then proceeded to deliver a remarkable speech in support:

> I am not myself, Mr. Chairman, favorable to the creation of corporations . . . and the reason is that I do not want to encourage a fungous growth of speculators in this country. . . . Contrast your own condition with the countries that have manufactories scattered over them. They have millions of wealth, and millions of poor human beings degraded into the condition of mere servants of machinery . . . seething in misery and crime from the age of puberty to the grave. . . . Contrast [that] with the condition of your own people, breathing the pure air, with the canopy of heaven for a ventilator, and then tell me with whom is the preference?[133]

Reuben Boise agreed with his supreme court colleague, recalling a conversation with one Elihu Burrett, a Massachusetts acquaintance

131 *Id.* at 243.

132 *Id.* at 245–46. Regarding banks, see *infra* text accompanying notes 137–40.

133 *Id.* at 248–49.

who, after visiting England, informed Boise that "corporations were the ruin of humanity in Europe."[134]

The more moderate George Williams thought truth lay between the two extremes being debated. With no corporations at all, only the very wealthy could engage in any sort of large-scale enterprise. Boise's description of New England factories was, in Williams's view, "all moonshine," and adopting the Deady amendment would be "fatal . . . to the prosperity of Oregon." Ultimately that amendment failed, 13–36.[135] Further, often repetitive motions and discussion continued intermittently for two more days, until eventually the majority decided on the following, relatively pro-development language:

> The stockholders of all corporations, and joint stock companies, shall be liable for the indebtedness of said corporation to the amount of their stock subscribed, and unpaid, and no more.[136]

F. Banks

Many early Oregonians shared the strong agrarian hostility toward banks so widespread by 1850 in much of the Midwest and South. They had witnessed, if not experienced, the evils of unregulated wildcat banking, including especially the floods of inadequately secured banknotes circulating as currency. Many also subscribed to a deeper critique that banks, even more than corporations generally, were harbingers of the economic, social, and moral instability that seemed to accompany the growth of industry and finance.[137]

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[134] *Id.* at 250. Boise continued,

> You take any girl of 18 and put her into any manufacturing establishment in the state of Massachusetts, and work her as they work them there from bell to bell—nearly 18 hours . . . . I have heard it frequently said . . . that there was no girl that ever went into these factories and remained eight years who did not come out with a constitution broken down, and a mind ruined forever.

Id. at 250–51.

[135] *Id*. at 252–59.

[136] OR. CONST. art. XI, § 3. Burton 3, *supra* note 5, at 304–06, contains a useful chart describing the several amendments proposed and their fates.

[137] Before the Civil War, American banking had been largely unregulated and, outside the Northeast, chaotic. Many "storefront banks" in the Midwest and South were "little more than legal counterfeiting shops," issuing large quantities of undersecured banknotes that lost value quickly in even a mild recession. IRWIN UNGER, THE GREENBACK ERA: A SOCIAL AND POLITICAL HISTORY OF AMERICAN FINANCE, 1865–1879, at 17 (1964); *see generally* BRAY HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION

The Panic of 1837 caused many states to begin regulating banks more extensively. During the next two decades, the most common regulations included prohibiting legislative bank charters, other forms of direct or indirect state aid, and banknote issue. Finally, in 1863, Congress enacted a comprehensive system of federal bank regulation, and two years later it taxed state banknotes out of existence altogether.[138]

Virtually all delegates to Oregon's constitutional convention disliked and distrusted banks. The committee on Corporations and Internal Improvements initially proposed language prohibiting the legislature from establishing "any bank or banking company or moneyed institution whatever" with the privilege of "issuing or putting in circulation any bill, check ticket certificate promisory note, or other paper . . . to circulate as money."[139]

George Williams, a relative moderate on shareholder liability, was among the most adamantly opposed to certain bank practices in the new state. He moved to add language prohibiting *any* bank (whether created by the Oregon legislature or not) from issuing any form of "currency." Frederick Marple opposed that broader language, however; like others, he disliked the then-current "system of banking," but because states certainly "would have it," banks should be established and regulated by law. The Missouri system, featuring a state bank, "worked to a charm," he felt. Moreover, "[m]en had a right to engage in what business they chose," and any effort to "keep banks out of the state would prove futile and against the [C]onstitution of the United States." Still, Williams's amendment passed, 31–20, and found its way into article XI, section 1.[140]

TO THE CIVIL WAR (1957). For Oregon banking history, see O.K. BURRELL, GOLD IN THE WOODPILE: AN INFORMAL HISTORY OF BANKING IN OREGON (1967).

138 National Currency Act, ch. 58, § 47, 12 Stat. 665 (1863); Act of March 3, 1865, ch. 78, 13 Stat. 469, 484 (1865); *see generally* authorities cited *supra* note 118; LEONARD C. HELDERMAN, NATIONAL AND STATE BANKS: A STUDY OF THEIR ORIGINS (1931); MARGARET G. MYERS, A FINANCIAL HISTORY OF THE UNITED STATES (1970).

139 *See* BURTON 3, *supra* note 5, at 295.

140 THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 274–78; *see also* Burton 3, *supra* note 5, at 296–99. Two decades later, the banking prohibition(s) generated a lawsuit that reinforces the importance of careful punctuation. The language approved at third reading read as follows:

> The Legislative Assembly shall not have the power to establish, or incorporate any bank or banking company, or monied institution whatever nor shall any bank company, or institution exist in the state with the privilege of making issuing or putting in circulation any bill check certificate promissory note or other paper or the paper of any bank company or person to circulate as money.

G. Do We Need a Bill of Rights?

Finally, one of the convention's earliest and lengthiest debates was whether to include a bill of rights in the constitution. Delazon Smith was the most vocal proponent of doing so, noting that virtually every state constitution had one, whether "designed as a bill of rights or [as] a simple article of the constitution." He favored particularly the rights enumerated in the Indiana Constitution, which were "gold refined" and "up with the progress of the age." The latter characteristic was important to Smith because "[m]any changes have taken place since our fathers first formed constitutions."[141]

Curiously, it was Chief Justice George Williams who spoke in opposition to a separate bill of rights. He contended that a bill of rights would be little more than a "Fourth of July oration," tending to create "very much legislation and contention" as they had done "in the older states." He preferred instead to insert any important constitutional safeguards into the various articles to which they related.[142]

Smith responded to the "Fourth of July" reference with his usual eloquence:

> I remember the time very well, when . . . a poor man, because he hadn't a dollar in his pockets, was sent to the county jail. And I remember a great many other things which people held entirely

However, the final, enrolled version contained (in addition to needed commas) a *semicolon* following "whatever" in line 2. That semicolon appeared to create *two* prohibitions—one against Oregon-incorporated banks and one against any bank within the state issuing paper money. *See id.* at 296.

"In late 1879, however, five [Oregonians] incorporated the Hibernian Savings and Loan Association. The Multnomah County district attorney quickly invoked Article XI § 1 to challenge the action, and *State v. Hibernian Savings & Loan Ass'n*, 8 Or. 396 (1880), reached the [supreme] court the following year." Justices James Kelly, Reuben Boise, and Paine Page Prim—all former constitutional convention delegates—rescued Hibernian's corporate existence by substituting a comma in place of the semicolon. Justice Kelly consulted Matthew Deady, by then Oregon's federal district judge, and together they concluded (with the help of files Deady had retained from the convention) that the semicolon was a "clerical mistake"; the delegates had intended merely to ban banks that issued circulating currency of any sort. *See generally* Ralph James Mooney & Raymond H. Warns, Jr., *Governing a New State: Public Law Decisions by the Early Oregon Supreme Court*, 6 LAW & HIST. REV. 25, 49–50 (1988) (citation added); 1 PHARISEE AMONG PHILISTINES, *supra* note 28, at 300.

141 THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 101.

142 *Id.* at 76, 102–03.

> republican and right, which subsequent experience and the progress of the age taught us are blots upon our national escutcheon.[143]

Indiana recognized this "progress" in its own bill of rights:

"She nobly reasserts what our fathers said about the natural rights of man to the pursuit of life, liberty and happiness [then] proceeds to assert the civil rights of the citizens as ascertained in . . . 70 years of progress."[144]

Williams answered once again, also at length, characterizing his disagreement with Smith as primarily a "question of form." However, he also warned that certain "black republican" language commonly included in a bill of rights might result in unintended, pernicious consequences:

> Lately there has been a convention to frame a constitution in the state of Iowa, and they put in a long bill of rights, a sort of parody on the Declaration of Independence, asserting the natural equality of mankind, and already the papers in the state are fighting and quarreling about its meaning. Some say that it means that negroes are equal with whites.[145]

Eventually, an unrecorded majority, convinced either by Smith and Shattuck or by Frederick Waymire's more playful argument, voted to create a separate bill of rights.[146]

The actual *content* of the bill of rights elicited few serious debates. The drafting committee took nearly all its thirty-three sections verbatim from the Indiana Constitution, and much of it could be found, in one form or another, in the Federal Constitution as well: (male) equality, freedom of and from religion, freedom of expression

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143 *Id.* at 102.

144 *Id.* Erasmus Shattuck of Washington County, who later served twenty-one years in the state judiciary, agreed with Smith:

> [T]he history of the world teaches us that the majority may become fractious in their spirit and trample upon the rights of the minority; . . . if the individual citizen is to be protected . . . there must be restrictions put into this constitution. . . . I am in favor of all the essential principles of a bill of rights.

Id.

145 *Id.* at 102–03.

146 *Id.* at 105. Waymire's stated reason for favoring a separate bill of rights was this: "Put a good bill of rights right in the beginning of the constitution, and the voters would read that, and vote for the whole constitution without ever reading the constitution at all. (Laughter.)" *Id.*; *see generally* Burton 1, *supra* note 5, at 480–82.

and assembly, procedural protections for the criminally accused, jury trial in civil cases, and private-property protections.[147]

One controversial section, as reported, prohibited spending public money either for "compensation of any religious services" or to benefit any "theological institution." Delegate Hector Campbell from Clackamas County moved to strike the former prohibition, noting that it would apply even to the use of paid chaplains in the legislature. Any such ban was, in his view, "unprecedented," a "disregard of the injunctions of the New Testament," and contrary to the universal practice of American governments. Moreover, "morality and virtue" must keep pace with the era's scientific improvements because the "moral power of a nation is its greatest safeguard."[148]

Several other delegates (Marple, Kelsay, Watkins, Farrar, Boise, Dryer) agreed with Campbell that the section "went too far,"[149] but Matthew Deady offered a powerful rebuttal. He did not share the concern expressed by some that the disputed language would cause voters to defeat the constitution; or that even some delegates themselves would "arouse prejudice against this constitution" if the comprehensive ban were retained. Deady wanted to "make a constitution for which I can vote myself."[150]

On the merits, Deady instructed the delegates once again on the "theory of our government":

> With [Mr. Campbell], I believe that morality and private virtue and a proper sense of dependence upon an overruling Providence are the true foundations of a nation's greatness. But, sir, what is the theory of our government upon this subject? It is that the government shall be separated from the churches, and the maintenance and administration of religion; that religious duties shall be no function of the government. . . . [T]he country contains persons of all religious denominations, as well as nonbelievers, and if you have

147 *See generally* OR. CONST. art. I; Burton 1, *supra* note 5, at 485–86 (list of sections with presumed sources). Two less familiar sections, at least to modern eyes, provided, "No law shall [grant] any title of Nobility" and "No conviction shall work corruption of blood." OR. CONST. art. I, §§ 25, 29.

148 THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 296–97. Campbell was certainly a true believer: "It was not by chance or accident that . . . liberty and independence were implanted upon our American soil;" an "overruling . . . and almighty Providence" had guided the nation through the "darkest hour of our revolution" and the "times of political turmoil that have followed," accounting even for the superiority of "our armies on the plains of Mexico." *Id.* at 297–98.

149 *Id.* at 304–05.

150 *Id.* at 303.

> religious services carried on and paid for by government, you necessarily tax all the people to support some one religion . . . .[151]

Despite Deady's eloquence, Campbell's amendment passed 24–16, but, curiously, three days later some delegates seemed to have changed their mind regarding legislative chaplains because, by a vote of 26–23, the convention added to that section the following language: "Nor shall any money be drawn from the treasury as compensation for religious services in either house of the legislative assembly."[152]

The second lengthy bill-of-rights debate concerned original section 10, regarding libel: "In all prosecutions for libel, the truth of the matter alleged to be libelous may be given in justification." Frederick Marple moved to substitute "mitigation of damages" for "justification," and Matthew Deady moved to add the proviso that truth would assist only if the alleged libel "relates to the public character of the complainant."[153]

Oregonian editor Thomas Dryer took exception to both amendments as attempts to "muzzle the free press." Deady answered that, yes, he did dislike the territory's "irresponsible public press," which was a "running sore on the community." Offended, naturally, Dryer asked Deady and the other judge-delegates how *they* would react if he called the territorial *judiciary* a "running sore on the community." After a lengthy debate, the delegates decided to delete section 10 altogether, and turned their attention to judges and juries.[154]

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[151] *Id.* at 303–04. La Fayette Grover, chair of the bill of rights committee, also defended the original language, by calling attention first to the Massachusetts Constitution requiring "towns, parishes, precincts, and other bodies politic . . . to make suitable provision, at their own expense, for . . . support and maintenance of public, Protestant teachers of piety, religion and morality":

> Under this clause great civil abuses and much tyranny grew up in Massachusetts. Laws were passed requiring that a certain portion of a man's annual income should be devoted to the support of a particular church . . . . Citizens were compelled, under penalties, to attend once a quarter upon that church . . . .

By contrast, the "late constitutions of the western states," including that of the "great state of Indiana," had, "step by step, tended to a more distinct separation of church and state." *Id.* at 302.

[152] *Id.* at 306, 330; *see also* Burton 1, *supra* note 5, at 499–507 ("Few issues were debated at such length and with such strong feeling as the question relating to paid chaplains.").

[153] THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 309.

[154] *Id.* at 310–11, 329. Moving to strike the section altogether, George Williams contended that the *prior* section "embraced all that was required." *Id.* at 310. That

Section 19, as reported, stated that in all criminal trials the jury "shall have the right to determine the law and the facts." Deady moved to substitute the following: "In all trials by a jury [civil as well as criminal, presumably] the court shall decide the law, and the jury the facts." He contended that jurors "could not be as competent as lawyers" in deciding "intricate questions of law." Here Thomas Dryer could respond in kind to Deady's earlier attack on Dryer's profession, and he did so, asserting that "12 honest, intelligent jurors were as capable of judging of the law as the judge himself." Surprisingly, Dryer's principal convention adversary, attorney Delazon Smith, agreed with him.[155]

The debate on Deady's proposed amendment carried over into the afternoon session, and according to the *Oregonian* reporter, was one of the "most interesting, lengthy and animated" of the entire convention. Ultimately, the delegates defeated the amendment 22–24, whereupon George Williams moved to add to the original section, "nor shall a judge be allowed to instruct a jury or grant a new trial!" The *Oregonian* reporter surmised that Williams's object was to "make the farce complete."[156]

By then, tempers were well frayed. Stephen Chadwick denounced the entire bill of rights as a "humbug"; Frederick Waymire said he would support the [farcical] Williams amendment if the judges, who then would "do nothing," were paid no more than $600 a year; Thomas Dryer opined that the proposed amendment was a "disgrace," and accused the judge-delegates of trying to create a "judicial monarchy." In the end, the delegates agreed on a Delazon Smith compromise proposal that the jury would determine law as well as fact, but "under the direction of the court as to law" with "right of new trial as in civil cases."[157]

section, which became article I, section 8, provided, "No 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." *See generally* Burton 1, *supra* note 5, at 512–14.

155 THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 310–13.

156 *Id.* at 310–11, 313.

157 *Id.* at 314–15.

IV
AFTERMATH

The convention concluded with three remarkable speeches and a final vote. Delazon Smith, the Lion of Linn and leader of the Democrats, reviewed virtually the entire constitution, urging its adoption. He seemed to speak not only to his fellow delegates but to the *voters* as well (". . . though I speak in this convention, I address myself to the country").[158]

According to Smith, the bill of rights responded to the "demands of humanity" and conformed to the "genius of republicanism." By establishing a system of free schools, the constitution made "liberal and abundant provision for the education of the rising generation." And including within the new state a large territory east of the Cascades would enable Oregonians to take maximum advantage of Congress's pattern of large land giveaways at statehood for education and transportation.[159]

Smith also emphasized again the various wise economies included in the constitution. Adding a fourth supreme court justice postponed any immediate need for separate trial and appellate courts; and the "amalgamated offices," low fixed salaries, and biennial rather than annual legislative sessions also would help ensure a frugal state government. He praised as well the article II "compromise" on *viva voce* voting, which granted the legislature power at any time to switch to paper ballots in popular elections (though not in legislative votes). In general, Smith urged his listeners (and readers), it was critically important for delegates and voters alike to approve the new constitution—and statehood—as quickly as possible.[160] He ended with, for him, a typical flourish:

> Sir, . . . I would vote for it a thousand times; I would labor for its adoption for the promotion of the manifold blessings which it will bring to this country, to me, and my children. I would give [a great deal] for the simple privilege of once more feeling that I am an American citizen[,] . . . that I might have the privilege of voting at national elections . . . .
>
> . . . .
>
> And, having done our whole duty, we may leave our children in the possession of a glorious boon, surrounded with the institutions of

158 *Id.* at 386–93.

159 *Id.* at 388.

160 *Id.* at 389–90, 397.

> freedom, religion and law; and as a state and a people they will stand, like the Angel of the Resurrection, clad in robes of spotless white pointing the world to Freedom and bidding it hope in God.[161]

Thomas Dryer answered Smith one final time, objecting as usual less to constitutional language itself than to what he perceived as Democratic hegemony at the convention. He had "no prepared set speech to make," and would not answer Smith directly except to point out that Smith's "transparent" purpose in speaking had been "for publication," a stump speech for personal political gain:

> Sir, there are other interests connected with the adoption or rejection of this constitution, aside from the political advancement of particular individuals in this country; there are momentous questions, sir . . . .
>
> . . . .
>
> . . . Sir, when I see gentlemen take upon themselves authority which their numerical strength alone gives them, to crush out liberty of speech and the right of thought, I am opposed to them and to their schemes.[162]

The Democrats' principal failing, according to Dryer, had been their steadfast "shirking" of responsibility on politically controversial issues, especially slavery:

> Did any man here avow his principles upon that slavery question? Was there not a studied effort to crush discussion upon the question?
>
> . . . .
>
> . . . So, too, upon the viva voce question; so upon the prohibitory liquor question.
>
> . . . .
>
> . . . I charge that there is a positive evidence of cowardice on the part of this convention . . . .[163]

So Dryer announced he would vote against the constitution, and, presumably campaign against it in the pages of the *Oregonian*.

But it was left to William Watkins, the persistently anti-Chinese delegate from Josephine County, to make the most surprising end-of-convention speech, explaining why he also would vote against the constitution:

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[161] *Id.* at 397.

[162] *Id.* at 381–82.

[163] *Id.* at 383.

> Its general features meet my approbation. That it is not expensive, that it will protect us in our lives, liberties, privileges and property, no one will doubt. But, sir, there is one article which must inevitably prevent my voting in the affirmative here. . . . I allude to that article in the schedule which provides that [if the voters so declare]: "No free negro . . . shall ever come, reside, or be within this state or hold any real estate or make any contract or maintain any suit therein."[164]

Watkins was "no abolitionist," and would not interfere with slavery wherever it already existed. But the proposed "free negro" term was different:

> The black man in my estimation has as much right to live, eat, drink, read, think, and in the various avenues of life to seek a livelihood and means of enjoyment and happiness as has the proudest Caucasian. . . . [W]hat is proposed in this constitution, sir? That no negro shall maintain any suit. Under this barbarous provision (for I can use no milder term) the negro is cast upon the world with no defense; his life, liberty, his property, his all, are dependent on the caprice, the passion, and the inveterate prejudices of not only the community at large but of every felon who may happen to cover an inhuman heart with a white face.[165]

Watkins concluded with a flourish, invoking a major Democratic icon:

> Sir, believing with Jefferson, that every human being has rights of which he can not be justly deprived, among which is protection in person and property, and believing this provision is unworthy of this convention, unworthy of Oregon, unworthy of our great empire of growing states, unworthy of our republican institutions, of the declaration of independence and the long line of ameliorations which have followed in the train of Magna Charta, unworthy of our civilization, past and future, and unworthy of our Christianity, I hereby enter my humble protest . . . .[166]

The final convention vote was 35–10 in favor of recommending the constitution to the voters, with fifteen delegates absent. Other than the two Josephine County delegates, Watkins and S.B. Hendershott, all those opposed came from Portland and surrounding counties

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164 *Id.* at 384.

165 *Id.* at 384–85. This concluding speech is so surprising of course, indeed so stunning, because it was Watkins who had proposed three days earlier adding *Chinese* to the exclusion term—and, when that failed, convinced a majority of delegates to prohibit Chinese immigrants arriving after statehood from owning real estate or owning or working mining claims. *See supra* notes 82, 85 and accompanying text.

166 THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 385.

(including, notably, Thomas Dryer and David Logan), and nearly all were free-state advocates.[167]

So, in the end, the convention delegates submitted three questions to Oregon voters: (1) whether to adopt the constitution and petition Congress to become a state; (2) if yes, whether to petition for admission as a free state or slave state; and (3) again if yes, whether to permit free blacks to enter, own real estate, and maintain legal actions within the state.[168] They scheduled the vote for six weeks hence, the second Monday in November; ordered 5000 copies of the constitution to be printed and mailed to postmasters for distribution to voters; arranged for its printing in the territory's newspapers as well; and adjourned.[169]

Newspaper debates regarding those questions, during the six postconvention weeks preceding the November vote, were relatively muted, even on the radioactive slavery issue.[170] Early in 1857, pro-slavery sentiment seemed ascendant in the territory, especially outside the Portland area. However, George Williams's "Free State Letter," published in Asahel Bush's *Statesman* three weeks before the convention, apparently convinced many Oregonians that slavery would be uneconomical in their far-west state, and would serve only to degrade free white labor.[171] In any event, Oregonians voted on November 9, 1857, as follows: (1) 7195 for statehood and 3215 against; (2) 7727 for a free state and 2645 for a slave state; and (3) 1081 for admitting free blacks and 8640 opposed.[172]

Congress, however, was in no hurry to act on the matter. Southern Senators and House members generally opposed admitting any more northern states. And some Republicans opposed Oregon statehood as well, fearing that its largely Democratic population would increase

167 *Id.* at 24.

168 OR. CONST. art. XVIII, §§ 2–4.

169 *Id.* at § 1; THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 378, 398; *see also* Burton 1, *supra* note 5, at 374.

170 "There was one remarkable feature of the slavery agitation in Oregon preceding the vote upon the Constitution, and that was the lack of agitation." Davenport, *supra* note 25, at 243.

171 The letter's lengthy text appears in *The "Free-State Letter" of Judge George H. Williams*, 9 OR. HIST. Q. 254 (1908). For summaries and assessments of its influence, see THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 32; JOHANNSEN, *supra* note 5, at 36; WOODWARD, *supra* note 7, at 116. Years later, Williams contended that following publication of his letter, the likelihood of his election at statehood to the U.S. Senate "vanished like the pictures of a morning dream." Williams, *supra* note 30, at 16.

172 THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 27.

that party's strength in Congress as well as its chance of retaining the White House in 1860. Other arguments by opponents related to Oregon's small population[173] and the infamous black-exclusion clause.[174]

In May 1858, the Senate voted 35–17 to admit Oregon, but Congress adjourned before the House could act. Finally, on February 12, 1859, Buchanan-administration allies in the House, together with other Oregon-statehood advocates, prevailed against the Republican leadership and southern extremists, 114–108. Two days later, the president signed the bill, and Oregon had achieved statehood.[175]

Oregon politics remained uncommonly turbulent for three years after the convention, as did the nation's politics generally. The first "state" legislature (elected in June 1858, well before actual statehood) selected Jo Lane and Delazon Smith as U.S. senators. However, the Democrats were dividing rapidly into "state Democrats," or "hards," led by members of the old Salem Clique and largely pro-slavery,[176] and "national Democrats," or "softs," who tended toward moderation on slavery as well as other issues. Meanwhile, the new Republican party was gaining strength, in Oregon as elsewhere, and Lane became the vice-presidential nominee on the pro-southern Breckinridge ticket.[177]

When the legislature met in September 1860, it declined to reelect either Smith or Lane to the Senate. Instead, the "National Democrats" ("softs") allied themselves with the upstart Republicans to elect one of each—Democrat James Nesmith and Republican Col. Edward Dickinson Baker, the latter newly arrived from California.[178]

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173 Congress had recently adopted 93,000 as the population apportionment for each Congressional seat, and those opposing Oregon's admission pointed out that its population was almost certainly far below that number. *See, e.g.*, THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 20, 45; WOODWARD, *supra* note 7, at 147–49; Henry H. Simms, *The Controversy Over the Admission of the State of Oregon*, 32 MISS. VALLEY HIST. REV. 355, 361 (1945).

174 Oregon is the only state ever admitted with such a clause in its constitution. National ratification of the Fourteenth Amendment in 1868 nullified the clause, but Oregon did not actually repeal it until 1926. MCLAGAN, *supra* note 16, at 158–61.

175 WOODWARD, *supra* note 7, at 147–48; Simms, *supra* note 174, at 364–70.

176 *See* JOHANNSEN, *supra* note 5, at 72.

177 WOODWARD, *supra* note 7, at 149.

178 When legislatively elected in 1858, Smith had drawn the "short" term, which expired when the then-sitting Congress adjourned, a mere month after he and Lane were sworn in. Lane drew the "long" term that expired in 1860. JOHNSON, *supra* note 2, at 279–82; WOODWARD, *supra* note 7, at 161.

Two months later, Oregon gave its three electoral votes to Abraham Lincoln, who outpolled Breckinridge and Douglas 5344 to 5074 and 4131 respectively.[179] The "political revolution" of 1860 had occurred.

V
A FEW CONCLUDING THOUGHTS

The traditional view of Oregon's 1857 constitutional convention, and of the document it produced, seems largely correct. The delegates were, by and large, cautious, prudent men who had forsaken the lure of California gold and glamour for quieter, steadier lives in Oregon.[180] As David Schuman characterized them, they and their constituents were generally a "people eschewing luxury, ostentation and growth, embracing prudence and diligence . . . sturdy yeoman farmers and small merchants, industrious, stubborn and somewhat small-minded."[181]

Similarly, the constitution that emerged was, for the most part, a conservative, frugal framework for what the delegates undoubtedly

Edward Dickinson Baker became an instant Oregon legend. Born in London in 1811, he moved with his family to Philadelphia when he was five, then to Indiana, and finally to the Illinois territory, where he studied law and joined the bar in 1830. He served in the Black Hawk War with Abraham Lincoln, and the two became lifelong friends. Lincoln named his second son Edward Baker Lincoln, and chose Baker to introduce him at his inauguration.

Baker entered politics as a Whig, serving both in the Illinois legislature and briefly in Congress. In 1846, he became a colonel in the Mexican War, and six years later he moved to California, where he practiced law and became a renowned orator. In late 1859, delegates from Oregon's fledgling Republican Party lured him north with promises of political support, and the following year the Oregon legislature elected him to the U.S. Senate. He joined the Union army when the Civil War broke out, and died in October 1861 leading a charge at Balls Bluff (the same battle at which Oliver Wendell Holmes suffered his first serious wound). *See generally* William C. Boyd, *Edward Dickinson Baker: Alien Senator*, 43 OR. HIST. Q. 139 (1942); William D. Fenton, *Edward Dickinson Baker*, 9 OR. HIST. Q. 1 (1908).

179 *E.g.*, WOODWARD, *supra* note 7, at 188.

180 A common jest among early Oregonians was that at a fork in the overland trail near Rock Springs, Wyoming, a chunk of ore marked the way to California, while a sign pointed "to Oregon"; and that all travelers who could read turned northward. *See* JOHN D. UNRUH, JR., THE PLAINS ACROSS: THE OVERLAND EMIGRANTS AND THE TRANS-MISSISSIPPI WEST, 1840–60, at 93 (1979).

181 Schuman, *supra* note 5, at 639. One of their own, T.W. Davenport, offered half a century later a more positive assessment of early Oregonians generally: "After a long and extensive acquaintance with the Oregon pioneers, I am constrained to declare them an exceptionally good people, hospitable, social and fraternal to a marked degree, as well as being resolute and public-spirited." Davenport, *supra* note 25, at 216–17.

envisioned as a conservative, frugal state far into the future. It contained little that was genuinely new or unique, but, in my view, even where the delegates adopted ideas or language from elsewhere, they did so carefully and thoughtfully.

Parts of the constitution were, of course, pretty shockingly racist. We Oregonians never should forget that ours is the only state ever to enter the Union with a black-exclusion clause in its constitution. Or, equally, that had it not been for the delegates' belief that immigrant Chinese would be "useful" as subsistence laborers and domestics, they too likely would have been barred; instead the delegates simply excluded them politically and restricted them economically.[182]

In addition, the delegates' historical reputation for extreme penuriousness is no doubt warranted as well. Multiple duties for the few officials, including judges; rock-bottom salaries; biennial legislative sessions; and strict limits on public indebtedness all serve to confirm Dorothy Johansen's charge of "almost obsessive concern with money." Indeed, recall that the delegates would not even spring for a reporter to record their own proceedings.[183]

Beyond those largely critical observations, however, lie others more welcome on this sesquicentennial occasion. Despite Thomas Dryer's repeated charges of a Democratic steamroller, the convention seems to have proceeded in remarkably open, even-handed fashion, with little indication of either individual domineering or party-enforced discipline.

The historical record, of course, is far from complete. However, the sources that do remain suggest strongly that, with few exceptions, all delegates had ample opportunity to speak on any issue they cared about, and most voting divisions were more random than disciplined. Certainly it was not uncommon for allies on some issues to disagree—even emphatically—on others.

In general, the delegates seemed to pay considerably more attention to their own views of an issue's merits than to either personal or party advancement. This seems especially true, for example, of Matthew Deady and George Williams, two of the Democratic leaders who contributed often to the debates. Republican John McBride, for example, years later praised the substance and style of Deady's convention leadership as follows: "President Deady

182 *See generally supra* text accompanying notes 82–105, 172.

183 *See generally supra* text accompanying notes 57–81.

made a most excellent presiding officer, and increased his popularity with all [the delegates]."[184]

Moreover, the entire convention produced few serious substantive disputes. Democratic leaders selected a recent, generally acceptable model, the 1851 Indiana Constitution, and altered it only sparingly. The delegates did debate at varying lengths *viva voce* voting, supreme court size, salary levels, the northeast boundary, shareholder responsibility, and the need for a bill of rights; however among those only *viva voce* voting was truly a partisan issue, or even particularly contentious.

So yes, 1857 *was* an exciting time for most or all the sixty constitutional convention delegates, many of whom would indeed become prominent in the new state.[185] They spent a productive, memorable month in Salem in mid-1857, creating a political framework for their new state. The sense of excitement, optimism, and faith in the future one senses from surviving newspaper accounts must have been wonderful. And today, 150 years later, while we Oregonians should feel a measure of inherited shame for the black exclusion clause, and continuing chagrin over our state's notorious devaluing of public service, we also must thank the sixty delegates for their otherwise sensible, public-spirited service. Personally, I doubt that any sixty elected delegates would do as well today.

184 THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 486.

185 For a partial list, see George H. Himes, comp., *Constitutional Convention of Oregon*, 15 OR. HIST. Q. 217–18 (1914).