

IN THE SUPREME COURT OF THE STATE OF OREGON

LORI HORTON, as Guardian Ad Litem and Conservator of and for [REDACTED] a minor,

Plaintiff-Respondent,

and

LORI HORTON, Individually; and STEVE HORTON,

Plaintiffs,

v.

OREGON HEALTH AND SCIENCE UNIVERSITY, a Public corporation,

Defendant,

and

MARVIN HARRISON, M.D.,

Defendant-Appellant,

and

PEDIATRIC SURGICAL ASSOCIATES, P.C., an Oregon professional corporation; and AUDREY DURRANT, M.D.,

Defendants.

Multnomah County Circuit Court  
1108-11209

SC No. S061992

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TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF  
OREGON'S *AMICUS CURIAE* BRIEF

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Appeal from the January 6, 2014 Limited Judgment and Money Award of  
the Honorable Jerry Hodson of the Circuit Court of Multnomah County

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## TABLE OF CONTENTS

|      |                                            |    |
|------|--------------------------------------------|----|
| I.   | INTRODUCTION .....                         | 1  |
| II.  | THE EARLY OREGON EXPERIENCE .....          | 3  |
| A.   | First Steps .....                          | 3  |
| B.   | The Broader Historical Context .....       | 10 |
| III. | WRITING THE OREGON CONSTITUTION .....      | 15 |
| A.   | The Proceedings in General .....           | 15 |
| B.   | The Judiciary Committee Specifically ..... | 17 |
| C.   | Matters Touching Upon the Jury .....       | 18 |
| D.   | Legislative Authority in General .....     | 24 |
| IV.  | CROSS-TERRITORIAL COMPARISONS .....        | 27 |
| V.   | CONCLUSIONS .....                          | 29 |

## TABLE OF AUTHORITIES

### Cases

|                                                                                                  |            |
|--------------------------------------------------------------------------------------------------|------------|
| <i>Calder v. Bull</i> , 3 US 386, 3 Dall 386, 1 L Ed 648 (1798) .....                            | 24         |
| <i>Coleman v. Southwick</i> , 9 Johns 45 (NY Sup 1812) .....                                     | 6          |
| <i>Knighton v. Burns</i> , 10 Or 548 (_____) .....                                               | 25, 31     |
| <i>McCulloch v. Maryland</i> , 17 US 316, 4 Wheat 316, 4 L Ed 579 (1819) .....                   | 24         |
| <i>Samuel Braselton v. Warren L. Jenkins</i> , 1839 WL 3798 (Iowa Terr 1839) .....               | 9          |
| <i>State v. Daley</i> , 54 Or 514, 103 P 502, <i>reh'g den</i> , 54 Or 514, 104 P 1 (1909) ..... | 21         |
| <i>State v. Merten</i> , 175 Or 254, 152 P2d 942 (1944) .....                                    | 21, 22, 23 |
| <i>Sturges v. Crowninshield</i> , 17 US 122, 4 Wheat 122, 4 L Ed 529 (1819) .....                | 25         |
| <i>Williams v. Currie</i> , 135 The English Reports 774 (Common Pleas 1845) .....                | 9          |

### Statutes

|                                                                                                                                            |        |
|--------------------------------------------------------------------------------------------------------------------------------------------|--------|
| Code of Civil Procedure of the State of New York .....                                                                                     | 24     |
| Oregon Organic Law of 1843 .....                                                                                                           | 23, 26 |
| Organic Law of 1845 .....                                                                                                                  | 23, 26 |
| Revised Statutes of the State of New York, Vol II, Title 5, § 1 (1829) .....                                                               | 6      |
| Revised Statutes of the Territory of Iowa (1843) .....                                                                                     | 23     |
| Statutes of Oregon, ch 2, title VII, § 36(5) (1855 ed) .....                                                                               | 23, 26 |
| The Statute Laws of the Territory of Iowa (1839 (reprinted in 1900)),<br>Justices of the Peace, Art VI, § 4 (approved Jan 21, 1839)) ..... | 8, 23  |
| The Statute Laws of the Territory of Iowa (1839 (reprinted in 1900)),<br>Practice, § 20 (approved Jan 25, 1839)) .....                     | 8, 23  |

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|                                                                                                                                                                    |  |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
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| Northwest Ordinance of 1787.....6, 8, 12, 14                                                                                                                       |  |
| William Blackstone, 3 <i>Commentaries on the Laws of England</i> 387 (1768 (University of Chicago reprint (1979)).....9                                            |  |

## **Constitutional Provisions**

|                                                  |            |
|--------------------------------------------------|------------|
| New York Constitution, Art VII, § 2 (1821) ..... | 6          |
| Oregon Constitution, Article I, § 8 .....        | 1          |
| Oregon Constitution, Art I, § 3 .....            | 1          |
| Oregon Constitution, Article I, § 2 .....        | 23         |
| Oregon Constitution, Article I, §16 .....        | 20, 21, 22 |
| Oregon Constitution, Article I, §17 .....        | passim     |
| Oregon Constitution, Article I, § 9 .....        | 1          |

## **Books, Reports, and Other Materials**

|                                                                                                                                                                     |                |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| Charles Henry Carey, <i>The Oregon Constitution and the Proceedings and Debates of the Constitutional Convention of 1857</i> (Oregon Historical Society 1926) ..... | 16, 17, 19, 20 |
| David Alan Johnson, <i>Founding the Far West: California, Oregon, and Nevada, 1840-1890</i> (University of California Press 1992) .....                             | 4, 17          |

|                                                                                                                                                                    |            |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------|
| David C. Duniway and Neil R. Riggs, "The Oregon Archives, 1841-1843,"<br>60 Or Hist Q 210 (June 1959).....                                                         | 4          |
| Donald C. Johnson, <i>Politics, Personalities, and Polices of the Oregon Territorial Supreme Court, 1849-1859</i> , 4 Environmental Law 11 (Fall 1973).....        | 13         |
| Dorothy O. Johansen and Charles M. Gates, <i>Empire of the Columbia: A History of the Pacific Northwest</i> , chs 8-15 (Harper and Row,<br>2d ed 1967).....        | 3, 27      |
| Dorothy O. Johansen, <i>A Tentative Appraisal of Territorial Government in Oregon</i> , 18 Pacific Historical Review 485 (November 1949) .....                     | 12         |
| Earl Pomeroy, <i>The Pacific Slope: A History of California, Oregon,<br/>Washington, Idaho, Utah, and Nevada</i> (A. A. Knopf 1966).....                           | 11         |
| Earl Pomeroy, <i>The Territories and the United States 1861-1890: Studies in Colonial Administration</i> (University of Pennsylvania Press, 1947) .....            | 29         |
| Earl Pomeroy, <i>Toward a Reorientation of Western History: Continuity and Environment</i> , 41 Mississippi Valley Historical Review 579, 581<br>(March 1955)..... | 11, 12     |
| Elliott West, <i>Reconstructing Race</i> , 34 Western Historical Quarterly 7 (Spring<br>2003) .....                                                                | 15         |
| Elliott West, <i>The Last Indian War: The Nez Perce Story</i> (Oxford University<br>Press 2009).....                                                               | 15         |
| F. L. Herriott, <i>Transplanting Iowa's Laws to Oregon</i> , 5 Or Hist Q 139, 140<br>(March 1904).....                                                             | 6          |
| Gerald D. Nash, <i>Creating the West: Historical Interpretations 1890-1990</i><br>(University of New Mexico Press 1991) .....                                      | 10         |
| Gordon Morris Bakken, <i>Rocky Mountain Constitution Making, 1850-1912</i><br>(Greenwood Press 1987).....                                                          | 26, 28, 30 |

|                                                                                                                                                                                |          |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| Gordon Morris Bakken, <i>The Development of Law on the Rocky Mountain Frontier: Civil Law and Society, 1850-1912</i> (Greenwood Press 1983) .....                              | 28       |
| Howard R. Lamar, <i>Earl Pomeroy, Historian's Historian</i> , 56 Pacific Historical Review 546 (November 1987).....                                                            | 11       |
| James K. Kelly, <i>History of the Preparation of the First Code of Oregon</i> , 4 Or Hist Q 185 (1903) .....                                                                   | 24       |
| John D. W. Guice, <i>The Rocky Mountain Bench: The Territorial Supreme Courts of Colorado, Montana, and Wyoming, 1861-1890</i> (Yale University Press 1972).....               | 28       |
| La Fayette Grover, Commissioner, <i>The Oregon Archives; including the Journals, Governors' Messages and Public Papers of Oregon</i> (Asahel Bush, Public Printer, 1853).....  | 4, 7, 8  |
| Matthew P. Deady and Lafayette Lane, <i>The Organic and Other General Laws of Oregon</i> 46 (Semple 1874) .....                                                                | 23       |
| Michael P. Malone, <i>Earl Pomeroy and the Reorientation of Western American History</i> ,.....                                                                                | 11       |
| Mirth Tufts Kaplan, <i>Courts, Counselors and Cases: The Judiciary of Oregon's Provisional Government</i> , 62 Or Hist Q 117 (June 1961).....                                  | 5, 7, 10 |
| Richard W. Etulain, ed., <i>Writing Western History: Essays on Major Western Historians</i> (University of New Mexico Press 1991; University of Nevada Press 2002 & 2014)..... | 10, 11   |
| Richard W. Etulain, <i>Lincoln and Oregon Country Politics in the Civil War Era</i> (Oregon State University Press 2013) .....                                                 | 7        |
| Robert W. Johannsen, <i>Oregon Territory's Movement for Self-Government, 1848-53</i> , 26 Pacific Historical Review 17 (February 1957).....                                    | 13       |
| Robert W. Johannsen, <i>The Frontier, the Union, and Stephen A. Douglas</i> (University of Illinois Press 1989).....                                                           | 14       |

|                                                                                                                                                                                     |    |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| Thomas M. Cooley, <i>Constitutional Limitations</i> 9 (Little Brown & Co 1868) .....                                                                                                | 24 |
| William H. Goetzmann, <i>Exploration and Empire: The Explorer and<br/>the Scientist in the Winning of the American West</i> xiii (Alfred A. Knopf 1966;<br>W. W. Norton 1978) ..... | 26 |

## I. INTRODUCTION

In 1857, the framers of the Oregon Constitution endorsed the proposition that “[i]n all civil cases the right of Trial by Jury shall remain inviolate.” *See Claudia Burton and Andrew Grade, A Legislative History of the Oregon Constitution of 1857 – Part I (Articles I and II)*, 37 Will L Rev 528-29 (2001). From before Runnymede up through modern times, the core principle underlying the notion that juries should resolve disputes between individuals or between individuals and government has always been about a distribution of power. But what would become Article I, section 17, of the Oregon Constitution, by its plain terms, did not purport to redistribute any power or create any rights. The framers simply memorialized a right already extant and provided for its maintenance.

But what was that right and what was the balance of power earlier struck that the Oregon Constitution sought to hold inviolate? What was the role of the jury relative to that of the judge? Or the legislature? What is the significance that other parts of the bill of rights specifically forbade statutory encroachment (*e.g.*, “No law shall in any case whatever control the free exercise, and enjoyment of religious opinions \* \* \*;” “No law shall be passed restraining the free expression of opinion \* \* \*;” “No law shall violate the right of the people to be secure in their persons \* \* \*” (Or Const, Art I, §§ 3, 8, 9)) but Article I, section 17, did not? Stated differently, at the time the constitution was adopted, what role did legislative authority play in shaping or limiting the jury’s function, and what are the implications of that authority on the framers’ intent?

This brief is intended to help the Court answer those questions and, in turn, aid in resolving the interpretive issues that this case presents. It does so not from the perspective of a lawyer or a legal academician but, instead, from the

perspective of a historian based upon inquiry. His analysis, augmented by that of counsel, follows. (A copy of Professor Etulain's abbreviated resume is attached to this brief as an appendix.) That inquiry utilizes not only the tools familiar to legal historians and judges alike – statutory enactments and judicial decisions – but examines as well the broader historical record: the circumstances of the earliest settlers to the Oregon Country and their efforts to establish a provisional government; Oregon's push for territorial status; and, finally, statehood.

The analysis then continues further, looking more broadly to Oregon's place in the American drive westward during the mid-19<sup>th</sup> century. That analysis also produces revealing evidence about then-contemporary public understandings of the relationship between government and the people, government and its respective branches, and federal and state interests – all of which help to illustrate the nature of the right to trial by jury in civil cases as it existed more than 150 years ago.

The results of those inquiries, both individually and collectively, confirm generally that which the words of Article I, section 17, convey specifically: The laws of early Oregon, and indeed the Constitution itself, were primarily the product of Oregonians taking something that already existed and adopting it for their own with little or no change. In other words, when it came to lawmaking, Oregon's founders were in large measure "Replicators," not "Innovators." Equally important, the laws that were being imported into Oregon had been developed within – and were being moved westward into – an environment where, unlike the federal government with its enumerated powers, legislative authority (1) was plenary (unless and until limited by organic law) and (2) comfortably embraced the idea that the people through their representatives could amend the common law as they deemed appropriate.

When one applies that historical analysis to Article I, section 17, it is more than reasonably clear that the words “remain inviolate” do not mean (and could not have been intended to mean) that the constitutional right to a jury trial in civil cases somehow and for the first time rendered the legislative assembly impotent to pass laws that affected jury trials, altered the common law, made it easier or more difficult to maintain civil actions or, for that matter, broadened or limited a person’s right to recovery.

## II. THE EARLY OREGON EXPERIENCE

### A. First Steps

As the discussion later in this brief makes clear, the Oregon Country – the Pacific Northwest – traveled a territorial path different from that of the rest of the trans-Mississippi West in the 19<sup>th</sup> century. A vigorous tug-of-war was occurring. That clash followed the earliest incursions of the British (exploration and fur trade) and the Americans (explorations, including Lewis and Clark, and Astoria). By 1818, an agreement of Joint Occupation between the British and Americans was hammered out, a compromise renewed indefinitely in 1827. Meanwhile, American adventurers and proponents for Manifest Destiny, as well as missionaries (Lees, Whitmans, Spaldings, and several Catholic priests), had arrived in the Pacific Northwest and had called for more American control in the area. But when hundreds and then thousands of immigrants began flooding up the Oregon Trail from the early 1840s onward, the urgent requests for American occupation and control increased markedly – and yearly. So did calls for some kind of governmental organization in the Oregon Country.<sup>1</sup>

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<sup>1</sup> The political-governmental-legal transitions in the Oregon Country are covered in Dorothy O. Johansen and Charles M. Gates, *Empire of the Columbia: A History of the Pacific Northwest*, chs 8-15 (Harper and Row, 2d ed 1967). There

For a full generation – from roughly 1841 to 1859 – parts of the Oregon Country passed through a series of uncertain steps from disorganized competition to American statehood. Those faltering footsteps inform the nature of calls for – and actual movements toward – governmental organization. Those steps, as well, reveal how competitions, conflicts, and compromises played major roles in what became the state of Oregon in 1859.

The explicit steps toward American organization of the Oregon Country began even before the area was legally American. In the early winter of 1841 several urgencies converged to impel Americans on the path toward governmental organization. The major urgencies were, probably in order of importance: (1) protection for the land on which settlers had squatted and for which they had no legal title; (2) defense against the aggressive Hudson's Bay Company and its chief factor, Dr. John McLoughlin at Fort Vancouver; (3) guidelines on how to probate the estate of recently deceased trapper-entrepreneur Ewing Young; (4) protection against roving Indians; and (5) help in controlling the wild animals, especially wolves, that were depredating the settlers' livestock. Other issues also mentioned were taxing and revenue policies, and militia organization.<sup>2</sup>

The formal and informal meetings from February 1841 to July 1843 were rather hit-and-miss affairs. The aforementioned issues were real, but settlers were hesitant about too much coercive government. Plus, the widely scattered farmers,

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also is the significant effort of David Alan Johnson in his book *Founding the Far West: California, Oregon, and Nevada, 1840-1890* (University of California Press 1992).

<sup>2</sup> La Fayette Grover, Commissioner, *The Oregon Archives; including the Journals, Governors' Messages and Public Papers of Oregon* (Asahel Bush, Public Printer, 1853); David C. Duniway and Neil R. Riggs, "The Oregon Archives, 1841-1843," 60 Or Hist Q 210-84 (June 1959).

the majority of settlers in western Oregon, found it difficult to leave their fields, harvests, and animals to debate politics. Another difficulty lay in the question of what was to be done with the divided allegiances to two countries, Great Britain and the United States. While the power of the Mission Party under missionary Jason Lee was diminishing, what might replace it was unclear. When a group of 114 Americans came up the Oregon Trail in fall 1842, they wanted more government and more explicit stiff-arming of the Hudson's Bay Company.

A few of the several informal and formal meetings convened during those two years and more called for a code of laws. At first, the committee commissioned to bring together a code of laws failed to do so. It was a huge order of work for anyone. In the spring of 1841, the Oregon Country settlers called on Dr. Ira L. Babcock, a Lee Mission official, to serve as a judge with probate powers. Until the far westerners compiled their own system of laws, they instructed Dr. Babcock to act "according to the laws of the State of New York." Scholars disagree on how much he did so – in fact disagree whether there was a complete copy of the New York laws available in Oregon in the early 1840s. But, clearly, some of the New York laws were at hand, because in a July 1843 meeting, a motion was passed indicating "the jury and witness fees of New York [will be used] instead of those of Iowa."<sup>3</sup>

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<sup>3</sup> Document 426, Provisional and Territorial Government Papers, Oregon State Archives, quoted in Mirth Tufts Kaplan, *Courts, Counselors and Cases: The Judiciary of Oregon's Provisional Government*, 62 Or Hist Q 117, 121-22 (June 1961). Kaplan provides a valuable examination of whether a full copy of New York laws was available in Oregon in the early 1840s. *Id.* at n 11.

To the extent the laws were available, it is not insignificant that New York, by statute, had for more than a decade provided that a Court of Common Pleas had the power "[t]o grant new trials \* \* \*." The Revised Statutes of the State of New

Those initial efforts to import a framework of laws for the country were followed in the next half-dozen years by quickly occurring events that forced settlers in the Far Corner of the American West to move rapidly ahead on the trail to a more organized government. In two meetings in the early spring and July of 1843, Oregon Country residents made giant strides toward governmental organization and the codification of laws for the region. The legislative committee called for a new code of laws – again replicating – this time based on Iowa's code of 1839 as well as the stipulations about territories in the Northwest Ordinance of 1787.<sup>4</sup>

A flood of new immigrants poured into the region in fall 1843, many with alternative ideas concerning land holdings, governmental frameworks, county organization, and a cumulative code of laws. Three years later, in 1846 and via a

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York, Vol II, Title 5, § 1(2) at 208 (1829). Thus, at least in New York, and notwithstanding that the right to jury trial there had constitutional cognizance, the legislature did not view itself as constrained from authorizing judicial oversight of jury verdicts. *See* NY Const, Art VII, § 2 (1821) (“The trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever; and no new court shall be instituted, but such as shall proceed according to the course of the common law; except such courts of equity as the legislature is herein authorized to establish.”). Nor did the courts, even earlier than that, view the power as unavailable to them, even if it was one to be exercised with circumspection. *See, e.g., Coleman v. Southwick*, 9 Johns 45 (NY Sup 1812) (“In actions for *slander, libel*, and other *personal torts*, the court will not grant a new trial, on the ground of *excessive damages*, unless the amount of damages is so flagrantly outrageous and extravagant, as manifestly to show that the jury must have been actuated by passion, partiality, prejudice, or corruption.” (Emphasis in original.)).

<sup>4</sup> Legal replication was not unique to Oregon. When Iowa itself gained territorial status in 1838, the laws of Wisconsin were extended over it, and the territory proceeded to adopt most of its laws from Michigan. *See* F. L. Herriott, *Transplanting Iowa's Laws to Oregon*, 5 Or Hist Q 139, 140 (March 1904).

treaty with Great Britain, the Pacific Northwest south of the 49th parallel became official American territory. The Whitman massacre in November 1847 scared regional residents and helped spawn a new petition to the U. S. Congress calling for territorial status for the Oregon Country. Congress finally heeded that petition and named Oregon a territory in August 1848. Among those supporting the territorial status for Oregon (without slavery) was Abraham Lincoln, then serving as an Illinois congressman in the U. S. House of Representatives.<sup>5</sup>

While those events impelled Oregon toward a more well-organized government and becoming a territory, residents were also continuing to attempt to assemble a code of laws for the region. Those steps were, at best, stumbling experiences. Pragmatically and uncertainly, Oregon Country settlers tried during their Provisional Government years to put together a workable code of laws. In their tentativeness they turned first to the New York code and then, much more extensively, to the Iowa code.

In July 1843 residents accepted the "Report of the committee on the Judiciary," labeled "the 1843 Organic Law" by one scholar. Mirth Tufts Kaplan, *Courts, Counselors and Cases: The Judiciary of Oregon's Provisional Government*, 62 Or Hist Q 117, 126-30 (June 1961). Article 2 of that compilation – copied from the Northwest Ordinance – provided that "[t]he inhabitants of said territory shall always be entitled to the benefits of \* \* \* trial by jury." La Fayette Grover, Commissioner, *The Oregon Archives; including the Journals, Governors' Messages and Public Papers of Oregon* 28 (Asahel Bush, Public Printer, 1853); compare Northwest Ordinance, Art 2 (*reprinted in General Laws Passed by the*

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<sup>5</sup> Richard W. Eulain, *Lincoln and Oregon Country Politics in the Civil War Era* (Oregon State University Press 2013).

Legislative Assembly of the Territory of Oregon at the Fourth Regular Session at 8 (Bush 1853)). Article 12 stated that "the statutes of Iowa territory shall be law of this territory in civil, military and criminal cases, in all cases not otherwise provided for and where no provision of said statutes applies the principles of common law and equity shall govern." *The Oregon Archives* at 30-31.

But the people went even further, and, at the conclusion of the 1843 Organic Law, also "adopted as the laws of this territory" specific chapters of the 1838-39 laws of Iowa, also known as the "Little Blue Book." *The Oregon Archives* at 31-32; *see generally* Arthur S. Beardsley, *Code Making in Early Oregon*, 23 Or L Rev 22, 37-38 (1943). Included among the chapters adopted were those pertaining to justices of the peace and practice of the courts. *The Oregon Archives* at 32. Provisions in those chapters, in turn, suggest that Iowans did not view the right of trial by jury as something wholly impervious to legislative or judicial regulation:

"If any judgment be set aside and a new trial granted, the justice shall fix a time for such trial and make out under his hand a notice to the opposite party, stating the fact that such judgment has been set aside, and specifying therein the time and place fixed for trial."

The Statute Laws of the Territory of Iowa (1839 (reprinted in 1900)), Justices of the Peace, Art VI, § 4 at page 314 (approved Jan 21, 1839)). *See also* Practice, § 20 at page 400 (approved Jan 25, 1839) ("if either party may wish to except to the verdict or for other causes to move for a new trial, or in arrest of judgment, he shall, before final judgment be entered, give by himself or counsel to the opposite party or his counsel, the points in writing \* \* \* and final judgment shall thereupon be stayed until such motion can be heard by the court \* \* \*"). In other words,

legislative enactments that authorized judges to set aside jury verdicts in certain circumstances and according to specified procedures.<sup>6</sup>

In the long run, the foregoing account of the uses of New York and Iowa laws in the Oregon Country were notable illustrations of cross-continental influences at work in the Far West. Those persisting influences from East to West played a major role in determining the laws and legal thinking in the early Oregon Country. But even more importantly, the settlers' efforts would continue – that is, the borrowing of laws from other jurisdictions as Oregon's own – up through the constitutional convention 16 years later.

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<sup>6</sup> Iowa judicial decisions from the period are in accord. *See, e.g., Samuel Braselton v. Warren L. Jenkins*, 1839 WL 3798 (Iowa Terr 1839) (“There is no doubt but that an erroneous decision of the Court below, on an application for a new trial, may be brought up here for review and correction, for such a power appears to be conferred by Statute.--(Laws of 1836, p. 23.) \* \* \* There is nothing before us from which we can infer either that the damages were excessive, or that the Defendant below had any sufficient reason for neglecting to prepare for the trial.”).

Moreover, to the extent the subject of new trials was not otherwise occupied by statutory enactment, the common law had long recognized the power of judges to superintend jury verdicts. *See, e.g., William Blackstone*, 3 *Commentaries on the Laws of England* 387 (1768 (University of Chicago reprint (1979))) (“So that if any defect of justice happened at the trial, by surprise, inadvertence, or misconduct, the party may have relief in the court above, by obtaining a new trial[.]”). Causes for new trials included, among others, “a verdict without or contrary to evidence,” and “exorbitant damages.” *Id.; see also, e.g., Williams v. Currie*, 135 The English Reports 774-777 (Common Pleas 1845) (Cresswell, J.: “I do not think the damages are so extravagant as to justify us in submitting the case to a second jury.”).

## B. The Broader Historical Context

Legal scholar M. T. Kaplan, in her overview of early Oregon Country "courts, counselors and cases," asserts the "American settlers were not innovators." Kaplan, *Courts, Counselors and Cases* at 118. In that bald, inclusive statement, the author may have revealed more than she knew. True, she helpfully notes that westerners borrowed so much from New York, Iowa, and Wisconsin codes (and she might have added Indiana if her essay pushed farther into the 1850s). But what she misses is the importance of innovation versus replication in understanding the larger contexts of Oregon history and the American West in the nineteenth century. The larger historiographical picture demands explanation.

The conclusion that far westerners were not innovators in their formulations of legal and governmental systems illuminates a major shift that took place in mid-twentieth-century western historiography. From the 1890s to the 1950s, most western historians held deeply to the interpretations of noted historian Frederick Jackson Turner. In his frontier or Turner thesis, he told other historians, including his own mentor at the John Hopkins University, they had it all wrong: not European legacies (Turner called them "germs" of culture) but the American frontier was *the* most important shaping source of American history. Turner's touting of the molding power of the American frontier grabbed and held the attentions of historians writing about the American West in the next half century.<sup>7</sup>

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<sup>7</sup> Overviews of western historiography include Gerald D. Nash, *Creating the West: Historical Interpretations 1890-1990* (University of New Mexico Press 1991), and Richard W. Etulain, ed., *Writing Western History: Essays on Major Western Historians* (University of New Mexico Press 1991; University of Nevada Press 2002 & 2014).

But in the 1950s two dissenting viewpoints challenged Turner's thesis. In his tipping point volume, *Virgin Land: The American West as Symbol and Myth* (1950), American Studies scholar Henry Nash Smith demonstrated that, rather than dismissing ideas about a Wild West as falsehoods, historians and literary critics should understand them as mythic "truths," eastern concepts centrally important for spawning subsequent ideas and writings about the American West.

Even more important in challenging Turner's frontier thesis and advancing an alternative viewpoint about the American West were the writings of western historian Earl Pomeroy. In a key essay published in 1955, "Toward a Reorientation of Western History: Continuity and Environment," Pomeroy pointed to American eastern influences, traditions, and continuities, which, he said, "bulked at least as large in the history of the West as new environments, innovation, and radicalism. The Westerner has been fundamentally imitator rather than innovator \* \* \*." Ten years later, Pomeroy put this new historiographical viewpoint to work in his *The Pacific Slope*, still the most valuable historical overview of the American Far West.<sup>8</sup>

To support his overall contention of eastern continuity being as important as western innovation, Pomeroy pointed to eastern "similarities, antecedents, and outside influences" as revealing examples of cultural-intellectual carryover into

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<sup>8</sup> Earl Pomeroy, *Toward a Reorientation of Western History: Continuity and Environment*, 41 Mississippi Valley Historical Review 579, 581-82 (March 1955); Pomeroy, *The Pacific Slope: A History of California, Oregon, Washington, Idaho, Utah, and Nevada* (A. A. Knopf 1966). Pomeroy's shaping impact on western historical writing is examined in Howard R. Lamar, *Earl Pomeroy, Historian's Historian*, 56 Pacific Historical Review 546-60 (November 1987), in Michael P. Malone, *Earl Pomeroy and the Reorientation of Western American History*, and in Etulain, *Writing Western History* at 311-34.

far-western legal-constitutional configurations. "The territorial system," Pomeroy added, "figured as a channel in the large process of acculturation, transporting American ways from East to West." From the East, governors, secretaries, and judges brought eastern experiences and precedents and put them to work in the West. Pomeroy, *Reorientation* at 583; Dorothy O. Johansen, *A Tentative Appraisal of Territorial Government in Oregon*, 18 Pacific Historical Review 485-99 (November 1949).

This historiographical competition between the Innovators (Turner) and the Replicators (Pomeroy), to coin two new terms, was already at work in the Oregon Provisional Government era. And when westerners borrowed so widely and thoroughly from the Northwest Ordinance of 1787 and the New York and Iowa codes, the influence of the Replicators was dramatically expanded in the Oregon territorial period beginning in 1848-49.

The transition to territorial status in 1848-49 for Oregon proved to be its most momentous transition before statehood in 1859. Congress declared Oregon a new territory in August 1848, and President Polk signed the bill into law soon thereafter. Indiana resident Joseph Lane arrived the next March, just three days before Polk's Democratic administration ended and Whig Zachary Taylor's presidency began. In the next year or two, flux and discontent rose to the surface.

The new territorial status brought marked changes to Oregon's governmental-legal systems, but continuities also remained on scene. The changes, as we have seen, meant that the appointive power of the federal government under territorial status, particularly in the president's appointments, began to sideline those powers that had existed primarily in the hands of Oregon Country residents under the Provisional Government. Now, the president would

name the territory's executive leaders – the governor and the secretary – and its judicial leaders too, a chief justice and two associate justices. Some of those appointments spelled huge dissatisfactions among Innovators wanting to keep local control. Many Oregonians chaffed under the mounting federal rule, forced now to think of themselves as "colonials," under the lion's paw of a distant, sometimes disinterested Washington, D.C., government.

Part of the discontent arose from what Oregonians considered the inattention of the federal government. For example, in fall 1849, one of the associate justice positions remained unfilled, and so was that of the U. S. attorney for Oregon. Several of the early justices were clear failures. The first appointed chief justice, William P. Bryant, stayed out of Oregon during several months of his appointment (1848-50). For much of 1849 to 1851, Oregon limped along with just one justice. Other judges, as well as the first two territorial governors, Joseph Lane and John P. Gaines, were imports from outside Oregon. The presidents' tendencies to name nonresidents to the executive and judicial positions particularly upset Oregomans, as it did most residents of western territories. They wanted home rule, not domination by a "foreign power."<sup>9</sup>

The Innovators favoring home rule pushed for "self-government" measures in the early years of Oregon's territorial period. Working with Minnesota, Oregomans sent a bill to Congress asking for the right to elect their own territorial

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<sup>9</sup> For additional discussion, see Robert W. Johannsen, *Oregon Territory's Movement for Self-Government, 1848-53*, 26 *Pacific Historical Review* 17-32 (February 1957) (reprinted in Johannsen, *The Frontier, the Union, and Stephen A. Douglas* 3-18 (University of Illinois Press 1989)). Donald C. Johnson, *Politics, Personalities, and Polices of the Oregon Territorial Supreme Court, 1849-1859*, 4 *Environmental Law* 11-76 (Fall 1973).

judges. Not surprisingly, Congress turned a deaf ear to a memorial that went against territorial ingredients in use for more than sixty years. A bit later in a public gathering, Oregonians also congregated to level major criticisms of nonresident judges being appointed to the territory. In a third example of self-government attempts, Oregon's archetypal pioneer Jesse Applegate outlined a plan of territorial organization that included filling judicial positions with Oregon residents. Admittedly, a major part of that territorial discontent was political. The huge majority of Oregonians were Democrats, and when Whig appointees came to the territory from 1849 to 1853, they rarely pleased – and often alienated – partisan Oregonians. When Franklin Pierce and James Buchanan appointed primarily Democrats in the next two administrations, the enthusiastic calls for Oregon territorial self-government notably declined. Johannsen, *The Frontier, the Union, and Stephen A. Douglas* at 14-15.

Besides, territorial residents realized they could play their own trump cards. Territorial legislatures, territorial delegates, and local juries were – and remained – homeland voices to speak for local issues and viewpoints in territorial politics and courts. When Oregon became a territory in 1848-49, it retained the Provisional Government's right to elect its own legislatures. (The right to elect a territorial legislature was part of the NW Ordinance of 1787.) Thus, in the early 1850s, as a new territory, Oregonians were thinking of a quick transition to statehood, and escaping what they perceived as a demeaning colonial existence. But an interplay of local and national events forestalled a quick move to state status. Oregon would remain a territory for nearly a decade.

The most provocative new interpretation in western historical writing in the past generation helps bring into focus the divisive competitions between national

and local affairs that illuminate Oregon in the 1850s. Professor Elliott West argues in his Greater Reconstruction thesis that we need to marry the two most important large subjects in American history – the westward movement and the Civil War – to understand mid-nineteenth-century U. S. history. His suggestive approach reveals much about Oregon in the 1850s, leading up to the constitutional convention of 1857.<sup>10</sup> Here again the clash between the Innovators and the Replicators powered much of the controversy.

### **III. WRITING THE OREGON CONSTITUTION**

#### **A. The Proceedings in General**

When the sixty delegates gathered in the Salem courthouse in September 1857 to write a constitution for an upcoming state, most of them came with an agenda solidly in mind. Shortly before the first deliberations opened, most of the regular Democrats caucused and made plans for the coming weeks. About 40 of the 60 delegates evidenced support for the "regular" Democratic agenda. Another three to five non-attendees also promised their support. That meant that all but 15 or so of the delegates, or approximately three-fourths of the total, were regular Democrats or supporters of that party; only one-fourth were identified as anti-Democrats. The minority opponents were not organized around any tight core of principles or leaders; they were, instead, opponents of the regular Democrats. The Democrats, however, chose Matthew Deady as president of the convention and

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<sup>10</sup> Elliott West advanced his concept of the Great Reconstruction in his presidential address to the Western History Association, and it was published as *Reconstructing Race*, 34 Western Historical Quarterly 7-26 (Spring 2003). He then used the concept in an important Pacific Northwest study: *The Last Indian War: The Nez Perce Story* (Oxford University Press 2009) (especially xvi-xix, 180, 318-19).

selected members of the all-important committees who would provide reports – an agenda, really – for sections of the proposed constitution. Revealingly, even though the regular Democrats seemed to have a clear majority of the delegates in hand, the differences among party members would be revealed almost as much as their agreements in the coming days.

Historian-lawyer Charles Henry Carey prepared an invaluable compendium of information in his notable book *The Oregon Constitution and the Proceedings and Debates of the Constitutional Convention of 1857* (Oregon Historical Society 1926). One of Carey's most helpful contributions is his comparisons of the Oregon Constitution of 1857 with other legal codes and constitutions in several other states, most notably Indiana, Iowa, Michigan, but also, to a lesser extent, Maine, Massachusetts, Ohio, Illinois, Connecticut, and Wisconsin. All these, of course, are northern states. He lists but one parallel from one southern state, Texas. In Carey's "Grand Summary" of "sources" numbering 188, he lists 103 from Indiana, 52 from Oregon, 9 from Michigan, and 7 each from Iowa and Wisconsin. Here was abundant evidence of the power of precedence and carryover in the hands of Replicators in the writing of the Oregon Constitution.

At the outset, eleven standing committees were announced. They included committees on the legislative department, executive department, judicial department, military affairs, education and school lands, seat of government and public buildings, corporations and internal improvements, boundaries, suffrages and elections, expenses, and Bill of Rights. Each committee report came before the convention, but those that received the most attention or proved to be the most

extensively covered in the finished constitution were those dealing with the judicial and legislative departments, the Bill of Rights, and controversial voting rights.<sup>11</sup>

B. The Judiciary Committee Specifically

Article 7 of the Constitution, dealing with the judicial department, is, of the major sections of the constitution, the least linked to another state's constitution. True, some ingredients of the Oregon state judiciary derived from the Wisconsin Constitution of 1848, but, according to Carey's conclusions, most of this article derived from "(1) the minds of the [judiciary] committee; (2) the territorial system." Carey, *A History of the Oregon Constitution* at 475, 482.

All members of the Judiciary Committee of the Constitutional Convention were among the leading chiefs – or would become so – in the territory's tribe of lawyers. Chief Justice George H. Williams, who had been appointed by President Franklin Pierce in 1853 and reappointed by President James Buchanan in 1857, was the committee chair. His two associate justices on the Territorial Supreme Court, Cyrus Olney and Matthew P. Deady (and also appointed by President Pierce), were on the committee. Two other committee members later moved to the top of the Oregon legal system. Reuben P. Boise would be named chief justice twice (1862-64), and Paine Page Prim three times (1864-66, 1870-72, 1876-78). James K. Kelley, later a U. S. senator (1871-77), also served as a chief justice (1878-80). La Fayette Grover was elected Oregon's governor in 1870. Another member, David Logan, the son of Abraham Lincoln's second law partner, later

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<sup>11</sup> David Alan Johnson makes clear and abundant use of the studies of republican ideological studies, published from the 1960s to the 1990s, to make a strong case of economic conflicts among constitutional delegates in California, Oregon, and Nevada from 1849 to the early 1860s. The present study emphasizes political and cultural-intellectual influences of a different sort. See Johnson, *Founding the Far West, supra* at 4 n 1.

became mayor of Portland, and some of his colleagues thought of him as the best trial lawyer in Oregon. In the constitutional convention, Logan and his colleague Thomas Dryer, editor of the *Oregonian*, were the most verbal opponents.

Although not agreeing on much between them, Logan and Dryer tried to blunt much of the regular Democratic thinking they thought was over-riding the convention. It is important to note, too, that in addition to serving on the Judiciary Committee, some members were chairs of other important standing committees: Grover (Bill of Rights), Kelly (Executive Department), Boise (Legislative Department and the Seat of Government and Public Buildings Committee).

A careful comparison between the report Judiciary Committee chair Williams submitted on August 22<sup>nd</sup>, just five days after the convention opened, and the final version of the 1857 constitution discloses how few changes were made to Williams's early report. But placing emphases only on the small number of changes misses the revelations occurring in the heated debates about judicial matters. Those interchanges were fractious, and interesting. Less than ten days into the convention debate over the Judiciary Committee report reached a new intensity. Page after page of dialogue – especially among members of the committee itself – dealt with the number of judges to be named, how long they would hold office, and many other topics. (Perhaps the arguments over the judiciary report were so extensive and convoluted because that committee report was mainly from the Oregon committee itself rather than being primarily derived from another state's constitution.)

### C. Matters Touching Upon the Jury

As with many of the Oregon Constitution's other provisions, what is now Article I, section 17, passed without apparent discussion. Burton and Grade, *A*

*Legislative History of the Oregon Constitution*, 37 Willamette L Rev at 528-29. That section read "the right of trial by jury in civil cases shall remain inviolate when jury trial is demanded by either party." Carey, *A History of the Oregon Constitution* at 315. Before the close of the constitutional proceedings, the phrasing after "inviolate" was discarded.

Section 19 of the report, however, which dealt with the rights of criminal defendants (an important distinction), nevertheless helps to shed some light on the framer's understanding about judicial and legislative authority with respect to juries in civil cases. That section provoked an extended discussion when it was opened for debate and, as initially offered, would have provided simply that "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." *Id.* at 120. The journalist from the *Oregonian* observed that this topic "elicited one of the most interesting, lengthy and animated discussions that have been had since the session of the convention." *Id.* at 310-11.

The division of opinion on Section 19 on whether juries in criminal cases should be *the* authority "on law and the facts" revealed much about the stances of several delegates. Those with experiences as judges – namely Williams, Olney, and Deady, for example – wanted judges to determine the law, not the juries, whom they thought could be misled by unscrupulous lawyers. But lawyers David Logan, Delazon Smith, and editor Dryer wanted juries to decide both the law and the facts in criminal cases; they were convinced that juries would be fairer, more inclined to think of peoples' rights. Plus, the Indiana constitution included such a provision where the jury decided both the law and the facts, and so did those of other states. One should not overlook, too, the role of politics here. Logan and

Dryer, delegates from Multnomah County, were the most outspoken opponents of regular Democrats, represented in Deady, for example.

After much debate concerning the Bill of Rights vis-à-vis judges and juries, Delazon Smith provided an amended, compromise section. His amendment read; "The jury shall determine the law and the fact, under the direction of the court as to law, and the right of new trial as in civil cases." Carey, *A History of the Oregon Constitution* at 314. When the final vote came, all members of the Judiciary Committee supported (including Logan and Dryer) Smith's compromise amendment, save Boise. *Id.* at 327.

The issue underlying what became Article I, section 16, of the Oregon Constitution was what is now known as jury nullification in criminal cases. At its most basic level, and as Oregon's framers seem to have understood, the principle allowed the jury "when the cause came before them as judges of the laws and facts, [to conclude that a] law was unconstitutional." Carey, *A History of the Oregon Constitution* at 313 (statement of Farrar; bracketed text added). The framers knew that judges already had that power – judicial review, *see id.* (Logan expressing no doubt as to how the supreme judges of Ohio, New York, and Connecticut would rule on the fugitive slave law) – the question was whether Oregon would be one of the states allowing it to juries as well.

In respect of the compromise that was struck – and it was, indeed, a compromise – the balance favored the government: legislative authority and judicial direction. As this Court would conclude some five decades later:

"It will be borne in mind that the clause of our Constitution under consideration confers upon the jury in all criminal cases the right to determine the law and the facts, 'under the direction of the court as to the law,' thereby restricting the authority of the jury to a much greater extent than is prescribed by the organic law of Indiana or of Maryland or by the statute of Illinois, to which notice has been

directed. Notwithstanding the restricted application of the doctrine under consideration, the jury in the trial of a criminal action in this state have the power to disregard the instructions of a court and to find a defendant not guilty. \* \* \* Though such power of the jury is recognized, their right, in the trial of a criminal action, to ignore the charge of the court, may well be doubted, for if an instruction misstates the law applicable to the facts involved, and the defendant is found guilty, the error which has been committed can be corrected on appeal. If, however, the jury assuming to be the judges of the law, contrary to the direction of the court, return a verdict of not guilty in a criminal action, the public necessarily sustains an injury which cannot be legally corrected."

*State v. Daley*, 54 Or 514, 521-22, 103 P 502, *reh'g den*, 54 Or 514, 104 P 1 (1909) (emphasis added).

For purposes of the present civil law inquiry, however, perhaps the most interesting thing about Article I, section 16, is its implications with respect to one of the most well established examples of both legislative and judicial interaction with jury verdicts – the grant of a new trial. Again, the text is instructive. Article I, section 16, is couched in terms of an extant right: the same right of new trial available in civil actions. And the right of new trial is nothing if not a judicial curb on jury verdicts. But, as this Court would announce nearly nine decades later, it was really more than that back then.

In *State v. Merten*, 175 Or 254, 152 P2d 942 (1944), a death penalty case, one of the defendants advanced the novel argument that the trial court had committed error not only by denying his motion for a new trial based upon a claim of newly discovered evidence, but also because the jury rather than the judge should have decided the motion under Article I, section 16. In rejecting that argument ("he does not explain how the jury could perform such a task \* \* \*") 175 Or at 260), Justice Rossman provided not only an extensive history of the constitutional debate, *id.* at 261- 63, but of the historical context as well.

He noted, for example, that “[i]t has been the practice in this state from the earliest times for the judge, not the jury, to pass upon a motion for new trial,” *id.* at 263, and cited examples from the provisional, territorial, and post-statehood eras, *id.* at 263-65. The opinion then takes the analysis even further back, to “[t]he judges of three centuries ago, when the jury consisted of witnesses, [who] reached out and devised this right as a means of thwarting arbitrary verdicts”:

“Juries ought to be fined if they would go against the hare and direction, take bit in mouth and go headstrong against the Court; and said, that by the grace of God he would have it tried, seeing the attaint is now fruitless.”

*Id.* at 267 (internal quotations and citation omitted).

Bnt that is not all. Not only was “[t]he right to grant a new trial \*\*\* inherent in all courts, unless withheld by lawful enactment[,]” but, “to revert to the conditions present when the Constitutional Convention was under way,” the *legislature* also had the power to grant a new trial, even after judgment had been entered. *Id.* at 268-69 (from a Connecticut decision: “Our colonial records show that one very large branch of legislative business was the hearing and granting of new trials.” (Internal quotations and citation omitted.)).

Contrary to the defendant’s contentions in *Merten*, the Court held that the last clause of Article I, section 16, offered by Delazon Smith, was intended to ensure that the jury’s authority in criminal cases to determine the law and facts – always under the judge’s direction – also would not destroy a criminal defendant’s right of new trial. So a “positive guarantee” was added:

“There is no provision in our Constitution which confers upon a jury in civil cases the power to determine both law and facts. Therefore, since Smith evidently wished that the right of new trial, which he proposed to guarantee, should be a complete one, he employed the phrase, ‘the right of new trial as in civil cases.’ Manifestly, his purpose was not to make it possible for future legislative assemblies

to assign to juries motions for new trials filed in criminal cases, but to make the right of new trial in criminal actions as complete as in civil cases. Evidently he was satisfied with the interpretation which the decisions aforementioned had placed upon the right of new trial."

175 Or at 271.

Other authority, also extant in 1857, demonstrated that the right of new trial in civil cases was not limited to instances in which a jury disregarded the instructions of the judge but extended to considerations of damages as well. Three years earlier, the territorial legislature had devoted an entire title to the subject of new trials, one provision of which applied in the case of "[e]xcessive damages, appearing to have been given under the influence of passion or prejudice." The Statutes of Oregon, ch 2, title VII, § 36(5) (1855 ed).<sup>12</sup>

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<sup>12</sup> Nothing about the distribution of power between the legislature, juries, and judges changed in any relevant respect between the adoption of the Oregon Organic Law of 1843 and the drafting of code of civil procedure in 1853. In 1845, the people approved what has been called the Organic Law of 1845. Arthur S. Beardsley, *Code Making in Early Oregon*, 23 Or L Rev 22, 35 (1943); see Matthew P. Deady and Lafayette Lane, *The Organic and Other General Laws of Oregon* 46-51 (Semple 1874). The right to trial by jury remained preserved, this time in Article I, section 2. Deady and Lane at 46. And, while Oregonians continued to look to Iowa for the bulk of their statutory law, the laws in Iowa had by then changed. So it was to the *revised* statutes of that territory that Oregon looked in 1845. See Revised Statutes of the Territory of Iowa (1843) (1911 reprint; also known as the "Big Blue Book"). The sections on justices of the peace and practice in the courts remained unaltered. See *id.* at Justices of the Peace, Art V, § 4 at 229 of reprint (Feb 9, 1843); Practice, § 20 at 334 of reprint – approved Feb 10, 1843).

By that time, Oregon's judiciary had begun to develop its own experiences with judicial oversight of jury verdicts by way of motions for new trial or the like. See, e.g., *Cline v. Broy*, 1 Or 89, 90 (Or Terr 1845) ("When a new trial will be productive of more injury than advantage to the party applying therefore, the court, in the exercise of sound discretion, may refuse to grant such new trial and, on account of the smallness of the verdict in this case, we think the decision of the court below right upon that ground."); *Oregon Supreme Court Record* at 41

And, as a final note, it is not insignificant to the thesis this brief presents that the person responsible for drafting that code of civil procedure – Commissioner James Kelly – derived the provision by copying verbatim from the recently enacted Code of Civil Procedure of the State of New York. 3 Documents of the Assembly of the State of New York, Seventy-Sixth Session, Ch VI, Art II, § 797 *et seq.* (March 5, 1853); *see* James K. Kelly, *History of the Preparation of the First Code of Oregon*, 4 Or Hist Q 185, 190-91 (1903) (“By common consent we agreed to accept the New York code of practice as the basis of our own, but with a notable exception in regard to proceedings in equity.”). Replication, not innovation.

#### D. Legislative Authority in General

As Chief Justice John Marshall observed in the case of *McCulloch v. Maryland*, the federal “government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it \* \* \* is now universally admitted.” 17 US 316, 4 Wheat 316, 405, 4 L Ed 579 (1819). In contrast, and as Justice Samuel Chase had observed more than two decades earlier, “all the powers that remain in the State Governments are indefinite \* \* \*” and “the peculiar and exclusive province, and duty of the State Legislatures \* \* \*. *Calder v. Bull*, 3 US 386, 387, 3 Dall 386, 1 L Ed 648 (1798) (involving a legislative grant of new trial). Or, as Professor Cooley explained: “[T]he constitutions of the several States \* \* \* are not grants of power to the States, but \* \* \* apportion and impose restrictions upon powers which the States inherently possess.” Thomas M. Cooley, *Constitutional Limitations* 9-10 (Little Brown & Co 1868).

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(Stevens Ness 1938) (*McCary v. Oregon Territory* (1846): noting that “motion was made in arrest of judgment” in criminal case).

The framers of the Oregon Constitution understood that distribution of power: the federal government began with nothing and took what it was given; the states – acting through their own organic acts and legislative assemblies – possessed the rest. Indeed, a decision from the Supreme Court of the Provisional Government utilized that principle when deciding that a note executed in November 1845 could not be paid in scrip authorized by a December 1845 statute. The case, *Knighton v. Burns*, is printed in the *Oregon Supreme Court Record* at 53-57, and in volume 10 of the Oregon Reports, at pages 548-52, as an appendix. In discussing the state counterpart to the Obligations of Contracts Clause of the federal constitution, the Court stated that “[t]his [Oregon’s organic provision] is a prohibition of great moment, affecting extensively the authority of the legislative branch of the established government.”<sup>10</sup> Or at 549 (bracketed text added).

Later in the opinion, when discussing an earlier federal decision, *Sturges v. Crowninshield*, 17 US 122, 4 Wheat 122, 4 L Ed 529 (1819), the Court announced the following understanding of the relationship between government and the common law in the context of contracts and constitutional (or organic) protection:

“In the opinion delivered by the late Chief Justice Marshall a broad and well defined distinction was made between the contract **and the remedy for the enforcement of that contract**; and the court held that while **the remedy to enforce the obligation of a contract might be modified as the wisdom of the Legislature should direct**, yet that the constitution intended to restore and preserve public confidence completely by establishing the great principle that the obligation of contracts should be inviolable. \* \* \* The Supreme Court admitted in this case, that the states might, by law, discharge debtors from imprisonment, and that they might pass statutes of limitations, because **these relate only to the remedy** affecting only the means of coercion \* \* \*. ”

10 Or at 550 (emphasis added).

In other words, the framers would not have disagreed with the notion that the legislature's plenary authority comfortably included the ability to modify the common law up to and including the remedy that it could provide, so long as it did not breach a constitutional mandate. Indeed, their predecessors said as much when, in the Organic Acts of both 1843 and 1845, they provided that the common law would govern *only* when "not otherwise provided for, and where no statute of Iowa territory applies" (1843) or "when no statute Law has been made or adopted" (1845). As but one example of the use of that authority to modify the common law – a damages enhancement – the territorial government authorized "treble the amount of damages which may be assessed" for timber trespass. *The Statutes of Oregon (1853)* Ch I, Title II, § 17 at 151.

All of that serves to confirm that Oregonians, like lawmakers in nearly all other territories, were Replicators, making use of the constitutions and codes of law of older states to the east, especially New York, Iowa, and Indiana. There was, as one writer has put it, a "recurrence to fundamental principle."<sup>13</sup> In Oregon's case, a reminder is needed: residents of the area, since the early 1840s, had been doing this, borrowing from their predecessors; as historian William H. Goetzmann put it, westerners were "prisoners of an emulative society."<sup>14</sup>

They were Replicators at work to make good use of precedents and models. One delegate, speaking for Innovators trying to break away from binding traditions, asserted "here upon the Pacific Coast \* \* \* we ought to go by the reason

<sup>13</sup> Bakken, *Rocky Mountain Constitution Making*, "Introduction" at 3-5.

<sup>14</sup> William H. Goetzmann, *Exploration and Empire: The Explorer and the Scientist in the Winning of the American West* xiii (Alfred A. Knopf 1966; W. W. Norton 1978).

of things, and not go so much by precedent." Johansen and Gates, *Empire of the Columbia* (2<sup>nd</sup> ed) at 263. His views, for the most part, were pushed aside by the Replicators. One of those precedent-following delegates put their views succinctly: "if he was sent here to form a new Bible he would copy the old one \* \* \* to make a hymn book, he would report an old one – they are better than any he could make." *Id.* Whether it was a Bible, hymn book, or new constitution, the homely metaphor made clear what most residents of western territories thought and felt: it was better not to try to re-invent the wheel.

In sum, the historical record – statutes, cases, organic enactments, and the broader context – all point to the conclusion that the framers of the Oregon Constitution represented the latest in a line of earlier Replicators and that the laws they had been replicating (together with the accepted understanding of those laws generated elsewhere) established a strong sense of legislative primacy – a primacy that did not fade when the particular enactment or policy decision might affect the remedy to which a person otherwise was entitled.

#### **IV. CROSS-TERRITORIAL COMPARISONS**

At first glance, more differences than similarities seem to exist between Oregon and other far-western territories. Several facts support that tentative conclusion. Oregon's journey from the early 1840s to the last of its territorial period is, in several ways, clearly at odds from the pattern of its neighbors. Even though Oregon might not be *sui generis*, its history differs from that of other western areas. Consider the several differences that make direct comparisons difficult. No other area from the Rockies west went through a Provisional Government like the one set up and put in play in Oregon from 1841/43 to 1848/49. Utah experienced a period of separate church direction from 1846/47 to

1850, and California had a military directorship from 1848 to 1850, but they differed in almost all particulars from Oregon's Provisional Government. Arizona and New Mexico had experienced Spanish domination before 1821 and Mexican control from 1821 to 1846 (as had California), but again Spanish-Mexican direction differed dramatically politically and culturally from Oregon's Provisional Government.

The varied chronologies of territorial progression also led to dissimilarities between Oregon and other far-western territories. Only California and Oregon became new states before the outbreak of the Civil War; all other areas from Kansas west came in during the war, shortly after, or late in the nineteenth or early twentieth century. Washington, Idaho, Montana, Wyoming, Colorado, and Utah, for example, came to statehood much later than Oregon, under transformed national and regional circumstances. Colorado entered the Union in 1876, most of the others in 1889-90, and Utah in 1896. Unlike Oregon, those areas experienced the Civil War and Reconstruction, the major mineral rushes, most of the final stages of conflict with Indians, and the burst to the surface of a nascent industrial America.<sup>15</sup> Oregon experienced none of those before 1859.

But there were similarities as well. The most significant of those was the uniformity of structure of U.S. territories on their way to statehood. All far-

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<sup>15</sup> The Rocky Mountain states, that range of states from Idaho and Montana in the North to Arizona and New Mexico in the South, have attracted more legal historians than the Pacific Coast. See, for example, Gordon Morris Bakken, *The Development of Law on the Rocky Mountain Frontier: Civil Law and Society, 1850-1912* (Greenwood Press 1983); Bakken, *Rocky Mountain Constitution Making, 1850-1912* (Greenwood Press 1987); and John D. W. Guice, *The Rocky Mountain Bench: The Territorial Supreme Courts of Colorado, Montana, and Wyoming, 1861-1890* (Yale University Press 1972).

western areas save for California were officially a territory. That meant all labored under governments that most westerners reacted to ambivalently. They did not like having their governors, secretaries, leading judges, and several other territorial leaders named by a distant federal government that showed, they charged, too little interest in their livelihood.<sup>16</sup> And, as noted, there was the near universal tendency across the different far-western jurisdictions to take freely from the shelf of eastern precedents for use wholesale, or nearly wholesale, in their new environments.

## V. CONCLUSIONS

The desire to protect their personal liberties and rights, their freedoms, and their land pushed Oregonians into a Replicator mode, drawing on legal-constitutional precedents in writing their constitution. They thoroughly, almost slavishly, adopted the legal codes and constitutions of states such as New York, Iowa, and Indiana. The Bill of Rights, Executive, Legislative, and Judicial sections of the Oregon Constitution display on every page how much Oregonians utilized constitutions of the past for their present-day needs.

The sections of the constitution devoted to the main branches of the Oregon government reveal much about legal thinking in the late 1850s. The executive section is quickly skipped over, suggesting that the role of the governor was not a worrisome area for Oregonians. The legislative guidelines, both in Section 4 and other scattered sections, indicate Oregonians wanted their legislators to be their protectors. Unlike some Rocky Mountain residents, Oregonians exhibited little fear that their legislature had to be closely watched so that it would not snatch away their rights or load them with new tax codes and other obligations. The

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<sup>16</sup> Pomeroy, *The Territories and the United States 1861-1890: Studies in Colonial Administration* (University of Pennsylvania Press, 1947).

Oregon Constitution and the proceedings in Salem did not exhibit the discontent that drove some Rocky Mountain residents to express a "fear of the 'biennial mob of adventurers' in legislatures."<sup>17</sup>

The organization of the Judiciary Department in the Oregon Constitution derived from somewhat unusual circumstances. There is no exact parallel in other far-western territories becoming states. Safely in the hands of the territory's leading judges and leading lawyers, who were all Democrats, the committee report called for an extraordinary amount of direction to be in the hands of judges. After opponents pushed hard to have juries decide both the law and facts in criminal cases, legal leaders like George H. Williams accepted a compromise phrase from Delazon Smith that attempted to balance the power of the judges and juries. From the scant scattered evidence available, the judges seemed to get their way for the most part.

The implications of that historical evidence with respect to how the framers would have viewed the right to jury trial in civil cases seem pretty clear:

- First, legislative authority was understood to be plenary unless superseded by a provision of organic law.
- Second, from its first organic act in 1843 – using text that is the product of replication rather than innovation – Oregon has consistently recognized and protected the right to trial by jury.
- Third, Article I, section 17 (also using borrowed wording), did not purport – either expressly or impliedly – to remove from the legislative

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<sup>17</sup> Bakken, *Rocky Mountain Constitution Making* at 103.

domain any authority not already subsumed within the right to jury trial as it existed in 1857.

- Fourth, notwithstanding the protected status of civil jury trials, legislators from provisional times onward regularly had been enacting statutes that both altered the common law and did so in ways that necessarily affected the function of the civil jury (authorizing new trials, permitting treble damages, etc.).
- Fifth, courts – including Oregon’s provisional supreme court in the *Knighton* case – had specifically embraced the principle that legislatures properly may modify common-law remedies, and judges for years had been policing jury verdicts for excessive damages, insufficient evidence, and legal inconsistency.

In light of the foregoing, there does not appear to be any historical basis to support the proposition that Article I, section 17, prevents the legislature from making common law claims easier or more difficult to prove, or establishing damages limitations.

Respectfully submitted this 9<sup>th</sup> day of June 2014.

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**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE  
SIZE REQUIREMENTS**

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a) is 9,547 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on June 9, 2014, I caused to be electronically filed the foregoing *AMICUS CURIAE* BRIEF with the Supreme Court Administrator through the eFiling system and served on the parties or attorneys for parties identified herein, in the manner and on the date set forth below:

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