

BRADLEY J. NICHOLSON,¹ THE OREGON CONSTITUTION: LEGAL BORROWING AND SOURCES OF LAW

Today, few people give much thought to the rights available under American state constitutions. When speaking of constitutional rights, most Americans, including lawyers, immediately think of the Constitution of the United States. That is not a surprise. The federal Constitution preceded most state constitutions. More importantly, the federal Constitution applies to all Americans. It controls the decisions and actions of both federal and state governments, because it is superior to all other law. It is the constitution that is taught to first-year students in American law schools. It is the constitution about which law professors usually write, because it has assumed vastly greater importance than state constitutions.

Confining one's thoughts to the federal Constitution, however, creates a kind of tunnel vision about what a constitution is, or can be. The federal constitution is a peculiar document, created at a particular time, reflecting the concerns of an exceptional group of men shortly after the nation achieved independence from Great Britain. The drafters of the federal Constitution represented an elite group, some of whom were slaveowners, who were steeped in 18th-century ideas of deism, natural rights, civic republican politics, and classical humanism. The federal Constitution naturally reflects those influences. In addition, the federal Constitution by necessity was forged to regulate a peculiar set of functions: providing for a national government, a federal system that would regulate the relationship between states, and addressing other national issues such as the conduct of foreign affairs. After addressing those weighty concerns, the Bill of Rights was added as a supplement to the main document.

Originally, the federal Bill of Rights was not supposed to be the primary source of rights for citizens, because it mainly purported to regulate the actions of the federal government. The federal Constitution recorded only a short list of rights, and mainly ones that the federal government might violate. As the federal Constitution initially was conceived and promulgated, it restrained the authority of the states rather minimally. By contrast, at least until the post-Civil War amendments, it was understood that state constitutions were supposed to provide the most significant rights for individual citizens. With the enactment of the Fourteenth Amendment, however, the federal Constitution assumed a greater role in guaranteeing all citizens' rights. Combined with the power of an insulated federal judiciary, the federal Constitution began its ascendance to the preeminence it enjoys today.

Thinking about state constitutional issues provides another perspective on constitutional rights and liberties, because it may avoid peculiar or questionable federal traditions and old conflicts over issues that have dominated the debate about its meaning for a century. For example, many state constitutions protect rights that differ from those featured in the federal Constitution. Many state constitutions provide for rights regarding remedies for civil injuries or access to the courts. Many state constitutions express guarantees for freedom of speech in a different and more specific manner than the federal Constitution. Interpretation of constitutional documents may bear some relationship to the different manner in which federal and state judges are selected and retained. For better or worse, most state court judges do not enjoy life tenure, but must face the voters in some fashion in a series of elections or reconfirmations. Such a system does not necessarily encourage independent judicial creativity or policymaking and may in fact punish it. Most state constitutions also are easier

¹ This essay draws from my forthcoming book, *A Sense of the Oregon Constitution*.

to amend than the federal constitution. State constitutions thus provide another American perspective regarding how rights are identified, how they are protected, and how they are modified.

In 1857, over one hundred and fifty years ago, a group of men met in a convention and drafted a proposed constitution for the State of Oregon.² The endeavor can only be described as a success. The people of the state approved it. Congress did not reject it during the statehood process, although its consideration in Washington was not without some controversy. Perhaps most importantly, with some amendments, the same constitution governs the state today. Many other states have substantially revised their constitutions, some repeatedly, but Oregon has not.

This article discusses state constitutional rights and seeks to provide some perspective on the sources of law and the role of legal borrowing in the development of American state constitutional law. In the interests of space and for ease of analysis, the focus will be on the Oregon Constitution. The Oregon Constitution is an appropriate subject for several reasons. Relative to other states, Oregon judges and lawyers have devoted greater attention to provisions of its constitution. The Oregon Supreme Court often relies on the provisions of its state constitution in deciding significant cases on its docket. The court's jurisprudence, moreover, is part of a larger trend in American law in the last 40 years, known as new judicial federalism, which seeks to search out greater protection for individual rights in the provisions of state constitutions. The Oregon Constitution thus receives the attention it deserves. The Oregon Constitution, moreover, has not been revised (that is, replaced) since it was adopted in 1857, on the eve of the American Civil War, although it has been amended on many occasions. More importantly, the Oregon Constitution features a number of significant provisions that do not appear in the federal Constitution, but which do appear in many other state constitutions. The most significant provisions of its bill of rights includes rights of religious freedom, free speech, trial by jury, remedies, equal privileges and immunities, property, and the initiative process.

This article will focus on the sources of some of those provisions. In particular, the provisions discussed are examples of legal borrowing from earlier state constitutions, the texts of which were based on legal literature such as the writings of Edward Coke and William Blackstone. It is also important to observe that the purpose of those constitutional provisions differ from today's emphasis on the protection of minority rights. The constitutional provisions discussed largely protect the majority of people from overreaching by aristocratic or oligarchic elites rather than protecting minorities from oppressive laws enacted by the majority.

I. The Oregon Constitutional Convention

Oregon sought statehood just as the slavery question in the United States was about to culminate in a civil war. The Oregon Territory was still a sparsely populated area with a largely agricultural economy, although some inhabitants engaged in fur trading, fishing, and mining. American interests in the northwest competed with the Russians and the British and eventually overcame them. In 1843, a territorial government was formed. The first legislature met in 1849, but

² In the 1920s, Charles Carey, a lawyer and judge, gathered together newspaper reports, addresses of participants, his own writings, and other material into a guide that has proved useful to generations of Oregon lawyers. THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857 (Charles Henry Carey, ed. 1926) [hereinafter CAREY].

it was not until the mid-1850s that statehood became viable. In 1857, the Oregon territory voted to convene a constitutional convention.³

The issues of slavery and local control dominated the political debate in the years leading up to the constitutional convention. No law sanctioned slavery in Oregon.⁴ The Kansas-Nebraska Act of 1854 made slavery an option in states in which slavery would have been forbidden under the Compromise of 1820.⁵ Later, in early 1857, the United States Supreme Court issued the *Dred Scott* decision, which held that Congress could not prohibit slavery in American territories.⁶ Oregon could have chosen to become a slave state, if it had wanted to become one. Whether it would do so depended partly on the political leadership of the state and partly on national politics. Although the Democratic party was the strongest in Oregon, it was split on the issue of slavery.⁷ Some Democrats, such as Justice Matthew Deady, were publicly in favor of slavery, while other Democrats were in favor of slavery but were reluctant to express their opinions publicly.⁸ At the same time, many thought that Oregon was unsuitable for slavery, perhaps because of the prevalence of small farms rather than large plantations or latifundia.⁹

Some feared that Oregon, in light of its status as a territory rather than a state, had little control over its future. It was widely believed that the administration of President James Buchanan, in concert with some United States Senators, was poised to force the practice of slavery on Oregon whether or not the local population wanted it.¹⁰ Other contentious issues at that time included

³ See generally CAREY, ch 1; DAVID ALAN JOHNSON, FOUNDING THE FAR WEST: CALIFORNIA, OREGON, AND NEVADA, 1840-1890 ch. 2 (1992); David Schuman, *The Creation of the Oregon Constitution*, 74 OR. L. REV. 611 (1995). For the legal landscape before 1857, see Joe Stephens, *Oregon Law Before Statehood: History & Sources*, in 2 PRESTATEHOOD LEGAL MATERIALS (Michael Chiorazzi & Marguerite Most eds. 2007).

⁴ See Organic Law of the Provisional Government of Oregon Art. I, §4 (July 5, 1845) (outlawing slavery), reprinted in THE ORGANIC AND OTHER GENERAL LAWS OF OREGON TOGETHER WITH THE NATIONAL CONSTITUTION AND OTHER PUBLIC ACTS AND STATUTES OF THE UNITED STATES at 58 (Matthew P. Deady ed., 1866) [hereinafter DEADY CODE]; An Act to Establish the Territorial Government of Oregon §14 (adopted by United States Congress, August 14, 1848) (adopting Northwest Ordinance for Oregon); Northwest Ordinance of 1787 art. 6 (July 13, 1787) (outlawing slavery in northwest territories).

⁵ See, e.g., CAREY at 39-41 (discussing creation of Oregon as a state).

⁶ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

⁷ CAREY at 24.

⁸ CAREY at 485 (Appendix (b): Address of Hon. John R. McBride).

⁹ CAREY at 32.

¹⁰ CAREY at 22-24.

immigration of ethnic minorities, the prohibition of liquor, and the growing power of corporations. The prevailing sentiment in Oregon was that statehood would provide greater local control of the determination of such significant issues.¹¹

The convention met in August 1857. The convention delegates came from many different walks of life, although the dominant groups were farmers (in numbers) and lawyers (in erudition and verbal assertiveness).¹² There were thirty-three farmers, eighteen lawyers, five miners, two newspaper men, and one civil engineer.¹³ Although various delegates had differing abilities in debating skills, “[t]ruth, however, justifies the statement that the lawyers monopolized most of the time and the farmers the least.”¹⁴ Three of the lawyers were the justices of the Oregon Territorial Supreme Court: Chief Justice George H. Williams, and Justices Matthew P. Deady and Cyrus Olney.¹⁵ A future Justice, Reuben P. Boise, also was a delegate. Another notable delegate was the Whig editor of the *Oregonian*, Thomas J. Dryer. Finally, Delazon Smith, a lawyer, journalist, and future United States Senator known by his admirers as the “Lion of Linn [County]” and by his detractors as “Delusion Smith,” gave many lengthy speeches at the convention.¹⁶

Several subjects dominated the debate at the convention. First, the delegates met just four years before the onset of the Civil War, and the subject of slavery was on every delegate’s mind. One abolitionist delegate sought to force the issue, but the majority of delegates refused to take a stand on whether Oregon should become a slave state. Instead, they cautiously decided to refer the matter to the voters.¹⁷ The delegates also referred to the voters the issue of whether free blacks would be allowed to emigrate to Oregon. When the voters approved the constitution, they rejected slavery, but declined to permit free blacks to emigrate to Oregon.¹⁸

The convention focused on a few matters that might seem surprising to the modern reader, because certain topics that were the subject of vigorous disagreement in 1857 have long since been settled. The delegates debated the issue of corporate liability and whether shareholders would be

¹¹ Interestingly, another issue was where Oregon’s eastern boundary would be drawn. Some, including prominent Democratic Senator Stephen A. Douglas, thought that it should be drawn at the Cascade Mountains. CAREY at 16-18, 20. The dynamic of Oregon politics would have been different if the line were so drawn.

¹² In other states the mix was similar. See JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 220 (1950).

¹³ CAREY at 484.

¹⁴ *Id.*

¹⁵ CAREY at 28-29.

¹⁶ See, e.g., CAREY at 27, 488-90.

¹⁷ CAREY 31-34, 430.

¹⁸ *Id.*

liable for more than the value of their shares of stock (i.e., either personally liable, or liable for twice the value of their shares), but decided that the liability of corporate shareholders would be limited to the value of their stock.¹⁹ Dueling would disqualify one for higher office.²⁰ Some wanted the convention to prohibit liquor, as the state of Maine had done in 1851, or at least refer the issue to the voters.²¹ The delegates also spent a significant amount of time discussing the relationship between the state and religion.²²

In seeking substantive content for Oregon's new constitution, many provisions, including some that have special significance today, were borrowed from other state constitutions. The rights provisions of the Indiana Constitution of 1851 held a special influence, although that was not the only state constitution that provided model text for the convention's consideration. Perhaps the most significant provisions included free speech, remedies, equal privileges, and takings of private property. Other provisions that are significant today were in part borrowed, but were also debated and rewritten. Those provisions include the ones regarding religion and the right to a jury trial in criminal cases. To the chagrin of some of today's lawyers and judges, who might want to know precisely what the delegates thought of each provision incorporated into the Oregon Constitution, the provisions that were the most controversial either were not adopted (such as slavery, corporate liability, prohibition of liquor) or, if adopted, were subsequently repealed (such as restrictions on immigration). At the same time, many of the provisions that are significant to us today were not debated, because they were borrowed from other constitutions.²³ The Oregon Constitution thus is an excellent example of the pervasive historical phenomenon of legal borrowing.

II. Legal Borrowing and the Oregon Constitution

Following the initial period of constitution drafting in the late 18th century, few if any state constitutions in the United States have been created completely from scratch. Instead, most state constitutions have been copied or borrowed from earlier state constitutions, the federal constitution, or other charters such as the Northwest Ordinance. Relatively little attention has been paid to the nature of the kind of legal borrowing that occurred in state constitutional development and what that history means for interpreting state constitutions, and the provisions that have been borrowed from

¹⁹ OREGONIAN, September 19, 1857, at 2, *reprinted in* CAREY 232-59; STATESMAN, September 8, 1857, at 1, 4, *reprinted in* CAREY 259-65; OREGONIAN, September 26, 1857, at 1, *reprinted in* CAREY 267-68; OREGONIAN, October 3, 1857, at 1, *reprinted in* CAREY at 275, 284; STATESMAN, September 4, 1857, at 4, *reprinted in* CAREY 275-76.

²⁰ STATESMAN, September 15, 1857, at 4, *reprinted in* CAREY at 323-24; OREGONIAN, October 3, 1857 at 2, *reprinted in* CAREY at 324-25.

²¹ CAREY at 34, 163, 267, 316, 329, 354-55.

²² OREGONIAN, October 3, 1857, at 1, *reprinted in* CAREY at 296-306.

²³ It is likely that those provisions were debated informally among delegates, but we have no writings that reflect the substance of such discussions.

other state constitutions that, in turn, had borrowed them from earlier state constitutions.²⁴

Comparative legal scholar and Roman law authority Alan Watson has written extensively on the phenomenon of borrowing in the western legal tradition. In his many works, Watson has sought to explain the manner in which law has developed historically. After many years of studying Roman law, medieval law, and early-modern European law, Watson concluded that law often develops through borrowing rather than being created from scratch in response to local social conditions. Legal transplants have occurred in so many places that it is difficult to catalog all of them. The source of many legal transplants in the western legal tradition was the *Corpus Juris Civilis*, especially the *Institutes*, compiled during the reign of the sixth-century Byzantine Emperor Justinian. The *Institutes*, a compendium of rules for students, served to spread the influence of Roman law, due in part to its concise descriptions of law and intelligent organization.

The Roman legal codes, from the time of their resurgence to prominence during the Italian Renaissance, had an enormous effect on legal scholars and lawgivers, and provided a rich source of legal transplants. Transplants often occurred within the framework of a particular legal tradition. The *Institutes* influenced the Napoleonic code of 1804, which in turn influenced many subsequent codifications in countries throughout Europe, Africa, Asia, and South America. For example, the *Corpus Juris Civilis* influenced the French civil code; in turn, the 1804 French civil code influenced the creation of the Chilean civil code (1850), which Ecuador (1860), Columbia (1873), and other South American nations subsequently copied.²⁵ Transplants can occur outside a particular legal tradition as well. Japan, during the industrializing Meiji period, relied primarily on German materials to create its legal code of 1895. In the 1920s, Kemal Atatürk relied on the 1907 Swiss *Zivilgesetzbuch* in creating a legal code for the modernizing nation of Turkey. In addition, borrowing may occur either by taking statutes and rules piecemeal or by incorporating larger sections of laws. In the latter instance, legal reformers sometimes lifted sections from older codes and installed them in new law codes.²⁶

The practice of borrowing can be traced in part to the intellectual dynamic of western legal culture. Western legal culture prizes the prestigious provenance of particular legal rules. In constructing arguments, historically, lawyers often based their arguments not on utilitarian consequences of rules or generalized principles of justice, but on the fact that certain sources of law are more prestigious than others and therefore more worthy of adoption. For example, when the Continental Congress sought to create a military code for the Continental Army, it adopted John Adams' draft code, based on the British Rules and Article of War. Adopting the British code made

²⁴ A few commentators have recognized the pattern of borrowing in state constitutional law. See, e.g., Christian Fritz, Book Review, *Rethinking the American Constitutional Tradition: National Dimensions in the Formation of State Constitutions*, 20 RUTGERS L.J. 969 (1995); Patrick Baude, *Interstate Dialogue in State Constitutional Law*, 28 RUTGERS L.J. 835 (1997).

²⁵ Maria Luisa Murillo, *The Evolution of Codification in Civil Law Systems: Toward Decodification and Recodification*, 11 J. TRANSNAT'L L. & POLICY 1, 9 (2001).

²⁶ See ALAN WATSON, *THE MAKING OF THE CIVIL LAW* ch. 2 (1981) (describing "block effect" of Roman law and its effect on subsequent legal borrowing).

a certain amount of sense, because many soldiers in the Continental Army had served in the British Army or militias under British military control, and were familiar with the content of the British laws. Adams, however, in order to secure adoption of the new rules, argued that the British code should be adopted not merely for the utilitarian reason that the rules were useful and already familiar, but also because their provenance (he claimed) could be traced back to Roman times.²⁷

Outside of the common-law countries, Justinian's *Corpus Juris Civilis*, particularly the *Institutes*, has long provided both inspiration, structure, and even a source of particular legal rules. The *Institutes* was intended as an elementary student's textbook, to give an rational structure, a roadmap, to one's legal education.²⁸ The key to the success of the *Corpus Juris Civilis* was that the *Institutes* provided the nutshell version of the detailed laws set forth in the other parts of the *Corpus Juris Civilis*, namely, the *Codex*, *Digest*, and *Novellae*. Its success cannot be denied. Watson observed that lawyers in the civil law tradition, the world over, have searched for answers in the *Corpus Juris Civilis*.

No matter that the society, politically, economically, and in religion, in fourteenth-century Paris or fifteenth-century Salamanca or sixteenth-century Leipzig or seventeenth-century Leiden, was very different from that of Rome of the second century or Constantinople of the sixth century, the *Corpus Juris Civilis* was there to be plundered.²⁹

The influence of Roman law reached beyond the European continent:

The mobility of Roman law is geographical as well as historical: Roman-based systems are now at home in icy Quebec, tropical Panama, sunny South Africa, as well as in most of Western continental Europe — in water-filled low-lying Holland, arid mountainous Spain, and in industrial West Germany as previously in pastoral Prussia.³⁰

Even in the common-law tradition, the concepts and structure of Justinian's *Institutes* have been used to bring order and coherence to the unplanned and disorganized common law. Unlike Roman law, the common law was a form of customary law. After judges memorialized the customs in writing,

²⁷ Bradley J. Nicholson, *Courts-Martial in the Legion Army: American Military Law in the Early Republic, 1792-1796*, 144 MILITARY L. REV. 77, 80 (1994).

²⁸ After setting out preliminary definitions of justice and jurisprudence, Justinian observed at the outset of the *Institutes* that, in order not to confuse the student, the rules should be explained care and simplicity, and without burdening the student with unnecessary details; otherwise, the student might be so discouraged as to abandon his studies. JUSTINIAN, *INSTITUTES*, Book I, Title 1-2. The *Institutes* were, in effect, one of the earliest versions of "Law in a Nutshell." See Alan Watson, *The Importance of Nutshells*, 42 AM. J. COMP. L. 1, 6-8 (1994) (discussing the phenomenon of nutshells in historical perspective). It is a pity that American law schools customarily reject the utility of that pedagogical approach.

²⁹ ALAN WATSON, *ROMAN LAW & COMPARATIVE LAW* 167 (1991).

³⁰ WATSON, *supra* note 26, at 14.

they consisted of a disorganized mass of judgments and judicial opinions. The common law thus lacked the systematic order of the *Corpus Juris Civilis*, until Blackstone applied the organizational ideas from the *Institutes* in devising the organization of his breakthrough treatise, *Commentaries on the Laws of England*.³¹

Legal borrowing sometimes occurs in principalities or dictatorships in which a ruler seeks to adopt new rules, particularly in the area of private law. In such instances, as Watson has observed, the ruler often had little regard for the precise content of those rules. Not unlike some examples of state support of the arts, the impetus for adoption of such rules at least in part reflected the egotism of the ruler, who wished to enact a lasting code of laws bearing his name as a kind of written monument. The most prominent examples of that phenomenon include Justinian and Napoleon.³² Other rulers might seek a law code to spur the process of westernization and economic development, such as the rulers of Meiji Japan and Turkey's Atatürk. Whatever the motivation, the extent to which rulers sought to determine the particular content of the rules themselves is doubtful, in part because they usually were untrained in the law. Instead, they appointed a committee of lawyers to create a code from esteemed earlier laws. The source of those laws may be internal or external to the legal system, depending on the preferences and prejudices of the lawyers. Lawyers often indulge in debating the relative esteem that sources of law deserve; accordingly, the process of choosing the law code from which to borrow usually reflects some degree of professional preferences, which at its worst can reflect a form of professional snobbery. In sum, the lawyers might have been quite selective and thoughtful in choosing the rules involved, or they might not have cared overly much, as long as some set of rules existed to guide such significant aspects of daily life as commercial transactions, adoptions, and inheritances.

The implication of borrowing is that legal codes may not reflect the period in which they were adopted as much as they may reflect the period in which they were originally created. Watson has remarked, for example, that in the highly charged religious atmosphere of 6th-century Byzantium, it is surprising that the *Corpus Iuris Civilis* contains so few references to Christian themes, until one considers that the texts Justinian's committee adopted were from legal commentators who had lived centuries earlier in pagan Rome.³³

It is a popular assumption that economic relationships determine the nature of law in a given society. Economics may have an influence, perhaps a very strong influence at times, but it is not necessarily decisive, because of the strong pull of tradition on the education and thought processes of lawmakers and the legal profession. For example, Marx asserted that economic conditions determined cultural constructs such as law, and that law was a form of superstructure that rested upon the economic engine of true change. Later adherents to Marxism, however, had to admit that law was akin to an obstinate cultural trait, which often did not enjoy a close relationship to economic

³¹ WATSON, *supra* note 29, ch. 18.

³² See BERNARD SCHWARTZ, *THE NAPOLEONIC CODE AND THE COMMON LAW WORLD* vii (1956) (Napoleon believed that his legal accomplishments would outlive his military exploits).

³³ ALAN WATSON, *COMPARATIVE LAW: LAW, REALITY AND SOCIETY* 83 (2007).

change.³⁴ Although many still ascribe a primary cause of legal change to economic power and its influence, law in fact often exhibits a disconnection to local conditions, whether economic or political.³⁵ As previously noted, the statute-intensive Roman legal system, originally created in the ancient Mediterranean, in an economy based on agriculture and slavery, has adapted to industrialized nations and mixed economies all over the world, including such disparate places as Germany, France, Russia, Brazil, Argentina, and Mexico.

Watson's observations about features of the development of law explain some significant features of the Oregon Constitution that might seem odd at first glance. For example, little of the Oregon Constitution was created from scratch during the convention. Instead, most provisions were borrowed from other state constitutions. As a result, the provisions of the Oregon Constitution do not necessarily tell us much about Oregon or its economy and society in 1857. For example, many provisions of the Oregon Constitution also can be located in the constitutions of economically and culturally different states. Although Oregon rejected slavery, a decision that was consistent with its economy based on small farms rather than plantations, the Oregon Constitution shared similar provisions with the contemporary constitutions of plantation slave states such as Arkansas, Mississippi, Tennessee, and Alabama.³⁶

In other words, Oregon was not exceptional and, like other states, borrowed much of its constitutional and statutory law. In fact, legal borrowing played a large role in state constitutional development across the United States. Most state constitutional conventions borrowed provisions from other state constitutions. Only after the Civil War and the legal revolution encompassed in the Fourteenth Amendment and the growing influence of federal law, did the federal constitution enjoy a greater influence on state constitutional drafting. During the 19th century, however, states usually looked to other states for inspiration in drafting state constitutions.

Even before the constitutional convention, Oregon's leaders expressed an interest in borrowing laws from other states. In 1841, American settlers in Oregon adopted the statutes of New

³⁴ Compare KARL MARX, *A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY* 11-12 (1904; originally published 1859) (economic base of society determines the cultural superstructure, which includes law), with 1 LESZEK KOLAKOWSKI, *MAIN CURRENTS OF MARXISM* 343, 363-64 (1981) (most Marxists now accept a reciprocal relationship between base and superstructure).

³⁵ See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 764, 816-22 (1992) (criticizing idea that state constitutions are expressions of local or regional "character").

³⁶ Compare ALA. CONST. Art. I, §§ 1, 2, 8, 3-7, 14 (1819) with OR. CONST. Art. I, §§ 1, 2-5, 8, 10; compare ARK. CONST. Art. II §§ 1, 2 (1836) with OR. CONST. Art. I, § 1; compare MISS. CONST. Art. I, 6-7 (1817) with OR. CONST. Art. I, § 8; compare TENN. CONST. Art. I, §§ I, III, VI, XVII (1835) with OR. CONST. Art. I, §§ 1, 2-5, 17, 20.

York.³⁷ In 1849, describing a session in which the territorial legislature adopted many statutes from Iowa, an Oregon newspaper remarked:

The territory was without law and without officers and all felt that the public wants were pressing; and every one was animated with the patriotic desire of providing a good code of laws.

The only ground of difference among members was found in the fact that each was most partial to the laws of the state from which he had recently emigrated, and with the operation of which, of course, he was most familiar. The difficulty growing out of this difference of partialities was seriously felt, and retarded, to the very last day of the session, the progress of business.³⁸

The predilection for legal borrowing in Oregon thus predated the constitutional convention.

At the Oregon constitutional convention, delegates defended borrowing from other constitutions on grounds of familiarity, access, and efficiency. One delegate remarked that “there were not less than a half dozen constitutions already written out, and in the pockets of members — they were ready to report them.”³⁹ Not all were in favor of mere copying, however. “We must consider what Oregon wants in constructing this constitution, and not what other states have. Let us not be mere copyists. If there is anything in other constitutions suitable to Oregon, let us take it, but let us not hastily patch it up with contradictory positions — let the instrument be well considered and read harmonious in all its parts.”⁴⁰ Some delegates disagreed and thought that other constitutions were handy and, well, why reinvent the wheel? Delegate Waymire “thought we might as well take old constitutions, that the people were familiar with, as to try to strike out into something new, that they knew nothing about. If he was sent here to form a new Bible he would copy the old one, and if he was employed to make a hymn book, he would report an old one — they are better than any he could make.— Let us make a constitution and go home in fifteen days.”⁴¹

And copy they did. The Oregon convention engaged in borrowing from other states, revising many provisions only slightly, if at all. According to Carey, most of the bill of rights, Article I, came from the Indiana Constitution of 1851, as did most of Articles II, III, IV, V, XVI, and XVII.⁴²

³⁷ Schuman, *supra* note 3, at 612 (citing Marie M. Bradley, *Political Beginnings in Oregon*, 9 Q. OR. HIST. SOC’Y, 42, 45 (1908)).

³⁸ OREGON SPECTATOR, October 18, 1849, *reprinted in* CAREY at 8. *See also* Joe Stephens, *Oregon Law Before Statehood in Constitutional Law (and History) 2007* at 3B5-3B6 (Oregon State Bar CLE November 30, 2007) (discussing the Iowa and New York statutes used in pre-statehood Oregon).

³⁹ STATESMAN, August 25, 1857, at 4 *reprinted in* CAREY at 108.

⁴⁰ *Id.*, *reprinted in* CAREY at 108-09

⁴¹ *Id.*, *reprinted in* CAREY at 109

⁴² *See generally* CAREY at 468-82 (discussing sources of the Oregon Constitution).

Original Article VII, defining the judicial department, may have found its provenance, at least to some extent, in the Wisconsin Constitution of 1848.⁴³ According to Carey, the delegates also borrowed provisions from the constitutions of Iowa (1857), Maine (1819), Massachusetts (1780), Michigan (1850), Ohio (1851), Illinois (1818), Connecticut (1818), and Texas (1845).⁴⁴ Delegate Delazon Smith, in a single speech at the convention, mentioned the constitutions of Delaware, Indiana, New York, Pennsylvania, Texas and Wisconsin.⁴⁵

As was the case with the popularity of a useful and well-organized compendium such as Justinian's *Institutes*, written sources of law available to the delegates facilitated legal borrowing. Several books, published repeatedly during the 19th century, were compendia of prior state constitutions. The Philadelphia publisher A.S. Barnes published numerous editions of a book that collected the federal and state constitutions.⁴⁶ John Bigelow also collected the federal and state constitutions into a similar book.⁴⁷ A copy of yet another book of state constitutions appears to have belonged to a delegate, La Fayette Grover, and a handwritten notation inside the front cover suggests that it was present at the Oregon constitutional convention and may have served as a useful resource.⁴⁸ The delegates apparently used such guides at the convention, because they make numerous references to the provisions of other constitutions and various committees relied on other constitutions to produce drafts of various articles. The ready availability of such compendia

⁴³ *Id.* at 475-76.

⁴⁴ *See generally* CAREY 468-82.

⁴⁵ OREGONIAN, August 29, 1857, at 2, *reprinted in* CAREY 101-02.

⁴⁶ *See, e.g.*, THE CONSTITUTIONS OF THE SEVERAL STATES OF THE UNION AND UNITED STATES, INCLUDING THE DECLARATION OF INDEPENDENCE AND ARTICLES OF CONFEDERATION (A.S. Barnes, publisher, 1856).

⁴⁷ JOHN R. BIGELOW, THE AMERICAN'S OWN BOOK (Gates, Stedman & Co., publisher, 1849).

⁴⁸ THE AMERICAN'S GUIDE: COMPRISING THE DECLARATION OF INDEPENDENCE, THE ARTICLES OF CONFEDERATION, THE CONSTITUTION OF THE UNITED STATES, AND THE CONSTITUTIONS OF THE SEVERAL STATES COMPOSING THE UNION (Hogan & Thompson, Philadelphia, 1850). Grover headed the committee that wrote the bill of rights. CAREY at 29. That particular book's utility at the convention would have been somewhat limited, because it was published in 1850, and thus did not contain the 1851 Indiana constitution. Markings in the book suggest that its owner seemed most interested in provisions regarding suffrage and qualifications of electors. In addition, Claudia Burton located a copy of a similar book (published in 1857) in the Lewis & Clark College Library, and suggested that that book also might have been used at the convention. *See* Claudia Burton, *A Legislative History of the Oregon Constitution of 1857 — Part II*, 39 WILLAMETTE L.REV. 245, 248 n.16 (2003).

facilitated borrowing from other states' constitutions.⁴⁹

As previously mentioned, the lawyers dominated the convention despite the fact that the farmers and others outnumbered them. Not surprisingly, in light of their diligent study, professional prejudices, and intellectually aggressive training, the lawyer-delegates disagreed among themselves as to their preferred sources of constitutional law. Delazon Smith expressed his admiration for the constitution of the state of Indiana, opining that it was “gold refined.” “But of all the constitutions of all the states, I am best pleased, as a whole, with that of the state of Indiana . . . Its bill of rights I should hardly be disposed to dispense with.”⁵⁰ Chief Justice Williams on the other hand, expressed his admiration for the constitution of the state of Michigan.⁵¹ Although the convention may have borrowed some provisions from the Michigan constitution, there is evidence that Smith’s admiration for the Indiana Constitution carried greater weight with the other delegates, in light of the fact that the convention apparently copied so many constitutional provisions from Indiana.

Comparing the Oregon convention with the first California constitutional convention held nine years earlier reveals a common phenomenon reflecting the relationship between legal borrowing and law and society. Oregon primarily was an agricultural state. The Oregon pioneers who settled the state in the 1850s were largely midwestern farmers who established small family farms. By contrast, at the time of its convention, California was undergoing a great gold rush, featuring a massive influx of thousands of young, unattached men seeking a quick fortune. David Alan Johnson, in his comparative study of the constitutional conventions of California, Oregon, and Nevada, argued for a relationship between the demographics of each state and the constitution that each state produced; accordingly, he classified the participants as either self-seeking Jacksonian liberal democrats or as communitarian civic republicans.⁵² He maintained that many of the men at the gold-rush era California convention were Jacksonian liberal democrats who believed in a competitive marketplace in which their individual fortunes would prosper.⁵³ By contrast, he portrayed the men at the Oregon convention as small farmers who spoke in terms that an 18th-century civic republican would understand: self-denial, moderation, and the common good.⁵⁴ One would expect, if Johnson’s

⁴⁹ See generally Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 HASTINGS CONST. L.Q. 199 (2000) (describing the existence of many editions of various compendia of state constitutions).

⁵⁰ OREGONIAN, August 29, 1857, at 2, *reprinted in* CAREY at 101.

⁵¹ OREGONIAN, September 5, 1857, at 1, *reprinted in* CAREY at 103.

⁵² See generally JOHNSON, *supra* note 3, ch. 4.

⁵³ As Johnson acknowledged, some of the men at the California convention were from Hispanic families already established in California, in addition to the men recently arrived from the United States. *Id.* at 107.

⁵⁴ See Remarks of David Alan Johnson, Constitutional Law (and History) 2007, Oregon State Bar CLE, Constitutional Law Section, November 30, 2007.

characterization in correct, that the two conventions would have produced radically or at least significantly different constitutions, particularly in the area of individual rights. In fact, they did not. Even though the California convention largely borrowed its bill of rights from the constitutions of Iowa and New York, and the Oregon convention largely borrowed its bill of rights from the constitution of Indiana, the rights provisions were remarkably similar in substance.⁵⁵ There was, despite the demographic and geographical differences between the populations of the two states, much common ground, because each of the aforementioned constitutions borrowed provisions from earlier constitutions, and the lawyers, the intellectual leaders at each convention as a result of their professional training, looked to earlier state constitutions to guide the present. Hence, they argued in favor of borrowing from recent constitutions, the texts of which were based on a collection of even earlier models.

Unlike the federal Constitution, which is difficult to amend and which as a result has remained relatively static, the proliferation of state constitutions reflected a view that constitutional realization was work in progress. Many of today's commentators often hold up the federal Constitution as a paragon of constitutional protections, as if all the state constitutions that both preceded and succeeded it deserve less respect. At least some of the drafters of the Oregon Constitution apparently did not see it that way. For them, writing a new constitution was an opportunity to realize a better model of government. As noted, the federal Constitution was not so much their guide as other, more recently drafted, state constitutions. There is good reason that states would seek inspiration in the work of other states. Significantly, as previously mentioned, the federal Constitution was designed with a somewhat different set of problems in mind than state constitutions. Indeed, one delegate seemed to suggest that the federal Constitution (and early state constitutions) were already dated by the mid-19th century.⁵⁶ In drafting a series of new constitutions through the early part of the 19th century, delegates to constitutional conventions believed that improvements could be made and they made them. For example, the Oregon Constitution contains a specific provision defining the separation of powers; by contrast, the federal doctrine lies in the structure of the Constitution, rather than relying on an explicit written provision. In another example, federal Constitution guarantees "freedom of speech" and "freedom of the press." In the 18th century, the phrase "freedom of speech" often had a narrow meaning, referring to statements made by a deliberating member of a legislative body, and "freedom of the press" referred to the right to be free from prior restraints on speech, such as licensing or censorship schemes.⁵⁷ The Oregon Constitution guarantees that no law will be passed

⁵⁵ See J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA IN THE FORMATION ON THE STATE CONSTITUTION 24-36 (1850) (delegates discussing borrowing from other states).

⁵⁶ OREGONIAN, August 29, 1857, at 2, *reprinted in* CAREY at 101 (Delazon Smith stated that "[m]any changes have taken place since our fathers first formed constitutions").

⁵⁷ FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 46, 48 (1985).

“restraining the free expression of opinion,” but provides that abuses of speech shall be punished.⁵⁸ By contrast with the federal Constitution, the expression of the free-speech right in the Oregon Constitution seems perhaps broader in scope but employs more specific wording.⁵⁹ Despite the fact that the founders sought to make improvements, they also apparently sought to conserve what they thought were sound provisions from prior constitutions.

As previously observed, rules of law may reflect more clearly the time when they were drafted than the time in which they were adopted, particularly if a significant amount of time has elapsed, but that is not a bar to their later adoption.⁶⁰ The continental civil-law tradition for centuries has relied on ancient statements of law in Roman texts such as the *Corpus Juris Civilis*, many of which already were centuries-old when Justinian adopted them. Even in common-law jurisdictions, lawyers advance old propositions of law, not necessarily because they reflect a sound policy, but precisely because they are old and established and therefore (in lawyers’ minds) worthy of respect. Still, when a lawyer advances an old rule in litigation, the advancement of the rule reflects some contemporary cause. The lawyer would not advance it unless it was favorable to the client’s interest. A judge may advance ancient and venerable rules of law, moreover, because citing such rules may enhance the judge’s scholarly reputation. In a constitutional convention, however, when a lawyer thinks of the public interest rather than individual clients, the considerations may differ from litigation. In that setting, a delegate may advance a set of already existing rules because the delegate is lazy, but might also advance such rules because the delegate understands them and finds them agreeable.

If the legal borrowing occurred without regard to content, one would lack evidence of the original understanding or intent of the adopting convention. In that instance, if the adopting convention gave no thought to a particular provision, no original understanding or intent existed in the minds of the drafters (putting the understanding of the ratifiers, namely the voters, aside for a moment). Such lack of consideration seems unlikely, however, in the case of the Oregon Constitution. The drafters likely possessed a firm idea regarding the meaning of the text, but did not express it in the records of the convention, possibly because they thought that the meaning was obvious to all or most of the delegates. In those circumstances, the meaning reflected a common current of legal and political thought, accessible in law books and treatises that were available to all

⁵⁸ OR. CONST. Art. I, §8.

⁵⁹ See *Barron v. Baltimore*, 32 U.S. 243 (1833) (federal bill of rights does not bind states); Paul Finkelman & Stephen E. Gottlieb, *State Constitutions & American Liberties*, in *TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS* 4-5 (Paul Finkelman & Stephen E. Gottlieb, eds. 1991) (citizens originally looked to states to protect their liberties). One must bear in mind that the two documents not only were drafted at different times, but had different purposes: state constitutions were supposed to be the most generous font of liberties for citizens, while the federal constitution regulated only the federal government, limited by the powers enumerated in the Constitution, and was concerned in large part with the areas of federalism and international relations.

⁶⁰ Cf. Claudia Burton, *A Legislative History of the Oregon Constitution of 1857 — Part III*, 40 WILLAMETTE L.REV. 225, 226 (2004) (“Constitutions reflect the times in which they were created and the people who drafted and approved them”).

and probably read by many. In addition, to discover the original understanding and a firm meaning of the text, one could search for the understanding reflected in the original activity of drafting and study the problem that the provision was created to address. Such understanding may be discovered in sources on which the drafters relied. In such an instance, the original understanding, barring any later modification of the text, would be reflected in the ideas underlying the original adoption of the text.⁶¹

At the Oregon convention, the provisions borrowed from earlier state constitutions likely not only reflected the conscious choices of the delegates, but also reflected the earlier original meaning of the texts themselves. That conclusion is based on several reasons. First, at least some of the delegates believed that the provisions spoke for themselves. “[T]he reference of the most common mind to the constitution of Indiana teaches that mind its rights under our government. They are there in monosyllables; and although individuals of common capacity, or of ordinary pursuits, may not be regarded as expounders of the constitutional law, yet the doctrine is contained, the declarations embodied in that bill of rights, and the meanest capacity can understand them.”⁶² That delegate added, “I am opposed to having anything in the constitution which is not practical, plain, and easy to be understood.”⁶³ The existing constitutions were what “the people were familiar with.”⁶⁴ In respect of hiring a reporter to record the proceedings of the convention, one delegate observed:

The making of a constitution now is not such an interesting proceeding as it may have been heretofore. What is said and done is not of that character, and the constitution that we may make, and every principle we can engraft into it, has been discussed and decided time and again. It is not solution of new principles; it is no solution of new doctrines. We have a number of models before us, and have only to select such as are applicable to the country at this time. Among the mass of principles which are already settled, we are only looking to the solution of those which are applicable to the present circumstances of Oregon.⁶⁵

The quote suggests that the provisions, though drafted previously in a different place and time, were chosen because they suited the delegates’ notions of proper law applicable to Oregon’s peculiar

⁶¹ See *State v. Wheeler*, 343 Or. 652, 175 P.3d 438 (2007) (court assumed that, in adopting a provision of the Oregon Constitution, the framers shared the concerns of the original drafters of the provision in an earlier constitution).

⁶² OREGONIAN, August 29, 1857, at 2, *reprinted in* CAREY at 102 (statement of Delazon Smith).

⁶³ OREGONIAN, September 5, 1857, at 1, *reprinted in* CAREY at 103 (statement of Chief Justice George Williams).

⁶⁴ STATESMAN, August 25, 1857, at 4, *reprinted in* CAREY at 109 (statement of Frederick Waymire).

⁶⁵ OREGONIAN, September 5, 1857, at 2, *reprinted in* CAREY 141-42 (statement of James K. Kelly).

circumstances. At least, the drafters could defend them as such.

Second, the delegates, and perhaps many voters as well, likely understood the vocabulary and assumptions underlying the provisions, many of which were rooted in natural law or civic republicanism or a synthesis of both.⁶⁶ One provision of the Oregon Constitution makes explicit reference to natural law and in others the connection is implicit.⁶⁷ The ideas of John Locke's *Two Treatises of Government*, Blackstone's *Commentaries on the Laws of England*, and Edward Coke's writings guided the original drafting of many early American state constitutional provisions. In *Two Treatises of Government*, Locke provided the philosophical basis for natural law that laid the groundwork, not only for the federal constitution, but for the state constitutions drafted during the late 18th and early 19th centuries, based on his description of natural law. Blackstone provided an explanation of English common law, often expressed in the language of Locke's philosophical writings, and many state constitutional provisions appear to be grounded at least in part in Blackstone's discussions. Early American constitutional theorists, such as Joseph Story, also relied heavily on natural-law concepts.⁶⁸

The drafters of the Oregon Constitution adopted an introductory clause outlining a number of identifiable natural-law assumptions. The very first clause of the Oregon Constitution offers clues as to the nature of the other rights expressed, and their intellectual underpinnings:

We declare that all men, when they form a social compact are equal in right: that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; and they have at all times a right to alter, reform, or abolish the government in such manner as they may think proper.⁶⁹

⁶⁶ See CHARLES G. HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 57 (1965) (observing that judges, when using natural law concepts, did not need extensive legal training or books).

⁶⁷ See OR. CONST. Art. I, §2 (“All men shall be secure in the natural right, to worship Almighty God according to the dictates of their own consciences”).

⁶⁸ 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §325 at 293 (1833) (citing, e.g., works by continental writers Emmerich de Vattel, Johann Gottlieb Heineccius, and Jean-Jacques Burlamaqui).

⁶⁹ OR. CONST. Art. I, §1. Carey identifies the 1851 Indiana Constitution as the source of the Oregon clause. CAREY at 468. That provision states:

WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the People have, at all times, an indefeasible right to alter and reform their government.

IND. CONST. Art. I, § 1 (1851). Obviously, the Oregon delegates opted for a more streamlined text

Article I, section 1 is a statement of natural rights, very similar to earlier American statements of natural rights, such as the Declaration of Independence⁷⁰ and the United States Constitution.⁷¹

At the same time, the free speech and equal privileges provisions, although consistent with natural-law principles, also seem to reflect civic republican ideas. Indeed, many provisions seem to fit well with the precepts of civic republicanism. For example, the right to bear arms for individual defense, defense against tyranny, and citizens' defense of the republic itself has strong roots in the writings of civic republicans such as Niccolo Machiavelli and James Harrington.⁷² Titles of nobility, for example, ideally would not be permitted in a civic republic.⁷³ On the other hand, a constitutional provision for public schools may stem from the idea of public virtue and the inculcation of republican ideals.⁷⁴

The text of some of the Oregon Constitution's most important rights — the speech protections, the remedies clause, and the equal privileges and immunities clause, for example — were drafted during the 1780s, a period during which civic republican ideals were most popular and the texts initially adopted at that time reflect those ideals.⁷⁵ In tracing the origin of those four significant state constitutional provisions, one sees the unmistakable influence of William Blackstone and Edward Coke on the earliest generation of drafters of American constitutions. Coke provided a significant gloss on the ideas set out in Magna Carta, extending those ideas into broader concepts of

than Indiana. It is interesting that the Oregon provision is more qualified in one way, because it emphasizes that men are equal when they form a social compact, rather than in a more general sense.

⁷⁰ “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed[.]” Declaration of Independence.

⁷¹ “We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.” Preamble, U.S. CONST.

⁷² OR. CONST. Art. I, § 27 (“The people shall have the right to bear arms for the defense of themselves, and the State, but the Military shall be kept in strict subordination to the civil power”).

⁷³ OR. CONST. Art. I, § 29 (“No law shall be passed granting any title of Nobility, or conferring hereditary distinctions”).

⁷⁴ OR. CONST. Art. VIII, § 3 (“The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools”).

⁷⁵ *See, e.g.*, OR. CONST. Art. I, §8 (free speech with abuse clause: originally drafted 1790), Art. I, §10 (remedies clause: 1776); Art. I, §17 (civil jury: 1776); Art. I, §18 (takings: 1777); Art. I, §20 (equal privileges: 1776); art. I, §21 (contract impairment: 1787; ex past facto: 1789).

due process and everyone's right of access to the courts for the redress of injuries. Blackstone not only brought order to the chaos of the common law in his writings, but built upon the writings of Coke and Locke in articulating the rights of Englishmen. In particular, Blackstone described the concepts of freedom of speech, privileges and immunities of citizenship, and private property. In America, state constitution writers developed the ideas of Coke and Blackstone into state constitutional texts that described the rights of all citizens.

Among the most significant rights were those set out in the free speech clause; the remedies clause; the right to equal privileges and immunities; and the clause requiring compensation for takings of private property. The right to free speech in the Oregon Constitution is encompassed in a provision stating that "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."⁷⁶ Although the first half of that text seems very protective of free speech, the second half provides for potentially significant restrictions on speech, anchored in whether speech is harmful. The evidence suggests that the text was intended to adopt the common law and statutory restrictions on speech, rather than providing a springboard for judges to strike down restrictions in favor of a novel judicial interpretation of the constitutional text.⁷⁷ The remedies clause states that "every man shall have remedy by due course of law for injury done him in his person, property, or reputation."⁷⁸ Although some courts have used this clause to overturn statutes limiting the scope of tort claims, the clause was designed to provide for equal access to the court system.⁷⁹ The equal privileges and immunities clause provides that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." Today, courts approach this clause as a requirement for equal access to governmental benefits. Originally, however, "privileges and immunities" more likely referred to certain fundamental rights of life, liberty and property necessary to individual economic independence, in particular, the right to travel, the right to reside, the right to hold real estate, the right to make contracts, and the right to file suit in court. At the same time as the convention sought to protect those rights for white citizens, however, the delegates submitted to the voters a choice of whether to adopt a regime of slaveholding, or to ban black persons from the state. The voters rejected slavery, but adopted the exclusionary provision, which stated that no free black persons "shall come, reside, or be within this

⁷⁶ OR. CONST. Art. I, §8; *see also* OR. CONST. Art. I, §26 ("No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good").

⁷⁷ THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 416-17 (1st ed. 1868).

⁷⁸ OR. CONST. Art. I, §10.

⁷⁹ *Smothers v. Gresham Transfer*, 332 Or. 83, 23 P.3d 333 (2001) (legislature cannot modify common law remedies without providing equal or more generous substitute).

State, or hold any real estate, or make any contracts, or maintain any suit therein.”⁸⁰ State constitutional rights at that time, obviously, often were not universal in character and not protective of minorities.

III. Early Conceptions of Rights Under the Oregon Constitution

It is an interesting question whether the rights provisions of the Oregon Constitution seek to vindicate rights of the minority, or rights of the majority, although one finds expression of both at the convention. Some, such as Delazon Smith, indicated that a constitution may protect minority rights from the excesses of majoritarian democracy.⁸¹ Their response likely would identify individual rights that a majority of citizens, acting through elected representatives of government on their behalf, might endanger. At least some of the delegates at the Oregon constitutional convention probably agreed with Smith.

On the other hand, many delegates supported the idea that a constitution protects majority rights when the elected representatives were self-interested or unresponsive. The idea of a social contract, even one that could be abrogated and reformed, was a strong one. The very first provision, Article I, section 1, reflected that belief. The fact that people agreed to give up some rights to enjoy the benefits of a common government meant that the government was expected to govern for the greater good of all, not just a few fortunate public office-holders and their benefactors. As previously observed, the delegates feared that their legislators would betray them by becoming or facilitating a new aristocracy. One delegate opined that:

the cost of a government did not consist alone in the salaries and other usual expenses which could be counted up at the beginning of the year. But they consisted mainly in the frittering away of the people’s money by the legislature. And if there was any way to keep the hands of the legislature out of the public treasury, he was for adopting it.⁸²

Government jobs were a worrisome drain on the public fisc in light of the Jacksonian spoils system. In discussing whether to create an office of state printer, many delegates were suspicious that the office would become a political appointment, and that the office holder would draw a salary from the taxpayers but provide poor or no service. Delegate Watkins stated that an office of state printer was “a humbug.” “Why, the officers of state who are his political friends or enemies, as the case may be, and who would be influenced by their prejudices, rather than the wants of the work or the responsibility of the man.”⁸³ Contracts on the Erie canal, he observed, were all given to Whigs, but he was certain that the Democrats would have done the same thing.

In addition, the expression of class distrust was unmistakable. Delegate Logan suspected the

⁸⁰ CAREY at 430. The proposal, once approved, became section 35 of the Oregon Constitution, which was repealed in 1926 after an unsuccessful attempt to do so in 1916. *Id.* at 462.

⁸¹ OREGONIAN, September 12, 1857, at 1, *reprinted in* CAREY at 167.

⁸² STATESMAN, September 15, 1857, at 1, *reprinted in* CAREY at 288.

⁸³ OREGONIAN, October 3, 1857, at 1, *reprinted in* CAREY at 292.

motives of “gentlemen,” i.e., aristocrats, the political elite:

Gentlemen are continually expressing disapprobation of tying the hands of the legislature; they have confidence in the legislature! For himself, he had all confidence in the people that they would do right in this matter, but he did not believe in the legislature, and he was willing to be set down for one who distrusts, if not the honesty, the prudence of the legislature.⁸⁴

“Improvident legislation” had ruined “states, individuals, and whole communities,” and he did not want to give legislators the opportunity to do the same in Oregon.⁸⁵ Some delegates thus distrusted the legislature as a potential bastion of class power, a drain of precious resources, and a likely source of corruption. The Oregon Constitution was supposed to serve as “the friend of right, and the foe of privilege.”⁸⁶ As one commentator observed, the Oregon constitutional convention was concerned with the “corrupting influence of power” and “self-serving material advancement.”⁸⁷ Many delegates viewed government as a burden on the taxpaying citizens.

Before the Civil War, protecting minority rights was an ambiguous concern. In particular, one must bear in mind an important point about the concept of “minority rights” in the first half of the 19th century. At that time, minority rights referenced a different connotation than what we might assume when we hear that term today. When Delazon Smith spoke of the rights of minorities at the convention, we should understand the intellectual context of his argument. He almost certainly was not thinking of racial or ethnic minorities. In fact, many delegates at the convention freely and repeatedly expressed their racist views, whether it was enslaving blacks, or excluding blacks or Chinese people or others from the state.⁸⁸ When Smith spoke of protecting the minority, perhaps he was talking about protecting property owners from expropriation. In Federalist 10, James Madison expressed his concern that, in a popular government, the majority might seek to expropriate the valuable property of the wealthier minority. Smith referred specifically to the rights of property owners, namely those who owned liquor, a beverage that others sought to prohibit as a wicked threat to society. Prohibitionists threatened to make alcohol illegal and, if successful, seize that property as contraband.⁸⁹

Other kinds of property also were at stake at that time. In particular, it is likely that Smith’s

⁸⁴ *Id.*, reprinted in CAREY at 292.

⁸⁵ *Id.*, reprinted in CAREY at 293.

⁸⁶ STATESMAN, September 22, 1857, at 4, reprinted in CAREY at 388 (statement of Delazon Smith).

⁸⁷ Christian Fritz, Book Review: *Rethinking the American Constitutional Tradition: National Dimensions in the Formation of State Constitutions*, 20 RUTGERS L.J. 959, 986 (1995).

⁸⁸ *See, e.g.*, CAREY 33, 79, 318, 320-24, 361-62, 369.

⁸⁹ OREGONIAN, September 12, 1857, at 1, reprinted in CAREY at 167.

ideas about the rights of minorities were based on those of Senator John C. Calhoun.⁹⁰ Calhoun and others feared that the North and the majority of Americans (because slaveholding reflected the economic interests of a minority of people in a minority of states) would seek to end the system of slavery. Although Smith was not a vocal supporter of slavery, he was a prominent figure in the Democratic Party, which was the party most closely identified with defending the rights of white slaveholders before the Civil War. In alluding to minority rights, Smith implicitly raised the contemporary constitutional defense of slaveholders and their right to continue to hold their property in slaves.⁹¹ In 1857, when white politicians referred to the rights of the minority and individual rights, slaveholders and other property owners were often the minorities they had in mind.⁹² The idea was relevant to political discourse, because Oregon was about to vote on whether to become a slave state.

The delegates, a collection of white men, limited the scope of natural rights to citizens, and then mostly to white male citizens. As for others, including blacks, Chinese, and Native Americans, the delegates sought to exclude them from the warm glow of natural rights.⁹³ Article I, section 31 provided that “[w]hite foreigners who are, or may hereafter become residents of this State shall enjoy the same rights in respect to the possession, enjoyment, and descent of property as native born citizens.”⁹⁴ In addition, the people of the Oregon territory, at the same election at which they approved the constitution, approved the following provision, which became Article I, section 35:

No free negro, or mulatto, not residing in this State at the time of the adoption of this Constitution, shall come, reside or be within this State, or hold any real estate, or make any contracts, or maintain any suit therein; and the Legislative Assembly shall provide by penal laws, for the removal, by public officers, of all such negroes, and mulattoes, and for their effectual exclusion from the State, and for the punishment of

⁹⁰ See generally JOHN C. CALHOUN, DISQUISITION ON GOVERNMENT (written 1848-49; published 1851).

⁹¹ William Treanor makes two interesting observations about the original understanding of the takings clause, forbidding governmental seizures without compensation: (1) that it was a reaction to British confiscations of colonists’ property during the Revolutionary War; and (2) it offered protection to slaveholders if slaves were freed by government decree. William M. Treanor, *Regulatory Takings*, 12 ENGAGE 4, 4 (June 2011).

⁹² The subject of slavery was just under the surface at the Oregon convention, although some, particularly delegate Jesse Applegate, sought to force the debate into the public eye. See CAREY 30-33.

⁹³ One historian has argued that, earlier in American history, colonial rulers cemented racial solidarity between poor whites and aristocratic whites by importing slaves. See generally EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA (1975).

⁹⁴ The Oregon Constitution also purported to give the legislature the power to control emigration to the state. Article I, section 31 was repealed in 1970.

persons who shall bring them into the state, or employ, or harbor them.⁹⁵ This provision, as previously mentioned, made it clear that black persons were deprived of the rights they otherwise might have enjoyed under the equal privileges and immunities clause of Article I, section 10.

Not everyone agreed with the decision to adopt slavery or racial discrimination in the Oregon Constitution, however, as delegate Watkins condemned the proposed constitution's treatment of black people.

The people of the southern portion of the republic do hold and, with my free consent, will hold men as property. They believe this to be right and proper. While I believe it to be wrong in morals as in policy, and I only claim what I am willing to concede, that we both have equal rights to express our sentiments and determinations.

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. And, when I say this, I do not consider that I am under obligation to treat him socially as my equal or my companion or to invest him with political privileges. But what 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.⁹⁶

Watkins thus condemned the lack of legal protection for blacks in the proposed Oregon Constitution as inconsistent with the spirit of liberty and equality otherwise provided in the bill of rights. He observed that the whites and blacks shared a common humanity that the law ought to recognize and protect.

His property may be taken, his life endangered, his limbs broken by some fiend in human shape; but your laws, framed to protect the weak, the innocent, the helpless, and to administer justice, could give him no redress. . . . [T]he free negro has claims upon us which we can neither ignore nor destroy; he was born upon our soil, he speaks our language, he has been taught our religion, and his destiny and ours are eternally linked. Fate never forged bolts stronger than those which connect his future with ours; and, for weal or woe, we are in the same boat and must finish the voyage

⁹⁵ Article I, section 35 was repealed on November 3, 1926. In November 2002, the voters approved Measure 14, which removed racial references from sections 2, 10, and 14 of Article VII (original), and sections 2 and 4 of Article XVIII, including the text of the referenda regarding slavery and free blacks that were submitted to the voters at the same time as the constitution.

⁹⁶ OREGONIAN, October 10, 1857, at 1, *reprinted in* CAREY at 384-85. Congressman John Bingham, who later was the primary drafter of section 1 of the Fourteenth Amendment, was against statehood for Oregon, because the Oregon Constitution did not guarantee equal rights for nonwhites. Cong. Globe, 35th Cong. 2d Sess. 981-84 (1859).

together.⁹⁷

A majority of delegates likely did not share delegate Watson's views on the rights to which free blacks should be entitled. At the same time, they refused to take a position on the question, probably because they did not wish to freight the proposed constitution with the most controversial racial questions of the day. A majority of delegates voted to submit the constitution to the voters and simultaneously refer the questions regarding free blacks and slavery.

In 1857, following the constitutional convention, the voters of Oregon approved the proposed constitution. At the same time, they rejected slavery yet chose to exclude free blacks. Two years later, Oregon became a state. By 1861, the nation was at war. After the war, the federal government adopted the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution. Those amendments had at least two effects. First, they did away with efforts, such as those in Oregon, to limit the scope of rights expressed in its constitution to only whites, and white men in particular. Second, the new federal amendments contributed to the growth and, ultimately, the predominance of federal constitutional law over state constitutional law in the late 19th and 20th century. State constitutional law declined in status and use until the 1970s and the advent of new judicial federalism, a movement advocating greater reliance on state constitutional law.

Oregon did not participate in foreshadowing the revolution that resulted in the 14th Amendment. Instead, Oregon's constitution was one of the last constitutions before the outbreak of the Civil War. Oregon had left to the voters the choice of limiting the rights of non-whites. Perhaps not surprisingly, the voters did not want the inequality of slaveholding among whites (which favored an oligarchy of large wealthy landowners), but did not want ethnic minorities either, or did not want to recognize them as equals. Later, Oregon failed to participate in the civil-rights revolution of the 14th Amendment.⁹⁸ Despite new voters (first non-white men, later women) becoming part of the consensus upon which the constitution must rest, the state constitution remained the same. Indeed, the racist provisions of the Oregon constitution remained a useless and shameful appendage for decades.

More recently, in a movement known as new judicial federalism, state courts have sought to expand the scope of protection of individual rights. Inspired by the expansive activism of the Warren Court, state supreme courts sought to use the provisions of their state constitutions as a means of expanding rights of free speech, sexual liberty, and rights of criminal procedure. The role of the courts, as they saw it, was to use constitutional provisions to protect the rights of "discrete and insular minorities" who could not otherwise protect themselves in the political process.⁹⁹

The state courts, however, have not been quite as successful in that endeavor as the federal courts, for several reasons. One is that state courts are for the most part elected and the judges might

⁹⁷ OREGONIAN, October 10, 1857, at 1, *reprinted in* CAREY at 385.

⁹⁸ Although Oregon initially ratified the 14th Amendment in 1866, it withdrew its ratification in 1868. Oregon again ratified the amendment in 1973. *See generally* Cheryl A. Brooks, Comment, *Race, Politics & Denial: Why Oregon Forgot to Ratify the Fourteenth Amendment*, 83 OR. L. REV. 731 (2004).

⁹⁹ *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938).

not be reelected if they act too radically. Also, the initiative process, available in many states such as Oregon, can be used to modify the state constitution to overrule, in effect, an unpopular judicial decision. Another reason is that the expansive view of minority rights is often inconsistent with the text and spirit of state constitutions. As a result, state courts have struggled for credibility when they advocate significant social change. For example, the Oregon Supreme Court has adopted a highly libertarian reading of the free speech clause of the Oregon Constitution, particularly in matters of obscenity. In order to do so, however, the court practically ignored the second half of the provision, the abuse clause, which invites legislative (that is to say, majoritarian) regulation of speech. The courts thus have struggled with reconciling the old texts with modern issues.

In light of the age of the Oregon Constitution, drafted and adopted before the American Civil War, it would be beneficial to consider drafting a new constitution, one that reflects modern rather than pre-Civil-War values, particularly modern concepts of human rights, and which acknowledges the more significant role of the modern state in people's daily lives.

Such guidance may exist in recent constitutions of other nations, because those constitutions reflect the most progressive approaches to defining the relationship between state and citizen. As Alan Watson has taught us, law often develops through borrowing. Borrowing from, or at least considering, the experiences of other nations may be useful. For example, the Canadian Charter of Rights and Freedoms provides guarantees of speech and protection of minorities that are greater than those found in the Oregon Constitution. The Charter of the Fundamental Rights of the European Union (EU Charter) offers additional ideas, because it is a document that specifically recognizes many facets of the principle of individual autonomy. At the outset, it asserts the necessity of respect and protection for human dignity.¹⁰⁰ The EU Charter protects the right of the integrity of the person against, for example, involuntary testing or eugenics,¹⁰¹ and also protects against the use of torture.¹⁰² It asserts the liberty and security of all people.¹⁰³ It advocates respect for privacy and family life, including protection of personal data.¹⁰⁴ In addition, the EU Charter protects minorities by

¹⁰⁰ EU Charter, Art. II-1; *cf.* Universal Declaration of Human Rights [hereinafter UDHR], art. 1 (people are free and equal, possessing “reason and conscience,” and they should act in a “spirit of brotherhood.”); Basic Law for the Federal Republic of Germany I(1) (respect for human dignity). The Montana state constitution contains a similar provision. *See* MONT. CONST. Art. II, §4 (“The dignity of the human being is inviolable.”). The concept of human dignity, however, is a vague standard subject to varying interpretations which may invite endless debate rather than clarity. For a skeptical view of constitutional protections for dignity, see James Q. Whitman, “Human Dignity in Europe and the United States: The Social Foundations” in GEORG NOLTE, ED., EUROPEAN AND US CONSTITUTIONALISM (2005).

¹⁰¹ EU Charter, Art. II-3.

¹⁰² EU Charter, Art. II-4; *cf.* UDHR, art. 5 (forbidding torture and cruelty).

¹⁰³ EU Charter, Art. II-6.

¹⁰⁴ EU Charter, Art. II-8.

proclaiming equality before the law,¹⁰⁵ forbidding discrimination,¹⁰⁶ establishing equality of the sexes,¹⁰⁷ and calling for respect for cultural, religious, and linguistic diversity.¹⁰⁸ Through those provisions, the rights of minorities and individuals are protected explicitly. Other collections of rights may also be useful to consult, including Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The foregoing texts addressing human rights would be worthy of consideration in a revised constitution. Legal borrowing, having guided the past, might guide the future as well.

IV. Conclusion

We may draw from the foregoing discussion a number of points about the Oregon Constitution. Although some scholars have focused significant attention on the convention and debates at the convention, details of the convention are only somewhat useful in determining the meaning of the Oregon Constitution. The debates offer a glimpse into the thinking of some western pioneers on the eve of the Civil War, during which time the most significant issues were slavery, racial restrictions on emigration, religion, liquor, and the power of corporations. Unfortunately, the debates shed only a little light on the most significant provisions of the constitution that remain today (e.g., free speech, remedies, equal privileges, and property rights), because many of those provisions were borrowed from other state constitutions and adopted without debate. Even some currently significant provisions that the delegates did debate (e.g., religion clauses, jury clauses) were drafted based on provisions of other states' constitutions.

The role of borrowing in state constitutional law has received little attention and is often misunderstood. Borrowing was an important force (perhaps one of the most important themes) in legal history. The role of borrowing is evident in the development of continental private law through the influence of Justinian's *Institutes*. Similarly, state constitutional law in the United States developed through borrowing, facilitated by the availability of books that collected the texts of various state constitutions. In addition, the rights provisions in earliest state constitutions often found their basis in Blackstone's *Commentaries*. Its heavy reliance on Coke's ideas and Lockean political theory informed many of the borrowed constitutional provisions adopted before the Civil War.

As a result, the Oregon Constitution perhaps evidences little of a distinctively Oregon character. Rather, it is better viewed an example of a wider Anglo-American legal tradition. Although legal borrowing historically sometimes was a seemingly unreflective process, repeated adoption of certain popular constitutional provisions might suggest a consensus on certain issues. In 19th-century America, those include rights of free speech, remedies, equal privileges, and property

¹⁰⁵ EU Charter, Art. II-20; *cf.* UDHR Art. 7 (providing for equality and equal protection of the law).

¹⁰⁶ EU Charter, Art. II-21(1); *cf.* UDHR, arts. 2, 7, 10 (non-discrimination provisions); European Convention on Human Rights Art. 14 (same).

¹⁰⁷ EU Charter, Art. II-23.

¹⁰⁸ EU Charter, Art. II-22.

rights. As such, their inherited meaning can be traced with a high degree of confidence by examining the prior debates in earlier constitutions adopting those provisions. As for clauses that were both borrowed, then debated and modified, we may determine their original understanding as well. This legal tradition is reflected in provisions borrowed from constitutions that borrowed those provisions from other constitutions. The legal borrowing shows consensus regarding significant provisions, which expressed ideas adopted from Magna Carta, the writings of Coke, Blackstone, and others in the natural-law and republican tradition. Constitutional meaning comes from the text and the meaning of the text from the tradition and original understanding at the time of adoption. An ordinary person can read the constitution, but in reading that document, the reader would be expected to infer meaning from a ready knowledge of political assumptions and legal principles, which were more commonplace then than they are today. If the reader was confused by the terms, the reader could consult the cases and books by commentators such as Blackstone and Story, which could shed light on the legal concepts reflected in the text of the Oregon Constitution.

As noted previously, at the time of the drafting of the Oregon Constitution, there was a widespread distrust of the legislature and its inclination to reward factional interests with special benefits. There was a concern that the government promote the general welfare and a preoccupation with the costs of government. As a result, many provisions of the Oregon Constitution, like many other pre-civil-war constitutional provisions, were majoritarian in nature and protective of the general welfare. The Oregon Constitution reflects not so much a concern with minority rights as a concern that no one receive a special advantage.

In the future, Oregon may wish to consider revising its constitution to incorporate ideas that are appropriate to modern society. In doing so, the drafters of a new constitution might consider the provisions of contemporary constitutional texts as worthy objects of incorporation.