

## Chapter 39

# Oregon Law Before Statehood: History and Sources

Joe K. Stephens

### *INTRODUCTION*

The legal history of Oregon prior to statehood is fairly complex. This chapter attempts to aid research into early legal materials by placing them in the context of that history. The first section is a scene-setting account of early claims to sovereignty, based largely on secondary sources, cited in the notes. Citations to treaties and conventions between the contending powers are also relegated to the notes, since these preceded anything that can be considered to be Oregon law. Subsequent sections provide brief narratives of legally significant events in the historical development of the provisional government, the territorial government, and the drive to statehood, with citations to supporting secondary sources cited in the notes, but with citations to primary sources with annotations in the text.

### *THE "OREGON QUESTION," 1789-1821*

At the end of the eighteenth century, the Oregon Country or Oregon Territory<sup>1</sup> was a vast, but vaguely defined area stretching along the Pacific coast from somewhere north of the Spanish settlements in California to somewhere south of the Russian settlements in Alaska, and bounded by the crest of the Rocky Mountains in the east.<sup>2</sup> Hence the Oregon Country included all of the present states of Oregon, Washington, and Idaho, a good part of California, Wyoming, and Montana, and the greater part of what is now British Columbia. In the 1790s, it was claimed by Russia, Spain, England, and the United States. Spanish and English claims were initially based on sixteenth-century voyages of exploration to the area;<sup>3</sup> Russian claims rested on eighteenth-century voyages down the coast of Alaska and settlements as far south as fifty-five degrees north latitude. The American claim

rested on Captain Robert Gray's discovery of a great river in 1792, which he named the Columbia after his ship.<sup>4</sup> The issue of whose claim to sovereignty would prevail was discussed as the "Oregon Question."<sup>5</sup> The conventions and treaties resolving the question provide the background of early Oregon law.

In response to Russian incursions into areas claimed by Spain, the Spanish intensified northern explorations, claiming sovereignty over the entire northwest coast.<sup>6</sup> In 1789, Spain attempted to assert its sovereignty when it seized two British ships in Nootka Sound, an inlet on the western coast of Vancouver Island, and a center of the flourishing fur trade between the Northwest coast and China. This incident resulted in the Nootka Convention of October 28, 1790, forced by England on Spain with the threat of war. With the Nootka Convention, Spain conceded the British right to establish settlements in any unpopulated area nominally claimed by Spain by right of prior discovery, but never occupied.<sup>7</sup> Development or settlement rather than discovery henceforth became the basis for claims of sovereignty.

The American claim based on Gray's discovery of the Columbia River was not strong, but was considerably enhanced by the Lewis and Clark Expedition of 1804-06, which explored a continuous route from the Mississippi to the Pacific, and ultimately allowed the movement of settlers into the region, as the United States exploited the very principle established by England with the Nootka Convention.<sup>8</sup> John Jacob Astor's Pacific Fur Company established the first American settlement at Fort Astoria in 1811.<sup>9</sup> In the aftermath of the Louisiana Purchase, Spain ceded its now diminished claims in the Oregon Country to the United States with the treaty by which the United States gained the Floridas.<sup>10</sup> Though this treaty does not mention the Oregon Territory explicitly, by fixing the border between U.S. and Spanish territories in the West, it established the southern border of the Oregon Territory at forty-two degrees north latitude.

Spain was thus no longer a claimant in the region, but Russia soon took advantage of the principle of the Nootka Convention and began to extend its settlements south of fifty-five degrees. In 1810, in response to Russian objections to what it regarded as American encroachments, the American minister in St. Petersburg sought to fix the boundary of Russian claims. The Russian response was to claim the entire coast from Bering's Strait to somewhere south of the mouth of the Columbia. With this declaration of the Russian position, negotiations were broken off.<sup>11</sup>

Negotiations with Great Britain were more fruitful, issuing in a Convention of Joint Occupation for "any country that may be claimed by either party on the northwest coast of America, westward of the Stony Mountains . . . for the term of ten years."<sup>12</sup> In 1827, this provision was extended indefinitely to allow for "a more definite settlement of the claims of each party to

the . . . Territory," until terminated by either government giving twelve months' notice.<sup>13</sup>

In 1821, the Russian emperor Czar Alexander I recognized that British and American developments in the territory made it untenable to persist in the claim of 1810. Instead, he proclaimed Russian sovereignty to fifty-one degrees north latitude, a line halfway between Anglo-American settlements on the Columbia River and the southernmost Russian settlements to the north of that river. Both Britain and the United States protested, and each negotiated a boundary with the Russians of fifty-four degrees forty minutes north latitude.<sup>14</sup> Hence the Oregon Country now had both northern and southern boundaries, and claimants were reduced to Great Britain and the United States.

## **THE PROVISIONAL GOVERNMENT**

### ***Legal History, 1821-1848***

The British Parliament enacted in 1821 a statute imposing the Laws of Upper Canada upon British subjects in Oregon Territory, and vesting the Hudson's Bay Company with authority to apply those laws.<sup>15</sup> Law and order were maintained by the authority of John McLoughlin,<sup>16</sup> chief factor of the Hudson's Bay Company. During the 1830s American settlers began to drift into the country south of Fort Vancouver, the headquarters of the Hudson's Bay Company, joining missionary groups, trappers, and former employees of the Hudson's Bay Company. Although McLoughlin had no real legal authority over the Americans, he sought to maintain order and settle disputes among them. The Americans chafed at this de facto subjugation to British law, and soon petitioned Congress for the protection afforded by U.S. law.<sup>17</sup> Although debate in Congress turned to the Oregon Question, no action was taken at this time.<sup>18</sup>

In February 1841, Ewing Young, one of the most prominent American settlers, died intestate, leaving no known heirs.<sup>19</sup> This lent urgency to the need to establish some kind of civil law in the territory. At a meeting on the day following Young's funeral, the settlers selected Dr. Ira L. Babcock of the Methodist Mission "to fill the office of supreme judge with probate powers," and instructed him to act according to the laws of the state of New York in the matter of Young's estate, although it is doubtful that any copy of the New York Code was in fact available.<sup>20</sup> Also at this meeting, a committee of seven was appointed to draft a code of laws for the settlements south of the Columbia River. There was to be a meeting on June 1, 1841, to consider the work of the committee, but that meeting was adjourned when it

was learned that the committee had not produced such a code. This apparently was the result of consultation with John McLoughlin, chief factor of the Hudson's Bay Company, who discouraged the formation of a government. A further meeting was scheduled for October 1841, but this did not take place, and this first attempt to form a provisional government ended.<sup>21</sup>

In response to attacks on livestock by wolves and other predators, meetings were held in 1843, ostensibly to devise means to protect the herds. These meetings became known as the "Wolf Meetings." At the first meeting, February 2, 1843, a committee was appointed to report back at a second meeting in March. At the second meeting, the committee set forth eight resolutions providing for the collection of money to pay bounties for the destruction of predators. As the meeting was drawing to a close, the subject changed from bounties to a plea for the organization of civil government. The meeting ended with the appointment of a committee to consider the propriety of forming a government "for the civil and military protection of this colony." This committee called for a public meeting to be held May 2, 1843, to present its report.<sup>22</sup> The report was initially rejected, but then taken up and acted on article by article, after the meeting was divided, and dissenting French Canadians withdrew.<sup>23</sup> A legislative committee was appointed to draft a code of laws, and a public meeting scheduled for July 5, 1843. This committee duly produced a report, and its articles were voted on and adopted by the people at that July 5 meeting. This code is usually referred to as the 1843 Organic Law. It provided for an executive committee of three, a judiciary, a military, and land laws, and it divided the entire territory into four counties, claiming jurisdiction within the entire area delimited by the Treaty of Joint Occupation, though there were as yet no American settlers north of the Columbia.<sup>24</sup> The Organic Law also adopted thirty-seven acts taken verbatim from the laws of the 1839 Iowa Territorial Statutes, and it was based in part on the Ordinance of 1787<sup>25</sup> (bound with the copy of the Iowa statutes relied on by the Legislative Committee).

The preamble to the Organic Law states its purpose as "mutual protection, and to secure peace and prosperity among ourselves . . . until such time as the United States of America extend their jurisdiction over us," ignoring entirely the claims of Great Britain under the Joint Occupation Agreement. There were about 140 Americans in Oregon in 1842.<sup>26</sup> They were certainly outnumbered by French Canadians and the minions of the Hudson's Bay Company, but the British saw the Oregon Territory almost entirely as hunting and trapping country, not as an area to be colonized. It was thought that the "natural barriers" to settlement from the United States were "so numerous and so formidable" that there was no route "which can ever be used as a highway . . . for an influx of emigrants overland."<sup>27</sup> This was a serious miscalculation. In the fall of 1843, only a few months after the adoption of the

Organic Law, nearly 900 Americans joined those who had put the provisional government in place, and the number increased every year for the rest of the 1840s.

This migration virtually ensured a resolution of the Oregon Question favorable to the United States,<sup>28</sup> but it did not come as soon as the settlers expected, and the Organic Law did not provide for a mechanism to amend its provisions, nor for any tax revenue to enable the provisional government to function. This became an issue as the number of settlers increased, and the confusion created by the manner of adoption of Iowa territorial statutes became apparent.

The Organic Law adopted the 1839 Iowa Territorial Code as “the 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” (Oregon Archives, Article 12, pp. 30-31, full citation *infra*). Some Iowa statutes are adopted explicitly, in Articles 13, 14, and 15, and a list of thirty-seven of the seventy-five statutes of this Iowa Code is adopted in a resolution following Article 19. Does Article 12 adopt all the Iowa statutes? If so, why are some included explicitly in the subsequent articles, and why are only thirty-seven of the seventy-five listed? The confusion created by this apparently inconsistent document persisted well into the Territorial period when it became important to determine what laws had actually been adopted during the period of the provisional government.

In May 1844, several of the new settlers were elected to the legislative committee, and the new committee made several changes in the 1843 Organic Law, altering the form of the executive office and reorganizing the judiciary, and attempting to clarify which Iowa laws had been adopted in 1843.<sup>29</sup> These actions led to a debate as to whether the 1843 Organic Law was a constitution. No distinction was drawn in the document between constitution and statutes—“It was either all constitution or all statutes. All were adopted at the same public meeting and were recommended by the same committee.”<sup>30</sup> They were called “organic laws,” which is consistent with a legal framework document, but no mode of amendment was provided, and to change it would therefore be revolutionary. On the other hand, unless it could be considered statutory, and therefore something that could be changed by the legislative committee, there would be nothing for the committee to do. The committee decided to consider it statutory.<sup>31</sup>

In its 1844 message to the legislative committee, the executive committee agreed. However, they also expressed concern regarding “the expectation of receiving some information from the United States, relative to the adjustment of the claims of that government, and of Great Britain, upon this country.” They concluded that since the matter had been unsettled for the

twenty-six years since the 1818 Joint Occupation Agreement, it would be a good idea to frame a constitution for Oregon, "which may serve as a more thorough guide to her officers, and a more firm basis of her laws."<sup>32</sup> Accordingly, the legislative committee proposed a constitutional convention, and the question was submitted to the voters at the general election of June 3, 1845. The voters rejected this proposal, but the newly elected legislature prepared an Amended Organic Law, which was submitted to the voters and approved July 26, 1845.<sup>33</sup>

The 1845 Organic Law retained some of the changes of the 1844 attempt at revision, but again reorganized the judiciary, and allowed for the participation of British subjects in the government. By statute, the legislative committee also attempted to clarify the status of the 1839 Iowa Territorial Code, declaring that their intent was to adopt all the laws of the 1839 Iowa Code

so far as they are applicable to the condition of this country, and in all cases not otherwise provided for, by the acts of the People or the House of Representatives of this Territory . . . That the Common Law of England shall in all cases govern where no Statute Law has been made or adopted.<sup>34</sup>

The vagueness of this formula ensured that confusion would continue, since it would prove difficult to determine which statutes were "applicable to the condition of this country."

The 1846 Treaty with Great Britain resolving the Oregon Question and establishing finally the boundaries of the Oregon Territory brought the region under U.S. jurisdiction, but Congress did not act until 1848, when the Territorial Act was passed.<sup>35</sup> The provisional government functioned under the 1845 Organic Law until March 3, 1849, when Joseph Lane, appointed governor by President Polk, finally reached Oregon and issued a proclamation setting the new territorial government in operation.<sup>36</sup>

### ***Legal Materials***

#### *Federal*

An Ordinance, for the government of the Territory of the United States, Northwest of the river Ohio ch. 8, 1 *Stat.* 52 fn. (a) (1787). [Superseded by An Act to provide for the Government of the Territory Northwest of the river Ohio, ch. 8, 1 *Stat.* 51 (1789), in order to keep the Ordinance in full force under the present constitution.]

Not law under the provisional government, since the Oregon Country was still under the Joint Occupation Agreement. However, some articles were adopted almost verbatim as part of the Organic Act, and the ordinance is reprinted along with the U.S. Constitution, the 1846 Treaty with Great Britain, the 1848 Territorial Act, and the 1850 Surveyor-General Act in the Territorial Government's 1854 "Kelly Code," the most systematic attempt to codify statutes enacted and "continued in force" to that point.

Treaty with Great Britain, in Regard to Limits Westward of the Rocky Mountains, July 17, 1846, U.S.-Gr. Brit., 9 *Stat.* 869 (1846).

The resolution of the Oregon Question, acknowledging United States sovereignty over the Oregon Country, and establishing the northern boundary at forty-nine degrees north latitude.

### *Iowa Territorial Code*

*The Statute Laws of the Territory of Iowa, Enacted at the First Session of the Legislative Assembly of said Territory, Held at Burlington, A.D. 1838-39.* Du Buque, Russell and Reeves, Printers, 1839.

### *Legislation of the Provisional Government*

La Fayette Grover, *The Oregon Archives, including the Journals, Governor's Messages and Public Papers of Oregon.* La Fayette Grover, comm'r, Salem, Asahel Bush, Public Printer, 1853.

First publication<sup>37</sup> of the papers of the provisional government, including minutes, reports, resolutions, journals, statutes, and organic laws of 1843, pursuant to an Act of the Fourth Session of the Legislative Assembly of the territory of Oregon (An Act to Provide for the Collection and Publication of the Laws and Archives of Oregon, 1852-53 *Laws of Oregon* 65-66 [1853]). It includes material from the 1841 attempt to form a government. The 1843 Organic Law is published here as the Report of the Legislative Committee, upon the Judiciary, pp. 28-32. Most of this volume consists of the journals of the legislative committee and its successor under the amended Organic Law, the house of representatives. The journal provides a record of legislation considered and passed, but the acts are not printed here. In general, arranged chronologically, with a broad index.

David C. Duniway and Neil R. Riggs, eds., "The Oregon Archives, 1841-1843," 60 *Or. Hist. Q.* 211-280 (1959).



In his preface to "The Oregon Archives," Grover complained that "within the proper depository of the public papers he [the commissioner] has not been able to find entire and satisfactory records of all that . . . has transpired," and the work "goes from his hand with many fears, lest it may prove less perfect than it should." Duniway and Riggs attempt to remedy some of the imperfections of Grover's work by reexamining original documents relating to the meetings of 1841 and 1843 and the adoption of the 1843 Organic Law. They provide alternative texts in some cases, and some additional material. The material is arranged chronologically, with source notes. The final document in this compilation is the text of the Organic Law prepared by the recorder in May 1844. This contains the earliest surviving text of some of the reports and resolutions.

*Statutes of a General Nature passed by the Legislative Assembly of Oregon: At the Second session, begun and held at Oregon City, December 2, 1850.* Oregon City, Asahel Bush, Territorial Printer, 1851.

This appears to be the first publication of the 1845 Organic Law, along with the 1787 Ordinance, and the 1846 Treaty with Great Britain establishing the boundaries of the territory of Oregon.

*Laws of a General and Local Nature passed by the Legislative Committee and Legislative Assembly, at their various successive sessions from the year 1843, down to and inclusive of the session of the Territorial Legislature, held in the year 1849, except such laws of said session as were published in the bound volume of Oregon Statutes, dated Oregon City, 1851.* Salem, Asahel Bush, Public Printer, 1853.

Published pursuant to the same act providing for the publication of "The Oregon Archives," which required their publication in a separate volume. Laws on pages 3-108 were enacted by the provisional government, except for the following three, which were territorial:

- an act to provide for a special term of the supreme court (p. 65);
- an act to establish a seminary in Washington County (p. 68); and
- an act to enact and cause to be published a code of laws (p. 103).

Laws of the following sessions are contained in this volume: June 1844, December 1844, December 1845, December 1846, and February 1849. It does not include the Organic Laws of 1843 and 1845, nor any material from August 1845 session of the legislative committee. No laws were enacted in the December 1848 session. There is a minimal index. Spine title: *Laws of Oregon 1843-49*.



*Oregon Acts and Laws Passed by the House of Representatives at a Meeting Held in Oregon City, August, 1845.* New York, N.A. Phemister Co., 1921.

A much belated (unofficial) publication of the laws enacted by the Fifth Regular Session of the House Representatives of the provisional government, August 1845. The laws of this session were not included in the 1843-49 compilation. No information is provided as to how this compilation was accomplished, nor by whom. However, the manuscript laws are in the Oregon State Archives with the governor's signature. There is a minimal index.

### *Case Law and Court Records Under the Provisional Government*

*Oregon Supreme Court Record: An original printing of cases and other matter contained in a manuscript labeled Book 1, 1844-1848.* Portland, Stevens-Ness Law Publishing Co., 1938.

This is a printed version of a manuscript in the State of Oregon Law Library. It provides a record of early court proceedings under the provisional government, including cases, petitions, court rules appointments, resignations, and other documents. Case reports are very brief. There is a subject index and an index of cases.

### *Other Resources Pertaining to the Provisional Government*

J. Henry Brown, *Brown's Political History of Oregon: Provisional Government.* Portland, Wiley B. Allen, Publisher, 1892.

Historical narrative with many relevant documents reproduced, some in facsimile. These include treaties and conventions, legal documents, letters, petitions to Congress, and other material, much of it difficult to obtain elsewhere. Although the title page of this volume indicates that it is "Volume I," apparently no further volumes were published.

*The Oregon Law Index: An index to Oregon Territorial and State Laws up to 1866.* Portland, Stevens-Ness Law Publishing Co., 1937.

Although the title might lead one to believe that provisional statutes are not indexed in this publication, those published in the sources cited previously can in fact be found here. This is a fairly comprehensive subject index, with separate indexes for general laws, special laws, and city charters. Each entry

is followed by the year of enactment in parentheses, followed by the year and page of the session laws or other source where the statutes can be found.

Eleanor Ruth Rockwood, *Oregon State Documents: A Checklist, 1843 to 1925*. Portland, Oregon Historical Society, n.d.

“... covers all that could be found in the libraries of Oregon, for the period from the beginning of the provisional government in 1843 . . .” (from the preface). Ms. Rockwood gives very complete descriptions of the relatively sparse material available on the provisional government. Her account of the journals for the territorial legislative assembly is also very useful, since she gives a detailed description of the contents for each session.

*Guide to Oregon Provisional and Territorial Government Records*. Salem, Oregon State Archives, 1990.

Descriptions of the records of the territorial and provisional governments in the Oregon State Archives, divided into three sections:

- records of Oregon counties that were created before statehood;
- records of the provisional and territorial governments; and
- records of counties that became part of Washington Territory when it was formed in 1853.

Each section contains agency or county administrative histories, describing the creation and development of government during the provisional and territorial periods, and series descriptions following United States Machine Readable Cataloging-Archival and Manuscripts Control (USMARC-AMC) standards, including microfilm reel numbers. There is a microfilm reel index and a subject index.

George N. Belknap, *Oregon Imprints 1845-1870*. Eugene, University of Oregon Books, 1968.

Complete bibliographic descriptions of 1,521 items printed within the boundaries of the present state of Oregon between 1845 and 1870, with information on holding libraries for each item. It includes books, pamphlets, folders, and broadsides and is arranged chronologically, with a subject index keyed to item numbers and an index to printers and publishers. Also includes a list of “lost imprints” based largely on printing orders found in legislative journals. Includes a few messages, proclamations, and records of the provisional government from 1845-1848.

## THE TERRITORIAL GOVERNMENT

### *Legal History, 1846-1859*

In 1844, the Democrats nominated James K. Polk for president, and adopted a platform that included a declaration that the U.S. title to the whole of the Oregon Country, to the northern boundary of the Joint Occupation Agreement at fifty-four degrees forty minutes north latitude, was "clear and unquestionable." In the ensuing campaign, the slogan "Fifty-four forty or fight" became very popular. When Polk was elected on this platform, the British became alarmed. Warships were ordered to the Oregon coast, and British military agents were sent overland to look into the defense of British-Canadian settlements in case of war. There was talk of war in Washington also, but President Polk proved more amenable to compromise than the platform and his inaugural address would indicate.<sup>38</sup> Polk accepted the "traditional" American claim as to the northern boundary of Oregon Territory at forty-nine degrees north latitude, except for Vancouver Island, which was conceded to the British in its entirety.<sup>39</sup>

Congress acted to provide a legal basis for the government for the new territory in 1848,<sup>40</sup> and the new government became operational with Territorial Governor Joseph Lane's proclamation of March 3, 1849. The 1848 Organic Act organizing Oregon as a territory recognized the existence and validity of the laws enacted under the provisional government,<sup>41</sup> but exactly what laws had been enacted was in doubt since there had been no publication of the laws of the provisional government. Governor Lane called upon the first session of the legislature to address this problem—"Your immediate attention is most respectfully urged to the examination and remedy of the loose and defective condition of the statute laws declared by the organic act to be operative in the Territory."<sup>42</sup> The legislature responded with "An Act to Enact and Cause to be Published a Code of Laws," which adopted the revised laws of Iowa of 1843 "as hereinafter amended" and required that they be published with any other acts of the session "after the manner of the Iowa laws . . . to which shall be prefixed the Declaration of Independence, the Constitution of the United States, the ordinance of 1787, the Constitution of the late Provisional Government of Oregon, and the organic law of Oregon Territory."<sup>43</sup>

This "code" was known as the "Chapman Code" after its sponsor, and later, derisively, as the "Steamboat Code," because of its miscellaneous content. Its influence was limited, because it was never published as the statute authorized, due to a dispute between the secretary of the territory and the territorial printer,<sup>44</sup> and because its validity was questioned as con-

traversing section 6 of the Organic Act of 1848, which required that every act should embrace but one object, which must be expressed in its title. Since laws on a variety of subjects from the Iowa statutes of 1843 had been adopted in one act, it was claimed that the act was unconstitutional, and that the 1839 Iowa Code was still in effect. The territorial court split on this issue, and in their roles as circuit judges in their districts, two of the three judges relied on the 1839 Iowa Code (the "Little Blue Book"). A third judge held that the enactment of the Chapman Code was constitutional, since it dealt with one subject, the enactment of a code of laws, and relied on the 1843 Iowa Code (the "Big Blue Book").<sup>45</sup> Of this inconvenience, Matthew Deady remarked many years later "the Big-Bookers and Little-Bookers grew almost as fierce as between the Big-Endians and the Little-Endians of Lilliput, over the momentous question, at which end should an egg be broken."<sup>46</sup>

When a special session of the Legislature met on May 2, 1850, the territory was still without a published code of laws. A resolution was passed calling for the appointment of a committee

to select and prepare for the press such Acts of the Assembly as may be of immediate and pressing importance to the people of the Territory, and procure the printing of two hundred copies at the earliest possible period commencing with the Acts on 'Justices of the Peace' . . . until twenty Acts shall have been printed.<sup>47</sup>

Pursuant to this resolution, the committee produced a compilation that became known as "Twenty Acts," apparently selected for their practical importance. This was not a code, but a kind of handbook of the more important statutes in force. Most of them were from the Iowa codes of 1839 and 1843, revised extensively.<sup>48</sup>

In his message to the legislature, the governor once again invited "immediate attention to the condition of the laws of the Territory. . . . These difficulties should at once be gotten rid of, and a code instituted that would command the respect of all our constituents."<sup>49</sup> By resolution, the legislature requested that the secretary of the territory make a list of all the laws passed at the last session and the current session (1850-51) to be published in the newspapers of the territory.<sup>50</sup> At the close of the session, Secretary Hamilton requested that a member of the judiciary committee, Matthew Deady, compile and prepare for publication the laws that had been passed, along with the laws of the September 1849 and May 1850 sessions. Deady arranged this material by subject and added some headnotes and other material on his own responsibility. This was published under the direction of the secretary, and was known as the "Hamilton Code."<sup>51</sup> The practice with

these early laws was repeal by implication. Statutes did not usually include repealing clauses. The Hamilton Code hence repealed by implication all other laws not consistent with it, but other acts not included and not specifically repealed were still of uncertain validity, and confusion continued as to what laws were in force.<sup>52</sup>

Among the enactments of the 1850-51 session was an act locating the seat of the territorial government at Salem.<sup>53</sup> Because this act also provided for a penitentiary to be located in Portland and a university to be located at Marysville and contained other provisions relating to the construction and financing of buildings, it triggered a dispute similar to the dispute between proponents of the "Little Blue Book" and those who favored the "Big Blue Book." That is, those who had an interest in retaining the seat of government at Oregon City argued that this act violated the "one object rule" of section 6 of the 1848 Organic Act, since it dealt not just with the location of the seat of government, but also with the location of a penitentiary, a university, and other matters. In December 1851, legal proceedings were brought before two judges (Nelson and Strong) of the territorial supreme court sitting at Oregon City, to retain the capital at Oregon City. The jurisdiction of the court was challenged on the grounds that it was not convened in the seat of government, as the Organic Act required. They handed down a decision finding the Location Act unconstitutional and declaring Oregon City to be the capital.<sup>54</sup>

However, all but five members of the legislative assembly gathered at Salem on December 1, 1851, for the third session of the territorial legislature, and the third judge of the territorial supreme court (Pratt) wrote an opinion at the request of the legislators convened in Salem, finding that the act establishing the seat of government at Salem was constitutional, and that Salem was the proper place for the legislature to convene. Thus there was a bitter legal and political deadlock on the issue. This was resolved by Congress, since section 6 of the 1848 Organic Act provided that "All laws passed by the Legislative Assembly shall be submitted to the Congress of the United States." By a joint resolution of May 4, 1852, Congress "ratified, approved, and confirmed" the Location Act, and declared the recent session of the legislative assembly convened in Salem to have been held "in conformity to the provisions of law."<sup>55</sup>

Congress did not resolve the question regarding which version of the Iowa laws was in force in Oregon, i.e., the "Big Blue Book" or the "Little Blue Book." This was not addressed until the legislative session of 1853, which acted to create a code commission to prepare a code of laws for the territory of Oregon.<sup>56</sup> Three commissioners were elected by the legislative assembly, and they set to work, in agreement that the act creating the Code Commission "did not simply authorize us to make a revision of the statutes

now in force, but that it required us to prepare a full and complete code."<sup>57</sup> They agreed to accept the New York code of practice as the basis for their code, and they drafted an entirely new code of statutory laws for Oregon.<sup>58</sup> This draft was enacted by the 1853 legislative assembly, to take effect May 1, 1854. This delay was necessitated by the fact that there was no possibility of having the code printed before that time, since there were no facilities for printing or binding a volume of this size in Oregon at the time.<sup>59</sup> The territorial printer made arrangements to have the code printed and bound in New York, then shipped to Oregon. A part of the shipment came overland by the Isthmus of Panama, but the remainder came by sea around Cape Horn and was lost in a shipwreck. In a letter to the legislative assembly of 1854, the territorial printer proposed that the code should be reprinted with the laws of that session (again in New York), hence in effect providing a second edition of the code.<sup>60</sup> These editions of the code became known as the "Kelly Code," after James K. Kelly, the chairman of the Code Commission. The Kelly Code was revised several times after statehood, but the main features of Oregon statutory law incorporated in the Kelly Code remained substantially the same well into the twentieth century.<sup>61</sup>

### *Legal Materials*

#### *Federal*

An Ordinance, for the government of the Territory of the United States, Northwest of the river Ohio ch. 8, 1 *Stat.* 52 fn. (a) (1787). [Superseded by An Act to provide for the Government of the Territory Northwest of the river Ohio, ch. 8, 1 *Stat.* 51 (1789), in order to keep the Ordinance in full force under the present constitution.]

It explicitly made applicable to the territory of Oregon by section 14 of the Organic Act of 1848, establishing the Oregon Territory.

An Act to establish the Territorial Government of Oregon, ch. 177, 9 *Stat.* 323 (1848).

The Organic Act, providing the framework for the territorial government, with federally appointed executive and judicial officers, a bicameral legislature elected by the people, and federal review of all legislation.

An Act authorizing the Negotiation of Treaties with the Indian Tribes in the Territory of Oregon, for the Extinguishment of their Claims to Lands lying west of the Cascade Mountains, and for Other Purposes, ch. 16, 9 *Stat.* 437 (1850).

This act extended the Indian Country Act, 4 *Stat.* 729 (1834), regulating trade and intercourse with the Indian tribes east of the Rocky Mountains “or such provisions of the same as may be applicable” to the Indian tribes of the territory of Oregon. In *United States v. Tom*, 1 Oregon 26 (1853), the territorial supreme court found that Congress, by omitting to declare which provisions of the Indian Country Act were applicable in Oregon, conferred that power on the judiciary of the territory. In the case at hand, the court found that the provision of the Indian Country Act prohibiting the sale or barter of spirituous liquors to Indians was applicable in Oregon Territory.

An Act to create the Office of Surveyor-General of the Public Lands in Oregon, and to provide for the Survey, and to make Donations to Settlers of the said Public Lands, ch. 76, 9 *Stat.* 496 (1850).

House Executive Documents, 32nd Congress, 1st Session, Document No. 94, May 3, 1852.

A compilation of documents regarding the Location Act controversy, including President Fillmore’s “Message from the President of the United States Inviting the Attention of Congress to the condition of things in the Territory of Oregon”; Governor Gaines letter of February 3, 1851, to the legislative assembly questioning the conformity of the act to the requirements of the 1848 Organic Act; Territorial Attorney General Crittenden’s letter of April 23, 1851, to the president, expressing his opinion that the act was “null and void”; the opinions of Justices Strong and Nelson in the case of *Strong v. Ermatenger* (on the question as to the proper place for holding the present term of the court); and Justice Pratt’s letter of December 15, 1851, supporting the position of the legislature convened at Salem.

A Joint Resolution approving and confirming an Act of the Legislative Assembly of the Territory entitled “An act to provide for the Selection of Places for Location and Erection of the Public Buildings of the Territory of Oregon,” and for other purposes, No. 8, 10 *Stat.* 146 (1852).

Congress’s resolution of the controversy regarding the Location Act, which moved the seat of government to Salem, and confirming the actions of the legislative assembly convened at Salem.

An Act to establish the Territorial Government of Washington, ch. 90, 10 *Stat.* 172 (1853).

Section 1 of the 1848 Organic Act creating the territory of Oregon provided that this vast area could be divided into “two or more Territories, in such



manner and at such times as Congress shall deem convenient and proper." Settlers north of the Columbia River soon found their remoteness from the seat of government burdensome, and memorialized Congress, urging that a separate territorial government be established for the country north and west of the Columbia to be known as the territory of Columbia. The Oregon legislature adopted a similar memorial to Congress on November 4, 1852 (*Journal of the House*, Fourth Regular Session, Appendix 34 [1853]), also urging the creation of the new territory. Congress acted with unusual promptness, since there was little opposition, though the name of the territory was changed to Washington in the house of representatives, and the boundaries were enlarged to include all the region north of the Columbia to its intersection with the forty-sixth parallel north latitude, and north to the established eastern boundary of Oregon, then the summit of the Rocky Mountains. Hence the new territory included the present Idaho panhandle, and most of present-day Montana west of the Rockies.

*Territorial Papers of the United States: The Territory of Oregon, 1848-1859, a Microform Supplement.* Washington, National Archives and Record Service, 1977-78, M-1049, 12 rolls.

The territories were generally administered by the Department of State from the beginning of the federal government until 1873, but many documents regarding the territories were scattered through the files of other agencies, and at the behest of the American Historical Society, the federal government undertook the publication of this vast array of source material in accordance with the Ralston Act, 43 *Stat.* 1104 (1925). Thirty-eight print volumes were published from 1934 to 1975, but the project had become too big and too expensive, and subsequent material, including Oregon material, was published as a microform supplement.

Contents: Roll 1. Records of the United States Senate; Roll 2. Records of the United States House of Representatives; Roll 3. Records of the Supreme Court of the United States; Rolls 4-5. General Records of the Department of State; Roll 6. General Records of the Department of State, Records of the Bureau of the Census, Records of the Post Office Department; Roll 7. Records of the Office of the Secretary of the Interior; Roll 8. Records of the Bureau of Indian Affairs; Roll 9. General Records of the Department of the Treasury—letters received from executive officers (AB series, 33 volumes 1848-61), letters received from executives of territories (AB series, 1 volume, 1838-1856); Rolls 10-12. General Records of the Department of the Treasury.

*Territorial Papers of the United State Senate: 1789-1873: Oregon 1824-1871*, Roll 13 of 20 rolls, Record Group 46, Records of the United States Senate. Washington, National Archives and Record service, 1951.

Pursuant to the Ralston Act, the papers of the Senate relating to territorial affairs were selected for possible publication as part of the Territorial Papers of the United States. It includes petitions and memorials, bills, resolutions, reports from executive departments, and correspondence, some of it outside the scope of the projected (never published) volume. Arranged chronologically.

Robert M. Kvasnicka, Comp., *The trans-Mississippi West, 1804-1912: A Guide to Federal Records for the Territorial Period*. Washington, DC, National Archives and Records Administration, 1993-(1996).

Pt. 1. A Guide to Records of the Department of State for the Territorial Period

Pt. 2. A Guide to Records of the Department of Justice for the Territorial Period

Pt. 3. A Guide to Records of the Department of Agriculture for the Territorial Period

Pt. 4. A Guide to Records of the Department of the Interior for the Territorial Period

This is a major research aid launched by the National Archives after discussions with the Western History Association. It was designed to succeed the previous print and microfilm publication of documents concerning each of the territories. Its objective is to identify and describe records created by both civil and military agencies and organizations that include or are likely to contain documents concerning the states beyond the Mississippi River. Descriptions vary in level of detail from summaries of content to lists of titles. Generally, material is arranged by record group, which consists of the records of a single agency or its predecessors, but scope and quantity of materials vary greatly. There is a detailed subject index for each part, with entries for each state.

### *Iowa Territorial Codes*

*The Statute Laws of the Territory of Iowa, Enacted at the First Session of the Legislative Assembly of said Territory, Held at Burlington, A.D. 1838-39*. Du Buque, Russell and Reeves, Printers, 1839.

This is the "Little Blue Book," adopted repeatedly, if confusingly, by the provisional government, and still in force in the new territory of Oregon,

since the 1848 Organic Act left in place the enactments of the provisional government where not in conflict with the Constitution nor the provisions of the Organic Act.

*Revised Statutes of the Territory of Iowa, Revised and Compiled by a Joint Committee of the Legislature—Session 1842-43.* Iowa City, Printed by Hughes and Williams, 1843.

This is the "Big Blue Book," a code of one hundred and sixty-two statutes, arranged alphabetically by subject, from "Abatement" through "Wills." Seventy-two of these were adopted, with amendments, by the first session of the legislative assembly of the territory of Oregon (An Act, To enact and cause to be published a code of Laws, September 29, 1849, in Laws of Oregon 1843-49, 103 [1853]). This was the "Chapman Code," never published in this form, as the act required. Its adoption led to a conflict with proponents of the Little Blue Book, who claimed that the act adopting the 1843 statutes violated the "one object" rule of the 1848 Organic Law.

#### *Territorial Legislative Material*

##### *Legislative Sessions:*

First Regular Session	July 16 to September 29, 1849
First Special Session	May 6 to 18, 1850 <sup>62</sup>
Second Regular Session	December 2, 1850, to February 8, 1851
Third Regular Session	December 1, 1851, to January 21, 1852
Second Special Session	July 26 to 29, 1852
Fourth Regular Session	December 6, 1852, to February 3, 1853
Fifth Regular Session	December 5, 1853, to February 2, 1854
Sixth Regular Session	December 4, 1854, to February 1, 1855
Seventh Regular Session	December 3, 1855, to January 31, 1856
Eighth Regular Session	December 2, 1855, to January 29, 1857
Ninth Regular Session	December 7, 1857, to February 4, 1858
Third Special Session	July 5, 1858, to September 14, 1858 <sup>63</sup>
Tenth Regular Session	December 6, 1858, to January 22, 1859

##### *House and Council Journals:*

*Journal of the Legislative Assembly of the Territory of Oregon, First-Tenth Regular Sessions and Special Sessions, 1849-1859.* Asahel Bush, Territorial Printer, 1851-1859.

Daily records of legislative action in the house and council; governor's messages; rules; reports; joint resolutions; correspondence; memorials and

other materials. Title varies. Content varies. After the first regular session there is a separate title page for house and council, and they are separately paginated, but usually bound together. Daily sessions are indexed, but other material is not.

The first regular session contains local laws. The third regular session (1852) contains an appendix with the legislative assembly's memorial to the Congress of the United States regarding the Location Act controversy and Judge Pratt's opinion. At the fifth regular session, the legislature adopted a joint resolution directing that the opinions of the supreme court of the territory be published and appended to the journals of the legislative assembly (*House Journal*, p. 151). This practice was followed for the fifth through eighth sessions. The opinions were published with a separate title page and separate pagination. In libraries, they were not bound with the journals, however, and I have not located the cases in this format.

*Bills:*

House Bills, Sixth–Tenth Sessions. Salem, Asahel Bush, Territorial Printer, 1854-1859.

Council Bills, Sixth–Tenth Sessions. Salem, Asahel Bush, Territorial Printer, 1854-1859.

Bills were printed individually during the session beginning with the Sixth Regular Session. Microfilm versions of extant copies are available at the University of Oregon Library, Eugene, and at the Oregon Historical Society Library in Portland.

*Session Laws/Statutes/Codes:*

*Acts of the Legislative Assembly of the Territory of Oregon, passed at their sessions, begun and held at Oregon City, in July 1849, and May 1850.* Oregon City, Robert Moore, Printer, 1850.

Known as "Twenty Acts," this is the first collection of Oregon laws, a kind of handbook of the statutes of practical importance then in force.

*Statutes of a General Nature passed by the Legislative Assembly of the Territory of Oregon: at the second session, begun and held at Oregon City, December 2, 1850.* Oregon City, Asahel Bush, Territorial Printer, 1851.

Known as the "Hamilton Code," after Edward Hamilton, territorial secretary, this was the first publication of all the laws of a session. It contains all

the laws of the May 1850 special session and the December 1850 regular session, as well as the laws of the 1849 regular session. Those not included were impliedly repealed. This volume is said to have been edited and annotated by Matthew Deady, at Hamilton's request. It includes a table of contents and a fairly detailed index.

*Statutes of a Local Nature and Joint Resolutions of the Legislative Assembly of Territory of Oregon: passed at the second session thereof, begun and held December 2, 1850.* Oregon City, Asahel Bush, Territorial Printer, 1851.

*Laws of a general and Local Nature of the Territory of Oregon: passed by the Legislative Assembly: at the third regular session thereof, begun and held at Salem, December 1, 1851.* Oregon, Asahel Bush, Territorial Printer, 1852.

In two parts, "General Laws . . ." and "Local Laws and Joint Resolutions . . .," with separate pagination and separate indexes.

*General and Special Laws of Oregon: passed by the Legislative Assembly: at the fourth regular session thereof, begun and held at Salem, December 6, 1852.* Oregon, Asahel Bush, Public Printer, 1853.

In two parts, "Statutes of a General Nature" and "Statutes of a Special Nature and Joint Resolutions," with separate pagination and separate indexes.

*Report of the Commissioners Elected to Prepare a Code of Laws for the Territory of Oregon.* Salem, Asahel Bush, Territorial Printer, 1853.

The Code Commission was established by statute at the fourth regular session (Statutes of a General Nature, *supra* 57-58) and instructed to report at the fifth session. This is their report, a draft of the "Kelly Code" enacted by the fifth session.

*Laws of a General and Local Nature passed by the Legislative Committee and Legislative Assembly, at their various successive sessions from the year 1843, down to and inclusive of the session of the Territorial Legislature, held in the year 1849, except such laws of said session as were published in the bound volume of Oregon Statutes, dated Oregon City, 1851.* Salem, Asahel Bush, Public Printer, 1853.

This is an attempt to compile the statutes of the provisional government, still in effect under the 1848 Organic Act. Includes three acts from the 1849 territorial session:

an act to provide for a special term for the supreme court (p. 65);  
an act to establish a seminary in Washington County (p. 68); and  
an act to enact and cause to be published a Code of Laws (p. 103).

The third act is the "Chapman Code," adopting the 1843 Iowa statutes (the "Big Blue Book"). It was not published as the act required, and its major influence was a controversy over which Iowa statutes were law in Oregon. The volume contains a minimal index.

*The Statutes of Oregon, enacted and continued in force by the Legislative Assembly, at the session commencing 5th December, 1853.* Oregon, Asahel Bush, Public Printer, 1854.

This is a codification of the general laws of the territory, based on the report of the code commissioners, known as the "Kelly Code," after J.K. Kelly, chair of the Code Commission. Although the title carries the imprint of the public printer, the volumes were actually printed in New York, and most of them were lost in a shipwreck en route to Oregon.

The "advertisement" following the title page notes that statutes "relating to the manner of commencing and prosecuting actions at law are taken, word for word, from the New York Code." Hence side notes refer to the New York Reports, "acknowledged to be superior in legal erudition." Contains a detailed index.

*The Statutes of Oregon, enacted, and continued in force, by the Legislative Assembly, at the Fifth and Sixth Regular Sessions thereof.* Oregon, Asahel Bush, Public Printer, 1855.

This is essentially a republication of the 1854 Kelly Code, with the 1855 statutes integrated. This was necessary, since most of the 1854 volumes had been lost at sea. Like the 1854 Code, this was printed in New York.

*Special Laws passed by the Legislative Assembly of the Territory of Oregon at the sixth regular session thereof.* Salem, Asahel Bush, Territorial Printer, 1855.

*Laws of the Legislative Assembly of the Territory of Oregon; enacted during the seventh regular session thereof.* Salem, Asahel Bush, Territorial Printer, 1856.

In two parts, "Laws of a General Nature" and "Laws of a Special Nature," separately paginated and indexed.

*Laws of the Legislative Assembly of the Territory of Oregon; enacted during the eighth regular session thereof.* Salem, Asahel Bush, Territorial Printer, 1857.

In two parts, "General Laws" and "Special Laws," separately paginated and indexed.

*Laws of the Territory of Oregon: enacted during the ninth regular session of the Legislative Assembly.* Salem, Asahel Bush, Territorial Printer, 1858.

In four parts, "General Laws," "Special Laws," "Memorials," and "Joint Resolutions," separately paginated. Separate indexes for general and special laws. Other material is not indexed.

*Laws of the Territory of Oregon: Enacted during the tenth regular session of the Legislative Assembly.* Salem, Asahel Bush, Territorial Printer, 1859.

In four parts, "General Laws," "Special Laws," "Memorials," and "Joint Resolutions," separately paginated. Separate indexes for general and special laws. Other material is not indexed.

### *Judicial Materials*

Records of the Supreme Court, December Term 1851 & 2: Supreme Court Record Book No. 2. (An unpublished manuscript in the State of Oregon Law Library.)

Similar to Supreme Court Record Book 1, 1844-1848, published as *Oregon Supreme Court Record* (1938), supra p. 15. The earliest record of proceedings of the territorial supreme court, it includes brief accounts of cases not published elsewhere, court rules, and records of the admission of attorneys. In spite of the cover title, there is some material from 1853.

*Reports of Cases argued and determined in the Supreme Court of the Territory of Oregon and of the State of Oregon Vol. 1.* Albany, NY, Banks and Brothers Law Publishers, 1862.

This is the first volume of Oregon Reports, and it contains the cases of the territorial supreme court 1853-1858, as well as state supreme court and federal district court cases from 1859-1861. Later versions of Oregon Reports published by Bancroft and Bancroft-Whitney were apparently reprints of this edition, with some editorial material added. Territorial cases were initially published as appendixes to the house and council journals, for the fifth through eighth sessions. Some important cases were never officially



published, like the majority opinion in *Short v. Ermatenger*, the Location Act case.

Other court records are available from the Oregon State Archives. See *infra* *Guide to Oregon Provisional and Territorial Government Records*.

### *Other Materials Pertaining to the Territorial Government*

*The Oregon Law Index: An index to Oregon Territorial and State Laws up to 1866.* Portland, Stevens-Ness Law Publishing Co., 1937.

This is a fairly comprehensive subject index, with separate indexes for general laws, special laws, and city charters. Each entry is followed by the year of enactment in parentheses, then the year and page of the session laws or other source where the statute can be found.

Eleanor Ruth Rockwood, *Oregon State Documents: A Checklist, 1843 to 1925.* Portland, Oregon Historical Society, n.d.

"... covers all that could be found in the libraries of Oregon, for the period from the beginning of the provisional government in 1843 . . ." (from the preface). Ms. Rockwood gives very complete descriptions of the relatively sparse material available from the provisional government. Her account of the journals for the territorial legislative assembly is also very useful, since she gives a detailed description of the contents for each session.

*Guide to Oregon Provisional and Territorial Government Records.* Salem, Oregon State Archives, 1990.

Descriptions of the records of the territorial and provisional governments in the Oregon State Archives, divided into three sections:

- records of Oregon counties that were created before statehood;
- records of the provisional and territorial governments; and
- records of counties that became part of Washington Territory when it was formed in 1853.

Within each section are agency or county administrative histories, describing the creation and development of government during the provisional and territorial periods, and series descriptions following USMARC-AMC standards, including microfilm reel numbers. There is a microfilm reel index, and a subject index.

George N. Belknap, *Oregon Imprints 1845-1870*. Eugene, University of Oregon Books, 1968.

Complete bibliographic descriptions of 1,521 items printed within the boundaries of the present state of Oregon between 1845 and 1870, with information on holding libraries for each item. It includes books, pamphlets, folders, and broadsides and is arranged chronologically, with a subject index keyed to item numbers and an index to printers and publishers. Also includes a list of "lost imprints" based largely on printing orders found in legislative journals. Includes a few messages, proclamations, and records of the provisional government from 1845-1848, and many records of the publications of the territorial government.

### **THE DRIVE FOR STATEHOOD**

#### ***Legal History, 1849-1859***

Oregon aspired to statehood from the inception of the territorial government. At the first session of the territorial legislature a bill was proposed "to take the expression of the people for and against a convention to form a state government." At the next session, a joint resolution was pending "to enquire into the propriety of calling a convention for the purpose of framing a state constitution." At each of the next two sessions, both houses passed bills setting up committees to study the possibility of statehood, but no action was taken. In 1853, the house passed a bill to submit the question of a state constitution to the people, but it was defeated in the council. In the 1854 session, however, both houses passed a bill submitting the question of statehood to the people. Statehood lost. The legislature referred the question to the people twice more, in 1855 and 1856 with the same outcome, but each time by a smaller margin. Finally in 1857, Oregon voted to hold a constitutional convention and petition to join the Union.<sup>64</sup>

The act providing for this election includes a remarkable preamble setting forth arguments for statehood.<sup>65</sup> Slavery is not mentioned, but was at this time the subtext of virtually all politics in Oregon and in the nation. The provisional government had taken an antislavery position in 1843 when it adopted the Ordinance of 1787 as the basis for its Organic Act, intending to settle the slavery question west of the Rockies as it had been settled in the Old Northwest.<sup>66</sup> However, there was considerable hostility toward non-whites from the beginning, and part of the objection to slavery was a fear of an antiwhite alliance between Indians and escaped slaves.<sup>67</sup> One of the first acts of the provisional legislature excluded free blacks and mulattoes from the territory upon penalty of whipping.<sup>68</sup> The bill that became the Organic

Act of 1848, providing for the territorial government, was nearly defeated by southern interests who saw the antislavery position as a denial of their right to take their slaves with them into the new territories.<sup>69</sup> In Oregon, a territorial supreme court justice, sitting as a circuit judge, decided that in the absence of "some positive legislative enactment" the children of a former slave could not be held as slaves.<sup>70</sup> This decision, along with the Missouri Compromise of 1820,<sup>71</sup> was thought to ensure that Oregon would be a free state. However, the Kansas-Nebraska Act of 1854<sup>72</sup> permitted territorial self-determination on slavery. Although there were deep divisions on the issue in Oregon politics, there was a fear of federal intervention as had occurred in Kansas, so long as Oregon remained a territory. Oregonians of all persuasions preferred any Oregon-determined solution to the problem over any federally imposed one. The vote for statehood in 1857 reflected this preference.<sup>73</sup>

The constitutional convention met in Salem, August 17 to September 18, 1857. The document produced by the delegates to this convention was almost entirely conventional. One hundred and seventy-two of its 185 sections were copied from other constitutions.<sup>74</sup> Generally, the delegates avoided discussion of the slavery issue, but approved, as part of Article XVIII of the new constitution, a section putting the slavery question to a vote of the people, along with their vote on whether to allow free blacks to reside in Oregon, and whether to approve or reject the constitution itself.<sup>75</sup> A special election was held November 9, 1857, to vote on these questions. The constitution was adopted; slavery was rejected by a large majority; free blacks were excluded by an even larger majority.<sup>76</sup>

The ninth regular session of the territorial legislature was held shortly after the approval of the constitution. It did little legislatively, on the assumption that Congress would soon approve statehood, but it did adopt a memorial to Congress praying the admission of the state of Oregon into the Union.<sup>77</sup>

The new constitution, in anticipation of early congressional action, provided that if the constitution was adopted, a special election would be held in June 1858 to elect a state legislature and other state officers, and that a special session of the state legislative assembly would be convened in July 1858 to elect two senators and to complete the organization of state government.<sup>78</sup> It was soon obvious that these dates had been set too early. Congress did not act promptly, and there was growing doubt that the state would be admitted at all. The June elections were held and a state legislative assembly was elected, but the party conventions took the precaution of also nominating territorial officers. The July session of the state assembly was held as required by the schedule of the new constitution, and two senators were elected for the new state of Oregon, though there was as yet no state of

Oregon. This session is not now recognized as one of the numbered state assemblies, but the validity of the election of senators was not challenged.<sup>79</sup>

In Congress, the bill to admit Oregon came up for debate in the Senate in May 1858. It passed in the Senate, though questions were raised as to the sufficiency of the population to justify a representative in Congress, and about the discrimination against nonwhites in the constitution of the would-be new state. The bill did not reach a vote in the House before adjournment. In December 1858, the territorial legislature met for its tenth regular session. A bill was introduced to recognize the right of citizens of Oregon in the protection of slave property, based on the Dred Scott decision of the United States Supreme Court.<sup>80</sup> This bill passed the council, but did not reach a vote in the House.

In the new session of Congress, the bill for Oregon statehood was debated in the House, after the Senate bill was reported out of the Committee on Territories with no recommendation. Questions were again raised about the sufficiency of the Oregon population, and the discriminatory provisions of the constitution. This debate took place in the same winter the territorial legislature very nearly passed a bill protecting the rights of slave owners. Had it passed, it is very likely that republicans would have voted against statehood, and the bill would have failed. However, on February 12, 1859, the debate closed, and the bill carried by a narrow margin. It was signed by President Buchanan on February 14, 1859, and statehood is dated from this date, though the statehood bill differed in the boundaries prescribed by the new constitution, and other conditions had to be met by the state assembly.<sup>81</sup>

### ***Legal Materials***

#### *Federal*

An Act for the Admission of Oregon into the Union, ch. 33, 11 *Stat.* 383 (1859).

This is an Act of Admission, setting the present boundaries of the state and incorporating the residue of the territory of Oregon into the territory of Washington, and setting forth six propositions to be accepted by the people of Oregon patterned after conditional clauses used in admitting other states. These propositions were accepted at the first extra session of the state legislative assembly, 1859 Or. Laws Extra Session 29 (An Act relative to certain propositions made by the Congress of the United States to the people of the State of Oregon).

An Act to provide for extending the Laws and Judicial System of the United States to the State of Oregon and for other Purposes, ch. 85, 11 *Stat.* 437 (1859).

### *The Constitutional Convention*

Charles Henry Carey, ed., *The Oregon Constitution and proceedings and Debates of the Constitutional Convention of 1857*. Salem, State Printing Dept., 1926.

Early in the convention, there was a debate about whether to appoint an official reporter. Although it was agreed that this was the most important event in the history of Oregon, it was decided that the expense involved in having an official reporter was too great, and hence there was no official record of the convention. This was remedied to some extent many years later, with the publication of this volume. It is a history of the events and politics leading up to statehood, with essential documents. Includes the proceedings as briefly chronicled in the journal, but also the debates as reported in the pages of the two leading newspapers of the time, the *Oregonian* and the *Statesman*. Also includes the Constitution of 1857 and subsequent amendments to 1926. There is an appendix with a table of "Sources of the Constitution," identifying other state constitutions from which articles were adopted in the Oregon document.

*Journal of the Constitutional Convention of the State of Oregon, Held at Salem, commenced August 17, 1857, Together with the Constitution Adopted by the people, November 9, 1957*. Salem, W.H. Byars, State Printer, 1882.

A much belated publication in pamphlet form of the journal of the convention, this is a minimal account of the proceedings.

Claudia Burton and Andrew Grade, "A Legislative History of the Oregon Constitution of 1857—Part I (Articles I & II)," 37 *Willamette L. Rev.* 429 (2001); "Part II (Frame of Government: Articles III- VII)," 39 *Willamette L. Rev.* 245 (2003); "Part III" Forthcoming.

This is a section-by-section examination of the original Oregon constitution, based on a previously unknown, but nearly complete, set of documents from the Constitutional Convention of 1857, with an initial committee report, a set of amendments for each article, and the engrossed article. This material allowed Professor Burton to compile a much fuller legislative history of the Oregon Constitution. The original material is part of the collec-

tion of the Oregon Historical Society, but archive-quality photographs are now in the J.W. Long Law Library of Willamette University College of Law and in the State of Oregon Law Library. Each part of Professor Burton's article includes an appendix with her transcription of the source material.

### *Other Resources*

*The Oregon Law Index: An index to Oregon Territorial and State Laws up to 1866.* Portland, Stevens-Ness Law Publishing Co., 1937.

This is a fairly comprehensive subject index, with separate indexes for general laws, special laws, and city charters. Each entry is followed by the year of enactment in parentheses, then the year and page of the session laws or other source where the statute can be found.

*Eleanor Ruth Rockwood, Oregon State Documents: A Checklist, 1843 to 1925.* Portland, Oregon Historical Society, n.d.

"... covers all that could be found in the libraries of Oregon, for the period from the beginning of the provisional government in 1843 ..." (from the preface). Ms. Rockwood gives very complete descriptions of the relatively sparse material available from the provisional government. Her account of the Journals for the territorial legislative assembly is also very useful, since she gives a detailed description of the contents for each session.

George N. Belknap, *Oregon Imprints 1845-1870.* Eugene, University of Oregon Books, 1968.

Complete bibliographic descriptions of 1,521 items printed within the boundaries of the present state of Oregon between 1845 and 1870, with information on holding libraries for each item. It includes books, pamphlets, folders, and broadsides and is arranged chronologically, with a subject index keyed to item numbers and an index to printers and publishers. Also includes a list of "lost imprints" based largely on printing orders found in legislative journals. Includes a few messages, proclamations, and records of the provisional government from 1845-1848, and many records of the publications of the territorial government.

### *Library Resources*

The early records of Oregon government have not been well preserved. Much of the earliest material was lost in 1855 when the new capitol burned to the ground. More was lost in 1935, when the capitol again burned. Fortu-

nately, some records had been transferred to the Oregon Historical Society in 1931, where they were given some semblance of order and microfilmed for preservation. They were returned to Salem in 1952, and are now in the Oregon State Archives. Libraries with extensive early Oregon law collections are:

**Oregon Historical Society**

1200 SW Park Avenue  
Portland, OR 97205-2035  
<<http://www.ohs.org/general/>>

**Oregon State Archives**

800 Summer Street NE  
Salem, OR 97310  
(503) 373-0701  
<<http://arcweb.sos.state.or.us>>

**State of Oregon Law Library**

1163 State Street  
Salem, OR 97301-2563  
<<http://egov.oregon.gov/SOLL/index.shtml>>

**University of Oregon Libraries**

15th Avenue and Kincaid  
Eugene, OR 97403  
(541) 346-3053  
<<http://libweb.uoregon.edu>>

NOTES

1. The origin of the name "Oregon" remains obscure, but it appears to have been derived from the fanciful name given to the rumored Great River of the West by 18th Century explorers of the upper Mississippi Valley, perhaps from a misunderstanding of an Indian word. See Lewis A. McArthur, *Oregon Geographic Names* 637-640 (6th ed. rev. Lewis L. McArthur, Portland: Oregon Historical Society Press, 1992).

2. Judith A. Farmer and Kenneth L. Holmes, *An Historical Atlas of Early Oregon* 4 (Portland: Historical Cartographical Publications, 1973).

3. For a general account of these voyages, see Derek Hayes, *Historical Atlas of the Pacific Northwest* (Seattle: Sasquatch Books, 1999).

4. Farmer and Holmes, *supra* note 2, at 31.

5. See generally Joseph R. Wilson, "The Oregon Question," *Or. Hist. Q.* Pt. I: 1: 111-131, Pt. II: 213-252 (1900).



6. Early Spanish claims were extravagant. When Balboa crossed the Isthmus of Panama to become the first European to see the Pacific in 1513, he claimed the ocean and any coasts it might wash in the name of Spain. Hayes, *supra* note 3, at 9.

7. William Ray Manning, *The Nootka Sound Controversy* 284-285 (Washington, DC: GPO, 1905). The English text of the Nootka Convention is reproduced at 454-456.

8. Wilson, *supra* note 5, at 122.

9. Hayes, *supra* note 3, at 102.

10. Treaty of Amity, Settlement and Limits, designating the limits of respective bordering territories in North America, Feb. 22, 1819, U.S.-Spain, 8 *Stat.* 252 (1819).

11. Wilson, *supra* note 5, at 129.

12. Convention with Great Britain, Oct. 20, 1818, U.S.-Gr. Brit., art. 3, 8 *Stat.* 248, 249.

13. Convention with Great Britain, Aug. 6, 1827, U.S.-Gr. Brit., 8 *Stat.* 360.

14. Convention between the United States of America and Russia, Apr. 5, 1824, U.S.-Russ., 8 *Stat.* 302, 304. Convention between Great Britain and Russia concerning the Limits of their Respective Possessions on the North-West Coast of America and the Navigation of the Pacific Ocean, Feb. 16, 1825, Gr. Brit.-Russ., art. 3, 75 *Consol. T. S.* 95, 97-98.

15. An Act for regulating the fur trade, and establishing a criminal and civil jurisdiction, within certain parts of North America, 1821, 1 and 2 *Geo.* 4, ch. 66 (Eng.). This statute is reproduced in J. Henry Brown, *Brown's Political History of Oregon: Provisional Government* 24-29 (Portland: Lewis and Dryden Printing Co., 1892).

16. There is now a statue of McLoughlin on the grounds of the Oregon Capitol inscribed "Dr. John McLoughlin 1784-1857 First to govern the Oregon Country 1824-1843."

17. Petitions from 1838, 1839, and 1840 are reprinted in Brown, *supra* note 15, at 54-58.

18. On the Oregon Question in Congress, see Marie Merriman Bradley, "Political Beginnings in Oregon," *Or. Hist. Q.* 9: 42, 66-72 (1908).

19. Ewing Young was already well-known as a trapper and mountain man when he settled in Oregon in 1834. See F.G. Young, "Ewing Young and his Estate," *Or. Hist. Q.* 21: 171-199 (1920).

20. Arthur S. Beardsley, "Code Making in Early Oregon," *Or. L. Rev.* 23: 22, 25-27 (1943).

21. H.W. Scott, "The Formation and Administration of the Provisional Government of Oregon," *Or. Hist. Q.* 2: 95, 100 (1901).

22. This report is apparently not extant. David C. Duniway and Neil R. Riggs, eds., "The Oregon Archives, 1841-1843," *Or. Hist. Q.* 60: 211, 236.

23. Beardsley, *supra* note 20, at 30.

24. An Act of June 27, 1844, apparently changed the northern boundary claimed to the Columbia River (An Act on the Organizing of Counties, Laws of Oregon 1843-49, p. 74), but at the next meeting of the legislative committee was changed by An Act Explanatory of An Act to amend the Several Acts organizing Counties

(Laws of Oregon 1843-49, p. 72) to a claim to jurisdiction all the way to fifty-four degrees forty minutes, thereby definitely including territory claimed by the British.

25. An Ordinance, for the government of the territory of the United States, Northwest of the river Ohio, ch. 8, 1 *Stat* 52 fn. (a) (1787). Superseded by An Act to provide for the Government of the Territory Northwest of the river Ohio, ch. 8, 1 *Stat*. 51 (1789), in order to keep the Ordinance in full force under the present constitution.

26. Brown, *supra* note 15, at 81.

27. *Ibid.* at 147.

28. Leslie M. Scott, "Oregon's Provisional Government, 1843-49," *Or. Hist. Q.* 30: 207 (1929).

29. An Act regulating the Executive Power, the Judiciary, and for other purposes, Laws of Oregon 1843-49, June 27, 1844, pp. 98-101.

30. Peter H. Burnett, "Recollections and Opinions of an Old Pioneer," *Or. Hist. Q.* 5: 150, 186 (1904).

31. Mirth Tufts Kaplan, "Courts, Counselors and Cases: The Judiciary of Oregon's Provisional Government," *Or. Hist. Q.* 62: 117, 131-133 (1961).

32. See La Fayette Grover, *The Oregon Archives* 56-58 (Salem: Asahel Bush, Territorial Printer, 1853).

33. Beardsley, *supra* note 20, at 35.

34. An Act adopting the Statute Laws of the Territory of Iowa and the common Law, passed 12 August, 1845, Oregon Acts and Laws 1845 at 16. (New York: Phemister Co., 1921).

35. An Act to establish the Territorial Government of Oregon, ch. 177, 9 *Stat.* 323 (1848).

36. Lawrence T. Harris, "History of the Oregon Code," *Or. L. Rev.* 1: 129, 140-141 (1922).

37. The legislation of the provisional government was not published. Some sections of some laws were hand copied for the officers of government responsible for administering them. See Kaplan, *supra* note 31, at 142.

38. Charles Henry Carey, *History of Oregon* 490-494 (Author's Edition, Portland: The Pioneer Historical Publishing Company, 1922).

39. Treaty with Great Britain, in Regard to Limits Westward of the Rocky Mountains, July 17, 1846, U.S.-Gr.Brit., 9 *Stat.* 869. This treaty also provided that the boundary "shall be continued westward along the said forty-ninth parallel to the middle of the channel which separates the continent from Vancouver's Island; and thence southerly through the middle of the said channel and Fuca's Straits to the Pacific Ocean." But there were at least two channels separating Vancouver Island from the mainland, and an entire archipelago between. Who owned which islands depended on which channel was referred to in the treaty, and American settlements in the San Juan Islands in 1859 led to further conflict, not settled until 1872, when Emperor William I of Germany, acting as arbitrator, sustained the claim of the United States. See Carey, *supra* note 38, 494-496.

40. *Supra* note 35.

41. *Ibid.* Article 14.

42. Quoted in Kaplan, *supra* note 31, at 142.

43. Laws of Oregon 1843-9 103 (Salem: Asahel Bush, Territorial Printer, 1853).
44. Beardsley, *supra* note 20, at 36-37.
45. *Ibid.* at 38.
46. Quoted by Beardsley, *ibid.*
47. *Acts of the Legislative Assembly of the Territory of Oregon passed at their Sessions Begun and Held at Oregon City, in July, 1849, and May, 1850*, p. 180 (Oregon City: Robert Moore, Printer, 1850).
48. Beardsley, *supra* note 20, at 41-43.
49. Quoted by Beardsley, *ibid.* at 43.
50. *Journal of Council*, 1850-51, Resolution No. 6, 119.
51. Statutes of a General Nature of the Territory of Oregon (Oregon City: Asahel Bush, Territorial Printer, 1851).
52. Beardsley, *supra* note 20, at 44-45.
53. An Act to provide for the selection of places for location and erection of the Public Buildings of the Territory of Oregon, *Statutes of a General Nature*, *supra* note 51, at 222.
54. Carolyn P. Stoel, "Oregon's First Federal Courts: 1849-1859," in *The First Duty: A History of the U.S. District Court for Oregon* 2, 29-35 (Carolyn M. Buan, ed., Portland: U.S. District Court Historical Society, 1993).
55. 10 *Stat.* 146 (1852). See also "Message from the President of the United States inviting the attention of Congress to the condition of things in the Territory of Oregon," among the documents surrounding the controversy compiled in House Executive Documents, 32nd Congress, 1st Session, Document No. 94, May 3, 1852. The opinions of the territorial supreme court and of Judge Pratt are also included in this compilation.
56. An Act, to create a Board of Commissioners to prepare a Code of Laws for the Territory of Oregon, *Statutes of a General Nature* 57-58 (Salem: Asahel Bush, Territorial Printer, 1853).
57. Report of the Commissioners elected to prepare a Code of Laws for the Territory of Oregon, Preface (Salem: Asahel Bush, Territorial Printer, 1853).
58. For an authoritative account of the work of the Commission, see J.K. Kelly, "Preparation and Adoption of the First Code," *Proc. Or. Bar Assoc.* 4: 66 (1894). Kelly was chairman of the Board of Commissioners.
59. *Ibid.* at 71.
60. *Journal of Council*, Sixth Regular Session, December 4, 1854, Letter of January 15, 1855, 63-64 (Salem: Asahel Bush, Territorial Printer, 1855).
61. Beardsley, *supra* note 20, at 48.
62. No record of this session exists except for an account of its proceedings in the *Oregon Spectator* for May 13, 1850.
63. This was organized as the first state session, but delays in ratification of statehood meant that it could accomplish little. It is not now recognized as one of the numbered state assemblies, and is listed by the Oregon State Archives as a special session of the territorial assembly. See Charles Henry Carey, ed., *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* 42-43 (Salem: State Printing Dept., 1926).
64. *Ibid.* at 7-21.

65. 1855-56 Or. Laws 7.
66. Marie Merriman Bradley, "Political Beginnings in Oregon," *Or. Hist. Q.* 9: 42, 54 (1908).
67. David Schuman, "The Creation of the Oregon Constitution," *Or. L. Rev.* 74: 611, 615 (1995).
68. James R. Robertson, "The Genesis of Political Authority in Oregon," *Or. Hist. Q.* 1: 3, 38 (1900).
69. *Ibid.* at 50.
70. Sidney Teiser, "The Life of George H. Williams: Almost Chief Justice," *Or. Hist. Q.* 47: 255, 259-260 (1946). For a compilation of the proceedings in this case and Judge William's opinion, see "Documentary: The Case of *Robin Holmes v. Nathaniel Ford*," *Or. Hist. Q.* 23: 111 (1923).
71. Ch. 22, 3 *Stat.* 545 (1820).
72. Ch. 59, 10 *Stat.* 277 (1854).
73. Schuman, *supra* note 67, at 615-617.
74. *Ibid.* at 611.
75. Or. Const. art. XVIII, sect. 2 (1857).
76. Carey, *supra* note 63, at 27.
77. 1857-58 Or. Laws App. p. 4.
78. Or. Const. art. XVIII, sect. 6 (1857).
79. For a fuller account of these matters, see Carey, *supra* note 63, at 40-43.
80. *Scott v. Sandford*, 60 U.S. (14 How.) 393 (1857).
81. Carey, *supra* note 63, at 43-52.