IN THE CIRCUIT COURT FOR THE STATE OF OREGON
COUNTY OF MARION

BRYN HAZELL, FRANCIS NELSON, TOM CIVILETTI, DAVID DELK, GARY DUELL, JOAN HORTON, and KEN LEWIS,

Plaintiffs,

v.

BILL BRADBURY, Secretary of State of the State of Oregon,

and

HARDY MYERS, Attorney General of the State of Oregon,

Defendants.

and

CENTER TO PROTECT FREE SPEECH, INC., an Oregon nonprofit corporation, and FRED VANNATTA,

Intervenor-Defendants and Cross-Claimants

Case No. 06C-22473

HAZELL PLAINTIFFS MEMORANDUM OPPOSING SUMMARY JUDGMENT FOR DEFENDANTS AND INTERVENORS

AND

HAZELL PLAINTIFFS REPLY MEMORANDUM SUPPORTING SUMMARY JUDGMENT FOR PLAINTIFFS

(Errata corrected)

Judge Mary M. James
Hearing: June 18, 2007
9:30 a.m.
Recording Requested

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Plaintiffs Hazell, Nelson, Civiletti, Delk, and Duell [hereinafter "Hazell" or "Hazell Plaintiffs"] moved for an order granting summary judgment on the merits of their First and Second Claims for Relief. In the memorandum below, they respond to the Memorandum in Support of Defendant' Motion for Summary Judgment and in Opposition to Plaintiffs' and Intervenors' Motions for Summary Judgment (March 9, 2007) [hereinafter "Defendants' Memorandum"]. They also adopt and incorporate fully by reference the memorandum filed today by the Horton Plaintiffs, except their argument that Section (9)(f) of Measure 47 is invalid.

Because the argument in Defendants' Memorandum is essentially a refutation of the Combined Memorandum in Support filed by the Hazell Plaintiffs on February 16, 2007 [hereinafter "Hazell Plaintiffs Summary Judgment Memorandum"], the argument below follows the organization of that memorandum and is presented in the form of a reply to Defendants.

The Horton Plaintiffs join this memorandum and argument.

I. PRELIMINARY ISSUES.

Defendants have raised no issues pertaining to the Hazell Plaintiffs standing to pursue this action, jurisdiction and venue, the standard for granting summary judgment, the applicable facts, or that material facts are not in dispute.

II. RESPONSE TO BACKGROUND PRESENTED BY DEFENDANTS.

Defendants (p. 4) first advance the notion, often repeated, that the Oregon Supreme Court in ***Meyer v. Bradbury***, 341 Or 288, 142 P3d 1031 (2006) held that

Article I, Section 8, prohibits all "laws restricting campaign expenditures and contributions."[1] The validity of laws restricting contributions or expenditures was not at issue in ***Meyer v. Bradbury***, where intervenor-defendant David Delk (here one of the Hazell Plaintiffs) prevailed against a lawsuit brought by employees of the Oregon Chapter of American Civil Liberties Union of Oregon to remove Measure 46 (not Measure 47) from the ballot for constituting more than one amendment to the Oregon Constitution. The Oregon Supreme Court was commenting upon its decision in ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997). The comments were *dicta*. No party argued that the ***Vannatta*** analysis did or did not apply to Measure 47. It was not an issue.

Vannatta was a decision which held that a particular statute, Measure 9 of 1994, violated Article I, Section 8. Courts rule on the cases that are presented to them and do not legislate or issue sweeping generalizations. As we argue below, the ***Vannatta*** analysis does not apply to Measure 47, for several reasons. We further argue that ***Vannatta*** itself was incorrectly decided and is subject to reconsideration. ***Stranahan v. Fred Meyer, Inc.***, 331 Or 38, 54, 11 P3d 228, 237 (2000).

Defendants (p. 5) seek to conclude that "limitations on CC&Es are categorically unconstitutional." That is obviously not the case. As noted in the Hazell Plaintiffs Summary Judgment Memorandum, pp. 15-16, Oregon statutes contain many

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1. Defendants (p. 11) cite ***Meyer v. Bradbury*** for the statement that "the Oregon Supreme Court has held--definitively and categorically--that statutory limits on CC&Es are impermissible under the Oregon Constitution." The Court's statement in ***Meyer v. Bradbury*** was not a holding.

limitations on political contributions and expenditures that are not even subject to credible constitutional challenge, such as the requirements, inter alia, that:

1. Every entity making any contribution or expenditure to communicate with voters about a candidate or measure register with the government and file detailed reports on a monthly basis; and

2. Every person making "independent expenditures" to communicate with voters about candidates or measures also register with the government and make detailed reports.

Defendants offer no basis for distinguishing those restrictions on "political speech" from restrictions which consist of numeric limits contributions or expenditures. All are, in the vernacular of ***Vannatta***, "content-based" restrictions, because they apply only when the content of the communications being regulated consists of "political speech." There are no cases in Oregon striking down such limitations as inconsistent with the Oregon Constitution or with the U.S. Constitution.

III. THE HAZELL PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR FIRST CLAIM FOR RELIEF (Declaratory Judgment).

As noted in the Hazell Plaintiffs Summary Judgment Memorandum, pp. 4-12, government officers are required to implement and enforce duly-enacted statutes, there are no even cognizable challenges to at least 12 severable and independently enforceable provisions of Measure 47, and in fact there has been filed no challenge at all to the validity of any provision in Measure 47. Defendants have arrogated to themselves the power to consider the entirety of a duly-enacted law to be a nullity.

Defendants' only argument is that enforcement of all of Measure 47 is excused due to its Section (9)(f). This argument is addressed in the Hazell Plaintiffs Summary Judgment Memorandum, pp. 12-18, and below.

A. IMPLEMENTATION OF MEASURE 47 IS NOT EXCUSED BY SECTION (9)(f).

Section (9)(f) is either a valid exercise of legislative power, or it is not. In either event, implementation of the rest of Measure 47 is not excused.

a. IF SECTION (9)(f) IS INVALID.

Both the Horton Plaintiffs and Intervenors claim that Section (9)(f) is invalid, for different reasons. If Section (9)(f) is invalid, then Section (11), the severability clause, automatically severs Section (9)(f) from the remainder of Measure 47. The remainder of Measure 47 is then to be implemented. That leaves Defendants with not even an asserted basis for refusing to implement and enforce the provisions of Measure 47 other than Section (9)(f).

Defendants do not dispute that, if Section (9)(f) is invalid, it must be severed and therefore leave the remainder of Measure 47 intact. The Intervenors do dispute that, and their argument is answered in the Horton Plaintiffs Response/Reply Memorandum, also filed today.

b. IF SECTION (9)(f) IS VALID.

The Hazell Plaintiffs contend that Section (9)(f) is valid and does not afford Defendants an excuse for their refusal to implement and enforce Measure 47.

Section (9)(f) reads:

> If, on the effective date of this Act, the Oregon Constitution does not allow limitations on political campaign contributions or expenditures, this Act shall nevertheless be codified and shall become effective at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations.

Both the Hazell Plaintiffs and Defendants argue that Section (9)(f) is valid. We differ as to whether it has triggered and whether, even if triggered, it relieves Defendants of obligation to implement and enforce the provisions of Measure 47.

(1) THE PREDICATE FOR TRIGGERING (9)(f) HAS NOT OCCURRED.

The operative portion of Section (9)(f) is not triggered, unless "on the effective date of this Act, the Oregon Constitution does not allow limitations on political campaign contributions or expenditures." No such blanket judicial determination has been made. In earlier cases, the Oregon Supreme Court examined specific sets of numeric limits and found those numeric limits to be invalid. ***Vannatta***; ***Deras v. Myers***, 272 Or 47, 535 P2d 541 (1975). This does not amount to a generic and all-encompassing judicial determination as to all limitations on political campaign contributions or expenditures.

Also, note the hole in Defendants' argument here. They claim that, when Section (9)(f) refers to "limitations," it must be referring only to numeric limitations. Because the Oregon Supreme Court has not approved such numeric limitations, say Defendants, Section (9)(f) has triggered and has placed all of Measure 47 into dormancy.

Of course, courts decide specific cases and do not make sweeping legislative proclamations. Even so, as we have shown, the term "limitations" in Measure 47 clearly refers to both numeric limitations and non-numeric limitations.[2] The Oregon Supreme Court has not struck down, to our knowledge, any of the sort of non-numeric limitations that Measure 47 adopted, such as the 12 provisions presented in the Hazell Plaintiffs Summary Judgment Memorandum, pp. 10-11. Thus, even if Defendants are correct in asserting that Section (9)(f) has triggered, that trigger does not apply to the non-numeric limits that the Oregon courts have never invalidated. Thus, Defendants are obligated to immediately implement and enforce those non-numeric limitations, even if Section (9)(f) has triggered for the numeric limitations.

But Section (9)(f) refers to "limitations" in the plural. It states that the Act shall be codified yet dormant if "the Oregon Constitution does not allow limitations on political campaign contributions or expenditures." If the Oregon Constitution currently allows <u>some</u> limitations (non-numeric) but not <u>all</u> <u>possible</u> limitations (including numeric ones), how does this language apply? Clearly, the language triggers the dormancy only if the Oregon Constitution does not allow <u>any</u> limitations. It does not trigger, if the Oregon Constitution allows <u>some</u> limitations. If some limitations are allowed, then the conditional clause ("if the Oregon Constitution does not allow limitations") is false. So

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2. Section (9)(d) refers to "numeric limits or thresholds, percentage limits or thresholds, time periods, or age limits." The general term "limitations" obviously includes this list of specific types of limits.

the fact that the Oregon Constitution does allow some limitations means that the dormancy is not triggered at all.

Defendants' argument suffers another logical flaw. Their memo repeatedly refers to "CC&E limits" as if all possible limits, including non-numeric ones, are simply a single creature. Each time Defendants use the term "CC&E limits," the question arises: Which ones? All such limits? All numeric-only limits? The limits adopted in Measure 9 of 1994? The limits adopted in Measure 47? The argument becomes near incomprehensible, because Defendants often do not specify which limits they are referring to.

Further, the argument of Defendants is circular. They offer no constitutional analysis on the specific limits in Measure 47 or its legislative findings of fact. They summarily dismiss (pp. 12-14) the substantial reasons we offer why the Measure 47 limits would be treated differently by the Oregon Supreme Court than the Measure 9 of 1994 limits, even if ***Vannatta*** were in no way reconsidered. See Hazell Plaintiffs Summary Judgment Memorandum, pp. 18-24. Defendants also dismiss in a single sentence (p. 14) our contention that ***Vannatta*** relied upon a demonstrably faulty historical analyses of Article II, Section 8, and of Article I, Section 8. *Id.*, pp. 24-40. Instead, Defendants merely assume that the limits in Measure 47 are unconstitutional and therefore assume that Section (9)(f) is triggered.

Defendants (pp. 8-11) then postulate that "Measure 47 itself presumed and intended that its own operative effect would depend on a constitutional change, such as adoption of Measure 46." This is clearly not the case, because Section (9)(f) itself

contemplated that the limitations in Measure 47 may well be constitutional now, with no change to the Oregon Constitution. It states:

> If, on the effective date of this Act, the Oregon Constitution does not allow limitations on political campaign contributions or expenditures, this Act shall nevertheless be codified and shall become effective at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations.

It refers to when the "Oregon Constitution is found to allow, or is amended to allow, such limitations." The interpretation argued by Defendants would require striking the words "is found to allow, or" from the text of Section (9)(f). In construing statutes, courts are "not to insert what has been omitted, or to omit what has been inserted." ORS 174.010. See ***State ex rel. Kirsch v. Curnutt***, 317 Or 92, 96-97, 853 P2d 1312 (1993) (rejected interpretation omitted words "and is performing" from the statute). No amount of alleged context or "legislative history" can allow the court to so alter the words of the statute.

Let us examine the context offered by Defendants. They (p. 9) cite Section (1)(r) of Measure 47. All of Section (1) consists of findings, not operational provisions. Section (1)(r) states:

> (r) In 1994, voters in Oregon approved a statutory ballot measure, Measure 9, establishing contribution limits similar to those in this Act, by an affirmative vote of 72 percent. The Oregon Supreme Court in 1997 found that those limits were not permitted under the Oregon Constitution. This Act shall take effect at a time when the Oregon Constitution does allow the limitations contained in this Act.

There is nothing in this section that indicates that the drafters of Measure 47 presumed the necessity of a constitutional change. The section does not even

mention the need for constitutional change. It refers to the ***Vannatta*** decision as applying to the Measure 9 limits ("those limits").

Defendants then seek to refer to legislative history, although they do not first demonstrate or even assert that the language being construed (Section (9)(f)) is ambiguous on this point. Such a demonstration is required before resorting to legislative history. ***Kirsch v. Curnutt***, *supra*, 317 Or at 96. Defendants then seek to refer to the ballot title and explanatory statement for a different measure (Measure 46), but none of the material referenced prove the asserted point that the drafters of Measure 47 assumed that constitutional change was absolutely required, since Section (9)(f) itself contemplates that the limitations in Measure 47 could be approved without such constitutional change.

Everyone can agree that the adoption of Measure 46 along with Measure 47 would have ensured that all of the limitations in Measure 47 would have passed muster under the Oregon Constitution. Naturally, the proponents of Measure 47 also urged a "yes" vote on Measure 46, in order to guarantee the validity of all of the limitations in Measure 47. Unfortunately, Measure 46 did not pass. That does not mean that the limitations in Measure 47 are contrary to the Oregon Constitution. It just means that the constitutionality of those limitations must be adjudicated, with a strong presumption that they are constitutional. ***Wadsworth v. Brigham***, 125 Or 428, 464, 266 P 875 (1928).

Defendants then resort to quoting Voters' Pamphlet arguments, first for a different measure and not for Measure 47. They then quote one Laura Etherton for

the proposition that "the existing Oregon Constitution does not allow any limits on political spending." This illustrates the hazard of quoting from Voters' Pamphlet arguments.[3]

The Voters' Pamphlet is not useful as a reference to determine the state of the law of campaign finance limitations. It is useful to determine the intent of a measure, if there is some question as to its applicability. Assume that an adopted measure restricts speech, and all of the material in the Voters' Pamphlet pertains solely to the restriction of nude dancing. Then a government official prosecutes a billboard company for violating the measure. The content of the Voters' Pamphlet would then be relevant to show that the intent of the voters was directed at nude dancing and not billboards. Here, however, Defendants seek to use the Voters' Pamphlet as support for assertions about the constitutionality of Measure 47, which is as pure a legal issue as can be imagined.

Consider the converse. What if a Voters' Pamphlet statement contended that Measure 47 was valid and enforceable, even without adoption of Measure 46? Would that prove that Measure 47 is valid and enforceable? Clearly it would not, and it would not have any conceivable bearing on the outcome of that legal issue. Similarly, statements by whomever in the Voters' Pamphlet that Measure 47 depends on Measure 46 for its validity are merely assertions of law that are not entitled to any consideration whatever.

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3. Laura Etherton was not a chief petitioner.

In addition, anyone can put anything in the Voters' Pamphlet upon payment of $500 for 325 words. For example, Measure 9 of 2000 proposed to prohibit public school instruction encouraging certain behaviors. Here is its ballot title:

> PROHIBITS PUBLIC SCHOOL INSTRUCTION ENCOURAGING, PROMOTING, SANCTIONING HOMOSEXUAL, BISEXUAL BEHAVIORS
>
> RESULT OF "YES" VOTE: "Yes" vote prohibits public school instruction encouraging, promoting, or sanctioning homosexual/ bisexual behaviors; provides penalties.
>
> RESULT OF "NO" VOTE: "No" vote rejects proposal to prohibit public school instruction encouraging, promoting, sanctioning homosexual/bisexual behaviors.
>
> SUMMARY: Amends statutes. Prohibits public schools from instructing on behaviors relating to homosexuality and bisexuality in a manner that encourages, promotes or sanctions such behaviors. Provides sanctions for noncompliance by any public elementary or secondary school or by any community college, including loss of all or part of state funding.

Here is a Voters' Pamphlet argument in favor of this Measure 9:

> ARGUMENT IN FAVOR
>
> AN EXPLANATION: BALLOT MEASURE 9
>
> Amends state statutes to make Lon Mabon's personal moral beliefs into public policy.
>
> Prohibits public schools from providing any instruction contrary to Lon's opinions about homosexuality.
>
> Establishes precedent for anyone else to make the schools teach their beliefs to your children.
>
> Establishes that morality is determined by popular vote.
>
> Establishes precedent for additional censorship amendments attacking freedom of speech, censoring library books, and polarizing the public schools as a divisive electoral battleground over conflicting theologies.

Dresses in a new disguise the OCA's same old attempt to legislate Lon's personal moral opinion that's been twice defeated by Oregon voters.

Increases the teenage suicide rate by instilling children with guilt and self-loathing.

Increases teenage AIDS infections by prohibiting accurate information on prevention.

Facilitates hatred and violence against your children if they are gay or lesbian or merely perceived as such, increasing assaults and killings.

Allows good teachers to be fired for expressing disagreement with Lon Mabon or if a paranoid person imagines them to be gay.

Forces teachers to lie if students ask about scientific studies that document homosexuality in more than 450 species of animals (Bruce Bagemihl, Biological Exuberance).

May prohibit schools from teaching about Michelangelo, Leonardo da Vinci, Tchaikovsky, Leonard Bernstein, Gertrude Stein,Hans Christian Andersen, and numerous other "dangerous and destructive" gay artists.

Perpetrates the lie that gays are a "threat," when actually children are over 100 times more likely to be abused by heterosexual relatives than by homosexuals (Pediatrics, July 1994).

Scapegoats homosexuals to avoid discussing the real threat to children: inadequate and dysfunctional parenting.

Does absolutely nothing to prevent physical, sexual, and psychological abuse of children.

Plants the seeds of intolerance for other minorities.

Builds political power for Lon Mabon, who's declared himself to be GOD'S ONLY MESSENGER (Sunday Oregonian, March 10, 1996)!

(This information furnished by M. Dennis Moore, Special Righteousness Committee.)

Should the interpretation of that measure, if enacted, have been influenced by the insertion of this "argument in favor" of the measure? How can such arguments be a reliable source for interpretation? In fact, opponents of measures have adopted a practice of inserting numerous statements in favor of the measures they actually oppose. Should legal interpretation of such measures depend upon the statements of the opponents?[4]

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4. For example, the next argument in favor of Measure 9 of 2000 also makes numerous assertions about the meaning of the measure that its drafters and supporters would contest. The next argument in favor read:

> ARGUMENT IN FAVOR
>
> MEASURE 9 ALSO
>
> Tells anti-gay lies to teach "morality."
>
> Misrepresents the Christian values of nonjudgment, tolerance, and understanding as the "promotion" of homosexuality.
>
> Violates the Ninth Commandment; insists that relentlessly bearing false witness against gays "isn't hatred."
>
> Sets a standard of hypocrisy and self-righteous intolerance.
>
> Dishonestly pretends to speak for all Christians, when actually the largest coalition of churches in the state has consistently opposed OCA hate initiatives.
>
> Slanders Jesus by misleading people into thinking that all Christians are as obnoxious as the OCA.
>
> Violates religious freedom by legislating Lon's moral beliefs as the only true beliefs.
>
> Abuses the Bible as an excuse for common nonsense and "time-tested" bigotry by teaching only 0.2 percent of Leviticus, ignoring the cultural context of the other 99.8 percent of Leviticus, which says that eating oysters and shaving are just as wrong as homosexuality! (Coming soon: The Student

(continued...)

Defendants (p. 11) conclude: "Because the status quo is unchanged, § (9)(f) is triggered, placing the entire measure in abeyance pending a constitutional change." At best for Defendants, the triggering of Section (9)(f) would place Measure 47 in abeyance pending a constitutional change or a judicial finding that any or all of its provisions are currently valid under the existing Oregon Constitution. That is why Section (9)(f) refers to "the time that the Oregon Constitution is found or allow, or is amended to allow, such limitations." Section (9)(f) does not allow Measure 47 to be put into cold storage, pending a change to the Oregon Constitution. Instead, it acknowledges that such change could occur but also states that it shall become effective if the existing Oregon Constitution is found to allow its limitations. That is what this litigation is about.

4.(...continued)
Facial Hair Protection Act!)

> Sets the stage for reintroduction of OCA "No Special Rights" Committee initiatives to limit the freedom of religion. Religious freedom has meant the right to practice your personal beliefs and be protected from discrimination, but Lon Mabon wants to redefine religious freedom and create a new special "Right of Conscience" for persons who disagree with your moral beliefs to oppose your "immoral" behavior.
>
> Lon's other initiatives would (1) change the freedom of religion clause in the state Constitution for the first time since Oregon statehood in 1859, (2) declare that straight single parents and their children are not "family," (3) legalize discrimination against homosexuals and straight single parents, (4)establish a precedent for anyone to fire you and evict you if they don't like your moral beliefs, and (5) provide a campaign income for Lon--GOD'S ONLY MESSENGER--Mabonso he doesn't have to get a real job.
>
> For more information, visit us at www.specialrighteousness.org on the Web. (This information furnished by M. Dennis Moore, Special Righteousness Committee.)

Defendants (pp. 14-17) claim that the term "limitations" in Section (9)(f) refers only to numeric limitations. But nothing in their discussion even tends to show that. Defendants (p. 14) merely assert that the plain meaning of the term "refers only to numeric limitations," without support of any kind and without refuting the presentation of dictionary definitions in the Hazell Plaintiffs Summary Judgment Memorandum, p. 15. Further, Section (9)(d) shows that the drafters of Measure 47 did not use the term "limitations" to refer only to numeric limitations, as that section refers to "numeric limits or thresholds, percentage limits or thresholds, time periods, or age limits." The general term "limitations" obviously includes this list of specific types of limits and is not limited to numeric limitations only.

Defendants (p. 15) then claim that, whenever Measure 47 used the term "limitation on political campaign contributions or expenditures," it meant numeric limits. That is also not the case. As noted above, Section (9)(d), appearing in Measure 47 before Section (9)(f), specifically distinguishes among numeric limits and other types of limits. Their footnote 10 lists several instances where terms such as "limited" or "unlimited" are used in Measure 47.[5] Indeed, often Measure 47 does refer to the need for numeric limits, as when it refers to the size of contributions by "wealthy individuals" and avoiding the "adverse effects of large contributions" and "raising funds from large contributors." But that does not establish the Measure 47's references to limitations are exclusively to numeric limitations.

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5. The first half of the footnote refers only to the discussion in Section (1) of Measure 47, its legislative findings.

And, even if Section (9)(f) was referring exclusively to numeric limitations, Defendants' argument does not appear to make sense. As noted at page 6, *supra*, even if Defendants are correct in asserting that Section (9)(f) has triggered because the Oregon Constitution does not currently allow numeric limitations, that trigger does not apply to the non-numeric limits that the Oregon courts have never invalidated. Thus, Defendants are obligated to immediately implement and enforce those non-numeric limitations, even if Section (9)(f) has triggered for the numeric limitations. And we are asking in this suit for declarations as to the validity of each of the limitations in Measure 47, including the 12 such provisions identified in the Hazell Plaintiffs Summary Judgment Memorandum as not being subject to any cognizable constitutional challenge, even under the doctrines of ***Vannatta***.

Defendants (p. 17) contend that Section (9)(f) would be redundant of the severability clause, unless Section (9)(f) is interpreted to place all of the limitations in Measure 47 in dormancy. As noted above, however, the language of Section (9)(f) requires dormancy only if "the Oregon Constitution does not allow [any] limitations on political campaign contributions or expenditures," which is not the case. Even ***Vannatta*** admits that even some limitations involving money are permissible, such as sanctions against bribery or against corporate or union contributions or other circumstances. ***Vannatta***, 324 Or at 522 n10. Oregon has dozens of other limitations on campaign contributions, such as the requirement that every contribution be made in the name "of the person who in truth provides the contribution," ORS 260.401 (a practice referred to in the cases as money laundering). And, as Measure 47, Section

(9)(d)(4) states, a prohibition on the use of money in a particular manner is a numeric limitation of zero.

Defendants (pp. 16-17) then turn to Voters' Pamphlet arguments and newspaper articles. They first cite to arguments submitted by the opponents of Measure 47, including several labor unions. Statements created by the opponents of a measure and inserted into the Voters' Pamphlet are not reliable indicia of the meaning of the measure. If the courts were to rely on such statements by opponents, the Voters' Pamphlet would become saturated with false statements offered by opponents in order to impair its later implementation. Defendants then quote from a newspaper, the Bend Bulletin, which repeatedly editorialized against Measure 47. They even quote directly the Medford Mail Tribune's editorial against Measures 46 and 47. Again, quoting the opponents of a measure does not even tend to prove its meaning, as opponents have every incentive not to portray the measure accurately, and Voters' Pamphlet statements are not reviewed by anyone for accuracy.

And, as noted at page 10, *supra*, Defendants quote the Voters' Pamphlet and newspaper articles to try to show the state of the law pertaining to campaign finance limitations or to show the legal meaning of the measures. These are not appropriate sources for that task.

B. THERE IS NO ADJUDICATED CHALLENGE TO THE PROVISIONS OF MEASURE 47 ESTABLISHING NUMERIC LIMITS.

Again, there has been no legal challenge to any of the provisions of Measure 47; Defendants on their own have merely refused to implement or enforce any of Measure

47, based on their assumption that some of the provisions transgress ***Vannatta***, *supra*, which in their view triggers Section (9)(f).

We need not examine the merits of whether the numeric limits in Measure 47 past muster under ***Vannatta***, *supra*, until and unless someone challenges the constitutionality of those limits. No such challenge has been filed. We offered some anticipatory defenses in the Hazell Plaintiffs Summary Judgment Memorandum, pp. 18-40, and Defendants have offered some responses to those.

C. *VANNATTA*'S EVALUATION OF MEASURE 9 OF 1994 DOES NOT APPLY TO INVALIDATE THE LIMITS IN MEASURE 47.

1. UNLIKE MEASURE 47, MEASURE 9 OF 1994 WAS NOT SUPPORTED BY LEGISLATIVE FINDINGS OF FACT.

The Oregon Supreme Court found Measure 9's limits invalid, in part due to the absence of legislative findings of fact setting forth the purposes of the limits. See Hazell Plaintiffs Summary Judgment Memorandum, pp. 18-19. In contrast, Measure 47 contains extensive legislative findings of fact setting forth the harms resulting from the absence of limits on political contributions and expenditures and a complete rationale for the limits and why they serve compelling state interests, and those findings are entitled to near complete deference by the courts. *Id.*, pp. 19-21.

Defendants (p. 12) respond only by stating that Measure 47's findings "express the same sort of harm that could not save Measure 9 in ***Vannatta***." This misses the point. In ***Vannatta***, 324 Or at 539, the Court stated:

> Common Cause cites numerous studies as support for its position that large campaign contributions can create undue influence over the political

> process. But those studies, like the arguments in favor of Measure 9 in the Voters' Pamphlet, only establish that there is a debate in society over whether and to what extent such contributions indeed cause such a harm. As ***Purcell*** and ***Stoneman*** make clear, apart from the legal question whether Article I, section 8, prohibits enactment of the law as drafted for any purpose, the harm that legislation aims to avoid must be identifiable from legislation itself, not from social debate and competing studies and opinions. Measure 9 does not in itself or in its statutory context identify a harm in the face of which Article I, section 8, rights must give way.

The presence of extensive legislative findings of fact in Measure 47 is a fundamental difference from Measure 9 of 1994.

In the absence of such findings, the ***Vannatta*** opinion felt unconstrained in making its own conclusions of fact, based on no apparent source of evidence.

> Shorn of its reliance on ***Fadeley***, the Secretary of State's argument is a reiteration of the idea that money necessarily and inherently corrupts candidates. It is natural that support-financial and otherwise-will respond to a candidate's positions on the issues. Yet an underlying assumption of the American electoral system always has been that, in spite of the temptations that contributions may create from time to time, those who are elected will put aside personal advantage and vote honestly and in the public interest. The political history of the nation has vindicated that assumption time and again. The periodic appearance on the political scene of knaves and blackguards cannot, so far as we know, be tied to contributions more than to other forms of expression. There is no necessary incompatibility between seeking political office and the giving and accepting of campaign contributions. This argument is not well taken.

This rather stunning series of factual findings is now entirely and comprehensively contradicted by the specific findings of fact adopted by the voters of Oregon in Section (1) of Measure 47.[6] These findings are entitled to near complete judicial deference.

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6. They are further contradicted by the fact that the U.S. Congress and every state in the United States, except Oregon and New Mexico, have found it necessary and appropriate to enact and enforce limits on political campaign contributions. Federal Election

(continued...)

State ex rel. Van Winkle v. Farmers Union Co-op Creamery of Sheridan, 160 Or 205, 219-220, 84 P2d 471, 476-77 (1938). The courts can no longer legitimately rely upon such judicial findings, which were key to the invalidation of Measure 9 of 1994.

2. UNLIKE MEASURE 9 OF 1994, MEASURE 47 CONTAINS SEVERABLE LIMITATIONS ON CAMPAIGN CONTRIBUTIONS AND/OR SPENDING BY CORPORATIONS AND UNIONS.

The Oregon Supreme Court in ***Vannatta*** left open the door for limits on political contributions or spending by corporations and unions.

> [T]here doubtless are ways of supplying things of value to political campaigns or candidates that would have no expressive content or that would be in a form or from a source that the legislature otherwise would be entitled to regulate or prevent. To give but a few examples: A bribe may be an expression of support (with an anticipated quid pro quo), but it is not protected expression; **a gift of money to a candidate from a corporation or union treasury may be expression but, if it is made in violation of neutral laws regulating the fiscal operation of corporations or unions, it is not protected**; a donation of something of value to a friend who later, and unexpectedly, uses that thing of value to support the friend's political campaign is not expression.

324 Or at 522 n10.[7]

> But the right to spend money to encourage some candidate or cause does not necessarily extend to spending other people's money on a political message without their consent, whether that money comes from

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6.(...continued)
Commission (FEC), CAMPAIGN FINANCE LAWS 2002, Chart 2A (http://www.fec.gov/pubrec/cfl/cfl02/cfl02chart2a.htm), as cited in the Hazell Plaintiffs Summary Judgment Memorandum, p. 36.

7. Parenthetically, one wonders why a bribe is not protected expression under Article I, Section 8. What exactly is the meaningful difference between a "bribe" and a campaign contribution to a politician who later performs favors for the contributor (as documented in the Measure 47 legislative findings of fact)? Both would appear to be "political speech" under ***Vannatta***.

> compulsory union fair share fees, a shareholder's equity, student activity fees, or dues paid to an integrated Bar.

Vannatta, 324 Or at 524. The Court nevertheless struck down all of Measure 9 of 1994, because Measure 9 applied contribution limits to individuals, and the Court implemented Measure 9's express non-severability clause, which called upon the courts to invalidate all remaining parts if they, "standing alone, are incomplete and incapable of being executed." ***Vannatta***, 324 Or 546.

In contrast, Measure 47, Sections (3) and (6), contains severable limitations on political contributions and expenditures by corporations and unions. These funds come from shareholder's equity and from union dues. No one has stated why such independently enforceable and severable limits are in violation of ***Vannatta***. And Measure 47's strict non-severability clause protects these limitations.

Defendants (pp. 12-13) respond. They claim that the import of the Court's comment on corporations and unions is "that only funds legitimately obtained for political purposes properly may be used for such purposes." We do not know what that means. The Court in ***Vannatta*** quite clearly indicated that political contributions by non-individuals may well be subject to state limitations. Defendants further respond that corporations and unions do "enjoy free-speech protection under the Oregon Constitution." That misses the point. In ***Vannatta***, the Court placed into question the extent of their free speech protection in the specific context of political contributions. There is no Oregon case holding that corporations or unions have the right to make unfettered political campaign contributions. The prohibitions on such contributions in

Measure 9 were dragged down by the invalid limitations on contributions by individuals, combined with the non-severability clause. The Court in ***Vannatta*** repeatedly stated that it was upholding the free speech rights of "the people" or "the voters" or "Oregon citizens." See, e.g., 324 Or 522-23.[8] Corporations and unions are artificial entities. They are not people or voters or citizens.

3. UNLIKE MEASURE 9 OF 1994, MEASURE 47 CONTAINS SEVERABLE LIMITATIONS ON CAMPAIGN CONTRIBUTIONS AND/OR SPENDING BY CORPORATIONS AND UNIONS VALIDATED BY ARTICLE II, SECTION 22, OF THE OREGON CONSTITUTION.

Vannatta discusses Article II, Section 22, of the Oregon Constitution and concludes that it may well remove Article I, Section 8, protection for political contributions made by entities other than individuals residing inside the voting district of the candidate in question. 324 Or at 527. This section of the Oregon Constitution was enacted by Measure 6 of 1994.[9] Unlike the litigants in ***Vannatta***, the Hazell

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8. The opinion is replete with references to the rights of "citizens" and "individuals" and "people." It does not refer to any rights of unions or corporations.

9. Measure 6 of 1994 enacted Article II, Section 22, as follows:

> **Section 22. Political campaign contribution limitations.**
>
> Section (1) For purposes of campaigning for an elected public office, a candidate may use or direct only contributions which originate from individuals who at the time of their donation were residents of the electoral district of the public office sought by the candidate, unless the contribution consists of volunteer time, information provided to the candidate, or funding provided by federal, state, or local government for purposes of campaigning for an elected public office.

(continued...)

Plaintiffs specifically have argued for partial application of Article II, Section 22, to validate all of the limitations in Measure 47 that do not pertain to individuals residing inside the voting district of the candidate receiving the contributions.

Defendants (p. 13) respond that "the Hazell plaintiffs fail to develop any such argument here." We did develop precisely such argument in the Hazell Plaintiffs Summary Judgment Memorandum. Defendants then argue that they "are enjoined from enforcing" Article II, Section 22. Our examination of the case shows no order of injunction. Instead, the U.S. District Court concluded, with affirmance by the Ninth Circuit Court of Appeals, that the feature of Measure 6 of 1994 that ran afoul of the U.S. Constitution was its discrimination against individuals who were not residents of

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9.(...continued)

Section (2) Where more than ten percent (10%) of a candidate's total campaign funding is in violation of Section (1), and the candidate is subsequently elected, the elected official shall forfeit the office and shall not hold a subsequent elected public office for a period equal to twice the tenure of the office sought. Where more than ten percent (10%) of a candidate's total campaign funding is in violation of Section (1) and the candidate is not elected, the unelected candidate shall not hold a subsequent elected public office for a period equal to twice the tenure of the office sought.

Section (3) A qualified donor (an individual who is a resident within the electoral district of the office sought by the candidate) shall not contribute to a candidate's campaign any restricted contributions of Section (1) received from an unqualified donor for the purpose of contributing to a candidate's campaign for elected public office. An unqualified donor (an entity which is not an individual and who is not a resident of the electoral district of the office sought by the candidate) shall not give any restricted contributions of Section (1) to a qualified donor for the purpose of contributing to a candidate's campaign for elected public office.

Section (4) A violation of Section (3) shall be an unclassified felony.

[Created through initiative petition filed Jan. 25, 1993, and adopted by the people Nov. 8, 1994]

the district from which the candidate was running. The federal courts had no problem with Measure 6's absolute ban on political contributions by non-individuals, since complete bans on political contributions by non-individuals (corporations and unions) have been in place in federal elections for decades and are currently also in place in about half of the states.[10]

Why, then, did the federal courts not sever the parts of Measure 6 of 1994 that discriminated on a geographic basis, while letting stand the parts that banned all contributions by non-individuals? After all, such severance or limiting construction

10. Federal Election Commission (FEC), CAMPAIGN FINANCE LAWS 2002, Chart 2A (http://www.fec.gov/pubrec/cfl/cfl02/cfl02chart2a.htm), as cited in the Hazell Plaintiffs Summary Judgment Memorandum, p. 36.

could easily be accomplished by striking a few words from the measure.[11] It was because they misunderstood the law of Oregon.

> Furthermore, I conclude that the unconstitutional portions of Measure are not severable because the Measure's lack of clarity prevents the Court from ascertaining the intentions of the people who enacted it.

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11. For example:

> **Section 22. Political campaign contribution limitations.**
>
> Section (1) For purposes of campaigning for an elected public office, a candidate may use or direct only contributions which originate from individuals ~~who at the time of their donation were residents of the electoral district of the public office sought by the candidate~~, unless the contribution consists of volunteer time, information provided to the candidate, or funding provided by federal, state, or local government for purposes of campaigning for an elected public office.
>
> Section (2) Where more than ten percent (10%) of a candidate's total campaign funding is in violation of Section (1), and the candidate is subsequently elected, the elected official shall forfeit the office and shall not hold a subsequent elected public office for a period equal to twice the tenure of the office sought. Where more than ten percent (10%) of a candidate's total campaign funding is in violation of Section (1) and the candidate is not elected, the unelected candidate shall not hold a subsequent elected public office for a period equal to twice the tenure of the office sought.
>
> Section (3) A qualified donor (an individual ~~who is a resident within the electoral district of the office sought by the candidate~~) shall not contribute to a candidate's campaign any restricted contributions of Section (1) received from an unqualified donor for the purpose of contributing to a candidate's campaign for elected public office. An unqualified donor (an entity which is not an individual ~~and who is not a resident of the electoral district of the office sought by the candidate~~) shall not give any restricted contributions of Section (1) to a qualified donor for the purpose of contributing to a candidate's campaign for elected public office.
>
> Section (4) A violation of Section (3) shall be an unclassified felony.
>
> [Created through initiative petition filed Jan. 25, 1993, and adopted by the people Nov. 8, 1994]

> My decision not to sever is buttressed by the fact that the state legislature is free to enact legislation which limits campaign contributions by corporations for profit, labor unions, banks, etc. A ban on contributions to federal candidate elections by corporations, labor unions, banks and similar entities has been in existence for almost 90 years and has been found to comport with the First Amendment. See ***FEC v. National Right to Work Committee***, 459 U.S. 197, 103 S.Ct. 552, 74 L.Ed.2d 364 (1982); ***First National Bank of Boston v. Bellotti***, 435 U.S. 765, 788 n. 26, 98 S.Ct. 1407, 1422 n. 26, 55 L.Ed.2d 707 (1978).
>
> Measure 6 makes no express effort to exempt individuals, non-profit corporations, partnerships and the like. A measure must do so to pass federal constitutional muster.

Vannatta v. Keisling, 899 F Supp 488, 497 (DC Or 1994), affirmed 151 F3d 1215 (9th Cir 1998).

Thus, the federal courts believed that the legislative process in Oregon was free to re-enact the limits on campaign contributions by corporations, labor unions, banks, etc. That turned out to be wrong.

Article II, Section 22, remains in the Oregon Constitution. Giving a construction limited to allowing contributions by individuals of any residence, it provides a basis in the Oregon Constitution for the limitations in Measure 47 applicable to corporations, unions, and all other entities that are not individuals.

D. *VANNATTA* NOT DOES INVALIDATE THE NUMERIC LIMITATION SYSTEM IN MEASURE 47.

The numeric limits in Measure 47 are different from those in Measure 9 of 1994. Measure 9 adopted static limits, but all numeric limits in Measure 47 are subject to the automatic adjustment clause, Section (9)(d). Defendants here only repeat their

contention that ***Vannatta*** somehow invalidated all limits on political contributions and expenditures, including those devised nearly a decade after 1997.

E. *VANNATTA* RELIED UPON FAULTY HISTORICAL ANALYSIS OF ARTICLE II, SECTION 8, OF THE OREGON CONSTITUTION.

The Hazell Plaintiffs Summary Judgment Memorandum, pp. 24-32, shows that the ***Vannatta*** opinion relied upon a faulty historical analysis of Article II, Section 8. Defendants (p. 14) dismiss this argument with a single sentence.

We have since had the opportunity to conduct more historical research and can now demonstrate beyond question that the term "election" had come by 1857 to encompass the process of campaigning for public office. This removes the basis for the ***Vannatta*** conclusion that limits on political campaign contributions and expenditures are not authorized by Article II, Section 8, of the Oregon Constitution.

Of particular note is the sequence of events in Texas. In 1845, Texas adopted a constitution that contained both (1) a free speech provision essentially verbatim to Article I, Section 8, of the Oregon Constitution, and (2) an election protection provision essentially verbatim to Article II, Section 8, of the Oregon Constitution. In 1856, pursuant to its election protection constitutional authority, the Texas Legislature enacted a statute to limit political campaign contributions. As documented below, the 1856 Texas statute included "furnish[ing] money to another, to be used for the purpose of promoting the success or defeat of any particular candidate," among "Offences [*sic*] Affecting the Rights of Suffrage." The Oregon Constitutional Convention met the following year and adopted free speech and election protection

clauses near verbatim those in Texas. Under these circumstances, there remains no support for the conclusion in ***Vannatta*** that the term "election" at the time of voter adoption of the Oregon Constitution in 1857 included only events on the day of voting and not the process of campaigning for public office.

1. PRIMARY SOURCES SHOW THAT PRIOR TO 1857 "ELECTION" HAD EXPANDED BEYOND THE MEANING ATTRIBUTED IN WEBSTER'S DICTIONARY (1828).

a. OREGON CONSTITUTIONAL JURISPRUDENCE REQUIRES CONSIDERATION RELEVANT HISTORICAL EVENTS AND UNDERSTANDING OF VOTERS.

The Oregon Supreme Court in ***Priest v. Pearce,*** 314 Or 411, 840 P2d 65, 67-69 (1992), set out an "originalist" approach for interpreting provisions of the Oregon Constitution. The text of the Constitution must be interpreted in light of (1) its specific wording, "text and context," (2) prior case law, and (3) the historical circumstances of its creation. In ***Stranahan v. Fred Meyer***, 331 Or 38, 54, 11 P3d 228 (2000), the Court expressly noted that "it long has been the practice of this court 'to ascertain and give effect to the intent of the framers of the provision at issue and of the people who adopted it'" citing ***Jones v. Hoss***, 132 Or 175, 178, 285 P 205 (1930); ***Oregonian Publ'g Co. v. O'Leary***, 303 Or 295, 304, 736 P2d 173 (1987). The Constitutional Convention met in the late summer of 1857. In 1857 Oregon was one of the first states to adopt its constitution by popular vote as a congressional condition of admission to the Union.

b. THE *VANNATTA* TEXTUAL ANALYSIS ERRS FOR LACK OF PRIMARY SOURCES.

Vannatta refers to the established case law but also appears to unnecessarily elevate the "intentions" of those who drafted the Oregon Constitution, as reflected by the records of the convention of 1857 (which are largely composed of contemporaneous newspaper accounts).

> Our precedents make it clear that, when construing provisions of our constitution, we attempt to understand the wording in the light of the way that wording would have been understood and used by those who created the provision.

Vannatta, 324 Or at 530, 931 P2d at 780. Reliance upon the drafters is understandable. Prior to the growing availability of digitalized historical tracts, treatises, novels, and 18th and 19th Century ephemera, it was easier to review the very scanty records of the Oregon Constitutional Convention than to reconstruct the understanding and vernacular of the delegates and voters and what they likely understood the words to mean in 1857.

Nonetheless, the line of cases leading to ***Priest v. Pearce*** does not overlook popular understanding. See also, ***City of Portland v. Stock***, *supra*. In ***Jory v. Martin***, 153 Or 278, 289, 56 P2d 1093 (1936), the Court explained its reliance upon citations to the Constitutional Convention by pointing out that the proceedings of the Convention were published in two leading newspapers. At the time, those were the *Oregon Statesman* (Salem, Democratic) and the *Weekly Oregonian* (Portland, Whig). "These two papers were conducted with intense and unexampled partisanship and widely read." Carey, *Introduction*, THE OREGON CONSTITUTION (Western Imprint 1984

facsimile edition) at 11. The ***Jory*** Court reasoned that, given the popular press accounts, “it would seem to follow that the people, in adopting the constitution, were of the same opinion” as was expressed at the convention. ***Jory v. Martin****, supra*. This reasoning suggests that having the Constitution available means Oregonians cast informed votes, but it does not address what the people *understood* the published words to mean. We contend that it is necessary to look at what the same voters were reading in the press and publications to discern their sense of what the words meant at the time.

The ***Vannatta*** Court held that the use of the word "elections" in Article II, § 8, had a contemporaneous meaning in mid-19th Century of exclusively the events on election day, although it conceded that the word "elections" has come to mean the entire process of seeking election.

> If one were to utilize the modern definition of “election” as a “process,” there would be room for the Secretary of State’s argument for a sweeping interpretation of the word “elections” in Article II, section 8, because the “process” contemplated by the section could be deemed to be the entire electoral adventure, from the announcement of candidacy through the canvassing of election returns.

Vannatta, 324 Or at 530.

> It thus appears to us that, in order to keep faith with the ideas imbedded in Article II, section 8, we should construe “elections” to refer to those events immediately associated with the act of selecting a particular candidate or deciding whether to adopt or reject an initiated or referred measure.

Vannatta, 324 Or at 531. This conclusion was critical to the Court’s holding that Measure 9 of 1994 was not authorized by Article II, Section 8.

In reaching this conclusion, the Court relied solely upon WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), apparently *sua sponte*.[12] The exclusive reliance upon this source is misplaced. The Oregon Supreme Court has relied upon WEBSTER'S (1828) in only two cases other than ***Vannatta***. In each of those cases, the word under consideration had reached an expanded "modern" meaning long before 1857.[13] The Court of Appeals has relied upon WEBSTER'S (1828) three times, but in every case has also weighed other mid-19th century sources.[14] Thus, correcting the error arising from lack of primary sources in ***Vannatta*** would not seriously impact the body of originalist law which has developed.

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12. Undersigned has reviewed the briefs submitted to the Court and found no reference to any primary sources of language by any party, intervenor, or amicus. None of the briefs cite to the WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). None of the statutes of other states discussed in this memorandum were brought to the Court's attention.

13. In ***State v. Ciancanelli*** 339 Or 282, 293, 121 P3d 613, 619 (2005), the Court relied on this source for the meaning of "expression," a word which appears to been used in a wide variety of contexts by 1828. In ***Juarez v. Windsor Rock Products, Inc***, 341 Or 160, 169-170, 144 P3d 211, 215-216 (2006), the Court referred to WEBSTER'S (1828) to construe early meanings of "property," another word which appears to have long had a meaning akin to current meaning. ***Juarez*** does not rest exclusively on the WEBSTER'S but uses historical sources including, BLACKSTONE'S COMMENTARIES and BLACK'S DICTIONARY OF LAW CONTAINING DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN (1891 ed).

14. In ***Liberty Northwest Ins. Corp. v. Oregon Ins. Guarantee Ass'n***, 206 OrApp 102, 113, 136 P3d 49, 55 (2006), the Court of Appeals concluded that "man" did not refer to fictional entities. It relied upon John Bouvier, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION (rev 6th ed 1856). In ***State v. Norris***, 188 OrApp 318, 332, 72 P3d 103, 110-11 (2003), the Court relied upon Alexander M. Burrill, A LAW DICTIONARY AND GLOSSARY (1867) and Bouvier, *Id.*, for a definition of a legislative "Act." In ***State v. Jackson***, 178 OrApp 233, 239, 36 P3d 500, 502-503 (2001), the Court looked to an 1839 edition of Bouvier to determine the meaning of "public" trial. None of these decisions relied exclusively upon WEBSTER'S (1828).

To the contrary, revisiting the ***Vannatta*** decision with better information would give new accuracy and vitality to the search for meaning at the time of the adoption of the Oregon Constitution. In the instant case, we demonstrate through many primary sources that "election" has been used in an expanded "modern" meaning (to include campaigning for office) since 18*48*. Electioneering became so associated with election campaigns that the need to modify "campaign" as an "electioneering" campaign disappeared in printed sources.[15] Subsequently, the merger in concepts evolved, and we provide a number of examples in print by 1848 which use "elections" in its expanded sense to include events occurring in the months preceding the casting of votes on Election Day.

Statutes regulating electioneering *prior to* the day of elections were enacted by states at least as early as 1801 (North Carolina) and New York (1829). Also, prior to the Oregon Constitutional Convention, statutes specifically limiting campaign contributions and expenditures were enacted. As but one example, Texas in 1856 codified "furnish[ing] money to another, to be used for the purpose of promoting the success or defeat of any particular candidate," among "Offences [*sic*] Affecting the Rights of Suffrage," punishable with large fines.[16] Full text at App 5-6. At that time, the authority for such legislation in the Texas Constitution was almost exactly the

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15. In much the same way, it is no longer deemed necessary to refer to a "color television" or a "touchtone phone" as each concept is widely understood to incorporate the attribute which was once used as a necessary modifier.

16. DIGEST OF THE GENERAL STATUTES OF THE STATE OF TEXAS (UPON AUTHORITY OF THE LEGISLATURE) (Goldham & White 1859).

same as Oregon's Article II, Section 8. Texas also had essentially the same free speech clause as Oregon's later Article I, section 8.[17] None of these primary sources or early state laws we discuss below were presented to the ***Vannatta*** Court. We urge the Court to discontinue reliance upon WEBSTER'S DICTIONARY (1828) in favor of historical evidence from primary sources of what the voters understood.[18]

Let's closely look at the reasoning and implicit assumptions about the process of linguistic change adopted in ***Vannatta***.

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17. Texas Constitution (1845), Article VII, Section 4:

> * * * The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice.

Oregon Constitution, Article II, Section 8:

> The Legislative Assembly shall enact laws to support the privilege of free suffrage, prescribing the manner of regulating, and conducting elections, and prohibiting under adequate penalties, all undue influence therein, from power, bribery, tumult, and other improper conduct.

The Texas Constitution (1845) also included a free speech clause essentially verbatim to that later adopted in Oregon. Article I, section 5, of the Texas Constitution:

> Every citizen shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.

18. The historical texts discussed in § III.E are all available in digital form from Google Books: http://books.google.com. Typing the title of the book into the search field will yield a digitalized version of the book, which can be viewed. Entering the words of a quotation into the search field will find that text in the book and in other books. Each of the referenced texts is available in some university collections but were digitalized in 2005 and 2006. Plaintiffs intend to add more primary sources as additional texts are digitalized, including those in the Library of Congress. These references were not readily available to the litigants in ***Vannatta***, and none of them were cited.

The Secretary of State would have us construe "elections" to include *all* activities that occur during political *campaigns.* But the two concepts do not necessarily overlap so completely. A present day dictionary defines "election" as "the act or process of choosing a person for office, position, or membership by voting." WEBSTER'S THIRD NEW INT'L DICTIONARY at 731 (unabridged 1993). "Campaign" is defined as "a series of operations or efforts designed to influence the public to support a particular political candidate, ticket, or measure." *Id.* at 322. The parties have gone to considerable effort to persuade us either that the two concepts are the same or that they are completely distinct.

Article II, section 8, has been in the Oregon Constitution since statehood. It is directed to the legislature and requires that body to "enact laws" that will "support the privilege of free suffrage" in two ways: (i) by "prescribing the manner of regulating, and conducting elections"; and (ii) by "prohibiting * * * all undue influence therein." The first clause may be broken down further into two parts: The legislature is to (1) prescribe the manner of regulating elections; and (2) prescribe the manner of conducting elections. That is, both parts refer to "elections." As a matter of grammar, the word "therein" in the second clause also refers to the topic mentioned earlier, *viz.,* "elections." Thus, the second clause properly may be restated as referring to "all undue influence [in elections]." There is no specific mention in Article II, section 8, of the word "campaigns." Yet, at the time that Article II, section 8, was adopted in Oregon in 1859, the behavior that we now think of as political campaigns was commonplace.

* * *

However, the constitutional provision that we construe here was proposed in 1857, not in 1996. A dictionary relevant to that time gives a more limited definition of the word "election": "The act of choosing a person to fill an office or employment, by any manifestation of preference, as by ballot, uplifted hands or viva voce[.]" WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

The dictionary on which we rely has no definition of "campaign" that corresponds to the present-day use of that word as a description of the effort to obtain public office or to obtain the passage of an initiated or referred measure. The concept of that time closest to what we now term "campaigning" was "electioneering," which Noah Webster defined as "[t]he arts or practices used for securing the choice of one to office." WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). It thus appears that, whatever the degree of their overlap today, the ideas of

> "electioneering" and "elections" were somewhat distinct at the pertinent time, *viz.,* at the time that the Oregon Constitution was created.

Vannatta at 530-31, 780-81.

This ***Vannatta*** analysis is simply incorrect that the word for the process called a "campaign" did not exist independently by the mid-1800s. We provide many examples of political "campaign" in the informal lexicon and in formal oratory settings years before the adoption of the Oregon Constitution in the following sections, and in the detailed appendix of additional citations. App 1-2.

More important, however, is that the term "election" by 1857 had certainly come to include the processes of attempting to influence voters and influence the outcome of the contest. Thus, by the time of the Oregon Constitutional Convention in 1857, the term "election" did include activities that we commonly refer to as "campaigning," and the literature shows that the term "election" was used to refer to the entire process of exercising influence on voters. "Election" was not merely the process on election day, as the ***Vannatta*** decision erroneously concluded.

2. EVIDENCE OF WHEN THE LANGUAGE EVOLVED.

Plaintiffs agree with the ***Vannatta*** statement that the term "election" has come to mean "the act or process of choosing a person for office, position, or membership by voting," and includes the process of political campaigns. We demonstrate that the shift in meaning occurred by 1848. "Election" has undergone the expansion from the

"act" or the "day" of public choice of officers to the entire process including what we commonly now call campaigns.[19]

The ***Vannatta*** opinion implicitly recognizes that the use of words is crucial to the eventual merger of meaning by pointing out that the "behavior" now known as political campaigns was known by 1857. But ***Vannatta*** finds it significant that there was no use of that word to describe the behavior in its 1828 source. ***Vannatta***, 324 Or at 529 n15. To the contrary, the uncontroverted evidence of the *use* of the words is what is truly significant. Electioneer, campaign and election all bear close conceptual, chronological and associational relationships, and "election" came to be used in a

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19. This is a common, perhaps innate, cognitive shift in the meaning of language. This kind of change is illustrated by synecdoche or metonymy in classic rhetoric. "Sails" standing for entire ship, as in "sails on the sea." More recently such expansions have come to be understood as based on a cognitive function, not merely a poetic device.

    In cognitive linguistics (and the science of artificial intelligence), "metonymy" now refers to the use of a single characteristic to identify a more complex entity as one of the basic characteristics of cognition. The process explains why it is common for people to take one well-understood aspect of something and use that to stand either for the thing as a whole or for some other aspect or part of it. George Lakoff and Mark Johnson, METAPHORS WE LIVE BY, (Univ Chicago 1980), p. 36.

    Examples of metonymic extension:

word	original use	metonymic use
crown	sovereign's headgear	the British monarchy
White House	specific building	President, staff, and administration
election	act of casting votes	process of persuading voters before and leading to, election day

continuing sense to encompass all three terms. We show that the shift occurred by the 1840s, if not earlier.

3. "CAMPAIGN" HAD EXISTED AS A POPULARLY UNDERSTOOD WORD CLOSELY RELATED TO ELECTIONS FOR DECADES AND STATES REGULATED THOSE ACTIVITIES PRIOR TO ELECTION DAY.

The ***Vannatta*** decision is historically incorrect. Well-regarded popular writers and orators used "campaign" in an election sense in the early 1800s. In 1813, Francis Scott Key wrote:

> I have not seen nor heard of Ridgley since his political campaign commenced. It closed yesterday and we have not yet heard how he has fared.[20]

In 1828, Henry Clay published a refutation of statements made by Andrew Jackson's campaign, arguing that false attacks on him, "was the policy with which the political campaign was conducted in the Winter of 1824-25 by the forces of the General."[21] Representatives John Quincy Adams[22] and Charles Underwood of Kentucky used the phase "electioneering campaign" on the floor of the House of Representatives in

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20. Letter from Francis Scott Key to John Randolph, October 5, 1813, reprinted in Hugh A. Garland, LIFE OF JOHN RANDOLPH, (Appleton 1851), p. 24.

21. Henry Clay, ADDRESS TO THE PUBLIC IN REFUTATION OF THE CHARGES AGAINST HIM MADE BY GEN ANDREW JACKSON TOUCHING THE LAST PRESIDENTIAL ELECTION, (Force 1827), p. 23, discussing a number of letters and charges and "circulars" both candidates circulated. Clay used the phrase again in "Letter dated November 20, 1844," to William Seward quoting a supporter who encouraged Clay, "Throughout this whole political campaign, I have never doubted your good intentions." Benjamin F. Hall REPUBLICAN PARTY AND ITS PRESIDENTIAL CANDIDATES (Miller, Orton, Mulligan 1856), p. 362.

22. Serving as a Representative from Massachusetts after his Presidency.

June 1841 in debating Adams' bill to appropriate $25,000 to the widow of William Henry Harrison. Underwood contended that the sum improperly included expenses such as postage for thousands of letters, inquiring, "are those but the expenses of the electioneering campaign?" Adams defended that the sum was not indemnity for Harrison's "electioneering campaign."[23]

In 1841 the very popular essayist Washington Irving wrote in a commentary on recent elections, "[E]very thing remains exactly in the same state it was before the last wordy campaign: except a few noisy retainers, who have crept into office, and a few noisy patriots * * *."[24] Further primary sources are cited at App 1-2.

As the franchise expanded [***Vannatta,*** 324 Or at 530], the concept of a democratic election came to include rousing those newly enfranchised voters through planned "campaigns." By 1840, the political parties in most states had adopted the primary nominating process, further transforming the idea of an election in local races into a lengthy "process" and not a one-day event. The shift had already long since begun at the Presidential level (***Vannatta***, 324 Or at n15). The election of William Henry Harrison (1840) included a spectacular campaign, described by the Whigs as their "great commotion," a months-long process including large assemblies, large teams of men rolling large balls from town to town (to "keep the ball rolling" for

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23. SPEECH ON THE BILL TO APPROPRIATE $25,000 TO WIDOW OF THE LATE PRESIDENT OF MR UNDERWOOD DELIVERED IN THE HOUSE OF REPRESENTATIVES, JUNE 18, 1841, (National Intelligencer 1841), pp. 6-7.

24. *Letter XIV*, SALMAGUNDI; OR THE WHIM-WAHMS AND OPINIONS (Daly 1841), p. 239.

Harrison), torchlight parades with tens of thousands of people, log cabin headquarters and parade floats which dispensed free hard cider, and weekly dispatches from the partisan "campaign" papers, all involving great throngs of newly enfranchised voters. Roger A. Fisher, TIPPECANOE AND TRINKETS, TOO, (Univ Illinois 1988), pp. 30-37.

As early as 1801, states enacted laws patterned after 17th century British statutes to limit abusive means to influence potential voters during campaigns.[25] In 1801, North Carolina enacted a statute which prohibited "treating with either meat or liquor, on any day of election or on any day previous thereto, with intent to influence the election, under the penalty of two hundred dollars."[26]

In 1829, New York made it unlawful to try to influence voters "previous to, or during the election" or to contribute money to promote the election of any particular

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25. ***Duke v. Asbee***, 11 Ired 112, 33 NC 112, 1850 WL 1267, *2 (1850), traces North Carolina limitations to the "British Statute passed in the 7th of William the 3rd, ch 4th." William III reigned as King of England from 1689 until his death in 1702. The statute was passed in the "seventh year of king William, called, an act for preventing the charge and expence in the election of members to serve in parliament * * *." Williams Thomas Roe, APPENDIX TO A TREATISE ON THE LAW OF ELECTIONS (1812), p. xxvi.

26. Rev Stat ch 52 sec 23.

    The preceding section of the act makes it highly penal for any person, who is a candidate for a seat in the legislature, to give, either directly or indirectly, any money, gift, gratuity, or reward, &c. in order to be elected, and embraces all persons who shall do either of the acts "to procure any other person to be elected."--The penalty is a forfeiture of four hundred dollars. The 23rd sec. forbids *treating* with either meat or liquor, on *any day of election or on any day previous thereto,* with intent to influence the election, under the penalty of two hundred dollars. The 22nd sec. of the act of 1836 is taken from the 11th sec. of the 116th ch of an act passed in 1777, and the 23rd was originally passed in 1801.

    Duke v. Asbee, 11 Ired 112, 33 NC 112, 1850 WL 1267, *2 (1850). (Emphasis in original).

candidate or party ticket. ***Jackson v. Walker***, NYSup, 5 Hill 27 (1843). The Harrison "log cabin" campaign headquarters were held to be in violation of an 1829 statute making it an election offense for anyone "[t]o provide or furnish entertainment at his expense to any meeting of electors, previous to, or during the election * * *."[27] *Id*.

Maryland by 1852 made it an offense for any "political agent," (defined as "all persons appointed any candidate before an election or primary election"), "to receive or disburse moneys to aid or promote the success or defeat of any such party, principle, or candidate." ELECTIONS LAWS OF THE STATE OF MARYLAND, (Lucas 1852), p. 90. Wagering on elections was also deemed improper because it incited "perversion of facts" and "circulating falsehoods," discussed in ***Bettis v. Reynolds***, 12 Ired 344, 34 NC 344, 1851 WL 1199, 1-2 (1851).

4. BY 1848 "ELECTION" HAD COME TO STAND FOR THE ENTIRE ELECTION PROCESS, INCLUDING CAMPAIGNING.

The metonymic shift in the word "election" to stand for and include both campaigns and electioneering had occurred in American usage by the late 1840s. It certainly had occurred earlier in Britain. During the reign of William III (late 17th century), laws were passed limiting election activities, and it was assumed that "elections" lasted for weeks or months. An 1816 source notes that elections in England were thought of as lasting weeks, allowing for great mischief, and laws were

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27. A suit against the Harrison supporters for payment for building and maintaining a log cabin for "the accommodation of political meetings to further the success of certain persons" was dismissed as an illegal, unenforceable agreement. ***Jackson v. Walker***, NYSup, 5 Hill 27 (1843).

passed limiting the "duration of elections."[28] In 1832, John Galt described his earlier abandonment of principles during an election, "I had made up my mind to be, during the election, all things to all men * * *."[29]

The same extension of meaning can be found in American sources. In 1835, an American writer, G.K Paulding, uses the past continuing tense in describing the "interest excited by" the United States Bank controversy "that there was during the election of a President of the United States * * *."[30] The lengthy American election process typified in the growing campaigns was well known abroad. It was described in the acerbic commentary of an Irish Lord as an "ordeal" with on-going attacks:

> In a popular government, legitimate emotion can be best gratified through the channels of popular election, and no man can afford to undergo the ordeal of a really democratic election, unless his private character and moral conduct are so correct as to enable him to defy any serious accusation of guilt or turpitude.

Daniel O'Connell, OBSERVATION ON CORN LAWS PRAVITY AND INGRATITUDE (Machen Dublin 1842).[31]

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28. [B]efore the act which limited the duration of elections, (a measure of real reform,) we remember a contest that continued for six weeks * * *.

    Robert Southey, *Essay VII On the State of Public Opinion, and the Political Reformers*, 1816, ESSAYS, MORAL AND POLITICAL (Murray 1832), p. 384.

29. John Galt, THE RADICAL, AN AUTOBIOGRAPHY, (Frasier 1832), pp. 170-171.

30. LETTERS FROM THE SOUTH (Harper & Brothers 1835), p. 76.

31. Lord O'Connell was an ardent abolitionist with a seat in the British Parliament. He was read in the United States; see App 3-4.

The shift to the expanded meaning of "elections" to encompass a process in the months before the decision at the polls is seen in popular pieces by one columnist in the American press written between 1830 and 1850. Political satirist Seba Smith created a character, "Major Jack Dowing," a rural Maine "downeaster" Democrat who described the events "in his own plain language" in "letters" printed in several newspapers between 1830-1859. *Preface*, MY THIRTY YEARS OUT OF THE SENATE, (Oaksmith 1859), p. 5.[32]

In an early "Letter," dated January 18, 1830, he notes the acrimony at the Maine legislature because "the preceding electioneering campaign had been carried out with a bitterness and personality unprecedented in the State."[33] In an account dated July 19, 1830, he "quotes" a hopeful seeking appointment as writing, "I'm going to start to-morrow morning on an electioneering cruise."[34] However, by June 30, 1848, Dowing uses the word "election" in a continuing sense. He comments on the disarray in nominating a Democratic candidate to run against Zachary Taylor, the torchlight parades already underway, and then wonders how things are going "this election," using the word "election" to refer generally to the events occurring months before the *day* of the 1848 election or the casting of ballots.

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32. In ***State v. Delgado***, 298 Or 395, 403 n6, 692 P2d 610, 614 n6 (1984), the Oregon Supreme Court observed that a Dickens novel, "MARTIN CHUZZLEWIT, published in 1842 shortly after his return from America" described what might have been "a switchblade knife," and thus this instrument may have been known in Oregon at the time of the drafting of criminal statutes.

33. MY THIRTY YEARS OUT OF THE SENATE, p. 36.

34. *Id.*, p. 100.

> [C]all and see Mr. Ritchie * * *; I'm told the dear old gentleman is workin' too hard for his strength--out a nights in the rain, with a lantern in his hand, heading the campaign. * * * And be sure to ask him how the Federals are goin' this election, for we can't find out anything about it down here. I used to know how to keep the run of the Federals, but now there is so many parties--the Democrats, and the Whigs, and Hunkers, and Barnburners, and Abolition folks, and Proviso folks--all criss-crossin' one another * * *."

MY THIRTY YEARS OUT OF THE SENATE, pp. 308-9. The use of the present progressive tense "are going" shows the "election" is in progress at the time of the writing--June 1848, some 5 months before the casting of votes in November. Progressive forms indicate action that is happening at the same time the statement is written. Such newspaper columns are good authority for what readers understood. The events described are historically-based, not fanciful.[35] While the writer affects a vernacular dialect in spelling, all the verb tenses are internally consistent and present progressive in the last example.

Thereafter, in later "Letters," the characters continue to use "this election" in a continuing sense in columns published during the 1852 campaign. In a letter dated July 20, 1852, Dowing's uncle assures him that Van Buren has promised that "he'd stand the platform for this election, anyhow."[36] On September 18, 1852, Dowing

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35. This passage comments upon actual events. "Barnburners" were a faction of the Democratic Party opposed to slavery who refused to support Democratic presidential nominee Cass in 1848. "Proviso folks" supported the "Wilmot Proviso" which would have outlawed slavery in the territory acquired from Mexico. Both factions later joined (with Abolitionists) in the Free Soil Party. "Hunkers" were a faction of the Democratic Party in opposition to making slavery a campaign issue.

36. MY THIRTY YEARS OUT OF THE SENATE, p. 387.

blames the poor outlook for his candidates on the fact that, "the liquor law has played the mischief this election all round, and got things badly messed up."[37]

We have found other uses of "election" in this continuing process sense in formal American writing prior to 1858. "But if [Aaron Burr's] name was on the [1800 New York State assembly] ticket as a candidate, his personal exertions during the election would be lost to the party." Matthew L. Davis, MEMOIRS OF AARON BURR, (Harper & Brothers 1855), p. 435. "[T]o those who had been his true friends during the election struggle [Andrew Jackson] extended the graceful hand * * *." Benson J. Lossing, A HISTORY OF THE UNITED STATES, (Mason Bros 1857), p. 461.

As states in the south and west joined the union, they modified the earliest state constitutional provisions to use the word "elections" in an evolving sense. For example, in colonial times, Connecticut adopted a constitutional prohibition against influencing electors at the *viva voce* town meeting elections, which became part of its Constitution after joining the union:

> Laws shall be made to support the privilege of free suffrage, prescribing the manner of regulating and conducting meetings of the electors, and prohibiting, under adequate penalties, all undue influence therein, from power, bribery, tumult, and other improper conduct.

Connecticut Const (1818) Article VI, § 6. Other states modified the phrase to refer to "regulating and conducting *elections*" and not only the "meetings of electors," well before 1857. The following chart shows those provisions adopted in the constitutions of Kentucky (1799), Mississippi (1817), Alabama (1819), Florida (1838), Texas (1845),

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37. *Id.*, p. 395.

Louisiana (1846), and California (1849), all of which adopted a provision nearly identical to Oregon's Article II, § 8.[38]

STATE (year adopted)	ELECTION PROTECTION PROVISION IN CONSTITUTION
Kentucky (1799)	Article VIII, section 2: Laws shall be made to exclude from office and from suffrage, those who shall thereafter be convicted of bribery, perjury, forgery, or other high crimes or misdemeanors; the privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties; all undue influence thereon from power, bribery, tumult, or other improper practices.
Mississippi (1817)	Article VI, section 5: Laws shall be made to exclude from office and from suffrage those who shall thereafter be convicted of bribery, perjury, forgery, or other high crimes or misdemeanors. The privileges of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper conduct.

38. Carey, OREGON CONSTITUTION, Appendix (a), summarizes an Oregon Law Review (April 1926) article by W.C. Palmer, on "sources" for the Oregon Constitution, noting other state constitutions with "identical" or "similar" provisions. For the "source" of Article II, section 8, Carey/Palmer remark it is "similar" to the Connecticut Constitution, 1818, Article VI, § 6. Carey at 470. Apparently, Palmer and Carey did not have access to the constitutions of all of the other states. The only 7 states they mention at all as having any provisions similar to the Oregon Constitution were Indiana, Maine, Iowa, Michigan, Connecticut, Massachusetts, and Wisconsin. Their incomplete research failed to find the 7 nearly *identical* state constitutional provisions we have located so far. These 7 provisions are essentially verbatim to Article II, Section 8, of the Oregon Constitution, were adopted prior to 1857, and are certainly more likely sources of it than the somewhat different provision in the Connecticut Constitution.

STATE (year adopted)	ELECTION PROTECTION PROVISION IN CONSTITUTION
Alabama (1819)	Article XI, section 5: Laws shall be made to exclude from office, from suffrage, and from serving as Jurors, those who shall hereafter be convicted of bribery, perjury, forgery, or other high crimes or misdemeanors. The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult, or other improper conduct.
Florida (1838)	Article VI, section 13: Laws shall be made by the General Assembly, to exclude from office, and from suffrage, those who shall have been or may thereafter be convicted of bribery, perjury, forgery, or other high crime, or misdemeanor; and the privilege of suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult, or other improper practices.
Texas (1845)	Article 16, section 2: Laws shall be made to exclude from office, serving on juries, and from the right of suffrage those who may have been or shall hereafter be convicted of bribery, perjury or other high crimes. The privilege of free suffrage shall be protected by laws regulating elections, and prohibiting under adequate penalties all undue influence therein from power, bribery, tumult, or other improper practice.
Louisiana (1846)	Article 93: The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult, or other improper practice.

STATE (year adopted)	ELECTION PROTECTION PROVISION IN CONSTITUTION
California (1849)	Article XX, section 11: Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, persons convicted of bribery, perjury, forgery, malfeasance in office, or other high crimes. The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice.

5. THE HISTORICAL CONTEXT INCLUDES SIMILAR STATE CONSTITUTIONS AND PRE-1857 LAWS LIMITING CAMPAIGN CONDUCT AND POLITICAL SPENDING.

a. OREGON VOTERS IN 1858 WOULD HAVE UNDERSTOOD THAT STATES WERE REGULATING POLITICAL SPENDING UNDER CONSTITUTIONAL PROVISIONS VERY SIMILAR TO THOSE THEY ADOPTED.

We have previously shown that the outcome (counting the ballots to declare a winner) and the process (campaigns) were both referred to as "elections" long before Oregon statehood. Accordingly, "other improper conduct" is that which interferes with freely expressed voter choice (suffrage) and is not limited to conduct that can occur on election day, as ***Vannatta*** concluded. As noted, early legislatures prohibited certain conduct aimed at influencing voters before elections and also specifically limited money used to improperly influence voters, including what we would today call "campaign contributions" or "campaign expenditures."

Texas provides a particularly relevant example of pre-1857 campaign spending limits. As noted above, the Constitution of Texas (1845) contains sections nearly

identical to Oregon's Article I, § 8, and Article II, § 8. A year before the Oregon Constitutional Convention, the Texas legislature passed the Act of August 28, 1856, codified at Title VIII, "Offenses Affecting the Rights of Suffrage," Chapter I, "Bribery and Undue Influence." Article 262 provided:

> If any person shall furnish money to another, to be used for the purpose of promoting the success or defeat of any particular candidate, or any particular question submitted to a vote of the people, he shall be punished by fine, not exceeding two hundred dollars.[39]

The Texas statute provides vital historical context relevant both to understanding intent and evaluating an historical exception to the reach of Article I, § 8, of the Oregon Constitution. The lawyers and judges--in fact, all of the delegates to the Oregon Constitutional Convention--can be presumed to have been aware of state constitutions which had previously adopted language so similar to the terms proposed in Oregon. We submit that it is both reasonable and judicially sanctioned to assume that Oregon delegates and voters were familiar with the well-known congressional orators and current events and did not rely exclusively upon an 1828 dictionary for their understanding of the word "elections." The delegates were politically active.[40] More than 40 of the 60 delegates were affiliated with national parties and were elected

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39. Article 263 punished violence or threats of violence to person or property to "endeavor to procure the vote of any elector, or the influence of any persons over other electors," by a fine of up to $500.00. All of Title VIII, ch I is included in the Appendix to this memorandum.

40. See description of rise of political parties before the Convention, *Address of George H. Williams "Political History of Oregon from 1853-1865,"* reprinted in THE OREGON CONSTITUTION, pp. 496-514.

as delegates on party tickets.[41] Almost a third were lawyers, and two edited newspapers.[42] Earliest Oregon cases looked to the careers of the delegates to Constitutional Convention to discern their earlier understanding of constitutional issues. ***State v. Finch***, 54 Or 482, 497, 103 P 505, 511 (1909).[43] Using that standard, Joseph Lane may be presumed to have been keenly aware of national politics and the vigorous campaigns. After serving very briefly as Governor of the Oregon Territory, he was an unsuccessful candidate for the Democratic presidential nomination in 1852 and, in the next election cycle after the Oregon Constitutional Convention, was the

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41. "About three-fourths were chosen on regular Democratic tickets, while the opposition was a mixture of bolting Democrats, Independents, Old Line Whigs, and a single member nominated by a Republican convention and elected as such." Address of the Hon.R. McBride, "The Constitutional Convention, 1857" reprinted in Carey, OREGON CONSTITUTION, p. 483.

42. "Speech," OREGON CONSTITUTION, *Id*. at 484.

43. Concerning the death penalty, the Court reasoned:

> The first test, and one to which great weight is to be attached, is contemporaneous construction, and long acquiescence by the courts and Legislatures. ENDLICH ON INTERPRETATION OF STATUTES, § 527. The present Constitution was framed and adopted in 1857, and the state was admitted into the Union in 1859.
>
> Among the members of the constitutional convention were Judges Boise, Prim, Shattuck, Kelly, Kelsay, and Wait, all of whom were afterwards members of the Supreme Court of this state, and all of whom, excepting Judge Kelly, performed circuit duty. It is part of the judicial history of this state that all of these eminent jurists either pronounced the sentence of death while upon circuit duty, or participated in affirming such judgments when sitting upon the supreme bench. Rousseau well observes that “He who made the law knows best how it ought to be interpreted,” and this judicial and legislative recognition of the validity of capital punishment by the very men who framed the Constitution ought itself to be sufficient answer to the contention of defendant’s counsel.

State v. Finch, *supra*.

candidate for Vice-President of the United States on the 1860 "Southern" Democratic ticket (Breckinridge/Lane). Delegates Delazon Smith, G.K. Kelly, LaFayette Grover, and George Williams all later became United States Senators.

b. HISTORICALLY, POLITICAL SPENDING WAS RESTRAINED REGARDLESS OF GUARANTEES OF FREE SPEECH.

In ***State v. Robertson***, 293 Or 402, 649 P2d 569 (1982), the Oregon Supreme Court held that:

> * * * Article I, section 8, * * * foreclosures the enactment of any law written in terms directed to the substance of any opinion' or any 'subject' of communication, unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach * * *.

293 Or at 412, 649 P2d 569.

As noted, England limited election spending in the reign of King William. The Texas limits on political spending adopted in 1856, the New York statute of 1829 (making it unlawful for "any candidate for an elective office, or for any other person, with intent to promote the election of any such candidate * * * to contribute money for any other purpose intended to promote an election of any particular person or ticket") and Maryland's statute of 1852 (making it unlawful "to receive or disburse moneys to aid or promote the success or defeat of any such party, principle, or candidate") all suggest that the protection of suffrage through limiting conduct and spending money to influence voters in elections was a historical exception to what might otherwise be protected by Article I, section 8, within the meaning of ***Robertson***.

6. OTHER STATES WITH SIMILAR PROVISIONS PROTECTING SUFFRAGE VIGILANTLY PROTECT AGAINST MANY KINDS OF UNDUE INFLUENCE.

The great solicitude intended by the states which adopted the constitutional protections for suffrage cited in the foregoing table has been early and far-reaching. Many states concluded that the drafters of the state constitution mandated that legislatures protect suffrage by regulation.

Louisiana

> The Convention, however, imposed this injunction on the Legislature: "The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, *all undue influence* thereon, from power, bribery, tumult, *or other improper practice*," which all think requires the Legislature to pass laws to protect all entitled to vote in the enjoyment of the right of suffrage * * *.

Dwight v. Rice, 1850 WL 3859, *2 (La 1850). (Emphasis in original).

Kentucky

> As was said by Lord Holt in a celebrated case, "a right that a man has to give his vote at the election of a person to represent him in parliament, there to concur in the making of laws which are to bind his liberty and property, is a most transcendent thing." (*Ashley vs. White,* 2 Raym., 950.) Here, it is the fundamental right; all other rights, civil and political, depend on the free exercise of this one, and any material impairment of it is, to that extent, a subversion of our political system. Hence the care with which any invasion of this right, from every possible source, has been guarded against. The constitution declares that "all elections shall be *free and equal*;" that "the privilege of free suffrage *shall* be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practices."

Chrisman v. Bruce, 1864 WL 2499, *4 (KyApp 1863) (Emphasis in original).

Florida

> Under section 26 of article 3 the Legislature is required to pass laws regulating elections and prohibiting under adequate penalties all undue influence thereon from power, bribery, tumult, or other improper practice. As has been held by this court, such section of the Constitution contemplates laws regulating primary elections as well as general elections because of the inevitable relationship of the two classes of elections to each other. But the constitutional predicate for the authority of the state to deal at all by statute with the conduct of party primary elections is to be found only in the recognized fact that primary elections are merely a species of preliminary election set up by political parties to be participated in by party members who are otherwise qualified electors for the subsequent elections and who are expected to participate in such subsequent general elections by supporting therein the nominees selected at the primaries of their respective parties.
>
> The act of registration of an elector is the first step in the process of voting which is a sovereign act, in fact the highest act of sovereignty that can be exercised by an American citizen.

State ex rel. Gandy v. Page, 125 Fla 348, 356-357, 169 So 854, 857-858 (1936).

Texas

> Our Constitution requires and commands the Legislature to enact laws to regulate elections in this state. Section 2 of article 16 provides: "Laws shall be made to exclude from office, serving on juries, and from the right of suffrage those who may have been or shall hereafter be convicted of bribery, perjury or other high crimes. The privilege of free suffrage shall be protected by laws regulating elections, and prohibiting under adequate penalties all undue influence therein from power, bribery, tumult, or other improper practice." In section 4 of article 6 it is also provided: "In all elections by the people, the vote shall be by ballot, and the Legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud, and preserve the purity of the ballot box." It will thus be seen that the Constitution of this state not only authorizes, but commands, the Legislature to pass laws to prevent undue influence by improper practices * * *.

Watts v. State, 61 TexCrim 364, 368-369, 135 SW 585, 587 (TexCrimApp 1911).

> In the instant case, the legislative authority to regulate the electoral process flows directly from the Texas Constitution. Article XVI, section 2, mandates that "the privilege of free suffrage shall be protected by laws regulating elections and prohibiting under adequate penalties all undue influence therein from power, bribery, tumult or other improper practice." Tex. Const. Art. XVI, § 2. Further, article VI, section 4, provides that the Legislature shall "make such regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box." Tex. Const. Art. VI, § 4. [] In light of this authority, the legislature enacted title 15 of the Election Code. There are numerous criminal and civil penalties under title 15, including section 251.008, which may befall a candidate or person found to be in violation of **the reporting, contribution, and expenditure requirements**.

Ragsdale v. Progressive Voters League, 790 SW2d 77, 82 (TexApp 1990) (emphasis added).

California

> The California Constitution has directed since its inception that the right to vote shall be supported by laws not only regulating elections but also 'prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult , or other improper practice.' (Const. of 1849, art. XI, s 18; Const. of 1879, art. XX, s 11; new art. II, s 3, eff. Nov. 8, 1972.) The response of the Legislature **to this directive** has grown dramatically over the years. The first election law denominated only eight offenses against the franchise, and all were punishable as misdemeanors. (Stats.1850, ch. 38, pp. 110-111, ss 98-105.) Today, in sharp contrast, the Elections Code punishes at least 76 different acts as felonies, in 33 separate sections; at least 60 additional acts are punished as misdemeanors, in 40 separate sections; and 14 more acts are declared to be felony-misdemeanors.

Ramirez v. Brown, 9 Cal3d 199, 214, 507 P2d 1345, 1355-1356, 107 CalRptr 137, 147 148 (1973) (emphasis added).[44] Among these offenses punished in the Elections Code are political contributions in excess of the stated limits. See, e.g.

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44. ***Richardson v. Ramirez***, 418 US 24, 94 SCt 2655, 41 LEd2d 551 (1974), reversed on the issue of "civil death" for felons.

CALIFORNIA ELECTIONS CODE §§ 10202 et seq., 10003 et seq., 18360 et seq., 20200 et seq, all of which limit political contributions.

7. *VANNATTA* DOES NOT CORRECTLY IDENTIFY THE *EJUSDEM GENERIS* BETWEEN "POWER" AND "BRIBERY."

In light of the discussion of the meaning of the text and the historical context, we submit that the ***Vannatta*** decision improperly employs the rule of textual analysis, *ejusdem generis*, to limit the meaning of "improper conduct."

> The clause directing the legislature to prohibit all undue influence in elections specifically enumerates the sources of influence that it considers to be "undue": "power, bribery, tumult, and other improper conduct." As we understand them, each of the first three enumerated examples is concerned specifically with the act of voting itself. "Power" appears to be a reference to the possibility that persons might, by a show of force, either attempt to prevent an election from occurring or coerce a particular outcome. *See* WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining "power" as, *inter alia,* "[v]iolence; force; compulsion"). "Bribery" appears to be a reference to someone actually paying a voter to vote in a particular way. And "tumult" again is a reference to the kind of unruly or riotous conduct at or near the polling place that would have the actual effect of hindering or preventing the voting process. Thus, all three specific examples in the clause speak to actual interference in the act of voting itself. None is as broad in scope as either the concepts of "regulating" or "conducting," and both of those concepts in turn speak to a narrow historical concept of "elections."
>
> Given the scope of the three specific examples in the clause, it becomes clear why the Secretary of State's expansive reading of the last, unspecific phrase, "other improper conduct," probably is not the appropriate one. *See, e.g., State v. K.P.,* 324 Or. 1, 11 n. 6, 921 P2d 380 (1996) (illustrating doctrine). Therefore, because the first three listed items in the clause all appear to refer to conduct that interferes with the act of voting itself, rather than with the far broader concept of political campaigning, the last phrase also should be read as being confined to that more narrow scope. Ordinary campaign contributions and expenditures do not constitute "undue influence" under any one of the specified sources of undue influence. The Secretary of State's contrary argument is not well taken.

342 Or at 533.

There must be two or more specific items preceding the general term in order to illustrate the category of similarity.[45] A concluding general term is then implied to share that quality of similarity with the other enumerated items. Thus, when items are specifically listed, one must correctly identify the *ejusdem generis* between each of them in the sequence in order to apply the rule of *ejusdem generis* to following items. For example, the phrase "other animals," is different in the sequence, "Cats, dogs, goldfish, and other animals" (suggesting "other" animals commonly considered pets), than in the phrase, "Cats, dogs, cows, and other animals" (suggesting "other" domesticated animals). It is also true that each animal in each list is capable of being spotted in color, but that mere coincidence does not establish a meaningful categorizing relationship. One would not say that *ejusdem generis* requires that in the

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45. A variation of the maxim of *noscitur a sociis* is *ejusdem generis*. Meaning literally, "of the same kind", the doctrine, often called Lord Tenterden's Rule, is of ancient vintage, going back to Archbishop of Canterbury's Case, 2 Co Rep 46a, 76 Eng Repr 519 (1596). Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. Where the opposite sequence is found, i.e., specific words following general ones, the doctrine is equally applicable, and restricts application of the general term to things that are similar to those enumerated. *Ejusdem generis* has been called a common drafting technique designed to save the legislature from spelling out in advance every contingency in which the statute could apply. The Maryland courts have set out the following conditions under which ejusdem generis applies: (1) the statute contains as enumeration by specific words; (2) the members of the enumeration suggest a class; (3) the class is not exhausted by the enumeration; (4) a general reference supplements the enumeration, usually following it; and (5) there is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires.

Singer, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, § 47.17.

sequences "cats, dogs, cows" or "cats, dogs, goldfish" the "other animals" in each list refers to other spotted animals.

"Power" is state power publicly displayed (militia posted to the colonies, for example), "bribery" is a covert transaction between individuals, and "tumult" is any public disruption that is not a lawful exercise of police power. ***Vannatta*** says the element of similarity in this sequence is that each can interfere with the act of voting on election day. But that is not really a meaningful categorizing similarity. "Bribery" does not inhibit the casting of a ballot and is not limited to election day. Instead, it distorts the choice expressed by the ballot. Each of power, bribery, and tumult can (and historically has occurred) in the weeks preceding the casting of votes. Moreover, none of the list is unique to *vote* contamination. Each could corrupt the outcome of a judicial proceeding or a sporting contest in the same manner of public intimidation or private corruption of participants or officials.

"Capable of occurring on election day" does not establish *ejusdem generis* between three things that can happen any time and in other situations. To use the above examples, it would be similar to reasoning that "cats, dogs, cows, and other animals" requires that all "other animals" be spotted. The *ejusdem generis* between power, bribery and tumult is that each dilutes the opportunity for voters exercising their franchise without being subject to undue influence. For example, Texas in 1856 included bribery and threats of violence prior to and on election day under "Offences Affecting the Right of Suffrage." App 5.

8. SUMMARY.

The ***Vannatta*** opinion was not premised on relevant text and context in construing Article II, section 8. The Court relied exclusively upon WEBSTER'S DICTIONARY (1828) for insight into the minds of Oregon voters in 1858. In ***Vannatta,*** the Court conceded that, "If one were to utilize the modern definition of "election" as a "process," "then more expansive interpretation of the word "elections" in Article II, section 8, would be warranted for the "entire electoral adventure." Plaintiffs submit that the language of well-known figures such as Francis Scott Key, Henry Clay, John Quincy Adams, and the phrasing of popular writers of the early-19th century such as Washington Irving[46] and newspaper columnists who wrote in terms that were understandable and entertaining for a wide audience "in [their] own plain language" are far better sources for discerning the meaning of language to Oregon voters in 1858 that is a single reference to an 1828 dictionary. We believe we have demonstrated that in American usage, "elections" had undergone the metonymic extension to include "campaigns" by the 1840s.

Plaintiffs have shown that, before the 1857 Oregon Constitutional Convention, a number of states had adopted laws regulating conduct prior to elections and during that period of time known then and now as the "campaign." The Oregon Constitutional Convention delegates and ordinary citizens understood the expanded

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46. Irving was published and read in America and Europe, was one of the first Americans to earn a living as a writer and was a "household name." Irving uses the phrase again in GEORGE WASHINGTON, (Putnam 1859), p. 246, referring to Washington's views on "political campaigns" in heading to *Ch XXIX*.

meaning of "election." The Convention delegates where themselves party partisans, aware of political campaigns, and the people who adopted the Oregon Constitution were fully familiar with the notion of "elections" encompassing an "entire electoral adventure," with numerous debates, entertainments, rallies and many opportunities for both information and participation, as well as the potential for "undue influence" throughout. They were not provincials, and would have been aware that New York, Maryland, North Carolina and Texas had broad prohibitions on campaign conduct, contributions and expenditures, adopted under authority of their constitutional provisions that were essentially verbatim to Article II, Section 8, of the Oregon Constitution.

Thus, the ***Vannatta*** holding about the meaning of Article II, Section 8, should be reexamined in light of the historical record never presented to Oregon Supreme Court in that case.

F. *VANNATTA* FAILED TO RECOGNIZE THAT THE OREGON "FREE SPEECH" CLAUSE WAS ADOPTED FROM INDIANA, AND INDIANA HAS STRICT LIMITS ON POLITICAL CAMPAIGN CONTRIBUTIONS AND EXPENDITURES.

Defendants offer no substantive response to this argument.

G. *VANNATTA* FAILED TO RECOGNIZE THAT THE OREGON "FREE SPEECH" CLAUSE IS COMPLETELY OR FUNCTIONALLY IDENTICAL TO THOSE IN 28 OTHER STATES, 27 OF WHICH HAVE LIMITS ON POLITICAL CONTRIBUTIONS AND EXPENDITURES.

Defendants offer no substantive response to this argument.

H. IF NECESSARY, *VANNATTA* SHOULD BE RECONSIDERED AND REVERSED.

Defendants offer no substantive response to this argument.

IV. THE HAZELL PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR SECOND CLAIM FOR RELIEF (Injunctive Relief).

The Second Claim seeks injunctive relief upon the same basis as the declaratory relief sought in the First Claim. Defendants offer no substantive response here.

V. CONCLUSION.

Based on the materials on file in the record of this case, and the discussion and authority herein, this Court should grant summary judgment on the Hazell Plaintiffs' First and Second Claims for Relief and grant the relief outlined at the close of the Hazell Plaintiffs Summary Judgment Memorandum.

Dated: March 30, 2007

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing:

HAZELL PLAINTIFFS MEMORANDUM OPPOSING SUMMARY JUDGMENT FOR DEFENDANTS AND INTERVENORS AND HAZELL PLAINTIFFS REPLY MEMORANDUM SUPPORTING SUMMARY JUDGMENT FOR PLAINTIFFS

by (1) e-mail and (2) first class mail to all parties listed below, deposited in the U.S. Postal Service at Portland, Oregon, with first class postage prepaid.

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