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 SURREPLY MEMORANDUM SUPPORTING SUMMARY JUDGMENT FOR PLAINTIFFS

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 Defendants' Reply Memorandum in Support of Motion for Summary Judgment (April 20, 2007) [hereinafter "Defendants' Reply Memorandum"] and to Intervenor-Defendants/Cross-Claimants' Memorandum in Opposition to Plaintiffs' and Defendants' Motions for Summary Judgment, etc. (March 20, 2007).

The argument below follows the organization of the Hazell Plaintiffs Summary Judgment Memorandum (February 16, 2007). The Horton Plaintiffs join this memorandum and argument.

I. PRELIMINARY ISSUES.

No party has raised issues here pertaining to the Hazell Plaintiffs or Horton Plaintiffs.

II. RESPONSE TO BACKGROUND PRESENTED BY DEFENDANTS' REPLY MEMORANDUM.

Defendants (p. 1) claim that Measure 47 in its entirely should be held in abeyance, because some of its limits are not constitutional. But that position requires that the constitutionality of the Measure 47 limits be examined and determined by the courts, including both each of its numeric limits and each of its non-numeric limits. Still, no one has stated a specific constitutional challenge to any of the specific limits in Measure 47.

> The party asserting constitutional violation must sustain the burden of proof. ***Milwaukie Co. of Jehovah's Witnesses v. Mullen et al***, 1958, 214 Or. 281, 330 P2d 5, *appeal dismissed* 359 U.S. 436, 79 S.Ct. 940, 3 L.Ed.2d 932.

Oregon-Nevada-California Fast Freight, Inc. v. Stewart, 223 Or 314, 326, 353 P2d 541 (1960).

As noted in the Hazell Plaintiffs Summary Judgment Memorandum, pp. 15-16, Oregon statutes contain many limitations on political contributions and expenditures that are not subject to any credible constitutional challenge, including requirements that persons or entities receiving campaign contributions or making campaign expenditures register and report monthly, as well as requirements that campaign contributions not be cloaked by a name other than the true donor. Defendants still offer no basis for distinguishing those restrictions on "political speech" from restrictions which consist of numeric limits on 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.[1]

III. THE HAZELL PLAINTIFFS ARE ENTITLED TO SUMMARY

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1. Another example is presented in ***In re Fadeley***, 310 Or 548, 802 P2d 31 (1990), where the Oregon Supreme Court upheld a pure limitation on political speech (ban on solicitation of campaign contributions by a candidate for judicial office), because doing so served an important state interest in "the appearance of judicial integrity." *Id.*, 310 Or at 564. The important societal interests in limiting political campaign contributions and expenditures are set forth in detail in Section (1) of Measure 47.

JUDGMENT ON THEIR FIRST CLAIM FOR RELIEF (Declaratory Judgment).

The Hazell Plaintiffs Summary Judgment Memorandum (pp. 4-12) established the following, which Defendants have not sought to refute:

B.

GOVERNMENT OFFICERS ARE REQUIRED TO IMPLEMENT AND ENFORCE DULY-ENACTED STATUTES.

C.

THERE IS NO COGNIZABLE CHALLENGE TO AT LEAST 12 SEVERABLE AND INDEPENDENTLY ENFORCEABLE PROVISIONS OF MEASURE 47.

1.

MEASURE 47 CONTAINS A STRONG SEVERABILITY CLAUSE.

2.

MEASURE 47 CONTAINS NUMEROUS INDEPENDENT PROVISIONS NOT SUSCEPTIBLE TO CHALLENGE UNDER *VANNATTA*.

Instead, Defendants contend only that implementation of Measure 47 is suspended by its Section (9)(f).

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

As the chart on the following page illustrates, unless all of the positions of Intervenors are accepted by the Court, then this case ends up in the same posture: "Court determines the validity of each [other] severable part of Measure 47." So the Court needs to address the merits of the contentions about the validity of each of the parts of Measure 47.

Intervenors have presented no position and no argument on the validity of any specific part of Measure 47, other than Section (9)(f). The Defendants assume that ***Vannatta*** applies to invalidate all of Measure 47's numeric limits on political campaign contributions and expenditures. Defendants do not argue that the non-numeric limits in Measure 47 are invalid but instead argue that the non-numeric limits are also somehow dormant until the numeric limits are validated in court. It is not clear when the dormancy ends. Does it end when one of the numeric limits in Measure 47 is found valid? When some of the numeric limits in Measure 47 are found valid? When all of the numeric limits in Measure 47 are found valid? Does it end when this Court finds some or all of the numeric limits valid or only when the Oregon Supreme Court so finds?

The only material difference in consequence between the position of the State Defendants and the Hazell Plaintiffs regarding dormancy is whether any or all of the limits in Measure 47 are to be enforced prior to the conclusion of this litigation, presumably in the Oregon Supreme Court. If this Court agrees with the Hazell Plaintiffs that some or all of the limits (non-numeric and numeric) are valid, then those limits should be enforced, pending appellate review, and the Complaint seeks that relief.

1.

IF SECTION (9)(f) IS INVALID.

As shown in the chart, none of the parties except Intervenors disagree that, 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.

2.

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.

3.

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

Defendants' Reply Memorandum (p. 1) states: "Section(9)(f) is most reasonably interpreted as itself presuming the need for Measure 46's constitutional authorization to validate its CC&E limits." This is clearly not the case.[2] The drafters of Section (9)(f) did not condition its effectiveness upon the enactment of Measure 46. Instead, in Section (9)(f) they expressly contemplated the circumstance in which Measure 47 was enacted but Measure 46 was not. In that circumstance, even accepting all of Defendants' other arguments (which we contest below), the worst possible outcome for Plaintiffs is that the Measure 47 limitations are suspended until "the Oregon Constitution is found to allow * * * such limitations." It is this litigation that will

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2. The Defendants' Reply Memorandum makes essentially the same statement repeatedly. For example, it states (p. 3):

> The text and context uniformly point to the same interpretation: Measure 47's operative effect was intended to be contingent on approval of Measure 46.
>
> There is no basis for that statement, which would require that the words "is found to allow" be stricken from Section (9)(f).

determine whether none, some, or all of the limitations in Measure 47 are constitutional.

The drafters of Measure 47 were seeking to avoid application of ***Smith v. Cameron***, 123 Or 501, 262 P2d 946 (1928), which held that a later amendment to the Oregon Constitution did not resurrect or revive a statute previously held to be unconstitutional. While ***State v. Hecker***, 109 Or 520, 221 P 808 (1923), decided five years prior to ***Cameron***, concluded that a statute with a dormancy or resurrection clause somewhat similar to the one in Measure 47 was not in conflict with the existing Oregon Constitution and was valid, it was not clear to the drafters of Measure 47 whether ***Hecker*** had been overruled by the later ***Cameron*** decision. Thus, they inserted Section (9)(f) in order to ensure that the provisions of Measure 47 would go into effect as soon as they were either found to be constitutional or were deemed constitutional by a later amendment to the Oregon Constitution.

The drafters of Measure 47 were not opining on the validity of any or all of the limitations in Measure 47. Such expression of opinion would be irrelevant in any case.

Defendants' Reply Memorandum (pp. 1-2) then contends that Section (9)(f) is nonetheless "triggered" because "the constitution does not allow CC&E limits on the effective date." But which "limitations on political campaign contributions or expenditures" are the trigger in Section (9)(f)? Some sort of hypothetical numeric limits? Hypothetical non-numeric limits? And exactly which of those limits are not allowed by the Oregon Constitution? Such a conclusion (that "the Oregon Constitution does not allow limitations on political campaign contributions or expenditures") requires

someone to prove that every such limitation (on either contributions or expenditures) is unconstitutional--a burden of proof no party in this case has even attempted to fulfill. As we have pointed out, the Oregon Constitution clearly allows many sorts of limits on "political campaign contributions or expenditures" against which no one has launched a successful challenge, whether in this litigation or previous litigation.[3] If any of those limitations are constitutional, then the triggering clause in Section (9)(f) is negated, and the trigger has not been pulled.

Allow us here to note the perfect circularity of Defendants' argument. The Defendants' Reply Memorandum (p. 12) states:

> Plaintiffs maintain, nevertheless, that they are entitled to a declaration as to the validity of each provision of the measure. Hazell Reply at 16. But to the extent that the measure, properly interpreted, is in abeyance, plaintiffs are not entitled to a declaration of the substantive validity of any specific provision. There is no ripe controversy and there is not necessarily any adversity on any such issue.

The logic here is perfectly circular. Defendants state that all of Measure 47 is suspended, because its limits on political campaign contributions or expenditures are unconstitutional. Then Defendants state that the constitutionality of those limits cannot be adjudicated (no ripeness or adversity), because Measure 47 is suspended. Our position is that the duly-enacted limits in Measure 47 are not invalid until they are adjudicated to be invalid. Further, Section (9)(f) itself contemplates, at worst, that the limits will take effect when "the Oregon Constitution is found to allow * * * such

3. See ***In re Fadeley***, 310 Or 548, 802 P2d 31 (1990).

limitations." This requires litigation to determine the validity of the limitations, not the permanent limbo status demanded by Defendants.

Defendants' Reply Memorandum (p. 12) also contends that our interpretation of Section (9)(f) "renders that section essentially redundant of the severability clause." The opposite is true. Defendants' contention is that Section (9)(f) entirely contradicts and nullifies the severability clause, Section (11), as they claim Section (9)(f) functions as a super-non-severability clause. While Section (11) is very careful to require precise severance of any unconstitutional language in Measure 47, thereby maximizing the preservation of its features, Defendants claim that all of the provisions of Measure 47 must rise or fall together under Section (9)(f).

To the contrary, Section (9)(f) and Section (11) are consistent. Section (11) preserves all provisions in Measure 47, except the specific provisions that are found unconstitutional. Section (9)(f), in order to avoid the ***Cameron*** doctrine, states that Measure 47 "shall be codified and shall become effective at the time that the Oregon Constitution is found to allow, or in amended to allow, such limitations." Section (11) and Section (9)(f) serve two different functions, but those functions are consistent in seeking to preserve as much of Measure 47 as possible.

The Defendants' Reply Memorandum (p. 10) also contends that the term "limitations on political campaign contributions or expenditures" in Section (9)(f) cannot possibly refer to any limits that are constitutional, such as provisions requiring reporting of contributions or expenditures or registration of persons and entities that accept contributions or make expenditures. Why? Because:

> Of course, that construction would completely obviate Section (9)(f), because it cannot be doubted that reasonable registration requirements--to use plaintiffs' example--are allowed.

Again, Defendants' logic is flawed. Section (9)(f) would not be "obviated," just because some limitations on political campaign contributions or expenditures are allowable. Section (9)(f) ensures that such provisions take effect as soon as the Oregon Constitution is found to allow them. But Defendants appear to start with the proposition that Section (9)(f) cannot allow any limitations to take effect and the assumption that all limits on political campaign contributions or expenditures must be invalid.

Our earlier memoranda contended that Section (9)(f) does not trigger, unless all limits on political campaign contributions or expenditures, including non-numeric limits, are deemed unconstitutional. We further argue that it is Defendants burden to prove, not merely assume, in order to pull the Section (9)(f) trigger, that all "limitations on political campaign contributions or expenditures" must be unconstitutional in Oregon. Hazell Plaintiffs Memorandum Opposing Summary Judgment for Defendants and Intervenors and Reply Memorandum Supporting Summary Judgment for Plaintiffs (March 30, 2007). pp. 5-8 [hereinafter "Hazell Plaintiffs Response/Reply Memorandum"]. Defendants reply (pp. 10-11) does not address the fact that the logical predicate for triggering of the suspension in Section (9)(f) requires a conclusion that all limits, including non-numeric limits, are unconstitutional. Instead, Defendants (p. 10) state:

> The plural form is appropriate, consistent with the State's interpretation of the provision, because the provision is concerned generally with whether the

> constitution permits limits on the amounts of CC&Es. It is not concerned with the permissibility of any specific limit.

First, Defendants simply assert that the provision is concerned generally with numeric limits, even though the term does not appear in Section (9)(f). Second, Defendants claim that Section (9)(f) "is not concerned with the permissibility of any specific limit." Then what is it concerned with? The generic permissibility of some undefined set of limits? Courts adjudicate the validity of specific provisions of law, not the generic validity of an undefined sorts of laws.

Defendants' Reply Memorandum (pp. 2-3) then returns to Section (1)(r) of Measure 47 but fails to note that nothing in that section states that the limits in Measure 47 are or are not constitutional.[4] Instead, Section (1)(r), part of Measure 47's legislative findings of fact, notes that the Oregon Supreme Court found unconstitutional the limits in Measure 9 of 1994. Yes, said the drafters of Measure 47, the Measure 9 limits were similar, but that is not a conclusion that the Measure 47 limitations (whether numeric, non-numeric, or both) are unconstitutional. Even so, the intent of Measure 47 is clearly stated in Section (9)(f)--that the limitations in Measure 47 take effect when they are found be constitutional or are deemed to be constitutional in a later amendment to the Oregon Constitution. Nothing about Section (1)(r) negates the requirement that the courts examine the constitutionality of each provision of Measure 47.

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4. Such a statement in Measure 47 would be immaterial, in any event, and would not establish whether the limits are or are not constitutional.

Defendants' Reply Memorandum (p. 3) then contends that Section (1)(r) necessarily implies that, when Measure 47 was written, the circumstance (of the Oregon Constitution allowing CC&E limits) "had not yet arisen." Again, Section (1)(r) says no such thing. It does not state whether the Oregon Constitution allows the limitations contained in Measure 47.

As for Defendants' reliance on legislative history in the form of the Voters' Pamphlet, they still have not attempted to demonstrate the ambiguity in Section (9)(f) that would allow reference to any legislative history. ***State ex rel. Kirsch v. Curnutt***, 317 Or 92, 96 853 P2d 1312 (1993). They did claim that they are citing the Voters' Pamphlet "as a tool for interpreting the voters' intent in adopting Measure 47, not as a tool for interpreting the existing constitution." To the contrary, they cited statements in the Voters' Pamphlet (about Measure 46, not Measure 47) that in a shorthand way explained the rationale for Measure 46. These statements explained nothing about Section (9)(f) in Measure 47, which is the statutory section being interpreted here. The only statement in the Voters' Pamphlet about Measure 47 at all was the Laura Etherton statement that "the existing Oregon Constitution does not allow any limits on political spending." How that statement is material to the meaning of Section (9)(f) is a mystery. Nor do Defendants answer our contention that statements in the Voters' Pamphlet, apart from those of the chief petitioners, are not a reliable indicator of anything, since anyone can insert any statement, with any degree of legitimacy or

absurdity, into the Voters' Pamphlet, on either side of a measure, for the sum of $500.[5]

4.

EVEN IF THE PREDICATE FOR TRIGGERING (9)(f) HAS OCCURRED, THE CONSEQUENCE STILL REQUIRES THAT SOME PARTY PROVE THE UNCONSTITUTIONALITY OF THE SPECIFIC PROVISIONS OF MEASURE 47.

Even if Section (9)(f) has been "triggered," the consequence is merely that the limitations in Measure 47 are suspended, pending the outcome of litigation to determine their validity. This is that litigation.

The question remains about which limitations are suspended. Defendants assume that all of them are suspended, numeric and non-numeric alike, regardless of the constitutional validity of any of the specific limits. As explained in our previous memoranda, we believe that the courts must examine each of the limitations in the duly-enacted statute and apply ordinary constitutional analysis to determine the validity of each. Those which are invalid are then to be severed, leaving the remainder of them in effect.

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

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5. For another recent example of an intentionally bogus explanation of the purpose of a measure, see the argument in favor of Measure 45 of 2006 (term limits) by Steve Novick. http://www.sos.state.or.us/elections/nov72006/guide/meas/m45_fav.html.

Again, there has been no legal challenge to any of the provisions of Measure 47; Defendants on their own have 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).

There remains no stated challenge to the constitutionality of any specific limit adopted in Measure 47.

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

Defendants' Reply Memorandum (pp. 4-5) discusses ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997), but grossly overstates its holding. ***Vannatta*** did not hold that all limitations on political campaign contributions and expenditures were invalid ("because CC&Es were held to constitute protected expression not subject to limitation"), as Defendants state. There is no such blanket statement in ***Vannatta***. Further, we have shown that many statements in ***Vannatta*** indicate that its rationale would not serve to invalidate various of the limitations in Measure 47, including its statements about limiting political contributions and expenditures by corporations and unions. Also, Defendants do not indicate what they mean here by "limitations" that CC&Es are not subject to. The Oregon courts have never struck down a variety of limits on political contributions and expenditures, such as reporting requirements,

advertising disclosure requirements, and other requirements that are contained within Measure 47.

Making blanket statements about what ***Vannatta*** struck down in 1997 is not useful. As noted above, those who challenge the constitutionality of a duly-enacted statute are required to shoulder the burden of proving why its provisions are unconstitutional. This requires looking at each provision and stating why it is unconstitutional, in light of the strict severability clause in Measure 47 and the Oregon statute favoring severability. Defendant has not attempted to satisfy that burden of proof.

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.

The Defendants' Reply Memorandum (p. 5) contends: "The shortcoming of Measure 9 in ***Vannatta*** was that the harm relied upon was insufficient, not that it was insufficiently expressed." Defendants do not cite anything in ***Vannatta*** that establishes that. To the contrary, the Court specifically noted the lack of anything in Measure 9 to "identify a harm in the face of which Article I, Section 8, rights must give way." Such

harms do indeed exist, such as potential harm to public perception of judicial integrity. ***In re Fadeley***, 310 Or 548, 802 P2d 31 (1990), for example, a case decided in the ***Robertson*** era of free speech analysis,[6] upheld a pure limitation on political speech (ban on solicitation of campaign contributions by a candidate for judicial office), because doing so served an important state interest. "[T]he interest in judicial integrity and the appearance of judicial integrity is an offsetting societal interest of that kind." *Id.*, 310 Or at 564. The important societal interests in limiting political campaign contributions and expenditures are set forth in detail in Section (1) of Measure 47. There were no such legislative findings of fact in Measure 9.

the Defendants' Reply Memorandum (pp. 5-6) then offers more sweeping statements about ***Vannatta***, again without reference to any statement in ***Vannatta***. Nor do Defendants even attempt to refute that the legislative findings of fact in Measure 47 are entitled to near complete judicial deference. ***State ex rel. Van Winkle v. Farmers Union Co-op Creamery of Sheridan***, 160 Or 205, 219-220, 84 P2d 471, 476-77 (1938). Defendants claim that ***Vannatta*** did not make findings of fact but merely used "historical, constitutional analysis." The ***Vannatta*** analysis was dependent on sweeping statements of historical fact about the lack of need for limitations on political campaign contributions and expenditures. See ***Vannatta***, 324 Or at 541; Hazell Plaintiffs Response/Reply Memorandum, pp. 18-19. The courts can no longer legitimately rely upon such findings, which were key to the invalidation of

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6. ***State v. Robertson***, 293 Or 402, 649 P2d 569 (1982).

Measure 9 of 1994, as those findings are contradicted by the duly-enacted legislative findings of Measure 47.

2.

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

Oregon Supreme Court in ***Vannatta*** left open the door for limits on political contributions or spending by corporations and unions, as documented by citations to ***Vannatta*** in our prior memoranda.

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

Vannatta, 324 Or at 524.

Defendants now state:

> Properly understood, those passages merely acknowledge specific rules that already govern corporations and unions, and which are no part of Measure 47's CC&E limits.

This response avoids the issue. Defendants fail to refute that the Court even in ***Vannatta*** recognizes that there can be valid, constitutional limits on political campaign contributions or expenditures by corporations and unions. It matters not whether those limits exist now or not or whether they are part of Measure 47 or not. This

entirely refutes Defendants' sweeping statements that ***Vannatta*** bans all limits on political campaign contributions or expenditures.[7]

Defendants' Reply Memorandum (p. 7) continues:

> But so long as corporations and unions are "spending their own money," they enjoy ordinary constitutional protection for their expressive activity, including their campaign contributions.

What does "spending their own money" mean? Where does "their own money" come from? In ***Vannatta***, the Court specifically cited these examples of entities "spending other people's money on a political message without their consent": "compulsory union fair share fees, a shareholder's equity, student activity fees, or dues paid to an integrated Bar." 324 Or at 524 (emphasis added). Where, in Defendants' view, is the corporation's "own money" coming from? All of a corporation's money belongs to its shareholders.

Further, Defendants never contend with the fact that in ***Vannatta*** the Court always referred to the free speech rights of "the people" or "the voters" or "Oregon citizens." See, e.g., 324 Or 522-23. Defendants (p. 7) claim that corporations and unions "enjoy ordinary constitutional protection for their expressive activity, including their campaign contributions," without benefit of legal citation. Measure 47, Sections (3) and (6), contains severable limitations on political contributions and expenditures by

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7. Defendants state that "corporate spending may be constrained to some extent by neutral laws, such as those prohibiting waste of corporate assets. See, e.g., Klinicki v. Lundgren, 298 Or. 662, 678, 695 P.2d 906 (1985)." That case does not pertain to political contributions or expenditures. In ***Vannatta***, the Court stated that laws could indeed validly place limits on "spending other people's money on a political message," and referred specifically to a corporation spending its shareholder's money.

corporations and unions, and Section (11) of Measure 47 demands that such severable limitations be preserved.

Defendants (p. 7) claim that the Measure 9 limits on union and corporations were struck down "without reference to the ‘nonseverability’ clause." That is immaterial. Measure 9 contained no separate prohibition on union and corporate contributions. Instead, it retained the then-current definition of "person" as meaning "an individual or a corporation, association, firm, partnership, joint stock company, club, organization or other combination of individuals having collective capacity." ORS 260.005(15) [then ORS 260.005(11)]. The limitations on contributions were then expressed as applicable to "a person." Measure 9, Section 3. Thus, Measure 9 afforded no way, by means of severance, to preserve limits on contributions that would be applicable only to corporations and unions. Striking down Section 3’s contribution limits applicable to any "person" thus necessarily struck down contribution limits applicable to any corporation or union. There was no means of exercising severability.

Measure 47, on the other hand, contains clearly severable limitations on contributions by corporations and unions in its Section (3)(a): "No corporation or labor union shall make any contribution to a candidate committee, political committee, or political party." Measure 47 does not use the term "persons" but instead uses the defined term "individual" (Section (2)(s)) that includes only "any human being." Measure 47 states its limitations on "individuals" separately from its limitations on corporations and unions, thus making each set of limitations easily severable from the other sets.

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.

Defendants' Reply Memorandum (p. 8) contends that none of Measure 6 can be considered, because the U.S. District Court issued an injunction against its enforcement. Yes, direct enforcement of all of its provisions may violate the U.S. Constitution, as the Court held, because of the discrimination based on residence of the contributor. But the federal court did not, and could not, remove Article II, Section 22, from the Oregon Constitution, where it today remains.

No party has contended that any of the limitations in Measure 47 are contrary to the U.S. Constitution. Missouri's limits similar to Measure 47 were upheld against such challenges in ***Nixon v. Shrink Missouri Government PAC***, 528 US 377 (2000). So the question is whether Measure 47's limitations are authorized by the continuing presence of Article II, Section 22, of the Oregon Constitution. Article II, Section 22, forbids all contributions that do not "originate from individuals." This provides

constitutional authority for Measure 47's ban on corporation and union contributions, as those entities are not "individuals."[8]

Let us assume that, as Defendants assert, corporations and unions have the same Article I, Section 8, free speech rights as individuals. These rights would then be in conflict with the authority provided by Article II, Section 22 (and implemented by Measure 47) to ban political contributions by those entities. When provisions of the Oregon Constitution are in conflict, the later-enacted provision prevails.

> We have no difficulty in holding that, in this context, it is Article I, section 8, that is modified. When the people, in the face of a pre-existing right to speak, write, or print freely on any subject whatever, adopt a constitutional amendment that by its fair import modifies that pre-existing right, the later amendment must be given its due. See ***Hoag v. Washington-Oregon Corp.***, 75 Or 588, 612, 144 P 574, 147 P 756 (1915) (It is a familiar rule of construction that, where two provisions of a written [c]onstitution are repugnant to each other, that which is last in order of time and in local position is to be preferred * * *.). To hold otherwise would be to deny to later-enacted provisions of the constitution equal dignity as portions of the same fundamental document.

In re Fadeley, *supra*, 310 Or at 560. Thus, Article II, Section 22, prevails over Article I, Section 8.

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

8. Article II, Section 22, can easily be given a limiting construction, as specified in the Hazell Plaintiffs Response/Reply Memorandum, p. 25. Application of limiting constructions are favored, if doing so would preserve validity. ***Crumpton v. Keisling***, 160 Or App 406, 416-17, 982 P2d 3 (1999), *review denied*, 329 Or 650, 994 P2d 132 (2000).

Defendants' Reply Memorandum (p. 9) again avers to "the categorical rule of ***Vannatta*** and Meyer that CC&E limits are impermissible under the Oregon Constitution," again without benefit of citation. We deny there is such a categorical rule. See, e.g., ***In re Fadeley***, *supra*; ***Crumpton v. Keisling***, *supra* (upholding reporting requirements on independent expenditures).

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

We have offered a detailed account of the fundamental historical error in ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997), which requires a thorough reconsideration of its value as controlling precedent in this case. In ***Stranahan v. Fred Meyer, Inc.***, 331 Or 38, 52, 11 P3d 228, 237 (2000), the Court described the jurisprudential reaction to such new information.

> [T]he Oregon Constitution is the fundamental document of this state and, as such, should be stable and reliable. On the other hand, the law has a similarly important need to be able to correct past errors. This court is the body with the ultimate responsibility for construing our constitution, and, if we err, no other reviewing body can remedy that error. *See* ***Hungerford v. Portland Sanitarium,*** 235 Or 412, 415, 384 P2d 1009 (1963) ("[t]he pull of *stare decisis* is strong, but it is not inexorable").
>
> * * * [W]e remain willing to reconsider a previous ruling under the Oregon Constitution whenever a party presents to us a principled argument suggesting that, in an earlier decision, this court wrongly considered or wrongly decided the issue in question. We will give particular attention to arguments that either present new information as to the meaning of the constitutional provision at issue or that demonstrate some failure on the part of this court at the time of the

earlier decision to follow its usual paradigm for considering and construing the meaning of the provision in question.

Defendants' Reply Memorandum (p. 11) contends that our historical analysis is defective, because "the [Oregon] Supreme never held that the shift [from a narrow to a broader definition of "election"] occurred at any particular time."

> It held only that "elections" were at the time of the constitution a "relatively narrowly defined concept." ***Vannatta***, 324 Or. at 531.

To further show that "elections" had the broad meaning, encompassing campaigning for election, we supplement our historical analysis in this memorandum.

Defendants further argue (p. 11):

> Plaintiffs' arguments with respect to Article I, § 8, are even less likely to gain traction. Plaintiffs' reliance on other states' statutes and on out-of-state case law that post-dates the Oregon Constitutional Convention are no part of the proper analysis of an original constitutional provision.

This reflects a fundamental misunderstanding of our arguments, based on the new historical research. The history supports at least 3 independent arguments why the limits in Measure 47 are constitutional:

1.

The Measure 47 limits are authorized by Article II, Section 8, regardless of Article I, Section 8.

Vannatta concluded that the Measure 9 limits were not authorized by Article II, Section 8, because the word "elections" had a narrow meaning at the time of the adoption of the Oregon Constitution in 1857 (relying on a 1828 dictionary). Our

research now shows that, prior to 1857, the term "elections" did include the concept of campaigning for office. Obviously, the historical sources are not limited to Oregon, because the meaning of the word "elections" did not develop solely in Oregon. Further, the nature of the government-imposed limitations and punishments for election-related conduct (whether involving bribery or "treating" or limits on contributions) is immaterial. The point is that "elections" was understood to mean the process of campaigning for public office.

2.

The Measure 47 limits are within the historical exception to free speech limits, as stated in *Robertson*, regardless of the interpretation of Article II, Section 8.

Having concluded that Article II, Section 8, did not provide an independent basis for the Measure 9 limits, ***Vannatta*** adopted the ***Robertson***, *supra*, approach to Article I, Section 8, which would validate the limits if they were the sort of limits on speech historically accepted prior to adoption of the Oregon Constitution. The historical question here is whether limits on political contributions or expenditures was an accepted practice, prior to 1857, particularly in states having free speech clauses in their constitutions. We show that many states had free speech clauses and also had limits on political contributions and expenditures, both prior to and after 1857. For example, New York in 1829 adopted a statute restricting political campaign contributions, as did Maryland in 1852 and Texas in 1856, despite the fact that New

York and Texas had free speech clauses essentially verbatim to Article I, Section 8. See Hazell Plaintiffs Summary Judgment Memorandum, pp. 35, and Table 1, *infra*.

3.

The interpretation of both Article I, Section 8, and Article II, Section 8, should be governed by the doctrine of contemporaneous construction.

Using contemporaneous construction is highly consistent with the doctrine of constitutional originalism. After all, governments in place just after the creation of the State of Oregon in 1859 would have greater insight into the intend of the framers than would those observing at a distance of over 100 years. This history relevant to application of contemporaneous construction is that the Oregon Legislature adopted limits on political campaign contributions and expenditures in 1864 and 1870. The people using the new initiative process also adopted a different set of such limits in 1908. Since then, the Oregon Legislature repeatedly adopted minor amendments to the 1908 law, until it repealed the contribution and

expenditure limits in 1971 and replaced them with a different formula of expenditure limits. None of these limits on political campaign contributions or expenditures, no matter when adopted, were challenged as contrary to Article I, Section 8, until 1973. Invalidating such limits under Article I, Section 8, is a recent judicial innovation. The doctrine of contemporaneous construction strongly counsels in favor of the constitutionality of statutes which were adopted soon after Oregon's statehood and which remained in place, albeit somewhat amended from time to time, for 107 years.

Let us further examine the history that Defendants question.

1.

THE MEASURE 47 LIMITS ARE AUTHORIZED BY ARTICLE II, SECTION 8, REGARDLESS OF ARTICLE I, SECTION 8.

Our research identifies a heretofore ignored body of relevant law and judicial precedent, which should inform our understanding of the sources of the provisions of the Oregon Constitution pertaining to elections and campaigns: the states of the south and west prior to 1857. The extent of this new information is enough to question

whether the Court in ***Vannatta***, relying entirely upon WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) for the outdated and constricted meaning of "elections," correctly applied its originalist paradigm. ***Vannatta*** assumed that Article II, Section 8, of the Oregon Constitution was based on the 1818 Connecticut Constitution.[9] The Court then itself emphasized that the Connecticut provision applied only to "*meetings of the electors."*

> The Connecticut provision empowered its legislature to enact laws "prescribing the manner of regulating and conducting *meetings of the electors*. (Emphasis added.) That provision expressly limited its scope to such meetings.

Vannatta, 324 Or at 534. The Court continued:

> We have found nothing in the available history of the 1818 Connecticut Constitution that explains what its framers may have had in mind by the use of the term undue influence, followed by the list of examples that Oregon later adopted. It follows that nothing in our review of the history of Article II, section 8, alters our preliminary reading of that provision.

Id. But the Court was looking in the wrong place. Instead of examining Connecticut, it should have been examining the states that had adopted language essentially verbatim to Article II, Section 8, and applicable expressly to "elections," starting with Kentucky and ending with California.

The Hazell Plaintiffs Response/Reply Memorandum, pp. 44-45, showed that Oregon's Article II, section 8, owes its lineage to the Kentucky Constitution of 1799, which in turn had pervasive influence on constitutional conventions of many states, as statehood moved south and west. H. Carey, OREGON CONSTITUTION, Appendix (a),

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9. "Article II, section 8, is the only provision in Oregon's original constitution that is derived from the Connecticut Constitution." ***Vannatta***, 324 Or at 534 n17.

reprints most of W.C. Palmer, *The Sources of the Oregon Constitution*, OREGON LAW REVIEW (April 1926), 200. 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. But Article II, Section 8, is less similar to the provision in the Connecticut Constitution but more similar to provisions in the earlier constitutions of Kentucky and Mississippi and the later (but pre-1857) constitutions of Alabama, Florida, Texas, Louisiana, California, and Kansas.[10]

Why did Palmer and Carey disregard the provisions in these other pre-1857 state constitutions? Palmer and Carey relied upon compilations of state constitutions prepared in Michigan (1907) and New York (1915). "Bibliography," *The Sources of the Oregon Constitution*, *supra*. These compilations simply omitted the pre-Civil War constitutions of the Confederate States. Instead, they included the postwar constitutions of Florida, Mississippi, Alabama, Louisiana and Texas, after they were adopted upon the re-admission of these states to the Union (1865 and 1866).[11]

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10. As explained below, we now add the Kansas Constitution adopted by the Free Soil Convention and ratified by the voters of the Kansas Territory in 1855.

11. Kentucky did not officially secede from the Union (although it was admitted to the Confederacy on July 2, 1861) and thus was not re-admitted as were the states of the deep south.

As for Kentucky, Palmer and Carey simply ignored it, even though its 1850 version was included in the New York compilation.[12] We can only assume that Palmer/Carey mistakenly thought the Connecticut Constitution (1818) was the source of the Kentucky (1850) version, not realizing that the Kentucky Constitution (1799) was clearly the prototype for the Mississippi (1817) and Connecticut (1818) provisions, as well as for the other southern and western states which adopted constitutions prior to 1857.

Thus, it appears that Palmer and Carey made fundamental errors in failing to realize that:

1. The states of Florida, Mississippi, Alabama, Louisiana, and Texas had constitutions prior to the Civil War;

2. The Kentucky Constitution was adopted in 1799, not 1850; and

3. Those pre-war southern constitutions were available to the members of the Oregon Constitutional Convention, as they were widely reprinted at the time in AMERICA'S OWN BOOK, a series of collections of state constitutions, revised and reissued as new states joined the union.

Relying on the Michigan and New York compilations apparently misled Palmer and Carey into believing that Connecticut was the likely original source of Article II, section 8, when it is clear from a fuller historical record that Connecticut borrowed from the

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12. The 1850 Constitution preserved the sections of the 1799 Constitution set out in Table 1, below, and they remain in the Kentucky Constitution to this day.

earlier-adopted constitution of Kentucky, which also influenced the constitutional thinking of many later-admitted states. These errors have influenced later research. Relying upon Palmer/Carey's conclusions has tended to cause later legal researchers to miss relevant originalist context in the law and history of the pre-confederate southern and western states, as enlarged suffrage and statehood moved south and west. Our previous citation to the 1856 Texas statute limiting political campaign contributions is an example of relevant law earlier than 1857 which has been overlooked.

Each state which adopted language similar to Oregon's Article II, section 8, also had a section of its Bill of Rights similar to Oregon's Article I, section 8, as shown in Table 1 below:[13]

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13. All of those states have also adopted limits on political campaign contributions. Federal Election Commission (FEC), CAMPAIGN FINANCE LAWS 2002, Chart 2A (http://www.fec.gov/pubrec/cfl/cfl02/cfl02chart2a.htm). For example, Florida limits individuals, corporations and unions to contributing not more than $500 to the candidacy of anyone running for office. Investment and law firms doing business with state agencies are prohibited from making contributions. *Id.*

TABLE 1

STATE (year adopted)	ELECTION PROTECTION PROVISION IN STATE CONSTITUTION (EQUIVALENT TO OREGON ARTICLE II, § 8)	FREE SPEECH PROVISION IN STATE CONSTITUTION (EQUIVALENT TO OREGON ARTICLE I, § 8)
Kentucky (1799)	Article VIII, section 4: 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.	Article XIII, section 9: * * * The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print, on any subject, being responsible for the abuse of that liberty.
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.	Article I, section 6: Every citizen may freely speak, write and publish his sentiments on all subjects; being responsible for the abuse of that liberty.
Connecticut (1818)	No similar provisions in the Fundamental Orders (1638-9) or in the Charter of the Colony (1662) Article VI, section 6: 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.	Article I, section 5: Every citizen may freely speak, write, and publish his sentiments on all subjects; being responsible for the abuse of that liberty.

STATE (year adopted)	ELECTION PROTECTION PROVISION IN STATE CONSTITUTION (EQUIVALENT TO OREGON ARTICLE II, § 8)	FREE SPEECH PROVISION IN STATE CONSTITUTION (EQUIVALENT TO OREGON ARTICLE I, § 8)
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.	Article I, section 8: Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.
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.	Article I, section 5: That every citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that liberty and no law shall ever be passed to curtail, abridge, or restrain the liberty of speech or the press
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.	Article I, section 5: 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.

STATE (year adopted)	ELECTION PROTECTION PROVISION IN STATE CONSTITUTION (EQUIVALENT TO OREGON ARTICLE II, § 8)	FREE SPEECH PROVISION IN STATE CONSTITUTION (EQUIVALENT TO OREGON ARTICLE I, § 8)
Louisiana (1825)	Article VI, section 4: 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 practice.	No similar provision
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.	Article 106: The press shall be free. Every citizen may freely speak, write, and publish his sentiments on all subjects; being responsible for an abuse of this liberty.
California (1849)	Article XI, section 18: 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.	Article I, section 8: Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. * * *
Kansas Free State (1855)[1]	Article II, section 10: Every person shall be disqualified from holding any office of honor or profit in this State, who shall have been convicted of having given or offered any bribe to procure his election, or who shall have made use of any undue influence from power, tumult, or other improper practices.	Article I, section 11: Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

STATE (year adopted)	ELECTION PROTECTION PROVISION IN STATE CONSTITUTION (EQUIVALENT TO OREGON ARTICLE II, § 8)	FREE SPEECH PROVISION IN STATE CONSTITUTION (EQUIVALENT TO OREGON ARTICLE I, § 8)
Oregon (1857)	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.	Article I, section 8: No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.
Nevada (1864)[2]	Article IV, section 27: Laws shall be made to exclude from serving on juries all persons not qualified electors of this State, and all persons shall have been convicted of bribery, perjury, forgery, larceny or other high crimes unless restored to civil rights; and laws shall be passed regulating elections, and prohibiting, under adequate penalties, all under [*sic*] influence thereon, from power, bribery, tumult, or other improper practice.	Article I, section 9: Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty; and no law shall be passed to restrain or abridge the liberty of speech or of the press. * * *

STATE (year adopted)	ELECTION PROTECTION PROVISION IN STATE CONSTITUTION (EQUIVALENT TO OREGON ARTICLE II, § 8)	FREE SPEECH PROVISION IN STATE CONSTITUTION (EQUIVALENT TO OREGON ARTICLE I, § 8)
1.		Free State Constitution (passed by electors of Territory, rejected by the United States Senate). In 1856, federal troops dispersed the meeting of the Free State Legislature. The full text is at: http://www.lewisandclarkinkansas.com/research/collections/documents/online/topekaconstitution.htm
2.		Nevada held several constitutional conventions, all of which considered this language. The earlier constitutions were defeated for failure to resolve the issue of taxing mining revenue. We include Nevada in the table, because use of the cited language shows the vitality the language had in the western territories throughout the period.

Fewer than 20,000 votes were cast on the question of ratification of the Oregon Constitution, and it passed by a majority of 3,980 votes. H. Bancroft, WORKS, HISTORY OF OREGON (History Company 1888), p. 428. The question is: What did the words of the Oregon Constitution mean to the approximately 11,000 voters who approved the document?

We have discussed (in Hazell Response/Reply Memorandum, pp. 38-45) that the voters who read newspapers and popular works of fiction and followed the oratory of the period would have understood that the regulation of "elections" meant the regulation of the entire period of time then-understood to be the "election."

2.

THE MEASURE 47 LIMITS ARE WITHIN THE HISTORICAL EXCEPTION TO FREE SPEECH LIMITS, AS STATED IN *ROBERTSON*, REGARDLESS OF THE INTERPRETATION OF ARTICLE II, SECTION 8.

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

> * * * Article I, section 8, * * * forecloses 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.

Our earlier memoranda have shown that, historically, political spending was restrained regardless of guarantees of free speech. Hazell Plaintiffs Response/Reply Memorandum, pp. 51-54. This argument has nothing to with the meaning of the term "elections" in 1857, although the evidence does show that governments have long restricted speech in the context of "elections" clearly understood to extend over a period far longer than merely election day.

"Bribery" has long been understood in the English Codes and Roman law to include improper practices of spending money to influence election outcomes. In a decision in 1762, Lord Mansfield opined that, "Bribery at elections for members of parliament

most undoubtedly have always been a crime at common law and consequently punishable by indictment or information." ***Rex v. Pitt*****,** 3 Burrows 1335, 1338-1340 (1762). The common law of England was recognized as being part of the common law of the nascent states. The common law crimes relating to elections became part of the law of the states. ***Commonwealth v. Silsbee***, 9 Mass 417, 1812 WL 964 (1812) (prosecution for voting twice at a town meeting upheld without statute as a common law crime). See also, ***Doyle v. Kirby***, 184 Mass 409, 68 NE 843 (1893); ***State v. Jackson***, 73 Me 91, 1881 WL 4017 (1881).

Statutory enactments became increasingly common to limit the more subtle and insidious methods of tainting elections prior to election day itself and in which candidates "themselves co-operate, by bribery and corruption," to influence electors. Britain in 1697[14] and every state which entered the Union outlawed explicit bribery at or prior to elections. Most states prohibited furnishing liquor or the practice of "treating," such as "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" (North Carolina 1801). Many states banned wagering on elections, because it gave the bettors a financial interest in the outcome of the contest.

We have previously noted (Hazell Plaintiffs Response/Reply Memorandum, p. 40):

> 1.
>
> 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

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14. British Statutes, 7 William the 3rd, ch 4.

candidate * * * to contribute money for any other purpose intended to promote an election of any particular person or ticket");

2.

The Maryland 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"); and

3.

The 1856 Texas prohibition (Texas Laws 1856, Title VIII, Art 262):

> 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.

The Texas 1856 statute is particularly relevant, because (1) Texas in 1845 adopted a constitution with provisions that are essentially verbatim to both Oregon's Article I, Section 8, and Article II, Section 8, and (2) Texas used its constitutional authority to adopt the statute limiting campaign spending in 1856, prior to the Oregon Constitutional Convention. When a state with a constitutional provision similar to the one adopted in Oregon thereafter takes action which tends to show what the constitutional provision means, the Oregon Supreme Court takes notice. ***State v. Cookman***, 324 Or 19, 28, 920 P2d 1086 (1996) (referring to 1822 decision of the

Indiana Supreme Court interpreting a provision similar to one adopted in the Oregon Constitution in 1857).[15]

Throughout the mid- to late 19th Century, each of the states in Table 1, including Oregon, adopted what we would today call campaign finance reform legislation to limit the corrupting influence of money in some manner, which is further evidence of what the general population must have understood the language of their constitutions to

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15. Were the decisions of the Indiana Supreme Court available to the framers of the Oregon Constitution? Were they available to the voters who adopted the Oregon Constitution? These questions were not presented or answered in ***Cookman***. The Court assumed so, and that assumption would appear equally valid if applied to the provisions in the constitutions of Kentucky, Alabama, Florida, Mississippi, Texas, Louisiana, and California, as of 1857 and the statutes of Texas as of 1857. As noted earlier, one of the unfortunate legacies of the Palmer/Carey research which identified so few of the actual sources of the Oregon Constitution has been a lack of research into the law and statutes from many states in South and West available in 1857 and construing similar provisions of their state constitutions.

mean. All of these states, except Louisiana, had free speech guarantees essentially verbatim to Oregon's. It is reasonable to believe that the "other improper practices" or conduct was understood to encompass practices long associated with the general concept of "bribery." As early as 1829, a number of states sought to limit the uses of money in elections. In the following decades, some banned campaign contributions, some banned corporate contributions, and some limited expenditures according to the number or electors in the district.

Efforts by candidates and their supporters to influence voters (also known as electors) in advance of election day had long been seen as corrupting and a more subtle form of "bribery." The Indiana Supreme Court relied upon BLACKSTONE'S COMMENTARIES from the late 1700s to hold:

> * * * [I]n 1 Cooley, BL. COMM 179[16] [T. Cooley ed 1899], the author says: "Thus are the electors of one branch of the legislature secured from any undue influence from either of the other two, and from all external violence and compulsion. But the greatest danger is that in which themselves co-operate, by the infamous practice of bribery and corruption, to prevent which it is enacted that no candidate shall, after the date (usually called the 'tests') of the writs, or after the vacancy, give any money or entertainment to his electors, or promise to give any, either to particular persons or to the place in general, in order to his being elected, on pain of being incapable to serve for that place in parliament. And if any money, gift, office, employment, or reward be given, or promise to be given, to any voter, at any time, in order to influence to give or withhold his vote, as well he that takes as he that offers such bribe forfeits £500, and is forever disabled from voting and holding any office in any corporation, unless before conviction he will discover some other offender of the same kind, and then he is indemnified for his own offense." In the note upon this passage it is said: "In like manner, the Julian law *de ambitu* inflicted fines and infamy upon all who were

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16. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (1765-1769).

> guilty of corruption at elections * * *." From these authorities and enactments, we think it evident that corruption at elections has from the earliest times been regarded as an infamous crime, subject to severe penalties, and frequently punished by depriving the guilty person of his right to vote and to hold office.

Baum v. State, 157 Ind 282, 285-6, 61 NE 672, 673-674 (1901).

Thus, it is clear that, prior to 1857, it was widely recognized that the guarantee of free speech did not prohibit the states from adopting laws pertaining to the use of money in political campaigns. Thus, the limits in Measure 47 meet the historical exception test of ***Robertson***.

3.

THE INTERPRETATION OF BOTH ARTICLE I, SECTION 8, AND ARTICLE II, SECTION 8, SHOULD BE GOVERNED BY THE DOCTRINE OF CONTEMPORANEOUS CONSTRUCTION.

We argued in the Hazell Plaintiffs Response/Reply Memorandum that historically accurate contemporaneous construction should be a tool in the effort at constitutional originalism.

3.

OREGON ADOPTED LIMITS ON POLITICAL MONEY IN 1984 AND 1870.

Early Oregonians agreed that regulation of elections was necessary to prevent "public wrongs" which impaired the voters' free suffrage. In 1864 and 1870, soon after Statehood (1859), the Oregon Legislature adopted criminal sanctions for election violations as "Crimes Against Public Justice," thus giving concrete examples to the kinds of "improper conduct" the legislature could control under the power of Article II, sections 7 and 8 of the Oregon Constitution. The representatives included offenses which could occur (1) long before the "day of" the election and (2) which corrupted the

election process without actual *quid pro quo* bribery or force. The crimes included offering any "thing whatever" directly or indirectly "with intent to influence" the voter [Crimes Against Public Justice Act of 1864, (October 19, § 616), Or Gen Laws (Deady 1972), T II, c 5, § 627, later codified at Hill's Code Or, T II, c 5, § 1843].[17]

In 1870, the Legislature made criminal the act of persuading any legal voter not to vote.

> Any person who shall, in the manner provided in the preceding section [promises of favor or reward, or otherwise], induce or persuade any legal voter to remain away from the polls, and not vote at any general election in this state, shall, on conviction, be deemed guilty of a felony.

Frauds in Election Act (October 22, 1870, § 3), Or Gen Laws (Deady 1874), T II, c 5, § 634, Hill's Code Or, T II, c 5, § 1850. The penalty for such persuasion was imprisonment in the penitentiary for 1-3 years and/or a fine of $100 to $1,000 and a lifetime ban on holding any office of trust or profit in Oregon. Note that the conduct prohibited in the Frauds in Election Act of 1870 was not bribery but was mere

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17. Despite Article I, section 8, of the recently adopted Oregon Constitution, the 1864 Act also provided criminal penalties for failure to speak and disclose an interest or the interest of principal when lobbying (fine and imprisonment). Crimes Against Public Justice Act of 1864, (October 19, § 622), Or Gen Laws (Deady 1972), T II, c 5, § 638, later codified at Hill's Code Or, T II, c 5, § 1855.

persuasion, which was certainly an exercise of what we today would call "political speech." Addison Gibbs, a lawyer (and partner in a firm with Oregon Constitutional Convention delegate, George H. Williams), was Governor at the time of the passage of the Crimes Against Public Justice Act of 1864. LaFayette Grover, lawyer and Oregon Constitutional Convention delegate, was Governor at the time of the passage of the Frauds in Election Act on October 22, 1870. Neither of these men, active in the law and on the political scene, objected that the election regulation laws passed by the Legislature were invalid under the recently adopted Oregon Constitution. Neither exercised his power of veto.[18]

Oregon Courts also adopted expansive interpretations of "public wrongs." In 1875, the Court described the statute originally passed as § 616 of the Crimes Against Public Justice Act of 1864, Or Gen Laws (Deady 1974), T II, c 5, § 627:

> Our Criminal Code (§ 627) makes it a felony to pay or promise to pay any valuable consideration, or thing whatever, to influence a voter to vote for or

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18. Gubernatorial terms: Gibbs, 1862-1866; Grover, 1970-1877. At the time, general elections were held in June of even-numbered years, and inaugurations for state offices took place in September of the same even-numbered year. Thus, Grover was the sitting Governor during the Legislative Session that passed the Frauds in Election Act in October 1870.

against a particular person, at any legally authorized election in this State, and denounces the act as bribing, or offering to bribe, a voter.

State ex rel. Church v. Dustin, 5 Or 375, 1875 WL 1030 (1875).

4.

OTHER STATES PROCEEDED TO ADOPT LIMITS ON POLITICAL CONTRIBUTIONS AND EXPENDITURES.

By 1903, another four states had adopted similar laws controlling political contributions or expenditures:

1.
North Dakota, Rev Codes 1899, secs 6855-60, 6890 (misdemeanor to contribute money to promote the election of any candidate, with exceptions for legitimate expenses);

2.
Nevada, Comp Laws 1900 § 1606, 1672-75 (felony to furnish any money or property to promote election of candidate, with exceptions);

3.
South Dakota, Penal Code 1901, §§ 7510, 7545-54 (misdemeanor to furnish any money or property to promote election with exceptions);

4.
Oklahoma, Rev Stat 1903, secs 1977-82, 2010 (misdemeanor to furnish money for election either on the part of candidates or of others to promote the election of any person).

Additionally, Minnesota (Laws 1895, c 277) and Nebraska (Comp Stat 1902, secs 2103-06) limited election expenditures on a formula based on the number of electors in district.

By 1905, the following seven states had banned all corporate political contributions:

1. Tennessee, Laws 1897, c 18 (corporate funds for political or campaign purposes unlawful);

2. Florida, Laws 1898, c 24 (prohibits corporations from spending money for candidates or any political purpose);

3. Kentucky, Laws 1900 c 12 (unlawful for corporations to contribute to campaign funds);

4. Missouri, Laws 1893, p 157 (prohibits corporations from spending money for political or campaign purpose);

5. Nebraska, Comp Stat 1902, secs 2103-06 (prohibits using corporate funds for political or campaign purpose);

6. Texas, Laws 1905, c 11 (corporate contributions prohibited, punishable for charter forfeiture);

7. Wisconsin, Rev Laws 1905 c 492 (prohibits political contributions by corporations punishable by fine from $100-$5000, imprisonment of officer, or both fine and imprisonment).

By 1905, at least 15 states also had laws limiting political expenditures, requiring detailed contribution and expenditures reports submitted under oath, and requiring that only lawfully-established and registered committees receive and disburse such funds, as shown in Table 2 below.

TABLE 2

State	Provisions

California, Laws 1891, c 167; Laws 1893, c 16	Detailed contribution and expenditure reports required; only candidates and committees could spend money, other expenditures prohibited
Connecticut, Laws 1900, c 280	Detailed contribution and expenditure reports required, only treasurer of committees could spend money, candidate expenditures limited to personal expenses during campaign
Kansas, Laws 1893 c 77	Prohibited the use of money or other valuable thing to influence voters or to reward services at polls
Massachusetts, Rev Laws 190, c 11, amended by Laws 1903, c 318 and 1904, c 375, 380	Detailed contribution and expenditure reports required; only treasurer of committees could spend money, candidate expenditures limited to personal expenses during campaign
Michigan, Comp Laws 1897, secs 437-69	Detailed contribution and expenditure reports, outlawed certain expenses
Minnesota, Laws 1895, c 277	Detailed contribution and expenditure reports, defined legal expenditures, limited expenditures on a formula based on number of electors in district
Missouri, Laws 1893, p. 157	Detailed contribution and expenditure reports, defined legal expenditures
Montana, Penal Code 1895, secs 74-111	Detailed contribution and expenditure reports, defined legal expenditures, forbids solicitation of money by candidates
Nebraska, Compiled Stat 1902, secs 2103-06	Detailed contribution and expenditure reports, defined legal expenditures
New York, Laws 1890 c 94, and 1892 c 693 Laws 1890, c 70	Detailed contribution and expenditure reports, defined legal expenditures Misdemeanor for newspaper to solicit money from candidates for editorial support
Pennsylvania, Laws 1874, p. 63; Laws 1906, No 6 Laws 1906, No __	Prohibits municipal officers or employees for soliciting or contributing money for political purposes Detailed contribution and expenditure reports, defined legal expenditures; all money must go through appointed Treasurer, lawful expenditures enumerated, candidate expenses prohibited with exceptions
Texas, Laws 1905, c 11	Detailed contribution and expenditure reports, defined legal expenditures; political advertisements must be labeled

Virginia, Code 1904, §§ 14448, 1452, 3824, 3847, 3853	Detailed contribution and expenditure reports, defined legal expenditures, candidate and others prohibited from expending money expect for lawful purposes
Wisconsin, Rev Stat 1898, sec 4543b	Detailed contribution and expenditure reports, defined legal expenditures, nonresidents prohibited from making contributions

5.

OREGON'S SECOND ROUND OF POLITICAL CAMPAIGN MONEY LIMITS: THE 1908 INITIATIVE.

After unsuccessful attempts to get their legislatures to act, voters in Oregon and Idaho adopted comprehensive election regulations in 1908. The people of Oregon went beyond mere reporting requirements. Acting upon the common understanding as to what constituted "improper conduct" which caused "undue influence" upon the process of elections, in June 1908 Oregon voters through initiative passed by 64-36% the Corrupt Practices Act, which the 1907 Legislature had declined to enact.[19] This ballot measure adopted many of the reforms extant in other states (noted above and in Table 2) **and added a ban on political contributions by corporations and strict**

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19. James Duff Bennet, THE OPERATION OF THE INITIATIVE, REFERENDUM AND RECALL IN OREGON (MacMillan 1915), p. 244-45; Paul S. Reinsch, READINGS ON AMERICAN STATE GOVERNMENT (Ginn 1911), p. 103. The Public Power League campaigned for and passed a similar initiative in Idaho later in 1908 as well.

candidate campaign spending limits, coupled with the then-novel provision for what we now call the Voters Pamphlet ("publicity pamphlet").[20]

The 1908 Oregon Corrupt Practices Act reforms included:

1. a complete ban on all political contributions by corporations, or their owners, carrying on the business of a "bank, savings bank, cooperative bank, trust, trustee, surety, indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, water, cemetery, or crematory company, or any company having the right to take or condemn land or to exercise franchises in public ways granted by the state or by any

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20. The earliest "publicity pamphlet" was adopted as part of the laws to implement the 1903 Constitutional amendment allowing voter-initiated measures. The informational measure pamphlet was later expanded to include candidates (1907).

county, city or town" (Section 25);[21]

2. an aggregate limit on the expenditures by or on behalf of any candidate, "in excess of fifteen percent of one year's compensation or salary of the office" (but not less than $100) in the primary election at "in excess of ten percent of one year's compensation or salary of the office" in the

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21. This ban on corporate contributions is particularly important, because Defendants contend that "corporations and unions enjoy rights of free expression under Article I, § 8. The State is unaware of any case holding that Article I, § 8 applies in a limited way to such entities." Defendants' Reply Memorandum, p. 6. The fact that these corporate contributions were banned for the 62 years from 1909 to 1971 shows the contemporaneous construction by all branches of government that Article I, Section 8, was not understood to disallow limits or even bans on political contributions.

general election (but not less than $100);[22]

3. requiring candidates to report to government on their contributions and expenditures;

4. improvements to the Voters Pamphlet;

5. prohibitions on "treating" voters to favors;

6. requiring every political ad to disclose who paid for it;

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22. In both the primary and general elections: "For the purposes of this law the contribution, expenditure, or liability of a descendant, ascendant, brother, sister, uncle, aunt, nephew, niece, wife, partner, employer, employe, or fellow official or fellow employe of a corporation shall be deemed to be that of the candidate himself." Section 1, Section 8. Thus, the overall expenditure limit also served as a contribution limit. The candidate could not receive contributions in excess of the expenditure limit, as the measure prohibited the candidate from spending such money on his campaign.

7. banning newspapers from accepting money to take an editorial position; and

8. other regulations about elections, as stated on the ballot itself and in the *Measure Pamphlet* mailed to every voter:

"A bill for a law to limit the amount of money candidates and other persons may contribute or spend in election campaigns; declaring what shall constitute corrupting use of money and undue influence in elections and punishing the same; prohibiting attempts on election day to persuade any voter to vote for or against a candidate or candidates, or any measure submitted to the people; to protect the purity of the ballot; furnishing information to voters concerning candidates and parties, partly at public expense and providing for the manner of

conducting election contests."[23]

The measure's creation of an election "publicity pamphlet" was an integral part of the Oregon system to limit money contributed and spent on election campaigns. A contemporary academic writer noted:

> [T]he corrupt practices act limits the candidate to the expenditure of 15 per cent of one year's salary in his primary campaign and 10 per cent of a year's salary in the general campaign, in addition to what he pays for space in the publicity pamphlet, yet the law does not prohibit any legitimate use of money within this limitation. The act makes it possible for a man of moderate means to be a candidate upon an equality with a man of wealth.
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> * * *

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23. *A PAMPHLET Containing a Copy of All Measures "Referred to the People by the Legislative Assembly," "Referendum Ordered by Petition of the People," and "Proposed by Initiative Petition," to be submitted to the Legal Voters of the State of Oregon for their Approval or Rejection at the REGULAR GENERAL ELECTION to be held on the first day of June, 1908 (State of Oregon)*, p. 76 [hereinafter "*Measure Pamphlet (1908)]* (available via http://books.google.com by searching on its title); Allen H. Eaton, THE OREGON SYSTEM: STORY OF DIRECT LEGISLATION IN OREGON (McClurg 1912), p. 105.

> The salary of governor is $5000 a year. A candidate for the nomination for governor may take a maximum of four pages in the publicity pamphlet, and thus, at a cost of $400, be able to reach every register voter of his party in the entire state. In addition to the $400 he may spend $750, or 15 per cent of one year's salary, in any other manner he may choose, not in violation of the corrupt-practices act. * * *.
>
> The successful nominee in the primary may spend in his general campaign 10 per cent of one year's salary, this expenditure, in the case of a candidate for governor, being $500. In addition to this 10 per cent of one year's salary, this expenditure, in the case of a candidate for governor, being $500. In addition to this 10 per cent of a year's salary he may contribute toward the payment for his party's statement in the publicity pamphlet to be mailed by the Secretary of State to every registered voter. * * *
>
> The candidate is therefore limited to an expenditure of $600 in his general campaign, only $100 of which is necessary in order to enable him to reach every registered voter. He could reach every registered voter in his party in the primary campaign for $400. Under no other system could a candidate reach all the voters in two campaigns for a total cost of $500.[24]

The only argument regarding the Corrupt Practices Act in the *Measure Pamphlet (1908)* stated in part:

> Reason is the only safe influence in the politics of a free people. Promises by candidates or others to appoint voters to desireable offices or employment, and the secret use of money to influence elections, are dangerous to liberty because they are always used for the advantage of individuals or special interests and classes, and never for the common good. The right to spend large sums of money publicly in elections tends to the choice of none but rich men or tools of wealthy corporations to important offices, and thus deprives the people's government of the services of its poorer citizens, regardless of their ability. The primary purpose of this bill is, as nearly as possible, to prevent the use of any means but arguments addressed to the voter's reason in the nominations an elections of Oregon.

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24. READINGS ON AMERICAN STATE GOVERNMENT, *supra*, at 104-05.

Measure Pamphlet (1908) at 103.[25]

These campaign finance reform provisions in the Oregon initiative were praised by reformers outside Oregon.

> There is no interference with such legitimate acts as tend to secure full publicity and free expression of opinion. Personal and political liberty is in no way infringed upon, the only purpose being to prohibit the excessive use of money, promise of appointment, or deception and fraud.

READINGS ON AMERICAN STATE GOVERNMENT, *supra*, p. 106.

Obviously, Oregonians believed that limiting the undue influence of money in political campaigns was consistent with their own Oregon Constitution, as they understood the words to mean. We do not argue that their understanding made campaign spending limits constitutional in 1908. We do argue that these voters and writers were contemporaries with the Oregon House and Senate members who

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25. We have previously pointed out the relatively recent tactic employed by measure opponents of submitting farcical arguments "in support" for inclusion in the Voters Pamphlet for the purpose of deriding a measure. Here, in contrast, the argument has every indicia of being the authentic statement of the proponents' intent. It is submitted on behalf of the Public Power League, the proponents of the initiative amendment to the Constitution passed in 1902, and lists the names of many well-known advocates.

passed the earliest criminal laws pertaining to political money in 1864 and 1870, limiting conduct prior to elections, including "persuasion," as well as the 1857 Constitutional Convention delegates, some of whom lived well into the 20th Century.[26]

Further, it has long been the presumption those early legislators were mindful of their understanding of the Constitution, and "that the territorial legislature knew the history and background of the constitutional amendment, and what common-law right it was intended to preserve * * *." ***State ex rel Gladden v. Lonergan***, 201 Or 163, 172, 269 P2d 491, 496 (1954). We argue that the 1908 voters shared a common understanding of the meaning of words in Article II, Section 8, and Article I, Section 8, of the Oregon Constitution with those contemporaries.

In ***Jory v. Martin***, 153 Or 278, 56 P2d 1093 (1936), the Court explained the relationship between contemporaneous understanding of language, the doctrine of contemporaneous construction, and constitutional originalism. The ***Jory*** Court noted that the intent of the voters who ratified the Constitution should be considered and pointed out that accounts of the Constitutional Convention were published in two

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26. Including at least: William H. Packwood, convention delegate and judge, d. 1917; Lafayette Grover, convention delegate, US Senator and Oregon Governor, d. 1911; George H. Williams, convention delegate and US Senator, d. 1910.

leading newspapers. 153 Or at 289. It then explained why it accorded great weight to contemporaneous construction of provisions in the Constitution:

> Mr. Justice Lord, in ***Cline v. Greenwood***, 10 Or 230, 241, speaking for the court, said: "But did we entertain any doubt whether the legislature had exercised its power in the mode prescribed by the constitution, we should be compelled to dissolve that doubt in favor of the constitutionality of the mode which the legislature had adopted. Before a statute is declared void, in whole or in part, its repugnancy to the constitution ought to be clear and palpable and free from all doubt. Every intendment must be given in favor of its constitutionality. Able and learned judges have, with great unanimity, laid down and adhered to a rigid rule on this subject. Chief Justice Marshall, in [***United States v. Peters***] 5 Cranch [115] 128 [3 LEd 53]; Chief Justice Parsons, in [***Kendall v. Kingston***] 5 Mass [524] 534; Chief Justice Tilghman, in [***Farmers' & Mechanics' Bank v. Smith***] 3 Serg & R [Pa] [63] 72; Chief Justice Shaw, in [***Norwich v. County Com'rs***] 13 Pick [Mass] [60] 61, and Chief Justice Savage, in [***Ex parte McCollum***] 1 Cow [NY] [550] 564, have, with one voice declared, that 'it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts be considered void. The opposition between the constitution and the law should be such that the people feel a clear and strong conviction of their incompatibility with each other.'"

Jory v. Martin, 153 Or at 300.

This strong relationship between contemporaneous construction and Constitutional originalism was restated in ***State ex rel Gladden v. Lonergan***, supra.

201 Or 163, 172:

> Thus, it has been stated that contemporaneous construction of a constitutional provision by the legislature, continued and followed, is a safe guide as to its proper interpretation. Such contemporaneous construction affords a strong presumption that it rightly interprets the meaning and intention of the constitutional provision.

201 Or at 177-8 (quoting 11 AMJUR at p. 699. with approval).

The fact that the leaders of Oregon, soon after concluding the Constitutional Convention, proceeded to adopt laws governing both the pre-election day periods of

time and various kinds of undue influence, involving money, is powerful evidence about the meaning of that Constitution. Further powerful evidence from contemporaneous construction is the fact that Oregon had continuously in place laws limiting political money since 1864 and laws specifically limiting political contributions and expenditures from 1908 to 1971 (when the Legislature repealed the expenditure limits established in the 1908 ballot measure), with no known assertion that those laws were contrary to the Oregon Constitution. And Oregon had statutes governing the improper use of "persuasion" in political campaigns as early as 1870.

> [G]reat weight has always been attached to a contemporaneous exposition of the meaning of fundamental law, not only where such interpretation is that of the courts, but also where it is that of other departments of government.
>
> "*Contemporanea expositio est optima et fortissima in lege*" is a maxim of the civil law resting on a foundation of solid reason. The presumption is that those who were the contemporaries of the makers of the constitution have claims to the deference of later tribunals, because they had the best opportunities of informing themselves of the understanding of the framers and of the sense put upon the constitution by the people when it was adopted. Similarly, a construction which has been long accepted by the various agencies of government, and by the people, will usually be accepted as correct by the judiciary, or will at least be given great weight, unless it is manifestly contrary to the letter or spirit of the Constitution, and a court may take judicial notice of widespread opinion and general practices in the interpretation of constitutional provisions.

AMERICAN JURISPRUDENCE, Constitutional Law § 85 (2007) (footnotes omitted).

> It is a settled rule of constitutional construction that a long-continued understanding and application of a provision in a constitution amounts to a practical construction of it. Such a construction, acquiesced in for many years, is frequently resorted to by the courts, because it is entitled to great weight and deference and because it can be a valuable interpretive aid and a safe guide to the constitutional provision's proper interpretation, and will not be disregarded unless it clearly appears that it is erroneous and unauthorized. Similarly, the fact that for many years a certain construction has been assumed to apply to a constitutional provision is of important force in determining its meaning.

> An important application of the principle of acquiescence as fixing the interpretation of a constitution is found in reference to the exercise of powers. The general rule is that the exercise of powers and general acquiescence therein for a long period of years, especially if commencing with the organization of the government, may be treated as fixing the construction of the Constitution and as amounting to a contemporary and practical exposition of it, and may be sufficient to demonstrate that powers conferred by a statute are not inconsistent with the provisions of the fundamental law.

AMERICAN JURISPRUDENCE, Constitutional Law § 86 (2007) (footnotes omitted).

> The principle of contemporaneous construction may be applied to the construction given by the legislature to the constitutional provisions dealing with legislative powers and procedure. Though not conclusive, such interpretation is generally conceded as having great weight or persuasive significance. The legislative history and the contemporaneous construction of a constitutional provision by the legislature that has been continued and followed for a long time are valuable aids as to its proper interpretation, are entitled to great weight and careful consideration when courts interpret the provision, are presumed to be correct, and should not be departed from unless manifestly erroneous.

AMERICAN JURISPRUDENCE, Constitutional Law § 87 (citing ***State ex rel. Gladden v. Lonergan***, 201 Or 163, 269 P2d 491 (1954) (footnotes omitted).

The rule of contemporaneous construction applies here to the complete acquiescence by potential opponents of the initiative in 1908, understanding expressed by dozens of successive legislative sessions, and conduct of those who became defendants to enforcement actions. The strict limits on campaign contributions by candidates were never challenged as inconsistent with the Oregon Constitution--even at the time of their enactment. In fact, no one printed a statement in opposition to the Corrupt Practices Act in the *Measure Pamphlet (1908)*.[27]

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27. Clearly, partisans knew about and used the low-cost space in the (continued...)

In addition to the contemporaneous absence of an argument of constitutional infirmity, successive legislatures continued to make modest changes to these political contribution and expenditure limits by increasing the spending caps, which remained in effect for over 60 years, until repealed by the Oregon Legislature in 1971. Laws 1971, c 749 § 92. The cases reveal several instances of enforcement or attempted enforcement of the campaign finance limitations, with no defendant raising any constitutional infirmity. One action was brought between candidates for the office of Attorney General, ***Thornton v. Johnson***, 253 Or 342, 453 P2d 178 (1969). Others were accused of violating its campaign reporting provisions. ***Nickerson v. Mecklem et al.***, 169 Or 270, 126 P2d 1095 (1942). Others were accused of exceeding the expenditure limits. ***In re Tom McCall***, 33 Opinions Attorney General 75 (1996). Other cases show that the provisions limiting contributions and expenditures were

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27.(...continued)

Measure Pamphlet to great advantage. A glance at the *Measure Pamphlet (1908)* shows scores of pages of argument pro and con (with pictures of prominent advocates) for other measures on the same ballot, so the opponents of the Corrupt Practices Act had an opportunity to make an argument of unconstitutionality at that time in an effort to dissuade voters.

considered valid and provided the basis for jury verdicts involving related issues. ***Printing Industry of Portland v. Banks***, 150 Or 554, 46 P2d 596 (1935).

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

The above arguments show that the holding of ***Vannatta*** does not apply to the limits in Measure 47. We also argue that ***Vannatta*** is based on an erroneous survey of history. We further argue that ***Vannatta*** is but one in a series of Oregon Supreme Court decisions involving Article I, Section 8, since ***Robertson***, which are not consistent.

The essential difference between (1)the accepted United States Supreme Court analysis of free speech under the First Amendment (2) the ***Robertson*** analysis of free speech under Article I, Section 8, is that the First Amendment cases recognize that restrictions on speech can be justified by either important or compelling state interests. The ***Robertson*** approach (applied in ***Vannatta***, in any event) invalidates restrictions on speech, regardless of the justifications offered. But other cases invoking ***Robertson*** have upheld restrictions on speech due to the other interests served. The interests served by the limits in Measure 47 are set forth in Section (1) of Measure 47.

Several cases illustrate that the Oregon Supreme Court has allowed justification of limitations on speech by the harms that flow from that speech. According to Judge Jack Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, OREGON LAW REVIEW Winter 2000, pp. 851-52 (footnotes omitted):

The [Oregon Supreme Court] also has shown occasional discomfort with the results that would be dictated by the strict application of the ***Robertson*** analysis. As a result, on occasion, the court has found it necessary to create exceptions or to modify the analysis. ***In re Fadeley*** is perhaps the most obvious example of the court's creation of an exception. At issue in that case was the constitutionality of various judicial canons that prohibit a judge from personally soliciting campaign contributions for his or her election candidacy. Oregon Supreme Court Justice Edward Fadeley admitted that he had violated the canons but argued that the canons violated his right to free speech guaranteed by article I, section 8. The canons undeniably regulated speech. Thus, under ***Robertson***, they should have been unconstitutional unless wholly contained within a well-established historical exception. But the court held otherwise.

The court certainly began its opinion in ***Robertson*** fashion: "This court has repeatedly held that the provision means what it says: although certain harmful effects of speech may be forbidden, restrictions aimed not at the harm but at the content of the speech itself normally are impermissible." But then it took an abrupt turn away from its precedent, commenting that "[n]ot even article I, section 8, is absolute--there are exceptions to its sweep." One such exception, the court ultimately held, was occasioned by the qualifying effect of a competing constitutional provision that authorized the Oregon Supreme Court to discipline judges for violating rules of judicial conduct. In any event, the court added, sometimes the right to speak, write, or print freely on any subject must be balanced against larger public interests, as in the case of the public interest in regulating certain professions, such as judges. The decision is startlingly inconsistent with ***Robertson*** and its conceptual underpinnings as Justice Linde had articulated them.

An example of the court's modification of the Robertson analysis can be found in ***State v. Stoneman***. At issue in that case was the constitutionality of a state statute that outlawed the purchase or possession of child pornography. [FN245] By its terms, the statute was directed at free expression; the content of books, photos, or films determined the extent to which their purchase or possession would give rise to criminal liability. Under the uncompromising analysis described in ***Robertson***, the statute would be unconstitutional unless it was wholly contained within a well-established historical exception. Of course, the court's prior historical exception cases--particularly ***Henry***--suggest that the court was not likely to find an exception applicable to the child pornography statute. Thus, it would be expected that the court would have found the statute unconstitutional.

But that is neither the analysis that the court applied nor the result that it reached. As in ***Fadeley***, the court began its opinion by invoking ***Robertson*** and

> proclaiming "the breadth of our state's constitutional guarantee of free expression." The court then assumed that the statute proscribed certain forms of expression and addressed whether it was wholly contained within a well-established historical exception. With a citation to ***Henry***, the court quickly concluded that it was not. The court did not stop there, however.
>
> At that point, the court recanted its assumption that the statute was directed at speech. The real focus of the statute, the court held, was the prevention of harm to children. The fact that the statute did not explicitly say that proved no impediment to the court's conclusion. The production of child pornography, the court reasoned, "necessarily involves harm to children." Therefore, by prohibiting commerce in such material, the legislature implicitly had set its sights on harmful effects, not speech. That, of course, is a substantial modification of the original ***Robertson*** analysis, the very heart of which was the principle that, to avoid the broad protective sweep of article I, section 8, legislatures were required explicitly to focus on harmful effects, not speech. Under ***Stoneman***, the focus on harmful effects need not be explicit; it may be inferred. That is not much different from the United States Supreme Court's decision in ***Brandenburg***, the criticism of which--ironically--gave birth to the analysis adopted in ***Robertson*** in the first place.

In ***Stoneman***, *supra*, the restriction on pornography was a pure restriction on speech based on its content. But the Court found it valid, because that restriction was intended to prevent harm to children, even though the statute made no explicit reference to such harm. Likewise, even if limits on political campaign contributions and expenditures were pure restrictions on speech based on its content, they are justified by preventing the harm that unlimited political spending imposes upon democracy, as expressly set forth in the text of Measure 47 itself.

Other legal scholars have questioned the validity of the ***Robertson*** analysis. See, e.g., Long, *Free Speech in Oregon: A Framework under Fire*, OREGON STATE BAR BULLETIN (October 2003); West, *Arrested Development: An Analysis of the Oregon Supreme Court's Free Speech Jurisprudence in the Post-Linde Years*, 2000 ALBANY LAW REVIEW 1237.

IV. 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: April 27, 2007

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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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