IN THE COURT OF APPEALS OF THE STATE OF OREGON

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

Plaintiffs-Appellants Cross-Respondents

v.

BILL BRADBURY, Secretary of State of the State of Oregon, HARDY MYERS, Attorney General of the State of Oregon,

Defendants-Respondents Cross-Respondents

and

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

Intervenors-Respondents Cross-Appellants

No. A137397

Marion County Circuit Court Case No. 06C-22473

OPENING BRIEF OF HORTON PLAINTIFFS

AND

EXCERPTS OF RECORD

Appeal from the Judgment of the Circuit Court
for Marion County

Honorable Mary Mertens James, Judge

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May 2008

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I. STATEMENT OF THE CASE.

A. NATURE OF THE ACTION.

This is a civil action brought under election law statutes and the Declaratory Judgment Act, seeking, *inter alia*, (1) a declaration that Section (9)(f) of Measure 47 (2006) is unconstitutional and (2) an order to Defendants to implement and enforce the remaining provisions of Measure 47.

B. NATURE OF THE JUDGMENT.

The trial court entered a general judgment after granting defendants' motion for summary judgment and denying cross-motions for summary judgment. ER 48.

C. JURISDICTION.

Plaintiffs-Appellants filed separate notices of appeal in the Supreme Court and this Court, alleging jurisdiction under ORS 19.255(1) and ORS 250.044(5). The Supreme Court initially accepted jurisdiction but later dismissed without opinion.

D. DATE OF JUDGMENT.

Judgment was entered on October 31, 2007. ER 48. This appeal was filed on November 19, 2008, within 30 days of entry of judgment and is timely.

E. QUESTIONS PRESENTED.

1. Under Oregon Constitution Article IV, § 4(d), may the operation of a statute be made contingent upon the outcome of a conceptually possible, but presently unanticipated election, rather than an actual scheduled election?

2. Under Oregon Constitution Article IV, § 4(d), may the operation of a statute be suspended and made contingent upon a "finding" made by an unspecified judicial officer in some potential litigation at an unknown time and involving litigants who do not refer to (or necessarily know of) the existence of the dormant statute? These first two questions are of first impression.

3. Will the Court reconsider the conclusion about the meaning of Oregon Constitution, Article II, § 8, reached in ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997) [hereinafter ***Vannatta***], in view of (1) undisputed, newly available primary source material on the meaning of "election" and "campaign" at the time of the adoption of the Oregon Constitution which contradicts the sole source (WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)) used by the Court for its conclusions about the meaning of these words, and (2) new information about context, including the fact that states, such as Texas, with constitutions containing close analogs to the Oregon Constitution (both Article I, § 8 and Article II, § 8) had imposed limits on political contributions before 1857?

F. SUMMARY OF ARGUMENT.

First, the Horton Plaintiffs argue that § (9)(f) of Measure 47 of 2006 is invalid under the Oregon Constitution because the contingencies necessary for operation of the statute (outcome of some unscheduled, but hoped-for, election upon an amendment to the Oregon Constitution, or alternatively, a future "finding") are too uncertain or too vaguely described. Section (9)(f) cannot itself compel the operation of the long-dormant statute by surprise, and therefore it is thus either

unconstitutional itself, or mere surplusage, and cannot suspend the operation of the remainder of Measure 47.

Second, and in the alternative, we urge reconsideration of ***Vannatta***'s historical analysis in light of new research which more accurately captures the use of language in the decades prior to adoption of the Oregon Constitution than does the WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) [WEBSTER'S (1828)]. This new information includes a wealth of new context, including statutes banning campaign contributions in states with constitutions containing clauses nearly identical to Article I, § 8 and Article II, § 8, and materials known to Convention delegates. We argue:

1. Measure 47's limits on campaign contributions[1] are authorized by Article II, § 8, regardless of Article I, § 8.[2]

2. Such limits are within the "historical exception" to restrictions upon free speech [***State v. Robertson***, 293 Or 402, 412, 649 P2d 569 (1982)], regardless of the interpretation of Article II, § 8.

3. The doctrine of contemporaneous construction shows that the validity of limits on political contributions in Oregon was recognized by early lawmakers (and voters) and not challenged for 120 prior to ***Vannatta.***

In addition to these 3 independent reasons, based on new historical information, the Horton Plaintiffs join and adopt the *Opening Brief* of the Hazell Plaintiffs and the *Amici Brief* of Fair Elections Oregon and Elizabeth Trojan, which

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1. The Circuit Court used the abbreviation "CC&E" to refer to political "campaign contributions and expenditures," even thought Measure 47 contains no aggregate limits on expenditures by any candidate.

2. As used herein "Article," refers to an Article of the Oregon Constitution, unless otherwise stated.

show that the Circuit Court misinterpreted § (9)(f), that Measure 47 is significantly different from the measure struck down in ***Vannatta***, and that the supreme courts of other states with free speech clauses identical, or nearly identical, to Article I, Section 8, have not invalidated limits on campaign contributions, even though those courts also employ a doctrine of originalism in interpreting their constitutions.

II. FACTS.

In the November 6, 2006, voters in Oregon passed Measure 47. ER 11-19. A companion constitutional amendment, Measure 46, failed. Letter from John Lindback; ER 20. Measure 47 contains, *inter alia*, limitations of dollar contributions to state candidate campaigns and new provisions on reporting and disclosure of contributions and expenditures.

In full, § (9)(f) of Measure 47 states:

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

ER 18. The state Defendants declined to enforce any of Measure 47 (apart from their interpretation of § (9)(f) itself). ER 20. The Horton Plaintiffs sought a declaration that § (9)(f) was invalid and hence could not preclude implementation of the remainder of Measure 47. Complaint, ER 5-8. We also joined or jointly filed with the Hazell Plaintiffs a series of motions and memoranda. OJIN Nos. 22, 23, 31, 34, 36, 37, 39; examples at: ER 23, 25, 35.

III. FIRST ASSIGNMENT OF ERROR: THE COURT ERRED IN DENYING HORTON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN GRANTING DEFENDANTS' MOTION.

A. RULING OF THE TRIAL COURT.

The trial court denied the Horton Plaintiffs' Motion for Summary Judgment and granted summary judgment in favor of Defendants by Letter Opinion. ER 41-47. The trial court concluded as a matter of law that CC&Es are currently not permitted under the Oregon Constitution [Letter Opinion, p. 3; ER 43]; then concluded that, under ***State v. Hecker***, 109 Or 520 (1923), § (9)(f) "must be sustained under that directly controlling authority." Letter Opinion, p. 5; ER 45.[3]

B. PRESERVATION OF ERROR.

Horton Plaintiffs preserved error by (1) filing detailed legal memoranda in support of their positions and in response and reply to the arguments raised by other parties [OJIN Nos. 22, 31, 32, 36] and (2) orally arguing in support of these positions at the July 13, 2007, hearing. ER 36.

C. STANDARD OF REVIEW UPON APPEAL.

There are no material facts in dispute. The court reviews for an error of law.

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3. The Letter Opinion misstates a contention of the Horton Plaintiffs: "The Horton plaintiffs and intervenors argue that section (9)(f) must be construed as an attempt to alter the effective date, not just the operative effect, of Measure 47, making it constitutionally impermissible." Letter Opinion, p. 4, ER 44. Only Intervenors urged that all of Measure 47 failed for violation of Oregon Constitution, Article IV, § 21. Horton Plaintiffs argued against that proposition. Horton Plaintiffs' argument is based on Article IV, § 4(d), and not on any distinction between "effective" and "operative." OJIN No. 31.

D. DISCUSSION: § (9)(f) IS INVALID UNDER ARTICLE IV, § 4(d).

Statutes may properly be passed and remain dormant and unenforceable until the occurrence of an actual expected event, but § (9)(f) purports to trigger the effectiveness of some parts of Measure 47 upon vague, improbable contingencies. This violates Article IV, § 4(d), of the Oregon Constitution:

> Notwithstanding section 1, Article XVII of this Constitution, an initiative or referendum measure becomes effective 30 days after the day on which it is enacted or approved by a majority of the votes cast thereon. A referendum ordered by petition on a part of an Act does not delay the remainder of the Act from becoming effective.

Consequently, § (9)(f) is invalid and must be severed from the rest of Measure 47 (§ (11) of Measure 47).

Or, § (9)(f) is mere surplusage, as explained in greater detail.

1. A Hypothetically Conceivable Election Is Not "Anticipated".

State v. Hecker, 109 Or 520, 221 P 808 (1923) concluded that a statute with a dormancy clause somewhat similar to § (9)(f) was suspended and not in conflict with the existing Oregon Constitution while awaiting the outcome of a scheduled election on a proposed constitutional amendment. Assuming ***Hecker*** is good law (and not overruled by the later decision in ***Cameron v. Smith***, 123 Or 501, 263 P2d 946 (1928), which holds that currently unconstitutional statutes are void *ab initio*, without reference to the ***Hecker*** facts), the rule is that the effective date of a statute may be suspended until a date certain or be made contingent upon an anticipated event, such as the outcome of a scheduled election. In this case, had the companion constitutional amendment, Measure 46 on the November 2006 ballot, passed,

Hecker would have compelled the conclusion that Measure 47 did not conflict with the Constitution, as it would have become effective contemporaneously with the amendment. However, ***Hecker*** offers no guidance when the triggering event does not occur. Just because § (9)(f) would have been constitutionally firm had Measure 46 passed, does not mean that § (9)(f) remains constitutional as drafted. Thus, the Circuit Court erred in relying upon ***Hecker***.

These rules of constitutional interpretation are consistently applied in other jurisdictions as well. In sum:

> It is the general rule in this country that a legislature has power to enact a statute not authorized by the existing constitution of that State when the statute is passed in anticipation of an amendment to its constitution authorizing it or which provides that it shall take effect upon the adoption of an amendment to its constitution specifically authorizing and validating such statute.

Henson v. Georgia Indus. Realty Co., 220 Ga 857, 862, 142 SE2d 219, 224 (1965). Section (9)(f) fails both prongs of this formula. It no longer can be said to "anticipate" an actual election on a constitutional amendment, nor does it provide that it "shall take effect upon the adoption of an * * * amendment specifically authorizing and validating" the terms of Measure 47.

Here, the constitutional amendment was defeated at the anticipated election. Can a law be left dormant awaiting a favorable outcome of some future election that is conceptually possible but not actually foreseen or expected? A close look at ***Hecker***, *supra*, shows the close relationship required for a dormant statute to be said to be "in anticipation of" an election upon a constitutional amendment. Voters abolished the death penalty in 1914 by amending the Oregon Constitution. In 1920,

the Legislature (1) enacted a law providing for the death penalty and related procedures in April and expressly suspended its operative effect pending the outcome of a vote on the Constitutional amendment re-establishing capital punishment; and (2) referred such an amendment for a May election. Voters approved the amendment. The Supreme Court upheld the constitutionality of the Act and the sequence of legislative conduct.

In all other Oregon cases, the suspended statutes and the elections upon the proposed Constitutional amendments which could trigger the operative effect of the statutes have been close in time--either the next regularly scheduled election in the same year or an election specially called--and thus the elections were clearly anticipated when the statutes were passed. ***Libby v. Olcott***, 66 Or 124, 134 P 13 (1913), (1913 Legislature passed a number of laws and authorized a special election for November 1913, should any referral be taken); ***State v. Rathie***, 101 Or 339, 199 P 169, 200 P 790 (1921) (statute providing for death penalty for murder in the first degree passed in January 1920 contingent upon outcome of election called for May 20, 1920, on a constitutional amendment re-authorizing death penalty); ***Marr v. Fisher***, 182 Or 383, 187 P2d 966 (1947) (Legislature passed statutes in April 1947 relating to income tax exemptions contingent upon outcome of a constitutional amendment authorizing a sales tax referred by same session for election to held in November 1947). In each case the subject matter of the suspended statutes and the proposed constitutional amendments (and the short time interval between passage of the suspended statute and the anticipated election) assured compliance with the

fundamental requirement that voters must expressly or implicitly endorse the earlier statutory terms which remain contingent upon the outcome of the vote on the Constitutional amendment. ***Northern Wasco County PUD***, *supra.*

Courts in other jurisdictions have upheld the practice of suspending statutes pending approval of a related constitutional amendment at a actually scheduled election.[4]Many reported cases upheld statutes which were suspended until a specific event.[5]

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4. In ***Alabama's Freight Co. v. Hunt***, 29 Ariz 419, 422-23, 242 P 658 (1926) (relying upon ***Hecker***), the court approved the constitutionality of a 1933 workers compensation statute contingent on passage of constitutional amendment referred to voters in the same legislative act and to be voted on in November of the same year. In widely cited cases, ***Re Opinions of Justices***, 227 Ala 291, 149 So 776 (1933) (income tax enabling act contingent upon constitutional amendment) and ***Re Opinions of Justices***, 227 Ala 296, 149 So 781 (1933) (warrant enabling act and constitutional amendment regarding the state debt), the Alabama Supreme Court held that an enabling act may properly be passed in anticipation of the outcome of a scheduled vote upon a constitutional amendment. See also, ***Henson v. Georgia Indust. Realty Co.***, *supra* (statutes adopted by 1952 Legislature relating to special laws contingent upon outcome of vote upon referral in November 1953 election on constitutional amendment); ***Application of Okla. Indus. Fin. Auth***., 360 P2d 720 (Okla 1961) (July 1959 enabling legislation to create State Industrial Finance Authority contingent upon outcome of July 1960 vote on constitutional amendment referred by same legislative session); ***Application of Okla. Indus. Fin. Auth***., 360 P2d 720 (Okla 1961) (specific enabling legislation contingent upon constitutional amendment referred for vote of electors at same legislative session).

5. The following cases upheld statutes which were suspended until a specific event:

Druggan v. Anderson, 269 US 36, 46 SCt 14, 70 LEd 151 (1925) (Congress passed National Prohibition Act in 1916 to go into effect after the 18th Amendment went into effect on January 16, 1917); ***Neisel v. Moran***, 80 Fla 98, 85 So 346 (1919) (statutes adopted December 1918 on alcohol sales to become effective on the same date that adopted Constitutional Amendment was effective, January 1, 1919); ***Fry v. Rosen***, 207 Ind 409, 189 NE 375 (1934) (state laws adopted and suspended in anticipation of liberalization of federal prohibition on

(continued...)

The cases, including ***Hecker***, are thus each and all clearly distinguishable on the facts from the situation here. There is no "anticipated" election date set for any constitutional amendment, only a hope that some day a constitutional amendment may be offered to voters. Wishing for something to happen and preparing for an outcome are not synonymous. Here, the anticipated[6] event was the outcome of the 2006 election upon the constitutional amendment, Measure 46. Now a series of contingencies must all occur before any election could even be held: a majority vote of the legislature to refer an amendment or a successful signature drive on an initiated constitutional amendment.

2. <u>Section (9)(f) Purports to Make Measure 47 Self-Enacting Upon Adoption of Any Amendment Relating To CC&E Limitations.</u>

Statutory provisions that are unconstitutional when adopted are *void ab initio* and not revived by subsequent amendment to the constitution which might merely permit re-enactment of the invalid statute. ***Smith v. Cameron***, *supra*, ***Northern Wasco County People's Utility Dist. v. Wasco County***, 210 Or 1, 12-13, 305 P2d 766 (1957) [hereinafter ***Northern Wasco PUD***], apparently clarifies ***Smith v. Cameron*** by holding that a subsequent constitutional amendment, *if sufficiently*

5.(...continued)
sale of alcohol); ***State ex rel Woodahl v. Straub***, 164 Mont 141, 520 P2d 766, *cert denied*, 419 US 845, 95 SCt 79, 42 LEd2d 73 (1974) (statute passed and suspended until effective date of constitutional amendment).

6. MERRIAM-WEBSTER ONLINE DICTIONARY (10TH ED 2008) offers the following definitions of "anticipate": to give advance thought, discussion, or treatment to; * * * foresee and deal with in advance: FORESTALL; * * * to act before (another) often so as to check or counter; to look forward to as certain: EXPECT.

specific, may revive an unconstitutional statute.

> [A] Constitutional provision may ratify and validate a previously enacted statute, but it will not so operate unless an intention to do so is clearly manifested.

Id., quoting 16 CJS, Constitutional Law, § 45. The later voters must clearly evidence their intent to revive. Thus, a section of Measure 47 cannot be the self-executing mechanism for its own animation without later voter approval. Yet, § (9)(f) purports to become effective, if and when the Constitution is amended to allow *any* "limitations on political campaign contributions or expenditures," not the limits contained in Measure 47.

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

Thus "such limitations" refers to the referenced "limitations on political contributions or expenditures" in the third clause of the same sentence. That first reference to limitations is not modified by any word such as, "these" or "herein." "Such limitations" in the last clause thus refers back to *any* and unspecified limitations, not the particular limitations set out in Measure 47. This contingency clause could spring all of Measure 47 into effect if the Oregon Constitution were later amended to merely permit legislative adoption of any CC&E limitations.

Nor can § (9)(f) be read to mean that it shall become effective "upon the adoption of an amendment * * * *specifically authorizing and validating* such statute" (emphasis added). ***Henson v. Georgia Indus. Realty Co.***, *supra*; ***Northern Wasco PUD***, *supra*. That would "add" words to the actual text in violation of ORS

174.010 to "not to insert what has been omitted," and ***PGE v. Bureau of Labor and Industries***, 317 Or 606, 610-12, 859 P2d 1143 (1993) ("***PGE v. BOLI***").

Leaving dormant statutes hovering in limbo to take effect with multiple provisions upon the future adoption of any constitutional amendment on the topic of either political contributions or expenditures (or both) would result in unpredictable and unintended consequences. The electorate could pass a constitutional amendment and unintentionally enable a law unknown to, or even opposed by, those later voters. In ***Banaz v. Smith,*** 133 Cal 102, 104, 65 P 309 (1901), the California Supreme Court stated the policy reasons against unintentional relief from dormancy:

> That would give the amendment the effect of enacting laws instead of merely authorizing the legislature to do so, and it would be to enact a law to which no reference was made, and which the people in adopting the amendment could not have had in mind. Such is not the ordinary function of a constitutional provision, and such effect will not be given to it unless it is expressly so provided.

Cited and quoted with approval, ***State ex rel Woodahl v. District Court of Second Judicial District***, 162 Mont 283, 294-5, 511 P2d 318, 324 (1973); ***Fellows v. Schultz***, 81 NM 496, 501, 469 P2d 141, 146 (1970). In Oregon, enacting a statute *sub silentio*, through constitutional amendment without reference to the earlier dormant legislation would be contrary to what have been described as the spirit of "procedural protections" of Article IV, § 1(2).

3. A "Finding" Cannot Be A Valid Contingency.

In the alternative to approval of some Constitutional amendment, § (9)(f) provides that it shall take effect "at the time that the Oregon Constitution is found to

allow * * * such limitations." This language is too vague to be constitutionally valid. If "found" means something other than the usual course of court review for constitutionality, we cannot tell what that meaning is.

The trial court's colloquy during oral argument with Hazell Plaintiffs' counsel shows the flaw in this the portion of § (9)(f). Counsel argued that only through the trial court's findings upon each provision of Measure 47 *in this instant litigation* could "the Oregon Constitution [be] found to allow" a limitation set out in Measure 47. The trial judge disagreed, positing that the necessary finding could potentially be made by any court in a case at any time involving entirely different parties:

> Mr. Meek: And without litigation [in the instant case], how would there be a finding that the Oregon constitution allows the limitations?
>
> The Court: Well, it may not be litigation on this particular case. It may be litigation on another case involving other limitations.

TR July 13, 2007 Hearing, at 61:4-9. ER 38. The Assistant Attorney General, representing Defendants, agreed that a finding in another case might inadvertently trigger the operation of Measure 47:

> Mr. Leith: But another possible eventuality is that, as the Court posits, another limitation, perhaps a local campaign contribution and expenditure limitation might be adopted without an operativeness provision and might be challenged and it might be appealed to the Supreme Court, and the Supreme Court might say, you know, we got it wrong in *Vannatta* and in *Meyer*.

TR July 13, 2007 Hearing, at 70:25-71:1-5. ER 39-40.

While the Oregon Supreme Court could indeed revisit ***Vannatta***, doing so in some unrelated proceeding could not effectuate Measure 47. Letting unrelated court proceedings trigger a dormant statute would be contrary to the "procedural

protections" of Article IV, § 1(2). There is absolutely no case law to support the idea that a dormant law could spring into effect, taking future electors, litigants and judicial officers unawares. The Oregon Constitution does not allow statutes to become effective by accident or inadvertence.

4. All of Section (9)(f) Must Be Severed From Measure 47.

If any part of § (9)(f) is unconstitutional, then it must be so declared, and all of § (9)(f) must then be severed pursuant to the severability instructions in § (11) of Measure 47; pursuant to ORS 174.040; and pursuant to Oregon's common law regarding severability. If § (9)(f) is thus severed, the remainder of Measure 47 is not in the state of limbo contemplated by the Circuit Court (Letter Opinion at 4, ER 44), and Defendants are obligated to implement and enforce it.

The Letter Opinion's ruling on the constitutionality of § (9)(f) appears to be internally contradictory. First, it assumes that § (9)(f) is in effect for the purpose of determining "that Measure 47, in its entirety, presently is not operative" [ER 47]. One part of a statute cannot be operative, if the statute "in its entirety, presently is not operative."

Second, the Letter Opinion does not substantively resolve the application of ***Hecker***, which would conclude (as shown above) that a future "finding" cannot be a valid triggering contingency. Instead, the Letter Opinion simply purports to sever 5 words from § (9)(f) ("is found to allow, or") in order to preserve the constitutionality of § (9)(f). This exercise of "severance" violates § (11) of Measure

47, ORS 174.040, and Oregon's common law regarding severability.[7]

a. Severance of the 5 words alone violates Oregon law on severability.

(1) Parts of a statute can be severed, only after a finding of unconstitutionality.

The Letter Opinion purports to sever 5 words, without first finding that any part of § (9)(f) is unconstitutional.[8] This is an unlawful application of severance.

> ORS 174.040 and this court's cases thus demonstrate that this court considers whether a part of a statute should be severed **only when part of a statute is held to be unconstitutional** and the court therefore must

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7. The Letter Opinion adopted this approach, although it was not suggested by any party. The ruling in embodied in this sentence fragment: "I need not decide whether the measure's operative effect can be made to depend on a judicial finding, for even if this contingency is indefensible constitutionally [*sic*]." Letter Opinion (p. 7).

8. It is also Defendants' claim that the Circuit Court did not find <u>any part</u> of Measure 47 to be unconstitutional.

> Thus, the constitutional challenges to Measure 47 failed in this case. Plaintiffs have incorrectly filed notices of appeal directly in this court, based on the mistaken premise that the circuit court ruled Measure 47 unconstitutional in part.
>
> * * *
>
> The circuit court rejected each of the constitutional challenges to Measure 47, and instead sustained the state's position that the measure is in abeyance and therefore shielded from constitutional attack.

Defendants-Respondents/Cross Respondents' Reply to Plaintiffs-Appellants/ Cross-Respondents' Response to Order to Show Cause Regarding Jurisdiction (December 13, 2007), pp. 8, 9 (Nos. S055474 and S055477).

This assertion by Defendants to the Oregon Supreme Court prevailed, as that Court dismissed the appeals filed there from the instant decision of the Circuit Court (March 12, 2008).

> determine whether that part of the statute can be severed and the remaining parts of the statute saved.

State v. Dilts, 337 Or 645, 653, 103 P3d 95 (2004) (emphasis added)

(2) Courts are to follow the severability terms set forth in the statute at issue.

The 5-word phrase cannot be "severed," because § (11) directs that severability applies to "Each section, subsection, and subdivision thereof." These terms refer to the formal construction of the Measure itself, not grammatical phrases or words. Section 9(f) is a "subsection" of § 9, and § (9)(f) is itself without subdivisions. When a statute specifies its own severability provisions, those take precedence over ORS 174.040 and Oregon's common law.

> Whether an invalid provision is severable from the enactment of which it is a part is a question of legislative intent. ***Fullerton v. Lamm***, 177 Or 655, 697, 165 P2d 63 (1946). Thus, if there is an explicit severability clause, our role is to construe it as we would any other enactment, that is to say, in a manner that best reflects the intentions of the voters or the legislative entity that enacted it.

Advocates for Effective Regulation v. City of Eugene, 176 OrApp 370, 376, 32 P3d 228 (2001).[9] Thus, § (11) requires that the entirety of § (9)(f) be severed, whatever

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9. In ***Advocates***, for example, the severability clause at issue called for severance of even a single word at a time.

> "If any section, subsection, paragraph, phrase or word (hereafter the parts) of this Act shall be held to be unconstitutional, void, or illegal, either on its face or as applied, this shall not affect the applicability, constitutionality, or legality of any other parts hereof; and to that end, the parts of the Act are intended to be severable."

Instead, § (11) requires severance on the level of sections, subsections, or subdivisions thereof. What the Circuit Court severed was merely 5 words from §

(continued...)

the reason for finding some phrase it contains to be repugnant. The trial court erred in failing to implement § (11). ***PGE v. BOLI***, *supra*; ORS 174.010.

b. Severance of the 5 words alone violates Oregon law on statutory construction.

Selectively striking the 5 words ignores (1) the statutory mandate "not to insert what has been omitted, or to omit what has been inserted." ORS 174.010, and (2) principles of statutory construction. ***PGE v. BOLI***, *supra*. There is no basis for selective re-writing of the terms of Measure 47. While a statute must be construed wherever possible to avoid unconstitutionality [***Easton v. Hurita***, 290 Or 689, 694, 625 P2d 1290, 1292 (1981)], the words must still be construed, not merely eliminated or changed to achieve a constitutional meaning. ***Bernstein Bros., Inc. v. Department of Revenue***, 294 Or 614, 621, 661 P2d 337, 541 (1983).

IV. SECOND ASSIGNMENT OF ERROR: THE COURT ERRED IN DENYING HAZELL PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION.

A. RULING OF THE TRIAL COURT.

The trial court granted summary judgment to Defendants and denied Hazell Plaintiffs' motion, which Horton Plaintiffs had joined. ER 41-47. The trial court erred in concluding that the contribution limits contained in Measure 47 are prohibited by the Oregon Constitution. Letter Opinion, p. 3; ER 47.

9.(...continued)
(9)(f), but those 5 words did not constitute a section, subsection, or subdivision thereof.

B. PRESERVATION OF ERROR.

Horton Plaintiffs preserved error by preparing portions of memoranda filed with the court, and joining or jointly filing motions and memoranda with the Hazell Plaintiffs, all urging that the ***Vannatta*** decision be reconsidered. OJIN Nos. 22, 23, 31, 34, 36, 37, 39; examples at: ER 23, 25, 35.

C. STANDARD OF REVIEW UPON APPEAL.

There are no material facts in dispute. The court reviews for an error of law.

D. DISCUSSION: CORRECTLY APPLIED, AN ORIGINALIST ANALYSIS WOULD UPHOLD MEASURE 47'S LIMITS.

The Oregon Supreme Court employs an "originalist" approach to interpreting the Oregon Constitution. ***Priest v. Pearce,*** 314 Or 411, 840 P2d 65, 67-69 (1992). The text of the Constitution must be interpreted in light of (1) its specific wording, (2) prior case law, and (3) the historical circumstances of its creation. ***Stranahan v. Fred Meyer***, 331 Or 38, 54, 11 P3d 228 (2000); ***Vannatta***, *supra*, 324 Or at 530, 931 P2d at 780.

> [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 * * *.

Stranahan v. Fred Meyer, *supra*, 331 Or at 54, 11 P3d 228.

The ***Vannatta*** Court held that the word "elections" in Article II, § 8, had a mid-19th Century meaning consisting of events on election day. The Court

conceded that "elections" has later come to mean an entire process.

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

Vannatta, 324 Or at 530, 931 P2d at 780.

> It thus appears to us that, in order to keep faith with the ideas imbedded in Article II, section 8, we should construe "elections" to refer to those events immediately associated with the act of selecting a particular candidate or deciding whether to adopt or reject an initiated or referred measure. * * *
>
> The direction to enact laws prescribing the manner of conducting elections, by contrast, appears to be concerned with the mechanics of the elections themselves, i.e., with questions of where and how many polling places there will be, how they shall be operated, who may be present in them to ensure their proper operation, and the like.

Vannatta, 324 Or at 531-32, 931 P2d at 781. The Court's analysis relied solely upon WEBSTER'S (1828).[10] ***Vannatta*** did not refer to 19th century law texts, which suggest the word "election" referred to the entire process of selection, not merely to events a specific day.[11] We now provide many early (1835-55)

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10. Undersigned counsel has reviewed the following briefs filed in ***Vannatta*****:** the opening briefs of Petitioners and Intervenors and Amici; Respondent's answering brief; and Petitioners' reply brief. She found no reference to any primary sources of language, other than case and statute references. No brief cited WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

11. References are found in ***Bowler v. Eisenhood***, 48 NW 136, 138 (SD 1891):

> Bouvier, in his LAW DICTIONARY, (volume 1, p. 519,) defines "election:" "Choice; selection; the selection of one man from amongst more, to discharge the duties in a state" * * *.

(continued...)

instances of the term "elections" used for the entire "electoral adventure."[12] We submit these offer compelling new information as to the meaning of the constitutional provisions under consideration in ***Vannatta***.

1. <u>"Election" Had Assumed Its Current Meaning Before 1857</u>.

Jory v. Martin, 153 Or 278, 289, 56 P2d 1093 (1936), noted that the proceedings of the Oregon Constitutional Convention were published in two leading newspapers, which informed a wide audience about the terms of the Constitution. By the same reasoning, a wide audience was familiar with the meanings of words used in newspapers and formal oratory, as well as popular tracts, treatises, novels, and 18th and 19th Century ephemera. Through these sources we can trace the actual evolution of the words "campaign" and "election" in the decades prior to adoption of the Oregon Constitution in 1858.

Let's review the process of linguistic change described in ***Vannatta*** at 530-31.

> The Secretary of State would have us construe "elections" to include *all* activities that occur during political *campaigns.* * * *. A present day dictionary defines "election" as "the act or process of choosing a person for office, position, or membership by voting." * * *. "Campaign" is defined as "a series of operations or efforts designed to influence the

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11.(...continued)
In ***State v. Meyer***, 1878 WL 5947, *2 (Ind 1878), Bouvier's LAW DICTIONARY is cited for:

> "Election" meaning, "Etymologically, election denotes choice, selection out of the number of those choosing." Thus, the election of a governor would be the choice of some individual from the body of the electors to perform the duties of governor.

12. The historical texts are all available free in dpwnloadable digital form from Google Books, http://books.google.com. Decl. of Linda Williams, OJIN No. 32.

> public to support a particular political candidate, ticket, or measure." *Id.* at 322. * * *.
>
> * * *
>
> However, the constitutional provision [Article II, section 8] that we construe here was proposed in 1857, not in 1996. A dictionary relevant to that time gives a more limited definition of the word "election": "The act of choosing a person to fill an office or employment * * *[.]" WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).
>
> The dictionary on which we rely has no definition of "campaign" that corresponds to the present-day use of that word as a description of the effort to obtain public office or to obtain the passage of an initiated or referred measure.The concept of that time closest to what we now term "campaigning" was "electioneering," which Noah Webster defined as "[t]he arts or practices used for securing the choice of one to office."WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). It thus appears that * * * the ideas of "electioneering" and "elections" were somewhat distinct at * * * the time that the Oregon Constitution was created.

Vannatta correctly recognized that a word must first be commonly used in order to come to identify a more complex entity. For example, the "White House" has gone from describing a specific building to mean the American President, staff and administration. This is synecdoche or metonymy in classic rhetoric.[13] Such shifts in meaning may be based on cognitive function, not merely poetic elision.[14] In reasoning that "election" had not expanded to mean "political campaign," the ***Vannatta*** opinion considered it significant that WEBSTER'S (1828) does not include political behavior in the definition of "campaign." ***Vannatta***, 324 Or at 529 and n15. The decision reasons, if the word "campaign" as we understand it was not

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13. "Sails" standing for entire ship, as in "sails in the sunset."

14. George Lakoff & Mark Johnson, METAPHORS WE LIVE BY (University of Chicago 1980), p. 36.

commonly used by 1857, the word "election" could not have expanded to include the "campaign" time period within its enlarged meaning by 1857.

In the following discussion we will show first that "campaign" has been used in America to refer to a protracted election struggle comparable to a military campaign since at least 1789 in the phrases "political campaign" and "electioneering campaign." Secondly, we supply examples where the need to modify a "campaign" as an"electioneering" or "political" campaign disappeared.[15] Third, we show that "election" came to be used alone in American vernacular to encompass the "electioneering" and "campaign" components by the 1830s.

Statesmen and popular writers for American audiences used "campaign" in a political sense long before WEBSTER'S (1828) was published. Gouverneur Morris (credited with drafting many sections of the United States Constitution), used the phrase "political campaign" in a letter dated 1789.[16] In 1813 Francis Scott Key wrote, "I have not seen nor heard of Ridgley [an acquaintance in Virginia] since his political campaign commenced."[17] In 1820 a satirical bi-weekly explained that "Mrs. Busybody" "has been much occupied and harassed during the last spring by

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15. This occurred in the same manner that it is no longer common usage to refer to a "color television" or "touchtone phone." The noun is widely understood to incorporate the attribute which was once necessary as a modifier.

16. "Monsieur de Lafayette is since returned from his political campaign in Auvergn, crowned with success." Jared Sparks, LIFE OF GOUVERNEUR MORRIS: WITH SELECTIONS FROM HIS CORRESPONDENCE, VOL II (Grey & Bowen 1832), p. 67.

17. Letter from Francis Scott Key to John Randolph, October 5, 1813: "I have not seen nor heard of Ridgley since his political campaign commenced. It closed yesterday and we have not yet heard how he has fared." Hugh A. Garland, LIFE OF JOHN RANDOLPH (Appleton 1851), p. 24.

the election campaign in New-York."[18]

In 1827 Henry Clay gave an address about Andrew Jackson's partisans, stating that "was the policy with which the political campaign was conducted in the Winter of 1824-25 by the forces of the General."[19]A biography of Elbridge Gerry (Madison's vice-president) published in 1829 noted that the "expectation of decrease of the energies of an election campaign was hardly to be justified."[20] Given these diverse examples of the word "campaign" used in a political sense by the 1820s, the absence of a definition for "political" campaign from WEBSTER'S (1828) is of little weight.

During debate on the floor of the House, representatives John Quincy Adams[21] and Charles Underwood of Kentucky both referred to an "electioneering campaign" in 1841. At issue was Adams's bill to appropriate $25,000 to President William Henry Harrison's widow. Concerning an allowance for postage for thousands of letters, Underwood asked, "are those but the expenses of the electioneering campaign?" Adams countered that the sum was not for Harrison's "electioneering campaign."[22] Also in 1841, James Buchanan said on the floor of

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18. Cornelius Tuttle, THE MICROSCOPE, No. 1, Vol. 1, Tuesday, March 21, 1820 (Maltby), p. 198.

19. Calvin Colton, THE LIFE OF HENRY CLAY (A.S. Barnes & Co. 1846) p. 359.

20. James Austin, THE LIFE OF ELBRIDGE GERRY (Wells & Lilly 1829), p. 328.

21. He was serving as a Representative from Massachusetts after his Presidency.

22. *Speech On the Bill to Appropriate $25,000 to Widow of the Late President of Mr Underwood delivered in the House of representatives, June 18, 1841*, NATIONAL INTELLIGENCER (1841), pp. 6-7.

the Senate, "I can truly say that, during the whole election campaign, I never saw one single resolution in favor of a national bank."[23]

In 1839, an essayist used the phrase "election campaign."[24] In 1843 a periodical writer used the phrase "political campaign" repeatedly in its thoroughly modern sense.[25] The following appeared in 1852: a memoir by a newspaperman describing "the last electioneering campaign" of Daniel Webster,[26] and the mention in ANNALS OF ALBANY[27] of a "penny paper, issued during the election campaign." An additional ten citations from a variety of American sources, including formal speeches, tracts, and literature for mass audiences published between 1826 and 1855 are in the *Hazell Plaintiffs' Appendix to Memorandum in Opposition,* filed March 30, 2007.[28] ER 26-27.

"Campaign" in its political sense also entered the language of tradespeople, as

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23. James Buchanan's *Speech on the National Bank, July 7, 1841*, reprinted R.G. Horton, LIFE AND PUBLIC SERVICES OF JAMES BUCHANAN (Derby & Jackson 1856), p. 322.

24. Robert Mayo, POLITICAL SKETCHES OF EIGHT YEARS IN WASHINGTON (multiple publishers 1839), p. 27.

25. "The Political campaign of 1840 called forth some most powerful and spirited from both political creeds, abounding in bold and stirring eloquence." J.M. Peck, *Traveler's Directory for Illinois*, METHODIST REVIEW QUARTERLY REVIEW (Lane & Sanford 1843), p. 406.

26. J. T. Buckingham, PERSONAL MEMOIRS AND RECOLLECTIONS OF EDITORIAL LIFE, Vol II, (Ticknor, Reed, Fields 1852) p. 123.

27. (Musell Albany 1852), p. 355,

28. Appendix to the Hazell Plaintiffs Memorandum Opposing Summary Judgment for Defendants and Intervenors and Hazell Plaintiffs Reply Memorandum Supporting Summary Judgment for Plaintiffs (March 30, 2007).

reported in judicial decisions. In ***Whitaker v. Carter***, 4 Ired 4, 1844 WL 992 *1 (NC 1844), the decision summarizes testimony about provisions for "two sacks of salt, and he intended to make him carry them all over Wake county on his electioneering campaign." In ***Wilson v. Davis***, 1843 WL 5088 *3 (Pa 1843), the court describes the defendants as "proprietors of a country newspaper on the eve of a political campaign; and they cast about for an editor * * *." In ***Hurley v. Van Wagner***, 28 Barb 109, NYSup (1858), the plaintiff sued to receive money promised for his work assisting the Republican party in 1856. He testified, "I thought, when I hired to him, that the work I was to do was to go with him in the political campaign and assist him in the campaign."

During this period before 1858, the modifier "political" or "electioneering" became unnecessary. For example, in 1841, the popular essayist Washington Irving wrote in a commentary on recent elections, "[E]very thing remains exactly in the same state it was before the last wordy campaign"[29] In a book published in 1854, Missouri Sen. Thomas Hart Benton refers to Andrew Jackson's (1828) race, noting "the silence of Mr. Calhoun during the campaign * * *."[30] A collection of partisan songs for election rallies in 1856 used the word "campaign" in the title: FREMONT AND DAYTON CAMPAIGN SONGSTER (Whitten & Towne 1856).

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29. *Letter XIV*, SALMAGUNDI; OR THE WHIM-WHAMS AND OPINIONS (Daly 1841), p. 239. Irving uses the phrase again in GEORGE WASHINGTON (Putnam 1859), p. 246, referring to Washington's views on "political campaigns" in the heading to *Ch XXIX*.

30. T.H. Benton, THIRTY YEARS' VIEW: OR, A HISTORY OF THE WORKING OF THE AMERICAN GOVERNMENT (Appleton 1854), p. 174.

The metonymic shift in the word "election" to stand for and include the process known as "campaigns" and "electioneering" had occurred by the late 1600s in Britain. During the reign of William III (1650-1702), laws were passed limiting election activities, and it was assumed that "elections" lasted for weeks or months.[31] An 1816 source notes that elections in England were thought of as lasting weeks, allowing for great mischief and laws were passed limiting the "duration of elections."[32] In 1832, John Galt described his earlier abandonment of principles during an election, "I had made up my mind to be, during the election, all things to all men * * *."[33] The lengthy election process was described in the acerbic commentary of an Irish Lord as an "ordeal" with on-going attacks:

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

Daniel O'Connell, OBSERVATION ON CORN LAWS PRAVITY AND INGRATITUDE

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

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

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

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

(Machen Dublin 1842). Lord O'Connell was an ardent abolitionist with a seat in the British Parliament, widely read in the United States. *Hazell Plaintiffs' Appendix to Memorandum in Opposition*, ER 28-29.

The shift to the expanded modern meaning of "elections" to include the process months before actual voting can be seen in popular American pieces between 1830 and 1850. Political satirist Seba Smith created a character, "Major Jack Dowing," a rural Maine "downeaster" Democrat who described the events "in his own plain language" in several newspapers between 183O and 1859. *Preface*, MY THIRTY YEARS OUT OF THE SENATE, (Oaksmith 1859), p. 5.

In an early "Letter" of January 18, 1830, the character notes the acrimony at the Maine legislature because "the preceding electioneering campaign had been carried out with a bitterness and personality unprecedented in the State."[34] In an account dated July 19, 1830, he quotes a hopeful seeking appointment as writing, "I'm going to start to-morrow morning on an electioneering cruise." *Id.*, p. 100. Notably, by June 30, 1848, Dowing uses both *election* and *campaign* in their modern senses. He first comments on the disarray in nominating a Democratic candidate to run against Zachary Taylor and the torchlight parades already underway. He then wonders how things are going "this election," using the word "election" to refer generally to the events months before the day of the 1848 election or the casting of ballots.

> [C]all and see Mr. Ritchie * * *; I'm told the dear old gentleman is workin' too hard for his strength--out a nights in the rain, with a lantern

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

> in his hand, heading the campaign. * * * And be sure to ask him how the Federals are goin' this election, for we can't find out anything about it down here. I used to know how to keep the run of the Federals, but now there is so many parties--the Democrats, and the Whigs, and Hunkers, and Barnburners, and Abolition folks, and Proviso folks--all criss-crossin' one another * * *."

MY THIRTY YEARS OUT OF THE SENATE, pp. 308-09. The use of the present progressive tense "are going" shows the "election" is underway at the time of the writing (June 1848), since progressive verbs indicate action in progress at the time of the statement. The events are historically accurate.[35] While the writer employs dialect, all the verb tenses are internally consistent and present progressive.

Thereafter, in later "Letters," the characters continue to use "this election" in a continuing sense in columns published during the 1852 campaign. In a letter dated July 20, 1852, Dowing's uncle assures him that Van Buren has promised that "he'd stand the platform for this election, anyhow."[36] On September 18, 1852, Dowing blames the poor outlook for his candidates on "the liquor law has played the mischief this election all round, and got things badly messed up." *Id.*, p. 395.

There are many additional uses of the word "election" in this continuing process sense in American usage prior to 1857. From biographies of the time:

> But if [Aaron Burr's] name was on the [1800 New York State assembly] ticket as a candidate, his personal exertions during the election would be

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35. "Barnburners" were a faction of the Democratic Party opposed to slavery and who did not support presidential nominee Cass in 1848. "Provisos" supported the "Wilmot Proviso" outlawing slavery in the territory acquired from Mexico. "Hunkers" were another faction of the Democratic Party.

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

> lost to the party.[37]
>
> [T]o those who had been his true friends during the election struggle [Andrew Jackson] extended the graceful hand * * *.[38]

As the word election was understood to involve a long process, efforts to control election (i.e., campaign) spending also entered the popular discussion. For example, influential newspaper editor Horace Greeley wrote in 1856:

> We heartily approve the recent act of Congress requiring the fullest publicity in regard to all campaign contributions, whether made in connection with primaries, conventions or elections.[39]

In context, it is clear that Greeley was not advocating disclosure of contributions made only on the day of elections but during the process of "elections," including primary elections.[40]

2. Oregon Delegates Considered State Constitutions Which Contained Analogs To Both Article I, § 8 and Article II, § 8.

Newly available research adds new context for considering the Oregon Constitution. As states in the South and West joined the Union, they modified the earliest state constitutional provisions to use the word "elections" in an evolving sense. For example, in colonial times, Connecticut adopted a constitutional prohibition against influencing electors at the *viva voce* town meeting elections,

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37. M.L. Davis, MEMOIRS OF AARON BURR, (Harper & Brothers 1855), p. 435.

38. B.J. Lossing, A HISTORY OF THE UNITED STATES, (Mason Bros 1857), p. 461.

39. Horace Greeley, *et al*., THE TRIBUNE ALMANAC AND POLITICAL REGISTER (Tribune Association 1838), p. 350.

40. At §§ IV.D 4 and 5 of this brief, *post*, we set out a more extensive history of campaign monetary restrictions.

which became part of its Constitution:

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

Connecticut Constitution (1818) Article VI, § 6. Other states modified the phrase to refer to "regulating and conducting *elections*," not just the single-day meeting of electors, well before 1857.

STATE (year adopted)	ELECTION PROTECTION PROVISION IN CONSTITUTION	FREE SPEECH PROVISION
Kentucky (1799)	Article VIII, § 2, second clause: [T]he 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 VIII, § 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, § 5, second sentence: 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, § 6 Every citizen may freely speak, write and publish his sentiments on all subjects; being responsible for the abuse of that liberty.
Connecticut (1818)	Article VI, § 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, § 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 CONSTITUTION	FREE SPEECH PROVISION
Alabama (1819)	Article XI, § 5, second sentence: 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, § 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, § 13, second clause: [A]nd 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, § 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 of the press
Texas (1845)	Article 16, § 2, second sentence: 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, § 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 CONSTITUTION	FREE SPEECH PROVISION
Louisiana (1825)	Article VI, § 4, second clause: [T]he 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
(1848)	Title VI, 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, § 18, second sentence: 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, § 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. (Section about proof of liable.)

STATE (year adopted)	ELECTION PROTECTION PROVISION IN CONSTITUTION	FREE SPEECH PROVISION
Oregon (1857)	Article II, § 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, § 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.

While early scholars[41] do not mention the nearly *identical* state constitutional provisions as sources of Article II, § 8, recent research by Judge Claudia Burton shows that LaFayette Grover owned the 1850 edition of THE AMERICAN'S GUIDE, a compilation of state constitutions which Grover used at the Oregon Constitutional Convention. She believes it likely that Delazon Smith and William Packwood had similar compilations.[42] Thus, we now know that the Oregon delegates had the

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41. The trusted authority, Charles Henry Carey, THE OREGON CONSTITUTION PROCEEDINGS AND DEBATE OF THE CONSTITUTIONAL CONVENTION OF 1857 (Western Imprint 1984 facsimile edition of 1926 edition) [hereinafter "Carey"] at Appendix (a) summarizes W.C. Palmer, *The Sources of the Oregon Constitution*, 5 OREGON LAW REVIEW 200, 214 (1926). As to the "source" of Article II, § 8, Carey remarks only that it is "similar" to Connecticut Constitution (1818), Article VI, § 6. Carey at 470. He failed to note that it is even more similar to the then-existing constitutions of Kentucky, Mississippi, Alabama, Florida, Texas, and California.

42. The book, THE AMERICAN'S GUIDE: COMPRISING THE DECLARATION OF INDEPENDENCE, THE ARTICLES OF CONFEDERATION, THE CONSTITUTION OF THE UNITED STATES, AND THE CONSTITUTIONS OF THE SEVERAL STATES COMPOSING THE UNION (1850), is in the collection of the Oregon Historical

(continued...)

earlier state constitutions listed above with them at the Constitutional Convention. Texas provides a particularly relevant example of pre-1857 campaign spending limits. As the table shows, the Constitution of Texas (1845) contains sections very similar to Article I, § 8, and Article II, § 8, of the Oregon Constitution. A year before the Oregon Constitutional Convention, the Texas legislature passed the Act of August 28, 1856, codified at Title VIII, "Offenses Affecting the Rights of Suffrage," Chapter I, "Bribery and Undue Influence." Article 262 provided (ER 31):

> 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.

When a state with a constitutional provision similar to one later adopted in Oregon has taken 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 Indiana Supreme Court on a provision similar to one adopted in the Oregon Constitution in 1857).[43]

42.(...continued)

> Society Library. The flyleaf bears the following inscription: "L.F. Grover Philadelphia 1850. This book was used in the constitutional convention of Oregon in 1857. L.F.G."

Claudia Burton, *A Legislative History of the Oregon Constitution of 1857 -- Part II*, 39 WILLAMETTE LAW REVIEW 245, 456 n15 (Spring 2003). The 1850 and earlier editions of THE AMERICAN'S GUIDE, available on Google Books, are in fact the sources of the table in the text.

43. ***Cookman*** assumes the Indiana Constitution and decisions were available to the Oregon Constitution's framers and voters in 1857 and 1858. That assumption about knowledge of the constitutions of other states appears equally valid applied to the constitutions of Kentucky, Alabama, Florida, Mississippi, Texas, Louisiana,

(continued...)

In addition to the three convention delegates who carried the other state constitutions, all of the delegates were politically active and can be presumed to have understood how "elections" were regulated in other states. More than 40 of the 60 delegates were affiliated with national parties and were elected as Oregon Constitutional Convention delegates on party tickets.[44] Almost a third were lawyers, and two edited newspapers. *Carey*, at p. 484. For example, delegate Joseph Lane may be presumed to have been keenly aware of national politics and vigorous campaigns. After serving very briefly as Governor of the Oregon Territory, he was an unsuccessful candidate for the Democratic presidential nomination in 1852 and in the next election cycle after the 1857 Constitutional Convention, was the candidate for Vice-President of the United States on the 1860 "Southern" Democratic ticket (Breckinridge/Lane). Delegates Delazon Smith, G.K. Kelly, LaFayette Grover, and George Williams all later became United States Senators.

Oregon cases have consistently looked to the later careers of the delegates to Constitutional Convention to discern their intent and understanding of constitutional provisions. ***State v. Finch***, 54 Or 482, 497, 103 P 505, 511 (1909), in upholding

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43.(...continued)
and California, as well as to the statutes of Texas, as of 1857 and 1858. One of the 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 early statutes in the South and West available in 1857 and cases construing provisions of their constitutions that are similar to Oregon's.

44. Address of the Hon. R. McBride, *The Constitutional Convention, 1857*, reprinted in Carey, OREGON CONSTITUTION, p. 483.

the death penalty, stated:

> Among the members of the constitutional convention were Judges Boise, Prim, Shattuck, Kelly, Kelsay, and Wait, all of whom were afterwards members of the Supreme Court of this state, and all of whom, excepting Judge Kelly, performed circuit duty. It is part of the judicial history of this state that all of these eminent jurists either pronounced the sentence of death while upon circuit duty, or participated in affirming such judgments when sitting upon the supreme bench. Rousseau well observes that "He who made the law knows best how it ought to be interpreted," and this judicial and legislative recognition of the validity of capital punishment by the very men who framed the Constitution ought itself to be sufficient answer to the contention of defendant's counsel.

3. The Doctrine of Contemporaneous Construction Shows Article II, § 8, Applies Political Expression.

In 1864 and 1870, 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 recently adopted Constitutional powers of Article II, §§ 7 and 8. The listed offenses 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, such as offering any "thing whatever" directly or indirectly "with intent to influence" the voter.[45]

Despite Article I, § 8, of the recently adopted 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).[46] In 1870 the

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45. Crimes Against Public Justice Act of 1864, (October 19, § 616), Or Gen Laws (Deady 1872), T II, c 5, § 627, later codified at Hill's Code Or, T II, c 5, § 1843.

46. Crimes Against Public Justice Act of 1864, (October 19, § 622), Or Gen Laws (Deady 1872), T II, c 5, § 638, later codified at Hill's Code Or, T II, c 5, § 1855.

Legislature made it criminal to "persuade" any legal voter not to vote.[47] Penalties for such persuasion was imprisonment, and/or a fine of $100 to $1,000, and a lifetime ban from holding office. Addison Gibbs, a lawyer (and law partner of Convention delegate, George H. Williams), was Governor at the time of the passage of the Crimes Against Public Justice Act of 1864. LaFayette Grover was Governor at the time of the passage of the Frauds in Elections Act on October 22, 1870. Neither vetoed nor objected that these laws regulating campaigning were not authorized under Article II, §§ 7 o 8, of the recently adopted Oregon Constitution.

These legislative actions (1) illustrate the original understanding of the meaning of terms to delegates/lawmakers, and (2) invoke the doctrine of contemporaneous interpretation. See 2 SUTHERLAND, STATUTORY CONSTRUCTION, pp 514-515, § 5104 (3d ed). There is a strong relationship between contemporaneous construction and Constitutional originalism:

> * * * [C]ontemporaneous 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.

State ex rel Gladden v. Lonergan, 201 Or 163, 177-8, 269 P2d 491, 496 (1954) (quoting, with approval, 11 AMJUR, p. 699).

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47. 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 prohibited conduct was not bribery but was mere persuasion, which was certainly an exercise of what we today would call "political speech."

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 in campaigns, 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.

The ballot title of the 1908 initiative read:

> A Bill for a law to limit the amount of money candidates and other persons may contribute or spend in election campaigns; to prohibit and punish the corrupting use of money and undue influence in elections; to protect the purity of the ballot and furnish information to voters concerning candidates and all political parties, partly at public expense.

Nickerson v. Mecklem et al., 169 Or 270, 278 126 P2d 1095 (1942). Note, the ballot title refers to "the corrupting use of money and undue influence <u>in elections</u>." (Emphasis added). This language was clearly used to refer to the use of money in political campaigns, not merely in the act of filling out a ballot or voting on election day. The title of the statute includes to "limit candidates' election expenses," again using the term "elections" to refer to the process of campaigning for office. The candidates' expenses are obviously for their campaigns, not for functions tied to administering the mechanics of voting.

We do not argue that their voters' understanding made campaign spending limits constitutional in 1908. We <u>do</u> argue that the 1908 voters and writers were

contemporaries with the Oregon House and Senate members who passed the earliest criminal laws pertaining to political money in 1864 and 1870, which limited or prohibited various conduct occurring prior to election day, including "persuasion," as well contemporaries with some of the 1857 Constitutional Convention delegates, several of whom lived well into the 20th Century.[48] The 1908 voters shared with those contemporaries a common understanding of the meaning of words in Article II, § 8, and Article I, § 8, of the Oregon Constitution.

4. The *Ejusdem Generis* In Article II, § 8 Is Undue Influence Upon Suffrage During Campaigns, Not Interference With Casting Ballots.

In light of the above research on the meaning of "election" as of 1858, we submit that the ***Vannatta*** decision improperly employed the rule of *ejusdem generis*, to limit the meaning of "improper conduct" in Article II, § 8, to that occurring on a single day of election. When items are specifically listed, one must correctly identify the *ejusdem generis* between each pair of the sequence in order to further apply the rule to following items.[49] A coincidental attribute does not establish a categorizing relationship. ***Vannatta*** identifies the categorizing principle between "power," "tumult" and "bribery," as each can interfere with the act of voting, but that is also a coincidental similarity, not *ejusdem generis* between three things that can happen anytime and in other situations. None is unique to *vote* contamination.

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

49. Singer, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, § 47.17.

Each could corrupt a judicial proceeding or a sporting contest in exactly the same manner: instilling fear or privately corrupting the participants or officiators. The *ejusdem generis* between power, bribery and tumult is that each can corrupt the process at any time. Since the outcome and the process were both referred to as "elections" long before Oregon statehood, "other improper conduct" is that which interferes with the process of elections.

5. Limits On Expressions In Furtherance of Protecting the Rights of Suffrage Have Been Imposed Since the 1600s.

Thus far, we have urged reconsideration of ***Vannatta***'s holding on the meaning of Article II, § 8, because we now know that the delegates and voters understood that the regulation of pre-election day conduct (i.e., campaigning) was intended, despite the simultaneous adoption of Article I, § 8. The research also reveals that the regulation of expressive conduct in the form of contributions during election campaigns is also firmly within an historical exception to the scope of Article I, § 8.

In ***State v. Robertson***, 293 Or 402, 412, 649 P2d 569 (1982), the Oregon Supreme Court explained that Article I, § 8, contains a broad prohibition on restraints on expression together with an historical exception.[50] In ***State v. Ciancanelli***, 339 Or 282, 290-291, 121 P3d 613, 618 (2005), the Court elaborated:

> [A]mong the various historical crimes that are "written in terms" directed at speech, those whose *real* focus is on some underlying harm or offense may survive the adoption of Article I, section 8, while those that focus on protecting the hearer from the message do not.

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50. The Court specifically identified, as examples of historical exceptions, the crimes of "perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants." *Id.*

> * * * Although the laws making those acts criminal may be "written in terms" directed at speech, all those crimes have at their core the accomplishment of present danger of some underlying actual harm to an individual or group, above and beyond any supposed harm that the message itself might be presumed to cause to the hearer or to society.

The party seeking to prove existence of a historical exception has the burden of more than a "mere showing of some legal restraints on one or another form of speech or writing" and that Article I, § 8, was not intended to override such early legal restraints. ***State v. Henry***, 302 Or 510, 521, 732 P2d 9 (1987); ***Ciancanelli***, *supra,* 339 Or at 321-21.

First, the best evidence that Article I, § 8, was not intended to prohibit laws which protected free suffrage from all undue influence is the simultaneous adoption of Article II, § 8, in the original Oregon Constitution, as we now more clearly understand the original intention of the drafters and voters to protect "elections" in the expanded meaning of the election process, discussed at §§ IV.D.1-3, *ante*. But even if the Court were unpersuaded by the new evidence, we here supply evidence of restrictions upon campaign expression which would bring such limits within the historical exception to the reach of Article I, § 8.

Second, using the ***Ciancanelli*** framework, while some provisions of Measure 47 may be written in terms limiting what some might consider expression (size of monetary contributions), the "real focus is on the underlying harm" of corruption of the participants and the outcome which taints the governance of the people for years. Americans did consider suffrage a fundamental right necessary to assure the health of the body politic. Corruption of the American experiment in democracy is

both distinct from, and far "above and beyond," the harm caused by hearing "words" or seeing the effects of money during a campaign, satisfying the test set out in ***Ciancanelli***, 339 Or at 318.

Such dangers were real to Americans. The watchword for all the founders was "the public," which they understood to mean the collective interest of the citizenry, more enduring than the popular opinion of fleeting majorities. They all agreed that "faction" was improper, by which they meant interest groups that abandoned the public good in favor of sectarian agendas or played demagogue politics with issues in order to confuse the electorate. Thus the founders condemned gaining votes by force, false statements, intrigue, corruption, "or by other means."[51]

Representative democracy and laws to assure free and fair suffrage were the solution, deemed essential by later writers.

> [T]he right of suffrage is at the foundation of our government * * *. If this right * * is improperly exercised, it so far tends to endanger the government-- * * * It will corrupt the people, because it will bring corrupt men and corrupt principles into action in the elections; and corrupt measures will be resorted to, as the means of gaining success. And it will corrupt the rulers, because they must resort to corrupt means

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51. James Madison warns in FEDERALIST NO. 10 that:

> Men of factious tempers, or local prejudices, or of sinister designs, may by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interest of the people.

Madison begins FEDERALIST NO. 10: "Among the numerous advantages promised by a well-constructed union, none deserves to be more accurately developed than its tendency to break and control faction," which he goes on to describe as "this dangerous vice." George Washington criticized both false statements and physical intimidation arising from "faction" in his *Farewell Address*. Faction "agitates the community with ill-founded jealousies and false alarms; kindles the animosity of one part against another, foments occasionally riot and insurrection."

to obtain and to keep their offices.

Samuel Jones, TREATISE ON THE RIGHT OF SUFFRAGE, (Otis, Broaders & Co Boston 1842), p. 53.

Echoing Washington and Madison, courts upheld restrictions upon conduct and expression that had a merely "might" or had only a "tendency" to unduly influence even a single vote. An early New York case stated that wagering (a form of expression) on elections was against public policy because of the underlying harm it caused to voters: a tendency "to produce clamor, misrepresentation, abuse, discord; the exertion of improper influence; of intrigue, bargain and corruption * * *." ***Rust v. Gott***, 9 Cow 169, 18 Am Dec 497 (NY (1828)).[52] The North Carolina courts agreed on the essential nature of suffrage and need to curb all undue influences:

> Everything, not merely the proper action, but the very existence, of our institutions, depends on the free and unbiased exercise of the elective franchise; and it is manifest, that whatever has a tendency, in any way, unduly to influence elections, is against public policy. This position we assume, as self-evident.

Bettis v. Reynolds, 12 Ired 344, 34 NC 344, 1851 WL 1199, 1-2 (1851). The ***Bettis*** opinion then condemns any wagering on elections because it leads to the underlying "self-evident" harms of "perversion of facts" and "circulating falsehoods." *Id.* Such

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52. "[T]he parties interested might be led to exert a corrupt influence upon that board, with a view to produce a fraudulent determination in favor of the candidates bet upon. The result of the state election, closely contested, may depend on a single county canvass, or even that of a single town. Some bearer of votes may, by management, be defeated in his purpose of attending. Thus, even after the poll closed, the evil consequences may be much more extensive than the influence of the single vote of an elector, which is the reason why a bet with him, previous to his vote being given, is void."

Rust v. Gott*, supra*.

activities are certainly form of "expression" or "speech," yet they were not protected.

Kentucky courts (under a 1799 state constitution with terms very similar to Article I, § 8, and Article II, § 8) perceived the danger to the body politic:

> As was said by Lord Holt in a celebrated case, "a right that a man has to give his vote at the election of a person to represent him in parliament, there to concur in the making of laws which are to bind his liberty and property, is a most transcendent thing." (*Ashley vs. White,* 2 *Raym.,* 950.) Here, it is the fundamental right; all other rights, civil and political, depend on the free exercise of this one, and any material impairment of it is, to that extent, a subversion of our political system. Hence the care with which any invasion of this right, from every possible source, has been guarded against.

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

The manner in which lawmakers attacked the evil of undue influence changed over time. The earliest enactments sought to limit undue influence by restricting candidate expenditures or material inducements aimed at influencing voters at any time leading up to election day, including using money to express an opinion about an election result, which "might" incite corrupt behavior. This kind of regulation was joined well before 1857-8 by laws limiting campaign contributions.

First, a brief history of limits on expenditures during the election process shows that the colonies and states enacted laws patterned after 17th century British statutes adopted in the reign of King William III to limit abusive influence over potential voters during campaigns (n 30, *ante*). Early statutes included restrictions on campaign conduct and financial transactions, such as third-party wagering and indirect efforts to influence voters.[53] In 1695, Virginia limited candidate

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53. The early statutes also prohibited candidate dueling, which was campaign conduct (continued...)

expenditures deemed improper, distinct from criminal bribery. In 1790 Virginia went further and prohibited legislative candidates from using any "reward" "to promote their election." 1 VA REV CODE 389 (1790). This statute was noted with approval in ***Barker v. People***, 3 Cow 686, 15 Am Dec 322, (Supreme Ct NY 1824).

> The legislature, in the act for regulating elections, (24 Sess ch 10 § 17) evince a disposition to guard them from undue influence, by prohibiting bribery, menace, or any other *corrupt means or device, directly or indirectly*, to influence an elector [1 Rev Stat 149]. They intended that the suffrages of the people should be, as far as possible, free and unbiassed [*sic*].

Lewis v. Few, 5 Johns 1, NY Sup (1809) (emphasis supplied). In 1801, North Carolina enacted a statute which forbid "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."[54] These early prohibitions target (1) the time period of the campaign, not just election day, and (2) the harm of corruption of potential voters, not miscounting ballots cast at elections.

These early efforts were soon followed by specific limits on campaign contributions. The laws limiting political contributions in place by 1857 were not just "some" restraints on "one or another" form of speech, but specific limits on

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53.(...continued)
not related to direct coercion of voters but was deemed inimical to the process of seeking office.

54. The 23rd sec. forbids *treating* with either meat or liquor, on *any day of election or on any day previous thereto,* with intent to influence the election, under the penalty of two hundred dollars. The 22nd sec. of the act of 1836 is taken from the 11th sec. of the 116th ch of an act passed in 1777, and the 23rd was originally passed in 1801.

Duke v. Asbee, *supra* (emphasis in original).

contributing money to political campaigns, meeting the level of specificity required by ***Ciancanelli.*** In 1829, New York sought to protect the entire campaign process, making it unlawful to try to influence voters "previous to, or during the election" and made it illegal to contribute money to promote the election of any particular candidate or party ticket. ***Jackson v. Walker***, NYSup, 5 Hill 27 (1843). Referring to the policy behind New York's campaign contribution limits passed in 1829 (after ***Rust v. Gott***, *supra*, was decided), a court stated in 1858:

> [I]ts provisions were designed to prohibit contributions in money to a common fund to be expended for election purposes, and which might be employed by unscrupulous men to demoralize and corrupt the electors and to defeat the public will.

Hurley v. Van Wagner, *supra.*

By 1852, Maryland had made it an offense for any "political agent" (defined as "all persons appointed any candidate before an election or primary election") "to receive or disburse moneys to aid or promote the success or defeat of any such party, principle, or candidate." ELECTIONS LAWS OF THE STATE OF MARYLAND, (Lucas 1852), p. 90. We have previously discussed the 1856 Texas statute, prohibiting "furnish[ing] money to another, to be used for the purpose of promoting the success or defeat of any particular candidate."

The existence of an historical exception within the meaning of ***Robertson*** to what might otherwise be protected by Article I, § 8, is fully demonstrated by the Texas statute limiting political contributions adopted in 1856 [ER 30-32]; the New York statute of 1829, making it unlawful for "any candidate for an elective office, or for any other person, with intent to promote the election of any such candidate *

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

Ciancanelli, and ***Stranahan***, *supra*, caution that, even if proponent shows that a precedent was not correctly decided, that proponent must also persuade the Court that overturning the challenged precedent would not be disruptive.

Revisiting the holding in ***Vannatta*** would not adversely the body of originalist constitutional interpretation which has developed, but instead would set a valuable new standard for historical analysis. Since ***Priest v. Pearce***, *supra*, was decided in 1992, the Oregon Supreme Court has relied solely upon WEBSTER'S (1828) for constitutional interpretation in few cases other than ***Vannatta***. In each of those other cases, the word(s) under consideration had reached an expanded "modern" meaning long before 1857 and the WEBSTER'S (1828) definition merely confirms that long-understood usage.[55] In contrast, in ***Vannatta***, for whatever reasons,

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55. ***State v. Wheeler***, 343 Or 652, 655, 175 P3d 438, 441 (2007) (opinion refers to WEBSTER'S (1828) for confirmation that "proportion" had long meant a "comparative relation" in construing Oregon Constitution Article I, § 16); ***State v. Ciancanelli,*** 339 Or 282, 293, 121 P3d 613, 619 (2005) (Court relies on this source for the meaning of "expression," which appears to have been used in a wide variety of contexts by (1828), in construing Article I, § 8); ***Bobo v. Kulongoski***, 338 Or 111, 120, 107 P3d 18, 23 (2005) (Court relies upon WEBSTER'S (1828) for a definition of "raise" and "revenue," which had both acquired "modern" meanings by (1828)); ***State v. Vasquez***, 336 Or 598, 604, 88 P3d 271, 274 (2004), (opinion turns to WEBSTER'S (1828) for the term "justice" in Article I, § 10, concluding that the word "had a meaning similar to that of today"); ***MacPherson v. Dept. of Administrative Services***, 340 Or 117, 130 P3d 308 (2006), (Court uses WEBSTER'S (1828) for "suspend," which had acquired its current usage).

Webster ignored a widespread common usage. While appearance in the (1828) work can suggest that meanings had become settled before 1857, absence from the (1828) compilation does not prove much about rapidly-evolving American usage decades later.

In considering a word with legal connotation, the Supreme Court has discussed, but not relied upon WEBSTER'S (1828) alone. The other cited sources have included John Bouvier's, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION (various editions), terms in other state constitutions, and other historical texts.[56] The Court of Appeals has cited WEBSTER'S (1828) a number of times, but in each decision it has relied upon additional mid-19th century sources.[57]

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56. ***Juarez v. Windsor Rock Products, Inc***, 341 Or 160, 169-170, 144 P3d 211, 215-216 (2006), refers to WEBSTER'S (1828) in construing early meanings of "property," a word which appears to have long since reached its current meaning. ***Juarez*** does not rest exclusively on WEBSTER'S but uses historical sources including BLACKSTONE'S COMMENTARIES and BLACK'S DICTIONARY OF LAW CONTAINING DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN (1891). The following opinions reference both WEBSTER'S (1828) and BLACKSTONE'S COMMENTARIES: ***Rico-Villalobos v. Giusto***, 339 Or 197, 207, 118 P3d 246, 252 (2005) (context for the meaning of "evident" in Article I, § 14); ***State v. MacNab***, 332 Or 469, 476, 51 P3d 1249 (2002) (interpreting "punishment" in Article I, § 21). WEBSTER'S (1828) is cited with additional sources in the following: ***State v. Caven***, 337 Or 433, 443, 98 P3d 381, 386 (2004) (John Bouvier's law dictionary); ***Coast Range Conifer, LLC v. Or. State Board of Forestry***, 339 Or 136, 117 P3d 990 (2005) (other state constitutions); ***Lakin v. Senco Products, Inc.***, 329 Or 62, 69, 987 P2d 463, 468 (1999) (other 19th Century dictionaries).

57. ***State v. Norris*****,** 188 OrApp 318, 332, 72 P3d 103, 110-11 (2003), cites WEBSTER'S and relies additionally upon Alexander M. Burrill, A LAW

(continued...)

Overturning ***Vannatta*** would not "unduly cloud or complicate the law." ***State v. Ciancanelli***, *supra*, 339 Or at 291. In ***Stranahan*** the reconsidered decision was 10 years old; here, ***Vannatta*** was rendered 11 years ago (February 1997). There has not been any intervening precedent which has relied on upon ***Vannatta*** to strike down numerical campaign finance limits. This case presents the "the earliest possible moment" to correct what is argued to be an incomplete analysis in that immediately preceding case.

V. CONCLUSION.

For the reasons set out above, the Defendants' refusal to implement any of Measure 47 (or to seek or even allow judicial scrutiny) cannot be justified on the

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57.(...continued)
DICTIONARY AND GLOSSARY (1867) and John Bouvier, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION (rev 6th ed 1856). ***Lahmann v. Grand Aeire of Fraternal Order of Eagles***, 202 OrApp 123, 135, 121 P3d 671, 678 (2005), uses WEBSTER'S (1828) and a number of state constitutions to consider the meaning of "to assemble," as used in Article I, § 26. In ***Allen v. Employment Division***, 184 OrApp 681, 685-6, 57 P3d 903, 904 (2002), the court reviewed both WEBSTER'S (1828) and BLACKSTONE'S COMMENTARIES. ***City of Keizer v. Lake Labish Water Control Dist.***, 185 Or App 425, 60 P3d 557 (2002), considers WEBSTER'S (1828) definition of "private" in trying to determine "private property" in the takings clause, also considering a number of 19th Century texts on eminent domain. In the following cases seeking historical meaning of a word or phrase, the Court refers to both WEBSTER'S (1828) and an edition of Bouvier: ***American Federation of Teachers-Oregon v. Oregon Taxpayers United PAC***, 208 Or App 350, 405 n 17, 145 P3d 1111 (2006) (construing constitutional meaning of "people," considering Article IV, § 1); ***Liberty Northwest Ins. Corp. v. Oregon Ins. Guarantee Ass'n***, 206 OrApp 102, 113, 136 P3d 49, 55 (2006) (whether "man" includes artificial entities and definition of a legislative "Act"); ***State v. Watters, Jr.***, 211 Or App 628, 642, 156 P3d 145, 153, (2007) (meaning of "open" and "unclaimed" in an 1855 Treaty); ***State v. Jackson***, 178 OrApp 233, 239, 36 P3d 500, 502-503 (2001) (meaning of "public" trial).

basis of § (9)(f). Alternatively, the ***Vannatta*** analysis should be reconsidered, as the Court's reliance exclusively upon WEBSTER'S (1828) for insight into the minds of voters in 1858 in adopting Oregon Constitution, Article II, § 8, led it into error. The historical context also reveals that Measure 47 fits within an exception to the scope of Article I, § 8, of the Oregon Constitution. Therefore this court should reverse the decision of the trial court and remand.

Dated: May 14, 2008

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CERTIFICATE OF SERVICE

I hereby certify that I filed an original and 20 copies with the State Court Administrator and served 2 true copies of the foregoing: HORTON PLAINTIFFS OPENING BRIEF AND EXCERPT OF RECORD by 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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