IN THE SUPREME COURT OF THE STATE OF OREGON

BRYN HAZELL, FRANCIS NELSON, TOM CIVILETTI,
DAVID DELK, and GARY DUELL,
Plaintiffs-Appellants
Cross-Respondents,
and
JOAN HORTON, and KEN LEWIS,
Plaintiffs-Appellants
Cross-Respondents,
Petitioners on Review,
v.
KATE BROWN, Secretary of State of the State of Oregon; and
JOHN R. KROGER, Attorney General of the State of Oregon,
Defendants-Respondents
Cross-Respondents,
Respondents on Review,
and
CENTER TO PROTECT FREE SPEECH, INC., an Oregon nonprofit corporation, and FRED VANNATTA,
Intervenors-Respondents
Cross-Appellants,
Respondents on Review.
Court of Appeals
A137397

No. S059245

OPENING BRIEF ON REVIEW OF PETITIONERS JOAN HORTON AND KEN LEWIS

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The Horton Petitioners file this Opening Brief on Review of ***Hazell v. Brown***, 238 OrApp 487, 242 P3d 743 (2010). They also rely upon their briefs filed at the Court of Appeals, which we refer to as the "Horton Opening Brief," the "Horton Reply Brief" [Combined Reply and Cross-Answering Brief of the Horton Plaintiffs], and the "Horton Supplemental Memorandum."

I. STATEMENT OF THE CASE.

On November 6, 2006, Oregon voters enacted Measure 47 to establish a system of campaign finance reform. Horton Opening Brief, ER 11-19. A companion constitutional amendment intended to eliminate any question of the constitutional validity of such a system, Measure 46, failed. *Id*., ER 20.

Measure 47 contains restrictions upon contributions to state and local candidate campaigns and new provisions on reporting and disclosure of contributions and expenditures. It also contains the following, § (9)(f):

> 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.

The parties referred to § (9)(f) as a "dormancy clause."

The lower courts declined to review new historical evidence pertinent to determination of the constitutionality of Measure 47, because they construed § (9)(f) to preclude any consideration of the substantive provisions of Measure 47 in the present proceeding. They ruled that § (9)(f) means no judicial review is

ripe until either of two events later occur, "the Oregon Constitution is found to allow, or is amended to allow" limitations contained in Measure 47's terms.

The Court of Appeals simply assumed, without specific inquiry, that some restrictions in Measure 47 conflict with Oregon Constitution, Article I, § 8, thus triggering suspension of the entire Act. The Court of Appeals also found no limit upon the drafters' power to "postpone" the operation of Measure 47 indefinitely until a possible future event, however unpublicized or unintended that contingent event. Other procedural matters are addressed in the "Statement of the Case" in the Horton Opening Brief.

A. QUESTIONS PRESENTED.

1. Does any term in Measure 47 conflict with the current Oregon Constitution?

2. Did the lower courts fail to determine specifically whether any term of Measure 47 conflicts with the Oregon Constitution, so that the dormancy clause might be triggered?

3. In reviewing any potential conflict between any term in Measure 47 and Article I, § 8, of the Oregon Constitution, should the holdings in ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997) [hereinafter "***Vannatta I***"] regarding Measure 9 of 1994 be reconsidered in light of new primary sources and research showing that:

    a. There were statutes in place and many State Constitutions with provisions similar to both Article I, § 8, and Article II, § 8, which should have been considered as "historical exceptions" in determining whether limits on pre-Election Day activities were regulated at the time of the drafting and adoption of the Oregon Constitution (*Horton Opening Brief*, pp. 29-49); and

b. The word "elections" had by 1857 acquired its modern meaning of an entire "election campaign" in popular and formal usage and that meaning was intended by drafters and understood by voters adopting Article II, § 8. *Id.* pp. 20-28.

4. Can dormant laws spring into operation upon later contingencies entirely divorced from the express or implied will of the people?

B. SUMMARY OF ARGUMENT.

Petitioners agree that, if any term in Measure 47 conflicts with the current Oregon Constitution, its operation *may* be postponed, as ***Hazell v. Brown*** holds, relying upon ***State v. Hecker***, 109 Or 520 (1923) ("***Hecker***"). The Court of Appeals relies upon this *dicta* from ***Hecker***:

> "A measure may become a law on a determined date, and yet that law may not go into active operation until *some later date* or until the happening of *some contingency*."

Hazell v. Brown, 238 OrApp at 503 (emphasis to ***Hecker*** supplied by Court of Appeals). Petitioners disagree that "any" contingency can activate a law, no matter how remote in time, unrelated to the law's subject matter, unplanned, and unlikely to receive public notice that event may be.

Had 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 operative contemporaneously with the amendment. Merely because § (9)(f) provided a valid contingency for operation of Measure

47 (approval of Measure 46), does not mean that § (9)(f) (1) can preclude examination of specific terms now or (2) presently states constitutionally valid contingencies. Petitioners therefore argue that § (9)(f) cannot impede implementing the substantive terms of Measure 47 now or prevent judicial evaluation of any challenged terms of Measure 47, because

1. All of § (9)(f) presently fails to state a valid contingency upon which a dormant law may become operative, and it must be severed in its entirety (under § 11 of Measure 47); or

2. Section (9)(f) must be construed as intended by its drafters, and the remaining sections of Measure 47 must be evaluated for conformity with the Oregon Constitution in the instant proceeding.

The Oregon Constitutional amendments of 1902, creating the initiative (now in Article IV), were intended to be read in harmony with the original Constitution which implicitly requires that the public have notice of the operation of changes in law which alter citizens' duties and rights. The compact for representative democracy does not include implied consent to be governed in an arbitrary manner where laws can spring into operation upon later nonpublic contingencies entirely divorced from the express or implied will of the people.

Petitioners urge the Court to adopt the rule that suspended laws may operate contingent upon actual anticipated events (such as the outcome of an election), which are germane to the substance of the suspended law, but never by inadvertence, surprise, or upon arbitrary events completely decoupled from

any expression of assent by voters or their representatives. Applying that principle here, the courts must review the substantive terms of Measure 47.

Petitioners urge the Court to reconsider or instruct the trial court to consider the historical information tending to vitiate ***Vannatta I***, and to discontinue exclusive reliance upon mere absence from WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (hereinafter "WEBSTER'S (1828)) in construing words used decades later.

Here is an example of how the research provides new context: LaFayette Grover owned the 1850 edition of THE AMERICAN'S GUIDE, a compilation of state constitutions which Grover used at the Oregon Constitutional Convention. Delegates Delazon Smith and William Packwood likely had similar compilations.[1] Thus, we now know that the Oregon delegates had all the earlier state constitutions available at the Constitutional Convention.

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1. 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 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.

In 1856, using its 1845 Constitution, Texas codified "furnish[ing] money to another, to be used for the purpose of promoting the success or defeat of any particular candidate," among "Offences [*sic*] Affecting the Rights of Suffrage," punishable by large fines.[2] The authority for this in the Texas Constitution was almost exactly the same as what became Oregon's Article II, Section 8. Texas also had essentially the same free speech clause as Oregon's Article I, § 8.[3]

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2. DIGEST OF THE GENERAL STATUTES OF THE STATE OF TEXAS, (Goldham & White 1859). Opening Brief of Horton Plaintiffs, ER 31. The entire statute is at ER 31-34.

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

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

Oregon Constitution, Article II, Section 8:

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

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

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

By 1870, Grover was Governor and signed the Frauds In Elections Act, which limited what we would now call "political speech" meant to influence potential voters. Grover's familiarity with the Texas Constitution adds new context for discerning the Oregon Convention delegates' understanding of the regulation of "elections." None of these primary sources discussed below were presented to the ***Vannatta I*** Court.

II. FIRST ASSIGNMENT OF ERROR: THE COURT OF APPEALS ERRED IN HOLDING LAWMAKERS HAVE UNFETTERED POWER TO SUSPEND LAWS CONTINGENT ON PRIVATE OR COVERT EVENTS AND DECLINING SUBSTANTIVE REVIEW OF MEASURE 47.

A. STANDARD OF REVIEW.

A question of law is reviewed *de novo*.

B. OVERVIEW.

Two things are important about the holdings in ***Hecker*** and the case upon it most heavily relies, ***Fouts v. Hood River***, 46 Or 492 (1905) ("***Fouts***"). First, there is the conclusion that the word "effective" as it appears in Article I, § 21, (and presumably, Article IV §§ 1(4)(d) and 28), has a narrow *express* meaning limiting only the legislature's power to alter the codification date of a law, but does not expressly limit the power of the legislature to postpone the operation of any law. Petitioners do not disagree.

Secondly, neither ***Hecker***, ***Fouts***, or any subsequent case cites express language in the Oregon Constitution allowing enactment of suspended statutes. While not discussed in ***Hecker*** or ***Fouts***, a careful reading of the case authority cited from other jurisdictions suggests that power to postpone the operation of laws is found by applying well-known principles of statutory construction to the Oregon Constitution. It is a document which limits powers [see, ***State v. Cochran***, 55 Or 157, 200, 105 P 884 (1909); ***Marr v. Fisher***, 182 Or 383, 387, 187 P2d 966 (1947)] and there is no express limit upon the legislative power to enact contingently operative statutes. Again, Petitioners do not disagree with the general premise.

Petitioners disagree that this premise can be expanded to mean there are absolutely no limits upon choosing contingencies which, when they occur, change the legal rights and responsibilities of citizens. Could the Legislature for example, provide that a law passed in 2009 about day care centers remain dormant until the Cubs win the World Series? If not, why not? And if not, can the drafters make Measure 47 immediately operative whenever any court in Oregon makes a finding that some future law relating to campaign expenditures (perhaps a public funding mechanism) is allowed under Article I, § 8? Can the drafters provide that Measure 47 become operative, immediately and without notice, if there is any amendment to Article I, § 8, fifty years hence allowing for public financing of elections?

Petitioners posit there are implicit limits upon arbitrarily fixing the operation of laws upon private or obscure future events. The outlines of the limits can be discerned from the actual facts and holdings in the cases. None of the cases upon which ***Hecker*** or ***Fouts*** or any other Oregon case relies upholds any contingency activating a dormant statute other than (1) an election clearly related to the question whether the dormant statute will operate, or (2) the public actions of a deliberative body with the authority to activate the dormant law. No case since ***Hecker*** in any jurisdiction that we can find has allowed a dormant statute to operate upon any other contingency.

C. THE COURT OF APPEALS CONSTRUES HECKER *DICTA* TOO BROADLY.

The Court of Appeals found ***Hecker*** controlling for the proposition that "the legislature could validly enact legislation the operation of which was dependent upon some future, contingent event." ***Hazell v. Brown***, 238 OrApp at 502. This is far too broad. In every case *cited* by ***Hecker***, ***Fouts***, and cited by the earlier Oregon case, ***State v. Rathie***, 101 Or 339, 199 P 169, 200 P 790 (1921) ("***Rathie***"), the question presented to the court was whether a law could constitutionally remain dormant until the occurrence of a specific public event, either the (1) outcome of an election or (2) duly conducted and publicly

announced decision of another deliberative body. The ***Hecker***,[4] ***Fouts***,[5] and ***Rathie***[6] courts themselves consider and rule upon the constitutionality of laws which depend on the outcome of a specific anticipated election for operation. The only subsequent Oregon case has held that a law could be suspended from operation contingent upon the outcome of the scheduled election on the relevant Constitutional amendment. ***Marr v. Fisher***, *supra*.[7]

The Court of Appeals acknowledged that the Oregon cases all hold that laws may become operative contingent upon the outcome of elections but found this fact pattern immaterial to what it considered the broad power of the legislature to make the operation of laws contingent upon any event whatsoever.

> The unifying issue in ***Libby***, ***Rathie***, ***Hecker***, and ***Marr*** was whether the legislature could validly enact legislation the operation of which

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4. ***Hecker'***s facts are: In 1920, the Legislature (1) enacted a law providing for the death penalty and procedures in April and expressly suspended its operation pending the outcome of a vote on the Constitutional amendment re-establishing capital punishment; and (2) referred the amendment for a May election, where it was approved. This was held constitutional.

5. ***Fouts*** held that determining what law would apply to the sale of alcoholic beverages based on the outcome of local option elections was a valid contingency.

6. In ***Rathie***, the 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.

7. There the Court upheld statute passed by Legislature 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.

> was dependent upon some future, contingent event. See ***Libby***, 66 Or at 129, 134 P 13 (statute provided for a special election in the event that any act of the Twenty-Seventh Legislative Assembly was subsequently challenged by referendum); ***Rathie***, 101 Or at 363, 199 P 169 (legislation *503 providing for a penalty of death for murder in the first degree to become operative upon adoption of a constitutional amendment reauthorizing the death penalty); ***Hecker***, 109 Or at 544-47, 221 P 808 (implicitly extending the rationale in ***Rathie*** to legislation proscribing the manner of executing the death penalty); ***Marr***, 182 Or at 385-86, 187 P2d 966 (operation of legislation resulting in higher personal income taxes made contingent on voter rejection of a referred Sales Tax Act). To be sure, in each of those cases, as the Horton plaintiffs note, the contingency that would trigger the operation of the challenged legislation was a proximate and known event. See, e.g., ***Rathie***, 101 Or at 363, 199 P 169 (contested legislation contained emergency clause calling for a special election to be held on a specified date at which the constitutional amendment would be voted on). However, that circumstance, albeit common to each of those cases, was not material to their disposition. Rather, as defendants emphasize, the gravamen of the Supreme Court's reasoning in those decisions did not turn on the proximity or anticipated nature of the contingent event.

Hazell v. Brown, 238 OrApp at 503-4. The reference to ***Libby v. Olcott***, 66 Or 124, 134 P 13 (1913) ("***Libby***"), in the decision reflects confusion. ***Libby*** was a challenge to an act of the 1913 Legislature setting a date for a special election, should there be successful citizen referral of any measure passed in that session. It was not a case where the law calling for the special election would be "dormant," until something occurred. Instead, it was effective and operational, although it might not be utilized. ***Libby v. Olcott***, *supra*, 66 Or at 131-32 states:

> The fourth objection is * * * that the act is unconstitutional in that the election is made to depend upon the contingency of a referendum being invoked as to any act of the twenty-seventh legislative assembly. * * *. Neither this law, nor its taking effect, is made to

> depend in this instance upon anything except constitutional authority. The election itself mentioned may depend upon a contingency, but the election is not the law. The statute authorizing it went into effect like any other enactment. It is prospective in its operation and, as in many other cases, as the situation existed at the date of its enactment, there was no immediate use for it * * *.

Libby is not relevant to the question at hand about when a dormant law may become operational.

The Court of Appeals continues:

> The court's rationale in ***Hecker*** is illustrative. There, the contested legislation contained a clause stating that it would become operative " 'as soon as and whenever' " the constitution and amendments thereto " 'will permit.' " 109 Or at 539, 221 P 808 (quoting Or Laws 1920, ch 20, § 4). The same legislature that proposed the statute also referred a constitutional amendment to the ballot, which, if adopted, would allow the statute to take operative effect. *Id.* at 536-38, 221 P 808. Although, at the time the statute was enacted, the election on the constitutional amendment was forthcoming, the contested statute's text did not refer to that circumstance--nor was the Supreme Court's rationale for upholding the statute predicated on that fact. By its terms, the statute would become effective "whenever" it became constitutional; it did not refer specifically to the pending election on the constitutional amendment. Likewise, in upholding the contingency, the Supreme Court did not refer to the proximity of the election: "A measure may become a law on a determined date, and yet that law may not go into active operation until some later date or until the happening of *some* contingency." *Id.* at 545, 221 P 808 (emphases added). The necessary implication of the court's statement that the statute was valid even though it was to remain dormant until "some later date" or the happening of "some contingency" was that the contingency could occur at any time.
>
> [A]s the Horton plaintiffs note, the contingency that would trigger the operation of the challenged legislation was a proximate and known event. * * *. However, that circumstance, albeit common to each of those cases, was not material to their disposition. Rather, as defendants emphasize, the gravamen of the Supreme Court's reasoning

> in those decisions did not turn on the proximity or anticipated nature of the contingent event.

Id. at 504.

Note that in the next to last sentence in the above quotation the Court of Appeals refers to all of the decisions (including the irrelevant ***Libby***) as having a "contingency [of] a proximate and known event," and the last sentence refers to the "anticipated nature of the contingent event." The phrasing suggests that the Court assumes the election is the anticipated contingent event and that further, the proximity of this "event" is irrelevant.

But that is a logical error. The actual contingency upon which the law's operation rests in each Oregon case is the *outcome* of an election. Some elections may be set by law for a specific date (***Rathie, Hecker***, ***Marr***), others may depend upon initiating steps that will determine a known and specific date pursuant to other laws (***Fouts***, holding local option elections), but in each Oregon case, the election which would determine the operative effect of a dormant statute (1) was or would be called for that purpose, and (2) voters therefore knew they would be voting on a question which could trigger the operation of the suspended statute.

Thus "anticipated" event as used by Petitioners, refers not to expecting the particular election date, but anticipating that the operation of a law will be contingent upon the outcome of the election whenever it is held. Proximity in

time between the passage of a suspended law and an election determining its operation is relevant to whether voters anticipate that the votes cast in that election will have the consequence of making a recently-passed law operational. Foreknowledge what a "yes" or "no" vote means assures compliance with the fundamental precepts of constitutional democracy, that those who are governed by laws have fair notice of the content and applicability of laws and voters must expressly or implicitly know what they are voting upon. We note that in the instant case, there is absolutely no assurance that voters in some future election can anticipate that their "yes" votes on some Constitutional amendment to Article I, § 8, can trigger operation of Measure 47.

D. THE CASES UPON WHICH *RATHIE*, *FOUTS* AND *HECKER* RELY ILLUSTRATE ONLY TWO WIDELY ACKNOWLEDGED VALID CONTINGENCIES.

1. *RATHIE* CITES CASES WHERE THE CONTINGENCY IS THE OUTCOME OF AN ELECTION OR THE ACT OF A DELIBERATIVE BODY.

Rathie relies upon ***Home Ins. Co. v. Swigert***, 104 Ill 653, 1882 WL 10469 (1882), where the issue was whether the "reciprocity" provision of the Illinois insurance law was constitutional since its application depended on action taken by deliberative bodies in other states which might tax Illinois-based companies. The statute provided that a foreign insurance company doing business in Illinois could be taxed more heavily than Illinois-established companies, if the law of the company’s home state imposed a discriminatory higher tax upon Illinois

based companies than upon home-state companies. The Illinois court held that under the Illinois constitution the contingency upon which the operation of a law is made to depend may consist of a vote of the people *or* the action of some foreign deliberative or legislative body. 1882 WL 10469 at *7.

In ***Alcorn v. Hamer***, 9 George 652, 38 Miss 652, 1859 WL 7043 (1860), date), the court held that taxes for local levy improvement districts could become operational depending upon the outcome of elections held for that purpose.

2. *HECKER* RELIES ENTIRELY ON CASES WHERE THE CONTINGENCY IS THE OUTCOME OF AN OR RATIFYING ACT OF A DELIBERATIVE BODY.

To better understand what ***Hecker*** meant by "A measure may become a law on a determined date, and yet that law may not go into active operation until some later date or until the happening of some contingency," we can look at the cases upon which it relies. In every case upon which ***Fouts*** and ***Hecker*** rely, the contingent event deciding the operation of a statute was either (1) the outcome of a duly held election, or (2) the decision of a public deliberative body directly related to the dormant law. The facts of those cases do not stand for the proposition that the power to establish contingent operative effect is unlimited.

Hecker relies upon ***Fouts*** and ***Pratt v. Allen***, 13 Conn 119 (1839), where the Connecticut Supreme Court held that, after the legislature had duly proposed an amendment to the Constitution (providing that the county sheriff should be an elected, not appointed, office), it properly enacted a statute (prescribing the time and manner of holding the election) to go into effect only if the amendment were adopted by the voters. ***Hecker*** also relies on ***State v. Kirkley***, 29 Md 85 (1868) (municipal action adopted contingent upon approval of that action by the Maryland legislature during then-current session).

Hecker additionally relies upon ***Galveston B. & C. N. N.-G. R. W. Co. v. Gross***, 47 Tex. 428 (1877) ("***Galveston***"), which held that a March 18, 1873, statute (setting aside public lands for schools) was enacted by the Legislature in anticipation that it would ratify the Constitutional amendment voters had passed in November 1872 (as it did on March 19, 1873.) The Texas Supreme Court held:

> Looking to the history of the constitutional amendment, we think it evident that the act objected to was passed in anticipation of its adoption. * * *.
>
> It is an evidence of the legislative expectation of a constitutional change, that, in 1871, an important act had been passed, in which provision was made for substituting a land grant for the bonds of the State "when the Legislature became vested with the constitutional power so to do." (See "An act to encourage the speedy construction of a railway through the State of Texas to the Pacific ocean," Special Laws, 12th Leg., 1st sess., p. 488; also Special Laws, 2d sess., 12th Leg., p. 94.)

> Whilst there is no such express declaration in this statute, we think it evident that the Legislature had in view an approaching time when it would be empowered to make land grants to railroads. The object and intention, where plainly discernible from the provisions of the statute, or of other statutes, prevails over the strict letter. (***Brooks v. Hicks***, 20 Tex 667.) * * *.
>
> We know of no rule forbidding legislation looking to the contingency of a constitutional change, *at least when the consummation of that change rests with the Legislature alone*. (Cooley's CONST. LIM., 114-117, and references; ***Brig Aurora v. U.S.***, 7 Cranch, 382; ***Bull v. Read***, 13 Gratt, 78; ***State v. Parker***, 26 Vt 357; ***Peck v. Weddell***, 17 Ohio, NS, 271; ***State v. Kirkley***, 29 Md 85.)

Galveston, 47 Tex at 436 (emphasis supplied.)

3. *FOUTS* RELIES EXCLUSIVELY UPON CASES WHERE THE CONTINGENCY IS THE OUTCOME OF AN ELECTION.

Fouts, *supra*, cites a number of cases, each of which upholds legislative decisions to allow later elections to determine whether a law will become operative under the general principle that the legislative act of allowing for local elections constitutionally and permissibly delayed the operative effect of the law until such an election was held and either retained or altered the *status quo*.

One case, ***State ex rel. Dome v. Wilcox***, 45 Mo 458, 464 (1870) (also cited in ***Rathie***) allowed local option elections to determine formation of a local school districts and impose taxes within the district. Sixteen cases allowed results of local option elections to decide what controls on alcoholic beverages

would be operative.[8] Two cases upheld local option elections to make livestock control measures operative.[9] Two cases upheld local elections to determine taxes upon railroads for costs associated with improvements.[10] One case upheld local option power to restrict operation of a bowling alley.[11] One allowed a local election to form a public works board.[12]

No case cited by ***Fouts*** holds that the law-making body had unbridled power to make laws operative upon any contingency it might choose. ***Fouts*** cannot be said to rely on any authority--or to hold--that the legislature has the

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8. Citation format as cited in ***Fouts***, dates or corrections added: ***Locke's Appeal***, 72 Pa 491, 13 AmRep 716 (1873); ***Fell v. State***, 42 Md 71, 85, 20 AmRep 83 (1875); ***Paul v. Gloucester County***, 50 NJLaw, 585, 15 Atl 272, 1 LRA 86 (1888); ***State v. Forkner***, 94 Iowa 1, 62 NW 772, 28 LRA 206 (1875); ***Boyd v. Bryant***, 35 Ark 69, 37 AmRep 6 (1879); ***State v. Wilcox***, 42 Conn 364, 19 AmRep 536 (1875); ***Caldwell v. Barrett***, 73 Ga 604 (1884); ***Commonwealth v. Weller***, 77 Ky 218, 29 AmRep 407 (1878); ***Gayle v. Owen County Court***, 83 Ky 61 (1885); ***Commonwealth v. Bennett***, 108 Mass 27 (1871); ***Commonwealth v. Dean***, 110 Mass 357 (1872); ***State v. Cooke***, 24 Minn 247, 31 AmRep 344 (1877); ***Rohrbacher v. City of Jackson***, 51 Miss 735 (1875); ***Schulherr v. Bordeaux, Sheriff***, 64 Miss 59, 8 So 201 (1886); ***State v. Pond***, 93 Mo 606, 6 SW 469 (1887); ***State v. Morris Common Pleas***, 12 AmLaw Reg (NJ) 32; correct cite: ***State ex rel., Sandford v. Court of Common Pleas of Morris County*** (1872).

9. ***Dalby v. Wolf and Palmer***, 14 Iowa 228 (1862); ***Weir v. Cram***, 37 Iowa 649 (1873).

10. ***Clarke v. City of Rochester***, 24 Barb 446; 28 NY 605; (correct cite: 1 Tiff 605) (1864); ***Cincinnati R. Co. v. Clinton County***, 1 Ohio St 77 (1852).

11. ***State v. Noyes***, 30 NH 279 (1855).

12. ***State v. O'Neill***, 24 Wis 149 (1869)

power to set any conceivable contingency as the triggering event for operation of a suspended law. On its facts it was concerned with local option elections held under the authority of general laws.

4. THERE IS NO PRECEDENT FOR UNFETTERED LEGISLATIVE POWER TO SET ARBITRARY OR PRIVATE EVENTS AS CONTINGENCIES.

Marr v. Fisher relies upon treatises which summarize the principles from other jurisdictions.

> While the legislature cannot delegate its power to make a law, it is well settled that it may make a law to become operative on the happening of a certain contingency or future event. 11 AMJUR 926, § 216; 50 AMJUR 516, § 497.

Marr, *supra*, 182 Or at 388. In sum, the overwhelming majority of cases upon which ***Rathie***, ***Fouts***, and ***Hecker*** rely involve statutes passed in anticipation of the outcome of an election. An exception is ***State v. Kirkley,*** where the contingency was the decision of a deliberative body (approving or disapproving municipal acts) during the then-current legislative session. In ***Galveston*** the outcome of the election approving a Constitutional amendment was known, and the statute was passed contingent upon the anticipated vote of the Texas Legislature ratifying the voter-approved Constitutional amendment. In every case the contingency was the outcome of deliberate choices by voters or elected representatives of the people. Not a single case rests on a contingent event of

private party conduct or accidental choice. No case stands for the proposition that legislators have unfettered choice of any conceivable triggering event.

E. CASES FROM OTHER JURISDICTIONS SUGGEST LIMITS OF LEGISLATIVE POWER TO CHOOSE A CONTINGENCY.

In contrast to the very general statement of the power to adopt laws with suspended operative effect in ***Hazell v. Brown***, in practice, more recent cases from other jurisdictions express some limiting principles to define the power to choose triggering events for dormant statutes.

> 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). This passage quoted with approval in ***State ex rel. Woodahl v. Straub***, 164 Mont 141, 146, 520 P2d 766, *cert denied*, 419 US 845, 95 SCt 79, 42 LEd2d 73 (1974) (contingent statute passed in express anticipation of approved constitutional amendment which had not yet taken effect); and ***Smigiel v. Franchot***, 410 Md 302, 317 978 A2d 687 (2009) (contingent statute authorizing video lottery terminals passed conditioned on passage of constitutional amendment). See also, ***In re Thaxton***, 78 NM 668, 670, 437 P2d 129, 131 (1968) ("It is generally held that the legislature may pass a statute in

anticipation of adoption of an amendment to the constitution and to take effect thereon."); and ***Fullam v. Brock***, 271 NC 145, 149, 155 SE2d 737, 739-40 (1967):

> The General Assembly has power to enact a statute not authorized by the present Constitution where the statute is passed in anticipation of a constitutional amendment authorizing it or provides that it shall take effect upon the adoption of such constitutional amendment.

No case we have found from any state has allowed operative effect to depend upon any event other than the outcome of an election or the act of another deliberative body on a topic germane to the operation of the suspended law.[13]

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13. The following cases have upheld statutes which were contingent upon specific and anticipated changes contingent upon the outcome of elections. ***Re Opinions of Justices***, 227 Ala 291, 149 So 776 (1933) (income tax enabling act and Constitutional amendment allowing taxation) and ***Re Opinions of Justices***, 227 Ala 296, 149 So 781 (1933) (warrant enabling act and Constitutional amendment regarding the state debt); ***Neisel v. Moran***, 80 Fla 98, 85 So 346 (1919) (Florida Supreme Court upheld the constitutionality of a statute to implement a constitutional amendment prohibiting the manufacture and sale of intoxicating liquor adopted after passage of Constitutional amendment but prior to its effective date; ***Alabama's Freight Co. v. Hunt***, 29 Ariz 419, 422-23, 242 P 658 (1926) (workers' compensation statute expressly contingent upon adoption of proposed constitutional amendment and relying upon reasoning applied in ***Hecker***); ***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); ***Fry v. Rosen***, 207 Ind 409, 189 NE 375, 378 (1934) (state laws adopted in anticipation of liberalization of federal prohibition on sale of alcoholic beverages to become effective upon action by Congress, a deliberative body which could remove the impediment on the state law's operation under the Supremacy Clause by repealing prohibition).

F. LEGISLATIVE POWER TO SUSPEND THE OPERATION OF STATUTES HAS TO CONFORM TO THE INTENT OF THE CONSTITUTION AND AMENDMENT DRAFTERS.

1. LIMITS ARE IMPLIED BY OTHER PRINCIPLES OF CONSTRUCTION APPLICABLE TO THE OREGON CONSTITUTION AS A WHOLE.

Generally, the Oregon Constitution is "construed as a whole" to ascertain its intent and general purposes and each provision must be "harmonized with all others, without distorting the meaning of any provisions" ***Jory v. Martin***, 153 Or 278, 287, 56 P2d 1093 (1936).

As noted above, the Court of Appeals declined to consider arguments presented under Article IV. Giving operative effect to a currently inoperative statute *sub silentio* by later constitutional amendment years later, without reference to the earlier dormant legislation, or through "findings" in an unrelated case between private litigants is contrary to the spirit of procedural protections of Article IV. To the extent the power of law-makers to postpone the operation of laws is retained because the Oregon Constitution does not expressly limit it, that power has not been harmonized with *implicit* limits suggested by other provisions of the Oregon Constitution. ***MacPherson v. Department of Administrative Services***, 340 Or 117, 127, 130 P3d (2006) ("***MacPherson***.")

Fundamental to constitutional democracy is that governments "derive[] their just powers from the consent of the governed." *Declaration of Independence.* The Oregon Constitution, Article I, § 1, declares a "social compact" which is

further ensured by provisions on drafting, passing and voting upon laws. "[E]lections are designed to permit the people * * * to take the legislative power into their own hands to make policy decisions." ***Vannatta I*** at 522 and "[i]t is through the political process of election and representation that the public maintains control over government * * *." ***In re Fadeley***, 310 Or 548, 583, 802 P2d 31 (1990). That opinion then reiterates the importance of information to voters.

Allowing laws to become operative as an unintended consequence of a later vote by an electorate uninformed of the hidden meaning of a "yes" or "no" vote creates an implicit and "inherent conflict" of the kind acknowledged in ***MacPherson***, *supra*, 340 Or at 128 [quoting Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS, p. 176 n4 (8th ed 1927)], with the careful structures whereby the contents, deliberations upon and effective dates of laws are required to be public and publicly noticed.

The implicit provisions of the Constitutional "compact" that assures citizens have information about laws which will govern them are found in Article IV(1)(d) (contents of initiative petitions), IV(4(d) (effective date of initiatives), IV(14) (public deliberations of legislature), and IV(19)-(21) (public reading of bills, subject matter, plain wording). Should a law spring into operation which carries penalties for violation, there must be notice sufficient to afford fairness under Article I, § 10, and federal due process. Altering legal obligations by

covertly tying the operation of long-dormant laws to later adoption of amendment to Article I, § 8, would also violate the principle that "no legislative act will bind a subsequent Legislature" (***Johnson v. City of Pendleton***, 131 Or 46, 55, 280 P 873 (1929), by binding voters to the immediate and automatic activation of Measure 47 regardless of the intent of those later voters.

Cooley has stated as a principle in his TREATISE ON THE CONSTITUTIONAL LIMITATIONS, p. 127 (7th ed 1903), that:

> Every positive direction contains an implication against anything contrary to it, or which would frustrate of disappoint the purpose of that provision.

The positive restraints on legislation (both by initiative and representatives) compel disclosure and notice of laws. Allowing operation of laws by arbitrary and covert contingencies frustrates the purposes of open government and governance under laws. Knowing the terms of a law is a meaningless right without also knowledge of when or if the law will operate upon one's own conduct.

2. VOTERS DID NOT INTEND FOR LEGISLATED OR INITIATED LAWS TO APPLY BY SURPRISE.

The history of the initiative reform illustrates a belief in fundamental fairness which implies limits upon the power to alter the legal obligations of citizens upon purely capricious or covert contingencies. In construing later amendments to the Oregon Constitution, "it is the people's understanding and

intended meaning of the provision in question" that prevails. ***Stranahan v. Fred Meyer***, 331 Or 38, 57, 11 P3d 228 (2000); *accord*, ***George v. Courtney***, 344 Or 76, 84-85, 176 P3d 1265, 1269 (2008). "If, however, the voters' intent is not clear after that inquiry, this court will turn to the provision's history." ***George v. Courtney***, *supra*.

While this Court has noted there were no Voters Pamphlet statements for the 1902 referral creating the Oregon initiative and referendum [***Stranahan***, *supra*, 331 Or at 65], other primary sources of voter information are now accessible. The point of initiative and referendum reform was to create an informed and engaged electorate. Reformers saw "no reason why every farmers' club, labor union, and lyceum in the State cannot become in effect a miniature legislative assembly." Joseph Schafer, "*Oregon As a Political Experiment Station*," AMERICAN MONTHLY REVIEW, Vol XXXIV (New York July-December 1906), p. 176. Of course, as noted in the preceding section, the existing Legislature had constitutional requirements for public notice and protections against deceptive identification of proposed acts.

Proponents of the initiative amendment included George H. Williams, an Oregon Constitutional Convention delegate, who stated he had proposed citizen initiatives at the Convention in 1857. *"Sure to Prevail: No Opposition to*

Initiative and Referendum," THE (PORTLAND) OREGONIAN, May 14, 1902.[14] In the spring of 1902, Williams was running for mayor of Portland and active in the campaign to pass the initiative and referendum amendment.[15] Days after voters approved the amendment, Williams reiterated his belief that citizens would never vote to deprive anyone of fundamental rights, because "every individual is interested in the preservation of those rights * * *." *"Amendment Now Law: Initiative and Referendum Has Large Majority,"* THE OREGONIAN, June 7, 1902. There is no reason to believe that Williams intended to alter the safeguards in the Oregon Constitution (which he voted to adopt), assuring notice to the populace of the terms and passage of laws, or that he perceived that the initiative could deprive citizens of fundamental rights to information and notice when the initiative process was used to pass laws.

3. THERE IS NO EVIDENCE OF INTENT TO ALLOW OPERATION CONTINGENT UPON JUDICIAL FINDINGS IN UNRELATED CASES.

Unwitting actions by private litigants cannot trigger operation of a dormant law. While this Court could indeed revisit ***Vannatta I***, doing so in some unrelated proceeding could not make Measure 47 operative. There is absolutely

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14. OREGONIAN articles are available online at "Oregonian Historical Archive" within "America's Historical Newspapers," both at: multcolib.org.

15. Early Oregon cases looked to the later careers of the delegates to Constitutional Convention for their understanding of constitutional provisions. See, § III.C.2., *post*.

no case law to support the position that a dormant law can spring into effect, litigants and judicial officers unawares, when the courts address the constitutionality of some other statute.

For example, the City of Portland instituted (and other jurisdictions still have) what is called public funding of political campaigns. In the Portland scheme, once a candidate qualified by an initial showing of support, she received specific amounts of public funding for her campaign but was prohibited from accepting any private contributions. This is a limit on persons who might want to contribute and a limit (zero) on private campaign contributions to that political campaign. If such a public finance law were enacted within any Oregon political jurisdiction, was challenged and found constitutional in Oregon, would that decision be a finding the "limitations on political campaign contributions" were constitutional and thus trigger immediate operation of all of Measure 47 statewide?

Under the rule Petitioners urge, the answer is "no." Litigation between private parties on some other matter is divorced from any affirmative express or implied act by the governed to make a dormant law operative. Depending upon unrelated litigation results could trigger a long-dormant Measure 47 immediately with no notice to anyone, including the public and perhaps even contrary to the interests of the litigants.

In contrast to the failure of the first contingency in § (9)(f) (some later constitutional amendment), the second contingency contemplated in § (9)(f) can be reasonably construed to accomplish the intended result. The instruction that terms of Measure 47 shall take effect "at the time that the Oregon Constitution is found to allow * * * such limitations" is capable of immediate resolution in this lawsuit.

This litigation, like countless other cases decided by courts, will announce what the law under consideration means, but will not have the unintended consequence of activating another dormant law not at issue between the litigants. Ignoring the command of § (9)(f) to engage in a review of the constitutionality of its terms (many of which are currently not of constitutional magnitude) would lead to an unfair, even absurd result. If § (9)(f) does not apply to the instant litigation, but some finding in another matter (the Court of Appeals position), then Measure 47 could become operative by surprise and inadvertence.

G. CONSTITUTIONAL PROVISIONS ARE NOT CONSTRUED AS RETROACTIVE.

A Constitutional amendment voted on at some later date cannot have any retroactive effect unless such intent was clear in the language. Sutherland, STATUTORY CONSTRUCTION § 23.21 Westlaw 2011). Thus, under Oregon case law, a subsequent constitutional amendment will not unintentionally revive a

void statute, unless later voters clearly evidence an intent to act retroactively when enacting the later amendment. ***Smith v. Cameron, et al.***, 123 Or 501, 262 P 946 (1928); ***Northern Wasco County People's Utility Dist. v. Wasco County***, 210 Or 1, 12-13, 305 P2d 766 (1957) (hereinafter "***Northern Wasco PUD***").

As explained in ***Vloedman v. Cornell***, 161 OrApp 396, 399, 984 P2d 906 (1999), the term "retroactive," in its narrowest sense applies to "enactments that change the effect of past actions automatically upon passage. See, e.g., Jan G. Laitos, *Legislative Retroactivity*, 52 WASH. U.J. URBAN & CONTEMP. L. 81, 86-87 (1997); Smith, 5 TEXAS L. REV. at 232.[16]"

Allowing a subsequent Constitutional amendment to give operational effect to the 2006 ballot measure has such a retroactive effect. The later voters would be changing the past action (intended dormant status) automatically upon passage, regardless of any knowledge that would be the unintended consequence of their "yes" votes on some other matter and without their intent to make any suspended law operative. This kind of retroactive effect should follow the ***Northern Wasco PUD*** rule.

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16. Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEXAS L. REV. 231 (1927).

H. THE *NORTHERN WASCO PUD* REASONING SHOULD CONTROL.

As noted, a subsequent constitutional amendment cannot unintentionally revive a void statute but requires clear evidence of such intent. ***Northern Wasco PUD***. The Court of Appeals declined to use this reasoning to hold that later voters cannot unintentionally give operative effect to a dormant statute when approving a later constitutional amendment. ***Hazell v. Brown***, 238 OrApp at 501-2.

Under the Court of Appeals decision, a later electorate could pass a constitutional amendment and unintentionally activate a law unknown to, or even opposed by, those later voters.

> 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.

Banaz v. Smith, 133 Cal 102, 104, 65 P 309 (1901), cited and quoted with approval, ***State ex rel Woodahl v. District Court of Second Judicial District***, *supra*, 162 Mont 283, 294-5, 511 P2d 318, 324 (1973); ***Fellows v. Schultz***, 81 NM 496, 501, 469 P2d 141, 146 (1970).

Petitioners urge that there is no meaningful distinction between reviving a law and making a law operative. In each circumstance, there is existing text which is not currently enforced. In each case the legal status and obligations of

persons will be altered, if the text becomes operative. The rule should be the same in both circumstances: Later voters must intend that their vote makes an inoperative law operative, and they must have notice of the new obligations so they can conform their future conduct to the terms of such law.

Horton Petitioners urge the Court to adopt the rule that suspended laws may become operative contingent upon actual anticipated events which are germane to the substance of the suspended law, as set out above.

III. SECOND ASSIGNMENT OF ERROR: COURTS ERRED IN DECLINING TO REVISIT *VANNATTA I* BASED ON NEW HISTORICAL EVIDENCE.

A. STANDARD OF REVIEW.

This is a question of law subject to *de novo* review.

B. OVERVIEW.

Petitioners urge the Court to reconsider or instruct lower court reconsideration of ***Vannatta I*** based on new research. We know from ***Vannatta I*** at 528 that Article II, § 8, part of the original Constitution, could be evidence of an intent that restrictions under Article I, § 8, would not apply. We supply such evidence.

1. HISTORICAL MEANING OF ARTICLE II, § 8: REGULATION OF "ELECTIONS."

Vannatta I held that the use of the word "elections" in Article II, § 8, had a contemporaneous meaning in the mid-19th Century of regulation of the events on election day, although conceding that the word "elections" has since come to mean the entire process of seeking election. ***Vannatta I*** at 530.

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

Vannatta I at 531. This conclusion was critical to the Court's holding that Measure 9 of 1994 was not authorized by Article II, § 8, as an exception to Article I, § 8.

In reaching this conclusion about Article II, the Court used one source, WEBSTER'S (1828), apparently *sua sponte*.[17] Since ***Priest v. Pearce***, 314 Or 411, 840 P2d 65, 67-69 (1992), where this Court set out methodology for an "originalist" interpretation of the Oregon Constitution, this Court has relied solely upon WEBSTER'S (1828) for construing the meaning of constitutional words very few times. In each of those other cases, the word(s) under

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17. Undersigned has reviewed the briefs submitted to the Court and found no reference to any primary sources of language by any party, intervenor, or amicus. None of the briefs cite WEBSTER'S (1828). None of the historical statutes discussed in the Horton Opening Brief or in this Horton Opening Brief on Review was brought to the Court's attention in ***Vannatta I***.

consideration had reached a "modern" meaning long before 1857 so the inclusion in WEBSTER'S (1828) merely confirmed long-understood usage.[18]

While appearance in the 1828 work confirms that meanings were settled before 1857, absence from the 1828 compilation does not assist understanding of rapidly-evolving American usage decades later. In other decisions, this Court has included review of additional sources.[19] The Court of Appeals has cited

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18. ***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 widely used 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***, *supra*, (Court uses WEBSTER'S (1828) for "suspend," which had acquired its current usage).

19. ***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);

(continued...)

WEBSTER'S (1828) a number of times, but in each decision has consulted additional mid-19th century sources or cases.

What did the attendees at Champoeg and the Territorial Legislature and the drafters and voters of 1857-8 understand the power to regulate the conduct of "elections" to include? Primary sources show that "election" has been used in an expanded "modern" meaning (to include campaigning for office) by 18*48*.[20] "Electioneering" became so associated with election campaigns that the need to modify "campaign" as an "electioneering" campaign disappeared in printed sources.[21] We provide a number of examples in print by 1848 using

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19.(...continued)
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); ***Pendleton School Dist. 16R v. State***, 345 Or 596, 613, 200 P3d 133 (2009) ("uniform" coupled with "common schools" in Art VIII, § 3) looks to Alexander M. Burrill, A LAW 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 2nd ed 1867); James Kent, COMMENTARIES ON AMERICAN LAW (3rd ed. 1836) and later historical articles.

20. The historical texts discussed herein are all available in digital form from Google Books: http://books.google.com. Typing the title of the book into the search field will yield a digitalized version of the book, which can be viewed. Entering the words of a quotation into the search field will find that text in the book and in other books. Each of the referenced texts is available in some university collections but were digitalized in 2005 and 2006. These references were not readily available to the litigants in ***Vannatta I***, and none were cited.

21. As it is no longer necessary to refer to a "touchtone phone," since the noun
(continued...)

"elections" in its expanded sense to include events occurring in the months preceding the casting of votes. It is reasonable to assume that Oregon Convention delegates[22] and voters were familiar with the well-known congressional orators and current events and did not rely exclusively upon an 1828 dictionary for their understanding of the word "elections."

By the time of the adoption of the Oregon Constitution, "election" had expanded in meaning to include the entire campaign and was used in that sense in the state constitutions upon which Oregon's Constitution is modeled and in state legislation adopted before 1857.

2. HISTORICAL MEANING OF ARTICLE I, § 8: FREE SPEECH DID NOT INCLUDE IMPROPER COERCION UPON SUFFRAGE.

As part of the Article I, § 8, analysis for an "historical exception," ***Vannatta I*** finds the parties did not offer examples of restrictions on campaign contributions and (324 Or at 538):

21.(...continued)
is understood to incorporate the attribute once used as a modifier.

22. Almost a third of the delegates were lawyers, and two edited newspapers. See George H. Himes, *Constitutional Convention of Oregon*, QUARTERLY OF THE OREGON HISTORICAL SOCIETY, Vol XV (March-December 1914), p. 218 (more legible version from TRANSACTIONS OF THE 40TH ANNUAL REUNION OF THE OREGON PIONEER ASSOCIATION, Portland, June 20, 1912 (Chausee-Prudhomme, Portland 1915) pp. 626-628, excerpts provided at Horton App 5-7.

> Neither have we found any indication that, at the time of statehood, the possibility of excessive campaign contributions was considered a threat to the democratic process. No historical exception applies.

First, we now know that in 1857 there were some laws limiting campaign contributions and pre-election day conduct in states with free speech clauses similar to Article I, § 8. Second, whether there were "laws to limit campaign contributions" is too narrow a focus. Such limits are but one example of laws aimed at protecting suffrage. Other protections of suffrage include prohibiting conduct to induce voters to vote for a candidate ("treating" before the election) or to abstain from voting at all by leaving the jurisdiction before an election (Oregon Frauds in Election Act of 1870, § 3). Pre-election day conduct such as wagering on the outcome of a contest was illegal because, "whatever has a tendency, in any way, unduly to influence elections, is against public policy" and betting creates incentive to "circulate lies" to alter the outcome. ***Bettis v. Reynolds***, 12 Ired 344, 34 NC 344, 1851 WL 1199, 1-2 (1851).

C. THE INTENT OF THE DRAFTERS OF THE OREGON CONSTITUTION IS SHOWN BY THE ADOPTION OF ARTICLE II, SECTION 8.

Article I, § 8 is the product of drafters of the Oregon Constitution who knew of the efforts in other states to limit "improper" or undue influence on voter choice prior to election day balloting, they themselves observed the development of lengthy "campaigns" during their own political careers and understood by 1857 that "elections" required such campaigns.

1. STATUTES IN OTHER STATES LIMITED CONDUCT INIMICAL TO SUFFRAGE PRIOR TO ELECTION DAY.

In addition to the convention delegates who carried copies of other state constitutions, all of the delegates were politically active. It can be presumed they understood how "elections" were regulated in other states.[23] More than 40 of the 60 delegates were affiliated with national parties and were elected as Oregon Constitutional Convention delegates on party tickets.[24] They had observed the changes in election campaigns throughout their careers.

They would have known that, as early as 1801, states enacted laws patterned after 17th century British statutes meant to limit abuses in influencing potential voters before the day of voting. North Carolina enacted a statute which prohibited "treating with either meat or liquor, on any day of election or on any day previous thereto, with intent to influence the election, under the penalty of two hundred dollars."[25] In 1829, New York made it unlawful to try

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23. See Horton Opening Brief, p. 35, for a summary of political careers.

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

25. Rev Stat ch 52 sec 23.

> The preceding section of the act makes it highly penal for any person, who is a candidate for a seat in the legislature, to give, either directly or indirectly, any money, gift, gratuity, or reward, &c. in order to be elected, and embraces all persons who shall do either of the acts "to procure any other person to be elected."--The penalty is a forfeiture of four hundred dollars. The 23rd sec. forbids *treating* with either meat or liquor, on *any day*

(continued...)

to influence voters "previous to, or during the election" or to contribute money to promote the election of any particular candidate or party ticket. ***Jackson v. Walker***, NYSup, 5 Hill 27 (1843) found the Harrison "log cabin" campaign headquarters in violation by serving liquor and entertainments before the election.

By 1852, Maryland had made it an offense (with some exceptions) for any "political agent" ("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.

The North Carolina courts explained the essential nature of suffrage and the need to curb all undue influences upon it:

> 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.

25.(...continued)

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

Bettis v. Reynolds, *supra*. ***Bettis*** condemns any wagering on elections because it leads to the underlying "self-evident" harms of "perversion of facts" and "circulating falsehoods." *Id.* Such activities are certainly "expression" or "speech," yet they were not protected from limits by mid-19th Century lawmakers because of their pernicious impacts on suffrage.

2. CONTEMPORANEOUS CONSTRUCTION OF LAWS REGULATING ELECTIONS BY THE CONSTITUTIONAL DRAFTERS.

Oregon cases have looked to the careers of the Constitutional Convention delegates to discern their understanding of constitutional provisions. ***State v. Finch***, 54 Or 482, 103 P 505, 511 (1909).[26] There is a strong relationship between contemporaneous construction and Constitutional originalism. ***State ex rel Gladden v. Lonergan***, 201 Or 163, 177-8, 269 P2d 491, 496 (1954).

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26. In upholding the death penalty, the Court (54 Or at 497) 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. * * *. 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.

Some of the Constitutional Convention delegates had been active in legislating since the Champoeg Convention (1843),[27] which drafted the Oregon Organic Law (1843) which served as the governance document until the Constitution was adopted.[28] These men continued to serve in the Provisional Legislatures (from 1844 until replaced by the Territorial Legislature in 1849), which adopted Iowa elections law.[29] Other delegates to the Oregon Constitutional Convention served in the Territorial Legislatures (which met yearly from 1849-1859), re-adopting the Iowa Law in large part and then adopting the first Oregon Code in 1855.[30]

The core group of lawyers who shaped the Territorial codes, participated in the Constitutional Convention, then served in or advised the early statehood legislatures includes 1854 Code Commissioners James Kelly and Reuben Boise and Convention Chair and state code codifier, Matthew Deady, as well as lawyer, Addison Gibbs. Gibbs had served in Territorial Legislature and, as

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27. Public meetings at Champoeg, 1843, Oregon History Project, Oregon Historical Society http://www.ohs.org/education/oregonhistory/historical_records/dspDocument.cfm?doc_ID=40889788-92F9-C578-96471494DA12A34C

28. *Oregon History: The "Oregon Question" and Provisional Government*, OREGON BLUE BOOK at http://bluebook.state.or.us/cultural/history/history10.htm.

29. Two examples: Jesse Applegate, Asa Lovejoy.

30. Reuben Boise, Matthew Deady, LaFayette Grover, James Kelly, Cyrus Olney, J.C. Peebles, Frederick Waymire, David Logan, for example.

sitting Governor, signed into law limits on lobbying and election campaign misconduct in 1864.[31] As noted, lawyer Lafayette Grover had also been a delegate, and as Governor, signed into law limits on election misconduct in 1870.

This core group lived through and observed the changing dynamics of political campaigns. The governing documents they endorsed show an evolution consistent with trends in society towards long election "campaigns" and use of the language which evolved with the changing practices.

Here's an example of how the evolution in governing documents assists interpretation. As noted in ***Vannatta I***, 324 Or at 533-34, Connecticut adopted a constitutional prohibition against influencing electors at the *viva voce* elections, which became part of its Constitution after joining the union:

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

Connecticut Const (1818) Article VI, § 6. ***Vannatta I*** concludes:

> The fact that Oregon's provision does not limit its scope expressly to the meeting of electors but, instead, uses the term, "elections," arguably supports either of two different conclusions. On the one hand, it could indicate that the Oregon provision was intended to extend further than the Connecticut provision. On the other hand, the

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

> framers of the Oregon Constitution may have regarded the terms, "meetings of the electors" and "elections," as synonymous.

But now we can trace the expansion in campaign activity, the meaning of "elections," and attendant regulation upon election campaigns more specifically by comparing the narrow regulatory power in the Territorial laws with the provisions of Article II, § 8.

The earliest Oregon governance documents, borrowed intact from Iowa in the 1830s, provided for regulation of elections in the narrower sense that ***Vannatta I*** posits. For example, the Oregon Organic Act adopted after the Champoeg Convention of 1843 contained then-extant principles of equity and the common law known in Iowa, and Section 5 of the Act to Establish the Territorial Government of Oregon, 30 Con Ch 177, 9 Stat 323 (1848), gave the Territorial Legislature only the authority to set the "time, place and manner of holding and conducting all elections of the people * * *."

Even though the Territory adopted its pre-constitution laws from Iowa wholesale, *unlike* Iowans, Oregonians later expanded the scope of election regulation by adopting a Constitution that expressly authorized the Legislature to regulate elections and protect citizens from any sort of "undue influence" or "improper conduct" upon suffrage by using the language of pre-1857 Constitutions of Texas and California (and the other states listed in the table at page 44, *post*). In contrast to the narrow definition of authority in the Territorial

laws (where the source of authority was Congress, with Territorial legislation subject to Congressional veto[32]), the Constitution used the phrase of more recently enacted constitutions, not Iowa's.

In ***State v. Moyle***, 299 Or 691, 696, 705 P2d 740 (1985), this Court found that the Territorial Legislature's elimination of certain crimes prior to adoption of the Constitution indicated an intent to not prohibit that conduct under the new Article I, § 8. Here, the converse may be implied; voters granted a new plenary power over elections under Article II, § 8, which the Territorial laws had previously circumscribed to the regulation of election day events only.

3. ARTICLE II, SECTION 8, PROTECTION OF INDIVIDUAL RIGHTS TO BE FREE OF COERCION DURING THE ELECTION CAMPAIGN.

As states in the deep south, along the Mississippi River, and farther west through Texas and California joined the union, they used the word "elections" in the evolving sense, thus acknowledging that the period of time in which "improper" influences might work upon potential voters could occur long before election day.

The ***Vannatta I*** discussion of the Connecticut Constitution (1818) suffers from the erroneous impression that Oregon "adopted" a version of the Connecticut Constitution and might have intended that "elections" have the same

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32. See ***Stevens v. Meyers***, 62 Or 372, 126 P 2d (1912).

meaning as the one-day meeting of electors.[33] In fact, Oregon followed at least seven other states in using the phrase "regulating and conducting *elections*" (as the popular understanding of that word developed) well before 1857 as shown in the following chart.

STATE (year adopted)	ELECTION PROTECTION PROVISION IN CONSTITUTION
Kentucky (1792)	**Article VIII, Section 2:** [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.
Louisiana (1812)	**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.

33. Carey, OREGON CONSTITUTION, Appendix (a), summarizes an Oregon Law Review (April 1926) article by W.C. Palmer, on "sources" for the Oregon Constitution. For the "source" of Article II, § 8, Carey/Palmer remark it is "similar" to the Connecticut Constitution, 1818, Article VI, § 6. Carey at 470. Palmer and Carey did not have access to or declined to consider the constitutions within THE AMERICAN'S GUIDE (which delegate Grover carried) of those states which later seceded from the union (or the constitutions therein from Kentucky and California). The only 7 states Carey/Palmer mention as having similarities to the Oregon Constitution were Indiana, Maine, Iowa, Michigan, Connecticut, Massachusetts, and Wisconsin. The 7 nearly *identical* state constitutional provisions in the table below are far more likely direct sources of Article II, § 8, than the somewhat different provision in the Connecticut Constitution.

STATE (year adopted)	ELECTION PROTECTION PROVISION IN CONSTITUTION
Mississippi (1817)	**Article VI, Section 5:** 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.
Alabama (1819)	**Article XI, section 5:** The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult, or other improper conduct.
Florida (1838)	**Article VI, Section 13:** [T]he privilege of suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult, or other improper practices.
Texas (1845)	**Article 16, Section 2:** 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.
California (1849)	**Article XX, section 11:** 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.

Actions under these Constitutions were known to lawyers and judges. In upholding the right to deny the right to vote to someone who participated in a duel before the election, the Louisiana Supreme Court relied upon the power of

the legislature to prohibit any "improper practice" (here one that occurred prior to balloting):

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

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

Texas provides a particularly relevant example of pre-1857 campaign funding limits which would have been known to the Convention delegates. As the table above shows, the Constitution of Texas (1845) contains sections essentially identical 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:

> 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.[34]

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34. Article 263 punished violence or threats of violence to person or property to "endeavor to procure the vote of any elector, or the influence of any persons over other electors," by a fine of up to $500.00. See Opening Brief of Horton Plaintiffs, ER 31.

The Texas statute provides vital historical context relevant both to understanding intent and evaluating an historical exception to the reach of Article I, § 8, of the Oregon Constitution and what the Oregon Convention delegates and voters intended Article II, § 8, to accomplish. It was adopted after decades of efforts throughout the United States protect suffrage from corruption by inducements or coercion.

Within the next few legislative sessions after statehood, 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, § 8. The listed offenses (1) could occur long before the "day of" the election and (2) could corrupt 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.[35]

In 1870, the Oregon Legislature made it a crime to "persuade" anyone to change residence or to persuade a legal voter not to vote. Deady Code (1872)

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35. 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. Conduct which could affect an election long before the day of balloting included offering, receiving or soliciting a promise of "any beneficial thing" in exchange for a later vote. Crimes Against Public Justice Act (1864), §§ 616, 617, 619. Also, "changing his habitation" Frauds in Election Act § 632 (1870). Included for convenience of the Court in Appendix to the petitioners Opening Brief on Review, at App 1-4.

Crim Code T II, C V, §§ 632-634. The penalties for "persuasion" were harsh: imprisonment, and/or a fine of up to $1,000, and a lifetime ban from holding office. As noted above, Addison Gibbs, lawyer and law partner of Convention delegate George H. Williams, was Governor at the time of the passage of the 1864 act. Convention delegate Grover was Governor at the time of the passage of 1870 legislation. Neither vetoed or objected that these laws regulating campaigning were prohibited by Article I, § 8, or were outside the authority granted by Article II, § 8, to regulate elections.

Concern with corruption of the elections process more subtle than overt *quid pro quo* bribery was expressed in Oregon law in 1870.

> 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.[36]

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36. Note that the prohibited conduct was not overt "bribery" but mere persuasion of any kind influencing the voting decision. Nor was any additional *mens rea*, such as "wrongfully" or "corruptly" (although these terms are defined in the criminal statutes); the only mental state required was an intent to "persuade" through the conduct of the prohibited inducement.

D. BY 1858 "ELECTION" HAD EXPANDED BEYOND THE MEANING ATTRIBUTED IN WEBSTER'S (1828).

That many of the same men who participated in the territorial government, served as Constitutional Convention delegates, and later served as elected officials after statehood, passed laws criminalizing some pre-Election Day conduct did not reflect a radical change in their thinking. They lived through changes in electioneering conduct and understood evolving practices and language.

Vannatta I makes important assumptions about the process of linguistic change.

> The Secretary of State would have us construe "elections" to include *all* activities that occur during political *campaigns.* But the two concepts do not necessarily overlap so completely. A present day dictionary defines "election" as "the act or process of choosing a person for office, position, or membership by voting." WEBSTER'S THIRD NEW INT'L DICTIONARY at 731 (unabridged 1993). "Campaign" is defined as "a series of operations or efforts designed to influence the public to support a particular political candidate, ticket, or measure." *Id.* at 322.
>
> * * *.
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> However, the constitutional provision that we construe here was proposed in 1857, not in 1996. A dictionary relevant to that time gives a more limited definition of the word "election": "The act of choosing a person to fill an office or employment, by any manifestation of preference, as by ballot, uplifted hands or viva voce[.]" WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).
>
> The dictionary on which we rely has no definition of "campaign" that corresponds to the present-day use of that word as a description of the effort to obtain public office or to obtain the passage of an initiated or

> referred measure. The concept of that time closest to what we now term "campaigning" was "electioneering," which Noah Webster defined as "[t]he arts or practices used for securing the choice of one to office." WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). It thus appears that, whatever the degree of their overlap today, the ideas of "electioneering" and "elections" were somewhat distinct at the pertinent time, *viz.*, at the time that the Oregon Constitution was created.

Vannatta I, 324 Or at 530-31.

Article II, § 8, was proposed by Oregon Convention delegates who followed the law and read accounts of speeches by leaders such as John Quincy Adams, Henry Clay, and James Buchanan, all using "campaign" to mean an election campaign. It was adopted by voters who read novels, biographies, popular columns and entertainments, all using "election" in its modern sense of including the campaigning phase. We urge this Court to allow the terms of Measure 47 to be construed in light of information not available to this Court in ***Vannatta I***.

1. "CAMPAIGN" WAS USED TO REFER TO POLITICAL CAMPAIGNS LONG BEFORE 1857.

The term "campaign" was well-known to educated speakers, political figures and popular writers for American audiences long before WEBSTER'S (1828) was published. Further, the term "campaign" became so closely associated with elections that the need to identify a "campaign" as an "electioneering" or "political" campaign disappeared. Finally, "election" came to

be used alone in American vernacular by the 1830s to encompass the "electioneering" and "campaign" components.[37]

Gouverneur Morris (a drafter of sections of the U.S. Constitution) used the phrase "political campaign" in a letter dated 1789.[38] In 1813 Francis Scott Key wrote, "I have not seen nor heard of Ridgley [a Virginia acquaintance] since his political campaign commenced."[39] In 1820 a satirical bi-weekly explained that "Mrs. Busybody" "has been much occupied and harassed during the last spring by the election campaign in New-York."[40]

In 1828 Henry Clay published a refutation of statements made by Andrew Jackson's partisans, arguing that "was the policy with which the political campaign was conducted in the Winter of 1824-25 by the forces of the General." A 1829 biography of Elbridge Gerry (Madison's vice-president in 1812) noted that the "expectation of decrease of the energies of an election

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37. This shift in meaning is known as metonymy, as when the word "crown" comes to stand for the larger related concept of monarchy beyond its original meaning as fancy headgear.

38. "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.

39. 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.

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

campaign was hardly to be justified."[41] Given these diverse examples of "campaign" used in a political sense by the 1820s, the absence of that political definition from WEBSTER'S (1828) is of little weight.

During debate on the House floor, representatives John Quincy Adams and Charles Underwood 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. Disputing 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."[42] Also in 1841, James Buchanan said on the floor of the Senate, "I can truly say that, during the whole election campaign, I never saw one single resolution in favor of a national bank."[43]

In 1839, an essayist used the phrase "election campaign."[44] In 1843 a periodical writer used the phrase "political campaign" repeatedly in its

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

42. *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.

43. 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.

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

thoroughly modern sense.[45] In 1852, a memoir by a newspaperman described "the last electioneering campaign" of Daniel Webster,[46] and the ANNALS OF ALBANY (Musell Albany 1852), p. 355, noted a "penny paper, issued during the election campaign." The ProQuest Historical Newspaper database for the *New York Times* shows numerous references to "political campaigns" as protracted contests by the early 1850s. *See*, the notice dated June 25, 1852, from *The New York Daily Times*, telling readers that "During the political campaign upon which the country has just embarked," it will publish "*The Campaign Times*" "for the whole campaign." Horton Petitioners Appendix, App 10.

"Campaign" in its political sense entered the language of tradespeople, as reported in judicial decisions. ***Whitaker v. Carter***, 4 Ired 4, 1844 WL 992 *1 (NC 1844), 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 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 for money promised for

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45. "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.

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

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 1857, the modifier "political" or "electioneering" for the word "campaign" was becoming unnecessary. For example, in 1841, the popular essayist Washington Irving commented on recent elections, "[E]very thing remains exactly in the same state it was before the last wordy campaign"[47] 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 * * *."[48] A collection of partisan songs for election rallies in 1856 was titled: FREMONT AND DAYTON CAMPAIGN SONGSTER (Whitten & Twone 1856).

2. LONG BEFORE 1857, THE TERM "ELECTION" INCLUDED THE PERIOD OF CAMPAIGNING BEFORE THE DAY OF VOTING.

"Election" also evolved before 1857 to encompass more than the "act" or the "day" of public choice of officers to the entire process we now call

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47. *Letter XIV*, SALMAGUNDI; OR THE WHIM-WAHMS 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*.

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

campaigns for election. ***Vannatta I*** implicitly recognizes that common usage is crucial to the eventual merger of meaning in concepts by pointing out that the "behavior" now known as political campaigns was known by 1857. But the Court then finds significant the omission of a word to describe that "behavior" in its 1828 source and no use of a word to describe that "behavior" in Article II, § 8. ***Vannatta I*** at 529 n15. Yet, demonstrably "election" had expanded in meaning to mean "election campaign" by at least 1848.

> As the franchise expanded [***Vannatta I,*** 324 Or at 530], the concept of a democratic election came to include rousing those newly enfranchised voters through planned "campaigns." By 1840, the political parties in most states had adopted the primary nominating process, further transforming the idea of an election in local races into a lengthy "process" and not a one-day event. The shift had already long since begun at the Presidential level (***Vannatta I***, 324 Or at n15).

The metonymic shift of "election" to stand for and include both campaigns and electioneering had occurred in American usage by the 1840s. It had occurred earlier in Britain. 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,"[49] clearly referring not to the day of the

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

voting but to the period of time when candidates attempted to persuade voters.

The same extension of meaning occurred in the United States. In 1835, an American writer, G.K Paulding, used the past continuing tense in describing the "interest excited by" the United States Bank controversy "that there was during the election of a President of the United States * * *."[50] Paulding was not referring to just one day of voting.

The expanded meaning of "elections" to encompass a process in the months before the decision at the polls is traced through popular pieces by one columnist in the American press written between 1830 and 1850. Political satirist Seba Smith created a character, "Major Jack Dowing," a Maine "downeaster" Democrat who described events "in his own plain language" in "letters" printed in several newspapers between 183O--1859. *Preface*, MY THIRTY YEARS OUT OF THE SENATE, (Oaksmith 1859), p. 5.[51]

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

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

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

In an early "Letter," dated January 18, 1830, "Dowing" noted acrimony at the Maine legislature because "the preceding electioneering campaign had been carried out with a bitterness and personality unprecedented in the State."[52] In July 19, 1830, he quotes a hopeful seeking appointment as writing, "I'm going to start to-morrow morning on an electioneering cruise."[53]

Years later, on June 30, 1848, Dowing used the word "election" in a continuing sense. He comments on the disarray in nominating a Democratic candidate to run against Zachary Taylor, the torchlight parades already underway, and wonders how things are going in "this election," using the word "election" to refer generally to the events occurring months before the *day* of the 1848 election or the casting of ballots.

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

MY THIRTY YEARS OUT OF THE SENATE, pp. 308-9. Use of the present progressive tense "are going" shows the "election" is in progress at the time of the writing--June 1848, some 5 months before the casting ballots in November.

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

53. *Id*., p. 100.

Progressive verb forms indicate action that is happening at the same time the statement is written. Such newspaper columns are good authority for what readers understood. In this case the events described are historically-based, not fanciful.[54] While the writer affects a vernacular dialect in spelling, all the verb tenses are internally consistent and present progressive.

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.[55]" On September 18, 1852, Dowing blames the poor outlook for his candidates on the fact that, "the liquor law has played the mischief this election all round, and got things badly messed up.[56]"

There are many additional examples of the word "election" in this sense of "during the campaign prior to casting ballots" in American usage prior to 1857. From biographies of the time:

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54. This passage comments upon actual events. "Barnburners" were a faction of the Democratic Party opposed to slavery who refused to support Democratic presidential nominee Cass in 1848. "Proviso folks" supported the "Wilmot Proviso" which would have outlawed slavery in the territory acquired from Mexico. "Hunkers" were a faction of the Democratic Party in opposition to making slavery a campaign issue.

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

56. *Id*., p. 395.

> But if [Aaron Burr's] name was on the [1800 New York State assembly] ticket as a candidate, his personal exertions during the election would be lost to the party.[57]
>
> [T]o those who had been his true friends during the election struggle [Andrew Jackson] extended the graceful hand * * *.[58]

As the word election comprehended 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.[59]

In context, it is clear that Greeley was not advocating disclosure of contributions made only on the day of elections or conventions but during the process of "elections," including primary elections. We offer other examples at App 8-9.

IV. CONCLUSION.

The Oregon Constitution, Article II, § 8, is the product of drafters and voters responding to changes in the democratic process which fast evolved in the early 1800s--longer "campaigns," masses of organized partisans, prolonged efforts and opportunity to influence voters, some pernicious. They understood

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

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

59. Horace Greeley, *et al*., THE TRIBUNE ALMANAC AND POLITICAL REGISTER (Tribune Association 1858), p. 350.

"elections" to be the months-long process of persuading voters, not just a day for voting. They understood free suffrage to be at risk for the duration of such campaigns. They read, contributed to, and used the changing vernacular of their times. We urge the Court to be similarly receptive to new research and either reconsider ***Vannatta I*** or specifically instruct the lower courts to do so in light of relevant research.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITATIONS AND TYPE SIZE REQUIREMENTS ORAP RULE 5.05 and ORAP 9.05(3)(a)

Length of Opening Brief

I certify that (1) the foregoing Opening Brief complies with the word-count limitation of ORAP 9.05(3)(a) and (2) the word count of this Opening Brief as described in ORAP 5.05(2)(a) is 13,909 words.

Type Size

I certify that the size of the type in this Petition for Review is not smaller than 14 point for both the text and footnotes as required by ORAP 5.05(4)(f).

September 29, 2011

/s/ Linda K. Williams

CERTIFICATE OF ACCURACY OF INFORMATION PRESENTED IN APPENDICES

ORAP RULE 9.07

I certify that the documents contained in the Appendix to this Opening Brief on Review are accurate copies of the information that appears at the internet addresses provided for each document in the Opening Brief on Review or on the document in the Appendix itself.

Dated: September 29, 2011

/s/ Linda K. Williams

Linda K. Williams

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I FILED the original OPENING BRIEF ON REVIEW OF PETITIONERS JOAN HORTON AND KEN LEWIS by Efile this date and further that I SERVED it by Efile on the parties listed in No. S059245 and marked with an asterisk below. I SERVED it also by emailing a true copy to each counsel below.

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