direct expression of the drafters' intent where the question involves the legislature's authcjiity over the election process. It, too, controls to the extent of any conflict with the general free speech guarantee of Article I, section 8.

A. Article n, section 22 constitutionally limits campaign contributions and precludes any claim that Oregon's general free speech provision secures broader contribution rights.

Article **n,** section **22,** which appeared on the **1994** November ballot as Measure ***6,*** was enacted and made part of the constitution at the same time that the voters considered and passed Measure **9.** Section **22,** entitled "Political campaign contribution limitations," contains detailed provisions that limit who may make campaign contributions to candidates for elected public office. The presence of that provision in the Oregon Constitution raises two questions: **(1)** what bearing does it have on any claim of a state constitutional right to make certain campaign contributions; and **(2)** if the federal constitution confers some greater contribution rights, does that fact nullify Article **n,** section **22** for purposes of determining the scope of protection given by the state constitution? The state's answers to those questions are: **(1)** section **22** is dispositive of petitioner's claim that Measure **9** violates the Oregon Constitution by restricting the campaign contributions of corporations, labor organizations and other associations and of their "associational" claims ***in*** general as they apply to contributions; and **(2)** whether section **22**'s Hmits are at odds with federal law does not alter the scope of the protection *hat petitioners can invoke under the Oregon Constitution,

The key provision of Article II, section **22** states:

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The fuU text of Article **n,** section **22** is set out at App-13.

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

Art **n, I 22(1).** This provision of the Oregon Constitution limits campaign contributions in two key ways. First, contributions may come only from within the electoral district served by the office the candidate seeks. Second, and of particular import for petitioners' claims here, campaign contributions may be made only by individuals. Simply put, even if the act of contributing to a candidate is expression that would otherwise be protected by Article I, section **8** *(but see* Section IVA, *infra),* the Oregon Constitution affirmatively disables anyone but individuals living in the affected electoral district from making campaign contributions. Contrary to petitioners' arguments, therefore, other potential contributors — *e.g.,* coiporations, labor unions, political committees, or other associations — may not lay claim under the Oregon Constitution to any right whatsoever to contribute to a candidate for state office. Nor may any individual living outside the electoral district of a particular public office do so. The general guarantees of the free speech clause cannot be said to confer rights that the specific provisions of Article **n, -** section **22** restrict. In effect, the enactment of Article **n,** section **22** is preemptive; it "occupies the field" and defines campaign contribution rights under the Oregon Constitution.

Petitioners will undoubtedly claim that Article ***TL,*** section **22** violates the federal constitution and point out that the federal district court has already agreed with them on

that score. Although the federal court abstained from testing Measure 9 by federal standards until this Court could first consider them under state law, that court did conclude that the contribution limits in Measure 6 violate the First Amendment and, by judgment entered August 8, 1995, enjoined enforcement of the campaign contribution limits contained in that portion of the Oregon Constitution. *VanNatm v. Keisling,* USDC No 94-1541-JO (August 8, 1995). That decision is currently on appeal. *VanNana* v. *Keisling,* USCA, 9th Cir No. 95-35999.

A claim that if Article **n,** section 22 violates the federal constitution, it is superfluous, as a matter of state law would be fundamentally wrong where the question is: what does the Oregon Constimtion itself guarantee? Whether Article **n,** section 22 is superseded by federal constitutional principles does not determine the correct construction of the Oregon Constimtion. Article II, section 22 remains a part of the Oregon Constitution unless and until it is repealed by the people of Oregon. It would be a peculiar result to conclude not only that federal law may supersede a state constitution, but also that it may effectively rewrite that state charter to embody policies contrary to those that it affirmatively contains. So long as Article It, section 22 remains part of the text of the Oregon Constitution and states that only individuals may contribute to candidates, candidates cannot successfully assert that the Oregon Constitution confers on them a right to receive contributions from associations or corporations; similarly, neither associations nor corporations may assert that the Oregon Constitution gives them a right to contribute to candidates. The Oregon Constitution remains the Oregon Constitution,

complete with the policies reflected in Article **n,** section 22, even if those poUcies as a federal law matter are unenforceable.

Any other conclusion would fundamentally undermine principles of independent state constitutional analysis. States are free to write their constitutions so that they do not protect some conduct that is affirmatively protected by the federal constitution. As this court's familiar methodology demonstrates, the court first tests a claim that a statute is unconstitutional against the state constitution. *E.g., Zockert* v. *Fanning,* 310 Or 514, 520, 800 P2d 773 (1990). If the statute passes state constitutional muster, the court then proceeds to test it against any asserted federal right. *See Smith* v. *Employment Division,* 301 Or 209, 721 P2d 445 (1986) *vacated and remanded Employment Division* v. *Smith,* 485 US 660, 108 S Ct 1444, 99 L Ed 2d 684 (1987) *on remand Smith* v. *Employment Division,* 307 Or 68, 763 P2d 146 (1988) *rev'd Employment Division v. Smith,* 494 US 872, 110 S Ct 1595, 108 L Ed 2d 876 (1990). If the chaUenger does not assert a claim under the federal constitution, however, the court's inquiry ends after determining that the law does not violate the state constitution. If the state constitution's lack of protection falls below a governing federal standard, citizens are free to rely on federal law, but they may not claim that the federal law obligates the state to provide the same level of protection as part of its organic law. When a state constitution forbids that which the federal constitution permits, the analysis should be no different. The person wishing to «igage in that conduct may rely on federal law to avoid the state prohibition, but may not insist that the state constitution be rewritten to contain protection for that which it ^ffiimatively forbids.

That conclusion is reaffirmed by considering the same problem were it to be arise in other contexts. Assume, for example, that Oregon voters were to amend the Oregon Constitution by adding a sweeping constimtional prohibition against the creation, distribution or possession of pornography of any and all kinds. Of course, the new provision could not be held "unconstimtional" under the Oregon Constitution, given that it is itself a part of the state constitutional charter. Therefore, despite the fact that this court has previously held that Article I, section 8, protects many forms of pornography. *State* V. *Henry,* the hypothetical new amendment would supersede that protection. It might be that, as a matter of federal law, the antipomography provision would go too far and would encompass in its sweep materials that are protected by the federal First Amendment. That fact, however, would not alter the analysis of what protection may be claimed as a matter of state law. Plainly, under the hypothetical, the fact that federal law might compel Oregon's constimtional antipomography policy to give way would not be a basis to transform that policy into one where pornography could again be deemed to be protected under the Oregon Constitution.^^

Other examples, some hypothetical and some not, similarly reveal the fallacy of expanding the inteipretation of the Oregon Constitution where federal supremacy renders an ejqpress state constitutional policy unenforceable. Punitive damages provide a recent example. Under Article VII (Amended), section 3, of the Oregon Constimtion, Oregon courts are precluded from most forms of review of punitive damages. *See Oberg* v. *Honda Motor Co.,* 316 Or 263, 851 P2d 1084 *rec denied* (1993). Federal due process principles, however, require judicial review of the size of punitive damage awards. *Honda Motor Co.* v. *Oberg,* 512 US_____, 114 S Ct____, 129 L Ed 2d 336 (1994). That fact, however, does not mean that the limitation contained in the Oregon Constitution can ^ read out of it, or that Oregon Constitutional policy is altered and some other more general provision of Oregon's charter should be construed to contain such a right. A seeking review of a punitive damages award must assert a federal claim to obtain it.

(continued...)

Here, because of the procedural history of this case, petitioners have asserted their claims only under the Oregon Constitution; the^' have asserted no federal claims in this court. Even if Article **n,** section 22 is ultunately found unconstitutional as a matter of federal law, it still remains a part of the Oregon Constitution and petitioners may not claim that their rights under the Oregon Constimtion are violated if Article II, section 22 forbids the conduct they claim a right to engage in.

Article **n,** section 22 disposes of most of petitioners' claims. All claims based on the alleged rights of political committees, coiporations and unincorporated associations to contribute to candidates, for example, simply do not state claims on which relief may be granted under the Oregon Constitution and should be dismissed. The same is true of petitioners' general associational claims. The significant provisions of Measure 9 that Article **n,** section 22 does not address are individual contribution limits and expendimre guidelines. The challenge to the limitation on contributions fails in the face of another provision of the Oregon Constitution that petitioners also have not addressed.

(...continued)

Similarly, assume hypothetically that the Oregon Constitution, in addition to providrag for a general right of jury trial in aU criminal cases (Article I, section 11), specifically excluded crimes where the potential penalty is less than one year imprisonment. Under the federal constitution, that provision would be unenforceable for any person charged with a crime in which the potential penalty is greater than six months. *E.g., Baldwin* v. *New York,* 399 US 66, 69, 90 S Ct 1886, 26 L Ed 2d 437 (1970) (plurality decision). That fact, however, certainly could not be said to "nullify" Oregon's<express contrary policy so that the general jury trial guarantee of the Oregon Constitutioii could itself be read to confer a right to jury trial in criminal cases where the penalty is six months imprisonment. It would be a pure fiction to assert that the Oregon Constitution provided a right to a jury trial in a case with a six-month penalty and the defendant would have to rely on federal law.