IN THE SUPREME COURT FOR THE STATE OF OREGON

STATE OF OREGON, **Plaintiff-Appellant/respondent on Review,** **v.** **THOMAS PAUL MOYER,** **Defendant-Respondent-Petitioner on Review.**	**Supreme Court No. S056990** **Court of Appeals No: A128796** **Multnomah County Circuit Court No. 040935104**
STATE OF OREGON, **Plaintiff-Appellant/Respondent on Review,** **v.** **VANESSA COLLEEN STURGEON, aka Vanessa Sturgeon, aka Vanessa Colleen Kassab,** **Defendant-Respondent-Petitioner on Review.**	**Court of Appeals No: A128797** **Multnomah County Circuit Court No. 040935105**
STATE OF OREGON, **Plaintiff-Appellant/Respondent on Review,** **v.** **SONJA R. TUNE,** **Defendant-Respondent-Petitioner on Review.**	**Court of Appeals No: A128798** **Multnomah County Circuit Court No. 040935106**

BRIEF OF AMICUS CURIAE POLICY INITIATIVES GROUP AND SEVEN INDIVIDUAL OREGON ELECTORS

Review of the Decision of the Court of Appeals on Appeal from the Circuit Court for Multnomah County, Honorable John A. Wittmayer

OPINION FILED: January 7, 2009
AUTHOR OF OPINION: Landau, joined by Haselton and Ortega
CONCURRING OPINION: Brewer, joined by Edmonds
CONCURRING OPINION: Schuman
DISSENTING OPINION: Sercombe, joined by Wollheim, Rosenblum, Armstrong

(counsel information on inside cover) July 2009

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I. INTEREST OF THE AMICI.

Bryn Hazell, Francis Nelson, Tom Civiletti, David Delk, and Gary Duell (the "Hazell Plaintiffs"), and Joan Horton and Ken Lewis (the "Horton Plaintiffs") are plaintiffs and appellants in ***Hazell v. Brown***, Oregon Court of Appeals No. A137397. Hazell, Nelson, and Delk were chief petitioners on statewide campaign finance reform measures in 2006, including the successful Measure 47 (2006). Horton, Lewis, and Civiletti were supporters of the measures.[1] All of them seek in ***Hazell v. Brown*** to require the Secretary of State and Attorney General to enforce Measure 47.

Their immediate interest in the instant case is to correct misstatements about the history of campaign finance regulation in Oregon, including requirements for truthful disclosure of the sources of political campaign contributions.

Policy Initiatives Group is an Oregon nonprofit corporation which since 1992 has supported research and programs, *inter alia*, to encourage civic engagement. Among its projects are those that investigate voter attitudes towards the initiative process and the history of voting reforms in Oregon. The immediate interest of the group and its supporters is to present accurate historical research on laws protecting suffrage in the United States and, particularly, Oregon.

The Amici offer extensive primary research conducted after ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997), was decided. None of the early primary source evidence or early legal authority cited in this brief was presented to the Supreme Court in that case or to the attention of the Court of Appeals in the instant case below. The primary source research on the early 19th century evolution of the words "election" and "campaign" is original, compiled for the first time by

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1. Ken Lewis currently serves on the Oregon Government Ethics Commission. He appears here in his capacity as an Oregon elector and not as a representative of the Commission.

undersigned for preparations for the trial court and appeal in ***Hazell v. Brown***.

II. INTRODUCTION.

Defendants challenge the constitutionality of ORS 260.402, which formed the basis of their indictments: violation of a ban on political donations in a "false name." Amici adopt the Appellant State of Oregon's statement of the case, except we offer these additional specific questions:

1. Is ORS 260.402 within an historical exception to Article I, § 8?

2. Is ORS 260.402 authorized by Article II, § 8, which is the more specific constitutional provision applicable to the regulations of elections?

The primary focus of this brief is to provide a correct, objective history on regulation of campaign contributions and of false statements pertaining to such contributions and to political affairs generally. The *Petitioners' Joint Brief on the Merits* to this Court [hereinafter "Petitioners Brief" or just "Petitioners" with a page number] makes a number of incorrect statements about objective historical facts, claiming, for example, "Campaign contribution regulation at both the state and federal level is a 20th century invention." *Id*., p. 35, n15. Both the opinion of the court and the dissenting opinion in this case below appear to believe that laws to protect the integrity of elections and campaigns began in 1908 with Oregon citizen-initiated reforms. ***State v. Moyer***, 225 OrApp 81, 200 P3d 619 (2009). In fact, such legislation had been in place in Oregon for decades before that and in the colonies from 1699.[2] There is a history in America of laws targeting any conduct

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2. In 1699, members of the Virginia House of Burgesses asked themselves the same questions that define today's campaign finance debates: How should we regulate campaign money? * * *. What we do know is that they enacted what may have been the first campaign finance law on this side of the Atlantic * * *.

(continued...)

which tends to harm the popular will expressed by suffrage, including prohibitions on false statements to elections officers, that extends for more than 200 years.[3]

Early American statutes targeted harmful conduct and effects by regulating election campaign conduct, curbing direct and "indirect" bribery of both voters and candidates, limiting or prohibiting conduct of classes of contributors (such as corporations and lobbyists), limiting amounts donated or spent for proscribed activities, and criminalizing conduct aimed at potential voters in the run-up to balloting. Such statutes were in place for decades before the Oregon Constitutional Convention of 1857. These American statutes adopted the models of the British reform acts which targeted indirect bribery. These laws first restricted certain campaign conduct and financial transactions by candidates, such as campaign expenditures to influence voters by "treating" or serving liquor.[4] They were closely

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2.(...continued)

Robert E. Mutch, essay, *Three Centuries of Campaign Finance Law,* A USERS GUIDE TO CAMPAIGN FINANCE LAW, (Lubenow ed., Rowman & Littlefield 2001).

3. To the extent necessary, we request judicial notice of the facts for which we provide references in this brief pursuant to Rule 201(b)(2), Oregon Rules of Evidence. The citations in this brief should satisfy Rule 201(c)(d)(2).

4. According to contemporary early 19th century British writers, statutes based on "ancient usage" forbid campaign contributions.

> The Act of 49th Geo III, c 118, proceeds on a preamble, that giving or promising money to procure a seat in Parliament is not bribery, if the money is not given or promised to a voter or returning officer; but that such gift or promise is contrary to the ancient usage, right, and freedom of election, and laws and constitution of the realm; and, therefore, if any person give, directly or indirectly, any sum, &c., on an engagement, &c., to procure, or endeavour to procure, the return of any person to serve in Parliament for any county, &c., the consequences shall be, 1. Forfeiture of ££1000 by the person so offending; 2. If returned, incapacity to serve in that Parliament; 3. Forfeiture to the Crown of the gift, &c., by the receiver, besides a penalty of ££500. No action is maintainable at common law on bonds of

(continued...)

followed by restrictions on the conduct of political supporters and others. Wagering on elections was prohibited for similar reasons--because it gave third parties an incentive to influence election results.

These laws regulating campaigns were not seen as weakening the freedom of speech guaranteed in many early American state constitutions but as serving to strengthen free government envisioned by the Constitutional Convention delegates in 1789. This concern for protecting the American experiment in extended suffrage was the historical backdrop for both Article I, § 8, and Article II, § 8, of the Oregon Constitution. That the Oregon Constitution allows limits on campaigns is further evidenced by the statutes adopted by the Oregon Provisional Legislature (1844-1849), the Oregon Territorial Legislature (1849-1859), and early sessions of the state legislature. Many members of these legislatures were delegates to the 1857 Oregon Constitutional Convention. With the new Oregon Constitution fresh in their minds, they promptly (in 1864 and 1870) adopted limits on money and "influence" in election campaigns. Many of these statutes, in various forms, have remained on the books in Oregon ever since.

Research also shows there has never been a protected "interest" in surreptitious support for candidates or for legislative matters. The Territorial Laws of Oregon adopted in 1854 deemed false statements to an elections official to be perjury and made it a crime to engage in even unsuccessful efforts to "incite" such perjury. These prohibitions were re-adopted after statehood (Crimes Against Public Justice

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4.(...continued)

> this description; and this principle, combined with the fair protection is oppressive, and, in the eye of the law, unreasonable. Whatever injures the public interest is void, on the ground of public policy.

Patrick Shaw, A TREATISE ON THE LAW OF OBLIGATIONS AND CONTRACTS (T. & T. Clark 1847), p. 78.

Act of 1864, §§ 589, 590), and perjury and solicitation remain crimes. Crim Code (Deady 1872), T II, C V, §§ 609, 611.[5]

Amici also question the methodology of the Court of Appeals which relies upon ***Vannatta v. Keisling***, not merely for legal precedent but also as a sort of history super-treatise. The Court in deciding ***Vannatta v. Keisling*** did not appear to have extensive historical research at its disposal. The "historical exception" part of the decision is based upon a single source, WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) [hereinafter "WEBSTER'S (1828)"]. In considering a word with legal connotation, this Court has discussed, but never relied upon WEBSTER'S (1828) alone *except* in the ***Vannatta*** opinion.[6] Nor did the briefs of the parties in that case present any substantial discussion of historical facts. The prior incomplete examination of history does not enshrine the resulting incorrect historical

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5. For convenience of reference sections of the 1864 nd 1872 Deady compilations are reproduced in the Amicus App-2-6.

6. ***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 ago 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) (Bouvier's LAW DICTIONARY); ***Coast Range Conifer, LLC v. Or. State Board of Forestry***, 339 Or 136, 117 P3d 990 (2005) (other state constitutions); ***Lakin v. Senco Products, Inc.***, 329 Or 62, 69, 987 P2d 463, 468 (1999) (other 19th Century dictionaries); ***Pendleton School Dist. 16R v. State***, 345 Or 596, 613, 200 P3d 133 (2009) ("uniform" coupled with "common schools" in Art VIII, § 3). This last case looked also to Alexander M. Burrill, A LAW DICTIONARY AND GLOSSARY (1867); 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.

findings with the cloak of precedent. The historical facts are the historical facts, even if they have not previously been presented to this Court.

III. THE OPINIONS OF THE COURT OF APPEALS ARE NOT BASED UPON A COMPLETE REVIEW OF THE AVAILABLE HISTORY.

The Court of Appeals *en banc* upheld the constitutionality of ORS 260.402, which forbids political campaign contributions "in any name other than that of the person who in truth provides the contribution." One central issue is whether this restriction on campaign contributions is within the historical exception prong of ***State v. Robertson***, 293 Or 402, 412, 649 P2d 569 (1982). On that question, the Court of Appeals split 4-6, with only 4 Judges (those joining the Court's opinion by J. Landau, plus J. Schuman) holding that it falls within an historical exception and 6 Judges (the dissenters plus Judges Brewer and Edmonds) holding otherwise. Thus, a majority of the Judges concluded that ORS 260.402 was not within an historical exception to the free speech provisions of Article I, § 8, based upon this conclusion in the dissenting opinion:

> As a matter of specific predicate, there was no well-established regulation of political campaign contributions at the time of the enactments of the federal and state constitutions. In ***Vannatta*** [***v. Keisling***, 324 Or 514, 931 P2d 770 (1997)], the Supreme Court found that, "[a]t the time of statehood and the adoption of Article I, section 8, there was no established tradition of enacting laws to limit campaign contributions." 324 Or at 538, 931 P2d 770. As noted above, Oregon voters initiated and then adopted the state's first campaign finance law, the Corrupt Practices Act, at the June 1908 election. Or Laws 1909, ch. 3. At the time of the adoption of the Oregon Constitution in 1859, then, the regulation of campaign contributions and political campaigns was a half century away.

State v. Moyer, 225 OrApp at 109-110. Even the plurality opinion focused on the 1908 initiative:

> What is now ORS 260.402 was enacted by the people in 1908 (later known as the Corrupt Practices Act) and prohibited--among many other things (it was an extraordinarily long initiative measure)--falsely reporting the source of a contribution and required candidates to report all

> contributions. The legislative history of that enactment shows that the people were concerned that "the secret use of money to influence elections [is] dangerous to liberty, because [it is] always used for the advantage of individuals or special interests and classes, and never for the common good." Official Voters' Pamphlet, General Election, June 1, 1908, 103.

State v. Moyer, 225 OrApp at 92-93. But "the secret use of money" and covert political influence had been deemed against public policy long before 1908.[7]

First, as shown later in this brief, there were in 1857 laws limiting campaign contributions in states having free speech clauses upon which Article I, § 8, was closely modeled. The parties in ***Vannatta v. Keisling*** simply did not do the historical research to find those statutes.

Second, whether there were "laws to limit campaign contributions" is too narrow a focus. Such limits were but one example of laws aimed at protecting the rights of suffrage, including laws prohibiting false statements to elections officers and laws prohibiting secrecy in political campaigns and in lobbying.

Third, the Territory of Oregon adopted its pre-constitution laws from Iowa, wholesale. But, unlike Iowa, Oregon then adopted a constitution that expressly authorized the Legislature to regulate elections and protect them from any sort of "undue influence" or "improper conduct." Oregon Constitution, Article II, § 8. It was abundantly clear at the time that Article II, § 8, was to apply to all phases of elections, including the campaigning that takes prior to the actual casting of ballots. Prohibiting campaign contributions in a false name is the type of regulation authorized by Article II, § 8. The Oregon Supreme Court has already recognized that, in the subject area of elections, the provisions of Article II, § 8, control over those of Article I, § 8.

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7. The Court's opinion does cite ***State v. Huntley***, 82 OrApp 350, 356, 728 P2d 868 (1986), rev den, 302 Or 594, 732 P2d 915 (1987), which cited a pre-statehood generic perjury statute but then incorrectly stated, "The first statute prohibiting false statements in the elections laws was passed in 1909." 82 OrApp at 354-55.

Fourth, early sessions of the Oregon Legislature in 1964 and 1870 used this constitutional authority to adopt laws punishing false statements to elections officials and prohibiting anyone from seeking to persuade qualified voters not to vote.

IV. ORS 260.402 IS WITHIN AN HISTORICAL EXCEPTION TO ARTICLE I, § 8.

A. HISTORY OF REGULATION OF FALSE STATEMENTS TO ELECTIONS OFFICERS.

1. SINCE BEFORE OREGON STATEHOOD, FALSE STATEMENTS TO ELECTIONS OFFICERS HAVE BEEN UNLAWFUL.

There is no Article I, § 8, right to assume another's identity[8] or to speak falsely on an instrument required by the government. Making a false statement to an elections officer has been a crime since colonial times. For example, a potential voter who falsely claimed to be another person (or misstated his residency address, age, or other information) would be committing the crime of making a false statement to an elections officer.

> No person shall be permitted to give in his vote or ballot, until the person presiding shall have ascertained that the same is in the list, and shall have had time to check the same; and any person wilfully voting contrary to the provisions of this Act, or who shall give any false name or answer to the person presiding, shall forfeit and pay a fine of not exceeding thirty dollars, for every offence.

Massachusetts Laws 1813 Ch 68, § 4.[9] Similar statutes from Maine (1834) and Connecticut (1840) are reproduced in the Amicus App-14.

The Provisional and Territorial authorities of Oregon adopted the Organic Law of Iowa and Iowa statutes in place in 1839 and 1843. Chapter 68, § 12, of the Iowa

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8. Assuming a disguise "in any manner" "with intent to obstruct or hinder the due execution of the law" was a crime. Crimes Against Public Justice Act of 1864, § 615; Crim Code (Deady 1872), T II, C V, § 626. Amicus App-4.

9. John Bacon, THE TOWN OFFICER'S GUIDE: CONTAINING A COMPILATION OF THE GENERAL LAWS OF BY MASSACHUSETTS (Thomson Gale Firm 1825).

Organic Law (1839 amended and referred to in older cases as the "Big Blue Book" in distinction to an earlier collection of Iowa statutes) set out an "oath or affirmation" for anyone whose qualifications to vote were challenged and further provided that "if any person shall take the said oath or affirmation, knowing it to be false, he shall be deemed guilty of wilful and corrupt perjury * * *." *Id.* Oregon adopted this language.

Under the authority to regulate the conduct of elections, the Territorial Legislature of Oregon adopted C I, Title II, § 16, of the Act Relating to Elections of 1854, which also required an oath to be administered (by a specially-sworn elections official) upon challenge to an elector. Section 16 of that Act provided:

> [I]f any person shall take such oath, knowing it to be false, he shall be deemed guilty of wilful and corrupt perjury; and shall, on conviction, suffer such punishment as is now or shall hereafter be prescribed by law, for persons guilty of perjury. And if any person shall vote at any election who is not a qualified voter, he shall forfeit and pay for the use of the county in which such election shall take place, a sum not exceeding fifty, nor less that twenty-five dollars * * *.

Amicus App-2.

The mental state required was knowledge of falsity in the oath about one's own age, identity and residency. The "wilful and corrupt" nature of the falsity are *"deemed"* from making the untrue statements about facts readily known to the speaker, in contrast to the need to prove intent to "wilfully swear or affirm falsely" in the early perjury statute discussed in ***State v. Huntley***, *supra*, 82 Or App at 354. Section 16 was included as Oregon Laws, C XIII, T II, § 14 of the 1864 Deady Code.[10] A person who attempted to cause a false statement would also be committing a crime under Statutes of Oregon (1854) C VI, § 2:

If any person shall endeavor to procure or incite another person to

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10. See also, Act of October 11, 1862, which deemed any false oath to an "authorized" person perjury. Deady Code 1864 (Civil) C X, T III. Amicus App-1.

> commit the crime of perjury, though no perjury be committed upon conviction, he shall be punished by imprisonment in the penitentiary not more than three years, nor less than one year.

Re-codified as Crimes Against Public Justice Act of 1864, and T II, V, Crim Code, §§ 609 and 611 (1872). Amicus App-3.

These are examples of statutes in place in Oregon, long before the ballot measure of 1908, that prohibited false statements to elections officers and prohibited, with severe criminal penalties, even the encouraging of false statements.

B. HISTORY OF PROHIBITION ON SECRECY IN POLITICAL MATTERS, INCLUDING ELECTIONS AND LEGISLATION.

If a political contributor cannot be banned from making contributions in a false name, then the public cannot know who is making contributions to support or oppose a candidate. This is precisely the same as allowing secret monetary support of a candidate. There is a long history in England, the United States, and Oregon of prohibiting secrecy in election matters. In fact, the modern notion of a "secret ballot" itself is a recent invention and was expressly rejected by the 1857 Oregon Constitutional Convention and rejected several times thereafter.

1. SINCE BEFORE OREGON STATEHOOD, IT HAS BEEN CONTRARY TO PUBLIC POLICY TO CONCEAL ONE'S SUPPORT FOR A CANDIDATE OR FOR LEGISLATION.

There has never been a recognized "right" to conceal one's support for a candidate or bill in the political arena. In fact, covert political action was abhorred. A Joint Resolution of the Territorial Legislature of Oregon, December 1, 1854, stated what it claimed to be the hidden agenda of the "Knownothings" and resolved that:

> [I]n a country like ours, all secret *political* organizations "*choose darkness rather than light, because their deeds are evil*"--because they dare not suffer TRUTH to have a free and fair grapple with the error in the broad light of day!

Special Laws of the Territory of Oregon (1854), p 54 (all forms of emphasis in original). This same sentiment is expressed in the *viva voce* voting law passed two weeks later (December 15, 1854) requiring that all votes in public elections:

> shall be given viva voce or by ticket handed to the judges, and shall in both cases be cried out in an audible voice by the officer attending, and noted by the clerk in the presence and hearing of the voters.

"Act to substitute the viva voce for the ballot for voting" (1854), § 1. The voter's choice would be stated by the voter or, if written by the voter, announced out loud by the elections judge.

Nor was there a right to conceal political support for a candidate or legislation. While the right of a citizen to openly and freely petition the government, including legislators [***Sweeny v. McLoed***, 15 Or 320, 15 P 275 (1887)], in public fora was protected in the organizing documents of the colonies, the U. S. Constitution, and the various states' bills of rights, there has never been a constitutional right to have another *secretly* advance one's political agenda. Making a campaign contribution in a false name constitutes secret political support.

a. SECRECY HAS HISTORICALLY BEEN BANNED IN ELECTION MATTERS.

"Expression" has never included a right to conceal one's monetary support for legislation or candidates. The modern respect for the secrecy of one's expression of choice by vote in elections, which we take for granted today, is not Constitutionally required. After debate,[11] the drafters of Oregon Constitution provided for "open" voting: "in all elections by the people, votes shall be given openly, or by *viva voce*,

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11. Charles Henry Carey, THE OREGON CONSTITUTION PROCEEDINGS AND DEBATE OF THE CONSTITUTIONAL CONVENTION OF 1857 (Western Imprint 1984 facsimile edition of 1926 edition) [Hereinafter "Carey, CONSTITUTION"], pp. 325-26, 329, 331, 337-38, 340-41, 346-47.

until the Legislative Assembly shall otherwise direct."[12] Oregon Constitution, Article II, 15. Voters' preferences were stated to the elections judges and were tallied in the poll book for each voter.[13] Public disclosure of votes remained the practice for years. In 1860 and 1864 there were attempts to allow voting by secret ballot, each defeated after vigorous public debate.[14] Oregon did not allow private balloting (the modern secret ballot system with standardized ballots and the act of voting conducted in private polling booths) until 1891. Oregon Laws, "Election Law of 1891," p. 23, § 47; 2 Codes and Statutes of Oregon, T XXIII (Bellinger and Cotton 1902); ORS 250.080. In 1872, Oregon law allowed voters to use handwritten paper or submit printed party "tickets," but no privacy for filling out such ballots was provided. Oregon Laws (1872), C XIV. T I, § 10.

The absence of "secret balloting" made it even more important that bribery, whether direct or indirect, be combatted. With the *viva voce* system, a scheme of voter bribery was a serious threat, because it could indeed be enforced (as the voter's actual votes were publicly announced and recorded in the poll book and not a secret). Under the secret ballot, however, the briber could not be sure that the vote he had purchased was actually delivered in the privacy of the voting booth.

Oregon has now again abandoned the secret ballot filled out in the privacy of the official polling booth, so once again a scheme of bribery could be enforced (since a briber could require the voter to deliver her properly completed ballot to the

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12. Judge Deady, in his commentary to Oregon Laws 1845-1864, n1, p. 699, notes that the 1857 Constitution uses the word "openly" but that "[t]he legal effect was probably the same" as the 1854 Act on viva voce voting quoted in the text above.

13. See, Oregon Constitution, Article XVIII, § 2.

14. W.C. Woodward, *Political Parties in Oregon*, QUARTERLY OF THE OREGON HISTORICAL SOCIETY, XII:1 (March 1911), pp. 320-3, describes the 1860 effort. C.H. Carey, HISTORY OF OREGON (Pioneer Historical Publishing Co. Portland, 1922), discusses the 1864 attempt at p. 535.

briber before insertion into the "secrecy envelope" and mailing to the elections office).[15]

b. SECRECY HAS HISTORICALLY BEEN BANNED IN LEGISLATIVE MATTERS.

To protect the public from secret political dealings, it was long illegal to seek to influence legislators without truthfully disclosing the identities of those for whom the lobbying was done. In fact, "lobbying," meaning persuasion of legislators in private, itself was condemned. For example, a New York jury in 1837 refused to enforce a contract for lobbying. ***Hillyer v. John Travers***, American Law Reports, July 1837 (New York Court of Common Pleas). This result was widely reported and attracted much commentary.[16] Other cases followed: ***Marshall v. Baltimore &***

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15. Once that ballot is mailed in, the voter is not allowed either to obtain a second ballot or, if a second ballot is somehow obtained, to cast votes with the second ballot. If the county elections office receive more than one ballot from a voter, only the first one is counted, and the office is directed to refer the voter to the Secretary of State's office as a potential election law violator. VOTE BY MAIL PROCEDURES MANUAL (2009), p. 61 (adopted as an agency rule by OAR 165-007-0030).

16. In the weekly *New York American*, July 20, 1838, p 422.

> [T]he plaintiff was one of those shameless persons known at Albany, and, as it would seem, at Trenton, as members of the Lobby, or of the third House, and who sues for his compensation for "operating" upon members of the legislature.
>
> It is the first time, so far as we remember, that an attempt was ever made to enforce, through a court of justice, contracts of such a nature; and we are glad to believe, from the failure of this, that there will be no future attempts * * *.

James Silk Buckingham, AMERICA, HISTORICAL, STATISTIC, AND DESCRIPTIVE: VOL II, Appendix pp. 559-562 (Fisher, Son & Co., 1841), commented with approval on the jury verdict.

> Any agreement to use the influence of relations or others, or to use private influence of any sort, would be corrupt, and all agreements of such a kind are consequently void.

(continued...)

Ohio Railroad Company, 16 How 314, 57 US 314, 14 LEd 953 (1843) (applying Virginia law) and ***Clippinger v. Hepbaugh***, 5 Watts & Serg 315, 40 AmDec 519, 1843 WL 5037 (Pa 1843), where the court refused to enforce a lobbying contract as contrary to public policy:

> It matters not that nothing improper was done, or expected to be done, by the plaintiff. It is enough that such is the tendency of the contract that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to the use of an extraneous secret influence over an important branch of the government. It may not corrupt all; but if it corrupts or tends to corrupt some, or if it deceives or tends to deceive some, that is sufficient to stamp its character with the seal of disapprobation before a judicial tribunal.

Quoted and followed in ***Sweeny v. McLoed***, *supra*, 15 Or 332. More cases are collected as the statement of the law at RESTATEMENT (FIRST) OF CONTRACTS § 559, *Bargain To Influence Legislation*.[17]

Despite Article I, § 8, of the recently adopted Oregon Constitution, the Crimes

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16.(...continued)
* * *

> A legislator selected by the people to discharge a public trust, ought to discharge it independently and honestly: but the legislator who votes from private influence, acts dishonestly and corruptly. And every effort to obtain votes through private influence, is adverse to public policy and legislative purity, and at variance with every sense of propriety.

The decision is also quoted at length in Thomas Brothers, THE UNITED STATES OF NORTH AMERICA AS THEY ARE: NOT AS THEY ARE GENERALLY DESCRIBED; BEING A CURE FOR RADICALISM (Longman, Orme, Brown, Green & Longmans, 1840), pp. 88-9.

17. § 559. Bargain To Influence Legislation

(1) A bargain to influence or to attempt to influence a legislative body or members thereof, otherwise than by presenting facts and arguments to show that the desired action is of public advantage, is illegal; and if a method is provided by law for presenting such facts and arguments, a bargain that involves presenting them in any other way is illegal.

(2) A bargain to conceal the identity of a person on whose behalf arguments to influence legislation are made, is illegal.

Against Public Justice Act of 1864, § 622, included criminal penalties for lobbying and "explaining" a measure to an elected representative without disclosing an interest or the interest of one's principal.

> If any person, having any interest in the passage or defeat of any measure before, or which shall come before, either house of the legislative assembly of this state, or if any person being the agent of another so interested, shall converse with, explain to, or in any manner attempt to influence any member of such assembly in relation to such measure, without first truly and completely disclosing to such member his interest therein, or that of the person whom he represents, and his own agency therein, such person, upon conviction thereof, shall be punished by imprisonment in the county jail, not less than three months, nor more than one year, or by fine not less than fifty, nor more than 500 hundred dollars.

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. Amicus App-6. This Oregon restriction is an early example of the public's "right to know" (***Nickerson v. Mecklem et al.*** *supra*), 45 years before the 1908 initiative.

This is consistent with the understanding from early case law that hidden influence on elections and on law-making were forms of indirect bribery, because the real proponents of candidacies and legislation were hidden from scrutiny and secrecy corrupted representative government. Moreover, Oregon courts refused to enforce even disclosed contracts for lobbying as contrary to public policy. Secret dealings with state legislators had long been denounced:

> A person may, without doubt, be employed to conduct an application to the legislature as well as to conduct a suit at law, and may contract for, and receive pay for, his services in preparing and presenting a petition or other documents, in collecting evidence, in making a statement or exposition of facts, or in preparing or making an oral or written argument; provided all these are used, or designed to be used, either before the legislature itself, or some committee thereof, as a body; but he cannot, with propriety, be employed to exert his personal influence, whether it be great or little, with individual members, **or to labor privately in any form with them out of the legislative halls**, in favor of, or against any act or subject of, legislation.

Sweeny v. McLeod, *supra*, 15 Or at 337 (emphasis added).

> [P]ublic policy requires that legislators or councilmen act solely from considerations of public duty and with an eye single to the public interests, and the courts uniformly hold to be illegal contracts for services that involve the use of secret means or the exercise of sinister or personal influences upon lawmakers to secure the passage or the defeat of proposed laws or ordinances. This principle applies to common councils or other lawmaking bodies of municipal corporations to the same extent that it does to Congress or the Legislature of a state.

Hyland v. Oregon Hassam Paving Co., 74 Or 1, 11, 144 P 1160, 1163 (1914).

This longstanding antipathy to lobbying eventually led to early "publicity" statutes that required the registration of lobbyists, publicity of committee hearings, and the recording of all votes in committee hearings.[18] Oregon had been an early leader in adopting some of these reforms, first by incorporating an early legislative "publicity" mandate into the original Constitution in Article II, § 15, and then by the continuing efforts outlined above, culminating in the 1908 initiative. Far older is the underlying principle of conducting the public's business in the open, free of private and undisclosed interests that were thought to inherently taint elections and legislation.

C. HISTORY OF LIMITS ON POLITICAL CAMPAIGN CONTRIBUTIONS.

The dissent in ***State v. Moyer*** based its rejection of an historical exception for ORS 260.402 on its conclusion that "there was no well-established regulation of political campaign contributions at the time of the enactments of the federal and state constitutions." 225 OrApp at 109. For support, the dissent turned to the statement in ***Vannatta v. Keisling*** that "[a]t the time of statement and the adoption of Article I, § 8, there was no established tradition of enactment laws to limit campaign contributions." 324 Or at 538. The factual premise relied upon by the

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18. The National Publicity Law organization was formed at that time. By the turn of the 20th century, 19 states had some publicity laws. Louise Overacker, POLITICS AND PEOPLE, THE ORDEAL OF SELF-GOVERNMENT IN AMERICA (1932), p. 294.

dissent is incorrect.

1. LAWS SPECIFICALLY LIMITING CONTRIBUTIONS TO POLITICAL CAMPAIGNS PREDATE THE OREGON CONSTITUTION.

Laws limiting political contributions must necessarily be accompanied by laws requiring truthful disclosure of such contributions; otherwise, enforcement is impossible. In 1829, New York sought to protect the entire campaign process, making it unlawful to try to influence voters "previous to, or during the election" and made it illegal to contribute money to promote the election of any particular candidate or party ticket. ***Jackson v. Walker***, NYSup, 5 Hill 27 (1843). Referring to the policy behind New York's campaign contribution limits passed in 1829 (after ***Rust v. Gott***, 9 Cow 169, 18 Am Dec 497 (NY 1828), *infra*, had been decided), a court stated in 1858:

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

Hurley v. Van Wagner, 28 Barb 109, NYSup (1858).

By 1852, Maryland had made it an offense for any "political agent" (defined as "all persons appointed by 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.

Texas provides a particularly relevant example of pre-1857 campaign funding limits. As the table below 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.

Amicus App-8.

When a state with a constitutional provision similar to the one later adopted in Oregon has taken action which tends to show what the constitutional provision means, the Oregon Supreme Court takes notice. ***State v. Cookman***, 324 Or 19, 28, 920 P2d 1086 (1996) (referring to an 1822 decision of the Indiana Supreme Court interpreting a provision similar to one adopted in the Oregon Constitution in 1857).[19]

STATE (year adopted)	**ELECTION PROTECTION PROVISION IN CONSTITUTION**	**FREE SPEECH PROVISION IN CONSTITUTION**
Kentucky (1799)	Article VIII, § 2, second clause: [T]he privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties; all undue influence thereon from power, bribery, tumult, or other improper practices.	Article VIII, § 9 * * * The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print, on any subject, being responsible for the abuse of that liberty.
Mississippi (1817)	Article VI, § 5, second sentence: The privileges of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper conduct.	Article I, § 6 Every citizen may freely speak, write and publish his sentiments on all subjects; being responsible for the abuse of that liberty.

19. ***Cookman*** assumes the Indiana Constitution and decisions were available to the Oregon Constitution's framers and voters in 1857 and 1858. That assumed knowledge of the constitutions of other states is equally valid applied to the constitutions of Kentucky, Alabama, Florida, Mississippi, Texas, Louisiana, and California, as well as to the statutes of Texas, as of 1857 and 1858.

STATE (year adopted)	ELECTION PROTECTION PROVISION IN CONSTITUTION	FREE SPEECH PROVISION IN CONSTITUTION
Connecticut (1818)	Article VI, § 6: Laws shall be made to support the privilege of free suffrage, prescribing the manner of regulating and conducting meetings of the electors, and prohibiting, under adequate penalties, all undue influence therein, from power, bribery, tumult, and other improper conduct.	Article I, § 5 Every citizen may freely speak, write, and publish his sentiments on all subjects; being responsible for the abuse of that liberty.
Alabama (1819)	Article XI, § 5, second sentence: The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult, or other improper conduct.	Article I, § 8 Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.
Florida (1838)	Article VI, § 13, second clause: [A]nd the privilege of suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult, or other improper practices.	Article I, § 5 That every citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that liberty and no law shall ever be passed to curtail, abridge, or restrain the liberty of speech of the press
Texas (1845)	Article 16, § 2, second sentence: The privilege of free suffrage shall be protected by laws regulating elections, and prohibiting under adequate penalties all undue influence therein from power, bribery, tumult, or other improper practice.	Article I, § 5 Every citizen shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.

STATE (year adopted)	ELECTION PROTECTION PROVISION IN CONSTITUTION	FREE SPEECH PROVISION IN CONSTITUTION
Louisiana (1825) (1848)	Article VI, § 4, second clause: [T]he privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult, or other improper practice. Title VI, Article 93: The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult, or other improper practice.	No similar provision Article 106: The press shall be free. Every citizen may freely speak, write, and publish his sentiments on all subjects; being responsible for an abuse of this liberty.
California (1849)	Article XI, § 18, second sentence: The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice.	Article I, § 8: Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. (Section about proof of liable.)
Oregon (1859)	Article II, § 8 The Legislative Assembly shall enact laws to support the privilege of free suffrage, prescribing the manner of regulating, and conducting elections, and prohibiting under adequate penalties, all undue influence therein, from power, bribery, tumult, and other improper conduct.	Article I, § 8 No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

2. OTHER LAWS LIMITING USE OF MONEY IN POLITICAL CAMPAIGNS PREDATE THE OREGON CONSTITUTION.

As pointed out in ***Nickerson v. Mecklem et al.***, 169 Or 270, 278 126 P2d 1095 (1942), the 1908 initiative was adopted "to prevent fraud and insure purity of elections." "People" the court said, "have the right to know--and it is so contemplated by the act--who is spending money and the amount thereof * * *." *Id.* The "evil" that the statute addressed, the court summarized, was concealing the names of election campaign contributors and the amounts that they contributed. *Id.* at 282, 126 P2d 1095. But the recognition of the evils, and the demand for reform, has far deeper historical roots.

The forging of a true public in the sense meant by framers of the Constitution was threatened by popular opinion and fleeting majorities inspired by "factions." James Madison warns in FEDERALIST NO. 10 that:

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

George Washington criticized both false statements and physical intimidation arising from "faction" in his *Farewell Address*. Faction "agitates the community with ill-founded jealousies and false alarms; kindles the animosity of one part against another, foments occasionally riot and insurrection." "Factions" were interest groups that abandoned the public good for sectarian, even covert, agendas. They played demagogic politics with issues in order to confuse the electorate.

Later reformers attacked the concentration of money in the coffers of such factions (which evolved into well-established political parties), but from the outset the founders condemned contamination of the public will by votes influenced by force, false statements, intrigue, corruption, "or by other means."

The watchword for the foundational thinkers in the American Revolution was

"the public," which they understood to mean the collective interest of the citizenry, binding them together in a new nation-state. The public will was to be expressed through suffrage, and that collective will should not be subverted by "impure" votes or elected representatives with conflicts of interest.

Equally repugnant was persuasion of elected representatives by hidden agendas. An informed public and laws to assure free and fair suffrage were the solution. Thus the concepts of campaign regulation and public disclosure are as old as the United States itself. Oregon's Constitutional drafters acknowledged this tradition in Article II, § 8, by expressly mandating that "[t]he Legislative Assembly shall enact laws to support the privilege of free suffrage * * *" and following 7 other states which had earlier included such a command within their constitutions, as shown at p. 18 *ante*.

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

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

The manner in which reformers sought to protect suffrage from the evils of undue influence and destructive faction evolved over time. The earliest laws restricted candidate expenditures aimed at influencing voters at any time leading up to election day, which "might" incite corrupt behavior. Money expended to "treat" voters to food and liquor, money wagered on election outcomes, and money donated by wealthy corporate interests were all regulated as "indirect" forms of bribery in many states long before the Oregon Constitutional Convention.

This kind of regulation upon office-seekers was joined well before 1857 by

laws limiting actual campaign contributions *to* candidates by anyone, without regard to the use of the funds. The conduct of the supporters and "agents" of political figures has also long been regulated. A brief history of limits on monetary "expression" and "indirect bribery" during the entire election campaign process *and* subsequent conduct of elected lawmakers shows that the colonies and states enacted laws patterned after 17th century British statutes adopted in the reign of King William III, which limited influence over potential voters during campaigns (note 22 *post*).

In other states, concentrations of wealth and interest in legislation were deemed so suspect that corporate contributions were banned altogether and state courts uniformly refused to enforce contracts for lobbying, seeing such undisclosed influence-peddling as against public policy.

These early prohibitions targeted the harm of corrupting the will of the people expressed through suffrage (not just the act of election day balloting) for the entire time period of the campaign. Limits on contributions, and disclosure of the source of campaign funds, followed in the tradition of targeting harmful conduct which infected elections. See pages 16-18, *ante*.

a. EARLY 19TH CENTURY CONTROL OF IMPROPER INFLUENCES ON SUFFRAGE.

Echoing Washington and Madison and long before the adoption of the Oregon Constitution, state courts upheld restrictions upon conduct and expression that "might," or had a "tendency" to, unduly influence even a single vote. An early New York case stated that wagering (a form of expression or opinion as to the outcome of a future event) on elections was against public policy, because of the underlying harmful effects upon voters: a tendency "to produce clamor, misrepresentation, abuse, discord; the exertion of improper influence; of intrigue, bargain and

corruption * * *." ***Rust v. Gott***, *supra*, 9 Cow 169, 18 Am Dec 497 (NY 1828).[20] The temptation of winning sums by bets placed upon election outcomes was deemed an "indirect form of bribery."[21]

In 1699, Virginia limited candidate expenditures deemed improper, distinct from criminal bribery. In 1790 Virginia went further and prohibited legislative candidates from using any "reward" "to promote their election." 1 VA REV CODE 389 (1790).

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

Lewis v. Few, 5 Johns 1, NY Sup (1809) (emphasis supplied). This statute was noted with approval in ***Barker v. People***, 3 Cow 686, 15 Am Dec 322, (Supreme Ct NY 1824).

In 1801, North Carolina enacted a statute which forbid "treating with either meat or liquor, on any day of election or on any day previous thereto, with intent to influence the election, under the penalty of two hundred dollars."[22] The North

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

    Id.

21. Overacker, *op cit*, p. 291.

22. ***Duke v. Asbee***, 11 Ired 112, 33 NC 112, 1850 WL 1267, *2 (1850), traces North Carolina limits to the "British Statute passed in the 7th of William the 3rd, ch 4th."

(continued...)

Carolina courts agreed on the essential nature of suffrage and need to curb all undue influences:

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

Bettis v. Reynolds, 12 Ired 344, 34 NC 344, 1851 WL 1199, 1-2 (1851). The ***Bettis*** opinion then condemns any wagering on elections because it leads to the underlying "self-evident" harms of "perversion of facts" and "circulating falsehoods." *Id.* Such activities are certainly form of "expression" or "speech," yet they were not protected by mid-19th Century concepts of freedom of speech.

b. BRIBERY AND INDIRECT BRIBERY OF VOTERS AND CANDIDATES LONG PROHIBITED.

Bribery and indirect bribery are pernicious to suffrage by corrupting the "honest" vote of an elector or corrupting the vote of an elected representative. Outright bribery, whether to influence the votes of electors or the votes of lawmakers has long a crime. "Indirect bribery" was a term used on both sides of the Atlantic to describe financial ties meant to influence a vote--whether the vote was cast by an elector or by an elected official casting a vote as a representative. Statutes criminalizing bribery and forcing disclosure of the extent of contributions are directed at conduct which corrupts the elections process directly (improperly influenced vote and distorted outcomes) and indirectly (undermining confidence in

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22.(...continued)

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

the system).

The targeting of these effects has a long history. The British Reform Act of 1835, restricting sums spent by candidates, was aimed specifically at closing loophole that existed for "indirect bribery" by reducing election campaign costs:

> Whereas it is expedient to make further regulations for preventing corrupt practices at elections of members to serve in parliament, and for diminishing the expenses of such elections.[23]

In Great Britain one form of indirect bribery prohibited by the 1835 reforms was the hiring of unnecessary election day "workers."

> The story of a pure election in this ancient city [Gloucester] is quite a hard thing to come at. * * *. The indirect bribery before the Reform Act [1835] was shown in the employment of bands, messengers, clerks and flagbearers, and also in swearing in so many special constables to keep the peace.

Our Eyewitness at Gloucester, ALL THE YEAR ROUND (November 19, 1859).[24]

In the States, the term "indirect bribery" also referred to hidden influences infecting the legislative process and is so understood in the same sense today.

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23. The 7 & 8 Geo IV is an act specially framed to protect the freedom of elections from the undue influence which a wealthy candidate may acquire over a large body of the poorer class of voters, by engaging them nominally in his service as agents, messengers, or flagmen, but in reality under that pretence purchasing their votes. It is in fact an act passed to carry out the full design of the Bribery Act, as is shewn by its preamble: "Whereas it is expedient to make further regulations for preventing corrupt practices at elections of members to serve in parliament, and for diminishing the expenses of such elections."

    Jerome William Knapp, Edward Ombler, CASES OF CONTROVERTED ELECTIONS IN THE TWELFTH PARLIAMENT OF THE UNITED KINGDOM (Sweet, Stevens and Maxwell 1837).

24. The "eyewitness" essays by Charles Collins from the magazine were reprinted in 1860 as THE EYE-WITNESS AND HIS EVIDENCE ABOUT MANY WONDERFUL THINGS (Sampson, Low, Son & Co. 1960), where the quotation appeared at p. 101.

During the debates on the revision of the Indiana Constitution in 1850[25] a delegate stated that officers and directors of railroads should be prohibited from serving the Legislature because their corporate interests amounted to "a form of indirect bribery" upon legislators--a common concern that political party machines, employers, or others would secretly and indirectly influence lawmakers.

> But indirect bribery, by promises of promotion, or allowing shares in profitable undertakings, and, above all, intimidation, positive or indirect, I believe to have existed in the largest possible extent. We may certainly assume that every government officer, or person connected in some way with government, is worth his four or five votes at least which he will direct as he in turn is directed to do by his superiors, or he loses his place.

Francis Lieber, ON CIVIL LIBERTY AND SELF-GOVERNMENT (Lippincott, Philadelphia, 1850), p. 390.

V. EVEN IF ORS 260.402 WERE NOT WITHIN AN HISTORICAL EXCEPTION TO ARTICLE I, § 8, IT IS AUTHORIZED BY ARTICLE II, § 8.

A. IN ELECTION MATTERS, ARTICLE II, § 8, CONTROLS OVER ARTICLE I, § 8.

Vannatta v. Keisling, 324 Or at 528, recognized that conduct which may be protected by Article I, § 8, can nevertheless be controlled by the Legislature under Article II, § 8, if it involves the subject matter of Article II, § 8 :

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

The Court did not state expressly why Article II, § 8, would take precedence in that circumstance. One probable reason is that, with regard to elections, Article II, § 8, is the more specific constitutional provision. The Court in ***Vannatta v. Keisling***

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25. H. Fowler, REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA (A.H. Brown 1850), p. 1215.

then discussed Article II, § 8, extensively, deciding that it did not serve to authorize the statute at issue there.

Further, strong evidence that Article I, § 8, was not intended to prohibit laws which protected free suffrage from undue influence and improper conduct is the simultaneous adoption of Article II, § 8, as we now more clearly understand the original intention of the drafters and voters to protect "elections" in the expanded meaning of the election process, discussed at pages 30-48 below.

The Court in ***Vannatta v. Keisling*** rejected application of Article II, § 8, finding that it authorized the Legislature to regulate only the mechanics of elections, such as voting on election day, and not political campaigns or political behavior in the period prior to election day.[26] That finding was based on an incomplete historical record offered to the Court by the parties. Later research, presented in part below, demonstrates that Article II, § 8, was intended to authorize the regulation of "elections," which was known to encompass behaviors long before election day, including what we would now call "political campaigns." One important part of regulating political campaigns is the mandatory disclosure of the sources of campaign contributions. Thus, if Article II, § 8, authorizes regulation of political campaign behavior, then it authorizes ORS 260.402, whether or not that statute would otherwise be thought inconsistent with Article I, § 8.

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26. The Court also concluded that Article II, § 8 was concerned only with "elections."

> As a matter of grammar, the word “therein” in the second clause also refers to the topic mentioned earlier, *viz.,* “elections.” Thus, the second clause properly may be restated as referring to “all undue influence [in elections].”

Vannatta v. Keisling, 324 Or at 539. To the contrary, Article II, § 8, deals not only with "elections" but also requires laws "to support the privilege of free suffrage." As shown in this brief, protecting suffrage included prohibiting secrecy in campaigning.

B. ARTICLE II, § 8, AUTHORIZES ORS 260.402, BECAUSE REGULATION OF ELECTIONS WAS UNDERSTOOD TO INCLUDE REGULATION OF CAMPAIGNS.

Article II, particularly § 8, shows an intent to regulate election campaigns, balloting, and the conduct of elected representatives, not merely the act of voting on election day. Campaign finance laws of all kinds, including disclosure laws, were indeed contemplated by Article II, § 8.

History supports a interpretation that Article II was meant to have a real impact on legislative authority to control the elections process, including what we now call campaigns. All of the early governing documents of Oregon provided for regulation of elections. The Oregon Organic Act adopted after the Champoeg Convention of 1843 adopted then-extant principles of equity and the common law known in Iowa. Oregon Organic Law of 1843, § II, § 12. Elections were to be conducted "under such regulations as the laws of Iowa provide." *Id.*, § II, Article 18. At the time Iowa Organic Law (Amended in 1839) gave the Legislature the power to control "the time, and place and manner of holding and conducting all elections by the people * * *." Iowa Organic Law (1839) § 5. Section 5 of the Act to Establish the Territorial Government of Oregon, 30 Con Ch 177, 9 Stat 323 (1848), gave the Territorial Legislature the authority to set out the "time, place and manner of holding and conducting all elections of the people * * *."

What did the men, attendees at Champoeg, the voters who later approved the Second Organic Law (1845), and the Territorial Legislature acting under the Territorial Law of 1848 think that the power to regulate the conduct of "elections" meant in the 1840s and 1850s? How did that understanding express itself among those men and their contemporaries who sat at the Oregon Constitutional Convention?

There are three ways of discerning the meaning the words and phrases had to

voters and lawmakers of the times: (1) the laws that lawmakers enacted about the conduct of elections under the authority they were given by the Organic and Territorial Acts; (2) the drafters' express inclusion of Article II in the Oregon Constitution; and (3) how the words had been used in the press, popular writing, formal speeches and personal diaries in the preceding decades.

1. PRE-STATEHOOD OREGON LAWS INCLUDED REGULATION OF ATTEMPTS TO INFLUENCE VOTERS.

Oregon's pre-statehood laws regarding elections were not limited to the mechanics of voting but included laws pertaining to influencing voters, which could occur anytime during a campaign.

a. PRE-STATEHOOD LAWS INDICATE INTENT OF THE DRAFTERS OF THE OREGON CONSTITUTION.

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

> Among the members of the constitutional convention were Judges Boise, Prim, Shattuck, Kelly, Kelsay, and Wait, all of whom were afterwards members of the Supreme Court of this state, and all of whom, excepting Judge Kelly, performed circuit duty. * * *. 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.

There is a strong relationship between contemporaneous construction and Constitutional originalism:

> * * * [C]ontemporaneous construction of a constitutional provision by the legislature, continued and followed, is a safe guide as to its proper interpretation. Such contemporaneous construction affords a strong presumption that it rightly interprets the meaning and intention of the constitutional provision.

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

Some of the Constitutional Convention delegates had been active in legislating since the Champoeg Convention[27] (1843), which drafted the Oregon Organic Law (1843) and the framework for the provisional government for the Oregon County. These future delegates continued to serve in the ensuing Provisional Legislatures (meeting from 1844 until replaced by the Territorial Legislature in 1849), which adopted Iowa elections law.[28] Other delegates to the Oregon Constitutional Convention served in the Territorial Legislatures (which met yearly from 1849-1859),[29] re-adopting the Iowa Law in large part and then adopting the first Oregon Code in 1855.[30] The Organic Law served the function of a Constitution during this entire, pre-1859 period.[31]

Late in 1856 the Territorial Legislature put the question of a convention to voters, who approved and then elected delegates (June 1857). Many of the 60 Convention delegates (1857) then served in the Oregon Legislatures of 1864 and 1870, which adopted laws regulating the conduct of elections and candidates and their supporters. These facts allow invocation of the doctrine of contemporaneous interpretation. See 2 SUTHERLAND, STATUTORY CONSTRUCTION, pp 514-515, §

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

28. Two examples: Jesse Applegate, Asa Lovejoy.

29. Under the authority of the Act to Establish the Territorial Government of Oregon, 9 Stat 323 in 1848.

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

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

5104 (3d ed).

The meaning of the early laws, adoption of particular Articles and phrases in the Oregon Constitution, implementation through early state legislation and judicial interpretation through case law, can be traced to the drafting skills and later decisions of a relatively small group of lawyers who served in the Territorial Legislature, the Constitutional Convention, and on the state and federal bench. They include 1854 Code Commissioners James Kelly and Reuben Boise and 1862-64 code codifier Matthew Deady, all of whom served in the Territorial Legislature and were Convention delegates and served as judges.[32] These shapers of Oregon law also include Judge George Williams, who sat on the Territorial Supreme Court and served in the Territorial Legislature and was a delegate to the Convention, and lawyers Addison Gibbs (Williams' law partner) and LaFayette Grover, who were both Convention delegates and who, within a decade of that service, each as a sitting governor, signed into law statutes to protect suffrage from undue influences (in 1864 and 1870).

b. PRE-STATEHOOD LAWS REGULATED MORE THAN JUST THE MECHANICS OF VOTING.

In Oregon the Provisional (1844-48) and Territorial (1849-59) governments adopted criminal sanctions for conduct interfering with suffrage. See page 9 *ante*. Future Convention delegates James K. Kelly and R.P. Boise are credited with preparing in 1854 "the first code of Oregon laws."[33] The law commission drew

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32. Matthew Deady had served on the Territorial Oregon Supreme Court (1853-1859) and was appointed a federal judge after Oregon statehood (1859-1893).

33. Joseph Gaston, PORTLAND OREGON, ITS HISTORY AND BUILDERS (S.J. Clarke Pub Co. Chicago 1911), p 427. Future Constitutional Convention delegates David Logan and LaFayette Grover held seats in the 1854 Territorial Legislature (comparison of Legislative Journals by undersigned).

from many sources, including criminal codes of Iowa.[34]

2. THE OREGON CONSTITUTION SPECIFICALLY EMPHASIZES CONTROL OF ELECTIONS.

Article II, § 8, takes on greater significance in light of the fact that the Oregon Convention delegates, although steeped in the laws of Iowa [***Smith v. Chipman***, 220 Or 188, 194-5, 348 P2d 441 (1960)], looked well beyond Iowa to choose a Constitutional provision granting express authority to the Legislature regulate elections. This provision, Article II, § 8, was found at that time in many other state constitutions (see table at page 18, *ante*). While the Iowa Constitution (of 1850) in effect at the time of the Oregon Constitutional Convention in 1857 contained a "free speech" provision in addition to the rights that had been contained in the Organic Law, it contained no analog to Oregon's Article II, § 8, and no express authority to regulate "undue influence" or "improper conduct" in elections.

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34. It was this dispute [the disagreement among circuit judges over which codification of Iowa law to use] that gave rise to the appointment of the code commission authorized and appointed by the legislative session of 1853, who prepared the Oregon Code of 1853, which commission consisted of James K. Kelly of Clackamas county, chairman, Reuben P. Boise of Polk county, and Daniel R. Bigelow of Thurston county.

State v. Stevenson, 98 Or 285, 301, 193 P 1030, 1035 (1920).

The ***Stevenson*** opinion draws upon an article by James Kelly, *History of the Preparation of the First Code of Oregon*, OREGON HISTORICAL SOCIETY QUARTERLY IV:3, p. 185. The Code Commission drew from sources such as the statutes of Iowa and New York. Judge Kelly acted a chair of the Code Commission. He notes that he and fellow-commissioner Reuben Boise were encouraged to run for the Oregon legislature so they would be available to "explain" and answer questions about the Code. Bigelow resided in Vancouver, beyond the new boundaries of the Oregon Territory drawn in early 1853. Kelly and Boise were elected, Boise chaired the House Judiciary Committee, and Kelly chaired the Judiciary Committee of the upper chamber. *Id.*, at 194.

While early scholars[35] do not mention the nearly *identical* state constitutional provisions as sources of Article II, § 8, recent research by Willamette University professor emeritus Claudia Burton shows that LaFayette Grover owned the 1850 edition of THE AMERICAN'S GUIDE, a compilation of state constitutions which Grover used at the Oregon Constitutional Convention. She believes it likely that Delazon Smith and William Packwood had similar compilations.[36] Thus, we now know that the Oregon delegates had the earlier state constitutions with them at the Constitutional Convention.[37]

The Oregon Constitutional drafters provided a more overt grant of power to the Legislature, mirroring Texas and California (and the other states listed in the table at pages 18-20 above). As noted at page 17 above, Texas had laws against

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35. While the trusted authority, Charles Henry Carey, in Carey, CONSTITUTION, at Appendix (a) summarizes W.C. Palmer, *The Sources of the Oregon Constitution*, 5 OREGON LAW REVIEW 200, 214 (1926), for the "source" of Article II, § 8, Carey remarks only that it is "similar" to Connecticut Constitution (1818), Article VI, § 6. Carey at 470.

36. 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.

37. ***Vannatta v. Keisling***, 324 Or at 533-34, concluded that Article II, § 8, was based on a not-so-similar provision in the Connecticut Constitution, relying upon the incomplete research of Palmer and Carey, who were apparently unaware of the provisions in the constitutions of Kentucky (1799), Mississippi (1817), Alabama (1819), Florida (1838), Texas (1845), Louisiana (1825) and (1848), and California (1849) that were essentially identical to Article II, § 8 (see table at pages 18-20 above). ***Vannatta v. Keisling*** dismissed the Connecticut provision, because it only authorized laws regulating "meetings of the electors." But the provisions in the other 7 states noted above applied expressly to "elections."

"undue influence" in elections and prohibitions on political campaign contributions in place in 1856 under a close analog to Article II, § 8.

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

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

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

We may assume the Oregon Convention delegates were aware of the use of the word "elections" in the then-current sense. They were well-read and politically astute. Members of Congress including John Quincy Adams, James Buchanan and Charles Underwood used the term "election" to include the overall campaigning phase in published remarks from the floors of Congress in 1841--well before the passage of the Territorial Act of 1848, as set out in detail at pp. 43-43, *post*, This is further demonstrated by the timeline of speeches, case law and literary references to "elections" and "campaigns" in public discourse in America from the late 1700s set out the Amicus App-15-16, and additional primary source citations presented to the trial court and Court of Appeals. Amicus App-12-13.

If members of Congress knew the word "elections" had an extended meaning by the time of the 1848 Territorial Act it is unrealistic to say that Oregonians intended to circumscribe and imply an archaic meaning to the word "elections" in

adopting Article II, § 8, almost 10 years later.

The Convention delegates also had broad experience in the older states and with the law. None of the delegates had been born in the Oregon Territory and none had lived in the Territory before 1843. More than half arrived in Oregon in 1850 or later.[38] In addition to the three convention delegates who almost certainly had the constitutions of other states with them, all of the delegates were politically active and can be presumed to have understood how "elections" were regulated in other states. More than 40 of the 60 delegates were affiliated with national parties and were elected as Oregon Constitutional Convention delegates on party tickets.[39] Almost a third (19) were lawyers, and two were printers and editors of newspapers.[40] Many engaged in public life and ran campaigns for a variety of state and local offices as popularly elected officials. Amicus App-11.[41]

3. EARLY POST-STATEHOOD LAWS REGULATED MORE THAN JUST THE MECHANICS OF VOTING.

Constitutional Convention chair Judge Matthew Deady is credited with assembling and securing the passage of the civil and criminal codes in 1862 and 1864.[42] In 1864 and 1870, the Oregon Legislature adopted criminal sanctions for

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38. George H. Himes, *Constitutional Convention of Oregon*, QUARTERLY OF THE OREGON HISTORICAL SOCIETY, Vol XV (March-December 1914), p. 218, summarizing delegates, location of birth, occupation, from where they had most recently emigrated, and later careers. For convenience of reference, reproduced in Amicus App-9-11.

39. Address of the Hon. R. McBride, *The Constitutional Convention, 1857*, reprinted in Carey, CONSTITUTION, 483; Himes, *Constitutional Convention of Oregon*, note 40, *Ibid.*

40. Address of the Hon. R. McBride, *Ibid.*, at 484.

41. Himes, *op cit*, p. 218.

42. It is said that "[d]uring the years 1862-64, Judge Deady prepared the codes of civil and criminal procedure and the penal code, and procured their passage by

(continued...)

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.[43] Amicus App-3-5.

In 1870, the Oregon Legislature made it criminal to "persuade" anyone to change residence or to persuade a legal voter not to vote. Deady Code (1872) Crim Code T II, C V, §§ 632-634. Amicus App-5. The penalty for such persuasion was imprisonment, and/or a fine of $100 to $1,000, and a lifetime ban from holding office. Addison Gibbs, lawyer and law partner of Convention delegate George H. Williams, was Governor at the time of the passage of the Crimes Against Public Justice Act of 1864. Convention delegate LaFayette Grover was Governor at the time of the passage of the Frauds in Elections Act on October 22, 1870. Neither vetoed nor objected that these laws regulating campaigning were 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*

42.(...continued)
the legislature as they came from his hand, besides much other legislation * * *." Hubert Howe Bancroft HISTORY OF OREGON VOL II 1848-1883 (the History Co. San Francisco 1888), p. 144.

43. Crimes Against Public Justice Act of 1864, (October 19, 616), Or Gen Laws (Deady 1872), T II, C V, § 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" for voting, Frauds in Election Act (1870), § 632 (1870), could occur before an election. See Amicus App-3-5.

pro quo bribery became 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. Amicus App-5.

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); he only mental state required was an intent to "persuade" through the conduct of the prohibited inducement.

4. LATER POST-STATEHOOD LAWS REGULATED MORE THAN JUST THE MECHANICS OF VOTING.

The fact that the leaders of Oregon in the Territorial Legislature and then soon after concluding the Constitutional Convention, proceeded to adopt laws governing both the pre-election day periods of time and various kinds of undue influence, including money in campaigns, is powerful evidence about the meaning of that Constitution. Further powerful evidence from contemporaneous construction is the fact that Oregon had continuously in place laws limiting political money since 1864 and laws specifically limiting political contributions and expenditures from 1908 to 1971 (when the Legislature repealed the expenditure limits established in the 1908 ballot measure), with no known assertion that those laws were contrary to the Oregon Constitution.

The ballot title of the 1908 initiative read:

> A Bill for a law to limit the amount of money candidates and other persons may contribute or spend in election campaigns; to prohibit and punish the corrupting use of money and undue influence in elections; to protect the purity of the ballot and furnish information to voters

concerning candidates and all political parties, partly at public expense. See, ***Nickerson v. Mecklem et al.***, 169 Or 270, 278 126 P2d 1095 (1942).

The ballot title refers to "the corrupting use of money and undue influence in elections." This language was clearly used to refer to the use of money in political campaigns, not merely in the act of filling out a ballot or voting on election day. The title of the statute includes to "limit candidates' election expenses," again using the term "elections" to refer to the process of campaigning for office. The candidates' expenses are obviously for their campaigns, not for functions tied to administering the mechanics of voting.

We do not argue that the voters' understanding made the requirement to force public disclosure constitutional in 1908. We do argue that the 1908 voters and writers were contemporaries with the Oregon House and Senate members who passed the earliest criminal laws pertaining to political money in 1864 and 1870, which limited or prohibited various conduct occurring prior to election day, including "persuasion," and secret contracts. The 1908 voters were also likely contemporaries with some of the 1857 Constitutional Convention delegates, more than a few of whom lived well into the 20th Century.[44] The 1908 voters shared with those contemporaries a common understanding of the meaning of words in Article II, § 8, and Article I, § 8, of the Oregon Constitution.

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44. Including at least: William H. Packwood (d. 1917); Lafayette Grover (d. 1911); George H. Williams (d. 1910); Robert V. Short (d. 1908); Reuben Patrick Boise (d. 1907); H.B. Nichols (d. 1907); William Starkweather (d. 1905); John McBride (d. 1904); James Kelly (d. 1903). See Oregon Secretary of State website: www.sos.or.us/archives/exhibits/pioneer.html

5. BY MID-19TH CENTURY, THE TERM "ELECTIONS" WAS USED TO INCLUDE THE POLITICAL CAMPAIGN PROCESS.

Last, we turn to the voices of the people expressed in primary sources throughout the decades prior to the adoption of the Oregon Constitution. ***Vannatta v. Keisling*** held that the word "elections" in Article II, § 8, had a mid-19th Century meaning limited to the events on election day. The Court also conceded that "elections" had later come to mean a process that included political campaigns.

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

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

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

Vannatta, 324 Or at 531-32, 931 P2d at 781. The Court's analysis relied solely upon WEBSTER'S (1828).[45] We now provide many early (1835-55) instances of the term "elections" used for the entire "electoral adventure."[46] These offer

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

46. Detailed historical research is no longer beyond the reach of attorneys. The historical texts cited in this brief are all available in digital form from Google

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compelling new information as to the meaning of Article II, § 8.

First, even 19th century law texts show that the word "election" referred to the entire process of selection of officers, not limited to events a specific day.

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

Bowler v. Eisenhood, 48 NW 136, 138 (SD 1891). In ***State v. Meyer***, 1878 WL 5947, *2 (Ind 1878), Bouvier's LAW DICTIONARY is cited for:

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

Second, "election" had come to include the process of campaigning. ***Jory v. Martin***, 153 Or 278, 289, 56 P2d 1093 (1936), noted that the proceedings of the Oregon Constitutional Convention were published in two leading newspapers, which informed a wide audience about the terms of the Constitution. By the same reasoning, a wide audience was familiar with the meanings of words used in newspapers and formal oratory, as well as popular tracts, treatises, novels, and 18th and 19th Century ephemera. Through these sources we can trace the actual evolution of the words "campaign" and "election" in the decades prior to adoption of the Oregon Constitution in 1857.

Let's review the process of linguistic change described in ***Vannatta v. Keisling***:

> However, the constitutional provision [Article II, section 8] that we construe here was proposed in 1857, not in 1996. A dictionary relevant to that time gives a more limited definition of the word "election": "The act of choosing a person to fill an office or employment * * *[.]"

46.(...continued)
Books and can be located by entering search terms at http://books.google.com. Declaration of Linda Williams (Docket 32 in ***Hazell v. Brown***, Oregon Court of Appeals No. A137397).

WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

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

Vannatta v. Keisling correctly recognized that a word must first be commonly used in order to come to identify a more complex entity. For example, the "White House" has gone from describing a specific building to mean the American President, staff and administration. This is synecdoche or metonymy in classic rhetoric.[47] Such shifts in meaning may be based on cognitive function, not merely poetic elision.[48]

In reasoning that "election" had not expanded to mean "political campaign," ***Vannatta v. Keisling*** considered it significant that WEBSTER'S (1828) did not mention political behavior in the definition of "campaign." ***Vannatta***, 324 Or at 529 and n15. The decision reasons, if the word "campaign" as we understand it was not commonly used by 1857, the word "election" could not have expanded to include the "campaign" time period within its enlarged meaning by 1857.

But "campaign" before 1857 had been used to refer to a protracted election struggle, comparable to a military campaign, since at least 1789 in the phrases "political campaign" and "electioneering campaign." Further, the term "campaign" became so closely associated with elections that the need to identify a "campaign"

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

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

as an "electioneering" or "political" campaign disappeared.[49] Finally, "election" came to be used alone in American vernacular by the 1830s to encompass the "electioneering" and "campaign" components, shown by the formal speeches of Henry Clay, John Quincy Adams and James Buchanan.

These statesmen were using language well-known to educated speakers, political figures and popular writers for American audiences long before WEBSTER'S (1828) was published. Gouverneur Morris (credited with drafting many sections of the U.S. Constitution) used the phrase "political campaign" in a letter dated 1789.[50] In 1813 Francis Scott Key wrote, "I have not seen nor heard of Ridgley [an acquaintance in Virginia] since his political campaign commenced."[51] 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."[52]

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 biography of Elbridge Gerry (vice-president to James Madison in 1812) published in 1829 noted that the "expectation of decrease of the energies of an election campaign was

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

50. "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.

51. 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.

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

hardly to be justified."[53] Given these diverse examples of the word "campaign" used in a political sense by the 1820s, the absence of a definition for "political" campaign from WEBSTER'S (1828) is of little weight.

During debate on the floor of the House, representatives John Quincy Adams (the former President) and Charles Underwood of Kentucky both referred to an "electioneering campaign" in 1841. At issue was Adams's bill to appropriate $25,000 to President William Henry Harrison's widow. Concerning an allowance for postage for thousands of letters, Underwood asked, "are those but the expenses of the electioneering campaign?" Adams countered that the sum was not for Harrison's "electioneering campaign."[54] 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."[55]

In 1839, an essayist used the phrase "election campaign."[56] In 1843 a periodical writer used the phrase "political campaign" repeatedly in its thoroughly modern sense.[57] In 1852, a memoir by a newspaperman described "the last

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

54. *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.

55. 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.

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

57. "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.

electioneering campaign" of Daniel Webster,[58] and the ANNALS OF ALBANY (Musell Albany 1852), p. 355, noted a "penny paper, issued during the election campaign." An additional ten citations from a variety of American sources, including formal speeches, tracts, and literature for mass audiences published between 1826 and 1855 presented to the courts below are at Amicus App-12-13.

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

During this period before 1858, the modifier "political" or "electioneering" for the word "campaign" had become unnecessary. For example, in 1841, the popular essayist Washington Irving wrote in a commentary on recent elections, "[E]very thing remains exactly in the same state it was before the last wordy campaign"[59] 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 * *

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

59. *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*.

*."[60] A collection of partisan songs for election rallies in 1856 used the word "campaign" in the title: FREMONT AND DAYTON CAMPAIGN SONGSTER (Whitten & Twone 1856).

The metonymic shift in the word "election" to stand for and include the process known as "campaigns" and "electioneering" had occurred by the late 1600s in Britain. During the reign of William III (1650-1702), laws were passed limiting election activities, and it was assumed that "elections" lasted for weeks or months, not one day.[61] 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."[62] In 1832, John Galt described his earlier abandonment of principles during an election, "I had made up my mind to be, during the election, all things to all men * * *."[63]

The shift to the expanded modern meaning of "elections" to include the process months before voting at the polls can be seen in popular American pieces between 1830 and 1850. Political satirist Seba Smith created a character, "Major Jack Dowing," a rural Maine "downeaster" Democrat who described the events "in

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

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

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

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

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

his own plain language" in "letters" printed in several newspapers between 183O and 1859. *Preface*, MY THIRTY YEARS OUT OF THE SENATE (Oaksmith 1859), p. 5.

In an early "Letter" of January 18, 1830, the character notes the acrimony at the Maine legislature because "the preceding electioneering campaign had been carried out with a bitterness and personality unprecedented in the State."[64] In an account dated July 19, 1830, he quotes a hopeful seeking appointment as writing, "I'm going to start to-morrow morning on an electioneering cruise."[65] Notably, by June 30, 1848, Dowing uses both *election* and *campaign* in their modern senses. He first comments on the disarray in nominating a Democratic candidate to run against Zachary Taylor and the torchlight parades already underway. He then wonders how things are going "this election," using the word "election" to refer generally to the events months before the day of the 1848 election or the casting of ballots.

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

Ibid., pp. 308-09. The use of the present progressive tense "are going" shows the "election" is underway at the time of the writing (June 1848), since progressive verbs indicate action in progress at the time of the statement. The events are historically accurate.[66] While the writer employs dialect in spelling, all the verb tenses are internally consistent and present progressive.

Thereafter, in later "Letters," the characters continue to use "this election" in a

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64. Seba Smith, MY THIRTY YEARS OUT OF THE SENATE (Oaksmith 1859), p. 36.

65. *Ibid*., p. 100.

66. "Barnburners" and "Hunkers" were factions of the Democratic Party split on slavery. "Provisos" supported the "Wilmot Proviso" limiting expansion of slavery.

continuing sense in columns published in 1852. 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."[67] On September 18, 1852, Dowing blames the poor outlook for his candidates on "the liquor law has played the mischief this election all round, and got things badly messed up."[68]

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

> But if [Aaron Burr's] name was on the [1800 New York State assembly] ticket as a candidate, his personal exertions during the election would be lost to the party.[69]

> [T]o those who had been his true friends during the election struggle [Andrew Jackson] extended the graceful hand * * *.[70]

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

> We heartily approve the recent act of Congress requiring the fullest publicity in regard to all campaign contributions, whether made in connection with primaries, conventions or elections.[71]

In context, it is clear that Greeley was not advocating disclosure of contributions made only on the day of elections but during the process of "elections," including primary elections. See additional primary sources at Amicus App-15-16.

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67. Seba Smith, MY THIRTY YEARS OUT OF THE SENATE (Oaksmith 1859), p. 387.

68. *Ibid.*, p. 395.

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

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

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

VI. IF ORS 260.402 IS UNCONSTITUTIONAL, THEN OREGON'S SYSTEM OF REPORTING OF CAMPAIGN CONTRIBUTIONS FALLS.

If Article I, § 8, does not allow the government to require that campaign contributions not be made "in any name other than that of the person who in truth provides the contribution," ORS 260.402(1), then the government also cannot require that the sources of campaign contributions be accurately reported. If Article I, § 8, invalidates the requirement that a campaign contributor truthfully reveal her contribution, in her own name, then it would be impossible for a campaign to accurately report its contributors under the requirements of ORS Chapter 260.

The federal government and every one of the 50 states requires public reporting of political campaign contributions. Campaign Disclosure Project, GRADING STATE DISCLOSURE 2008 (Pew Charitable Trusts 2009).[72] Of those states, 37 have freedom of speech clauses essentially identical to Oregon's. Each of them declares that every person has the right "to speak, write, or print freely on any subject." Some of them use the word "publish" instead of "print," but they are otherwise the same as Oregon's.[73]

Alaska	Iowa	New Mexico
Arizona	Kansas	New York
Arkansas	Kentucky	North Dakota
California	Maine	Ohio
Colorado	Maryland	Oklahoma
Connecticut	Michigan	Pennsylvania
Delaware	Minnesota	South Dakota
Georgia	Missouri	Tennessee
Florida	Montana	Texas
Idaho	Nebraska	Virginia
Illinois	Nevada	Washington
Indiana	New Jersey	Wisconsin
		Wyoming

We are not aware of any reported cases in which the political contribution reporting

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72. Available at http://www.campaigndisclosure.org/gradingstate/GSD08.pdf.

73. This list was produced by doing a natural language search in the Westlaw state constitutions database, using the language of Article I, § 8, as the search term.

requirements of any of these states has been held to be invalid due to the free speech clause (or any other clause) in the state's constitution.

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Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing BRIEF OF AMICUS CURIAE POLICY INITIATIVES GROUP AND SEVEN INDIVIDUAL OREGON ELECTORS by Efile and further that, I SERVED by Efile the parties indicated by "*" and registered with Efile system, and further that I SERVED 2 true copies of it by mailing 2 true copies to all other parties listed below, deposited in the U.S. Postal Service at Portland, Oregon, with first class postage prepaid.

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