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Appellate Court Records

IN THE SUPREME COURT THE STATE OF OREGON

In the Matter of Validation Proceeding To Determine the Regularity and Legality of Multnomah County Home Rule Charter Section 11.60 and Implementing Ordinance No. 1243 Regulating Campaign Finance and Disclosure.

MULTNOMAH COUNTY,
Petitioner-Appellant,

and

ELIZABETH TROJAN, MOSES ROSS, JUAN CARLOS ORDONEZ, DAVID DELK, JAMES OFSINK, RON BUEL, SETH ALAN WOOLLEY, and JIM ROBISON,
Intervenors-Appellants,

and

JASON KAFOURY, Intervenor,

v.

ALAN MEHRWEIN, PORTLAND BUSINESS ALLIANCE, PORTLAND METROPOLITAN ASSOCIATION OF REALTORS, and ASSOCIATED OREGON INDUSTRIES,
Intervenors-Respondents

Multnomah County Circuit Court No. 17CV18006
Court of Appeals No. A168205
Supreme Court No. S066445

OPENING BRIEF OF INTERVENORS-APPELLANTS ELIZABETH TROJAN, DAVID DELK, AND RON BUEL

On Certified Appeal from a Judgment of the Multnomah County Circuit Court, the Honorable Eric J. Bloch, Judge.

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This brief is filed on behalf of Intervenor-Appellants Elizabeth Trojan, David Delk, and Ron Buel ("Trojan Intervenors").

I. STATEMENT OF THE CASE

A. NATURE OF THE PROCEEDING

This is an appeal from a decision of the Multnomah County Circuit Court, which held certain parts of Measure 26-184 and its implementing ordinance to be invalid under the Oregon Constitution. Measure 26-184 added a new Section 11.60 to the Multnomah County Charter. The ordinance to assist in its implementation was adopted as Sections 5.200 - 5.206 to the Multnomah County Code. The Circuit Court heard the matter pursuant to ORS 33.710 -.720.

B. NATURE OF THE JUDGMENT.

The judgment declared certain portions of the above charter amendment and ordinance to be invalid under the Oregon Constitution.

C. JURISDICTION.

The Court of Appeals had jurisdiction pursuant to ORS 19.205 and ORS 33.720(4). This Court has jurisdiction under ORS 19.405, which grants the Supreme Court jurisdiction in cases that are certified and accepted from the Court of Appeals.

D. ENTRY OF JUDGMENT AND NOTICE OF APPEAL.

The Circuit Court entered a General Judgment on June 22, 2018 (MC ER-75)[1]. These parties filed Notice of Appeal on July 3, 2018, within 30 days of the entry of judgment. ORS 19.255(1).

Elizabeth Trojan	James Ofsink
Moses Ross	Ron Buel
Juan Carlos Ordonez	Seth Alan Woolley
David Delk	Jim Robison

E. QUESTIONS PRESENTED.

1. Do the limits on political campaign contributions in Measure 26-184 violate Article I, § 8, of the Oregon Constitution?
   a. Are campaign contributions (transfers of property) protected expression under Article I, § 8, of the Oregon Constitution?
   b. Are campaign contribution limits within an historical exception to Article I, § 8, of the Oregon Constitution?
2. Do the limits on political campaign contributions in Measure 26-184 violate the First Amendment of the United States Constitution?
3. Do the limits on independent expenditures to support or oppose candidates for Multnomah County public office contributions in

1. We refer to pages in the Excerpt of Record filed by Multnomah County as "MC ER." We refer to pages in the Excerpt of Record filed by the Trojan Intervenors as "ER."

Measure 26-184 violate Article I, § 8, of the Oregon Constitution?

F. SUMMARY OF ARGUMENTS.

All of the provisions of Measure 26-184 are valid under the Oregon Constitution and United States Constitution.

The limits on contributions to candidates in elections for Multnomah County public office are consistent with Article I, § 8, of the Oregon Constitution. Years after the issuance of ***Vannatta v. Keisling***, this Court clarified that transfers of property (including money) are not "expression" that is protected by Article I, § 8. ***Vannatta v. Oregon Government Ethics Com'n***, 347 Or 449, 222 P3d 1077 (2009), *cert denied*, 560 US 906, 130 SCt 3313, 176 LEd2d 1187 (2010) ("***Vannatta II***"); ***State v. Moyer***, 348 Or 220, 230 P3d 7 (2009). ***Vannatta II*** also held that a candidate or public official can validly be prohibited or limited in the "receipt" of property, even if the contributor of that property has a free speech right to offer it to the candidate or public official. The limits in Measure 26-184, Section (1), are limits on the receipt of contributions.

Further, Measure 26-184 is different in important ways from Measure 9 of 1994, partially invalidated in ***Vannatta I***. Unlike Measure 9 of 1994, Measure 26-184:

> is supported by legislative findings of fact that are entitled to judicial deference; and

> contains limitations on campaign contributions and expenditures by corporations and unions that are severable from the limitations on individuals

Vannatta I addressed only the constitutionality of limits on individuals, not ruling on the validity of limits on entities that are not human beings.

Also, ***Vannatta I*** should be reconsidered. Two of its central conclusions were based on very little historical research:

> whether contribution limits are within an historical exception to Article I, § 8 (not even asserted in ***Vannatta I***); and

> whether the term "elections" in Article II, § 8, was meant to include activities occurring in the days prior to the day of balloting.

Research using more recent tools clearly show that England and many of the United States had adopted limits on campaign contributions and expenditures prior to the 1857 Oregon Constitutional Convention, including New York (1829), Maryland (1852), and Texas (1856). The Texas versions of Article I, § 8 and Article II, § 8, are effectively identical to the Oregon versions. The 1856 Texas law stated:

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.

Today, 44 states have limits on contributions to candidate campaigns.[2] Of those states, 37 have "free speech" clauses in their constitutions that are effectively identical to Oregon's clause. 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 Article I, § 8. No court in any of those states has interpreted the state's "free speech" clause to preclude limits on campaign contributions.

In addition, Measure 26-184's limits on contributions are not restrictions on expression. They target not speech but the harms of unlimited money in political campaigns. Further, Multnomah County needs to adopt such limits in order to prevent the bribery of public officials, which is actually legal in Oregon (ORS 162.005-.025), if the *quid* is a campaign contribution. Oregon law does not allow a local government to criminalize an activity that state law allows. So the only way for Multnomah County to restrict the opportunity for legal bribery of public officials with campaign contributions is to limit the size of campaign contributions to a level sufficiently low that public officials would not be tempted to take official actions in exchange for such contributions.

The limits on contributions to candidates in elections for Multnomah County public office are also consistent with the United States Constitution.

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2. National Conference of State Legislatures, State Limits on Contributions to Candidates 2017-2018 Election Cycle (June 27, 2017) (ER-15-28).

Similar limits have been upheld in ***Nixon v. Shrink Missouri Gov't PAC***, 528 US 377, 389, 120 SCt 897, 905 (2000); ***Lair v. Motl***, 873 F3d 1170 (9th Cir 2017), *cert den sub nom* ***Lair v. Mangan***, 139 S Ct 916, 202 L Ed 2d 644 (2019); and ***Thompson v. Hebdon***, 909 F3d 1027, 1036-37 (9th Cir 2018).

Measure 26-184's limits on independent expenditures are consistent with Article I, § 8, of the Oregon Constitution. This Court has not squarely held that independent expenditures (transfers of property) to support or oppose candidates for public office constitute protected expression. A sort of expenditure limits were addressed in ***Deras v. Myers***, 272 Or 47, 535 P2d 541 (1975). Those limits were very different than the expenditure limits in Measure 26-184. The statutes examined in ***Deras*** entirely banned all independent expenditures by everyone and also capped total expenditures by any candidate. Measure 26-184 places no limit on overall candidate spending and sets reasonable limits on independent expenditures by individuals and political committees, leaving open the opportunity for unlimited independent expenditures by Small Donor Committees.

G. SUMMARY OF FACTS.

The Trojan Intervenors accept the summary of facts in the Appellant Multnomah County's Opening Brief.

II. STANDARDS OF REVIEW APPLICABLE TO ALL ASSIGNMENTS OF ERROR.

A. GRANTS OF SUMMARY JUDGMENT BASED ON CONSTITUTIONAL CONSTRUCTION ARE REVIEWED FOR LEGAL ERROR.

> We review the trial court's grant of summary judgment for legal error. ***Johnson v. State Board of Higher Education***, 272 OrApp 710, 714, 358 P3d 307, *review denied*, 358 Or 527, 366 P3d 1168 (2015).

Huntsinger v. BNSF Ry. Co., 286 OrApp 84, 85, 398 P3d 403 (2017). Issues of constitutional construction are matters of law, reviewed for error of law. ***Filipetti v. Dep't of Fish & Wildlife***, 224 OrApp 122, 197 P3d 535 (2008).

B. DULY-ENACTED LAW IS STRONGLY PRESUMED TO BE CONSTITUTIONAL IN OREGON.

A challenge to the constitutionality of a duly-enacted charter amendment carries a heavy burden of proof and persuasion.

> Every statute is presumed to be constitutional, and all doubt must be resolved in favor of its validity. As a corollary, he who assails it has the burden of establishing its invalidity. ***Fox v. Galloway***, 174 Or 339, 347, 148 P2d 922, and cases there cited; ***Detroit International Bridge Co. v. Corporation Tax Appeal Board of Michigan***, 287 US 295, 297, 53 SCt 137, 77 LEd 314.

Milwaukie Co. of Jehovah's Witnesses v. Mullen, 214 Or 281, 293, 330 P2d 5, 11 (1958), *cert denied*, 359 US 436, 79 SCt 940 (1959); *accord*, ***State v. NRL***, 354 Or 222, 227 n3, 311 P3d 510, 513 n3 (2013).

> Good reason for the legislation is presumed and it should not be deemed unconstitutional unless conflict with the constitution is clear, palpable and free from doubt. ***Horner's Market, Inc. v. Tri-Met***, 2 OrApp 288, 467 P2d 671 (1970).

State v. Robinson, 3 OrApp 200, 212, 473 P2d 152, 158 (1970).

There is a strong presumption that a duly-enacted statute is constitutional. ***Greist v. Phillips***, 322 Or 281, 298, 906 P2d 789 (1995); ***State ex rel. Juv. Dept. v. Orozco***, 129 OrApp 148, 150, 878 P2d 432 (1994), *review denied*, 326 Or 58, 944 P2d 947 (1997). The burden of proof is on anyone who would challenge the validity of the statute, not those who assert its validity. ***Oregon-Nevada-California Fast Freight, Inc. v. Stewart***, 223 Or 314, 326, 353 P2d 541 (1960). A successful ballot measure is a legislative act of the voters of this state. As such, it "is clothed with a presumption in its favor." ***Milwaukie Co. of Jehovah's Witnesses v. Mullen***, *supra*, 214 Or at 292.

C. CONSTITUTIONAL AND STATUTORY PROVISIONS REQUIRE LIBERAL INTERPRETATION.

Whether a statute, rule, or government practice violates the Oregon or United States Constitution are questions of law reviewed for legal error. ***Oregon Educ. Ass'n v. Phillips***, 302 Or 87, 95, 727 P2d 602 (1986), ruled that the Oregon Constitution "should be liberally construed to uphold legislation."

III. FIRST ASSIGNMENT OF ERROR: THE CIRCUIT COURT ERRED IN CONCLUDING THAT MEASURE 26-184'S LIMITS ON CAMPAIGN CONTRIBUTIONS VIOLATED THE OREGON CONSTITUTION.

PRESERVATION OF ERROR.

The Trojan Intervenors and Ross Intervenors (known below as the Citizen Parties) argued this point in their Opening Brief and Reply Brief and at the

Circuit Court hearing. The Circuit Court's Order on Petitioner Multnomah County's Motion for Declaration of Validity (March 6, 2018) (MC ER-56-66) ("*MC Validation Order*") ruled otherwise (MC ER-65).

Measure 26-184 limits the receipt of contributions by candidates for Multnomah County public office. ER-27-30.

(1) Contributions in Multnomah County Candidate Elections.

(a) An Individual or Entity may make Contributions only as specifically allowed to be received in this Section.

(b) A Candidate or Candidate Committee may receive only the following contributions during any Election Cycle:

(A) Not more than five hundred dollars ($500) from an Individual or a Political Committee other than a Small Donor Committee;

(B) Any amount from a Small Donor Committee; and

(C) No amount from any other Entity.

Today, 44 states have limits on contributions to candidate campaigns.[3] Of those states, 37 have "free speech" clauses in their constitutions that are effectively identical to Oregon's clause, because 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 Article I, § 8.

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3. National Conference of State Legislatures, State Limits on Contributions to Candidates 2017-2018 Election Cycle (June 27, 2017) (ER-15-28).

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

No court in any of those states has interpreted the state's "free speech" clause to preclude limits on campaign contributions.

A. THE CIRCUIT COURT DID NOT CORRECTLY ANALYZE THE LAW AND PRECEDENTS.

The *MC Validation Order* did not correctly analyze the applicable law and precedents.

1. THE *ROBERTSON* LINE OF CASES IS FUNDAMENTAL TO THE LEGAL ANALYSIS.

Fundamental to discussion of the First Assignment of Error is the constitutional analysis announced in ***State v. Robertson***, 293 Or 402, 649 P2d 569 (1982) ("***Robertson***"), as explicated, applied and modified by its progeny, including ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997) ("***Vannatta I***") and ***Vannatta v. Oregon Government Ethics Com'n***, 347 Or 449, 222 P3d 1077 (2009), *cert denied*, 560 US 906, 130 SCt 3313, 176 LEd2d 1187 (2010) ("***Vannatta II***").

Robertson held that Article I, § 8, contains a broad prohibition on restraints on expression, unless such limits were either (1) historically imposed and known at the time of adoption of the Oregon Constitution[4] or (2) approved by voters in either adopting or later amending the Oregon Constitution.

The Circuit Court incorrectly summarized the state of the law after ***Vannatta II*** and ***Hazell vs. Brown***, 352 Or 455, 287 P3d 1079 (2012). Moreover, ***Vannatta I***, in evaluating the exceptions set out in ***Robertson***, lacked the benefit of later historical documentation made feasible by new research tools, such as Google Books. This Court was not presented with the evidence that there are (1) numerous apt historical examples of campaign regulations, including limits on contributions and expenditures, dating from the 17th Century, and (2) Oregon voters in 1859 would have understood and intended that Article II, § 8, authorized protections for election integrity during the campaign process as well as during the time of casting ballots, easily satisfying the ***Robertson*** tests for permissible restrictions on expression.

2. THE CIRCUIT COURT INCORRECTLY ANALYZED CASES AFTER *VANNATTA I.*

The *MC Validation Order* stated (p. 6):

> Indeed, the continued precedential vitality of ***Vannatta I*** has been affirmed in cases decided since ***Vannatta II***, in both the Oregon Court

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4. The Court specifically identified, as examples of historical exceptions, the crimes of "perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants." 293 Or at 412.

> of Appeals and the Oregon Supreme Court. See *eg.* ***Hazell vs. Brown*** 352 Or 455, 469 (2012); ***Hazell vs. Brown*** 238 OrApp 497, 510-51 1 (2010) ("***Vanatta I*** remains controlling law").

In fact, neither court addressed any of the arguments presented in ***Hazell v. Brown*** about revisiting ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997) ("***Vannatta I***"). Instead, ***Hazell v. Brown*** was resolved by its interpretation of Section (9)(f) of Measure 47 (2006), which eliminated the need to address the constitutionality of Measure 47 or to revisit ***Vannatta I***. Further, the Oregon Supreme Court opinion made no statement that ***Vannatta I*** "remains controlling law."

No provision of Measure 47 has been declared invalid by any court. ***Hazell v. Brown***, 352 Or 455, 287 P3d 1079 (2012), did not rule that the Measure 47 limits violated any provision of any constitution; the Court declined to address that issue and instead ruled that the Measure 47 limits on campaign contributions are in a state of suspension, due to § (9)(f) of Measure 47 itself. ***Hazell*** did not suspend the adoption or enforcement of Measure 47 on grounds of Article I, § 8. It did so on the basis of § (9)(f) of Measure 47 itself and the Court's survey of the decisional law **in effect as of its effective date (December 6, 2006)**, which predated the two later Oregon Supreme Court decisions that repudiated ***Vannatta I***: ***Vannatta v. Oregon Government Ethics Com'n***, 347 Or 449, 222 P3d 1077 (2009), *cert denied*, 560 US 906, 130 SCt

3313, 176 LEd2d 1187 (2010) ("***Vannatta II***"), and ***State v. Moyer***, 348 Or 220, 229, 230 P3d 7 (2009).

> Based on the foregoing, and because the Oregon Constitution did not allow such limitations on the effective date of Measure 47, we conclude that the condition provided by 9(f) for holding Measure 47 in operational abeyance has, indeed, been met here.

Hazell v. Brown, 352 Or at 467.

The *MC Validation Order* also stated that the limitations on political contributions at issue in ***Vannatta I*** "were, in many ways, very similar to those at issue here." That conclusion is contradicted by the many differences between Measure 9 of 1994 (at issue in ***Vannatta I***) and the limits at issue here. As one example, the Measure 26-184 limits prohibit candidates from <u>receiving</u> contributions above certain levels. ***Vannatta II*** concluded that limits on the <u>receipt</u> of money by candidates and public officeholders do not involve speech or expression and are not prohibited by the Oregon Constitution. See pages 17-17, *post*. Conversely, Measure 9 of 1994 expressed its limitations in terms of ceilings on the making of contributions).[5]

Also, the Measure 9 limits on contributions by individuals and by entities (corporations, unions, etc.) were linked together in the definition of "persons" subject to the limits. ***Vannatta I*** addressed only the constitutionality of limits on individuals, never addressing the validity of limits on entities that are not

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5. The complete treatment of Measure 9 in the 1994 Voters' Pamphlet, including its full text, is Exhibit R1 (ER-29-43).

human beings. See pages 31-38, *post*. Measure 26-184, however, contains fully severable limits on individuals and, separately, on entities. The *MC Validation Order* did not address the validity of the separate contribution limits on entities.

The *MC Validation Order* (p. 5) also stated:

> But the ***Vannatta II*** court employed that clarification to distinguish the gifts at issue there from the political contributions at issue in ***Vannatta I***, and so to reach its holding that a ban on giving gifts to legislators was constitutional. For obvious reasons, that distinction cannot save the charter and ordinance, which indeed restrict political contributions.

There are no obvious reasons. We documented that campaign contributions can be spent by candidates and public officeholders in the same manner as gifts. See pages 18-23, *post*. No one has offered any principled basis for treating campaign contributions differently than gifts, under Article I, § 8.

B. THE OREGON SUPREME COURT HAS REPUDIATED CRUCIAL PARTS OF ITS EARLIER OPINION STRIKING DOWN CERTAIN POLITICAL CAMPAIGN CONTRIBUTION LIMITS.

The Oregon Supreme Court in 1997 in ***Vannatta I*** struck down a comprehensive set of limits on political campaign contributions enacted by Measure 9 of 1994. Oregon voters again enacted statewide limits on political campaign contributions in Measure 47 of 2006. The Oregon Supreme Court in 2012 ruled that those limits are currently in limbo. ***Hazell v. Brown***, *supra*. The Court did not rule that the 2006 limits violate any provision of the Oregon or U.S. Constitutions.

When the Court in 2009 in ***Vannatta II***, *supra*, addressed a 2007 statute that limited "gifts" by lobbyists to public officials and candidates, it repudiated the basis for its 1997 opinion regarding Measure 9 of 1994: that contributions (transfers of money or property) constitute "expression" that receives free speech protection. The Court further upheld limits on the receipt of gifts by public officeholders and candidates, even if the offering of gifts to them would be invalidated under Article I, § 8. The contribution limits in Measure 26-184 are expressed as restrictions on the receipt of campaign contributions. The Court also concluded that "giving gifts to public officials [or candidates] is nonexpressive conduct," 347 Or at 465, and thus outside the protection of freedom of speech.

1. *VANNATTA II* RECOGNIZED THAT TRANSFERS OF PROPERTY ARE NOT "EXPRESSION."

Vannatta I, 324 Or at 521, stated that giving a political campaign contribution is necessarily an "expression":

> However, the contribution, in and of itself, is the contributor's expression of support for the candidate or cause--an act of expression that is completed by the act of giving and that depends in no way on the ultimate use to which the contribution is put.

Vannatta II, 347 Or at 464-65, expressly withdrew the above statement:

> First, the court's statement in ***Vannatta I*** that campaign contributions were constitutionally protected forms of expression regardless of the "ultimate use to which the contribution is put" was unnecessary to the court's holding. On further reflection, we conclude that that observation was too broad and must be withdrawn. Second, because

> ***Vannatta I*** assumed a symbiotic relationship between the making of contributions and the candidate's or campaign's ability to communicate a political message, this court did not squarely decide in ***Vannatta I*** that, in every case, the delivery to a public official, a candidate, or a campaign of money or something of value also is constitutionally protected expression as a matter of law.

Vannatta II illustrates that ***Vannatta I*** is not immutable and that a statute which prohibits or limits the provision of money to candidates must be itself evaluated for its relationship with Article I, § 8.

As Justice Robert Durham stated:

> ***Vannatta II*** makes it clear that this court already has begun the process of reconsidering the absolute position voiced in ***Vannatta I*** and, as a consequence, to focus the free speech analysis under Article I, section 8, on whether a financial contribution in fact constitutes not merely a delivery of property but an act of protected expression by the donor.
>
> Aside from the problems already noted, the court's reasoning in ***Vannatta I*** for its absolute conclusion seems suspect. * * * But an act--giving property to another--that does not constitute free speech in most conceivable contexts is not transformed into protected speech simply because the donee is a candidate or campaign and the donor is a political supporter. The answer cannot consist of categorically pronouncing, as the court did on occasion in ***Vannatta I***, that contributing political money constitutes speech always or even most of the time. * * *
>
> This court has expressed its willingness to reconsider prior interpretations of the state constitution or statutes under the correct circumstances. ***Stranahan v. Fred Meyer, Inc.***, 331 Or 38, 54, 11 P3d 228 (2000).

Hazell v. Brown, *supra*, 352 Or at 475-77.

Limiting campaign contributions does not limit expression; it is not a

content-based limitation on speech. One need not examine the content of a campaign message or advertisement in order to apply the limits on contributions. The ad can say anything. It can be about the candidate or her opponent; it can be about public issues; or it can be about anything. No matter its content, if it is paid for by means of contributions to a candidate for Multnomah County public office, then the candidate must comply with the campaign contribution receipt limitations of Measure 26-184. Those are limitations on transfers of property, not content-based limitations on what can be said in the advertisements. See discussion of expression at pages ?-?, *post*.

2. *VANNATTA II* RECOGNIZED THE VALIDITY OF STATUTES LIMITING RECEIPT OF PROPERTY BY PUBLIC OFFICIALS OR CANDIDATES.

Vannatta II ruled that, while persons subject to the gift limits had a free speech right to offer unlimited gifts to public officeholders and candidates, there was no corresponding right of public officeholders or candidates to accept gifts. 347 Or at 457-67.[6] This Court concluded that, while offering gifts is "expression," receiving gifts is not "expression," and actually even "giving gifts to public officials [or candidates] is nonexpressive conduct." 347 Or at 465.

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6. ***Vannatta II***, 347 Or at 458, stated:

> The statutory restrictions are thus confined to the act of a public official, a candidate, or a relative or member of their household, in taking possession or delivery of a gift valued in excess of statutory limits.

Further, "the act of delivering property to a public official [or candidate] is nonexpressive conduct." 347 Or at 462.[7]

> Lobbyists also may intend their gift-giving to communicate political support or goodwill toward the recipients-as this court has observed, "most purposive human activity communicates something about the frame of mind of the actor." ***Huffman and Wright Logging Co.***, 317 Or at 450, 857 P2d 101. But something more is required to elevate mere purposive human activity into protected expression. To the extent that the gift receipt restrictions interfere with gift-*giving* by lobbyists, they impede only nonexpressive conduct. Moreover, the array of political expressions and communicative intentions that may surround the giving of gifts by lobbyists does not immunize the nonexpressive conduct of gift-giving from legislative regulation.

347 Or at 462-63.

This description of gifts is fully applicable to campaign contributions. Making a campaign contribution is delivering property (usually money but sometimes in-kind services) to a candidate. Like gift-givers, campaign contributors "may intend their [contributions] to communicate political support or goodwill toward the recipients." Like limiting receipt of gifts, limiting receipt of campaign contributions does not "apply restrictions to [contributors'] particular words or expression." A campaign contribution to a candidate may mean, "I support you" or "I oppose one or more of your opponents" or "I want you to view me favorably, after you are in office" or "I expect you to do what I

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7. Although both of these statements refer only to "public officials," the Court clarified that it used the term "public officials" to refer to anyone covered by the statutory phrase "a public official, candidate for public office or a relative or member of the household of the public official or candidate." ***Vannatta II***, 347 Or at 455 n6.

want while in office" or "My husband wanted me to do this," etc. Measure 26 does not apply its restrictions to any of these particular words or expressions.[8] Moreover, the gift givers and campaign contributors remain free to continue to express their opinions by other means on behalf of the issue or candidate, including smaller contributions and volunteer services.

Measure 26-184 does not prevent any individual from expressing whatever is being expressed via a campaign contribution (of up to $500 in any race for Multnomah County office). It does not limit contributions by anyone or any entity to political committees, and it allowed each such committee to contribute not more than $500 to any candidate for Multnomah County public office. Measure 26-184 also allows any individual to make independent expenditures of up to $5,000 per election cycle on each race for Multnomah County office.

Vannatta II, applied to campaign contributions, would (at worst) find that, while persons subject to the contribution limits of Measure 26-184 may have a free speech right to offer unlimited contributions, there is no right of candidates

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8. ***Vannatta II***, 347 Or at 460, described ***Fidanque v. Oregon Govt. Standards and Practices***, 328 Or 1, 8, 969 P2d 376 (1998):

> [T]his court did not express or imply that public officials or others are entitled to take delivery of property or other largess, free of regulation, simply because lobbyists proffer it in connection with a political communication. Nor did ***Fidanque*** express or imply that those who listen to and interact with lobbyists--public officials and candidates for office, for example--have a constitutional free expression right to receive gifts of property, free of governmental regulation.

or political committees to accept such contributions. Measure 26-184, § (1), contains in separate subsections:

(1) limits on receipt of political campaign contributions by candidates; and

(2) a ban on the making of political campaign contributions, except "as specifically allowed to be received in this Section."

Thus, like the gift limits, Measure 26-184 would be fully effective, even if only the limits on receiving contributions were upheld, because contributions (or gifts) which cannot lawfully be accepted also cannot, in practice, be made.

3. *VANNATTA II* RECOGNIZED THE VALIDITY OF STATUTES LIMITING RECEIPT OF PROPERTY THAT CAN BE USED FOR NON-EXPRESSIVE PURPOSES.

Vannatta II's withdrawal of ***Vannatta I***'s statement appears to remove, at a minimum, free speech protection for contributions which can be used for purposes other than "to communicate political messages." *Id.*, 347 Or at 465.

Oregon law allows campaign contributions to be used for many non-communicative purposes, including trips to luxury vacation spots and payments to friends or relatives for undocumented office work. More recent examples of use of campaign contributions in Oregon for purposes other than communicating with voters (collected by journalists and not disputed) include:

1. Bar tabs for meetings with lobbyists in Salem (over $8,000 for one legislator over 2 years);

2. Hotel rooms in Salem for overnight lodging of legislators (over $7,000 for one legislator over 2 years);

4. $400 per month in paid to the legislator for using a room in his home as his "District Office";[9]

5. Purchase and installation of a $7,400 security system at the home of the Governor's former wife;[10] and

6. A two-week trip for 17 Oregon legislators (and family members and friends) to and around The People's Republic of China.[11]

7. A salary of $21,000 per year to a public officeholder (majority leader in the Oregon Senate), whose own PAC contributes hundreds of thousands of dollars to the PAC paying that salary.[12]

8. Payments of $88,000 to the candidate's wife and $10,000 to the candidate's own company for campaign "management services."[13]

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9. Examples 1-3 are documented in Nigel Jaquiss, *Perfectly Legal: How one lawmaker uses campaign money to subsidize his mortgage, pay his bar tabs and explore Canada*, WILLAMETTE WEEK, May 11, 2011 (http://www.wweek.com/portland/article-17463-perfectly_legal.html) (App-66-67).

10. Nigel Jaquiss, *Kitzhaber Uses Campaign Funds for Home Security System*, WILLAMETTE WEEK, July 21, 2011 (http://wweek.com/portland/blog-27411-kitzhaber_uses_campaign_funds_for_home_security_sy.html).

11. Harry Esteve, *Oregon lawmakers, spouses, family members head to China for trade mission*, THE OREGONIAN, August 24, 2011 (http://www.oregonlive.com/politics/index.ssf/2011/08/oregon_lawmakers_spouses_famil.html).

12. Gordon Friedman, *Oregon lawmakers pay their businesses with campaign funds - it's legal, but is it ethical?*, THE OREGONIAN, January 27, 2017 http://www.oregonlive.com/politics/index.ssf/2017/01/oregon_lawmakers_pay_their_businesses.html

13. Nigel Jaquiss, *Rep. Greg Smith Is a Member of the Select Group That Doles Out State Dollars. He Also Makes a Tidy Living From Public Contracts. It's Perfectly Legal.*, WILLAMETTE WEEK, May 29, 2019 (https://www.wweek.com/news/2019/05/29/rep-greg-smith-is-a-member-of-

(continued...)

Since all contributions to candidates or committees can be used for such non-communicative purposes, ***Vannatta II*** has rendered those contributions clearly beyond the protection of ***Vannatta I*** and subject to limits and/or prohibitions.

Under Oregon law, the distinction between (1) "gifts" to a public official or candidate and (2) "campaign contributions" is illusory:

1. Neither "gifts" nor "campaign contributions" need to be spent on communications. As noted above, campaign contributions can be used for many purposes other than to fund communications with voters about the candidacy.

2. Both "gifts" and "campaign contributions" can be spent on communications, if the candidate so chooses.

There is nothing that prevents a candidate who receives a gift from using it in a communicative manner. No law stops a candidate who receives, say, a $50 gift from a lobbyist (or anyone else) from using that $50 to fund her campaign communications, as long as she reports it to the government pursuant to ORS Chapter 260. Note that ORS 260.005 (3) defines "contribution" (emphasis added) as:

> (a) The payment, loan, <u>gift</u>, forgiving of indebtedness, or furnishing without equivalent compensation or consideration, <u>of money</u>, services other than personal services for which no compensation is asked or given, supplies, equipment or any other thing of value:
>
> > (A) For the purpose of influencing an election for public office or an election on a measure, or of reducing the debt of a candidate for

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13.(...continued)
the-select-group-that-doles-out-state-dollars-he-also-makes-a-tidy-living-from-public-contracts-its-perfectly-legal/) (App-68-75).

> nomination or election to public office or the debt of a political committee; <u>or</u>
>
> (B) To or on behalf of a candidate, political committee or measure;

Thus, "contribution" includes the "gift * * * of money * * * to or on behalf of a candidate." And the candidate can use any "gift" to fund campaign communications.

Thus, if gift-receiving and gift-giving are not expressive, then contribution-giving and contribution-receiving are also not expressive.

Under Oregon law, campaign contributions are the functional equivalent of gifts, so limits on them are just as valid as limits on gifts.[14] Article I, § 8, is a limit on legislative power. It protects expression. Thus, it does not protect the conduct of giving money (or other things of value).

There is no inextricable link between the opportunity to accept <u>unlimited</u> campaign contributions and the candidate's ability to engage in political speech. As stated by ORS 259 § (1)(s):

> When the Measure 9 limits were in effect during the 1996 election cycle, candidates were able to amass sufficient funds to campaign effectively and have their voices rise to the level of public notice, using the contributions

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14. Campaign contributions are not currently restricted by the gift limits, because ORS 244.020(5)(b) excludes "contributions as defined in ORS 260.005" from the definition of "gift." "Contributions" defined in ORS 260.005 are campaign contributions. Note, thus, that the ORS Chapter 244 limits on gifts do not actually apply to "gifts * * * of money * * * to or on behalf of a candidate." That campaign contributions are excluded from the definition of "gift" does not accord campaign contributions greater protection under Article I, § 8.

> allowed by Measure 9. A more recent example shows that the contribution limits in this Act will allow effective campaigns. In 2004, Tom Potter won the election for Mayor of Portland, in a race involving over 350,000 registered voters, while limiting his campaign to contributions from individuals not exceeding $25 per individual in the primary and $100 per individual in the general election campaign. The reasonable limits in this Act will increase competition for public office, foster a greater robustness of political debate in Oregon, and alleviate the adverse effects noted above.

The Measure 26-184 limits have been in effect in Multnomah County races since September 1, 2017. The successful candidates for Multnomah County public office since then have complied with the limits. Deborah Kafoury won the contest for County Chair, having raised $132,801 during the 2-year election cycle without violating the Measure 26-184 limits. Jennifer McGuirk (non-incumbent) won the contest for County Auditor, having raised $26,742 during the 2-year election cycle, with 94.4% raised in compliance with the Measure 26-184 limits. Susheela Jayapal (non-incumbent) won the contest for County Commissioner for District 2, having raised $149,069 with no violation of the Measure 26-184 limits.[15]

Two successful candidates for Portland City Council recently filed declarations in the validation proceeding (No. 19CV06544) for Portland Measure 26-200 (the "Portland Measure Validation Proceeding"), stating that they could run effective campaigns for citywide public office under the $500 contribution limits. From such contributions, Chloe Eudaly's 2016 campaign raised 72% of

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15. All data is from the ORESTAR system maintained by the Secretary of State.

its funds, and Jo Ann Hardesty's 2018 campaign raised 60% of its funds. Both testified they could have raised additional funds in compliance with the limits. App-1-4. Multnomah County Commissioner Sharon Meieran testified in her declaration that she could "run an effective campaign for Multnomah County Commissioner under the contribution limits of Measure 26-184 ($500 per individual and political committee, plus amounts from Small Donor Committees)." App-5-6[16]

Further, Bernie Sanders recently demonstrated that effective campaigns, even for President of the United States, can be funded almost entirely by means of small contributions. His campaign used the internet to raise over $231 million from 7 million donations, an average of $33 per donation.[17]

State v. Moyer, *supra*, 348 Or at 230, explained the Oregon Supreme Court's changing analysis in ***Vannatta I*** and ***Vannatta II***.

> We acknowledge that this court's various statements in ***Vannatta I*** to the effect that campaign contributions are constitutionally protected forms of expression by the political contributors could be understood to mean that, in every instance, the delivery to a candidate or campaign of a contribution is constitutionally protected expression. However, we recently clarified those statements in ***Vannatta v. Oregon Government Ethics Comm.***, 347 Or 449, 465, 222 P3d 1077 (2009) (***Vannatta II***). In ***Vannatta II*** we pointed out that, ***Vannatta I*** had "assumed a symbiotic relationship between the making of contributions and the candidate's or campaign's ability to communicate a political message," for purposes of that case, however,

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16. We request judicial notice of these declarations, pursuant to OEC 201(b)(2).

17. https://www.opensecrets.org/pres16/candidate?id=N00000528

> the court had not decided that, "in every case, the delivery to a public official, a candidate, or a campaign of money or something of value also is constitutionally protected expression as a matter of law." 347 Or at 465, 222 P3d 1077.
>
> Second, the Court of Appeals plurality noted this court's statement in ***City of Portland v. Tidyman***, 306 Or 174, 18586, 759 P2d 242 (1988), that, to qualify as a ***Robertson*** category-two statute--a statute that focuses not on speech but on harmful effects--the operative text must "specify adverse effects" targeted by the legislature. ***Moyer***, 225 OrApp at 89, 200 P3d 619. However, in ***Vannatta I***, this court commented that, "[e]ven when the statute does not, by its terms, target a harm, a court may infer the harm from context." 324 Or at 536, 931 P2d 770. That statement in ***Vannatta I*** was based on this court's analysis of the statute at issue in ***State v. Stoneman***, 323 Or 536, 54547, 920 P2d 535 (1996). In ***Stoneman***, this court stated that, in determining the nature of the harmful effect targeted by a statute, the statute cannot be read in a vacuum: "An examination of the *context* of a statute, as well as of its wording, is necessary to an understanding of the policy that the legislative choice embodies." *Id.* at 546, 920 P2d 535 (emphasis in original). * * * In our view, ***Stoneman*** correctly states that a statute should not be read in isolation, and that the legislature's policy choice (the harm that is the target of the criminal prohibition) in some cases may be determined not only from the statute's text, but also from its context.

C. OREGON HAS LONG ENFORCED CAMPAIGN CONTRIBUTION AND EXPENDITURE LIMITATIONS.

The voters of Oregon have enacted campaign contribution limits at least six times: 1908, 1994 (twice), 2006, Measure 26-184 (Multnomah County 2016), and Measure 26-200 (Portland 2018).

In June 1908 Oregon voters through initiative passed by a 63-27% vote the Corrupt Practices Act,[18] which included:

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18. The full text is at App-21-42. Such limits were enacted under the title,
(continued...)

1. contribution and expenditure limits upon candidates;

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

3. improvements to the Voters Pamphlet;

4. prohibitions on "treating" voters to favors;

5. requiring political ads to disclose who was responsible for placing them; and

6. banning newspapers from accepting money to take editorial positions.

We have not located any instance in which any provision of the 1908 measure was challenged as unconstitutional, despite the fact that the limits on contributions and expenditures were enforced, as shown in ***Thornton v. Johnson***, 253 Or 342, 453 P2d 178 (1969); ***Nickerson v. Mecklem et al.***, 169 Or 270, 126 P2d 1095 (1942) (reporting requirements); ***In re Tom McCall***, 33 Opinions Attorney General 75 (1996) (expenditure limits). Other cases show that the provisions limiting contributions and expenditures were considered valid and provided the basis for jury verdicts involving related issues. ***Printing Industry of Portland v. Banks***, 150 Or 554, 46 P2d 596 (1935).

18.(...continued)
"Corrupt Practices Act," indicating that voters believed that the limits and disclosure requirements in the initiative were aimed at preventing, avoiding, and/or fighting corruption. Its official preamble noted it is "a law to * * * define, prevent, and punish corrupt and illegal practices in nominations and elections." The ballot title noted that the initiative declared "what shall constitute corrupting use of money and undue influence in elections." App-22.

These contribution and expenditure limits were raised by the Oregon Legislature in 1971 and then were repealed in 1973 and replaced with a set of aggregate expenditure limits on candidates and complete bans on independent expenditures. Those limits were invalidated in ***Deras v. Myers***, 272 Or 47, 535 P2d 541 (1975). They were then repealed in the Oregon Legislature's 1975 session. More about this history is at App-7-9. This contemporaneous and long-standing construction by the Legislature and courts supports a determination of constitutional validity for contribution limits. See pages 83-?, *post*.

D. MEASURE 26-184 AVOIDS THE PITFALLS OF *VANNATTA I.*

1. UNLIKE MEASURE 9 OF 1994, MEASURE 26-184 IS SUPPORTED BY LEGISLATIVE FINDINGS OF FACT.

Absent legislative findings, ***Vannatta I*** disregarded the rationales proffered by the proponents for Measure 9's limits in legal arguments and instead concluded only "that there is a debate in society over whether and to what extent such contributions indeed cause such a harm."

> [T]he "harm" that legislation aims to avoid must be identifiable from legislation itself, not from social debate and competing studies and opinions. Measure 9 does not in itself or in its statutory context identify a harm in the face of which Article I, section 8, rights must give way.

Vannatta I, 324 Or at 539.

In contrast, Measure 26-184 is supported by its own legislative findings of fact and those adopted by Oregon voters in Measure 47 of 2006 (App-10-19),

which contains legislative findings of fact setting forth the harms resulting from the absence of limits on political contributions and expenditures and a rationale for each of the limits and why compelling state interests are served.[19]

Measure 26-184 contains pertinent legislative findings of fact:

> Whereas, the people of Multnomah County find that limiting large contributions and expenditures in political campaigns would strengthen democratic institutions, enhance public confidence in government, and reduce the cost of running for office, thereby enabling a greater diversity of persons to seek public office.

Measure 47, in its introduction and Section (1), placed into Oregon law extensive legislative findings of fact setting forth the harms resulting from the absence of limits on political contributions and expenditures and a rationale for the each of the limits contained in Measure 47 (similar to those in Measure 26-184) and why each serves compelling state interests,

> The purpose of this Act is to restore democracy in Oregon and reduce corruption and the appearance of corruption by limiting political campaign contributions and independent expenditures on candidate races and by increasing timely public disclosure of the sources of those contributions and expenditures.

The findings include:

> (c) Large contributions distort the political process and impair democracy, with these adverse effects:

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19. While the substantive provisions of Measure 47 of 2006 are not currently operational, its legislative findings of fact remain in Oregon law as ORS Chapter 259, § (1). Further, the opinion in ***Hazell v. Brown***, 352 Or 455, 462, 463, 466, 287 P3d 1079 (2012), expressly relied upon the words of those findings in interpreting the rest of Measure 47 and in making its determinations, so the findings are considered in effect and operational.

(1) Corrupting public officials and causing them to take actions that benefit large contributors at the expense of the public interest;

(2) Causing public officials to grant special access and accord undue influence to large contributors;

(3) Significantly impairing the opportunity for voters to hear from candidates who do not accept large contributions and for those candidates to communicate with voters; and

(4) Fostering the appearance of corruption and undermining the public's faith in the integrity of elected officials and the political process.

All of these findings are entitled to near complete deference by the courts. ***State ex rel. Van Winkle v. Farmers Union Co-op Creamery of Sheridan***, 160 Or 205, 219-220, 84 P2d 471, 476-77 (1938), adopted the reasoning of ***United States v. Carolene Products Co.***, 304 US 144, 58 SCt 778, 82 LEd 1234 (1938), instructing courts to give great weight to legislative findings in considering the constitutionality of an Oregon law.

Without such findings, the ***Vannatta I*** opinion felt unconstrained in making its own conclusions of fact, without citing a source of evidence.

> Shorn of its reliance on ***Fadeley***, the Secretary of State's argument is a reiteration of the idea that money necessarily and inherently corrupts candidates. It is natural that support-financial and otherwise-will respond to a candidate's positions on the issues. Yet an underlying assumption of the American electoral system always has been that, in spite of the temptations that contributions may create from time to time, those who are elected will put aside personal advantage and vote honestly and in the public interest. The political history of the nation has vindicated that assumption time and again. The periodic appearance on the political scene of knaves and blackguards cannot, so far as we know, be tied to contributions more than to other forms of expression. There is no necessary incompatibility between seeking

> political office and the giving and accepting of campaign contributions. This argument is not well taken.

This series of factual findings (without evidence) is now comprehensively contradicted by the specific findings of fact adopted by the voters of Oregon in Section (1) of Measure 47 and in Measure 26-184. The courts can no longer legitimately rely upon the ***Vannatta I*** judicial findings of fact, which were key to the invalidation of Measure 9 of 1994.

Vannatta I specifically noted the lack of anything in Measure 9 to "identify a harm in the face of which Article I, Section 8, rights must give way." ***In re Fadeley***, 310 Or 548, 802 P2d 31 (1990), for example, a case decided in the ***Robertson***[20] era of free speech analysis, upheld a pure limitation on political speech (ban on solicitation of campaign contributions by a candidate for judicial office), because doing so served an important state interest. "[T]he interest in judicial integrity and the appearance of judicial integrity is an offsetting societal interest of that kind." *Id.*, 310 Or at 564. Actual and perceived integrity of the legitimacy of candidate election is another "offsetting" public good.

2. UNLIKE MEASURE 9 OF 1994, MEASURE 26-184 CONTAINS SEVERABLE LIMITATIONS ON CAMPAIGN CONTRIBUTIONS AND/OR SPENDING BY CORPORATIONS AND UNIONS.

Unlike Measure 9 of 1994, Measure 26-184 in separate, severable sections contains limits on the political campaign contributions and expenditures of <u>non-</u>

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

individuals--any "other Entity." ***Vannatta I*** did not address limits on political contributions or spending by corporations and unions.

> [T]here doubtless are ways of supplying things of value to political campaigns or candidates that would have no expressive content or that would be in a form or from a source that the legislature otherwise would be entitled to regulate or prevent. To give but a few examples: A bribe may be an expression of support (with an anticipated quid pro quo), but it is not protected expression; **a gift of money to a candidate from a corporation or union treasury may be expression but, if it is made in violation of neutral laws regulating the fiscal operation of corporations or unions, it is not protected**; a donation of something of value to a friend who later, and unexpectedly, uses that thing of value to support the friend's political campaign is not expression.

Vannatta I, 324 Or at 522 n10.

> But the right to spend money to encourage some candidate or cause does not necessarily extend to spending other people's money on a political message without their consent, whether that money comes from compulsory union fair share fees, a shareholder's equity, student activity fees, or dues paid to an integrated Bar.

Vannatta I, 324 Or at 524.

It is not surprising that ***Vannatta I*** would recognize the validity of limits on campaign contributions by corporations. After all, Oregon for decades had and enforced a statutory ban on political campaign contributions by certain corporations, with no known constitutional challenges. See 260.415 (formerly 260.472, formerly 260.280; repealed Oregon 1983 Session Laws, c. 71, section 12.[21]

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21. The statute read:

(continued...)

Measure 26-184 § (1)(b)(C) is a severable limitation on political contributions and expenditures by any "Entity," which includes all corporations and unions. And § (6), its severability section, demands that such severable limitations be preserved.

Further, ***Vannatta I*** always referred to the free speech rights of "the people" or "the voters" or "Oregon citizens." See, e.g., 324 Or at 522-23. Corporations and unions are not people or voters or citizens. ***Vannatta I*** does not even once refer to any rights of unions or corporations.[22]

21.(...continued)

> No corporation, and no person, trustee or trustees owning or holding the majority of the stock of a corporation, carrying on the business of a bank, savings bank, cooperative bank, trust, trustee, surety, indemnity, safe deposit, insurance, telegraph, telephone, gas. electric light, heat, power, canal, aqueduct, water, cemetery or crematory company, or (a) any company engaged in business as a common carrier of freight or passengers by railroad, motor truck, motor bus, airplane or watercraft or (b) any company having the right to take or condemn land or to exercise franchises in public ways granted by the state, county, city or town, shall pay or contribute in order to aid, promote or prevent the nomination or election of any person, or in order to aid or promote the interests, success or defeat of any political party or organization. No person shall solicit or receive such payment or contribution from such corporation or holders of a majority of such stock.

22. Why, then, did the Measure 9 of 1994 limits on corporate and union contributions not survive ***Vannatta I***? Because Measure 9 contained no separate or severable limits on union and corporate contributions. Instead, it defined "person" as "an individual or a corporation, association, firm, partnership, joint stock company, club, organization or other combination (continued...)

Vannatta I stated that political contributions by non-individuals may be subject to state limitations. There is no Oregon case holding that corporations or unions have the right to make political campaign contributions in Oregon candidate races.[23] Further, ***State v. Ciancanelli***, 339 Or 282, 121 P3d 613 (2005), concluded that the framers of the Oregon Constitution were probably either influenced by the Blackstone restrictive approach to free speech or were influenced by the "natural rights" approach. In either approach, the rights adhere to individuals, not to entities such as corporations or unions.

> The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature: being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free-will. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase;

22.(...continued)
of individuals having collective capacity." ORS 260.005(15) [then ORS 260.005(11)]. It then expressed its substantive limitations on contributions (its Section 3) as applicable to "a person." Thus, Measure 9 afforded no way, by means of severance at any level, to preserve limits on contributions that would be applicable only to corporations and unions. Striking down Measure 9, Section 3's contribution limits applicable to any "person" thus necessarily struck down its contribution limits applicable to any corporation or union.

23. Measure 26-184 does not ban all such contributions. It allows any political committee to contribute not more than $500 per election cycle to any candidate. It does not limit sources of contributions into political committees, other than Small Donor Committees.

> and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish.

William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 121 (1765).

3. UNLIKE MEASURE 9 OF 1994, MEASURE 26-184 CONTAINS SEVERABLE LIMITATIONS ON CAMPAIGN CONTRIBUTIONS AND/OR INDEPENDENT EXPENDITURES BY CORPORATIONS AND UNIONS AUTHORIZED BY ARTICLE II, § 22, OF THE OREGON CONSTITUTION.

Vannatta I discusses Article II, § 22, of the Oregon Constitution and concludes that it may well remove Article I, § 8, protection for political contributions made by entities other than individuals residing inside the voting district of the candidate in question. 324 Or at 527. This section of the Oregon Constitution was enacted by Measure 6 of 1994. It states:

> **Section 22. Political campaign contribution limitations.**
>
> **Section (1)** For purposes of campaigning for an elected public office, a candidate may use or direct only contributions which originate from individuals who at the time of their donation were residents of the electoral district of the public office sought by the candidate, unless the contribution consists of volunteer time, information provided to the candidate, or funding provided by federal, state, or local government for purposes of campaigning for an elected public office.

The reason that ***Vannatta I*** found that Article II, § 22, did not validate the limits in Measure 9 of 1994 was:

> No party has separately argued for any partial application of Article II, section 22, to corporations, unions, or PACs. Article II, section 22, has been presented to us only in the form of an "all or nothing" pre-emption. As we have explained, that argument is not well taken.

324 Or at 527 n13.

Unlike the litigants in ***Vannatta I***, the Citizen Parties here have argued for partial application of Article II, § 22, to validate all of the limitations in Measure 26-184 that do not apply to individuals residing inside the voting district of the candidate receiving the contributions.

The litigation in federal courts about Measure 6 (1994) is immaterial to the effect of Article II, § 22, in this case. The federal court issued an injunction against its enforcement in ***Vannatta v. Keisling***, 899 F Supp 488, 497 (DC Or 1994), *aff'd* 151 F3d 1215 (9th Cir 1998) ("***Vannatta Fed***")., which concluded that Article II, § 22's discrimination against individuals who were not residents of the candidate's district ran afoul of the First Amendment.

The fact is that Article II, § 22, is part of the Oregon Constitution. While direct enforcement of all of the provisions of Measure 6 of 1994 may violate the U.S. Constitution, because of the discrimination based on location of the residence of the contributor, the federal courts did not, and could not, remove Article II, § 22, from the Oregon Constitution, where it today remains. The other provisions of the Oregon Constitution, including Article I, § 8, are subject to the terms of the later-enacted Article II, § 22, whether or not all of the provisions of Article II, § 22 are directly enforceable.

The existence of Article II, § 22, in the Oregon Constitution negates the contention that Article I, § 8, prohibits limitations on political campaign

contributions by corporations or unions. The power to prohibit corporate and union contributions does not offend the U.S. Constitution in any way, since (as the federal courts noted above), there is nothing in the U.S. Constitution that establishes any right by corporations or unions to make political campaign contributions in the first place. Corporations and unions are banned from making contributions to federal candidates and from making contributions to state and local candidates in most states. Exhibit 4. Thus, corporations and unions (and other non-individuals) cannot use Article I, § 8, as a defense to the application of a statute, such as Measure 26-184, that bans their campaign contributions.

Stated another way, the limitation on contributions in Measure 26-184 is not contrary to the U.S. Constitution.[24] So the question is whether Measure 26-184's limitations are authorized by the continuing presence of Article II, § 22, in the Oregon Constitution. Article II, § 22, expressly forbids all contributions that do not "originate from individuals." This provides constitutional authority for Measure 26-184's ban on corporation and union ("Entity") contributions, as those entities are not "individuals."

Even if we assume that corporations and unions have the same Article I, § 8, free speech rights as individuals (a proposition never adopted by the Oregon

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24. Missouri's limits similar to Measure 26-184 were upheld against such challenges in ***Nixon v. Shrink Missouri Gov't PAC***, 528 US 377, 120 SCt 897 (2000) ("***Shrink Missouri***").

Supreme Court), those rights would then be in conflict with the authority provided by Article II, § 22 (and implemented by Measure 26-184) to ban political contributions by those entities (if transfers of money are still considered "speech," after ***Vannatta II***). When provisions of the Oregon Constitution are in conflict, the later-enacted provision prevails.

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

In re Fadeley, *supra*, 310 Or 548 at 560. Thus, Article II, § 22, prevails over Article I, § 8, to the extent of (1) authorizing limits on political contributions by non-individuals or (2) negating the asserted Article I, § 8, prohibition on campaign contribution limits applicable to non-individuals.

E. *VANNATTA I* RELIED UPON INCOMPLETE HISTORICAL ANALYSIS OF BOTH ARTICLE I, § 8, AND ARTICLE II, 8, AND A MISINTERPRETATION OF *ROBERTSON*.

Vannatta I considered whether either ***Robertson*** exception applied. First, had voters intended Article II, § 8--adopted at the same time as Article I, § 8--to authorize protection of election contests from corrupting influence by

moneyed interests, regardless of what might be protected expression? The Court concluded that voters in 1858 would have understood that "election," used in Article II, was what occurred on the day of balloting only and so did not authorize any restrictions during the campaign period. It relied solely upon the definition of "election" in WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("WEBSTER'S (1828)") (with reference to 1818 Constitution of Connecticut), to discern the public meaning of "election" in 1858. ***Vannatta I***, 324 Or at 528-36. The meaning of "election" as of 1858 is addressed at pages 65-?, *post*.

Second, ***Vannatta I*** considered whether any "historical exception" allowing regulation of such "speech" existed prior to 1858. It found none. Proponents did "not argue for, nor are we aware of, any historical exception that removes those restrictions on expression from the protection of Article I, section 8." ***Vannatta I***, 324 Or at 538. The Court incorrectly found that the earliest law about "the role that money plays in the political process is the 1909 'Corrupt Practices Act Governing Elections.'" ***Vannatta I***, 324 Or at 538 n23. But there were many such earlier laws in Oregon and elsewhere, as shown below.

Legislation regulating campaign contributions and spending had been in place in Oregon for decades before 1909 and in the colonies from 1699.[25]

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25. In 1699, members of the Virginia House of Burgesses asked themselves the same questions that define today's campaign finance (continued...)

There is a history of colonial and early American regulation of political campaigns to protect the popular will expressed by suffrage that extended for more than 200 years.[26] The only statement in the 1908 Voters' Pamphlet about the proposed Corrupt Practices Act indicated that the drafters were aware of similar laws dating back to 1883 and 1895.

> The Huntley Bill for a law for purity of elections, limitation of candidates' expenses and prevention of corrupt practices, No. 330, 331, on the official ballot, is patterned after the very successful British laws of 1883 and 1895 for the same purpose.
>
> * * *
>
> The bill permits any person to do as much writing, speaking, publishing or other work, and spend as much time as he wishes, without pay, for any candidate or political party.

App-45.

Revisiting the holding in ***Vannatta I*** based on more complete historical research would not harm the body of originalist constitutional interpretation

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25.(...continued)

> 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 * * *.

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

26. 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).

which has developed. It would instead set a valuable new standard for historical analysis.

1. BEST EVIDENCE OF THE MEANING OF ARTICLE I, § 8, REGARDING ELECTIONS IS ARTICLE II, § 8.

The best evidence that Article I, § 8, was not intended to prohibit laws which protected free suffrage from all undue influence is the simultaneous adoption of Article II, § 8, in the original Oregon Constitution, particularly since it is now clear that the public understanding of the word "election" by 1858 had expanded to encompass the extended period of time for contacting voters, as discussed at pages 65-?, *post*.

2. LIMITS ON EXPRESSIONS IN FURTHERANCE OF PROTECTING THE RIGHTS OF SUFFRAGE HAVE BEEN IMPOSED SINCE THE 1600s.

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. Such laws first restricted certain

campaign conduct and financial transactions by candidates, such as campaign expenditures to influence voters by "treating" or serving liquor.[27] They were closely 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.

Statutes adopted by the Oregon Provisional Legislature (1844-1849), the Oregon Territorial Legislature (1849-1859), and early sessions of the Oregon Legislature also targeted money and influence in campaigns. Many members of these legislatures were delegates to the 1857 Oregon Constitutional Convention.

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27. 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 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.

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, as discussed further at pages 79-83, *post*.

a. PROTECTING SUFFRAGE HAS BEEN FUNDAMENTAL TO AMERICAN DEMOCRACY.

> [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.

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

Courts upheld restrictions upon conduct and expression that merely "might" or have a "tendency" to unduly influence even a single vote. An early New York case stated that wagering (a form of expression) on elections was against public policy because of the underlying harm it caused to voters: a tendency "to produce clamor, misrepresentation, abuse, discord; the exertion of improper influence; of intrigue, bargain and corruption * * *." ***Rust v. Gott***, 9 Cow 169,

18 Am Dec 497 (NY 1828).[28] The North Carolina courts agreed on the essential nature of suffrage and need to curb all undue influences:

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

Bettis v. Reynolds, 12 Ired 344, 34 NC 344, 1851 WL 1199, 1-2 (1851). ***Bettis*** then condemned 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.

The manner in which lawmakers attacked the evil of undue influence changed over time. The earliest enactments sought to limit undue influence by restricting candidate expenditures or material inducements aimed at influencing voters at any time leading up to election day, including using money to express an opinion about an election result, which "might" incite corrupt behavior. This

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

Rust v. Gott*, supra.*

kind of regulation was joined well before 1857-58 by laws limiting campaign contributions.

b. LIMITS ON CAMPAIGN EXPENDITURES WERE IN PLACE BY 1695.

The colonies and states enacted laws patterned after 17th century British statutes adopted in the reign of King William III to limit abusive influence over voters during campaigns. Early statutes included restrictions on campaign conduct and financial transactions, such as third-party wagering and indirect efforts to influence voters. In 1695, 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). This statute was noted with approval in ***Barker v. People***, 3 Cow 686, 15 Am Dec 322, (Supreme Ct NY 1824).

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

Lewis v. Few, 5 Johns 1, NY Sup (1809) (emphasis supplied).

In 1801, North Carolina enacted a statute which forbid "treating with either meat or liquor, on any day of election or on any day previous thereto, with intent to influence the election, under the penalty of two hundred dollars."[29]

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29. ***Duke v. Asbee***, 11 Ired 112, 33 NC 112, 1850 WL 1267, *2 (1850).

These prohibitions targeted (1) the time period of the campaign, not just election day, and (2) the harm of corruption of potential voters, not miscounting ballots cast at elections.

These were soon followed by specific limits on campaign contributions. The laws limiting political contributions in place by 1857 were not just "some" restraints on "one or another" form of speech, but specific limits on contributing money to political campaigns, meeting the level of specificity required by ***Ciancanelli***. In 1829, New York sought to protect the entire campaign process, making it unlawful to try to influence voters "previous to, or during the election" and made it illegal to contribute money to promote the election of any particular candidate or party ticket.

> The statute, after forbidding several things, declares that money shall not be contributed "for any other purpose intended to promote an election of any particular person or ticket."

Jackson v. Walker, 5 Hill 27, 31 (NYSup 1843), *affirmed*, 7 Hill 387, (NY 1844). This 1829 law was discussed in ***Hurley v. Van Wagner***, 28 Barb 109, 115 (NYSup 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. * * * Funds contributed by the members of a political party upon the eve of an election are quite likely to be devoted to questionable and reprehensible uses; to purposes of demoralization and corruption, and thus to defeat a free and fair expression of the popular will. The contribution and collection of such funds, for such purposes, justly deserve the censure and condemnation of a wise and virtuous community.

By 1852, Maryland had made it an offense for any "political agent" (defined as "all persons appointed any candidate before an election or primary election") "to receive or disburse moneys to aid or promote the success or defeat of any such party, principle, or candidate." ELECTIONS LAWS OF THE STATE OF MARYLAND (Lucas 1852), p. 90.

Texas provides a particularly relevant example of pre-1857 campaign funding limits likely known to the Oregon Convention delegates. As Table 1 below shows, the Constitution of Texas (1845) contains sections essentially identical to Article I, § 8, and Article II, § 8, of the Oregon Constitution. The Texas 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.[30]

Each state which adopted language similar to Oregon's Article II, section 8, also had a section of its Bill of Rights similar to Oregon's Article I, section 8, as shown in Table 1 below[31]

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30. Article 263 punished violence or threats of violence to person or property to "endeavor to procure the vote of any elector, or the influence of any persons over other electors," by a fine of up to $500.00.

31. All of those states have also adopted limits on political campaign contributions, although Alabama recently repealed its limits. ER-15-28.

Accepting *arguendo*, ***Vannatta I***'s assumption that the parties advocating that the measure is constitutional have to demonstrate the existence of an historical exception within the meaning of ***Robertson*** to what might otherwise be protected by Article I, § 8, such exception is fully demonstrated by the 1829 New York statute, 1852 Maryland statute, and 1856 Texas statute. There were probably other such statutes, now lost to history.

The delegates to the Oregon Constitutional Convention were politically active. It can be presumed they 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.[32] They had observed the changes in election campaigns throughout their careers.

F. *VANNATTA I'*S ORIGINALIST INTERPRETATION IS UNIQUE AMONG STATES WITH SIMILAR CONSTITUTIONAL TERMS.

Oregon courts often rely upon construction of state constitutional provisions similar to those later adopted in Oregon to inform understanding of Oregon voter intent. ***State v. Cookman***, 324 Or 19, 28, 920 P2d 1086 (1996) (referring to an 1822 decision of the Indiana Supreme Court on a provision similar to one

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

adopted in the Oregon Constitution in 1857).[33] The following table shows the states which adopted analogs to Article I, § 8, and Article II, § 8, before or near-contemporaneous with adoption of the Oregon Constitution.

TABLE 1

STATE (year adopted)	ELECTION PROTECTION PROVISION IN STATE CONSTITUTION	FREE SPEECH PROVISION IN STATE CONSTITUTION
Kentucky (1799)	Article VIII, § 4: Laws shall be made to exclude from office and from suffrage, those who shall thereafter be convicted of bribery, perjury, forgery, or other high crimes or misdemeanors; the privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practices.	Article XIII, § 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.

33. ***Cookman*** assumes the Indiana Constitution and decisions were available to the Oregon Constitution's framers and voters in 1857 and 1858. That assumption about knowledge of the constitutions of other states appears equally valid applied to the constitutions of Kentucky, Alabama, Florida, Mississippi, Texas, Louisiana, California, and Kansas, as well as to the statutes of Texas, as of 1857 and 1858. One of the legacies of the Palmer/Carey research which identified so few of the actual sources of the Oregon Constitution has been a lack of research into the early statutes in the South and West available in 1857 and cases construing provisions of their constitutions that are similar to Oregon's.

STATE (year adopted)	ELECTION PROTECTION PROVISION IN STATE CONSTITUTION	FREE SPEECH PROVISION IN STATE CONSTITUTION
Mississippi (1817)	Article VI, § 5: Laws shall be made to exclude from office and from suffrage those who shall thereafter be convicted of bribery, perjury, forgery, or other high crimes or misdemeanors. The privileges of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper conduct.	Article I, § 6: Every citizen may freely speak, write and publish his sentiments on all subjects; being responsible for the abuse of that liberty.
Connecticut (1818)	No similar provisions in the Fundamental Orders (1638-9) or in the Charter of the Colony (1662) Article VI, § 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: Laws shall be made to exclude from office, from suffrage, and from serving as jurors, those who shall hereafter be convicted of bribery, perjury, forgery, or other high crimes or misdemeanors. The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult, or other improper conduct.	Article I, § 8: Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.

STATE (year adopted)	ELECTION PROTECTION PROVISION IN STATE CONSTITUTION	FREE SPEECH PROVISION IN STATE CONSTITUTION
Florida (1838)	Article VI, § 13: Laws shall be made by the General Assembly, to exclude from office, and from suffrage, those who shall have been or may thereafter be convicted of bribery, perjury, forgery, or other high crime, or misdemeanor; and the privilege of suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult, or other improper practices.	Article I, § 5: That every citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that liberty and no law shall ever be passed to curtail, abridge, or restrain the liberty of speech or the press
Texas (1845)	Article 16, § 2: Laws shall be made to exclude from office, serving on juries, and from the right of suffrage those who may have been or shall hereafter be convicted of bribery, perjury or other high crimes. The privilege of free suffrage shall be protected by laws regulating elections, and prohibiting under adequate penalties all undue influence therein from power, bribery, tumult, or other improper practice.	Article I, § 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.
Louisiana (1825)	Article VI, § 4: Laws shall be made to exclude from office and from suffrage those who shall thereafter be convicted of bribery, perjury, forgery or other high crimes or misdemeanors, the privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult, or other improper practice.	No similar provision
Louisiana (1846)	Article 93: The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult, or other improper practice.	Article 106: The press shall be free. Every citizen may freely speak, write, and publish his sentiments on all subjects; being responsible for an abuse of this liberty.

STATE (year adopted)	ELECTION PROTECTION PROVISION IN STATE CONSTITUTION	FREE SPEECH PROVISION IN STATE CONSTITUTION
California (1849)	Article XI, § 18: Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, persons convicted of bribery, perjury, forgery, malfeasance in office, or other high crimes. The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice.	Article I, § 8: Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. * * *
Kansas Free State (1855)[1]	Article II, § 10: Every person shall be disqualified from holding any office of honor or profit in this State, who shall have been convicted of having given or offered any bribe to procure his election, or who shall have made use of any undue influence from power, tumult, or other improper practices.	Article I, § 11: Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.
Oregon (1857)	Article II, § 8: The Legislative Assembly shall enact laws to support the privilege of free suffrage, prescribing the manner of regulating, and conducting elections, and prohibiting under adequate penalties, all undue influence therein, from power, bribery, tumult, and other improper conduct.	Article I, § 8: No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.
Nevada (1864)[2]	Article IV, § 27: [L]aws shall be passed regulating elections, and prohibiting, under adequate penalties, all under [*sic*] influence thereon, from power, bribery, tumult, or other improper practice.	Article I, § 9: Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty; and no law shall be passed to restrain or abridge the liberty of speech or of the press. * * *

STATE (year adopted)	ELECTION PROTECTION PROVISION IN STATE CONSTITUTION	FREE SPEECH PROVISION IN STATE CONSTITUTION
1. Free State Constitution (passed by electors of Territory, rejected by the United States Senate). In 1856, federal troops dispersed the meeting of the Free State Legislature. See http://www.lewisandclarkinkansas.com/research/collections/documents/online/topekaconstitution.htm		

Vannatta I is unique in American jurisprudence. Westlaw searches produce not a single case in which the courts of another state have cited ***Vannatta I*** for the proposition that a state free expression clause restricts the power of the state to limit political campaign contributions. Westlaw shows ***Vannatta I*** as the only case in which ***Buckley v. Valeo***, 424 US 1, 96 SCt 612, 46 LEd2d 659 (1976) was "not followed on state law grounds." Legal encyclopediae list the Oregon case as the only example of campaign contribution limits having been invalidated on the basis of a state constitution.[34]

This calls into question the accuracy of the ***Vannatta I*** historical analysis, because (1) at least 37 states have free expression clauses essentially identical to Oregon's, (2) each of those states has limits on campaign contributions, and (3) many of those states apply originalism or an historical approach to determine the meaning of their state constitutions, similar to that announced in ***Robertson***.

34. See, e.g., *Constitutional Validity of State or Local Regulation of Contributions by or to Political Action Committees*, 24 ALR 6th 179 (2019); *State Regulation of the Giving Or Making of Political Contributions Or Expenditures by Private Individuals*, 94 ALR3d 944 (2019).

As listed at page 9, *ante*, at least 37 states currently have "free speech" clauses either identical to Oregon's or functionally identical, most of which were adopted in the late 1700s and early 1800s, prior to the Oregon Constitutional Convention of 1857.[35] Each declares that every person has the right "to speak, write, or print freely on any subject." Some use the word "publish" instead of "print," but they are otherwise the same as Oregon's. Of these 37 states, <u>all</u> have numeric limits on political campaign contributions. ER-13-28. Our examination of the decisions of each state's highest court has found no approach to constitutional interpretation different from the originalism or historical analysis applied in ***Vannatta I*** or ***Robertson***.[36]

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35. For example, Kentucky (admitted 1792, constitution 1799), Louisiana (admitted 1812, constitution with free expression provision 1848), Alabama (admitted 1813, constitution 1819), Florida (constitution 1838, admitted 1845), Indiana (admitted 1816), Illinois (admitted 1818), Missouri (admitted 1820), Ohio (admitted 1803), Michigan (admitted 1837), Texas (constitution 1845), California (constitution 1850), Minnesota (constitution 1858). The constitutions of Connecticut, Delaware, George, Maryland, New York, New Jersey, Pennsylvania, and Virginia were adopted near the time of the 1789 constitutional convention.

36. See, e.g., ***Golden Gateway Center v. Golden Gateway Tenants Association***, 26 Cal4th 1013, 29 P3d 797 (2001) (free speech clause); ***Bush v. Holmes***, 886 So2d 340 (Fla 2004); ***Malone v. Shyne***, 936 So2d 1279 (LaApp 2006); ***Archer Daniels Midland Co. v. Seven Up Bottling Co.***, 746 So2d 966 (Ala 1999); ***American Bush v. City of South Salt Lake***, 140 P3d 1235 (Utah 2006) (free speech clause); ***McIntosh v. Melroe Co.***, 729 NE2d 972 (Ind 2000); ***Golden v. Johnson Memorial Hosp., Inc.***, 66 ConnApp 518, 785 A2d 234 (2001).

Yet, none of highest courts of those states has struck down limits on political campaign contributions as contrary to the state constitution. This indicates no support for the conclusion that these free expression clauses in state constitutions contemporaneous with adoption of the Oregon Constitution were believed to have banned limitations on campaign contributions.

1. INDIANA, THOUGHT TO BE THE SOURCE OF OREGON'S ARTICLE I, § 8, HAS STRICT LIMITS ON POLITICAL CAMPAIGN CONTRIBUTIONS AND EXPENDITURES.

Article I, § 8, of the Oregon Constitution is verbatim to a provision in the Indiana Constitution, which has been thought to be its model. Claudia Burton and Andrew Grade, *A Legislative History of the Oregon Constitution of 1857-Part I,* 37 WILLAMETTE L REV 469, 526 (2001).

As shown in Table 1 (page 49, *ante*), many states had essentially the same free expression clause as of 1857 (along with a close analog to Article II, § 8), including Kentucky, Mississippi, Connecticut, Alabama, Florida, Texas, Louisiana, Kansas, and California. Additionally, before 1858 Vermont,[37] Michigan,[38] Iowa,[39] and New

37. (1793 version) Chapter I, § 13: The people have a right to a freedom of speech, and of writing and publishing their sentiments concerning the transactions of government, and therefore the freedoms of the press ought not to be restrained.

38. (1835) Art I, § 7: Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right: and no laws shall be passed to restrain or abridge the liberty of speech or the press.

Jersey[40] had in place very close analogs to Oregon's Article I, § 8. All of these states have limits on political campaign contributions. ER-13-28. Indiana limits every corporation and labor organization to a grand total of only $5,000 per year in political contributions pertaining to all statewide office, $2,000 per year pertaining to all candidates for state senate, and $2,000 per year pertaining to all candidates for state house of representatives.

Indiana adopted its constitution in 1851 and has also adopted the doctrine of constitutional originalism, requiring that the Indiana Constitution be interpreted in light of the knowledge and intent of its framers.[41] Oregon convention delegates

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39.(...continued)

39. (1844) Art II , § 7: Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or the press.

40. (1844 Constitution) Art I, § 5: Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.

41. Proper interpretation and application of a particular provision of the Indiana Constitution requires a search for the common understanding of both those who framed it and those who ratified it. ***Collins v. Day***, 644 NE2d 72, 75-76 (Ind 1994); ***Bayh v. Sonnenburg***, 573 NE2d 398, 412 (Ind 1991). Furthermore, "the intent of the framers of the Constitution is paramount in determining the meaning of a provision." ***Boehm v. Town of St. John***, 675 NE2d 318, 321 (Ind 1996); ***Eakin v. State ex rel. Capital Improvement Bd. of Managers of Marion County***, 474 NE2d 62, 64 (Ind 1985). In order to give life to their intended meaning, we "examin[e] the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions." ***Indiana Gaming Comm'n v. Moseley***, 643 NE2d 296, 298 (Ind 1994). See also ***Price v. State***, 622 NE2d

(continued...)

had copies of the Indiana Constitution (and all other extent state constitutions) with them during the Constitutional Convention. If Indiana is the model for interpreting the Oregon Constitution, Indianians have interpreted their constitution as allowing limits on campaign contributions.

2. HISTORICAL MEANING OF ARTICLE I, § 8: FREE SPEECH CLAUSES IN STATE CONSTITUTIONS DID NOT PROTECT SPEECH AIMED AT THWARTING SUFFRAGE RIGHTS.

By 1857 there were laws limiting campaign contributions and pre-election day conduct in states with free speech clauses similar to Article I, § 8. See pages 39-53, *ante*. Whether there were "laws to limit campaign contributions" is too narrow a focus. Such limits are but one example of laws aimed at protecting suffrage. Other protections included prohibiting conduct to induce voters to vote for a candidate ("treating" before the election) or to abstain from voting at all by leaving the jurisdiction before an election (Oregon Frauds in Election Act of 1870, § 3). Pre-election day conduct such as wagering on the outcome of a contest was illegal because, "whatever has a tendency, in any way, unduly to influence elections, is

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41.(...continued)
954, 957 (Ind 1993); ***State Election Bd. v. Bayh***, 521 NE2d 1313 (Ind 1988). In construing the constitution, we "look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief, and the remedy." ***Sonnenburg***, 573 NE2d at 412 (citing ***State v. Gibson***, 36 Ind 389, 391 (1871)).

McIntosh v. Melroe Co., 729 NE2d 972, 985 (Ind 2000).

against public policy," and betting creates incentive to "circulate lies" to alter the outcome. ***Bettis v. Reynolds***, 12 Ired 344, 34 NC 344, 1851 WL 1199, 1-2 (1851).

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

Article II, § 8, is the product of drafters and voters responding to fast evolving changes in the early 1800s--longer "campaigns," masses of organized partisans--resulting in months-long efforts and opportunity to influence voters (described at pages 74-79, *post*), during which threats or bribes could just as easily alter the eventual result as surely as disruption or improper inducements made at the time for casting ballots.

Thus, in 1864 and 1870 the Oregon Legislature, including members who had attended the Constitutional Convention, adopted criminal sanctions for election violations as "Crimes Against Public Justice," giving concrete examples of "improper conduct" the legislature was meant to control under the power of Article II, §§ 7 & 8 of the Oregon Constitution. These included offenses which could occur (1) long before the "day of" the election and (2) which corrupted the election process without actual *quid pro quo* bribery or force, such as offering any "thing whatever" directly or indirectly "with intent to influence" the voter [Crimes Against Public Justice Act

of 1864, (October 19, § 616), Or Gen Laws (Deady 1972), T II, c 5, § 627, later codified at Hill's Code Or, T II, c 5, § 1843].[42]

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

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

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

Addison Gibbs, a lawyer (and partner in a firm with Oregon Constitutional Convention delegate, George H. Williams), was Governor in 1864. LaFayette Grover, lawyer and Oregon Constitutional Convention delegate, was Governor in 1870. Neither of them, active in the law and on the political scene, objected that the 1864 or 1870 laws were invalid under the Oregon Constitution. Neither exercised his power of veto.

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

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

> Our Criminal Code (§ 627) makes it a felony to pay or promise to pay any valuable consideration, or thing whatever, to influence a voter to vote for or against a particular person, at any legally authorized election in this State, and denounces the act as bribing, or offering to bribe, a voter.

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

Oregon cases have looked to the careers of the Constitutional Convention delegates to discern their understanding of constitutional provisions. ***State v. Finch***, 54 Or 482, 103 P 505, 511 (1909).[43] There is a strong relationship between contemporaneous construction and Constitutional originalism. ***State ex rel Gladden v. Lonergan***, 201 Or 163, 177-8, 269 P2d 491, 496 (1954).

Some of the Constitutional Convention delegates had been active in legislating since the Champoeg Convention (1843),[44] which drafted the Oregon Organic Law

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43. In upholding the death penalty, the Court (54 Or at 497) stated:

> Among the members of the constitutional convention were Judges Boise, Prim, Shattuck, Kelly, Kelsay, and Wait, all of whom were afterwards members of the Supreme Court of this state, and all of whom, excepting Judge Kelly, performed circuit duty. * * *. Rousseau well observes that "He who made the law knows best how it ought to be interpreted," and this judicial and legislative recognition of the validity of capital punishment by the very men who framed the Constitution ought itself to be sufficient answer to the contention of defendant's counsel.

44. Public meetings at Champoeg, 1843, Oregon History Project, Oregon

(continued...)

(1843) which served as the governance document until the Constitution was adopted.[45] These men continued to serve in the Provisional Legislatures (1844-49, which adopted Iowa elections law.[46] Other delegates to the Constitutional Convention served in the Territorial Legislatures (1849-1859), re-adopting the Iowa laws in large part and then adopting the first Oregon Code in 1855.[47]

The core group of lawyers who shaped the Territorial codes, participated in the Constitutional Convention, then served in or advised the early statehood legislatures included 1854 Code Commissioners James Kelly and Reuben Boise and Convention Chair and state code codifier, Matthew Deady, as well as lawyer Addison Gibbs. Gibbs had served in Territorial Legislature and, as sitting Governor, signed into law limits on lobbying and election campaign misconduct in 1864.[48] Lawyer Lafayette

44.(...continued)
Historical Society http://www.ohs.org/education/oregonhistory/historical_records/dspDocument.cfm?doc_ID=40889788-92F9-C578-96471494DA12A34C.

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

46. Two examples: Jesse Applegate, Asa Lovejoy.

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

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

Grover had also been a delegate, and as Governor, signed into law limits on election misconduct in 1870.

4. THE HISTORICAL ANALYSIS IN *VANNATTA I* PLACED THE BURDEN OF PROOF ON THE WRONG PARTY.

The approach of ***Vannatta I*** was to find unconstitutional any limitation on speech that could not be documented as an historical exception to the protections of Article I, § 8. This approach is contradicted by the contemporaneous understanding of the meaning of the free speech clauses of the state constitutions.

The most respected commentor on state constitutions was Thomas Cooley.

> The standard general work on state constitutional interpretation was Thomas M. Cooley's A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION, first published in 1868 and updated in numerous subsequent editions. Many courts relied on this work as authority, referring to it simply as "Cooley's Constitutional Limitations."

R.F. Williams, *Interpreting State Constitutions as Unique Legal Documents*, OKLAHOMA CITY UNIVERSITY LAW REVIEW (Spring 2002), p. 193. Cooley's 1868 treatise stated that the free expression clauses of state constitutions were not intended to grant new rights but to prevent the erosion of existing free expression rights recognized by the common law.

> It is to be observed of these several provisions, that they recognize certain rights as now existing, and seek to protect and perpetuate them, by declaring that they shall not be abridged, or that they shall remain inviolate. They do not create new rights, but their purpose is to protect the citizen in the enjoyment of those already possessed.

Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION (Little, Brown 1868), pp. 416-17[49]

Robertson implicitly adheres to this understanding. By considering recognized historical "exceptions" to Oregon's free speech clause, this Court has acknowledged that voters enshrined common law protections for speech into the Oregon Bill of Rights, along with existing limitations on those protections. Under ***Robertson***, any enactment encroaching on common law expression must either be (1) within historical parameters or (2) intentionally approved by voters adopting or amending the Constitution.

Given the actual existence of relevant laws limiting both money and conduct during election campaigns in both Colonial America and in 1858 (and Judge Cooley's authoritative summary of the purpose of state free expression clauses in 1868), the correct historical question under ***Robertson*** is not whether there is proof of voter intent to limit pernicious campaign expression despite Article I, § 8, guarantees, as ***Vannatta I*** assumed. It is instead whether Convention delegates and voters in 1857-59 intended to create a new right to make and accept unlimited political campaign contributions and expenditures. Absent proof of such a common law right, Article I, § 8, did not by itself create such a right, as the free expression clauses in state constitutions did not create new rights.

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49. http://books.google.com/books?id=vOI9AAAAIAAJ.

Vannatta I thus placed the burden of historical proof on the wrong side by requiring proof that limits on campaign contributions were a recognized historical exception to free speech protection instead of requiring that the opponents of Measure 9 prove that unlimited contributions were a recognized common law right as of 1857-59.

G. MEASURE 26-184 FOCUSES UPON THE UNDERLYING HARM TO DEMOCRACY OF UNLIMITED CAMPAIGN CONTRIBUTIONS.

While some provisions of Measure 26-184 may be written in terms limiting what some might consider expression (size of monetary contributions), they are constitutionally permitted as within traditional means to protect the public from corruption and subversion of the common will; their "real focus is on the underlying harm"[50] of corruption and the appearance of corruption. Americans did consider suffrage a fundamental right necessary to assure the health of the body politic. Corruption of democracy is both distinct from and far "above and beyond," the harm

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

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

State v. Ciancanelli, *supra*, 339 Or at 290-291.

caused by hearing "words" or seeing the effects of money during a campaign, satisfying the test set out in ***Ciancanelli***, *supra*, 339 Or at 318.

H. THE MEASURE 26-184 LIMITS ON CONTRIBUTIONS ARE AUTHORIZED BY ARTICLE II, § 8, OF THE OREGON CONSTITUTION.

Article II, § 8, of the Oregon Constitution states:

> 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.

Measure 26-184 fits within this authorization.

The defenders of Measure 9 of 1994, including the Secretary of State, also cited Article II, § 8, as authorizing the limits on political campaign contributions in that measure.[51] ***Vannatta I*** rejected that argument, based on insufficient historical research.

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

> It thus appears to us that, in order to keep faith with the ideas imbedded in Article II, section 8, we should construe "elections" to refer to those events

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51. ***Vannatta I*** appeared to accept the contention of the Secretary of State that, <u>if</u> "elections" were interpreted to include the campaign phase, then Article II, § 8, would "remove[] the contribution and expenditure restrictions imposed by Measure 9 from any protection under Article I, § 8." 324 Or at 528.

> immediately associated with the act of selecting a particular candidate or deciding whether to adopt or reject an initiated or referred measure.

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

In reaching this conclusion, the Court used one source, WEBSTER'S (1828), apparently *sua sponte*.[52] Since ***Priest v. Pearce***, 314 Or 411, 840 P2d 65, 67-69 (1992), where this Court set out methodology for an "originalist" interpretation of the Oregon Constitution, this Court has rarely relied solely upon WEBSTER'S (1828) for construing the meaning of constitutional words.[53]

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52. Review of the briefs submitted to the Court in ***Vannatta I*** found no reference to any primary sources of language by any party, intervenor, or amicus. None of the briefs cite WEBSTER'S (1828). None of the historical statutes discussed in this brief was brought to the Court's attention.

53. For example, ***Pendleton School Dist. 16R v. State***, 345 Or 596, 613, 200 P3d 133 (2009) ("uniform" coupled with "common schools" in Art VIII, § 3) looked to Alexander M. Burrill, A LAW DICTIONARY AND GLOSSARY (1867) and John Bouvier, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION (2nd ed 1867); James Kent, COMMENTARIES ON AMERICAN LAW (3rd ed 1836) and later historical articles.

    See also, ***Juarez v. Windsor Rock Products, Inc***, 341 Or 160, 169-170, 144 P3d 211 (2006) (construing "property," referred to WEBSTER'S (1828) and 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)). ***Rico-Villalobos v. Giusto***, 339 Or 197, 207, 118 P3d 246 (2005) (meaning of "evident" in Article I, § 14) and ***State v. MacNab***, 332 Or 469, 476, 51 P3d 1249 (2002) (interpreting "punishment" in Article I, § 21), both relied upon WEBSTER'S (1828) and BLACKSTONE'S COMMENTARIES. ***State v. Caven***,

(continued...)

While appearance in the 1828 work can confirm meanings that were settled by 1828, absence from the 1828 compilation does not assist understanding of rapidly-evolving American usage decades later. Discerning the public meaning of constitutional language by comparing usage in multiple contemporaneous texts is well-advised, since

> we cannot hope to accurately reconstruct the hypothetical, objective, reasonably well-informed reader in the United States in 1788 unless we look at a host of examples of the English language produced by ordinary, reasonably well-informed Americans of that time.

Phillips, Ortner, Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE LJ FORUM 20, 22 (2016). This observation applies to understanding 19th Century phrases used in the Oregon Constitution as well.

53.(...continued)
337 Or 433, 443, 98 P3d 381, 386 (2004), used WEBSTER'S and John Bouvier's law dictionary. ***Coast Range Conifer, LLC v. Or State Board of Forestry***, 339 Or 136, 117 P3d 990 (2005), also used other state constitutions. ***Lakin v. Senco Products, Inc.***, 329 Or 62, 69, 987 P2d 463 (1999), used other 19th Century dictionaries.

The following use WEBSTER'S to confirm a word had achieved its "modern" meaning by 1828: ***State v. Wheeler***, 343 Or 652, 655, 175 P3d 438, 441 (2007) ("proportion" had long meant a "comparative relation" in Article I, § 16); ***State v. Ciancanelli***, 339 Or 282, 293, 121 P3d 613, 619 (2005) ("expression" in Article I, § 8); ***Bobo v. Kulongoski***, 338 Or 111, 120, 107 P3d 18, 23 (2005) ("raise" and "revenue" both acquired "modern" meanings); ***State v. Vasquez***, 336 Or 598, 604, 88 P3d 271, 274 (2004) ("justice" in Article I, § 10); ***MacPherson***, *supra*, ("suspend" had acquired its current usage).

"Corpus linguistics" is an empirical approach to the search for meaning in historical context made possible by the increasingly large digitalized databases, including 18th and 19th Century primary sources.[54] Reviewing words in multiple contexts allows courts to

> draw inferences about language from data gleaned from real-world language in its natural habitat--in books, magazines, newspapers, and even transcripts of spoken language.[55]

"[O]ne of the chief benefits of a corpus-linguistics-style analysis is that it offers a systematic, non-random look at the way words are used across a large body of sources." ***Muddy Boys, Inc. v. Dept. of Commerce,*** 440 P3d 741, 748 (Utah 2019).

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

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

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54. This is consistent with how Oregon courts have understood statutory and constitutional interpretation. The United States Supreme Court has looked to Westlaw and Lexis databases to examine how words are used in ordinary English when exploring congressional intent in using a particular word or phrase. *See* ***Muscarello v. United States***, 524 US 125, 129, 118 SCt 1911 (1998).

55. Lee, Thomas R. and Mouritsen, Stephen C., *Judging Ordinary Meaning* (March 19, 2017). 127 YALE LAW JOURNAL, p. 788 (2018).

In this case, empirical evidence from popular novels and publications, journals kept by those engaged in political contests, legal opinions and press accounts suggest that "election" was not in 1857-59 a legal term of art referring only to events on the day of the balloting or only events concerning the mechanics of conducting the vote. Its commonly understood public meaning was far more expansive than WEBSTER'S (1828) or ***Vanatta I*** affords it. It encompassed both the campaign and "electioneering" efforts preceding the casting of ballots, as shown at pages 70-?, *post*.

Primary sources show that "election" had been used in an expanded "modern" meaning (to include campaigning) by **1848**.[56] It is reasonable to assume that Oregon Convention delegates[57] and voters were at least equally familiar with the speeches of congressional orators and popular literature as they were with an 1828 dictionary in their intended usage of the word "elections."

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

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

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

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

The core group of lawyers who shaped the Territorial codes, participated in the Constitutional Convention, then served in or advised the early statehood legislatures (see pages 59-62, *ante*) lived through and observed the changing dynamics of political campaigns. The governing documents they endorsed show an evolution consistent with trends in society towards long election "campaigns" and use of the language which evolved with the changing practices.

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

The earliest Oregon governance documents, borrowed intact from Iowa in the 1830s, provided for regulation of elections in the narrower sense that ***Vannatta I*** posits. For example, the Oregon Organic Act adopted after the Champoeg Convention of 1843 contained then-extant principles of equity and the common law known in Iowa, and § 5 of the Act to Establish the Territorial Government of

Oregon, 30 Con Ch 177, 9 Stat 323 (1848), gave the Territorial Legislature only the authority to set the "time, place and manner of holding and conducting all elections of the people * * *."

Unlike Iowans, Oregonians later expanded the scope of election regulation by adopting a Constitution that expressly authorized the Legislature to regulate elections and protect citizens from any sort of "undue influence" or "improper conduct" upon suffrage by using the language of pre-1857 Constitutions of Texas and California (and the other states listed in Table 1, *ante*). In contrast to the narrow definition of authority in the Territorial laws, the Oregon Constitution used the phrase of more recently enacted constitutions, not Iowa's.

As noted in ***Vannatta I***, 324 Or at 533-34, Connecticut adopted a constitutional prohibition against influencing electors at the *viva voce* elections, which became part of its Constitution after joining the union:

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

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

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

The ***Vannatta I*** discussion of the Connecticut Constitution (1818) suffers from the erroneous impression that Oregon "adopted" a version of the Connecticut Constitution and might have intended that "elections" have the same meaning as the one-day meeting of electors.[58] In fact, Oregon followed at least seven other states in using the phrase "regulating and conducting *elections*" (as the popular understanding of that word developed) well before 1857 as shown in Table 1 (page 49, *ante*).

In upholding the right to deny the right to vote to someone who participated in a duel before the election, the Louisiana Supreme Court relied upon the power of the legislature to prohibit any "improper practice" (here one that occurred prior to balloting):

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

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58. Carey, OREGON CONSTITUTION, Appendix (a), summarizes an OREGON LAW REVIEW (April 1926) article by W.C. Palmer, on "sources" for the Oregon Constitution. For the "source" of Article II, § 8, Carey/Palmer remark it is "similar" to the Connecticut Constitution, 1818, Article VI, § 6. Carey at 470. Palmer and Carey did not have access to or declined to consider the constitutions within THE AMERICAN'S GUIDE (which delegate Grover carried) of those states which later seceded from the union (or the constitutions therein from Kentucky and California). The only 7 states Carey/Palmer mention as having similarities to the Oregon Constitution were Indiana, Maine, Iowa, Michigan, Connecticut, Massachusetts, and Wisconsin. The 7 nearly *identical* state constitutional provisions in Table 1 (page 49, *ante*) are far the more likely sources of Article II, § 8, than the different provision in the Connecticut Constitution.

> requires the Legislature to pass laws to protect all entitled to vote in the enjoyment of the right of suffrage * * *.

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

Within the next few legislative sessions after statehood, in 1864 and 1870, the Oregon Legislature adopted criminal sanctions for election violations as "Crimes Against Public Justice," thus giving concrete examples to the kinds of "improper conduct" the legislature could control under the 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.[59] 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.

In 1870, the Oregon Legislature made it a crime to "persuade" anyone to change residence or to persuade a legal voter not to vote. Deady Code (1872) Crim Code T II, C V, §§ 632-634. Governors Addison Gibbs and La Fayette Grover signed the 1864 and 1870 bills, without objecting that they prohibited by Article I, § 8, or were outside the authority granted by Article II, § 8,

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

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

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

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

> The Secretary of State would have us construe "elections" to include *all* activities that occur during political *campaigns.* But the two concepts do not necessarily overlap so completely. A present day dictionary defines "election" as "the act or process of choosing a person for office, position, or membership by voting." WEBSTER'S THIRD NEW INT'L DICTIONARY at 731 (unabridged 1993). "Campaign" is defined as "a series of operations or efforts designed to influence the public to support a particular political candidate, ticket, or measure." *Id.* at 322.
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> * * *
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> However, the constitutional provision that we construe here was proposed in 1857, not in 1996. A dictionary relevant to that time gives a more limited definition of the word "election": "The act of choosing a person to fill an office or employment, by any manifestation of preference, as by ballot, uplifted hands or viva voce[.]" WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).
>
> * * * It thus appears that, whatever the degree of their overlap today, the ideas of "electioneering" and "elections" were somewhat distinct at the pertinent time, *viz.,* at the time that the Oregon Constitution was created.

Vannatta I, 324 Or at 530-31.

"Election" had evolved before 1857 to encompass more than the "act" or the

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

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

The metonymic shift of "election" to include campaigns and electioneering had occurred in American usage by the 1840s. It had occurred earlier in Britain. An 1816 source notes that "elections" in England were thought of as lasting weeks, allowing for great mischief and laws were passed limiting the "duration of elections,"[60] clearly referring not to the day of the voting but to the period of time

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

when candidates attempted to persuade voters. The same extension of meaning occurred in the United States. In 1835, an American writer, G.K Paulding, used the past continuing tense in describing the "interest excited by" the United States Bank controversy "that there was during the election of a President of the United States * * *."[61] Paulding was not referring to just one day of voting.

The expanded meaning of "elections" to encompass a process in the months before the decision at the polls is traced through popular pieces by one columnist in the American press written between 1830 and 1850. Political satirist Seba Smith created a character, "Major Jack Dowing," a Maine "downeaster" Democrat who described events "in his own plain language" in "letters" printed in several newspapers between 183O--1859. *Preface*, MY THIRTY YEARS OUT OF THE SENATE, (Oaksmith 1859), p. 5.[62]

In a "Letter" dated January 18, 1830, "Dowing" noted acrimony at the Maine legislature because "the preceding electioneering campaign had been carried out with

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

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

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

a bitterness and personality unprecedented in the State."[63] In July 19, 1830, he quotes a hopeful seeking appointment as writing, "I'm going to start to-morrow morning on an electioneering cruise."[64]

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

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

MY THIRTY YEARS OUT OF THE SENATE, pp. 308-9. Use of the present progressive tense "are going" shows the "election" is in progress at the time of the writing--June 1848, some 5 months before the casting ballots in November. Progressive verb forms indicate action that is happening at the same time the statement is written. Such newspaper columns are good authority for what readers understood. In this

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

64. *Id.*, p. 100.

case the events described are historically-based, not fanciful.[65] While the writer affects a vernacular dialect in spelling, all the verb tenses are internally consistent and present progressive.

The characters continue to use "this election" in a continuing sense in columns published during the 1852 campaign. In a letter dated July 20, 1852, Dowing's uncle assures him that Van Buren has promised that "he'd stand the platform for this election, anyhow.[66]" On September 18, 1852, Dowing blames the poor outlook for his candidates on the fact that, "the liquor law has played the mischief this election all round, and got things badly messed up.[67]"

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

> 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.[68]

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

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

67. *Id*., p. 395.

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

> [T]o those who had been his true friends during the election [Andrew Jackson] extended the graceful hand * * *.[69]

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

> We heartily approve the recent act of Congress requiring the fullest publicity in regard to all campaign contributions, whether made in connection with primaries, conventions or elections.[70]

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

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

1. OREGON ADOPTED LIMITS ON POLITICAL MONEY IN 1864 AND 1870.

These are described at pages 58-60, *ante*.

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

Voters in Oregon and Idaho adopted comprehensive election regulations in 1908. Acting upon the common understanding as to what constituted "improper conduct"

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

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

which caused "undue influence" upon the process of elections, in June 1908 Oregon voters through initiative passed by 64-36% the Corrupt Practices Act, which the 1907 Legislature had declined to enact.[71] This ballot measure **added a ban on political contributions by corporations and strict candidate campaign spending limits**, coupled with the then-novel provision for what we now call the Voters Pamphlet ("publicity pamphlet").[72]

The 1908 Oregon Corrupt Practices Act reforms included:

1. a complete ban on all political contributions by corporations, or their owners, carrying on the business of a "bank, savings bank, cooperative bank, trust, trustee, surety, indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, water, cemetery, or crematory company, or any company having the right to take or condemn land or to exercise franchises in public ways granted by the state or by any county, city or town" (Section 25);[73]

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

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

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

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

of one year's compensation or salary of the office" in the general election (but not less than $100);[74]

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

4. improvements to the Voters Pamphlet;

5. prohibitions on "treating" voters to favors;

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

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

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

   "A bill for a law to limit the amount of money candidates and other persons may contribute or spend in election campaigns; declaring what shall constitute corrupting use of money and undue influence in elections and punishing the same; prohibiting attempts on election day to persuade any voter to vote for or against a candidate or candidates, or any measure submitted to the people; to protect the purity of the ballot; furnishing information to voters concerning candidates and parties, partly at public expense and providing for the manner of conducting election contests."[75]

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

75. *A PAMPHLET Containing a Copy of All Measures "Referred to the People by the Legislative Assembly," "Referendum Ordered by Petition of the People," and "Proposed by Initiative Petition," to be submitted to the Legal Voters of the State of Oregon for their Approval or Rejection at the REGULAR GENERAL ELECTION to be held on the first day of June, 1908 (State of Oregon)*, p. 76 [hereinafter "*Measure*

(continued...)

The only argument regarding the Corrupt Practices Act in the *Measure Pamphlet (1908)*, submitted by Public Power League and other many well-known public officials, stated in part:

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

Measure Pamphlet (1908) at 103. App-45.

Obviously, Oregonians believed that limiting the undue influence of money in political campaigns was consistent with their own Oregon Constitution. We do not argue that their understanding made campaign spending limits constitutional in 1908. We do argue that these voters and writers were contemporaries with the Oregon House and Senate members who passed the earliest criminal laws pertaining to political money in 1864 and 1870, limiting conduct prior to elections, including

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75.(...continued)
Pamphlet (1908)] (available via http://books.google.com by searching on its title); Allen H. Eaton, THE OREGON SYSTEM: STORY OF DIRECT LEGISLATION IN OREGON (McClurg 1912), p. 105.

"persuasion," as well as the 1857 Constitutional Convention delegates, some of whom lived well into the 20th Century.[76]

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

In ***Jory v. Martin***, 153 Or 278, 56 P2d 1093 (1936), the Court explained the relationship between contemporaneous understanding of language, the doctrine of contemporaneous construction, and constitutional originalism. The ***Jory*** Court noted that the intent of the voters who ratified the Constitution should be considered and pointed out that accounts of the Constitutional Convention were published in two leading newspapers. 153 Or at 289. It then explained why it accorded great weight to contemporaneous construction of provisions in the Constitution:

> Mr. Justice Lord, in ***Cline v. Greenwood***, 10 Or 230, 241, speaking for the court, said: "But did we entertain any doubt whether the legislature had exercised its power in the mode prescribed by the constitution, we should be compelled to dissolve that doubt in favor of the constitutionality of the mode which the legislature had adopted. Before a statute is declared

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

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

Jory v. Martin, 153 Or at 300.

This strong relationship between contemporaneous construction and Constitutional originalism was restated in ***State ex rel Gladden v. Lonergan***, supra. 201 Or 163, 172:

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

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

The fact that the leaders of Oregon, soon after concluding the Constitutional Convention, proceeded to adopt laws governing both (1) the pre-election day periods of time and (2) various kinds of undue influence involving money is powerful evidence about the meaning of that Constitution. Further powerful evidence from contemporaneous construction is the fact that Oregon had continuously in place laws

limiting political money since 1864 and laws specifically limiting political contributions and expenditures from 1908 to 1973 (when the Legislature repealed the expenditure limits established in the 1908 ballot measure), with no known assertion that those laws were contrary to the Oregon Constitution. And Oregon had statutes governing the improper use of "persuasion" in political campaigns as early as 1870.

> [G]reat weight has always been attached to a contemporaneous exposition of the meaning of fundamental law, not only where such interpretation is that of the courts, but also where it is that of other departments of government. * * * Similarly, a construction which has been long accepted by the various agencies of government, and by the people, will usually be accepted as correct by the judiciary, or will at least be given great weight, unless it is manifestly contrary to the letter or spirit of the Constitution, and a court may take judicial notice of widespread opinion and general practices in the interpretation of constitutional provisions.

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

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

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

> The principle of contemporaneous construction may be applied to the construction given by the legislature to the constitutional provisions dealing with legislative powers and procedure. Though not conclusive, such interpretation is generally conceded as having great weight or persuasive significance. The legislative history and the contemporaneous construction of a constitutional provision by the legislature that has been continued and followed for a long time are valuable aids as to its proper interpretation, are

> entitled to great weight and careful consideration when courts interpret the provision, are presumed to be correct, and should not be departed from unless manifestly erroneous.

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

The rule of contemporaneous construction applies here to the understanding expressed by dozens of successive legislative sessions for over 60 years (1909 - 1973) and conduct of those who became defendants to enforcement actions. The strict limits on campaign contributions by candidates were never challenged as inconsistent with the Oregon Constitution--even at the time of their enactment.

J. LIMITS ON CAMPAIGN CONTRIBUTIONS AND INDEPENDENT EXPENDITURES ARE NOT RESTRICTIONS ON EXPRESSION OR THE CONTENT OF SPEECH.

Nothing in Measure 26-184 prevents individuals or entities from expressing their support or opposition to candidates for public office or from expressing any opinion whatsoever.[77] They are all free to speak, write, and publish on this subject. Measure 26-184 regulates only the conduct or action of making campaign contributions and independent expenditures beyond certain limits.

Measure 26-184 does not proscribe expression. Instead, it proscribes the harm of undue influence of money on candidates and officeholders who depend upon large

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77. Measure 26-200 on its face does not forbid speech. If a statute "does not on its face forbid speech, it follows that the statute does not on its face violate rights protected by Article I, section 8." ***Slate v. Chakerian***, 325 Or 370, 380, 938 P2d 756 (1997).

campaign contributions in order to be elected. See ORS Chapter 259, § (1), which finds that campaign contributions are given in order to obtain (1) special access to the candidate or officeholder by the donor and (2) special treatment by officeholders receiving the contributions.

As shown at pages 15-22, *ante*, ***Vannatta II*** has withdrawn the statement in ***Vannatta I*** that "the contribution, in and of itself, is the contributor's expression of support for the candidate or cause." The Oregon Supreme Court now recognizes that transfers of property (including money) are not expression, so limits on such transfers are not "directed to the *substance* of any opinion or any subject of communication" and "do not refer to expression at all." ***State v. Moyer***, *supra*, 348 Or at 229. Thus, they must be "analyzed for vagueness or for as-applied constitutionality. *Id.* (citing ***State v. Plowman***, 314 Or 157, 164, 838 P2d 558 (1992), *cert denied*, 508 US 974, 113 SCt 2967, 125 LEd2d 666 (1993)). None of Measure 26-184 is vague, and there is no as-applied challenge to any of its limitations.

Further, Measure 26-184 does not prevent any individual from expressing support for a candidate via a campaign contribution (of up to $500 plus contributions made via Small Donor Committees). As noted in ***Buckley v. Valeo***, *supra*, expression of support occurs when a contribution is made, regardless of its size. So, to the extent that a monetary contribution "expresses" support, that expression is not hampered by a contribution limit.

> The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests

> solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

424 US at 635-36. Measure 26-184 also allows any individual to make independent expenditures of up to $5,000 in each race of Multnomah County public office. Thus, Measure 26-184 does not impair the opportunity for anyone to express support for or opposition to a candidate. It merely establishes that the avenue is not a superhighway with no lines and no speed limits. It is akin to the content-neutral time, place, and manner restrictions upheld in ***Outdoor Media Dimensions, Inc. v. Dept. of Transportation***, 340 Or 275, 132 P3d 5 (2006) (size and placement of billboards), and in ***State v. Rich***, 218 OrApp 642, 180 P3d 744 (2008) (statute prohibiting "unreasonable noise").

Measure 26-184 does not apply to the content of any expression. It does not stop candidates or anyone else from speaking, writing, or printing anything. Under Measure 26-184, all persons are free, in addition to making contributions and expenditures, to use 100% of their volunteer time and effort to support or oppose candidates. Measure 26-184 just stops corporations and unions and others from providing money to obtain access and favors from politicians or even appearing to do so. It is undisputable that money provides an overwhelming megaphone for the speech of those candidates receiving the large contributions. See ORS Chapter 259,

§ (1)(d) (documenting that the bigger spenders win over 90% of the legislative races in Oregon).

The Measure 26-184 political campaign contribution limits are not content-based. The act of giving money does not have content. If it did, then Oregon could not lawfully impose its full panoply of laws requiring disclosure and reporting of political campaign contributions and expenditures, as such restrictions would apply only to "political speech" and thus be forbidden content-based restrictions. **If political campaign contributions are expression**, then how can Article I, § 8, forbid numeric limits on contributions but allow all sorts of other limitations, such as:

1. The sources and amounts of the funds used for political advertisements must be promptly reported to the government (ORESTAR system, ORS 260.057 *et seq*.).

2. Candidate statements in the Voters' Pamphlet must "begin with a summary of the following: Occupation, educational and occupational background, and prior governmental experience." (ORS 251.085, ORS 251.087(5)(b)).

3. Campaign communications must not include false statements (ORS 260.532).[78]

Those limitations are no less aimed at the content of "political speech" than are Measure 26-184's contributions limits. The existing reporting requirements apply only to financial transactions involving "political speech." They illustrate that the

78. ***Bryant v. Recall for Lowell's Future Comm.***, 286 OrApp 691 (July 12, 2017) (reversing trial court's dismissal of the complaint). Also, ***Yes On 24-367 Comm. v. Deaton***, 276 OrApp 347, 367 P3d 937 (2016).

Oregon Constitution is not offended by restrictions that apply only to "political speech," when in fact those are restrictions on the giving or receiving of money.

K. MEASURE 26-184 FOCUSES ON THE HARMS OF UNLIMITED CONTRIBUTIONS, NOT ON SUPPRESSING CONTENT OF THE SPEECH.

This Court has allowed limitations on speech by laws that "focus on proscribing the pursuit or accomplishment of forbidden results rather than on the suppression of speech or writing." ***State v. Ciancanelli***, *supra*, 339 Or at 296.

> [A]mong the various historical crimes that are "written in terms" directed at speech, those whose *real* focus is on some underlying harm or offense may survive the adoption of Article I, section 8, while those that focus on protecting the hearer from the message do not.
>
> * * * Although the laws making those acts criminal [perjury, etc.] may be "written in terms" directed at speech, all those crimes have at their core the accomplishment of present danger of some underlying actual harm to an individual or group, above and beyond any supposed harm that the message itself might be presumed to cause to the hearer or to society. * * * Article I, section 8, is concerned with prohibitions that are directed at the content of speech, not with prohibitions that focus on causing palpable harm to individuals or groups.

In addition to the harm to public trust in the judiciary noted in ***Fadeley***, *supra*, an example of harm to a group which is "above and beyond" the message to the hearer is found in ***Stoneman***, *supra*. While the restriction on pornography was a pure restriction on expressive content, the Court found it valid because it was intended to prevent harm to a vulnerable group--children (even though the statute made no explicit reference to such harm). Exploitation of children is a harm distinct from any asserted harm that prurient materials may cause to an observer. Likewise,

even if limits on political campaign contributions and expenditures were pure restrictions on speech based on its content, they are justified by preventing the harms that unlimited political spending imposes upon democracy, as expressly set forth in the findings of Measure 26-184 and Measure 47 (2006). See pages 28-30, *ante*.

L. LIMITS ON RECEIVING CAMPAIGN CONTRIBUTIONS ARE WITHIN THE INCOMPATIBILITY EXCEPTION TO ARTICLE I, SECTION 8.

In re Fadeley, *supra*, upheld a pure limitation on political speech (ban on solicitation of campaign contributions by a candidate for judicial office), because doing so served an important state interest in "the appearance of judicial integrity." 310 Or at 564. The important societal interests in limiting political campaign contributions and expenditures are set forth in detail in § (1) of ORS Chapter 259.[79]

Vannatta I, however, characterized the ***Fadeley*** decision as hinging on the "incompatibility exception" to Article I, § 8. It rejected that exception, because "it cannot be contended that the expression in question (contributions) actually impairs performance of, e.g., legislative functions in all cases." 324 Or at 542. But the Legislature has now found, as fact, that contributions of unlimited size do generically and universally impair the legislative function. ORS Chapter 259, § (1) (App-11-13).

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79. The Court in ***Fadeley*** used the balancing approach familiar in First Amendment litigation. Such a test would validate contribution limits, as in Measure 47, as it has in other cases involving contribution limits, such as ***Buckley v. Valeo***, *supra*, and ***Shrink Missouri***, *supra*.

Vannatta I rejected the incompatibility exception, based upon a undocumented recitation of history.

> Yet an underlying assumption of the American electoral system always has been that, in spite of the temptations that contributions may create from time to time, those who are elected will put aside personal advantage and vote honestly and in the public interest. The political history of the nation has vindicated that assumption time and again. The periodic appearance on the political scene of knaves and blackguards cannot, so far as we know, be tied to contributions more than to other forms of expression. There is no necessary incompatibility between seeking political office and the giving and accepting of campaign contributions.

324 Or at 541. These statements were not supported by evidence in the record of the case or by citations to historical documents. In any event, these factual findings are now comprehensively contradicted by the specific legislative findings of fact adopted by the voters of Oregon in Measure 26-184 and in § (1) of ORS Chapter 259, which are entitled to near complete judicial deference. See page 30, *ante*.

M. MEASURE 26-184 IS WITHIN THE HISTORICAL EXCEPTION FOR COUNTERING BRIBERY.

The Oregon Supreme Court's analysis of Article I, § 8, would validate statutes that address bribery, since bribery was punishable under common law and countering bribery is a longstanding exception to freedom of speech protection. ***Nixon v. Shrink Missouri Gov't PAC***, 528 US 377, 389, 120 SCt 897, 905 (2000) ("***Shrink Missouri***"); ***Buckley v. Valeo***, *supra*, 424 US at 27, 96 SCt at 639 (1976). Further, combatting bribery is specifically authorized by Article II, § 8, of the Oregon Constitution.

Despite this history, in Oregon bribing public officials with campaign contributions in Oregon is deemed to be legal by statutes that allow *quid pro quo* bribery if the *quid* is clothed as a campaign contribution. A person can hand over money to a public official in direct exchange for the public official's official act, including a vote on a bill or approval of a government contract for the person or her business, as long as the money is a political campaign contribution.

The bribery statutes, ORS 162.005, 162.105, and 162.025, all depend upon the bribery offering or the target accepting a "pecuniary benefit."[80]

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80. **162.015 Bribe giving.**

(1) A person commits the crime of bribe giving if the person offers, confers or agrees to confer any pecuniary benefit upon a public servant with the intent to influence the public servant's vote, opinion, judgment, action, decision or exercise of discretion in an official capacity.

(2) Bribe giving is a Class B felony.

162.025 Bribe receiving.

(1) A public servant commits the crime of bribe receiving if the public servant:

(a) Solicits any pecuniary benefit with the intent that the vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced; or

(b) Accepts or agrees to accept any pecuniary benefit upon an agreement or understanding that the vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

(continued...)

> **162.005 Definitions for ORS 162.005 to 162.425.** As used in ORS 162.005 to 162.425, unless the context requires otherwise: (1) "Pecuniary benefit" means gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary, in the form of money, property, commercial interests or economic gain, but does not include a political campaign contribution reported in accordance with ORS chapter 260.

The statutes excludes all campaign contributions from the definition of "pecuniary benefit." So, no matter what the public official agrees to do in exchange for a political contribution, the actions of the donor and of the public official or candidate do not constitute bribery.

And the public official can use campaign contribution money for almost anything, including personal benefit. She can literally put the money into her personal bank account as a salary for managing the campaign committee or for rent on maintaining an office in her spare bedroom, as shown at pages 20-22, *ante*. Any public official in Oregon can maintain campaign committees and accept contributions and make expenditures, whether or not the public official ever runs for office again.

State v. Gyenes, 121 OrApp 208, 213, 855 P2d 642 (1993), ruled that there is no possibility of "bribe giving" from the making of a campaign contribution, even if the campaign contribution is <u>not</u> reported to the government.

80.(...continued)

(2) Bribe receiving is a Class B felony.

> [W]e should exercise our good sense and read the bribery statute as exempting any campaign contribution that is required to be reported by the donee under ORS chapter 260, even if the donee fails to report it.

Multnomah County cannot remedy this problem locally by adopting an ordinance that defines bribery of public officials to include doing official acts in exchange for campaign contributions. Local governments do not have authority to deem certain conduct to be a crime, if a state statute permits that conduct.

> Article XI, section 2, of the Oregon Constitution provides that cities and towns of Oregon have the authority generally to enact local ordinances "subject to the Constitution and criminal laws of the State of Oregon." In ***City of Portland v. Dollarhide***, 300 Or 490, 501, 714 P2d 220 (1986), the Supreme Court explained that the foregoing limitation prohibits local governments from enacting ordinances that "conflict" with state criminal laws. A local ordinance is said to "conflict" with state criminal law if it prohibits conduct that the state statute permits or permits conduct that the state statute prohibits. *Id.* at 502, 714 P2d 220.

State v. Robison, 202 OrApp 237, 241, 120 P3d 1285 (2005). So the only way for Multnomah County to restrict the opportunity for legal actual bribery of public officials with campaign contributions is to limit the size of allowable campaign contributions to a level sufficiently low that public officials would not be tempted to take official actions in exchange for such a contribution. That is what Measure 26-184 accomplishes.

IV. SECOND ASSIGNMENT OF ERROR: THE CIRCUIT COURT ERRED IN FAILING TO RULE THAT MEASURE 26-184'S LIMITS ON CAMPAIGN CONTRIBUTIONS ARE CONSISTENT WITH THE U.S. CONSTITUTION.

PRESERVATION OF ERROR.

The Trojan Intervenors argued this point in their Opening Brief and Reply Brief and at the Circuit Court hearing. The *MC Validation Order* did not address that matter and thus failed to perform the assurance function intended by ORS 33.710.

A. THE UNITED STATES SUPREME COURT HAS CONSISTENTLY UPHELD LIMITS ON CAMPAIGN CONTRIBUTIONS.

Exhibit 4 (ER-15-28) shows that many states have contribution limits similar to those of Measure 26-184. The limits applicable to candidates for local office are typically lower than for statewide candidates and usually lower than for candidates for the state legislature. Exhibit R2 (ER-44) is a brief survey of states with relatively low contribution limits in legislative races, which generally correspond to limit applicable in contests for local office. None of these limits has been invalidated in court.

In addition, many cities and counties have their own limits on campaign contributions that are lower than state-imposed limits. For brevity, we offer only California and Washington. Exhibit R3 (ER-45-46) shows the contribution limits imposed by 109 California cities for their races for city council. The limit in large cities there is typically $250 - $700 (see Berkeley, Long Beach, Los Angeles,

Oakland, San Diego, San Francisco, San Jose). Seven cities there have a limit of $100. None of these limits has been invalidated in court.

Exhibit R4 (ER-47-48) shows the contribution limits in Washington, including those applicable to local offices. The contribution limit applicable to all individuals, PACs, unions, corporations and other entities is $1,000 per election. Some local jurisdictions, including Seattle, have adopted lower limits. Seattle limits contributions to candidates for any public office to $500 per election. None of these limits has been invalidated in court.

The Missouri limits upheld in ***Shrink Missouri***, *supra*, ranged to as low as $275 per person per election.

> "[T]he prevention of corruption and the appearance of corruption" was found to be a "constitutionally sufficient justification," [***Buckley***], at 2526, 96 SCt 612: "To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined. . . . "Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions .... Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical ... if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Id.*, at 2627, 96 SCt 612 (quoting ***Civil Service Comm'n v. Letter Carriers***, 413 US 548, 565, 93 SCt 2880, 37 LEd2d 796 (1973)).

Nixon v. Shrink Missouri Gov't PAC, 528 US at 388-89.

> In speaking of "improper influence" and "opportunities for abuse" in addition to "quid pro quo arrangements," we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind our recognition that the Congress could

> constitutionally address the power of money "to influence governmental action" in ways less "blatant and specific" than bribery. ***Buckley v. Valeo***, 424 U.S., at 28, 96 SCt 612.4

Nixon v. Shrink Missouri Gov't PAC, 528 US at 389.

> In defending its own statute, Missouri espouses those same interests of preventing corruption and the appearance of it that flows from munificent campaign contributions. Even without the authority of ***Buckley***, there would be no serious question about the legitimacy of the interests claimed, which, after all, underlie bribery and antigratuity statutes. While neither law nor morals equate all political contributions, without more, with bribes, we spoke in ***Buckley*** of the perception of corruption "inherent in a regime of large individual financial contributions" to candidates for public office, *id.*, at 27, 96 SCt 612, as a source of concern "almost equal" to quid pro quo improbity, *ibid.* The public interest in countering that perception was, indeed, the entire answer to the overbreadth claim raised in the Buckley case. *Id.*, at 30, 96 SCt 612. This made perfect sense. Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works "only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." ***United States v. Mississippi Valley Generating Co.***, 364 US 520, 562, 81 SCt 294, 5 LEd2d 268 (1961).

Shrink Missouri, 528 US at 390.

That unlimited campaign contributions in Oregon and Multnomah County pose a threat of corruption and appearance of corruption is demonstrated throughout the Voters' Pamphlet statements on Measure 26-184 (ER-4-11), the literature distributed to most Multnomah County households (Exhibit 3, ER-12-14), the 2016 Report of the Multnomah County Charter Review Committee (MC ER-35), a letter submitted to that Committee on June 8, 2016 (App-47-48), the declarations of candidates filed below (ER-59-56), and the declarations filed in the similar City of Portland validation

case (App-1-6), and articles in THE OREGONIAN showing that Oregon's government and campaign system is "*Polluted by Money*." App-79-115.[81]

> And although majority votes do not, as such, defeat First Amendment protections, the statewide vote on Proposition A certainly attested to the perception relied upon here: "[A]n overwhelming 74 percent of the voters of Missouri determined that contribution limits are necessary to combat corruption and the appearance thereof." ***Carver v. Nixon***, 882 FSupp 901, 905 (WD Mo), rev'd, 72 F3d 633 (CA 8 1995); see also 5 FSupp2d, at 738, n7.

Shrink Missouri, 528 US at 394. The vote in favor of Measure 26-184 was 89% "yes."

> "[T]here is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters."

Shrink Missouri, 528 US at 394-95.

The U.S. Supreme Court has consistently upheld contribution bans and limits on corporations, unions, and other entities. ***Fed. Election Comm'n v. Beaumont***, 539 US 146, 161-62, 123 SCt 2200 (2003). The only contribution limits on individuals struck down by the U.S. Supreme Court were those in ***Randall v. Sorrell***, 548 US 230, 126 SCt 2479, 165 LEd2d 482 (2006). The Ninth Circuit has determined that ***Randall*** does not provide controlling precedent.

> As a result, there was no majority, controlling opinion in ***Randall***: "The only binding aspect of ***Randall*** . . . is its judgment, striking down the Vermont contribution limit statute as unconstitutional."

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81. We request judicial notice of these documents, declarations and articles, pursuant to OEC 201(b)(2).

Lair v. Bullock, 798 F3d 736, 744 (9th Cir 2015).

> With no majority opinion, ***Randall*** cannot serve as the requisite "controlling authority" capable of abrogating our precedent.

Lair v. Bullock, 798 F3d at 747. Despite that, we discuss ***Randall v. Sorrell***, and show that the Vermont statute at issue was very different from Measure 26-184.

The plurality opinion evaluated the Vermont limitations on both campaign contributions and overall expenditures by candidates as a package and found these troubling elements, none of which exist in Measure 26-184:

> Act 64, which took effect immediately after the 1998 elections, imposes mandatory expenditure limits on the total amount a candidate for state office can spend during a "two-year general election cycle," i.e., the primary plus the general election, in approximately the following amounts: governor, $300,000; lieutenant governor, $100,000; other statewide offices, $45,000; state senator, $4,000 (plus an additional $2,500 for each additional seat in the district); state representative (two-member district), $3,000; and state representative (single member district), $2,000. 2805a(a).

Randall v. Sorrell, 548 US at 237. Measure 26-184 has no limits on the amounts that any candidate's campaign can spend.

> Act 64 also imposes strict contribution limits. The amount any single individual can contribute to the campaign of a candidate for state office during a "two-year general election cycle" is limited as follows: governor, lieutenant governor, and other statewide offices, $400; state senator, $300; and state representative, $200. 2805(a). Unlike its expenditure limits, Act 64's contribution limits are not indexed for inflation.

Randall v. Sorrell, 548 US at 237. Measure 26-184's contribution limits are more lenient. While it has both limits on the making of contributions and receiving of contributions, expressed from the point of view of a contributor, it allows in any Election Cycle any individual to:

1. contribute up to $500 directly to any candidate for Multnomah County public office; plus

2. contribute up to $100 to any number of Small Donor Committees (each of which can contribute to any candidate(s) and can make unlimited independent expenditures to support or oppose any candidate; plus

3. contribute any amount to any number of other Political Committees (each of which can contribute up to $500 directly to any candidate and also make up to $10,000 in independent expenditures to support or oppose any candidate); plus

4. make independent expenditures of up to $5,000 to support or oppose any candidate.

In effect, Measure 26-184 allows any individual to spend unlimited amounts of money to support or oppose any candidate, as long as a sufficient number of Small Donor Committees and/or other Political Committees exist or are created. There are no limits on the number of Small Donor Committees or Political Committees.

Measure 26-184 does significantly change the way such spending must be disclosed to the public and does significantly limit contributions and independent expenditures by non-humans ("Entities"). And Measure 26-184 § (5) indexes all of its limits for inflation.

The Vermont package had other troubling elements pertaining to limits on political parties, since the statute applied to all candidate contests. Measure 26-184 applies only to nonpartisan candidate races, because all Multnomah County offices are elected on a nonpartisan basis.

> Thus, for example, the statute treats the local, state, and national affiliates of the Democratic Party as if they were a single entity and limits their total contribution to a single candidate’s campaign for governor (during the

> primary and the general election together) to $400. The Act also imposes a limit of $2,000 upon the amount any individual can give to a political party during a 2-year general election cycle. 2805(a).

Randall v. Sorrell, 548 US at 238-39.

> We are aware of no State that imposes a limit on contributions from political parties to candidates for statewide office lower than Act 64's $200 per candidate per election limit.

Randall v. Sorrell, 548 US at 251.

> The Act applies its $200 to $400 limits--precisely the same limits it applies to an individual-- to virtually all affiliates of a political party taken together as if they were a single contributor. Vt. Stat. Ann., Tit. 17, § 2805(a) (2002). That means, for example, that the Vermont Democratic Party, taken together with all its local affiliates, can make one contribution of at most $400 to the Democratic gubernatorial candidate, one contribution of at most $300 to a Democratic candidate for State Senate, and one contribution of at most $200 to a Democratic candidate for the State House of Representatives.

Randall v. Sorrell, 548 US at 257.

> We consequently agree with the District Court that the Act's contribution limits "would reduce the voice of political parties" in Vermont to a "whisper." 118 FSupp2d, at 487. And we count the special party-related harms that Act 64 threatens as a further factor weighing against the constitutional validity of the contribution limits.

Randall v. Sorrell, 548 US at 259. Measure 26-184 does not limit what political parties can contribute to those parties' candidates or what an individual can contribute to a political party.

B. THE NINTH CIRCUIT COURT OF APPEALS HAS CONSISTENTLY UPHELD LIMITS ON CAMPAIGN CONTRIBUTIONS.

Lair v. Motl, 873 F3d 1170 (9th Cir 2017), *cert den sub nom* ***Lair v. Mangan***, 139 S Ct 916, 202 L Ed 2d 644 (2019) ("***Lair III***"), validated Montana's contribution limits, which are lower than those adopted in Measure 26-184. Montana's statute limits a candidate for city or county office to receiving $340 per election cycle from any individual or political committee. The corresponding limit in Measure 26-184 is $500.

Thompson v. Hebdon, 909 F3d 1027, 1036-37 (9th Cir 2018), upheld Alaska's contribution limits, concluding:

> Thompson argues that the individual-to-candidate limit lacks a narrow focus because, he asserts, Alaska fails to show that reducing the limit from $1,000 to $500 was necessary, and because the limit is among the lowest in the nation. We have already explained that Alaska need not show that it was necessary to reduce the contribution limit to $500, only that the new limit targets *quid pro quo* corruption or its appearance. See ***Buckley***, 424 U.S. at 30, 96 S.Ct. 612. On the question of whether the $500 limit is "narrowly focused" on that interest, we must uphold the dollar amount unless it is "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." ***Shrink Mo.***, 528 U.S. at 397, 120 S.Ct. 897. * * *
>
> Moreover, although the $500 limit is on the low-end of the range of limits adopted by various states, it is not an outlier. At least four other states (Colorado, Kansas, Maine, and Montana) have the same or lower limit for state house candidates, as do at least five comparably sized cities (Austin, Portland, San Francisco, Santa Cruz, and Seattle). We recently upheld a comparable limit. ***Lair III***, 873 F3d at 1174 tbls. 2 & 3.

Thalheimer v. City of San Diego, 2012 WL 177414 (SD Cal 2012), upheld San Diego's $500 limit on contributions to candidates in city races. It applied ***Randall v. Sorrell***, as the Ninth Circuit had not indicated its lack of precedential value until 2015 in ***Lair v. Bullock***, *supra*, 798 F3d at 747. ***Thalheimer*** concluded:

> As such, "[t]aken together," the ***Randall*** factors do not suggest that the $500 individual contribution limit in this case "threaten[s] to inhibit effective advocacy" by challengers, "mute[s] the voice of political parties," or otherwise imposes disproportional burdens on First Amendment interests.

Thalheimer, 2012 WL 177414, at *10.

> [T]he $500 contribution limit * * * appears to be comparable with the contribution limits in Los Angeles ($500/$1,000), Phoenix ($488), San Antonio ($500/$1,000), San Jose ($200/$500), Jacksonville ($500/$500), and San Francisco ($500/$500). The fact that the challenged limit is lower than similar limits in several other cities is a factor to consider, but does not necessarily mean it is unconstitutionally low. See ***Montana Right to Life Ass'n v. Eddleman***, 43 F3d 1085, 1095 (9th Cir 2003) ("As long as the limits are otherwise constitutional, it is not the prerogative of the courts to fine-tune the dollar amounts of those limits."). Rather, the Court should also consider the limits previously upheld by the courts. See ***Randall***, 548 US at 250-51. In this case, the $500 limit ($1,000 per election cycle) is comparable to other contribution limits previously upheld. See, e.g., ***Shrink***, 528 U.S. 377, 120 S.Ct. 897, 145 L.Ed.2d 886 ($275 to $1,075 for statewide office); ***Buckley***, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 ($1,000 for federal office); ***Eddleman***, 343 F.3d 1085 ($100, $200, and $400 for statewide office).

Thalheimer, 2012 WL 177414, at *8.

> The City has articulated an anti-corruption interest that is not novel or implausible, so it is not required to meet a heightened evidentiary burden.

Thalheimer v. City of San Diego, 645 F3d 1109, 1123 (9th Cir 2011).

V. THIRD ASSIGNMENT OF ERROR: THE CIRCUIT COURT ERRED IN CONCLUDING THAT MEASURE 26-184'S LIMITS ON INDEPENDENT EXPENDITURES VIOLATE THE OREGON CONSTITUTION.

PRESERVATION OF ERROR.

The Trojan Intervenors argued this point in their Opening Brief and Reply Brief and at the Circuit Court hearing. The *MC Validation Order* ruled otherwise (MC ER-61).

Measure 26-184 imposes these limits on independent expenditures:

> **(2) Expenditures in Multnomah County Candidate Elections.**
>
> (a) No Individual or Entity shall expend funds to support or oppose a Candidate, except those collected from the sources and under the Contribution limits set forth in this Section.
>
> (b) An Entity shall register as a Political Committee within three (3) business days of making aggregate Independent Expenditures exceeding $750 in any Election Cycle to support or oppose one or more Candidates in any Multnomah County Candidate Election.
>
> (c) Only the following Independent Expenditures are allowed per Election Cycle to support or oppose one or more Candidates in any particular Multnomah County Candidate Election:
>
> (A) An Individual may make aggregate Independent Expenditures of not more than five thousand dollars ($5,000).
>
> (B) A Small Donor Committee may make Independent Expenditures in any amounts from funds contributed in compliance with Section III above.
>
> (C) A Political Committee may make aggregate Independent Expenditures of not more than ten thousand dollars ($10,000), provided that the

> Independent Expenditures are funded by means of contributions to the Political Committee by Individuals in amounts not exceeding five hundred dollars ($500) per Individual per year.

Section (2) of Measure 26-184 limits independent expenditures to support or oppose one or more candidates in any Multnomah County candidate election. MC ER-28. The *MC Validation Order* contends that ***Vannatta I***, *supra*, ***Hazell***, *supra*, and ***Meyer v. Bradbury***, 341 Or 288, 142 P3d 1031 (2006), "have uniformly considered campaign expenditures to be a form of speech fully within the protections afforded by Article I, Section 8 of the Oregon Constitution." MC ER-61. In ***Vannatta I***, all parties "concede that campaign expenditures constitute expression for Article I, section 8, purposes." 324 Or at 521. It was not a judicial determination. Here, the parties do not so concede. ***Hazell*** did not address the constitutionality of limits on expenditures at all. Nor did ***Meyer v. Bradbury***, where the current validity of laws restricting contributions or expenditures was not at issue. Instead, intervenor-defendant David Delk prevailed in a lawsuit brought by employees of the Oregon Chapter of American Civil Liberties Union to remove Measure 46 from the 2006 ballot for constituting more than one unrelated amendment to the Oregon Constitution. The Court of Appeals ruled against Delk, but the Oregon Supreme Court reversed and kept Measure 46 on the ballot. The passage about the constitutionality of limits was the Oregon Supreme Court commenting upon the applicability of ***Vannatta I*** as of December 2006. The comment was not a

holding; it was *dicta* at most, as no party in ***Meyer v. Bradbury*** argued that the ***Vannatta I*** analysis did or did not render unconstitutional any part of any statute.

Also, note that the passage in ***Meyer v. Bradbury***, 341 Or at 299, *dicta* for the conclusion that Article I, § 8, makes "legislatively imposed limitations on individual political campaign contributions and expenditures impermissible," applies only to limits on individuals. Unlike Measure 9 of 1994, Measure 26-184 in separate, severable sections contains limits on the political campaign contributions and expenditures of non-individuals--corporations, unions, and other entities. Above (pages 31-38, *ante*) we show how those limits are both valid and severable under ***Vannatta I*** (not to mention subsequent developments, including ***Vannatta II*** and ***State v. Moyer***, *supra*). This illustrates the need for the Court to examine the specific provisions of the statute at issue and not to rely on sweeping generalities derived from past cases dealing with different statutes.

Expenditure limits were addressed in ***Deras v. Meyer***, *supra*. Those limits were very different than the expenditure limits in Measure 26-184. First, the statutes examined in ***Deras*** entirely banned all independent expenditures by everyone. The only spending allowed in campaigns had to be approved by the

candidate and were deemed to be expenditures by the candidate.[82] Second, the statutes limited total spending by any candidate (including the independent expenditures approved by the candidate) to a certain number of cents per eligible voter in the district (25 cents in races for the Legislature, 10 cents in statewide races).[83] Measure 26-184 has no ceiling on candidate spending and allows substantial independent expenditures.[84]

> Stated in condensed form, ORS 260.027 imposes a monetary limit upon the total expenditures that can be made in support of or in opposition to a candidate for public office. ORS 260.154 prohibits Any expenditure in support of or in opposition to a candidate unless the person making the expenditure is a candidate or is acting with the prior consent of the candidate.

Deras v. Myers, 272 Or at 52. The opinion was based on the "weighing of interests," despite the facts that (1) there was no evidence presented in the case and (2) the statutes were not accompanied by legislative findings of fact.

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82. In essence, this was a complete ban in independent expenditures, since expenditures approved by the candidate would not qualify as "independent" under today's nomenclature.

83. There were about 1.3 million registered voters in Oregon in 1975. The average House district contained about 22,000 voters. So the statutes limited every House candidate to total spending of $5,500. Today, individual candidates for the Oregon House of Representatives have been spending $1 million or more in their campaigns. In 2016, the average spent by the top 10 candidates was $825,000 each. App-76-78.

84. It allows in each candidate race independent expenditures of $5,000 by any individual plus $10,000 by any political committee plus unlimited amounts by any Small Donor Committee; see pages 100-101, *post*.

Conversely, Section (2) of Measure 26-184 allows substantial independent expenditures, without consent of the candidate: $5,000 by any individual per candidate; $10,000 by any political committee per candidate; and unlimited by any Small Donor Committee (SDC), provided the funds come from amounts contributed to the SDC (limited to $100 per individual per year). This is a contribution limit, not an expenditure limit.

And Measure 26-184 imposes no limit on overall spending in any candidate race, either by the candidate or by independent spenders in the aggregate. So Measure 26-184 is very different from the statutes examined in ***Deras***.

Dated: July 11, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITATIONS AND TYPE SIZE REQUIREMENTS ORAP 5.05

<u>Length of Opening Brief on Merits</u>

I certify that (1) the foregoing Opening Brief complies with the 28,000 word limitation approved by order of the Supreme Court and (2) the word count of this Opening Brief for elements of text described in ORAP 5.05(1)(a) is 26,872 words as determined by the word-counting function of Wordperfect 5.1.

<u>Type Size</u>

I certify that the size of the type in this Opening Brief on Merits is not smaller than 14 point for both the text and footnotes, as required by ORAP 5.05(2)(d)(ii).

Dated: July 11, 2019

/s/ *Linda K. Williams*

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Linda K. Williams

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I FILED this date by Efile the original of the foregoing OPENING BRIEF OF INTERVENORS-APPELLANTS ELIZABETH TROJAN, DAVID DELK, AND RON BUEL by Efile this date on the State Court Administrator and served it by Efile this date upon:

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