OREGON LAW REVIEW
Spring 1999 – Volume 78, Number 1
(Cite as: 78 Or. L. Rev. 365)

OBSTACLES TO OREGON CAMPAIGN FINANCE REFORM: VANNATTA V. KEISLING

Courtney C. Muraski [FNa1]

On both state and federal levels, the issue of campaign finance reform is important to the American public because it affects popular notions of governmental legitimacy. Many people around the country engage in heated discussions regarding the role of "soft money" [FN1] in the political process and its power to purchase access to politicians. While some argue for eliminating the use of "soft money" on philosophical grounds, practically speaking, it is hard to imagine a system without it in light of the exorbitant cost of running political campaigns. In order to reduce the use of "soft money," various methods of campaign finance reform have been implemented across the country. One such method is to impose relatively strict limits on campaign contributions by individuals and groups. In 1994, Oregon citizens placed Measures 6 and 9 on the November ballot by initiative in an attempt to implement state campaign finance reform. Measure 6, a constitutional amendment, provided for limitations on contributions depending on district origin and was closely related to Measure 9. Measure 9, a statutory initiative, provided for extremely low limits on campaign contributions by individuals or political action committees in legislative and statewide races. Oregon voters passed Measure 9 by a large majority and Measure 6 by a more narrow majority, [FN2] and both were in effect for the subsequent***366** November 1996 elections. [FN3]

However, campaign finance reform efforts in Oregon, specifically Measure 6 and Measure 9, faced challenges at both the state and federal levels. In the federal court litigation, proponents of reform were defeated when Measure 6 was declared unconstitutional on First Amendment grounds. [FN4] Then, in February 1997, the Oregon Supreme Court, in Vannatta v. Keisling, [FN5] declared Measure 9 unconstitutional in part for violating Article I, Section 8 of the Oregon Constitution. These decisions return the state campaign financing system to the way it was before the measures passed in 1994; the result is one step backward for those seeking reform. As a result, in the November 1998 elections, there were no limits on campaign contributions and the cost of state-wide legislative races was extremely high. [FN6]

In this Note, I will examine the issues in the Vannatta litigation and provide some perspective on its impact on campaign finance reform in Oregon. I will focus primarily on the state court litigation and peripherally address the federal court litigation. I will argue that the citizen initiative is not the most effective way to resolve such a politically polarizing issue as campaign finance reform because it bypasses the crucial legislative drafting stages, it does not ultimately achieve the intended goal, and it faces increasing hostility in the courts. Yet in Vannatta, the Oregon Supreme Court was unable to resolve the problem either. In fact, the state court only complicated the problem by implicating federal free speech concerns in its decision. By associating monetary contributions with speech or expression, the court misdirected its analysis. Until such a premise is re-evaluated, required reform will run into legal obstacles. If the heart of the problem stems from governmental legitimacy, then legislative action and a system of public financing will be necessary for real campaign finance reform.

***367** I

Proponents and Opponents of Measure 9: The State Court Litigation

In 1994, approximately seventy-two percent of Oregon voters passed Measure 9. [FN7] Despite its overwhelming voter support, this particular measure is one of five high-profile voter initiatives since 1994 to be overturned by the Oregon courts as unconstitutional. [FN8] The measure limited permissible contributions by individuals or political committees in state political campaigns to $100 for candidates running for State Senate or State Representative and $500 for candidates running for Governor, Secretary of State, State Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of the Bureau of Labor and Industries, or judge of the Oregon Supreme Court, Court of Appeals, or Tax Court. [FN9] According to the measure, candidates or principal campaign committees of candidates cannot contribute to other campaigns or accept contributions in excess of the limitations. [FN10] It also prohibited corporations, professional corporations, nonprofit corporations, or labor organizations from contributing

to candidates or political committees. [FN11] In addition, the measure provided political candidates with the ability to file a declaration of voluntary expenditure limits with the Secretary of State. Statements by the candidates were then to be included in the voter's pamphlet indicating whether they agreed to limit their ***368** expenditures. [FN12]

The petitioners in Vannatta included the Greater Salem Area Political Action Committee (PAC) (a political committee), the Center to Protect Free Speech, Inc. (a non-profit corporation), Public Affairs, Inc. (a for-profit corporation), a registered lobbyist, a potential candidate for state office, and the guardian ad litem of a minor. [FN13] They filed the petition based on the original jurisdiction conferred on the Oregon Supreme Court by section 23(1) of Measure 9. [FN14] They sought a declaration from the court that the measure was unconstitutional as a whole, or in the alternative, that specific sections violated state constitutional provisions. [FN15]

Oregon Secretary of State Phil Keisling was the respondent in Vannatta. [FN16] He argued that Measure 9 did not violate the Oregon Constitution because campaign contributions were distinguishable from expenditures and did not constitute expression under Article I, Section 8 of the Oregon Constitution. [FN17] He also argued that Article II, Sections 8 and 22 of the Oregon Constitution prevented expression, which otherwise might be protected under Article I, Section 8 of the Oregon Constitution, from being protected when it dealt with political campaigns. [FN18] Keisling further argued that the countervailing effect of Article II, Sections 8 and 22 of the Oregon Constitution, which provided for the regulation of elections and political campaign contribution limitations based on districts, removed political campaigns from the scope of protection under Article I, Section 8 of the Oregon Constitution. [FN19]

Other groups intervening in the case included the League of Women Voters and the Oregon State Public Interest Research Group. Amicus briefs were filed by the American Civil Liberties ***369** Union and Common Cause of Oregon. [FN20]

II

Procedural and Substantive Background Law

A. The Initiative Process in Oregon

The citizen initiative in Oregon, a form of direct democracy, dates back to 1902. [FN21] Article IV, Section 1 of the Oregon Constitution allows voters to place statutes or constitutional amendments on the ballot. [FN22] In order to be placed on the ballot, an initiative law requires a petition signed by six percent of the total number of votes cast for Governor, and an initiative constitutional amendment requires a petition signed by eight percent of the total number of votes cast for Governor. [FN23] The statutes or amendments are limited to "embrac[ing] one subject only and matters properly connected therewith." [FN24]

Oregon voters have the privilege of signing petitions to place important issues on the ballot. The initiative is a prominent part of the republican form of government, and one in which Oregonians take great pride. Overall, twenty-four states use some form of the initiative system. [FN25] Six states use statutory initiatives exclusively, while one uses only constitutional initiatives. [FN26] The initiative process is popular because it permits citizens to take part in public-policy making while leaving the essential ***370** lawmaking role to the legislature. [FN27]

Nevertheless, while the initiative process is popular among many citizens, it also concerns other Oregonians because of its operation. [FN28] Some critics believe the initiative process is not as effective as the legislative process because of inherent problems. [FN29] They believe the lack of legislative involvement in the process is dangerous because initiatives do not receive the same type of committee and hearing scrutiny that legislative enactments receive. [FN30] Thus, while the role of judicial review in the initiative process is disputed, in reality, courts provide one of the only checks on initiatives. [FN31] Because its goals include addressing legitimacy concerns and preventing corruption, campaign finance reform can be addressed more adequately through the legislative process than the initiative process.

B. The Initiative Process and State Campaign Finance Reform

Oregon, Missouri, and Montana all passed initiatives in 1994 specifically related to aggressive campaign finance reform. [FN32] The initiatives from the three states established some of the lowest campaign contribution limits in

the county. [FN33] However, in 1995, the Eighth Circuit declared the Missouri voter initiative unconstitutional ***371** on federal First Amendment grounds. [FN34] The Eighth Circuit held that the campaign contribution limits in Missouri, which imposed incremental monetary limits from $100 to $300 per election cycle based on population, were "not narrowly tailored to meet the compelling state interest of limiting the influence of corruption associated with large campaign contributions," [FN35] and therefore, the limits "unconstitutionally burden[ed] the First Amendment rights of association and expression." [FN36]

The Carver court focused on the interests implicated by contribution limits, the level of review required under Supreme Court precedent, and whether the limits were too low. The Eighth Circuit acknowledged that even though other states and the federal government have imposed contribution limits and the voters approved the limits because they found them necessary to prevent corruption, "popular sentiment in favor of campaign finance reform . . . does not assist [the court's] analysis, because voters may not adopt an unconstitutional law any more than the legislature." [FN37]

The Missouri case briefly compared the ballot initiatives enacted in both Montana and Oregon. The limits in Montana and Oregon are greater than the ones in Missouri when considered on an election cycle basis. [FN38] While the Carver court's analysis is different because of its federal constitutional focus, the result questioned the validity of the state contribution limits, and it was similar to what recently occurred in Vannatta. The implication is that voter initiatives are facing judicial obstacles to campaign finance reform across the nation.

C. Federal Campaign Finance Reform

The topic of campaign finance reform continuously calls for analysis of the United States Supreme Court's decision in Buckley v. Valeo. [FN39] In 1976, the Supreme Court addressed federal campaign finance reform and set the standards for campaign contributions and expenditures. The Buckley Court held that limits on total federal campaign expenditures were unconstitutional restrictions ***372** of free speech and freedom of expression because they did not serve any substantial government interest. Thus, the Court struck them down. [FN40] However, it upheld a $1000 limit on individual contributions to candidates running for federal political office because such limits were narrowly tailored. [FN41]

Critics hope that the issue of campaign financing will be revisited by the Supreme Court and that the scope of Buckley will be limited. Since 1976, many scholars have disagreed with one premise upon which Buckley relied: that money is equal to speech. [FN42] Critics also have attacked the Court's distinction between campaign contributions and expenditures under the First Amendment. [FN43] Furthermore, opponents of Buckley have found fault with the Court's failure to recognize the need for "equalizing the electoral influence of rich and poor." [FN44] Together, these arguments recognize the fundamental problems with the Buckley Court's treatment of campaign financing and emphasize the need for further reform. [FN45]

Essentially, any citizen initiative attempting campaign finance reform has two sets of hurdles to clear. An initiative must pass both the state's constitutional standards and the federal constitutional standards. The Supreme Court in Buckley provided guidance on the federal level when it prohibited limits on expenditures. However, it left the door open to imposing limits ***373** on contributions because Buckley left unanswered the question of whether the First Amendment permits governments to regulate campaign financing to a greater extent. [FN46]

III

Measure 9 As Unconstitutional Reform

In the state court litigation, the Oregon Supreme Court in Vannatta held that limits on contributions would be impermissible under the Oregon Constitution. The court found that Measure 9 did not even clear the state constitutional hurdle, and thus it did not need to reach the federal constitutional hurdle. The court declared that certain sections of Measure 9, which limited or banned campaign contributions, violated Article I, Section 8 of the Oregon Constitution and were void. [FN47] As a result, it also held that other sections of Measure 9 were "incomplete and incapable of being executed." [FN48] Nevertheless, the court found that some sections of Measure 9, which dealt with voluntary expenditure provisions, did not violate Article I, Section 8 of the Oregon Constitution. [FN49] The Oregon Supreme Court did not focus its analysis on the level of monetary limits imposed by Measure 9 or on the corruption sought to be prevented by contribution limits, which were First Amendment concerns raised in several federal campaign finance reform cases, because it found that limits on

campaign contributions violated the Oregon Constitution.

The Oregon Supreme Court had original jurisdiction in this matter pursuant to the provisions of Measure 9 itself. [FN50] The court began its opinion by acknowledging the opinion's relatively narrow scope. The court stated that because petitioners' challenges involved the specific wording of the statutory enactment, the challenges were limited. [FN51] Arguably however, the scope of the opinion is not narrow considering the decision's overall effect on campaign financing.

***374** In the Oregon federal court litigation, which occurred around the same time as the state court litigation, the U.S. District Court for the District of Oregon and the Ninth Circuit Court of Appeals provided review on the constitutional issues related to both Ballot Measure 6 and Ballot Measure 9. The district court eventually struck down Ballot Measure 6 as unconstitutional and abstained from ruling on the constitutionality of Ballot Measure 9 because of the pending state court litigation. [FN52] The court granted summary judgment to the plaintiffs and dismissed the case. [FN53] The Ninth Circuit certified three questions to the Oregon Supreme Court, but the Oregon court rejected the certification. [FN54] The Ninth Circuit then affirmed the district court ruling. [FN55]

A. Article I, Section 8

1. Contributions

Article I, Section 8 of the Oregon Constitution provides: "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." [FN56] Petitioners relied on Deras v. Myers [FN57] in analyzing this section of the Oregon Constitution and argued that the measure was unconstitutional because it restricted expression. Deras involved a statutory scheme for the regulation of campaign expenditures. The court stated that citizen interests protected by Article I, Section 8 outweighed the public interests protected by the statutes in question [FN58] and that the statutory restrictions placed on free expression lacked justification. [FN59] The court in Vannatta, however, did not find Deras helpful in its modern Article I, Section 8 jurisprudence. The parties and the court agreed in Vannatta that Article I, Section 8 covered expenditures, but they did not agree about contributions. [FN60] Thus, the main issue in ***375** Vannatta was whether political contributions and expenditures were forms of expression covered under Article I, Section 8.

While the United States Supreme Court in Buckley recognized federal campaign contributions as expression, it nevertheless allowed limits on contributions because it found they were less central to First Amendment expression than expenditures. [FN61] Instead of arguing for contribution limits under the Buckley analysis, the Secretary of State in Vannatta argued that the rationale behind that decision was unpersuasive because contributions really do not constitute political expression; therefore, it follows that contributions can be regulated. [FN62] The Oregon Supreme Court determined that Oregon's Article I, Section 8 jurisprudence did not allow for the distinction used by the United States Supreme Court regarding whether the contributions were more or less central to expression than expenditures, but it did not agree with the Secretary of State's argument either. Instead, it found that the $100 contribution limits were unconstitutional. [FN63] The Oregon Supreme Court did not reach the federal First Amendment issues because it struck the measure down on state law grounds.

The Oregon Supreme Court criticized the Buckley analysis because of the assumption by the Buckley Court that speech by contribution is that of the candidate, not the contributor. The court also did not agree that contributions only express general support. [FN64] The Oregon Supreme Court evaluated expenditures and contributions as closely related activities, thereby deserving the same protection. [FN65] It regarded the distinction between generalized or specific support as being unimportant to the expression analysis. [FN66] The Oregon Supreme Court found that many contributions were expressions of support, and it concluded that they should be protected under Article I, Section 8.

The Oregon Supreme Court employed a three-part analysis for the Article I, Section 8 issues in this case. The first level of analysis evaluated whether the provision was "on its face 'written in terms directed to the substance of any "opinion" or any "subject" ***376** of communication." ' [FN67] If the challenged provision was written in such terms and it was not subject to an "incompatibility" exception to Article I, Section 8, the statute was invalid. [FN68] The second level of analysis was whether the statute targeted a harm that could be inferred from context. [FN69] If the statute did not restrict expression, then the final level of analysis would be a vagueness challenge. [FN70] In Vannatta, the court concentrated on the first level of analysis.

The court determined that the contribution provisions in Measure 9 (sections 3, 4, and 16) fell under the first level of Article I, Section 8 scrutiny, and that the provisions did not specify a harm that they were designed to protect, nor could one be inferred; in essence, they were targeted at protected speech. [FN71] The court found that "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." [FN72] Also, the court found that the contribution provisions of Measure 9 did not meet an "incompatibility" exception which would have removed it from the protection of Article I, Section 8. [FN73]

2. Expenditures

In relation to the expenditure provisions of Measure 9 (sections 6, 13, and 19), the court determined that they did not violate Article I, section 8 under the first level of analysis. [FN74] The court looked at whether these sections impermissibly coerced candidates and found that they did not for two reasons: (1) the publication requirement of Measure 9, section 13 did not inflict a punishment, and (2) this kind of objective truth did not impermissibly burden expression. [FN75] The expenditure provisions were also voluntary, which seemed to affect the court's analysis as well.

***377** B. Article II, Sections 8 and 22

In addition to the primary Article 1, Section 8 arguments discussed above, the Secretary of State argued that Article II, Sections 8 and 22 of the Oregon Constitution further defined campaign contribution rights in Oregon. [FN76]

1. Section 8

The Secretary of State argued that Article II, Section 8, which has been in the constitution since statehood, allowed the Legislative Assembly to enact laws that limit campaign expenditures and contributions. [FN77] Petitioners argued that the provision applied only to the Legislative Assembly, not to the people by initiative, and that the provision applied only to "elections," not to "campaigns." The court disagreed with petitioners' first contention by finding that the wording in the provision applied to the people by initiative, not just to the Legislative Assembly, but it agreed with petitioners' second contention that the provision addressed "elections," not "political campaigns." [FN78]

The court relied on a dictionary definition of the word "election" from 1857, [FN79] not 1996, to limit the scope of the provision and to reject the Secretary of State's argument for a broad interpretation of "elections" that would include political campaigning activities. [FN80] The court also used narrow definitions of other terms in the clause to narrow the concept of "elections." Furthermore, the court looked to the historical context of Article II, Section 8, but it did not change the view that it gleaned from the textual interpretation. [FN81] Finally, the court looked to previous case law, but the survey did not change its prior determination. [FN82]

***378** 2. Section 22

Article II, Section 22, provided limits on contributions based on the electoral district of the candidate. [FN83] It passed by initiative at the same time Measure 9 passed, and the two measures were related. [FN84] The Secretary of State argued that this provision of the constitution "preempts the entire field of campaign contributions" [FN85] and negates the protections of Article I, Section 8. The Oregon Supreme Court considered the merits of the Secretary of State's argument, even though Measure 6 was being reviewed at the federal appellate level, but it nevertheless determined that Article II, Section 22 did not preempt the protection found in Article I, Section 8 of the Oregon Constitution. [FN86]

C. Specific Sections of Measure 9

The court declared sections 3, 4, and 16 of Measure 9 unconstitutional because they targeted speech consisting of political support for a candidate. [FN87] Because the court found those sections unconstitutional, it then proceeded to find sections 11, 14, 15, and 17 void for lack of purpose as well. [FN88] The court did not agree ***379** with petitioners' claim that sections 6, 10, and 13 of Measure 9 violated Article I, Section 26 of the Oregon Constitution. [FN89] The court did not specifically address petitioners' claims that sections 3(2), 3(3), 4(1)(a), 15, and 16 of Measure 9 violated Article I, Section 20 of the Oregon Constitution because they were voided on other

grounds. [FN90]

D. Attorney's Fees in Connection with Measure 9

In the final portion of its decision, the Oregon Supreme Court denied petitioners' request for attorney's fees because the petitioners involved were not entirely disinterested parties. The public benefit resulting from the case was not the key result, and thus, the court refused to exercise its equitable power by awarding attorney's fees. [FN91]

E. Additional Information on the Federal Vannatta Litigation

At the same time the Vannatta state court litigation was progressing, federal court litigation was advancing as well. Plaintiffs at the federal level included Fred Vannatta (a contributor), George Boehnke (a candidate), Charles Gill (a contributor), Denny Smith (a candidate), and the Center to Protect Free Speech (a contributor). Defendants at the federal level included Oregon Secretary of State Phil Keisling and Oregon Attorney General Ted Kulongoski. [FN92] Plaintiffs sought to enjoin the enforcement ***380** of Ballot Measure 6 and requested that the court declare it void. [FN93] The court found that plaintiffs had standing to challenge sections 1 and 2 of Measure 6, but not sections 3 and 4. [FN94] The court also found that the dispute was ripe for consideration of the First Amendment rights of free expression. [FN95]

In reaching the merits of the case, the district court found Ballot Measure 6 unconstitutional because it impermissibly chilled political expression. [FN96] Measure 6 in effect limited the amount of contributions that candidates could accept from donors who were from another district and limited the amount that contributors could make to out-of-district candidates. Applying strict scrutiny analysis, the court found that the law was not "narrowly tailored" to serve the compelling state interest of preventing corruption. [FN97] The court found the measure unconstitutional on First Amendment grounds and thus did not address the Plaintiff's Fifth Amendment, Fourteenth Amendment, Privileges and Immunities Clause, and Commerce Clause arguments.

At the federal appellate court level, the majority affirmed the lower court's decision. [FN98] The court attempted to certify three questions to the Oregon Supreme Court regarding the validity of Measure 6 under the Oregon Constitution, the interpretation of Article II, Section 22 in light of Article I, Section 8, and the meaning of the word "individuals" as used in Measure 6. The Oregon Supreme Court, however, declined to answer the questions posed. [FN99] The appellants argued that Measure 6 was supported by the state's interest in preventing corruption and the state's interest in a republican form of government. [FN100] The court did not find either argument persuasive enough to override the First Amendment concerns addressed by the lower court. [FN101] The court applied rigorous scrutiny whereby it looked to see if the law was "closely drawn" to advance a "sufficiently important interest" and found that it failed to pass. [FN102]

***381** IV

Implications for Oregon Campaign Finance Reform

The Oregon Supreme Court's decision in Vannatta, as well as the federal court decisions, will have a significant effect on future elections and the legislative political agenda in Oregon. When the reform measures were in effect, the 1996 election cycle yielded the lowest campaign spending amounts in almost twenty years. [FN103] Already in the 1998 election cycle, after the courts invalidated the measures, candidates were spending tremendous amounts of money again. By declaring limits on contributions to be an unconstitutional restriction on free expression, the court prevented limiting the price of campaigning in Oregon. As a result, "pent-up money" that people were unable to spend during the time Measure 9 was in effect can now be channeled into the political process. [FN104] Some predicted there would likely be a return to big-spending legislative campaigns, and in reality, there was during 1998. [FN105]

According to Phil Keisling, the Oregon Supreme Court's ruling, released one month after the start of the 1997 legislative session, affected behavior during the legislative session because the possibility of big contributions in the future loomed. He said that while he cannot give specific examples of corruption, "what the money does is, it sends things off the table. Bills that ought to be heard don't even get heard. Votes that ought to be taken, to see where people stand, don't get taken." [FN106] Without the contribution limits imposed by Measure 9, various groups in Oregon can now freely contribute to the campaigns of legislators that are in positions to beneficially affect

the group's interests. [FN107]

While campaign finance reform seems to be a hot issue today, one legislator does not think that many people are losing sleep over the Oregon Supreme Court's decision regarding campaign financing limits. Rep. Tony Corcoran, D- Cottage Grove, also acknowledged the "ongoing self-interest" that lobbyists have in giving ***382** money to various campaigns. [FN108] Nevertheless, the public at large should be concerned about campaign financing because the problems have not gone away. Keisling hopes that the public is still sufficiently concerned about campaign finance reform to keep legislators accountable.

The magnitude of the effect of the Oregon Supreme Court's decision on future elections is difficult to assess. The current system limits access to those who can pay to have their voice heard in government. The Oregon Supreme Court did not fix the problems facing campaign financing. In fact, the court limited speech by its decision because without money, one sometimes does not have a voice in the process. By finding that the campaign contribution limits of Measure 9 violated Article I, Section 8 of the Oregon Constitution, the court wrongfully linked money to speech and in turn provided a flawed analysis of the key issues.

The importance of yielding to constitutional concerns cannot be overlooked, and that is the court's role. Yet, the interface between constitutional protection for speech/expression on the one hand and the legitimacy of possible campaign finance reform on the other, is problematic and unresolved by the decision. How can this be resolved? If citizens seek campaign finance reform, they need to look at what forms it can take and what would be constitutionally permissible. Three options remain for advocates of campaign finance reform: (1) amending the Oregon Constitution to overturn the Oregon Supreme Court's decision; (2) focusing on a model system using incentives for voluntary spending limits by the candidates; or (3) creating a public funding mechanism for campaigns which could be restricted constitutionally. [FN109] The third option, public financing of elections, seems to be the most plausible and effective solution. Public funding is essentially a system of campaign subsidies which attempts to equalize campaigns by funding the actual election process. [FN110]

***383** Maine, Kentucky, Arizona, and Massachusetts could serve as models for Oregon reform. [FN111] For example, the Maine Clean Elections Act provides for a method of voluntary public financing. Even though it passed by voter initiative, it has managed to withstand court scrutiny. [FN112] While some scholars argue for a public financing system on the federal level, their arguments equally apply to state levels. [FN113] A public financing system could in fact be less expensive than a system dependent on private contributions. [FN114] It could also achieve many of the goals of reform, such as political autonomy, efficiency, prevention of corruption, enhancing political equality, increasing voter knowledge, enhancing quality of representation, and restoring confidence in democracy. [FN115]

During the 1999 Oregon Legislative Assembly, an effort at campaign finance reform was launched in hopes of achieving intended goals through a new route. Secretary of State Keisling and the Working Group for Campaign Finance Reform proposed bills in both the house and the senate in favor of public financing of state campaigns. [FN116] However, if proponents are unable to achieve success with the legislature, another initiative campaign is likely to follow. [FN117]

Conclusion

An important public interest exists in the search for campaign finance reform. While campaign finance reform is at the height of public awareness at this time, it fades in and out of the public consciousness. Perhaps the Oregon Supreme Court's decision is not so dramatic after all. It merely serves to return the Oregon ***384** election financing system to the way it was before Measure 9 passed in 1994. By creating an obstacle to campaign finance reform, the Oregon Supreme Court makes the ultimate goal more difficult to achieve. The court assigns to the citizens and legislators of Oregon the responsibility to create a better constitutional method of reform.

Many agree that something needs to be done about campaign finance reform. But perhaps the initiative process is not the most efficient or most effective way to resolve the problem. Measure 9 encountered a road block to campaign finance reform in the courts. One reason may have stemmed from the form in which it was passed: by initiative. The court attacked the language of the measure as well as other fundamental faults. Properly inserting the reformers' goals in the measure may have been one way to survive the court's attack. The faults of Measure 9 could have potentially been cured by better drafting or at least an in-depth legislative review process.

A legislative vehicle for reform may ultimately be necessary if initiative reform does not work. Even though the legislative process is slower and it may take time for the system to change, legislators need to be accountable to their constituents. If people are truly upset and disgusted with the way political contributions and expenditures currently operate, then the legislators will eventually have to provide a solution. Through people exerting more pressure, legislators will be forced to search for solutions or risk being voted out of office.

[FN1]. Nonfederal money that is unregulated is commonly referred to as "soft" money. For a further description of the distinction between "hard" and "soft" money, see Note, Soft Money: The Current Rules and the Case for Reform, 111 Harv. L. Rev. 1323, 1323-25 (1998).

[FN2]. Ballot Measure No. 9 passed by a vote of 851,014 to 324,224 on November 8, 1994. It went into effect on December 8, 1994. 1995 Or. Laws ix, ch. 1 (codified at Or. Rev. Stat. § 260 (1997) (containing various provisions on campaign finance regulation and election offenses)). Ballot Measure No. 6 passed by a vote of 628,180 to 555,019. 1995 Or. Laws ix; Or. Const. art II, § 22.

[FN3]. Ashbel S. Green, Lawmakers Weigh Changing Measures, Oregonian, Feb. 22, 1997, at B1.

[FN4]. Vannatta v. Keisling, 899 F. Supp. 488, 496-97 (D. Or. 1995).

[FN5]. 324 Or. 514, 521-22, 931 P.2d 770, 775-76 (1997).

[FN6]. While campaign spending was considerably lower than in the past during the 1994 elections, it skyrocketed during the 1998 elections after the measures were overturned. See To Limit or Not to Limit?, Register Guard, Jan. 3, 1998, at 12A (citing campaign spending during 1996 as the lowest in 20 years); Campaign Reform DOA?, Register Guard, March 6, 1999, at 18A (stating that campaign spending during 1998 was around $11.4 million, "the highest amount in state history").

[FN7]. See supra note 2. See also Letting Voters Have Their Say, Oregonian, June 15, 1995, at C06 (stating that 72% of voters approved of Measure 9); Green, supra note 3, at B1 (stating that 74% of voters approved of Measure 9).

[FN8]. Judicial action overturning numerous voter initiatives has generated voter frustration. Five measures since 1994 have been rejected by the courts as unconstitutional including one involving victim's rights, one allowing doctor-assisted suicide, one requiring public employees to allocate a portion of their salaries toward their pensions, and two limiting campaign contributions. See Green, supra note 3, at B2 (citing four of them). See also Armatta v. Kitzhaber, 327 Or. 250, 959 P.2d 49 (1998) (for a fifth voter initiative that was overturned by the courts).

[FN9]. 1995 Or. Laws ch. 1, § 3 (codified at Or. Rev. Stat. § 260.160(1)(a) and (b) (1997)).
An individual shall not contribute in any calendar year an aggregate amount exceeding $100 to any one political committee other than a principal campaign committee or a political committee organized exclusively to support or oppose one or more candidates for national or political party office or one or more measures.
Or. Rev. Stat. § 260.160(3).

[FN10]. 1995 Or. Laws ch. 1, § 4 (codified at Or. Rev. Stat. § 260.168 (1997)).

[FN11]. 1995 Or. Laws ch. 1, § 16 (codified at Or. Rev. Stat. § 260.172 (1997)).

[FN12]. 1995 Or. Laws ch. 1, §§ 6, 13 (codified at Or. Rev. Stat. §§ 260.180, 260.184 (1997)).

[FN13]. 324 Or. at 517-18, 931 P.2d at 774.

[FN14]. "Upon petition of any person, original jurisdiction is vested in the Supreme Court of this state to review and determine the constitutionality of this Act. The Supreme Court shall have sole and exclusive jurisdiction of proceedings initiated under this section." 1995 Or. Laws 11, ch. 1, § 23.

[FN15]. Vannatta, 324 Or. at 517-18, 931 P.2d at 774.

[FN16]. Id.

[FN17]. Id. at 520, 931 P.2d at 775.

[FN18]. Id. at 525, 931 P.2d at 778.

[FN19]. Id.

[FN20]. Id. at 518, 931 P.2d at 774.

[FN21]. For a history of the initiative's origin in Oregon and its modern- day importance, see David Schuman, The Origin of State Constitutional Direct Democracy: William Simon U'Ren and "The Oregon System," 67 Temp. L. Rev. 947 (1994). See also Hans A. Linde, Who is Responsible for Republican Government?, 65 U. Colo. L. Rev. 709 (1994). Seth Lewelling and William U'Ren were charismatic leaders who started a movement toward using direct legislation to deal with the problems in the political system in Oregon. The City Club of Portland, The Initiative and Referendum in Oregon 6 (1996) [[hereinafter City Club Report].

[FN22]. "The people reserve to themselves the initiative power, which is to propose laws and amendments to the Constitution and enact or reject them at an election independently of the Legislative Assembly." Or. Const. art. IV, § 1(2)(a).

[FN23]. Or. Const. art. IV, §§ 1(2)(b) and (c).

[FN24]. Or. Const. art. IV, § 1(2)(c). For a recent discussion of the single subject jurisprudence in Oregon, see Armatta v. Kitzhaber, 327 Or. 250, 959 P.2d 49 (1998).

[FN25]. See City Club Report, supra note 21, at 6.

[FN26]. See City Club Report, supra note 21, at 7 (citing David Kehler and Robert M. Stern, Initiative in the 1980s and 1990s: Table 5.15: Statewide Initiative and Referendum, The Book of the States 1994-95, The Council of State Governments, Vol. 30, 1995, at 294). The map on page 7 indicates which states use the initiative process, including Washington, Oregon, California, Idaho, Nevada, Montana, Colorado, Arizona, Utah, Wyoming, North Dakota, South Dakota, Nebraska, Oklahoma, Michigan, Maine, Massachusetts, Indiana, Illinois, Missouri, Florida, Arkansas, Mississippi, and Alaska.

[FN27]. See City Club Report, supra note 21.

[FN28]. For a description of early constitutional challenges to initiatives, see Schuman, supra note 21, at 956-58 (citing Kadderly v. City of Portland, 44 Or. 118 (1903) (holding statutory initiatives did not violate Or. Const. art IV, § 4); Pacific States Telephone and Telegraph Co. v. Oregon, 223 U.S. 118 (1912) (finding that the issue was a political question to be decided by Congress, not the federal courts)). See also City Club Report, supra note 21, at 8 (citing Keirnan v. Portland, 57 Or. 454 (1910) (concluding that popular petitions do not violate the guarantee of a republican form of government)).

[FN29]. See generally Jane S. Schacter, The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy, 105 Yale L.J. 107(1995) (identifying various problems regarding the search for popular intent and how to interpret direct democracy law making). But see Clayton P. Gillette, Plebiscites, Participation, and Collective Action in Local Government Law, 86 Mich. L. Rev. 930 (1988) (discussing numerous theories underlying the political process, both plebiscitary and legislative, and dispelling common misconceptions).

[FN30]. Abner Mikva, Address at the Morse Chair Lecture at the University of Oregon (Oct. 15, 1997). See also City Club Report, supra note 21, at 12.

[FN31]. See City Club Report, supra note 21, at 11-12.

[FN32]. See William J. Connolly, Note, How Low Can You Go? State Campaign Contribution Limits and the First Amendment, 76 B.U. L. Rev. 483 (1996).

[FN33]. Id. at 484.

[FN34]. See Carver v. Nixon, 72 F.3d 633 (8th Cir. 1995), cert. denied, 518 U.S. 1033 (1996).

[FN35]. Id. at 645.

[FN36]. Id. at 644.

[FN37]. Id. at 640.

[FN38]. Id. at 642 n.9.

[FN39]. 424 U.S. 1 (1976) (per curiam).

[FN40]. Id. at 54-58.

[FN41]. Id. at 26-29, 58-59.

[FN42]. Interview with Abner Mikva, Wayne Morse Chair of Law and Politics at the University of Oregon (Oct. 17, 1997). Having worked in all three branches of the government, Abner Mikva provides a unique perspective on divided government. See also Jamin Raskin and John Bonifaz, The Constitutional Imperative and Practical Superiority of Democratically Financed Elections, 94 Colum. L. Rev. 1160 (1994); Robert Peck et al., Constitutional Implications of Campaign Finance Reform, 8 Admin. L.J. Am. U. 161 (1994); Burt Neuborne, One Dollar, One Vote? The Supreme Court's Buckley Decision Virtually Assures a Campaign Dollar Chase, The Nation, Dec. 2, 1996, at 21 [hereinafter One Dollar, One Vote?]; J. Skelly Wright, Politics and the Constitution: Is Money Speech?, 85 Yale L.J. 1001, 1001-06 (1976).

[FN43]. Neuborne, supra note 42.

[FN44]. See Neuborne, supra note 42, at 21, 22. See also Peck et al., supra note 42, at 167.

[FN45]. A more recent decision of the United States Supreme Court regarding campaign financing is Colorado Republican Campaign Committee v. FEC, 518 U.S. 604 (1996). That case provides additional guidance on the issues involved, but does not limit the effect of Buckley's underlying rationales.
Another important case that could impact overall campaign finance reform and the Buckley analysis is Nixon v. Shrink Missouri Government PAC, 161 F.3d 519 (8th Cir. 1998), cert. granted, 119 S. Ct. 901 (1999).

[FN46]. See Connolly, supra note 32, at 496.

[FN47]. Vannatta v. Keisling, 324 Or. 514, 541, 931 P.2d 770, 787 (1997).

[FN48]. Id. at 517, 931 P.2d at 773-74. The court declared that sections 3, 4, and 16 of Measure 9 violated Or. Const. art I, § 8 (codified at Or. Rev. Stat. §§ 260.160, 260.168, 260.172 respectively). Sections 11, 14, 15, and 17 of Measure 9 were also void after the court's initial determination (codified at Or. Rev. Stat. §§ 260.999, 260.190, 260.164, 260.192 respectively).

[FN49]. Vannatta, 324 Or. at 542-46, 931 P.2d at 787-89.

[FN50]. Id. at 518, 931 P.2d at 774.

[FN51]. Id.

[FN52]. Vannatta v. Keisling, 899 F. Supp. 488 (D. Or. 1995).

[FN53]. Id. at 497.

[FN54]. Vannatta v. Keisling, 151 F.3d 1215, 1217 (9th Cir. 1998), cert. denied, Miller v. Vannatta, 119 S. Ct. 870 (1999).

[FN55]. Id. at 1218.

[FN56]. Or. Const. art. I, § 8.

[FN57]. 272 Or. 47, 535 P.2d 541 (1975).

[FN58]. Id. at 54, 535 P.2d at 545.

[FN59]. Id. at 65, 535 P.2d at 550.

[FN60]. 324 Or. 514, 520, 931 P.2d 770, 775 (1997).

[FN61]. 424 U.S. at 28-29.

[FN62]. 324 Or. at 521, 931 P.2d at 776.

[FN63]. Id. at 522, 931 P.2d at 776.

[FN64]. Id. at 521-22, 931 P.2d at 776.

[FN65]. Id. at 524, 931 P.2d at 777.

[FN66]. Id.

[FN67]. Id. at 536, 931 P.2d at 784 (citing State v. Stoneman, 323 Or. 536, 543, 920 P.2d 535, 539 (1996) (citations omitted)).

[FN68]. Id.

[FN69]. Id. (citing Stoneman, 323 Or. at 546, 920 P.2d at 541).

[FN70]. Id.

[FN71]. Id. at 538, 931 P.2d at 785.

[FN72]. 324 Or. at 539, 931 P.2d at 785. The court also stated "the 'harm' that legislation aims to avoid must be identifiable from legislation itself, not from social debate and competing studies and opinions." Id.

[FN73]. Id. at 540, 931 P.2d at 786.

[FN74]. Id. at 543, 931 P.2d at 787.

[FN75]. Id.

[FN76]. Id. at 525, 931 P.2d at 778.

[FN77]. "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." Or. Const. art. II, § 8.

[FN78]. 324 Or. at 528-29, 931 P.2d at 779-80.

[FN79]. 324 Or. at 529-30, 931 P.2d at 780. The limited definition the court used for the word "election" was: "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[.]" Id. (citing Webster's American Dictionary of the English Language (1828)).

[FN80]. 324 Or. at 529-30, 931 P.2d at 780. The broader definition of "election" which the Secretary of State would have preferred was: "the act or process of choosing a person for office, position, or membership by voting."

Id. (citing Webster's Third New Int'l Dictionary 731 (unabridged 1993)).

[FN81]. Id. at 533, 931 P.2d at 782.

[FN82]. Id. at 535, 931 P.2d at 783. For additional cases dealing with the scope of Article II, Section 8 of the Oregon Constitution, see In re Fadeley, 310 Or. 548, 802 P.2d 31 (1990); Libertarian Party of Oregon v. Roberts, 305 Or. 238, 750 P.2d 1147 (1988); City of Eugene v. Roberts, 305 Or. 641, 756 P.2d 630 (1988); and White v. Commissioners, 13 Or. 317, 10 P. 484 (1886) (Thayer, J., dissenting).

[FN83]. "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." Or. Const. art. II, § 22(1).

[FN84]. Ballot Measure 6, which amended Article II of the Oregon Constitution, was an initiative petition as well. It was adopted on November 8, 1994 as Or. Const. art. II, § 22. See supra introduction.

[FN85]. 324 Or. at 527, 931 P.2d at 779.

[FN86]. Id. Petitioners argued that respondents could not rely on Article II, Section 22 because a federal district court in Oregon declared it void. Vannatta v. Keisling, 899 F. Supp. 488 (D. Or. 1995). However, the federal court left certain issues regarding the constitutionality of Measure 9 to be resolved by the state court. Because that case was on appeal to the Ninth Circuit at the time, the Oregon Supreme Court considered the merits of the Secretary of State's argument. 324 Or. at 526, 931 P.2d at 778.

[FN87]. 324 Or. at 541, 931 P.2d at 787. 1995 Or. Laws ch. 1, sections 3, 4, and 16 related to the actual monetary limits imposed on contributions, the prevention of candidate or political committee contributions to other campaigns or acceptance of contributions in excess of the statutory limits, and prohibition of corporate or labor organization contributions.

[FN88]. 324 Or. at 546, 931 P.2d at 789. 1995 Or. Laws ch. 1, section 11 dealt with civil penalties for contributions in violation of sections 3, 4, or 16. 1995 Or. Laws ch. 1, section 14 further defined the nature of contributions from political committees. 1995 Or. Laws ch. 1, section 15 related to section 3 and personal contributions and independent expenditures. 1995 Or. Laws ch. 1,section 17 specified further contribution and expenditure guidelines relating to sections 3 and 6.

[FN89]. 324 Or. at 547, 931 P.2d at 790. 1995 Or. Laws ch. 1, section 6 dealt with a candidate's voluntary expenditure limits and declaration of such limits. 1995 Or. Laws ch. 1, section 10 provided for civil penalties against candidates who exceed their voluntary expenditure limits. 1995 Or. Laws ch. 1, section 13 required the Secretary of State to include a candidates statement of voluntary expenditure limits in the voters' pamphlet. None of these sections violated the Oregon Constitution.
"No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good; nor from instructing their Representatives; nor from applying to the Legislature for redress of grievances." Or. Const. art. I, § 26.

[FN90]. 324 Or. at 548, 931 P.2d at 790.

[FN91]. Id. at 549, 931 P.2d at 791. For an in-depth discussion relating to attorneys fees and fee-shifting reform, see Sean D. Schrock, Attorney Fees in State Constitutional Litigation: A Proposed Legislative Reform for Oregon, 34 Willamette L. Rev. 57 (1998).

[FN92]. Vannatta v. Keisling, 899 F. Supp. 488, 491 & n.2 (1995).

[FN93]. Vannatta, 899 F. Supp. at 491.

[FN94]. Id. at 493.

[FN95]. Id. at 495.

[FN96]. Id. at 496-97.

[FN97]. Id. at 497.

[FN98]. Vannatta v. Keisling, 151 F.3d 1215 (9th Cir. 1998), cert. denied, Miller v. Vannatta, 119 S. Ct. 870 (1999).

[FN99]. Id. at 1217.

[FN100]. Id.

[FN101]. Id. at 1218.

[FN102]. Id. at 1223 (Brunetti, concurring in part and dissenting in part).

[FN103]. To Limit or Not to Limit?, Register Guard, Jan. 3, 1998, at 12A.

[FN104]. Harry Esteve, Campaign Finance Issue on Back Burner, Register Guard, Sept. 22, 1997, at 1A.

[FN105]. Id.

[FN106]. Id.

[FN107]. Recently enacted term limits would arguably limit the extent that the threat could loom for any individual legislator. See Or. Const. art. II, § 20.

[FN108]. See Esteve, supra note 104, at 6A.

[FN109]. According to Keisling and OSPIRG, these three options are available in Oregon. See Esteve, supra note 104, at 6A. See also Harry Esteve, Capitol Conversations: Keisling Disappointed by Legislature, Register Guard, Sept. 22, 1997, at C1. For additional, comparable reforms and analysis of each on the federal level, see Kathleen M. Sullivan, Political Money and Freedom of Speech, 30 U.C. Davis L. Rev. 663 (1997).

[FN110]. Burt Neuborne, The Values of Campaign Finance Reform, Campaign Finance Reform and the First Amendment, ABA Section of Individual Rights and Responsibilities CLE Program, Aug. 4, 1997. See also Mikva, supra note 30.

[FN111]. See Neuborne, One Dollar, One Vote?, supra note 42, at 24. See also Campaign Reform DOA?, supra note 6, at 18A.

[FN112]. See also Michael E. Campion, The Maine Clean Election Act: The Future of Campaign Finance Reform, 66 Fordham L. Rev. 2391 (1998).

[FN113]. See Raskin and Bonifaz, supra note 42, at 1189-1201.

[FN114]. See Peck, supra note 42, at 183.

[FN115]. See generally Neuborne, One Dollar, One Vote?, supra note 42.

[FN116]. Group Seeks Campaign Finance Reform, Register Guard, March 4, 1999 at 3C. "If the public really wants to see less partisanship, more ideas, and better decision-making from political leaders, the public--not special interests--must own the campaign process." Id. (quoting Secretary of State Phil Keisling). See also Senate Bill 890 and House Bill 3015.

[FN117]. Id. See also Campaign Reform DOA?, supra note 6, at 18A (indicating that the bills may not even get legislative hearings this session).

[FNa1]. Third-year law student, University of Oregon School of Law. Articles Editor, Oregon Law Review, 1998-1999. The author would like to thank Professor Lisa A. Kloppenberg for her helpful comments on this Note.