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NOTE: ARMATTA V. KITZHABER: A NEW TEST SAFEGUARDING THE OREGON CONSTITUTION FROM AMENDMENT BY INITIATIVE

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In recent years the initiative process has been carving through Oregon's constitutional landscape like the Columbia River first traversing its course to the Pacific Ocean. In the last two general elections, 1996 and 1998, Oregon voters were asked to decide the merits of twenty-six signature gathered measures. [FN1] This reflects a dramatic increase in the number of signature gathered measures appearing on the ballot. There are a variety of reasons behind the recent bounty of measures appearing on the ballot. However, one implication is clear; individuals and political action groups with the financial resources to sell a proposal directly to the voters are able to substitute the deliberative and often cumbersome legislative process with bumper-sticker slogans and thirty-second television commercials. In addition, many ballot measures propose to amend the Oregon Constitution, rather than statutes, [FN2] for the sole purpose of protecting the new provision from legislative tinkering after enactment. [FN3] Thus, an initiative petitioner has had the relative freedom to draft a measure containing a wish list of often fundamental and controversial policy changes, [FN4] which then masquerade under a simpler and more ***1140** palpable media campaign. Therefore, judicial review of voter-approved ballot measures serves as a last line of defense, safeguarding the Oregon Constitution from overly broad and procedurally unconstitutional changes. The Oregon Supreme Court's decision in Armatta v. Kitzhaber, [FN5] invalidating Measure 40, illustrates this judicial function.

On June 25, 1998, the Oregon Supreme Court handed down its controversial decision in Armatta v. Kitzhaber. This unanimous opinion invalidated Measure 40, a crime victims' rights initiative, in its entirety because the measure failed to satisfy a procedural requirement for amending the state constitution, contained in article XVII, section 1, of the Oregon Constitution. This effectively counter-majoritarian "veto" of the popular vote was met with both praise and criticism. Supporters of Measure 40 criticized Armatta as an "unprincipled exercise of raw political power" and claimed that "the court has reached critical mass as far as politicizing itself," [FN6] while Measure 40 opponents said the "measure was not about crime victims' rights but about making it easier to convict defendants" [FN7] and were naturally pleased with the court's decision. However, "both sides of the debate said the significance of the ruling [was its] effect on the initiative system." [FN8] Whether Armatta represents an improvement in the initiative process depends on one's perspective. The prevailing view seems to be that "[w]hen it struck down Measure 40 . . . the Oregon Supreme Court did the state a favor by slowing down the wholesale amending of the constitution in great big gulps." [FN9]

Doctrinally, Armatta breathed new life into a virtually dormant provision of the Oregon Constitution, the separate-vote requirement of article XVII, section 1 (hereinafter referred to as the separate-vote requirement). The Oregon Supreme Court had invoked the separate-vote requirement only three times since its inception in 1906 [FN10] and had never relied upon the provision ***1141** to invalidate a voter approved constitutional amendment until Measure 40.

This Note explores the Armatta decision with particular emphasis on the formulation of the separate-vote requirement test, which was articulated for the first time by the Oregon Supreme Court. Part I of this Note outlines the provisions contained in Measure 40 and the procedural background of Armatta. Part II briefly summarizes the relevant background law. Part III retraces the analytical framework used by the court in reaching its holding. Part IV discusses the implications of the new constitutional test and provides illustrative examples of its recent application by the Secretary of State.

I

Facts of Armatta

A. Overview of Measure 40

Measure 40 was approved by Oregon voters as an initiated amendment to article I (the Bill of Rights) of the Oregon Constitution in the 1996 general election. [FN11] According to the preamble, Measure 40 was "designed to preserve and protect crime victims' rights to justice and due process and to ensure the prosecution and conviction of persons who have committed criminal acts." [FN12]

Measure 40 contained nine sections. Section 1 listed fourteen rights to which victims of crime would be entitled in all criminal prosecutions and juvenile delinquency proceedings. These rights most notably included the following: (1) The right to have all relevant evidence admissible against the criminal defendant; (2) The right to have criminal defendants tried by a jury composed of jurors who are registered voters and who have not been convicted of a felony or served a felony sentence within the last 15 years; (3) The right to have a nonunanimous jury vote of 11 to 1 render a verdict of guilty in aggravated murder and murder cases; (4) The right to have criminal defendants serve their sentences in full, without such sentences being set aside, except through the governor's reprieve, commutation, or pardon power, or pursuant to appellate or post-conviction relief. [FN13]

***1142** Section 2 of Measure 40 stated that the rights set out in the measure (1) "shall be limited only to the extent required by the United States Constitution," (2) that article I, sections 9 and 12, of the Oregon Constitution, "shall not be construed more broadly than the United States Constitution," and (3) that in cases involving victims, "the validity of prior convictions shall not be litigated except to the extent required by the United States Constitution." [FN14] Section 3 provided that the measure "shall not [1] reduce a criminal defendant's rights under the United States Constitution, [2] reduce any existing right of the press, or [3] affect any existing statutory rule relating to privilege or hearsay." [FN15]

Section 4 of Measure 40 granted the decision to initiate criminal prosecution or juvenile delinquency proceedings to the district attorney and gave the district attorney the authority to assert the rights conferred upon victims in the measure. [FN16] Sections 5 to 8 defined relevant terms for purposes of Measure 40 and clarified various matters relating to the rights conferred in the measure. [FN17] Finally, section 9 declared that Measure 40 "creates no new civil liberties." [FN18]

B. Relevant Procedural Background

Shortly after the 1996 general election, a group of plaintiffs filed an action for declaratory and injunctive relief, seeking a ruling that Measure 40 was unconstitutional. [FN19] Specifically, plaintiffs contended that Measure 40 violated the Oregon Constitution in three respects: (1) the measure contained two or more amendments, in violation of article XVII, section 1; (2) it embraced more than one subject, in violation of article IV, section 1(2)(d); and (3) it revised, rather than amended, the Oregon Constitution, which under article XVII, section 2, cannot be accomplished by initiative petition. [FN20] Plaintiffs also sought an injunction prohibiting defendant Governor Kitzhaber and the State of Oregon from enforcing Measure 40. The State filed an answer and both sides moved for summary judgment. [FN21]

***1143** In a letter opinion issued on February 5, 1997, the circuit court severed section 2 as an impermissible revision of the Oregon Constitution and left the rest of the measureintact. [FN22] On February 19, 1997, the circuit court entered an order and judgment enjoining enforcement of section 2 of Measure 40. [FN23]

Plaintiffs appealed to the court of appeals, contending that the circuit court erred in concluding that section 2 was severable from the rest of Measure 40 and also erred in rejecting their other substantive challenges to the measure. [FN24] The State cross-appealed, contending that the circuit court erred in concluding that section 2 revised the constitution. [FN25] Shortly thereafter, the State moved to stay or modify the circuit court's injunction concerning enforcement of section 2 of Measure 40. [FN26] The court of appeals stayed the injunction in August 1997, pending outcome on appeal. [FN27] In early 1998, the court of appeals certified the appeal to the Oregon Supreme Court in response to plaintiffs' motion under ORS 19.405(1) and the motion was accepted by the supreme court under ORS 19.405(2). [FN28]

II

Background Law

Prior to Armatta, the Oregon Supreme Court had not developed its analysis of the separate-vote requirement of article XVII, section 1. However, the court had developed its analysis of the single-subject requirement of article IV, section 1(2)(d). Part II of this Note explores the textual language and case law of these two provisions to provide the necessary background to understand the new test articulated in Armatta. [FN29]

***1144** A. The Separate-Vote Requirement

The people's power to amend the Oregon Constitution through initiative petition arises under article IV, section 1, of the Oregon Constitution. [FN30] Article XVII, section 1, of the Oregon Constitution sets out procedural requirements that apply to amendments approved by voters:

> Any amendment or amendments to this Constitution may be proposed in either branch of the legislative assembly, and if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall . . . be . . . referred by the secretary of state to the people for their approval or rejection . . . . If a majority of the electors voting on any such amendment shall vote in favor thereof, it shall thereby become a part of this Constitution. The votes for and against such amendment, or amendments, severally, whether proposed by the legislative assembly or by initiative petition, shall be canvassed by the secretary of state in the presence of the governor, and if it shall appear to the governor that the majority of the votes cast at said election on said amendment, or amendments, severally, are cast in favor thereof, it shall be his duty forthwith . . . to declare said amendment, or amendments, severally . . . to have been adopted by the people of Oregon as part of the Constitution thereof, and the same shall be in effect as part of the Constitution from the date of such proclamation. When two or more amendments shall be submitted in the manner aforesaid to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately. . . . This article shall not be construed to impair the right of the people to amend this Constitution by vote upon an initiative petition therefor. [FN31]

The italicized portion is referred to as the separate-vote requirement. [FN32]

Prior case law interpreting the separate-vote requirement of article XVII, section 1, of the Oregon Constitution is minimal and not very instructive. In fact, only three Oregon Supreme Court cases have interpreted the separate-vote requirement since the provision was added to article XVII, section 1, by initiative in 1906. In State v. Osbourne, [FN33] the court simply concluded, without ***1145** analysis, that the separate-vote requirement was not implicated "because only one amendment was submitted at the election." [FN34] In State v. Payne, [FN35] the court similarly held that a legislatively referred amendment reinstating the death penalty did not violate the separate-vote requirement "because only one amendment was submitted to the voters." [FN36] The Payne court noted, however, that the amendment at issue contained two different sections and repealed a constitutional provision that effectively contained two sections, "although not separately numbered." [FN37] Thus, under Payne, the fact that a proposed constitutional amendment contains more than one section does not preclude its submission as a single amendment.

Finally, in Baum v. Newbry, [FN38] the Oregon Supreme Court addressed the issue of whether an initiated amendment, concerning reapportionment of the legislative assembly, constituted a single amendment. The Baum court stated:

> Section 1 of article XVII does not prohibit the people from adopting an amendment which would affect more than one article or section by implication. At most it prohibits the submission of two amendments on two different subjects in such manner as to make it impossible for the voters to express their will as to each. The fact, if it be one, that the reapportionment amendment may have amended more than one section of the constitution, would be immaterial. [FN39]

Thus, the case law reflects the fact that the number of sections amended by the measure is not the sole determination of whether the separate-vote requirement is violated.

B. The Single-Subject Requirement

Article IV, section 1(2)(d), of the Oregon Constitution provides: "An initiative petition shall include the full text of the proposed law or amendment to the Constitution. A proposed law or amendment to the Constitution shall embrace one subject only and matters properly connected therewith." [FN40] The case law ***1146** interpreting this single-subject requirement is well-settled.

In OEA v. Phillips, [FN41] the Oregon Supreme Court noted that the central purpose of the single-subject

requirement is to prevent the practice of inserting two or more unrelated provisions into a single bill, commonly known as "log-rolling," so that legislators favoring one provision would be compelled to vote for the bill despite their opposition to the other provisions. [FN42] More recently, in State ex rel Caleb v. Beesley, [FN43] the Oregon Supreme Court outlined the following framework for analyzing one-subject challenges to the body of an amendment: "To determine if the [amendment] embraces but one subject, the court attempts to identify a unifying principle logically connecting all provisions in the act." [FN44] The Caleb court further noted: "This court's one-subject decisions demonstrate that an enactment that embraces only one subject does not violate the one-subject provisions of Article IV merely by including a wide range of connected matters intended to accomplish the goal of that single subject." [FN45]

In sum, the case law interpreting the separate-vote requirement of article XVII, section 1, is lacking in detailed analysis. However, as a whole, the cases demonstrate that the purpose of the separate-vote requirement is to allow the people to vote upon separate constitutional changes separately. The case law interpreting the single-subject requirement of article IV, section 1(2)(d) clearly demonstrates that the requirement is intended to prohibit "log-rolling." Nonetheless, when conducting a single-subject inquiry, a court must examine only the content of the proposed amendment, not the effect that the amendment might have upon the existing constitution. [FN46]

III

Holding and Rationale in Armatta

The plaintiffs in Armatta appealed to the Oregon Supreme Court claiming that Measure 40 violated three provisions of the Oregon Constitution: (1) the single-subject rule of article IV, section 1(2)(d); (2) the prohibition against revisions by initiative ***1147** found in article XVII, section 1; and (3) the separate-vote requirement of article XVII, section 1. Without discussing the first two claims, the court found the separate-vote requirement dispositive and engaged in a four-step analysis to reach its holding. [FN47] Part III of this Note explores the court's analysis at each step, with particular emphasis on the court's interpretation of the separate-vote requirement and the development of the new test.

A. Application of the Separate-Vote Requirement to Initiatives

The Armatta court first analyzed the State's argument that the separate-vote requirement of article XVII, section 1, of the Oregon Constitution applies only to constitutional amendments proposed by the legislature and not by initiative. In analyzing a provision of the Constitution, the court considers "its specific wording, the case law surrounding it, and the historical circumstances that led to its creation." [FN48]

Article XVII, section 1, prescribes the procedure for the legislature to propose constitutional amendments, as well as other requirements relating to amendment of the constitution. [FN49] The State argued that article XVII, section 1, contains three distinct parts, and that the words "submitted in the manner aforesaid" refers to only the first part of article XVII, section 1, which sets out voting and referral procedures for legislatively proposed amendments. [FN50] As contextual support for its reading of article XVII, section 1, the State pointed to article IV, section 1(4)(d), of the Oregon Constitution, which provides that "[i]nitiative and referendum measures shall be submitted to the people as provided in this section and by law not inconsistent therewith." [FN51] The State read that provision as clarifying that article IV, section 1, not article XVII, section 1, governs the method for submitting amendments proposed by initiative petition. The Armatta court found the text of article IV, section 1(4)(b) to cut against the State's argument. [FN52] That section provides that an initiated amendment must be submitted in accordance with article IV, section 1, "and by law not inconsistent therewith." Thus, the court ***1148** reasoned that article IV, section 1(4)(b), itself acknowledges that certain requirements in addition to those set out in article IV, section 1, such as the separate-vote requirement of article XVII, section 1, also govern the submission of initiated amendments. [FN53]

The Armatta court then briefly noted that the case law applying the separate- vote requirement is limited to Baum v. Newbry, [FN54] in which the Oregon Supreme Court assumed without deciding that the separate-vote requirement applied to initiated constitutional amendments. [FN55] Thus, the case law provided little guidance in this analysis.

In summary, after reviewing the specific wording of article XVII, section 1, as well as the contextual support provided by parts of article IV, section 1, the Oregon Supreme Court concluded that "[the separate vote requirement of] Article XVII, section 1, applies to amendments 'proposed by the legislative assembly or by initiative petition,'

unless article IV, section 1, specifically provides otherwise." [FN56]

B. Interpretation of the Separate-Vote Requirement

The Armatta court then turned to the State's argument that the scope of the separate-vote requirement is defined by article IV, section 1(2)(d), which requires merely that a constitutional amendment embrace "one subject only." [FN57] The State argued that if a proposed amendment embraces a single subject, it necessarily constitutes a single amendment. [FN58]

The Armatta court analyzed the meaning of the separate-vote requirement of article XVII, section 1, and its relationship, if any, to the single-subject requirement of article IV, section 1(2)(d). When interpreting the constitution, the court assumes:

> that every word, clause and sentence therein have been inserted***1149** for some useful purpose . . . . Thus, because we are concerned with two requirements that are worded differently and are located in different parts of the Oregon Constitution, we must assume that they have different meanings and that neither requirement is superfluous. [FN59]

The separate-vote requirement of article XVII, section 1, provides: "When two or more amendments shall be submitted in the manner aforesaid to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately." [FN60] The Armatta court first established that this provision, at a minimum, prevents the combining of several proposed amendments, which have been labeled from their inception as separate amendments, into one proposed amendment subject to a single vote. [FN61] The court then considered the historical context surrounding the development of article XVII, section 1. Article XVII of the Oregon Constitution of 1859 was based upon Article XVI of the Indiana Constitution of 1851 and is identical in all material aspects. [FN62] However, the debates from the Indiana convention of 1850 suggest that a constitutional "amendment" was intended by the framers of the Indiana Constitution of 1851 to address a particular constitutional change, and the court found nothing to suggest that the framers of the Oregon Constitution had a different understanding or intent. [FN63]

The Armatta court then turned to the limited case law interpreting the separate-vote requirement of article XVII, section 1. As Part II of this Note discussed, Osbourne and Payne provided little guidance on this question. The court, however, extrapolated the following key principles from Baum:

> [(1)] the purpose of the separate-vote requirement is to allow the voters to decide upon separate constitutional changes separately[; (2)] by implication, a single constitutional amendment may affect one or more constitutional provisions without offending the separate-vote requirement [[; and (3)] that the separate-vote requirement encompasses, to some extent, the notion that a single amendment must contain a single ***1150** "subject." [FN64]

The Armatta court then analyzed article IV, section 1(2)(d). The principal substantive restriction set out in article IV, section 1(2)(d), is that a proposed amendment must "embrace one subject only and matters properly connected therewith." [FN65] The court noted that, unlike the text of the separate-vote requirement, the single-subject requirement focuses upon the content of the proposed amendment by requiring that the amendment embrace only a single subject. [FN66] Thus, the single-subject requirement concerns the text of the proposed amendment viewed in isolation, rather than how a proposed amendment might change the existing constitution. [FN67]

Then, the Armatta court determined that the single-subject requirement applies only to constitutional amendments adopted by initiative, rather than those adopted pursuant to legislative referral under article XVII, section 1. [FN68] This conclusion was reached by the court's analysis of the historical development of article IV, section 1(2)(d), which illustrated that the Oregon Constitution originally contained a single-subject requirement for legislation, but not for constitutional amendments. [FN69] It was not until 1968 that article IV, section 1, was amended by initiative to impose a single-subject limitation upon the people's ability to amend the constitution. [FN70] However, the Oregon Constitution never imposed a single-subject requirement upon the legislature's ability to propose amendments to the constitution. [FN71]

The Armatta court then turned to the case law interpreting article IV, section 1(2)(d), which states that the single-subject requirement is intended to prohibit "log-rolling." [FN72] Therefore, when conducting a single-subject inquiry, a court must examine only the content of the proposed amendment, not the effect that the amendment will have upon the existing constitution. [FN73] Accordingly, the court rejected the State's argument that Baum ***1151** stands for the principle that the single-subject and separate-vote requirements impose the same

restriction upon the people's ability to amend the constitution. [FN74] The court reasoned that Baum, which was decided fourteen yearsbefore the single-subject requirement for initiated amendments was added to article IV, section 1, [FN75] suggests that the "purpose of the separate-vote requirement is to allow the people to vote upon separate proposed constitutional changes separately." [FN76]

Having analyzed the specific wording, historical development, and case law surrounding the two requirements, the Armatta court noted that while the two requirements serve similar purposes, "to ensure that the voters will not be compelled to vote upon multiple 'subjects' or multiple constitutional changes in a single vote," the two requirements are different in several respects. [FN77] First, the single-subject requirement focuses upon the content of a proposed law or amendment, by requiring that "it 'embrace only one subject and matters properly connected therewith," ' whereas, the separate-vote requirement focuses upon the form of submission, as well as the potential change to the existing constitution, by requiring that two or more constitutional amendments be voted upon separately. [FN78] Thus, in addition to speaking to the form of submission, the separate-vote requirement addresses the extent to which a proposed amendment would modify the existing constitution. Second, the separate-vote requirement applies only to constitutional amendments, while the single-subject requirement applies equally to constitutional amendments and legislation. Thus, the separate-vote requirement imposes a narrower requirement than does the single-subject requirement.

The Armatta court proceeded to admonish that "because the separate-vote requirement is concerned only with a change to the fundamental law, the notion that the people should be able to vote separately upon each separate amendment should come as ***1152** no surprise. In short, the requirement serves as a safeguard that is fundamental to the concept of a constitution." [FN79]

Finally, the Armatta court turned to the question of how to determine whether a proposal to amend the Oregon Constitution offends article XVII, section 1, because it contains two or more amendments. The court articulated the following three-pronged constitutional test:

> [T]he proper inquiry is to determine whether, [1] if adopted, the proposal would make two or more changes to the constitution that [2] are substantive and that [3] are not closely related. If the proposal would effect two or more changes that are substantive and not closely related, the proposal violates the separate-vote requirement of article XVII, section 1. [FN80]

To assist in the application of this test, the court added that "[i]n some instances, it will be clear from the text of the proposed initiative whether it runs afoul of article XVII, section 1. In other instances, it will be necessary to examine the implications of the proposal before determining whether it contains two or more amendments." [FN81]

C. Application of Legal Principles to Measure 40

The Armatta court then examined Measure 40 under the new separate-vote requirement test. The court first noted that the measure purported to amend only article I of the Oregon Constitution, specifically by adding a number of crime victims' rights to that article and by prescribing a construction methodology for article I, sections 9 and 12. [FN82] The court, however, determined that four of the crime victims' rights contained in Measure 40 changed four existing sections of the Oregon Constitution that encompassed six separate, individual rights. [FN83] The court then reasoned that the multiple constitutional changes effected by Measure 40 "are more than sufficient to meet that part of the test . . . that inquires whether the measure at issue makes two or more changes to the constitution . . . . It is equally clear, we think, that the changes effected by Measure 40 are substantive." [FN84] Notably, the court did not articulate what constitutes a ***1153** "substantive" change.

The Armatta court concluded that Measure 40 failed the third prong of the testbecause the constitutional provisions affected by the measure were not closely related. [FN85] For example, the court noted that "the right of all people to be free from unreasonable searches and seizures . . . has virtually nothing to do with the right of the criminally accused to have a unanimous verdict rendered in a murder case . . . . The two provisions involve separate constitutional rights, granted to different groups of persons." [FN86] Accordingly, the court unanimously held that Measure 40 contained two or more amendments in violation of the separate-vote requirement of article XVII, section 1. [FN87]

D. Measure 40 is Invalid in its Entirety

Finally, the Armatta court recognized the long-standing principle of law that a proposed amendment must be

adopted in compliance with the procedures set forth in the Oregon Constitution. [FN88] Because Measure 40 was not adopted in compliance with article XVII, section 1, of the Oregon Constitution, the court held Measure 40 void in its entirety. [FN89]

IV

Implications

Armatta significantly changes the process of constitutional amendment by initiative in two related areas. First, the rigorous new test gives real meaning and effect to the previously dormant separate-vote requirement of the Oregon Constitution. As a result, ballot measures approved in the past and future are subject to legal challenges under the new standard. This could lead to an increase in challenges to voter-approved measures, and, more ***1154** notably, an increase in successful challenges. Second, the new test is actively being applied by the Secretary of State in determining whether proposed initiatives comply with constitutional procedures. As a result, Armatta could slow the recent proliferation of initiatives seeking to amend the constitution as petitioners adjust to the new requirement or opt for less restrictive statutory changes. Part IV of this Note explores these potential and realized implications of Armatta on the constitutional and initiative landscape in Oregon.

A. Pre-election Implications of Armatta

Under Oregon law, the Secretary of State may promulgate rules governing the review of proposed initiative measures for compliance with constitutional procedures. [FN90] Prior to Armatta, the Secretary of State reviewed measures for compliance with the single-subject rule and the rule against revisions. [FN91] Shortly after Armatta, the Secretary of State amended the review process to include the separate-vote requirement. [FN92] As a result, to date, [FN93] a half-dozen proposed initiative petitions for the general election in November, 2000, have been rejected by the Secretary of State for failing to comply with the separate-vote requirement. [FN94] Three of these petitions were also rejected on grounds that they constituted a revision of the constitution, impermissible under article XVII, section 2 of the Oregon Constitution. [FN95] No petitions were rejected for failing to comply with the single-subject requirement. These results suggest that the Armatta separate-vote requirement test is indeed having the desired effect of erecting a narrower, more rigorous requirement to amending the state constitution.

It is not surprising then that opponents to the Oregon Supreme Court's decision in Armatta filed a proposed initiative petition to ***1155** amend the state constitution so that the court would be restricted from interpreting the constitution in a similar fashion in the future. Proposed initiative No. 21, filed on September 28, 1998, seeks to add several provisions to article IV, section 1, of the Oregon Constitution, that limit the judicial, legislative, and executive branches from further restricting the people's right to use the initiative process. Proposed initiative petition No. 21, in relevant part, states:

> Any amendment to this Constitution enacted by the people on or after November 7, 2000, pertaining to the initiative or referendum power or process, shall not be impaired by decision of any court on any basis other than conflict with the United States Constitution or with a later enacted amendment to this Constitution.
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> . . .
>
> The Constitution and laws of Oregon shall be interpreted to preserve the initiative and referendum powers of the people and to protect use of the initiative and referendum processes by the people. [FN96]

Ironically, the Secretary of State, on advice from the Attorney General, rejected proposed initiative petition No. 21 because it "violates the separate amendment requirement of Article XVII of the Oregon Constitution and constitutes a revision of the constitution which may only be adopted through the procedures set forth in Article XVII, section 2 of the Oregon Constitution." [FN97] The petitioner re-drafted the proposal, and re- submitted as initiative petition No. 33, only to be rejected again on the same grounds. [FN98] Furthermore, one of Oregon's most active initiative petitioners, Bill Sizemore, has had three of his proposed initiative petitions rejected by the Secretary of State for failing to comply with the separate-vote requirement. [FN99] This is notable because Mr. Sizemore, the director of Oregon Taxpayers United, is assumingly able to hire skilled and experienced lawyers to draft his measures. This further suggests that the separate-vote requirement is imposing a restrictive procedure on petitioners' ability to ***1156** draft measures that meet both their policy objectives and withstand article XVII, section 1, scrutiny under Armatta.

Therefore, the critical question for practitioners drafting initiatives is how can a measure withstand separate-vote

requirement scrutiny and still achieve substantial policy changes by amending the state constitution. Deputy Attorney General Schuman may have provided the best analysis thus far. At a seminar for attorneys practicing constitutional law in Oregon, [FN100] Deputy Attorney General Schuman outlined the following analysis for applying the separate-vote requirement of article XVII, section 1, after Armatta:

In general, a separate-amendment analysis should be rigorous; it should be conducted in light of the court's admonition that the requirement serves as a fundamental safeguard to the integrity of the state's most important law.

More specifically, a measure violates the separate-amendment rule if:

(1) The measure makes two or more changes to the constitution. A measure makes a change for separate-amendment purposes when the measure adds a new part, or has an actual and identifiable (as opposed to speculative) effect, either express or by necessary implication, on an existing provision including a provision added by judicial gloss. When the proposed measure would have an impact on only a particular part of an existing provision of the constitution, then the relevant change is that part only.

(2) Those changes are substantive, that is, not merely formal changes such as spelling, re-arranging or re-numbering.

(3) The subjects of the parts of the constitution that are affected by these substantive changes are not closely related. Among the factors to consider in determining closeness: The subjects are not closely related if their only connection is that they are both independently related to the general subject of the proposed measure. They are not closely related merely because they are located in the same numerical section of the existing constitution. They are closely related if they deal with the same constitutional limitation and apply most directly to the same group of people, or if the principal change inevitably creates a mirror-image change in a corresponding existing provision of the constitution.

(4) Generally, the measure joins together discrete policy choices in a way that precludes the people from deciding them separately and, possibly, differently. [FN101]

***1157** Considering that the Attorney General advises the Secretary of State on pre-election review of proposed initiative petitions and defends voter- approved measures against legal challenges in the courts, Schuman's analysis may be instructive as to the result in future challenges to proposed and approved ballot measures and, perhaps, lend insight on how a measure may withstand scrutiny under Armatta.

B. Challenges to Approved Measures

As discussed previously, the number of proposed initiatives rejected for failing to comply with the separate-vote requirement is considerable. However, those rejections are occurring pre-election. The other forum for activity under Armatta is post-election challenges to approved measures that amend the constitution.

A challenge could be brought against measures approved by voters either before or after Armatta was handed down in the summer of 1998. An illustrative, and perhaps extreme, example is Measure 5, approved by voters at the general election in 1990. Measure 5 instituted a comprehensive change of the property tax system in Oregon by lowering dedicated revenues to school districts. It is now conceivable that a school district, or other entity with standing, could challenge Measure 5 on the grounds that it violates the separate-vote requirement articulated in Armatta. Measure 5 required a six- year implementation period during which a substantial shift in responsibility for school funding was imposed upon the legislature, which allocates the income tax-supported General Fund. Therefore, a successful separate-vote requirement challenge to Measure 5, or a measure of similar magnitude, would likely cause the Oregon Supreme Court to re-examine the scope of the separate-vote requirement test because the widespread implications of reversing the completed implementation of Measure 5 would undoubtedly prompt a rash of litigation and bring the court under intense scrutiny. The court probably had the foresight, however, to anticipate such a scenario and "tested" its own test. The court presumably analyzed whether previously approved measures would comply with the separate-vote requirement test formulated in Armatta. In the interest of preserving the status quo, the court seems to have formulated a test that would not provide obvious grounds for ***1158** striking down previously approved measures. Nonetheless, the potential for a challenge stands, and at a minimum, in the highly politicized and contentious environment of legal reform by initiative, Armatta provides political foes one more legal tool with which to thwart an opponent's measure.

Conclusion

In enunciating a powerful new rule of constitutional law that narrows the requirement for amending the Oregon Constitution by initiative, the Oregon Supreme Court has changed the landscape of the Oregon initiative process. The ultimate result of this controversial change is difficult to forecast. To many proponents of Measure 40, and the initiative process in general, the court's decision is an unwarranted blow to the people's right to initiate and enact fundamental laws. Such people view Armatta as judicial overreaching in an attempt to "reform" Oregon's initiative system and consequently dilute direct democracy.

An equally persuasive argument can be made that Armatta strengthens the initiative process, or more aptly, aligns the process with its original intent. However, whether Armatta signals the end of major changes to the initiative process has yet to be determined. [FN102] As future initiatives are examined for adherence with the separate-vote requirement, and are rejected or severed by the Secretary of State for non-compliance, it seems clear that a significant check has been placed on the ability of initiative proponents to "load up" a single ballot measure. Constitutional amendment by initiative (but significantly, not legislation by initiative) will become more cumbersome and expensive for its proponents. Finally, while the Oregon Supreme Court will undoubtedly be called upon to revisit Armatta, it is clear that Oregon's initiative system will never be the same.

[FN1]. Steve Suo, Court Tosses Initiative Limits, The Oregonian, Jan. 13, 1998, at A1. This figure only reflects the number of signature-gathered initiatives and does not include the additional ballot measures referred to voters by the legislature.

[FN2]. Almost two-thirds of the last 49 initiatives called for constitutional amendments. Leroy J. Tornquist, Direct Democracy in Oregon-- Some Suggestions for Change, 34 Willamette L. Rev. 675-76 (1998).

[FN3]. Id.

[FN4]. See David R. Anderson, State Court Throws Out Crime Measure: The Ruling: Justices Say Measure 40 has Too Many Amendments, The Oregonian, June 26, 1998, at A1. "The practice lately has been to draft an initiative that's a Christmas wish list for some special-interest group and put everything they possibly can into it that they can't get passed by the Legislature." Id. (quoting Thomas Christ, an ACLU attorney).

[FN5]. 327 Or. 250, 959 P.2d 49 (1998).

[FN6]. Anderson, supra note 4, at A1.

[FN7]. Id.

[FN8]. Id.

[FN9]. No More Amending in Great Big Chunks, Albany Democrat-Herald, June 30, 1998.

[FN10]. See State v. Payne, 195 Or. 624, 244 P.2d 1025 (1952); State v. Osbourne, 153 Or. 484, 57 P.2d 1083 (1936); Baum v. Newbry, 200 Or. 576, 267 P.2d 220 (1954).

[FN11]. The vote on Measure 40 was 778,574 yes, 544,301 no. Before being struck, it was Article I, section 42, of the Oregon Constitution.

[FN12]. Measure 40, Preamble (emphasis in original).

[FN13]. Measure 40, §§ 1(f), (g), (h), and (j) (1996); see also, Armatta, 327 Or. at 254, 959 P.2d at 52.

[FN14]. Measure 40, art. I, § 2 (1996).

[FN15]. Id. § 3.

[FN16]. Id. § 4.

[FN17]. Id. §§ 5-8.

[FN18]. Id. § 9.

[FN19]. Armatta, 327 Or. at 253, 959 P.2d at 51.

[FN20]. Id. at 255-56, 959 P.2d at 52.

[FN21]. Id.

[FN22]. Id. at 253, 959 P.2d at 51.

[FN23]. Id.

[FN24]. Id.

[FN25]. Id.

[FN26]. Id.

[FN27]. Armatta v. Kitzhaber, 149 Or. App. 498, 943 P.2d 634 (1997).

[FN28]. Armatta, 327 Or. at 254, 959 P.2d at 51.

[FN29]. The plaintiffs in Armatta asserted that Measure 40 violated three distinct provisions of the Oregon Constitution: the single-subject rule; the rule against revision by initiative; and the separate-vote requirement. However, without discussion of the other two provisions, the Oregon Supreme Court found the separate-vote requirement to be dispositive. Therefore, Part II of this Note addresses the background law of the separate-vote requirement. The background law of the single-subject rule is also selectively presented because of its relevance to the court's interpretation of the separate-vote requirement, which is discussed in Part III. The background law of the rule against revisions is beyond the scope of this Note.

[FN30]. The Oregon Constitution provides that: "The people reserve to themselves the initiative power, which is to propose laws and amendments to the Constitution and enact or reject at an election independently of the Legislative Assembly." Or. Const. art. IV, § 1(2)(a).

[FN31]. Or. Const. art. XVII, § 1 (emphasis added).

[FN32]. Armatta, 327 Or. at 255, 959 P.2d at 52 n.3.

[FN33]. 153 Or. 484, 57 P.2d 1083 (1936) (involving a challenge to a legislatively referred amendment providing that ten members of a jury could render a guilty or not-guilty verdict, except in first degree murder cases).

[FN34]. Id. at 486, 57 P.2d at 1084.

[FN35]. 195 Or. 624, 244 P.2d 1025 (1952).

[FN36]. Id. at 635, 244 P.2d at 1031.

[FN37]. Id.

[FN38]. 200 Or. 576, 267 P.2d 220 (1954).

[FN39]. Id. at 581, 267 P.2d at 223 (emphasis added).

[FN40]. Or. Const. art. IV, § 1(2)(d) (emphasis added).

[FN41]. 302 Or. 87, 727 P.2d 602 (1986).

[FN42]. Id. at 95, 727 P.2d at 606.

[FN43]. 326 Or. 83, 949 P.2d 724 (1997).

[FN44]. Id. at 89, 949 P.2d at 728.

[FN45]. Id. at 91, 949 P.2d at 729.

[FN46]. See Armatta v. Kitzhaber, 327 Or. 250, 275, 959 P.2d 49, 63.

[FN47]. Id. at 255, 959 P.2d at 52.

[FN48]. Priest v. Pearce, 314 Or. 411, 415-16, 840 P.2d 65, 66-67 (1992).

[FN49]. See Or. Const. art. XVII, § 1; see also Part II of this Note.

[FN50]. Armatta, 327 Or. at 257, 959 P.2d at 53; see also Or. Const. art. XVII, § 1; Part II of this Note.

[FN51]. Or. Const. art. IV, § 1(4)(d).

[FN52]. Armatta, 327 Or. at 258, 959 P.2d at 54.

[FN53]. Id.

[FN54]. 200 Or. 576, 267 P.2d 220 (1954).

[FN55]. "While there may be some question as to whether the above quoted portion of Article XVII, Sec. 1, applies to constitutional amendments submitted by initiative petition, we will assume for the purposes of this case that it does." Id. at 581, 267 P.2d at 223.

[FN56]. Armatta, 327 Or. at 259, 959 P.2d at 54.

[FN57]. Respondents' Brief at 34, Armatta v. Kitzhaber, 327 Or. 250, 959 P.2d 49 (1998) (No. 96-C-14060).

[FN58]. The State contended that Measure 40 embraced a single-subject-- either "crime victims' rights" or, more broadly, "crime"--and therefore constituted only a single amendment to the constitution. See id. at 6; see also Armatta, 327 Or. at 261, 959 P.2d at 55-56.

[FN59]. Armatta, 327 Or. at 262, 959 P.2d at 56.

[FN60]. Or. Const. art. XVII, § 1.

[FN61]. Armatta, 327 Or. at 262, 959 P.2d at 56.

[FN62]. See id. at 264, 959 P.2d at 57 (citing The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857 481 (Charles Henry Carey, ed., 1926)).

[FN63]. Id. at 267, 959 P.2d at 58 (the Oregon Constitution was modeled after the Indiana Constitution).

[FN64]. Id. at 269, 959 P.2d at 59-60.

[FN65]. Id. at 270, 595 P.2d at 60 (citing Or. Const. art. IV, § 1(2)(d)).

[FN66]. Id. at 270, 959 P.2d at 60.

[FN67]. Id.

[FN68]. Id. at 271, 959 P.2d at 61.

[FN69]. Id. at 272, 959 P.2d at 61.

[FN70]. Id.

[FN71]. Id.

[FN72]. See OEA v. Phillips, 302 Or. 87, 100, 727 P.2d 602, 609 (1986).

[FN73]. See State ex rel Caleb v. Beesley, 326 Or. 83, 89-91, 949 P.2d 724, 727-29 (1997).

[FN74]. 327 Or. at 273-74, 959 P.2d at 43-44.

[FN75]. Although the people acquired the initiative power in 1902, it was not until 1968 that Article IV, section 1, imposed a single-subject limitation upon the people's ability to amend the constitution. However, the Oregon Constitution never has imposed a single-subject requirement upon the legislature's ability to propose amendments to the constitution.
Id. at 272, 959 P.2d at 61.

[FN76]. Id. at 274, 959 P.2d at 62.

[FN77]. Id.

[FN78]. Id. at 270, 959 P.2d at 60.

[FN79]. Id. at 276, 959 P.2d at 63.

[FN80]. Id. at 277, 959 P.2d at 64 (emphasis added).

[FN81]. Id.

[FN82]. Id.

[FN83]. Id.

[FN84]. Id. at 283, 959 P.2d at 67 (citations omitted).

[FN85]. Id.

[FN86]. Id.

[FN87]. Id. at 284, 959 P.2d at 64.

[FN88]. Id. at 284-85, 959 P.2d at 68.
The provisions of the constitution for its own amendment are mandatory, and must be strictly observed. A failure in this respect will be fatal to a proposed amendment, notwithstanding that it may have been submitted to and ratified and approved by the people .... If ... an attempt is made to amend an existing constitution, its every requirement regarding its own amendment must be substantially observed, and the omission of any one will be fatal to the amendment.
Kadderly v. Portland, 44 Or. 118, 135-36, 74 P. 710, 716 (1903).

[FN89]. Armatta, 327 Or. at 285, 959 P.2d at 68 (footnote omitted).

[FN90]. See ORS 246.150 which provides: "The Secretary of State may adopt rules the secretary considers necessary to facilitate and assist in achieving and maintaining a maximum degree of correctness, impartiality and efficiency in administration of the election laws." Or. Rev. Stat. § 246.150 (1994).

[FN91]. See Or. Admin. R. 165-014-0028 (1997).

[FN92]. See Or. Admin. R. 165-014-0028 (1999).

[FN93]. The last review of proposed initiative petitions filed with the Secretary of State was conducted on March 5, 1999.

[FN94]. See Proposed Initiative Petitions No. 21, 26, 28, 31, 33, 37, Secretary of State, Elections Division.

[FN95]. Proposed Initiative Petitions No. 21, 26, 33, Secretary of State, Elections Division.

[FN96]. Proposed Initiative Petition No. 21, art. IV, § 1(6)(d), Secretary of State, Elections Division (filed Sept. 28, 1998).

[FN97]. See Letter from Phil Keisling, Secretary of State, to Lloyd Marbet (Sept. 28, 1998) (regarding proposed initiative petition No. 21).

[FN98]. See Letter from Phil Keisling, Secretary of State, to Lloyd Marbet (Dec. 30, 1998).

[FN99]. See Proposed Initiative Petitions No. 26, 31, and 37, Secretary of State, Elections Division.

[FN100]. Continuing Legal Education Seminar, Oregon State Bar, The Future of Oregon's Ballot Initiative Process (Portland, OR, Sept. 23, 1998).

[FN101]. Continuing Legal Education Seminar, Oregon State Bar, David Schuman, Article XVII Section 1 of the Oregon Constitution after Armatta v. Kitzhaber: The Future of Oregon's Ballot Initiative Process (Portland, OR, Sept. 23, 1998).

[FN102]. Continuing Legal Education Seminar, Oregon State Bar, Jim Westwood, Armatta v. Kitzhaber--How Did the Court Get There? (Portland, OR, Sept. 23, 1998).

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