IN THE SUPREME COURT OF THE STATE OF OREGON

MICHELLE ROSSOLO,
Plaintiff-Appellant,
Petitioner on Review,

v.

MULTNOMAH COUNTY ELECTIONS DIVISION and TIM SCOTT, Director,
Defendants-Respondents,
Respondents on Review,

and,

METRO,
Intervenor-Respondent,
Respondent on Review.

Court of Appeals
A156429

S 063524

BRIEF *AMICUS CURIAE*

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December 2, 2015

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Preliminaries

A. Timeliness of Application/Brief

On November 4, 2015, this Court issued an order granting review of the Court of Appeals decision in this case and setting December 2, 2015, as the due date for the opening brief on the merits.

ORAP 8.15(5)(c)(ii) defines that date as the due date for a non-aligned party to file an application to appear *Amicus Curiae* as to the merits.

B. Summary of Argument

* Post WW II – after a half century of fits and starts – this Court established the oft-repeated principle that – apart from purely procedural matters – neither the Courts nor the Executive can review a petition unless and until that petition becomes law.

* This ***Constitutional*** deference began to crumble in the mid-1960s. As to the "legislative/administrative" distinction, specifically, this retreat dates back to a 1990 opinion, *Foster v. Clark.*[1]

* This Court has silently over-ruled *Foster*. This resurrects the law that – in the main – Court's lack the jurisdiction to review the operations of the petition process until it has run its course.

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[1] *Foster v. Clark*, 309 Or 464, 790 P2d 1 (1990).

Points & Authorities

C. Lack of Jurisdiction is Never Waived

The defense of lack of jurisdiction may be raised at any time, "including for the first tme on appeal."[2]

D. The State and Local Petition Powers March in Lock-step

A 1902 legislative referral – ***Article IV, section 1*** – created the statewide petition power. A 1906 citizen initiative – ***Article IV, section 1a*** – "further reserved" to local voters the ***same*** powers – "neither greater nor less."[3]

Accordingly, the extent of the local power can only be measured by reference to the state power, and *vice versa*.[4]

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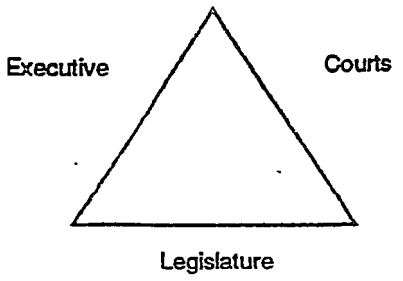
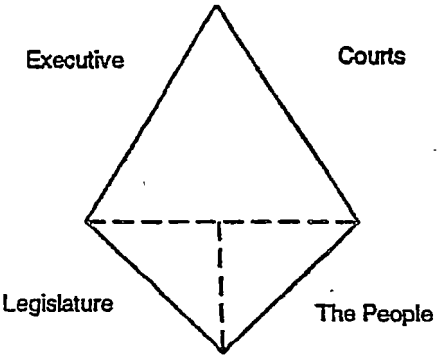
[2] *Waddill v. Anchor Hooking, Inc.*, 330 Or 376, 384, 8 P3d 200 (2000), *citing*, *SAIF v. Shipley*, 236 Or 557, 561 n. 1, 955 P2d 244 (1998),

[3] *Roy v. Beveridge*, 125 Or 92, 96, 266 P 230 (1928).

[4] *Multnomah Co. v. Mittleman*, 275 Or 545, 557 ftn 11, 552 P2d 242 (1976); *Kosydar v. Collins,* 201 Or 271, 282, 270 P2d 132 (1954); *Loe v. Britting*, 132 Or 572, 577, 287 P 74 (1930); *Cameron v. Stevens,* 121 Or 538, 543, 256 P 395 (1927).

E. Oregon's Post-1902 Constitutional Constellation





> "* * * either branch of the legislative department, * * * ***may repeal any act passed by the other.***"[5] (emphasis mine).

F. Chief Justice Thomas A. McBride Deserves Substantial Deference

As a lawyer, Chief Justice McBride served on the Executive Committee of the Peoples' Power League and understood as well as any – and better than most – what the framers of the Initiative Amendments intended.[6]

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[5] *Straw v. Harris*, 54 Or 424, 431, 103 P 777 (1909).

[6] Remarks by W.S. U'Ren at the Supreme Court's Memorial for Justice McBride, 133 Or xxii (1930).

Cf, Rose v. Port of Portland, 82 Or 541, 572, 162 P 498 (1917).

> "* * *. 'He who made the law knows best how it ought to be interpreted' is no less true now than when Rousseau wrote it."

In a 1912 concurrence, Justice McBride scoffed at the notion that ***mere*** administrative officers could refuse to process petitions because of concerns about the legitimacy of the underlying text:

> "Suppose a bill should be presented to the legislature and ordered printed in its regular course.
>
> "Would anyone seriously contend that the State Printer could say: 'This bill is unconstitutional, and I therefore refuse to print it?'
>
> "Surely not.
>
> " I can see no difference in the two cases; the duty to file in one case and the duty to print in the other, seem to me to stand on the same footing. * * *"[7] (paragraphs mine).

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[7] *Schubel v. Olcott*, 60 Or 503, 517, 120 P 375 (1912) (McBride, J., concurring), *cited with approval, Johnson v. City of Astoria*, 227 Or 585, 593 (1961).

G. State ex rel. Carson v. Kozer – The Most Important Decision Ever

As said by the 1928 Court – which still included Justice McBride:

> * * * neither the ***executive department*** nor the ***judicial department*** has the authority to say to ***either of the legislative branches*** * * *
>
> "The law you are proposing to enact is unconstitutional and because it is you cannot determine for yourself whether the same shall be enacted into law or not."[8] (emphasis mine).

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[8] *State ex rel. Carson v. Kozer*, 126 Or 641, 649 (1928), *followed, State ex rel. v. Newbry*, 189 Or 691, 696-98 (1950), *quoted, Meyer v. Bradbury*, 341 Or 288, 300 (2006).

Soon after publication of *State ex rel. Carson,* at least two (2) other state supreme courts cited it with approval. *White v. Welling*, 57 P2d 703, 705 (Ut 1936); *Anderson v. Bryne*, 242 NW 687, 692 (ND 1932).

In 1977, the Wisconsin Supreme Court quoted *State ex rel. Carson* at length, *State ex rel. Althouse v. City of Madison*, 255 NW2d 449, 457 (Wisc 1977); The Colorado Supreme Court did likewise in 1952. *Yenter v. Baker*, 248 P2d 311, 314 (Colo 1952).

Cf, Associated Taxpayers of Idaho v. Cenarrusa, 725 P2d 526, 528 (Idaho 1986) (Shepard, J., concurring).

> " * * * To argue, as do the petitioners here, that the two legislative processes * * * are different because the representative process contains opportunity for deliberation and/or amendment, is unavailing.
>
> "Circumstances can easily be postulated illustrating the inevitability of the enactment of unconstitutional legislation absent interference by this Court.
>
> "Nonetheless, I deem it clear that this Court would not interfere in the (regular) legislative process." (paragraphs mine). (parentheses mine).

From *Johnson et al. v. Pendleton et al.*, a 1929 decision:

> "* * *. Acts of parliament derogatory from the power of subsequent parliaments, bind not. (cite omitted).
>
> " * * * ***There can be no difference in the rule whether (the statute comes) by popular vote or by act of the legislature itself***"[9] (emphasis mine).

H. The Depression-Era Court Abandons the Constitution

Justice McBride died in 1930 and was replaced by Justice Kelly. Another member, Justice Coshaw, left office in 1931 and was replaced by Justice Campbell.

In 1931's *Monahan v. Funk*,[10] this new incarnation of the Court ignored the exhaustive and masterful 1928 opinion detailed on the previous page – *State ex rel. Carson v. Kozer* – and, without explaining why, took pre-election jurisdiction of a referendum case.

This it did by invoking the "legislative/administrative" distinction.

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[9] *Johnson et al. v. Pendleton et al.*, 131 Or 46, 56, 280 P 873 (1929).

[10] *Monahan v. Funk*, 137 Or 580 (1931).

Even if the *Monahan* Court were correct in attaching the "administrative" label to the ordinance before it – which it wasn't – it had no authority to take pre-election jurisdiction.

The Court repeated this obvious error in *Whitbeck v. Funk*,[11] a decision published not quite a year later.

Again, neither *Monahan* nor *Whitbeck* explained why the Court decided it could take pre-election jurisdiction. Both times, the Court, with no discussion, just did.

I. The Court Returns to the People, but not their Constitution

In *Tillamook P.U.D. v. Coates*[12] – a 1944 case – the Court correctly took jurisdiction and blocked a referendum election, but, for the wrong reasons.

The pre-election injunction was proper, not because the underlying ordinance was administrative – which it was – but because the ordinance was simply administering the legislative decision of the people to form the P.U.D.

Given these facts, it would been an absurd waste of money to hold a ***referendum*** election.

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[11] *Whitbeck v. Funk*, 140 Or 70, 12 P2d 1019 (1932).

[12] *Tillamook P.U.D. v. Coates*, 174 Or 476, 149 P2d 558 (1944).

J. The Tillamook Court Mistakenly Looks to Monahan

The *Tillamook* Court placed great reliance on *Monahan v. Funk*, the decision so roundly criticized above. (*Supra,* at 6-7).

This was error. The two cases raise completely different questions.

In *Tillamook*, statutes prescribed the bonds' interest rates, how they would be sold, how soon they had to be retired, the monthly principal, etc.[13]

In short, the Board had little, if any, wiggle room.

The situation in *Monahan* was much different. There, the city Charter merely authorized the council to sell the bonds, leaving many of the important legislative decisions - including the specific location - for later.

Rather than seeking guidance from *Monahan*, the *Tillamook* Court should have branded *Monahan* the unconstitutional nonsense that it is.

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[13] OCLA 114-255: 114-256.

K. Justice Hay Leads the Court Back to the Constitution Again

In *State ex rel. v. Newbry*, Justice Arthur D. Hay – who appeared with William S. U'Ren in a 1918 initiative case, *Carriker v. Lake County*[14] – wrote for a Court that included Justice Earl C. Latourette.[15]

The *Newbry* Court declined to take pre-election jurisdiction, as doing would violate the Separation of Powers Clause.

> "* * * For the ***Secretary of State***, or the courts, to (review the measure in advance) * * * would be tantamount to claiming the power of life and death over every initiated measure * * *.
>
> "It would limit the right of the people to propose only valid laws, whereas ***the other lawmaking body***, the Legislature, would go untrammeled as to the legal soundness of its measures."[16] (emphasis & paragraphs mine).

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[14] *Carriker v. Lake County,* 89 Or 240, 171 P 407 (1918).

[15] Like Justices McBride and Hays, Justice Lattourette warrants special consideration as concerns petition debates.

History of the Bench and Bar in Oregon, a 1910 publication by Historical Publishing Company, lists five Latourettes with offices in Portland and Oregon City. The point being that members of Latourette's family practiced law in Oregon City as contemporaries of U'Ren and McBride.

Justice Latourette likely learned about the Initiative Amendments from the people who wrote them.

[16] *State ex rel. v. Newbry*, 189 Or 691, 698 (1950), *quoting, State ex rel. Bullard v. Osborn*, 143 P 117, 118 (Ariz 1914).

The *Newbry* Court placed great reliance on *State ex rel. Carson v. Kozer*, the pre-depression opinion highlighted above,[17] (*infra*, at 5), a case this Court recently cited with approval.[18]

From *Unlimited Progress v. Portland*, a legislative/administrative case published in 1958:

> "* * * It is only after the proposed measure is enacted that the courts have power to declare the measure ineffectual in law. Such is the established law of the state * * *."[19]

In *Johnson v. City of Astoria*, this Court cited Justice McBride's 1912 concurrence (*supra*, at 3) when refusing to take pre-election jurisdiction.[20]

L. The 1968 Amendment

The 1968 amendment of Article IV did not change the language used in that portion of the 1906 citizen initiative reserving the I & R to local voters as to legislation "of every character."

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[17] *Newbry*, 189 Or at 696-98.

[18] *Meyer v. Bradbury*, 341 Or 288, 300, 142 P3d 1031 (2006).

[19] *Unlimited Progress v. Portland*, 213 Or 193, 195, 324 P2d 239 (1958).

[20] *Johnson,* 227 Or at 593.

Moreover, the 1967 Legislature – which referred the 1968 Amendment to the ballot – assured the voters that the proposed changes would eliminate "archaic and redundant" language, but, "***in no way*** do they diminish the power of the people to initiate or refer measures."[21] (emphasis mine).

M. "Legislative/Administrative" – A Court-Made Distinction

The "Legislative/Administrative" distinction is found, not in the ***Constitution***, but in a 1908 opinion, *Long v. City of Portland*,[22] an opinion quoted extensively in the Court of Appeals opinion.[23]

The authorities cited in *Long* all support the same notion:

A Court won't order a legislative body to take a legislative act.

This is hardly a startling announcement. That's basic Separation of Powers law.

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[21] *Voters' Pamphlet, May 1968 (Marion County)*, at 8.

[22] *Long v. City of Portland*, 53 Or 92, 101 (1908).

[23] *Rossolo v. Multnomah County Elections Div.*, 272 Or App 572, 584-85, ___ P3d __ (2015)

N. Foster v. Clark – The Court Ignores the Constitution, Again

Repeating, for decades after WW II, it was well-established Oregon law that – except as to purely procedural matters – neither the courts nor the elections bureaucrats could interfere in the petition process unless and until the measure won approval.

With *Foster v. Clark*[24] – a 1990 opinion – this Court accelerated its 1986 choice to begin chipping away at this constitutional deference.[25]

The *Foster* Court justified this increased usurpation by noting that there are two lines of cases concerning pre-enactment challenges, and, announcing that it – the *Foster* Court – had decided to follow the more recent trend.[26]

The first part of that sentence is true. There are two lines of pre-enactment challenge cases:

1. Those that were decided correctly; and,

2. Those that weren't.

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[24] *Foster v. Clark*, 309 Or 464, 790 P2d 1 (1990).

[25] In *OEA v. Roberts* – a 1986 opinion – this Court announced that the Secretary of State could review the text of proposed initiatives to ensure compliance with the "single subject" requirement. A more detailed discussion of *OEA* is attached as Exhibit A.

[26] *Foster*, 309 Or at 470-71.

The *Foster* Court cited so many cases that refuting them would take pages. Instead, *Amicus* reacts to this single excerpt:

> "* * * a court may inquire into whether a measure is "municipal legislation,' ***because that qualifying language is used in the <u>Constitution</u> itself.***[27] (paragraphs, capitals & emphasis mine).

Article IV, section 1, also ***expressly*** limits the Legislative Assembly to exercising only "legislative power." Does this mean that the courts can take pre-enactment jurisdiction to ensure that the Legislative Assembly doesn't attempt administrative action?

A ***Constitution*** – and, all its amendments – is to be read as a single document.[28]

Oregon ***Constitution*** Article IV, § 18, requires that bills raising revenue "originate in the House of Representatives." Article IV, § 19, prescribes how and when "bills" will be voted upon.

A bill is to an act what a proposed initiative is to an approved ballot measure – a necessary precursor to legislative action.

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[27] *Foster*, 309 Or at 471.

[28] *Coleman v. City of La Grande*, 73 Or 521, 525, 144 P 468 (1914).

Do the explicit constitutional references just set out give Courts the implied authority to ignore the Separation of Powers clause, and, muck about in the Legislative Assembly's business to ensure that the lawmakers abide by both these requirements from the start?

To quote Chief Justice McBride:

"Surely not."[29]

O. Foster v. Clark has been all but Discarded

1. Beal v. City of Gresham

In *Beal v. City of Gresham,*[30] then-Judge Kistler wrote for a 3-judge panel facing a party trying to make lemonade out of the lemons of *Foster.*

Given his inferior position, Judge Kistler had no authority to sort out the pre-enactment mess that confronted him.

Besides, the question presented in *Beal* was ***not*** whether a pre-enactment challenge could be brought, ***but***, whether a challenge to the constitutionality of an ordinance adopted by initiative ***had*** to be brought pre-enactment.

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[29] *Schubel*, 60 Or 503, 517 (McBride, J., concurring), *cited in, Johnson v. City of Astoria*, 227 Or 585, 593, 363 P2d 571 (1961).

[30] *Beal v. City of Gresham*, 166 OrApp 528, 998 P2d 237 (2000).

To answer this question, Judge Kistler restated the well-rehearsed notion that a challenge to the constitutionality of a city ordinance can be brought at any time after its enactment.[31] This, no matter who enacts it.

2. Meyer v. Bradbury – Court of Appeals

In *Meyer v. Bradbury*,[32] Judge Rosenblum relied heavily on the teachings of *Foster v. Clark* (*supra,* at 12), and a different 3-judge panel took pre-enactment jurisdiction, and, ordered the Secretary not to place an otherwise valid initiative measure on the ballot.

3. Meyer v. Bradbury – This Court

In its version of *Meyer v. Bradbury*,[33] this Court exercised pre-enactment jurisdiction and reversed the Court of Appeals, citing *Straw ex rel. Carson*, the masterful 1928 case detailed above. (*Supra*, at 5).

With all due respect, the metaphysically absurd combination of taking pre-enactment jurisdiction ***and*** taking guidance from *State ex rel. Carson* illustrates just what a constitutional mess initiative law has become.

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[31] *Beal,* 168 OrApp at 533-36.

[32] *Meyer v. Bradbury*, 205 OrApp 297, 134 P3d 1005 (2006).

[33] *Meyer v. Bradbury*, 341 Or 288, 142 P3d 1031 (2006).

Relator, once more, quotes from *State ex rel. Carson.*

> "* * * neither the executive department * * * nor the judicial department has authority to say ***to either of the legislative branches***:
>
> "'The law you are proposing to enact is unconstitutional and * * * you cannot determine for yourself whether the same shall be enacted into law or not.'"[34] (emphasis & paragraphs mine).

While the *Meyer* Court didn't block the election, it apparently thought it had that authority.

P. U.S. Parliaments Routinely Debate & Enact Unconstitutional Acts

As then Judge Landau taught in 1994:

> "* * *. Both state and federal constitutions contain numerous provisions that prohibit legislative bodies from passing certain kinds of laws.
>
> "The courts have never held that those legislative bodies may be enjoined from voting on the prohibited laws
>
> "To the contrary, ***the courts consistently have held that such * * * prohibitions establish only that the prohibited legislation, if approved, is invalid.*** (cites omitted)."[35] (paragraphs & emphasis mine).

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[34] *State ex rel. Carson*, 126 Or at 649.

[35] *Boytano v. Fritz*, 131 OrApp 466, 473, 886 P2d 31 (1994), *withdrawing former opinion and affirming trial court.*

These words come from *Boytano v. Fritz,* a case underlaid by a 1993 statute which prohibited local laws protecting "any citizen or group of citizens on account of sexual orientation."[36]

In an *Amicus* brief, then Asst. Attorney General Kistler wrote:

> "* * *. The legislature understood that HB 3500 would not prohibit local initiative measures from going forward; it would instead preempt any local laws that conflicted with it.
>
> "***A contrary interpretation would run afoul of the Oregon Constitution***. * * *."[37] (paragraphs & emphasis mine).

Q. The "Administrative" Label Threatens to Neutralize the Referendum

Amicus Wasson agrees with *Amicus* Oregon Progressive Party that the "legislative/administrative" distinction has become the "go to" attack for local governments.[38] For that reason – and, in case this Court decides to address the substance of the "administrative/legislative" distinction – *Amicus* Wasson offers these thoughts as to the substance of that distinction.

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[36] In *Romer v. Evans*, 517 US 620, 116 SCt 1620, 1628, 134 LEd2d 855 (1996), the U.S. Supreme Court struck an initiated clause of the Colorado ***Constitution*** prohibiting the same thing.

[37] *Boytano v. Fritz*, 131 OrApp 466, 886 P2d 31 (1994), *Brief of Amicus Curiae Secretary of State,* at 2.

[38] Brief, *Amicus Curiae,* Oregon Progressive Party, at 2.

1. An action is ***legislative*** if a court would not have ordered the governing board to take the action.

2. If the court would not have ordered the governing body to take the action, it should not block a subsequent referendum.

This formulation applies even where the local government is making legislative decisions pursuant to statutory delegation.[39]

That there is a clear and present danger to the local petition power is shown by reviewing *Jack Gray Transport, Inc. v. Ervin*,[40] a 1992 case.

These facts come from Appellate's opening brief at 2-3.

* The Metro Council sent out a Request for Bids to transport Metro's garbage to the big hole east of the mountains for disposal;

* The Council than accepted a 20 year, $ 208-million bid from Jack Gray Trucking to haul the garbage along I-84;

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[39] *Cf, Inglin v. Hoppin*, 105 P 582, 583 (1909):

> "* * * where the legislature instructs the * * * doing of an act to some one or another of its agents or mandatories, this act takes on the attributes of legislation and becomes legislative ***in the sense that its due performance may not be controlled by the courts*** * * *." (emphasis mine).

[40] *Jack Gray Transport, Inc. v. Ervin*, 113 OrApp 742, 833 P2d 1349 (1992).

* Interested citizens collected what they believed to be sufficient signatures to refer the ordinance accepting Jack Gray's bid;[41] and,

* The Multnomah County Circuit Court – unconstitutionally exercising pre-enactment jurisdiction – blocked the referral.

Think about that!

Prior to accepting Jack Gray's bid, Metro had no obligation to anyone. More importantly, it had no obligation to become obligated to anyone.[42]

Once it accepted Jack Gray's bid, Metro was obligated to spend $ 208 million over 20 years.[43]

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[41] This portion of the *Jack Gray* appeal is not relevant to this discussion.

[42] *See, State ex rel. MacColl v. Roberts*, 309 Or 225, 228, 785 P2d 358 (1990) (Fadeley, J, dissenting).

[43] In 2008, the Ohio Supreme Court (*Upper Arlington v. Franklin Cty. Bd. of Elections,* 895 NE2d 177 (2008), cited *Jack Gray* as support for the blanket statement that an ***initiative*** – as opposed to a ***referendum*** – could not be used to cancel a "district's award of contract for hauling solid waste * * *."

This just isn't true.

Municipal corporations are subject to the same rules of contract law as any other party – 63 *C.J.S. Municipal Corporations*, section 749. *See, also, Public Market Co. v. Portland*, 171 Or 522, 590, 130 P2d 624 (1943) (Rule that if parties put it beyond their reach to perform, their liability at once accrues, is applicable to the conduct of municipalities) – and, have no special duty to refrain from breaching contractual obligations.

If this is not 'municipal legislation' then "it would seem that the phrase has dropped into desuetude in Oregon."[44]

Argument

Stripped of its legal trappings, what's happened here is that the County made the choice to dedicate part of its revenue stream to support a Convention Center Hotel.

The county had every right to make this policy choice.

But, to allow the county to recast this decision as some house-keeping task beyond the reach of the referendum runs counter to the essence of citizen government.

Moreover, the county is arguing that by amending the county code – something the Commission can do at its whim – the county has deprived its citizens of petition rights found in the Oregon ***Constitution***.

That's the real kick in the populist gut, here

While the two governments are arguing that the people don't have the right to veto this decision, barring a contrary contractual obligation, either government would be free to do so at any time.

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[44] *Appellant's Brief*, at 16, *Joplin v. Ten Brook*, 124 Or 36, 263 P 893 (1928).

In a Home Rule county, the only Commission judgments that should be immune from cancellation by referendum are those that are mandated by the county charter, or, the state ***Constitution***.

(And, that immunity should not be the topic of a legal case until after the referendum is approved).

For instance, if Multnomah's charter ***instructed*** the Commission to improve the roads between Portland and Gresham when the population of Gresham reached a certain level, a resolution letting the contract could well be an administrative act.

If the charter merely ***authorized*** such street improvements, ordering the repairs would clearly be a legislative act, a fact that drives another nail in the coffin of *Foster v. Clark.* (*Supra* at 12).

The four incarnations of the ultimate veto:

1. ***Proposed Referendum*** - text submitted to the relevant bureaucrat;
2. ***Referendum Petition*** – text certified for circulation;
3. ***Ballot Measure*** - petition supported by sufficient signatures; and,
4. ***Cancelled Ordinance*** - an approved ballot measure.

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Given the Separation of Powers clause, the "legislative/administrative" distinction only matters in the fourth manifestation.

Prior to that, the petition process is a refinement of the federal right to petition, worthy of 1st Amendment protection.[45]

Statutes which burden 1st Amendment rights – even if they escape strict scrutiny – must be "necessary."[46]

Since Oregon Courts can review any measure if and when it becomes law, pre-enactment review is inherently unnecessary.[47]

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[45] *Meyer v. Grant*, 486 US 414, 108 SCt 1886, 1892, 100 LEd2d 425 (1988).

Justice Fadeley relied on *Meyer v. Grant* in part of a 1993 concurrence – *Lloyd Corporation v. Whiffen*, 315 Or 500, 523, 849 P2d 446 (1993) (Fadeley, J., concurring).

[46] *Burdick v. Takushi*, 504 US 428, 112 SCt 2059, 2063, 119 LEd2d 245 (1992).

Accord, Tashjian v. Republican Party of Connecticut, 479 US 208, 107 SCt 544, 547-48, 93 LEd2d 514 (1986); *Anderson v. Celebrezze*, 460 US 780, 103 SCt 1564, 1572, 75 LEd2d 547 (1983).

[47] *See, Beal v. City of Gresham,* 168 OrApp 528, 535, 998 P2d 237 (2000).

Conclusion

Consider the answers given over the years to this simple question:

Despite the Separation of Powers clause, can the Court conduct pre-enactment review of the text of petitions before such petitions are approved at the polls?

1. 1912 - *Schubel v. Olcott,* 50 Or 503 ..... Maybe
2. 1928 - *State ex rel. Carson v. Kozer,* 126 Or 641, 646-47 ..... No
3. 1931 - *Monahan v. Funk*, 137 Or 580 ..... Yes
4. 1932 - *Whitbeck v. Funk*, 140 Or 70 ..... Yes
5. 1944 - *Tillamook P.U.D. v. Coates,* 174 Or 476 ..... Yes
6. 1950 - *State ex rel. v. Newbry,* 189 Or 691, 697 ..... No
7. 1958 - *Unlimited Progress v. Portland,* 213 Or 193, 195 ..... No
8. 1961 - *Johnson v. City of Astoria*, 227 Or 585, 591-92 ..... No
9. 1964 - *Holmes v. Appling*, 347 Or 546 ..... Yes
10. 1970 - *Oregon AFL-CIO v. Weldon*, 256 Or 307, 312 ..... No
11. 1972 - *Yamhill County v. Dauenhaur*, 261 Or 154 ..... Yes
12. 1973 - *State v. Campbell/Campf/Collins,* 265 Or 82, 89-90 ..... No
13. 1978 - *McGinnis v. Child*, 284 Or 337, 339 ..... No
14. 1984 - *Oregon Aqua-Foods v. Paulus*, 296 Or 469, 472 ftn 3 ..... No
15. 1986 - *OEA v. Roberts*, 301 Or 228, 235 ..... Yes

16. 1986 - *Ellis v. Roberts*, 302 Or 6, 13 ..... Yes

17. 1990 - *Foster v. Clark*, 309 Or 464, 470 ..... Yes

The fact that this Court has had such difficulty in divining a judicial analysis that yields a consistent conclusion supports the notion that Oregon's system of Direct Democracy needs structural changes.

Such is hardly surprising.

The Initiative & Referendum – which have never been substantively rewritten – were designed to allow a small group of activists to harass, stymie and control the elected government.

The I & R creates two (2) lawmaking bodies, but, doesn't require them to work together. The people can unilaterally – and, permanently – thwart the legislature for any reason, or, no reason at all.

So, rich reactionaries with simplistic answers to complex questions hassle the legislature by buying constitutional amendments at 50 per-cent-plus-one elections.

The legislature responds by passing laws it has no authority to pass making it harder to use the initiative.[48]

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[48] As Sen. Morse used to teach: "***Allow me to control your procedural rights, and, I'll control your substantive rights.***"

In the process, the ***Constitution*** cries just a little bit more.

Our only option is to start all over and use Oregon's ample ***political*** machinery to rewrite and update the Initiative Amendments.

DONE & DATED this 2nd day of December, 2015.

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CERTIFICATE OF COMPLIANCE WITH COMPLIANCE LENGTH LIMITATIONS AND TYPE/SIZE REQUIREMENTS

I certify that the foregoing brief of *Amicus Curiae* Greg Wasson complies with the word-count limitations set out in the ORAP. The word count of this brief for elements of text described in ORAP 5.05(2)(a) is **4,853 words** as determined by the word-counting function of Wordperfect 5.1.

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

Greg Wasson, *Pro Se*

A. OEA v. Roberts – Pre-Enactment "Single Subject" Review

The evolution of pre-enactment review for compliance with the "single subject" requirement dates back to 1967, when the Legislative Assembly referred a ballot measure that combined and rewrote the petition language then found in Article IV, § 1 and Article IV, § 1a.

Promised the lawmakers:

> "These repealed sections are purely 'clean-up' of the wording and in no way do they diminish the power of the people to initiate or refer measures."[1]

In *Oregon AFL-CIO v. Weldon*, the 1970 Supreme Court took the lawmakers at their word, writing that the 1968 Amendment didn't change the constitutional protection provided for the Popular Legislature.[2]

> "We have repeatedly held that the courts are without power to determine the validity of a proposed law or ordinance before its enactment. (cites omitted) * * *.
>
> "* * * ***The other branches of government cannot interfere with the people's exercise of the legislative power*** so long as the procedures prescribed by statute are complied with." (emphasis mine).

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[1] *Official Voters' Pamphlet, May 1968 (Marion County)*, at 8.

[2] *Oregon AFL-CIO v. Weldon*, 256 Or 307, 312-13, 473 P2d 664 (1970).

Almost 20 years after the 1968 Amendment, this Court announced that, after the 1968 changes, the Secretary of State – a mere ***administrative*** officer – was now required to perform – pre-enactment – a ***judicial*** function and decide whether the text of a proposed initiative contains multiple subjects.[3]

The *OEA* Court supported its decision this way:

1. The post-1968 language – unlike the original two initiative clauses – requires that a "***proposed*** law" deal with one subject only;[4]

2. This requirement would be meaningless unless the Secretary of State is given the power to prevent circulation of a certified text containing multiple subjects; and,

3. Ergo, the Secretary could now refuse to certify proposed petitions.

This, even though the 1967 Legislature promised that the 1968 Amendment would, ***in no way***, diminish the power of the people.[5]

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[3] *OEA v. Roberts*, 301 Or at 231-32.

[4] *Id.*

[5] The pre-*OEA* law:

Elections bureaucrats – part of the executive branch – perform "***no judicial function***" and have "***no discretion.***" *State ex rel. v. Snell*, 168 Or 153, 163, 121 P2d 930 (1942), *quoting, Kellaher v. Kozer*, 112 Or 149, 158, 228 P 1086 (1924).

The "reasoning" of *OEA v. Roberts* doesn't survive even casual scrutiny.

First, a bill is to an act what a proposed initiative is to an approved ballot measure – a necessary precursor to legislative action.

Oregon ***Constitution*** Article IV, § 18, requires that bills raising revenue "originate in the House of Representatives." Article IV, § 19, prescribes how and when "bills" will be voted upon.

Do the explicit constitutional references mean that the Court has the implied authority to muck about in the Legislative Assembly's business to ensure that the legislature abides by both these requirements from the start?

Simly asking the question answers it.