

FILED: October 19, 2006

IN THE SUPREME COURT OF THE STATE OF OREGON

LINCOLN INTERAGENCY NARCOTICS
TEAM (LINT), a law enforcement
agency created by intergovernmental
agreement,

Respondent on Review,

and

LINCOLN COUNTY, a political
subdivision of the State of Oregon,

Plaintiff,

and

ANIMAL LEGAL DEFENSE FUND,
OREGON HUMANE SOCIETY,
HUMANE SOCIETY OF THE
WILLAMETTE VALLEY, STEPHAN
K. OTTO, SHARON M. HARMON
and WAYNE S. GEIGER,

Respondents on Review,

v.

JOHN KITZHABER, M.D., Governor
of the State of Oregon, BILL
BRADBURY, Oregon Secretary of State,
and the STATE OF OREGON,

Petitioners on Review,

and

RAY HESLEP and SANDRA ADAMSON,

Petitioners on Review.

(CC 00C-19878; CA A115401;
SC S50900 (control), S50904)
(Consolidated for Argument and Opinion)

On review from the Court of Appeals.*

Argued and submitted November 4, 2004.

Philip Schradle, Special Counsel to the Attorney General, Salem, argued the cause and filed the briefs for petitioners on review John Kitzhaber, M.D., Bill Bradbury and State of Oregon. With him on the briefs were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

Eli D. Stutsman, Portland, argued the cause and filed the brief for petitioners on review Ray Heslep and Sandra Adamson.

Robert E. Bovett, Newport, argued the cause and filed the brief for respondent on review LINT.

B. Carlton Grew, Portland, filed the brief for respondents on review Animal Legal Defense Fund, Oregon Humane Society, Humane Society of the Willamette Valley, Stephan K. Otto, Sharon M. Harmon, and Wayne S. Geiger.

Before Carson, Chief Justice,** and Gillette, Durham, De Muniz,*** Balmer, and Kistler, Justices, and Riggs, Justice pro tempore.****

GILLETTE, J.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is affirmed.

Durham, J., specially concurred and filed an opinion.

Kistler, J., dissented and filed an opinion in which De Muniz, C.J., and Balmer, J., joined.

*Appeal from Marion County Circuit Court,
Pamela L. Abernethy, Judge.
188 Or App 526, 72 P3d 967 (2003).

**Chief Justice when case argued.

***Chief Justice when decision rendered.

****The Honorable R. William Riggs, Senior Judge, sitting by designation. Walters, J., did not participate in the consideration or decision of this case.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Petitioners on Review

[] No costs allowed.

[X] Costs allowed, payable by: Respondent on Review LINT

[] Costs allowed, to abide the outcome on remand, payable by:

1 GILLETTE, J.

2 The issue in this case is whether Ballot Measure 3
3 (2000) (Measure 3), a constitutional amendment that the people
4 adopted pursuant to the initiative process, actually contains two
5 or more constitutional amendments in violation of Article XVII,
6 section 1, of the Oregon Constitution.¹ A divided panel of the
7 Court of Appeals held that the measure does contain two or more
8 amendments because it makes at least two substantive changes to
9 the constitution that are not closely related. Lincoln
10 Interagency Narcotics Team v. Kitzhaber, 188 Or 526, 72 P3d 967
11 (2003). For the reasons that follow, we disagree with that
12 conclusion and therefore reverse the decision of the Court of
13 Appeals.

14 The voters adopted Measure 3 at the November 7, 2000,
15 general election. The measure adds a new section dealing with
16 forfeitures to Article XV of the Oregon Constitution. Measure 3
17 provides:

18 "Article XV of the Constitution of the State of
19 Oregon is amended by a vote of the People to include
20 the following new section:

21 "Section 10. The Oregon Property Protection Act
22 of 2000. (1) This section may be known and shall be

1 ¹ Article XVII, section 1, of the Oregon Constitution,
2 provides:

3 "When two or more amendments shall be submitted
4 * * * to the voters of this state, they shall be
5 submitted so that each amendment shall be voted on
6 separately."

1 cited as the 'Oregon Property Protection Act of 2000.'

2 "(2) Statement of principles. The People, in the
3 exercise of the power reserved to them under the
4 Constitution of the State of Oregon, declare that:

5 "(a) A basic tenet of a democratic society is that
6 a person is presumed innocent and should not be
7 punished until proven guilty;

8 "(b) The property of a person should not be
9 forfeited in a forfeiture proceeding by government
10 unless and until that person is convicted of a crime
11 involving the property;

12 "(c) The value of property forfeited should be
13 proportional to the specific conduct for which the
14 owner of the property has been convicted; and

15 "(d) Proceeds from forfeited property should be
16 used for treatment of drug abuse unless otherwise
17 specified by law for another purpose.

18 "(3) Forfeitures prohibited without conviction.
19 No judgment of forfeiture of property in a civil
20 forfeiture proceeding by the State or any of its
21 political subdivisions shall be allowed or entered
22 until and unless the owner of the property is convicted
23 of a crime in Oregon or another jurisdiction and the
24 property is found by clear and convincing evidence to
25 have been instrumental in committing or facilitating
26 the crime or to be proceeds of that crime. The value
27 of the property forfeited under the provisions of this
28 subsection shall not be excessive and shall be
29 substantially proportional to the specific conduct for
30 which the owner of the property has been convicted.
31 For purposes of this section, 'property' means any
32 interest in anything of value, including the whole of
33 any lot or tract of land and tangible and intangible
34 personal property, including currency, instruments or
35 securities or any other kind of privilege, interest,
36 claim or right whether due or to become due. Nothing
37 in this section shall prohibit a person from
38 voluntarily giving a judgment of forfeiture.

39 "(4) Protection of innocent property owners. In a
40 civil forfeiture proceeding if a financial institution
41 claiming an interest in the property demonstrates that
42 it holds an interest, its interest shall not be subject

1 to forfeiture.

2 "In a civil forfeiture proceeding if a person
3 claiming an interest in the property, other than a
4 financial institution or a defendant who has been
5 charged with or convicted of a crime involving that
6 property, demonstrates that the person has an interest
7 in the property, that person's interest shall not be
8 subject to forfeiture unless:

9 "(a) The forfeiting agency proves by clear and
10 convincing evidence that the person took the property
11 or the interest with the intent to defeat the
12 forfeiture; or

13 "(b) A conviction under subsection (3) is later
14 obtained against the person.

15 "(5) Exception for unclaimed property and
16 contraband. Notwithstanding the provisions of
17 subsection (3) of this section, if, following notice to
18 all persons known to have an interest or who may have
19 an interest, no person claims an interest in the seized
20 property or if the property is contraband, a judgment
21 of forfeiture may be allowed and entered without a
22 criminal conviction. For purposes of this subsection,
23 'contraband' means personal property, articles or
24 things, including but not limited to controlled
25 substances or drug paraphernalia, that a person is
26 prohibited by Oregon statute or local ordinance from
27 producing, obtaining or possessing.

28 "(6) Law enforcement seizures unaffected. Nothing
29 in this section shall be construed to affect the
30 temporary seizure of property for evidentiary,
31 forfeiture, or protective purposes, or to alter the
32 power of the Governor to remit fines or forfeitures
33 under Article V, Section 14, of this Constitution.

34 "(7) Disposition of property and proceeds to drug
35 treatment. Any sale of forfeited property shall be
36 conducted in a commercially reasonable manner.
37 Property or proceeds forfeited under subsections (3),
38 (5), or (8) of this section shall not be used for law
39 enforcement purposes but shall be distributed or
40 applied in the following order:

41 "(a) To the satisfaction of any foreclosed liens,
42 security interests and contracts in the order of their

1 priority;

2 "(b) To the State or any of its political
3 subdivisions for actual and reasonable expenses related
4 to the costs of the forfeiture proceeding, including
5 attorney fees, storage, maintenance, management, and
6 disposition of the property incurred in connection with
7 the sale of any forfeited property in an amount not to
8 exceed twenty-five percent of the total proceeds in any
9 single forfeiture;

10 "(c) To the State or any of its political
11 subdivisions to be used exclusively for drug treatment,
12 unless another disposition is specially provided by
13 law.

14 "(8) State and federal sharing. The State of
15 Oregon or any of its political subdivisions shall take
16 all necessary steps to obtain shared property or
17 proceeds from the United States Department of Justice
18 resulting from a forfeiture. Any property or proceeds
19 received from the United States Department of Justice
20 by the State of Oregon or any of its political
21 subdivisions shall be applied as provided in
22 subsection (7) of this section.

23 "(9) Restrictions on State transfers. Neither the
24 State of Oregon, its political subdivisions, nor any
25 forfeiting agency shall transfer forfeiture proceedings
26 to the federal government unless a state court has
27 affirmatively found that:

28 "(a) The activity giving rise to the forfeiture is
29 interstate in nature and sufficiently complex to
30 justify the transfer;

31 "(b) The seized property may only be forfeited
32 under federal law; or

33 "(c) Pursuing forfeiture under state law would
34 unduly burden the state forfeiting agencies.

35 "(10) Penalty for violations. Any person acting
36 under color of law, official title or position who
37 takes any action intending to conceal, transfer,
38 withhold, retain, divert or otherwise prevent any
39 proceeds, conveyances, real property, or any things of
40 value forfeited under the law of this State or the
41 United States from being applied, deposited or used in

1 accordance with subsections (7), (8) or (9) of this
2 section shall be subject to a civil penalty in an
3 amount treble the value of the forfeited property
4 concealed, transferred, withheld, retained or diverted.
5 Nothing in this subsection shall be construed to impair
6 judicial immunity if otherwise applicable.

7 "(11) Reporting requirement. All forfeiting
8 agencies shall report the nature and disposition of all
9 property and proceeds seized for forfeiture or
10 forfeited to a State asset forfeiture oversight
11 committee that is independent of any forfeiting agency.
12 The asset forfeiture oversight committee shall generate
13 and make available to the public an annual report of
14 the information collected. The asset forfeiture
15 oversight committee shall also make recommendations to
16 ensure that asset forfeiture proceedings are handled in
17 a manner that is fair to innocent property owners and
18 interest holders.

19 "(12) Severability. If any part of this section
20 or its application to any person or circumstance is
21 held to be invalid for any reason, then the remaining
22 parts or applications to any persons or circumstances
23 shall not be affected but shall remain in full force
24 and effect."

25 (Emphasis in original).

26 Measure 3 follows the unfortunate practice, sometimes
27 questioned, of inserting provisions in the state constitution
28 that have more in common, both in appearance and in substance,
29 with legislation than with constitutional amendments. See Olsen
30 v. State ex rel Johnson, 276 Or 9, 19, 554 P2d 139 (1976)
31 (recognizing practice). The measure begins, for example, by
32 stating that it "may be known and shall be cited as the 'Oregon
33 Property Protection Act of 2000'" -- a designation more typically

1 associated with legislation than with constitutional amendments.²
2 See Christ/Tauman v. Myers, 339 Or 494, 499, 123 P3d 271 (2005)
3 (explaining that "[a]cts are different from constitutional
4 amendments"). The fact that Measure 3 adds almost two pages of
5 provisions dealing with forfeitures to a single section of the
6 Oregon Constitution is consistent with that designation. The
7 measure imposes various procedural and substantive limitations on
8 forfeiture proceedings, establishes priorities for and
9 limitations on the distribution of forfeiture proceeds (including
10 proceeds from federal forfeiture proceedings that are available
11 to the state), creates a state agency to monitor and report on
12 forfeitures, and provides a civil penalty for violating its
13 provisions.

14 After the people adopted Measure 3, plaintiffs Lincoln
15 Interagency Narcotics Team (LINT) and Lincoln County filed a
16 declaratory judgment action against the Governor, the Secretary
17 of State, and the State of Oregon (collectively the "state"),
18 seeking a declaration that the measure contained two or more
19 amendments in violation of Article XVII, section 1.
20 Alternatively, plaintiffs sought a declaration that Measure 3
21 embraced more than one subject, in violation of Article IV,

1 ² And, that provision notwithstanding, we shall continue
2 to refer to the measure as "Measure 3" throughout this opinion.

1 section 1(2)(d), of the Oregon Constitution.³ The chief
2 petitioners of Measure 3 (interveners) intervened in defense of
3 the measure.⁴ On cross-motions for summary judgment, the trial
4 court ruled that Measure 3 contained only one amendment to the
5 constitution and embraced only a single subject, and entered
6 judgment accordingly.

7 Plaintiff LINT appealed, and a divided panel of the
8 Court of Appeals reversed. The majority concluded that, under
9 the analysis in Armatta v. Kitzhaber, 327 Or 250, 959 P2d 49
10 (1998), subsections (3) and (7) of Measure 3 made two substantive
11 changes to the constitution that were not closely related.
12 Lincoln Interagency Narcotics Team, 188 Or App at 538-43, 546-48.

13 Judge Armstrong dissented. In his view, the majority's
14 decision failed to give effect to this court's decisions in Baum
15 v. Newbry et al., 200 Or 576, 267 P2d 220 (1954), and Hartung v.
16 Bradbury, 332 Or 570, 33 P3d 972 (2001). The dissent reasoned
17 that the changes that Measure 3 made to the Oregon Constitution
18 were as closely related as the changes that the court upheld in

1 ³ Article IV, section 1(2)(d), of the Oregon
2 Constitution, provides, in part:

3 " * * * A proposed * * * amendment to the
4 Constitution shall embrace one subject only and matters
5 properly connected therewith."

1 ⁴ Various organizations and individuals also intervened
2 as plaintiffs. Because their arguments essentially track
3 plaintiffs' arguments, we do not refer to those interveners
4 separately.

1 Baum and that they were the type of changes that "would commonly
2 be placed in a single section of the constitution." Id. at 570
3 (Armstrong, J., dissenting). It followed, the dissent concluded,
4 that Measure 3 did not contain two or more amendments to the
5 constitution. Id. We allowed the state's petition for review to
6 consider this recurring issue.

7 As noted, Article XVII, section 1, of the Oregon
8 Constitution provides that, "[w]hen two or more amendments shall
9 be submitted in the manner aforesaid to the voters of this state
10 at the same election, they shall be submitted so that each
11 amendment shall be voted on separately." In Armatta, this court
12 undertook, for the first time, a comprehensive examination of the
13 meaning of that separate-vote requirement.⁵ Following the
14 methodology in Priest v. Pearce, 314 Or 411, 840 P2d 65 (1992),
15 the court considered the wording of Article XVII, section 1, its
16 history, and the cases interpreting it. See Armatta, 327 Or at
17 256-77 (undertaking that analysis). The court drew three
18 conclusions from those sources. First, looking primarily to the
19 debates on the Indiana Constitution, the court concluded that the
20 word "amendment" refers to a specific or particular change to the
21 constitution. Id. at 265-66; see Lehman v. Bradbury, 333 Or 231,

1 ⁵ Before Armatta, this court had applied the separate-
2 vote requirement without considering either the wording of the
3 requirement or its history. See Baum, 200 Or at 580-81 (stating,
4 without explanation, that a 1952 constitutional amendment "did
5 not submit 'two or more amendments' to the voters" in violation
6 of Article XVII, section 1).

1 239, 37 P3d 989 (2002) (drawing that conclusion from Armatta).
2 Citing historical examples, the court observed that "a single
3 'amendment,' such as one concerning the establishment of a state
4 bank or the rights of married women, was intended to encompass a
5 particular constitutional change." Armatta, 327 Or at 265-66.

6 Second, the court concluded that the separate-vote
7 requirement for initiated laws and constitutional amendments
8 imposes a more restrictive test than the single-subject
9 requirement set out in Article IV, section 1(2)(d), of the Oregon
10 Constitution. Id. at 276. The court noted that the single-
11 subject requirement focuses on the content of a proposed law or
12 amendment, while the separate-vote requirement focuses on the
13 "potential change to the existing constitution" and the degree to
14 which "a proposed amendment would modify the existing
15 constitution." Id. (emphases in original). More significantly,
16 the court explained that

17 "the separate-vote requirement applies to only
18 constitutional amendments, while the single-subject
19 requirement applies equally to constitutional
20 amendments and legislation. It follows, we believe,
21 that the separate-vote requirement of Article XVII,
22 section 1, imposes a narrower requirement than does the
23 single-subject requirement of Article IV, section
24 1(2)(d). Such a reading of the separate-vote
25 requirement makes sense, because the act of amending
26 the constitution is significantly different from
27 enacting or amending legislation. * * * Indeed, because
28 the separate-vote requirement is concerned only with a
29 change to the fundamental law, the notion that the
30 people should be able to vote separately upon each
31 separate amendment should come as no surprise. In
32 short, the requirement serves as a safeguard that is

1 fundamental to the concept of a constitution."

2 Id. (emphases in original; citation omitted).

3 Third (and most important to the task we face in this
4 case), the court recognized that, although the separate-vote
5 requirement is more restrictive than the single-subject
6 requirement, it is not inflexible. The court recognized that two
7 or more changes will not violate the separate-vote requirement if
8 the relationship between the two changes is a close one. Id. at
9 277. As the court phrased the test, the question whether a
10 measure contains two or more amendments in violation of Article
11 XVII, section 1, turns on whether the measure, if adopted, "would
12 make two or more changes to the constitution that are substantive
13 and that are not closely related." Id. Or, as this court
14 recently summarized the Armatta methodology:

15 "To implement th[e] * * * requirement of [Article XVII,
16 section 1], we do not search simply for a unifying
17 thread to create a common theme, thought, or purpose
18 from a melange of proposed constitutional changes.
19 Instead, we inquire whether, if adopted, a proposal
20 would make two or more changes to the constitution that
21 are substantive and are not closely related. If so,
22 the proposal violates the separate-vote requirement of
23 Article XVII, section 1, because it would prevent
24 voters from expressing their opinions as to each
25 proposed change separately."

26 Meyer v. Bradbury, 341 Or 288, 296-97, ___ P3d ___ (2006).

27 In Armatta, the court held that the measure at issue
28 there contained multiple substantive changes to the constitution
29 and that those changes were not closely related. More

1 specifically, the court identified two pairs of changes to the
2 constitution that were not closely related:

3 "For example, the right of all people to be free from
4 unreasonable searches and seizures under Article I,
5 section 9, has virtually nothing to do with the right
6 of the criminally accused to have a unanimous jury
7 verdict rendered in a murder case under Article I,
8 section 11. The two provisions involve separate
9 constitutional rights, granted to different groups of
10 persons. Similarly, the right of the criminally
11 accused to bail by sufficient sureties under Article I,
12 section 14, bears no relation to legislation concerning
13 the qualifications of jurors in criminal cases under
14 Article VII (Amended), section 5(1)(a)."

15 Id. at 283-84.

16 In deciding whether the changes in Armatta were closely
17 related, the court "considered both the relationship among the
18 constitutional provisions affected by [the measure] and the
19 relationship of the constitutional changes that were made in
20 those provisions to one another." See Lehman, 333 Or at 245
21 (explaining Armatta). In some cases, however, the court has
22 looked solely to the relationship between two or more changes
23 that a measure effects in holding that the changes were not
24 closely related. See Swett v. Bradbury, 333 Or 597, 608, 43 P3d
25 1094 (2002) (employing that methodology). But, beyond
26 identifying those two methodologies for testing whether
27 constitutional changes are closely related, the court has
28 declined one party's proposal to reformulate the "closely
29 related" standard announced in Armatta. See Lehman, 333 Or at
30 242 (explaining that party's proposed reformulation of "closely

1 related" test would not advance inquiry). Indeed, this court has
2 observed recently that, "if this court has written little on the
3 subject, it is because there have been few instances in which the
4 constitutional changes before the court presented a close
5 question on that issue." Meyer, 341 Or at 300.

6 Finally, we add to the foregoing overview of our
7 "separate-vote" jurisprudence the following observation from
8 Swett, which (as will be seen) is particularly applicable here:

9 "Ordinarily, we begin any separate-vote inquiry by
10 identifying the changes, both explicit and implicit,
11 that the ballot measure purports to make to the Oregon
12 Constitution. We then determine if those changes are
13 substantive. If they are, we then determine if those
14 substantive changes are 'closely related.' In Lehman,
15 we described that analytical process this way:

16 " * * * First, we examine the
17 relationship among the constitutional
18 provisions that the measure affects
19 * * *. If the affected provisions of the
20 existing constitution themselves are not
21 related, then it is likely that changes to
22 those provisions will offend the separate-
23 vote requirement. * * * [T]he fact that a
24 proposed amendment asks the people, in one
25 vote, substantively to change multiple
26 provisions of the Oregon Constitution that
27 are not themselves related is one indication
28 that the proposed amendment might violate the
29 separate-vote requirement.

30 "'Next, we must consider the
31 constitutional changes themselves. That is,
32 * * * we must determine whether the changes
33 made to those * * * constitutional provisions
34 are closely related. If they are closely
35 related, the measure under consideration
36 survives scrutiny under Article XVII, section
37 1. If they are not, it does not.'

1 "The foregoing statement from Lehman was
2 descriptive, not prescriptive. That is, it is equally
3 valid analytically to start the inquiry by focusing on
4 the changes themselves. This case illustrates the
5 point. We need not discuss each of the steps described
6 above, because the parties' arguments narrow the focus
7 of our inquiry.* * *

8 Swett, 333 Or at 607 (citations omitted) (quoting Lehman, 333 Or
9 at 246 (ellipses and modifications in original)). As we shall
10 identify, the parties to the present case have, like the parties
11 in Swett, attempted to short-cut the process here by focusing
12 their arguments primarily on the issue whether the multiple
13 changes that Measure 3 effects are "closely related."

14 We turn to the various provisions of Measure 3. The
15 parties focus, as the Court of Appeals did, on two subsections in
16 Measure 3 -- subsection (3) and subsection (7). The parties
17 agree that subsection (3) makes three substantive changes to the
18 Oregon Constitution: (1) it makes a criminal conviction a
19 prerequisite for a civil forfeiture; (2) it requires that proof
20 of the elements necessary to establish forfeiture be by clear and
21 convincing evidence; and (3) it provides that the value of the
22 forfeited property "shall not be excessive and shall be
23 substantially proportional to the specific conduct for which the
24 owner of the property has been convicted." The parties disagree,
25 however, as to whether those three substantive changes are
26 closely related.

27 For the sake of the present argument, we will assume

1 that the foregoing three statements in fact do reflect three
2 separate substantive changes to the Oregon Constitution.
3 However, that assumption does not assist plaintiffs in their
4 claim that Measure 3 violates the separate-votes requirement of
5 Article XVII, section 1. That is so because the identified
6 changes all are "closely related."

7 Our analysis in that regard ordinarily would begin with
8 an examination of the relationship among any existing
9 constitutional provisions that the three identified changes
10 affect to determine if those provisions themselves are closely
11 related. See ___ Or at ___ (slip op at 12) (quoting Swett).
12 However, we find that the three changes are additions to the
13 Oregon Constitution and have no effect on any existing
14 constitutional provision in that document. The first change --
15 making criminal conviction a prerequisite of civil forfeiture --
16 requires no discussion in that regard: Neither party has made
17 any claim that the change relates to any existing provision in
18 the state or federal constitution. As to the second change --
19 requiring forfeitures to be proved by clear and convincing
20 evidence -- there is some suggestion that the change alters
21 constitutional provisions pertaining to standards of proof in
22 criminal and other proceedings. We note, however, that the Due
23 Process Clause of the Fourteenth Amendment to the United State
24 Constitution generally is accepted as the source of the various

1 constitutional standard-of-proof requirements recognized by the
2 courts, see, e.g., In re Winship, 397 US 354, 364, 90 S Ct 1068,
3 25 L Ed 2d 368 (1970) (holding that Due Process Clause requires
4 proof beyond a reasonable doubt in criminal proceeding), and that
5 the Oregon Constitution contains no due process clause or
6 anything comparable to it, State v. Miller, 327 Or 622, 635 n
7 10, 969 P2d 1006 (1998).

8 Finally, we conclude that the third identified change
9 -- the requirement that the value of forfeited property be
10 substantially proportional to the predicate offense -- also is an
11 addition to, and does not affect any existing provision in, the
12 Oregon Constitution. We reject plaintiffs' suggestion that the
13 change affects Article I, section 16, which provides that "all
14 penalties shall be proportional to the offense." Article I,
15 section 16, applies only in criminal proceedings, Oberg v. Honda
16 Motor Co., 316 Or 263, 274-75, 850 P2d 371 (1993), reversed and
17 remanded on different grounds, Honda Motor Co v. Oberg, 512 US
18 415, 114 S Ct 2331, 129 L Ed 2d 336 (1994), while the
19 proportionality requirement at issue speaks to a civil
20 proceeding.

21 Having determined that the three identified changes do
22 not alter or affect different provisions of the existing
23 constitution, we may proceed to consider whether the three
24 changes are themselves closely related. We think that it is

1 clear that the changes are all parts of an effort to define the
2 judicial process for forfeiture in constitutional terms. The
3 first part of subsection (3) describes that judicial process as
4 requiring a predicate conviction to justify commencing the
5 process. The second part sets out the permissible standard of
6 proof in that process. Finally, the third part of subsection (3)
7 provides that the forfeiture process may proceed only to the
8 extent that the forfeiture is proportional to the underlying
9 criminal conviction. Seen in that way, the close, interconnected
10 relationship between the three parts is clear.

11 Plaintiffs also point to subsection (7) of Measure 3.
12 They contend (and, again, we assume for the sake of argument)
13 that that subsection contains two separate substantive changes to
14 the Oregon Constitution: (1) it prohibits using forfeited
15 property and proceeds for "law enforcement purposes"; and (2) it
16 establishes a priority for distributing forfeited property or
17 proceeds. Plaintiffs recognize that neither part has any analog
18 in the Oregon Constitution and, thus, that neither changes any
19 existing provision of the constitution. As before, then, we need
20 not consider whether existing provisions affected by those
21 changes are closely related to one another: We may proceed to
22 the question of whether the changes identified in subsection (7)
23 are themselves closely related.

24 We conclude that the two changes are closely related,

1 if they are separate at all. A brief illustration suffices, in
2 that regard: If one looks at the two parts of subsection (7) in
3 reverse order, one first considers the subsection's direction
4 that forfeiture proceeds be distributed to "the State or any of
5 its political subdivisions to be used exclusively for drug
6 treatment" and then its prohibition on the use of proceeds for
7 "law enforcement purposes." Viewed from that perspective, the
8 latter provision may be seen for what it is -- a limitation on
9 what otherwise would be considered a proper distribution of
10 forfeited money "to the State or any of its political
11 subdivisions to be used exclusively for drug treatment, unless
12 another disposition is specially provided by law." See Meyer,
13 341 Or at 301 (explaining similar relationship). So understood,
14 the two concepts are not separate at all; one merely delimits the
15 other. At the very least, they are "closely related."

16 Finally, we turn to consider whether the changes
17 effected by subsection (3) and the changes effected by subsection
18 (7) are also "closely related to each other" (as before, our
19 determination that those changes do not affect any existing
20 provisions of the Oregon Constitution obviates any need to
21 consider the relationship between existing provisions).
22 Plaintiffs contend that they are not, arguing as follows:
23 Subsection (3) provides increased procedural and substantive
24 protections for property owners to ensure against premature,

1 inaccurate, or excessive forfeitures. Subsection (7), on the
2 other hand, prohibits the executive and legislative branches from
3 using the proceeds of forfeitures for law enforcement purposes
4 and directs how forfeiture revenues shall be used. Plaintiffs
5 argue that the right of property owners to require the state to
6 prove its case by clear and convincing evidence is no more
7 closely related to the prohibition against using forfeiture
8 proceeds for law enforcement purposes than the right of all
9 people to be free from unreasonable searches and seizures, at
10 issue in Armatta, was closely related to the right of the
11 criminally accused to have a unanimous jury. It follows,
12 plaintiffs reason, that, as the court held in Armatta, the
13 changes contained in subsections (3) and (7) of Measure 3 are not
14 closely related and, accordingly, constitute two or more
15 amendments under Article XVII, section 1.

16 Again, we are unpersuaded. Indeed, it seems to us that
17 plaintiffs' analysis works only if one stands as close as
18 possible to each provision and ignores the others. To us, it is
19 perfectly clear that the administrative detail provided in
20 subsection (7) is closely related to the substantive changes made
21 in subsection (3): Not only do the people wish to be assured
22 that forfeitures are reined in, they shall encourage it by
23 removing the carrot which otherwise would tempt the two political
24 branches of government to treat the criminal law as a revenue-

1 raising source. The measure's sponsors included a wealth of
2 detail in the measure, perhaps suspecting darkly that, unless
3 they did, the legislature and the executive somehow would attempt
4 to avoid their policy concern. But we need not agree with that
5 idea, which appears to have motivated the measure's sponsors, in
6 order to resolve plaintiffs' claims.

7 Although the foregoing discussion of subsections (3)
8 and (7) disposes of the subsections at the heart of the
9 disagreement between the parties, we add a further and more
10 general set of observations. Although it has several provisions,
11 Measure 3 itself can be viewed essentially as containing two
12 parts: the first part, encompassing subsections (3) through (6),
13 sets out constitutional protections for property owners by
14 creating a constitutional concept of civil forfeiture proceedings
15 and by imposing a number of procedural protections (and
16 accompanying limitations) in such proceedings); the second part,
17 encompassing subsections (7) through (11), sets out an
18 administrative process for collecting and disbursing funds
19 derived from forfeited property. Both parts add new provisions
20 to the Oregon Constitution; neither changes existing rights or
21 other constitutional provisions. And, as we will discuss, the
22 two parts reasonably can be characterized as containing various
23 provisions that are closely related to each other under the
24 reasoning set out in Armatta.

1 Turning to the "closely related" question, it is
2 undeniable that a relationship exists between the two parts: The
3 administrative funding and disbursal scheme (the second change
4 just identified) has a place in the constitution because of the
5 new civil forfeiture process (the first change), and it concerns
6 the disbursal of funds derived from that process. In our view,
7 that relationship is a stronger one than the relationships (or
8 lack thereof) between the constitutional changes at issue in
9 Swett and Armatta. See Swett, 333 Or at 608-09 (although changes
10 purportedly shared same subject matter of limiting influence of
11 money in elections, change that imposed contribution disclosure
12 requirement was not closely related to change that imposed
13 eligibility requirement on initiative signature-gatherers);
14 Armatta, 327 Or at 283-84 (although disparate changes, including
15 right to unanimous jury verdict in murder trials, search-and-
16 seizure protections, right to bail, and juror qualifications were
17 related in sense that they pertained to rights implicated during
18 criminal investigation or prosecution, that relationship was
19 insufficient to render them closely related for separate-vote
20 purposes).

21 From the foregoing, we think that it also is
22 permissible to conclude that the relationship between the two
23 parts of Measure 3 just discussed is sufficiently "close" to pass
24 muster under Article XVII, section 1. That is, the

1 administrative scheme set out principally in subsections (7) to
2 (11) of Measure 3 bears a close relationship to the civil
3 forfeiture proceeding provisions set out in subsections (3) to
4 (6), because it would have no reason for existence were it not
5 for those provisions. The former (i.e., the administrative
6 scheme and money flowing into and out of it) wholly derives from
7 the latter (i.e., the forfeiture proceeding provisions) and from
8 no other source.

9 For the reasons stated, we hold that Measure 3 does not
10 contravene the "separate-vote" requirement of Article XVII,
11 section 1. The contrary holding of the Court of Appeals was
12 error. It must be reversed.⁶

13 The decision of the Court of Appeals is reversed. The
14 judgment of the trial court is affirmed.

1 ⁶ As noted, plaintiffs also advanced the notion in the
2 Court of Appeals that Measure 3 violated the "single-subject"
3 limitation found in Article IV, section 1(2)(d), of the Oregon
4 Constitution. However, that subsection, which applies to
5 statutory enactments as well as constitutional amendments, is
6 less demanding than the separate-vote requirement of Article
7 XVII, section 1. See Armatta, 327 Or at 276 (so stating). In
8 fact, a constitutional amendment that passes muster under Article
9 XVII, section 1, almost by definition will pass muster under
10 Article IV, section 1(2)(d). See id. at 277 (stating that
11 separate-vote requirement encompasses notion that a single
12 constitutional amendment must contain a single subject). We
13 therefore hold that plaintiffs' arguments under Article IV,
14 section 1(2)(d), also are not well taken. It follows that the
15 case need not be remanded to the Court of Appeals for further
16 proceedings. Instead, we can affirm the judgment of the trial
17 court by this opinion.

1 DURHAM, J., specially concurring.

2 I concur with the decision of the plurality that the
3 Court of Appeals erred in holding that Ballot Measure 3 (2000)
4 was invalid under Article XVII, section 1, of the Oregon
5 Constitution, which provides, in part:

6 "When two or more amendments shall be submitted in
7 the manner aforesaid to the voters of this state at the
8 same election, they shall be so submitted that each
9 amendment shall be voted on separately."

10 However, I do not agree with all the reasoning that the
11 plurality employs to reach its conclusion. I write separately to
12 explain my reasons for agreeing with the plurality's ultimate
13 conclusion.

14 The plurality notes that the question here, i.e.,
15 whether Measure 3 contains two or more amendments to the Oregon
16 Constitution, is a "recurring issue." Lincoln Interagency
17 Narcotics Team v. Kitzhaber, ___ Or ___, ___, ___ P3d ___, (2006)
18 (plurality opinion) (slip op at 8). I agree that Oregon's courts
19 and many litigants continue to struggle with the correct
20 application of Article XVII, section 1. The problem, however,
21 lies at least in part in the difficulty that judges and litigants
22 face in applying this court's case law under that provision.
23 Inconsistent and unexplained conclusions and analytical models
24 based on subjective criteria exacerbate that problem. I discuss
25 below some of those sources of confusion. Although analytical
26 simplicity in this area probably is not possible, the court must

1 be willing to examine its evolving case law to ensure that the
2 various "tests" that it has developed continue to apply the
3 constitution's terms faithfully. It is in the interest of that
4 ultimate goal -- accurate constitutional interpretation -- that I
5 offer the observations below.

6 This court has noted that Article XVII, section 1,
7 partially shares the objective of another constitutional
8 provision, Article IV, section 1(2)(d), which provides, in part:

9 "A proposed law or amendment to the Constitution
10 shall embrace one subject only and matters properly
11 connected therewith."

12 In Armatta v. Kitzhaber, 327 Or 250, 275-76, 959 P2d 49
13 (1998), this court stated with regard to the separate-vote and
14 single-subject requirements:

15 "First, the purposes behind the two requirements are
16 similar: Both serve to ensure that the voters will not
17 be compelled to vote upon multiple 'subjects' or
18 multiple constitutional changes in a single vote.

19 "However, it is significant that, from the
20 beginning of statehood, the single-subject and
21 separate-vote requirements have been worded
22 differently. As we have discussed, the single-subject
23 requirement * * * focuses upon the content of a
24 proposed law or amendment, by requiring that it embrace
25 only one subject and matters properly connected
26 therewith. * * *

27 "The separate-vote requirement, by contrast,
28 focuses upon the form of submission of an amendment, as
29 well as the potential change to the existing
30 constitution, by requiring that two or more
31 constitutional amendments be voted upon separately.
32 That is, in addition to speaking to the form of
33 submission, the separate-vote requirement addresses the
34 extent to which a proposed amendment would modify the

1 existing constitution. That is significantly different
2 from the wording of the single-subject requirement,
3 which focuses in isolation upon only the text of a
4 proposed amendment in requiring that it embrace a
5 single subject.

6 "* * * Indeed, because the separate-vote
7 requirement is concerned only with a change to the
8 fundamental law, the notion that the people should be
9 able to vote separately upon each separate amendment
10 should come as no surprise. In short, the requirement
11 serves as a safeguard that is fundamental to the
12 concept of a constitution."

13 (Emphasis in original.)

14 Consistently with that passage from Armatta, we must
15 bear in mind the different ways in which the separate-vote and
16 single-subject provisions apply. In particular, we must endeavor
17 not to blur the distinctive protections that those provisions
18 impose on the process of amending the constitution by initiative.

19 Armatta drew attention to the fact that the
20 constitution does not define the term "amendment":

21 "Although Article XVII, section 1, does not define
22 what is meant by 'two or more amendments,' it is
23 important to note that the text focuses upon the
24 potential change to the existing constitution, by
25 requiring that two or more constitutional amendments be
26 voted upon separately."

27 Id. at 263 (emphasis in original.) That statement is undoubtedly
28 correct. However, it leaves open the question of the correct
29 application of Article XVII, section 1, in two separate contexts
30 that are pertinent to the problem in this case: (1) an amendment
31 that modifies or repeals existing constitutional wording either
32 expressly or by implication; and (2) an amendment that adds new

1 wording to the constitution that does not modify or otherwise
2 affect the operation of existing constitutional provisions.

3 The Armatta court's discussion of two early Oregon
4 cases sheds at least some light on the answer to that issue. The
5 court noted that State of Oregon v. Payne, 195 Or 624, 635, 244
6 P2d 1025 (1952), confirmed that "the fact that a proposed
7 constitutional amendment contains more than one section does not
8 preclude its submission as a single amendment." Armatta at 268.

9 Additionally, in Armatta the court observed that, in
10 Baum v. Newbry et al, 200 Or 576, 581, 276 P2d 220 (1954), the
11 court had stated:

12 "[The separate vote requirement] does not prohibit
13 the people from adopting an amendment which would
14 affect more than one article or section by implication.
15 * * * At most it prohibits the submission of two
16 amendments on two different subjects in such manner as
17 to make it impossible for the voters to express their
18 will as to each. The fact, if it be one, that the
19 reapportionment amendment may have amended more than
20 one section of the constitution, would be immaterial."

21 In summarizing the Baum holding, the court in Armatta
22 stated:

23 "Baum stands for the following principles. First,
24 it demonstrates that the purpose of the separate-vote
25 requirement is to allow the voters to decide upon
26 separate constitutional changes separately. Stated
27 differently, Article XVII, section 1, imposes a
28 requirement aimed at ensuring that the voters are able
29 to express their will in one vote as to only one
30 constitutional change. That is consistent with our
31 textual analysis of the separate-vote requirement,
32 which noted that the requirement focuses upon the
33 nature of the change to the existing constitution, as
34 well as the procedural form that an amendment takes

1 when it is submitted to the people. Second, Baum
2 demonstrates that, by implication, a single
3 constitutional amendment may affect one or more
4 constitutional provisions without offending the
5 separate-vote requirement. Finally, Baum suggests that
6 the separate-vote requirement encompasses, to some
7 extent, the notion that a single amendment must contain
8 a single 'subject.'"

9 Armatta, 327 Or at 269.

10 The conclusion that Armatta drew from Payne, quoted
11 above, seems unremarkable: A permissible single amendment may
12 contain multiple sections. The summary of Baum in Armatta is
13 more problematic, in part because it repeated certain conclusory,
14 ambiguous statements of the court in Baum. For example, both
15 Baum and Armatta indicate that a single constitutional amendment
16 may "affect" one or more constitutional provisions without
17 violating the separate-vote requirement. Baum, 200 Or at 581;
18 Armatta, 327 Or at 269. That does not explain, however, whether
19 the term "affect" refers to (1) a modification or repeal of one
20 or more existing constitutional provisions; or (2) an addition of
21 wording to an existing constitutional provision without repealing
22 or modifying existing wording; or (3) both of the above.

23 Moreover, it appears that the Armatta court, in
24 summarizing the final principle that it drew from Baum, i.e., "a
25 single amendment must contain a single 'subject[,]' " 327 Or at
26 269, modified the statement in Baum that "[a]t most [the separate
27 vote requirement] prohibits the submission of two amendments on
28 two different subjects in such manner as to make it impossible

1 for the voters to express their will as to each." Baum, 200 Or
2 at 581. That restatement of the holding in Baum is notable, and
3 correct in my view, because it did not repeat the notion from
4 Baum that the separate-vote requirement applies solely to
5 multiple amendments that concern different "subjects."¹ The
6 constitutional source for the requirement that a proposed
7 amendment contain one subject and matters properly connected
8 therewith is Article IV, section 1(2)(d), not Article XVII,
9 section 1.

10 Armatta itself illustrates that point. In Armatta, the
11 proposed constitutional amendments changed the effect of the
12 existing terms of several constitutional provisions. The court
13 held that the proposal violated the separate-vote requirement.

1 ¹ Notwithstanding the selective restatement in Armatta of
2 the comments in Baum, this court said in Hartung v. Bradbury, 332
3 Or 570, 579 n 5, 33 P3d 972 (2001), that it declined the
4 petitioners'

5 "invitation to revisit this court's decision in Baum in
6 light of Armatta v. Kitzhaber [citation omitted].
7 Contrary to petitioners' arguments, nothing in Armatta
8 suggests that Baum was decided incorrectly; indeed,
9 Armatta cites Baum favorably for the proposition that
10 Article XVII, section 1, 'imposes a requirement aimed
11 at ensuring that the voters are able to express their
12 will in one vote as to only one constitutional change.'
13 Armatta, 327 Or at 269."

14 It is true that Armatta neither overtly criticizes nor
15 overrules Baum. However, the court's summaries of the Baum case
16 in Armatta and Hartung demonstrate the court's disinclination to
17 endorse all that Baum had to say about the scope of the separate-
18 vote requirement.

1 Armatta, 327 Or at 284. The fact that the proposed
2 constitutional amendments probably were germane to one subject,
3 i.e., the rights of crime victims, and thus probably satisfied
4 the single-vote requirement in Article IV, section 1(2)(d), was
5 beside the point. As the court in Armatta put it,

6 "Although the court in Baum referred to a hypothetical
7 amendment containing multiple 'subjects,' the court did
8 not state that, if a proposed amendment contains a
9 single subject, then it also must be deemed to be a
10 single amendment."

11 Id. at 274. Armatta went on to expressly reject the state's
12 argument that a proposed amendment satisfies the separate-vote
13 requirement if it satisfies the single-subject requirement. Id.
14 at 277.

15 After observing that the prior Oregon cases were
16 "lacking in detailed analysis[,] " id. at 275, the Armatta court
17 stated:

18 "We conclude that the proper inquiry is to determine
19 whether, if adopted, the proposal would make two or
20 more changes to the constitution that are substantive
21 and that are not closely related. If the proposal
22 would effect two or more changes that are substantive
23 and not closely related, the proposal violates the
24 separate-vote requirement of Article XVII, section 1,
25 because it would prevent the voters from expressing
26 their opinions as to each proposed change separately."

27 Id. at 277. The court had no difficulty applying that test in
28 Armatta, because the initiative measure clearly changed the
29 substance of numerous provisions of the state constitution.

30 Because Armatta was an "easy" case, the court spent no

1 time in its opinion attempting to explain how it arrived at the
2 two announced separate-vote criteria "substantive" and "closely
3 related," or how they applied. However, it soon became evident
4 that those criteria were causing confusion.

5 In Dale v. Keisling, 167 Or App 394, 999 P2d 1229
6 (2000), the Court of Appeals opined that, to satisfy the two
7 criteria announced in Armatta, two or more substantive changes to
8 the constitution would have to be so closely related that a vote
9 in favor of one proposed amendment necessarily would imply a vote
10 in favor of the other. Id. at 401. I refer to that test as the
11 "necessary implication" test.

12 In 2002, this court addressed a challenge to Measure 3
13 (1992) under the separate-vote provision. In Lehman v. Bradbury,
14 333 Or 231, 37 P3d 989 (2002), this court concluded that Measure
15 3, which concerned term limits for various public officials,
16 embodied multiple amendments to the constitution in violation of
17 the separate-vote requirement.

18 The trial court in Lehman had attempted to apply the
19 "necessary implication" test from Dale. On appeal, the Secretary
20 of State complained that the "closely related" criterion from
21 Armatta required clarification. Id. at 242. The Secretary of
22 State urged the court to adopt the following test for determining
23 whether multiple amendments to the constitution are "closely
24 related":

1 "[T]wo or more changes to the constitution are
2 'closely related' if they are so logically interrelated
3 as to present one specific, discrete, cohesive policy
4 choice."

5 Id.

6 This court refused to accept the test that the
7 Secretary of State offered, stating:

8 "Defendant apparently believes that Armatta needs
9 clarification. However, adopting defendant's
10 'clarification' would mean that we potentially were
11 permitting our task under Article XVII, section 1, to
12 degenerate into an endless war of adjectives and
13 adverbs, each battle of which would involve further
14 efforts to explain and elaborate on whichever set of
15 adjectives and adverbs has been used in the next
16 preceding case. That does not mean that we would not
17 accept a party's proposed reformulation of an existing
18 analytical test, if it appeared that the proposed test
19 would be a better tool to use in future cases.
20 Defendant's proffered test simply does not appear to us
21 to be a better tool."

22 Id. Lehman rejected the "necessary implication" test from Dale
23 as well as the adjective-laden test that the Secretary of State
24 offered.

25 I agree that those proffered tests were flawed. In
26 addition to their subjective and, thus, standardless character,
27 they did not reflect the core requirement that Armatta correctly
28 had discerned in the separate-vote requirement: A measure must
29 embody "a particular constitutional change" that will allow
30 voters to "express their will in one vote as to only one
31 constitutional change." Armatta, 327 Or at 269.

32 Lehman easily concluded that Measure 3 proposed

1 multiple substantive changes to the wording of different
2 provisions of the constitution. Lehman, 333 Or at 244. The
3 analysis could have stopped there, because, under the core
4 requirement of the separate-vote rule, as this court construed
5 that rule in Armatta, Measure 3 failed to offer voters "a
6 particular constitutional change" about which the voters could
7 express their will in one vote.

8 However, Lehman proceeded to inquire whether the
9 multiple substantive constitutional amendments were "closely
10 related." Id. The court acknowledged that Armatta had not
11 explained what the "closely related" criterion meant. Id.
12 However, the court took note of several of the observations that
13 the Armatta court made about the proposed measure that it
14 examined and concluded that those comments were themselves
15 additional legal tests regarding the "closely related" criterion.

16 As a consequence of that conclusion, Lehman announced
17 that the court would apply the "closely related" criterion on two
18 separate levels. First, the court would ask whether the multiple
19 constitutional provisions that the measure modified are
20 themselves "closely related." Id. at 246. Second, the court
21 would ask whether the constitutional changes embodied in the
22 proposed measure are themselves "closely related." Id. After
23 applying those multiple tests, the court concluded that Measure 3
24 violated the separate-vote requirement. Id. at 250.

1 The court's ultimate conclusion in Lehman remains
2 persuasive to me. In many ways, Measure 3 was as plainly
3 violative of the separate-vote requirement as was the measure
4 addressed in Armatta. However, the Lehman court's elaboration of
5 the "closely related" criterion deserves reconsideration for
6 several reasons.

7 First, Article XVII, section 1, prohibits the
8 submission to the voters of more than one amendment to the
9 constitution for a single vote. It does not invite the
10 submission of multiple amendments for one vote if judges decide
11 that the affected constitutional provisions or the proposed
12 amendments themselves have a relationship that is "close." By
13 opening the door to the submission of multiple substantive
14 constitutional amendments for a single vote, the court risks the
15 emasculatation of the important protection that Article XVII,
16 section 1, embodies.

17 Second, the court's reliance on a test that
18 incorporates multiple applications of a subjective, court-created
19 phrase simply feeds an unfortunate public perception that judges
20 execute only their personal predilections in applying the
21 constitution. One can hardly imagine a phrase more elastic, or
22 more lacking in some objective foundation, than "closely
23 related." The court originally (and correctly) intended that
24 criterion as a means of disposing of the argument that any change

1 to more than a single word in the constitution would violate
2 Article XVII, section. As Lehman stated,

3 "[I]n any separate-vote inquiry, it is imperative that
4 we remain aware that any amendment to the constitution
5 involves some change to the wording of that document.
6 However, not every one-word change to the wording of
7 the constitution is a separate 'amendment.' If it
8 were, then amendments to the constitution would have to
9 happen word-by-word, and the people's power to amend
10 the constitution would be hamstrung."

11 Id. at 240. The court should restore that focus to its analysis
12 of whether a proposed change in constitutional wording is a
13 separate amendment.

14 Third, asking whether several proposed amendments to
15 different constitutional provisions share a "close relationship"
16 is, in substance, an inquiry into whether the proposals embrace
17 one subject and matters properly connected to that subject.
18 Stated differently, any attempt to compare and contrast the
19 content of multiple proposed amendments to multiple
20 constitutional provisions will quickly devolve into an effort to
21 discover a common theme or policy choice that the component parts
22 tend to promote. The differences in the points of discussion
23 offered by the plurality and the dissent in this case are a good
24 example. The respective opinions differ over whether the
25 elements of the instant measure are or are not germane to a
26 common subject. But that inquiry properly results from the
27 single-subject provision, not the separate-vote provision. The
28 plurality's present conception of the "closely related" test thus

1 blurs the line that separates those distinctive constitutional
2 requirements. To repeat, we must avoid confusing those separate
3 legal requirements.

4 Two later cases further illustrate the difficulty that
5 litigants face in attempting to comply with the court's "closely
6 related" criterion. In Swett v. Bradbury, 333 Or 597, 43 P3d
7 1094 (2002), the defendants sought to defend a campaign finance
8 disclosure measure from a challenge under Article XVII, section
9 1. They agreed that the proposed measure changed the operation
10 of multiple provisions of the constitution. Id. at 607.
11 However, they endeavored to point out that the measure's
12 provisions shared a common subject, i.e., "'they are regulations
13 designed to prevent, control, or expose the influence of money in
14 the initiative [and] referendum * * * process.'" Id. at 608.
15 The court began by noting, correctly, that:

16 "More importantly, however, defendants' argument
17 fails because it is an attempt to show that sections 1
18 and 3 of Measure 62 share the same subject matter.
19 That may or may not be true, but it is beside the point
20 in an analysis under Article XVII, section 1.
21 Defendants do not focus, as they must in a separate-
22 vote challenge, on the particular changes made to the
23 constitution. See Lehman at 241-42 (separate-vote
24 requirement, in contrast to single-subject requirement,
25 focuses on extent to which proposed amendment modifies
26 existing constitution)."

27 Id. at 609 (emphasis in original). The court also noted,
28 correctly, that, as the parties agreed, the proposed measure
29 altered the wording of more than one provision of the

1 constitution. But the court then went on to assess whether those
2 multiple alterations of the constitution bore a "close"
3 relationship to each other. Despite the court's attempted
4 explanation to the contrary, that assessment consisted of
5 determining only whether the disparate changes nevertheless
6 shared some similar policy goal or subject. The court concluded
7 that no such relationship was present. To adopt the court's own
8 words, that inquiry was "beside the point." Id.

9 In Meyer v. Bradbury, 341 Or 288, ___ P3d ___, (2006),
10 this court decided a separate-vote question involving a proposed
11 measure that changed the substantive operation of two different
12 constitutional provisions. However, the court majority concluded
13 that the measure's alteration of the power of the Oregon
14 legislature to enact laws regulating campaign finance was
15 "closely related" to the measure's alteration of the people's
16 constitutional right of free speech. Id. at 301. Even though
17 the measure would not permit the voters to vote separately on
18 those multiple, important changes to the constitution, the
19 majority's discovery of a "relationship" that was "close" allowed
20 it to sidestep the separate-vote requirement.

21 The plurality and the dissent in this case continue
22 that kind of debate. They differ about whether the various
23 elements of Measure 3 do or do not share a policy theme or
24 advance a discernible lawmaking objective. But any

1 constitutional amendment of any degree of complexity (and most
2 legislation for that matter) almost always will embody multiple
3 policy objectives. Analyzing a measure for the common objectives
4 among its parts only amounts to an assessment of whether it
5 embraces one subject and properly connected matters, not whether
6 it contains more than one particular constitutional change, as
7 Armatta stated the issue.

8 The plurality is correct in observing that Measure 3
9 adds new wording to the constitution without altering the
10 operation of any existing provision of the constitution. The
11 dissent's claim that Measure 3's parts affect several
12 constitutional provisions, or analogues of those provisions, is
13 unpersuasive. Measure 3 creates one new, albeit complex,
14 amendment to the existing constitution. The fact that Measure 3
15 contains several clauses that address distinctive policy goals
16 that are germane to its subject is beside the point.

17 The plurality continues to search for close
18 relationships between the parts of Measure 3. That search fails
19 to advance the separate-vote inquiry. The fact that Measure 3's
20 parts contain "a unifying principle logically connecting all
21 provisions" in the amendment demonstrates only that Measure 3
22 satisfies the single-subject requirement. See State ex rel Caleb
23 v. Beesley, 326 Or 83, 91, 949 P2d 724 (1997) (stating test for
24 single-subject requirement). Rather, Measure 3 satisfies the

1 separate-vote requirement because it embodies one constitutional
2 change even though that change appears in a proposal with
3 multiple parts. Measure 3 does not compel voters to engage in a
4 single vote on two or more changes to the existing state
5 constitution. It does not combine in one measure multiple
6 alterations of the constitution's terms, either expressly or by
7 implication. Thus, Measure 3 satisfies Article XVII, section 1.

8 I also join in the plurality's conclusion that Measure
9 3 passes muster under the single-subject requirement in Article
10 IV, section 1(2)(d).

11 For the reasons stated above, I concur in the
12 plurality's decision to reverse the Court of Appeals and to
13 affirm the judgment of the trial court.

1 KISTLER, J., dissenting.

2 The plurality's decision marks an abrupt departure from
3 this court's cases applying the separate-vote requirement of
4 Article XVII, section 1, of the Oregon Constitution. Today, the
5 plurality concludes that all the various parts of Ballot Measure
6 3 (2000), which adds almost four pages of text to the Oregon
7 Constitution, are "closely related" to each other and thus comply
8 with Article XVII, section 1. It is worth pausing to consider
9 the breadth of that conclusion. Among other things, Measure 3
10 enacts new substantive and procedural protections for persons
11 whose property is subject to forfeiture, it prohibits the
12 legislature from using forfeiture proceeds for law enforcement
13 purposes, it imposes new limits on state and federal cooperation,
14 and it creates a new, constitutionally-based agency to monitor
15 forfeiture proceedings.

16 The plurality concludes that all those various
17 provisions are closely related to each other. In my view, not
18 only is the plurality's decision incorrect on its own terms, but
19 the plurality cannot fairly reconcile its decision today with the
20 decisions in Armatta v. Kitzhaber, 327 Or 250, 959 P2d 49 (1998),
21 and Lehman v. Bradbury, 333 Or 231, 37 P3d 989 (2002). This
22 court held in Lehman that a measure imposing term limits on state
23 and federal officials made two changes to the constitution that
24 were not closely related. Measure 3 contains more numerous and

1 more varied provisions than the measure at issue in Lehman. If a
2 measure imposing term limits on government officials did not
3 survive scrutiny under Article XVII, section 1, then neither
4 should Measure 3. I respectfully dissent.

5 Article XVII, section 1, provides that, "[w]hen two or
6 more amendments shall be submitted * * * to the voters of this
7 state at the same election, they shall be so submitted that each
8 amendment shall be voted on separately." This court carefully
9 reviewed the text and history of that provision in Armatta and
10 clarified the principles that govern our analysis of separate-
11 vote claims. The plurality's restatement of those principles is
12 accurate as far as it goes, but it omits a distinction that was
13 critical to the court's holding in Armatta and consequently, I
14 believe, misapplies Article XVII, section 1, in this case.

15 As the plurality recognizes, the separate-vote
16 requirement imposes a stricter standard on constitutional
17 amendments than the single-subject test imposes on legislation.
18 As the court explained in Meyer v. Bradbury, 341 Or 288, 296, ____
19 P3d ____ (2006), the separate-vote requirement "has a different
20 application and is driven by a decidedly different rationale. *
21 * * [T]he separate-vote requirement serves as a safeguard that is
22 fundamental to the concept of a constitution."

23 The difference between those two standards is the level
24 of generality at which they operate. Armatta held, and this

1 court reaffirmed in Meyer, that "a separate-vote analysis must
2 focus on the 'particular changes made to the constitution.'"
3 Meyer, 341 Or at 297 (quoting Swett v. Bradbury, 333 Or 597, 609,
4 43 P3d 1094 (2002)) (emphasis in original); Armatta, 327 Or at
5 278. Unlike the single-subject test, which permits courts to
6 define the subject of a measure at a relatively high level of
7 generality, the separate-vote requirement requires courts to
8 focus on the specific changes to the constitution and ask whether
9 those specific changes are closely related. Meyer, 341 Or at
10 297.

11 In Armatta, the court explained that the various
12 changes that Measure 40 made could be grouped under the subject
13 of criminal procedure but that the specific changes that measure
14 made had little relationship to each other. 327 Or at 283-84.
15 For example, the court held that two changes to criminal
16 procedure that Measure 40 made -- involving the right to bail and
17 juror qualifications -- were not "closely related" for the
18 purposes of the separate-vote requirement. Similarly, as noted,
19 the measure at issue in Lehman imposed term limits on state and
20 federal officials. 333 Or at 234-35. The court explained that
21 imposing term limits on each group of officials constituted two
22 constitutional changes and that those changes "had little or
23 nothing to do" with each other. Id. at 250. That was true even
24 though both changes could be described, at only a slightly higher

1 level of generality, as limiting the terms that all government
2 officials could serve.

3 Following those decisions, I would hold that Measure 3
4 makes at least four changes to the constitution that are not
5 closely related. As the plurality recognizes, subsection (3)
6 makes three changes to the constitution. __ Or at __ (slip op at
7 13). Two of those changes bear no greater relation to each other
8 than the changes at issue in Armatta and Lehman. Subsection 3
9 requires, among other things, that the state prove forfeitures by
10 clear and convincing evidence. It also requires that the
11 forfeiture be proportional to the crime that gave rise to it. As
12 the plurality notes, the first change finds an analogue in the
13 Due Process Clause of the United States Constitution and focuses
14 on the degree of certainty that the trier of fact must possess
15 before he or she can forfeit property. __ Or at __ (slip op at
16 14-15). The other change finds analogues in Article I, section
17 16, of the Oregon Constitution and the Eighth Amendment to the
18 United States Constitution and seeks to ensure that the sanction
19 is proportional to the crime that led to the forfeiture.

20 Both changes are substantive. See Meyer, 341 Or at 298
21 (defining "substantive" changes). Neither is closely related;
22 each addresses separate concerns. The standard of proof goes to
23 the determination whether property meets the criteria necessary
24 for forfeiture in the first instance. The requirement that the

1 value of the forfeited property be substantially proportional to
2 the crime goes to the sanction that a court may impose after it
3 finds that a forfeiture should occur. Stated more succinctly,
4 one change goes to liability while the other goes to the
5 sanction.

6 Eighth Amendment limitations on punishment present
7 separate concerns from due process requirements of standards of
8 proof. The two changes that subsection (3) makes to the Oregon
9 Constitution present equally separate concerns. If the changes
10 to two aspects of criminal procedure -- bail and juror
11 qualifications -- were not sufficiently related for the purposes
12 of the separate-vote requirement, as this court held in Armatta,
13 then the procedural and substantive changes that subsection (3)
14 makes are equally unrelated.

15 Those two changes should be sufficient, standing alone,
16 to say that Measure 3 makes two substantive changes that are not
17 closely related. Were there any doubt about the matter, however,
18 subsection (7) resolves it. Among other things, subsection (7)
19 modifies the authority of the legislative and executive branches;
20 it prohibits them from using the proceeds of forfeitures for law
21 enforcement purposes. See Armatta, 327 Or at 283 (holding that
22 provision prescribing juror qualifications "limit[ed] the
23 legislature's ability to establish juror qualifications in
24 criminal cases"). Prohibiting the government from using the

1 proceeds of forfeitures for law enforcement purposes arguably
2 removes an incentive for the police to pursue criminal
3 investigations that could lead to forfeitures. Subsection (7)
4 thus could result in reducing the number of forfeitures, but it
5 would do so without regard to the validity of any particular
6 forfeiture.

7 Subsection (3) is directed at a different target. It
8 grants specific substantive and procedural protections to persons
9 whose property is subject to a forfeiture. It seeks to protect
10 those persons from forfeitures that precede a criminal
11 conviction, that are not proven to a specific level of certainty,
12 or that are excessive. To be sure, those two constitutional
13 changes are not completely unconnected. If there are fewer
14 forfeitures, then there will be fewer opportunities for any
15 particular forfeiture to be premature, unproven, or excessive.
16 But the relationship among the nature of the particular changes
17 that subsections (3) and (7) make is far too tenuous to qualify
18 as "close."

19 The plurality offers three rationales for reaching a
20 different conclusion. None withstands scrutiny. Perhaps the
21 most telling rationale is the one that the plurality offers at
22 the end of its decision. The plurality begins its explanation of
23 that rationale by stating that Measure 3 contains "essentially
24 * * * two parts." __ Or at __ (slip op at 19). The plurality

1 reasons:

2 "[T]he first part, encompassing subsections (3) through
3 (6), sets out constitutional protections for property
4 owners by creating a constitutional concept of civil
5 forfeiture proceedings and by imposing a number of
6 procedural protections (and accompanying limitations)
7 in such proceedings; the second part, encompassing
8 subsections (7) through (11), sets out an
9 administrative process for collecting and disbursing
10 funds derived from forfeited property."

11 Id.

12 As an initial matter, in describing the "two parts" of
13 Measure 3, the plurality does not "focus on the particular
14 changes made to the constitution," as our cases direct us to do
15 in analyzing a separate-vote claim. See Meyer, 341 Or at 297
16 (stating principle) (internal quotation marks omitted; emphasis
17 in original). Rather, the plurality groups numerous changes
18 under two broad headings -- "procedural protections" and
19 "administrative process."¹

20 Not only does the plurality's analysis operate at too
21 high a level of generality, but its conclusion that the two parts
22 of the measure are closely related rests on an incorrect premise.
23 In concluding that the "two parts" of Measure 3 are closely
24 related, the plurality states initially:

1 ¹ To illustrate, the plurality groups a prohibition
2 against using forfeited property for law enforcement purposes and
3 a limitation on federal-state cooperation under the heading of
4 "administrative process for collecting and disbursing funds
5 derived from forfeited property." And it groups "a number of"
6 discrete rights under the heading of "procedural protections" in
7 forfeiture proceedings.

1 "The administrative funding and disbursal scheme (the
2 second change just identified) has a place in the
3 constitution because of the new civil forfeiture
4 process (the first change), and it concerns the
5 disbursal of funds derived from that process."

6 __ Or at __ (slip op at 20). It then concludes that "the
7 administrative scheme set out principally in subsections (7) to
8 (11)" is closely related to "the civil forfeiture proceeding
9 provisions set out in subsections (3) to (6), because [the
10 administrative scheme] would have no reason for existence were it
11 not for those provisions." Id. (slip op at 20-21) (emphasis
12 added.)

13 The premise that underlies the plurality's conclusion
14 -- that the administrative scheme set out in subsections (7) to
15 (11) "would have no reason for existence" were it not for the
16 civil forfeiture proceedings set out in subsections (3) to (6) --
17 is incorrect in two respects. First, civil forfeiture is a
18 creature of the common law, which the legislature has codified.
19 See, e.g., State v. Curran, 291 Or 119, 127-29, 628 P2d 1198
20 (1981) (discussing common-law forfeitures and legislative
21 codification); ORS 475A.020 (authorizing forfeiture of property
22 used to manufacture, contain, and transport controlled
23 substances). Second, and relatedly, subsections (3) to (6) do
24 not create a cause of action for forfeitures. Rather, those
25 subsections impose, as a matter of constitutional law,
26 substantive and procedural protections on existing statutory

1 causes of action for civil forfeitures. Contrary to the premise
2 that underlies the plurality's reasoning, forfeiture proceedings
3 would occur regardless of whether subsections (3) to (6) existed.

4 It follows that the plurality errs in asserting that
5 the "administrative scheme" set out in subsections (7) to (11)
6 would have no reason for existence without the forfeiture
7 provisions in subsections (3) to (6). Even without subsections
8 (3) to (6), there still would be an equal need (at least from the
9 drafters' perspective) for an administrative scheme to regulate
10 statutory forfeiture proceedings. Indeed, if the existing
11 statutory forfeiture proceedings continued unchecked by the
12 procedural and substantive protections set out in subsections (3)
13 to (6), then the need for an administrative scheme (an oversight
14 agency and so forth) to regulate statutory forfeiture proceedings
15 would be all the greater.

16 The plurality's alternative rationale for holding that
17 subsections (3) and (7) are closely related is no more
18 persuasive. The plurality begins its alternative rationale by
19 observing that one can say that subsections (3) and (7) are not
20 closely related only if "one stands as close as possible to each
21 provision and ignores the others." __ Or at __ (slip op at 18).
22 The difficulty with the plurality's use of that metaphor is that
23 its own analysis works only if one stands as far away as possible
24 from the specific provisions of Measure 3 and describes those

1 provisions in only the most general terms. For example, the
2 plurality's alternative rationale recasts the specific changes
3 that subsection (3) makes as an "assur[ance] that forfeitures are
4 reined in," id.; that is, it reduces the specific changes to a
5 goal of limiting forfeitures. It then describes subsection (7)
6 as "removing the carrot" from government "to treat the criminal
7 law as a revenue-raising source." Id. at 18-19.

8 That is precisely what Armatta, Swett, and Meyer
9 explain that a court must not do when it engages in a separate-
10 vote analysis; it may not limit its analysis to searching for a
11 common theme or policy that unites disparate parts of a proposed
12 measure. See Meyer, 341 Or at 297 (explaining that "a separate-
13 vote analysis must focus on the particular changes made to the
14 constitution") (internal quotation marks omitted; emphasis in
15 original). Otherwise, a court reduces the separate-vote
16 requirement for constitutional amendments to a single-subject
17 test for legislation and, in doing so, removes "a safeguard that
18 is fundamental to the concept of a constitution." See id. at 296
19 (explaining purpose of separate-vote requirement).²

1 ² For the reasons explained above, a proper focus leads
2 to the conclusion that subsections (3) and (7) are not closely
3 related. The latter change prohibits the use of forfeiture
4 proceeds for law enforcement purposes. The former grants
5 procedural and substantive protections to persons whose property
6 is subject to forfeiture. A constitutional change that limits
7 the instances in which forfeitures occur has only the most
8 tenuous relationship to a change that grants separate
9 constitutional protections to those persons whose property is

1 Finally, the plurality holds that the three changes
2 that subsection (3) makes are themselves closely related. It
3 reasons:

4 "We think that it is clear that the changes are all
5 parts of an effort to define the judicial process for
6 forfeiture in constitutional terms. The first part of
7 subsection (3) describes that judicial process as
8 requiring a predicate conviction to justify commencing
9 the process. The second part sets out the permissible
10 standard of proof in that process. Finally, the third
11 part of subsection (3) provides that the forfeiture
12 process may proceed only to the extent that the
13 forfeiture is proportional to the underlying criminal
14 conviction. Seen in that way, the close,
15 interconnected relationship between the three parts is
16 clear."

17 __ Or at __ (slip op at 15-16).

18 The plurality's reasoning proves too much. Using that
19 reasoning, the court could have held in Armatta that the various
20 changes to criminal procedure that Measure 40 made were, to
21 borrow the plurality's words, "all parts of an effort to define
22 the judicial process for [criminal trials] in constitutional
23 terms." One part of Measure 40 described the procedures that
24 were appropriate in setting bail; another described the types of
25 evidence that would be admissible in criminal trials, and yet
26 another described the number of jurors necessary to convict for
27 certain crimes. Armatta, 327 Or at 278-80. To use the
28 plurality's reasoning, "Seen in that way, the close,
29 interconnected relationship between the three parts is clear."

1 subject to forfeiture.

1 In my view, the changes that subsection (3) makes to forfeiture
2 proceedings are no more closely connected than the changes that
3 Measure 40 made to criminal proceedings. If the latter changes
4 were not closely connected, then neither are the changes here.
5 The plurality errs in holding otherwise.

6 The concurrence takes a different tack. It would hold
7 that Measure 3 is a single amendment because it does not modify
8 existing constitutional provisions. Instead, it merely adds new
9 limitations to the constitution concerning a single subject --
10 forfeitures. Before turning to the concurrence's reasoning, it
11 is important to note that the plurality does not accept the
12 concurrence's position. Rather, the plurality's decision rests
13 on the premise that Measure 3 makes more than one change to the
14 constitution, and the plurality asks a question that the
15 concurrence finds it unnecessary to reach -- whether those
16 changes are closely related.

17 The concurring opinion rests on the proposition that a
18 measure that adds new matter to the constitution, as opposed to
19 changing existing provisions, results in only one constitutional
20 change. This court's decision in Lehman poses a hurdle for the
21 concurrence. The measure at issue in Lehman added new provisions
22 to the Oregon Constitution. 333 Or at 234 (quoting statement
23 that measure creates "new Sections 19 and 20 in Article II").
24 One added a new limitation on the number of years that state

1 representatives and senators could serve and also changed the
2 number of years that certain statewide officials could hold
3 office. Id. at 243-44. The other added a new provision
4 regarding the number of terms that federal officials could serve.
5 Id. at 244. In holding that the measure made two changes to the
6 constitution, the court explained that the fact that the second
7 change did not modify an existing constitutional provision was of
8 no moment. Id. at 250 (explaining that the problem was not that
9 one change was new). Rather, the problem was that the two
10 changes had "little or nothing to do" with each other. Id.

11 Lehman thus stands for the proposition that the fact
12 that a measure adds new matter to the constitution does not bear
13 on the question whether it contains more than one amendment.
14 But, if Lehman were not enough, the text of the constitution also
15 is at odds with the concurrence's position. The Oregon
16 Constitution provides that both the Legislative Assembly and the
17 people may propose amendments to the constitution. Article XVII,
18 section 1, provides that the Legislative Assembly may propose
19 "[a]ny amendment or amendments to this Constitution," and Article
20 IV, section 1(2)(a) provides that the people, using the
21 initiative power, may "propose * * * amendments to the
22 Constitution." Article XVII, section 1, also provides that,
23 "[w]hen two or more amendments shall be submitted * * * to the
24 voters of this state at the same election, they shall be so

1 submitted that each amendment shall be voted on separately."³

2 The constitutional text does not distinguish between
3 amendments that modify existing provisions and amendments that
4 add only new material to the constitution. Rather, the
5 constitutional text refers to "amendment" and "amendments"
6 without distinction. The concurring opinion does not identify
7 any history that would support the limitation that it would read
8 into Article XVII, section 1, nor am I aware of any. The fact
9 that a measure adds only new matter to the constitution does not
10 provide any basis for saying that it adds only a single amendment
11 to that document.

12 Having held in Armatta that the separate-vote
13 requirement in Article XVII, section 1, sets a higher standard
14 for constitutional amendments than the single-subject test sets
15 for legislation, we should apply that holding consistently to all
16 the cases that come before us. Article XVII, section 1, should
17 not expand and contract like an accordion from one case to the
18 next. The plurality, however, would uphold Measure 3 only by
19 effectively employing a single-subject test and, in doing so, it
20 would depart from this court's application of the separate-vote
21 requirement in Armatta, Lehman, and Meyer. If we apply those
22 decisions consistently, we should affirm the Court of Appeals

1 ³ This court explained in Armatta that the separate-
2 vote requirement applies to both initiated and legislatively
3 proposed amendments. 327 Or at 261.

1 decision. I respectfully dissent.

2 De Muniz, C.J., and Balmer, J., join in this dissenting

3 opinion.

