

## SELECTING OREGON'S JUDGES

*Hans A. Linde*<sup>†</sup>

### I. INTRODUCTION

How state judges are chosen is once again on the public agenda.<sup>1</sup> Media attention centers on judicial elections, especially when an incumbent appellate judge faces well-publicized opposition, either on behalf of competing candidates or in a retention election. We should ask whose interests may lead them to resist change in the state courts and whose interests may lead them to marshal change.

Recent developments have added urgency. Decades of extending modern media campaigns and their attendant financial demands to judicial elections eventually led to two unsurprising Supreme Court decisions. First, the Court declared that free speech principles apply to judicial as to other elections, and second, that recusal is a necessary effect of a judge's political indebtedness to major campaign contributors when such contributors have a stake in a case before the judge's court.<sup>2</sup> *Republican Party v. White* rejected efforts to justify regulating the amount and nature of advocacy for or against judicial candidates more than is permitted in other elections because "judges are different."<sup>3</sup> The recusal remedy demanded by *Caperton v. A. T. Massey Coal Co.* has implications for judicial elections that critics resist by citing its description as an "extreme case."<sup>4</sup> But a state with any pride in its judicial ethics cannot

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<sup>†</sup> Justice Hans Linde (ret.), B.A., Reed College, J.D., University of California at Berkeley. Justice Linde clerked for Supreme Court Justice William O. Douglas, and has taught at numerous universities. He served on the Oregon Supreme Court from 1977 to 1990, and currently is a member of the Council of the American Law Institute and a fellow of the American Academy of Arts and Sciences. A version of this article also appears in volume 46 of the *Willamette Law Review*.

1. See Brennan Center for Justice, *State Judicial Elections*, [http://www.brennancenter.org/content/section/category/state\\_judicial\\_elections](http://www.brennancenter.org/content/section/category/state_judicial_elections) (last visited Feb. 27, 2010).

2. *Republican Party of Minn. v. White*, 536 U.S. 765, 781–82 (2002); *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2256–57 (2009).

3. *Republican Party of Minn.*, 536 U.S. at 784.

4. *Caperton*, 129 S. Ct. at 2257 (The CEO of a company planning to appeal a \$50 million jury verdict contributed the statutory maximum of \$1000 to an appellate judge's campaign, spent over \$500,000 on mailings and advertisements supporting that judge as a candidate, and donated

long leave a statement of its standards for recusal to the haphazard litigation of federal due-process formulas.

The two constitutional decisions gave national impetus to what had long been sporadic concerns in one state or another.<sup>5</sup> The cause of reform in the name of “judicial independence” found its Paul Revere in the retired Justice Sandra Day O’Connor, who has rung the tocsin from Washington’s Georgetown University in the East to Washington’s Seattle University in the Pacific Northwest, where she gave the keynote address at a conference on state judicial independence.<sup>6</sup> I participated in the Seattle conference, as well as another conference soon thereafter in Salem, Oregon, in celebration of the Oregon Supreme Court’s 150th anniversary. These were lively discussions before public audiences rather than presentations of scholarly papers (of which there have been many in recent years).<sup>7</sup> The following pages summarize a few personal observations on the topic of redesigning state judicial selection. They reflect experience with only Oregon’s courts.

## II. REFINING THE ISSUES

National attention to state judicial elections is welcome, but it cannot avoid oversimplifications.

First, current discourse describes election of judges as an issue of judicial independence.<sup>8</sup> This views the question through the eyes of incumbent judges. Independence, or impartiality, is essential, but elections

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nearly \$2.5 million to a political organization that supported that judge and campaigned against his opponent.).

5. The national concern has begun to draw congressional attention. Examining the State of Judicial Recusals After *Caperton v. Massey*: Hearing Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary, 111th Cong., Dec. 10, 2009. That concern need not focus on legislating standards of due process for state courts; a more familiar and productive approach might be to provide a degree of financial support to the hard-pressed state courts if their judges are selected by the standards of professionalism and independence from electoral politics discussed here. It has precedents in federal systems such as Germany, which relies largely on state judges qualified and largely paid with national funds.

6. See generally, *The Debate Over Judicial Elections and State Court Judicial Selection*, 21 GEO. J. LEGAL ETHICS 1347 (2008); Conference, State Judicial Independence—A National Concern, Seattle University School of Law (Sept. 14, 2009), available at [http://www.law.seattleu.edu/Faculty/Judicial\\_Independence.xml](http://www.law.seattleu.edu/Faculty/Judicial_Independence.xml); see also Bruce A. Green, *Fear of the Unknown: Judicial Ethics After Caperton*, 60 SYRACUSE L. REV. 229, 230 (2010).

7. See Pete Shepherd, *One Hundred Fifty Years of Electing Judges in Oregon: Will There Be Fifty More?*, 87 OR. L. REV. 907 (2008); J. Christopher Heagarty, *Public Opinion and an Elected Judiciary: New Avenues for Reform*, 39 WILLAMETTE L. REV. 1287 (2003); Kyle D. Cheek & Anthony Champagne, *Partisan Judicial Elections: Lessons from a Bellwether State*, 39 WILLAMETTE L. REV. 1357 (2003).

8. See David Schultz, *The State of Judicial Selection: The White Cases Revisited*, BENCH & BAR MINN., Jan. 2010, at 40; Bruce A. Green, *Fear of the Unknown: Judicial Ethics After Caperton*, 60 SYRACUSE L. REV. 229, 230–31 (2010).

and independence are separate issues—electing judges would be at least as problematic if judges were elected for life. Just as important is how judges are chosen in the first place. The commentary, both scholarly and professional, overlooks how a system that limits appointees to persons willing to run for election and excludes persons who reject this role skews the pool of potential judges.<sup>9</sup> Most statewide judges whom I know would never seriously consider entering an initial election for the position, and many would have declined an initial appointment if a contested election campaign had been a certainty.

Second, only contested elections to state supreme courts draw media and public attention, as is true for appointments to the United States Supreme Court. But what goals are common to selecting trial judges versus appellate judges, and in what respects should the selection differ?

Finally, a problem in discussing American institutions, like other multi-state systems, is to separate what allows generalizations from what differs from state to state. This applies to the selection of state judges as to much else. All state courts perform very similar functions by similar processes, often compelled by national standards of due process. The majority of state judges who face elections also face similar challenges in the nature and costs of modern campaigns. In other respects, however, those challenges differ greatly with a state's size, history, geographic and social diversity, competing interests, and political cultures. They include the political dynamics of changing old institutions, such as judicial elections. One must recognize what lends itself to a class picture and what requires individual portraits. This applies even to apparently similar states like Oregon and Washington.

### III. OREGON'S COURTS

#### A. History

Oregon judicial history preceded even its territorial government, when the death of an early pioneer led his fellow settlers to elect one of their number—a doctor—as “supreme judge” with probate powers, so as to enable the passage of property titles to the next generation.<sup>10</sup> At the

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9. See Roy A. Schotland, *A Plea for Reality*, 74 MO. L. REV. 507, 518 (2009); Roy A. Schotland, *Six Fatal Flaws: A Comment on Bopp and Neeley*, 86 DENV. U. L. REV. 233, 235 (2008); James A. Gardner, *Deliberation or Tabulation? The Self-Undermining Constitutional Architecture of Election Campaigns*, 54 BUFF. L. REV. 1413, 1469 n.215 (2007).

10. The colorful early history of Oregon's courts has often been recounted. See, e.g., OREGON SUPREME COURT RECORD, [with] LAWRENCE T. HARRIS, A HISTORY OF THE JUDICIARY OF OREGON, (Stevens-Ness, 1938); S. Smith, *An Historical Sketch of Oregon's Supreme Court*, 55 OR. L. REV. 85 (1976). Beginning in 1843, early settlers adopted and modified their “Organic Law,” shifting between simple votes in an assembly of settlers and election by a “house of representatives.” Shepherd, *supra* note 7. Shepherd describes the delegates' attention to the recent decision in Dred

time, there was no alternative to some form of election, but when Congress soon thereafter created the Oregon Territory (reaching from the Canadian border to California and from the Rocky Mountains to the Pacific Ocean), presidents in Washington, D.C., appointed judges who might or might not spend their time in Oregon. Oregon's constitutional convention, one of the last before the Civil War, followed the models of Midwestern states in the Jacksonian tradition of popular election of all officials, including judges.

Originally, eligible citizens—adult, white-male residents—voted *viva voce*, or by self-prepared ballot slips. In the mid-nineteenth century, firmly held partisanship was taken for granted, and candidates were known to be Democrats, Republicans, or of another party. But party nominations were not the state's business until the "Australian" ballot in 1873 required election officials to know the parties' nominees. Judicial candidates continued to run as political party nominees until 1931, when the state introduced primary elections. Since then, identification with one or another political party, even when widely known, has played no explicit role in electing judges and most other officials.<sup>11</sup> Defenders of electing judges, however, must contemplate the more radical changes that modern developments, mostly in technology, have brought to elected offices. They include the loss of the newspapers with long-term editors and staff that were the familiar forum for community news, opinion, and ballot endorsements. Do we really want judges to maintain personal websites, write blogs and periodic newsletters (as legislators or their staff do), or seek attention and supporters on social media networks?

Actually, no one demands that all Oregon judges gain office by initial election or that judges should be replaced after a limited number of terms. Given midterm retirements and other career changes, more judges are now selected by governors than by competitive elections. The Oregon constitution leaves these appointments in the governor's sole discretion. Most modern governors have awaited polls or other evaluations by state or local lawyers and consulted knowledgeable advisers before filling a vacancy. Without legislative confirmation of judges, local legislators do not play the role that United States senators do in selecting federal judges. In short, opponents of changing Oregon's judicial selection

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Scott v. Sandford, 60 U.S. (19 How.) 393 (1856), and its meaning for slavery in Oregon at the 1857 constitutional convention. *Id.* at 914–19.

11. One may wonder how state judges still elected as party nominees can judge litigation by or against a political party, when receipt of large campaign contributions requires recusal. Oregon retains partisan election for the original offices of governor, secretary of state, treasurer, and attorney general, for legislators and most county commissioners, but not for the state superintendent of public instruction and labor commissioner or for large numbers of elected county, municipal, and district officials.

system can defend their nineteenth-century populist principles at little cost in actual practice. They benefit from responsibly appointed courts while maintaining the illusion that their judges are elected. Still, when a judge does run out his or her term, the resulting vacancy attracts candidates whose qualifications, beyond a winning name, voters are poorly equipped to assess. Often, the vacancy attracts candidates whose names are familiar from prior ballots for other political offices.<sup>12</sup>

### B. Changing Functions

The work of the Oregon courts has changed greatly in the past fifty, let alone one hundred and fifty, years. For generations, state judges presided over trials of conventional crimes and common law disputes about real property, contracts, and torts, as they still do. In some counties, juvenile matters, probate, and some misdemeanors were left to the elected county judge or justice of the peace.<sup>13</sup> Occasional review of a governmental action was an important but infrequent part of a judge's work which was complicated by an antiquated system of writs. Most state supreme court justices were former trial judges and saw their task mainly as examining whether the judge trying a case had made an erroneous ruling on a properly stated motion or objection, on whatever legal grounds the appellant briefed on appeal.

Their work changed with the growth of statutory, administrative, and constitutional law and with the creation of the Oregon Court of Appeals in 1969.<sup>14</sup> With that court handling the bulk of the caseload, the supreme court could devote its largely discretionary jurisdiction to re-

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12. Supreme Court Justices of Oregon, <http://bluebook.state.or.us/state/elections/elections27.htm> (last visited Mar. 7, 2010). In 1988, two long-serving state senators from metropolitan areas ran first and second of four candidates for a seat on the Oregon Supreme Court. A few years later in 1996, another long-serving legislator, then attorney general, defeated an appellate judge for a supreme court vacancy, which he soon relinquished to run for governor. But name familiarity need not be political; an appointee to Oregon's state-wide court of appeals lost to a self-starting candidate with a famous pioneer name. (The runner-up was later reappointed and thereafter went on the serve on the supreme court.)

For Washington's experience with the drawing power of familiar names associated with an unrelated person or context, see William W. Baker, *Named to the Bench*, 39 WILLAMETTE L. REV. 128 (2003). In North Carolina in 1998, a respected incumbent was defeated in the primary by a challenger who happened to have the same name as a popular recent governor, and who campaigned with signs of the colors and design used in the governor's campaigns. The nominee, in turn, lost to an opposing nominee with the same popular last name. See J.C. Heagarty, *Public Opinion and an Elected Judiciary*, 39 WILLAMETTE L. REV. 1287, 1297-98 (2003).

13. See generally Roland Johnson et al., *Justice Courts in Oregon*, 53 OR. L. REV. 411 (1974).

14. See Stephen R. Armitage, *History of the Oregon Judicial Department, Part 2: After Statehood* (2009), available at [http://www.oregon.gov/SOLL/images/OregonJudicial DepartmentHistoryPt2\\_04\\_2009.pdf](http://www.oregon.gov/SOLL/images/OregonJudicial%20DepartmentHistoryPt2_04_2009.pdf).

solving new issues or clarifying old ones. Because these tasks aim to guide decisions beyond the case before the court, they are less confined by what advocates argue and are more susceptible to divided opinions. Many appointees to the appellate courts now have had experience as judicial clerks or in Oregon's Department of Justice, rather than on the trial bench. But the same changes also put in question whether the goals and the criteria for state-wide appellate and local trial judges call for identical or somewhat varied systems of selection.

### C. Previous Critiques

Calls for changing Oregon's system of judicial elections are not new. In 1962, the Commission on Constitutional Revision, following a 1959 commission report on the judiciary, recommended a system of appointment to which I return below.<sup>15</sup> The revised constitution as a whole fell one senator's vote short of submission to the voters, but the proposal for judicial appointments drew little controversy.<sup>16</sup> In 1977, the legislature submitted a variant of the American Judicature Society's plan (sometimes called the Missouri plan) of gubernatorial appointment from a list nominated by a commission, which the voters rejected.<sup>17</sup> This was thirty-two years ago, before judicial elections became battlegrounds for the heavy weaponry of professional campaign managers.<sup>18</sup>

Since then, critical accounts of particularly bitter, outrageous, or expensive contests for judgeships have been biennial staples of press reports around the nation (as well as a popular novel) and of many professional symposia.<sup>19</sup> As both Chief Justice Paul De Muniz and former Attorney General David Frohnmayer have observed, Oregon has not been spared such contests, though neither the level of raw invective nor expenditures match that in more populous and excitable states.<sup>20</sup> The large

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15. Shepard, *supra* note 7, at 921.

16. Shepard, *supra* note 7, at 922.

17. S.J. Res. 6, 1977 Or. Laws 1990 (1977).

18. In its 1996 report, Washington's Walsh Commission on Judicial Selection recited familiar quotations from citizens that they did not know the names of any judges and did not really know what judges do, but that polls nonetheless showed majorities for keeping elections. The commission therefore sought a compromise of inserting nominating commissions into what ostensibly would remain an elective system, as stressed in the title of the report., *See* WALSH COMM'N, THE PEOPLE SHALL JUDGE: RESTORING CITIZEN CONTROL TO JUDICIAL SELECTION (1996).

19. *See, e.g.*, Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 1996-98 (1988); Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1399-1404 (2003); JOHN GRISHAM, *THE APPEAL* (Doubleday 2008); Hans A. Linde, *The Judge as Political Candidate*, 40 CLEV. ST. L. REV. 1, 6-7 (1992).

20. Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 374-85 (2002); David B. Frohnmayer, *Election of State Appellate Judges*, 39 WILLAMETTE L. REV. 1251, 1254 (2003). Frohnmayer described a "snarling, sarcas-

sums needed for serious media campaigns, however, ordinarily come from sources interested in the legal answers decided by appellate judges.

#### *D. State and Local Perspective*

What does this mean for the selection and tenure of trial judges? Although trial and appellate judges equally need both relevant professional skills and judicial independence, there also are important differences in the qualities demanded in trial courts, as well as in how voters may evaluate a judge's performance. Trial judges make discretionary decisions in individual cases that are never reviewed on appeal. While most people never see an appellate court, many observe trial judges first hand as jurors, witnesses, parties or interested neighbors in family, juvenile, or everyday criminal cases. Attention, patience, and courtroom demeanor therefore matter. Voters are unlikely to fault the judge for legal errors in run-of-the mill litigation that become the stuff of appeals. Outside metropolitan areas with multi-judge courts, judges will be personally known to molders of public opinion, including county seat editors, where they still exist.<sup>21</sup> A controversial decision is grist for opponents of supreme court justices and trial judges alike, but a locally-elected judge can also be more exposed and vulnerable than any appellate judge, at a fraction of the cost, when the law compels an unpopular outcome, adverse to a local economic interest or dividing the community along ethnic or other social fault lines. Visibility, or expectations of hometown justice, may affect an elected trial judge more than the distant appellate judges who review the decision months after the event.

#### *E. Designing an Alternative*

##### 1. Commission Models: Who Initiates and Who Decides?

Some features of the American Judicature Society (AJS) model poses intrinsic problems. The model leaves the governor responsible for an appointed judiciary, yet it limits the governor's options to a list of names chosen by other people.<sup>22</sup> This constraint goes well beyond laws

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tic and vicious radio ad" in a court of appeals campaign, apparently produced by a political campaign consultant as an independent expenditure by an "agriculture-related PAC," for which the candidate against the incumbent would not be accountable. *Id.* at 1252–53.

21. At the Seattle conference, a comment from the audience recommending that judges mingle more with people in the community led one panelist, Chief Justice Wallace Jefferson, to describe the realities preventing this image of personal interaction in Texas cities and suburbs. Texas Supreme Court Chief Justice Wallace Jefferson, Comments at the Conference for State Judicial Independence—A National Concern (Sept. 14, 2009).

22. AM. JUDICATURE SOC'Y, MODEL JUDICIAL SELECTION PROVISIONS 1–2 (2008), available at [http://www.judicialselection.us/uploads/documents/MJSP\\_ptr\\_3962CC5301809.pdf](http://www.judicialselection.us/uploads/documents/MJSP_ptr_3962CC5301809.pdf).

requiring some agency boards to include members from affected categories.<sup>23</sup> The design shifts the political focus to the composition and selection of the nominating commission, and it leaves governors to find back channels to get one name or another on the commission's list.<sup>24</sup>

Appointment of judges by the political executive of the day is not indispensable; early state legislatures appointed judges,<sup>25</sup> and the system survives in a small minority of states.<sup>26</sup>

Many national systems of selection and promotion are designed to secure a professional career judiciary, but those also differ in other respects.<sup>27</sup> California leaves the initial choice of appellate judges to the governor, subject to a form of professional control: it requires the governor's appointees to be confirmed by a commission composed of the chief justice, the senior judge of the courts of appeals, and the state's elected attorney general.<sup>28</sup> Thereafter, appellate judges are subject to periodic retention elections.<sup>29</sup>

Many appellate judges resist retention elections, including Wisconsin's Chief Justice Shirley Abrahamson, a battle-hardened veteran of re-

23. See, e.g., TENN. CODE ANN. § 17-4-102(a) (2010) (requiring judicial nominating commission to be comprised of certain members); R.I. GEN. LAWS § 8-16.1-2(a) (2010) (similar).

24. A critical commentary described the selection of a Missouri supreme court justice under that state's commission system:

An ostensibly non-partisan seven-member commission chooses a slate of three nominees and the Governor chooses among them. The idea was to produce candidates based on merit while diluting political influence over courts.

But that was then. Anybody with the power to choose judicial candidates was also destined to become a political actor. And that's exactly what happened. . . . Now Republican Governor Matt Blunt finds himself battling the Missouri bar over the commission's latest panel of candidates. . . .

Review and Outlook, *Show Me the Judges*, WALL ST. J., Aug. 30, 2007, at A10.

25. See JAMES QUAYLE DEALEY, GROWTH OF AMERICAN STATE CONSTITUTIONS: FROM 1776 TO THE END OF THE YEAR 1914 39, 261 (Da Capo Press 1972) (1915).

26. See S.C. CONST. art. V, § 3; VA. CONST. art. VI, § 7.

27. The roles of trial judges and lawyers in American courts differ from those in civil law systems in ways that demand prior experience rather than some form of civil service exams; judges generally are appointed from professional law practice. Closer to the civil law system may be the evolving role of unelected administrative law judges, who now are meant to be independent of executive agencies and of parties affected by agency actions. Of course, the actual performance of courts around the world and over time reflects more important differences than selection systems.

28. CAL. CONST. art. VI, § 16, cl. (d)(2). The system has not always precluded political considerations. In 1938, Governor Cuthbert Olsen nominated a well-known professor, Max Radin of the University of California, to the supreme court. The chief justice supported the appointment, but it was rejected by the votes of the senior appellate judge and an ambitious Republican attorney general, Earl Warren, who objected to Radin's political views. JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 12 (Univ. of Cal. Press 1989). The governor then appointed Radin's colleague, Roger Traynor. *Id.*

29. CAL. CONST. art. VI, § 16, cl. (a).

peated competitive elections who participated in the Seattle conference.<sup>30</sup> In a retention election, groups whose interests are affected by the appellate courts' decisions can finance a campaign to reject an incumbent judge, on whatever grounds will stir negative votes, without having to identify a replacement. The 1986 defeat of California Justices Cruz Reynoso and Joseph Grodin in retention elections, along with the governor's more provocatively chosen Chief Justice Rose Bird, became cautionary examples.<sup>31</sup> In contrast, when a voter can choose only between the incumbent judge and one or more other candidates, the challengers' qualifications and records are also fair game.<sup>32</sup> Often the judge faces no competitor for reelection, at least in states without party nominations.<sup>33</sup> Still, even lacking a serious contender, Oregon groups sometimes seek out and sponsor a candidate (sometimes one of their lawyers) so as to alert voters to their annoyance with a judge, or as a caution to others.<sup>34</sup>

## 2. Who Cares About the Selection of Judges?

In the search for organized interests, it is easy to overlook those personally involved: lawyers who actually aspire to a judicial career, and judges seeking to advance to a higher court. "Higher," in this context, has a financial component that also becomes a higher pension, especially when a formula makes the salary a factor to be multiplied by years in other public offices. The ironic implication is that raising salaries for underpaid state judges may reduce their job security. Except for someone with an already familiar or appealing name, however, a contested

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30. Conference, State Judicial Independence—A National Concern; Seattle University School of Law (Sept. 14, 2009), available at [http://www.law.seattleu.edu/Faculty/Judicial\\_Independence.xml](http://www.law.seattleu.edu/Faculty/Judicial_Independence.xml); see also Colloquy, A Conversation About Judicial Independence and Impartiality, 6 JUDICATURE 339, 342 (2006).

31. See GRODIN, *supra* note 28, at 174 (observing that the \$7,000,000 raised to defeat the three justices came from other sources than fans of capital punishment); see PREBLE STOLZ, *JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT* (The Free Press 1981).

32. Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2003 (1987–88); see James L. Huffman, *Politics and Judicial Independence: A Proposal for Reform of Judicial Selection in Oregon*, 39 WILLAMETTE L. REV. 1425, 1427 (2003).

33. States with partisan elections include Alabama, Illinois, Louisiana, New Mexico, New York, Ohio, Pennsylvania, Texas, and West Virginia. See American Judicature Society, *Judicial Selection in the States*, <http://www.judicialselection.us/> (last visited Mar. 7, 2010); see also Huffman, *supra* note 32, at 1426 (noting that the 2003 Oregon Court of Appeals election was unusual in that there were two candidates).

34. See Ronald K.L. Collins, *Hans Linde and His 1984 Judicial Election: The Primary*, 70 OR. L. REV. 747 (1991); Hans Linde, *Oregon's Property Rights Debate*, Presentation at Georgetown Envtl. Law and Policy Inst. Conf., U.C. Berkeley (Oct. 10, 2002) (describing campaign against Judge David Schuman).

election campaign demands money and organized efforts. Who will provide these, and to what end?

In Oregon campaigns, the focus on crimes, sentences, and the death penalty common in the 1980s has widened to include issues of land-use controls, taxes, and initiative measures.<sup>35</sup> Elsewhere, campaign issues may extend to governmental display of religious symbols or teaching evolution in public schools. The Supreme Court's decisions on abortion and sodomy laws has federalized all these divisive issues, but the split between appointed and elected state courts on the constitutional status of marriage may not be wholly coincidental.<sup>36</sup> Ideology apart, what state judicial doctrines now matter?

One political battleground, surprisingly, is the common law of torts—substantively in product liability and procedurally in the form of class action.<sup>37</sup> Plaintiffs' lawyers have been national whipping boys since the presidential campaign of George H. W. Bush, and they in turn have been actively involved in elections of state judges and of governors who appoint them. Moreover, where lawmakers have been persuaded to enact limits on damages, state judges have invalidated them under one or another clause of their state's constitution. Tort and property issues now also have moved to the federal agenda. From punitive damages to “takings” by land-use control to damages for medical malpractice to the congressional debate of health insurance, each has moved to the federal level. In Oregon, a second battleground has been the use of initiative law-making to restrict what critics deemed to be overly generous benefits for public employees, a restriction that the Oregon Supreme Court held to violate the federal “contract clause.”<sup>38</sup> The legislative sponsor of that measure, Bob Tiernan, later entered a race for the court.<sup>39</sup>

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35. See Paul J. De Muniz, *Judicial Selection in Oregon: Money, Politics, and the Initiative Process*, 39 WILLAMETTE L. REV. 1265, 1269 (2003).

36. See generally Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669, 684 (2002).

37. For an example from Texas, see Kyle D. Cheek & Anthony Champagne, *Partisan Judicial Elections: Lessons From a Bellwether State*, 39 WILLAMETTE L. REV. 1357, 1366–71 (2003).

38. U.S.CONST. art. I, § 10; see also *Oregon State Police Officers' Ass'n v. State*, 323 Or. 356, 361 (1996).

39. See Oregon Republican Party, Chairman Bob Tiernan, <http://www.oregonrepublicanparty.org/node/87> (last visited Feb. 23, 2010); see also Judge of the Supreme Court Candidate: Bob Tiernan, <http://www.sos.state.or.us/elections/nov398/guide/npart/tiemb.htm> (last visited Feb. 23, 2010).

### 3. An Alternative Forum for Concerned Groups

Most people and groups who care at all about the composition of a state's courts do so from political interests, not professional ones.<sup>40</sup> Reformers must persuade these political interest groups to support a more thoughtful way to engage the selection process rather than to sponsor or finance campaigns to elect one judge or another.

How might a state design judicial selection to reflect the institutional and political elements discussed in the foregoing pages: stakeholders in appellate decisions, especially in constitutional questions; geographic and social groups looking for understanding faces on the bench, especially in trial courts; the minimized relevance of party politics; clear responsibility for selection coupled with some form of collective assent; and above all else, assured professional qualifications for judging? The relative importance of all but the professional element will differ from state to state, but the primacy of the professional-qualification element excludes simple popular election, which invites judicial candidacies based solely on prior political or other name familiarity, organizational sponsorship, or access to campaign funding.

#### *F. A Framework for Oregon*

##### 1. The 1962 Proposal

Oregon's 1962 plan for a modern state constitution accepted the basic AJS concept of dividing judicial selection between a multi-member commission and a unitary appointing authority—the governor—followed by a retention election.<sup>41</sup> The revised constitution contemplated a process of consultation between the governor and a state law commission to be established by statute, but the constitution would not limit the governor's choice to names initially presented by the commission.<sup>42</sup> (The federal Constitution similarly contemplated "advice" from the Senate as

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40. One exception is the League of Women Voters, which studied the topic in 2007. *See* LEAGUE OF WOMEN VOTERS OF OREGON, THE OREGON JUDICIARY PART II: CHALLENGES FOR THE 21ST CENTURY, available at [http://www.lwvor.org/documents/ORJudiciaryPt2Chall 2007.html](http://www.lwvor.org/documents/ORJudiciaryPt2Chall%202007.html) (last visited Feb. 25, 2010).

41. Shepherd, *supra* note 7, at 921–22.

42. The proposed text provided as follows:

A State Law Commission may be established in a manner provided by law to make studies, reports and recommendations to the Legislative Assembly on law and its administration, to the Governor on judicial selection and to the Supreme Court on rules of procedure, and to perform additional advisory services as may be provided by law.

THE COMMISSION FOR CONSTITUTIONAL REVISION, A NEW CONSTITUTION FOR OREGON: A REPORT TO THE GOVERNOR AND THE 52ND LEGISLATIVE ASSEMBLY (1962), reprinted in 67 OR. L. REV. 127, 149 (1988). The text was included to allow legislators, judges, executive officials, and private members to serve together on the commission despite the constitution's general separation of powers.

well as final “consent” to the President’s appointment of judges and other high officials.<sup>43</sup>) In effect, the proposal invited both the commission and the governor to originate names of potential nominees and to consult about the choice, but it left details of the process to legislation or to political practice. The plan was adequate for its time, when the bulk of the courts’ work did not involve controversial government policies or conflicts among major organized interests or about diversity on the bench. Selection of judges not followed by an election now needs greater specificity.

## 2. Initial Selection

Without such an election, one option for selecting judges is executive appointment subject to some process of confirmation or rejection, as in the federal or the California model. A version has been recommended for Oregon by James Huffman, former Dean of Lewis & Clark Law School.<sup>44</sup> Another is the AJS model of nomination by a collective group that confines a governor’s choice to a few names, even if it includes the option to reject all and ask for additional nominations.<sup>45</sup> The two schemes differ fundamentally, but both invite exploratory communications in some form, open or *sub rosa*—the consultation proposed in the 1962 draft.

Oregon, in fact, has a statutory law commission, established in 1997 to advise lawmakers and agencies about legal reforms.<sup>46</sup> The Oregon Law Commission includes legislators appointed from both parties in the Oregon House and Senate, the attorney general, the chief justice of the supreme court, the chief judge of the court of appeals, and a trial judge. Other members include an appointee of the governor, the deans or professors from Oregon’s three law schools, and lawyers appointed by the Oregon State Bar.<sup>47</sup> Its basic structure includes the use of committees for various functions.<sup>48</sup> This structure could readily be adapted to the role of evaluating and recommending the relative professional qualifications and skills of potential appointees to appellate courts, as was contemplated in the revised constitution.

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43. U.S. CONST. art. II, § 2.

44. See Huffman, *supra* note 32.

45. AMERICAN JUDICATURE SOCIETY, MODEL JUDICIAL SELECTION PROVISIONS 1 (perm. ed., rev. vol. 2008), available at [http://www.ajs.org/selection/docs/MJSP\\_web.pdf](http://www.ajs.org/selection/docs/MJSP_web.pdf).

46. The commission’s origins and subsequent history are the subject of 44 WILLAMETTE L. REV. No. 2 (2008).

47. OR. REV. STAT. § 173.315(2)-(3) (2009).

48. OR. REV. STAT. § 173.315 (2009).

Oregon's law commission, however, is no venue for weighing other elements in shaping the judiciary—neither the competing interests of economic stakeholders nor demands for geographic or social balance on the courts. These interests are unavoidably political. Where the initial selection of potential judges is assigned to a judicial nominating commission, the composition of the commission itself becomes the object of competing demands for inclusion. Combining the professional and political functions in a single commission would only distort the composition and the work of the law commission.

If the non-political law commission contemplated in the 1962 revised constitution considers only professional qualifications, where might “political” representation in the selection of judges be placed? For many reasons, senate confirmation is not the answer for Oregon, whatever one thinks of its use at the national level, where appellate nominees have become targets for routine displays of partisan ideology and senators insist on controlling appointments to district courts.<sup>49</sup> At best, legislators have diverse political agendas with which a vote on a judicial nomination may become entangled. Oregon's part-time legislature also lacks many long-term, experienced lawyer members like those serving on the U.S. Senate's judiciary committee.

Might it be better to add a separate “citizens' panel” to reflect (not “represent”<sup>50</sup>) the variety of geographic, social, and economic sectors that have distinctive interests in appellate opinions, interests that they now press on governors and pursue by financing election campaigns or ballot measures to reshape the courts?<sup>51</sup> The members of such a panel, whether titled a “commission” or something else, must know something

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49. See Warren Richey, *What May Be Behind Long Nominee Battles*, THE CHRISTIAN SCI. MONITOR, Apr. 15, 2005, at A3, available at [http://www.csmonitor.com/2005/0514p\\_03s01-usju.html?s=yaht](http://www.csmonitor.com/2005/0514p_03s01-usju.html?s=yaht).

50. Panel members would not be delegates: when their decisions have official effect, they may be neither designated nor directed by particular economic or social organizations. Cf. OR. CONST. art. I, § 21; *Dr. Bonham's Case*, (1610) 77 Eng. Rep. 638 (K.B.).

51. After Oregon's large, sparsely populated eastern and southern counties lost their long customary seat on the appellate courts, in part due to the risk of defeat by a candidate from the populous Willamette Valley, agricultural and related interests sponsored unsuccessful initiative measures in 2002 and 2006 to elect appellate judges by districts rather than statewide. Edward Walsh, *Setting Districts for Appellate Judges Makes the Ballot*, THE OREGONIAN, Aug. 4, 2006, at E1. In other states, groups pursuing ethnic and other diversity on the courts may be torn about appointed or elected judges, favoring elections where the group has sufficient voting strength and appointment for statewide appellate courts. In 1990, an incumbent California judge lost reelection to a lesbian candidate, who had no criticism of his performance but argued that “it seemed time for the lesbian and gay community to be represented on the Superior Court.” George Markell, *New Judge, New Perspective: Donna Hitchens Says She Brings a Respect for Diversity*, S.F. CHRON., Jan. 1, 1991, at A4. In Oregon, minority judges have been appointed to state trial and appellate courts as well as to the United States District Court.

about courts, serve long enough, and be few enough in number—between eleven and fifteen—to engage in joint scrutiny and discussions of potential nominees. Some or all of the members might well be appointed by legislative leaders (for instance, appointment of one panel member might be allocated to the legislative delegation from each congressional district) but not more than half should be from any one political party. Details regarding the composition of the professional and the non-professional panels are best left to statutes and amendments in light of experience, except for provisions (perhaps respecting appointment or participation by legislators) that the state constitution otherwise prevents. If both panels must confirm an appointment, the specifics must be designed to facilitate and not to obstruct that function.

### 3. Review and Retention

What can replace retention elections to satisfy demands for judicial “accountability”? The answer must ensure the security of tenure essential both for attracting potentially excellent judges to leave other careers and for protecting judicial independence, but it also must assure the public of its judges’ continued responsible performance on the bench. For most states, tenure for life (or “during good Behaviour”<sup>52</sup>) is not an option, but terms longer than six years are often suggested. No single design to secure both goals is demonstrably best, but the question lends itself to rational solution, at least for Oregon.

Oregon judges are subject to removal or lesser discipline by the supreme court for cause, including willful misconduct, persistent failure to perform judicial duties, or incompetent performance.<sup>53</sup> Judges, like other officials, may face a popular vote in a recall election upon the petition of a requisite number of voters, which is a major undertaking against a state-wide official. Also, unlike an automatic retention election, recall petitions must specify reasons, and those reasons and the incumbent’s response are each given up to 200 words on the ballot.<sup>54</sup>

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52. U.S. CONST. art. III, § 1. The obstacles to copying the federal model are not only political but lie also in the larger number and varying roles of state judges and the smaller institutions capable of the scrutiny devoted to federal appointments. The increasing range of judicial tasks in fact has also led the United States to create a variety of magistrates and specialized or administrative law judges not appointed pursuant to Article III.

53. OR. CONST. art. VII, § 8. The 1859 constitution originally provided for removal by the governor upon a joint resolution by two-thirds majorities in both houses of the legislature.

54. OR. CONST. art. II, § 18. Given the direct channel for specific complaints against a judge, recalls are rarely attempted and are unlikely to succeed; they may serve to publicize dissatisfaction similarly to running a little-known opponent in an otherwise uncontested election. Circuit judges in Marion County, the usual venue for challenges to initiative measures, were targets of several recall petitions between 1988 and 2005. See Crystal Bolner and Peter Wong, *Recall Targets Judge in Measure 37 Case*, STATESMAN-JOURNAL, Oct. 27, 2005, at A1.

Once a system already assigns the professional evaluation of potential appointees to an ongoing, non-political law commission, the same commission is also the logical body to evaluate a judge's professional performance at prescribed intervals (perhaps eight or more years after an initial review at the end of a shorter term) and to decide whether or not to reconfirm the judge for another term. The separate, more political, "citizens' panel" cannot participate in a reconfirmation vote; this would only institutionalize and intensify the threat to an independent judiciary posed by outright popular election, without the campaign costs. At most, that panel might serve to receive public criticisms or praise of particular decisions and summarize any that actually bear on a judge's professional performance for the law commission's information.

#### 4. Adaptation for Trial Courts

How can a commission system be adapted to the selection and confirmation of trial judges? Statewide individual evaluations, even by committees of the commission, would swamp a law commission like Oregon's and distract from its primary ongoing function. The model is not readily replicated locally, even in the populous Willamette Valley counties. Yet, service on state courts calls for some common standards and procedures.

The question requires the system to leave room for flexibility and change, rather than freeze its details in the constitution. Reform might proceed in stages. For instance, after experience with consulting on and confirming appellate appointments, the state commission, in cooperation with Oregon's integrated (i.e., mandatory) state bar, might develop legislation under which the commission would prepare model standards and procedures for gubernatorial appointment of local judges upon consultation and confirmation by regional commissions similar to those for appellate judges. However, this is only one illustration. If the second stage is delayed, Oregon's circuit judges will continue to be appointed or elected, and usually retained, by whatever criteria matter to local voters—the divided system that prevails in New York and California, but without the partisan or other divisive complications found in those states.<sup>55</sup> That need not hold up reforming the system of electing statewide appellate judges.

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55. See *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008) (reversing an appeals court affirmation of a district court's injunction of partisan judicial nominating conventions); Norman L. Greene, *What Makes a Good Appointive System for the Selection of State Court Judges: The Vision of the Symposium*, 34 *FORDHAM URB. L.J.* 35 (2007).

## IV. CONCLUSION

The foregoing comments briefly summarize Oregon's changing experience of electing state judges and a possible approach to reforming the election and retention of appellate judges. A common refrain of conservatives in the 1961–62 Commission on Constitutional Revision was, “if it ain't broke, don't fix it.”<sup>56</sup> Oregon's courts are not broken (though they are sometimes financially broke), but neither are most Oregon bridges and other infrastructure; a better time to strengthen things is before they break. A legal system is strengthened if it does not discourage potential judges by the prospect of facing repeated popularity polls. However, people who now care about who serves on the courts need to believe that the alternative to popular elections will preserve their voices in a more rational system.

“The Rule of Law”—our currently favored phrase to distinguish legitimate from arbitrary or corrupt governance—postulates that law exists in some form before judges apply it. Nominees to the United States Supreme Court are expected to and routinely do assure Senators that they will follow the law, not make it.<sup>57</sup> The postulate demands many qualities for superior judging at any level, but pursuing popular outcomes is not one of them. It is incompatible in principle with voter election or retention of appellate judges like political lawmakers, featuring criticism of their past or expected decisions and financed by groups with one or another stake in those decisions. Legal realist orthodoxy, of course, sees law as the product of judicial decisions and appellate judges as the primary or ultimate lawmakers.<sup>58</sup> Those who subscribe to this view of law also can defend political campaigns to elect different judges, complete with adversary campaign slogans and funded by competing interests.

For designing courts of law, however, the question is not which theory is the more realistic description. The question rather is, or ought to be, what view of their role judges should bring to their task: whether it is to reach an outcome preferred by their supporters and their community, or to search for and set out the most plausible, coherent, and consistent solution to the legal problem at issue. How judges respond, in the mass of cases, will matter less to outcomes than to the court's explanations. Yet the difference is what distinguishes courts from lawmakers

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56. See generally Alfred T. Goodwin, *The Commission for Constitutional Revision*, 67 OR. L. REV. 1 (1988).

57. See, e.g., Peter Baker & Neil A. Lewis, *Sotomayor Vows “Fidelity to the Law” as Hearings Start*, N.Y. TIMES, July 13, 2009, available at <http://www.nytimes.com/2009/07/14/us/politics/14confirm.html>.

58. See Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L. J. 227 (1972).

elected to reflect majority wishes and opinions. The distinction requires a different mode of selecting and retaining judges.

There is nothing radical about the kind of alternative described above; it revives proposals that Oregon commissions advocated half a century ago and that modern developments have only made more timely.<sup>59</sup> It would replace the now inappropriate and outdated reliance on competitive statewide elections conducted by professional campaign managers and funded by law firms and competing interest groups, while also replacing the more frequent appointment of appellate judges by governors without any other independent participation. It draws on but adapts the widely used commission model; it gives the governor a shared initiative rather than only a reactive role; it incorporates separate professional and political judgments by pre-appointment consultation and by eventual confirmation of nominees; and it provides for periodic reconfirmation on the sole basis of professional performance. The question is whether such a plan can overcome the drag of inertia and intuitive reaction against ending elections for any office, while offering participation to concerned economic, social, or geographic interests at lower cost than competing in the electoral arena.

Historically, the odds are against it. Existing institutions rarely attach high priority to institutional reform. It may require more than the costs of modern election campaigns and mandatory recusal from cases involving one's supporters or opponents to overcome this hesitancy. If other voices join Justice O'Connor's to recognize that strong and independent state courts are a national interest, national financial incentives for qualifying state systems could help to secure that interest.

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59. THE COMMISSION FOR CONSTITUTIONAL REVISION, *supra* note 42. *See also* Shepard, *supra* note 7.