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One Hundred Fifty Years of Electing Judges in Oregon: Will There Be Fifty More?

The State of Oregon entered the Union on February 14, 1859, equipped with a constitution providing for direct competitive election of its judiciary.[1] One hundred fifty years later,[2] Oregonians still directly and competitively elect judges "for the term of [s]ix years"[3] despite occasionally partisan and increasingly expensive judicial campaigns, academic and judicial criticism, and failed attempts to change their original choice by constitutional amendments. Why did the delegates to Oregon's Constitutional Convention choose to elect instead of appoint judges? What light does a sesquicentennial perspective shed on improvements that should be made in how Oregon selects its judges?

This Article contends that Oregonians' decision to directly elect judges stemmed primarily from the broad agreement that judicial

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1 OR. CONST. art. VII, § 3. By a "direct competitive election" the author means a popular election open to all candidates meeting the minimum legal qualifications for office.

2 Sixty delegates convened in Salem on August 17, 1857, to draft Oregon's Constitution. They completed their work on September 18, 1857. Oregonians approved the referred draft in a statewide election held on November 9, 1857. OR. CONST. pmbl. (2007); CHARLES H. CAREY, GENERAL HISTORY OF OREGON 508, 510–11 (Binfords & Mort, 3d ed. 1971) (1922).

3 OR. CONST. art. VII, § 1 (amended 1910).

power had grown too dominant and thus should be checked by the democratic influence of periodic competitive elections. This agreement arose from the fact that by the time of the constitutional convention, judicial power had increased through the establishment and acceptance of judicial supremacy[4] over the legislative and executive branches in regards to constitutional interpretation.

Oregonians have rebuffed all attempts to reverse their original choice, and judicial supremacy remains the rule. Although the U.S. Supreme Court has ruled that content-based restrictions on statements by candidates for elective judicial positions may violate the First Amendment,[5] and despite escalating costs of campaigns for judicial office,[6] Oregonians likely will still elect judges through direct competitive elections fifty years from now. But long before the bicentennial, Oregonians should have improved the judicial-selection process by lengthening judicial terms and publicly funding judicial elections.

Part I of this Article examines Oregonians' original decision to select judges by direct competitive elections. Part II outlines criticisms of that decision and describes attempts to reform or reverse it. Part III recounts the history of direct competitive judicial elections in Oregon. In the last Part, this Article suggests two modest reforms that are consistent with the rationale for Oregonians' original choice yet address some of the criticisms of that choice.

I
THE ORIGINAL CHOICE

In framing their constitution, Oregonians deliberately subordinated the judicial power to democratic limits. Section A describes the records of the constitutional convention and the text of the constitution that the convention produced, as those records and text help reveal what Oregonians intended. Section B uses *Dred Scott v.*

4 "Judicial supremacy" is capable of multiple meanings. For purposes of this Article, the expression refers to the power of the judicial branch of a democratic government to declare an exercise of the legislative or executive power unconstitutional with finality, barring subsequent amendment. For a discussion of "the nature of judicial power and the [Supreme] Court's own sense of strategic responsibility in the American constitutional system" in 1857, see DON E. FEHRENBACHER, THE *DRED SCOTT* CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 209–35 (1978).

5 Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002).

6 Press Release, Justice at Stake, 2008 Supreme Court Elections: More Money, More Nastiness (Nov. 5, 2008), http://temp.justiceatstake.org/node/63.

Sandford to frame Oregonians' original choice in the context of the judicial power and of the incandescent political issue of the time—whether Oregon would be admitted as a state in which slavery was lawful.

A. The Convention and Its Product

As the constitutional convention opened in Salem on August 17, 1857, the delegates could have chosen any of several familiar models for selecting judges. Although delegates had before them three examples of models featuring appointed judges, the delegates rejected all of them.[7]

The first example of judicial appointment on which the delegates could have drawn was the frontier experience of the Hudson Bay Company. Until 1846, when the Senate ratified the Oregon Treaty,[8] the Hudson Bay Company and its leader, Dr. John McLoughlin, exercised unelected *de facto* judicial authority over the land that became the Oregon Territory in 1849 and then became the State of Oregon ten years later.[9]

Second, delegates could have created an appointed judiciary following the plan of the United States or as provided by the federal law that established the territorial government of Oregon. The President of the United States is empowered, "by and with the [a]dvice and [c]onsent of the Senate," to appoint judges to the Supreme Court and other courts.[10] Once in office, federal judges serve "during good Behavior."[11] The President appointed judges in the Territory of Oregon, which was formally established in 1848, "by and with the advice and consent of the senate."[12] Delegates

[7] For a careful dissection of the records of the debate about article VII, see Claudia Burton, *A Legislative History of the Oregon Constitution of 1857—Part II (Frame of Government: Articles III– VII)*, 39 WILLAMETTE L. REV. 245 (2003).

[8] Treaty with Great Britain in Regard to Limits Westward of the Rocky Mountains, U.S.-Gr. Brit.-Ir., July 17, 1846, 9 Stat. 869.

[9] Joe K. Stephens, *Oregon Law Before Statehood: History and Sources*, *in* 2 PRESTATEHOOD LEGAL MATERIALS: A FIFTY-STATE RESEARCH GUIDE 957, 959 (Michael Chiorazzi & Marguerite Most eds., 2005); *see generally* DOROTHY NAFUS MORRISON, OUTPOST: JOHN MCLOUGHLIN & THE FAR NORTHWEST (1999) (giving an engrossing and comprehensive biography).

[10] U.S. CONST. art. II, § 2.

[11] U.S. CONST. art. III, § 1.

[12] THE ORGANIC AND OTHER GENERAL LAWS OF OREGON: TOGETHER WITH THE NATIONAL CONSTITUTION, AND OTHER PUBLIC ACTS AND STATUTES OF THE UNITED

confronted the federal example daily because they had selected Matthew P. Deady to chair the proceedings. Deady concurrently served, by appointment of President Pierce, as Associate Justice of the Supreme Court of the Territory of Oregon.[13]

Delegates did discuss the federal model. Delegate Delazon Smith expressly contrasted the federal system with existing state systems of electoral judicial selection. The Oregon Statesman reported that during a debate Smith opined that "[i]t was not probable that [the states] would ever go back to the appointive system," and that it was clear Smith "thought some of them would return to longer terms."[14]

Finally, the delegates could have followed the examples set by other states.[15] The constitutions of all thirteen original states provided for appointment, not election, of judges.[16] The delegates could have modeled Oregon's constitution on any of them. Fifty-eight of the delegates were immigrants to the Oregon Territory from other states; it is likely that at least the nineteen lawyers among them were aware of the method of selecting judges in their original jurisdictions.[17] Smith's explicit comparison during debate of the federal system of appointing judges with the elective systems adopted by some states confirms that delegates of the Oregon Constitution also knew of systems in which judges were elected. Additionally, the constitution of every state admitted between 1832 and 1858 provided for the direct competitive election of judges.[18]

STATES: 1843–1872, at 57 (compiled by Matthew P. Deady & Lafayette Lane, 1874) (quoting § 11 of the Territorial Act) [hereinafter LAWS OF OREGON].

13 CAREY, *supra* note 2, at 495.

14 *The Constitutional Convention*, OR. STATESMAN, Sept. 1, 1857 [hereinafter STATESMAN (Sept. 1, 1857)]. Asahel Bush, an ardent Democrat and a leader of the Democratic Party subset referred to by its rivals as the "Salem Clique," edited and published the *Oregon Statesman*. During the convention the newspaper printed close accounts of the debates. CAREY, *supra* note 2, at 497.

15 "The delegates to the Oregon Constitutional Convention were familiar with developments in other states." Burton, *supra* note 7, at 247 (noting, without specific reference to the selection of judges, the familiarity of various delegates with the records of deliberations in other states about other state constitutions).

16 Richard B. Saphire & Paul Moke, *The Ideologies of Judicial Selection: Empiricism and the Transformation of the Judicial Selection Debate*, 39 U. TOL. L. REV. 551, 554 (2008).

17 CAREY, *supra* note 2, at 511 (describing geographic origins and professional backgrounds of delegates); *see* Burton, *supra* note 7, at 247.

18 Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 716–17 (1995) (describing the status of states entering the Union).

Closer to home, immigrants' most significant attempts at self-governance predating the establishment of the Territory of Oregon featured elected instead of appointed judges.[19] Oregon immigrants' first effort to create a comprehensive system of self-governance occurred in July 1843.[20] Immigrants to the Willamette Valley then adopted a code of laws they labeled the "Organic Law."[21] Article 4, section 7 of the Organic Law vested the judicial power in a "[s]upreme [j]udge and two [j]ustices of the [p]eace."[22] Officers chartered by the Organic Law were to be filled "by election in their several districts By Balet [sic] in the most central and convenient place in each district."[23]

Waves of immigrants continually reexamined and modified the Organic law.[24] They eventually proposed the Organic Law of 1845, approved by voters at a special election on July 26, 1845.[25] Article II, section 8 of the Organic Law of 1845 vested the judicial power in a "supreme court, and such inferior courts of law, equity and arbitration, as may, by law, from time to time be established."[26] The supreme court's lone judge was to have been "elected by the house of

19 Oregon was inhabited before it became a Territory of the United States. Oregon's original inhabitants had been self-governing for at least *fourteen thousand* years before any of the delegates to the convention were born. M. Thomas P. Gilbert et al., *DNA from Pre-Clovis Human Coprolites in Oregon, North America*, 320 SCIENCE 786, 786–89 (2008) (a cave in south-central Oregon yields DNA dating to 12,300 years B.C.). For a readable and sympathetic survey of the long history of Oregon's original human inhabitants, see STEPHEN DOW BECKHAM, THE INDIANS OF WESTERN OREGON: THIS LAND WAS THEIRS (1977). The extent to which immigrants' political, social, and economic institutions were shaped by the culture and institutions of their well-established predecessors in the Oregon Territory is itself a largely unexplored frontier.

20 JOHN A. HUSSEY, CHAMPOEG: PLACE OF TRANSITION 161–62 (1967). In 1959 the Oregon State Highway Department called for a comprehensive study of Champoeg, an open prairie on the south bank of the Willamette River upstream from what is now known as Wilsonville. *Id.* at 338. Hussey was a National Park Service historian engaged by the Highway Department to help evaluate the area's historical significance and possible federal recognition as a national historical site. *Id.* at 338. The immigrants to the region met numerous times beginning in 1843 to form provisional governments and enact "organic laws." *Id.* at xii.

21 *Id.* at 161–62.

22 Or. Historical Soc'y, *The Oregon Archives, 1841–1843*, at 60 OR. HIST. Q. 211, 275 (David C. Duniway & Neil R. Riggs eds., 1959).

23 *Id.* at 262.

24 *See generally* HUSSEY, *supra* note 20, at 145–72 (describing the fits and starts of immigrants' attempts to govern themselves between 1843 and 1849).

25 LAWS OF OREGON, *supra* note 12, at 46 n.1.

26 *Id.* at 49.

representatives."[27] But twelve years later when the constitutional convention adjourned, article VII of its product, which covered the judicial branch, provided for the direct competitive election of judges.

As evidenced by records of the delegates' debates and contemporaneous discussions of the draft constitution, no one seems to have doubted that the final product would provide for an elected judiciary. The absence of debate on this point is all the more remarkable given that "[n]o other article was debated over as long a time, or amended as extensively, as the article on [the] judicial department."[28]

The delegates' discussion of the length of the elective term for judicial offices nevertheless provides the foundation for strong inferences[29] about their rationale. In their debate over the length of judicial terms, delegates expressly invoked a democratic check on the power of the judiciary. Delegates accepted the proposition that the election of judges would cause judges to reflect the concerns of the "common man" even as some of the delegates recognized and sought to limit the risk of what one delegate termed judicial "electioneering."[30]

Both Judge Deady and delegate Reuben P. Boise, an attorney who would later serve on the Oregon Supreme Court, favored terms longer than six years. According to the *Oregon Statesman*, Deady "was for electing judges for a long term, and for giving them good fair salaries." Boise's comments were reported at length:

> We ought to fix these terms so long as to remove the judges from politics, and from temptation to the making of the judgeship a stepping-stone to political promotion—to prostitute the ermine to political ends. It was the great bane of impartiality and justice upon the bench. It had been the study of governments to guard against this evil. Elect your judges for short terms, and you would find them electioneering for the next term, upon the bench, or perhaps

[27] *Id.*

[28] Burton, *supra* note 7, at 393.

[29] Historians and lawyers may be more alike than either care to admit. Both out of necessity draw constantly on inferences from often incomplete sets of facts. *Compare, e.g.*, UNIFORM OREGON CIVIL JURY INSTRUCTION 10.08 (proof may be by "proof of a chain of circumstances pointing to the existence or nonexistence of a certain fact"), *with* Robin W. Winks, *Introduction* to THE HISTORIAN AS DETECTIVE: ESSAYS ON EVIDENCE xvi (Robert W. Winks ed., Harper Colophon 1970) ("The historian must reconstruct events often hundreds of years in the past . . . when the full evidence will never be recoverable and, for that portion of it recovered, when it may have meanings other than we would attach to similar evidence today.").

[30] STATESMAN (Sept. 1, 1857), *supra* note 14 (quoting Reuben P. Boise).

> courting some other office. Elect them for long terms, bind them by oath not to accept other office, and you direct their ambition in the line of the judiciary and have some guaranty of pure fountains of justice.[31]

Delegate John Kelsay favored shorter terms. The *Oregon Statesman* reported that Kelsay "was in favor of rotation in office, and in favor of giving other and common men a chance."[32] He thought "short term judges no more subject to political influences than long term ones."[33] But Smith had the last word on the length of judicial terms. After comparing state systems of elective judges to the federal-appointment system and arguing for a term of office longer than six years, Smith asserted that "[t]he frequent return of power to the people was a good rule applied to the executive and legislative departments of government."[34] Smith's implicit contention was that the rule was equally sound as applied to the judicial department.

The text of other elements of the constitution tends to confirm delegates' intent to subordinate the judicial power to democratic limits. For example, the original Oregon Constitution provided two methods of removing an incumbent judge from office during the judge's term. Article VII, section 19 provided that, after a trial in circuit court, any public officer could be tried for "incompetency, corruption, malfeasance, or delinquency in office . . . in the same manner as criminal offences." Grand juries initiated all criminal proceedings.[35] Article VII, section 20 permitted the Governor, upon resolution by the Legislative Assembly, to remove Supreme Court justices for "incompetency, Corruption, malfeasance or delinquency in office, or other sufficient cause." Both of the removal provisions were initiated by electors—directly in the case of grand-jury presentment and indirectly in the case of legislative resolution.

In contrast to the U.S. Constitution, Oregon's original constitution did not include any prohibition against reductions in judicial salaries during a judge's term of office.[36] The delegates assigned to the

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31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 OR. CONST. art. VII, § 18. *See* State v. Gortmaker, 295 Or. 505, 513–16, 668 P.2d 354, 358–61 (1983) (discussing the history of Oregon, and the grand jury system, including the 1899 amendment allowing alternatives to grand jury indictment).

36 A committee did report a section limiting reduction in judicial salaries. The committee's report, however, was not adopted. Burton, *supra* note 7, at 451.

Legislative Assembly the exclusive power to raise revenue and barred any expenditure by any means except "appropriations made by law."[37] Other state constitutions also lacked a protective salary-bar and granted broad spending authority; Alexis de Tocqueville observed this was "a practice that necessarily subjects [judges] to [the legislature's] immediate influence."[38] Lastly, justices of the Oregon Supreme Court were elected by district[39] instead of in statewide elections in which distinct geographic interests presumably would be muted.

The delegates' debates, and the text of the constitution they referred to the voters, support the inference that the delegates acted intentionally to check the power of the judiciary by subordinating it to direct or indirect (through the powers granted to the Assembly) democratic action. Events outside their meeting room buttress the inference. Those events are discussed in Section B.

B. The Original Choice Through the Lens of Dred Scott

On March 6, 1857, six months before Oregon's constitutional convention convened, Chief Justice Roger Taney issued the U.S. Supreme Court's judgment in *Dred Scott v. Sandford*.[40] Scott

[37] OR. CONST. art. IV, § 18 ("[B]ills for raising revenue shall originate in the House of Representatives."), and art. IX, § 4 ("No money shall be drawn from the treasury, but in pursuance of appropriations made by law.").

[38] I ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 155 (Francis Bowen trans., Alfred A. Knopf, Inc. 14th prtg, 1984) (1835).

[39] OR. CONST. art. VII, § 2. In 1910, an initiative petition adopted by the people amended the constitution to allow the Legislature to eliminate district elections for judges with statewide appellate jurisdiction. OR. CONST. art. VII, § 1 (amended 1910). The Legislature subsequently exercised that power. In 2006 a proposal to revert to election by district reached the ballot by initiative petition. A supporter of the proposal wrote that it would cause the Oregon Supreme Court to "better reflect Oregon's citizens—not just lawyers—if judges ran from district similar to those that divide Oregon into five Congressional districts." Official Voters' Pamphlet, State Measures, Oregon General Election, Nov. 7, 2006, at 19, *available at* http://www.sos.state.or.us/elections/nov72006/guide/meas/m40_fav.html (quoting an argument in favor of Ballot Measure 40, submitted by eleven district attorneys). Opponents argued "Judges are not elected to represent people, regions, or political viewpoints; rather they interpret, administer and uphold the constitution and laws. Unlike legislators, who are charged with representing regional constituents, the role of judges is to fairly and impartially apply the law without regard to political ideology or geography." Or. State Bar, Constitutional Amendment 40 Position Paper, http://www.osbar.org/_docs/lawimprove/06_OSBposition40.pdf (last visited May 4, 2009).

[40] 60 U.S. (19 How.) 393 (1856).

contended that he was freed by the fact of his residence for a time in a territory of the United States in which slavery was prohibited.

The court ordered the U.S. Circuit Court for the District of Missouri to dismiss Scott's claim to be a free person "for the want of jurisdiction in that court."[41] The Chief Justice declared that

> the act of Congress [referring to one of the statutory elements of the Missouri Compromise] which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory . . . ."[42]

The Court expressly held unconstitutional the statutory components of the Missouri Compromise.[43] Contemporaries widely understood *Dred Scott* to hold that Congress could not constitutionally prohibit slavery in any territory.[44] Abraham Lincoln, among others, believed that *Dred Scott* inescapably presaged an opinion declaring unconstitutional any *state's* effort to prohibit slavery:

> I think myself, and I repeat it here, that this decision does not merely carry slavery into the Territories, but by its logical conclusion it carries it into the States in which we live.[45]

If Lincoln were right, Oregon's new constitution could not constitutionally prohibit slavery; and yet prohibiting slavery in the new state was precisely what an overwhelming majority of voters in the territory wished to do, as subsequent events would demonstrate. *Dred Scott*, slavery, and their incendiary implications dominated the windup to Oregon's constitutional convention.

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41 Nat'l Archives & Records, *Civil War and Reconstruction (1850–1877): Dred Scott Decision*, http://www.archives.gov/exhibits/american_originals/scott.html (last visited May 4, 2009) (providing an image of the Chief Justice's one-page judgment).

42 *Dred Scott*, 60 U.S. at 452.

43 *See id.* The "Missouri Compromise" temporarily resolved the gridlock of 1819–1830 between southern and northern members of Congress over the admission of Missouri and Maine and the extension of slavery to territories north and south of 36° 30'. FEHRENBACHER, *supra* note 4, at 100–13.

44 "For there can be no doubt that Taney's opinion was accepted as the opinion of the Court by its critics as well as its defenders. In all branches of government and in popular thought, the "Dred Scott decision" came to mean the opinion of the Chief Justice." FEHRENBACHER, *supra* note 4, at 333–34.

45 Abraham Lincoln, Speech at Columbus, Ohio (Sept. 16, 1859), *in* III THE COLLECTED WORKS OF ABRAHAM LINCOLN 420–21 (Roy P. Basler ed., 1953).

On July 28, 1857, Asahel Bush published on the front page of his *Oregon Statesman* a lengthy letter from his close political ally, fellow Democrat, and soon-to-be delegate to the constitutional convention, George Williams.[46] While declaring his preference for a free Oregon and omitting any reference to *Dred Scott* by name, Williams confronted directly the Supreme Court's opinion and just as directly rejected it:

> I contend that we have a perfect right to have slavery or not, as we please.
>
> . . . .
>
> I take the ground that the General Government has no right in any way to interfere with slavery, except to carry out the fugitive slave clause of the constitution, and have maintained the opinion that each State and Territory has the absolute right to establish, modify, or prohibit slavery within its borders, subject only to the Constitutional restriction [allowing a federal fugitive slave law].[47]

A week later another Oregonian took the opposite position in terms that plainly evidence knowledge of the Supreme Court's opinion in *Dred Scott*:

> There are many reasons why Oregon should become a slave State.
>
> . . . .
>
> [T]he narrow-minded abolitionists and shallow-brained republican[s] . . . trample the Constitution of the United States under foot and denounce the decision of the Supreme Court of the United States as being a southern one.[48]

Williams' position proved by far the more popular. Delegates to the constitutional convention referred to the people several questions subsidiary to the approval or rejection of their draft.[49] One of those questions was: "Do you vote for Slavery in Oregon? Yes, or No."[50] On November 9, 1857, voters cast 7727 votes against slavery and 2645 for it.[51] By prohibiting slavery, Oregonians exercised a political power that the appointed judiciary of the U.S. Supreme Court implied that states did not possess.

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46 *Slavery in Oregon*, OR. STATESMAN, July 28, 1857 (letter of George Williams).

47 *Id.*

48 *The Slavery Question*, OR. STATESMAN, Aug. 4, 1857, at 4 (Letter of F.B. Martin).

49 OR. CONST. art. XVIII, § 2.

50 *Id.*

51 SECRETARY OF STATE, OREGON BLUE BOOK: ALMANAC AND FACT BOOK 353 (2007–2008).

For Oregonians in the summer of 1857, *Dred Scott* focused attention on the federal judiciary's power to declare laws unconstitutional as applied to the most important political and social issue of the day. That power had evolved in the eighty years since the U.S. Constitution and the constitutions of the original states were adopted. By 1857 the Supreme Court had long since discovered in its charter the conclusive authority (barring subsequent amendment) to instruct the other branches as to the meaning of the words of the constitution.[52] *Dred Scott* was all the more inflammatory given the broad acceptance, by Democrats and Republicans alike, of the proposition that the U.S. Supreme Court is empowered to rule on the constitutionality of statutes.

Democrats invoked the principle of judicial supremacy, and centrist Republicans, reluctant to repudiate the principle, sought to distinguish the Court's opinion. Democrats like Stephen Douglas insisted that the nation must acquiesce to the Supreme Court's opinion.

> The courts are the tribunals prescribed by the Constitution and created by the authority of the people to determine, expound and enforce the law. Hence, whoever resists the final decision of the highest judicial tribunal, aims a deadly blow to our whole Republican system of government—a blow, which if successful would place all our rights and liberties at the mercy of passion, anarchy and violence.[53]

Lincoln disclaimed resistance to the Court's opinion:

> We believe, as much as Judge Douglas, (perhaps more) in obedience to, and respect for the judicial department of government. We think its decisions on Constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution.[54]

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[52] The Supreme Court had, before *Dred Scott*, frequently asserted or implied the power to declare an act of Congress unconstitutional, "and the existence of such power was widely assumed by the American people" in 1857. FEHRENBACHER, *supra* note 4, at 4.

[53] Lincoln, *supra* note 45, at 401 (quoting Stephen A. Douglas's speech at Springfield, Illinois, on June 26, 1857).

[54] Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), *in* II THE COLLECTED WORKS OF ABRAHAM LINCOLN 401 (Roy P. Basler ed., 1953).

Lincoln's "respect" for the decision was limited, however, to the decision "in so far as it decided in favor of Dred Scott's master and against Dred Scott and his family."[55] Lincoln said that Douglas:

> [W]ould have the citizen conform his vote to that decision; the Member of Congress, his; the President, his use of the veto power. He would make it a rule of political action for the people and all the departments of the government. I would not. By resisting it as a political rule, I disturb no right of property, create no disorder, excite no mobs.[56]

The evolution and ultimate establishment of the judiciary's power to declare unconstitutional laws passed by its coordinate legislature is a story beyond the scope of this Article. It is important to note, however, that the judiciary's triumph over lawmakers evolved over the same decades in which states shifted from appointed to elective judiciaries and crystallized in the form of *Dred Scott* immediately before Oregon's constitutional convention convened in 1857.[57] That triumph left the makers of the Oregon Constitution, and the makers of every other state constitution drafted during the maturation of the principle of judicial supremacy, with an enduring problem. A modern political scientist, Robert Dahl, framed the problem as follows:

> If a law has been properly passed by the lawmaking branches of a democratic government, why should judges have the power to declare it unconstitutional? If you could simply match the intentions and words of the law against the words of the constitution, perhaps a stronger case could be made for judicial review. But in all important and highly contested cases, that is simply impossible. Inevitably, in interpreting the constitution judges bring their own ideology, biases, and preferences to bear.[58] American legal scholars have struggled for generations to provide a satisfactory rationale for the extensive power of judicial review that

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[55] Abraham Lincoln, Speech at Springfield, Illinois (July 17, 1858), *in* II THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 54, at 516.

[56] *Id.*

[57] *See* FEHRENBACHER, *supra* note 4, at 4.

[58] ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 55 (2002). Lawyers and judges debate the "inevitability" of this conclusion. The Supreme Court agrees. "Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well." Republican Party of Minn. v. White, 536 U.S. 765, 784 (2002). The Court's view of the state court process contrasts sharply with the perspective expressed by eight states, participating as friends of the court in the *Republican Party of Minn. v. Kelly*: "[T]he judicial process is not one of debating toward what the law *should* be. It is rather the finding of what the law *is*." Brief Amicus Curiae of California, Arizona, Missouri, Montana, Oklahoma, Oregon, Texas and Washington in Support of Respondents at 6, No. 01-521 (8th Cir. Feb. 19, 2002).

> has been wielded by our Supreme Court. But the contradiction remains between imbuing an unelected body—or in the American case, five out of nine justices on the Supreme Court—with the power to make policy decisions that affect the lives and welfare of millions of Americans. How, if at all, can judicial review be justified in a democratic order?[59]

Dred Scott focused a spotlight on that question on the eve of Oregon's constitutional convention.[60] Had Dahl published his question as a letter to the editor of the *Oregon Statesman* in the summer of 1857, every reader would instantly have understood him to refer to *Dred Scott*. Dahl's question, though unstated, hung heavy over the convention. The delegates answered the question by establishing a system in which judges are chosen in direct competitive elections. As a result of their decision, no tension arises currently in Oregon between the creation of law by democratic processes and the judiciary's power to declare laws unconstitutional. Although Oregonians repeatedly have revisited the question, their original answer has endured.

II
CRITIQUES OF THE ORIGINAL CHOICE AND FAILED ATTEMPTS AT REVISION

In 1835, Alexis de Tocqueville linked the existence of the principle of judicial supremacy to the limitations placed on that power by state constitutions.

> Armed with the power of declaring the laws to be unconstitutional, the American magistrate perpetually interferes in political affairs. . . . I am aware that a secret tendency to diminish the judicial power exists in the United States . . . . Some other state constitutions make the members of the judiciary elective, and they are even subjected to frequent re-elections. I venture to predict that these innovations will sooner or later be attended with fatal consequences; and that it will be found out at some future period that by thus lessening the independence of the judiciary they have

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[59] DAHL, *supra* note 58, at 55.

[60] In addition to F.B. Martin's rebuttal to George Williams's rejection of *Dred Scott*, the *Oregon Statesman* of August 4, 1857, carried a report of the transformation of Marion County's courthouse into a space suitable "for the sittings of the Constitutional Convention." It also carried Bush's editorial declaring himself "for a free State in Oregon," provided free negroes were excluded, whites were barred from transporting slaves into Oregon, negroes were prohibited from acquiring real estate, and negroes were prohibited from suing or being sued in state courts. *The Constitution and Negroes*, OR. STATESMAN, Aug. 4, 1857.

> attacked not only the judicial power, but the democratic republic itself.[61]

For more than a century, bar associations and other professional associations have counseled against the perceived excesses of direct competitive elections.[62] Academics,[63] distinguished practitioners,[64] lawyer-novelists,[65] and the Oregon Supreme Court[66] have all expressed alarm about the implications of the choice made more than 150 years ago. Judges have joined this chorus. In 2002, Paul De Muniz, now Chief Justice of the Oregon Supreme Court, and at the time an associate justice of that court, wrote that:

> [C]onstitutional scholars, historians, social commentators, the American Bar Association, and watchdog groups are now voicing grave concern that state supreme court elections are being transformed into purely political affairs at odds with the independent and impartial role that judges and courts must perform under America's three-branch system of government.[67]

Justices of the U.S. Supreme Court have expressed concern about direct competitive election of state judges. Justice O'Connor believes that relying on campaign contributions "may leave judges feeling indebted to certain parties or interest groups" and that even the public's perception of the possibility of such indebtedness "is likely to

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[61] DE TOCQUEVILLE, *supra* note 38, at 279 (footnote omitted).

[62] "By the early twentieth century, elective judiciaries were increasingly viewed as plagued by incompetence and corruption—a view that in 1913 led Herbert Harley, Albert Kales, Roscoe Pound, John Wigmore, and others to establish the American Judicature Society ("AJS") in the pursuit of judicial reform." Croley, *supra* note 18, at 723.

[63] *See, e.g.*, Hans A. Linde, *State Courts and Republican Government*, 41 SANTA CLARA L. REV. 951, 965 n.54 (2001).

[64] *See, e.g.*, David B. Frohnmayer, *Election of State Appellate Judges: The Demise of Democratic Premises*, 39 WILLAMETTE L. REV. 1251 (2003).

[65] JOHN GRISHAM, THE APPEAL 218 (2008).

[66] *In re* Fadeley, 310 Or. 548, 563, 802 P.2d 31, 40 (1990) ("The stake of the public in a judiciary that is both honest in fact and honest in appearance is profound. A democratic society that, like ours, leaves many of its final decisions, both constitutional and otherwise, to its judiciary is totally dependent on the scrupulous integrity of that judiciary. A judge's direct request for campaign contributions offers a *quid pro quo* or, at least, can be perceived by the public to do so. Insulating the judge from such direct solicitation eliminates the appearance (at least) of impropriety and, to that extent, preserves the judiciary's reputation for integrity.").

[67] Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 368 (2002).

undermine the public's confidence in the judiciary."[68] Additionally, Justices Kennedy and Breyer recently observed:

> When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence. The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges. And it may seem difficult to reconcile these aspirations with elections.[69]

Some scholars recently have attempted empirical evaluations of the arguments for and against direct competitive election of judges.[70] Their efforts have yielded no knockout blow in either direction, but the effort to quantify the risks inhering from the direct competitive election of judges seems unlikely to flag.[71]

Given the steady drumbeat of criticism, it is not surprising that proposals have been advanced in Oregon to eliminate direct competitive judicial elections, or to minimize their perceived disadvantages. Coincident with the state's centennial, voters approved article XVII, section 2 of the Oregon Constitution. It permitted the Legislative Assembly, on the agreement of "at least two-thirds of all the members of each house," to propose to the voters constitutional revisions embracing more than one subject.[72] The Legislature created a Commission for Constitutional Revision in 1961 in preparation for the exercise of its new authority.[73] In 1962 the Commission proposed a new constitution to the Legislature.[74]

Article VI of the Commission's proposal described the judiciary. Judges were to be appointed by the Governor and were thereafter

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[68] Republican Party of Minn. v. White, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring).

[69] N.Y. State Bd. of Elections v. Lopez Torres, 128 S. Ct. 791, 803 (2008) (Kennedy & Breyer, JJ., concurring).

[70] Saphire & Moke, *supra* note 16, at 565–73 (surveying empirical studies; concluding that the results of empirical studies provide "mixed" support for reform).

[71] *Id.*

[72] H.R.J. Res. 5, 55th Leg., Reg. Sess., 1959 Or. Laws 1535 (approved by voters Nov. 8, 1960).

[73] COMM'N FOR CONST. REVISION, A NEW CONSTITUTION FOR OREGON: A REPORT TO THE GOVERNOR AND THE 52ND LEGISLATIVE ASSEMBLY 35 (1962); S.J. Res. 20, 1961 Or. Laws 1514.

[74] COMM'N FOR CONST. REVISION, *supra* note 73, at 1–30.

subject to retention elections in which voters were to be asked simply whether the judge was to be retained.[75] If the people answered affirmatively the judge would serve an additional term of six years, but if they answered negatively the seat would be declared vacant, and the Governor would exercise the appointment power.[76] A majority of the Commission contended that direct competitive elections offer the people no genuine choice. The Commission argued that a voter "has no basis on which to make a choice unless it is anger toward an incumbent for a past decision rendered honestly, and the candidate cannot give the voter a basis without compromising his judicial independence if elected."[77]

Two members of the Oregon House of Representatives also serving on the Commission dissented from the Commission's proposal.[78] They prophetically focused on the judicial article and particularly on the proposed elimination of the direct competitive election of judges. One of the dissenting legislators wrote "Section 8 of Article VI provides for the appointment of judges and this takes from the people their opportunity to vote for judges in a positive way. . . . When we have a highly adequate system why instigate a change that is highly controversial?"[79]

In 1963 the Commission's proposal passed the House with the requisite two-thirds majority, but it failed in the Senate.[80] Until 1969, successive biennial struggles failed to attract sufficient votes in the House, Senate, or both, for referral of a revision to the people. The Measure[81] finally referred in 1969 appeared on the May 26, 1970, primary-election ballot as Ballot Measure 3. But by then, section 8 of article VI of the Commission's original proposal for reformation of the judicial-selection process had been transformed into an *affirmation* of the original constitution. Ballot Measure 3 (1970) stated that: "Judges of courts in the judicial system shall be elected at

75 *Id.* at 17.

76 *Id.*

77 *Id.* at 43.

78 *See id.* at 5.

79 *Id.* at 54 (Statement of Representative Stafford Hansell). Representative Thomas Mahoney dissented from the report and specifically from the Commission's recommended section 8 of article VI on the ground that Senate confirmation of the Governor's appointee was an essential component of an appointive system. *Id.* at 56–57. The Commission's proposal did not provide for Senate confirmation of the Governor's appointee.

80 H.J. Res. 1, 52nd Leg., Reg. Sess. (Or. 1963).

81 S.J. Res. 23, 55th Leg., 1969 Or. Laws 1951.

regular general elections by the voters of the state or appropriate geographical district."[82] The people capped the decade-long adventure by trouncing Ballot Measure 3 (1970), 182,074 for and 322,682 against.[83] Nothing in the arguments about the Measure suggests that the people rejected it because they preferred the Commission's original proposal for an appointed judiciary to the final proposal affirming the existing constitution.[84]

Opponents of the direct competitive election of judges tried again in 1977. In that year, the Legislative Assembly passed Senate Joint Resolution 6,[85] referring to the people a constitutional amendment modifying the system of direct competitive election of judges. The referred measure appeared on the November 7, 1978, general election ballot as Ballot Measure 1.[86] Under Section 1 of the Measure, the successor to a circuit judge serving a full term would have been selected by the people in a direct competitive election.[87] Section 2 provided a very different approach for selecting judges exercising statewide territorial jurisdiction.[88] As to those judges, a "nonpartisan judicial nominating commission" would have presented to the Governor a report identifying "well-qualified" candidates.[89] The Governor would choose from the presented list. Once appointed, the incumbent would have been required to stand for a confirmation election in which the only question presented would be: "Shall Judge (naming him or her) be elected to succeed (himself or herself, as appropriate) as judge of the (name of court)?"[90]

Opponents of the referred measure echoed the views expressed by John Kelsay and Delazon Smith at the Constitutional Convention

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82 Ballot Measure 3, Official Voters' Pamphlet, pt. 1, Oregon Democratic Party Primary Nominating Election, no. 1, May 26, 1970, 19–44 (quoting article VI, section 7).

83 SECRETARY OF STATE, OREGON BLUE BOOK, INITIATIVE, REFERENDUM AND RECALL: 1958–1970, http://bluebook.state.or.us/state/elections/elections18.htm (last visited May 5, 2009).

84 Official Voters' Pamphlet, pt. 1, Oregon Democratic Party Primary Nominating Election, no. 1, May 26, 1970, at 10–45 (The arguments for and against Ballot Measure 3 are on pages 10–18.).

85 S.J. Res. 6, 59th Leg., Reg. Sess., 1977 Or. Laws 1090.

86 Ballot Measure 1, Official Voters' Pamphlet, Oregon General Election, no. 1, Nov. 7, 1978, at 4.

87 *Id.*

88 *Id.*

89 S.J. Res. 6, 59th Leg., Reg. Sess., 1977 Or. Laws 1090.

90 *Id.*

about the beneficial effects of frequent judicial elections.[91] The opponents answered emphatically Robert Dahl's question:

> The judiciary, at both trial and appellate levels, is a consistent and highly significant voice in the formulation of public policy. As such it must be representative of and accountable to the people of this state, and the only way this accountability can be guaranteed is through the present election process by which outstanding Oregon judges have been selected for decades.[92]
>
> . . . .
>
> IF YOU'RE SMART ENOUGH TO ELECT A GOVERNOR AND A LEGISLATURE, WHY WON'T THEY ALLOW YOU TO ELECT JUDGES?[93]
>
> . . . .
>
> Our courts exercise ever-growing power over our economic and political rights and liberties. Therefore, it is ever more vital that judges remain effectively accountable to the voters.[94]

The people rejected the proposal by a vote of 358,504 for and 449,132 against.[95] It is as close as Oregon ever has come to eliminating the direct competitive election of judges. Its defeat is consistent with the modern trend as exhibited in other states since the mid-1980s.[96]

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[91] *See supra* Part I.A.

[92] Official Voters' Pamphlet, Oregon General Election, no. 1, Nov. 7, 1978, at 6 (quoting Harl Haas and John Ray's "Argument in Opposition" to Ballot Measure 1).

[93] *Id.* (quoting the Women's Legislative Council's "Argument in Opposition" to Ballot Measure 1).

[94] *Id.* at 7 (quoting Henry Kane's "Argument in Opposition" to Ballot Measure 1).

[95] SECRETARY OF STATE, OREGON BLUE BOOK, INITIATIVE, REFERENDUM AND RECALL: 1972–1978, http://bluebook.state.or.us/state/elections/elections19.htm (last visited May 5, 2009).

[96] "[S]ince the mid-1980s, voters in several states have rejected merit proposals by substantial margins. In five other states, legislative proposals for reform of the judicial selection system have repeatedly failed." Saphire & Moke, *supra* note 16, at 556 (footnote omitted).

III
ONE HUNDRED FIFTY YEARS UNDER THE ORIGINAL CHOICE

Aggregate information about appellate court[97] elections hints at some intriguing patterns but does little to help evaluate key criticisms or formulate remedies. The data are set out in Table 1.

More than sixty percent of Oregon Supreme Court justices who have served first gained office through gubernatorial appointment. Almost eighty percent of court of appeals judges initially reached office by appointment. Approximately seventy-three percent of the justices initially appointed to the bench later won office by election. And 93.5% of judges of the court of appeals originally appointed were later elected.

TABLE 1[98]
AGGREGATE NUMBER OF ELECTIONS, APPOINTMENTS
(APPELLATE COURTS)

COURT	TOTAL NUMBER OF JUSTICES OR JUDGES WHO HAVE SERVED	INITIALLY ELECTED	INITIALLY APPOINTED	ELECTED AT LEAST ONCE AFTER INITIAL APPOINTMENT	APPOINTED BUT NOT ELECTED
SUPREME COURT JUSTICES	92	36 (39.1%)	56 (60.9%)	41 (73.2% of appointees)	15 (26.8% of appointees)
COURT OF APPEALS JUDGES	39	8 (20.5%)	31 (79.5%)	29 (93.5% of appointees)	2 (6.5% of appointees)

Table 1 neither informs one of the number of contested elections nor helps evaluate the quality or tenor of such elections. Statements submitted by judicial candidates and their supporters for publication in voters' pamphlets published by the Oregon Secretary of State do, however, permit one to sample the quality and tenor of direct

[97] Year-by-year review of trial court elections in each of Oregon's thirty-six counties likely would shed further light on the consequences of the original choice. The author did not attempt that monumental undertaking.

[98] The Oregon Blue Book, published by the Secretary of State, contains lists exhibiting the tenure of each judge of the court of appeals and justice of the supreme court. Data in this table were derived from that source. SECRETARY OF STATE, OREGON BLUE BOOK, STATE OFFICIALS HISTORY, http://bluebook.state.or.us/state/elections/elections23.htm (last visited June 17, 2009).

competitive elections in Oregon. Table 2 is based on examination of all the voters' pamphlets published for statewide elections between 1934 and 2006. The Table includes thirty-seven electoral cycles. Each "cycle" could include a primary and general election for the same contested seat. One or more direct competitive elections occurred in twenty-three of the electoral cycles. No contested election for a supreme court or court of appeals seat occurred in years between 1934–2006 and omitted from Table 2.

TABLE 2[99]
NUMBER OF CONTESTED ELECTIONS (APPELLATE COURTS)

YEAR	NO. OF CONTESTED SUPREME COURT SEATS	NO. OF CONTESTED COURT OF APPEALS SEATS	CANDIDATES
1934	1		Bagley v. Rand (Primary)
1938	1		Bean v. Zimmerman (General)
1950	1		Tooze v. Dunn v. McGuire (Primary)
1956	1		Lusk v. Sandblast (Primary)
1958	2		Sloan v. Overhulse v. Bowe (Primary) Rossman v. Lee (Primary)
1962	1		Denecke v. Wolff (Primary)
1964	1		Holman v. Howell v. Fort v. Lee (Primary) Holman v. Howell (General)
1968	1		McAllister v. Lenske (Primary)
1974	1	1	McAllister v. Lent (Primary – S.Ct) Lee v. Tanzer (Primary – CA)
1976	1	3	Lent v. Field (Primary – S. Ct.) Johnson v. Kane v. Lucas v. Chez (Primary – CA pos. 1) Schwab v. Kitson (Primary – CA pos. 3) Richardson v. Fort (Primary – CA pos. 4)
1980	1	2	Peterson v. Field v. Wolff (Primary – S. Ct) Peterson v. Field (General – S. Ct) VanHoomison v. Warden (Primary – CA pos. 2) Warren v. Brown (Primary – CA pos. 6)

[99] The Oregon Supreme Court Law Library holds a bound collection of voters' pamphlets published since 1902 by the Secretary of State. The collection appears incomplete for elections before 1934. Table 2 is based on the author's examination of all of the collected pamphlets with special emphasis on those published from 1934 forward.

YEAR	NO. OF CONTESTED SUPREME COURT SEATS	NO. OF CONTESTED COURT OF APPEALS SEATS	CANDIDATES
1984	1	0	Linde v. Norblad v. Nissman (Primary) Linde v. Norblad (General)
1986	0	1	Deits v. Erwin (Primary)
1988	2	0	VanHoomison v. Buttler (Primary – Pos. 2) Fadeley v. Cook v. Jelderks v. Bearden (Primary – Pos. 4) Fadeley v. Cook (General – Pos. 4)
1994	0	1	Armstrong v. Adamson (General)
1996	1	0	Kulongoski v. Armstrong v. Yraguen (Primary)
1998		2	Riggs v. Tiernan v. Westwood v. Rice v. Hoffer (Primary, Pos. 7) Riggs v. Tiernan (General, Pos. 7: Tiernan withdrew after the primary but before the election) Warden v. Jackson (Primary, Pos. 6)
2000	1	0	DeMuniz v. Byrne v. Merten v. Niven v. Hatfield (Primary) DeMuniz v. Byrne (General)
2002	0	1	Schuman v. Hunnicutt (Primary)
2004	2	1	Kistler v. Leuenberger (Primary – S. Ct. pos. 4) Riggs v. Murgo (Primary – S. Ct. pos. 7) Wollheim v. Brockett (Primary – CA pos 7)
2006	1	0	Linder v. Roberts v. Hallman (Primary) Linder v. Roberts (General)

Most of the published statements of candidates and their supporters in the contested elections listed in Table 2 are fairly described as self-restrained, nonpartisan, and biographical. Most candidates and their supporters eschewed specific commentary on substantive issues already decided by, or likely to be pending before, the court. Chief Justice Bean's brief statement in the 1938 voters' pamphlet succinctly captures the spirit animating many of the statements: "Partisan questions are not involved in the election of judge."[100] On that spare platform, and on the record compiled in four terms on the supreme

[100] Official Voters' Pamphlet, Oregon Regular General Election, no. 1, Nov. 8, 1938, at 71.

court bench, Chief Justice Bean was reelected for the fifth and final time.[101]

Even the voters' pamphlets, however, contain a few issue-specific commentaries and overtly political appeals. In 1956, a nonlawyer candidate urged voters to choose "from the ranks of Labor Union and women."[102] In 1958, a challenger criticized the personal productivity of the incumbent justice in his voters' pamphlet statement; in the same pamphlet, there appeared a "statement opposing the nomination" of the challenger and two surrebuttals to the statement opposing the nomination of the challenger.[103] In 1968, a candidate seized the bully pulpit of his candidacy to urge judges to speak out against the war in Vietnam.[104] In 1984, one of the candidates in a three-way primary race for a supreme court position asserted that "THE INCUMBENT IS OUT OF TOUCH WITH OREGONIANS . . . All too often his major concern has been for the criminal, not the crime victim."[105] Crime emerged again as an explicit issue in 2000, when a challenger's supporter contended in the voters' pamphlet that the incumbent, formerly a court of appeals judge, had "sided with criminal defendants in four of his five opinions reviewed by the Supreme Court."[106]

The Oregon Secretary of State mails voters' pamphlets to every registered voter. But while the pamphlets are a critically important aspect of a judicial campaign, they certainly are not the only measure of its tenor and content. Indeed, the nonpartisan tone generally exhibited in voters' pamphlets since 1938 is not characteristic of any judicial campaign occurring between statehood and 1931, because judicial elections were expressly partisan throughout that period.

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101 SECRETARY OF STATE, OREGON BLUE BOOK, SUPREME COURT JUSTICES OF OREGON, http://bluebook.state.or.us/state/elections/elections27.htm (last visited May 5, 2009).

102 Official Voters' Pamphlet pt. 2, Oregon Nonpartisan Judiciary Offices, Primary Election, no. 60, May 18, 1956, at 5 (quoting L.B. "Sandy" Sandblast).

103 Official Voters' Pamphlet, Oregon Democratic Party Primary Nominating Election, no. 1, May 16, 1958, at 14–19.

104 Official Voters' Pamphlet, Democratic Party Nominating Election, May 28, 1968, at 109 (statement of Reuben Lenske, candidate for Judge of the Supreme Court, Pos. No. 1).

105 Official Voters' Pamphlet, Oregon Primary Election, no. 13, May 15, 1984, at 73 (quoting David Marshall Nissman's statement).

106 Official Voters' Pamphlet, Oregon General Election, no. 1, Nov. 7, 2000, at 24 (quoting Steve Doell in statement of Greg Byrne).

Under the territorial laws in effect until 1859, voters either handed election officials a party-supplied and color-coded ticket[107] listing the party's preferred candidates or voted aloud and publicly.[108] Oregon's constitution changed the territorial voting procedure. Under the original constitution, voters were required to declare publicly their votes, a system known as *viva voce* voting.[109] Although no longer a necessity after the constitution established *viva voce* voting, parties continued to publish tickets post-statehood. Tickets contained the party's preferred candidate for each position, including the party's preference in judicial candidates. To cast a vote, voters or election workers read aloud from the ticket.

Voting reverted to the territorial system in 1872 with the elimination of oral voting. Tickets printed by the parties again became physically essential to casting one's vote. For example, the files of the Oregon Historical Society hold the "Modern Whig Ticket: Republican State Ticket" for the general election of 1876; it listed John B. Waldo, E.D. Shattuck, and Seneca Smith for supreme court and two district court positions, respectively.[110] The voter simply inserted the printed ticket into the ballot box.[111]

Partisan appeals did not stop with a Delphic listing of the judicial candidate's name on the party ticket. In an election most likely held in 1902, for example, Judges Hamilton, a Democrat, and Potter, a Republican, squared off in a contested election for a circuit court position. In an anonymous circular replying to an anonymous circular supporting Judge Hamilton, Judge Potter's supporters made an explicitly partisan appeal:

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[107] Party-prepared ballots became known as "tickets" because they looked like the train tickets of the time. Jill Lepore, *Annals of Democracy: Rock, Paper, Scissors: How We Used to Vote*, NEW YORKER, Oct. 13, 2008, at 88, 93.

[108] The so-called Australian Ballot, or secret ballot, familiar to Oregonians on the sesquicentennial, did not become the rule in Oregon until 1891. PAUL BOURKE & DONALD DEBATS, WASHINGTON COUNTY: POLITICS AND COMMUNITY IN ANTEBELLUM AMERICA 3–9 (John Hopkins University Press 1995).

[109] OR. CONST. art. II, § 15.

Viva voce voting "required citizens either to give their votes in the British manner, with a loud voice, or to have their written ballot called out by the clerk." BOURKE & DEBATS, *supra* note 108, at 4. To vote, a "voter stepped forward and announced his name. A clerk recorded the name and, as the voter proclaimed aloud each of his political choices, a written record of the vote was made. The voting proceeded, with all the participants aware of the choices being made, and the emerging outcome." *Id.* at 10.

[110] Manuscript File 1513, Politics Collection, Box 7, Folder #1, in the Oregon Historical Society library.

[111] BOURKE & DEBATS, *supra* note 108, at 176.

> The only way to maintain the Republic party in power and perpetuate its principles and policies is to support its candidates at the polls. Judge Hamilton is part and parcel of the Democratic machine in this district . . . Judge Potter has and will continue to use his every influence in support of the Republican party and the grand principles for which it stands. Republicans do not be deceived; the office of District Judge is a political office and one of the most lucrative within the gift of the people of the district.[112]

In 1931, the Legislature made judicial elections nonpartisan.[113] Explicitly partisan appeals nevertheless persisted. For example, William B. Murray sought election in 1956 to the Multnomah County Circuit Court. His campaign committee mailed a flyer bearing a note from the campaign's chair:

> To our Democratic friends:
>
> Bill Murray is the only Democrat running for this non-partisan position. He was your Democratic nominee for Attorney General in 1948.
>
> If we are to have a truly non-partisan bench we should not elect our Judges exclusively from the Republican Party.[114]

Overt partisanship has since faded from most judicial campaigns in Oregon. In 2006, three candidates sought an open Oregon Supreme Court position. Carrying on a long tradition from past judicial campaigns, all three candidates included in their respective voters' pamphlet statements personal endorsements, including laudatory quotes, from prominent Oregonians.[115] None of the endorsements invoked any candidate's party affiliation.

Other features of the candidates' voters' pamphlet statements in the primary election of 2006 confirm that organizations with significant political and economic policy agendas have turned their attention to Oregon's judicial campaigns. Two of the candidates for the open supreme court position listed endorsements that they had received

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112 Manuscript File 1513, Politics Collection, Box 7, Folder #1, in the Oregon Historical Society library. It is not clear when the document was created; the author dates it based on a cross-reference it contains to a case reported by the Oregon Supreme Court in a specified volume.

113 Act of Mar. 11, 1931, ch. 347, § 6, 1931 Or. Laws 610.

114 Manuscript File 1513, Politics Collection, Box 7, Folder #1, in the Oregon Historical Society library.

115 Official Voters' Pamphlet, Oregon Primary Election, May 16, 2006, http://www.sos.state.or.us/elections/may162006/guide/np/sup_ct.html) (including statements of W. Eugene ("Gene") Hallman, Virginia L. Linder, and Jack Roberts).

from groups organized to advance or protect the political or economic interest of their members; the third referred readers to the campaign website where "other endorsements" were promised.[116] Six of the ten organizations identified in the voters' pamphlet as organizational endorsements have appeared as parties or amicus in the appellate courts of Oregon; two of these six appeared as parties or as amici in cases reported during the term for which the candidates were contending.[117]

Evidence from beyond the pages of the voters' pamphlet demonstrates that voters and commentators believed that important policy outcomes depended on the result of the 2006 election. For example, the editor of a self-described blog "for conservative Oregonians"[118] said of the primary:

> The importance of the Supreme Court vacancy cannot be overstated.
>
> . . . .
>
> Jack Roberts would easily be the most fiscally conservative member of the Oregon Supreme Court if elected.
>
> . . . .
>
> Linder is endorsed by Judge Merton James and Judge Lipscomb the dynamic duo that revoked both property rights Measures 7 & 37 (and revoked these measures using the most contorted legal reasoning imaginable). Candidate Hallman is former president of the Oregon Trail [sic] Lawyers Association—enough said.[119]

At least one newspaper conceived of the election in "left" and "right" political terms. In endorsing Linder, the *Portland Mercury* wrote "She's got a reputation as a moderate who leans right on law

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116 *Id.*

117 *Id.* Candidates included in their voters'pamphlet statements endorsements from the organizations listed below. The parentheticals following the names of the organizations note the number of cases in which the organization had appeared separated by a colon from the number of appearances in cases that arose during the term for which the candidates contended. Crime Victims United of Oregon (0:0); National Federation of Independent Business (4:0); Oregon AFSCME Council 75 (3:0); Oregon Education Association (61:3); Oregon Farm Bureau Federation (13:1); Oregon Home Builders Association (5:0); Oregon State Firefighters' Council (4:0); Planned Parenthood PAC of Oregon (0:0); Teamsters, Council #37 (0:0); and, UFCW Local 555 (0:0).

118 Oregon Catalyst.com, http://www.oregoncatalyst.com/aboutus.php (last visited May 5, 2009).

119 Jason Williams, *Jack Roberts—A Chance for Change*, OREGON CATALYIST.COM, May 9, 2006, http://www.oregoncatalyst.com/index.php?/archives/171-Jack-Roberts-a-chance-for-change.html.

and order issues, and left on social policy issues, and she's earned the Oregon Bar Association's highest rating."[120]

The Multnomah County Democratic Party endorsed Hallman, sparking this response from a conservative blog:

> Oregon has an extremely liberal Supreme Court. One of the more conservative members is retiring. There are three people running to fill that seat. Gene Hallman is the most liberal, the most activist, and the most likely to legislate from the bench.
>
> Gene Hallman, if elected, would be the most dangerous man in Oregon politics.[121]

People and organizations identifying strongly with rival policy positions on social, economic, and criminal justice issues did much more than talk about the candidates in the 2006 campaign. They also contributed money, time, and other things of value. Campaign contributions, including contributions from people and organizations whose endorsements appeared in the candidates' statements, set record levels for Oregon judicial campaigns.[122] Between them, the three candidates spent approximately $1.4 million in the primary and general elections.[123]

In their first pre-election campaign contribution and expenditure report to the Secretary of State,[124] two of the three candidates for the supreme court position in 2006 reported contributions from lawyers and law firms who appeared on briefs filed in cases decided by the appellate courts during the term of office for which they were

120 Amy Jenniges et al., *Who You Will Vote for 2006!*, PORTLAND MERCURY, May 4, 2006, http://www.portlandmercury.com/portland/Content?oid=39177&category=34029.

121 Question: Who is Gene Hallman?, Mar. 8, 2006, http://gullyborg.typepad.com/weblog_archive/2006/03/question_who_is.html (emphasis omitted).

122 Peter Wong, *Spending Sets Record in State's High Court Race: Judicial Campaigns Now Are More Costly in Other States, Too*, SALEM STATESMAN J., May 14, 2006, at 1C.

123 The National Institute on Money in State Politics describes itself as "the only nonpartisan, nonprofit organization revealing the influence of campaign money on state-level elections and public policy in all 50 states." Nat'l Inst. on Money in State Politics, Mission and History, http://www.followthemoney.org/Institute/index.phtml (last visited May 5, 2009). The Institute reported that Hallman spent $340,763 in his losing bid in the primary. Nat'l Inst. on Money in State Politics, *Oregon 2006 Candidates*, http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?s=OR&y=2006&f=J (last visited May 5, 2009). Roberts spent $715,270. *Id.* Linder won the runoff in the general election. She spent $351,802. *Id.*

124 Contributions early in a campaign help the fledgling candidate establish credibility and fund the infrastructure necessary for a successful campaign.

contending.[125] The candidate reporting no contributions in his first pre-election report from lawyers or law firms with business before the appellate courts nevertheless received two contributions from companies with business before the appellate courts.[126] All three reported receiving contributions from issue-oriented organizations during the course of the primary campaign.[127]

The fact that lawyers, businesses, or groups interested in the policy implications of the court's work participated in the 2006 election for the supreme court position is not surprising. Delazon Smith, for one, might have viewed their participation as enabling the "frequent return of power to the people" that he considered a "good rule."[128] Nor does the receipt of contributions diminish the strong professional attainments of any of the three candidates or mean that any of them, if elected, were likely to abandon the independence and probity that Justices Kennedy and Breyer observed are preconditions for the rule of law.[129]

In the runoff election in 2006, both candidates executed and maintained a joint pledge to abide voluntarily by certain standards of conduct. As to fundraising, the candidates pledged to "take all reasonable steps to ensure that . . . fundraising does not undermine the dignity and impartiality of judicial office."[130] Far from demonstrating that any of the candidates "prostitute[d] the ermine to

125 *See* ELECTION FILING REPORT: 2006 PRIMARY ELECTION, OREGON SUPREME COURT CANDIDATE HALLMAN (2006), http://egov.sos.state.or.us/division/elections/elec_images/5120_2006_P100_1STPRE.pdf [hereinafter HALLMAN PRE-ELECTION REPORT]; ELECTION FILING REPORT: 2006 PRIMARY ELECTION, OREGON SUPREME COURT CANDIDATE LINDER (2006), http://egov.sos.state.or.us/division/elections/elec_images/4714_2006_P100_1STPRE.pdf [hereinafter LINDER PRE-ELECTION REPORT]; ELECTION FILING REPORT: 2006 PRIMARY ELECTION, OREGON SUPREME COURT CANDIDATE ROBERTS (2006), http://egov.sos.state.or.us/division/elections/elec_images/4714_2006_P100_1STPRE.pdf [hereinafter ROBERTS PRE-ELECTION REPORT]. The author compiled a list of contributing attorneys and firms from each candidate's first pre-election report of campaign expenditures to the Oregon Secretary of State, then searched reported opinions of the Oregon Court of Appeals and Oregon Supreme Court for cases in which the contributors appeared as counsel.

126 HALLMAN PRE-ELECTION REPORT, *supra* note 125; LINDER PRE-ELECTION REPORT, *supra* note 125; ROBERTS PRE-ELECTION REPORT, *supra* note 125.

127 HALLMAN PRE-ELECTION REPORT, *supra* note 125; LINDER PRE-ELECTION REPORT, *supra* note 125; ROBERTS PRE-ELECTION REPORT, *supra* note 125.

128 STATESMAN (Sept. 1, 1857), *supra* note 14 (quoting Delazon Smith).

129 *See* N.Y. State Bd. of Elections v. Lopez Torres, 128 S. Ct. 791, 803 (2008) (Kennedy & Breyer, JJ., concurring).

130 Letter from Virginia Linder and Jack Roberts to Chief Justice De Muniz (Sept. 25, 2006) (on file with the author).

political ends,"[131] the history of the 2006 campaign for the Oregon Supreme Court position instead demonstrates that even well-qualified and strongly independent candidates are trapped by their reliance on contributions from motivated contributors.[132] The campaign underscores the strength of Justice O'Connor's belief that the harsh necessity of contributions creates a perception of indebtedness that in turn corrodes public confidence in the judiciary.[133]

IV

PREDICTING THE FUTURE: TWO MODEST REFORMS

A historian asserted that: "in a recounting of past crimes, the proper question to ask is not 'Who was guilty then?' unless it leads directly to: 'What is our responsibility now?'"[134] Oregon's original decision to select judges by direct competitive election, the reasons for that decision, and the state's experience under that choice are recounted above. Now, what might Oregon do to improve Oregon's system of selecting judges?

The momentum of our history and the fact that the delegates' original choice continues to solve the enduring tension between the principle of judicial supremacy and democratic policy-making strongly suggest that Oregonians will not reform their original choice by abandoning it. Oregonians could, by making two changes fully consistent with the original choice, approach more closely the "guaranty of pure fountains of justice" that Reuben Boise thought in 1857 ought to be an outcome of a well-designed judiciary.[135]

131 STATESMAN (Sept. 1, 1857), *supra* note 14 (quoting Reuben Boise).

132 "Even though judicial campaign spending has risen more sharply in recent years than other campaign spending, and even though high-dollar campaigns have undoubtedly affected public perceptions about judicial impartiality, not every judge who has been involved in a high-dollar, vigorous campaign can be presumed to have a probability or likelihood of bias whenever a matter in which some supporter is vitally interested later comes before the judge's court." Brief of the Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 24–25, Caperton v. A.T. Massey Coal Co., No. 33350, 2008 WL 918444 (W. Va. Apr. 3, 2008), *cert. granted*, 129 S. Ct. 593 (2008). In Caperton, "[t]he question presented is whether [a state Supreme Court Justice's] failure to recuse himself from participation in his principal financial supporter's case violated the Due Process Clause of the Fourteenth Amendment." Brief for Petitioners at i, *Caperton*, 2008 WL 918444. Oral arguments occurred on Tuesday, March 3, 2009. Transcript of Oral Argument, *Caperton*, 2008 WL 527723.

133 *See* Republican Party of Minn. v. White, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring).

134 HOWARD ZINN, HOWARD ZINN ON HISTORY 207 (2001).

135 STATESMAN (Sept. 1, 1857), *supra* note 14 (quoting Reuben P. Boise).

A. Public Financing of Direct Competitive Judicial Elections

Judicial campaigns will demand larger and larger contributions from lawyers and litigants with business before the courts. Campaign-finance disclosure laws and the increasingly near real-time transparency of campaign-contribution records ironically would enhance the appearance of impropriety inherent in the current system of privately funded judicial campaigns. Detailed campaign contribution and expenditure reports filed with the Oregon Secretary of State before 2004 are accessible to the public in paper only. For reports filed between 2004 and January 1, 2007, complete reports are publicly available online but in a format that cannot readily be searched by contributor, amount of contribution, or other important details. Oregon's online ORSTAR system now permits any interested person to conduct detailed and flexible searches of reports submitted by candidates.[136] Future direct competitive judicial elections in Oregon eventually will feature dueling advertisements stating, accurately, that the campaigns of rival candidates are fueled by "special interest" groups. Advertising of that ilk will reinforce the perception that private campaign contributions buy special access to biased justice.

No rules forbid private contact with a legislator about a bill pending in the Legislative Assembly or, with few exceptions, with any other elected official in Oregon. Proponents of a given outcome may meet privately with an elected decision-maker about any contested matter, and few opponents of the position discussed in that private meeting would assert a right based in law to be present. An elected decision-maker may decide not to hear an interested person's concerns at all; if the official does make a decision, he or she is not restricted in most cases to any record in making the decision.

Lobbyists sometimes assert that the only thing they gain from making campaign contributions is access of the type just described. One case study concluded from interviews with lobbyists "that there are [sic] a significant minority of legislators who give preferential treatment to large donors and are much more willing to meet with individuals who help to keep them in office."[137] The same purpose expressed with respect to judicial candidates contradicts deep-seated

136 *See* Or. Sec'y of State, Elections Division, ORESTAR, https://secure.sos.state.or.us/eim/transactionPubDetail.do?tranRsn=443317 (last visited May 5, 2009).

137 Trevor D. Dryer, *Gaining Access: A State Lobbying Case Study*, 23 J.L. & POL. 283, 314 (2007).

values about the impartiality of the judiciary. With limited exceptions, no judge is permitted to meet secretly with a party,[138] and no party is allowed to make an *ex parte* approach to the court on the merits of a case.[139] Judges must restrict their decision-making to a fixed record that is, in nearly every aspect, equally transparent to all parties to the case. In the judicial context, the very aim of a private campaign contribution is inimical to the judicial process.

Public financing of judicial campaigns could free the judicial-selection process from the perceptions of indebtedness and special access that increasingly and inevitably attend privately financed direct competitive elections.[140] Public financing would leave undisturbed the choice Oregonians made 150 years ago and have maintained ever since. Although many difficulties would be encountered in creating an effective system, the concept has been subjected to detailed study[141] and other states have begun to experiment with models of the system.[142] Oregon could draw on those sources to help shape its own system.

B. Lengthen Judicial Terms

The debate at the constitutional convention in 1857 demonstrates that Oregonians did not intend for their original choice to create a system in which judges were simply wind vanes for popular passions.[143] The six-year term ultimately established at the

[138] REVISED OREGON CODE OF JUDICIAL CONDUCT JR 2-102(B) (1996), http://www.ojd.state.or.us/web/OJDPublications.nsf/Files/CJC.pdf/$File/CJC.pdf ("A judge shall not communicate . . . with a lawyer or party about any matter in an adversary proceeding outside the course of the proceeding, except with the consent of the parties or as expressly authorized by law or permitted by this rule.").

[139] *See, e.g.*, OREGON RULES OF PROF'L CONDUCT R. 3.5(b) (2006) ("A lawyer shall not: . . . communicate ex parte on the merits of a cause with [a judge, juror, prospective juror or other official] during the proceeding unless authorized to do so by law or court order.").

[140] The question presented in *Caperton* would be irrelevant in a jurisdiction in which judges were selected in publicly funded, direct popular elections. Brief for Petitioners at i, Caperton v. A.T. Massey Coal Co., No. 33350, 2008 WL 918444 (W. Va. Apr. 3, 2008), *cert. granted*, 129 S. Ct. 593 (2008).

[141] *E.g.*, AM. BAR ASS'N STANDING COMM. ON JUDICIAL INDEPENDENCE, PUBLIC FINANCING OF JUDICIAL CAMPAIGNS 27 (2002) (describing then-existing Wisconsin system).

[142] N.C. Right to Life Comm. Fund for Indep. Pol. Expenditures v. Leake, 524 F.3d 427 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 490 (2008) (upholding aspects of North Carolina's system of public financing of judicial elections against First Amendment attack).

[143] *Supra* text accompanying notes 26–29.

convention and maintained ever since is longer than provided for any other term of constitutional office. It is an inexact effort to identify a midpoint between delegates' reconciliation of judicial review with a democratic order and the risk to judicial independence posed by direct competitive elections.

The history of judicial campaigns in Oregon since 1859 is more remarkable for its restraint than for its excess.[144] The Revised Oregon Code of Judicial Conduct models this restraint, prohibiting "a judicial candidate" from making "pledges or promises of conduct in office that could inhibit or compromise the faithful, impartial and diligent performance of the duties of the" judicial office sought.[145] However, *Republican Party of Minnesota v. White*[146] casts doubt on the constitutionality of content-based speech restrictions on candidates for judicial positions. *White* makes less likely repetition of the self-restraint demanded by the Oregon Code and exhibited by the runoff candidates in Oregon's last contested supreme court election,[147] and makes more likely the kind of "electioneering" that some delegates feared.[148]

In *White*, the Court concluded that Minnesota's canons of judicial conduct violated the First Amendment by prohibiting candidates for judicial election in that state from announcing their views on disputed legal and political issues.[149] Since *White*, Oregon's code has not been tested against First Amendment attack. Whatever its legal effect, *White* almost inevitably will embolden judicial candidates to tack ever more closely to the winds of popular passion. Had *White* been decided on the eve of the constitutional convention, delegates might have calculated the term-length midpoint differently.

Longer terms dampen the influence of popular passion in at least two ways. First, if one assumed that candidates for judicial office were most tempted to "prostitute the ermine for political ends" during campaigns, then the window of greatest vulnerability could be cut in half by doubling terms. Second, increasing the interval between elections also increases the possibility that the passions driving

144 *Supra* text accompanying notes 80–110.

145 REVISED OREGON CODE OF JUDICIAL CONDUCT JR 4-102(B) (1996). The prohibition applies to incumbents seeking reelection and to declared candidates. *Id.* at JR 4–104.

146 536 U.S. 765 (2002).

147 *See supra* text accompanying notes 130–32.

148 STATESMAN (Sept. 1, 1857), *supra* note 14.

149 536 U.S. at 788.

interest in a given issue pending before the court will have been settled by political or social compromise before a judge who rendered an unpopular, but nonetheless principled, decision faces reelection.

CONCLUSION

Oregonians created and have maintained against all attacks a system of direct popular election of judges. That system, however, risks creation of a perception of indebtedness that in turn corrodes public confidence in the independence and impartiality of the judiciary. Publicly funding judicial campaigns and lengthening terms of office would reduce that risk.