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JUDICIAL SELECTION IN OREGON: MONEY, POLITICS, AND THE INITIATIVE PROCESS

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Informed criticism of court rulings, or of the professional or personal conduct of judges, should play an important role in maintaining judicial accountability. However, attacking courts and judges—not because they are wrong on the law or the facts of a case, but because the decision is considered wrong simply as a matter of political judgment—maligens one of the basic tenets of judicial independence—intellectual honesty and dedication to enforcement of the rule of law regardless of popular sentiment. Dedication to the rule of law requires judges to rise above the political moment in making judicial decisions. What is so troubling about criticism of court rulings and individual judges based solely on political disagreement with the outcome is that it evidences a fundamentally misguided belief that the judicial branch should operate and be treated just like another constituency-driven political arm of government. Judges should not have “political constituencies.” Rather, a judge’s fidelity must be to enforcement of the rule of law regardless of perceived popular will.¹

I. INTRODUCTION

The constitutional role of the judiciary in a democratic, rule of law society—impartial, independent and dedicated to enforcement of the rule of law regardless of perceived popular will—is always at risk to some degree in the thirty-nine states in which judges face popular election.² However, with increasing frequency and perniciousness, state judges and courts are the subject of intense public criticism by vocal special

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1. *Republican Party of Minnesota v. White*, 536 U.S. 765, 803 (2002) (Stevens, J., dissenting) (quoting De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 387 (2002)). In *Republican Party of Minnesota v. White*, the majority held that the Minnesota Supreme Court’s canon of judicial conduct prohibiting candidates for judicial election from “announcing” their views on disputed legal and political issues violated the First Amendment. *Id.* at 713. The text of the judicial canon provides that a candidate for judicial office shall not “announce his or her view on disputed legal or political issues.” MINN. CODE OF JUDICIAL CONDUCT, Canon 5(A)(3) (d)(i) (2002). The Oregon Code of Judicial conduct does not contain an “announce” provision.

2. Nationally, 87% of all state judges face election. Call To Action, *Statement of the National Summit on Improving Judicial Selection*, National Center for State Courts, 12 (2002), available at http://www.ncsconline.org/D_Research/CallToActionCommentary.pdf.

interests offended by past judicial decisions. As noted above, the public criticism leveled by special interests groups seldom asserts that the decision is legally or factually incorrect. Instead the groups assert that the decision is wrong as a matter of political judgment. In Oregon, the disagreement with various decisions of the Oregon Supreme Court—decisions alleged to be contrary to the will of the voters—has led to intense efforts by individuals and special interest groups to change the composition of Oregon’s appellate courts. Those efforts have taken two forms. First, special interest groups have sponsored judicial candidates touted to be sympathetic to the interest group’s political view. The second, and more recent effort, has been an attempt to change the state’s judicial selection frame-work through the initiative process. This essay focuses on those dual efforts by examining recent contested races for Oregon’s appellate courts, the upwardly spiraling costs associated with those elections,³ and the individuals and groups most involved in the efforts to change the composition of the appellate courts through candidate sponsorship and the initiative process.

3. For example, noncandidate spending in judicial races in 2000 in the states of Alabama, Michigan, Ohio, Mississippi, and Illinois was estimated to be at least \$16,000,000. Roy Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 LAW REV. M.S.U.-D.C.L. 849, 851 (2001).