The Judge as Political Candidate

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Oregon Supreme Court

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I. TWO MODELS OF JUDGING

Judges are expected to satisfy two conflicting ideals. First, they are to follow the law without fear or favor, regardless of personal sympathies and preferences, to "adjudicate" rather than to "legislate." Second, they are to reach results that are preferred by or at least acceptable to their communities. The first ideal requires judicial independence and job security. Elective judgeships are sometimes defended as serving the second. It is not easy to convince people that the two ideals conflict. Judges are expected to assert that what their communities want the law to be really is the law, whether or not there is a legal basis for the assertion. If a judge finds this difficult to do, there generally is someone else ready to do it.

It is not news that the system of electing judges calls into question what it means to be a judge. But how does our model of an elected judge differ from our model of an appointed judge? The topic has become timely due to three recent court decisions and another stormy battle over a judicial appointment.

We have gone through a third public examination of a Supreme Court nominee in which the Senate and the public considered it important to question the nominee about his views of the major issues on the Court's contemporary agenda. Judge Robert Bork explained his views in his academic writings, in his prior legal work, and in the hearings, and he was rejected. Judge David Souter and Judge Clarence Thomas, on the other hand, avoided clear statements and were confirmed. At the close of the Thomas hearing, members of the Senate Judiciary Committee expressed frustration at their inability to get answers, and the chairman announced that the committee would reexamine the entire confirmation process. Academic commentators approved the new practice of probing a nominee's views rather more enthusiastically than the same practice used by the President in making appointments. Senators will likely extend the scrutiny to lower court appointees who look like embryonic Supreme Court nominees.

** Judge, Oregon Supreme Court, 1977-90; Senior Judge since 1990.
Recent events in the law of judicial elections are less widely noted. Public examination like the Bork, Souter, and Thomas hearings do not occur in the states. The reason is not that state court decisions are unimportant or uncontroversial. Vastly more cases on a far wider range of issues are decided by state judges than by the relatively few federal judges. But very few states follow the model of executive appointment and legislative confirmation. In 16 states, judges appointed by the governor face elections in which the question is whether or not to retain the judge on the court.¹ In 19 other states, judges are elected in competitive elections and often face competition for another term.² Some states elect trial judges by one system and appellate judges by another. In 1990 alone, more than 2,400 judges appeared on the state ballots.³

Elections imply constituencies, candidates, campaigns, organized support, opposition, and campaign funds. In the case of legislators and political executives, elections imply general and specific campaign promises. We pause when these essential features of democratic choice are applied to judges. This discomfort leads to efforts to distinguish the position of elective judges from that of other elective policy-makers, efforts that in turn raise constitutional doubts. The American Bar Association and some states have reexamined their codes governing judicial campaigns. Before turning to the recent cases, however, we need to introduce another element. We need to consider our prevailing theories of what judges do and how they should do it.

American law leaves more than most legal systems to the social views and the ad hoc discretion of judges. Our jurisprudential theorists as well as first-year law students study rules of law only as products of choices made by appellate courts. In part, our reliance on courts in preference to laws reflects the homelessness of systematic lawmaking in our structures of government. The reliance on court-made law is familiar in what remains of the common law, especially in torts, but also in such central public policies as the law governing law enforcement. A trial judge's personal judgment appears indispensable in family and criminal cases even after the swing to determinate sentencing laws. And the power of American state as well as federal judges is, of course, famous in the constitutional review of legislation.

In our court-centered legal order it was no great feat to describe law as whatever judges decide. This has been the orthodoxy of American law for a century. Legal realism soon went beyond a theory describing judicial behavior to a demand for an explicitly social and instrumental, that is to say, a policy-making style in appellate decisions. The road to judicial distinction was to announce that the reason why the Constitution forbids racial segregation in schools is its effect on education, or that the court's

² Id.
view of contemporary realities calls for abolishing an old tort immunity, for dispensing with proof of causation for liability for an untraceable product, or for replacing contributory with comparative negligence. And where the court cannot fashion a new rule, it announces a new multi-factor balancing formula to be used in making future judicial decisions.

In constitutional law, scholars like Lawrence Tribe link what some call the "antimajoritarian difficulty" of judicial review to the fact that federal judges are not elected or otherwise accountable to elected officials. John Hart Ely's stated objection to having judges enforce their view of national values is not that they are judges, but that they are unelected judges. Burt Neuborne warns against a "myth of parity" between state and federal courts in unpopular cases but argues that elected judges have a greater "democratic pedigree" when they do act. From the other end of the political spectrum, Robert Bork declares that only unelected, unaccountable and unrepresentative judges can prevent voters from destroying the republic and basic freedoms.

What does all the talk about unelected judges imply when judges are elected? Should elected judges decide controversial issues of equality, privacy, speech, religion, or police practices less judicially, more according to public opinion, than their appointed colleagues in the neighboring state? The constitutional scholars, to whom state courts seem to be invisible, do not say so. Nor does Justice Robert Utter of Washington, when he describes the tension between the ideal of an independent judiciary, demanding strict adherence to the law no matter how unpopular the result, and the ideal of every public servant's democratic accountability. But if appointed and elected judges should approach the task of judging in the same judicial manner, what is the point of electing judges?

"Judicial accountability" has a virtuous ring to it, until one asks, "accountability" for what? For judging fairly and impartially, for conscientious attention to law and facts, for staying awake, sober and courteous to the parties, witnesses, and court personnel—in short, for performing according to the classic model of judging? Or does it mean accountability for decisions in controversial cases?

In the classic model, the judicial power is something other than the legislative or the executive power. The responsibility of judges is not that of legislators or law enforcement officials. A judge's responsibility is to decide disputes impartially according to law, not according to prior commitments, political inducements, or the popular demands of the moment.

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On the other hand, the realists tell us that the classic model is a pious fiction; that judges inevitably make law, wholesale in the appellate courts and retail in trial courts; that judges do so upon considerations which are not very different from those of other policymakers; and that what people get will depend on the beliefs, values, and loyalties that the judges bring to the bench. If so, it is argued, people are entitled to judges chosen for their beliefs, values, and commitments, and to replace them on the same basis—to be "represented" on the courts. So we get what Michael Shapiro calls the "clumsy institution" that tries to straddle the contradiction of independence and democratic control.

II. JUDGES AS REPRESENTATIVES

In what sense are elected officials the "representatives" of those who are entitled to elect them? Since 1802, Ohio's Constitution has guaranteed its people the right to assemble to consult for the common good and to instruct their representatives. When the people of a state insist on electing their judges, do they expect judges to act as their representatives in the same manner as legislators? Are all judges policymaking officials?

The Supreme Court has held that the Fourteenth Amendment's one-person, one-vote principle does not apply to judicial elections. But the Voting Rights Act forbids any political process that gives some citizens, by reason of race or color, less opportunity than others to participate and to "elect representatives of their choice." The Voting Rights Act includes districting that dilutes minority votes. Did "representatives" include two Louisiana justices elected from one double district and trial judges elected county-wide in Texas? The Fifth Circuit thought not. It described judges as "the referees in our majoritarian political game" who "represent no one."

The Supreme Court reversed because excluding judges from the word "representatives" would exclude other practices besides judicial districting from the act. The Court read "representatives" to mean anyone elected in a popular election. Three dissenting justices argued that "[r]epresentative' connotes one who is not only elected by the people, but who also . . . acts on behalf of the people." Unlike prosecutors who appear

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10 Ohio Const. of 1802, art. VIII, § 19 superseded by Ohio Const. art. I, § 53 (1851).
14 Id. at 625.
16 Id. at 2372.
for "the People," they wrote, "the judge represents the Law—which often requires him to rule against the People."17

The Court clearly stated its distaste for electing judges. The majority editorialized that judges need not be elected, and that "ideally public opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment."18 But Louisiana chose to "compel judicial candidates to vie for popular support just as other political candidates do."19 The Court continued: "The fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office."20 Election pressures, the court noted, carry the burdens of "financing a campaign, soliciting votes, and attempting to establish charisma or name identification."21

Yet on the same day, the Court referred to the policy-making nature of the judicial function, with the customary reference to Holmes and Cardozo, in sustaining Missouri's age limit on its judges.22 Justice O'Connor, a former state judge, observed that periodic elections might not suffice to force judges to retire: Voters could expect to discover that their governor or legislator was not performing adequately, she wrote, but "most voters never observe state judges in action, nor read judicial opinions."23

Representation can mean something different from making policy choices on behalf of one's constituency. One can argue that the right to choose judges for their human and social values matters more in choosing trial judges than appellate judges, contrary to the academic preoccupation with policy decisions by the highest courts. Consider this report from California after a lesbian civil rights lawyer in 1990 defeated a Superior Court judge for the first time in 18 years:

[Hitchens] said she did not challenge Benson because of anything the judge did on the bench. But she did want to bring to the court a perspective different from that of the career prosecutor, a Deukmejian appointee who was a member of the exclusive Olympic Club .... Hitchens attributes her narrow election victory to support from a broad coalition of minority groups, labor leaders, and attorneys.

'It seemed time that the lesbian and gay community be represented on Superior Court, in terms of the experience one

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17 Id.
18 Id. at 2367.
19 Id.
20 111 S. Ct. at 2367.
21 Id. at 2367 n.29 (quoting John Paul Stevens, The Office of an Office, 55 Chi. B. Rec. 276, 280-81 (1974)).
23 Id. at 2407.
brings from their life, recognizing some value in diversity,' Hitchens said . . . . 'I think that affects the way you respond to both verbal and nonverbal behavior in the courtroom, [as well as] . . . make you more receptive to alternative dispute resolution, alternative sentencing, joint endeavors with the community to get meaningful and effective programs off the ground.'

III. PARTIES IN JUDICIAL ELECTIONS

Who may tell voters that a judicial candidate is "one of us" and an opponent is "one of them"? At one time, judges like other officials were elected on a partisan ballot. The partisan ballot is still used for electing judges in thirteen states, including large states like Illinois, New York, Pennsylvania, and Texas. (The others are Alabama, Arkansas, Indiana, Kansas, Mississippi, Missouri, North Carolina, Tennessee, and West Virginia.) In Ohio, I understand, judicial candidates are nominated in party primaries so that their party affiliation is a known element in the election even though party affiliation does not appear on the final election ballot.

North Carolina had a partisan election in 1990. A reformist North Carolina Committee on Judicial Campaigns with apparent trepidation set out some standards to guide judicial candidates. Observing that North Carolina had not in modern times had a "two-party judiciary," the committee asserted its nonpartisanship and its effort not to appear to shelter incumbent judges against challengers. Its guidelines called for letting representatives or committees handle campaign financing and limiting contributions from any attorney or other source so as to avoid the appearance that the contributor sought special advantage from the candidate. The guidelines stuck with the usual prescription that candidates speak about their qualifications and views on court reform, adding rather gingerly "identification of [a] general philosophical orientation, but the candidate should avoid intimating or forecasting how he or she would rule on a particular issue or fact situation." The committee also offered candidates a complaint procedure that theoretically could lead to appropriate action by the committee, presumably in the form of adverse publicity, but the procedure was limited to complaints against the candidates or those working on their campaigns.

25 Renne v. Geary, 111 S. Ct. 2331 (1991). See infra notes 44-48 and accompanying text. Partisanship was at issue in this case but was not decided.
26 McFadden, supra note 1, at 178-87.
27 Id. at 185. See OHIO REV. CODE ANN. §§ 3501.01(j), 3505.03, 3505.04 (Baldwin 1992).
28 NORTH CAROLINA COMMITTEE ON JUDICIAL CAMPAIGNS, JUDICIAL CAMPAIGN GUIDELINES 1 (Sept. 7, 1990).
29 Id. at 3.
Two weeks later, North Carolina newspapers reported that the state's Republican governor had delivered a "biting attack" on its Democratic supreme court justices for being too liberal. The governor called for replacing the three justices who were candidates for reelection with Republican superior court judges in order to create a conservative majority.31 Some quotations give a flavor of the campaign. A teacher had been awarded damages under federal civil rights law for being fired in a biased dismissal proceeding, and the supreme court affirmed.32

"You're going to love this," [the governor said]. "There was a driver education instructor over in Hickory who had a bad thing about taking indecent liberties with teenage girls."

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"The liberal Democratic majority of the [North Carolina Supreme Court] said, 'That's all right, he can have $78,000' .... Maybe it was the little girl who should have gotten the $78,000," he said, drawing cheers from the audience.33

The Governor also asserted that the Democratic justices' campaigns were financed by lawyers for tort plaintiffs who "appear before them and rake in huge contingency fees," citing another decision that sustained a malpractice claim of parents for emotional distress from the stillborn birth of a fetus.34 In a separate television commercial, the Republican state chairman attacked the court for overturning a murder conviction in terms that are drearily familiar to every elected judge: "[T]he judges on our Supreme Court are more interested in criminal rights than in victim rights."35

The chief justice, one of the Democratic candidates, observed that these opinions were not written by any candidate but by a justice whom the governor had praised as the most conservative member of the court.36 But this fact provides only partial cover in campaigns for election to a collegial court. Voters are invited to feel angry at a decision and to vent that anger against any judge who participated in it.

31 Rob Christensen, Martin Goes to Bat for Judicial Candidates, RALEIGH NEWS-OBSERVER, Sept. 24, 1990, at 1B.
33 Christiansen, supra note 31, at 3B.
34 Id. at 1B, 3B. Judicial campaign contributions by trial lawyers have been a contentious issue elsewhere. In a 1988 report, a Texas group stated that half of a total $8.8 million had gone to four Texas Supreme Court justices, and that "[s]upport and contributions from plaintiff's attorneys 'dwarf all others'." Peggy Rikac, Group Ponders Effect of Law Firms' Largess to State Court: Jurists Report Stirs Criticism from Several Quarters, HOUSTON POST, Sept. 27, 1988, at A11.
In 1990, the Tennessee Trial Lawyers Association proposed legislation to fund judicial campaigns in anticipation of more partisan contests in that state. Sue Allison, Bill Enacts Tax to Pay for Supreme Court Campaigns, UPI, Jan. 22, 1990, available in LEXIS, Nexis Library, UPI File.
35 GOP Chief's Attack Discomfits Hopefuls, RALEIGH NEWS-OBSERVER, Sept. 16, 1990, at 1C, 3C.
36 Christiansen, supra note 31, at 3B.
The Republican candidates distanced themselves from the criticisms made by their party spokesmen. The governor himself knew better; four years earlier, one editorial recalled, he had told North Carolina lawyers that the system of partisan elections was "outmoded and wrong and ... against the best interests of our people." That occurred when the governor's Republican appointee as chief justice was defeated by a Democrat. Whatever his real views were, in a partisan election the party's political leaders are expected to argue for the party's candidates. The efforts of the North Carolina Committee on Judicial Campaigns expressly focused on the conduct of the judges' own campaigns, leaving party leaders, officials, and other groups to use the judicial election in whatever way served their respective goals.

It is difficult for a watchdog committee to regulate what party leaders, officials, and others say about judges, beyond protesting falsehoods and exaggerations. Exploitation of high profile judges for partisan ends is not limited to partisan judicial elections or to elective judgships. In 1986, California's Governor Deukmejian sometimes appeared to be running against Chief Justice Bird, who was defeated in a retention election, just as President Nixon earlier had campaigned for law and order against the Warren Court. In 1990, the Republican candidate for governor of New York campaigned against the "Cuomo Court" for coddling criminals. Some people might suspect political motivation in the most recent Supreme Court appointment if the President had not assured us that he chose Judge Thomas as the most qualified person for that Court.

Nonetheless, it has been considered a major reform that most states abandoned partisan for nonpartisan judicial elections. But what exactly does this change? May a partisan governor then not attack a judge's views and decisions and support the opposing candidate? Can a party chairman be kept from doing the same in television commercials? The question reached the Supreme Court this year but was not decided.

The distinction between partisan and nonpartisan elections is a consequence of printing official ballots, a system that the states adopted only after the Civil War. Previously, voters might cast a vote for anyone they chose, or put in the ballot box the "straight tickets" prepared for them by the respective political parties. Legally, the parties were private as-

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37 Martin's Ugly Attack, RALEIGH NEWS-OBSERVER, Sept. 26, 1990, at 18A. In 1988, North Carolina's Chief Justice James G. Exum, Jr. reviewed Governor Martin's previous efforts to recruit Republican opponents for the state's largely Democratic judiciary and the disruptive effects of lengthy and expensive election campaigns on the work of the courts. His recommendations to the state's Judicial Selection Committee concluded that most desirable system of judicial selection would be gubernatorial appointment with legislative confirmation for terms of 15 or more years, without reappointment. James Exum, Judicial Selection in North Carolina, N.C. B. Q., Summer 1988, at 4.

38 Rin fret Says He'd Ask Top Court Judges to Quit, TIMES UNION, Oct. 5, 1990, at B11.

The paradox..., lies in the assumption that judges can remain independent though compelled to seek financial contributions and other assistance, including endorsements, from powerful special interests and pressure groups, but that their very integrity may crumble if they ask members of a political party publicly to proclaim their collective support.

Judges Reinhardt and Kozinsky continued:

[Political parties have as much right to make known their views regarding candidates for judicial office as do the Crime Victims for Court Reform, the Law and Order Campaign Com-

40 See McFadden, supra note 1, at 101-02.
41 In 1990, a new ABA draft proposed to allow judicial candidates to identify themselves as members of a party. Id. at 195.
42 In re Kaiscr, 759 P.2d 392 (Wash. 1988).
44 911 F.2d 280 (9th Cir. 1990) (en banc), cert. granted, 111 S. Ct. 750 (1991), and vacated, 111 S. Ct. 2331 (1991).
45 Id. at 290.
46 Id.
mittee, the District Attorneys’ Association of California, the National Organization for Women, or the San Francisco Chronicle, all of which took official positions in California’s 1986 retention election.47

The concurring judges noted that instead of party tickets distributed by political parties before the state printed official ballots, California now has “slate mailers,” printed and mailed by private entrepreneurs in a pseudo-official format, on which judges and other nonpartisan candidates pay to be included among so-called “endorsed” candidates. They concluded: “California cannot have it both ways. If it wants to elect its judges, it cannot deprive its citizens of a full and robust election debate. It cannot forbid speech by persons or groups who wish to make their views, support, or endorsements known.”48 If people are to choose their judges, they must be free to form their judgment on the basis of endorsements and the candidates’ political philosophies, just as much as Presidents do when they appoint federal judges from members of their own parties.

So in the West at least, the First Amendment lets political parties, like other groups, endorse nonpartisan judicial candidates and lets candidates ask for support.

But does the First Amendment protect a candidate’s right to ask for financial support to get the message to the voters? The canon says no. The issue led to our third case of the year, a disciplinary proceeding against a supreme court judge.

IV. SEEKING CAMPAIGN CONTRIBUTIONS

A recent study of financing the 1988 Texas campaign for chief justice begins:

Conflicts between plaintiff and defense attorneys normally take place in court proceedings. But in Texas . . . [and elsewhere] attorneys on opposite sides of the docket have the opportunity to fight their battles in another arena as well, namely in attempting to influence the outcome of judicial elections through campaign contributions.49

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Naturally, one would expect interest groups, regular litigants and lawyers to contribute to those judicial candidates whom they view as being generally favorable to their own interests. Such is the nature of normal partisan politics. But normal politics may contribute to ethical dilemmas for judges who, after election, are supposed to be fair, impartial and ob-

47 Id. at 292.
48 Id. at 294.
jective toward all who appear before them. Everyone expects legislators to look after the interests of supporters and contributors, but that is not the normal expectation for judges.\textsuperscript{50}

The study found that 85 percent of respondents believed that a state's type of judicial selection affects the neutrality of judges, and that most people did not believe that political contributions do not affect a judge's decisions.\textsuperscript{51}

Justice Joseph Grodin of California, whose loss of a retention election was a by-product of the heavily financed campaign against Chief Justice Rose Bird in 1986, called asking for campaign funds "one of the worst experiences of my life," particularly when he found that one of his fundraisers had told lawyers that Grodin would remember after the election who contributed and who did not.\textsuperscript{52}

Another view of the process is less agonized than cheerfully agnostic. Justice Richard Neely of West Virginia explained how he became a judge. An incumbent United States Senator seemed about to retire and Neely, the grandson of a long-time governor and senator, announced for the seat and began to raise campaign funds. Neely's support evaporated when the incumbent filed for reelection. At this point, Neely writes:

I decided it was better to be a winning state supreme court justice than a losing United States senator, so I took my small organization and the statewide name recognition I had bought with the campaign contributions into a lower stakes game which I could win. I outspent my opponents ten to one and won the primary election for judge by 35,000 votes and the general election by 54,000. The outcome had nothing to do with my legal ability, but with inherited name recognition, the enthusiasm and charm of youth, and money - most of it either mine or my father's.\textsuperscript{53}

First, of course, was the political name inherited from his grandfather. But Neely concludes: "I... know that when I run for reelection for judge, I would rather have an impecunious Oliver Wendell Homes as an opponent than a well-financed Jack the Ripper."\textsuperscript{54}

In 1988, a candidate who had long been a distinguished state senator was elected to an open position on the Oregon Supreme Court. After the election, he was charged with having joined in requesting financial pledges first at a meeting to organize his campaign and later from business representatives and members of the bar, and with asking for campaign funds from the readers of a labor newspaper.

\textsuperscript{50} Id.
\textsuperscript{51} Id. at 188.
\textsuperscript{52} JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE 174 (1989).
\textsuperscript{53} RICHARD NEELY, HOW COURTS GOVERN AMERICA 35 (1981).
\textsuperscript{54} Id.
The Oregon Supreme Court rejected the judge's defense that forbidding candidates to ask for campaign funds was inconsistent with making an office elective and with the free speech guarantees of the state and federal constitutions. The court's majority and dissenting opinions sharply focused the anomaly of election campaigns by candidates who may not ask people who care about the office to help finance the campaign.

The majority conceded that requests for campaign funds were constitutionally protected free speech: "So long as judges are chosen by the electoral process, it will be impossible to deny lawyers and potential litigants the right to give to campaigns or to deny judges the right to seek contributions. Both activities are too important in the scheme of things to permit either to be forbidden outright." Candidates for other offices might be entitled to ask for contributions in person. Nevertheless, the court held this practice incompatible with judicial office:

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.

According to the majority, this justified making judicial candidates "obtain funds to carry out a campaign [without] the specter of contributions going from the hand of the contributor to the hand of the judge." Forbidding the candidate himself to ask for funds "need not cause the campaign to suffer, if the judge picks good people for his or her campaign finance committee"—meaning people good at fundraising. If this was less effective than direct appeals by the candidate, that just proved the point of the prohibition.

The dissenters saw elections differently. A constitutionally mandated election implies that candidates will campaign for votes. "Surely, it is unquestioned," Justice Unis wrote, "that a statute prohibiting candidates from personally soliciting support for their campaigns could not survive a constitutional challenge . . ." The constitutional right to ask for support for one's candidacy necessarily includes requests for campaign funds, given the need to reach voters through privately owned media. Personal solicitation of campaign funds as well as political support cannot be in-

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55 In re Fadeley, 802 P.2d 31 (Or. 1990).
56 Id. at 41.
57 Id.
58 Id.
59 Id.
60 In re Fadeley, 802 P.2d 31 (Or. 1990) (Unis, J., concurring in part, dissenting in part).
compatible with the role of candidates for elective offices generally, the
dissent argued, and neither Oregon's constitution nor empirical evidence
gave any grounds for singling out judicial candidates.

It is no surprise when a court sustains its own no-solicitation canon in
the name of judicial probity and public respect. The justices were them-
selves successfully elected with campaign funds raised by "good people";
anyone whose candidacy was unappealing to the good people who help
finance campaigns would likely not be on the court. The court's concerns
about an elected judge's political indebtedness and about the public's
confidence in its judges are understandable. Consider, however, the prem-
ises of the decision.

First, the states entrust other elected officials with applying law as
well as a conscientious view of the public interest. State election officers,
state treasurers, attorney generals, and prosecutors are examples. If ask-
ing for campaign funds compromises one's ability to act according to one's
best judgment of the public interest, should a court also sustain prohi-
bitions against personal solicitations by candidates for those offices, or
for legislative and gubernatorial candidates?

Second, why draw the line between having others solicit funds for one's
campaign and asking for funds oneself? Judicial candidates may suggest
whom to approach. They are not forbidden to know who contributed and
who did not, nor to thank the donors; indeed, reformers have long insisted
that campaign contributions be publicly reported. As for a judge being
beholden to donors after an election in anticipation of the next election,
other forms of support are more important than any single contribution.

An incumbent judge may need funds to campaign against an opponent
who does not. Washington voters in 1990 replaced incumbent Chief Jus-
tice Keith Callow with a lawyer named Charles Johnson, the name of a
television news anchor as well as of a trial judge. It is widely observed
that voters rarely know what appellate judges do, or who the incumbent
is when the ballot does not say.

There is a plausible reason not to let judges personally ask lawyers for
campaign contributions; it is to protect the lawyers' freedom to decline.
But that reason should not overcome a candidate's freedom of speech. The
reason accepted by the Oregon court comes down to appearances: Direct
solicitation of campaign funds is unseemly for judicial though not for
other candidates while indirect requests for funds and direct solicitation
of other forms of support are not unseemly. We do not know whether these
distinctions satisfy the First Amendment because the case was not taken
to the Supreme Court. The fact that many states omit the restraint on
candidates from their versions of Canon 7 suggests that it serves less
than a "compelling" interest if that is the test.

61 See Edmund B. Spaeth, Jr., Reflections on a Judicial Campaign, 60 JUDI-
CATURE 10, 14 (1976).
62 See Note, Stuart Banner, Disqualifying Elected Judges from Cases Involving
V. RESTORING A DISTINCTIVE JUDICIAL ROLE

Let me end with a recent commentary on law and politics in *The New Yorker* magazine. It said that "[t]he battle over the Supreme Court nomination of Robert Bork had revealed to the public a grave development that legal scholars had been observing for some time: a breakdown in consensus on the most basic American legal principles" about the meaning of the Constitution and about how to apply tools of legal reasoning to interpret it.63

“One effect of the breakdown,” the writer continued, “is that the law is now almost always spoken of popularly in terms of outcomes that are indistinguishable from political ends.”64 Judges are assessed in terms of whether they back or oppose causes like abortion, affirmative action or the claims of environmentalists and criminal defendants. I interpolate that state judges, who are responsible for a much wider range of issues, can add to the list tort plaintiffs, liability insurers, doctors, manufacturers, utility companies, school teachers, school boards, homeowners and other taxpayers. The piece concluded: “[L]egal thinkers have tried to rationalize controversial decisions in terms of judicial philosophy, but the failure of their ideas to win public understanding and approval has reinforced the impression that the ends of law and of politics are the same.”65 If a new consensus is not reached, “the law will increasingly become what cynical observers contend that it already is - just another tool of power.”66

The New Yorker has a point. I suspect that people have always judged court decisions in terms of outcomes rather than premises. No doubt most people care about results, not reasons. They care about abortion or affirmative action, not about federalism or the Fourteenth Amendment. But courts give up their defense against the charge that law is nothing more than politics when they explain their decisions as a choice of social policy with little effort to attribute that choice to any law.

Styles of explanation are more than pretense. Of course courts, at least the highest courts, face real choices - otherwise there would be nothing to appeal - and in some issues, the law makes the predictable effects a factor in the choice. The search for legal premises is often attacked as formalism, as heresy against the realist orthodoxy. Yet if a court wants to maintain its distinction from the legislature, the court must link its decision to some source besides its own power to choose. If a proposed opinion cannot articulate a link to some principle beyond the court’s preferred economic or social policy toward the disputed issue, the decision itself needs a second look. This is true of common law opinions, particularly in Torts, where external legal norms can be hard to find. It is even more true of constitutional opinions which presuppose that an accountable government has chosen a public policy.

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64 *Id.*
65 *Id.*
66 *Id.* at 32.
In this lay the strength of Judge Bork’s attack on recent Supreme Court doctrines. They expressly rested decisions on balancing competing interests, on value judgments whether some interests are more or less fundamental, whether the purpose for bending the First or the Fourteenth Amendment was compelling or only significant, and whether the means chosen for the purpose were necessary or only useful. These inescapably look like legislative judgments, issues on which judges, like legislators, predictably would divide and on which ordinary citizens would see no reason to defer to whichever side happened to be in the majority on the Court. As Professor Robert Nagel has argued, such decisions leave no reason why opposing sides on an issue like abortion should not demonstrate in front of the Supreme Court building and flood the justices’ chambers with mail as Justice Scalia has deplored.

When citizens vote to change the court, why should they not do so in the expectation that the new majority would overrule their predecessors’ policy preferences just as legislators would? Why should judicial candidates not make it clear that this is exactly what they propose to do (or to resist) if people will muster the financial and other support to elect them to the court? Why should judges not anticipate the next election and, like other elected officials, defend their personal votes in media appearances and mailings to selected audiences whenever an important decision is rendered? Why should an elected judge not replace a law clerk with a press aide like those of other elected officials? And why should advocates not argue that the court should take popular reaction into account in deciding a controversial issue as they would argue to legislators?

Some audiences would not find this prospect appalling, but I trust you do. The distinction between courts and other officials, between law and political discretion, defines the law as a profession. I believe people want equally impartial performance on their state and federal courts if the question is put that way. Impartiality and the risk of disqualification are legitimate grounds for limiting what a judge may say either during or outside a campaign. Yet, most people also hate to give up the power to vote judges out of office where this power exists. Reflecting on his own experience, Justice Grodin called for a public consensus on permissible criteria in judicial elections, but he acknowledged that people may and do defeat a judge for any reason without knowing much of what judges do, from discontentment with one decision or with a general trend. This leaves an elective judge two choices: to cater to majority opinion, or to persuade opinion leaders that unpopular rulings are principled applications of law.

What can be done about the contradiction between judicial independence and judicial elections? Not much, I fear, short of giving up on one or the other. The Canons of Judicial Conduct seek to keep the conduct of

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judicial candidates themselves under control for the sake of appearances more than for political reality. This does not constrain others who have political, ideological, or selfish reasons to campaign for or against a judge. Where bar associations and state courts see restrictions on candidates as an essential compromise between competing goals, others see a sacrifice of free speech to hypocrisy. But the conflict can be reduced by steps already familiar in some states, taken by each branch of government as well as by citizens who care about the courts.

1. Legislatures can and should finance ways to inform voters about candidates in all elections as some states now do in official voters pamphlets, but particularly in elections to courts and other professional positions. Legislature should also offer subsidies for campaign media costs of judicial candidates who limit private campaign funds. The judicial branch could persistently press these reforms upon legislative and executive branches.

2. Governors should, as a matter of principle, forswear political attacks on judges (it would help if presidents set the tone) and they should also advise prosecutors and other executive officials, who collectively are the largest set of litigants, not to take public sides in judicial campaigns.

3. Other states can develop North Carolina's model of an official but respected committee on judicial elections into a stronger, long-term body that can call fouls on improper conduct, even by persons outside the judicial campaign organizations, so effectively as to make such conduct counterproductive.

4. More important than any campaign reform, legislature, governors, and the legal profession should cooperate to find an institutional home in state government for long-term, systematic law reform and thereby reduce the demand for courts to serve as the primary lawmakers in major areas of the law.

5. The courts themselves, instead of relishing that lawmaking role, can make greater efforts to explain their decisions in a judicial rather than a legislative style of opinions. Since I am speaking in a law school, the academy might reconsider its enthusiasm for every innovative opinion regardless of its juristic cogency.

6. Judges as well as commentators should abandon the facile notion that legal interpretation by elected judges has either greater legitimacy or greater latitude than by appointed judges. The distinction undercuts the courts' claim of professional fidelity to law and effectively invites those who disagree with an interpretation to campaign against the judges rather than amend the law.

7. As Judges Reinhardt and Kozinsky said in their Renne concurrence, if the concern is to free judges from fear that their decisions will cost them reelection to the court, there are options short of the federal model of life-time appointment; for instance, to give judges much longer terms after the first election following an initial trial period.

This list contains nothing about regulation. From my observation, the quality and self-restraint of election campaigns, including judicial elections, depends far more on a state's political culture, the expectation of
the people and community leaders, and on the common "consensus of
constraint" mentioned by former Justice Grodin than on laws. Attempts
to restrict the quantity or quality of political campaign speech by pro-
hibitions (beyond those essential to avoid a judge's disqualification in
future cases)\textsuperscript{68} contradict the premise of popular elections. Prohibitions
only divert campaigns into less direct channels, and the effort to sustain
them does more harm to principles of free speech than any good that the
restrictions can accomplish.

The federal Constitution postulates adjudication in state courts, and
legitimate adjudication depends on its distinction from ad hoc political
decisions. The federal Constitution also "guarantee[s] to every state . . .
a Republican Form of Government.\textsuperscript{69} States and state courts must comply
with that obligation, even if the United States Supreme Court will not
adjudicate it.\textsuperscript{70} If a state's politics cannot distinguish its judges from other
elected officials, the judges' ultimate defense does not lie in trying to
exclude themselves and their constituents from the First Amendment. It
must lie in the Constitution's guarantee of a republican form of govern-
ment, if a court knows when and how to use it.

\begin{quote}
\textsuperscript{68} Oregon's formulation, for instance, proscribes political activity by a judge or
judicial candidate that "involves persons, organizations or specific issues that will
require a judge's disqualification under Canon 3(C)." \textit{Oregon Code of Judicial
\end{quote}

\begin{quote}
\textsuperscript{69} \textit{U.S. Const.} art. IV, \S\ 4.
\end{quote}

\begin{quote}
\textsuperscript{70} See Hans A. Linde, \textit{When Is Initiative Lawmaking Not "Republican Govern-
\end{quote}