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BRENNAN LECTURE

OVERTURNING PRECEDENT: THE CASE FOR JUDICIAL ACTIVISM IN REENGINEERING STATE COURTS

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In the Seventeenth Annual Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice, Paul J. De Muniz, Chief Justice of the Oregon Supreme Court, discusses the challenges confronting state judiciaries in the face of economic crises and corresponding state budget cuts. Chief Justice De Muniz urges state court leaders to adopt the concept of reengineering to overhaul antiquated court management processes in favor of more efficient alternatives. Drawing from the Oregon state judiciary's own efforts, Chief Justice De Muniz identifies court governance structures, case administration, essential court functions, and leadership as key targets in any successful reengineering endeavor.

Thank you Chief Judge Lippman for that kind introduction.
Distinguished guests, ladies and gentlemen:

I am so very honored by the invitation to give the Seventeenth Annual Justice William J. Brennan, Jr. Lecture. Looking at the names

* Copyright © 2012 by Paul De Muniz, Chief Justice, Oregon Supreme Court. An earlier version of this lecture was delivered on October 27, 2010 at New York University School of Law. Chief Justice De Muniz was elected to the Oregon Supreme Court in 2000 and has been the court's Chief Justice, as well as the Oregon Judicial Department's administrative head, since January 2006. Between 1990 and 2000, he sat on the Oregon Court of Appeals and served as presiding judge on one of the three panels that comprise that body. Prior to ascending to the bench, Chief Justice De Muniz was in private practice for thirteen years in Salem, Oregon, where he specialized in complex criminal and civil litigation, as well as appellate advocacy. Before entering private practice, he was a deputy public defender with the State of Oregon from 1975 to 1977. Chief Justice De Muniz speaks frequently to both national and international audiences on the importance of maintaining independent state judiciaries, improving state court administration, and the need for adequate state court funding.

of those who have given this lecture over the past years makes the invitation a wonderful honor but also a humbling experience. Although Oregon is about as far away as you can get in this country from New York and from Justice Brennan's native New Jersey, there is a connection of sorts, both historically and more recently, between Oregon and Justice Brennan. From a historical perspective, many legal scholars have credited Justice Brennan with renewed legal study of state constitutional law. In 1977, Justice Brennan published an article in the *Harvard Law Review* emphasizing the fundamental principle that U.S. Supreme Court interpretations of the Federal Constitution "are not . . . dispositive of questions regarding rights guaranteed by counterpart provisions of state law."¹ Many legal scholars, such as Stewart Pollock, identify Justice Brennan's article as the starting point of the modern re-emphasis on state constitutions.² At that very same time on the opposite coast, University of Oregon law professor and later Oregon Supreme Court Justice Hans Linde's writings and lectures had a nationwide impact. Justice Linde urged state court judges to resolve constitutional questions under their own constitution before analyzing them under the Federal Constitution.³ Today, legal scholars credit the two men with together reestablishing the primacy of state constitutions as independent sources of state law in American jurisprudence.⁴

As to the present-day connection, I recently read that on June 3, 2010, the Essex County Justice William J. Brennan, Jr. Memorial Statue was dedicated in front of the Hall of Records in Newark. The statue of Justice Brennan was created by Thomas Jay Warren, a well-known and prolific sculptor. As it turns out, Mr. Warren created the eight-foot statue in his Rogue River studio in Oregon.⁵

¹ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

² See, e.g., Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983) (referring to Justice Brennan's 1977 article as "the Magna Carta of state constitutional law").

³ See Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 387-96 (1980) (encouraging state courts to look first to their own state constitutions in resolving state constitutional law questions, thereby insulating such decisions from federal review).

⁴ See Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 102 (2006) (referring to Justice Linde and Justice Brennan as the cofounders of the "New Judicial Federalism" movement in the 1970s).

⁵ See Phillip Read, *Sculptor To Honor William Brennan*, NJ.COM (Jan. 25, 2010, 8:05 AM), http://www.nj.com/newark/community/index.ssf/2010/01/sculptor_to_honor_william_brennan.html (detailing sculptor Thomas Jay Warren's progress in his Rogue River, Oregon studio as well as the sculpture's significance to Newark, Justice Brennan's hometown).

So, although I am a long way from Oregon tonight, there is something about the connection between Oregon and the namesake of this lecture that shortens that distance.

Now let me turn to the substance of my remarks.

I

INTRODUCTION

In 1958, IBM brought a new computer online for the U.S. military, a behemoth formally designated AN/FSQ-7, but colloquially known as the SQ-7 by those that worked with it.⁶ The SQ-7's mission was to coordinate a system that would automatically identify and respond to hostile jet bombers before they could reach American airspace.⁷ The twenty-three SQ-7 units built between 1958 and 1963 were—and remain—among the world's largest computers. The SQ-7's calculating capacity derived from an extensive array of vacuum tubes, over 50,000 per unit. Consequently, the SQ-7 was enormous; it weighed approximately 250 tons, drew three megawatts of power, and occupied two entire floors of a blast-proof bunker the size of a four-story football field. The computer required one hundred people to operate it, as well as its own diesel-powered cooling plant.⁸

However, a scant five years into the program—and shortly after the last SQ-7 became fully operational in 1963—the military began dismantling the units and closing the facilities that housed them. Two developments effectively had rendered the SQ-7 obsolete. First, new computer designs based on transistors and solid-state engineering had gone into production, supplanting the SQ-7's vacuum tube technology. Now, literally scores of computers, using a fraction of the power at a fraction of the cost, could operate in the same space previously occupied by a single SQ-7.⁹

Second, the mission for which the SQ-7 had been designed had changed dramatically. The specter of enemy bombers flying over the American heartland gave way to that of nuclear missiles, a new threat that was simply beyond the SQ-7's ability to effectively react to or

⁶ Loewen, "Achtung! Alles Lookenspeepers!", MIKE LOEWEN'S CORNER OF THE WEB, <http://css.its.psu.edu/news/nlfa07/blinkenlights.html> (last visited Jan. 28, 2012).

⁷ *Id.*

⁸ SAGE Computer System, COMPUTERMUSEUM.LI, <http://www.computermuseum.li/Testpage/IBM-SAGE-computer.htm> (last visited Jan. 28, 2012).

⁹ See IBM AN/FSQ-7, OLD-COMPUTERS.COM, <http://www.old-computers.com/museum/computer.asp?st=1&c=1050> (last visited Jan. 28, 2012) (explaining rapid changes in defense needs and technology that led to the replacement of SQ-7). The solid-state version of the SQ-7 was the IBM 7090 and it was roughly the size of a desk. *Id.*

track.¹⁰ By 1965, large pieces of the decommissioned computers began appearing as background props in science fiction television shows such as *Voyage to the Bottom of the Sea* and *Lost in Space*.¹¹ In its new capacity, the SQ-7's sole function was to masquerade as the future.

The story of the SQ-7's demise could serve as a cautionary parable for America's state courts. Like the SQ-7 in its final days, our state court systems are increasingly perceived as too big, too cumbersome, and too costly. Like the SQ-7, state court systems frequently rely on outmoded technologies and antiquated operating frameworks to carry out their core functions. And finally, like the SQ-7, state courts now face a challenge that threatens the continued viability of their mission as a coequal branch of state government. The economic crisis that plagues most state economies today is fueling a demand for state court services while at the same time causing state courts to experience ever-deepening budget cuts.¹² If state courts are to maintain their institutional and fiscal independence in the face of what is predicted to be a prolonged economic crisis, a period that state government leaders are now viewing as a "decade of deficits,"¹³ state court leaders must begin—now—to embrace a new kind of judicial activism. This reinterpretation of judicial activism is one that is focused on reengineering our state courts by overturning outdated management precedents that currently affect court operations across the country. In that regard, reengineering concentrates on identifying alternatives that will dramatically increase efficiencies—allowing court systems to operate with fewer revenues—while at the same time improving the delivery of judicial services to the public.

In my remarks tonight I will discuss the concept of reengineering, its importance to state courts today, the key targets for reengineering in a state court system, and finally, the role leadership must play in the court reengineering process. Let me begin by explaining the concept of reengineering.

¹⁰ See *id.* (noting that SQ-7's original mission was to detect bombers, not later-developed intercontinental ballistic missiles).

¹¹ Loewen, *supra* note 6 (listing various television shows and movies that have incorporated old SQ-7 parts as props).

¹² See *infra* Part III (arguing that the combination of increased demand for judicial services and increased budget cuts requires dramatic reengineering of state court systems).

¹³ STATE OF OR., GOVERNOR'S RESET CABINET, UPDATE FROM THE GOVERNOR'S RESET CABINET 3 (2010), available at <http://library.state.or.us/repository/2010/201005210937215/index.pdf>.

II REENGINEERING DEFINED

Among court management professionals today, the word of the moment is “reengineering.” The term arises frequently in the current literature of court administration as a synonym for any effort aimed at reorganizing court processes to decrease costs while maintaining and increasing quality.¹⁴ In 1990, author and business consultant Michael Hammer first used the term to describe a phenomenon that extended far beyond cost cutting or efficiency creation. In an article published in the *Harvard Business Review*, Hammer’s notion of reengineering sounded a call for businesses seeking dramatic performance improvement to consciously identify and break away from outdated rules and assumptions, factors that were frequently the root cause of an organization’s underperformance in the first place.¹⁵ For Hammer, corporate reengineering would eventually come to mean “the fundamental rethinking and radical redesign of business processes to achieve dramatic improvements in critical, contemporary measures of performance, such as cost, quality, service, and speed.”¹⁶ That definition, Hammer noted, contained four words that were the keys to grasping the full scope of his reengineering concept: fundamental, radical, dramatic, and process.¹⁷

Reengineering was fundamental, Hammer urged, because it forced businesses to reexamine all the rules and assumptions undergirding their operations and ask, “*Why* do we do what we do? And why do we do it the way we do?”¹⁸ Reengineering was radical in the sense that it implemented change at the *radix*—or “root”—of a business’s operating structure, rather than at its margins.¹⁹ Reengineering

¹⁴ See Daniel J. Hall & Lee Suskin, *Reengineering Lessons from the Field*, in *FUTURE TRENDS IN STATE COURTS 2010*, at 36, 36 (Carol R. Flango et al. eds., 2010), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1605> (describing reengineering in the court context as an enterprise-based philosophy, focused on analyzing, redesigning, and reorganizing court processes to adapt to the volumetric and economic constraints of the twenty-first century).

¹⁵ See Michael Hammer, *Reengineering Work: Don't Automate, Obliterate*, *HARV. BUS. REV.*, July–Aug. 1990, at 104, 107 (explaining that reengineering business processes differs from merely rearranging them, because reengineering requires discarding all assumptions about a company’s operations, including those that have been fundamental to the company’s operations since its inception).

¹⁶ MICHAEL HAMMER & JAMES CHAMPY, *REENGINEERING THE CORPORATION: A MANIFESTO FOR BUSINESS REVOLUTION* 32 (1993).

¹⁷ *Id.* at 32–36 (describing four key concepts of reengineering in the business context and how such concepts differentiate reengineering from mere improvement, enhancement, or modification of existing operations).

¹⁸ *Id.* at 32.

¹⁹ See *id.* at 33 (“Radical redesign means getting to the root of things: not making superficial changes or fiddling with what is already in place, but throwing away the old.”).

was dramatic because it was meant to be employed only when organizations needed to make quantum leaps in performance, often because they were in trouble, could see trouble looming on the horizon, or were ambitious and aggressive.²⁰ Finally, and most importantly, it was process-oriented because it strove to replace whole systems within organizations rather than tinker with discrete tasks.²¹

Most state court systems are ripe for reengineering today. They are facing a new long-term economic reality, one that includes the promise of ever-growing budget shortages. What follows is an overview of that new economy and its consequences for state courts.

III THE NEW ECONOMY

The antecedents of the new economic reality and its effects on state courts stretch back well over a decade. The 1990s witnessed the states' collective spending grow by 28.2% when adjusted for inflation.²² At the same time, a strong economy generally increased tax revenues at a rate that outpaced state spending. The response in at least forty-three states was to enact permanent tax cuts.²³

However, as the economy began to sour by the end of 2001, the amount of money feeding state revenues began to decline. The tax cuts implemented by so many states during the previous decade's prosperity quickly became unaffordable. The third quarter of 2001 saw an overall 5% decrease in state revenues from the same quarter the year before.²⁴ In the first quarter of 2002, revenues were down 9.3%, followed by an 11.7% drop in the second quarter.²⁵ For most states, diminishing funds meant massive shortfalls in state operating budgets. In 2002, those deficits totaled \$40 billion across the states; by 2003, that total had risen to \$75 billion and in 2004, to \$80 billion.²⁶

²⁰ *Id.* at 33–34.

²¹ *See id.* at 35–36 (identifying the process component, which focuses on how well the process implemented leads to the end result, rather than on the discrete tasks within a process, as the most important component of reengineering).

²² Daniel J. Hall, Robert W. Tobin & Kenneth G. Pankey, Jr., *Balancing Judicial Independence and Fiscal Accountability in Times of Economic Crisis*, JUDGES' J., Summer 2004, at 5, 5–6.

²³ *Id.* at 5–6.

²⁴ Jason White, *Govs Scramble for Soundbites to Decry Budget Crisis*, STATELINE.ORG, (Mar. 21, 2003), <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15196>.

²⁵ *Id.*

²⁶ Daniel J. Hall, *How State Courts Are Weathering the Economic Storm*, in FUTURE TRENDS IN STATE COURTS 2009, at 1, 2 (Carol R. Flango et al. eds., 2009), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1486>.

Unsurprisingly, the mounting deficits created significant impediments for many state justice systems. In Oregon, for example, between 2001 and 2003, the state's courts numbered among those hardest hit by the national recession.²⁷ The Oregon Judicial Department's (OJD) budget was cut by over \$50 million, or approximately 12%.²⁸ At that time, those cuts severely impacted court operations and indigent defense. During the last four months of the 2001–2003 biennium (March through June), Oregon courts were closed on Fridays²⁹ and approximately seventy-four judicial branch employees were laid off; another 189 OJD job openings simply were left vacant.³⁰ Except for judges, the remaining workforce participated in mandatory work furloughs during that four-month period that reduced the work week to thirty-six hours and salaries by 10%.³¹ Oregon courts were forced to implement a case management system that prioritized violent felonies and juvenile dependency cases over civil matters and property crimes.³² The revolving door experience of an alleged car thief in Oregon illustrates the consequences of the state judiciary's budget crunch. The individual was arrested, charged, and processed on three separate occasions for different car thefts, only to be released on his own recognizance because each time the state lacked the resources to provide him with a lawyer.³³

Nearly seven years have passed since the 2003 recession and states now find themselves in even worse financial straits. In 2009, the states' cumulative budget deficits reached \$101 billion, over \$60 billion more than in 2002.³⁴ Forty-four states currently anticipate deficits for 2010 and beyond.³⁵ The total for those estimated shortfalls is projected to be \$145 billion in 2010 and over \$150 billion in 2011.³⁶

²⁷ Daniel J. Hall & Thomas Clarke, *Delivering Judicial Services in Hard Times*, in *FUTURE TRENDS IN STATE COURTS 2008*, at 63, 64 (Carol R. Flango et al. eds., 2008), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1258>.

²⁸ Memorandum from Kateri Walsh, Or. State Bar Comm'ns, to All Or. Presiding Judges and Trial Court Administrators 3 (Oct. 22, 2002) (on file with the *New York University Law Review*).

²⁹ *Id.* at 4.

³⁰ Summary Table, Or. Judicial Dep't, Impact of Five Special Legislative Sessions (Sept. 28, 2009) (on file with the *New York University Law Review*).

³¹ Memorandum from Walsh, *supra* note 28, at 4.

³² *Id.*

³³ See *Alleged Car Thief Goes Free Courtesy of Tight State Budget*, EUGENE REG. GUARD, Apr. 20, 2003, at B3 (stating that prosecutors expected an alleged thief to walk for a third time due to state's fiscal inability to hire a state-appointed lawyer).

³⁴ Hall, *supra* note 26, at 2.

³⁵ *Id.* at 1.

³⁶ *Id.* at 2.

For state courts, the renewed deficits translate into another round of hard economic times. Several examples from among the many that can be found across the country follow.

California's judicial budget was reduced by \$256 million in fiscal year 2008–2009.³⁷ The budget was then reduced by over \$500 million in fiscal year 2009–2010.³⁸ All state courts were closed on the third Wednesday of every month between September 2009 and July 2010,³⁹ and Chief Justice Ronald George of the California Supreme Court asked judges across the state to join him in pledging to voluntarily reduce their own salaries.⁴⁰

Due to severe budget cuts in Minnesota, the state judiciary instituted a hiring freeze that has left judicial vacancies unfilled and also implemented voluntary furlough and separation incentive programs.⁴¹ Public counters are now closed half a day a week in over half of the state's judicial districts.⁴² Minnesota courts have terminated civil arbitration services in certain judicial districts, halted funding for family courts, suspended visitation services in some districts, reduced staffing in domestic abuse service centers, and reduced funding for drug courts statewide.⁴³

Oregon's state court system also continues to be buffeted by economic uncertainty. After multiple rounds of budget cuts, the Oregon judiciary's 2009–2011 budget is now \$37.2 million less than the amount needed to continue services at 2007–2009 levels.⁴⁴ Although Oregon courts have remained open and accessible, those reductions have imposed a serious cost. The Judicial Department was forced to eliminate an entire division within the State Court Administrator's office, along with two deputy administrators.⁴⁵ Many Oregon court staffs now operate at a 10–20% vacancy rate, and, except for judges, all judi-

³⁷ *Budget Resource Center: California*, NAT'L CTR. FOR STATE COURTS, <http://www.ncsconline.org/wc/budget/activities/california.asp> (last visited Jan. 31, 2012).

³⁸ *Id.*

³⁹ Elizabeth Larson, *State Decides To Close Courts on Third Wednesdays*, LAKE COUNTY NEWS, Aug. 17, 2009, <http://www.lakeconews.com/content/view/9971/764/> (last visited Oct. 6, 2011).

⁴⁰ Chief Justice Ronald M. George, Address at the Cal. State of the Judiciary State Bar Annual Meeting (Sept. 12, 2009), *available at* <http://www.courts.ca.gov/7882.htm>.

⁴¹ *Overview: Minnesota*, NAT'L CTR. FOR STATE COURTS, http://ncsc.contentdm.oclc.org/cdm4/item_viewer.php?CISOROOT=/financial&CISOPTR=149&CISOBX=1&REC=2 (last visited Feb. 4, 2012).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Or. Judicial Dep't, Budget Reduction Plan (Aug. 2010) (on file with the *New York University Law Review*).

⁴⁵ Among the services that disappeared with that division were support and accountability functions such as statewide drug court coordination, internal auditing, and performance measurement. *Id.*

cial branch personnel began a new series of ten to twelve unpaid furlough days for the 2009–2011 biennium.⁴⁶

In June 2010, a special gubernatorial cabinet appointed to examine how state government in Oregon could be restructured published its final report. Among other things, the report forecast at least a decade in which Oregon would grapple with an average deficit of over \$2 billion for each consecutive biennium through 2019.⁴⁷ That report is proving prescient. In September 2010, the state issued its quarterly economic forecast, projecting a revenue shortfall of over \$1.25 billion from estimates made at the close of the 2009 legislative session.⁴⁸ As a result, today Oregon faces a projected \$3.2 billion deficit as the state prepares for its 2011–2013 biennium.⁴⁹

The grimness of that scenario is bulwarked by a 2010 report from the Pew Center on the States. Among other things, the report posits that the 2007 recession marked the beginning of a protracted period in which state governments will face “slow revenue growth, spending cuts, depleted reserves,” and a growing backlog of needs as they head, inexorably, toward some form of permanent retrenchment.⁵⁰ That kind of seismic shift, the report notes, stems from long-run structural problems that will not be solved through short-run solutions.⁵¹ In the interim, state governments will most likely experience fiscal distress for years to come as they struggle to find the “new normal,”⁵² whatever that might be.

In light of the serious and protracted revenue shortfalls facing state governments, judicial leaders can no longer pretend that they can avoid dramatic and destabilizing budget reductions by relying on time-worn truisms, i.e., that the judicial branch is a coequal independent branch of state government performing a core governance function or that even modest reductions to state court budgets impact the well-being of children and families, threaten public safety, and ulti-

⁴⁶ See Or. Judicial Dep’t, Temp. Policy for Implementation of Cost Reduction (Aug. 2009) (on file with the *New York University Law Review*) (listing number of mandatory furlough days based on salary).

⁴⁷ STATE OF OR., GOVERNOR’S RESET CABINET, FINAL REPORT 22 (2010).

⁴⁸ OR. OFFICE OF ECON. ANALYSIS, OR. ECON. REVENUE FORECAST SUMMARY 13 (Sept. 2010), available at <http://www.oregon.gov/DAS/OEA/docs/economic/forecast0910.pdf>.

⁴⁹ See STATE OF OR., GOVERNOR’S RESET CABINET, *supra* note 47, at 22 (adding a projected \$592.3 million deficit for the 2009–2011 biennium to the projected 2011–2013 shortfall of \$2.67 billion).

⁵⁰ Stephen C. Fehr, *Recession Could Reshape State Governments in Lasting Ways*, in STATE OF THE STATES 2010: HOW THE RECESSION MIGHT CHANGE STATES 1, 2 (Diane Fanher et al. eds., 2010).

⁵¹ *Id.* at 3.

⁵² *Id.* at 2.

mately retard economic recovery by limiting access to the civil judicial system. Those arguments have consistently failed to persuade state legislatures to maintain adequate funding for state courts. State judiciaries, in turn, have responded to legislative budget intransigence with an array of tactics such as fee increases for conducting court business, hiring and promotion freezes for court staffs, reductions in travel, training, and education, and the implementation of layoffs and unpaid furloughs throughout court work forces.⁵³ Those tactics, although necessary to make ends meet, are at best only stopgap measures. They should not be confused with large-scale budget strategies that can simultaneously shepherd courts through bad economic times, improve the quality of judicial services, and significantly enhance the judiciary's profile as an innovative manager of the public funds.

I believe it is time for state judicial branch leaders to move beyond piecemeal responses to budget problems and to embrace a bold, innovative approach to meeting the current economic realities. State judicial leaders should view the fiscal difficulties now facing state governments less as a crisis and more as an opportunity to dramatically improve judicial productivity and service quality by reengineering court structures and operations. To do so, however, judicial leaders must clearly understand the optimal targets for state court reengineering.

IV

REENGINEERING: THE KEY TARGETS

As I have already noted, reengineering requires recognizing and changing the outdated rules and assumptions that often drive an organization's operations.⁵⁴ Doing less, Michael Hammer warns, is "merely rearranging the deck chairs on the Titanic."⁵⁵ Accordingly, if we are to confront judicial branch traditions and cultures that may no longer be useful, we as judicial leaders must be willing to ask hard questions about how and why we do things with regard to the business processes of our courts. That is particularly difficult for entities founded on the values of precedent and *stare decisis*. Let me use Oregon's judicial branch as an example.

From an organizational standpoint, Oregon's court system is a large, complex entity. Even though its courts are unified within a well-

⁵³ See *supra* notes 37–46 and accompanying text (recounting various states' responses).

⁵⁴ See *supra* note 15 and accompanying text (explaining Michael Hammer's notion that outdated practices often cause an organization's underperformance).

⁵⁵ Hammer, *supra* note 15, at 107.

defined administrative hierarchy,⁵⁶ physically, the judicial branch remains a collection of widely dispersed courthouses, each with a unique and independent organizational culture.⁵⁷ In order to reengineer the structure and operations of Oregon's courts, we are focusing on three key target areas: (1) governance structures, (2) case administration, and (3) essential functions.⁵⁸ We do so guided by four principles. Before contemplating any change to the operating structure of Oregon's judicial branch, we first ask whether the proposed change will (1) improve litigants' convenience, (2) reduce cost and complexity for litigants, (3) improve litigants' access to justice, and (4) improve case predictability. With that in mind, let me briefly outline Oregon's current reengineering initiatives.

A. Reengineering Court Governance Structures

According to Gordon Griller, a director at the Institute for Court Management, most state courts are examples of "loosely coupled organizations," that is, "organizations where individual elements display a relatively high level of autonomy vis-à-vis the larger system within which they exist."⁵⁹ As a general rule, the professionals within

⁵⁶ In 1981, the Oregon Legislature passed legislation reconfiguring the state's judicial department as a unified branch of state government. See 1981 Or. Laws Spec. Sess. 1503 ("The Legislative Assembly hereby declares . . . it is in the best interests of the people of this state that the judicial branch . . . be funded and operated at the state level."). Under the new provisions, the state's appellate, tax, and county-based circuit courts all became part of a single state-funded entity. *Id.* The new law recognized the Supreme Court as the state's highest judicial tribunal and established its Chief Justice as the court's presiding judge and the Judicial Department's administrative head. OR. REV. STAT. § 1.002(1) (2009). As part of that function, the Chief Justice is tasked with exercising administrative authority and supervision over the lower state courts by, among other things, (1) making rules and issuing orders appropriate to the exercise of that power; (2) requiring reports from other state court judges, officers, and employees when necessary; and (3) taking, as needed, any other appropriate action. *Id.* § 1.002(1)(a)–(b), (k) (2009). By statute, the Chief Justice is elected by the Supreme Court from among its own ranks and presides for a six-year term. *Id.* § 2.045(1), (3) (2009).

⁵⁷ Brian J. Ostrom and his co-authors define organizational culture, in part, as "the set of values and assumptions that underlie the statement, 'This is how we do things around here.'" BRIAN J. OSTROM ET AL., TRIAL COURTS AS ORGANIZATIONS 22 (2007) (quoting ROBERT E. QUINN, BEYOND RATIONAL MANAGEMENT 66 (1988)). They go on to note that governmental organizations are in reality often a mosaic of competing and complementary cultures. See *id.* at 24 (explaining how multiple and competing cultures are a hallmark of government agencies and how the same characteristics can be expected to manifest in other public organizations).

⁵⁸ See Thomas M. Clarke, *Reengineering: The Importance of Establishing Principles*, in FUTURE TRENDS IN STATE COURTS 2010, at 30, 30–31 (Carol R. Flango et al. eds., 2010), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1605> (setting forth three principles to guide reengineering efforts).

⁵⁹ Gordon M. Griller, *Governing Loosely Coupled Courts in Times of Economic Stress*, in FUTURE TRENDS IN STATE COURTS 2010, at 48, 48 (Carol R. Flango et al. eds., 2010).

such organizations operate independently, as do the organizations' work units.⁶⁰ For state court systems, the result is frequently a balkanized organization.⁶¹ Reengineering the processes used in that kind of decentralized entity requires, among other things, "a governance structure that treats a court system more like a single enterprise" than not.⁶²

One of the ways that Oregon courts are moving toward such a system is by placing greater emphasis on centralizing judicial staff functions within local courthouses. To do so, however, runs counter to 150 years of judicial culture in Oregon. Traditionally, the "judicial unit, essentially [a] judge and his or her personal support staff,"⁶³ has been considered sacrosanct—the supervisory domain of the sitting judge alone.⁶⁴ As a result, judicial staff can frequently be insulated from changes that affect a courthouse's central administrative work force, changes that often include increased workloads and staffing shortages.⁶⁵

At the Oregon Supreme Court, the traditional concept of the judicial unit has held sway for well over one hundred years. Until recently, each justice has had her or his own judicial assistant and staff resources. However, that organizational model made sense only when judicial assistants typed short opinions on Underwood typewriters with onion skin copies; it is no longer useful in today's technologically advanced world.

As a result of early reengineering efforts, judicial assistants at the Oregon Supreme Court now share duties between multiple chambers under the supervision of a single Appellate Court Manager rather than the court's seven Justices. That format, in turn, has allowed the court's judicial assistants to take on tasks directly related to court operations that were previously performed by the Appellate Records Division (Records). Today four judicial assistants do the same work that a seven member staff did four years ago and, in addition, perform all of the electronic case management duties related to the Supreme Court's docket. The increased flexibility of that work unit, moreover,

Griller notes that other examples of such organizations include hospitals, research institutions, and universities. *Id.*

⁶⁰ *Id.*

⁶¹ *See id.* (attributing the judicial branch's balkanization to its loosely-coupled structure).

⁶² Clarke, *supra* note 58, at 30.

⁶³ Griller, *supra* note 59, at 50.

⁶⁴ *See id.* at 48 (describing commonly held belief of judicial independence as stemming from the judiciary's "freedom from control by other branches of government and freedom from interference in case-related decisions").

⁶⁵ *Id.* at 50.

has effectively added the equivalent of two and one half full time employees to Records, enabling that department to efficiently handle the increasing case management workload of the Oregon Court of Appeals—our state’s busiest appellate court.

The Multnomah County Circuit Court, Oregon’s largest court, has recently adopted a similar strategy: All thirty-eight judicial assistants in that county now operate under the supervision of the trial court administrator and are required to devote twenty-five percent of their time each day to courthouse operations. Even in the short-term, that strategy has resulted in the equivalent of adding at least seven full-time positions to court operations, allowing the court to retain its efficiency despite severe budget reductions. Implementing a similar culture shift throughout the state is one of the reasons that Oregon courts remain open and accessible today despite the severe budget reductions they have all experienced.

From a reengineering standpoint, however, the examples set out above are really only harbingers of a much larger and bolder shift toward centralized operations that I believe state court systems in general—and Oregon’s in particular—must make in order to more closely resemble a single enterprise. Indeed, centralized docket control, jury management, and payment systems are the next logical steps in any regimen devoted to state court reengineering. In Oregon, we have begun that process by following the example set by Minnesota’s state courts.

In Minnesota, the state’s judicial branch is preparing to roll out a centralized Court Payment Center that will process over one million citations that now pass through the courts in eighty-five different Minnesota counties.⁶⁶ Among other things, the payment center will input citations into a central case management system; receive fines by mail, telephone, and the internet; automatically split payments between governmental agencies; and automatically refer unpaid fines to collections vendors.⁶⁷ The expected dividends for Minnesota and its citizens include: (1) increased convenience for those paying fines, (2) increased efficiencies for state courts, and (3) increased collection revenues for state and local governments.⁶⁸

Centralizing common court operations can, in turn, facilitate further renovation of court governance structures by redistributing and regionalizing state courts and judges to maximize judicial resource management, staffing, and the general delivery of trial court services.

⁶⁶ MINN. JUDICIAL BRANCH, FY10–11 BUDGET REDUCTION IMPACT, *available at* <http://minnlawyer.com/wp-files/pdf/BudgetReduction.pdf>.

⁶⁷ *Id.*

⁶⁸ *Id.*

Oregon has thirty-six counties, each with a county courthouse that serves as the administrative hub and seat of circuit court business.⁶⁹ Judicial resources, however, are not apportioned by county in Oregon; by statute, they are apportioned by judicial district.⁷⁰ There are currently twenty-seven judicial districts in the state, some composed of single counties and some composed of multiple counties combined into one district.⁷¹

The Oregon Judicial Department is now examining whether court administration can be carried out more efficiently by combining many of the state's counties into larger administrative judicial districts. That strategy is not untried. Minnesota, for example, is in the process of merging its courts into multicounty work units to cut costs, share workloads, and improve the consistency of procedures and practice. It has now combined two of its ten judicial districts into a multidistrict entity that shares a common administrator and allows court staff to work across district lines as needed.⁷² To facilitate our own administrative regionalization or redistricting plan, I will be seeking legislation in the next legislative session to authorize the Chief Justice to establish consolidated administrative judicial districts for the purpose of providing prompt, consistent, and orderly dispatch of the court system's business.

Let me turn now to the subject of case administration.

B. *Reengineering Case Administration*

For some, *case* administration means routine *court* administration and thus has only limited utility in animating court reengineering efforts.⁷³ While that analogy may be apt, as far as it goes, I believe that case administration has a broader *justice* context that should focus on (1) the processes by which controversies are brought to

⁶⁹ For a listing of all thirty-six Oregon counties and the courthouses in each, see the Oregon Blue Book 2011–2012. OREGON BLUE BOOK 3, 128, 255 (Julies Yamaka et al. eds., 2011–2012), available at <http://bluebook.state.or.us/local/counties/countiesgen.htm>. Counties are governed by a board of commissioners or a “county court” with a judge and two commissioners. *Id.*

⁷⁰ Oregon Revised Statutes § 3.012 establishes those districts, the counties that constitute them, and the number of judges in each district. Under the statute, for example, Judicial District No. 4, which contains Multnomah County and the greater Portland metropolitan area, is comprised of thirty-eight circuit court positions. OR. REV. STAT. § 3.012(d) (2009). In contrast, Judicial District No. 24, which contains eastern Oregon's Grant and Harney Counties, has only one judicial position. *Id.* § 3.0129(x) (2009).

⁷¹ See *id.* (listing the composition of all twenty-seven districts).

⁷² NAT'L CTR. FOR STATE COURTS, *supra* note 41.

⁷³ See, e.g., Clarke, *supra* note 58, at 31 (“Case administration principles are rarely used to motivate reengineering projects simply because they deal by definition with the more routine aspects of court administration . . .”).

court, and (2) the processes by which those controversies are resolved. Seen in that light, reengineering the framework for case administration can also be viewed as an effort to streamline and expedite many of the bedrock processes by which state courts serve the public. Doing so increases access to justice while creating the potential for courts to realize concrete fiscal benefits as well.

In Oregon, our reengineering efforts in that regard have initially focused on the paper-intensive method by which state courts and Oregon's citizens currently interface. Oregon courts typically handle approximately fifty million pieces of paper—or 250 tons of documents—every year.⁷⁴ Presently, the majority of those documents are processed and managed by hand.⁷⁵ The inherent inefficiencies of that system, particularly in the face of rising judicial workloads, often combine with budget-mandated staff reductions to hinder courts unnecessarily in fulfilling their constitutional mission.⁷⁶ To combat that dilemma in Oregon, we initiated the Oregon eCourt Program.

Begun in 2006, the eCourt Program has focused primarily on appellate matters, building, in the process, a state-of-the-art electronic system for case management, electronic filing, and e-commerce. Trial courts now electronically transmit court files and exhibits to Oregon's appellate courts rather than shipping boxes of documents from the courthouse.⁷⁷ By June 2011, Oregon's appellate courts will have a fully operational electronic content management system in place. The goal over the next three years is to transform the business operations of Oregon's courts by creating a single virtual courthouse—the largest and most accessible in the state—that will be available twenty-four hours a day, seven days a week. When completed, the system will house: (1) a website through which parties will be able to conduct significant portions of court business online without traveling to an actual courthouse, (2) an Enterprise Content Management system that acts as an electronic warehouse to store every court-related document—e-filed or not—centrally and in a digital format, (3) a Financial Management System that will facilitate online payment of court filing fees, as well as fines and restitution awards, and (4) a Case Management System that will allow court personnel to track the mul-

⁷⁴ Bud Borja, *Oregon eCourt—Improving Judicial Outcomes and Services*, in *FUTURE TRENDS IN STATE COURTS 2009*, at 87, 87 (Carol R. Flango et al. eds., 2009), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1486>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See Or. Chief Justice Order 10-043 (Aug. 30, 2010) (on file with the *New York University Law Review*) (adopting procedures for electronic transmission of trial court file and exhibits in any case on appeal as of August 30, 2010).

titude of matters that arise in the course of an individual case from inception to final disposition.⁷⁸

Although harnessing technology is an important component in reengineering case administration, it is largely a means unto an end. Before courts can dramatically restructure the way they administer the matters that come before them, they must also fundamentally rethink how cases are processed and tried, particularly those that make up the civil docket.

In Oregon, we have implemented an innovative civil trial format known as the Expedited Civil Jury Program.⁷⁹ At the discretion of the presiding judges in each judicial district, civil matters eligible for a jury trial may now be tried in the Expedited Civil Jury Program on a joint motion of the parties.⁸⁰ Such cases are exempt from mandatory arbitration,⁸¹ and, after being assigned to a specific judge, receive an expedited trial before a six-person jury.⁸² Trial dates are set within four months of acceptance into the program, and mandatory pre-trial conferences are held at least fourteen days before trial.⁸³ Parties either jointly stipulate to a plan encompassing the nature, scope, and timing of discovery or, absent such an agreement, are subject to the program's own limited and expedited discovery schedule.⁸⁴ Pretrial motions are prohibited without leave of court.⁸⁵ The program is intended to be particularly useful in smaller personal injury cases, contract cases, and any similar cause of action in which no case participant stands to benefit from a prolonged course of litigation. In addition to providing a streamlined path to a jury verdict, the Expedited Civil Jury Program also allows lawyers and judges to gain valuable litigation expertise, helping to ensure that, when needed, Oregon citizens can turn to a large community of seasoned litigation professionals for help.

Oregon courts also are pursuing similar measures in more complicated civil matters as part of a program known as the Oregon Complex Litigation Court (OCLC). The court was first established in

⁷⁸ Borja, *supra* note 74, at 89.

⁷⁹ Or. Chief Justice Order No. 10-025 (May 6, 2010) (on file with the *New York University Law Review*); see also Press Release, Multnomah Bar Ass'n, Speedy Justice for Civil Cases in Multnomah County (on file with the *New York University Law Review*) (describing the mechanics and benefits of the Expedited Civil Jury Program).

⁸⁰ Or. Unif. Trial Ct. R. 5.150(1) (2011), available at http://courts.oregon.gov/OJD/docs/programs/utcr/2011_UTCR.pdf.

⁸¹ Or. Unif. Trial Ct. R. 5.150(2)(a).

⁸² Or. Unif. Trial Ct. R. 5.150(7).

⁸³ Or. Unif. Trial Ct. R. 5.150(2)(b).

⁸⁴ Or. Unif. Trial Ct. R. 5.150(3).

⁸⁵ Or. Unif. Trial Ct. R. 5.150(5).

2006 as a pilot project within the state's Second Judicial District.⁸⁶ Its primary mission was to adjudicate complex litigation unfettered by venue boundaries.⁸⁷ When the program began, litigants throughout Oregon could request a change of venue to the Second Judicial District to have their cases heard in a specialized forum if their disputes were likely to strain local court dockets.⁸⁸ The pilot project was successful and is now being expanded statewide.⁸⁹ When fully implemented, litigants will no longer need to travel to the OCLC. Instead, the court will travel to the litigants using a cadre of experienced judges who will be available to adjudicate complex disputes throughout the state while also presiding over matters in their home districts.

Let me now explain how courts can better align their diminishing resources with their essential functions.

C. *Reengineering the Courts' Essential Functions*

Regardless of how extensively case administration processes are restructured, most state court systems will still need to actively participate in a final area of court reengineering—i.e., redefining essential court functions and providing services accordingly. Redefining essential court functions may prove to be the most subjective facet of court reengineering, resulting in state court systems that each view their essential functions differently. Despite those differences, what court systems will nevertheless have in common after reengineering is greater control over their dockets through the redirection of matters to alternate forums.

Increasingly, court management experts describe redefining essential court functions as legal “triage”: the act of prioritizing and disposing of cases by identifying and using the most issue-appropriate resources.⁹⁰ Our limited time tonight does not permit me to discuss in detail how legal triage might be applied to better align court resources

⁸⁶ *Oregon Complex Litigation Court: History and Description*, OREGON JUDICIAL DEPARTMENT, http://courts.oregon.gov/OJD/docs/courts/circuit/OCLC_History_Description.pdf (last visited Jan. 28, 2012) [hereinafter *History*]. The Second Judicial Circuit consists of Lane County. OR. REV. STAT. § 3.012(b) (2009).

⁸⁷ See *History*, *supra* note 86. (“[The] program . . . was designed to allow Lane County Circuit Court to handle complex litigation cases from out of county that would have been burdensome to a court’s normal docket.”).

⁸⁸ *Id.*

⁸⁹ Or. Chief Justice Order No. 10-066 (Dec. 2, 2010) (on file with the *New York University Law Review*).

⁹⁰ See Victor E. Flango, *Which Disputes Belong in Court?*, in *FUTURE TRENDS IN STATE COURTS 2010*, at 11, 11 (Carol R. Flango et al. eds., 2010), available at <http://content.dm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=ctadmin&CISOPTR=1605> (suggesting state courts should “triage” court services by rationing scarce resources).

with essential court functions. Suffice it to say that state court systems have long benefited from a similar kind of sorting through the use of limited jurisdiction venues such as small claims court. More often than not, however, use of those forums is predicated on self-selection; litigants must *opt in* to whatever process is offered. Reengineering a court's essential functions would, among other things, shift responsibility for that sorting to the courts themselves rather than the parties.

The reengineering initiatives I have described so far can be summarized as follows:

Centralization: We can reduce costs and local trial court workload through the central processing of payables, collections, payment of traffic citations, and jury management.

Regionalization: We can more efficiently manage court processes regionally by modifying venues to expedite case processing or adjudication and developing specialized dockets to better utilize our judicial resources statewide.

Leveraging Technology: We must commit to providing the public with the ability to pay fees and fines online—including traffic citations—as well as providing online access to dockets and documents. We must use technology to promote the more efficient use of judicial resources statewide.

Redistricting and Venue: We can reconfigure or combine judicial districts administratively to maximize the management, staffing, and delivery of trial court services.

All those initiative areas are vitally important to any reengineering effort. There is, however, a final key component of court reengineering that may well be the key to its success or failure: leadership.

V

REENGINEERING: THE LEADERSHIP FACTOR

No single path defines the reengineering process. There are, no doubt, as many different ways to redefine the way an organization conducts its business as there are different organizations. However, if there is a single overarching consistency that marks all reengineering efforts, it is manifested in the fact that “[n]o one in an organization wants reengineering. It is confusing and disruptive and affects everything people have grown accustomed to. . . . Commitment, consistency—maybe even a touch of fanaticism—are needed to enlist those who would prefer the *status quo*.”⁹¹ Consequently, Hammer posits that the one factor essential to successful organization-wide reen-

⁹¹ Hammer, *supra* note 15, at 112 (emphasis added).

gineering is the presence of a dynamic leadership espousing a dynamic vision.⁹²

That is particularly true of the loosely coupled organizational form that is typical of most state court systems. If such systems are to achieve a greater degree of cohesiveness in executing their essential functions, it will be because there are court leaders willing to embrace a new brand of judicial activism, one bent on dramatically reinventing the decentralized operating structure by which state courts do business today. That activism, if it is to succeed, will be marked by several common attributes:

It will create and infuse a “common vision of a preferred future.”⁹³ For today’s state courts, that means a vision where increased centralization, standardization, regionalization, and digitization are the new operational imperatives.

It will “advance the capabilities of the [court system’s] component parts”⁹⁴ by providing high quality tools and support services as an upshot of reengineering. Innovations that add concrete value to the work and worth of individual courts and their staffs create confidence in both the reengineering processes and those that facilitate them.

It will promote a realistic “understanding of the threats and opportunities” that face courts in a down-bound economy.⁹⁵

And, above all, the new judicial activism will think big. It must, because state courts are at a critical crossroads. As Massachusetts Chief Justice Margaret Marshall explained in a 2009 address to the American Bar Association House of Delegates, ninety-five percent of all litigation in the United States takes place in state courts. Consequently, “[a]s justice in our state courts goes, so goes justice in our nation.”⁹⁶ Chief Justice Marshall also noted, “Our state courts are in crisis. A perfect storm of circumstances threatens much that we know, or think we know, about our American system of justice.”⁹⁷ Integral to that point was the observation that the budget reductions currently being forced on our nation’s state courts threaten the ability of those institutions to remain open and accessible.⁹⁸ Her remarks, however,

⁹² See *id.* (positing that “executive leadership with real vision” is crucial to reengineering success).

⁹³ Griller, *supra* note 59, at 50–51.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Margaret H. Marshall, Mass. Chief Justice, Remarks to the American Bar Association House of Delegates 2 (Feb. 16, 2009), available at http://www.ncsconline.org/D_Comm/ThisWeek/Marshall_remarks_021609.pdf.

⁹⁷ *Id.* at 3.

⁹⁸ See *id.* at 3–4 (questioning whether state courts can continue providing adequate services given budget cuts).

could have applied with equal vigor to the increase in intra-governmental jockeying that has arisen as state government entities face off for control of the judiciary's purse strings. In New Hampshire, for example, a group of lawyers led by a former New Hampshire Supreme Court Justice recently filed suit against the state and its treasurer, seeking restoration of \$4 million to the New Hampshire judiciary and a permanent injunction requiring adequate funding for the state's civil court docket.⁹⁹ The September 2010 action was brought on behalf of four different civil plaintiffs who all allegedly were damaged by trial delays brought on by budget-mandated court closures, furloughs, and reductions in judicial hours.¹⁰⁰

Thus, if reengineering is left for another generation of court leaders, state court systems may, in the interim, potentially face two kinds of competing chaos. The first will come about through the steady diminishment of timely citizen access to justice as state courts acquiesce to repeated cuts to judicial resources. The second will manifest itself if state judiciaries are forced to actively battle the other branches of state government for those resources, leaving a flurry of state constitutional crises in their wake. The effort to reengineer our state courts, while undoubtedly arduous, represents a middle way that is a constructive alternative to both scenarios.

A future with reengineered, renewed courts will come about only if there are leaders who are willing to pair large-scale ambitions with large-scale actions. To be sure, maintaining the status quo for America's courts in the present economy will not end the judiciary's role in state government. State courts will continue to exist, even as the SQ-7 computer continues to exist; parts of it recently appeared in 2006 as props on the hit television program *Lost*.¹⁰¹ Our courts will simply be less independent, less relevant, and more beholden to the other branches of state governments at the end of the day. As court leaders we can either resign ourselves to that process—and watch as America's state courts are beggared—or we can begin reengineering now.

Again, thank you for the opportunity to speak publicly about a subject that I believe is so important.

⁹⁹ Sheri Qualters, *New Hampshire Lawyers Sue State Over Court Budget Cuts and Delays*, NAT'L L.J. (ONLINE) (Sept. 28, 2010) (on file with the *New York University Law Review*).

¹⁰⁰ *Id.*

¹⁰¹ Loewen, *supra* note 6.