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# Federal and State Judicial Selection in an Interest Group Perspective

Michael E. Solimine\*  
Rafael Gely\*\*

## I. INTRODUCTION

The literature on judicial selection systems has given considerable attention to the role that politicians and their parties – through their legislative roles – have played in the adoption and operation of these judicial selection systems. Less attention, however, has been given to both the effect that interest groups, broadly defined, have in the creation and implementation of judicial selection systems and the effect that these systems have on the strategies adopted by interest groups to accomplish their goals. This Article seeks to fill this gap. Using the framework advanced by William M. Landes and Richard A. Posner in their seminal article on judicial independence,<sup>1</sup> we explore the relationships between interest groups and the functioning of judicial selection systems at both the federal and state levels.

Like that of Landes and Posner, our analysis is primarily positive. That is, we explore, from a theoretical and empirical perspective, the role of interest groups in creating judicial selection systems and influencing those systems once created. Like them, our focal point is the seeming puzzle of why legislative bodies (and their supporters among interest groups) would establish an independent and possibly competing branch of government. Unlike them, we extend the analysis to consider how interest groups affect judicial selection systems once they are created. We have relatively little to say about normative issues, that is, what the implications of this interest-group behavior are on sound judicial selection. There is a large amount of literature on that point. Though our analysis may inform that discussion, we will leave that task to others.

This Article proceeds as follows. In Part II, we summarize the model advanced by Landes and Posner. In Part III, we explore some of the criticisms that have been levied against their model, while in Part IV we raise

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1. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975).

some criticisms of our own and explore how later scholarship has addressed them. Part V concludes the article.

## II. LANDES AND POSNER: A BRIEF SUMMARY

In their 1975 article, Landes and Posner propose a model for understanding judicial behavior in the context of interest-group politics.<sup>2</sup> Their model begins by observing that, from an interest-group perspective, legislation is the result of a bidding process among groups or coalitions.<sup>3</sup> That is, legislatures sell and interest groups buy legislation. Payment could take a variety of forms: campaign contributions, electorate support, promises, and sometimes even illegal behavior such as bribes.<sup>4</sup> The price that interest groups are willing to pay for a favorable piece of legislation depends on the value of the protection they seek to receive, as well as the ability of the particular interest group to reduce free-riding problems.<sup>5</sup>

The value of legislation depends not only on the level of protection received but also on the expected durability of the legislative enactment. Because supporting the enactment of new legislation is expensive (for both the interest groups and the legislators themselves), the deal between legislators and interest groups will only be worth the effort if some assurances exist that the legislative deal will not be undone by future legislatures.<sup>6</sup> In this context, note Landes and Posner, the legislative deal needs to include not only the substantive protections sought by the interest group but also structures that limit the ability of future legislatures to change the law. It is in the interest of the enacting legislature to create such limits because they increase the value of legislation. Thus, legislators are in a position to extract higher payments from the various interest groups.<sup>7</sup>

Therefore, the task for legislatures is to determine the type of structures and processes that can be used to constrain future legislatures. Landes and Posner identify various possible avenues. Legislatures, they point out, could adopt procedural rules making the enactment of legislation more “difficult

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2. *Id.* at 876-77.

3. *Id.* at 877.

4. *Id.* The interest-group theory of legislation has a long and rich history. See, e.g., George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); George J. Stigler, *Economic Competition and Political Competition*, 13 PUB. CHOICE 91 (1972); William Mark Crain & Robert D. Tollison, *Campaign Expenditures and Political Competition*, 19 J.L. & ECON. 177 (1976); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Robert E. McCormick & Robert D. Tollison, *Rent-Seeking Competition in Political Parties*, 34 PUB. CHOICE 5 (1979). See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 560-81 (7th ed. 2007).

5. Landes & Posner, *supra* note 1, at 877.

6. *Id.*

7. *Id.* at 877-78.

and time-consuming.”<sup>8</sup> Traditional and ubiquitous legislative constructs, such as “bicameralism [and] the committee system,” are consistent with this perspective.<sup>9</sup>

In addition to rules internal to the legislative process, legislatures can seek to create a judicial structure to reinforce the ability of the enacting legislature to limit future legislatures’ ability to enact new laws and, in that way, ensure that these future legislatures do not undo prior legislation. A “subservient” judiciary, one where the “judges are perfect agents” of the current legislature, could nullify prior legislation by using its authority to interpret legislation in a way that is more consistent with the interest of the current, as opposed to the enacting, legislature.<sup>10</sup> On the other hand, a “non-subservient,” independent judiciary might be more likely to interpret statutes with the goal of validating the intent of the enacting legislature. In that sense, Landes and Posner argue, an independent judiciary enables the legislative deal between legislators and interest groups, allows the legislature to extract a higher rent from those groups, and, consequently, “facilitates rather than . . . limits the practice of interest-group politics.”<sup>11</sup>

Having identified the reasons why the legislature would prefer to deal with an independent judiciary that interprets legislation according to the intent of the enacting legislature, Landes and Posner note that it is in the interest of the judiciary to follow that interpretative approach. A highly valued judiciary (at least in terms of public perception) makes it harder for the other two branches to sanction the judiciary, as any attempt to punish the judiciary might be seen as a politically vindictive act. Because the value of the judiciary, to a large extent, depends on the predictability of its decisions, courts have an incentive to interpret legislation according to the intent of the enacting body, as opposed to the likely much more uncertain political preferences of subsequent legislatures.<sup>12</sup> Thus, Landes and Posner conclude that “the ability of courts to maintain their independence from the political branches may depend at least in part on their willingness to enforce the ‘contracts’ of earlier legislatures according to the original understanding of the ‘contract.’”<sup>13</sup>

Landes and Posner observe that granting life tenure to judges is an effective mechanism to achieve judicial independence. Clearly, by granting the judges life tenure, the legislature diminishes the ability of future legislatures to threaten judges for decisions with which the legislature might disagree. However, life tenure also reduces the impact that interest groups might have

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8. *Id.* at 878.

9. *Id.*

10. *Id.* at 879.

11. *Id.* Landes and Posner also note that there are costs associated with an independent judiciary. To the extent that a truly independent judiciary is not beholden to any legislature, it could refuse to enforce every legislative deal. *Id.*

12. *Id.* at 885.

13. *Id.*

on the judiciary. Life tenure raises the costs and reduces the benefits of any type of deals that interest groups might seek to make with judges to incentivize them to decide in their favor. A judge will be less likely to acquiesce to interest groups' pressures of this kind (i.e., bribery) where the risk of losing her job is low.<sup>14</sup>

Finally, Landes and Posner identify a variety of positive implications of their model. Of particular interest to this Article are the implications of their model for *state* judicial selection systems. Landes and Posner note that the ability of a legislature to enact protective legislation corresponds to that legislature's jurisdiction. Because it is easier for those affected by a particular state law to move to a different state to avoid that law than for an individual or business to move to a different country to avoid a law enacted at the federal level, the ability of a state to enact laws favorable to a specific interest group is less than the ability of Congress to do so. Therefore, the narrower the jurisdiction of a legislature, the less likely that legislature will be to enact long-term legislative deals. Accordingly, interest groups will not be willing to pay as much for protective legislation at the state level as what they are willing to pay for protective legislation at the federal level. Thus, as compared to the U.S. Congress, state legislatures are less likely to adopt judicial selection and retention systems that maximize independence. This is an observation which, Landes and Posner note, conforms to reality.<sup>15</sup>

### III. COMMENTARY ON THE LANDES AND POSNER MODEL

As with other work of these two prolific scholars, Landes and Posner's independent judiciary paper has produced a significant amount of both positive and negative commentary.<sup>16</sup> Nobel Prize winner James M. Buchanan praised Landes and Posner's effort to develop a public choice model of the judicial branch. In particular, Buchanan praised Landes and Posner's "criticism of the romantic view that the members of the judiciary are the unique guardians of some mystical 'public interest,' something that is wholly ignored by the other branches of government."<sup>17</sup>

Over the ensuing years, numerous scholars have explored the various components of the Landes and Posner model. For example, Mark Crain and Robert Tollison explore other mechanisms that legislatures can use to in-

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14. *Id.* at 886.

15. *Id.* at 891.

16. An online search on HeinOnline, an electronic dataset, indicates that the Landes and Posner article has been cited 262 times. See HeinOnline, <http://heinonline.org/>.

17. James M. Buchanan, *Comment*, 18 J.L. & ECON. 903, 903 (1975). See also Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 345 (1988) (noting that Landes and Posner offer "an interesting and empirically rich theory of the demand for legislation.").

crease the value of the protection they sell to interest groups.<sup>18</sup> While Landes and Posner focus on judicial independence as a mechanism that helps legislators increase the value of legislation, they also point out that other mechanisms might achieve the same objective. In particular, Landes and Posner point out that a legislature could accomplish the same objective by providing protection to interest groups via constitutional right instead of through legislation.<sup>19</sup> Using data on constitutional amendments across states, Crain and Tollison find support for Landes and Posner's model. Regarding the issue of judicial independence, Crain and Tollison find that shorter judicial tenure, which they assume to be associated with less judicial independence, leads to higher reliance by legislatures on constitutional amendments "for generating durable legislative contracts."<sup>20</sup>

Other commentators, however, have criticized various aspects of the Landes and Posner model, such as the model's failure to provide a theory of judicial independence. For example, Donald Boudreaux and A.C. Pritchard challenge Landes and Posner's basic conclusion that an independent judiciary increases the value of the legislative deal, allowing the legislature to extract larger rents from interest groups.<sup>21</sup> Primarily, Boudreaux and Pritchard argue that legislatures do not possess any viable means to control the judiciary.<sup>22</sup> In particular, Boudreaux and Pritchard argue that judges do not have any clear incentives to enforce the legislative bargain.<sup>23</sup> They note that judges, particularly at the federal level, do not appear to be particularly motivated by money.<sup>24</sup> They also note that, even if judges were motivated by money at the margin, the judiciary as a whole would face an insurmountable collective-action problem.<sup>25</sup> That is, judges will always have an incentive to undo the legislative deal of the enacting legislature, given that a judge who decides not to follow the intent of the enacting legislature does not bear the entire cost associated with that decision.<sup>26</sup> Since federal salaries are set for judges as a group, the costs to one judge of not enforcing the legislative deal are borne by all judges.<sup>27</sup> According to Boudreaux and Pritchard, a judge who faithfully

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18. W. Mark Crain & Robert D. Tollison, *Constitutional Change in an Interest-Group Perspective*, 8 J. LEGAL STUD. 165 (1979).

19. Landes & Posner, *supra* note 1, at 892.

20. Crain & Tollison, *supra* note 18, at 173.

21. Donald J. Boudreaux & A. C. Pritchard, *Reassessing the Role of the Independent Judiciary in Enforcing Interest-Group Bargains*, 5 CONST. POL. ECON. 1 (1994).

22. *Id.* at 8.

23. *Id.* at 10.

24. *Id.* at 11-12.

25. *Id.* at 12-14.

26. *Id.* at 12.

27. *Id.*

enforces interest-group deals “may pay immediate costs in diminished reputation and forgoe[] the significant benefits of free-riding.”<sup>28</sup>

#### IV. THE LANDES AND POSNER MODEL REVISITED

Boudreaux and Pritchard’s criticism boils down to the fact that Landes and Posner fail to provide a theory of judicial independence: Without knowing why independent judges are likely to agree with the legislatures’ preferences, Landes and Posner’s model is at best a description of current practice that fails to have any predictive value.<sup>29</sup> Unlike Boudreaux and Pritchard’s criticism, we do not seek to comment on the failure of Landes and Posner to provide a theory of judicial behavior. Instead, we focus on what they have to say (or do not say) about the role that interest groups play in their model. In particular, we focus on three issues which are raised, but not fully addressed, by Landes and Posner: the definition of an interest group; the role that interest groups play in the designing of judicial selection systems; and the role that interest groups might play once the selection system is in place.

##### *A. What Is an Interest Group?*

Landes and Posner frequently refer to interest groups but never fully provide a definition of the term. They generally refer to interest groups only in an indirect manner when discussing the preferences of legislators. In some of the examples they use, Landes and Posner appear to have in mind industry interest groups in search of protective legislation.<sup>30</sup> Thus, it appears that they are conceiving of interest groups in a narrowly defined sense. In reality, there are a variety of groups with interests in the judicial and legislative process that might act in the same way that industry interest groups act.<sup>31</sup> In this sec-

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28. *Id.* at 13. For similar analysis, see also Matthew C. Stephenson, “*When the Devil Turns...*”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 62 (2003).

29. A substantial amount of work has subsequently developed on the topic of explaining judicial behavior. In his recent review of the now enormous literature, Posner lists no less than nine theories: attitudinal, strategic, sociological, psychological, economic, organizational, pragmatic, phenomenological, and legalist. RICHARD A. POSNER, *HOW JUDGES THINK* 19 (2008). Some of this analysis would answer the critique of Boudreaux and Pritchard that the Landes & Posner model lacks a theory of judicial behavior. *See, e.g., id.* at 57-77 (exploring motives of judges); *see also id.* at 191-203 (exploring how strict or loose construction of statutes can enforce or undermine the intent of the framers of statutes). Posner briefly discusses his article with Landes at a couple of points. *Id.* at 58-59, 201. *See also* POSNER, *supra* note 4, at 567-69 (summarizing the article with Landes and some of its scholarly progeny).

30. *See* Landes & Posner, *supra* note 1, at 879 (discussing the enactment of tax on margarine at the behest of the dairy industry).

31. Michael R. Dimino, Sr., *We Have Met the Special Interests, and We Are They*, 74 MO. L. REV. 495, 496 (2009).

tion, we briefly identify other relevant interest groups and explore their possible incentives in relation to the designing of a judicial selection system.<sup>32</sup>

## 1. The Bar

Lawyers have many different interests related to the designing of a judicial selection system, and these interests might not all be consistent with those of legislators. For example, there are reputational considerations. To the extent that lawyers' reputations are related to the reputation of the judiciary, the bar has a stake in designing a system that increases the reputation of judges. To the extent that the reputation of judges is dependent on being perceived as above politics and independent from the politics of the time, it is in the interest of the bar to support a judicial selection system that maximizes judicial independence. In fact, reputational concerns are believed to have been one of the factors that led some of the first bar associations to support a shift from direct popular elections of judges to the use of non-partisan elections.<sup>33</sup>

In addition to reputational concerns, the bar might also have an interest in playing a larger role in judicial selection since it places the bar in a position where it can exercise its political capital. Having a say in the nomination or appointment process puts the bar in a similar position as that of legislatures and consequently creates the opportunity for trading in policy outcomes. Similarly, by having a say in the process of selecting judges, the bar has the opportunity, though perhaps slight, to influence the type of judges who are nominated and appointed. This suggests that, to the extent the bar can influence the individuals who actually get appointed, the bar might not care as much whether the judges show independence once they are appointed.

A major assumption of Landes and Posner's model is that legislators benefit from having judges who interpret statutes based on the intent of the enacting legislature since such certainty increases the value of the legislative deal.<sup>34</sup> Since legislators are motivated by the direct benefits they receive from increasing the value of legislation, and thus are motivated to act, one wonders, how does an interest group like the bar benefit from increasing the value of the enacted legislation, and what is its motivation to act? To the

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32. In what follows we also draw from the extensive political science literature on interest groups. See, e.g., KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* (1986); Frank R. Baumgartner & Beth L. Leech, *Interest Niches and Policy Bandwagons: Patterns of Interest Group Involvement in National Politics*, 63 J. POL. 1191 (2001).

33. See F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431 (2004). For an account of Missouri's shifts from appointment, to election, to the Missouri Plan, see Laura Denvir Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711, 720-25 (2009).

34. See *supra* notes 10-14 and accompanying text.



extent that the bar is interested in the substantive protection of the legislation, its interests are similar to those of other interest groups and thus consistent with the arguments made by Landes and Posner. However, there might be some opposing incentives. The bar represents a diverse set of interests. On any given issue, there are those who support some regulation and those who oppose it. For example, legislation imposing a tariff or tax on a given product makes it more expensive to produce that product and thus will be supported by producers of alternative products and opposed by the producers of the product on which the tax is being imposed.<sup>35</sup> Both interests are represented by lawyers and, thus, by the bar. To the extent that judicial independence leads to the support of the tax by lawyers (as judges interpret legislation according to the will of the enacting legislature), the interests of some of the members of the bar (those against the tax) are not satisfied. Under these circumstances, judges not blindly following the intent of the enacting legislature might serve the interests of the bar. Perhaps, as a group, lawyers might prefer a not-so-independent judiciary and might seek to establish a selection system that takes this into account.

Similarly, unlike the tax legislation that Landes and Posner use as an example, there is other legislation that does not produce a clear set of winners and a clear set of losers. Lawyers might benefit from such uncertainty in several ways. Lawyers whose clients might be considered the losers of the legislative deal may welcome the uncertainty. It could result in the opportunity to win back, through litigation, what they feel they lost through legislation. The interests of this group of clients might be well served by a judiciary which is more "accountable" and less independent of the desires of the enacting legislature.<sup>36</sup>

## 2. Non-Industry-Specific Interest Groups

Landes and Posner focus primarily on industry-based interest groups. These groups, as described above, represent the specific interests of a particular industry and seek the enactment of laws which protect those interests. Because the value of legislation is dependent on its duration, and since its duration in turn depends on the judges enforcing the legislative deal, those groups will likely be in favor of selection mechanisms that maximize judicial independence. Are non-industry-specific interest groups likely to behave the same way?

As discussed above, we suggest that at least one type of interest group, the professional bar, might have interests that are inconsistent with an independent judiciary, at least in the way that it is defined by Landes and Posner.

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35. Landes and Posner use the example of a federal tax on the production of margarine. See Landes and Posner, *supra* note 1, at 879. They argue that such regulation will be sought by dairy producers and opposed by margarine producers. *Id.*

36. Dimino, *supra* note 31, at 497-98; 500-01.

Is the same true of other interests groups? As one would expect, there is a wide variety of groups that advocate in favor of many different types of issues.<sup>37</sup> In addition to industry-specific interest groups, there are groups that advocate in favor of specific social issues (e.g., Sierra Club, NRA), groups that advocate for the adoption of prudent government practices (e.g., National Governor's Association, Citizens Against Government Waste), and groups that advocate for broad policy goals on domestic or international issues (e.g., Council of Foreign Relations).<sup>38</sup> Not only do interest groups focus on a wide variety of issues, but they also use a wide range of approaches to achieve their objectives, such as litigating, providing advice in the drafting of regulations, or participating in election activities.<sup>39</sup> The types of policy that interest groups seek to support or alter are also very different. In some cases, one would expect that the policy issue of interest to the particular interest group is very well settled and long established. In other areas, the public policy at stake might have been subject to numerous changes and thus be fairly volatile. For example, in their analysis of lobbying activities, Baumgartner and Leech show that only a few issues generate a large number of lobbying efforts, while the vast majority of legislative activity generates a very small amount of lobbying.<sup>40</sup>

Given the variety of issues pursued by interest groups, approaches used, and different types of policy changes they seek to implement, it is likely that not all interest groups will have the same preferences regarding degrees of judicial independence.<sup>41</sup> Consider, for example, an interest group which primarily targets state legislatures (e.g., teachers' unions, school reform groups). Suppose that this group has a fairly large and strong voter base (teachers or parents) and thus feels confident in its ability to affect the outcome of local elections. This group might be leery of too much judicial independence since it might prefer the fluidity of the legislative process, particularly when dealing with issues for which a clear policy has not yet developed. In fact, it

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37. Several scholars have discussed the explosion in interest groups since the early 1970s. See, e.g., JEFFREY M. BERRY, *THE INTEREST GROUP SOCIETY* (3d ed. 1997).

38. See Baumgartner & Leech, *supra* note 32, at 1194-96 (describing the activities of different types of interest groups, such as trade associations, nonprofit organizations, citizen groups, professional associations, and unions.).

39. See KENNETH M. GOLDSTEIN, *INTEREST GROUPS, LOBBYING, AND PARTICIPATION IN AMERICA* (1999).

40. See Baumgartner & Leech, *supra* note 32, at 1200.

41. Agency problems between the interest groups and the lobbyists who represent their interests make it even less likely that all interest groups share the same sort of support for the notion of judicial independence. See Matthew Stephenson & Howell E. Jackson, *Lobbyists as Imperfect Agents: Implications for Public Policy in a Pluralist Society*, (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 09-12, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1331503](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1331503).

might resist too much judicial independence because it eliminates one of the tools available to the interest group to affect public policy.

*B. What Role Do Interest Groups Play  
in Selecting a Selection System?*

In the Landes and Posner model, interest groups appear to play no direct role in the process of designing judicial selections systems. That is, Landes and Posner take the existing structures for selecting judges at the federal level as a given and only discuss the economic rationale for such structure. This oversight, perhaps, was due to the fact that Landes and Posner's focus was on the U.S. Congress and consequently on the *federal* judiciary.<sup>42</sup> For example, they focused on aspects of the federal judiciary – appointment and life tenure – which have remained unchanged since the beginnings of the republic and are consistent with the argument that judicial independence facilitates legislative deal making.<sup>43</sup> Although they recognize the existence of other judicial selection and retention mechanisms and note that the scope of the jurisdiction of the elective body is inversely related to the need for judicial independence, Landes and Posner largely leave unexplored the details of judicial selection and retention mechanisms.

Recent scholarship has begun to explore the role that interest groups have played in the adoption of judicial selection and retention mechanisms.<sup>44</sup> For example, in his account of the development of selection systems across the various states, F. Andrew Hanssen describes the emergence of five different types of selection procedures: legislative appointment, governmental appointment, partisan election, non-partisan election, and the appointment/election hybrid, also known as the merit or Missouri plan.<sup>45</sup> Hanssen argues that the development of the five mechanisms can be explained as an attempt by the polity to resolve agency problems between citizens and legislatures and between citizens and judges.<sup>46</sup> For example, Hanssen attributes the initial choice of legislative appointment of judges to the perception that legislatures were more responsive to the will of the people than the existing judicial establishment. Placing the right to select judges in the hands of the legislatures was seen as a way of minimizing the influence of those judges whose interests were perceived to be aligned with Britain.<sup>47</sup> Legislative ap-

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42. Landes & Posner, *supra* note 1, at 878-79.

43. *Id.* at 876.

44. See, e.g., F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus the Appointment of State Judges*, 28 J. LEGAL STUD. 205 (1999) (noting that the debate regarding the election versus the appointment of state judges had focused primarily on the trade-off between accountability and independence).

45. See Hanssen, *supra* note 33, at 431-32.

46. *Id.* at 432.

47. *Id.* at 440.

pointment of judges was thus seen as a way of controlling agency problems between the citizens and the judiciary.

By the mid 1850s, notes Hanssen, the perception of state legislatures changed as problems of corruption and incompetency arose. Judges were seen as a necessary mechanism to restrain run-away legislatures. A new way of guaranteeing an independent judiciary was needed, and the use of direct popular elections was seen as the mechanism to achieve that goal. By providing judges with an electoral power base of their own, judges would have the political capital and credibility to restrain legislatures.<sup>48</sup> Direct popular elections, however, proved to fall far short of achieving the objective of developing an independent judiciary. Political parties quickly gained control over the election process and thus severely compromised the independence of the judiciary.<sup>49</sup> During the Progressive Era, reformers sought to fine-tune the selection process by shifting to the use of the non-partisan election.<sup>50</sup>

Over the next several decades, continued tinkering with selection mechanisms eventually resulted in the adoption of the merit selection system in some states. The merit selection system involves a variety of players in the process of selecting judges in order to prevent any one group from co-opting the judiciary. For example, merit plans usually involve a non-partisan nominating commission, which provides the governor with a list of acceptable candidates. Also, selected judges serve for an initial term and are then subject to a non-competitive retention election.<sup>51</sup>

Hanssen's account is instructive, since, by providing a description of the various mechanisms used to achieve the goal of an independent judiciary, he provides important insights into how various actors (including interest groups) seek to influence the choices that states make regarding their judicial selection systems.<sup>52</sup> Lee Epstein and her colleagues pick up on this theme and provide an illuminating analysis of the conditions associated with the legislative choices regarding judicial selection and retention mechanisms.<sup>53</sup> Epstein and her colleagues observe that prior research did not, oddly enough, discuss any of the politics that led to the adoption of a specific selection sys-

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48. *Id.* at 447 & n.22.

49. *Id.* at 448.

50. *Id.* at 450-51.

51. *Id.* at 452.

52. For a discussion of the role that interest groups played in California's adoption of the merit selection system, see Ronald Schneider & Ralph Maughan, *Does the Appointment of Judges Lead to a More Conservative Bench? The Case of California*, 5 JUST. SYS. J. 45 (1979-1980). Schneider and Maughan argue that the various interest groups involved in the process of adopting the merit system "had specific policy concerns beyond the 'good government' goal of non-partisan judicial selection." *Id.* at 47.

53. Lee Epstein et al., *Selecting Selection Systems*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 191 (Stephen B. Burbank & Barry Friedman eds., 2002).

tem.<sup>54</sup> Accordingly, they focus on the relationship between judicial independence and political uncertainty. In particular, it is hypothesized that judicial independence will be a goal in situations associated with high uncertainty, both in terms of the personal political future of the government officials involved in adopting a judicial selection system and in terms of the uncertainty among the public regarding the likely dominant public policy alternative.<sup>55</sup> Thus, those with a say in designing a judicial selection system will be more likely to select a system that maximizes judicial independence when their own political careers face an uncertain future. The rationale here, similar to Landes and Posner's model, is that an independent judiciary in that kind of uncertain environment will serve to uphold the will of the enacting legislature, at least to the extent that the judiciary will be less susceptible to the wishes of future legislatures.<sup>56</sup> Similarly, where the political future of the relevant jurisdiction (whether a state or country) is uncertain, and there is an increased likelihood that political outcomes will be different in the near future, judicial independence helps to protect judges from changing political winds. In that sense, judicial independence makes it more likely that judges will honor the initial legislative deal.<sup>57</sup>

More explicitly than Hanssen, Epstein and her colleagues address the role that political interests play in selecting selection mechanisms. By considering the role that a politician's future electoral prospects might play in the designing of a judicial selection mechanism, Epstein and her colleagues expand on Landes and Posner's insight that selection mechanisms serve as a tool for the enacting legislature to increase the value of the legislative deal.

### *C. What Do Interest Groups Do Once the System Is in Place?*

In their article, Landes and Posner focus on the ex ante incentives of legislators and interest groups to create an independent judiciary. They have relatively little to say about the role of interest groups or others in the ex post operation of the selection system for the judiciary. Under their analysis, the selection system, once created, is more-or-less static, and the creators of the system will leave it alone to operate in a (presumably) independent way.<sup>58</sup> There is also relatively little concern with the operation of the selection system, once created.

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54. *Id.* at 201-02.

55. *Id.* at 214-16.

56. *Id.*

57. *Id.*

58. The same observations can be made about much of the subsequent literature discussing ex ante incentives to create independent judiciaries. See, e.g., Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853, 860 (2008) (observing, with little elaboration, that judges will be selected through appointment or election).

This is not to say that they ignore the issue. They observe, after addressing the incentives to create an insulated judiciary in the first instance, that it is “unrealistic to suppose the judiciary [is] wholly independent of the current desires of the political branches.”<sup>59</sup> But they suggest that brute force by legislators, such as reduction of judicial budgets, limiting jurisdiction, or packing the judiciary with more amenable members, has “been resorted to infrequently.”<sup>60</sup> Among the reasons for the reticence is that such changes would affect whatever legislation the current legislature (not to mention its supporting interest groups) desires. Furthermore, they do not ignore the ex post behavior of interest groups, but here too they suggest that institutional constraints and norms limit the scope and effectiveness of that behavior. Thus, they argue, outright bribery or ex parte contacts by interest groups is unlikely.<sup>61</sup> In the

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59. Landes & Posner, *supra* note 1, at 885.

60. *Id.* Since the article, other scholars have addressed the issue of legislative reaction to Supreme Court decisions. On judicial budgets, see, for example, Eugenia Froedge Toma, *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*, 20 J. LEGAL STUD 131 (1991). On statutory limits to jurisdiction, see, for example, Lauren C. Bell & Kevin M. Scott, *Policy Statements or Symbolic Politics? Explaining Congressional Court-Limiting Attempts*, 89 JUDICATURE 196 (2006); Dawn Chutkow, *Jurisdiction Stripping: Litigation, Ideology, and Congressional Control of the Courts*, 70 J. POL. 1053 (2008). On increasing the number of lower-federal-court judges, see, for example, John M. De Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J.L. & ECON. 435 (1996); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1887-1891*, 96 AM. POL. SCI. REV. 511 (2002). Most of the literature deals with reaction by Congress to federal courts, not reaction by state legislatures to state courts. A casual examination of the literature would generally seem to support Landes and Posner’s conclusion of infrequent use, but a full examination of the issue is beyond the scope of this article. For a discussion of various provisions in state constitutions that place limits on the power of state legislatures to affect state court independence, see Michael L. Buenger, *Friction by Design: The Necessary Contest of State Judicial Power and Legislative Policymaking*, 43 U. RICH. L. REV. 571, 601-19 (2009).

61. Landes & Posner, *supra* note 1, at 886. They also observe that judges may deny interest groups legal standing to bring litigation “as distinct from the individuals or firms immediately affected.” *Id.* Subsequent doctrinal developments seem to permit organizations to have standing in an easier manner than contemplated by the article. See, e.g., *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977) (establishing three-part test to determine when organizations have standing in federal court). See generally ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 106-08 (5th ed. 2007). Posner acknowledges this change in later writing. POSNER, *supra* note 4, at 561.

end, they concede that such actions implicate theories of judicial behavior, which are beyond the scope of the article.<sup>62</sup>

To be sure, implicit in the article is the notion that legislatures can subsequently change the method of selection, though the constitutional entrenchment of such provisions makes change difficult. The embedded problem is especially clear at the federal level.<sup>63</sup> It is less true at the state level, where there have been waves of change in judicial selection in the nineteenth and twentieth centuries.<sup>64</sup> As discussed above, the former was primarily a switch from legislative appointment to elections, and the latter was, for some states, a further switch to merit-based appointments with retention elections (i.e., the Missouri plan or some variation thereof). The precise reasons for both waves remain a topic of ongoing scholarly discussion.<sup>65</sup> As we have already suggested, it has been persuasively argued that the adoption of merit-based systems in the past century is largely due to the efforts of state bar associations.<sup>66</sup>

Despite this attention to possible or actual changes in judicial selection systems, Landes and Posner and their scholarly progeny have generally paid relatively little heed to the subsequent operation of such systems in general and the role of interest groups in that process in particular. This section of the Article seeks to fill some of that gap. Examining both federal and state judicial selection reveals a richer and more varied picture of the role of interest groups. In broad scope, that role has been more frequent and effective, we think, than argued by Landes and Posner. Indeed, at least in recent decades, interest groups have played an active role in both the federal and state systems, regardless of the formal method of judicial selection.

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62. Landes & Posner, *supra* note 1, at 887. Posner has devoted considerable attention to this issue in subsequent writings, the latest of which is his book, *How Judges Think*. POSNER, *supra* note 29.

63. Boudreaux & Pritchard, *supra* note 21, at 8, 15.

64. See generally Stith & Root, *supra* note 33, at 720-25.

65. See, e.g., G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 121-22 (1998); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

66. See *supra* notes 32-35 and accompanying text. See also F. Andrew Hanssen, *On the Politics of Judicial Selection: Lawyers and State Campaigns for the Merit Plan*, 110 PUB. CHOICE 79 (2002). This is not to deny that other factors, such as the degree of interparty competition or the difficulty of amending the constitution in a particular state, are at play. See, e.g., Hanssen, *supra* note 33. By the same token, other interest groups may oppose the change of an existing selection system. See, e.g., Michael E. Solimine & Richard B. Saphire, *The Selection of Judges in Ohio*, in 1 THE HISTORY OF OHIO LAW 211, 222-24 (Michael Les Benedict & John F. Winkler eds., 2004) (organized labor successfully opposed change from elective to a Missouri-plan system in Ohio in 1987).

## 1. Federal Judicial Selection

Under the U.S. Constitution, the president nominates persons to be federal judges, subject to confirmation by the Senate.<sup>67</sup> The conventional wisdom is that, until the past several decades, this process was relatively sedate and noncontroversial, with little interest-group involvement.<sup>68</sup> There were a handful of exceptions, such as the successful efforts of the NAACP and labor groups to oppose President Hoover's nomination of U.S. Court of Appeals Judge John Parker to the Supreme Court, due to his perceived hostility to their interests.<sup>69</sup> Starting in the late 1940s, the American Bar Association also began rating judicial nominees and providing testimony in their nomination hearings.<sup>70</sup>

By all accounts, the tranquility came to an end at some point in the 1970s or 1980s and shows no sign of returning. The most obvious examples have been nominations to the Supreme Court of the United States. By that time, greater numbers of interest groups were testifying in confirmation hearings in the Senate, or expending time and money to convince Senators to vote for or against particular nominees.<sup>71</sup> As has been well chronicled, those efforts reached a high point during the controversial nominations of Robert

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67. We focus on the appointment of Article III judges with lifetime tenure. There are also large numbers of non-Article III federal adjudicators, appointed in various ways and serving in a variety of federal court or agency settings. See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 43-48 (5th ed. 2003). An exploration of the role of interest groups or others in establishing such adjudication or affecting the selection of their judges is beyond the scope of this article.

68. This is not to say that the nomination process was not political in any sense of that word. It is well established that, starting in the early decades of the last century at the very least, the political party of the appointing president played an influential role in the nomination and confirmation process. By influencing appointments, Republicans and Democrats may wish to pursue a particular policy agenda or simply fulfill political patronage. This is evidenced by the fact that, with few exceptions, presidents almost always nominated lawyers affiliated in some way with their own party. See SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN (1997). While political parties as such can easily be conceptualized as interest groups, our primary focus in this article is on other interest groups.

69. LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 94-95 (2005); Laura Cohen Bell, *In Their Own Interest: Pressure Groups in the Federal Judicial Selection Process*, in EXPLORING JUDICIAL POLITICS 31, 35 (Mark C. Miller ed., 2009).

70. Bell, *supra* note 69, at 36. Due to the perceived liberal bias of ABA evaluators, by the 1990s the Senate Judiciary Committee, when controlled by the Republicans, excluded the ABA from any formal role in the nomination or confirmation process. *Id.* at 41.

71. EPSTEIN & SEGAL, *supra* note 69, at 95-96. Interest groups also, in various ways, lobby the president directly before any nomination is made.



Bork and Clarence Thomas to the Supreme Court in 1986 and 1991, respectively.<sup>72</sup> Nor have those nominations proven to be unusual in that regard, as illustrated by the considerable interest-group activity supporting or opposing the nominations of John Roberts and Samuel Alito in 2005 and 2006.<sup>73</sup>

This sustained increase in interest-group activity has been traced to several factors.<sup>74</sup> One is simply a larger number of interest groups engaging in lobbying all branches of the federal government in various ways. Another factor is the perception, if not the reality, of the increased importance of the Supreme Court as a national policy-maker since the 1960s. The Warren, Burger, and Rehnquist Courts undertook to decide cases involving desegregation, school bussing, rights of criminal suspects, capital punishment, school prayer, abortion, affirmative action, pornography, and other controversial issues.<sup>75</sup>

A final factor has been the procedures of the Senate itself. Until the 1960s, the confirmation procedure in that body was relatively apolitical and informal. That too changed, with the process becoming more regularized and open to interest-group involvement, through hearings and in other ways.

We do not claim that interest-group activity was the only, or even the primary, factor in the increased salience of the confirmation process for Supreme Court Justices. Other factors are of course at play, starting with the desires of the president and the Senate to influence the ideological makeup of the Court. Though prior administrations paid attention to the membership of the Court with regard to executive policy goals (consider as just one example FDR's Court-packing plan), by some accounts, the Reagan administration was the first to give systematic and sustained attention to this goal.<sup>76</sup> Likewise, whether the executive branch and the Senate were controlled by the same political party, the threat of filibusters and other factors have influenced

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72. Bell, *supra* note 69, at 36-37.

73. *Id.* at 37.

74. In this paragraph we draw on EPSTEIN & SEGAL, *supra* note 69, at 85-116; Bell, *supra* note 69, at 38-41.

75. A cautionary note in this regard is suggested by Frederick Schauer, *The Supreme Court, 2005 Term, Foreword: The Court's Agenda – and the Nation's*, 120 HARV. L. REV. 4, 30-31 (2006), who notes that, on the whole, the types of cases the Supreme Court decides, with some exceptions, do not always map well onto the issues the general public, as revealed by opinion polls, considers most important. Schauer does not directly discuss the implications of his argument for judicial selection, but his views are not at variance with the increased role of interest groups in that process. Many of those groups are concerned with one issue or a narrow set of issues, and they will be concerned with judicial selection as long as federal courts are deciding some cases dealing with those issues. Schauer's observations carry less force for the lower federal courts, which of course hear far more, and a richer variety of, cases than the Supreme Court.

76. Dawn E. Johnson, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 396-99 (2003).

the modern confirmation process.<sup>77</sup> Still, we think there is considerable evidence that interest-group activity has raised the temperature on these actions.

A similar, though not identical, story can be told about the selection process for the lower federal courts.<sup>78</sup> Until relatively recently, the nomination and confirmation process for lower-federal-court judges was even more sedate than the old process for Supreme Court nominations. Presidents typically made nominations with deference to the advice of their political party and the Senators of the state where the nominee would sit. The confirmation process was usually swift and informal. If hearings were held, they were perfunctory, and full Senate confirmation was often by voice vote. There was typically little, if any, interest-group involvement in the vast majority of appointments. This too came to an end for lower-federal-court nominations not long after it did for Supreme Court nominations. By the late 1970s and early 1980s, increasing numbers of nominations were attracting the support or opposition of interest groups.<sup>79</sup> During the Clinton and Bush II administrations, in particular, the confirmations of increasing numbers of nominations either were delayed in unprecedented fashion or never took place at all.<sup>80</sup>

We do not want to overstate this point. Unlike Supreme Court nominations, where virtually every nomination receives considerable public attention and mobilizes many interest groups, most lower-court nominations do not attract interest-group attention and do result in confirmation.<sup>81</sup> This is particularly true for the more numerous district court nominees, as opposed to the fewer court of appeals nominees. The latter often receive more attention because they have increased importance with regard to policy-making and they are potential nominees for future Supreme Court vacancies. But even at the lower-court level, interest-group involvement during the Clinton and Bush II administrations was at historic highs for largely the same reasons those

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77. For greater development of these points, see David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 CARDOZO L. REV. 479 (2005); David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033 (2008) (reviewing BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES (2006) and JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007)).

78. In this paragraph and those that follow, we draw on GOLDMAN, *supra* note 68; NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS (2005); Lauren M. Cohen, *Missing in Action: Interest Groups and Federal Judicial Appointments*, 82 JUDICATURE 119 (1998); Sarah Binder & Forrest Maltzman, *Advice and Consent During the Bush Years: The Politics of Confirming Federal Judges*, 92 JUDICATURE 320, 328-29 (2009).

79. SCHERER, *supra* note 78, at 3-4, 19-20.

80. Bell, *supra* note 69, at 37-38.

81. For example, even in the Bush II administration, less than thirty-five percent of lower-court nominees resulted in interest-group opposition. SCHERER, *supra* note 78, at 4 fig.I-3.

groups were paying increased attention to Supreme Court nominations. More interest groups were at work than in prior decades, and the lower federal courts were perceived to be deciding many cases raising important issues of public policy, decisions often left intact by the Supreme Court's diminishing caseload in the past two decades.<sup>82</sup> And, as already noted, changes in Senate procedures and norms also opened up the process for interest groups. But there was one difference. Apparently fed up by the perceived politicization of the process, the Republican-controlled Judiciary Committee in 1997 forbade interest groups from testifying at confirmation hearings for lower-federal-court judges.<sup>83</sup> But this limit has not had much effect on interest-group activity, which has continued to be marked by direct lobbying of Senators and involvement in senatorial election campaigns.<sup>84</sup>

As before, we do not claim that interest-group activity is the sole driving force in the recent contentiousness of the confirmation process for lower-court judges. While patronage and deference to home-state Senators still plays a large role, recent administrations have given greater attention to the ideological makeup of the lower courts. So has the Senate, and, as with nominations to the Supreme Court, the presence of divided government, threatened filibusters, or other factors affects the strategy and success of presidential nominations.<sup>85</sup> Indeed, even in recent years, most lower-court nominations succeed. Interest groups have, however, played a significant role in monitoring these nominations and, as one study has documented, served as a fire alarm for Congress for particularly controversial (from the viewpoint of that interest group) nominations. For those nominations, some Senators will change from their default passive mode and provide more active scrutiny of a nomination.<sup>86</sup> In this respect, interest groups might be said to play a more important role at the lower-court level than at the Supreme Court level.

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82. *Id.* at 13-17.

83. Interest groups could still place in the record written materials, but only at the direction of a member of the Judiciary Committee. Bell, *supra* note 69, at 41. The practice apparently continued after Democrats gained control of the Senate in 2002.

84. SCHERER, *supra* note 78, at 133-80 (discussing variety of interest-group activity regarding federal judicial selection after the mid-1990s).

85. For greater elaboration of these points, see the sources cited in note 77 *supra*, and David M. Primo et al., *Who Consents? Competing Pivots in Federal Judicial Selection*, 52 AM. J. POL. SCI. 471 (2008).

86. Nancy Scherer et al., *Sounding the Fire Alarm: The Role of Interest Groups in the Lower Federal Court Confirmation Process*, 70 J. POL. 1026 (2008) (study of nominations to the U.S. Court of Appeals from 1985 to 2004). Even this study indicated that three-fourths of such nominations did not attract interest-group opposition. *Id.* at 1032.

## 2. State Judicial Selection

The story of interest-group activity in state judicial selection has many similarities to the activity covered in the preceding section, but it is a more difficult story to tell. We are dealing with fifty states, each one with its own history and peculiarities with regard to judicial selection. Within each state there are judges staffing the supreme court, trial courts (both of general and specialized jurisdiction), and, for most states, intermediate appellate courts. The method of selection may not be the same for all of these judges within one state.<sup>87</sup> So, in the aggregate, we are dealing with far more state than federal judges and several methods of selection. For these reasons, even more so than in the federal system, sweeping generalities and facile summaries must be viewed with caution.

With those caveats in mind, the story of state judicial selection and interest-group activity does have many parallels to that of federal judicial selection.<sup>88</sup> For most of American history, state judicial elections of whatever stripe and for whatever position were relatively sedate affairs. Many judges in putatively competitive (i.e., non-retention) elections ran unopposed. The intensity of campaigning and fundraising, when it took place, rarely approached that of other elective offices. For that reason, and due to ethical restrictions on judicial campaigns by candidates and their supporters and lack of information, reliance on cues like incumbency, name recognition, and political party support often influenced voting decisions. There was often considerable voter roll off in such races, in that many voters would simply not vote for the judicial candidates on a ballot with other offices, presumably because they did not know for whom to vote and did not particularly care who prevailed. Interest-group involvement, other than that of state and local bar associations, was generally minimal.<sup>89</sup>

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87. Useful compilations of the judicial selection systems of the states can be found in Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 314-60 (2002), and at the website of the American Judicature Society, Judicial Selection in the States, <http://www.judicialselection.us/> (last visited June 20, 2009).

88. There is vast descriptive and evaluative literature on state judicial selection, for which our references cannot do justice. Among the recent sources we found helpful (in addition to those that we cite later), especially as they pertain to the activity of interest groups, were AM. BAR ASS'N, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY (2003); Symposium, *Fair and Independent Courts: A Conference on the State of the Judiciary*, 95 GEO. L.J. 897 (2007); Sandra Day O'Connor Project on the State of the Judiciary, 21 GEO. J. LEGAL ETHICS 1229 (2008); Symposium on Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges, 34 FORDHAM URB. L.J. 1 (2007).

89. For helpful overviews of these points, see Herbert M. Kritzer, *Law is the Mere Continuation of Politics by Other Means: American Judicial Selection in the Twenty-First Century*, 56 DEPAUL L. REV. 423, 431-61 (2007); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 293-96 (2008).

This state of affairs came to end in the 1980s, at least in some states for some judges (especially state supreme court justices). Since then, many judicial contests have come to resemble their non-judicial counterparts. The characteristics of many races now include actual competition, vigorous campaigning, and considerable fundraising by judges and their supporters. These changes have created higher salience and media coverage, which have resulted in more scrutiny of the races.<sup>90</sup> Many of the changes have been credited to (or blamed on) a variety of interest groups. These groups have, among other things, raised and spent considerable funds to buy advertisements in a variety of media and engaged in other forms of campaigning to support or attack particular candidates. These were not isolated developments. They frequently occurred in several states (notably Alabama, Illinois, Ohio, Texas, and West Virginia, among others) and for numerous races.<sup>91</sup>

The increased activity of interest groups at the state level has been traced to several factors, which, not surprisingly, find parallels with developments at the federal level. While the reasons are often peculiar to each state, several common themes have emerged. One is concern with a variety of tort-reform statutes. These laws were passed by many state legislatures over the past three decades and have been subject to state constitutional challenges. Various interest groups associated with business (e.g., the U.S. Chamber of Commerce) and plaintiffs' attorneys (e.g., the American Trial Lawyers Association), among others, have intervened in state supreme court elections on

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90. It is worth mentioning that that one consequence of a greater salience for judicial elections is that it impacts some of the perceived inadequacies of those elections. So, for example, there appears to be less voter roll off in contentious state supreme court elections. See Melinda Gann Hall, *Voting in State Supreme Court Elections: Competition and Context as Democratic Incentives*, 69 J. POL. 1147 (2007); Melinda Gann Hall & Chris W. Bonneau, *Mobilizing Interest: The Effects of Money on Citizen Participation in State Supreme Court Elections*, 52 AM. J. POL. SCI. 457 (2008).

91. For useful overviews of these developments, see Deborah Goldberg, *Interest Group Participation in Judicial Elections*, in RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 73, 76-80 (Matthew J. Streb ed. 2007); Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 2009 WIS. L. REV. 21; Kritzer, *supra* note 89; Posen, *supra* note 89. Most of the literature on interest groups focuses on elections, not on the appointment process in states with Missouri plans. In that regard, the literature has discussed how bar associations have, in various ways, influenced the initial appointment process in those states. See, e.g., Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 FORDHAM URB. L.J. 125, 152-55 (2007); Rachel Paine Caufield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions*, 34 FORDHAM URB. L.J. 163, 178-80 (2007).

this issue. Other concerns have been criminal justice issues, such as the application of capital punishment by states.<sup>92</sup>

Several cautionary observations are in order when addressing the undoubted increase in activity of interest groups in state judicial selection. One is that, as with federal judicial selection, interest-group activity has not been the sole factor driving the increased visibility of state judicial selection. Other factors include heightened inter-party competition in some states, state courts deciding more cases raising high-profile and controversial issues of public policy, increased campaign spending, and the loosening of various ethical limits on campaigns.<sup>93</sup>

To be sure, these factors operate synergistically and overlap with the increased activity of interest groups, but those groups cannot be singled out as the sole causative factor. Similarly, the higher profile of state judicial elections should not be overstated. For over two decades the increased salience has been concentrated in a relatively small number of states, and even in those states it has been restricted, for the most part, to the elections of the highest court of the state. Most of the literature focuses on state-supreme-court selection, but the evidence we have on lower-state-court selection suggests that most trial and intermediate appellate court elections have *not* been characterized by increased interest-group and related activity.<sup>94</sup> This comes as no surprise since state supreme courts wield the most policy-making authority among courts in those jurisdictions, and interest groups have limited resources and must pick and choose where to fight. That said, interest-group activity in lower-state-court elections would benefit from greater scholarly attention.

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92. For more information on the increased activity of interest groups because of tort reform, criminal justice, and other issues, see Goldberg, *supra* note 91, at 80-83; Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1232-45 (2008); Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why it Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1266 (2008); Joanne M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 643-44 (2009).

93. For helpful overviews, see Brandenburg & Schotland, *supra* note 92, at 1232-50; Geyh, *supra* note 92, at 1263-69.

94. See, e.g., Brandenburg & Schotland, *supra* note 92, at 1234-36 (pointing out that, even in recent years, most state court judges in competitive elections, especially at the trial court level, run unopposed); Matthew J. Streb et al., *Contestation, Competition, and the Potential for Accountability in Intermediate Appellate Court Elections*, 91 JUDICATURE 70 (2007) (study of 942 intermediate appellate court general elections from 2000-2006 for retention and competitive elections showed, among other things, that less than one-third were contested).

### 3. Interest Groups as Litigants and Amici

As we already noted,<sup>95</sup> Landes and Posner seem skeptical that interest groups, on the whole, would play much of a role in the judicial process. Subsequent literature and developments have considerably undermined that assumption. At the time of Landes and Posner's writing, it was recognized that certain interest groups with less influence in the legislative or executive branches would turn to litigation to achieve policy objectives. The storied litigation campaign of the NAACP to desegregate schools and other public facilities is but one example.<sup>96</sup> More recent studies have demonstrated that advantaged interest groups also frequently file litigation or support the litigation of others, depending on the issue, with the desire to entrench an objective in judicial precedent and the desire to counterbalance the efforts, in litigation or in other policy-making forums, of other interest groups.<sup>97</sup>

Another frequent activity of interest groups, not mentioned by Landes and Posner, is to file friend-of-the-court, or *amicus curiae*, briefs. It is typically quicker and cheaper for such groups to submit briefs than to file, or participate in, litigation. On the other hand, there is no guarantee that a court will follow the advice of the *amicus*, though of course that is true with regard to other forms of lobbying as well. Nor can *amici* take a direct role in the litigation regarding discovery, motions, and trial strategy, as the parties do. Nonetheless, interest groups will file such briefs to bring to the attention of courts arguments and information that the parties may not to induce courts to reach outcomes preferred by the groups and to pursue organizational maintenance, i.e., to attract membership support.<sup>98</sup>

*Amicus* activity by interest groups, particularly before the U.S. Supreme Court, was frequent at the time of Landes and Posner's article.<sup>99</sup> It has substantially increased since then. In the post-WWII era, the number of cases where one or more *amicus* briefs were filed rose from about twenty percent to almost ninety percent in recent Terms.<sup>100</sup> In recent years, a rich variety of interest groups have filed briefs. These interest groups include state and local

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95. See *supra* notes 58-62 and accompanying text.

96. PAUL M. COLLINS, JR., *FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING* 20 (2008). For an account contemporary to that of the Landes and Posner article, see Karen Orren, *Standing to Sue: Interest Group Litigation in the Federal Courts*, 70 AM. POL. SCI. REV. 723 (1976).

97. COLLINS, *supra* note 96, at 21-25.

98. *Id.* at 26-32.

99. *Id.* at 38-45; Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 720-21 (1963); Nathan Hakman, *Lobbying the Supreme Court: An Appraisal of "Political Science Folklore,"* 35 FORDHAM L. REV. 15 (1966).

100. COLLINS, *supra* note 96, at 46; Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs in the Supreme Court*, 148 U. PA. L. REV. 743, 753 (2000); Ryan J. Owens & Lee Epstein, *Amici Curiae During the Rehnquist Years*, 89 JUDICATURE 127, 128-29 (2005).

governments, public-interest organizations, unions, businesses, professional groups, and others.<sup>101</sup> There is less literature on the number and filers of amicus briefs in lower federal courts and state courts, but what evidence there is suggests that more briefs are also being filed in those courts.<sup>102</sup>

Of particular interest to the present study is the activity of interest groups filing amicus briefs in cases regarding judicial selection. In *Chisom v. Roemer*, the Supreme Court held that the Voting Rights Act does apply to state judicial elections.<sup>103</sup> A number of conservative interest groups (e.g., the Washington Legal Foundation and Pacific Legal Foundation) filed briefs in support of the state, arguing the Act did not apply, while several liberal interest groups (e.g., the ACLU, the American Jewish Committee) filed briefs on the other side.<sup>104</sup> Similarly, in *Republican Party of Minnesota v. White*, the Court held that certain state restrictions on judicial election campaigns violate the First Amendment.<sup>105</sup> A large number of organizations filed amicus briefs in the case. However, here various interest groups filed briefs in arguably unpredictable fashions. Among the groups supporting the constitutionality of campaign restrictions were the Brennan Center, the American Judicature Society, the ABA, and the Missouri Bar. In support of the First Amendment challenge were groups from both liberal and conservative political perspectives, such as the ACLU, Public Citizen, and the U.S. Chamber of Commerce.<sup>106</sup>

The strange bedfellows' amici continued in *Caperton v. A.T. Massey Coal Co.*, decided this past Term in the Supreme Court.<sup>107</sup> *Caperton* involved the appropriate standard for recusal when an elected state judge receives campaign contributions from parties to lawsuits.<sup>108</sup> A wide variety of interest groups filed amicus briefs in support of requiring recusal in the case: the ABA, the Brennan Center, Justice at Stake, and many corporations (including Lockheed Martin Corp., Pepsico, Wal-Mart Stores, Inc., and others).<sup>109</sup> Among the conservative groups which filed briefs for the position

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101. COLLINS, *supra* note 96, at 56-63.

102. See, e.g., Wendy L. Martinek, *Amici Curiae in the U.S. Courts of Appeals*, 34 AM. POL. RES. 803 (2006) (study of filings from 1925 to 1996); Donald R. Songer & Ashlyn Kuersten, *The Success of Amici in State Supreme Courts*, 48 POL. RES. Q. 31, 31-32, 41 (1995) (study of filings in three state supreme courts).

103. 501 U.S. 380, 383-84 (1991).

104. *Id.* at 382 n.† (listing amicus curiae briefs). The American Judicature Society, the originator of the Missouri plan, filed an amicus brief that did not support either side. Brief of the American Judicature Society as Amicus Curiae in Support of Neither Party, *Chisom v. Roemer*, 501 U.S. 380 (1991) (Nos. 90-757 and 90-1032), 1991 WL 11007933.

105. 536 U.S. 765, 788 (2002).

106. *Id.* at 767 n.\* (listing amicus briefs).

107. 129 S. Ct. 2252 (2009).

108. *Id.* at 2256-57.

109. Brief of Amicus Curiae American Bar Association, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22); Brief of Amicus Curiae Brennan Cen-



that more rigorous recusal standards are necessary for state judicial elections were the James Madison Center for Free Speech and the Center for Competitive Politics.<sup>110</sup> These cases demonstrate both that there is a variety of interest groups and that they do not act as a whole in supporting or attacking policies which address the perceived independence of state judges.<sup>111</sup>

## V. CONCLUSION

In their characteristically provocative manner, Landes and Posner, in their 1975 article, shed helpful light on the perennial topic of judicial selection by arguing that legislatures and interest groups would want an independent judiciary to enforce legislative deals. This *ex ante* perspective helped explain a puzzle of public choice theory, since it was not obvious why legislatures (or drafters of constitutions) would want to create a branch of government that, on its face, does not serve the goals of interest groups. Our extension of their model suggests that interest-group activity in this regard is more complex and nuanced than suggested by Landes and Posner. Interest groups themselves are more diverse in type and goals than Landes and Posner suggest, and not all of them, all of the time, support the notion of an independent judiciary. A variety of interest groups may seek to change judicial selection systems to serve their own goals or influence the selection of judges under any system of selection. The upshot is that an interest-group perspective on judicial independence requires a richer understanding of interest groups and the notion of judicial independence itself.

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ter at NYU School of Law, the Campaign Legal Center, and the Reform Institute, 129 S. Ct. 2252 (2009) (No. 08-22); Brief of Amicus Curiae Justice At Stake, American Judicature Society, Appleseed, Common Cause, Constitutional Accountability Center, Institute for the Advancement of the American Legal System, League of Women Voters, National Ad Hoc Advisory Committee on Judicial Campaign Conduct, Alabama Appleseed Center for Law & Justice, Colorado Judicial Institute, Democracy North Carolina, Fund for Modern Courts, Illinois Campaign for Political Reform, Justice For All, League of Women Voters of Michigan, League of Women, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009) (No. 08-22); Brief of Amicus Curiae Committee For Economic Development, 129 S. Ct. 2252 (2009) (No. 08-22).

110. Brief of Amicus Curiae James Madison Center for Free Speech Supporting Respondents, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009) (No. 08-22); Brief of Amicus Curiae Center for Competitive Politics, 129 S. Ct. 2252 (2009) (No. 08-22).

111. Conservative groups have not been of one mind on state judicial elections. Some argue that robust judicial elections are necessary to combat capture of merit selection processes by liberal groups. Others emphasize the virtues of federalism and depoliticizing the state judicial selection process. For an overview, see George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1543-44 (2008).