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## We Have Met the Special Interests, and We Are They

*Michael R. Dimino, Sr.\**

The subject of this symposium – special interests and judicial elections – is an important one and will be much in the news in light of *Caperton v. A.T. Massey Coal Co.*<sup>1</sup> In *Caperton*, the Supreme Court held that the Due Process Clause was violated when an elected judge participated in a case involving a company whose CEO spent large amounts of money to help elect the judge.<sup>2</sup> My purpose here is to broaden our focus and argue that, while the influence of campaign contributors is likely to draw most of the popular attention surrounding the power of special interests within the judiciary,<sup>3</sup> the exercise of judicial power will advantage certain interests at the expense of others regardless of the method of judicial selection a particular state uses. Accordingly, we should be careful that attempts to control the influence of special interests do not, in fact, simply advantage one set of special interests.

I have two major points. First, because there is no such thing as a general interest, it makes no sense to speak of “special” interests. Second, judicial decisions make policy. In so doing, they benefit certain interests at the expense of others, whether judges are selected by elections, appointments, or some hybrid system. So, it should not be surprising that politics pervades the choice of judges under every system used or considered today. No selection system may be capable of eliminating the power of interest groups, but the selection system may determine *which* of those interests are benefited. As a result, debates about judicial selection should be viewed skeptically and are far more likely to reflect disagreements about policy than about the appropriate selection methods to ensure judicial quality.

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1. 129 S. Ct. 593 (2008) (granting certiorari). The Supreme Court handed down its opinion on this case on June 8, 2009. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (considering whether independent campaign expenditures supporting the election of a judge require the judge’s recusal from a case involving the speaker’s company).

2. *Id.*

3. See, e.g., Richard Briffault, *Public Funds and the Regulation of Judicial Campaigns*, 35 IND. L. REV. 819 (2002); Paul J. De Muniz, *Eroding the Public’s Confidence in Judicial Impartiality: First Amendment Federal Jurisprudence and Special Interest Financing of Judicial Campaigns*, 67 ALB. L. REV. 763 (2004).

## I. WE ARE ALL “SPECIAL” INTERESTS

The term “special interest” is a disparaging one because it implies a comparison with something else – a “general interest.” But it is elementary political science that there is no general interest. No policy is optimal for all segments of society, and therefore the job of policy-makers is to choose between potential benefits and between potential beneficiaries. Is a town to zone land for parks or businesses? Build schools, lower taxes, or increase welfare benefits? Construct roads or public transportation? It simply gets us nowhere to label some of these policies the work of “special interests”; rather, we use the label to dismiss those policies we have already concluded are unwise. Thus, job creation can be portrayed either as a benefit to the community or as a special benefit for the employers and employees who most directly profit. Parks can be seen as advancing a general interest or as a special benefit to the people who play there or work or reside nearby. The very concept of a “special interest,” therefore, is purely rhetorical and is incoherent and useless as a tool of logical persuasion.<sup>4</sup>

The interests benefited and harmed by judicially made public policy are just as “special” as those benefited and harmed by legislatively made policy. A court’s adoption of strict liability or negligence, its choice between strict and forgiving readings of a statute of limitations, and its interpretation of the Takings Clause<sup>5</sup> all result in benefits and harms to identifiable portions of society.<sup>6</sup> In such circumstances the judicial process has benefited some interests over others, regardless of the outcome. Accordingly, the relevant question is not whether the interests favored by judicial elections are “special,” but whether any system of selecting judges can avoid the risk of giving certain interests an advantage in the judiciary’s policymaking. The answer is that no such system is possible. Critics of elections, therefore, should have to explain why a system that favors their interests is preferable to one that favors the interests preferred by voters.<sup>7</sup>

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4. See, e.g., WILLIAM P. BROWNE, *GROUPS, INTERESTS, AND U.S. PUBLIC POLICY* 27-28 (1998) (noting that interest groups are “disdained in general but nonetheless valued and joined”).

5. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

6. See, e.g., MATTHEW J. BURBANK ET AL., *PARTIES, INTEREST GROUPS, AND POLITICAL CAMPAIGNS* 223 (2008); RONALD J. HREBENAR, *INTEREST GROUP POLITICS IN AMERICA* 219, 231 (3d ed. 1997).

7. To be sure, judicial elections, like all elections, may not perfectly reflect the policy views of the electorate. Voters in judicial elections have been especially unable to base their votes on the candidates’ policy views because of canons of judicial conduct that have restricted judicial candidates’ speech. This situation is changing, however, as a result of the Supreme Court’s recognition, in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), that the First Amendment protects judicial candidates’ ability to discuss their views on disputed legal and political issues.

## II. COURTS AS POLICY-MAKERS

Everybody understands that courts make policy, and, therefore, everybody understands that the results of court decisions advantage certain interests. The problem, according to those who decry special-interest influence, is that the interest groups not only benefit from, but also seek to shape, judicial decisions. Thus, while critics may admit that the phrase “special interests” is misleading and incapable of neutral definition, their essential point remains: Judges should not be influenced by forces outside of the law, whether those interests are “special” or otherwise, because judges should not be “politically vulnerable for being legally right.”<sup>8</sup>

Judicial independence, however, allows judges not only to enforce long-established or clear laws but also to exercise discretion in the interpretation of ambiguous law. Where a court’s decisions have a great impact upon public policy and when reasonable jurists can disagree as to the appropriate outcomes – as in virtually every state-supreme-court decision in which there is a dissent and in a significant percentage of unanimous cases as well – the people’s ability to affect the membership of courts through elections is most beneficial, and the insulation of those courts from public influence is least defensible. Indeed, cases where no reasonable jurist could disagree are extremely rare at the level of state supreme courts, notwithstanding the protests of some critics, including Professor Schotland in his unintentionally ironically titled *Plea for Reality*, that “law-making by judges . . . [comprises] a minor fraction of the docket.”<sup>9</sup> Accordingly, a critique of elections stressing judges’ mechanical, law-applying function assumes a simplistic, fourth-grade-civics ideal of the judicial process that portrays judicial decisions as neutrally discovering law in a manner unaffected by political consequence or ideology.<sup>10</sup>

Of course any particular court decides very few cases dealing with the most divisive public issues, such as abortion, affirmative action, and the right

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Though no election can represent the views of the electorate exactly, judicial elections are able to do so to a much greater extent than any other selection system, which allows the public to influence judicial selection only indirectly.

8. Nathan S. Heffernan, Fmr. Chief Justice, Wisc. Supreme Court, *Judicial Responsibility, Judicial Independence and the Election of Judges*, Inaugural E. Harold Hallows Judicial Fellow Lecture (Mar. 27, 1996), in 80 MARQ. L. REV. 1031, 1043 (1997).

9. Roy A. Schotland, *A Plea for Reality*, 74 MO. L. REV. 507, 517-18 n.28 (2009).

10. See Charles Gardner Geyh, *Straddling the Fence Between Truth and Pre-tense: The Role of Law and Preference in Judicial Decision Making and the Future of Judicial Independence*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 435, 446 (2008) (“If . . . judicial independence exists for the sole purpose of promoting the ‘rule of law,’ conventionally understood, then once it is conceded that independent judges do not simply follow the law, the rationale for judicial independence is diminished or obliterated.”). See also *id.* at 436-41. Professor Geyh, however, believes that independence can be defended on other grounds. See *id.* at 446-48.

to die. Some of those cases involve statutory interpretation rather than bringing a judge's "own judgment"<sup>11</sup> to bear on an interpretation of a constitutional phrase as vague as the Eighth Amendment's Cruel and Unusual Punishments Clause or the Fifth and Fourteenth Amendments' Due Process Clauses. However, decisions that do not make headlines still make policy (consider implied private rights of action, for example), and, as rare as it is for a court to decide a crucial case about school funding or the death penalty, those cases may be viewed as the most important ones a court hears. It is a curious defense of judicial independence to say that society should have to tolerate unrepresentative judicial lawmaking concerning the legal questions that matter most so that judges can be free to reach proper conclusions with respect to the hum-drum.<sup>12</sup>

Moreover, as anyone who has read a statutory-interpretation case can attest, the meaning that a judge gives to statutory text can vary tremendously depending on the judge's view of the potential policy consequences.<sup>13</sup> Further, judges' common-law-making power is not subject even to the restraints judges face in interpreting statutes. Thus, state supreme courts, which exercise the power to shape common law far more than the federal courts, indisputably make policy based on their views of good policy.<sup>14</sup>

Interest groups have long recognized courts' policymaking capabilities and have sought to influence decisions of both elected and appointed courts for decades. Such influence is relatively uncontroversial when groups such as

11. *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion).

12. Schotland, *supra* note 9, at 517-18 n.28.

13. *See Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009).

14. It is no answer that interpretations of statutes and the common law *can* be overruled by the other branches. *See* Schotland, *supra* note 9, at 517-18 n.28. It is difficult to muster the votes necessary to pass any legislation, including legislation upsetting a court-imposed status quo, and the power to make policy is the power to make policy, even if subject to a slight possibility of oversight. *Cf., e.g., Alexander M. Bickel, The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 62-63 (1961). Additionally, statutory vagueness may exist precisely because there is no legislative coalition strong enough to resolve the matter through clear language. *See, e.g., Ernest A. Young, Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1597-98 (2000). A legislature's decision to punt a question to the courts, then, indicates that there will certainly not be enough votes in both houses of the legislature to override the courts' ultimate resolution of that question. Finally, the argument that unaccountable policymaking is acceptable if it is not final proves too much. Constitutional decisions may be overruled, albeit in a more difficult method than the standard procedure for passing legislation, and all governmental policymaking is subject to eventual countermanding by the people. Less theoretically, policymaking actions of a presidential administration are subject to being overruled by legislation, yet most agency officials are responsible directly to the executive because we would not permit such policy decisions to be made without political accountability, notwithstanding the possibility of corrective legislation.

the NAACP, NRA, ACLU, etc., file amicus briefs, fund litigation, offer advice to litigants, uncover potential plaintiffs, or develop their own test cases.<sup>15</sup>

Interest-group influence becomes controversial, it appears, only when the groups attempt to influence judicial decisions by influencing the selection of the judges who make them. And there can be no doubt that interest groups do, in fact, seek to affect judicial selection. But it is important to recognize that such influence occurs regardless of the method of judicial selection. In elective states, groups such as the chamber of commerce and the trial lawyers' association advertise for the election of their favored candidates; it only makes sense for them to do so, given the policy differences that can result from the selection of different judges.<sup>16</sup> In our pluralist system, individuals' interests are represented by groups, and there is nothing per se wrong with interest groups' attempts to influence elections; if individuals can engage in electoral advocacy, then groups should be able to do so as well.

In federal-style appointive systems, interest groups lobby the official responsible for selecting the nominee, as well as the body responsible for confirming the selection. In states using the Missouri Plan, interest groups are able to do both: They lobby for the appointment of judges with favorable philosophies, and they lobby the electorate to retain them and reject others. As we might expect, therefore, there is no evidence that the Missouri Plan eliminates threats to judicial independence.<sup>17</sup>

Of course some types of influence are improper. Interest groups (or individuals, for that matter) certainly should not be able to bribe judges or intimidate them by threats of violence. Beyond such clear cases, however, the dispute about interest-group influence is only the perennial one between judicial independence and accountability. But judges' accountability to the people is in tension with, if not opposed to, the judicial function of deciding cases based on the law and the facts, irrespective of public opinion.<sup>18</sup> In other words, while states require judges to stand for reelection or retention to ensure that the judges do not vary too much from public opinion, judges must –

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15. See, e.g., HREBENAR, *supra* note 6, at 219-35.

16. See generally, e.g., Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229 (2008); Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391 (2001).

17. See 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 (2007); Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623 (2008). See also Brandenburg & Schotland, *supra* note 16, at 1234 n.18 (noting the ways in which retention elections can undermine judicial independence); Peter Paul Olszewski, Sr., *Who's Judging Whom? Why Popular Elections Are Preferable to Merit Selection Systems*, 109 PENN. ST. L. REV. 1 (2004).

18. See, e.g., Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43 (2003); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

if they are to be faithful to their offices – rule against public opinion when the law requires it.<sup>19</sup> To admit that certain selection systems may lead to bad consequences, however, does not mean that alternative systems are flawless. Rather, each system has its problems, and states must determine where the advantages and disadvantages of each matter most.

That is why I have argued that states evaluating their judicial-selection systems should consider appointing lower-court judges and electing high-court judges to lengthy, non-renewable terms.<sup>20</sup> The pressure on judges to decide cases consistently with popular opinion, rather than with the law, may be too great in a system where judges' jobs depend on someone else's evaluation of their decisions. Making terms non-renewable means that there should be no re-selection, whether by election, appointment, or the uncontested elections identified with the Missouri Plan.<sup>21</sup>

My dissatisfaction with re-selection systems, however, says nothing about the kind of system we should employ for the *initial* selection of judges. As noted earlier, judges on state supreme courts exercise a wide amount of discretion in interpreting statutes and constitutions, especially in shaping the common law.<sup>22</sup> Those decisions affect policy, and judges exercise their discretion based in part on their own views of wise policy. Accordingly, states have an interest in ensuring that those policies are acceptable to the public rather than merely embodying the preferences of unrepresentative judges.<sup>23</sup> Interest groups can aid in communicating and motivating public opinion, and, therefore, the involvement of groups in the process of judicial selection can help to ensure that a state's judges have philosophies consonant with the dominant opinion in that state. And, where interest-group involvement is limited to judges' *initial* selection, there is less risk of the harms caused when sitting judges fear antagonizing groups that could retaliate by opposing their reelection efforts.

19. See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 410-11 (1991) (Scalia, J., dissenting) (“[I]t is the prosecutor who represents ‘the People’; the judge represents the Law – which often requires him to rule against the People.”).

20. See Michael R. Dimino, Sr., *Accountability Before the Fact*, 22 NOTRE DAME J. L. ETHICS & PUB. POL’Y 451 (2008).

21. Even a ban on judicial re-selection does not eliminate the potential for non-legal forces to influence a judge’s decisions. Judges hoping to be elevated to a higher court, for example, have an incentive to issue rulings that do not depart from the preferences of the persons who will select the person to sit on the higher bench. Additionally, judges might be influenced by a desire to please a spouse, to achieve fame, to please editorial writers, or to advance their own view of justice or good policy. But there is no practical way to eliminate all non-legal influences, and it is no defense of re-selection requirements to say that they are not the only extra-legal influences that might improperly affect judicial decisions.

22. See, e.g., Paul D. Carrington & Adam R. Long, *The Independence and Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, 472 (2002).

23. Cf. Dennis B. Wilson, *Electing Federal Judges and Justices: Should the Supra-Legislators Be Accountable to the Voters?*, 39 CREIGHTON L. REV. 695 (2006).

Interest groups seeking to influence elections must compete with every other group that has the resources, the people, and the inclination to become involved. The resulting marketplace of ideas might be distasteful to some who believe that judges should be treated differently than politicians, but it allows all interested groups to express their opinions. The danger in other systems is not only that groups will be able to influence the process (they will) but also that certain groups will be granted disproportionate influence – with elites and those who already have power determining the appropriate balance of power between groups.

Critics of elections note the potential for campaign donors, party leaders, and other supporters to be “repaid” by favorable decisions while on the bench.<sup>24</sup> It is certainly possible that these supporters might be the recipients of improperly favorable rulings during the beneficiary’s term of office.<sup>25</sup> Two notes of caution are in order, however. First, most of the influence that such a supporter would carry would be due to the implicit effect of a decision on the supporter’s willingness to back the judge in his or her bid to retain office. If there is no chance of re-selection, threats of withdrawn support for an effort to retain the office lose their strength.<sup>26</sup> Second, it is not just elections that yield debts to persons and interests who are influential in placing a judge on the bench. Indeed, states’ adoption of judicial-election systems was motivated in large part by a desire to free judges from the influence of the political branches and political officials who would otherwise have been responsible for their appointment. Supporters of judicial elections reasoned that it was better to have a judge accountable to the electorate than to have the judge beholden to individuals in government.<sup>27</sup>

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24. See, e.g., David Barnhizer, “On the Make”: Campaign Funding and the Corrupting of the American Judiciary, 50 CATH. U. L. REV. 361, 367-70 (2001).

25. See Chris W. Bonneau & Damon M. Cann, *The Effect of Campaign Contributions on Judicial Decisionmaking*, <http://ssrn.com/abstract=1337668>; Stephen J. Ware, *Money, Politics, and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645 (1999).

26. Cf. Republican Party of Minn. v. White, 536 U.S. 765, 780 (2002) (“[O]ne would be naive not to recognize that campaign promises are – by long democratic tradition – the least binding form of human commitment[.]”).

27. See Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 205-19 (1993); Shepherd, *supra* note 17, at 631-34; Laura Denvir Stith & Jeremy Root, *The Missouri Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711, 721 (2009).



### III. THE INFLUENCE OF INTERESTS IN SYSTEMS NOT USING POPULAR ELECTIONS

Reasonable people can disagree with the political philosophy that seeks to make judges reflective of the will of the voting public, but one cannot seriously contend that appointive systems take politics out of judicial selection. If the people are not permitted to use political considerations directly in judicial elections, then the people's representatives will use political considerations in judicial appointments. Eliminating elections, therefore, will do little to lessen the influence of interest groups and may increase their power.

The federal experience provides an example. Presidents have often made political considerations paramount when selecting judges, and in a pluralist society politics means pleasing or placating pressure groups. This influence of interest groups on judicial appointments has taken two principal forms.<sup>28</sup> First, Presidents will often seek to satisfy an interest group by nominating a judge perceived to be associated with that interest or a member of the interest group itself. To recount only a few noteworthy examples, President Eisenhower chose Justice Brennan because Brennan was a Catholic Democrat; President Lyndon Johnson chose Justice Marshall in large part because he was black; and President Reagan chose Justice O'Connor because of her sex.<sup>29</sup>

Second, Presidents appoint judges because the judges' decisions are predicted to favor certain interests. For example, President Nixon selected four Justices believed at the time to advance his law-and-order agenda, and President Reagan used his appointments to make the federal judiciary more conservative.<sup>30</sup> Conversely, interest groups can act to defeat or prevent the nomination of judges believed to be opposed to the interest groups' policy goals. Organized labor, for example, was instrumental in defeating the Supreme Court nominations of Judge Parker and Judge Haynsworth.<sup>31</sup>

President Obama has declared his intention to use his judicial appointments to advance his political vision and the visions of interest groups that support him. He has stated that he will look for a potential judge "who's got the heart, the empathy, to recognize what it's like to be a young teenage

28. Presidential appointments have also been motivated by a third type of political consideration: rewarding past supporters. Such a desire was the principal cause of Chief Justice Warren's appointment. See HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 199-202* (5th ed. 2008); ED CRAY, *CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 246* (1997).

29. See, e.g., ABRAHAM, *supra* note 28, at 207-08, 228-30, 265-70.

30. See *id.* at 9-17, 235-56, 264-88.

31. See *id.* at 11; WILLIAM D. BADER & ROY M. MERSKY, *THE FIRST ONE HUNDRED EIGHT JUSTICES 43-44* (2004); JOHN P. FRANK, *CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT* (1991).

mom. The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old."<sup>32</sup> If there is one thing this litany of interest groups makes clear, it is that interest-group power in judicial selection is not restricted to judicial elections.

Indeed, elections may be less likely than appointments to be influenced by certain interests. Reform models based on the Missouri Plan often institutionalize the power of interest groups by reserving power on judicial nominating commissions for representatives of various groups – particularly the organized bar.<sup>33</sup> For example, almost all states using nominating commissions reserve places on the commissions for lawyers;<sup>34</sup> one state, Kansas,<sup>35</sup> allows lawyers to select a majority of its commissioners.<sup>36</sup> Not only does the composition of the commissions give lawyers disproportionate influence over judicial policy,<sup>37</sup> but the choice of those lawyer-commissioners is often left to bar associations or bar presidents, rather than to elected officials.<sup>38</sup> Ironically, involvement of the bar is often portrayed as a solution to the problem of interest-group influence,<sup>39</sup> rather than as a part of the problem.<sup>40</sup>

Eleven states using nominating commissions have a provision for ensuring that either the applicants or the commissioners, or both, are diverse.<sup>41</sup>

32. Alexandra MacCallum, *Barack at Planned Parenthood Today*, July 17, 2007, <http://my.barackobama.com/page/community/post/alexmaccallum/CtN5>. The substance of then-candidate Obama's statement has been reported in several other news sources.

33. See, e.g., Norman L. Greene, *The Judicial Independence Through Fair Appointments Act*, 34 *FORDHAM URB. L.J.* 13, 15 (2007).

34. Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 *MO. L. REV.* 751, 759-60 n.36 (2009).

35. See generally Stephen J. Ware, *Selection to the Kansas Supreme Court*, 17 *KAN. J.L. & PUB. POL'Y* 386 (2008).

36. AM. JUDICATURE SOC'Y, *JUDICIAL MERIT SELECTION: CURRENT STATUS*, tbl.1 (2008), available at <http://www.ajs.org/selection/docs/Judicial%20Merit%20Charts.pdf>.

37. For example, lawyers appear to have an interest in the shape of the tort system and the tax code. See Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 *J. LEGAL STUD.* 807 (1994); Richard A. Epstein, *The Political Economy of Product Liability Reform*, 78 *AM. ECON. REV.* 311, 313-14 (1988); Michelle J. White, *Legal Complexity and Lawyers' Benefit from Litigation*, 12 *INT'L REV. L. & ECON.* 381 (1992), available at <http://econ.ucsd.edu/~miwhite/complexity.pdf>.

38. AM. JUDICATURE SOC'Y, *supra* note 36, at tbl.2.

39. See Gerald F. Uelmen, *Crocodiles in the Bathub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 *NOTRE DAME L. REV.* 1133, 1153 (1997).

40. F. Andrew Hanssen, *On the Politics of Judicial Selection: Lawyers and State Campaigns for the Merit Plan*, 110 *PUB. CHOICE* 79, 79 (2002) (citing "the self-interest of lawyers" as accounting for Missouri Plan support among members of the bar).

41. AM. JUDICATURE SOC'Y, *supra* note 36, at tbl.5.

The criticism is not meant to contend that minorities, women, lawyers, or any other interest should be denied access to commissions or places on the bench. My point, rather, is that each group is an interest – a “special” interest, if you prefer – and that manipulating the membership of the commissions or the characteristics of the applicants is a less visible way of achieving policy results that might not be politically possible in elections. Reformers champion the ability of appointments to increase the numbers of minorities and women on the bench,<sup>42</sup> although such a defense of appointments is a transparent admission that the fault that reformers find with elections is not that elections can be influenced by interests, but that the “wrong” interests too often prevail.<sup>43</sup>

#### IV. USING JUDICIAL SELECTION TO FAVOR CERTAIN INTERESTS

Regardless of the method of judicial selection, people who disagree with judicial decisions will characterize those decisions as favoring special interests. Already some Court-watchers, for example, have criticized the Roberts Court as favoring business interests.<sup>44</sup> Of course, those critiques come from

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42. See, e.g., Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83 SOC. SCI. Q. 504 (2002) (concluding that women are more likely to be selected to all-male courts in states using appointments than in states using elections). See also Stith & Root, *supra* note 27, at 747. Some also favor elections because they are thought to result in a more diverse bench. Data collected by the American Bar Association indicate that a majority of minorities on the bench were selected by popular elections. Am. Bar Ass’n, National Database on Judicial Diversity in State Courts, <http://www.abanet.org/judind/diversity/national.html#4> (last visited Feb. 2, 2008). The result is surprising because a majority of judges are initially selected by appointment, even in states with elections, because judges are often appointed to fill unexpired terms. See Lisa M. Holmes & Jolly A. Emrey, *Court Diversification: Staffing the State Courts of Last Resort Through Interim Appointments*, 27 JUST. SYS. J. 1 (2006).

43. See, e.g., Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 40 (1995) (suggesting a commission-based plan that not only balances partisan considerations, but which also requires at least three members of the nine-member commission to be “racial or ethnic minorit[ies], or . . . wom[e]n”). Cf. CIARA TORRES-SPELLISCY ET AL., BRENNAN CENTER FOR JUSTICE, IMPROVING JUDICIAL DIVERSITY 4-5 (2008), available at [http://brennan.3cdn.net/96d16b62f331bb13ac\\_kfm6bplue.pdf](http://brennan.3cdn.net/96d16b62f331bb13ac_kfm6bplue.pdf) (suggesting that steps be taken to encourage the selection of more minorities and women, and finding that both appointive and elective systems do an insufficient job of bringing diversity to the bench).

44. See, e.g., Symposium, *Big Business and the Roberts Court: Explaining the Court’s Receptiveness to Business Interests*, 50 SANTA CLARA L. REV. (forthcoming 2009). The promotional material for the symposium, available at <http://law.scu.edu/lawreview/symposium.cfm> (last viewed Jan. 23, 2009), promises “explanations for what some have called the Court’s extreme friendliness to American business interests.”

observers with anti-business biases of their own. This demonstrates that observers will decry courts succumbing to special interests when, and to the extent that, the courts reach decisions with which the observers disagree.

The lesson for those of us who study judicial selection is to be careful of our own motives and suspicious of the motives of anyone who urges that the public is incapable of choosing its own public officials.<sup>45</sup> Arguments by “reformers,” such as the American Bar Association and the Brennan Center for Justice, promise that eliminating judicial elections will result in a judiciary that is more independent, but it is surely not coincidental that the reformers often push for unpopular policies that would be resisted by the voters.

For example, if any issue has historically predominated in judicial elections, it has been crime.<sup>46</sup> Candidates spend much of their campaigns trying to portray themselves as “tough,” and their opponents as “soft,” on crime. Judges running for reelection know that rulings in favor of criminal defendants will be fodder for opposing candidates. From Rose Bird to Penny White, judges have lost their offices because of public opposition to decisions believed to favor criminal defendants (and, in particular, to decisions inhibiting capital punishment). Elections, therefore, are thought to produce judges who are tougher on crime than would be the case in a system in which judges were more insulated from public opinion. It is not surprising, then, that reform groups such as the ABA oppose elections, when those groups tend to be far more solicitous of the rights of criminal defendants than the general public.<sup>47</sup> It is the same with other examples meant to illustrate the harm of special-interest influence in judicial elections: Elected courts might, it is feared, lead to greater limitations on tort awards or a greater acceptance of

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45. See Bradley A. Smith, *Selecting Judges in the 21st Century*, 30 CAP. U. L. REV. 437, 448 (2002) (“It may be good to have judges selected by a knowledgeable elite . . . . But that is a very different argument from one that calls for a theoretically neutral, electoral accountability, then seems to rig the scales in favor of certain views or attributes.”); *id.* at 453 (“[E]fforts to assure that voters draw the ‘appropriate inferences’ and elect the ‘right’ judges can hardly withstand scrutiny as anything other than attempt to rig the political system toward their favored outcomes.”).

46. As Professor Champagne noted in his comments at the Symposium, however, a judicial campaign’s apparent focus on criminal justice may be a tool used by persons and groups with a different focus. Anthony Champagne, *Parties, Interest Groups, and Systemic Change*, 74 MO. L. REV. 555, 557 (2009). Thus, a campaign seeking to unseat a sitting judge because of the judge’s punitive-damages decisions will criticize the judge as soft on crime.

47. See Amy E. Black & Stanley Rothman, *Shall We Kill All the Lawyers First?: Insider and Outsider Views of the Legal Profession*, 21 HARV. J.L. & PUB. POL’Y 835, 842-49 (1998) (finding lawyers to be more socially liberal than the general public, but moderately conservative on economic issues); Paul Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 664-67 (1985) (finding the “legal elite” to be more civil libertarian than both the public and the “opinion elite”).

public endorsements of religion.<sup>48</sup> It is doubtful that the same groups would continue to oppose judicial elections if their opinions about substantive matters were in line with those of the electorate.

Reform groups seek to alter rules about judicial selection not to purify the judiciary but to produce a judiciary that is more amenable to the reform groups' favored policies. In other words, the reform groups are special interests.

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48. Recent elections have seen an increase in the degree to which other issues besides crime have played a substantial role in judicial elections. See Bronson D. Bills, *A Penny for the Court's Thoughts? The High Price of Judicial Elections*, 3 NW. J. L. & SOC. POL'Y 29 (2008) (discussing an election for chief justice of Nevada, in which the incumbent's defeat may be creditable to her vote in a civil tax case).