
**DO JUDICIAL ETHICS CANONS AFFECT PERCEPTIONS
OF JUDICIAL IMPARTIALITY?**

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[The judge’s] obligation of reasoned choice requires of the professional decisionmaker an *impartial* application of principles that are consistent with a community standard.¹

INTRODUCTION

Kennesaw Mountain Landis² was the first commissioner of Major League Baseball.³ He was also a federal judge;⁴ at the same time, in fact.⁵ Judge

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¹ ROBERT E. KEETON, KEETON ON JUDGING IN THE AMERICAN LEGAL SYSTEM 14 (1999) (emphasis added).

² See generally DAVID PIETRUSZA, JUDGE AND JURY: THE LIFE AND TIMES OF JUDGE KENESAW MOUNTAIN LANDIS (1998).

Landis first made headlines by imposing a \$29,000,000 fine against John D. Rockefeller's Standard Oil, then the largest fine ever handed down by an American court.⁶ But the headlines over Judge Landis's overlapping careers are what is of interest here. Judge Landis' dual employment – at a salary of \$42,500 from baseball and \$7,500 from the federal government – was seen as a threat to judicial impartiality,⁷ and proved to be just the catalyst the American Bar Association (“ABA”) needed to adopt model judicial ethics regulation.⁸ Ever since, the ABA has maintained a Model Code of Judicial Conduct and, more or less, so has every state.⁹

Today, there is again cause to believe judicial impartiality may be imperiled. Recent state ballot initiatives,¹⁰ increasingly bitter state judicial campaign tactics,¹¹ vitriolic federal confirmation battles,¹² jurisdiction stripping initiatives,¹³ and violent attacks on judges¹⁴ all contribute to an aura of public

³ *Id.* at 213. Landis is, perhaps, most well known for banning for life all eight players implicated in the Chicago Black Sox Scandal. *See id.* at 187-88.

⁴ *Id.* at 40.

⁵ *Id.* at 170.

⁶ *Id.* at 63. Indeed, this was the beginning of the litigation against Standard Oil which eventually led to the seminal antitrust precedent. *Id.* at 94. *See generally* Standard Oil Co. v. United States, 221 U.S. 1 (1911).

⁷ *See id.* at 196 (recounting how one of Judge Landis's contemporaries decried Landis's “vicious infidelity to public service”).

⁸ *See* ABA, ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT (2004), <http://www.abanet.org/judicialethics/about/background.html> [hereinafter ABA PAPER].

⁹ JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 1.03 (4th ed. 2007) (stating that only Montana has not yet passed a version of the model codes).

¹⁰ In South Dakota, the failed “Jail 4 Judges” initiative to amend Article VI of the state constitution would have “allow[ed] thirteen [volunteers] to expose [judges] to fines and jail . . . for making decisions which break rules defined by the [volunteers].” *See* South Dakota Secretary of State, 2006 South Dakota Ballot Question Attorney General Explanations, Constitutional Amendment E, http://www.sdsos.gov/elections/voteregistration/upcomingelection_2006BQExplanations.shtm. A failed Montana initiative would have amended that state's constitution to allow for the recall by petition of a judge for any reason. *See* 2006 Montana Constitutional Initiative No. 98 (CI-98), *available at* <http://sos.state.mt.us/ELB/archives/2006/CI/CI-98.asp>.

¹¹ *See, e.g.,* DEBORAH GOLDBERG ET AL., JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, at 4 (2005) (documenting the personal attack ads used in one West Virginia Supreme Court election).

¹² *See generally* CHARLES PICKERING, SUPREME CHAOS: THE POLITICS OF JUDICIAL CONFIRMATION AND THE CULTURE WAR (2005); Edith H. Jones, *Observations on the Status and Impact of the Judicial Confirmation Process*, 39 U. RICH. L. REV. 833 (2005).

¹³ *E.g.,* We the People Act, H.R. 5739, 109th Cong. (2006) (proposing limitations on federal jurisdiction over constitutional challenges to local regulation of religion and sexual practices); Marriage Protection Act of 2005, H.R. 1100, 109th Cong. (2005) (proposing

hostility towards the judiciary of which even the most insulated judge must be cognizant.¹⁵ Books,¹⁶ scholarly articles,¹⁷ and mainstream media¹⁸ have all highlighted the tension between the current socio-political environment and the ideal of judicial impartiality. Yet, judicial ethics canons are loosening,¹⁹ a trend which seems more apt to enable judicial indiscretion than to protect judicial impartiality.

Surprisingly, courts themselves are responsible for the trend towards looser judicial ethics canons. Beginning with *Republican Party of Minnesota v. White*,²⁰ and continuing in a wave of decisions over the last several years, courts have repeatedly held restrictions on judges' and judicial candidates' political activity unconstitutional.²¹ In the courts' views, the First Amendment rights of judges and judicial candidates are paramount to states' concerns about

limitations on federal jurisdiction over questions arising under the Defense of Marriage Act).

¹⁴ See Deborah Sontag, *In Courts, Threats Become Alarming Fact of Life*, N.Y. TIMES, Mar. 20, 2005, § 1, p. 1 (reporting on the killing of a federal judge's family in Chicago and of a judge in Atlanta as well as other incidents of judge-related violence).

¹⁵ But see Viet D. Dinh, *Threats to Judicial Independence, Real & Imagined*, 95 GEO. L.J. 929, 930 (2007) ("Public criticism of the federal courts is nothing new."); Bruce M. Selya, *The Confidence Game: Public Perceptions of the Judiciary*, 30 NEW ENG. L. REV. 909, 917-18 (1996) ("[T]o the extent that problems with public confidence in the judiciary has [sic] eroded, the sources of the erosion may be more deeply embedded in our civic consciousness than is typically presumed.").

¹⁶ See generally CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* (2006); CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006).

¹⁷ See generally Carolyn Dineen King, *Current Challenges to the Federal Judiciary*, 66 LA. L. REV. 661 (2006); Roger J. Miner, *Judicial Ethics in the Twenty-First Century: Tracing the Trends*, 32 HOFSTRA L. REV. 1107 (2004).

¹⁸ See, e.g., Erwin Chemerinsky & Catherine Fisk, *Judges do Make Law – It's Their Job*, USA TODAY, Aug. 24, 2005, available at http://www.usatoday.com/news/opinion/editorials/2005-08-23-forum-judges_x.htm; Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18.

¹⁹ See *infra* Part I.C.1.

²⁰ 536 U.S. 765 (2002).

²¹ See, e.g., *id.* at 788; *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002). Some earlier cases also treated constitutional challenges to judicial ethics canons. See, e.g., *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 231 (7th Cir. 1993) (Posner, J.) (striking down the "announce clause" of Illinois's judicial ethics canons as unconstitutional under the First Amendment); *Stretton v. Disciplinary Bd. Sup. Ct. of Pa.*, 944 F.2d 137, 146 (3d Cir. 1991) (upholding both the "announce clause" and "personal solicitation" clauses of the Pennsylvania judicial ethics canons despite First Amendment challenges); see also *Ackerson v. Ky. Judicial Ret. & Removal Comm'n*, 776 F. Supp. 309 (W.D. Ky. 1991) (holding Kentucky's judicial campaign-speech restrictions unconstitutional on much narrower grounds than either *White* or *Buckley*). Nonetheless, it is *White* that touched off the wave of litigation and regulatory responses which remain ongoing. See *infra* Part I.B-C.

judicial impartiality.²² These decisions have driven regulators of judicial conduct to liberalize judicial ethics canons.²³ Litigants have sought to further this drive towards deregulation,²⁴ while some commentators have hailed the litigants' victories, not only as vindication of judicial free speech rights,²⁵ but also as a boon for poorly informed voters in judicial elections.²⁶ Many, however, assert that strict judicial ethics canons are necessary to protect judicial impartiality²⁷ and decry the canons' loosening for opening a "Pandora's box."²⁸

This Note contributes an empirical perspective to the commentary on judicial ethics canons. It is certainly a rational intuition that, as states regulate judicial conduct less strictly, judges will seize the opportunity to act less impartially; or, at the very least, judges will be perceived as acting less impartially when they are less strictly regulated. Are these anything more than intuitive assumptions? Using econometric modeling and data on several variables, including the strictness of judicial ethics canons, this Note seeks to answer this question. A nationwide study of general counsels, which ranks the states from one to fifty according to how impartially the state's judges are

²² See, e.g., *White*, 536 U.S. at 787-88; *N.D. Family Alliance v. Bader*, 361 F. Supp. 2d 1021, 1039-40 (D.N.D. 2005).

²³ See *infra* Part I.C.1.

²⁴ See *infra* Part I.C.2.

²⁵ See Jon C. Blue, *A Well-Tuned Cymbal? Extrajudicial Political Activity*, 18 *GEO. J. LEGAL ETHICS* 1, 63 (2004) (concluding that it is a mistake to bar judges from political involvement); Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates are Unconstitutional*, 35 *IND. L. REV.* 735, 735 (2002); James L. Swanson, *Judicial Elections and the First Amendment: Freeing Political Speech*, 2002 *CATO SUP. CT. REV.* 85, 113.

²⁶ See Michael R. Dimino, *Pay No Attention to that Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 *YALE L. & POL'Y REV.* 301, 302 (2003); see also *infra* notes 132-38 and accompanying text.

²⁷ See Paul J. DeMuniz, *Eroding the Public's Confidence in Judicial Impartiality: First Amendment Federal Jurisprudence and Special Interest Financing of Judicial Campaigns*, 67 *ALB. L. REV.* 763, 768 (2004) (suggesting that loosening restrictions on judicial campaign speech may lead to "some judicial candidates indifferent to or actually intending the institutional consequences of their demagogic campaign tactics"); Vincent R. Johnson, *The Ethical Foundations of American Judicial Independence*, 29 *FORDHAM URB. L.J.* 1007, 1027-28 (2002); Randall T. Shepard, *Campaign Speech: Restraint & Liberty in Judicial Ethics*, 9 *GEO. J. LEGAL ETHICS* 1059, 1067 (1996); Lindsay E. Lippman, Note, *Republican Party of Minnesota v. White: The End of Judicial Election Reform?*, 13 *CORNELL J.L. & PUB. POL'Y* 137, 138 (2003).

²⁸ Press Release, Justice at Stake Campaign, Top Legal Organizations Express Concern About Impact of Supreme Court's *White* Decision on Fair and Impartial Courts (June 27, 2002), available at <http://faircourts.org/files/WhitePressRelease.pdf>; see also *infra* notes 143-52 and accompanying text.

perceived,²⁹ is used as data for the model's dependent variable. Data for the model's other variables were taken from a variety of sources more fully explained later.³⁰ Most importantly, data on the variable of interest – the strictness of state judicial ethics canons – were created by assigning points to each state according to how many limitations that state's judicial conduct code places on judges' political activity.³¹ The states' ranks in the study of judicial impartiality was regressed³² by the combined data on the states (including the score each state received based on their judicial codes of conduct) to determine whether a statistically significant correlation exists between the strictness of states' judicial ethics canons and how impartially general counsels perceive states judges as being.

This Note's empirical analysis finds no evidence to support the intuition that looser judicial ethics canons lead to less impartial judges. In fact, in this Note's model, the strictness of a state's code of judicial conduct does not significantly affect how impartially that state's judges are perceived in the nationwide survey of general counsels. That the perception of general counsels is examined (rather than judicial impartiality itself or perceptions of the public at large) obviously limits the conclusions that follow from the Note's analysis.³³ Still, the empirical approach hopefully makes a novel and important contribution to the scholarship on judicial ethics canons. Most interestingly, the empirical model reveals some factors that do influence perceptions of judicial impartiality, observations which should inform those who seek to fortify judges' independence in what they see as a difficult climate for judicial impartiality.

Part I of this Note sets out background information on judicial ethics canons, specifically: how the ABA developed the first canons of judicial ethics into the present day ABA Model Code of Judicial Conduct; how state versions of the ABA Model Code have been challenged in the courts; how the ABA, states, litigants, and commentators have reacted to the courts' rulings; and what those reactions say about the underlying theories of judicial ethics regulation. Part II details an original empirical model developed to test whether perceptions of judicial impartiality will be negatively impacted by less restrictive ethics canons. Part II then reports the empirical finding arising from this model: perceptions of judicial impartiality – at least the perceptions of general counsels at America's largest corporations – are not significantly impacted by the strictness of states' judicial conduct codes. Part III analyzes this result,

²⁹ HUMPHREY TAYLOR ET AL., 2007 U.S. CHAMBER OF COMMERCE STATE LIABILITY SYSTEMS RANKING STUDY (2007) [hereinafter RANKING STUDY].

³⁰ See *infra* notes 173-82 and accompanying text.

³¹ See *infra* notes 156-72 and accompanying text.

³² The results presented in the Note are derived from a Tobit regression model. See *infra* note 170 (explaining the rationale for using a Tobit model).

³³ See *infra* Part III.A-B (discussing these limitations); see also *infra* Part III.C-D (defending against other potential criticisms).

recognizing certain limitations on the model while refuting other potential criticisms. This Note was written with the debate over judicial ethics canons in mind and the econometric model developed here was designed to test the effect those canons have on perceptions of impartiality. Other variables were necessarily included in the model, however, and Part III discusses the variables from the model that did emerge as statistically significant contributors to perceptions of judicial impartiality, namely: a state's rate of educational attainment, the salary of state trial judges, and the number of law schools in a state.

I. THE CREATION AND EVOLUTION OF MODERN JUDICIAL CANONS

Before considering the mechanics and results of the empirical analysis, some background on the regulation of judicial ethics is warranted. The legality and wisdom of judicial canons of ethics, especially as the canons relate to judicial elections, has been widely debated of late. The following treatment of the history, leading cases, and commentary on the subject should assist in interpreting how canons of varying stricture might affect perceptions of judicial impartiality.

A. *Developing the Canons*

Despite passing a Canon of Professional Ethics for attorneys in 1908, the ABA did not ratify its Canons of Judicial Ethics until 1924.³⁴ Attempts had been made in 1909 and in 1917, but it was not until Judge Landis decided to moonlight as the commissioner of baseball that serious headway was made on the first code of judicial conduct.³⁵ The first model contained thirty-four separate canons.³⁶ The ABA suggested the canons "as a proper guide and reminder for judges"³⁷ but included no enforcement mechanism, leading at least one commentator to describe them as simply "hortatory."³⁸

In 1972, the 1924 Canons were substantially redrafted and consolidated into seven canons comprising the first ABA Model Code of Judicial Conduct.³⁹ With this new model, the ABA made the canons enforceable, stating "[t]he canons and text establish mandatory standards unless otherwise indicated."⁴⁰ The first Model Code was shortly followed by the Standards Relating to Judicial Discipline and Disability Retirement, which set out an enforcement

³⁴ ABA PAPER, *supra* note 8.

³⁵ *Id.*

³⁶ CANONS OF JUDICIAL ETHICS (1924), available at http://www.abanet.org/cpr/jclr/1924_canons.pdf.

³⁷ *Id.* pmb1.

³⁸ John F. Sutton, Jr., *A Comparison of the Code of Professional Responsibility with the Code of Judicial Conduct*, 1972 UTAH L. REV. 355, 355.

³⁹ See MODEL CODE OF JUDICIAL CONDUCT (1972) [hereinafter 1972 MODEL CODE].

⁴⁰ *Id.* Preface.

framework for the new Code.⁴¹ By 1990, forty-seven states had adopted the 1972 Code or some variation of it.⁴² The 1972 Code contained the now infamous “announce clause” forbidding a judge or judicial candidate from “announc[ing] his views on disputed legal or political issues.”⁴³

Yet another Model Code was promulgated in 1990.⁴⁴ The 1990 version further consolidated the seven canons into five.⁴⁵ Its enforcement counterpart, the Model Rules for Judicial Disciplinary Enforcement, provided for sanctions anywhere between a private admonishment and removal from office.⁴⁶ Two new states, Rhode Island and Wisconsin, have since adopted variations of the 1990 Code and twenty states having previously adopted the 1972 Code updated to the 1990 Code.⁴⁷ Montana is the only state not to have adopted some adaptation of the ABA’s Model Codes, instead following a format similar to the original 1924 Canons.⁴⁸

The 1990 ABA Model Code contained five canons directing judges (and, in the case of Canon 5, judicial candidates) to 1) “uphold the integrity and independence of the judiciary,”⁴⁹ 2) “avoid impropriety and the appearance of impropriety in all of the judge’s activities,”⁵⁰ 3) “perform the duties of judicial office impartially and diligently,”⁵¹ 4) “so conduct the judge’s extra-judicial activities as to minimize the risk of conflict with judicial obligations,”⁵² and 5) “refrain from inappropriate political activity.”⁵³ Canon 5 abandoned the announce clause of the 1972 model, but contained several other provisions that became fodder for litigation across the country. Subsections (A)(3)(d)(i) and (ii), respectively, prohibited “pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office,”⁵⁴ and “statements that commit or appear to commit the candidate with respect to

⁴¹ See Barbara B. Crabb & Vivi L. Dilweg, *Preface* to MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT 1, 1 (1994), available at <http://www.abanet.org/cpr/juddis/preface.html> [hereinafter 1994 MODEL ENFORCEMENT RULES].

⁴² ALFINI ET AL., *supra* note 9, § 1.03.

⁴³ 1972 MODEL CODE, *supra* note 39, Canon 7(B)(1)(c).

⁴⁴ MODEL CODE OF JUDICIAL CONDUCT (1990) [hereinafter 1990 MODEL CODE].

⁴⁵ *Id.*

⁴⁶ See 1994 MODEL ENFORCEMENT RULES, *supra* note 41, Rule 6(2).

⁴⁷ ALFINI ET AL., *supra* note 9, § 1.03.

⁴⁸ See *Harris v. Smartt*, 57 P.3d 58, 71-72 (Mont. 2002); see also MONTANA CANONS OF JUDICIAL ETHICS (1980), available at <http://www.montanacourts.org/supreme/boards/canons.rtf>.

⁴⁹ 1990 MODEL CODE, *supra* note 44, Canon 1.

⁵⁰ *Id.* Canon 2.

⁵¹ *Id.* Canon 3.

⁵² *Id.* Canon 4.

⁵³ *Id.* Canon 5.

⁵⁴ *Id.* Canon 5(A)(3)(d)(i).

cases, controversies or issues that are likely to come before the court.”⁵⁵ Subsection (A)(1) set out various political activity limitations.⁵⁶ Subsection (C)(2) ordered that a judge or judicial candidate “shall not personally solicit or accept campaign contributions or personally solicit publicly stated support.”⁵⁷ Respectively, these provisions are referred to as “pledge or promise clauses,” “commit clauses,” “appear to commit clauses,” “political activity limitations,” and “personal solicitation prohibitions.” The ABA Model Code was retooled again in 2007,⁵⁸ but only after a recent wave of litigation targeting these provisions of the 1990 Code.

B. *Litigating the Canons*

Most contemporary discussions of state judicial conduct codes take the Supreme Court’s 2002 decision in *Republican Party of Minnesota v. White*⁵⁹ as the starting point.⁶⁰ By a vote of five to four,⁶¹ the Supreme Court held the announce clause of Minnesota’s Code of Judicial Conduct unconstitutional as a violation of the First Amendment.⁶² Because the announce clause presented a content-based restriction and “burden[ed] a category of speech that is ‘at the core of the First Amendment,’” the Court applied strict scrutiny.⁶³ Minnesota advanced preservation of judicial impartiality and preservation of the *appearance* of judicial impartiality as separate compelling interests supporting

⁵⁵ *Id.* Canon 5(A)(3)(d)(ii).

⁵⁶ Canon 5(A)(1) states:

Except as authorized in Sections 5B(2), 5C(1) and 5C(3), a judge or a candidate for election or appointment to judicial office shall not: (a) act as a leader or hold an office in a political organization; (b) publicly endorse or publicly oppose another candidate for public office; (c) make speeches on behalf of a political organization; (d) attend political gatherings; or (e) solicit funds for, pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.

Id. Canon 5(A)(1) (internal references omitted).

⁵⁷ *Id.* Canon 5(C)(2).

⁵⁸ See MODEL CODE OF JUDICIAL CONDUCT (2007); see also *infra* notes 102-09 and accompanying text (discussing the discrepancies between the 1990 and 2007 Model Codes).

⁵⁹ 536 U.S. 765 (2002).

⁶⁰ See, e.g., Talbot D’Alemberte, *Foreword: The Legacy of Republican Party of Minnesota v. White: Judicial Independence, Judicial Selection, and the First Amendment in the Post-White Era*, 55 *DRAKE L. REV.* 597, 598 (2007); Jonathan Remy Nash, *Prejudging Judges*, 106 *COLUM. L. REV.* 2168, 2168 (2006); Tobin A. Sparling, *Keeping Up Appearances: The Constitutionality of the Model Code of Judicial Conduct’s Prohibition of Extrajudicial Speech Creating the Appearance of Bias*, 19 *GEO. J. LEGAL ETHICS* 441, 443 (2006).

⁶¹ *White*, 536 U.S. at 766.

⁶² *Id.* at 788.

⁶³ *Id.* at 774 (quoting *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 861 (2001) (citing *Eu v. S.F. County. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989))).

the announce clause.⁶⁴ Justice Scalia, writing for the majority, went on to consider three potential definitions of “judicial impartiality,”⁶⁵ but concluded Minnesota’s announce clause was not sufficiently narrowly tailored to serve any of these three possible interests.⁶⁶

In his final analysis, Justice Scalia refused to recognize a distinction between judicial and legislative elections.⁶⁷ He observed “an obvious tension between the article of Minnesota’s popularly approved Constitution which provides that judges shall be elected, and the Minnesota Supreme Court’s announce clause which places most subjects of interest to the voters off limits.”⁶⁸ He continued by citing cases on legislative and initiative elections for the proposition that “the First Amendment does not permit [the state] to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about.”⁶⁹ Although Justice Scalia expressly limited *White*’s application to announce clauses,⁷⁰ his view of judicial campaign regulation as no different from other election regulations calls into question all restrictions of judges’ political activity.⁷¹

Litigants quickly realized *White*’s broad potential. In *Spargo v. New York State Commission on Judicial Conduct*,⁷² the Northern District of New York held certain restrictions on judicial candidates’ political activity unconstitutional.⁷³ Justice Spargo, a New York state trial judge challenged his state’s provision barring a judge or judicial candidate from:

⁶⁴ See *id.* at 775.

⁶⁵ *Id.* Justice Scalia criticized the State for being “vague . . . about what they mean by ‘impartiality.’” *Id.* He posited that impartiality may mean any of three things: first, “lack of bias for or against either party to the proceeding,” *id.*; second, “lack of preconception in favor of or against a particular legal view,” *id.* at 777; or, third, “open-mindedness” which Justice Scalia explained as requiring a judge “be willing to consider views that oppose his preconceptions,” *id.* at 778.

⁶⁶ See *id.* at 775-84.

⁶⁷ See *id.* at 784 (“Justice Ginsburg greatly exaggerates the difference between judicial and legislative elections.”).

⁶⁸ *Id.* at 787.

⁶⁹ *Id.* at 788.

⁷⁰ *Id.* at 770 (“[T]he Minnesota Code contains a so-called ‘pledges or promises’ clause, . . . a prohibition that is not challenged here and on which we express no view.”).

⁷¹ Nat Stern, *The Looming Collapse of Restrictions on Judicial Campaign Speech*, 38 SETON HALL L. REV. 63, 81 (2008).

⁷² 244 F. Supp. 2d 72 (N.D.N.Y. 2003).

⁷³ *Id.* at 89 (“[A] rule prohibiting an elected judge or judicial candidate from participating in politics is not narrowly tailored to serve the state’s interest in an independent judiciary.”). *But see In re Watson*, 794 N.E.2d 1, 8 (N.Y. 2003) (upholding New York’s pledges or promises clause); *In re Raab*, 793 N.E.2d 1287, 1293 (N.Y. 2003) (upholding New York’s proscription of judicial candidates’ political contributions to campaigns other than their own).

(c) engaging in any partisan political activity . . . ; (d) participating in any political campaign for any office or permitting his or her name to be used in connection with any activity of a political organization; (e) publicly endorsing or publicly opposing (other than by running against) another candidate for public office; (f) making speeches on behalf of a political organization or another candidate; [or] (g) attending political gatherings.⁷⁴

The federal district court found the limitations on political activity broader than specific limitations such as announce or commit clauses and thus even more constitutionally offensive than the provisions at issue in *White*.⁷⁵

The *Spargo* judgment was later vacated on jurisdictional grounds,⁷⁶ but even more expansive rulings remain undisturbed. In *North Dakota Family Alliance, Inc. v. Bader*,⁷⁷ the District of North Dakota held the pledge or promise, commit, and appear to commit clauses in the North Dakota Code of Judicial Conduct unconstitutional.⁷⁸ The court found all the clauses to be “essentially de facto ‘announce clauses’” and thus unconstitutional after *White*.⁷⁹ Chief District Judge Hovland opined that “[f]or First Amendment rights to mean anything, judicial candidates must be allowed to impart whatever information they choose about their views on political, legal, and social issues, and their personal philosophy – without restriction.”⁸⁰ In closing, the court questioned “[w]hether the decision in *White* left any room for the regulation of the speech of judicial candidates.”⁸¹ District Courts in Kentucky⁸² and Kansas⁸³ have

⁷⁴ *Spargo*, 244 F. Supp. 2d at 82 (quoting RULES GOVERNING JUDICIAL CONDUCT, N.Y. COMP. CODES R. & REGS. tit. 22, §§ 100.1-100.5 (2003)).

⁷⁵ *Id.* at 88.

⁷⁶ *Spargo v. N.Y. State Comm’n on Judicial Conduct*, 351 F.3d 65 (2d Cir. 2003).

⁷⁷ 361 F. Supp. 2d 1021 (D.N.D. 2005).

⁷⁸ *Id.* at 1042. The pledge or promise and commit clauses considered in *Bader* were slightly more restrictive than those set out in the ABA Model Code then in effect. Compare NORTH DAKOTA CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i)-(ii), as quoted in *Bader*, 361 F. Supp. 2d at 1024 (“A candidate for a judicial office: (d) shall not: (i) make pledges or promises of conduct in office other than the faithful and impartial performance of duties of the office; (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . .”), with MODEL CODE OF JUDICIAL CONDUCT (as amended in 2003) [hereinafter 2004 MODEL CODE] Canon 5A(3)(d)(i) (“[S]hall not: (i) with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office . . .”), and NORTH DAKOTA CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (as amended in 2006), available at <http://www.court.state.nd.us/rules/judicial/frameset.htm> (mirroring the ABA’s version).

⁷⁹ *Bader*, 361 F. Supp. 2d at 1042.

⁸⁰ *Id.* at 1040.

⁸¹ *Id.* at 1041.

⁸² *Family Trust Found. of Ky. v. Wolnitzek*, 345 F. Supp. 2d 672, 711 (E.D. Ky. 2004) (“Kentucky’s canon of judicial conduct that professes to prohibit candidates from making

issued preliminary injunctions against those states' pledge or promise and commit clauses, apparently agreeing with Chief Judge Hovland that there is no longer any constitutional room for regulating judicial campaign speech.

Codes of judicial conduct have not fared any better in the federal appeals courts. In *Weaver v. Bonner*,⁸⁴ the Eleventh Circuit held Georgia's personal solicitation clause unconstitutional.⁸⁵ The court summarily rejected the state's arguments in support of the clause, devoting a paltry two paragraphs and a single precedential citation to its analysis.⁸⁶ Previous decisions have tended to accept the connection between judicial ethics canons and impartiality, but have held various clauses unconstitutional upon finding them overbroad, i.e., not "narrowly tailored" in the language of strict scrutiny.⁸⁷ In *Weaver*, however, the Eleventh Circuit disputed outright the argument that personal solicitation prohibitions would protect impartiality at all.⁸⁸

The Eighth Circuit, presiding en banc over the remanded *White* case,⁸⁹ interpreted the Supreme Court's ruling most expansively of all. In an opinion by Circuit Judge Beam, the court held Minnesota's political activity and personal solicitation restrictions unconstitutional.⁹⁰ The circuit court rehashed Justice Scalia's various definitions of judicial impartiality⁹¹ and accepted as compelling the State's asserted interest in protecting litigants from biased

promises, pledges or commitments in fact limits the candidate's ability to announce his or her views in violation of the First Amendment to the United States Constitution.").

⁸³ Kan. Judicial Watch v. Stout, 440 F. Supp. 2d 1209, 1240 (D. Kan. 2006) ("The Court finds that plaintiffs are substantially likely to succeed on the merits of their claims concerning the pledges and promises, commits, and solicitation clauses . . .").

⁸⁴ 309 F.3d 1312 (11th Cir. 2002).

⁸⁵ *Id.* at 1322. The personal solicitation clause states that judicial candidates "shall not themselves solicit campaign funds, or solicit publicly stated support." *Id.* at 1315 (quoting GEORGIA CODE OF JUDICIAL CONDUCT Canon 7(B)(2) (2002)).

⁸⁶ *Id.* at 1322-23.

⁸⁷ See, e.g., Republican Party of Minn. v. White, 536 U.S. 765, 776 (2002); N.D. Family Alliance v. Bader, 361 F. Supp. 2d 1021, 1039 (D.N.D. 2005).

⁸⁸ *Weaver*, 309 F.3d at 1323 ("Successful candidates will feel beholden to the people who helped them get elected regardless of who did the soliciting of support."). The Eleventh Circuit could have extended *White* and *Weaver* even further in a case two years later. In *Christian Coalition of Alabama v. Cole*, plaintiffs challenged the Alabama Judicial Inquiry Commission's opinion prohibiting judges and judicial candidates from answering questionnaires soliciting their legal and political views. 355 F.3d 1288, 1290 (11th Cir. 2004). Alabama narrowly avoided an unfavorable ruling by withdrawing the Commission's opinion and rendering the appeal moot. *Id.* at 1293.

⁸⁹ Republican Party of Minn. v. White, 416 F.3d 738 (8th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1157 (2006).

⁹⁰ *Id.* at 766.

⁹¹ See *supra* note 65 for a brief discussion of Justice Scalia's proposed definitions of impartiality.

judges.⁹² But the regulations again proved too broadly tailored because they did “not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*.”⁹³ If the State wanted to protect litigants, the circuit court reasoned, “recusal is *the* least restrictive means.”⁹⁴ This rationale gives *White* its broadest reach yet because, in comparison to recusal, any regulation of judges’ political activity will be viewed as overbroad and therefore unconstitutional.⁹⁵

C. *Responding to White and Its Progeny*

Various parties have been compelled – or have, at least, felt compelled – to respond to the hostility federal courts are expressing towards judicial ethics canons.⁹⁶ The ABA and state judicial conduct commissions modified their codes to remove constitutionally offensive provisions. Litigants (and their counsel) have obliged themselves of the courts in supporting deregulation. And commentators have welcomed the opportunity to offer a wide range of views on the propriety of deregulating judicial political behavior.

1. The Regulators

The political activities clause at issue in the remanded *White* case was somewhat more restrictive than the analogous ABA Model Code provision,⁹⁷

⁹² *Id.* at 754.

⁹³ *Id.* (quoting *White*, 536 U.S. at 776).

⁹⁴ *Id.* at 755 (emphasis added).

⁹⁵ See Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 570 (2004) (arguing that “the possibility of this less-speech-restrictive alternative suggests that even the narrowest content-based prohibitions on truthful judicial campaign speech may be unconstitutional”).

⁹⁶ Notably, the trend in state courts has not been so hostile to judicial ethics canons. In New York, the same state where the *Spargo* court ruled against portions of the New York Code of Judicial Conduct, the state Court of Appeals upheld both the state’s pledge or promises clause and its restrictions on judicial candidates’ contributions to campaigns other than their own. *In re Watson*, 794 N.E.2d 1, 8 (N.Y. 2003) (upholding the pledge or promises clause); *In re Raab*, 793 N.E.2d 1287, 1293 (N.Y. 2003) (upholding the personal solicitation prohibition). The Supreme Court of Florida interpreted *White* even more literally and upheld the State’s appear to commit clause. See *In re Kinsey*, 842 So. 2d 77, 87 (Fla. 2003). As part of that decision, the court affirmed the judicial commission’s imposition of a \$50,000 fine and public reprimand. *Id.* at 92. Most recently, the Supreme Court of New Mexico upheld the State’s rule against judges and judicial candidates endorsing non-judicial candidates for office. *In re Vincent*, 172 P.3d 605, 607 (N.M. 2007).

⁹⁷ Compare MINNESOTA CODE OF JUDICIAL CONDUCT Canon 5A(1)(a) & (d) as quoted in *Republican Party of Minn. v. White*, 416 F.3d 738, 745 (8th Cir. 2005) (“[A] judge or candidate for election to judicial office shall not: (a) identify themselves as members of a political organization, except as necessary to vote in an election . . . (d) attend political gatherings; or seek, accept, or use endorsements from a political organization . . .”), with 2004 MODEL CODE, *supra* note 78, Canon 5A(1)(a) & (d) (“[A] judge or a candidate for

but the solicitation clauses in both *White* and *Weaver* were comparable to those in the 1990 Model Code.⁹⁸ The 1990 Code also contained pledge or promise, commit, and appear to commit clauses similar, if not identical, to those struck down in *Bader*, *Wolnitzek*, and *Stout*.⁹⁹ In 2003, the ABA responded by retiring its appear to commit clause.¹⁰⁰ Faced with the potential unconstitutionality of several of its other model provisions, the ABA also created a commission to propose additional revisions on a larger scale.¹⁰¹ The commission's proposals were adopted as the new ABA Model Code of Judicial Conduct in February 2007.¹⁰²

In particular, the ABA adopted changes to Rule Four, previously Canon Five, in an effort "to find a balance that accommodates the political realities of judicial selection and election while ensuring that the concepts of judicial independence, integrity, and impartiality are not undermined."¹⁰³ Apparently, however, the appropriate "balance" is not that different from the balance struck in the 1990 Code. In fact, the ABA expanded the political activity limitations from five provisions to thirteen.¹⁰⁴ The number of provisions does not tell the whole story, though, because many of the "new" provisions have simply been moved from other sections. Notably, the personal solicitation, pledge or promise, and commit clauses remain, and are now found in this section of the "new" Rule Four.¹⁰⁵ According to the ABA commission, the personal solicitation, pledge or promise, and commit clauses "are solidly supportable limits that must be set,"¹⁰⁶ and five comments are therefore dedicated to

election or appointment to judicial office shall not: (a) act as a leader or hold an office in a political organization . . . (d) attend political gatherings . . .").

⁹⁸ Compare MINNESOTA CODE OF JUDICIAL CONDUCT Canon 5B(2), as quoted in *White*, 416 F.3d at 745 ("A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support."), and GEORGIA CODE OF JUDICIAL CONDUCT Canon 7B(2) as quoted in *Weaver v. Bonner*, 309 F.3d 1312, 1315 (11th Cir. 2002) ("judges and judicial candidates shall not themselves solicit campaign funds, or solicit publicly stated support."), with 2004 MODEL CODE, *supra* note 78, Canon 5C(2) ("A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support.").

⁹⁹ See *supra* note 69 (comparing the ABA Model Code and North Dakota's version of the Code); see also *Kan. Judicial Watch v. Stout*, 440 F. Supp. 2d 1209, 1216 (D. Kan. 2006); *Family Trust Found. of Ky. v. Wolnitzek*, 345 F. Supp. 2d 672, 676 (E.D. Ky. 2004).

¹⁰⁰ See 2004 MODEL CODE, *supra* note 78, Canon 5(A)(3)(d)(i).

¹⁰¹ See generally ABA Joint Commission To Evaluate the Model Code of Judicial Conduct, <http://www.abanet.org/judicialethics/home.html> (last visited Feb. 11, 2008).

¹⁰² MODEL CODE OF JUDICIAL CONDUCT (2007) [hereinafter 2007 MODEL CODE].

¹⁰³ ABA JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, DRAFT REPORT 7 (Nov. 2006) [hereinafter ABA REPORT].

¹⁰⁴ Compare 2004 MODEL CODE, *supra* note 78, Canon 5(A)(1)(a)-(e), with 2007 MODEL CODE, *supra* note 102, R. 4.1(A)(1)-(13).

¹⁰⁵ 2007 MODEL CODE, *supra* note 102, R. 4.1(A)(8) & (13).

¹⁰⁶ ABA REPORT, *supra* note 103, at 8.

distinguishing the *White* decision.¹⁰⁷ In addition to reorganizing these familiar clauses, the ABA has set new limits on political activity as well. Subsections 4.1(A)(6) and (7) state that a judge or judicial candidate shall neither “publicly identify himself or herself as a candidate of a political organization,” nor “seek, accept, or use endorsements from a political organization.”¹⁰⁸ Rule 4.2 excepts judicial candidates in a public election from these last two restrictions,¹⁰⁹ but, considered as a whole, the latest ABA Model Code of Judicial Conduct hardly retreats from the positions that touched off the debate over judicial ethics canons in the first place.

States, by virtue of the fact that their codes of judicial conduct are actually tested in court, have been forced to respond more defensively than the ABA. North Carolina went the farthest, amending its canons in connection with its implementation of partial public financing for judicial elections.¹¹⁰ North Carolina’s amendments to its code of judicial conduct effectively created an affirmative grant of authority from what had previously been styled as a prohibition.¹¹¹ Additionally, the State removed the pledge or promise and personal solicitation clauses.¹¹² Other States responded with more modest changes, such as limiting language that narrows the scope of their pledge or promise and commit clauses.¹¹³ Texas, acting the summer *White* was decided and just before upcoming elections, made minimal substantive changes but felt compelled to implement them “without the full and deliberate study the Court would ordinarily employ.”¹¹⁴ Still other States opted for a quick fix, choosing

¹⁰⁷ See 2007 MODEL CODE, *supra* note 102, R. 4.1 cmts. 11-15; see also ABA REPORT, *supra* note 103, at 8 (“Perhaps the most significant addition to Comment [sic] accompanying Rule 4.1, however, is the series of five comments that discuss the distinction between ‘announce clauses,’ . . . and ‘pledges and promises’ clauses . . .”).

¹⁰⁸ 2007 MODEL CODE, *supra* note 102, R. 4.1(A)(6) & (7).

¹⁰⁹ *Id.* R. 4.2(C) (“A judicial candidate in a partisan public election may . . . (1) identify himself or herself as a candidate of a political organization; and (2) seek, accept, and use endorsements of a political organization.”).

¹¹⁰ J.J. GASS, AFTER *WHITE*: DEFENDING AND AMENDING CANONS OF JUDICIAL ETHICS 4 (2004).

¹¹¹ See NORTH CAROLINA CODE OF JUDICIAL CONDUCT (1973) (amended 2006); GASS, *supra* note 110, at 4 (“North Carolina . . . turned the political activity regulations on their heads – changing the basic canon from ‘[a] judge should refrain from political activity inappropriate to his judicial office’ to the current ‘[a] judge may engage in political activity consistent with his status as a public official.’”).

¹¹² GASS, *supra* note 110, at 4.

¹¹³ *E.g.*, Order Amending Rule 81, Rules of the Supreme Court Arizona Code of Judicial Conduct (June 8, 2004), available at http://www.supreme.state.az.us/ethics/2004_Order_Amending_Judicial_Code_of_Conduct.pdf.

¹¹⁴ Matthew J. Medina, Note, *The Constitutionality of the 2003 Revisions to Canon 3(E) of the Model Code of Judicial Conduct*, 104 COLUM. L. REV. 1072, 1072 n.3 (2004) (quoting Approval of Amendments to the Texas Code of Judicial Conduct, Misc. Docket No. 02-9167, at 1 (Tex. Aug. 22, 2002)). Texas considered more thorough amendments, see

to issue orders espousing narrower interpretations of problematic canons.¹¹⁵ The result, for now at least, is a range of approaches whereby states enforce some combination of campaign speech and other political activity limitations.

2. The Litigator(s)

James Bopp, Jr. and his supporters are hoping to narrow, if not eliminate entirely, the range of permissible approaches to judicial ethics regulation. Bopp, known to some as the Big Bopper, runs a small firm dedicated almost exclusively to challenging judicial canons.¹¹⁶ Bopp argued the *White* case before the Supreme Court¹¹⁷ and on remand,¹¹⁸ as well as the *Bader*¹¹⁹ and *Wolnitzek*¹²⁰ cases. Bopp argues, on behalf of his clients, that limitations on judicial speech “deprive[] the voting public of information . . . necessary to make an informed choice,” and foster a “patronizing implication that the general electorate must be protected from itself by remaining in ignorance.”¹²¹ Regarding political activity restrictions, Bopp has argued they “censor[] the message of the campaigner . . . thus directly and absolutely abridging First Amendment rights.”¹²² As his results demonstrate, Bopp won support at the Court and elsewhere. Most impressively, Bopp swayed Justice O’Connor, one of the many who has recently commented on unhealthy threats to judicial independence.¹²³ Justice O’Connor concurred in *White* to express disapproval of electoral systems of judicial selection, but agreed with the underpinning of Justice Scalia’s majority opinion that the state was out of luck once it made that choice:

generally FINAL REPORT AND RECOMMENDATIONS OF THE SUPREME COURT’S TASK FORCE ON THE CODE OF JUDICIAL CONDUCT (2005), *available at* <http://www.scjc.state.tx.us/pdf/rpts/cjcfinalreport.pdf>, but does not appear to have implemented them, *see* TEXAS CODE OF JUDICIAL CONDUCT Canon 5 (1993) (amended 2002) (reflecting none of the 2005 Report’s suggestions).

¹¹⁵ *See* Cynthia Gray, *The States’ Response to Republican Party of Minnesota v. White*, 86 JUDICATURE 163, 163-64 (2002) (detailing interpretative changes by the California, Indiana, and Ohio judicial conduct commissions).

¹¹⁶ *See* Terry Carter, *The Big Bopper: This Terre Haute Lawyer Is Exploding the Canons of Judicial Campaign Ethics*, 92 A.B.A. J. 31, 32 (2006).

¹¹⁷ *See* Republican Party of Minn. v. White, 536 U.S. 765, 766 (2002).

¹¹⁸ *See* Republican Party of Minn. v. White, 416 F.3d 738, 744 (8th Cir. 2005).

¹¹⁹ *See* N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1024 (D.N.D. 2005).

¹²⁰ *See* Family Trust Found. of Ky. v. Wolnitzek, 345 F. Supp. 2d 672, 675 (E.D. Ky. 2004).

¹²¹ Brief of Petitioner at 49, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (No. 01-521), 2002 WL 100597.

¹²² Supplemental Brief of Plaintiffs-Appellants at 7, Republican Party of Minn. v. White, 416 F.3d 738 (8th Cir. 2002) (No. 99-4021), 2002 WL 32102161.

¹²³ *See* O’Connor, *supra* note 18; Justice Sandra Day O’Connor, *The Importance of Judicial Independence*, Remarks Before the Arab Judicial Forum (Sept. 15, 2003), <http://usinfo.state.gov/journals/itdhr/0304/ijde/oconnor.htm>.

In [choosing an electoral system] the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.¹²⁴

Bopp's latest strategy, implemented with the help of his clients, is to send judicial candidates questionnaires soliciting their views on a range of political, legal, and social issues.¹²⁵ The questionnaires give candidates the option of declining to answer due to concern their responses will trigger ethics complaints.¹²⁶ This approach is designed to allow Bopp's special interest clients to sue as plaintiffs, a role previously filled only by judges being punished under the canons.¹²⁷ The questionnaire strategy is, thus far, one of the few aspects of Bopp's approach that courts appear to disfavor. The Third Circuit recently affirmed a district court's denial of standing to the Pennsylvania Family Institute, a Bopp client that had sent out ideological questionnaires.¹²⁸ Still more recently, the Seventh Circuit overturned a district court decision granting standing based on the questionnaires.¹²⁹ What's more, the Ninth Circuit affirmed a district court's award of costs and attorneys fees to members of the Disciplinary Board of the Alaska Bar Association who were unsuccessfully sued by the Alaska Right to Life Political Action Committee.¹³⁰ The circuit court construed Bopp's appeal for pre-enforcement standing as "wholly without merit."¹³¹

¹²⁴ *White*, 536 U.S. at 792 (O'Connor, J., concurring); see also David Schultz, *Minnesota Republican Party v. White and the Future of State Judicial Selection*, 69 ALB. L. REV. 985, 986 (2006) ("[T]he turn to elections to select judges forfeits judicial independence for public accountability.").

¹²⁵ Carter, *supra* note 116, at 34.

¹²⁶ See *Pa. Family Inst. v. Black*, 489 F.3d 156, 164 (3d Cir. 2007) (citing *Indiana Right to Life, Inc. v. Shepard*, 463 F. Supp. 2d 879 (N.D. Ind. 2006)); *North Dakota Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021 (D.N.D. 2005); and *Family Trust Found. of Kentucky v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004) as cases where the plaintiff's standing was based on such surveys, but denying standing for plaintiffs in the instant case).

¹²⁷ See *Ind. Right to Life*, 463 F. Supp. 2d at 884 (granting standing to Indiana Right to Life, in part, based on judicial candidates' refusals to respond to a questionnaire due to ethical concerns), *rev'd*, 507 F.3d 545 (7th Cir. 2007).

¹²⁸ *Pa. Family Inst.*, 489 F.3d at 169.

¹²⁹ *Ind. Right to Life, Inc. v. Shepard*, 507 F.3d 545, 550 (7th Cir. 2007).

¹³⁰ *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 852 (9th Cir. 2007).

¹³¹ *Id.* (quoting *Karam v. City of Burbank*, 352 F.3d 1188, 1195 (9th Cir. 2003)).

3. The Commentators

When not appealing to the courts, Bopp makes his case in the commentary.¹³² As in the courts, Bopp's interpretation of the First Amendment seems to be shared by others.¹³³ Bopp's views are not shared universally, however, and some commentators go so far as to predict dire policy consequences should the deregulation of judicial conduct be allowed to continue.¹³⁴

Writing before the *White* decision was announced, Professor Chemerinsky seemed to know just what the Court would say: "If a state chooses to have judges elected or retained by the voters, then the electorate should have the necessary information to make an informed choice."¹³⁵ Elaborating on the necessity of information about judicial candidates, Chemerinsky explained that "[t]he beliefs and views of a judge inevitably influence how [his or her] discretion will be exercised."¹³⁶ Therefore, just as an appointing "President or governor looks to a judicial candidate's ideology, the voters – in an election or retention election – are justified in doing so."¹³⁷

In an article focusing on more strictly legal arguments, Professor Michelle Friedland argued that, after *White*, all judicial canons' restrictions on campaign activity are unconstitutional.¹³⁸ This is so, she posits, because the only compelling interest supporting the canons is the protection of litigants' due process right to an unbiased judge.¹³⁹ Because the canons preclude speech that would not require a judge's disqualification on due process grounds, and further, because disqualification is a more surely constitutional solution to potential bias problems, Friedland finds that the existing canons, even if redrafted to apply more narrowly, are unconstitutional in states where judges are elected.¹⁴⁰

Chemerinsky, Friedland, and others¹⁴¹ notwithstanding, the bulk of commentary on the *White* opinion and the ensuing liberalization of judicial

¹³² See generally James Bopp, Jr., *Preserving Judicial Independence: Judicial Elections as the Antidote to Judicial Activism*, 6 FIRST AMENDMENT L. REV. 180 (2007).

¹³³ See *infra* notes 138-44 and accompanying text.

¹³⁴ See *infra* notes 145-51 and accompanying text.

¹³⁵ Chemerinsky, *supra* note 25, at 736; see also *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) ("[T]he First Amendment does not permit [the State] to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about.").

¹³⁶ Chemerinsky, *supra* note 25, at 736.

¹³⁷ *Id.* at 738.

¹³⁸ Friedland, *supra* note 95, at 605.

¹³⁹ *Id.* at 567.

¹⁴⁰ See *id.* at 614.

¹⁴¹ See Blue, *supra* note 25, at 63; Alan B. Morrison, *The Judge Has No Robes: Keeping the Electorate in the Dark About What Judges Think About the Issues*, 36 IND. L. REV. 719, 739 (2003); Swanson, *supra* note 25, at 113.

campaign speech has been negative.¹⁴² The president of the American Bar Association at the time called *White* “a bad decision” that would “open a Pandora’s box.”¹⁴³ Scholarly articles have been more explicit in their reasons for condemning *White*. Professor Wendy Weiser’s article counters the assertion that protection of litigants’ due process rights is the only compelling justification for the canons.¹⁴⁴ Weiser argues that states have a compelling interest in protecting the judiciary’s independence from other branches of government, and that this interest is served by restrictions on judicial campaign activity.¹⁴⁵ In so arguing, Weiser expands on the observations of Washington Superior Court Judge Robert H. Alsdorf, who previously drew attention to the *White* Court’s failure to define the role of the judiciary and attendant failure to distinguish between elected judges and other elected officials.¹⁴⁶

The most interesting commentaries, however, are those linking looser judicial canons with undesirable policy consequences. One student author characterizes the *White* decision as a major “setback” to the previously successful national judicial election reform movement targeting “the ills of excessive campaign financing, inappropriate mudslinging, special interest group endorsement of candidates, and other types of campaign foul play.”¹⁴⁷ The same author concludes that “[t]he very viability of a free and independent judiciary is at stake” in the debate over judicial ethics regulation.¹⁴⁸

Justice Paul J. DeMuniz of the Oregon Supreme Court believes “a permissive campaign speech environment will likely attract some judicial candidates indifferent to or actually intending the institutional consequences of their demagogic campaign tactics.”¹⁴⁹ Justice DeMuniz further predicted that the *White* decision would drive campaign spending higher and that “[a]s the expenditures increase and the perniciousness of rhetoric increases, the public’s

¹⁴² See, e.g., Rachel Paine Caufield, *In the Wake of White: How States Are Responding to Republican Party of Minnesota v. White and How Judicial Elections Are Changing*, 38 AKRON L. REV. 625, 636-37 (2005) (relating the reactions of several members of the legal community).

¹⁴³ Press Release, *supra* note 28.

¹⁴⁴ Wendy Weiser, *Regulating Judges’ Political Activity After White*, 68 ALB. L. REV. 651, 655 (2005).

¹⁴⁵ *Id.* at 688 (“[T]he political activity canons ensure that prospective judges are not entangled in the same political machinery as the political branches.”).

¹⁴⁶ See Robert H. Alsdorf, *The Sound of Silence: Thoughts of a Sitting Judge on the Problem of Free Speech and the Judiciary in a Democracy*, 30 HASTINGS CONST. L.Q. 197, 213 (2003) (“The Court did not pose the question as one raising any fundamental issues of the nature of judging or of the separation of powers . . . [and instead] appears to have considered the electoral process to be always political, regardless of the office involved.”).

¹⁴⁷ Lippman, *supra* note 27, at 138.

¹⁴⁸ *Id.* at 166.

¹⁴⁹ DeMuniz, *supra* note 27, at 768.

confidence in the fairness of the judiciary will continue to seep away.”¹⁵⁰ In addition, Rachel Paine Caufield claims that anecdotal evidence of an upswing in campaign spending during Pennsylvania’s 2003 judicial election cycle substantiates at least the first half of Justice DeMuniz’s hypothesis.¹⁵¹ What remains to be seen is whether deregulation of judicial campaign speech and political activity is affecting perceptions of the judiciary’s impartiality.

II. EMPIRICALLY TESTING THE EFFECT OF JUDICIAL ETHICS CANONS ON PERCEPTIONS OF THE JUDICIARY’S IMPARTIALITY

The rest of this Note aims to test the latter half of Justice DeMuniz’s prediction: whether confidence in a state’s judiciary is “eroded” by looser judicial ethics canons. Intuition suggests that, in a deregulated environment, candidates will be more likely to engage in questionable behavior. But a more comprehensive approach is needed – one that goes beyond anecdotal or simple intuitive conjecture. This Note develops an original, econometric model to test this intuition and concludes that, in all likelihood, confidence in the impartiality of a state’s judges – as measured in a nationwide study of general counsels – is unaffected by variation in the strictness of judicial ethics canons.

A. *Methodology*

The 2007 State Liability Systems Ranking Study¹⁵² reports the results of a poll of general counsels and other senior attorneys at public corporations.¹⁵³ The poll was conducted by Harris Interactive on behalf of the U.S. Chamber of Commerce Institute for Legal Reform.¹⁵⁴ The Harris Interactive poll ranks from one to fifty the perceived fairness of each of the states’ court systems based on a variety of factors, including how impartial the state’s judges are perceived as being.¹⁵⁵ In ranking the states according to judicial impartiality, the poll quantifies a variable that would ordinarily be very difficult to express as the dependent variable in an econometric study. This Note develops an econometric model of variables likely to affect perceptions of judicial impartiality as reported in the Harris poll, hopefully capitalizing on the unique opportunity the poll presents.

Quantifying the strictness of state judicial ethics canons was more difficult. First, all fifty states’ judicial conduct codes were collected.¹⁵⁶ Second, the

¹⁵⁰ *Id.*

¹⁵¹ See Caufield, *supra* note 142, at 638.

¹⁵² RANKING STUDY, *supra* note 29.

¹⁵³ *Id.* at 6.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 33.

¹⁵⁶ In order to ensure the codes studied reflected those that would have been perceivable, the codes collected were those in effect at the time the Harris Poll was conducted: December 2006. See *id.* at 6.

states' codes were evaluated to determine whether those codes contained any or all of five restrictive elements provided in the ABA Model Code, (pledge or promise clauses, commit clauses, political activity limitations, except as otherwise permitted clauses, and personal solicitation prohibitions) and two additional elements present in some states' codes though not in the ABA Model Code (partisan activity/identification prohibitions and appear to commit clauses).¹⁵⁷ Third, the states' codes were scored based on their strictness. States received two points for each pledge or promise clause, appear to commit clause, commit clause, and except as otherwise permitted clause, making a total of eight points available if all these elements were present. Points for these clauses were all or nothing; the element was either present or it was not.

For the other elements of judicial ethics canons evaluated, a range of points was available. Each state's political-activity limitations were compared to the 2004 ABA Model Code and three strictness points were available. One point was given if a state had restrictions less stringent than the ABA Model Code provisions; two points, if a state either adopted the ABA Model Code intact or had modifications of equal stricture (for instance additional restrictions, but also additional exceptions); and, three points, if a state had modified the ABA Model Code to make it more strict.¹⁵⁸ A state could score either one or two points for its partisan activity/partisan identification prohibition: two points where the prohibition was absolute;¹⁵⁹ one point where the prohibition was

¹⁵⁷ The five elements of the 2004 ABA Model Code are: a pledge or promise clause; a commit clause; political activity limitations; an except as otherwise permitted clause; and a personal solicitation prohibition. *See, e.g.*, 2004 MODEL CODE, *supra* note 78, Canon 5(A)(3)(d)(i) (prohibiting "pledges [or] promises . . . inconsistent with the impartial performance of the adjudicative duties of the [judicial] office"); *id.* (proscribing "commitments that are inconsistent with the impartial performance of the adjudicative duties of the [judicial] office"); *id.* Canon 5(A)(1)(a)-(e) (setting out five political activity limitations); *id.* Canon 5(C)(2) (prohibiting judicial candidates from personally soliciting campaign contributions). The two elements not present in the ABA Model Code are a partisan activity/partisan identification limitation and an appear to commit clause. *See, e.g.*, FLORIDA CODE OF JUDICIAL CONDUCT Canon 7(C)(3) (2006) ("The candidate should refrain from commenting on the candidate's affiliation with any political party A judicial candidate attending a political party function must avoid conduct that suggests or appears to suggest support of or opposition to a political party"); ARKANSAS CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (1993) (amended 1996) (barring "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court").

¹⁵⁸ Political-activity limitations refers to a group of restrictions that, in many states, makes up a large portion of the state's regulation of campaign speech and conduct. *See, e.g.*, NEW YORK CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(a)-(i) (setting out nine distinct limitations on judges' and candidates' political activity). For that reason, three points were available rather than two.

¹⁵⁹ *E.g.*, OREGON REVISED CODE OF JUDICIAL CONDUCT JR 4-102(C) (2002) ("A judicial candidate shall not knowingly . . . publicly identify . . . for the purpose of election, as a member of a political party other than by registering to vote.").

more flexible.¹⁶⁰ Likewise, one or two points were available on the same basis for personal solicitation prohibitions.¹⁶¹ A state could thus score anywhere between zero and fifteen on the overall strictness of its code of judicial conduct, though no state scored lower than one or higher than thirteen.

As an example of the coding for the strictness of judicial ethics canons, consider the Ohio Code of Judicial Conduct.¹⁶² First, the Ohio Code received two points each for its pledge or promise,¹⁶³ commit,¹⁶⁴ and appear to commit clauses.¹⁶⁵ Next, the Ohio Code's political activity limitations had to be considered. Although the Ohio Code lacked one element of the 2004 ABA Model Code,¹⁶⁶ the Ohio Code set out much more detailed restrictions on judges' and candidates' solicitation and use of campaign funds¹⁶⁷ and on general "campaign standards."¹⁶⁸ The political activity limitations were therefore viewed as more restrictive than those of the 2004 ABA Model Code and three points were given to this element of the Ohio Code.¹⁶⁹ The Ohio Code's attempt to regulate partisan identification also presented a unique circumstance. Although the Ohio Code purports to disallow judges and candidates from publicly presenting themselves as a member of a particular political party, the notes following the latest version of the Ohio Code made

¹⁶⁰ *E.g.*, NEW YORK CODE OF JUDICIAL CONDUCT Canon 5(A)(1) (1996) (amended 2006) ("Prohibited political activity shall include: . . . (c) engaging in any partisan political activity, provided that nothing in this section shall prohibit a judge or candidate from participating in his or her own campaign for elective judicial office.").

¹⁶¹ For a strict personal solicitation prohibition, see ALASKA CODE OF JUDICIAL CONDUCT Canon 5(C)(3) (1998) ("A judge who is a candidate for retention in judicial office shall not personally solicit or accept any funds to support his or her candidacy or personally solicit publicly stated support for his or her candidacy."). For a more flexible version, see MISSOURI CODE OF JUDICIAL CONDUCT Canon 5(B)(2) (2006) ("[A judicial] candidate shall not solicit in person campaign funds from persons likely to appear before the judge.").

¹⁶² OHIO CODE OF JUDICIAL CONDUCT (1997) (amended 2005).

¹⁶³ *Id.* Canon 7(B)(2)(c).

¹⁶⁴ *Id.* Canon 7(B)(2)(d).

¹⁶⁵ *Id.*

¹⁶⁶ Compare 2004 MODEL CODE, *supra* note 79, Canon 5(A)(1)(d) (barring a judge or judicial candidate from attending political gatherings), with OHIO CODE OF JUDICIAL CONDUCT Canon 7(B)(3)(a)(i) (expressly allowing judges and candidates to attend political gatherings).

¹⁶⁷ OHIO CODE OF JUDICIAL CONDUCT Canon 7(C)(1)-(7).

¹⁶⁸ *Id.* Canon 7(D)(1)-(11).

¹⁶⁹ The coding of this element of the Ohio Code exemplifies the subjectivity that was, in some instances, unavoidable in the coding process. The political activity limitations discussed here, perhaps, could have been viewed as equally restrictive to the 2004 ABA Model Code if the absence of the one limitation was viewed as offsetting the presence of additional restrictions. In the author's judgment, however, the additional restrictions on campaign solicitations and conduct more than outweighed the one missing restriction on attendance of political gatherings.

clear that this provision was no longer in force.¹⁷⁰ The Ohio Code thus scored a zero in the partisan activity/identification category. The Ohio Code also scored a zero for not having an except as otherwise permitted clause. Last, the Ohio Code scored two points for having a clear prohibition on judges or candidates personally soliciting support.¹⁷¹ In total, the Ohio Code was given a strictness score of eleven.¹⁷²

Table 1 reports descriptive statistics for the strictness variable:

Table 1

Mean	8.32
Median	9
Standard Deviation	3.466693
Observations	50

In addition to the variable of interest – strictness of state judicial ethics canons – the final model included several other variables to enhance the model’s robustness. Data on state judicial campaign contributions was compiled from the National Institute on Money in State Politics website and its 2006 report on judicial elections.¹⁷³ The report provided aggregate campaign contribution figures by state for the years 1999-2006.¹⁷⁴ Also reported were the number of candidates in each election cycle.¹⁷⁵ The website provides additional information on a state or candidate basis. Particularly useful is the breakdown of each candidate’s receipts according to the contributor’s economic interest.¹⁷⁶ Using this feature, the amount and percentage of total contributions derived from “general business” and “lawyers and law firms” was calculated for each state. To mitigate potential distortion created by

¹⁷⁰ OHIO CODE OF JUDICIAL CONDUCT Canon 7(B)(3)(b).

¹⁷¹ *Id.* Canon 7(C)(2)(a).

¹⁷² The data on the strictness of all states’ judicial ethics canons is available in the Appendix, *infra*.

¹⁷³ JAMES SAMPLE ET AL., JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006 [hereinafter 2006 MONEY REPORT]; *see also* THE NAT’L INST. ON MONEY IN STATE POLITICS, STATE ELECTIONS OVERVIEW 2004 (Dec. 2005) [hereinafter 2004 MONEY REPORT]; THE NAT’L INST. ON MONEY IN STATE POLITICS, STATE ELECTIONS OVERVIEW 2002 (Nov. 2004) [hereinafter 2002 MONEY REPORT]. All reports and additional campaign contribution data are available at <http://www.followthemoney.org>.

¹⁷⁴ *See* 2006 MONEY REPORT, *supra* note 173, at 59-60. Only the figures for 2002-2006 were used in the final model.

¹⁷⁵ *Id.*

¹⁷⁶ *E.g.*, The Nat’l Inst. on Money in State Politics, <http://www.followthemoney.org/database/StateGlance/candidate.phtml?si=20042&c=396050> (last visited Feb. 10, 2008) (providing detailed information on the campaign receipts of Michael F. Bolin, a 2004 Republican candidate for the Alabama Supreme Court).

extraordinarily aggressive spending in any single race, the total contributions from 2002, 2004, and 2006 were combined and percentages calculated relative to this sum.¹⁷⁷

Additional data on objective factors that might influence perceptions of judicial impartiality were gathered from the U.S. Census Bureau (Census), Bureau of Economic Analysis (BEA), American Bar Association (ABA), and National Center for State Courts (NCSC). All of these data reflect characteristics of the states' legal systems or of individual states themselves. The Census website provided the estimated 2006 population of each state and the percentage of each state's population that did not obtain at least a high school diploma or the equivalent.¹⁷⁸ The BEA provided total 2005 GDP figures for each state as well as the amount of 2005 GDP attributable to the legal services industry.¹⁷⁹ Legal services GDP was also calculated as a percentage of total GDP for each state. The ABA had information on the number of lawyers and number of accredited law schools in each state.¹⁸⁰ The NCSC contributed data on the total number of civil and criminal court claims filed in each state during 2003,¹⁸¹ as well as cost adjusted figures for the salary of trial judges in each state's courts of general jurisdiction.¹⁸²

B. *Results*

As the cases, commentary, and codes themselves demonstrate, the law of judicial ethics has recently been in a state of flux. The resulting range of approaches to judicial-conduct regulation, taken together with the Harris poll, presented the opportunity to empirically estimate whether the flux in regulation significantly contributes to fluctuations in perceived impartiality. The short

¹⁷⁷ In the cases of Pennsylvania and Wisconsin, which elect judges in odd years, the data reflects the 2005, 2003, and 2001 election cycles.

¹⁷⁸ United States Census Bureau, Current Population Survey (CPS) Table Creator, http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=PEP&_submenuId=&_lang=en&_ts= (last visited Feb. 10, 2008) (reporting population data); United States Census Bureau, American Fact Finder, Education, http://factfinder.census.gov/servlet/ACSSAFFPeople?_submenuId=people_5&_sse=on (follow "Population who are High School Graduates or Higher map by state" hyperlink) (last visited Feb. 10, 2008) (reporting educational attainment data).

¹⁷⁹ Bureau of Econ. Analysis, Gross Domestic Product by State, <http://www.bea.gov/region/gsp/> (last visited Feb. 10, 2008).

¹⁸⁰ ABA, Market Research Dep't, http://www.abanet.org/marketresearch/2007_Natl_Lawyer_FINALonepage.pdf (last visited Feb. 10, 2008). Data on the number of law schools in each state is available on the Law School Admissions Council site, <http://officialguide.lsac.org/Search/GeographicSearch.aspx> (last visited Feb. 10, 2008).

¹⁸¹ Nat'l Ctr. for State Courts, Court Statistics Project, http://www.ncsconline.org/D_Research/csp/CSP_Main_Page.html (last visited Feb. 10, 2008).

¹⁸² See NAT'L CTR. FOR STATE COURTS, SURVEY OF JUDICIAL SALARIES (Jan. 1, 2006), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/judicial&CISOPTR=122>.

answer is that the two are not significantly related. Table 2 reports the results of a Tobit¹⁸³ regression of the states' ranks in the Harris Interactive poll by the following independent variables: the percentage of a state's total GDP attributable to legal services; the percentage of a state's population over the age of twenty-five but without a high school diploma; the state's average trial-judge salary adjusted for cost of living; total judicial campaign contributions for the years 2002-2006; the percentage of contributions from general business; the percentage of contributions from lawyers and law firms; a dummy variable equal to one in states with some form of judicial elections; and, the strictness of the judicial code of conduct.

¹⁸³ The Tobit model was used rather than standard ordinary least squares (OLS) regression because the dependent variable is limited to a possible range from one to fifty. See TAKESHI AMEMIYA, *ADVANCED ECONOMETRICS* 360 (1985). The Tobit approach presents one difficulty, however: analyzing a Tobit model's goodness of fit – that is, the model's overall predictive capability – is more complicated than with standard OLS. See generally Michael R. Veall & Klaus F. Zimmerman, *Goodness of Fit Measures in the Tobit Model*, 56 *OXFORD BULL. OF ECON. & STATS.* 485 (1994). Although one can, as here, obtain a pseudo R-squared value, that value is not readily comparable to the R-squared value reported from an OLS regression. *Id.* at 485. Nonetheless, the presence here of three significant variables, three others approaching significance, a relatively high Chi Squared value, and a very low P-value related to that Chi Squared value all suggest the model has substantial predictive capability. Additionally, a standard OLS regression of the same variables resulted in an adjusted R-squared value of 0.39.

Table 2

Regression Statistics	
LR Chi-Squared	36.56
P Value of Chi-Squared	0.0001
Pseudo R-Squared	0.0894
Log Likelihood	-186.13765

Independent Variable	Coefficient	T-Statistic
Elections (=1 if some form of judicial elections)	4.000891	0.88
Percentage of Contributions from General Business	-34.45365	-1.04
Percentage of Contributions from Lawyers and Law Firms	14.23724	1.41
Total Judicial Campaign Contributions	0.000006	1.90
Average Trial Judge Salary (Cost of Living Adjusted)	-0.0002911	-2.95
Percentage of 25 and Over Population Without a High School Diploma	2.055196	4.32
Number of Law Schools	-1.820377	-2.45
Percentage of GDP Attributable to Legal Services	10.761	1.83
Total Number of Claims Filed	0.00000308	1.71
Strictness of Judicial Ethics Canons	0.3522191	0.78
Constant	12.93767	1.03

With a T-statistic of only 0.78, the variable of interest is not a significant contributor to this model of perceived judicial impartiality. Although the strictness variable does not appear significant, three other variables do emerge as potentially significant contributors to perceptions of judicial impartiality. Most significantly, the percentage of a state's population without a high school diploma has a strong negative effect on perceived impartiality. Holding other variables constant, a one-percentage-point increase in the attainment variable causes a state's impartiality ranking to be two rankings higher (i.e., worse). Similarly, the amount of trial judges' salaries has emerged as a highly significant force on perceptions of judicial impartiality. The salary effect is less dramatic than the attainment effect; holding other variables constant, it takes an approximately \$5,000 increase in trial judge salary to lower (improve) a state's impartiality ranking by one spot. The third significant variable is the number of law schools in a state. All else constant, one additional law school in a state would lower (again, improve) the state's ranking by nearly two spots.

III. ANALYZING THE RESULTS

The empirical results find no evidence to support the idea that stricter judicial ethics canons lead to a perception of increased impartiality, a result that contradicts much legal scholarship¹⁸⁴ and even some judicial opinions.¹⁸⁵ This Part presents possible explanations for the insignificance of the canons' effects on perceived impartiality and also explores some of the model's potential shortcomings. Finally, this Part discusses those variables which did emerge as statistically significant contributors to perceptions of judicial impartiality and suggests some rationale for those findings.

A. *General Counsels vs. the General Public*

The result might not be the same if the perception of the public at large were measured rather than that of general counsels. In several ways, the views of general counsels may be distinct from those of workers in other occupations. For example, general counsels may be more likely to trust in other checks on judicial bias, such as recusal and disqualification rules.¹⁸⁶ General counsels may also be more likely to appreciate the countervailing First Amendment considerations, and thus less likely to view judicial ethics canons as positive devices. In addition, general counsels have interests distinct from those of the general population. If looser canons mean greater judicial campaign contributions,¹⁸⁷ and if contributing to a judge's campaign is viewed as a way to influence that judge's vote, then general counsels may view the liberalization of judicial ethics canons as a good thing.

A survey conducted just before the *White* decision supports the idea that the public in general may perceive judicial impartiality differently than do general counsels.¹⁸⁸ Despite generally favoring rules that would increase the amount of information available about judicial candidates,¹⁸⁹ eighty-two percent of

¹⁸⁴ See Caufield, *supra* note 142, at 646-47; DeMuniz, *supra* note 150, at 768.

¹⁸⁵ E.g., *In re Watson* 794 N.E.2d 1, 7 (N.Y. 2003) (“[The state judicial conduct code] furthers the State’s interest in preventing actual or apparent party bias . . . because it prohibits a judicial candidate from making promises that compromise the candidate’s ability to behave impartially, or to be *perceived* as unbiased and open-minded by the public . . .” (emphasis added)).

¹⁸⁶ E.g., 2007 MODEL CODE, *supra* note 102, R. 2.11(A) (“A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.”).

¹⁸⁷ See Caufield, *supra* note 142, at 638 (claiming that Pennsylvania saw record levels of campaign expenditures in the elections immediately following a loosening of its ethics canons).

¹⁸⁸ David B. Rottman, *The White Decision in the Court of Public Opinion: Views of Judges and the General Public*, 39 CT. REV. 16, 24 (Spring 2002), available at <http://aja.ncsc.dni.us/courtrv/cr39-1/CR39-1Rottman.pdf>.

¹⁸⁹ *Id.* (“The public is more supportive than the judiciary of reforms that will bring more information into judicial elections.”).

randomly selected respondents found the following statement either somewhat or very convincing: “Judges should be treated differently than other public officials since they must make independent decisions about what the law says. Judges should not have to raise money like politicians, make campaign promises like politicians, or answer to special interests.”¹⁹⁰ Agreement with that statement indicates that, unlike the general counsels whose perceptions the Harris poll studied, the public links increased regulation of judges with increased impartiality.

Judges, however, seem likely to agree with the general counsels. Although the survey results indicate “pervasive” concern among judges “over elections and campaign fundraising activity,”¹⁹¹ nearly two thirds of judges nonetheless reported their states had “the right amount and type” of judicial campaign speech restrictions.¹⁹² Like the general counsels studied here, state judges do not perceive tightened judicial ethics regulation as a guarantor of judicial impartiality.

Judges and general counsels, as repeat players in the civil justice system, are likely the most informed about the system. But, the fact that the general public might perceive judicial impartiality differently than do judges and general counsels is not a trifling consideration. The Harris Interactive poll currently represents the best evidence on perceptions of judicial impartiality; further study of the general public’s perceptions is warranted and would be useful for extending this Note’s analysis.

B. *Perception vs. Reality*

Another limitation is that the analysis here is based on the Harris Interactive poll’s observations of *perceptions* of judicial impartiality. Perception is, of course, distinct from reality and the deregulation of judicial ethics may be having an unperceived but significantly negative effect on judicial impartiality. As Judge Kozinski aptly put it, “[j]udicial ethics, where it counts, is hidden from view.”¹⁹³

Naturally, measuring perception rather than reality is a limitation of this Note’s analysis. But perception is important of its own right. From an economic perspective, perception impacts efficiency. Fifty-seven percent of respondents in the Harris Interactive poll reported that the litigation environment in a state is likely to influence important business decisions, such as where to locate.¹⁹⁴ If business that would otherwise be located in a particular jurisdiction is diverted due to perceived bias or unfairness in the courts there, efficiency suffers. From a philosophical perspective, Justice

¹⁹⁰ *Id.* at 19.

¹⁹¹ *Id.* at 23.

¹⁹² *Id.* at 18 tbl.6.

¹⁹³ Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1106 (2004).

¹⁹⁴ RANKING STUDY, *supra* note 152, at 9.

Frankfurter said it best: “justice must satisfy the appearance of justice.”¹⁹⁵ The judiciary’s legitimacy depends as much, if not more, on perception than it does on reality.¹⁹⁶ Regardless of the actual state of judicial impartiality, calls for change will only come after problems are perceived. The old saying that perception is reality may not be strictly true, but as the basis of people’s actions, perception is equally important.

C. *Plaintiffs vs. Defendants*

Deep philosophical inquiries aside, two more technical points deserve mention. First, because the Harris Interactive poll is conducted annually at the behest of the U.S. Chamber of Commerce’s Institute for Legal Reform,¹⁹⁷ and because the poll surveys general counsels who most often wind up at the defendant’s table rather than at the plaintiff’s, the rankings of judicial impartiality could be biased in favor of pro-business judges.¹⁹⁸ The breakdown of judicial contributions by whether the donor was associated with general business or lawyer/law firm economic interests was included in the final model to observe whether such bias did, in fact, appear. The empirical results support the null hypothesis – that there is no pro-business bias in the Harris Interactive poll – but it’s a relatively close call. The positive coefficient on lawyer/law firm contributions suggests that, all else constant, as lawyer/law firm contributions make up a greater part of total contributions in a state, the state’s judges may be perceived as less impartial. Conversely, the negative coefficient on general business contributions indicates that if a state’s judges receive proportionally more money from business-related donors, the state will fare better in the impartiality rankings. Neither of these variables is statistically significant, however, and both variables’ confidence intervals straddle zero. Still, these results certainly do not prove that the Harris Interactive poll’s rankings are completely unbiased.

D. *Endogeneity vs. Exogeneity*

The second technical difficulty is that the empirical model may suffer from an endogeneity problem. It seems plausible that states perceived as being less impartial would generate more campaign contributions than states perceived as

¹⁹⁵ *Offutt v. United States*, 348 U.S. 11, 14 (1954).

¹⁹⁶ Cf. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1789 (2005) (“[T]he legal legitimacy of the Constitution depends more on its present sociological acceptance than on the (questionable) legality of its formal ratification.”).

¹⁹⁷ See generally Inst. for Legal Reform, <http://www.instituteforlegalreform.com/index.cfm> (last visited Feb. 10, 2008).

¹⁹⁸ See, e.g., Inst. for Legal Reform, About ILR, <http://www.instituteforlegalreform.com/about/index.cfm> (last visited Feb. 10, 2008) (listing “neutraliz[ing] plaintiff trial lawyers’ excessive influence over the legal and political systems” among ILR’s “aims”). On the “excessive influence” of trial lawyers, see 2006 MONEY REPORT, *supra* note 173, at 18 (“Business Interests Donate Twice as Much as Lawyers”).

being more fair; perhaps contributors spot biased judges and contribute more believing they will get a better return on their investments. If this were the case, the total campaign contributions variable would be correlated with the model's residual errors and the model's results would be unreliable. Fortunately, an endogeneity test suggested the total campaign contributions variable is not endogenously correlated with perceived judicial impartiality.¹⁹⁹ Additionally, all the same variables remain significant and the coefficients approximately the same when the total campaign contributions variable is excluded from the model.

E. *Influence vs. Insignificance*

The model suggests the strictness of a state's code of judicial conduct will not significantly impact its impartiality ranking in the Harris Interactive poll. Yet, three important observations emerge about what variables *do* significantly impact perceptions of impartiality.

First, the most significant variable in the model was the percentage of the state's population over the age of twenty-five but without a high school diploma or the equivalent. The model predicted that just a one point increase in this non-attainment percentage would cause the state to slip two spots in the rankings.²⁰⁰ Two possible explanations for this come to mind. First, it is possible the Harris Interactive poll respondents were not judging judicial impartiality strictly on its merits. If information about states' attainment levels is commonly known, or accurately assumed, then perhaps this result reveals a bias against states accurately perceived as being less educated. Second, educational attainment in a state may actually be having an impact on judicial impartiality. Perhaps educational attainment says something about the pool of candidates available for election or appointment to a state's judiciary; that is, perhaps there are not as many qualified candidates in states with low attainment numbers and the judiciary is forced to reach further into the pool, necessarily becoming less selective as to issues like impartiality as it does so.

The second interesting and unexpected outcome of the model is the data on the effect of state trial judge's salaries. The model suggested that higher salaries make for a judiciary that is perceived as more impartial.²⁰¹ Again, there are two possible explanations for this, depending on whether one believes the salaries effect is perceived directly or indirectly. If poll respondents are actually aware of state judicial salary levels, they might again be ignoring the

¹⁹⁹ The endogeneity check was performed by, first, including total campaign contributions as the regressand in a model with all the other independent variables as regressors. The residuals from this regression were then included in a second model with all the original independent variables as regressors and judicial impartiality as the regressand. Because the residuals were not a statistically significant variable in this last model, the inference of endogeneity may safely be rejected.

²⁰⁰ See *supra* p. 805 tbl.2.

²⁰¹ See *supra* p. 805 tbl.2.

merits of judicial impartiality and instead responding based on the assumed effect of higher salaries. Alternatively, it is possible that salaries have a real effect on impartiality that is accurately but indirectly perceived by the poll respondents. With the non-attainment variable, it seemed possible that poll respondents might have known or been able to accurately assume states' relative levels of educational attainment. With respect to the state judicial salaries variable, however, it seems unlikely this information is well known or susceptible to accurate conjecture by the poll respondents. Because this information on states judges' salaries is likely not well known, it seems more likely that increased salary has a real effect on impartiality which the Harris Interactive poll respondents indirectly, but accurately, perceive.²⁰²

The third apparently significant variable in the model is the number of law schools in a state. The model indicated that one additional law school in a state would lead the state's judicial impartiality ranking to decrease by nearly two spots.²⁰³ This result may be viewed similarly to the non-attainment data. Perhaps the poll respondents view states with more law schools as generally more educated, effectively the converse of perceiving states with higher non-attainment levels as generally less educated. And perhaps these views are reflected in the Harris Interactive poll because of bias in favor of generally more educated states. Alternatively, the number of law schools in a state might say something about the pool of candidates for state judicial positions. Assuming most law students practice in the state where they attend school,²⁰⁴ the more law schools there are in a state, the deeper the pool of candidates for state judicial positions. With a deeper candidate pool, the state could be more selective as to its judges and, insofar as impartiality is a desired quality, could choose better judges from that pool.

²⁰² Cf. Scott Baker, *Should We Pay Federal Circuit Judges More?*, 88 B.U. L. REV. 63, 64 (2008) (concluding "that judicial pay is largely irrelevant to the performance of the circuit courts"). Professor Baker's analysis, as the title states, took place in the context of federal circuit courts, for which there is no data on impartiality analogous to the Harris Interactive poll used here. Instead, Baker looked to "the nature of votes in controversial cases, the speed of controversial case disposition, the frequency of citation to outside circuit authority, [and] the strength of opinions as measured by citation counts," in addition to the rate of dissent in controversial cases, to draw his conclusions about circuit judge performance. *Id.* This Note's results suggest Professor Baker's conclusion that judicial pay is "irrelevant" to judicial quality may stem from the difficulty in measuring judicial quality in the federal circuit court context. See Frank Cross, *Perhaps We Should Pay Federal Circuit Judges More*, 88 B.U. L. REV. 815, 819-21 (2008).

²⁰³ See *supra* p. 805 tbl. 2.

²⁰⁴ See *America's Best Graduate Schools*, U.S. NEWS & WORLD REPORT, Apr. 7, 2008 (reporting that, with the exception of schools ranked in the top twenty and schools located in the District of Columbia, the majority of each law school's graduates take the bar exam for the state in which the school is located).

CONCLUSION

The value of empirical research lies in its ability to test our theories and intuitions. Here, intuition suggests general counsels would account for the strictness of a state's judicial ethics canons in reporting their perception of how impartially the state's judges render decisions. The model presented above finds no evidence to support that intuition.²⁰⁵ The model does produce other significant results, however, as a state's level of judicial salaries, level of educational attainment, and number of law schools all emerge as significant contributors to perceptions of judicial impartiality.

After the Supreme Court's decision in *White*, supporters of judicial ethics canons have relied on intuition in claiming disastrous policy consequences will result from deregulating judicial conduct. Hopefully, the findings here challenge these supporters to evaluate the rationales upholding the canons and – if the supporters continue to press judicial impartiality and the appearance of judicial impartiality as compelling interests in the canons' favor – to bolster their reasoning with statistical evidence. The findings here could be useful in another respect. There is general concern, apart from the debate over judicial ethics canons, about threats to judicial independence and impartiality in the current socio-political environment. In particular, the finding that trial judges' salary levels significantly affects perceptions of judicial impartiality should inform concerns about judicial independence and impartiality. The findings suggest efforts to raise state judges' salaries would be more fruitful than the present efforts to enforce strict judicial ethics canons.

²⁰⁵ On the proper interpretation of econometric models finding no evidence to reject a null hypothesis, see Cross, *supra* note 202, at 823-24.

APPENDIX

The following table reports how each state's code of judicial conduct was scored according to the measures explained in Part II.A, *supra*.

- A = Pledge or Promise Clause
- B = Appear to Commit Clause
- C = Commit Clause
- D = Political Activity Limitations
- E = Partisan Identification/Partisan Activity Prohibition
- F = Except as Otherwise Permitted Clause
- G = Personal Solicitation Prohibition

State	A	B	C	D	E	F	G	Total Score
Alabama	2	2	0	1	0	0	1	6
Alaska	2	2	2	3	0	2	2	13
Arizona	2	0	2	1	0	2	2	9
Arkansas	2	2	2	2	1	0	2	11
California	0	0	2	1	0	0	0	3
Colorado	2	2	0	2	0	2	2	10
Connecticut	0	0	0	2	0	2	0	4
Delaware	0	0	0	2	0	2	0	4
Florida	2	0	2	2	2	0	2	10
Georgia	0	0	2	1	0	0	0	3
Hawaii	0	0	0	2	0	2	0	4
Idaho	2	2	2	1	0	2	2	11
Illinois	0	2	2	1	0	2	2	9
Indiana	2	2	2	3	0	2	2	13
Iowa	2	0	2	2	0	2	0	8
Kansas	2	2	2	2	0	2	2	12
Kentucky	0	0	2	1	0	2	2	7
Louisiana	2	0	2	1	0	2	2	9
Maine	2	2	2	2	0	2	2	12
Maryland	2	0	2	1	1	0	0	6
Massachusetts	0	0	0	2	0	0	0	2
Michigan	2	0	0	1	0	0	2	5
Minnesota	2	0	0	1	0	2	2	7
Mississippi	2	2	2	2	0	2	2	12
Missouri	2	0	0	1	0	2	1	6
Montana	2	0	0	1	0	0	0	3
Nebraska	2	2	2	2	0	2	2	12
Nevada	2	0	2	1	0	2	2	9
New Hampshire	2	0	2	2	0	2	0	8
New Jersey	0	0	0	3	0	2	0	5
New Mexico	2	0	2	1	1	0	0	6
New York	2	0	2	2	1	2	2	11

State	A	B	C	D	E	F	G	Total Score
North Carolina	0	0	0	1	0	0	0	1
North Dakota	2	0	2	3	0	2	2	11
Ohio	2	2	2	3	0	0	2	11
Oklahoma	2	0	2	1	0	0	2	7
Oregon	2	0	0	1	2	0	2	7
Pennsylvania	2	2	2	3	0	2	2	13
Rhode Island	2	2	2	2	0	2	2	12
South Carolina	2	2	2	2	0	2	2	12
South Dakota	2	0	2	1	0	2	0	7
Tennessee	2	2	2	2	0	0	2	10
Texas	2	0	0	1	0	0	0	3
Utah	2	0	0	3	1	0	2	8
Vermont	2	2	2	2	0	2	2	12
Virginia	0	0	0	2	0	2	0	4
Washington	2	2	2	3	2	0	2	13
West Virginia	2	2	2	2	0	2	2	12
Wisconsin	2	0	2	2	1	0	2	9
Wyoming	2	2	2	2	0	2	2	12