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Lawyer, Candidate, Beneficiary, AND Judge? Role Differentiation in Elected Judiciaries

James Sample[†]

INTRODUCTION

From 2002 to 2009, the United States Supreme Court decided three cases directly bearing on one of the most notable, or perhaps notorious, examples of American exceptionalism—state judicial elections.

First, the Court held, 5-4, in *Republican Party of Minnesota v White*¹ that a state canon prohibiting judicial candidates from announcing their views on issues “likely to come before [them]” failed First Amendment strict-scrutiny analysis.² The juxtaposition of the holding in *White* with the majority’s express caveat that it “neither assert[ed] nor impl[ie]d that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office”³ continues to spawn challenges to state judicial canons across the country, with many trial and appellate courts reaching diametrically different results.⁴ Six years later, in *New York State Board of Elections v López Torres*,⁵ the Court upheld New York’s uniquely byzantine system of trial-court elections, emphasizing legislative deference and party associational rights over ballot access and voter and candidate in-

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¹ 536 US 765 (2002).

² *Id.* at 771.

³ *Id.* at 783.

⁴ See *In re Kinsey*, 842 S2d 77, 87 (Fla 2003) (denying a judge’s constitutional challenge to Canon 7 of Florida’s Code of Judicial Conduct because its “pledges and promises clause” and commit clause were sufficiently narrowly tailored). But see *Family Trust Foundation of Kentucky v Wolnitzek*, 345 F Supp 2d 672, 711 (ED Ky 2004) (finding that Kentucky’s canon of judicial conduct prohibiting candidates from making promises, pledges, or commitments is overly broad and violates the First Amendment).

⁵ 552 US 196 (2008).

terests.⁶ And most recently, in *Caperton v A.T. Massey Coal Co, Inc*⁷ the Court found a due process violation where a West Virginia Supreme Court Justice refused to recuse himself from the appeal of a company whose CEO spent \$3 million supporting the justice's campaign for the bench.⁸ The Court's decisions occurred against the backdrop of a decade in which judicial campaign costs, campaign rhetoric, and tensions surrounding the judicial role escalated dramatically.

This Article examines the shifting landscape of judicial elections, and the developing dialogue in response to the decisions in the lower federal courts, state courts, and state legislatures as to the questions of whether elected judges really are different from constituent officials, and if so, in what ways the law can—and cannot—protect and reinforce those differences.

The Article proceeds in three Parts. Part I opens by describing a 2010 sequence involving a judicial candidate's campaign promise concerning his intended conduct if elected to the judiciary. The sequence is both illustrative of increasingly commonplace dynamics in state judicial elections and, paradoxically, also singularly bizarre for its comical—though tragically so—machinations and explanations.

Part II briefly describes and attempts to harmonize each of the Supreme Court's state judicial election decisions in the last decade, with an eye towards discerning a mode for the developing doctrinal balancing as between competing First Amendment, due process, and structural considerations.

Finally, Part III points to a recent decision of the United States Court of Appeals for the Seventh Circuit, written by Judge Frank Easterbrook, that does a particularly effective job of reconciling any perceived tension between the Court's holdings in *White* and *Caperton*.⁹

I. EXHIBIT 2010: *KETCHUM V KETCHUM*

A recent recusal controversy in West Virginia exemplifies current tensions in many of America's state courts. The reference is not to Justice Brent Benjamin's notorious refusal to disqualify himself from A.T. Massey Coal's appeal after benefiting from \$3 million in campaign expenditures from its chief executive of-

⁶ Id at 208–209.

⁷ 129 S Ct 2252 (2009).

⁸ Id at 2257.

⁹ *Bauer v Shepard*, 620 F3d 704, 706 (7th Cir 2010).

ficer.¹⁰ Nor is it a reference to Benjamin's former colleague, then-Chief Justice Eliot Maynard, who vacationed in the Riviera with the same Massey CEO while the same Massey appeal was pending, and who then voted, like Benjamin, in Massey's favor, without disclosing the Mediterranean merriment until, much to his chagrin, photos depicting it made national news.¹¹ No, compared to such high-dollar, high-drama affairs, the scenario described below involving one of Benjamin's newest colleagues, Justice Menis Ketchum, is mild. Yet, if the extraordinary facts underlying *Caperton v Massey* took a sledgehammer to ideals of judicial impartiality, the comparatively tame Ketchum sequence illustrates the erosion, via a thousand cuts, of the same. Regrettably, such sequences are increasingly de rigueur not only in West Virginia, but in many of the thirty-nine states in which judges are elected.¹²

While campaigning for a seat on West Virginia's Supreme Court of Appeals in 2008, Ketchum told the *West Virginia Record*: "My judicial philosophy is really quite simple . . . I believe it is the function of judges to even-handedly apply the law rather than to make the law. . . . I want to be known as a fair-minded Justice who puts the law before politics or ideology."¹³ During the same campaign for judicial office, however, Ketchum staked out a position so categorical as to qualify as a political "gotcha" moment even in a race for legislative or executive office. Addressing the state's cap on punitive damage awards, Ketchum flatly and categorically promised: "I will not vote to overturn it, I will not vote to change it. I will not vote to modify it."¹⁴

Predictably, in the fall of 2010, an appeal before the state high court presented a direct challenge to the constitutionality of the state Medical Professional Liability Act, which limits puni-

¹⁰ *Caperton*, 129 S Ct at 2257–58.

¹¹ See, for example, Ian Urbina, *West Virginia's Top Judge Loses His Re-election Bid*, NY Times A25 (May 15, 2008); Maggie Barron, *Impartiality Still an Issue After WV Judge's Riviera Scandal* (Brennan Center for Justice May 15, 2008), online at http://www.brennancenter.org/blog/archives/impartiality_still_an_issue_after_wv_judges_riviera_scandal/ (visited Sept 9, 2011).

¹² See Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 Georgetown L J 1077, 1094 (2007). See, for example, Catherine Stone and Wendy Martinez, *Caperton v. A. T. Massey Coal Co.: The Texas Implications*, 41 St Mary's L J 621, 623–31 (2010) (discussing several recusal cases in Texas which called into question the propriety of campaign contributions made by one of the parties to the presiding judge).

¹³ Chris Dickerson, *Ketchum Formally Starts Supreme Court Bid*, W Va Rec (Dec 13, 2007).

¹⁴ Tony Mauro, *New Recusal Controversy in W. Va. High Court*, Natl L J (Sept 27, 2010), online at <http://www.law.com/jsp/article.jsp?id=1202472535461> (visited Sept 9, 2011).

tive damages in malpractice suits to \$500,000.¹⁵ Unsurprisingly, the plaintiffs in the action, led by Robert Peck of the Washington, DC-based Center for Constitutional Litigation, sought Justice Ketchum's recusal on the ground that Ketchum's campaign statements "indicate[d] clear prejudgment of this case,"¹⁶ thus violating the state code of judicial conduct, which prohibits candidates from making "pledges or promises of conduct in office" and making statements that "commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."¹⁷

Justice Ketchum denied the recusal motion, asserting that "those statements reflect my views as Lawyer Ketchum—not jurist Ketchum. . . . [A]s a jurist I am required to look at all issues from a different perspective than I enjoyed as *Lawyer Ketchum*."¹⁸

"Lawyer Ketchum" was also, of course, candidate for State Supreme Court Justice Ketchum. For that matter, even Lawyer Ketchum's statement expressly refers *three times* to how he would "vote"—a luxury not afforded to lawyers qua lawyers on such matters—if elected to the state high court. To promise specific conduct, in reference to a specific law, even to the point of categorically ruling out the possibility of minor "change" or "modif[ication]" while in pursuit of votes for judicial office, and then, having obtained the office, to turn around and claim that the statements reflect only the persona of Lawyer Ketchum not only reflects a serious lack of understanding of the judicial canons, but is also patently duplicitous.

Ketchum's nonrecusal came via an order released only to the parties in the case.¹⁹ After learning of the nonrecusal, Peck correctly told the *National Law Journal's* Tony Mauro that there was no procedural mechanism to appeal Ketchum's refusal despite his clear contravention of the judicial code. In West Virginia, and in most state supreme courts in the United States,²⁰ the

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ W Va Code of Judicial Conduct Canon 5(A)(3)(d)(i)–(ii).

¹⁸ Memorandum from Justice Menis E. Ketchum to Rory L. Perry, II, Clerk, and the Other Justices, *MacDonald v City Hospital*, No 35543 (Sept 23, 2010) (on file with author).

¹⁹ Tony Mauro, *W. Va. Justice Reverses Self, Recuses in Malpractice Case*, Natl L J (Sept 29, 2010), online at <http://www.law.com/jsp/article.jsp?id=1202472652410> (visited Sept 6, 2011) (quoting Ketchum's later statement that the order "was sent only to the lawyers in the case").

²⁰ See Jeffrey W. Stempel, *Impeach Brent Benjamin Now!?! Giving Adequate Atten-*

most that a litigant or lawyer in Peck's situation can presently hope for is a long-after-the-fact disciplinary reprimand of the judge that proves of little consequence to the jurist, provides little solace to the litigant, and does little, if anything, to restore public confidence in the courts.

If the fact pattern involving Lawyer Ketchum, setting creative semantics aside, seemed illustrative of dynamics increasingly common in judicial elections, the events a mere ninety-six hours later, proved truly remarkable—even frightening. Four days after Ketchum's initial order, it became clear that it was not at all accidental that the order was released only to the lawyers in the case.

The following Monday, Justice Ketchum issued a second order, the opening sentence of which stated, "Upon further reflection, I am disqualifying myself from the above case."²¹ Did the canons of conduct suddenly reign? Far from it. Justice Ketchum reasserted: "I strongly believe there is absolutely no legal basis for my disqualification."²² Instead, Justice Ketchum asserted, "[I]t appears to me that the lawyers who moved to disqualify me are attempting to create a 'firestorm' by assaulting the integrity and impartiality of West Virginia's Supreme Court."²³ The basis for that assertion is as tenuous as the distinction between Lawyer and Jurist Ketchum itself. Justice Ketchum continued, "I promptly sent my disqualification response to the lawyers on September 23, 2010. The next day my response appeared in a Washington internet blog. (See copy attached). How did a blog so quickly get my disqualification memorandum which was sent *only* to the lawyers in the case?"²⁴ Picking up on his earlier Lawyer Ketchum fiction, Ketchum further asked, rhetorically: "Why

tion to Failings of Judicial Impartiality, 47 San Diego L Rev 1, 64 (2010). Prompted by *Caperton v Massey*, the Michigan Supreme Court in a 4-3 decision adopted new recusal rules requiring that a judge facing a petition for voluntary recusal provide a written opinion explaining his or her decision. Under these new—and certainly improved from Michigan's previous standard, which lacked the American Bar Association's general disqualification clause adopted by forty-seven other states—rules, if the judge refuses to recuse himself or herself, the challenger may petition the court en banc for a decision. Ed Brayton, *Mich. Supreme Court Adopts New Recusal Rules*, Mich Messenger (Dec 1, 2009).

²¹ Memorandum from Justice Menis E. Ketchum to Rory L. Perry, II, Clerk, and the Other Justices, *MacDonald v City Hospital*, No 35543 (Sept 27, 2010), online at <http://dl.dropbox.com/u/6504817/Ketchum%20recusal%20order%2C%20statement%2C%20and%20blog%20post.pdf> (visited Sept 6, 2011) ("Ketchum Sept 27 Memo" hereinafter).

²² *Id.*

²³ *Id.*

²⁴ *Id.* (parenthetical and italics in original).

is it news worthy that a West Virginia judge previously exercised his right of Freedom of Speech?”²⁵

The answer to the first of Ketchum’s rhetorical questions is, of course, exactly what he implies: the lawyers in the case, quite logically, shared the order with Mauro.²⁶ What is shocking is that, apparently, Ketchum thinks it inappropriate for them to have done so. Indeed, given his own italicized statement that he sent the initial order “*only* to the lawyers in the case,”²⁷ making the order public was precisely what Ketchum intended to avoid. Ketchum’s statement, and particularly the italics, reflects a fundamental misunderstanding of the role of a judge in a public court system. The matter was not a dispute before a private arbitrator bound by confidentiality, but rather involved an order from a justice of the Supreme Court of Appeals of West Virginia in a case involving a challenge to a state law. Moreover, the motion raised a serious and legitimate question as to whether an officer of that court should have disqualified himself from the appeal based on the (equally public) state canons of judicial conduct. Providing transparency in such circumstances is among the highest and most time-honored traditions of the free press²⁸—a wrinkle that is perhaps ironic given Ketchum’s singular emphasis on his own First Amendment speech rights.²⁹

Beyond the almost tragicomic qualities of the initial and subsequent written orders, Ketchum’s bungling of the merits of the recusal motion reflects not only a deeply troubling misunderstanding of disqualification standards, but also a striking lack of savvy as to judicial independence in general. In addition to the tortured reasoning of the Lawyer Ketchum—Jurist Ketchum dichotomy, Ketchum’s reading of *White* was objectively erroneous, no matter one’s normative view on the *White* decision itself. *White* is a decision that struck down an *ex ante* prohibition on

²⁵ Ketchum Sept 27 Memo (cited in note 21).

²⁶ As yet further indication of Justice Ketchum’s pattern of using semantics as sword, it bears noting that Mauro is hardly a mere “Washington internet blog[ger]” but is, rather, among the deans of legal journalism.

²⁷ Ketchum Sept 27 Memo (cited in note 21).

²⁸ See *Near v Minnesota*, 283 US 697, 719–20 (1931) (warning that the press is a necessary means of protecting against the corruption of government officials and against the upheaval of our constitutional democracy). See also Mark Fenster, *The Opacity of Transparency*, 91 Iowa L Rev 885, 895 (2006) (noting that “open government is an essential element of a functional liberal democracy”).

²⁹ See Ketchum Sept 27 Memo (cited in note 21) (“The blog did not have the decency to publish my First Amendment rationale as authorized by *Republican Party of Minnesota v. White*, or quote the legal rationale from *White* set out in my memorandum.”).

judicial candidates announcing their views,³⁰ which not only failed to expressly reach highly specific pledges or promises with respect to conduct in office, but also expressly noted the availability of recusal as an ex post remedy in lieu of the ex ante prohibition.³¹ Moreover, Justice Ketchum's invocation of *White* not only failed to account for the differences inhering in the ex post remedy of recusal, but reflected what can only be described as either a failure to actually read *White*, or a failure to understand even its most direct passages, chief among them, the majority's statement that:

[w]e know that "announc[ing] . . . views" on an issue covers much more than *promising* to decide an issue a particular way. The prohibition extends to the candidate's mere statement of his current position, even if he does not bind himself to maintain that position after election. All the parties agree this is the case, because the Minnesota Code contains a so-called "pledges or promises" clause, which *separately* prohibits judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office,"—a prohibition that is not challenged here and on which we express no view.³²

Second, when a state supreme court jurist declines to disqualify based on the applicable canon of the judicial code, but then decides to disqualify, expressly citing the creation of a "firestorm" over the decision—even including as an attachment with his order the one news story—the sequence inverts the most basic norms of an independent judiciary. Ketchum's "firestorm," referring to one story in one outlet—notably, a news story that didn't even editorialize but merely (1) reported the plaintiffs' arguments; (2) reported and quoted from Justice Ketchum's decision declining to disqualify; and (3) reported an academic's evaluative comment³³—makes one question whether it is premature to conclude that judicial independence is not only dead but in need of a better mortician.

³⁰ See *White*, 536 US at 788.

³¹ *Id.* at 794 (Kennedy concurring).

³² *Id.* at 770 (internal citations omitted) (alteration in original).

³³ Mauro, *New Recusal Controversy*, Natl L J (cited in note 14). While the academic quoted was, in fact, your author, one certainly need not be an expert in recusal to have detected and been troubled by the sequence.

While the correct result of disqualification was ultimately reached, the dynamics created by the wrong rationale are patently perverse. If one news story in a legal trade publication is a “firestorm,” imagine the persuasive power of more sustained criticisms—not to mention the new incentives to generate such critiques. Further, the transparent, even italicized, acknowledgment by Ketchum that he intended his decision on the matter “*only*” for the parties in the case reflects a fundamental misapprehension of the public judicial role as distinct from, for example, a private arbitrator.³⁴

Clearly, Justice Ketchum’s story represents merely one particularly colorful example of the changing nature of the judicial role in states with elected judiciaries. *Ex ante*, Ketchum’s repeated and categorical campaign promises with respect to capping punitive damages in malpractice suits, even to the point of ruling out slight modification, were inconsistent with the judicial role—regardless of selection mode. *Ex post*, Justice Ketchum’s analysis in the initial order denying disqualification was, at best, misleading with respect to the relationship between “Lawyer Ketchum” and “Jurist Ketchum” as well as a confused misapplication of *White*’s holding. Finally, the postscript, in which Ketchum ultimately reached the correct decision on recusal despite his expressly reactionary reasoning, was solely based on his reaction to the slightest of public critiques.³⁵ That Justice Ketchum expressly cited as the basis of his disqualification the “firestorm” created by the report reflects devolution in the norms of an independent judiciary and chilling precedent for further devolution yet to come. This Article asserts, more broadly, that the Ketchum incident illustrates not only confusion, but increasingly polarized perspectives within judiciaries themselves as to the canons of judicial conduct, the rules of disqualification, and the strained relationship between campaigns for the courts and the judicial role once seated on the bench.

³⁴ Lynn M. LoPucki, *Court-System Transparency*, 94 Iowa L. Rev. 481, 494–514, 535 (2009) (describing the benefits of transparency in public adjudication, including the exposure of impropriety and enhancing general knowledge, as contrasted with the essentially confidential nature of private arbitration results and proceedings).

³⁵ See generally Federalist 78 (Hamilton), in *The Federalist* 521, 529 (Wesleyan 1961) (Jacob E. Cooke, ed) (warning that if there were judicial elections “there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the constitution and the laws”).

II. COURTS IN COURT: *WHITE*, *LÓPEZ TORRES*, AND *CAPERTON*A. *Republican Party of Minnesota v White*

The first of the Supreme Court's three forays into state judicial elections during the opening decade of the 2000s involved a provision of Minnesota's code of judicial conduct known as the "announce clause," which prohibited candidates for judicial office from announcing their positions on disputed political or legal questions.³⁶ The Court emphasized states' *ex ante* option to choose appointments rather than elections and held that,

[although states can choose whether to elect judges or appoint them,] the greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.³⁷

Reduced to its essence, the *White* majority reasoned that if a state chooses to elect judges then the announce clause comes at a severe informational cost to voters. However, this reasoning inadequately addressed the simple fact that state judicial elections are the norm rather than the exception, as thirty-nine states elect some or all of their judges.³⁸ Minnesota's announce clause prohibition was one part of the state's overall code of judicial conduct. Such codes, in place in each of the thirty-nine elective states as well as in states without judicial elections, are generally "modeled after Canon 5 of the American Bar Association's (ABA) Model Code of Judicial Conduct, and adopted in some form in virtually every state,"³⁹ and the codes "have long served as one

³⁶ *White*, 536 US at 770.

³⁷ *Id* at 788.

³⁸ See Schotland, 95 Georgetown L.J at 1092 (cited in note 12).

³⁹ Wendy W. Weiser, *Regulating Judges' Political Activity After White*, 68 Albany L Rev 651, 651 (2005). See also *id* at 651 n 2 (noting the ABA announcement to develop revisions to the ABA Model Code of Judicial Conduct). The revised ABA Model Codes were unanimously approved by the House of Delegates on February 12, 2007. See American Judicature Society, *Evaluation of the Model Code*, online at http://www.ajs.org/ethics/eth_ABA_commission.asp (visited Sept 6, 2011). For example, having taken effect on January 1, 2009, the canons were replaced with rules of judicial conduct by the Indiana Supreme Court. See Cynthia Gray, *Developments Following Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), online at <http://www.ajs.org/ethics/pdfs/DevelopmentsafterWhite.pdf> (visited Sept 6, 2011).

of the primary means by which states seek to ensure the distinct characters and constitutional roles of their judicial branches.”⁴⁰ The codes reflect an effort aptly described as “attempt[ing] to find that magic line in the sand—the precise point at which public accountability does not inherently violate the independence and impartiality that is essential to the judicial function.”⁴¹ Neither finding nor concluding that “magic line in the sand” is “an easy task.”⁴²

Minnesota proffered two interests in justifying the announce clause: (1) “preserving the impartiality of the state judiciary” via the “protect[ion] of the due process rights of litigants”;⁴³ and (2) “preserving the impartiality of the state judiciary” via the “preserv[ation] of public confidence in the judiciary.”⁴⁴ Perhaps the most doctrinally thorough portion of the *White* decision is its discussion of the different ways in which impartiality may be defined. The majority recognized three potential definitions of judicial “impartiality”: (1) “lack of bias for or against either party to [a] proceeding;”⁴⁵ (2) “lack of preconception in favor of or against a particular legal view;”⁴⁶ and (3) “open-mindedness,” by which the majority meant not lack of preconceptions, “but that [the judge] be willing to consider views that oppose [the judge’s] preconceptions, and remain open to persuasion, when the issues arise in a pending case.”⁴⁷

The majority acknowledged the compelling interest in the first of the three types of impartiality (bias for or against a party); hedged as to the third; and rejected the second.⁴⁸ The majority, applying strict-scrutiny analysis, found that the announce

⁴⁰ Weiser, 68 Albany L Rev at 651 (cited in note 39).

⁴¹ 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, 629 (2005).

⁴² *Id.*

⁴³ *White*, 536 US at 775.

⁴⁴ *Id.*

⁴⁵ *Id.* (emphasis omitted).

⁴⁶ *Id.* at 777 (emphasis omitted).

⁴⁷ *White*, 536 US at 777–78.

⁴⁸ *Id.* at 777–78, 781. With respect to the majority’s framing of the second interest, Charlie Geyh’s colorful description is that the majority “beats the stuffing out of a straw man, when it rejects the silly notion that impartiality requires judges to have a total ‘lack of preconception’ on particular legal views.” Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 Ohio St L J 43, 65 (2003). Geyh notes there is “a clear difference between the judge who harbors preconceptions on issues of law, which is both inevitable and desirable, and the judge who has publicly etched his position on such issues in stone before the case is heard—which is the problem that the announce clause was designed to address.” *Id.* at 65–66.

clause was not narrowly tailored to serve either the first or third interest.⁴⁹ In the case of the first, the Court indicated that it “guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party.”⁵⁰ Since the announce clause precluded judicial candidates from addressing issues rather than parties, the majority reasoned that it worked a substantial deprivation of the very type of information of value to voters while failing to serve the interest in protecting against party-based bias.⁵¹ In the case of the third, even assuming, *arguendo*, that the state had a compelling interest in open-mindedness, the Court likewise found that the announce clause was not narrowly tailored to serve that interest, given the range of other mediums through which judges could express opinions.⁵²

As J.J. Gass ably articulates, “bias against a particular party and bias on particular legal issues are not as clearly distinct as the *White* opinion makes it seem.”⁵³ Gass uses the example of a “woman in a custody battle standing before a judge who declared in his election campaign that ‘men get too many raw deals in custody rulings,’” and who, in Gass’s terms, “cannot be comforted by the thought that this is merely a bias ‘on an issue.’”⁵⁴ Still, the majority’s definitions are helpful in moving beyond the malleable generic term “impartiality” alone. Indeed, when read in combination, the definitions offer particular support for what I will term “interest 1.5,” the midpoint between interest one and interest two: the interest in preventing bias for or against certain classes of litigants.⁵⁵ Like Gass, legal ethics scholar Charlie

⁴⁹ *White*, 536 US at 776, 781.

⁵⁰ *Id.* at 776.

⁵¹ *Id.*

⁵² Consider *id.* at 780 (“As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.”).

⁵³ J.J. Gass, *After White: Defending and Amending Canons of Judicial Ethics* 6 (Brennan Center for Justice 2004), online at http://brennan.3cdn.net/0b74af850b81d92928_bvm6y5sdf.pdf (visited Sept 9, 2011) (em dash omitted).

⁵⁴ *Id.* at 6–7.

⁵⁵ My former colleague Wendy Weiser deserves credit for seizing on this point shortly after *White*. See Weiser, 68 Albany L Rev at 659 & n 40 (cited in note 39). See also *In re Watson*, 794 NE2d 1, 3, 8 (NY 2003) (per curiam) (upholding “New York’s pledges or promises clause” as applied to statement by a judge suggesting that he will favor prosecutors); *In re Kinsey*, 842 S2d at 87 (per curiam) (same with respect to Florida canon). But see *Mississippi Commission on Judicial Performance v Wilkerson*, 876 S2d 1006, 1015 (Miss 2004) (rejecting application of canon to judge’s insulting public statements about gays on the grounds that there is “no compelling state interest in requiring a partial judge to keep quiet about his prejudice so that he or she will appear impartial”).

Geyh, whose overall view of *White's* taxonomy is that “[a]part from being unnecessary, the Court’s trifurcated analysis of impartiality is patently fallacious,”⁵⁶ is particularly cognizant that interest 1.5 is actually more likely to be meaningful than interest one itself. As Geyh notes:

As to the first definition, whenever a judicial candidate takes a categorical position on an issue that concerns a class of would-be parties (be it gays, fundamentalist Christians, women, environmentalists, white collar defendants, immigrants), that position can reflect, or be perceived as reflecting, the candidate’s underlying biases vis-à-vis members of that class. Indeed, judicial candidates on the stump will rarely, if ever, have occasion to make statements that exhibit bias toward particular parties independent of the issues those parties are likely to litigate.⁵⁷

White was, by its own terms, a narrow decision. Justice Scalia’s majority opinion expressly stated that “we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.”⁵⁸ But in *White's* wake, “state regulatory systems designed to promote the independence and impartiality of their judiciaries [were] thrown into disarray.”⁵⁹ In part, the disarray resulted from the combination of the “neither assert nor imply” caveat, mixed with the fact that “the Court also pointedly declined to find that the First Amendment allows greater regulation of judicial election campaigns than of other elections.”⁶⁰ Reflecting on those mixed signals, one scholar wrote that “[w]hether the *White* result is correct, its reasoning, which fails to lay out a framework balancing the constitutional values served by the canons with those of free speech in the special context of judicial elections, is unsatisfying.”⁶¹

⁵⁶ Geyh, 64 Ohio St L J at 65 (cited in note 48).

⁵⁷ *Id.*

⁵⁸ *White*, 536 US at 783. Indeed, Tom Phillips recently wrote, “In and of itself, [*White*] was hardly a remarkable decision, as it affected only one obsolete provision that seemed patently overbroad.” Thomas R. Phillips and Karlene Dunn Poll, *Free Speech for Judges and Fair Appeals for Litigants: Judicial Recusal in a Post-White World*, 55 Drake L Rev 691, 698 (2007).

⁵⁹ Weiser, 68 Albany L Rev at 651 (cited in note 39).

⁶⁰ Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U Pa L Rev 181, 182 (2004).

⁶¹ Weiser, 68 Albany L Rev at 653 (cited in note 39).

Beyond the mere “unsatisfying” doctrinal aspects of the decision alluded to in the comments above, however, more pragmatically, the lack of a framework “exact[s] a considerable cost”:⁶² as state courts, legislatures, and bar associations engage in post-*White* reconsiderations of their judicial codes, they are left to do so without “adequate direction from the Supreme Court for these considerable tasks.”⁶³ As of the *White* decision in 2002, “only eight states had some version of the Announce Clause (which was part of the 1972 ABA Model Code of Judicial Conduct),”⁶⁴ but the Court’s holding and the ambiguities in its reasoning rendered “other restrictions on campaign speech . . . ripe targets” for litigation challenges.⁶⁵ It took little time for challenges to state rules involving judicial campaign pledges or promises,⁶⁶ solicitation clauses,⁶⁷ prohibitions on false or misleading statements,⁶⁸ recusal provisions,⁶⁹ and clauses restricting partisan activities⁷⁰ to proliferate.⁷¹

1. The endurance of the *White* concurrences.

a) *Justice O’Connor*. Justice O’Connor and Justice Kennedy each concurred in *White*.⁷² With the benefit of nearly a decade’s hindsight, it is clear that, for very different reasons, their respective concurrences remain touchstones in the field of judicial selection. Justice O’Connor joined the majority opinion but

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Gass, *Defending and Amending Canons of Judicial Ethics* at 7 (cited in note 53). One reason that so few states had announce clauses at the time of *White* was that the announce clause had been removed from the ABA’s 1990 Model Code. See *White*, 536 US at 773 n 5.

⁶⁵ Gass, *Defending and Amending Canons of Judicial Ethics* at 2 (cited in note 53). See also Weiser, 68 Albany L Rev at 653 n 10 (cited in note 39) (summarizing early challenges).

⁶⁶ See, for example, *Ackerson v Kentucky Judicial Retirement & Removal Commission*, 776 F Supp 309, 313–14 (WD Ky 1991) (“The canon . . . prohibits, in broad language, pledges and promises of conduct in office and commitments with respect to issues likely to come before the court.”). See also ABA Model Code of Judicial Conduct Rule 2.10(B) (2007) (“Model Code” hereinafter).

⁶⁷ See Model Code Rule 3.7(A)(2)–(3). See, for example, *Ackerson*, 776 F Supp at 313–14; *Weaver v Bonner*, 309 F3d 1312, 1323 (11th Cir 2002).

⁶⁸ See Model Code Rule 4.1(A)(11). See, for example, *Ackerson*, 776 F Supp at 313–14.

⁶⁹ See Model Code Rule 2.11. See, for example, *Ackerson*, 776 F Supp at 313–14.

⁷⁰ See Model Code Rule 4.2 (2007). See, for example, *Ackerson*, 776 F Supp at 313–14; *Siefert v Alexander*, 608 F3d 974, 977 (7th Cir 2010).

⁷¹ See Weiser, 68 Albany L Rev at 653 n 10 (cited in note 39) (summarizing early challenges). See also David E. Pozen, *The Irony of Judicial Elections*, 108 Colum L Rev 265, 297–98 (2008) (surveying challenges to the canons).

⁷² *White*, 536 US at 788 (O’Connor concurring); *id* at 792 (Kennedy concurring).

wrote “separately to express [her] concerns about judicial elections generally.”⁷³ Justice O’Connor’s concurrence was, to say the least, pointed:

Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system . . . In doing so the State has voluntarily taken on the risks to judicial bias . . . 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.⁷⁴

Justice O’Connor, it is now widely acknowledged, came to regret her role as the fifth vote in *White*.⁷⁵ To her enduring credit, Justice O’Connor’s retirement from the Court has been marked by anything but a retirement from the discourse on matters of judicial selection.⁷⁶ Justice O’Connor remains an ardent critic of judicial elections and an ardent supporter of commission-based appointment processes.⁷⁷ Her advocacy, which has included extensive time working on court reform with her colleagues on elected state benches, as well as with court reform advocates, has also led her to embrace judicial-election reform measures that stop well short of appointment systems—a significant tempering of the it’s-the-state’s-fault-for-choosing-the-system-in-the-first-place spirit of her *White* concurrence.⁷⁸ As just one example of

⁷³ Id at 788 (O’Connor concurring).

⁷⁴ Id at 792.

⁷⁵ See Matthew Hirsch, *Swing Voter’s Lament: At Least One Case Still Bugs O’Connor*, Legal Intelligencer (Nov 8, 2006), online at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1162893919695> (visited Sept 6, 2011) (quoting Justice O’Connor as saying that *White* “does give me pause”).

⁷⁶ See Joan Biskupic, *O’Connor Retired from Court, Not Discourse*, USA Today 2A (Sept 9, 2010).

⁷⁷ See Sandra Day O’Connor, *Take Justice Off the Ballot*, NY Times WK9 (May 22, 2010), online at <http://www.nytimes.com/2010/05/23/opinion/23oconnor.html> (visited Sept 6, 2011).

⁷⁸ See id. It bears mentioning here that I am an agnostic on what one scholar aptly terms “The Endless Judicial Selection Debate.” See Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 Georgetown J Legal Ethics 1259, 1279 (2008) (noting that changing election systems “can be a worthy goal and one well worth pursuing . . . but not at the expense of ignoring shorter-term remedies that can make a bad system better in the interim”). My colleague Monroe Freedman, who, among his many achievements, has received the American Bar Association’s highest award for professionalism in recognition of his scholarship in legal ethics, asserts, more aggressively, that “[t]here is substantial reason to believe that elected judge-

this subtle but significant change, Justice O'Connor recently drafted the foreword to a report detailing the transformation of judicial elections in the first decade of the 2000s,⁷⁹ and, in addition to advocating appointment systems, noted that “[o]ther promising state initiatives have included public financing of judicial elections, campaign disclosure laws, and recusal reforms.”⁸⁰

b) Justice Kennedy. If Justice O'Connor's concurrence occasioned regret and an energetic and deeply personal commitment to promoting impartial state courts, Justice Kennedy's concurrence provided, though few recognized it at the time, a limiting principle and a dose of foreshadowing. According to Justice Kennedy, strict-scrutiny analysis was unnecessary in that “[t]he speech at issue” was not “within any of the exceptions to the First Amendment.”⁸¹ On the other hand, Justice Kennedy asserted that the state interest in maintaining the integrity of its judiciary is an interest of “vital importance”⁸² and, most notably, that states “may adopt recusal standards more rigorous than due process requires.”⁸³ One curiosity of Justice Kennedy's endorsement of “adopt[ing]” recusal rules “more rigorous than due process requires” is that such rules existed at the time of *White*, and still exist, in all fifty states.⁸⁴ The most general, both in its terms and

es are influenced in controversial cases by the threat of being voted out of office . . . [and thus] there is a strong argument that a decision by such a judge violates the Due Process Clause of the Fourteenth Amendment.” Monroe H. Freedman and Abbe Smith, *Understanding Lawyers' Ethics* § 8.10, 248–50 (4th ed 2010). Ultimately, probably the primary force behind my own agnosticism is pragmatism. Indeed, my own approach could scarcely be articulated more effectively than via the words through which Roy Schotland articulates his. See Roy A. Schotland, *A Plea for Reality*, 74 Mo L R 507, 508 (2009) (“I have adhered to agnosticism about methods of selection. One reason is this: My writing and work aim at making a difference, but to say anything new on this subject seems almost impossible, and for the last generation the battles to change selection methods have been futile.”).

⁷⁹ Justice Sandra Day O'Connor, *Foreword*, in James Sample, et al, *The New Politics of Judicial Elections, 2000–09: Decade of Change* (Charles Hall ed) (Justice at Stake Campaign 2010), online at http://justiceatstake.org/media/cms/JASNPJEDecadeONLINE_EC9663F6F7865.pdf (visited Sept 6, 2011) (“New Politics 2010” hereinafter). In addition to being grateful to Justice O'Connor for her foreword to the report, this author is forever indebted to her for the privilege of having appeared as an undercard speaker at several of the dozens of events across the country in which Justice O'Connor has tirelessly and devotedly appeared advocating for her twin priorities of civics education and merit selection of judges.

⁸⁰ *Id.*

⁸¹ *White*, 536 US at 793.

⁸² *Id.* at 793.

⁸³ *Id.* at 794.

⁸⁴ James Sample, David Pozen, and Michael Young, *Fair Courts: Setting Recusal Standards* 17 (Brennan Center for Justice 2008), online at <http://brennan.3cdn.net/>

in its near-universal adoption with only minor variation, is Rule 2.11(A) of the ABA's 2007 Model Code (formerly Canon 3E(1)): "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."⁸⁵

Given the ubiquity of such standards, one might expect that Justice Kennedy's "more rigorous" statement would be considered neither particularly complicated, nor particularly controversial. But one would be wrong—in part because recusal rules are so widely misunderstood, and in part because of organized efforts to undermine them. Most notably, James Bopp, who successfully argued *White* before the Supreme Court, has subsequently developed a cottage industry challenging other canons of judicial conduct in states across the country.⁸⁶ The following exchange from an *ABA Journal* cover profile of Bopp reflects both the misunderstandings and the clear efforts to seize on those misunderstandings: "In fact, Justice Anthony M. Kennedy, in his concurrence in the *White* case, wrote that states 'may adopt recusal rules more rigorous than due process requires and censure judges who violate these standards.' Bopp says *if that happens*, he will sue over the disqualification standards."⁸⁷

Suits or no suits, Bopp obfuscates the fact that there is no "if" applicable to Justice Kennedy's statement: rules such as the "might reasonably be questioned" standard have long been in place, despite the fact that, while clearly having due process norms at their foundation, they are indisputably broader than constitutional due process requires. On the other hand, Justice Kennedy's concurrence in the *White* judgment, when read in combination with the "more rigorous" statement, reflected an inherent and underlying predicate—namely that, in the context of judicial elections, First Amendment interests are not talismanic and must be balanced against due process. The concurrence further suggests that recusal might be constitutionally *mandated* in certain instances and that mandatory-recusal regimes might be constitutionally *permitted* in a broader range of circumstances.

1afc0474a5a53df4d0_7tm6brjhd.pdf (visited Sept 9, 2011) ("Setting Recusal Standards" hereinafter) (noting that forty-seven states have adopted some version of ABA Model Code Rule 2.11(A), and the remaining three that have not may incorporate the rule through other means).

⁸⁵ *Id.* (noting the near universality of the basic disqualification standard).

⁸⁶ Terry Carter, *The Big Bopper*, 92 ABA J 31, 34 (Nov 2006) (noting that "if Bopp wins these cases [challenging state canons] . . . he often collects fees from the other side," including his "biggest payday" yet in the *White* case: \$867,000).

⁸⁷ *Id.* (emphasis added).

After *White*, luminaries among Justice Kennedy's state colleagues, such as former Texas Chief Justice Tom Phillips, would specifically cite Justice Kennedy's statement for the proposition that "more rigorous' recusal standards are the proper response to concerns that unfettered judicial speech may undermine the real and perceived fairness of the courts,"⁸⁸ and, further, that "now, as never before, reinvigorating recusal is truly necessary to preserve the court system that Chief Justice Rehnquist called the 'crown jewel' of our American experiment."⁸⁹ Phillips even speculates that it is "[p]erhaps because of Justice Kennedy's concurrence" that "no challenge to the disqualification or recusal provisions of a state code, rule, or statute has yet succeeded."⁹⁰

2. After *White*.

The post-*White* "disarray" also reflects competing political agendas:

No doubt some who continue to defend traditional interpretations of all the canons are unrealistically optimistic about the limits of the decision in *White* or simply disagree with it. Other groups, however, have just as clearly exaggerated the effect of the holdings and argued . . . that almost all restrictions on the political activity of all judges should be eliminated—not just the restrictions on campaign activity . . . That argument goes far beyond the actual holdings, and such an expansive reading is an unjustified abandonment of the state courts' efforts to promote judicial integrity, impartiality, and independence.⁹¹

These diametrically opposed perspectives on whether a state's decision to elect, or not elect, its judges is the equivalent of an all-or-nothing, on-off proposition, and results from the overstated spin spawned by those perspectives.⁹²

⁸⁸ Honorable Thomas R. Phillips, *Foreword*, in Sample, et al, *Setting Recusal Standards* 3 (cited in note 84).

⁸⁹ *Id.*

⁹⁰ Phillips and Poll, 55 Drake L Rev at 700 (cited in note 58). See also Cynthia Gray, *Case-Law Following* Republican Party of Minnesota v. White, 93 Judicature 26 (2010). But see *Duwe v Alexander*, 490 F Supp 2d 968, 977 (WD Wis 2007) (finding that the rule requiring judges to recuse themselves for appearing to commit to a particular position violated the First Amendment on its face).

⁹¹ Cynthia Gray, *Viewpoint: The Limits of White*, 89 Judicature 315, 315 (2006).

⁹² The topic of how to interpret *White* is far from alone in this respect, even within the subject area of judicial selection. As one commentator notes, the topic of judicial selection generally "suffers from much myth and much spin. Myth matters when it differs

Writing in the immediate aftermath of *White*, Roy Schotland predicted that the decision would “downgrade the pool of candidates for the bench, reduce the willingness of good judges to seek reelection, add to the cynical view that judges are merely ‘another group of politicians,’ and thus directly hurt state courts and indirectly hurt all our courts.”⁹³ Whether such predictions proved accurate or not is impossible to determine. For his part, Schotland’s more recent assessments reflect some tempering. In 2009, in the final law review article of a scholarly career, much of which entailed trailblazing in the study of state courts, Schotland asserted that “[i]n fact, as important as *White* has been, so far it has had little impact on campaigns, but that will change as traditional norms are eroded by envelope-stretching candidates.”⁹⁴

My own view is a bit closer to Schotland’s initial assessment. In a 2006 amicus brief⁹⁵ in support of an unsuccessful cert petition in a notorious, pre-*Caperton* case arising out of a fundraising-record-breaking judicial election in Illinois,⁹⁶ I argued that when canons are stricken, “[g]iven the dynamics of modern political contests, the vacuum formerly occupied by the canon is almost invariably filled by a race to the bottom with respect to the conduct at issue,”⁹⁷ and that under such circumstances “judicial candidates refrain from once-prohibited conduct only at their peril. Without effective canons, the candidates face a prisoner’s dilemma: either they comport themselves in a manner that may be inconsistent with impartiality or risk almost certain defeat.”⁹⁸

from reality about where we are and how we got here. Spin matters because it interferes with honest dialog about where we are and what, if any, change is needed.” Schotland, 74 Mo L Rev at 507–08 (cited in note 78) (emphasis omitted).

⁹³ Roy A. Schotland, *Should Judges Be More Like Politicians?*, 39 J Am Judges Assn 1, 8 (2002).

⁹⁴ Schotland, 74 Mo L Rev at 519 n 34 (cited in note 78).

⁹⁵ Brief Amicus Curiae of 12 Organizations Concerned about the Influence of Money on Judicial Integrity, Impartiality, and Independence in Support of Petitioners, *Avery v State Farm Mutual Auto Insurance Co*, Civil Action No 05-842 (Ill filed Feb 3 2006) (available on Westlaw at 2006 WL 295175) (“Judicial Integrity Brief”). The brief, jointly authored with colleagues at the Brennan Center and Campaign Legal Center, was submitted on behalf of a dozen national non-profit and good government groups in support of the Petitioners.

⁹⁶ See generally *Avery v State Farm Mutual Auto Insurance Co*, 835 NE2d 801 (Ill 2005). The facts in *Avery* are not for the faint of heart. See generally James Sample, *The Campaign Trial*, Slate (Mar 6, 2006), online at <http://www.slate.com/id/2137529/> (visited Sept 6, 2011).

⁹⁷ Judicial Integrity Brief at *18 (cited in note 95).

⁹⁸ *Id.* Although a more fulsome discussion of this particular point is beyond the scope of the present Article, it bears noting briefly that, on a purely anecdotal level, the highest-profile state supreme court elections of 2010—retention elections in Iowa and Illinois—

One challenge of estimating *White's* impact is the impossibility of isolating it as a factor apart from other trends in judicial elections over the prior decade.⁹⁹ There are, however, certain statistical anomalies that are so pronounced, and so close in time to *White* itself, that it is difficult to conclude that *White* was not at least a significant factor. Perhaps the most notable of these is the jump in television advertising in contested elections for seats on state supreme courts. In the year 2000—that is, in the election cycle prior to the Supreme Court's decision in *White*—just 22 percent of contested races for state high court included television advertisements.¹⁰⁰ In the very next cycle in 2002, and just a few months removed from the *White* decision, with many candidates and courts unsure as to the contours of the new norms, that same figure climbed to 64 percent.¹⁰¹ In 2004 and 2006, television advertising appeared, respectively, in 80 and 91 percent of contested high-court campaigns.¹⁰² It would be foolish to equate, in this instance, correlation with causation—myriad factors and developing trends were at play. It is, however, equally implausible to conclude that *White*, and the loosening of both codified restrictions as a matter of law and the corresponding loosening of content norms as a matter of prudence, did not play a role.

More verifiably, *White* led state supreme courts around the country to make substantial changes to their respective state

bear out this assertion. In 2010, the national judicial election flashpoints involved retention rather than contested elections. One 2010 judicial-election recap notes that in Iowa the three Iowa Supreme Court justices, who were defeated in their retention contests on account of a concerted effort by opponents of same-sex marriage, did very little to campaign on their own behalf, and were outspent nearly 4-1 in the election—one of them explained earlier “[w]e did not want to contribute to the politicization of the judiciary here in Iowa and so we have not formed campaign committees and we have not engaged in fundraising.” See C. David Kotok, *Marriage Ruling Costs Iowa Judges*, Omaha World Herald (Nov 3, 2010), online at <http://www.omaha.com/article/20101103/NEWS01/711039884> (visited Sept 6, 2011); Josh Nelson, *Chief Justice: Don't Politicize Judicial System*, WCF Courier (Oct 21, 2010), online at http://wfcourier.com/news/local/article_722dbfe9-90d1-5ab3-b37f-a5a7f988e9ee.html (visited Sept 6, 2011). Conversely, the recap notes that the “same lesson can be learned from Illinois, though the result was quite different. In Illinois, Chief Justice Thomas Kilbride was facing a strong anti-retention movement based on a series of ‘anti-business’ rulings over the past few years. . . . [but] [u]nlike the Justices in Iowa, Justice Kilbride was a very aggressive fundraiser and campaigner, which allowed him to successfully beat back the challenge.” *Election Recap*, (Choose Your Judges 2010), online at <http://www.chooseyourjudges.org/> (visited Sept 9, 2011).

⁹⁹ See generally Sample, et al, *New Politics 2010* (cited in note 79) (detailing judicial campaign spending and other judicial election trends from 2000–2009).

¹⁰⁰ *Id.* at 24.

¹⁰¹ *Id.*

¹⁰² *Id.*

codes of judicial conduct.¹⁰³ Likewise, the ABA revised its Model Code of Judicial Conduct in accordance with *White*, while retaining the “pledge and promise” and “commit” clauses and offering additional guidance—to the extent feasible—based on the tea leaves in *White* as to nonannounce clause applicability.¹⁰⁴ In contrast to Schotland, Tom Phillips, who served as the Chief Justice of the Texas Supreme Court for nearly two decades, asserts that “*White* and its progeny (legitimate or otherwise), together with the resulting code changes, have created a sea change in judicial campaign practices.”¹⁰⁵

With respect to the implied assertion that certain of *White*’s progeny is “other” than legitimate, perhaps no decision in *White*’s aftermath is more criticized—or more illustrative of the resulting disarray—than *Weaver v Bonner*.¹⁰⁶ In *Weaver*, the Eleventh Circuit struck down Georgia’s rules prohibiting judicial candidates from making false and misleading statements¹⁰⁷ and prohibiting judicial candidates from personally (as opposed to through a designated campaign committee) soliciting campaign contributions.¹⁰⁸

More sweeping than *Weaver*’s holding, however, was the rationale behind it. The *Weaver* court declared: “[W]e believe that the Supreme Court’s decision in *White* suggests that the standard for judicial elections should be the same as the standard for legislative and executive elections.”¹⁰⁹ Apparently, the Eleventh Circuit either read *White* only selectively, or concluded that it knew better what the Supreme Court majority thought than the justices themselves, because the *Weaver* declaration commanded

¹⁰³ See generally Gray, 93 *Judicature* 26 (cited in note 90). See also Phillips and Poll, 55 *Drake L Rev* at 701 (cited in note 58) (noting that “at least twenty-two state supreme courts have amended their codes in response to *White*” and that “in at least six states—Alabama, Florida, Michigan, Ohio, South Dakota, and Vermont—judicial ethics advisory committees or disciplinary bodies withdrew or amended earlier positions deemed inconsistent with *White*”).

¹⁰⁴ See Phillips and Poll, 55 *Drake L Rev* at 701 (cited in note 58).

¹⁰⁵ *Id.* at 702 (parenthetical in original).

¹⁰⁶ 309 F3d 1312 (11th Cir 2002). See, for example, Roy A. Schotland, *Six Fatal Flaws: A Comment on Bopp and Neeley*, 86 *Denver U L Rev* 233, 240 (2008) (noting that the Eighth Circuit “panel’s *sua sponte* activism led it to sweep away the entire [Georgia] Canon”); Shira J. Goodman, David Caroline, and Lynn A. Marks, *What’s More Important: Electing Judges or Judicial Independence? It’s Time for Pennsylvania to Choose Judicial Independence*, 48 *Duquesne L Rev* 859, 878–79 (2010) (noting that *White* and its progeny, including *Weaver*, “have integrated judges further into the money side of their campaigns”).

¹⁰⁷ *Weaver*, 309 F3d at 1319.

¹⁰⁸ *Id.* at 1322.

¹⁰⁹ *Id.* at 1321.

a majority despite the Supreme Court's express statement that "we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative and executive office."¹¹⁰

One campaign practice that has waxed in the post-*White* era is the interest-group questionnaire for judicial candidates and, in turn, the dissemination of grossly oversimplified interest-group literature based on those questionnaires.¹¹¹ Whereas in prior decades, "the judicial conduct code provisions allowed the candidates themselves to operate in a parallel universe," and to "generally ignore[] or evade[]" questionnaires "by pointing to the ethical restrictions,"¹¹² the loss of that buffer combined with the need for campaign contributions and support dramatically increases the pressure on candidates. The result is that groups are "able to demand that judicial candidates make general statements coming down on one side or the other" of an issue, and candidates "find it difficult to resist such demands because these organizations will likely make campaign contributions contingent upon a favorable response."¹¹³

The questionnaires of several groups included an option for candidates to decline to answer the questionnaires based on the jurisdiction's applicable code of judicial conduct.¹¹⁴ Far from of-

¹¹⁰ *White*, 536 US at 783.

¹¹¹ For visual examples of questionnaires from Kansas Judicial Watch and from the Florida Family Policy Council, see James Sample, Lauren Jones, and Rachel Weiss, *The New Politics of Judicial Elections 2006* at 30, 32 (Justice at Stake Campaign 2007) ("New Politics 2006"), online at http://brennan.3cdn.net/49c18b6cb18960b2f9_z6m62gwji.pdf (visited Sept 6, 2011). For a visual example of the almost inevitably binary-only literature that is the byproduct of such questionnaires, see *id.* at 31 (picturing the literature image from the 2006 Alabama contest between Drayton Nabers and Sue Bell Cobb indicating "agree or disagree" options on propositions such as "Unborn Child is Fellow Human Being," "Home School Education Tax Credits," "The State Can Acknowledge God," and "Same Sex Marriage").

¹¹² Phillips and Poll, 55 Drake L Rev at 702 (cited in note 58).

¹¹³ Republican Party of Minnesota v. White: *What Does the Decision Mean?*, (Brennan Center for Justice 2002), online at http://www.brennancenter.org/content/resource/republican_party_of_minnesota_v_white_what_does_the_decision_mean (visited Sept 6, 2011).

¹¹⁴ As one example, the "decline" to answer option on the Kansas Judicial Watch questionnaire included an asterisked footnote stating as follows:

This response indicates that I would answer this question, but believe that I am or may be prohibited from doing so by Kansas Canon of Judicial Conduct 5A(3)(I) and (ii), which forbids judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" or "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." This response also indicates that I would answer this question, but believe that, if I did so, then I will or may be required to recuse myself

fering a fig leaf of protection for judicial independence, however, candidates who checked the “decline” option created—whether wittingly or unwittingly—the predicate for suits challenging the cited provisions of the conduct codes.¹¹⁵ In response, many bar associations, judges, and groups concerned about judicial independence came up with recommendations for judicial candidates such as “never use the pre-printed answers provided on the questionnaire” and “never rely upon a judicial Canon to justify a decision not to respond.”¹¹⁶ While this advice is clearly sound, it also reflects, and to a certain degree promotes, the marginalization of the codes themselves. Perhaps most effectively, some judges and judicial candidates chose to respond to questionnaires with open public letters aimed at reinforcing the proper role of a judge. Perhaps the most widely disseminated and most effective such letter—today, one might say it went “viral” within judicial and courts circles—was that of Judge Peter D. Webster of Florida’s First District Court of Appeal:

I have spent a good portion of my life thinking about issues related to the judiciary. My experiences lead me to conclude without reservation that questionnaires such as that which I have received from your organization are ill-conceived. Over the long term, their impact cannot be anything but bad—bad for the judiciary as an institution; bad for the rule of law; and bad for the people of Florida. I say this because such questionnaires create the impression in the minds of voters that judges are no different

as a judge in any proceeding concerning this answer on account of Kansas Canon 3E(1), which requires a judge or judicial candidate to recuse him or herself when “the judge’s impartiality might reasonably be questioned . . .”

National Ad Hoc Advisory Committee on Judicial Campaign Oversight, *How Should Judicial Candidates Respond to Questionnaires?* 1 (Aug 29, 2008), online at http://www.judicialcampaignconduct.org/2008%20Updated%20Advice_on_Questionnaires.pdf (visited Sept 6, 2011) (noting that “[a]n almost identical paragraph has been used on similar questionnaires in other states, e.g. Tennessee in 2006 and Florida in 2008”).

¹¹⁵ Midwest Democracy Network and Justice at Stake Campaign, *Guidelines for Judicial Candidates: Running Campaigns That Educate the Public and Promote Confidence in the Courts*, Memorandum for Midwest Court Candidates 6 (Sept 2008), online at http://www.justiceatstake.org/media/cms/JASMWMemorev_50F6EDD22B678.pdf (visited Sept 6, 2011). See also Sample, et al, *New Politics 2006* at 29 (cited in note 111) (noting that the “strategy in which candidates who cite the Code of Judicial Conduct as a reason for declining to respond ends up triggering lawsuits challenging provisions in the Code” and that “[s]uch lawsuits have been brought in Alaska, Florida, Indiana, Kansas, Kentucky, North Dakota, and Pennsylvania”).

¹¹⁶ Midwest Democracy Network, *Guidelines for Judicial Candidates* at *5 (cited in note 115).

from politicians—that they decide cases based on their personal biases and prejudices.¹¹⁷

The response of Texas Chief Justice Wallace Jefferson to the “Free Market Foundation Voters’ Guide” questionnaire in 2006 noted that Jefferson “elected not to answer some of the questions” because, while he had “opinions on many areas of substantive law,” he makes “it a practice to give litigants the opportunity to persuade me, based on the facts of their case and any developments in the law, that their position is meritorious.”¹¹⁸ Particularly pertinent to scenarios such as the “Lawyer Ketchum v Jurist Ketchum” sequence described in Part I of this Article, and to Judge Easterbrook’s model of post-*Caperton* analysis in *Bauer v Shepard*, which is detailed in Part III, is Chief Justice Jefferson’s statement of his further reason for declining to respond:

Second, I would be subject to recusal were I to express an opinion on disputed legal issues before the case is actually decided by my Court. I have an obligation to minimize the areas in which recusal would be warranted so that I can be a participant, and not a spectator, in the administration of justice.¹¹⁹

Indeed, despite the limitations of anecdote, the best way to sum up the state of judicial post-*White* confusion and disarray may be via a series of comparisons illustrating the chasm between the opposing interpretations of *White*.

Compare, for example, Chief Justice Jefferson’s approach to Justice Ketchum’s. Similarly, consider the difference between the *White* majority’s express caveat that they “neither assert[ed] nor impl[ied] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office” with the Eleventh Circuit’s declaration in *Weaver*. For better or worse, and it almost certainly is the latter, material for such illustrative comparisons is in ample supply. Arguably, the divergence of post-*White* norms could scarcely be better illustrated than via a comparison of jurists such as Chief Justice Jefferson and Judge Peter Webster, as reflected in their respective responsive letters quoted above, with, for example, the radio advertise-

¹¹⁷ Sample, et al, *New Politics 2006* at 33 (cited in note 111).

¹¹⁸ National Ad Hoc Advisory Committee, *How Should Judicial Candidates Respond to Questionnaires?* at *3 (cited in note 114) (excerpt from a 2006 letter by Judge Jefferson of Texas declining to answer the questionnaire).

¹¹⁹ *Id.*

ment run by *incumbent* Alabama Supreme Court Justice Tom Parker in 2010, in which he likened United States District Court Judge Virginia Phillips, who struck down the military's Don't Ask Don't Tell policy, to the threat posed by Al Qaeda.¹²⁰ According to Parker's radio spot, "[m]ost people believe al-Qaeda is one of America's biggest security threats. I think it's time to add liberal activist judges like Judge Phillips to that list."¹²¹ According to Parker, that comparison is justified because "liberal activists like Judge Phillips are overturning marriage laws, raising taxes, violating property rights, and now they are attacking our very national security."¹²²

Chief Justice Jefferson and Judge Webster provide just two examples of the thousands of candidates and judges—elected and appointed—who remain willing to swim against the currents; to approach the judicial role with a restraint reflective of rigorous respect for both the rule and *process* of law. To the extent that the canons protect and promote the judicial role, they serve a high purpose. After all, "impartiality is not an end in itself. It is an instrumental value designed to preserve a different end altogether: the rule of law."¹²³

Nearly a decade removed from *White*, facing financial and interest-group pressure, many state jurists and judicial candidates find themselves struggling with an increasingly challenging dilemma: to signal or not to signal? As the relative cost-benefit analysis for an isolated individual continues to diverge from the less favorable cost-benefit analysis for society writ large, jurists like Ketchum and Parker remain, for now, the exceptions. In *White's* aftermath, however, the exceptions are increasing in both number and degree. And it is becoming difficult to conclude that the pushing of the envelope is not inevitably resulting in a feedback loop producing yet more of the same—and consequent erosion in the perception and actuality of the rule of law.

B. *New York State Board of Elections v López Torres*

For the purposes of divining a developing doctrinal approach to judicial elections, the least critical of the decade's three Su-

¹²⁰ See Peter Hardin, *Campaign Ad Likens US Judge and Terrorists* (Justice at Stake Campaign 2010), online at <http://www.gavelgrab.org/?p=14986> (visited Sept 9, 2011).

¹²¹ *Id.*

¹²² *Id.* (emphasis added).

¹²³ Geyh, 64 Ohio St L J at 65 (cited in note 48).

preme Court cases is *López Torres*. Accordingly, relative to *White* and *Caperton*, this Article's treatment of *López Torres* is quite brief. *López Torres* does, however, offer substantially more than has been recognized in the literature with respect to the recent evolution of the Court's views on elected judiciaries. In New York State, the trial court of general jurisdiction is, bizarrely but enduringly, called the Supreme Court of New York.¹²⁴ For the most part, *López Torres*, while involving a system of convention-based nominations for that court, is not really a case about judicial selection, so much as it is a case about a particular—and particularly byzantine—convention-based nomination system, where the nominees just happen to be candidates for judicial, as opposed to legislative or executive, office.¹²⁵

In *López Torres*, the district court preliminarily enjoined the judicial nominating conventions as violating the First Amendment, and the Second Circuit affirmed, on the ground that the practical requirements of the statutorily mandated systems were “insurmountable” for candidates like Judge López Torres, who are widely supported by party members—and who indeed won primary and general elections for judicial offices not subject to the convention—but not supported by the local party leader.¹²⁶ The party leader, the lower courts found, is, as a practical and factual matter, able to exert complete—or at least outcome guaranteeing—control over the process.¹²⁷ As one might imagine, such an extraordinary concentration of power leads inexorably to abuse of that power. Controlling the convention machinery to block Judge López Torres's candidacy, despite her support among the party's voters, as retribution for her “consistent refusal” to engage in “patronage hires”¹²⁸ while a civil court judge, is one such abuse. The Supreme Court, finding no constitutional claim,

¹²⁴ See NY Const Art VI, §§ 7, 8.

¹²⁵ See *López Torres*, 552 US at 199–200. It bears noting here by way of disclosure, that having had the distinct privilege of serving as one of the attorneys who represented the plaintiffs, including Judge Margarita López Torres, I am anything but neutral on the topic of *López Torres*. Suffice it to say that on the merits of the claims involved, I favor the opinion of United States District Judge John Gleeson of the Eastern District of New York and the opinion affirming him by the United States Court of Appeals for the Second Circuit. Ultimately, those opinions, however, did not hold sway. See *López Torres v New York State Board of Elections*, 462 F3d 161 (2d Cir 2006); *López Torres v New York State Board of Elections*, 411 F Supp 2d 212 (EDNY 2006). The views described herein with respect to *López Torres*, while consistent with the posture of the plaintiffs whom I (with co-counsel) was privileged to represent in the litigation, are entirely my own.

¹²⁶ See *López Torres*, 552 US at 201.

¹²⁷ *Id* at 202 (citing lower court decisions).

¹²⁸ *Id* at 201.

reversed.¹²⁹ Ellen Katz captures the analysis in *López Torres* as follows: “Most notably, *López Torres* examined New York’s regime solely as state statutes *describe it*, and disregarded how it *operates in practice*. The Court never disagreed with the lower courts’ finding that New York’s system is functionally impenetrable to challenger candidates and their supporters.”¹³⁰ As a strictly legal (as opposed to functional) matter, however, the Court found the process “legally accessible.”¹³¹

Whatever the merits of such fact-detached formalism in the context of an election for legislative or executive office, it is notable that Justice Scalia, writing for the Court, as he did in setting forth the impartiality taxonomy in *White*, was unconcerned by the impartiality implications of New York’s system. This embrace of rigid formalism enabled the Court to wash its hands of the underside of a system described by political scientists Thomas Mann and Norman Ornstein (of the Brookings Institution and the American Enterprise Institute, respectively) as follows:

[A]lthough New York’s . . . scheme may ensure that Supreme Court Justices are independent of public opinion, it makes them completely dependent on local party leaders, a group that represents neither the party voters nor the general citizenry. As a result, Supreme Court judgeships and many below them in the New York judicial hierarchy have become objects of local party patronage, where party bosses not only control who becomes a judge but also feel free to demand whom judges hire in their most important and sensitive positions.¹³²

¹²⁹ Id at 209.

¹³⁰ Ellen Katz, *Withdrawal: The Roberts Court and the Retreat from Election Law*, 93 Minn L Rev 1615, 1619 (2009) (emphasis added), citing *López Torres*, 552 US at 207.

¹³¹ Katz, 93 Minn L Rev at 1619 (emphasis omitted) (cited in note 130). Katz asserts that the Court “steadfastly refused to examine the system’s cumulative effects and came close to embracing what Justice Stevens’s dissent in *Clingman* described as ‘empty formalism.’” Id at 1620, citing *Clingman v Beaver*, 544 US 581, 610 (2005) (Stevens dissenting). See also Norman L. Greene, *Advancing the Rule of Law through Judicial Selection Reform: Is the New York Court of Appeals Judicial Selection Process the Least of Our Concerns in New York?*, 72 Albany L Rev 633, 646 (2009) (“According to the . . . findings in *López Torres*, which the U.S. Supreme Court’s reversal did not disturb, political parties (or political bosses) have extensive control over judicial selection in the New York Supreme Court; and voters are left to ratify those choices at the general election.”).

¹³² Brief Amici Curiae Thomas Mann, Norman Ornstein, the Reform Institute, and Campaign Legal Center in Support of Respondents, *New York State Board of Elections v López Torres*, Civil Action No. 06-766, *2–3 (filed July 13, 2007) (available on Westlaw at 2007 WL 2047542) (“Mann Brief” hereinafter).

Justice Stevens joined the Court's opinion but wrote a separate one-paragraph concurrence joined by Justice Souter, stating that the holding "should not be misread as endorsement of the electoral system under review, or disagreement with the findings of the District Court that describe glaring deficiencies in that system."¹³³ Whatever one's view as to the decision upholding the constitutionality of New York's system, it is definitively unique—there is not another elective or convention system like it, for judicial or nonjudicial office—anywhere in the country.¹³⁴ Yet, even faced with such a one-off-type system, the very fact that the system contained the patina of an election was opening enough for Justice Stevens to assert that the system's "glaring deficiencies . . . even lend support to the broader proposition that the very practice of electing judges is unwise. But as I recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: "The Constitution does not prohibit legislatures from enacting stupid laws."¹³⁵

Justice Kennedy concurred in the *López Torres* judgment but was the lone justice not to join the Court's opinion.¹³⁶ Joined by Justice Breyer with respect to the portion of the concurrence discussed herein, Justice Kennedy wrote that he found it "understandable that the Court refrains from commenting upon the use of elections to select the judges of the State's courts of general jurisdiction, for New York has the authority to make that decision," but that a "closing observation, however, seems to be in order."¹³⁷

The substantive portion of Kennedy's "closing observation" begins: "When one considers that elections require candidates to conduct campaigns and to *raise funds* in a system designed to allow for competition among *interest groups* and political parties, the persisting question is whether that process is *consistent with the perception and the reality of judicial independence* and judicial excellence."¹³⁸

¹³³ *López Torres*, 552 US at 209 (Stevens concurring).

¹³⁴ Mann Brief at *4 ("[T]he New York system is unique, and has no parallel in another state or jurisdiction.").

¹³⁵ *López Torres*, 552 US at 209 (Stevens concurring).

¹³⁶ *Id.* at 209 (Kennedy concurring).

¹³⁷ *Id.* at 212 (Kennedy concurring).

¹³⁸ *Id.* (Kennedy concurring) (emphasis added). First, it is notable in itself that the "closing observation" was, of course, entirely sua sponte, and completely unnecessary in any real sense of the term—Justice Kennedy had already, in Part I of his concurrence, explained his reasoning with respect to why he concurred in the judgment. In addition, Kennedy, who concurred in *White*, and Breyer, who dissented in *White*, joined together in

With those words, Kennedy, who has consistently been on the antiregulatory, First Amendment “side” of every major campaign-finance case since joining the high court,¹³⁹ and who was likewise on the First Amendment “side” in the actual speech (as opposed to financial speech) dispute in *White*, signaled more than mere policy reservations as to the nexus of money and the courts.¹⁴⁰ First, the sentence recognizes a unique tension, created specifically by money, for the state interest in maintaining the integrity of its judiciary—an interest that Kennedy had described in *White* as of “vital importance.”¹⁴¹ Second, applied to the context of a particular case, the reference to “interest groups” arguably implicates the first impartiality type in the *White* taxonomy (bias in favor of or against a party), and unequivocally implicates concerns with the combination of money and the group-based biases that this Article terms as impartiality type 1.5.¹⁴² Third, it reflects Kennedy’s sensitivity to both the reality *and* perception of judicial independence—the latter being oft-discussed by courts but rarely having the constitutional teeth Kennedy would come to ascribe to it in *Caperton*.¹⁴³ Kennedy, indeed, expanded on this point in the *López Torres* concurrence, noting the “rule of law, which is a foundation of freedom, presupposes a functioning judiciary *respected for its independence*, its professional attainments, and the *absolute probity* of its judg-

transmitting the same message. This point of agreement was scarcely recognized as meaningful at the time or since, in part because it is hardly unusual for Kennedy and Breyer to agree (particularly when the judgment of the Court is unanimous).

¹³⁹ See, for example, *McConnell v Federal Election Commission*, 540 US 93, 286 (2003) (Kennedy dissenting in part and concurring in part); *Federal Election Commission v Wisconsin Right to Life*, 551 US 449, 483 (2007) (Kennedy concurring); *Davis v Federal Election Commission*, 554 US 724, 728 (2008) (Kennedy joining Alito’s majority opinion); *Citizens United v Federal Election Commission*, 130 S Ct 876, 886 (2010) (Kennedy delivering the majority opinion).

¹⁴⁰ It is worth noting, though, that Justice Kennedy had already demonstrated in *White* that his thinking with respect to state judicial elections was not in lockstep with the Court. Moreover, he had signaled in *White* that his analysis was particularly focused on process-based rule of law concerns. See discussion of Kennedy’s concurrence in *White* in Part II.A.1.b (noting that states “may adopt recusal standards more rigorous than due process requires”). Kennedy’s “more rigorous” recusal point in the *White* concurrence and his *López Torres* “closing observation” are both animated by rule of law concerns. Kennedy’s *López Torres* opinion, however, also seems to reflect the subtle refinements of time and further evolution of thought specifically on the topic of state judicial elections, and even a desire to affirmatively *transmit that message* though not necessary to his reasoning in the case.

¹⁴¹ *White*, 536 US at 793 (Kennedy concurring).

¹⁴² See Part II.A.

¹⁴³ See *Caperton v A.T. Massey Coal Co*, 1239 S Ct at 2266 (2009); discussion of appearance in *Caperton* at Part II.C.

es.”¹⁴⁴ Consider that if, as Kennedy further asserts: “it may seem difficult to reconcile these aspirations with elections” as a general matter, then, a fortiori, the most extreme factual manifestation of those concerns that the brave new world of elections has yet had to offer—the scenario in *Caperton*—poses a severe threat to that very presupposition, and thus, derivatively, to the rule of law.

In considering Justice Kennedy’s thinking with regard to judicial elections, it bears noting that, in the period between *White* and *López Torres*, Chief Justice Roberts and Justice Alito replaced Chief Justice Rehnquist and Justice O’Connor, respectively.¹⁴⁵ With that transition, Justice O’Connor’s commitment to state courts would manifest itself in varied ways,¹⁴⁶ but without a doubt, her biggest initial splash came in a 2006 conference she cochaired with the justice who joined Justice Kennedy’s concurrence, Justice Breyer.¹⁴⁷ In addition to an audience only cochairs of such esteem could produce,¹⁴⁸ most importantly, the participants included, as both speakers and as audience members, Justice O’Connor and *six* then-sitting Supreme Court justices.¹⁴⁹ Indiana Chief Justice Randall Shepard found the most important aspect of the conference to be the “willingness of a majority of the Supreme Court justices to sit down and listen the whole day [M]embers of the Court [] sat there and listened to people talk about them The image of it is just striking. It says an enormous amount about their commitment to this enterprise.”¹⁵⁰

¹⁴⁴ *López Torres*, 552 US at 212 (Kennedy concurring) (emphasis added).

¹⁴⁵ See Supreme Court of the United States, *Members of the Supreme Courts of the Unites States*, online at <http://www.supremecourt.gov/about/members.aspx> (visited Sept 6, 2011).

¹⁴⁶ See Biskupic, *O’Connor Retired from Court, Not Discourse*, USA Today at 2A (cited in note 76).

¹⁴⁷ See Greg Langlois and Anne Cassidy, *Fair and Independent Courts: A Conference on the State of the Judiciary* (Georgetown Sept 28, 2010), online at https://www.law.georgetown.edu/news/events/conference_story.html (visited Sept 6, 2011).

¹⁴⁸ See *id.* (stating that attendees included nonlawyers like Berkshire Hathaway Chairman and Chief Executive Officer Warren Buffet, Washington Post Company Chairman and CEO Don Graham, and RAND Corporation President and CEO James Thomson; lawyers in attendance included then-Attorney General Alberto Gonzales, former Solicitors General Theodore Olson and Walter Dellinger, and then-Solicitor General Paul Clement, as well as NAACP Legal Defense and Education Fund Director-Counsel and President Theodore Shaw; speakers and attendees included numerous federal and state court judges and justices as well as prominent academics).

¹⁴⁹ See *id.* (noting that in addition to Breyer, Justices Samuel Alito, Ruth Bader Ginsburg, David Souter, and Clarence Thomas all attended conference programs, and Chief Justice John Roberts delivered an address).

¹⁵⁰ *Id.*

While, as it happens, Kennedy was not one of the justices who attended the event, there can be little doubt that he was well aware of its content, and particularly of the evolution in O'Connor's thinking—and of her tireless efforts, discussed earlier in this Article.¹⁵¹ Indeed, one aspect of Kennedy's "closing observation" stands in stark contrast to what this Article describes as the "it's-the-state's-fault-for-choosing-the-system-in-the-first-place" spirit of O'Connor's *White* concurrence¹⁵² and in equally stark parallel to O'Connor's postretirement embrace of reform measures that stop short of moving to appointment systems. According to Kennedy in *López Torres*, while the Constitution chooses appointments for its federal judges, "most States have made the opposite choice,"¹⁵³ and thus, in light of the "longstanding practice and tradition" of elected judges in the states, "the appropriate practical response is *not to reject* judicial elections outright but to *find ways to use elections* to select judges with the highest qualifications."¹⁵⁴

Finally, Kennedy asserts, quite rightly, that "[e]ven in flawed election systems there emerge brave and honorable judges who exemplify the law's ideals. But it is unfair to them and to the concept of judicial independence if the State is indifferent to a selection process open to manipulation, criticism, and serious abuse."¹⁵⁵ Clearly, at the time he wrote those remarks in late 2007 and/or January 2008, Justice Kennedy was not thinking of West Virginia's Brent Benjamin. The *Caperton* sequence described below was still developing and would first be presented to the Court in a cert petition filed in July 2008.¹⁵⁶ This Article asserts, however, that it is scarcely unreasonable to think that Justice Kennedy's call to arms in *López Torres*, and particularly his eschewing of "indifferen[ce]" to abuses of fairness and judicial independence, influenced his thinking both with respect to the *Caperton* petition and ultimately, in his decision for the Court.¹⁵⁷

¹⁵¹ See discussion in Part II.A.1.a.

¹⁵² See note 74 and accompanying text.

¹⁵³ *López Torres*, 552 US at 212 (Kennedy concurring).

¹⁵⁴ *Id.* (Kennedy concurring) (emphasis added) (Justice Kennedy also noted that the "organized bar, the legal academy, public advocacy groups, a principled press, and all the other components of functioning democracy must engage" in the process of finding ways to use elections to promote "fair and open" elections.).

¹⁵⁵ *Id.* at 212–13 (Kennedy concurring).

¹⁵⁶ See Petition for a Writ of Certiorari, *Caperton v A.T. Massey Coal Co*, No 08-22 (filed July 2, 2008) (available on Westlaw at 2008 WL 2676568) ("*Caperton* Cert Petition").

¹⁵⁷ *López Torres*, 552 US at 213.

C. *Caperton v A.T. Massey Coal Co, Inc*

Rare is the case with facts as compelling as those in *Caperton*;¹⁵⁸ it is difficult to resist the allure of giving the facts and the opinion they generated extensive treatment here. But because, like many others,¹⁵⁹ I have covered *Caperton* and its early aftermath in great detail elsewhere,¹⁶⁰ this Article treats the case in a relatively cursory fashion and then focuses specifically on *Caperton*'s relationship to the developing doctrinal approach to judicial elections discussed within this Article. Thus, in *Caperton*, West Virginia Justice Brent Benjamin refused to recuse himself from the appeal of the \$50 million jury verdict against Massey Coal, even though Don Blankenship, Massey's CEO, spent \$3 million supporting Benjamin's campaign for a seat on the court—more than all other supporters of Benjamin's campaign *combined*—

¹⁵⁸ 129 S Ct 2252 (2009).

¹⁵⁹ The Harvard and Syracuse Law Reviews each published symposium issues devoted to *Caperton*. For further background and discussion, Keith Swisher's excellent article usefully cites each individual symposium contribution. See Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 *Ariz L Rev* 317, 340 n 88 (2010).

¹⁶⁰ See James Sample, *Caperton: Correct Today, Compelling Tomorrow*, 60 *Syracuse L Rev* 293, 303–04 (2010) (arguing that, although *Caperton* overturned a judge's decision of nonrecusal, its outcome will not result in the end of judicial elections; instead, *Caperton*'s import and long-lasting result will be stricter and clearer recusal rules for judges that will be vigorously enforced when judges face conflicts of interest); James Sample, *Court Reform Enters the Post-Caperton Era*, 58 *Drake L Rev* 787 (2010) (surveying the post-*Caperton* developments in the areas of recusal regulation, judicial independence, and the influence of money on, if nothing else, judicial selection practices, with a primary focus on such efforts made in the state courts of Wisconsin, Michigan, and West Virginia; expounding on federal developments and a "renewed congressional interest in judicial disqualification"; and concluding that, while the year since the 2009 landmark decision has certainly felt mixed effects, it has in large ignited a trend towards revitalizing the public's confidence in judicial integrity); Sample, et al, *New Politics 2010* (cited in note 79) (arguing that *Caperton* incentivizes states to adopt revised regulations guiding recusal practices); James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, 66 *NYU Ann Surv Am L* 2011 (forthcoming 2011), online at http://works.bepress.com/james_sample/1/ (visited Sept 6, 2011) (describing the distinction between independent expenditures and direct contributions as they pertain to judicial campaigns, while detailing their similar effects: threatening the impartiality of judicial election practices, and thus "creat[ing] an independent state interest in regulating not only campaign contributions, but also expenditures").

Both by way of disclosure and context, I had the privilege of authoring amicus briefs in support of the *Caperton* Petitioners at the certiorari and merits stage, and of working with Petitioners' outstanding counsel to coordinate other briefs. In my view, however, nothing I or anyone else will ever write about the case will ever be as compelling as the words of Hugh Caperton himself. If the personal side of the case is of interest, in my view, there is no better way to spend five minutes than by viewing his comments at the National Press Club. See *Video of 'New Politics Event': 'Justice for Sale?'* (Justice at Stake Campaign 2009), online at http://www.justiceatstake.org/resources/new_politics_of_judicial_elections_20002009/video_of_new_politics_event_justice_for_sale.cfm (visited Sept 9, 2011).

while Blankenship and Massey were preparing to appeal the verdict. After winning election to the court, Justice Benjamin cast the deciding vote in the court's 3-2 decision overturning that verdict.¹⁶¹

The Court, with Justice Kennedy writing the opinion for a 5-4 majority, started quite literally with first principles, noting that “[i]t is axiomatic that ‘a fair trial in a fair tribunal is a basic requirement of due process.’”¹⁶² It then reasoned from the principles of its precedents¹⁶³ to hold that Benjamin’s refusal to disqualify himself violated due process.¹⁶⁴ According to the Court, due process was jeopardized by the “serious risk of actual bias—based on objective and reasonable perceptions.”¹⁶⁵

The most significant indicator that Justice Kennedy might be inclined towards an outcome consistent not with the *results* he reached in the earlier cases, but rather, with the evolving *signals* he sent in those cases that are considered in this Article, came during this exchange in oral argument, involving Massey’s counsel Andrew Frey:

JUSTICE SOUTER: Well, I—as I understand it, although you never directly, I don't think you ever directly answered it, I—I understood you to imply in response to Justice Stevens that there would be no appearance problem that would ever justify a constitutional standard.

MR. FREY: Appearance is a standard for recusal, a non-constitutional statutory standard for recusal in virtually every State, so we already have—and in the Federal system, so—

¹⁶¹ *Caperton*, 129 S Ct at 2258.

¹⁶² *Id* at 2259, citing *In re Murchison*, 349 US 133, 136 (1955).

¹⁶³ See Penny White, *Relinquished Responsibilities*, 123 Harv L Rev 120, 125 (2009) (noting that “the majority used *Tumey*’s bricks and *Murchison*’s and *Lavoie*’s mortar to cobble together a new category of judicial disqualification necessitated by emerging problems but based upon an existing constitutional right”), citing *Tumey v Ohio*, 273 US 510, 532 (1927); *Murchison*, 349 US at 136; *Aetna Life Insurance Co v Lavoie*, 475 US 813 (1986).

¹⁶⁴ See *Caperton*, 129 S Ct at 2258.

¹⁶⁵ *Id* at 2263. The Court explained that this serious risk existed “when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.” *Id* at 2263–64. The Court noted that “[t]he inquiry centers on the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.” *Id* at 2264.

JUSTICE SOUTER: Yes. And we have—and we have an appearance standard under the ABA Canons, but I think it would be difficult to make a very convincing argument that that standard was effective in this case.

MR. FREY: Well, that—that's a matter of opinion. I—I—

JUSTICE SOUTER: Well, it's—it's the matter of opinion that brings the case before us. And would you agree—I am not—I am not asking you to agree that the ABA standard was violated. That's not what you're here for. But would you agree that the ABA standard is certainly implicated by the facts of this case, whatever the ultimate recusal decision should have been?

MR. FREY: I think I would agree that reasonable people could have a different view one way or the other about whether there is an appearance of impropriety for Justice Benjamin sitting. I would agree with that. I don't think I would go further than that because my personal view is that there was no impropriety, that it was reasonable, and if you read his opinion I think you'll see a—a fair, balanced, thoughtful statement of the reasons why he feels he could sit.

JUSTICE KENNEDY: I want you to be able to elaborate your full theory of the case, but just so you know, it—it does seem to me that the appearance standard has—has much to recommend it. In part it means that you don't have to inquire into the actual bias; it's—it's more objective. Now, of course it has to be controlled, it has to be precise. But I just thought that you know that I—I do have that inclination.

MR. FREY: But—but we're here on the question of constitutional requirements and the Constitution—

JUSTICE KENNEDY: And we're asking—we're asking what substance we can give to the constitutional protection.¹⁶⁶

¹⁶⁶ Transcript of Oral Argument, *Caperton v A.T. Massey Coal Co*, Civil Action No 08-22, *31-34 (Mar 3, 2009) (available on Westlaw at 2009 WL 527723) (“*Caperton* Oral Argument Transcript” hereinafter).

The above exchange is compelling in many respects but particularly if interpreted as the culmination of several incremental steps in Justice Kennedy's thinking on judicial elections, that led him, over a period of nearly a decade, to the Court's landmark, and in my view, eminently correct decision in *Caperton*.¹⁶⁷ As with any attempt to quantify and cabin a gradual process, identifying particular discrete steps involves a series of arbitrary—but, ideally also helpful—lines of demarcation. With that caveat, this Article chronicles what one might term Justice Kennedy's Seven Steps to *Caperton* and his *Citizens United* Postscript.

First, the exchange above demonstrates the seriousness of Kennedy's perspective in *White* as to the "vital importance" of maintaining the integrity of the judiciary.¹⁶⁸

Second, Kennedy's "more rigorous" recusal statement in *White* reinforced the predicate floor of constitutionally mandated disqualification.¹⁶⁹ As of *White*, we did not know exactly where that floor might be save for in the Court's existing precedents, which, while offering the analogies that the Court ultimately embraced, did not address campaign support.

Third, by reinforcing that predicate floor in the context of *White*—a judicial elections case that would subsequently give Justice O'Connor "pause" and cause upheaval and disarray in the lower federal and state courts—he laid an architectural framework to eventually bridge from the Court's existing due process precedents to the judicial elections context.

Fourth, Kennedy differentiated, in First Amendment terms, between the announce-clause restriction—which he viewed as depriving voters of valuable information, in service of an inadequately defined interest—and his concern, articulated first in *López Torres*, as to the need to "raise funds" from "interest

¹⁶⁷ Similarly recognizing aspects of this evolution, Rick Hasen, in the course of considering Justice Kennedy's differential treatment of independent campaign expenditures in *Caperton* with his treatment of independent campaign expenditures in *Citizens United*, speculates that Justice Kennedy perhaps has come to reject what Justice Ginsburg, in her dissent in *White*, "disparagingly termed a 'unilocular, an election is an election, approach' to the First Amendment," and notes that "by *Caperton* he had more fully expressed his reservations about judicial elections." Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 Mich L Rev 581, 614 (forthcoming 2011), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1620576 (visited Sept 9, 2011) (citing Justice Ginsburg's dissent in *White* where she stated, "I do not agree with this unilocular [sic], 'an election is an election,' approach. Instead, I would differentiate elections for political offices, in which the First Amendment holds full sway, from elections designed to select those whose office it is to administer justice without respect to persons.>").

¹⁶⁸ See discussion in Part II.A.1.b.

¹⁶⁹ See *White*, 536 US at 794 (noting that states "may adopt recusal standards more rigorous than due process requires").

groups” who may then appear before the courts. Consider, in this regard, the striking similarity of this portion of Kennedy’s words in *López Torres* to Justice O’Connor’s words in a *Wall Street Journal* op-ed published just two months prior to the Court’s decision in *López Torres*.¹⁷⁰ In that op-ed O’Connor wrote that contributions from lawyers and litigants “threaten the integrity of judicial selection and compromise the public perception of judicial decisions.”¹⁷¹

Fifth, the above colloquy’s emphasis on “appearance” is an especially strong confirmation that Kennedy was not merely adding boilerplate verbiage in writing of the importance of both the reality and the “perception”¹⁷² in *López Torres*, but was rather pointing to two distinct and separate concerns and the corresponding need to give “substance . . . to the constitutional protection.”¹⁷³

Sixth, Kennedy’s notion, articulated in *López Torres*, that it is “unfair” to the judges who exemplify the rule of law and “to the concept of judicial independence if the State is indifferent to a selection process open to manipulation, criticism, and serious abuse,” is particularly apt in *Caperton*.¹⁷⁴ This is so because *Caperton* presented an easy state question in which the disregard of the clear state rule “gave birth to the difficult federal issue.”¹⁷⁵

West Virginia’s Code of Judicial Conduct required Justice Benjamin’s disqualification whenever his impartiality “might reasonably be questioned.”¹⁷⁶ Under the code, Justice Benjamin’s

¹⁷⁰ Sandra Day O’Connor, *Justice for Sale*, Wall St J A25 (Nov 15, 2007).

¹⁷¹ *Id.*

¹⁷² See note 138 and accompanying text.

¹⁷³ *Caperton* Oral Argument Transcript at 33–34 (cited in note 166). See also discussion in Part II.B.

¹⁷⁴ *López Torres*, 552 US at 212–13 (Kennedy concurring).

¹⁷⁵ Sample, 60 Syracuse L Rev at 294 (cited in note 160). Notably, this view is shared by many leading First Amendment scholars who, in the context of campaign finance cases for nonjudicial offices, are like Justice Kennedy, on the deregulatory side. For example, Kathleen Sullivan, speaking at a recent conference, stated that “the outcome in the *Caperton* case is clear. Given all the particular facts and optics in the case, Justice Benjamin should have recused himself under either the West Virginia standard or the ABA standard. In other words, it should have been an easy matter that did not have to go to a due process ruling.” Kathleen Sullivan, *One Symptom of a Serious Problem: Caperton v. Massey* (symposium transcript), 33 Seattle U L Rev 569, 584 (2010). In a scathing but thoughtful and thorough article, Jeffrey Stempel catalogs the specific—and often glaring—shortcomings of Justice Benjamin’s analysis, and Stempel notes that “the more one knows about Justice Benjamin’s refusal to recuse, the worse it looks for him and the judicial system.” Stempel, 47 San Diego L Rev at 28 (cited in note 20).

¹⁷⁶ W Va Code of Judicial Conduct Canon 3(E)(1) (2009).

responsibility to disqualify was not a close call. “Applying the facts to the terms of the state rule, ‘might’ it have been ‘reasonable’ to question Benjamin’s impartiality? To answer that question in the negative not only strains credibility, but also renders the provision a nullity.”¹⁷⁷ This is to say that “it is important to acknowledge that if Benjamin had complied with the state rule, *or if the state had otherwise ensured Benjamin’s disqualification*, there would have been absolutely no constitutional case.”¹⁷⁸

Procedurally, as remains true in most states,¹⁷⁹ there was no available state recourse following Benjamin’s repeated unilateral refusals to disqualify himself under the applicable state code. Thus, viewed through the lens of Justice Kennedy’s words, precisely because of the state’s “indifference” (absent the Court intervening in the case to reinforce the constitutional floor), the judges about whom Kennedy was concerned, as well as the perception and possibly the reality of judicial independence, would have suffered precisely the “unfair[ness]” to which he pointed in *López Torres*.¹⁸⁰

This “sixth” point is particularly critical to an understanding of *Caperton*’s prospective import, and, in my view, is a particularly powerful rejoinder to the Chief Justice Roberts’s questions in dissent¹⁸¹ and those commentators who have criticized the de-

¹⁷⁷ Sample, 60 Syracuse L Rev at 294 (cited in note 160). See also Brief Amici Curiae of 27 Former Chief Justices and Justices in Support of Petitioners, *Caperton v A.T. Massey Coal Co*, Civil Action No 08-22, *5 (2009) (stating unequivocally that, even apart from the constitutional issue, the twenty-seven former justices “uniformly believe[d] that the participation of Justice Benjamin . . . created an appearance of impropriety. All amici participating in this brief would have recused if they had benefited from the level and proportion of independent expenditures by the CEO of a party to a case pending before the court.”).

¹⁷⁸ Sample, 60 Syracuse L Rev at 294 (cited in note 160) (emphasis added).

¹⁷⁹ As explored along with other state level post-*Caperton* developments in Sample, 58 Drake L Rev at 790–91 (cited in note 160). In response to *Caperton*, Michigan adopted a new administrative rule whereby the objective component of that standard would no longer be subject to the fundamental flaw exposed in *Caperton* itself—the entirely subjective and unreviewable determination of that objective standard by the target judge herself. See Mich Comp Laws Ann § 2.003(C)(1)(b) (West 2010).

¹⁸⁰ See note 155 and accompanying text.

¹⁸¹ *Caperton*, 129 S Ct at 2269–72 (Roberts dissenting) (listing forty numbered questions that Chief Justice Roberts characterizes as “only a few uncertainties that quickly come to mind”). Keith Swisher’s excellent piece on the Judicial Ethics Forum, addressing Chief Justice Roberts’s questions in dissent, does a masterful job of noting that many of the line-drawing questions could just as easily be flipped in reverse. See Keith Swisher, *Caperton: Answers to the Chief Justice’s “Twenty Questions” Times Two*, The Judicial Ethics Forum (June 15, 2008), online at <http://judicialethicsforum.com/2009/06/15/caperton-answers-to-chief-justice-roberts-twenty-questions-times-two/> (visited Sept 9, 2011) (noting that “an umpire who merely calls balls and strikes should be less concerned with questions not before the court, and indeed, every case could spawn a multitude of forward-looking questions not raised by the facts at hand”).

cision as “largely unworkable.”¹⁸² Imagine, for a moment, the consequences if the Court had failed to step in, even despite the extraordinary facts in *Caperton*.

With respect to the possibility of “unfairness” (to borrow Justice Kennedy’s word), I asserted in an amicus brief that if the Court failed to “speak decisively” in *Caperton*, “the message will be clear: Litigants, lawyers, and judges will understand that the Due Process Clause imposes no meaningful constraints on attempts to buy influence, even in pending cases.”¹⁸³ While that alone would have imposed serious consequences on the courts, it would also have imposed a special, concentrated unfairness on the actors within the process—litigants, lawyers, and judges—who, whether out of probity, heightened regard for appearances, or even risk aversion, would have put themselves at a comparative disadvantage had such a scenario ultimately obtained. That is to say, if the Court had declined to hold that *Caperton*’s facts fell beneath the floor of due process, such a decision would have been interpreted as “license by future actors in the shoes of Mr. Blankenship and Justice Benjamin [and t]he resulting race to the bottom [would] severely corrode both the quality and perception of American justice.”¹⁸⁴

Seventh, even if Justice Kennedy might have otherwise had lingering reservations about—if one will indulge the metaphor—crossing the Rubicon to the other side in the context of *Caperton*, they were likely substantially mitigated by the knowledge that he was hardly going it alone. In this regard Petitioners’ lead counsel, Ted Olson, made a similar crossing in the sense of concluding that the nexus of money and judicial elections is different in constitutionally salient ways from the nexus of money and

¹⁸² Stephen M. Hoersting and Bradley A. Smith, *The Caperton Caper and the Kennedy Conundrum*, 2009 Cato Sup Ct Rev 319, 319 (2009). One curiosity of this argument, of course, is that most if not all of the decision’s critics just as surely would have criticized the Court if it had reached out to draw bright-line rules that were not necessary to decide the case. Moreover, Rick Pildes, among others, notes persuasively the decision’s particular value from a constitutional-boundary-enforcing perspective. See Rick Pildes, *Caperton and Boundary-Enforcing Justices Part II: How Vague Law Can Create Stable Outcomes*, Balkanization (June 25, 2009), online at <http://balkin.blogspot.com/2009/06/caperton-and-boundary-enforcing.html> (visited Sept 9, 2011) (asserting that, in analyzing the decision, Chief Justice Roberts and critical commentators “fail to consider . . . that the enforcement might include other institutional actors not constrained in the same way the Court is”).

¹⁸³ Brief of Amici Curiae the Brennan Center for Justice at NYU School of Law, the Campaign Legal Center, and the Reform Institute in Support of Petitioners, *Caperton v A.T. Massey Coal Co*, Civil Action No 08-22, *4 (filed Jan 5, 2009) (available on Westlaw at 2009 WL 45972).

¹⁸⁴ *Id.*

legislative and executive politics.¹⁸⁵ And the most remarkable brief in the case, that of the Conference of Chief Justices,¹⁸⁶ asserted, from a perspective on the front lines of rising campaign expenditures, that “the Constitution may require the disqualification of a judge in a particular matter because of extraordinarily out-of-line campaign support from a source that has a substantial stake in the proceedings”¹⁸⁷ and further that, “[b]ecause the applicability of the Due Process Clause in the campaign spending context depends on the particular facts of each case, no bright-line rule can or should be attempted.”¹⁸⁸

Given the striking similarity of those statements from the state chief justices to Justice Kennedy’s opinion for the Court, Justice Kennedy’s opinion is paradoxically both a landmark and a properly narrow model of restraint and deference to the state court judges—albeit not to one rogue within their ranks.

Finally, the postscript to the seven incremental refinements in Justice Kennedy’s thinking about judicial elections is *Citizens United v Federal Elections Commission*.¹⁸⁹ Less than one year removed from the decision in *Caperton*, the Court, with Justice Kennedy once again writing for a 5-4 majority, issued its blockbuster opinion in *Citizens United*, in which the Court, inter alia, overturned century-old limits on corporate general treasury fund expenditures to influence candidate elections.¹⁹⁰ A fulsome discussion of *Citizens United* is beyond the scope of this Article, as is a searching examination of the relationship between *Citizens United* and *Caperton*.¹⁹¹ Within the context of considering Jus-

¹⁸⁵ See, for example, Paul J. Nyden, *Mining Appeal Moving Along*, Charleston Gazette (W Va) 1A (May 16, 2008) (noting Olson’s statement that “[t]he improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today. . . . A line needs to be drawn somewhere to prevent a judge from hearing cases involving a person who has made massive campaign contributions to benefit the judge”).

¹⁸⁶ Brief of the Conference of Chief Justices as Amicus Curiae in Support of Neither Party, *Caperton v A.T. Massey Coal Co*, Civil Action No 08-22 (2009) (available on Westlaw at 2009 WL 45973) (“CCJ Brief” hereinafter). A more substantial treatment of the influence of the truly remarkable CCJ Brief is beyond the scope of this article. The CCJ Brief is covered in greater depth in Sample, 60 Syracuse L Rev at 296 (cited in note 160).

¹⁸⁷ CCJ Brief at *4 (cited in note 186).

¹⁸⁸ Id at *22.

¹⁸⁹ 130 S Ct 876.

¹⁹⁰ See id at 917.

¹⁹¹ In *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, in which I examine the Court’s older and more recent campaign-finance jurisprudence through the combined lenses of *Caperton* and *Citizens United*, I coin the concept of “*Caperton* contributions” to describe the equation, in *Caperton*, of independent expenditures with contributions in the judicial elections context. Sample, 66 NYU Ann

tice Kennedy's thinking on judicial elections, however, *Citizens United* not only does not undermine the appropriateness of differential treatment of judicial elections, but underscores Justice Kennedy's acute sensitivity to the need for such treatment.

The fact that Justice Kennedy's *Citizens United* opinion was joined by his ideological adversaries in *Caperton* illustrates that his sense of the influence of money on the judiciary is *sui generis*.¹⁹² Meanwhile, Justice Stevens's view—that, “[a]t a time when concerns about the conduct of judicial elections have reached a fever pitch, the Court today unleashes the floodgates of corporate and union general treasury spending in these races”¹⁹³—is shared by, among others, Justice O'Connor. Justice O'Connor told an audience at the Georgetown University Law Center that, “[i]n invalidating some of the existing checks on campaign spending, the majority in *Citizens United* has signaled that the problem of campaign contributions in judicial elections might get considerably worse and quite soon. . . . I think mutually assured destruction is the most likely outcome.”¹⁹⁴ Whatever one's perspective as to the reasoning in *Citizens United*,¹⁹⁵ that Justice Kennedy writes both opinions ultimately turns on one principle more than any other: judicial elections are different. In that sense, Justice Ginsburg may have lost the day in *White*, and Justice O'Connor may have come to regret her vote, but ultimately, in *Caperton*, it is Justice O'Connor's regret, and Justice Ginsburg's rejection of the “unilocular, ‘an election is an election’”¹⁹⁶ interpretation of *White* that wins the decade. Justice Kennedy's

Surv Am L 2011 at 47 (forthcoming 2011) (cited in note 160). I argue, moreover, that Justice Kennedy's “sub silentio treatment of independent expenditures as contributions is a refreshing rejection of formalism in a circumstance where, if the rigid [contribution/expenditure] distinction had been controlling, the focus of analysis would have been \$1,000 in campaign contributions as opposed to \$3 million in expenditure support.” *Id.* at 5. For an excellent treatment of the two cases, see Hasen, 109 Mich L Rev at 584 (forthcoming 2011) (cited in note 167) (asserting that “the Court's new doctrine is already incoherent. The *Citizens United* majority did not satisfactorily explain how independent expenditures—which apparently cannot corrupt—were so corruptive, apparently corruptive, or distorting of a judicial election . . . that the Court mandated [Benjamin's] recusal [in *Caperton*]”).

¹⁹² See Part II.C.

¹⁹³ *Citizens United*, 130 S Ct at 968 (Stevens dissenting) (citations omitted).

¹⁹⁴ Adam Liptak, *Former Justice O'Connor Sees Ill in Election Finance Ruling*, NY Times A16 (Jan 27, 2010).

¹⁹⁵ My own views are much more in line with those of the dissenters (whose reasoning on the same questions commanded a majority just seven years earlier in *McConnell v FEC*, 540 US 93 (2003)).

¹⁹⁶ *White*, 536 US at 805 (Ginsburg dissenting).

incremental path to differentiating judicial elections is the basis of that victory.

III. JUDGE EASTERBROOK: “RECUSAL CLAUSE DOES NOT PRESENT A CONSTITUTIONAL ISSUE AT ALL”

A. *Caperton*’s Impact on the Canons

For all of the appropriate focus on *Caperton* from a constitutional perspective, it is my contention that “the decision’s greatest impact will be not as dispositive precedent in itself, but in spurring greater vigilance in recusal, both systemically and among individual jurists.”¹⁹⁷ One commentator asserts that the “second legacy point of the opinion” is that “*Caperton* supercharged—both legitimized and green-lighted—disqualification based on canons of judicial ethics.”¹⁹⁸

In a reprise of Kennedy’s statement in *White*—and now speaking for the Court—the majority in *Caperton* noted that “[s]tates may choose to adopt recusal standards more rigorous than due process requires.”¹⁹⁹ Further, the Court noted with approval the Conference of Chief Justices’ statement that the canons of judicial conduct are the “principal safeguard against judicial campaign abuses’ that threaten to imperil ‘public confidence in the fairness and integrity of the nation’s elected judges.’”²⁰⁰ To quote both the applicable canon in West Virginia and its mirrored language in the ABA Model Rule and in 28 USC § 455(a) is to require disqualification whenever the judge’s “impartiality might reasonably be questioned.”²⁰¹

¹⁹⁷ Sample, 60 Syracuse L Rev at 293–94 (cited in note 160). During a late revision of this Article, proposed changes to Part 151 of the New York State Rules of the Chief Administrator of the Courts were announced on February 14, 2011. See *Proposed Part 151 of the Rules of the Chief Administrator of the Courts*, online at <http://www.nylj.com/nylawyer/adgifts/decisions/021511rule.pdf> (visited Sept 9, 2011). The new rules, *inter alia*, disqualify a judge from hearing a case by an attorney or litigant who contributed \$2,500 or more individually or \$3,500 or more collectively to a judge’s campaign. This striking shift demonstrates an interest in increasing judicial integrity; however, that the rules exempt expenditures from limitation illuminates the campaign-expenditure dichotomy revealed in *Buckley v Valeo* and further indicates the need for more stringent recusal guidelines. 424 US 1 (1976). See Joel Stashenko and Noeleen G. Walder, *Recusal Is Step in Right Direction, Bar Leaders Say*, NY L J (Feb 15, 2011), online at <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202481963973&slreturn=1&hbxlogin=1> (visited Sept 6, 2011).

¹⁹⁸ Swisher, 52 Ariz L Rev at 348 (cited in note 159).

¹⁹⁹ *Caperton*, 129 S Ct at 2267 (internal quotation omitted).

²⁰⁰ *Id.* at 2266, quoting CCJ Brief at *4, *11 (cited in note 186).

²⁰¹ *Caperton*, 129 S Ct at 2266.

According to the Court, the “codes of conduct serve to maintain the integrity of the judiciary and the rule of law.”²⁰² Prior to *White*, such a statement would not have been newsworthy in the slightest,²⁰³ but in the post-*White* “disarray” described in Part I, contrary claims were able to flourish.²⁰⁴ Accordingly, the “judicial seal of approval from the nation's highest court is a big deal,” even though, “in the main, the Court just repeated the laws (Codes) that had been on the books for many, many years.”²⁰⁵

B. *Bauer v Shepard*

The Seventh Circuit’s 2010 decision, *Bauer v Shepard*,²⁰⁶ provides a model of analysis for judicial campaign restrictions in the post-*Caperton* era. It also serves to marry the various strands of this Article, ranging from Lawyer Ketchum to *White* to *Caperton*. Earlier in 2010, the Circuit had held that Wisconsin rules forbidding judges to be members of political parties were unconstitutional, but that “rules restricting partisan activities (such as endorsing a candidate for non-judicial office), and personal solicitation of funds, [were] valid.”²⁰⁷ In *Bauer*, the Seventh Circuit addressed a challenge to Indiana’s Code of Judicial Conduct, the genesis of which was an Indiana Right to Life (“IRL”) questionnaire for judicial candidates similar to those described in Part II.A.2.²⁰⁸

IRL distributed questionnaires to candidates for Indiana judicial office, with nine questions asking recipients whether they subscribe to propositions such as: “I believe that the unborn child is biologically human and alive and that the right to life of human beings should be respected at every stage of their biological development.”²⁰⁹ The questionnaire included options for candi-

²⁰² *Id.* Note, in this regard, that Justice Kennedy once again, as he foreshadowed in *López Torres* and *White*, speaks to both distinct interests rather than conflating them.

²⁰³ Briffault, 153 U Pa L Rev at 198 (cited in note 60), quoting Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 Georgetown J Legal Ethics 1059, 1067 (1996) (explaining that “[a]s Chief Justice Randall T. Shepard of Indiana has argued, the duty of judicial impartiality and the rules protecting it ‘have their foundations in due process’”).

²⁰⁴ See, for example, Briffault, 153 U Pa L Rev at 182 (cited in note 60) (asserting that in *White* “[t]he Court cast doubt on the primary rationale for the campaign canons—preserving the impartiality and the appearance of impartiality of the state judiciary”).

²⁰⁵ Swisher, 52 Ariz L Rev at 349 (cited in note 159).

²⁰⁶ 620 F3d 704 (7th Cir 2010).

²⁰⁷ *Id.* at 706, citing *Siefert v Alexander*, 608 F3d 974 (7th Cir 2010).

²⁰⁸ See *Bauer*, 620 F3d at 706–07.

²⁰⁹ *Id.*

dates to indicate one of the following responses to each of the above propositions: “agree,” “disagree,” “undecided,” “decline,” or “refuse to answer.”²¹⁰ The plaintiffs, who were candidates recruited by IRL,²¹¹ with James Bopp serving as counsel (see Part II.A.1.b), challenged four provisions of Indiana’s Code.

The first challenged provision, the “commits clauses,” “forbid judges and candidates . . . to make commitments that are inconsistent with the impartial performance of judicial office.”²¹² The second, the “recusal clause,” consisted of Indiana’s codification of the near-universal recusal provision discussed in Part II.A.1.b, requiring recusal whenever a judge’s impartiality “might reasonably be questioned.”²¹³ In the words of the Seventh Circuit, the “[p]laintiffs direct[ed] special fire at subsection 2.11(A)(5), which requires recusal if the judge ‘has made a public statement . . . that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.’”²¹⁴ The plaintiffs also challenged Indiana’s “partisan-activities clauses”²¹⁵ and “solicitation clauses” that restrict the fundraising activities of judicial candidates.²¹⁶

²¹⁰ *Bauer v Shepard*, 634 F Supp 2d 912, 922 (ND Ind 2009). The “decline” option included an asterisk indicating:

By declining to answer, I assert that I would have replied to this question but for the prospect that I may be disciplined for doing so under Indiana Judicial Canon 5A(3)(d)(i) and (ii)—which provides that a judicial candidate “shall not: (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] (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.” I also will not answer because doing so could subject me to mandatory recusal as a judge under Canon 3E(1), which requires “[a] judge [to] disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” My response would neither cause me to be biased for or against parties nor affect my ability to be open-minded with regard to any issue. *Id.* Picking up on the *White* taxonomy, Indiana’s collective “commits clauses” define the term “impartiality” as “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind considering the issues that may come before a judge.” *Bauer*, 620 F3d at 713.

²¹¹ *Bauer*, 620 F3d at 707 (noting that, after an initial dismissal due to lack of standing, Indiana Right to Life “then recruited a candidate for judicial office (Torrey Bauer) and a sitting judge (David Certo) as plaintiffs to join it in this new suit” and that “both say that they refrain from speaking about abortion, and other controversial topics, because they fear the prospect of sanctions under the Code”).

²¹² *Id.* See also Ind Code of Judicial Conduct Canon 2.10(B) (2010); Ind Code of Judicial Conduct Canon 4.1(A)(13) (2010).

²¹³ *Bauer*, 620 F3d at 707. See also Ind Code of Judicial Conduct Canon 2.11(A) (2010).

²¹⁴ *Bauer*, 620 F3d at 707.

²¹⁵ *Id.* See Ind Code of Judicial Conduct Canon 4.1(A)(1) (2010); Ind Code of Judicial

Relying on the Circuit’s decision in *Siefert*, Judge Easterbrook, writing for the court, quickly disposed of the challenges to the solicitation²¹⁷ and partisan-activities clauses,²¹⁸ noting, in the case of the latter, that like Hatch Act restrictions on the political activities of government employees, “rules that keep judges out of active politics” are aimed at the “preservation of public confidence.”²¹⁹ While these holdings are entirely consistent with the broader premise that, notwithstanding *White*, judicial elections are different in constitutionally salient respects, for purposes of this Article, *Bauer’s* analysis of Indiana’s “commits” and “recusal” clauses is of greater importance and offers a model approach for post-*Caperton* analysis of the canons of judicial conduct.

Bauer begins by recognizing that “[s]ome, perhaps many, of the state’s judges and judicial candidates may be using the commits clauses as a pretext to keep out of a political minefield.”²²⁰ *Bauer* notes, however, that none of the questions requires a “commitment” or “promise” on any issue in the sense that a judicial candidate who answers “agree” in response to the proposition set forth above regarding the “unborn child” has “not committed to defying *Roe v. Wade* and its sequels.”²²¹ *Bauer* recognizes that *White* “holds that judges and judicial candidates are entitled to announce their views on legal and political subjects.”²²² With that recognition, *Bauer* notes that “judges and judicial candidates have views on issues such as those the questionnaire poses, and are entitled to have them.”²²³ To this point in the analysis, one might be uncertain as to whether, given the emphasis, Judge

Conduct Canon 4.1(A)(2) (2010).

²¹⁶ *Bauer*, 620 F3d at 707.

²¹⁷ *Id.* at 709–10. Note that the Sixth and Eighth Circuits reached contrary results in *Carey v Wolnitzek*, 614 F3d 189, 206 (6th Cir 2010) (concluding that Kentucky’s solicitation clause was unconstitutionally overbroad) and *Wersal v Sexton*, 613 F3d 821, 842 (8th Cir 2010) (striking down Minnesota’s no-[political] endorsement rule and solicitation limits). Judge Easterbrook, recognizing these decisions, noted in particular that the Eighth Circuit panel in *Wersal* concluded that it was bound by that circuit’s decision on remand in *White* to apply “strict scrutiny to all ethical rules that affect either judicial campaigns or judges’ participation in campaigns for other offices,” but Judge Easterbrook noted, “[w]e are unpersuaded and shall stick with *Siefert’s* analysis, which differentiates what judges can do in their own campaigns . . . from how judges can participate in other persons’ campaigns.” *Bauer*, 620 F3d at 713.

²¹⁸ *Bauer*, 620 F3d at 711–13.

²¹⁹ *Id.* at 712.

²²⁰ *Id.* at 713–14.

²²¹ *Id.* at 714.

²²² *Bauer*, 620 F3d at 714, citing *White*, 536 US at 788.

²²³ *Bauer*, 620 F3d at 714.

Easterbrook finds the provisions constitutional. The answer is not only affirmative, but emphatically so: “Although the Court held in *White* [] that judges may state their views on contestable and controversial subjects—such as whether the exclusionary rule is wise policy, or whether mandatory minimum sentences should be repealed—it *did not hold that judges may make commitments or promises about behavior in office.*”²²⁴ Perhaps most effectively, *Bauer* takes this principle beyond the abstract with a series of hypothetical scenarios. In the context of this article, it may be instructive to keep Justice Ketchum in the back of one’s mind as one reads the italics following each of the examples offered by Judge Easterbrook:

Imagine a judge or judicial candidate who said: “I will issue a search warrant every time the police ask me to.” *That speaker is promising to defy the judicial oath of office.* Or imagine the statement: “I will always rule in favor of the litigant whose income is lower, so that wealth can be redistributed according to the principles of communism.” (More plausibly, a candidate might say that he will award damages against drug companies, whether or not the drug has been negligently designed or tested, because they charge “too much” for their products.) *Again that person is promising to disobey the law and disregard the litigants’ entitlements.* Nothing in *White* [] deals with statements of this flavor, *or any other promise to act on the bench* as a partisan of a political agenda.²²⁵

The critical distinction recognized by the Seventh Circuit, and either misunderstood or—less charitably—ignored by individual candidates and jurists akin to Justice Ketchum and Justice Parker²²⁶ and by the interest groups with whom they act in tandem, is that a “judge who promises to ignore the facts and the law to pursue his (or his constituents’) ideas about wise policy is problematic in a way that a judge who has announced considered views on legal subjects is not. The commits clauses condemn the

²²⁴ *Id.* at 715 (emphasis added). See also Stephen Gillers, “*If Elected, I Promise []*”—*What Should Judicial Candidates Be Allowed to Say?*, 35 *Ind. L. Rev.* 725, 725 (2002) (noting that “[w]e have assumed the popular election of judges and we must now find the right balance between voter information and the values of the judicial process and therefore due process”).

²²⁵ *Bauer*, 620 F3d at 715 (emphasis added).

²²⁶ See Part I.

former and allow the latter.”²²⁷ Inevitably, a perfectionist will be less than satisfied by the imprecision of the distinction, but as *Bauer* recognizes, “[i]t is not as if Indiana could make everything clear by changing a few words. The main source of ambiguity in the commits clauses is the protean word ‘impartial.’ It has been around for a long time and has resisted precise definition.”²²⁸

It is at this juncture of *Bauer* that the decision begins to marry the canon-based strands discussed in this Article—that have, as Indiana Chief Justice Randall Shepard notes,²²⁹ due process at their foundation—to *Caperton’s* treatment of due process itself. “It is easy to say that a judge who has a financial stake in the outcome is not impartial. But how about a judge who receives a campaign contribution from one side? A big campaign contribution? A *whopping* campaign contribution?”²³⁰

In a sense, Judge Easterbrook is pointing out, via three different levels of “contributions”—“a” contribution, a “big” contribution, and a “*whopping*” contribution—that the protection of the state interest in impartiality involves data points on a spectrum, with correspondingly different levels of protection being appropriate. All of which echoes Justice Kennedy’s original “more rigorous than due process requires” statement in his *White* concurrence.²³¹ A state may choose, for example, to require, by rule, recusal²³² in circumstances involving a “big” but not “whopping”

²²⁷ *Bauer*, 620 F3d at 715–16. With respect to the plaintiffs’ allegation that the canons are, like the announce clause in *White*, overbroad, *Bauer* recognizes the possibility that Indiana might, in a future case, read the commits clauses so broadly as to sweep in protected speech, noting that “there is an irreducible risk that a promise may be misunderstood—or that the Commission and the Supreme Court of Indiana may treat as ‘inconsistent with the impartial performance of the adjudicative duties of judicial office’ even the sort of statements that are squarely protected by *White*,” but *Bauer* maintains that the “best way to find out is to wait and see.” *Id.* at 716.

²²⁸ *Id.* at 717.

²²⁹ See quotation of Chief Justice Shepard at note 203 and accompanying text.

²³⁰ *Bauer*, 620 F3d at 717, citing *Caperton*, 129 S Ct 2252 (“\$3 million from one donor, more than all other contributions combined”). Notably, Judge Easterbrook’s description of the “whopping campaign contribution” is, like Justice Kennedy’s use of the term ‘contribution’ in *Caperton*, technically incorrect in the sense that the \$3 million in support from Massey CEO Blankenship came in the form of independent expenditures. See *Caperton*, 129 S Ct at 2257 (emphasis added). Nonetheless, as I argue in *Democracy at the Corner of First and Fourteenth*, Justice Kennedy’s conflation of the terms in *Caperton* is clearly intentional, and, from a de facto if not de jure perspective, “the case for regulating not only contributions, but expenditures, in judicial campaigns is not only compelling, but urgently necessary to prevent a developing constitutional crisis.” Sample, 66 NYU Ann Surv Am L 2011 at 778 (forthcoming 2011) (cited in note 159).

²³¹ *White*, 536 US at 794. See also notes 168–169 and accompanying text.

²³² Justice Kennedy’s majority opinion in *Caperton* expressly notes that, “[i]n deed, some States require recusal based on campaign contributions similar to those in this case. See, e.g., Ala Code §§ 12-24-1, 12-24-2 (2006); Miss Code of Judicial Conduct, Canon 3E(2)

campaign expenditure, where a *Caperton*-based due process analysis would not *constitutionally* require it.

Pivoting, Judge Easterbrook in *Bauer* observes that the court's commits clause analysis "implies the validity of the recusal clause. States have a strong interest in ensuring that judges come to their cases without precommitments. . . . But there is more to be said. *The recusal clause does not present a constitutional issue at all.*"²³³ A stronger post-*Caperton* affirmation of the relationship between *Caperton's* validity as a constitutional floor and the State's prerogative to protect its "vital interest" in maintaining the actual and perceived integrity of its judiciary is not to be found.

Noting that "a state may decide to assign each case to a judge whose impartiality is not in question," *Bauer* acknowledges that "all [the recusal rule] does is allocate cases among judges, just as 28 U.S.C. § 455 [the general federal disqualification provision] does. . . . States are entitled to protect litigants by assigning impartial judges before the fact, as well as by removing partial judges afterward."²³⁴ And speaking to the overstated notion that, because a state has chosen elections as its means of judicial selection, the remedy for bias is political rather than legal, Judge Easterbrook properly notes that "[i]t is small comfort for a litigant who takes her case to state court to know that, while her trial was unfair, the judge would eventually lose an election."²³⁵

IV. CONCLUSION

Roy Schotland notes that, "[b]ack in 1906, Roscoe Pound, a scholar at Harvard Law School, started a campaign to have judges appointed When he spoke, eight in ten American judges stood for election. Today, the figure is 87 percent."²³⁶ It is abundantly clear today not only that judicial elections are not going away, but that the tensions between First Amendment and due process interests are greater than ever. More than a century removed from Pound's remarks, in the last decade the United States Supreme Court issued three decisions reflecting in particular the incremental refinements in the thinking of Justice An-

(2008)." *Caperton*, 129 S Ct at 2266.

²³³ *Bauer*, 620 F3d at 718 (emphasis added) (citations omitted).

²³⁴ *Id.*

²³⁵ *Id.*, quoting *Bauer v Shepard*, 634 F Supp 2d at 922 (alteration in original).

²³⁶ Schotland, 74 Mo L Rev at 510 n 7 (cited in note 78), citing *The Election of Judges: Guilty, Your Honour?*, *The Economist* 28–29 (July 24, 2004).

thony Kennedy. These three decisions offer guidance for America's next century of judicial elections. The climax of that incremental process is the landmark decision in *Caperton*. As one scholar puts it, "[p]ost-*Caperton*, the world has changed."²³⁷

Jurists navigating that changed world would be hard pressed to find better, more concise guidance as to their role—a role of prestige; a role of choice—as fiduciaries of the rule of law than the following sentence from Judge Easterbrook's decision in *Bauer*. In the course of his decision affirming the validity and value of the canons of judicial conduct Judge Easterbrook writes: "The recusal clause applies to a judge in his role as public employee, not his role as candidate."²³⁸ The preceding is a sentence that both Lawyer and Jurist Ketchum—and others like him—ought to read very carefully.

²³⁷ Swisher, 52 Ariz L Rev at 349 (cited in note 159).

²³⁸ *Bauer*, 620 F3d at 718.

