

NOTES

TESTING THREE COMMONSENSE INTUITIONS ABOUT JUDICIAL CONDUCT COMMISSIONS

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States use judicial conduct commissions to discipline judges who misbehave, but there is a large disparity among commissions in the number of disciplinary actions they take. What makes some commissions more prone to mete out discipline than others? This Note uses a case study of California's Commission on Judicial Performance to tease out several theories: (1) commissions that are controlled by laypeople issue more disciplinary actions than commissions controlled by judges and lawyers; (2) commissions in states that elect their judges issue more disciplinary actions than commissions in states that appoint them; and (3) well-funded commissions issue more disciplinary actions than less well funded commissions. The Note then uses a decade of disciplinary data from thirty-five states to test these three hypotheses. In the end, it finds statistical support for only one hypothesis: the number of disciplinary actions a state commission takes is strongly correlated with the size of the commission's budget.

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INTRODUCTION

People knew there was something wrong with the juvenile court in Luzerne County, Pennsylvania.¹ As the *New York Times* described it:

Proceedings on average took less than two minutes. Detention center workers were told in advance how many juveniles to expect at the end of each day—even before hearings to determine their innocence or guilt. Lawyers told families not to bother hiring them. They would not be allowed to speak anyway.²

Time and again, juvenile defendants found themselves sentenced to jail even when the probation officers did not recommend detention.³ Parents and

1. See Ian Urbina, *Despite Red Flags About Judges, a Kickback Scheme Flourished*, N.Y. TIMES, Mar. 28, 2009, at A1, available at <http://www.nytimes.com/2009/03/28/us/28judges.html>.

2. *Id.*

3. See United States of America v. Mark Ciavarella, Jr. and Michael Conahan, DEP'T JUST., http://www.justice.gov/usao/pam/Victim_Witness/Luzerne_County_Corruption/Ciavarella_Conahan/ciavarella_conahan_index.html (last visited Apr. 13, 2012).

others complained to the state's Judicial Conduct Board, but the complaints were ignored for years.⁴

Finally, in 2009, a federal investigation uncovered the truth: Mark Ciavarella Jr. and Michael Conahan, two state judges in Luzerne County, were being paid by a privately owned detention center to lock up children.⁵ All told, the "kids-for-cash"⁶ kickback scheme netted the judges \$2.6 million⁷ in an outrageous example of judicial misconduct. While the judges have both been sentenced to federal prison,⁸ their misconduct continues to stain the state's judiciary.⁹ And this misconduct is far from the only example of judicial misbehavior.

Judicial misconduct is the dirty little secret of the state judiciary, well known but rarely discussed. In Wisconsin in 2011, one supreme court justice accused another justice of putting her in a chokehold in chambers as the two debated the constitutionality of the state's controversial collective bargaining law.¹⁰ A New York judge in 2010 was punished for jailing all forty-six defendants in his courtroom when a cell phone went off and no one would say whose it was.¹¹ In 2003, the Chief Justice of the Alabama Supreme Court was removed from the bench after he disobeyed a federal judge's order to remove a statue of the Ten Commandments from the courthouse grounds.¹² Every year, judges are disciplined for falsifying court documents,¹³ verbally abusing liti-

4. See Editorial, *Juvenile Justice Delayed*, PHILA. INQUIRER, Mar. 12, 2010, at A14.

5. Urbina, *supra* note 1.

6. *Juvenile Justice Delayed*, *supra* note 4.

7. John Sullivan, *Luzerne Judge Broke His Vow to Reform*, PHILA. INQUIRER, Jan. 28, 2009, at B1.

8. See *Former Luzerne Judge Conahan Sentenced to 17.5 Years*, TIMES-TRIB. (Sept. 23, 2011), <http://thetimes-tribune.com/news/former-luzerne-judge-conahan-sentenced-to-17-5-years-1.1207994#axzz1h5pv3joD>.

9. See Editorial, *Judges Must Be Policed, Too*, PHILA. INQUIRER, July 3, 2011, at C4.

10. Brendan O'Brien, *Alleged Physical Altercation Between Wisconsin Judges Probed*, REUTERS (June 28, 2011, 5:00 PM EDT), <http://www.reuters.com/article/2011/06/28/us-wisconsin-court-idUSTRE75R6ZW20110628>.

11. *In re Robert M. Restaino*, 2007 WL 5541893 (N.Y. Comm'n on Judicial Conduct 2007), *aff'd per curiam*, 890 N.E.2d 224 (N.Y. 2008).

12. *Ten Commandments Judge Removed from Office*, CNN (Nov. 14, 2003), http://articles.cnn.com/2003-11-13/justice/moore.tencommandments_1_ethics-panel-state-supreme-court-building-ethics-charges?_s=PM:LAW.

13. See, e.g., Andy Brownfield, *Hard Line Urged on Altering Court Papers: Case Involving Two Local Judges Prompts Senate Bill with Harsh Penalty*, ST. J.-REG. (Springfield, Ill.), Apr. 25, 2011, at 11, available at <http://www.sj-r.com/top-stories/x1274368965/Bill-would-impose-harsh-penalties-for-falsifying-court-documents>.

gants,¹⁴ sexually harassing court employees,¹⁵ and using their authority to demand special treatment outside of court.¹⁶

Judicial misconduct is sometimes downright ridiculous. For example, litigants in a Maryland courtroom complained about a judge who was “eating and lifting dumbbells behind the bench for most of the hearing.”¹⁷ In Arkansas, a judge was chastised for selling “The Testimony,” a CD of his “inspirational musical performances.” He violated the Code of Judicial Conduct by marketing his CD with a picture of himself in judicial robes.¹⁸ In California, a judge instructed the husband of a bailiff to film the judge in court so that the judge could send a demo tape to a television audition.¹⁹ A Utah judge landed in trouble when he publicly referred to President Bill Clinton as the “anti-Christ.”²⁰ The list goes on and on.

Judges are people, and misbehavior is part of human nature. But judicial misbehavior is exacerbated by the fact that judges have so much power and so little oversight. While judges’ doctrinal mistakes are corrected by the well-established appellate court system, there are fewer protections against judges’ misconduct on and off the bench. That’s where judicial conduct commissions come in.

The duty of policing judicial misconduct falls on these commissions, little-known state administrative agencies. Their success in disciplining judges is the focus of this Note.

The first judicial conduct commission was established in California in 1960.²¹ By 1981, they had sprouted up in every state in the nation, as well as in the District of Columbia.²² Their proceedings are largely confidential because of the sensitive nature of their work. As a result, scholars pay them little atten-

14. See, e.g., Debra Cassens Weiss, *Judge Who Acted with “Unconscionable Arrogance” Must Retire or Face Suspension*, ABAJOURNAL.COM (May 20, 2011, 10:24 AM CST), http://www.abajournal.com/news/article/judge_who_acted_with_unconscionable_arrogance_must_retire_or_face_suspensio.

15. See, e.g., *In re Subryan*, 900 A.2d 809, 811, 819 (N.J. 2006).

16. See, e.g., *Miss. Comm’n on Judicial Performance v. Osborne*, 977 So. 2d 314, 321 (Miss. 2008).

17. COMM’N ON JUDICIAL DISABILITIES, STATE OF MD., ANNUAL REPORT FOR FISCAL YEAR 2010, at 8 (2011).

18. Letter from James A. Badani, Exec. Dir., Judicial Discipline & Disability Comm’n, to the Honorable L.T. Simes, II, Circuit Judge (Oct. 15, 2004), *available at* http://www.arkansas.gov/jddc/pdf/10152004_simes.pdf.

19. *In re Judge DeAnn M. Salcido*, No. 189, slip op. at 2 (Cal. Comm’n on Judicial Performance Nov. 10, 2010), *available at* http://cjp.ca.gov/res/docs/Censures/Salcido_DandO_11-10-10.pdf.

20. JUDICIAL CONDUCT COMM’N, STATE OF UTAH, ANNUAL REPORT FY 2002, at 2 (2003).

21. Edward J. Schoenbaum, *A Historical Look at Judicial Discipline*, 54 CHI.-KENT L. REV. 1, 20 (1977).

22. Steven Lubet, *Judicial Discipline and Judicial Independence*, LAW & CONTEMP. PROBS., Summer 1998, at 59, 60.

tion, and the media largely ignores them. Only when there is a bizarre charge of misconduct, or a complaint against a high-profile judge, does the public ever hear about the commissions. Day in and day out, however, they are charged with the critical function of preserving the integrity of the judiciary.

This Note looks at why some commissions do their jobs more effectively than others. As this Note's empirical analysis reveals, some commissions take a no-nonsense approach toward misconduct, disciplining many judges; other commissions soft-pedal discipline, punishing hardly anyone. Understanding the factors that make some commissions more aggressive than others is not just an academic exercise; it provides practical information to states as they continue to redesign their commissions.

The statistics in this Note come from a dataset I created specifically for the project. The dataset tracks the number of disciplinary actions against judges in thirty-five states from 2000 through 2010. It also follows other factors that are thought to be relevant in predicting the amount of disciplinary activity a commission takes: the number of complaints received by each commission, the composition of each commission (i.e., how many judges, attorneys, and laypeople are on the commission), the annual budget of each commission, and the method of judicial selection in the state (i.e., elections versus appointments). This is the only dataset of its kind, and it permits a novel analysis of the factors that lead to disciplinary activity—a topic that has never before been examined statistically.

This Note starts with a case study of California's Commission on Judicial Performance. The case study develops three theories about what makes some commissions more aggressive than others. It then puts those theories to the test using the new data. The result is that several widely shared intuitions about these commissions turn out to be wrong. These intuitions have driven legislation and public policy in California, Washington, and other states, but their reasoning is not supported by the data. By putting the factors to the test, this Note enables policymakers to make informed decisions about how to create commissions that will best maintain the public's trust in the judiciary. Likewise, the study provides researchers with a new dataset on the topic, a dataset that will facilitate future study.

The analysis proceeds in three parts. Part I begins with a brief background of the developments that led to the modern judicial conduct commission and then surveys the existing literature on the topic.

Part II uses the California case study to set out three existing theories about what makes some commissions more aggressive than others—theories derived from dozens of interviews with judges, defense attorneys, commission members, and commission staff. The first intuition that emerged from these interviews is that commissions are more aggressive when a majority of their members are laypeople, and less aggressive when a majority of the commission members are judges and lawyers. This intuition has driven public policy and legislative action, causing several states to alter the structure of their commis-

sions. The second intuition is that commissions are more inclined to discipline elected judges than appointed ones. This theory has obvious importance given the current debate about the costs and benefits of electing judges.²³ The third intuition is that well-funded commissions carry out more disciplinary actions than underfunded commissions because they have the resources to investigate more cases. In hard economic times, as lawmakers search state budgets for cuts, the connections between funding and discipline are all the more important.

Part III uses a thirty-five-state dataset of disciplinary activity to put these hypotheses to the test. The tests arrive at surprising results. First, there is no evidence of a statistically significant relationship between the composition of a commission and the level of disciplinary activity, notwithstanding all the legislative blustering to the contrary. Second, there is reason to doubt that states that elect judges (“election states”) discipline their judges more often than states that appoint judges (“appointment states”), despite the conventional wisdom to the contrary. Finally, the budget matters. Well-funded commissions discipline judges more often than underfunded commissions. This finding demonstrates the importance of adequately funding these commissions and suggests the dangers to the integrity of the judiciary that could occur from cutting the commissions’ funding.

There is one theoretical assumption that undergirds all the statistical analysis in this Note and therefore must be mentioned at the outset. My dataset measures the aggressiveness of a commission by the number of disciplinary actions it takes. But that raises a chicken-and-egg problem. If a commission carries out relatively few disciplinary actions, does that mean the commission is soft on judges? Or does it mean that the judiciary is extremely well behaved? And if the judges in a particular state are better behaved than in other states, is that a reflection on the collective character of that state’s judiciary, or is it the result of the state’s prior diligence in rooting out misconduct? These are fundamental yet practically unanswerable questions. This Note deals with these questions by making the assumption that the number of disciplinary actions in a state reflects the commission’s vigorousness in prosecuting misconduct, not the underlying character of the state’s judiciary. To assume otherwise, we would need some data indicating that the judiciary in some states truly is more corrupt than the judiciary in other states. I am not aware of any such data.

23. See, e.g., Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80 (2009); Rebecca Love Kourlis, *America’s Judicial Selection Wars*, HUM. RTS., Winter 2009, at 51; Dan Eggen, *Group Draws Ideological Line in Debate over Judicial Elections*, WASH. POST, Sept. 11, 2010, at A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/10/AR2010091007055.html>.

I. REVIEW OF THE LITERATURE AND THE DEVELOPMENT OF THE MODERN
JUDICIAL CONDUCT COMMISSION

A. *The Evolution of Judicial Discipline*

The story of judicial conduct commissions begins in California in 1960 with the founding of California's Commission on Judicial Qualifications, later renamed the Commission on Judicial Performance.²⁴ Prior to the Commission's founding, there were only limited ways to deal with misbehaving judges. In California, judges could be removed only by "impeachment, concurrent resolutions of the Legislature, and recall."²⁵ Politically and legally cumbersome, these methods drained time and political capital from busy legislators and provided no appropriate correction for a judge who deserved discipline short of removal. The options were similarly limited in other states.²⁶ There was no dedicated body responsible for making sure judges behaved appropriately. Judges were shielded from disciplinary oversight in an attempt to protect their independence.

Not only was there no entity in charge of discipline; for a long time there was not even a code of judicial conduct. It was not until 1924 that the American Bar Association created the Canons of Judicial Ethics.²⁷ The California Bar Association adopted the Canons of Judicial Ethics in 1928, but a year later, the California Supreme Court effectively invalidated the Canons when it held that California judges were not members of the state bar and thus not subject to the bar's rules.²⁸ It was not until 1949 that California adopted its Code of Judicial Ethics.²⁹ But around the country, other states had begun experimenting with different methods of judicial discipline.

Beginning with Virginia in 1938 and carrying through the 1950s, five states gave their bar associations some responsibility over judicial discipline, albeit very limited responsibility.³⁰ The bar associations were not allowed to make final decisions about judicial discipline, nor could they exercise jurisdiction over many types of misconduct. In Missouri, for example, the commission focused only on senile or otherwise disabled judges.³¹ New York took a different tack in 1948. Rather than empowering the bar association to handle disci-

24. Comm'n on Judicial Performance, *Mandate & Legislative History*, ST. CAL., http://cjp.ca.gov/mandate_legislative_history.htm (last visited Apr. 13, 2012).

25. Jack E. Frankel, *Judicial Conduct and Removal of Judges for Cause in California*, 36 S. CAL. L. REV. 72, 72 (1962).

26. See Schoenbaum, *supra* note 21, at 1.

27. See Frankel, *supra* note 25, at 73.

28. See *id.* at 74, 79.

29. See CAL. CODE OF JUDICIAL ETHICS preface (2009), available at http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf.

30. See Schoenbaum, *supra* note 21, at 11-13.

31. *Id.* at 11.

pline, it passed a constitutional amendment creating a Court on the Judiciary composed of high-ranking judges and justices from the appellate courts.³² The Court on the Judiciary could be convened at the request of the Governor, the Chief Justice, the presiding judge of an appellate division, the Judicial Council, or the Executive Committee of the State Bar Association. But it was not until 1960, twelve years after its creation, that it was ever convened. To give an example of how underdeveloped it was, the Court on the Judiciary did not even have written rules of procedure until its first meeting, twelve years after its creation.³³

Flawed though it was, the New York Court on the Judiciary caught the attention of reformers in California. During the 1950s, California's legislature considered and rejected several bills to create a standing judicial conduct commission.³⁴ In 1959, the state bar made the creation of such a commission a central plank in its legislative platform.³⁵ The Conference of California Judges followed suit that year, ratifying by a vote of 364 to 34 a proposal to create a standing commission on judicial discipline.³⁶ The public needed little convincing about the benefits of this commission. When the proposition made it onto the ballot in 1960, voters embraced it by a margin of three to one, thus creating the nation's first judicial conduct commission.³⁷

California's action set off a torrent of activity in other states. California's Commission has always been a model for states around the country, and its members embraced that role right from the beginning. In its 1963 annual report, the Commission noted with pride a congratulatory letter from a Florida legislator, a supportive editorial from the *St. Louis Globe-Democrat*, and a fawning *Reader's Digest* reference to "[a] new plan which 49 other states might follow to advantage."³⁸ The next year, Commission members traveled to Louisiana, Texas, New Mexico, and Indiana to tell judicial conferences about the California experiment in judicial discipline.³⁹

32. Frankel, *supra* note 25, at 78-79.

33. *Id.* at 79 & n.24.

34. *Id.* at 81.

35. *Id.* at 83.

36. *Id.*

37. *Id.* at 85; *see also* Schoenbaum, *supra* note 21, at 20. In terms of the growing professionalization of the judiciary, it is worth noting that California's Administrative Office of the Courts was founded just one year later, in 1961. *Ralph N. Kleps*, CAL. CTS., <http://www.courts.ca.gov/15586.htm> (last visited Apr. 13, 2012). The California Judges Association (then called the Conference of California Judges) also began publishing the first volume of its newsletter, *California Courts Commentary*, in 1961. *See Thank You L.A.* Daily Journal, CAL. CTS. COMMENT. (Conference of Cal. Judges, S.F., Cal.), January 1961, at 1. All these signs hint at a growing interest in professionalizing the judiciary.

38. CAL. COMM'N ON JUDICIAL QUALIFICATIONS, 1963 REPORT OF THE COMMISSION ON JUDICIAL QUALIFICATIONS TO THE GOVERNOR 4-5 (1964) (quoting Murray Teigh Bloom, *California Cleans Its Courts*, READER'S DIG., Mar. 1963, at 91, 91).

39. CAL. COMM'N ON JUDICIAL QUALIFICATIONS, 1964 REPORT OF THE COMMISSION ON JUDICIAL QUALIFICATIONS TO THE GOVERNOR 4 (1965).

It did not take long for the interest in California's Commission to translate into action. In 1965, the American Judicature Society "strongly recommended the adoption of the commission plan in all states as an alternative to existing removal procedures,"⁴⁰ and the states fell in line. Texas created its commission in 1965.⁴¹ Florida, Maryland, Nebraska, and Oklahoma followed in 1966.⁴² Colorado and New Mexico both established judicial conduct commissions in 1967, and Alaska, Louisiana, Idaho, Michigan, Pennsylvania, and Utah created theirs in 1968.⁴³ By 1977, only Maine, Mississippi, and Washington lacked judicial conduct commissions,⁴⁴ and those states would soon create them. By 1981, all fifty states and the District of Columbia had judicial conduct commissions up and running,⁴⁵ thus completing the transformation of the judicial conduct commission from a California curiosity to a common feature across the country.

B. *Similarities and Variations Between the Judicial Conduct Commissions*

The commissions all developed for the same purpose at roughly the same time. Not surprisingly, they share many similarities. All are administrative agencies, operating according to their own regulations and their states' rules of administrative procedure. All receive complaints from the public, and assign those complaints to staff members for investigation. All have appointed commission members—judges, attorneys, laypeople—who weigh the facts in deciding whether to proceed with disciplinary action. And all have procedures for formal administrative hearings. Nonetheless, there are a number of significant differences among the commissions. While this Note focuses on the three differences that people in the field believe to be important—commission composition, elected versus appointed status of judges, and commission budgets—there are other structural differences that are worth mentioning here. Some of the following differences likely have an effect on the level of disciplinary activity in a state, but the dataset I am using cannot take these differences into account.

The first general variation among commissions is the range of sanctions that can be imposed. States that have more options for discipline may be more inclined to take action. For example, while every state allows for the removal

40. Robert R. Davis, Jr., Note, *The Chandler Incident and Problems of Judicial Removal*, 19 STAN. L. REV. 448, 459 (1967).

41. Schoenbaum, *supra* note 21, at 24 tbl.1 (listing the founding dates for each state's commission).

42. *Id.*

43. *Id.*

44. *Id.* at 22.

45. Lubet, *supra* note 22, at 60.

of a judge for severe misconduct,⁴⁶ most states also have lower tiers of discipline. These lower tiers include suspension, public censure, and a full spectrum of private disciplinary actions. Private discipline does not carry the harm to a judge's reputation that public discipline does, but it can nonetheless have a serious effect on a judge's career. In California, for instance, private discipline against a judge can be revealed "upon the request of the governor of any state, the President of the United States, or the Commission on Judicial Appointments" for any judge who is "under consideration for a judicial appointment."⁴⁷ Thus, private discipline could hurt a judge's prospects of elevation. Private discipline can also result in a judge being sent to "anger management, gender sensitivity or sexual harassment" training.⁴⁸ Nonetheless, many private disciplinary actions amount to nothing more than an acknowledgment that some de minimis violation has occurred that is not worth prosecuting.⁴⁹ In other words, it is often a slap on the wrist with no real consequences. And some states do not have any private disciplinary actions.⁵⁰ This is an example of how a difference in available punishments might affect the number of disciplinary actions a commission takes.

The second variation among states concerns which governmental body has the final say on discipline. California is unusual in that its commission can administer any type of punishment, including removal.⁵¹ Most other states give their commissions a free hand in administering private discipline and low-grade public discipline, but require their state supreme courts to sign off on censure or

46. In Massachusetts, however, neither the state's commission nor its supreme court can remove a judge for misconduct; the legislature must do it. *See* COMM'N ON JUDICIAL CONDUCT, COMMONWEALTH OF MASS., ANNUAL REPORT 2009, at 4 (2010).

47. COMM'N ON JUDICIAL PERFORMANCE, STATE OF CAL., 2010 ANNUAL REPORT 2 (2011).

48. *See* COMM'N ON JUDICIAL CONDUCT, STATE OF TEX., FISCAL YEAR 2008 ANNUAL REPORT 9 (2009), available at www.sjc.state.tx.us/pdf/rpts/AR-FY08.pdf.

49. *See, e.g.*, Judicial Discipline & Disability Comm'n, *Procedure*, ST. ARK., <http://www.state.ar.us/jddc/procedure.html> (last visited Apr. 13, 2012) ("Complaints may also be dismissed on preliminary evaluation because in the judgment of the Commission . . . the alleged misconduct would constitute, at most, a single and very minor violation."); Div. of State Court Admin., Ind. Judicial Branch, *The Complaint and Disciplinary Process*, IN.GOV, <http://www.in.gov/judiciary/jud-qual/2619.htm> (last visited Apr. 13, 2012) ("[I]f the investigation indicates that a violation occurred which does not warrant further proceedings, the Commission still may resolve the complaint with a private caution.")

50. For example, states without private disciplinary actions include Alabama, Arkansas, Florida, and New Hampshire. Telephone Interview with Jenny Garrett, Exec. Dir., Judicial Inquiry Comm'n (Dec. 20, 2011) (describing Alabama system); Telephone Interview with David Stewart, Exec. Dir., Ark. Judicial Discipline & Disability Comm'n (May 17, 2011) (describing Arkansas system); E-mail from Brooke Kennerly, Exec. Dir., Fla. Judicial Qualifications Comm'n (May 27, 2011) (on file with author) (describing Florida system); E-mail from Robert Mittelhozer, Exec. Sec'y, Comm. on Judicial Conduct (Dec. 20, 2011) (on file with author) (describing New Hampshire system).

51. *See* Comm'n on Judicial Performance, *The Complaint Process*, ST. CAL., http://cjp.ca.gov/complaint_process.htm (last visited Apr. 13, 2012).

removal.⁵² At the other extreme, some states do not allow their commissions to administer *any* type of discipline. In those states, the most the commission can do is recommend discipline to the state's high court.⁵³ Obviously, this could have an effect on the amount of judicial disciplinary activity.

The variation discussed above can make it difficult to compare one state's disciplinary figures to another's. In addition, each state uses slightly different terms to describe the types of disciplinary action its commission can take. Further complicating things, some states issue warnings in addition to discipline. These warnings tell a judge that her behavior came close to—but did not cross—the line.⁵⁴ In order to compare disciplinary numbers from state to state, this Note uses a bright-line definition of discipline: any action where there is a finding of misconduct.⁵⁵ By hewing to this bright line, the Note manages to compare apples to apples.

C. *The Analytical Gap in the Literature*

No researchers have analyzed the factors that make some commissions more active than others, and the existing literature suffers from a reliance on anecdotes rather than statistics. For example, an early monograph in the field, *Who Judges the Judges? A Study of Procedures for Removal and Retirement*, compared disciplinary procedures in five states. Two states used judicial con-

52. See, e.g., *About Us*, COLO. COMMISSION ON JUD. DISCIPLINE, http://www.coloradojudicialdiscipline.com/About_us.html (last visited Apr. 13, 2012); Judicial Review Council, Office of Governmental Accountability, *Procedure*, ST. CONN., <http://www.ct.gov/jrc/cwp/view.asp?a=3061&q=384646> (last visited Apr. 13, 2012) (permitting the Commission to take many types of disciplinary action, but requiring supreme court action for removals and for suspensions longer than one year).

53. See, e.g., JUDICIAL INQUIRY COMM'N, STATE OF ALA., ANNUAL REPORT FY 2005, at 5 (2006), available at www.alalinc.net/jic/docs/jic2005.pdf ("The Commission does not itself adjudicate complaints. It does not hold formal hearings, and it cannot impose discipline on judges. It has been analogized in function to a grand jury."); *The Judiciary Commission of Louisiana*, LA. SUP. CT., http://www.lasc.org/la_judicial_entities/judiciary_commission.asp (last visited Apr. 13, 2012) (limiting the Commission to recommending discipline).

54. See, for example, Pennsylvania, where a "Letter of Caution" is issued in situations that fall short of discipline (that is, where "the conduct did not arise to a violation of the Code or Rules of Conduct but the conduct may lead to judicial misconduct if not corrected"). JUDICIAL CONDUCT BD., COMMONWEALTH OF PA., 2010 ANNUAL REPORT 9 (2011), available at http://judicialconductboardofpa.org/index.php/download_file/view/77/1. Pennsylvania also has a higher level of private action, a "Letter of Counsel," which does qualify as discipline, albeit of a minor sort. A Letter of Counsel can be issued where the "evidence suggests that a violation of the Code or Rules was an isolated incident or the result of inadvertence." *Id.*

55. If an action does not contain such a finding of discipline, I treated it as a warning and did not include it in my numbers. The reason to exclude warnings is that not all states use them. States that do use warnings may issue them less carefully than they issue disciplinary actions, since no finding of misconduct is required. I wanted to avoid having the number of warnings inflate any state's disciplinary figures. See Part III.A.1 below for more detail.

duct commissions to discipline judges, another relied on impeachment as the sole method for addressing misconduct, and two others vested disciplinary power in the courts themselves.⁵⁶ But as a contemporary reviewer complained, the piece made “[n]o attempt . . . to answer definitively the question ‘which is best?’ In fact, the conclusions reached are at once tentative and qualified, as indeed they must be.”⁵⁷ Four decades later, the same can be said of the entire body of judicial discipline literature. No one has attempted to look at the factors that lead some commissions to be more aggressive than others.

Instead of looking at those factors, scholars look at other issues, such as the ethical questions involved in disciplining judges. When does a commission cross the line from punishing judicial misbehavior to dictating judges’ doctrinal decisions? How much influence is too much for a commission to assert over judges?⁵⁸

Similarly, the sole treatise on the topic, *Judicial Conduct and Ethics*, goes into exhaustive detail about the doctrinal questions raised by the Code of Judicial Conduct, but it makes no attempt to look at the institutional decisionmaking of the commissions that oversee this behavior.⁵⁹ First published in 1990, the treatise contains sections ranging from “Abuse of the Contempt Power” to “Love and Sex.”⁶⁰ It is decidedly not an analytical account of the factors that propel disciplinary activity. Nor are the reports that have been published by the Center for Judicial Ethics at the American Judicature Society, a nonprofit think tank for commission members and commission staff. The Center’s staff has published prolifically on judicial conduct issues. One of their articles went to the extraordinary trouble of cataloguing the circumstances leading up to all 110 judicial removals between 1990 and 2001.⁶¹ But despite the assiduous spadework, there was no attempt to organize the raw data into any form of statistical analysis.

The lack of statistical treatment of judicial conduct commissions is all the more surprising given that the American Judicature Society published data each year from 1985 to 2001 on disciplinary activities and commission budgets in

56. WILLIAM THOMAS BRAITHWAITE, WHO JUDGES THE JUDGES? A STUDY OF PROCEDURES FOR REMOVAL AND RETIREMENT 13-15 (1971).

57. Charles F. Stafford, Book Review, 120 U. PA. L. REV. 1021, 1025 (1972).

58. Gerald Stern, at the time the Executive Director of New York’s Commission on Judicial Conduct, took up the question of judicial independence in a 1987 law review article. See Gerald Stern, *Is Judicial Discipline in New York State a Threat to Judicial Independence?*, 7 PACE L. REV. 291 (1987).

59. JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS (2d ed. 1995).

60. *Id.* §§ 2.03, 10.34.

61. See CYNTHIA GRAY, A STUDY OF STATE JUDICIAL DISCIPLINE SANCTIONS 1, 7-23 (2002). Gray currently maintains a Twitter feed to keep her followers up to date with the latest reported cases of judicial discipline. *AmerJudicatureSocty*, TWITTER, http://twitter.com/#!/ajs_org (last visited Apr. 13, 2012).

every state.⁶² These data could have spawned the type of analysis undertaken in this Note, but the American Judicature Society did not take up this analysis, nor did anyone else. In 2001, the American Judicature Society stopped collecting the figures altogether because it became too politically sensitive. As Cynthia Gray, Director of the American Judicature Society's Center for Judicial Ethics, explained, journalists would use the data to criticize commissions that overspent or underperformed their peers.⁶³ The American Judicature Society has occasionally surveyed the commissions in the decade since 2001, but rather than publicly release the data, it distributes the data privately to the various commissions to avoid negative press coverage.⁶⁴

The absence of statistical analysis of judicial discipline is all the more noticeable given the recent bloom of statistical studies in the related field of judicial elections. Elections and discipline are two sides of the same coin. Read together, they describe the way the judiciary of a particular state is shaped—how judges join the judiciary, and how they are removed from it. Despite the relatedness of the fields, the empirical literature dealing with judicial elections is far more developed than the literature dealing with judicial discipline. Recent studies on judicial elections have looked at the many ways that elected judges might behave differently from appointed ones. The studies explored whether elected judges differ from appointed judges in terms of the independence of their decisions,⁶⁵ the size of the tort damages they give out,⁶⁶ and the overall quality of their performance,⁶⁷ to name just a few. Unfortunately, no one has paid attention to the statistics of judicial discipline. For some reason, there is a lack of interest in questions about these commissions' institutional designs.

One obvious barrier to statistical analysis of judicial conduct is that, up until now, no one had gone through the effort to build a dataset that would allow for comparisons between states. This Note provides such a dataset, and as a result, it is able to conduct a long-overdue analysis of the factors that do and do not influence the level of disciplinary activity in a given state.

62. See, e.g., *Judicial Conduct Organizations Share Complaint Data*, JUD. CONDUCT REP., Fall 1993, at 1.

63. Telephone Interview with Cynthia Gray, Dir., Ctr. for Judicial Ethics, Am. Judicature Soc'y (June 8, 2011).

64. *Id.*

65. See, e.g., F. Andrew Hanssen, *Is There a Politically Optimal Level of Judicial Independence?*, 94 AM. ECON. REV. 712, 715 n.13, 720-22 (2004) (examining state appellate courts).

66. See, e.g., Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157 (1999).

67. See, e.g., Damon Cann, *Beyond Accountability and Independence: Judicial Selection and State Court Performance*, 90 JUDICATURE 226, 230 (2007); Stephen J. Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290, 299 (2008).

II. A CALIFORNIA CASE STUDY: THREE HYPOTHESES ABOUT WHAT DRIVES DISCIPLINARY ACTIONS

California's Commission on Judicial Performance is a natural place to start any study of judicial discipline. Not only was it a model for the rest of the country, but it also has a variety of other features that make it a useful case study. First, its jurisdiction extends over an impressively large sample of judges. In 2010, the Commission oversaw 1774 state judges and 392 court commissioners and referees,⁶⁸ more in total than the entire number of authorized Article III judgeships.⁶⁹ Second, the state has a diverse judiciary in terms of how judges are selected—both by election and by appointment. Finally, California is a good place to start because the state's fractious political culture has led to a number of changes in the Commission's operation, thus highlighting the many ways that political forces interact with judicial discipline.⁷⁰ This Part looks at three hypotheses about what drives the rates of judicial disciplinary actions. Each hypothesis is spelled out in this Part, and then tested against a thirty-five-state dataset in Part III.

A. *Hypothesis #1: Commissions with More Laypeople Issue More Disciplinary Actions*

There is a widespread belief that the composition of a judicial conduct commission dictates the amount of discipline it metes out. Throughout the country, commissions are composed of different combinations of judges, lawyers, and laypeople (defined as people who are not and have not been judges or lawyers).⁷¹ The intuition is that judges and lawyers are more sympathetic to accused judges than laypeople are, and therefore that a commission dominated by judges will take disciplinary action less often than one dominated by laypeople. Paul Fischer, the Executive Director of Michigan's Judicial Tenure Commission, echoed this sentiment in an interview. He said it is "very, very important"

68. Comm'n on Judicial Performance, *Case Statistics*, ST. CAL., http://cjp.ca.gov/case_statistics.htm (last visited Apr. 13, 2012).

69. *Federal Judgeships*, U.S. CTS., <http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx> (last visited Apr. 13, 2012).

70. California changed the Commission by constitutional amendment in 1966, 1976, 1988, 1994, and 1998. With the 1966 amendment, voters added the ability to censure judges, rather than just remove them. In 1976, the Commission was given power to issue private discipline without seeking approval from the state supreme court. In 1994, Proposition 190 created a layperson majority on the Commission in an effort to push the Commission to punish more judges. It also transferred authority for disciplining judges from the California Supreme Court to the Commission. Prior to that, the Commission could only recommend discipline to the supreme court. Comm'n on Judicial Performance, *supra* note 24.

71. In New Hampshire, however, one spot on the Commission is reserved for a clerk of the court or a former clerk of the court. *Judicial Conduct Committee*, N.H. JUD. BRANCH, <http://www.courts.state.nh.us/committees/judconductcomm/overview.htm> (last visited Apr. 13, 2012).

to have judges and lawyers on the commission so they can “rein in popular rage against a particular judge.”⁷² Fischer noted, however, that this rage is also what makes lay members the “most important element” in the judicial discipline system.⁷³ “It’s good to have that rage because the system needs to have someone looking at it as innocents saying, ‘What the heck are those judges doing?’”⁷⁴

It is this intuition about rage-filled lay members that led to the passage of Proposition 190 in California and Amendment 85 in Washington,⁷⁵ both of which created a lay-member majority on their state’s respective commissions. Voters passed these amendments on the intuition that radically altering the composition of the Commission would lead to more disciplinary activity against judges. They wanted the judges to be under the power of laypeople, who they thought would be less likely than judicial members of the commission to coddle wayward judges.⁷⁶ This intuition makes sense in principle, but as this Note will show, it is not supported by the data.

One measure of the public anger toward the judiciary was the spike in complaints in the years leading up to Proposition 190. As Figure 1-1 shows, there was a steady increase in the number of complaints against judges, with a particularly sharp spike in 1994, the year Proposition 190 was passed.

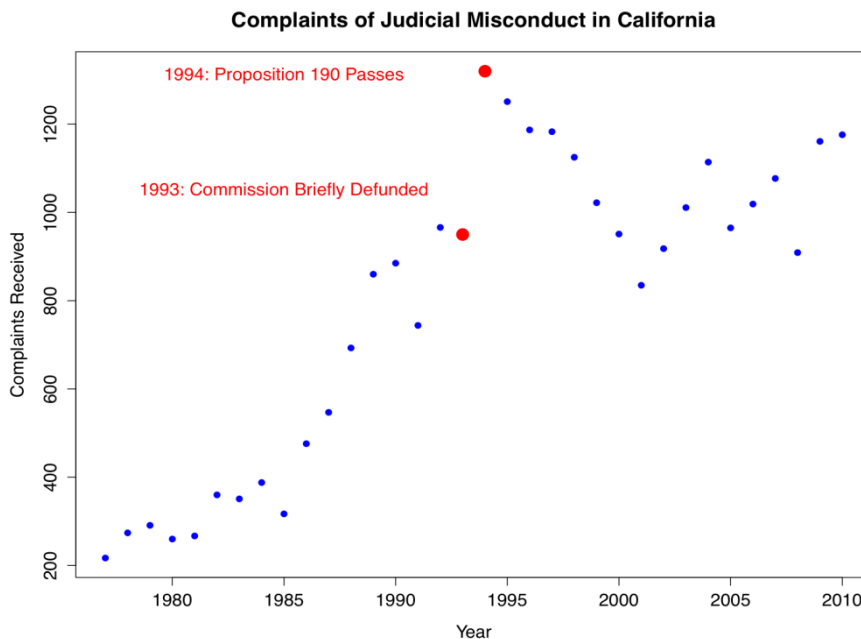
72. Telephone Interview with Paul J. Fischer, Exec. Dir., Mich. Judicial Tenure Comm’n (June 24, 2011).

73. *Id.*

74. *Id.*

75. California’s commission had a layperson majority for the first time after the passage of Proposition 190. See Comm’n on Judicial Performance, *supra* note 24 (“The membership of the Commission was increased to eleven members and its composition changed to three judges, two lawyers and six citizens.”). Washington added two lay members to its commission, creating a panel of six laypeople, two attorneys, and three judges. This was likewise the first time that lay members made up a majority of Washington’s commission. Roberta Ulrich, *Proposed Judicial Conduct Changes Aired*, OREGONIAN, Mar. 30, 1989, at B4. The amendment came in the wake of a scandal in which Judge Gary Little shot himself to death in the courthouse. The suicide came just hours before a local newspaper was to reveal that he had been privately disciplined for having inappropriate relationships with young boys. “Although Little had been suspended from hearing juvenile cases three times and the state’s Commission on Judicial Conduct had secretly disciplined him, none of those actions or allegations had ever been made public,” one newspaper reported. *Id.* The scandal prompted changes to Washington’s judicial conduct system in order to hold judges more accountable—and publicly so. Amendment 85 was ratified by voters on November 7, 1989. See *Washington Judicial Commission, Amendment 85 (1989)*, BALLOTPEdia, http://ballotpedia.org/wiki/index.php/Washington_Judicial_Commission,_Amendment_85_%281989%29 (last visited Apr. 13, 2012).

76. See Editorial, *Improve the Courts—Yes on 190 and 191*, S.F. CHRON., Oct. 20, 1994, at A22.

FIGURE 1-1⁷⁷

Why was there such a flare-up in anti-judge sentiment? Part of the reason seems to have been the acrimonious rivalry between the legislature and the judiciary. As contemporary observers noted, the friction between the legislature and judiciary was at an all-time high in 1994. The *Los Angeles Times* traced the hostility to the California Supreme Court's 1991 decision to uphold Proposition 140, which imposed term limits on elected officials and cut the legislature's budget by 38%.⁷⁸ The legislature retaliated the next year by threatening to cut the California Supreme Court's budget by 38%, a sign of the tension between the legislature and the judiciary.⁷⁹

Others trace the anti-judge sentiment to a growing sense that judges were not being held accountable for their actions. An often-discussed example was the decision not to discipline California Chief Justice Malcolm Lucas. Lucas

77. I collected the data from the annual reports of California's Commission on Judicial Performance from 1977 to 2010. The reports from 2003 through 2010 are available online. See Comm'n on Judicial Performance, *Annual Reports*, ST. CAL., http://cjp.ca.gov/annual_reports.htm (last visited Apr. 13, 2012).

78. See Alan Abrahamson, *California Elections/Prop. 190*, L.A. TIMES, Sept. 25, 1994, at A3. For more information about the fight between the judiciary and the legislature, see Lorie Hearn, *Judge Says Bar Didn't Back Courts in Crisis*, SAN DIEGO UNION-TRIB., Oct. 5, 1992, at A3.

79. Abrahamson, *supra* note 78. The threatened cuts were not carried out. *Id.*

had accepted trips to Austria, Bangkok, and Hawaii from corporations with business pending before the California Supreme Court, but in February 1994, the judicial conduct commission ruled that these gifts did not justify taking disciplinary action against him.⁸⁰ That decision set off accusations that the Commission was in the pocket of the judiciary—accusations that were all the more acute because Lucas’s supreme court had selected the judicial members of the Commission, who in turn made up the majority of the Commission. The Lucas affair was “one of the tipping points for me,” recalled Peter Keane, president of the San Francisco Bar at the time and the author of Proposition 190.⁸¹ “This was the fox guarding the chicken coop,” he said.⁸² It spurred him and others to propose legislation that would change the composition of the Commission to make sure it held judges accountable.

By the summer of 1994, Keane was not the only one calling for changes to the Commission, which he labeled a “whitewashing” machine⁸³ and an “old-crony system operating in back rooms.”⁸⁴ Influential voices across the state bought into the idea that changing the structure of the Commission would lead to more—and much-needed—disciplinary action. Professor Erwin Chemerinsky said the judge-dominated Commission was “much too willing to tolerate improprieties by judges.”⁸⁵ The *San Francisco Chronicle* faulted the Commission’s structure, noting that “judges themselves dominate the disciplinary process from start to finish.”⁸⁶ After a sustained investigation, the newspaper found that the Commission was one in which “judges who have engaged in repeated acts of misconduct and breaches of ethics codes . . . often have been punished privately with simple admonishments or letters of warning.”⁸⁷ The *Los Angeles Times* also voiced its disapproval of the Commission’s structure and performance, calling it “demonstrably clubby, secretive and ineffective at disciplining errant or incompetent judges.”⁸⁸

It was not merely the supporters of Proposition 190 who thought a change in the composition of the Commission would increase the number of disciplinary actions. Opponents of Proposition 190 were convinced of this intuition as well. The California Judges Association launched a media blitz against the pro-

80. See Editorial, *The Lucas Ruling*, S.F. CHRON. SUNDAY PUNCH, Feb. 6, 1994, at 1.

81. Telephone Interview with Peter Keane, Professor of Law & Dean Emeritus, Golden Gate Univ. Sch. of Law (Apr. 15, 2011).

82. *Id.*

83. Sandra Gonzales, *New Way to Discipline Judges*, SAN JOSE MERCURY NEWS (Peninsula), Jan. 9, 1995, at 1B.

84. Harriet Chiang, *Judges Fear Review Panel Partisanship*, S.F. CHRON., May 24, 1995, at A1.

85. Abrahamson, *supra* note 78.

86. William Carlsen & Harriet Chiang, *Secret Justice for State’s Judges: Panel Hands Out Lenient Punishment for Acts of Misconduct*, S.F. CHRON., Apr. 20, 1994, at A1.

87. *Id.*

88. Editorial, *190 and 191: “Yes” on Judicial Reform*, L.A. TIMES, Oct. 10, 1994, at B6.

posals.⁸⁹ The blitz was led by Judge Joseph Wapner of *The People's Court* television fame.⁹⁰ In a letter to the editor in the *Los Angeles Times*, the nation's best-known state judge warned that "[t]he Legislature designed Prop. 190 so it could control the judiciary by dominating the Commission on Judicial Performance."⁹¹ Politicians would dominate the Commission, he alleged, by installing a layperson majority. Wapner added that "[j]udges should be independent, and not worried about political pressure when they are deciding cases."⁹²

These warnings were not just overheated rhetoric; they were backed up by action. After the passage of Proposition 190, the California Judges Association for the first time offered group malpractice insurance to cover any legal costs that judges might incur while defending themselves from the Commission.⁹³ The need for this insurance came about because county attorneys, who typically defended judges in malpractice suits, announced they were not obligated to shoulder the costs of defending judges against the Commission.⁹⁴ The county attorneys, like practically everyone else, believed the change in the Commission's composition would lead to an increase in disciplinary actions against judges, and they did not want to bear the costs of defending the judges—costs that, in the 1990s, ranged from \$15,000 to \$250,000, according to the published estimate of one prominent lawyer.⁹⁵

Everyone agreed that there would be a major increase in disciplinary activity following the passage of Proposition 190, but everyone was wrong. As Figure 1-2 shows, the expected increase never materialized.⁹⁶

89. See Abrahamson, *supra* note 78.

90. See *id.*

91. Joseph A. Wapner, Letter to the Editor, *Judicial Reform Propositions*, L.A. TIMES, Nov. 5, 1994, at B7.

92. *Id.*

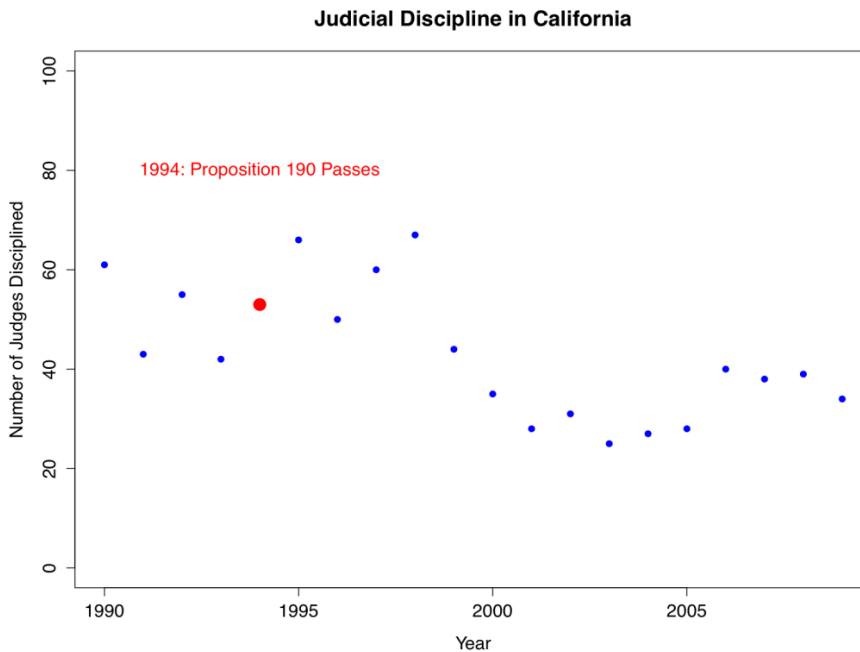
93. Davan Maharaj, *State's Judges Plan to Buy Type of Liability Insurance Law*, L.A. TIMES, Aug. 7, 1995, at A1, available at http://articles.latimes.com/1995-08-07/news/mn-32417_1_liability-insurance.

94. *Id.*

95. *Id.* The current arrangement is that any judge who goes through an ethics training class is covered by the insurance plan. Each year from 2002 through 2010, there were between \$400,000 and \$950,000 in legal claims against the policy. See E-mail from Philip Carrizosa, Pub. Info. Officer, Admin. Office of the Courts, Judicial Council of Cal. (Apr. 8, 2011) (on file with author).

96. These data come from the California Commission on Judicial Performance's Annual Reports. The reports from 2003 through 2010 are available online. See Comm'n on Judicial Performance, *supra* note 77. My numbers from annual reports were double-checked against the Commission's summary figures for 1990 to 1999. COMM'N ON JUDICIAL PERFORMANCE, STATE OF CAL., SUMMARY OF DISCIPLINE STATISTICS: 1990-1999, at 14 tbl.3-C (2002), available at http://cjp.ca.gov/res/docs/Miscellaneous/Statistical_study_1990-1999.pdf. From 2000 onwards I used the figures reported in the annual reports. In the Commission's ten-year summary figures, "discipline" equals the number of judges who received public discipline or private discipline, including advisory letters. *Id.* at 1. The Commission did not count the resignation of a judge while under investigation as an instance of disciplinary action. *Id.* This strikes me as a mistake because judges often resign when they

FIGURE 1-2



Though the number of disciplinary actions was slightly higher in three of the four years after Proposition 190, this short-term increase did not lead to disciplinary levels that were significantly higher than in the years before Proposition 190. In fact, looking over the two decades from 1990 to 2010, the number of disciplinary actions shows no upward trend. If anything, the number of actions has actually declined.⁹⁷ The changes in the composition of the Commission, then, did not change the number of disciplinary actions, a conclusion that Part III confirms with data from thirty-five states. The intuition behind Proposition 190 drove public policy and legislation, yet it has no grounding in the data. In a recent interview, I circled back to Keane to ask why the change in the Commission's composition did not result in more disciplinary action. "That's unfortunate," he said. "If that's the case, that's unfortunate."⁹⁸

realize they are about to be disciplined, so I included such resignations as disciplinary actions in my chart. *See infra* note 156 for a more in-depth discussion.

97. Victoria Henley, Executive Director of the California Commission on Judicial Performance, suggested that record-keeping changes in the mid-1990s could have accounted for the drop. *See* Telephone Interview with Victoria Henley, Exec. Dir., Cal. Comm'n on Judicial Performance (July 6, 2011).

98. Telephone Interview with Peter Keane, *supra* note 81.

B. *Hypothesis #2: Commissions Issue More Disciplinary Actions Against Elected Judges than Appointed Judges*

Another popular intuition about judicial misconduct is that commissions discipline elected judges more often than appointed ones. Again, we flesh out this intuition by starting with the California case study.

1. *Elected versus appointed judges: an intrastate comparison*

California's trial court judges reach the bench either through election or, much more commonly, through appointment. Many people share an intuition that California's Commission on Judicial Performance punishes elected judges at a higher rate than appointed judges. This is not just a crackpot conspiracy theory. In 2002, the Commission published a study finding as much.⁹⁹ According to the study, between 1990 and 1999 the Commission disciplined 43.6 elected judges for every 1000 elected judges on the bench, and 29.8 appointed judges for every 1000 appointed judges on the bench.¹⁰⁰ This suggests something systematically different about the way elected and appointed judges are treated. But the study refused to offer an explanation for the disparity. "This report presents the disciplinary statistics without analysis or interpretation," it noted.¹⁰¹ "It was not within the scope of this study to actually draw inferences from the data or to perform any statistical testing."¹⁰²

What accounts for this disparity? Maybe the elected judges are sharp-elbowed politicians who are more inclined to cut corners and thus to get in trouble. Maybe the Commission has some internal bias that causes it to scrutinize elected judges more intensely than appointed ones. Or maybe there are other reasons for this disparity. Unfortunately, the task of explaining the disparity is made particularly difficult because the Commission keeps so much of its data confidential. It releases numbers on private disciplinary actions, but it does not say whether those actions were taken against elected judges or appointed

99. See COMM'N ON JUDICIAL PERFORMANCE, *supra* note 96. The Commission on Judicial Performance's study included not only public discipline, but also private discipline: "advisory letters, public and private admonishments, public reprovls [which were eliminated in 1995], public censures and decisions removing judges from office." *Id.* at 1 (footnote omitted).

100. *Id.* at 14 tbl.3-A.

101. *Id.* at 3.

102. *Id.* It would have been better to calculate this rate by using the number of cases heard by each type of judge, rather than using the number of judicial positions occupied by each type of judge. But it probably does not matter because elected and appointed judges serve side-by-side in the courts, so an individual judge's caseload should not vary based on whether he was elected or appointed.

ones. As a result, we cannot test on our own whether elected judges in California really are disciplined at higher rates than their appointed colleagues.¹⁰³

A work-around to this problem, however, is to compare states with judicial elections to states without them. If election states see higher levels of disciplinary activity than appointment states, it might suggest that elected judges are disciplined at a higher rate than appointed judges.¹⁰⁴ Even if the state-to-state comparison does not shed light on the intrastate question, it is worth considering because, as the next Subpart shows, many experts in the field believe there are profound differences between judicial-election and judicial-appointment states.

2. *Elected versus appointed judges: a state-to-state comparison*

Many experts in the judicial discipline field believe that election states mete out discipline more often than appointment states. In the process of collecting data for this Note, I interviewed commission officials in dozens of states and heard this intuition echoed many times—especially in states without judicial elections.

The difference between election and appointment states is “like night and day,” according to William Campbell, Executive Director of Colorado’s Commission on Judicial Discipline.¹⁰⁵ He believes Colorado’s low level of disciplinary activity is a direct result of the merit selection process by which the state chooses its judges.¹⁰⁶

Carol Collins, the Executive Director of Wyoming’s Commission on Judicial Conduct and Ethics, said the difference between election and appointment states is “always one of our topics of conversation when we come back” from national judicial conduct conferences.¹⁰⁷ Collins thinks elections open the door to judges’ accepting bribes or granting preferential treatment to campaign donors—election-driven misconduct that would not exist in a state where all judges are appointed. “We believe that we have less conduct issues than states

103. The Commission is updating the 2002 report, but it has not published these findings. I requested an advance copy, but as of January 2012 I had not been provided with one.

104. Of course, if one believes that the disparity in disciplinary rates results from the fact that commissions scrutinize their elected judges more carefully than their appointed ones, then looking at the state-to-state comparison would not be helpful.

105. Telephone Interview with William J. Campbell, Exec. Dir., Colo. Comm’n on Judicial Discipline (May 2011).

106. *Id.* In merit selection, a judicial nominating commission vets candidates and presents a slate of recommendations to the governor, who then chooses a judge from the slate. Judges must run in retention elections in order to keep their judgeships. *See Frequently Asked Questions*, AM. JUDICATURE SOC’Y, http://www.ajs.org/selection/sel_faqs.asp (last visited Apr. 13, 2012).

107. Telephone Interview with Carol Collins, Exec. Dir., Wyo. Comm’n on Judicial Conduct & Ethics (June 24, 2011).

that have an electoral process—especially I’m looking at Texas,” she said.¹⁰⁸ “That must be a nightmare to work with that commission down there.”¹⁰⁹

Cathae Hudgins, the Executive Director of the District of Columbia’s Commission on Judicial Disabilities and Tenure, also suspects a connection between elections and misconduct. “I always think that . . . maybe the reason we have not seen some of the big scandals that have happened in [other] jurisdictions was because [we have] merit selection—our judges don’t have to be politicians part of the time,” she said.¹¹⁰ “But whether there is any real correlation between the two, I don’t really know.”¹¹¹

While Hudgins is unsure about the connection, her Massachusetts counterpart, Gillian Pearson, has no such doubts. Not only are the judges all appointed in Massachusetts, but their appointments last until age seventy.¹¹² Unlike in most appointment states, Massachusetts judges do not even run in retention elections.¹¹³ Pearson, the Executive Director of Massachusetts’s Commission on Judicial Conduct, said the lack of judicial elections produces a cleaner judiciary. Elections “absolutely” lead to more judicial misconduct, she said.¹¹⁴ “The states where judges are elected, to us the misconduct they get is just wild. It’s like the Wild Wild West. We can’t even imagine those things happening here.”¹¹⁵ When told about this Note’s findings—discussed in Part III—that election states do not appear to discipline judges at a higher rate than appointment states, Pearson stuck to her position. “I think something is throwing you off there because I think that is a false result,” she said.¹¹⁶ “I think something statistical [went wrong in your study] because this is such a strong impression that we all have here. If it really is true, it would really surprise me.”¹¹⁷

3. *What accounts for the supposed difference between elected and appointed judges?*

The California Commission’s 2002 study found an intrastate disparity between the disciplinary rate of elected judges and the disciplinary rate of appointed judges. But this Note’s analysis of state-to-state figures calls into ques-

108. *Id.*

109. *Id.*

110. Telephone Interview with Cathae J. Hudgins, Exec. Dir., D.C. Comm’n on Judicial Disabilities & Tenure (June 24, 2011).

111. *Id.*

112. *Methods of Judicial Selection*, AM. JUDICATURE SOC’Y, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Apr. 13, 2012).

113. *Id.*

114. Telephone Interview with Gillian E. Pearson, Exec. Dir., Mass. Comm’n on Judicial Conduct (June 24, 2011).

115. *Id.*

116. *Id.*

117. *Id.*

tion the supposed disparity in discipline between election states and appointment states. (The intrastate comparison could not be performed because California keeps secret whether judges who are privately disciplined were elected or appointed.¹¹⁸) However, if we allow that there is a disparity based on whether judges are elected or appointed, the obvious next step is to look at what might cause this disparity. Those who believe that elected judges are treated differently from appointed ones offer several different explanations.

The most cynical explanation regards a commission's role as a tool of the legal establishment. As noted earlier, in California there are two ways to become a trial judge: election and appointment.¹¹⁹ The majority of judges in California are initially appointed to the bench and then run unopposed in periodic retention elections.¹²⁰ Once in a while, however, a dark-horse candidate runs against an incumbent and wins. Judges who are initially appointed are considered to be insiders because, after all, they have somehow wrangled an appointment from the governor, whereas judges who made it onto the bench by winning election are considered outsiders because they have not sought approval from the powers that be. This outsider status can make them a threat to the judicial establishment. This cynical theory holds that elected judges are punished more often because the commissions scrutinize them more carefully. The commission wants to keep the outsiders in check, so it deals roughly with elected judges—or so the theory goes.

One example cited by proponents of this theory is the case of José Velasquez, a defrocked judge from Monterey County. Velasquez was elected as a municipal court judge in a 1995 special election that was ordered as part of a settlement to a Voting Rights Act lawsuit.¹²¹ The suit alleged that Monterey

118. See *supra* text accompanying note 103.

119. I refer to trial court judges because they make up the majority of judges in the state courts. See, e.g., COMM'N ON JUDICIAL PERFORMANCE, *supra* note 47, at 7 (noting that there are 7 supreme court justices, 105 appellate court judges, and 1662 trial court judges). Not surprisingly, trial court judges are the subjects of the majority of verified complaints. See, e.g., N.M. JUDICIAL STANDARDS COMM'N, STATE OF N.M., 2010 ANNUAL REPORT 13 (2010), available at http://www.nmjsc.org/docs/annual_reports/FY10AnnualReportPt1.pdf (noting that in 2010 only 1% of “verified” complaints (i.e., complaints that are “substantiated by oath and notarized”) were filed against supreme court and appellate court judges).

120. Eighty-eight percent of California judges were initially appointed to the bench rather than elected. COMM'N ON JUDICIAL PERFORMANCE, *supra* note 96, at 14 tbl.3-B. Roughly 92% of all the judicial elections in 2000, 2002, 2004, 2006, and 2008 saw only one candidate in the race. See Data Archive for General Jurisdiction Trial Courts, JUD. ELECTIONS DATA INITIATIVE, <http://jedi.wustl.edu/data-general-jurisdiction-trial-courts.php> (last visited Apr. 13, 2012). From 1972 to 2002, “the percentage of superior court judges facing electoral opposition exceeded 2 percent in only two of those 30 years.” Michael J. Nelson, *Uncontested and Unaccountable? Rates of Contestation in Trial Court Elections*, 94 JUDICATURE 208, 212 (2011) (citing Roy A. Schotland, *The Crocodile in the Bathtub . . . and Other Arguments to Extend Terms for Trial Judges*, CAL. CTS. REV., Fall 2005, at 10, 12).

121. Kenneth Ofgang, *Monterey Jurist Velasquez Seeks Supreme Court Review of Ouster*, METROPOLITAN NEWS-ENTERPRISE, July 26, 2007, at 1, available at <http://www.metnews.com/articles/2007/vela072607.htm>.

County had discriminated against Hispanic voters by combining a number of municipal court judgeships into a countywide judgeship.¹²² The settlement created a majority Hispanic district to remedy the discrimination.¹²³ A judge—not Velasquez—was appointed by the governor to serve until the special election, but at that election Velasquez prevailed.¹²⁴

Velasquez's victory upset Monterey County's legal establishment, according to Velasquez's lawyer. Many of the judges in Monterey County were appointed directly from the local prosecutor's office, the lawyer said, while Velasquez had a much different background, having grown up connected to the United Farm Workers Union and Cesar Chavez.¹²⁵ When Velasquez was sworn in, three of his fellow judges boycotted the event.¹²⁶

"I've always been a troublemaker," Velasquez said in an interview.¹²⁷ He did his best to rile up the local establishment after the election. For example, he made a point of showing up to the swearing-in ceremony in what he described as a custom-made "Pancho Villa" outfit just to upset his enemies.¹²⁸ It was not long before the complaints started coming in against him. In 1997, Velasquez received a public censure for, among other things, accusing the Presiding Judge of Monterey County in open court of a racially motivated conspiracy to humiliate him.¹²⁹ The Commission punished Velasquez for disparaging his colleagues. In 2006, Velasquez was privately disciplined for addressing some defendants directly in Spanish, which violated court rules requiring all proceedings to be conducted in English.¹³⁰ Again in 2006, the Commission came after him for harshly treating defendants in his court, initiating an investigation that eventually led to his removal the following year.¹³¹ Velasquez's own lawyer, Jim Friedhofer, admits that what Velasquez did was wrong—though he argues that it was a "legal error" as distinct from judicial misconduct,

122. *Id.*

123. *Id.*

124. *Id.*

125. Telephone Interview with Jim Friedhofer (Mar. 3, 2011).

126. *Id.*

127. Telephone Interview with José Velasquez, Former Cal. Superior Court Judge (Apr. 2011).

128. *Id.*

129. *See In re A Judge*, No. 139, slip op. at 4-6 (Cal. Comm'n on Judicial Performance Apr. 16, 1997), available at http://cjp.ca.gov/res/docs/Censures/Velasquez_4-16-97.pdf (imposing public censure upon Judge José A. Velasquez).

130. *Ofgang*, *supra* note 121. This discipline was referred to publicly in the Commission's forty-nine-page decision removing Velasquez from office. *In re Judge José A. Velasquez*, No. 180, slip op. at 44 (Cal. Comm'n on Judicial Performance Apr. 25, 2007), available at http://cjp.ca.gov/res/docs/Removals/Velasquez_04-25-07.pdf.

131. *Id.* at 1, 49.

and thus not deserving of removal.¹³² Friedhofer cites this case as an example of how the Commission comes down particularly hard on outsiders.¹³³

Velasquez is not the only elected judge who believed he was persecuted by the Commission. The problem is common, Friedhofer said: “One of the first things that I would ask when I met with a new judge, was ‘How did you get your job? Were you appointed or were you elected?’ There does seem to be some suspicions about elected judges.”¹³⁴

A less nefarious explanation of the disparity is that appointed judges are simply more capable and more qualified than their elected colleagues. Appointed judges are vetted by the governor and his professional staff, who presumably weed out bad candidates. Elected judges, on the other hand, are selected by the public, which does not have the time or the resources to scrutinize the judges as carefully. The Commission is an “offshoot of California’s system of electing judges,” explained Myron Moskowitz, a law professor at Golden Gate University.¹³⁵ “If we didn’t elect judges we wouldn’t need it so badly.”¹³⁶ Simply put, the theory is that elected judges are disciplined more frequently because they misbehave more frequently—not because they receive extra scrutiny from the Commission.

Another theory is that, in addition to the lack of vetting, elected judges may be more prone to misbehavior because of the very nature of who gets elected. The same sharp-elbowed political skills that are required to win an election may make a judge more likely to break the ethical rules. If this hypothesis is true—if elected judges really are more prone to misbehavior—that should be testable in the state-to-state comparisons; namely, states that elect their judges should show significantly higher rates of discipline than states that appoint their judges. But as we will see in Part III, that is not the case.

Finally, it is worth mentioning the most innocuous explanation for the supposed disparity. Under this final theory, it is not that elected judges are systematically less ethical, or that commissions are systematically more suspicious of elected judges. Rather, the act of running for office simply exposes judges to so many ethical problems that they are thus more likely to run afoul of the rules than their colleagues in states who do not run in elections. In Florida, for example, many disciplinary actions are election-related. The judicial misconduct there includes everything from making misleading statements about judicial opponents to accepting campaign donations from parties involved in litigation.¹³⁷ Like the vetting theory, this one is also testable through state-to-state

132. Telephone Interview with Jim Friedhofer, *supra* note 125.

133. *Id.*

134. *Id.*

135. Telephone Interview with Myron Moskowitz, Professor of Law, Golden Gate Univ. Sch. of Law (Feb. 24, 2011).

136. *Id.*

137. The American Judicature Society (AJS) mentions this prohibition on judges expressing opinions on certain topics:

comparisons. If running for elected office is so ethically treacherous, then we would expect to see significantly more misconduct in election states. As Part III shows, however, that is not the case.

C. *Hypothesis #3: Commissions with Higher Budgets Issue More Disciplinary Actions*

Like so many commonsense propositions, this one sounds straightforward: states that spend more on their judicial conduct commissions complete more investigations and mete out more disciplinary actions. But unlike the other hypotheses, this one is supported by the data. The correlation between disciplinary activity and funding is an important finding because it is the first time the relationship has been documented. More importantly, this relationship raises questions about the balance of power among the three branches of government, given that the legislature and the executive may be able to control the level of disciplinary activity faced by the judiciary simply by raising or lowering the budget of the judicial conduct commission.¹³⁸ It may not be surprising to learn that California's legislators have already given that budget lever a pull in an effort to intimidate the judiciary, as the following discussion shows.

1. *The legislature's use of the budget lever against the judiciary*

The passage of Proposition 190 in 1994 coincided with several acts of budget brinksmanship in which the legislature took aim at the judiciary. As noted earlier, some trace the tension between the legislature and the judiciary back to 1991, when the judiciary upheld the constitutionality of Proposition 140—a proposition that imposed term limits on elected officials and cut the legislature's budget by 38%.¹³⁹ Many legislators argued that the legislature should strike back by cutting the judiciary's budget by the same amount.¹⁴⁰ Legislators also turned their ire on the judicial conduct commission, which they believed had not dealt aggressively enough with judicial misconduct.

The 2007 AJS/*Drake Law Review* Symposium issue tackles the growing politicization of judicial selection in the United States, stemming, at least in part, from the U.S. Supreme Court decision *Republican Party of Minnesota v. White*, holding that judicial candidates may not be prohibited from announcing their views on disputed legal and political subjects.

AJS/Drake Law Review Symposium Examines the "Fragile Right" of Judicial Free Speech, AM. JUDICATURE SOC'Y, <http://www.ajs.org/ajs/publications/Judicatories/2007/July/symposium.asp> (last visited Apr. 13, 2012) (citation omitted).

138. On the other hand, the panel data discussed in Part III raise the question of whether there is an immediate, direct relationship between increases in budgets and increases in disciplinary actions. Obviously, there are other ways for the legislature and the executive to strike at the judiciary, including drastic cuts to the judiciary's funding.

139. Abrahamson, *supra* note 78.

140. *Id.*

The budget lever proved an effective way for the legislature to menace the Commission on Judicial Performance. In 1993, State Senator Charles Calderon pushed through a resolution that defunded the Commission.¹⁴¹ The funds were ultimately restored, but at a budget hearing a year later, legislators again threatened to dismantle the Commission if it did not intensify its disciplinary activity.¹⁴² Victoria Henley, the Executive Director of California's Commission, discussed that meeting in a recent interview. She recalled "a lot of criticism over the Commission not doing enough, and that the Commission should be doing more discipline."¹⁴³ Attorney Jim Friedhofer remembers that "[s]omebody said, 'We want to see a body count.' That was the mandate. 'We want to see them hang some judges.'"¹⁴⁴

The Commission defended its activity, or lack thereof, by pointing out that its budget was too small to deliver major increases in disciplinary activity.¹⁴⁵ Hearing this, Calderon, who had voted to defund the agency a year earlier, proposed doubling the budget. "I felt that before we nuke the commission, maybe we should give them the resources to do the job," he said to the *San Francisco Chronicle*.¹⁴⁶ "If they come back and have not done it, then we should do away with the commission."¹⁴⁷ With that, the legislature increased the Commission's budget from \$1.3 million in fiscal year 1994 to \$2.4 million in fiscal year 1995.¹⁴⁸ The number of staffers on the Commission nearly doubled, going from 13 to 25.¹⁴⁹ This budget increase was passed, the *Los Angeles Times* reported, "with the obvious expectation . . . that there would be results," meaning more discipline.¹⁵⁰

But, as shown in Figure 1-3, doubling the budget did not lead to an increase in disciplinary activity.¹⁵¹

141. William Carlsen, *Lawmakers Move to Overhaul Agency That Rides Herd on Judges*, S.F. CHRON., June 17, 1994, at A24; Harriet Chiang & William Carlsen, *California Trails the Nation in Judging Wayward Judges*, S.F. CHRON., Apr. 21, 1994, at A1.

142. See Carlsen, *supra* note 141.

143. Telephone Interview with Victoria Henley, *supra* note 97.

144. Telephone Interview with Jim Friedhofer, *supra* note 125.

145. See Carlsen, *supra* note 141.

146. *Id.*

147. *Id.*

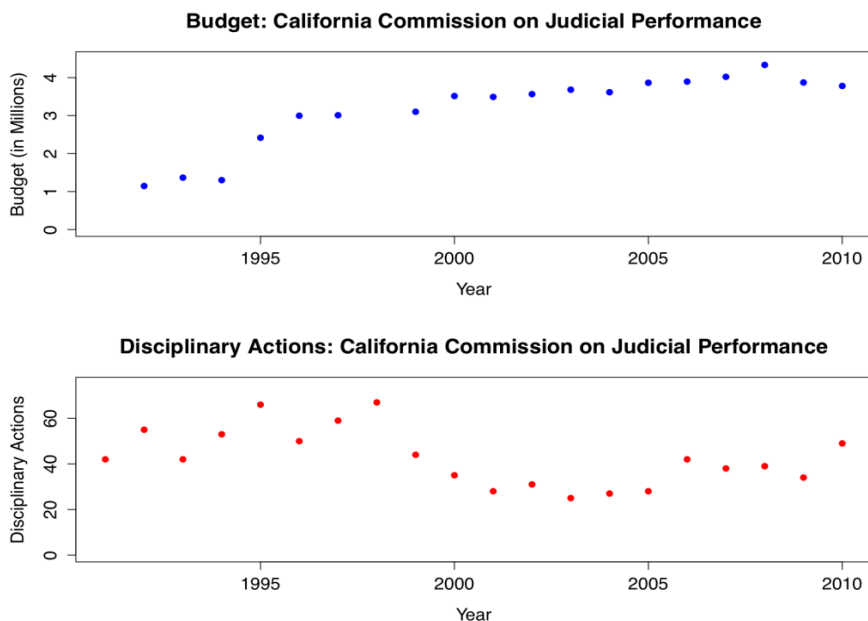
148. *Conduct Organizations Share Complaint, Budget Data*, JUD. CONDUCT REP., Winter-Spring 1996, at 1, 4; *Judicial Conduct Organizations Share Budget Data*, JUD. CONDUCT REP., Winter 1995, at 1, 2. For a number of reasons, I believe the *Judicial Conduct Reporter* mislabeled the California data in its tables. In this Note, I treat the data as Fiscal Year 1993-1994 and Fiscal Year 1994-1995, rather than calendar year 1993 and calendar year 1994.

149. *Conduct Organizations Share Complaint, Budget Data*, *supra* note 148, at 4; *Judicial Conduct Organizations Share Budget Data*, *supra* note 148, at 2.

150. Abrahamson, *supra* note 78.

151. These data come from the annual reports of California's Commission on Judicial Conduct. See *supra* note 77.

FIGURE 1-3



Why such a dramatic budget increase did not translate into an increase in discipline is an interesting question that is addressed more fully in Part III. As it turns out, the multistate comparison in Part III reveals that there *is* a statistically significant relationship between budget and discipline when we look at a commission's average budget and average discipline over a number of years.¹⁵² But year-to-year increases in the budget do not translate into year-to-year increases in discipline.¹⁵³ In taking up the budget question at the end of Part III, this Note tries to reconcile these seemingly contradictory findings.

III. TESTING THE HYPOTHESES WITH THE THIRTY-FIVE-STATE DATASET

The California case study in Part II drew out three hypotheses about what drives judicial conduct commissions to take disciplinary action. Part III builds on that case study by testing these intuitions against an original dataset of thirty-five states. The dataset suggests that much of the conventional wisdom about

152. There is quite an interesting range of budget allocations, from California, Texas, New Mexico, and other states where there are well-funded staffs, to states like Kansas, where there are no staff members on the commission and the work is instead done by employees of other parts of the court system. In several states, including Colorado, the commissions do not publicly release their budgets. *See, e.g.*, E-mail from William J. Campbell, Exec. Dir., Colo. Comm'n on Judicial Discipline (Jan. 26, 2012) (on file with author).

153. *See infra* Part III.B.3.

judicial conduct commissions is wrong. For example, the data do not show a relationship between the level of disciplinary activity and the balance on the commission among judges, lawyers, and laypeople. The data also call into question the supposed correlation between judicial elections and higher levels of disciplinary activity. In fact, Part III shows that of the three initial hypotheses, only the one proposing a correlation between budget and discipline is supported by the data.

Before delving into the results, it is important to address a few of the strengths and weaknesses of the data.

A. *The Data*

The dataset I built for this Note is the most current and comprehensive dataset on judicial discipline. It tracks the annual number of public disciplinary actions, private disciplinary actions, resignations, and complaints for thirty-five states from 2000 through 2010.¹⁵⁴ The dataset also tracks the composition of the commissions—that is, the mixture of judges, lawyers, and laypeople on each commission—as well as the annual budget expenditures of the commissions and the number of staff members the commissions employed. The purpose of the dataset was to test why some commissions discipline more judges than others. Thanks to this dataset, we can answer that question with statistics, not speculation.

Despite the many strengths of this dataset, there are several challenges that arose in working with the data. The first of these challenges was in standardizing the data across all the states. The second was in dealing with unobserved variables that might influence the results. But before we look at those challenges, it is worth setting out a standard definition of discipline.

1. *Defining discipline*

This dataset tracks the number of disciplinary actions in each state. The first step was defining what counts as discipline and what does not. Every state tracks its commission's activity differently. In some states, the commissions issue warnings to judges even when there is no actual wrongdoing. The warnings might simply alert the judge that her actions are approaching an ethical line and that she should be careful.¹⁵⁵ I was interested in the redress of actual misconduct, so I did not want some states to appear to be addressing lots of misconduct when all they were doing was issuing warnings. Therefore, I settled

154. I contacted all fifty states and the District of Columbia about getting data, but a number of states were not able to provide me with the relevant data. Many of the thirty-five states I included could not provide data for all of the years in the range. The states for which data are available, and the years for which those states provided data, are listed in the Appendix.

155. *See supra* note 54 and accompanying text.

on the following bright-line rule: If the commission made a finding of misconduct, I counted it as a disciplinary action. If there was no finding of misconduct, as in the warnings discussed above, I did not count it as discipline.

My study looked at all disciplinary action, regardless of its severity, provided that there was a finding of wrongdoing. While I looked at the total number of disciplinary actions, it is possible to subdivide these actions into three categories: “public discipline,” “private discipline,” and a category loosely titled “resignations,” which includes any judge who resigned, retired, or failed to win reelection while being investigated.¹⁵⁶ Public discipline accounts for roughly 28% of the disciplinary activity in the dataset, private discipline for 59%, and resignations for 12%.¹⁵⁷

The advantage of adding all three categories together is that it captures the full scope of a commission’s activity. The disadvantage is that it masks the intensity of a commission’s actions. For example, a state that issues ten private admonishments will appear more aggressive than a state that removes nine judges, even though removal is a much more severe punishment than admonishment. I considered weighting the three categories to account for their relative severity, but there is no principled way to decide the proper weighting. Is one removal equivalent to five private admonishments? To twenty? I also considered looking only at the most severe category, public discipline, but that would exclude almost three quarters of the commissions’ activities. And looking only at public discipline would further be problematic because judges often resign before they can be disciplined, so if we ignored the resignation category these judges would slip through the cracks. Likewise, if we looked only at private discipline, we would not get very far because some states do not have private discipline. Total discipline was the cleanest way to permit for state-to-state comparisons.

There is always a tradeoff between measuring the frequency of disciplinary action and measuring the intensity of those actions. Both measures would produce interesting results, but for reasons of practicality, I chose to observe the frequency of judicial disciplinary action.

156. I tracked this number because, in many cases, judges who know they will be disciplined choose retirement in the hope of escaping a mark on their record. In some states, resignation ends the commission’s jurisdiction over the judge. *See, e.g., Frequently Asked Questions*, N.M. JUD. STANDARDS COMMISSION, www.nmjsc.org/frequentlyaskedquestions.php (last visited Apr. 13, 2012) (“The Commission has no jurisdiction over retired judges[or] judges who are no longer in office . . .”). In other states, the commission has jurisdiction over former judges as well. *See, e.g., Comm’n on Judicial Performance, Background Information on the Commission*, ST. CAL., <http://cjp.ca.gov> (last updated Feb. 7, 2012) (“The Commission’s jurisdiction includes all judges of California’s superior courts and the justices of the Court of Appeal and Supreme Court. The Commission also has jurisdiction over former judges for conduct prior to retirement or resignation.”).

157. These figures come from the data that I collected.

2. *Standardizing the data among the states*

Every state seems to keep track of its commission's activity in a different way. For example, most states track the number of *judges* who are disciplined, but some states track the number of *complaints* against judges that are resolved through discipline. In Massachusetts in 2003, there was one judge who had sixty-three complaints against her.¹⁵⁸ When her case was resolved, Massachusetts counted that as sixty-three disciplinary actions,¹⁵⁹ whereas most states would have counted it as a single disciplinary action. In order to standardize the data, the staff at the Massachusetts Commission converted their published figures for me so that I could have the number of *judges* disciplined. However, some states, such as South Carolina, were not able to convert their disciplinary figures into per-judge numbers, so those states are not among the thirty-five included in the dataset.

Finally, I will mention two other standardization issues pertinent to the budget. For each state, I requested the commission's annual expenditures since 2000. Most states could provide them, but a nontrivial number could provide only appropriations. I considered excluding those states, but I decided that it was better to have some estimate of the budgets than no estimate at all. The expenditures-appropriations divide obviously leads to some imprecision. For those states that provided both appropriations and expenditures, however, the numbers were very close, suggesting this is not a significant source of inaccuracy.

Likewise, some commissions are assigned duties in addition to discipline, which can affect the budget analysis. In the District of Columbia, the Commission reviews the fitness of judges who apply for senior judge status, in addition to handling the typical judicial conduct cases.¹⁶⁰ So not every dollar in that commission's budget is dedicated to disciplinary activity—unlike in states where the commissions are involved only in disciplinary actions. Similarly, the budgets in some states include rent payments for office space, whereas in other states, the budgets do not include rent payments because the offices are located in state-owned buildings. One way I accounted for these budget discrepancies was by tracking the number of staff members who worked for the commissions. My data show a correlation between discipline and staffing levels, which gave

158. COMM'N ON JUDICIAL CONDUCT, COMMONWEALTH OF MASS., ANNUAL REPORT 2003, at 7-8 (2004), *available at* www.state.ma.us/cjc/2003_Annual_Report.pdf.

159. *Id.* at 9 chart 2.

160. *Senior Judge Recommendations*, DC.gov, <http://cjdt.dc.gov/DC/CJDT/About+CJDT/Who+We+Are/Senior+Judge+Recommendations> (last visited Apr. 13, 2012). Some commissions do not have their own budgets or staff. For example, in Kansas, the staff for the judicial conduct commission comes from the Clerk of the Appellate Court. Telephone Interview with Ron Keefover, Pub. Info. Officer, Kan. Office of Judicial Admin. (2011). Therefore, I did not include any budget figures for Kansas in my data.

me more confidence that the correlation between budget and discipline was not being driven by mere accounting discrepancies.

3. *The effect of unobserved variables*

Unobserved variables are always a challenge in dealing with regression analysis. This Note examines whether three variables—commission composition, elected versus appointed status, and commission budget—account for differences in discipline among the states.

But it could be that the differences are driven by something else, some variable that I did not take into consideration. For example, some state judiciaries may just be more corrupt than others, which could explain why commissions in those states take disciplinary action more often. Or maybe litigants in some states are simply more combative than litigants in others, thus leading to more vindictive complaints against judges and, ultimately, more disciplinary actions. Or maybe the differences are attributable to something as subtle as the varying office cultures among the commissions' staffs (i.e., some staffs may push harder for disciplinary action than others). The list of possible unobserved variables goes on and on.

The fear of bias from such unobserved variables, however, should be tempered by several factors. First, there is no reason to think the states with the highest rates of disciplinary activity—Mississippi, Alaska, New York, and New Mexico—differ systematically in any of those variables from the states with the lowest disciplinary rates—Alabama, Delaware, Florida, and Maryland. Second, my analysis does not attempt to assign precise values to the relationship between, say, budget and discipline, so small imprecisions do not derail the analysis. Finally, the goal of this Note is to question the common intuitions about judicial conduct commissions. I chose to track the three factors that people believe to be responsible for differences in disciplinary rates. I found no evidence that commission composition was related to discipline. And the data cast doubt on the idea that a state's method of choosing judges (by election or by appointment) is correlated with significantly higher or lower disciplinary rates. But I did find evidence of a relationship between budget size and discipline. It could be that by accounting for some unobserved variables, future research will resurrect the intuitions that I have discredited here. But until then, the burden is on the supporters of these intuitions to back up their beliefs with data.

4. *Sources of inaccuracy in the state caseload data*

A final word remains to be said about the data. In comparing the disciplinary rates across states, I had to adjust for the size of the state's caseload. Caseload is relevant because the vast majority of complaints against judges arise

from litigation,¹⁶¹ so the more cases there are in the system, the more discipline we would expect to see, as shown in Figure 1-4. Therefore, I adjusted for each state's caseload over the period.

In principle, adjusting for caseload would be sufficient, but I had some concerns about the caseload data. The data come from the National Center for State Courts,¹⁶² and are the best available. I used the table titled "Reported Grand Total State Trial Court Caseloads, 2008."¹⁶³ The National Center for State Courts provides these data with the intention that people use them to compare states. But the report warns about gaps in certain states' data.¹⁶⁴ Some courts within a given state system have reported fewer than 75% of their cases.¹⁶⁵ This can lead to inaccurate caseload data, which is obviously troubling. But I thought it better to include the caseload data with a warning than to exclude them.

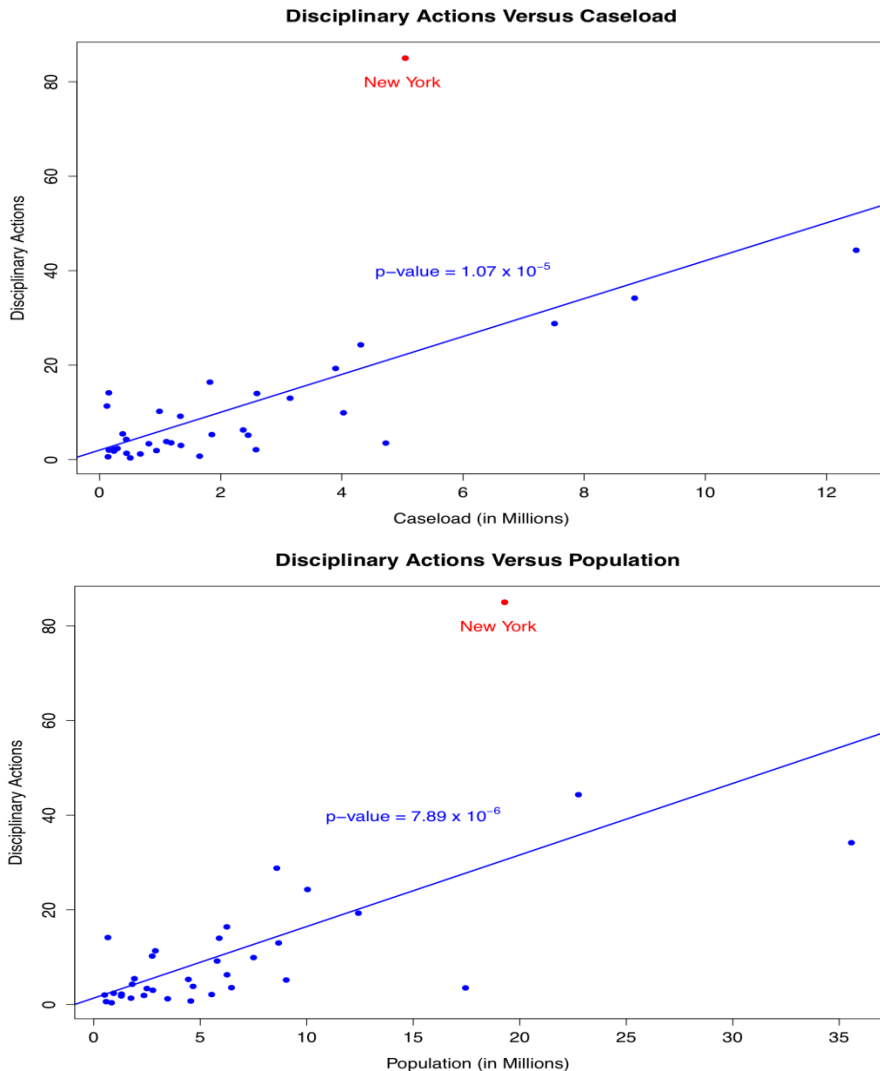
161. See COMM'N ON JUDICIAL PERFORMANCE, *supra* note 47, at 9. Some people suggested that I adjust not for population or caseload but for the number of judges that the commission is charged with overseeing. This is the way some commissions themselves track their statistics. See JUDICIAL QUALIFICATIONS COMM'N, STATE OF GA., ANNUAL REPORT 2010, at 25 (2011), available at http://www.gajqc.com/annualreports/Georgia_JQC_Annual_Report_FY2010.pdf (looking at complaints per judge and budget per judge). But this strikes me as a flawed method for several reasons. Some commissions have jurisdiction over retired judges, others do not. Retired judges do not hear cases, and thus generally do not have complaints registered against them, so they should not be counted in the discipline calculations as if they were regular judges. In addition, some states have many part-time judges, which would further skew any calculation that depended on the number of judges. See, e.g., *Appendix to Part I: Code of Judicial Conduct*, N.J. CTS., http://www.judiciary.state.nj.us/rules/appendices/app1_jud.htm (last visited Apr. 13, 2012); *Judicial Conduct Committee*, *supra* note 71. Each of these part-time judges hears substantially fewer cases than a full-time judge, so adjusting for them would essentially overstate the size of the judiciary. Granted, retired or part-time judges can be disciplined for a DUI or for some other out-of-court activity. But since almost all complaints originate in court proceedings, the best factor to use is either caseload or its proxy, population.

162. *State Court Caseload Statistics Reports 1975-2006*, NAT'L CENTER FOR ST. CTS., http://www.ncsconline.org/d_research/csp/SCCS-pastreports.html (last updated Jan. 12, 2012) (listing reports from 1975 to 2007); *State Court Caseload Tables—Trial Courts*, NAT'L CENTER FOR ST. CTS., http://www.ncsconline.org/d_research/csp/2008_files/2008_state_court_trial_sheets.html tbl.8 (last updated Jan. 12, 2012); *Trial Courts—Grand Total Caseloads 2009.xlsx*, NAT'L CENTER FOR ST. CTS., http://www.courtstatistics.org/Other-Pages/~/_media/Microsites/Files/CSP/DATA%20XLS/SCCS/Trial%20Courts%20-%20Grand%20Total%20Caseloads%202009.ashx (last visited Apr. 13, 2012).

163. NAT'L CTR. FOR STATE COURTS, COURT STATISTICS PROJECT, STATE COURT CASELOAD STATISTICS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 46 tbl.2 (2010).

164. See, e.g., *id.* at 52-53 tbl.2.

165. *Id.*

FIGURE 1-4¹⁶⁶

I also built in a redundancy to compensate for any problems with the caseload data. When I tested the hypotheses, I used the population of the state as a proxy for the size of the state’s court system.¹⁶⁷ The population data, which I

166. *Historical Data: 2000s*, U.S. CENSUS BUREAU, <http://www.census.gov/popest/data/historical/2000s/index.html> (last visited Apr. 13, 2012) (listing the data in the “Vintage 2009” spreadsheet).

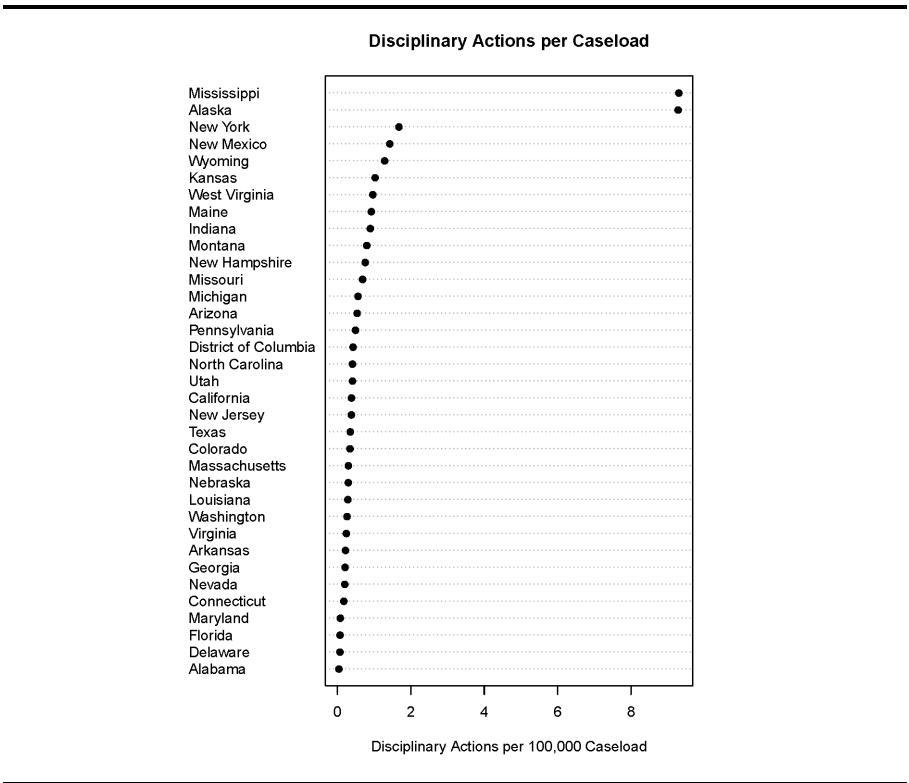
167. Intuitively, population seems like a good proxy for caseload. More people in a state means more arrests, more divorces, more tort suits, and more cases generally. To confirm that population and caseload were, in fact, linearly related, I looked at the states that

drew from the U.S. Census, were easily attainable and very dependable. This provided me with a safeguard. Every time I adjusted for caseload in my calculations, I also ran a parallel test to adjust for population. The population data gave me more confidence that my results were not skewed by any problems in the caseload data.

B. *The Results*

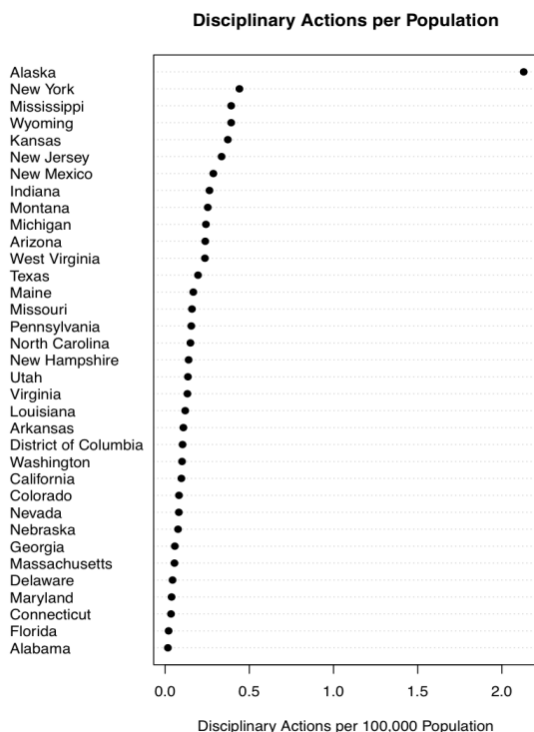
Figure 2-1 and Figure 2-2 show the very wide range of disciplinary activity across the thirty-five states in the study.

FIGURE 2-1



reported all or almost all of their cases to the National Center for State Courts. Then I plotted the 2008 population of those states against the 2008 caseload numbers. I found a linear relationship between caseload (C) and population (P): $C = 0.3302P + 278,062$. The R-squared value was 0.76.

FIGURE 2-2

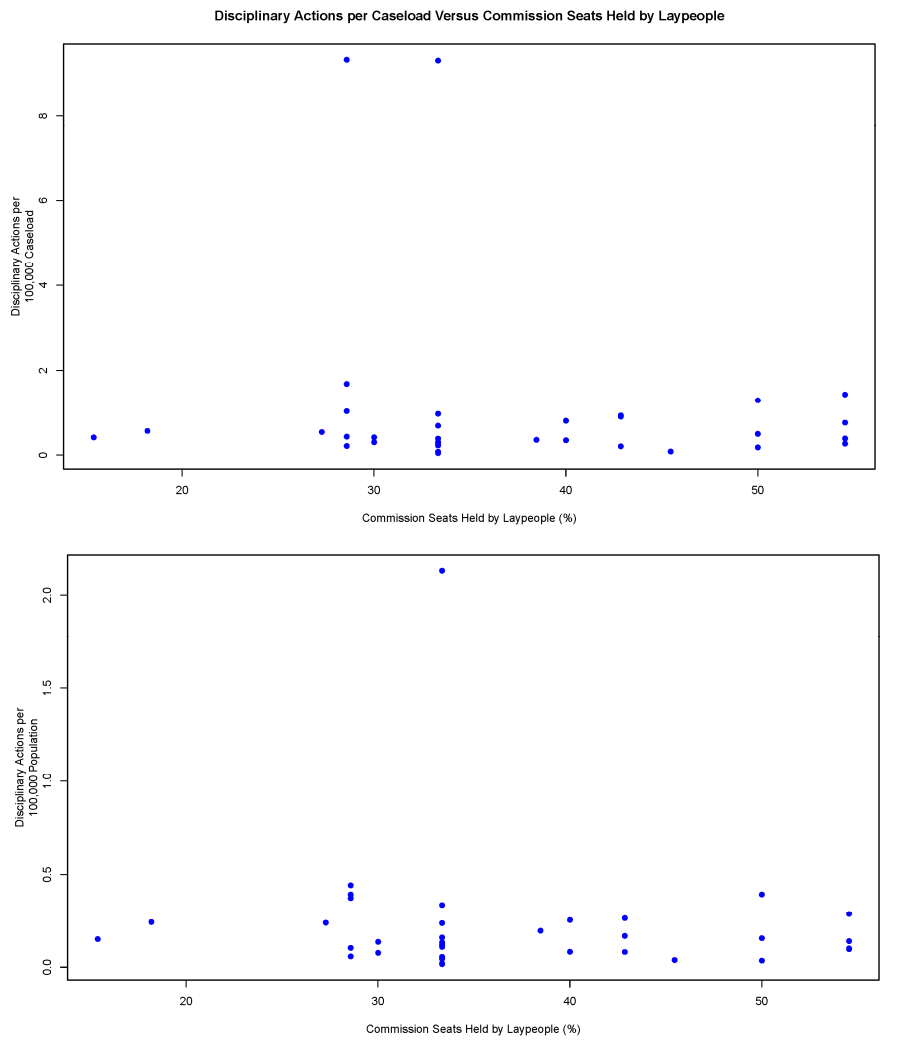


Even excluding the outliers of Mississippi and Alaska, the variation is apparent. That is what makes it interesting to look at the factors that influence the level of discipline. There is clearly something that makes some states much more aggressive than others.

1. *Hypothesis #1: Commissions with more laypeople issue more disciplinary actions*

The first thing to test is the connection between discipline and the number of laypeople on the commission. The charts below plot the percentage of commission seats held by laypeople on the *x*-axis of each chart, and the number of disciplinary actions per capita and per case on the two *y*-axes. If more laypeople on the commission led to more disciplinary actions, we would expect an upward-sloping line. Figure 2-3 shows no relationship between total discipline and the percentage of commission seats held by lay members.

FIGURE 2-3



Some judicial conduct practitioners were not surprised by this finding. Jim Murphy, an attorney who has handled roughly 200 judicial conduct cases and tried more formal proceedings before California’s Commission than anyone else, said the composition of the commission is irrelevant.¹⁶⁸ “The public members for the most part are like sheep,” he said.¹⁶⁹ “I don’t want to characterize them as sheep, [but] they pretty much follow what the lawyers and judges

168. Telephone Interview with James A. Murphy, Founding Member, Murphy, Pearson, Bradley & Feeney (Feb. 25, 2011).

169. *Id.*

are doing.”¹⁷⁰ A former Commission member, who spoke only on the condition that his name not be used, pointed out that lay members frequently deferred to the judges on the panel. “This is not the Tea Party,” he said.¹⁷¹ “This is not six laypeople saying ‘Yippee-do. We’re in the majority and we’ll tell you lawyers and judges what to do.’”¹⁷² The lay members often were overwhelmed by the amount of legal reading needed to keep up with Commission business, the former Commission member said, and deferred instead to the lawyers and judges on the panel.¹⁷³

Perhaps there is no correlation here because the laypeople behave like sheep on the commissions, or perhaps it is because the average case that comes before a commission is so clear-cut that the laypeople, the judges, and the lawyers all vote in the same direction based on the merits. Or maybe there is a correlation, but my data somehow fail to capture it. Whatever the case may be, this finding is important because it shows that the common intuition about laypeople—an intuition that drove legislative changes in California and Washington—is not supported by the data.

2. *Hypothesis #2: Commissions issue more disciplinary actions against elected judges than appointed judges*

Thirty-three states hold judicial elections for their trial courts.¹⁷⁴ In some states the elections are partisan. In others, judges run without party affiliation.¹⁷⁵ Testing the connection between judicial elections and disciplinary activity required classifying the states as election states or appointment states. In this analysis, a lot hinges on this classification,¹⁷⁶ so I tried three ways of clas-

170. *Id.*

171. Telephone Interview with Former Comm’n Member, Cal. Comm’n on Judicial Performance (Apr. 12, 2011).

172. *Id.*

173. *Id.* Reiko Callner, Executive Director of Washington’s State Commission on Judicial Conduct, said that she always recommends to the governor’s appointment staff that they pick laypeople who are capable of standing up for themselves. Otherwise, they can be bowled over by judges and lawyers on the committee who possess not only an air of prestige and a familiarity with legal issues, but also a mindset that attunes them to debate. *See* Telephone Interview with Reiko Callner, Exec. Dir., Wash. Comm’n on Judicial Conduct (June 2011). The *San Francisco Chronicle* reported a similar sentiment, noting the lay members’ malleability to the influence of the Commission’s staff attorneys: “[J]udges and legal experts speculate that the staff may have undue influence because the commission is dominated by lay people, *who do not always understand the law or the responsibilities of a judge.*” Harriet Chiang, *Judicial Watchdog’s Probes Assailed*, S.F. CHRON., July 24, 1998, at A1 (emphasis added).

174. *Methods of Judicial Selection*, *supra* note 112.

175. *Id.*

176. A number of states use merit selection to pick judges. *Id.* I counted merit selection as a form of appointment system because it clearly does not fit within the definition of elections.

sifying them. First, I classified the states by whether or not they held elections for their trial courts. Next, I tried to improve on that classification by looking at the “contestation rate” of each state. The contestation rate is the number of contested elections divided by the number of total judgeships that could have come up for election had more than one person entered the race. Finally, I refined my classification by looking at the total number of contested elections, adjusted for the caseload and population of the state. The Subpart that follows walks through the steps I took, and my reasons for refining the elected-versus-appointed classification through three iterations. Ultimately, I could not find a statistically significant correlation between elections and discipline.

As noted above, my first attempt at classification was to look at the election status of the trial court judges. If a state elected any of its trial court judges, I counted it as an election state. If not, I counted it as an appointment state, even if it elected some appellate judges. I focused on the trial courts because the vast majority of judges serve at the trial court level. Not surprisingly, trial court judges are the subject of the overwhelming majority of misconduct complaints.¹⁷⁷

FIGURE 2-4¹⁷⁸

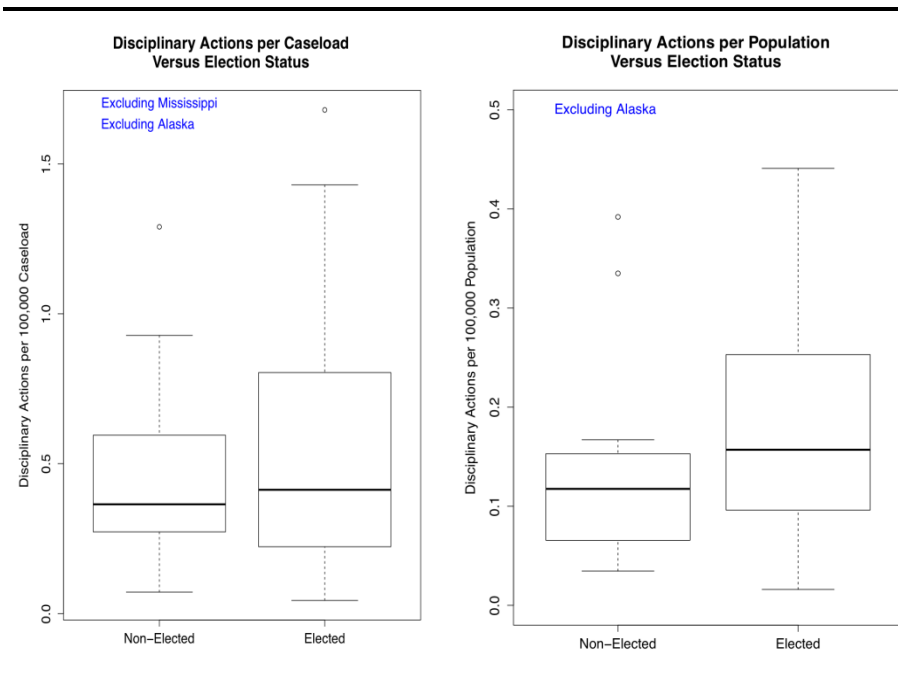


Figure 2-4, above, uses a boxplot to show the disciplinary rate for appointment states compared to the disciplinary rate for election states. The panel

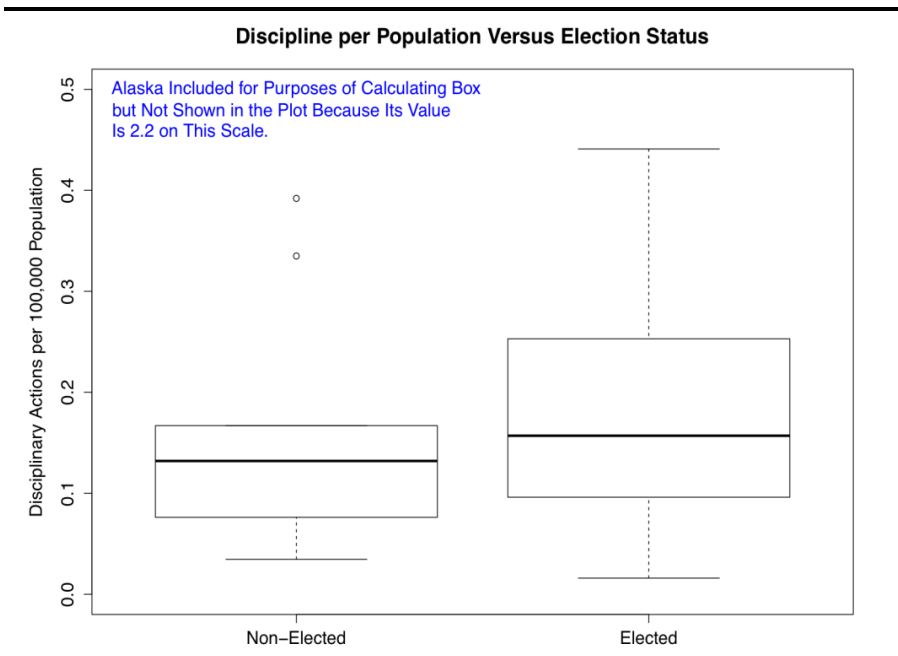
177. See N.M. JUDICIAL STANDARDS COMM’N, *supra* note 119.

178. These data come from my dataset.

on the left adjusts for the state's caseload, and the panel on the right adjusts for the state's population. The thick horizontal line within each box represents the median value for the sample. The top of each box represents the 75th percentile of the distribution; the bottom of the box represents the 25th percentile. There are thirty-five measurements total. Thirteen of those are appointment states, and twenty-two are election states. These boxplots permit us to compare the distribution between two groups more easily than with a typical scatterplot. I excluded the outliers as noted in the charts.

The common intuition among experts is that the election states would have significantly higher disciplinary rates than appointment states. As one expert put it, the difference between appointment and election states is "like night and day."¹⁷⁹ But the results of Figure 2-4 should cause us to question those intuitions. While there is some difference between the levels of disciplinary actions in the election and appointment states, the difference is not great and certainly does not indicate that the two types of states are "like night and day." The discipline figures adjusted by caseload show a very small difference. When the discipline figures are, instead, adjusted for population, the difference becomes larger, though still short of "night and day." If we include Alaska in the calculation, the difference in population-adjusted figures gets even smaller, as shown in Figure 2-5 below.

FIGURE 2-5¹⁸⁰



179. Telephone Interview with William J. Campbell, *supra* note 105.

180. These data come from my dataset.

Of course, it is difficult to know whether the differences prove or disprove the “night and day” intuition. A large part of that difficulty is that these intuitions have never been quantified, so we do not know how much of a difference there would have to be to make it “like night and day.” But the difference shown by this study calls that intuition into question.

In any case, there are reasons to doubt whether this kind of method even makes sense. My initial classification sorted states based on whether they elected *any* trial court judges, but that classification suffers from the problem that some of these election states elect only a small handful of their judges. With the all-or-nothing classification method I used above, a state that mostly appoints its judges would nonetheless be classified as an election state if it has even one election. California is just such an example. Each election cycle, California holds elections for its trial court judges, so I counted it as an election state. In reality, however, elections do not play an important role in choosing judges. Statistics show that 88% of California judges were initially appointed to the bench,¹⁸¹ and while they technically run in retention elections, those elections are rarely contested. One study found that from 2000 through 2008, 92% of those judicial elections had only one candidate in the race.¹⁸² Another study found that from 1972 to 2002, the number of California judges “facing electoral opposition exceeded 2 percent in only two of those 30 years.”¹⁸³ These numbers suggest that California is an election state in name only.

This realization led me to search for a way to distinguish “true” election states from those that are election states in name only. Scholars in the field of judicial elections have developed a way to look at the intensity of elections in a state. They call it the “contestation rate,” and it is derived by taking the number of elections where more than one candidate enters the race (i.e., “contested” elections), and dividing that number by the total number of judicial positions where an election would have been held had more than one person entered the race at any point.¹⁸⁴ If half the races had more than one candidate, the contestation rate would be 50%. The point of the contestation rate is to show how important—or unimportant—elections are in shaping the judiciary by measuring how frequently they are contested.

As it turns out, most judicial elections are not contested at all. In a 2011 article, Michael J. Nelson collected data on every trial court election in every state that held such elections in 2000, 2002, 2004, 2006, and 2008. He found that in 75% of the roughly 11,000 elections nationwide, only one candidate ever entered the race.¹⁸⁵ This fact suggests that judicial elections, even when they

181. See COMM’N ON JUDICIAL PERFORMANCE, *supra* note 96, at 14 tbl.3-B.

182. See Data Archive for General Jurisdiction Trial Courts, *supra* note 120 (examining elections in 2000, 2002, 2004, 2006, and 2008).

183. Nelson, *supra* note 120, at 212 (citing Schotland, *supra* note 120, at 12).

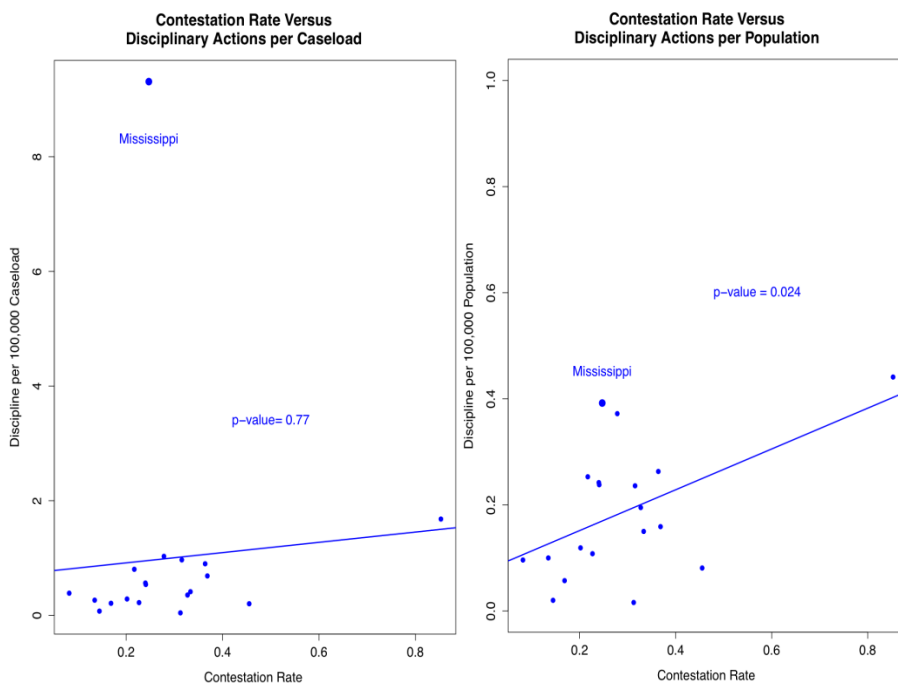
184. See *id.* at 213-14.

185. *Id.* at 209.

are permitted, are not that important in forming the judiciary. The point is particularly acute in California, where the contestation rate is the lowest in the country at 8%.¹⁸⁶

So maybe the problem with my earlier analysis of elections is that I counted states like California as election states when I should have treated them as appointment states. Had I looked at its contestation rate, I would have seen that California does not really use elections—it is not a “true” election state. Thus, the intuition that election states see more discipline might be right. Maybe if I had focused on “true” election states in my initial analysis, I would have found that the judges in “true” election states are more political, more corrupt, and more inclined to break ethical rules.¹⁸⁷ We can tell a plausible story about how the contestation rate is a proxy for the degree of politicization of the judiciary. So if there is a correlation between the contestation rate and the level of discipline in a state, we might be able to confirm the intuition that elected judges get in trouble more often than appointed judges. Unfortunately for believers in this intuition, the data do not bear it out.

FIGURE 2-6



186. See Data Archive for General Jurisdiction Trial Courts, *supra* note 120. The state with the highest contestation rate was New York, with a contestation rate of 85%. *Id.*

187. See *supra* text accompanying notes 105-16.

I plotted the relationship between the contestation rate and the level of disciplinary activity in Figure 2-6, above. The right-hand panel shows a statistically significant relationship between the contestation rate and per capita discipline. The p -value for this relationship was 0.024, which meets the commonly accepted standard of statistical significance. The left-hand panel, however, shows no statistically significant relationship between the contestation rate and the per-case discipline figures, as demonstrated by the high p -value of 0.77. But that lack of correlation is entirely the result of Mississippi's case figures, which make Mississippi an outlier.

Excluding Mississippi from the sample, we see that the relationship between per-case disciplinary levels and the contestation rate is statistically significant, as is the relationship between per capita disciplinary levels and the contestation rate, as shown in Figure 2-7 below.

These results could be seen as proof that elections are related to higher levels of disciplinary activity. But the question still remains whether the contestation rate meaningfully captures anything about the state's judiciary. In the end, I believe it does not.

To be sure, the contestation rate tells us to what extent there is competition for the contestable judgeships, but it never looks at how many contestable judgeships there are in the first place. For example, Texas had a contestation rate of roughly 30% from 2000 through 2008.¹⁸⁸ During that period it had 1091 contestable elections.¹⁸⁹ On the other hand, New York's contestation rate was 85% during that same period, but it had only 164 contestable elections.¹⁹⁰ Both states have roughly the same population.¹⁹¹ So, which state is more of a "true" election state? Where do elections play a bigger role in shaping the judiciary? Looking solely at the contestation rate, we would say New York's 85% easily bests Texas's 30%, thus making New York the "true" election state. But Texas had many more contested elections—a larger part of its judiciary went through the process of running for office. In that sense, Texas is a state where judicial elections play a much more important role in shaping the judiciary. This example shows a significant flaw with using the contestation rate to determine which states are "true" election states.

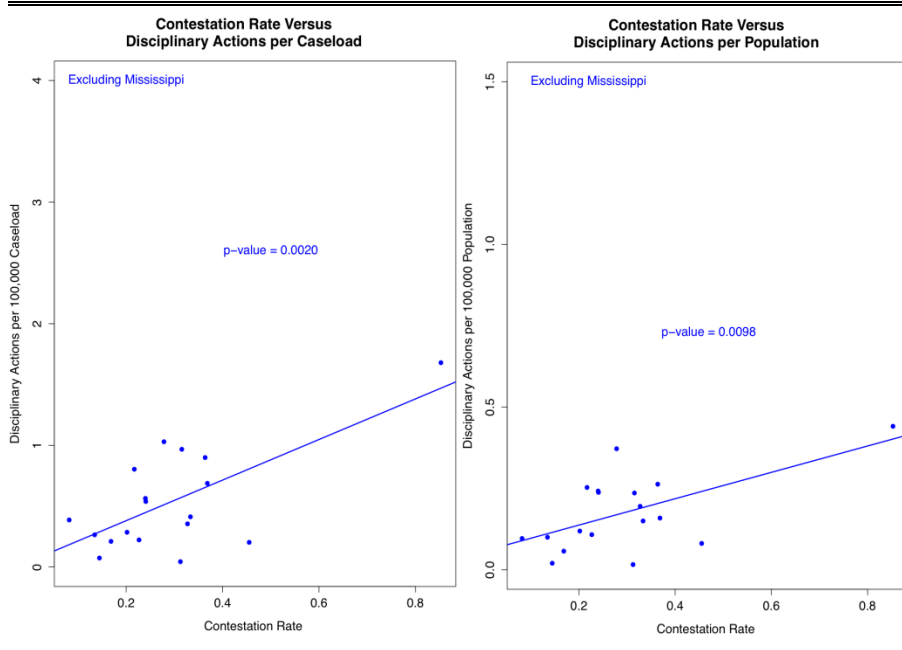
188. See Data Archive for General Jurisdiction Trial Courts, *supra* note 120 (compiling data from 2000, 2002, 2004, 2006, and 2008 elections).

189. *Id.*

190. *Id.*

191. See *id.* The estimated population of Texas in 2010 was 25,145,561. *Texas QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48000.html> (last visited Apr. 13, 2012). The estimated population of New York in 2010 was 19,378,102. *New York QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/36000.html> (last visited Apr. 13, 2012).

FIGURE 2-7



Arguably, the contestation rate analysis should be further refined. Rather than looking at the ratio of contested to contestable judgeships, we should look at the overall number of contested elections, adjusted for the state's population and caseload. This metric will capture the fact that Texas *elects* more of its judges in contested elections than New York does, even though New York's contestation rate is much higher. Figure 2-8 shows discipline per case and discipline per capita, plotted against the number of contested elections per case and per capita, respectively.

As the right-hand panel shows, there is no statistically significant correlation between the per capita discipline levels and the per capita number of contested elections. There is, however, a strong statistical correlation between discipline per case and the number of contested elections per case, as the left-hand panel shows. But that relationship exists only because Mississippi is such an outlier.¹⁹² Figure 2-9 removes Mississippi from the per-case calculation, resulting in no statistically significant relationship, as shown by the high *p*-value of 0.34.

192. As discussed earlier, I was concerned about some of the caseload numbers, including Mississippi's, which is why I have consistently used population figures as a safeguard. See *supra* text accompanying notes 162-67.

FIGURE 2-8

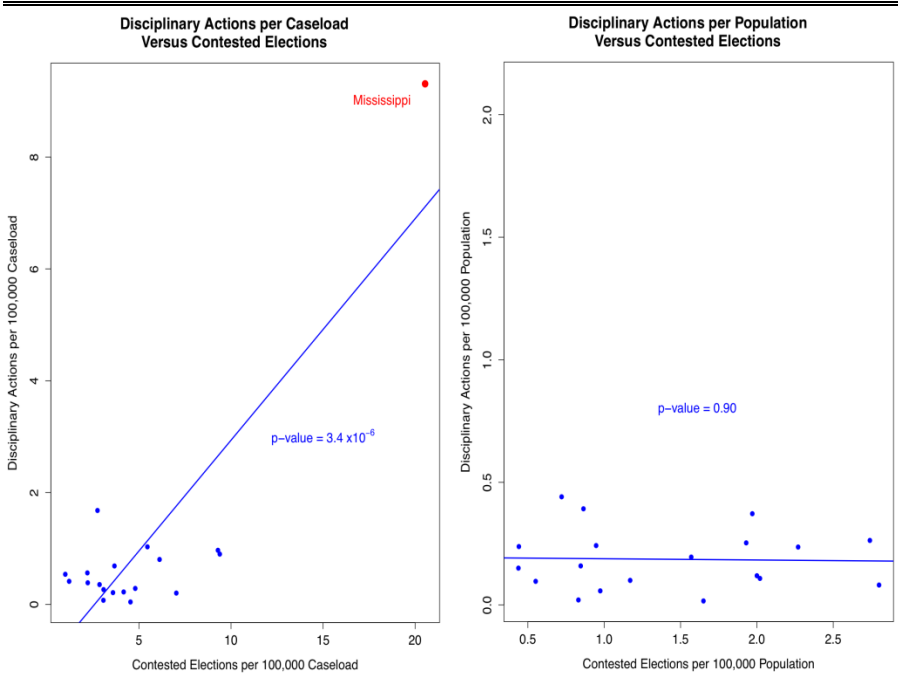
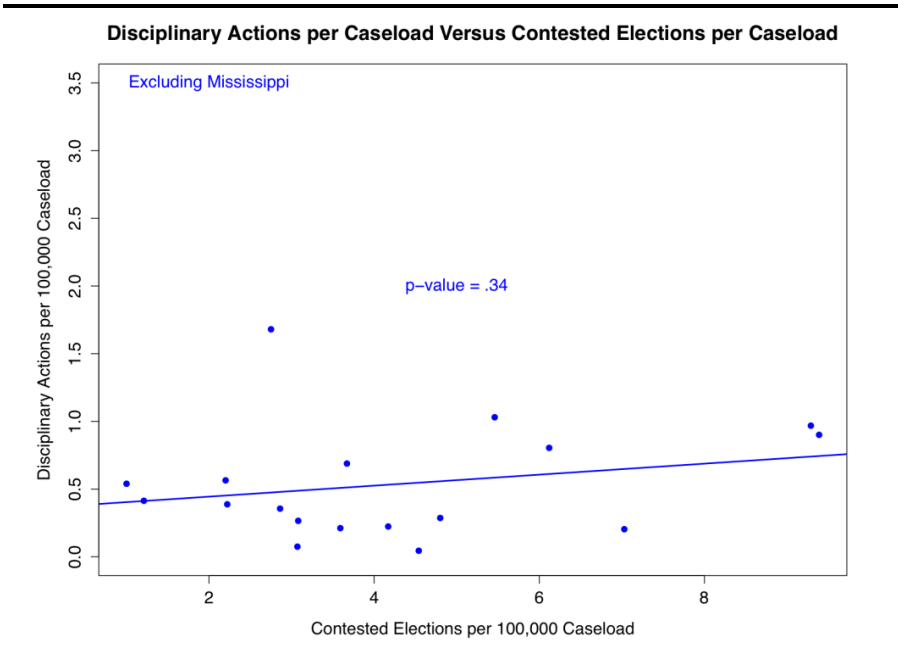


FIGURE 2-9



Thus, the most refined of the three tests returns us to the initial conclusion: the data do not show a statistically significant relationship between elections and discipline.

This conclusion is surprising to people like Gillian Pearson, the Executive Director of the Massachusetts Commission, who said that judicial misbehavior in election states is “like the Wild Wild West.”¹⁹³ As she said when I told her of these results: “I think something is throwing you off there because I think that is a false result. I think something statistical [went wrong in your study] because this is such a strong impression that we all have here. If it really is true, it would really surprise me.”¹⁹⁴

But should it really be surprising? Stepping away from the statistics for a moment, it seems that even the intuition is flawed. Are appointed judges really that much more removed from politics than elected ones? After all, it is not as if people are appointed to the bench solely for their skills and virtues as future jurists. The reality is that people are appointed because of their ties to the politicians who make the nominations. So the very premise of this intuition—that elected judges are more political and thus more corrupt—seems to be in need of rethinking.

Ultimately, the data discussed in this Subpart call into question the conventional wisdom that election states have significantly higher disciplinary rates than appointment states. While the contestation rate is correlated to higher levels of discipline, the contestation rate is a flawed proxy for determining which states are “true” election states. When we correct for that flaw by looking at the total number of contested judicial elections per capita or per case we again find no statistically significant relationship between elections and discipline.

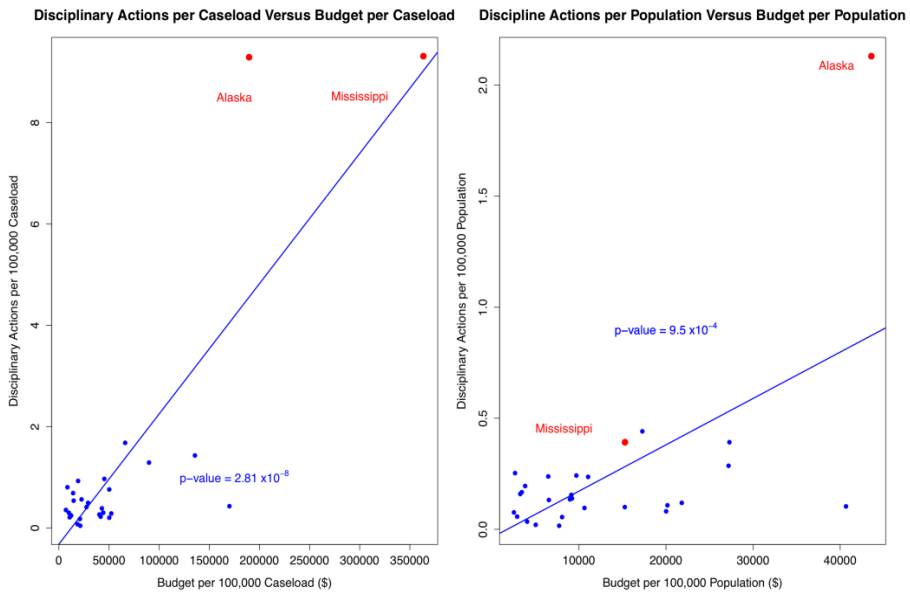
3. *Hypothesis #3: Commissions with higher budgets issue more disciplinary actions*

The final hypothesis to test is whether states that spend more money on their commissions see higher levels of disciplinary activity. That is the commonsense intuition in judicial conduct circles, and the data appear to bear it out. Looking at the average level of discipline per year against the average annual budgets for 2000 through 2010, we see that states that consistently spend more on their commissions wind up disciplining more judges, even adjusting for population and caseload. Figure 2-10 shows that discipline per capita and discipline per case are strongly correlated with budget per capita and budget per case. Better-funded commissions rack up more discipline.

193. Telephone Interview with Gillian E. Pearson, *supra* note 114.

194. *Id.*

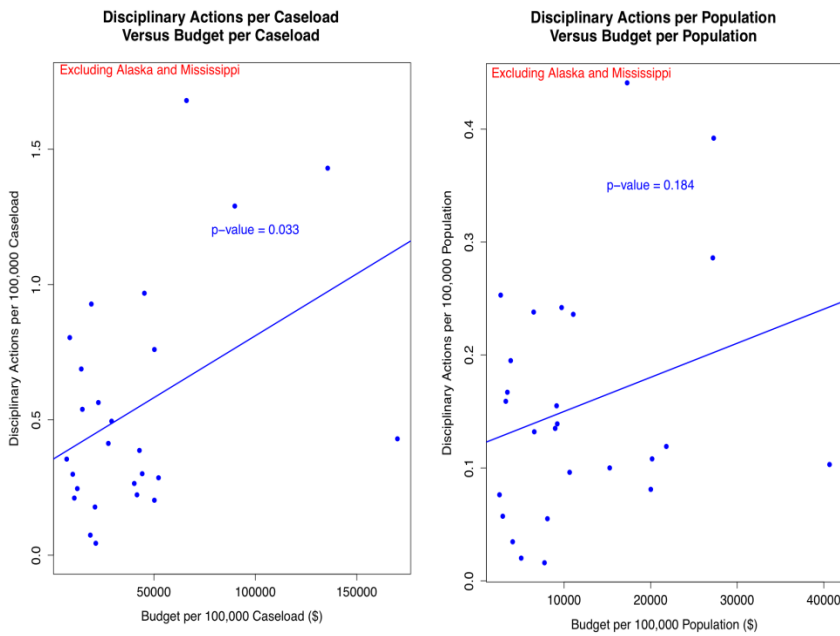
FIGURE 2-10



After removing the outliers of Mississippi and Alaska, the relationship between budgets and discipline is significant in the per-case comparisons, though not in the per capita comparisons.¹⁹⁵ That relationship is shown in the figures below.

195. Mississippi’s per-case figures are far outside the rest of the distribution. Alaska’s per-case *and* per capita figures are both outliers. As mentioned earlier, the per-case aberrations could result from an error in reporting their caseloads to the National Center for State Courts. *See supra* text accompanying notes 162-67 and note 192. Alaska is in some sense less concerning because *both* its per-case and per capita numbers are outliers. That might suggest it truly is aberrant, and not that there is some flaw in the numbers, because the per capita numbers are based on the U.S. Census and should be dependable. Nonetheless, I excluded Mississippi and Alaska in Figure 2-11 so that we could get a look at the main run of the data.

FIGURE 2-11
Excluding Alaska and Mississippi



In addition to graphing the data, we can test the relationship using multi-variable regression analysis. This method allows us to keep both population and caseload constant, while looking at the effect on discipline of increasing the budget. As it turns out, this effect is extremely strong, as shown by the very small *p*-value associated with the budget.

TABLE 2-1

Coefficients:	Estimate	Standard Error	<i>t</i> -value	<i>p</i> -value
(Intercept)	-0.1303	2.388	-0.055	0.95692
Population ¹⁹⁶	-2.505×10^{-6}	8.586×10^{-7}	-2.917	0.00755
Caseload	6.037×10^{-6}	1.699×10^{-6}	3.554	0.00161
Budget	2.282×10^{-5}	4.490×10^{-6}	5.082	3.38×10^{-5}

196. The fact that population is inversely correlated with discipline is troubling, as we would expect that increasing the size of the state would increase the number of disciplinary actions filed.

The results in Table 2-1 suggest that if population and caseload remain constant, an increase of \$1,000,000 in a commission's budget would result in roughly 23 additional disciplinary actions per year. The extremely low *p*-value shows that this finding is very strongly statistically significant.

Table 2-2, below, shows the regression analysis when we exclude Mississippi and Alaska, two outliers that we might have worried were driving the relationship. Again, the table shows discipline as a function of caseload, population, and budget.

TABLE 2-2

Coefficients:	Estimate	Standard Error	<i>t</i> -value	<i>p</i> -value
(Intercept)	-0.5756	2.458	-0.234	0.81693
Population	-2.548×10^{-6}	8.652×10^{-7}	-2.946	0.00726
Caseload	6.219×10^{-6}	1.722×10^{-6}	3.612	0.00147
Budget	2.287×10^{-5}	4.516×10^{-6}	5.063	3.99×10^{-5}

These results suggest that the budget is, in fact, related to discipline.

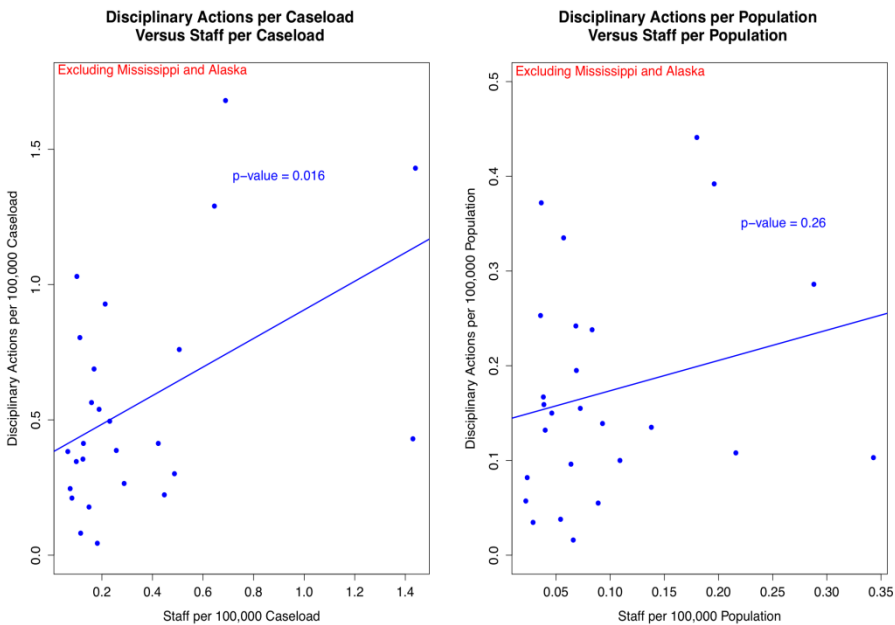
For the sake of completeness, I have also looked at the relationship between discipline and staffing. By measuring the correlation between discipline and staffing (as measured in full-time equivalents), I can get at the heart of the budget question: do states that hire more people to investigate complaints wind up taking disciplinary action more often, adjusting as always for population and caseload? This staffing-to-discipline relationship helps assuage some of the concerns about inaccuracies in the budget data by showing that the budget's relationship to discipline does not depend on some accounting oddity, such as whether the state rents office space or receives it for free. Instead, the difference in the number of disciplinary actions is correlated with the difference in staffing levels—the core expense of any commission.¹⁹⁷

Figure 2-12 shows a statistically significant relationship between discipline and staffing levels when we look at per-case figures, but not when we look at per capita figures, again excluding Alaska and Mississippi.¹⁹⁸ The reason for the divergence between the per capita and per-case figures remains unclear to me.

197. See *supra* Part III.A.2 (discussing concerns about budget data).

198. The staffing statistics come from the data I gathered by contacting the states, which I retain on file.

FIGURE 2-12



Putting aside the graphs, we can use multivariable regression analysis to test for a relationship between discipline and staffing, adjusting as always for caseload and population. That test reveals a strong, statistically significant relationship between discipline and staffing, as shown in the table below.¹⁹⁹

TABLE 2-3

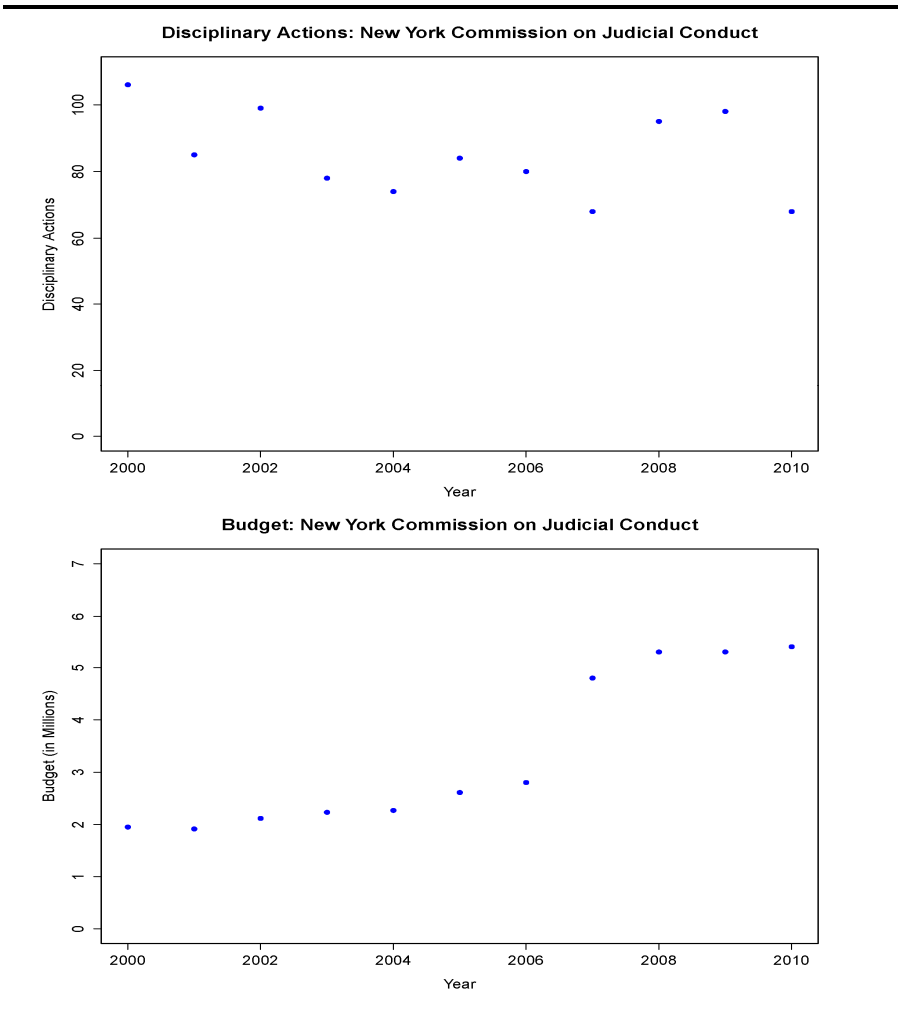
Coefficients	Estimate	Standard Error	<i>t</i> -value	<i>p</i> -value
(Intercept)	-0.5886	1.557	-0.378	0.708905
Population	-1.228×10^{-6}	3.742×10^{-7}	-3.281	0.003280
Caseload	3.029×10^{-6}	7.488×10^{-7}	4.045	0.000503
Staff	2.485	0.2584	9.617	1.59×10^{-9}

199. One concern with looking at budget and staffing data is that better-funded and better-staffed states may have been better equipped to respond to my requests for data. They may also be more able to publicize their work. The fear would be that such states are not punishing judges at a higher rate, but rather doing a better job of taking credit for it. In the end, I think this fear is not valid since some of the smallest commissions (including Montana and Wyoming) were able to get me numbers, and some of the largest (including Illinois) were not.

The relationship between staffing and discipline further suggests that the relationship between budgets and discipline is not merely the result of some odd accounting practice.

It is not hard to understand why budgets might control the level of disciplinary activity. Commissions have to spend a lot of time investigating complaints, both in uncovering the facts and researching the law. The more money a commission has, the more investigations it can undertake.

FIGURE 2-13

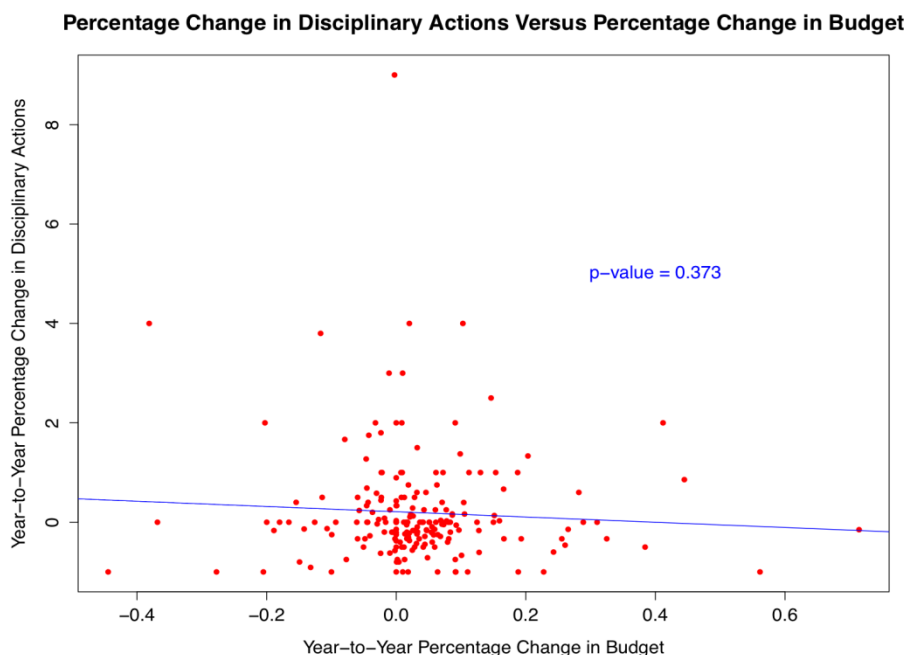


But when we look at actual case studies, the budget story is not so simple. An increase in a commission’s budget does not immediately lead to an increase in disciplinary activity. In California, we saw that even a doubling of the budg-

et did not translate into an increase in disciplinary activity.²⁰⁰ In New York, the budget of the Commission doubled in 2007, but discipline did not increase, as shown by the chart above.²⁰¹

How can it be that dramatic increases in the budget do not immediately lead to increases in the number of disciplinary actions? Figure 2-14, below, probes this question with panel data. Panel data compare the year-to-year change in one variable against the year-to-year change in another variable. Below, I plotted the percentage change in budgets against the percentage change in discipline for each state in my dataset for each year from 2000 through 2010.²⁰²

FIGURE 2-14



If doubling the budget meant doubling the amount of discipline, the data would form an upward-sloping line. Instead, the data show no linear relationship. In case the visual representation is not convincing, the high p -value of 0.373 should leave no doubt: there is no statistically significant relationship be-

200. See *supra* Figure 1-3 and accompanying text.

201. The data was derived from the annual reports on the New York Commission's website. *Annual Reports*, N.Y. ST. COMMISSION ON JUD. CONDUCT, <http://www.scjc.state.ny.us/Publications/AnnualReports.htm> (last visited Apr. 13, 2012).

202. I did not adjust for changes in caseload or in population because those year-to-year changes were relatively minor. As recorded in the Appendix, some states were not able to provide data for all the years in the 2000 through 2010 period. See *infra* Appendix.

tween year-to-year percentage change in discipline and year-to-year percentage change in budget, at least not one captured by my data. These results, however, conflict with the results earlier in this Subpart, which found a correlation between states' average funding in the 2000 through 2010 period and their average disciplinary rates in the same period. It is not clear how to reconcile the seemingly contradictory results between the panel data and the 2000 through 2010 averages. In fact, it may be that the results cannot be reconciled, in which case we would be left to choose between competing interpretations.

In evaluating the competing interpretations, we start by noting that there are several benefits to using panel data. First of all, panel data are good at canceling out unobserved variables that might influence the level of disciplinary action. Panel data eliminate unobserved variables by looking only at the change from one year to the next. If there is something about a state's character that makes it hostile toward judges, that character trait will presumably have the same effect in 2000 as in 2001, so the effect will cancel out. Whereas if one simply looks at the average level of disciplinary activity for 2000 through 2010, it might be that this unmeasured hostility leads to a much higher level of disciplinary activity.

The second benefit of the panel-data method is that it gives us more data points to compare. Rather than having thirty-five states, each with a single number for average budget and average discipline, the panel data use 202 data points.²⁰³ A final benefit of the panel-data method is that it seems to address one of the main questions we are asking: if the legislature decides to increase the budget to put more pressure on the judiciary, will that budget increase actually result in more disciplinary actions? According to the panel data, the answer is no. If the panel data's conclusions are correct—that is, if the percentage change in the budget from one year to the next has no correlation to the percentage change in discipline from one year to the next—that would be a very interesting finding, indeed.

But there are some problems with the panel data, and these problems make the 2000 through 2010 average data a more useful analytical method. The first problem with the panel data is the fact that states have drastically different levels of funding for their commissions, even adjusting for population and caseload. Some states purchase the Rolls-Royce of commissions; others spend only enough to buy an economy car. The panel data do not capture this level of spending because the panel data start with the baseline year and look only at the change from that baseline. To the extent that the sustained level of spending is important in dictating the number of disciplinary actions, the panel data will not be helpful.

203. The reason there are only 202 points, and not the expected 350 (35 states times 10 year-to-year comparisons per state) is again that many states in my dataset were not able to report data for every year in the 2000 through 2010 period. See *infra* Appendix.

Furthermore, the year-to-year comparisons risk overstating the significance of small, random fluctuations in both budget and discipline. Most commissions' budgets vary little from year to year, and the number of disciplinary actions is so small²⁰⁴ that random fluctuations can make one year look significantly different from another even when there is no real change in the commission's operations. The variation could result from something as small as how long it takes to resolve a case.²⁰⁵ If we were dealing with large numbers, we would not have to worry about this randomness, but the fact that we have such small numbers of disciplinary actions each year means that the panel-data method is particularly vulnerable to this problem.

Similarly, there is the serious problem of lag time. The panel data in Figure 2-14 reflect year-to-year changes, but what if an increase in the budget takes three years to translate into an increase in disciplinary activity? The panel data would not capture such a relationship because it looks only at a one-year timeframe. These multiyear fluctuations are, however, accounted for by the data that look at the average for 2000 through 2010, just like the random fluctuations in budget and discipline. For all the reasons mentioned above, the 2000 through 2010 averages that I used at the beginning of this Subpart give a clearer picture of how the budget affects the level of disciplinary activity.

The conclusion that the data suggest—that budgets are correlated with the level of disciplinary activity—makes a good deal of sense. It costs money to investigate and bring actions against judges. States that underfund their commissions wind up limiting the number of actions their commissions can bring. For example, in Florida in 1991, the Commission had to put an investigation on hold because it ran out of money, though the investigation was resumed the next fiscal year.²⁰⁶ Cost is “always” a motivation for Massachusetts's Commission to settle cases rather than to take them to formal proceedings; the budget is simply too small to sustain expensive, formal proceedings.²⁰⁷ In 2010, Georgia's Commission was “poised to bring charges against several judges” but was unsure if it would “be able to do so because its budget [was] running dry,” ac-

204. The average state in the dataset disciplines just 11.3 judges per year.

205. Some cases are resolved in the same year the investigation begins. Others can take three years or more to resolve. *See, e.g.*, *Broadman v. Comm'n on Judicial Performance*, 959 P.2d 715, 718-19 (Cal. 1998) (finally resolving in August 1998 a case that was first formally heard by the California Commission on Judicial Performance in June 1995). Thus, there is a certain amount of randomness in whether the resulting disciplinary action is carried out, and thus recorded, in any given year.

206. Bob Port & Kathleen Ovack, *Judges' Sealing of Records Could Be Reviewed*, ST. PETERSBURG TIMES, Feb. 4, 1992, at 1B.

207. *See* Telephone Interview with Gillian E. Pearson, *supra* note 114. In 2003, the Commission ran out of money while prosecuting Judge Maria Lopez and was required to ask for a supplemental appropriation to keep it in operation. *See The Price of Public Confidence*, MASS. LAW. WKLY. (May 26, 2003), <http://masslawyersweekly.com/2003/05/26/the-price-of-public-confidence>.

ording to a news report.²⁰⁸ In all these cases we see how budgets can constrain the ability of commissions to do their job.

After all the back-and-forth about budgets and discipline, it is important to emphasize the bottom line. There is a statistically significant relationship between the amount of money a state spends on its commission and the amount of discipline that commission metes out. But as the panel data and the California and New York case studies suggest, the relationship between budget and discipline is not straightforward. Legislators cannot immediately turn up the pressure on the judiciary just by raising the budget. However, states that consistently fund their commissions generously tend to have higher levels of disciplinary activity than states that underfund their commissions. This is an important lesson for states to keep in mind as they consider the costs and benefits of slashing the budgets of their respective judicial conduct commissions. Such cuts may have long-term effects on the commissions' ability to monitor judicial conduct.

CONCLUSION

Judicial conduct commissions are not well known, but they have an important responsibility. Every time there is a scandal in the judiciary, people ask what could have been done to prevent it, and those questions invariably lead back to the judicial conduct commissions. In Pennsylvania, for example, the scandal involving juvenile court judges taking kickbacks led to accusations that Pennsylvania's Judicial Conduct Board had ignored four complaints about the judges.²⁰⁹ An American Bar Association task force even came in to investigate the workings of the Judicial Conduct Board.²¹⁰ In the State of Washington, the judicial conduct commission was redesigned in the wake of revelations that a judge had not been sufficiently disciplined for carrying on inappropriate relationships with a number of boys.²¹¹ And in California, years of growing dissatisfaction with the judicial conduct commission culminated in the passage of Proposition 190. The commissions are constantly being scrutinized for ways to improve their effectiveness, and that is why it is so important to understand what does and does not increase the level of disciplinary activity.

This Note tries to answer that question using an original dataset. It tests three commonly held intuitions and concludes that two of these intuitions are not supported by the data. This Note shows no statistically significant relation-

208. Bill Rankin, *Judicial Probes Stalled*, ATLANTA J.-CONST., Dec. 29, 2010, at A1.

209. See *Juvenile Justice Delayed*, *supra* note 4.

210. See Press Release, Judicial Conduct Bd. of Pa., Judicial Conduct Board Receives Independent Report on the Judicial Discipline System and Solicits Public Comment (June 2011), available at http://judicialconductboardofpa.org/index.php/download_file/view/66/102.

211. See *Seattle Judge Shoots Himself in Courthouse*, OREGONIAN, Aug. 20, 1988, at A1. For discussion of Amendment 85 and the changes to the Commission, see note 75 above and accompanying text.

ship between the composition of a commission and the number of disciplinary actions it takes. It also calls into question the conventional wisdom that elections lead to significantly higher disciplinary rates. The one intuition that does seem to hold true is that the level of disciplinary activity is correlated with the size of the commission's budget. In these difficult budget times, when states are slashing budgets wherever possible, this finding has particular resonance. It suggests that there could be a steep cost to be paid by any state that tries to save money by cutting the budget of its commission. The panel data suggest that cost—in terms of foregone disciplinary actions—may not materialize immediately; but over the span of a decade, such consistent underfunding will likely result in less oversight of the judiciary. Now, with this Note, a statistical link has finally been established between budgets and discipline.

But beyond its specific findings, this Note calls attention to the significant disparities between states in judicial disciplinary activity. The state trial courts are the backbone of the judicial system in this country. State courts handled more than 100 million incoming cases in 2009²¹² compared to just 2 million in the federal courts.²¹³ But the state courts—and the disparities among them—receive little attention from academics. This Note calls attention to one such disparity: the fact that some states employ sophisticated, well-funded, active judicial conduct commissions, and others do not. It should be striking how some states make judicial discipline a priority, while other states ignore it. Hopefully this Note will raise questions about whether we are comfortable with the fact that judges are held to such different standards of behavior from state to state.

Obviously, this study is not the last word on judicial conduct commissions. Rather, it is the first attempt to bring statistical analysis to bear on this topic. Anecdotes and intuitions can only go so far in understanding what drives the behavior of these commissions. What is needed in the future is clear, analytical thinking and the numbers to support it. No matter what conclusions future scholars draw on this topic—whether they agree or disagree with the findings of this Note—they must back up their conclusions with the statistics to prove them. This Note aims to set researchers on that course.

212. *Total Caseloads Remained Essentially Unchanged in 2009*, CT. STAT. PROJECT, <http://www.courtstatistics.org/Overview/OverviewUnchanged.aspx> (last visited Apr. 13, 2012).

213. ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY: DECEMBER 31, 2010, at 6 (2010), available at <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2010/dec10/Dec2010Indicators.pdf> (last visited Apr. 13, 2012).

APPENDIX

Table A-1 below summarizes the scope of the data that I had available on judicial conduct commissions. As noted above, data were not available from every state; in addition, some states that provided data were not able to provide data for every year from 2000 through 2010.

For each state that provided data, I have noted the years for which that state provided data on disciplinary actions, on its commission's budget, and on its commission's staffing levels.

TABLE A-1

State	Disciplinary Action Data Available	Budget Data Available	Staffing Data Available
Alabama	2000-2010	2000-2010	2000-2010
Alaska	2003-2009	2003-2009	No Data Available
Arizona	2000-2010	2000-2010	2000-2010
Arkansas	2004-2010	2004-2010	2006-2010
California	2000-2010	2000-2010	2000-2010
Colorado	2000-2010	No Data Available	2000-2010
Connecticut	2006-2010	2000-2006, 2008-2010	2000-2006, 2008-2010
Delaware	2000-2010	No Data Available	No Data Available
District of Columbia	2005-2010	2000-2010	No Data Available
Florida	2000-2010	2002-2010	No Data Available
Georgia	2005-2010	2000-2010	2008, 2010
Indiana	2000-2010	No Data Available	No Data Available
Kansas	2002-2010	No Data Available	2009-2010
Louisiana	2000-2009	2000-2010	No Data Available
Maine	2000-2010	2000, 2010	2000-2003, 2010
Maryland	2000-2002, 2004-2010	No Data Available	2006-2007, 2010
Massachusetts	2002-2010	2000-2010	2000-2010
Michigan	2001-2010	2001-2010	2001-2010
Mississippi	2000-2010	2000-2010	2000-2005, 2007-2010
Missouri	2000-2010	2010	2000-2010
Montana	2000-2010	2010	2000-2010

State	Disciplinary Action Data Available	Budget Data Available	Staffing Data Available
Nebraska	2005-2010	2005-2010	No Data Available
Nevada	2004-2007	2000-2010	No Data Available
New Hampshire	2000-2010	2006-2010	No Data Available
New Jersey	2001-2010	No Data Available	2000-2010
New Mexico	2000-2010	2000-2010	2000-2010
New York	2000-2010	2000-2010	2000-2010
North Carolina	2000-2010	2001-2005	2007-2010
Pennsylvania	2000-2009	2000-2009	2000-2009
Texas	2000-2010	2000-2010	2000-2010
Utah	2000-2010	2000-2010	2003-2010
Virginia	2000-2010	2000-2010	2000-2010
Washington	2000-2010	2000-2010	2010
West Virginia	2000-2010	2000-2010	No Data Available
Wyoming	2000-2010	2000-2010	2000-2010