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A CANCER ON THE REPUBLIC: THE ASSAULT UPON IMPARTIALITY OF STATE COURTS AND THE CHALLENGE TO JUDICIAL SELECTION

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Cover Page Footnote

Dean and Foundation Professor, University of Idaho College of Law; former Dean and Professor, Louis D. Brandeis School of Law, University of Louisville; and former judge, Idaho Court of Appeals. This Article is an extension of remarks offered in a panel discussion on nominating commissions and criteria, during the Fordham Law School Symposium on Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges, April 7, 2006.

A CANCER ON THE REPUBLIC: THE ASSAULT UPON IMPARTIALITY OF STATE COURTS AND THE CHALLENGE TO JUDICIAL SELECTION

*Donald L. Burnett, Jr.**

The story is a familiar one. On September 17, 1787, in Philadelphia, citizens gathered outside Independence Hall as word spread that the deliberations of the Constitutional Convention had concluded. Seeing Benjamin Franklin emerge from the building, a woman in the crowd asked him: “[W]hat have we got—a republic or a monarchy?”¹ Without hesitation, Franklin responded, “A republic . . . if you can keep it.”²

Today, we are not keeping the republic envisioned by the framers; we are losing it. The framers created a distinctive republic—a *constitutional* republic—in which representative government was combined with the constraint of a written charter. Power was dispersed among three separate, but connected, branches of the government, and fundamental rights of individuals and minorities were protected against usurpation by majorities. For more than two centuries, this republic has in all respects depended for its vitality upon the impartiality of an independent judiciary. At national and state levels, however, the concept of judicial impartiality is now under assault. Disregarding or dismissing the differences between the judiciary and the other, more partisan branches of government, powerful economic and political forces across the spectrum are now competing to control the composition of the courts, in order to create a judiciary aligned with their special interests. This assault upon judicial impartiality is a growing cancer upon our constitutional republic.

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1. Franklin’s statement was noted by Constitution signer James McHenry. His diary entry later appeared in 11 AM. HIST. REV. 618 (1906); *see also* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 app. A at 85 (Max Farrand ed., 1937).

2. 11 AM. HIST. REV. 618; 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 app. A at 85.

The well-publicized battles between the President and the Senate over Supreme Court nominations and other federal appointments have, until recently, diverted attention from the spread of this cancer among the state courts. Similarly, at both federal and state levels, much literature has explored and counterpoised the “independence” and the “accountability” of the judiciary, rather than focusing on a more fundamental, unique, and essential feature of the third branch of government: impartiality. This Article examines judicial impartiality in the context of the state courts. Section I endeavors to show how impartial state courts are essential to fulfilling the constitutional guarantees of a republican form of government and of due process and equal protection of the law. Section II describes the current assault upon the impartiality of state courts, and Section III suggests several ways in which this cancer on the republic can be slowed or reversed—by specific actions within, or related to, the judicial selection process.

I. THE IMPARTIALITY IMPERATIVE

The genius of the constitutional republic created at Philadelphia lay in its establishment of a representative democracy, coupled with mechanisms for combating two historic forms of tyranny: the oppression of the many by the few, and the oppression of the few by the many. To prevent the oppression of the many by the few, the framers created a structural separation of powers. In *THE FEDERALIST PAPERS*, where Alexander Hamilton, James Madison, and (to a lesser degree) John Jay advocated successfully for ratification of the Philadelphia document, the dispersion of power received detailed attention.³ In *THE FEDERALIST NO. 9*,⁴ for example, Hamilton argued that the “science of politics” has advanced, revealing that a “distribution of power into distinct departments” can provide the “means . . . by which the excellencies of republican government may be retained and its imperfections lessened or avoided.”⁵ Thus, the legislative, executive, and judicial functions of government would be performed separately. Failure to maintain this separation, wrote Madison in *THE FEDERALIST NO. 47*,⁶ would result in an “accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and

3. See generally *THE FEDERALIST PAPERS* (Clinton Rossiter ed., 1961).

4. *THE FEDERALIST NO. 9* (Alexander Hamilton), *supra* note 3, at 66-71.

5. *Id.* at 67.

6. *THE FEDERALIST NO. 47* (James Madison), *supra* note 3, at 297-304.

whether hereditary, self-appointed, or elective, [that] may justly be pronounced the very definition of tyranny.”⁷

Focusing on the judicial branch in THE FEDERALIST NO. 78,⁸ Hamilton declared that the independence of judges, secured by tenure during “good Behaviour,”⁹ was “one of the most valuable of the modern improvements in the practice of government [I]n a republic it is a[n] . . . excellent barrier to the encroachments and oppressions of the representative body.”¹⁰ “[T]he independence of judges,” Hamilton continued, “may be an essential safeguard against the effects of occasional ill humors in the society” and against “injury of the private rights of particular classes of citizens, by unjust and partial laws.”¹¹ Judges, in Hamilton’s view, would embody, and would themselves be subject to, the rule of law:

[A] voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them”¹²

Thus, the framers charged the judiciary, as part of a constitutional republic, to prevent the rule of law from disintegrating under the duress of partisan forces operating in the other, more “representative” branches of government. The framers gave judges tenure for good behavior, in order to remove the judiciary as much as possible from the immediate pressures of majorities of the moment. The judges would stabilize the republican government, anchoring it in a rule of law and maintaining the structure of separated powers.¹³

The framers similarly sought to prevent the oppression of the few by the many. In a constitutional republic, buttressed by an independent judiciary, the fundamental rights of individuals and minorities would not be subject to forfeiture upon the demand of

7. *Id.* at 298.

8. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 3, at 463-71.

9. *See* U.S. CONST. art. III, § 1.

10. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 3, at 464.

11. *Id.* at 469. Hamilton also explained that the courts would be obliged to treat as void any statutes contrary to the Constitution, thereby laying the foundation of judicial review. *Id.* at 465-66.

12. *Id.* at 470.

13. *See generally* Hon. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989) (advocating that, in safeguarding the rule of law, judges are expected, when necessary, to “stand up to what is generally supreme in a democracy: the popular will.”).

political majorities. Judicial independence, as Chief Justice Rehnquist later observed, was “every bit as important in securing the recognition of the rights granted by the Constitution as . . . the declaration of those rights themselves.”¹⁴ Thus, in the nation’s history since the framing of the Constitution, the national courts have been challenged occasionally to “stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.”¹⁵

The benefits of a constitutional republic were so manifest to the framers of the Constitution, and so closely related to the concept of a federal system embracing a nation and the several states, that the framers provided for the national government to “guarantee to every State in this Union a Republican Form of Government.”¹⁶ This guarantee has come to be regarded, impliedly, as an obligation on the part of each state to establish and maintain a republican form of government.¹⁷

Because state governments are required to be republican in form, they must be representative, reflecting the sovereignty of the people.¹⁸ Whether they must also comprise *constitutional* republics following the national model—with separated powers and independent judiciaries—is a question that was not fully resolved by the framers. In THE FEDERALIST NO. 39,¹⁹ Madison contended that it would be sufficient for the state governments and officers to receive their authority directly or indirectly from the people.²⁰ In

14. William H. Rehnquist, *An Independent Judiciary: Bulwark of the Constitution*, 9 N. ILL. U. L. REV. 1, 8 (1988).

15. *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

16. U.S. CONST. art. IV, § 4; see *Duncan v. McCall*, 139 U.S. 449, 461 (1891).

17. See, e.g., *Appeal of Allyn*, 71 A. 794 (Conn. 1909) (interpreting Article IV as implying that states are required to maintain a republican form of government).

18. The “republican paradigm” has been described as “representative government bottomed on the principle of popular sovereignty.” JOSEPH J. ELLIS, *FOUNDING BROTHERS* 6 (2000). Republican government also has been more broadly “understood to include rule by the people, the rule of law, political virtue, and representation.” DONALD S. LUTZ, *POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS* 14 (1980); see also Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1493 (1988) (“[O]nly through a modern reconsideration of republican constitutional thought can we hope to make sense for our age of Americans’ persistent beliefs and avowals that political liberty calls for both ‘a government of the people, by the people’ and ‘a government of laws and not of men.’”). See generally Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

19. THE FEDERALIST NO. 39 (James Madison), *supra* note 3, at 236-43.

20. *Id.* at 237.

THE FEDERALIST NO. 43,²¹ he further suggested that states might choose various republican forms, so long as they did not interfere with the design and operation of the national government.²² Yet it was also Madison, as noted above, who warned against the “tyranny” of “accumulation of all powers, legislative, executive, and judiciary, in the same hands.”²³ And Hamilton, in THE FEDERALIST NO. 85,²⁴ noted the analogy of a state constitution to the proposed national constitution, with its “additional securities to republican government.”²⁵

Today it appears widely accepted that the “analogy” holds true—that the national government must guarantee, and each state must provide, a constitutionally republican form of government which constrains the power of represented majorities. As noted by the Supreme Court in *Duncan v. McCall*:

By the constitution, a republican form of government is guaranteed [sic] to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.²⁶

Such “bounds to . . . power” require that state governments have courts anchored in the rule of law and functionally differentiated from the other branches of government.²⁷

Further support for impartial and independent state courts can be found in the Fourteenth Amendment, which mandates that the states shall accord equal protection and due process of law to all persons.²⁸ Each of these obligations implies that courts must be more than the puppets of represented majorities. Although the

21. THE FEDERALIST NO. 43 (James Madison), *supra* note 3, at 268-77.

22. *Id.* at 271-72.

23. *See* THE FEDERALIST NO. 47 (James Madison), *supra* note 3, at 298; *see also supra* text accompanying note 7.

24. THE FEDERALIST NO. 85 (Alexander Hamilton), *supra* note 3, at 520-27.

25. *Id.* at 521.

26. 139 U.S. 449, 461 (1891).

27. *See generally* Peter M. Shane, *Interbranch Accountability in State Government and the Constitutional Requirement of Judicial Independence*, 61 LAW & CONTEMP. PROBS. 21 (1998).

28. U.S. CONST. amend XIV, § 1.

Federal Constitution prescribes neither the methods by which state governments shall be organized, nor, in particular, how state court judges shall be selected, the methods must produce judges who can, and do, deliver upon these mandates of equal protection and due process.²⁹

The relationship between judicial impartiality and due process has been made explicit by the United States Supreme Court.³⁰ The Court has long recognized that due process requires the “impartiality of any jury empaneled [sic] to try a cause.”³¹ The Court has observed that “[t]he theory of the law is that a juror who has formed an opinion cannot be impartial.”³² More generally, an accused is entitled to be tried by “a public tribunal free of prejudice, passion, excitement and tyrannical power.”³³ Due process de-

29. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). In *Reynolds*, the Supreme Court struck down an Alabama legislative reapportionment scheme that violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 568. The Court differentiated the equal protection issue from a claim that the federal constitutional guarantee of a republican form of government also had been violated. *Id.* at 583-84. The Court noted that its earlier cases had treated disputes under Article IV, Section 4, as nonjusticiable. *Id.* at 582-83. *See, e.g.*, *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565, 569 (1916); *Taylor v. Beckham*, 178 U.S. 548, 580 (1900). Subsequently, however, the Court has intimated a willingness to revisit the nonjusticiability of claims under Article IV, Section 4. In *New York v. United States*, 505 U.S. 144, 184-85 (1992), the Court said:

The view that the Guarantee Clause implicates only nonjusticiable political questions . . . has not always been accepted *See* Attorney General of Michigan *ex rel. Kies v. Lowrey*, 199 U.S. 233, 239, 26 S.Ct. 27, 29, 50 L.Ed. 167 (1905); *Forsyth v. Hammond*, 166 U.S. 506, 519, 17 S.Ct. 665, 670, 41 L.Ed. 1095 (1897); *In re Duncan*, 139 U.S. 449, 461-462, 11 S.Ct. 573, 577, 35 L.Ed. 219 (1891); *Minor v. Happersett*, 21 Wall. 162, 175-176, 22 L.Ed. 627 (1875). *See also* *Plessy v. Ferguson*, 163 U.S. 537, 563-564, 16 S.Ct. 1138, 1148, 41 L.Ed. 256 (1896) (Harlan, J., dissenting) (racial segregation “inconsistent with the guarantee given by the Constitution to each State of a republican form of government”).

. . .

Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances. *See, e.g.*, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 398 (2d ed. 1988); J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 118, and n., 122-123 (1980); W. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 287-289, 300 (1972); Merritt, 88 *COLUM. L. REV.* at 70-78; Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 *MINN. L. REV.* 513, 560-565 (1962).

We need not resolve this difficult question today.

30. *See, e.g.*, *Morgan v. Illinois*, 504 U.S. 719 (1992).

31. *Id.* at 726; *see also* *Turner v. Louisiana*, 379 U.S. 466 (1965); *Irvin v. Dowd*, 366 U.S. 717 (1961).

32. *Irvin*, 366 U.S. at 722 (quoting *Reynolds v. United States*, 98 U.S. 145, 155 (1878)).

33. *Chambers v. Florida*, 309 U.S. 227, 236-37 (1940).

mands impartiality of judges as well as jurors.³⁴ It extends beyond criminal cases to civil matters, as well as to cases in which decisions are made by government officers performing quasi-judicial functions.³⁵ It requires, in all contexts, “[a] fair trial in a fair tribunal.”³⁶

Moreover, the equal protection doctrine, in its traditional form, contains a similar element of fairness. It constrains the power of a majority and provides a safeguard against arbitrary action by requiring, for example, that legislative classifications of persons be “reasonable, not arbitrary.”³⁷ Such classifications “must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”³⁸ This safeguard, like the guarantee of due process, can be effective only if the judiciary is impartial and independent.

In the states, therefore, no less than in the national government, the constitutional mandate of a republican government—containing functionally differentiated powers, adhering to the rule of law, and affording its citizens the equal protection and due process of law—depends upon the independence of an impartial judiciary for its fulfillment.³⁹ Judicial impartiality implies judicial objectivity⁴⁰ and resides at the core of what Justice Kennedy memorably has called the “promise” of “neutrality.”⁴¹ Impartiality is an impera-

34. *See, e.g.*, *Weiss v. United States*, 510 U.S. 163 (1994) (discussing the need for impartiality of military judges).

35. *See* *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) (addressing the required impartiality of administrative hearing officers); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (asserting that litigants have a right, protected by the Due Process Clause of the Fourteenth Amendment, to “an impartial and disinterested tribunal in both civil and criminal cases”).

36. *In re Murchison*, 349 U.S. 133, 136 (1955).

37. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

38. *Id.*

39. For a thorough and spirited exposition of the connection between judicial impartiality and the guarantee of a republican form of government, see Luke Bierman, *Comment on Paper by Cheek and Champagne: The Judiciary as a “Republican” Institution*, 39 WILLAMETTE L. REV. 1385 (2003). Bierman makes a case, not only for impartial courts as an essential part of a republican form of state government, but also for impartiality as a requisite of institutional legitimacy of all state courts.

40. Ryan L. Souders, *A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States*, 25 REV. LITIG. 529, 531 (2006).

41. Justice Kennedy has been quoted as follows: “The law makes a promise The promise is neutrality. If that promise is broken, the law ceases to exist. All that’s left is the dictate of a tyrant, or a mob.” Joan Biskupic, *Two Justices Defend Judicial Independence*, SEATTLE TIMES, Dec. 6, 1998, at A22. Justice Kennedy expressed a similar theme in his majority opinion for the Court in *Romer v. Evans*: “Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protec-

tive, not merely a policy choice to be embraced or rejected by the states.

This constitutional imperative also has been woven into canons of judicial ethics contained in the ABA Model Code of Judicial Conduct (the “Code”).⁴² Judges are directed by the Code to “perform the duties of judicial office impartially and diligently,” thereby demonstrating that they are “faithful to the law,” that they are not “swayed by partisan interests, public clamor or fear of criticism,”⁴³ and that they have undertaken to “perform judicial duties without bias or prejudice.”⁴⁴ In order to assure not only that justice is rendered impartially, but also that the public can repose confidence in the impartiality of the judiciary, the Code further requires a judge to “disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.”⁴⁵

The impartiality imperative, in both its ethical and constitutional dimensions, is more than a narrow preclusion against bias or prejudice concerning certain persons, such as parties or their lawyers, or against a judge’s direct personal or family stake in the outcome of the case. It is, more broadly, an affirmative duty to “[maintain] an open mind in considering issues that may come before the judge.”⁴⁶ Impartiality in this sense is the core element of fairness and neutrality in the administration of justice.

tion is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.” 517 U.S. 620, 633 (1996).

42. See generally MODEL CODE OF JUDICIAL CONDUCT Canon 3 (2000). The ABA Model Code has been adopted in some form in forty-nine of the fifty states. Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably Be Questioned,”* 14 GEO. J. LEGAL ETHICS 55, 55 (2000). In February, 2007, the ABA House of Delegates adopted a new Model Code of Judicial Conduct, MODEL CODE OF JUDICIAL CONDUCT (2007) [hereinafter 2007 CODE]. Canon 3 of the pre-2007 Code now appears, with revisions, as Canon 2 of the new code. 2007 CODE, *supra*, Canon 2.

43. MODEL CODE OF JUD. CONDUCT, *supra* note 42, Canon 3, § B(2); compare 2007 CODE, *supra* note 42, Canon 2, §§ 2.2 and 2.4 and related comments.

44. MODEL CODE OF JUD. CONDUCT, *supra* note 42, Canon 3, § B(5); compare 2007 CODE, *supra* note 42, Canon 2, § 2.3(A).

45. MODEL CODE OF JUD. CONDUCT, *supra* note 42, Canon 3, § E(1); compare 2007 CODE, *supra* note 42, Canon 2, § 2.11(A).

46. MODEL CODE OF JUD. CONDUCT, *supra* note 42, at Preamble - Terminology (impartiality). Parallel language appears in the Terminology section of the new code. 2007 CODE, *supra* note 42, Canon 2. Bringing an “open mind” to each case and adhering to the rule of law even when an outcome is not aligned with the judge’s personal preferences are elements of professionalism that can be reinforced, not only by ethical standards, but also by the culture in which the judge operates. Judges are aware of salient professional audiences in addition to case-specific, issue-shaped audiences; the judges are motivated, on the whole, to earn the respect of their professional peers. See generally LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPEC-

II. THE ASSAULT UPON IMPARTIALITY OF STATE COURTS

A. The Assailing Forces

Attacks upon the impartiality of state courts usually consist either of efforts by policy-makers or interest groups to populate the bench with judges who will decide high-profile cases in a manner consistent with certain preferred outcomes, or of efforts to remove or discipline judges for making decisions at variance with those preferences. The latter phenomenon is often reflected in complaints made to judicial disciplinary bodies by litigants who are troubled, not by any personal conduct of the judges, but rather by the content of their decisions. When those judicial disciplinary bodies decline, usually quite rightly, to act upon such complaints, the complainants may seek legislative action or propose voter initiatives to limit the terms of the judges or to make retention of judicial office more difficult.⁴⁷ Voter initiatives may even seek to establish extra-judicial remedies for what the proponents regard as judicial misconduct.⁴⁸ Such efforts seldom are limited to concerns

TIVE ON JUDICIAL BEHAVIOR (2006). A recent study of federal judges indicated that “[e]ven in the most controversial cases, the law imposes a great deal of discipline, in the sense that Republican appointees and Democratic appointees agree more often than they disagree.” CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* viii (2006). In the absence of binding law, “the convictions of particular, flesh-and-blood judges—their own views about how to handle difficult questions—inevitably play a role. But the role of those views, once uncovered by the actual data, is far more interesting than can be captured by any simple claims about the relationship between law and politics.” *Id.*

47. In New Mexico, for example, the vote required to retain a judge in office has been elevated from a simple majority to a supermajority of fifty-seven percent, making it easier for a well-organized special interest group to block the retention of a judge whose decisions that group does not like. See Sarah E. Saucedo, *Majority Rules Except in New Mexico: Constitutional and Policy Concerns Raised by New Mexico’s Supermajority Requirement for Judicial Retention*, 86 B.U. L. REV. 173, 186 (2006). In Colorado, a 2006 ballot initiative (“Amendment 40”) proposed to shorten the constitutionally prescribed terms of appointed judges by increasing the frequency of their retention elections. See State of Colorado, *Analysis of the 2006 Ballot Proposals*, http://www.state.co.us/gov_dir/leg_dir/lcsstaff/bluebook/Bluebook2006.pdf (last visited Jan. 25, 2007). Amendment 40 failed to pass, with fifty-seven percent of voters voting against it. See William E. Raftery, *The State Courts at the Ballot Box: 2006*, NCSCONLINE.org, Nov. 8, 2006, http://ncsconline.org/d_comm/news_111006.html (last visited Feb. 21, 2007).

48. Two examples stand out at the time of this writing in 2006. In Montana, the 2006 general election ballot included a Constitutional Initiative No. 98, allowing the direct recall of state supreme court justices for any reason. BRAD JOHNSON, MONTANA SECRETARY OF STATE, 2006 VOTER INFORMATION PAMPHLET 19-24, <http://sos.mt.gov> (follow “Elections” hyperlink, then “2006 Voter Information Pamphlet” hyperlink) (last visited Jan. 25, 2007). The Montana initiative was removed prior to the election due to fraudulent signatures. See Raftery, *supra* note 47. In South Dakota, the 2006 general election ballot included a more radical measure, Constitutional

about judicial competence and diligence, which could be addressed by existing systems of judicial discipline in the state courts.⁴⁹ Rather, these efforts are designed to prune the judiciary of individuals considered to be sources of aberrant decisions,⁵⁰ and to send an intimidating message to the rest of the judges.⁵¹

Interest groups recognize, of course, that there would be less need to create new systems and standards for removal of judges if the groups could exert greater control over the selection of judges in the first place. Accordingly, the efforts of interest groups have become increasingly prominent in judicial selection processes, particularly in campaigns where judges are subject to contested elec-

Initiative E (popularly known as the “Jail 4 Judges” initiative), providing for a special grand jury “to expose these decision makers [judges and other governmental decision-makers] to fines and jail, and strip them of public insurance coverage and up to one-half of their retirement benefits, for making decisions which break rules defined by the special grand jurors.” CHRIS NELSON, SOUTH DAKOTA SECRETARY OF STATE, 2006 BALLOT QUESTIONS 4, <http://www.sdsos.gov> (follow “Past Elections” hyperlink, then “2006 Voter Information” hyperlink) (last visited Jan. 25, 2007). The South Dakota initiative failed to pass, with eighty-nine percent of voters voting against it. See Raftery, *supra* note 47.

49. The California Constitution, for example, provides that a Commission on Judicial Performance may censure or remove a judge for engaging in “willful misconduct in office, persistent failure or inability to perform the judge’s duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.” CAL. CONST. art. VI, § 18(d).

50. In Florida, a group known as Citizens for Judicial Accountability has advocated that “[c]omplaints of misconduct against judges . . . be investigated even if it involves their decisions, procedural rules or the merits of the case, particularly where the judges fail to follow the law and rules and falsify, and/or disregard the facts and evidence,” and that “judges and lawyers [be held] responsible for their behavior to litigants, and make them accountable and subject them to penalties for the abuse and violation of the guidelines of the laws and rules.” Citizens for Judicial Accountability, Homepage, <http://www.judicialaccountability.org> (follow “Our Goal” hyperlink) (last visited Jan. 25, 2007). Judges may be targeted in federal courts as well as in the state courts. The Eagle Forum, for example, has advocated broader impeachment of federal judges: “Article III states that ‘The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior,’ and it is not ‘good behavior’ to hand down rulings based on personal social views rather than the Constitution’s words.” Phyllis Schlafly, *It’s Time to Hold Federal Judges Accountable*, PHYLLIS SCHLAFLY REP., Mar. 1997, <http://www.eagleforum.org/psr> (scroll down to “March 1997 Issue” and follow “It’s Time to Hold Federal Judges Accountable” hyperlink) (last visited Jan. 25, 2007). For a compendium of voter initiatives or referenda in 2006 (as of this writing), see Molly McDonough, *Voting on the Law: States Have Referenda on Judicial Recall, Lawsuits, Term Limits*, ABA J. E-REP., Oct. 27, 2006, <http://www.abanet.org/journal/ereport/oc27ballot.html>.

51. See generally Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733 (1994).

tions.⁵² This is an important change in the state judicial landscape. Although *interests* have long been implicated by judicial selection processes, the formation of organized and funded *interest groups*—dedicated to shaping state judiciaries that will deliver preferred outcomes on high-profile issues—is a relatively recent phenomenon, bluntly inconsistent with the concept of an impartial judiciary.⁵³

In some circumstances, interest groups may form around a perception that their constituents have been disfavored by state judiciaries that already lack impartiality. For the most active and well-funded interest groups, however, the proposed remedy is not to restore impartiality; rather, it is to advance a preferred counter-partiality on high-profile issues.⁵⁴ Interest group action to influence the selection of judges has become increasingly vigorous as state courts increasingly have been drawn into business climate issues or “hot button” social questions.⁵⁵ In many of the thirty-one states where some or all of the appellate and general-jurisdiction trial judges are elected,⁵⁶ judicial campaigns have become freighted with push-polls, negative advertising, and third-party advocacy.⁵⁷ Spending on state judicial campaigns has risen from an estimated \$29 million in 2002 to nearly \$47 million in 2004, with average amounts expended by victorious candidates increasing from approximately \$450,000 to approximately \$650,000.⁵⁸ Expenditures

52. This trend was apparent even in the mid-1990s. See generally Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

53. *Id.* at 735-37 n.143, 740-41 nn.150-51, 752.

54. See, e.g., DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2004: REPORT ON STATE SUPREME COURT ELECTIONS, <http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf> (last visited Jan. 25, 2007).

55. *Id.* The Council of Chief Justices has launched an initiative to caution voters not to view issues in judicial campaigns in the same way issues are viewed in campaigns for other elective offices. See Tony Mauro, *Chief Justices Sound Alarm on Elections*, LEGAL TIMES, Aug. 21, 2006, at 8.

56. Larry C. Berkson (updated by Rachel Caufield), *Judicial Selection in the United States: A Special Report*, Am. Judicature Soc’y, Judicial Selection in the States, <http://www.ajs.org/js/materials.htm> (follow “Judicial Selection in the United States: A Special Report” hyperlink) (last visited Jan. 25, 2007). Varying methods of categorizing the courts can produce differing counts of the number of states holding judicial elections. Some authorities put the number at thirty-nine. See, e.g., COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 209-11 (2002).

57. See generally ABA, AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE (1997); GOLDBERG ET AL., *supra* note 54; Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL’Y REV. 301 (2003).

58. GOLDBERG ET AL., *supra* note 54, at vii.

are “likely to spiral even higher” in 2006.⁵⁹ Interest groups also have begun increasingly to request that judicial candidates complete detailed questionnaires probing their views on specific issues likely to come before the courts.⁶⁰ The thread connecting all of these developments is a perception that the judicial branch can be controlled, and that control may be acquired though the same political techniques that are applied to the other branches of government.

B. Impartiality Trumped? The First Amendment and the “Announce Clause”

As the organized and well-funded advocacy efforts of interest groups have grown in prevalence and impact, so have the issue-specific campaigns of judicial candidates in the states that elect judges. These candidates—at the prodding (welcome or unwelcome) of interest groups—increasingly appear to be declaring positions on issues, identifying themselves with those positions, and securing voter approval based on those positions—regardless of the adverse impact on judicial impartiality or on the appearance of impartiality. This flaunting of judicial impartiality is rationalized by a theory that impartiality is not a constitutional imperative at all; rather, it is a policy choice that yields to free expression under the First Amendment. The First Amendment, the theory implies, trumps the guarantees of due process and equal protection under the Fourteenth Amendment and the guarantee of republican government under Article IV, Section 4. This sweeping theory was tested in *Republican Party of Minnesota v. White*,⁶¹ where a First

59. Editorial, *Judicial Politics Run Amok*, N.Y. TIMES, Sept. 19, 2006, at A24.

60. For example, a questionnaire distributed in 2006 by “Iowans Concerned About Judges” asked whether candidates support “a judge’s choice to display the Ten Commandments in his or her courtroom,” believe the Iowa Constitution allows students in vocational religious studies to receive state scholarship or loan funds, believe that the Iowa Constitution “recognizes a right to homosexual sexual relationships,” or allows “same-sex couples . . . to enter into legal marriage.” IOWANS CONCERNED ABOUT JUDGES, 2006 JUDICIAL VOTERS’ GUIDE QUESTIONNAIRE FOR JUDICIAL CANDIDATES 2-4, <http://www.iowansconcernedaboutjudges.com> (follow “Survey” hyperlink) (last visited Jan. 25, 2007). The questionnaire also asked whether the candidate “in the last 20 years” has ever “been a member, contributed money, volunteered time, been employed by, been endorsed by for a campaign, received from for a campaign or had any other affiliation” with any of approximately sixty-five organizations. *Id.* at 5. For an overview of such questionnaires and judges’ responses to them, see Terry Carter, *Loaded Questionnaires? Judicial Candidates Advised to Be Wary of Answers Inviting Suits Challenging Canons*, 5 No. 36 A.B.A. J. E-REP. 3 (2006).

61. 536 U.S. 765 (2002). The Court intimated no view about the validity of a “pledges or promises” clause of the type found in the ABA Model Code since 2003.

Amendment challenge was levied against an “announce clause” contained in the 1972 ABA Model Code of Judicial Conduct, as adopted in Minnesota.⁶² The theory was upheld, seemingly legitimating—and plainly emboldening—the forces against judicial impartiality.

Minnesota’s “announce clause,” in its black-letter language, prohibited any judicial candidate to “announce his or her views on disputed legal or political issues.”⁶³ Speaking for the five-member majority, Justice Scalia noted that the clause did not address impartiality in the conventional sense of bias toward a party or a lawyer.⁶⁴ Rather, it invoked a broader notion of impartiality (or “open-mindedness”) on issues, and in so doing—in the majority’s view—it neither served a compelling state interest nor was narrowly tailored to achieve such an interest.⁶⁵ The ramifications of the majority’s reasoning became manifest when the Court denied a petition for certiorari⁶⁶ after the Court of Appeals for the Eighth Circuit, upon remand in the same case, determined that the logic of *White* also would require invalidation of Minnesota’s prohibitions against judicial candidates engaging in specific partisan political acts or personally soliciting money for their campaigns.⁶⁷

What, then, of Article IV, Section 4, and the Fourteenth Amendment? Focusing tightly on the First Amendment, the Supreme Court majority in *White* did not address the connection between judicial impartiality and a constitutionally republican government.

Id. at 780. Canon 5, section A(3)(d), of the 2003 Code provides that a candidate for judicial office “shall not, with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.” MODEL CODE OF JUDICIAL CONDUCT, *supra* note 42, Canon 5, § A(3)(d). Parallel language appears in the 2007 code. 2007 CODE, *supra* note 42, Canon 2, Rule 2.10(B).

62. See generally MODEL CODE OF JUDICIAL CONDUCT (1972).

63. MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (1996).

64. *White*, 536 U.S. at 775-79.

65. *Id.* at 776-78. Justice Scalia questioned whether impartiality—which he characterized in part as a lack of judicial preconceptions—ever could, or should, be fully achieved. *Id.* at 778. The Justice’s observations have been used to rationalize whatever infringement upon impartiality results from the pressure of interest group questionnaires. For example, the “Iowans Concerned About Judges” claim that the Supreme Court has said, and that it is now the “law,” that answering its questionnaire “definitely does not hurt a judge’s fairness or impartiality” and that “it is desirable to select judges who have preconceived views on legal issues—it shows them to be more qualified.” Iowans Concerned About Judges, Homepage, <http://www.iowansconcernedaboutjudges.com> (last visited Jan. 25, 2007).

66. *Dimick v. Republican Party of Minn.*, 126 S. Ct. 1165, 1165 (2006) (denying certiorari).

67. *Republican Party of Minn. v. White*, 416 F.3d 738, 766 (8th Cir. 2005).

Neither did the majority fully analyze the connection between impartiality and due process or equal protection, other than to suggest that state judicial elections hardly could be viewed as inconsistent with due process if they had coexisted with the Fourteenth Amendment for more than a century.⁶⁸ The majority further stated that impartiality regarding issues, whether characterized as a lack of bias or as “open-mindedness,” was not significantly advanced through the “announce clause,” and might not be achievable or even desirable.⁶⁹ The majority stopped short, however, of opining on whether a more specific “pledges or promises” clause—prohibiting judges and judicial candidates from making commitments on issues or controversies likely to come before their courts—might pass constitutional muster as a more precise measure for assuring judicial impartiality.⁷⁰

Dissenting opinions by Justices Stevens⁷¹ and Ginsburg⁷² called attention to the distinctiveness of the judiciary in our system of government, but they did not mount an argument based upon the guarantee of a republican form of government. They did explain, however, the difference between judicial elections and other types of elections, and they proclaimed the importance of safeguarding judicial impartiality.⁷³ Justice Stevens observed that “[t]he Court seems to have forgotten its prior evaluation of the importance of maintaining public confidence in the ‘disinterestedness’ of the judiciary.”⁷⁴ Justice Ginsburg wrote with particular emphasis about the linkage between impartiality and due process.⁷⁵ She also noted that the Minnesota “announce clause” had received a limiting con-

68. *Republican Party of Minn. v. White*, 536 U.S. 765, 782-83 (2002).

69. *Id.* at 780-81. The majority appeared to see no difference between a judge’s views, which evolve case-by-case and are always open to reconsideration upon a novel set of facts or especially cogent legal argument, and the views of other public officials who are held democratically accountable to carry out the voters’ mandate. *Id.* Judges properly exercising the judicial function “recognize the argumentative character of even the views they hold unreflectively and . . . they understand that even these are, in principle, vulnerable to a theoretical challenge they have a responsibility to meet, if and when it arises, the best they reasonably can.” RONALD DWORKIN, *JUSTICE IN ROBES* 48 (2006).

70. A special concurrence by Justice Kennedy, however, could be read as expressing the view that even a “pledges or promises” clause would violate the First Amendment. *See White*, 536 U.S. at 792-96 (Kennedy, J., concurring); *see also id.* at 802 n.4 (Stevens, J., dissenting).

71. *Id.* at 797-803 (Stevens, J., dissenting).

72. *Id.* at 803-21 (Ginsburg, J., dissenting).

73. *Id.* at 798-803 (Stevens, J., dissenting), 803-09 (Ginsburg, J., dissenting).

74. *Id.* at 802 (Stevens, J., dissenting).

75. *Id.* at 812-20 (Ginsburg, J., dissenting).

struction by lower courts, making it applicable specifically to a judge publicly stating how he or she would decide disputed issues.⁷⁶ With such a construction, Justice Ginsburg observed, an “announce clause” was not overbroad; indeed, it served a vital function—protecting judicial impartiality by preventing an “end run around the letter and spirit of . . . the pledges or promises clause.”⁷⁷

Justice O’Connor cast the dispositive fifth vote with the majority, holding the “announce clause” to be constitutionally infirm.⁷⁸ Yet, in a special concurrence, she echoed the dissenters’ concern about the state’s interest in judicial impartiality, declaring that “even aside from what judicial candidates may say while campaigning, the very practice of electing judges undermines this interest.”⁷⁹ She evidently was not persuaded, however, that impartiality is impermissibly abridged by this “very practice” when judges and judicial candidates declare their views on disputed issues that may come before their courts.⁸⁰ Justice O’Connor seemed to treat the impartiality issue as a policy dilemma rather than a constitutional problem, observing that “[i]f the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.”⁸¹

In the end, the *White* decision may have come down to Justice Scalia’s statement that “the First Amendment does not permit [Minnesota] to achieve its goal [of an impartial judiciary] by leaving the principle of elections in place while preventing candidates from discussing *what the elections are about*.”⁸² Members of the Court who ascribed primary constitutional importance to the First Amendment appeared to treat judicial elections as being “about” what other elections are about: identifying issues, taking positions, and seeking voter approval based on an alignment of interests and positions. Conversely, those who gave primary constitutional weight to judicial impartiality appeared to treat judicial elections—

76. *Id.* at 810.

77. *Id.* at 820.

78. *Id.* at 788-92 (O’Connor, J., concurring).

79. *Id.* at 788.

80. *Id.* at 792.

81. *Id.* at 792.

82. *Id.* at 788 (majority opinion) (emphasis added). See Tobin A. Sparling, *Keeping Up Appearances: The Constitutionality of the Model Code of Judicial Conduct’s Prohibition of Extrajudicial Speech Creating the Appearance of Bias*, 19 GEO. J. LEGAL ETHICS 441, 445-47 (2006) (arguing cogently that the *White* Court was divided between “traditionalists,” who believe in the Hamiltonian ideal of an impartial judiciary, and the “revisionists,” who, ascribing to a realist viewpoint, believe the ideal is a myth; the revisionists prevailed).

if held at all—as being “about” the public’s opportunity to choose individuals whom they trust to serve conscientiously and to render justice fairly and even-handedly. By adopting the former view of judicial elections, and by questioning the concept of impartiality itself, the majority framed a classic political speech issue and awarded a trump to the First Amendment. The Court thereby weakened the constitutional foundations of republican government, due process, and equal protection; it also put in doubt any ethical constraints on judicial candidate speech.⁸³

Until the Court speaks to this general issue again, in a context beyond the “announce clause,” the *White* decision will encourage—and will appear to invite—further assaults upon judicial impartiality in judicial campaigns.⁸⁴ The cancer on our constitutional republic will continue to grow.

III. STRENGTHENING IMPARTIALITY THROUGH JUDICIAL SELECTION AND RELATED PROCESSES

Can the cancer be slowed, or even arrested, by improved judicial selection methods and other measures to protect judicial impartiality? The literature has been ambivalent. Discourses about elective and appointive systems have concluded that neither system takes the “politics” entirely out of judicial selection.⁸⁵ Moreover, reports

83. The American Bar Association is “holding the line” against allowing judicial candidates to make pledges, promises, or commitments. The 2007 Code continues the provision, adopted in 2003, that a judge or candidate for judicial office “shall not, with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.” 2007 CODE, *supra* note 42, Canon 4, Rule 4.1(A)(13).

84. A Kansas federal district court, not within the Eighth Circuit where *White* originated, recently concluded that the demise of the “announce clause” also would require the invalidation of a “pledges or promises” clause. *Kan. Judicial Watch v. Stout*, 440 F. Supp. 2d 1209, 1231-32 (D. Kan. 2006). For recent analyses of the *White* decision and its aftermath to date, including litigation spawned in the lower federal courts and state courts, see generally James Layman, *Judicial Campaign Speech Regulation: Integrity or Incentives?*, 19 GEO. J. LEGAL ETHICS 769 (2006); Francisco R. Maderal, *Regulating Judicial Campaign Speech: Republican Party of Minnesota v. White on Remand*, 19 GEO. J. LEGAL ETHICS 809 (2006).

85. See generally Kermit L. Hall, *Judicial Independence and the Majoritarian Difficulty*, in *THE JUDICIAL BRANCH* 60 (K. Hall & K. McGuire eds., Oxford Univ. Press 2005). In addition to the conflict between the rule of law and purely majoritarian government, Hall notes the age-old problem of voter apathy and ignorance in judicial elections, characterizing it as a so-called “Rule of 80.” *Id.* at 73. “That rule,” he writes,

holds that 80 percent of the electorate does not vote in judicial elections; that 80 percent is unable to identify candidates for judicial office; that 80 percent believes that when judges are elected, they are subject to influence

of research on which system produces individual judges with the highest qualifications,⁸⁶ or a judiciary with the richest diversity,⁸⁷ have yielded support for arguments on both sides. A recently compiled bibliography on “professionalism” in judicial selection contains articles on strengths and needed improvements in both elective and appointive systems.⁸⁸ The question of elective or appointive judicial selection has appeared to reach an intellectual stalemate.

But the stalemate seems likely to break as the constitutional and ethical foundations of judicial impartiality receive increased attention from scholars, and as the corroding effect of elections upon judicial impartiality becomes increasingly apparent. As noted previously in this Article, elections are now increasingly characterized by campaigns in which candidates are positioned aggressively on issues. The candidates’ stances are then either supported or attacked through media communications funded by interest groups unlikely to be motivated primarily by a civic calling to good government.⁸⁹

A dark shadow is falling, fairly or unfairly, upon the perceived integrity of judges in many states that elect judges. Justice has

from their campaign contributors; and that, most strikingly, 80 percent of the public favors electing judges. *Id.*

Hall further notes that “most Americans like to elect judges and that they do not know what they are doing poses especially acute problems in light of the continued judicialization of public life. *Id.* Compare Jeffrey W. Stempel, *Malignant Democracy: Core Fallacies Underlying Election of the Judiciary*, 4 NEV. L.J. 35 (2003), with Michael R. Dimino, Sr., *The Worst Way of Selecting Judges—Except All the Others that Have Been Tried*, 32 N. KY. L. REV. 267 (2005), and Peter P. Olszewski, Sr., *Who’s Judging Whom? Why Popular Elections are Preferable to Merit Selection Systems*, 109 PENN ST. L. REV. 1, 1-2 (2004) (contending that “merit selection” is really “merit politics,” but also acknowledging that judicial elections could be improved through campaign finance reform and better voter education).

86. See generally Sheldon Goldman, *Judicial Selection and the Qualities that Make a “Good” Judge*, 462 ANNALS AM. ACAD. POL. & SOC. SCI. 112 (1982) (suggesting recruitment strategies that could be adapted to either appointive or elective systems). For a seemingly fanciful but thought-provoking treatment of what constitutes a good judge, and of how to make any “politicking” in judicial selection transparent, see Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299 (2004).

87. See, e.g., James A. Wynn, Jr. & Eli P. Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 ALB. L. REV. 775 (2004).

88. Suzanne L. Cassidy, *Judicial Selection: A Selective Bibliography*, 56 MERCER L. REV. 1019 (2005) (part of symposium entitled “Judicial Professionalism in a New Era of Judicial Selection”).

89. See *supra* Section II.A; see also Mauro, *supra* note 55, at 8; Ann Woolner, *Ask No Promises of These Political Candidates*, BLOOMBERGNEWS.COM, Sept. 1, 2006, <http://www.bloombergnews.com> (search news “Ask No Promises”).

been characterized as being “for sale.”⁹⁰ Impartiality and the judiciary’s rule-of-law function are plainly threatened. In the words of Justice Alan Page of the Minnesota Supreme Court:

In the vast majority of states across the country that use some form of election to select or retain their judges, independence and impartiality are under attack. Not from those who would seek the violent overthrow of our system of government, but from judicial candidates and others who would substitute their personal, partisan, economic, or social agenda for the rule of law.⁹¹

Consequently, as exemplified by the Fordham Symposium of which this Article is a part, current thinking on how to protect the impartiality of the judiciary is gravitating toward the use and refinement of appointive methods of selection and related processes.⁹² Although appointive systems are not free of controversy,⁹³ merit-based appointment is widely regarded as the best method for ensuring judicial independence.⁹⁴

90. See, e.g., Press Release, Justice at Stake, Senator John McCain Decries Special Interest Influence on Judicial Campaigns (Nov. 20, 2002), available at <http://faircourts.org> (follow “Press Room” hyperlink; then “News Releases” hyperlink; then “2002 and 2003 Press Releases” hyperlink). “Our judges are trapped in a bad system under siege by special interests groups . . . [O]rdinary Americans believe that justice is for sale . . . The perception of corruption must end.” *Id.*

91. Hon. Alan C. Page, Minn. Supreme Court Justice, Judicial Independence vs. Judicial Selection: Due Process in the Balance, Address at the National Press Club (Nov. 15, 2001), available at <http://www.courts.state.mn.us> (follow “News” hyperlink, then “Speeches” hyperlink).

92. Compare Norman L. Greene, *Perspectives on Judicial Selection*, 56 MERCER L. REV. 949 (2005) (focusing on appointive systems and the composition of nominating commissions), with Symposium, *Judicial Professionalism in a New Era of Judicial Selection: Improving the Election of Judges*, 56 MERCER L. REV. 859 (2005) (focusing on methods to minimize the adverse impact of elections and electioneering on judicial impartiality).

93. Appointive systems are susceptible to a charge of “back-room politics.” See, e.g., Seth Andersen, *Examining the Decline in Support for Merit Selection in the States*, 67 ALB. L. REV. 793 (2004). Moreover, post-appointment retention (yes-no) elections, as contrasted with contestable elections, have been criticized for exposing judges to greater danger from one-issue voter insurgencies than judges would face from real-life opponents with human frailties. See Hon. Joseph E. Lambert, *Sticking with Nonpartisan Elections*, KY. J., Summer 2001, at 11.

94. See, e.g., COMMITTEE FOR ECONOMIC DEVELOPMENT, JUSTICE FOR HIRE: IMPROVING JUDICIAL SELECTION (2002). In language echoing themes in THE FEDERALIST PAPERS, the Committee for Economic Development, a respected organization of business leaders and educators, has noted that appointment

is the only selection process that avoids the problems associated with elections, since it is the only method that does not require judicial candidates or sitting judges to participate in some form of popular election to gain or retain office. Appointed judges do not need to solicit campaign contributions.

A. Nominations and Appointments

In order to preserve (or restore) judicial impartiality, appointments must emanate from nomination systems designed to maximize the likelihood of selecting individuals who are not tied to special interest groups and who are personally committed to the detached and neutral administration of justice. The nominating commissions must be independent in their composition, transparent in their procedures, and objective in their evaluations of judicial applicants. The requirement of independence refers not only to an upright state of mind (although members of a nominating commission assuredly must exhibit a backbone and sense of purpose), but also to a selection process structure that minimizes the likelihood of undue influence.

A nominating commission can be independent—and perceived as independent, which is just as important—only if a majority of its membership is not determined by the judicial appointing authority or by any other single source. In Idaho, for example, the nominating commission (a single, statewide “Judicial Council”) consists of seven members: three non-lawyer citizens appointed by the Governor (the judicial appointing authority) with the consent of the Senate, three lawyers (one of whom is a general jurisdiction trial judge) appointed by the Idaho State Bar with the consent of the Senate, and the Chief Justice of Idaho.⁹⁵ Of the five non-judicial members, no more than three may be affiliated with one political party.⁹⁶ No outside source controls a majority of the body. In contrast, the Kentucky Constitution provides that there shall be a “Judicial Nominating Commission” in each of the state’s judicial circuits and that every commission will be composed of the Chief Justice, two lawyers chosen by the state bar association, and four non-lawyer citizen members—two from each political party—appointed by the Governor (the judicial appointing authority).⁹⁷ Thus in Kentucky, the Governor controls a majority of the composition of the nominating commission.

They do not face the electoral incentive to tailor their opinions to the preferences of popular majorities. Nor do they need to be responsive to the pressure tactics of organized interests.

Id. at 33. See also Aman McLeod, *If at First You Don’t Succeed: A Critical Evaluation of Judicial Selection Reform Efforts*, 107 W. VA. L. REV. 499, 505-09 (2005) (describing, in part, the effect of judicial campaigns and campaign contributions on the behavior of judges).

95. IDAHO CODE ANN. § 1-2101(1) (2006).

96. *Id.*

97. KY. CONST. § 118(2).

Such a structural difference can influence perceptions of independence, and can affect behavior based on those perceptions. In Idaho during the late 1970s—a time when the author was executive director of the Judicial Council—it was widely perceived (and observed by the author to be true) that the Council was independent. The Council took its independence so seriously that anyone writing to the Council about an applicant for judicial office would create a negative impression among Council members if he or she intimated that the applicant had a professional or personal connection with the Governor. Consequently, such statements were seldom made. In Kentucky during the 1990s, however, where the author, as a law dean, became familiar with the bar's impressions of the nomination process in that state, there was a perception that circuit nominating commissions varied in their degree of independence and that it was not unusual in some circuits for a relationship between an applicant and the Governor to be mentioned in a letter to the commission.

A nominating commission's actual and perceived independence, grounded in a structure insulating it from domination by the judicial appointing authority, is important to the commission's credibility and to its capacity to conduct an objective evaluation of applicants for judicial office. Processes for appointment and training of commission members must emphasize the commission's independence and the importance of producing an impartial judiciary. Indeed, the commitment to impartiality by judges nominated and selected is unlikely to be any stronger than the commitment expressed and demonstrated by members of the nominating commission.

Members of the commission should be chosen through a merit screening process conducted within each constituency represented on the commission. Once chosen and assembled, the commissioners must comprise a "credible, neutral, nonpartisan, deliberative body,"⁹⁸ committed to the value of an independent, impartial judiciary. Individuals known to harbor an agenda for shaping the judiciary along ideological lines should not serve on nominating commissions. Neither should a commission be composed of persons with competing agendas; such a commission is more likely to be engaged in a struggle for supremacy than in a cooperative search for applicants exhibiting impartiality.

98. Symposium, *The Organized Bar in Judicial Selection: What Role?*, 33 U. TOLEDO L. REV. 303, 312 (2002).

Members of the nominating commission also should receive training on fair evaluative processes and on clear criteria for determining the individuals to be nominated for judicial office. The processes should be transparent and conducted in accord with published criteria and procedures. The criteria should include an applicant's record of qualification—by learning, experience, and temperament—to decide cases impartially and in accordance with the law. In order to nominate a candidate, the commission should be satisfied regarding the individual's capacity and apparent willingness to be neutral—that is, to consider facts and legal arguments even if they may lead to a conclusion that does not comport with the individual's personal preferences. Related criteria for measuring each applicant should include: fair-mindedness on procedural as well as substantive matters; expertise in the law; capacity to think and write lucidly; personal integrity; physical and mental capacity to handle the demands of the position (often underestimated by lawyers who have heard beguiling stories about “retiring to the bench”); judicial demeanor, including civility toward judicial colleagues as well as toward litigants, lawyers, and staff; administrative skills in handling a caseload; and the possession of both humility and common sense in the exercise of judicial power.⁹⁹

Of course, the qualifications of eventual appointees, and the strength of their commitment to judicial impartiality, can be no greater than those possessed by the pool of applicants entering the open end of the judicial selection funnel. Individuals with high qualifications and a deep sense of commitment to impartiality might not step forward to enter the funnel, however—particularly if there has been a past history of highly politicized appointments by the governor or a record of nominations by the commission evidencing coolness toward applicants of certain demographic backgrounds or philosophical orientations. A commission should take

99. Goldman, *supra* note 86, at 113-14. In states where appointed judges must either be reappointed or retained by election upon expiration of their terms, review commissions similar to the nominating commissions should evaluate the judges' performance and make recommendations in light of the foregoing criteria *and* the following considerations: preparation, attentiveness, control over judicial proceedings, judicial management skills, courtesy, and quality of judicial opinions. Symposium, *supra* note 98, at 312 (citing Rachelle, DesVaux Bedke, Assistant U.S. Attorney, Member, ABA Standing Comm. On Judicial Independence). For a thorough treatment of the subject of judicial performance evaluations, which may occur in either appointive or elective systems, see UNIV. OF DENVER, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *SHARED EXPECTATIONS: JUDICIAL ACCOUNTABILITY IN CONTEXT* (2006), <http://www.du.edu/legalinstitute> (follow “Shared Expectations: Judicial Accountability in Context” hyperlink) (last visited Jan. 25, 2007).

steps to stimulate a broad array of applications, rather than merely accepting passively whatever applications may be received. Indeed, given the importance of judicial appointments, it may not be too much to suggest that nominating commissions should undertake professionalized search processes similar to those utilized by business organizations when hiring senior executives, or by academic institutions when hiring senior administrators and tenure-track faculty members. The use of search consultants could well be appropriate.

Professional searches for qualified, impartial applicants would represent a change in the culture of many state courts and bar organizations. Some lawyers and judges likely would object to incorporating such a “proactive” outreach into judicial selection systems. Searches for potential judges already are occurring, however, in political circles and among interest groups, whenever judicial vacancies appear. Often, these searches are conducted quietly, but thoroughly, by persons or interest groups with a high stake in the outcome of judicial selections and a low regard for the value of an impartial judiciary. Ironically, the only stakeholders *not* engaged in active searches are likely to be the members of the bench and bar whose dominant interest *is* in an independent and impartial judiciary. This asymmetry of interests and engagement can produce a skewed nominating and appointing process.

States that establish and sustain nomination processes meeting all of the standards suggested above—structural independence of the nominating commission from the appointing authority or other sources of influence, careful selection and training of nominating commission members, utilization of clear criteria designed to produce highly qualified judges committed to an independent and impartial judiciary, and engagement in active outreach to generate a wide array of qualified applications for judicial vacancies¹⁰⁰—should be rewarded with national recognition. Even the most sour skeptics of appointive systems, or of the “merit selection” concept, would likely feel a sense of pride if their states were recognized by a respected national organization, such as the American Judicature Society, and conversely, would likely feel some competitive or pa-

100. *See supra* text accompanying note 99. This compilation of elements of an optimal selection system is hardly comprehensive. There are, for instance, broader issues concerning the methods of evaluation and retention of judges after their appointment for a term of years. Those issues are outside the scope of this Article, but they were broached during the Fordham Law School Symposium on April 7, 2006, and may be addressed in the other published articles.

rochial discomfort if other states were to receive such recognition while theirs did not. The time has arrived, in the evolution of thinking about appointive systems, for a neutral national organization to distill a list of best practices and periodically to review the performance of the states in a manner similar to (but obviously less regulatory than) accreditation of educational institutions by regional or national organizations. Reports of unsatisfactory, satisfactory, or exceptional performance by states could be compiled and publicized, together with offers of assistance to states where performance could be improved.

B. Recusal

Beyond the process of judicial selection, there exists a supplemental safeguard of impartiality that is vitally linked to the constitutional and ethical imperative of impartial state courts. It is a sitting judge's duty of recusal.

As mentioned earlier in this Article,¹⁰¹ the ABA Model Code of Judicial Conduct, at Canon 3, section E(1), provides that a judge "shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . ." ¹⁰² This duty arises "but [is] not limited to instances where" the judge has a bias or prejudice relating to a party or lawyer, the judge possesses knowledge of disputed evidentiary facts, or the judge has an economic interest—or a relationship with a person who has more than a de minimus interest—in the proceeding.¹⁰³ A bias exhibited or acquired in the course of seeking and obtaining judicial office logically could be the basis for such a recusal. Indeed, under the current version of the Code, the duty of recusal includes a circumstance where a judge, "while a judge or candidate for judicial office," has made a "public statement that commits, or appears to commit, the judge with respect to (i) an issue in the proceeding; or (ii) the controversy in the proceeding."¹⁰⁴

101. See *supra* note 45 and accompanying text.

102. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 42, Canon 3, § E(1).

103. *Id.*

104. *Id.* Canon 3, § E(1)(f); compare 2007 CODE, *supra* note 42, Canon 2, § 2.11(A)(5). This section of the Code is consonant—but should not be confused—with the Code's general admonitions that a judge must "avoid . . . the appearance of impropriety" and must "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." MODEL CODE OF JUDICIAL CONDUCT, *supra* note 42, Canon 2 (heading), Canon 2, § A; compare 2007 CODE, *supra* note 42, Canon 1. Canon 4 of the 2000 code further requires the judge to conduct all extra-judicial activities so that they do not "cast reasonable doubt on the judge's capacity to act impartially as a judge." MODEL CODE OF JUDICIAL CONDUCT, *supra*

Mandatory recusal, where a judge's impartiality may be reasonably questioned in the circumstances of a particular case, legitimates and strengthens judicial independence.¹⁰⁵ It serves as a "safety net" for litigants and the public, protecting them against exercises of power by judges—whether appointed or elected—who owe their judicial offices to political or economic forces that now seek preferred outcomes in specific cases, or by judges whose impartiality in particular cases may be reasonably questioned for any other reason.¹⁰⁶

Because the duty of recusal protects a litigant's right to an impartial tribunal, it does not directly implicate the issue of prior restraint of candidate speech that the Supreme Court examined in *Republican Party of Minnesota v. White*.¹⁰⁷ Concededly, there is a concern that mandatory recusal, whenever statements by a candidate have raised reasonable doubt about the individual's impartiality as a judge, may have a chilling effect on future candidate speech and may adversely affect the numbers of judges available to hear

note 42, Canon 4, § A(1); compare 2007 CODE, *supra* note 42, Canon 3, § 3.1(c). Taken together, these provisions have been deemed to prohibit an "appearance of partiality"—a concept criticized for being overbroad and for lacking specific guidance on what conduct may subject a judge to judicial discipline. *See, e.g.,* Abramson, *supra* note 42; Sparling, *supra* note 82. Notwithstanding such criticism, the ABA has maintained the reference to "appearance of impropriety" in the 2007 Code, at Canon 1. In any event, the disqualification provisions of the pre-2007 and 2007 codes are neither so elusive nor so punitive. They are remedial; they provide a method—recusal—by which a judge can steer clear of potential discipline in a doubtful case while at the same time according to each litigant the elemental right to an impartial tribunal. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 42, Canon 3, § E(1)(f); 2007 CODE, *supra* note 42, Canon 2, § 2.11(A)(5).

105. Vincent R. Johnson, *The Ethical Foundations of American Judicial Independence*, 29 FORDHAM URB. L.J. 1007, 1025-26 (2002). Although recusal for bias or prejudice was not available at common law, it was provided by statute, shortly after the adoption of the Constitution, for federal judges who had interests in cases before them or who had served as counsel in such cases; it subsequently was extended to instances of bias in general. *See generally* Matthew D. Besser, Note, *May I Be Recused? The Tension Between Judicial Campaign Speech and Recusal After Republican Party of Minnesota v. White*, 64 OHIO ST. L.J. 1197, 1215-17 (2003). Today, by addressing cases where impartiality may reasonably be questioned, the Model Code, as embodied in federal law and adopted by the states, reflects a growing recognition of the importance of safeguarding case-specific judicial impartiality. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 42, Canon 3, § E(1)(f).

106. *See generally* Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449 (1988).

107. *See generally* Todd L. Wheeler, *I Can't: Ethical Responses and the Roberts Confirmation Hearings*, 19 GEO. J. LEGAL ETHICS 1067, 1074-75 (2006).

cases.¹⁰⁸ Even so, the “safety net” function of recusal appears to serve a compelling state interest. Moreover, because the duty to recuse turns upon a case-specific, fact-intensive inquiry into a plausible connection between a candidate’s statements and the issues before the court, recusal also appears to be narrowly tailored to its purpose.¹⁰⁹ Unlike judicial conduct codes, which are necessarily broad and regulatory, the duty of recusal is narrow and remedial. It draws its constitutional strength from its particularity.

Opponents of mandatory recusal have contended that impartiality is not reasonably subject to question if the judge as a candidate has made statements that are free from prior restraint under *White*.¹¹⁰ Freedom from prior restraint should translate into freedom from recusal, the argument goes. This facile equation, however, would deprive recusal of its “safety net” function and would further erode whatever remains of impartial and independent state courts in the wake of *White*.¹¹¹ Indeed, if a litigant’s right to an impartial tribunal were subordinated to a judge’s freedom to harbor and exhibit bias, or were held hostage to the “efficiency” of allowing biased judges to decide cases, then the law’s promise of neutrality would truly be broken.

108. See generally Josh Clubb, *Campaign Speech Above All: Republican Party of Minnesota v. White and Its Impact on Motions to Disqualify Judges*, 42 BRANDEIS L.J. 129 (2003).

109. It might be argued that recusal neither serves a compelling interest, nor is narrowly tailored to that interest, when it is applied to cases where impartiality might reasonably be questioned, as opposed to applying it only to cases of actual bias. The state’s interest, however, lies not only in combating actual bias but also in cultivating public confidence in the judiciary and acceptance of its legitimacy. “The need for the judiciary to appear impartial is either as important as actual impartiality ‘or at least a close second.’” Besser, *supra* note 105, at 1222 (quoting Stephen Gillers, “If Elected, I Promise [___]”—What Should Judicial Candidates Be Allowed to Say?, 35 IND. L. REV. 725, 729 (2002)).

110. See, e.g., Besser, *supra* note 105.

111. Since *White*, numerous courts have subjected their states’ judicial codes “to a raking constitutional examination, particularly regarding campaign speech, and frequently have found the . . . [codes] wanting.” Sparling, *supra* note 82, at 444. Ironically, in one of the post-*White* decisions, where the court upheld a judge’s right to make caustic, homophobic statements in a letter to a newspaper, the court implicitly embraced the “safety net” function of recusal, rejecting the notion that prior restraint and recusal standards should be the same. See *Miss. Comm’n on Judicial Performance v. Wilkerson*, 876 So. 2d 1006, 1012-13 (Miss. 2004). The court saw freedom from prior restraint and the duty of recusal as complementary:

Allowing—that is to say, forcing—judges to conceal their prejudice against gays and lesbians would surely lead to trials with unsuspecting gays or lesbians appearing before a partial judge. Unaware of the prejudice and not knowing that they should seek recusal, this surely would not work to provide a fair and impartial court to those litigants.

Id. at 1015.

Our constitutional republic has not come to that end-game yet. The Supreme Court has not decided that the First Amendment is offended by mandatory recusal where a judge's impartiality in a specific case may reasonably be questioned. As matters now stand, a judge's duty of recusal, to maintain the impartiality of the tribunal and public confidence in the judiciary, remains enforceable. Members of the bar, as officers of the legal system, have a correlative duty to seek recusal when necessary to secure their clients' right to an impartial tribunal. These professional obligations of judges and lawyers must be undertaken, even in discomforting situations, in order to protect judicial impartiality and to safeguard the rule of law.

Standing up for impartiality is not easy. Impartiality is a value little understood or appreciated in our partisan society, but it is the foundation of judicial independence and of our constitutional republic. The forces currently assaulting the impartiality of state courts are, like a cancer, inexorable if not confronted. Yet, with credible, professional selection systems designed to promote the appointment of impartial judges, and with case-specific protection of each litigant's right to an impartial tribunal, the cancer can be driven into remission.

The republic of Franklin, Hamilton, and Madison awaits our rescue.