Maryland Law Review

Volume 72 | Issue 1 Article 4

Recusal, Government Ethics, and Superannuated Constitutional Theory

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ESSAY

RECUSAL, GOVERNMENT ETHICS, AND SUPERANNUATED CONSTITUTIONAL THEORY

KEITH SWISHER*

ABSTRACT

Something good and something bad happened recently in government and judicial ethics; for some reason, no one has truly noticed yet. The Supreme Court all but banned First Amendment analysis as applied to recusal laws, both legislative and judicial. That, actually, is the good thing, or so this Article argues. The bad thing is that the Court, in doing so, used a geriatric approach to constitutional theory. The approach is unduly reverent of anything "old;" and old is not limited to the practices of the Founding Fathers but also includes "traditional" practices within some undefined range. But what is old is not necessarily wise, and a theory to the contrary leads to degenerative results in general and in ethics in particular, or so this Article argues further. This Article concludes with a return to the positive, hoping that the Court's path may have inadvertently sparked a viable conceptual foundation for judicial recusal law and practice, which of course, have received much general press and scholarly attention of late. That path is reconceptualizing the nature of judicial action away from the judge as an individual and toward the judge as a trustee.

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INTRODUCTION

A decade ago, the Supreme Court opened a can of worms in the field of judicial ethics regulation. Some of the Justices did so intentionally,[1] other Justices did so mistakenly,[2] and other Justices resisted futilely.[3] Whatever the intent, these worms have since been burrowing sizeable holes in the canons of judicial ethics.

The case was *Republican Party of Minnesota v. White*,[4] and the can of worms was, perhaps surprisingly, the First Amendment. Although

1. *See* Republican Party of Minn. v. White, 536 U.S. 765, 776, 788 (2002) (striking down a Minnesota rule of judicial ethics barring judicial candidates from "announcing their views on disputed legal or political issues" because the rule was not narrowly tailored and therefore failed First Amendment strict scrutiny analysis); *see also* Republican Party of Minn. v. White, 416 F.3d 738, 766 (8th Cir. 2005) (en banc) (striking down a rule of judicial ethics prohibiting judicial candidates from announcing their party affiliation).

2. Retired Justice Sandra Day O'Connor has since repudiated her vote in *White* (to no legal effect, of course). *See* Matthew Hirsch, *Swing Voter's Lament: At Least One Case Still Bugs O'Connor*, LEGAL INTELLIGENCER, Nov. 9, 2006, at 2 (quoting Justice O'Connor stating that the "*White* case, I confess, does give me pause").

3. *See White*, 536 U.S. at 797, 817 (Stevens & Ginsburg, JJ., dissenting) (arguing that the majority opinion, which ignored the importance of judicial impartiality, would have far-reaching effects).

4. 536 U.S. 765 (2002).

the judicial ethics codes have been around for eighty-plus years,[5] they have never enjoyed a comfortable working relationship with the First Amendment. Indeed, whole canons are aimed—purposely—at suppressing judges' speech and expressive conduct, and other canons are aimed—again purposely—at forcing judges to recuse themselves from certain cases on the basis of their speech and expressive conduct.[6] Although the tension between the canons and the First Amendment has always been palpable, the canons—and more importantly, the judicial regulators charged with enforcing them—suffered very few First Amendment losses until a decade ago.[7]

White caused, or at least portended, a wave of constitutional litigation in both federal and state courts. To judicial ethics regulators (and me)[8] that wave was scary and chilling, and in some ways, it still

5. *See* Eileen C. Gallagher, *The ABA Revisits the Model Code of Judicial Conduct: A Report on Progress*, 44 JUDGES J. 7, 7 (2005) (noting that the ABA's Canons of Judicial Ethics were first adopted in 1924).

6. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT Canon 2, R. 2.10(A) (2007) (barring judges from commenting on pending proceedings); MODEL CODE OF JUDICIAL CONDUCT Canon 3B(9) (2004) (same); MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007) (barring even the "appearance of impropriety"); MODEL CODE OF JUDICIAL CONDUCT Canon 2A (2004) (same); MODEL CODE OF JUDICIAL CONDUCT Canon 4, R. 4.1 (2007) (barring various interactions and affiliations with political organizations); MODEL CODE OF JUDICIAL CONDUCT Canon 5A(1) (2004) (same); MODEL CODE OF JUDICIAL CONDUCT Canon 2, R. 2.11(A)(5) (2007) (requiring recusal when "[t]he judge . . . has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy"); MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(f) (2004) (requiring recusal whenever "the judge, while a judge or a 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").

7. To be sure, the prominent Judge Posner struck a significant First Amendment blow about a decade earlier. *See* Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 228, 231 (7th Cir. 1993) (striking down the "announce clause"). As Judge Posner necessarily conceded, however, his only on-point authority was a Kentucky Supreme Court decision from two years earlier, *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953 (Ky. 1991), and as he further conceded, the Third Circuit had reached the opposite conclusion that same year in *Stretton v. Disciplinary Board*, 944 F.2d 137 (3d Cir. 1991).

8. By way of background, the United States now has a generally strong system of judicial ethics regulation, in which judicial conduct commissions and state supreme courts routinely discipline (for example, censure, suspend, or remove) judges for conduct that violates the canons of judicial ethics. *See* Keith Swisher, *The Judicial Ethics of Criminal Law*

is.[9] While weighing countervailing First Amendment interests, *White* seemingly underweighs the ideal role of the judge in the American system,[10] and it is symptomatic of judicial elections, which are problematic for reasons beyond this Essay's scope. But two very recent Supreme Court cases have protected, and even exalted, the judicial ethics rules and statutes governing recusal.[11] As I argue in Parts I through III, the end result is that *White*, when coupled with two very recent cases in an unlikely trilogy, has ultimately and perhaps inadvertently brought a greater good to ethics in government: Recusal laws are now clearly constitutional and enforceable. This result should promote (among other good things) judicial impartiality and integrity, which in turn protect litigants, the rule of law, and public confidence in the judiciary.

But with good often comes bad: The Court's reasoning—namely, that age and tradition should play the primary roles in assessing the permissibility of conduct—leads to arbitrary constitutional and ethical theory, if it can be called theory at all. It is, in short, a blind reverence to anything old, which is concerning for any primary theory of interpretation, but it is particularly concerning for ethics, as raised in Part IV. Moreover, the Court's approach is further diminished by a lack of rigor in its historiography.[12] I end, however, on a positive upshot of the Court's historical approach: By taking away judges' ownership and standing over their judicial votes, the Court's reasoning has suggested

Adjudication, 41 ARIZ. ST. L.J. 755, 756–65 (2009) (discussing judicial conduct commissions, the judicial ethics codes, and their significant influence in regulating judicial conduct).

9. *See infra* note 119 (noting the risk that future litigation might raise vagueness, overbreadth, and associational rights challenges to the judicial ethics rules).

10. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 803–04 (2002) (Ginsburg, J., dissenting) ("Unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide 'individual cases and controversies' on individual records, neutrally applying legal principles, and, when necessary, 'stand[ing] up to what is generally supreme in a democracy: the popular will.'" (alteration in original) (citations omitted) (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989))); *see also id.* at 813 ("This judicial obligation to avoid prejudgment corresponds to the litigant's right, protected by the Due Process Clause of the Fourteenth Amendment, to 'an impartial and disinterested tribunal in both civil and criminal cases.'" (quoting Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980))).

11. *See infra* Parts II–III.

12. *See infra* Part IV.A.

a new conceptual foundation for judicial recusal, which badly needs the boost of late.[13]

I. CONUNDRUM: *REPUBLICAN PARTY OF MINNESOTA V. WHITE*

The modern story of the regulation of judges' ethics in this country has much to do with a trilogy of cases. The first case in that trilogy prominently pitted the First Amendment against judicial ethics, and when the Supreme Court declared the First Amendment to be the winner,[14] the judicial ethics regulations and regulators were cast into doubt for a decade.[15]

A candidate for the Minnesota Supreme Court, Greg Wersal, wanted to campaign on what has become a typical conservative platform in judicial elections. In particular, he desired to criticize the court publicly for its rulings on "crime, welfare, and abortion."[16] As a

13. *See infra* Part IV.B (describing the conceptual shift toward "judges as trustees"). Judicial ethics and particularly recusal have received much press of late, focusing on the Supreme Court's lack of a binding judicial ethics code, which embarrassingly distinguishes it from virtually every other federal and state court in the country, and its questionable recusal decisions. *See, e.g.*, Editorial, *The Supreme Court's Recusal Problem*, N.Y. TIMES, Dec. 1, 2011, at A38. The buzz has been so loud that Chief Justice Roberts devoted his entire annual report to the matter. *See* CHIEF JUSTICE JOHN ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2011), http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf (commenting on the call for and development of the ABA's first judicial ethics code); Adam Liptak, *Chief Justice Defends Peers on Health Law*, N.Y. TIMES, Jan. 1, 2012, at A1 (relating the Chief Justice's comments in his report to the debate on whether Justices Thomas and Kagan should recuse themselves from the healthcare case). In as many months, Chief Justice Roberts has twice rejected calls for reform. *See* Robert Barnes, *Roberts: Justices Won't Adopt Code of Conduct*, WASH. POST, Feb. 22, 2012, at A7 (citing Chief Justice Roberts's recent letter to senators, including the Chair of the Judiciary Committee, in which the Chief Justice rejected their requests for the Court to adopt a binding judicial ethics code).

14. *White*, 536 U.S. at 788.

15. *See supra* note 6 (providing a significant sampling of the various provisions of judicial ethics implicating the First Amendment); *see also supra* note 8 (noting the widespread and well-rooted system of judicial ethics regulation in this country).

16. *White*, 536 U.S. at 768. The political (attitudinal) read of the case is that the Republican Justices invalidated a rule that blocked a Republican judicial candidate from announcing his conservative views during the judicial election. For this and other reasons, judicial elections tend to be, on balance, more problematic than merit selection, but a direct attack on judicial elections is beyond this work's scope. For more on the advantages

candidate for judicial office, however, the canons of judicial ethics in Minnesota (and in several other states at the time) prohibited him from doing so.[17] In particular, the rules barred candidates (and incumbents) from announcing their views on "disputed legal and political issues."[18] Fearing that he might be silenced or disciplined, or both, Wersal brought suit claiming that this "announce clause" violated the First Amendment.[19]

Applying demanding strict scrutiny analysis, the Court concluded that the canon violated the First Amendment.[20] Although Justice O'Connor has since renounced her vote in the case,[21] at the time she perhaps framed the problem best: She acknowledged that "[e]lected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects" and their "rel[iance] on campaign donations may leave judges feeling indebted to certain parties or interest groups."[22] But, having

of the merit system, see Mark I. Harrison et al., *On the Validity and Vitality of Arizona's Judicial Merit Selection System: Past, Present, and Future*, 34 FORDHAM URB. L.J. 239, 239, 250–59 (2007).

17. *White*, 536 U.S. at 770; *see also* J.J. GASS, AFTER WHITE: DEFENDING AND AMENDING CANONS OF JUDICIAL ETHICS 2 (2004) (noting that eight states had some version of the challenged "announce clause" when *White* was decided).

18. *White*, 536 U.S. at 768.

19. I have spared the reader *White*'s disorderly procedural posture. *See id.* at 768–70 (reviewing the procedural history of the case).

20. *Id.* at 774–75, 788; *see also* James Bopp, Jr. & Anita Y. Woudenberg, *To Speak or Not to Speak: Unconstitutional Regulation in the Wake of* White, 28 JUST. SYS. J. 329, 330 (2007) ("In particular, the Court, interpreting 'impartiality' to prevent 'bias for or against parties' and possibly to preserve the 'openmindedness' of a judge, found that preventing judicial candidates from merely announcing their views on various legal, political, and social issues did not address those concerns at all and, consequently, could not justify the restriction of an express constitutional right to free speech.").

21. *See* Hirsch, *supra* note 2, at 2 (revealing that Justice O'Connor has since reconsidered her vote in *White*).

22. *White*, 536 U.S. at 789–790 (O'Connor, J., concurring); *see also id.* at 816 (Ginsburg, J., dissenting) (concluding that an elected judge has a "direct, personal, substantial, [and] pecuniary interest in ruling against certain litigants for she may be voted off the bench and thereby lose her salary and emoluments unless she honors the pledge that secured her election." (alteration in original) (citation omitted) (internal quotation marks omitted)); MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS § 9.08[3], at 248–50 (3d ed. 2004) (noting the important fact that Justices Ginsburg and O'Connor were writing for five justices).

chosen that questionable system, the state could not duct-tape judges' mouths on the campaign trail:

> Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan. In doing so the State has voluntarily taken on the risks to judicial bias . . . . As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.[23]

And Justice Scalia seized on the point:

> '[T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.'[24]

Although *White* was laudable in some ways,[25] its crowning feature was, regrettably, its corrosive effect on judicial ethics regulation. It

23. *White*, 536 U.S. at 792 (O'Connor, J., concurring).

24. *Id.* at 788 (majority opinion) (alterations in original) (quoting Renne v. Geary, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

25. Although the litigation aftermath of (and some of the language in) *White* was highly problematic, the result was palatable. *See, e.g.*, Keith A. Swisher, *The Moral Judge*, 56 DRAKE L. REV. 637, 670–71 (2008) (arguing that the *White* result was laudable insofar as it lifted the flawed "don't ask, don't tell" policy in judicial regulation); *see also* Viet D. Dinh, *Threats to Judicial Independence, Real and Imagined*, 95 GEO. L.J. 929, 937 (2007) ("It certainly is proper for Senators to inquire about nominees' general judicial philosophies and interpretive methodologies."); Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 977 n.45 (2007) ("Inquiries as to interpretive methodology, though sometimes used as a proxy for substantive ideology, may pose fewer risks of creating the appearance of seeking, or giving, 'assurances' or precommitments, because its application may be uncertain in particular cases."). Another salutary development following *White* was the ethical codification of open-mindedness. *See White*, 536 U.S. at 775–78 (defining impartiality as "lack of bias for or against either party" or "as openmindedness," which "in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and re-

bogged down judicial regulators, who were already understaffed and underfunded, in years of First Amendment litigation. Post-*White* and pre-*Caperton*,[26] moreover, commentators were predicting and hastening an end to judicial campaign regulation, and regulators were living in fear of the First Amendment.[27] The following is a telling summary of the post-*White*, pre-*Caperton* picture:

> The increasing and often successful attacks on [a] wide array of canons have left state bodies charged with regulating judicial conduct in disarray, especially when applying canons applicable to campaign conduct. As one trial court observed: "To say that there is considerable uncertainty regarding the scope of the Supreme Court's decision in *White* is an understatement . . . ."[28]

main open to persuasion, when the issues arise in a pending case"). Impartiality is now defined as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." MODEL CODE OF JUDICIAL CONDUCT Terminology (2007); *see also* MODEL CODE OF JUDICIAL CONDUCT Terminology (2004) (using substantively identical language).

26. Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009); *see also infra* Part II (discussing *Caperton*'s impact).

27. *See, e.g.*, Steven Lubet, *Judicial Campaign Speech and the Third Law of Motion*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 425, 426 (2008) (forecasting that bans on extrajudicial speech may be doomed by expanding First Amendment doctrine); Bopp & Woudenberg, *supra* note 20 at 332–33 (concluding that disciplining judges for failing to recuse themselves would be unconstitutional to the extent it "chill[s]" campaign speech protected by the First Amendment).

28. Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 508 (2007) (alteration in original) (citation omitted) (quoting in part N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1041 (D.N.D. 2005)); *see also id.* at 515 (arguing that, although some recent scandals have driven recusal reform, "it is the *White* ruling more than any other development that now has the potential to alter the nature and practice of judicial disqualification"); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 297–98 (2008) (noting the many post-*White* challenges to various canons). Indeed, for years now, the American Judicature Society has maintained a running study of *White* consequences. *See* Am. Judicature Soc'y, *Case-law Following* Republican Party of Minnesota v. White, 536 U.S. 765 (2002), 1 (last visited July 9, 2012), http://www.ajs.org/ethics/pdfs/CaselawafterWhite.pdf (tracking cases that have "challeng[ed] restrictions on campaign and political conduct by judges and judicial candidates"); Cynthia Gray, Am. Judicature Soc'y, *Developments Following* Republican Party of Minnesota v. White, 536 U.S. 765 (2002) (last visited July 9, 2012),

Perhaps even more disturbingly, however, some courts and commentators persuasively argued that if a judge had a right to announce a certain view, such as "tough on crime," she should not face a corresponding duty to recuse herself for exercising her right.[29] *Caperton*, however, brought imperfect relief, through a case in which "bad" facts finally made some good law.[30]

II. COUNTERWEIGHT: *CAPERTON V. A.T. MASSEY COAL*

Caperton v. A.T. Massey Coal Co. is the second case in our constitutional ethics trilogy.[31] It is a "pathbreaking" and "momentous" Su-

http://www.ajs.org/ethics/pdfs/DevelopmentsafterWhite.pdf (tracking developments, on both the state and federal levels, following from the *White* decision). Similarly, the Brennan Center for Justice provides another tally. *See* Brennan Ctr. for Justice at N.Y.U. Sch. L., *Summaries of Relevant Cases Decided Since* Republican Party of Minnesota v. White, http://www.brennancenter.org/content/resource/summaries_of_relevant_cases_decided_since_republican_party_of_minnesota_v_w (last visited July 9, 2012) (summarizing cases decided after *White*).

29. *See, e.g.*, Bopp & Woudenberg, *supra* note 20, at 332–33 (concluding that disciplining judges for failing to recuse themselves would be unconstitutional to the extent it "chill[s]" campaign speech protected by the First Amendment). To be sure, Justice Kennedy's concurrence nodded approvingly to stricter recusal provisions, *White*, 536 U.S. at 794 (Kennedy, J., concurring), but the majority's holding strongly suggested to the contrary.

30. Chief Justice Roberts reached the opposite conclusion, claiming that the majority's opinion exemplified the "legal aphorism: 'Hard cases make bad law.'" *Caperton*, 556 U.S. at 899 (Roberts, C.J., dissenting). His conclusion hardly follows: "Few situations more severely threaten trust in the judicial process than the perception that a litigant never had a chance because the decisionmaker may have owed the other side special favors." Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 483 (1986).

31. *Caperton* has quickly generated a strong literature. *See* Comment, Caperton v. A.T. Massey Coal Co.*: Due Process Limitations on the Appearance of Judicial Bias*, 123 HARV. L. REV. 73 (2009) (discussing the case and the Court's reasoning); Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of* Caperton, 123 HARV. L. REV. 80 (2009) (discussing *Caperton*'s contribution to discussions on judicial elections and "judicial regulation of politics"); Lawrence Lessig, *What Everybody Knows and What Too Few Accept*, 123 HARV. L. REV. 104 (2009) (addressing the issues of independence and improper dependence concerning campaign contributions); Penny J. White, *Relinquished Responsibilities*, 123 HARV. L. REV. 120 (2009) (discussing the opinions in *Caperton* in conjunction with the Due Process Clause concerns raised by judicial elections). For an excellent symposium on the issue, see Sym-

preme Court decision from 2009.[32] *Caperton*, to be sure, said nothing about the First Amendment—it never even uttered those words. The case was instead about due process: In particular, the Court grappled with the extent to which money (both independent expenditures and campaign contributions) spent assisting a judge's election created an intolerable risk of bias in that judge. The petitioner's question to the Court concisely framed the issue:

> [Acting Chief] Justice Brent Benjamin of the Supreme Court of Appeals of West Virginia refused to recuse himself from the appeal of the $50 million jury verdict in this case, even though the CEO of the lead defendant[, Don Blankenship,] spent $3 million supporting his campaign for a seat on the court—more than 60% of the *total* amount spent to support Justice Benjamin's campaign—while preparing to appeal the verdict against his company.[33] After winning election to the court, Justice Benjamin cast the deciding vote in the court's 3-2 decision overturning that verdict. The

posium, *Caperton v. A.T. Massey Coal Co.*, 60 SYRACUSE L. REV. 215 (2010). For my own take on the case, from which I have liberally borrowed for this short Part, see Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 339–51 (2010) [hereinafter Swisher, *Pro-Prosecution Judges*].

32. *See* James J. Sample, Caperton*: Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. 293, 298 (2010) [hereinafter Sample, *Correct Today, Compelling Tomorrow*] (noting that *Caperton* is "a pathbreaking decision of momentous import for the future of judicial elections and disputes over judicial bias" (internal quotations marks omitted)); *Caperton*, 556 U.S. at 872 (holding that due process requires state court judges to recuse themselves from cases in which parties have directly contributed, or independently expended, large sums of money in support of the judges' election).

33. The three million-plus that Blankenship spent on the campaign was itemized as follows:

> In addition to contributing the $1,000 statutory maximum to Benjamin's campaign committee, Blankenship donated almost $2.5 million to "And For The Sake Of The Kids," a political organization formed under 26 U.S.C. § 527. . . . Blankenship's donations accounted for more than two-thirds of the total funds it raised. . . . Blankenship spent, in addition, just over $500,000 on independent expenditures—for direct mailings and letters soliciting donations as well as television and newspaper advertisements—"to support . . . Brent Benjamin."

Id. at 873 (third alteration in original) (citations omitted) (quoting Blankenship's state campaign financial disclosure filings); *see also* DonLBlankenship, YOUTUBE (Sept. 8, 2010), http://www.youtube.com/user/DonLBlankenship#p/u (providing access to the television advertisements Blankenship funded during the election).

> question presented is whether Justice Benjamin's failure to recuse himself from participation in his principal financial supporter's case violated the Due Process Clause of the Fourteenth Amendment.[34]

The Supreme Court voted five to four that Benjamin's failure to recuse himself violated the Due Process Clause.[35] Justice Kennedy authored the opinion, concluding that Benjamin harbored a "serious," "objective" "probability of bias" when he refused to recuse himself in a case involving his biggest supporter from his previous—and perhaps future—election.[36]

As suggested at the outset, the case was noticeably imperfect in that it never even mentioned the First Amendment.[37] *Caperton* was and is relevant, however, because it treated recusal rules with unmatched reverence. States were not only free, but encouraged, to craft recusal rules stronger than the due process floor (that is, the relatively low point at which a judge's "probability" of bias becomes constitutionally intolerable).[38] The Court, furthermore, explicitly blessed

34. Brief for Petitioners at i, *Caperton*, 556 U.S. 868 (No. 08-22), 2008 WL 5433361, at *i.

35. *Caperton*, 556 U.S. at 871–72.

36. *Id* at 872, 884, 886. In its narrow form, the Court's holding was "that Blankenship's significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Id.* at 886 (alterations in original) (internal quotation marks omitted). Stated slightly differently, there was "a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id.* at 884; *see also* Keith Swisher, *Legal Ethics and Campaign Contributions: The Professional Responsibility to Pay for Justice*, 24 GEO. J. LEGAL ETHICS 225 (2011) (providing context for measuring influence and bias).

37. Although the Court itself never mentioned the First Amendment, both the Court and the parties in their briefs cited the *White* opinion. *Caperton*, 556 U.S. at 889; *see also, e.g.*, Brief for Petitioners, *supra* note 34, at v (indicating locations of citations to *White* within the brief).

38. *See Caperton*, 556 U.S. at 889 ("States may choose to adopt recusal standards more rigorous than due process requires." (internal quotation marks omitted)); *see also id.* at 889–90 (reiterating that "states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today" (internal quotation marks omitted)); Sample, *Correct Today, Compelling Tomorrow*, *supra* note 32, at 303–04 (observing that *Caperton* "provides real momentum for state-based recusal reform efforts").

"the judicial reforms the States have implemented to eliminate even the appearance of partiality."[39] Moreover, even without an explicit First Amendment reference, the context—in which a citizen had supported one justice and opposed another through *independent* expenditures—spoke loudly.[40] Thus, under current First Amendment doctrine, the supporter had clearly exercised First Amendment-protected freedoms to speak in a sense.[41] To be sure, the Justice's speech was not in issue, but regulating matters of speech and money concerning an elected judge or his supporter necessarily risks affecting the judge at the polls or in his conduct. Yet, recusal law and the Due Process Clause carried the day.[42]

In sum, *Caperton* swung the pendulum away from the First Amendment, but regulators would have to wait until the third and final case of this ethics trilogy before the Court again directly addressed the looming First Amendment.

III. CLOSURE: *NEVADA COMMISSION ON ETHICS v. CARRIGAN*

Almost exactly two years later, the Supreme Court has now, arguably, closed the can of worms. In *Nevada Commission on Ethics v. Carrigan*,[43] the Supreme Court upheld Nevada's Ethics in Government Law, which requires (in short) that public officials refrain from voting on matters in which they have personal interests.[44] In *Carrigan*, a city

Even Chief Justice Roberts, in dissent, explicitly agreed: "States are, of course, free to adopt broader recusal rules than the Constitution requires—and every State has—but these developments are not continuously incorporated into the Due Process Clause." *Caperton*, 556 U.S. at 893 (Roberts, C.J., dissenting).

39. *Caperton*, 556 U.S. at 888 (majority opinion).

40. *Id.* at 873.

41. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 18 (1976) (reasoning that limits on campaign expenditures are limits on protected political speech).

42. *See* Citizens United v. FEC, 130 S. Ct. 876, 910 (2010) (discussing *Caperton* and noting that "[t]he remedy of recusal was based on a litigant's due process right to a fair trial before an unbiased judge. *Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned." (citation omitted)). In light of the influence and timing of the expenditures, moreover, the *Caperton* opinion contained this theme: "Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own cause." *Caperton*, 556 U.S. at 886. I return briefly to this theme in Part IV.

43. 131 S. Ct. 2343 (2011).

44. *Id.* at 2346–47.

council member voted to approve a casino even though his campaign manager and close friend had a financial interest in the casino's development.[45] The Nevada Ethics Commission censured the council member for his actions, and in response he brought a First Amendment challenge, claiming in part that his vote constituted protected speech.[46] Rejecting the challenge, the Court found (again in short) that recusal rules in these circumstances do not, and did not ever, violate the First Amendment.[47] The Court was unanimous as to the result—and nearly so as to the reasoning.[48] And bringing our trilogy of Supreme Court cases full circle, the first case that the *Carrigan* Court cited on the merits was, surprisingly, *White*.[49]

A narrow reading of the *Carrigan* opinion is simply this: Even if legislators intend to express deeply held beliefs through their votes, the "act of voting [i]s still nonsymbolic conduct engaged in for an independent governmental purpose."[50] In other words, "a legislator has no right to use official powers for expressive purposes."[51] But the narrow holding is only half the point: The Court unanimously justified this holding by using the historical strength of recusal laws, both legislative and judicial.[52] Immediately below, I explain why *Carrigan* is generally outstanding for judicial recusal law, although it rests on

45. *Id.*

46. *Id.* at 2347.

47. *Id.* at 2350–51. A contrary holding would have, once again, struck First Amendment fear in the hearts of judicial ethics regulators. *Cf.* Brief for Reporters Comm. for Freedom of the Press et al. as Amici Curiae Supporting Petitioner at 13–14, *Carrigan*, 131 S. Ct. 2343 (No. 10-568), 2011 WL 882593, at *13–14 (worrying that several canons of judicial ethics could be put into constitutional jeopardy if the Court applied First Amendment strict scrutiny analysis to Nevada's recusal scheme).

48. *Carrigan*, 131 S. Ct. at 2346 (majority opinion); *id.* at 2352 (Kennedy, J., concurring); *id.* at 2354 (Alito, J., concurring).

49. *Id.* at 2348 (majority opinion).

50. *Id.* at 2350–51.

51. *Id.* at 2351.

52. *See id.* at 2347–49 (noting the "long-established tradition" of judicial and legislative recusal statutes); *see also id.* at 2352 (Kennedy, J., concurring) (joining the Court's opinion but writing separately to express reservations about possible infringement of associational rights by legislative, but not judicial, recusal law); *id.* at 2355 (Alito, J., concurring) (concluding that legislative voting is indeed expressive conduct, but nevertheless concurring because "recusal rules were not regarded during the founding era as *impermissible* restrictions on freedom of speech").

shaky analytical ground. I then unearth a few ways in which the case and its theories present both concern and promise for the future.

IV. CONGRATULATIONS, CONCERN, AND CONVALESCENCE

The majority and two concurring opinions in *Carrigan* are relevant and indeed crucial to judicial ethics for at least four reasons: (1) the essentially unanimous opinion of the Court strongly validates the historical pedigree and constitutional legitimacy of American recusal laws, both legislative *and judicial*;[53] (2) both Justice Scalia (for the opinion of the Court) and Justice Kennedy (for his own pivotal self) suggest that recusal rules may, understandably, be crafted *more* rigidly for the judiciary than for the legislature;[54] (3) the Court draws an im-

53. In support of federal judicial recusal laws, the Court listed the following evidence:

> Federal conflict-of-interest rules applicable to judges also date back to the founding. In 1792, Congress passed a law requiring district court judges to recuse themselves if they had a personal interest in a suit or had been counsel to a party appearing before them. In 1821, Congress expanded these bases for recusal to include situations in which "the judge . . . is so related to, or connected with, either party, as to render it improper for him, in his opinion, to sit on the trial of such suit." The statute was again expanded in 1911, to make any "personal bias or prejudice" a basis for recusal. The current version, which retains much of the 1911 version's language, is codified at 28 U.S.C. § 144.

Id. at 2348–49 (majority opinion) (citations omitted). The Court listed the state evidence as follows:

> A number of States enacted early judicial recusal laws as well. *See, e.g.*, 1797 Vt. Laws, § 23, p. 178 ("[N]o justice of the peace shall take cognizance of any cause, where he shall be within either the first, second, third, or fourth degree of affinity, or consanguinity, to either of the parties, or shall be directly or indirectly interested, in the cause or matter to be determined"); 1818 Mass. Laws, § 5, p. 632 ("[W]henever any Judge of Probate shall be interested in the estate of any person deceased, within the county of such Judge, such estate shall be settled in the Probate Court of the most ancient next adjoining county . . ."); *Macon v. Huff*, 60 Ga. 221, 223–226 (1878).

Id. at 2349 n.4 (alterations in original).

54. As Justice Scalia noted in the Court's opinion, "[t]here are of course differences between a legislator's vote and a judge's, and thus between legislative and judicial recusal rules; nevertheless, there do not appear to have been any serious challenges to judicial recusal statutes as having unconstitutionally restricted judges' First Amendment rights." *Id.* at 2349 (footnote omitted); *see also id.* at 2349 n.3 (distinguishing *White*). Justice Kennedy somewhat similarly noted in his concurrence:

portant First Amendment distinction between campaign conduct and official conduct (such as a failure to recuse from voting);[55] and (4) the majority opinion provides a way to conceptualize judges' votes that may pay future dividends toward reconciling and crafting recusal law.[56] *Carrigan* thus presents remarkable promise for ushering in a new era of solidarity and hope in recusal law. The capstone of this constitutional trilogy therefore deserves congratulations to that extent, and it is congratulations that no court or commentator has yet granted the opinion.

Carrigan and its reasoning, however, typify a growing problem in constitutional theory, and this problem is amplified when applied to legal and judicial ethics. Before I look further to the opinion's promise, I address its Trojan-horse-like problems in the next Section.

A. Concern: Gerontology and Ethics

Among many other famous remarks, Justice Holmes captured our realist hearts by noting that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[57] Moving from realist to critical, though, our cherished principles—including the First Amendment, "fundamental rights," and due process—can be corrupted into historical relics and thereby

> The Court has held that due process may require recusal in the context of certain judicial determinations, see *Caperton* . . . . The differences between the role of political bodies in formulating and enforcing public policy, on the one hand, and the role of courts in adjudicating individual disputes according to law, on the other, may call for a different understanding of the responsibilities attendant upon holders of those respective offices and of the legitimate restrictions that may be imposed upon them.

Id. at 2353 (Kennedy, J., concurring) (citations omitted).

55. *See id.* at 2349 n.3 (majority opinion) (distinguishing *White* because it dealt with campaign-trail conduct, not acts or omissions in office).

56. *See infra* Part IV.B; *see also* Posting of Keith Swisher to The Judicial Ethics Forum, A Supreme Victory for Government Ethics and Judicial Recusal (June 14, 2011), http://judicialethicsforum.com/2011/06/14/a-supreme-victory-for-government-ethics-and-judicial-recusal/.

57. Justice Oliver Wendell Holmes, Supreme Judicial Court of Mass., Address at the Dedication of the New Hall of the Boston University School of Law: The Path of the Law (Jan. 8, 1897), *in* 10 HARV. L. REV. 457, 469 (1897); *see also id.* (noting further that "[i]t is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past").

become deserving of Holmes's criticism.[58] Although *Carrigan* has much to commend it, it is also a pointed example of problematic constitutional theory that transcends far beyond one case. It is a theory of keeping law old and outdated, and the theory is further complicated by the Court's sloppy application. Both the methodology and the merit of the Court's theory are addressed below.

1. Historiographical Analysis: Older Is Looser

The Court's methodology in historical inquiry employs essentially four factors designed to determine whether any given practice[59] should survive constitutional scrutiny. In order of seeming importance to the Court, the four factors follow: (1) contemporaneity;[60] (2) longevity;[61] (3) uniformity;[62] and (4) dormancy.[63] Below, I analyze

58. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 710 (1997) (explaining that in due process cases, courts "begin . . . by examining our Nation's history, legal traditions, and practices" and concluding that banning all physician-assisted suicide of competent, terminally ill patients does not violate a fundamental right). Professor Erwin Chemerinsky notes:

> These examples [of Supreme Court decisions]—drawn from substantive due process, criminal procedure provisions such as the Fourth and Eighth Amendments, and the First Amendment—are simply representative illustrations of a much larger body of cases. Common to these cases is the Supreme Court's use of history and tradition to reject claims of individual rights. The Court openly declares that the scope of constitutional rights is limited to that which has been historically protected.

Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 907 (1993).

59. By practice, I mean any conduct under examination as to whether it is or was legally permissible or impermissible (for example, whether judges must recuse themselves from cases in which their spouses have a financial interest in the outcome; or whether certain groups may vote in an election).

60. To determine contemporaneity, the Court measures the temporal distance between the beginning of the practice under scrutiny and the Constitution's drafting (and if applicable, the amendment's ratification).

61. Here the Court looks for the length of time that the practice (or ban) has endured in this country. For lengthy practices, the Court calls them "tradition." *See, e.g.*, Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2347–48 (2011). It is important to note that a lengthy practice (since 1924) might have started many years after the Constitution or the relevant amendment. It thus occupies a decidedly distinct axis than contemporaneity occupies, although the *Carrigan* Court conflated the two factors. *See, e.g.*, *id.* (demon-

problems of rigor in the application of each of these four related factors.

Carrigan quintessentially illustrates the Court's lack of methodological rigor.[64] The Court ran together the first two factors, namely, contemporaneity and longevity, to which we now turn. By contemporaneity, I mean that the Court measures the temporal distance between the beginning of the practice under scrutiny and the Constitution's drafting (and if applicable, the amendment's ratification): shorter is better. By longevity, I mean that the Court measures the length of time that the practice has endured in this country: longer is better. When considering the practice of recusal regulation, the Court was enamored with the early congressional enactments of both legislative and judicial recusal rules.[65] "That evidence is *dispositive* here" of the constitutional question.[66]

strating a "long-established tradition of prohibiting certain conduct" by referring to "[e]arly congressional enactments").

62. That is, whether all, most, or at least many of the states have adopted the practice under scrutiny. A critical mass of states following a contrary practice obviously would destroy or at least diminish uniformity.

63. Dormancy means that the practice has gone (largely) unchallenged.

64. Of course, this is not the first (or last) objection to the Court's methodology in studying and using history. *See, e.g.*, Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 526 (1995) ("[H]abits of poorly supported generalization—which at times fall below even the standards of undergraduate history writing—pervade the work of many of the most rigorous theorists when they invoke the past to talk about the Constitution."); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809, 826, 883–84 (1997) ("[T]he Court continues to . . . ask questions of the past that the past cannot answer."); Lucian E. Dervan, Comment, *Selective Conceptions of Federalism: The Selective Use of History in the Supreme Court's States' Rights Opinions*, 50 EMORY L.J. 1295, 1321–28 (2001) (outlining the Court's reliance on selective history). Historian Alfred Kelly provided the prime critique. *See* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 157 (calling the "present use of history by the Court . . . a Marxist-type perversion of the relation between truth and utility"); *see also id.* at 122 (defining the Court's "'law-office' history" as "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered").

65. *Carrigan*, 131 S. Ct. at 2348 ("[E]arly congressional enactments 'provid[e] contemporaneous and weighty evidence of the Constitution's meaning.'" (alterations in original) (quoting Printz v. United States, 521 U.S. 898, 905 (1997))).

66. *Id.* (emphasis added).

Although the Court's conclusion is a strong win for recusal, it is nevertheless concerning for the future—in part because the Court appears to follow few rules to ensure rigor in its measurements. Interestingly, for example, this "dispositive" evidence included a fifteen-year gap from the nation's founding to the adoption of the Senate recusal rules.[67] The Court correctly noted that the House adopted a recusal rule in 1789.[68] In its next breath, however, the Court passingly noted that the "first Senate rules did not include a recusal requirement," and when the subject was finally addressed fifteen years later, the resulting recusal rule was not adopted by the full Senate, but only by its President (who, granted, was Thomas Jefferson).[69] The Court immediately likened this "dispositive" history to that of federal judicial recusal laws (and later, state judicial recusal laws).[70]

Interestingly again, although the Court began with federal judicial recusal evidence from 1792, it then cited evidence from 1821 and even 1911.[71] Surely, the Court cannot mean that congressional acts in 1911 are also "contemporaneous and weighty evidence of the Constitution's [original] meaning;"[72] it must instead mean that a centennial of practice is old and therefore wise. For Justice Scalia in particular, a hundred-years-old practice is more than old enough.[73] Similarly, for

67. *Id.*

68. *Id.* ("No member shall vote on any question, in the event of which he is immediately and particularly interested." (quoting 1 ANNALS OF CONG. 99 (1789) (Joseph Gales ed., 1834))).

69. *Id.*

70. *Id.* at 2348–49.

71. *Id.* It is important to note that, although these recusal citations were amendments to what generally is the same recusal statute (currently, 28 U.S.C. § 455), each amendment significantly broadened the statute's scope by adding new bases for judicial disqualification, as the Court acknowledged. *Id.* Thus, we are not dealing with merely technical changes to a statute that has remained substantively the same throughout the country's history.

72. *Id.*

73. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 375–77 (1995) (Scalia, J., dissenting) (finding eighty-year ban persuasive of constitutional meaning). But older is even better. *See* Doe v. Reed, 130 S. Ct. 2811, 2832–34, 2836 (2010) (Scalia, J., concurring) (referring to the tests for acceptance as (1) "a long history of practice," (2) "regulation that had been widely used by the States since the end of the 19th Century," (3) "governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage," or (4) "longstanding and unquestioned," but concluding that a practice first instituted in the states "in 1888, and almost 90

the historical evidence of state judicial recusal laws, the Court cited laws from three, far-from-tightly-grouped years: 1797, 1818, and 1878.[74]

This lack of rigor in establishing relevant years, temporal distances, or requisite longevity presents aggravated problems for the future of judicial ethics regulation of elective judiciaries. Judicial elections were virtually nonexistent at the time of the founding; they bebegan to appear in the first quarter of the 1800s, with significant growth in the mid-1800s.[75] Because the Court has applied a lack of rigor in analyzing the relevant dates or date-ranges, we have little idea what this complex history will mean for related judicial ethics regulation.

Even if the Court would articulate a time window of relevance (which it has to date failed to do), an additional concern is the broad *and* narrow framing of the practices under scrutiny. In *Carrigan*, the Court went with broad framing, that is, lumping all recusal laws together and then checking whether recusal laws were on the books near the founding (and fortunately some were).[76] The question is whether future cases will frame the question more narrowly by, for

percent of the States had followed . . . by 1896" was nevertheless insufficient in light of earlier, contrary practice at the founding and the fact that apparently no one had explicitly raised First Amendment concerns with the earlier practice); *cf.* Texas v. Johnson, 491 U.S. 397, 399, 428 (1989) (striking down an anti-flag-burning law on First Amendment grounds; although forty-eight states prohibited such conduct, they had done so only since approximately 1917).

74. *Carrigan*, 131 S. Ct. at 2349 n.4; *see generally* John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 612–26 (1947) (citing several state examples from the mid to late 1800s). To be sure, the Court also drew example from a 1878 state case, City of Macon v. Huff, 60 Ga. 221 (1878). That case does not involve legislative or judicial recusal but rather a mildly analogous situation in which the mayor had entered into a personal contract with the city council. *Huff*, 60 Ga. at 223–24. The case does cite, however, a state judicial recusal statute from 1801 prohibiting judicial officers from sitting in cases in which they were "pecuniarily interested," former counsel, or related to a party, an 1850 statute prohibiting sheriffs and similar officers from purchasing at sheriff's sales, and an 1872 statute (later declared unconstitutional on other grounds) prohibiting municipal officers for contracting with the corporation for treasury payments. *Id.* at 225–28.

75. *See* Republican Party of Minn. v. White, 536 U.S. 765, 785–86 (2002) (describing the history of judicial elections); Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1093–1115 (2010) (chronicling the move to judicial elections from 1846 to 1851).

76. Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2348–49, 2349 n.4 (2011).

example, asking whether a *particular type* of recusal law is the right amount of "old." Narrowly framing the question would not be novel; *White* followed it.[77] Indeed, the Court even has a name for this (or something like this) approach—the most "specific level" of abstraction.[78]

Turning to the third factor, and moving a bit away from the old, the Court also asks whether the practice was uniform. But uniformity necessarily means that it was popular with the controlling majorities in most or all states.[79] Bowing to majorities' preferences, however, is deeply adverse to the judiciary's purpose.[80] Furthermore, the Court gives no test for discerning the requisite amount of uniformity. It is

77. *White*, 536 U.S. at 785 (analyzing the relatively narrow "practice of prohibiting speech by judicial candidates on disputed issues" and finding that practice "neither long nor universal"). Judicial ethics, of course, regulates judges' speech in many other ways, both on and off the campaign trail; the *White* Court discussed none of them.

78. *See* Michael H. v. Gerald D., 491 U.S. 110, 127–28 n.6 (1989) ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."). Not all justices wholly accept this formulation, however. *See id.* at 132 (O'Connor, J., concurring) (refusing to join the footnote because "[o]n occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be the most specific level available" and wishing not to "foreclose the unanticipated by the prior imposition of a single mode of historical analysis") (citations omitted) (internal quotations marks omitted).

79. To be sure, the diversity of the states gives us some assurance that certain practices would not be uniform across the states. Similarly, if the Court required strict uniformity (perhaps unanimity) it would provide some assurance that controversial practices would fail this factor.

80. See, for example, *Raines v. Byrd*, in which the Court stated:

> `"The irreplaceable value of the power articulated by Mr. Chief Justice Marshall [in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803),] lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests."

521 U.S. 811, 828–29 (1997) (quoting United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring)); *see also* THE FEDERALIST NO. 78 (Alexander Hamilton) (noting the need for judicial independence to protect the minority against majority overreaching).

entirely unanswered whether that amount means all states, all states having legislated on the practice, a super-majority of states, or a majority of states, as examples. Indeed, what little is in the *Carrigan* and other opinions suggests that a "uniform" practice might even consist of something less than a majority of states.[81]

With respect to the fourth factor, finally, the Court tells us that dormancy is good; in other words, if no one has raised a "serious challenge" for (some unknown number of) years, the practice is constitutional and indeed a candidate for fundamental liberty. In *Carrigan*, just for example, the Court observed that "there do not appear to have been any serious challenges to judicial recusal statutes as having unconstitutionally restricted judges' First Amendment rights."[82] Even ignoring the Court's surprisingly sloppy use of nineteenth century state practices (before the First Amendment was even incorporated against the states) to prove First Amendment consistency,[83] this factor suggests another serious caution. The Court did not grapple with the meaning of either "serious" or "challenges."[84] Nor did it grapple with

81. *See Carrigan*, 131 S. Ct. at 2349 & n.4 (citing "a number of states" for two propositions: (1) "States, by common-law rule, have long required recusal of public officials with a conflict;" and (2) "States enacted early judicial recusal laws as well"). For each proposition, the Court cites *only three* states as examples. *Id.* In another example, however, the Court observed that "90 percent" of the states prohibited a certain practice for nearly 100 years and reasoned that "this widespread and time-tested consensus" should guide its First Amendment analysis. Burson v. Freeman, 504 U.S. 191, 205–06 (1992).

82. *Carrigan*, 131 S. Ct. at 2349; *see also id.* at 2349 n.3 (distinguishing *White* because that case involved a candidate's campaign speech for judicial election).

83. *See* Gitlow v. New York, 268 U.S. 652 (1925) (incorporating First Amendment rights to apply to the states). I thank Michael O'Connor for noting the timing issue.

84. For example, whether one challenge would be sufficient; whether that challenge needs to raise the First Amendment (or whether another constitutional question would suffice); and whether the challenge needs to have been lodged in a judicial forum (as opposed to, say, Congress or a newspaper). Apparently in *Carrigan*, however, each of these questions would have been answered in the negative: "The Nevada Supreme Court and Carrigan have not cited a single decision invalidating a generally applicable conflict-of-interest recusal rule—and such rules have been commonplace for over 200 years." 131 S. Ct. at 2348. The Court, however, never clarified what it meant by a "generally applicable" recusal rule, and what, if any, non-"generally applicable" recusal rules it meant to distinguish.

more mundane questions, such as why seemingly irrelevant publication factors should impact constitutional interpretation.[85]

The Court thus provides no indication of the requisite timing, frequency, and venue of any "serious challenges" to the practice. This dormancy requirement—depending on what it actually endeavors to include—is again troubling for the judiciary. The politically and fiscally powerless (or underpowered) are less likely to have been in a position to challenge a practice.[86] When they finally have an opportunity to challenge it, they should not be turned away because they lacked power to bring several challenges in several places over several years.

In sum, each criterion is problematic for the judiciary to employ, and the primary criteria (age and tradition) are particularly degenerative for ethical decisions.

2. Superannuated Constitutional Theory: Older Is Older

The most striking characteristic of the four factors is not their methodological indeterminacy but their geriatric emphasis: the older, the better. This old-is-better bias, however, seems to be particularly problematic for ethical inquiries: the values of men in 1787 through

85. For example, whether a court's decision to publish an opinion should be consequential at all to the interpretation of a constitutional provision, and whether the decision of a private publisher, such as West, impacting if and when certain court orders and opinions are published should also be consequential to the interpretation of a constitutional provision. The upside, of course, is administrability: with the advent of electronic legal databases, the inquiry into published challenges is relatively easy and the result is relatively provable.

86. Justices Stevens and Breyer raised similar concerns about political powerlessness in *Raines*. Justice Stevens stated:

> The majority's reference to the absence of any similar suit in earlier disputes . . . does not strike me as particularly relevant. First, the fact that others did not choose to bring suit does not necessarily mean the Constitution would have precluded them from doing so. Second, because Congress did not authorize declaratory judgment actions until the federal Declaratory Judgment Act of 1934, the fact that President Johnson did not bring such an action in 1868 is not entirely surprising.

Raines v. Byrd, 521 U.S. 811, 838 n.3 (1997) (Stevens, J., dissenting) (citation omitted). Justice Breyer questioned reliance on "lawsuits that were *not* brought." *Id.* at 843 (Breyer, J., dissenting); *see also* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97–104 (1974) (discussing systemic distortion of legal rules by repeat, and often wealthy, players).

1791 are, at best, underrepresentative of our pluralist society and, at worst, patently offensive.[87] Similarly, values in the nineteenth and even early twentieth centuries are often underdeveloped by today's standards. Professional ethics codes, likewise, were in a primitive (and to a significant extent, nonexistent) state. Codified judicial ethics, in particular, had not yet even been born, and it would not be until significantly into the twentieth century before the ethics codes took firm root across the country.[88] Thus, our personal and professional ethics have evolved substantially in more recent times,[89] and it reverses our ethical development to take an overly geriatric approach to these questions.

The "dispositive" historical analysis provokes another concern. In *Carrigan*, unlike *White*, history was on recusal's side. That is, recusal rules have been on the books—and largely unchallenged—since (close to) the founding. The same could not be said of the judicial campaign speech rules in *White*.[90] Those particular rules were of relatively recent vintage, and the states had not uniformly adopted those rules in any event. "The practice of prohibiting speech by judicial

87. We stand for diversity both in values and in people in ways wholly unappreciated at the time of the Constitution and the Bill of Rights. *See, e.g.*, Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389, 394–402 (2005) (discussing the values of moral pluralism); *cf.* Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (referring to diversity as a compelling interest).

88. *See, e.g.*, Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics-I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469, 471–72, 479–80 (2001).

89. See, for example, *Lawrence v. Texas*, which stated:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

539 U.S. 558, 578–79 (2003); *see also* Atkins v. Virginia, 536 U.S. 304, 311–12 (2002) ("'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" (alteration in original) (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958))).

90. Indeed, the *Carrigan* Court's first substantive citation was to *White*—a belated and surprising ally to recusal law. Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2348 (2011).

candidates on disputed issues . . . is neither long nor universal," at least according to Justice Scalia and four other Justices.[91] It is, therefore, fundamentally unsettling to note that it was not until 1924 that the ABA produced the Canons of Judicial Ethics.[92]

The divergent results above, then, owe mostly to history, not merit. Good governance might well mean that judges should refrain from announcing their views on disputed legal or political issues, and perhaps because of this reason or another, recusal laws are unnecessary or even untoward. Perhaps, for example, recusal laws—by encouraging judges to run from, rather than deal professionally with, their biases—might fail to promote the type of inner strength that good judges should possess and exercise.[93] But such appeals to consequences or principles are largely irrelevant. Instead, we look primarily to whether the law is old—and the older the better.[94]

The *Carrigan* reasoning is indeed justified on public confidence grounds (that is, without recusal law and regulation, litigants and observers would not believe that a judge will maintain independence, impartiality, and integrity in a case involving a personal conflict),[95] due process grounds (that is, the judge's significant personal conflict

91. Republican Party of Minn. v. White, 536 U.S. 765, 766, 785 (2002). Again, Justice Scalia's meaning of "long" seems to vary. *See* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 S. CT. REV. 119, 156 (noting that judges' training and experience do not produce professional historians).

92. *See generally* JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS (4th ed. 2007) (providing background on judicial conduct statutes and rules); ROBERTS, C.J., *supra* note 13, at 1–2 (commenting on the call for and development of the ABA's first judicial ethics code). The Canons served as the blueprint for judicial ethics codes across the country. *Id.* at 2.

93. *See, e.g.*, Sarah M.R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1 (2007) (proposing a significant curtailment of recusals and a requirement that judges provide thorough explanations of their decisions to bolster their legitimacy).

94. Justice Alito's analysis was particularly striking on this point. From a realist perspective, his conclusion that the restriction on state legislators might at times limit their freedom of speech rang true, but he was completely comfortable with suppressing that speech because such restrictions were permissible "during the founding era." *Carrigan*, 131 S. Ct. at 2355 (Alito, J., concurring). Thus, although both the Court's opinion and Justice Alito's concurrence lead to the same result, Justice Alito's concurrence is notably frank in its sole criterion: history.

95. *See, e.g.*, *In re* Murchison, 349 U.S. 133, 136 (1955) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)) (noting that not only actual justice, but the "appearance of justice" must be satisfied).

effectively breaks the state's promise of due process before taking life, liberty, or property),[96] and other grounds (for example, counteracting cognitive biases in the administration of government).[97] It is important, however, to complain about this geriatric approach even when it accidentally leads to the right results. The Court's approach in *Carrigan* is arbitrary: Had history long permitted the types of conflicts exemplified by the case,[98] it would have been made matters worse, not better. This reasoning, moreover, is affirmatively against continuous improvement in the law generally.[99]

At least in ethics cases (and presumably in others), we seemingly should instead view the Constitution as setting forth a timeless set of general principles—such as "due process," "free speech," and "equal protection"—to be applied in today's cases, partly irrespective of his-

96. *See, e.g.*, *supra* Parts II, IV.

97. *See, e.g.*, Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification—And a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 REV. LITIG. 733, 740–49 (2011) (describing the effects of cognitive bias in judges).

98. In *Carrigan*, for example, the personal conflict involved the council member's three-time campaign manager, whose PR firm also gave Carrigan services at cost. According to the petition for writ of certiorari:

> Vasquez was Carrigan's campaign manager at the time of the Lazy 8 vote; Vasquez and his company had provided services to Carrigan's three campaigns at cost; Carrigan considered Vasquez's assistance 'instrumental' to Carrigan's three successful campaigns; and Carrigan, by his own admission, confided in Vasquez 'on matters where he would not confide in his own sibling.

Petition for Writ of Certiorari at 6, *Carrigan*, 131 S. Ct. 2343 (No. 10-568), 2010 WL 4278724, at *6. The campaign manager had worked on and stood to benefit further financially from the casino development, for which the council member favorably voted. *Carrigan*, 131 S. Ct. at 2347.

99. *See, e.g.*, Doe v. Reed, 130 S. Ct. 2811, 2826 (2010) (Alito, J., concurring) (using against the state the fact that it had operated in a certain way for years; suggesting that, if the state wanted to improve its laws nevertheless, it would have "to explain how circumstances have changed so dramatically in recent years" to justify the improvement); *see also id.* ("[T]he State fails to come to grips with the fact that public disclosure of referendum signatory information is a relatively recent practice in Washington. . . . For nearly a century, Washington's referendum process operated—and apparently operated successfully—without the public disclosure of signatory information. The State has failed to explain how circumstances have changed so dramatically in recent years that public disclosure is now required.").

torical fetish or anecdote.[100] At a minimum, these concerns suggest that, assuming contemporaneity can never be ignored or demoted in constitutional interpretation, the Court should give longevity (a.k.a. "tradition") much less weight.

B. Convalescence: Judges as Trustees

Although *Carrigan*'s historical reasoning rings problematic in both its methodology and its merit, *Carrigan*'s legacy might be elsewhere. That is, by taking a concept that had been applied primarily to legislators and applying it to judges, the Court may have sparked a new theory of recusal, or so I suggest. Answering why legislative (and by slight extension, judicial) voting is not protected expression and therefore fully subject to recusal law, the Court reminded us that legislators' (and judges') official acts are not their personal rights:

> The answer is that a legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it. As we said in *Raines v. Byrd*, 521 U.S. 811, 821 (1997), when denying Article III standing to legislators who claimed that their voting power had been diluted by a statute providing for a line-item veto, the legislator casts his vote "as trustee for his constituents, not as a prerogative of personal power." In

100. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 579 (2003) ("As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."); GEOFFREY R. STONE & WILLIAM P. MARSHALL, ISSUE BRIEF: THE FRAMERS' CONSTITUTION: TOWARD A THEORY OF PRINCIPLED CONSTITUTIONALISM (Am. Constitution Soc'y, 2011), http://www.acslaw.org/sites/default/files/Stone_Marshall_-_The_Framers_Constitution_Issue_Brief.pdf (arguing that the Constitution sets forth broad principles, to which judges must give life and substance in an ever-changing society); Erwin Chemerinsky, *supra* note 58, at 919 (observing that both tradition and the Supreme Court formerly banned women from practicing law and noting that "surely the historical approval of such discrimination does not justify the practice today," that "[s]ociety is constantly changing and its moral standards are perpetually evolving," and that "[t]he Constitution must reflect these changes and this cannot be accomplished through a method of interpretation that is primarily based on Blackstone, English common law, and nineteenth century precedents").

> this respect, voting by a legislator is different from voting by a citizen.[101]

The Court used only one clear criterion before applying the above analysis: whether voting "is a core legislative function."[102] With respect to judges, no one would dispute that judicial voting is indeed a "core [judicial] function." As with a legislator, moreover, a judge's vote should not be personal, and like a litigant, no one should be the judge "in his own cause."[103] Furthermore, a judge's personal interest in keeping a case ranges from illegitimate to insignificant,[104] and thus the weight of the individual judge's interest does not counterbalance the recusal scales. It seems, then, that judges' votes in a case are not their own (and are not protected by their First Amendment rights),[105]

101. *Carrigan*, 131 S. Ct. at 2350.

102. *Id.* at 2347 (quoting Carrigan v. Comm'n on Ethics, 236 P.3d 616, 621 (Nev. 2010)).

103. "'[N]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.'" Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2259 (2009) (quoting THE FEDERALIST NO. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961)). For recusal law, that is true in at least two ways: (1) various personal conflicts of interest often give the judge a personal (for example, financial) interest in the case; and (2) even without such a personal interest, the decision is still "personal" in that the judge is asked to judge her own actions and propensities (and their appearances).

104. Indeed, the only detriment might be an illegitimate one: requiring recusal might remove the judge from a case in which the judge could make a name for herself. *See* CANONS OF JUDICIAL ETHICS Canon 34 (1924), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/1924_canons.authcheckdam.pdf (stating that a judge should not "administer the office for the purpose of advancing his personal ambitions or increasing his popularity"); *see also* Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 814–15 (2009) [hereinafter Stempel, *Duty to Sit*] (arguing that judges do not have a "duty to sit" in cases presenting valid grounds for recusal). Although there is no tangible detriment to the judge who denies a disqualification motion and then is reversed, it is worth noting that judges do not like to be reversed. Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129, 130 (1980) ("For reasons not completely understood, judges seem to desire to avoid being reversed.").

105. *See Carrigan*, 131 S. Ct. at 2349 & n.3 (suggesting that judicial recusal statutes do not violate the First Amendment and distinguishing *White* because it dealt with campaign-trail conduct, not acts or omissions in office). Indeed, after *Carrigan*, it may well take the recusal equivalent of *White* (that is, a case involving a judge's failure to recuse, or disqualification, for merely "announcing" a view on a "disputed legal or political issue") before the

and that this fundamental point should guide the law and procedure of judicial recusal to the extent possible.[106]

But whose votes are they? The opinion identifies two potential owners: (1) "the people;" and (2) the "constituents."[107] These potential owners, however, do not seem well-suited to own judges' votes. Judges swear to uphold the law, including the Constitution and the rule of law generally. To the extent that the law is equivalent to "the people" in our constitutional republic, perhaps "the people" will suffice, if not a perfect match. To the extent that "the people" means the voters or "constituents," we need to find new ownership.

Because each litigant has a due process right to an impartial judge, and because a lasting beauty of the judiciary is its role in protecting minorities,[108] the majority (and what is popular with the majority), or a random assortment of outspoken "constituents," seem unfit to own the votes.[109] The Codes of Judicial Conduct have long offered a better understanding: The judge should administer her office as a "public trust."[110] As a trustee, the judge does not own the

First Amendment becomes a formidable question. *See* Republican Party of Minn. v. White, 536 U.S. 765, 784 n.12 & 785 (2002) (striking down a Minnesota rule of judicial ethics barring judicial candidates from announcing their views on "disputed legal or political issues" because the rule failed to survive First Amendment strict scrutiny analysis); *see also supra* Part I.

106. This key point that the First Amendment does not limit the regulation of "legislative action"—and according to this Essay, judicial action—was also made in *Reed*. Doe v. Reed, 130 S. Ct. 2811, 2833 n.3 (2010) (Scalia, J., concurring) (distinguishing the first case in this trilogy, *White*, because it involved a prohibition against speaking on the campaign trail).

107. Somewhat analogously, Professor Sarah Cravens identified the common law as "(metaphorically) the property of the public," and the public has in turn "entrusted the care and maintenance of the corpus of the common law to the judiciary." Sarah M.R. Cravens, *Judges as Trustees: A Duty to Account and an Opportunity for Virtue*, 62 WASH. & LEE L. REV. 1637, 1639 (2005). "As trustees of the law," she argued further, "judges have an obligation to uphold and maintain the corpus in individual cases in accordance with the underlying aims of the corpus." *Id.* at 1639–40.

108. *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 828–29 (1997) (noting that the value of judicial review stems from the protection it affords to individuals and minority groups); *see also supra* note 80.

109. If, again, we can safely substitute "the people" for the law, or arguably even justice, this new conceptualization might lead to a better understanding of recusal law.

110. MODEL CODE OF JUDICIAL CONDUCT Pmbl. (2004) ("Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor

corpus.[111] Without even identifying the precise owner of judicial votes—whether past, present, or future litigants, the political subdivision, the people, or justice—we can determine that *judges* neither own their votes nor have rights to cast conflicted votes.[112]

For whatever reason, many judges are lax in recusing themselves, and many other judges are lax in later disqualifying those judges who failed to recuse themselves.[113] Perhaps explaining ownership—and emphasizing that judges clearly do not own votes—might resonate better with judges, and the concept takes one more step toward mak-

the judicial office *as a public trust* and strive to enhance and maintain confidence in our legal system.") (emphasis added); MODEL CODE OF JUDICIAL CONDUCT Pmbl. (2007) (substantially the same); *cf.* James J. Sample, *Lawyer, Candidate, Beneficiary, AND Judge? Role Differentiation in Elected Judiciaries*, 51 JUDGES' J. 30, 33–34 (2012) (referring astutely to judges as "fiduciaries of the rule of law").

111. Of course, trustees are indeed authorized to make decisions affecting the corpus, but that bare fact misses the conceptual point (and ignores conflicts rules). Trustees' personal interests, moreover, are not a legitimate factor in those decisions.

112. *Cf.* Menachem Mautner, *Moral And Legal Luck: Luck in the Courts*, 9 THEORETICAL INQUIRIES L. 217, 231 (2008) (noting that "the duty incumbent on judges to abide by the norm of impartiality might be viewed as an expression of the approach that sees the judge as a trustee of the litigating parties"). Judges, under this conception, must not be distracted from this trusteeship by other influences, including "personal" ones. *Id.* Arguably, then, their personal interests would include (among others) (1) their interest in assessing their own impartiality, or the appearance of it, and (2) any personal interest in keeping the case, despite a pending motion to disqualify or ground for recusal. Judges whose impartiality is in question are not the proper judges to decide that question.

113. *See, e.g.*, Keith Swisher, *Pro-Prosecution Judges, supra* note 31, at 370–72 (discussing some of the various studies and reasons showing that judges are not accurate judges of their own disqualification questions). In addition to the studies and reasons listed in the previously cited work, one vivid example can be found in *United States v. Holland*, holding that the trial judge permissibly presided over the sentencing of a defendant who had called the judge's home and threatened him. 519 F.3d 909, 916 (9th Cir. 2008). The court was apparently worried about judge shopping through defendants' hollow threats. *Id.* at 915. Yet the court missed several points: (1) that the judge would likely be at least angry that the defendant called the judge's house making improper remarks (even if the judge was not scared about threats); (2) that each time a defendant threatens a public official, he commits a serious felony, the fear of which would deter most defendants from making hollow threats merely to judge shop; and (3) the defendant had not previously threatened this or another federal judge (and thus disqualifying the trial judge would not necessarily lead to more threats and more disqualifications).

ing the matter less personal to them.[114] Moreover, although recusal law has historically been plagued (and mocked) because the same judge whose impartiality is being questioned also decides whether her impartiality could be questioned, this new conception might beckon an end to this legal joke. Under the conception, as a non-owner, the affected judge simply does not have standing to challenge a disqualification motion.[115] This cleansing perhaps could even be extended to other instances in which *individual* judges are named in and potentially defend actions in their "official" capacity;[116] this often erroneous conflation of the individual and the official should stop. Similarly, in drafting and enforcing recusal law, drafters and regulators might be better guided and energized now that they have a clearer picture of the rightful "owner"—or at least the "non-owner."

Finally, this clarified conception exposes the lurking error in Kennedy's concurrence, which implied strong "associational rights" for elective officials to bond with campaign supporters and rule on

114. Indeed, one of the advantages of an appearance-based disqualification standard is that it does not require the judge, or the judges' colleagues, to declare that the judge is actually biased—something that they would be reluctant to do—only that the circumstances create an untoward appearance.

115. Judges have no individual stake in—and suffer no cognizable harm from the loss of—their votes. *Cf., e.g.*, Raines v. Byrd, 521 U.S. 811, 829 (1997) (concluding the same for legislators' votes); Stempel, *Duty to Sit*, *supra* note 104, at 814–15 (concluding that judges have no duty to sit). Any "claim of standing is based on a loss of political power, not loss of any private right." *Raines*, 521 U.S. at 821. "The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power." *Id.* Thus, judges individually bring with them no interest to counterbalance the movant's interest in disqualification. The focus then should shift to any interest they hold in their trustee capacity (for example, the fair administration of justice). In light of their personally questioned impartiality, however, these judges are not the best trustees to identify and effectuate the trust's best interests; other judges should instead decide whether disqualification is appropriate.

116. *See, e.g.*, Gowan v. Keller, No. 11-50874, at 3 (5th Cir. filed May 30, 2012), http://www.ca5.uscourts.gov/opinions%5Cunpub%5C11/11-50874.0.wpd.pdf (construing a complaint against Texas Court of Criminal Appeals Justice Sharon Keller as a mandamus action); Derendal v. Griffith, 104 P.3d 147, 149 (Ariz. 2005) (appealing Phoenix Municipal Judge Griffith's ruling); Costa v. Mackey, 261 P.3d 449, 455 (Ariz. Ct. App. 2011) (defending the trial judge's decision, including a decision refusing to disqualify the previous trial judge).

"common cause[s]."[117] Our public officials (or a minimum the subset of judges) may well have personal "associational" rights, but they should have no right to import those "associational rights" into the duties of public office. The public office stands pure in its public purpose—from which no judge's personal needs or wants should detract. Indeed, a judge whose "associational rights" might affect the proceeding in any significant way should not attempt to remain in the case; to the contrary, the judge should step aside so that another judge without individual baggage can better discharge the public purpose. A judge who instead rationalizes or appeals to stay in the case necessarily seeks to commingle the public purpose with personal purpose.

In sum, the conceptual shift is incremental, and it will not answer all questions. But it is fundamental: Judges administering the public office as trustees have no recognized personal interest—and no standing to attempt to assert personal interest.

V. CODA

The *Carrigan* and *Caperton* Courts wisely (if somewhat inadvertently) closed the opening in *White*, which had constitutionally jeopardized and practically deterred recusal law.[118] After nearly a decade of living in significant fear and under considerable uncertainty, judicial ethics regulators in the post-*Carrigan* world should finally be able

117. Justice Kennedy was worried about the "burdens [that recusal laws might] impose on the First Amendment speech rights of legislators and constituents apart from an asserted right to engage in the act of casting a vote." *Carrigan*, 131 S. Ct. at 2352 (Kennedy, J., concurring). In particular, he thought even close friendships and other associations, including campaign supporters, should not necessarily disqualify legislators from their "common cause[s] now at stake." *Id.* at 2353. To be sure, Kennedy himself arguably excluded judges from this analysis. *See id.* (noting that the role of legislative bodies might not apply to "principles of judicial impartiality" and the "role of courts in adjudicating individual disputes"). But to speak generally about First Amendment rights of judges "apart from" their vote is a faulty premise. Judges—as members of the judiciary—should have no such rights. On the campaign trail and off the bench, for instance, individual candidates and incumbents have measured First Amendment rights. *See supra* Part I and accompanying notes. *Carrigan*, however, helped to show that the First Amendment no longer applies on the bench. *See supra* Part III. Of course, judicial speech necessary to carry out the public office cannot and should not be silenced, but that has nothing to do with the underlying personal rights of the individual judge.

118. *See supra* Parts I–III.

to enforce recusal rules to their intended extent. To be sure, a few dangerous First Amendment openings still exist, including whether (and if so, which particular) recusal rules violate the associational rights of elective judges.[119] Moreover, the Court's use of history is dangerous in general and doubly dangerous for ethics in particular.[120] Although history can contain useful observations for both judicial and moral interpretations, the Court has created a constitutional "stop loss" policy by which outdated practices are continually forced to maintain active duty; notwithstanding the drastically changed circumstances, these tired practices now constitute and constrain our constitutional order.[121]

But *Carrigan* and *Caperton* have also created other promising new openings—including the conceptual act of removing voting power from the list of judges' personal rights—which present possibilities to reconcile, unify, and grow recusal law.[122]

119. *See* Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2353–54 (2011) (Kennedy, J., concurring) (implying strong associational rights for elective officials to bond with campaign supporters and rule on "common cause[s]"). The Court also did not address the vagueness or overbreadth challenges, but presumably between the strongly supportive language of the Court's opinion and Justice Kennedy's distinction between the judicial and legislative contexts, there is little to fear. *See id.* at 2353 (distinguishing between judicial and legislative situations).

120. *See supra* Part IV.A.

121. *See supra* Part IV.A.

122. *See supra* Part IV.B.