COMMENT

STEP ONE TO RECUSAL REFORM: FIND AN ALTERNATIVE TO THE RULE OF NECESSITY

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We decree by this general law that no one shall act as judge in his own case, or interpret the law for himself, as it would be very unjust to give anyone the right to render a decision in an affair which is his own.

—THE CODE OF JUSTINIAN 3.5.1 (Valens, et al. 378)

The rule of necessity allows a judge to hear a case despite the judge's conflict of interest if the judge's disqualification would deny a forum for the case. For example, if every justice on a state supreme court has a conflict of interest, the court can still hear the case. At the turn of the twentieth century, the rule of necessity rarely appeared in case law. However, in recent decades its use appears to have spiked. Today, forty-two states endorse the rule of necessity either in a rule of their judicial code of conduct or a comment to a rule or in an internal operating procedure. Few scholars, and more importantly few states, have considered alternatives to the rule of necessity.

This Comment argues for an alternative. Specifically, it argues states should have standing panels made up of professors and lawyers who are nominated by a chief justice and confirmed for set terms by a supermajority of a court. For brevity, this Comment focuses on Wisconsin. It proposes an amendment to the Wisconsin Constitution to implement this panel system. However, other states could apply its suggestions.

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In the interest of disclosure, the author notes that he will be clerking for Wisconsin Supreme Court Chief Justice Patience Drake Roggensack following graduation from law school.

INTRODUCTION

How can most or even all judges in a jurisdiction have a conflict of interest in the same case? First, plaintiffs, disgruntled with the legal system, can sue all, or nearly all, judges in a jurisdiction.[1] Second, cases about judicial salaries or pensions can raise conflicts of interest for all judges and even retired judges within a jurisdiction.[2] Third, state supreme courts are occasionally asked to get involved in the discipline of a member of their court.[3] In one recent case, most justices of the

1. *See, e.g.*, *Ignacio v. Judges of the U.S. Court of Appeals for the Ninth Circuit*, 453 F.3d 1160, 1162 (9th Cir. 2006) ("Pro se appellant, Tevis R. Ignacio, appeals the district court's dismissal of his complaint alleging that all judges from the Ninth Circuit, other federal and state judges, public officials, and certain private individuals, conspired to dismiss Ignacio's previous lawsuits."); *Pilla v. Am. Bar Ass'n*, 542 F.2d 56, 57 (8th Cir. 1976) ("The complaint in this case named as defendants The American Bar Association, the Chief Justice of the United States and four of the eight Associate Justices of the Supreme Court of the United States, all of the circuit judges, including senior circuit judges of this circuit, practically all of the district judges of this circuit, members of the Supreme Court of Minnesota and other defendants too numerous to mention.").

2. *See infra* Section I.B.

3. Roger J. Miner, *Judicial Ethics in the Twenty-First Century: Tracing the Trends*, 32 HOFSTRA L. REV. 1118 & n.55 (2004). For example, in 2003:

Wisconsin Supreme Court saw one justice physically assault another justice, making them witnesses and thus creating a conflict of interest for them.[4] Fourth, judges sometimes sue other judges. Before the turn of the new millennium, judges rarely (if ever) sued other judges for performing their official duties.[5] However, state judges have sued other state judges three times in just over the past decade.[6] All have been litigated in federal court.[7] If instead these cases had been brought in state court, many judges would have had a conflict of interest: they would have been named parties or close associates of a named party.[8] These examples are just a few fact patterns that can give rise to many or all judges within a jurisdiction having a conflict of interest in the same case.

This Comment argues states should have procedures to mitigate the effect of many or all judges on their high court having a conflict of interest in the same dispute. It proposes modest changes in Wisconsin law that will give the state a model system for resolving these disputes—using a panel of appointed professors and lawyers. Significantly, these panels provide an alternative to the controversial "rule of necessity," which states if every justice has a conflict, none have a conflict.[9] (Or, more accurately stated, if a state supreme court

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> the entire bench of a state supreme court recused and was replaced by judges from the state's court of appeals in connection with a petition by a member of the state supreme court. The petition apparently was filed by the member to secure a writ of prohibition to prevent a court of appeals judge from pursuing a judicial ethics complaint against her for, of all things, misrepresentation made in campaign literature.

Id. at 1118; *see also id.* at 1118 n.55 (discussing *In re Sanders*, 955 P.2d 369 (Wash. 1998)).

4. Barbara S. Gillers et al., *A View from the Bench*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 549, 575 (2015) (remarks of Louis Butler) ("[T]here is no question that six of the seven justices were either participants or witnesses to the altercation. Six of seven. . . . One of the justices was not privy to that particular action . . . ."); *see infra* Section II.A.

5. When a justice sued other sitting justices in *Abrahamson v. Neitzel*, the court only cited one similar case, *Opala v. Watt*. *Abrahamson v. Neitzel*, 120 F. Supp. 3d 905, 919 (W.D. Wis. 2015) (citing *Opala v. Watt*, 454 F.3d 1154 (10th Cir. 2006)). Notably, *Opala* cited no similar cases. *See generally Opala*, 454 F.3d 1154. Both cases occurred after the turn of the century.

6. *See, e.g.*, *Opala*, 454 F.3d 1154; *Abrahamson*, 120 F. Supp. 3d 905; Tal Kopan, *Judge Sues State Supreme Court over Right to Hear Death Penalty Cases*, CNN (Oct. 6, 2017), http://www.cnn.com/2017/10/06/politics/judge-suit-death-penalty-arkansas-wendell-griffen/index.html [https://perma.cc/99VP-EH9Z].

7. *See supra* note 6.

8. *E.g.*, WIS. STAT. § 757.19 (2017–18).

9. *E.g.*, *Pilla*, 542 F.2d 56, 79 (8th Cir. 1976) ("[W]here all are disqualified, none are disqualified.").

lacks a quorum because too many members have conflicts of interest, a member with a conflict does not need to recuse him or herself.)[10]

This Comment relies heavily on Wisconsin case law regarding the rule of necessity. When every justice has had a conflict in the past (and the judges of the Wisconsin Court of Appeals have also had a conflict), the court has sometimes taken advantage of a provision of the Wisconsin Constitution that allows the chief justice to appoint a panel of judges to resolve the dispute.[11] This Comment argues using a modified version of the panel system already in place is the best solution for cases where the rule of necessity may apply. Specifically, it argues states should have standing panels, with members nominated and confirmed for set terms by a supermajority of the court, to resolve disputes where many or every justice has a conflict. This system preserves the supremacy[12] of state supreme courts because the justices choose the members of the panel but recognizes justices sometimes have conflicts of interest. This Comment also argues using a standing panel increases the legitimacy of court proceedings and minimizes due process issues—unlike the rule of necessity.

While this Comment argues for a system specifically designed to deal with the rule of necessity, it has broader implications. "In February of 2011, 138 highly distinguished law professors signed a letter to the House and Senate Judiciary Committees outlining the need for new recusal legislation to 'protect the integrity of the [U.S.] Supreme Court.'"[13] Justices have testified before Congress on the ethics of recusal.[14] The question of "who decides" a case is "highly . . . controversial."[15] Implementing panels at the state level may curtail the

10. However, during oral arguments at the U.S. Supreme Court in *United States v. Will*, Justice Potter Stewart inquired into whether the rule of necessity applies merely when the Court lacks a quorum as opposed to literally all justices having a conflict. Oral Argument at 46:14–46:19, *United States v. Will*, 449 U.S. 200 (1980) (No. 79-983), https://www.oyez.org/cases/1980/79-983 [https://perma.cc/CX9M-G2E7]. His inquiry was in response to the rhetorical manner in which counsel phrased the rule: "[I]f every judge is disqualified, then nobody is disqualified." *Id.* at 46:02–46:04.

11. *Moran v. Wis. Dep't of Admin.*, 603 N.W.2d 234, 235 n.1 (Wis. Ct. App. 1999).

12. Supremacy refers to the idea that state supreme courts should be involved in developing the law. *See infra* Section I.B.

13. Louis J. Virelli III, *The (Un)constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181, 1183.

14. *Id.*

15. *Id.* at 1181–82. In fact, recusal rules became an issue in Wisconsin's recent supreme court election cycle. WISN 12 NEWS, *Milwaukee Judge Runs for Supreme Court*, YOUTUBE, at 4:10–5:00 (Sept. 30, 2017) (videotaped interview of Wisconsin Supreme Court Candidate Judge Rebecca Dallet), https://www.youtube.com/watch?v=gD7PKNHIpJ8. In 2017, the Wisconsin Supreme Court issued a particularly controversial decision that judges and justices may hear

controversy. At a minimum, state experimentation with panels may help the American legal system discover a better way of handling recusals. The rule of necessity is arguably the most extreme, and therefore controversial, recusal rule because not just one, but all, justices may have a conflict. Fixing this extreme rule is a logical first step toward recusal reform. Moreover, the rule of necessity has crept into case law with disturbingly increasing frequency. Figure 1 shows the number of times the rule of necessity has been discussed in state court opinions by year since 1904.[16] It demonstrates that the use of the rule of necessity is becoming more prevalent—or at least more visible.[17]

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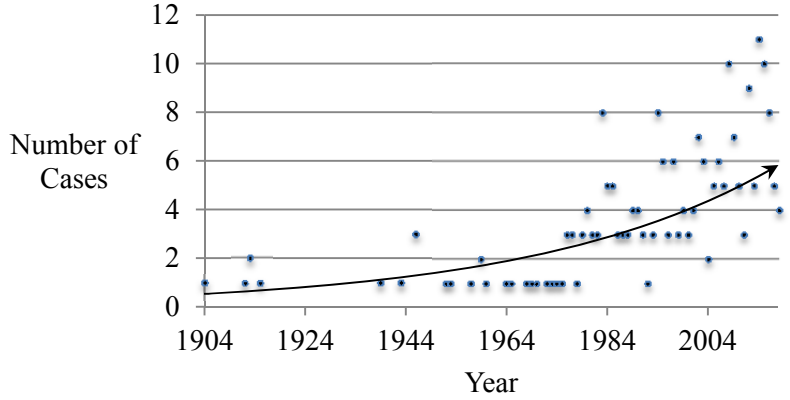
cases where one party donated money to their campaign. *See* Patrick Marley, *Wisconsin Supreme Court Rejects Recusal Changes When Campaign Donors Are Litigants*, MILWAUKEE J. SENTINEL (Apr. 20, 2017), https://www.jsonline.com/story/news/politics/2017/04/20/wisconsin-supreme-court-weighs-recusal-rules-when-campaign-donors-litigants/100644698/ [https://perma.cc/KSL2-ZQVQ].

16. Cases involving the rule of necessity arise more frequently than one might expect. Mark S. Hurwitz, *Judges and the Rule of Necessity:* Ignacio *and the Ninth Circuit's Judges*, 28 JUST. SYS. J. 241, 243 (2007). The author obtained the data for Figure 1 by running a search on Lexis for " 'rule of necessity' w/25 (recu! or disqual!)." The author limited the search to states and territories. He then narrowed the results by the following subject matter: "Civil Procedure or Constitutional Law or Governments or Legal Ethics." Narrowing by these subject matters helped eliminate criminal cases where defendants raised necessity defenses. It also helped eliminate cases primarily about administrative law. In total, the author found 238 cases. However, some of these cases primarily dealt with the rule of necessity for various boards. For example, a medical examination review board might have rule of necessity dilemmas. Further narrowing by the search terms "judge or justice," reduced the total number of cases to 232. The author ran the search on November 8, 2018. Further research should be done to determine the cause of the rise in rule of necessity cases. The results of the search are on file with the *Wisconsin Law Review*.

17. The equation for the trendline in Figure 1 is $N = 2(10^{-18})e^{0.021y}$, where N is the number of cases and y is the year. Based on statistics from the National Center for State Courts, the approximate rise in decided cases at state courts of last resort, per year, is 2.19 percent. CSP: CT. STATISTICS PROJECT (last visited Mar. 21, 2019), http://popup.ncsc.org/CSP/CSP_Intro.aspx (directions: proceed to "Appellate Court Overview," proceed to search 2016 by manner of disposition, then average, perform the same step for 2012, minus the averages, and observe the change over time). The spike in data in Figure 1 appears to start shortly after 1964. Around 1964, rule of necessity cases appeared, approximately, once a year. At a rate of increase of 2.19 percent per year beginning in 1964 (using a compound interest formula), the expected number of rule of necessity cases should be 3.22 per year in 2018. Yet, the trendline puts the expected number of cases at approximately 5.08. Thus, rule of necessity cases are increasing at an apparently higher rate than the number of cases decided by state courts of last appeal in general. The author did not verify that every case included in this search is on point. Thus, the actual numbers may vary slightly.

Figure 1: Cases Discussing the Rule of Necessity by Year



This Comment proceeds in five parts. Part I explains judicial disqualification and the rule of necessity. Part II highlights why the rule of necessity is controversial. Part III provides background on panels. Part IV begins by summarizing Wisconsin's current panel system. Next, Part IV proposes several amendments to the current panel system, such as changing how the panel is selected. Part IV argues this panel system would minimize due process issues and increase legitimacy. Part V proposes the language for an amendment to the Wisconsin Constitution. This Comment then concludes by calling for Wisconsin to set an example and serve as a model for other states.

I. BACKGROUND ON JUDICIAL DISQUALIFICATION AND THE RULE OF NECESSITY

This Part begins by outlining judicial disqualification rules. Next, this Part explains the rule of necessity, which is an exception to standard recusal rules. This Part ends by summarizing the arguments in favor of the rule of necessity and providing an example of its use.

A. When Must a Judge Recuse Him or Herself?

Under various legal authorities, a judge has to recuse[18] him or herself if the judge has an interest in the outcome of a case. The Due Process Clause may require judicial recusal under some

18. A judge could theoretically recuse him or herself when the law does not require the judge to. Under some circumstances, however, the law requires recusal. The difference between the terms "recusal," which may denote a voluntary act, and "disqualification," which denotes a required act, should not be confused. AM. BAR ASS'N, REPORT OF THE JUDICIAL DISQUALIFICATION PROJECT 1 n.1 (2009). Stating a judge must recuse him or herself is equivalent to saying the judge is disqualified.

circumstances,[19] but "most matters relating to judicial disqualification [do] not rise to a constitutional level."[20] The standard is whether "experience teaches that the probability of actual bias on the part of the judge . . . is too high."[21] Statutory schemes sometimes require judicial recusal. One Wisconsin statute states, "[a]ny judge shall disqualify himself or herself . . . [w]hen a judge is a party . . . except that a judge need not disqualify himself or herself if the judge determines that any pleading purporting to make him or her a party is false, sham or frivolous."[22] Wisconsin law further provides that a judge must recuse him or herself if the judge determines that "for any reason" he or she cannot be impartial.[23] Lastly, judicial rules of conduct laid down by state supreme courts can require judicial recusal. For example, in Wisconsin one rule states, "a judge must recuse himself or herself whenever the facts and circumstances . . . raise [a] reasonable question of the judge's ability to act with impartiality."[24]

B. An Exception to Standard Recusal Rule: The Common Law Rule of Necessity

The common law rule of necessity is an exception to these usual recusal rules. It states, "if a judge has a disqualifying personal interest in the outcome of the proceeding, and if his or her disqualification *would deny a forum for resolution of the dispute*, then there is a potential that the judge may not be disqualified by his or her personal interest."[25] In practice, this rule means if every justice has a conflict, none do.[26]

"Although the origin of the rule [of necessity] is unknown, it can be traced through English common law to at least the year 1430."[27] That year, the Chancellor of Oxford judged a case despite being a party because no law authorized the appointment of a different judge.[28] While

19. *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 880 (2009).

20. *Id.* at 876 (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948)).

21. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

22. WIS. STAT. § 757.19(2) (2017–18). The word "judge" includes supreme court justices. § 757.19(1).

23. § 757.19(2)(g).

24. WIS. SUP. CT. R. 60.04(4) cmt.

25. *Wis. Judicial Comm'n v. Prosser (In re Prosser)*, 813 N.W.2d 208, 212–13 (Wis. 2012) (Roggensack, J., recusal decision) (emphasis added).

26. *Pilla v. Am. Bar Ass'n*, 542 F.2d 56, 59 (8th Cir. 1976) ("[W]here all are disqualified, none are disqualified.").

27. Ira P. Robbins, *Justice by the Numbers: The Supreme Court and the Rule of Four—Or Is It Five?*, 36 SUFFOLK U. L. REV. 1, 26 (2002).

28. Thomas McKevitt, Note, *The Rule of Necessity: Is Judicial Disqualification Really Necessary?*, 24 HOFSTRA L. REV. 817, 829 (1996).

the rule has a predominantly common law history, in 1743, an Act of Parliament codified a limited version of the rule: "[J]ustices of the peace were not disqualified from deciding cases simply because they had a dual status as taxpayers."[29]

The historical justification for the rule of necessity was the "dearth of judges" and necessity of deciding cases.[30] "At the time of the [United States'] founding, finding a replacement judge was not a simple proposition. Counties were far apart, and many had only a single justice to hear disputes."[31] The number of judges in the United States increased in the decades following the American Revolution and, as a result, the need for the rule of necessity lessened.[32] At least one commentator has suggested the codification of federal recusal laws in 1792 and 1821 can be attributed to the increase in the number of judges.[33] Nevertheless, state high courts approved of the rule of necessity throughout the nineteenth century.[34] The U.S. Supreme Court implicitly endorsed the rule of necessity in 1920,[35] although the Court may have done so sooner.[36]

In modern times, the rule of necessity is rarely "necessary"[37] in lower courts because "[t]he ability to designate judges from one court to another virtually guarantees the availability of a suitable replacement for a recused judge."[38] However, in some situations, the rule of necessity still has a purpose at lower courts. A trial judge "might be the only judge available in a matter that requires immediate action."[39]

For example, a teenager might need to obtain a judicial bypass of a parental consent law in order to obtain an abortion. One commentator has argued if all judges in a rural and religious county decline to hear

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29. *Id.*

30. Jeffrey T. Fiut, Comment, *Recusal and Recompense: Amending New York Recusal Law in Light of the Judicial Pay Raise Controversy*, 57 BUFF. L. REV. 1597, 1602 (2009); *see also* Dmitry Bam, *Our Unconstitutional Recusal Procedure*, 84 MISS. L.J. 1135, 1184 (2015).

31. Bam, *supra* note 30, at 1184.

32. Fiut, *supra* note 30, at 1602.

33. *Id.*

34. McKevitt, *supra* note 28, at 830 & n.87.

35. *United States v. Will*, 449 U.S. 200, 215 (1980) (quoting *Evans v. Gore*, 253 U.S. 245, 247–48 (1920)).

36. The U.S. Supreme Court may have applied the rule of necessity without documenting it. *See infra* notes 128–130 and accompanying text.

37. Thomas McKevitt used similar wording for the title of his note, *The Rule of Necessity: Is Judicial Disqualification Really Necessary?*, *supra* note 28.

38. Virelli, *supra* note 13, at 1189.

39. JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 4.04 (5th ed. 2018). In such a case, the judge should make a good faith effort to transfer the case to a judge without a conflict, assuming one exists, and should disclose the conflict on the record. *Id.*

the teenager's petition, the teenager could force one judge to hear the case because of the rule of necessity.[40] While not an ideal strategy for the teenager, it is better than nothing.[41] The fact that the teenager could appeal to a higher court is no counterargument to applying the rule. First, the case requires a decision as soon as possible. Second, the appellate court might lack original jurisdiction. Third, the teenager has a constitutional right to a first appeal. If an appellate court has already heard the case, who will hear the "appeal"? In states without an intermediate appellate court, this issue creates a particularly serious dilemma. This dilemma will likely force the appellate court to use its supervisory jurisdiction to force the trial judge to hear the case. Rather than engage in a wasteful time suck of jurisdiction and procedure, the trial judge should simply decide the case. Thus, perhaps one argument in favor of the rule of necessity that often goes unmentioned is judicial efficiency.

Rule of necessity problems also roar their ugly head at intermediate appellate courts. In 2010, the Fifth Circuit declined to apply the rule of necessity, reasoning the plaintiff could petition for certiorari at the U.S. Supreme Court.[42] The *Harvard Law Review* appropriately criticized this argument in a "Recent Cases" note.[43] "The threat of replacing an appeal as a matter of right with the opportunity for a less-than-one-percent chance of plenary review by the Supreme Court seems to fall squarely within the ambit of the interests the rule of necessity is intended to protect."[44] While this Comment focuses on state high courts, perhaps, the panel system discussed *infra* could be modified and applied to state intermediate appellate courts.

At high courts, judges and commentators generally believe the situation is more serious than at lower courts.[45] These judges and commentators argue, without the rule of necessity a litigant might be denied a last appeal.[46] Additionally, state supreme courts are partly

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40. Lauren Treadwell, Note, *Informal Closing of the Bypass: Minors' Petitions to Bypass Parental Consent for Abortion in an Age of Increasing Judicial Recusals*, 58 HASTINGS L.J. 869, 885–87 (2007).

41. *Id.* at 887.

42. *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1054 (5th Cir. 2010) (en banc) (per curiam).

43. Recent Cases, *Civil Procedure—Quorum Requirements—Fifth Circuit Leaves Panel Decision Vacated upon Loss of En Banc Quorum*, 124 HARV. L. REV. 624 (2010).

44. *Id.* at 631.

45. *State v. Herrmann*, 867 N.W.2d 772, 804–05 (Wis. 2015) (Prosser, J., concurring); Virelli, *supra* note 13, at 1189 ("The unusual circumstances surrounding recusal at the Supreme Court are the most common justification for the Court's limited view of its own recusal requirements.").

46. *See, e.g.*, Virelli, *supra* note 13, at 1189 ("The most compelling difference is the lack of an available replacement in the event a Justice is removed from

responsible for developing the law, which they cannot do if they do not hear a case.[47] Wisconsin Supreme Court Justice David Prosser Jr. outlined this rationale for the rule of necessity in his concurring opinion in *State v. Herrmann*.[48] He explained that state supreme courts make decisions partly to develop the law[49] (as opposed to error-correcting intermediate courts of appeal).[50] To support his position, Justice Prosser cited the recusal rules for the Wisconsin Supreme Court, which state, "recusals affect the interests of non-litigants as well as non-contributors, inasmuch as supreme court decisions almost invariably have repercussions beyond the parties."[51] In an unpublished order in a different case, Justice Prosser expressed a similar concern:

> The results that flow from these recusals are troubling. . . . [B]y their recusals, four members of the court have deprived the other three members of the ability to exercise their constitutional responsibilities. In other words, four members of the court have not only deprived a litigant of the opportunity to be heard, but also deprived three justices of the opportunity to hear the litigant.[52]

This Comment refers to Justice Prosser's rationale—that supreme courts have a duty to develop the law, or at least be involved in the process—as supreme court supremacy.[53] To a lesser degree, supremacy concerns

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a case. Common law courts applied the 'rule of necessity' as an exception in cases that otherwise required recusal.").

47. *Herrmann*, 867 N.W.2d at 804–05 (Prosser, J., concurring); *see State ex rel. Wis. Senate v. Thompson*, 424 N.W.2d 385, 387 (Wis. 1988) ("[I]t is this court's function to develop and clarify the law.").

48. 867 N.W.2d 772, 804–05 (Wis. 2015) (Prosser, J., concurring).

49. *Id.* at 804 (Prosser, J., concurring).

50. *See generally* Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49 (2010) (discussing the error-correcting function of appellate courts).

51. *Herrmann*, 867 N.W.2d at 804–05 (quoting WIS. SUP. CT. R. 60.04(7) cmt. (2015)).

52. *Wis. Judicial Comm'n v. Prosser*, 817 N.W.2d 830, 833 n.1 (Wis. 2012) (Crooks, J., concurring) (quoting *Debraska v. Quad Graphics, Inc.*, No. 2007AP2931, slip. op. (Wis. Dec. 15, 2009) (Prosser, J., concurring)).

53. Supremacy is different from the duty to sit. The duty to sit is grounded in a sort of comity among judges and judicial efficiency.

> There are at any juncture only a finite number of available judges. The recusal of one judge puts greater pressure on judges that are not disqualified, particularly in smaller districts with fewer judges. To a degree, the duty to sit, at least in its benign form, is in large part a duty not to unreasonably burden fellow judges by recusing in response to a weak argument for disqualification.

Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit Doctrine*, 57 BUFF. L. REV. 813, 820–21 (2009); *see also* Jeffrey W. Stempel,

apply at lower courts: Judges must decide the law because that is their role.

Supremacy concerns are present throughout the entire U.S. legal system. However, in states that elect judges, supremacy may be a particularly great concern because it bears directly on the right to vote. Wisconsin Supreme Court Justice Patience Roggensack (now chief justice) explained,

> [w]e elect judges in Wisconsin; therefore, judicial recusal rules have the potential to impact the effectiveness of citizens' votes cast for judges. Stated otherwise, when a judge is disqualified from participation, the votes of all who voted to elect that judge are cancelled for all issues presented by that case.[54]

Justice Roggensack made a supremacy-style argument: Judges are elected to decide the law and therefore judges must decide. Justice Ann Walsh Bradley, in a dissent responding to Justice Roggensack, claimed, "[j]udicial recusal is unrelated to casting a vote."[55] Justice Bradley is wrong. If a member of Congress claimed to have a conflict, and thus did not vote, his or her constituents would have a valid gripe: They were not represented. Of course, the need for an impartial decisionmaker, at some point, trumps the need for supremacy. However, supremacy cannot be forgotten completely when discussing recusal rules.

Supremacy helps explain the increased use of the rule of necessity in important cases. Often, "[U.S. Supreme Court] Justices who should recuse themselves fail to do so based on a 'rule of necessity'-like decision to ensure that an important area of the law receives a binding precedential decision."[56] In a 1973 article, then-Justice William H. Rehnquist implied the argument for applying the rule of necessity increases with the importance of the case:

> [I]f in theory one is entitled to a full appellate court, a theory which would seem to be true in most state courts of last resort, in the Supreme Court of the United States, and in the

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Rehnquist, Recusal, and Reform, 53 BROOK. L. REV. 589, 604 (1987) [hereinafter Stempel, *Rehnquist*]. Supremacy is about a duty to develop the law.

54. *In re Amendment of the Code of Judicial Conduct's Rules of Recusal*, 2010 WI 73, ¶ 11 (Roggensack, J., statement in support), https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=51874 [https://perma.cc/V2AV-ZYXE].

55. *Id.* ¶ 19 (A.W. Bradley, J., dissenting).

56. Adam H. Morse & Julian E. Yap, *A Panel-Based Supreme Court*, 37 OHIO N.U. L. REV. 23, 46 (2011).

> federal courts of appeals in *en banc* hearings, disqualification does not simply substitute one full court for another; instead, it removes one of the component parts of the court, and the litigants have their case decided by a partially truncated judicial tribunal.
>
> Where we deal with appellate courts which customarily sit *en banc*, it seems to me scarcely debatable that decisions of important questions of statutory or constitutional law by less than a full court are, other things being equal, undesirable.[57]

The rule of necessity arises most commonly today in disputes over judicial salaries.[58] For example, in *United States v. Will*,[59] district court judges sued the United States after Congress repealed a cost-of-living increase.[60] The district court judges argued the repeal violated the Compensation Clause.[61] The trial court ruled in their favor.[62] The United States appealed to the U.S. Supreme Court.[63] Although every member of the Supreme Court had a pecuniary interest, the Court applied the rule of necessity and decided the case, notably in favor of the judges.[64] The Court's rationale mostly relied on necessity.[65] However, during oral argument, then-Justice Rehnquist questioned if a state court could hear the case; a question implicating both necessity and supremacy concerns.[66]

II. THE PROBLEMATIC RULE OF NECESSITY

Despite the various arguments for the rule of necessity, it remains a highly controversial recusal rule.[67] The backdrop this Part provides

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57. William H. Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 REC. ASS'N B. CITY N.Y. 694, 704, 707 (1973).

58. McKevitt, *supra* note 28, at 818–19.

59. 449 U.S. 200 (1980). At least one commentator has called the case a classic in rule of necessity literature. Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1891 (1988).

60. *Will*, 449 U.S. at 202–10.

61. *Id.* at 209.

62. *Id.* at 210.

63. *Id.* at 209–10.

64. *Id.* at 213–17.

65. *See generally id.*

66. Oral Argument at 50:53–51:00, *United States v. Will*, 449 U.S. 200 (1980) (No. 79-983), https://www.oyez.org/cases/1980/79-983 ("Well, couldn't the Circuit Court of Cook County have adjudicated this case?").

67. *See, e.g.*, Adrian Vermeule, *Contra* Nemo Iudex in Sua Causa*: The Limits of Impartiality*, 122 YALE L.J. 384, 408 (2012) ("It is hardly obvious that the

gives useful insight into problems with the rule of necessity. Statutory recusal laws show a clear legislative purpose: that the judiciary should avoid conflicts of interest. When courts apply the rule of necessity, regardless of how "necessary" it is, they do so in contravention of the express purpose of these recusal laws. If possible, such conflicts between statutes and the common law should be avoided. Additionally, the cases discussed in this Part help demonstrate why state constitutional amendments—and not mere statutes—are the proper way to implement panel systems.

A. Conflicting Case Law: Can Common Law Trump a Statute?

The case law inside and outside of Wisconsin is confusing as to whether statutes can trump the rule of necessity. One of the best examples is *Will*.[68] The U.S. Supreme Court had to deal with the fact that 28 U.S.C. § 455(a) states, "[a]ny justice . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[69] The legislative history, according to the Court, did not contemplate situations where all justices were disqualified.[70] For example, the Reports of the House and Senate stated, "[t]he statutes contain ample authority for chief judges *to assign other judges* to replace either a circuit or district court judge who become [sic] disqualified [under § 455]."[71] Additionally, the Court stated the purpose of § 455 was to ensure a fair forum for litigants, and the Court reasoned that failing to apply the rule of necessity would deny a forum altogether.[72] The Court held § 455 does not foreclose the application of the rule of necessity.[73] Often, judges will construe "a statute . . . to alter the common law only when that disposition is clear."[74] However, the Court in *Will* did not just construe law narrowly: It utterly ignored the plain meaning of § 455, ultimately allowing the common law to trump a statute.

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rule of necessity is really necessary. If the case cannot proceed without a *nemo iudex* [meaning 'no man should be the judge in his own case'] violation, perhaps it should not proceed at all.").

68. See *supra* Section I.B, discussing the facts in *Will*.

69. 28 U.S.C. § 455(a) (2012); *Will*, 449 U.S. at 216–17. One commentator has suggested that this statute forbids a judge from hearing a case if the "judge had even a penny at stake." Judith Resnik, *Feminism and the Language of Judging*, 22 ARIZ. ST. L.J. 31, 33 (1990).

70. *See Will*, 449 U.S. at 216–17.

71. *Id.* at 216 (quoting H.R. REP. NO. 93-1453, at 5 (1974); S. REP. NO. 93-419, at 5 (1973)).

72. *Id.* at 217.

73. *Id.*

74. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318 (2012).

Unfortunately, *Will* does not provide clear guidance on whether Congress even has the authority to pass a statute trumping the rule of necessity. Instead, *Will* stated, "we would not casually infer that the Legislative and Executive Branches sought by the enactment of § 455 to foreclose federal courts from exercising 'the province and duty of the judicial department to say what the law is.'"[75] One way of understanding this statement in *Will*, is, perhaps, that Congress does not have the constitutional power to enact statutes trumping the rule of necessity.[76] Indeed, one commentator has suggested panel systems—like the one called for in this Comment—would be unconstitutional at the federal level:

> Whether such a practice could be adopted in the federal system is questionable; one might make constitutional arguments for the Rule of Necessity. Can the federal courts be the final arbiters on the meaning of the Constitution if other bodies were to decide even a single aspect of Constitutional law? Arguably, Article III itself forbids the conferring of such power on others . . . .[77]

This Comment, however, focuses on state supreme courts. Nothing in the U.S. Constitution suggests states could not implement a panel system. Therefore, the reasoning in *Will* is only relevant insofar as state supreme courts might strike down a statute overruling the rule of necessity on state constitutional grounds. Thus, this Comment argues for state constitutional amendments.

Despite *Will*, some judges have held statutes can trump the rule of necessity. In Wisconsin, the conflict between statutes and the rule of necessity recently played out in a series of memorandum recusal decisions in *Wisconsin Judicial Commissioner v. Prosser (In re Prosser)*. Unlike the U.S. Supreme Court's opinion in *Will*, these memoranda generally came out in favor of statutes trumping the common law.

In 2011, Justice Prosser "put his hands around the neck of Justice Ann Walsh Bradley . . . in Justice Bradley's chambers."[78] Additionally, Justice Prosser called then-Chief Justice Shirley Abrahamson "a total bitch" at a closed supreme court conference.[79] The other justices were

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75. *See Will*, 449 U.S. at 217 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

76. *See generally* Resnik, *supra* note 59, at 1896.

77. *Id.*

78. *Wis. Judicial Comm'n v. Prosser*, 817 N.W.2d 830, 832 (Wis. 2012) (Crooks, J., recusal decision).

79. *Id.*; *see Wis. Judicial Comm'n v. Prosser (In re Prosser)*, 813 N.W.2d 208, 210 (Wis. 2012) (Roggensack, J., recusal decision).

present for one or both events.[80] Justice Roggensack even gave statements to capital police and the Dane County Sheriff's Department following the incident between Justices Prosser and Bradley.[81] The Wisconsin Judicial Commission filed a complaint against Justice Prosser for the incidents.[82] When such a complaint is filed, Wisconsin statutes require the chief judge of the Wisconsin Court of Appeals (not the chief justice of the Wisconsin Supreme Court) to appoint a judicial conduct panel.[83] For reasons not explained in the memoranda, the chief judge never formed the panel.[84] The Judicial Commission then moved the Wisconsin Supreme Court to create the panel.[85]

Notably, the kind of panel called for by the Judicial Commission is not the kind of panel argued for in this Comment. This Comment argues for panels when state supreme courts lack a quorum to do business because of conflicts of interest. However, the fact that Wisconsin might use a judicial conduct panel to discipline supreme court justices shows the idea is plausible.[86] If the kind of panel advocated for in this Comment were used in *Prosser*, it would be to pick the judicial conduct panel.

Justice Prosser's attorney sent letters, which were treated as motions, for the justices to disqualify themselves under Wisconsin Statute Section 757.19(2)(b).[87] This statute states a justice must recuse him or herself when the justice is a "material witness."[88] Generally, justices uphold "a longstanding practice" of not issuing a decision explaining why they recused themselves.[89] Because of the unusual facts in this case, however, Justices Roggensack,[90] Bradley,[91] Annette Ziegler,[92] and Michael Gableman[93] issued opinions explaining why they

80. Gillers et al., *supra* note 4, at 575 (remarks of Louis Butler).

81. *Prosser*, 813 N.W.2d at 210 (Roggensack, J., recusal decision).

82. *Id.* at 208 (Roggensack, J., recusal decision).

83. *Prosser*, 817 N.W.2d at 832 (Crooks, J., recusal decision) (citing WIS. STAT. § 757.87(1) (2009–10)).

84. *Id.* (Crooks, J., recusal decision).

85. *Id.* (Crooks, J., recusal decision).

86. Other states have similar disciplinary panel procedures. *See, e.g.*, OHIO GOV. BAR. R. V.1.(A).

87. *E.g.*, *Prosser*, 813 N.W.2d at 209 (Roggensack, J., recusal decision).

88. WIS. STAT. § 757.19(2)(b) (2017–18).

89. *Wis. Judicial Comm'n v. Prosser (In re Prosser)*, 817 N.W.2d 875, 876 n.1 (Wis. 2012) (Ziegler, J., recusal decision).

90. *Prosser*, 813 N.W.2d 208 (Roggensack, J., recusal decision).

91. *Wis. Judicial Comm'n v. Prosser*, 827 N.W.2d 605 (Wis. 2013) (A.W. Bradley, J., recusal decision).

92. *Prosser*, 817 N.W.2d 875 (Ziegler, J., recusal decision).

93. *Wis. Judicial Comm'n v. Prosser (In re Prosser)*, 818 N.W.2d 923 (Wis. 2012) (Gableman, J., recusal decision).

recused themselves, while Justice Patrick Crooks[94] issued an opinion explaining why he did not.

The motions raised rule of necessity issues because the Wisconsin Constitution requires a quorum of four justices "for the conduct of court's business."[95] Because four justices (of seven total) recused themselves, the court lacked a quorum and the Judicial Commission "d[id] not receive . . . [its] day in court despite wishing to be heard."[96] These memoranda, while not binding law, illustrate the tension between statutes and the common law rule of necessity. This Section analyzes the reasoning of these memoranda. This Part ends by summarizing the various issues with using a panel or using the rule of necessity identified in them. This Comment argues using a constitutionally implemented panel, if appropriately implemented, resolves all the issues identified in *Will* and these memoranda.

1. JUSTICE CROOKS'S TAKE ON THE RULE OF NECESSITY

Justice Crooks's memorandum stated he could hear the case because of the rule of necessity and his "duty to sit on cases."[97] Of note, the rule of necessity should never be discussed next to the duty to sit. The duty to sit is based on the rationale that a judge should not burden another judge by recusing him or herself.[98] It also discourages "judge shopping."[99] However, the rule of necessity is only an issue if

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94. *Wis. Judicial Comm'n v. Prosser*, 817 N.W.2d 830 (Wis. 2012) (Crooks, J., recusal decision).

95. WIS. CONST. art. VII, § 4(1); *see, e.g.*, *Prosser*, 817 N.W.2d at 832 (Crooks, J., recusal decision).

96. *See Prosser*, 817 N.W.2d at 878 (Ziegler, J., recusal decision) (explaining what will happen if at least four justices recuse themselves).

97. *Prosser*, 817 N.W.2d at 831 (Crooks, J., recusal decision). While the "duty to sit" and the rule of necessity are often discussed in the same breadth, they are two different concepts:

> [The duty to sit] doctrine holds that in cases where the challenged judge faces a serious and close disqualification decision, the judge should decide in favor of sitting and against recusal in order to minimize intrusion on fellow judges and enhance judicial efficiency, as well as to discourage the bringing of disqualification motions by litigants as a variant of forum or judge shopping.
> The duty to sit doctrine should be distinguished from the "rule of necessity," . . . .

Stempel, *Rehnquist*, *supra* note 53, at 604.

At the federal level, arguably the duty to sit is no longer good law. Richard E. Famm, *History of and Problems with the Federal Judicial Disqualification Framework*, 58 DRAKE L. REV. 752, 760 (2010). In practice, however, it would seem few judges find this argument persuasive. *Id.*

98. Stempel, *Rehnquist*, *supra* note 53, at 604.

99. *Id.*

no other forum exists. In such cases, no other judge can be burdened by a refusal to apply the rule of necessity nor can a litigant engage in judge shopping.

Justice Crooks's opinion generally reflects the common reasoning behind the rule of necessity: If not applied, a litigant will be denied an opportunity to be heard, and therefore the usual disqualification rules should not apply.[100] He cited the American Bar Association's (ABA) Model Code of Judicial Conduct, among other non-statutory sources, to support his reasoning.[101]

Justice Crooks, however, provided a mere four-sentence paragraph on why Wisconsin statutes did not disqualify him as a material witness:

> Justice Prosser asserts that I am disqualified pursuant to . . . 757.19(2)(b) and (g), . . . I have carefully considered all of the arguments raised by Justice Prosser in his recusal motion. As required by . . . 757.19(2)(g), I have made a subjective determination that I can act impartially in this matter. I believe that I could be fair in judging the allegations against Justice Prosser and would act in an impartial manner.[102]

Justice Crooks's short paragraph explaining his reading of Section 757.19 suggests he was primarily concerned with policy, not statutory interpretation. His only policy reason, which he restated multiple times, is that if the court did not apply the rule of necessity, the Judicial Commission would be denied its opportunity to be heard.[103]

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100. *See Prosser*, 817 N.W.2d at 833–34 (Crooks, J., recusal decision).

101. *See id.* (Crooks, J., recusal decision).

102. *Id.* at 834 (Crooks, J., recusal decision) (internal citation omitted). Justice Crook's citation to Subsection (g), without explanation for Subsection (b), makes his reasoning suspect. Section 757.19(2) states a "judge shall disqualify himself or herself from any . . . action or proceeding when one of the following situations occurs: . . . (b) . . . (g) . . . ." WIS. STAT. § 757.19(2) (2017–18). Subsection (g) gives judges the power to recuse themselves when they "determine[] that . . . [they] cannot . . . act in an impartial manner." § 757.19(2)(g). The plain meaning of Subsection (g) appears to give judges the subjective power to make a decision like Justice Crook's reasoned. However, Subsection (b) does not appear to be a subjective determination for the judge: "When a judge is a party or a material witness . . ." the judge is disqualified "unless the judge determines the pleadings that purport to make the judge a party are false, sham or frivolous." § 757.19(2)(b). If the issue at hand was whether a case purporting to make Justice Crooks a party was "false, sham or frivolous," he might be able to make the same subjective call he made regarding Subsection (g). However, Subsection (b)'s material witness disqualification does not appear objective. Perhaps judges could reason they are not a material witness objectively, but the statute does not support a subjective approach. Note that Justice Roggensack argued the standard under Subsection (b) is objective. *Wis. Judicial Comm'n v. Prosser (In re Prosser)*, 813 N.W.2d 208, 212 (Wis. 2012) (Roggensack, J., recusal decision) (citing *State v. Am. TV & Appliance of Madison, Inc.*, 443 N.W.2d 662 (Wis. 1989)).

103. *See generally Prosser*, 817 N.W.2d 830 (Crooks, J., recusal decision).

2. THE OTHER JUSTICES' TAKE ON THE RULE OF NECESSITY

The other justices who wrote opinions recused themselves and focused more on statutory interpretation than Justice Crooks but still included public policy.[104] Justice Roggensack explored the evolution of the rule of necessity in Wisconsin case law.[105] In 1915, the Wisconsin Supreme Court applied the rule in a case where a judge claimed he did not have to pay income tax on his salary in 1913 for income he earned in 1912 "because he was a 'state officer.'"[106] In 1999, however, the Wisconsin Supreme Court refused to apply the rule of necessity in *Moran v. Wisconsin Department of Administration*.[107] Instead, (then) Chief Justice Abrahamson appointed a panel.[108] Part of Justice Roggensack's public policy arguments for her decision rested on a material witness being a more serious conflict of interest than the indirect pecuniary interest in the 1915 case.[109] Her public policy argument could be seen as concern over both court legitimacy and fairness.

Justice Ziegler's recusal opinion expressly stated due process concerns.[110] Her reasoning clearly showed her worry that a material witness has too great a conflict and may even be required to recuse him or herself under the Due Process Clause of the U.S. Constitution.[111] Furthermore, Justice Ziegler seemed to believe the ad hoc nature of appointing a judicial conduct panel could retain some of the same conflict of interest issues as the Wisconsin Supreme Court simply deciding the case itself.[112] Justice Ziegler also stated that some parties, whose cases have substantive merit, cannot have "their day in court."[113] This statement could be seen as a response to Justice Crook's public policy argument that failing to apply the rule of necessity destroys the opportunity for a litigant to be heard. For example, Justice Ziegler stated a litigant might be denied an opportunity to be heard because the

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104. *E.g.*, *Prosser*, 813 N.W.2d at 212 (Roggensack, J., recusal decision).

105. *Id.* at 213–14 (Roggensack, J., recusal decision).

106. *Id.* (Roggensack, J., recusal decision) (citing *State ex rel. Wickham v. Nygaard*, 150 N.W. 513 (1915)).

107. *Id.* (Roggensack, J., recusal decision) (citing *Moran v. Wis. Dep't of Admin.*, 603 N.W.2d 234 (Wis. Ct. App. 1999)).

108. See *infra* Part IV, for a detailed discussion of *Moran*.

109. *Prosser*, 813 N.W.2d at 214 (Roggensack, J., recusal decision).

110. *See Wis. Judicial Comm'n v. Prosser (In re Prosser)*, 817 N.W.2d 875, 877–78 (Wis. 2012) (Ziegler, J., recusal decision).

111. *Id.* (Ziegler, J., recusal decision). Justice Ziegler's claim that the Due Process Clause may require recusal is suspect. The standard for judicial disqualification under the Due Process Clause is high—and frankly somewhat vague. *See supra* Section I.A.

112. *Prosser*, at 877–78 & n.7 (Ziegler, J., recusal decision).

113. *Id.* at 878 (Ziegler, J., recusal decision).

time to file a complaint under the statute of limitations has passed.[114] She did not see a difference between these situations and the one before her about the rule of necessity.[115] Perhaps most interestingly, Justice Ziegler pointed out that applying the rule of necessity would mean Justices Prosser and Bradley had to hear the case, which Justice Ziegler called an "absurd result."[116]

Justice Gableman's opinion provides little reasoning in its own right, instead stating, "for the reasons expressed in Justice Roggensack's and Justice Ziegler's orders, the motion is granted, and I disqualify myself from participation in the matter."[117] However, it is worth noting Justice Gableman misstated other courts' practices in similar situations. He stated U.S. Supreme Court Justices and Wisconsin Supreme Court justices follow similar recusal practices.[118] As illustrated above, *Will* suggests otherwise.[119]

Lastly, Justice Bradley recused herself because of her desire to minimize the political "dysfunction of the court."[120] Her concerns are more public policy related than the other justices' concerns. She noted, "[i]n the past, our court has been a model for other state supreme courts throughout the country. With a commitment to address these and other issues that hinder us from best serving the people of this state, it can be again."[121] She called for reform in the judicial disciplinary process that will increase accountability, yet improve "collegiality."[122]

B. Summarizing the Issues: Can a Panel Solve All of Them?

The opinion of the U.S. Supreme Court in *Will* and the various memoranda of the Wisconsin Supreme Court justices in *Prosser* note a relatively small number of discrete problems with using a panel or

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114. *Id.* (Ziegler, J., recusal decision).

115. *Id.* (Ziegler, J., recusal decision).

116. *Id.* (Ziegler, J., recusal decision). Judge Roger J. Miner, who served on the Second Circuit Court of Appeals, suggested that, in an analogous situation where a supreme court justice filed a complaint against a court of appeals judge, the justice would not participate in the decision even if the rule of necessity was applied. Miner, *supra* note 3, at 1118. Although his suggestion makes intuitive sense, he cited no source for this proposition. And given that judges have invoked the rule to sit on cases where they are parties going back to the year 1430, it is far from clear his assertion was correct. *See supra* Section I.A.

117. *Wis. Judicial Comm'n v. Prosser (In re Prosser)*, 818 N.W.2d 923, 924 (Wis. 2012) (Gableman, J., recusal decision).

118. *Id.* (Gableman, J., recusal decision).

119. See *supra* Section I.B, for a discussion on *Will*.

120. *Wis. Judicial Comm'n v. Prosser (In re Prosser)*, 827 N.W.2d 605, 609–10 (Wis. 2012) (A.W. Bradley, J., recusal decision).

121. *Id.* (A.W. Bradley, J., recusal decision).

122. *Id.* (A.W. Bradley, J., recusal decision).

applying the rule of necessity. First, both *Will* and Justice Crook's opinion expressed concerns over denying litigants the chance to be heard. Second, Justices Roggensack's and Ziegler's opinions argued the rule of necessity might be unfair. Third, Justice Ziegler suggested the ad hoc nature of appointing panels is problematic. And lastly, Justice Bradley added her concerns over court legitimacy and dysfunction.

III. BACKGROUND ON PANELS

The concerns raised in *Will* and *Prosser*, such as litigants being heard, the unfairness of the rule of necessity, court legitimacy ("noticeable dysfunction" as Justice Bradley put it), etc., can be fixed by using a panel system when enough justices have a conflict of interest to prohibit the court from hearing the case. The real question is how states should implement panels, not whether they should. This Part surveys states that have used panels other than Wisconsin. Then it summarizes the works of three scholars that have identified panels as an alternative to the rule of necessity. This Part ends by summarizing positive panel traits.

A. Survey of States Using Panels

Wisconsin is not the only state that has used panels. Tennessee[123] and Texas[124] have too. This Section surveys the two states to identify the pros and cons of various panel systems. Additionally, this Section looks briefly at Minnesota's use of appointed judges when sitting judges have a conflict of interest because this method of dealing with conflicts of interest is probably more closely aligned with how most states deal with the issue than the panel systems of Tennessee and Texas.

Admittedly, this Section surveys a small number of states. Identifying states that use alternatives to the rule of necessity is difficult for two reasons. First, almost all states apply it in some circumstances. Even the ABA's Model Code of Judicial Conduct comments, "[t]he rule of necessity may override the rule of disqualification."[125] Today, forty-two states, either by rule or by comment or through an internal

123. *See generally* TENN. CONST. art. VI, § 11; *Hooker v. Haslam*, 393 S.W.3d 156 (Tenn. 2012) (per curiam).

124. *See* McKevitt, *supra* note 28, at 841 n.161.

125. MODEL CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (AM. BAR ASS'N 2011) ("The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order . . . .").

operating procedure, endorse the rule of necessity.[126] Even in states with judicial codes of conduct that fail to mention the rule of necessity, many have case law endorsing the rule.[127] Second, "many courts do not have a tradition of documenting their disqualifications, their special appointments, and their designations."[128] Often, opinions document alternatives to the rule of necessity in a mere footnote and without reference to the rule.[129] Sometimes, courts even appear to hide recusal-related documents.[130] For example, in 1987, a "reporter attempted to see a recusal motion on file at the U.S. Supreme Court but was told that such a motion 'was not part of the public record.'"[131]

A professor who tried to conduct a similar survey of alternatives to the rule of necessity in 1988 found only seven states.[132] One of the states has since repealed its alternative.[133] The two states this Section surveys are representative of the seven states, and the survey points out similarities. While the survey may be incomplete, it provides sufficient insight for this Comment.

1. TENNESSEE'S PANEL SYSTEM

The Tennessee Constitution provides:

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126. See *infra* Appendix I, for a fifty-state survey of the rule of necessity. *See also* Am. Bar Ass'n CPR Policy Implementation Comm., Comparison of ABA Model Judicial Code and State Variations Rule 2.11: Disqualification (2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_11.pdf [https://perma.cc/EX6T-WDXW].

127. *See infra* Appendix I.

128. Resnik, *supra* note 59, at 1937 n.235; *see also* Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 112 (2004) ("[W]hen a [U.S.] Supreme Court Justice makes a decision to recuse or not recuse (for whatever reason), the Court has traditionally neither offered nor required any reasoning be provided in the record. Therefore, the potentially aggrieved litigant is left with no way to understand, much less challenge the decision.").

129. *E.g.*, Resnik, *supra* note 59, at 1894; *see Moran v. Wis. Dep't of Admin.*, 603 N.W.2d 234, 234 n.1 (Wis. Ct. App. 1999) ("Chief Justice Abrahamson designated and assigned reserve judges Hon. Paul C. Gartzke, Hon. Michael T. Sullivan, and Hon. Daniel L. LaRocque to serve temporarily in the Court of Appeals, Dist. IV to hear and decide this appeal."); *see also* Judith Resnik, *Constructing the Canon*, 2 YALE J.L. & HUMAN. 221, 228 (1990) ("[T]ales of the relinquishment of judicial power are often hard to find.") [hereinafter Resnik, *Constructing*].

130. Resnik, *Constructing*, *supra* note 129, at 228 ("[T]he fact of power relinquishment is hidden, and the conversation about how much power is held, distorted.").

131. *Id.* at 228 n.38 (quoting Tony Mauro, *Smoking Out the Ginsburg Story: How the Reporters Got the Dope*, LEGAL TIMES WASH., 16 Nov. 1987, at 15, col. 1).

132. Resnik, *supra* note 59, at 1936 n.234 and accompanying text.

133. *Infra* note 135.

> In case all or any of the Judges of the Supreme Court shall thus be disqualified from presiding on the trial of any cause or causes, the Court, or the Judges there of shall certify the same to the Governor of the State, and he shall forthwith specially commission the requisite number of men, of law knowledge, for the trial and determination thereof.[134]

Two other states have similar constitutional provisions—North Dakota and Washington.[135] The Tennessee Supreme Court used this provision in 2012 when a litigant made a plausible argument that members had an "economic interest" in the outcome of a case.[136] The court, however, noted the need for some limits on the use of this provision.[137] The court emphasized a judge should not recuse him or herself if a case is frivolous.[138]

Other policy issues exist with Tennessee's panel system. First, the panels are appointed on an ad hoc basis. In other words, a conflict of interest has to arise, and then a panel is appointed. Potentially, a governor who favored a particular outcome could appoint the panel with people he or she felt would rule in a certain way.[139] The political influence of the governor in these cases could cause some of the same issues as applying the rule of necessity. Secondly, for similar reasons, the governor may not be the ideal appointing authority even if appointments were made in advance. If the governor has a different ideology than the court, he or she will appoint different individuals than the court would. Put differently, the supremacy of a high court in interpreting the law may be weaker than it should be under such a system.[140]

Another problem with Tennessee's constitutional provision is its reliance on individual justices. Recall that in *Prosser* only four justices

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134. TENN. CONST. art. VI, § 11.

135. Arkansas used to have a similar constitutionally authorized, governor-appointed panel system, but it has been repealed. *See* Resnik, *supra* note 59, at 1936 n.234 (citing ARK. CONST. art. 7, § 9 (1988), *repealed by* ARK. CONST. amend. 77, § 3). In North Dakota, the chief justice has the constitutional authority to make appointments to a panel. *Id.* (citing N.D. CONST. art. 6 § 3). Washington's constitution states, "a majority of the Supreme Court is empowered to authorize judges or retired judges of courts of record . . . to perform, temporarily, judicial duties in the Supreme Court . . . ." *Id.* (citing WASH. CONST. art. IV § 2(a)).

136. *Hooker v. Haslam*, 393 S.W.3d 156, 158 (Tenn. 2012) (per curiam).

137. *Id.* at 162 n.3.

138. *Id.*

139. *See* Arnold Rochvarg, *Is the Rule of Necessity Really Necessary in State Administrative Law: The Central Panel Solution*, 19 J. NAT'L ASS'N ADMIN. L. JUDICIARY 35, 53–54 (1999) (arguing governors should not make ad hoc appointments to resolve disputes regarding state administrative law).

140. See *supra* Section I.B, explaining the concept of supremacy.

recused themselves.[141] However, they all had a conflict.[142] Under the Tennessee constitutional provision, if all justices have a conflict, but only two or three certify their conflict to the governor, the remaining justices still get to hear the case. This shortcoming creates a collective action problem. Why would any one justice recuse him or herself if none of the other justices are willing to and all justices have a conflict? The Tennessee constitutional provision appears to allow "the Court," (presumably a majority of justices) to certify a conflict recusing all justices.[143] But what if all liberal justices on a court represent less than a majority and recuse themselves? Potentially, a conservative majority is left to rule without a counterbalancing voice if the governor appoints other conservatives. Under these circumstances, what incentive exists for a liberal justice to recuse him or herself?

2. TEXAS'S PANEL SYSTEM

Texas used a similar governor-appointed panel in the 1925 case *Johnson v. Darr*.[144] Many (possibly every) member of the Texas judicial system belonged to a fraternal (male) organization, which was a party to the case.[145] The governor appointed three women to act as justices of the Texas Supreme Court for the sole purpose of deciding the case.[146] Figure 2 shows a historic photograph of the women sitting on the court.[147] Unfortunately, the court in *Johnson* did not explain the legal basis for using a governor-appointed panel. At least as early as 1932, Texas had a statute authorizing the use of governor-appointed

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141. *Supra* Section II.A.

142. See *supra* Section II.A, explaining that the justices were material witnesses.

143. TENN. CONST. art. VI, § 11 ("[T]he Court, or the judges there of shall certify the same to the governor of the state . . . .").

144. 272 S.W. 1098 (Tex. 1925).

145. Resnik, *Constructing*, *supra* note 129, at 227 ("[T]he members of the Supreme Court of Texas were disqualified in a case that involved a fraternal organization, the Woodmen of the World. Apparently, many male judges and lawyers were members of the organization, an insurance company that grew out of Modern Woodmen of American, founded in 1882."); *see also* McKevitt, *supra* note 28, at 841 n.161.

146. *See* McKevitt, *supra* note 28, at 841 n.161.

147. The photograph in Figure 2 appeared in Resnik, *supra* note 59, at 1895 and Jen Graffunder, *Flashback: In 1925, a Woman's Place Was on the Texas Supreme Court*, DALLAS NEWS (Mar. 8, 2018), https://www.dallasnews.com/news/from-the-archives/2018/03/08/flashback-1925-womans-place-texas-supreme-court [https://perma.cc/88S2-GKNV]. Note that Texas used this all-women panel "about thirty years before women were allowed to sit on juries in Texas . . . ." Graffunder, *supra*.

panels.[148] The statute is analogous to Tennessee's constitutional provision.[149] Two states have similar statutes—Alabama and Virginia.[150]

Figure 2: The All-Woman Panel of the Texas Supreme Court in 1925

148. *See Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 447 n.11 (Tex. 2009) (Hecht, J., concurring) ("Special Chief Justice Sidney L. Samuels of Fort Worth was designated by Governor Ross Sterling in January 1932 to sit for Chief Justice Cureton under a statute now codified as section 22.005 of the Texas Government Code.").

149. Texas's statute states:

> (a) The chief justice may certify to the governor when one or more justices of the supreme court have recused themselves under the Texas Rules of Appellate Procedure or are disqualified under the constitution and laws of this state to hear and determine a case in the court.
>
> (b) The governor immediately shall commission the requisite number of persons who are active appellate or district court justices or judges and who possess the qualifications prescribed for justices of the supreme court to try and determine the case.

TEX. GOV'T CODE ANN. § 22.005 (West 2018).

150. Resnik, *supra* note 59, at 1937 n.234 (citing ALA. CODE § 12-2-14 (1986)); ALA. CODE § 12-2-14 (2018).

In Virginia, the chief justice has the statutory authority to appoint a judge instead of following the rule of necessity. Resnik, *supra* note 59, at 1936 n.234 (citing VA. CODE ANN. § 17-7(2) (1982)); *see* VA. CODE ANN. § 17.1-105(B) (2014).

3. MINNESOTA'S USE OF APPOINTED JUDGES

Minnesota has not used a true panel system, but it has appointed district court judges to sit in place of supreme court justices with a conflict of interest.[151] In Minnesota, the basis for appointing judges to sit on the Minnesota Supreme Court is both constitutional and statutory.[152] The primary issue with Minnesota's law is that the chief justice, like in Wisconsin, makes appointments.[153] In cases where a chief justice has a conflict of interest, letting him or her pick panel members is problematic. Additionally, the panel may be made up of members who all have the same views as the chief justice, even though the panel is standing in for an entire court.

B. Commentators' Views on Panels

Little scholarly work exists on panels as an alternative to the rule of necessity. A few commentators—Thomas McKevitt,[154] Professor Judith Resnik,[155] and Professor Arnold Rochvarg[156]—however, have noted panels as an alternative. This Section summarizes the pros and cons of their work.

1. FORGETTING ABOUT FEDERALISM AND MINIMIZING JURISDICTIONAL CONCERNS

Mr. McKevitt authored a student note for the *Hofstra Law Review* arguing the rule of necessity is not "necessary."[157] According to Mr. McKevitt, "[s]tate courts have experimented in the past with creating special judicial panels to adjudicate a dispute [where the rule of necessity might apply]."[158] However, he did not explain how the panels should work, instead stating a single issue: "Conflicts again arise when

151. *Peterson v. Knutson*, 233 N.W.2d 716, 717 n.* (Minn. 1975). The Delaware Supreme Court has a similar procedure. *The Supreme Court of Delaware: Oral Arguments*, DEL. CTS., https://courts.delaware.gov/help/proceedings/supreme.aspx [https://perma.cc/9CEA-5RRV] ("On occasion, a justice may enter a disqualification in a case because of . . . a conflict of interest . . . When this happens, a judge from the Court of Chancery, the Superior Court, or a retired Justice can be appointed to sit with the Court.").

152. MINN. CONST. art. 6 § 2; MINN. STAT. § 2.724 (2018); Resnik, *supra* note 59, at 1936 n.234.

153. MINN. STAT. § 2.724.

154. McKevitt, *supra* note 28, at 841.

155. Resnik, *supra* note 59, at 1892–93 and accompanying footnotes.

156. Rochvarg, *supra* note 139.

157. McKevitt, *supra* note 28.

158. *Id.* at 841.

the case involves the salaries or pensions of all state judges."[159] Mr. McKevitt then argued the solution is to let federal judges hear these cases, although he acknowledged they might lack jurisdiction.[160] His proposed solution was an amendment to the U.S. Constitution;[161] a seemingly impossible goal.[162]

Furthermore, Mr. McKevitt's solution assumes federal courts having jurisdiction is desirable. Other commentators have noted the tension between federal courts policing state courts and due process requirements for a neutral decisionmaker.[163] Ideally, federal courts should stay out of state court disputes, and states should have systems that provide for a neutral decisionmaker.

2. TRANSFERS TO LESS INTERESTED JUDGES

Professor Resnik teaches at Yale Law School.[164] She suggested creating "rules of transfer to less interested judges."[165] For example, instead of the U.S. Supreme Court applying the rule of necessity in *Will*, Professor Resnik would have had it transfer the case to: (1) "state court judges";[166] (2) "Article I judges"; (3) "special master[s]"; or (4) "specially created ad hoc courts."[167] Professor Resnik's suggestion to transfer federal cases involving the rule of necessity to state court

159. *Id.*

160. *Id.*

161. *Id.*

162. Amending the U.S. Constitution requires one of two procedures, both of which are extremely difficult. U.S. CONST. art. V. First, either two-thirds of both Houses must propose an amendment or two-thirds of all states must call for a convention. *Id.* Second, a proposed amendment only becomes effective after three-fourths of the state legislatures have ratified it or three-fourths of states at a constitutional convention. *Id.* The difficulty of amending the U.S. Constitution explains why there are only twenty-seven amendments. *Id.* amend. XXVII.

In comparison, the Wisconsin Constitution has been amended so many times it is hard to count. (The Wisconsin Constitution does not list all amendments at its end like the U.S. Constitution. WIS. CONST.) Therefore, the solution suggested in this Comment is more realistic than Mr. McKevitt's solution.

163. *See* Jeffrey W. Stempel, *Playing Forty Questions: Responding to Justice Robert's Concerns in* Caperton *& Some Tentative Answers About Operationalizing Judicial Recusal and Due Process*, 39 SW. L. REV. 1, 4–5 (2009).

164. *Judith Resnik*, YALE L. SCH., https://law.yale.edu/judith-resnik [https://perma.cc/2YTT-UFAC].

165. Resnik, *supra* note 59, at 1892.

166. Professor Resnik is not the only commentator to make this suggestion. Judge John T. Noonan, Jr., who served on the Ninth Circuit Court of Appeals, made the same observation. John T. Noonan, Jr., *Making the Case One's Own*, 32 HOFSTRA L. REV. 1140, 1141 (2004) ("Where a federal forum is lacking for a federal constitutional issue, a state court may decide it, as Henry Hart used to teach in his famous course on federal courts.").

167. Resnik, *supra* note 59, at 1892.

judges is appealing. Unfortunately, the inverse of her suggestion does not work as well: A federal court will lack jurisdiction to hear a case transferred from a state court unless the case involves a federal question or diversity jurisdiction. Even if a state law question finds its way to federal court, federal judges hesitate to rule on matters that will profoundly affect state government[168] (although not all state law questions will).

Additionally, Professor Resnik cited 28 U.S.C. § 2109 as an example of an alternative to the rule of necessity.[169] The statute allows the U.S. Supreme Court Chief Justice to "remit" cases to federal circuits when the Court cannot establish a quorum of six justices.[170] Section 2109 assigns a remitted case to "the three circuit judges senior in commission . . . ."[171]

Section 2109 has multiple issues. First, it fails to take into account that if the U.S. Supreme Court lacks a quorum because of a conflict, federal circuit judges likely have a conflict as well. Second, it fails to acknowledge the Supreme Court's supremacy. The legal views of the Court are not accounted for under § 2109. Third, the Chief Justice knows whom the senior circuit judges are and can base the remittal decision on that fact. Thus, letting the Chief Justice decide whether to remit a case is only one step better than letting the Chief Justice create a panel on an ad hoc basis. Additionally, § 2109 is merely optional—nothing stops the justices from simply ignoring it. Thus, § 2109 has several problems.

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168. *See generally Abrahamson v. Neitzel*, 120 F. Supp. 3d 905 (W.D. Wis. 2015).

169. Resnik, *supra* note 59, at 1892–93 n.53. The statute reads:

> If a case brought to the Supreme Court by direct appeal from a district court cannot be heard and determined because of the absence of a quorum of qualified justices, the Chief Justice of the United States may order it remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court either sitting in banc or specially constituted and composed of the three circuit judges senior in commission who are able to sit, as such order may direct. The decision of such court shall be final and conclusive. In the event of the disqualification or disability of one or more of such circuit judges, such court shall be filled as provided in chapter 15 of this title.
>
> In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.

28 U.S.C. § 2109 (2018).

170. Resnik, *supra* note 59, at 1892–93 n.53.

171. § 2109.

3. THE USE OF STANDING PANELS IN STATE ADMINISTRATIVE LAW

Professor Rochvarg teaches at the University of Baltimore School of Law.[172] He advocated for the "central panel" system as an alternative to the rule of necessity for state administrative law.[173] Under this system, an administrative agency refers cases to an administrative judge at a "central" panel.[174] When Professor Rochvarg discussed the concept in 1999, over twenty-five states used a variant of this system.[175] Professor Rochvarg argued the use of central panels should be mandatory at least in cases where administrative judges would have to apply the rule of necessity.[176] Professor Rochvarg was critical of the other alternatives to the rule of necessity, such as letting governors appoint replacement judges on an ad hoc basis.[177]

Professor Rochvarg noted three advantages of the central panel system.[178] First, the system seems fairer than allowing biased judges to decide a case.[179] Second, the panel is standing.[180] Therefore, the system can move quicker and is fairer than one where decisionmakers are appointed as conflicts arise.[181] Lastly, the standing nature of the panel minimizes concerns over expertise.[182]

Professor Rochvarg did not argue for an alternative to the rule of necessity outside of state administrative law. Nevertheless, his arguments for abandoning the rule of necessity are equally applicable to other areas of law. In some ways, his arguments are even more compelling outside the context of administrative law. In 1974, a student comment argued (notably before the Supreme Court's decision in *Will*) that the Supreme Court had "cast doubt on the continuing validity of

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172. *Arnold Rochvarg*, U. BALT., http://law.ubalt.edu/faculty/profiles/rochvarg.cfm [https://perma.cc/8V26-D3TX].

173. Rochvarg, *supra* note 139, at 36.

174. *Id.* at 54–55.

175. *Id.* at 55.

176. *Id.* at 36.

177. *Id.* at 53–54. Although, somewhat oddly, Professor Rochvarg was okay with governors appointing judges to the central panel. *Id.* at 56. Professor Rochvarg may have been okay with the governor appointing central panel members because the governor is the head of the executive branch, and he was specifically dealing with state administrative law. In contrast, chief justices' points-of-view are not necessarily identical with the supreme court as a whole, and the whole court is supposed to make judicial decisions.

178. *Id.* at 53, 55–56.

179. *Id.*

180. *Id.*

181. *See id.*

182. *Id.* at 55–56.

the rule of necessity" for "biased [state] licensing agenc[ies]."[183] Indeed, the comment explained that some state courts have even applied a higher standard of review for agency decisions that employed the rule of necessity.[184] If administrative agencies cannot be trusted to apply the rule of necessity, why should high courts? At least a party can seek judicial review of an administrative agency's decision. No equivalent exists for a decision rendered by a biased high court. Again, the issue is how, not if, state courts should use panels.

C. Summarizing Identified Problems and Proposing Possible Solutions

The previous two Sections have identified several issues with panel implementation. First, under what circumstances should the law require judges with a conflict of interest to turn the case over to a panel? How should the law account for judicial efficiency? Relatedly, what event should trigger sending a case to a panel? Letting the chief justice have complete discretion gives the chief justice too much power. On the other hand, Tennessee's constitutional provision relies heavily on individual justices to certify they have a conflict to the governor who then appoints replacements.[185] Relying on individual justices is equally problematic. Recall in the *Prosser* case only four justices recused themselves even though they all had a conflict of interest—at least according to a Wisconsin statute.[186] Indeed, even relying on a majority is problematic in courts narrowly divided along "ideological" (party) lines. If, for example, all "liberal" justices recused themselves, but they constituted less than half of the court, a purely conservative court will decide the case—with no dissenting voices—depending on if and how substitute justices are chosen. In a narrowly divided court, it is not unreasonable to think liberal justices could sway one conservative, changing the outcome of a case entirely. This Comment proposes the following solution: If the same number of justices necessary to grant certiorari agree that a case should proceed before a panel, the case is sent to a panel.[187]

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183. Stephen B. Braden, Comment, *Procedural Due Process and the Separation of Functions in State Occupational Licensing Agencies*, 1974 WIS. L. REV. 833, 845 n.65 ("Gibson v. Berryhill, 411 U.S. 564 (1973), affirmed (in dictum) a district court's injunction of a license revocation proceeding by a biased state optometry board. Although the question was not explicitly discussed in either the district court or the Supreme Court decisions, it appears that if the optometry board were enjoined from proceedings, no other body could take its place.").

184. *Id.* at 845 n.64.

185. TENN. CONST. art. VI, § 11.

186. *Supra* Section II.A.

187. See Robbins, *supra* note 27, at 28–29, explaining the problem of conflicts in the certiorari process.

This solution solves another interesting dilemma. Should justices apply the rule of necessity when voting on whether to grant certiorari?[188] If a justice recuses him or herself from casting a vote, should the number of votes necessary to grant certiorari be the same as if all justices reviewed the petition?[189] At many high courts, such as the Wisconsin Supreme Court, the number of justices that must agree to grant certiorari is fixed.[190] The policy issues raised by conflicts of interest at this stage in the procedural posture of a case stem, in part, from the fact that justices currently have only two options: vote yes or vote no. If a justice has a conflict, the certiorari process leaves him or her literally no option but to cast a vote because a refusal to cast a vote is, in a sense, a vote. The following example demonstrates the problem better than any argument could:

> Napoleon Beazley was scheduled to be executed on August 15, 2001. On August 13, the Supreme Court denied a request for a stay. Only six Justices voted; because Justices Scalia, Souter, and Thomas were acquainted with Fourth Circuit Judge J. Michael Luttig, the son of the victim in the case, they recused themselves. Despite the fact that three of the six remaining Justices—Stevens, Ginsburg, and Breyer—voted to grant the stay, the Court denied the request. On August 15, the day of the scheduled execution, the Texas Court of Criminal Appeals granted a stay of execution.[191]

The proposed panel system mitigates the problems of recusal that can arise during the certiorari (or stay)[192] process by giving justices a third

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188. *Id.* at 29. Certiorari means "to be more fully informed." *Id.* at 29 (quoting *Certiorari*, BLACK'S LAW DICTIONARY (7th ed. 1999)). Thus, Ira P. Robbins, a professor at American University, has argued a high court should grant certiorari even if the court might not be able to constitute a quorum for the purpose of deciding the case. *Id.* But why should a court take the time to become "more fully informed" if it clearly cannot decide the case?

189. See *id.*, for a discussion suggesting there is not a good answer to this question.

190. FILING A PETITION FOR REVIEW: A GUIDE TO SEEKING REVIEW IN THE WISCONSIN SUPREME COURT 12 (2011) ("There are seven justices on the Wisconsin Supreme Court. At least three of them must vote 'yes' in order to grant your petition for review.").

191. Robbins, *supra* note 27, at 29 n.152 (internal citations omitted).

192. Currently, the U.S. Supreme Court has different procedures for granting a stay than granting certiorari. A REPORTER'S GUIDE TO APPLICATIONS PENDING BEFORE THE SUPREME COURT OF THE UNITED STATES 2–3, SUP. CT. U.S., https://www.supremecourt.gov/publicinfo/reportersguide.pdf [https://perma.cc/TV7M-WLMQ].

> An application is a request for emergency action addressed to an individual Justice. Although most applications involve routine matters such as requests

option: vote to send the case to a panel. To make this solution work in practice, if a case would otherwise be denied certiorari, any votes to send a case to a panel should be combined with votes to grant certiorari. For example, in Wisconsin, if two justices vote yes and one justice votes to send the case to a panel, the case should be sent to the panel rather than denying certiorari.

Second, the legal instrument implementing the panels should clearly state the court does not need to turn over frivolous cases. But who decides whether a case is frivolous? If a supreme court has total discretion to call a case frivolous, it can effectively negate the purpose of a panel system. Using the certiorari-inspired solution discussed above may balance judicial efficiency with common sense. If enough justices necessary to grant certiorari agree the case is non-frivolous, the case proceeds to the panel. But if enough justices agree the case is frivolous, these justices can block the case from going any further.

Third, who should pick panel members and when should they be picked? Governors and chief justices should not pick panel members without checks and balances. Ideally, the panel should reflect the legal views, but not the biases, of the entire court on whose behalf it is deciding a case—thus preserving supremacy.[193] Empirical evidence suggests preserving supremacy is a legitimate concern. One study looked at how chief justices of Canada, during "the post-Charter years," have appointed panels, and how chief justices of the South African Appellate Division, during the apartheid-era, appointed panels.[194] During the relevant time periods, these courts did not (normally) hear cases en banc.[195] Instead, the courts' chief justices "assign[ed] judges to panels."[196] The study found the chief justices of

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> for extension of the time limit for filing, some—such as late night applications for a stay of execution or a restraining order in a dramatic case—draw the attention of reporters. . . .
>
> Applications are addressed to a specific Justice, according to federal judicial circuit. . . .
>
> The Circuit Justice may act on an application alone or refer it to the full Court for consideration. . . . Applications for stays in capital cases are often, though not always, referred to the full Court. . . .
>
> If the full Court acts on an application, five Justices must agree in order for the Court to grant a stay, but the votes of only four Justices are required to grant certiorari. . . .

Id.

193. See *supra* Section I.B, discussing the concept of supreme court supremacy.

194. Lori Hausegger & Stacia Haynie, *Judicial Decisionmaking and the Use of Panels in the Canadian Supreme Court and the South African Appellate Division*, 37 LAW & SOC'Y REV. 635, 635 (2003).

195. *Id.* at 642.

196. *Id.* at 635.

both systems "behave[d] strategically" in their selection of panel members.[197] Specifically, the chief justices appeared to pick panel members they thought would decide cases "as close as possible" with their preferences.[198] The policy preferences of a chief justice may not reflect the policy preferences of a court as a whole. A panel *should* reflect the policy preferences of the court on whose behalf it is acting. This proposition is particularly true when that court is elected by the people, such as the Wisconsin Supreme Court. In fact, the people of Wisconsin saw the election of justices as especially important at the time the Wisconsin Constitution was drafted.[199]

Of course, a mostly conservative or liberal court will pick a mostly conservative or liberal panel, respectively. However, that is not a counterargument, but a benefit, of this panel system. If, for example, Wisconsin voters elect six conservative justices and one liberal, the panel should reflect mostly conservative views because that best reflects what the voters of Wisconsin desire. This Comment suggests chief justices should nominated individuals, for set terms, subject to confirmation by a supermajority of justices.[200] If justices cannot agree, then governors can fill the vacancies subject to a simple majority confirmation. These panels should be filled before a dispute arises—not on an ad hoc basis.

Fourth, who should be eligible to be on a panel? If only sitting and retired judges are on the panel, the panel members will have a conflict whenever the case involves salaries or pensions. Recall judicial salary and pension issues are among the most common reasons for applying the rule of necessity.[201] One solution to the pension issue is to have state supreme courts appoint law professors or lawyers who agree to hear these cases—presumably pro bono.[202] At first, using lawyers, as

197. *Id.*

198. *Id.*

199. Joseph A. Ranney, *The Beginnings of Wisconsin's Progressive Tradition: The 1848 Constitution*, HIST. CTS.: ARTICLES WIS. LEGAL HIST. (last updated Mar. 7, 2012), https://www.wicourts.gov/courts/history/article05.htm [https://perma.cc/SG3N-8WC9].

200. The author considered term limits but rejected the idea because he believes the supermajority confirmation requirement accomplishes analogous goals to term limits.

201. McKevitt, *supra* note 28, at 818–19. Some commentators have suggested that having more than nine justices on the U.S. Supreme Court and picking only a subset of justices to serve on a "panel" to decide a case may reduce the use of the rule of necessity. *See* Morse & Yap, *supra* note 56, at 46. This idea has merit. However, it does little good when an entire court, as is often the case, has a conflict.

202. Email Interview with Erin Hahn, Practicing Attorney and Mediator in Dane County (Dec. 26, 2017, 9:02AM) (on file with the *Wisconsin Law Review*) (noting mediators in Dane County often do mediation pro bono and suggesting attorneys in the area might be willing to do pro bono work in conflict of interest cases but may be skeptical to rule on matters pertaining to judges).

opposed to judges or retired judges, may raise concerns over expertise. However, lawyers often act as mediators and arbitrators resolving disputes on a regular basis. Additionally, state supreme courts already use local lawyers as referees in attorney disciplinary proceedings.[203]

Limiting panel membership to retired judges at the state level, where judges are often elected, makes less sense than at the federal level, where judges receive lifetime appointments. If the populace of a state has changed, retired state judges may not reflect the values of the state, which defeats the purpose of holding judicial elections. The proposed panel system accounts for this purpose by letting currently sitting judges act as a conduit for the will of the people in selecting panel members. In the federal system, where judges are appointed for life, it would appear society has made a collective choice that the will of the people matters less.[204]

In summary, panels should be made up of legal experts, but not judges, nominated by a chief justice, and confirmed by a supermajority of a court. Supreme courts should impanel members before cases arise. Whenever a specific number of justices agree the supreme court should grant certiorari, but cannot because of conflicts of interest, the supreme court should forward the case to the panel.

IV. WISCONSIN'S PANEL SYSTEM

This Part explains the current panel system in Wisconsin. It then explores the deficiencies in Wisconsin's panel system, relying on the ideal panel traits identified in Part III. It argues for an amendment to the Wisconsin Constitution to implement a model panel system. Using this panel system, this Part argues, would increase the legitimacy of court proceedings that otherwise would apply the rule of necessity.

Unfortunately, the precedent for appointing a panel in Wisconsin is minimal, making its study difficult. One relevant case is *Moran*.[205] Like *Will*,[206] *Moran* dealt with judicial salaries.[207] Wisconsin passed a law that stated, with some exceptions, the salary of government employees cannot "equal or exceed that amount paid [to] the governor."[208] The

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203. *For Referees*, WIS. CT. SYS. (last updated Jan. 14, 2016), https://www.wicourts.gov/services/referee/index.htm [https://perma.cc/M6EK-6BYR].

204. Various constitutional issues, of course, would arise from using retired justices at the U.S. Supreme Court. *See generally* Rebekah Saidman-Krauss, Comment, *A Second Sitting: Assessing the Constitutionality and Desirability of Allowing Retired Supreme Court Justices to Fill Recusal-Based Vacancies on the Bench*, 116 PENN ST. L. REV. 253 (2011).

205. *Moran v. Wis. Dep't of Admin.*, 603 N.W.2d 234 (Wis. Ct. App. 1999).

206. See *supra* Section I.B, discussing the facts in *Will*.

207. *Moran*, 603 N.W.2d at 235.

208. *Id.* (citing 1973 Wis. Sess. Laws 978).

Wisconsin Departments of Administration and Employment Relations "appeal[ed] from an order granting the Director of State Courts' motion for summary judgment declaring that the salary cap provision . . . does not apply to judicial salaries."[209] The Wisconsin Court of Appeals certified the question to the Wisconsin Supreme Court.[210] Because all currently serving judges in the state had a conflict of interest, the chief justice appointed a panel of retired judges pursuant to Article VII, Section 4(3) of the Wisconsin Constitution to hear the case.[211]

Interestingly, a strict reading of Article VII, Section 4(3) does not appear to grant the chief justice these powers. Section 4(3) states, "[t]he chief justice may assign any judge of a court of record to aid in the proper disposition of judicial business in any court of record *except the supreme court*."[212] The Section specifically exempts its use for disposing of Wisconsin Supreme Court judicial business.[213] This exemption makes sense because if it did not exempt the Wisconsin Supreme Court, the chief justice could appoint a panel of judges to decide issues anytime the chief justice thought the court might rule in a manner he or she disapproved of. Essentially, the chief justice could "go rogue" and act as a one-person court. However, the chief justice in *Moran* was disposing of Wisconsin Court of Appeals judicial business and not Wisconsin Supreme Court business. The Wisconsin Court of Appeals—via a panel of retired judges—was merely interpreting Wisconsin law, which happened to affect Wisconsin Supreme Court justices.

In *Moran*, the Wisconsin Supreme Court used a legal fiction—suggesting the panel was conducting Wisconsin Court of Appeals business[214]—to circumscribe this issue. But using this legal fiction requires the consent of the Wisconsin Supreme Court, which it will likely not give in many cases. Therefore, an amendment to Section 4(3) should authorize the disposal of supreme court judicial business via panels. The provision in Tennessee's constitution shows this is not a radical idea.[215]

Another issue that could have easily been present in *Moran* is judicial pensions. When a case only has the potential to affect the salary of sitting judges, retired judges seem like obvious panel member

209. *Id.*

210. *See Wis. Judicial Comm'n v. Prosser (In re Prosser)*, 813 N.W.2d 208, 213–14 (Wis. 2012) (Roggensack, J., recusal decision); *Moran v. Wis. Dep't of Admin.*, No. 98-3008, slip op. (Wis. Ct. App. May 6, 1999).

211. *Moran v. Wis. Dep't of Admin.*, 603 N.W.2d 234, 234 n.1 (Wis. Ct. App. 1999); *see Prosser*, 813 N.W.2d at 213–14 (Roggensack, J., recusal decision).

212. WIS. CONST. art. VII, § 4(3) (emphasis added).

213. *Id.*

214. *See Moran*, 603 N.W.2d at 235 n.1.

215. TENN. CONST. art. VI, § 11.

candidates. But sitting and retired judges are likely to have conflicts in pension cases. The Wisconsin Constitution is vague on who may be appointed to a panel. It uses the phrase "judge of a court of record."[216] It appears a "judge of a court of record" must be a sitting or retired judge.[217] Section 24(3) of the Wisconsin Constitution states, "[a] person who has served as a supreme court justice or judge of a court of record may, as provided by law, serve as a judge of any court of record except the supreme court on a temporary basis if assigned by the chief justice of the supreme court."[218] The requirement to use sitting or retired judges should be removed, and panel members should only be required to have "knowledge of the law."[219]

Another potential problem with the current panel system is that the chief justice appoints members. As discussed above, a panel should reflect the views of an entire court because it is the court as a whole that sets policy—it is the supreme court's function to be "supreme." Therefore, an amendment to Section 4(3) should require a supermajority of five justices to confirm panel members before a dispute arises.

By appointing the panel in advance, the chief justice could not cherry pick judges in a manner favorable to a specific case outcome. The chief justice cannot predict what cases will be brought in the future. Additionally, these kinds of cases should be able to move quickly because panels would already be appointed. These are similar points to those made by Professor Rochvarg in his argument for increased use of central panels.[220] Furthermore, supermajorities protect minorities.[221] By requiring a supermajority, the panel will likely be made up of the most unbiased membership possible. The chief justice could not nominate panel members without substantial support. Ideally, the policy preferences of the panel will reflect the court as a whole and not only the chief justice.

If supreme courts cannot agree on panel members, then this

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216. WIS. CONST. art. VII, § 4(3).

217. The precedent has been to use retired judges, but it does not state only sitting judges or retired judges must be used. *Moran*, 603 N.W.2d at 234 n.1; *see Wis. Judicial Comm'n v. Prosser (In re Prosser)*, 813 N.W.2d 208, 213–14 (Wis. 2012) (Roggensack, J., recusal decision).

218. WIS. CONST. art. VII, § 24(3).

219. See *supra* Section III.A.1, describing Tennessee's panel system, which only imposes the requirement that panel members be knowledgeable in law.

220. *Supra* Section III.B.3 (explaining Professor Rochvarg's views in more detail).

221. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 TEX. L. REV. 1115, 1140–41 (2007) ("If we were confident that members of the minority in a legislative area were likely to suffer more harm than members of the majority were to receive benefits, a supermajority rule would be desirable.").

Comment recommends letting the governor make the appointment subject to confirmation by a simple majority.[222] But governors will likely inject their own political biases. Thus, while governor appointments are better than nothing, they are not ideal.

Using the procedures discussed above adds legitimacy to the court system. Recusal issues generally capture significant media attention,[223] and for the sake of preserving the legitimacy of the proceedings, letting a neutral panel decide is essential. Yale Law Professor Tracey L. Meares argued the legal system works because society believes "government has the right to dictate . . . proper behavior."[224] Therefore, when courts are perceived as unfair, or overtly political, it threatens the entire foundation of the legal system. The panel system described thus far ensures a neutral decisionmaker.

V. A PROPOSED AMENDMENT TO THE WISCONSIN CONSTITUTION

The proposed amendment below reflects the considerations noted in Parts III and IV. It is an original idea, although the constitutional and statutory provisions discussed in Section III.B influence it. It provides one possible solution to the archaic problem of the rule of necessity. Some states, without the same constitutional restrictions as Wisconsin, could implement a panel system by statute. However, a constitutional amendment cannot be struck down as a violation of the separation of powers the way a statute can.[225]

Proposed Amendment:

Supreme court panels.

(1) In a case that is not frivolous or obviously sham, where the supreme court lacks a quorum to conduct judicial business because of conflicts of interest, the court shall forward the

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222. See *supra* Sections III.A.1–2, discussing the governor-appointed panels used by Tennessee and Texas.

223. See *supra* Introduction, discussing recent calls for recusal reform.

224. Riley Combelic, *Procedural Justice: Public Perception of Court and Legal System Legitimacy*, INST. FOR ADVANCEMENT AM. LEGAL SYS. (July 7, 2014), http://iaals.du.edu/blog/procedural-justice-public-perception-court-and-legal-system-legitimacy [https://perma.cc/8Z6A-9D6C]; *see also* Kenneth M. Fall, Note, Liljeberg v. Health Services Acquisition Corp.*: The Supreme Court Encourages Disqualification of Federal Judges Under Section 455(a)*, 1989 WIS. L. REV. 1033, 1033 ("Judicial impartiality is a major goal of the American legal system. Public confidence in the judicial system depends not only on the attainment of impartiality, but also on the appearance of impartiality.").

225. See *supra* Section II.A, for an argument that state constitutional provisions, and not statutes, are the ideal way of implementing panels.

case to a panel if the same number of justices necessary to grant certiorari vote to do so.[226] If a case would otherwise be denied certiorari, votes to send a case to a panel shall be combined with votes to grant certiorari, and if the total is equal to the number of justices necessary to grant certiorari, the court shall forward the case to a panel. The court shall not change the number of votes necessary to grant certiorari more than once in a five-year period.

(2) The panel shall have the same legal authority granted to the supreme court for the sole purpose of deciding cases properly before it.

(3) The panel shall consist of three members who shall be knowledgeable in matters of law. The chief justice shall nominate individuals for terms of four years. Nominees must be confirmed by a supermajority of at least two-thirds of supreme court justices.[227] No member of the panel shall participate in a case that was sent to the panel prior to the member's confirmation.

(4) The supreme court shall impanel the requisite number of panel members within six months of the date of the passing of this amendment using the procedures outlined in Section 3, at which time, the other Sections shall become effective. In the event the supreme court fails to appoint three individuals to the panel within the allowed time under this Section, the governor shall fill the vacant positions subject to confirmation by a majority of justices. In the event the justices do not confirm one or more of the governor's nominees, the governor may ask the senate to confirm the outstanding nominees. After the first panel has been impaneled, if any position on the panel shall go vacant more than three months, the governor may fill the vacancy subject to confirmation by a majority of justices. In the event that the justices refuse to confirm two governor nominees in a row for the same vacancy, the governor may send a new nominee for the

226. In Wisconsin, three of seven justices must vote to grant certiorari. WIS. SUP. CT. INTERNAL OPERATING PROC. III.B (2018), https://wicourts.gov/sc/IOPSC.pdf [https://perma.cc/MVH5-YRUM].

227. On a seven-justice court, this would require five members to approve.

> vacancy to the senate for confirmation by a majority vote.[228]
>
> (5) The supreme court may remove a panel member prior to his or her term expiring by a vote of at least three-fourths of justices.
>
> (6) Two members shall constitute a quorum for the panel for the purpose of trying and deciding a case. If the panel lacks a quorum, the panel shall notify the supreme court. Upon notification, supreme court justices shall decide whether to take the case according to the rules of the common law while keeping in mind contemporary notions of due process.[229] If the panel ties, the panel shall notify the supreme court. Upon notification, the supreme court shall decide the case.
>
> (7) In the event of a dispute involving the interpretation or implementation of Sections 1 through 6, the court of appeals, sitting en banc, shall decide the case. The court of appeals may only grant equitable relief or a writ of mandamus for a violation of Sections 1 through 6.[230]

Alternatively, the amendment could merely authorize the legislature to create and regulate panels. Jurists, including Chief Justice John Marshall, have argued constitutions should only provide a framework for government.[231] These jurists may feel the proposed

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228. The purpose of the redundancy in this provision is to encourage justices to negotiate and find common ground under threat of other branches stepping in. *See infra* note 230.

229. In other words, in the unlikely event panel members also have a conflict of interest, the supreme court may apply the rule of necessity.

230. The proposed amendment uses language such as "the supreme court shall" at various points. What if the supreme court ignores its constitutional duty? In *State ex rel. Lamb v. Cunningham*, the Wisconsin Supreme Court had to determine how to deal with similar language: "the legislature shall." 53 N.W. 35, 58 (Wis. 1892). The Wisconsin Constitution provided, "the legislature shall apportion and district anew the members of the senate . . . *according to the number of inhabitants*." *Id.* (quoting WIS. CONST. art. 4, § 3) (emphasis added). Yet, the legislature created senate districts that seemed to disregard this constitutional mandate. *Id.* For example, one senate district had a population of 30,732, while another had a population of 65,952. *Id.* A private citizen sued the secretary of state seeking an order enjoining the secretary from publishing the results of an election. *Id.* at 37, 48–50. The court issued the order. *Id.* at 59. This proposed amendment includes fallbacks, such as gubernatorial appointments, to avoid these awkward court cases. On a practical level, state supreme courts are unlikely to regularly ignore constitutionally mandated duties because doing so costs political capital.

231. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("A constitution, to contain an accurate detail of all the subdivisions of which its great power will admit, and of all the means by which they may be carried into execution,

amendment is too detailed. Additionally, the legislature can amend a statute more easily than the people of Wisconsin can amend their Constitution. However, the Wisconsin Constitution contains some sections with substantially more detail than the proposed amendment. For example, Article IV, Section 24 is over one thousand words long and deals exclusively with the legislature's power to regulate gambling.[232] Furthermore, the proposed amendment protects the panel system by shielding it from the legislature. Another advantage of a more detailed amendment is that it adds a level of formality. "[P]eople who hold prejudicial attitudes are more prone to act on those attitudes in informal, rather than formal, settings."[233] The panel system should not be seen as an alterative dispute resolution system on steroids. It should be seen as a part of the judicial branch itself. Thus, this Comment recommends a detailed amendment, like the one proposed, over a mere legislative authorization.

CONCLUSION

As courts become increasingly political,[234] the law should progress by developing ways to ensure conflict free courts. The current rule of necessity, based in common law, flies in the face of statutory law, leading to a strange conflict. States should begin experimenting more with panels. When panels have been used to date, whether in administrative law or state courts, they have been successful. Their increased use will likely be controversial at first,[235] but it is hard to understand why panels would ever be more controversial than letting justices who are, for example, parties to a suit hear the case.

Indeed, many state supreme court justices may welcome panels. First, these panels may allow justices to wash their hands of some awkward situations. Likely, no justice, for example, looks forward to

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would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves . . . . [W]e must never forget it is *a constitution* we are expounding.").

232. WIS. CONST. art. IV, § 24.

233. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1359.

234. *See* Patience Drake Roggensack, *To Begin a Conversation on Judicial Independence*, 91 MARQ. L. REV. 535, 538 (2007) ("In recent years, there have been overt attempts to politicize the judiciary through questioning in the federal appointment process and through questioning in state judicial elections.").

235. *Cf.* Fiut, *supra* note 30, at 1638–39 ("Because of the sensitive nature of recusal, any change in New York recusal law will likely receive a fair amount of attention and criticism.").

the day he or she has to participate in the discipline of another justice. If the justice rules in favor of his or her colleague, the justice will face accusations of bias. If the justice rules against his or her colleague, the workplace will become quite awkward. The justice faces a lose-lose situation. Second, as this Comment shows, these panels can be designed with supreme court supremacy in mind. Justices give up only a small amount of power by supporting the above panel system. The amount of power justices lose seems a small and fair price to pay for escaping the various lose-lose situations that panels can address: particularly in states where judges are elected.

For these panels to work there needs to be a clear framework. Ideally, members of the panel must be as impartial as possible. Requiring a supermajority confirmation helps ensure impartiality as well as supremacy. Additionally, appointing panels in advance helps too. There also needs to be clear triggers for when a panel should be used. This Comment recommends an amendment to the Wisconsin Constitution with these goals in mind.

Wisconsin has a long and storied tradition of progressive, independent, and conflict-free courts. In fact, famed Wisconsinite Bob Kastenmeier once played a role in recusal reform and judicial ethics at the national level.[236] A few years ago, then-Justice Roggensack gave a speech where she highlighted the need for a conversation on judicial independence.[237] The time has come for Wisconsin to reassume its role as a model for other states—it is time for Wisconsin to live up to its motto and move "Forward!"[238]

APPENDIX

This survey looks, primarily, at the treatment of the rule of necessity in judicial codes of conduct. Citing case law for a survey like this one could be dangerous because it may not always be clear if a subsequent case has overruled a past case. Additionally, a state might not apply the rule of necessity in one case but apply it in another.

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236. Shirley S. Abrahamson, *The Kastenmeier Influence on Wisconsin Courts*, 2015 WIS. L. REV. 559, 560 ("Bob's efforts as a member of the National Commission on Judicial Discipline and Removal and his work on recusal and the Code of Judicial Conduct are well known.").

237. *See generally* Roggensack, *supra* note 234. Of course, judicial independence and impartiality are not the same thing. Michael Kirby, *Judicial Recusal: Differentiating Judicial Impartiality and Judicial Independence?*, 4 BRIT. J. AM. LEGAL STUDS. 1 (2015). Nevertheless, they are related concepts.

238. "Forward!" is the official state motto of Wisconsin. Wis. Historical Soc'y, *Odd Wisconsin: Origin of Wisconsin's 'Forward' Motto*, WIS. ST. J. (Oct. 12, 2010), http://host.madison.com/wsj/news/local/odd-wisconsin-origin-of-wisconsin-s-forward-motto/article_5aa2bde4-d586-11df-bd79-001cc4c002e0.html [https://perma.cc/AP7N-S4FC].

Notably, many states only refer to the rule of necessity in an advisory note or comment to another rule. Some state supreme courts have explicitly stated these notes are not a part of their code of judicial conduct.[239] The sole purpose of this survey is to show that, in at least some circumstances, the rule of necessity is followed in most states.

239. ME. SUP. CT. ORDER 2015-24 ("The Advisory Notes state the reason for recommending the language of the Canon or Rule, but the Advisory Notes are not part of the Canon or Rule adopted by the Court.").

Table 1: Fifty-State Survey of the Rule of Necessity

State	Rule of Necessity Endorsed Via:		Citation
	Rule	Note or Comment	
Alabama	No	No	CANONS OF JUDICIAL ETHICS Canon 3 (ALA. SUP. CT. 2004), http://judicial.alabama.gov/library/RulesCanons [https://perma.cc/94RG-EKER].
Alaska	No	Yes	CODE OF JUDICIAL CONDUCT Canon 3E(1) cmt. (ALASKA SUP. CT. 1998), https://public.courts.alaska.gov/web/rules/docs/cjc.pdf [https://perma.cc/LS4E-PFWP].
Arizona	No	Yes	ARIZ. CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (ARIZ. SUP. CT. 2009), https://www.azcourts.gov/portals/137/rules/Arizona%20Code%20of%20Judicial%20Conduct.pdf [https://perma.cc/4PLP-VAFC].
Arkansas	No	Yes	ARK. CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (ARK. SUP. CT. 2016), https://www.arcourts.gov/rules-and-administrative-orders/arkansas-code-of-judicial-conduct [https://perma.cc/3XNX-UTA3].
California	No	Yes	CAL. CODE OF JUDICIAL ETHICS Canon 3E cmt. (CAL. SUP. CT. 2018), https://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf [https://perma.cc/EV42-6VPU].
Colorado	Yes	Yes	COLO. CODE OF JUDICIAL CONDUCT r. 2.11(D) & cmt. 3 (COLO. SUP. CT. 2010), https://www.courts.state.co.us/Courts/Education/Conduct.cfm [https://perma.cc/GU5B-4Q5X].
Connecticut	No	Yes	CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (CONN. SUP. CT. 2010), https://www.jud.ct.gov/Publications/PracticeBook/Judicial_Conduct.pdf [https://perma.cc/2BLF-24UM].
Delaware	Yes	No	DEL. SUP. CT. INTERNAL OP. PROC. r. XIX(2) (2015), https://courts.delaware.gov/rules/pdf/SupremeCourtIOP.pdf

			[https://perma.cc/KG4V-H85V]. [240]
Florida	No	Yes	CODE OF JUDICIAL CONDUCT Canon 3E(1) cmt. (FLA. SUP. CT. 2006), https://www.floridasupremecourt.org/Opinions/Judicial-Ethics-Advisory-Committee/Code-of-Judicial-Conduct2/Canon-3 [https://perma.cc/9RKG-FH77].
Georgia	No	Yes	GA. CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (GA. SUP. CT. 2016), https://www.gabar.org/newsandpublications/announcement/upload/Georgia-Code-of-Judicial-Conduct-final-May-22-2015.pdf [https://perma.cc/M4YP-8Z3M].
Hawaii	Yes	Yes	HAW. REVISED CODE OF JUDICIAL CONDUCT r. 2.11(a) & cmt. 3 (2008), https://www.courts.state.hi.us/docs/court_rules/rules/rcjc.htm [https://perma.cc/PK93-UZLR].
Idaho	No	Yes	CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (IDAHO SUP. CT. 2017), https://judicialcouncil.idaho.gov/pdf/Idaho_Code_Judicial_Conduct_06_17.pdf [https://perma.cc/GR7C-98HP].
Illinois	No	No	CODE OF JUDICIAL CONDUCT r. 63: Canon 3 (ILL. SUP. CT.), https://www2.illinois.gov/sites/jib/Pages/Code.aspx#qst4 [https://perma.cc/N7P6-XT62].
Indiana	No	Yes	IND. CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (IND. SUP. CT. 2018), https://www.in.gov/judiciary/rules/jud_conduct/#_Toc244667168 [https://perma.cc/3J7K-BY5Y].
Iowa	No	Yes	IOWA CODE OF JUDICIAL CONDUCT r. 51:2.11 cmt. 3 (IOWA SUP. CT. 2010), https://www.legis.iowa.gov/docs/ACO/CR/LINC/12-14-2018.chapter.51.pdf [https://perma.cc/7WKL-6YYE].
Kansas	No	Yes	KAN. CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (KAN. SUP. CT. 2009), http://www.kscourts.org/rules/judici

240. Note that this source is not a judicial code of conduct. Indeed, Delaware's Judges' Code of Judicial Conduct is silent on the rule of necessity. DEL. JUDGES' CODE OF JUDICIAL CONDUCT r. 2.11 (2008), https://courts.delaware.gov/forms/download.aspx?id=39408 [https://perma.cc/32T7-T9Z8]. The author has chosen to treat the internal operating procedures, however, as analogous to a judicial code of conduct for the purposes of this survey.

			al_conduct.asp [https://perma.cc/ACX6-PRWW].
Kentucky	No	Yes	KY. CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (KY. SUP. CT. 2018), https://courts.ky.gov/courts/supreme/Rules_Procedures/201803.pdf [https://perma.cc/XTX5-AM4K].
Louisiana	No	No	CODE OF JUDICIAL CONDUCT (LA. SUP. CT. 2016), https://www.lasc.org/rules/supreme/cjc.asp [https://perma.cc/A5BF-NXTF].
Maine	Yes	Yes	ME. CODE OF JUDICIAL CONDUCT r. 2.11(E) & Advisory Notes (ME. SUP. JUDICIAL CT. 2017), https://courts.maine.gov/rules_adminorders/rules/text/mc_jud_conduct_plus_2017-9-5.pdf [https://perma.cc/7SGB-UTEV].
Maryland	No	Yes	MD. CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (MD. CT. APP. 2010), http://www.courts.state.md.us/rules/reports/codeofjudicialconduct2010.pdf [https://perma.cc/5S8T-9CVF].
Massachusetts	No	Yes	CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (MASS. SUP. JUDICIAL CT. 2016), https://www.mass.gov/supreme-judicial-court-rules/canon-2-a-judge-shall-perform-the-duties-of-judicial-office#rule-2-11-disqualification- [https://perma.cc/G2Q2-FQWH].
Michigan	No	No	MICH. CODE OF JUDICIAL CONDUCT (MICH. SUP. CT. 2018), https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan%20Code%20of%20Judicial%20Conduct.pdf [https://perma.cc/5DJ3-L3LB].
Minnesota	No	Yes	CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (MINN. SUP. CT. 2016), https://www.revisor.mn.gov/court_rules/pr/subtype/judi/id/2/#2.11 [https://perma.cc/QD3U-RTM3].
Mississippi	No	Yes	CODE OF JUDICIAL CONDUCT Canon 3E(1) cmt. (MISS. SUP. CT. 2002), https://courts.ms.gov/research/rules/msrulesofcourt/code_of_judicial_conduct.pdf [https://perma.cc/H84K-97P8].
Missouri	No	Yes	CODE OF JUDICIAL CONDUCT r. 2-2.11 cmt. 2 (MO. SUP. CT. 2012), https://www.courts.mo.gov/file/Rule2-CodeofJudicialConduct-effective01-01-12.pdf.

Montana	No	Yes	2008 MONT. CODE OF JUDICIAL CONDUCT r. 2.12 cmt. 3 (MONT. SUP. CT. 2008), https://courts.mt.gov/Portals/189/supreme/boards/jud_standards/Montana%20Code%20of%20Judicial%20Conduct%20Effective%202009.pdf [https://perma.cc/F3HE-VXZJ].
Nebraska	No	Yes	NEB. REVISED CODE OF JUDICIAL CONDUCT § 5-302.11 cmt. 3 (NEB. SUP. CT. 2011), https://supremecourt.nebraska.gov/supreme-court-rules/chapter-5-judges/article-3-nebraska-revised-code-judicial-conduct-effective-january-1-2011/%C2%A7-5-3020-canon-2-judge-shall-perform-duties-judicial-office-impartially-competently-diligently/%C2%A7-5-30211-disqualification [https://perma.cc/XEW2-HP25].
Nevada	No	Yes	NEV. CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (NEV. SUP. CT. 2009), https://www.leg.state.nv.us/courtrules/scr_cjc.html [https://perma.cc/96AZ-KRE6].
New Hampshire	No	Yes	CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (N.H. SUP. CT. 2011), https://www.courts.state.nh.us/rules/scr/scr-38-Canon%202-new.htm#Rule%202.11 [https://perma.cc/24HY-PCWU].
New Jersey	No	Yes	CODE OF JUDICIAL CONDUCT r. 3.17 cmt. 9 (N.J. SUP. CT. 2016), https://www.njcourts.gov/attorneys/assets/rules/cjc.pdf [https://perma.cc/34PW-WWCE].
New Mexico	No	Yes	CODE OF JUDICIAL CONDUCT r. 21-211 cmt. 3 (N.M. SUP. CT. 2015), http://www.nmjsc.org/wp-content/uploads/2018/04/Code-of-Judicial-Conduct-as-of-4-27-18.pdf [https://perma.cc/YUY7-RA4S].
New York	No	No	N.Y. R. OF CHIEF ADMIN. JUDGE § 100.3(E) (N.Y. CT. APP. 2019), http://ww2.nycourts.gov/rules/chiefadmin/100.shtml#03 [https://perma.cc/D5YG-TX98].
North Carolina	No	No	N.C. CODE OF JUDICIAL CONDUCT (N.C. SUP. CT. 2015), https://www.nccourts.gov/assets/inline-files/NC-Code-of-Judicial-Conduct.pdf?Zjg7FIMDTZpoWqmY7qxsED4HVrFt7dRj [https://perma.cc/8FKT-JF8W].

North Dakota	No	Yes	N.D. CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (N.D. SUP. CT. 2012), https://www.ndcourts.gov/legal-resources/rules/ndcodejudconduct/canon-2 [https://perma.cc/MZL3-773H].
Ohio	No	Yes	OHIO CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (OHIO SUP. CT. 2017), http://www.supremecourt.ohio.gov/LegalResources/Rules/conduct/judcond0309.pdf [https://perma.cc/N6ST-3LQU].
Oklahoma	No	Yes	OKLA. STAT. tit. 5, Ch. 1, App.4, r. 2.11 cmt. 3 (2019).
Oregon	Yes	No	OR. CODE OF JUDICIAL CONDUCT r. 3.10(B) (OR. SUP. CT. 2013), https://www.courts.oregon.gov/rules/Other%20Rules/CodeJudicialConduct.pdf [https://perma.cc/SFY9-WWKP].
Pennsylvania	No	Yes	207 PA. CODE 33 r. 2.11 cmt. 3 (2019).
Rhode Island	No	Yes	R.I. CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (R.I. SUP. CT. 2018), https://www.courts.ri.gov/Courts/SupremeCourt/SupremeMiscOrders/Order_Adopting_New_Rhode_Island_Code_of%20_Judicial_Conduct.pdf [https://perma.cc/AN6C-YKGL].
South Carolina	No	Yes	CODE OF JUDICIAL CONDUCT r. 3E(1) cmt. (S.C. SUP. CT. 2015), https://www.sccourts.org/courtreg/displayRule.cfm?ruleID=501.0&subRuleID=Canon%203&ruleType=APP [https://perma.cc/RME9-RCWR].
South Dakota	No	Yes	S.D. CODIFIED LAWS § 16-2 app. A Canon 3E(1) cmt. (2019).
Tennessee	No	Yes	CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (TENN. SUP. CT. 2015), http://www.tsc.state.tn.us/rules/supreme-court/10#CANON%202 [https://perma.cc/HKB7-82FP].
Texas	No	No	TEX. CODE OF JUDICIAL CONDUCT (TEX. SUP. CT. 2002), https://www.txcourts.gov/media/514728/TXCodeOfJudicialConduct_20020822.pdf [https://perma.cc/2KLG-6EQP].
Utah	No	Yes	CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (UTAH SUP. CT. 2016), http://www.utcourts.gov/resources/rules/ucja/ch12/Canon.2.htm [https://perma.cc/R6MY-TA77].

Vermont	No	No	VT. CODE OF JUDICIAL CONDUCT (VT. SUP. CT. 2012), https://www.vermontjudiciary.org/sites/default/files/documents/Text_of_A.O._10_Vt_Code_of_Judicial_Conduct.REFORMATTED.pdf [https://perma.cc/3MSS-6K3B].
Virginia	No	Yes	CANONS OF JUDICIAL CONDUCT FOR THE COMMONWEALTH OF VA. r. 3E(1) cmt. (VA. SUP. CT. 2015), http://www.courts.state.va.us/agencies/jirc/canons_of_judicial_conduct.pdf [https://perma.cc/LWA5-H5GM].
Washington	No	Yes	CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (WASH. SUP. CT. 2015), https://www.cjc.state.wa.us/index.php?page=governing_provisions&section=code_of_judicial_conduct_canons [https://perma.cc/T26Y-SCLU].
Washington D.C.	No	Yes	CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (D.C. COURTS 2018), https://www.dccourts.gov/sites/default/files/divisionspdfs/Code-of-Judicial-Conduct_2018.pdf [https://perma.cc/4DRM-L8NK].
West Virginia	No	Yes	W. VA. CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (W. VA. SUP. CT. 2018), http://www.courtswv.gov/legal-community/court-rules/judicial-conduct/judicial-conductCanon2.html#disqualification [https://perma.cc/QN4L-ZWXR].
Wisconsin	No	Yes	WIS. SUP. CT. R. 60.04(4) cmt. (2018), https://docs.legis.wisconsin.gov/misc/scr/60/04/4 [https://perma.cc/A99T-KBW9].
Wyoming	No	Yes	WYO. CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 3 (WYO. SUP. CT. 2018), https://www.courts.state.wy.us/wp-content/uploads/2017/05/WYOMING_CODE_OF_JUDICIAL_CONDUCT.pdf [https://perma.cc/CV55-WFFK].

Table 2: States Where the Rule of Necessity is Endorsed in Case Law but Not in a Rule, Comment, or Internal Operating Procedure[241]

State	Case Citation
Illinois	*Jorgensen v. Blagojevich*, 811 N.E.2d 652, 660 (Ill. 2004).
Louisiana	*Haley v. Leary*, 2010 La. LEXIS 3006.
Michigan	*Citizens Protecting Mich.'s Constitution v. Sec. of State*, 755 N.W.2d 147 (Mich. 2008).
New York	*Diamond v. Cuomo*, 130 A.D.2d 292, 294 n. 2 (N.Y. App. Div. 1987) (per curiam), *aff'd*, 514 N.E.2d 1356, 1357.
North Carolina	*Boyce & Isley, PLLC v. Cooper*, 588 S.E.2d 887, 888 (2003) (applying the rule of necessity but noting three justices recused themselves).
Texas	*Kennedy v. Wortham [sic]*, 314 S.W.3d 34, 37 (Tex. App. 2010).

241. A search for Vermont case law suggests that the Vermont Supreme Court has never applied the rule of necessity to the judiciary. It has, however, discussed the rule in the context of reviewing an administrative decision, and when doing so, it used the term, "judicial disqualification":

> Where actual prejudice exists to the point of precluding an unbiased hearing, no rule of necessity will supplant a constitutionally protected right.
>
> Prior involvement in the subject matter of the hearing, of itself, will not work a judicial disqualification. And a claim of prejudgment founded on prior participation will not oust the only tribunal that has the authority to act in the premises.

In re Davenport, 283 A.2d 452, 456 (Vt. 1971) (internal citations omitted). For Alabama, the author has found several cases about the rule of necessity in the context of administrative law, but the author has not found a case dealing with it in the context of judicial recusal.