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Making Appearances Matter: Recusal and the Appearance of Bias

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Making Appearances Matter: Recusal and the Appearance of Bias

*Dmitry Bam**

In the United States, judges are required to recuse themselves—that is, remove themselves from participating in a case—not only when they are biased, but even when they may appear biased to a neutral observer. This nominally strict, appearance-based recusal standard is intended to ensure the judge’s impartiality in resolving disputes, to protect the judiciary’s reputation, and to instill public confidence in the fairness of the courts. It has long been assumed that so long as the judge makes the correct recusal decision, the appearance of impartiality is restored and the reputation of the judiciary is protected.

This Article challenges that long-standing assumption and argues that the focus on appearances only at the time of the recusal decision, when the public has already formed its impressions of judicial impartiality, may not fully restore public confidence and protect the reputation of the judiciary. In other words, a judge’s recusal decision may be too little and come too late. Moreover, when appearances are considered on a case-by-case basis, often by the very judge whose impartiality has been challenged, even the correct nonrecusal decision does not always foster an appearance of impartiality.

*Most of the literature on recusal focuses on the recusal standard and the reasons why judges might, intentionally or unintentionally, reach the incorrect recusal decision, and seeks solutions to that problem. In this Article, I propose a new role that appearances should play in American recusal jurisprudence, and a new approach to judicial recusal. I argue that rather than allowing individual judges to consider appearances *ex post* (i.e., in the context of individual cases), legislators must consider appearances *ex ante* to prevent the damage to the judiciary from arising in the first instance. This means that legislators must regulate judicial selection (including judicial elections) and judicial conduct, as*

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well as extrajudicial conduct, with an eye towards potential future recusal. To that end, legislatures should create ethical rules and regulations designed to eliminate any appearance of impartiality from arising. And, to the extent that recusal cannot be avoided by such ex ante regulation, legislatures must also consider appearances ex ante in creating and implementing new recusal procedures.

I. INTRODUCTION.....	945
II. JUDICIAL RECUSAL: PAST AND PRESENT.....	950
A. Roots	951
B. Judicial Disqualification in the United States	952
1. Federal recusal statutes.....	953
2. ABA Codes of Judicial Conduct.....	957
C. Recusal Under the Due Process Clause	958
1. Financial interest	959
2. Criminal contempt.....	961
3. <i>Caperton v. Massey</i>	962
D. Recent Incidents	964
III. IS GETTING IT RIGHT ENOUGH?	966
A. “Getting to Recusal”	969
B. Why Recusal May Not Be the Solution.....	973
1. Too little, too late	973
2. One case at a time	977
IV. EX ANTE REGULATION AND RECUSAL PROCEDURE	982
A. Ex Ante Regulation of Judicial Conduct and Judicial Elections	982
1. Judicial elections	984
2. Judicial relationships	988
3. Judicial financial interests	990
4. Extrajudicial involvement	991
B. Recusal Procedures.....	992
1. (Non)history of recusal procedure.....	994
2. The importance of procedure	997
V. CONCLUSION	1003

“We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.”

—Judge Benjamin Cardozo¹

I. INTRODUCTION

Throughout this nation’s history, Americans have only sporadically paid close attention—or any attention—to judicial recusal. Recusal, which in certain circumstances requires a judge to step aside from hearing a case, is a doctrine that protects (some would say is *crucial* to protecting) both judicial impartiality and the appearance of impartiality. That a judge must be disinterested, and must appear disinterested, is universally accepted in American legal culture. But despite the centrality of that notion in Western legal thought, the attention that recusal receives is often short-lived. The public temporarily takes notice of the issue when controversy arises, and in response to public outcry, state and federal legislatures, state supreme courts, and various bar associations promulgate new rules and guidelines to govern judicial disqualification or, more often, revise the rules already in place.² The issue then fades from the public’s mind and lays quiescent until the cycle is repeated with a new high-profile incident.

But the familiar on-again-off-again pattern has been broken in the last few years as recusal has steadily lingered in the national spotlight. From the controversy surrounding Justice Scalia’s infamous duck-hunting trip with then-litigant Dick Cheney,³ to the recent Supreme Court decision in *Caperton v. A. T. Massey*,⁴ to the more recent outcry over a federal district judge’s decision to overturn a federal moratorium on deep-sea drilling in the Deepwater

1. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 13 (1921).

2. The terms “recusal” and “disqualification” are used interchangeably throughout this Article. These terms originally had slightly different meanings, with “recusal” referring to withdrawal at the judge’s discretion and “disqualification” meaning exclusion by force of law, but this distinction is no longer recognized. John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 *LAW & CONTEMP. PROBS.* 43, 45 (1970); see also RICHARD E. FLAMM, *JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES* § 20.8 *passim* (2d ed. 2007).

3. *Cheney v. U.S. Dist. Court for the D.C.*, 541 U.S. 913 (2004) (Scalia, J.).

4. *Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). This case is discussed in greater detail throughout this Article. The underlying facts in *Caperton* were the basis for John Grisham’s best-selling novel *The Appeal*.

Horizon controversy,⁵ to the even more recent debate about whether a reportedly homosexual federal district court judge should have recused himself from ruling on the constitutionality of California's ban on gay marriage,⁶ judicial recusal has never been more in vogue.⁷ A federal appellate judge once commented that recusal is the "topic du jour," and this was *before* the spate of recent incidents dramatically shook the foundation of the judicial disqualification jurisprudence.⁸ While the aphorism that there is "no such thing as bad publicity" may be true in many aspects of modern popular culture, this is not the case when it comes to the judiciary. As the number of high-profile disqualification controversies continues to grow, the reputation of our courts is tarnished, and the public's faith in judicial impartiality and independence erodes.

There is potentially a silver lining to the cloud of negative publicity: as more people notice a problem, and it continues to capture their attention, more people tend to work on a solution. This has certainly been the case with judicial recusal. The *Caperton* decision has sparked, or at the very least rekindled, academic and political interest in judicial disqualification.⁹ Following on the heels

5. On June 22, 2010, federal district judge Martin Feldman overturned President Obama's moratorium on deep-ocean oil well drilling. The president had imposed the moratorium in response to the disaster in the gulf that spewed millions of barrels of crude oil into the Gulf of Mexico each day. It was later discovered that Feldman owns (or owned) extensive stock in oil companies and oil drilling corporations, including Allis-Chalmers and Exxon, although the stock appears to have been sold the very day that Judge Feldman issued his ruling. See Tennille Tracy, *Groups Seek Judge's Removal in Drilling-Moratorium Case*, WALL ST. J., July 2, 2010, <http://online.wsj.com/article/SB10001424052748704293604575343361857605650.html>.

6. See John C. Eastman, *Should Judge Have Recused Himself on Prop. 8?*, SFGATE.COM (Aug. 11, 2010), http://articles.sfgate.com/2010-08-11/opinion/22213940_1_parties-judge-walker-new-trial. On June 14, 2011, Judge Ware denied the motion to disqualify Judge Vaughn Walker. See Howard Mintz, *Judge Rejects Bid to Set Aside Proposition 8 Ruling*, MERCURYNEWS.COM (June 14, 2011, 10:09 PM), http://www.mercurynews.com/samesexmarriage/ci_18271537?source=rss&nclck_check.

7. While this Article focuses on recusal rules in the United States, recusal has also received significant attention overseas. See, e.g., HUGO YOUNG, *The Compromising of Lord Hoffman*, in SUPPING WITH THE DEVILS: POLITICAL WRITING FROM THATCHER TO BLAIR 212-14 (2003).

8. M. Margaret McKeown, *Don't Shoot the Canons: Maintaining the Appearance of Propriety Standard*, 7 J. APP. PRAC. & PROCESS 45, 45 (2005).

9. As of June 21, 2010, a Westlaw search for "Caperton and Massey" yields 172 hits in the JLR database. Interestingly, a search of the "ALLFEDS" (all federal cases) and "ALLSTATES" (all state cases) yields only 129 results, suggesting that the academic and scholarly interest in the case may outweigh its impact on the courts and subsequent litigation.

of that decision, Congress held hearings examining judicial recusals in light of *Caperton*,¹⁰ states grappled (and continue to grapple) with new recusal rules and procedures,¹¹ and law schools around the country have held conferences and symposia dedicated to *Caperton* and judicial ethics writ large.¹² But despite this concerted effort, no large-scale, national disqualification reform looms on the horizon. The problem seems to be that while many scholars and judges agree that *something* must be done, few agree on precisely what that something should be.¹³

There is, however, an overwhelming consensus on one point: When it comes to recusal, the focus is generally on the actual recusal decision—“What did the judge decide?” and “Was that decision correct?” In other words, scholars, judges, and politicians have

This casts some doubt on the *Caperton* dissenters’ prediction that the decision would open the floodgates for “*Caperton* motions” and that the courts would be inundated with frivolous disqualification demands.

10. On December 10, 2010, the House Judiciary Committee’s Subcommittee on Courts and Competition held a hearing entitled “Examining the State of Judicial Recusals after *Caperton v. A.T. Massey*.” This is not the first time in recent years that Congress has paid attention to judicial recusal. Shortly after the controversy over Justice Scalia’s non-recusal in a case involving Vice President Dick Cheney, Democrats on the House Judiciary Committee called for hearings into possible shortcomings of recusal laws that allowed Justice Scalia to hear a case after vacationing with one of the litigants. Senator Kerry asserted at the time that “[t]here is absolutely no question that when judges accept vacations and gifts from the parties before them it erodes public trust in the courts.” Josh Gerstein, *Kerry Has Pressed a Long Campaign to Rein in Judges*, N.Y. SUN, July 14, 2004, at 1.

11. West Virginia, Michigan, and Wisconsin are just a few of the states where contentious debate regarding the appropriate reaction to *Caperton* took place. For an article summarizing reforms in the states following *Caperton*, see James Sample, *Court Reform Enters the Post-Caperton Era*, 58 DRAKE L. REV. 787 (2010). On June 27, 2011, New York issued new recusal rules for elected state judges, prohibiting those judges from hearing cases involving litigants—parties or lawyers—who contributed over \$2,500 to their campaigns. See Rules Governing the Assignment of Cases Involving Contributors to Judicial Campaigns, RULES OF THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS § 151.1, available at http://nycourts.gov/rules/chiefadmin/151.shtml#section151_1.

12. See, e.g., Symposium, *Caperton v. A.T. Massey Coal Co.*, 60 SYRACUSE L. REV. 215 (2010); Symposium, *State Judicial Independence—A National Concern*, 33 SEATTLE U. L. REV. 559 (2010); Symposium, *Judicial Ethics and Accountability: At Home and Abroad*, 42 MCGEORGE L. REV. 1 (2010); Press Release, Georgetown Law School, State Courts and U.S. Supreme Court Rulings: Will *Caperton* and *Citizens United* Change the Way States Pick Judges? (Jan. 19, 2010), available at <http://www.law.georgetown.edu/news/releases/January.26.2010.html>.

13. But see John A. Meiser, Note, *The (Non)Problem of a Limited Due Process Right to Judicial Disqualification*, 84 NOTRE DAME L. REV. 1799 (2009) (suggesting that national-level reforms to disqualification rules are unnecessary, and that the issue should be left to individual states).

historically concentrated on what I call “getting to recusal,” that is, creating and amending *substantive* recusal rules that require partial judges (whether that partiality is real or perceived) to step aside. And even though appearances play an important role in the law of judicial recusal, only at the point of the recusal decision are appearances and public perception considered. This results-oriented, outcome-based approach to recusal is not surprising—the final recusal decision is generally the most salient part of the entire recusal process and one that figures most prominently in the public spotlight. After all, it was recusal decisions themselves that generally gave rise to the recusal-related controversies arising in the last decade. In turn, the focus on outcomes leads recusal reformers to proceed under a fundamentally flawed assumption that the problem can be solved by simply fashioning a new rule requiring a future judge to recuse under the same factual circumstances that may have led a present-day judge not to recuse. As a consequence of this assumption, substantive recusal standards have been continually revised and refined, while recusal procedures have remained stagnant. Additionally, the same assumption (i.e., that recusal can eliminate the appearance of partiality created by the judicial conduct requiring recusal in the first place) has led scholars and politicians to pay little attention to regulating the underlying judicial conduct.

In the pages that follow, I argue that this outcome-based approach is misguided when it comes to maximizing the appearance of judicial impartiality and judicial legitimacy. Focusing on the final recusal decision, and considering appearances only at the time of that decision, places too much emphasis on an aspect of recusal that may not be so important, at least when it comes to public confidence in the impartiality and fairness of American courts.

This Article recommends a two-part solution. The first part requires that attention shift *away from* the outcome-based recusal jurisprudence that focuses on the substantive recusal standard and the actual recusal decision. The second requires that attention shift *toward* the rules, regulations, and procedures that precede the recusal decision: namely, (1) ex ante regulation of judicial conduct and judicial selection that creates the appearance of bias in the first place,¹⁴ and (2) new recusal procedures to govern the processes by

14. Unlike ex post solutions like judicial recusal, which seek to minimize the damage to the judiciary by removing judges when they may be perceived as biased, an ex ante solution in

which judges make recusal decisions. The recommended shift of attention to ex ante regulation of judicial conduct and appearance-based recusal procedures will promote the appearance of judicial impartiality.

While at first glance recusal may seem like a narrow and obscure topic within the larger field of judicial ethics and judicial impartiality, judicial recusal is a linchpin for the underlying proposition that a court should be fair and impartial. Partly as a result of a poorly functioning recusal scheme, public confidence in the legal system has waned, and people are rightly concerned about the impartiality of their courts.¹⁵ A “crisis of confidence” may be infecting our ideals of judicial impartiality.¹⁶ In light of the United States Supreme Court’s decisions in *Republican Party of Minnesota v. White*¹⁷ and *Citizens United v. FEC*,¹⁸ recusal reform may be the best way—perhaps the only way—to deal with the appearance of partiality that can be created by large campaign contributions to a judge in the course of an election.¹⁹ As other safeguards of judicial impartiality have fallen by the wayside or been struck down by the Supreme Court, and as judicial elections have come to resemble legislative elections, finding a new approach to recusal becomes more and more crucial.

This Article proceeds in three parts. Part II discusses the history of judicial recusal in the United States. This history shows the evolution of American thought about judicial recusal, from its common-law origins, when disqualification was required only if the judge had a pecuniary interest in the case, to the regime in place today, which requires recusal for a mere appearance of bias. I will also show how substantive recusal standards have evolved under the

this context consists of rules that minimize or eliminate the damage to the judiciary from occurring in the first place. It may seem odd at first glance that in this Article about recusal, the key jurisprudential change that I recommend is not actually a change to recusal rules at all, but rather a new approach to regulating judges and aspiring judges. Nonetheless, I hope to show that to maximize the appearance of impartiality, the time to think about recusal is before the appearance of bias arises in the first place.

15. Damon M. Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens’ Diffuse Support for State Courts*, 36 AM. POL. RES. 297, 313 (2007).

16. John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 245 (1987).

17. 536 U.S. 765 (2002).

18. 130 S. Ct. 876 (2010).

19. Of course, another solution would be to eliminate judicial elections altogether. However, the public strongly supports judicial elections, and eliminating judicial elections at this time is politically infeasible.

assumption that the substantive recusal rule is the key factor in creating the appearance of judicial impartiality.

Part III starts with the proposition that the public's perception of judicial conduct—the *appearance* of fairness and partiality—must be considered in recusal and disqualification rules and standards. It nevertheless concludes that relying solely on the “appearance of bias” standard—an *ex post* standard that has largely been accepted by judges and scholars—fails to create an appearance of impartiality. I challenge the long-accepted and virtually uncontroverted assumption that a judge's recusal can eliminate the appearance of impartiality. To the contrary, I argue that the mere act of recusal is an ineffective way to restore the public's confidence in the courts, in part because it comes much too late. Although the empirical data on this issue is very limited, some preliminary research suggests that once the public has perceived conditions that create impartiality or bias, the recusal decision alone cannot fully restore public confidence. Furthermore, I argue that making appearance-based recusal decisions in individual cases on an *ad hoc* basis may not create an appearance of impartiality, no matter the substantive standard. Both of these conclusions require substantially more empirical analysis, but this Article suggests that it is a field worth a closer look.

Part IV proposes a solution: to maximize the appearance of impartiality and protect the reputation of the judiciary, we must implement *ex ante* regulations of judicial conduct that prevent the need for recusal altogether whenever possible. When recusal cannot be avoided, I propose the implementation of systemic, appearance-based procedural recusal rules. The appearance-based recusal procedures are themselves the ends of my proposal, not the means by which we accomplish some other goal (namely, the “right” substantive result). And while I leave open the question of what specific *ex ante* rules and which particular recusal procedures do the most to maximize and restore the appearance of judicial impartiality, I conclude with some suggestions about how my proposals could be implemented.

II. JUDICIAL RECUSAL: PAST AND PRESENT

The American legal system is based on a simple and noncontroversial proposition: a fair and neutral judge is essential to the operation of a just legal system. This maxim was recognized

throughout the history of legal institutions, and, in some respects, the academic scholarship on the judiciary, and the judicial role is about advancing fair, impartial, and independent judges. Disqualification of unfair and non-neutral judges is just one method commonly used to ensure impartiality within the judiciary.²⁰ After all, judges are human and often develop personal and professional relationships that may hinder their ability to preside over a dispute in a fair and impartial manner. This Part provides an overview of the history and development of recusal rules in the United States. The recusal scheme that exists in the United States today has its roots in English common law. Exploring the history of recusal rules and standards helps explain recent controversies surrounding judicial disqualification in state and federal courts. The discussion will also highlight the important role that appearances—public perception of the judiciary and confidence in the courts—play in current recusal jurisprudence.

A. Roots

Early Jewish and Roman law recognized the importance of judicial impartiality.²¹ In fact, medieval Jewish law prohibited judges from participating in cases involving a friend or a kinsman,²² and the Roman Code of Justinian provided for removal of judges for mere

20. There are, of course, more draconian measures that can be used to remove biased or partial judges, including censure, reprimand, and impeachment. Often, these measures are reserved for judges who engage in blatant corruption or violate other ethical rules. *See, e.g.*, Ian Urbina & Sean D. Hamill, *Judges Plead Guilty in Scheme to Jail Youths for Profit*, N.Y. TIMES, Feb. 13, 2009, at A22, available at http://www.nytimes.com/2009/02/13/us/13judge.html?_r=1&adxnnl=1&adxnnlx=1300986369-2HIFqUYyJrX5IElf75zRAQ.

21. FLAMM, *supra* note 2, § 1.2, at 5. Bracton set out the common law rule for disqualification in the thirteenth century:

A justiciary may be refused for good cause, but the only cause for refusal is a suspicion, which arises from many causes, as if the judge be a blood relative of the plaintiff, his vassal or subject, his parent or friend, or an enemy of the tenant, his kinsman or a member of his household, or a table-companion, or he has been his counsellor or his pleader in that cause or in another, and in any such like capacity.

6 HENRICI DE BRACTON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIE 249 (Travers Twiss trans., 1883).

22. FLAMM, *supra* note 2, § 1.2, at 5 (citing THE CODE OF MAIMONIDES: BOOK FOURTEEN, THE BOOK OF JUDGES 68–70 (Julian Obermann et al. eds., Abraham M. Hershtman trans., Yale Univ. Press 1949)). The Talmud, dating back to the third century, “created strict prohibitions on judges’ interactions with parties.” Jay Hall, Note, *The Road Less Traveled: The Third Circuit’s Preservation of Judicial Impartiality in an Imperfect World*, 50 VILL. L. REV. 1265, 1268 (2005).

suspicion of bias.²³ Similarly, English common law provided for replacement of a suspect judge and recognized the maxim that “no man ought to be a judge in his own cause.”²⁴ But by the 18th century, the common-law recusal practice was exceedingly simple and highly constrained: only if he had a direct pecuniary interest in the case was the judge to be disqualified.²⁵

Commentators, including Blackstone, and English courts of that time rejected the notion that a judge should be disqualified from hearing a case merely because he may be biased.²⁶ This was largely due to the then-prevalent respect for judges.²⁷ “[T]he law will not suppose a possibility of bias or favour in a judge,” Blackstone wrote, “who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.”²⁸ Recusal was not required even when family members appeared as parties in front of a judge.²⁹

B. Judicial Disqualification in the United States

Under the common law, and in the British Commonwealth even to this day, the law on judicial recusal is largely judge-made. In the United States, federal and state legislation also play a key role in regulating judicial disqualification. This is an important distinction, as this Article will later argue that judges are not in the best position to regulate their own conduct, whether it comes to recusal procedures or to the substantive recusal standard. For now, however, let us examine the history and development of the standard.

23. Harrington Putnam, *Recusation*, 9 CORNELL L.Q. 1, 3 n.10 (1923).

24. *Dr. Bonham's Case*, [1610] 77 Eng. Rep. 646, 652 (P.C.); *accord* *Tumey v. Ohio*, 273 U.S. 510, 525 (1927).

25. John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609–12 (1947). The two leading common law authorities for this proposition are the *Sir Nicholas Bacon's Case*, [1563] 73 Eng. Rep. 487, and the *Earl of Derby's Case*, [1614] 77 Eng. Rep. 1390.

26. 3 WILLIAM BLACKSTONE, COMMENTARIES *361; *Brookes v. Rivers*, [1668] 145 Eng. Rep. 569 (holding that a judge was not required to recuse himself in his brother-in-law's case).

27. Of course, one could argue it was also partly due to a lack of understanding of human nature and subconscious bias. See PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICYMAKERS 267–301 (2010) (discussing biases in processing and judging information, including hindsight bias, confirmation bias, and overconfidence).

28. BLACKSTONE, *supra* note 26, at *361.

29. *Brookes*, 145 Eng. Rep. at 569 (explaining that a judge need not recuse himself from a brother-in-law's case because “favour shall not be presumed in a judge”).

1. Federal recusal statutes

Although the American Founders shared some of the English reverence for the judiciary, and American disqualification law grew directly out of the common law tradition, American judges—at least American federal judges—have historically been held to a more stringent recusal standard than judges in England.³⁰ Judges continue to take an oath swearing to administer justice “faithfully and impartially.”³¹ But in virtually every jurisdiction, financial interest is now only one of many disqualifying factors, which also include familial and professional connections to the parties or their counsel, prejudice, partiality, bias, and knowledge of disputed evidentiary facts.³²

Leading up to the American Revolution, colonists adopted the simple and narrow common law recusal rule described above. But shortly thereafter, in 1792, Congress passed the United States’ first recusal statute.³³ It is unknown why Congress stepped into the fray so quickly, but the passage of the law was perhaps a sign of a concern that the recusal issue should not be left entirely to judges. This initial legislation was narrowly drawn and interpreted, and did not prohibit judges from hearing cases in which they might have a bias for or against a party.³⁴ Rather, the statute largely codified the common law disqualification rules and called for disqualification of a district court judge who was “concerned in interest,” as well as judges who had “been of counsel for either party.”³⁵

30. As I explain in greater detail below, while the substantive recusal standard has changed significantly since the common law, and we have a much greater understanding of both conscious and subconscious bias, the recusal procedures used in common law are still prevalent today.

31. 28 U.S.C. § 453 (2006). Each judge and justice of the United States must take the following oath:

“I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.”

32. See FLAMM, *supra* note 2, chs. 23–27 (surveying disqualification rules in state and federal courts).

33. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278–79 (amended by Act of Mar. 3, 1821, ch. 51, 3 Stat. 643).

34. *Id.* In other words, Congress did not entirely reject the simple recusal standard that was in place in England.

35. *Id.*

Over the next two centuries, the federal recusal statute was amended and shaped. The federal statute that governs recusals by federal judges today is 28 U.S.C. § 455.³⁶ It is divided into two parts. Section 455(a) is a general catch-all provision that requires disqualification whenever a judge's "impartiality might reasonably be questioned."³⁷ This standard was intended to promote not only the impartiality of the judiciary but also the public perception of the impartiality of the judicial process.³⁸ No longer do we tolerate all non-financial bias by our judges. Instead, the statute is interpreted to proscribe even the appearance of bias, as viewed from the perspective of an objective observer.

This appearance-based standard has been in place since the statute was amended in 1974 and was intended to overrule the duty-to-sit doctrine, which suggested that close questions on disqualification issues should be resolved in favor of hearing the case.³⁹ Section 455(a) has been described by the Court as a "catchall" provision, covering all kinds of bias and prejudice, and requiring an objective evaluation rather than the earlier subjective standard.⁴⁰

Section 455(b), on the other hand, lists specific circumstances requiring disqualification.⁴¹ Some consider the § 455(b) list as an a

36. This statute is a descendant of the original 1792 statute, which was altered in 1821 by the Act of Mar. 3, 1821, ch. 51, 3 Stat. 643; in 1891 by the Act of March 3, 1891, ch. 23, § 21, 36 Stat. 1090; then again in 1911 by the Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1087, 1090; and recodified as 28 U.S.C. § 455 in 1948.

37. 28 U.S.C. § 455(a) (2006).

38. H.R. REP. NO. 93-1453, at 5 (1974); *see also* S. REP. NO. 93-419, at 5 (1973); *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988) ("The general language of subsection (a) was designed to promote public confidence in the integrity of the judicial process by replacing the subjective 'in his opinion' standard with an objective test.").

39. Mark T. Coberly, Note, *Caesar's Wife Revisited—Judicial Disqualification After the 1974 Amendments*, 34 WASH. & LEE L. REV. 1201, 1205 (1977).

40. *Liteky v. United States*, 510 U.S. 540, 548 (1994); *Liljeberg*, 486 U.S. at 870–71 (Rehnquist, C.J., dissenting).

41. 28 U.S.C. § 455(b). Subsection 455(b)(1) requires a judge to recuse himself when he "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." *Id.* § 455(b)(1). Subsection (b)(2) requires recusal "[w]here in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning [the matter in controversy]." *Id.* § 455(b)(2). Subsection (b)(3) requires recusal when the judge "has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." *Id.* § 455(b)(3). Subsection (b)(4) demands recusal when the

priori, per se determination of conditions that automatically satisfy the standard set forth in § 455(a), while others regard the list as a predetermined set of circumstances that involve actual bias rather than “the public perception of the judicial process.”⁴² Section 455(b) is implicated in cases involving allegations of personal bias or prejudice, or when the judge’s relationships and interests—including prior employment, family relationships, and financial interests—create a conflict of interest. In other words, unlike § 455(a), which focuses on how a reasonable person would perceive the judicial conduct, § 455(b) addresses circumstances that are likely (in the eyes of the legislature) to create actual bias towards a party to the litigation.

Despite numerous amendments, each broadening and expanding the disqualification standards, judges have always interpreted the statute narrowly.⁴³ This is partly because judges apply the law to themselves, and most judges hesitate to admit that they are so biased or so interested in a case as to be unable to render a fair, impartial decision. Research in cognitive psychology has recognized various biases that may affect judicial decision making on recusal, including unconscious bias and self-serving bias.⁴⁴ In addition, the judge-

judge

knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

Id. § 455(b)(4). Finally, subsection (b)(5) requires recusal when a spouse, or close relative, is a party in the proceeding or the lawyer to a party in the proceeding, has outside information regarding the case in controversy, or stands to gain financially from the case’s outcome. *Id.* § 455(b)(5).

42. Compare Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 NEB. L. REV. 1046, 1049–50 (1993) (arguing that § 455(b) particularizes the grounds for disqualification that satisfy the catch-all standard of § 455(a)), with *Herrington v. County of Sonoma*, 834 F.2d 1488, 1502 (9th Cir. 1987) (“Section 455(b) covers situations in which an actual conflict of interest exists, even if there is no appearance of one.”) (emphasis omitted); see also *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1527 (11th Cir. 1988).

43. Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 540–41 (2005).

44. Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913 (1999) (discussing unconscious bias); see also Robert A. Prentice, *The Case of the Irrational Auditor: A Behavioral Insight into Securities Fraud Litigation*, 95 NW. U. L. REV. 133, 143–80 (2000) (discussing self-serving bias).

created “duty to sit” doctrine encouraged judges to err on the side of remaining on a case even when there was a strong argument in favor of recusal.⁴⁵

Judicial reluctance to acknowledge bias is only part of the reason why federal recusal statutes have had only limited success. Bias is a difficult concept to define. Generally, bias is defined as an “[i]nclination; prejudice, predilection; a preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction.”⁴⁶ Unfortunately, the attempts to draw bright lines for judges to follow have focused predominantly on judges’ financial interests at the expense of all other interests.⁴⁷ In fact, the disclosures required of all federal judges address only financial holdings.⁴⁸ The focus on financial interests is understandable since financial interests are generally easier to define and identify. Furthermore, the popularity of law and economics—which claims that wealth maximization motivates human behavior—shifts the emphasis even more to a judge’s financial ties.

A second recusal statute, codified as 28 U.S.C. § 144, allows litigants to seek disqualification of a district court judge for any alleged bias or prejudice and establishes a broader recusal standard. Under this statute, judges have limited discretion about whether to recuse; litigants need only file an affidavit alleging sufficient facts to infer a judge’s prejudice.⁴⁹ Once such an affidavit is filed, the facts contained in the affidavit are presumptively valid, and a judge is automatically disqualified from the case.⁵⁰ In *Berger v. United States*, the Supreme Court explained that this statute prohibits a judge from

45. *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (emphasis omitted).

46. BLACK’S LAW DICTIONARY 171 (9th ed. 2009).

47. A judge must recuse himself when “[h]e knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy.” 28 U.S.C. § 455(b)(4) (2000). Financial interest is defined as “ownership of a legal or equitable interest, however small” *Id.* § 455(d)(4).

48. *See* Ethics in Government Act, §§ 101–102, 5 U.S.C. app. 4 (2000); *see also* Richard Carelli, *Judges’ Financial Reports Hit Web*, ASSOCIATED PRESS, June 22, 2000.

49. *Berger v. United States*, 255 U.S. 22 (1921).

50. *See* FLAMM, *supra* note 2, § 25.2.1, at 721 (“On its face § 144 appears to be a peremptory disqualification provision, and there is little doubt that it was originally intended to be one.”).

ruling on the truth of the allegations in a party's affidavit, requiring disqualification so long as the affidavit is facially sufficient.⁵¹

However, judges have adopted a narrow definition of prejudice and continue to review the affidavit to determine whether the litigants have satisfied the statutory requirements.⁵² In other words, the very judge whose fairness is under review rules on the sufficiency of the affidavit. Professor Frank has explained:

Frequent escape from the statute has been effected through narrow construction of the phrase "bias and prejudice." Affidavits are found not "legally sufficient" on the ground that the specific acts mentioned do not in fact indicate "bias and prejudice," a reasoning which emasculates the *Berger* decision by transferring the point of conflict.⁵³

2. ABA Code of Judicial Conduct

While 28 U.S.C. §§ 455 and 144 control only in federal courts,⁵⁴ nearly every state has adopted the American Bar Association's *Code of Judicial Conduct*.⁵⁵ The Code, therefore, governs judicial

51. 255 U.S. at 36.

52. See Debra Lyn Bassett, *Judicial Disqualification in the Federal Courts*, 87 IOWA L. REV. 1213, 1224 (2002).

53. Frank, *supra* note 25, at 629. Countervailing a judge's duty to recuse was a judicially created "duty to sit," first articulated by the Fifth Circuit. *Edwards v. United States*, 334 F.2d 360, 362 n.2 (5th Cir. 1964). That court explained that "[i]t is a judge's duty to refuse to sit when he is disqualified but it is equally his duty to sit when there is no valid reason for recusal." *Id.* The "duty to sit" provided the ammunition for judges to err on the side of nonrecusal, even when recusal was arguably justified. Although the duty to sit doctrine was eventually accepted by all circuits, see *Laird v. Tatum*, 409 U.S. 824, 837 (1972), the duty to sit has now largely been rejected.

54. The Code of Judicial Conduct does not apply to the Justices of the United States Supreme Court, although the Supreme Court looks to the Code for guidance. See Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 111 (2004). In light of recent controversies surrounding recusal of Supreme Court Justices, including Justices Scalia and Thomas, some commentators and law professors have called on the Court to adopt the Code for itself or for Congress to impose such adoption upon the Court.

55. The original *Canons of Judicial Ethics* were adopted in 1924 by the House of Delegates of the American Bar Association and ultimately by a majority of the states over the course of the next five decades. The House of Delegates adopted more explicit standards for judicial conduct in 1972 and ultimately adopted a revised *Model Code of Judicial Conduct* in 1990. That Code was superseded by a revised Code adopted in February 2007 by the ABA House of Delegates. The 2007 revision is available at http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf.

disqualification in almost all American state courts⁵⁶ and applies to all full-time judges and all legal and quasi-legal proceedings.⁵⁷

Rule 2.11 of the 2007 Code states: “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned”⁵⁸ Impartiality is defined as the “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before the judge.”⁵⁹ In many ways, disqualification under the Code resembles disqualification under 28 U.S.C. § 455(a): both have been interpreted to impose an appearance-based disqualification standard.⁶⁰ Both also leave judges with broad discretion in interpreting and applying this standard, and judges have exploited this discretion to downplay the potential for an appearance of bias.⁶¹ I discuss disqualification of state and federal judges interchangeably, as any distinctions between the two are generally inapposite for the purposes of this Article.

C. Recusal Under the Due Process Clause

In addition to the federal statutes and the state judicial codes, the Constitution’s Due Process Clause guarantees litigants a right to have their cases heard and decided by fair and impartial judges.⁶² The Supreme Court has held that a biased judge violates the litigant’s constitutional rights, requiring either a new trial or a new hearing on

56. Forty-nine states have adopted the Code in one form or another. Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably Be Questioned,”* 14 GEO. J. LEGAL ETHICS 55, 55 (2000).

57. The Code of Conduct for United States Judges is another ethical code that applies to most federal judges and is largely similar to the ABA Model Code. The Code, adopted and revised by the Judicial Conference of the United States, does not govern the Justices of the United States Supreme Court because the Conference has no authority to create rules controlling the Supreme Court. See Richard K. Neumann, Jr., *Conflicts of Interest in Bush v. Gore: Did Some Justices Vote Illegally?*, 16 GEO. J. LEGAL ETHICS 375, 386 (2006).

58. MODEL CODE OF JUDICIAL CONDUCT 2.11 (2007). The rule goes on to list specific situations where the likelihood of prejudice or its appearance is presumed, although the list is not exhaustive.

59. *Id.*

60. Abramson, *supra* note 56, at 55 n.2 (“Whether a judge’s impartiality might reasonably be questioned is also referred to as the appearance of partiality, appearance of impropriety, or negative appearances.”).

61. Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 680 (2005).

62. U.S. CONST. amends. V, XIV.

appeal without the tainted judge's presence.⁶³ These holdings, however, are exceptions rather than the rule, and it has long been thought that the Constitution mandates disqualification in only very limited circumstances. The Supreme Court has explained that "matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion" rather than a constitutional recusal floor.⁶⁴ For decades, it was thought that recusal was mandated under the Due Process Clause in only two circumstances: (1) when the judge has a financial interest in one of the parties; or (2) when the judge presides over a criminal contempt hearing after presiding over an earlier hearing in which the contemptuous behavior took place. But in *Caperton*, the Supreme Court held that recusal is also mandated when the judge's relationship with one of the litigants creates a probability of bias.⁶⁵ Although *Caperton* involved a judge who decided a case involving a supporter of the judge's election bid, the holding of the case does not appear to be limited to the electoral context.⁶⁶ Nonetheless, it remains to be seen whether *Caperton* will change recusal analysis under the Due Process Clause, or if it will be a one-off case limited to its facts. These three categories of recusal—the two classic standards, and the new *Caperton* standard—are discussed in greater detail below.

1. Financial interest

The first situation where the Due Process Clause requires disqualification is when the judge may benefit financially depending on the outcome of the case. In the leading case, *Tumey v. State of Ohio*, an Ohio statute authorized a mayor to preside over cases as a judge.⁶⁷ The mayor then received court costs assessed against a convicted defendant, but not an acquitted one. The Court held that this incentive scheme threatened judicial impartiality and invalidated the statute on due process grounds, explaining that due process is

63. *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.")

64. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (citing *Wheeling v. Black*, 25 W. Va. 266, 270 (1884)).

65. *Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

66. *See id.* at 2257, 2267.

67. *Tumey*, 273 U.S. at 510.

violated when a judge is “paid for his service only when he convicts the defendant.”⁶⁸ In its holding, the Court relied on the common law rule that a judge may not have a “direct, personal, substantial pecuniary interest” in the case.⁶⁹ That rule has its origins in the maxim that no person is allowed to be “a judge in his own cause, because his interest would certainly bias his judgment, and . . . corrupt his integrity.”⁷⁰ This result is neither controversial nor surprising; a judge should not receive “contingency fees” for convicting a defendant.⁷¹

A judge’s interest need not be a direct financial one to violate due process. For example, in *Ward v. Village of Monroeville* the Court held that a mayor could not preside as a judge over ordinance violations and traffic offenses when contributions to the town’s budget came from the fines assessed by the court.⁷² While the mayor’s salary did not depend on his conviction rate, the mayor still had a financial incentive to convict; he was responsible for the town’s revenue production. That incentive, held the Court, is inconsistent with due process.⁷³

Similar incentives were held to violate due process in *Aetna Life Insurance Co. v. Lavoie*.⁷⁴ There, an Alabama Supreme Court justice ruled in favor of the plaintiff on his bad faith claim against Aetna. It turned out, however, that the same judge had filed two nearly identical actions against other insurance companies making similar allegations and seeking punitive damages.⁷⁵ Those cases were still pending in Alabama’s lower courts at the time the *Aetna* case was decided. The Supreme Court held that the justice’s refusal to recuse violated the Due Process Clause. Without deciding whether the justice was in fact influenced by his pending cases, the Court explained that the circumstances “would offer a possible temptation

68. *Id.* at 531.

69. *Id.* at 523.

70. THE FEDERALIST NO. 10 (James Madison).

71. Ronald D. Rotunda, *Judicial Disqualification in the Aftermath of Caperton v. A.T. Massey Coal Co.*, 60 SYRACUSE L. REV. 247, 249 (2010).

72. 409 U.S. 57, 60 (1972). Between 1964 and 1968, the fines, forfeitures, costs, and fees that the court had imposed provided nearly one-half of the village’s annual revenue. *Id.* at 58.

73. *Id.* at 60 (“The mayor’s executive responsibilities [sic] for village finances may make him partisan to maintain the high level of contribution from the mayor’s court.”).

74. 475 U.S. 813, 825 (1986).

75. *Id.* at 817.

to the average judge to lead him to not to [sic] hold the balance nice, clear and true.”⁷⁶ In other words, recusal was necessary not because of the justice’s ill will towards insurance companies, but rather because his decision “had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case.”⁷⁷ As with *Tumey* and *Ward*, the judge could have used his position on the bench to further his own financial interests, acting as “a judge in his own case.”⁷⁸

In short, before *Caperton*, the “interested judge” category was fairly straightforward: if the judge could be linked to any financial interest, disqualification was required. The common thread in all of these cases was that the presiding judge derived a direct or indirect benefit by ruling in favor of one of the litigants.

2. *Criminal contempt*

The second disqualification category that falls within the confines of the Due Process Clause does not involve any financial interest to the judge. Instead, the Court has held that the due process forbids a judge from wearing too many hats. For example, in *In re Murchison*, the Court found a violation of the Due Process Clause although the judge did not have a personal pecuniary interest in the outcome of the case.⁷⁹ There, the Court set aside contempt convictions and held that it is a violation of due process for the same judge to serve as the one-person grand jury and then preside over a contempt proceeding related to the grand jury hearing.⁸⁰

Mayberry v. Pennsylvania, which followed *In re Murchison*, is also instructive.⁸¹ In *Mayberry*, the defendant, in the course of trial, verbally attacked the presiding judge⁸² and continuously interrupted court, to the point where Mayberry had to be removed from the

76. *Id.* at 825 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

77. *Id.* at 824.

78. *Id.*; see also *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (holding that an administrative board made up of optometrists was disqualified from presiding over a hearing against competing optometrists).

79. 349 U.S. 133 (1955).

80. *Id.*

81. *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971).

82. Defendant referred to the judge as a “hatchet man for the State,” a “dirty sonofabitch,” and a “dirty, tyrannical old dog.” *Id.* at 456–57.

courtroom.⁸³ The Supreme Court held that when the defendant faces criminal contempt charges he “should be given a public trial before a judge other than the one reviled by the contemnor.”⁸⁴ Again, disqualification was necessary because of the interaction between the judge and the defendant prior to the contempt hearing.⁸⁵ The Court explained that a “vilified” judge “necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication.”⁸⁶

3. *Caperton v. Massey*

This was the state of recusal law under the Due Process Clause until *Caperton v. A.T. Massey Coal Co.*⁸⁷ In that case, West Virginia Supreme Court Justice Benjamin cast the deciding vote in favor of the appellant, Massey, whose CEO, Don Blankenship, was an extremely generous supporter of Justice Benjamin in the previous West Virginia Supreme Court election campaign. Blankenship contributed more to Benjamin’s campaign than all other donors combined, all while his attorneys were preparing the *Caperton* case for an appeal.⁸⁸ Justice Benjamin refused Caperton’s recusal request and voted with the majority in a three–two decision overturning the trial court’s verdict.⁸⁹ The Supreme Court reversed, holding that

83. *Id.* at 462.

84. *Id.* at 466. The same rule applies when a trial judge, following trial, punishes a lawyer for contempt committed during trial without giving that lawyer an opportunity to be heard in defense or mitigation. *See Taylor v. Hayes*, 418 U.S. 488, 499–500 (1974). In such circumstances, a different judge should conduct the contempt trial in place of the judge who initiated the contempt.

85. *Mayberry*, 400 U.S. at 465.

86. *Id.*

87. 129 S. Ct. 2252 (2009).

88. During the campaign Blankenship spent approximately \$3 million to help Justice Benjamin. However, only \$1000, the West Virginia limit for direct campaign contributions, was given directly to Benjamin’s campaign. The rest of the money (i) funded a tax-exempt organization, And for the Sake of the Kids, which was formed to defeat incumbent Justice McGraw, and (ii) was spent on newspaper and television advertising attacking McGraw. *See Brief for Petitioners at 6–8, Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22).

89. *Id.* at 2. The case’s long history and factual background is not relevant for the purposes of this Article. It should be noted, however, that recusal played a prominent role in the case’s procedural history. After Benjamin cast the deciding vote in the original appeal, Blankenship’s relationship with yet another justice on the West Virginia Supreme Court drew substantial public attention when photographs surfaced showing Blankenship and Justice

Justice Benjamin's failure to recuse violated Caperton's right to due process.

After *Caperton*, there is little doubt that recusal is required under the Due Process Clause even when the judge has no personal interest in the outcome of the litigation and did not act as both a judge and a prosecutor or witness in the same case. It remains to be seen, however, whether this case is a trendsetter and will change the way that states approach judicial recusal, or if it is simply an outlier that will have limited jurisprudential effect. Some have suggested that the *Caperton* holding is fairly narrow, requiring a judge to recuse "himself because of campaign contributions or independent expenditures by an individual who is not a lawyer or party before the Court but has an interest in a case that is before the court."⁹⁰ And Justice Kennedy's majority opinion takes great pains to convey the limited precedential effect of the Court's decision. The opinion describes the situation as "exceptional" and "extreme,"⁹¹ so exceptional, in fact, that "[a]pplication of the constitutional standard implicated in this case will thus be confined to rare instances."⁹²

But there is no reason to believe that the decision is limited solely to the campaign contribution context. Rather, the *Caperton* test may be satisfied, and disqualification may be required, even outside the universe of judicial elections and campaign contributions. For example, the Court accepted the notion that Justice Benjamin "would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected."⁹³ There is nothing in that notion—the idea of a debt of gratitude—that is limited to judicial elections. Would a federal judge feel a debt of gratitude to the president who selected her? Or perhaps to the judge's former colleague at a large law firm who helped the judge in some life endeavor? How the lower courts interpret the Supreme Court's

Elliott Maynard vacationing together on the French Riviera. John Gibeaut, *Caperton's Coal: The Battle over an Appalachian Mine Exposes a Nasty Vein in Bench Politics*, 95 A.B.A. J. 52, 56 (2009). As a result of the controversy, Justice Maynard recused himself from the case. *Id.* At around the same time, Justice Larry Starcher, a critic of Massey and Blankenship, also recused himself from the case. *Id.*

90. Rotunda, *supra* note 711, at 256.

91. *Caperton*, 129 S. Ct. at 2263, 2265, 2267.

92. *Id.* at 2267.

93. *Id.* at 2262.

decision in *Caperton* will be one of the most important trends to follow in the area of judicial ethics.

D. Recent Incidents

Recusal has garnered national headlines on many occasions over the last few decades. Judges have been denied appointments to the Supreme Court,⁹⁴ suspended,⁹⁵ and have faced other sanctions and general opprobrium for their recusal-related misconduct.⁹⁶ But in the last decade alone, five current Supreme Court Justices—Justice Scalia, along with Justices Thomas,⁹⁷ Ginsburg,⁹⁸ Roberts,⁹⁹ and

94. When President Nixon nominated Judge Clement Haynsworth to the United States Supreme Court, his failure to recuse ultimately led to his nomination being defeated. First, Haynsworth's opponents pointed out that he sat on an important labor case involving the Deering Milliken Darlington Manufacturing Company while owning stock in a vending company that installed and serviced vending machines in the Deering plants. See Peter W. Bowie, *The Last 100 Years: An Era of Expanding Appearances*, 48 S. TEX. L. REV. 911, 929–30 (2007). The Senate Judiciary Committee closely scrutinized Judge Haynsworth's interest in the vending company and its relations with Deering. *Id.* at 930. Later, it was learned that Haynsworth purchased stock in the Brunswick Corporation while a case involving Brunswick was under submission, after oral argument and before the draft decision was circulated. Frank, *supra* note 2, at 56. Haynsworth did not recuse himself. In large part due to his improper conduct on the bench and failure to recuse himself in the *Deering* and *Brunswick* cases, Haynsworth's nomination was denied by the Senate. See Bowie, *supra*, at 930.

95. For example, the Tenth Circuit suspended District Judge Stephen Chandler from all judicial duties after he refused to recuse himself in two cases. *Chandler v. Judicial Council*, 398 U.S. 74 (1970).

96. See generally JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* 236–252 (1974); Andrew J. Lievens & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of Ways*, 28 JUST. SYS. J. 271 (2007).

97. Justice Thomas's wife, Virginia Thomas, is alleged to have ties to the Tea Party and has been active in conservative politics. Recently, House Democrats called for Justice Thomas to recuse himself from hearing any challenge to the constitutionality of the Affordable Care Act. See Huma Khan, *Should Supreme Court Justices Clarence Thomas, Elena Kagan Sit Out Health Care Case?*, ABC NEWS (Mar. 22, 2011, 3:01 PM), <http://abcnews.go.com/Politics/supreme-court-justice-clarence-thomas-sit-health-care/stor y?id=12878346>.

98. The controversy stemmed from her involvement with the National Organization of Women Legal Defense and Education Fund. In light of her involvement, thirteen Republican Congressmen demanded that Justice Ginsburg recuse herself from all future abortion cases. *GOP Lawmakers Ask Ginsburg to Withdraw from Abortion Cases*, L.A. TIMES, Mar. 19, 2004, at A15.

99. Justice Roberts was questioned about his continued involvement in *Hamdan v. Rumsfeld* after he was approached about a potential nomination to the United States Supreme Court. The case was considered to be important to the President, and some scholars have commented that Roberts should have recused himself from *Hamdan* after he learned that he was being considered for the nomination to the Supreme Court. See Ronald D. Rotunda, *The Propriety of a Judge's Failure to Recuse When Being Considered for Another Position*, 19 GEO. J.

Alito¹⁰⁰—have been embroiled in recusal-related controversies. Justice Scalia’s denial of plaintiffs’ recusal request in *Cheney v. United States District Court* is perhaps the most controversial incident in the last decade.¹⁰¹ In the underlying action, plaintiffs sought discovery regarding an Energy Advisory Panel that was convened by then-Vice President Dick Cheney. When the issue reached the Supreme Court, one of the plaintiffs asked Justice Scalia to recuse himself because while the appeal was pending, Scalia and Cheney took a duck-hunting trip together. Justice Scalia denied the recusal motion, concluding that his impartiality could not reasonably be questioned.¹⁰²

Even before the Supreme Court’s *Caperton* decision, Judge McKeown called judicial recusal the “topic du jour.”¹⁰³ But despite all this controversy, “the theoretical underpinnings of American judicial disqualification jurisprudence remain murky, . . . unsettled, . . . and replete with inconsistencies.”¹⁰⁴ Recusal experts have commented that “judicial disqualification frequently is subjective, random, and arbitrary,”¹⁰⁵ and that “disqualification law is a sprawling patchwork, as thin as it is wide.”¹⁰⁶ Although judicial bias and recusal have always been issues of considerable importance, recusal has recently taken on an even greater significance that demands immediate scholarly attention. As judicial elections become “noisier, nastier and costlier,” recusal becomes more and more important to minimize the judicial bias created in the course of judicial elections.¹⁰⁷

LEGAL ETHICS 1187 (2006).

100. While he was a judge on the Third Circuit, Justice Alito sat on a case in which Vanguard, a mutual fund management firm in which he had invested, was a party. Judge Alito wrote the opinion affirming dismissal of the plaintiff’s claim. R. Jeffrey Smith, *Judge Participated in 2002 Vanguard Case Despite Promise to Recuse*, WASH. POST, Nov. 1, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/31/AR2005103101686.html>

101. *Cheney v. U.S. Dist. Court for the D.C.*, 541 U.S. 913 (2004) (Scalia, J.).

102. *Id.* at 929.

103. McKeown, *supra* note 8, at 45.

104. FLAMM, *supra* note 2, § 1.6, at 14.

105. JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 4–5 (1995).

106. Deborah Goldberg et al., *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 517–18 (2007).

107. Roy A. Schotland, *Elective Judges’ Campaign Financing: Are State Judges’ Robes the Emperor’s Clothes of American Democracy?*, 2 J.L. & POL. 57, 76 (1985).

This transformation of judicial elections is no minor point. The Supreme Court's decisions in *Republican Party of Minnesota v. White*¹⁰⁸ and *Citizens United v. Federal Election Commission*¹⁰⁹ are part of the recent trend that has seen judicial elections come to resemble legislative elections. Over 70 percent of Americans believe that judges receiving campaign contributions are not impartial in litigation involving those contributors,¹¹⁰ and numerous empirical studies demonstrate that judges tend to rule in favor of their campaign contributors.¹¹¹ Even judges do not believe that their colleagues can be impartial when dealing with those who helped them get elected.¹¹² In this legal environment, recusal is necessary to ensure that bias stemming from judicial campaign contributions and judicial elections is minimized. In fact, judicial recusal may be the only way to deal with the appearances of partiality created when judges accept contributions from lawyers and persons who ultimately appear as litigants in front of the judge.

III. IS GETTING IT RIGHT ENOUGH?

As the discussion above shows, most jurisdictions in the United States have implemented recusal standards that revolve primarily around the *appearance* of impartiality. That is, in determining whether a judge should be disqualified from hearing a case, the challenged judge's actual state of mind is largely irrelevant; the

108. 536 U.S. 765, 794 (2002) (striking down a Minnesota judicial canon that prohibited candidates for judicial office from announcing their views on legal issues).

109. 130 S. Ct. 876, 886 (2010) (holding that federal restrictions on corporate independent expenditures and electioneering communications are unconstitutional).

110. See GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 4 (2001), available at http://www.gqrr.com/articles/1617/1412_JAS_ntlsurvey.pdf; ZOGBY INT'L FOR THE JUSTICE AT STAKE CAMPAIGN, MARCH 2004 SURVEY HIGHLIGHTS: AMERICANS SPEAK ON JUDICIAL ELECTIONS (2004), available at http://www.soros.org/initiatives/usprograms/focus/transparency/articles_publications/publications/justiceatstake_20040506/c_zogby_summary.pdf; see also David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 305 (2008).

111. Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 623 (2009) (finding a "strong relationship between campaign contributions and judges' rulings" and demonstrating that elected judges "routinely adjust their rulings to attract votes and campaign money"); Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583, 584 (2002); Margaret S. Williams & Corey A. Ditslear, *Bidding for Justice: The Influence of Attorneys' Contributions on State Supreme Courts*, 28 JUST. SYS. J. 135, 136 (2007).

112. Pozen, *supra* note 110, at 305.

recusal decision hinges on the perceptions of “a reasonable person knowing all the relevant facts.”¹¹³ This standard is intended “to protect the . . . *appearance* of impartiality.”¹¹⁴ Of course, recusal is also required in the event the judge is actually biased, but rarely does a disqualification inquiry turn on a judge’s actual bias.¹¹⁵ Cases of actual bias are rare, in part because an “affirmative finding of actual bias requires direct evidence or a very strong inference that the judge was so predisposed against a party that he or she had an entirely closed mind.”¹¹⁶ Indeed, the appearance-of-bias test came into existence to address the problems inherent in a disqualification rule that either requires the litigant to show that the judge is “actually biased” or demands that the judge so conclude on her own. While some scholars and judges have criticized the appearance-based substantive recusal standard, few people dispute that appearances are important to the American judiciary and are a valid, if not a compelling, consideration in setting rules to govern judicial disqualification.¹¹⁷ Alexander Hamilton observed that the judicial

113. *Roberts v. Bilar*, 625 F.2d 125, 129 (6th Cir. 1980).

114. *United States v. Gipson*, 835 F.2d 1323, 1325 (10th Cir. 1988).

115. In *Caperton*, the Supreme Court held that a judge must recuse himself when there is a *probability* of actual bias. I have previously argued that the probability-based rule announced in *Caperton* is different and distinct from the appearance-based rule contained in the federal recusal statute and the state judicial codes. See generally Dmitry Bam, *Understanding Caperton: Judicial Disqualification Under the Due Process Clause*, 42 MCGEORGE L. REV. 65 (2010). Others, including Justice Ginsburg, disagree. See Transcript of Oral Argument at 34–35, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-22.pdf (“I was taking appearance, likelihood, probability as all synonyms”); cf. Gerard J. Clark, *Caperton’s New Right to Independence in Judges*, 59 DRAKE L. REV. 661, 707 (2010) (“The Court’s due process standard, however, is really no different than the standards in recusal statutes and judicial codes.”); Terri R. Day, *Buying Justice: Caperton v. A.T. Massey: Campaign Dollars, Mandatory Recusal and Due Process*, 28 MISS. C. L. REV. 359, 370 (2009) (discussing the terms “appearance,” “perception,” and “probability” and treating them as synonymous);

116. GRANT HAMMOND, *JUDICIAL RECUSAL: PRINCIPLES, PROCESS AND PROBLEMS* 17 (2008).

117. For criticism, see Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1340–41 (2006) (arguing that appearance-based standards for judicial conduct are too vague to protect the judiciary); Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914 (2010). Despite the fact that both authors criticize the “appearance of impropriety” standard, neither appears to question that appearances themselves are important for a successful and well-functioning judiciary. My proposal in this Article gets around many of the problems identified by Rotunda and McKoski by taking the appearance inquiry out of the hands of individual judges and allowing appearances to be considered *ex ante*, only in implementing rules of judicial conduct and

branch has “no influence, over either the sword or the purse.”¹¹⁸

Policymakers today appreciate that judges lack both electoral legitimacy and political force, making the judiciary’s success depend in large part on the public’s acceptance of its authority.¹¹⁹ Without such acceptance, a judicial proclamation carries no weight, and court rulings are routinely ignored.¹²⁰ If the public lacks confidence in the impartiality of judges, or worse, refuses to comply with judicial decisions voluntarily, the notion that “we are a government of laws” would necessarily collapse. If for no other reason, courts should be protective of their reputation from public outrage and rejection for the sake of self-preservation.¹²¹

Just as policymakers recognize the importance of appearances and public perception in setting recusal standards, judges acknowledge that the success of the judiciary hinges in large part on public confidence—the people’s faith—in the impartiality, independence, and accountability of the judiciary. Justice John Paul Stevens once said, “[i]t is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law.”¹²² The Supreme Court has stressed the importance of appearances, stating that “our system of law has always endeavored to prevent even the probability of unfairness” and that “to perform its high function in the best way ‘justice must satisfy the appearance of justice.’”¹²³ Appearance of fairness, in other words, is as important as fairness itself.¹²⁴ Thus, in considering the effectiveness of a recusal scheme, impartiality is only part of the equation; appearance of impartiality and appearance of justice are perhaps just as important.¹²⁵

recusal procedures.

118. THE FEDERALIST NO. 78, at 425 (Alexander Hamilton) (E.H. Scott ed., 1898).

119. See generally ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

120. MACKENZIE, *supra* note 96, at ix. There are many nations where judges’ rulings are routinely ignored and many others where the judiciary is held in disrepute because of its lack of independence, rampant corruption, or other forces.

121. *Id.*

122. *Bush v. Gore*, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting); see also *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (“The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.”).

123. *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

124. *Ex parte Bryant*, 682 So. 2d 39, 41 (Ala. 1996).

125. Cf. Randall J. Litteneker, Comment, *Disqualification of Federal Judges for Bias or*

But even if one starts with the assumption that appearances should continue to play a key role in recusal jurisprudence, we must still ask *how* and *when* appearances should be considered, what role public perception should play, and whether certain rules indeed foster the public's confidence in the judiciary or, to the contrary, impede it. This is where current recusal jurisprudence goes astray. Despite my enthusiastic support for the consideration of appearances in judicial disqualification jurisprudence, I argue that scholars writing about recusal, as well as politicians and bar associations setting recusal rules and judges enforcing those rules, have paid undue attention to the substantive recusal standard at the expense of other rules and standards that may actually be more important when it comes to maximizing the appearance of impartiality.

A. "*Getting to Recusal*"

Today, the entire "appearance" inquiry takes place at one discrete point of a recusal timeline: the time when the actual recusal decision is made. It is only then that the appearance-of-bias test is triggered, and only then that anybody—usually the very judge whose continued presence on the case is being questioned—considers the potential effect on public perception if the challenged judge continues to preside over, or casts a vote in, the case. The timing is generally not viewed as a problem because of the widely accepted assumption that if the judge makes the correct recusal decision, public confidence in the judiciary will be restored. In other words, so long as the judge reaches a "correct" recusal decision, law essentially operates on the well-established playground basketball principle of "no harm, no foul." Under this assumption, postponing consideration of appearances until this late juncture makes perfect sense.

Operating under this assumption, policymakers (when it comes to recusal, the policymakers are usually legislators, bar associations, or state supreme courts) have focused almost entirely on the substantive recusal standard, amending it when controversies arise and defining more precisely the circumstances that should lead to recusal.¹²⁶ For example, at the federal level, when Congress decides

Prejudice, 46 U. CHI. L. REV. 236, 267 (1978) (identifying the importance of "a judicial system that not only is impartial in fact, but also appears to render disinterested justice").

126. *See, e.g.*, 28 U.S.C. § 455 (2006) (providing that federal judges are disqualified in

to amend the judicial disqualification statute, it almost always “enlarge[s] the enumerated grounds for seeking disqualification.”¹²⁷ The focus on the substantive standard has led to what some commentators have termed a “vicious cycle.”¹²⁸ Describing the holding pattern in the development of judicial disqualification doctrine in the United States, Amanda Frost wrote:

First, Congress sets the standard governing when judges must remove themselves from sitting on cases in which they are not able, or might not be able, to be impartial. That standard is then narrowly construed by the judges who must apply it to decide whether they themselves should be disqualified from a case. Eventually, a particularly egregious situation arises in which a judge sits on a case when most outside observers think that she should have stepped aside. The situation comes to the attention of the press, the public, and ultimately Congress, which amends the law to provide stiffer standards for recusal. And then the whole process begins anew.¹²⁹

But it is not only politicians and bar leaders who operate under this assumption. Most of the scholarship in the field has focused on what I call “getting to recusal”—that is, seeking solutions that will lead to the “correct” substantive recusal decision, assuming, once again, that if judges can reach such a decision, recusal will do its job. In discussing recusal, scholars generally pay insufficient attention to preventing the underlying event or conduct from occurring.

Much of the normative recusal scholarship falls into one of two broad categories.¹³⁰ The first focuses on the substantive recusal standard itself. Some authors argue that the appearance-based recusal standard is misguided and should be changed.¹³¹ For example, Sarah Cravens suggests that the main goal of judicial ethics is to achieve not the appearance of justice but rather actual justice in judicial decision making.¹³² She argues that impartiality concerns should be

certain narrowly drawn scenarios).

127. FLAMM, *supra* note 2, § 23.1, at 670.

128. Leubsdorf, *supra* note 16, at 245.

129. Frost, *supra* note 43, at 538.

130. There is of course a great deal of descriptive scholarship looking at the history and evolution of judicial recusals, describing trends in judicial disqualification jurisprudence, and discussing the implications of particular recusal decisions.

131. Sarah M.R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1 (2007).

132. *Id.*

addressed not through recusal standards that focus on appearance, but rather “through a requirement that judges provide explanations of adequate internal legal reasons supporting their dispositive decisions.”¹³³ Others defend the standard against these attacks, arguing that appearances should continue to play an important or even greater role in the substantive recusal standard.¹³⁴ Both camps, however, focus on the actual recusal decision; their disagreement is only about the standard that should be applied. They both mirror the approach that Congress has taken, tinkering with the substantive recusal standards and amending judicial disqualification statutes.

The second, larger category of recusal-related scholarship involves attempts by academics to identify the facts and circumstances that should lead to disqualification under the current, appearance-based standard.¹³⁵ Here, again, the focus is on the recusal decision, but this time the effort is not to formulate the best substantive standard but rather to determine when recusal is necessary in the current scheme. For example, in a recent article, Keith Swisher argues that judges taking a “tough on crime” stance in the course of judicial elections should be disqualified under the current appearance-based recusal standard because their impartiality may reasonably be questioned.¹³⁶ Others have argued for additional guidance and inclusion of specific, clear, bright-line substantive rules that would aid the court in deciding whether refusal to recuse would create an appearance of impropriety.¹³⁷

The assumption that a stringent recusal standard can negate the damage to appearances, and reinforce the appearance of judicial impartiality, also motivates judges. Concurring in *White*, which struck down a provision in Minnesota’s code of judicial ethics that prohibited judicial election candidates from discussing political issues and announcing their positions on those issues, Justice Kennedy

133. *Id.* at 2.

134. Bassett, *supra* note 52; Frank, *supra* note 25; Jed Handelsman Shugerman, *In Defense of Appearances: What Caperton v. Massey Should Have Said*, 59 DEPAUL L. REV. 529 (2010); Jeffrey W. Stempel, *Completing Caperton and Clarifying Common Sense Through Using the Right Standard for Constitutional Judicial Recusal*, 29 REV. LITIG. 249 (2010); Brian P. Leitch, Note, *Judicial Disqualification in the Federal Courts: A Proposal to Conform Statutory Provisions to Underlying Policies*, 67 IOWA L. REV. 525 (1982).

135. See Abramson, *supra* note 56; Abramson, *supra* note 42.

136. Keith Swisher, *Pro-Prosecution Judges: “Tough on Crime,” Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317 (2010).

137. Abramson, *supra* note 42, at 1080.

explained that states “may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.”¹³⁸ In other words, according to Justice Kennedy, the way to create and foster an appearance of a fair and impartial judiciary is by tightening the recusal framework, not by regulating the judicial conduct that creates the appearance in the first place.

The same reasoning continued in *Caperton*, where Justice Kennedy, this time writing for the Court, said that the “appearance of impropriety” standard is “[t]he *principal* safeguard against judicial campaign abuses’ that threaten to imperil ‘public confidence in the fairness and integrity of the nation’s elected judges.’”¹³⁹ Again, any damage to the public confidence in the impartiality and fairness of the courts is to be remedied by imposing a strict recusal standard requiring disqualification of judges for even an appearance of bias.¹⁴⁰

The following chart (Figure 1) provides a visual illustration of the “getting to recusal” approach. It shows the four possible recusal decisions that a judge may reach. There are two correct decisions: a judge may recuse when there is appearance of partiality, and non-recuse when there is no appearance of impartiality. There are also two incorrect decisions: a judge may recuse when there is no appearance of partiality, and a judge may decide not to recuse when there is such an appearance. Under the traditional “getting to recusal” framework, the focus has generally been on getting the judge out of the two “wrong” boxes¹⁴¹ and into the two “right” ones. This Article argues that simply getting it right is not enough to create an appearance of impartiality.

138. *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring).

139. *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2266 (2009) (emphasis added) (quoting Brief for Conference of Chief Justices as Amicus Curiae at 4, 11).

140. Lower court judges have mirrored the Court’s rationale. In a recent case, the Eighth Circuit explained: “[W]e think the Constitution favors stricter recusal standards and fewer speech restrictions.” *Wersal v. Sexton*, 613 F.3d 821, 841 (8th Cir. 2010).

141. In particular, the upper right box has caused the most concern. Although the judge in the lower left box wrongly recuses when there is no appearance of bias, most commentators today do not view this mistake as particularly problematic. This was not always so as courts had at one time held that it is “a judge’s duty to refuse to sit when he is disqualified, but it is equally his duty to sit when there is no valid reason for recusation.” *United States v. Edwards*, 334 F.2d 360, 362 n.2 (5th Cir. 1964) (citing *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 860 (2d Cir. 1962), *rev’d*, 376 U.S. 398 (1964)). The duty to sit has now been abandoned for most state and federal judges.

Figure 1.

Correct Decision Appearance of Bias: Yes Recusal: Yes	Wrong Decision Appearance of Bias: Yes Recusal: No
Wrong Decision Appearance of Bias: No Recusal: Yes	Correct Decision Appearance of Bias: No Recusal: No

B. Why Recusal May Not Be the Solution

In the following pages, I suggest that the underlying assumption that a correct recusal decision fully restores public confidence and entirely eliminates the appearance of bias may need to be reconsidered. This may be the case even when a judge *correctly* concludes (a) that his impartiality could reasonably be questioned and recuses, or (b) that his impartiality could not be questioned and declines to recuse. There are two reasons for this surprising assertion.

1. Too little, too late

The first reason why the “getting to recusal” approach fails to foster an appearance of impartiality is because the focus on appearances comes too late. Because appearances are considered only at the time of the final recusal decision, judges are free to engage in conduct that ultimately creates an appearance of partiality, and only then, once the appearance has been created, is the judge expected to recuse.¹⁴² This means that by the time the recusal decision is ultimately made and publicized, the public has already observed the conduct and the events that negatively affect its perception of the judiciary and formed its own, often negative, opinions about judicial impartiality. Recusal is intended as the solution to the problem; by requiring the judge to step aside, any appearance of impartiality is

142. It is important to highlight that the underlying conduct that is the focus of this Article is not improper by itself, as judicial codes already prohibit judges from engaging in such conduct. Rather, the problem arises only when a particular litigant, or a particular case, appears in front of the judge.

thought to be eliminated and public confidence in the court restored.

Research done by political scientists James Gibson and Gregory Caldeira suggests that things are not quite so simple.¹⁴³ Gibson and Caldeira set out to study recusal's effect on restoring the public's confidence in the judgment of a particular case or in the judiciary itself. They used vignettes modeled after the facts in *Caperton* to determine whether citizens believed that "the recipient of the campaign support can serve as a fair and impartial judge and whether the West Virginia Supreme Court itself is a legitimate institution."¹⁴⁴ Among the independent variables that Gibson and Caldeira manipulated was the judge's recusal decision—did the judge step aside or did the judge cast his vote in the case despite the calls for recusal. The authors hypothesized, just as scholars and politicians for centuries had assumed, that "where a conflict of interest exists, recusal will rescue the legitimacy of the court."¹⁴⁵

But this assumption turned out to be wrong, at least in part. Instead, the study revealed that the "effect of recusals is not to restore the court/judge to the level of support that exists when no conflict of interest is present."¹⁴⁶ That is, the recusal decision did not counteract the appearance of partiality that was created when a judicial candidate accepted contributions from a future litigant. This research confirms that the traditional assumption that recusals can neutralize conflicts of interests may not be entirely correct, and that "recusal is only a weak palliative for conflicts of interests created by contributions."¹⁴⁷ In other words, even when a judge on a multi-member court recuses, the public's confidence in that court is only partially restored, and the public's perception of partiality and bias is not completely erased.

These results may be surprising to some, but they also make a great deal of sense. Sticking to the judicial election context, we know that campaign contributions have a negative effect on institutional

143. James L. Gibson & Gregory A. Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can the Legitimacy of Courts Be Rescued by Recusals?*, (Oct. 19, 2009) (on file with the author), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1428723 (follow "One-Click Download" hyperlink).

144. *Id.* at 11.

145. *Id.* at 13.

146. *Id.* at 32.

147. *Id.* at 3.

legitimacy.¹⁴⁸ This concern is not without reason, since data suggest that judges are more likely to decide in favor of their contributor.¹⁴⁹ Furthermore, the public may be reasonably concerned that other contributions were made that simply have not yet come to light. It is much too optimistic, then, to expect that institutional legitimacy will be restored when apparently biased judges recuse themselves. To paraphrase Mr. Darcy, the public's good opinion of the judiciary, once lost, is lost forever (or, at the very least, is not entirely restored by judicial recusal).¹⁵⁰ In short, concentrating on the actual recusal decision in order to create or maximize the appearance of impartiality may make up only part of the picture, and our focus on appearances must come before the decision maker makes a recusal decision.

To see how this problem operates in the real world, let us take a look at what circumstances may lead to the public's loss of confidence in the judiciary. The trigger may be a judge's interest in one of the parties or in a certain outcome in litigation, as it was in *Tumey* and *Lavoie*, or it may be the judge's relationship with a litigant or an attorney for one of the parties, as it was in *Caperton* and the Scalia-Cheney duck hunting incident. An example of the former was recently on display in the challenge to the federal drilling moratorium in the wake of the BP disaster in the Gulf. Judge Martin Feldman, a U.S. District Court Judge for the Eastern District of Louisiana overturned a six-month moratorium on drilling that halted the approval of any new permits and suspended deep-water drilling at existing exploratory wells in the Gulf. It was later discovered that Judge Feldman held energy stocks in numerous drilling and offshore energy companies, including Transocean and Halliburton. After Judge Feldman failed to recuse himself, the case received significant media attention as numerous environmental groups sought recusal.¹⁵¹ But putting aside the judge's recusal decision,¹⁵² the

148. *Id.*

149. Shepherd, *supra* note 111.

150. JANE AUSTEN, *PRIDE AND PREJUDICE* 94 (Patricia Meyer Spacks ed., 2010) (1813) ("My good opinion once lost is lost forever.").

151. The Sierra Club, Natural Resources Defense Council, and Defenders of Wildlife were among the groups that sought Judge Feldman's recusal. Tennille Tracy, *Groups Seek Judge's Removal in Drilling-Moratorium Case*, WALL ST. J., July 2, 2010, <http://online.wsj.com/article/SB10001424052748704293604575343361857605650.html>.

152. In other words, let us assume that a reasonable person could question Judge Feldman's impartiality and that recusal was indeed required by 28 U.S.C. § 455—a reasonable

relevant question for this Article is whether a different substantive recusal standard—or even a different recusal decision—would have restored public confidence in the impartiality of the judiciary. I believe the answer is “no.”

When the federal drilling moratorium was litigated, the Los Angeles Times reported that

[S]even of the 12 federal judges of the Eastern District of Louisiana already have cited potential conflicts of interest in bowing out of cases brought by fishermen, charter operators, tourist services and families of those killed in the April 20 explosion of the Deepwater Horizon rig in the Gulf of Mexico.¹⁵³

In the Fifth Circuit, it was discovered that most judges held some interest in oil companies, or had other close ties to the oil industry.¹⁵⁴ As a result, recusals in cases involving the oil industry have become so common in the Fifth Circuit that the court was unable to reach a quorum to review a case brought by victims of Hurricane Katrina.¹⁵⁵ It is precisely these types of interests that may create the impression of a biased and partial judiciary, and once the public has perceived judicial bias or a *quid pro quo* between a judge and a potential litigant, the recusal decision, no matter what the substantive standard and no matter what the decision, cannot fully restore the public’s confidence in the courts.

The Gibson & Caldeira study is the first of its kind. Very little is known about how the recusal decision affects public perception of judicial impartiality. Because of the centuries-old assumption that recusal restores public confidence in the court, scholars have largely ignored this issue. My hope is that Gibson & Caldeira’s findings, together with this Article, will spur further study of how the public perceives judicial recusal decisions, and the extent to which even a correct recusal decision may still leave the reputation of the judiciary in doubt.

assumption given the controversy that arose following Judge Feldman’s decision.

153. Carol J. Williams, *Judges’ Hands Tied By Oil Industry Interests*, L.A. TIMES, June 23, 2010, at A2.

154. See ALLIANCE FOR JUSTICE, JUDICIAL GUSHER: THE FIFTH CIRCUIT’S TIES TO OIL, http://www.afj.org/about-afj/press/fifth_circuit_judges_report.pdf (summarizing investments and interests of Fifth Circuit judges in the gas and oil industries) (last visited Aug. 18, 2011).

155. *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1054 (5th Cir. 2010).

2. One case at a time

The second reason why focusing excessively on the substantive appearance-based recusal standard and considering appearance only at the time of the recusal decision fails to foster an appearance of impartiality is that one-time, one-off recusal decisions are not as effective in maximizing public confidence in the judiciary and the legitimacy of the courts as broad structural reforms. In a wide range of fields, scholars have observed that effective reform often requires structural changes rather than relying on favorable outcomes one case at a time.¹⁵⁶ When recusal decisions are made on an ad hoc basis, public confidence in the judiciary is undermined. This is partly because the public does not know what led to a particular decision, and partly because, as discussed in greater detail below, the public only learns of a limited set of recusal decisions, which skews its perception.¹⁵⁷ This is true even when the challenged judge properly assesses whether her impartiality may reasonably be questioned, and even when the judge ultimately recuses herself.

It is generally understood that “[a]s a matter of legal technique, it is far preferable to have sound general principles rather than ad hoc rules, or even worse, a ‘myriad of single instances.’”¹⁵⁸ But when it comes to recusal, ad hoc decisions are the norm, and each recusal decision becomes a one-time proposition, good for that day only. There is great variation from judge to judge in how they resolve recusal questions, and this variation not only leads to inconsistent results but also leads the public to question the fairness and impartiality of the judiciary.

Another reason why considering appearances on a case-by-case basis is problematic is that, at the point of recusal, judges generally know the parties, the lawyers, and the nature of the particular dispute from which they are asked to recuse. Of course, this information is not supposed to matter to the judge making the recusal decision, but it is hard to know whether it filters into judicial recusal analysis. For example, if the case involves a subject-matter close to the judge’s heart—let’s say the judge is particularly

156. JAMES BESSEN & MICHAEL J. MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK* 25 (2008).

157. The public’s lack of knowledge is especially true because judges rarely publish an opinion explaining their recusal decision.

158. HAMMOND, *supra* note 116, at 6.

interested in expanding the scope of the First Amendment—there is a risk that the judge will decide not to recuse because she wants to cast a vote in the case, despite the fact that she may have a close relationship with one of the attorneys, or despite the fact that one of the litigants contributed heavily to her campaign. As Part IV argues below, the solution to this problem is that legislators must consider appearances *ex ante*, without knowing the particular circumstances in which recusal may arise in the future.

Congress and the courts have acknowledged the importance of appearances when it comes to judicial legitimacy. Now, they must come to realize that structural problems should be remedied by large-scale systemic solutions, not in a case-by-case fashion.¹⁵⁹ Recusal statutes and judicial codes are unable to protect judicial legitimacy and the appearance of impartiality as long as the appearances are considered in an *ad hoc* fashion. In the recusal context in particular, there are two reasons why recusal decisions in individual cases do not create an appearance of impartiality: (1) the role of the media in publicizing non-recusal decisions, and (2) the difficulties inherent in the substantive recusal standard.

a. Judicial recusal and the media. The media plays an ever-increasing and important role in the way the public perceives judicial disqualification and judicial impartiality. When it comes to judicial disqualification, only cases of non-recusal generally receive media scrutiny and public recognition. This is part of the reason why legislative and judicial reliance on judicial recusal decisions to create an appearance of impartiality, or even to eliminate the appearance of partiality, is misguided—when a judge steps aside, the public rarely knows it.

One need only look at the controversies that have arisen in the last few years alone—Justice Scalia’s nonrecusal in the case involving Dick Cheney, Justice Benjamin’s nonrecusal in *Caperton*, and Judge Feldman’s nonrecusal in *Hornbeck Offshore Services v. Salazar*.¹⁶⁰ But one is hard-pressed to identify any high-profile cases of *recusal*. This is because recusal often takes place under the radar, without an explanation or an opinion from the recusing judge, and without

159. Cf. Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80 (2009) (highlighting the difficulties inherent in the Court’s approach to addressing structural problems relating to judicial impartiality).

160. 696 F. Supp. 2d 627 (E.D. La. 2010).

media scrutiny. For example, decisions of the Supreme Court often indicate that one or more Justices did not participate in the case with a simple note that reads “Justice _____ did not participate in the decision.”¹⁶¹ Unlike the criticism and scrutiny that often accompanies nonrecusal decisions, these judicial recusals are generally ignored by the media and therefore cannot increase (or even affect) public perception of judicial impartiality.

In the rare circumstances when judicial recusals (as opposed to nonrecusals) actually receive public scrutiny, the attention is generally negative, often focusing on the underlying judicial conduct that necessitated recusal in the first place. In other words, even when judges fully appreciate that their impartiality might reasonably be questioned, their decision to recuse, just like their decision not to recuse, often is to the *detriment* of public confidence in the judiciary. This is because it highlights the conduct that created the appearance of impartiality in the first place. I touched on one example earlier in the Article: the media coverage of Fifth Circuit judges, and their frequent recusal in cases involving the oil industry. Despite judicial recusals in those cases, the reputation of the judiciary likely suffered from the disclosure that many, if not most, Fifth Circuit judges have connections to the oil and gas industry.

Another prominent recent example of a recusal that received largely negative attention involved Ninth Circuit Chief Judge Alex Kozinski. In 2008, Judge Kozinski was presiding over an obscenity trial when it was reported that Kozinski’s personal website contained explicit pornographic material.¹⁶² When the reports became public, Judge Kozinski recused himself from the case. Following the recusal, the public commentary was overwhelmingly negative and critical of the judge, focusing on the underlying conduct rather than on the recusal decision itself. Here again, a recusal decision intended to create the appearance of impartiality and fairness potentially had the opposite effect.¹⁶³

161. See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 129 S. Ct. 2592 (2009) (in which Justice Stevens did not participate because he owns beachfront property in Florida).

162. *Obscenity Trial Suspended After Judge Posts Sex Images Online*, FOX NEWS, June 12, 2008, <http://www.foxnews.com/story/0,2933,365701,00.html>.

163. Of course, this case is not typical and the salacious nature of the facts contributed to the negative publicity.

Aside from the fact that nonrecusal decisions receive far greater public scrutiny and attention than recusal decisions, there is yet another reason why even a correct recusal decision, one that properly considers public perception and appearance, does not promote an appearance of impartiality. This is because the public's perception of the underlying events is often skewed by the "lens of the media." To apply the appearance-based disqualification test correctly under the federal disqualification statute (28 U.S.C. § 455) or the state judicial codes, a judge must determine whether an impartial and objective observer, *knowing all the facts*, might question the judge's impartiality and reasonably perceive an appearance of bias. But the public rarely, if ever, has access to all the facts that underpin a recusal controversy. These facts are often complex and may involve long-standing relationships between the judge and a litigant, or the judge and an attorney. While the superficial level of knowledge that the public may have perceived, or learned from media coverage, may lead a reasonable member of the public to question the judge's impartiality, a greater understanding of the judiciary and the situation may negate any appearance of impropriety.

As a result of this tension, the challenged judge may correctly determine that recusal is unnecessary because no reasonable person knowing all of the facts could question the judge's impartiality, while at the same time the public perceives bias because it is basing its conclusions on a different set of facts.¹⁶⁴ Once again, we may be left with a "correct" recusal decision that simultaneously damages the reputation of the judiciary and harms the appearance of impartiality.

b. The appearances of appearances. Furthermore, in an ironic twist, the substantive appearance-based recusal standard itself may damage the reputation of the judiciary and minimize its legitimacy for two reasons.

164. This was the issue raised by Justice Scalia in his recusal memorandum following the duck hunting trip with Vice President Cheney. In seeking Scalia's recusal, the Sierra Club argued that "[b]ecause the American public, as reflected in the nation's newspaper editorials, has unanimously concluded that there is an appearance of favoritism, any objective observer would be compelled to conclude that Justice Scalia's impartiality has been questioned." *Cheney v. U.S. Dist. Court for the D.C.*, 541 U.S. 913, 923 (2004). Justice Scalia identified numerous factual mistakes in the editorials and argued that the editorials should play no role in determining whether a reasonable observer would question Scalia's impartiality. *Id.* at 924 ("Such a blast of largely inaccurate and uninformed opinion cannot determine the recusal question.").

First, an appearance-based substantive recusal standard may be inconsistent with the practice of judicial elections. Jed Shugerman suggests that a slightly ambiguous standard like the “appearance of bias” has an advantage insofar as it may lead judges to “err in favor of recusing themselves.”¹⁶⁵ And it is undoubtedly true that some judges do err on the side of caution, and step aside simply to avoid any controversy even when they do not believe their partiality could reasonably be questioned. But, thirty-nine states elect some or all of their judges, and the public overwhelmingly prefers elected judges over appointed ones, despite concerns about bias towards campaign contributors.¹⁶⁶ As Justice O’Connor explained in her concurrence in *White*, judges who must run for reelection “are likely to feel that they have at least some personal stake in the outcome of *every publicized case*.”¹⁶⁷ Studies show that even minor contributions, even *rejected* contributions, may create an appearance of partiality requiring recusal.¹⁶⁸ An aggressive recusal standard may defeat the very purpose of electing judges and could actually harm judicial legitimacy by depriving citizens of an opportunity to choose their judges for the cases that matter most.¹⁶⁹

There is another reason why the appearance-based recusal standard may itself be damaging to the public perception of the judiciary. The “appearance of bias” test is not a model of clarity and precision, with some commentators going so far as to call the standard unworkable at best, and a sham at worst.¹⁷⁰ This problem becomes more acute as high-profile accusations of judicial bias and partiality become more and more common, as they have in the recent months. As the dissenters in *Caperton* argued, an increase in the number of allegations that judges are biased will further “erode

165. Shugerman, *supra* note 134, at 550.

166. James Sample et al., *The New Politics of Judicial Elections 2006*, THE BRENNAN CENTER FOR JUST. (2007), http://brennan.3cdn.net/49c18b6cb18960b2f9_z6m62gwji.pdf.

167. *Republican Party of Minn. v. White*, 536 U.S. 536, 788–89 (2002) (O’Connor, J., concurring) (emphasis added).

168. Gibson & Caldeira, *supra* note 143.

169. A recent study showed that in 60 percent of the cases heard by the Pennsylvania Supreme Court, “at least one of the litigants, attorneys, or firms involved had contributed to the election campaign of at least one justice.” *Campaign Contributors and the Pennsylvania Supreme Court*, AMERICAN JUDICATURE SOCIETY, <http://www.ajs.org/selection/jnc/docs/AJS-PAstudy3-18-10.pdf> (last updated 2009).

170. See Rotunda, *supra* note 117.

public confidence” in the fairness and integrity of the courts.¹⁷¹ While these predictions may be overblown,¹⁷² one cannot help but wonder whether an expansive recusal standard and increased publicity for recusal motions may adversely affect the public perception of the judiciary by undermining confidence in the fairness and impartiality of the American judiciary. This is in part because it is so easy to allege an appearance of impropriety and so hard to determine whether there in fact is an appearance of impropriety. When recusal standards are too nebulous, and if allegations of an appearance of bias become the norm in litigation, recusal law becomes too vulnerable to manipulation and rather than furthering the appearance of impartiality, may only harm it. Additional research is necessary to confirm the suspicion that over-recusal, and excessive demands for recusal, can weaken the judiciary’s reputation. But at least one commentator suggests that this may indeed be the case.¹⁷³

IV. EX ANTE REGULATION AND RECUSAL PROCEDURE

This Part proposes two changes to American recusal jurisprudence intended to increase public confidence in the impartiality of the courts and maximize judicial legitimacy. First, I will argue that when possible, ex ante regulation of judicial conduct that prevents the appearance of bias from arising in the first place would be the best method for creating and maintaining an appearance of judicial impartiality and fairness. Second, I propose that appearance-based regulation of recusal procedures may in fact do more to maximize the appearance of impartiality than the substantive recusal standards.

A. Ex Ante Regulation of Judicial Conduct and Judicial Elections

There is vast literature examining the tension between ex ante and ex post consideration in creating legal rules and standards. The advantage of an ex post approach is that it permits greater accuracy and tailoring while ex ante considerations often allow for greater clarity. But if it is true that recusal comes too late to restore public

171. *Caperton v. A. T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2267 (2009) (Roberts, C.J., dissenting).

172. See Bruce A. Green, *Fear of the Unknown: Judicial Ethics After Caperton*, 60 SYRACUSE L. REV. 229, 233–34 (2010).

173. Rotunda, *supra* note 117.

confidence in the judiciary once an appearance of bias has been created—if ex post recusal decisions are not the best way to “promote public confidence in the integrity of the judicial process”¹⁷⁴—then the most important recusal related jurisprudential changes are not actually changes to recusal rules at all. Rather, they are changes to other rules regulating judges—rules of judicial conduct and judicial selection—that explicitly consider how certain judicial behavior may influence the perception of judicial impartiality. For judicial regulation to truly have an effect on the appearance of impartiality, we must increase our regulation of the very conduct that creates the appearance problem in the first place, avoiding even the creation of an appearance of bias. In other words, when it comes to considering the appearance of impartiality and fairness, the best time to think about recusal is before the appearance of bias arises.

By pushing back the time when appearances are considered we can avoid much of the damage that the judiciary suffers as a result of improper judicial conduct while eliminating the need for recusal rules and decisions to carry the heavy load of remedying the problem. Under the proposed ex ante regime, policymakers must do whatever possible to minimize the need for potential future recusals, as well as the number of calls for recusal. Implementation of better ex ante rules can reduce the number of future *Caperton*-like appeals and ease the dissenting Justices’ concerns that the *Caperton* decision will lead to a flood of new recusal motions. Greater ex ante regulation of judicial conduct and judicial elections also helps alleviate, if not eliminate, the “one case at a time” problem identified in Part III.B.2. While judges may not be in the best position to engage in the line drawing required in individual recusal cases, ex ante regulation allows the line drawing to be done on a general, systemic level by legislators or bar associations. In other words, adopting an ex ante approach to judicial recusal “eliminates the burden on judges to determine where the line for recusal is drawn.”¹⁷⁵

Furthermore, ex ante regulation of judicial conduct is preferable to ex post recusal-based regulation because the latter method misses

174. *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 860 (1988) (citing S. Rep. No. 93-419, at 5 (1973); H.R. Rep. No. 93-1453, at 5 (1974)).

175. Symposium, *Session 1: One Symptom of a Serious Problem: Caperton v. Massey*, 33 SEATTLE U. L. REV. 569, 587 (2010) (transcript of comments of Kathleen Sullivan).

the conduct that negatively affects the judiciary but that may never otherwise come to light. For example, in an election context, the losing candidate's conduct may harm the reputation of the judiciary but would never be challenged on recusal. Likewise, recusal is not well designed to address a situation where a judge develops a relationship with a particular contributor, and while that particular contributor never appears as a litigant in front of the judge, making recusal unnecessary, the contributor may still have an interest in the outcome of other cases heard by the judge. This "different litigant, same interest" problem is extremely difficult to address with recusal but may still damage the appearance of judicial impartiality and harm the reputation of the judiciary.

I propose four categories where *ex ante* rules could assist in avoiding damage to judicial legitimacy and the appearance of partiality. Within each category, I will discuss my proposed rule and provide an example of how the rule would operate in the context of recent recusal-related controversies: (1) judicial elections, (2) judicial friendships and relationships, (3) judicial financial interests, and (4) extrajudicial activities.

1. Judicial elections

a. The problem. We start at the beginning of the judge's career: judicial selection.¹⁷⁶ The process by which a judge is selected is one of the key factors in the public's perception of the courts.¹⁷⁷ especially important are the methods of judicial selection and the campaign environment.¹⁷⁸ In fact, the element of judicial elections that has the greatest effect on the public's perception of the judiciary is campaign fundraising.¹⁷⁹ As mentioned earlier, the public's concerns about the impartiality of judges receiving contributions from litigants are well founded. Recent studies confirm that judges

176. Of course, recusal may be necessary as a result of a judge's conduct before judicial selection. For example, if a judge worked as a partner at a law firm before joining the bench, as many judges have, those friendships cannot be regulated by an *ex ante* scheme. *Ex post* recusal rules, like those contained in 28 U.S.C. § 455(b) are intended to address these situations.

177. Cann & Yates, *supra* note 15, at 316.

178. Penny J. White, *Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy*, 74 MO. L. REV. 635, 645 (2009).

179. James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New-Style" Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 69 (2008).

are more likely to rule for those who helped fund their campaigns.¹⁸⁰ Because ex post recusal cannot fully restore judicial legitimacy, it is important that we regulate conduct during judicial elections in order to avoid the harm in the first place. In other words, legislatures must regulate judicial elections to ensure that election-related practices and conduct do not damage the appearance of impartiality by pushing back the time frame for when we look at appearance—all the way back to the election itself.

In *Caperton*, recusal was necessary because one of the litigants spent extravagant amounts of money to elect the very judge who would later rule on that litigant's case.¹⁸¹ The damage to the reputation of the judiciary is done at this early stage. The very fact that a future or current litigant helps a judge get elected gives rise to the appearance of judicial bias and partiality.

And *Caperton* does not present a unique fact pattern. Most judges in the United States stand for election and must raise the funds for their candidacies from the parties that they may eventually meet in the courtroom. For example, *Avery v. State Farm Mutual Auto Insurance Company*¹⁸² was a class action suit for breach of contract in which the plaintiffs alleged that State Farm violated its duty to restore automobiles to their original pre-crash condition by using automobile parts salvaged from other damaged vehicles.¹⁸³ After the lower courts found in favor of the plaintiffs, the Illinois Supreme Court reversed. Like *Caperton*, *Avery* was decided shortly after an election cycle for the Illinois Supreme Court. During his campaign for the court, Justice Lloyd Karmeier made numerous pro-business statements.¹⁸⁴ Karmeier also received over \$350,000 in contributions from State Farm's employees and its lawyers.¹⁸⁵ After

180. Michael S. Kang & Joanna Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 69 (2011) (“[E]very dollar of direct contributions from business groups is associated with an increase in the probability that the judges will vote for business litigants.”).

181. *Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252, 2257. In sum, the litigant spent about three million dollars.

182. 835 N.E.2d 801 (Ill. 2005).

183. *Id.* at 811.

184. See Goldberg et al., *supra* note 106, at 510.

185. Brief for 12 Organizations Concerned About the Influence of Money on Judicial Integrity, Impartiality, and Independence as Amici Curiae Supporting Petitioners at 4, *Avery v. State Farm Mut. Auto. Ins. Co.*, 547 U.S. 1003 (2006) (No. 05-842).

being elected to the bench, Justice Karmeier declined to recuse himself and cast the deciding vote in favor of the defendant.

These two cases are just a small part of a larger problem. In fact, elected judges deciding cases involving their contributors has reached epidemic proportions. For example, a recent study showed that nearly two-thirds of cases heard by the Pennsylvania Supreme Court in 2008 and 2009 involved at least one party, lawyer, or law firm that contributed to the campaign of at least one of the justices.¹⁸⁶

In one word, the problem here is “money.”¹⁸⁷ In response to *Caperton*, some states have begun to put in place ex post recusal reforms.¹⁸⁸ But to really get at appearances of judicial partiality, states should create ex ante rules focusing on their election practices.

b. The solution. What specific rules must be reformed? Most of the damage described above comes from judicial contributions and independent expenditures by individuals or groups that are likely to come in front of the elected judge as litigants. Therefore, legislators must better regulate the flow of money from contributors to judicial candidates by (1) eliminating or limiting direct contributions and independent expenditures for judicial elections altogether, (2) implementing a public financing scheme for judicial elections, or (3) requiring that all contributions to judicial candidates be anonymous.¹⁸⁹

186. Malia Reddick & James R. DeBuse, *Campaign Contributions and the Pennsylvania Supreme Court*, THE BRENNAN CENTER FOR JUST. (Mar. 11, 2010), http://www.brennancenter.org/content/elert/campaign_contributions_and_the_pennsylvania_supreme_court/.

187. Bert Brandenburg, *Big Money and Impartial Justice: Can They Live Together?* 52 ARIZ. L. REV. 207, 217 (2010) (“Money is changing judicial elections and threatens to erode trust in the courts themselves.”).

188. *See, e.g.*, New York’s new rule prohibiting elected judges from deciding cases involving litigants that had contributed \$2,500 or more to their campaigns. *See* Rules Governing the Assignment of Cases Involving Contributors to Judicial Campaigns, RULES OF THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS § 151.1, *available at* http://nycourts.gov/rules/chiefadmin/151.shtml#section151_1.

189. This Article does not discuss the potential constitutional hurdles to regulating judicial campaign contributions. While these hurdles are real, their effect may be overstated. After the Supreme Court’s decision in *White*, commentators predicted that most regulation of judicial campaigns may be unconstitutional under the First Amendment. Lower-level courts struck down a number of canons regulating candidates’ conduct in judicial elections. After *Caperton*, things may be looking up for supporters of regulation of judicial elections. *See* James Sample, *Caperton: Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. 293, 303–04

Requiring anonymous contributions is a particularly appealing proposal because such a requirement likely would not be subject to many of the constitutional objections that a proposal to eliminate or limit contributions altogether would be.¹⁹⁰ It is difficult to understand why judges need to know the identity of their contributors, and why contributors must let judges know that they have contributed, other than to curry favor with the judges.¹⁹¹ A few states experimented with anonymous contributions for judicial elections in the 1970s, but the idea has not caught on.¹⁹² Today, this proposal may sound strange given the trend towards more disclosure, not less. But it is time for all states that elect judges to consider implementing this approach to combat the problem of judicial bias towards their contributors.

Implementation of this proposal need not be overly complicated. Obviously, if judges were able to discover the identity of their contributors after the election, then the anonymity requirement would be futile. But it still seems likely that a successful anonymity scheme could be implemented. Perhaps the best approach was suggested by Ian Ayres and Jeremy Bulow, who proposed a similar regime that would operate through a privatized system of blind trusts.¹⁹³ Under this regime campaigns could no longer accept contributions directly from individuals or companies. Rather, all

(2010) (concluding that *Caperton* “provides real momentum for state-based recusal reform efforts”). In fact, *Caperton*’s apparent disregard of the infamous contribution/expenditure framework from *Buckley v. Valeo* suggests that states may regulate spending in judicial elections in ways that are otherwise impermissible in other elections.

190. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976). In the years since *Buckley*, there has been a tremendous amount of legal scholarship examining the question of whether money is speech. See, e.g., Deborah Hellman, *Money Talks But It Isn’t Speech*, 95 MINN. L. REV. 953 (2011); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 688–89 (1997); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

191. For an excellent discussion of potential ethical issues involved in attorney contributions to judges, see Keith Swisher, *Legal Ethics and Campaign Contributions: The Professional Responsibility to Pay for Justice*, 24 GEO. J. LEGAL ETHICS 225 (2011).

192. See Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 473 n.130 (1988) (noting that the ten adopting states were Arkansas, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia, and Wyoming).

193. Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837, 853 (1998).

donations to candidates (and political parties) would have to be made by mail to established blind trusts.¹⁹⁴

2. *Judicial relationships*

a. The problem. The second category that is a frequent source of recusal controversies is judicial relationships with friends. This can involve close friendships as well as romantic relationships with attorneys and litigants. Of course, these friendships are often unavoidable and cannot be prohibited outright. But particularly troublesome interactions between judges and their friends and colleagues should be regulated.

One of the most famous recent incidents was Justice Scalia's infamous duck-hunting trip with then-litigant Dick Cheney. After details of the trip came to light, calls for recusal reform grew to a fever pitch. The American Bar Association's Joint Commission to Evaluate the Model Code of Judicial Conduct considered revisions to the judicial code, and two Democrats on the House Judiciary Committee called for hearings to amend federal recusal law. Then, as always, the focus was on the final recusal decision; namely, Justice Scalia's decision that his impartiality could not reasonably be questioned. But, can we foster an appearance of impartiality when it comes to judicial friends through ex ante recusal reform?

b. The solution. There is little scholarship on regulation of judicial friendships,¹⁹⁵ and even fewer rules regulating judges' relationships with their friends and colleagues. What little scholarship exists supports the ex post "getting to recusal" approach that focuses on the substantive recusal rules (which I identified earlier).¹⁹⁶ But, if our main goal is to maximize the appearance of judicial impartiality, then it is important to amend rules concerning friendships or interaction between judges and litigants rather than focusing on recusal alone. In other words, the ex ante rules that I propose do more to regulate the interaction between judges and litigants (or likely future

194. *Id.*

195. *But see* Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)*, 33 PEPP. L. REV. 575, 584-614 (2006) (proposing a bright-line recusal rule for cases involving a judge's close friends).

196. *Id.*

litigants) where interaction would create an appearance of partiality, even if the judge might eventually have an opportunity to recuse.

For example, the rules of judicial conduct could be revised to prohibit any interaction between judges and current litigants, or litigants that are likely to appear in front of the judge within the next year. Admittedly, it is often difficult to predict which litigants will appear in front of the judge. Furthermore, it is important that judges remain active members of the community and participate in bar functions like Inns of Court. At the very least, however, when a party is litigating a case in the district court, the appellate judges likely to review any future appeal should refrain from interacting with that party until the case has concluded. This prophylactic measure is more likely to increase the appearance of impartiality and judicial legitimacy than asking the judge to recuse himself based on the appearance of impropriety.

States should also consider implementing ex ante rules regulating certain types of friendships and relationships that should be prohibited outright. For example, judges should be prohibited from having romantic or sexual relationships with litigants that frequently appear in front of them.¹⁹⁷ Just last year, a controversy broke out in Texas when a former judge and a former district attorney in Texas admitted that they had engaged in a lengthy affair. Both had participated in the trial of a man who was convicted of murder and sentenced to death.¹⁹⁸ Similarly, a number of states have recently considered whether judges can be friends with lawyers on social networking sites like LinkedIn or Facebook.¹⁹⁹

While these regulations may seem simplistic, invasive, or perhaps downright silly, these are precisely the types of ex ante regulations that can prevent situations like Justice Scalia's duck-hunting controversy from damaging the reputation of the judiciary.

I do not propose that judges live in isolation, shielding themselves from any interaction with potential lawyers and litigants who may appear before them. Judicial selection mechanisms in the United States, whereby judges get to their position because of

197. Of course, this prohibition would not apply to judges who are married or related to those parties, but current recusal rules already require automated disqualification in those cases.

198. See Steve Mills, *Judge's Affair Complicates Death Row Case*, CHI. TRIB., Sept. 10, 2008, available at <http://articles.latimes.com/2008/sep/10/nation/na-execution10>.

199. John Schwartz, *For Judges on Facebook, Friendship Has Limits*, N.Y. TIMES, Dec. 11, 2009, at A25.

contacts and friendships formed in school, private practice, and public service, do not permit such an approach.²⁰⁰ But when one litigant shares a close friendship or an intimate relationship with the judge, the appearance of impartiality suffers. Restricting these relationships while cases are pending is a reasonable burden.

3. *Judicial financial interests*

a. The problem. American recusal law takes a hard-line approach to recusal when it comes to judges' financial interests: a judge must recuse himself from a case if he has any financial interest in a litigant, even if the ownership interest is only a single share of stock.²⁰¹ But again, this is an ex post rule; there is no ex ante prohibition on stock ownership in the first place.

We saw an example of the problems with the ex post approach last summer when the Fifth Circuit failed to reach a quorum in a case because too many judges were required to recuse themselves.²⁰² Under the "getting to recusal" approach, the fact the judges recused themselves should eliminate any appearance of partiality. But this situation demonstrates why the ex post solutions alone are imperfect and insufficient.

b. The solution. If damage to the judiciary's reputation cannot be remedied by recusal alone, then it is important to create ex ante rules about stock ownership or financial interest when parties (or those interests) are likely to come in front of the court. Rather than permitting stock ownership for any company or industry that the judge wants and then requiring recusal or divestment on the back end, judges should simply be prohibited from owning certain stock. It is not unreasonable to require that judges invest only in mutual

200. A federal judge famously quipped that a "U.S. District judge is someone who went to school with a future U.S. senator, and a U.S. Circuit judge is someone whose college roommate became a U.S. senator." Joseph E. Lambert, *Contestable Judicial Elections: Maintaining Respectability in the Post-White Era*, 94 KY. L.J. 1, 3 (2005).

201. 28 U.S.C. § 455(b)(4) (2006). Generally, a computer program tracks judges' stock ownership, and judges are automatically excluded from hearing cases involving corporations featured in judges' investment portfolios. For a criticism of the rule, see Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1105 (2004) ("The idea that I would give up my honest judgment in a case for a few dollars is beyond silly—it's ludicrous and insulting. So many of the things contained within the Canons, the ones most talked about, are wholly irrelevant in practice. They make no difference at all.")

202. *See Comer v. Murphy Oil USA*, 607 F.3d 1049, 1053–54 (5th Cir. 2010).

funds to ensure that their money is not closely tied to any particular company or industry.

For example, an *ex ante* rule prohibiting judges in the Fifth Circuit from owning any direct interests in the oil industry would not unduly burden judges and would obviate the need for frequent recusals in cases that often come before the court. This would do much more for the appearance of fairness and the reputation of the judiciary than perpetual recusals.

4. *Extrajudicial involvement*

a. The problem. Another problem is participation by judges in partisan activities that may create an impression that judges decide cases with an eye towards those partisan interests. Canon 4 of the Code of Conduct for United States Judges does not appear to prohibit this type of conduct.²⁰³ A recent example demonstrates this concern.

Shortly after the Supreme Court decided *Citizens United*,²⁰⁴ reports surfaced that Justices Scalia and Thomas attended seminars and a political retreat sponsored by the energy giant and conservative bankroller Koch Industries. According to a Koch Industries mailing, the purpose of these retreats is to raise funds “to review strategies for combating the multitude of public policies that threaten to destroy America as we know it.”²⁰⁵ The seminar was held shortly before the case was added to the Supreme Court docket, but suggestions arose

203. Canon 4 of the Code of Conduct for United States Judges reads:

A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge’s office, interfere with the performance of the judge’s official duties, reflect adversely on the judge’s impartiality, lead to frequent disqualification, or violate the limitations set forth below.

CODE OF CONDUCT FOR U.S. JUDGES canon 4 (2009). Although the second clause prohibits the judge from engaging in some extrajudicial activities if they “reflect adversely on the judge’s impartiality” or “lead to frequent disqualification,” this rule is rarely enforced, and judges generally decide for themselves whether their conduct runs afoul of the prohibition. Often, the judge’s impartiality cannot be questioned until a particular case arises. Moreover, as mentioned earlier, the Code of Conduct does not apply to Justices of the United States Supreme Court. *See supra* note 54.

204. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

205. Kate Zernike, *Secretive Republican Donors Are Planning Ahead*, N.Y. TIMES, Oct. 20, 2010, at A18.

immediately that Scalia and Thomas's ruling in *Citizens United* may have been affected by their time with Koch officials.²⁰⁶ Nothing is known about the discussions that took place at the seminar, but, as noted by Common Cause, the primary group that argued that Scalia and Thomas should have recused themselves, the ruling furthered the interests of Koch Industries.²⁰⁷

b. The solution. Because there are no clear rules in place to prevent judges from being associated, even closely associated, with people, politicians, or political activists, ex post recusal is generally considered the best, perhaps the only, solution to this kind of judicial conduct. This type of conduct can and should be regulated ex ante, before the reputation of the court suffers and judicial impartiality is questioned.²⁰⁸

Just as with the regulation of judicial relationships and judicial financial holdings, judges should not be permitted to attend functions, retreats, or any other activities sponsored by groups with a direct stake either in pending litigation or in litigation that frequently arises in front of the court. Such flat bans may seem draconian, but, to the extent that they increase the appearance of judicial impartiality and independence, they are worth the effort.

B. Recusal Procedures

Regulation of the underlying judicial conduct and implementation of ex ante rules that prevent the appearance of impartiality or bias from arising in the first place is the best approach to maximize judicial legitimacy and public confidence in the courts. But sometimes it is impossible to prevent recusals altogether no matter how well-tailored our ex ante rules may be. For example, no amount of ex ante regulation can prevent recusal-related controversies when judges were personally involved in passing or

206. See Eric Lichtblau, *Advocacy Group Says Justices May Have Conflict in Campaign Finance Cases*, N.Y. TIMES, Jan. 20, 2011, at A15.

207. *Id.*

208. It should be noted that, to the extent the conduct itself creates an appearance of impropriety or impartiality, such conduct is already prohibited by the Code of Conduct, at least for all judges other than members of the United States Supreme Court. See Neumann, *supra* note 57. The ex ante proposals in this Part, and throughout this paper, are intended to regulate conduct that does not create an appearance of impartiality until a particular case arises requiring recusal.

defending the very law in question.²⁰⁹ Furthermore, at least in the United States, judges become judges because of their relationships, friendships, and connections with influential political leaders and members of the community established over many years. Those connections and relationships cannot be prevented. Neither can judges erase years, sometimes decades, of other experience, including private practice and public service. It is precisely in these circumstances that recusal law must be at its strongest.

An example of a situation where *ex ante* solutions are theoretically possible but practically infeasible occurs when it is not the judge's previous conduct that leads to damage to the appearance of impartiality, but that of the judge's spouse. Two recent recusal controversies illustrate this problem.

First, Ninth Circuit judge Stephen Reinhardt was asked to recuse himself from hearing the appeal of a same-sex marriage case²¹⁰ because his wife, Ramona Ripston, the executive director of the ACLU of Southern California, was consulted about whether the case should have been brought in the first place.²¹¹ Appellants argued that Reinhardt must recuse himself because his "impartiality might reasonably be questioned."²¹² Judge Reinhardt denied the motion.²¹³ Second, controversy has erupted over the activities of Virginia Thomas, the wife of Justice Clarence Thomas. After allegations that Mrs. Thomas has reported ties to anti-health care initiatives, House Democrats called for Justice Thomas to recuse himself from any legal challenge to the Affordable Care Act.²¹⁴ Legal challenges to the Act have not yet reached the Supreme Court,²¹⁵ and it is not yet known

209. During Elena Kagan's confirmation hearings, for example, Justice Kagan was questioned about whether or not she would recuse herself from a likely Supreme Court challenge to the recently enacted health-care reform law. See Laura Meckler, *Republicans Push Kagan on Health-Care Recusal*, WALL ST. J., July 15, 2010, <http://online.wsj.com/article/SB10001424052748704518904575364930042286638.html>.

210. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

211. *Perry v. Schwarzenegger*, 630 F.3d 909, 911, 913 (9th Cir. 2011).

212. *Id.* at 916.

213. *Id.* at 911.

214. Letter from Anthony D. Weiner, Frank Pallone, Jr., Fortey Pete Stark, & Christopher S. Murphy, U.S. Cong., to Justice Clarence Thomas, Supreme Court (Feb. 9, 2011), available at <http://www.scribd.com/doc/48573148/Letter-to-Justice-Thomas-Asking-for-Recusal-In-Health-Law-Case>. The letter was also partly spurred by Justice Thomas's failure to disclose his wife's receipt of substantial sums of money from the Heritage Foundation, a prominent opponent of health-care reform. *Id.*

215. District courts have split on the constitutionality of the Act. Compare *Florida ex rel.*

whether Justice Thomas will indeed recuse himself from hearing the case.

One could imagine an *ex ante* proposal that prohibits spouses or family members from engaging in political or legal activity on issues likely to reach the judge. And one could certainly argue that the public can doubt the impartiality of a judge whose spouse has publicly participated either in the case itself, or in political activity surrounding the case. But such *ex ante* solutions are too draconian and overinclusive. Therefore, I limit my proposal to *ex ante* regulation of judicial conduct and judicial elections; familial speech or behavior should be excluded from regulation.

1. (Non)history of recusal procedure

An astute reader may have noticed something lacking in the historical discussion in Part II: there was no mention of recusal procedure either at the state or the federal levels. This absence is not an omission by the author; rather, it is a reflection of the apathy and neglect that disqualification procedures have received from legislatures and bar associations devising disqualification rules as well as the courts interpreting them. The federal disqualification statute²¹⁶ does not even provide a procedure for its enforcement. The same is true of the Model Judicial Code, which, like the federal statute, sets a substantive standard without a procedure for how that standard is to be enforced. Judges have generally made up the procedures *ad hoc*. One cannot review the history of procedural recusal law because none exists.

This observation may be surprising given the great deal of public attention that recusal has received in the last few years as well as the number of amendments to the substantive recusal rules. Despite that attention, and despite those amendments, the recusal procedures have remained stagnant and are by far the least developed aspect of American recusal jurisprudence. Scholars have observed that “[u]nlike almost any other area of the law, the process by which

Bondi v. U.S. Dep’t of Health & Human Servs., No. 3:10-cv-91-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011) (finding the Act unconstitutional), *aff’d in part, rev’d in part sub nom.* Florida *ex rel.* Att’y Gen. v. U.S. Dep’t of Health and Human Servs., 648 F.3d 1235 (11th Cir. 2011), *with* Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010) (upholding the Act as constitutional). The split is likely to reach the Court within the next couple of years.

216. 28 U.S.C. § 455 (2006).

judges decide whether to recuse themselves ignores the systems usually employed to resolve disputes in a fair and impartial manner.”²¹⁷

Procedurally, policymakers treat recusal the same way it was treated hundreds of years ago. The practice of self-recusal, a procedural quirk that allows the challenged judge to rule on her own recusal motion, has a long history in the common law. But this practice was created with virtually no discussion in British cases or scholarly literature before spreading, again with no critical analysis or discussion, to Australasia and the Americas. This common law recusal procedure survives to this day: the general practice in both state and federal courts is that the judge to whom the motion to recuse is directed decides whether his or her recusal is necessary.²¹⁸ And self-recusal is only one of the procedures that hearken back to Blackstone’s England. Judges rarely write opinions explaining their recusal decisions, and appellate courts rarely review those decisions with any vigor.²¹⁹

Procedures like self-recusal may have made sense when scholars and lawyers simply assumed that judges sworn to uphold justice could not and would not be biased.²²⁰ But as our understanding of human nature and the judiciary repudiated that presumption, and as social scientists uncovered the depths of potential subconscious bias, legislators and the courts should have reexamined recusal procedures like self-recusal.²²¹ A system that relies on a sua sponte admission of bias, or even an appearance of bias, by a judge is bound to fail. Instead, various courts throughout the nation have adopted different approaches, resulting in a lack of uniformity.²²² Some states permit a

217. Frost, *supra* note 43, at 536.

218. FLEMING JAMES JR. ET AL., CIVIL PROCEDURE 394 (5th ed. 2001).

219. Richard E. Flamm, *History of and Problems with the Federal Judicial Disqualification Framework*, 58 DRAKE L. REV. 751, 760 (2010) (“[W]hile federal judges do recuse themselves in many situations, a judge who does so rarely writes an opinion explaining why.”). Because few opinions explaining the judge’s recusal rationale are published, the law of recusal is slow to develop and fails to provide any meaningful guidance to litigants and lawyers about when and whether disqualification is warranted in any particular case.

220. See BLACKSTONE, *supra* note 26, at *361 (“[T]he law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.”).

221. See Bam, *supra* note 115, at 78–80 (discussing the importance of tailoring recusal procedures to the evolving substantive standards).

222. Leubsdorf, *supra* note 16, at 238.

judge whose recusal is sought to decide his own recusal motions, while others require somebody else to decide such motions.²²³

More troubling is the fact that most states are silent on the subject, suggesting that recusal procedure is no more than an afterthought if it is a thought at all.²²⁴ And even when states get around to considering recusal procedure, the movements generally have little success. In the last decade, four states sought to amend their recusal rules to require that a judge other than the judge whose recusal is sought rule on each motion.²²⁵ All four efforts failed.²²⁶

Why is recusal procedure almost entirely ignored by Congress and state legislatures? One explanation may be that process is viewed as minutiae, unworthy of legislative attention. After all, procedural law has been described by some as “painstaking, ministerial, and ultimately boring.”²²⁷ Additionally, Congress has generally been cautious in regulating judicial procedures in order to protect judicial impartiality and maintain separation of powers.²²⁸ Moreover, it is (wrongly) assumed that procedural issues should be left to judges, since that is what judges presumably do best. Surely, one may think, judges can create recusal procedures that fairly implement the substantive rules that are in place. Part of the explanation for this belief lies in the underlying assumption, discussed and challenged in Part III, that so long as the judge ultimately reaches the correct recusal decision, nothing else, including the procedure used to reach the decision, particularly matters.

And even when scholars consider recusal procedure, it is only as a means to an end—the end being, once again, the correct recusal

223. See, e.g., CAL. CIV. PROC. CODE § 170.3(c)(5) (West 2006).

224. See William E. Raftery, “*The Legislature Must Save the Court from Itself?*: Recusal, Separation of Powers, and the Post-Caperton World,” 58 DRAKE L. REV. 765, 766–67 (2010) (listing the states that do not set forth any recusal procedure for consideration of recusal motions).

225. *Id.* at 772–73.

226. *Id.*

227. Joachim Zekoll, *Comparative Civil Procedure*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1327–28 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

228. Howard M. Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy*, 102 NW. U. L. REV. 1547, 1555 (2008) (“The procedure/merits line also rides on strong separation of powers concerns, dividing the respective lawmaking capacities of Congress and the courts.”). Scholars have criticized the shortcomings in a system of judicial self-discipline in other contexts. See, e.g., Lara A. Bazelon, *Putting the Mice in Charge of the Cheese: Why Federal Judges Cannot Always Be Trusted to Police Themselves and What Congress Can Do About It*, 97 KY. L.J. 439 (2009).

decision. In other words, when recusal procedure receives any attention, it is generally part of the critique of the outcomes rather than the appearances created by the procedures themselves. For example, other scholars have attacked the practice of self-recusal on the grounds that judges may not appreciate the presence of subconscious bias, which leads them to under-recuse.²²⁹ To the contrary, I argue that procedures themselves are the ends—it is in setting recusal procedures that we should be thinking about appearances, not hoping that procedures will lead to a substantive result that will create an appearance of impartiality.

2. *The importance of procedure*

Why might an appearance-based recusal procedure be more effective in creating an appearance of an impartial judiciary than the current outcome-based recusal model? Research by social scientists holds the key.²³⁰ This research supports the notion that the public's perception of the judiciary is influenced in large part by whether the judicial process is perceived to be procedurally fair.²³¹ In fact, several scholars have shown that even when a court's substantive decisions are disfavored, courts retain their perceived legitimacy so long as the decisions were reached in a procedurally fair manner.²³² These

229. See, e.g., Bassett, *supra* note 54, at 1242; Steven Lubet, *It Takes a Court*, 60 SYRACUSE L. REV. 221, 228 (2010) ("When it comes to disqualification, it takes more than a single judge to render a fair decision."). Of course, judges are at times self-aware of the possibility of subconscious bias. One of the all-time famous Supreme Court recusals happened in *Public Utilities Commission of District of Columbia v. Pollak* when Justice Frankfurter recused himself because of his objection to the playing of radios on public buses. 343 U.S. 451, 454 (1952) ("[N]either the operation of the service [of playing the radio on public buses] nor the action of the Commission [in] permitting its operation is precluded by the Constitution."). In his memorandum explaining the recusal decision, Frankfurter said that his subconscious hatred of the radio on public buses was so strong that his "unconscious feelings" could influence his resolution of the dispute. *Id.* at 466–67.

230. James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC'Y REV. 469, 471 (1989); Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC'Y REV. 621, 621–22 (1991). Much of the literature in this field focuses on the United States Supreme Court but likely applies equally to other institutions, including lower-level federal courts and state courts.

231. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 1–2 (1988).

232. Gibson, *supra* note 230, at 471; Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 734 (1994).

findings are especially true for an institution where the decision makers are appointed rather than elected and are independent from the public rather than accountable to their constituents.²³³

Because procedural fairness is indeed crucial to public perception, ignoring recusal procedures is a fatal mistake, at least so long as recusal aims to create an appearance of impartiality. And if outcomes matter less than process, then leaving aside all consideration of appearances until the judge makes the final recusal decision, rather than establishing a proper appearance-based recusal procedure, misses the boat entirely.

Taking appearances seriously, therefore, means that reforming the recusal procedures should be a top priority. Only such large-scale structural changes can create an appearance of fairness and impartiality. Implementing proper procedures can legitimize judicial institutions that often operate in an independence-based model. For example, procedural changes requiring judges to explain their recusal decisions would foster judicial accountability by giving the public greater access to—and understanding of—judicial recusal decisions.²³⁴ It would also require judges to be more thoughtful in decisions they have to justify publicly. Americans have great faith in the courts in large part because they believe they get a fair shot and a fair resolution. In the context of recusals this means that we should create procedures that reduce the appearance of partiality and reassure Americans that recusal decisions are made in a way that fosters impartiality and independence.

The question of what specific procedures are necessary to create the appearance of impartiality is difficult to answer without empirical studies. However, political scientists have identified four essential elements contributing to the perception of procedural fairness.²³⁵ First, litigants must be treated with dignity and respect.²³⁶ Second, parties must have the opportunity to participate in the process.²³⁷

233. John R. Allison, *Ideology, Prejudgment, and Process Values*, 28 NEW ENG. L. REV. 657, 682 (1994); Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 314–315 (1997).

234. Cf. Roberts, *supra* note 54, at 121 (discussing how the lack of clear recusal procedures in the United States Supreme Court “permits unaccountability, and increases doubts about appearances of impartiality”).

235. Tom R. Tyler, *What Do They Expect?: New Findings Confirm the Precepts of Procedural Fairness*, CAL. CTS. REV., Winter 2006, at 22–23.

236. *Id.*

237. *Id.*

Third, judges must be trustworthy, and, fourth, the judiciary must be neutral.²³⁸ These recommendations mirror, in some respects, those of the widely respected Legal Process Theory developed by Hart and Sacks.²³⁹ They identified five central procedural elements: (1) litigants must initiate disputes, (2) an adversarial process must allow each party to advance its position, (3) the court must provide a rationale for its decision, (4) the decision itself must be supported by a body of law, and (5) the decision maker must be impartial.²⁴⁰

Some have argued that all of the elements identified by Hart and Sacks should be imported to the American recusal framework in toto.²⁴¹ For example, Amanda Frost suggests that because these tenets of adjudication “serv[e] a vital legitimating function,” they should all be “incorporate[d] into recusal law.”²⁴² There is some merit to this proposal; after all, if those are all essential ingredients in a legal system, why not incorporate them into our recusal jurisprudence?

But while the five Legal Process tenets identified above are essential for legitimizing judicial decisions, they may not all be necessary (or even advantageous) in creating an appearance of impartiality, and some may even undermine that goal. For example, the adversarial process is a key part of the American legal system, allowing both parties an opportunity to present their conflicting arguments. This party control over case presentation serves a legitimizing function. But importing the adversarial model into recusal jurisprudence may in fact harm the appearance of judicial impartiality by requiring that judges (or their representatives) argue their cases and attempt to prove to some neutral arbiter that they are not biased and that their earlier conduct was not improper. Pitting judges against litigants may in fact work to the detriment of appearances.²⁴³

238. *Id.*

239. HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (2001).

240. *Id.*

241. Frost, *supra* note 43, at 555–56.

242. *Id.* at 535.

243. Judges are often frustrated by what they perceive as frivolous recusal requests, and this problem would be exacerbated if judges were forced to defend themselves in a proceeding from such charges.

Therefore, this Article suggests a modified, appearance-based process theory, whereby those procedures that would appear to a reasonable person as necessary to create a fair recusal scheme would be implemented. In other words, rather than asking what procedures foster confidence in the correctness of the final decision, we should ask what procedures create an appearance of impartiality. This would require empirical studies designed to learn which aspects of the Legal Process Theory matter most for the purpose of appearances. For example, it seems that Legal Process Theory elements three, four, and five, which require that an *impartial decision maker* provide a rationale for its decision in a written *opinion* that must be *supported by a body of law*, would likely be the crucial elements that must be imported into recusal procedures. Elements one and two, that litigants must initiate disputes and an adversarial process must allow each party to advance its position, however, may or may not be necessary; this should be confirmed using social science data.

The specific determinations, however, need not, and cannot, be made at this point. The biggest procedural hurdle to the appearance of fairness, and one that must likely be addressed first, is the dubious practice of self-recusal. One of the most important procedural questions when it comes to recusal is the question of who should decide recusal motions: the impugned judge, another judge of the same court, a group of judges, or some other party. The issue of self-recusal has been perhaps the most criticized aspect of American recusal rules and procedures.²⁴⁴ When one looks at recusal procedure from the appearance-based perspective, the flaws inherent in a system where a potentially biased judge is assigned the task of ruling on her own recusal motion become immediately apparent. First, the self-recusal procedure violates the fundamental principle that one should not be a judge in her own cause. Furthermore, the practice leads attorneys to abstain from making a recusal motion because of a fear of judicial retribution. Finally, a judge deciding her own recusal motion may not acknowledge that she is biased, either because she does not recognize the bias, because she does not want to admit that

244. See SHAMAN & GOLDSCHMIDT, *supra* note 105, at 66–67; Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 561 (1994) (“The appearance of partiality and the perils of self-serving statutory interpretation suggest that, to the extent logistically feasible, another judge should preside over such motions.”); David K. Stott, Comment, *Zero-Sum Judicial Elections: Balancing Free Speech and Impartiality Through Recusal Reform*, 2009 BYU L. REV. 481, 500.

she is biased, or because she does not want to admit that she engaged in conduct that created the appearance of bias.

There is another advantage to focusing on appearances while setting recusal procedures rather than leaving the appearance inquiry until the very end when the judge makes her recusal decision. It is the advantage of time—there is an opportunity to think about and conduct empirical research into what procedures create an appearance of impartiality, as opposed to when the case is already in front of the judge. When appearances are considered in creating recusal procedures, the burden of setting clear, consistent, and appearance-based recusal procedures will fall to state and federal legislatures.²⁴⁵ Judges are generally too hesitant to impose procedures that threaten the collegial relations with their colleagues. Judges rarely criticize a colleague for being biased or prejudiced, although they have anonymously acknowledged that their colleagues (but not them!) may be biased in favor of some litigants, especially those who helped them get elected.²⁴⁶

Furthermore, considering appearances *ex ante*, before any case is actually pending, eliminates the opportunity for judges to consider the facts of the case in reaching a recusal decision. Once the decision maker knows the legal issue in question or the identities of the parties, she may under- (or over-) appreciate whether her impartiality might reasonably be questioned. For example, a judge may be tempted to refuse to recuse herself in a case involving a cause important to the judge (for example, tort reform for a conservative judge or abortion for a liberal one). But if legislatures consider appearances in advance and implement appearance-based recusal procedures, it may be more difficult for the underlying facts of the dispute to infiltrate the recusal decision.

More importantly, just as I questioned the wisdom of allowing judges to apply the “reasonable person” standard to test the appearance of their own conduct, judges are likewise not well-suited to set procedures for determining whether their own impartiality is in question. This is in part because judges do not have the means that legislators have to determine which procedures create an appearance of impartiality. Judges have their own interests in mind,

245. See Raftery, *supra* note 224, at 766 (discussing the role that legislatures can and should play in drafting recusal statutes and crafting recusal mechanisms).

246. Pozen, *supra* note 110, at 290–91.

and these interests often conflict with creating a recusal procedure that avoids the appearance of bias. Judges should neither be setting the recusal procedures nor applying the recusal standards to themselves. In fact, to the extent that judges do have control over either the recusal process or the outcome, they are not likely to appear impartial.²⁴⁷

I conclude this Part by returning to the discussion of the substantive recusal standard and by reconsidering what the substantive recusal standard should entail. Earlier, I argued that the appearance-based standard in place now is not by itself sufficient to create an appearance of impartiality. But that, of course, is not an argument in favor of scrapping the standard altogether. Rather, I believe legislatures must consider the substantive recusal standard just as they would recusal procedures and determine what standard is likely to foster an appearance of fairness. One should not assume that an appearance-based standard is best for appearances. As mentioned earlier, by lowering the threshold that parties must meet to obtain recusal, more recusal motions will be filed and public confidence in the courts may suffer.²⁴⁸ Ultimately, just as the legislatures will need to determine which recusal procedures create an appearance of impartiality, they will also need to decide what substantive recusal standard is best for judicial legitimacy and the reputation of the courts.

247. One solution would be to create an independent office to review recusal-related decisions. The 112th Congress has suggested the creation of an Inspector General for the judicial branch. Judicial Transparency and Ethics Enhancement Act of 2011, H.R. 727, 112th Cong. § 1021 (1st Sess. 2011). Although the office is intended to investigate misconduct and prevent “waste, fraud, and abuse” within the judiciary, an additional option may be to give it the power to review recusal decisions by federal judges. *Id.* § 1023(3). This procedural change may instill confidence in the public that judges are accountable for their recusal decisions.

248. For example, in a recent West Virginia case, a litigant sought state supreme court justice Menis Ketchum’s recusal based on statements that he made in his election campaign. Jessica M. Karmasek, *Ketchum Reverses Course, Recuses Himself*, W. VA. REC., Sept. 28, 2010, available at <http://www.wvrecord.com/news/230005-ketchum-reverses-course-recuses-himself>. After the judge denied the recusal motion, somebody leaked the decision to legal blogs, creating even greater controversy and drawing negative attention and publicity to the West Virginia courts. *Id.* This publicity ultimately led Justice Ketchum to recuse himself not because he believed his continued presence on the case violated the appearance of impartiality, but rather because he did not “want [the] Court to be publicly maligned.” *Id.*

V. CONCLUSION

Recusal lies at the heart of our understanding of the role of the courts in a democracy. It is meant to ensure judicial independence and impartiality and to protect the legitimacy of the courts as well as the reputation of the judiciary. Without reforms to various aspects of recusal law, public confidence in the judiciary—the primary source of judicial legitimacy—will continue to wane.

This Article suggests that the long-standing assumption that recusal completely restores the appearance of judicial impartiality and public confidence in the courts may need reexamination. It is time to focus on the circumstances that lead to recusal as well as recusal procedures. By shifting the focus away from the substantive recusal standard and the actual recusal decision, we can begin to maximize the appearance of impartiality on a systemic basis. And by considering appearance *ex ante*, before problems arise, we can put in place ethics rules and recusal procedures that truly legitimize the judiciary and restore the people's faith in the fairness of the American courts.

