

PEER REVIEW ARTICLE†

OUR UNCONSTITUTIONAL RECUSAL
PROCEDURE

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INTRODUCTION

This Article argues that the recusal procedure used in the vast majority of American courtrooms today, and for nearly all of American history, is unconstitutional. The procedure allows the judge or justice whose impartiality is questioned—generally (though not always) in a motion for recusal filed by one of the parties—to decide for himself or herself whether recusal is warranted. I will demonstrate that this procedure violates the Due Process Clause because it allows the challenged judge to act as a “judge in his own cause.”¹ At first blush, that may sound like an outrageous claim. After all, how can a procedure with such an impressive pedigree—over 235 years of acceptance in the United States, and centuries beyond that in England—violate a bedrock principle of constitutionalism, recognized in the common law since at least the beginning of the seventeenth century?² But as this Article will show, we should not be surprised that judges have not declared the practice unconstitutional, as judges themselves have an interest in its continued existence.

Although this Article is the first to argue that the American recusal procedure is unconstitutional, recusal has been a hot topic of late.³ And even though much of the focus has been on the

¹ Dr. Bonham’s Case, (1610) 77 Eng. Rep. 638, 652 (C.P.) (recognizing the principle of “nemo iudex in causa sua,” or “no man shall be a judge in his own cause”).

² *Id.*

³ In fact, there is a quickly growing body of literature on judicial recusal. A few recent articles have looked at due process concerns arising out of substantive recusal decisions. See, e.g., Andrey Spektor & Michael Zuckerman, *Judicial Recusal and Expanding Notions of Due Process*, 13 U. PA. J. CONST. L. 977 (2011); Gabriel D. Serbulea, Comment, *Due Process and Judicial Disqualification: The Need for Reform*, 38 PEPP. L. REV. 1109 (2011); Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563 (2004). In addition, one author has looked at potential separation-of-powers concerns of congressional regulation of the Supreme Court’s recusal rules. Louis J. Virelli III, *The (Un)Constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181 [hereinafter Virelli, *Supreme*] (arguing that Congress may not set the recusal standards for the judiciary without violating separation of powers doctrine). Recusal procedure has not received similar constitutional treatment. This Article fills that gap.

substantive recusal standards, or specific recusal decisions,⁴ recusal procedure, which has long been neglected by scholars, has finally garnered some much-needed attention. In particular, scholars have begun to criticize the self-recusal procedure followed in thousands of state and federal courts throughout the country, referring to self-recusal as “problematic,”⁵ “troubling,”⁶ and “bizarre.”⁷ I, too, have previously criticized our approach to recusal, suggesting that the judiciary and the legislature should take greater heed of recusal’s effect on appearances in drafting recusal legislation.⁸ And recently, Congress has joined the chorus of critics of the Supreme Court’s recusal rules, calling for the Court to pay more attention to issues of judicial ethics.⁹

But rather than rehashing those oft-repeated criticisms, this Article looks at recusal procedure from an entirely new, constitutional perspective. Specifically, it asks whether the self-recusal procedure violates the Fourteenth Amendment’s Due Process Clause, and in particular the guarantee of impartiality contained in the Fourteenth Amendment. The Court has frequently referred to judicial impartiality as the sine qua non of the American legal system generally, and of the Due Process Clause in particular. Unquestionably, due process requires a fair and impartial tribunal for *all* phases of litigation, including pre-trial motions like the motion for recusal. And not only is the presence of a fair and disinterested judge a critical component of due process, but it is the means by which all our rights, fundamental and otherwise, are preserved in the legal system.

⁴ Non-recusals by Supreme Court Justices have received particular coverage in the media, as well as scholarly literature.

⁵ Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1554 (2012) [hereinafter Virelli, *Congress*] (discussing Supreme Court recusal practice and describing the self-recusal procedure as “problematic”).

⁶ Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1237 (2002) [hereinafter Bassett, *Judicial*] (referring to recusal procedures followed by federal courts as “troubling”).

⁷ John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 242 (1987) (noting the “bizarre rule” permitting “the very judge whose acts are alleged to be warped by unconscious bias to decide whether there is an adequate showing of bias”).

⁸ Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 BYU L. REV. 943.

⁹ *Id.* at 946-47.

The entire adversarial system, in fact, depends on the presence of a neutral referee to resolve the disputes vigorously presented by the lawyers in the case. The Court's due process jurisprudence leads to the inescapable conclusion that a recusal procedure that (a) does not ensure litigants a trial in front of an impartial judge, or (b) permits the participation of a judge with an interest in the outcome of a dispute is unconstitutional as violative of due process. This Article argues that the self-recusal procedure fails on both prongs.

The particular element that renders the American recusal procedure unconstitutional is that the same judge whose recusal is sought—the very judge whose impartiality is being questioned—decides whether recusal is required. The United States inherited this self-recusal procedure from England, and self-recusal has remained dominant in the United States since the founding.¹⁰ Admittedly, some state courts, at various levels of their respective state judiciaries, and even a few federal courts, have implemented different local recusal procedures that allow for a neutral decisionmaker to hear, and decide, motions for recusal. Such alternative approaches will be discussed later in the Article, but these courts are the exception, while self-recusal has long been, and continues to be, the rule. Self-recusal is also the only procedure followed by the United States Supreme Court. In other words, the Justices decide for themselves whether recusal is warranted, and their decisions are not only unreviewable by their colleagues, but are also unappealable to any other court because of the Court's place on top of the judicial pyramid.

The appeal to history and practice is perhaps the strongest criticism of my argument. But despite its initial attractiveness, I believe the historical defense of self-recusal fails. Our recusal regime is built on a factual framework that has started to crack. The formalistic assumptions that the identity and the background of the judge do not matter have long been debunked by legal

¹⁰ *Id.* at 952.

theorists. We know now that a judge's upbringing,¹¹ family,¹² political preferences,¹³ and even personal characteristics like race and gender,¹⁴ are important attributes of judicial decision-making. The recusal scheme rests on similar, and similarly unfounded, assumptions: assumptions that judges can set aside their personal biases when they don their robes, and that judges deciding their own recusal motions can evaluate their own conduct and impartiality using an objective "reasonable person" standard. These assumptions have also been convincingly challenged in social science literature. But scholars and courts have been slow to account for that evidence, and have failed to assess the constitutional implications of the research on bias conducted by psychologists and social scientists. This Article takes up that assessment, and concludes that judicial recusal procedures—in particular the procedures followed by the United States Supreme Court—violate the guarantees of due process. I argue that when we accept, not avoid, psychological and other social science scholarship, the constitutional foundation for our recusal practice collapses entirely.

The self-recusal procedure also rests on a misunderstanding of recusal. Or, more accurately, it rests on an outdated, formalistic understanding of recusal. Formally, recusal is a dispute between the two litigants appearing in front of the judge. But that misconstrues the recusal motion. Because generally only one party

¹¹ See Hon. Alvin K. Hellerstein, *The Influence of a Jewish Education and Jewish Values on a Jewish Judge*, 29 *TOURO L. REV.* 517, 523 (2013) (describing the influence that a judge's religious upbringing can have on judging).

¹² A recent study showed that judges with daughters decide cases in favor of women's rights more often than judges with only sons or no children at all. See Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 *AM. J. POL. SCI.* 37, 45-47 (2015).

¹³ See FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 201-02 (2007); Nancy C. Staudt, *Modeling Standing*, 79 *N.Y.U. L. REV.* 612, 669 (2004) (finding that political preferences play important roles in judicial decisionmaking). In legal literature, this has come to be known as the "attitudinal model" of judging. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002) (explaining that judges frequently make decisions based on their political preferences).

¹⁴ Edward A. Adams, *Race & Gender of Judges Make Enormous Differences in Rulings, Studies Find*, *A.B.A. J.* (Feb. 7, 2010, 12:20 AM), http://www.abajournal.com/news/article/race_gender_of_judges_make_enormous_differences_in_ruling_s_studies_find_aba/.

seeks the judge's recusal, the other party in litigation plays no role on the recusal question. Most often, the opposing party remains silent because it does not have the facts necessary to oppose the motion. After all, the judge is the one who can answer the allegations of bias or impartiality, not the litigants. Functionally, then, the recusal dispute is between the moving party and the judge, not between two litigants. Once the dispute is properly understood as such, any recusal procedure that allows a party to the dispute (here, the judge) to resolve the dispute faces a strong presumption of unconstitutionality. It is a presumption that proponents of self-recusal cannot overcome.

Part I of this Article discusses the substantive and procedural recusal standards, with an eye towards how those standards have developed over the last two centuries. Although the substantive standards have undergone a significant transformation, I will show that recusal procedures have remained stagnant. This decoupling of procedure from substance has far-reaching implications—a procedure that made sense under the common-law recusal standard makes little sense given our current approach to recusal. Part I will also explain the theoretical underpinning supporting the law's approach to the recusal procedure, and how that foundation was formed centuries ago based on incorrect factual assumptions (that judges could set aside their bias when elevated to the judicial office) and a misguided view of recusal.

Part II then looks at judicial decisions interpreting the Due Process Clause, paying particular attention to the Supreme Court's case law establishing litigants' due process right to a fair and impartial judge. At the heart of the Court's jurisprudence is the "no man shall be a judge in his own cause" standard. Here, I will discuss how the meaning of this standard has evolved from a very limited common law principle that a judge must not have a financial interest in the case's outcome to the Court's current insistence that a judge free of bias is the lynchpin of the Due Process Clause and is a basic constitutional guarantee for all litigants. These decisions highlight the importance of judicial impartiality to our concept of fairness and justice. In fact, the Court has suggested that even the appearance of impartiality is guaranteed by the clause. This part, therefore, also explains the

role that appearances have played in the Court's decisions, as well as the importance of appearances to the judiciary's success.

Part III forms the core of my argument. Here, I argue that the self-recusal procedure is constitutionally problematic in two different ways. First, to the extent that the Due Process Clause protects even the appearance of impartiality, the self-recusal procedure fails to foster such an appearance. Summarizing the work of legal process theorists and procedural fairness scholars, I conclude that one of the key components of the appearance of impartiality is the presence of a neutral decisionmaker. No reasonable person, however, perceives the judge whose impartiality is under attack as such an impartial decisionmaker. Second, the self-recusal procedure allows the judge to act as a "judge in his own cause," something the Due Process Clause prohibits. I reach this conclusion because the motion for disqualification, unlike any other pre-trial motion, challenges the judge's own conduct, and should be understood as a dispute between the challenging party and the judge, rather than as a dispute between two litigants. Thus properly understood, the judge is resolving a dispute to which she is herself a party, meaning that the judge has an interest in the outcome of the motion.

Finally, in Part IV, I propose alternative recusal procedures that alleviate, or at the very least minimize, the effect of the cognitive biases outlined in Part III. Each recommendation involves shifting the recusal decision to an independent third party: another judge, a group of other judges, or an independent group of non-judges. Of course, these procedures come with their own set of warts, hurdles and drawbacks, and these, too, will be addressed here. But these solutions, if implemented, would not only address the concerns about the quality of judicial decisionmaking on recusal issues, but also foster an appearance of impartiality. I stop short of recommending a universal recusal procedure that all state and federal courts should follow. Rather, each state, as well as the federal government, should come up with a process that works well for its own judiciary, taking into account such factors as the size of the judiciary (a procedure that works well for New York courts may not for those in Wyoming) as well as the level of the judiciary (different recusal procedures may

be appropriate for trial courts and appellate courts). In proposing these alternatives, Part IV also considers an unusual practical problem that arises in the context of arguably unconstitutional actions by the judiciary: what happens when the Supreme Court's own procedures arguably violate the Due Process Clause? Finally, Part IV shows how changes in recusal procedure can alleviate some other concerns associated with judicial elections; namely, the problem of judges who accept contributions from litigants and lawyers who appear in front of them, and the problem of judges who appear to pre-commit themselves to rule a certain way on particular issues in the course of their election campaigns.¹⁵

I. RECUSAL LAW AND PROCEDURE

A. *The Importance of Recusal*

In recent years, the issue of judicial disqualification¹⁶ has become ubiquitous.¹⁷ A federal judge has referred to it as the “topic du jour”;¹⁸ academics describe it as “hot.”¹⁹ And hot it is. Seemingly every high-profile case, at both state and federal levels, has involved a recusal controversy. From federal challenges to the constitutionality of the Affordable Care Act²⁰ and restrictions on

¹⁵ This is a particular problem in criminal cases where judicial candidates often promise the electorate that they will be “tough-on-crime.” See Keith Swisher, *Pro-Prosecution Judges: “Tough on Crime,” Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317 (2010).

¹⁶ I use “recusal” and “disqualification” interchangeably. Although the words have historically had slightly different meanings, most scholars now use both terms synonymously. See RICHARD E. FLAMM, *JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES* 4 (2d ed. 2007). “In fact, in modern practice ‘disqualification’ and ‘recusal’ are frequently viewed as synonymous, and employed interchangeably.” *Id.* (footnote omitted).

¹⁷ Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification—and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 REV. LITIG. 733, 735 (2011) (“[I]ssues of judicial impartiality and disqualification are at the forefront of contemporary debates about the state of the legal system.”).

¹⁸ M. Margaret McKeown, *Don’t Shoot the Canons: Maintaining the Appearance of Propriety Standard*, 7 J. APP. PRAC. & PROCESS 45, 45 (2005).

¹⁹ Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 672 (2011).

²⁰ Numerous commentators called for the recusal of Justice Elena Kagan because of her previous work as Solicitor General. See Robert Barnes, *Health-Care Case Brings*

same-sex marriage,²¹ to state criminal prosecutions of George Zimmerman²² and Aaron Hernandez,²³ recusal has been a common thread uniting all of these disparate cases. Over the last decade, nearly every Supreme Court Justice has faced calls for recusal,²⁴ and a number of highly publicized cases have led to

Fight Over Which Supreme Court Justices Should Decide It, WASH. POST (Nov. 27, 2011), http://www.washingtonpost.com/politics/health-care-case-brings-fight-over-which-supreme-court-justices-should-decide-it/2011/11/22/gIQAwRWb2N_story.html. Others called for Justice Clarence Thomas to step aside because of his wife's opposition to the Affordable Care Act and her work to repeal it, as well as Justice Thomas's own participation at events sponsored by the Affordable Care Act's opponents. See, e.g., Editorial, *The Supreme Court's Recusal Problem*, N.Y. TIMES, Dec. 1, 2011, at A38; Jeffrey Toobin, *Partners*, NEW YORKER, Aug. 29, 2011, at 40, available at <http://www.newyorker.com/magazine/2011/08/29/partners-jeffrey-toobin> (reporting on the calls for Justice Thomas's recusal from challenges to the Affordable Care Act).

²¹ The challenges to the constitutionality of California's Proposition 8 included calls for recusal at all three levels of the federal judiciary. Some questioned whether Judge Vaughn Walker could preside over the trial given his own long-term relationship with another man. See Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 567-68 (2012). On appeal to the Ninth Circuit, Proposition 8 proponents demanded that Judge Reinhardt step aside because his wife was the head of the ACLU of Southern California and had submitted an amicus brief against Proposition 8. See Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 732-33 (2012). Finally, when the case got to the Supreme Court, supporters of Proposition 8 called for Justice Scalia to step aside because he had previously expressed his views about the constitutionality of same-sex marriage bans. See Michael Russnow, *Scalia's Gay Stance Is Unacceptable: Recusal from Supreme Court Deliberations on DOMA and California Proposition 8 Is Called for*, HUFFINGTON POST (Dec. 14, 2012, 8:53 AM), http://www.huffingtonpost.com/michael-russnow/scalias-gay-stance-is-una_b_2298838.html.

²² Circuit Judge Jessica Recksiedler recused herself at the request of George Zimmerman's counsel because "her husband's law partner . . . ha[d] been hired to give commentary on the case for CNN." See Madison Gray, *Trayvon Martin Case Gets New Judge After Recusal*, TIME (Apr. 18, 2012), <http://newsfeed.time.com/2012/04/18/trayvon-martin-case-gets-new-judge-after-recusal/>.

²³ Judge Susan Garsh denied the prosecution's recusal motion. The lead prosecutor sought recusal because Judge Garsh "made erroneous rulings and treated him with disrespect in a 2010 murder trial." Kevin Vaughan, *Recusal Denied in Hernandez Case*, FOX SPORTS (June 2, 2014, 1:56 PM), <http://msn.foxsports.com/nfl/story/aaron-hernandez-murder-case-judge-susan-garsh-refuse-recusal-102113>.

²⁴ Justices Alito, Breyer, Ginsburg, Scalia, Sotomayor, and Thomas have been criticized for interacting with groups that are likely to appear, or have appeared, before the Court, as well as for their involvement with conservative or liberal organizations like the Federalist Society, American Constitution Society, and the Koch brothers. See Nan Aron, *An Ethics Code for the High Court*, WASH. POST (Mar. 14, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/13/AR2011031303258>.

significant scrutiny of the Supreme Court's approach to recusal.²⁵ While some scholars have suggested that these may be "false controversies[ies],"²⁶ and undoubtedly some of the recusal challenges had more merit than others, there is no denying that they are controversies nonetheless, attracting significant media and scholarly attention.²⁷ And these are just the cases that received national media coverage. In the lower federal courts, as well as in state courts, a number of judges have been criticized by the media and judicial ethics scholars for not recusing in various contexts.²⁸ Many of these decisions remain out of the public limelight, with only the litigants and court-watchers seething over a judge's non-recusal decision.

And recusal has not been a mere sideshow in cases dealing with other substantive issues. Just three years ago, the Supreme Court addressed recusal head-on in a high-profile case.²⁹ In *Caperton v. Massey*, the Court ruled that, in some circumstances, a state judge who has received campaign contributions³⁰ from one

html; Nina Totenberg, *Bill Puts Ethics Spotlight on Supreme Court Justices*, NPR (Aug. 17, 2011, 12:01 AM), <http://www.npr.org/2011/08/17/139646573/bill-puts-ethics-spotlight-on-supreme-court-justices>. The Justices have overwhelmingly rejected these calls for recusal.

²⁵ Justice Scalia's non-recusal in early 2004 is one of the most highly publicized incidents. That is when Justice Scalia famously went on a duck hunting trip with Vice President Dick Cheney while a lawsuit against Cheney was pending before the Court. See Jeffrey Rosen, *The Justice Who Came to Dinner*, N.Y. TIMES, Feb. 1, 2004 at 4(1).

²⁶ James Sample, *Supreme Court Recusal from Marbury to the Modern Day*, 26 GEO. J. LEGAL ETHICS 95, 98 (2013) (questioning the legitimacy of some recent recusal controversies).

²⁷ Of course, the issue of judicial disqualification goes back to the founding. To this day, scholars debate whether Chief Justice Marshall should have been disqualified from hearing *Marbury v. Madison*, a case in which Marshall's own failure to deliver a commission that he had signed and sealed as the Secretary of State was a key fact. *Id.* at 106-07.

²⁸ Often, these concerns arise in the context of judicial elections, when a judge does not recuse herself after receiving campaign contributions from one of the parties. But even outside the election context, we continue to see news stories critical of judges' recusal decisions.

²⁹ So high profile, in fact, that it was the subject of John Grisham's bestselling novel, *The Appeal*. See Joan Biskupic, *Supreme Court Case with the Feel of a Best Seller*, USA TODAY (Feb. 16, 2009, 10:12 PM), http://usatoday30.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm.

³⁰ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009). This case actually involved independent expenditures by Massey's CEO. The distinction between expenditures and contributions is a crucial one in election law, but the Court

of the litigants must recuse himself from hearing a case involving that contributor.³¹ Immediately following the *Caperton* decision, a number of state courts were forced to reconsider the constitutionality, and the propriety, of their recusal systems. The contentious nature of the recusal debates in Wisconsin³² and Michigan³³ show that recusal is at the forefront of the judiciary's collective mind.

The federal judiciary, too, has had to directly address its own recusal controversies. Chief Justice Roberts devoted the entirety of his 2011 Annual Year-End Report to issues of judicial ethics generally, and recusal in particular.³⁴ And Justice Scalia, after the infamous duck-hunting incident involving then-Vice President Dick Cheney, wrote a defensive opinion justifying his decision to remain on the case.³⁵ Justice Scalia's decision attracted negative media attention and a sustained outcry.³⁶

The interest in recusal extends far beyond the judiciary, as members of Congress have also stepped into the fray. After revelations of Justice Ruth Bader Ginsburg's involvement with the National Organization of Women Legal Defense and Education Fund, thirteen Republican Congressmen wrote a letter requesting Justice Ginsburg recuse herself from all future cases dealing with abortion.³⁷ More recently, Justices Breyer, Kennedy,

consistently referred to the expenditures as campaign contributions. This left some scholars questioning whether the distinction maintains its relevance in the recusal context. See James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, 66 N.Y.U. ANN. SURV. AM. L. 727 (2011).

³¹ *Caperton*, 556 U.S. at 872. *Caperton* is discussed in greater detail below. See *infra* Part II.A.

³² Wisconsin was one of the first states to modify its recusal rules after the *Caperton* decision. See Ben P. McGreevy, Comment, *Heeding the Message: Procedural Recusal Reform in Idaho After Caperton v. A.T. Massey Coal Co.*, 46 IDAHO L. REV. 699, 716-19 (2010).

³³ The fierce debates on changes to the recusal procedure within the Michigan Supreme Court are discussed in greater detail below.

³⁴ See CHIEF JUSTICE JOHN G. ROBERTS, JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2011), available at <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

³⁵ See Monroe H. Freedman, *Duck-Blind Justice: Justice Scalia's Memorandum in the Cheney Case*, 18 GEO. J. LEGAL ETHICS 229 (2004).

³⁶ See Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 659 & n.8 (2005) [hereinafter Bassett, *Recusal*].

³⁷ *GOP Lawmakers Ask Ginsburg to Withdraw from Abortion Cases*, L.A. TIMES (Mar. 19, 2004), <http://articles.latimes.com/2004/mar/19/nation/na-ginsburg19>.

and Scalia have been called to testify in front of Congress on recusal issues,³⁸ and Senators have written letters to Chief Justice Roberts asking the Court to adopt the recusal requirements in the Judicial Conference of the United States Code of Conduct for United States Judges.³⁹ Then-Congressman Anthony Weiner led the (unsuccessful) charge calling for Justice Thomas's recusal in *NFIB v. Sebelius*, frequently appearing on national television to expound his views.⁴⁰ And recently, a federal judge was impeached in part because of his failure to recuse himself "from a case in which he had solicited money from an attorney in a pending case."⁴¹

Recusal issues have also gripped the academy. Recently, 138 law professors wrote a letter to the House & Senate Judiciary Committees, calling for reform of the Supreme Court's recusal standards.⁴² And scholarship on issues of judicial recusal and disqualification has increased exponentially, filling the pages of law reviews.⁴³ What had once been a niche topic, of interest only to relatively few ethicists, has evolved into one of "the most high profile and controversial issues involving the [Supreme] Court."⁴⁴ Even scholars outside the relatively cloistered world of judicial ethics have begun to see recusal as a central battleground issue in the national debate about judicial independence and impartiality.⁴⁵

³⁸ Virelli, *Congress*, *supra* note 5, at 1538 n.5.

³⁹ *Id.* at 1537 n.4. As it stands today, Supreme Court Justices are the only federal judges not subject to the Code of Conduct for United States Judges. See Bassett, *Recusal*, *supra* note 36, at 678. Numerous bills have been introduced to impose a code of conduct on the Supreme Court Justices. See, e.g., H.R. 862, 112th Cong. (2011).

⁴⁰ *America Live* (FOX News television broadcast Mar. 2, 2011), available at <http://video.foxnews.com/v/3067814741001/anthony-weiner-discusses-calls-for-health-care-recusal/?#sp=show-clips>.

⁴¹ Geyh, *supra* note 19, at 674 (describing impeachment of Louisiana District Judge G. Thomas Porteous).

⁴² See Virelli, *Supreme*, *supra* note 3, at 1225.

⁴³ See generally Virelli, *Congress*, *supra* note 5.

⁴⁴ *Id.* at 1537.

⁴⁵ See, e.g., Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80, 81 (2009).

B. Recusal Statutes and Codes

Understanding the problems with current recusal procedure and the constitutional objection that this Article raises requires at least a short description of the substantive recusal standards, as well as how they have evolved since the founding. Additionally, the history of judicial disqualification highlights the judiciary's traditional ambivalence towards the issue, something that will become more important later in the Article. Therefore, this section will briefly describe the history and development of the substantive law of recusal and identify the current state of the law in the United States.

In the United States, judicial disqualification is controlled by state and federal statutes. Although American disqualification law grew directly out of the common law tradition, American judges have historically been held to a more stringent recusal standard than judges in England. Under British common law as it existed before American independence, financial interest was the sole basis for judicial disqualification, and the founding generation adopted the same simple and narrow recusal rule.⁴⁶ But almost immediately following the ratification of the Constitution, Congress passed the United States' first recusal statute.⁴⁷ That statute has been frequently amended, and its descendant, 28 U.S.C. § 455,⁴⁸ is the most important federal recusal statute today. Under that statute, a judge's financial interest in the case is now only one of many potential disqualifying factors. Additional factors include familial and professional connections to the parties or their counsel, prejudice, partiality, bias, and knowledge of disputed evidentiary facts.⁴⁹ The most important provision of the statute is its broad catch-all provision, Section 455(a), which proscribes even the appearance of bias.⁵⁰ But despite

⁴⁶ FLAMM, *supra* note 16, at 6.

⁴⁷ Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278-79.

⁴⁸ This statute is a descendant of the original 1792 statute, which was altered in 1821 (Act of Mar. 3, 1821, ch. 51, 3 Stat. 643), in 1891 (Act of Mar. 3, 1891, ch. 517, 26 Stat. 826), then again in 1911 (Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1087, 1090), and recodified as 28 U.S.C. § 455 in 1948.

⁴⁹ See FLAMM, *supra* note 16, at 669-822 (surveying disqualification rules in state and federal courts).

⁵⁰ *Liteky v. United States*, 510 U.S. 540, 548 (1994). Unlike Section 455(a), which offers a general recusal standard, "Section 455(b) . . . lists specific circumstances

congressional efforts to broaden and expand the disqualification standards, judges have always interpreted the statute narrowly, leading to persistent modification and expansion of the recusal rules.⁵¹

A second recusal statute, 28 U.S.C. § 144, applies only to federal district court judges.⁵² The statute allows litigants to disqualify a trial judge for any alleged bias or prejudice, and was intended to limit judges' discretion about when to recuse.⁵³ In a sense, this statute was designed to give litigants a peremptory challenge to federal district court judges, taking the recusal decision out of the hands of the judge himself and putting it into the hands of the moving party.⁵⁴ But here, too, judges have interpreted the statute narrowly, essentially requiring litigants to adequately allege evidence of bias despite the peremptory nature of the statute, and thus undermining the key purpose of the statute.⁵⁵

Some states have passed judicial disqualification statutes of their own. Although these state statutes have been adopted at various points throughout American history, they uniformly take a similar approach to recusal.⁵⁶ Just like the federal recusal statutes, most state counterparts identify specific circumstances that require judges to recuse themselves.⁵⁷ Financial interest, independent knowledge of the issues in the case, and involvement in the underlying case are perhaps the most common bases for mandatory recusal.⁵⁸ In addition, most statutes require recusal

requiring disqualification. . . . 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." Bam, *supra* note 8, at 954-55; see also Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 871 (Rehnquist, C.J., dissenting).

⁵¹ See Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 540-41 (2005). Not only are judges reluctant to acknowledge their biases, but bias is a difficult concept to define.

⁵² See 28 U.S.C. § 144 (2012).

⁵³ *Berger v. United States*, 255 U.S. 22, 36 (1921).

⁵⁴ See the discussion of judicial peremptory challenges in Part IV.

⁵⁵ See Bassett, *Judicial*, *supra* note 6, at 1224.

⁵⁶ Roger J. Miner, *Judicial Ethics in the Twenty-First Century: Tracing the Trends*, 32 HOFSTRA L. REV. 1107, 1116 (2004) ("[T]he rules of recusal in state courts generally are similar to the federal statutory provisions.")

⁵⁷ *Id.*

⁵⁸ See 28 U.S.C. § 455 (2012).

not just for actual bias or a risk of bias, but also for the appearance of bias, and most include a catch-all provision, similar to 28 U.S.C. § 455(a), that requires recusal when a judge's impartiality could reasonably be questioned.⁵⁹

In addition to the federal and state disqualification statutes, recusal issues are also a matter of judicial ethics. Nearly every state has adopted the American Bar Association's Code of Judicial Conduct.⁶⁰ These codes govern judicial disqualification in almost all American courts,⁶¹ and apply to the conduct of all full-time judges⁶² and all legal and quasi-legal proceedings.⁶³ A key provision of the code is Rule 2.11, which states: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned"⁶⁴ The rules define "impartiality" as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well

⁵⁹ See Miner, *supra* note 56, at 1116.

⁶⁰ 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 of 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. See MODEL CODE OF JUDICIAL CONDUCT (2007), available at http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf.

⁶¹ 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).

⁶² 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 either adopt the Code for itself or for Congress to impose such adoption upon the Court. See *supra* notes 38-39 and accompanying text.

⁶³ 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. That Code, adopted and revised by the Judicial Conference of the United States, does not govern the Justices of the United States Supreme Court, however, 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 (2003).

⁶⁴ MODEL CODE OF JUDICIAL CONDUCT R. 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.

as maintenance of an open mind in considering issues that may come before a judge.”⁶⁵ These disqualification standards, then, do not depart much from the disqualification standards under 28 U.S.C. § 455(a): both have been interpreted to impose an appearance-based disqualification standard.⁶⁶

C. Recusal Procedures

In an article focused on the constitutionality of American recusal procedure, one might expect the section describing current recusal procedures and developing their origins and evolution to be one of the longest, if not the longest, in the article. But that will not be the case, for both the history, and the practice, of recusal procedure in the United States are simple and straightforward. While the substantive recusal standard has undergone substantial transformation since Congress’s passage of the first federal recusal statute, the recusal procedure has largely remained the same. Just as eighteenth century judges and justices in the United States decided their own recusal motions, twenty-first century judges and justices have continued this practice. Within the judiciary, although some courts have suggested that recusal motions must be referred to a neutral judge,⁶⁷ most courts continue the practice of allowing such recusal motions to be heard by the challenged judge.⁶⁸

Think back to some of the biggest recusal controversies in recent years. There are criminal cases and civil cases. There are federal cases and state cases. There are trial court cases and appellate cases. But one common thread unites all of these disparate cases: in each case, the judge (or justice) whose recusal was sought made the final—sometimes unreviewable—decision whether to step aside. In theory, the judge made that decision by carefully examining his or her own conduct and determining that not only was the judge not biased, but that no reasonable person could believe that the judge was improperly biased. In all of these

⁶⁵ *Id.* at 4 (defining “impartiality”).

⁶⁶ Abramson, *supra* note 61, at 55 n.2 (“Whether a judge’s impartiality might reasonably be questioned is also referred to as the appearance of partiality, the appearance of impropriety, or negative appearances.”).

⁶⁷ *See, e.g.*, United States v. Torkington, 874 F.2d 1441, 1446-47 (11th Cir. 1989).

⁶⁸ *See, e.g.*, *In re Lieb*, 112 B.R. 830, 837 (Bankr. W.D. Tex. 1990).

cases, the motion for recusal was never transferred to another judge or panel of judges; it was never briefed or argued in an adversarial manner; and, if it was appealed, it was reviewed by an appellate court in a highly deferential manner and, ultimately, upheld.⁶⁹ And it is no surprise that such disparate cases, from such disparate courts scattered throughout the nation, involved the same recusal procedure because the self-recusal procedure is in fact used in most courts throughout the United States, just as it has been for over two centuries.

Not only has the recusal procedure remained the same, but it has also remained largely ignored.⁷⁰ Neither the federal recusal statutes, nor the ABA Model Code of Judicial Conduct, address what procedure should be followed when a judge's impartiality might reasonably be questioned. Courts, too, have largely turned a deaf ear to academia's call for procedural reform.

What we do know about recusal procedure can be summarized quickly: when recusal is required under one of the federal statutes, the Codes of Judicial Conduct, or the Constitution, the judge must recuse *sua sponte*, without awaiting a party's request that he do so.⁷¹ Often, this is precisely what happens, with judges stepping aside before any party files a motion seeking recusal.⁷² This self-enforcing scheme is absolutely

⁶⁹ Many of these recusal decisions were never appealed because, for the reasons discussed later, the likelihood of success on appeal of a recusal ruling is small.

⁷⁰ Although the courts have largely ignored the recusal procedure, academic literature critical of self-recusal has been picking up steam. This literature is summarized in Part I.A. But there is little evidence that this growing body of literature has had much effect in eradicating self-recusal, or convincing judges as to the procedure's problems.

⁷¹ *United States v. Story*, 716 F.2d 1088, 1091 (6th Cir. 1983) (“[S]ection 455 is self-executing, requiring the judge to disqualify himself for personal bias even in the absence of a party complaint.”); *see also* Bassett, *Recusal*, *supra* note 36, at 675 & n.96 (citing *Taylor v. O’Grady*, 888 F.2d 1189, 1200 (7th Cir. 1989)).

⁷² For example, federal judges are required to maintain a list of companies in which they have a financial interest, and when litigation involving one of those companies comes in front of the court, the judge will not even be assigned to the case. When the judge chooses to step aside, the litigants and the public are often unaware of the recusal decision because the case might simply be re-assigned to a new judge. Even when the public is aware of the judge's recusal decision, the judge's reasons for recusal may not be known. Timothy J. Goodson, Comment, *Duck, Duck, Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of Cheney v. United States District Court*, 84 N.C. L. REV. 181, 195 (2005) (“[T]ypically, no reasons

essential because the parties are often unaware of the judge's disqualifying interest.⁷³ Of course, when the judge steps aside on his own initiative, there are no constitutional problems.⁷⁴ And many judges, out of an abundance of caution, will recuse themselves even without a motion by either party.⁷⁵

If a judge does not step down on her own initiative, a party must seek disqualification by filing a recusal motion with the court, supported by proper evidence.⁷⁶ The challenged judge then decides whether to grant the motion based on her own review of the motion and the supporting documentation.⁷⁷ If the judge

are given for a Justice's nonparticipation, even if it is known that a Justice recused himself in a case . . .").

⁷³ Judges have a duty to disclose any information they believe that the litigants might consider relevant. This obligation exists even if the judge does not believe the information requires disqualification. *Blaisdell v. Rochester*, 609 A.2d 388, 390-91 (N.H. 1992). Although this requirement theoretically allows litigants to learn potentially disqualifying information, this obligation has little practical effect. Even if the judge discloses some relevant information, it is ultimately still up to the same judge to decide whether recusal is warranted. But at this stage, the judge has already made the decision that there is no basis for disqualification, despite the fact that the parties or their counsel might consider the information relevant.

⁷⁴ Some scholars have expressed concern that judges who step aside when not required to do so may be shirking their judicial duties. *See, e.g.*, Sarah M. R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 12 (2007) (arguing that the current approach to recusal encourages over-recusal). However, the "duty to sit" doctrine, which required the judges to remain on the cases unless they were absolutely required to recuse, has long been eliminated. *See Jeffrey W. Stempel, Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 815-16 (2009) (discussing the "duty to sit" doctrine and its demise).

⁷⁵ The author has talked to many judges who have explained that that is precisely their approach to recusal questions. Even if they believe that recusal is not warranted by the facts, they prefer to step aside and let a colleague take over to avoid any potential controversy in the future.

⁷⁶ Some jurisdictions require the motion to be supported by a written brief, affidavits, oral testimony, transcript from an earlier proceeding, or some combination of these. Litigants must also comply with the state's timeliness and specificity requirements. All of these requirements vary from state to state, and often courts have the discretion to waive these procedural requirements. *See FLAMM, supra* note 16, at 669-822 (surveying rules in state and federal courts).

⁷⁷ *See id.* at 498 ("In the absence of some disability on the part of the challenged judge, the question of whether such a motion is legally sufficient to warrant the requested relief is one that is ordinarily addressed, in the first instance, to the personal conscience and sound discretion of the judge whose disqualification is being sought.") (footnotes omitted). Most jurisdictions require that the party moving for disqualification show cause. Nineteen states provide for peremptory challenges for trial judges, similar to the provisions in 28 U.S.C. § 144. *See ABA Judicial Disqualification Project, Taking Disqualification Seriously*, 92 JUDICATURE 12, 15 n.39 (2008). States

concludes that the movant has demonstrated good cause for recusal, the judge is required to step aside. If not, the judge is free to remain on the case, unless an appellate court reverses the judge's decision or issues a writ of mandamus disqualifying the judge.⁷⁸ Ultimately, the decision whether to recuse rests solely in the hands of the judge whose impartiality is under attack—the very judge who is alleged to harbor bias against the moving party, or in favor of its opponent, or both. As a result, the person with the biggest stake in the outcome of the recusal decision is the one who decides whether to recuse.

Treating a motion for recusal like any other motion ignores the fact that disqualification motions are different from any other motion a lawyer might file in the course of litigation. Unlike, say, a discovery motion, or a motion for summary judgment, a lawyer asking a judge to step aside calls into question the fairness, impartiality, and often even the integrity, of the challenged judge. It is also the only motion that requires the judge to examine, and rule on, his own conduct rather than the conduct of the lawyers or the parties appearing before him.

We know little about when and how the self-recusal procedure came into existence; there are no records showing the first use of self-recusal, or any positive law establishing self-recusal as the norm. But this recusal procedure has become so entrenched in our legal fabric that when state courts try to shift away from self-recusal, it becomes a contested, and highly contentious, issue. The changes to recusal procedures at the Michigan Supreme Court offer a great example. In 2009, the Michigan Supreme Court responded to the United States Supreme Court's *Caperton* decision by amending its court rules to permit the entire court to hear a party's disqualification motion if the challenged judge denied the motion in the first instance.⁷⁹ In a

that do provide for peremptory challenges take different approaches to how those challenges are reviewed. The peremptory challenge procedure is outside the scope of this paper, except insofar as it is one possible alternative that I suggest other state and federal courts that currently provide for self-recusal should consider adopting.

⁷⁸ For a summary of appellate procedure for recusal decisions, see FLAMM, *supra* note 16, at 959.

⁷⁹ MICH. CT. R. 2.003(D)(3)(b). Prior to the change, the Michigan Supreme Court's recusal procedure was identical to that of the United States Supreme Court, and that

bitter dissent from the Court's announcement of the procedural change, Justice Corrigan, on behalf of three justices, accused the four-justice majority of curtailing the fundamental freedoms of state judges and "depriv[ing] their co-equal peers of their constitutionally protected interest in hearing cases."⁸⁰ In other words, according to the three dissenting justices, deviation from self-recusal is not just bad policy, but is itself unconstitutional. It is not often that a procedural change to court rules evokes such passionate dissents from judges or justices, but abandoning self-recusal triggered just such a reaction. More recently, Wisconsin had a similar, and similarly bitter, experience when the Wisconsin Supreme Court also considered revisions to its recusal procedures.⁸¹

Why did self-recusal become such an entrenched part of our recusal jurisprudence? Although there is little historical evidence, we can glean at least part of the answer by examining some of the factual assumptions underlying self-recusal. At common law, it was presumed that judges, upon their elevation to the position, shed any personal biases, simply casting those prejudices aside to do their job.⁸² This view was encapsulated by William Blackstone, who, in his famous *Commentaries*, explained that "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."⁸³

American judges accepted this notion without a critical examination. For example, Maine's Supreme Judicial Court explained in an early case that "[i]n addition to their legal learning, judges are presumably selected because of their ability to lay aside personal prejudices and to hold the scales of justice

of nearly all the other state supreme courts. That is, each justice was in charge of his or her own recusal motion, without any oversight by his or her colleagues.

⁸⁰ MICH. CT. R. 2.003 cmt.; see also Richard E. Flamm, *The History of Judicial Disqualification in America*, JUDGES' J., Summer 2013, at 12, 14 (discussing the debate over changes to Michigan's rule).

⁸¹ See Jessica M. Karmasek, *Report: Wis. SC Justices Torn Over Possible New Recusal Rules*, LEGAL NEWSLINE (Apr. 16, 2013, 10:00 AM), <http://legalnewsline.com/news/240898-report-wis-sc-justices-torn-over-possible-new-recusal-rules>.

⁸² See John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609-12 (1947) (explaining the common law understanding of judicial bias).

⁸³ 3 WILLIAM BLACKSTONE, COMMENTARIES *361.

evenly. The presumption is that they will do so.”⁸⁴ Or, as one commentator (facetiously?) put it,

[t]he judge is considered a distinctly superior being with an olympian detachment enabling him to shake the bonds of preconception and environment that shackle the judgments of ordinary men. He is capable of impartial justice even though convinced of the guilt of the accused, or even though required to judge between his warm friend and his bitter enemy.⁸⁵

A similar view of judges’ ability to set aside personal prejudices appears in a number of early judicial opinions as well as early literature on judging.⁸⁶

These attitudes towards judicial infallibility and presumptions of impartiality have laid the foundation for the acceptance, at least by the judiciary, of self-recusal. If the judge, upon ascending to the bench, is truly capable of shutting off her personal bias like a switch, then giving the judge discretion to decide whether she is too biased in favor of one party makes good sense, as does the presumption that the judge is not biased. But as this Article shows, such assumptions can no longer be tolerated given our understanding of judicial decision-making and cognitive biases.

There is another important reason for the common law’s acceptance of self-recusal. As explained earlier, under the common law, recusal was only required if a judge had a pecuniary interest in the outcome of the litigation. So long as the judge did not have a “direct financial interest” in the case, he could hear the case.⁸⁷ Recusal for bias was not required, either under then-existing recusal statutes, or under then-existing understanding of the Due Process Clause. For example, judges could hear cases involving family members, even close family members, as litigants.⁸⁸ The common law substantive standard helped shape the common law

⁸⁴ *Bond v. Bond*, 141 A. 833, 836 (Me. 1928).

⁸⁵ Note, *Disqualification of Judges by Peremptory Challenge*, 47 YALE L.J. 1403, 1403 (1938).

⁸⁶ *State v. Cole*, 15 P.2d 452, 452-53 (Kan. 1932); *In re Cameron*, 151 S.W. 64, 74 (Tenn. 1912); *Leonard v. Willcox*, 142 A. 762, 771 (Vt. 1928).

⁸⁷ See Bassett, *Judicial*, *supra* note 6, at 1223.

⁸⁸ *Brookes v. Earl of Rivers*, (1668) 145 Eng. Rep. 569 (Ex.) (holding that a judge was not required to recuse himself in his brother-in-law’s case).

recusal procedure because under such a narrow substantive standard, it is much easier to identify when a pecuniary interest in the outcome of a case might exist. Identifying such a pecuniary interest does not require the kind of introspective analysis that is mandated by the modern recusal standards, or the current understanding of due process. The self-recusal procedure was well tailored for that objective substantive test. But once the substantive test evolved, recusal procedures should have followed suit. They didn't.

II. JUDICIAL IMPARTIALITY AND THE DUE PROCESS CLAUSE

In this section, I will discuss the application of the Due Process Clause in the context of judicial impartiality and judicial recusal. Although there is little Supreme Court case law on point,⁸⁹ the role of judicial impartiality under the United States Constitution is clear: due process guarantees the right to a fair trial, which in turn requires the presence of an impartial arbiter—a fair, neutral judge. As Justice Holmes stated nearly a century ago, “[w]hatever disagreement there may be as to the scope of the phrase ‘due process of law,’ there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard.”⁹⁰ Especially in an adversarial system like ours, where both parties are expected to vigorously present their own cases from their own individualized perspective, judges must remain impartial to produce a fair result. After all, other procedural protections, such as those provided by the rules of evidence, are of little value if the judge is partial in favor of one of the litigants.⁹¹

⁸⁹ And none of the Supreme Court's decisions directly address the question of recusal procedure. This requires that we apply the Supreme Court's analysis in a somewhat new context. Nonetheless, given that the Supreme Court follows the same recusal procedure that is the subject of this Article—namely, self-recusal—we can infer that the Supreme Court does not consider the self-recusal procedure in violation of the Due Process Clause. For more discussion of this issue, and my response to this argument in favor of self-recusal's constitutionality, see Part III.C.

⁹⁰ *Frank v. Mangum*, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting).

⁹¹ The term “impartiality” is one that eludes an easy definition. As mentioned earlier, many “non-legal” factors influence judicial decisions, including the judge's family, upbringing, number and sex of children, and political leanings. See *supra* notes 11-14 and accompanying text. Thus, a requirement that the judge remain impartial does not mean that the judge's mind was a complete *tabula rasa*. Certain preconceptions about the law, for example, are not just tolerated but expected of judges

In fact, the Court has hinted that even the *appearance* of impartiality may fall within the confines of the Due Process Clause.⁹² I will begin by discussing the key cases establishing the right to a fair and impartial tribunal, and then I will discuss the less established, but not less important, right to a judge that appears impartial.

A. Recusal Under the Due Process Clause

The Fourteenth Amendment to the United States Constitution provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.”⁹³ The Fifth Amendment imposes identical obligations on the federal government.⁹⁴ The meaning of this provision has been subject to considerable debate in our nation’s history. The Supreme Court, at various points in its history, has interpreted the clause to protect a number of substantive freedoms, from economic rights⁹⁵ to privacy rights.⁹⁶ But while there is considerable disagreement within the judiciary (and the academy) about the meaning of the clause, and the validity of substantive due process as a theory of constitutional interpretation,⁹⁷ there is little dispute that the Due Process Clause guarantees to each person an impartial tribunal in all legal proceedings, and in all phases of a legal proceeding.

Importantly, the right to a fair judge did not originate in the Constitution. Scholars have traced the due process right as far back as the Magna Carta.⁹⁸ The importance of an impartial decisionmaker has been recognized in “the Old Testament, the Code of Justinian, and Shakespeare’s Henry VIII.”⁹⁹ The United States Constitution enshrines judicial independence and judicial

who must be learned in the law before taking the bench. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 778 (2002) (“Judges of the supreme court, the court of appeals and the district court shall be learned in the law.” (quoting MINN. CONST. art. VI, § 5)).

⁹² *See infra* Part III.B.

⁹³ U.S. CONST. amend. XIV, § 1.

⁹⁴ U.S. CONST. amend. V.

⁹⁵ *Lochner v. New York*, 198 U.S. 45, 53 (1905).

⁹⁶ *Roe v. Wade*, 410 U.S. 113, 154 (1973).

⁹⁷ *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 509-11 (2010).

⁹⁸ *See* Serbulea, *supra* note 3, at 1110.

⁹⁹ Frost, *supra* note 51, at 565 (footnotes omitted).

impartiality as two of its central values by including a number of structural protections to ensure that judges are not conflicted when deciding disputes between two litigants.¹⁰⁰ As the Court has explained on numerous occasions, “[a] fair trial in a fair tribunal is a basic requirement of due process.”¹⁰¹ Judicial impartiality “is a *sine qua non* of procedural due process.”¹⁰² And on the flip side, the presence of a biased judge violates due process.¹⁰³

Despite the apparent breadth of the doctrine, and the Supreme Court’s soaring rhetoric, there are few decisions finding that lower-court judges were unconstitutionally biased. The Court has applied the Due Process Clause to reverse a lower court judgment in only four distinct situations:

1. When the judge was paid a salary from the fines he collected from defendants appearing before him.¹⁰⁴
2. When the judge presided over a contempt proceeding against defendants who had allegedly committed contempt toward the judge in a separate proceeding.¹⁰⁵
3. When the judge participated in a decision that had a direct effect on a different but substantively related lawsuit to which the judge himself was a party.¹⁰⁶
4. When the judge participated in a case in which one of the parties substantially supported the judge’s campaign for office.¹⁰⁷

¹⁰⁰ U.S. CONST. art. III, § 1 (establishing life tenure and undiminished salaries for federal judges); *see also* THE FEDERALIST NOS. 78, 79 (Alexander Hamilton).

¹⁰¹ *See, e.g., In re Murchison*, 349 U.S. 133, 136 (1955).

¹⁰² Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 477 (1986).

¹⁰³ *See Bigby v. Dretke*, 402 F.3d 551, 558 (5th Cir. 2005) (“[T]he cornerstone of the American judicial system is the right to a fair and impartial process. Therefore, any judicial officer incapable of presiding in such a manner violates the due process rights of the party who suffers the resulting effects of that . . . bias.”) (citation omitted).

¹⁰⁴ *Tumey v. Ohio*, 273 U.S. 510, 522-23 (1927).

¹⁰⁵ *Murchison*, 349 U.S. at 135-36.

¹⁰⁶ *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824-25 (1986).

¹⁰⁷ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886-87, 889-90 (2009).

The leading decision that helped shape the meaning of the Due Process Clause in the recusal context is *Tumey v. Ohio*.¹⁰⁸ There, a judge received his income solely from the fines he recovered from his convictions, but received no additional benefits when the defendant was acquitted.¹⁰⁹ Not surprisingly, the judge's conviction rate was quite high, and one defendant appealed.¹¹⁰ The Supreme Court reversed the appellant's sentence, holding that a judge may not have such a direct, personal, and substantial interest in convicting defendants.¹¹¹ The Court explained that

[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof . . . or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.¹¹²

Notice the Court's language: "every procedure." Although the decision itself was about the substantive recusal standard contained within the Due Process Clause, the Court's phrasing suggests that when it comes to recusal, substance and procedure are not subject to a neat separation. The *Tumey* decision was reaffirmed, and to some degree extended, in *Ward v. Village of Monroeville*.¹¹³ There, the Court held that the judge did not need a direct financial interest in order to violate due process.¹¹⁴ Rather, a violation of due process can occur even when the judge-mayor's salary does not depend on his conviction rate, if the fines assessed went towards increasing the town's budget.¹¹⁵

Aetna Life Insurance Co. v. Lavoie is another example of a financial incentive that might lead a judge, in the words of the Court, "not to hold the balance nice, clear and true."¹¹⁶ In *Aetna*, a justice of the Alabama Supreme Court ruled in favor of the

¹⁰⁸ 273 U.S. 510 (1927).

¹⁰⁹ *Id.* at 520.

¹¹⁰ *Id.* at 521.

¹¹¹ *Id.* at 535.

¹¹² *Id.* at 532.

¹¹³ 409 U.S. 57 (1972).

¹¹⁴ *Id.* at 60.

¹¹⁵ *Id.*

¹¹⁶ *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (quoting *Tumey*, 273 U.S. at 532).

plaintiff on his bad faith claim against the defendant insurance company.¹¹⁷ Unbeknownst to the defendants, that same justice had filed two nearly identical actions against other insurance companies making similar allegations.¹¹⁸ Those cases were still pending in Alabama's lower courts at the time the *Aetna* case was decided.¹¹⁹ The justice's decision, then, had the effect of creating precedent favorable to the justice's own claim.¹²⁰ Reversing the Court's decision, the United States Supreme Court held that the justice's failure to recuse violated the Due Process Clause.¹²¹ The Court explained the opportunity to further his own financial interests could "lead [the justice] not to hold the balance nice, clear and true,"¹²² thus allowing the justice to act as "a judge in his own case."¹²³ Establishing favorable precedent for his own litigation creates too much incentive for the judge to decide the case not according to its merits, but according to the judge's personal preference.

The most recent, and perhaps the most famous, case exploring the intersection of recusal and due process is *Caperton v. A.T. Massey Coal Co.*¹²⁴ In *Caperton*, newly-elected West Virginia Supreme Court Justice Brent Benjamin cast the deciding vote in favor of Massey to overturn a \$50 million lower-court judgment.¹²⁵ It turned out, however, the Massey's CEO, Don Blankenship, was an extremely generous supporter of Justice Benjamin in the previous West Virginia Supreme Court election campaign.¹²⁶ In fact, Blankenship had contributed more to Benjamin's campaign than all other donors combined.¹²⁷ To make matters worse, the campaign and the contributions all happened

¹¹⁷ *Id.* at 817.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 817-18.

¹²⁰ *Id.* at 822.

¹²¹ *Id.* at 825.

¹²² *Id.* at 825 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

¹²³ *Id.* at 824 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)); see also *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (holding that an administrative board made up of optometrists were disqualified from presiding over a hearing against competing optometrists).

¹²⁴ 556 U.S. 868 (2009).

¹²⁵ *Id.* at 874.

¹²⁶ *Id.* at 873.

¹²⁷ *Id.*

while Massey's lawyers were preparing the *Caperton* case for an appeal.¹²⁸ After Caperton asked Justice Benjamin to recuse himself, Benjamin refused and voted with the majority in a 3-2 decision overturning the trial court's verdict.¹²⁹ But the United States Supreme Court reversed, holding that Justice Benjamin's non-recusal violated Caperton's due process right to a fair and impartial judge.¹³⁰ Although it remains to be seen whether *Caperton* will change the way that states approach judicial recusal, *Caperton* leaves no doubt that recusal can be required under the Due Process Clause even when the judge has no personal financial stake in the outcome of the litigation.¹³¹

There are some lesser cases defining the parameters of due process and judicial impartiality, but the few cases discussed above are the Court's most important pronouncements on the subject. One of the reasons for the dearth of cases is due to the fact that Congress and the states have imposed recusal standards that are more rigorous than those imposed by the Due Process Clause.¹³² As a result, before judges can cross the constitutional threshold, they must already have crossed the statutory and

¹²⁸ *Id.* Blankenship spent approximately \$3 million of his own money in support of Justice Benjamin's election. *Id.* Most of that money funded a tax-exempt organization, And For The Sake Of The Kids, which was formed to defeat incumbent Justice McGraw. *Id.* In addition, Blankenship funded newspaper and television advertising attacking McGraw. See Brief for Petitioners at 7, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (No. 08-22).

¹²⁹ *Caperton*, 556 U.S. at 873-74. 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 showing Blankenship and Justice Elliott Maynard vacationing together on the French Riviera. See John Gibeaut, *Caperton's Coal*, A.B.A. J., Feb. 2009, at 52, 56, available at http://www.abajournal.com/magazine/article/capertons_coal/. 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 a separate case involving Massey. *Id.*

¹³⁰ *Caperton*, 556 U.S. at 886-87.

¹³¹ However, studies continue to show that judges are more likely to recuse themselves in cases involving a financial interest than in cases involving a non-financial bias. See JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 1 (1995).

¹³² See *supra* Part I.B (discussing ethical and statutory standards for judicial disqualification).

ethical lines. Nonetheless, with relevant decisions coming approximately thirty years apart, scholars have long thought that the Constitution mandates disqualification in only very limited circumstances when the judge has engaged in outrageous conduct. 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.¹³³ According to the Court, “[t]he Due Process Clause demarks only the outer boundaries of judicial disqualifications.”¹³⁴

Within those boundaries, this is an area of law where bright lines are particularly difficult to draw. It is easy to proclaim that a judge cannot be “too biased,” but identifying the specific circumstances when the judge is not sufficiently impartial is a challenge.¹³⁵ However, the few Supreme Court decisions we have can help us deduce some standards that can help assess the constitutionality of the self-recusal procedure. For example, the Court has made clear that due process requires that a judge “must be sufficiently free of predisposition to be able to render an impartial decision in it.”¹³⁶ The Court has also explained that due process precludes more than judges with a pecuniary interest in the outcome of the case. Rather, the judge must not have prejudged the issues in the case, and must not be biased in favor of or against either party.¹³⁷ Therefore, unlike the common law recusal standard, due process requires that all surrounding circumstances and relationships be considered.¹³⁸

From this limited case law, we can draw the constitutional tests that can help us decide when a judge is not sufficiently impartial. There are two key tests. First, “no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.”¹³⁹ This common-law maxim underpins

¹³³ *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (citing *Wheeling v. Black*, 25 W. Va. 266, 270 (W. Va. 1884)).

¹³⁴ *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986).

¹³⁵ This is an extremely difficult question, but it is a question of the appropriate substantive standard, not of the proper recusal procedure to identify such bias.

¹³⁶ *FLAMM*, *supra* note 16, at 34.

¹³⁷ *Republican Party of Minn. v. White*, 536 U.S. 765, 775-76 (2002).

¹³⁸ *In re Murchison*, 349 U.S. 133, 136 (1955).

¹³⁹ *Id.*

the Supreme Court's jurisprudence on the scope of due process.¹⁴⁰ It is a bedrock constitutional principle that was invoked by Blackstone¹⁴¹ in his famous *Commentaries*, as well as by Madison in *Federalist No. 10*.¹⁴² It is a principle with deep roots in American history, as well as Anglo-American jurisprudence.¹⁴³ It is also a principle that has been frequently invoked by the United States Supreme Court as well as the lower federal courts to prohibit judges from presiding over matters in which the judge is personally involved¹⁴⁴ or in which he is an active participant.¹⁴⁵ Thus, any procedure that allows a judge to act as a judge in his own cause violates the constitutional mandate.

Second, constitutional due process concerns arise when the circumstances would tempt the average judge “not to hold the balance nice, clear and true.”¹⁴⁶ This test, too, defies an easy application, but can serve as a reminder that even the probability of unfairness—remember, only a showing that the average judge would be tempted is required—can rise to the level of a constitutional violation without proof of actual bias.¹⁴⁷ Under this test, the focus is on temptation: would an average judge be unable

¹⁴⁰ This principle is originally derived from Sir Edward Coke's famous decision in *Dr. Bonham's Case*. See *supra* note 1 and accompanying text.

¹⁴¹ 1 WILLIAM BLACKSTONE, *COMMENTARIES* *91 (“[I]t is unreasonable that any man should determine his own quarrel.”).

¹⁴² THE FEDERALIST NO. 10 (James Madison) (“No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”).

¹⁴³ See Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 305-07 (1989); see also Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384 (2012) (discussing the history of the “no man should be a judge in his own case” maxim, and describing it as the “bedrock principle of natural justice and constitutionalism”).

¹⁴⁴ See *Offutt v. United States*, 348 U.S. 11, 17 (1954) (mandating recusal when the judge became “personally embroiled” with one of the parties).

¹⁴⁵ See *United States v. Alabama*, 828 F.2d 1532, 1545 (11th Cir. 1987). For example, in *Harrison v. McBride*, 428 F.3d 652, 670 (7th Cir. 2005), the Seventh Circuit held that a judge's “desire to vindicate his name directed his actions and clouded his reasoning.” In other words, the judge's interest in protecting his reputation rendered the judge insufficiently impartial and therefore tainted the trial over which he was presiding.

¹⁴⁶ *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

¹⁴⁷ See *In re Murchison*, 349 U.S. 133, 136 (1955) (stating that because “[a] fair trial in a fair tribunal is a basic requirement of due process” the judiciary “has always endeavored to prevent even the probability of unfairness”).

to approach the question at issue neutrally, without being enticed to rule in favor or against a party for reasons unrelated to the legal merits of the party's position. For the reasons discussed in Part III, this Article concludes that the self-recusal procedure fails both tests.

Admittedly, many of the key cases interpreting the Due Process Clause have arisen in the criminal context, where the presence of a biased judge is particularly repugnant to due process when a person's liberty is at stake. But the due process guarantee applies in both civil and criminal matters, so any conclusions as to the constitutionality of self-recusal will apply in all cases where the procedure is followed.¹⁴⁸ And not only is the right to an impartial decisionmaker guaranteed in every *type* of proceeding, it is also a right applicable to every *stage* of a proceeding. Thus, nothing in the Court's jurisprudence suggests that disqualification proceedings are exempted from the protections of the Due Process Clause, or do not require an impartial arbiter.¹⁴⁹

Of course, the Supreme Court's jurisprudence on due process and recusal does not address the issue of the recusal procedure itself. The Supreme Court's recusal procedures have never been challenged, and the Supreme Court has never questioned the constitutionality of the recusal procedures either at the Supreme Court or any state or lower federal courts. In fact, not once have litigants even raised concerns about the constitutionality of the self-recusal procedure in front of the Supreme Court, focusing instead on the actual (non) recusal decisions made by state and lower federal court judges.¹⁵⁰ Thus, all of the cases finding due process violations deal with the actual decisions that judges reach using the current self-recusal scheme, without touching on the issue of *who* gets to decide whether recusal is required. But that

¹⁴⁸ *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

¹⁴⁹ Indeed, the Supreme Court's decisions discussed above rest upon the assumption that the Due Process Clause applies to motions for recusal. *See, e.g.*, *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) ("*Every procedure* which would offer a possible temptation to the average man as a judge to forget the burden of proof . . . denies the latter due process of law.") (emphasis added).

¹⁵⁰ A recent cert petition to the United States Supreme Court raised the issue tangentially. *See* Petition for a Writ of Certiorari at 9, *Hill v. Schilling*, 133 S. Ct. 2859 (2013) (No. 12-1258). The petition argued that "[t]he most significant impediment to a truly impartial judiciary is challenged judges having unbridled discretion over their own recusal decisions." *Id.* However, the Supreme Court denied cert in the case.

question—who decides?—is just as important as the question of what the decision must be. In fact, often times the answer to the former question will forecast the answer to the latter. Here, the Court’s reasoning is instructive, and the common-law concepts the Court has announced offer us some guidance in assessing the constitutionality of recusal procedure. And the Court’s focus on the importance of judicial impartiality helps us frame the discussion in Part III as to whether the self-recusal procedure can be consistent with due process.

B. Due Process and Appearance of Bias

Before moving on to Part III, there is one outstanding issue concerning the scope of the Due Process Clause. While there is no doubt that due process requires a fair and impartial judge, courts have at times suggested that due process requires more: that, in addition to actually being fair and impartial, a judge must also *appear* to be fair and impartial. That is, judges must be viewed by the participants in the legal system and by the public as unbiased. Of course, this requirement is contained in the canons of judicial ethics.¹⁵¹ But the Court has also hinted that this requirement is a component of due process. In *Murchison*, the Supreme Court famously stated that it is not enough for a procedure to result in a fair decision; “to perform its high function in the best way, ‘justice must satisfy the appearance of justice.’”¹⁵² And in *Peters v. Kiff*, the Court reiterated that “even if there is no showing of actual bias in the tribunal, . . . due process is denied by circumstances that create the likelihood or the appearance of bias.”¹⁵³ And the Court has continually stressed that public confidence in the judiciary is essential in a constitutional democracy.¹⁵⁴ Even

¹⁵¹ See MODEL CODE OF JUDICIAL CONDUCT Canons 1, 2, 4 (2007).

¹⁵² *Murchison*, 349 U.S. at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

¹⁵³ *Peters v. Kiff*, 407 U.S. 493, 502 (1972).

¹⁵⁴ *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (explaining that the public’s confidence in judicial impartiality must be “jealously guarded”). As Debra Lyn Bassett observed, “[j]udicial decisions rendered under circumstances suggesting bias or favoritism tend to breed skepticism, undermine the integrity of the courts, and generally thwart the principles upon which our jurisprudential system is based.” Bassett, *Recusal*, *supra* note 36, at 662 (quoting RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 5.4.1, at 150 (1996)).

outside the recusal context, the Court has frequently stressed the dignity component that attends due process of law, and “the feeling, so important to a popular government, that justice has been done.”¹⁵⁵

Unfortunately, the Supreme Court never truly explained what it meant by the “appearance of justice” and there is no Supreme Court case law interpreting and applying the appearance-based test in the due process context. For example, not once has the court held that a judge’s or justice’s failure to recuse violated due process solely because of the appearance of impartiality. Most recently, *Caperton v. Massey* raised a similar issue and offered the Supreme Court another chance to answer this important question, but the Court failed to provide definitive guidance.¹⁵⁶ Justice Benjamin, the West Virginia Supreme Court justice who was asked to recuse, took the position that due process does not require recusal based solely on the appearance of bias.¹⁵⁷ Initially, that was the issue on which the Supreme Court granted cert, but somewhere along the way *Caperton* changed its focus from appearances to probabilities. When the case was finally decided, the Court did not address the appearance claim, focusing instead on the judge’s probability of bias.¹⁵⁸

Thus, while the Court has consistently reiterated that the appearance of fairness is important to the judiciary, and is

¹⁵⁵ See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).

¹⁵⁶ Dmitry Bam, *Understanding Caperton: Judicial Disqualification Under the Due Process Clause*, 42 MCGEORGE L. REV. 65, 73-75 (2010).

¹⁵⁷ *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 295 (W. Va. 2008) (Benjamin, C.J., concurring).

¹⁵⁸ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 882-84 (2009). Some have interpreted the *Caperton* opinion as holding that the appearance of impartiality violates the Due Process Clause. See Gerard J. Clark, *Caperton’s New Right to Independence in Judges*, 58 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.”); see also Joan Biskupic, *Court: Judges Must Avoid Appearance of Bias*, USA TODAY (June 8, 2009, 10:23 PM), http://usatoday30.usatoday.com/news/washington/judicial/2009-06-08-supreme-court-judge_N.htm; *Demise of Judicial Elections and Lessons from the Lonestar State*, CHOOSE JUDGES ON MERIT (Feb. 18, 2010, 8:19 PM), <http://judgesonmerit.org/2010/02/18/demise-of-judicial-elections-and-lessons-from-the-lonestar-state/> (“*Caperton* plainly lays out that even the appearance of impartiality due to large campaign contributions may violate due process.”).

perhaps required by the Due Process Clause,¹⁵⁹ the Court's holdings are at best inconclusive as the appearance language generally appears in dicta. But the Court's opaqueness has not stopped the lower courts from speculating about the role of appearances. Indeed, some lower courts have held that appearances are a crucial part of the Due Process Clause. For example, in *Allen v. Rutledge*, the Arkansas Supreme Court held that "[d]ue process requires not only that a judge be fair, but that he also appear to be fair."¹⁶⁰ The Ninth Circuit, too, has held that due process "is concerned not only with actual bias but also with 'the appearance of justice.'"¹⁶¹ Other courts have disagreed. For example, in *State v. Canales*, the Connecticut Supreme Court held that "a judge's failure to disqualify himself or herself will implicate the due process clause only when the right to disqualification arises from *actual bias* on the part of that judge."¹⁶²

The lack of guidance from the Supreme Court, and the divergent decisions from the lower courts, has left scholars questioning whether appearances have any role to play in interpreting the scope of the Due Process Clause.¹⁶³ So long as the complaining party receives a fair trial in front of a fair tribunal, the argument goes, why should it matter that the proceeding appeared to be unfair, or that the judge appeared to be biased?¹⁶⁴ The answer lies in the fact that the appearance-based prong of the Due Process Clause is important to "maintain public trust and

¹⁵⁹ See, e.g., *Marshall*, 446 U.S. at 242 ("The neutrality requirement . . . preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.'" quoting *McGrath*, 341 U.S. at 172)).

¹⁶⁰ *Allen v. Rutledge*, 139 S.W.3d 491, 498 (Ark. 2003) (disqualifying a judge for appearance-based reasons); see also *Pierce v. Pierce*, 39 P.3d 791, 798 (Okla. 2001) ("The High Court has explained that the reach of due process jurisprudence requires not only a fair tribunal, but also the *appearance* of a fair tribunal.").

¹⁶¹ *Exxon Corp. v. Heinze*, 32 F.3d 1399, 1403 (9th Cir. 1994) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

¹⁶² *State v. Canales*, 916 A.2d 767, 781 (Conn. 2007); see also *Cowan v. Bd. of Comm'rs*, 148 P.3d 1247, 1260 (Idaho 2006) ("[W]e require a showing of actual bias before disqualifying a decision maker even when a litigant maintains a decision maker has deprived the proceedings of the appearance of fairness.").

¹⁶³ See *Cravens*, *supra* note 74, at 12 (arguing that recusal standards should focus not on appearance of bias, but rather evidence of actual bias).

¹⁶⁴ See *id.* at 11-13.

confidence in the judiciary.”¹⁶⁵ Appearances are particularly important to the judiciary. As discussed earlier, the Model Code of Judicial Conduct, as well as the federal disqualification statutes, focus on appearances because public confidence in the courts is preserved only when judges appear to act impartially.¹⁶⁶ And the requirement of judicial impartiality is intended to produce more than just a fair trial; it is designed to promote the public’s confidence in the judiciary.¹⁶⁷ Such confidence gives the judiciary the institutional legitimacy to make unpopular rulings that are enforced by the other branches of government, and that the public complies with despite disagreement.¹⁶⁸ An appearance-based recusal standard assures the public that impartiality is taken seriously by the courts.¹⁶⁹

In fact, it is not so unusual for the Court to consider appearances in deciding constitutional controversies. For example, the Supreme Court’s campaign-finance jurisprudence allows for government regulation of speech (campaign contributions) because of the government’s interest in preventing not just corruption, but

¹⁶⁵ Pederson v. State, 649 N.W.2d 161, 164 (Minn. 2002).

¹⁶⁶ See generally Charles Gardner Geyh, *Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism*, in BENCH PRESS: THE COLLISION OF COURTS, POLITICS, AND THE MEDIA 21 (Keith J. Bybee ed., 2007) (explaining the evolution of the American focus on disqualification for appearance of bias).

¹⁶⁷ See *In re Murchison*, 349 U.S. 133, 136 (1955); *To Broaden and Clarify the Grounds for Judicial Disqualification: Hearing on S. 1064 Before the Subcomm. on Improvements in Judicial Mach. of the S. Comm. on the Judiciary*, 93d Cong. 80 (1973) (statement of Hon. Roger J. Traynor, Chairman, ABA Special Committee on Standards of Judicial Conduct) (“It is not enough that people have confidence in the sturdiness of judicial procedures. They must have utmost confidence in the integrity of their judges.”).

¹⁶⁸ At least when it comes to the federal judiciary, such institutional legitimacy is critical because judges are unelected and therefore, unlike many of their state counterparts, are not accountable to voters for their decisions. See THE FEDERALIST NO. 78 (Alexander Hamilton) (stating that the courts have “no influence over either the sword or the purse”).

¹⁶⁹ See Bassett, *Judicial*, *supra* note 6, at 1245-46 (“[P]ublic confidence in the judiciary does not result from the judiciary’s perception of impartiality; it results from the public’s perception of impartiality.”); Nancy J. Moore, *Is the Appearance of Impropriety an Appropriate Standard for Disciplining Judges in the Twenty-First Century?*, 41 LOY. U. CHI. L.J. 285, 291 (2010) (“Avoiding not only impropriety, but also the appearance of impropriety, is important for judges because public confidence in the independence, integrity, and impartiality of the judiciary is critical to the public’s willingness to accept judicial decision-making and submit to the rule of law.”).

also the appearance of corruption.¹⁷⁰ And appearances play an important role in other areas of the law and politics.¹⁷¹ But with scant guidance from the Supreme Court, scholars and lower courts have resorted to speculating about the role of appearances in due process analysis. Thus, while this Article discusses the constitutionality of self-recusal from an appearance-based perspective,¹⁷² my focus remains on the Supreme Court case law grounding the due process inquiry in bias rather than the mere appearance of bias.

III. JUDGES IN THEIR OWN CASES

With an understanding of American recusal procedure and its history, as well as the requirements of due process, we can finally try to answer the key question this Article seeks to answer: is the self-recusal procedure practiced throughout the United States consistent with due process? This section will argue that self-recusal does not and cannot ensure a judge is, or appears to be, impartial. This section also addresses an obvious critique of my argument: how can a practice that has been in place since the founding (and long before that), a practice followed by the vast majority of courts throughout the country (including the United States Supreme Court), be unconstitutional?

A. Bias and Due Process

Because the case law on appearances is so limited and inconclusive, let us assume that the Due Process Clause does not protect the appearance of impartiality. Rather, this section proceeds under the assumption that the Due Process Clause only protects the non-controversial and well-established right to a fair trial in front of a fair, impartial tribunal. Thus, rather than focusing on the appearance of bias, we now turn our attention to

¹⁷⁰ *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam) (stating that preventing “corruption and the appearance of corruption” is a compelling governmental interest).

¹⁷¹ See generally Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563 (2012) (describing the numerous instances of appearance-based justifications in law and in politics).

¹⁷² See *infra* Part III.B.

actual bias, or the probability of bias.¹⁷³ Does the recusal procedure satisfy that requirement? This Part concludes that self-recusal fails the impartiality test established by the Court, and allows a judge to act as a judge in his own case.

1. Understanding Recusal Functionally

Deciding whether self-recusal satisfies due process requires, at the outset, that we understand the nature of the party's motion for disqualification. The motion challenges the judge's ability to remain impartial, and suggests that the judge has engaged in conduct that would lead a reasonable observer to question the judge's impartiality. The recusal motion often criticizes the judge for something that the judge has done. The motion frequently claims that the judge will be unable to act impartially, a requirement of the job of judging. Not surprisingly, 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.¹⁷⁴ Instead, the judge's natural reaction is to deny—sometimes angrily deny—any bias or prejudice.¹⁷⁵ In fact, the more biased the target judge is, the less likely that judge is to recuse himself, because recusal disables the judge from being able to rule in favor of the side toward which he is predisposed, or against the side toward which the judge harbors a bias.¹⁷⁶

In other contexts, the Supreme Court has acknowledged that expecting an angered judge to act impartially is overly optimistic. For example, in *Mayberry v. Pennsylvania*, the defendant had

¹⁷³ The Court has always been clear that the Due Process Clause does not require proof of actual bias. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (“Under our precedents there are objective standards that require recusal when ‘the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.’” (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975))); *see also id.* at 887 (stating that recusal is required whenever there is an “unconstitutional probability of bias”). Of course, the level at which a probability rises to “constitutional intolerability” is the question, not the answer.

¹⁷⁴ *See Bassett, Recusal*, *supra* note 36, at 669.

¹⁷⁵ *Id.*

¹⁷⁶ *See, e.g.*, Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (discussing the impact of cognitive illusions and biases on the decision-making processes of judges).

verbally attacked the presiding judge,¹⁷⁷ and continuously interrupted court, to the point where Mayberry had to be removed from the courtroom.¹⁷⁸ 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.”¹⁷⁹ The Court recognized that the judge who received the defendant’s wrath could not remain impartial, explaining 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.”¹⁸⁰

Although the parties to the recusal proceedings are nominally the litigants whose names appear on the caption, the recusal proceeding is functionally a dispute between the movant and the judge. The party challenging the judge’s impartiality alleges that the judge has an interest, a relationship, or some other bias that will lead her to rule against the moving party. In response, the judge either recuses, or denies the allegations. Either way, the judge and the moving party are the two participants in the disqualification dispute. In fact, the opposing party in the underlying case often has no basis to respond to a recusal motion because only the judge is aware of all the facts.¹⁸¹ The challenged judge is “most familiar with his own conduct” and is often the only one that can refute or deny the party’s allegations.¹⁸² Thus, what at first glance might appear to be a simple pre-trial motion, in fact turns out to be a dispute involving the judge himself. While the judge is “the most appropriate party to respond to a disqualification motion . . . the judge does not respond . . . because she is responsible for deciding the legal question of whether her

¹⁷⁷ *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971). 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.

¹⁷⁸ *Id.* at 462.

¹⁷⁹ *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, 499-501 (1974). In such circumstances, a different judge should conduct the contempt trial in place of the judge who initiated the contempt. *Id.*

¹⁸⁰ *Mayberry*, 400 U.S. at 465.

¹⁸¹ *See Frost*, *supra* note 51, at 568.

¹⁸² Randall J. Litteneker, Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 266 (1978).

conduct merits disqualification.”¹⁸³ Properly understood, then, allowing the judge to review and decide his own recusal motion is a perfect example of putting the fox in charge of the henhouse. Or, in the language of the Due Process Clause, self-recusal allows a judge to act as a “judge in his own cause.”¹⁸⁴

Of course, the judge is not formally a judge in his own case, but that is not the end of the recusal inquiry. As explained earlier, the Court has rejected such a formalistic approach to recusal in favor of a more pragmatic test. For example, in *Lavoie*, the Alabama Supreme Court case involving a justice who participated in a case while at the same time being a party to a separate class action that would benefit from the court’s ruling, the justice was not formally ruling in the case in which he was a party.¹⁸⁵ Rather, he was deciding a case that made his own claims stronger.¹⁸⁶ But the Supreme Court’s functional opinion held that the opportunity to develop favorable law could “lead [the justice in question] not to hold the balance nice, clear and true.”¹⁸⁷ The same functional understanding should apply in the context of recusal procedure. A judge addressing a motion calling for his recusal might have a strong incentive to deny the motion either because he is actually biased in favor of the other party and wants to decide the case in their favor, or, perhaps more likely, because the judge does not want to suggest that he erred by failing to recuse himself, as he was required to do, before the recusal motion was filed.¹⁸⁸ Either way, the judge benefits from the decision not to recuse, even if those benefits are intangible.

We also know that judges perceive that they have a stake in the outcome of the recusal motion because of the judges’ actions when they are disqualified against their wishes. For example, some judges, when disqualified by an appellate court, have fought those disqualification decisions, even spending their own

¹⁸³ Frost, *supra* note 51, at 569.

¹⁸⁴ See *supra* note 1 and accompanying text.

¹⁸⁵ Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 817 (1986).

¹⁸⁶ *Id.* at 824.

¹⁸⁷ *Id.* at 825 (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)).

¹⁸⁸ As discussed earlier, under the state Codes of Judicial Conduct, a judge must recuse himself *sua sponte*. See *supra* note 71 and accompanying text. Thus, recusal in response to a party’s recusal motion may indicate that the judge acted improperly by not recusing before the party’s motion was filed.

resources to seek reversal of their disqualification.¹⁸⁹ This shows that judges have some attachments to the cases that they are assigned. Additionally, there may be a notion of professional pride that attaches some stigma to being forced to recuse, either because of an appellate court's decision, or because of a party's call for recusal. In fact, a judge who grants a party's recusal motion is arguably admitting a violation of the Code of Judicial Conduct, which requires the judge to recuse herself *sua sponte*.¹⁹⁰ Undoubtedly, the judge has a self interest in not admitting an ethical violation.

Furthermore, as mentioned earlier, when Michigan changed its recusal rules to allow for disqualification of state Supreme Court justices by their colleagues, a number of justices dissented and argued that they have a constitutional right to hear cases assigned to them.¹⁹¹ Such complaints are unlikely to come from someone with no vested interest in the resolution of the recusal decision. Psychologists have also confirmed this intuition. Studies show that people are subject to a status quo bias. This means that people have a "tendency to stick with their current situation."¹⁹² In the context of disqualification, the motion for recusal necessarily comes after a judge has been assigned to the case, which means that the status quo bias works against the grant of a disqualification motion.

Perhaps most importantly, the preceding discussion in a way assumes the presence of a judge who wants to remain fair and impartial. If the judge truly is biased in favor of one side, then that judge has an even greater interest in not recusing: recusal eliminates the judge's opportunity to exercise his bias. For example, in *Caperton*, the Supreme Court suggested that recusal was necessary in part because Justice Benjamin might owe a "debt of gratitude" to Massey's CEO for helping him win the

¹⁸⁹ See generally Todd Lochner, *Judicial Recusal and the Search for the Bright Line*, 26 JUST. SYS. J. 231, 233 (2005) (describing the incident involving Judge Gertner and her disqualification by the First Circuit).

¹⁹⁰ "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned" MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007).

¹⁹¹ See *supra* notes 79-80 and accompanying text.

¹⁹² See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 34 (2008) (discussing the status quo bias).

judicial election.¹⁹³ In such circumstances, the judge almost certainly has a strong incentive not to recuse, for one of the best ways for a judge to repay a debt of gratitude to a litigant is to rule in the litigant's favor. Recusal thwarts that goal. Thus, whether the judge is partial or impartial, she has a strong incentive not to recuse, and cannot "hold the balance nice, clear and true."¹⁹⁴

For elected judges—and nearly eighty percent of judges in the United States are elected judges¹⁹⁵—there is an additional pressure not to recuse. In *Republican Party of Minnesota v. White*, the Supreme Court held that judges have the right to announce their views on controversial issues, and many states even allow judges to make promises to voters of how the judge will act while in office.¹⁹⁶

If the judge, in the course of her campaign for office, does make such promises, the judge has a strong incentive to rule in a way consistent with those promises. Recusal eliminates the judge's ability to do so. To make matters worse, if voters perceive that the judge's promises are empty because the judge simply recuses any time the issue on which the judge campaigned arises, recusal will likely hurt the judge in the next election. And for a judge who would like to retain his job,¹⁹⁷ that is strong incentive not to recuse in cases where recusal may be required.

The Supreme Court has never hinted that different constitutional standards apply to the recusal proceeding. There is no reason to think that would be the case. The recusal proceeding is an important component of the litigation process, and it would be arbitrary to single it out as the only part of the case that does not require an impartial arbiter. In fact, courts have frequently held that due process requires a fair and impartial judge at *every*

¹⁹³ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 882 (2009).

¹⁹⁴ *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

¹⁹⁵ See generally JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* (2012) (describing the growth and the prevalence of judicial elections in the United States).

¹⁹⁶ *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002).

¹⁹⁷ That group includes essentially every judge in the United States. See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993) (arguing that judges are ordinary people who seek to keep their jobs while minimizing their work).

stage of the litigation, which presumably includes recusal.¹⁹⁸ Therefore, so long as the recusal motion is a “proceeding” at which due process applies, the party challenging the judge’s impartiality is entitled to an impartial arbiter to resolve that dispute, just as an impartial judge is required to resolve a motion for summary judgment or a pre-trial evidentiary motion.

The availability of appellate review is also insufficient to remedy any constitutional violation.¹⁹⁹ For the purposes of due process, it is largely irrelevant that the decisions of a biased judge are subject to eventual review by an appellate court.²⁰⁰ As the Supreme Court has made clear, the possibility of appellate review does not ameliorate defective procedures below. For example, in *England v. Louisiana State Board of Medical Examiners*,²⁰¹ the Court held that “such review, even when available by appeal rather than only by discretionary writ of certiorari, is an inadequate substitute” because “[l]imiting the litigant to review [at the Supreme Court] would deny him the benefit of a federal trial court’s role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims.”²⁰²

In addition, appellate courts reviewing a trial court’s denial of a recusal motion apply a very deferential standard of review. Generally, recusal decisions are reviewed only for abuse of discretion.²⁰³ Not surprisingly, reversals of non-recusals are exceedingly rare.²⁰⁴ To make matters worse, appellate review of Supreme Court recusal decisions is unavailable, and while state

¹⁹⁸ Redish & Marshall, *supra* note 102, at 503 n.180 (stating that an independent adjudicator is required for all stages of litigation).

¹⁹⁹ Some courts have made the opposite argument. See *McCauley v. Weller*, 12 Cal. 500, 500 (Cal. 1859) (“The province of a Judge is to decide such questions of law as may arise in the progress of the trial. His decisions upon these points are not final; and if erroneous, the party has his remedy by bill of exceptions and appeal.”).

²⁰⁰ *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61-62 (1972) (“Nor, in any event, may the State’s trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.”).

²⁰¹ 375 U.S. 411 (1964).

²⁰² *Id.* at 416.

²⁰³ See Stempel, *supra* note 17, at 755 (explaining that the deferential standards of review used by most states and federal courts means that reversal of a non-recusal decision on appeal is unusual).

²⁰⁴ *Id.* at 755-58.

high court and federal circuit refusals to recuse are theoretically appealable to the United States Supreme Court, such review is extremely rare, and becoming even more so as the Supreme Court's docket continues to shrink.²⁰⁵

2. Unconscious Bias and Self-Recusal

The constitutional objection could be blunted if judges indeed had the ability to set aside their biases in considering recusal motions. This, after all, was the historical basis for the self-recusal procedure.²⁰⁶ But modern research in cognitive psychology has recognized a number of biases that affect judicial decision-making that are particularly relevant for recusal decisions, including unconscious bias and self-serving bias.²⁰⁷ This research rebuts the common-law assumptions that judges can assess their own impartiality free of bias. Judges are human beings, and, like all other humans, they suffer from cognitive biases that disable them from assessing their own impartiality.²⁰⁸ This is true despite the fact that our current recusal regime relies on an objective recusal standard purportedly designed to eliminate the need for judges to assess their own state of mind. It is true that the standards were “implemented in an effort to make judicial disqualification determinations less dependent on judicial caprice.”²⁰⁹ But imposing an objective disqualification standard is futile because, regardless of the substantive test, judges must assess the objective appearances *of their own conduct*. And the evidence is overwhelming that this is an impossible task.

²⁰⁵ See Adam Liptak, *The Case of the Plummeting Supreme Court Docket*, N.Y. TIMES (Sept. 28, 2009), <http://www.nytimes.com/2009/09/29/us/29bar.html>.

²⁰⁶ See *supra* Part I.C.

²⁰⁷ See, e.g., 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); 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).

²⁰⁸ Similar cognitive constraints limit judges' ability to assess the conduct of their friends or others with whom they identify. See Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1278-80 (2002) (discussing cognitive psychology literature and the effect of cognitive biases on judicial decisionmaking).

²⁰⁹ FLAMM, *supra* note 16, at 105.

Making the task impossible are the cognitive biases that make people unable to assess their own conduct dispassionately and open-mindedly. Scientists have long recognized that “misperceptions or unconscious biases favoring beliefs, recollections, or predictions about their own behavior consistent with self-concept”²¹⁰ may influence people’s decisionmaking. We all have a tendency to make decisions in a manner skewed to favor our own self-interest.²¹¹ People are naturally convinced that our “judgments are less susceptible to bias than the judgments of others.”²¹² Psychologists refer to this bias as the “Bias Blind Spot.”²¹³ Understanding the Bias Blind Spot provides powerful evidence that judges deciding their own disqualification motions are unable to “hold the balance nice, clear, and true” in a way that satisfies the requirements of due process.²¹⁴

The Bias Blind Spot is best understood as a collection of different cognitive biases that hinder people’s self-assessment abilities.²¹⁵ Numerous studies reveal that people are poor at self-assessment because of self-enhancement motives. These biases may go by different names in the psychological literature—self-serving bias, egocentric bias, self-interest bias²¹⁶—but they all show the same thing: that people tend to think they are better than they actually are at a number of different tasks and on a number of different criteria.²¹⁷ Scientists have recognized that people are inclined to see themselves in a positive light, ignoring

²¹⁰ Lauren E. Willis, *Evidence and Ideology in Assessing the Effectiveness of Financial Literacy Education*, 46 SAN DIEGO L. REV. 415, 425-26 (2009) (citing MARK L. MITCHELL & JANINA M. JOLLEY, *RESEARCH DESIGN EXPLAINED* 213-15 (6th ed. 2007)).

²¹¹ Ward Farnsworth, *The Legal Regulation of Self-Serving Bias*, 37 U.C. DAVIS L. REV. 567, 570 (2003).

²¹² Joyce Ehrlinger, Thomas Gilovich & Lee Ross, *Peering into the Bias Blind Spot: People’s Assessments of Bias in Themselves and Others*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 680, 681 (2005).

²¹³ Emily Pronin, Daniel Y. Lin & Lee Ross, *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369, 370 (2002).

²¹⁴ *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

²¹⁵ See Ehrlinger et al., *supra* note 212, at 681.

²¹⁶ See, e.g., Melinda A. Marbes, *Refocusing Recusals: How the Bias Blind Spot Affects Disqualification Disputes and Should Reshape Recusal Reform*, 32 ST. LOUIS U. PUB. L. REV. 235, 250-53 (2013) (summarizing different biases that make up the Bias Blind Spot).

²¹⁷ *Id.*

any objective evidence to the contrary.²¹⁸ For example, psychologists have shown that people see themselves as more ethical and fair than others.²¹⁹ And to make matters worse, we refuse to acknowledge that these biases and interests affect our decisions, despite the fact that most people recognize the presence of such biases in others.²²⁰ Experiments in behavioral economics have also shown that these biases often lead people to irrationally overlook flaws in their own behavior.²²¹ All lawyers, judges included, may be inclined to ignore or misinterpret the rules of ethics when asked to judge themselves.²²² As a result, judges overestimate their ability to remain impartial.²²³

Judges, of course, are subject to the same constraints.²²⁴ Although judges are rarely the subjects of these psychological experiments, there is some evidence showing that judges, too, are subject to the same Bias Blind Spot. For example, in one study, researchers asked federal magistrate judges to estimate their rate of reversal on appeal to their colleagues. Not surprisingly, nearly ninety percent of judges rated themselves as less likely than the average magistrate judge to be overturned on appeal.²²⁵ Even casting the social science evidence aside, it is human nature to believe oneself to be unbiased and fair, and judges, who are

²¹⁸ See Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS IN COGNITIVE SCI. 37, 37-38 (2006).

²¹⁹ See David M. Messick et al., *Why We Are Fairer Than Others*, 21 J. EXPERIMENTAL SOC. PSYCHOL. 480 (1985).

²²⁰ Pronin, *supra* note 218, at 37.

²²¹ See generally Norbert L. Kerr, Robert J. MacCoun & Geoffrey P. Kramer, *Bias in Judgment: Comparing Individuals and Groups*, 103 PSYCHOL. REV. 687 (1996) (discussing the operation of the self-serving bias in groups).

²²² See Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, in BEHAVIORAL LAW AND ECONOMICS 355 (Cass R. Sunstein ed., 2000).

²²³ See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1519-20 (2009).

²²⁴ See Guthrie et al., *supra* note 176, at 784-821 (explaining that judges suffer from the same cognitive biases as laypersons); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaption?*, 79 OR. L. REV. 61, 99-100 (2000) ("Courts identify cognitive illusions that might affect juries and adapt to them, but fail to identify cognitive illusions that affect judges and fall prey to them. . . . [R]esearch indicates that judges, like everyone else, are susceptible to illusions of judgment.").

²²⁵ Guthrie et al., *supra* note 176, at 814. Obviously, by definition, ninety percent of judges cannot be better than average.

expected to play the role of an “umpire,”²²⁶ are even more likely to rationalize their opinions as objectively reasonable.

The confluence of these self-enhancement biases shows that, in the recusal context, a judge assessing his own impartiality is likely to conclude that he is not biased, and that no reasonable observer could conclude that he is biased. As Judge Posner once noted, judges “use introspection to acquit ourselves of accusations of bias, while using realistic notions of human behavior to identify bias in others.”²²⁷ Admittedly, psychological processes and biases can affect all judicial decision-making. But these self-enhancement biases and cognitive biases are particularly problematic when it comes to recusal because judges are asked to assess their own conduct. And because judges by definition lack awareness of their own unconscious biases, it is impossible for them to take any action to eliminate such biases.²²⁸

B. Appearance of Bias and Due Process

If we assume that due process mandates not just actual impartiality, but also the appearance of impartiality, as the Supreme Court has hinted and some lower courts have held, then self-recusal is almost certainly at odds with the Due Process Clause’s mandate. Self-recusal undermines the appearance of justice and the public’s trust and confidence in the judiciary.

Justifying that conclusion is not easy. Many scholars and judges have complained that an appearance-based standard is simply too fuzzy and too vague to be judicially enforceable.²²⁹ They have suggested that focusing on appearances, rather than actual misconduct or impartiality, makes the inquiry too malleable and subjective, without offering judges substantial guidance as to what conduct creates such an appearance of bias or

²²⁶ Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709, 1709 (2007) (discussing the umpire metaphor invoked by Chief Justice Roberts and Justice Alito during the hearings on their nominations to the United States Supreme Court).

²²⁷ RICHARD A. POSNER, HOW JUDGES THINK 121 (2008).

²²⁸ See Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142, 1142 (1996); Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 181, 181 (1995).

²²⁹ See, e.g., Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1338 (2006).

impropriety.²³⁰ These arguments are not without merit, as it is hard to define, with any kind of precision, what recusal procedures are consistent with the appearance of impartiality. This may even be one reason why the Supreme Court has been hesitant to give appearances any bite in its due process decisions. And, admittedly, with many judicial procedures, it would be a challenge to conclude with any degree of certainty that the procedure violates the appearance of impartiality. But the work of legal process theorists over nearly a century has given us an adequate foundation to reach some basic conclusions, especially when it comes to recusal procedure.

First, political scientists have shown that when it comes to appearances, procedural fairness is significantly more important than substantive outcomes.²³¹ Through the use of fair procedures, the courts create the confidence in their own legitimacy.²³² And within the panoply of fair procedure, the one procedural element more important than any other is the presence of a neutral and impartial arbiter.²³³ As Tom Tyler has explained, the public's evaluation of the judiciary is "especially influenced by evidence of even-handedness, factuality, and the lack of bias or favoritism."²³⁴ Additionally, "[f]ew situations more severely threaten trust in the judicial process than the perception that a litigant never had a chance because the decisionmaker may have owed the other side special favors."²³⁵ Each party must have confidence that it can disqualify such a biased judge, but it is hard to imagine that a party that perceives such a bias will be satisfied by the self-recusal procedure. In fact, as one scholar has argued, "[i]t is

²³⁰ *Id.* at 1340, 1342-43.

²³¹ See Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 314 (1997).

²³² Tom R. Tyler, *A Psychological Perspective on the Legitimacy of Institutions and Authorities*, in THE PSYCHOLOGY OF LEGITIMACY: EMERGING PERSPECTIVES ON IDEOLOGY, JUSTICE, AND INTERGROUP RELATIONS 416, 422 (John T. Jost & Brenda Major eds., 2001).

²³³ See *United States v. Jordan*, 49 F.3d 152, 157 (5th Cir. 1995) (acknowledging that an average layperson "is less likely to credit judges' impartiality than the judiciary").

²³⁴ Tyler, *supra* note 232, at 422.

²³⁵ Redish & Marshall, *supra* note 102, at 483.

doubtful that a party requesting disqualification is ever convinced by a judge's own ruling that he is impartial."²³⁶

Legal process theorists have also demonstrated that a fair procedure is one of the most important sources of judicial legitimacy.²³⁷ Although the legal process literature is rich and varied, one of the critical ingredients of procedural legitimacy is that "disputes are presented through an adversarial system in which two or more competing parties give their conflicting views" to an impartial decisionmaker.²³⁸ Descriptively, this is, in fact, how most disputes are handled by the judiciary, with recusal being perhaps the biggest procedural exception. Only when it comes to recusal procedure do we tolerate the presence of a decisionmaker who is not neutral or impartial. This is an odd exception because the presence of an impartial arbiter may be more important in the context of recusal proceedings than at other stages of litigation, not less. After all, these proceedings often challenge the judge's character and integrity, probe the judge's biases, and are at times very personal in nature.²³⁹ Judges facing recusal motions are frequently angered by the motion, and litigants fear they will exact revenge against the party seeking the motion.²⁴⁰

Thus, if we take the Supreme Court at its word that due process requires the judiciary not only to protect litigants from bias but also to guarantee the appearance of impartiality, then our

²³⁶ Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 697 (1985).

²³⁷ See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1994).

²³⁸ Frost, *supra* note 51, at 555-56 (identifying the "five procedural components of adjudication that are universally considered essential to the legitimacy of the final product").

²³⁹ See Neumann, *supra* note 63, at 392 ("The case law is filled with descriptions of defensive and angry judges denying motions that they recuse themselves. Judges in a different courthouse, and perhaps in a distant city, are usually better able to see the situation in a disinterested way.")

²⁴⁰ See Nancy M. Olson, *Judicial Elections and Courtroom Payola: A Look at the Ethical Rules Governing Lawyers' Campaign Contributions and the Common Practice of "Anything Goes"*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 341, 365 (2010) (explaining "litigants fear bringing valid recusal motions because they may anger judges, and because the odds of success are extremely low"). For an example of a judge who found the motion for his disqualification offensive, see *Hook v. McDade*, 89 F.3d 350, 353 (7th Cir. 1996).

recusal procedure falls woefully short of satisfying that promise. The bench, the bar, the academy, and other institutional actors have spoken about commitment to the appearance of justice and the appearance of impartiality. To the extent that these commitments have a constitutional dimension, they require a recusal procedure that creates such an appearance, and promotes public confidence in the courts.²⁴¹

C. Responding to the Historical Objection

But how can the self-recusal procedure be unconstitutional when it has been practiced every single day in thousands of courtrooms throughout the country? When the Supreme Court, whose duty is to say what the law is,²⁴² follows the same recusal procedure?²⁴³ At the oral argument in *Hollingsworth v. Perry*, the California Proposition 8 case, Justice Scalia used what the media termed a “gotcha” question: he wanted to know when the Constitution came to protect same-sex marriage.²⁴⁴ The intuition behind the question is obvious. If same-sex marriage was banned throughout the country at the time the Fourteenth Amendment was ratified, and that practice continued unabated since the ratification of the Amendment, then how can it be that the Fourteenth Amendment makes same-sex marriage unconstitutional? Justice Scalia made a similar argument in *Republican Party of Minnesota v. White*.²⁴⁵ Discussing the

²⁴¹ My proposals for recusal procedures that satisfy the appearance component of due process are discussed in Part IV.

²⁴² *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“It is . . . the province and duty of the judicial department to say what the law is.” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

²⁴³ The judicial supremacy debate is far outside the scope of this Article. For challenges to judicial supremacy, see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (arguing in favor of popular constitutionalism); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 6-32 (1999) (rejecting the notion of judicial supremacy). Other scholars have argued in favor of judicial supremacy. See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 517 (1981) (defending judicial supremacy).

²⁴⁴ See Transcript of Oral Argument at 38, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144). Theodore Olson answered with a question of his own, asking Justice Scalia when the Constitution came to bar public school segregation. *Id.*

²⁴⁵ 536 U.S. 765 (2002).

constitutionality of judicial elections, Scalia explained that since judicial elections have coexisted with the Due Process Clause since at least 1840, when states had begun adopting judicial elections as the method of choosing its judges, there can be no challenge to the constitutionality of the practice.²⁴⁶

The same line of reasoning, with self-recusal taking the place of same-sex marriage and judicial elections, forms perhaps the strongest objection to the argument that self-recusal violates due process. In other words, a critic of my conclusion would point out that the recusal procedure is not only practiced by the Supreme Court, which in our system has assumed the role of the ultimate interpreter of the Constitution, but has been practiced by the Court since the time of the founding, so it has an impressive historical pedigree. A practice which has coexisted with due process for more than two centuries, the argument might go, cannot be unconstitutional.

It is a strong argument, but I believe it fails on a number of fronts. First, although self-recusal is admittedly practiced throughout the country, the Supreme Court has never expressly subjected recusal procedures to any kind of scrutiny under the Due Process Clause. The Court's recusal procedure has never been challenged. And the few constitutional challenges that have been brought against the use of self-recusal by lower federal courts and state courts have received only perfunctory review. Therefore, any inference of constitutionality must come from Supreme Court silence rather than from Supreme Court precedent.

Second, an unconstitutional procedure does not gain constitutional legitimacy simply because of its lineage or historical acceptance. The Court has frequently struck down statutes as unconstitutional, despite past practice and even previous Supreme Court approval.²⁴⁷ Here, the default recusal rule was arguably an

²⁴⁶ *Id.* at 780-84.

²⁴⁷ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-96 (1954) (overruling *Plessy v. Ferguson*, and holding unconstitutional a practice that had been in existence since the time of the founding); *INS v. Chadha*, 462 U.S. 919, 977 (1983) (White, J., dissenting) (with the majority overturning the legislative veto as a violation of separation of powers, despite the fact that the legislative veto was placed in over 200 separate laws over a period of five decades).

implementation of the rule of necessity.²⁴⁸ At the time of the founding, finding a replacement judge was not a simple proposition. Counties were far apart, and many had only a single justice to hear disputes. This geographic limitation required procedural rules that would allow cases to be heard quickly and efficiently. Today, even in sparsely populated states, another judge is never far away. Given improvements in travel, the rule of necessity no longer provides an adequate justification for the self-recusal procedure.

Most importantly, American recusal practice is built on certain foundational assumptions. As discussed above, the recusal regime as it exists now came into being in England, with the assumptions that judges could put aside their own bias, and that due process required recusal only when the judge had a financial interest in the outcome of the case. As Charles Geyh explains, American “disqualification practice proceeds on two implicit assumptions: that judges are able to assess the extent of their own bias; and . . . how others reasonably perceive their conduct.”²⁴⁹ And courts have traditionally presumed that judges can cast aside their personal biases and beliefs in performing their judicial duties.²⁵⁰ Whether this happens because of the solemn oath that judges take,²⁵¹ or because of special training,²⁵² the self-recusal procedure can only make sense if these core foundational assumptions are true. Even a recusal procedure that was thought to be constitutional can become unconstitutional if the factual underpinning that supported that practice has been proven to be erroneous.

Of course, we now know that these assumptions are wrong. Blackstone’s assertion that “the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer

²⁴⁸ Thomas McKeivitt, Note, *The Rule of Necessity: Is Judicial Non-Disqualification Really Necessary?*, 24 HOFSTRA L. REV. 817, 818 (1996) (discussing the history and evolution of the doctrine of necessity, which allows for a biased judge to hear a case when no impartial arbiter can be found).

²⁴⁹ Geyh, *supra* note 19, at 708.

²⁵⁰ *United States v. Kehlbeck*, 766 F. Supp. 707, 713 (S.D. Ind. 1990) (“As a professional, a judge is presumed to be capable of distinguishing his personal life from his professional obligations.”).

²⁵¹ See 3 WILLIAM BLACKSTONE, COMMENTARIES *361.

²⁵² *Mann v. Thalacker*, 246 F.3d 1092, 1098 (8th Cir. 2001) (“Judges are trained to lay aside personal opinions and experiences when they sit in judgment.”).

impartial justice, and whose authority greatly depends upon that presumption and idea,”²⁵³ should be put to rest. Once the foundation for self-recusal falls away, it becomes clear that self-recusal allows disqualification motions to be decided by the judge who is personally involved in the matter and has a direct interest in the outcome of the recusal motion. This means that judges deciding their own recusal motions are acting as judges in their own cases. In fact, the Court has explained in other contexts that even a long-accepted law may be unconstitutional if the factual premises supporting that law are no longer true.²⁵⁴ A practice must stand or fall based on factual reality of the world, not on faulty assumptions of yesteryear.

This change in constitutional meaning is not unique to the recusal context. For example, laws that discriminated against women were historically upheld based on a factual misunderstanding about the genetic differences between men and women.²⁵⁵ In a number of cases, most famously *Bradwell v. Illinois*, the Supreme Court relied on the outdated assumption that women belong in the home to uphold statutes that treated women differently than men.²⁵⁶ But once that understanding was discredited, a law that was widely viewed as constitutional in the nineteenth century might “become” unconstitutional in the twenty-first.²⁵⁷ Sometimes, it is essential that the law becomes unconstitutional due to changed factual circumstances in order to protect liberty; sometimes, to protect equality; and in the context of recusal, to protect impartiality. Today’s judiciary need not

²⁵³ See 3 WILLIAM BLACKSTONE, COMMENTARIES *361.

²⁵⁴ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) (“[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.”).

²⁵⁵ See Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011).

²⁵⁶ *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 142 (1872) (Bradley, J., concurring); see also *Muller v. Oregon*, 208 U.S. 412, 421-23 (1908).

²⁵⁷ See, e.g., *United States v. Virginia*, 518 U.S. 515, 544-45, 558 (1996) (holding that VMI’s exclusion of women violated the Fourteenth Amendment because the reasons for excluding women from VMI were obsolete). Of course, the law does not just “become” unconstitutional. It was unconstitutional all along. In other words, the Due Process Clause has always meant that people were entitled to an impartial judge, but it took hundreds of years for us to realize that this principle is inconsistent with the practice of self-recusal.

perpetuate Blackstone's factual errors in deciding whether a certain practice violates the Due Process Clause.

For example, in *Brown v. Board of Education*,²⁵⁸ the Supreme Court overruled *Plessy v. Ferguson*, explaining that the Court "cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in light of its full development and its present place in American life throughout the Nation."²⁵⁹ The Court went on: "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected."²⁶⁰ Thus, changed circumstances change the meaning and the application of a constitutional provision, despite existing Supreme Court case law to the contrary.²⁶¹

And while most of these examples involve substantive rules, procedural rules, too, are subject to the same analysis. For example, the Court recently invalidated an old rule of criminal procedure that permitted defense counsel not to convey plea offers to their clients.²⁶² The Court reasoned that a new rule was required because "plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages."²⁶³

So to answer Justice Scalia's hypothetical, self-recusal became unconstitutional when our knowledge and understanding of the Bias Blind Spot and other self-enhancement biases reached the point where the factual assumptions underlying self-recusal could no longer support the practices they were intended to

²⁵⁸ 347 U.S. 483 (1954).

²⁵⁹ *Id.* at 492-93.

²⁶⁰ *Id.* at 494-95 (footnote omitted).

²⁶¹ The Court asked a similar question in many contexts. For example, in *Planned Parenthood v. Casey*, the Court explained that it was important to determine "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." 505 U.S. 833, 855 (1992).

²⁶² See *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

²⁶³ *Id.* at 1407.

support. The Due Process Clause, of course, is not a panacea, and just because something is bad does not mean it is unconstitutional. Some critics of the frequent recourse to the Due Process Clause termed the resort to the clause as the “nuclear option.”²⁶⁴ But the evidence is overwhelming. In this context, given the state of our understanding of human nature, and with a functional understanding of recusal as a dispute involving the judge, we are left with the inescapable conclusion that self-recusal violates the most fundamental principle of due process: the right to an impartial judge.

IV. AVOIDING UNCONSTITUTIONALITY

Although some courts appear to recognize the problems with self-recusal,²⁶⁵ few solutions have been implemented. In this section, I suggest some ways that courts (and other actors) can reform recusal procedures to comply with the requirements of due process.²⁶⁶ Then, I will look at how these changes can be implemented, in particular at the Supreme Court level, and some other advantages for judicial independence and impartiality that such changes can bring, as well as some potential drawbacks of each alternative.

A. *Peremptory Challenges*

One option that avoids all constitutionality concerns is to implement a system of preemptory judicial disqualification, akin to preemptory challenges permitted in nearly every state for juror disqualification. In fact, nineteen states have adopted just such an approach, giving a party an opportunity to request a judicial

²⁶⁴ Swisher, *supra* note 15, at 347.

²⁶⁵ *Stern Bros., Inc. v. McClure*, 236 S.E.2d. 222, 225 (W. Va. 1977) (“It appears to be the general rule that a judge before whom a disqualification motion is filed should not hear the merits of the motion. . . . The reason for this rule is rather obvious. Without it, the judge is placed in the difficult position of attempting to judge a matter which involves him directly and personally. No man can be a judge in his own cause.”).

²⁶⁶ There is a separate question of *who* should implement these proposals. For the reasons discussed above, judges have an obvious self-interest in keeping recusal decisions in their own hands. This leaves legislatures as the obvious solution, but there are potential separation of powers concerns with legislators imposing recusal rules on the judiciary. For a good discussion of this issue, see Virelli, *Congress, supra* note 5, at 1555.

substitution without the need to convince the challenged judge of her partiality.²⁶⁷ The obvious advantage of such an approach, for the purposes of this Article, is that it entirely eliminates the self-recusal problem. In addition, there are three other advantages. First, the procedure is not time-consuming, since it does not require a protracted inquiry into the challenged judge's conduct and eliminates the need for the issue to be considered on appeal. Second, this procedure offers an effective solution to a constant source of trepidation for a litigant concerned about a judge's impartiality—that the recusal motion will anger the target judge, who, after all, will remain on the case if he declines to recuse. Finally, the peremptory challenge procedure eliminates concerns associated with requiring a target judge's friend and colleague to consider his friend's bias.²⁶⁸

But there are also some potential concerns. First, some scholars have expressed concern that the procedure will be abused by attorneys to delay the proceedings and to judge-shop.²⁶⁹ For example, an attorney, or a group of attorneys, may always seek to disqualify judges seen unfavorable to their cause, regardless of the judge's impartiality. Furthermore, the peremptory challenge procedure may damage the reputation of the judiciary by undermining the presumption of judicial impartiality that was so prevalent under common law. Finally, since the recusal procedure can only be used a limited number of times,²⁷⁰ courts must resort to their default disqualification procedures (often self-recusal) for any subsequent disqualification request.

Thus, the procedure is not perfect, and may lead to frivolous disqualification requests as well as some administrative interruption. Nonetheless, peremptory challenges are a potential step in the right direction, and more state, and federal, courts

²⁶⁷ See FLAMM, *supra* note 16, at 762-65 (explaining how peremptory challenges of judges operate); JAMES SAMPLE, DAVID POZEN & MICHAEL YOUNG, FAIR COURTS: SETTING RECUSAL STANDARDS 26 (2008), available at http://www.brennancenter.org/content/resource/fair_courts_setting_recusal_standards/ (identifying the nineteen states permitting peremptory challenges of judges).

²⁶⁸ See *infra* Part IV.B.

²⁶⁹ See Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181, 212 (2011) (stating that “the most common objection to [a peremptory challenge] procedure is the fear of potential judge-shopping”).

²⁷⁰ In most states that permit peremptory disqualification, such challenges are limited to one per side.

should consider whether implementing such challenges can help protect judicial impartiality.

B. Other Judge(s)

The second alternative that eliminates the self-recusal problem is to allow another judge, whether on the same court as the target judge or on a different court, to decide the recusal motion. As with the peremptory challenge proposal, shifting the recusal decision away from the target judge answers the constitutional objections. No longer is the challenged judge acting as a judge in his own case, and the appearance concerns are also obviated.

This solution also raises some perception concerns, insofar as the procedure sends a message that judges cannot be trusted. In addition, expanding the process creates a concern about efficiency: while a frivolous motion can be quickly disposed of by the challenged judge, requiring the assigned judge to transfer the disqualification motion to another judge might be used to disrupt the administration of the courts.²⁷¹ In addition, some have questioned whether a third party—any third party—can make a well-reasoned decision given that the target judge is often the only one who knows all the facts that must be considered and that led to the recusal motion in the first place. After all, the “judge himself is likely to have or know the information most relevant to a determination of actual bias, such as financial connection to one of the parties, familial relationship with one of the parties, or participation as a lawyer in the litigation at an earlier stage.”²⁷²

But here, too, the objections can be rebutted. Despite some inefficiency, bringing in a third party decisionmaker is consistent with the tenets of the Legal Process Theory, which emphasizes the importance of a neutral arbiter for dispute resolution. It also

²⁷¹ This could be particularly problematic in jurisdiction with only a few judges. See *United States v. Zagari*, 419 F. Supp. 494, 499 (N.D. Cal. 1976) (“The judiciary would be seriously crippled in the states or territories having only one or two federal judges if it were necessary to send to another state to get a judge to hear the motion.”) (footnotes omitted).

²⁷² Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in Bush v. Gore*, 61 MD. L. REV. 606, 617 n.56 (2002); see also Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 546 (1994) (explaining that judges best know their “thoughts” and “feelings”).

avoids the self-assessment-bias problems discussed in Part III.²⁷³ Additionally, the procedure could require the target judge to first consider the motion and issue a written opinion.²⁷⁴ This would allow the challenged judge to make the initial disqualification decision, and if the judge felt that recusal was necessary, she could step aside without the need for a third party judge to become involved. And in denying the disqualification motion, the target judge would be required to write an opinion explaining the reason for her decision, thus creating a record that a reviewing judge could rely on.²⁷⁵ The party's motion, along with the target judge's decision, would give a third party judge sufficient factual background to decide the recusal issue. These two documents can essentially serve as adversarial briefs.²⁷⁶ Making the task easier is the fact that the third party judge would not be required to decide whether the challenged judge is actually biased, but rather whether there is an appearance of bias. Another way to mitigate the concern about litigants abusing the new recusal procedure is to give judges the authority to sanction attorneys who file frivolous or abusive motions. A reviewing judge would review the motion for legal sufficiency, and the party filing a frivolous motion could be forced to bear the costs associated with the delay. Furthermore, the delay concerns could be minimized by the creation of a national system that allows for disqualification motions to be referred to judges from other jurisdictions who could decide the motions more quickly or who have the time and resources to reach the motion promptly.

²⁷³ See *supra* Part III.A.

²⁷⁴ See Frost, *supra* note 51, at 535 (discussing the importance of reasoned written opinions).

²⁷⁵ This gets around the concerns expressed by Justice Scalia in his opinion denying the recusal motion in *Cheney*. See *supra* note 35 and accompanying text. Scalia explained that the media's description of the facts was misleading, or even flatly wrong. Under my proposed procedure, the third party judge would have not only the media accounts and whatever other documents that the moving party used to support its recusal motion, but also the target judge's decision explaining what actually happened.

²⁷⁶ See Randy Beck, *Transtemporal Separation of Powers in the Law of Precedent*, 87 NOTRE DAME L. REV. 1405, 1422 (2012) (discussing the importance of adversarial briefing to overcoming some of the most common cognitive biases).

C. Outsiders

The final, and perhaps the best, potential solution to the self-recusal problem is to allow observers outside the judiciary to play a more active role in the recusal process. There are a number of ways this could be done. For example, states could create committees made up of laypeople as well as attorneys that could offer guidance to judges on recusal issues, and perhaps even review judges' recusal decisions. Although such a committee would be unprecedented on the recusal issues, states have created similar committees to monitor judicial campaign conduct.²⁷⁷ Likewise, states that have adopted the Missouri Plan for judicial selection²⁷⁸ have created judicial performance evaluation commissions that review the work of judges and provide the public with an evaluation that the public can use in deciding whether to retain those judges.²⁷⁹ At the federal level, Congress likely has the power to create a separate office devoted to judicial ethics—an Inspector General for the Court.²⁸⁰ The Inspector General's office could have a panel, or a set of panels, devoted to immediately reviewing disqualification decisions made by federal judges.

These independent recusal commissions or Inspector General panels have a number of potential advantages. First, these commissions “could identify best practices and encourage judges to set high standards for themselves.”²⁸¹ This would give judges the advice they need when faced with difficult recusal issues, and offer judges a defense when criticized for their non-recusal decisions.²⁸² But giving the commission the power to disqualify judges

²⁷⁷ See Joseph E. Lambert, *Contestable Judicial Elections: Maintaining Respectability in the Post-White Era*, 94 KY. L.J. 1, 13 (2005).

²⁷⁸ See Dmitry Bam, *Voter Ignorance and Judicial Elections*, 102 KY. L.J. 553, 559 & n.31 (2014) (summarizing the Missouri Plan process).

²⁷⁹ *Id.* at 588-91 (describing the work of judicial performance evaluation commissions in a number of states).

²⁸⁰ Ronald Rotunda has made a similar recommendation outside the recusal context. Ronald D. Rotunda, *Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspector General for the Courts*, 41 LOY. U. CHI. L.J. 301 (2010). There are some separation-of-powers concerns associated with such a proposal, but that issue is outside the scope of this Article.

²⁸¹ SAMPLE ET AL., *supra* note 267, at 7.

²⁸² On the other hand, if a judge chose to ignore the commission's advice, it would create negative publicity for the judge, perhaps ensuring that the judge will provide clear reasons for his decision not to disqualify despite the recusal recommendation.

eliminates a major concern with allowing other judges to make such decisions. Judges hesitate to impugn each other's impartiality, so even though shifting the recusal decision to a different judge eliminates the due process concerns associated with self-recusal, such a procedure raises a separate concern. That is, the worry that judges would be too deferential to their colleagues, hesitant to create animosity on the court. As the Seventh Circuit explained,

[j]udges asked to recuse themselves hesitate to impugn their own standards; judges sitting in review of others do not like to cast aspersions. Yet drawing all inferences favorable to the honesty and care of the judge whose conduct has been questioned could collapse the appearance of impropriety standard under § 455(a) into a demand for proof of actual impropriety. So although the court tries to make an external reference to the reasonable person, it is essential to hold in mind that these outside observers are less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be.²⁸³

As always, there are drawbacks with any proposal, and the drawback with this proposal is the potential inefficiency involved in bringing third parties into the recusal controversy. There is a risk that a recusal proceeding will become a side-show to a trial, adding significant delay (and potentially expense) to a proceeding.

D. Collateral Benefits

No solution to the self-recusal dilemma is perfect. But most importantly, adopting one of these recusal procedures can address due process concerns while also fostering an appearance of impartiality. In addition, a more stringent recusal system enforced by neutral judges helps address two other related concerns about judicial impartiality. Both of these concerns arise in the context of judicial elections.²⁸⁴ First is the problem created by the Supreme

²⁸³ *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990).

²⁸⁴ Approximately ninety percent of American judges face the electorate to attain, or retain, their position in office. See G. Alan Tarr, *Rethinking the Selection of State Supreme Court Justices*, 39 WILLAMETTE L. REV. 1445, 1446 (2003). Concern about the

Court in *Republican Party of Minnesota v. White*.²⁸⁵ In *White*, the Supreme Court held that candidates in judicial elections have a First Amendment right to announce their views on controversial issues they may face as judges after election.²⁸⁶ Anticipating the concerns that would be raised by the academy—concerns that these judges will have precommitted themselves to ruling a certain way on particular issues—Justice Kennedy suggested in his concurrence that a more stringent recusal regime may be the way states can protect parties from (arguably) biased judges.²⁸⁷ But that suggestion may be somewhat naïve if the same judge who had, while campaigning, promised voters to rule in a particular way in a future case, is put in charge of deciding whether he should hear that case in the first place.²⁸⁸ For Justice Kennedy’s suggestion to truly act as a solution, a different judge than the one who made the campaign promises should decide the recusal issue.

The second problem that changes to recusal procedures can address is the “*Caperton* problem.” Here, the challenge to judicial impartiality comes not from the Supreme Court decision itself, but from the fact that candidates in judicial elections must often raise funds to succeed in those elections, and those funds frequently come from the same parties and lawyers who will appear in front of those judges. Once again, recusal has been offered as a potential solution to the concern that these elected judges will feel a debt of gratitude to the parties that elected them,²⁸⁹ or animosity towards parties that supported the judge’s opponent. The Supreme Court itself held in *Caperton* that due process may require recusal under these circumstances.²⁹⁰ But it is difficult to see how self-recusal does anything but impede those goals. The greater the debt of gratitude towards a contributor, and the greater the animosity

effect of judicial elections on judicial independence and impartiality is one of the most written about topics in the legal literature.

²⁸⁵ 536 U.S. 765 (2002).

²⁸⁶ *Id.* at 788.

²⁸⁷ *Id.* at 793-94 (Kennedy, J., concurring).

²⁸⁸ The judge might be worried about how the voters would react if he recused himself from the very cases where he promised to rule a certain way. Such recusals may make it less likely that voters would re-elect the judge during the next election cycle.

²⁸⁹ In addition, the judges may try to curry favor with those lawyers and parties in the hope that they would contribute to the judge’s next reelection campaign.

²⁹⁰ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 885 (2009).

towards the contributor of an opponent, the less likely the judge is to step aside. Bringing in a neutral decisionmaker, one removed from the need to keep financial backers and the electorate happy, is the only way recusal can act to address the due process concerns in cases like *Caperton*.

CONCLUSION

The self-recusal procedure followed by the majority of state and federal courts in the United States is best understood as a vestige of the historical approach to recusal. It has been criticized by a number of scholars, but this Article concludes that the procedure is unconstitutional. Although that verdict may seem shocking at first, given the historical pedigree of the practice, that conclusion is supported by the Supreme Court's precedent interpreting the Due Process Clause. Taking the recusal decision out of the hands of the challenged judge will help ensure that the cases are heard by an impartial jurist, as well as ensure public confidence in the courts.