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

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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

Jeffrey W. Stempel*

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Questions of judicial impartiality inspire strong assessments and emotions that now run particularly high in the wake of *Caperton v. A.T. Massey Coal Co.*,¹ *Citizens United*,² and another season of big money, interest group, sound-bite laden judicial elections³ that

1. 129 S. Ct. 2252 (2009). In *Caperton*, the Court in a 5–4 decision held that due process required West Virginia Supreme Court Justice Brent Benjamin to recuse himself in a case involving review of a $50 million judgment levied against a company where the company’s CEO had accounted for $3 million in campaign support for the state court justice in a hotly contested election in which the Justice unseated an incumbent. See Jeffrey W. Stempel, *Impeach Brent Benjamin Now!*?, *Giving Adequate Attention to the Failings of Judicial Impartiality*, 47 SAN DIEGO L. REV. 1, 2–62 (2010) (concluding that Justice Benjamin’s conduct was so clearly in violation of established law as to call into question his competence or integrity); *see also* Jeffrey W. Stempel, *Completing Caperton and Clarifying Common Sense Through Using the Right Standard for Constitutional Judicial Recusal*, 29 REV. LITIG. 249, 250–68 (2010) (summarizing *Caperton* decision and arguing for expansion of *Caperton*’s constitutional recusal standard as a backstop in cases of severe error in failing to recuse by state court judges).


included the failure of merit selection initiatives$^4$ and the removal of three Iowa Supreme Court Justices for the “crime” of issuing a decision striking down state prohibition of same-sex marriage.$^5$

As Professor Charles Geyh has noted, issues of judicial impartiality and disqualification are at the forefront of contemporary debates about the state of the legal system.$^6$ Judicial disqualification

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4. For example, a proposed revision to the Nevada Constitution to adopt a variant of the Missouri Plan, in which judges are initially appointed by the governor from a short list generated by a merit selection committee that includes lawyers and laypersons and then are required to prevail in retention elections to maintain their posts, was soundly defeated. See General Election Results, LAS VEGAS REV.-J., Nov. 4, 2010, at 4B (stating that ballot Question No. 1 regarding judicial appointments lost with 58% (390,370 votes) voting “No” and 42% (285,746 votes) voting “Yes”). In a bit of a dark day for judicial reform, creation of an intermediate appellate court (Nevada is the largest state with no such court) lost by a 53% to 47% vote. Id. But see Sylvia R. Lazos & Chris W. Bonneau, Appoint judges? No thanks, LAS VEGAS REV.-J., Oct. 31, 2010, at 4D (departing from prevailing academic sentiment, a law professor and political scientist support election of judges).

5. See A. G. Sulzberger, Ouster of Iowa Judges Sends Signal to Bench, N.Y. TIMES, Nov. 4, 2010, at A1 (stating that voters chose to remove all three justices on the liberal Iowa Supreme Court who were seeking new terms). See also Varnum v. Brien, 763 N.W.2d 862, 872 (2009) (holding unanimously that Iowa’s definition of marriage as between man and woman violated the state and federal constitutions). But see Editorial, Iowa’s Total Recall, WALL ST. J., Nov. 6, 2010, at A12 (cheering the defeat of the judges and describing gay marriage decision as “precisely the kind of judicial arrogance—finding a right to gay marriage in the state constitution after many decades in which no one noticed it—the recall election was designed for,” and criticizing Missouri Plan merit selection as “allowing the lawyers guild that dominates the nominating process to get virtual lifetime tenure for their selections,” but supporting executive appointment of judges rather than election; stating “[a] better system would be to let the Governor nominate anyone he chooses and have the legislature offer advice and consent, as in Washington”).

6. See Charles Gardner Geyh, Why Judicial Disqualification Matters. Again., 30 REV. LITIG. 671, 673–74 (2011) (noting that the combination of the 2007 revisions to ABA Model Code of Judicial Conduct, high-spending, high-profile state court elections, and the Supreme Court’s Caperton decision has focused greater attention on judicial disqualification). See also Leslie Abramson, Remarks at Current Issues in Judicial Disqualification: Assessing the Landscape Post-Caperton, Citizens United and the 2007 ABA Model Code of Judicial Conduct (Jan. 7, 2011) (stating that although the ABA 2007 Model Code seeks to expand grounds for judicial disqualification to include receipts of campaign contributions from interested litigants or counsel, states have been slow to adopt proposed change and abandon historical norms viewing campaign support as non-
is "hot" and "matters—again." Judge M. Margaret McKeown might respond that judicial impartiality has always mattered and that the judicial establishment has been addressing the issues vigorously despite occasional news stories that portray some members of the bench in an unfavorable light. My own view is that while many judges and much of the judicial establishment are to be commended for the seriousness with which disqualification and other ethics issues are addressed, the problem remains under-addressed rather than overstated.

In that regard, I largely agree, but take some modest issue with, aspects of Professor Geyh’s contribution to this symposium in which he embraces, seemingly with more resignation than enthusiasm, “procedural” or process-oriented approaches as a pragmatic but perhaps second-best response to the problem of disqualifying; the status quo continues not to see political friendships as disqualifying.

7. Geyh, supra note 6, at 671, 672. In her contribution to this symposium, Professor Margaret Tarkington touches on these themes and the importance of counsel as legal “canaries” in the litigation “coal mine” who must be sufficiently free to question judicial impartiality and to question alleged misconduct in order for the system to work properly. Margaret Tarkington, Attorney Speech and the Right to an Impartial Adjudicator, 30 Rev. Litig. 849, 850 (2011).

8. Examining the State of Judicial Recusals After Caperton v. A.T. Massey: Hearing Before the H. Comm. on the Judiciary, 111th Cong. 2–4 (2009) (prepared testimony of Hon. M. Margaret McKeown). Judge McKeown, Chair of the Committee on Codes of Conduct of the Judicial Conference of the United States, noted the extensive system of financial disclosure, judicial education, and advice regarding disqualification as well as the comprehensive rules regarding recusal. Id. at 1–12.

9. See, e.g., Geoffrey P. Miller, Bad Judges, 83 Tex. L. Rev. 431, 431–40 (2004) (collecting instances of judicial misfeasance). See also Geyh, supra note 6, at 674 (describing impeachment of Louisiana District Judge G. Thomas Porteous, “in part for failing to disqualify himself from a case in which he had solicited money from an attorney in a pending case” (citation omitted)).

10. See McKeown, supra note 8, at 4–10 (describing extensive infrastructure designed to raise ethical consciousness of federal judges).

11. See Stempel, Impeach Brent Benjamin Now!?, supra note 1, at 62–82 (noting with disappointment that despite great lapses in judicial professional responsibility, there have been no disciplinary consequences for Justice Benjamin, the non-recusing justice of Caperton fame); Stempel, Completing Caperton, supra note 1, at 296–326 (arguing for broader and more aggressive use of Due Process Clause to police egregious situations in which state court judges fail to follow applicable law of judicial disqualification).
judicial recusal. A strengthened proceduralist approach to judicial disqualification is an important and practically necessary means of helping to enhance judicial impartiality and public confidence in the courts. But more than Professor Geyh, I also embrace a regime of appearance-based judicial recusal—one strongly supported by effective procedural prerogatives for litigants—as a potentially effective, realistic means of improving judicial disqualification practice and outcomes. In particular, a broader concept of what constitutes a "reasonable question as to impartiality" is one that does

12. See Geyh, supra note 6, at 719 ("[A]t a time when the appearances-based regime is crumbling because consensus on the application of substantive disqualification rules is lacking, reorienting the focus toward procedural reform is a natural next step.").

13. Id. I also agree with Professor Geyh’s succinct but illuminating history of attitudes toward judicial disqualification in which he observes four major approaches: (1) the Blackstonian Common Law’s “almost iron-clad” and nearly irrefutable presumption “that judges were uniformly impartial and essentially immune from disqualification”; (2) a regime that “carved out exceptions” to this presumption by requiring disqualification for particular conflicts of interest such as being a “judge in one’s own case” where the outcome of the matter could affect the judge’s financial interests; (3) a brief, almost abortive approach in which judges were to be automatically disqualified “if aggrieved parties made specific allegations pursuant to specified procedure”; and (4) the current regime, which Professor Geyh views as under attack and perhaps losing sway, that “dwells upon appearances, by organizing disqualification standards around the principle that a judge should step aside” when the judge’s impartiality may be reasonably questioned, “in other words, when [the judge] might appear less than impartial to a reasonable person.” Id. at 677–90.

14. For purposes of this article (and in my writings on the subject generally), I treat “disqualification” and “recusal” as synonyms. However, there traditionally has been a technical distinction between the two terms in that disqualification is more often used to connote a legal requirement that a judge not participate in a case, while recusal traditionally carries the connotation of a judge voluntarily stepping aside even when perhaps not absolutely required. In modern practice, the terms are used interchangeably. See, e.g., RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 20.8 (2d ed. 2007) (noting a traditional distinction but using the terms interchangeably throughout the treatise); J. ALFINI, STEVEN LUBET, JEFFREY M. SHAMAN & CHARLES GARDNER GEYH, JUDICIAL CONDUCT AND ETHICS § 4.04 (4th ed. 2002) (tending to use disqualification as a preferred term but using recusal as an acceptable synonym); Debra Lyn Bassett, Judicial Disqualification in the Federal Appellate Courts, 87 IOWA L. REV. 1213, 1223 (2002) (using the terms interchangeably); Jeffrey W. Stempel, Refocusing Away from Rules Reform and Devoting More Attention to the Deciders, 87 DENVER U. L. REV. 335, 338, n.10 (2010) (noting that despite some traditional differentiation between the terms, disqualification and recusal are used as synonyms today).
not implicitly seek an unattainable consensus but instead recognizes that the health of the judicial system is threatened whenever a substantial portion of the public harbors significant, nonfrivolous concern over the neutrality of a judge who insists on continuing to preside over a matter.

If the legal system is to achieve its aspiration of impartiality beyond reasonable question, greater procedural protections are of course required, notwithstanding some attendant additional logistical burdens. There must also be a broadened definition of the existence of reasonable question as to impartiality and greater sensitivity on the part of bench, bar, and the public. Like Odysseus, who tied himself to the mast to prevent him from leading his ship to ruin in response to the Sirens’ Song, the judiciary would be wise to institute a more stringent system of recusal practice than currently prevails. One can view judicial recusal as an example of a situation where the imposition of stronger pre-existing rules (both procedural and substantive) constraining or “nudging” judicial authority can enhance judicial impartiality by forcing necessary recusal that would

15. HOMER, THE ODYSSEY 76–77 (Robert Fagles, trans., Penguin Books 1996). Odysseus was returning from the Trojan War, a task taking a decade (an Odyssey by any definition) and forcing his encounter with all manner of dangerous, strange, and wonderful things. Id. Among them were the Sirens, women who dwelled near a rocky shoreline and sang a song so sweet that it lured sailors so close to the shore that their ships wrecked and they drowned. Id. at 76–77. Odysseus wanted to both hear the Sirens’ Song and avoid death and loss of ship and crew. He arranged for his crew to wear earplugs (thus protecting them from the seductive allures of the Sirens’ Song) and to lash him (sans earplugs) to the ship’s mast, where he could hear the Song and, squirm and yell as he might, would not be able to direct the ship too close to the rocky shore. Id.

Notwithstanding its creepy sexist origins (attractive but deadly women luring clueless or insufficiently disciplined men to their deaths), the story of Odysseus and the Sirens has become a staple of philosophical, political, and legal discussion regarding the wisdom of imposing pre-existing constraints in order to avoid making mistakes in moments of haste, weakness, or temptation. The classic discussion is in JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN THE SUBVERSION OF RATIONALITY (1983). As of December 2010, Elster’s work has been cited more than 300 times in law review literature while the Odysseus story has been cited more than 400 times. See also RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 41–42 (2008) (popularizing cognitive psychology of decision-making by employing the Odysseus example).

16. See THALER & SUNSTEIN, supra note 15, at 11–13 (stating that people can be guided toward better decisions through use of mental framing devices, regulation, limitation of choices, and paternalism).
not result if individual jurists were left to their own devices under the status quo.

Judges and the legal body politic should move toward more frequent use of the appearance-based standard of impartiality, which is slower to accept judging by those who may have inclinations to favor certain litigants on the basis of social, economic, and political affiliation. This requires that the legal system and society must move away from what appears to be the implicit governing notion as to when a reasonable question exists as to impartiality, wherein the judge will only recuse if she is convinced that nearly every sane person would hold a reasonable question regarding the judge’s impartiality. This system tends to minimize concerns of partiality if the concern falls short of a consensus. Traditionally, this has meant that the court deciding the recusal motion must be convinced that the mythical “objectively reasonable” person, accurately informed of the situation, would entertain serious doubts as to the neutrality of the judge.

This standard overlooks the reality that in the modern (or post-modern) world there will be disagreements and differences in perception among “reasonable” people. In many disqualification cases, it will be impossible, as a practical matter, to attain the type of consensus or near-unanimity presupposed by the traditional articulation of the appearance of impartiality standard. Rather than ignoring this elephant in the room, the legal system should confront the problem by requiring disqualification whenever a substantial portion of adequately informed, objectively reasonable observers would entertain serious questions as to the impartiality of the judge under challenge.

Beyond procedurally based protections, the modern status quo of judicial disqualification would also profit from an enhanced conception of a “reasonable question” as to impartiality and a recognition that there need not be consensus—or even a clear majority view—about a given situation to support disqualification.

17. An important component of enforcing this improved regime regarding judicial recusal is the greater “breathing space” for attorneys urged by Professor Tarkington. See Tarkington, supra note 7, at 876 (urging that attorney speech central to client representation be judged according to a FRCP 11 or Rule of Professional Conduct 3.1 standard as to whether attorney assertions have a basis in law or fact, while attorney criticisms of judges be assessed according to a N.Y. Times v. Sullivan actual malice inquiry as to whether counsel knew statements were false or were uttered with reckless disregard as to their truth or falsity).
Thus, both a stronger definitional sense of the appearance of fairness and some substantial judicial consciousness-raising are in order. Coupled with the procedural protections advocated by Professor Geyh and most others in the academy (as well as the protection of attorney speech urged by Professor Tarkington), a sounder, more confidence-enhancing recusal regime is possible.

Whether this improved recusal regime is attainable in the current climate remains questionable. Jurists—particularly at the Supreme Court level—have occasionally shown a disturbing defensiveness, insensitivity, and even some seeming ignorance regarding the area of recusal. As Professor Geyh notes, there is a gulf separating traditionalist judges with a strong presumption of judicial impartiality from realist judges with a much weaker, more easily rebutted presumption of judicial impartiality. Without doubt, the realist judges are correct. Only a modest presumption of judicial impartiality should reign. Until the judiciary accepts this notion, litigants are inadequately protected from potential judicial bias and public confidence is inadequately nurtured.

I. FACING REALITY: JUDGING AND JUDGES IN THE REAL WORLD

A. Unconscious Bias and Insufficient Self-Awareness

Judges are, of course, human beings. Like all humans, they are

18. Geyh, supra note 6, at 676.
19. Tarkington, supra note 7, at 851.
20. See infra notes 278–81 (Scalia), 302 (Breyer), 318 (Ginsburg, Scalia, and Olson) (describing questionable recent behavior of some Justices).
21. See Geyh, supra note 6, at 698–99 (noting the divide between judges with strong presumption of judicial impartiality and judges more willing to accept the notion that judicial neutrality may be compromised by various external factors).
22. See Jerome Frank, Are Judges Human?, 80 U. PA. L. REV. 17, 42 (1931) (concluding, perhaps unsurprisingly, that the answer is “yes” and that the law must account for this humanity rather than projecting unrealistically Herculean qualities upon judges); see also CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 15, 74, 118–19 (2006) (finding significant correlation between political backgrounds of judges and rulings in particular classes of cases); Lawrence Baum & Neal Devins, Why the Supreme Court Cares About Elites, Not the American People, 98 GEO. L.J. 1516–
subject to cognitive constraints when assessing their own conduct or that of friends, co-workers, or those with whom they identify.\textsuperscript{23} Applied in the judicial context, one can make a persuasive argument that the natural human foibles such as status quo bias,\textsuperscript{24} overconfidence,\textsuperscript{25} and false consensus bias\textsuperscript{26} become exacerbated, rather than reduced, because of the isolation in which judges work and the pedestal upon which they are placed.

Additionally, there now exists extensive literature establishing that humans are likely to have extensive unconscious biases and prejudices regarding people, companies, attorneys, race, gender, ethnicity, religion, national origin, and other matters.\textsuperscript{27} The

\textsuperscript{17} 1580–81 (2010) (concluding that Justices’ very human motivations and responses to incentives make the Court more interested in elite opinion, particularly elite opinion about the Court’s performance, rather than the long-term impact of Court decisions on society).

23. See infra notes 26–36 and accompanying text (noting that people’s perspectives vary by demographic traits and pointing out that judges are not immune from this trait).

24. See infra note 41 and accompanying text (stating that “status quo bias” or a “general tendency to stick with the current situation” is a prevalent human trait); see also Thaler & Sunstein, supra note 15, at 34–36 (same).

25. See infra notes 34–35 and accompanying text (noting that people, including judges, tend toward excessive optimism and overconfidence); see also Thaler & Sunstein, supra note 15, at 31–33 (same).

26. See Lawrence M. Solan et al., False Consensus Bias in Contract Interpretation, 108 Colum. L. Rev. 1268, 1269 (2008) (stating that individual readers of contract language are quite certain that they know what the language means and that others agree with them, and that as a whole, readers assign substantially different meanings to the same language).

27. Sylvia R. Lazos Vargas, Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench, 83 Ind. L.J. 1423, 1433–35 (2008); see Gary Blasi, Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology, 49 UCLA L. Rev. 1241, 1276–1281 (2002) (applying cognitive psychology literature to posit that judges and juries, like everyone else, are subject to biases and prejudices and advancing strategies for overcoming these traits); Joshua Correll et al., Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot, 92 J. Personality & Soc. Psychol. 1006, 1006 (2007) (stating that police officers are more likely to shoot at black subjects than white subjects when actions of the subject are ambiguous); see also Sunstein et al., supra note 22, at 15, 74, 118–19 (finding significant correlation between political backgrounds of judges and rulings in particular classes of cases); Theresa M. Beiner, The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium, 36 U.C. Davis. L. Rev. 597, 603–09 (2003) (summarizing empirical research regarding gender and racial differences in judicial behavior); Howard Gillman, What’s Law Got to Do With It? Judicial Behavioralists Test the “Legal
point is so uncontroversial that it is reflected in a recent ABA Litigation Section calendar. As Professor Geyh has noted, "disqualification practice proceeds on two implicit assumptions: that judges are able to assess the extent of their own bias; and that judges are able to assess how others reasonably perceive their conduct. Neither assumption is safe."

Well before modern research regarding cognitive theory, the point was recognized as a matter of common sense by an anonymous law student, who observed that "[a] biased mind rarely realizes its own imperfection." Although judges may be able to dampen these reactions through training, experience, and discipline, it is highly

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There is compelling scientific research showing that the unconscious and conscious associations built up over time shape people’s preconceptions and responses to life’s situations.

One study showed that prospective jurors given the same set of facts for a defendant named “William” versus one named “Tyrone” more frequently remembered aggressive details for the one named “Tyrone.”

American Bar Association, Section on Litigation, 2011 Calendar, February 2011.

Interestingly, the Litigation Section’s focus was on implicit bias in jurors rather than judges, although there is no basis for believing that judges are any less influenced by the William-Tyrone perception than are jurors. Criticism of the Court’s invocation of the Clark doll studies in Brown and the bona fides of that study are beyond the scope of this paper.

29. Geyh, supra note 6, at 708.

unlikely that judges can consistently overcome or even recognize their own biases and prejudices.\textsuperscript{31}

Studies reveal that people are generally poor at self-assessment, and tend to be overly optimistic evaluators of their own abilities. Inflated preconceptions of their abilities, in turn, lead subjects to over-estimate their competence in performing specific tasks. Unsurprisingly, then, test subjects “report being less susceptible than their peers to various cognitive and motivational biases.”\textsuperscript{32} They tend to exhibit a blind spot to their own biases, take their perception of the world as objective reality, and attribute contradictory perspectives to bias in others, rather than themselves.\textsuperscript{33}

The trait of self-serving or egocentric bias, like all biases, is well-established in people generally and has been reflected in judges as well.\textsuperscript{34} Judges, like all of us, simply think they are better than

\begin{itemize}
  \item Traditional usage sometimes characterizes “bias” (and the term is so used in Solan et al., \textit{supra} note 26, at 1268–69) as a preference for someone or something, while “prejudice” is an antipathy to someone or something. Thus, a traditionalist might distinguish the two terms and speak in favor of being biased in favor of X and prejudiced against Y. Modern usage, however, treats the two words as synonyms meaning “a personal and sometimes unreasoned judgment.” \textsc{Merrim-Webster’s Collegiate Dictionary} 110 (10th ed. 1996). For ease of reference, this article will at times use the terms interchangeably.

  \item Emily Pronin et al., \textit{The Bias Blind Spot: Perceptions of Bias in Self Versus Others}, 28 \textsc{Personality and Soc. Psychol. Bulletin} 369, 374 (2002).

  \item Geyh, \textit{supra} note 6, notes 146–52 and accompanying text (footnotes omitted).

  \item \textsc{See Thaler & Sunstein, \textit{supra} note 15, at 31–33} (stating that surveys of students “reveal a high degree of unrealistic optimism about performance in the class” and “people are unrealistically optimistic even when the stakes are high” which “can explain a lot of individual risk-taking;” applied to judges, these prevalent human traits suggest that judges will be unduly slow to recognize situations in which their ability to be neutral is impaired and the degree to which outside observers will concur in their assessments); Pat K. Chew & Robert E. Kelley, \textit{Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases}, 86 \textsc{Wash. U. L. Rev.} 1117, 1156–58 (2009) (finding significant differences in rulings based on race of judge); Chris Guthrie et al., \textit{Inside the Judicial Mind}, 86 \textsc{Cornell L. Rev.} 777, 811–16 (2001) (finding judges susceptible to cognitive bias and error at rates substantially similar to that of the general population); Jeffrey J. Rachlinski et al., \textit{Does Unconscious Racial Bias Affect Trial Judges?}, 84 \textsc{Notre Dame L. Rev.} 1195, 1197–1204 (2009) (concluding that the answer largely is “yes” and noting presence of implicit biases among judges that appear to impact decision-making); Jeffrey J. Rachlinski, \textit{Heuristics and Biases in the Courts: Ignorance or Adaptation?}, 79 \textsc{Or. L. Rev.} 61, 101 (2000) (finding judges subject to same cognitive factors affecting all persons).
\end{itemize}
they actually are. Because judges have considerably more power over the lives of others than do most people, this essentially human trait becomes more troublesome in judges (as well as police officers, prosecutors, business executives, high public officials, and military leaders) than it would be in most other settings in which the overconfident have less opportunity to adversely impact others. What may be tolerable where individuals have relatively little practical power to do harm becomes unacceptable in the judicial setting and requires potentially over-inclusive protection in order to avoid injustice.  

This type of cognitive error is often accompanied by false consensus bias as well. A false consensus bias occurs when one is erroneously overconfident that everyone else—or at least all objectively rational, intelligent people—see a situation in the same

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35. For example, a law professor’s excessive self-confidence may produce the erroneous belief that his or her more recent manuscript is a paradigm-shifting breakthrough. If, however, the professor is wrong (which is almost certainly the case, as real breakthroughs of this sort are comparatively rare), the realistic worst that can happen is that misguided members of a legal periodical may share the same misconception and publish the manuscript in lieu of better submissions. Alternatively, articles editors have the power to deny space to the manuscript altogether and readers are of course free to skip the article or disagree with it, even to ridicule it. When the professor submits the supposedly path breaking manuscript to the law review at her own school, this could raise genuine questions of whether the students at the professor’s own school are sufficiently impartial about the merits of the manuscript. No one treats this as a serious problem because article selection is not adjudication and is simply not that important in the grander scheme of the world. However, if the professor were to blackmail students in an attempt to attain publication (e.g., withholding or awarding grades on the basis of the review’s decision) or retaliate against students if the article were rejected, a rational law school would presumably take stern action to discipline the professor and protect the students.

By contrast, the law professor as a teacher has considerably more authority when conducting class and awarding grades (although it is, of course, a lot less power than that exercised by judges twenty to thirty times per day). If there are allegations of prejudice against a student (e.g., because the student is an employee of a company involved in litigation against the professor or bullied the professor’s child during high school), the professor may be inclined to think that he would not discriminate against the student in assigning grades. No law school in the country, however, would keep the student in Professor X’s class under these circumstances (assuming the allegation is accurate). The academy, whatever it lacks in other regards, understands that the person impacted is unlikely to be a good judge of his actual impartiality and that—more important by analogy to the Judicial Code—there are serious grounds for doubting Professor X’s impartiality under such circumstances.
way. For example, experiments have suggested that people reading contracts or other texts, no matter how turgid or arguably ambiguous the language, tend to decide the text has a particular meaning and then believe that almost all readers of the text would assign it the same meaning. Often, however, there is much greater division of opinion about the text than the initial reader acknowledges. In other words, the presumed consensus does not exist.

By analogy, a judge assessing his or her own impartiality is likely to perceive that no other reasonable observer could disagree with the judge’s conclusion and that there exists no reasonable question as to the judge’s ability to be impartial in a pending case, but there will almost certainly be more disagreement than the judge anticipated. Case law reflects this through reversals of decisions declining disqualification and the division we have seen at the United States Supreme Court on matters of judicial disqualification. Caperton v. A.T. Massey Coal Co., for example, was a 5–4 decision. Nevertheless, each individual Justice writing alone

36. See Solan et al., supra note 26, at 1290 (interpreting answers to a questionnaire and finding that “subjects overestimate the extent to which other participants understand the term the same way they do”).

37. See Solan et al., supra note 26, at 1289–92 (finding that lay people overestimate, by a significant deviation, how many of their peers would give an ambiguous word the same meaning they would give it; also noting that people are excessively confident in the accuracy of their predictions).

38. Id.

39. See Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2256, 2263–64 & 2268 (2009) (finding situation carries unacceptably high risk of actual bias in favor of campaign supporter or against his litigation opponents, while dissenting Justices Roberts, Scalia, Thomas, and Alito not only disagree with the reach of the Due Process Clause as applied to disqualification, but see little risk that West Virginia Supreme Court Justice Brent Benjamin would be swayed by $3 million in campaign support received from interested litigant); see also, Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 864–65 (1988) (5–4 decision reversing lower court where trial judge presided over case notwithstanding his status as trustee of University that stood to gain from particular litigant’s victory); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821 (1986) (setting aside, in 5–4 decision, Alabama Supreme Court decision on due process grounds where participating justice had pending similar suit against insurer party to the case); Turney v. Ohio, 273 U.S. 510, 531–35 (1927) (overturning imposition of traffic violation conviction where trial judge funded by revenues generated from traffic citations and convictions); United States v. Tucker, 78 F.3d 1313, 1325 (8th Cir. 1996) (reversing trial judge’s failure to recuse in case involving political ally of President Clinton due to trial judge’s personal friendship with Hillary Rodham Clinton);
would believe that the overwhelming majority of observers agreed with his or her assessment, just as West Virginia Supreme Court Justice Brent Benjamin appears not to have contemplated that anyone could entertain reasonable questions as to his impartiality. As discussed in Part II.B of this article, the tendency of judges to think no reasonable observer could disagree with the judge’s conclusion argues for a broader and more robust approach to disqualification based on reasonable questions as to impropriety in addition to a requirement that recusal motions be heard before a judge other than the judge who is the target of the disqualification motion.

Other commonly found cognitive biases can also hamper judging. Research has identified a “hindsight bias” which “suggests that people often think, in hindsight, that things that happened were inevitable, or nearly so.” This undoubtedly can contribute to the spoliation-like problem discussed below, in which an appellate court reviewing rulings by a judge who should have been disqualified may make excessive use of the harmless error concept and be unable to see how the case could have come out differently had an untainted judge presided.

Related to this is the availability heuristic in which persons overestimate the chance of a future event (e.g., an alligator attack)

Nichols v. Alley, 71 F.3d 347, 352 (10th Cir. 1995) (reversing an Oklahoma City federal trial judge’s failure to recuse himself in trial of alleged bomber).


41. See CASS R. SUNSTEIN, BEHAVIORAL LAW AND ECONOMICS 4 (Cass R. Sunstein, ed., Cambridge Univ. Press 2000) (“[P]eople often think, in hindsight, that things that happened were inevitable, or nearly so. The resulting ‘hindsight bias’ can much distort legal judgment.”).

42. See discussion infra Part I.C (discussing spoliation concerns; suggesting that “both private and public decisions may be improved if judgments can be nudged back in the direction of true probabilities”).
where there has been a recent well-publicized such event.\textsuperscript{43} Although this cognitive trait is less likely to affect disqualification practice, it holds potential to bring about bad decisions (of either undue resistance or hair-trigger disqualification) due to recent high profile episodes of recusal motion abuse or undue judicial resistance to disqualification.\textsuperscript{44}

In addition, there is the representativeness heuristic that prompts people to complete an indeterminate picture in accord with pre-conceived patterns of thought, experience, or association.\textsuperscript{45} Applied to disqualification practice, this may make judges too quick to dismiss recusal motions as merely mirroring previously unsuccessful similar motions, or to reflexively deem recusal motions strategic rather than meritorious, or insufficiently serious based on a judge’s long-standing track record of generally avoiding criticism despite a longstanding practice of being resistant to recusal.

Without doubt, people are generally subject to a status quo bias in which they harbor a “general tendency to stick with their

\textsuperscript{43} THALER & SUNSTEIN, supra note 15, at 26.

\textsuperscript{44} For example, in 2006, an investigative reporting series by the Los Angeles Times suggested that Las Vegas area judges were overly influenced by powerful litigants and lawyers. See Michael J. Goodman, Juice vs. Justice: A Judge Who Isn’t Playing by Fast and Loose Rules, L.A. TIMES (June 8, 2006), available at http://www.latimes.com/news/politics/la-na-vegasside8jun08_1,4286554.story (highlighting Judge John S. McGroaty’s avoidance of conflicts of interest in a “juice town,” referring to money and influence); Michael J. Goodman & William C. Rempel, Juice vs. Justice: For this Judge and his Friends, One Good Turn Led to Another, L.A. TIMES (June 9, 2006), http://articles.latimes.com/2006/jun/09/nation/na-vegas9 (describing pattern of some judges in regularly awarding court-appointed receiver or special master work to lawyers with whom they have personal or professional ties); Michael J. Goodman & William C. Rempel, Juice vs. Justice: In Las Vegas, They’re Playing with a Stacked Judicial Deck, L.A. TIMES (June 8, 2006), http://articles.latimes.com/2006/jun/08/nation/na-vegas8 (describing discrete judicial treatment of cases that could be embarrassing to influential litigants); Michael J. Goodman & William C. Rempel, Juice vs. Justice: Special Treatment Keeps them Under the Radar, L.A. TIMES (June 10, 2006), http://articles.latimes.com/2006/jun/10/nation/na-vegas10 (exploring the alleged corruption of Las Vegas’s senior judges). In response, local attorneys and others perceived a reaction of greater judicial willingness to recuse in reaction to the black eye the newspaper series had inflicted on the local bench. Of course, this perception may have been due to cognitive error by the observers.

\textsuperscript{45} See THALER & SUNSTEIN, supra note 15, at 26–28 (exploring the representativeness heuristic).
current situation."\(^{46}\) Because, by definition, disqualification motions (other than peremptory challenges of right) occur after a judge has been assigned to the case, status quo bias generally works against the grant of a disqualification motion. With Judge X already on the case, both Judge X and any colleague to whom the recusal motion is assigned will tend to oppose granting the motion if the case is close, to better maintain the status quo. Added to this may be a notion of professional pride that attaches some stigma to being too quick to recuse.

Another important cognitive trait is "anchoring," in which "people make probability judgments on the basis of an initial value, or 'anchor,' for which they make insufficient adjustments" even though "[t]he initial value may have an arbitrary or irrational course."\(^{47}\) For judges (and the legal system generally), an important anchor is the presumption of judicial impartiality. For many judges, the anchor is firmly set in favor of a very strong, hard to rebut presumption of impartiality, although even realist and less traditionalist judges also have this anchor.

In all cases, then, judges will resist disqualification motions, sometimes resisting greatly with the traditionalist’s anchor outweighing information which calls impartiality into question. To the extent that a strong impartiality presumption is arbitrary, irrational, or even merely overstated, this cognitive trait of humans will warp recusal decisions, particularly where, like all humans, judges make insufficient adjustments once their anchor point is set.

Humans also are subject to "loss aversion" behavior in which they place greater value on retaining something than in gaining something new.\(^{48}\) A cognitive cousin is the "endowment effect" in

\(^{46}\) See THALER & SUNSTEIN, supra note 15, at 34–36 (exploring status quo bias).

\(^{47}\) SUNSTEIN, supra note 41, at 5 (noting that when anchor points are arbitrary or have an irrational source "probability assessment may go badly wrong"); THALER & SUNSTEIN, supra note 15, at 23–25.

\(^{48}\) See SUNSTEIN, supra note 41, at 5 ("People are especially averse to losses. They are more displeased with losses than they are pleased with equivalent gains—roughly speaking, twice as displeased."); Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47 ECONOMETRICA 263, 269 (1979) (finding that a "psychological principle—the overweighting of certainty—favors risk aversion in the domain of gains and risk seeking in the domain of losses").
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which already owned items are valued at a rate above market value. This is why someone will refuse to accept $20 for a widget already owned even when that same person would never pay $20 for the same widget in a store.

Applied to judging, one might reasonably posit that the initially assigned judge gains “possession” of a case or is endowed with the case. A disqualification motion then presents the possibility of loss. The judge, like other humans with loss aversion, may be overly inclined to avoid the loss and keep the case even in the face of serious questions regarding impartiality. Similarly, the judge with a case in hand may be unwilling to “sell” it back to the clerk of court for reassignment because the judge has subconsciously assigned the currently possessed case a greater value than a prospective replacement case.

In short, there are a several cognitive traits that suggest judges will be unduly inclined to reject disqualification motions. In the face of these factors, the legal system needs to ensure that its rules and procedures regarding judicial disqualification are sufficiently vigorous to overcome these cognitive barriers.

49. See SUNSTEIN, supra note 41, at 5 (“Contrary to economic theory, people do not treat out-of-pocket costs and opportunity costs as if they were equivalent.”); id. at 6 (indicating that assignment of a legal entitlement “creates an endowment effect, that is, a greater valuation stemming from the mere fact of endowment”).

50. See THALER & SUNSTEIN, supra note 15, at 33–34 (using example of mug given to half of class of college students, with result that students with mugs demand higher price to sell than students without mugs will pay to buy).

51. See SUNSTEIN, supra note 41, at 5–6 (applying the concept to conclude that the Coase Theorem is at least partially incorrect).

Recall that the Coase Theorem proposes that when transaction costs are zero, the allocation of the initial entitlement will not matter, in the sense that it will not affect the ultimate state of the world, which will come from voluntary bargaining. The theorem is wrong because the allocation of the legal entitlement may well matter, for those who are initially allocated an entitlement are likely to value it more than will those without the legal entitlement.

Id.
B. The Inevitable Socio-Political Element of Adjudication

Because of the cognitive factors noted above, there is almost no question that different judges will react differently to the same cases, litigants, lawyers, and legal questions. In this sense, complete uniformity of dispute outcomes is an unattainable goal. Inevitably, judges will bring their own values, orientations, ideologies, and jurisprudential views to the adjudication task. Justice Rehnquist's memorandum defending his erroneous decision not to recuse in Laird v. Tatum is deservedly maligned, but the memorandum contains at least one kernel of truth, noting that a judge without any legal or world views coming to the bench would not be fit to take the bench.

Jurisprudential and demographic diversity may actually contribute to improved adjudication even at the cost of uniformity in that these types of variances among judges create a type of judicial

52. See Jeffrey W. Stempel, Shady Grove and the Democracy-Enhancing Potential of Erie Formalism, 44 AKRON L. REV. (forthcoming 2011) (arguing that Erie "hawks" preferring to apply state law even when it is part of the state's procedural code are excessively concerned with symmetry of state and federal court outcomes, a forlorn quest because similar legal and factual disputes invariably produce disparate adjudication outcomes because of differences in litigant and lawyer charisma, juries, timing, and outside influences).


54. See Laird v. Tatum, 409 U.S. 824, 835 (1972) (Rehnquist, J., mem.) ("Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.").
pluralism similar to electoral pluralism that traditionally has been praised by political scientists and policymakers. But when the

55. See, e.g., Nadia A. Jilani et al., Gender, Consciousness Raising, and Decision Making on the Supreme Court of Canada, JUDICATURE, Sept.–Oct. 2010, at 59 ("The analysis of patterns of voting by male justices indicates quite clearly that as the number of women on the Court increased, the behavior of male justices changed in ways that were both statistically significant and substantively important.").

A particular example from the article involved Safford Unified Sch. Dist. No. I v. Redding, which concerned the constitutionality of a school’s strip search of a 13-year-old girl to discover whether or not she had illegal drugs in her possession. 129 S. Ct. 2633, 2638, 2642–44 (2009). Two judges considered similar in jurisprudential philosophy appeared to clash because of different perspectives on the intrusiveness of such a search:

Justice Breyer suggested that it’s no big deal when kids strip. After all, they do it for gym class all the time. [Plaintiff] Savana Redding didn’t reveal her body beyond her underclothes, said Breyer. Justice Ginsburg, the court’s only female justice, bristled, her eyes flashing with anger. She noted that there’s no dispute that Savana was required to shake out her bra and the crotch of her panties. Ginsburg seemed to all but shout, boys may like to preen in the locker room, but girls, particularly teenage girls, do not.

Nina Totenberg, Supreme Court to hear school strip search case, NAT’L PUB. RADIO (April 21, 2009), http://www.npr.org/templates/story/story.php?storyid=103334943. See also Transcript of Oral Argument at 45, Safford Unified Sch. Dist. No. I v. Redding, 129 S. Ct. 2633 (2009) (No. 08-479), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-479.pdf (“I’m trying to work out why is this a major thing to say strip down to your underclothes, which children do when they change for gym . . . ”). Ultimately, Justice Breyer, like Justice Ginsburg and the Court majority, ruled that the school’s strip search violated the girl’s Fourth Amendment rights. Safford United, 129 S. Ct. at 2641–43. This perhaps provides more evidentiary support for the thesis that availability of a woman’s perspective on the bench can make a difference.

Of course the value of adding different life experiences and attendant consciousness raising to a court is not the same thing as judges voting for the stereotypes and biases of their own demographic group. Consequently, I am not suggesting that the type of seemingly beneficial education judges may receive when serving with judges of different backgrounds makes a case for seeking a more variegated bench of judges exercising unconscious bias. I am willing to be agnostic, however, on the question of whether the negative additional biases in judging may co-exist with the positive of a more aware bench due to its diversity. Alternatively, even if a diverse bench is at its worst a fractured bench of judges unconsciously biased toward their favored groups, this still may be an
judicial variance stems not from a different intellectual attack on legal questions but instead results from cognitive bias due to extra-judicial traits, injustice rather than enrichment seems the more likely result.\textsuperscript{57}

Some "slanting" of the bench becomes inevitable to the extent that members of the legal profession exhibit different beliefs, values, ideologies, and jurisprudential preferences, and to the extent that the larger political context occasionally favors some beliefs, values, ideologies, and jurisprudential preferences over others. To use an obvious example, Republican presidents and governors will tend to appoint a greater percentage of politically and legally conservative judges than will Democratic presidents and governors. Executives of both parties will be constrained in their choices by legislatures, merit selection panels, the organized bar, and other factors—with the mix of these factors changing over time. The same holds true where judges are elected in that the relative electoral impact of the plaintiff's bar, the defense bar, organized labor, business, civil rights groups, and law enforcement will vary over time.\textsuperscript{58}

improvement of a more uniform bench tending to be biased toward a particular group or groups.


57. A biased or even a corrupt judge is not necessarily chronically in error. Just as a broken clock is correct at least twice each day, it may be the case that litigants unfairly aided by a judge’s prejudices (or litigants that purchased the judge’s decision) are legally entitled to victory under the prevailing law if fairly applied. However, even if this were true more often than the broken clock gives the correct time, it would hardly be a justification for a more relaxed attitude toward judicial impartiality.

58. \textit{See} Curtis Wilkie, \textit{In Search of the South Long Lampooned for its Backwater Politics and Plantation Mentality, the Region Now Defies Stereotypes. Today’s Presidential Candidates Find Themselves Confronted with a Diverse and Shifting Landscape}, Globe (Boston) Mar. 6, 1988, at 14, \textit{available at 1988 WLNR} 618982 (detailing the changing demographics of the Southern electorate);
To the extent that these variances reflect only differing judicial orientation of appointees and candidates, this is not only inevitable but probably unobjectionable. No thinking person familiar with a subject is totally without at least tentative views about it. Recusal on this basis would lead to the absurdity warned about in the otherwise faulty and justly infamous Rehnquist Memorandum in *Laird v. Tatum*. However, where a judge’s orientation goes beyond legal philosophy or opinion and becomes pre-existing extra-judicial preference for particular litigants or case outcomes, this violates judicial impartiality. Sound recusal policy would reach these situations where there is an appearance of such impartiality.

C. Spoliation Concerns

1. The Inherent Difficulty of Demonstrating the Impact of a Tainted Judge and the Harm of Harmless Error Analysis

In addition to the difficulty of self-evaluation, there exists the perhaps larger problem of sorting out the impact, if any, on adjudication presided over by a judge whose impartiality is subject to question. In many cases, the presiding judge may be subject to a reasonable question as to his or her impartiality. Nevertheless, the judge may continue to sit under circumstances clearly in violation of the law, or at least under circumstances that cause discomfort but where there may be little or no indication that the same outcome would not have been obtained before a completely impartial judge.

As a result, appellate review based on impact will likely be insufficient as it is often difficult to demonstrate that a particular outcome resulted from lack of impartiality rather than the closely

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see also Curtis Wilkie, *The Fall of the House of Zeus: The Rise and Ruin of America’s Most Powerful Trial Lawyer* 81–89 (2010) (describing the downfall of prominent plaintiff’s attorney Richard “Dickie” Scruggs, the extensive culture of corruption and favoritism in Mississippi, and the pitched electoral and financial battle for ideological/political control of the Mississippi Supreme Court).

59. See Laird v. Tatum, 409 U.S. 824, 835 (1972) (Rehnquist, J., mem.) (noting that complete absence of thought in general legal area of concern suggests lack of judicial competence more than neutrality).

60. See infra text accompanying notes 215–55 (discussing recusal standards and the “substantial group of doubters” trigger for recusal).
contested merits of the case. In addition to the problem of cognitive and unconscious bias, judicial decision-making is affected by what might be termed a spoliation problem. Even where a clearly ineligible judge presides over a proceeding, it is often difficult to determine whether the tainted judge’s participation affected the outcome. As a result, reviewing courts may be disinclined to undo the resulting case outcome.

Although one scholar has implicitly defended this phenomenon by advocating for an “actual justice” test rather than the articulated “reasonable question as to impartiality” test, such a move would only make judicial disqualification worse by leading to insufficient disqualification in cases where actual injustice has probably resulted but cannot be affirmatively demonstrated. By contrast, the appearance standard, while perhaps leading to some over-disqualification, provides greater protection to litigants at relatively low cost in terms of judicial resources and probably no cost in terms of substantive outcome. As Professor Geyh correctly observed:

The problem of over-disqualification is largely one of squandering judicial resources on the administration of unnecessary disqualifications, whereas the problem of under-disqualification is one of subjecting litigants to the loss of life, liberty or property in an unfair (or seemingly unfair) process. As between promoting fairness and administrative efficiency, the former goal is intuitively more compelling...

Going a step beyond this observation, my own normative assessment is that there is no doubt that a legal system should be more concerned with ensuring the fairness of presiding judges than in conserving judicial resources unless the efficiency savings are enormous. Almost certainly, whatever savings would result from a

61. See supra text accompanying note 41 (discussing hindsight bias).
63. Geyh, supra note 6, at 714; see also Stempel, Completing Caperton, supra note 1, at 324–25 (arguing that any adjudication presided over by a judge whose impartiality is not beyond reasonable question deprives litigants of due process and that Caperton’s higher “unreasonable probability of actual bias” standard is insufficiently protective of litigants and justice).
stingier recusal regime would be modest. It simply is not very burdensome to adopt the procedural protections urged in this article, nor is it very burdensome to err on the side of disqualification through the use of the appearance-of-impartiality-standard rather than to err on the side of unfairness through the proof-of-actual-injustice standard.

Although harmless error is a valuable judicial concept that can provide substantial economy and even justice, it becomes problematic when applied to failure-to-recuse cases. Despite this, the harmless error doctrine has substantial support in recusal practice. Although "[t]he traditional rule was that when a disqualified judge sat in violation of an express statutory standard, his rulings were to be vacated on appeal," the majority of states and at least a substantial number of the federal circuits appear to apply the harmless error doctrine to recusal, particularly if there has been extensive activity in the case prior to recusal or failure to recuse. Where risk of actual bias (as opposed to questions of neutrality and appearance) is thought low, . . . and no prejudice to the complaining party has been shown, or is readily apparent on review of the appellate record, appellate courts have proven reluctant to reverse a lower court's judicial

64. FLAMM, supra note 14, § 33.8, at 1012.
65. See FLAMM, supra note 14, § 33.8 at 1012–13 (listing jurisdictions that do not necessarily require reversal of judgments or vacatur of orders handed down by judges who failed to recuse themselves); see also, e.g., Doddy v. Oxy USA, Inc., 101 F.3d 448, 458 (5th Cir. 1996) (holding that judge erred in reentering case after prior recusal but error did not require vacating all trial court rulings); United States v. Troxell, 887 F.2d 830, 833 (7th Cir. 1989) (holding that the trial judge was not required to recuse himself); Lyons v. Sheetz, 834 F.2d 493, 495 n.1 (5th Cir. 1987) (noting that even if the judge should have recused himself from the third action since he presided over the first action and was a party himself to the second action, his failure to recuse himself was harmless error since "no other judge could reasonably have reached a different result"); Powell v. Anderson, 660 N.W. 2d 107, 115 (Minn. 2003) ("[N]ot every case involving judicial disqualification deserves vacatur.").
66. See FLAMM, supra note 14, § 33.8, at 1013 ("[I]t is generally agreed that only those errors that result in an unfair trial, or deprive a party of its substantial rights, are sufficient to warrant reversal or remand."). See generally Tennant v. Marion Health Care Found., Inc., 459 S.E.2d 374, 386 (W. Va. 1995) (holding that violation of the recusal standard "involving only the appearance of impropriety does not automatically require a new trial").
disqualification decision, either in civil cases or in criminal ones. This is so even where the lower court judge clearly erred in failing to disqualify himself.\textsuperscript{67}

Where there was a substantial risk of actual bias by the judge rather than merely a reasonable question as to impartiality or a seemingly minor violation of one of the financial, professional, or factual grounds for disqualification found in 28 U.S.C. § 455(b) or ABA Model Code of Judicial Conduct R. 2.11,\textsuperscript{68} failure to recuse is often not treated as harmless error.\textsuperscript{69} But at the same time, “even when actual bias has been shown, disqualification or reversal will not necessarily be ordered unless the situation is one in which it would be unreasonable to require the complaining party to establish prejudice.”\textsuperscript{70}

\textsuperscript{67} FLAMM, supra note 14, § 33.8 at 1013–15 (citations omitted).

\textsuperscript{68} See infra note 106 and accompanying text (reviewing these grounds for disqualification).

\textsuperscript{69} See FLAMM, supra note 14, § 33.8, at 1013 (stating that where the risk that the judge was actually biased is substantial, the error in failing to recuse is not harmless, and any judgment rendered by the judge may be reversed).

\textsuperscript{70} Id. at 1015 (citations omitted).

Reversal of a decision based on a judicial bias claim is especially unlikely to be ordered where the malfeasance alleged is either excusable; where only an appearance of bias or impropriety is involved, rather than actual bias or impropriety; where the complaining party, despite knowledge of grounds for disqualification, did not seek to disqualify the trial judge before his decision on the merits of the matter was rendered; or where the appellate court is in a position to either remedy any inequities that arguably may have been occasioned by the challenged judge’s failure to disqualify himself, or to independently confirm the correctness of the lower court judge’s decision on the merits. Under such circumstances the error may be deemed to be harmless, and the disqualification issue may be deemed to be moot.

\textit{Id.} at 1015–16 (citations omitted). Flamm further notes that “[t]he harmless error rule is especially likely to be invoked in circumstances in which the case came to the appeals court upon the grant of a motion for summary judgment,” because the appellate court, in giving plenary review to the summary judgment grant will, if affirming the grant, likely think that where “summary judgment was proper, remanding the case to another judge would be an exercise in futility.” \textit{Id.} at 1016–17 (citations omitted). See also Pierce v. Pierce, 39 P.3d 791, 799 (Okla. 2001) (“We have indicated in a divorce case that we would affirm a decree if it was just and equitable even if a trial judge showed bias. . . .” On the other hand, we have
A significant number, but still a seeming minority of jurisdictions, take the view that “once an appearance of partiality has been shown prejudice is presumed,” and the matter must be remanded, heard, and decided again by a new judge.\footnote{Flamm, supra note 14, § 33.8, at 1012; see, e.g., United States v. Antar, 53 F.3d 568, 573 n.7 (3d Cir. 1995) (stating that the integrity of the judiciary is the touchstone of recusal); United States v. Van Griffin, 874 F.2d 634, 637 (9th Cir. 1989); Buttrum v. Black, 721 F. Supp. 1268, 1296 (N.D. Ga. 1989).}

The Supreme Court, despite not being consistently clear on the issue, stated in \textit{Arizona v. Fulminante} that the administration of a case by a judge lacking impartiality is among the “structural defects in the constitution of the trial mechanism, which defy analysis by ‘harmless-error’ standards,”\footnote{Arizona v. Fulminante, 499 U.S. 279, 310 (1991); accord Neder v. United States, 527 U.S. 1, 7-8 (1999) (stating that the harmless error analysis is not apt in cases involving a biased trial judge); Bigby v. Dretke, 402 F.3d 551, 559 (5th Cir. 2005) (stating adjudication before a biased trial judge “represents a structural error subject to automatic reversal”); State v. Esparza, 660 N.E.2d 1195, 1196 (Ohio 1996) (stating that if judge who is not impartial is present on the bench, it is structural constitutional error).}

but the \textit{Fulminante} case appears to have been one of actual bias rather than merely a reasonable question as to judicial impartiality.\footnote{Arizona v. Fulminante involved the voluntariness of a confession given by a murderer suspect to an undercover informant. 499 U.S. at 282–84. A new trial was ordered without admission of the tainted confession. \textit{Id.} at 284. Although the discussion was not strictly necessary to its decision, a majority of the court drew a strong distinction between “classic ‘trial error’” that involves a mere mistake by the adjudicator and structural error that invalidates the entire proceeding, using as one example the lack of an impartial judge. \textit{Id.} at 309–10. In \textit{Fulminante}, the Court used failure to provide counsel in felony prosecutions, exclusion from grand jury on basis of race, denial of right to self-representation, and denial of public trial as examples of structural error. \textit{Id.} Thus, the U.S. Supreme Court appears to have rejected a harmless error approach to erroneous failure to recuse. \textit{See, e.g., Del Vecchio v. Ill. Dept. of Corr., 31 F.3d 1363, 1371 (7th Cir. 1994) (‘[B]ad appearances alone should not require disqualification to prevent an unfair trial. What may appear bad to an observer, especially in hindsight, may not have influenced—or more importantly, may not have had any real possibility to influence . . . the judge . . . ’).} Moreover, in its most significant modern decision applying the federal disqualification statute, the Court stated that reversal of a decision was likely only where there

said that a party is entitled to reversal of a proper judgment when the judge was statutorily required to disqualify.”\footnote{HeinOnline -- 30 Rev. Litig. 757 2010-2011}.
was actual bias or impropriety rather than merely the appearance of bias or impropriety.\textsuperscript{74}

Harmless error review thus appears to be the norm in cases where disqualification is sought based on appearance, financial holdings, past professional affiliations, or factual connections to a case. Judicial failure to recuse on these grounds will not require reversal if the reviewing court believes the same outcome would be obtained before a neutral judge. Although this may seem a reasonable exercise in judicial economy, it unduly weakens the disqualification regime.

As one judge put it, "[t]he issue is not whether a judge whose partiality might reasonably be questioned has been shown to be biased . . . [but, rather,] whether a judge whose partiality might reasonably be questioned should even conduct the proceeding in the first place."\textsuperscript{75} The answer, of course, is that the judge about whom there exists a reasonable question regarding impartiality should not preside. Everything taking place in the case after the improper failure to recuse is wrongful, and the resulting outcome should logically be viewed as a nullity even if it is not viewed as an abomination.

In addition to this logical ground for vacating the outcomes at trials presided over by tainted judges, adjudication before a judge that should have recused creates difficult forensic problems of assessing the degree to which lack of judicial neutrality was a factor in the result and determining whether other reasonable outcomes could have resulted absent the tainted judge's participation.

In many cases, determining whether a tainted judge's participation affected trial results will be reminiscent of that genre of science fiction movies in which modems travel back in time to the site of famous historical events.\textsuperscript{76} Will the intrusion of the modems alter the subsequent course of history? No one knows until the final scene when, in nearly all cases, history remains unchanged, due to a little luck and audience suspension of disbelief.\textsuperscript{77}

In similar fashion, appellate courts reviewing trial outcomes may find it difficult to believe that a seemingly clear case could have


\textsuperscript{76} E.g., BACK TO THE FUTURE (Universal Studios 1985).

\textsuperscript{77} Id.
come out differently had it been officiated by a judge free of disqualifying traits. Perhaps. However, one is hard-pressed to make this determination post hoc. Metaphorically, it attempts to put the genie back in the bottle or close Pandora’s Box. Trial outcomes are at least as path dependent as other parts of life, perhaps more. The judge’s initial orders (e.g., injunctive relief, scheduling, etc.) and interaction with the parties, including even subliminal reaction to the case on the merits, logically affects everything else going forward. Judicial rulings on discovery, which almost never get tested on appeal, can have a particularly shaping effect.

Under these circumstances, it is unwise to apply a harmless error analysis to judicial error in failing to recuse. Requiring vacatur and remand in such cases creates in the courts a strong incentive to treat disqualification matters seriously and to err on the side of disqualification in close cases, a generally preferable approach to the resistance to recusal that has frequently animated the courts. 78

Disqualification matters can be complicated or close, and many denials of disqualification are not obviously incorrect. In such cases, a de facto form of harmless error analysis may animate reviewing courts. Where a case looks clear on the merits, the reviewing court may be excessively inclined to resolve recusal questions against disqualification, particularly if the failure to recuse is not an egregious misapplication of the law.

In effect, the appellate court will be tempted to affirm a failure to recuse under questionable circumstances because it appears, at least subconsciously to the appellate judges, that the trial judge’s participation did not change the seemingly inevitable outcome of the case. Perhaps the trial judge made the same internal calculus when declining to recuse in the first instance, subconsciously finding recusal and transferring to (i.e., burdening) another judge a greater cost than the perceived modest risk of biased judging.

A variant of this problem may have been at work in Caperton and other disqualification cases that have divided the Supreme Court under circumstances where the judge under review appears clearly to have erred in failing to recuse. The overt split in the Caperton Court was over the wisdom of extending constitutional due process

78. See infra text accompanying note 191 (discussing procedural reforms designed to prompt more serious treatment of judicial disqualification decisions by courts).
protections to litigants harmed by a state court judge's failure to recuse (and Justice Benjamin's failure to disqualify himself was clear error under the applicable law of West Virginia). The dissenters, however, may have been motivated by a "does it make any difference?" inquiry, coupled with an "is this worth the time and effort of remand?" question.

Without doubt, the Caperton litigation had already been extensive and, despite plaintiff Caperton's $50 million verdict at trial, several state supreme court justices had accepted defendant Massey's legal defenses based on arguments of claim preclusion and failure to enforce a forum selection clause. My own analysis, like that of the Caperton dissenters in the West Virginia high court, is that those arguments were woefully weak. They nonetheless

79. See Stempel, Impeach Brent Benjamin Now!?, supra note 1, at 20–25 (detailing substantial and repeated legal error by Justice Benjamin in approaching and deciding four separate disqualification motions; noting that Justice Benjamin consistently applied a subjective approach asking whether he personally thought he could be fair rather than the required approach of asking whether an observer might have reasonable questions as to his impartiality). Caperton itself stands as an example of the negative things that can happen when judges do not take appearance standards sufficiently seriously.

80. See Stempel, Impeach Brent Benjamin Now!?, supra note 1, at 25–30 (noting variety of dissenter concerns).

81. According to the U.S. Supreme Court, the West Virginia Court's rationale for vacating the trial court decision was, in part, "that a forum-selection clause contained in a contract to which Massey was not a party barred the suit in West Virginia, and second, that res judicata barred the suit due to an out of state judgment to which Massey was not a party." Caperton v. A. T. Massey Coal Co., 129 S. Ct. 2252, 2258 (2009) (citations to record omitted).


83. See Stempel, Impeach Brent Benjamin Now!?, supra note 1, at 15 n.50 (reviewing Massey's preclusion and forum selection arguments and finding them unpersuasive); see also Stempel, Completing Caperton, supra note 1, at 257–59 (discussing Massey's procedural attacks on Caperton verdict in more detail).

In brief, Massey argued that because a Caperton company, Harman Mining, had previously won a breach of contract suit against a Massey subsidiary, this judgment precluded the business fraud claim prosecuted by Caperton in West Virginia. The argument is not well-taken because the scope and nature of the West Virginia fraud litigation is so different in quality and kind than the breach of contract action in Virginia. Although it is correct that Massey's alleged intentional breaching of the Virginia contract was part of its purported scheme to destroy
enjoyed support from three real jurists who were not subject to the same ethical cloud that hovered over Justice Benjamin. After the U.S. Supreme Court’s remand, the Caperton verdict was again set aside, this time by a 4-1 vote, as the West Virginia Court ruled that a forum selection clause in a coal contract between a Caperton company and a Massey subsidiary required trial of all “related”

Caperton, it was but a part of a much larger, company-wide effort that went far beyond a single contract, transaction, or facility.

At the very least, a finding of claim preclusion under these circumstances is an unusually broad application of the doctrine, prompting one to wonder why some West Virginia Justices would be so eager to extend a doctrine that effectively limits a plaintiff’s day in court and permits a company to escape punishment for allegedly very bad business behavior. Subsequent events have made the West Virginia Court’s affection for Massey all the more puzzling. Massey, it should be recalled, is the parent company of Upper Big Branch Mine, the site of a tragic mining disaster in which nearly thirty miners died. The mine had been the subject of approximately 1,300 safety infractions in five years. Ken Lawless, Massey’s Massive Massacre, INDUSTRIAL WORKER, Oct. 2010, at 11.

Defenders of the Court will undoubtedly argue that this simply means that even unsavory defendants such as Massey and Blankenship received fair and objective application of “the law” of res judicata. In my view, however, they received an excessively generous application of the doctrine. One might have expected that from a Court faced with an impoverished widow and young children being subjected to multiple SLAPP (Strategic Lawsuits Against Public Participation) designed to throttle their objections to construction of a planned polluting facility in a residential neighborhood. It makes no sense to see expansion of a doctrine that has the potential to prevent full adjudicative airing of alleged reprehensible business behavior, particularly in the context of a predatory company attempting to corner more of the coal market, to the potential disadvantage of West Virginia consumers, workers, and competing businesses.

84. Prior to the U.S. Supreme Court’s ruling, Caperton was heard and decided twice by the West Virginia Supreme Court. See Caperton v. A.T. Massey Coal Co., No. 33350, 2007 WL 4150960 at *4 (W. Va. Nov. 21, 2007), vacated, 679 S.E.2d 223 (W. Va. 2008). In the first decision, the court voted 3-2 to reverse the decision, with two justices joining the ultimately disqualified Justice Benjamin. Id.

The rehearing and recusal motions were based on information about state court Chief Justice Spike Maynard vacationing on the French Riviera with Massey CEO Don Blankenship, a childhood friend of Maynard’s, while the case was pending. Caperton, 129 S. Ct. at 2258. Justice Maynard ultimately recused himself, as did Justice Larry Starcher, who had voted in favor of Caperton in the first decision. Id. Justice Benjamin, as acting Chief Justice, appointed two judges to replace Maynard and Starcher. Id. The replacement judges split on the questions of claim preclusion and forum selection, resulting in another 3-2 victory for Massey in the Court’s second decision of April 2008. Caperton, 679 S.E.2d at 223.
matters—including Caperton’s allegations of an effort to destroy him—in Buchanan County, Virginia, making the West Virginia proceedings—and Hugh Caperton’s $50 million verdict—a nullity.85

Although this seems to be an additional miscarriage of justice, the forum selection clause and claim preclusion arguments cannot be totally dismissed and are, whatever their analytical shortcomings, the “law” of West Virginia.86 Under these circumstances, where a case comes out the same with or without a tainted judge who should have been recused at the outset, many judges may view the situation, at least unconsciously, as evidence that excessive sensitivity about the appearance of judicial impartiality merely adds additional cost without affecting substantive case outcomes.

Similarly, the Supreme Court’s most prominent disqualification case prior to Caperton was Liljeberg v. Health Services Acquisition Corp., was also a 5–4 decision.87 The Court divided over the propriety of the conduct of a New Orleans federal trial judge who failed to recuse in a case in which Loyola University, on whose board he sat, had a financial interest.88 In addition to disputing the judge’s state of mind and the wrongfulness of the


86. Technically, of course, the West Virginia Court’s 2008 decision on claim preclusion has been vacated but it nonetheless, as a practical matter, stands as support for Massey’s position on the issue. Caperton, 679 S.E. 2d at 223. On the other hand, the failure of the Court to address claim preclusion in its November 2009 decision, 690 S.E. 2d 322, finding for Massey on the merits based on only the forum selection clause, may reflect some judicial retreat from the broad view of res judicata expressed in the Court’s November 2007, No. 33350 (W. Va. Nov. 21, 2007), and April 2008 opinions. 679 S.E. 2d 223.


88. Id. (Stevens, J., for the majority; Rehnquist, C.J., dissenting; O’Connor, J., dissenting). See also id. at 870 (Rehnquist, C.J., dissenting, joined by White and Scalia, JJ.); id. at 874 (O’Connor, J., dissenting). Justice O’Connor’s dissent, however, was partially procedural in that she “believe[d] the issue [of whether the trial judge had actual knowledge of disqualifying information] should be addressed in the first instance by the courts below” and “would therefore remand . . . .” Id. Like the other dissenters, however, she refused to find that a trial judge’s constructive knowledge of disqualifying information could be a “basis for a violation of 28 U.S.C. § 455(a).” Id.
judge’s conduct,\(^89\) the *Liljeberg* dissents can be read as reflecting hesitancy to set aside a judgment that may have been correct (particularly since the dissenters were reluctant to find actual knowledge of disqualifying information by the trial judge despite a “quite remarkable” set of facts raising suspicion)\(^90\) and would merely result again after disqualification, remand, and a repeat of court proceedings.\(^91\)

Although such sentiments are understandable, they make for an inappropriate approach to judicial disqualification. To be sure, there are many cases that will come out the same way regardless of the judge’s biases or prejudices. The party favored by judicial bias—even a bribing or blackmailing party—may deserve to win on the merits just as a party against whom the judge is prejudiced may deserve to lose on the merits. But such bottom line concerns miss the point. A central tenant of the judicial system is adjudication before a neutral judge and fair jury. The alleged inevitability of an outcome cannot justify a lax attitude toward recusal.\(^92\)

That reviewing judges, or judges assessing their own impartiality, seldom state openly their view that the case is “clear” or “easy” does not negate the real risk that they are doing so silently and subconsciously. To combat this tendency, a more rigorous

89. Ultimately, the *Liljeberg* majority appears to have been dramatically vindicated on the issue of whether the trial judge in question was being “punished” through disqualification merely because of inadvertence, or whether there was something more nefarious afoot. The judge was later convicted for bribery, conspiracy, and obstruction of justice and sentenced to seven years imprisonment. STEPHEN GILLERS & ROY SIMON, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 602 (8th ed. 2009). Despite this, he refused to resign and “continued to draw his salary while in prison” before finally resigning in the face of impending impeachment. *Id.* He was also disbarred. *Id.*


91. It appears that the *Liljeberg* litigation settled after remand as there are no further reported adjudicatory proceedings.

92. This is why any move toward an “actual justice” standard, see, e.g., Cravens, *supra* note 62 and accompanying text, rather than strict enforcement of the reasonable-question-as-to-impartiality standard, is mistaken in light of the goals and commitments of the legal system.
attitude toward disqualification is required. As discussed in Part II.B.5 of this article, this should include replacement of the abuse of discretion standard of review and elimination of a harmless error approach when a trial judge erroneously fails to recuse.

A more practical and less normative objection to relaxing judicial recusal in cases where no miscarriage of justice seems to have resulted is the difficulty in determining whether results in a case were, in fact, largely preordained by the inarguable merits of the case. This is particularly true where failure to recuse occurs at trial. At least on appeal, there are other judges familiar with the record who can see the matter differently and call out the non-recusing appellate judge, as took place in Caperton.93 The trial judge acts alone, however, in shaping the record that will be reviewed on appeal and characterizing the nature of the parties’ legal arguments.

With the case so cast by a judge that should have recused, the results may seem on their face to be obvious and inevitable; but what if a different judge, not subject to disqualification, had shaped the record and assessed the arguments in first instance? Even searching re-examination by an appellate court often (perhaps usually) cannot answer these questions. The “genie” of a tainted opinion by a tainted judge is out of the metaphorical bottle and cannot be put back in the container. Only a new proceeding before a judge whose impartiality is not subject to reasonable question can ensure that the case on appeal is fairly presented.

2. The Inherent Difficulty of Uncovering and Demonstrating Bias or Prejudice in Judges

In addition, questions of judicial impartiality are afflicted with another, perhaps even more difficult, type of spoliation problem. Sometimes, perhaps most of the time, it is very hard to determine the prejudices of a decision-maker. To take an extreme example, a judge may harbor deep-seated racism, sexism, or homophobia but be sufficiently cautious in utterances that she is never found out. While a judge disciplined enough to avoid any

such public utterances or conduct may also be disciplined enough to keep these prejudices outside the adjudication process, this is unlikely. More probably, the hidden biases of such judges manifest themselves in a subtle manner adverse to the disfavored litigants or lawyers: a refusal to adequately credit the testimony of a woman; excessive reliance on the testimony of a Hispanic witness or member of the same college fraternity; concern that a black plaintiff has been insufficiently willing to persevere through pain to get back to work. To the extent any of this happens, some litigants are not getting adequate due process.

Even though judges are relatively high profile members of society, the risk of failure to discover these attitudes is significant. Consider the latest revelations about former President Richard Nixon, who led the nation from 1969 until his Watergate-fueled resignation in mid-1974. For a quarter-century, Nixon was a significant force in national policy as a congressman, senator, vice-president, and as President elected in 1968 and re-elected in 1972 in a landslide. Although Nixon had more than a few critics during his rise to power and reign, he was not regarded as racist, bigoted, or anti-Semitic. Had Nixon been a judge, no one would have

95. Returning to California after service in the Pacific during World War II, Richard Nixon became a rising political star, elected first to the U.S. House of Representatives, then as the state’s U.S. Senator before being chosen as President Dwight Eisenhower’s 1952 vice-presidential running mate, a position he held for eight years before losing the 1960 presidential election to John F. Kennedy. *Id.* Nixon also lost the 1962 California gubernatorial election to Edmund G. “Pat” Brown, father of current California Governor Jerry Brown and went into a period of political exile during which he became a named partner in New York’s Mudge Rose law firm. *Id.* Nixon continued to serve as an elder statesman and intellectual leader of the Republican party between 1962 and 1968. *Id.* His rehabilitation was so sufficiently complete in 1968 that he emerged as the GOP nominee and was elected President, defeating Democrat Hubert Humphrey, Lyndon Johnson’s vice-president and long-time U.S. Senator, as well as Alabama Governor George Wallace, who ran as a third-party candidate. *Id.* See generally MELVIN SMALL, THE PRESIDENCY OF RICHARD NIXON (2003); RICHARD REEVES, PRESIDENT NIXON: ALONE IN THE WHITE HOUSE (2001); ROGER MORRIS, RICHARD MILHOUS NIXON: THE RISE OF AN AMERICAN POLITICIAN (1990); IRWIN F. GELLMAN, THE CONTENDER: RICHARD NIXON: THE CONGRESS YEARS 1946-1952 (1999); RICHARD NIXON, RN: THE MEMOIRS OF RICHARD NIXON (1978).
96. This is not to say that Nixon’s policies were not accused of being anti-black, anti-woman, and so on, in that Nixon frequently supported conservative policies generally unpopular with some groups, such as a “law-and-order”
successfully obtained his disqualification on this basis. However, the secret tapings of White House conversations he ordered have raised substantial questions about his prejudices toward certain groups. In these private conversations, Nixon made very disparaging remarks about Jews, blacks, Italians, and the Irish.98

Thus, as a judge, Nixon could have presided for decades over cases involving litigants and lawyers who he disliked or discounted simply because of their background. Imagine Judge Nixon presiding over a barroom brawl assault and battery case where one of the combatants was an Irish-American who had consumed a few beers before the incident, or a job discrimination case filed by an Italian-American where the purported reason for discharge was the employee’s disorganization, or a similar suit by an African-

campaign platform, support for restrictive abortion laws, etc. Id. Nixon was also accused of corruption, a charge he successfully defused in his famous “Checkers” speech (so named for a dog he received as a gift which he used to illustrate the idiocy of charges that he had been accepting improper donations). See Richard Nixon, Address at University of Virginia (Sept. 23, 1952); “Checkers” Speech (September 23, 1952) Richard Milhous Nixon, UNIV. VA., http://millercenter.org/scripps/archive/speeches/detail/4638 (last visited March 14, 2011). Despite all this, it does not appear that any credible critic ever successfully tagged Nixon with the label of being biased or prejudiced on the basis of sex, race, ethnicity, national origin, or religion—at least not until the release of the White House tapes.

97. This is hardly a far-fetched hypothetical. Despite spending most of his adult life as a full-time politician, Nixon was a lawyer and by all accounts one with strong legal skills, some of which were on display as early as 1936. See, e.g., Richard M. Nixon, Note, Changing Rules of Liability in Automobile Accident Litigation, 3 LAW & CONTEMP. PROBS. 476 (1936). Had his political fortunes not revived during the mid-1960s, Nixon would have been a strong and credible nominee for a judicial post in a Republican Administration.

98. Adam Nagourney, In Tapes, Nixon Rails About Jews And Blacks, N.Y. TIMES, Dec. 11, 2010, at A12, available at http://www.nytimes.com/2010/12/11/us/politics/11nixon.html. For example, in a conversation with an adviser, Nixon denied being prejudiced but stated that he “just recognized that, you know, all people have certain traits,” mentioning Jews as an example. Id. “[T]he Irish can’t drink. What you always have to remember with the Irish is they get mean.” Id. As for Jews, “they are just . . . very aggressive and abrasive and obnoxious” [but] “insecure. And that’s why they have to prove things.” Id. Regarding blacks, Nixon took issue with his Secretary of State’s opinions that black Americans were making progress after decades of oppression and suggested that black progress would be slow because of inadequate support in black culture for achievement and too much “inbreeding.” Id. By contrast, “Italians, of course, those people course [sic] don’t have their heads screwed on tight. They are wonderful people, but [voice trailing off].” Id.
American accused of insufficient work ethic. What about business disputes between Christians and Jews in which the Jew was accused of fraud, duress, or bad faith opportunism? Any reasonable member of any of these groups who was aware of Judge Nixon's private attitudes would presumably want Judge Nixon off their case. However, without revelations such as the White House tapes (which would never have come into existence if the man had been Judge Nixon rather than President Nixon), there would be no apparent basis for recusal under current federal law. The attorneys for these disfavored litigants might have a strong hunch that Judge Nixon had his prejudices but they would be stuck with Judge Nixon for the duration of the matter.

It is likely that there are many cases of undiscovered bigotry on the bench (and in the Oval Office and in Congress). While it may be that the constraints of the system prevent such judges from harming litigants because of hidden biases, realism requires a strong commitment to paying more, rather than less, attention to judicial impartiality. The extent to which discovering the "true self" and inner-most attitudes of a judge is difficult or impossible, which strongly argues for setting high substantive standards of impartiality and enforcing them through a broad set of procedural protections. Although this may result in some unbiased judges occasionally passing a case on to a judge with a greater perception of fairness, it seems a fair price to pay for enhancing confidence in the courts.

II.

THE PROMISE OF PROCEDURAL PROTECTIONS

A. Per Se Disqualification Standards (Without Exception) as Useful Procedural Protections

Faced with a situation where evaluating judicial behavior and its impact on ultimate case outcomes is difficult, the judicial system has wisely (if at times haphazardly) evolved in the direction of procedural and process-based disqualification. Continuing and enforcing the trend holds the best promise for protecting judicial impartiality in the post-Caperton world.

99. See Geyh, supra note 6, at 727–31 (noting modern movement toward objective and per se, procedurally based disqualification justified by particular connections between judge and litigants or lawyers, such as financial investments, family ties, or professional affiliations).
As discussed above, attaining accurate information about judicial biases and prejudices is difficult.\textsuperscript{100} Even when there appears to be a substantial basis for questioning a judge’s impartiality, many judges will be reluctant to recognize the problem or will be unwilling to recuse despite a compelling reason to do so.\textsuperscript{101} Judges appear to divide substantially as to the degree of suspicion that requires disqualification.\textsuperscript{102} On appeal, reviewing judges are likely to defer to the non-recusing judge, particularly if the judge enjoys an otherwise good reputation and the case for disqualification is anything less than clear-cut.\textsuperscript{103} Even where recusal was clearly required, the reviewing court may find that the judge’s failure to disqualify did not affect the case outcome.\textsuperscript{104}

Under these circumstances, any softening of attitudes toward judicial disqualification could be disastrous. One can make a strong case that under the status quo, many judges subject to serious questions about their impartiality fail to recuse in too many cases. To combat the factors that promote under-policing of judicial impartiality, the legal system needs to strengthen its procedural protections. While a cost-benefit analysis is problematic due to the difficulty of quantifying the recusal situation, it favors erring toward recusal, at least if the system assigns a reasonably high value to achieving greater impartiality and public confidence. The cost of a stronger recusal regime simply is not that significant.\textsuperscript{105} It largely

\textsuperscript{100} See supra Part I.C.2 (observing that because educated, sophisticated, politically savvy people such as lawyers and judges seldom vocalize their prejudices, detecting bias is inherently difficult).

\textsuperscript{101} See supra Part I.C.1 (explaining that high settlement rates of cases and the possibility that a party was favored by a biased judge limits ability to detect and correct disqualification errors on appeal).

\textsuperscript{102} See supra note 87 and accompanying text (noting division of the Supreme Court in \textit{Caperton} and \textit{Liljeberg} cases, both 5–4 decisions in instances where it appears clear that recusal was required).

\textsuperscript{103} See supra text accompanying notes 76–78 (pointing out that the tendency of reviewing judges to give judge under review benefit of the doubt combined with hindsight bias further limits review on appeal as a correction for disqualification errors).

\textsuperscript{104} Id.

\textsuperscript{105} As a percentage of government and social expenditures, adjudication as a whole is cheap, generally consuming only 3\% or so of government budgets. See, e.g., \textit{LEGISLATIVE BUDGET BOARD, TEXAS FACT BOOK} 46 (2010), available at http://www.lbb.state.tx.us/Fact_Book/Texas_FactBook_2010.pdf (showing that only 4\% of the state budget goes to the judiciary). Consequently, even a disqualification regime that increases adjudication costs considerably will never be
involves only the logistical burdens of transferring cases to judges who are not subject to impartiality concerns.

To be sure, the Code of Judicial Conduct and federal disqualification statutes go a long way in advancing procedural protections by providing for automatic disqualification in cases of disqualifying financial or family ties, but some substantive fine-tuning is required. For example, in addition to the substantive appearance standard and the requirement that a judge recuse where the judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding," both state and federal law require that a judge disqualify himself from further proceedings where the judge:

- served as a lawyer in the matter, had a partner serving as counsel, or was a material witness;

- served while in government as counsel, advisor or material witness in the matter, or expressed an "opinion concerning the merits of the particular case in controversy;" both state and federal law require that a judge disqualify himself from further proceedings where the judge:

...
• has knowledge that in individual or fiduciary capacity, he or a minor resident child has a financial interest in the subject matter in controversy or is a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding. In addition, the judge must “inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household[.]”

• has a spouse or other reasonably close relative who is a party, a lawyer in the proceeding, [is] likely to be a material witness, or [is] “known by the judge to have an interest that could be substantially affected by the outcome of the proceeding . . .”

These are important bulwarks of judicial impartiality and public confidence in the courts, the product of the forward-looking 1972 version of the ABA Model Code of Judicial Conduct (continued through with the 1990 and 2007 versions of the Model Code) and the 1974 amendments championed by former U.S. Senator Birch Bayh. But there remain some gaping holes in this

111. 28 U.S.C § 455(c) (2006); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(B) (2007).
113. See generally MACKENZIE, supra 53, at 209–23 (explaining that changes to the federal statute governing judicial disqualification were prompted by changes in the ABA Model Code and an adverse reaction to Rehnquist’s failure to recuse in Laird v. Tatum, 409 U.S. 824, 826–28 (1972) (Rehnquist, J., mem.)); John P. Frank, Disqualification of Judges: In Support of the Bayh Bill, 35 LAW & CONTEMP. PROBS. 43, 62–63 (1970) (discussing later-enacted legislation proposed by Birch Bayh (D-Ind.) designed to widen grounds for disqualification and eliminate or narrow exceptions); Leubsdorf, supra note 53, at 247 (explaining that the 1974 amendments to the disqualification statute were designed to address perceived problems, including resistance to recusal exemplified by Justice Rehnquist’s failure to recuse in Laird v. Tatum); Jeffrey W. Stempel, Chief William’s Ghost, supra note 40, at 825–32 (describing history and development of
edifice designed to be a bulwark of required disqualification in what are the most objectively obvious sources compromising judicial integrity.

1. Limiting Waiver

A significant shortcoming of the ABA Model Code, upon which most state disqualification laws are patterned, is that the Code permits the litigants to waive disqualification except in cases where the judge has "personal bias or prejudice concerning a party's lawyer or personal knowledge of facts that are in dispute in the proceeding." By contrast, federal law prohibits judges from accepting waiver of disqualification in cases involving any of the these largely financial, business, or litigation connected ties listed in 28 U.S.C. § 455(b).

Although there is some safeguard in that lawyers and litigants may not be forced to make this decision in the potentially intimidating presence of the judge or court personnel (who may

114. See MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(1) (2007) (listing personal bias or prejudice as grounds for disqualification). The Model Judicial Code Rule 2.11(c) provides the following:

A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

115. See 28 U.S.C. § 455(c) (2006) (forbidding judges from accepting waiver of disqualification grounds based on § 455(b)). See also text accompanying notes 46–51 (highlighting that although parties may consent to trial before the judge becomes subject to § 455(a) reasonable-question-as-to-impartiality disqualification, consent is not permitted where disqualification is based on one or more enumerated grounds of § 455(b)). In contrast to the corresponding Model Code provision, § 455(c) states that "[n]o justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b)." 28 U.S.C. § 455(c) (2006).
themselves be intimidating or will report to the judge a party’s hesitancy or unwillingness to waive disqualification), the Model Code approach nonetheless permits too much danger that lawyers and litigants will be mugged by the “velvet blackjack” of de facto coercion.\textsuperscript{116}

Where a financial, professional, or factual basis for disqualification arises, it is seldom symmetric. Almost by definition, it favors one party over others. Consequently, the favored party (absent concerns of reversal on appeal\textsuperscript{117} or a judge’s overcorrection in favor of the opposite party in order to refute any suspicion of bias),\textsuperscript{118} will likely be quite willing to waive. The party

\begin{quote}
\textsuperscript{116} See MACKENZIE, supra note 53, at 97 (using the term to describe the situation where Judge Learned Hand would ask litigants to consider waivers of disqualification based on Hand’s investment in companies involved in dispute).

\textsuperscript{117} Although a waiver of disqualification may be technically correct and not in itself reversible, the outcome of the case at trial may be more vulnerable on appeal in cases where a reviewing appellate court may be uncomfortable about a judge’s participation notwithstanding obtainment of a waiver of disqualification.

\textsuperscript{118} The federal judge for whom I clerked, Raymond J. Broderick (E.D. Pa.), was convinced this type of overcorrection took place in a case in which he appeared before a Pennsylvania state court trial judge (Judge Flood) who had been his “preceptor” (a type of assigned mentor at a time when such mentorship/apprenticeship was required for bar admission in Pennsylvania), but this was not viewed as a problem by counsel or the parties in the case, who proceeded through with a bench trial before Judge Flood.

Judge Broderick was surprised to suffer an adverse outcome in the case, one in which he was convinced that the facts and law strongly favored his client. Years later, he broached the matter with Judge Flood, who replied that perhaps he had been unduly tough on young lawyer Broderick “because I wouldn’t want anyone to think I was favoring you.” Rather than try to cite to a specific “interview” with Judge Broderick, I simply note that he was sufficiently upset about the episode decades later for me to hear the story at least three times during my two-year clerkship. In retrospect, Judge Broderick stated that he would have insisted on Judge Flood’s disqualification in order to have assigned a judge completely freed of possible temptations for favoritism for a former mentee or the alternative over-correction against the mentee so that observers would not wonder about judicial bias.

It is of course possible that Judge Broderick misconstrued the situation (although in my experience he was a shrewd and accurate observer of courtroom events and the relative strengths and weaknesses of cases) or that Judge Flood was engaged in some mistaken etiquette by ascribing the case loss to being too close to the presiding judge. My point is simply that episodes of this type, which should give rise to concern, can be eliminated entirely by barring waiver of financial, professional, or personal connection grounds for recusal.
disadvantaged by the financial or other connection may find it difficult and uncomfortable to resist waiver.

When the great Southern District of New York Judge Learned Hand presided over trials, his apparently diversified financial interests raised recusal issues with some frequency, with the financial interest in question often being significant but not overwhelming. In what came to be known as the velvet blackjack, Judge Hand routinely sought and obtained waivers from the

The Broderick/Flood view that one may “bend over backwards” to avoid being accused of favoritism to one side and in the process unwittingly give undue favor to the opposite side has support in academic literature. See, e.g., Christin Jolls, Cass R. Sunstein, and Richard H. Thaler, A Behavioral Approach to Law and Economics, in SUNSTEIN, BEHAVIORAL LAW & ECONOMICS, supra note 41, at 13, 24–26 (describing Matthew Rabin’s “model of fairness” and concluding that reputation and aspirations to be seen as fair are powerful motivators).

Although less obviously applicable, the literature on context-dependent decision making is consistent with the occasional tendency of judges to over-correct even if the general norm is one of resistance to recusal. See Mark Kelman, Yuval Rottenstreich & Amos Tversky, Context-Dependence in Legal Decision Making, in SUNSTEIN, BEHAVIORAL LAW & ECONOMICS, supra note 41, at 61 (presenting results of a series of case studies tending to prove that context affects the legal decisions of judges and jurors). In the normal context, where the disqualification norm involved common professional connections not normally seen as grounds for recusal, a jurist like Judge Flood presumably is making whatever decision he would otherwise make. But where the context changes to involve a former mentee but the judge fails to recuse, the internal cognitive dissonance (to use Leon Festinger’s memorable phrase) about deciding a case with this greater degree of professional tie could push the judge toward deciding against the mentee. See generally LEON FESTINGER, HENRY W. RIECKEN & STANLEY SCHACHTER, WHEN PROPHECY FAILS (1956) (introducing the social psychology theory of internal cognitive dissonance).

Similarly, a person’s tendency to make a “second-order” decision, defined as “decisions about the appropriate strategy for reducing the problems associated with making a first-order decision” could explain part of a judicial over-correction. Cass R. Sunstein & Edna Ullmann-Margalit, Second-Order Decisions, in SUNSTEIN, BEHAVIORAL LAW AND ECONOMICS, supra note 41, at 187. In this anecdote, Judge Flood made a first-order decision not to recuse (just as then-attorney Broderick made a decision not to seek recusal). Thereafter “stuck” with his decision to stay on the case, Judge Flood may have consciously or unconsciously realized that one way to mitigate any criticism of his participation in the case was to rule against his former law clerk. I am applying the term a bit differently than Sunstein and Ullmann-Margalit in that they suggest that use of second-order decisions (e.g., forming a commission or delegating to an administrative agency) is often a way of avoiding that first-order decision altogether rather than compensating for a first-order decision.
Informed by this episode, the drafters of the 1974 revisions to 28 U.S.C. § 455 included the non-waiver provision. For similar reasons, the Model Judicial Code should follow suit. Under the Code's approach, no matter how honorable the intentions of those involved, it is impossible to prevent the impression that waivers are obtained (and possibly coerced) under circumstances where the ground for disqualification is weighty enough that the judge should not have presided, notwithstanding the litigants' apparent agreement that the judge's financial, professional, or factual tie to the case was not a problem.

2. Eliminating De Minimis Exceptions to Financial, Professional, or Factual Disqualification

Another shortcoming is that the ABA Model Code is not as rigorous as federal statutory law. Although the Code provides for the disqualification of judges where the financial ties listed above are present, it defines the requisite “economic interest” triggering disqualification as “ownership of more than a de minimis legal or equitable interest,” with a de minimis interest defined as “an insignificant interest that could not raise a reasonable question regarding the judge's impartiality.” In addition, unless the judge

119. See MACKENZIE, supra note 53, at 97 (describing Hand's conduct). Of course, it is possible that litigants agreed to Judge Hand's participation because he was Learned Hand, one of the most revered judges in American law. See James L. Oakes & Roger K. Newman, Learned Hand, in Yale Biographical Dictionary of American Law 248 (2009) (“Although appellate opinions often resemble pebbles cast in a passing stream, Judge Hand's opinions have cast a long intellectual shadow.”). Oakes and Newman also note that Hand “recognized that he had biases and struggled to be impartial,” and described Hand's examination of patents and re-creation of accidents in a manner that could suggest inappropriate judicial investigation rather than assessment of facts introduced at trial. Id.; See generally Gerald Gunther, Learned Hand: The Man and the Judge (1994) (providing an overview of Judge Hand's approach to judicial decisions).

120. See MACKENZIE, supra note 53, at 98 (noting that the absence of a de minimis exception to recusal based on financial ties to litigant in federal statute was a reaction to perceived abuses in which judges extracted waivers from litigants in cases of small financial holdings, as exemplified by Judge Hand's practice); Jeffrey W. Stempel, Rehnquist, Recusal & Reform, supra note 53, at 628–31 (describing congressional awareness of problem of extracted waivers of disqualification).

is managing the economic interest or it is one that “could be substantially affected by the outcome of a proceeding before a judge,” it does not include investments in mutual funds, government securities or religious and charitable securities, deposits in mutual savings associations, credit unions, or similar holdings.122

This escape route from financial disqualification, although well intended, unfortunately leaves open the door to self-serving assessments by challenged judges and charitable review on appeal. State disqualification practice, which generally follows the ABA Model Code, would be improved by adopting the strict federal approach in which there is no exception for de minimis financial ties. Any of the listed financial interests should be sufficient to disqualify the judge.

Although the Code’s definition of de minimis interests contains the objective “reasonable person” ground for assessing the possible impact of judicial financial ties to a litigant or dispute, policing this aspect of the Code with any rigor requires significant expenditure of judicial resources that becomes unnecessary if there instead exists a per se bar to judicial participation where the judge has any of the Code or § 455(b)’s forbidden financial ties.

122. Id. In its effort to be brief, the summary in the text may lack precision. The complete language of the exception discussed reads as follows:

Except for situations in which the judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

(1) An interest in the individual holdings within a mutual or common investment fund;

(2) An interest in securities held by an educational, religious, charitable, fraternal, or civil organization in which the judge or the judge’s spouse, domestic partner, parent, or child serves as a director, an officer, an advisor, or other participant;

(3) A deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or

(4) An interest in the issuer of government securities held by the judge.

Id. “Fiduciary” is defined to include “relationships such as executor, administrator, trustee, or guardian.” Id.
Further, what may be termed insufficiently large to create a "reasonable" concern over impartiality itself requires some difficult determinations on which courts have divided.123 In addition, accurate determinations of "reasonable" risk may be hard to obtain where the judge's own cognitive biases and a reviewing court's tendency to avoid suggesting that a fellow judge may be cheaply bought or that the financial tie in question, although small, is but the tip of the iceberg of strongly held judicial attitudes toward a particular entity, industry, or activity.

A variant of this problem is presented when enforcing the provisions of federal and state law that require disqualification "in any proceeding in which [the judge's] impartiality may be reasonably questioned."124 Nevertheless, the presence of a catch-all criterion for disqualification regarding questionable impartiality is necessary to catch threats to judicial independence that do not fall neatly within the enumerated categories of statute or code.125 The use of a potentially elastic term like "reasonable" is probably a necessary evil when crafting such a catch-all.126

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123. See supra text accompanying note 87 (noting sharp division of the U.S. Supreme Court in Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988)).


125. Certainly, this has been the view of the legal profession for the past four decades during which the reasonable question as to the impartiality standard has been part of the ABA Model Judicial Code and the federal disqualification statute. The importance of this ground for disqualification is reflected in the frequency with which it is invoked and addressed by courts. For example, 3,788 cases in the Westlaw database mentioned 28 U.S.C. § 455(a) between 1975 and January 1, 2011—an average of 108 per year. Search for "28 U.S.C. § 455(a)," WESTLAW, http://www.westlaw.com (last performed Apr. 20, 2011) (filtering citing references for 28 U.S.C. § 455 by (1) document type, federal and state cases; (2) locate terms and connectors, "455(a)"); and (3) date, after 1/1/1975 and before 1/2/2011).

126. During development of the 1972 ABA Model Code of Judicial Conduct, in which this ground for disqualification first appears, and during amendment of 28 U.S.C. § 455, there was considerable focus on the wording of the provision and the means of operationalizing the concept that disqualification should be required where a reasonable observer might have doubts about a judge's neutrality even though there was no proof of actual bias or prejudice. The "reasonable question as to impartiality" language resulted, and it is now widely accepted throughout the profession. See JAMES J. ALFINI ET AL., supra note 14, at §4.04 (reviewing development of the "reasonable question as to impartiality" standard); FLAMM, supra note 14, at chs. 1–2 (reviewing development of the
By contrast, it is a mistake to introduce the concept of the reasonable observer's degree of concern when attempting to apply sound recusal policy based on the judge's financial ties to a case. Where financial ties are considered, there is no need to introduce potential disagreements and difficulties of empiricism in determining what people may think. Rather, a broad, easily applicable bright-line rule is more useful. A simple statement that disqualification for any financial interest of the type prohibited by § 455 and Rule 2.11 limits problems of application and removes the risk that self-serving bias or deference to colleagues will prevent the system from recognizing that a relatively small economic interest is indeed large enough to warp judgment and undermine fairness.

By way of comparison, one cannot help but note that both federal law and the Model Code use such an approach to the question of disqualification based on prior professional or factual connection to the case. The rules do not provide for disqualification only if the judge’s former lawyering activity related to the matter (or that of a colleague) was significant, important, or would lead a reasonable observer to wonder about the judge’s neutrality. On the contrary, if the judge was involved in the matter, disqualification is required, period.127

Similarly, disqualification on the basis that the judge was a material witness in a matter does not depend on what reasonable observers would think. If the judge has been a witness, disqualification ensues.128 Even for less measurable problems such as whether a former government lawyer “expressed an opinion

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128. See 28 U.S.C. § 455(b)(2) (2006) (requiring disqualification when the judge has been a material witness concerning the matter); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(6)(c) (2007) (requiring disqualification where judge serves as a witness regardless of importance or impact of testimony and regardless of whether judge’s perceptions have changed or whether testimony and past impressions are still remembered by judge).
concerning the merits of the particular case in controversy," there is no escape hatch similar to that available for *de minimis* economic interests.\(^{129}\) The former government lawyer is not asked whether his prior opinion was well-developed, deeply held, tentative, or irrevocable. The mere existence of the prior opinion requires disqualification.\(^{130}\)

If economically based disqualification is to be applied with sufficient seriousness, it too should be stripped of any possible avoidance based on differing notions of what amount of economic interest might compromise a judge's ability to be fair. Although the financial tie in question may not be large in absolute terms or in relation to the judge's overall wealth, it may still hold considerable power to warp judgment.\(^{131}\) Investment or ownership may easily create a type of allegiance that undermines impartiality and may be especially problematic in cases where the value of the economic interest is relatively small and thus affects the judge subconsciously while the judge believes he has banished from his mind the possibility that the economic tie has colored his perception.\(^{132}\)

### 2. Recognizing Substantial Campaign Support as a Disqualifying Interest

Perhaps the greatest weakness of the economic interest aspects of current disqualification law is the degree to which it largely overlooks the problems created by judicial election campaigns. Until the 2007 revisions, the ABA Model Code essentially avoided the issue. The current Model Code encourages states with elected judiciaries to adopt a version of Rule 2.11(4), which provides that a judge should disqualify where the judge has

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130. *Id.*; *MODEL CODE OF JUDICIAL CONDUCT* R. 2.11(6)(b) (2007).
131. *See Thaler & Sunstein, supra* note 15, at 33–35, 120–21 (observing that the phenomena of status quo bias and "loss aversion," in which people tend to overvalue what they already possess relative to what could be gained, may make judges reluctant to transfer a case to another judge due to a perceived inability to handle the matter and cause judges to be wary of alienating supporters by creating situations in which supporters are effectively punished by not being able to have their cases heard by judges originally thought qualified).
132. *See supra* text accompanying notes 23–26, 30 (discussing cognitive biases and the difficulties people have in realizing their own biases and prejudices).
received substantial campaign contribution support from a party or the party’s lawyer. 133

To date, only two states have adopted the ABA’s proposed standard requiring disqualification where the judge has received significant electoral support from lawyers or parties, 134 although a few states have provisions giving greater scrutiny to disqualification where the judge has received campaign support from a litigant or lawyer. 135 Roughly eighty percent of the state systems have some form of judicial elections, 136 although only about twenty states have what might be termed direct elections in the matter of other political offices (six partisan and fifteen non-partisan), 137 while many states provide for retention elections after judges are initially appointed to the bench through some type of merit selection process. 138

133. See infra text accompanying notes 147-50 (describing the serious problems of campaign contributions in judicial elections). A “contribution” is defined as “both financial and in-kind contributions such as goods, professional or volunteer services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure.” MODEL CODE OF JUDICIAL CONDUCT Terminology (2007). “Aggregate” contributions “mean[] not only contributions in cash or in kind made directly to a candidate’s campaign committee, but also all contributions made indirectly with the understanding that they will be used to support the election of a candidate or to oppose the election of the candidate’s opponent.” Id.

134. ARIZ. CODE OF JUDICIAL CONDUCT, Canon 2, Rule 2.11(A)(4) (2010); UTAH CODE OF JUDICIAL CONDUCT, Canon 2, Rule 2.11(A)(4) (2010).

135. ALA. CODE § 12-24-2(c) (2006); MISS. CODE OF JUDICIAL CONDUCT 3E(2) (2008); see also Adam Skaggs & Andrew Silver, Promoting Fair and Impartial Courts Through Recusal Reform, BRENNAW CENTER FOR JUSTICE 7–8 (2011) (“To date, however, only Utah and Arizona have adopted the [ABA Model] rule . . . . Since Caperton, several states have implemented new rules that, to varying degrees, respond to the different forms of spending seen in today’s expensive judicial election environment.”).


137. See Jan Witold Baran, Judicial Elections: Changes and Challenges, 42 CT. REV. 16, 16 (2006), available at http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1021&context=ajacourtreview&seiredirect=1#search=%22Judicial+Elections:+Changes+and+Challenges,%22 (“Six states have partisan elections, 15 have nonpartisan elections, and 17 have uncontested retention elections after an initial appointment.” (citations omitted)).

138. See Geyh, Judicial Elections, supra note 136, at 52–53 (summarizing state selection methods); Baran, supra note 137, at 16–17 (same); AM. JUDICATURE SOC’Y, JUDICIAL SELECTION IN THE STATES, APPELLATE AND GENERAL
To perhaps state the obvious, this creates a situation in which judicial candidates (even the incumbents facing only a retention election) tend to need, and usually do receive, significant financial support. Not surprisingly, much of that support comes from business entities or lawyers with a substantial amount of litigation business; the typical contributor to a judicial election or retention campaign is not an individual sending a small check in the mail.139

Although judges in judicial election states are not permitted to have more than a de minimis investment or employment interest in the litigants or in their counsel, the current system simultaneously permits judges to receive large, perhaps even vital economic aid from litigants and lawyers appearing before them. Whatever misgivings one may have about the de minimis exception to the economic interest disqualification standard, it at least is a standard that attempts to prevent compromised judges from presiding over cases. By contrast, the rules regarding electoral support are comparatively no rules at all, save for whatever campaign finance regulations may exist.

State regulation on judicial campaign spending varies and, in some cases, sets fairly tight restrictions on direct campaign contributions to judges seeking election or retention. Even this, however, is too little protection for judicial impartiality and public confidence. In the notorious Caperton v. Massey situation, West Virginia limited permissible direct campaign contributions to $1,000, an amount for which judges presumably would not sell out.140

139. See James Sample, Court Reform Enters the Post-Caperton Era, 58 DRAKE L. REV. 787, 791 (2010) (emphasizing that primary sources of judicial campaign contributions are “often the litigants, lawyers, and litigation stakeholders appearing before the judges they support”). See also AM. JUDICATURE SOC’Y, JUDICIAL CAMPAIGNS AND ELECTIONS (2011), available at http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state (last visited Apr. 25, 2011) (listing campaign contributions by state; reflecting large portion made by attorneys and commercial or institutional entities likely to be more frequent litigants than individuals).

140. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2257 (2009). See also Stempel, Impeach Brent Benjamin Now!?, supra note 1, at 3–5 (describing the reaction to Caperton); Stempel, Completing Caperton, supra note 1, at 281–90 (analyzing the criticisms of Caperton).
Massey CEO Don Blankenship evaded this restriction by establishing an advocacy group to which he contributed approximately $2.5 million that was largely spent in support of judicial candidate Brent Benjamin. Blankenship also spent $500,000 of his own money on behalf of the Benjamin candidacy without funneling the funds through the official Benjamin campaign. Where campaign finance laws are so easily surmounted, the case for an expanded recusal regimen based on campaign support grows.

The problem of money in judicial politics is serious. Surveys consistently suggest that a large majority of the electorate perceives that judicial decisions are impacted by campaign contributions. In Caperton, the plaintiffs, after having lost three prior disqualification motions, conducted a survey showing that West Virginians supported Justice Benjamin stepping aside in view of the large financial support he had received from Blankenship.

141. Blankenship has since resigned as Massey CEO, apparently as a result of adverse publicity and criticism regarding Massey’s poor safety record and the 2010 Upper Big Branch mining disaster in which twenty-nine coal miners died. Clifford Krauss, Massey Energy’s Chief Is Quitting, Renewing Talk of a Takeover, N.Y. TIMES, Dec. 4, 2010, at B7. Prior to this eventual capitulation, Blankenship appeared relatively impervious to criticism. He was outspoken in his pro-business, anti-labor, anti-government, anti-environment beliefs and his seven-figure support of the Benjamin supreme court candidacy. See Stempel, Impeach Brent Benjamin Now!?, supra note 1, at 4 n.5 (describing Blankenship’s support of Benjamin).


143. Id.

144. See Facts & Stats, JUSTICE AT STAKE, http://www.justiceatstake.org/resources/facts_stats_and_quotes/facts_stats.cfm (last visited Mar. 19, 2011) (pointing out that “76% of Americans believe campaign contributions have at least some impact on a judge’s courtroom decisions”).

145. Stempel, Impeach Brent Benjamin Now!?, supra note 1, at 47. Undaunted, Justice Benjamin refused to disqualify himself for a fourth time, labeling the survey an unpersuasive “push poll” designed for litigation rather than research. Id. at 49.

Although his skepticism was not without some basis in that the question was a bit loaded, the concern expressed by the survey respondents was so overwhelming that, absent proof of outright fraud in the polling, it should have mattered more to a reasonable judge facing a recusal motion in a large, high profile case. Public
To the extent that substantial campaign support creates the impression (and perhaps the reality) that special interests can shape the bench to their liking, it greatly undermines both the ideals of neutrality and fairness, as well as public confidence in and support for the courts. Where judges receive contributions from those who appear before them or who have direct interest in case outcomes, the public (to the extent it knows of the situation) likely becomes more disillusioned. At a minimum, losing litigants and counsel are less likely to accept judicial outcomes, which may lead to the specific problems of protracted appeals, attempts to avoid paying judgments or complying with injunctions, as well as the more general problem of diminished authority of the courts.\footnote{146}

The contrast between elected judges in the states with campaign fundraising and appointed judges in the federal system indicates the breadth and depth of the problem. In the most recent example of federal judicial corruption to hit the headlines, Eastern District of Louisiana Judge G. Thomas Porteous, Jr. was impeached “in part for failing to disqualify himself from a case in which he had confidence in the West Virginia high court was clearly at risk, but Justice Benjamin, as he did consistently over a two-year period, applied an erroneous legal analysis to the issue of his participation and continued to incorrectly conclude that he could participate in the case so long as he personally felt he could be impartial. See id. at 38 (describing errors of Justice Benjamin’s legal analysis); see supra text accompanying note 93 (noting that the presence of additional judges sitting on an appellate panel or state supreme court may create greater informal pressure for recusal of an individual judge or justice); see infra text accompanying note 215 (discussing application of reasonable-question-regarding-impartiality standard of judicial recusal).

146. An extreme example of unwillingness to accept a case outcome (although, ironically from a state where judges are not elected) is \textit{Demoulas v. Demoulas Super Markets, Inc.}, 677 N.E.2d 159 (Mass. 1997). Two lawyers representing elements of the Demoulas family in a pitched battle for control of the family’s grocery store interests were so obsessed with losing at the trial court level that they engaged in extensive deception and role-playing designed to get the judge’s law clerk to provide information about the judge’s corruption (which the law clerk and all credible sources knowledgeable about the matter denied). \textit{Crossen, Curry disbarred by Mass. Supreme Judicial Court}, MASS. LAWYERS WEEKLY, Feb. 11, 2008, \textit{available} at http://masslawyersweekly.com/2008/02/11/crossen-curry-disbarred-by-sjc/. The overarching ruse involved pretending to be interested in recruiting the law clerk for a fictitious job with a fictitious entity, followed by harassment of the clerk. \textit{Id.} Eventually, the two distrustful-cum-paranoid attorneys were disbarred. \textit{Id.}
solicited money from an attorney in a pending case.”

Without attempting to undervalue the importance of other factors leading to the impeachment, one could describe this aspect of the basis for disciplining Judge Porteous as merely everyday business-as-usual in many state courts. In the states with judicial elections, judges preside every day over cases where the lawyers, the parties, or both have contributed to their campaigns, often asymmetrically. What might get a federal judge removed from the bench is standard operating procedure in many state courts.

To its credit, the ABA Model Code of Judicial Conduct attempts to prompt states to combat the problem. ABA Model Code Rule 2.11(4) invites states to adopt a provision requiring recusal where the judge

[k]nows or learns by means of a timely motion that a party, a party’s lawyer, or the law firm of a party’s lawyer, has within the previous [insert number] years[s] made aggregate contributions to the judge’s campaign in an amount that [is greater than $][insert amount] for an individual or $ [insert amount] for an entity][is reasonable and appropriate for an individual or an entity].

Under the ABA approach, states with elected judiciaries are encouraged to adopt a customized rule of recusal for judicial disqualification in cases where the amount of campaign support is sufficiently high to raise reasonable questions as to a judge’s impartiality. “Contributions” are defined in the ABA Model Code as “both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance which, if obtained by the recipient otherwise would require a financial expenditure.”

An “aggregate” contribution could be “contributions in case or in kind made directly to a candidate’s campaign committee” or “all contributions made indirectly with the understanding that they will be used to support the election of a


candidate or to oppose the election of the candidate’s opponent.”  
The intent is to address all monetary support from all sources and not only direct contributions to a judicial candidate’s official campaign. Many states have specific statutes limiting the amount of such direct contributions, but as the Caperton case revealed, such limitations on direct campaign funding are easily evaded.

As of the end of 2010, only two states have adopted some version of the ABA’s suggested limit on campaign support. Most states have declined the ABA’s invitation to take action. Those that have acted have set the bar at a level quite solicitous of judicial candidates and their potential contributors, permitting substantial financial assistance to judicial campaigns without triggering an obligation to recuse. For example, in Nevada, the state judiciary

150. Id.
151. It remains to be seen whether even the broad language of the ABA Model Code of Judicial Conduct would reach all so-called independent expenditures for judicial candidates, such as the $3 million in campaign support from Don Blankenship that ultimately resulted in Justice Benjamin’s disqualification in Caperton. Although Blankenship’s intent to aid the Benjamin candidacy (and to diminish that of Benjamin’s opponent, incumbent Justice Warren McGraw) was obvious, in less severe situations one might argue that contributions to advocacy groups were made with a sufficiently clear “understanding that they will be used to support” a candidacy. See id. (explaining that the definition of “aggregate contributions” also includes indirect contributions made with the understanding that they will be applied to support a candidate or attack the candidate’s opposition).

For a description of the manner in which the Blankenship money was used to fund an advocacy organization and to purchase advertising support, see Caperton v. A. T. Massey Coal Co., 129 S. Ct. 2252, 2257 (2009) (discussing Blankenship’s contributions to “And For the Sake of Kids,” an advocacy organization that attacked Benjamin’s opponent); Stempel, Completing Caperton, supra note 1, at 256 (discussing how Blankenship used the “Kids” organization to purchase advertising highly critical of incumbent Justice Warren McGraw and implicitly supportive of Benjamin); Stempel, Impeach Brent Benjamin Now!?, supra note 1, at 12 (describing how in addition to “Kids” attack ads directed at McGraw, Blankenship individually purchased pro-Benjamin advertisements).


154. Id. at 4–7.
rejected the unanimous recommendation of its Advisory Commission in an episode that illustrates the difficulty faced by recusal reformers.155

In mid-2008, the Nevada Supreme Court constituted an Advisory Commission (the Commission) to review the 2007 ABA Model Code of Judicial Conduct and to make recommendations regarding Nevada’s potential adoption of the Model Code.156 For the most part, the Commission endorsed the Model Code, recommending it to the Nevada Supreme Court in 2009; the court largely adopted the Commission’s recommendations157—except to the extent that the Commission attempted to broaden and toughen recusal practice.

In addition to recommending abolition of the duty to sit, Nevada’s Commission, acting in the wake of Caperton, recommended a version of ABA Model Rule 2.11(4) that would require per se disqualification where a judge received more than $50,000 in campaign support and would provide for recusal on a reasonable question as to the impartiality where there existed significant financial support below $50,000.158 The Nevada Supreme Court rejected both recommendations without official

155. See supra text accompanying note 139 (noting limited success of ABA Model Code’s effort to prompt states to require recusal based on campaign support).

156. I was a member of the Commission and its lone law school professor, joined by University of Nevada-Reno political scientist and sociologist James Richardson, an expert in judicial disqualification and campaign finance. See, e.g., James Richardson, Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World, 25 LAW & HUM. BEHAV. 433 (2001) (discussing the application of the Daubert test to judicial decisions). The Commission was chaired by retired Nevada Supreme Court Chief Justice A. William Maupin, with former Clerk of Court Janette Bloom serving as Reporter, and benefited from the assistance of ABA General Counsel George Kuhlman. It was comprised of six judges and a dozen distinguished practitioners representing a variety of fields and practices. Obviously, I am biased, but I think any objective observer would have to characterize it as a pretty sophisticated, representative group, well-positioned to represent the larger public interest.


comment, although the chief justice of the court was quoted describing the recommendation as “killing a fly with a sledgehammer.”

Perhaps as one of the authors of the Commission’s rejected proposal I am unduly sensitive. Nonetheless, it is a little disturbing to have one of the top jurists of an American state characterize problems of judicial impartiality and disqualification as a mere “fly” buzzing around the figurative head of the justice system. Like other members of the Commission, I find this characterization inapt in light of the history of insufficient judicial recusal and the recent Caperton case. Whatever the chief justice thought about the

159. See NEVADA CODE OF JUDICIAL CONDUCT R. 2.11 (2009) (containing no version of ABA Model Code of Judicial Conduct R. 2.11(4)). In perhaps a partial victory for the Commission, the current Nevada Code does not endorse the duty to sit, as did its predecessor. See NEVADA CODE OF JUDICIAL CONDUCT CANON 3(e)(1) (2009) (otherwise patterned on 1990 ABA Model Code of Judicial Conduct). That development presumably makes it easier for the Supreme Court in subsequent decisions to end the duty to sit or at least ignore or diminish it. See Ham v. Eighth Judicial Dist. Ct., 566 P.2d 420, 424 ( Nev. 1977) (adopting the duty to sit doctrine); see also Millen v. Eighth Judicial Dist. Ct., 148 P.3d 694, 696–97 (Nev. 2006) (reaffirming duty to sit and balancing against party right to choose counsel, concluding that “when a judge’s duty to sit conflicts with a client’s right to choose counsel, the client’s right generally prevails, except when the lawyer was retained for the purpose of disqualifying the judge and obstructing management of the court’s calendar.”); Las Vegas Downtown Redev. Agency v. Eighth Judicial Dist. Ct., 5 P.3d 1059, 1061 (Nev. 2000) (requiring trial judge who had recused to preside over case). Ironically, Nevada embraced the duty to sit after Congress rejected it in the 1974 amendments to 28 U.S.C. § 455(a) (2006). See Ham v. Eighth Jud. Dist. Ct., 566 P.2d 420, 424 ( Nev. 1977) (“A trial judge has a duty to preside to the conclusion of all proceedings, in the absence of some statute, rule of court, ethical standard, or other compelling reason to the contrary.”). Without diminishing the progress made in removing the codification of a problematic doctrine, one would have preferred that the Court eliminate the duty to sit doctrine altogether. See discussion infra Part II.B.4 (discussing detriments of duty to sit doctrine).


161. While it may not rival West Virginia, Nevada’s track record in this regard is nothing to crow about. See Stempel, Chief William’s Ghost, supra note 40, at 918–34 (providing an extensive description of the traditionally lax attitude toward judicial disqualification in Nevada); see, e.g., Valladares v. Second Jud. Dist. Ct., 910 P.2d 256, 257 (Nev. 1996) (indicating that the judge was not disqualified from presiding over a case in which his former election opponent was

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Commission's proposal, the problem it sought to address was not trivial.

Similarly, it seems almost hyperbolic to label the proposed recusal-triggering contribution amount of $50,000 as a "sledgehammer," with its connotation of overkill, when describing the notion that a judge who has received $50,000 from a litigant or lawyer should not sit in judgment on the contributor's cases. Hit men (admittedly hit men of lower stature than George Clooney) reportedly can be hired for a tenth of that amount. Even when one counsel even though judge had questioned the honesty and competence of counsel during the judicial election campaign).

162. See THE AMERICAN (Focus Features 2010) (telling the story of an international assassin hiding out in picturesque Italian hill town from enemies and former colleagues turned enemies, indulging—because he is, after all, George Clooney—in fine food, wine, and the companionship of an upscale prostitute).

163. It appears that one can find people willing to kill total strangers with whom they have no conflict at shockingly low prices. See Art Barnum, No bail for ex-husband in plot; Supposed hit man was undercover cop who recorded alleged job offer, CHI. TRIB., July 17, 2009, at 10C (noting the stated fee used by undercover officer, which ex-husband was willing to double for killing of former wife, was $1,500); Missy Diaz & Barbara Hijek, From Matrimony to Murder Plot; Whether Motivated by Greed or a Messy Divorce, Amateur Killer-For-Hire Cases in South Florida Usually Involve a Spouse or Lover, FT. LAUDERDALE SUN-SENTINEL, Nov. 18, 2009, at 1A (according to the Palm Beach County Sheriff's Office, the "going rate for a contract killing is between $5,000 and $10,000"); Tom Jackman, Scam, Like A Nesting Doll, Hid Even More; Cigarette Probe Found Sweatshop, WASH. POST, Jan. 11, 2009, at C1 (discussing how an organized criminal offered $2,500 to undercover cop for contract killing); Susan Jacobson, Restaurateur charged in plot to kill ex-worker, ORLANDO SENTINEL, Oct. 27, 2008, at A15 (discussing a $3,000 fee for a thwarted contract killing that was to include beheading of victim). See also Kieran Crowley et al., L.I. Wife Got a Cheap 'Hit'—Thrilled With 20G Price: DA, N.Y. POST, Mar. 6, 2010, at 7 (discussing how a wealthy Long Island housewife "allegedly hired" undercover cop to kill husband for $20,000).

Of course, the average judge has dramatically more scruples than the average hit man, as well as significantly more to lose if caught. However, judicial partiality, if it is even recognized, is hardly the functional equivalent of cold-blooded murder. Even the most honest judge may easily convince himself that he finds the defendant's witnesses more credible based on the merits of their testimony and not because defendant's law firm collectively donated $100,000 to his re-election campaign. Nonetheless, the bench as a whole refuses to recognize the problem. But see Editorial, Bold Step for Fair Courts in New York, N.Y TIMES, Feb. 14, 2011, at A28 (discussing New York Court of Appeals Chief Judge Jonathan Lippman and state judicial board's proposed ban on elected judges "hearing cases involving any lawyer or party who contributed $2,500 or more to the judge's campaign in the preceding two years").
accounts for the ordinarily law-abiding nature of judges, is it realistic to suggest that the $50,000 demarcation point is so trivial to the judicial campaign enterprise that no judge will be influenced, even subconsciously, by the munificence of an interested litigant or lawyer? If this is the attitude of the state court bench, the prospects for improved disqualification jurisprudence appear dim indeed.\textsuperscript{164}

Given the lukewarm reaction to ABA Model Code of Judicial Conduct Rule 2.11(A)(4) to date, it further appears that increased rigor regarding policing of electoral financial support and disqualification will need to come from legislators. In addition to maintaining and perhaps strengthening existing campaign spending laws, state legislatures should enact appropriate versions of Rule 2.11(A)(4) to reduce the influence of money in judicial politics and—equally important—the perception that money makes a difference in states that elect judges.

\textbf{B. A Punch List of Procedural Improvements}

In addition to the expansion of stringent application of the grounds for disqualification that admits of no \textit{de minimis} exceptions, the legal system would benefit from a universal application of a number of sound procedural protections for litigants seeking judicial neutrality. Regarding financial interest disqualification, the federal

\textsuperscript{164} Justice Hardesty, the quipster behind the “killing a fly with a sledgehammer” quote, is generally regarded in the Nevada Bar as a good jurist concerned with law reform. Attorneys who practice before the court, who wish not to be identified by name, have privately told me they consider him one of the “intellectual leaders” of the court. He overwhelmingly won re-election with no serious challenge. \textit{See} Richard Lake, \textit{Most Candidates Paid Dearly}, LAS VEGAS REV.-J., Nov. 8, 2010, http://www.lvrj.com/news/most-candidates-paid-dearly-106873943.html (reporting that Hardesty was re-elected to state supreme court seat with seventy-five percent of the vote). If this type of judge is not only unwilling to support enhanced recusal practice, but also finds it necessary to belittle the enterprise, the prospects for state court-led recusal reform are hardly heartening.
In the federal system, courts have been stronger than most state courts. In particular, the federal system stands significantly ahead of states with elected judiciaries in protecting litigants from the potential corruption of a judge's financial ties. Regarding procedural protections, some state courts have outpaced the federal system; nevertheless, both state and federal systems stand in need of improvement in this area.

1. Peremptory Challenges

One area in which the federal judicial system has lagged is its acceptance of litigants' peremptory challenges of judges. Under this sort of system, each litigant in a dispute has one opportunity, usually exercisable only at the outset of the case, to have the initially assigned judge removed without question or articulated cause. This approach to recusal operates in the manner of a peremptory challenge of prospective jurors. Litigants or counsel may ask for a different judge simply because of their bad feelings about or prior bad experiences with the judge. As part of this process, all courts—including the federal courts—should embrace a system where each litigant is afforded one peremptory challenge to the initially assigned judge.

Although reasonably widespread among the states, the idea of judicial peremptory challenges has been controversial. Critics have labeled it a system in which a litigant can "pick" his or her

165. See supra text accompanying note 106 (describing different federal statutory and ABA Model Code approaches to financial interest disqualification; urging that ABA and states take a zero-tolerance approach and eliminate the de minimis exception to financial interest disqualification).

166. See FLAMM, supra note 14, at §26.1, 753–54 (describing nature of peremptory challenges).


168. See FLAMM, supra note 14, at § 26.3 (describing automatic and peremptory challenges of judges and identifying states that permit some variant of this approach); id. at §§ 26.1–27.19, at 790–822 (listing specific peremptory disqualification provisions for the eighteen states providing for peremptory challenge of judge); see also JAMES SAMPLE ET AL., FAIR COURTS: SETTING RECUSAL STANDARDS, 26–27 (2008), available at http://www.brennancenter.org/content/resource/fair_courts_setting_recusal_standards/ (identifying nineteen states with peremptory challenges and recommending wider adoption of the device).
judge, but that is a mischaracterization of the approach.\textsuperscript{169} Federal judges in particular have resisted the idea, appearing to regard it as an attack on the overall integrity and competence of the federal bench.\textsuperscript{170} Federal judges may also find this an undue imposition in view of their already extensive procedures for maintaining impartiality.\textsuperscript{171} The costs of the approach, however, are minimal, and the potential gains significant.\textsuperscript{172}

Although the "reasonable question as to impartiality" standard for recusal reflected in 28 U.S.C. § 455(a) and Rule 2.11 of the ABA Model Code is already reasonably stringent,\textsuperscript{173} it is not self-

\textsuperscript{169} To perhaps state the obvious, if a litigant is given but one peremptory challenge of a judge, it hardly follows that the litigant or lawyer is able to obtain the judge of one's choice, even in a jurisdiction with a relatively small number of judges. When a peremptory challenge is exercised, this simply means that the initially assigned judge is removed from the case and that another judge is assigned to the case. In a multi-party case, there exists the possibility of several peremptory challenges and judicial assignments, but without doubt no single litigant or lawyer is provided with any right (and hardly any possibility) of obtaining a preferred judge. See, e.g., 28 U.S.C. § 1870 (2006) ("In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly."). State peremptory challenge systems largely follow the federal model. See, e.g., Nev. Rev. Stat. § 16.40 (1997) (providing that each party has four peremptory challenges as a matter of right; in multi-party cases, judge has discretion to give all parties on one side minimum requirement of four challenges or to provide up to eight challenges).


\textsuperscript{171} See 28 U.S.C. § 455(b)(3) (2006) (requiring recusal where immediate family member has even a modest financial interest in a litigant); 28 U.S.C. § 455(b)(4) (2006) (requiring recusal where first cousins or closer relatives of judge have even modest professional or financial ties to litigants); 28 U.S.C. § 455(b)(1) & (2) (2006) (requiring recusal where judge has relatively modest professional connection to case or "has been a material witness" concerning case); see also McKeown, supra note 8, at 3–8 (describing aspects of current system supportive of judicial impartiality). By contrast, ABA Model Judicial Code 2.11(A)(2), which requires recusal for family financial connections to the case, nevertheless permits an exception where the interest is "de minimis," defined as "an insignificant interest that could not raise a reasonable question as to the judge's impartiality." Id. at Terminology.

\textsuperscript{172} See infra text accompanying notes 273–74 (outlining minimal costs of transferring a case from one judge to another).

\textsuperscript{173} See 28 U.S.C. § 455(a) (2006) ("Any justice, judge, or magistrate judge . . . shall disqualify himself in any proceeding in which his impartiality might
executing. The substantive standard has the power to police judicial recusal only to the extent that it is correctly applied with sufficient frequency by the bench. There exists considerable disagreement within the legal profession as to when the standard is met.\(^{174}\)

Further, even if there were a uniform, conscious, and articulated consensus regarding the definition of a reasonable question as to impartiality, there would remain the problems of unconscious bias and cognitive error that sufficiently blind judges (like all persons), so that they might frequently fail to recognize when they should apply their own standards for disqualification.\(^{175}\)

In addition, a widely followed regime of peremptory challenges provides an important indication of judicial performance as well as greater protection against cases being heard before a judge lacking sufficient neutrality. When litigants and lawyers “vote with their feet” to remove the initially assigned judge from a case and to obtain a new judicial assignment, they are not only registering concerns about Judge A’s impartiality, but are often also expressing reservations about Judge A’s competence. Although challenging a judge’s competence may not be the primary goal of the judicial peremptory challenge, it is, in my view, a valuable collateral benefit that can help court administrators and policymakers identify problematic judges. Perhaps this is why the judiciary resists it so much.

Here, Nevada provides a positive illustration on the issue (as contrasted with the state’s embarrassing embrace of the duty to sit and resistance to financial contribution limits with teeth).\(^{176}\) Nevada

reasonably be questioned.”); Model Code of Judicial Conduct R. 2.11(A) (2007) (A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, defining impartiality in the Terminology section as “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.”).

174. See Geyh, supra note 6, at 676 (“[T]he appearances-based disqualification regime is in trouble . . . [in part because] the legal establishment is deeply divided over when it is reasonable for the presumption of impartiality to yield to the suspicion that extralegal influences may have compromised the judge’s impartial judgment.”).

175. See supra text accompanying notes 22–32 (describing cognitive traits that undermine judicial ability to correctly identify disqualification issues).

176. See supra text accompanying notes 156–58 (describing Nevada’s reluctance to abolish duty to sit and resistance to the idea of automatic recusal based on financial contributions).
law provides that litigants may move to disqualify the initially assigned judge from the case; each party gets one such peremptory challenge. If the litigant who has used a peremptory challenge dislikes the subsequently assigned judge, the litigant is "stuck" unless there exists an affirmative ground for recusal pursuant to the Judicial Code.

In practice, lawyers have used peremptory challenges not only to replace judges thought to be biased or prejudiced, but also to replace judges disfavored because their legal abilities are widely questioned in the organized bar. Over time, a pattern has emerged in which a small group of trial judges is most frequently targeted by such recusal motions. Logically, this same handful of judges cannot be more biased or prejudiced regarding particular litigants or cases than the bench as a whole. What must be happening (and what lawyers privately tell me is happening) is that certain judges are challenged not only because of bias or prejudice, but also because they are simply not considered very good by lawyers in the community. Often these judges are removed because counsel

177. See Nev. Supreme Court R. 48.1 (providing that party may disqualify initially assigned judge as a matter of right upon paying $450 administrative fee; thereafter, any attempt to remove judge must be for cause); Flamm, supra note 14, § 27.11 (describing Nevada peremptory challenge process). See also Towbin Dodge, LLC v. Eighth Jud. Dist. Ct., 112 P.3d 1063, 1066 (Nev. 2005) (discussing judge's discretion to reject untimely request for change in judge); Turnipseed v. Truckee-Carson Irrigation Dist., 13 P.3d 395, 399 (Nev. 2000) (ruling peremptory challenge may not be exercised after judge has ruled on contested matter in case).


179. Judicial Performance Evaluation – 2010, Las Vegas Rev.-J., available at http://media.lvrj.com/documents/Judicial_Report_2010.pdf; see also Frank Geary, Lawyers Give Poor Scores to Nine Judges, Las Vegas Rev.-J., May 10, 2010, at 1A (noting that nine judges had approval ratings—defined as respondent's willingness to retain judge—of less than fifty percent). Peremptory challenges are directed toward these judges at higher-than-average rates. On condition of anonymity, area lawyers inform me that their use of such challenges against these (and some other judges) is often based on concerns about judicial competence rather than a belief that these judges are more frequently compromised by issues of bias or prejudice toward litigants or counsel.

180. This assessment has been communicated to me repeatedly during the past ten years or so by Nevada lawyers. Although, like any collection of anecdotes (or inferences drawn from broader data), it could be wrong—but I find it persuasive. Every lawyer making this observation to me over the years was a reasonably successful, well-respected attorney. Presumably their judgment both
thinks the judge will not correctly understand the case and will not rule wisely on discovery, joinder, and summary judgment motions, jury instructions, and evidence. In some cases, the judge is removed because he or she is perceived as inconsistent, erratic in demeanor, slow, or prone to error that may result in needless reversal.\textsuperscript{181}

Although some may decry the situation as a misuse of recusal-driven peremptory challenges, I rather like the market system feedback it provides. By examining the pattern of peremptory challenges, one can get a pretty good idea of which judges are held in low esteem by the bar and, conversely, which judges are highly regarded by a wide spectrum of litigants and lawyers. Although this pattern appears not to translate into meaningful electoral feedback,\textsuperscript{182} this information at least has the potential to affect whether judges keep their seats in subsequent elections. More immediately, however, it provides a relatively low-cost way for wiser counsel to keep weaker judges from presiding over their cases. To the extent that wiser counsel are associated with more complex, high-stakes cases with substantial impact, the system provides a benefit in the reduced chance that a weaker judge will preside over a complex matter.\textsuperscript{183}

\begin{itemize}
  \item About the abilities of judges and the motivations of their colleagues, formed after years of practice, is relatively accurate. At a minimum, they know their own reasons for exercising a peremptory challenge and, as far as I can determine, have no reason to misrepresent their motivations in casual conversations with me.
  \item Again, I base these assessments on years of informal conversations with Nevada litigators, largely from the Las Vegas area. For obvious reasons, I am disinclined to attribute the comments to particular lawyers who must practice before judges regarded as problematic. I am also refraining from naming the judges in question, although it is no secret in the local legal community that a half-dozen or so of the Clark County trial judges are considered noticeably weak, just as some are considered exceptionally good.
  \item The judges who are most frequently the subject of peremptory challenges appear to win re-election with comparative consistency and ease and at the same rate as do highly regarded judges. \textit{See Judicial Performance Evaluation – 2010, LAS VEGAS REV.-J., available at} http://media.lvrj.com/documents/Judicial_Report_2010.pdf; Geary, \textit{supra} note 179. Despite the considerable variance in approval ratings, nearly all incumbent Nevada trial judges are re-elected, notwithstanding adverse publicity sometimes received as a result of the Judicial Performance Evaluation survey. Since 2000, only six Las Vegas area trial judges have lost their seats due to adverse election outcomes.
  \item To a degree, the Eighth Judicial District of Nevada has institutionalized this goal of putting the most complex or difficult cases in the hands of judges thought to have particular expertise in that it has established a “business court” docket in which complex, large, or protracted commercial cases
\end{itemize}
2. Recusal Motions Should Be Heard by Independent Judges

As noted above, the cognitive limitations of human beings make them particularly ill-suited to examine their own conduct objectively. Simply put, a challenged judge is often simply too invested in the matter to be in the best position to assess the merits of a recusal motion. West Virginian Justice Benjamin’s stubborn refusal to step aside in *Caperton* provides an amazingly extreme example of judicial recalcitrance which indicates the extent to which judges’ emotional investments in disqualification may blind them and cause them to produce poor legal analysis. The solution is obvious: recusal motions should be heard and decided, even in first instance, by another trial judge in the relevant district. Where a challenge targets an appellate judge, it should be heard and decided by other members of the panel or, if necessary, by the court as a whole. Where the challenge targets a United States Supreme Court Justice or a judge or justice of any other jurisdiction’s highest court, the disqualification decision should be made by the entire court.

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are assigned to a subset of judges widely viewed as particularly adept. See *Nev. 8*th *Jud. Dist. Ct. R.* 1.61 (2009), available at http://www.leg.state.nv.us/CourtRules/EighthDCR.html (establishing “business court” docket in which particularly involved or complex cases are assigned to particular judicial departments; although not readily apparent from the face of the Rule, the business court is intended to be something of an elite court. Rule 1.61(c) provides for designation of business court judges by the chief judge with no mention of criteria for selection. But to date, the designation has thus far been given to trial judges considered particularly competent and experienced).

184. See supra notes 30–32 and accompanying text (noting that it is “highly unlikely that judges can consistently overcome or even recognize their own biases and prejudices”).

185. See Stempel, *Impeach Brent Benjamin Now!*?, supra note 1, at 34–80 (describing how Justice Brent Benjamin denied recusal motions, sometimes in very defensive fashion, four times over a three-year period, enlisted state supreme court bureaucracy in his defense, and lobbied U.S. Supreme Court to deny certiorari). Observing Justice Benjamin’s tenacity in repeatedly refusing to correctly apply governing disqualification law, one might reasonably conclude that his violation of the law was intentional. However, giving him the benefit of the doubt that this was mere error, it must result from emotional investment warping judgment.

186. See Stempel, *Chief William’s Ghost*, supra note 40, at 899–918 (noting instances of insufficient sensitivity to disqualification issues and impartiality values under current United States Supreme Court approach); Stempel, *Rehnquist, Recusal and Reform*, supra note 53, at 845 (urging that the Court cease the practice
Here again is an area where many of the states are ahead of the federal system in that a significant number of states use this procedure,\(^{187}\) while the federal model is one in which the trial judge that is the target of the recusal motion makes the decision on the motion, subject, of course, to appellate review.\(^{188}\) In addition, state and federal courts should give serious consideration to a system in which recusal motions bypass the challenged judge entirely so that the judge does not become aware that his participation has been challenged.

Lawyers think long and hard before bringing disqualification motions and may well be too reluctant to make meritorious (or at least colorable) motions out of fear of alienating a judge who will preside over the matter if the motion is denied.\(^{189}\) Placing such motions before a judge who will not be in an immediate position to punish counsel during the remainder of the case if the motion is denied will give further breathing space to lawyers wishing to exercise the rights of free speech advocated by Professor Margaret Tarkington.\(^{190}\) To make this aspect of the system effective, the judge

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187. See William E. Raftery, "The Legislature Must Save the Court From Itself": Recusal, Separation of Powers, and the Post-Caperton World, 58 Drake L. Rev. 765, 772 (2010) (explaining that as of 2000, fifteen states provided for decision on recusal motions by a different judge, and although four states have since given serious consideration to this procedure, the number of states providing for this protection remained static).

188. See 28 U.S.C. § 455 (2006) (setting forth recusal standards but permitting trial judge in question to make initial disqualification decision, which is like all trial rulings subject to appellate review at the conclusion of the case, or perhaps earlier, if an exception to the final order rule applies).

189. See Geyh, supra note 6, at text accompanying notes 85–86 (explaining that because recusal motions are often denied, party and attorney making motion face significant risk that not only will purportedly disqualified judge remain on the case but also will be even more inclined to rule against the movant based on defensiveness over the motion). Certainly, this is consistent with litigation protocol in the law firm where I practiced in Minneapolis, Minnesota during the 1980s and is the consistent view expressed by lawyers I have known in the legal communities of Minneapolis, New York, Florida, and Nevada.

190. See Tarkington, supra note 7, at 850–51 (expressing concern that attorneys exercising free speech rights on behalf of clients or the judicial system face substantial risks of reprisal by judges). See generally Margaret Tarkington, A Free Speech Right to Impugn Judicial Integrity, 51 B.C. L. Rev. 363, 364–66 (2010) (arguing that lawyers have substantial constitutional and ethical right to criticize judges but that attorneys are too often improperly or unduly punished for
who is the subject of the motion should not even be aware of which party is making the motion.

In advocating for disqualification rulings made by a different judge, I am to some degree backtracking on my views of a quarter-century ago, a time when I viewed the federal model as adequate at the trial level¹⁹¹ but problematic at higher levels, particularly in the U.S. Supreme Court.¹⁹² Over time, I have become either wiser or making such criticisms); Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech and Judicial Reputation*, 97 GEO. L.J. 1567, 1569–75 (2009) (arguing that courts reviewing attorney speech have been unduly sensitive to judicial reputation and public appearances but too insensitive to the value of attorney criticism alerting courts and the public to purported judicial improprieties).

The attitude that lawyers question judges at their peril appears to be widely held among judges themselves. In December 2010, I was quoted in a local television newscast commenting on a Las Vegas state court judge’s management of a trial in which she required jurors to deliberate almost until dawn so that the case could be concluded in time for her planned vacation. Doug McMurdo, *Judge Stands by Decision to Keep Jurors Overnight*, LAS VEGAS REV.-J., Dec. 31, 2010, at 1B. Not surprisingly, the comments had a bit of a critical tone, although I was careful to note that sometimes uncontrollable circumstances impose burdens on courts and jurors and to defend a judge’s general right to flexible scheduling and conducting court business as necessary outside the nine-to-five time slot. Much to my surprise, the story was picked up by national wire services and even included a brief appearance on *Fox and Friends* (largely without my qualifying nuances).

Later that month, I ran into a judge from another state who is a long-time acquaintance and who had seen the story and found it amusing, albeit with some empathy for the judge who had lost control of her scheduling. My friend’s assessment of the consequences of saying anything even this mildly critical of the judge: “If you ever have to appear before her, you can forget about winning that case.” Obviously, I hope that judges are not this thin-skinned. As this anecdote indicates, however, strong disqualification practice is essential to a fair judicial system.

¹⁹¹. See Stempel, *Rehnquist, Recusal and Reform*, supra note 53, at 632–37 (generally approving of federal system in which challenged trial judge makes initial determination regarding disqualification because of backstop of appellate review).

¹⁹². Although each justice acts as his or her own unreviewable umpire in this regard, there may be informal consultation on such matters by particular justices in particular cases. See Stempel, *Chief William’s Ghost*, supra note 40, at 813–14 (noting that Justice Rehnquist in *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (Rehnquist, J., mem.), despite making a decision as to his own participation, consulted with colleagues and sought their approval of his decision to issue a memorandum explaining his decision not to recuse).

Although this is better than nothing, it hardly solves the problem. In *Laird v. Tatum*, for example, Chief Justice Warren Burger and Justices Potter Stewart and
more cynical, and now believe that there is simply too much inertia in favor of non-disqualification, which results in insufficiently frequent recusal when challenged judges assess questions of their own impartiality or public perception of it.

In addition, I have come to appreciate the manner in which the final order rule, whatever its overall attributes, exacerbates the problems of disqualification at the trial court level. Under the final order rule, matters in a case are not generally subject to appellate review unless the case has been resolved on the merits.\textsuperscript{193} By definition, an order granting or denying judicial disqualification does not decide the case on the merits and thus, it is not automatically eligible for appellate review.\textsuperscript{194} Neither is Rule 54(b) certification available,\textsuperscript{195} and because the recusal decision does not grant, deny or modify an injunction, it is also not immediately reviewable pursuant to 28 U.S.C. § 1292(a).\textsuperscript{196}

Byron White all rallied to Justice Rehnquist’s defense, supporting his position of non-disqualification under circumstances where it was clear he should never have participated. See Stempel, \textit{Chief William’s Ghost, supra} note 40, at 813–14, 851–63 (describing support of other Justices for Justice Rehnquist’s widely criticized failure to recuse in \textit{Laird v. Tatum}).

Although this reaction may indicate widespread insensitivity to recusal in the Court, it more likely represents the power of personal relationships and collegiality to warp independent judgment or to result in conflict avoidance. The other justices, presuming they understood the situation (and they may not have, depending solely on Justice Rehnquist’s memorandum, which presented the matter favorably to his decision) should have told Justice Rehnquist to forgo the memorandum, step aside, and support rehearing.


\textsuperscript{194} See 28 U.S.C. § 1291 (2006) (providing appellate jurisdiction over all “final decisions” of trial courts). A final decision is generally defined as one that completely ends the litigation on the merits and leaves “nothing for the court to do but execute the judgment.” \textit{Catlin v. United States}, 324 U.S. 229, 233 (1945).

\textsuperscript{195} Because a ruling on a disqualification motion does not even address the merits of the lawsuit, much less decide them, Rule 54(b) immediate appeal is not available for denials of disqualification. See \textit{FED. R. CIV. P.} 54(b) (providing for immediate appeal when \textit{final judgment} is entered against fewer than all parties in a case or on fewer than all claims in a case where the judge finds no just reason for delay).

\textsuperscript{196} See 28 U.S.C. § 1292(a)(1) (2006) (providing for immediate appeal of orders granting, denying, or modifying injunctions); see also FLAMM, \textit{supra} note 14, ch. 32 at 959–81 (outlining law of appellate review of disqualification decisions).
The additional limitation of the collateral order doctrine exception to the final order rule\(^{197}\) makes appellate review an unlikely vehicle for immediately challenging recusal decisions. Certification for immediate review pursuant to 28 U.S.C. § 1292(b) is ineffective because the certifying judge must be convinced that the decision certified is a reasonably close one on which there is substantial ground for difference of opinion.\(^{198}\) For the cognitive reasons previously discussed,\(^{199}\) judges are unlikely to think their failure to recuse was erroneous or even a close call (and may even assert that if the matter had been a close one, recusal would have been ordered). This leaves only the petition for mandamus as a vehicle for immediate review of a disqualification decision, and mandamus is an extraordinary remedy that, as a practical matter, is only successful when there appears to have been a clear abuse of discretion by the trial judge.\(^{200}\)

\(^{197}\) See Mohawk Indust., Inc. v. Carpenter, 130 S. Ct. 599, 604–08 (2009) (holding court order of disclosure rejecting assertion of attorney-client privilege not eligible for immediate appellate review under collateral order doctrine, which provides that an order that is not final on the merits may be accorded interlocutory review where the order fully decides an important issue completely separate and independent from the merits that cannot be effectively reviewed after final judgment on the merits); FLAMM, supra note 14, § 32.4 (describing collateral order doctrine); TEPLY & WHITTEN, supra note 193, at 972 (describing collateral order doctrine).

\(^{198}\) See 28 U.S.C. § 1292(b) (2006) (setting forth requirements for discretionary certification of a matter for interlocutory appeal; requiring controlling question of law, substantial ground for difference of opinion, and judge’s conclusion that immediate appeal will advance ultimate termination of the case); FLAMM, supra note 14, § 32.3 (describing codification of disqualification orders). In addition, an appellate court is free to reject the trial court’s conclusions as to whether a matter qualifies for § 1292(b) certification where the trial judge is “of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b) (2006). In effect, three out of four judges on a panel addressing a denial of a disqualification motion must find the § 1292(b) criteria satisfied if there is to be interlocutory appellate review of the denial.

\(^{199}\) See supra notes 24–45 and accompanying text (explaining that cognitive traits and biases affecting people logically affect judges as well, distorting their ability to correctly assess their own impartiality).

\(^{200}\) See TEPLY & WHITTEN, supra note 193, at 972 (describing review by writ of mandamus); FLAMM, supra note 14, §§ 32.6–32.8 (addressing interlocutory review of recusal denials through writs of mandamus or prohibition).
Under these circumstances, the legal system would do well to invest more resources to ensure that initial recusal decisions are as accurate as possible. Reassignment to a different judge—even at the trial court level in federal court—is a wiser system worth the extra expenditure of judicial resources. Additionally, all parties to the litigation should be permitted to be involved in the recusal motion process to better ensure that the recusal motion will not be granted too quickly and that litigants who are perfectly comfortable with the challenged judge will be heard. In general, a fuller airing of disqualification issues is desirable at the outset of litigation.

3. Written Decisions Regarding Disqualification Motions with Reasons (Considered Published and Citable)

Disqualification decisions should also be made in writing or on the record in open court, accompanied by reasons for the court’s decision to recuse or remain on the case. Although it is not the gravest problem with modern disqualification, the clipped, abrupt, and uninformative manner in which many disqualification decisions are delivered undermines the public confidence the process should inspire. Many decisions are simple orders with no information about the nature of the motion, the asserted grounds for disqualification, or the court’s rationale. Recusal practice would be enhanced by reasoned opinions that force judges to give greater reflection to an issue and reduce the chance that decisions will be made hastily or reflexively.

Written explanations of recusal decisions would also in turn develop a more comprehensive body of precedent to guide the legal community and the bench. In the service of greater information and transparency, these written and explanatory opinions should be easily available on court websites and available in legal research databases such as Lexis and Westlaw. Similarly, recusal decisions should be considered citable precedent that can be used by lawyers and litigants in making and resisting recusal motions.

Unsurprisingly, the U.S. Supreme Court is perhaps the worst court in America in this regard. The public is routinely informed

201. See Stempel, Chief William's Ghost, supra note 40, at 813–14, 851–68 & 899–918 (discussing the Supreme Court’s tendency to take judicial qualification less seriously than lower courts); see generally Caprice L. Roberts, The Fox...
only that Justice X took no part in the consideration or decision regarding a case. Citizens are left to ponder whether Justice X had health problems, was financially disqualified due to personal interests or those of a relative, or instead invoked 28 U.S.C. § 455(a) notwithstanding the lack of any pending motion. Although Court-watchers can often figure out the basis for recusal (e.g., Justice Elena Kagan sitting out cases involving the federal government stemming from her service as Solicitor General), the situation is unduly secretive and uninformative. Admittedly, lack of information about a voluntary recusal is less of a problem than Justices unreasonably failing to step aside and making these decisions unilaterally without review. Nonetheless, this cryptic aspect of Court practice is in keeping with the Court’s generally arrogant attitude toward disqualification.

This minimalist treatment of disqualification matters is also puzzling given the Court’s professed concern for recusal or absences that reduce the number of participating judges. If, as the Justices assert, the absence of even a single Justice raises important concerns because of the unavailability of substitutes, one would logically expect that the Court would treat a Justice’s absence sufficiently seriously to provide an explanation for the absence. In addition, the regular announcement of reasons for voluntary recusals would help to establish working guidelines on the issue for litigants, counsel, and the public.

Guarding the Henhouse: Recusal and the Procedural Void in the Court of Last Resort, 57 RUTGERS L. REV. 107, 153–65 (2004) (voicing concern that U.S. Supreme Court disqualification process is particularly problematic because there exists no review of an individual justice’s denial of disqualification, even when denial is clearly erroneous).

202. See Stempel, Chief William’s Ghost, supra note 40, at 899–918 (reviewing and criticizing Court’s approach to disqualification).

203. Press Release, United States Supreme Court, Statement of Recusal Policy (Nov. 1, 1993), reprinted in GILLERS & SIMON, supra note 89, at 724–25 (stating it was signed by Chief Justice Rehnquist and Justices Stevens, O’Connor, Scalia, Kennedy, Thomas and Ginsburg; Justices Blackmun and Souter did not sign); See Stempel, Chief William’s Ghost, supra note 40, at 899–918 (noting the Court’s position to this effect and the Court’s generally lax attitude toward judicial disqualification).
4. Elimination of the Pernicious “Duty to Sit”

As discussed above, the so-called “duty to sit” mindset needs to be more formally and completely eradicated from the system.204 In attacking the duty to sit, I want to be clear that I am not attacking the sentiment expressed in ABA Model Code of Judicial Conduct, which provides that a judge has a “responsibility to decide” cases and directs that the judge “shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.”205 This admonition that judges not shirk duties or dodge difficult, controversial, or unpopular cases206 reflects what should not need to be said. To the extent it establishes a “duty” to sit, it is a benign and reasonable concept of the duty, one that must yield to the need for disqualification.

However, a different concept of the duty to sit began in the nineteenth century and held the most sway during the mid-twentieth century.207 Properly understood, even these precedents need not

204. See infra text accompanying note 209 (arguing that duty to sit concept is problematic because it encourages judges to decide against disqualification in close cases when inclination should be exactly the opposite).
205. MODEL CODE OF JUDICIAL CONDUCT R. 2.7 (2007).
206. Comment I to Rule 2.7 (the sole Comment to the Rule) fleshes out the concept embodied in the Model Code:

Judges must be available to decide matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge’s respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge’s colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.


Although I might have preferred that this implicit aspect of judging (at least I always assumed that part of the attraction of judging was the opportunity to face difficult, controversial or unpopular cases) not be codified at all lest it be misinterpreted as an edict to unduly resist recusal, Rule 2.7, properly understood, creates no barrier to sound disqualification practice pursuant to ABA Model Code Rule 2.11 or 28 U.S.C. § 455.

207. See Stempel, Chief William’s Ghost, supra note 40, at 840–51 (tracing the evolution of duty to sit concept and its relation to the older, now outdated
create a barrier to sound recusal practice. Nevertheless, the notion of a judge's obligation not to shirk work and responsibility morphed into a more pernicious concept of the duty to sit, one that encouraged judges to be unduly resistant to disqualification and to resolve close cases against disqualification. This "pernicious" version of the duty to sit concept should be distinguished from its more benign cousin stressing judicial responsibility.

Although this pernicious version of the duty to sit was abolished in federal courts in 1974 and was effectively eliminated in the ABA Model Codes by 1972, it remains in effect in about a half-

Blackstonian notion that judges were reliably impartial and virtually beyond challenge).

Although the roots of the doctrine can be traced to Blackstone and the pre-1800 English attitude that only direct financial stake in a case disqualified a judge, neither the 1924 [ABA] Canons [of Judicial Ethics] nor the 1972 [ABA] Code [of Judicial Conduct] embraced the duty to sit in their texts, although the 1990 [ABA] Code [of Judicial Conduct], like the 2007 [ABA] Code [of Judicial Conduct], notes that judges have an obligation to discharge their responsibilities as judges. The first reported American case to use the term appears in 1824, one of approximately twenty cases using the term in the nineteenth century, most after 1880. The duty to sit as a basis for declining to recuse in non-compelling cases began appearing with more frequency in reported opinions during the 1950s and 1960s. Perhaps the most prominent duty to sit case, Edwards v. United States, 334 F.2d 360 (5th Cir. 1964), was decided in 1964, less than a decade before Justice Rehnquist's memorandum invoking the concept in defense of his failure to recuse in Laird v. Tatum, 409 U.S. 824, 835 (1972) (Rehnquist, J., mem.).

Id. at 846–47 (citations omitted).

208. See Stempel, Chief William's Ghost, supra note 40, at 847–51 (discussing Edwards v. United States, a widely cited duty to sit case, and demonstrating that the Fifth Circuit was not advocating a pernicious version of the doctrine unduly resistant to judicial recusal). See also id. at 850–51 (explaining that Edwards was "really only applying the benign version of the duty to sit rather than its more pernicious cousin") (citation omitted).

209. See id. at 847–68 (noting development of duty to sit concept is excessively resistant to valid recusal motions and its use by Justice Rehnquist in Laird v. Tatum, a move sufficiently unpopular that it helped spur the abolition of the pernicious duty to sit doctrine in the 1974 amendments to the federal disqualification statute; noting also absence of duty to sit rationale opposing recusal in 1972 ABA Model Code of Judicial Conduct).

210. See id. at 818–34 (discussing concept and distinctions between the two forms of the duty to sit doctrine at greater length).
dozen states, with some lingering use in judicial decisions in jurisdictions (including in the federal system) where the doctrine has been eliminated. To a degree, this continued use appears to result from courts’ reliance on Justice Rehnquist’s *Laird v. Tatum* memorandum without any apparent appreciation that the Rehnquist memorandum is viewed by most informed observers as legally erroneous and an embarrassment to the judiciary.

For whatever reason, the pernicious duty to sit doctrine continues as official policy in a few states and exerts influence on judges in others, with this form of the doctrine urging courts to resist disqualification as a general matter and to resolve close questions against disqualification. For reasons that I hope are obvious, sound recusal practice should aim in exactly the opposite direction. Where a disqualification question is close, the court should err on the side of recusal in order to avoid inadvertent lack of neutrality due to unconscious bias and to enhance public and litigant confidence in the courts. Properly understood, ABA Model Rule 2.7 is not to the contrary.

211. See id. at 891–94 (listing Alabama, Arkansas, Mississippi, Nevada, and South Carolina as states formally retaining duty to sit, while states in which the pernicious form of the doctrine appears to have some continued vitality, or at least in which there is some non-overruled duty to sit case law, are Alaska, California, Colorado, Connecticut, Delaware, Indiana, Kentucky, Louisiana, Maryland, New Mexico, North Dakota, Oklahoma, Texas, Utah, Vermont, West Virginia, and Wyoming).

212. Id. at 860–62. See also Stempel, Rehnquist, Recusal and Reform, supra note 53, at 594–96 (noting legal community’s criticism and essential rejection of Rehnquist’s analysis in his memorandum defending participation in *Laird v. Tatum*).

213. See supra text accompanying note 199 (positing that judges are unlikely to recognize a failure to recuse as erroneous or even a close question because of cognitive biases); MODEL CODE OF JUDICIAL CONDUCT 2.7 (2007) (providing that the judge “shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law”). By specifically referencing the disqualification provisions of Rule 2.11, the ABA Model Code expressly resolves close cases of recusal in favor of disqualification rather than adhering to a duty to sit irrespective of other factors. This is not to suggest that the current system lacks these procedural protections completely. On the contrary, the American justice system as a whole in my view scores rather well on this dimension. Nonetheless, examples like *Caperton* or other miscarriages of recusal justice are too frequent. See generally Miller, supra note 9, at 450, 454, 460–62 (discussing egregious examples of judges sitting in cases where they should have recused); see infra text accompanying notes 226, 303–04 (noting that individual judges may be very confident of assessments that prove to be “wrong”
5. Disqualification Decisions Reviewed De Novo with an End to Abuse of Discretion Review and Harmless Error Exceptions

Because a variety of psychological, sociological, and professional cultural forces auger against disqualification even in cases where the judge's ability to be impartial may be in question, some recalibration of appellate review of disqualification decisions is in order. Historically, trial court disqualification decisions have been reviewed under the deferential abuse of discretion standard and, as

at least as measured by appellate court review and reversal); Stempel, *Chief William's Ghost*, supra note 40, at 868–954 (noting the degree to which the wrongfulness of the former Chief Justice’s failure to recuse in important case continues to be under-appreciated, as are other instances of Supreme Court Justices’ failures to recuse); Stempel, *Completing Caperton*, supra note 1, at 254–67 (noting the great error of West Virginia Justice Benjamin in refusing to recuse despite multiple opportunities and strong arguments repeatedly made by Caperton counsel); Stempel, *Impeach Brent Benjamin Now!*?, supra note 1, at 7–10 (arguing that despite ultimate disqualification of Justice Benjamin, the matter as a whole was a disgraceful black eye for the American legal system).

214. See *supra* text accompanying notes 33–43 (discussing unconscious cognitive factors affecting judges).

215. See FLAMM, *supra* note 14, § 33.1 (stating that abuse of discretion is the dominant yardstick for appellate review of judicial recusal).

Abuse of discretion review is contrasted with de novo review, in which the appellate court treats the issue (e.g., whether there exist grounds for disqualification) as one of first impression, and is less deferential than abuse of discretion review. See generally STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, 1 FEDERAL STANDARDS OF REVIEW: CIVIL CASES AND GENERAL REVIEW PRINCIPLES (4th ed. 2010). Most deferential to trial courts is review under a “clearly erroneous” test under which a trial court’s decision is set aside only if the reviewing court is left with the definite and firm impression that a mistake has been made. See STEVEN ALAN CHILDRESS, FEDERAL STANDARDS OF REVIEW §§ 4.21 & 4.22 (1992) (stating that in determining whether a trial court has abused discretion, focus is on the reasonableness of judge’s actions).

Under the abuse of discretion standard, a judge’s determination is reversed only if the reviewing court concludes that the judge has exceeded the bounds of permissible discretion or “abused” the discretion accorded the judge. *Id.* § 4.21 at 4-162, 4-165 By definition, a reviewing court’s determination to apply the abuse of discretion standard presumes that the decision to be made regarding disqualification is one of discretion. This imbedded assumption is arguably erroneous. The governing statutes and the ABA JUDICIAL CODE Rule 2.11 (2007) do not expressly make recusal a matter of discretion and there is not a logical reason that a judge should be able to deny recusal on a discretionary basis if the movant has established the requisite grounds for recusal. Accordingly, de novo
previously noted, harmless error analysis has usually been applied even in cases where a refusal to disqualify was erroneous. 216

In combination, these approaches make it unduly difficult to overturn trial court decisions mistakenly concluding that reasonable observers could not have reasonable doubts about a judge’s ability to be impartial in a particular matter. The prevailing tendency of judges to shrink from criticizing or countermanding one another in public, combined with difficulties and divisions in such cases, make it likely that refusals to recuse will be under-policed by appellate courts.

To combat this result, the abuse of discretion standard of review should be replaced with de novo appellate review of disqualification decisions. 217 Where trial court decisions are found to be incorrect, matters should be remanded to the trial court without appellate inquiry into whether a mistaken failure to recuse was “harmless” error. As discussed above, a harmless error backstop for incorrect failures to disqualify creates too much risk of injustice in an area where sorting out the impact of a tainted judge is difficult. A matter may look to have been correctly resolved on the merits even though the judge should have recused. However, because it is difficult, if not impossible, to know what the case’s result would have been absent the tainted judge, the apparent inevitability of the substantive outcome of a case may be a mirage created by the activities of a presiding trial judge who should have stepped aside. 218

Appellate inquiry unbounded by the deference of the abuse of discretion standard and harmless error limits to remedy would serve as an important quality control mechanism for disqualification practice.

216. See supra text accompanying notes 64–65 (discussing the prevalence of harmless error analysis for appellate review of disqualification matters and outlining harmless error concept).

217. See supra note 215 (describing de novo appellate review standard).

218. See supra text accompanying notes 61–75 (discussing “spoliation” problems of determining impact of tainted judge when conducting both merits review and harmless error review).
III. **Avoiding the Acclamation Fallacy: A More Reasonable Trigger of the Reasonable Question as to Impartiality Standard and the Implications of the New Approach for Politically and Ideologically Based Appearances of Partiality**

Although procedural protections are important, an effective disqualification regime requires the breadth, flexibility, and backstopping characteristics of a stricter "reasonable question as to impartiality" standard. The appearance-based standard can catch situations of concern that might otherwise fall through the metaphorical "cracks" of a system of procedural protections. It can also set an overall tone in the judicial community of erring on the side of ensuring judicial impartiality and public confidence rather than lionizing judges, ignoring unconscious bias, privileging efficiency, and unduly fearing strategic disqualification motions.

According to Professor Geyh, however, the reasonable-question-as-to-impartiality standard is under attack and seemingly in eclipse, perhaps primarily because of the great division of opinion in the legal profession.

[I]t is not enough that the legal establishment and the public agree that the judiciary should strive to preserve the appearance of impartiality. Rather, they must share a basic understanding of what constitutes an appearance of partiality. Currently, the legal establishment is deeply divided over when it is reasonable for the presumption of impartiality to yield to the suspicion that extralegal influences may have compromised the judge's impartial judgment. The general public is comparably divided, and between the legal establishment and the general public, there are still further divisions. The net effect is that except in extreme or well-settled cases, consensus on when it is fair or reasonable to doubt the impartiality of a judge is elusive—we do not know it when we see it.219

219. Geyh, supra note 6, at 676.
I quibble a bit with the breadth of this statement. Although there has been, particularly at the United States Supreme Court level, sharp division over disqualification law, the judiciary is, at least ostensibly, united behind a basic vision of the rules of recusal. Nevertheless, courts still divide at the margin regarding issues such as whether the Constitution should reach recusal errors by state judges, or whether constructive or actual knowledge supports disqualification (Liljeberg v. Health Services Acquisition). Among opinion leaders or public intellectual forces such as media outlets and commentators, there also appears to be more consensus than Professor Geyh posits. The public at large is perhaps most united in sentiment but appears to hold stronger views about threats to impartiality than the legal and political intelligentsia. This is reflected in surveys showing that four out of five Americans believe that a judge’s acceptance of a campaign contribution violates the appearance of the impropriety ideal. If the legal profession and political elites agreed with the public, mandatory disqualification in cases involving campaign contributors would be the rule.

220. See supra text accompanying notes 39, 87–88 (discussing 5–4 Supreme Court splits in Caperton v. Massey and Liljeberg v Health Services Administration).

221. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2267 (2009) (Robert, C.J., dissenting with three other justices from majority decision to apply Due Process Clause to require recusal of state court justice due to massive electoral support provided to justice by CEO of litigant).

222. Liljeberg v. Health Servs. Acquisition, 486 U.S. 847, 864–67 (1988). See supra text accompanying notes 39, 87–88 (discussing Court splits in Caperton and Liljeberg). Of course, it is possible that the dissenting Justices in Caperton and Liljeberg, although outwardly disagreeing with the majority based on these more technical grounds, were actually opposed to the disqualifications in those cases because they simply saw nothing improper in the judicial behavior under review. There is certainly some of this tone in Justice Roberts’s Caperton dissent, and particularly in Justice Scalia’s dissent. 129 S. Ct. at 2273–74 (Roberts, C.J., dissenting); 129 S. Ct. at 2274–75 (Scalia, J., dissenting); see also Stempel, Playing Forty Questions, supra note 142, at 27–65 (dissecting Justice Roberts’s dissent and concluding that Roberts’s technical and operational objections to the majority holding are not well-taken and readily resolved).

223. See generally Bert Brandenburg, The Role of Public Opinion in the Debate Over Recusal Reform, 58 DRAKE L. REV. 737, 738–45 (2010) (reviewing survey data consistently reflecting that a majority of the public lacks confidence in the impartiality of judges receiving campaign contributions from lawyers or litigants who appear before them).

224. See Baum & Devins, supra note 22, at 155–56. (pointing out that justices are relatively unmoved by public opinion, which expresses concern about
At present, there is insufficient empirical information to effectively resolve whether there is as much consensus on when the impartial appearance standard overcomes a rebuttable presumption of judicial neutrality, as I posit, or whether there is as much division on the question as is posited by Professor Geyh. But without doubt, his observation is true at its core: there is substantial disagreement among both lawyers and laity as to what constitutes a reasonable question as to impartiality. Nevertheless, Professor Geyh and I divide over what impact this disagreement should have on the positive law of disqualification. He suggests that the division requires increased use of procedural mechanisms upon which there is wider consensus and that these are the best means for policing judicial neutrality. I agree, but also argue that the legal system and the body politic needs to accept an updated, "post-modern," approach to operationalizing the appearance standard.

Professor Geyh seems to suggest, as does disqualification case law, that the appearance standard is not triggered until there is widespread, almost universal agreement that the appearance of impartiality standard has been breached. As I read his assessment, case precedent, and scholarly commentary, a judge’s impartiality is not subject to reasonable question unless nearly the entire viewing audience—as represented by the hypothetical “reasonable person”—has this perception. At the very least, the judge deciding the motion has this perception about the hypothetically well-informed lay public’s perception. This de facto insistence on consensus is the judicial neutrality due to judicial elections and political activity by judges; justices are more concerned with opinions of social, economic, and political elites).

225. Geyh, supra note 6, at 676.
226. Id. at 701.
227. Id. at 719.
228. See id. at 694 (“Achieving the appearances-based regime’s second goal of making disqualification more workable by relying on an objective standard . . . assumes that there is a shared view of when to doubt a judge’s impartiality that can be embodied in the ‘reasonable person’ of song and story.”).
229. See, e.g., In re Mason, 916 F.2d 384, 386 (7th Cir. 1990) (judges must imagine how a single well-informed observer of the judicial system would react; no suggestion that reasonable well-informed observers may divide over a judge’s impartiality). See also FLAMM, supra note 14, § 5.6.3 (discussing “[t]he Reasonable Person’s Point of View” and the mind of a reasonable, uninvolved observer) (emphasis added) (citations omitted); id. at § 5.7 (focusing on a single reasonable person as an exemplar of all opinion on questions regarding judicial impartiality).
norm even if it is not expressly articulated. As a leading commentator summarized:

Even when it is accepted that a judge’s impartiality is to be determined from the standpoint of the fictitious “reasonable person,” rather than from that of the judge or a party litigant or its counsel, problems may and often do arise in determining precisely who this so-called “reasonable person is, and how she would determine an appearance of bias or impropriety.”

Note that the inquiry described in this treatise is filtered through a single reasonable person that purports to represent what any and all reasonable lay observers would conclude. In a world of varying opinions, this standard seems hopelessly outmoded. It is a little like attempting to intuit what the mythical reasonable person will conclude regarding deficit spending, tax rates, universal health care, or the Obama presidency. On issues like these, the public is

230. See Flamm, supra note 14, § 5.1 at 104 (noting that standard for disqualification based on reasonable question as to impartiality is “an objective one, pursuant to which recusal is called for whenever a judge’s impartiality might reasonably be questioned by a disinterested observer”) (citations omitted); James J. Alfini et al., supra note 14, § 4.04 at 4–11 (“The test for an appearance of partiality is meant to be an objective standard, that is, whether an objective, disinterested observer fully informed of the relevant facts would entertain a significant doubt that the judge in question was impartial. This is objective in the sense that the standard is filtered through the eyes of a reasonable observer, rather than through the subjective view of the judge in question.”) (citations omitted). Accord, Tyler v. Purkett, 413 F.3d 696, 704 (8th Cir. 2005) (stating that test for disqualification “asks whether, from the perspective of ‘the average person on the street,’ a reasonable man knowing all the circumstances ‘would harbor doubts about the judge’s impartiality’”); Higganbotham v. Okla. Transp. Comm’n., 328 F.3d 638, 645 (10th Cir. 2003) (same proposition); United States v. Wilderson, 208 F.3d 794, 797 (9th Cir. 2000) (same proposition); Pepsico, Inc. v. McMillen, 764 F.2d 458, 460 (7th Cir. 1985) (same proposition).

Implicit in these treatise summaries and the prevailing case law is the notion that the yardstick for this inquiry is a hypothetical, reasonable, disinterested, adequately informed lay observer who represents the entire populace. There is no mention of the possibility of division among objective lay observers or consideration of a substantial minority view. Rather, the unspoken assumption is that all reasonable observers can only see the disqualification issue one way—as either a case where the judge’s impartiality is questionable or a case where it is not.

231. Flamm, supra note 14, § 5.7, at 130 (citations omitted).
deeply divided. Although we each may have our favored positions on these matters, can it really be said that those with whom we disagree are unreasonable? In effect, we do something like this under current disqualification practice by embracing the fallacy that there will be consensus or supermajority agreement on all matters of recusal and then relegating any potential disagreement to the category of the unreasonable.

The current implicit operational definition to policing judicial neutrality is almost doomed to failure in the modern–post-modern world of diverse communities, differing ideologies, varied backgrounds, and competing ideologies that often color perceptions of neutrality. Even in cases as extreme as Justice Benjamin’s refusal to recuse in *Caperton* despite benefiting from $3 million of political support from someone involved in the case—*Extremely* the archetypical “extreme” case envisioned by Professor Geyh—has its defenders. The defenses may vary, but collectively there is a non-trivial segment of society that appears to see nothing wrong with Justice Benjamin’s behavior, and a larger group (including four Supreme Court Justices) that is willing to allow such behavior notwithstanding the awful appearance.

Against this backdrop of a segmented society, disqualification law is unduly constricted if the legal system adopts (even implicitly) the notion that there must be broad consensus approaching uniformity before it may deem a situation one that raises a reasonable question as to a judge’s impartiality. The system begins with a presumption of judicial impartiality that, although not as strong as in Blackstone’s time, remains quite vigorous. Added to this presumption is some inevitable lack of transparency.

233. Geyh, *supra* note 6, at 676.
234. See Jeffrey W. Stempel, *Playing Forty Questions*, *supra* note 142, at 4 (noting that although *Caperton* holds that disqualification was widely praised, a significant number of commentators, including The Wall Street Journal, The Tampa Tribune, and the Las Vegas Review-Journal, opposed disqualification and supported the dissenters).
235. See *supra* text accompanying notes 1, 39 (reviewing the *Caperton* decision and the 5–4 division of the Supreme Court).
236. See *supra* text accompanying notes 197–205 (highlighting the persistence of pernicious version of duty to sit doctrine).
237. See *supra* text accompanying notes 193–95 (noting the cryptic nature of many recusal decisions).
Society and the legal profession can seldom know what a judge really thinks about people, companies, situations, and the world, unless the judge is unusually loose-lipped. 238 Beyond this, judges, like everyone else, are subject to unconscious attitudes that may undermine their neutrality. 239 Additionally, when assessing recusal motions directed at them, judges deciding these motions are gripped by cognitive traits that reduce their ability to assess themselves fairly and accurately. 240 When assessing recusal motions directed at colleagues, judges remain subject to these and other cognitive and sociological traits that make for under-enforcement of the impartiality norm. 241

Under these circumstances, insisting on something approaching consensus before deciding that the appearance standard has been met is a prescription for unduly weak disqualification law. Rather, the legal system’s notion of when reasonable questions as to impartiality exists must expand to match the reality of illusive consensus. Instead of insisting that every “reasonable” observer harbor questions as to impartiality in order to trigger disqualification, we should find the standard met whenever a substantial segment of the reasonable public would harbor doubts about a challenged judge’s impartiality.

My rough stab at operationalizing this notion would look something like this. Judges deciding recusal motions cannot, as a practical matter, conduct a plebiscite or public opinion survey. Even if it was possible logistically and financially, getting the electorate or the respondents adequately informed would be nearly impossible. Often, the facts surrounding a recusal motion are too numerous, detailed, or subtle to adequately communicate to outsiders with any efficacy. Judges are necessarily reduced to conducting a thought experiment as to how the hypothetical informed layperson would react to a potential disqualification scenario.

In conducting this thought experiment, however, judges should not be imagining whether every observer would harbor

238. See supra text accompanying notes 93–99 (noting the difficulty in knowing degree to which judge may harbor bias or prejudice).
239. See supra text accompanying notes 23–27 (discussing human tendency toward unconscious bias or prejudice).
240. See supra text accompanying notes 30–32 (discussing judges’ tendency toward cognitive error in evaluating their own abilities).
241. See supra text accompanying note 23 (describing cognitive constraints affecting judges’ assessments of colleagues’ conduct).
questions about the judge’s impartiality or even whether a majority
would have reasonable questions regarding judicial neutrality.
Rather, the judge should be asking whether a substantial segment of
the public would have such doubts. Although there is no magic
figure for this inquiry (at least not one I would advance at this time),
my instinctive view is that if twenty-five to thirty-five percent of
observers would question a judge’s impartiality, the judge should
step aside.
I set out this rough standard by reference to the common
practice of democratic societies in establishing supermajority
standards for decision in matters of great importance. For most
government decision-making, even for many important matters, a
simple majority rules. John F. Kennedy, Richard Nixon, George H.
W. Bush, Bill Clinton, and George W. Bush won presidential
elections by relatively small or even razor-thin margins.242 Neither
Clinton nor the younger Bush was supported by a majority of those
total.
But nonetheless, all were accepted as legitimate winners by
the vast bulk of the body politic and, to state the obvious, all
obtained unquestioned executive authority.
But in a number of areas, American political society has long
demanded supermajorities for decision-making deemed particularly
important or otherwise subject to special circumstances. The United
States Constitution may be amended only if the proposed
amendment is supported by two-thirds of Congress and ratified by
three-quarters of the states.244 Presidential vetoes may be overridden
only with a two-thirds vote of both houses of Congress.245 Treaties

242. See President, CHI. TRIB., Nov. 7, 1996, at 4 (showing that in 1988
George Bush, Sr. won by a little over seven million votes—approximately 7.8%;
in 1992 Bill Clinton won by 5.8 million votes—approximately 6.9%; in 1996 Bill
Clinton won by a margin of 7.7 million votes—approximately 9%); Eric Black,
The 2004 Election in Historical Context, STAR TRIB., Dec. 13, 2004, at 5A
(discussing that in 2000 George W. Bush had .5% less of the popular vote than Al
Gore but received five additional electoral college votes; in 2004 George W. Bush
won by 2.9% of the popular vote); Philip E. Converse, Angus Campbell, Warren
E. Miller & Donald E. Stokes, Stability and Change in 1960: A Reinstating
Election, 55 AM. POL. SCI. REV. 269, 275 (1961) (“Popular vote tallies show that
Kennedy received 49.8 percent of the two-party vote outside of the South and 51.2
percent of the popular vote case in the South.”). See generally J. CLARK ARCHER,
244. U.S. CONST. art. V.
must be ratified by two-thirds of the U.S. Senate. Although a president may be impeached by a majority vote of the House of Representatives, he may only be convicted by a two-thirds vote of the Senate. Senate matters can be thwarted by a forty percent minority through use of the filibuster, which requires sixty votes for cloture and a vote on the merits of the matter.

Analogously, many states have similar rules in their state constitutions while many cities have supermajority requirements for charter amendment. Many private organizations take a similar attitude toward important decision-making. For example, corporations frequently require a supermajority of sixty to seventy-five percent support for changes to bylaws or removal of officers or

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248. U.S. CONST. art I, § 3.
250. See OKLA. CONST. art. V, § 33 (two-thirds vote of legislature required to override governor’s veto); R.I. CONST. art. IX, § 14 (same); NEV. CONST. art. 4, § 35 (same); see also Elmer Cornwell, Constitutionalism in Rhode Island: Continuity of Colonial Design, in THE CONSTITUTIONALISM OF AMERICAN STATES 565, 573 (George E. Connor & Christopher W. Hammons eds., 2010) (stating that Rhode Island requires three-fifths vote to override veto); Ronald M. Peters, Jr. & Michael K. Avery, Oklahoma’s Statutory Constitution, in THE CONSTITUTIONALISM OF AMERICAN STATES 565, 573 (George E. Connor & Christopher W. Hammons eds., 2010) (noting that the Oklahoma constitution requires three-fourths vote of legislature to initiate new taxes or raise income taxes).
251. See EUGENE MCQUILLIN, 4 THE LAW OF MUNICIPAL CORPORATIONS § 13.31.20 (3d ed. 2010) (“Acts regarded as of more than ordinary importance may require a two-thirds vote, or in some cases considered of greater public interest a three-fourths vote, of the local legislative body; for example, in event of remonstrance on the part of property owners, where they are required to pay for the contemplated improvement by local assessment or special tax, or in case of proposed restrictions in the use of real property, as so-called zoning regulations. Other examples are to remove an officer, expel a member, or to vacate a street. To accomplish certain things, even a greater vote, such as four-fifths, may be prescribed; e.g., to expend money for extraordinary purposes, as to celebrate some notable event of general or local interest. Where protest of a specified percentage of the owners of property likely to be affected is made, sometimes a unanimous vote is exacted; and such a vote is sometimes required to alter a zoning district or to change a highway grade.”) See also LAS VEGAS MUN. CODE §19.06.090(1)(6) (describing three-fourths vote requirement for designating a historic district if there is community objection).
directors. Many law schools (including my own at UNLV) require a two-thirds vote for hiring or for tenure and promotion. Retention election systems for state court judges sometimes require more than a majority vote in favor of retaining a judge.

Reviewing these longstanding practices in politics, academia, and business, one is left with the general feeling that our system strives to ensure that particularly important matters enjoy more than mere majority support, with the two-third figure frequently cropping up. My hypothesis is that public confidence in the impartiality of judges is a sociopolitical value on a par with constitutional amendment, treaty confirmation, important hiring and retention matters, or changes to organizational rules. Applying society’s implicit calculus, I posit that the public and profession should be confident— to at least a two-thirds level—that adjudication outcomes do not involve judges hampered by reasonable questions regarding impartiality. If something approaching a third of the profession or public harbors such questions, the adjudicatory outcome does not sufficiently enjoy the confidence of the profession or the public.

252. See William Meade Fletcher, Fletcher Cyc. L., Private Corps. § 4209.10 (2011) (“Supermajority voting and quorum requirements can be cumbersome. Nevertheless, shareholders in closely held corporations frequently choose them to protect their interest, and directors in publicly traded corporations will adopt them to help fend off takeover bids.”); Id. at §5760.10 (“State corporations codes generally allow shareholders to impose supermajority quorum or voting requirements on themselves, either in the articles of incorporation or in the bylaws if the articles of incorporation authorize such bylaws.”)

253. See, e.g., William S. Boyd School of Law, University of Nevada Las Vegas, Bylaws art. 2.6 (Nov. 19, 2010) (requiring a two-thirds vote for faculty hiring and amendments to bylaws); William S. Boyd School of Law, University of Nevada Las Vegas, Substantive Standards and Procedural Guidelines for Promotion and Tenure §§ IV(B) & IV(D) (Feb. 2010) (requiring a two-thirds vote for promotion from assistant professor to associate professor and from associate professor to full professor).

254. See, e.g., N.M. CONST. art. VI, § 33A (57% required for retention); ILL. CONST. art. 6 § 12(d) (60% required for retention). Nevada’s proposed merit selection system, which failed to obtain the necessary two-thirds vote for a state constitutional amendment, would have required a 55% vote for retention. But see Sarah Elizabeth Saucedo, Note, Majority Rules Except in New Mexico: Constitutional and Policy Concerns Raised by New Mexico’s Supermajority Requirement for Judicial Retention, 86 B.U. L. REV. 173, 177-78 (2006) (“In all but two of the states that employ some form of merit selection followed by retention elections, judges are required to garner only a bare majority of the vote (i.e., more then 50%) to remain in office.”).
Consequently, judges should order recusal whenever that confidence level is unmet.

One can make a good case that a three-quarters or seventy-five percent rule is superior to my proposed two-thirds rule. Perhaps. But for now, I would be satisfied to see the legal system move away from the current notion that there is an insufficient question about impartiality in the absence of uniform shock or rioting in the streets regarding a failure to disqualify. Further, imposing a supermajority rule regarding public perception could cause excessive administrative problems by making recusal too common and excessively empowering a relatively small minority of observers. Even long-established and logical supermajority rules are subject to the criticism that they can lead to de facto minority tyranny. Requiring recusal when less than thirty percent of the hypothetical reasonable audience has doubts could give an unrepresentative reasonable group excessive power.

Even if the judge is in fact neutral and even if a majority of observers perceive no reasonable question as to impartiality, the legal system should not be conducting adjudications about which one-third of the public has serious concerns regarding fairness. Public confidence is unduly undermined as is the confidence of the system’s participants: litigants; their constituents (e.g., taxpayers and corporate shareholders); interested parties (e.g., the investment and banking communities); lawyers; witnesses (to the extent they are aware of the issue); court and government staff (including law enforcement personnel frequently in contact with adjudication); and other judges (who over time will slouch toward weaker recusal practice themselves after witnessing adjudication where such large segments of the community have doubts about judicial neutrality).

An obvious objection to my “substantial group of doubters” trigger for recusal is that it seems inconsistent with the traditional legal view that community sentiment is to be measured through the vessel of a single objectively reasonable person. This standard, however, although useful in many areas of law such as determining negligence in tort, is both unrealistic and unattainable in many instances. Perhaps more important, the legal system’s use of the reasonable person standard for substantive law usually carries with it an automatic mini-plebiscite in the form of a jury determination. In effect, the jury as mini-society decides whether given conduct is reasonable. No similar controlled public feedback takes place regarding judicial failure to recuse unless the matter results in
appellate review after final order or through mandamus, becomes
salient in an election, or is sufficiently egregious to trigger
impeachment or corruption challenges.\footnote{255} Rather, under current
practice, the trial judge decides disqualification questions in a
unilateral vacuum, subject to limited review by an electorate of three
appellate judges inclined to defer to a colleague under the abuse of
discretion standard and harmless error review.

Another undoubted objection to my standard for triggering
appearance-based disqualification is that it can be characterized as a
heckler's veto in which the views of a small minority thwart the
larger public interest. Obviously, my suggestion would not create a
classic "heckler's veto," as Professor Harry Kalven used the term.\footnote{256}

\footnote{255. One potential counter-argument to my view that a substantial
minority's concerns should satisfy the reasonable question standard is that the
system regularly allows a single judge to determine that no reasonable person
could find facts sufficient to support a party's claims and therefore grants summary
judgment. As discussed below (see infra text accompanying notes 256–60), cases
like \textit{Scott v. Harris} and the cognitive illiberalism problem make suspect much of
the modern rationale favoring a "strong," more jury-displacing approach to
summary judgment suspect. \textit{See generally} Jeffrey W. Stempel, \textit{A Distorted
Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed
(arguing that the shift in this direction by the U.S. Supreme Court's 1986 trilogy of
summary judgment decisions was insufficiently sensitive to the possibility of law
disagreement); Samuel Issacharoff & George Loewenstein, \textit{Second Thoughts on
Summary Judgment}, 100 \textit{Yale L.J.} 73, 108–14 (1990) (presenting a similar
criticism of trilogy cases).

Even if these concerns are misplaced (and I think, if anything, the judiciary
has been too dismissive of academic criticisms of the modern trend toward greater
use of summary judgment), the fact remains that the judge granting summary
judgment is nonetheless looking to establish that there is not a single reasonable
law observer who could find the material, legally controlling facts undisputed. If
there is even a small perceived minority who might find the light red rather than
green or who might characterize conduct as unreasonable rather than legally
permissible, the court is supposed to deny summary judgment, at least if it is
following the rules. \textit{But see} Stempel, supra note 14, at 343 (noting that forty
percent of trial court summary judgments are reversed, hardly a very comforting
tract record for trial judges if in fact they are following the rules regarding
determination of a genuine factual issue).

\footnote{256. \textit{See} Geoffrey R. Stone, \textit{Harry Kalven, Jr.}, in Roger K. Newman, \textit{The
Kalven invented the term "heckler's veto" to describe circumstances in which
government stifled speech due to objections of some in a potential audience and
that terms such as heckler's veto and "public forum"—also invented by Kalven—}
I would require a **substantial** segment of the community to have nontrivial and reasonable concerns about a judge's impartiality as a prerequisite to recusal. A single person or even a fairly significant minority group would not be enough to command disqualification unless their numbers amounted to something approaching a third of the public (and their concerns about impartiality had sufficient intellectual rigor, a qualifier discussed in more detail below).

Although there is of course some diminution of judicial legitimacy whenever there is any question among any persons regarding a judge's neutrality, an inevitable corollary to the contemporary pluralistic world is that there will almost always be some people who are not only dissatisfied with adjudication outcomes but who also question the bona fides of the adjudicator with whom they disagree. This "tail" of public or legal community sentiment cannot be permitted to wag the metaphorical "dog" of sound recusal practice and effective court administration.

Under my proposed triggering point, there must be a sufficiently large group of doubters regarding impartiality and their doubts must be, in the minds of the adjudicator, sufficiently reasonable that they cannot be dismissed as the ravings of the lunatic fringe, even where it is a relatively large fringe. There must be at least colorable concerns regarding a judge's impartiality and they must be shared by a sufficiently substantial segment of the legal community or the public before a judge must recuse. Unlike the status quo's implicit standard of a single, unrealistically uniform view regarding neutrality, or Professor Geyh's notion of rough consensus of at least a majority of doubters required to force disqualification, my proposal would set a more realistic and more frequently met standard, resulting in somewhat more judicial disqualification.

In my view (which I admit will not be universally shared in a pluralistic legal community), this move toward a more easily pulled trigger and more disqualification will enhance actual and perceived fairness at minimal cost to the system. The legal community need not agree on precisely what triggers the reasonable-question-regarding-impartiality standard in all circumstances and it need not wait for an overwhelming community verdict on the matter. Rather, the judicial system should look only for sufficient rational doubt...
regarding a judge’s impartiality shared by a substantial segment of the community that is based on nonfrivolous grounds. With this yardstick, the appearance standard becomes sufficiently vigorous to catch current non-disqualification falling through gaps in the wall of procedural protections endorsed by most commentators and also generally moves the bench toward disqualification in close cases rather than excessively clinging to initial case assignments of judges.

My suggestion has at least the implicit intellectual support in the emerging notion that the judicial system must be wary of "cognitive illiberalism" among judges. The term is most associated with an important law review article criticizing the U.S. Supreme Court’s decision in *Scott v. Harris*, in which the court affirmed summary judgment for police officer defendants in a suit brought by a plaintiff injured in a high-speed car chase. With only Justice Stevens in dissent, the Court found that there was no genuine dispute of material fact regarding the police actions in conducting the chase and intercepting the plaintiff-suspect (which resulted in his car hitting a tree and severe injury). The Court reached this near-consensus on the basis of a trailing police cruiser’s video of the chase, which the Court found so persuasive it posted it on the Court’s website for all to see.

Taking the Court’s invitation, Professors Dan Kahan, David Hoffman and Donald Barman conducted a survey in which respondents viewed the tape and expressed their opinions as to the reasonableness of the police behavior. Although a clear majority of the viewers agreed with the Court majority that the tape revealed the plaintiff creating a dangerous situation justifying the police interception of his flight, a substantial minority of viewers disputed this or at least had doubts regarding the propriety of the police action. Further, a substantial segment of the substantial minority

259. *Id.* at 389 (Stevens, J., dissenting).
260. *Id.* at 381–86.
261. *Id.* at 378 n.5.
262. See Kahan et al., *supra* note 257, at 841–43 (detailing how respondents were shown police videotape of car chase at issue in *Scott v. Harris* and asked to categorize police conduct as reasonable or unreasonable).
263. See *id.* at 865–68 (emphasizing that majority of those viewing the videotape agreed with *Scott v. Harris* that fleeing suspect created dangerous
were African-American, perhaps reflecting their personal or their community's past interactions with law enforcement. 264

Professor Kahan and his co-authors labeled the Court majority's inability to even imagine that reasonable persons could view the tape in a way different than its own as "cognitive illiberalism." 265 The term has caught on and was labeled by the New York Times as one of the "big ideas" of 2009. 266 In the roughly eighteen months that the study has been in the public domain, it has already been cited more than seventy-five times in scholarly law journals 267 and mentioned prominently in popular news accounts. 268

Even before the phenomenon was given its catchy moniker, viewers of adjudication had long observed that too much judicial decision-making proceeds on the judge’s notion (or the panel’s or Supreme Court’s notion) that no sane person could view the case in any other way than does the deciding court. 269

Obviously, this sort of empirical certainty is incorrect. The judiciary itself demonstrates this again and again when judges themselves disagree regarding what is "negligent" or "material" or "ambiguous." The Kahan study of the Scott v. Harris video demonstrates that even when there is widespread consensus among a situation justifying police bumping maneuver, but that one-third disagreed and saw no such exigent circumstances).

264. See id. at 843-48 (responding to the Court’s invitation to “see for yourself” and concluding that the “obvious” views come from troubling psychological bias).


267. This information is based on a search of the LexisNexis Legal Periodicals database on February 15, 2011 (search of Dan w/2 Kahan w/9 Scott w/2 Harris).

268. See, e.g., Christopher Shea, Ninth Annual Year in Ideas, N.Y. TIMES MAGAZINE, Dec. 13, 2009, at 30 (describing the concept of cognitive illiberalism articulated in the Kahan article as one of the major ideas of 2009); Bruce Weber, Umpires v. Judges, N.Y. TIMES, July 12, 2009, Week in Review at 1 (noting the Kahan study and racially differential responses to the Scott v. Harris videotape); Ben Arnolds, In video age, a rush to judgment?, CHRISTIAN SCIENCE MONITOR, Jan. 13, 2009, at 1 (referring to the study and quoting Kahan).

269. See supra text accompanying note 255 (discussing similar issues presented by excessive judicial enthusiasm for summary judgment).
particular group of judges, there may be considerably more division among other legal or lay observers. As a result, some greater degree of judicial humility is required, as well as a more realistic test for determining a reasonable question as to impartiality that does not insist on uniformity, consensus, or even majority rule.

Presumably fearing that open acknowledgement of the implications of differences of perception and opinion will undermine judicial authority, courts persist in pretending that there is greater certainty or inevitability of adjudication results than is actually the case—but that is a topic for another day. Applied to judicial disqualification, the import of the cognitive illiberalism concept is that the bench must be more willing to entertain the possibility that a judge’s or appellate panel’s view regarding impartiality does not necessarily represent public consensus. It may not even represent a majority view of the laity. Even if it does represent the majority view, a huge proportion of the public may disagree, perhaps even strongly, and therefore distrust any subsequent judicial outcomes involving the judge in question. Faced with this reality in a diverse, pluralistic society, courts should not only strengthen procedural provisions designed to enhance judicial neutrality but also adjust their thinking as to when the appearance standard is triggered.

In this regard, disqualification is different than adjudication on the merits. After a decision on the merits, there is always some disagreement and often substantial disagreement. At a minimum, there are disappointed litigants and often other observers with similar

270. See supra notes 265–68 and accompanying text (noting that group of observers, all presumably reasonable people, can hold variety of views in circumstances where judge or group of judges assumed lack of such divergent views).

271. For example, courts routinely refuse to concede that a particular standardized contract provision is ambiguous even though courts have differed dramatically as to the meaning of the provision. See Jeffrey W. Stempel, Stempel on Insurance Contracts § 4.08[B] at 4-76 to 4-79 (3d ed. 2006 & Supp. 2010) (noting that courts almost uniformly take the position that differing judicial constructions of identical contract or insurance policy language do not establish the ambiguity of the language). See, e.g., Emeric Fischer, Peter Nash Swisher & Jeffrey W. Stempel, Principles of Insurance Law §§ 11.06, 11.11, 11.12 & 11.14 (3d ed. 2004) (reproducing and discussing cases in which courts have taken diametrically opposing views of the very same insurance policy language). See also Solan et al., supra note 26, at 1269 (noting that people generally underestimate the degree to which others may disagree with their construction of words).
interests who are upset. For example, after a judicial ruling favoring plaintiffs, insurers, banks, employers, or other groups likely to be future defendants in such cases typically criticize the decision and at a minimum warn of its implications for the future. After a decision in favor of any of these groups, workers, unions, policyholders, or borrowers may make countervailing criticisms. The public may be similarly divided, with these divergent groups waging public relations campaigns as part of an effort to influence judges and prospective jurors.

Notwithstanding society's commitment to the "rule of law," this sort of disagreement is tolerable except to the extent it is intertwined with more troublesome lobbying efforts, such as runaway spending on judicial election campaigns. At least in normal circumstances, the legal profession and society accept that after adjudication, there will be winners and losers. So long as the process is perceived as sufficiently fair, adjudicative decisions are accepted, even by those working to reverse or revise them, and society finds the rule of law upheld. But where there is a substantial, serious question about a judge's impartiality, the legal community and the public's acceptance of the decision is imperiled. This in turn requires a more sensitive approach to judicial disqualification than has historically prevailed.  

Because the financial and logistical costs of a more vigorous approach to recusal are relatively low, my proposed fine-tuning of the reasonable-question-as-to-impartiality test also passes cost-benefit analysis. Although some may complain about the perceived cost of transferring cases and making available a new judge after a successful challenge to the initially assigned judge, there simply is

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272. Considerable work by social scientists suggests that people have a strong desire for procedural justice that may equal or surpass their desire for substantive justice and fairness. Research suggests that where disputants feel they have enjoyed a chance to be sufficiently heard by a neutral, respectful decision-maker, they are inclined to accept even adverse substantive outcomes without much complaint. See generally Tom R. Tyler & E. Allan Lind, Procedural Justice, in HANDBOOK OF JUSTICE RESEARCH IN LAW 65, 68–69 (Joseph Sanders & V. Lee Hamilton eds. 2001) (stating that parties to disputes are likely to accept tribunal’s resolution of dispute as legitimate if they have been accorded respectful opportunity to be heard before a decision-maker perceived as neutral); E. Allan Lind & Tom R. Tyler, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988) (same).

not much staff time and money required to effect a substitution of judges, particularly if recusal takes place during the early stages of litigation. Under my proposed triggering point, the already existing costs of disputing recusal will decrease as the bench is relieved of the need to search for certainty of community opinion or

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...case because of receipt of campaign contributions from litigants to retain the case, in part because the judge's recusal had triggered a "chain" of additional recusals when the next two judges to whom the case was assigned disqualified themselves on this basis; expressing concern that disqualification under this standard will make staffing of cases difficult and impose undue costs on the system). A three-link chain is fairly short and reflects the degree to which courts may tend to overstate the burdens of expanded disqualification doctrine. In a case like Las Vegas Downtown, the administrative costs of upholding judicial disqualification due to receipt of campaign funds would be low. It simply does not take much of a court clerk's time to move a file from one office to another. Even if most of the district's thirty judges were disqualified, this would still require perhaps a half-day or so of a court worker's time (estimating fifteen minutes or so to transfer a file from chambers to chambers) as well as some limited judicial time considering and ruling on the motion (likely to be short because the inquiry is fairly simple and objective). Although this cost may not be trivial, neither is it enough of a burden to justify a failure to recuse if there is a serious question about judicial impartiality.

In cases like this and others involving important commercial interests in litigation (in this case, several casino companies were interested in the redevelopment project that was the subject of the case), the perceived problem (based on what attorneys and judges involved in the case have said to me privately) is fear that a culture of disqualification based on any campaign contribution holds the potential to spur a culture of excessively easy recusal and a rash of disqualifications inconsistent with ABA Model Code of Judicial Conduct Rule 2.7, as judges in an elected system routinely attempt to duck cases in which there is the potential for alienating useful friends or making powerful enemies. In this situation, there may indeed be a justification for what I have termed the "benign" concept of the duty to sit. See Stempel, Chief William's Ghost, supra note 40, at 818–25, 933–35.

274. It appears that the Administrative Office of the United States Courts and state court administrators do not maintain data regarding the costs specifically arising from transfer of cases between judges after disqualification of the initially assigned judges. Logically, however, the cost cannot be large. Such transfers, unless voluminous, are unlikely to require the hiring of additional court staff. Existing staff are expected to perform assigned duties in a reasonably expeditious manner and are generally salaried employees who do not receive overtime pay should they stay later than 5 p.m. or work weekends, which is seldom done in any event. Although there is undoubtedly some internalized expense or opportunity cost when court workers transfer a file rather than perform another task, no opponent of strong disqualificiation practice appears to have set forth any price tag occasioned by more aggressive recusal practice.
ascertain with some care whether a majority of the community harbors doubts as to impartiality. In return for this modest increase in judicial system resources already spent on disqualification, the system receives greater guarantees of impartiality and greater confidence in the fairness of adjudication.

IV. IMPLICATIONS OF THE NEW APPROACH FOR POLITICALLY AND IDEOLOGICALLY BASED APPEARANCES OF PARTIALITY

Adoption of my suggested modification of prevailing notions of when reasonable question as to impartiality exists will in general shift disqualification law in the direction of greater protection for neutrality without creating wholesale new categories of disqualification. One possible exception, however, is the possibility that my substantive approach to recusal may require greater imposition of disqualification based on judges' political and ideological activities. As discussed in Part I.B. above, it is inevitable that judges come to the bench with prevailing attitudes about the law, the world, economics, and politics. We accept this as the price for having educated, intelligent people on the bench. But we should be unwilling to accept judicial participation in cases where the judge has been involved in activity that a substantial portion of the public regards as excessively partisan or ideological. This participation, under my yardstick, raises a reasonable question as to impartiality. Such activity is not only unseemly for judges but also may make them excessively committed to results favored by affiliated persons or organizations, thereby undermining the aspiration of neutrality for judges notwithstanding that judges often or even usually come to the bench as liberals, conservatives, Republicans, or Democrats.

Separating mere judicial preference from inappropriate judicial ties to political and interest group activity presents difficult issues of line-drawing. Two recent episodes illustrate the problem. Most recently, U.S. Supreme Court Justice Antonin Scalia was booked as a speaker at a "Conservative Constitutional Seminar" sponsored by the Tea Party.275 As the New York Times put it with some understatement, it "was a bad idea for him to accept it". 275

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At least I hope most every member of the legal profession will agree that being a featured speaker at an avowedly political and partisan organization’s event extolling a particular jurisprudential philosophy with a heavy dose of result orientation is a bad idea. In addition, this behavior from Justice Scalia, who has a history of some arguable lapses of judgment regarding disqualification—and a tendency to extreme defensiveness when challenged about it—is troublesome.277

Justice Scalia’s combativeness regarding his elbow-rubbing with the right wing of American politics goes beyond simple bad behavior. At a minimum, it raises nontrivial concern for many that he approaches the Court’s pending docket with a political or ideological agenda tied to that of groups like the Tea Party or entities like the Bush-Cheney Administration. This goes beyond merely having a world view when coming to the bench. It instead smacks of a justice willing and proud to carry adjudicative water for these groups, entities, or persons.278


277. See Stempel, Chief William’s Ghost, supra note 40, at 900–09 (describing Justice Scalia’s now-infamous duck hunting with former Vice President Dick Cheney while a case against Cheney was pending before the Court, and other instances of arguably inappropriate behavior); Monroe H. Freedman, Duck-Blind Justice: Justice Scalia’s Memorandum in the Cheney Case, 18 GEO. J. LEGAL ETHICS 229, 229–30 (2004) (excoriating Justice Scalia’s defense of his failure to recuse); Timothy J. Goodson, 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, 183–84 (2005) (criticizing Scalia’s failure to recuse and his defense).

278. The Scalia Tea Party star turn recurred in a slightly different form when he was booked for what was originally planned as a private question-and-answer session with the Tea Party Caucus in Congress, a group largely comprised of more conservative elements of the Republican rank-and-file and whose principal public face has been outspoken conservative Representative Michelle Bachman (R-Minn.). See generally Nina Totenberg, Justice Scalia Speaks to Tea Party Caucus, Democrats, NAT’L PUB. RADIO (Jan. 25, 2011), http://www.npr.org/2011/01/25/133195963/scalia-speaks (reporting Scalia’s appearance at Tea Party cause was relatively brief and included question-and-answer session; noting that although initially planned as private, it was opened to the press after complaints and concern that in the absence of media coverage, speculation could ensue about the Justice’s statements as pre-commitments on issues pending before the Court). Representative Bachman gave the Tea Party Caucus response to President
Just as seriously, the act of traveling or affiliating with, or appearing before particular political or ideological entities poses significant risk that the jurist involved becomes, by virtue of this involvement, less able to view their causes with sufficient neutrality. Substantial socio-psychological research suggests that when someone takes action or publically expresses a view, they become more wedded to that view.\textsuperscript{279}

Obama’s State of the Union address, which was viewed by at least one commentator as upstaging the Republican Party’s official response delivered by Representative Paul Ryan (R-Wis.). See generally Frank Rich, The Tea Party Wags the Dog, N.Y. TIMES, Jan. 30, 2011, Week in Review at 8, \textit{available at} http://www.nytimes.com/2010/01/30/opinion/30rich.html (describing the State of the Union and responses as well as expressing opinion regarding media reaction to Bachman response). As discussed below, this appearance can be differentiated from the other Tea Party event, particularly after the sponsors invited others to attend. It nonetheless raises concerns.

The problem with either event goes beyond appearances and is heightened when a jurist appears before an ideological group as a featured speaker. The Justice may have made statements reflecting a pre-commitment to particular case outcomes that would make his continued participation in some matters inappropriate. Although this can, of course, occur over dinner with a friend or during family conversation, I accept that, much as I would like, certain windows into the potentially prejudiced soul of a judge are simply closed as a practical matter. Nevertheless, the recusal regime of American courts needs to be more sensitive to the prospect that judges in private sessions with interest groups may make inappropriate pre-commitments on issues.

As a practical matter, one cannot realistically insist that judges give up interactions with friends or family that pose some dangers of undermining impartiality. However, we can insist that judges forgo speaking gigs and honoraria opportunities which pose such risks. Judging is supposed to be a full-time job. Judges hardly have a “right” to make star turns at political party functions or attend lavish retreats or summer law seminars in Europe. To the extent that a significant portion of the body politic finds these extracurricular activities to pose too great a threat to judicial impartiality, the legal system logically should prohibit such outings.

Although there is undoubtedly some benefit in having a judge or justice preside over a legal seminar in one of the great capitals of Europe, it is by no means clear that the students and sponsoring institution would not do as well or better with another instructor while eliminating the risk that the jurist will be inappropriately lobbied or influenced on an issue in that private setting. By contrast, when Judge Richard Posner writes a book, he does so in the solitude of his home or chambers, and the resulting product is in plain public view should anyone wish to use it as a basis for a disqualification motion.

279. See THALER & SUNSTEIN, \textit{supra} note 15, at 55–60 (noting that respondents tend to agree with prior opinions consistently expressed by others even when experiment has been structured so that prior opinions or statements are
The arguably harder question is whether such episodes might provide a basis for recusal. Under the current status quo and the implicit Geyh view requiring consensus or a strong majority opinion to trigger reasonable-question-as-to-impartiality review, the answer fairly clearly is that such behavior by sitting judges, although regrettable, is probably not ground for disqualification. Where a clearly incorrect; such “[c]onformity experiments have been replicated and extended in more than 130 experiments from seventeen countries”); ROBERT CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 52 (4th ed. 2000) (explaining that initial decision on a question or issue makes it more likely that same decision will be made if issue is subsequently presented); Soloman Asch, Opinions and Social Pressure, in READINGS ABOUT THE SOCIAL ANIMAL 13, 17–26 (Elliot Aronson ed., 1995) (observing that people dislike holding views or taking positions at odds with those of peers); see also TOBIAS J. MOSKOWITZ & L. JON WERTHEIM, SCORECASTING: THE HIDDEN INFLUENCES BEHIND HOW SPORTS ARE PLAYED AND GAMES ARE WON 157–59 (2011) (discussing conformity bias and socio-psychological research identifying the trait in people). See generally LEE ROSS & RICHARD NISBETT, THE PERSON AND THE SITUATION (1991) (arguing that people seek to be consistent and adhere to prior determinations made).

See also supra notes 22–43 and accompanying text regarding cognitive biases generally. For example, a judge who appears before an interest group and expresses views favored by the interest group has arguably established a status quo consistent with that interest group’s agenda. The judge may then be in at least the partial grip of a status quo bias favoring that interest group as the status quo of his or her thinking on an issue. In addition, the judge is now particularly aware of the interest group’s position on legal issues, which may make the judge’s future adjudicative thinking more vulnerable to the availability heuristic.

To some extent, this is common sense. We have all had the experience of seeing a person take a public position on an issue (in a political campaign, in a faculty meeting, at work, in court) and then later cling to that position out of pride or defensiveness even as further developments make the position appear unwise. Judges should as a general rule avoid putting themselves in situations where this phenomenon is likely to occur.

280. See Totenberg, supra note 278 (discussing how by the evening of the Scalia story’s revelation, “there appeared to be more fizzle than sizzle to the charge of unseemly partisanship by a Supreme Court justice”). See also FLAMM, supra note 14, at § 10.4, (discussing how political affiliations of a judge alone rarely compel recusal); id. at § 10.5 (discussing how institutional affiliations of a judge rarely support recusal); id. at § 10.7 (discussing how a judge’s ideological or public policy views rarely support recusal); id. at § 9 (discussing how political connections to a judge are generally not a sufficient basis for recusal unless the tie is particularly close); id. at § 8 (discussing how social relationships, unless particularly close, tend not to result in disqualification); id. at § 7.8 (discussing how formal business or financial relationships may warrant disqualification but informal acquaintance due to prior business activity generally does not). But see In re Sch. Asbestos Litig., 977 F.2d 764, 781–84 (3d Cir. 1992) (requiring judge’s
judge makes appearances to a range of groups, the conventional wisdom lines up even more strongly against recusal.\textsuperscript{281} Perhaps the current mainstream does not even see these episodes as regrettable.

"There’s nothing wrong with it," according to one prominent legal ethics expert,\textsuperscript{282} while another saw it as a healthy exercise in civic education: "I think this is a good thing. I think it should be done maybe monthly, with a quiz at the end."\textsuperscript{283}

Notwithstanding the tongue-in-cheek tone of the last comment, the norm that there are no neutrality problems when judges speak in public is in need of serious reconsideration. This sort of insensitivity to appearances certainly strengthens the case for expanding per se procedural tools for fostering judicial neutrality rather than relying solely on the reasonable question as to impartiality standard. It also raises questions about whether jurists are devoting enough of their available energy to judging. More troublesome are the risks, outlined above, that the judge’s interaction with the group and even the act of public speaking may create reasonable concern over his or her impartiality.\textsuperscript{284}

When the judge speaks only to interest groups of particular stripe or to more partisan incarnations of a group, the risks of improper appearances are increased. For example, one might excuse a judge speaking to the Tea Party Caucus because it is composed of recusal in asbestos cases where he attended at asbestos litigation conference sponsored by plaintiff lawyers featuring as speakers plaintiff’s expert witnesses).

To some extent, however, the possibility that the Scalia Tea Party caucus appearance would be seen as a serious recusal concern was mitigated when "the caucus then broadened the invitation to include Democratic members of Congress, too . . . ." However uncomfortable the Scalia star turn may make people like me, if the event is open to the press and on the record, this provides litigants with an opportunity to seek recusal on the basis of the particular content of any remarks even if the Justice takes the position that the appearance itself is not disqualifying. In addition, one of the attending Democrats (Rep. Jan Schakowsky of Illinois) described the Justice’s remarks as "very dry," hardly good fodder for a disqualification motion. Totenberg, supra note 278, at 283.

281. See id. ("Legal ethics experts largely agreed that Scalia violated no ethics rules, especially because he has spoken to liberal as well as conservative groups in the past.").

282. Id. (quoting Northwestern University Law School Professor Steven Lubet).

283. Id. (quoting New York University Law Professor Stephen Gillers).

284. One goal of judicial ethics is maintenance of public confidence, which may be undermined where judge or justice appears to be unduly friendly with partisan political group.
elected governmental representatives and at least some of the Caucus activity can be described as lawmaking despite the clear electoral overtones.\textsuperscript{285} One might draw the line, however, where a judge had addressed the Tea Party organization itself, because this entity has no mantle of government legitimacy and is engaged in more obviously partisan electioneering.\textsuperscript{286}

Under my proposed standard of impartiality assessment, the question of disqualification based on appearances with interest groups is far closer than under the status quo, which implicitly concludes that unless nearly everybody is outraged by a judicial star turn before an interest group, there is no recusal problem. Certainly,

\begin{quote}
\textsuperscript{285} For example, when members of the Tea Party Caucus congregate at meetings such as that attended by Justice Scalia, they presumably discuss legislative goals that they can then further pursue in their capacity as elected members of Congress affiliated with the Republican party that currently controls the House of Representatives and holds significant power in the Senate.

\textsuperscript{286} See Maureen Dowd, \textit{Mad Men and Mad Women}, N.Y. Times, April 3, 2011, Week in Review at 10 (noting widespread influence of Tea Party on Republican legislative activity and active collaboration and overlap of organizational leadership). Ironically, however, Justice Scalia himself appears to have “waived” the right to make this argument. Although he is apparently happy to talk in private session with the Tea Party Caucus and is willing to continue talking if Democrats are invited to the session, Justice Scalia (along with Justices Thomas and Alito) declines to attend the President’s State of the Union address, suggesting that the official lawmaking status of the speaker or others in the audience is of minimal import to him. See Joan Biskupic, \textit{Tensions Rise Between Supreme Court, Politicians}, USA Today, Jan. 15, 2011, http://www.usatoday.com/news/washington/justicial/2011-01-15-Rwcourtpolitics23STN.htm. (noting non-attendance of justices at State of the Union speech, widely thought to be reaction to President’s criticism of \textit{Citizens United v. Fed. Elec. Comm’n}, 130 S. Ct. 876 (2010) during prior year). Nonetheless, the distinction between the Tea Party itself and its per se political events and the Tea Party Caucus is probably worth making in assessing whether a judge’s interaction with these types of groups creates a reasonable question as to impartiality.

Notwithstanding my criticisms of Justice Scalia regarding the Tea Party and duck hunting with Dick Cheney, he (and Justices Thomas and Alito) have it exactly right regarding State of the Union attendance. The entire Supreme Court should skip that party. It makes perfect sense that Congress should attend the speech. The President is, notwithstanding his obvious public relations objectives, attempting to outline goals for which he is attempting to enlist congressional support. By contrast, the Court is not supposed to be any part of any political program. It is not supposed to be part of the President’s “team” and need not be subjected to the pep rally atmosphere of the speech nor any intended or inadvertent lobbying by any of the other attendees.
\end{quote}
if my proposed standard replaced that of Professor Gillers ("it should be done maybe monthly, with a quiz")²⁸⁷ we would at least not be praising such behavior—a long overdue step.²⁸⁸ Applying this article’s proposed “substantial segment of the public raising a colorable concern” standard, a court reviewing similar behavior by a judge in a case implicating Tea Party interests or Tea Party political goals would ask whether a reasonable argument can be made that featured speaker status creates reasonable questions about the judicial speaker’s impartiality. If so, the second question is whether a substantial segment of the public would in fact harbor doubts as to the speaker’s impartiality.

Depending on case and context, my proposed approach to appearances disqualification could make a difference concerning disqualification. On the easy end of the spectrum are cases where the Tea Party itself is a litigant. Even under the current status quo and the Geyh consensus trigger for appearance recusal, a judge in Justice Scalia’s position should now be barred from participating in Tea Party cases, at least for a reasonable length of time after the speaking engagement or other affiliations with the group.²⁸⁹

If a case arises in which the Tea Party is substantially interested (e.g., a challenge to the election of a favored candidate), the judge would probably be disqualified, because it is quite reasonable to have legitimate concerns about the speaking judge’s

²⁸⁷. Totenberg, supra note 278, at 283.
²⁸⁸. Professor Gillers’ comment implicitly suggests that there is some great educational gain or elevation of public policy debate and lawmaking when Supreme Court justices interact with lawmakers (he would have both liberal and conservative justices make these appearances). I am honestly at a loss to understand his rationale. Is it that the legislators might learn something about constitutional law in a twenty-minute gab session? Can the legislators not simply read a book or law review article (or several)? Or, more realistically, don’t they have staff that can brief them on these things? Even if we accept the implicit premise of the Gillers comment—that legislators aren’t particularly voracious readers—what is the magic in having a sitting justice or judge interact with the legislators? Prominent liberal and conservative academics or litigators (e.g., Harvard Law Professor Lawrence Tribe and former Al Gore counsel David Boies on the left, Stanford Law Professor Michael McConnell and former Bush counsel Ted Olson on the right) could serve the bill as well or better without raising any concerns about judicial impartiality. There simply is not enough additional payoff from judicial involvement to warrant even a trivial risk of undermining judicial neutrality.
²⁸⁹. Where the Tea Party participates as an amicus, the analysis would be like that when a case presents legal questions of great interest to the Party.
impartiality regarding matters near and dear to the sponsoring organization and because a considerable portion of the community (e.g., the New York Times, Times readers, liberals, Democrats, and judicial ethics purists) would have questions as to such a judge’s neutrality in such situations.

More difficult are questions where a case involves an issue of importance to the Tea Party. Litigation about the nation’s deficit or tax structure or foreign policy or something like a challenge to Oklahoma’s recent initiative barring use of Sharia law are examples that might someday present themselves in real cases. Applying the “nonfrivolous concern and substantial amount of concern” tests to such cases is not easy. But it is no more difficult or indeterminate than applying the current template of the mythical single reasonable observer.

Although many will be upset if a “Judge” Scalia were to preside over such a case, it is unlikely a clear majority would hold this view because of popular attitudes considering adjudication to be inevitably political and value-laden and the likely opinion of many that the Tea Party’s interests in the matter are simply too attenuated. With my suggested lower threshold of disqualification, however, the case is sufficiently close that it may result in disqualification that would not take place today. If Tea Party interests are sufficiently tied to resolution of a pending legal determination, it is not at all frivolous for reasonable observers to question the ability of a judge who has been a featured Tea Party speaker to be impartial in the matter. Much of the public (more than my twenty-five to thirty-five percent target) is likely to share this concern and feel better if the featured speaker judge does not participate in the case.

Under my suggested approach, jurists who accept speaking invitations or other adulation from groups with defined legal interests and agenda would be at considerably higher risk of disqualification than at present. This would be a positive development. Under the status quo, jurists, as exemplified by Justice Scalia’s behavior, play fast and loose regarding appearances of impartiality but do so with near impunity.

290. See Associated Press, Oklahoma: New Amendment Is Delayed, N.Y. TIMES, Nov. 9, 2010, at A21 (noting how in November 2010, Oklahoma voters approved a state constitutional amendment forbidding the application of “Sharia law,” international or Islamic law, by courts sitting in the state).
More headline-grabbing than Justice Scalia’s Tea Party invitation was Judge Henry Hudson’s ruling that the Obama administration’s health care reforms exceeded congressional power under the Commerce Clause. Two previous decisions had backed the Administration in this regard and the basic constitutional law of the situation has been relatively clear since at least *Heart of Atlanta Motel* and probably since *Wickard v. Filburn*. Medical care and medical insurance are trillion dollar industries and frequently involve the movement of patients, providers, and equipment across state lines. The consequences of medical care and insurance are widespread. To a traditional constitutional lawyer, there is almost no

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292. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 261–62 (1966) (finding Commerce Clause power sufficiently broad to support application of federal law requiring non-discrimination in public accommodations to hotel in Georgia that did not advertise in other states or affirmatively seek customers from other states); see also ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW § 3.3.4* (2006) (regarding the expansion of the Commerce Clause generally in the twentieth century). Certainly, the argument that substantive due process and freedom of contract prevents broad and stringent government regulation has been largely rejected since *West Coast Hotel v. Parrish*, 300 U.S. 379, 386–88, 400 (1937) (upholding state minimum wage law), the famous case in which the “switch in time” (by Justice Owen Roberts who had previously supported freedom of contract and substantive due process restrictions on such regulation) “saved nine” by reducing support for President Franklin Roosevelt’s proposal to “pack” the Supreme Court with favorable nominees by increasing its size to fifteen. NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES* 115–21 (2010).

293. See *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1944) (holding that the Commerce Clause allows the federal government to regulate sale of wheat even absent a showing that particular wheat will cross state lines because grain trading industry generally operates across state lines). See generally CHEMERINSKY, *supra* note 292, § 3.3.4 (stating that since late 1930s or 1940s, Supreme Court has taken expansive view of Commerce Clause power of Congress to regulate).
question that Congress had Commerce Clause power to enact the Obama health care packages.294

Nonetheless, Judge Hudson found the Commerce Clause not to have the breadth taught about in law schools. Even under some more recent retrenchment, such as United States v. Lopez,295 Judge Hudson’s decision seems incorrect in light of the traditional canon and what seems settled law. When this entire drama is played out, Judge Hudson may have the last laugh in that the only other judicial body likely to strike down the law is the U.S. Supreme Court, which consists of at least four justices who appear to dislike the post-New Deal, post-Civil Rights Act breadth of the Commerce Clause, while favoring business interests in general.296

Predictably, liberal constituencies were upset with Judge Hudson’s ruling.297 But their pique was not restricted solely to the Judge’s arguable attempt to turn back the clock on the Commerce Clause. In addition to his overall conservative orientation (which is not disqualifying and was presumably known to the Senate when he


296. See Adam Liptak, Justices Offer Receptive Ear to Business Interests, N.Y. TIMES, Dec. 19, 2010, at A1 (reporting that common thread in decisions of Roberts Court has been rulings largely favorable to business interests). Of course, business interests are not always monolithic. By most accounts, some elements of the medical provider community and the employer community (most private health insurance in the U.S. is group insurance provided by employers) favor at least some parts of the Obama health care law. But large insurers in particular are opposed to the law and are a major force in the U.S. business community and the American economy. At the risk of oversimplifying, I regard attacks on the health care law as representing the overall position of the business community.

was confirmed after nomination by President George W. Bush), Judge Hudson, it turns out, has an ownership interest in a consulting firm that regularly works for Republican clients and that has worked for such Big “R” Republicans and Big “C” Conservatives such as Jon Boehner, Michele Bachmann, and John McCain. Estimates are that the judge received somewhere between $15,000 and $50,000 in 2009 as a result of his interest in the firm. Although the firm and its clients may not have been directly involved in the health plan litigation, concern has been raised that Judge Hudson’s financial and business ties to a company so allied with politicians bent on upending the health care law (including a former client of his firm, the Virginia Attorney General who brought the suit) prevent him from being impartial in the matter.


As the Huffington Post and others first noted last July, Hudson’s annual financial disclosures show that he owns a sizable chunk of Campaign Solutions, Inc., a Republic consulting firm that worked this election cycle for John Boehner, Michele Bachmann, John McCain, and a whole host of other GOP candidates who’ve placed the purported unconstitutionality of health care reform at the center of their political platforms. Since 2003, according to the disclosures, Hudson has earned between $32,000 and $108,000 in dividends from his shares in the firm (federal rules only require judges to report ranges of income).

Campaign Solutions was instrumental in the launching of Sarah Palin’s PAC (though Palin has since split with the firm), and Ken Cuccinelli, the Virginia attorney general who filed the lawsuit that Hudson rules in favor of today, paid Campaign Solutions $9,000 for services rendered in 2009 and 2010.

299. See Cook, supra note 298 (exemplifying how Judge Hudson was criticized for presiding over challenge to health care legislation, opposition to which was central to political platform of clients of consulting firm in which he owns interest). See also Kevin Sack, Legal Battles on Health Care Law Stir Questions of Partisanship in the Courts, N.Y. TIMES, Dec. 16, 2010, at A26 (“Judge Hudson has deep Republican roots as a state and federal prosecutor in Northern Virginia. He is also a passive minority owner of a Republican political consulting firm, Campaign Solutions, Inc. Among its former clients is Mr. Cuccinelli, the attorney general who is the plaintiff in the Virginia case. Mr. Cuccinelli stopped using the firm this year after news accounts disclosed Judge Hudson’s investment.”); Dahlia Lithwick & Sonja West, Unplugged: When Do Supreme Court Justices Need to Just Sit Down and Be Quiet?, SLATE.COM (Dec.
Under the traditional approach to recusal and its seeming search for public consensus or a strong majority view, Judge Hudson’s ties to the GOP marketing machine are perhaps insufficient to require disqualification. But under this article’s proposed approach to appearance-based disqualification, he almost certainly should have stepped aside. A nonfrivolous argument posits that a judge this invested financially and ideologically with a partisan political stance toward pending litigation should not hear cases with such palpable partisan implications. Further, a substantial portion of the public appears to agree. Judge Hudson’s participation in the health care law litigation is the functional equivalent of a co-owner of James Carville’s political consulting business presiding over the Paula Jones litigation against Bill Clinton or litigation related to the Clinton’s Whitewater investments. Republicans and conservatives would scream—and rightly so. Democrats and liberals are justified in having similar objections to Judge Hudson’s behavior.

Whatever the merits of the Commerce Clause debate relative to the health care law, the judicial system would be better served if decisions on the matter—particularly decisions that cut against the grain of prevailing precedent—were rendered by judges free of taint or suspicion. That’s not Judge Hudson. Further, substitution of another judge, particularly at the outset of the case where the matter should have been raised by Judge Hudson himself, would pose little
logical burden on the courts. In return, the judicial system and the public would receive an opinion free from concerns about judicial impartiality. Even if the health care law is ultimately overturned by the U.S. Supreme Court, a result certain to outrage many, the decision will be accepted if judicial impartiality is assured. Judge Hudson’s decision has, by contrast, been examined as much for his uncomfortably close ties to the partisan aspects of the case as for his legal analysis. A broader approach to appearance-based disqualification and a lower threshold for requiring recusal in such situations would better serve the system.

In similar fashion, a more realistic approach to questions of judicial impartiality requires a fresh look at the degree to which the status quo has tended to overlook or minimize a range of judicial ties to partisan politics or ideology. A good recent example is provided by Justice Clarence Thomas and his wife. Virginia Thomas is a

302. I would prefer that liberal judges or justices provide some examples of questionable political behavior for testing my proposed revised test for determining reasonable question as to impartiality. Unfortunately, however, the liberal justices seem not to have as high a partisan or ideological political profile as their conservative colleagues. To be sure, however, this article’s proposed greater scrutiny of judicial extra-curricular activities would apply to the summer law school classes, seminars, and retreats frequented by liberal jurists as well. It appears, for example, that all justices engage in some form of this type of activity, which, as discussed above, supra notes 277–82 and accompanying text, is problematic.

In addition to summer law teaching and the like, we have examples such as Justice Blackmun’s frequent attendance at Aspen Institute summer seminars addressing philosophical issues related to the law. Although none of these have the blatant political-ideological-interest group overtones of a Tea Party gathering (or a union meeting or a corporate shareholders meeting), they nonetheless pose risks that judges will be improperly influenced by extra-judicial factors or make pre-adjudication commitments to case outcomes. Although in the final analysis many of these outings may not require recusal under my proposed approach, these sorts of activities clearly pose more serious disqualification questions than the system has acknowledged.

To be sure, liberal jurists can violate norms of judicial recusal just as easily as conservatives. For example, Professor Monroe Freedman makes a compelling case of error by Justice Breyer. See generally Monroe H. Freedman, Judicial Impartiality in the Supreme Court – The Troubling Case of Justice Stephen Breyer, 30 OKLA. CITY U. L. REV. 513, 514–15, 527–32 (2005) (discussing concerns about Justice Breyer’s transgressions in failing to recuse himself, particularly emphasizing the Justice’s role as chair of the Judicial Conduct and Disability Act Committee). In Freedman’s view, Justice Breyer’s conduct violated existing law. There is no need to adopt my proposal to find that Justice Breyer erred in failing to recuse.
long-time conservative activist who has worked for a number of advocacy groups that appear to be keenly interested in certain public policy matters likely to come before the Supreme Court. Justice Thomas recently received criticism for failing to provide information regarding her employment on the annual financial disclosure statements required of federal judges.\(^{303}\) This is regrettable and appears to have resulted from rather gross negligence on the part of Justice Thomas. But more than Justice Thomas's behavior in a particular case, the legal system should re-examine its view that disclosure alone is an inadequate way of dealing with a jurist's ties (through the jurist or close family members) to particular interest groups.

Rather than treating disclosure as a sufficient response to concerns that judges will be insufficiently neutral because of the extra-judicial influence of a spouse's political activism, these sorts of situations should be tested according to this article's proposed revised approach to operationalizing the reasonable question as to the impartiality standard for recusal. Certainly, a reasonable question can be raised as to whether Justice Thomas can be sufficiently impartial in cases involving issues of particular import to his wife's employer. If a substantial portion of lay observers hold this view, Justice Thomas should be disqualified in such cases or Virginia Thomas should find other employment.\(^{304}\)

Related to the problem of excessive judicial coziness with interest groups is the structural problem of judges being lobbied by interest groups under the guise not only of speaking engagements but also purported judicial education programs. The "business model" of these interest groups is now familiar. Vested interests establish an ostensible think tank that conducts education seminars with a curriculum and array of speakers heavily slanted in an analytical direction favoring the interest group. Seminars are located in posh


\(^{304}\) A job change for Virginia Thomas may not be enough, of course, in that a spouse's identification with a particular interest group agenda at issue in litigation before the Court might nonetheless require disqualification, even if the spouse is not formally employed by the interest group.
resorts or similar settings (on the beach, in the mountains, or at some other desirable locale). Judges are invited to attend for free, are charged a nominal fee that does not approach the actual cost of the program, or are given "stipends" or "scholarships" for attendance by the sponsoring organization. The judge attends and in this paradise-like setting is brainwashed for a week or two. If things go as planned for the sponsoring organization and its interest group constituents, the judge returns to the bench more inclined to see the world as does the interest group. To paraphrase the cliché about communism, the judge has received "re-education in the country" that may well influence votes in future cases.

Astonishingly, the legal and political system has allowed such subtle corruptions for decades, although more attention has been paid to the issue in recent years. Although there are some reporting requirements of disclosure concerning judicial attendance and payment under the 2007 ABA Model Code, the fact remains that judges can largely attend such programs in the manner described above. At present, all that keeps the judge from being brainwashed is the judge's own sense of perspective. This may actually be rather good protection in that judges are generally of reasonably strong mind and even the dimmest judge can identify the politics and goals of the sponsoring organization and its supporters.

But, as discussed above, judges, like all humans, are subject to cognitive biases and undue influence provided by context and surroundings, including the other attendees, sponsors, organizers and

305. See generally Douglas Kendall & Jason Rylander, Tainted Justice: How Private Judicial Trips Undermine Public Confidence in the Judiciary, 18 GEO. J. LEGAL ETHICS 65, 129–34 (2004) (arguing that judicial attendance at luxurious conferences funded by interest groups and presenting programs favoring interest group positions on issues poses significant threat to judicial impartiality). For a short overview of these sorts of seminars and the ethics questions they pose, see GILLERS & SIMON, supra note 89, at 607–08 (describing the phenomenon, summarizing criticism, and noting ABA Model Code’s approach to the problem).

306. See MODEL CODE OF JUDICIAL CONDUCT R. 3.14 & 3.15 (2011) (permitting judge and guest to receive “reasonable” reimbursement for attending such programs and to report attendance within thirty days of event and to post on court website where feasible); GILLERS & SIMON, supra note 89, at 608–09 (summarizing Rules 3.14 and 3.15 and noting official but nonbinding comment that a judge “must assure himself or herself that acceptance of reimbursement or fee waivers would not appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality”).
Where this faculty and peer group has a stake in pending litigation or related matters, greater caution is required than has been displayed by the system to date. Even where there is no direct link to pending litigation, application of a more stringent test for determining questions regarding impartiality may require that judges attending such seminars not preside over certain types of cases. But at present, generalized efforts to lobby the judge toward a particular perspective on the law or a type of legal issue in such posh seminar settings do not result in disqualification.

The Second Circuit refused to disqualify a seminar attendee judge from presiding over a remanded environmental case involving Texaco even though the judge had attended a seminar sponsored by the Foundation for Research on Economics and the Environment (FREE), a pro-business group supported financially by Texaco.

Although this decision may be correct according to current recusal law, it almost certainly would not pass muster under my proposed approach. But at least the appellate court recognized the seriousness of the problem:

[W]e caution judges that recusal may be required after accepting meals or lodging from organizations that may receive a significant portion of their general funding from litigants or counsel to them—whether or not in connection with an unbalanced presentation . . . [A]ccepting something of value from an organization whose existence is arguably dependent upon a party

307. See supra notes 22–51 and accompanying text (discussing the unconscious bias that affects judges).

308. See In re Aguinda, 241 F.3d 194, 198 (2d Cir. 2001) (holding that a judge did not abuse his discretion in attending the seminar because there was a “lack of showing that . . . the seminar touched upon an issue ‘material’ in the case”). A case like this, even though it did not result in disqualification, perhaps contradicts the prior statement in this text about judges being savvy enough to know when an organization or program may be slanted. A judge need not be Louis Brandeis to figure out that a group named “FREE” that has the money to provide the judge with free trip to an upscale Western lodge and is interested in the economics of environmentalism is probably a lobbying organization for various commercial energy interests. One does not see the Sierra Club or the National Resources Defense Council putting on this sort of subsidized Club Med for judges. A judge with any judgment would avoid such junkets, irrespective of whether there was a specific link to pending or possible litigation before the judge.
to litigation or counsel to a party might well cause a reasonable observer to lift the proverbial eyebrow.

Presentations at bar association meetings or law schools may well relate to particularized issues, and recusal should be considered seriously, but on a case-by-case basis. Judges should be wary of attending presentations involving litigation that is before them or likely to come before them without at the very least assuring themselves that parties or counsel to the litigation are not funding or controlling the presentation. . . . Where parties or counsel to them fund or control such a presentation, the appearance created bears too great a resemblance to an ex parte contact. 309

Perhaps once again, Professor Geyh is right to call for per se rules and procedural protections. 310 In a rational world, judicial attendance at such programs would be absolutely prohibited. 311 If judges want to learn more about the cost-benefit considerations of environmental and energy regulation and litigation, they can procure court-appointed experts, demand additional briefing by the parties, appoint a special master with expertise, lean on their law clerks for some research, and just plain study the issue. They hardly need to be “educated” through a vacation-like seminar.

In the absence of an express prohibition, an enhanced and expanded notion of the trigger of appearance-based disqualification can reach these cases. Under this article’s suggested standard, when a court concludes that a substantial portion of the lay public would (to use the Second Circuit’s words) “lift a proverbial eyebrow” over a judge’s presiding over a case linked to attendance at a judicial

309. *In re Aguinda*, 241 F.3d at 206; see also *In re Sch. Asbestos Litig.*, 977 F.2d 764, 781–85 (3d Cir. 1992) (disqualifying judge who, along with spouse, attended a conference where many of those making presentations regarding the science of asbestos-related injury were also expert witnesses for plaintiffs and where plaintiffs’ law firm was the source of the funding).


311. Lest I seem excessively critical of judges, I hasten to add that in a rational world, judges would be paid twice their current salaries so that they and their families could take nice vacations without being tempted to sponge off interest groups.
seminar, disqualification would be required. Unlike the Second Circuit and the status quo, this test is met not only if there is a direct link between parties, counsel, and a case, but also may be met where the sponsoring organization is seeking extrajudicial influence on judicial thinking about an issue presented in a current or subsequent case before the court.

Well-heeled interest groups are in it for the long haul and have broad interests beyond a given case involving a given supporter. They are hoping to generally bring judges to their point of view regarding a particular area of law. That is fine in an adversary system in a free country, so long as their efforts take place openly through the adjudication process through test case litigation, amicus briefs, or support for litigants. It becomes improper when attempted through extrajudicial channels such as the judicial seminar junket.

People are influenced by their surroundings and their peer groups. Placing a judge in an environment (a vacation-like environment to lower the attendee’s mental guard about indoctrination) that consistently promotes a particular worldview (both overtly and subtly) through instructors, curriculum, and perhaps peers can have an impact on anyone, at least on a subconscious level. It is not outlandish for observers to think that a judge exposed to these types of events will become significantly more likely to decide cases based on these influences and do so in a manner that favors the interest groups that arranged this soft-sell indoctrination.

312. *In re Aguinda*, 241 F.3d at 206.

313. *See supra* notes 33–43 and accompanying text (regarding cognitive psychological influences affecting humans).

314. Significant empirical research has established that in all major sports the home team enjoys a substantially higher winning percentage, ranging from a “mere” 54% win rate for baseball teams at home to 65% for college sports and nearly 70% for Major League Soccer (U.S.). (Soccer purists may be relieved to know that in the English Premier League, the home team wins at “only” a 63% clip.)

After addressing a plethora of explanations, two researchers conclude that the salient factor is favorable treatment of the home team by the officials (the home team typically has fewer penalties) resulting from the home field atmosphere. *See generally* MOSKOWITZ & WERTHEIM, *supra* note 279, at 157–67 (2011) (noting that social context of home-crowd enthusiasm and partisanship likely influences officials even if they are consciously attempting to be neutral and fair).
The pressure exerted on officials in favor of the home team is not a “kill the umpire” sort of straight-on intimidation, but the more subtle result of context and spectator enthusiasm influencing the judgment calls made by umpires and referees. Officials are not immune to social pressure, and that’s where we think the explanation for home team bias lies. Referees are, ultimately, human. In test after test, psychologists have found that social influence has a powerful effect on people’s behavior and decisions—without their even being aware of it. Psychologists call this influence conformity because it causes an individual’s opinion to conform to a group’s opinion. In other words, when humans are under enormous stress—say, making a crucial call with a rabid crowd yelling a few feet away—it is natural for them to want to alleviate it. Making snap judgments in favor of the home team is one way to do that. Umpires also may be taking cues from the crowd when they’re uncertain. They don’t know whether that tailing 95-mph fastball crossed the strike zone, but the crowd’s reaction may change their perception. In that case, umpires aren’t consciously favoring the home team; they are doing what they believe is right. In trying to make the right call, they conform to a larger group’s opinion, swayed by thousands of people, witnessing the exact same play they did.

Id. at 159.

Chief Justice John Roberts famously has analogized judging to being a sports referee or umpire. See Stempel, Playing Forty Questions, supra note 142, at 67 n.3 (detailing that during confirmation hearings, Chief Justice Roberts analogized judicial role to that of umpire officiating between competing legal teams); see generally Neil S. Siegel, Umpires at Bat: On Integration and Legitimation, 24 Const. Comment. 701 (2007) (noting that at his confirmation hearings, Justice Roberts “captured the public’s imagination” with the umpire analogy in which Roberts stated that the role of both the judge and the umpire was to “make sure everybody plays by the rules, but it is a limited role”). Although the analogy rightfully has its critics (e.g., Richard A Posner, How Judges Think 35–37 (2008)), it is not completely without basis. More importantly, this comparison is commonly used to describe Anglo-American judges (as contrasted to the more involved “inquisitorial” judges of continental European systems). Having embraced this comparison, Justice Roberts and the judiciary need to live by it and appreciate that the same contextual factors affecting officiating decisions are almost surely present in adjudication as well, although one hopes with less extremity.

To state the obvious, judging does not take place in an arena filled with rabid partisans. When it does, this would be grounds for reversal. See Sheppard v. Maxwell, 384 U.S. 333, 356 (1966) (reversing murder conviction of Cleveland-area physician Sam Sheppard because of prejudicial media portrayals and circus-like atmosphere of the trial, remarking that “[i]n this atmosphere of a ‘Roman holiday’ for the news media, Sam Sheppard stood trial for his life”) (internal citation omitted).

Is a case like Bush v. Gore so different, however, from the pressure inflicted on referees at a pack football game? See generally Bush v. Gore, 531 U.S. 98
For example, a litigant making a product liability or race discrimination claim is assigned a judge who has recently returned from a conservative law and economics conference probably has a (2000) (holding that the Equal Protection Clause was violated by Florida’s attempts to recount ballots in dispute during presidential election requiring cessation of recount proceedings). For example, interested partisans appear to have attempted to intimidate election officials, if not the courts. There was the invasion of Broward County’s ballot-counting and other demonstrations designed to intimidate opponents or influence public and judicial opinion (e.g., Republican protestors surrounding the Vice President’s residence and chanting that Al Gore should “Get out of Dick Cheney’s house”). Patty Reinert, Throwing in towel, Gore urges Americans to unite, HOUSTON CHRON., Dec. 14, 2000, at A1. Both sides regularly conducted press conferences spinning the facts and circumstances of the dispute, most famously in Bush representative James Baker’s attack on the Florida Supreme Court for unwarranted judicial activism, a charge that appeared to have visibly cowed some Florida justices at the next hearing on the matter. In addition, non-partisan media relentlessly expressed gloom-and-doom concern about the fate of the country if the election outcome remained uncertain for too long. See generally Laurence H. Tribe, eroG v. hsuB: Through the Looking Glass, in BUSH V. GORE: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed. 2002) (noting that media portrayal of case important to public perception, and “Bush spinmeisters outspun those of Gore” with result that “succession of television images does more than represent the case . . . it profoundly shaped the Supreme Court’s understanding of the stakes involved and its ultimate holding . . . ”).

In addition, concerns were raised about whether three of the Justices who eventually supported George Bush’s position in the case should have recused. See GILLERS & SIMON, supra note 89, at 589 (noting that two of Scalia’s sons were members of law firms arguing on behalf of Bush, that Virginia Thomas was “at the time gathering resumes for potential Bush administration jobs on behalf of the Heritage Foundation, a conservative think tank,” and that Justice O’Connor was reported to have been upset at prospect of Gore victory as it would compel her to remain on the Court until her successor could be nominated by a Republican president). Even if these arguments were not persuasive under current disqualification law—the view of Professor Gillers in STEPHEN GILLERS, TEACHER’S MANUAL FOR REGULATION OF LAWYERS 202 (2009)—this concern added to the Super Bowl-like atmosphere of Bush v. Gore that may have influenced the “referees” deciding the case. See also Thomas Boswell, In the End, Somebody Wins, Somebody Loses and Everybody Goes Home, WASH. POST, Nov. 15, 2000, at D1 (sports writer comparing public posturing of Bush and Gore campaigns to athletic coaches attempting to influence referees or “working the refs”).

Although one does not want to push the sports-umpire comparison too far, it is yet another reminder of what should be more obvious and admitted by judges—they are vulnerable to extrajudicial environmental influences. Logically, the law of disqualification should impose or at least encourage judges to avoid such corrupting influences.
good basis for fearing that the judge now has unduly heightened concern about the cost of safety protocols or interference with management personnel decisions. If I were that litigant or her lawyer, I would harbor doubts (which I believe to be reasonable, or at least non-frivolous) regarding the judge’s ability to be impartial regarding my claim. I might even have doubts simply because the judge was willing to subject himself to this sort of indoctrination in the first place. If a sufficiently substantial portion of the legal community or the public agrees, disqualification should result. In the absence of procedural protections such as an outright ban on judicial attendance at such conferences, recusal doctrine is all that protects litigants from biased judging resulting from such brainwashing efforts.

I realize I am pushing the disqualification envelope regarding this last example. By one popular and generally sound definition (ironically articulated by Justice Scalia)\(^\text{315}\) impartiality simply means indifference to which litigant wins or loses a dispute. Judicial attitudes about liability, free markets, cost-benefit analysis, economic efficiency, the wisdom of discrimination law or other regulation of markets can thus be viewed as something beyond the reach of disqualification law. Although this may be true as a general matter, particularly intense or hardened judicial attitudes on these dimensions implicate recusal law and practice to the degree that they are sufficiently strong to encourage or compel results in favor of certain litigants irrespective of the record in the case. In such instances, disqualification based on judicial attitudes acquired through specific extrajudicial sources such as speaking engagements, political activity, business interests, or conference attendance should be fair game for analysis under a broader view of the reasonable-question-as-to-impartiality test.

For example, in the hypothetical above, a product liability plaintiff may have a very legitimate claim that the judge exposed to seminars stressing the undue expense of such laws cannot be impartial in her individual case and has an ideological bent so strong that favoring the manufacturer is inevitable. The judge is no longer indifferent to whether the manufacturer loses and must pay (or have

\(^{315}\) See Republican Party of Minnesota v. White, 536 U.S. 765, 776 (2002) ("One meaning of ‘impartiality’ in the judicial context—and of course its root meaning—is the lack of bias for or against either party to the proceeding. Impartiality in this sense assures equal application of the law.").
its insurer pay) a judgment for plaintiff’s injuries. Similarly, the
discrimination plaintiff may have a legitimate reason to doubt the
judge’s neutrality (and ability to be indifferent to the case outcome)
if the judge has been told repeatedly at a recent conference that the
majority of job discrimination claims are merely efforts to extract
severance pay for substandard employees under the guise of crying
discrimination.\(^{316}\)

Taking recusal seriously and deploying the revised test set
forth in this article also has implications for assessing whether judges
should recuse more often on the basis of social affiliations with
parties or counsel. Ironically, both the federal statute and the ABA
Judicial Code require that judges step aside if a family member or
former law firm colleague is involved as counsel in a case.\(^{317}\) But
neither forbids a judge from hearing a case where a close social or
professional friend is involved as counsel.

The distinction between friends, former co-workers, and
family rests on tenuous grounds. One may care at least as much
about the fortunes of a friend trying an important case as one would
about the fortunes of a former law partner or a family member,
particularly about family members “within the third degree of
relationship” (cousins and closer) specified in 28 U.S.C. § 455(b)(5).
I actually like my cousins and most of the people in the law firms for
which I have worked. But I like and care about my friends just as
much or more. But under the current regime, I would, as a judge, be
required to recuse from cases involving former colleagues and
cousins I have not seen in twenty years while remaining free to aid
the causes of friends involved in litigation.

Unless my value structure is insufficiently tribal or
organizational as compared to the populace generally, this is a pretty
good indication that these relationship-related disqualification

\(^{316}\) To a degree, judicial seminars, retreats, and conferences may not be
much different from the judge simply socializing with persons who indoctrinate
the judge informally (e.g., his rich neighbors; her former plaintiffs’ lawyer
buddies). This type of extrajudicial influence on judges has generally not been
viewed as grounds for recusal, although perhaps this attitude needs to change as
well. See generally Jeremy M. Miller, Judicial Recusal and Disqualification: The
Need for a Per Se Rule on Friendship (Not Acquaintance), 33 PEPP. L. REV. 575,
595 (2006) (arguing that disqualification should be automatic if friend of judge is
involved as party or counsel). In any event, these sorts of informal associations
that may bias judges should be tested rigorously.

\(^{317}\) 28 U.S.C. § 455(b) (2006); MODEL CODE OF JUDICIAL CONDUCT R.
2.11 (2007).
grounds should be expanded to include social friendships. In the absence of such a reform, this article's suggested approach to determining a reasonable question as to impartiality provides the additional benefit of encouraging disqualification in cases that now are too quickly accepted as acceptable.

To take a well-publicized example, Justices Scalia and Ginsburg and their families have a tradition of celebrating the holidays with former Solicitor General Ted Olson, now a frequent advocate before the Court.\textsuperscript{318} For reasons I cannot fathom, this causes little stir. Regardless of the Justices’ predispositions on a case and its merits, it is hardly farfetched to suggest that in matters sufficiently close, the Justices’ close relation with Olson may sway them in favor of his client or amicus position. A reasonable lay observer could legitimately entertain serious doubts about the Justices’ impartiality in cases argued by Olson. If a large enough proportion of observers harbor such doubts (this article’s suggested benchmark of one-third of the reasonably well-informed public), recusal would be required under the proposed revised approach. Although Olson’s holiday socializing with Justices Scalia and Ginsburg is probably the most well-known example of such chumminess between jurists and a frequently appearing advocate, it is probably only the tip of the iceberg.\textsuperscript{319}

\textsuperscript{318.} See Joan Biskupic, \textit{Familiar Faces Revolve Through Supreme Court; Elite Lawyers with Ties to Justices Make Multiple Arguments}, USA TODAY, Dec. 15, 2008, at A9 (“When former Solicitor General Theodore Olson stands at the lectern, which he has done 51 times, he faces several friends among the nine, including two of his regular New Year’s Eve dining partners, Justices Antonin Scalia and Ruth Bader Ginsburg.”); Joan Biskupic, \textit{Justices Strike a Balance: Pals Ginsburg, Scalia Ring in the New Year, Then Duke It Out In Court}, USA TODAY, Dec. 26, 2007, at D1. Presumably, this social tradition continues notwithstanding the 2010 death of Justice Ginsburg’s husband Martin, a renowned tax law expert.

\textsuperscript{319.} For example, journalist Jeffrey Toobin relates the story of an impromptu car pool during a Washington snow storm in which Justices Scalia and Kennedy rode to the Court with noted attorney Carter Phillips, who was representing a party in a case before the Court that day. \textit{JEFFREY TOOBIN, THE NINE}, 121–22 (2007).

Although this makes for a good story and perhaps even falls under a weather-related version of the “rule of necessity,” it also illustrates the degree to which some lawyers are reasonably close social friends or acquaintances with judges, an advantage not enjoyed by all advocates. Even if the day’s cases were not discussed on the ride through the snow, Phillips opposing counsel probably wished he or she had been part of this particular car pool.
If disqualification were required in such instances, judges and justices might be willing to assess whether their friendships with litigants or lawyers, particularly with lawyers frequently appearing in their courts, need to be dialed back. The traditional answer to this concern is an almost reflexively defensive argument that judges should not be forced to give up friendships and related outside activities in return for appointment to the bench. But no one urging reform is demanding that judges sever social ties, only that the judge recuse in cases involving attorneys (or parties) who are significant social friends. If this results in unduly frequent recusal (the so-called small town problem), the judge needs to make a decision. Although some distancing from former friends is unfortunate, it is a small price to ask of jurists who wish not to be disqualified in cases involving lawyers or litigants who appear with considerable frequency. In a world of many judges and relative ease of travel and communication, there is no need to impose on concerned parties or counsel the risk that their opponents enjoy an extrajudicial advantage because of social friendship.

V. AN AGENDA FOR FUTURE RESEARCH

Although there is substantial research suggesting that judges, like others, make decisions on the basis of a variety of unconscious factors correlated with their differing demographic characteristics,

More disturbingly, one is left to wonder how many other court–counsel links exist that are never brought to light in the media, and which may raise more disturbing questions of excessive coziness between judges and counsel or litigants.

this field of inquiry is new and almost fallow. In order to better inform litigants, lawyers, and judges addressing disqualification issues, considerably more information is needed about the relationship of various characteristics of judges and their decision-making. The legal profession and the public have the right to inquire as to the degree to which a judge’s ruling and a case outcome turns on the judge’s race, gender, age, religion, political affiliation, ethnic background, economic status, prior litigation experience, or other factors. To the extent there exist powerful correlations between these traits and judicial outcomes, they must be factored into the process of determining whether to disqualify a judge.

Even if the correlation is strong, this does not necessarily compel automatic disqualification. Automatic recusal based on some patterns would probably be unworkable or even at odds with the legal system and the democratic process. For example, a judge who has worked as a prosecutor may sentence differently than a judge who was a public defender prior to ascending to the bench. A jurist who was an insurance defense lawyer may be more inclined to grant summary judgment for a defendant than a judge who formerly represented personal injury plaintiffs.

Although such correlations raise questions, it would prove too much to require blanket disqualification of any of these groups from presiding over particular types of cases, particularly in states where judges are elected. In the federal system or state counterparts, the executive may be appointing some of these judges precisely because of their former backgrounds as prosecutors or defenders, or claimant lawyers or defense lawyers because of what it reflects about their background or orientation.

But only an irrational system would fail to inquire as to these relationships or fail to take them into account in deciding whether recusal is required. Regardless of background (whether immutable or experiential), we expect judges to be indifferent to which party prevails in a dispute even if the judge has jurisprudential or ideological views that may readily be described as pro-plaintiff or pro-defendant. Where there are serious questions as to whether a judge is able to reach this level of neutrality, the governing law already requires recusal. Greater empirical knowledge of the

321. See supra text accompanying note 25-55 (discussing the variety of behavioral science factors that affect decision-making).
relationship between judicial outcomes and judicial background can only enhance application of the law.

Although it would prove too much to require that former defense lawyers consistently recuse in cases where a corporate entity is a defendant, plaintiffs suing corporate entities should be able to obtain recusal of judges who they have reasonable ground to suspect cannot rise above their past representation and decide fairly. If the judge has recently attended educational seminars sponsored by the corporation or has received its “Person of the Year” award, this is qualitatively different than simply knowing that the judge has a pro-business bent. Because these situations are often not clear-cut, increasing knowledge about the degree to which judicial decisions are a product of the judge’s background tend to strengthen the case for providing at least one peremptory challenge to litigants.

VI. CONCLUSION

In a world of occasionally egregious judicial misconduct in failing to recuse and a world populated by humans saddled with cognitive limitations, particularly when evaluating themselves, the legal system would profit from having greater procedural guarantees of judicial neutrality notwithstanding its occasional and systematic costs. Among this article’s proposals in this vein are peremptory challenges, elimination of the de minimis exception to financially based disqualification, referral of disqualification motions to a neutral judge for decision, elimination of the duty to sit, and adherence to a regime that resolves close cases in favor of recusal. In addition, review of denials of disqualification should be de novo, rather than application of the harmless error doctrine.

Additionally, the basic approach to determining whether a reasonable question as to judicial impartiality exists needs to be revised to account for the relative impossibility of achieving consensus or even overwhelming majority opinion on such matters. Nonfrivolous concern over judicial neutrality shared by a substantial portion of society should be enough to require recusal in order to preserve the actual and perceived integrity of the judiciary. At the end of the day, judicial impartiality is a value of such sufficient importance that it outweighs all but the most oppressive administrative costs.