ARTICLE

Melinda A. Marbes

Reforming Recusal Rules: Reassessing the Presumption of Judicial Impartiality in Light of the Realities of Judging and Changing the Substance of Disqualification Standards to Eliminate Cognitive Errors

Abstract. In recent years a number of high profile disqualification disputes in the federal and state courts have caught the attention of the media and the public. These cases have involved such controversial subjects as abortion, judicial elections, health insurance reform, same sex marriage, and the death penalty. In each instance, there has been an outcry from some segment of the press and the public when a presiding jurist was asked to recuse but declined to step aside. Unfortunately, even if the jurist writes a decision explaining his refusal to recuse, the reasons given often are unsatisfying and do little to quell suspicions of bias. Instead, the litigants, members of the press, and the public are left questioning whether the jurist actually is unbiased in the specific case and even doubting the impartiality of the judiciary as a whole.

This negative reaction to refusals to recuse is caused, at least in part, by politically charged circumstances that cause further suspicions of the jurists' motives. However, another significant problem underlying this disconnect between the perception of judicial bias by the bench and the public is the bias blind spot, a cognitive illusion that creates asymmetries in people's perceptions of bias in themselves versus their perception of bias in others. While jurists always have and always will decide some of the most controversial legal (and political) issues in our society, we can address this disconnect by reforming how disqualification decisions are made and the

substantive standards applied in such with disputes. The hope is such changes will help build consensus about when a jurist should be disqualified in order to protect litigants' rights to a fair tribunal and to bolster public confidence in the judiciary.

This Article proposes that all federal and state courts adopt one of two methods for deciding disqualification depending on the substantive standard—per se or catch-all rules—underlying the recusal request. If the challenge is based upon a specific per se rule, then the task involves less discretion and the challenged jurist may safely serve as the initial decision maker of whether recusal is warranted. Of course, in such instances the appearance of bias standard must be used because this lower threshold helps counter the bias blind spot when "self-judging" is involved. However, if the challenge is based upon the general catch-all provision, then discretion must be exercised and, possibly, a new rule developed–at least if there is no existing case on point. In that instance, the challenged jurist may determine the sufficiency of the factual averments on which relief is requested, but another jurist or group of jurists (the entire court, an appellate court, or a specially appointed panel) must make the decision of how the substantive standard applies to those facts. Since no "self-judging" is involved because the challenged jurist does not decide his own bias, the higher "probability of bias" standard articulated in *Caperton* may be applied to determine if the challenged jurist must be disqualified.

This two-pronged approach is designed to: (1) counter the likely impact of the bias blind spot, a cognitive illusion that creates an asymmetry in perceptions of bias in self and others; and (2) avoid pointless disqualification disputes that unnecessarily undermine the judiciary's generally well-earned reputation for impartiality. Also, this dual decision-making methodology offers the best protection of litigants' due process rights to a fair trial while at the same time fostering public confidence in the impartiality of the judiciary by avoiding the greatest risks of how the bias blind spot affects disqualification decisions.

Author. Melinda Marbes is a graduate of Emory University School of Law, J.D. 1988, and Emory College, B.A. 1985. She is grateful for the able assistance provided by Louis Rosen, an Assistant Professor of Law Library

and Reference Librarian at Barry Dwayne O. Andreas University School of Law, who aided with this article while she served as a visiting professor at the law school. The author also appreciates the hard work of the editorial board and staff of the *St. Mary's Law Journal*, especially Marissa Olsen the Editor in Chief, Kristie Duchesne, and Trevor Gallaway in preparing this piece for publication. The author states that none of these individuals is responsible for the opinions expressed or any mistakes made—she takes sole responsibility for those errors.

ARTICLE CONTENTS

I. INTRODUCTION

In recent years, a number of high profile disqualification disputes in federal and state courts have caught the attention of the media and the public. These cases have involved controversial subjects such as abortion, death penalty, judicial elections, health insurance reform, and same-sex marriage. In each instance, there has been an outcry from segments of the public and the press when a presiding jurist was asked to recuse themselves but declined to step aside. Unfortunately, even if the jurist writes a decision explaining their refusal to recuse, the reasons given are often unsatisfying and do little to quell suspicions of bias. Instead, the litigants, members of the press, and the public are left questioning whether the jurist actually is unbiased in the specific case and even doubting the impartiality of the judiciary as a whole.

This negative reaction to refusals to recuse is caused in part by the "bias blind spot" which creates asymmetries in people's perceptions of bias in themselves versus their perception of bias in others. The difference in perception also colors the jurist's disqualification decisions and can create situations where it seems obvious to persons other than the challenged jurist to require recusal. These asymmetries in perception of bias between the bench, on the one hand, and the bar and public on the other, conflict with the long-standing presumption of impartiality that underlies judicial recusal rules. In addition, these differences in perceptions and presumptions of impartiality are exacerbated by the context in which some

disqualification decisions play out (i.e., politically charged circumstances) that cast further suspicions on the jurists' motives. Currently, public confidence in all branches of our government, including the judiciary, is at a historic low. This waning level of trust in our government institutions may not be unwarranted given growing evidence of strategic decision-making by judges. However, the distrust further aggravates the perception of a partiality problem. Thus, this Article proposes reforms of the substantive standards applied in disqualification disputes with the hopes of building consensus about how to decide when a jurist should be disqualified to protect litigants' rights to a fair tribunal and to bolster public confidence in the judiciary.

Specifically, this Article recommends all federal and state courts should adopt one of two substantive standards for disqualification depending on who makes the initial disqualification decision. First, if the challenged jurist is the initial decisionmaker, then the decision should be limited to applying the specific *per se* rules for partiality and passing on the accuracy of the factual allegations of bias when the "catch-all" substantive standard is pled. When the challenged jurist is the initial decisionmaker, the evidentiary standard should remain the "appearance of bias" standard because this lower evidentiary threshold better accounts for the impact of the bias blind spot. Second, however, if another jurist, the entire court, or another court is the initial decision maker, then there should be no limit on the decision maker's authority to decide disqualification claims made under either the *per se* or the "catch-all" rules, or both. Also, given that the bias blind spot will have limited, if any, impact on these decisionmakers, the higher evidentiary threshold of "probability of bias," as articulated in *Caperton*,[1] should be applied. This two-pronged approach is designed to: (1) balance the realities of judging (including the impact of the bias blind spot) against our ideals about judges embedded in the presumption of impartiality; and (2) avoid jurists' resistance to recusal reforms by recognizing the judiciary's generally well-deserved reputation for impartiality. Thus, these dual standards are offered as a way to preserve meaningful protection for litigants' due process rights while at the same time fostering public confidence in the impartiality of individual jurists and the judiciary as a whole.

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

In support of this thesis, Part II of this Article introduces the most prevalent and persistent problems with disqualification decisions using a series of examples from the United States Supreme Court and the highest state courts. Part III briefly examines the history of the development of recusal laws, including the development of the presumption of impartiality and the resistance by the judiciary to recusal reform. Part IV describes emerging perspectives on judging based upon new social science so the reforms for substantive standards suggested in this Article can be evaluated for effectiveness. Part V briefly summarizes the current state of disqualification law in the federal and state courts and includes a discussion of how the bias blind spot impacts judging under the current procedures and substantive rules. Part VI proposes reforms to recusal rules and explains how the proposed reforms will preserve the presumption of impartiality in appropriate ways. This Article concludes by suggesting the proposed recusal reforms will further the goal of impartiality by creating disqualification standards that are, or at least appear to be, fair and unbiased.

II. PROBLEMS AND PERCEPTIONS OF PARTIALITY

In recent years, the most well-known disqualification disputes in the highest federal and state courts have involved very controversial subjects, including abortion[2], the death penalty[3], elections—both judicial[4] and

2. *See GOP Lawmakers Ask Ginsburg to Withdraw from Abortion Cases*, L.A. TIMES (Mar. 19, 2004), http://articles.latimes.com/2004/mar/19/nation/na-ginsburg19 (reporting on a letter written by thirteen Republican Congress members requesting that Ruth Bader Ginsburg recuse herself from all future abortion cases based upon her association with NOW Legal Defense Fund).

3. *See* Raymond Bonner, *Three Abstain as Supreme Court Declines to Halt Texas Execution*, N.Y. TIMES (Aug. 14, 2001), http://www.nytimes.com/2001/08/14/us/three-abstain-as-supreme-court-declines-to-halt-texas-execution.html (proclaiming three Supreme Court justices disqualified themselves from a stay of execution case because the judges had ties to the murder victim's son); *see also* Mark Davis, *Did Judge in Connecticut Death Penalty Decision Have Conflict*, NEWS 8, http://wtnh.com/2015/08/14/did-judge-in-connecticut-death-penalty-decision-have-conflict/ (last updated Aug. 15, 2015) (discussing the controversy surrounding a Connecticut supreme court justice who refused to recuse himself in a case overturning the Connecticut death penalty statute where, as the governor's legal counsel, he advised against the bill prior to being appointed to the high court); Adam Liptak, *Questions of an Affair Tainting Trial*, N.Y. TIMES (Feb. 22, 2010), http://www.nytimes.com/2010/02/23/us/23bar.html (examining a case in which a man was sentenced to death by a judge who was engaged in a sexual relationship with the prosecutor in the case).

4. *See Caperton*, 556 U.S. at 872 (finding a state supreme court justice required recusal for

executive[5], health insurance reform[6], and same-sex marriage.[7] It is not surprising that concerns about the possibility of partial jurists are magnified when the stakes of a case are higher for the litigants and the public at large.[8] Also, media attention on such highly political cases is

participating in a case involving a company whose CEO gave over $3 million in campaign donations while an appeal was pending).

5. Bush v. Gore, 531 U.S. 98, 157–58 (2000) (Breyer, J. dissenting) (referring to public confidence in the judiciary as a "public treasure" that s a "vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself"); *see also* Sherrilyn A. Ifill, *Do Appearances Matter: Judicial Impartiality and the Supreme Court In* Bush v. Gore, 61 MD. L. REV. 606, 608 (2002) (reviewing allegations that surfaced in 2000 suggesting Justices Scalia, O'Connor, and Thomas disqualify themselves in the controversial *Bush v. Gore* case because of their connection to the litigants in the case and a possible appearance of not being impartial); Richard K. Neumann, Jr., *Conflicts of Interest in* Bush v. Gore*: Did Some Justices Vote Illegally?*, 16 GEO. J. LEGAL ETHICS 375, 379 (2003) (considering whether allegations surrounding certain Justices' alleged impartiality in *Bush v. Gore* would be considered conflicts of interest under the law to justify an investigation into the facts surrounding the allegations).

6. *See* Sherrilyn A. Ifill & Eric J. Segal, *Judicial Recusal at the Court*, 160 U. PA. L. REV. PENNUMBRA 331, 335–36 (debating whether Justices Thomas and Kagan should step aside and not take part in the case challenging the insurance mandate under the Affordable Care Act, and whether there is a need for recusal rules governing the Supreme Court Justices).

7. *See, e.g.*, Motion of Amicus Foundation for Moral Law for Recusal of Justices Ruth Bader Ginsburg and Elena Kagan, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556) http://morallaw.org/2015/06/16/foundation-files-motion-for-recusal/ (last visited Apr. 2, 2017) (alleging Justices Ginsburg and Kagan were biased because they performed same-sex marriages). Interestingly, the movant acknowledges in its filing as an amicus, rather than an actual party to the appeal, the Foundation for Moral Law may not have standing to file the motion; but it asks the Justices to consider the issue in spite of any standing flaw. There is no notation on the docket of whether the request was reviewed, but both Justices Ginsburg and Kagan took part in the Supreme Court's decision, as did Justice Scalia who had repeatedly written or made public remarks about the amorality of same-sex unions. *See* Peter Hardin, *Should Scalia Recuse in Same-Sex Marriage Cases?*, GAVEL GRAB (Dec. 17, 2012), http://gavelgrab.org/?p=49589 (addressing the debate on whether Justice Scalia may have a bias strong enough to require recusal from hearing same-sex marriage cases); *see also* Heather Clark, *Legal Group Seeks Recusal of Justices as Supreme Court Considers Same-Sex 'Marriage' Case*, 108 PRAISERADIO (Apr. 28, 2015), www.108praiseradio.com/?p=274563 ("A Christian legal organization in Alabama has filed a motion urging the recusal of two U.S. Supreme Court justices who have officiated same-sex 'weddings' . . . ."). *See generally* Motion of Amicus Foundation for Moral Law for Recusal of Justices Ruth Bader Ginsburg and Elena Kagan, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556), http://morallaw.org/2015/06/16/foundation-files-motion-for-recusal/ (last visited Apr. 2, 2017) (outlining reasons Justices Ginsberg and Kagan should not participate in a same-sex marriage opinion).

8. *See, e.g.*, Margaret McKeown, *To Judge or Not to Judge: Transparency and Recusal in the Federal System*, 30 REV. LITIG. 653, 654–56 (2011).

> Public discourse about recusal is a positive development, yet media coverage is often anecdotal and obscures the reality of a robust disqualification regime. This may be because it often focuses on the egregious conduct of a few individual judges. Rarely has a controversy arisen

magnified when the disputes become part of the 24-hour news cycle with the possibility of perceptions of partiality skewing the discussion.[9] Of course, the perceptions of partiality proffered by the litigants, the press, and segments of the public often differ from the jurist's beliefs about their own partiality.[10] This difference in perception is the most significant consequence of the bias blind spot,[11] a cognitive illusion that causes each of us to judge our own impartiality using introspective evidence, which is different from the extrospective evidence relied upon by others when assessing the jurists' impartiality.[12] Thus, it is clear that differences in perceptions of partiality are more likely to arise and disqualification disputes are more likely to be litigated or debated in high-stakes cases.

> over a judge's decision to recuse in a case. Rather, the cascade of publicity has arisen in cases in which the judge decided not to recuse. . . . [P]ublished decisions suggest that litigants have not shied away from challenging judges. . . . As would be expected, recusal in not required for challenges based on substantive legal determination, unfavorable rulings, adverse evidentiary findings, or dissatisfaction with case management techniques.

Id.

9. *See* Robert Barnes, *Health-Care Case Brings Fights About Which Supreme Courts Justices Should Decide It*, WASH. POST (Nov. 11, 2011), https://www.washingtonpost.com/politics/health-care-case-brings-fight-over-which-supreme-court-justices-should-decide-it/2011/11/22/gIQAwRWb2N_story.html (reporting on various calls for Justice Thomas and Justice Kagan to recuse themselves from hearing appeal challenging validity of Affordable Care Act when the media coverage and controversy was at its peak).

10. *See* Melinda A. Marbes, *Refocusing Recusals: How the Bias Blind Spot Affects Disqualification Disputes and Should Reshape Recusal Reform*, 32 ST. LOUIS U. PUB. LAW REV. 235, 237–38 (2013) [hereinafter *Refocusing Recusals*] (exploring how the asymmetries in perception of bias between self and others lie at the heart of the bias blind spot distorting decision-making in disqualification disputes and negatively affecting the debate about proper recusal reforms); *see also* Melinda A. Marbes, *Reshaping Recusal Procedures: Eliminating Decision-maker Bias and Promoting Public Confidence,* 49 VAL. U. L. REV. 807, 848–58 (2015) [hereinafter *Reshaping Recusal Procedures*] (discussing the various recusal procedures currently used by federal and state courts and proposing reforms designed to address the impact of the bias blind spot in disqualification decisions).

11. *See* Nathan A. Heflick, *We Struggle with Objectivity: The Bias Blind Spot*, PSYCHOLOGY TODAY (Dec. 17, 2012) https://www.psychologytoday.com/blog/the-big-questions/201212/we-struggle-objectivity-the-bias-blind-spot ("Research shows that when we have a 'bias blind spot' . . . [where] people rate themselves as less susceptible to a variety of biases that others.").

12. The Supreme Court has indirectly acknowledged the difference in perceptions of partiality. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 870 (2009) (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975) (stating the challenged jurists' assessment of his own bias is subjective, but a reviewing court should ask "whether 'under a realistic appraisal of psychological tendencies and human weakness'" the interest poses a serious risk of personal bias)).

This problem of differing perceptions of partiality, especially in controversial cases, was the main issue in a disqualification dispute recently decided by the Supreme Court of the United States ("U.S. Supreme Court"). In *Williams v. Pennsylvania*,[13] Williams, a death row inmate appealing his death sentence, sought the disqualification of Chief Justice Castille of the Supreme Court of Pennsylvania ("PA Supreme Court") based upon Castille's prior involvement as the District Attorney who supervised the prosecutor that secured Williams's conviction and death sentence.[14] Chief Justice Castille also supervised the attorneys who handled the initial appeals from those judgments against Williams.[15] Williams argued because of the nature of his claims, which were based largely on prosecutorial misconduct by lawyers serving under District Attorney Castille, the jurist was probably biased or at least would appear to be biased in the case.[16] In addition, Williams called Castille's impartiality into question because Castille's own pronouncements of his stance in favor of the death penalty during his judicial campaign evidenced an apparent or probable bias.[17] Thus, Williams argued given the jurist's prior conduct,[18] Castille should be disqualified under both Pennsylvania law based on an "appearance of bias" standard[19] and under the federal

13. Williams v. Pennsylvania, 136 S. Ct. 1899 (2016).

14. *Id.* at 1903 (questioning "whether the justice's denial of the recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment").

15. Respondent's Motion to Recuse Chief Justice Castille at 2, Commonwealth v. Williams, 105 A.3d 1234 (Pa. 2014) (No. 163 EM) ("Chief Justice Castille was the District Attorney throughout the trial, capital sentencing, post-trial, and direct appeal proceedings in this case.").

16. *See id.* at 7 (stating there is requirement of no actual basis, yet "there must not be 'even the probability of unfairness'" for a justice to be exercised within the Eighth and Fourteenth Amendments).

17. *See id.* at 3–4 (listing examples of statements made by Castille during his campaign for the PA Supreme Court).

18. In the state court proceeding, Williams also argued Chief Justice Castille's prior statements in other death penalty cases, which questioned the tactics, motives, and ethics of Williams's legal defense team, from the Federal Community Defender Office (FCDO), provided another basis to disqualify the jurist. *Id.* at 5. However, for reasons not explained in any of the court pleadings (presumably a strategic decision by the appellate lawyers), Williams did not pursue this additional theory of disqualification when the case was at the U.S. Supreme Court. *See generally* Petitioners Brief for Writ of Certiorari, Williams v. Pennsylvania, 136 S. Ct. 1899 (2016) (No. 15-5040) (June 12, 2015); *see also* Brief for Petitioner, Williams v. Pennsylvania, 136 S. Ct. 1899 (No. 15-5040) (Nov. 30, 2015).

19. Respondent's Motion to Recuse Chief Justice Castille at 11, Commonwealth v. Williams, 105 A.3d 1234 (Pa. 2014) (No. 163 EM) ("Pennsylvania's Code of Judicial Conduct specifically identifies the following as an example of when a judge's 'impartiality might reasonably be questioned'

Due Process Clause standard, which relies on the higher "probability of bias" standard articulated in *Caperton*.[20]

A. *Justice Castille Refuses to Recuse*

The defense team timely raised his concerns about Chief Justice Castille's participation in Terry Williams's case by filing the motion for disqualification immediately after the appeal was docketed in the Pennsylvania Supreme Court.[21] In that motion, Williams requested Chief Justice Castille recuse himself, and asked that the entire PA Supreme Court review the matter if Chief Justice Castille denied the request.[22] Chief Justice Castille denied both requests.[23] Even though Williams's life hung in the balance, Chief Justice Castille refused to recuse himself without denying a single factual allegation upon which Williams's request for relief was based or addressing how the facts should be analyzed under the Pennsylvania recusal rule or the federal Due Process Clause.[24]

---

and, thus, when his or her recusal is required – when the judge 'served as a lawyer in the matter in controversy'."); *see also* Joseph v. Scranton Times, 987 A.2d 633, 634 (Pa. 2009) (per curiam) (requiring recusal where circumstances or factors "that may reasonably question the jurist's impartiality in the matter . . . [require] no need to find actual prejudice, but rather, the appearance of prejudice is sufficient to warrant the grant of new proceedings," and stressing a "judge should not only avoid impropriety but must also avoid the appearance of impropriety").

20. Respondent's Motion to Recuse Chief Justice Castille at 7, Commonwealth v. Williams, 105 A.3d 1234 (Pa. 2014) (No. 163 EM) ("As the United States Supreme Court most recently stated in *Caperton v. Massey Coal Co*., 556 U.S. 868 (2009): 'Under our precedents there are *objective standards* that require recusal when "the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable."'" (quoting Caperton v. Massey Coal Co., 556 U.S. 868 (2009))).

21. The appeal was docketed on September 28, 2012, and the disqualification motion was filed a few days later. *See* Respondent's Motion to Recuse Chief Justice Castille at 17, Commonwealth v. Williams, 105 A.3d 1234 (Pa. 2014) (No. 163 EM) (showing the Certificate of Service was hand delivered to the District Attorney's Office on Oct. 1, 2012). The motion to recuse makes clear that Mr. Williams's lawyers sought recusal of Justice Castille in other death penalty cases on similar grounds and those requests were repeatedly denied. *See id.* at 5–6 (detailing other cases where recusal was denied in similar situations).

22. *Id.* at 16 ("For the reasons stated, Respondent respectfully prays: 1. that Chief Justice Castille recuse himself; 2. that, should Chief Justice Castille decline to recuse himself, this motion be referred to the full Court for decision; and that the full Court direct Chief Justice Castille's recusal.").

23. *See* Petition for Writ of Certiorari at 1, Williams v. Pennsylvania, 136 S. Ct. 1899 (2016) (No. 15-5040) (outlining Justice Castille's orders); *see also* Williams v. Pennsylvania, No. 15-5040 (Sup. Ct. 2015), Order of Chief Justice Castille Denying Motion to Recuse (Oct. 1, 2012) (Joint Appendix I, 171a).

24. Petition for Writ of Certiorari at 15, Williams v. Pennsylvania, 136 S. Ct. 1899 (2016)

The prosecutors who opposed Justice Castille's recusal suggested the brevity of the denial was due to the time constraints imposed by Williams's pending execution, which was set for just a few days later.[25] However, Chief Justice Castille himself offered no such explanation and never otherwise explained his decision to not step aside, even though he wrote a lengthy concurring opinion on the merits.[26] Instead, his concurrence focused solely on what Chief Justice Castille deemed to be the abuses of the post-conviction review court and Williams's defense team.[27] The decision reads, in both substance and tone, like other disqualification decisions by the challenged jurist in high-profile cases—penned by a person lacking sufficient self-awareness or lacking any awareness of how their own conduct is viewed by others. The concurrence was Chief Justice Castille's death penalty "swan song," as he retired soon after his concurring opinion was docketed.[28]

(No. 15-5040) ("Chief Justice Castille issued a one-sentence order on the motion . . . ."). In fact, Chief Justice Castille denied the recusal motion in a single sentence order: "AND NOW, this 1st day of October, 2012, Respondent's Motion for Recusal is DENIED, as is the request for referral to the full Court." *Id.*; s*ee also* Williams v. Pennsylvania, No. 15-5040 (Sup. Ct. 2015), Order of Chief Justice Castille Denying Motion to Recuse (Oct. 1, 2012) (Joint Appendix I, 171a).

25. Brief of Respondent at 22 n.5, Williams v. Pennsylvania, 136 S. Ct. 1899 (2016) (No. 15-5040) (referencing the petitioners brief which stated the petitioner repeatedly asserted "Castille 'provided no explanation' for his recusal decision" and also indicating there was no time to file an opinion in the circumstances of the case because the execution was scheduled for two days later).

26. Pennsylvania v. Williams, 105 A.3d 1234, 1245 (Pa. 2014) (Castille, J., concurring) (limiting his concurrence to his thoughts on the Post-Conviction Relief Act (PCRA)).

27. *See id.* ("I write separately . . . to address the important responsibilities of the [Post-Conviction Relief Act ("PCRA")] trial courts in serial capital PCRA matters, an issue brought into stark relief by the extraordinary, and unauthorized, measures undertaken by the PCRA court in this case."). Chief Justice Castille also found the PRCRA court "lost sight of its role as a neutral judicial officer" when it ordered the production of the prosecutor's entire file to determine whether the *Brady* standards for disclosure of exculpatory evidence were violated. *Id.* In addition, Chief Justice Castille labeled Williams's latest request for relief from his death sentence as "frivolous" and criticized Williams's defense team for an "obstructionist, anti-death penalty agenda." *Id.*

28. Chief Justice Castille, whose role is the focus of the appeal, was involved in both the deliberation and voting that resulted in the PA Supreme Court reversing the lower court's ruling and reinstating Williams's death sentence. However, following that ruling on December 15, 2014, Castille resigned from the bench as required by the state's mandatory retirement rules for the PA Supreme Court based on age restrictions. Soon thereafter, Williams's defense team filed motions seeking re-argument and reconsideration, which were denied without any explanation by the PA Supreme Court.

B. *Lingering Doubts About Disqualification*

Chief Justice Castille's refusal to recuse himself without stating reasons, as well as the PA Supreme Court's refusal to review Castille's decision, garnered plenty of attention in the Keystone State, and created doubts about the impartiality of Chief Justice Castille and the entire high court of Pennsylvania.[29] This unrest may have impacted the decision for the U.S. Supreme Court to grant certiorari and resolve the disqualification dispute in *Williams*.[30] As with *Caperton*[31] and other high-profile recusal cases, it is likely there will be a lingering dissatisfaction with the results of *Williams* because the same substantive standards under the Due Process Clause were applied, although the underlying presumption regarding impartiality was not adequately addressed or explained by either the majority or the dissent.

The U.S. Supreme Court did take some advantage of the opportunity presented in *Williams* and held Chief Justice Castille and all jurists—whether acting alone or as part of a multi-member panel—to a higher ethical standard. The *Williams* case once again shined a bright spotlight

29. *See* Lincoln Caplan, *A Flagrant Conflict of Interest*, N.Y. TIMES (Oct. 2, 2012, 1:01 PM), http://takingnote.blogs.nytimes.com/2012/10/02/a-flagrant-conflict-of-interest/ (opining Castille's refusal to recuse himself "underscored his obtuseness about what basic fairness requires" and further reporting the court's opinion in the case will be tainted because of the circumstances of the case); *see also* Mary Claire Dale, *Despite Ties, PA Chief Justice Stays on Death Case*, TIMES HERALD (Oct. 2, 2012, 8:04 AM), http://www.timesherald.com/article/JR/20121002/NEWS03/121009923 (discussing Williams's lawyers attempt to have Justice Castille disqualified because of his previous involvement as a prosecutor in Williams's case); Andrew Keck, *Pa. Death Penalty System Denies Due Process*, LEHIGH VALLEY LIVE (Mar. 4, 2016, 9:29 AM) www.lehighvalleylive.com/opinion/index.ssf/2016/03/pa_death_penalty_system_denies.html ("The number of overturned death sentences in Pennsylvania is astronomical and unacceptable."); John L. Micek, *A Supreme Screw-up. Ex-Justice Castille Never Should Have Heard Death Penalty Case He Prosecuted*, PENN LIVE (Mar. 2, 2016, 8:29 PM) www.pennlive.com/opinion/2016/03/a_supreme_screw-up_pa_death_pe.html ("Everyone deserves a fair and unbiased shake before the court . . . Castille should have known better. That he didn't just strikes another blow to Pennsylvanians' shattered confidence in their highest court.").

30. *See* Dorothy Samuels, *Ethics 101: The Same Person Cannot Serve as Prosecutor and Judge in the Same Case. The Supreme Court Needs to Say So.*, HUFFINGTON POST (Feb. 25, 2016, 12:34 PM) http://www.huffingtonpost.com/dorothy-samuels/ethics-101-williams-v-pennsylvania_b_9318126.html ("[T]he current case turns on a transcending principle at the core of the nation's justice system and the rule of law, one that should not be controversial—namely, the right to a fair hearing before an impartial judge.").

31. *Caperton* outlined two instances where recusal would be required for due process, one where the judge had a financial interest in the case, and the other where the judge has actual basis or when the facts create a "probability of bias." *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 877–90 (2009) (outlining the types of cases where judicial recusal is required).

not just on the actions of Chief Justice Castille and the PA Supreme Court, but also upon the Justices of the U.S. Supreme Court.[32] A majority of the U.S. Supreme Court Justices agreed that "[u]nder the [federal] Due Process Clause there is an impermissible [and unconstitutional] risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case."[33] The *Williams* Court did not find that Chief Justice Castille was actually biased, but similar to the *Caperton* opinion, the U.S. Supreme Court emphasized the objective nature of the judicial bias inquiry.[34] The *Williams* majority also rejected the argument that a jurist's constitutionally impermissible bias could be deemed "harmless error" if the jurist's vote is not dispositive to the multi-member panel decision.[35] Rather, the *Williams* majority suggested that the actually or probably biased jurist's vote may not be dispositive because the challenged jurist was successful in influencing other panel members' votes.[36]

While the *Williams* decision creates a new, albeit narrow basis for disqualification under the federal Due Process Clause, it was disappointing that the opinion was not unanimous given the facts of the case and the number and quality of amicus briefs filed in support of petitioner (including a group of former judges with prosecutorial experience). However, in light of the recent recusal record of the Court,[37] it was disheartening to learn that the U.S. Supreme Court remains divided over disqualification. Nevertheless, this is not surprising because the *Williams* case presented the same tension between the strong presumption of impartiality and a weaker presumption based upon new cognitive psychology discoveries about the realities of judging, which were presented but unresolved in *Caperton*.[38] So, we see the same Justices dissenting in

32. *See* Adam Liptak, *Supreme Court, In Recusal Case, May Find Itself Looking Inward*, N.Y. TIMES (Jan. 4, 2016), http://www.nytimes.com/2016/01/05/us/politics/supreme-court-in-recusal-case-may-find-itself-looking-inward.html? (discussing disqualification dispute in *Williams* and suggesting that outcome of that case will impact practices of the Justices on the U.S. Supreme Court).

33. Williams v. Pennsylvania, 136 S. Ct. 1899, 1901 (2016).

34. *Id.* at 1905.

35. *Id.* at 1910 (stating if "the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless").

36. *Id.* at 1909 ("The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. That outcome does not lessen the unfairness to the affected party.").

37. *See supra*, notes 2–9 and accompanying text.

38. Tigran W. Eldred, *Faculty Blog: The Psychology of Conflicts of Interest in* Williams v. Pennsylvania, NEW ENG. L. REV. (June 20, 2016) https://newenglrev.com/2016/06/20/faculty-blog-the-

Williams who dissented in *Caperton*.[39] In fact, the dissent by Chief Justice Roberts in *Williams* relied upon the same narrow interpretation of earlier recusal precedents and a very strong presumption of judicial impartiality to which he gave voice in his *Caperton* dissent.[40]

Just as with *Caperton*[41] and other high-profile recusal cases, it is likely there will be a lingering dissatisfaction with the *Williams* decision. Although the substantive standards under the federal Due Process Clause were applied in a way that protected the litigant's right to a fair trial in that case, the underlying presumption regarding judicial impartiality was inadequately addressed by both the majority and the dissent. Moreover, the U.S. Supreme Court remains divided over how strong the presumption of judicial impartiality should be given to "psychological tendencies and human weaknesses" of the average jurist.[42] Thus, the bench, bar, litigants, and the public are left wondering how to strike the proper balance between the presumption of impartiality and the reality of jurists laboring under a bias blind spot.

Given the manner in which the most high-profile disqualification decisions appear to be handled in state and federal courts, including the use of procedures permitting the challenged jurist to make the

psychology-of-conflicts-of-interest-in-williams-v-pennsylvania/ ("[T]he [*Williams*] decision stands out as yet another example [like *Caperton*] of how the [Supreme] Court continues to make proclamations about the nature of human psychology and decision-making without identifying the scientific source for its conclusions.").

39. *Compare* Williams, 136 S. Ct. at 1910 (Roberts, C.J., dissenting with Alito J. joining), *and id.* at 1914 (Thomas, J. dissenting), *with* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 890 (2009) (Roberts, C.J., dissenting with Scalia, J., Thomas, J., and Alito, J. joining).

40. *Williams*, 136 S. Ct. at 1910 (Roberts, C.J., dissenting) ("The majority opinion rests on proverb rather than precedent. This Court has held that there is 'a presumption of honesty and integrity in those serving as adjudicators.'") (quoting Withrow v. Larkin, 421 U. S. 35, 47 (1975))). Justice Thomas filed a solo dissent in which he argues Williams's criminal case and his post-conviction proceedings constitute two separate and distinct cases so no recusal is needed even under the test applied by the majority. *Id.* at 1917 (Thomas, J., dissenting). However, that dissent also relied, in part, upon a strong presumption of judicial impartiality. *Id.* ("The biases of judges 'cannot be challenged,' according to Blackstone, '[f]or the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.'"(citation omitted)).

41. *See supra*, note 31.

42. *Accord Williams*, 136 S. Ct. at 1910 (Roberts, C.J., dissenting with Alito J. joining) ("This Court has held that there is 'a presumption of honesty and integrity in those serving as adjudicators.'"); *Id.* at 1906 (Kennedy, J.) ("There is, furthermore, a risk that the judge 'would be so psychologically wedded' to his or her previous position as a prosecutor that the judge 'would consciously or unconsciously avoid the appearance of having erred or changed position.'").

disqualification decision, it isn't surprising that public confidence in the judiciary has been negatively impacted.[43] This impact is apparent from recent surveys showing that public confidence in the highest federal courts[44] and state judiciary is waning when it comes to resolving important legal questions fairly.[45] Thus, the *Williams* decision is an initial step in a longer journey to restore public confidence in the judiciary. The next step is for the federal and state courts, including the U.S. Supreme Court, to fully examine and satisfactorily explain the proper role of the presumption of judicial impartiality taking into account our current understanding of cognitive psychology, the bias blind spot, and the importance of judicial impartiality.

C. *The Importance of Judicial Impartiality*

The legitimacy of the judicial branch depends more heavily on public confidence in the institution because, unlike the other two branches of government, the courts have "no influence over either the sword or the purse."[46] The U.S. Supreme Court has repeatedly recognized the importance of public confidence in maintaining the authority of the

43. John Wihbey, *The Supreme Court, Public Opinion and Decision-Making: Research Roundup*, JOURNALIST'S RESOURCE, www.journalistresource.org/studies/politics/polarization/research-roundup-supreme-court-public-opinion (last updated June 28, 2013) ("Many legal scholars noted that the Court's standing with the public . . . [has decreased] as 2012 polling data suggested that the Court's traditionally high approval ratings had declined considerably.").

44. *See Confidence in Institutions: Trends in Americans' Attitudes Toward Government, Media, and Business*, ASSOCIATED PRESS http://www.apnorc.org/projects/Pages/HTML%20Reports/confidence-in-institutions-trends-in-americans-attitudes-toward-government-media-and-business0310-2333.aspx (last visited Dec. 18, 2016) (reiterating America's confidence in the Supreme Court is at an all-time low); *see also* Justin McCarthy, *Americans Losing Confidence in All Branches of U.S. Gov't*, GALLUP (June 30, 2014), http://www.gallup.com/poll/171992/americans-losing-confidence-branches-gov.aspx (showing the Supreme Court has reached record lows in American's confidence).

45. *See* GBA Strategies, *Analysis of National Survey of Registered Voters*, NAT'L CTR. FOR ST. CTS. (Nov. 17, 2015), http://www.ncsc.org/~/media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC_2015_Survey%20Analysis.ashx (indicating the biggest threat to public confidence in the state court judiciary is the public's concern about judicial bias); *see also* James P. Wenzel et. al., *The Sources of Public Confidence in State Courts: Experience and Institutions*, 31 AM. POL. RES. 191, 194–95 (2003), http://www.lsu.edu/faculty/bratton/7963/wenzel.pdf (hypothesizing the public's confidence in state courts is affected by the method by which judges attain their positions).

46. THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *see also* Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) ("The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements . . . .").

judiciary in America's democracy.[47] In fact, the requirement of an impartial judiciary has "been jealously guarded"[48] by the U.S. Supreme Court. The U.S. Supreme Court regularly reiterates the importance of impartiality in our judicial system: "It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'"[49]

This mandate of fairness means not only that the procedures used in the trial must be impartial, but also the decisionmaker must not be biased for or against a party, or have prejudged the case.[50] The requirement of judicial impartiality is designed to produce just results in individual cases, as well as to promote public confidence in the justice system.[51] The public must be confident the judiciary is a legitimate institution to secure widespread compliance with court rulings, especially those that are unfavorable with a significant part of the citizenry.[52] The judiciary creates public confidence in the legitimacy of the institution in a number of ways,

47. *See* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (declaring the need to preserve "both the appearance and reality of fairness, which 'generat[es] the feeling, so important to popular government, that justice has been done' . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him") (citations omitted)); *see also In re* Murchison, 349 U.S. 133, 136 (1955) (finding an impartial judge is necessary to maintain the legitimacy of court proceedings in upholding due process).

48. *Marshall*, 446 U.S. at 242.

49. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876 (2009) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

50. Generally, the term "impartial" means "favoring no one side or party more than another; without prejudice or bias." *Impartial*, WEBSTER'S NEW WORLD C. DICTIONARY (2010). The ABA Model Code of Judicial Conduct defines impartial as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." MODEL CODE OF JUD. CONDUCT Terminology (AM. BAR ASS'N 2011).

51. *See In re* Murchison, 349 U.S. at 136 (declaring "[f]airness of course requires an absence of actual bias in the trial of cases[,]" and "our system of law has always endeavored to prevent even the probability of unfairness"); *see also* Barry P. McDonald, *Supreme Court Justices: Are They Supposed to Be Politicians in Black Robes?*, CNN, www.cnn.com/2016/10/27/opinions/supreme-court-role-shouldnt-be-political-mcdonald/index.html (last updated Oct. 27, 2016 5:49 PM) (suggesting when judges base cases on political preferences "the American public loses confidence in the court as a place where any person can get a fair hearing based on the merits of their legal claims" and hypothesizing public support can be retained if "the court exercise[s] that judgment impartially on behalf of all Americans").

52. *See* Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 79–80 (2006) [hereinafter *Psychological Perspectives*] (explaining legitimate actors and institutions can more effectively shape the behavior of citizens without using rewards or threats, and law-related actors and institutions are legitimized through the use of fair procedures).

including the use of fair procedures.[53] When people evaluate the procedural fairness of institutions, like the courts, they are influenced by "evidence of even-handedness, and objectivity in decision-making. . . ."[54] In other words, impartiality is a key component of how people assess the procedural fairness and, in turn, the legitimacy of the judiciary.[55]

D. *New Lows in Public Confidence in the Judiciary*

Unfortunately, public trust and confidence in the judiciary has waned in recent years. In the most recent Gallup national poll on trust in government, just 53% of Americans surveyed indicated they have a "great deal" or "fair amount" of trust and confidence in the federal judiciary.[56] In fact, recent polls reflect public confidence in the federal judiciary (as well as the other two branches of the federal government) is on a downward trend[57] and some polls show that public confidence in the judiciary has fallen to historic lows.[58]

The waning confidence in governments and the courts is not unique to the federal system. Some of the same national surveys show public confidence in state governments handling local problems is not particularly high.[59] In addition, nearly a third of the American public is similarly

53. *See* Tom. R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 317 (2003) ("Procedural justice matters when people are making general evaluations of the police or court by expressing their degree of trust and confidence.").

54. *Id.* at 298.

55. *See id.* ("People think that decisions are being more fairly made when authorities are neutral and unbiased and make their decisions using objective indicators, not their personal views.").

56. Jeffrey M. Jones, *Trust in U.S. Judicial Branch Sinks to New Low of 53%*, GALLUP (Sept. 18, 2015) http://www.gallup.com/poll/185528/trust-judical-branch-sinks-new-low.aspx (determining the drop in public approval is the lowest it has ever been and hypothesizing the drop is due to the "way things are going in the country"); *see also Trust in Government*, GALLUP, http://www.gallup.com/poll/5392/trust-government.aspx (last visited Apr. 2, 2016) (providing 12% of respondents have a "great deal" of trust and confidence in the federal judiciary and 49% of respondents indicating "a fair amount" of satisfaction with the judiciary, but 28% and 9% indicating "not very much" trust and confidence or "none at all" in the most recent poll).

57. Kathleen Hall Jamieson & Michael Hennessy, *Public Understanding of and Support for the Courts: Survey Results*, 95 GEO. L. REV 899, 900 (2007) (proclaiming two representative national surveys of American adults found only 64% of the public say it trusts the U.S. Supreme Court which is 11% lower only one year later).

58. Justin McCarthy, *supra* note 44 (echoing polled Americans have the lowest confidence in the U.S. Supreme Court since 1973, the first year confidence in the U.S. Supreme Court was documented).

59. *Trust in Government*, *supra* note 56 (noting 62% of respondents have a "great deal" or "fair amount" of trust and confidence in their state government compared to 71% confidence in the local

unsure about the ability of state courts to handle cases fairly.[60] The public's confidence is especially low when campaign contributors appear before the jurists who they helped elect, with 76% of Americans[61] believing that money influences outcomes in cases.[62] Even a greater number of voters, nearly 81%, voice concerns about impartiality when they are told that in some states nearly half of all cases heard by the highest state courts involve cases affecting the interests of campaign contributors.[63] The public's concerns with judicial impartiality are not limited to the influence of money but also extend to the impact of a jurist's personal political ideology as well.[64] Moreover, even jurists themselves are less sanguine about the impartiality and independence of an increasingly politicized judiciary.[65] In recent years, jurists themselves have begun to express doubts about the ability of the average judge to remain impartial with 26% of judges admitting campaign contributions have at least some influence on decisions they make.[66] In addition, some of the nation's top

government).

60. Jamieson & Hennessy, *supra* note 57, at 900 (commenting only 62% of the public say they trust their respective state courts to make decisions to the benefit of the state as a whole).

61. This number comes from samples of voters including both Democrats and Republicans. Memorandum from Stan Greenberg, Chairman and CEO, Greenberg Quinlan Rosner Research & Linda A. DiVall, President, Am. Viewpoint, to Geri Palast, Exec. Dir., Justice at Stake Campaign (Feb. 14, 2002), http://www.justiceatstake.org/media/cms/PollingsummaryFINAL_9EDA3EB3BEA78.pdf [hereinafter Memorandum from Greenberg & DiVall to Palast].

62. *See id.* (summarizing findings of a national survey of 1000 Americans registered to vote and concluding voters are concerned about how money and special interests effect court rulings).

63. *See id.* (indicating 81% of voters and 74 % of judges in some states are concerned that nearly half of all state supreme court cases "involve someone who has given money to one or more of the judges hearing the case").

64. *See* Lyle Denniston, *Constitution Check: Do Supreme Court Justices Have a Right to Comment on Politics*, CONST. DAILY (July 13, 2016), http://blog.constitutioncenter.org/2016/07/constitution-check-do-supreme-court-justices-have-a-right-to-comment-on-politics/ (emphasizing although Americans believe they have a right to hold strong views concerning politics, those same people "seem to be squeamish about having judges do the same"); *see also* Jamieson & Hennessy, *supra* note 57, at 900 (reporting six out of ten Americans believe judges "are legislating from the bench rather than interpreting the law").

65. *See, e.g.*, Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings,* N.Y TIMES (Oct 1, 2006), http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all&_r=0 (noting sitting judges are beginning to question the current campaign finance system, and quoting a current (at the time of the article) Ohio Supreme Court justice who feels like people "mean to be buying a vote" when they contribute to his campaigns).

66. *See* Memorandum from Greenberg & DiVall to Palast, *supra* note 61 (surveying 2,428 state court justices—including 188 state Supreme Court justices, 527 appellate court judges, and 1,713 lower court judges—regarding their views of judicial impartiality and independence with regard to

jurists have called for reforms in recusal rules to ensure an impartial judiciary in the face of increasing pressures from campaign contributors, especially in highly politicized judicial races.[67] These jurists have good reasons to be concerned. As reflected in a number of recent studies, there is a significant correlation between campaign donations and judge's votes in cases involving those supporters' interests, including at the highest state courts.[68] Thus, especially as our judicial branch becomes more political, it is not just the public who is concerned about the impartiality of the judiciary, jurists themselves are having doubts.

III. HISTORY OF RULES, RESISTANCE, AND REFORM

A. *History of Recusal Rules*

1. Civil, Canonical, and Other Ancient Laws

Some older judicial systems—including early Jewish law,[69] Christian canonical law,[70] and Roman civil law[71]—permitted parties to petition for the disqualification of jurists based upon a broad range of grounds, including a mere suspicion or appearance of bias. This more expansive view of disqualification was grounded in "the salutary doctrine that the

campaign contributions).

67. *See generally* Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J. at A18 (Sept. 27, 2006, 12:01 AM), http://www.wsj.com/articles/SB115931733674775033.

68. *See* Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 99–100 (2011) (finding elected judges are more likely to decide in favor of the business interests that support their campaign and the likelihood increases as the amount of the campaign contributions increases); *see also* Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES (Oct 1, 2006), http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all&_r=0) (highlighting a study of the Ohio Supreme Court, where there were 215 cases with "direct potential conflicts of interest, justices recused themselves just 9 times," and noting "[o]n average, [the Ohio Supreme Court Justices] voted in favor of contributors 70 percent of the time").

69. *See*, *e.g.*, RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES, § 1.2 at 5 , n1 & 2 (2d ed., 2007) (hereinafter "RECUSAL AND DISQUALIFICATION OF JUDGES") ("Every judge who judges a case with complete fairness, even for a single hour is credited by the Torah as though he had become a partner to the Holy One . . . in the work of creation." (citing Babylonian Talmud, Tractate Shabbath 10a (n.d.) quoted in 1 EMANUEL QUINT & NEIL HECHT, JEWISH JURISPRUDENCE 6 (1980) and The Code of Maimonides, Bk XIV, ch 23, 68-70 (translated by A. Herschman 1949)).

70. *See* Harrington Putnam, *Recusation*, 9 CORNELL L.Q. 1, 1 (1923) (explaining the origins of recusal in our judicial system lies within canonical law).

71. *See id.* at 3 ("[T]his [right of litigants to disqualify a jurist based upon a suspicion of bias] is set forth in the *Codex* of Justinian, with admirable emphasis.").

personal attitude of the judge toward the litigant, or toward the cause itself shall be above all suspicion."[72] The Roman law gives a clear example of the litigant's right to request recusal when bias is suspected:

> It is the clearest right under general provisions laid down from thy exalted seat, that before hearings litigants may recuse judges. A judge being so recused, the parties have to resort to chosen arbitrators, before whom they assert their rights.
>
> Although a judge has been appointed by imperial power yet because it is our pleasure that all litigations shall proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion to recuse him before the issue be joined, so that cause go to another . . . .[73]

In other words, there was no strong presumption of impartiality based upon the mere fact that the decisionmaker held judicial office. Rather, these ancient and more generous recusal rules appear to reflect that judges, being human, are not immune to bias.[74]

2. English Law

While there is some evidence the early English courts recognized a litigant's right to recuse a jurist for a broad range of reasons,[75] this was not true at the time the legal system was established in the Pre-Revolution American colonies.[76] Instead, when our nation was founded, English common law—unlike the Roman civil law and religious laws—severely limited the grounds for disqualification of judges:

72. *Id.*

73. *See id.* at 3 n. 10 (translating CODEX OF JUSTINIAN, lib. III, tit. I, No. 16); *see also* FRED H. BLUME, ANNOTATED JUSTINIAN CODE 18–19 (Timothy Kearley ed., 2d ed. 2009), *available at* http://www.uwyo.edu/lawlib/blume-justinian/_files/docs/book-3pdf/book%203-1.pdf.

74. *See* Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 699 (2011) [hereinafter *Why Judicial Disqualification Matters*] (discussing the fact that, objectively speaking, judges are prone to bias because of natural human psychology, but that disqualification decisions still depend, in part, upon the presumption of judicial impartiality).

75. *See* 4 HENRY BRACTON, DE LEGIBUS ET CONSUETDINBUS ANGLIEA 281 (Samuel E. Thorne trans., BRACTON President and Fellows of Harvard College ed., 1942) (suggesting a common law judge should recuse when he is related to a party, hostile to a party, or has been counsel in a case).

76. RECUSAL AND DISQUALIFICATION OF JUDGES, *supra* note 69, § 1.4, at 10–11 (detailing the creation and evolution of the American legal system).

> By the laws of England also, in the times of Bracton and Fleta, a judge might be refused for good cause; but now the law is otherwise, and it is held that judges or justices cannot be challenged. For the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.[77]

Blackstone went on to observe that if this strong presumption of impartiality proved to be wrong, then the judge could be impeached or otherwise held "accountable for his conduct."[78]

While the reasons for recusal by an English common law jurist were quite limited, at least two grounds for disqualification did exist.[79] First, a jurist was disqualified and could not preside over a case in which he had a direct pecuniary or propriety interest.[80] Second, as stated by Chief Justice Sir Edward Coke in *Dr. Bonham's Case*:[81] "*quiaaliquis non debet esse Judex in propria causa*" or "no man shall be a judge in his own cause."[82] As illustrated in *Dr. Bonham's Case*, the second principle meant even an

77. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 361 (University of Chicago eds. 1979) (1768), *available at* https://books.google.com/books?id=YiZOAAAAcAAJ&printsec=frontcover&dq=blackstone+commentaries+volume+3&hl=en&sa=X&ved=0ahUKEwjZ9JCXh7jRAhXJ44MKHTLMBZEQ6AEIIzAB#v=onepage&q=%22Bracton%20and%20Fleta%22&f=false.

78. *Id.*

79. Many courts and commentators have described these disqualifying grounds as one standard, direct or indirect pecuniary interest, rather than two standards. *See,* Tumey v. Ohio, 273 U.S. 510, 523 (1927) (holding an individual was denied due process by trial because the judge had a pecuniary interest in the case); *see also* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 868 (2009) (holding an appellate court judge should have recused himself when the CEO of a company before him contributed approximately $3million to the judge's campaign); *Why Judicial Disqualification Matters, supra* note 74, at 690–94 (discussing the current appearance-based approach to recusal). However, a careful reading of *Dr. Bonham's Case* suggests that prior to Lord Coke's pronouncement in that case an indirect pecuniary interest in the outcome of the case was not disqualifying. In addition, Lord Coke's opinion in *Dr. Bonham's Case* lays the groundwork for a further expansion of the grounds for disqualification by noting the partiality problem was exacerbated by the conflicting roles of judge and prosecutor played by the challenged jurist. Dr. Bonham's Case, 77 Eng. Rep. 646, 646 (K.B. 1609).

80. GRANT R. HAMMOND, JUDICIAL RECUSAL: PRINCIPLES, PROCESS AND PROBLEMS 12–13 (2009) (explaining that the "best known authorities for [this] proposition are *Sir Nicholas Bacon's Case* . . . and the *Earl of Derby's Case* . . . "(citations omitted)).

81. *Dr. Bonham's Case*, 77 Eng. Rep. 646 (K.B. 1609).

82. *Id.* at 652 ("The censors cannot be judges, ministers and parties; judges . . . give sentence or judgment; ministers . . . make summons; and parties . . . have moiety [in half] of the forfeiture, because no person may be a judge in his own cause . . . and one cannot be judge and attorney for any of the parties.").

indirect financial interest could be disqualifying so long as the interest or conflict was not too remote.[83] Otherwise, an English common law jurist could not be challenged on any ground, not even based upon a close family tie or friendship with a party, and certainly not for suspicion of bias.[84]

These narrow grounds for disqualification did not mean that impartiality was unimportant under English common law; rather, the jurist's impartiality was presumed. As reflected in Blackstone's own words, this presumption of impartiality was vital to the proper functioning of the judiciary in the English common law system: "For the law will not suppose a possibility of bias or favour in a judge who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." [85]

Blackstone was not alone in this view. In fact, other commentators, including Sir Matthew Hale, held similar views about the centrality of this presumption of impartiality to the judicial role and identity.[86] Given this strong presumption of impartiality and the concept of judicial identity underlying it, "[t]o challenge a [common law] judge for bias was, in effect, to accuse him of abdicating his role—an accusation the common law courts simply would not tolerate."[87]

This narrow right of litigants to recuse English common law jurists based upon only two distinct grounds was not and is not the rule in most civil law countries.[88] Louisiana, the one state to have always operated

83. *See* HAMMOND, *supra* note 79, at 12–13 (explaining the judge in *Dr. Bonham's Case* had an indirect interest in the case because the judge received a fine he had the power and authority to levy).

84. *Id.* (explaining *Brookes v. Rivers* held bias is not to be presumed, and therefore, the Chamberlin of Chester was not disqualified from hearing a case in which his brother-in-law was a party (citing *Brookes v. Rivers*, 1 Hard 503; 145 ER 569 (K.B. 1668))); *see also* RECUSAL AND DISQUALIFICATION OF JUDGES, *supra* note 69, § 1.2, at 6 ("[T]he refusal of early English [common law] courts to recognize bias as basis for disqualification extended even to cases involving familial relationships between judges and parties.").

85. 3 BLACKSTONE, *supra* note 77, at 361.

86. *See* 2 LORD J. CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 207–09 (James Cockcroft & Co. eds. 1881) (quoting Sir Matthew Hale's "Things Necessary to be Continually Had in Remembrance" which sets forth eighteen standards for conduct of a common law judge, at least seven of which direct jurists to remain impartial).

87. *Why Judicial Disqualification Matters, supra* note 74, at 679.

88. RECUSAL AND DISQUALIFICATION OF JUDGES, *supra* note 69, § 1.2, at 5–6 (citing Comment, *Disqualification for Interest of Lower Federal Court Judges: 28 U.S.C. Section 455*, 71 MICH. L. REV. 538, 538–39 n.5 (1973) which emphasizes the formation of sweeping disqualification statutes in common law jurisdictions).

under a civil code, recognizes a broad right of recusal.[89] However, the common law jurisdictions—including the United States and the United Kingdom—have long upheld a more restrictive view of recusal based upon a stronger presumption of impartiality.[90] This difference between the civil code and common law jurisdictions has been attributed to the differing roles that jurists played in both legal systems.[91] Specifically, common law judges did not act as fact finders as their civil law counterparts did; thus, the grounds for recusal were believed to be properly more narrow in common law jurisdictions.[92]

In addition, there is reason to believe that the conflicting views of judicial disqualification within common law countries reflects the differences of the roles played by jurists in courts of law and courts of equity, as well as certain technical requirements observed in those courts.[93] In the English courts of law, where the strong presumption of impartiality held sway, the legal claims and defenses were required to meet very technical pleading and proof requirements and relief could only be granted in legally prescribed forms.[94] This type of proceeding, naturally, lent itself to a more mechanical view of judging and created less risk of a jurist's bias affecting the outcome. In contrast, the forms of pleading, proof and relief in equitable cases heard by English chancery courts were less circumscribed, and led to the exercise of greater discretion by the jurist.[95] Understandably, the recusal rules governing chancery court were broader and included disqualification for suspicion or appearance of bias.[96] Thus, the different roles of jurists in courts of law and courts of

89. Putnam, *supra* note 70, at 8 (explaining how Louisiana is a civil law jurisdiction that has long recognized a more expansive right of disqualification, including recusal based upon financial and other interests, relationship with any litigant, or prior involvement in the case as an attorney or judge.).

90. *See* HAMMOND, *supra* note 80, at 11–14 (tracing the history of recusal rules in the British Commonwealth and United States).

91. *See generally Why Judicial Disqualification Matters, supra* note 74 (discussing the roles of judges in both common law and civil code jurisdictions).

92. *See id.* at 678–79 (noting even jurors in common law jurisdictions, who were the fact-finders in the proceedings, were subject to removal for a much broader range of reasons, including suspicion of bias).

93. These differences include the technical requirements for pleading and proving claims and the relief that could be granted in courts of law and courts of equity.

94. *See generally* GARRY SLAPPER & DAVID KELLY, THE ENGLISH LEGAL SYSTEM (11th ed. 2010) (inferring the technicality of the procedures gave little room for bias).

95. *See id.* at 6–7 (contrasting the procedures of courts of law and courts of equity and the discretion of the jurists in each type of court).

96. *See* Putnam, *supra* note 70, at 4–7 (describing the differences between the narrow

equity help explain the differing recusal rules in England at the time of the founding of our nation.

However, since that time, distinctions between the English common law and canonical courts have disappeared and a unified standard for judicial recusal has emerged in England.[97] This new unified standard relies less upon the ancient presumption of impartiality and now permits disqualification based upon apparent bias.[98] Likewise, in the United States, all federal and most state court jurists may grant legal and equitable relief in a single proceeding.[99] Thus, in light of the merger of jurist's role in granting relief under both law and equity, it is time to reexamine American recusal rules, including our continuing reliance on the strong presumption of impartiality that underlies much of our disqualification jurisprudence.

3. A "Vicious Cycle" of Refusal, Reform, Resistance, and Repeat

While the original disqualification standards in both England and the United States relied heavily upon the strong presumption of partiality, it was not long before new situations in both legal systems would challenge the soundness of that strong presumption of impartiality favored by the common law. In England, the erosion of the presumption began with some early common law court cases in which the jurist had a very close relationship to one of the parties, and the change was accelerated by the dissolution of the separate canonical courts and fusion of the common law and equity courts into a single court system.[100] In the United States, the initial disqualification standard, like the original English common law standard on which it was based, was quite narrow: "A [jurist] would be

disqualification rules in English common law courts and English ecclesiastical courts).

97. *See* HAMMOND, *supra* note 80, at 11–14 (describing evolution of English recusal standards and procedures from ancient times to present day).

98. *See id.* (illustrating the change in the English legal system has effected the standards of recusal).

99. *See* Charles T. McCormick, *The Fusion of Law and Equity in United States Courts*, 6 N.C. L. REV. 283, 284 (1928) ("The [U.S.] Congress did not, as no doubt it might have done, create separate national courts of equity and law, but organized only one system of courts in which might be tried cases at law, and cases in equity, according as the same judge happened to be playing the role of common law judge, or of chancellor."); *see also* Ross v. Bernhard, 396 U.S. 531, 540 (1970) ("Separable claims may be tried separately . . . or legal and equitable issues may be handled in the same trial.").

100. *See* HAMMOND, *supra* note 80, at 11–14 (analyzing the changes regarding the presumption of impartially of English standards and procedures from ancient times to present day).

disqualified for possessing a direct financial interest in the cause before him, and for absolutely nothing else."[101]

However, early in the nineteenth century the standards for disqualification were enlarged to include a jurist's relationship to a party litigant.[102] The broadening of disqualification standards continued with a significant overhaul of the Federal Disqualification Statute in 1911.[103] For the first time in America, this statute permitted parties to challenge a jurist on grounds of bias without requiring the challenger to demonstrate that actual bias existed.[104] This preemptory challenge mechanism was the first step in weakening the nearly ironclad presumption of impartiality, which erosion has continued in fits and starts to this day.

A variety of factors have been used to explain the expansion of reformed recusal rules. Some commentators have postulated that the single most important factor in expanding grounds for judicial disqualification in the United States was the increasing politicization of the judiciary which upset the balance between judicial independence and judicial accountability.[105] The shift was most dramatic in the states, many of which changed their judicial selection processes from appointments to elections in hopes of creating more accountability to the citizens.[106] Similar changes in disqualification practice were taking place in the federal judicial system, where all jurists are appointed.[107]

101. Richard E. Flamm, *History and Problems with Federal Judiciary Disqualification Framework*, 58 DRAKE L. REV. 751, 753 (2010) (citing Edward G. Burg, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CAL. L. REV. 1445, 1480–81 (1981) and noting American judicial disqualification jurisprudence emerged from this English base).

102. Flamm, *supra* note 101, at 754 (discussing the amendment of the judicial disqualification to include "relationship to a party as an additional ground for judicial disqualification").

103. 28 U.S.C. § 144 (2000) (creating new standards by amending the prior statute).

104. *See Why Judicial Disqualification Matters, supra* note 74, at 680–81 (describing recusal reform efforts in United States dating back as early as 1792 when Congress passed the first statute that included additional grounds for disqualification beyond what the early common law provided and continuing through today); *see also* Flamm, *supra* note 101, at 754 n.21 (describing the statute promulgating a procedure for "compelling a judge to enter the existence of his conflict of interest on the record and prescribing disqualification where the judge was a material witness").

105. *See* Gabriel D. Serbulea, Comment, *Due Process and Judicial Disqualification: The Need for Reform*, 38 PEPP. L. REV. 1109, 1114–20 (2011) (elaborating on the shift in balance between judicial independence and accountability created by state judicial elections, and federal and state legislative responses that included new bases for disqualification).

106. *See id.* at 1114 ("This state of affairs favored judicial independence from the electorate. That changed dramatically when Jacksonian-style Democracy swept the states-starting with Mississippi in 1832-bringing about statewide judicial elections.").

107. *See id.* at 1118 ("Although the 1792 version of the federal statute required disqualification

These changes in the federal judiciary could be explained by the impact of the shift in the state courts and to a lesser extent what was taking place in England.[108] Others have suggested the expansion of disqualification grounds reflects an "evolution in thinking" about judges, judging, and the judiciary.[109] Another theory suggests the changes in disqualification may mirror "a shift in society's view of judicial psychology, and of psychology in general: from the eighteenth century's economic man, susceptible only to the tug of financial interest, to today's Freudian person, awash in a sea of conscious and unconscious motives."[110]

Whatever the cause, there is little doubt the strong presumption of impartiality began to deteriorate as the grounds for judicial disqualification steadily increased in response to new problems or perceived problems with judicial impartiality. As new situations occurred, it became clear the very limited common law grounds for disqualification—direct or indirect pecuniary interest—were insufficient to insure judicial impartiality. Thus, there is a history in America of adopting new recusal rules, which is coupled with resistance by the judiciary that stymies full implementation of the recusal reforms, thereby setting the stage for the next crisis in confidence.

Changes in judicial recusal rules were often made in response to drops in public confidence arising from the most controversial cases:

> With each new scandal or crisis has come a flurry of scholarship advocating an expansion of the grounds for disqualification, and Congress has often responded by amending the recusal laws as suggested. However, altering the substance of the recusal standard has proven to be an ineffective method of reforming this sensitive area of judicial self-governance. . . . [H]istory shows that each time the standard for recusal is broadened by Congress, it is narrowed soon thereafter as members of the judiciary apply it to themselves. The very self-dealing that makes recusals necessary in the first place has

[of Article III judges] only for interest, for acting in the matter, or for having been of counsel in the case, Congress subsequently amended the statute and added new disqualification bases . . . .").

108. *See id.* at 1118–19 (reiterating how the issues in the states were influencing the federal courts).

109. RECUSAL AND DISQUALIFICATION OF JUDGES, *supra* note 69, § 1.4, at 8, n. 6.

110. John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 247 (1987).

> operated to prevent disqualification statutes from being employed as fully and broadly as Congress intended.[111]

This "vicious cycle" of new rules, resistance, reforms, and repeat can be traced throughout the history of American disqualification jurisprudence.[112] The pattern of change may reflect underlying tensions between the desire for jurists to be independent and the desire to hold jurists accountable in an increasingly political world.[113] The pattern may also reflect changes in our understanding of human psychology and our beliefs about how judges make their decisions.[114] Whatever the underlying reasons, there can be no doubt the history of recusal rules reflects a tug-of-war between the judiciary on one hand, and the legal community and general public on the other hand, over what it means to be a judge and how central the presumption of impartiality is to that role.[115]

Moreover, although the substantive standards and procedures are varied, the backdrop of recusal rules in current use embody a strong consensus among the bench, bar, and general public that jurists actually need to be impartial, and often to appear to be impartial.[116] In fact, the very existence of an appearance-based regime reflects this strong commitment to impartiality.[117] However, the current appearance-based recusal regime is in trouble because the judiciary, the larger legal establishment, and the public do not agree on "when . . . [the general] presumption of [judicial] impartiality [should] yield to the suspicion that

111. Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 533–34 (2005).

112. *See* Leubsdorf, *supra* note 110, at 245 (describing the "crisis of disqualification" occurring in America dealing with disqualification).

113. *See* Serbulea, *supra* note 105, at 1114–20 (discussing the challenges an elected judge faces against a public that is dissatisfied with the judge's decisions).

114. *See* Leubsdorf, *supra* note 110, at 244 (exploring ways in which a judge may justify her actions).

115. *Why Judicial Disqualification Matters, supra* note 74, at 676 ("Ultimately, then, recent interest in disqualification rules is emblematic of a larger struggle within the legal establishment over how best to preserve the legitimacy of the judiciary itself, at a time when our collective understanding of what properly influences judicial decision-making, and what perverts it, is unclear.").

116. *See id.* at 686–90 (explaining the trend in recusal rules where judges must avoid even the appearance of bias). *See generally* RECUSAL AND DISQUALIFICATION OF JUDGE *supra* note 69, (discussing current recusal standards).

117. *Why Judicial Disqualification Matters, supra* note 74, at 686–90 (discussing the appearance-based standard and emphasizing its importance to its supporters).

extralegal influences may have compromised the judge's impartial judgment."[118]

4. The Formalists and Realists Split Over the Presumption of Impartiality

This lack of consensus on the proper strength of the presumption of impartiality likely stems from differing understandings of (1) what judicial conduct constitutes "impartiality" or "partiality" in specific cases, and (2) the proper amount of evidence needed to overcome the presumption of impartiality. There is some consensus about when jurists are likely to be partial and those instances are codified in the conflict of interest provisions of disqualification statutes and judicial ethics codes, which include *per se* rules that serve as a sort of laundry list of situations in which partiality is presumed.[119] In addition, there have been some extreme cases of conflicts of interest or bias not covered by the enumerated exceptions that many in the bench, bar, and public believe called into question the jurist's impartiality.[120] Yet beyond those enumerated instances of

118. *Id.*

119. *See* 28 U.S.C. § 455(b) (2012) (mandating a federal jurist shall disqualify himself in the certain circumstances). The following are the circumstances when a federal jurist shall disqualify himself:

> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
> (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
> (ii) Is acting as a lawyer in the proceeding;
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
> (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

Id.

120. The amicus briefs filed before the U.S. Supreme Court in *Caperton*, including one brief for

recognized partiality and extreme cases of actual, probable, or apparent bias, there is little agreement on the substantive standards for recusal.[121]

This disagreement over substantive standards for disqualification is premised, at least in part, upon differing views of the proper strength of the presumption of impartiality. Not surprisingly, the split in support for a stronger or weaker presumption of judicial impartiality mirrors a larger divide within the legal community between formalists and legal realists.[122]

twenty-seven former state Supreme Court Justices, supported disqualification of the challenged jurist who received substantial campaign support from the CEO of a party litigant that eventually appeared before the Supreme Court of West Virginia. Brief Amici Curiae of 27 Former Chief Justices and Justices in Support of Petitioners, Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (No. 08–22), 2009 WL 45979; Brief of National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioners, Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (No. 08–22), 2009 WL 27299; Brief of Amicus Curiae in Support of Petitioners, Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (No. 08–22), 2009 WL 45974; Brief of the American Bar Association as Amicus Curiae in Support of Petitioners, Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (No. 08–22), 2009 WL 45978; Brief of the American Academy of Appellate Lawyers, Amicus Curiae, Supporting Petitioners, Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (No. 08–22), 2009 WL 815213; Brief of American Association for Justice as Amicus Curiae Supporting Petitioners, Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (No. 08–22), 2009 WL 45971; Brief of Amicus Curiae Public Citizen in Support of Petitioners, Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (No. 08–22), 2009 WL 45975. Also, public opinion was skewed heavily in favor of disqualification as evidenced by a plethora of news stories. *See* Dahlia Lithwick, *Cash Bar*, SLATE (Mar. 3, 2009, 8:31 PM) http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2009/03/cash_bar.html (discussing the judge's actions in a negative light); *see also* Adam Liptak, *The Worst Courts for Businesses? It's a Matter of Opinion*, N.Y. TIMES (Dec. 24, 2007) http://www.nytimes.com/2007/12/24/us/24bar.html (reviewing the failure of Justice Benjamin to recuse himself and suggesting that West Virginia Supreme Court judicial decisions should be judged more critically because of it). In addition, at least one statistical study of citizens domiciled within the state where the challenge arose shared the same consensus with the public. *See* James L. Gibson & Gregory A. Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can Recusals Rescue the Legitimacy of Court?*, 74 J. POL. 1, 19 (2012) (finding that both direct contributions and independent expenditures in judicial campaigns undermined public perceptions of jurists' fairness). However, there was a vigorous dissent in *Caperton*. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 890 (2009) (Roberts, J. dissenting). The Supreme Court dissenters did not suggest that the judge was qualified under the state's appearance of bias standard; instead they disagreed with the ruling based upon a belief the probability of bias standard, which the dissent viewed as a variation of an appearance standard, should not be constitutionalized. *See id.* at 98–99 ("The need to consider these [forty enumerated] and countless other questions helps explain why the common law and this Court's constitutional jurisprudence have never required disqualification on such vague grounds as 'probability' or 'appearance' of bias.").

121. *Why Judicial Disqualification Matters, supra* note 74, at 676 ("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.").

122. *See, e.g.*, BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 30 (2009) (relating the formalist view of judging as a mechanical

The formalists[123] embrace a strong presumption, which supports their own view of judging as a mechanical or formal application of law to the facts.[124] This formalist approach is also consistent with the belief that jurists, due to their education, intellect, training, and moral constitution, are able to overcome any biases—even nonconscious biases—that may exist.[125] Although these strong views of judicial impartiality persist even in the face of scientific evidence to the contrary, some formalists are open to the idea that judicial education may "assist judges in recognizing and combating these common barriers to well-reasoned, objective judgments, thereby enhancing the actual impartiality of the courts."[126] In contrast, the legal realists are more willing to accept newer scientific evidence regarding human cognition and to adapt legal standards to such realities.[127] This shift is reflected more broadly within the law, but also has impacted theories about judges, judging, and recusal rules.[128]

application of the facts of a given case to the legal standard).

123. This often includes many jurists applying the recusal standards to themselves or their brethren.

124. *See generally* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (the majority and dissent offer differing views of judging and the proper role of the presumption of judicial impartiality); *see also Why Judicial Disqualification Matters, supra* note 74, at 699 (discussing the appearance of this "fundamental rift over how deep the presumption of impartiality ought to go" and describing the *Caperton* dissenters as subscribing to the traditional or formalist view and the majority, in contrast, exhibiting realist or scientific inclinations).

125. *See, e.g.*, Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from "Big Judge Davis"*, 99 KY. L. J. 259, 303–11 (2010–2011) (suggesting judicial education can reinforce the ability of jurists to set aside biases and rule based upon the facts and the law).

126. *Id.* at 308 (describing the need for judicial education focused on teaching jurists about the science of heuristics and other cognitive illusions but failing to discuss how training will affect nonconscious bias in disqualification decisions, including the bias blind spot).

127. *See* RICHARD A. POSNER, HOW JUDGES THINK 19 (2008) (positing judicial decision-making reflects a combination of nine different theories of judicial behavior—including attitudinal, strategic, sociological, psychological, economic, organizational, pragmatic, phenomenological, and legalist); *see also* CHARLES GARDNER GEYH, SO WHAT DOES LAW HAVE TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE 1 (2011) (describing legal realism was inspired in part by principles of behavioral psychology). *See generally* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949) (documenting the legal realist view of judicial decision-making and collecting essays reflecting how law and politics affect judicial decision-making).

128. *See generally* Leubsdorf, *supra* note 110 (discussing recusal rules from a legal realist perspective).

In fact, the split between formalists and legal realists is reflected in the rift between the majority and the dissent in *Caperton*.[129] The formalist view underlies the dissenter's opinions and is particularly clear in Chief Justice Robert's dissent. In his opinion, Chief Justice Roberts emphasized the "presumption of honesty and integrity in those serving as adjudicators" and reminded us "[a]ll judges take an oath to uphold the Constitution and apply the law impartially, and we [should] trust that they will live up to this promise."[130] Echoing Blackstone's concerns about the need for a strong presumption of impartiality to support judicial authority,[131] Chief Justice Roberts even went so far as to predict the presumption of impartiality would be threatened by an increase in disqualification motions that would follow the *Caperton* decision and bring "the judge and the judicial system into disrepute."[132]

In contrast, the *Caperton* majority embraced a legal realist perspective on judging, even hinting at the latest scientific discoveries about the role of unconscious bias in human cognition.[133] In fact, Justice Kennedy, writing for the majority, explicitly acknowledged the danger of nonconscious bias by discounting the significance of the challenged jurist's subjective belief that he was not actually biased.[134] Justice Kennedy's majority opinion also makes clear that the federal due process disqualification standard is an objective and more scientifically based test:

129. *Refocusing Recusals, supra* note 10, at 247–50 (outlining the formalist perspective underpinning the dissenting opinions in *Caperton*).

130. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 891, 902 (2009) (Roberts, J. dissenting).

131. 3 BLACKSTONE, *supra* note 77, at 361 ("For the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.").

132. *Caperton*, 556 U.S. at 899. However, there is little evidence that *Caperton* actually did open the floodgates and cause a significant increase in motions to disqualify. *See* Adam Liptak et.al., *Caperton and the Courts: Did the Flood Gates Open?* 18 N.Y.U. J. LEGIS. & PUB. POL'Y 481, 494 (2015) (recognizing in the five years since the *Caperton* case was handed down, "it has indeed been rare to have *Caperton* motions . . . in part because of the narrowness of Justice Kennedy's opinion for the majority and the fact that lower courts have been unwilling to take a broad, sweeping approach to *Caperton* recusals").

133. *Refocusing Recusals, supra* note 10, at 247–50 (describing the legal realist perspective underpinning the majority opinion in *Caperton*).

134. *Caperton*, 556 U.S. at 869–70. ("Because the objective standards implementing the Due Process Clause do not require proof of actual bias, this Court does not question Justice Benjamin's subjective findings of impartiality and propriety and need not determine whether there was actual bias.").

> [T]he question is whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest [of the judge in question] "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."[135]

In other words, the *Caperton* majority embraced a view of judges and judging that is more in keeping with legal realism than formalist views of judicial decision-making.[136] However, while the *Caperton* majority suggested the "extreme" facts of the amount and timing of the campaign contribution warranted disqualification in the specific case, the *Caperton* majority stopped short of declaring a clear due process based disqualification standard that applies whenever a jurist's campaign supporter appears before a court.[137] Instead, the *Caperton* majority invited states to set more rigorous recusal rules using non-constitutional law (statutes and ethics rules) tailored to reflect the reality of judicial decision-making.[138]

Unfortunately, since the U.S. Supreme Court issued the *Caperton* opinion in 2009, few states have succeeded in taking up the challenge and making real changes to either the substantive standards or the procedural practices used in deciding disqualification disputes. There has been little progress in spite of the fact *Caperton* was followed by a plethora of scholarly articles suggesting a variety of substantive and procedural changes.[139] Soon after

135. *Caperton*, 556 U.S. at 869–70 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

136. Unfortunately, the *Caperton* majority stopped short of fully and finally adopting a legal realist view of judging when they failed to hold that allowing the challenged jurist to decide their own disqualification disputes, which is standard procedure in all federal and most state courts, likewise offends the Due Process Clause. *See Reshaping Recusal Procedures*, *supra* note 10, at 33 (explaining how the combination of cognitive illusions, most notably the bias blind spot, and this "self-judging" of disqualification disputes creates systemic risk of incorrect decisions and undermines public confidence and proposing the elimination of "self-judging").

137. Jeffery W. Stempel, *Completing Caperton and Clarifying Common Sense Through Using the Right Standard for Constitutional Judicial Recusal*, 29 REV. LIT. 249, 296–97 (2010) ("[O]bservers should recognize that *Caperton*'s tentative and case-specific approach did not go far enough and failed to enunciate the type of more sweeping due process recusal standard necessary to restore and maintain confidence in state judiciaries.").

138. *Id.*

139. *See, e.g.,* Charles Geyh et. al., *The State of Recusal Reform* 18 N.Y.U. J. LEGIS. & PUB. POL'Y 515 (2015) [hereinafter *The State of Recusal Reform*] (discussing the ABA's failed efforts to revise the Model Code of Judicial Conduct following *Caperton* and judicial reluctance to embrace some reforms).

Caperton, the ABA proposed a modification to the existing rule mandating disqualification when a party or its counsel made a campaign contribution to support a jurist's election[140] that would also encompass independent expenditures.[141] However, the ABA later withdrew the proposed amendment, which would have broadened the disqualification rule based upon more types of campaign support.[142]

Two years after the U.S. Supreme Court's pronouncement on when the federal Due Process Clause demands disqualification, only a handful of states had made any significant progress in recusal reforms in spite of increased spending in state judicial elections.[143] As of 2015, only Alabama, Arizona, California, Mississippi, and Utah had adopted a version of ABA Rule 2.11(a)(4) which sets a bright line test for disqualification based upon set spending levels.[144] Currently, an additional eleven states have adopted standards that contain no specific spending level triggers but are loosely modeled on the standard discussed in *Caperton*.[145] In addition, even after *Caperton*, two states—Nevada and Wisconsin—have outright

140. In 1999, the ABA amended Canon 2 of the Model Code of Judicial Conduct (the "ABA Judicial Code") to require disqualification in connection with direct campaign contributions, which standard was retained as Rule 2.11(a)(4) when the ABA Judicial Code was revised in 2007. That rule provides:

> The judge knows 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] year[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].

MODEL CODE OF JUDICIAL CONDUCT, r. 2.11(a)(4) (AM. BAR ASS'N 2011).

141. *See The State of Recusal Reform, supra* note 139, at 520–22 ("*Caperton* was decided in 2009, and beginning in 2010, the ABA tried mightily to pick up the gauntlet laid down by the [U.S.] Supreme Court in *Caperton* and modify the current ethics rules in the Model Code of Judicial Conduct regarding judicial elections.").

142. *See id.* ("In absence of support [from the ABA Judicial Division and the Conference of State Supreme Court Chief Justices], the decision was made to withdraw the proposal.").

143. *See id.* at 519 ("[Since *Caperton*, t]here have been some efforts in [the states to reform recusal standards], and the ABA has been trying for several years. But part of the reason it is hard is because judges understandably take their jobs seriously; they believe themselves to be impartial.").

144. *See* Cynthia Gray, *Judicial Disqualification Based on Campaign Contributions,* NAT'L CTR. FOR ST. CTS. 1, 2–4, http://www.ncsc.org/~/media/files/pdf/topics/center for judicial ethics/ disqualificationcontributions.ashx (last updated Nov. 2016) (listing the five states adopting ABA Rule 2.11(a)(4)).

145. *See id.* at 4–9 (describing the rules adopted by the state supreme courts in Arkansas, Georgia, Iowa, Michigan, Missouri, New Mexico, North Dakota, Oklahoma, Pennsylvania, Tennessee, and Washington).

rejected proposals to adopt disqualification rules based upon campaign spending.[146] Furthermore, while some recusal reforms have been proposed in Congress—including bills that would require the U.S. Supreme Court to adopt a code of ethics—those efforts have not been successful either.[147] Thus, the state of recusal practice across the country remains relatively unchanged since *Caperton*.

IV. NEW PERSPECTIVES ON IMPARTIALITY

While there has been little reform as of late, even reforms that made are often not fully implemented by the judiciary. In fact, there is a vicious cycle of resistance, reform, and repeat with no change, due in part to jurists' skeptical attitudes about their own partiality, which in turn creates doubt in their minds about the real need for recusal reform.[148] This cynicism is supported, at least in part, by how most jurists have been trained: they are taught impartiality is an important judicial value, but it must also be coupled with avoiding even the appearance of partiality. In other words, impartiality and the appearance of impartiality are a core part of what it means to be a "good" judge.[149] Thus, it is understandable that many jurists are reluctant to accept the possibility that they, like the rest of us, harbor nonconscious biases because to be open to that possibility requires jurists question whether they are doing their job correctly by remaining impartial.

This is not to say that all jurists are unwilling to accept that they may, at least in some circumstances, be less than entirely impartial. In fact, we all are willing to accept that such biases exist and these biases could, at least theoretically, affect our decision-making.[150] We also are willing to

146. *See id.* at 11–12 (detailing the basis of the rejection and the actions taken by those state supreme courts).

147. *See generally* Supreme Court Ethics Act, S. 1072, 114th Cong. (2015); Supreme Court Ethics Act, H.R. 1943, 114th Cong. (2015); Supreme Court Ethics Act, S. 1424, 113th Cong. (2013); Supreme Court Ethics Act, H.R. 2902, 113th Cong. (2013).

148. *See* Leubsdorf, *supra* note 110, at 245 (describing the history of recusal reform as "a vicious cycle" of resistance, reform, and repeat).

149. *See* Charles Gardner Geyh, *The Dimensions of Judicial Impartiality,* 65 FLA. L. REV. 493, 493 (2013) [hereinafter *The Dimensions of Judicial Impartiality*] (characterizing impartiality as "a standard of good conduct core to a judge's self-definition").

150. *See* Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCHOL. REV. 781, 783–84 (2004) (explaining individuals may not notice when "judgmental failings" influence their own rationality, although they readily accept their "decisions are tainted by bias" in some situations).

acknowledge in certain past circumstances, we may have unintentionally shown some bias.[151] But generally, we are unwilling or unable to admit "succumbing to [such biases] in any particular assessment we are currently making (or else, of course, we would change that assessment until we felt that it was in accord with reality)."[152] Thus, it stands to reason that jurists, like the rest of us, are aware of the impact of bias on human decision-making and may even, acknowledge that their past decisions may reflect some bias. Yet a jurist still may not fully embrace the need for recusal reform, and their nonconscious bias may impact disqualification and other decisions, thereby undermining the goal of impartial judging.

While jurists may be unwilling or unable to appreciate the impact of bias on their decisions, it does not necessarily mean any jurist who disagrees with a proposal to reshape recusal rules is intentionally impeding recusal reform efforts. On the contrary, some opposition to recusal reform may simply reflect that the jurist has an honest disagreement about how to achieve the goal of protecting judicial impartiality and balancing litigants' rights to a fair trial. In fact, some jurists have been an important voice in the debate over recusal reform. For example, current and former jurists have written scholarly articles regarding recusal reforms;[153] the Conference of Chief Justices has filed amicus briefs in important federal and state cases regarding recusal reforms;[154] and jurists have worked

151. *See id.* (noting individuals are inclined to believe they "have been guilty of particular biases" in the past, but "are innocent of bias" after introspective justification).

152. *Id.*

153. *See* Anthony J. Scirica, *Judicial Governance and Judicial Independence*, 90 N.Y.U. L. REV. 779, 798 (2015) (discussing recusal reform at the U.S. Supreme Court level and opining "judges understand and respect the importance of recusal decisions"); *see also* McKoski, *supra* note 125, at 303–11 (supporting a strong presumption of impartiality, and suggesting jurists are able to set biases aside due to their education, intellect, and inculcation within the traditions of the judiciary); Albert Tate, Jr., *The Propriety of Off-Bench Judicial Writing or Speaking on Legal or Quasi-Legal Issues*, 3 J. LEGAL PROF. 17, 19 (1978) (exploring whether a judge's right to express opinions regarding law reform may conflict with his or her appearance of impartiality).

154. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889 (2009) (discussing the Conference of Chief Justices' position that various state codes of judicial conduct prevent campaign misconduct and promote confidence in elected judicial officials (citation omitted)); *see also* Brief of Amicus Curiae Conference of Chief Justices in Support of Respondent at 5, Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656 (2015) (No. 13-1499) ("A judge whose appearance of impartiality is compromised undermines the public's confidence in the judiciary as a whole, and imperils public respect for its judgments."); Brief of Amicus Curiae Conference of Chief Justices in Support of Respondents at 12–13, Republican Party of Minn. v. Kelly, 536 U.S. 765 (2002) (No. 01-521) (arguing recusal reform by itself is insufficient and must be augmented by additional safeguards to guarantee impartial jurists (citation omitted)). Notably, the Conference of Chief Justices did not file an amicus brief in the

within the ABA, state bar committees, and various courts' rules committees to suggest or secure adoption of recusal reforms.[155] All of these efforts have advanced the conversation about the proper next steps in recusal reform, but these individual jurists' efforts have not interrupted the vicious cycle.

While some jurists are taking an active role in recusal reform, there are still not enough jurists seeking meaningful reform. It is disappointing how few jurists openly acknowledge the impact of nonconscious biases (particularly the bias blind spot) on disqualification decisions. In fact, much of what jurists have contributed to the conversation appears to be colored by their perception of their own and other jurists' presumptive impartiality.[156] Some jurists believe they are unfair "targets" of disqualification motions—with some jurists acting as if it is an affront for an attorney to file, much less vigorously pursue, a disqualification motion.[157] Sadly, there are even examples of jurists finding lawyers in

appeal of *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016). *Williams* involved a death row inmate who successfully challenged the refusal of the Chief Justice of the PA Supreme Court to recuse himself from the inmate's appeal. *See* Williams v. Pennsylvania, 136 S. Ct. 1899, 1910 (2016) (vacating and remanding the PA Supreme Court's judgment). The U.S. Supreme Court concluded the state supreme court justice created "an unconstitutional risk of bias" when he refused to recuse himself despite previously serving as the district attorney who approved the "decision to seek the death penalty," and supervised the prosecutors accused of engaging in prosecutorial misconduct during the inmate's criminal trial and appeals. *See id.* at 1907 (providing the procedural posture and background facts of the appeal).

155. *See, e.g.*, CONFERENCE OF CHIEF JUSTICES, RESOLUTION 8: URGING ADOPTION OF PROCEDURES FOR DECIDING JUDICIAL DISQUALIFICATION/RECUSAL MOTIONS: ENSURING A FAIR AND IMPARTIAL PROCESS (2014), *available at* http://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/01292014-Urging-Adoption-Procedures-Deciding-Judicial-Disqualification-Recusal-Motions.ashx (adopting a resolution that emphasizes the need to establish an effective standard for whether a judge should be recused).

156. *See* CHIEF JUSTICE JOHN ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY, at 7 (2011), *available at* https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf [hereinafter 2011 YEAR-END REPORT] (discussing recusal standards and applicability of judicial ethics codes to the U.S. Supreme Court). Chief Justice Roberts stated:

> I have complete confidence in the capability of my colleagues to determine when recusal is warranted. They are jurists of exceptional integrity and experience whose character and fitness have been examined through a rigorous appointment and confirmation process. I know that they each give careful consideration to any recusal questions that arise in the course of their judicial duties. We are all deeply committed to the common interest in preserving the Court's vital role as an impartial tribunal governed by the rule of law.

Id. at 10.

157. *See* Neumann, *supra* note 5, at 392 ("The case law is filled with descriptions of defensive

contempt for protecting their client's interests, retaliating against parties that seek to disqualify the jurist, and reporting lawyers to the state bar discipline authorities for conduct connected with the disqualification motion.[158] Of course, these egregious examples are the exception. However, these instances of improper reactions to disqualification motions tell an important part of the story of judicial resistance to recusal reform.

Based upon the history of disqualification practice in both federal and state courts, including the vicious cycle of recusal reform, there is little doubt that jurists have not openly embraced recusal reform. In fact, this doubtful (and some would say disdainful) attitude of some members of judiciary—including members of the U.S. Supreme Court—reflects the resistance that has characterized past attempts to reform recusal rules.[159]

---

and angry judges denying motions that they recuse themselves."). Recusal motions may stir resentment throughout the judicial community since disqualification challenges the very essence of a jurist's duty:

> Perhaps human nature causes judges to view disqualification motions as a challenge to their personal integrity. Certainly, no judge, and arguably no person, enjoys being told that he or she is, or appears to be, unfair. It is understandable, therefore, that some (perhaps, many) judges take umbrage at the filing of disqualification motions. . . . Judges may be offended by the allegations that they believe challenge their good name and reputation. They may view the motion as suggesting that they lack the most essential characteristic of good judging—the ability to judge a case impartially.
>
> But judges must battle these natural instincts to consider the motions as personal attacks or criticisms and instead reflect on the underlying purpose for judicial disqualification motions—to preserve public trust and confidence in the judiciary.

Penny J. White, *A New Perspective on Judicial Disqualification: An Antidote to the Effects of the Decisions in* White *and* Citizens United, 46 IND. L. REV. 103, 118–19 (2013) (citations omitted).

158. *See* Matthew Mosk & Brian Ross, *'Circus' Continues? Judge Goes After a Lawyer Who Challenged Her Over Controversial Jet Deal*, ABC NEWS (Feb. 11, 2015, 10:45 AM), http://abcnews.go.com/US/circus-continues-judge-lawyer-challenged-controversial-jet-deal/story?id=28886937 ("[I]n her first response to a recusal motion, Davis turned on one of the attorneys, accusing him of leveling a 'false and misleading assertion' against her. She [then] referred the matter to the Office of Disciplinary Counsel for investigation, a move that took legal ethics experts by surprise."); *see also In re* Cohen, 99 So.3d 926, 940 (Fla. 2012) (per curiam) (reprimanding a trial judge for unnecessarily creating a hostile atmosphere when he threatened to report counsel to the state bar because counsel filed motion to disqualify). In the same opinion, the Supreme Court of Florida also made clear "[a]ttorneys should not be placed in a position where they fear retaliation for filing a motion to disqualify." *Id.*

159. *See, e.g.*, Flamm, *supra* note 101, at 761 ("During the first half of the nineteenth century, one judge noted that in some districts, lawyers who wanted to try to disqualify a federal judge were 'advised to write out their motion to disqualify on the back of their license to practice law.'" (Citation omitted)).

Instead, many members of the judiciary appear to believe little or no recusal reform is needed, or the only proper reform is to make the litigant's ability to challenge a jurist more, not less, restrictive.[160] Jurists' reluctance to support reform of substantive and procedural recusal rules is based in part on a conscious choice to adhere to the tradition of a strong presumption of judicial impartiality.[161] However, that support for a strong, and in some cases nearly irrebuttable, presumption of impartiality does not properly reflect new social science discoveries regarding nonconscious biases and their effects on human cognition and decision-making.

A. *The Psychology of Decision-making*

1. Cognitive Illusions and Judicial Decision-making

In addition to jurists' conscious skepticism of the need for recusal reform, "the very nature of human cognition" can induce judges to "make consistent and predictable mistakes in" certain situations.[162] The human decision-making feature most responsible for these systematic mistakes relies on the use of heuristics—mental shortcuts that are used to quickly solve complex problems.[163] The use of heuristics often leads to good results; however, sometimes those mental shortcuts lead to inaccurate inferences that create flawed judgments.[164] These cognitive illusions systematically impact decisions made by jurors and lawyers, as well as

160. *Cf.* McKoski, *supra* note 125, at 295–96 (urging courts to reform recusal rules and eliminate the standard based on appearance of bias by adopting the higher "actual bias" test for disqualification).

161. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 891 (2009) (Roberts, C.J., dissenting) (stating "[a]ll judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise"). Chief Justice Roberts, in his dissenting opinion, also questioned whether a "judge get[s] to respond to the allegation that he is probably biased, or [whether] his reputation [is] solely in the hands of the parties to the case[.]" *See id.* at 898 (providing a list of forty questions "courts will now have to determine" regarding judicial bias as a result of the majority's opinion).

162. Chris Guthrie et. al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 780 (2001) [hereinafter *Inside the Judicial Mind*] (reporting on studies that demonstrate jurists are just as likely to be affected by a number of cognitive illusions as the ordinary public).

163. *Id.*

164. Chris Guthrie et. al., *Judging by Heuristic: Cognitive Illusions in Judicial Decision-Making*, 86 JUDICATURE, July–Aug. 2002, at 44, 50 (explaining the use of heuristics in judicial decision-making and demonstrating jurists are affected by cognitive illusions at nearly the same rate as laypersons).

other professionals in non-legal settings.[165] Recent studies have tested the impact of various cognitive illusions on jurists' decision-making, and it is clear that jurists suffer from the same cognitive illusions as the rest of us.[166] Thus, we need to understand and account for the impact of cognitive illusions, especially the bias blind spot, on jurists' disqualification decisions.

2. Bias Blind Spot and Disqualification Decisions

Recent social science discoveries have shown that a number of cognitive illusions affect judicial decision-making. For example, one well-known social science study demonstrated that judges, like the rest of us, are prone to a number of cognitive illusions that affect judicial decision-making, including anchoring, framing effects, hindsight bias, representativeness heuristics, and egocentric biases.[167] "These [cognitive] illusions are among the most well documented in the psychological literature on judgment and choice and they have been shown to affect litigants, lawyers, and the legal system as a whole."[168] Many of these cognitive illusions operate on a nonconscious level; therefore jurists are unaware of the impact on their decision-making.[169] Thus, even a well-intentioned jurist may be impacted by these cognitive illusions and, in some cases, could be unaware of the bias created.

Likewise, a number of studies have clearly demonstrated the existence of another cognitive illusion known as the "bias blind spot," which creates a particularly troubling form of nonconscious bias. The bias blind spot causes all of us to underestimate our own susceptibility to bias and the impact those biases have on our decisions and at the same time overestimate the likelihood of others' biases.[170] In other words, the bias

165. *See id.* (noting heuristics also affects doctors, accountants, engineers, and military leaders).

166. *See Inside the Judicial Mind*, *supra* note 162, at 784 (recording study results finding jurists to be affected by all five cognitive illusions tested for—anchoring effects, framing effects, hindsight bias, representativeness heuristic, and egocentric bias—and showing less vulnerability than laypersons and other experts in only two of the five illusions).

167. *See id.* (testing for these five illusions and concluding they do affect judges and their decision-making).

168. *Id.* at 787.

169. *See* Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS COGNITIVE SCI. 37, 39 (2006) (discussing the roots of the bias blind spot, including nonconscious biases and the use of introspection, which focuses on conscious thoughts).

170. *See id.* at 41 (investigating the effects of individual perceptions on bias and prejudice and discussing the sources of that bias).

blind spot is a sort of "metabias—a bias in the recognition of other biases—that systematically biases judgment and behavior in unique and predictable ways."[171] While there is no scientific study specifically demonstrating jurists also are susceptible to the bias blind spot, there is no reason to believe jurists are immune from this particular cognitive illusion, especially since we know they are affected by many other nonconscious biases.[172] In fact, when individual jurists' disqualification decisions or positions on recusal reform are evaluated, there are sound reasons to believe that the bias blind spot causes jurists to make questionable disqualification decisions.[173]

The important effect of the bias blind spot on disqualification decisions is that this metabias can result in a jurist who is actually, probably, or apparently biased remaining on the case, and impacting the litigant's rights and also the public's confidence in the judiciary. Thus, when evaluating judicial disqualification practices, the impact of the bias blind spot should be taken seriously.

B. *Impartiality and Bias Blind Spot*

The potential impact of a biased jurist on a litigant's rights has long been recognized: "It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'"[174] This mandate of fairness means the procedures used in the trial must be impartial, and also the decisionmaker must not be actually or probably biased for or against a party or have prejudged the case.[175] Otherwise, the jurists' participation

171. Irene Scopelliti et. al., *Bias Blind Spot: Structure, Measurement, and Consequences*, 61 MGMT. SCI. 2468, 2469–70 (2015), *available at* http://pubsonline.informs.org/doi/pdf/10.1287/mnsc.2014.2096.

172. *See* John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1, 6–7 (2010) (collecting studies of implicit bias and discussing the impact on judicial decision-making); *see also See Inside the Judicial Mind*, *supra* note 162, at 784–87 (describing studies demonstrating the impact five specific cognitive illusions have on litigants, lawyers, and the legal system as a whole).

173. *See, e.g.*, *Refocusing Recusals, supra* note 10, at 275–78 (discussing how the bias blind spot colored a state supreme court justice's perception of his own biases and makes it more likely disqualification decisions will be biased when made by the challenged jurist); Jeffrey W. Stempel, *Impeach Brent Benjamin Now!? Giving Adequate Attention to the Failings of Judicial Impartiality*, 47 SAN DIEGO L. REV. 1, 48 (2010) (finding some state supreme court justice's failure to recuse was an egregious error that likely impacted the decision on the merits).

174. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

175. *See id.* at 874 (holding a litigant's due process rights are violated when the probability of

violates a litigant's due process rights and can negatively affect the litigant's other legal rights.[176] The impact on litigants' legal rights may be immediate and direct when an actually or probably biased jurist takes part in the decision-making.[177] Although sometimes the impact on the outcome is hard to prove, there should be little doubt there is an effect.[178] Thus, if a jurist presides over a case and is actually or probably biased, it is likely the litigant's rights and the outcome of the case will be affected.

The requirement of judicial impartiality is designed to produce just results in individual cases and to promote public confidence in the justice system.[179] Even if the evidence rises only to the level of an appearance of bias, this can have a harmful impact on the public's confidence in the jurist and the judiciary as a whole.[180] The public must be confident in the judiciary as a legitimate institution to secure widespread compliance with court rulings, especially those that are unfavorable with a significant part of the citizenry.[181] The legitimacy of the judicial branch depends more heavily on public confidence in the institution, because unlike the other two branches of government, the courts have "no influence over either the sword or the purse . . . ."[182] When people evaluate the procedural fairness of institutions, like the courts, they are "especially influenced by evidence

bias is too high to be constitutionally tolerable, and requiring an objective assessment of the facts be made in deciding disqualification disputes).

176. Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification—and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 REV. LITIG. 733, 765 (2011) (discussing the impact of a biased decision-maker on litigants' legal rights).

177. *See id.* at 798, 805 (considering the impact of a biased decisionmaker and the ineffectiveness of appellate review using a deferential review standard).

178. *See id.* at 753–59 (examining the difficulties in sorting out the impact of a biased decisionmaker and the ineffectiveness of appellate review using a deferential review standard).

179. *See In re* Murchison, 349 U.S. 133, 136 (1955) (declaring "[f]airness of course requires an absence of actual bias in the trial of cases" and "our system of law has always endeavored to prevent even the probability of unfairness").

180. *See Caperton*, 556 U.S. at 886 (stating due process requirements for judicial recusal are only a bare minimum standard and inviting legislators and jurists to adopt higher standards, including an appearance of bias standard, to maintain public confidence in the judiciary).

181. *See Psychological Perspectives*, *supra* note 52, at 375 (explaining public compliance of the law is shaped by the fair use of procedures and trustworthiness even if the public is not in agreement with the decision).

182. THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1974); *see also* Baker v. Carr, 369 U.S. 186, 267 (Frankfurter, J., dissenting) ("The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.").

of even-handedness, factuality, and the lack of bias or favoritism (neutrality)."[183] In other words, impartiality is a key component of how people assess the procedural fairness and the legitimacy of the judiciary. This explains why the U.S. Supreme Court has repeatedly recognized the importance of public confidence to maintaining the authority of the judiciary in our democracy and has "jealously guarded" the need for judicial impartiality.[184] Thus, even jurists who may not harbor actual bias must sometimes step aside to ensure public confidence in the judicial system.

The lack of public confidence in the outcome when there are reasonable questions about the jurist's impartiality is exacerbated by the bias blind spot, which causes us all to perceive others' biases more negatively than we perceive our own biases. This difference in perceptions of bias leads to a disconnect between the views about impartiality held by the challenged jurist on the one hand, and the litigants and the public on the other hand. The existence and effect of the bias blind spot, which has been proved in repeated scientific studies,[185] calls into question the strong presumption of impartiality upon which much of our disqualification jurisprudence is based. For example, a recent study found that only one adult out of 661 admitted to being more biased than the next average adult.[186] Therefore,

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

184. *See* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (declaring the need to preserve "both the appearance and reality of fairness," which "'generat[es] the feeling, so important to popular government, that justice has been done' . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him") (internal citation omitted); *see also In re* Murchison, 349 U.S at 136 (finding an impartial judge is necessary to maintain the legitimacy of court proceedings).

185. *See* Emily Pronin et. al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369, 378 (2002) (analyzing bias blind spot perceptions when evaluating one's own bias versus the bias perceived in others); *see also* Joyce Ehrlinger et. al., *Peering Into the Bias Blind Spot: People's Assessments of Bias in Themselves and Others*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 1, 2 (2005) (suggesting self-enhancement motivation and naïve realist cognitive illusions as among the reasons we rely upon introspection when evaluating our own bias).

186. Scopelliti et. al, *supra* note 171, at 2473, 2475. The study comprised of fourteen specific biases which is said to compose a participant's bias blind spot score on a scale that ranged from -7 to 7. *Id.* at 2475. A score greater than zero indicated a bias blind spot. *Id.* "At the individual level, a large majority (85.2%) of participants exhibited a significant Bias Blind Spot across the [fourteen] items, with the averages of their scores being marginally or significantly greater than [zero] . . . . Only one participant (0.1%) had an average Bias Blind Spot score that was significantly lower than [zero]."

the strong presumption of impartiality—which undergirds the Blackstonian ideal of a jurist capable of overcoming any biases due to his intellect, education, and experience—must be reexamined in light of the latest social science discoveries.

Although social scientists continue to document the impact of the bias blind spot and other cognitive illusions on human decision-making, there is no evidence to support the assumption jurists are less prone to the impacts of the bias blind spot. First, a few empirical studies demonstrate that jurists are subject to a variety of other cognitive biases at rates similar to non-jurists.[187] Second, none of the cognitive or social psychology studies performed to date have challenged the existence and effects of the bias blind spot.[188] Third, there is no scientific evidence to support the belief more intelligent persons are less prone to the bias blind spot.[189] Lastly, the existing evidence supports the contrary conclusion: those who are more intelligent are more likely to falsely believe they can overcome this cognitive illusion.[190] Thus, the conviction—no matter how genuine—that jurists are capable of making unbiased decisions about their own biases is not supported by and is, in fact, contradicted by the scientific evidence.

The scientific evidence suggests there is absolutely no reason to believe that jurists are immune from the bias blind spot and, on the contrary, jurists may be more susceptible because they believe they do not suffer from the cognitive illusion. The latest social science experiments reflect

Id. "This susceptibility to the Bias Blind Spot appears to be pervasive, and is unrelated to people's intelligence, self-esteem, and actual ability to make unbiased judgments and decisions." Shilo Rea, *Researchers Find Everyone Has a Blind Spot: Believing You're Less Biased Than Your Peers Has Detrimental Consequences*, CMU (June 8, 2015), http://www.cmu.edu/news/stories/archives/2015/june/bias-blind-spot.html.

187. *See* Chris Guthrie et. al., *supra* note 164, at 45 n.4 (demonstrating judges are just as likely to be affected by a number of cognitive illusions as the ordinary public).

188. *See generally* Joachim I. Krueger & David C. Funder, *Towards a Balanced Social Psychology: Causes, Consequences, and Cures for the Problem-Seeking Approach to Social Behavior and Cognition*, 27 BEHAV. & BRAIN SCI. 313 (2004) (reviewing the literature on a variety of cognitive illusions and noting no studies that seriously question the existence of the bias blind spot).

189. *See* Richard F. West & Russell J. Meserve, *Cognitive Sophistication Does Not Attenuate Bias Blind Spot*, 103 J. PERSONALITY & SOC. PSYCHOL. 506, 515 (2012) (indicating the lack of scientific studies testing whether superior intellect may ameliorate the effects of the bias blind spot on certain cognitive functions).

190. *See id.* (finding the bias blind spot effect is "unmitigated by increases in intelligence [and this result is] consistent with the idea that the mechanisms that cause the bias are quite fundamental and not easily controlled strategically [because the cognitive mechanisms at work are] evolutionarily and computationally basic").

that the bias blind spot is "independent of intelligence and personality traits related to self-esteem, self-enhancement, and self-presentation."[191] Also, those studies demonstrate the bias blind spot is not dependent on our competency to make decisions either.[192] Instead, it appears that "the belief that one is less biased than one's peers appears to reflect a biased perception of the self rather than a more general inferior [decision-making] ability, or an accurate reflection of one's superior judgment and decision-making ability."[193] In other words, the less biased we believe we are, the more likely we are suffering from the bias blind spot but simply are unable to see it. In addition, the belief that one is less likely to be affected by bias makes it more likely bias will affect decision-making, and less likely the person will be impacted by advice from others and training to reduce the bias.[194] Also, this view of judicial impartiality also reflects how cognitive illusions—specifically the bias blind spot—have shaped not only individual disqualification decisions but the debate surrounding recusal reform.[195] Thus, litigants, the public, and the judiciary should be more concerned about impartiality when a jurist downplays the role of bias in their decision-making or otherwise exhibits a lack of understanding of the effects of the bias blind spot.

V. SUBSTANTIVE STANDARDS AND PROCEDURES PROTECTING IMPARTIALITY

To understand the impact of the bias blind spot on disqualification decisions, we must comprehend both the substantive standards and procedural process currently relied upon in the federal and state court systems to help protect a litigant's due process rights and maintain public confidence in judicial impartiality.

191. Scopelliti et. al, *supra* note 171, at 2468.

192. *Id.*

193. *Id.*

194. *See Refocusing Recusals, supra* note 10, at 303–04 (discussing how jurists' bias blind spot colors their perceptions of judicial bias and makes recusal reform more difficult).

195. *See id.* at 265–300 (examining the *Caperton* case and how the bias blind spot affected three judges' perception of their own bias in that case).

A. *Overview of Current Federal and State Substantive Standards for Disqualification*

The substantive standards used by all federal courts, as well as most state courts, require the challenged jurist to use an objective test to determine if sufficient concerns regarding impartiality exist to warrant disqualification. These substantive standards are drawn from three types of legal sources: (1) the Due Process Clause of the United States Constitution and similar provisions of some state constitutions; (2) applicable federal and state statutes on disqualification; and (3) the relevant federal and state judicial ethics codes.[196] Each of these sources of law provides for one of three standards for disqualification: the challenged jurist is disqualified when he is actually, probably, or apparently biased.[197] The federal Due Process Clause relies upon the probability of bias standard but also mandates disqualification for actual bias.[198] The state constitutions that address disqualification are, by and large, based upon an actual bias standard.[199] Generally, the federal and state statutory laws and judicial ethics codes include two types of tests: (1) a list of *per se* disqualifying conditions; and (2) a general disqualification standard that is invoked when the facts do not fit within one of the enumerated *per se* rules but the judge's impartiality might reasonably be questioned.[200] However, all of these standards for disqualification based upon judicial bias require consideration of the circumstances from the perspective of the reasonable, informed person—an "other" rather than from the "self" oriented perspective of the challenged jurist.[201] Thus, current federal and state substantive law applicable to disqualification decisions requires the

196. *See* Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181, 189–91 (2011) (discussing sources of judicial disqualification standards); *see also* Serbulea, *supra* note 105, at 1151–73 (surveying the recusal laws of the fifty states and the District of Columbia in the Appendix).

197. *See Reshaping Recusal Procedures*, *supra* note 10, at 820 (summarizing the various substantive standards for disqualification under federal and state constitutions, statutes, and judicial codes of conduct).

198. *See id.* at 822–24 (discussing actual and probability of bias standards embedded within the Due Process Clause).

199. *See* Serbulea, *supra* note 105, at 1119 ("In the majority of jurisdictions there is no constitutional ground to disqualify a judge, unless one is implicitly read in the right to fair trial, and even then it would require actual bias, not merely its appearance.").

200. *See Reshaping Recusal Procedures*, *supra* note 10, at 827–34 (considering the objective nature of the federal and state substantive standards for disqualification).

201. *Id.* at 834–35.

decisionmaker to evaluate the evidence of actual, probable, or apparent bias as an objective third party would assess the allegations of partiality.

1. Federal Court Substantive Standards for Disqualification

In its most recent pronouncement on the proper standard of proof for judicial disqualification under the federal Due Process Clause, the U.S. Supreme Court elucidated a test mandating disqualification when "the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable."[202] Applying this general standard, the *Caperton* majority held the state supreme court jurist was disqualified from hearing a matter "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."[203] It is clear from both the language and the holding in *Caperton* that the "probability of actual bias" standard requires an objective evaluation of the external evidence of bias to comply with the Due Process Clause.[204] In fact, *Caperton* explicitly states the disqualification determination does not depend on the challenged jurist's assessment of his own thoughts, opinions, or feelings, but relies on external evidence of how the average jurist would respond in the circumstances: "[W]hether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'"[205] The probability of bias standard examines the likelihood of actual bias but relies upon objective and external evidence of bias rather than introspection, which is subjective.[206] Thus, the Due Process Clause standard is not focused on

202. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 872 (2009) (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

203. *Id.* at 884.

204. *See Reshaping Recusal Procedures*, *supra* note 10, at 822–24 (explaining the three different ways that the *Caperton* majority made clear the due process standard of disqualifications requires an objective assessment of possible bias).

205. Caperton, 556 U.S. at 883–84 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)). In the facts before the *Caperton* Court, "[t]he inquiry center[ed] on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." *Id.* at 884.

206. *See* Dmitry Bam, *Understanding* Caperton*: Judicial Disqualification Under the Due Process Clause*, 42 MCGEORGE L. REV. 65, 66 (2010) (arguing *Caperton* "rejected the well-established appearances-based recusal standard in favor of a probability-based [standard] that examines the likelihood of

the internal evidence of actual bias (especially any "facts" known only to the challenged jurist), but mandates an objective assessment of the probability of judicial bias made from the perspective of a reasonable third party.

In the federal courts, a disqualification motion may also be based upon statutory law, specifically 28 U.S.C. §§ 47, 144, or 455.[207] However, Section 455 governs most federal disqualification disputes in practice.[208] This is true because of the limited scope of conduct encompassed by Sections 47 and 144.[209] First, 28 U.S.C. § 47 covers only "judges sitting on courts of appeals who were recently appointed from the district court or who are district judges sitting by designation, and directs their disqualification from appeals of cases they decided as trial judges."[210] Second, 28 U.S.C. § 144 addresses only disqualification for actual bias, which is difficult to prove and risky for parties to allege, and "applies only to district judges[.]"[211] In contrast, Section 455 covers all federal jurists (except arguably the Justices of the U.S. Supreme Court) and requires disqualification for actual, probable, and apparent bias.[212] Thus, the main federal statute for disqualification is 28 U.S.C. § 455.

Under Section 455, a federal jurist may be disqualified under either an "actual" or "apparent" bias standard.[213] However, because actual bias is so difficult to prove and the statute mandates disqualification even upon the lesser showing of an "appearance" of judicial bias, most disqualification disputes are decided based upon grounds other than actual

actual bias").

207. *See* 28 U.S.C. § 47 (2012) ("No judge shall hear or determine an appeal from the decision of a case or issue tried by him."); *Id.* at § 144 ("Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."); *see also* CHARLES GARDNER GEYH, FED. JUDICIAL CTR., JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 2-3 (2d ed. 2010) [hereinafter AN ANALYSIS OF FEDERAL LAW] (explaining the scope of 28 U.S.C. §§ 47, 144, and 255, as well as the contours of 28 U.S.C. § 2106 which permits a federal appellate court to remand and reassign the case).

208. 28 U.S.C. § 455(a) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."); *see also* AN ANALYSIS OF FEDERAL LAW, *supra* note 207, at 2-3 (explaining the narrow scope of 28 U.S.C. §§ 47 and 144, and the broader reach of 28 U.S.C. § 255).

209. 28. U.S.C. §§ 47, 144.

210. AN ANALYSIS OF FEDERAL LAW, *supra* note 208, at 3.

211. *Id.*

212. *Id.*

213. *Id.* at 49–50.

bias, relying instead upon the more commonly used appearance of bias standard.[214] Since both the actual bias and appearance of bias standards are included in these statutes, often both standards are pled by the moving party and courts regularly combine and sometimes confuse the two standards in their analyses.[215] However, both the litigants and courts often rely upon the lesser appearance of bias standard, which seems to be less critical of the challenged jurist's ethics because it does not require impugning the jurist's actual motives.[216] The appearance of bias standard is, therefore, the focus here as well.

There are two different parts of 28 U.S.C. § 455 that mandate disqualification based upon the appearance of bias standard. First, under subpart (a) of Section 455, a federal court jurist "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[217] This standard has been interpreted to require disqualification "when a reasonable person, knowing the relevant facts," would believe the jurist may be biased and does not require a showing of subjective bias.[218] The general disqualification standard of Section 455(a) is augmented in subpart (b) by a list of specific circumstances, which *per se* constitute disqualifying conditions.[219] Each of those enumerated conditions makes clear the external circumstances (the facts regarding the jurist's finances, relationships with parties or counsel, and any extra-judicial role in the case) mandate disqualification, regardless of the jurist's thoughts, feelings, or opinions.[220] Thus, Section 455 provides two

214. *See id.* at 49–50 (finding overlap in standards and remedies under 28 U.S.C. § 144 and 28 U.S.C. § 455(b)(1), and observing most courts' analysis of recusal requests under those statutes often confuse the two standards).

215. *See* Sande L. Buhai, *Federal Judicial Disqualification: A Behavioral and Quantitative Analysis*, 90 OR. L. REV. 69, 80–81 (2011) (discussing the overlap in standards between actual and apparent bias and lamenting both litigants and courts often combine or conflate the grounds for disqualification, thereby causing problems in evaluating disqualification decisions based upon allegations of actual bias).

216. *Id.*

217. 28 U.S.C. § 455(a) (2012).

218. *See* Liljeberg v. Health Serv. Acquisition Corp., 486 U.S. 847, 848 (1988) (holding if a reasonable person, knowing the relevant facts as they actually existed, would believe the judge should have known of the conflict, then the judge may be retroactively disqualified under Section 455).

219. 28 U.S.C. § 455(b) (2006).

220. *See* 28 U.S.C. § 455 (using the term "shall" to convey the mandatory nature of the statute). Before its amendment in 1974, Section 455 provided for a subjective test for determining whether disqualification was warranted:

different legal standards that both employ an objective test for determining whether disqualification is required.

2. State Court Substantive Standards for Disqualification

Like in the federal court system, most state disqualification disputes are decided based upon one of three sources of law: (1) due process provisions of the state constitution; (2) state statutory law; or (3) state judicial ethics codes.[221] Most, if not all of these substantive standards, appear to require an objective assessment of whether the alleged bias does or at least appears to exist sufficient to warrant the jurist stepping down.[222] In the majority of states, there is no explicit constitutional right to disqualify a jurist; rather, if such a right exists, it is based upon application of the Due Process Clause, which has been interpreted to require recusal when actual bias exists.[223] The disqualification standards provided in the statutes adopted in twenty-nine states can be categorized as follows: (1) five states seem to require a showing of actual bias; and (2) twenty-four states require disqualification upon the lesser showing of an appearance of partiality.[224] However, the statutory law in the remaining twenty-one states is not easily grouped into a single

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, *in his opinion*, for him to sit on the trial, appeal, or other proceeding therein.

28 U.S.C. § 455 (1970) (emphasis added).

221. RECUSAL AND DISQUALIFICATION OF JUDGES, *supra* note 69, § 5.2, at 42–45 (outlining the applicable sources of law in the states).

222. *See* Serbulea, *supra* note 105, at 1151–72 (examining the recusal laws of the fifty states).

223. *See id.* (listing the constitutions of twelve states that include provisions interpreted to require disqualification of judicial officers). Most of those state constitutional provisions are due process clauses. *See id.* (providing an appendix with each state's applicable laws on judicial recusal). However, a handful of state constitutions—those adopted in Arkansas, California, Maryland, and Texas—include explicit standards for judicial disqualification. *See id.* at 1169–70 (explaining the specific standards in these states; for example, California requires disqualification if a judge has "been indicted or recommended for removal or retirement," while Texas disqualifies judges who have an "interest in the case, relationship to the parties, or for having been of counsel in the matter, but not for bias").

224. *See id.* at 1122–23, 1123 n.108 (identifying the five states requiring actual bias as Arizona, Iowa, Louisiana, Michigan, and South Carolina); *see also* RECUSAL AND DISQUALIFICATION OF JUDGES, *supra* note 69, §§ 27.1–27.19, at 789–822 (identifying only eighteen states that permit some form of peremptory challenge that requires no showing of cause).

classification, although all appear to require evidence of something less than actual bias.[225]

The most common formulation of the standard in those remaining states is the "appearance of impropriety" or "appearance of partiality" test, which asks the decisionmaker to evaluate the evidence of possible bias in the same manner a reasonable and informed other would.[226] Although a minority of states permit some form of peremptory challenge, most limit that right to one challenge per party per case, so any party desiring to disqualify any substituted jurist must meet the applicable "for cause" standard.[227] In other words, the majority of state disqualification laws, whether based upon state constitutions or state statutes, employ an objective test and do not rely upon the jurist's subjective thoughts, feelings, or opinion about his own actual, probable, or apparent bias.

3. Federal and State Judicial Ethics Codes Require Recusal for Actual, Probable, or Apparent Bias

In addition to the constitutional and statutory grounds for disqualification, both federal and state court jurists (with the possible exception of the U.S. Supreme Court)[228] are subject to ethical rules that

225. *See* Serbulea, *supra* note 105, at 1122–23 n.108 (admitting "the law is unclear in the rest of the states"); *see also* RECUSAL AND DISQUALIFICATION OF JUDGES, *supra* note 69, §§ 5.1–5.2, at 103–08 (labeling both the "appearance of impropriety" and "appearance of bias" standards "objective assessments").

226. *See id.* (claiming that forty six of the fifty states—excluding Iowa, Louisiana, Michigan, and Wisconsin—have adopted the "appearance of bias" standard and held it requires the challenged jurist to step aside whenever "a reasonable person would think [the jurist] might not be absolutely detached and impartial"). This requires the decisionmaker to view the external evidence of possible bias.

227. *See* Serbulea, *supra* note 105, at 1123 n.105 (noting seventeen states permit disqualification without cause and three states use quasi-peremptory rules); *see also* RECUSAL AND DISQUALIFICATION OF JUDGES, *supra* note 69, § 27.1, at 790 (noting "a substantial minority of mostly western or mid-western jurisdictions . . . permit parties to seek disqualification on a peremptory basis, without any showing of cause"); JAMES SAMPLE ET AL., FAIR COURTS: SETTING RECUSAL STANDARDS 5 (2008), http://www.brennancenter.org/content/resource/fair_courts_setting_recusal_standards ("About a third of the states already permit counsel to strike one judge per proceeding.").

228. *See* 2011 YEAR-END REPORT, *supra* note 156, at 7 (stating "the limits of Congress's power to require recusal [of U.S. Supreme Court Justices] have never been tested"), https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf; *see also* James Sample, *Supreme Court Recusal from* Marbury *to the Modern Day*, 26 GEO. J. LEGAL ETHICS 95, 99 (2013) (suggesting recusal rules for the U.S. Supreme Court should be different given the Court's place within our judiciary and democracy); Louis J. Virelli III, *The (Un)Constitutionality of Supreme Court Recusal Standards*,

require an assessment of alleged actual, probable, or apparent bias. The federal judicial ethics code, the Code of Conduct for United States Judges ("Code of Conduct for U.S. Judges"), which has been adopted by the Judicial Conference of the United States, is the guide for determining when circumstances create an "appearance of impropriety" requiring the federal jurist to step aside and not hear a case.[229] The ABA Model Code of Judicial Conduct ("ABA Judicial Code") provides the yardstick for disqualification in state court systems because significant parts have been adopted by all fifty states.[230] It is not clear whether either of these ethical codes has the force of law. The ABA Judicial Code being merely a model code is not binding though it provides persuasive authority for purposes of disciplining jurists for ethical misconduct.[231] Likewise, there is some question regarding the Code of Conduct for U.S. Judges because the Judicial Conference may lack authority to enact binding ethics rules for jurists.[232] Nevertheless, the ethical standard expressed in both the Code of Conduct for U.S. Judges and the ABA Judicial Code is afforded great deference by courts deciding disqualification disputes.[233] Thus, the influence of the Code of Conduct for U.S. Judges and the ABA Judicial Code on disqualification standards permeates throughout the federal and state judicial branches.

The recusal provisions under both the Code of Conduct for U.S. Judges and the ABA Judicial Code, which are virtually indistinguishable, use the

2011 WIS. L. REV. 1181, 1218 (2011) (arguing Congressional attempts to define the recusal standards for the U.S. Supreme Court violates the constitutional separation of powers and offends federalism principles).

229. *See* Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1229–32 (2002) (discussing the standard where a judge may be disqualified if "the judge's impartiality might reasonably be questioned," including personal bias, prejudice about the facts or a party to a case, or when the jurist or a member of the jurist's family has an pecuniary interest in the subject matter or a party in the case).

230. Marie McManus Degnan, Comment, *No Actual Bias Needed: The Intersection of Due Process and Statutory Recusal*, 83 TEMP. L. REV. 225, 227 (2010) (describing the ethical rules adopted and applied in federal and state courts).

231. Of course, as a model code, the ABA Judicial Code lacks the force of law unless a jurisdiction elects to adopt its provisions. Forty-nine of the fifty states adopted the 1972 edition of the ABA Judicial Code by 2002. While some judicial codes are afforded the status of law in some states, other states use the ABA Judicial Code as a guideline for judicial ethics. Bassett, *supra* note 229, at 1229–30.

232. *Id.* at 1230.

233. *See id.* at 1235 (noting disqualification cases are reviewed for abuse of discretion which "accords too much deference to the" lower court's ruling).

same two-part framework for deciding disqualification disputes.[234] Under both of these judicial ethics codes, there are two basic scenarios that require recusal of a jurist: (1) when the jurist actually or probably is not impartial; or (2) when it appears to a reasonable person that the jurist might not be impartial.[235] In the first step of the analysis, recusal is required if any one of a non-exhaustive list of *per se* disqualifying conditions is met.[236] These *per se* standards require recusal when a jurist is either (a) actually partial based upon personal bias against a party or the party's lawyer or personal knowledge of facts that are in dispute or (b) presumed to be partial based upon a number of other specific circumstances related to the jurist's (and his family's) finances, relationships with litigants and parties, or extra-judicial knowledge and roles related to the case.[237] If the facts satisfy any one of these enumerated circumstances, the jurist shall step aside and no discretion is involved.[238] Since the list is not exhaustive, even if the facts do not warrant recusal under one of the enumerated *per se* standards, the jurist may still be disqualified under the catch-all provision.[239] In the second

234. *See Reshaping Recusal Procedures*, *supra* note 10, at 832–34 (comparing the substantive disqualification standards under both judicial ethics codes). Since the language of the two ethics codes is nearly identical (and the differences are not relevant here), this discussion will treat the rules as the same and focus on the ABA Judicial Code.

235. *See id.* at 829 (discussing the ABA Judicial Code's dual standards). An argument can be made that the enumerated standards other than for actual bias–unless bias is presumed–are akin to a probability of bias standard.

236. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(C)(1)(a)–(d) (AM. BAR. ASS'N 2014) (providing factors relevant to the disqualification analysis); *see also* MODEL CODE OF JUDICIAL CONDUCT r. 2.11 (AM. BAR. ASS'N 2011) (articulating six factors for determining disqualifications). Not all states have adopted all of the enumerated disqualifying circumstances. *See* Degnan, *supra* note 231, at 227 (noting each state has adopted significant portions of the ABA Model Code but not in its entirety). In fact, the part of the rule disqualification based upon campaign contributions by interested parties has been adopted in only one state. *Id.* at 228 n.27.

237. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(C)(1)(a)–(d)(a) (AM. BAR. ASS'N 2014) (contrasting the two model codes where the ABA Judicial Code does not include actual bias against a party's attorney as grounds for disqualification); *see also* MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A)(1)–(6) (2011).

238. *See* Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 GEO. J. LEGAL ETHICS 55, 57–58 (2000) (noting "shall" was substituted for "should" when the ABA Judicial Code was amended in 1990). In 1990, the term "should" was replaced with the currently used "shall" in all the canons and rules making the provisions of the ABA Judicial Code mandatory. *Id.* at 58.

239. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(C)(1) cmt. Canon3(C)(1)(d)(ii) (AM. BAR. ASS'N 2014) (stating even if the *per se* rule is not satisfied, recusal

step of the analysis, the catch-all disqualification standard is invoked when the facts do not fit within one of the enumerated *per se* rules, but the judge's impartiality nevertheless "might reasonably be questioned."[240]

Both the specific *per se* and more general catch-all standards for disqualification under the federal and state judicial ethics codes require an objective assessment of the jurist's impartiality, rather than an subjective assessment. The first step of the disqualification analysis, made under the *per se* rules (with the possible exception of the actual bias rule), requires evaluation of external facts measured from an objective perspective, not the subjective state of mind of the challenged jurist.[241] The second disqualification standard, when the "judge's impartiality might reasonably be questioned," is evaluated not from the perspective of the challenged jurist but from the point of view of the reasonable person—this being the hypothetical "other" in the law.[242] Thus, regardless of whether disqualification is based upon the six enumerated *per se* circumstances or the "might reasonably be questioned" catch-all provision, the evaluation of partiality under these judicial ethics codes embodies an objective standard that relies on external evidence of bias.

may still be required under Canon3(C)(1) if the interest "could be 'substantially affected by the outcome of the proceeding'"); *see also* MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A)(1)–(6) (2011) (providing six standards for disqualification).

240. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(C)(1) (AM. BAR. ASS'N 2014) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned"); MODEL CODE OF JUDICIAL CONDUCT r. 2.11, cmt. 1 (AM. BAR. ASS'N 2011) ("Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply.").

241. *See* Abramson, *supra* note 238, at 59–60 (evaluating the need to address individual objective facts when a judge's impartiality is in question). For example, the decision-maker must evaluate whether the jurist previously played a particular role in the case, if the jurist or a related person has a known direct or indirect economic interest in the case, or whether the jurist or related party may be a material witness. It does not matter what the challenged jurist believes about these connections to the case.

242. *See* MODEL CODE OF JUDICIAL CONDUCT r. 1.2 cmt. 5 (AM. BAR. ASS'N 2011) ("The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."); *see also* Abramson, *supra* note 238, at 58–59 (explaining the challenged jurist's subjective evaluation of the potentially disqualifying circumstances will differ from the assessment a reasonable other would make of the same situation).

B. *An Objective Assessment of Bias Promotes the Purposes of Impartiality*

Using an objective substantive standard to determine judicial bias makes sense given that the primary purposes of disqualification are to (1) safeguard the litigants' right to a fair trial by disqualifying actually or probably biased jurists and (2) promote public confidence in the courts by ensuring the appearance of impartiality is maintained.[243] The disqualification standard is an objective one when it is focused on external evidence of the challenged jurist's actual, probable, or apparent bias—his words and deeds. This externally focused standard is critical to measuring how a reasonable "other" would view the situation, which is required for the appearance of bias standard.[244] While a subjective standard for determining actual or probable bias may suffice when the bias is conscious, only an objective standard can adequately address nonconscious bias, even when actual.[245] Also, the use of a subjective standard in assessing probable or apparent bias would be improper because we cannot detect nonconscious bias, even by examining the internal evidence—the challenged jurist's thoughts, feelings and opinions.[246] Thus, the applicable

243. *See The Dimensions of Judicial Impartiality*, *supra* note 149, at 513 (discussing the primary purposes underlying the rule of impartiality in the context of disqualification as protecting individual rights to a fair trial in specific cases and creating confidence in the legal system generally). However, at least one commentator has asserted that disqualification based upon the Due Process Clause need only avoid actual bias and that concerns regarding the public's confidence in the courts are overblown and could be properly addressed by requiring jurists to provide explanations of their disqualification decisions. *See* Sarah M.R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 45–46 (2007) (analyzing alternative proposals for addressing issues of judicial impartiality and suggesting new procedures for judicial recusal).

244. *See Reshaping Recusal Procedures*, *supra* note 10, at 834 (discussing the use of external evidence to assess bias in others).

245. *See* Pub. Util. Comm. of D.C. v. Pollak, 343 U.S. 451, 466–67 (1952) (Frankfurter, J., concurring) (acknowledging the subconscious may lead to biased decision-making). The most notable instance of a jurist stepping down due to actual bias happened when Justice Frankfurter recused himself from hearing a case challenging the practice of playing the radio on public buses because his feelings were "so strongly engaged as a victim of the practice in controversy" it was better for him "not [to] participate in judicial judgment upon it." *Id.* at 467. Justice Frankfurter further stated his belief that most judges can, given their judicial "training, professional habits, [and] self-discipline[,]" set aside their feelings and judge impartially; however, Justice Frankfurter also stated that he worried that his "unconscious feelings" on the subject were so strong they might operate on a sub-conscious level and affect the outcome or—at the very least—"unfairly lead others to believe they are [so] operating." *Id.* at 466–67. Thus, he took no part in consideration of the case. *Id.* at 467.

246. *See Reshaping Recusal Procedures*, *supra* note 10, at 827–28 (discussing prevalence of an objective standard based upon external evidence compared to the use of introspective evidence to

substantive standards properly use an objective test to protect litigants' rights by preventing actually or probably biased jurists from hearing litigants' cases and maintaining public confidence in the judiciary by avoiding both the probability and the appearance of partiality.[247]

C. *Federal Courts and Most State Courts Use Self-Disqualification Procedures*

While the federal and state courts use procedures that differ in some ways when determining disqualification disputes, most of those procedures are defective because they allow "self-disqualification."[248] In other words, the challenged jurist is permitted to make the initial determination of whether he actually is, probably is, or appears to be sufficiently biased as to warrant disqualification. All the federal courts use self-disqualification procedures.[249] Also, despite the availability of limited rights to peremptory challenges in a minority of states, the same problems of self-disqualification plague the state courts as well.[250] Although most of those disqualification decisions (other than at the U.S. Supreme Court) are subject to some form of appellate review, the avenues for appeal, the costs of pursuing an appeal, and the lenient standard of review (usually clearly erroneous or abuse of discretion) makes it unlikely that an incorrect self-disqualification decision will be corrected on appeal.[251] Thus, in both the federal and state courts the affected parties have little, if any, meaningful opportunity to seek redress when the self-disqualification decision is wrong and the jurist incorrectly refuses to recuse.

assess bias in self).

247. *See* Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 881 (2009) ("The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'").

248. *See* Jeffrey M. Hayes, *To Recuse or to Refuse: Self-Judging and the Reasonable Person Problem*, 33 J.L. PROF. 85, 96–97 (2008) (labeling this phenomenon as "self-judging"). But, that is a misnomer because, as the author concedes, the jurist who is the target of the disqualification motion is not on trial. *Id.* at 97. Moreover, the jurist has no financial or other personal interest at stake in the case. *Id.* Thus, a better label for this phenomenon and the one used in this Article is "self-disqualification."

249. *See* RECUSAL AND DISQUALIFICATION OF JUDGES *supra* note 69, at 692, 721 (describing federal court procedures and implying the challenged jurist makes the initial disqualification decision).

250. *See id. at* 753–56 (discussing state court procedures for disqualification and implying the use of self-disqualification procedures used in state courts and noting that after an initial peremptory challenge another procedure is used).

251. *See Reshaping Recusal Procedures*, *supra* note 10, at 864–65 (discussing the limitations on meaningful appellate review of incorrect self-disqualification decisions).

VI. REFORMING RECUSAL RULES TO ELIMINATE THE BIAS BLIND SPOT

Unfortunately, in spite of the bench's well-meaning intention to objectively apply the substantive disqualification standards, the common use of self-disqualification procedures undermines the decision-making process in specific disqualification disputes and erodes the public's confidence in the judiciary in general. The chancy combination of the self-disqualification procedures, the objective reasonable person standard, and the impact of the bias blind spot creates an asymmetry in perceptions of judicial bias between the bench and bar, as well as between the bench and the public. To bridge that gap in perceptions and misperceptions of bias, a different balance must be struck between the bench's strong self-perception of impartiality and the others' increasingly skeptical view of judicial integrity. The solution to this problem lies in reassessing the presumption of impartiality and reforming recusal rules to reflect the realities of actual judging rather than an idealistic view of judges.

A. *Perceptions and Misperceptions of Bias in Disqualification Disputes*

In spite of most jurists' stated support of an objective test for determining judicial bias, there are sound reasons to believe many jurists do not apply disqualification standards objectively, especially when self-disqualification procedures are used. First, there is anecdotal evidence of jurists being less than objective when applying the disqualification standards—including decisions made by the challenged jurists in *Caperton*, *Williams*, and the high-profile cases referenced in this Article and analyzed in other scholarly and news articles.[252] Second, there is scientific evidence of cognitive illusions—similar to the bias blind spot—impacting judicial decision-making.[253] Third, there is evidence of how the bias blind spot affects all of us when assessing our own biases from which we can appreciate the likely impact of this particular cognitive illusion upon disqualification decisions.[254] Finally, there is evidence of the impact of the bias blind spot and other cognitive illusions on the disqualification decisions that jurists have actually made in specific cases.[255] Thus, the

252. *See* cases discussed *supra* Part II.

253. *See* cases discussed *supra* Part IV.A.2, IV.B.

254. *See Reshaping Recusal Procedures*, *supra* note 10, at 840 (explaining people are typically blind to their own biases, but they are quick to observe the same biases in others).

255. *See* Sande L. Buhai, *Federal Disqualification: A Behavioral and Quantitative Analysis*, 90 OR. L. REV. 69, 70–71, 107 (2011) (examining statistical analysis of over 1000 federal appeals from

impact of the bias blind spot on disqualification disputes is pretty clear and the solution lies in reassessing the combination of procedures and substantive standards used to make the decisions.

The problems with current disqualification practice are exacerbated by the asymmetry in perceptions and misperceptions of bias between the bench, on the one hand, and the bar and public, on the other hand. This disconnect is particularly evident in the most high-profile cases, which are often politically charged, and thus, make jurists more susceptible to allegations of bias—whether fair or unfair.[256] Given the high stakes in such cases (including abortion, death penalty, judicial and other elections, health insurance reform, and same sex marriage), and our increasingly polarized political climate, these situations require the greatest amount of public confidence in the fairness of the decision-making process in order for the decisions to be respected and carried out by others.[257] Thus, we must address this disconnect in perceptions of bias between the jurists (especially those who are permitted to use self-disqualifying procedures) and the others—litigants, the bar, and the general public—who are expected to abide by the ruling.

B. *Reforming Recusal Rules to Eliminate Misperceptions of Judicial Bias*

There are two basic types of recusal reform that have been proposed in recent years: (1) changes to the substantive standards; and (2) procedural reforms. However, to date, none of the proposed reforms have solved the problems of perception and misperception of judicial bias or seriously reinvigorated public confidence in judicial impartiality.

1. Past Proposed Reforms of Substantive Standards

The proposed reforms of substantive standards seem to fall into one of two categories. First, some scholars and other commentators have advocated for the addition of more *per se* rules that address the latest problems in disqualification—mostly troubles with judicial elections.[258]

disqualification decisions and noting that "the data suggest that cognitive illusions do play a role in federal recusal decisions" especially when certain grounds for disqualification are alleged).

256. *See* cases discussed *supra* Part II (discussing high profile cases and public reaction to same).

257. *See* discussion *supra* Part II (discussing of need for public confidence in judiciary).

258. *See* Deborah Goldberg et. al., *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J 503, 529 (2007) ("By setting a maximum threshold, the ABA's per se rule eliminates lawyers' incentive to curry favor through large contributions."); *see also Courts, Campaigns,*

Second, others, including current or former jurists, have called for the rejection of the appearance of a bias standard to eliminate the gap in perceptions of judicial bias.[259] The intent behind the second category of suggested changes is to bring the articulated standard for disqualification—whether a particular factual circumstance or the legal standard for finding bias—in line with the way the standards are actually applied by the bench. Unfortunately, there has been little consensus about which substantive changes properly balance judicial accountability and judicial independence, the values that underlie most disqualification disputes.[260] So, despite the merit of some of these suggested reforms, there has been little reform of the substantive standards used by the federal and state courts and perceptions and misperceptions of bias continue to divide us.

2. Past Proposed Reforms of Procedural Practices

The procedural reform proposals have included a variety of suggested changes that likewise have been less than fully effective due to poor implementation. Some commentators have suggested disqualification disputes should be handled no differently and use the same key procedures employed in other aspects of the adversarial process.[261] Still other observers have advocated more narrowly tailored reforms, including educating jurists and requiring that jurists write and publish opinions when

and Corruption: Judicial Recusal Five Years After Caperton, BRENNAN CTR. FOR JUST. (Nov. 14, 2014), https://www.brennancenter.org/event/courts-campaigns-and-corruption-judicial-recusal-five-years-after-caperton ("The American Bar Association's most recent attempt to create model recusal rules . . . [addressed] the new reality of increased campaign contributions and independent expenditures in state judicial races. There was debate as to whether judicial recusal should be addressed through reforms to ethical rules or procedural rules . . . .").

259. *See* Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned: Moving Beyond a Failed Standard*, 56 ARIZ. L. REV. 411, 417 (2014) (noting the appearance regime has been a documented failure and proposing to replace it with a procedural regime that includes peremptory challenges); *see also* Cravens, *supra* note 243, at 2, 10 (stating the "appearance-based recusal and disqualification standards are ill-conceived and ineffective" and addressing the need for a consistent and reliable procedural structure); *Why Judicial Disqualification Matters, supra* note 74, at 732 ("[T]he appearances paradigm is crumbling because it has been balkanized . . . . [A] resurrected and revitalized procedural regime . . . holds considerable promise.").

260. *See id.* at 677 (explaining there is no agreement between the legal establishment and the public regarding what constitutes an appearance of partiality).

261. Frost, *supra* note 111, at 555–57 (describing five key procedural protections that result in legitimate judicial decisions, including impartial decision-makers).

disqualification is denied (and sometimes even when it is granted).[262] In recent years, a number of scholars—including some of the most prominent judicial ethics scholars—have focused their reform proposals on eliminating self-disqualification procedures as a needed change in disqualification practice.[263] However, to date, few courts have adopted these meritorious proposals for procedural reform.[264] Even the U.S. Supreme Court has side-stepped the chance to reinvigorate recusals by declining to adopt procedural reforms despite calls from scholars, non-profit groups, and others for elimination of self-disqualification.[265] Thus, the divide in perceptions and misperceptions of bias in disqualification disputes remains unchanged.

3. Reluctant Recusants and the Need for Judicial Acceptance of Reforms

There is a significant reason for this lack of progress in recusal reforms: an important participant—the judiciary—has been reluctant to embrace proposed changes in disqualification practices. This resistance to reform has a long pedigree in American disqualification jurisprudence.[266] The reasons given for jurists' reluctance vary and include differing beliefs

262. *See* Flamm, *supra* note 101, at 760 ("[F]ederal judges who are called upon to decide disqualification motions are under no obligation to explain their rationale either for recusing themselves or declining to do so. This is problematic . . . ").

263. *See* Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563, 1564, 1578–79 (2013) (highlighting all participants in the legal community are susceptible to nonconscious bias and judges who preside over their own recusal hearings, harbor the same implicit biases as others, which can "infect judicial rulings, orders, and decisions"); *see also* Hayes, *supra* note 248, at 97, 101 (noting the disqualification process stands alone because it is virtually the only area of law where "judges are empowered to make their own decisions despite having a stake in the result" and suggesting the biases these judges hold may unwittingly lead them down a path of impartiality); *see also Reshaping Recusal Procedures*, *supra* note 10 (discussing the various recusal procedures currently used by federal and state courts and proposing reforms designed to address the impact of the bias blind spot in disqualification decisions).

264. *See* discussion *supra* Part III.A.4 (discussing lack of reforms since *Caperton* and describing exception in Georgia, which did reform its procedures to largely eliminate self-disqualification).

265. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 875 (noting J. Benjamin's concurring opinion addressing his refusal to recuse); *see also* Brief for Amici Curiae Brennan Center for Justice at NYU School of Law and Justice at Stake in Support of Petitioner et al. at 3, 13, Williams v. Pennsylvania, 136 S. Ct. 1899 (2016) (No. 15-5040), 2015 WL 8138320 (arguing modern social science literature has recognized fundamental implicit biases that evidence a tendency for a person to ignore impartiality, and due to such evidence, states such as Michigan and Tennessee, have implemented "independent review of recusal decisions made by justices of each State's supreme court").

266. *See* discussion *supra* Part III.B (discussing vicious cycle of resistance, reform, and repeat).

about the proper balance between judicial independence and accountability, the impact of cognitive illusions and other psychological factors on judicial decision-making, and the proper perception of judicial integrity, which underlies the presumption of impartiality.[267] While it is difficult to know the exact reasons for this ongoing power struggle, it is clear that the judiciary will have to be on board before reforms will be implemented in any meaningful way.[268] Thus, this Article proposes more modest changes to disqualification practices with the hopes that jurists will adopt, rather than resist, these recusal reforms, which are designed to both protect litigants' legal rights and safeguard the entire judiciary's well-deserved reputation for fairness.

C. *Reinvigorating Recusals by Eliminating the Bias Blind Spot and Rebalancing the Presumption of Impartiality*

Many proposed reforms take something of an all or nothing approach to recusal, but this Article suggests a compromise designed to strike a better balance between the competing views about the proper strength of the presumption of judicial impartiality while also eliminating the impact of the bias blind spot. The proposals to entirely dismantle the appearance-based recusal regime have not succeeded and, likewise, the calls for eliminating self-disqualification have fallen on deaf ears.[269] While these reform proposals have real merit, they are not resonating with the bench and are, therefore, unlikely to be fully implemented. At least one well-known judicial ethics scholar, Charles Gardner Geyh, has suggested the reason for judicial reluctance to embrace recusal reforms is really about disagreements over two fundamental issues: (1) whether jurists should enjoy a strong presumption of impartiality; and (2) what, if any, interests

267. *See supra* Part III.B.1 (exploring the reasons for historical and continuing judicial resistance to recusal reform).

268. Even if others—notably federal and state legislatures—could agree on the proper reforms, there is a serious question about whether another branch of government has the power to write binding judicial recusal rules. *See* 2011 YEAR-END REPORT, supra note 156, at 7 (stating "the limits of Congress's power to require recusal [of U.S. Supreme Court Justices] have never been tested"); *see also* Virelli, *supra* note 228, at 1218 (arguing Congressional attempts to define the recusal standards for the U.S. Supreme Court violates the constitutional Separation of Powers and offends federalism principles).

269. See *supra* Part VI.A (discussing suggested reforms to substantive standards and procedural practices used in disqualification disputes and noting that few, if any, have been adopted fully by the courts).

(personal, relational, political) are required to overcome that presumption.[270] This Article builds upon this idea, but adds one additional factor: what evidence, in terms of type and amount, is required to overcome that presumption. This third factor is aimed at the asymmetry in perceptions of bias between "self" versus "other" and is strongly influenced by who makes the disqualification decision. In other words, this last factor combines concerns of procedural practices with the substantive standards being employed by the disqualification decisionmaker.

To strike the correct balance between these competing views of judicial impartiality, it will help to very clearly define the tensions currently reflected in disqualification practice. Those tensions encompass both the substantive standards and the procedural practices used in the federal and most state courts and the balancing point is the presumption of impartiality, which underlies nearly every aspect of disqualification practice. The spectrum of assumptions regarding impartiality that underlie disqualification practice can be demonstrated graphically:

Actual Bias	**Probable Bias**	**Apparent Bias**
Formalist	Mix of Formalist/Realist	Realist
Strong Presumption	Modest Presumption	Weaker Presumption
More Evidence of Bias	Moderate Evidence of Bias	Less Evidence of Bias

The tug of war can best be seen by looking at how the fight shows up at each edge of this spectrum. On the one side are those who believe most in a strong presumption of impartiality and often pull for the elimination of the appearance-based regime, which they perceive as undermining judicial independence through judge shopping and other tactics sometimes used by litigants. Also, these substantive reforms seldom address the procedural practices used by courts in making disqualification decisions.

270. *See Why Judicial Disqualification Matters*, *supra* note 74 at 676 (discussing the failure of the current appearances regime and suggesting changes are due to a deep divide between the bench on the one hand and the bar and public on the other hand 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").

On the other side are those who are skeptical of jurists' ability to see their own biases, and, therefore believe in a weaker presumption of impartiality. They often argue for elimination of self-disqualification and adoption of other procedural reforms without regard to the substantive standard being applied. This Article proposes a middle ground in this tug of war: a two-prong approach that addresses both substantive and procedural concerns by recommending that all federal and state courts adopt one of two substantive standards for disqualification depending on who makes the initial disqualification decision.

1. Weaker Presumption for Self-Disqualification Decisions

The first prong of the proposal requires that if a court decides to continue using self-disqualification procedures, then the challenged jurist's authority to decide should be limited. Specifically, if the challenged jurist is the initial decisionmaker, then the disqualification decision should be limited to applying the specific *per se* rules for partiality and passing on the legal sufficiency (though not the accuracy) of the factual allegations of bias when the catch-all provision is applied. In both instances, the evidentiary standard should remain the appearance of bias standard because this is the lowest of the evidentiary thresholds for finding bias and it better accounts for the impact of the bias blind spot on the challenged jurist's perceptions of his own bias versus others' perceptions of his bias.[271] Of course, if the catch-all provision is used also, then another jurist must make that disqualification decision following the substantive standards set forth in the next section.

2. Stronger Presumption for Other Disqualification Decisions

The second prong of the proposed reforms proposal is if a court decides to discontinue using self-disqualification procedures and have a decisionmaker other than the challenged jurist, then the authority of those other decisionmakers should be plenary. If a jurist other than the challenged jurist (e.g., another member of the same court, the entire court, or another court) is the initial decisionmaker, then there should be no limit on the decisionmaker's authority to decide disqualification claims made under either the *per se* rules or the catch-all provisions, or both. Also, given that the bias blind spot will have limited, if any, impact on these

271. *See Reshaping Recusal Procedures*, *supra* note 10, at 834–35 (discussing standards on which to rely to determine "how a reasonable 'other' would view the situation").

other decisionmakers, a strong presumption of impartiality should be applied and the higher evidentiary threshold of "probability of bias," as articulated in *Caperton*, must be met.

This two-pronged approach is designed to: (1) balance the realities of judging (including the impact of the bias blind spot) against our ideals about judges that are embedded in the presumption of impartiality; and (2) avoid judicial resistance to reforms by recognizing the judiciary's generally well-deserved reputation for impartiality in most cases. The first of these goals is achieved by recognizing, as these proposed reforms do, that most jurists uphold their oaths of office; it further recognizes those jurists strive to make the best disqualification decisions possible while at the same time acknowledging that jurists sometimes fall short of that goal, especially when using self-disqualification procedures. Based upon a recent empirical study of federal appeals in disqualification disputes, it appears that jurists are most likely to make less objective assessments of their own impartiality when the certain grounds for disqualification are alleged.[272] In fact, the most problematic grounds reflected in this study were: (1) general bias against a party; (2) general bias against counsel; (3) professional or personal relationship with a party; (4) professional and personal relationship with counsel; and (5) bias based upon strong ethical or social convictions about an issue in the case.[273] While there are some distinctions between these categories of bias and the breakdown of the *per se* rules and the catch-all provisions that serve as the basis for the reforms recommended in this Article, there is enough overlap of the groupings to support the proposed two-prong approach.[274] Thus, the proposal is to permit challenged jurists to decide disqualification disputes that allege certain kinds of clearly delineated bias and require involvement of other decisionmakers in the cases in which the bias blind spot is most likely to impact the outcome due to the discretion involved. The second

272. *See* Sande L. Buhai, *Federal Judicial Disqualification: A Behavioral and Quantitative Analysis*, 90 OR. L. REV. 69, 107 (2011) (examining statistical analysis of over 1,000 federal appeals from disqualification decisions and noting "the data suggest[s] that cognitive illusions do play a role in federal recusal decisions[,]" especially when certain grounds for disqualification are alleged).

273. *See id.* at 105–08 (ranking the likelihood of reversal of the challenged jurist's decision based upon the grounds for disqualification alleged).

274. It is likely any differences are not real distinctions between the grounds for disqualification, but instead are due to a difference in how the data was labeled and coded. However, since the study does not reflect a direct comparison between the categories used and the provisions of the statutes or rules relied upon by the litigants, the analysis in this Article is based upon the description of each category in the study.

goal is met by balancing a strong presumption of impartiality with skepticism regarding the likelihood a jurist will realistically assess their own personal biases but giving jurists the benefit of the doubt when others make the disqualification decision. These proposed reforms should be more palatable to an otherwise reluctant judiciary because the courts can eliminate an appearance-based evidentiary standard and preserve the stronger presumption of impartiality, when they adopt fairer disqualification procedures that use unbiased jurists to decide the hardest cases. Thus, the proposed dual standards offer the best way to protect litigants' due process rights to a fair trial while at the same time fostering public confidence in the impartiality of jurists and the judiciary.

VII. CONCLUSION

In recent years a number of high profile disqualification disputes in the federal and state courts have caught the attention of the media and the public. These cases have involved controversial subjects such as abortion, the death penalty, judicial elections, health insurance reform, and same-sex marriage. In each instance, there has been an outcry from some segment of the public and the press when a presiding jurist was asked to recuse but declined to step aside. Unfortunately, even if the jurist writes a decision explaining their refusal to recuse, the reasons given are often unsatisfying and do little to quell suspicions of bias. Instead, the litigants, members of the press, and the public are left questioning whether the jurist is actually unbiased in the specific case and even doubting the impartiality of the judiciary as a whole.

This negative reaction to refusals to recuse is caused, in part, by the bias blind spot, which creates asymmetries in people's perceptions of bias in themselves versus their perception of bias in others. This difference in perception also colors the jurist's disqualification decisions and can lead, in cases that seem obvious to persons other than the challenged jurist, to the jurist presiding when recusal is required. These asymmetries in perception of bias between the bench on the one hand, and the bar and public on the other hand, conflict with the long-standing presumption of impartiality that undergirds judicial recusal rules. In addition, these differences in perceptions and presumptions of impartiality are exacerbated by the politically charged context in which some disqualification decisions play out further creating suspicions of the jurists' motives. Thus, this Article proposes reforms of the substantive standards applied in disqualification disputes about how to decide when a jurist should be disqualified to

protect litigants' rights to a fair tribunal and to bolster public confidence in the judiciary.

Specifically, this Article recommends that all federal and state courts adopt one of two substantive standards for disqualification depending on who makes the initial disqualification decision. First, if the challenged jurist is the initial decisionmaker, then the decision should be limited to applying the specific *per se* rules for partiality and passing on the accuracy of the factual allegations of bias when the catch-all substantive standard is pled. In both instances, the evidentiary standard should remain the appearance of bias standard because this lowest of the evidentiary thresholds for finding bias better accounts for the impact the bias blind spot is likely to have when self-disqualification procedures are used. Second, if another jurist, the entire court, or another court is the decisionmaker, then there should be no limit on the decisionmaker's authority to decide disqualification claims made under either the *per se* or the catch-all rules, or both. Also, given that the bias blind spot will have limited, if any, impact on these other decisionmakers, the higher evidentiary threshold of probability of bias, as articulated in *Caperton*, must be met. The hope is that these proposed reforms are sufficiently balanced between the opposing views on judicial entitlement to a presumption of impartiality in disqualification disputes in a way that will maximize the possibility the courts actually implement the proposed changes to make positive progress in disqualification disputes.