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* Associate Dean for Research and John F. Kimberling Professor of Law, Indiana University Maurer School of Law. I’d like to thank Bert Brandenburg, Steve Burbank, Amanda Frost, Jim Gibson, Steve Lubet, Roy Schotland, and Jeff Stempel for their comments, and Jenna Norden, Mark Plantan and Laura Heft for their research assistance. Thanks likewise to Mike Martin for organizing and moderating the panel at the annual meeting of the Association of American Law Schools, where papers giving rise to this symposium were presented. From 2007 to 2009, I served as consultant to and director of the American Bar Association’s Judicial Independence Project, under the auspices of the ABA Standing Committee on Judicial Independence. The views expressed here are mine alone, and not necessarily those of the Judicial Independence Project, the ABA Standing Committee on Judicial Independence, or the ABA.
I. INTRODUCTION

Judicial disqualification is hot—a phrase that, until recently, was likely turned only in sparsely attended conferences of lonely ethicists and marginalized proceduralists. Throughout the past decade, organizations such as the American Bar Association, the American Judicature Society, the Brennan Center for Justice, and the Justice at Stake Campaign have focused on disqualification problems,¹ and law review articles have covered the issue like kudzu.² A focal point has been the litigation in Caperton v. A.T. Massey Company, which spanned the better part of the last decade. It began in 2002, when a coal company lost a $50 million verdict in a West Virginia jury trial.³ While an appeal of that verdict was impending, the company’s CEO spent $3 million on a supreme court race to replace a disfavored incumbent with someone more to his liking. The incoming justice declined to recuse himself from hearing the case and cast the deciding vote in the coal company’s favor.⁴

⁴ Id.
John Grisham used the episode as fodder for his latest novel, editorial writers were apoplectic, and in 2009, a closely divided United States Supreme Court ruled that the justice’s failure to step aside violated the plaintiff’s due process rights.

While Caperton may be the flagship, there is a multitude of vessels in the flotilla of recent disqualification activity. In 1999, the American Bar Association revised its Model Code of Judicial Conduct to disqualify judges from hearing cases involving significant campaign contributors. In 2003, the ABA revised its disqualification rule again, this time to disqualify judges from cases in which they had made prior public statements committing themselves to decide issues then before them in particular ways. In 2004, Justice Scalia prompted a media outcry when he declined to disqualify himself from hearing a case in which Vice President Dick Cheney was a named party, after flying with the Vice President on a government jet to Louisiana for a weekend of duck hunting, while the appeal was pending. Likewise in 2004, a newly elected Illinois Supreme Court justice provoked media ire after he declined to disqualify himself from hearing a case in which a corporate defendant and its employees had made significant contributions to his election campaign while the appeal was pending. In 2005, that same justice cast the deciding vote in the defendant’s favor. In 2006, the New York Times ran an exposé on Ohio judges who received sizable contributions to their reelection campaigns from

8. Id. at Canon 3E(1)(f).
lawyers and parties appearing before them, concluding that “[i]n the 215 cases with the most direct potential conflicts of interest, justices recused themselves just 9 times.” In 2007, the ABA’s Standing Committee on Judicial Independence launched a Judicial Disqualification Project to evaluate state judicial disqualification around the country and recommend reforms. In 2009, the House Judiciary Committee held oversight hearings on federal judicial disqualification. In 2010, the House of Representatives impeached Louisiana District Judge G. Thomas Porteous, in part for failing to disqualify himself from a case in which he had solicited money from an attorney in a pending case. That same year, the national media reported on the non-disqualification of federal judges assigned to hear cases arising out of the BP oil disaster in the Gulf of Mexico, despite their ownership of petroleum company stock and mineral rights in lands leased to petroleum companies. And, the West Virginia high court was back in the news when a justice initially declined to disqualify himself from a case concerning the constitutionality of a statute he had committed himself to uphold as a judicial candidate, and then angrily disqualified himself later when his non-disqualification was widely reported and criticized.

Why the recent interest? Explanations tend to be piecemeal, with commentators delineating the scope of the problem with reference to whatever subtopic they are addressing:

relationships are inadequately regulated by disqualification rules; judges do not understand how the public perceives their relationships; judges are not concerned enough about appearance problems; judges are too concerned about appearance problems; contested judicial elections cause judges to take positions that compromise their impartiality; privately funded judicial campaigns infuse big money into judicial races and create the perception that judges are influenced by the support they receive.

The composite picture suggests that something more is afoot. In this article, I argue that the dominant regime that has structured judicial disqualification in the state and federal courts for nearly forty years (the last time judicial disqualification was hot) is crumbling, and the struggle for a successor regime has begun. My threefold purpose here is to explain why the prevailing regime is in trouble; to survey the field of new-regime wannabes; and to identify the likely frontrunner and assess its long-term prospects.

In Part II, I survey the history of judicial disqualification to the end of identifying four distinct regimes. The first was characterized by an almost ironclad presumption of impartiality; at common law, courts refused to entertain even the possibility of judicial bias. The second regime, which gradually intruded upon the monopoly of the first, carved out exceptions to the presumption of impartiality, in which judges were required to disqualify themselves when confronted with specifically enumerated conflicts of interest. The third regime, which held sway briefly, explored a procedural approach to disqualification that called upon judges to recuse themselves automatically if aggrieved parties made specified allegations pursuant to specified procedures. The fourth and current

regime dwells upon appearances, by organizing disqualification standards around the principle that a judge should step aside when her impartiality "might reasonably be questioned"—in other words, when she might appear less than impartial to a reasonable person. Although each regime has superseded its predecessor as an organizing principle for judicial disqualification, the vestiges—sometimes substantial—of former regimes remain in place, coexisting peacefully at some times and uneasily at others.

In Part III, I address the state of the current appearances regime. On the one hand, in principle, the legal establishment's commitment to preserving the appearance of justice remains strong. On the other hand, the appearances-based disqualification regime is in trouble. For an appearances regime to succeed, I argue, it is not enough that the legal establishment and the public agree that the judiciary should strive to preserve the appearance of impartiality. Rather, they must share a basic understanding of what constitutes an appearance of partiality. Currently, the legal establishment is deeply divided over when it is reasonable for the presumption of impartiality to yield to the suspicion that extralegal influences may have compromised the judge's impartial judgment. The general public is comparably divided, and between the legal establishment and the general public, there are still further divisions. The net effect is that except in extreme or well-settled cases, consensus on when it is fair or reasonable to doubt the impartiality of a judge is elusive—we do not know it when we see it.

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. In Part IV, I survey the field of potential successors to the appearances regime—each of which aims to retool or revitalize a predecessor regime—and conclude that a revamped procedural regime is the front-runner. At a time when disqualification standards are in flux (and achieving consensus on what those standards should be is thus impossible), seeking to enhance the legitimacy of disqualification practice through procedural reform makes sense. Moreover, procedural reform aimed at providing litigants with a fairer-seeming disqualification process may promote public confidence in ways that an appearance-based regime has not. That said, the future of a
nascent procedural regime remains unclear because judges remain ambivalent about disqualification and could thwart it as they have the implementation of prior regimes.

II. THE HISTORY OF JUDICIAL DISQUALIFICATION

The history of judicial disqualification, while interesting in its own right, is recounted here for the purpose of identifying four distinct disqualification regimes that have achieved prominence at different times. Each regime brought a different approach to bear that has taken its turn to dominate legal discourse on disqualification problems. New regimes, however, have not replaced the old, but have been built upon the foundations of their predecessors—meaning that the ruins of prior regimes have remained integral to the permanent disqualification landscape. Moreover, the current disqualification reform agenda, discussed in Part IV, is constituted largely of proposals to revise or resuscitate prior regimes. As a consequence, the current problems and proposed solutions can be better understood in historical context.

A. Regime 1: Common Law Presumption of Impartiality

The practice of judicial disqualification is old indeed. Under Roman law, litigants were entitled to petition for the disqualification of judges who were “under suspicion.” In 530 A.D., the Justinian Code provided:

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 should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion to recuse him before issue be joined, so that the cause go
to another; the right to recuse having been held out to him... 24

So generous an approach to disqualification for perceived bias, while embraced by civil law systems, did not take root in English common law. William Blackstone acknowledged “civil and canon laws,” under which “a judge might be refused upon any suspicion of partiality,” but wrote that in England “the law is otherwise,” and “it is held that judges or justices cannot be challenged.” 25 This early difference in approach may be attributable to the different roles of the judge in civil and common law systems. Civil law judges are fact-finders. Common law judges are not. In common law systems, fact-finding is delegated to jurors who, like judges in civil law systems, have long been subject to disqualification for bias. 26 With a wink of reassurance to the worried, common law commentators noted that isolated episodes of judicial bias could be remedied by impeachment (of rogue judges) or appeal (to correct bias-caused error) but otherwise adopted a nearly ironclad presumption of impartiality for judges. 27 As Blackstone

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24. CODEX OF JUSTINIAN, Book III, title 1, No. 16.
25. WILLIAM BLACKSTONE, III COMMENTARIES ON THE LAWS OF ENGLAND 361 (1768).
27. Blackstone regarded judicial disqualification for bias as unnecessary, given the availability of impeachment because “such misbehaviour would draw down a heavy censure from those, to whom the judge is accountable for his conduct.” BLACKSTONE, supra note 25, at 361. Writing during the 19th century, the California Supreme Court, in turn, saw judicial disqualification for bias as unnecessary, given the availability of appeal:

The law establishes a different rule for determining the qualification of Judges from that applied to jurors. The reason of this distinction is obvious. The province of the jury is, to determine from the evidence the issues of fact presented by the parties; and their decision is final in all cases where there is a conflict of testimony. Therefore, the expression of an unqualified opinion on the merits of the controversy, which evinces such a form of mind as renders him less capable to weigh the evidence with entire impartiality, is sufficient to exclude a juror.

The province of a Judge is to decide such questions of law as may arise in the progress of the trial. His decisions upon these points are not
wrote: “[T]he 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.”\textsuperscript{28}

Blackstone’s observation that the judge’s authority “greatly
depends” on a presumption of impartiality, underscores the centrality
of impartiality to the common law judge’s self-identity. Further
punctuating that point is Sir Matthew Hale’s “Rules for His Judicial
Guidance, Things Necessary to be Continually Had in
Remembrance”—a code of judicial conduct that Hale drafted in the
17th century, as Lord Chief Justice under King Charles II.\textsuperscript{29} Of
eighteen points in Hale’s code, seven elaborated on the need for a
judge to remain impartial.\textsuperscript{30} To challenge a judge for bias was, in
effect, to accuse him of abdicating his role—an accusation that
common law courts simply would not tolerate.

B. Regime 2: Statutory Conflicts of Interest

Under English common law, recusal was a distinctly limited
practice guided by a single, pithy principle first announced in 1609
by Sir Edward Coke in \textit{Dr. Bonham’s Case}: “No man shall be a

\begin{quote}
\textit{4. That in the execution of justice I carefully lay aside my own passions \ldots \ 6. That I suffer not myself to be prepossessed with any judgment at all, till the whole business, and both parties be heard. 7. That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard \ldots \ 10. That I be not biassed [sic] with compassion to the poor, or favor to the rich \ldots \ 11. That popular or court applause, or distaste, have no influence into anything I do in point of distribution of justice. 12. Not to be solicitous of what men will say or think, so long as I keep myself exactly according to the rules of justice. \ldots \ 16. To abhor all private solicitations \ldots in matters depending.}
\end{quote}

\textit{Id.}
judge in his own case.” While a judge could not be challenged on grounds of bias, he could be recused for having an “interest” in the cases he decided. Thus, in Dr. Bonham’s Case, a judge was disqualified from a case in which he would receive the fines he assessed. As one commentator has put it: “English common law practice at the time of the establishment of the American court system was simple in the extreme. Judges disqualified for financial interest. No other disqualifications were permitted, and bias... was rejected entirely.”

The distinction between bias and interest was an important one because disqualifying a judge for a conflict of interest averted the need to address actual partiality. Under circumstances in which a conflict of interest was present, disqualification was necessary, without regard to whether the judge was biased in fact, or could and would have set the conflict to one side and ruled impartially.

Under the common law, financial conflicts of interest were a discrete exception to a regime that presumed judicial impartiality. In the United States, however, state legislatures assumed control of disqualification early on by specifying and expanding upon the conflicts of interest that would require recusal, and courts reoriented their focus from the common law to those enactments. The net effect was to create a new disqualification regime that increasingly governed recusal with reference to this list of conflicts, rather than the common law.

The federal system likewise was distinguished by an emerging statutory regime of conflicts of interest. In 1792, Congress enacted legislation (that would gradually evolve into what is currently 28 U.S.C. § 455) that codified the common law by calling

32. Id. at 649, 653.
33. John P. Frank, Disqualification of Judges, 56 Yale L.J. 605, 611–12 (1947). Frank reported that at common law, disqualification did not extend to cases in which the judge was related to one of the parties. There appears to be some disagreement on that score. See, e.g., Turner v. Commonwealth, 59 Ky. 619, 626 (Ky. 1859) (“At common law, there were but two objections that went to the disqualification of a judge to try a cause, to wit: interest in his own behalf in the result, or being of kin to others interested therein.”).
34. E.g., Turner, 59 Ky. at 624–27; McCauley v. Weller, 12 Cal. 500, 523–24 (Cal. 1859); Peck v. Freeholders of Essex, 20 N.J.L. 457, 466–67 (N.J. 1845); Thomas v. State, 6 Miss. 20, 29–31 (Miss. 1840); Jim v. State, 3 Mo. 147, 147 (Mo. 1832).
for disqualification of district judges who were “concerned in interest” but added that a judge could also be disqualified if he “has been of counsel for either party.”\textsuperscript{35} In 1821, relationship to a party was added as another ground for disqualification.\textsuperscript{36} In 1891, Congress enacted legislation (later codified at 28 U.S.C. § 47) forbidding a judge from hearing the appeal of a case that the judge tried.\textsuperscript{37} In 1911, the precursor to § 455 was further amended to require disqualification where the judge was a material witness in the case.\textsuperscript{38}

C. Regime 3: An Experiment with Disqualification Procedure

A conflicts-based disqualification regime, read in tandem with the common law’s presumption of impartiality, made no room for disqualification on grounds of bias generally. Granted, disqualification for conflicts of interest presupposed a risk of bias that a conflicts regime sought to avoid. When no conflicts rule applied, however, and the applicable disqualification statute was silent as to bias or prejudice per se, the presumption of impartiality filled the gap to foreclose disqualification on such grounds, despite occasional recognition that judicial bias was a legitimate concern. The California Supreme Court observed in 1859:

The exhibition by a Judge of partisan feeling, or the unnecessary expression of an opinion upon the justice or merits of a controversy, though exceedingly indecorous, improper and reprehensible, as calculated to throw suspicion upon the judgments of the Court and bring the administration of justice into contempt, are not, under our statute, sufficient to authorize a change of venue on the ground that the Judge is disqualified from sitting.\textsuperscript{39}

\textsuperscript{35} Act of May 8, 1792, ch. 36, § 11, 1 Stat. 178–79 (1792).
\textsuperscript{36} Act of Mar. 3, 1821, ch. 51, 3 Stat. 643 (1821).
\textsuperscript{37} Act of July 30, 1894, ch. 172, § 2, 28 Stat. 161 (1894).
\textsuperscript{38} Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1090 (1911).
\textsuperscript{39} McCauley v. Weller, 12 Cal. 500, 523 (1859). See also Morris v. Graves, 2 Ind. 354, 357 (Ind. 1850) (holding that prejudice in the president judge is not among the statutory causes for a change of venue); Inhabitants of Northampton v. Smith, 52 Mass. 390, 396 (Mass. 1846). The Northampton court stated that:
Even as the English common law evolved to acknowledge disqualification for bias distinct from specific conflicts of interest, American state courts remained largely unyielding absent an explicit statutory directive.\textsuperscript{40}

In the nineteenth century, a few jurisdictions provided for bias-based disqualification.\textsuperscript{41} Given the ethos of impartiality that underlay the common law and judicial self-identity, it is understandable that trial judges would be reluctant to admit disqualifying bias and that appellate judges would be reluctant to second-guess their brethren.\textsuperscript{42} A few states sought to circumvent this

It may be, and probably is, very true, as the human mind is constituted, that an interest in a question or subject matter, arising from feeling and sympathy, may be more efficacious in influencing the judgment, than even a pecuniary interest; but an interest of such a character would be too vague to serve as a test... it would not be capable of precise averment, demonstration and proof; not visible, tangible, or susceptible of being put in issue and tried; and therefore not certain enough to afford a practical rule of action.

\textit{Northampton}, 52 Mass. at 396.


41. \textit{E.g.}, Massie v. Commonwealth, 20 S.W. 704, 704 (Ky. 1892) (stating that if affidavits prove a judge is prejudiced against the defendant, he should vacate); Conn v. Chadwick, 17 Fla. 428, 440 (Fla. 1880) (stating that an act of the legislature, chapter 3120, provides that if a party in a suit pending in the supreme court believes a judge to be prejudiced then the judge shall be disqualified from the case); Hungerford v. Cushing, 2 Wis. 397, 5 (Wis. 1853) (quoting section one of chapter ninety-five of the Revised Statutes, which states that a party in a civil suit who believes the judge is prejudiced may request a change of venue).

42. \textit{Hungerford}, 2 Wis. 397 at 3 (noting that statute authorized disqualification for prejudice if the trial judge was “satisfied of the truth of the allegations”). The \textit{Hungerford} court held that the judge was “obliged to pass on the state of his own mind or feelings” and rejected the claim that the judge should “change the venue, if the facts contained in the affidavits are sufficient to satisfy a reasonable mind that prejudice exists,” because then “all would be made the subjects of judicial investigation[.]” \textit{Id.} at 5. \textit{See also} Thomas v. State, 6 Miss. 20, 1840 WL 1620, at *7 (Miss. 1840) (declining to reverse non-disqualification where the judge had previously served as counsel for the prosecution in that case although “[t]he spirit of the law, the dignity of the state, and the reputation of the judiciary demand purity in the arbiters, and impartiality in the administration of justice,” and stating reversal was unwarranted because “[t]here is no tribunal
problem by adopting a procedural approach, whereby a party who complied with specified procedures, sometimes including a facially sufficient affidavit of bias against the judge, triggered disqualification automatically. In 1911, Congress followed suit, enacting legislation (later codified as 28 U.S.C. § 144) entitling a party to secure the disqualification of a district judge by submitting an affidavit that the judge had “a personal bias or prejudice” against the affiant or for the opposing party. In 1921, in Berger v. United States, the United States Supreme Court interpreted this legislation as written to prohibit the judge from ruling on the truth of matters asserted in the affidavit supplied by the party seeking disqualification and to require automatic disqualification if the affidavit was facially sufficient.

If judges remained ambivalent about disqualification for bias generally, they were especially ambivalent about a procedure that would subject judges to disqualification for alleged bias alone. A procedural approach to judicial disqualification, however, proved to be a two-way street. While the statute ostensibly forced disqualification for alleged bias if the movant followed specified procedures, the judges themselves decided when those procedures were followed and, at the federal level at least, were ill-disposed to interpret procedural requirements generously. As the First Circuit explained with manifest pique, “courts have responded to the draconian procedure—automatic transfer based solely on one side’s affidavit—by insisting on a firm showing in the affidavit that the judge does have a personal bias or prejudice toward a party[].”

adequate to decide a challenge to the judge when made in his own court” (quoting Lyon v. State Bank, 1 Stew. 442, 464 ( Ala. 1828)).

43. Turner v. Commonwealth, 59 Ky. 619, 626–30 (Ky. 1859); McGoon v. Little, 7 Ill. 42, 42–43 (Ill. 1845).
46. See, e.g., Mims v. Shapp, 541 F.2d 415, 417 (3d Cir. 1976) (adding to the disqualification order that “[p]robably the district court is right that there is no basis for the allegations” in the movant’s affidavit, and expressing “sympathy with district judges confronted with what they know to be groundless charges of personal bias”).
47. In re Martinez-Catala, 129 F.3d 213, 218 (1st Cir. 1997); see also United States v. Sykes, 7 F.3d 1331, 1339 (7th Cir. 1993) (“Because the statute ‘is heavily weighed in favor of recusal,’ its requirements are to be strictly construed to prevent abuse.”).
Federal Judicial Center monograph on judicial disqualification summarizes the procedural impediments that have tripped up affiants under § 144:

The federal courts have indeed held that under § 144 a judge must step aside upon the filing of a facially sufficient affidavit; but they have been exacting in their interpretations of what a facially sufficient affidavit requires and of the procedural prerequisites to application of the statute. Thus, motions have been dismissed for untimeliness; because the movant failed to submit an affidavit, because the movant submitted more than one affidavit, because the attorney rather than a party submitted the affidavit or submitted more than one affidavit; because the attorney rather than a party submitted the affidavit; because the movant’s affidavit was unaccompanied by a certificate of counsel or failed to make allegations with particularity; and because the certificate of counsel certified only to the affiant’s—not counsel’s—good faith.48

By its 40th birthday, the statute was moribund. In a seminal article on disqualification written in 1947, John Frank observed:

Frequent escape from the statute has been effected through narrow construction of the phrase “bias and prejudice.” Affidavits are found not “legally sufficient” on the ground that the specific acts mentioned do not in fact indicate “bias and prejudice,” a reasoning which emasculates the Berger decision by transferring the point of conflict.49

Frank warned that “unless and until the Supreme Court gives new force and effect to the Berger decision the disqualification

49. Frank, supra note 33, at 629.
practice of federal district courts will remain sharply limited." No "new force and effect" was forthcoming. Section 144 remains on the books to this day but has been so eclipsed by subsequent amendments to § 455 that the Supreme Court remarked that § 144 "seems to be properly invocable only when § 455(a) can be invoked anyway . . . ."

Ultimately, the procedural approach embodied in § 144 may be better cast as a failed experiment than a regime: It never had a heyday. In the federal system, § 144 was quickly and quietly hoisted on the petard of its own procedural requirements by unenthusiastic judges intent on marginalizing its impact. Among the states, the legacy is more mixed. A significant number of jurisdictions—most in the western half of the United States—have adopted some variation of a procedural approach, enabling litigants to disqualify a judge by correctly completing and submitting the required paperwork and in some cases making the necessary allegations of bias, without having to prove them. Those jurisdictions, however, remain in the minority, and even among them, some have interpreted applicable procedural requirements strictly, thus following (to varying degrees) in the footsteps of their federal counterpart.

If one steps back, however, and looks at the state of disqualification law as of the mid-twentieth century, a detectable trajectory begins to emerge. The nearly ironclad presumption of impartiality was gradually being eroded—first by a growing list of exceptions for financial and relational conflicts of interest, and more recently, by a patchwork of approaches to disqualify judges for bias

50. Id. at 630.
52. Frank, supra note 33, at 629.
that did not fall within the scope of specified conflicts. By 1968, a majority of jurisdictions made some provision to disqualify judges for bias. The multiplicity of approaches those states employed, however, reflected the ongoing search for an acceptable regime. Some states made no statutory or constitutional provision to disqualify judges for bias or prejudice. Among those states, some courts fell back on the common law rule and did not disqualify for bias, while other courts filled the gap with a disqualification rule of their own. Other states disqualified judges for bias by statute or under the state constitution. Of those, some placed a burden on the movant to show bias, others required a facially sufficient, factually specific affidavit alleging bias, while still others simply entitled litigants to seek a substitution of judge with or without a generally worded affidavit attesting to the affiant's belief that he would not receive a fair hearing before the judge in question.

D. Regime 4: The Appearance of Partiality

In a seminal address to the American Bar Association in 1906, entitled “The Causes of Popular Dissatisfaction with the Courts,” Roscoe Pound called attention to “the real and serious dissatisfaction with courts and lack of respect for law which exists in the United States today.” Two years later, American Bar Association President Jacob M. Dickinson echoed that “[j]udicial judgments are not accorded the same respect as formerly” and that “not a court but the courts are frequently and fiercely attacked”; the net effect, he concluded, was “to destroy confidence in the courts and to make a subservient judiciary.”

One of the legal establishment’s primary responses to this public confidence problem was to approach it as a public relations problem. As such, it was not enough for judges to be fair, impartial,

57. Id. at 347, tbl.1.
58. Id.
59. Id.
and just; they must appear so to the public. In 1924, the American Bar Association adopted Canons of Judicial Ethics that exhorted judges to avoid appearance problems that could compromise public confidence in the courts. Canon four provided that a judge’s conduct should be “free from . . . the appearance of impropriety.”62 Eleven additional canons warned judges to avoid behavior that could create “suspicion” of misbehavior or “misconceptions” of the judicial role that might “appear” or “seem” to interfere with judicial duties or that could “create the impression” of bias.63

This newfound desire to avoid appearance problems did not lead the authors of the Canons to call for disqualification when a judge was or appeared to be biased, but it laid the foundation for such a move later. In 1955, the Supreme Court described the “fair tribunal” to which litigants were entitled, with reference to the absence of bias and apparent bias:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence

62. AMERICAN BAR ASSOCIATION, CANONS OF JUDICIAL ETHICS Canon 4 (1924).
63. Id. Canon nineteen opined that to “avoid[] the suspicion of arbitrary conclusion [and] promote[] confidence in his judicial integrity,” judges should explain the basis for their rulings. Canon twenty-four encouraged a judge not to incur obligations that would “appear to interfere with his devotion to the expeditious and proper administration of his official functions.” Canon twenty-five urged a judge to avoid creating “any reasonable suspicion that he is utilizing the power or prestige of his office” to advance his private interests. Canon twenty-six counseled the judge against maintaining relationships that would “arouse the suspicion that such relations warp or bias his judgment.” Canon twenty-seven declared that a judge should refrain from holding fiduciary positions that would seem to “interfere with the proper performance of his judicial duties.” Canon twenty-eight warned judges against engaging in political activities that could give rise to the “suspicion of being warped by political bias.” Canon thirty advised a candidate for judicial office to do nothing “to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.” Canon thirty-one provided that in jurisdictions where judges were authorized to practice law part-time, the judge should not “seem[] to utilize his judicial position to further his professional success.” In Canon thirty-three, the judge was encouraged to avoid conduct that could “awaken the suspicion that his social or business relations or friendships, constitute an element in influencing his judicial conduct.” Canon thirty-four provided that “in every particular [a judge’s] conduct should be above reproach.” And Canon thirty-five observed that allowing cameras in the courtroom “create[s] misconceptions . . . in the mind of the public and should not be permitted.” Id.
of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way “justice must satisfy the appearance of justice.”64

In 1968, the Supreme Court decided Commonwealth Coatings Corp. v. Continental Casualty Co., in which the Court held that an arbitrator’s “appearance of bias” subjected him to disqualification.65 In 1969, judicial disqualification made national headlines, when the United States Senate rejected President Nixon’s nomination of Clement Haynsworth to the Supreme Court, at least in part because Haynsworth, as a circuit judge, had not disqualified himself from participating in several cases in which he owned stock or had some other ownership interest in a corporate party or its parent.66 While Haynsworth’s stock holdings were small, Senators complained that his sitting on the cases in question conflicted with the “appearance of justice.”67

Shortly after the Haynsworth episode, Senator Birch Bayh introduced legislation to amend § 455 by requiring disqualification from any case in which the judge’s participation would “create an appearance of impropriety.”68 Meanwhile, the American Bar Association established a Special Committee on Standards of Conduct, which promulgated a new disqualification rule in 1972, as part of a larger project to replace the Canons of Judicial Ethics with a Model Code of Judicial Conduct.69 The Special Committee took its cue from the “appearance of bias” standard adopted by the Supreme Court four years earlier in Commonwealth Coatings, concluding that

64. In re Murchison, 349 U.S. 133, 136 (1955) (citation omitted).
68. Id. at 68.
69. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 1, 60–71 (1973).
"[it] can be said with certainty that the same standard would be applied by the Supreme Court to a judge . . . under similar circumstances." Accordingly, the new rule required judges to disqualify themselves both when they had a "personal bias" and when their "impartiality might reasonably be questioned."

This reform movement occurred against the backdrop of longstanding and ongoing judicial ambivalence over disqualification generally and disqualification for bias in particular, which, as previously discussed, had been in perpetual tension with the ancient presumption of impartiality. In 1964, The United States Court of Appeals for the Fifth Circuit pushed back against over-disqualification with the so-called "duty to sit," declaring that "It is a judge's duty to refuse to sit when he is disqualified but it is equally his duty to sit when there is no valid reason for recusation." In 1972, Justice William Rehnquist reported that the duty to sit had been accepted by all circuit courts and cited that duty in support of his decision not to disqualify himself from a case then before the Supreme Court. In that case, he, as Assistant Attorney General under President Nixon, testified before a Senate Subcommittee on the district court's opinion in that case and expressed his view that the case was non-justiciable.

In 1974, Congress, agitated over the Rehnquist imbroglio, sided with the ABA and adopted the 1972 Model Code's appearances-based disqualification rule as an amendment to § 455. By virtue of its requirement that judges disqualify themselves when their impartiality might reasonably be questioned, the amendment was represented as ending the "duty to sit." In 1990, and again in

70. Id. at 60–61.
71. MODEL CODE OF JUDICIAL CONDUCT Canon 3C(1) (1972).
72. See supra notes 24–30 and accompanying text.
73. Edwards v. United States, 334 F. 2d 360, 362 n.2 (5th Cir. 1964).
76. Stempel, supra note 75, at 594 ("The reformist tide was given additional force by Justice Rehnquist's participation in Tatum.").
77. S. REP. NO. 93-419 at 5 (1973) ("This language also has the effect of removing the so called 'duty to sit.' Such a concept has been criticized by legal writers, and witnesses at the hearings were unanimously of the opinion that elimination of this 'duty to sit' would enhance public confidence in the impartiality
2007, the ABA retained the appearance of partiality standard in its disqualification rule.\(^7\) That standard, which has been adopted in at least forty-eight states,\(^7\) is more than just another entry in the ever-growing laundry list of disqualifying circumstances. It is an organizing principle that subsumes all other grounds for disqualification, by characterizing the specific, disqualifying conflicts of interest that had accumulated over the course of the preceding two centuries as comprising an incomplete list of circumstances in which the judge’s impartiality might reasonably be questioned.\(^8\)

III. THE CURRENT STATE OF THE APPEARANCES-BASED DISQUALIFICATION REGIME

As noted at the outset of this article, judicial disqualification is hot—heat attributable to concern over the state of judicial disqualification in an appearances-based regime. To evaluate the performance of that regime, it is useful to begin by identifying regime goals. First, a disqualification regime that concerns itself with how judicial conduct is reasonably perceived seeks to promote public confidence in the courts.\(^8\) By ending the duty to sit and

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\(^7\) See supra notes 1–18 and accompanying text.

\(^8\) Judicial Disqualification: Hearing on S. 1064 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. on the Judiciary on S. 1064, 93d Cong. 8 (1974) (statement of J. Traynor) ("It is not enough that people have confidence in the sturdiness of judicial procedures. They must have utmost confidence in the integrity of their judges."); Judicial Disqualification Hearing on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 93d Cong. 14 (1971) (statement of Sen. Birch Bayh) ("Finally, the bill relaxes the so-called duty to sit in cases where the judge is not disqualified by the provisions of the statute, and give him fair latitude to disqualify himself in other instances where 'in his opinion, it would be improper for him to sit.'").
giving judges the authority to withdraw from cases in which their participation would create perception problems, the public's confidence in the courts, it was claimed, would be enhanced. Second, because it employs an objective standard that evaluates bias problems from the perspective of a reasonable outside observer, an appearances regime seeks to make disqualification more workable and less capricious by obviating the need to rely on subjective assessments of a judge's state of mind. Third, a disqualification regime that enables judges to withdraw for perceived partiality without having to concede actual bias seeks to make disqualification

Bayh) ("If we are concerned, as most of us are with the need to shore up public confidence in our public institutions, we need to remove any scintilla of doubt that the public might have that that judge would be prejudiced in his decision. And that is why the criteria that we establish in S. 1886 is rather strict"). Note, Judicial Ethics—Recusal of Judges—The Need for Reform, 77 W. VA. L. REV. 763, 773 (1975); Note, Disqualification of Judges and Justices in the Federal Courts, 86 HARV. L. REV. 736, 746 (1973) ("[M]aintaining public confidence in the integrity of the judicial process, compels adoption of the appearance test.").

83. Sen. Hearing on S. 1064, supra note 77, at 2 ("[T]he real evil of our present law [is that] our system does not permit us to indulge the judge who would 'rather not' sit in a particular case. Our system says 'if you are not disqualified you must sit.'"); John Frank, Commentary on Disqualification of Judges—Canon 3C, 1972 UTAH L. REV. 377, 378 (describing a case in which a judge felt obligated to sit despite appearance problems and observing that the new rule would avoid such problems).

84. RICHARD FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 105 (2d ed. 2007) ("The objective standard was implemented in an effort to make judicial disqualification determinations less dependant on judicial caprice."); GYEH, supra note 48, at 17–18 (forthcoming 2011) ("[One justification for] making perceived partiality a grounds for disqualification [is that] disqualifying judges for outward manifestations of what could reasonably be construed as bias obviates the need to make subjective judgment calls about what is actually going on inside a judge’s heart and mind."); Ellen M. Martin, Comment, Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455, 45 FORDHAM L. REV. 139, 147 (1976) ("The other major revision of section 455 was intended to broaden the grounds for disqualification by replacing the old subjective standard for disqualification for relationship with the objective standard established in the new ABA Code. Rather than leave the decision regarding disqualification to the judge's own opinion, new section 455(a) required that a judge recuse himself 'in any proceeding in which his impartiality might reasonably be questioned."); Note, Judicial Ethics—Recusal of Judges—The Need for Reform, 77 W. VA. L. REV. 763, 773 (1975) ("The appearance test . . . by eliminating subjective speculation concerning the source and nature of a judge's mental state, makes the application of the standard easier.").
less stigmatizing and hence more acceptable to judges for whom impartiality is core to their self-definition. A logical corollary to this third goal is that an appearances regime makes seeking disqualification less problematic for lawyers who do not wish to stigmatize or otherwise impugn the impartiality of judges before whom they appear.

The first goal of an appearances-based regime—promoting public confidence in the courts—was foremost in the minds of those who framed the 1972 Model Code and the 1974 amendments to § 455. The capacity of the regime to promote public confidence in the courts turns first on the assumption that the legal establishment is committed to preserving the appearance of judicial impartiality in principle—committed enough to implement an appearance-based disqualification rule in ways that serve its purpose. On that score, it is clear that the bench and bar remain firmly committed to the appearance of justice generally and the appearance of impartiality in particular. Calling upon judges to disqualify themselves when their impartiality “might reasonably be questioned” is a more recent byproduct of the legal establishment’s century-long campaign to promote public confidence in the courts—a campaign that has

85. Sen. Hearing on S. 1064, supra note 77 at 18 (Statement of Sen. Bayh) (“One should not have to prove bias, because if you have to file an affidavit affirmatively alleging prejudice and bias before a judge, it is going to do one of two things, or maybe both: (1) It is going to prejudice that judge against that counsel who has to try cases before him every day, every week, every year; or (2) it is going to make that counsel reluctant to file a challenge alleging bias or prejudice even though he knows it exists, because he is going to be concerned about the prejudice this might establish in the judge’s mind against him in future cases.”); John Leubsdorf, Theories of Judging and Judge Disqualification, 62 N.Y.U. L. Rev. 237, 243 (1987) (asserting that the appearance-based disqualification standard “saves face for the judiciary, because a judge may be removed while appellate courts continue to proclaim their confidence in her impartiality”).

86. Sen. Hearing on S. 1064, supra note 77, at 14 (Statement of Sen. Bayh) (“I think it is important for us not to put any of the attorneys practicing before the bench in the position where they have to say to the judge, ‘All right, we will go along, Your honor, although we are concerned.’ There is a great reluctance on the part of counsel to suggest to the judge that he is prejudiced, because they are going to have to go ahead and practice before that judge later.”).

87. See supra note 82 and accompanying text.
focused in large part on how judges are perceived by the public they serve. 88

Since the 1920s, the United States Supreme Court has repeatedly manifested its concern for the risk of judicial bias, the appearance of judicial bias, and temptations that could foster judicial bias, separate and distinct from judicial bias itself. 89 In addition, state and federal ethics codes almost universally admonish judges to avoid the “appearance of impropriety.” 90 The ABA Model Code of Judicial Conduct, upon which state and federal codes are fashioned, defines “impropriety” to include “conduct that undermines a judge’s . . . impartiality.” 91 In a comment accompanying the rule directing judges to avoid the appearance of impropriety, the Model Code explains that “[c]onduct that compromises or appears to compromise the . . . impartiality of a judge undermines public confidence in the judiciary,” and that “the test for appearance of impropriety is whether the conduct would create in reasonable minds a perception” that the judge (among other possibilities) engaged in “conduct that reflects adversely on the judge’s . . . impartiality.” 92 In short, the legal establishment’s commitment to preserving the “appearance” of propriety and impartiality in principle is sound.

The legal establishment’s commitment to the appearance of impartiality in principle, however, does not translate into a consensus on when appearance problems worthy of disqualification arise. For an appearances-based disqualification regime to enhance public confidence in the courts, it is not enough for the legal establishment to recognize that appearances matter, and that judges should disqualify themselves when reasonable people might doubt their impartiality. The legal establishment and the public must also share a basic understanding of when it is reasonable to doubt the


90. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2007).


impartiality of a judge. Absent this common understanding among judges, disqualification standards will fracture and fail; absent such an understanding between judges and the public, disqualification scenarios that cause the public to doubt the impartiality of its judges will not coincide with disqualification scenarios that judges deem worthy of concern; and absent a common understanding among members of the public, decisions rendered in an appearances-based disqualification regime will simply affront some as they reassure others.

Achieving the appearances-based regime’s second goal of making disqualification more workable by relying on an objective standard to determine whether a judge’s impartiality might reasonably be questioned, likewise assumes that there is a shared view of when to doubt a judge’s impartiality that can be embodied in the “reasonable person” of song and story. Absent common ground, the “reasonable” view is no easier to ascertain or apply than crawling inside the skull of a particular judge to ascertain her actual motives. For the reasons elaborated upon below, however, this all-important consensus is lacking within the bench and bar, between the bench and bar and the public, and within the public itself.

A. Fractures Within the Bench and Bar

The bench and bar agree that they should strive to avoid appearance problems. It is harder, however, to agree on how to operationalize the appearance of impropriety or partiality as an enforceable legal standard. In 1969, the ABA promulgated the Model Code of Professional Responsibility, Canon 9, which admonished lawyers to “avoid even the appearance of professional impropriety.”

Fourteen years later, the ABA dropped the provision from its Model Rules of Professional Conduct; draft commentary explained that “such a standard is too vague and could cause judgments about the propriety of conduct to be made on instinctive, ad hoc, or ad hominem criteria.”

A similar debate occurred in 2007, in the context of deliberation over the “appearance of impropriety” rule in the ABA’s proposed Model Code of Judicial Conduct. After three years of review, the ABA’s Joint Commission to Evaluate the Model Code of

Judicial Conduct proposed to downgrade avoiding the appearance of impropriety from an enforceable standard (as it had been widely construed to be in the 1990 Model Code) to an aspirational goal. It did so, out of “continuing concern over the vagueness of the ‘appearance of impropriety’ as an enforceable standard,” despite objections that the proposal would dilute the Code’s (and by implication, the legal establishment’s) commitment to avoiding appearance problems. A scathing editorial in the New York Times followed, and when the new Model Code was being debated on the floor of the ABA House of Delegates, the Commission acquiesced to an amendment restoring the “appearance of impropriety” as an enforceable rule, at the urging of the Conference of Chief Justices and a number of legal organizations.

The ABA debate over the appearance of impropriety in the Model Code of Judicial Conduct did not extend to the role that appearances play in disqualification, but the implications of that debate for an appearances-based disqualification regime are nonetheless present. A judge’s impartiality “might reasonably be questioned” for purposes of disqualification when he creates an appearance of partiality. The appearance of partiality, in turn, is a subset of the “appearance of impropriety,” which the Commission that reviewed the Model Code concluded was too indefinite to enforce. One could argue that an appearance of partiality is more


96. Id.


98. As an active participant in the Code reform project, I am nonetheless left to speculate why opponents of the appearance of impropriety in Rule 1.3 did not likewise oppose the appearance of partiality embedded in the disqualification rule (Rule 2.11(a)). The answer, I suspect, lies in the fact that the appearance of impropriety rule is often enforced in disciplinary proceedings, and opposition to that rule was led by the Association of Professional Responsibility Lawyers, whose members represent judges in such proceedings. The disqualification rule, in contrast, is employed first and foremost as a procedural rule for judges to recuse themselves sua sponte, or for litigants to seek a judge’s disqualification, and is used as a basis for discipline only rarely, when a judge’s erroneous failure to disqualify is willful. James J. Alfini, Steven Lubet, Jeffrey M. Shaman & Charles Gardner Geyh, Judicial Conduct and Ethics, § 4.01 (4th ed. 2007).
“definite” than an appearance of impropriety because the former is a narrower subset of the latter. This assumes, however, that concern over the “appearance of impropriety” standard relates primarily to the vagueness of the term “impropriety,” rather than “appearance,” which may not be the case. In short, the legal establishment is united in the view that judges should avoid appearance problems but is less certain about whether it has a common understanding of when appearance problems arise that is sufficient to serve as the basis for enforcing a rule.

Decisions concerning the appearance of impropriety generally, and when a judge’s impartiality might reasonably be questioned for purposes of disqualification in particular, are not unguided; rather, they are informed by precedent. As an author who has taken money from publishers to write or co-write treatises on judicial ethics and disqualification, I cannot be heard to say that the precedent those treatises organize and digest is unhelpful to judges who seek guidance on when to disqualify themselves under an appearance-based disqualification regime. The question, however, is whether that precedent is helpful enough to create a shared understanding within the legal establishment of when a judge’s impartiality might reasonably be questioned. Such an understanding is needed for an appearances-based disqualification regime to achieve its goals.

One preliminary complication, which has been bemoaned by others, is that disqualification precedent and analysis are deficient for reasons having to do with the process by which they are generated. 99 First, the judge who disqualifies herself at the prompting of a party or on her own initiative typically does so without explanation; likewise, the judge who denies a motion to disqualify may or may not see fit to explain her decision. 100 Second, disqualification disputes are between the movant and the judge, rather than between the parties, as a consequence of which disqualification motions are often spared the rigors of the normal adversarial process. 101 Third, appellate review of disqualification decisions is confined almost exclusively to allegedly erroneous non-disqualification; review of

100. Frost, supra note 99, at 536.
101. Id.
allegedly erroneous disqualification, while not unheard of, is extremely rare. Fourth, with rare exception, non-disqualification is subject to a highly deferential standard of review on appeal (for abuse of discretion or clear error). The net effect is that appellate precedent is of limited utility to judges seeking guidance: appellate courts do not decide when a judge is wrong to disqualify herself; they do not decide when a judge is wrong not to disqualify herself, except when she is so wrong that she abused her discretion; and when they affirm a trial judge’s decision not to disqualify herself, it may be because they thought that the trial judge was right, or it may be because they thought that the trial judge was not wrong enough to override her discretion.

These concerns, while legitimate, should not be exaggerated: appellate courts can and do manage to offer trial judges meaningful guidance on their obligations under disqualification rules, in the context of appellate opinions. As a consequence, precedent has settled questions about whether a judge’s impartiality might reasonably be questioned in a variety of specific contexts. My primary concern, however, is not with the disqualification questions that precedent has settled but with the unsettled questions that have pushed disqualification into the spotlight. The structure of the appearances-based disqualification rule proceeds from the unstated premise that impartial judges are the norm, or default position. It is reasonable to deviate from that default position and doubt the impartiality of a judge under the rule only when one can point to specific facts, events, or conduct upon which such doubt is reasonably founded. Put another way, the traditional view that animates the appearances regime begins with a presumption of impartiality, in which “reasonable” people would agree that the prototypical judge is committed to disregarding extralegal influences and following the law. The question then becomes whether there is evidence sufficient to overcome this presumption and lead a reasonable person to doubt a particular judge’s impartiality.

The history of judicial disqualification under the common law began with an almost irrebuttable presumption of impartiality followed by centuries of struggle to weaken that presumption in different ways: by requiring disqualification for conflicts of interest

103. FLAMM, supra note 84, § 33.1.
104. Id.
that pose a risk of bias; by crafting procedural mechanisms aimed at forcing disqualification without a finding of actual bias; and by forcing disqualification for reasonably perceived, rather than actual bias. An ironclad presumption of impartiality is consistent with the traditional and formalist view that judges bracket out extralegal influences and follow the law. The ensuing agitation for more stringent disqualification rules reflects a sentiment more closely tied to the realist tradition—that judges are people too, and as such are subject to extralegal influences; hence, they should disqualify themselves when those influences risk getting the better of them.

In order for the judiciary to articulate a coherent view of when a judge’s impartiality might reasonably be questioned, there must be a rough consensus as to how sturdy the presumption of impartiality should be. Such a consensus, however, is lacking: judges of a more traditionalist bent will guard the presumption of impartiality far more zealously than those with, for want of a better term, more “realist” leanings.

In Caperton v. A.T. Massey Coal Co., the Supreme Court confronted the question of whether a plaintiff’s due process rights were violated by a state supreme court justice who refused to recuse himself after receiving over $3 million in independent support for his election from the defendant’s CEO, while the case was pending. Commentary on Caperton has tended to dwell on the “probability of bias” test that led the five-member majority to rule that Caperton’s rights were violated, the Pandora’s box of uncertainties that the four dissenters claimed the majority’s new test had opened, and Caperton’s implications for judicial campaigns. Lurking beneath

105. See supra Part II.
106. ROY L. BROOKS, STRUCTURES OF JUDICIAL DECISION-MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY 37–59 (2d ed. 2005).
these issues, however, was a more fundamental rift over how deep the presumption of impartiality ought to go. The dissenters subscribed to the traditional view: “There is a ‘presumption of honesty and integrity in those serving as adjudicators’ . . . . All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise.”109

The majority, in contrast, exhibited realist or scientific inclinations. Its opinion emphasized the frailties of the human mind and the risk of unconscious bias, which led it to question the capacity of judges to make subjective assessments of their own impartiality. Without an “objective” rule, the majority opined, “there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case.”110

The objective rule that the majority articulated, asked “whether, ‘under a realistic appraisal of psychological tendencies and human weaknesses,’ 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.’”111

*Caperton* may have established a new test for determining when non-disqualification gives rise to due process problems, but it did nothing to remediate the underlying divide over how strong the presumption of impartiality should be. Even assuming that in future cases the four dissenters relent and acquiesce to the “risk of actual bias” test, it is safe to anticipate that that their assessment of that risk will be colored by their underlying view that judges can be trusted to abide by their oaths to remain impartial. In other words, except in extreme or clearly settled cases, disqualification for bias, probable bias, or perceived bias will remain a deeply fractured process as long as judges lack a basic, shared understanding of when the presumption of impartiality should yield.


110. Id. at 2263.
111. Id. (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).
landscape. One narrative is that judges take umbrage at disqualification motions, which they regard as a slight to their honesty and integrity. Lawyers are loath to seek disqualification except in truly extreme cases because it will anger the judge without leading to his disqualification. A second narrative is that lawyers seek disqualification strategically, not because they doubt the judge’s real or perceived impartiality, but because they suspect that the judge will be unsympathetic to their clients on the merits. A third narrative is that an appearances-based disqualification regime leads to unnecessary disqualification by judges who are overly sensitive to appearance concerns or are looking for excuses to avoid uncomfortable situations.

While seemingly at odds, these conflicting narratives make sense in a system where disqualification norms are fractured. Traditionalist judges will take offense at the suggestion that they are less than impartial—an appearances-based regime may seek to lessen the stigma of disqualification by sparing judges the need to acknowledge actual partiality, but when judges are accused of

112. See Frost, supra note 99, at 567–68 (“[F]or example, a district court judge stated that he found the motion for his disqualification ‘offensive’ and he asserted that it ‘impugned [his] integrity’” (quoting Hook v. McDade, 89 F.3d 350, 353 (7th Cir. 1996))); see also, Nancy M. Olson, Judicial Elections and Courtroom Payola: A Look at the Ethical Rules Governing Lawyers’ Campaign Contributions and the Common Practice of “Anything Goes,” 8 CARDOZO PUB. L. POL’Y & ETHICS J. 341, 365 (2010) (arguing that recusal is an “illusory tool” because “litigants fear bringing valid recusal motions because they may anger judges, and because the odds of success are extremely low”); David K. Stott, Comment, Zero-Sum Judicial Elections: Balancing Free Speech and Impartiality Through Recusal Reform, 2009 BYU L. REV. 481, 500–01 (2009) (arguing that the “structural emphasis on judicial self-recusal creates a major weakness in existing recusal standards—litigants fear judicial retribution”).

113. See Norman L. Greene, How Great is America’s Tolerance for Judicial Bias? An Inquiry into the Supreme Court’s Decisions in Caperton and Citizen’s United, Their Implication for Judicial Elections, and Their Effect on the Rule of Law in the United States, 112 W. VA. L. REV. 873, 906 (2010) (“[T]here are also concerns about strategic recusals, where one judge or group of judges is inclined to disqualify another principally because of a voter disagreement, as opposed to a recusal standard necessarily being met.”); Shugerman, supra note 88, at 536–37 (2010).

114. See generally Cravens, supra note 21, at 12 (noting that one of many ways in which the current approach goes awry is in its promotion of over-recusal); Dmitry Bam, Understanding Caperton: Changing the Role of Appearances in Judicial Recusal Analysis, 42 MC GEORGE L. REV. 65 (2010) (arguing that states ought to tailor new recusal procedures in response to Caperton).
apparent bias, it is easy enough to understand why they would receive it as an unwelcome accusation of bias with a candy-coating. Lawyers who risk angering traditionalist judges by seeking their disqualification will thus think twice about doing so, unless they have concluded that the judge will be averse to their position on the merits, in which case they have less to lose by seeking disqualification. Judges with realist tendencies, in contrast, may be utterly unfazed by motions to disqualify and, in some cases, may bend over backwards to preserve the appearance of impartiality by stepping aside when asked, even when claims of perceived bias are strained. In short, an intra-judicial schism over the strength of the presumption of impartiality compromises the correctness of an assumption key to the success of an appearances-based regime: that judges share a common understanding of when impartiality might reasonably be questioned.

B. Fracture Between the Bench and Bar, and the Public

The schism over the presumption of impartiality is not only intra-judicial, but between the bench and bar, on the one hand, and the people they serve on the other, including the people's elected representatives in legislatures. The fracture lines between the legal establishment and the public are best understood in historical, legal, and psychological terms.

1. The Historical Divide

The history of judicial disqualification recounted in Part II is a history of legislators, who are doubtful of judges' impartiality, enacting disqualification laws with which judges, convinced of their own impartiality, grudgingly comply. Thus, cases arose in which judges sat after concluding that the presumption of impartiality had not been overcome by a specific conflict of interest rule. Unhappy legislatures responded with new conflict of interest rules. Judges interpreted the new rules to permit cases to fall through cracks between them, and legislatures responded with more conflict rules and procedures to disqualify judges for alleged bias. Ambivalent judges gave the new procedures a parsimonious construction, and legislatures responded with rules requiring disqualification for
perceived bias.\textsuperscript{115} Judges loath to acknowledge perceived partiality, in turn, have declined to disqualify themselves in a number of high-profile cases which have provoked a public outcry, as described at the outset of this article. The overall effect is what John Leubsdorf has aptly described as a "vicious cycle," in which litigants move for disqualification, judges resist, Congress responds with more stringent disqualification rules, which are then subjected to judicial interpretations that contort the rules again.\textsuperscript{116}

2. The Legal Divide

Fracture lines between the bench and bar on the one hand, and the public on the other, are likewise visible in the law of judicial conduct. For judges generally, commitment to impartiality is entrenched and robust: Sir Matthew Hale’s Code of Conduct demanded it, Blackstone’s commentaries presumed it, and canons of judicial ethics promulgated in the early twentieth century called upon judges to avoid even the appearance of "impropriety," which subsumes the appearance of partiality. Current “law” governing judicial conduct perpetuates this ethos of impartiality. The first words of the first Canon of the Model Code of Judicial Conduct, adopted with modifications in virtually every jurisdiction, declare: “A judge shall uphold and promote the independence, integrity and

\textsuperscript{115} This history likewise reflects a continued intra-judicial schism; the American Bar Association’s Model Code of Judicial Conduct, which proposed the first appearance-based disqualification rule, was propagated among the states by supreme courts which adopted the Model Code. \textit{Taking Disqualification Seriously, supra} note 13, at 14 (“The Model Code’s general provision, requiring disqualification if a judge’s ‘impartiality might reasonably be questioned,’ has been adopted by every jurisdiction, with the possible exceptions of Montana and Michigan.”). Supreme courts adopting an appearance-based rule clearly approved of the approach in principle and the discretion it afforded judges to disqualify themselves when necessary. That supreme courts approved of the approach in principle, however, does not mean that judges shared a common understanding of when disqualifying appearance problems arose.

\textsuperscript{116} Leubsdorf, \textit{supra} note 85, at 245 (“Litigants seeking to recuse unfavorable judges file motions; judges step aside or resist, with the most biased judges the least willing to withdraw; Congress and commentators survey the questionable results, seeking to end them with more sweeping legislation; the new legislation is thrown to the courts, where it undergoes the same pressures that twisted its precursors.”). \textit{See also} Frost, \textit{supra} note 99, at 534 (“[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.”).
impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”\textsuperscript{117} Canon 2 states: “A judge shall perform the duties of judicial office impartially.”\textsuperscript{118} Rules underlying Canon 2 elaborate—Rule 2.3, for example, directs that a judge “shall perform the duties of judicial office . . . without bias or prejudice.”\textsuperscript{119}

Closely linked to the duty to remain impartial is the duty to abide by the Rule of Law. Rule 2.2 states that a judge “shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially,” and an accompanying comment explains that “[a]lthough each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.”\textsuperscript{120} Rule 2.4(B), in turn, states that a judge “shall not permit family, social, political, financial or other relationships to influence the judge’s judicial conduct or judgment.”\textsuperscript{121} An accompanying comment adds that “[a]n independent judiciary requires that judges decide cases according to the law and facts, without regard to whether the particular law or litigants are popular or unpopular with the public, the media, government officials, or the judge’s friends or family,”\textsuperscript{122} and the Reporters’ Notes explain that this comment “link[s] the duty not to be swayed by the public, friends, or family to the judge’s primary obligation to follow the law and facts impartially.”\textsuperscript{123}

In short, within the legal establishment, a “good” judge is an ethical judge and an ethical judge is impartial, avoids the appearance of partiality, and follows the law. When a party asks a judge to disqualify himself because his impartiality might reasonably be questioned, it implies one of two possibilities: either the party is alleging that the judge appears to be partial but has not stepped aside on his own initiative, in contravention of his ethical duty to avoid the appearance of impropriety,\textsuperscript{124} or the party is finessing an accusation

\textsuperscript{117.} \textsc{model code of judicial conduct} canon 1 (2007).
\textsuperscript{118.} \textit{id.} at canon 2.
\textsuperscript{119.} \textit{id.} at r. 2.3(a).
\textsuperscript{120.} \textit{id.} at r. 2.2 cmt. 1.
\textsuperscript{121.} \textit{id.} at r. 2.4(b).
\textsuperscript{122.} \textit{id.} at r. 2.4 cmt. 1.
\textsuperscript{123.} geyh & hodes, supra note 95, at 31.
\textsuperscript{124.} in some cases, for example, when the disqualification motion is grounded in extrajudicial statements of the judge creating an appearance of bias, it is the
that the judge is biased in fact, in contravention of the judge’s ethical duty to be impartial. For judges who are truly committed to administering justice impartially, neither possibility is one they will concede lightly. Therein lies the problem for the third goal of the appearances-based regime: judges will not find it appreciably less stigmatizing to disqualify themselves for creating an appearance of partiality if an appearance is itself problematic or if an allegation of appearing partial is understood as a polite euphemism for partiality in fact.

In the preceding section of this article, I pointed to a schism within the bench and bar, in which some judges, including the majority in Caperton, are willing to second-guess judicial impartiality more readily than others. On the whole, however, judges are naturally going to be slower than the public they serve to second-guess the real or perceived impartiality of fellow judges. Disqualification can be conceptualized in two ways: as a matter of litigation procedure and as a matter of judicial ethics. Those who statements themselves that give rise to an appearance problem. See, e.g., United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976); United States v. Roebuck, 271 F. Supp. 2d 712 (V.I. 2003). In other cases, for example, where the judge is a close personal friend of a litigant, the underlying conduct—a personal friendship—may be innocuous enough, but an appearance problem arises as a result of the judge’s failure to step aside on his own initiative after the case is filed. No jurisdiction would discipline a judge for failing to disqualify himself before a motion was filed, or for refusing to disqualify himself after a motion was filed, if the refusal was in good faith. ALFINI, ET AL., supra note 98, § 4.01. The point, however, remains that, except when the judge is unaware of the conduct giving rise to the motion (e.g., the judge is unaware that a close relative recently acquired a financial interest in a party appearing before the judge), the unstated premise of the motion is that the judge is being asked to remedy an appearance problem that he could (and implicitly should) have resolved by recusing himself sua sponte.

125. There is a more innocuous, third possibility that I discuss later: the judge did not recognize the appearance problem until it was called to her attention. For this possibility to gain traction with judges, however, the scientific or realist approach to disqualification must be more widely accepted. See infra notes 213–18 and accompanying text.

126. Courts have acknowledged this difference in world view by evaluating whether a judge’s impartiality might reasonably be questioned from the perspective of a fully-informed, objective observer who is not a judge because judges will be less skeptical of a fellow judge’s impartiality than the general public. GEYH, supra note 48, at 18. Such an approach, however, begs the question of whether judges will credit the reasonableness of an objective outsider’s skepticism as readily as outsiders would.

127. GEYH, supra note 48, at 2.
conceptualize disqualification requirements largely as rules of practice and procedure that good lawyers exploit for the benefit of their clients (contributing to the narrative that lawyers seek disqualification for strategic reasons), may be unconcerned by the implications of disqualification motions. If those judges have internalized the lessons of legal realism and are sensitive to the "psychological tendencies and human weaknesses" of the judicial mind, they may be receptive, or at least not hostile, to disqualification requests.\textsuperscript{128} On the other hand, to the extent that judges as a whole remain mindful of the ethical dimension to disqualification, they are likely to embrace a more muscular presumption of impartiality and be inherently skeptical of calls for their disqualification. Even the \textit{Caperton} majority, which concluded that the circumstances there overcame the presumption of impartiality, nevertheless took pains to emphasize numerous times how exceptional those circumstances were.\textsuperscript{129}

Juxtaposed against this deep and abiding commitment to impartiality and the rule of law embedded in codes of judicial conduct are the disqualification rules themselves. Disqualification rules enumerate the circumstances in which judges cannot be trusted to rule impartially and according to law, i.e., when the risk is too great that a judge's personal prejudices or preferences will get the best of her. Disqualification rules thus challenge the ethos of impartiality pervading codes of conduct and the judge's self-definition. Although disqualification rules commonly appear in codes of conduct that supreme courts adopt, the engine driving their development is housed in legislatures that have been far more skeptical of judicial impartiality than have judiciaries.

As previously noted, there is a presumption of impartiality implicit in a rule-making disqualification, an exception to the norm in contrast to a hypothetical rule proceeding from the opposite presumption—that judges were disqualified except in enumerated circumstances. The strength of that implicit presumption, however, is unstated in the rules themselves, and the vicious circle described by Leubsdorf can best be explained as a struggle between the weaker presumption of impartiality shared by legislators who make disqualification rules, and the stronger presumption of impartiality held by judges who interpret and apply those rules. Thus, the

\textsuperscript{129} Id.
burgeoning number of disqualifying events that legislatures have added to their lists over the years, has been offset by a comparably impressive list of rules of judicial construction that judges have crafted to curtail the reach of disqualification requirements. Such rules of judicial construction include: creating a powerful presumption of impartiality; strictly construing disqualification procedures against movants; offsetting the duty to disqualify with a duty to sit; delegating disqualification decisions to the judge whose impartiality is challenged; limiting acceptable evidence of judicial partiality to that emanating from extrajudicial sources; subjecting non-disqualification to deferential standards of review; subjecting non-disqualification of judges on courts of last resort to no review at all; and limiting the application of disciplinary sanctions for non-disqualification to circumstances deemed willful rule violations.

Illustrative of the resulting schism between judges and their defenders, on the one hand, and legislators and the public they represent, on the other, is the fractious debate over "judicial activism" and the rule of law. Impartiality subsumes a lack of bias and an open mind enabling judges to set their personal prejudices aside and uphold the rule of law. Judges and court defenders, seeking to shield judges from attacks by court critics, have rallied around the principle that judges who are insulated from threats and intimidation will bracket out extralegal influences and follow the

130. See infra notes 131–38.
131. FLAMM, supra note 84, § 3.3.
132. United States v. Sykes, 7 F.3d 1331, 1339 (7th Cir. 1993).
133. FLAMM, supra note 84, § 20.8.
134. Id. § 17.6.
135. Id. § 19.8.
136. Id. § 33.1.
138. ALFINI ET AL., supra note 98, § 4.01.
139. MODEL CODE OF JUDICIAL CONDUCT Terminology ("'Impartial,' 'impartiality,' and 'impartially' mean 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.").
law. In contrast, court critics in legislatures and elsewhere accuse judges of disregarding the law and acting on their personal feelings and ideological appetites. Survey data show that while public confidence in the courts remains strong, most people do not believe judges when they say that they always follow the law and think judges often base decisions on their personal feelings.

I do not mean to imply that judges are or should be subject to disqualification for their ideological predilections, except in extreme cases when their views are so strongly held that they have publicly pre-committed themselves to reach a particular result before the case is heard. My point is simply that judges and the public do not share a common view of what influences judges and their decision-making and to what extent. In the context of disqualification, it means that the public will be quicker to question the impartiality of judges than will judges themselves. That, in turn, compromises the ability of an appearances-based disqualification regime to promote public confidence in the courts because the judges who implement that regime will be untroubled by episodes of non-disqualification that may be of much greater concern to a more skeptical public.

141. See id. (noting post realist critics that argue that judicial independence undermines the preferences of political majorities).
143. This is the line that the Model Code of Judicial Conduct draws. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(a)(5).
144. Disqualification precedent arguably addresses this problem by directing judges to evaluate a judge’s impartiality from the perspective of the public, or at least an objective, external observer. E.g., In re United States, 441 F.3d 44, 56 (1st Cir. 2006); United States v. Salemme, 164 F. Supp. 2d 86, 91 (Mass. Dist. Ct. 1998). As discussed in the next section, however, there are significant psychological impediments to judges accurately assessing how they are perceived by others.
3. The Psychological Divide

Finally, the schism between the bench/bar and the public can be understood in psychological terms. A multistate study conducted by the American Judicature Society found that judges are ambivalent about disqualification.\textsuperscript{145} Given the foregoing discussion, that should come as no surprise: disqualification rules give litigants a means to challenge judicial impartiality, which is at the core of the judge's self-definition.

At a more elemental level, however, disqualification practice proceeds on two implicit assumptions: that judges are able to assess the extent of their own bias; and that judges are able to assess how others reasonably perceive their conduct. Neither assumption is safe.

Studies reveal that people generally are poor at self-assessment and tend to be overly optimistic judges of their own abilities.\textsuperscript{146} Inflated preconceptions of their abilities, in turn, lead subjects to over-estimate their competence in performing specific tasks.\textsuperscript{147} Unsurprisingly, then, test subjects "report being less susceptible than their peers to various cognitive and motivational biases."\textsuperscript{148} They tend to exhibit a blind spot to their own biases, take their perception of the world as objective reality, and attribute contradictory perspectives to bias in others, rather than themselves.\textsuperscript{149}

Drawing conclusions about judges from such data is risky because judges differ from the general population in their training, experience, and commitment to objectivity and impartiality. One study, however, has found that judges are susceptible to implicit racial bias.\textsuperscript{150} Another has shown their vulnerability to egocentric

\begin{itemize}
\item \textsuperscript{147} David Dunning et al., Why People Fail to Recognize Their Own Incompetence, 12 Current Directions in Psychological Sci. 83, 86 (2003).
\item \textsuperscript{148} Emily Pronin et al., The Bias Blind Spot: Perceptions of Bias in Self Versus Others, 28 Personality & Soc. Psychol. Bull. 369, 374 (2002).
\item \textsuperscript{150} Jeffrey Rachlinski et al., Does Unconscious Racial Bias Affect Trial Judges?, 84 Notre Dame L. Rev. 1195, 1222 (2009).
\end{itemize}
bias—the propensity to overestimate one’s own abilities.\textsuperscript{151} Therefore, one can reasonably suspect that when evaluating the extent of their own bias, judges’ professed commitment to impartiality may render them especially vulnerable to overly-optimistic self-assessments or as Professor Steven Lubet calls it: “introspection deficit disorder.”\textsuperscript{152}

Disqualification for the appearance of bias can serve as a gentle proxy for suspected bias in fact, but when applying the appearance-based test, judges do not ask whether they are biased in fact, but whether they might reasonably appear so to another. Data shows, however, that people view themselves differently than others view them: whereas actors tend to evaluate their conduct in situational terms (I was late because my alarm clock did not go off), observers tend to evaluate actors’ conduct in dispositional terms (he was late because he is not a punctual person).\textsuperscript{153} Whereas actors evaluate their own conduct through introspection based on internal inputs, observers evaluate the conduct of actors through extrospection based on external cues.\textsuperscript{154} That leads actors to overvalue their introspections and undervalue or ignore those of others.\textsuperscript{155}

To the extent judges evaluate their own conduct differently than observers do, a schism between judges and the public is inevitable. The conduct, or external cues, leading observers to suspect that the judge has a biased disposition, will be marginalized by the judge who: does not think himself biased; attributes his conduct to the exigencies of the situation; and discredits opposing inferences as uninformed. Thus, judges will be less inclined to find themselves biased than the public at large would and will likewise be less inclined to credit public suspicions of bias than will the public.

\textsuperscript{151} Chris Guthrie et al., Inside the Judicial Mind, 86 CORNELL L. REV. 777, 811–16 (2001).
\textsuperscript{152} STEVEN LUBET, THE IMPORTANCE OF BEING HONEST 6 (2008).
\textsuperscript{154} Emily Pronin, How We See Ourselves and How We See Others, 320 SCIENCE 1177, 1177 (2008).
The historical, legal, and psychological schism between judges and the public has manifested itself in several recent episodes. Justice Scalia clung tenaciously to his conclusion that sitting on a case in which one of the parties was a personal friend with whom he had recently been duck hunting could not reasonably call his impartiality into question and categorically dismissed public expression of views to the contrary as unreasonable and ill-informed.\textsuperscript{156} A New York Times investigation of judicial campaign contributions in Ohio revealed that judges rarely disqualified themselves from cases in which contributors appeared before them, while an overwhelming majority of the public in Ohio and elsewhere believed that campaign contributions influence judicial decisions.\textsuperscript{157} The majority rule in the state and federal courts continues to be that the presumption of impartiality judges enjoy justifies them deciding their own disqualification motions, while survey data shows that the vast majority of the public thinks that disqualification requests should be assigned to a different judge.\textsuperscript{158} In short, the prospects for an appearances-based disqualification regime to promote public confidence in the courts are undercut by recurrent divergence of public and judicial views over when a judge’s impartiality appears doubtful.

C. Fractures Within Public Attitudes

The capacity of an appearances-based disqualification regime to achieve its goals depends on a more or less coherent conception of when it is reasonable to question a judge’s impartiality that judges and the public share. If, however, the public itself is deeply divided


\textsuperscript{157} Adam Liptak & Janet Roberts, Campaign Cash Mirrors a High Court’s Rulings, N.Y. TIMES, Oct. 1, 2006, § 1, available at 2006 WLNR 16983797; T.C. Brown, Majority of Court Rulings Favor Campaign Donors, THE PLAIN DEALER (Cleveland), Feb. 15, 2000, at 1A.

\textsuperscript{158} ABA Judicial Disqualification Project, supra note 13 (noting that most states authorize the subject judge to rule on disqualification); see Press Release, Justice at Stake, Poll: Huge Majority Wants Firewall Between Judges, Election Backers, (Feb. 22, 2009), available at http://www.justiceatstake.org/newsroom/press_releases.cfm?show=news&newsID=5677 (finding that 81% of survey respondents thought that a different judge should decide disqualification motions).
over whether and when to trust its judges to be impartial, the search for that coherent, shared conception becomes elusive if not illusory. A majority of the public thinks that judges are impartial. One recent study has found that fully one-third of the public is so confident in the impartiality of its judges that it does not second-guess their impartiality, even in extreme-seeming scenarios where parties make sizable contributions to a judge’s reelection campaign.

Not all Americans share that view. A significant minority lacks confidence in the courts and questions their impartiality. Of particular concern, there is a noticeable divide along racial lines. In one survey, a majority of whites (62%) believe that judges are fair and impartial, while a majority of African-Americans (55%) believe that judges are not fair and impartial. Consistent with these results, a major study conducted by the National Center for State Courts found that “African-Americans tend to have distinctly lower


160. James Gibson & Gregory Caldeira, Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can Legitimacy of the Courts Be Rescued by Recusal?, at 21 (July 2, 2009) (on file with authors) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1428723##. The authors’ core finding that two-thirds of the public does think that a judge’s impartiality is compromised when he receives campaign contributions from parties is obscured by two additional findings that fixate their attention: first, that the public is as troubled by rejected offers of support to a judge’s campaign as accepted ones; and second, that disqualification did not fully rectify the perception problems that campaign contributions created. Id. at 30, 32. The first point, while interesting, simply reinforces the importance of existing rules that require judges to create campaign committees to receive contributions in their stead, where offers of support rejected by campaign committees will not come to the judge’s attention. MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(8). The second finding is based on survey results showing that disqualification does not restore the public’s confidence in the impartiality of the disqualified judge. Id. at 32. Such an inquiry is puzzling: If, for example, a judge recuses himself from a women’s rights case because he is a raging misogynist, the data point that few respondents think the act of disqualification will cure him of his misogyny is neither surprising nor relevant from a regulatory perspective. The relevant point, which needs no survey support, is that by disqualifying himself, the case will be heard by a different judge, who is unencumbered by the disqualified judge’s bias.

evaluations than do Whites of the performance, trustworthiness, and fairness of courts."\footnote{DAVID B. ROTTMAN ET AL., PERCEPTIONS OF THE COURTS IN YOUR COMMUNITY: THE INFLUENCE OF EXPERIENCE, RACE AND ETHNICITY, FINAL REPORT 10 (2003), available at http://www.ncjrs.gov/pdffiles1/nij/grants/201302.pdf.} For example, in a juror survey, 63% of white respondents thought court outcomes tended to be fair, while only 21% of African-American respondents thought so.\footnote{Id. at 65.}

The default position of an appearances-based disqualification regime is that judges are impartial: Disqualification is triggered by information that leads a reasonable person to question a judge's impartiality. When, however, a significant and identifiable subset of the general population does not accept that default position and begins from the premise that judges are not impartial, it leads to one of two conclusions. Either the views of the subset—in this case, African-Americans—are categorically unreasonable, or reasonable people do not necessarily share the presumption of impartiality upon which an appearances-based regime is grounded. Implicitly, the "law" has opted for the former conclusion, by clinging to the presumption that most African-Americans do not share—an understandable tack, given the impracticable alternative of disqualifying judges categorically as partial-seeming. My ultimate point, however, is that the efforts of an appearances-based disqualification regime to promote public confidence in the courts is doomed from the start, to the extent that a segment of the public that ought to be of primary concern to the legal establishment (because its confidence in courts is low) does not share the presumption of impartiality that the regime employs as its starting point.

IV. PROPOSED ALTERNATIVES TO THE APPEARANCES-BASED DISQUALIFICATION REGIME

I am not alone in my doubts about the future of an appearances-based disqualification regime. Others have proposed alternatives that, in effect, seek to resurrect and rehabilitate one of the three predecessor regimes discussed in Part II.
A. Revitalizing the Presumption of Impartiality

Although the legal establishment as a whole remains committed to the appearance of justice in principle, some have dissented from the view that keeping up appearances is a worthy goal.164 Doubts about the intrinsic merits of obsessing over appearances, coupled with the inability of the appearances-based regime to articulate a coherent and enforceable standard for disqualification, has led Professor Sarah Cravens to argue that "actual justice" should replace the appearance of justice as the lodestar for disqualification.165 Such an approach effectively reverts to a robust presumption of impartiality that focuses attention on the reasons a judge offers for the decisions she makes and requires disqualification only when those reasons reflect the judge’s inability or unwillingness to do actual justice in the case.

For Cravens, presumably, none of the problem cases discussed at the outset of this article are problem cases because the judges in question offer reasons for their decisions that manifest no incapacity to reach a result that does actual justice. West Virginia Justice Brent Benjamin adopted this approach himself when declining to disqualify himself from Caperton, arguing that a disqualification rule based on appearances was too vague and that the focus ought to be on the “actuality” of justice as reflected in the reasons justifying the decisions he made.166

Proposals for the return of a strong presumption of judicial impartiality that can be overcome only when necessary to do actual justice are provocative but wrongheaded, for two reasons. First, these approaches fixate on the lesser concern of over-disqualification, which is already subject to independent regulation.167 Second, and more fundamentally, approaches which


165. Cravens, supra note 21, at 5.


167. MODEL CODE OF JUDICIAL CONDUCT, R. 2.7 (2007), provides that “a judge shall hear and decide all matters assigned to the judge, except when disqualification is required,” and an accompanying comment cautions that “[u]nwarranted disqualification may bring public disfavor to the court and to the judge personally.”
pay no heed to the real, probable, or perceived bias of the judge and focus exclusively on the reasons a judge gives for her decisions, reflect a problematic conception of "actual justice."

For proponents of an "actual justice" approach, the primary problem with an appearances-based disqualification regime is that it leads to over-disqualification by judges who are impartial and would do actual justice but who disqualify themselves to avoid perception problems—or cases they would rather not decide. The problem of over-disqualification is largely one of squandering judicial resources on the administration of unnecessary disqualifications, whereas the problem of under-disqualification is one of subjecting litigants to the loss of life, liberty, or property in an unfair (or seemingly unfair) process. As between promoting fairness and administrative efficiency, the former goal is intuitively more compelling. To the extent that over-disqualification arguably damages public confidence by creating unwarranted doubts about judicial impartiality, it is proscribed by a separate ethics rule that judges violate on pain of discipline: "A judge shall hear and decide matters assigned to the judge, except when disqualification is required." A comment accompanying this rule in the Model Code explains that "the dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues." Over-disqualification is thus a lesser, independently regulated concern that would hardly seem to warrant a regime change.

More fundamentally, a disqualification standard that purports to ensure "actual justice" by looking exclusively at the reasons judges give for their rulings reflects an anachronistic understanding of judicial decision-making and embraces an impoverished conception of justice. One need not be an exponent of critical legal

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168. Shugerman, supra note 89, at 552.
169. Chief Justice Roberts made a related argument in his dissent in Caperton: "The Court's new 'rule' ... will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case." Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2267 (Roberts, C.J., dissenting).
170. MODEL CODE OF JUDICIAL CONDUCT R. 2.7 (2007).
171. Id.
studies to recognize that able lawyers (and judges) can conjure plausible reasons for varying outcomes in every case that is not so frivolous as to warrant sanctions for the suit being filed or defended. Were a judge to place those reasons on a wheel and explain her decisions with reference to whichever one she stuck with a dart, no theory of which I am aware would claim that justice was done simply because the reason so chosen was plausible. The same would be true if the judge’s choice of reasons was dictated by bias instead of a dart. Codes of conduct promote judicial independence, integrity, and impartiality because “actual justice” demands more than rationality—it demands that the decisions judges make be unsullied by bias, dependence, or dishonesty, regardless of whether a biased, dependent, or dishonest judge can rationalize his decisions coherently. Yet, a disqualification regime that evaluates a judge’s fitness to sit with exclusive reference to whether the decisions he renders are supported by acceptable reasons would, of necessity, bar disqualification for suspected bias, actual bias, and even corruption, as long as judges are clever enough to devise plausible explanations for their decisions. In a post-realist age, when the best empirical work to date shows that the decisions judges make cannot be divorced from the judges who make them because judicial decision-making is subject to a complex array of legal and extralegal influences,172 confining proof of judicial partiality to an analysis of the opinions judges generate seems strangely naïve.

B. Reinvigorating a Conflicts Regime

A multi-state study of judicial disqualification conducted in the 1990s found that while judges were ambivalent about disqualification generally, they were less so about disqualification for conflicts of interest.173 To the extent that problems with disqualification arise in the absence of intra-judicial consensus on when a judge’s impartiality might reasonably be questioned, one possible solution is to diminish reliance on that standard by expanding the list of specifically enumerated conflict scenarios in which disqualification is automatic. In other words, requiring judges to withdraw in specified circumstances (when rule-makers deem the

172. WHAT’S LAW GOT TO DO WITH IT?: WHAT JUDGES DO AND WHY IT MATTERS (Charles Gardner Geyh, ed., forthcoming 2011).
173. SHAMAN & GOLDSCHMIDT, supra note 145, at 67.
risk of bias too high) reduces, if not eliminates the discretion that has caused the appearances-based disqualification regime to fracture.

In the past few years, the American Bar Association, as keeper of the Model Code of Judicial Conduct, has sought to guard against under-disqualification by crafting new conflicts rules to address disqualification scenarios that would otherwise be regulated by the general appearances-based standard. In 1999, the ABA revised the Model Code to require disqualification for campaign contributions in excess of a dollar threshold, in response to concerns that judges were not disqualifying themselves from cases in which parties or their lawyers had contributed substantially to the judge’s election campaign.\footnote{74} In 2003, the ABA revised its Model Code again, to require disqualification when judges had previously committed themselves to deciding the issue now before them in a particular way.\footnote{75} This was a response to the Supreme Court’s decision in \textit{White}, which declared that judicial candidates had a right to announce their views on issues that they were likely to decide as judges.\footnote{76} In 2010, the ABA’s Standing Committee on Judicial Independence proposed a post-\textit{Caperton} rule that would require disqualification when parties or lawyers then before the judge had lent independent support to the judge’s campaign, under circumstances specified in the rule.\footnote{77}

There is nothing wrong per se with a conflicts-based approach to disqualification. Inevitably, however, specific, conflicts-based disqualification “solutions” operate one step behind the innumerable disqualification problems that arise and cannot address those problems until they have recurred with frequency and force sufficient to prompt a rule change. Moreover, disqualification is often desirable under circumstances that are insusceptible to capture in clearly worded rules. For example, it is generally accepted that a judge’s impartiality might reasonably be questioned when especially close friends appear before the judge as litigants, lawyers, or witnesses but not when mere acquaintances do.\footnote{178} In the aftermath of imbroglios such as Justice Scalia’s duck hunt with Vice President Cheney while the latter’s case was pending before the
Supreme Court, it is tempting to propose a conflicts-based rule to bar judges from hearing cases in which personal friends appear before them, and at least one scholar has made such a proposal.\textsuperscript{179} As a practical matter, however, a rule that legislates the distinction between friends and acquaintances can be no more helpful than the general, appearances-based disqualification rule it replaces. If such a rule simply declares that judges must disqualify themselves when close friends appear before them, it does no more than codify existing precedent under the general disqualification rule and avoids the very question it needs to address. If the rule seeks to guide judges on the distinction between friends and acquaintances, such guidance must either draw arbitrary lines (by requiring disqualification if a party is the judge’s former roommate, maid of honor, godparent to the judge’s child, etc.) or revert to general standards of reasonableness or perception that afford judges the discretion that specific, conflicts-based rules seek to constrain.

Several existing conflicts rules illustrate this latter problem by trading bright lines for flexibility in ways that promote reasonable outcomes at the expense of predictability, thereby blurring the distinction between a conflicts-based approach to disqualification and an appearances regime. For example, under Model Code Rule 2.11(A)(3), a judge must disqualify himself if he has an “economic interest” in the subject matter of the case.\textsuperscript{180} The Code defines “economic interest” to mean more than a “de minimis” interest. “De minimis,” in turn, is defined to mean “an insignificant interest that could not raise a reasonable question regarding the judge’s impartiality”—which circles the analysis back to an appearances-based standard.\textsuperscript{181} Similarly, Rule 2.11(A)(5) calls on a judge to disqualify herself for making a prior public statement that “appears to commit the judge to reach a particular result” in the case. Presumably, whether a judge “appears” to have committed herself must be evaluated from the perspective of the same elusive, objective, reasonable observer that has caused the appearances-based disqualification regime to fracture.

\textsuperscript{179} Miller, supra note 18, at 577–78.
\textsuperscript{180} MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(3) (2007).
\textsuperscript{181} The same issue arises with a separate rule that calls for disqualification for other interests that are “more than de minimis,” which, as just noted, is a term defined with recourse to appearances. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(2)(c) (2007).
I do not mean to beat a straw man into horse bedding here. Proponents of new, conflicts-oriented disqualification rules seek discrete solutions to specific problems. They do not propose such rules, alone or in combination, as a global cure for what ails the law of disqualification, and there is no need for me to critique a regime change that no one advocates. My point is simply that conflicts rules are, by their nature, piecemeal reforms that may serve their limited purposes well but which remain too limited in scope to remedy the larger problems of an appearances-based disqualification regime.

C. Resurrecting a Procedural Regime

The first procedural regime was limited in scope; it sought to facilitate judicial disqualification for bias by enabling litigants to invoke procedures that required the judge to withdraw without a showing that the judge was biased in fact. More recently, scholars and good government organizations began supporting a wider range of disqualification proposals that can be loosely organized under the heading of procedural reform. Such proposals include: expanding the use of peremptory challenge procedures for trial judges; assigning a different judge to decide disqualification motions; integrating disqualification practice into the adversarial process by enabling both litigants (not just the movant) to participate in framing the operative issues; requiring the judge to provide the parties with reasoned explanations for disqualification rulings; subjecting non-disqualification to de novo review on appeal; establishing a process for review of non-disqualification by appellate judges; and devising a procedure to replace disqualified appellate judges.

182. supra Part II.B.
184. Id. at 530; Frost, supra note 99, at 583–84.
185. Frost, supra note 99, at 582.
186. Goldberg et al., supra note 183, at 531.
187. Id. at 531–32.
188. Frost, supra note 99, at 584.
189. Goldberg et al., supra note 183, at 532.
1. The Case for Procedural Reform

The recent push for procedural reform manifests an ongoing struggle for disqualification to join the mainstream of judicial administration. Having a judge rule on the propriety of his own conduct, without the benefit of adversarial argument, without the need to explain his decision, and subject to a deferential standard of review or no review at all, reflects the extent to which disqualification has been marginalized. Taking disqualification more seriously by subjecting it to the traditional rigors of the legal process is thus a significant step in its evolution. Professor Amanda Frost comes closest to articulating a unifying theme for these procedural reforms when she advocates a "process-oriented approach to judicial recusal" sup r a note 99, at 531.

It is time to stop tinkering with the substantive standard for recusal, and instead to propose reforming the process by which the recusal decision is made. The solution I offer is to incorporate into recusal law the core tenets of adjudication . . . essential to maintaining the judiciary's legitimacy . . . . Chief among these are the adversarial system in which parties present facts and arguments to an impartial judge, who then issues a reasoned explanation for her ruling. Id. at 535.

Put in broader context, at a time when the appearances-based regime is crumbling because consensus on the application of substantive disqualification rules is lacking, reorienting the focus toward procedural reform is a natural next step. The goals of an appearance based disqualification regime have been to promote public confidence in the courts by linking the need for disqualification to public perception and to end under-recusal by destigmatizing disqualification and obviating the need for subjective assessments of actual bias. While procedural reform seeks to improve the quality of disqualification decision-making generally, it does so in ways that further the goals that the appearances-based regime has pursued but failed to achieve. For example, preemptory

190. Frost, supra note 99, at 531.
191. Id. at 535.
challenge procedures address under-disqualification without recourse to stigmatizing challenges to a judge’s impartiality or inquiries into the judge’s state of mind. Reassigning disqualification motions to a different judge promotes public confidence by dispelling suspicions that the fox is guarding the henhouse.

Of particular importance, procedural reform can promote public confidence in the disqualification process despite an ongoing lack of consensus over the interpretation of substantive disqualification standards that judges apply. Research on public satisfaction with courts has yielded several important findings. In a study of misdemeanor cases, Professor Tom Tyler found that among defendants, case outcomes had “no direct effect on assessments of the judge or of the court system beyond what could be explained by perceptions of fairness,” which led Tyler to conclude that defendants who “fare poorly at trial will not denigrate the judge or the system so long as they believe their outcomes are fair ones reached by fair procedures.” Later studies reached similar conclusions in felony cases and civil actions. A major study by the National Center for State Courts Study concurred that “perceptions that courts use fair procedures and treat groups equally are the strongest predictors of favorable evaluations of court performance.” Taken together, “studies have consistently found that judgments of the fairness of the procedures that occur when citizens deal with legal authorities influence citizen satisfaction and evaluation of those authorities.”

Tyler's work further reveals that from the public’s perspective, “procedural justice” in court settings is a multifaceted concept that brings at least seven considerations to bear: (1) the judge’s efforts to be fair, (2) the judge’s honesty, (3) the ethics of the judge’s conduct, (4) the parties’ opportunity for representation, (5) the quality of the judge’s decisions, (6) the opportunity for appeal, and (7) the judge’s bias. Each of these seven considerations is implicated by one or more proposed reforms to disqualification

194. ROTTMAN ET AL., supra note 162, at 60.
196. Id. at 121.
procedures. Mechanisms providing a different judge to decide disqualification motions and enabling parties to strike a judge they distrust aim to reassure litigants that their judge will be fair, honest, ethical (respectful of their right to an impartial decision-maker),\footnote{In Tyler’s study, “ethical” related to whether the judge treated litigants with courtesy and respected their rights. \textit{Id.} at 129.} and unbiased. Requiring judges to explain their disqualification rulings aims to improve the quality of decision-making, as does subjecting disqualification questions to the rigors of the adversarial process, with the latter also increasing (at least indirectly) the parties’ opportunity for representation in the disqualification process. Finally, proposals to end deferential review of disqualification determinations by trial judges and establish a means to review non-disqualification of Supreme Court justices effectively enhance the opportunity for meaningful appellate review.

Given the complex, multifaceted character of procedural fairness, studies have shown that the perceived fairness of procedure is context-dependent.\footnote{TYLER ET AL., \textit{supra} note 193, at 92.} However, “there is considerable consensus among Americans about what constitutes a fair procedure within a particular setting.”\footnote{Id.} It is thus unsurprising, for example, to find widespread agreement that in disqualification proceedings, rulings should not be made by the judge whose disqualification is sought.\footnote{See Pronin et al., \textit{supra} note 148 (discussing the social psychology study’s conclusion that one who is susceptible to bias has difficulty avoiding that bias, but when the bias is negative, one works hard to avoid that bias and denies susceptibility to that bias. Thus, a biased judge cannot avoid his bias, even if he seeks to avoid it and denies his susceptibility.).}

In sum, research on procedural justice tells us that if courts follow disqualification procedures that the public regards as fair, public confidence is less likely to be adversely affected by disagreement over the substantive outcomes of disqualification rulings that courts make.

2. Procedural Reform and the Public Confidence Puzzle

The primary argument against procedural reform is the claim that it is unnecessary. Judges who are committed to and convinced of their collective impartiality may regard the campaign for
disqualification reform as much ado about nothing, or as Judge Edith Jones told the press, "a solution in search of a problem." Such categorical pronouncements are belied by the analysis in Part III, which shows the extent to which an appearances-based disqualification regime has failed to achieve its objectives.

Nevertheless, recent survey research suggests the possibility that concern over non-disqualification and its impact on public confidence in the courts is overblown. For example, Professor James Gibson has reported that the public is untroubled by judicial candidates who announce their views on issues they will decide as judges or who promise to decide issues in specific ways; presumably, the public would likewise be untroubled if those judges declined to disqualify themselves from subsequent cases in which those issues arose. Similarly, Gibson and Professor Gregory Caldeira have reported that while a majority is concerned when judges accept campaign contributions from parties who appear before them, they are equally concerned when the judge declines contributions offered and in neither case does disqualification allay their suspicions. Finally, despite the recurrence of non-disqualification stories in the news, survey data show that public confidence in the judiciary remains high and relatively stable.

One can quarrel with these results on a question by question basis (and I have). My overriding point for purposes here, however, is a more general one, with a twofold thrust. First, survey


data should be relied upon with caution because so much depends on how survey questions are framed. Second, the “public” that social scientists and pollsters survey is not the “public” of primary concern to the legal establishment, which creates confusion when public confidence problems of concern to the bench and bar are not reflected in survey data (and vice versa).

In debates over public confidence in the courts, survey data are routinely impressed into the service of opposing arguments. Judge Harold Leventhal’s observation about the use of legislative history in statutory interpretation—that it is like “looking over a crowd and picking out your friends”\textsuperscript{206}—applies equally to the use of surveys. To no small extent, the answers one gets turn on how the questions are framed: To support an argument that the public favors “judicial independence,” one can rely on surveys in which respondents are asked whether they favor efforts to threaten or intimidate judges, and they do not.\textsuperscript{207} To oppose such an argument, one can turn to surveys that ask whether the respondents favor holding judges accountable for their decisions and stopping judges who repeatedly ignore voter values, and they do.\textsuperscript{208} To support an argument that the public embraces “legal realism,” one can ask whether respondents favor judges who seek to achieve fair or just results, and they do.\textsuperscript{209} To oppose that argument, ask them whether

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\textsuperscript{207} Beldon et al., \textit{supra} note 204, at 13, 18 (indicating that 63% of respondents disapproved of threatening a judge with impeachment for a single decision); see also The Maxwell Poll, \textit{Law and Courts Questions from 2005 Poll} (2005), http://www.maxwell.syr.edu/uploadedFiles/campbell/data_sources/Law%20and%20Courts%20Questions%20from%202005%20Poll.pdf (indicating that 71.9% of respondents agree that “[j]udges should be shielded from outside pressure and allowed to make their decisions based on their own independent reading of the law”).

\textsuperscript{208} John Russonello, \textit{Speak to Values: How to Promote the Courts and Blunt Attacks on Judiciary}, 41 \textit{CT. Rev.} 10, 11 (2004) (indicating that 70% of respondents desire that the court not stray far from community norms); Martha Neil, \textit{Half of U.S. Sees “Judicial Activism Crisis,”} ABA J. E-\textit{REPORT}, Sept. 30, 2005 (indicating that 56% either somewhat or strongly agreed with the proposition “that court opinions should be in line with voters’ values,” and judges going against those values should be impeached).

\end{footnotesize}
they favor judges who disregard the law and act upon their personal or political preferences, and they do not.210 Public support for “judicial activism” can be found in surveys that show respondents favor judges who protect individual rights against political branch encroachment;211 on the flip side, the public opposes “activists” who act upon their ideological predilections.212

Notwithstanding such manipulations, understanding the public’s views is of enormous importance to a body of law that seeks to promote public confidence in the courts. As with “judicial independence,” “legal realism,” and “judicial activism,” the views of the “public” likewise depend on how the term “public” is framed. Public opinion surveys prepared by social scientists and polling organizations define the “public” literally to mean everyone—or at least a representative subset of everyone with the acuity and enthusiasm needed to operate a pencil or answer a telephone and complete a survey.

Although the legal establishment sometimes cites general public opinion surveys in its policy analyses, the public of primary concern to judges and lawyers is narrower. First, as a philosophical matter, the legal establishment is concerned about the institutional legitimacy of government, which, in a democratic republic, depends on the consent of the “public” being governed.213 This concern,

210. Keith Bybee, The Rule of Law is Dead! Long Live the Rule of Law!, in WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO AND WHY IT MATTERS (Charles Gardner Geyh, ed., forthcoming 2011) (“Polls show that large majorities of Americans expect federal judges to apply the law impartially and distrust judges who advance narrow ideological interests.”).

211. James Gibson, Judging the Politics of Judging: Are Politicians in Robes Inevitably Illegitimate?, in WHAT’S LAW GOT TO DO WITH IT?: WHAT JUDGES DO AND WHY IT MATTERS (Charles Gardner Geyh, ed., forthcoming 2011) (indicating that 51.8% of respondents rated “Defending constitutional rights and freedoms” as 10 out of 10 with 10 signifying the most important function of a judge); see also 2001 National Bipartisan Survey, supra note 209, at 6 (indicating that 93% of respondents found the proposition “[o]ur courts’ most important job is to protect our civil and constitutional rights” either very or somewhat convincing).

212. Neil, supra note 208, at 1 (indicating that 56% agreed with the statement that there is a judicial activism crisis).

213. AMERICAN BAR ASSOCIATION, supra note 159, at 10 (“[P]ublic confidence in our judicial system is an end in itself. A government of the people, by the people, and for the people rises or falls with the will or consent of the governed.”).
however, does not necessarily implicate the “public” in the universal sense of the term: The consent of the governed is unaffected by the views of the passive, indifferent, and disengaged—that segment of the public which may report its ennui over governmental institutions in telephone surveys but is insufficiently concerned to act upon it by rebelling or otherwise actively withholding its “consent” to be governed.\(^{214}\) Hence, few within the legal establishment would seriously suggest that Congress loses its legitimacy to govern when its approval ratings dip below 50% in public opinion surveys.

Second, as an instrumental matter, without “public” confidence in the judiciary, proposals to control the courts in ways that the legal establishment finds wrongheaded and threatening will gain traction.\(^{215}\) From this perspective, the “public” that matters to the legal establishment is the public that is engaged enough to act upon its dissatisfaction by, for example, electing representatives who are committed to curbing the courts—which can be a minority of the public as a whole.

Third, as a customer relations matter, the “public” that matters to the legal establishment is the public that the judiciary serves as litigants, witnesses, and jurors.\(^{216}\) From this perspective, the views of those who have no direct contact with the courts are of secondary concern relative to consumers of judicial services, who courts affect directly. For the legal establishment, this may be the “public” that matters most. It is the segment over whom the legal establishment has direct influence, and it is disaffected litigants and their families, friends, lawyers, and elected representatives who are most likely to be members of the other “public” of concern—those who agitate for court reform and who may ultimately challenge the legitimacy of the judiciary itself.

\(^{214}\) Of course, events may lead the passively disaffected to become actively disaffected, and thereby morph them into members of a “public” that does matter to the legal establishment.

\(^{215}\) \textit{American Bar Association, supra} note 159, at 13–14 (“If the public loses faith in a judiciary it perceives to have run amok, the obvious solution will be to bring the judiciary under greater popular control to the ultimate detriment of judicial independence and the rule of law that judicial independence makes possible . . . .”).

\(^{216}\) \textit{Id.} at 65–66 (“Public perceptions of the courts . . . . can be profoundly shaped by direct contact with the judicial system as jurors, witnesses, or litigants, or indirectly when a friend or family member serves in those capacities. These points of contact should be capitalized upon.”).
To illustrate this divide between general public opinion and the narrower public opinion of concern to the bench and bar, many judges, lawyers, and law professors have argued that the Supreme Court's decision in Republican Party of Minnesota v. White—which held that judicial candidates have a first amendment right to announce their views on issues that they may decide as judges—threatens to undermine public confidence in judicial impartiality. That concern fueled an amendment to the Model Code of Judicial Conduct, which required judges to disqualify themselves from cases in which they had previously committed or appeared to commit themselves to reach a particular result on an issue now before them. As previously noted, however, Gibson found that the public welcomed information about where judicial candidates stood on various issues and was unfazed by judges who made campaign promises to resolve issues in specified ways. Such findings, however, do little to dispel concerns within the legal establishment. From the perspective of judges and lawyers, the public confidence problem must be assessed from the perspective of parties whose confidence in the impartiality of the courts may be undermined by appearing before judges who have (or appear to have) committed themselves to rule in particular ways before a party's case is even called.

A comprehensive study of public confidence in the courts conducted by the National Center for State Courts found that confidence levels were consistently lower among respondents who had first hand exposure to the justice system. That may explain why the legal establishment is chronically more concerned about the state of public confidence in the courts than would seem to be

219. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(5) (2007) (stating that a judge shall disqualify himself or herself if “[t]he judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to read a particular result or rule in a particular way” in a proceeding or controversy before them).
220. ROTTMAN ET AL., supra note 162, at 60 ("People with recent court experience tend to hold less positive views of the courts than do those without that experience."). This finding is corroborated by other studies. Id. at 15–16.
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warranted by rosy-seeming results in general public opinion surveys. Given the legal establishment’s customer relations concern coupled with the results of Tyler’s research discussed earlier, a revamped procedural regime, which seeks to make the disqualification process more transparent and fair-seeming for litigants, has obvious appeal.

3. The Future of Procedural Reform

Procedural overhaul may represent the next wave in the history of disqualification reform, but its likely impact remains unclear. Some scholars attribute the chronic inability of rigorous disqualification standards to gain traction to judicial self-dealing by biased judges, who contort the rules to thwart their objectives. In my view, the problem is better explained as a paradox: Disqualification standards that are designed to second guess the impartiality of judges are interpreted and applied by judges who are so committed to their own impartiality that they are loath to second guess themselves. The real “enemies” of reform, then, are not bad judges intent on subverting disqualification requirements but good judges whose commitment to their own impartiality interferes with the achievement of disqualification objectives.

The first procedural regime fell victim to the disqualification paradox, as judges, troubled by procedures enabling litigants to secure disqualification with unsupported allegations of bias, interpreted statutory requirements so strictly as to defeat the legislation’s purpose. A similar future may await a new procedural regime. In 2009, the American Bar Association’s Standing Committee on Judicial Independence circulated a draft resolution proposing that states consider (not adopt, but merely “consider”) a package of reforms to disqualification procedure, including several of the proposals listed above. The draft resolution, and the

221. Tyler, supra notes 192, 193, 195–99 and accompanying text.
222. Leubsdorf, supra note 85, at 245 (attributing the cyclical inability of disqualification rules to be fully implemented to “the most biased judges,” who are “the least willing to withdraw”); Frost, supra note 99, at 534 (attributing the repeated narrowing of disqualification standards enacted by Congress to “self-dealing” by judges).
223. Telephone conversation with William Weisenberg, Chair of the ABA Standing Committee on Judicial Independence, March 4, 2011. From 2007 to 2009, I served as consultant to and director of the ABA Judicial Disqualification Project, under the auspices of the ABA Standing Committee on Judicial
underlying Report upon which it was based, was withdrawn following objections from representatives of the ABA’s Judicial Division (and other ABA entities). Unlike the ABA, Congress and state legislatures may be willing to enact procedural reform in the teeth of objections from judges, but then, administration of the new procedures will once again fall to those same judges.

Focusing on the proposed reforms themselves, some will be easier than others to implement without provoking an allergic reaction from the judiciary. For example, a rule that entitles both parties to be heard in disqualification proceedings by a judge who must give a reasoned explanation for her rulings does not impugn the presumption of impartiality and should not implicate the disqualification paradox (although judges who think disqualification practice is driven by lawyers angling for strategic advantage may still object to such procedures as an unnecessary waste of time). The same is true of proposals to replace disqualified high court judges. Peremptory challenge procedures are a mixed bag. Judges for whom such a procedure implies bias among jurists may construe procedural requirements strictly; on the other hand, if substitution is automatic and unencumbered by an implication that the targeted judge is less than impartial (e.g., because no attestation of bias is required), judges may accept peremptory challenge procedures without resistance.

More likely to encounter resistance are proposals that convey skepticism of judicial motives and impartiality, which implicate the judicial disqualification paradox directly. Assigning disqualification motions to a different judge implies that the target judge cannot be trusted to rule impartially; subjecting non-disqualification to a de novo standard of appellate review implies that no deference is due the trial judge’s assessment of her own fitness; and establishing a mechanism to review non-disqualification by appellate judges implies that appellate judges cannot be trusted to have the final word on their own impartiality. If these proposals are imposed upon a skeptical judiciary, judges may once again implement them less rigorously than rule-makers intend. Fellow judges may err on the side of non-disqualification when ruling on motions to disqualify colleagues; appellate courts may impose an implicitly deferential

Independence. In my capacity as present and former project consultant/director, I was privy to events described in the text accompanying notes 223 and 224, as corroborated by Chairman Weisenberg in our telephone conversation.

224. Id.
standard of “de novo” review; and judges assigned to review the non-disqualification of appellate colleagues may likewise do so with undue deference.

The long-term solution lies in managing the judiciary’s chronic ambivalence to disqualification. Such ambivalence cannot and should not be eliminated altogether. As long as “good” judges are women and men who strive to look and be impartial, then asking them to disqualify themselves or colleagues who are or appear less than impartial—and implicitly, less than “good”—is something that judges will do reluctantly. By design, the appearances-based disqualification regime enables judges to disqualify themselves or their brethren for an appearance of partiality without the need to find or concede actual bias. But that is not enough to overcome judicial ambivalence, if conceding an appearance of partiality is tantamount to conceding an appearance of impropriety. The two will be synchronous whenever a judge makes inappropriate statements, or engages in inappropriate conduct that calls her impartiality into question. In these situations, judicial ambivalence to disqualification is, to some extent, inherent and inevitable. There is an even broader array of situations, however, in which the appearance of partiality is created by conduct that is not improper and does not give rise to an appearance of impropriety. Such will be the case whenever harmless relationships, associations, and life experiences put the judge’s impartiality in doubt, under circumstances unique to a given case. In these situations, ambivalence may nonetheless persist, insofar as the judge is put on the defensive by a motion to disqualify which calls her out for an appearance problem she failed to fix by recusing sua sponte.

Assigning disqualification motions to a different judge will avoid self-interested judges “grading their own papers” but may not overcome the ambivalence judges feel about questioning the impartiality of colleagues.\textsuperscript{225} Overcoming ambivalence requires that judges more fully appreciate the dual psychological impediments to judicial self-evaluation: that judges (like the general population) have difficulty detecting their own biases, and that judges see themselves differently than others see them. Because of this, judges can misperceive how their conduct “reasonably” appears to the

\textsuperscript{225}. One study found that judges were, if anything, more reluctant to recommend the disqualification of a colleague than themselves. \textsc{Shaman} \& \textsc{Goldschmidt}, supra note 145, at 42.
public. Thus, when innocuous conduct gives rise to an appearance of partiality that triggers the need for disqualification, no inference of impropriety should arise from the underlying conduct or from the judge’s failure to appreciate the perception problems she created. When judicial conduct creates both an appearance of partiality and an appearance of impropriety, those same psychological impediments may disable the errant judge from appreciating the appearance problems she has caused. There should be no dishonor in that, even if the underlying conduct is unacceptable and must be called to the judge’s attention.

The simple-seeming solution of openly acknowledging the psychological impediments to judicial self-evaluation is complicated by its profound implications. The traditional view of the judicial role, reinforced by codes of conduct and the judiciary’s institutional culture, is that judges are independent and impartial men and women of integrity who uphold and apply the law and disregard extralegal influences. To concede a susceptibility to real or perceived bias, and a psychological blind spot to detecting it, is in obvious tension with this traditional view.

Recent social science research has shown us that judicial decision-making is subject to a host of influences: law, political ideology, motivated reasoning, strategic considerations, the audience for whom the judge is writing, the desire for elevation to higher judicial office, and—the focus of this article—bias.\(^2\) Whereas the legal establishment and its detractors implicitly characterize the proper judicial role in dichotomous terms—good judges follow the law, while bad judges succumb to extralegal influences—reality is much more complicated. From a regulatory perspective, a more realistic approach is to recognize that influences on judicial decision-making lie on a continuum, from the desirable to the intolerable. The goal of judicial oversight generally, should be to manage extralegal influences in ways that minimize the unacceptable. The goal of disqualification, in turn, should be to draw a line on that continuum, where the threat of unacceptable extralegal influences compromises the fairness—real or perceived—of a given proceeding.

If the legal establishment re-conceptualizes the nature of legal and extralegal influences on judicial decision-making in terms

\(^{226}\) What’s Law Got to Do With It?, supra note 172.
of a continuum instead of a dichotomy, the prognosis for the proposed procedural regime improves dramatically. Once judges acknowledge that the best among them are subject to extralegal influences, including bias, and that it is extremely difficult for a judge to accurately self-assess where her real or perceived biases fall on a continuum, then procedural protections aimed at better detecting and managing judicial bias become unobjectionable.

Procedural reform itself may aid in this acclimation process. Imposing procedural rigor requires judges to be more exacting in their approach to disqualification problems and in so doing conveys to those judges a heightened institutional commitment to taking disqualification problems seriously. If disqualification proceedings are run more like other adjudicatory proceedings, in which disinterested judges issue rulings accompanied by reasoned explanations after adversarial argument, judges may more fully accept judicial disqualification into the practice and procedure mainstream.

The history of judicial resistance to disqualification notwithstanding, the prospects for this re-conceptualization are relatively bright. In *Caperton*, a majority of the Supreme Court—albeit a bare one—underscored the unconscious nature of judicial bias that renders it insusceptible to self-detection. Although the *Caperton* Court reserved the application of its constitutional due process analysis to exceptional cases, it emphasized that the states were free to (and typically did) regulate real and perceived bias more rigorously and routinely. In a similar vein, a significant minority of jurisdictions have adopted meaningful peremptory challenge procedures and procedures for reassigning disqualification requests to other judges, which embody the view I am expounding. To capitalize on the momentum *Caperton* created, the next step is to create forums for judges from jurisdictions that have embraced such procedures to share their experiences with judges from jurisdictions that have not, and for judges generally to become more familiar with recent research on the psychology of bias.

227. ABA Judicial Disqualification Project, *supra* note 13 and accompanying text.
V. Conclusion

A muscular presumption of impartiality suits a formalist world in which the neutrality of judges is widely accepted as an article of faith, and dissenters can be discounted as unreasonable outliers. But in a modern world influenced by the lessons of legal realism, where scholars and citizens alike entertain complex and divergent views on how judges think, achieving a consensus on when doubts about a judge's impartiality are "reasonable" becomes ever more problematic. As a consequence, we are witnessing an escalating battle over disqualification in a range of settings, where judges who have internalized traditional presumptions of impartiality and decline to disqualify themselves are being called out by litigants, the media, and good government organizations that view the same events in fundamentally different ways. In short, the appearances paradigm is crumbling because it has been balkanized; it is increasingly reasonable to draw divergent inferences from the same events, for which reason regulating disqualification with reference to how a judge's conduct appears to a reasonable person has become increasingly unmanageable.

Against that backdrop, a resurrected and revitalized procedural regime that seeks to promote public confidence in the disqualification process, even if substantive disqualification standards are applied inconsistently, holds considerable promise. The prospects for a new procedural regime, however, turn on whether judges are ready to accept the ethos of disqualification embodied in procedures aimed at taking disqualification more seriously or whether they will remain resistant in ways that lead them to marginalize the new regime as they have its predecessors. Recent developments, which manifest growing awareness among judges of the complex psychology of judicial bias, are encouraging, but time will tell.