NOTES

THE (NON)PROBLEM OF A LIMITED DUE PROCESS RIGHT TO JUDICIAL DISQUALIFICATION

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> With respect to the people that are supporting me [in my election bid], my position has been the same, which is: if the law's in your favor, then I may find for you. If it's against you, then understand that I may find against you, that's the way it is. . . . That's what I stand for.
>
> —West Virginia Supreme Court Justice Brent D. Benjamin[1]

INTRODUCTION

When West Virginia Supreme Court Justice Brent D. Benjamin cast the deciding vote—twice—to overturn a $50 million award against Massey Energy Co. (Massey),[2] one hopes that the law was on Massey's side. But, despite Justice Benjamin's assurances that it was,[3]

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1 William Kistner, Am. RadioWorks, Justice for Sale?, AM. RADIOWORKS, http://americanradioworks.publicradio.org/features/judges/ (last visited Feb. 12, 2009) (quoting Justice Brent D. Benjamin).

2 Caperton v. A.T. Massey Coal Co., No. 33350, 2007 WL 4150960 (W. Va. Nov. 21, 2007), *vacated and superseded on rehearing by* 2008 WL 918444 (W. Va. Apr. 3, 2008), *cert. granted*, 129 S. Ct. 593 (2008) (No. 08-22).

3 *See Caperton*, 2008 WL 918444 (Benjamin, J., concurring) ("Because the Majority decision possesses such a deep strength of legal authority, I do not believe that the Dissenting opinion in any way weakens the authority or substance of the Court's decision.").

several commentators are not so convinced.[4] Their contentions are not with Justice Benjamin's legal reasoning (though that might also be suspect[5]), but rather with his participation in the case to begin with. Indeed, *Caperton* presented Justice Benjamin and the West Virginia Supreme Court with an unusual scenario: the CEO of appellant Massey, Don Blankenship, was a vocal and generous supporter of Justice Benjamin's recent West Virginia Supreme Court election campaign.[6] He was, one might say, Justice Benjamin's *best* supporter. Blankenship donated over $3 million to Benjamin's 2004 election bid—more than all other donors combined—while Massey's case was preparing for appeal.[7]

Understandably, Massy's opponents in *Caperton* sought to remove Justice Benjamin from the case, but Benjamin refused, and he ultimately voted with a three-to-two majority to overturn the verdict against Blankenship and Massey.[8] However, Massey's opponents would have another chance at the case—as it turns out, Blankenship is remarkably well connected in West Virginia, and that first decision was fraught with potential biases. Shortly after the decision, photographs surfaced of then-Chief Justice Elliott "Spike" Maynard (who also sided with the three-Justice majority) vacationing with Blankenship in Monte Carlo while the appeal was pending.[9] Blankenship's opponents requested, and were granted, a rehearing and Maynard removed himself from the case.[10] On the motion of Massey, a third justice, Larry Starcher, also sat out the second case.[11] In his outrage over the first decision (in which he was half of the two-Justice minority), Justice Starcher had proven to not be Blankenship's biggest supporter. Justice Starcher had in fact vocally berated Blankenship, calling him, among other things, "stupid, evil and a clown."[12] But Jus-

4 *See, e.g.*, Editorial, *Mining Shows Sooty Side of Big-Money Judicial Elections*, USA TODAY, Mar. 3, 2009, at 10A (arguing that Justice Benjamin's participation in the case "cannot be trusted"); Editorial, *Tainted Justice*, N.Y. TIMES, Nov. 13, 2008, at A28 [hereinafter *Tainted Justice*] (characterizing Justice Benjamin's vote in the case as the result of "a bald attempt by the chief executive of Massey Energy to purchase a favorable decision").

5 *See* Petition for Writ of Certiorari at 10–11, *Caperton*, No. 08-22 (U.S. Nov. 14, 2008), 2008 WL 2676568 [hereinafter Certiorari Petition].

6 *See* Kistner, *supra* note 1.

7 Certiorari Petition, *supra* note 5, at 2.

8 *Id.*

9 *See id.* at 11.

10 *Id.* at 2.

11 *Id.* at 13.

12 Adam Liptak, *U.S. Supreme Court Is Asked to Fix Troubled West Virginia Justice System*, N.Y. TIMES, Oct. 12, 2008, at A41.

tice Benjamin did not follow the lead of his colleagues and remained on the case—as acting Chief Justice—and he once again cast the deciding vote for a three-to-two majority in Massey's favor.[13]

The Massey saga is, in many senses, alarming, and the public has taken notice. News outlets across the country have followed the story, and editorials from the *Charleston Gazette*[14] to the *New York Times*[15] have criticized the West Virginia justices' behavior. Chief Justice Maynard has been called "unworthy of the bench,"[16] Justice Benjamin has been attacked for a lack of ethics,[17] and the West Virginia Supreme Court as a whole has been described as a "supreme mess."[18] Maynard has already lost his reelection bid,[19] and West Virginia lawmakers are reconsidering how the State selects its justices in the first place.[20] Famed novelist John Grisham has even used the episode to promote his newest legal thriller.[21] And now, the Supreme Court of the United States has heard the case, and will consider whether Justice Benjamin's participation was unconstitutional.[22]

But, perhaps most troubling, the Massey scandal is not as rare as it might seem. Throughout the twentieth century, the United States has intermittently been scandalized by similar judicial ethics controversies. In the 1940s, Justice Hugo Black's participation in a case[23] tried by his former law partner (from twenty years earlier) drew harsh

13 Certiorari Petition, *supra* note 5, at 3.

14 Editorial, *Supreme Mess*, CHARLESTON GAZETTE, Nov. 19, 2008, at 4A [hereinafter *Supreme Mess*].

15 *See Tainted Justice*, *supra* note 4.

16 Opinion, *The "Spike" Maynard Case: Justice Undermined*, PITT. TRIB.-REV., Jan. 21, 2008, at A7.

17 *See* Editorial, *Supreme Court*, CHARLESTON GAZETTE, Oct. 8, 2008, at 4A.

18 *See Supreme Mess*, *supra* note 14.

19 *See* Liptak, *supra* note 12.

20 *See* Lawrence Messina, *W.Va. Lawmakers Eye New Ways to Pick Judges*, CHARLESTON GAZETTE, Sept. 8, 2008, at 1A.

21 *See, e.g.*, Joan Biskupic, *At the Supreme Court, a Case with the Feel of a Best Seller*, USA TODAY, Feb. 16, 2009, at A1 (describing Grisham's promotion of his book on NBC's Today Show). Grisham's novel, *The Appeal*, which presents "an exposé of how highly organized special-interest groups, loaded with cash, can manipulate the judicial system," was released in early 2008. *See* Carol Memmett, *Grisham's 'Appeal' Rules Harshly on Bought Elections*, USATODAY.COM, Jan. 28, 2008, http://www.usatoday.com/life/books/reviews/2008-01-28-grisham-appeal_N.htm.

22 The Supreme Court granted certiorari in November 2008, *see* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 593 (2008) (No. 08-22) (granting certiorari), and oral argument was held in early March 2009, *see* Transcript of Oral Argument, *Caperton*, No. 08-22 (U.S. Mar. 3, 2009).

23 Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers, 325 U.S. 161 (1945).

criticism from his colleague Justice Robert Jackson, and "brought the subject of judicial disqualification sharply into the focus of public and professional attention."[24] In 1972, then-Justice William H. Rehnquist garnered similar criticism for his participation in a case[25] about a federal surveillance program that the government had initiated while Rehnquist worked in the U.S. Department of Justice.[26] Most recently, in 2004, Justice Antonin Scalia drew a veritable firestorm of criticism for sitting in a case[27] against Vice President Dick Cheney, with whom Justice Scalia had recently gone duck hunting.[28]

As the public backlash suggests, these occasional scandals raise an unsettling question: Does U.S. law, as currently practiced, fail to protect litigants from improper participation by biased judges? A recent wave of scholarship suggests that the answer to this question is yes. Some reformers have addressed lawmakers, proposing specific corrections for America's recusal statutes. Nearly every jurisdiction in the United States has created some measure of judicial disqualification (or recusal)[29] law to control the cases that its judges may hear—by forcing them to step down in certain situations. But, if the scholarship examining the scope of these laws is any indication, changes might be necessary. Moreover, others have suggested that the failure to remove certain judges is more than an issue for our congressmen. Indeed, underlying all the criticisms, and behind every public outcry, is the ultimate question of whether the participation of these various judges deprives litigants of their *constitutional* right to due process of law. This is the question that the Supreme Court will squarely address in the *Caperton* appeal, and it is the question that this Note evaluates.

Ultimately, however troubling these cases seem, due process is likely not the proper avenue for recusal reform. As established historically and as understood by the Supreme Court, due process provides only a basic floor for recusal standards, above which Congress and the States are left to fill in recusal procedures as they see fit. While this approach potentially leaves several questionable situations unpro-

24 John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 605 (1947).

25 Laird v. Tatum, 408 U.S. 1 (1972).

26 *See generally* Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 591–96 (1987) (describing Justice Rehnquist's decision and its reception).

27 Cheney v. U.S. Dist. Court, 542 U.S. 367 (2004).

28 *See* Editorial, *Judicial Ethics Under Review*, N.Y. TIMES, May 27, 2004, at A28 (describing "widespread outrage" when Justice Scalia refused to step down).

29 Though, technically, "disqualification" describes the statutorily or constitutionally *mandated* removal of a judge (typically on motion by one of the parties), whereas "recusal" refers to a judge's *voluntary* decision to step down from a case, this Note will follow the general practice of modern scholarship, which uses the two terms interchangeably. *See* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION § 1.1 (2d ed. 2007).

tected constitutionally—as the various above scandals illustrate—fears over limited recusal rights are in large part overblown. Indeed, the practical effects, potential benefits, and structural implications of a limited due process right to recusal demonstrate that such a right should not trouble the American public. It is simply not the case that due process is the only solution to recusal controversy, and the consequences of a robust due process right suggest that it is indeed an answer that we should hesitate to embrace. If anything, the freedom that a limited right offers to lawmakers, and its restraint from comprehensively "answering" what are exceedingly difficult policy choices, should appeal to the nation's court observers.

In evaluating these claims, this Note proceeds in four parts. Part I reviews the history and development of U.S. recusal law; Part II discusses the Supreme Court's approach to recusal law and describes criticisms of the Court's current jurisprudence; Part III examines specifically what due process requires of recusal; and Part IV evaluates the consequences of a limited due process right, considering its practical effects, its potential benefits, and its structural implications for our federal system of government.

I. JUDICIAL DISQUALIFICATION IN U.S. LAW

Judicial disqualification procedures existed long before the enactment of our Constitution and its Due Process Clauses,[30] and recusal has always been a part of U.S. law. Like U.S. law in general, our recusal procedures grew out of English common law practice, and over time they have steadily grown and developed. Before turning to the constitutional implications of judicial disqualification, it is useful to briefly outline this progression of U.S. judicial disqualification law, and to highlight both its current practice and its growing critics.

A. Common Law Origins

Rooted in the ancient maxim that judges should stand apart from the matter before them, the concept of judicial disqualification "is as old as the history of courts."[31] Both early Jewish law and the Roman Code of Justinian made provisions for the removal of judges on the suspicion of bias,[32] and renowned jurist Henry de Bracton sought to

30 U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); *id.* amend. XIV (prohibiting states from doing the same).

31 FLAMM, *supra* note 29, § 1.2, at 5.

32 *See id.* The Jewish Code of Maimonides declares that a judge is not to participate in any case wherein he has a personal relationship with a party, whether it be

infuse early English common law with similarly broad recusal standards.[33] But, despite his efforts, at the time of the United States' founding, common law recusal practice was, to quote Professor John Frank, "simple in the extreme": a judge was disqualified for his direct financial interest in the case, and for nothing else.[34] Sir William Blackstone directly confronted and rejected the proposition that judges be disqualified merely for suspected bias.[35] Because a judge "is already sworn to administer impartial justice," and because judicial authority "greatly depends upon that presumption and idea," Blackstone placed a heavy burden upon those seeking to impugn a judge's neutrality.[36] These narrow disqualification grounds were further restricted by the common law "rule of necessity," which required that a judge, even with a direct pecuniary interest, hear a case if no adequate substitute was available.[37] In short, early common law tradition required judges to step down in only the narrowest of instances.

B. Disqualification in Contemporary U.S. Law

United States law grew out of this common law tradition; however, as U.S. court systems developed, so did our recusal practices. Over time, both federal and state courts significantly broadened their disqualification standards beyond the rigid simplicity of Blackstone's time.[38] Throughout the United States' early independence, the narrow recusal standards of the common law prevailed,[39] but near the turn of the nineteenth century, both federal and state governments began attempts to restrain judicial bias through statutory control. The Second Congress led the way, enacting the first federal judicial dis-

friendship or dislike, and the Code of Justinian permitted a party to remove a judge that he suspected of bias. *See id.*

33 *See id.* at 5–6.

34 Frank, *supra* note 24, at 609–12.

35 *See id.* at 610 & n.15 ("'[I]t is held that judges and justices cannot be challenged. For the law will not suppose the possibility of bias or favor in a judge . . . .'" (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *361)).

36 3 BLACKSTONE, *supra* note 35, at *361. Indeed, this presumption of judicial neutrality was so strong that early English courts did not require judges to step down even from cases involving their immediate family members (though English jurors were disqualified in analogous situations). *See* FLAMM, *supra* note 29, § 1.2, at 6.

37 *See* Paul B. Lewis, *Systemic Due Process: Procedural Concepts and the Problem of Recusal*, 38 U. KAN. L. REV. 381, 383 (1990); *see also* FLAMM, *supra* note 29, § 20.1 (discussing the rule of necessity).

38 *See* Frank, *supra* note 24, at 612; *see also* FLAMM, *supra* note 29, § 1.4 (describing an American "evolution" of thinking about judicial disqualification).

39 *See* FLAMM, *supra* note 29, § 1.4, at 8 ("[F]or years following independence American law . . . admitted of very few grounds for seeking judicial disqualification.").

qualification statute in 1792.[40] Though this original statute provided only limited expansion of the common law,[41] it was subsequently amended several times, enlarging the disqualification grounds nearly every time.[42] Though too diverse to detail here, state governments often followed suit and enacted similar recusal laws of their own.[43]

Today, federal recusal law is governed principally by 28 U.S.C. § 455, the modern descendant of the 1792 recusal statute.[44] Broken into two parts—the first providing general grounds for recusal and the second specific—§ 455 essentially adds onto the common law "pecuniary interest" standard additional *bias*-based restrictions on a judge's ability to sit on a case.[45] First, § 455(a) provides a waivable catch-all standard, which requires a federal "justice, judge, or magis-

40 Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278, 278–79 (amended 1911); *see also* FED. JUDICIAL CTR., RECUSAL: ANALYSIS OF CASE LAW UNDER 28 U.S.C. §§ 455 & 144, at 2 (2002), *available at* http://bulk.resource.org/courts.gov/fjc/recusal.pdf (providing historical information about the modern recusal statute).

41 The 1792 statute allowed for disqualification only if the judge was "concerned in interest" or "ha[d] been of counsel for either party." § 11, 1 Stat. at 278–79.

42 FLAMM, *supra* note 29, § 1.4, at 9 & n.8. Examples of these expansions include prohibiting a judge from hearing appeal of a case he tried, *see* Act of Mar. 8, 1891, ch. 517, § 3, 26 Stat. 826, 827 (current version at 28 U.S.C. § 47 (2006)), and allowing disqualification for bias upon a party's sufficient affidavit, *see* Act of Mar. 3, 1911, ch. 231, § 22, 36 Stat. 1087, 1090 (current version at 28 U.S.C. § 455 (2006)).

43 *See, e.g.*, Kenneth S. Kilimnik, *Recusal Standards for Judges in Pennsylvania: Cause for Concern*, 36 VILL. L. REV. 713, 719 n.21 (1991) (describing Pennsylvania's judicial recusal laws passed in 1816 and 1825). A number of states included these recusal standards directly in their respective constitutions. *See, e.g.*, DEL. CONST. of 1831, art. VI, § 8 (providing for replacement of an "interested" chancellor on the chancery court by the chief justice of the superior court); KY. CONST. of 1850, art. IV, § 15 (noting the inability of judges to sit in cases on account of their interest in the cause, relationship to the parties, or prior involvement with the case in a lower court); MD. CONST. of 1851, art. IV, § 5 (prohibiting a judge from sitting in any case "wherein he may be interested, or where either of the parties may be connected with him by affinity or consanguinity within such degrees as may be prescribed by law, or when he shall have been counsel in said case"). However, it is worth noting that not all states followed behind the lead of the federal government, as Connecticut, for instance, has had its own disqualification statute since 1672. *See* FLAMM, *supra* note 29, § 28.8, at 838.

44 28 U.S.C. § 455 (2006); *see also* FED. JUDICIAL CTR., *supra* note 40, at 2 (describing the statute). There are, however, two other federal judicial disqualification statutes, which, for the purposes of this Note, it is unnecessary to discuss in detail. Section 144 of Title 28 governs district court recusals triggered by a party's affidavit showing actual bias, and is, for the most part, overlapped by § 455. *See id.* at 1. Often overlooked, 28 U.S.C. § 47 (2006) essentially codifies the 1891 amendment to the federal recusal statute, preventing a judge from hearing appeal of a case or issue that he previously tried. *See id.*

45 *See* 28 U.S.C. § 455.

trate" to remove himself from any case in which "his impartiality might reasonably be questioned."[46] Section 455(b), on the other hand, has a much narrower focus—it identifies particular, unwaivable situations in which perceived conflicts of interest require a judge to step down from a case, regardless of his (or anyone else's) assessment of the matter.[47] In practice, the two provisions work together to inject federal recusal with some concrete standards beyond the historical interest-only practice.

Similar to the federal standards, most states have enacted their own recusal statutes,[48] and nearly all states have some express measure of local recusal law.[49] In all jurisdictions, judges are subject to removal for at least good cause,[50] and in a "substantial minority" of states, litigants may also seek peremptory disqualification, requiring the automatic removal of a judge even without a showing of cause.[51] In almost all instances, these provisions provide an affirmative layer of disqualification standards above that which the Constitution guarantees.[52] In addition, in all U.S. court systems, the American Bar Association's (ABA) Model Judicial Code of Conduct provides explicit recusal provisions (similar in many ways to federal standards) that hold judges also to strict professional ethics standards for recusal.[53]

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46 *Id.* § 455(a). Since 1974, the broad language of § 455(a) has been examined objectively: the provision asks what a reasonable person would think about a judge's impartiality in a given situation. *See* Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 NEB. L. REV. 1046, 1048 (1993). The current § 455(a) replaced what had been a longstanding practice of assessing impartiality *subjectively*, where the relevant inquiry was whether the judge "in his opinion" believed his participation to be improper. *See* FED. JUDICIAL CTR., *supra* note 40, at 5.

47 *See* 28 U.S.C. § 455(b), (e); Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 860 n.8 (1988) ("[Section] 455(b)(4) requires disqualification . . . whether or not the interest actually creates an appearance of impropriety . . . . Section 455(b) is therefore a somewhat stricter provision and thus is not simply redundant with the broader coverage of §455(a) . . . ."). These unwaivable circumstances include, among other things, when a judge maintains a "personal bias or prejudice concerning a party," has previously "served as a lawyer in the matter in controversy," or has a "third degree" relative who is actively participating in the case. *See* § 455(b).

48 *See* FLAMM, *supra* note 29, § 2.6.

49 *See id.* § 26.1.

50 *See id.* § 28.

51 *Id.* § 27.1

52 *Id.* § 2.5.2, at 34–35.

53 *See id.* § 2.8. The level of enforcement behind these provisions varies across jurisdictions, but in some states the Code carries the full force of law. *See id.*

C. *Criticisms of Modern Practice*

Despite the growth of statutory recusal law, judicial disqualification standards do not always compel a judge to remove himself from a contentious case. Accordingly, a robust scholarly debate has emerged, and a number of writers have detailed various ills of current recusal law. Indeed, statutory recusal reform is frequently a live and active issue for our nation's lawmakers, and over time, recusal law has steadily grown in direct response to such criticisms.[54] Federal disqualification law has garnered particular attention—especially through a host of critiques stemming from the recent Supreme Court recusal controversies[55]—and, for brevity, these federal criticisms will be the focus here.[56]

The arguments for reform statutory are myriad, and they approach the issue from different angles, but they all operate from the same premise: the federal disqualification statute is inadequate, inconsistent, and in need of change. Most straightforward, many reformers seek the addition of specific substantive provisions to compel disqualification in presently unaccounted for situations.[57] Others argue, more broadly, that the procedures already in place need further clarification in order to be effective.[58] In this regard, at least one

54 Prevailing discontent has often led to growth in both the federal recusal statutes, *see id.* § 23.1, and state recusal laws, *see generally id.* §§ 27–28 (detailing state recusal laws).

55 For example, searches in the Westlaw "JLR" database reveal that Justice Scalia's decision to sit in *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004), has garnered attention in more than eighty articles, notes, and comments in law journals at the time of writing in Fall of 2008.

56 There are, of course, a wide array of criticisms of *state* recusal laws that are also worthy of engagement, but, for the purposes of this Note, discussion of federal recusal law is sufficient to demonstrate the thrust of scholarship in this area. For an overview of various issues within state recusal standards, see, for example, Kilimnik, *supra* note 43 (critiquing Pennsylvania recusal law); Charles Malarkey, Note, *Judicial Disqualification: Is Sexual Orientation Cause in California?*, 41 HASTINGS L.J. 695 (1990) (surveying California recusal law); Jennifer Simpson, Comment, *Automatic Judicial Disqualification Under Idaho Criminal Rule 25(a): A Necessary Lawyering Tool or Potential Nuclear Weapon?*, 43 IDAHO L. REV. 239 (2006) (proposing changes for Idaho recusal law). *See also* FLAMM, *supra* note 29, §§ 27–28 (detailing the historical progression, and criticisms, of each state's recusal law).

57 *See, e.g.*, Abramson, *supra* note 46, at 1076–81 (advocating for an express recusal requirement in cases litigated by a judge's former law clerk); Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need for a* Per Se *Rule on Friendship (Not Acquaintance)*, 33 PEPP. L. REV. 575, 595–96 (2006) (criticizing the lack of a statutory bright-line rule on "friendship").

58 *See, e.g.*, Ziona Hochbaum, Note, *Taking Stock: The Need to Amend 28 U.S.C. § 455 to Achieve Clarity and Sensibility in Disqualification Rules for Judges' Financial Hold-*

reformer simply longs for more eloquent drafters.[59] Still others highlight a deeper problem: the federal recusal process itself may require a stronger procedural backbone.[60] Regardless of the discrete situations that statutorily warrant disqualification, on this view, the procedural inadequacies of current federal recusal law threaten to undercut the recusal system as a whole.[61] For instance, the process of allowing judges to individually assess, for themselves, the propriety of sitting on a case may essentially render moot the discussion of what situations ought to require recusal.[62] Indeed, in the eyes of at least one critic, this current procedure may be so inadequate as to leave federal recusal law a "mere caricature[]."[63] While it is outside the scope of this Note to actively engage this debate, it is important to recognize

ings, 71 FORDHAM L. REV. 1669 (2003) (calling for clarification of the financial interest standards for disqualification); Matthew E. Kaplan, Comment, *Judicial Process at Risk: Scales of Justice Unequal Under Present Federal Judicial Disqualification Statutes*, 8 U. MIAMI BUS. L. REV. 273, 296–97 (2000) (suggesting changing the ambiguous language of § 455 to restrict judges' discretion and temper "creative interpretation" of its provisions); R. Matthew Pearson, Note, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV. 1799, 1829 (2005) (arguing that codifying the vagaries of Supreme Court recusal practices will ensure that the Court does not "reinvent[ ] the recusal process as new cases arise"). Professor Leslie Abramson has similarly critiqued the uncertainty surrounding the ABA's ethical standards for discrimination based on the "appearance" of bias. *See* Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 GEO. J. LEGAL ETHICS 55 (2000).

59 *See* Miller, *supra* note 57, at 595 ("In passing, it is also interesting to note, with requisite respect, that [the federal recusal statute] is sloppily drafted.").

60 *See, e.g.*, Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1251–56 (2002) [hereinafter Bassett, *Appellate Courts*] (proposing a peremptory challenge procedure for judicial disqualifications); Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 693–97 (2005) (urging Supreme Court Justices to facilitate effective recusal motions by voluntarily disclosing "statements of interest" in borderline cases); Amanda Frost, *Keeping up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 582–90 (2005) (proposing several procedural changes to control recusal decisions); Stempel, *supra* note 26, at 643–45 (proposing an amendment to § 455, to establish *neutral* review of recusal motions by the full Supreme Court, absent the challenged justice).

61 *See, e.g.*, Frost, *supra* note 60, at 552 ("[B]etter procedures, rather than stricter substantive standards, are needed to govern the [recusal] law's application. . . . What matters is that procedures be developed so that disqualification laws fulfill their goal . . . .").

62 The idea is that, assessing recusal for themselves, individual judges "have an incentive to narrowly construe" congressionally established recusal laws, "inevitably narrow[ing] [these laws] . . . to the point where they no longer serve the intended purpose." *Id.* at 551.

63 Stempel, *supra* note 26, at 642–43.

these general concerns and, moreover, the consistent attention to statutory recusal reform which they reflect.[64]

II. Judicial Disqualification and the Supreme Court

Compared to the wide growth of statutory recusal standards, as a constitutional matter, the grounds for judicial disqualification remain much narrower. It is well settled that due process requires an independent and impartial adjudicator,[65] but, as expressed by the Supreme Court, the recusal implications of that founding premise are rather limited. To date, the Supreme Court has only seldom extended the due process requirements of recusal beyond the common law pecuniary interest standard. Like the limits of current recusal statutes, the narrow constitutional requirements of judicial disqualification have come under scholarly fire, and, as expressed by some commentators, the implications of this limited standard might indeed be cause for serious concern.

A. The Court's Disqualification Jurisprudence

The Supreme Court has examined the constitutional requirements of judicial disqualification somewhat infrequently, and the Court has primarily extrapolated its recusal jurisprudence from a case decided in the 1920s: *Tumey v. Ohio*.[66] In *Tumey*, the Court invalidated a state procedure that compensated judges for delivering convictions, but not acquittals, in petty crime cases.[67] In line with common law practices, the Court explained:

> [I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.[68]

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64 For in depth discussion of the historical progression, modern practice, and lingering criticisms of both federal and state recusal laws, *see* Flamm, *supra* note 29, §§ 23, 27–28.

65 *See In re* Murchison, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases.").

66 273 U.S. 510 (1927).

67 *Id.* at 535.

68 *Id.* at 523. If the historical roots of this holding are not clear enough on its face, the Court relied directly upon English common law cases in reaching its decision. *See id.* at 524–26.

While the Court decided *Tumey* directly on this common law ground, its opinion also included some intriguingly further-reaching dicta,[69] upon which the Court would expand its approach in *In re Murchison*.[70] In *Murchison*, the Court held that a judge who had served as a "one-man grand jury" in the prosecution of a criminal defendant could not then preside over the defendant's trial.[71] Because in such a situation the judge likely maintains the "zeal of a prosecutor," the Court reasoned that he "cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused."[72] Quoting *Tumey*'s dicta, the Court reasoned that such a situation "might lead [the judge] not to hold the balance [between the parties] nice, clear and true," and therefore concluded that his participation was unconstitutional.[73] Further, the Court clarified that a definitive showing of *actual* bias is not necessary to trigger due process concerns[74]—presumably because of the great difficulty inherent in sorting out when a judge, despite his contentions to the contrary, is indeed biased.

Though *Murchison* thus affirmed that the Constitution, at times, requires recusal when the common law did not, the implications of its holding are nevertheless limited. Indeed, the Court carefully distinguished its decision from several analogous situations. First, the Court noted that, unlike the typical grand juror who participates among a group of many, a one-man grand jury cannot preside over his own charges, because he necessarily "prefers" them.[75] Thus, if the charging decision were spread among several participants, the Court's rule would not necessarily require a former grand juror to step down from the case. Further, the Court's rule does not even bar a judge from adjudicating a contempt charge that was committed in his immediate presence at trial. Because the judge in such a scenario has not "sum-

69 Despite the holding's common law basis, in reaching its decision in *Tumey*, the Court also opined:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Id. at 532.

70 349 U.S. 133.

71 *Id.* at 133, 139. Under Michigan law, the judge in *Murchison* was permitted to act as a "one-man grand jury" and to compel witnesses to testify about charges in limine, before proceeding with the trial. *See id.* at 133–34.

72 *Id.* at 137.

73 *Id.* at 136 (quoting *Tumey*, 273 U.S. at 532).

74 *See id.* ("[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case . . . .").

75 *Id.* at 137.

marily tried" the defendant, his participation would not rise to the same level of zealous interest as that in *Murchison*.[76] It would "not [be] impossible" for such a judge to free himself of any predeterminations, and his participation is therefore not unconstitutional.[77] Thus, while there were no finances to consider, the Court ultimately ruled against the judge in *Murchison* because he held a manifestly direct interest in the case.[78]

In *Ward v. Village of Monroeville*,[79] the Court again incrementally expanded its common law approach. There, the Court ruled that a village mayor could not fairly adjudicate a trial wherein a conviction would result in direct payment of fines to his village.[80] Citing *Tumey*'s direct pecuniary interest holding,[81] the Court extended "the limits of that principle" and found that the mayor's participation was unconstitutional because the revenue produced by the court provided a "'substantial portion of [his] municipality's funds.'"[82] In doing so, the Court carefully distinguished its holding from another case,[83] in which the mayor of Xenia, Ohio was permitted to exercise similar judicial functions. Noting the Xenia mayor's comparatively limited executive functions, the Court reasoned that, unlike in *Ward*, there "the financial policy of the city was too remote to warrant a presumption of bias" against him.[84] Thus, while expanding constitutional disqualification standards, in *Ward* the Court once again proceeded cautiously, in effect merely elaborating how "direct" a financial interest must be.[85]

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76 *Id.* at 137–38.

77 *Id.*

78 And indeed one might reasonably argue, as Justices Reed and Minton did in dissent, that the prosecutorial interest of the judge in *Murchison* was *not* direct or substantial enough to warrant disqualification, but disagreement over the Court's conclusion does not change the reasoning upon which it relied. *See id.* at 142 (Reed & Minton, JJ., dissenting) ("It is one thing to hold that a judge has too great an interest in a case . . . when his compensation is determined by the result he reaches. It is quite another thing to disqualify a state judge as having too great an interest . . . when his sole interest . . . is the maintenance of order and decorum in the investigation of crime . . . .").

79 409 U.S. 57 (1972).

80 *Id.* at 61–62.

81 *See id.* at 60.

82 *Id.* at 59 (quoting Vill. of Monroeville v. Ward, 271 N.E.2d 757, 761 (1971)).

83 Dugan v. Ohio, 277 U.S. 61 (1928).

84 *See Ward*, 409 U.S. at 60–61. In *Dugan*, the Mayor at issue still exercised both legislative and executive powers, but unlike the mayor in *Ward*, he shared those powers with a commission of four other people. *See id.*

85 *But see id.* at 62 (White, J., dissenting) (arguing that the majority's decision strayed too far from the direct pecuniary interest standard).

Even if *Murchison* and *Ward* arguably opened the door to a broad realm of constitutional judicial disqualifications, that door may have been shut by the Court's subsequent opinions. In *Aetna Life Insurance Co. v. Lavoie*,[86] the Court once again relied upon common law recusal standards to vacate a judgment by the Supreme Court of Alabama, which upheld an award for a bad faith insurance claim.[87] Because one of the Alabama justices personally had two similar claims pending in Alabama courts (whose merits would turn directly upon whatever rule was announced in *Aetna*), the Court ruled that he improperly held a direct pecuniary interest in the matter.[88] In reaffirming that due process incorporates the common law recusal prohibitions, the Court also expressly limited the extent of its holding and its prior decisions. The Court rejected the notion that its ruling rested broadly on the Alabama justice's "personal bias" against insurance companies, and instead clarified that only in the "most extreme of cases would disqualification [for personal bias] be constitutionally required."[89]

The Court reiterated these limits with even greater clarity in *Bracy v. Gramley*.[90] There, the Court held that a judge who accepts bribes from some criminal defendants at least arguably maintains an unconstitutional interest against other defendants (to protect his image as tough on crime, while keeping his bribes in place).[91] Nevertheless, the Court insisted that its approach to recusal should be construed narrowly:

> [M]ost questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard. Instead these questions are, in most cases, answered by common law, statute, or the professional standards of the bench and bar.[92]

In sum, despite a gradual progression over the twentieth century, constitutional recusal requirements, as established by the Supreme Court, remain rarely defined and rather narrow.

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86 475 U.S. 813 (1986).
87 *Id.* at 828–29.
88 *See id.* at 824–25.
89 *Id.* at 820–21.
90 520 U.S. 899 (1997).
91 *Id.* at 909.
92 *Id.* at 904 (citation omitted).

B. Searching for an Expanded Right

Like America's disqualification statutes, the Court's limited recusal jurisprudence has come under attack, and some claim that the Constitution requires more of our judges.[93] As Professors Martin Redish and Lawrence Marshall explain, the notion is simple: "[T]he participation of an independent adjudicator is at least one element of [the due process] floor."[94] However, what follows from that unassuming foundation is critical: "[W]ithout prophylactic protection of adjudicatory independence [through recusal], the Constitution's majestic guarantee of due process of law may in reality be no more than a deceptive façade."[95] Indeed, the Due Process Clauses of the Fifth and Fourteenth Amendments protect, at a minimum, the procedural rights to notice and a meaningful hearing,[96] and strict adherence to these values mandates that litigants argue before an independent and impartial adjudicator.[97] With so much at stake, the argument goes, we should not readily defer to state and federal legislatures as to what procedures their judges must afford litigants.[98]

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93 Indeed in many ways, it is this basic concern over due process that drives the statutory criticisms themselves. *See, e.g.*, Bassett, *Appellate Courts*, *supra* note 60, at 1256 (advocating reform of § 455, because "[t]he current federal recusal and disqualification provisions simply do not accord adequate due process protections").

94 Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 457 (1986).

95 *Id.* at 505. More controversially, Redish and Marshall also argue that assurance of an impartial adjudicator is perhaps the *only* necessary procedural due process requirement. *See id.* at 476 ("[T]he values of due process might arguably be safeguarded absent [other] procedural protections. None of the core values of due process, however, can be fulfilled without the participation of an independent adjudicator.").

96 *See* Fuentes v. Shevin, 407 U.S. 67, 80 (1972) ("[T]he central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and . . . they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted . . . in a meaningful manner.'" (citations omitted) (quoting first Baldwin v. Hale, 68 U.S.C. (1 Wall.) 223, 233 (1864), then Armstrong v. Manzo, 380 U.S. 545, 552 (1965))). However, more will be said on this below. *See infra* Part III.

97 *See In re* Murchison, 349 U.S. 133, 136 (1955) ("[Due process] requires an absence of actual bias in the trial of cases.").

98 *Cf.* Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 574 (2004) (noting that while the Supreme Court has mostly left recusal protections to the states, due process nevertheless requires disqualification in certain situations). Further, while the Supreme Court has taken a broadly deferential approach to judicial disqualification standards, the first Supreme Court decision to construe the Due Process Clause rejected a purely positivist account of due process (which would afford litigants only what processes the legislature has demanded). *See* Murray's Lessee v. Hoboken Land

Despite the relative limits of the Court's recusal *holdings*, its occasionally sweeping *language*[99] may lend itself to a more expansive recusal right. Indeed, some commentators insist that the broad phrasing of *Tumey*'s dicta in fact requires us to flesh out a robust right.[100] That the Court has, in some instances, extended judicial disqualification beyond a direct financial interest perhaps supports this notion. Indeed, Michelle Friedland argues that the *Murchison* decision reflects an underlying principle that due process prevents a judge who has "publicly drawn a conclusion about a case and what its outcome should be" from ultimately judging the merits of that case.[101] Friedland therefore argues for substantive additions to our constitutional recusal standards—specifically that a judge may not sit in a case wherein his previous public statements express a predetermined conclusion about the matter before him,[102] display "extreme animosity" against one of the litigants,[103] or demonstrate an intent to violate the law at issue in the case.[104]

The appellants in *Caperton* argue, more broadly, that *Murchison* requires the removal of any judge even "tainted" by the *probability* or *appearance* of bias.[105] Noting the Court's "endeavor" to prevent probable adjudicatory bias—rather than to fruitlessly search out a judge's admission of actual bias—the appellants take *Tumey*'s dicta at its face value and argue that *any* probable temptation of bias renders a judge's participation unconstitutional.[106] Professors Redish and Marshall illustrate this point with an argument that impresses with its sim-

& Improvement Co., 59 U.S. (18 How.) 272, 276 (1856) ("It is manifest that it was not left to the legislative power to enact any process which might be devised."); *see also* Redish & Marshall, *supra* note 94, at 457–58 (noting the Court's rejection of the positivist view).

99 *See supra* note 69.

100 *See, e.g.*, Friedland, *supra* note 98, at 578 (arguing that *Tumey*'s discussion of a judge's inability to "hold the balance, nice, clear and true" between the parties implies that a judge should be disqualified based on his public statements about the merits of a case); Redish & Marshall, *supra* note 94, at 500–02 (arguing that due process requires the removal of any judge with an identifiable bias).

101 Friedland, *supra* note 98, at 579.

102 *Id.* at 579–84.

103 *Id.* at 585–91.

104 *Id.* at 591–98. Such situations, Friedland contends, threaten "fundamental concept[s] in American justice," specifically the notions that guilt must be proven at trial, that a judge is to apply law evenhandedly, and that decisions are grounded in the law. *Id.* at 580, 585, 591.

105 Brief for Petitioners at 19, Caperton v. A.T. Massey Coal Co., No. 08-22 (U.S. Dec. 29, 2008), 2008 WL 5433361.

106 *See id.* at 19, 21–23; *see also* Transcript of Oral Argument, *supra* note 22, at 5 (urging the Court to adopt a "probably probable" standard for unconstitutional bias).

plicity: a judge who presides over a claim by his brother-in-law likely maintains at least the same level of prejudice as a judge who is in position to receive a negligible fee for a guilty verdict.[107] With no justifiable distinction between the temptation involved in these situations, the Constitution, they argue, ought to treat them the same.[108] To Redish and Marshall, any lesser protections threaten the very foundation of our procedural rights,[109] and a wide array of legal organizations have come forward to support the *Caperton* petitioners, arguing this same point.[110] Whether to protect "the integrity of the judicial process,"[111] to publicly "signal" the Court's commitment to the "highest ideals of due process,"[112] or to ensure that our courts do not become a "pay-to-play environment,"[113] the general consensus appears to be that the Supreme Court must announce stricter recusal standards, beginning first with its decision in *Caperton*.

With these arguments in mind, the remainder of this Note assesses the validity of the claim that due process mandates stricter recusal standards. As it will demonstrate, neither the historical roots of procedural due process, nor the Supreme Court's developed understanding of it, supports the notion that due process requires robust recusal procedures. Rather, the right protects only situations closely related to the common law standard and certain other "extreme" cases to prevent manifest injustice. Further, the consequences of this limited recusal right have been largely overblown, and in light of its practical effects, potential benefits, and implications for

107 *See* Redish & Marshall, *supra* note 94, at 501.

108 *Id.*

109 *See id.* at 505.

110 *See, e.g.*, Brief of Amici Curiae the Brennan Ctr. for Justice at NYU School of Law et al. in Support of Petitioners at 30, *Caperton*, No. 08-22 (U.S. Jan. 5, 2009), 2009 WL 45972 [hereinafter Brennan Ctr. Brief] ("Only if this Court reverses [the *Caperton* decision] can it put appropriate muscle in the constitutional commitment to judicial impartiality."); Brief of Nat'l Ass'n of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioners at 2, *Caperton*, No. 08-22 (U.S. Jan. 5, 2009), 2009 WL 27299 ("[U]nless the Court rules for Petitioners in this case . . . there will as a practical matter be no due process constraints at all."); Brief of the Ctr. for Political Accountability & the Carol & Lawrence Zicklin Ctr. for Business Ethics Research as Amici Curiae in Support of Petitioners at 4, *Caperton*, No. 08-22 (U.S. Jan. 5, 2009), 2009 WL 45977 [hereinafter Ctr. for Political Accountability Brief] ("Mandatory recusal is necessary to . . . maintain the integrity of the judicial system. The economy and the rule of law cannot thrive without robust safeguards of judicial impartiality.").

111 *See* Brief of the Am. Bar Ass'n as Amicus Curiae in Support of Petitioners at 3, *Caperton*, No. 08-22 (U.S. Jan. 5, 2009), 2009 WL 45978.

112 *See* Brennan Ctr. Brief, *supra* note 110, at 29.

113 *See* Ctr. for Political Accountability Brief, *supra* note 110, at 15.

our Constitution's federal structure, such a limited right should not be a point of concern for the American public.

III. DUE PROCESS AND JUDICIAL DISQUALIFICATION: WHAT THE RIGHT REQUIRES

There is little doubt that the arguments for broad constitutional recusal standards are facially compelling. The questions these commentators pose are serious, and the answers they offer are initially attractive. Though natural, these reactions may be misdirected. Due process is not a matter of simply outcome preferences; the inquiry, properly framed, is not a question of what is the "fairest" conceivable situation for an individual litigant. Rather, we must ask what the Fifth and Fourteenth Amendments directly require of judges.

That question—what the Due Process Clause requires—is one that the Supreme Court has consistently struggled with, and it has given rise to a number of different approaches over time. Indeed, the plain text of the clause itself is of little help. Ensuring "due process of law" clarifies the matter about as much as if the Framers had written that litigants must receive "whatever procedures they must."[114] In fact, several commentators (and judges) have at times contended that the plain meaning of "due process" affords litigants no more than the assurance that whatever procedural standards Congress and the courts have constructed will be followed.[115] However, such a strictly positivist interpretation of due process conflicts with long-established Supreme Court jurisprudence,[116] and this Note operates from the assumption that the Due Process Clause protects more than just the rule of established law. This Part reviews both the historical foundations of due process and the development of the Supreme Court's procedural due process jurisprudence. It then examines specifically the Court's approach to the due process requirements of recusal. Ultimately, despite certain expansions in the Court's overall approach to due process, it remains well established that due process requires very little for judicial disqualification. Rather, the Constitution provides only a basic floor to protect litigants from the most extreme and clear-cut situations of judicial partiality.

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114 *See* Robert P. Reeder, *The Due Process Clauses and "The Substance of Individual Rights,"* 58 U. PA. L. REV. 191, 204 (1910) ("[R]eading the words in their natural sense, it seems clear that 'due' process means simply the process which the person involved is entitled to receive.").

115 *See* Redish & Marshall, *supra* note 94, at 457–58 (noting and rejecting the positivist view of due process).

116 *See supra* note 98.

A. The History of Due Process

The question of what procedures the Due Process Clause requires is one that defies an easy answer. With little guidance from the plain text, the historical underpinnings of the Clause prove much more useful in deciphering what the Framers may have intended by it. The key phrase itself, "due process of law," appeared only once in the English Statutes of the Realm, in a 1354 statute that on its face is rather similar to our own Due Process Clause: "'[N]o man . . . shall be put out of land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law.'"[117] Extrapolating from other chapters of the same statute, it appears clear that this provision ensured simply that parties would not be summoned before the King without the "usual procedures of the common law."[118] More precisely, the statute promised service by a particular writ and the chance to appear before a court to answer, personally, to one's charges.[119]

In its first extended discussion of the meaning of due process,[120] the Supreme Court expressly embraced a historical interpretative approach. In *Murray's Lessee v. Hoboken Land & Improvement Co.*,[121] speaking for the Court, Justice Benjamin Curtis traced the roots of due process to another early English source of law—the Magna Carta—and to its provision that courts reach decisions "'by the law of the land.'"[122] While noting that several state constitutions expressly adopted the Magna Carta's language, and that the Due Process Clause certainly alluded to it, Justice Curtis rejected this singular interpretation of the Fifth Amendment as too deficient in its ability to restrain the legislature.[123] But the Court did not reject history outright. Quite to the contrary, Justice Curtis explained that where a procedure does not violate other specific constitutional provisions, its due process validity is assessed through examination of "those settled usages and modes of proceeding existing in the common and statue [sic] law of

117 Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265, 266 (1975) (quoting 28 Edw. 3, c. 3 (1354)).

118 *Id.* at 268.

119 Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339, 340 (1987).

120 *Id.* at 342–43.

121 59 U.S. (18 How.) 272 (1856).

122 *Id.* at 276 (quoting MAGNA CARTA cl. 39 (1215)); *see also* Eberle, *supra* note 119, at 343 (noting Justice Curtis' analysis).

123 *See* Eberle, *supra* note 119, at 343; *see also supra* note 98 (noting Justice Curtis' rejection of positivism).

England."[124] Upon consideration of this historical law (including, yes, the Magna Carta), Justice Curtis concluded that due process of law requires, much in line with the 1354 statute, simply "regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings."[125] Subsequent Supreme Court decisions have been even more explicit in their incorporation of the 1354 expression of due process, explaining that the right affords a party "notice and opportunity to be heard" when his life, liberty, or property are at issue.[126] Today, despite noted changes in the Court's due process jurisprudence, this historical two-pronged approach remains essentially intact, and it still provides the due process floor.[127]

B. Modern Due Process Analysis

Despite the early reign of historical analysis in its due process jurisprudence, the Supreme Court has long favored less rigid approaches.[128] Less than thirty years after the Court began its due process jurisprudence in *Murray's Lessee*, it changed its course.[129] In *Hurtado v. California*,[130] the Court shifted from historical analysis to more broadly assessing due process as a general guarantee of fundamental fairness.[131] Preferring jurisprudential flexibility to the "unchangeableness attributed to the laws of the Medes and Persians," the Court in *Hurtado* rejected Justice Curtis' history-only approach.[132] Rather, the Court added a consideration of the Fourteenth Amendment's "fundamental principles of liberty and justice" to the analy-

124 *Murray's Lessee*, 59 U.S. (18 How.) at 277.

125 *Id.* at 280. Justice Curtis also noted that in some instances—such as the trial of public debtors—due process might not even require this much. *See id.*

126 The specific formulation of procedural due process as embodying "notice and opportunity to be heard" appears to have first arisen in *Hagar v. Reclamation District No. 108*, 111 U.S. 701, 708 (1884), but subsequent constructions of procedural due process have widely incorporated some version of this phrase.

127 *See, e.g.*, Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 28–31 (1991) (Scalia, J., concurring) (expounding the history of due process and its "notice" and "opportunity" requirements and explaining that the additional "'settled course of judicial proceedings'" requirement mandates that courts give also the "'process due according to the laws of the land'" (emphasis omitted) (quoting Walker v. Sauvinet, 92 U.S. 90, 92–93 (1876))).

128 *See* Redish & Marshall, *supra* note 94, at 469 (noting that the "'frozen-in-history' approach did not last long").

129 *Id.*

130 110 U.S. 516 (1884).

131 2 CRAIG R. DUCAT, CONSTITUTIONAL INTERPRETATION 495–96 (7th ed. 2000).

132 *Hurtado*, 110 U.S. at 529.

sis.[133] The transition that *Hurtado* marked was later solidified in *Twining v. New Jersey*.[134] In *Twining*, after a thorough historical analysis,[135] the Court announced, "without repudiating or questioning the [historical] test proposed by Mr. Justice Curtis," that, despite the evident historical support for its holding, it preferred to rest its decision on "broader grounds."[136] Once again, the Court justified its decision through analysis of due process' "fundamental principle[s] of liberty and justice."[137] In other words, by 1908, history was no longer due process' undisputed trump card.[138]

However, the fundamental-concerns model did not last long either, and current due process jurisprudence proceeds on similarly flexible, though decidedly different, grounds. Dispensing with nebulous standards like *Hurtado*'s "liberty and justice" formulation, the Supreme Court now utilizes a "somewhat mechanical" balancing test.[139] In *Mathews v. Eldridge*,[140] Justice Lewis Powell ushered in a new realm of due process jurisprudence, establishing a multifactor balancing scheme that has become the "cornerstone for all analysis of procedural adequacy."[141] Noting that due process certainly requires "some form of hearing,"[142] Justice Powell determined the "specific dictates" of that right through consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[143]

Notably, the term "fairness" is completely absent from this formulation, and indeed Justice Powell mentions it only three times in the

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133 *Id.* at 535.

134 211 U.S. 78 (1908).

135 *See id.* at 100–06.

136 *Id.* at 106.

137 *Id.*

138 Of course this case leaves open the question of just how much of a role history played in the Court's decision, especially as the Court ultimately ruled in line with that history.

139 Redish & Marshall, *supra* note 94, at 470.

140 424 U.S. 319 (1976).

141 32 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE & PROCEDURE § 8129, at 82 (3d. ed. 2008).

142 *Mathews*, 424 U.S. at 333.

143 *Id.* at 335.

body of his argument (and once in a footnote).[144] The word "history" appears only once.[145] Justice Powell therefore departed from both Justice Curtis' historical tunnel vision and the ill-defined "principle"-based formulations that succeeded it, choosing instead a due process analysis couched in mechanistic efficiency.[146] And it is this particular analysis that has, in large part, taken hold of our due process jurisprudence.[147]

C. Due Process and Judicial Recusal

The preceding due process analysis suggests, it would seem, that the sufficiency of recusal procedures should be assessed under the *Mathews* framework. However, the Supreme Court has never applied the *Mathews* test to judicial disqualification.[148] In fact, in *Schweiker v. McClure*,[149] the Court considered two collateral due process claims—one involving judicial bias and the other challenging the availability of administrative review—and disposed of the recusal claim without even a reference to *Mathews*, despite relying squarely upon the *Mathews* test to assess the latter claim.[150] This is the only Supreme Court decision reviewing recusal rights that even mentions the *Mathews* test. In short, cornerstone or not, the *Mathews* test has not replaced the traditional approach to judicial disqualification, and, as Friedland admits, reformers cannot rely on it for their arguments.[151]

Rather, the Court has taken a restrained, ad hoc approach to assessing due process' requirements for judicial disqualification. While somewhat unclear, this approach—as earlier described[152]—has continued to accord certain weight to the limitations of common law practices. Initially, in *Tumey*, the Court undertook a plainly historical approach, directly following the narrow common law standard, and discussing at length early English laws and cases in support.[153] Similarly, one of the Court's most recent decisions to comprehensively

144 *See id.* at 343, 346 & n.29, 348.
145 *See id.* at 348.
146 *See* Redish & Marshall, *supra* note 94, at 472.
147 *See id.*
148 Friedland, *supra* note 98, at 576 n.48.
149 456 U.S. 188 (1982).
150 *See id.* at 195–200; Friedland, *supra* note 98, at 576 n.48.
151 *Id.* While not express about this point, neither Redish and Marshall nor the *Caperton* appellants rely on *Mathews* for their arguments. However, even relying upon *Mathews*, it is not clear that the arguments for reform succeed, which will be addressed below. *See infra* text accompanying notes 166–71.
152 *See supra* Part II.A.
153 *See* Tumey v. Ohio, 273 U.S. 510, 524–26 (1927).

engage the due process requirements of recusal focused heavily on common law practice, citing Blackstone[154] and announcing that a state's procedural rule "'is not subject to proscription under the Due Process Clause unless it offends some principle of justice *so rooted in the traditions* and conscience of our people as to be ranked as fundamental.'"[155] There, the Court ruled based upon the common law standard, and rejected the suggestion that due process was violated by the presence of mere bias.[156]

Admittedly, history has not been dispositive in the Court's jurisprudence, and its decisions in *Murchison* and *Ward* expanded the right, developing the interests which require recusal beyond direct finances.[157] Such decisions decidedly step outside a purely historical track, but even in these cases, the Court continued to cite and discuss the historical standard.[158] Moreover, the Court has noted that such expansions—though at times necessary—are likely rare, reserving these less-settled recusals for the most clear-cut situations.[159] Indeed, the Court has presumptively rejected the due process concerns of many of the most compelling nonhistorical recusal grounds, including kinship and personal bias.[160] In sum, though the Court has strayed from a centrally historical focus, it has consistently highlighted the traditional limits of recusal's due process implications,[161] and it continues to afford at least some deference to the history of recusal.

Accordingly, the Court has announced a considerably limited due process right to recusal, but, more precisely, the Court has taken

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154 *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 820 (1986).

155 *Id.* at 821 (emphasis added) (quoting Patterson v. New York, 432 U.S. 197, 201–02 (1977)).

156 *See supra* notes 86–89 and accompanying text.

157 *See supra* notes 70–85 and accompanying text.

158 *See, e.g.*, Ward v. Vill. of Monroeville, 409 U.S. 57, 59–60 (1972) (citing the common law standard relied upon in *Tumey* and noting "that the mayor there shared directly in the fees . . . did not define the limits of the principle").

159 *See Aetna*, 475 U.S. at 821 ("[O]nly in the most extreme of cases would disqualification on this [personal bias] basis be constitutionally required.").

160 *See* Tumey v. Ohio, 273 U.S. 510, 523 (1927) ("All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.").

161 *See, e.g.*, *id.*; *see also* Bracy v. Gramley, 520 U.S. 899, 904 (1997) ("[M]ost questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard."); *Aetna*, 475 U.S. at 828 ("The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification . . . .").

great care to disavow *the Constitution's* role in erecting strict recusal standards. The Court has repeatedly noted that its holdings only constrain the due process analysis, leaving federal and state legislatures free to create more rigorous standards as they see fit.[162] These explicit invitations to lawmakers suggest precisely why the Court favors a restrained approach over *Mathews*. Because setting recusal standards involves such difficult *policy* choices, the Court has essentially (and expressly) called on lawmakers to answer the question.[163] As expressed by the Court, due process forecloses legislative discretion beyond only the common law's bright line or in "the most extreme" of circumstances.[164] It is not that other circumstances may not warrant recusal, nor that receiving menial payments for convictions is necessarily less fair than presiding over a case involving one's brother-in-law. Rather, the Court's limited approach simply provides a somewhat reliable line for due process' requirements, and extending that line is too murky a task for any but the most egregious of situations.[165]

Such a limited approach to recusal makes sense if one considers the alternatives. Indeed, it is very difficult to imagine just how a *Mathews* test would function. Consider a difficult, though not unusual, circumstance: a judge is slated to hear a case wherein his recent judicial clerk is counsel for one of the parties. The first factor—the private interest at stake—is of little use as it would be the same in all recusal cases: adjudicatory fairness and impartiality are at issue. The decision is therefore to be made on balance of the remaining two factors: the judge must apprise the "risk of erroneous deprivation" of fairness (i.e., the risk that the judge is indeed biased) and weigh it against the government's interest in the function involved and the burdens of an alternative procedure (i.e., the benefits of protecting judicial independence and discretion).[166] On any wide basis, how should courts strike this balance? Impartiality is fundamentally an unapproachable question—a judge is either biased or he is not—that,

162 *See, e.g.*, *Tumey*, 273 U.S. at 523 (noting that recusal considerations require "legislative discretion").

163 *See id.*

164 *Aetna*, 475 U.S. at 821.

165 Indeed, if the *Caperton* oral argument is any indication, the desire to maintain this bright line continues to play a significant role in the Court's current approach to recusal standards. *See, e.g.*, Transcript of Oral Argument, *supra* note 22, at 15–16 (statement of Justice Kennedy) ("[A probability of bias standard] doesn't give sufficient guidance to courts . . . ."); *id.* at 19 (statement of Justice Scalia) ("You really have no test other than probability of bias. We can't—we can't run a system on—on such a vague standard.").

166 These benefits will be outlined in detail *infra* Part IV.B.

in reality, only the individual judge can answer.[167] Thus, under the *Mathews* framework, we simply arrive at the fundamental policy question behind all recusal standards: what situations are *so clearly* unfair so as to warrant intrusion into judicial independence, sacrificing its inherent benefits? Indeed, the specific question presented in this hypothetical is so difficult to assess that even judges on the same circuit do not agree on how to handle it.[168] While judges balance competing claims and answer difficult questions all the time, the Court is understandably reluctant to announce such complex determinations through the historically limited mantle of procedural due process. As for the *Hurtado*-like fairness assessment that Friedland advocates,[169] such an approach devolves into essentially the same assessment—only with even less guidance. Using the same example as above, the ultimate question becomes no easier if it is phrased in terms of protecting "fundamental fairness." Indeed, as opponents of such an approach have noted, the Court has never engaged in a "'looks bad' due process analysis," and likely for good reason.[170] Moreover, because what, systemically, best ensures fair and correct decisions is likely an empirically limited question, it is unclear even what kind of recusal standards such an approach supports.[171] Ultimately, more flexible approaches may not adequately fit the recusal analysis, and the Court has prudently adopted a roughly bright-line approach, leaving more obscure

167 *See* Symposium, *Professional Responsibility: Comments on Recusal*, 73 DENV. U. L. REV. 919, 921 (1996) [hereinafter *Professional Responsibility*] (statement of Judge Kelly); *see also* Sarah M. R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 21–24 (2007) (illustrating that strict recusal rules are too imprecise to sort out the often unapproachable question of actual bias).

168 *Compare Professional Responsibility*, *supra* note 167, at 922 (statement of Judge Ebel) ("If an attorney was formerly my law clerk, I would consider recusal but would not automatically step down. I would analyze how close a relationship we held and the number of years that have passed since the clerkship."), *with id.* at 923 (statement of Judge Tacha) ("I personally do not sit on former law clerk's cases and think it is presumptively not a good idea.").

169 *See* Friedland, *supra* note 98, at 576 n.48 (arguing that the *Mathews* test is inappropriate for recusal decisions, because it does not properly consider "when it would be unfair for a particular individual to preside over [a case]").

170 Brief for Respondents in Opposition at 14, Caperton v. A.T. Massey Coal Co., No. 08-22 (U.S. Nov. 14, 2008), 2008 WL 4126332; *cf.* Transcript of Oral Argument, *supra* note 22, at 11 (statement of Justice Scalia) (rejecting petitioner's contention that the Court's past holdings require recusal in the face of likely bias). To adopt such a test may well eliminate the historic distinction between apparent and actual bias, and is out of line with the Court's recusal holdings. *See id.* at 29–31; *see also* Cravens, *supra* note 167, at 5–18 (criticizing appearance-based recusal standards as imprecise and inconsistent).

171 *See infra* Part IV.B.

situations to the wisdom of judges and the legislatures that control them.

IV. DEFENDING THE LIMITS: THE VALUE OF A MODEST RIGHT

The constrained enforcement of judicial disqualification as a constitutional matter should not trouble us. At its essence, due process is not a rigorous procedural guarantee, and the Court's cautious approach in this regard reserves the difficult question of what recusal procedures best protect the judiciary, and the public it serves, to the consideration of Congress and the states. Such an approach is deeply rooted, long accepted, and indisputably workable. Moreover, the practical effects of a moderate due process right are rather limited, and the Court's moderation, in fact, carries particular benefits. A fuller understanding of the nature of judicial disqualification standards—and the difficult choices they pose—and consideration of our Constitution's federal structure counsel that we should, if anything, be encouraged by a restrained due process right and the freedom it offers our nation's lawmakers.

A. Practical Effects

As a practical matter, a limited constitutional disqualification right changes little for U.S. courts and litigants. Foremost, judges well understand their unique place in our political system and the public's need for their impartiality—and the recusal problem may therefore be overstated in general. The ABA Code of Judicial Conduct declares, "Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity and competence."[172] As their comments reveal, judges take this call rather seriously. Speaking on a panel at the University of Denver Law School, Tenth Circuit Judge Carlos F. Lucero explained, "I am extremely sensitive to any bias whatsoever, and personally would recuse if there is any reasonable possibility or suspicion of an appearance of impropriety."[173] On the same panel, Judge John J. Porfilio noted that "the party's belief in the fairness of the tribunal . . . is of the utmost importance."[174] Indeed,

172 MODEL CODE OF JUDICIAL CONDUCT pmbl. (2008).

173 *Professional Responsibility*, *supra* note 167, at 920 (statement of Judge Lucero).

174 *Id.* at 921 (statement of Judge Porfilio). During oral argument in *Caperton*, Justice Scalia presented a very similar view, stating that people elect judges because they expect them to be "fair and impartial," and therefore the greatest gratitude a

judges' concern over their own integrity is so prevalent that, as in Judge Deanell R. Tacha's experience, "recusal motions are a rare occurrence" because judges are so quick to recuse themselves in questionable situations.[175]

Moreover, in accepting that the Due Process Clause does not expansively control recusal decisions, we do not have to concede that no source of law can. Rather, the Court's restraint simply leaves the thorny (and perhaps unanswerable) question of what *comprehensive* recusal requirements best serve the public to those institutions most capable of engaging the issue: our nation's legislatures. As noted, nearly every jurisdiction in the United States has enacted positive law controlling the disqualification of its own judges,[176] and insofar as adjudicatory fairness (both actual and apparent) or the judiciary's reputation are concerns for us, these sources of law can be utilized to require whatever rigors we desire for judicial disqualification. Indeed, a strong push for enhanced statutory recusal requirements already exists,[177] and Congress and the states have time and again displayed their willingness to adapt judicial disqualification standards to prevailing opinions.[178] Ultimately, recusal standards present a number of worthy (and competing) policy considerations, and striking the appropriate balance is too capricious of a task for the Supreme Court to undertake on a comprehensive basis.[179] The Court's restraint in this area does not leave the nation's litigants without their appropriate protections, nor does it leave judges free from control. Rather, it merely marks a constitutional floor, placing the far more difficult policies in the hands of those legislatures directly tasked with assessing them.

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judge can show his supporters is to "be a good judge," be "faithful," and never "lie and distort cases" to meet his preferences. Transcript of Oral Argument, *supra* note 22, at 6 (statement of Justice Scalia).

175 *Professional Responsibility*, *supra* note 167, at 923 (statement of Judge Tacha).

176 *See supra* notes 48–52 and accompanying text.

177 *See supra* Part II.A.

178 As noted *supra* Part I.B, over the past two centuries, both Congress and the states have gradually expanded recusal laws in response to changing attitudes about judicial independence. Today, all U.S. jurisdictions, "with few exceptions," have imposed explicit judicial disqualification standards more rigorous than those required by due process. *See* FLAMM, *supra* note 29, § 2.5.2, at 34–35. In addition, the thirty-nine states that elect judges, *see* Certiorari Petition, *supra* note 5, at 3, possess perhaps another check on recusal unease: the threat of losing reelection if a judge fails to properly recuse himself. Indeed, this check appears to be alive and well in West Virginia. Only months after the *Caperton* scandal played out, Chief Justice Maynard lost his reelection bid. *See* Liptak, *supra* note 12.

179 This point will be developed more fully *infra* Part IV.B.

B. The Other Side of Judicial Disqualification

The prudence of leaving the bulk of these recusal decisions to America's legislators is especially clear upon proper consideration of the inherent benefits of limited judicial disqualification standards. Critics of recusal practices have, in large part, portrayed judicial disqualification as a one-sided procedure; arguments for reform treat recusal decisions as if they are to be based strictly upon whatever would be the fairest possible situation for the lone party seeking to remove the judge. However, recusal, properly understood, encompasses a difficult balance between allowing judges their due independence, and limiting that freedom in order to ensure impartiality. Ultimately, in only the clearest—or perhaps most "extreme"—of cases is the need for mandated recusal apparent. The great majority of potentially biased situations are subject to a number of competing views. Thus, the bulk of these choices are best made either personally, by the judge who actually knows whether he is indeed biased, or politically, by the legislatures directly charged with deciding these complex policies.

Indeed, judicial disqualification, as it has long been practiced, does not just objectively preempt the possibility of judicial bias. Rather, recusal is ultimately a personal, discretionary matter. The very phrasing of our federal recusal laws supports this notion; despite the noted substantive expansions in federal disqualification law, most recusal decisions remain (to the dismay of some[180]) within the judge's discretion: "Any [federal judge] shall *disqualify himself* in any proceeding in which his impartiality might reasonably be questioned."[181] Until 1974 that decision was not even made objectively,[182] and today it remains subject to the historical rule of necessity—permitting even a financially interested judge to remain on the case if he finds no adequate substitute.[183] At its essence, judicial disqualification remains often a private matter of professional ethics and prudence.[184]

Viewed in this light, in deciding the specific situations in which a judge must step down, we ought to assess not only the threat that the judge's participation would pose to instant adjudicatory fairness, but also the restraints that the standard would place on the judge's inde-

180 *See supra* notes 62–63 and accompanying text.

181 28 U.S.C. § 455(a) (2006) (emphasis added).

182 *See* FED. JUDICIAL CTR., *supra* note 40, at 5.

183 *See* United States v. Will, 449 U.S. 200, 213–16 (1980).

184 *See* Bracy v. Gramley, 520 U.S. 899, 904 (1997) (noting that, beyond legal mandates, many recusal questions are left to be answered by "the professional standards of the bench and bar").

pendence. This section evaluates the often overlooked value of judicial discretion and independence, and discusses the implications of considering recusal as a *balance* between fostering these interests and preemptively protecting fairness.

1. The Value of Judicial Discretion and Independence

Affording judges freedom to act through their own discretion carries both systemic and practical benefits. Systemically, the value in deferring to judges' discretion derives essentially from the need to protect an independent judiciary.[185] Judicial independence is a fundamental principle of U.S. law.[186] As the preamble to the ABA's Model Code of Judicial Conduct declares, an "independent, fair and impartial judiciary is indispensable to our system of justice."[187] Because we do not want our fundamental legal protections to "fall victim to the passions of the moment," we endow our judges with some amount of detachment from the rest of our political officers.[188] It is ultimately this detachment which gives judges any reasonable authority to definitively interpret our laws and Constitution.[189] Judicial independence is in fact a "core concept" of the Constitution itself, wherein the Framers created a distinctly independent federal judiciary, vesting the judicial power in its own branch, giving federal judges life tenure, and even protecting judicial salaries from congressional interference.[190]

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185 *Cf.* Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 134 (2004) (describing a causal chain in which public respect for the judiciary flows, in part, from its independence).

186 In fact, judicial independence was a fundamental principle of law, long before U.S. court systems even developed. *See* Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L.J. 1061, 1062 (2007).

187 MODEL CODE OF JUDICIAL CONDUCT pmbl. (2008).

188 David Boies, *Judicial Independence and the Rule of Law*, 22 WASH. U. J.L. & POL'Y 57, 58 (2006).

189 *See id.* at 62 ("The genius of the American judicial system's implementation of the rule of law is that it has coupled the principle of judicial supremacy with the principle of judicial independence; the latter enables judges to fulfill the function that the former gives them.").

190 Rakove, *supra* note 186, at 1062; *see also* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."). As U.S. District Court Judge Julie Robinson explains, these provisions demonstrate that "the founders, in their considered and educated judgment, determined that on the balance, the need for a

In order to uphold judges' independence, we therefore imbue the judiciary with at least a certain level of respect and deference. Judges are, of course, simply people—with their own experiences, opinions, and presumptions—and yet we expect them to decide cases objectively and fairly out of a commitment to their oaths.[191] As Blackstone described, judicial authority "greatly depends upon [the public's] *presumption*" that, on power of their oaths, judges will "administer impartial justice."[192] It is hard to imagine how an effective judiciary could work any other way; to the extent that judges are to be the ultimate arbiters of law, they must receive some amount of deference to their ability to carry out that task. If judges do not have the freedom to adjudicate cases through their wisdom and according to their oaths, judicial functioning will devolve into to an *outcome*-oriented affair, rather than a *decisionmaking* process, ultimately sacrificing the rule of law.[193] Allowing recusal decisions to be made by outsiders may in fact give judicial critics "a veto over participation of any Justices who had social contacts with . . . a named official."[194] That situation gives litigants, court observers, or even partisan journalists incentives to actively search for reasons to question a judge's impartiality—a result that is "intolerable."[195] Ultimately, much like the goal of mandated recusal, promoting judicial independence is largely to help ensure, at least on a system-wide level, the judiciary's decisional impartiality.[196]

Beyond (or perhaps below) the systemic values of an independent judiciary, deference to judicial discretion affords courts, and the public as a whole, a number of practical benefits. Foremost, leaving recusal decisions to the prudence of individual judges helps avoid the sort of "judicial forum shopping" that rigorous recusal standards would inevitably encourage.[197] If recusal were widely mandated, savvy

judiciary free of political or undue influence necessitated a judiciary that could render decisions without allegiance to the popular opinions or the most vocal proponents in the community." Julie A. Robinson, *Judicial Independence: The Need for Education About the Role of the Judiciary*, 46 WASHBURN L.J. 535, 540 (2007).

191 *See* Robinson, *supra* note 190, at 539.

192 3 BLACKSTONE, *supra* note 35, at *361 (emphasis added).

193 Robinson, *supra* note 190, at 544.

194 Cheney v. U.S. Dist. Court, 541 U.S. 913, 927 (2004) (mem. of Scalia, J.) (explaining his decision to not recuse himself from the case).

195 *Id.*; *see also* Cravens, *supra* note 167, at 18–21 (describing the danger in overvaluing the public's perception of the judiciary at the expense of judicial integrity).

196 *See* Viet D. Dinh, *Threats to Judicial Independence, Real and Imagined*, 95 GEO. L.J. 929, 931 (2007).

197 *See* Todd Lochner, *Judicial Recusal and the Search for the Bright Line*, 26 JUST. SYS. J. 231, 231–32 (2005).

litigants would presumably attempt to systematically remove certain judges until they were left with one of their liking.[198] In this regard, strict recusal standards may in fact *prevent* the best judge from hearing the case.[199] Further, robust disqualification standards would present a great burden to court resources and adjudicative efficiency. The more easily available recusal is, the more litigants will seek disqualification, thus straining court resources by forcing judges to be frequently shuffled around, and giving rise to an expanse of motions and appeals to be adjudicated.[200] Recusal imposes even heavier burdens on courts in especially complex litigation, wherein it will take the reassigned judge a great deal of time and effort to sift through the large case files or to get up to speed on intricate scientific evidence.[201] In such a case, the parties most affected by the judge's recusal decision—the actual litigants in the case—might well benefit from more judicial freedom to remain on the case, as the "fiscal burdens [of recusal] on litigants are formidable."[202] This raises its own fairness concern: because such recusals are so expensive, stricter disqualification standards might disproportionately benefit the wealthiest parties.[203] Finally, at the supreme court level (in both state and federal systems), recusal may simply prevent cases from being heard if disqualification leaves too few justices to constitute a quorum.[204]

198 An amicus curiae brief filed on behalf of seven states in support of the Massey Energy in *Caperton* warns that such practice would result inevitably in "en masse" overrecusal of judges. *See* Brief of the State of Alabama et al. as Amici Curiae in Support of Respondents at 5, Caperton v. A.T. Massey Coal Co., No. 08-22 (U.S. Feb. 4, 2009), 2009 WL 298466 [hereinafter States' Brief].

199 *See Professional Responsibility*, *supra* note 167, at 921 (statement of Judge Kelly).

200 *See* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1081–82 (1996).

201 *See* Panel Discussion, *Disqualification of Judges (the Sarokin Matter): Is It a Threat to Judicial Independence?*, 58 BROOK. L. REV. 1063, 1066 (1993) (statement of Jack B. Weinstein).

202 *Id.*

203 *See id.*

204 *See* Lewis, *supra* note 37, at 385. In the federal system, if the Supreme Court cannot constitute the required six-Justice quorum, it may transfer a case brought by direct appeal from a district court to the relevant circuit court (which happened famously in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945)) or must otherwise affirm the lower court judgment. *See generally* Stempel, *supra* note 26, at 647–51 (discussing the Supreme Court practice and cases where it lacked a quorum).

2. Searching for a Balance

The benefits of judicial independence and adjudicatory discretion demonstrate that the most rigorous recusal practices may not necessarily be the most desirable. However, judicial independence does not require complete freedom from external control, and judicial discretion must itself operate within the constraints imposed by disqualification standards. Setting recusal procedures is therefore a complex balancing exercise that assesses where the proper median between these two fundamental concerns should lie. The sheer difficulty of assessing that balance suggests that we should avoid readily erecting rigorous prophylactics against judicial bias, at the cost of judicial independence.

Indeed, just as our Constitution expresses certain answers to this question for the federal courts, lawmakers in every other U.S. jurisdiction have assessed, in their own judgment, this balance, and states have constructed a variety of systems to appoint and regulate their judicial officers. In structuring its own judiciary, each state necessarily chooses how and to what extent it will promote judicial independence. The diverging approaches that states have taken show that there are no clear or correct answers to be had.[205] Yes, certain bright lines seem warranted—for instance, that it cannot conceivably be fair to pay a judge to rule a certain way, despite whatever advantages it may offer—but it is largely too difficult to assert when, universally, judicial constraint must trump competing values. Indeed, the proper balance between judicial legitimacy and case-by-case impartiality is likely empirically unverifiable, and perhaps never can be settled. We should therefore refrain from too quickly espousing constitutional "answers" to these problems, and we ought to avoid erecting barriers to a fuller consideration of the complexities at hand.[206] For this very reason, the Supreme Court has taken a restrained approach in applying due process to recusal procedures, and its cautious jurisprudence should not offend our sensibilities.

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205 *See generally* Daniel R. Deja, *How Judges Are Selected: A Survey of the Judicial Selection Process in the United States*, 75 MICH. B.J. 904 (1996) (describing and comparing four basic approaches—each with its own variants—to the selection and qualification of state judges); *see also* States' Brief, *supra* note 198, at 19–21 (describing the "downright kaleidoscopic" diversity in state judicial selection procedures).

206 The seven-states amicus brief filed in support of Massey emphasizes this particular point, and argues that such "constitutionaliz[ing]" of state recusal practice is both needless and contrary to states' "vigorous and innovative" regulation of their own disqualification procedures. *See* States' Brief, *supra* note 198, at 3–4.

C. Federalism Concerns

Finally, the very structure of our constitutional government suggests that a restrained approach to recusal is an appropriate one. The creation of robust due process recusal rights would in essence compel all courts, in all states, to abandon their established practices and to adopt specific answers to what has been shown to be a rather complex policy decision. Such a proposal therefore carries disconcerting implications for our federal system.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government."[207] This proposition is neither controversial nor without force, and it has been extended to prevent federal commandeering of both state legislatures and executive officials.[208] While these prohibitions do not prevent the federal government from "commandeering" state courts by requiring them to hear certain cases in order to uphold federal law,[209] recusal duties present far different commands to judges than do rules obligating jurisdiction. Namely, imposing a duty to recuse does nothing to buttress substantive federal law. Judicial disqualification, as a general matter, is not "part and parcel" of any federal claim, it does not specially "burden a federal right," nor are there any other indications to suggest that it should be treated as fundamentally "substantive" in nature.[210] To the contrary, like other aspects of judicial process, recusal decisions are very much within the realm of states' "sovereignty over procedure."[211] Indeed, recusal choices merely reflect a judge's—and by extension a state's—own determination that he is adequately qualified to preside over a case. Though the Supreme Court has never directly ruled on the matter, it is likely that such assessments of state officials are squarely within the states' unique authority.[212] For the federal government to step in and precisely mandate when state judicial actors are and are not qualified to

207 Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

208 *See* Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 949–50 (2001).

209 *See* Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 75–76 (1998).

210 *See* Bellia, *supra* note 208, at 983–85.

211 *See id.* at 981 (noting that the Supreme Court has implied that "federal and state governments are sovereign over how their respective laws shall be enforced").

212 *See Gregory*, 501 U.S. at 460 (noting that congressional interference with Missouri's state judge qualifications would "upset the usual constitutional balance of federal and state powers").

hear a case involving *any* law is to thereby cross the very boundary of sovereignty that federalism is to protect.[213]

On this view, the restrained pronouncement of constitutional judicial disqualification standards appropriately respects the limits that federalism might place on recusal. Indeed, such an approach aligns well with certain federalism-inspired doctrines that the Court already practices, such as the presumption requiring a clear congressional statement for the preemption of state laws.[214] Moreover, the Supreme Court itself has suggested that federalism concerns might limit the federal government's power to control state judges.[215] In considering the constitutionality of a congressional statute that purported to invalidate certain state-imposed age qualifications for Missouri judges, the Court announced (while avoiding an ultimate answer): "Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' this balance."[216] Recusal choices—which essentially designate situations in which a judge is not competent to hear a case—encompass just those "defining" features of "constitutional officers" that are left to the states' appraisal. A limited right refrains from comprehensively binding states to one national answer for these assessments, ultimately helping to preserve our federal balance of power.

As it is, the limited recusal jurisprudence that we have carries certain consequences for federalism. Because the Supreme Court views

213 Of course, broader due process requirements would not "commandeer" state judges through a regulatory act of Congress, but rather they rest upon an individual constitutional right, making the case for them arguably more compelling. The Fourteenth Amendment did, after all, alter our federal balance of powers at least to some extent. In this regard, there is no doubt that the Fourteenth Amendment carries the power to compel state courts to follow certain procedures. However, to do so, the procedures it mandates must come directly from those required by its Due Process Clause. The passage of the Fourteenth Amendment did not simply eviscerate all remnants of federalism, leaving states—and their courts—at the mercy of the federal government. *See* Steven G. Calabresi, *We Are All Federalists, We Are All Republicans: Holism, Synthesis, and the Fourteenth Amendment*, 87 GEO. L.J. 2273, 2300 (1999) (reviewing AKHIL REED AMAR, THE BILL OF RIGHTS (1998)). Rather, that Amendment, like all amendments, is but a part of a larger constitutional scheme that incorporates, at its base, certain structural features, such as federalism and separation of powers, and it is through this light that it should be interpreted. *See id.*

214 *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

215 *See Gregory*, 501 U.S. at 460.

216 *Id.* (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985)).

(correctly) federal recusal law as imposing stricter standards than due process mandates, its recusal holdings typically compel state judges to step down. Broad expansion of those holdings therefore does not promote greater due process rights for our nation's litigants, but more precisely, it compels *state* court systems to adhere to the practices that Congress has deemed proper for *federal* judges. Such a proposal contradicts the understanding that states alone are charged with the duty to "defin[e] their constitutional officers"[217] or that "[t]he powers reserved to the several States . . . extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order . . . of the State."[218] And yet this infringement is precisely what scholars such as Friedland, and especially Professors Redish and Marshall, propose. Redish and Marshall suggest that a heavy presumption should in fact lie on the opposite side of mandated recusal. They argue: "Only when it is all but impossible to rectify bias should a potential lack of independence be tolerated."[219] This severe burden on judges to prove themselves *not* biased in unclear situations in no way aligns with our longstanding presumption that a judge is "already sworn to administer impartial justice,"[220] and as this section has sought to demonstrate, such a proposal should caution us from too quickly accepting arguments for expansive due process recusal requirements.[221]

Conclusion

What, then, are critics to make of our limited due process right to judicial disqualification? Frankly, not much. That our Federal Constitution does not provide definitive answers to some of the most difficult recusal questions does not mean that U.S. law cannot. Indeed, the Constitution's silence need not quiet our legislative concern. If anything, the recognition of due process' proper limits simply allows critics to more usefully direct their recusal complaints to the bodies that have proven their ability and willingness to act upon them—federal and state legislatures. Due process, in essence, protects only cases

217 *Gregory*, 501 U.S. at 460.

218 The Federalist No. 45, at 293 (James Madison) (Clinton Rossiter ed., 1961).

219 Redish & Marshall, *supra* note 94, at 504.

220 3 Blackstone, *supra* note 35, at *361.

221 In fact, to several states, the federalism implications of strict recusal standards are so great that they caution against even extension of the traditional pecuniary interest standard to the situation of judicial campaign finance. *See generally* States' Brief, *supra* note 198, at 7–9 (arguing against reversal in *Caperton*, because such a ruling would too greatly extend due process' reach, contravening principles of federalism).

of clear or extreme unfairness, and a limited approach ensures that it will do specifically that. The rest—with factual vagaries that neither Justices Black and Jackson nor Judges Ebel and Tacha can agree upon—is simply for our political bodies to decide.

Moreover, the *Caperton* appeal stands as an example of just how our system works. To be certain, the *Caperton* saga is ugly and troubling, but, most important, it is one that the Supreme Court has chosen to review. Indeed, the *Caperton* scenario is precisely the type that a restrained due process approach singles out. A strong argument can be made that $3 million in campaign money—for a judge who relies on elections for his livelihood—constitutes a "direct pecuniary interest" in the matter. Moreover, the *Caperton* case likely presents an "extreme" enough situation to warrant due process protections, regardless.[222] In this sense, the *Caperton* appellants and reformers such as Redish and Marshall may well have overplayed their hand. In order to protect litigants in these situations, we do not need to announce a sweeping due process right.[223] Conversely, a restrained due process right addresses precisely these situations, and if the Court decides—as it perhaps ought to—that due process was violated in *Caperton*, court observers should not infer much beyond this point.

But no matter the eventual outcome of *Caperton*, the Court's review of the case is only one in a host of potential protections. Former Chief Justice Maynard has already lost his seat on the West Virginia court, and if public commentators have their way, Justice Benjamin won't be far behind. The West Virginia legislature is currently considering judicial reform to address this very matter, and West Virginia has its own recusal statute, which its lawmakers are free to amend as they see fit. At the end of the day, the Court's holding—and whatever limitations the Justices place on it—will not constrain the protections that states may offer their litigants. To be certain, no system is perfect and not all decisions will be free of bias. However, the limits of due process need not affect our own pursuit of those goals, which the American public would do well to keep in mind as it watches *Caperton* play out, and as it reacts to whatever scandal inevitably arises next.

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222 Indeed, such a suggestion was briefly made by Justice Stevens at the *Caperton* argument. *See* Transcript of Oral Argument, *supra* note 22, at 29–30 (characterizing the *Caperton* case as the most "extreme" recusal case that the Court has yet confronted).

223 And, judging by the statements of some of the Justices in oral argument, if the *Caperton* petitioners lose their appeal, it might be directly because they hung their case on such an unrestrained due process formulation. *See, e.g.*, *supra* note 165 (describing the Justices' concern over the applicability of a "probable bias" standard).