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Systemic Due Process: Procedural Concepts and the Problem of Recusal

Paul B. Lewis*

1. INTRODUCTION

In the recent Texaco-Pennzoil litigation, Texaco alleged that the presiding judge’s failure to recuse himself violated due process. It is uncontested that Joseph D. Jamail, the principal attorney for Pennzoil, contributed $10,000 to the re-election campaign of Judge Farris, the presiding judge in the case.¹ Neither Mr. Jamail nor Judge Farris disclosed to Texaco the $10,000 contribution.² Texaco argued that because due process requires the opportunity to be heard in a meaningful manner,³ including review by an “impartial and disinterested tribunal,”⁴ Judge Farris’s failure to recuse himself violated due process of law. The Texas Court of Appeals disagreed, holding that no due process violation occurred because “Judge Farris neither participated with Pennzoil in the case being tried nor enjoyed even ‘the slightest pecuniary interest’ in the outcome of the trial.”⁵ In other words, despite the judge’s relationship with the attorney and the possible risk of bias, the court found no constitutional violation because the judge had no direct financial interest in the outcome.

This decision comports with United States Supreme Court precedent. The Supreme Court has adopted the common law standard that any direct pecuniary interest in a case, no matter how minimal, constitutionally mandates recusal.⁶ This standard implies that no person can fairly judge his or her own case. The Court has rejected, however, the notion that a breach of judicial impartiality based

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⁵ Texaco, 729 S.W.2d at 845.
on bias or familial relationship with a litigant undermines traditional notions of justice to the degree of a constitutional violation. Because, as the Court noted in *Patterson v. New York*, it is normally "within the power of the State to regulate procedures under which its laws are carried out," and its decision in this regard 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," such a violation can be controlled only by statute.

This Article contends that existing standards governing the due process clause prohibition of judicial improprieties are insufficiently broad, inconsistent, and inadequate. For example, in *In re New Mexico Gas Antitrust Litigation*, the Tenth Circuit held that a judge possessing only negligible amounts of stock in a corporation that is a party to a suit is sufficiently partial to mandate recusal. The court stated that "recusal would be required by the statute if the judge owned even one share of stock in a party to the litigation." Yet in *Laird v. Tatum*, Justice Rehnquist stated that his expression of legal views on the merits of a case during prior governmental service did not render him incapable of giving both litigants a fair hearing. This Article attempts to show, by examining the philosophical basis of due process, that such a disparate approach to recusal is unacceptable. Two concepts of due process have been widely accepted; both are problematic, and neither offers an adequate explanation for current recusal standards nor a sound foundation upon which to build a more comprehensive standard. Under the first concept, instrumental due process, a major goal of process is to facilitate efficiency in dealing with substantive rights. The second concept, intrinsic due process, maintains that procedure serves to protect the fundamental rights inherent in any litigant. Because neither of these concepts serves

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7. Bias may be defined as any feeling not based on judicial philosophy which may predispose a judge.
10. *Id.* at 201-02 (citations omitted).
11. 620 F.2d 794 (10th Cir. 1980).
12. *Id.* at 796 (interpreting 28 U.S.C. § 455(b)(4)(1982)).
13. 409 U.S. 824 (1972) (Rehnquist, J., mem.).
14. *Id.* at 836.
as an effective basis for due process, this Article will propose a
new concept, central to due process, that could serve as the basis
for a new theory of recusal. This view of due process will be
called systemic due process, and it professes that a fair system is
a fundamental prerequisite to a fair result. Hence, the principal
focus of this concept is on preserving the essence of the system.
Systemic due process will serve as the basis for an expansive and
uniform system of rules designed to regulate potential judicial
improprieties.

II. HISTORY

Historically, at common law, judges were disqualified for finan-
cial interest in a case.17 The desirability of a judge's complete
independence from a case dates back to the eleventh century, when
the distinction arose between one's personal knowledge and duties
(ut homo) and one's professional knowledge and duties (ut judex).18
Although Blackstone rejected the need for legal constraints on
judicial partiality, stating that "[t]he law will not suppose a
possibility of bias or favour in a judge, who is already sworn to
administer impartial justice, and whose authority greatly depends
upon that presumption and idea,"19 the law was generally clear
that any financial interest was enough to disqualify a judge. The
sole exception to this firm standard was the "rule of necessity,"
under which a judge could not decline to sit where no adequate
substitute could be found.20 Under this exception the rule of
disqualification yielded to the litigant's right to obtain a trial.21

The common law standard was adopted in the United States as
early as 1813, when Chief Justice Marshall disqualified himself.22
The modern standard for disqualification was declared by the
Supreme Court in Tumey v. Ohio.23 In Tumey, the mayor of an
Ohio town, who also acted as a judge, had the power to fine and
then use the revenue from the fines for city purposes. Chief Justice
Taft, after stating that abuse of neither interest nor relationship
rises to a constitutional level, held that direct financial interest in

19. 3 W. Blackstone, Commentaries *361.
21. See S. Breyer & R. Stewart, Administrative Law and Regulatory Policy
22. Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813). See also
White, The Working Life of the Marshall Court, 1815-1835, 70 Va. L. Rev. 1, 12-13 n.50
a case violates the fourteenth amendment’s due process clause.\textsuperscript{24} Furthermore, he enunciated the following standard for determining when such a violation has occurred:

> 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.\textsuperscript{25}

In \textit{In re Murchison},\textsuperscript{26} the Supreme Court elaborated on the concept laid out in \textit{Tumey}. In this decision, Justice Black stressed that even the possibility of unfairness caused by a judge’s interest in the case should not be tolerated:

> 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. But our system of law has always endeavored to prevent even the probability [sic] of unfairness. . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, “justice must satisfy the appearance of justice.”\textsuperscript{27}

In 1972, the Supreme Court reaffirmed the \textit{Tumey} standard in \textit{Ward v. Village of Monroeville}.\textsuperscript{28} In this case, the village mayor was allowed to levy fines for certain ordinance and traffic violations, and the money collected constituted a substantial part of the village’s revenue. Justice Brennan applied the \textit{Tumey} standard although the pecuniary interest of the decisionmaker was not direct.\textsuperscript{29}

Recently, in \textit{Aetna Life Insurance Co. v. Lavoie},\textsuperscript{30} the Supreme Court stated that due process forbids judges from hearing cases in which they have a financial interest.\textsuperscript{31} In \textit{Aetna}, an Alabama Supreme Court justice took part in a \textit{per curiam} decision regarding an insurance company when he was personally involved in similar pending insurance litigation.\textsuperscript{32} The United States Supreme Court found that the \textit{per curiam} decision was not based on existing precedent, and thus the state court justice had effectively created

\begin{itemize}
\item \textsuperscript{24} Id. at 523.
\item \textsuperscript{25} Id. at 532.
\item \textsuperscript{26} 349 U.S. 133 (1955).
\item \textsuperscript{27} Id. at 136 (citation omitted).
\item \textsuperscript{28} 409 U.S. 57 (1972).
\item \textsuperscript{29} Id. at 60.
\item \textsuperscript{30} 475 U.S. 813 (1986).
\item \textsuperscript{31} Id. at 821-22.
\item \textsuperscript{32} Id. at 823-24.
\end{itemize}
new law with precedential value to govern his own case. Therefore, a due process violation had occurred.

Significantly, the Supreme Court in *Aetna* reaffirmed that while a judge's financial interest in a case violates the Constitution, neither bias nor relationship with a party in the case constitutes such a violation. The *Aetna* Court quoted *Tumey* in holding that "not 'all questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.'" 33

Due process protections have not been sufficiently broad in the area of recusal. Significant opposing arguments have, however, been made for limiting the situations that require judicial disqualification. First, concern exists that disqualification of many judges might undermine public confidence in the judiciary. 34 Second, frequent judicial disqualification, as well as the necessary accompanying litigation, would limit the efficiency of the administration of justice. 35 Third, litigants may "judge shop" by manipulating an overly liberal disqualification standard to their advantage. 36 Finally, at the United States Supreme Court level, a strict disqualification standard could potentially prevent cases from being decided, 37 because the necessary quorum requires six justices. 38

Although effective arguments exist for limiting the scope of judicial disqualification, none explain the Supreme Court's rationale for confining due process violations to financial interest, while excluding violations of bias or familial relationship. Little justification can be discerned for the narrow rule except the clear advantages of a bright-line distinction; certainly political bias or a judge's familial relationship with a litigant endangers judicial legitimacy as much as a small financial interest in the case.

Judicial prejudice based not only on financial interest, but also on bias or relationship, is antithetical to the rule of law. 39

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33. *Id.* at 820 (quoting *Tumey* v. Ohio, 273 U.S. 510, 523 (1927)); See also FTC v. Cement Inst., 333 U.S. 683, 702 (1948) ("most matters relating to judicial disqualification [do] not rise to a constitutional level"); *Clyma* v. Kennedy, 64 Conn. 310, 29 A. 539 (1894) (at common law, a judge was not disqualified for prejudice or bias, in a criminal libel case, even though the judge was the person libeled).


36. *Id.*

37. *Id.*


Supreme Court's language in *Tumey* implies as much, stating that "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required'" constitutes a due process violation. Yet the Court has limited judicial recusal to the area of pecuniary interest, causing inequities to become commonplace in the case law. Thus, while courts have repeatedly held that any amount of financial interest in a case mandates recusal, grossly biased decisionmakers have been allowed to try cases.

For example, although a judge cannot hear an appeal from a case tried by that judge, a federal trial judge in *Antonello v. Wunsch* refused to disqualify himself from a case when the constitutionality of a decision he joined while on the Kansas Supreme Court was in question. The Tenth Circuit affirmed that his actions were appropriate, giving him license to determine the constitutionality of his own past decision. Similarly, in *Phillips v. Joint Legislative Committee on Performance and Expenditure Review*, the Fifth Circuit allowed a trial judge to hear a civil rights suit although his past remarks "[a]t times . . . reflected racial reactions not only outmoded but improper." Conversely, judges have recused themselves unnecessarily to insure the appearance of justice. Little distinguishes cases where disqualification occurred from those in which it did not. An example of the former type of case is *Public Utilities Commission v. Pollak*, which involved a first amendment challenge to the playing of radios in Washington buses and street cars. Justice Frankfurter disqualified himself because his dislike of such music made him unable to hear the case. He added:

> When there is ground for believing that . . . unconscious feelings may operate in the ultimate judgment, or may not . . . unfairly lead others to believe they are operating, judges recuse themselves. . . . The guiding

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41. *See In re Cement Antitrust Litig.*, 688 F.2d 1297 (9th Cir. 1982), aff'd mem. sub nom. Arizona v. United States Dist. Ct., 459 U.S. 1191 (1983); *see also* H.R. REP. No. 1453, 93d Cong., 2d Sess. 9, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6351, 6356 ("a financial interest is defined as any legal or equitable interest, 'however small'") (emphasis in original).
42. 28 U.S.C. § 47 (1982) ("No judge shall hear or determine an appeal from the decision of a case or issue tried by him.").
43. 500 F.2d 1260 (10th Cir. 1974).
44. *Id.* at 1262-63.
46. *Id.* at 1020.
47. 343 U.S. 451 (1952).
consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.

This case for me presents such a situation. My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it.44

In contrast to the Texaco case, a Florida court in Caleffe v. Vitale49 required recusal where a lawyer ran the re-election campaign of the judge, holding that "[c]ommon sense tells us that this alone would give rise to a reasonable fear on the petitioner's part that a conflict of interest may exist."50 Such inconsistencies and inequities suggest that the current due process jurisprudence governing recusal has not successfully produced an acceptable disqualification standard.

III. THE STATUTORY ENACTMENTS

In response to the historical inadequacies of due process recusal jurisprudence,51 Congress has enacted legislation pertaining to standards for disqualification. The first legislation was enacted in 1792, requiring disqualification of district judges in cases where they were "concerned in interest" or had "been of counsel."52 The current federal statutory enactment of recusal standards is based explicitly on the American Bar Association Code of Judicial Conduct ("Code"). Canon 3(C) of the Code establishes that judges should disqualify themselves if impartiality might reasonably be questioned in four areas: bias, past legal service, financial interest, and relationship.53 The decision to use the word "might" was

48. Id. at 466-67.
50. Id. at 629.
53. The text of Canon 3(C) states, in pertinent part:

DISQUALIFICATION

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal
intended to establish a reasonable person standard for disqualification: if a reasonable person knowing all of the circumstances would doubt the judges' impartiality, then the judges should recuse themselves.\(^4\)

Drawing heavily from the Code, in 1974 Congress amended the basic statutory provision governing judicial disqualification\(^5\) to conform to the ABA Code on the questions of bias, relationship, and interest.\(^6\) The strict provisions of the Code were designed to promote public confidence in the judiciary and to eliminate the "duty to sit."\(^7\) Section 455 reads in part:

Disqualification of justice, judge, or magistrate.
(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
(b) He shall also disqualify himself in the following circumstances:
   (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
   (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
   (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the knowledge of disputed evidentiary facts concerning the proceeding;
   (b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
   (c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
   (d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
       (i) is a party to the proceeding, or an officer, director, or trustee of a party;
       (ii) is acting as a lawyer in the proceeding;
       (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
       (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

\(^7\) Id. at 6355.
particular case in controversy;
(4) He knows that he, individually or as a fiduciary, or his spouse or
minor child residing in his household, has a financial interest in the
subject matter in controversy or in a party to the proceeding, or any
other interest that could be substantially affected by the outcome of the
proceeding;
(5) He or his spouse, or a person within the third degree of relationship
to either of them, or the spouse of such a person:
(i) Is a party to the proceeding, or an officer, director, or trustee of
a party;
(ii) Is acting as a lawyer in the proceeding;
(iii) Is known by the judge to have an interest that could be substan-
tially affected by the outcome of the proceeding;
(iv) Is to the judge's knowledge likely to be a material witness in the
proceeding. 58

Congress has clearly imposed a far more demanding standard
for judicial disqualification than the fourteenth amendment's due
process clause, and courts have recognized this. For example, in
Margoles v. Johns,59 the Seventh Circuit held that "[s]ection 455
goes beyond 'due process.' Its requirement of avoiding even the
appearance of partiality, even though bias or prejudice does not
exist, is based on considerations over and above constitutional
standards."60 Additionally, Congress deemed a violation of bias
or relationship equal to a violation of financial interest.

Although this statute is encompassing, it has not eliminated the
apparent inequities regarding recusal in the case law. For example,
in United States v. Harrelson,61 a judge who was a friend of a
murdered judge was allowed to sit in the trial of the alleged killer.
The Fifth Circuit held that although the trial judge might feel
hostility toward the actual killer, his ability to try the defendant
impartially would not be affected.62 This holding contradicts section
455(a), which states that a judge should "disqualify himself in any
proceeding in which his impartiality might reasonably be ques-
tioned."63 Because of the judge's potential animosity toward the
defendant, it is reasonable to question the judge's impartiality,
thus mandating recusal from the case.

Part of the problem with current recusal jurisprudence stems
from an improper philosophical basis for the due process clause.

59. 660 F.2d 291 (7th Cir. 1981), cert. denied, 455 U.S. 909
(1982).
60. Id. at 296.
61. 754 F.2d 1153 (5th Cir. 1985), cert. denied, 474 U.S. 1034
(1985).
62. Id. at 1166.
The two elements widely accepted as central to the basis of the due process clause are both inadequate grounds for due process jurisprudence. After analyzing these two elements, the Article will suggest that a third element is vital to properly understand the due process clause. Finally, recusal jurisprudence will be examined in light of this third element to suggest a new disqualification standard based entirely upon the fourteenth amendment.

IV. THREE CONCEPTS OF DUE PROCESS

The due process clause of the fourteenth amendment functions broadly as a concept, instead of as a conception. As Ronald Dworkin has made clear, the distinction delineates the broad concept of fairness from any given, specific conception of what is fair. That is, when one says “Act fairly,” one intends that the person be guided by a broader theory of fairness than any particulars the speaker may have had in mind.64

In keeping with such a theory, the due process clause was made deliberately vague by the framers of the Constitution.65 Although the due process clause has occasionally been interpreted to protect only the specific rights envisioned at its inception, its ambiguity has led subsequent case law to label this view as antithetical to the framers’ intent.66 For example, the Supreme Court has repeatedly asserted the breadth and the flexibility of the due process clause: “The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.”67 Although due process is broad, it must also be capable of uniform and fair application for it to be meaningful as a right. Neither instrumental nor intrinsic due process provides an adequate framework to achieve a fair and uniform due process jurisprudence to govern fourteenth amendment protections from judicial partiality.

A. Instrumental Due Process

Under the instrumental view of due process, procedures are purely a means to serve the social utility by accurately and efficiently achieving substantive results.68 This standard contemplates

68. See Posner, supra note 15.
more than merely arriving at the truth; it emphasizes reaching the truth in a manner comporting with the social utility. Hence, the instrumental concept of due process primarily values a procedural system designed to arrive at truth in the most direct manner possible.

Under this theory, procedure serves to maximize the social utility by minimizing two kinds of costs. The first form of cost may be called "error costs": intangible societal costs expended as the result of an inaccurate judicial system, which may be calculated as the product of the probability of error and the societal cost of error if it occurs. The second form of cost is the increased direct cost to society that is imposed through the error in the litigation, including attorneys' fees, court fees, and the loss of the litigant's time.69

Instrumental due process determines what procedures to afford by weighing the cost of procedural errors against the direct cost of error correction to the system. Because the goal is to maximize social utility, the direct costs to society should not be greater than the amount that would be saved by detecting and remedying the error. Thus, if a procedural safeguard will protect a litigant in an amount that could be quantified as "x," but the direct costs to society to impose the safeguard will be "x + 1," instrumental due process would refuse the litigant the procedural safeguard.70 For example, to disqualify a judge whose impartiality is in question, the additional direct cost to society, such as administrative costs and lawyers' fees, must be less than the economically measured cost to society and to the litigant of a potentially unfair trial.

The Supreme Court adopted a form of instrumental due process in Mathews v. Eldridge.71 The issue in Mathews concerned whether an individual has a right to an evidentiary hearing prior to the termination of Social Security disability benefits. The Supreme Court set out a three-pronged test for social cost accounting to determine when a litigant should receive a procedurally protected right:

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.72

69. Id. at 399-401.
70. Id. at 401.
72. Id. at 335 (citation omitted).
Thus, under the Supreme Court's formula, procedural protections will be guaranteed only if the product of the increased accuracy from additional procedures and the interest of the claimant is greater than the value lost by increasing the government's burden. For example, applying the Mathews standard to a hypothetical recusal case yields the following multistep process to determine when social utility mandates judicial disqualification: (1) the loss of the litigant's right to a fair tribunal must be quantified; (2) the ability of a biased judge, who is predisposed on the merits of the case because of extra-legal considerations, to fairly weigh the equities in a case must be assessed; (3) a quantification of the possible loss to the government and to society at large must be calculated. Then, if the loss to the litigant multiplied by the likelihood of judicial partiality is greater than the increased governmental burden, the litigant would obtain the right to a fair tribunal, and the judge would be disqualified.

Although efficiency is a relevant factor in a due process determination, emphasizing efficiency at the exclusion of other values is problematic. First, this form of utilitarian social cost-accounting attempts to quantify that which is inherently unquantifiable, for example, the true societal cost of procedural protections and the corresponding loss of litigants' rights if such protections are denied. In addition, in determining this calculus, "soft" variables such as individual dignity are minimized, and complexities are simplified in favor of more easily cognizable conceptions of the public good. For example, courts have held both that disqualification of judges may be required by a "circumspect and punctilious devotion to the ideal of justice in the abstract as it appears to the public at large" and that due process entitles a person to an impartial tribunal which "preserves both the appearance and reality of fairness." The fundamental importance of the appearance of justice, however, is precisely the type of "soft" variable that social cost accounting may ignore in making its utilitarian calculation.

More significantly, instrumental due process potentially limits the due process clause in favor of broader societal objectives. The due process clause was intended to protect individual liberty from
majority tyranny. Therefore, to meaningfully deem due process a fundamental right, the individual who invokes the fundamental right must be able to uphold it against all but the most compelling government interests. The interest-balancing, instrumental approach implies, however, that the government can eliminate procedures as long as its definition of the social utility is met.

Those who accept instrumental due process define the social utility in terms of processing legal administration with the greatest possible efficiency. The Supreme Court has denied such a repugnant view of due process by stating that the fundamental nature of due process insulates it from limitations solely to increase efficiency. The Court has held, for example, that “[p]rocedural due process is not intended to promote efficiency;” procedural protections must be provided “if that may be done without prohibitive cost;” and

The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Because instrumental due process attempts to minimize fundamental due process rights to obtain efficiency gains, it cannot be a dominant element of due process jurisprudence. Furthermore, instrumental due process neither explains current recusal standards nor suggests a more desirable standard. If due process serves primarily to promote efficiency, it remains unclear why financial interest violates the fourteenth amendment while bias and relationship abuses do not. To be as efficient as possible, judges would be disqualified only when they were completely incapable of rendering impartial justice; any other situation would waste administrative resources for a mere speculative gain in procedural fairness. Therefore, under the instrumental concept, not only should the fourteenth amendment's coverage exclude bias and relationship, it should also be narrowed to eliminate financial interest from its general scope. To obtain efficiency, only a judicial confession of

77. See Mashaw, supra note 16, at 48-49. See also Note, supra note 73, at 1543.
78. See R. Dworkin, supra note 64, at 190-92.
impermissible bias would be sufficient to mandate disqualification. Because such a theory would cast serious doubts upon the appearance of justice, the instrumental concept of due process seems an inadequate basis for recusal standards.

B. Intrinsic Due Process

Under the concept of intrinsic due process, certain rights are so fundamental that they cannot be denied to a participant in our democratic process. This notion derives from Kant's second form of the Categorical Imperative, that no man should be treated solely as a means. From this basic precept follows the notion of individual liberty. Such a view rejects the theory of utilitarian cost accounting, presumptively favoring the preservation of the inherent rights of the litigant against all challenges.

While recognizing other values, intrinsic due process places its principal emphasis upon the preservation of the rights and human dignity of each litigant. It emphasizes that individual participation in government, humane treatment of citizens, and fundamental fairness to litigants are such vital elements of dignity that they must be protected from attacks by all but the most compelling competing values. Thus, intrinsic due process delegates to secondary status that which instrumental due process regards as primary.

The Supreme Court has given its support to the intrinsic due process concept on several occasions. For example, in Twining v. New Jersey, the Court held that the conception of due process includes any "fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government."

More recently, the Supreme Court adopted a similar view in Goldberg v. Kelly, a case whose fundamental values were challenged by Mathews six years later. Goldberg analyzed whether termination of a recipient's public assistance payments without a pretermination evidentiary hearing constituted a due process violation. The Court, while recognizing the existence of a significant state interest in conserving fiscal and administrative resources, held

84. 211 U.S. 78 (1908).
85. Id. at 106.
87. Id. at 260.
that the recipient’s need for financial support and fundamental dignity mandated a pretermination hearing; thus, due process had been violated.\textsuperscript{88}

Although perhaps more intuitively attractive than instrumental due process, intrinsic due process suffers from the narrowness of its scope. First, courts have long held that a sufficiently significant governmental interest may curtail any “absolute” right. For example, in \textit{Schenck v. United States},\textsuperscript{89} the Supreme Court addressed the issue of the proper balance between individual rights and the public interest, stating that “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”\textsuperscript{90} Thus, while intrinsic due process may in theory seem absolute, in practice, certain “absolute” rights must occasionally yield to the necessity of other fundamental societal interests. Second, the intrinsic model depends upon the assumption that “intrinsic” rights are discernible. Yet as the theory of natural law continues to wane, agreement regarding what is “fundamentally fair” has been questioned, and identifying inherent rights is increasingly considered radically subjective. As Justice Black stated in his lengthy dissent in \textit{Adamson v. California},\textsuperscript{91}

\begin{quote}
I would not reaffirm the Twining decision. I think that decision and the “natural law” theory of the Constitution upon which it relies degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise.\textsuperscript{92}
\end{quote}

Given both the nonabsolute nature of “intrinsic” rights and the belief that such rights may not be discernible, the intrinsic concept is an ineffective basis upon which to rest due process. The problems stemming from this concept can be illustrated through a recusal example. Consider a judge whose brother was formerly an associate at the law firm representing one of the litigants. Also, suppose that this fact becomes known only toward the end of an eight-week trial. The judge claims that this does not predispose him in the case. Intrinsic due process requires recusal. Under such circumstances, however, even if some slight possibility of bias is suspected, it is difficult to justify mandatory recusal. Given the large administrative cost of retrying the case and the negligible connection

\textsuperscript{88} Id. at 264-66.
\textsuperscript{89} 249 U.S. 47 (1919).
\textsuperscript{90} Id. at 52.
\textsuperscript{91} 332 U.S. 46 (1947) (overruled by Malloy v. Hogan, 378 U.S. 1 (1964)).
\textsuperscript{92} Id. at 70 (Black, J., dissenting). See also, H.L.A. Hart, \textit{The Concept of Law} (1961).
between the judge and a party, running the minimal risk of a tainted trial is a rational choice.

The intrinsic concept of due process cannot successfully explain the rationale behind existing recusal standards. Contrary to the instrumental view, the intrinsic notion implies that the fourteenth amendment should protect against all possible abuses of judicial impartiality. No mere administrative savings can be compelling enough under this theory to justify the potential forfeiture of a litigant's fundamental right to a fair forum, even if the odds of an actual forfeiture are minimal. The intrinsic theory of due process should, therefore, protect against alleged bias and familial relationship in addition to financial interest.

The problem with this theory is that it does not differentiate between degrees of bias. Although it is reasonable to disqualify a judge who has a $1,000,000 financial interest in the outcome of a case regardless of societal cost, it is less clear why a judge who has a $1 financial interest should be disqualified when disqualification would be equally costly. This absolute approach to due process protections makes the intrinsic concept a troublesome basis for the fourteenth amendment.

C. Systemic Due Process

The systemic concept of due process, while recognizing the importance of efficiency and preservation of individual rights, embodies the notion that procedure in itself has value, and thus process must protect the procedural system. Although a process may hold at its core many values, such as participatory governance, humaneness, and procedural rationality,93 no substantive result can be legitimate unless it stems from fair procedures.94

The fundamental importance of government interest in preserving the appropriate process has been upheld by the Supreme Court. For example, although Faretta v. California95 guaranteed a criminal defendant the right to proceed pro se, the Supreme Court held in McKaskle v. Wiggins96 that a court may appoint standby counsel against a defendant's will to assist the judge in enforcing courtroom protocol and to aid in maintaining courtroom procedures. Under these circumstances, the sixth amendment right guaranteed by Faretta was modified to assure appropriate process.

94. See Saphire, supra note 73, at 124-25.
95. 422 U.S. 806, 807 (1975).
Justices Marshall and White advanced similar arguments in their respective dissents in the Gary Gilmore case.\(^7\) The Supreme Court refused to continue a stay of execution requested by Gilmore's mother as "next friend," finding that Gilmore had waived his eighth amendment rights. Justice Marshall argued that the eighth amendment not only protects individuals, but also extends to protect society as a whole against the administration of cruel and unusual punishment.\(^8\) Justice White's dissent implied that the eighth amendment also protects the vital interest in maintaining the appropriate structure and functioning of the legal system. Justice White believed that serious questions existed regarding the constitutionality of the Utah death penalty statute, and this fundamental issue could not be ignored solely because the defendant chose to do so:

[T]here are substantial questions under *Furman v. Georgia*, 408 U.S. 238 (1972), about the constitutionality of the Utah death penalty statute. Because of Gary Gilmore's purported waiver of his right to challenge the statute, none of these questions was resolved in the Utah courts. I believe, however, that the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment. Until the state courts have resolved the obvious, serious doubts about the validity of the state statute, the imposition of the death penalty in this case should be stayed.\(^9\)

The desire to protect procedure extends to due process protections in the civil realm as well. One prominent area in which procedure has received recent attention is personal jurisdiction. In *World-Wide Volkswagen Corp. v. Woodson*,\(^10\) the Supreme Court held that the state of Oklahoma could not, consistent with the due process clause of the fourteenth amendment, exert *in personam* jurisdiction over a car distributor incorporated in New York, whose only Oklahoma connection was its sale of an automobile in New York that was later involved in an accident in Oklahoma. The Court declared that larger, systemic interests were involved to protect process, and that these interests take precedence over efficiency of the adjudication, the interests of Oklahoma, and the convenience of the litigants:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy;

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98. *Id.* at 1019.
99. *Id.* at 1017-18 (White, J., dissenting) (footnote omitted).
even if the forum State is the most convenient location for the litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.\textsuperscript{101}

Justice Brennan's dissent asserted a different form of the systemic position in \textit{World-Wide Volkswagen}. He suggested that a state has interests in protecting its citizens and maintaining the structure of its judicial administration.\textsuperscript{102} These interests are sufficient to invoke personal jurisdiction if the litigation properly falls within the scope of the state's judicial structure.\textsuperscript{103} This notion has become dominant in subsequent cases involving personal jurisdiction.\textsuperscript{104}

A justification for the importance of the preservation of fair and uniform procedures can be illustrated by examining four differing areas: the nature of the Constitution, the moral basis for law, the structure of an effectively functioning legal system, and the role of courts in society. The Constitution itself begins by ensuring a durable structure. Indeed, the framers were so obsessed with assuring appropriate procedure that provisions governing process dominate the Bill of Rights.\textsuperscript{105} One commentator stated:

[The body of the original Constitution is devoted almost entirely to structure, explaining who among the various actors—federal government, state government; Congress, executive, judiciary—has authority to do what, and going on to fill in a good bit of detail about how these persons are to be selected and to conduct their business. Even provisions that at first glance might seem primarily designed to assure or preclude certain substantive results seem on reflection to be principally concerned with process.\textsuperscript{106}}

\ldots

The prohibitions against granting title of nobility seem rather plainly to have been designed to buttress the democratic ideal that all are equals in government. The Ex Post Facto and Bill of Attainder Clauses prove on analysis to be separation of powers provisions, enjoining the legislature to act prospectively and by general rule \ldots. [T]he Privileges and Immunities Clause of Article IV, and at least in one aspect \ldots the

\begin{flushleft}
101. \textit{Id.} at 294 (citation omitted).
102. \textit{Id.} at 300, 309 (Brennan, J., dissenting).
103. \textit{Id.} at 299-300.
105. \textit{See}, e.g., U.S. Const. amend. V.
106. J. \textit{Ely}, \textit{supra} note 65, at 90. \textit{See also} Leubsdorf, \textit{Constitutional Civil Procedure}, 63 Tex. L. Rev. 579, 587 (1984) ("The Framers of the Bill of Rights were not just interested in procedure; they were obsessed by it. Provisions governing court procedures dominate the Bill of Rights much more than a student of political philosophy would expect.").
\end{flushleft}
Commerce Clause as well, function as equality provisions, guaranteeing virtual representation to the politically powerless.107

In addition, one scholar noted that: "As a charter of government a constitution must prescribe legitimate processes, not legitimate outcomes, if like ours (and unlike more ideological documents elsewhere) it is to serve many generations through changing times."108 The desire to insure the purity of process thus underlies the structure of the Constitution, for our government malfunctions when process, rather than substantive decision-making, is undeserving of our trust.109

The need for uniformity of process is further evident in the moral realm, because such consistency serves as an ethical foundation for justifying a rule of law. Lon Fuller identifies constancy in the law—as one of the eight features upon which a morally justifiable rule of law depends.110 Fuller claims that one way for a legal system to fail is to introduce "such frequent changes in the rules that the subject cannot orient his action by them."111 The moral foundation of law requires the law to remain reasonably constant and to be applied equally to all.112 Therefore, procedures must exist that will provide consistent rules.

For a rule of law to be recognized as legitimate, individuals must have rights against institutions that exercise arbitrary power over them.113 The less defined the government's procedures to invoke this power, the more arbitrary and thus less legitimate the exercise of power appears. The due process clause of the fourteenth amendment "aims to provide some assurance of nonarbitrariness by requiring those who exercise authority to justify their intended actions in a public proceeding by adducing reasons of the appropriate sort and defending these against critical attack."114 Well-defined and consistently applied procedures insure the moral legitimacy of law by protecting against its arbitrary use. This moral consideration has played a central role in the history of modern political thought. As John Locke stated long ago: "This Freedom from Absolute, Arbitrary Power is so necessary to, and closely

107. J. Ely, supra note 65, at 90-91 (footnotes omitted).
109. J. Ely, supra note 65, at 103.
111. Id. at 39.
112. See generally L. Tribe, American Constitutional Law 629-32 (2d ed. 1988); see also Leubsdorf, supra note 106, at 594.
114. Id. at 96.
joined with a Man's Preservation, that he cannot part with it but by what forfeits his Preservation and Life together."\(^{115}\)

It has also been argued that concerns for an effectively functioning system mandate the preservation of process.\(^{116}\) Under such a view, the system provides long-term societal benefits in that it establishes a stable mechanism by means of which the collective can effectively operate.\(^{117}\) This allows society to enjoy benefits that accrue only by means of a collective sustained effort, such as allowing officials to exercise discretion, providing for governance by consistent rules, and assuring that individuals retain confidence in the system.

Under this structure, due process ensures fundamental fairness by protecting the structure of a fair system, and thus provides uniform results in similar cases. Due process procedures are designed to guarantee that the community will be informed of the condition of the system. This information is necessary to ensure that people are confident that their collective aims are being pursued through the system and that safeguards exist to limit some of the risks inherent in the systemic process.\(^{118}\) Under this theory, those who view themselves as potentially most seriously harmed by a systemic malfunction can be relied on to monitor its procedures.

Due process is thus conceptually tied to normative systems and what is due is to be discerned by attending to the special requirements of system. The dominant concern, then, is to process system, to institute procedures that will attend to the special vulnerabilities of system while preserving its valuable capacity to coordinate action, to reinforce or amplify the efficacy of individual effort, to respond adaptively and resourcefully in the face of changing circumstances, interests or needs.\(^{119}\)

This view of primarily maintaining the procedures of the judicial system emphasizes the common interest of each individual in assuring a properly functioning system, because only such a system can ultimately protect individual rights.

A final argument for the justification of systemic due process arises from the role of courts within the fabric of American society. In this country, use of the courts is the primary, and at times the only way to resolve disputes. The ability of private parties to


\(^{117}\) Id. at 240.

\(^{118}\) Id. at 241-42.

\(^{119}\) Id. at 244.
interact depends upon their belief that the available dispute-resolving mechanisms will use fair and standard rules to serve as neutral guidelines. As the Supreme Court pointed out in *Boddie v. Connecticut*, this is vital to the functioning of society:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the "state of nature."  

Under such a scheme, consistent and neutrally applied principles are needed to preserve the social advantages of the rule of law. The due process clause insures this preservation:

> Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just.

V. THE ELEMENTS OF A JUST PROCESS

Underlying the notion of preservation of the system are certain value judgments regarding what constitutes a good system. To determine what is to be valued, a two-step process is required. The first element considers whether the given aspect of the process helps to achieve the desirable result. The second element extends beyond this to determine the value of the procedure as a procedure, because the achievement of desirable ends does not always justify the means.

To maintain the system, a desirable element must have two features. First, it must be uniformly applicable. Second, the implementation of the element must not alter the basic structure of the process. Under systemic due process, any procedural element that satisfies these criteria will be considered a "fair" and "just"
element of the legal process, and the sum of these elements will constitute a fair system.

Fundamentally related to the concept of a fair and just system is the public's perception that the system is pure and just. Indeed, a major distinction between systemic due process and the instrumental and intrinsic concepts is that the systemic view, by assuring a fair system, significantly maintains the appearance as well as the reality of propriety. As Balzac once noted: "To distrust the judiciary marks the beginning of the end of society. Smash the present patterns of the institution, rebuild it on a different basis . . . but don't stop believing in it." The notion of public confidence, however, is problematic. If public confidence is defined as the perception of a neutral, detached decisionmaker rendering decisions according to external standards applied neutrally, a lack of public confidence in the judiciary dates as far back as John Adams's appointment of Chief Justice John Marshall and the Justice's decision in *Marbury v. Madison*. Also, the appearance of justice is manipulable, because it clearly depends upon the definition of justice. A procedural element may appear to be unjust solely because of a misunderstanding that distorts the public's perception. Correcting the appearance of impropriety by altering the common perception to fit the existing standard would be as legitimate as attempting to change the standard to align it with the publicly held belief. Perhaps only the ease with which such a change can be accomplished accounts for the belief that the latter rather than the former is the appropriate approach. Yet systemic due process does give the public confidence in the workings of the judicial apparatus. As the court noted in *Webbe v. McGhie Land Title Co.*, the fact that section 455 mandates disqualification when a judge's impartiality might reasonably be questioned shows that the appearance of impartiality is virtually as important as actual impartiality. This is a point of grave concern. Indeed, because the judiciary is "possessed of neither the purse nor the sword," its dependence upon the public's willingness to follow its dictates is fundamental.

126. 549 F.2d 1358, 1361 (10th Cir. 1977).
Therefore, the systemic concept of due process comports with the nature of the Constitution. It recognizes the desirability of such values as efficiency and individual dignity, but refuses to sacrifice process considerations to achieve any single value. Systemic due process maintains that the only way to assure legitimacy in a justice system is to guarantee that the procedural system remains fair by applying its precepts uniformly and in a manner that will not alter the system. The constancy and uniformity of such a system thus help legitimize the rule of law.

VI. A Substantive Recusal Standard

The systemic view of due process suggests the need for stronger recusal standards. Indeed, virtually every recent commentator except for Chief Justice Rehnquist has agreed that the current recusal standards enunciated in *Tumey* are insufficiently broad and inconsistent. Clearly, judges cannot be expected to be without opinions before trial. As Justice Rehnquist stated in his memorandum regarding *Laird v. Tatum*, "[p]roof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." It is meaningful, however, to speak of an impartial judge. Systemic due process implies a twotiered standard to determine the necessary level of judicial impartiality.

The first test can be inferred from Judge Jerome Frank's decision in *In re Linahan, Inc.*:

Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, "bias" and "partiality" be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. . . . [W]ere those pre-judgments which we call habits absent in any person, were he obliged to treat every event as an unprecedented crisis presenting a wholly new problem he would go mad. Interests, points of view, preferences, are the essence of living.

131. 409 U.S. 824, 835 (1972) (Rehnquist, J., mem.).
132. 138 F.2d 650 (2d Cir. 1943).
133. Id. at 651-52.
Judge Frank's statement raises the issue of which preferences and viewpoints should be tolerated in a sitting judge. Because maintaining a just system of uniform treatment is important, biases that will influence a judge in nearly all cases are more acceptable than those that will only affect certain decisions. Judge Frank similarly distinguished between two types of preconceptions. The first are preconceptions which "represent the community's most cherished values and ideals" and are part of the legal system itself. Such social pre-conceptions, the 'value judgments' which members of any given society take for granted and use as the unspoken axioms of thinking, find their way into that society's legal system, become what has been termed 'the valuation system of the law.' The second are preferences which are merely "idiosyncratic" and "uniquely personal." While the latter are held to be unacceptable biases, the former are not. Indeed, "[t]he judge in our society owes a duty to act in accordance with those basic predilections inhering in our legal system." Because such values are a part of society's fabric, judges must make their determinations within the contours of society's values. This scheme does not preclude prior legal philosophy and cultural background as elements in the judge's decision; unlike personal prejudices, these societal elements are unavoidably and uniformly applied to all litigants and to any judicial decision. While the applicability of such elements will vary from judge to judge, these effects are unavoidable in a system that relies upon different people with divergent backgrounds to make legal determinations.

The system does, however, demand judicial disqualification for bias against an individual or a class of litigants. While this approach may produce majority tyranny, because "biases" accepted by the community will be more acceptable than individual biases, it assures that only widely accepted community values are allowable. It may even be desirable that such "majority tyranny" inheres in the judiciary, because judges must work exclusively within societal guidelines, as reflected in the Constitution and the state law. While latitude in thinking is not only inevitable but desirable, the basic values of a judge must fall within the scope of acceptable societal values. The process of judicial confirmation attempts to insure that judges' values are not outside the "mainstream" of

134. Id. at 652 (footnote omitted).
135. Id.
136. Id. (footnote omitted).
137. Id.
American social thought,\textsuperscript{138} as the 1987 Bork confirmation hearings will attest.

For this theory to apply, a clear line must be drawn between these two standards so that judges can consistently apply the law to themselves. First, opinions that are based on legal philosophy must be distinguished from those that are not. Next, judicial preconceptions that are based on broad political ideology must be separated from those that stem from feelings about a particular litigant or the litigant's case. Finally, it must be determined whether the judge's feelings will allow the judge to apply the law uniformly to each litigant. Hence, a judge whose predispositions are legal in origin, are broadly based and do not prevent him from adequately applying the law will be allowed to hear the case. Conversely, if a judge's bias toward a party stems from extra-legal sources, the judge will be unable to apply the law equally and must be disqualified.

To illustrate this distinction, consider \textit{Phillips v. Joint Legislative Committee on Performance and Expenditure Review.}\textsuperscript{139} In \textit{Phillips}, employment discrimination actions were brought against three state agencies. Although the trial judge had previously made numerous remarks that "reflected racial reactions not only outmoded but improper," which the appellate court found "unseemly" and did "not condone,"\textsuperscript{140} the Fifth Circuit refused to disqualify the trial judge for his prejudice against a class of litigants. The systemic approach to recusal mandates the disqualification of such a judge, because his attitudes were not shaped by legal philosophy but were influenced by his prejudice against the class of which the litigants were members.\textsuperscript{141}

The second standard for judicial disqualification states that no judge may hear a case when a reasonable person would find the judge potentially motivated by self-interest.\textsuperscript{142} This broad standard of self-interest encompasses elements of financial interest, relationship, and bias. For example, any financial interest or any benefit to a family member could call into question judicial impartiality.

\begin{footnotesize}
140. \textit{Id.} at 1020.  
141. Clearly, in this case, an equal protection argument could also be made.  
142. Leubsdorf, \textit{supra} note 130, at 283-84.
\end{footnotesize}
An example of the second standard's effect on recusal can be illustrated by *United States v. Sellers*. The self-interest standard would mandate a different result. The familial relationship between the judge and a victim creates a sufficient question of bias to require disqualification.

Both of the recusal standards are justifiable under systemic due process concerns. The systemic view requires that rules be uniformly applied to the greatest degree possible, and the proposed two-tiered standard attempts to insure this by determining the acceptable degree of judicial preconception. Under the first standard, allowing judicial opinions to stem from broad societal standards does not affect the consistent application of justice. Because judges necessarily have beliefs before trial, it is important that they do not discriminate against any individual. Existing judicial philosophy and cultural values will be applied equally to all litigants, even if some litigants do not benefit or are equally harmed by such values. Conversely, a judge's unique biases should not be allowed to discriminate between litigants.

Under the proposed view, although not all litigants will actually be treated equally, a discernible uniform standard will emerge. This standard recognizes that certain preconceptions cannot be eliminated, and it tolerates those that the entire judiciary will tend to apply uniformly to all potential litigants. Likewise, under the second standard, precluding judges from hearing cases in which they might reasonably be presumed to be self-interested preserves the constancy of the process. If cases can be decided based on personal considerations, no recognizable standards will govern, and the legitimacy of the entire rule of law will be called into question.

The two-tiered standard for judicial disqualification differs significantly from the current statutory enactment. The second feature of the systemically based recusal standard is designed to encompass the statutory standards for bias, interest, and relationship contained in chapter 28, section 455 of the United States Title. The first part of the systemic standard is designed to explicitly address the problem that preconceptions are necessarily part of human nature, and must inevitably remain part of the legal system. A distinction

143. 566 F.2d 884 (4th Cir. 1977).
144. Id. at 887.
145. Leubsdorf, *supra* note 130, at 283-84.
146. See *supra* note 133-137 and accompanying text.
must therefore be drawn between those preconceptions that are acceptable and those that are not. Some tendencies that a judge possesses are grounded in judicial philosophy and are not only inevitable, but may actually assist the fair consideration of the equities in a given case. The systemic standard attempts to keep the determination of bias meaningful by providing workable guidelines by which it can be measured. Therefore, more consistent applications of recusal standards will be possible under this view than could exist under the statutory enactment.

One final caution must be mentioned when considering recusal standards. Recusal is unlike other due process concerns because, in almost all cases, judges apply the law to themselves. The sole exception is contained in section 144 of the U.S. Code, which allows litigants in district courts to file an affidavit alleging judicial bias. This provision applies, however, only to federal district court judges, and is generally not successful. Therefore, some danger of judicial abuse will always exist. For any system of judicial disqualification to function properly, the system must allow for more meaningful appeals than the current standard, which allows for reversal only for abuse of discretion.

The two-tiered standard for recusal presented in this Article suggests that many recent cases should have been decided differently. For example, in United States v. Pugliese, the Second Circuit allowed a judge to hear a criminal trial although he stated before the trial began, "I have a great deal of resentment for people like these who are foreigners and come here and are involved in crime. . . . This type of people [sic] are the worst things we have. . . ." This judge was not only biased against a class of which the defendant was allegedly a member, but he was obviously predisposed to the merits of the case. Systemic recusal standards would mandate disqualification in such a case, because it is reasonable to believe that the judge was unable to apply the criminal law consistently and fairly to the defendant. Likewise, in Parrish

151. 805 F.2d 1117 (2d Cir. 1986).
152. Id. at 1119, 1125.
v. Board of Commissioners,"153 the Fifth Circuit held that a judge, who had been president of an all-white bar association that integrated only after coming under public scrutiny, was not barred from hearing a racial discrimination suit.

In addition, the existing disqualification standard makes it difficult to disqualify even the most blatantly biased judge. Three federal appeals were needed to disqualify the trial judge in Walker v. Lockhart,154 who instructed the deputy sheriff before the trial that if the defendant "made a move to shoot him down, because he didn't want him brought back to him because he intended to burn the S.O.B. anyway."155 Disqualification was finally granted, not so much because a due process violation had occurred but largely because the bias supplemented the principal procedural error, the failure to turn over exculpatory evidence.156 Under the systemic approach to judicial disqualification, a judge who has predetermined the merits of a case is undoubtedly biased against the individual defendant, and should be disqualified.

One additional area warranting special consideration under systemic recusal is the election of state court judges. The systemic view implies that a judge should be recused whenever a lawyer or a litigant in a case has contributed to the campaign of the judge, either directly or through monetary donations. In this situation, a reasonable person would question whether the judge's decision would be affected by gratitude toward the contributor. Yet the court in Texaco v. Pennzoil157 allowed a judge to hear the case although the lawyer for Pennzoil was the single largest contributor to the trial judge's campaign.

To solve this apparent inequity, all members of the bar could be prohibited from involvement in judicial election campaigns. This would be difficult to enforce, however, and at best is only a partial solution. Because systemic recusal standards suggest an absolute ban against judges hearing cases involving their campaign contributors, a more encompassing solution is needed. An increasing number of commentators have argued that states should solve this problem by requiring selection of state judges exclusively by appointment.158 Many states have followed suit, and, at present,

155. Id. at 1255 (testimony of witness at pretrial disqualification hearing).
158. See generally, Davidow, Judicial Selection: The Search for Quality and Representativeness, 31 Case W. Res. 409 (1981) (arguing that selection by committee rather than by partisan elections also helps insure higher quality judges).
twenty-seven states appoint their supreme court justices, thirteen hold nonpartisan elections, and only ten hold the form of partisan election that was involved in *Texaco v. Pennzoil*.159

Switching to a system of judicial appointment would not only assist in the selection of better candidates, but would also avoid the huge expense160 of campaigns and the impropriety of judges' heavy dependence upon financial contributions from members of the bar. Thus, systemic recusal considerations support elimination of elections for state court judges.

Eliminating elected judges, however, may have serious repercussions. First, given the difficulty of deciding in advance who will make a good state court judge,161 it is questionable whether merit selection will improve the quality of the judiciary. In addition, democratic ideals are lost when judges are appointed. For example, to the degree that judicial accountability is deemed important, a sacrifice is made when community input is lost.162 In many states, the concept of a "judge" arguably includes the notions of responsiveness and responsibility to the community. Also, public faith in the judiciary may be sacrificed when judges can remain in office without responding to societal standards. Although these arguments are compelling, the heavy dependence of judicial elections on the bar163 requires some movement away from partisan elections to insure judicial impartiality.

VII. CONCLUSION

An independent and impartial decisionmaker is crucial to the effective functioning of our justice system. As former California Supreme Court Chief Justice Roger Traynor stated before the Senate Judiciary Committee, "[a]n independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved."164 A biased

159. See N.Y. Times, Jan. 22, 1988, at B4, col. 3.

160. Approximately $1,000,000 is spent per candidate per election in Texas. Id. at col. 5.


The Court ought not to be astute to discover refined and subtle distinctions to save a case from the operation of the maxim, ["No one can be a judge in his own cause"] when the principle it embodies bespeaks the propriety of its application. The immediate rights of the litigants are not the only objects of the rule. A sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance.1

In light of the inconsistent application of existing recusal standards, a new recusal approach is needed that will apply uniform rules to all areas of judicial impropriety. When a biased decision-maker sits, the legal process loses its legitimacy. Thus, protections against abuses of judicial bias or relationship are as necessary as safeguards against abuse of pecuniary interest.

This Article has attempted to illustrate how the philosophical foundations of due process have serious ramifications for the nature of constitutional protections against judicial partiality. It has suggested that systemic values warrant consideration in determining the nature of due process jurisprudence. To accept the desirability of incorporating these systemic concerns, the inherent value of fair procedures must be recognized, and it follows that the protection of just procedures should be an element of due process recusal guarantees. When procedural integrity is abused by a violation of judicial bias or relationship, the effect on the procedural system is as severe as a violation resulting from judicial pecuniary interest in a case. The approach for regulating judicial disqualification suggested by systemic due process attempts to guarantee necessary, stringent protections against all forms of potential judicial impropriety.