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Introduction

Many things interest Americans about the Supreme Court. Judicial recusal is not always one of them. This is unfortunate, because recusal, though not the highest-profile issue confronting the justices, directly impacts the Court’s most persistent and fundamental challenge—its struggle to maintain its legitimacy in a democratic society.

The Supreme Court is inherently different from our other government institutions. In what is generally a representative democracy, where the power of government is entrusted to people who are elected, and reelected, by those they govern, the Court is an unelected, unreviewable body composed of justices who hold their positions for life and whose decisions have a profound impact on every aspect of our lives. Many Americans have never read Justice Harry Blackmun’s decision in *Roe v. Wade* or Justice Anthony Kennedy’s opinion in *Citizen’s United v. FEC*, yet their mere mention sparks passionate debate. Even cases that are no longer good law linger in our collective memory. Names like *Plessy v. Ferguson* and *Dred Scott* are cultural shorthand for the failure of government institutions to protect the most vulnerable members of our community. What’s more, the Court’s influence over our political, social, and personal lives shows no signs of abating. In only the last few years the Court has taken on highly contested issues like gay marriage, gun possession, free speech, reproductive freedom, and campaign finance reform, to name just a few. As the country continues to grow more politically polarized, the Court finds itself increasingly on the cutting edge of American life.

But for all its power and independence, the Court is also vulnerable. It has the power to decide many of our most pressing and controversial national questions, but it has no power to enforce its decisions. In the words of Alexander Hamilton, the judiciary “has no influence over either the sword or the purse; . . . neither force nor will but merely judgment.”¹ This serves as an important check on the Court’s authority, but it also threatens its effectiveness. The Court relies on the cooperation of the other branches of government, and by extension the people they represent, to fulfill its constitutional responsibilities. It earns this
cooperation by remaining democratically legitimate, by exercising its judgment in a way that earns the faith and trust of the people it purports to govern. As Justice Sandra Day O’Connor famously stated in the landmark abortion case Planned Parenthood of Southeastern Pennsylvania v. Casey, “The Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.” This requires not only that the Court’s decisions themselves be defensible but also that they appear so to a watchful nation.

Enter judicial recusal. “Recusal,” sometimes called “disqualification,” is the exclusion of a judge or justice from participating in an individual case. Recusal is regularly required when a judge has a monetary interest in the outcome of a case or when he or she may be, or may reasonably appear to be, biased against one of the litigants. Recusal serves at least two broad purposes. It protects litigants by helping to ensure an impartial decision maker for their claims. It also helps preserve the legitimacy of the judicial system as a whole. In many cases, even though a judge may be perfectly capable of acting fairly and objectively, recusal is nonetheless required because the judge’s participation would create a reasonable appearance of bias. By guarding against the mere appearance of bias, recusal advances public confidence in the integrity and legitimacy of an otherwise unaccountable judiciary.

Perhaps because of its important role in defending the integrity of judges and the judicial system, recusal is as old as courts themselves. Early Jewish and Roman law both incorporated recusal, and it became part of the English common law system as early as the thirteenth century. It has continued unabated ever since, and American law is no exception. As direct descendants of the English common law system, pre-Revolutionary American courts employed recusal. Those practices were carried through the formation of the United States and the ratification of the Constitution. Recusal is currently practiced at all levels of the judiciary, in state as well as federal courts and from trial courts through appellate courts of last resort, including the U.S. Supreme Court.

Throughout this long history, recusal has been viewed almost exclusively as an issue of judicial ethics. This of course makes sense. The relationship of recusal to judicial ethics is obvious. When we think of judges in the American system, we think of people who are (hopefully) wise, but at minimum fair and independent. We expect judges to resolve
disputes objectively by applying the relevant law to the available facts. External pressures like monetary or political incentives are generally understood as disruptive to good judging. There are sound reasons for these preferences. Judicial fairness and independence are critical to the pursuit of justice. Recusal addresses the problem of unethical decision making by providing for the exclusion of potentially biased judges from individual cases.

Recusal is not, however, an exclusively ethical issue. Focusing solely on its ethical consequences overlooks the critical question of recusal’s proper place in our constitutional system. Federal recusal standards are statutory. Congress sets the criteria for when federal judges must recuse themselves. This interaction between Congress and the judiciary raises critical constitutional issues that have so far been largely neglected. Do legislative commands to a coequal branch of government improperly interfere with that branch’s own constitutional authority? Who should determine if violations have occurred? If violations are found, who should enforce them? Each of these questions implicates the separation of powers. The concept of separation of powers in America predates the Founding and is a fundamental principle of our constitutional system. It is based on the idea that the Constitution assigns each of the three coordinate branches authority over some aspect of government. At the same time, the branches’ authority overlaps enough for each branch to prevent potential overreaching by the others. These checks and balances help legitimize our constitutional system. The ability of the government to effectively curb its own power is a compelling reason for the citizenry to support its governmental institutions. This is especially true with regard to the judiciary. Calling again on Alexander Hamilton, this time quoting the French political philosopher Montesquieu, “‘there is no liberty if the power of judging be not separated from the legislative and executive powers.’”\(^5\) Legislatively prescribed recusal raises significant questions about the intersection of legislative and judicial power that can only be addressed by treating recusal as a matter of constitutional law.

The constitutional stakes are magnified when we consider recusal at the Supreme Court. The Supreme Court is the only federal court mandated by the Constitution. While Article III of the Constitution requires the existence of the Supreme Court, it merely permits Congress to create the lower federal trial and appellate courts. The Supreme Court’s constitutional mandate suggests that it also has a stronger claim
to judicial power under Article III than the voluntarily created lower courts. As Michael Gerhardt explained, “Separation of powers concerns are at their most sensitive in those instances in which the removal, disqualification, and disciplining of the most powerful federal judicial officers are at stake.” The history and procedures relating to Supreme Court recusal are also different from those of the lower federal courts. As a procedural matter, the justices typically provide little or no explanation for their recusal decisions, and those decisions are not subject to review. Lower federal courts, by contrast, must defend their recusal decisions on appeal to a higher court, including the Supreme Court. Historically speaking, the first Congress enacted a recusal statute for the lower courts, but it took more than 150 years before the statute was made applicable to members of the Supreme Court. Since that time, the justices have shown little enthusiasm for applying the statutory standards to their own conduct. The combination of the Court’s unique constitutional status as the head of the judicial branch and the justices’ traditional refusal to apply statutory standards to their recusal decisions makes Supreme Court recusal a complex and significant constitutional issue.

It is also a very real one. Throughout the Court’s history, the justices have been involved in a wide array of situations that raised serious questions about their recusal practices, including how those practices impact the constitutional separation of powers. Supreme Court justices have had close personal relationships with sitting presidents, even going so far as to provide the chief executive with policy advice or campaign assistance while on the bench. Others have participated in cases reviewing legislation that they themselves played a significant role in drafting while members of Congress, or in cases in which they were also part of the reviewing court below. Several justices sat on cases that they had knowledge of and even involvement in while serving in the executive branch, and others had familial relationships or simply engaged in conduct that could be seen as projecting a lack of impartiality about an issue before the Court. Even where not invited by the justices’ personal history or conduct, recusal has become a more frequent topic of public discourse about the Court, particularly as increasing partisanship fuels fears about the politicization of the justices and their decisions.

Put simply, Supreme Court justices have faced difficult questions related to recusal since the opening of the Court, and their decisions in those cases have often been controversial. So in light of this long his-
tory of Supreme Court justices making questionable decisions about their participation in certain cases, the question must be asked: “Why now?” What is it about the modern Supreme Court that requires the first comprehensive constitutional analysis of its recusal practices? On one hand, the answer is nothing. The separation-of-powers questions raised by Supreme Court recusal are timeless. They were just as important in 1803 when Chief Justice John Marshall chose not to recuse himself from the landmark case of Marbury v. Madison as they are today. For more than a century, the Supreme Court has continually reiterated the importance of preventing even the most innocuous infringements on the separation of powers.9 By that rationale, a constitutional treatment of Supreme Court recusal is long overdue but is not uniquely suited to the present.

On the other hand, this may be the perfect moment to discuss the constitutional ramifications of Supreme Court recusal. Although recusal may never rank as the public’s most pressing concern about the Court, it is garnering more and more attention. As the Court faces growing public scrutiny across the entire range of its operations, that scrutiny more frequently manifests itself in discussions about the justices’ recusal practices. Since 2010, multiple Supreme Court recusal statutes have been introduced in Congress, sitting justices have testified about recusal before Congress, the chief justice has published a Year-End Report on the Federal Judiciary that focused entirely on judicial ethics and recusal, and the conduct of several justices was questioned by members of Congress, the press, and the public in connection with recusal and other ethical issues. A cursory look at the environment surrounding the Court helps explain this growing interest in recusal. A divisive political climate and more frequent public appearances by the justices focus additional attention on the Court. Rick Hasen noted that “the last decade in particular, has seen an explosion of Supreme Court justices being publicly reported on and being seen to some extent as celebrities.”10 With the trappings of fame come greater attention and, inevitably, criticism. The breadth of available information about the justices and the efficiency with which that information is communicated make it easier for political opponents to attack a justice’s qualifications to participate in a particular case. All of these factors have contributed to an increasingly active and spirited public dialogue about recusal at the Court. As information about the justices and the Court continues to be readily and widely available, that dialogue is likely to continue, and
the constitutional issues surrounding Supreme Court recusal are only likely to grow in importance.

This book examines recusal at the Court from a constitutional perspective, both to better understand recusal and to offer a framework for thinking more broadly about the constitutional separation of powers. Chapter 1 outlines the evolution of American recusal law from the expansive views espoused by ancient and medieval regimes, through the far narrower view held in the English common law, to a modern approach that more closely resembles its ancient ancestors. This account of how the underlying principles of recusal have changed over time provides a useful backdrop for understanding the ongoing tension between Congress and the Court that drives the constitutional issues around Supreme Court recusal.

Chapter 2 focuses on recusal at the Court since the beginning of the Republic. It highlights some of the more prominent recusal issues in the Court’s history, from Chief Justice Marshall’s decision not to recuse in *Marbury v. Madison* to Justice Clarence Thomas’s and Justice Elena Kagan’s decisions to participate in the Court’s review of the controversial health care statute, the Affordable Care Act. It then examines the ongoing debate over recusal at the Court, including what I describe as the constitutional impasse between Congress and the Court over recusal. There are two primary purposes for this historical analysis. First, it highlights the long-standing and continuing relevance of Supreme Court recusal to American law and politics. This relevance shows no sign of fading and thus highlights the need to more closely examine all aspects of recusal at the Court. Second, some of the historical themes developed in chapter 2 bear directly on how the justices’ recusal decisions fit within the separation of powers.

Chapter 3 explains the primary constitutional dilemma with Supreme Court recusal: the difficult answer to the question of who decides. It argues from constitutional text, history, practice, and structure that Congress’s attempt to set mandatory recusal standards for the justices represents an unconstitutional infringement on the Court’s inherent judicial power under Article III. It shows why the Constitution reserves Supreme Court recusal questions for the justices alone and offers some arguments for why this outcome is a net benefit to litigants, the Court as an institution, and our constitutional democracy writ large.

Chapters 4 and 5 target the most constitutionally acceptable solutions to the problem highlighted in chapter 3. Chapter 4 focuses on
the impasse between Congress and the Court over recusal. There is an inherent conflict between the purportedly binding but utterly unenforceable federal statute governing the justices’ recusal decisions and the Court’s clear and open disregard for the statutory standard in its recusal practices. The result is a constitutional problem. Recusal creates a tension between the branches that draws their efficacy and legitimacy into question. Why would Congress enact a statute that it knows it cannot enforce and the Court will not abide by? How can the Court continue to act with open disregard for a validly enacted statutory mandate without any additional action or explanation as to why it feels entitled to do so? Chapter 4 seeks to resolve this inherent tension over recusal by applying separation-of-powers principles to suggest a course that both is faithful to those principles and acknowledges the Court’s exclusive authority over its own recusal practices.

Chapter 5 moves from solving the interbranch impasse over recusal to determining how the Court should decide recusal questions in the absence of a statutory standard. The answer lies in the intersection of constitutional due process and the First Amendment. After outlining the history of the Court’s due process recusal jurisprudence, I suggest a framework for the Court to apply due process principles to its own recusal decisions. This new framework seeks to balance the important ethical concerns that recusal is designed to address with the constitutional principle of separation of powers and the justices’ right to free speech under the First Amendment. The result is a holistic view of the constitutional landscape confronting the justices’ recusal decisions.

Chapter 6 relies on the preceding analysis to suggest applications beyond the Supreme Court, in particular how a constitutional view of recusal at the Court could better inform our understanding of recusal in the lower federal courts and in state supreme courts. In the case of the lower federal courts, it considers the (potentially significant) differences between the Supreme Court and other Article III courts within our constitutional structure and examines what constitutional limitations, if any, exist to constrain Congress’s regulation of recusal in the lower courts. It argues that Congress’s ability to regulate recusal in the lower courts depends on a set of related protections—such as the ability of federal judges to sit by designation on other courts—that would preserve the lower courts’ ability to fulfill their judicial function even in cases where recusal was otherwise required.

Chapter 6 also considers the question of how treating recusal as
a matter of constitutional law sheds light on recusal in state supreme courts and on the separation of powers in different constitutional systems. It relies on features of state constitutions that may distinguish them from the federal Constitution, such as their structure, their treatment of legislative power, their use of judicial elections, the breadth of state court jurisdiction, and their constitutional amendment procedures, to explore how the separation of powers affects legislative interaction with the judiciary over recusal at the state level.

Chapter 7 concludes by focusing on the broader lessons from Supreme Court recusal for interbranch conflict and the separation of powers. It recounts the major themes developed with regard to recusal in the federal courts and demonstrates how those themes are relevant to other separation-of-powers conflicts within the federal government. It relies on examples such as the interactions between Congress and the Court over quorum requirements, appellate jurisdiction, and impeachment, and between Congress and the president over the use of military force and the appointment and removal of federal officials to show how a constitutional view of recusal at the Court can shed light on other instances of imperfect interbranch relations.

So why should people be interested in Supreme Court recusal? The answer, I suggest, is twofold. First, the ethical integrity of the Court is vital to its ability to function as a legitimate part of a constitutional democracy. The second reason, and the primary focus of the following pages, is that the current structure of recusal at the Court raises a series of important and underappreciated constitutional questions that have an equal, if not greater, impact on its democratic legitimacy. These questions are critical to understanding how recusal decisions should be made and, more broadly, how our constitutional system should respond when two or more branches collide.