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Judges in Their Own Cases: Biblical Kings and Supreme Court Justices

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ABSTRACT

Allegations that the justices of the United States Supreme Court are judges in their own cases and that they judge themselves leniently are common. These allegations are often accompanied by an association with kings, queens, and monarchies, accountable to no one but their own divine authority. This Article took this association seriously and used the biblical story of prophet Nathan's rebuke of King David for his sin towards Bathsheba and Uriah to explain the problems, tensions, and conflicting considerations of the contemporary recusal doctrine of the United States Supreme Court. This biblical judicial tale has two possible conclusions, depending on two possible different interpretations.

The first interpretation appeals to Nathan's status as court prophet and the caution it necessitates. A court prophet is a member of the royal court who is dependent on the king and is in his service. This interpretation illustrates the need for institutional arrangements that secure judicial independence and impartiality by guaranteeing the judge's term of office or by drawing a line to separate proper judicial interactions and relations from inappropriate judicial ties to politicians, interest groups, wealthy benefactors, and other potential litigants. According to the second interpretation, the poor man's ewe lamb parable

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is a juridical parable meant to induce David to judge himself by the same yardstick that he applies to others. This interpretation suggests an utmost need to install a neutral third-party review, stipulate discovery, provide a full explanation, and adhere to precedents.

Despite the striking similarities between the legal conditions of biblical kings and Supreme Court justices, the Article concludes, after careful consideration, that the practices of Supreme Court justices are not like those of biblical kings. They are worse—much worse. The problem is not that the justices judge themselves but rather that, contrary to biblical kings, the rules and principles that are meant to regulate their self-judgment are almost nonexistent.

I. INTRODUCTION

In her Senate Judiciary Committee nomination hearing, then-Judge Ketanji Brown Jackson pledged to recuse[1] herself from the closely-watched case—*Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*[2]—that challenged the consideration of race in admission at Harvard.[3] Jackson, a Harvard graduate, had been a member of the Harvard Board of Overseers for six years, which generated concerns that she could have a conflict of interest.[4] When the Supreme Court granted certiorari in the *Harvard College* case, it consolidated it for oral argument with another affirmative action case regarding college admissions—*Students for Fair Admissions v. University of North Carolina*.[5] The *Harvard College* case contested affirmative action at a private college, claiming a violation of Title VI of the Civil Rights Act of 1964.[6] The *University of North Carolina* case challenged racial preferences at a public college, asserting both a violation of the Fourteenth Amendment's Equal Protection Clause and a Title VI claim. By granting review to both cases and consolidating them, the Court was positioned to provide a complete analysis by considering both a private university and a public university and both the Constitution and Title VI.

However, after Jackson's appointment was confirmed by the Senate and she was sworn in as a Supreme Court justice, the Court announced in a brief order that it would review the two cases

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[1] Unless stated otherwise, the terms "recusal" and "disqualification" will be used interchangeably to include both voluntary and involuntary removal of a justice or a judge from a case.

[2] Students for Fair Admission, Inc. v. President and Fellows of Harv. Coll., 600 U.S. 181 (2023).

[3] The pledge was in response to a question from Senator Ted Cruz, R-Texas. *See* James Romoser, *Jackson Says She'll Recuse Herself from Case Challenging Affirmative Action at Harvard*, SCOTUSBLOG (Mar. 23, 2022, 11:42 PM), https://www.scotusblog.com/2022/03/jackson-says-shell-recuse-herself-from-case-challenging-affirmative-action-at-harvard.

[4] Jacob Gershman, *Supreme Court Nominee Ketanji Brown Jackson's Harvard Service Raises Questions for Admissions Cases*, WALL ST. J. (Mar. 4, 2022, 5:06 ET), https://www.wsj.com/articles/supreme-court-nominee-ketanji-brown-jacksons-harvard-service-raises-questions-for-admissions-case-11646423272.

[5] U.S., Order List: 595 U.S. (Jan. 24, 2022) https://www.supremecourt.gov/orders/courtorders/012422zor_m6io.pdf.

[6] 42 U.S.C. § 2000d.

separately,[7] noting that "Justice Jackson took no part in the consideration of this order."[8] The order enabled Justice Jackson to participate in the *University of North Carolina* case while recusing herself from the parallel *Harvard College* case.[9]

This was a convenient solution. In granting review, the Court's conservative supermajority singled out its inclination to overrule the 2003 landmark decision in *Grutter v. Bollinger*[10] that allowed public institutions of higher education to consider race to achieve a diverse student body.[11] Had Jackson recused herself from both cases, it would have left only two liberal justices—Elena Kagan and Sonia Sotomayor—likely to rule in favor of the universities.[12] While Jackson's vote was not crucial to the outcome of the admission cases, her participation was imperative to stop the deterioration of the Court's legitimacy after the decision in *Dobbs v. Jackson Women's Health Organization*.[13] This is especially true since Justice Clarence Thomas, a member of the conservative wing of the Court who is not new to

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[7] U.S., Order List: 597 U.S. (Jul. 22, 2022) https://www.supremecourt.gov/orders/courtorders/072222zr_bpm1.pdf.

[8] *Id.*

[9] Amy Howe, *Court Will Hear Affirmative-Action Challenges Separately, Allowing Jackson to Participate in UNC Case*, SCOTUSBLOG (Jul. 22, 2022, 6:43 PM), https://www.scotusblog.com/2022/07/court-will-hear-affirmative-action-challenges-separately-allowing-jackson-to-participate-in-unc-case/.

[10] Grutter v. Bollinger, 539 U.S. 306 (2003).

[11] Eight years ago, in *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365 (2016), a divided Court (4-3) upheld the University of Texas' admission process, which considered race in its undergraduate admission process. Since then, the composition of the Court has changed dramatically, and a conservative super majority has formed.

[12] Bianca Quilantan, *The Case that Could Overhaul College Admissions*, POLITICO (Aug. 16, 2022, 3:12 PM), https://www.politico.com/newsletters/the-recast/2022/08/16/college-admissions-harvard-race-supreme-court-00052122.

[13] 597 U.S. 215 (2022). On the Court's legitimacy crisis after *Dobbs*, see Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (Jun. 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx; Zack Beauchamp, *What Happens When the Public Loses Faith in the Supreme Court?*, VOX (Jun. 26, 2022, 11:01 AM), https://www.vox.com/23055620/supreme-court-legitimacy-crisis-abortion-roe; Spencer Bokat-Lindell, *Is the Supreme Court Facing a Legitimacy Crisis?*, N.Y. TIMES (Jun. 29, 2022), https://www.nytimes.com/2022/06/29/opinion/supreme-court-legitimacy-crisis.html; *America's Supreme Court Faces a Crisis of Legitimacy*, ECONOMIST (May 7, 2022), https://www.economist.com/briefing/2022/05/07/americas-supreme-court-faces-a-crisis-of-legitimacy.

recusal controversies surrounding the Court,[14] also faced calls to recuse himself from the affirmative action cases because of a potential conflict of interest involving his wife.[15] Thus, the Court made an effort so that "its first Black female justice gets to take part in at least some of the looming arguments over schools' affirmative action policies"[16] and to avoid the criticism that the "specter of recusal has repeatedly been used to cast unjust aspersion on the judicial work of minorities and women."[17]

In accord, the two cases were argued separately at the end of October 2022.[18] Jackson was absent from the *Harvard College* case oral argument but participated actively in the *University of North Carolina* case. Jackson made some key arguments in favor of keeping race as one of many factors in higher education admissions: (1) she questioned the petitioner's "standing" to sue when race is used in this context;[19] (2) she doubted whether "stare decisis" can be overcome without clear historical evidence as to the original meaning of the Equal

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[14] *See infra* Part VI (discussing some of the recusal controversies surrounding Justice Thomas in recent years).

[15] Thomas's wife, Virginia (Ginni) Thomas, currently serves on the advisory board of the National Association of Scholars, which filed an amicus brief in the Harvard case. *See* Jane Mayer, *Is Ginni Thomas a Threat to the Supreme Court?*, NEW YORKER (Jan. 21, 2022), https://www.newyorker.com/magazine/2022/01/31/is-ginni-thomas-a-threat-to-the-supreme-court?utm_source=NYR_REG_GATE; Tierney Sneed, *What to Know about the Justice Clarence Thomas Recusal Debate Around His Wife's Texts*, CNN (Mar. 30, 2022), https://edition.cnn.com/2022/03/29/politics/clarence-ginni-thomas-election-reversal-texts/index.html.

[16] Alex Swoyer & Stephen Dinan, *Supreme Court's First Black Female Justice Expected to Weigh in on Affirmative Action*, THE WASH. TIMES (Aug. 3, 2022), https://m.washingtontimes.com/news/2022/aug/3/supreme-court-justice-ketanji-brown-jackson-expect/https://m.washingtontimes.com/news/2022/aug/3/supreme-court-justice-ketanji-brown-jackson-expect/.

[17] The Crimson Editorial Board, *A Black Woman on the Highest Court in the Land*, THE HARV. CRIMSON (Feb. 10, 2022) https://www.thecrimson.com/article/2022/2/10/editorial-a-black-woman-in-scotus/.

[18] Amy Howe, *Affirmative Action Appears in Jeopardy After Marathon arguments*, SCOTUSBLOG (Oct. 31, 2022, 7:44 PM), https://www.scotusblog.com/2022/10/affirmative-action-appears-in-jeopardy-after-marathon-arguments

[19] Transcript of Oral Argument at 18, Students for Fair Admission, Inc. v. Univ. of N.C., WL 3108901(2022) (No. 21-707), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-707_bb7j.pdf

Protection Clause;[20] and (3) she suggested that taking race out of the admission process, while taking into account other factors, would actually violate the Equal Protection Clause.[21]

To demonstrate the last point, Jackson presented a hypothetical with two applicants, both of whom were from North Carolina and wanted to have their family background recognized in the application process: one who would be the fifth generation to graduate from the University of North Carolina and another who is a descendant of slaves.[22] According to Jackson, the first applicant would be able to have his family background considered and valued if the Court were to adopt a new no-race-conscious admissions rule. However, the second applicant, "wouldn't be able to because his story is in many ways bound up with his race and with the race of his ancestors."[23] "Why [is] excluding consideration of race . . . not an equal protection violation?" Jackson defiantly asked the lawyer for the SFFA organization.[24] Although Justice Jackson, allied with Justices Sotomayor and Kagan, asked challenging questions of the attorney for SFFA and by which defended race-conscious admissions programs, court-watchers, who had observed the oral argument of the affirmative action cases, concluded the six conservative justices resolved to end or significantly narrow affirmative action in higher education.[25]

Seven months later, the Court resolved the two cases in a single majority opinion, delivered by Chief Justice Roberts and joined by Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett.[26] The Court noted that since "discrimination that violates the Equal Protection Clause . . . committed by an institution that accepts federal funds also constitutes a violation of Title VI," both admission programs would be evaluated under the standards of

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[20] *Id.* at 175.
[21] *Id.* at 30-31.
[22] *Id.* at 65-66.
[23] *Id.* at 66.
[24] *Id.* at 66-67
[25] Howe, *supra* note 18; Mark Sherman & Jessica Gresko, *Affirmative Action in Jeopardy After Justices Raise Doubts*, ASSOCIATED PRESS (Oct. 31, 2022), https://apnews.com/article/voting-rights-ketanji-brown-jackson-us-supreme-court-college-admissions-affirmative-action-196ab930c799bcdc8b2a4a220641dd48.
[26] Students for Fair Admission, Inc. v. President and Fellows of Harv. Coll., 600 U.S. 181, 191 (2023).

the Equal Protection Clause.[27] Accordingly, the Court ruled that Harvard College's and North Carolina's admission programs violated the Equal Protection Clause of the Fourteenth Amendment since they "lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner . . . and lack meaningful endpoints."[28] Roberts reasoned that "[c]ollege admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter."[29] While the Court did not explicitly overrule *Grutter v. Bollinger*,[30] the Court held that a "student must be treated based on his or her experiences as an individual—not on the basis of race."[31] Notwithstanding, Roberts clarified that the universities can consider an applicant's discussion of how race affected the applicant's life, "so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university."[32] The majority opinion contains references and responses to Jackson's positions and arguments but states that Justice Jackson took no part in the consideration or decision of the *Harvard College* case.[33] Jackson filed a dissenting opinion, joining Justice Sotomayor's dissent. Both dissents declare that Jackson did not participate in the consideration or decision of the *Harvard College* case.[34] In her dissent, Jackson wrote passionately and critically against the majority's opinion, the interpretation it adopted of the Equal Protection Clause, and the result reached, calling it "a tragedy for us all."[35]

The rare move[36] to separate the two cases resembles a previous decision made in a pair of cases—*Colorado Department of State v.*

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[27] *Id.* at 6. The Court cited *Gratz v. Bollinger*, 539 U.S. 244, 276 (2003). The Court also noted that Justice Gorsuch questioned the above proposition, and that neither party asked the Court to reconsider the proposition.

[28] Students for Fair Admission, Inc. v. President and Fellows of Harv. Coll., 600 U.S. 181, 230 (2023).

[29] *Id.* at 218.

[30] Grutter v. Bollinger, 539 U.S. 306 (2003).

[31] Students for Fair Admission, Inc. v. President and Fellows of Harv. Coll., 600 U.S. 181, 231 (Oct. 31, 2023).

[32] *Id.* at 188.

[33] *Id.* at 231.

[34] *Id.* at 318 n* (Sotomayor, J., dissenting); *Id.* at 318 n*(Jackson, J., dissenting).

[35] *Id.* at 411 (Jackson, J., dissenting).

[36] Swoyer & Dinan, *supra* note 16.

Baca[37] and *Chiafalo v. Washington*[38]—concerning the constitutionality of "'faithless elector' laws, which penalize or remove presidential electors who" refuse "to vote for the candidate they have pledged to" endorse.[39] These cases attracted attention because of their potentially dire consequences. Critics speculated that ruling in favor of the "faithless electors" could disenfranchise voters, subvert public confidence in the democratic system, and throw the 2020 presidential election into chaos.[40] The Court granted review in January 2020 and consolidated the cases for oral argument.[41] However, almost two months later, Justice Sotomayor notified the parties that she would not participate in one case because of her friendship with one of the respondents.[42] The Court then ordered the cases to be heard separately, noting that "Justice Sotomayor took no part in the consideration of this order."[43] This move also turned out to be convenient. The Court unanimously upheld Washington's statute in *Chiafalo*.[44] Justice Kagan wrote the majority opinion for eight justices and explained that nothing in the Constitution "expressly prohibits States from taking away presidential electors' voting discretion as Washington does."[45] In *Baca,* the Court issued an unsigned short *per curiam*, holding that the judgment of the Tenth Circuit is reversed for the reasons stated in *Chiafalo*, noting again that

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[37] Cal. Dep't of State v. Baca, No. 19-518, slip op. at 1 (July 6, 2020).

[38] Chiafalo v. Wash., No. 19-465, slip op. at 1 (May 13, 2020).

[39] Amy Howe, *Opinion Analysis: Court Upholds "Faithless Elector" Laws*, SCOTUSBLOG (Jul. 6, 2020, 1:43 PM), https://www.scotusblog.com/2020/07/opinion-analysis-court-upholds-faithless-elector-laws/.

[40] Adav Noti & Paul Smith, *Symposium: Unbinding Presidential Electors Could Throw the 2020 Election into Chaos*, SCOTUSBLOG (Apr. 23, 2020, 12:32 PM), https://www.scotusblog.com/2020/04/symposium-unbinding-presidential-electors-could-throw-the-2020-election-into-chaos/.

[41] *Colorado Department of State v. Baca*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/colorado-department-of-state-v-baca/ (last visited Aug. 25, 2024).

[42] Letter from the Clerk of Court to Counsel of record noting that Justice Sotomayor will not continue to participate in the Baca case (Mar. 10, 2020),.https://www.supremecourt.gov/DocketPDF/19/19-518/137674/20200310135922206_19-518%20SS%20recusal%20letter.pdf.

[43] *Colorado Department of State v. Baca,* SCOTUSBLOG (JUL. 6, 2020), https://www.scotusblog.com/case-files/cases/colorado-department-of-state-v-baca/.

[44] Chiafalo v. Washington, 591 U.S. 578, 581 (2020).

[45] *Id.* at 590.

Justice Sotomayor "took no part in the decision of this case."[46] The exact voting distribution of the justices in *Baca* is unclear since the failure to write separate opinions does not signal assent to the *per curiam*.[47] Notwithstanding, it is clear that the Court's disposition of *Chiafalo* and *Baca* left the system of faithless elector laws in place[48] and allowed Justice Sotomayor to participate in a significant part of the deliberations about "faithless elector" laws. While the Court did issue two separate opinions in the cases concerning the constitutionality of "faithless elector" laws, the disposition of these cases as it concerns discharging a justice recusal obligation, is not materially different from its disposition of the affirmative action cases. This difference could be explained, again, as motivated by convenience (e.g., the Court didn't want to issue duplicative or incomplete opinions).[49]

Recusal issues are not unique to the Supreme Court, and arise at each level of the federal judiciary.[50] However, at the Supreme Court level, recusal raises unique issues, presents distinct constitutional considerations, and engages worrisome practices.[51] Foremost, in each

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[46] Colo. Dep't of State v. Baca, 591 U.S. 655, 656 (2020). Justice Thomas concurred only in the judgment "for the reasons stated in his separate opinion in *Chiafalo*." *Id.* (Thomas, J., concurring).

[47] Josh Blackman, *Invisible Majorities: Counting to Nine Votes in Per Curiam Cases*, SCOTUSblog (Jul. 23, 2020, 3:23 PM), https://www.scotusblog.com/2020/07/invisible-majorities-counting-to-nine-votes-in-per-curiam-cases/.

[48] Howe, *supra* note 39.

[49] *See* Richard M. Re, *Did Justice Jackson Actually Recuse from Students For Fair Admissions v. Harvard?*, RE'S JUDICATA (June 30, 2023, 2:27 PM), https://richardresjudicata.wordpress.com/2023/06/30/did-justice-jackson-actually-recuse-from-students-for-fair-admissions-v-harvard/ (critiquing the Court for bending the recusal obligation for the sake of convenience).

[50] James V. Grimaldi, Coulter Jones, & Joe Palazzolo, *131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest*, WALL ST. J. (Sep. 28, 2021), https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421; M. Margaret McKeown, *To Judge or Not to Judge: Transparency and Recusal in the Federal System*, 30 REV. LITIG. 653 (2011); Richard E. Flamm, *History of and Problems with the Federal Judicial Disqualification Framework*, 58 DRAKE L. REV. 751 (2010).

[51] *See* Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657, 659 (1996); Caprice L. Roberts, *The Fox Guarding the Henhouse: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107 (2004); Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 680 (2005); Louis J. Virelli III, *The (Un)Constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181 (2011); Robert J. Hume,

level of the federal court system, individual judges decide for themselves whether recusal is needed,[52] but there is no formal procedure for court review or appeal of the recusal decision of a Supreme Court justice in a specific case.[53] Thus, contrary to the conventional wisdom that "no man should be a judge in his own case,"[54] every Supreme Court justice is the sole and final arbiter of his own impartiality, unlike every other federal judge. Furthermore, usually, the individual justice does not explain his or her decision.[55]

For the past two years, the Supreme Court has come under harsh scrutiny for the ethical standards of its justices. The criticism follows a series of investigative reports focusing on the justices' relations with politicians, wealthy benefactors, and organizations, with an interest in specific disputes or in the Court in general.[56] The decline in trust in the Court can be attributed in part to the sharp shift to the right, but also to what is perceived by the public as a lack of integrity and a double standard of its justices. Members of Congress have submitted several proposals to reform the Supreme Court's ethics and recusal practices.[57] Although their declared aim is bipartisan, Republican

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Deciding not to Decide: The Politics of Recusals on the Supreme Court, 48 LAW & SOC'Y REV. 621 (2014).

[52] According to federal statute 28 U.S.C. § 455, all federal judges, including the Justices of the Supreme Court, are disqualified from sitting in proceedings where their impartiality may reasonably be questioned, including instances where the justice has a personal bias concerning a party, has a financial interest in the case, or has acted as counsel in the matter. Moreover, federal judges, including Justices of the Supreme Court, take an oath of impartiality, swearing to "administer justice without respect to persons, and do equal right to the poor and to the rich, and [to]… faithfully and impartially discharge and perform all the duties… under the Constitution and laws of the United States." 28 U.S.C. § 453 (2023).

[53] William H. Rehnquist, *Let Individual Justice Make Call on Recusal*, ATLANTA J.-CONST., at 15A (Jan. 29, 2004).

[54] *See* Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 546, 558, 559 (1994); Dmitry Bam, *Our Unconstitutional Recusal Procedure*, 84 MISS. L.J. 1135, 1163 (2015); EDWARD COKE ET AL., REPORTS OF SIR EDWARD COKE, KNT. IN THIRTEEN PARTS 367-69 (1826).

[55] Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism,* 26 GEO. J. LEGAL ETHICS 443, 450 (2013); Barry Sullivan, *Law and Discretion in Supreme Court Recusals: A Response to Professor Lubet*, 47 VAL. U. L. REV. 907, 910 (2013). *See infra* Part VII (discussing some formal and informal changes in recusal practices in order to provide an explanation for recusal decisions).

[56] *See supra* notes 309-13 and accompanying text.

[57] For instance, Senator Sheldon Whitehouse (Dem.) and House Rep. Hank Johnson (Dem.) introduced the 21st Century Courts Act of 2022 to provide a procedure

lawmakers believe the proposals are an orchestrated attack on specific dedicated conservative justices and on the Court's conservative working majority.[58]

Regardless of the low chances of the proposals passing through a gridlocked Congress and becoming law, it also meets a constitutional obstacle that it may be unable to overcome. Chief Justice John Roberts explained in the *2011 Year-End Report on the Federal Judiciary*[59] that the current state of affairs (of no Court review) is the result of the "unique circumstances of the Supreme Court."[60] Namely, there is no higher court to review the justice's recusal decision since the Constitution orders that there should be only "one supreme Court."[61] Moreover, Roberts added that if the Supreme Court would review the justices' own recusal decision, "it would create an undesirable situation in which the Court could affect the outcome of the case by selecting who among its [m]embers may participate."[62] Roberts also questioned the power of Congress to regulate or "require" recusal to preempt any political involvement by devising an alternative solution, like the new proposals mentioned above, except a solution based upon a

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for recusals or disqualification motions and for their review by the entire Supreme Court if a justice decides not to recuse. If a party's motion is "(h)(1)… accompanied by a certificate of good faith and an affidavit alleging facts sufficient" to support disqualification, it will be referred to the full court, as will other procedural motions. The Bill seeks to amend statute 28 U.S.C. § 455 and states that: "(h)(3) The Supreme Court of the United States shall be the reviewing panel for a motion seeking to disqualify a justice." S. 4010, 117th Cong. (2021-2022), https://www.congress.gov/bill/117th-congress/senate-bill/4010/text; H.R. 7426 - 21st Century Courts Act of 2022, 117th Cong. (2021-2022) https://www.congress.gov/bill/117th-congress/house-bill/7426.

[58] Ellena Erskine, *Republicans Call Ethics Hearing a Double-Standard; Democrats Call for a Standard*, SCOTUSBLOG (Apr. 28, 2022, 6:49 PM), https://www.scotusblog.com/2022/04/republicans-call-ethics-hearing-a-double-standard-democrats-call-for-a-standard/.

[59] *See* CHIEF JUSTICE JOHN G. ROBERTS, JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY (DEC. 31, 2011), https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf.

[60] *Id.* at 7. *See also An Open Discussion with Justice Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1039 (2004) (maintaining that "one should distinguish the situation of a district judge or a court of appeals judge, from that of a Supreme Court Justice.").

[61] ROBERTS, *supra* note 59, at 9. U.S. Const. art. 3, § 1: "The judicial [p]ower of the United States, shall be vested in one [S]upreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

[62] ROBERTS, *supra* note 59, at 9.

constitutional amendment.[63] Recently, all nine presiding justices signed a *Statement on Ethics Principles and Practices*,[64] reaffirming the status quo. The Statement reiterated Robert's reasoning and included the *2011 Year-End Report on the Federal Judiciary* in the "Appendix – List of Judicial Ethics Authorities."

This position is understandable, as it wishes to maintain independence for the judiciary vis-à-vis Congress.[65] However, the unwarranted current state of affairs could be avoided if the Court had reconsidered its approach of not providing a Court review of recusal decisions taken by individual justices. The Court's orders concerning the deconsolidation of the cases mentioned above came very near to doing just that. By deciding to deconsolidate the cases, the Court had de facto affected who among its members can participate. Moreover, these orders imply approval of the recusal decisions taken by Justices Sotomayor and Jackson, since both orders indicated the Justices "took no part in the consideration of this order," namely, it was not up to them to decide on the matter. Lastly, contrary to the impression given by Roberts and the presiding justices, the "unique circumstances of the

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[63] ROBERTS, *supra* note 59, at 7. *See also* Virelli III, *supra* note 51, at 1191 (arguing that the Constitution, specifically the constitutional principle of separation of powers, precludes Congress from setting the recusal standards for the Justices). Virelli suggested that Congress should use various indirect constitutional tools, such as impeachment, confirmation hearings, investigation, and appropriation to influence the Justices' recusal practices. Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal,* 69 WASH. & LEE L. REV. 1535, 1587-99 (2012). *But see* Frost, *supra* note 55*,* at 443 (arguing that "Congress has broad constitutional authority to regulate the Justices' ethical conduct" (recusal procedures included) of the Supreme Court, "just as it has exercised control over other vital aspects of the Court's administration, such as the Court's size, quorum requirement, oath of office, and the dates of its sessions.").

[64] *See* STATEMENT ON ETHICS PRINCIPLES AND PRACTICES, signed by all current presiding justices, which was attached to the Letter from Chief Justice John G. Roberts to Senator Richard J. Durbin, Chair Committee on the Judiciary (Apr. 25, 2023).

[65] *See* CHIEF JUSTICE JOHN G. ROBERTS, JR., 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2021) ("The Judiciary's power to manage its internal affairs insulates courts from inappropriate political influence and is crucial to preserving public trust in its work as a separate and co-equal branch of government."). *See also* Tanner Stening, *Federal Judges' Financial Conflicts Add to the Mistrust of the Judicial System*, NEWS@NORTHEASTERN (Jan. 11, 2022), https://news.northeastern.edu/2022/01/11/federal-judges-financial-conflicts/.

[United States] Supreme Court"[66] and unique institutional setting[67] characterize other foreign common law "courts of last resort."[68]

The issue of self-judging in the highest court of the land and the efforts to curtail it are as old as the formation of a hierarchical court system and the conglomeration of judicial authorities under one supreme entity. I will use the biblical story about the rebuke King David received from the prophet Nathan after seducing Bathsheba and causing the death of her husband to explain the problems, tensions, and conflicting considerations of the contemporary recusal doctrine of America's highest court. This biblical judicial tale also has two possible conclusions, depending on the different interpretations of what transpired behind closed doors almost three thousand years ago. The first interpretation is the need for institutional arrangements that secure judicial independence and impartiality. The second understanding is the need to develop a judicial protocol that consists of procedural and substantive rules to deal with self-serving judging by the highest legal authority. This interpretation also explains why the pleas to reform the Supreme Court recusal have only increased despite increased efforts to regulate recusals in the new Roberts Court.[69] In light of this explanation, this Article offers a new assessment of the *Harvard College* and *Baca* judicial recusal strategies.

This Article will describe and analyze the problem of impartiality in the highest court of the land through the lenses of the different legal interpretations of David's rebuke by Nathan. This Article proceeds as follows: Part II explores the conventional interpretation of the biblical story and its twofold conclusion: that the impartial application of the law is contingent upon institutional arrangements that guarantee the justices' term of office and the need to draw a line to separate proper judicial interactions and relations from inappropriate judicial ties. In

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[66] STATEMENT ON ETHICS PRINCIPLES AND PRACTICES, *supra* note 64, at 5.

[67] ROBERTS, *supra* note 59, at 7.

[68] *See* R. Matthew Pearson, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV. 1799, 1814-15 (2005).

[69] Russell Wheeler, *Justice Thomas's Failure to Recuse May be Wrong but it's not Judicial Misconduct*, BROOKINGS (Mar. 29, 2022), https://www.brookings.edu/blog/fixgov/2022/03/29/justice-thomass-failure-to-recuse-may-be-wrong-but-its-not-judicial-misconduct/; Molly Coleman & Tristin Brown, *The Supreme Court's Legitimacy Crisis: From Recusal Issues to Blatant Partisanship*, TEEN VOGUE (June 16, 2022), https://www.teenvogue.com/story/supreme-court-legitimacy-crisis.

Part III, this Article presents a new alternative interpretation of the encounter between Nathan and David, according to which the poor man's ewe lamb parable is a juridical parable meant to induce David to judge himself by the same standard that he applies to others. The Article suggests the existence of an ancient judicial protocol that deals with the issue of the king-judge self-judging. This Article expounds on the conditions of the ancient juridical protocol and the ways it corresponds with modern recusal practices in the Supreme Court. In Part IV, this Article considers another problem that arises from Nathan's juridical parable: the absence of processes to investigate the king-judge to discover the facts of a claim brought against him. While the king had first-hand knowledge about his supposed misbehaviors, he functioned as both a fact finder and adjudicator in a matter in which he had proven to act partially and possibly in a deceitful manner. In Part V, this Article argues that Nathan's parable is designed to promote impartial decision-making by denying the king-judge access to the potential biasing information, similar to John Rawls's "veil of ignorance." In accord, the parable was a general judicial tool to ensure the king-judge impartiality vis-à-vis the different tribes (and towns) and to unify the law. While David knew he was hearing a dispute behind a "veil" meant to secure his impartiality towards the parties to the dispute, he didn't know that Nathan had converted this judicial tool into a juridical parable. In Part VI, this Article discusses and analyzes similarities and dissimilarities between the ancient judicial protocol and modern Supreme Court recusal policies. Contrary to my analysis of the self-judging protocol of ancient times, recusal is not a strong organizing doctrine and is also voluntarist in nature. Part VII discusses a considerable objection to the Court's voluntarist recusal approach based on my analysis: it allows the impartiality of the whole Court to be held hostage by a biased justice. Part VIII returns to the ancient self-judging protocol in search of the possible legal components that enabled the prophet to free the "captured" king-judge. In conclusion, Part IX proposes, based on the preceding discussion, an evaluation of the recusal procedure demonstrated in the affirmative action cases.

II. THE POOR MAN'S EWE LAMB PARABLE: INSTITUTIONALIZING JUDICIAL INDEPENDENCE AND IMPARTIALITY

Edicts intended to guarantee "judicial impartiality have been recorded since ancient times."[70] Though the issue of ensuring impartiality is timeless and universal, some scholars have traced the origin of American recusal law and the disqualification of judges to the "whole Jewish and Christian tradition."[71] My goal here is narrower: to explain the legal rules and institutions both expressly and implicitly described in the biblical story of the prophet Nathan's rebuke of King David.[72] Through the lens of this story, I wish to identify the noteworthy rules, principles, and judicial patterns that play a crucial part in the operation of the United States Supreme Court.

King David desired Bathsheba, the wife of Uriah the Hittite, a senior officer in the military.[73] To prevent people from discovering the adultery and Bathsheba's pregnancy, King David ordered Uriah to be moved to the front line and deserted in the war with the Ammonites so that he would be killed in battle.[74] Later, David married Bathsheba. Only then, after the grave crimes had been committed (adultery and murder), was Nathan sent by God to rebuke David for his sins:

> But the Lord saw what David had done as evil. And the LORD sent Nathan unto David. And he came unto him, and said unto him, There were two men in one city; the one rich, and the other poor. The rich man had exceeding many flocks and herds: But the poor man had

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[70] Flamm, *supra* note 50, at 753; John T. Noonan Jr., *Judicial Impartiality and the Judiciary Act of 1789*, 14 NOVA L. REV. 123 (1989).

[71] Noonan, *supra* note 70, at 124-25. *See also* John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 248 (1987).

[72] My analysis is limited to the juridical foundations and judicial patterns of the biblical story of Nathan's parable and the denunciation of David. The Poor Man's Ewe Lamb Parable and the frame story of David's sin against Bathsheba and Uriah have been interpreted meticulously and extensively by commentators of all periods. For notable studies see EDWIN M. GOOD, IRONY IN THE OLD TESTAMENT 35-37 (1965); MEIR STERNBERG, THE POETICS OF BIBLICAL NARRATIVES: IDEOLOGICAL LITERATURE AND THE DRAMA OF READING 186 (1985); GWILYM H. JONES, THE NATHAN NARRATIVES 93 (1990); URIEL SIMON, READING PROPHETIC NARRATIVES 93 (Lenn J. Schramm trans., 1997); MOSHE HALBERTAL & STEPHEN HOLMES, THE BEGINNING OF POLITICS: POWER IN THE BIBLICAL BOOK OF SAMUEL 79-99 (2017).

[73] 2 *Samuel* 11:2-4.

[74] *Id.* at 11:5-14.

> nothing, save one little ewe lamb, which he had bought and nourished up: and it grew up together with him, and with his children; it did eat of his own meat, and drank of his own cup, and lay in his bosom, and was unto him as a daughter. And there came a traveler unto the rich man, and he spared to take of his own flock and of his own herd, to dress for the wayfaring man that was come unto him; but took the poor man's lamb, and dressed it for the man that came to him. And David's anger was greatly kindled against the man; and he said to Nathan, As the LORD liveth, the man that hath done this thing shall surely die: And he shall restore the lamb fourfold, because he did this thing, and because he had no pity. And Nathan said to David, Thou art the man. [You are that Man].[75]

Robert Cover was inspired by this exemplary judicial tale, crowning it, along with two other judicial mythical stories,[76] the folktales of justice and jurisdiction.[77] According to Cover, the story illustrates the need to institutionalize the office of the Prophet, who would subject the king to "God and the Law" and whose ultimate purpose is "speaking truth to power."[78] To that end, Cover argued that the judge, "must be other than the king,"[79] and that he must be able to derive jurisdiction and authority from sources beyond the bureaucratic state and positive law.[80] Moreover, Cover insisted that the lesson from this folktale of justice is that judges should resist the state's restriction of the judicial role. This Article will return to Cover's non-positivist and anti-state

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[75] 2 *Samuel* 11:27; *id.* at 12:1-7

[76] Robert Cover*, The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 189 (1985). Cover mentioned three exemplary judicial tales of justice and jurisdiction: Lord Coke of the 17th century and his opposition to King James I; Simeon Ben Shetah of the 1st century B.C. confronting King Yanai; and prophet Nathan of the 10th century B.C. rebuking King David.

[77] *Id.*

[78] *Id.* at 190.

[79] *Id.* at 189.

[80] *Id.* For a critique of Cover's presentation of the biblical story of David's rebuke by Nathan see Ronald R. Garet, *Judges as Prophets: A Coverian Interpretation*, 72 S. CAL. L. REV. 385, 386, 394 (1999). For a different institutional conclusion from David's rebuke by Nathan see H. Mark Roelofs, *Church and State in America: Toward a Biblically Derived Reformulation of their Relationship*, 50 REV. OF POL. 561, 573-74 (1988).

agenda below. This Article will now discuss the author's reservations regarding Cover's attempt to anchor "the truth speaking" function of the judge on Nathan's performance as described in the biblical text.

Commentators of all periods have noted that the parable of the poor man's ewe offers no parallel to the situation to which it is applied, and the story does not fit David's circumstances in many respects.[81] The common denominator is that a relatively weak person has been unjustly harmed by a well-off individual. King David is the rich man, permitted to marry many wives, while Uriah is the relatively poor man, having only one wife to whom he is greatly attached.[82] But there are numerous substantial differences. Uriah is not poor at all—he is a senior military officer; Bathsheba was neither taken by force nor slaughtered—she rose to prominence and became the mother of King Solomon. In reality, it was Uriah who was slaughtered. David's crimes and cruelty outweigh the transgressions of the rich man. David also engaged in acts of fraud and concealment (his dealings with Uriah), misused his authority, and even involved others (Joab, David's military chief of staff) in the transgressions.[83] This conduct also led to the death of other soldiers besides Uriah because Joab feared that Uriah's murder would be too transparent, so he orchestrated a failed attack, placing Uriah with other warriors where they would surely be killed.[84]

Daniel Friedmann explained these incongruities, the moderation of the parable by comparison to the surrounding narrative, by appealing to "Nathan's status as court[-]prophet and the caution [it] necessitated."[85] A *court-prophet* is a member of the royal court who is

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[81] DANIEL FRIEDMANN, TO KILL AND TAKE POSSESSION: LAW, MORALITY, AND SOCIETY IN BIBLICAL STORIES 81 (2002). *See also* Joshua Berman, *Double Meaning in the Parable of the Poor Man's Ewe (2 Sam 12:1-4)*, 13 J. OF HEBREW SCRIPTURES 1 (2013).

[82] Berman, *supra* note 81, at 2.

[83] 2 *Samuel* 11:2-4.

[84] *Samuel* 11:14-17.

[85] FRIEDMANN, *supra* note 81, at 82. On Nathan being a court-prophet *see also* BENJAMIN UFFENHEIMER, EARLY PROPHECY IN ISRAEL 285-301 (David Louvish trans., 1999); Garet, *supra* note 80, at 408; JONES, *supra* note 72, at 20-21. There are other explanations, which have been offered. I will examine one of them in Part III below. Another explanation, which is beyond the scope of this article, was offered by David Janzen, *The Condemnation of David's "Taking" in Samuel 12:1-14*, 131 J. OF BIBLICAL LITERATURE 209 (2012). Janzen argued that the point of the parable "is to have David convict himself not primarily of murder and adultery but simply of 'taking' Bathsheba, a matter that God sees as an attempt by David to usurp God's role in their relationship." *Id.*

dependent on the king and is in his service. The court-prophet had the "task of confirming and preserving the monarchy" and was regularly consulted for divine advice as to which path would be following God's will and would guarantee success.[86] Within these boundaries, court-prophets sometimes censured the king's behavior, and their criticism was taken seriously. This position required Nathan to be extra careful, even when he reprimanded David for his sin, lest he be perceived as overstepping his role. According to this explanation, the parable is a subtle, indirect, and perhaps even pleasing way of criticizing the King. Nathan's preaching of morality was behind closed doors—David did not receive a physical punishment, and Nathan did not turn to the people or seek an alternative leader.[87] Nathan's conduct was by no means "speaking truth to power," rather it was similar to the conduct of a pastor-confessor or religious counselor—Nathan came to David's house, preached morals, demanded repentance, and offered absolution.[88] Later on, in 1 Kings, ch. 1, Nathan is presented as "an accomplice of Bathsheba in the move to secure the throne for Solomon," and his actions could be characterized more as a friend of the royal family or even as a servant ("bowing and doing obeisance on entering the king's presence")[89] rather than as a "justice prophet."[90]

In any case, Nathan's performance was in sharp contrast, for example, to the denunciation of King Saul by the prophet Samuel, whom Friedmann classified "*prophet as [a] national leader*,"[91] who

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[86] FRIEDMANN, *supra* note 81, at 165-67; JONES, *supra* note 72, at 21. On Nathan's role as legitimizer of the Davidic dynasty see G.W. Ahlstrom, *Prophecy and Society in Ancient Israel by Robert R. Wilson*, 44 J. OF NEAR E. STUD. 217 (1985) (book review).

[87] FRIEDMANN, *supra* note 81, at 166.

[88] According to the Biblical text, Nathan predicted three punishments: one was that the house of David will never give up a sword. The second punishment was the taking of David's wives and giving them to another publicly. The third punishment was that the son who is born will die. In Friedmann's opinion, for the most serious part of the case, namely the murder of Uriah, David gets away with nothing. FRIEDMANN, *supra* note 81, at 81.

[89] 1 *Kings* 1:23: "And they told the king, saying, Behold Nathan the prophet. And when he came in before the king, he bowed himself before the king with his face to the ground." JONES, *supra* note 72, at 29, 55.

[90] JONES, *supra* note 72, at 29, 55. *See also* Garet, *supra* note 80, at 408 ("The Nathan narratives serve in part to defend the legitimacy of the succession of Solomon. …Though Nathan was sufficiently 'other than the King' to rebuke David, his 'otherness' should not be exaggerated.").

[91] FRIEDMANN, *supra* note 81, at 165.

publicly humiliated Saul and impeached him at the people's assembly.[92] Another contrasting example is the prophet Elijah, classified by Friedmann as an *opposition-prophet*, who overthrew kings[93] and operated more as a free-lance prophet.[94] Elijah bluntly and directly confronted King Ahab for the murder of Naboth through a false trial that was engineered by the King's wife, Queen Jezebel, to take Naboth's vineyard which was adjacent to the King's palace. In one of the most furious of biblical admonitions, Elijah uttered the words, "Thus saith the Lord, Hast thou killed and also taken possession? And thou shalt speak unto him, saying, Thus saith the LORD, In the place where dogs licked the blood of Naboth shall dogs lick thy blood, even thine."[95] Elijah's condemnation of Ahab included not only the "unlawful taking," but also the murder of Naboth. Nathan mentioned the killing of Uriah only after David announced the rich man's judgment, leading some commentators to suggest that it is a late authorship installment.[96] The institutional difference—*court-prophet* versus *free-lance-prophet*—can explain the discriminatory treatment of the kings. David was allowed to repent and earn forgiveness, and the punishment was not extracted from him. Ahab's punishment was final, and the fate of his dynasty was doomed. From a moral and legal point of view, both kings committed grave sins and crimes. However, David was permitted to reap the fruit of his crimes, while Ahab was not.[97]

Thus, a possible conclusion from Friedmann's discussion is that the impartial application of basic rules (i.e., the prohibition against adultery and murder) and principles (i.e., no man should profit by his own wrong)[98] is contingent upon institutional arrangements that protect and guarantee the justices' term of office. This effectively grants them immunity from suffering personal punishment due to their judicial decisions and prevents their removal. The exception is for cases of the most serious crimes, and even then, only by an especially

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[92] *Id.*

[93] *Id.* at 167.

[94] Matthijs J. de Jong, *Review: Prophecy in the Ancient Near East: A Philological and Sociological Comparison by J. Stokl*, ARCHIV FÜR ORIENTFORSCHUNG 383, 383-84 (2015).

[95] 1 *Kings* 21:19.

[96] *See* HERTZBERG, *infra* note 331.

[97] *Compare* FRIEDMANN, *supra* note 81, at 82*, with* Nili Cohen, *The Slayer Rule*, 92 B.U. L. REV. 793, 797 (2012) ("In practice, however, both [kings] retained the profit of their crimes: David kept Bathsheba, Ahab the vineyard.").

[98] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 24 (1977).

cautious procedure.[99] Such arrangements, for example, are provided by Article III, sec. 1, of the U.S. Constitution, which establishes that the justices serve "during good [b]ehavior," which is generally interpreted as life appointment and that the justices' salaries may not be decreased while they are in office.[100] Another example is established by Article II, section 4, which provides that a justice's removal from office is available only for "Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors,"[101] and only by the process of impeachment where the House of Representatives must present a charge to the Senate that can convict the impeached justice with "the Concurrence of two thirds of the Members present."[102]

While this conclusion sheds some light on our current constitutional debates and provides a possible explanation for some of our arrangements, the biblical story cannot offer us serious guidance as to the specific measures that provide for judicial impartiality and independence for Supreme Court justices today. Even the arrangements provided by the Constitution can be seen as too outdated to deal with the modern political, social, and economic challenges facing the Court in the twenty-first century. Current institutional reform proposals to prevent or minimize conflict of interests and enhance impartiality vary greatly. Some propose requiring justices to disclose and sell their stocks,[103] while others suggest installing term limits for Supreme Court justices. The historical circumstances that mandated life tenure have changed and that lifetime appointment enables the justices to push their

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[99] *See also* Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 690 (1979).

[100] U.S. CONST. art. III, § 1, states: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." According to the Supreme Court website, this clause is meant to "ensure an independent Judiciary and to protect judges from partisan pressures." THE SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/institution.aspx (last visited Jan. 14, 2024).

[101] U.S. CONST. art. I, § 3; U.S. CONST. art. II, § 4.

[102] U.S. CONST. art. I, § 3, cl. 6. *See also* Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 990 (1996).

[103] *Stocks and Recusals*, FIX THE CT., https://fixthecourt.com/fix/stocks-and-recusals/ (last visited Jan. 3, 2024). *See also* Courthouse Ethics and Transparency Act, 5 U.S.C. §§ 1205-1207 (2022) (recently enacted by the 117th Congress).

partisan judicial agenda with almost no accountability.[104] I will not entertain these proposals since they are beyond the scope of this Article.

Another possible conclusion from Friedmann's discussion is that a person cannot judge his close friend, or that impartiality required Nathan to recuse himself because he was a friend of the royal family. Today, the basis for recusal under federal law is found in 28 U.S.C. § 455.[105] At first glance, such a conclusion seems fairly obvious as exemplified by Justice Sotomayor's recusal from the *Baca* case[106] due to her well-documented friendship with respondent Polly Baca.[107] In a short letter from the Clerk of the Court, counsels were informed that:

> Justice Sotomayor has determined that she will not continue to participate in this case. The Justice believes that her impartiality might reasonably be questioned due to her friendship with respondent Polly Baca. *See* 28 U.S.C. § 455(a). The initial conflict check conducted in Justice Sotomayor's Chambers did not identify this potential conflict.[108]

Nonetheless, life is not always so simple, as proven by the controversy regarding Justice Antonin Scalia's denial of a motion to recuse himself from a case involving Vice President Richard B. Cheney.[109] The motion was based on the close and long-standing friendship between Scalia and Cheney and a duck-hunting trip they went on together while the lawsuit against Cheney was pending before the Court.[110] In a twenty-one-page memorandum opinion, Scalia denied the motion, maintaining that friendship is grounds for recusal of a Justice where the case involves the personal pecuniary interest or the personal liberty of the friend, but not when the friend is involved in an ordinary ("run-

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[104] *Term Limits: Most recent FTC-endorsed Supreme Court Term Limits Act introduced in Congress*, FIX THE CT. (Jun. 30, 2023), https://fixthecourt.com/fix/term-limits/.

[105] 28 U.S.C. § 455.

[106] *See* Colo. Dep't of State v. Baca, 591 U.S. 655, 656 (2020).

[107] *See* Joey Bunch, *Denver Party Gets Direct Line to Congratulate Sotomayor*, THE DENVER POST, https://www.denverpost.com/2009/08/06/denver-party-gets-direct-line-to-congratulate-sotomayor/, (Aug. 6 200).

[108] Sotomayor Recusal Letter, *supra* note 42.

[109] Cheney v. United States Dist. Ct. for the Dist. of Columbia, 541 U.S. 913 (2004) (memorandum of Scalia, J.).

[110] *Id.* at 914-15.

of-the-mill") litigation in his official capacity.[111] Scalia added that a rule that mandates justices to recuse from cases in which the official actions of friends are at issue would "harm" and "disable" the Court,[112] giving "the press a veto over participation of any Justices who had social contacts with, or were even known to be friends of, a named official."[113] Scalia explained that many Justices had reached the Court precisely because they were friends of the incumbent President or other senior officials[114] and reviewed in length the history of Justices socializing with the President and other officers of the Executive.[115]

Critics characterized Scalia's memorandum opinion as defiant and disingenuous, misstating and misapplying the law and engaging fallacious arguments.[116] An extensive examination of the Scalia memorandum is beyond the scope of the possible conclusions from Friedmann's discussion of the biblical story. The most integral part of Friedmann's discussion is the need to draw a line to separate inappropriate prophetic ties to kings (e.g., Nathan bowing and doing obeisance on entering the king's presence) from proper prophetic interactions and relations. In our modern context, we need to separate proper judicial interactions and relations from inappropriate judicial ties to politicians, interest groups, wealthy benefactors, and other potential litigants.[117]

The challenge of line-drawing, either by Congressional legislation or by precedents, is especially challenging when the justices are selected partly because of ties they had acquired in the highest of places. Sotomayor was applauded for recusing in *Baca*, but her recusal notification did not specify or clarify the exact nature of the friendship

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[111] *Id.* at 916. Scalia dismissed the claim that the case centrally involved the Vice President's reputation and integrity and contended that "as far as the legal issues immediately presented to me are concerned, this is 'a run-of-the-mill legal dispute about an administrative decision'." *Id.* at 918-19.

[112] *Id.* at 916, 927.

[113] *Id.* at 927.

[114] *Id.* at 916.

[115] *Id.* at 916-17.

[116] Monroe H. Freedman, *Duck-Blind Justice: Justice Scalia's Memorandum in the Cheney Case*, 18 GEO. J. LEGAL ETHICS 229, 235 (2004).

[117] In recent decades justices have been criticized for interacting with groups that are likely to appear before the Court and for their involvement with politically interested organizations. Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification - and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation and Perceptual Realities*, 30 REV. LITIG. 733, 823 (2011).

nor the acquaintance which required recusal.[118] Scalia was condemned for not recusing in *Cheney v. U.S. Dist. Ct. for the District of Columbia*.[119] His memorandum opinion deserves "some measure of credit"[120] for attempting to draw a line, though almost all ethics experts agree that the line drawn (a suit in which the friend is involved in his personal capacity as opposed to a suit against a friend in his official capacity) and its application to the given case was erroneous.[121]

III. THE JURIDICAL PARABLE: FORMULATING SELF-JUDGING PROTOCOL

I wish to present an alternative interpretation of the biblical story of the encounter between Nathan and David, offered by Uriel Simon, a renowned biblical scholar.[122] Simon classified the poor man's ewe-lamb parable as a *juridical parable*, which is a parable aimed to lead the addressee, who committed a similar offense to the crime described in the parable, to pass judgment on himself:

> The offender will only be caught in the trap set for him if he truly believes that the story told him actually happened, and only if he does not detect prematurely the similarity between the offense in the story and the one he himself has committed . . . . The realistic dress of the juridical parable . . . is intended to conceal the very fact that it is a parable . . . . The juridical parable is a disguised parable designed to overcome man's own closeness to himself, enabling him to judge himself by the same yardstick that he applies to others.[123]

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[118] *See generally* Bunch, *supra* note 107.

[119] *See generally* Cheney v. United States Dist. Ct. for the Dist. Columbia, 541 U.S. 913 (2004) (memorandum of Scalia, J.).

[120] Roberts, *supra* note 51, at 117-18. *See also* Steven Lubet & Clare Diegel, *Stonewalling, Leaks, and Counter-Leaks: Scotus Ethics in the Wake of NFIB v. Sebelius*, 47 VAL. U. L. REV. 883, 892 n.33 (2013) (stating that Scalia's memorandum opinion is one of "two remarkable exceptions").

[121] Freedman, *supra* note 116, at 230 ("A justice's close friendship with a litigant, his acceptance of something of value from a litigant, and the potential for ex parte communications with a litigant, are all implicated in Scalia's duck-hunting trip with Cheney.").

[122] Uriel Simon, *The Poor Man's Ewe-Lamb: An Example of a Juridical Parable*, 48 BIBLICA 207, 220-21 (1967); SIMON, *supra* note 72, at 93.

[123] Simon, *supra* note 122, at 221. *See also* STERNBERG, *supra* note 72, at 429.

Simon explained that the poor man's ewe-lamb parable was meant to persuade King David into self-judgment.[124] Only after David had been caught in the trap and delivered and specified the rich man's proper punishment did Nathan interrupt him and reveal the true villain: "You are that Man!"

Contrary to Friedmann's interpretation which attributes the moderation of the parable to a court-prophet's modus operandi, Simon's interpretation fits the perspective that Nathan is one of the greatest prophets of all times and that the use of the parable, which ended with the words "[You] are the Man," only enhanced and amplified David's condemnation that followed soon after the parable.[125] Contrary to Cover's interpretation, which adopts the paradigm of prophet-as-judge,[126] Simon's interpretation reinstates King David as the judge in this judicial tale. While the case is not presented before David by a litigant, it is presented by the prophet Nathan as a real legal case as part of the prophet's "role of a champion of an oppressed poor man."[127]

Simon included four additional instances of juridical parables in the bible, but only the following two could be described as distinctly legal,[128] concerning actual legal cases,[129] and addressed a king-judge: 1) After Absalom, David's son, was exiled following his murder of Amnon, Joab asked a wise woman of Tekoa to impersonate a grieving widow whose son killed his brother.[130] She asked King David to intervene to prevent her son from being executed by relatives. Only after David heard her appeal and decided that her son should be spared did the woman tell David he should do the same with Absalom. 2) An unnamed prophet is ordered by God to disguise himself as a wounded

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[124] Simon, *supra* note 122, at 221.

[125] 2 *Samuel* 12:7-13.

[126] Mindful of the view that Nathan is classified a court-prophet by biblical scholars, Garet, *supra* note 80, at 407, offered the middle ground view that "Nathan is giving an 'advisory opinion' rather than 'deciding a case or controversy.'"

[127] Simon, *supra* note 122, at 221. For the perception of prophet Nathan as a lawyer for the poor see Thomas L. Shaffer, *The Biblical Prophets as Lawyers for the Poor*, 31 FORDHAM URB. L.J 15, 28 (2003); Thomas L. Shaffer, *Advocacy as Moral Discourse*, 57 N.C. L. REV. 647, 647-48 (1979); *In re Erdmann: What Lawyers Can Say about Judges*, 38 ALB. L. REV. 600 (1974).

[128] The other two parables, noted by Simon, *supra* note 122, at 221, are "part of the prophetic reproof addressed to the *people*" by prophets Isaiah and Jeremiah: *Isaiah* 5:1-7; *Jeremiah* 3:1-5.

[129] Simon, *supra* note 122, at 221.

[130] 2 *Samuel* 14:1-20.

soldier who was negligent in guarding a prisoner entrusted into his care.[131] The disguised prophet cried for leniency to King Ahab at the crossroad. After hearing the case, Ahab responded: "So shall thy judgment be; thyself has decided it"[132] Only then did the prophet remove his bandage from his eyes, rebuke Ahab for sparing the life of Ben-Hadad and announce that Ahab would pay with his life for this transgression.[133]

I agree with Simon's interpretation and argument, but would take it a little further and suggest that these three cases imply the existence of an ancient juridical protocol[134] that dealt with problems that arose when the king-judge, the highest legal authority, exercised self-judging.[135] The litigant, or another acting on his behalf (i.e., the prophet), brings a case against the king-judge and is willing to accuse the king of committing a crime and subject him to scrutiny through deliberate deception, intending to elicit the king to pass judgment upon himself. This is an act bordering on subversion against the monarch. It is true that in the ancient world, following such a protocol would be very risky, putting the litigant and his agent in harm's way. While the risk diminishes when the ritual is performed by a prophet or a member of the royal court, the risk was not minor, and that person placed himself in a very vulnerable position. Thus, as far as we know, the protocol

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131 1 *Kings* 20:35-43.

132 1 *Kings* 20:40.

133 1 *Kings* 20:41-43.

134 *See also* D. M. Gunn, *Traditional Composition in the "Succession Narrative"*, 26 VETUS TESTAMENTUM 214, 218 (1976). As noted by biblical scholars, while Simon classified the three parables under the "juridical" genre, there are notable differences among the parables. *See id.*; J. Hoftijzer, *David and the Tekoite Woman*, 20 VETUS TESTAMENTUM 419, 443 (1970). Some scholars characterized the two additional parables (the woman of Tekoa and the unnamed prophet) not as a legal case, but rather as petitions for justice, namely, as extra judicial appeal for mercy by parties that seek relief from legal but oppressive conditions. *See* F. W. Dobbs-Allsopp, *The Genre of the Meṣad Ḥashavyahu Ostracon*, 295 BULLETIN OF THE AMERICAN SCHOOLS OF ORIENTAL RESEARCH 49, 53 (1994); Jeremy Schipper, *From Petition to Parable: The Prophet's Use of Genre in 1 Kings 20:38-42*, 71 THE CATH. BIBLICAL Q. 264, 264-65 (2009). Schipper argued the stories about the wise woman of Tekoa and the unnamed prophet should be further classified as a "petitionary narrative," which has unique features and functions. *Id.* Specifically, regarding the unnamed prophet petition narrative, Schipper explained, the prophet wants to elicit a response that shows that he does not know when it is appropriate. *Id.* at 265.

135 Simon, *supra* note 122, at 221.

was followed successfully only in three rare cases[136] where there was no other reasonable alternative course of action. Namely, when directly addressing or confronting the king would be useless since the king had already proved his poor judgment regarding the particular incident, or the king is known to act partially in these matters.[137]

Interestingly, modern practices of recusal motions in the Supreme Court correspond partly with this ancient judicial protocol. Parties and their lawyers seldom move to disqualify a justice since questioning the impartiality of a justice puts them in a very vulnerable position, or as Professor Barry Sullivan described it: "such motions always entail costs to the movants and their lawyers."[138] The immediate concern is the fear of alienating the individual justice in case the motion is denied,[139] but also because of how the other justices may view this motion and those who make such an allegation against the impartiality of a Justice.[140] Although the risk of alienating the justices decreases when the allegations are balanced by well-respected and experienced Supreme Court advocates, they are not likely to jeopardize their credibility by urging recusal unless there is a solid basis for doing so and only as a last resort.[141] But on the flip side, ill-founded allegations against a justice's impartiality subvert the administration of justice profoundly and should be prevented or resisted. Thus, usually, only the actual parties to the case have standing to move for the recusal of a Justice who is subject to the system of checks and balances.[142]

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[136] Gunn, *supra* note 134, at 219. However, one should also note that in the case of the woman of Tekoa, David suspected he was being deceived ("Is the hand of Joab with you in all this?" 2 *Samuel* 14:19), and that the protocol was not completed in full ("you are that man!" 2 *Samuel* 12:7).

[137] Robert R. Wilson, *Israel's Judicial System in the Preexilic Period*, 74 THE JEWISH Q. REV. 229, 243 (1983) ("David was often arbitrary and unwilling to apply the law evenhandedly, particularly in cases involving his own family.").

[138] Sullivan, *supra* note 55, at 917.

[139] Even if the motion is granted, making such a frontal assault on a justice's impartiality could alienate him in future cases. Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 629 (1987).

[140] Sullivan, *supra* note 55, at 917.

[141] *Id.* at 918; Stempel, *supra* note 139, at 599 ("few, if any, litigants in a pending case would raise the recusal issue absent factual support."): *see* John G. Roberts Jr., *Oral Advocacy and the Re-Emergence of a Supreme Court Bar,* 30 J. SUP. CT. HIST. 68 (2005) (on the re-emergence of a Supreme Court bar).

[142] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (for the disparaging attitude towards a non-party seeking recusal of a justice). Freedom Watch, a public interest group that promotes ethics in government and the judicial system, filed an

Similarly, although the press or other concerned citizens can call for the recusal of a Justice or criticize his or her participation, they are not allowed to formally sponsor a motion to recuse since they are free of these considerations and "costs."[143]

My interpretation of the biblical story of the encounter between Nathan and David matches the tradition of judges at the gates[144] and

amicus curiae brief on behalf of the American people requesting the disqualification of Justice Kagan in the Obamacare case. *See* Brief of Amicus Curiae Freedom Watch in Support of Neither Party and on Issue of Recusal or Disqualification of Justice Elena Kagan at 18, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (Nos. 11-393, 11-400). While the parties consented to the filing, they did not sponsor or support it. Freedom Watch also requested to participate in the oral argument as amicus curiae and for divided argument on the issue. The Court denied all requests without explanation, noting only that "Justice Kagan took no part in the consideration or decision of this motion." Nat'l Fed'n of Indep. Bus. v. Sebelius, 565 U.S. 1176 (2012). Freedom Watch filed a motion to reconsider its participation at oral argument on the issue. *See* Motion for Reconsideration of Request to Participate at Oral Argument on Issue of Recusal or Disqualification of Justice Elena Kagan, Nos. 11-393, 11-400 (Jan. 30, 2012). The Court also denied the request to reconsider without any explanation, only noting again that "Justice Kagan took no part in the consideration or decision of this motion." Florida v. HHS, 565 U.S. 1233 (2012). *See also* Sullivan, *supra* note 55, at 918 n.22; Lubet & Diegel, *supra* note 120, at 891 n.30. S. 4010, 117th Cong. § 365 (h)(1) (2021-2022) (limiting motions to disqualify a justice to a party to the proceeding: "A justice . . . shall grant or certify to a reviewing panel a timely motion filed by a party to the proceeding that is accompanied by a certificate of good faith and an affidavit alleging facts sufficient to show that disqualification of the justice . . . is required under this section or any other Federal law.").

[143] Some of the justices' antagonistic approach to the involvement in recusal motions of the press and other concerned citizens should be viewed in light of the above described system of considerations and balancing forces. *See* Cheney v. United States Dist. Ct. for the Dist. of Columbia, 541 U.S. 913 (2004) (memorandum of Scalia, J.). *See also* Letter from Chief Justice William H. Rehnquist to Senator Patrick Leahy (Jan. 26, 2004), *reprinted in From the Bag: Irrecusable & Unconfirmable*, 7 GREEN BAG 2D 277, 280 (2004) ("[A]ny party may file a motion to recuse. And anyone at all is free to criticize the action of a Justice – as to recusal or as to the merits – after the case has been decided. But I think that any suggestion by you or Senator Lieberman as to why a Justice should recuse himself in a pending case is ill considered.").

[144] *Deuteronomy* 16:18 ("You shall appoint judges and officers in all your gates, which the Lord your God gives you, according to your tribes, and they shall judge the people with righteous judgment."); 2 *Samuel* 15:2 ("Now Absalom would rise early and stand beside the way to the gate. So it was, whenever anyone who had a lawsuit came to the king for a decision, that Absalom would call to him and say, 'What city are you from?' And he would say, 'Your servant is from such and such a tribe of Israel.'"). *See also* LUDWIG KOHLER, HEBREW MAN 127-29 (Peter R. Ackroyd trans., 1953).

biblical scholars' probable assumption that by the time of David's kingship, a unified hierarchical judicial system was being formed and consisted of two levels: trial courts of first instance at the gates, and an upper court with appellate jurisdiction where the person with the highest authority (i.e., King David) presided.[145] It can be assumed that royal intervention was necessary in important, hard, or unusual cases.[146] This assumption is strengthened by the pattern of the other juridical parables (the woman of Tekoa and the unnamed prophet), which are fictitious unusual cases of appellate nature: a soldier neglected to guard his prisoner and would have to pay with his life unless the king intervened, and a son killed his brother and was expected to be executed or exiled, lest the king rule otherwise.[147] This phenomenon characterized the transition from a tribal or rural judicial system to a more advanced and modern system. It is also comparable to trends regarding the United States Supreme Court,[148] which is assigned the role "to resolve great issues"[149] or to review cases that involve "broader legal questions than merely, which of the two parties of the case ought to prevail."[150]

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[145] Hanoch Reviv, *The Traditions Concerning the Inception of the Legal System in Israel: Significance and Dating*, 94 ZEITSCHRIFT FÜR DIE ALTTESTAMENTLICHE WISSENSCHAFT 566 (1982). *See also* Wilson, *supra* note 137, at 240-41; JONES, *supra* note 72, at 99. Most accounts of the two levels of unified judiciary are based on *Exodus* 18:13-27 and *Deuteronomy* 17:2-13. However, biblical scholars believe that the existence of such a unified hierarchical judiciary depends on the existence of a hierarchical social structure with ultimate judicial authority in the hands of a single individual or group. Modern studies found no evidence of such a social structure in Israel before the early monarchical period.

[146] *Exodus* 18:22 ("And let them judge the people at all times. Then it will be that every great matter they shall bring to you, but every small matter they themselves shall judge. So it will be easier for you, for they will bear the burden with you.").

[147] Reviv, *supra* note 145, at 569 n.7 (arguing the woman of Tekoa is of an appellate nature).

[148] *See* Frederick Schauer, *Abandoning the Guidance Function: Morse v. Frederick*, SUP. CT. REV. 205, 205 (2007); John P. Frank, *The Historic Role of the Supreme Court*, 48 KY. L.J. 26, 32 (1959); Robert F. Williams, *Justice Robert Utter, The Supreme Court of Washington*, *and the New Judicial Federalism: Judging and Teaching?,* 91 WASH. L. REV. ONLINE 27, 28 (2016).

[149] Charles E. Whittaker, *The Role of the Supreme Court*, 17 ARK. L. REV. 292, 301 (1963).

[150] William H. Rehnquist, *The Changing Role of The Supreme Court*, 14 FLA. ST. U. L. REV. 1, 10 (1986).

At first glance, the poor man's ewe lamp parable is not an unusual or hard case at all.[151] A (wealthy) person robs another (poor) person of his sheep. According to the biblical laws of theft, he is required to pay fourfold restitution.[152] The fact that the thief is rich and the person from whom the sheep was stolen is poor should not have made a difference. The punitive system in those days established a fixed sanction for defined offenses that could not be modified because of circumstances not taken into account by the law relating to the offense,[153] explicitly ordering the judge that neither the rich nor the poor is to have an unfair advantage in court proceedings.[154] While the parable included some aggravating circumstances—the lamb being "domestic" and the motive for the robbery is to fulfill the cultural obligation to provide for a wayfarer—it still begs the question of why did Nathan bring before King David a simple and straightforward case that could have been solved by seeking justice at the gate?[155] Namely, in what way do the aggravating circumstances make the case hard or important?

Some scholars have tried to assess the parable's legal importance, hardness, or uniqueness by identifying its particular origin or genre.[156] One explanation is found in the form or custom of a "legal theft," *Adayieh*, practiced by the Bedouin tribes of the Beersheba district.[157] Taking from the flock of one's neighbor to provide for an unexpected guest is permissible under certain rules, conditions, and restrictions.[158] One rule is that the ewe must be taken from an unguarded flock and cannot be a ewe brought up in a tent because that shows that

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[151] JONES, *supra* note 72, at 99; Stuart Lasine, *Melodrama as Parable: The Story of the Poor Man's Ewe-Lamb and the Unmasking of David's Topsy-Turvy Emotions*, 8 HEBREW ANN. REV. 101, 118 (1984).

[152] *Exodus* 22:1 ("If a man steals an ox or a sheep, and slaughters it or sells it, he shall restore five oxen for an ox and four sheep for a sheep.").

[153] FRIEDMANN, *supra* note 81, at 82.

[154] *Leviticus* 19:15 ("Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honor the person of the mighty: but in righteousness thou shalt judge thy neighbor."). *See also Exodus* 23:3 (forbidding the display of deference to a poor man in his dispute: "Neither shall you countenance a poor man in his cause.") Both passages played a role in the development of American codes and standards of judicial ethics. *See* Gordon J. Beggs, *Challenges in Judging: Some Insights from the Writings of Moses*, 44 CLEV. ST. L. REV. 145, 152-59 (1996).

[155] JONES, *supra* note 72, at 99.

[156] *Id.* at 98; Simon, *supra* note 122, at 226-27.

[157] JONES, *supra* note 72, at 101; Simon, *supra* note 122, at 226-27.

[158] Simon, *supra* note 122 at 226-27.

the owner had a special affection for her. Another explanation is that the parable protested the oppression of the poor by the rich despite the establishment of the monarchy.[159] According to this explanation, the physical existence of the poor depended on the ewe lamb, and a formalistic application of the biblical law of the thief was insufficient[160] since it did not answer the elementary needs of the poor and his lack of security.

Both explanations ground the dispute presented to David in the distribution of wealth as it related to the offense of theft. According to the first explanation, the parable appears to be a dispute concerning the "open texture" or "penumbra" of the legal-social rules in the ancient Israelite society.[161] In such cases, the positive rules do not guide resolving the conflict; expounding the meaning of those rules had to rely to a large extent on considerations of justice and efficiency. The second explanation suggests a conflict between positive rules, the biblical law of theft, and basic principles of justice or morality, which are embedded in the legal system.[162] Alternatively, it could be suggested that the parable seeks justice outside the normal judicial process as a form of equity because the prophet appeals in the name of the poor man for justice from the king as his last resort.[163] While these explanations and suggestions assign the king-judge different roles and dispositions, they all share the premise that the difficulty of the parable derives from the need to contemplate moral and policy considerations by the king-judge judicial decision-making. In other words, there is no straightforward or simple answer to the legal question presented by the parable, and the king-judge is required to legislate a solution, though the accounts differ as to the extent and nature of this judicial legislation. I will

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[159] The ancient motif of the parable is that the lone sheep provides for the poor people's basic needs, so it is subject to constant danger and requires exceptional protection. The parable is about the abuse of power by the rich and the poor's oppression and insecurity. JONES, *supra* note 72, at 100.

[160] *Exodus* 22:1 ("If a man steals an ox or a sheep, and slaughters it or sells it, he shall restore five oxen for an ox and four sheep for a sheep.").

[161] H.L.A. HART, THE CONCEPT OF LAW 123-28, 134 (2d ed. 1994).

[162] DWORKIN, *supra* note 98, at 24.

[163] This last interpretation of the uniqueness or hardness of the poor man's ewe lamb parable matches the interpretation of the two other parables—the woman of Tekoa and the unnamed prophet—suggested by biblical commentators to be "petitionary narrative." *See* Dobbs-Allsopp, *supra* note 134, at 50; Schipper, *supra* note 134, at 266-67. However, the poor man's ewe lamb parable differs from the other two parables since Nathan did not mention the names of litigants or witnesses and provided no evidence in the presentation of the case.

return to this point below, but first, I wish to consider another problem that arises from Nathan's juridical parable.

IV. BUT THE LORD SAW WHAT DAVID HAD DONE: FACTS, GAPS AND RUMORS

Unlike the vast majority of the narratives in the Bible that deal with the history of the people of Israel and their leaders in light of the relationship between them and their God, the poor man's ewe lamb parable is detached from any familiar timeline or geographic space.[164] The obvious reason for this detachment is that the poor man's ewe lamb parable is a fabricated story meant to convince David to exercise self-judgment and acknowledge his guilt. But the poor man's ewe-lamb parable is also distinguishable in this regard from the two other juridical parables because Nathan did not specify the names of the people involved, nor were witnesses mentioned or evidence presented. The lack of litigants, witnesses, and evidence has led some scholars to question whether the poor man's ewe-lamb parable is a legal case at all.[165] This perspective stands in opposition to David's response in the biblical text, which scholars tend to divide into two parts: an emotional spontaneous outburst that is not based on any written law, which is an expression of his sense of justice ("As the LORD liveth, the man that hath done this thing shall surely die");[166] and his reference to a fourfold restoration ("he shall restore the lamb fourfold, because he did this thing, and because he had no pity")[167] that reflects the biblical laws for theft.[168] Therefore, the parable and David's response should not be perceived as purely moral or political. Nathan brought a legal case before the king,[169] who is directly responsible for maintaining equal

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[164] YAIRAH AMIT, READING BIBLICAL NARRATIVES: LITERARY CRITICISM AND THE HEBREW BIBLE 118 (2001).

[165] Hoftijzer, *supra* note 134, at 443.

[166] 2 *Samuel* 12:15; *see* UFFENHEIMER, *supra* note 85, at 293; FRIEDMANN, *supra* note 81, at 81-82.

[167] UFFENHEIMER, *supra* note 85, at 293; FRIEDMANN, *supra* note 81, at 81. *See also* Assnat Bartor, *Reading Biblical Law as Narrative*, 32 PROOFTEXTS 292, 296-97 (2012).

[168] *Exodus* 22:1 ("If a man steals an ox or a sheep, and slaughters it or sells it, he shall restore five oxen for an ox and four sheep for a sheep.").

[169] Simon, *supra* note 122, at 221; J.P. FOKKELMAN, NARRATIVE ART AND POETRY IN THE BOOKS OF SAMUEL 72 (1981).

justice under the law and is formally the highest legal *instansia* in the land.[170]

It is not a coincidence that Nathan's juridical parable resembles the moot court proceedings held normally in law schools for the debate of moot or hypothetical cases.[171] Usually, this activity simulates proceedings before the Supreme Court raising a big issue.[172] The cases do not involve actual testimony of witnesses or the presentation of evidence. They focus on arguing about the law in abstract and the application of the law to an assumed or given set of facts.[173] The moot court has long been a part of legal education and is meant to help students develop practical writing and oral skills, as well as critical, objective, and independent professional judgment.[174] Theodore W. Dwight, Dean of the Columbia Law School, maintained in his address to the graduating class of 1887 that moot court emulates "the prophet Nathan in Scripture . . . the first fictitious case recorded in legal annals."[175]

Perhaps moot court proceedings also perpetuate the issue of Nathan's parable; facts do not matter on appeal because that is where you argue the law.[176] However, it is possible that the lack of litigants, witnesses, and evidence from Nathan's juridical parable may be a manifestation of a much wider problem. According to Menachem Perry and Meir Sternberg, the story of David and Bathsheba—the story

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[170] G. B. CAIRD, THE LANGUAGE AND IMAGERY OF THE BIBLE 105 (1980); Wilson, *supra* note 137, at 242; Reviv, *supra* note 145, at 569.

[171] *Moot Court*, BLACK'S LAW DICTIONARY (8th ed. 2004); Darby Dickerson, *In Re Moot Court*, 29 STETSON L. REV. 1217, 1218 (2000).

[172] Michael V. Hernandez, *In Defense of Moot Court: A Response to "In Praise of Moot Court-Not"*, 17 REV. LITIG. 69, 82 (1998); Dickerson, *supra* note 171, at 1218 n.4; John T. Gaubatz, *Moot Court in the Modern Law School*, 31 J. LEGAL EDUC. 87, 88 (1981) ("programs tend to have an infatuation with the Supreme Court of the United States . . . programs seem to have a similar infatuation with federal constitutional issues").

[173] Hernandez, *supra* note 172, at 73 ("moot court problems commonly focus primarily, if not exclusively, on pure issues of law").

[174] Hernandez, *supra* note 172, at 74.

[175] Theodore W. Dwight, *Address to the Graduating Class*, 1 COLUM. L. T. 1, 2 (1887).

[176] A well-known critique of moot court competitions is that they provide little or no training in dealing with the appellate court record: a complaint; supporting affidavits; trial testimony and jury instructions; the lower court's transcripts and the opinion of the trial court below.

surrounding Nathan's parable—is missing crucial facts.[177] Biblical narratives are known for their sparsity of detail and facts. However, Perry and Sternberg argued that the story of David and Bathsheba is a deliberate literary "system of gaps" left open by the biblical narrator precisely at key points central to the narrative's meaning and value.[178] Filling these gaps is required for any reader trying to understand the story, even in its simplest terms of what happened, and it is not simple, rather it requires considerable attention to the nuances of the text.[179] In the story of David and Bathsheba, the factual gaps are largely the result of two factors. First, the brutal and appalling story is presented in a neutral manner, without any comment or appraisal until the grave crimes had been committed and their fruit reaped.[180] Second, the biblical narrator left the mental states and processes of the main characters (David, Uriah, and Bathsheba) unknown, intentionally observing them only from the outside.[181]

To understand what is happening, readers must infer or assume the answers to two central questions: Did Uriah know about his wife's

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[177] Menachem Perry & Meir Sternberg, *The King Through Ironic Eyes: Biblical Narrative and the Literary Reading Process*, 7 POETICS TODAY 275, 280 (1986). In their literary analysis, Perry & Sternberg assign the reader the role of filling the gaps in the text. The gaps in the text were deliberately created by the narrator, who chose which details to present and where throughout the story. Perry & Sternberg demonstrate their literary theory through the story of David and Bathsheba. They argue that the biblical narrator, seemingly innocent, leads the reader to several possible interpretations of David's actions and the degree to which Uriah understood the situation. Through the gaps, the reader depicts the character of David ironically, although in practice, the narrator himself did not accuse David of anything.

[178] *Id.* at 282.

[179] *Id.*

[180] *See* 2 *Samuel* 11:1-27. Only in verse 27 the biblical narrator comments on David's actions: "But the thing that David had done displeased the LORD."

[181] Perry & Sternberg, *supra* note 177, at 282.

adultery and pregnancy?[182] What did David think that Uriah knew?[183] The answers to these questions (and subsequent or derivative questions as to the main characters' motives and aims) are crucial to understanding the moral and legal message of the plot. If Uriah knew about the affair and the pregnancy, then his actions—refusing to go home, laying down to sleep at the door of David's house, and his answer to David's inquiry about his behavior–should be interpreted as defiant, disingenuous and even subversive.[184] Moreover, the foreseeable consequences, especially to Bathsheba, could have been horrifying since Uriah could have demanded that she be killed.[185] On the other hand, David's actions should be interpreted as trying to resolve the matter peacefully

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[182] *Id.* at 292-300. By a careful and extensive examination, Perry & Sternberg show that the text does not permit a clear answer regarding whether Uriah knew about the adultery and his wife's pregnancy. Namely, both positive and negative answers are possibilities since both have good arguments that support them, while other arguments draw attention to their flaws and support the rival answer. The possibility that Uriah did not know is mainly supported by the following: the secrecy of the love affair ("and she returned to her house"). *See* 2 *Samuel* 11:4; "For thou didst do it secretly: but I will do this thing before all Israel, and before the sun." *See* 2 *Samuel* 12:12 (David's cover up operation aimed to appear that Uriah is the child's father.). The possibility that Uriah did not know is mainly supported by the following: by the time Uriah arrived in Jerusalem, a number of people had already known about the affair and the pregnancy (David used messengers to bring Bathsheba to him, and Bathsheba also used messengers to inform David of her pregnancy, see 2 *Samuel* 11:4-5; Uriah's public refusal to go home and meet his wife, see 2 *Samuel* 11:8-11).

[183] Perry & Sternberg, *supra* note 177, at 300-05. Perry & Sternberg examine the biblical text and demonstrate that there are three possible answers supported by the text (but also weakening each other) to the question of what David thought Uriah knew: One possible answer is that David thought Uriah did not know. The second possible answer is that David thought Uriah knew about the affair and pregnancy. The third possible answer is that David cannot decide whether Uriah knew.

[184] Some commentators, seeking to justify David's actions, suggested that Uriah's refusal to go home should be perceived as a rebellion against the crown since he disobeyed a direct order by the King. Friedmann discusses this possibility and dismisses it for two reasons. First, telling Uriah to go home to his wife was hardly the King's matter. Second, David did not accuse Uriah of disobedience, nor did he publicly sentence him to death. *See* FRIEDMANN, *supra* note 81, at 77. *But cf.* Perry & Sternberg, *supra* note 177, at 295 (explaining that Uriah's failure to comply with something between an order and a suggestion by the king should be added to Uriah's replay which stated that Joab was his lord).

[185] The prohibition against adultery was included in the Ten Commandments and specified the death penalty: "And the man who commits adultery with another man's wife, even he who commits adultery with his neighbor's wife, the adulterer and the adulteress shall surely be put to death." *Leviticus* 20:10. *See also* FRIEDMANN, *supra* note 81, at 76, 211-15.

and quietly. When his efforts were thwarted, and the possibility that Uriah was seeking to enforce the law arose, David had no other option than to choose between two tragic choices: the life of Bathsheba and his unborn child or the life of Uriah. Therefore, the killing of Uriah and the coverup operation that accompanied it are necessary evils justified to save Bathsheba and David's unborn child.

If Uriah did not know about the affair and the pregnancy, then his actions should be interpreted as abiding, honest, and even idealistic.[186] On the other hand, David's actions should be interpreted as either malicious (if David knew that Uriah did not know) or indifferent (if David did not care whether Uriah knew).[187] In any case, being that David was a king, he probably had numerous other means at his disposal that didn't necessitate the coldblooded murder of Uriah (e.g., David could have confessed and asked Uriah for forgiveness, David could have threatened or bribed Uriah to silence him).[188] Hence, the killing of Uriah and the abuse of power by David that accompanied it cannot be justified in any way, shape, or form.

Now, we must confront another problem with Nathan's juridical parable: Nathan's use of a juridical parable presupposed his knowledge of the relevant facts of the surrounding case, but as noted by Perry and Sternberg, the story as told by the biblical narrator is missing crucial facts. Moreover, while the surrounding stories of the two other juridical parables involved sins and crimes committed openly, and we have been given a much more detailed account of what

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[186] Perry & Sternberg, *supra* note 177, at 293-96. When Uriah was asked by David to explain his strange refusal to go home, he answered: "The ark, and Israel, and Judah, abide in tents; and my lord Joab, and the servants of my lord, are encamped in the open fields; shall I then go into my house, to eat and to drink, and to lie with my wife? as thou livest, and as thy soul liveth, I will not do this thing." *See* 2 *Samuel* 11:11. If we take Uriah's words at face value, he refrained from going home out of idealistic solidarity with his comrades and respect for God's Ark. According to the contrasting interpretation, Uriah was well aware of the King's plan, and rather than signify an innocent devotion to his fellow warriors, his answer was aimed to criticize David for staying in Jerusalem and not joining the forces besieging Rabbah. For a detailed analysis of the biblical text that supports the latter interpretation, see Perry & Sternberg, *supra* note 177, at 297-300. *See also* Yossi Leshem, *"And David Was Sitting in Jerusalem": The Accounts in Samuel and Chronicles*, 87 HEBREW UNION COLL. ANN. 49, 56 (2016).

[187] Perry & Sternberg, *supra* note 177, at 304.

[188] *Id.* at 290.

happened and why,[189] the story of David and Bathsheba was engulfed in secrecy, concealment, and disguise. Lastly, there is a crucial missing fact concerning David's state of mind: what did the King know and when did he know it, to paraphrase Senator Howard Baker in the Watergate investigation.[190] Having first-hand knowledge of his own mental state, David was in the best position to answer it.

Hence, it seems that a straightforward accusation (e.g., prophet Elijah's confrontation with King Ahab: "would you murder and take possession?")[191] was a more suitable means to reach the truth than the juridical parable. However, considering the coverup operation run by David and his servants, it is clear that a straightforward accusation was impractical and useless. It was impractical because, in the ancient world, there were no formal processes or means to investigate the King to discover the facts of a claim brought against the king-judge. It was useless since David would still have functioned as both a fact finder and adjudicator in a matter in which he had proven to act partially and with poor judgment. Nathan was left with no other choice than to use a juridical parable, assuming the relevant facts of the case from rumors, innuendos, and gossip circulating in Jerusalem and the royal court when Bathsheba was brought to the palace immediately after Uriah's death ("And when the mourning was past, David sent and fetched her to his house").[192] An alternative interpretation is that Nathan had the details of the case revealed to him by an omniscient God who knows all the facts. In fact, after the crimes were committed, the biblical narrator explicitly informs us that despite David's efforts of concealment, his actions did not escape God's notice ("but the Lord saw what David had done as evil").[193] For obvious reasons, this interpretation is less relevant to guide our modern legal and political practices, but this

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[189] The events that led to Absalom's exile are described in the story of the rape of Tamar by her half-brother Amnon, which immediately follows the Bathsheba affair. After David had failed to punish Amnon, Absalom avenged Tamar's rape by killing Amnon at a feast to which all of King David's sons had been invited. 2 *Samuel* 13; *See also* Perry & Sternberg, *supra* note 177, at 281.

[190] *See* Victoria Bassetti, *The Curious History of "What did the President Know, and When did he Know it?,"* BRENNAN CTR. FOR JUSTICE (March 12, 2018), https://www.brennancenter.org/our-work/analysis-opinion/curious-history-what-did-president-know-and-when-did-he-know-it.

[191] *See supra* text accompanying note 92.

[192] 2 *Samuel* 11:27.

[193] 2 *Samuel* 11:27-12:1.

installment by the narrator shows the objective need to bridge the factual gap discussed above.

If we return to Supreme Court Justices recusal practices, similar to ancient times, the Court lacks any formal rule or legal instrument to investigate the facts concerning a recusal motion. Therefore, litigants or other interested parties have never been allowed by the Court to develop the facts of a Justice's alleged conflict of interest.[194] Thus, recusal motions and decisions are generally made only based on facts of public record or those exposed through informal investigation by the movant or the press.[195] In some cases, the facts are well known and are uncontested: the attendance of a Justice's son in a military college whose policies were the subject of the case;[196] an attorney who testified against the Chief Justice at his elevation hearings;[197] a case handled by a Justice's brother who is a lower court judge;[198] a speech given at a public event criticizing the lower court's opinion at issue in

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[194] Stempel, *supra* note 139, at 642.

[195] *Id.*

[196] Justice Thomas recused himself from hearing an appeal challenging the policy of Virginia Military Institute (VMI) denying admission to women. *See* United States v. Virginia, 518 U.S. 515, 558 (1996) ("Justice Thomas took no part in the consideration or decision of these cases"). Thomas did not issue a statement stating the factual basis for his decision, but court-watchers were in agreement that Thomas's recusal stemmed from his son's being a student at VMI at that time. Assuming this factual ground, some have questioned whether he actually needed to recuse, since it is unclear how VMI's policy not to admit women substantially affected his son's interest. *See* Walter Sinnott-Armstrong, *Recusal and Bush v. Gore*, 21 LAW & PHIL. 221, 226 (2002).

[197] Prior to his appointment to the Court, William Rehnquist was a politically active Republican. Rehnquist, while acting as a GOP poll watcher in 1962, was accused of discouraging black voters from voting. Rehnquist denied this allegation, and no criminal prosecution was pursued. However, attorney James Brosnahan, then an Assistant U.S. Attorney in Phoenix, corroborated the fact that such an allegation was made against Rehnquist in testimony given to the Senate Judiciary Committee during Rehnquist's confirmation to Chief Justice in 1986. Following Brosnahan's testimony, Chief Justice Rehnquist recused himself from cases argued by Brosnahan. *See* Jeffrey Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit Doctrine*, 57 BUFF. L. REV. 813, 852 n.110 (2009); *see also Hearings before the Committee on the Judiciary Second Session on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States*, 99th Cong. 146-47, 984-1039 (1986).

[198] Mark Sherman & Jessica Gresko, *Justices Decide for Themselves When to Step Aside from Cases*, AP NEWS (March 26, 2022), https://apnews.com/article/stephen-breyer-us-supreme-court-elections-donald-trump-clarence-thomas-6ee20f9f391307885eb585abbca0ebf2.

the case.[199] But in other cases, the facts are unknown, obscure, or under dispute: the conduct occurred as part of the internal activities of a law office;[200] a trip or other private activity taken by the Justice with litigants or high level officials;[201] a Justice's spouse or other relatives involved in political and legal activity.[202]

A repeated claim made first by Justice Rehnquist in *Laird v. Tatum* and willingly adopted by other Justices is that the Justice facing a recusal motion is in a better position to know all "the factual background of his involvement in matters that form the basis of the motion than do the movants."[203] Moreover, Justice Scalia even criticized the litigants for basing their recusal motions on what he viewed as inaccurate press reports, holding that a recusal decision should "be made in light of the facts as they existed, and not as they were surmised or reported."[204] This critique was not meant to support the installment of legal mechanisms for developing the facts of recusal motions but rather to enforce the perception that the justices know best.

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[199] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 18 (2004) ("Scalia, J., took no part in the consideration or decision of the case."); *See, e.g.*, Suggestion for Recusal of Justice Scalia, Newdow v. United States, App. No. 03-7 (Sep. 5, 2003).

[200] Stempel, *supra* note 139, at 598 ("Because some of Justice Rehnquist's conduct occurred as part of the internal activities of a law office, many, if not most, of the facts about his role and prejudices concerning the *Laird v. Tatum* litigation were obscure, if not absolutely unknowable, to the litigants in Tatum."); Sherrilyn A. Ifill & Eric J. Segall, Debate, *Judicial Recusal at the Court*, 160 U. PA. L. REV. PENNUMBRA 331 (2012), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1069&context=penn_law_review_online. ("[I]t is certainly fair to ask questions about how involved Kagan may have been in providing counsel to members of the Administration in fashioning the health care law.").

[201] Cheney v. United States Dist. Ct. for the Dist. of Columbia, 541 U.S. 913, 917 (2004) (memorandum of Scalia, J.).

[202] *See* Keith M. Stolte, *Of Dog Food and Judicial Ethics: Clarence Thomas' First Failure to Recuse Himself*, 2022 INT'L J.L. ETHICS TECH. 73, 88 (2022); *see also* Jeffrey Toobin, *Partners: Will Clarence and Virginia Thomas Succeed in Killing Obama's Health-care Plan?*, NEW YORKER (Aug. 22, 2011), https://www.newyorker.com/magazine/2011/08/29/partners-jeffrey-toobin.

[203] Laird v. Tatum, Order Denying Recusal Motion, 409 U.S. 824, 824 n.1 (1972); *See also* Breyer, *supra* note 102, at 993; Ifill & Segall, *supra* note 200, at 335 ("Of course, the Justices themselves know more than we do about their private conduct and their public statements or involvement with advocates working for or against the legislation."); *see also* Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384, 402-03 (2012).

[204] *Cheney*, 541 U.S. 913, 914 (2004). (memorandum of Scalia, J.).

In accordance with this perception, in 2019, the Supreme Court adopted a rule intended to make it easier for the justices to identify conflicts of interest. The rule requires counsel to identify "all proceedings in state and federal trial and appellate courts" that "are directly related to the case" in all petitions seeking Supreme Court review.[205] On December 15th, 2022, Congress passed the Daniel Anderl Judicial Security and Privacy Act, allowing federal judges to shield their personal information to protect judges and their families.[206] Chief Justice John Roberts praised in his 2022 Year-End Report on the Federal Judiciary the installment of these new security measures.[207] Roberts did not pay attention to public interest groups' concerns that the new law would make it much more difficult to gather information about judges' conflicts of interest, nor did he discuss calls for more rigorous ethics rules and recusal procedures.[208] Hence, the new legislation would probably further increase the information gap between justices and litigants, hindering efforts to ascertain if a justice should be recused from a case.[209] It is true that the Justices, like King David, have first-hand knowledge about their supposed misbehaviors, potential conflicts of interests, or partiality. However, in these fact-specific recusal inquiries, they function as both fact finder and adjudicator, and their failure

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[205] Sup. Ct. R. 14 (b)(iii). (requiring "a list of all proceedings in state and federal trial and appellate courts, including proceedings in this Court, that are directly related to the case in this Court.").

[206] *Judiciary News: Congress Passes the Daniel Anderl Judicial Security and Privacy Act*, UNITED STATES COURTS (Dec. 16, 2022), https://www.uscourts.gov/news/2022/12/16/congress-passes-daniel-anderl-judicial-security-and-privacy-act.

[207] *See* CHIEF JUSTICE JOHN G. ROBERTS, JR., 2022 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2022).

[208] Nate Raymond & Patricia Zengerle, *Judicial Security Measure Clears U.S. Congress as Part of Defense Bill*, REUTERS (Dec. 15, 2022, 9:08 PM), https://www.reuters.com/world/us/judicial-security-measure-clears-us-congress-part-defense-bill-2022-12-16/; Amy Howe, *After a Year of Turmoil for the Court, Roberts Lauds Judicial-Security Measure*, SCOTUSBLOG (Dec. 31, 2022, 6:00 PM), https://www.scotusblog.com/2022/12/after-a-year-of-turmoil-for-the-court-roberts-lauds-judicial-security-measure; Adam Liptak, *In Year-End Report, Chief Justice Roberts Addresses Threats to Judges' Safety*, N.Y. TIMES (Dec. 31, 2022), https://www.nytimes.com/2022/12/31/us/supreme-court-chief-justice-roberts-letter.html.

[209] *Fix the Court Joins Letter Urging Senate to Remove Censorship Provision from Defense Bill*, FIX THE COURT (Dec. 12, 2022), https://fixthecourt.com/2022/12/fix-the-court-joins-letter-urging-senate-to-remove-censorship-provision-from-defense-bill/.

to recuse casts doubts that they had also failed to disclose all relevant information in a timely fashion or that they hid or misstated the facts.[210]

V. TWO MEN IN ONE CITY: THE VEIL OF IGNORANCE

The parable and the absence of facts serve another and more critical function very similar to John Rawls' "original position" and "veil of ignorance." According to Rawls, the original position is a fair and impartial point of view to be adopted by free and equal persons in reasoning and deliberating about fundamental principles of political justice for the basic constitutional structure.[211] The main feature of the original position is the "veil of ignorance," a device that deprives the parties of all knowledge of their personal characteristics and social and historical circumstances. The parties in the original position don't know their race, gender, social status, economic position, and political or religious affiliation. Rawls' goal when excluding this knowledge was to nullify the effect of specific contingencies that influence and tempt men to exploit social and natural circumstances to their advantage. Rawls explained that the knowledge of those contingencies

[210] *See* Stempel, *supra* note 139, at 590 (noting that many questioned both Rehnquist's impartiality and candor involving his decision to sit and cast the deciding vote in the *Laird v. Tatum* case); Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 576 (2005) (noting how in his memorandum in *Cheney*, "Justice Scalia revealed facts about circumstances and logistics of the trip that previously had been unknown"); Ifill & Segall, *supra* note 200, at 338-39 (discussing the possibility that Justice Kagan intentionally stayed away from the Affordable Care Act, while serving as Solicitor General, in anticipation of being asked to serve on the Supreme Court and in order to preempt the need to recuse herself from the case).

[211] JOHN RAWLS, A THEORY OF JUSTICE 14-15 (1971); JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 14-15 (2001); JOHN RAWLS, POLITICAL LIBERALISM 23-25 (1993). I do not argue that Nathan's juridical parable is identical to Rawls' original position. In fact, there are considerable differences. First, Rawls' original position is meant to establish principles of justice for the basic structure of society, while Nathan tries to establish rules and principles to judge David for a specific transgression. Hence, Rawls' endeavor is considerably more ambitious than Nathan's. Second, another considerable difference is that Rawls required the justification to fulfill a certain quality—being public and neutral. Accordingly, the justification should not be based on a specific conception of the good. Third, the Rawlsian project aimed to postulate a hypothetical social contract, while Nathan sought to secure an authoritative judgment by the king-judge.

sets men at odds, but more importantly, these differences are arbitrary from a moral point of view.[212]

Similarly, the poor man's ewe lamb parable was designed to promote impartial decision making by denying the king-judge access to the potential biasing information that the true villain of the tale is the king himself and not an "ordinary" wealthy man. This is crucial, because in the ancient world the king's role was religious in character and even the embodiment of absolute justice.[213] Namely, the king claimed a "divine right" to rule over his subjects because he was elected by gods or he himself was a god or godlike figure.[214] David's behavior—acquiring the wife while killing her husband—seems acceptable and in accord with common practices among the godlike-kings in the ancient world, as exemplified by thrice-repeated tales in *Genesis*.[215] Biblical law diverged in key points from this common religious conception of monarchy and established limitations on kings.[216] However, it accepted the proposition that the king is not equal to a layman in various significant matters (e.g., military deployment or expropriation of lands).[217] Nathan ignored this proposition and put King David on equal footing with Uriah. Hence, the parable and its content—a dispute between a rich man and a poor man and not between a king and his subordinate military officer— placed the king under the law and assumed the equal protection of the law, at least in this specific context.

In the same token, Nathan chose not to specify the names of the persons involved, their familial or tribal affiliation, or their town. Nathan's choice, and David's indifference to the disputants' background, stand in sharp opposition to the account given in the passage that describes the beginning of Absalom's revolt:

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[212] *Compare* DWORKIN, *supra* note 98, at 181-82 (arguing that Rawls' most basic assumption (in using the original position) is that men have a right to equal respect and concern in the design of political institution), *with* BRIAN BARRY, JUSTICE AS IMPARTIALITY 52 (1995).

[213] MICHAEL WALZER, THE JEWISH POLITICAL TRADITION 111 (2000); Yoram Hazony, *The Jewish Origins of the Western Disobedience Tradition*, 4 AZURE 17, 22 (1998).

[214] WALZER, *supra* note 213, at 111.

[215] FRIEDMANN, *supra* note 81, at 211-12.

[216] WALZER, *supra* note 213, at 110-11; Hazony, *supra* note 213, at 22.

[217] *Deuteronomy* 17:14-20; 1 *Samuel* 8; YAIR LORBERBAUM, DISEMPOWERED KING: MONARCHY IN CLASSICAL JEWISH LITERATURE 125-26 (2011).

> And it came to pass after this, that Absalom prepared him chariots and horses, and fifty men to run before him. And Absalom rose early, and stood beside the way of the gate: and it was so, that when any man that had a controversy came to the king for judgment, then Absalom called unto him, and said, Of what city art thou? And he said, Thy servant is of one of the tribes of Israel. And Absalom said unto him, See, thy matters are good and right; but there is no man deputed of the king to hear [you]. Absalom said moreover, Oh that I were made judge in the land, that every man which hath any suit or cause might come unto me, and I would do him justice! And it was so, that when any man came nigh to him to do him obeisance, he put forth his hand, and took him, and kissed him. And in this manner Absalom did to all Israel that came to the king for judgment: so Absalom stole the hearts of the men of Israel.[218]

In this passage, Absalom contests against his father's monarchic powers by usurping his privileges and powers.[219] Possibly, Absalom's remarks indicate a public discontent with the Davidic court system, alleging that no one had been appointed to hear the travelers' lawsuits.[220] However, it seems that the account given by the biblical narrator of Absalom's behavior was also meant to convey judicial misconduct by Absalom: inquiring about the disputant's background; notifying a disputant in advance that his claim is "good and right," that if he were made the "[highest?] judge in the land" he would do him justice; and above all "kissed" disputants, who came near him to do him obeisance. While "a judge should be patient, dignified, respectful, and courteous to litigants,"[221] kissing the litigants seems to be a breach of appropriate judicial decorum. Likewise, "[a] judge should not make public comment on the merits of a matter pending or impending in any court,"[222]

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[218] 2 *Samuel* 15:1-6.

[219] David C. Flatto, *The King and I: The Separation of Powers in Early Hebraic Political Theory*, 20 YALE J.L. & HUMAN. 61, 75 (2008).

[220] Wilson, *supra* note 137, at 242-43. *See also* Jules Gleicher, *Three Biblical Studies on Politics and Law*, 23 OKLA. CITY U. L. REV. 869, 878-79 (1998) (also suggesting that in the later years of David's reign, the king-judge's judgment may have been slipping).

[221] CODE OF CONDUCT FOR U.S. JUDGES, Canon 3(A)(3) (2019), https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.

[222] *Id.* at Canon 3(A)(6).

and must "avoid comment or behavior that could reasonably be interpreted as . . . prejudice or bias"[223] (e.g., inquiring about the disputant's town). Unsurprisingly, the narrator concludes that Absalom "stole the hearts" of the people, signifying Absalom resorted to trickery.[224]

If this description is correct, it helps explain the exclusion of the litigant's names and town by Nathan and David's indifference to this fact. The tribal Israelite society was defined by kinship, geographical proximity, shared religious practices, and common cultural customs. In the pre-monarchical period, there was no overarching central judicial authority. Biblical scholars assume that disputes within the nuclear family or the extended family were settled by the patriarch or the lineage head.[225] However, when the dispute involved two or more extended families or lineages, the lineage heads and the "elders" convened at the town gate to resolve the dispute in an acceptable manner.[226]

Biblical scholars are unsure about the elders' identity, but some suggested that kinship groups, in which the elders acted as their representatives, were simply a grouping of all the extended families living in the same location.[227] Thus, the town and the kinship group were in fact the same. When disputes involved more than one town, the elders' task was not an easy one. It included a fair amount of negotiation since the elders did not have coercive means to impose their solution on the litigants, who usually had the support of their respective lineage segments.[228] In rare situations, the absence of final and ultimate judicial authority in cases that involved a diversity of lineages and towns led to considerable bloodshed and internal war, as is illustrated by the story about the brutal rape and murder of the Levite's concubine at the city of Gibeah.[229]

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[223] *Id.* at Commentary to Canon 3(A)(3).

[224] METZUDAT DAVID.

[225] Wilson, *supra* note 137, at 234-35.

[226] *Id.* at 233-35.

[227] Robert R. Wilson, *Israel's Judicial System in the Preexilic Period*, 74 JEWISH Q. REV. 229, 234 (1983).

[228] *Id.* at 235-36.

[229] *Id.* at 238-39. In *Judges* 19-21, we are told about a Levite residing on the side of Mount Ephraim, who took for himself as a concubine a Judahite woman from Bethlehem. The concubine left the Levite and returned to her father in Bethlehem. The Levite went to Bethlehem to retrieve her, and on their way back, the couple traveled through the city of Gibeah, located in the territory of the Benjamites. The Levite and his party were offered to spend the night at the house of an old man who was also

The transition from lineage to a royal judicial system solved this problem when judicial authority ultimately rested in the hands of the king, who had the military and political power to enforce the law. However, in cases that involved a diversity of towns, apparently, his ability was still constrained by the tribal and lineage structure of society. Hence, disputes still had to be resolved in a way that did not split and polarize society.[230] The king-judge in such cases needed to be impartial for the trial to be fair, but not less important, he also had to appear impartial. By deliberating and adjudicating behind a veil—not knowing tribal affiliation—the king-judge ensured the parties of his impartiality and secured their compliance. A derivative result was that parity and uniformity of the law throughout the tribes of the Davidic Kingdom was achieved. Thus, the poor man's ewe lamb parable can be viewed as a general judicial tool to ensure the king-judge's impartiality *vis-à-vis* the different tribes (and towns) and to unify the law. The fictitious dispute presented by Nathan involved two men and a traveler, the affiliation of all not identified. David knew he was hearing a "parable," or more accurately, hearing a dispute behind a veil meant to secure his impartiality towards the parties to the dispute. David did not know that Nathan had converted this judicial tool into a

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from the mountains of Ephraim but had been living among the Benjamites for some time. At night, some Benjamite men surrounded the house and demanded the old man hand over the stranger so that they could rape him. The old man offered instead to send his virgin daughter and the concubine. The men refused the service of the daughter but took the concubine and repeatedly raped her through the night and left her to die on the host's doorstep. The Levite dismembered the concubine's corpse into twelve pieces—one for each tribe –and sent them throughout the land of Israel. The tribes confederated at Mizpah, and the Levite testified about the crime before a tribunal lineage of elders. The assembly decided to execute the wrongdoers from Gibeah, and messengers were sent to the Benjamite leadership to hand them over. The request was denied, and a full-scale war developed between the Benjamites and the rest of the Israelite tribes in order to enforce the tribunal's verdict. After a prolonged war, the Benjamites were defeated and came near to total annihilation. The rest of the Israelite tribes took drastic measures to prevent their extinction and devised a plan to reconstitute the Benjamite tribe. The story opens and closes by noting that, at that time, there was no king in Israel, and noting further that in the absence of a final and ultimate authority "[e]veryone did what is right in his own eyes."

[230] Wilson, *supra* note 137, at 236. The parallel between the 2 *Samuel* 12 and *Judges* 19 has been noted by interpreters of both passages; *see* Simon, *supra* note 122, at 227-28; Nathan MacDonald, *Hospitality and Hostility: Reading Genesis 19 in Light of 2 Samuel 10 (and Vice Versa)*, in UNIVERSALISM AND PARTICULARISM AT SODOM AND GOMORRAH: ESSAYS IN MEMORY OF RON PIRSON 179, 194 (Diana Lipton ed., 2012).

juridical parable to deal with the problem of the king-judge's self-judgement.

VI. SUPREME COURT JUSTICES: JUDGES IN THEIR OWN CASES

Supreme Court recusal requirements reflect the same worry about self-interest and biased judging. "[S]elf-interested judging . . . is at odds with the impartial, independent [Supreme Court] envisioned by [the] [U.S.] Constitution."[231] Recusal requirements are grounded on the constitutional right of litigants to have their cases heard by an impartial arbiter and the need to maintain public trust in the Court.[232] Justice recusal can be seen as part of a modern judicial protocol that seeks to ensure that judicial decisions will be based on general and unbiased considerations rather than appeals to the justice's personal interests, biases, or prejudices.[233] If a justice is a stockholder in a litigating corporation[234] or a member of the justice's family participates in a pending case,[235] there is no legal veil or exclusionary rule that can prevent the justice from knowing that and consciously or unconsciously taking it into account.[236] The only way to avoid the appearance of improper decision-making is to require the justice to recuse.

The ancient self-judging protocol secured the king-judge's impartiality by veiling biasing information. The modern recusal doctrine excludes the forbidden knowledge or argument by compelling the biased justice to withdraw. Nine justices serve on the Federal Supreme Court,[237] all cases are heard *en banc*, and a quorum of six justices is needed to meet and decide a case.[238] Hence, three justices could recuse

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[231] *See* Louis J. Virelli III, *Supreme Court Recusal*, ACS BLOGS (Oct. 28, 2020) https://www.acslaw.org/expertforum/supreme-court-recusal/.

[232] *Id.*; *see* also Ifill & Segall, *supra* note 200, at 333; Carmen Abella, Note, *'Bias Is Easy to Attribute to Others and Difficult to Discern in Oneself': The Problem of Recusal at the Supreme Court*, 33 GEO. J. LEGAL ETHICS 339, 342-44 (2020).

[233] Leubsdorf, *supra* note 71, at 281.

[234] *See Stocks and Recusals*, *supra* note 103.

[235] *See* REHNQUIST ET AL., STATEMENT OF RECUSAL POLICY 1 (1993).

[236] On the application of veils and cloaks of ignorance in mediation and conflict resolution, see Barry Anderson et al., *Veils and Cloaks of Ignorance: Under-used Tools for Conflict Resolution*, 30 OHIO STATE J. DISP. RESOL. 45 (2014).

[237] 28 U.S.C.S. § 1.

[238] *Id. See* Sup. Ct. R. 4(2). Professor Guha Krishnamurthi has suggested utilizing the quorum requirement by a minority of four justices to prevent rendering an incorrect decision involving a fundamental right. *See* Guha Krishnamurthi, *Sitting One Out: Strategic Recusal on the Supreme Court*, 11 CAL. L. REV. ONLINE 387 (2020).

themselves or not participate for other reasons (e.g., retirement, illness, or even death) in each case without preventing the Court from reviewing those cases and performing its constitutional role.[239]

However, in *Laird,* Justice Rehnquist contended that a permissive recusal approach would impair the Court's function to clarify and unify law,[240] particularly when a circuit court provides a decision in conflict with the decision of another circuit court or the state court of last resort on the same important matter.[241] Unlike lower court judges, justices cannot be replaced,[242] and a justice's recusal increases the chance for an evenly split decision.[243] A tie vote affirms the most recent lower court's decision but isn't binding anywhere else, leaving the issue largely unresolved.[244] But importantly, Rehnquist noted that: "affirmance of each of such conflicting results by an equally divided Court would lay down *'one rule in Athens, and another rule in Rome'* with a vengeance."[245]

Moreover, in *Cheney,* Justice Scalia asserted that granting a motion to recuse "is (insofar as the outcome of the particular case is concerned) effectively the same as casting a vote against the petitioner."[246] Scalia explained that the petitioner needs five votes to overturn the ruling of the lower court, and it makes no difference whether

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[239] Bassett, *supra* note 51, at 683.

[240] Laird v. Tatum, 409 U.S. 824, 837-38 (1972). Justice Rehnquist continued to hold this position decades later. *See* Microsoft Corp. v. United States, 530 U.S. 1301, 1303 (2000). *See also* Frederick Schauer, *Abandoning the Guidance Function: Morse v. Frederick*, 2007 SUP. CT. REV. 205, 206 (2007).

[241] Sup. Ct. R. 10(a).

[242] Aditi Deal, Comment, *When Less Is More: A New Formula for Avoiding Equally Divided Decisions in the Supreme Court*, 58 HOUSTON L. REV. 185 (2020).

[243] An evenly divided Court could also occur due to an individual Justice's retirement, illness, or even death. William L. Reynolds & Gordon G. Young, *Equal Divisions in the Supreme Court: History, Problems, and Proposals*, 62 N.C. L. Rev. 29, 35-36 (1983).

[244] *See* Ryan Black & Lee Epstein, *Recusals and the "Problem" of an Equally Divided Supreme Court*, 7 J. APP. PRAC. & PROCESS 75, 81 (2005); Ariel L. Bendor & Joshua Segev, *The Supreme Court as a Babysitter: Modeling Zubik v. Burwell and Trump v. International Refugee Assistance Project Rights*, 2018 MICH. ST. L. REV. 373, 382-83 (2018).

[245] *Laird*, 409 U.S. at 838 (quoting Cicero, *The Republic*, in THE REPUBLIC AND THE LAWS 68-69 (Niall Rudd trans., 1998)) (emphasis added). Based on this consideration, other justices have taken a similar stance as well. *See* REHNQUIST ET AL., *supra* note 235, at 1-2; Cheney v. United States Dist. Ct. for the Dist. of Columbia, 541 U.S. 913, 915-16; *Ginsburg*, *supra* note 60, at 1039.

[246] *Cheney*, 541 U.S. at 913 (memorandum of Scalia, J.).

the fifth vote is missing because it has been cast for the respondent or because a justice decided to recuse.[247] In 1993, seven justices maintained in their *Statement of Recusal Policy* that a "needless recusal deprives litigants of the nine Justices to which they are entitled . . . and has a distorting effect upon the certiorari process, requiring the petitioner to obtain . . . four votes out of eight instead of four out of nine."[248]

Finally, the Justices' reluctance to recuse relates to the unique difficulties faced by the Court in preserving social legitimacy—namely, the Court's difficulty in maintaining public confidence in a fractious and polarized society.[249] Cases reviewed by the Court generally involve a high public profile dispute, engaging religious, social, economic, and political features.[250] A permissive recusal policy would encourage ideologically motivated investigative journalists and pressure groups to make baseless allegations of impropriety and demand recusals in high profile cases to influence the outcomes of cases.[251] That, in turn, would create an atmosphere that assumes the Justices to be corruptible by the slightest friendship or favor, and would erode public confidence in specific decisions, the integrity of the justices, and the Court as a whole.[252]

All these arguments have been analyzed by court watchers and are subject to criticism on several grounds. First, they over-exaggerate

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[247] *Id.*

[248] *See* REHNQUIST ET AL., *supra* note 235, at 2. Under the "rule of four" at least four of the nine justices must vote to grant a certiorari to review a case. The four-vote rule is not imposed by law or statute but is a matter of tradition or practice. *See* Lubet, *supra* note 51, at 662 n.26; Bassett, *supra* note 51, at 685 n.146.

[249] *See* Sanford Levinson, *Trash Talk at the Supreme Court: Reflection on David Pozen's Constitutional Good Faith*, 129 HARV. L. REV. F. 166, 175 (2016); *see generally* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

[250] *See generally* Michael L. Wells, *"Sociological Legitimacy" in Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011 (2007).

[251] *Cheney*, 541 U.S. 913, 928 (2004) (memorandum of Scalia, J.).

[252] *Id.* at 915-16. In addition, an unnecessary recusal increases the possibility of a tie vote and could further discredit the Court's legitimacy by reinforcing the public perceptions of the politicization of the Supreme Court and by signifying judicial impotence. *See* Justin R. Pidot, *Tie Votes and the 2016 Supreme Court Vacancy*, 101 MINN. L. REV. HEADNOTES 107, 120 (2016); Henry P. Monaghan, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court*, 94 HARV. L. REV. 296, 308 (1980).

the problem of tie votes,[253] which could be ameliorated by other tools at the Court's disposal.[254] Second, normally litigants don't have a right to Supreme Court review,[255] especially when approximately 99 percent of petitions are rejected without explanation.[256] Third, the "rule of four" is not mandated by statute, it is merely a Supreme Court practice or custom that could be relaxed in certain circumstances.[257] Fourth, fair proceedings and the constitutional right to due process actually require impartial justices and the recusal of a biased justice.[258] Fifth, controversies arise when justices, whose impartiality might reasonably be questioned, "hear cases, not when they recuse themselves."[259]

Although there are other arguments for and against a permissive recusal approach, those presented are sufficient for my present purpose, which is to draw some conclusions about the modern recusal doctrine in the Federal Supreme Court and the conception of impartiality it implies. What emerges is that, contrary to my analysis of the self-judging protocol of ancient times, recusal is not a strong organizing doctrine in the administration of justice. So, it is not a primary legal doctrine or principle generating subsidiary principles and concepts (e.g., equality, unity, and public confidence). Rather, recusal (and the impartiality it implies) appears in one of the two following formulations or contexts in the operation of the Court.

First, recusal is either outweighed or traded off against competing considerations.[260] For example, while a justice's impartiality is obviously important, the justices prioritize "having every case decided

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[253] Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 748 (1973) (tie votes are rare occurrences with limited significance).

[254] *Id.* (For example: the Court can postpone the decision in the case to the next term; the Court could leave the resolution of the relevant legal questions to the next case presented to the Court in the future.).

[255] *Id.* at 749 ("At least in cases arising on certiorari, litigants have no absolute right to Supreme Court review."); Sinnott-Armstrong, *supra* note 196, at 232 (noting that litigants are not entitled to nine justices); Sullivan, *supra* note 55, at 916 (noting that litigants may not have a right to Supreme Court review, "but they do have a right to an impartial decision-maker.").

[256] Sullivan, *supra* note 55, at 916. Bassett, *supra* note 51, at 685.

[257] Lubet, *supra* note 51, at 670; DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 212 (8th ed. 2008) (noting that the rule of four was liberally applied and that three votes were sufficient to grant certiorari in certain circumstances).

[258] Sinnott-Armstrong, *supra* note 196, at 234.

[259] Lubet, *supra* note 51, at 660; Abella, *supra* note 232, at 344.

[260] Vermeule, *supra* note 203, at 400.

by an odd numbered, full complement of Justices, rather than by a smaller number of Justices whose impartiality is beyond dispute."[261] Thus, in striking deviation from the ancient judicial protocol of biblical kings, which achieved clarity, unity, and equality ("two men in one city"), the recusal requirement of the justices of the Supreme Court is qualified or limited to achieve these purposes (There will not be "one [such law] in Athens, and another . . . in Rome").[262] Another example is the claim that the individual judge, more than any council or committee, "is in the best position to assure that he or she does not decide a case in which he or she may be influenced by considerations other than the law."[263] While the individual justice is generally the most informed decisionmaker, having firsthand knowledge about his behavior and relationships, the unreviewable self-recusal procedure produces an increased risk of bias. Namely, it involves a tradeoff between impartiality and expertise that decreases impartiality for increased knowledge.[264]

Second, recusal is *only* one part of a larger picture, and there is another profound manner of characterizing what is at issue.[265] For example, due process requires the disqualification of a justice having a pecuniary interest in the outcome of the litigation[266] and other specific scenarios.[267] However, it is only one of the elements in a fair trial, which in the Supreme Court includes the fair right to obtain Supreme

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[261] Sullivan, *supra* note 55, at 914. *See also* Abella, *supra* note 232, at 346 ("In the Supreme Court, the duty to sit manifests as a duty to hear cases able to generate majority opinions that clearly establish the law, which in turn justifies a more lenient recusal standard.").

[262] Laird v. Tatum, 409 U.S. 824, 838 (1972).

[263] Breyer, *supra* note 102, at 993. *See also* Pearson, *supra* note 68, at 1833.

[264] Vermeule, *supra* note 203, at 402-03.

[265] *See also* Zygmont A. Pines, *Mirror, Mirror, on the Wall - Biased Impartiality, Appearances, and the Need for Recusal Reform*, 125 DICK. L. REV. 69 (2020) ("Today's recusal practice . . . has been habitually relegated to the periphery of our administration of justice. . . .").

[266] Tumey v. Ohio, 273 U.S. 510, 534 (1927); Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876 (2009).

[267] *See* LOUIS J. VIRELLI III, DISQUALIFYING THE HIGH COURT: SUPREME COURT RECUSAL AND THE CONSTITUTION 5-6 (2016) (noting other specific scenarios include service as counsel for either party in the same case, the appearance of a relative as a party before the judge, participation in an appeal of a case in which the judge presided below, or where he was a material witness in the case before him). *See also* Gabriel D. Serbulea, Comment, *Due Process and Judicial Disqualification: The Need for Reform,* 38 PEPP. L. REV. 1109 (2011).

Court review, equal treatment, etc.[268] Another example is the proposition, echoed in the Chief Justice's *2011 Year-End Report*, that recusal is a feature of "judicial power" vested in the Court by Article III of the Constitution, and therefore Congress is precluded from regulating recusal.[269] Regardless of whether or not Congress has the power to "require" recusal, recusal is "part of a complex constitutional scheme."[270]

In all these formulations and contexts, a policy judgment is necessary to balance or "square" the unique functions of the Court with core issues of impartiality, expertise, due process, and independence.[271] The doctrinal flexibility can mostly be pinpointed to a clash between a duty to recuse when impartiality is compromised and a combination of a revived duty to sit[272] and the rule of necessity.[273] In other

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[268] *See generally* Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267 (1975). In regard to the Supreme Court, see *supra* text accompanying notes 241-43 (noting different elements of a fair hearing or trial).

[269] Virelli III, *supra* note 51, at 1185.

[270] *Id.* at 1233.

[271] *Id.* at 1228; Lubet & Diegel, *supra* note 120, at 902; Leubsdorf, *supra* note 71, at 243 (noting that the federal disqualification doctrine "give[s] a judge leeway to stay in a case when she wants to, perhaps even more leeway than judges have in other matters").

[272] The "duty to sit" doctrine holds that in close recusal decisions, the judge should decide in favor of sitting and against recusal to minimize intrusions in judicial proceedings, enhance judicial efficiency, and discourage "judge shopping." Stempel, *supra* note 139, at 604. In its most "benign" form it merely underlines a judge's duty not to recuse where the alleged basis for disqualification is weak and warns against over-cautious recusals to avoid inconvenient or politically charged cases. Stempel, *supra* note 197, at 814 n.1. In its "pernicious" version, it emphasizes a judge's obligation not to recuse unless there is a compelling ground for disqualification and thus erroneously pushes judges to resolve close disqualification issues against recusal. Critics of the pernicious version regard the duty to sit as injurious to fairness, justice, and public confidence in the judiciary. Stempel, *supra* note 197, at 814-17. In 1974, Congress sought to abolish the duty to sit by specifically amending 28 U.S.C. § 455, establishing a "presumption of disqualification," according to which whenever a judge has doubts as to whether his disqualification was warranted, "he was to resolve those doubts in favor of disqualification." Stempel, *supra* note 197, at 863-64; Freedman, *supra* note 112, at 234. Nevertheless, court-watchers acknowledge that despite Congress' efforts, the justices of the U.S. Supreme Court consistently make arguments similar to those made by Justice Rehnquist in *Laird v. Tatum*, 409 U.S. 824, 838 (1972). *See also* Luke McFarland, *Is Anyone Listening? The Duty to Sit Still Matters because the Justices Say It Does*, 24 GEO. J. LEGAL ETHICS 677, 690 (2011).

[273] The rule of necessity allows a judge to hear a case despite the judge's prejudice or conflict of interest if the judge's disqualification would deny a litigant any judicial

terms, employing recusal requires a value judgment and a choice by the individual justice and the Court which referred it to him in the first place.[274] However, contrary to the king-judge, who adjudicated his own crimes behind a veil, the "veiling" of the full Court is contingent upon the individual justice's own will and judgment.

Scholars have termed this legal state of affairs discretionary because "each Justice is accorded what amounts to absolute and unreviewable discretion to sit in any case, no matter whether there are objecting litigants or widely perceived conflicts of interest."[275] But a more appropriate term, in my perspective, is *voluntarist*, since a justice's obligation to recuse arises only from his voluntary choice, namely, the justice's informed and deliberate decision not to sit.[276] The Court's efforts in recent years to identify conflicts of interest as early as possible should be seen as an attempt to increase justices' knowledge to enable them to decide when recusal is necessary. Similarly, senators' questions about a nominee's recusal policy has become a popular topic at confirmation hearings lately.[277] These questions and

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forum for enforcing claimed rights and leave the claim unresolved. While Justice Rehnquist addressed only the duty to sit in his memorandum in *Laird*, he invoked elements of the rule of necessity by engaging the claim that a justice is disqualified to hear a case because of his preexisting views as to constitutional issues in his previous legal career. Laird v. Tatum, 409 U.S. 824, 834-35 (1972).

[274] Lubet & Diegel, *supra* note 120, at 894 (although the Supreme Court's recusal policy is mostly unwritten, there is no doubt about the Court's procedure, referring recusal motions to the affected individual justice, without consideration by the full Court).

[275] Lubet & Diegel, *supra* note 120, at 893.

[276] Ordinarily, the term voluntary recusal is used to mean the voluntary decision (*sua sponte*) of a judge or a justice to step aside without being asked by any of the parties to the dispute. But the meaning I use here is wider, also including the justice's decision to disqualify himself when asked. The term non-voluntary is used to mean that a judge is ordered to step aside by another judge or court. It should also be noted that the justices, and the Court as a whole, are not interested in a fully voluntary recusal regime. For if the ideal of a fully voluntary recusal regime was in any way a regulative principle for the justices, they would have been interested in restructuring recusal so as to make it dependent on the choice of litigants as much as possible, such as adopting a system of "peremptory judicial disqualification, akin to peremptory challenges permitted in nearly every state for juror disqualification." Bam, *supra* note 54, at 1187.

[277] *See* Romoser, *supra* note 3; Virelli III, *supra* note 231; Nina Totenberg, *Democrats Ask Justice Barrett to Recuse in Case Involving Nonprofit Donor Privacy*, NPR (Apr. 22, 2021, 5:00 AM ET) https://www.npr.org/2021/04/22/989595589/democrats-ask-justice-barrett-to-recuse-in-case-involving-nonprofit-donor-privac; Andrew Desiderio & Marianne Levine, *In the Senate Questionnaire, Barrett Won't*

the justice's answers do not have any legal effect on the justice's post-confirmation, and even a specific promise to recuse is not enforceable.[278] Nevertheless, they are meant to influence the justice's future recusal choices and to encourage his recusal in certain or specific cases.

In contrast, the ancient judicial protocol was *non-voluntarist* since the king-judge was deprived of all biasing knowledge by an act of deception by the prophet. Nathan temporarily veiled David and restricted the arguments and considerations that should be taken into account by the king-judge as to what is fair from a deeper point of view,[279] or, more precisely, from a comparative point of view, by paralleling David's crimes to the crimes of the rich man in the parable.[280]

A serious argument against the Court's *voluntarist* approach is its reliance on formalistic assumptions that deny that the identity and the background of the justice affect judicial decision-making.[281] It assumes that a justice can set aside his personal and professional biases when he decides his recusal motion.[282] But, despite a justice's subjective persuasion in his ability to be impartial, he may still harbor unconscious stereotypes and beliefs.[283] In fact, the more biased the justice

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Pledge to Recuse Herself from 2020 Election Cases, POLITICO, https://www.politico.com/news/2020/09/29/amy-coney-barrett-recuse-election-cases-423248 (Sep. 29, 2020, 8:18 PM EDT).

[278] Virelli III, *supra* note 51, at 1594-95.

[279] DWORKIN, *supra* note 98, at 181 ("It supposes, reasonably, that political arrangements that do not display equal concern and respect are those that are established and administered by powerful men and women who, whether they recognize it or not, have more concern and respect for members of a particular class, or people with particular talents or ideals, than they have for others. It relies on this supposition in shaping the ignorance of the parties . . . . Men who do not know to which class they belong cannot design institutions, consciously or unconsciously, to favor their own class.").

[280] *See* AMARTYA SEN, THE IDEA OF JUSTICE 15 (2009); ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (D.D. Raphael & A. L. Macfie eds., 1976).

[281] Bam, *supra* note 54, at 1138-39 (arguing that the "judge's upbringing, family, political preferences, and even personal characteristics like race and gender, are attributes of judicial decision-making").

[282] According to Bam, there "may be a notion of professional pride that attaches some stigma to being forced to recuse . . . . In fact, a judge who grants a party's recusal motion is arguably admitting a violation of the Code of Judicial Conduct, which requires the judge to recuse herself *sua sponte*." *Id.* at 1173.

[283] Bassett, *supra* note 51, at 668. *See also* Lubet & Diegel, *supra* note 120, at 897-98.

is, the less willing that justice is to admit the existence of bias and the less likely that justice is to withdraw.[284]

Consequently, every justice is an island, entirely of his or her own self, even if he takes recusal seriously and aspires to be principled and consistent. Thus, the voluntarist approach—which allows each justice to assess his own impartiality independently—fits the subjective recusal standard, which was eliminated by Congress in 1974 and replaced by an objectively reasonable person inquiry.[285] But, the voluntarist approach is unfair in the sense that it leads to differences among the justices with respect to their policies to recusal. It creates a situation in which every justice is a law to itself in regard to recusals, but also that some justices, who adopt a more lenient recusal policy, participate less, and their voices are more frequently missing in comparison to other justices.

Perhaps the best argument in support of the Court's voluntarist approach is the political nature of the Court and the selection of justices based at least in part on their particular biases, ideologies, and political connections.[286] The voluntarist approach takes these differences among the justices seriously. It provides every justice the ultimate power to decide whether to participate or not in the judicial deliberation of the given case. Thus, it prevents the suppression of a particular viewpoint by the other court members, and considers important voices in the decision-making process. No less important, it respects the fact that recusal decisions are based on each justice's particular judicial philosophy, point of view, and life experience.

VII. THE "CAPTURED" APEX COURT: ABUSIVE "REFUSAL TO RECUSE"

But based on the discussion about the biblical self-judging protocol, there is another considerable objection to the Court's voluntarist recusal approach. It allows the impartiality of the whole Court and, consequently, the legitimacy of the Court to be held hostage by the worst feature of actual justices: actual bias. As noted above, despite

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[284] Bassett, *supra* note 51, at 670-71; Leubsdorf, *supra* note 71, at 245.

[285] Bassett, *supra* note 51, at 672.

[286] Bassett, *supra* note 51, at 691. *See also* Dmitry Bam, *Partisan Judicial Speech and Recusal Procedure*, 20 LEGAL ETHICS 131, 132 (2017) (Justices are selected and confirmed through a highly partisan appointment process and based on "having strongly held (and reliable) views about the law.").

the justice's assuredness that he is not biased, he may nevertheless harbor bias consciously or otherwise, and the veiling of the full Court is contingent upon his voluntary choice. In such cases, we may say that the Supreme Court appears to have been "captured" by one of its members,[287] which may lead to judicial decisions rendered under circumstances suggesting bias or favoritism. By failing to recuse when recusal is due and to veil the Court, the individual justice consciously or unconsciously improperly influences the decision-making process. In other words, the Court's voluntarist recusal approach may lead to the phenomenon of abusive "refusal to recuse," undermining the minimum core of judicial impartiality. Moreover, since the voluntarist recusal approach tolerates biased and unprincipled refusal to recuse, the Court's sociological legitimacy could also be damaged when justices are engaged repeatedly in unprincipled "refusal to recuse" behavior.[288]

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[287] My discussion here is limited to Supreme Court capture by one of its members through the abuse of the recusal doctrine. On Court capture by "outsiders' (e.g., the president, legislature, political parties, elite groups, special interest groups) and by other "tools" (e.g., term limits, court-packing, jurisdiction-stripping, etc.), *see generally* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 845-49 (2006); David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts against Democracy*, 53 U.C. DAVIS L. REV. 1313 (2020); David Landau, Hannah J. Wiseman & Samuel R. Wiseman, *Federalism for the Worst Case*, 105 IOWA L. REV. 1187 (2020); Lena Zwarensteyn*, Trump's Takeover of the Courts,* 16 U. ST. THOMAS L.J. 146 (2020); Amanda Hollis-Brusky, *Exhuming Brutus: Constitutional Rot and Cyclical Calls for Court Reform*, 86 MO. L. REV. 517 (2021); James A. Gardner, *The Illiberalization of American Election Law: A Study in Democratic Deconsolidation*, 90 FORDHAM L. REV. 423 (2021). Senator Sheldon Whitehouse has spoken and written considerably about what he characterized as "the scheme by right-wing donor interests to capture the U.S. Supreme Court." A series of Whitehouse's speeches describing "The Scheme" is available at Senator Sheldon Whitehouse, *The Scheme: Sheldon's Court Capture Speeches,* YOUTUBE https://www.youtube.com/playlist?list=PLhyg5hj7I21i1Aqcaym9TRFr-pWjPN9_ms; *see also* SHELDON WHITEHOUSE & MELANIE WACHTELL STINNETT, CAPTURED: THE CORPORATE INFILTRATION OF AMERICAN DEMOCRACY (2017).

[288] The legitimacy problem of the captured apex court is not due to the discretion accorded to the justices by the voluntarist recusal approach. According to Gibson & Caldeira, the legitimacy of the Supreme Court does not depend on the perception that judges "merely apply the law" and the American people know that the justices exercise discretion in making their decisions. Rather, Gibson & Caldeira suggest the Court's legitimacy flows from the view that judicial discretion is being exercised in a principled, rather than strategic, way. *See* James L. Gibson & Gregory A. Caldeira,

Evidently, Supreme Court capture occurs when the biased justice's vote is needed to grant review in the certiorari stage,[289] or when it affects the outcome of the case.[290] But when the Supreme Court decides a case, not merely the outcome of that decision, but its legal reasoning will thereafter be followed by the lower courts and even by the Supreme Court itself.[291] Hence, Supreme Court capture can also occur when the biased justice is assigned to write the opinion of the Court. The function of assigning who shall write the opinion of the Court falls to the most senior justice in the majority. According to tradition, when the chief justice is in the majority, he has the authority to assign the opinion.[292] It is doubtful that the chief justice or the senior justice will assign this task to a justice who they believe should have recused himself.

Thus, opinion assignment authority provides some protection against Court capture by writing the opinion of the Court, but it does not totally prevent it for the following reasons. First, the chief justice or the senior justice could be the very people who refuse to recuse and insist on writing the opinion of the Court. Second, the chief justice or the senior justice could be unaware of the "recusal issue" of the assigned justice. It should be noted that another "soft" protection against Supreme Court capture is informal consultation conducted by the individual justice with his colleagues or with the Court's Legal Office.[293] However, in the end, the decisions to disclose a potential conflict of interest, to consult about it, and to recuse are decisions the individual justice makes. Advice given to the justice by his colleagues or by the Court's Legal Office is unbinding.[294] Third, in any case, the allegedly

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Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?, 45 LAW & SOC'Y REV. 195, 195 (2011).

289 Lubet, *supra* note 51, at 661-62; Bassett, *supra* note 51, at 686.

290 Stempel, *supra* note 139, at 590.

291 *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176-77 (1989).

292 *See* O'BRIEN, *supra* note 257, at 267.

293 *See* Letter from Chief Justice John G. Roberts to Senator Richard J. Durbin, Chair Committee on the Judiciary (Apr. 25, 2023) (Attached was the Statement on Ethics Principles and Practices, signed by all current presiding justices.). *See also Ginsburg*, *supra* note 60, at 1039; Charles Lane, *Stevens Gives Rare Glimpse Of Court's 'Conference'*, WASH. POST (Oct. 19, 2003), https://www.washingtonpost.com/archive/politics/2003/10/19/stevens-gives-rare-view-of-courts-conference/27148bbb-ec96-4189-9fe2-d44e3a03e357/.

294 Roberts, *supra* note 293.

biased justice is free to issue his own separate opinion, whether a concurrence or dissent.[295] While there is a heated debate about the value and role of separate opinions, their presence or absence serves the goals of the Court.[296] The biased justice hijacks this legal instrument for his own goals. Hence, neither opinion assignment nor disclosure and consultation provide full protection against abusive refusal to recuse by the individual justice who is determined to formally express his opinion.

When legal opinions are influenced by bias or manipulated to achieve the individual justice's own ends, they risk losing the respect accorded to authoritative and principled statements of the law. Consequently, in a system built upon the consideration, percolation, and application of precedents, the Court's voluntarist recusal approach has a continuing problematic impact on subsequent caselaw (e.g., election cases, religious liberty, abortion cases, etc.). This may be true even though the allegedly biased individual justice expresses his distinctive view through a concurrence or dissent. In such cases, the biased justice is locked in by his prior legal view and reasoning. Not only because the individual justice is committed to what Professor Richard M. Re labeled "personal precedent,"[297] but also because he is motivated by unwillingness to admit after the fact his bias, which would significantly dent his professional reputation.

The problem of the captured apex court by one of its members was easily noticed during the controversy surrounding Justice Clarence Thomas′ participation in cases concerning challenges to the 2020 presidential election and cases involving the U.S. House of Representatives Committee investigating the January 6, 2021 insurrection on the United States Capitol.[298] Thomas' wife, Ginni, had repeatedly encouraged President Donald Trump's chief of staff, Mark Meadows, to

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[295] M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 292 (2007).

[296] *Id.* at 286. *See generally* Peter Bozzo, Shimmy Edwards & April A. Christine, *Many Voices, One Court: The Origin and Role of Dissent in the Supreme Court,* 36 J. SUP. CT. HIST. 193 (2011).

[297] *See* Richard M. Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 825 (2023).

[298] Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 1 (2020); Trump v. Thompson, 142 S. Ct. 680, 680 (2021); Ellena Erskine, *Supreme Court Ethics Bill Advances Out of House Committee After Party-Line Vote*, SCOTUSBLOG (May 12, 2022, 3:18 PM) https://www.scotusblog.com/2022/05/supreme-court-ethics-bill-advances-out-of-house-committee-after-party-line-vote/.

breach the 2020 presidential election results, attended the "Stop the Steal" rally that preceded the storming on the Capitol by Trump's supporters, and had been a leading Maga operative actively strategizing with others on overturning the election results.[299]

While it is still unclear "what Justice Thomas knew about his wife's activities, and when he knew it,"[300] experts on judicial ethics, including some that previously had argued that Ginni Thomas' activist career did not create a conflict of interest for her husband, harshly criticized Thomas.[301] In an interview with NPR, Professor Stephen Gillers explained that it was Thomas' obligation as a justice to ensure that nothing Ginni Thomas had been doing warranted his recusal in those cases and added that Justice Thomas "could not maintain a kind of false ignorance, closing his eyes and ears."[302] The *St. Louis Post-Dispatch* editorial board suggested that Justice Thomas' bias in favor Trump destroys the Supreme Court's "integrity" and "credibility."[303] The Op-Ed explained that "[i]t's highly doubtful the Thomases don't discuss their daily experiences around the dinner table. What's certain is that . . . Eight justices ruled against Trump [in Trump v. Thompson]. The sole vote in his favor: Clarence Thomas."[304]

A group of House and Senate Democrats went as far as to send a letter to the Court and requested Justice Thomas to recuse himself from any future cases concerning the 2020 elections and its aftermath.[305] Some Democrats even suggested Thomas should resign or

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[299] Caleb Ecarma, *Ginni Thomas didn't Just Praise Maga Supporters on January 6. She Actually Attended the "Stop the Steal" Rally,* VANITY FAIR (Mar. 14, 2022) https://www.vanityfair.com/news/2022/03/ginni-thomas-attended-stop-the-steal-rally.

[300] Nina Totenberg, *Legal Ethics Experts Agree: Justice Thomas Must Recuse in Insurrection Cases*, NPR (Mar. 30, 2022, 5:00 AM) https://www.npr.org/2022/03/30/1089595933/legal-ethics-experts-agree-justice-thomas-must-recuse-in-insurrection-cases. *See also* text accompanying *supra* note 190.

[301] Totenberg, *supra* note 300.

[302] *Id.*

[303] Editorial Board, J*ustice Thomas' Bias on Trump Destroys Supreme Court Integrity. He must Recuse*, ST. LOUIS POST-DISPATCH (Mar. 20, 2022) https://www.stltoday.com/opinion/editorial/editorial-justice-thomas-bias-on-trump-destroys-supreme-court-integrity-he-must-recuse/article_de1e459d-60b5-5352-bba7-9ec67808ead8.html.

[304] *Id.*

[305] Jacqueline Alemany, *Democrats in Congress Ask Clarence Thomas to Recuse Himself from Jan. 6 Cases*, WASH. POST (Mar. 29, 2022, 6:00 AM),

face impeachment to hold him accountable.[306] Nevertheless, Thomas continued to participate in those types of cases in the past year, and calls for his recusal continue.[307] Also persisted claims that "[a]ny justice in Thomas' position who was concerned about the Supreme Court's legitimacy—or his own integrity—would have recused himself."[308]

Moreover, Justice Thomas' continued participation in cases involving the 2020 election and the January 6th insurrection could attest to the limited reach of the Court's current soft protections against capture by refusal to recuse. Court-watchers repeatedly indicated that "the chief justice is powerless to force Justice Thomas to recuse himself."[309] While it is conceivable and even probable that Justice Thomas consulted Chief Justice Roberts on whether his wife's activities warranted recusal, analysts indicated that Roberts "is not the boss of Justice Clarence Thomas or any of the associate justices."[310] Commentators also offered various explanations for Thomas' persistent refusal to recuse, including "placating" his wife, avoiding embarrassment, and unwillingness to admit that he should not have participated in the earlier

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https://www.washingtonpost.com/politics/2022/03/29/democrats-clarence-thomas-recuse-jan6-letter/. Letter to Justice Roberts and Justice Thomas (Mar. 8, 2022), https://www.warren.senate.gov/imo/media/doc/2022.3.29%20Letter%20to%20Roberts%20and%20Thomas%20on%20SCOTUS%20Ethics.pdf.

[306] Callie Patterson, *AOC: Clarence Thomas Should Resign or Face Impeachment Over Wife's Texts*, N.Y. POST, https://nypost.com/2022/03/29/aoc-clarence-thomas-should-resign-over-wifes-texts/ (Mar. 29, 2022).

[307] *Graham v. Fulton County Special Purpose Grand Jury*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/graham-v-fulton-county-special-purpose-grand-jury/.

[308] Laurence H. Tribe & Dennis Aftergut, *Justice Thomas' Refusal to Recuse Himself is Thumbing His Nose at the Law*, L.A. TIMES (Oct. 26, 2022, 4:58 PM), https://www.latimes.com/opinion/story/2022-10-26/clarence-thomas-lindsey-graham-subpoena-recuse. *See also* Jackie Calmes, *Clarence Thomas' Jan. 6 Conflict of Interest are Showing Again*, L.A. TIMES (Nov. 23, 2022, 3:00 AM), https://www.latimes.com/opinion/story/2022-11-23/clarence-thomas-recusal-supreme-court-jan-6 (Thomas' participation in cases concerning the Capitol assault undermines the standing of the Court).

[309] Adam Liptak, *Ginni Thomas's Texts, and the Limits of Chief Justice Robert's Power*, N.Y. TIMES (March 31, 2022), https://www.nytimes.com/2022/03/31/us/politics/ginni-thomas-john-roberts-supreme-court.html. *See also* Joan Biskupic, *John Roberts Can't Do Anything About Clarence Thomas*, CNN (March 30, 2022, 5:01 AM), https://edition.cnn.com/2022/03/30/politics/john-roberts-clarence-ginni-thomas-supreme-court/index.html.

[310] Biskupic, *supra* note 309.

election cases,[311] namely, suggesting Thomas himself was locked in by his prior decision not to recuse. One commentator offered a more worrisome explanation that could also account for the failure of the Court's current soft protections against capture. According to CNN's legal analyst and Supreme Court biographer, Joan Biskupic, Thomas, whose stature has been enhanced in recent years by the new conservative appointees, enjoys "personal loyalty among the right wing [justices] that has eluded Roberts."[312] This explanation corresponds well with claims that Thomas is the de facto chief justice of the current Supreme Court, being the most senior associate justice with the assignment power whenever Roberts joins the Democratic appointees of the Court.[313]

In April 2023, Justice Thomas was under renewed scrutiny after ProPublica reported he had accepted travel and vacation accommodations paid for by billionaire Republican megadonor Harlan Crow for two decades and failed to disclose it.[314] Justice Thomas responded to the ProPublica report in a brief, rare public statement provided by the Court's Public Information Office.[315] Thomas acknowledged joining Crow "on a number of family trips," but claimed he had been told by "colleagues and others in the [J]udiciary . . . that this sort of personal hospitality from close personal friends, who did not have business

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[311] Lloyd Green, *Time for Clarence Thomas to Recuse Himself from Election Cases – His Wife's Texts Prove It*, THE GUARDIAN (March 27, 2022), https://www.theguardian.com/commentisfree/2022/mar/27/clarence-thomas-ginni-thomas-texts-recuse ("Placating Ginni, nursing decades-old grievances, and drawing a paycheck is the easier route to take.").

[312] Biskupic, *supra* note 309.

[313] *See* Jeffrey Toobin, *Clarence Thomas is the New Chief Justice*, CNN (July 22, 2021, 6:54 PM), https://edition.cnn.com/2021/07/21/opinions/clarence-thomas-supreme-court-power-toobin/index.html; Henry Gass, *To Understand this Supreme Court, Watch Clarence Thomas*, THE CHRISTIAN SCI. MONITOR (July 8, 2021), https://www.csmonitor.com/USA/Justice/2021/0708/To-understand-this-Supreme-Court-watch-Clarence-Thomas; Kelsey Reichmann, *The Thomas Court*, COURTHOUSE NEWS SERV. (Dec. 10, 2021), https://www.courthousenews.com/the-thomas-court/; Matt Ford, *The Chief Justice Who Isn't*, THE NEW REPUBLIC (Oct. 20, 2022). *But see* Michael C. Dorf, *Whose Court is it Now?*, DORF ON L. (August 5, 2021), http://www.dorfonlaw.org/2021/07/whose-court-is-it-now.html.

[314] *See* Joshua Kaplan, et al., *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023, 5:00 AM), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow.

[315] *See generally Statement by Justice Clarence Thomas*, PUB. INFO. OFF. (Apr. 7, 2023), https://s3.documentcloud.org/documents/23745868/clarence-thomas-statement-4-7-23.pdf.

before the Court, was not reportable."[316] The ProPublica report was only the first in a stream of reports undermining Thomas' defense[317] and censuring the ethics and recusal practices of Justice Thomas and other justices.[318]

In response to the ProPublica report, Senator Dick Durbin, chair of the Senate Judiciary Committee, along with all Senate Judiciary Committee Democrats, sent a letter to Chief Justice Roberts asking him to investigate the report and to ensure that the justices abide by the same ethical standards that bind other federal judges.[319] Other responses to the ProPublica report included calls for impeachment and the introduction of new ethics and recusal legislation to govern the

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316 *Id.*

317 Ed Pilkington, *Judicial Record Undermines Clarence Thomas Defence in Luxury Gifts Scandal*, GUARDIAN (Apr. 20, 2023), https://www.theguardian.com/us-news/2023/apr/20/clarence-thomas-supreme-court-harlan-crow-luxury-gifts; Ariane de Vogue, *Company with Ties to GOP Megadonor and Longtime Friend of Justice Thomas Had Business Before Supreme Court*, CNN, https://edition.cnn.com/2023/04/25/politics/clarence-thomas-harlan-crow-supreme-court/index.html (Apr. 25, 2023, 11:17 AM).

318 Emma Brown, Shawn Boburg & Jonathan O'Connell, *Judicial Activist Directed Fees to Clarence Thomas's Wife, Urged 'No Mention of Ginni',* WASH. POST (May 4, 2023, 7:15 PM), https://www.washingtonpost.com/investigations/2023/05/04/leonard-leo-clarence-ginni-thomas-conway/; Jane Mayer, *How Troubling Are the Payments and Gifts to Ginni and Clarence Thomas*, NEW YORKER (May 9, 2023), https://www.newyorker.com/news/daily-comment/how-troubling-are-the-payments-and-gifts-to-ginni-and-clarence-thomas. About other justices alleged disclosure and recusal violation, see Heidi Przybyla, *Law Firm Head Bought Gorsuch-Owned Property*, POLITICO (Apr. 25, 2023), https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579; Devan Cole, 2 *Supreme Court Justices did not Recuse Themselves in Cases Involving Their Book Publisher*, CNN, https://edition.cnn.com/2023/05/04/politics/sonia-sotomayor-neil-gorsuch-book-recusal-supreme-court-cases/index.html (May 5, 2023); Justin Elliott, et al., *Justice Samuel Alito, Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, 11:49 PM), https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court.

319 *See Durbin, Senate Judiciary Democrats Urge Chief Justice Roberts to Investigate Justice Thomas' Undisclosed Gifts and Take Action to Prevent Further Misconduct*, U.S. SENATE COMMITTEE ON THE JUDICIARY (Apr. 11, 2023), https://www.judiciary.senate.gov/press/dem/releases/durbin-senate-judiciary-democrats-urge-chief-justice-roberts-to-investigate-justice-thomas-undisclosed-gifts-and-take-action-to-prevent-further-misconduct. Preceding this letter, a letter by nearly two dozen House and Senate Democrats asked Roberts to start an investigation into the ProPublica report about Thomas: Letter from Senator Sheldon Whitehouse et al., U.S. Senate, to John G. Roberts, Chief Justice of the U. S. (Apr. 7, 2023).

Court. A common claim to all responses was that Thomas' behavior injured the Court's integrity and public confidence.[320] As revelations about other alleged disclosure violations by Thomas continued,[321] Senator Durbin sent another letter to Roberts inviting him, or another justice whom he would designate to appear before the committee, to a public hearing addressing Supreme Court ethics reform.[322]

Roberts turned down the invitation to appear before the Senate Judiciary Committee, commenting it would not be appropriate for the head of an independent branch of government to appear before the committee.[323] Roberts attached to his letter a *Statement on Ethics Principles and Practices*, signed by all current presiding justices, Thomas included.[324] The statement didn't directly address the disclosure or recusal controversies surrounding Thomas or any other justice. In regard to recusal, the statement reiterated the Court's voluntarist approach ("Individual Justices, rather than the Court, decide recusal issues"), reasoning that a full Court review, or any subset of the Court review, of individual justices' recusal decisions "would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its members may participate."[325] While the statement did not explicitly or implicitly defend Thomas' decisions not to recuse in any of the above controversial cases, it defended his conclusive and unreviewable discretion to decide whether to recuse.

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[320] *See* Connecticut Law Tribune Editorial Board, *Clarence Thomas' Latest Damage to SCOTUS Integrity Merits Swift Action*, CONN. L. TRIB. (Apr. 13, 2023), https://www.law.com/ctlawtribune/2023/04/13/clarence-thomas-latest-damage-to-scotus-integrity-merits-swift-action/.

[321] Justin Elliott et al., *Billionaire Harlan Crow Bought Property from Clarence Thomas. The Justice Didn't Disclose the Deal.*, PROPUBLICA (Apr. 13, 2023), https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus; Joshua Kaplan et al., *Courts: Clarence Thomas Had a Child in Private School. Harlan Crow Paid the Tuition.*, PROPUBLICA (May 4, 2023, 6:00 AM), https://www.propublica.org/article/clarence-thomas-harlan-crow-private-school-tuition-scotus.

[322] *Durbin Invites Chief Justice Roberts to Testify Before the Senate Judiciary Committee Regarding Supreme Court Ethics Reform*, U.S. SENATE COMM. ON THE JUDICIARY (Apr. 20, 2023), https://www.judiciary.senate.gov/press/dem/releases/durbin-invites-chief-justice-roberts-to-testify-before-the-judiciary-committee-regarding-supreme-court-ethics.

[323] *See* Letter from John G. Roberts, Chief Justice, U.S., to Richard J. Durbin, Chair, Comm. on the Judiciary, U.S. (Apr. 25, 2023).

[324] *Id.*

[325] *Id.*

It is not my intention to engage in "bashing" Thomas. First, maybe there are good arguments as to why Thomas did not have to recuse, despite his wife's involvement in these cases.[326] After all, Ginni Thomas was not a formal counselor or advisor to Trump's litigation team. Second, the affair could be explained along partisan lines. For instance, Senate Minority Leader Mitch McConnell dismissed Democrats' claims against Thomas, described him as "an exemplary jurist who has modeled fidelity to the rule of law for over 30 years,"[327] and accused Democrats of bullying him and of delegitimizing the Court.[328] Third, the failure of the soft protections against capture should not necessarily be attributed to "personal loyalty" among the rightwing justices. Indeed, the three new conservative appointees have shifted the Court to the right by forming a six-justice conservative supermajority. However, one effect of this supermajority is the decline in the centric institutional conservativism advocated by Chief Justice Roberts, who deeply cares about the way the Court is perceived by the public.[329] If the other conservative justices are less concerned about public trust as a guide to their decisions, this could be reflected in a more tolerant attitude towards abusive refusal to recuse. That may all be good and true but in the absence of a third-party review, that seeks to ensure decisions based on general and unbiased consideration, the impartiality of the Court is "captured" by the individual justice's alleged bias.

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[326] The Editorial Board, *Justice Thomas Shouldn't Recuse from Elections Cases*, WALL ST. J., https://www.wsj.com/articles/justice-clarence-thomas-shouldnt-recuse-ginni-thomas-texts-donald-trump-supreme-court-11648678766 (Mar. 30, 2022, 8:44 PM); Ben Johnson, *Justice Thomas Will Not Recuse: But Should He?*, VERFBLOG (Apr. 9, 2022), https://intr2dok.vifa-recht.de/receive/mir_mods_00012466; Wheeler, *supra* note 69; Bruce Ledewitz, *Debating When Clarence Thomas Should Recuse Himself is the Wrong Argument*, PA. CAP. STAR (May 24, 2022, 6:30 AM), https://www.penncapital-star.com/commentary/debating-when-clarence-thomas-should-recuse-himself-is-the-wrong-argument-bruce-ledewitz/.

[327] Callie Patterson, *Mitch McConnell Blasts Call for Clarence Thomas to Recuse, Resign as Dem 'Bullying,'* N.Y. POST (Mar. 30, 2022, 4:28 PM), https://nypost.com/2022/03/30/mitch-mcconnell-blasts-calls-for-clarence-thomas-to-recuse-resign/.

[328] *Id.*

[329] Stuart Gerson, *Understanding John Roberts: A Conservative Institutionalist Concerned with Durability of the Law and Respect for the Court*, JURIST (July 31, 2020, 2:17 PM), https://www.jurist.org/commentary/2020/07/stuart-gerson-understanding-john-roberts/.

VIII. STARE DECISIS: THUS SAYS THE LORD

Let us return to the ancient self-judging protocol in search of additional legal components that enabled the prophet to free the "captured" king-judge from his biases. The prophet presented the juridical parable before the king-judge, veiling him from unwarranted bias considerations. The king delivered, specified, and justified his judgment against the rich, sentencing him to death, ordering fourfold compensation of the poor, and providing reasons for his condemnation ("because he did this thing, and because he had no pity"). The prophet proclaimed in response, "You are that man" and decried:

> Thus saith the Lord God of Israel, I anointed thee king over Israel, and I delivered thee out of the hand of Saul; And I gave thee thy master's house, and thy master's wives into thy bosom, and gave thee the house of Israel and of Judah; and if that had been too little, I would moreover have given unto thee such and such things. Wherefore hast thou despised the commandment of the Lord, to do evil in his sight? thou hast killed Uriah the Hittite with the sword, and hast taken his wife to be thy wife, and hast slain him with the sword of the children of Ammon. Now therefore the sword shall never depart from thine house; because thou hast despised me, and hast taken the wife of Uriah the Hittite to be thy wife. Thus saith the Lord, Behold, I will raise up evil against thee out of thine own house, and I will take thy wives before thine eyes, and give them unto thy neighbor, and he shall lie with thy wives in the sight of this sun. For thou didst do it secretly: but I will do this thing before all Israel, and before the sun.[330]

Some biblical expositors suggest that the rebuke above is only a later interpolation,[331] and that the original text included only Nathan's enigmatic conviction: "You are that man," and the King's concise repentance: "I have sinned against the Lord."[332] A good argument for

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[330] 2 *Samuel* 12:7-12.

[331] HANS WILHELM HERTZBERG, I & II SAMUEL: A COMMENTARY 258 (J. S. Bowden trans., Vandenhoeck & Ruprecht, 2d ed. 1960) (1964).

[332] 2 *Samuel* 12:13. According to this account, the prophet's assurance in v. 13: "you shall not die," is an immediate nullification of the death sentence that David unknowingly pronounced on himself.

excluding the passage above is that brevity persuades by expressing much with few words. This suggestion could explain one of the most notable discrepancies between parable and narrative: the parable describes a rich man who takes a poor man's dear lamb to provide for a wayfarer, with no mention of murder or adultery. Nathan's direct censure, on the other hand, resembles the prophet Elijah's condemnation of King Ahab, who murdered and took possessions: "Thou hast killed Uriah the Hittite with the sword, and hast taken his wife to be thy wife."[333] Hence, if we omit Nathan's direct censure, discrepancies between the parable and narrative diminish. According to this account, David convicted the rich man of theft, and he is bound to apply the same judgment to himself, but not for murder and adultery, rather for "taking" Bathsheba. However, treating Nathan's direct censure as a later interpolation involves considerable difficulties. Not only is brevity not a criterion for determining authenticity,[334] but a gap still lies between David's deeds, as described in chapter 11, and Nathan's juridical parable at the beginning of chapter 12. Nathan's direct reproof is necessary to bridge this gap.[335]

Other expositors do not question the authenticity of these words of reproof, but they differ substantially over how they should be appreciated vis-à-vis the juridical parable. One strand of interpretation views Nathan's direct censure as containing important additional information not illuminated by the parable. Mainly the religious aspect—that David's actions were sins against God—and the aggravating circumstances—that Uriah's death was a premeditated murder by David so that he could marry his wife. There are two main ways to explain the incongruities between parable and direct censure. The first is that although both the parable and reproof are meant to provide a value judgment of David's actions, they provide it from different perspectives. For instance, the parable deals with David's motives and sins against man, while Nathan's direct censure concerns results and sins against God.[336] Second, the parable must omit and plant information so that the king does not prematurely detect the similarities between the offenses in the parable and his misbehaviors. For instance,

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[333] *Id.* at 9.

[334] Simon, *supra* note 122, at 232-33.

[335] Janzen, *supra* note 85, at 209 (No wonder Janzen argued that the point of the parable is to have David convict himself of "taking" Bathsheba, by relying on the rationales given by God and Nathan.); 2 *Samuel* 12:7-12.

[336] Simon, *supra* note 122, at 234.

the wayfarer in the parable, who has no equivalent in the actual case or the rebuke, could be accounted as a piece of "disinformation" meant to distract David from the love triangle in the actual case.[337]

Both options entail significant problems. If the reproof's judgment is based on a different perspective, then the parable is redundant or should be regarded as a rhetorical device, while the oracle carries God's charges against David and his punishment. David is not bound by his own judgment but by the eternal rationales proclaimed, which have nothing to do with the juridical parable. Similarly, if the parable is missing important considerations or installing significant extraneous factors, it could not parallel Nathan's direct reproof, and it fails to accomplish the goal of auto-condemnation. Interpreters can resolve these problems by arguing that Nathan intended to draw a single point of comparison,[338] so David's auto-condemnation is limited to that point only. I will return to this point soon.

The second strand of interpretation views Nathan's direct censure as the proper understanding of the parable or as its application to the actual case at hand.[339] Notably, the formalistic introduction: "Thus says the Lord," also appears in the other prophetic juridical parable presented to King Ahab by the unnamed prophet at the crossroad and signifies the crossover from the juridical parable (a soldier who was negligent in guarding a prisoner) to its proper application (the release of Ben-Hadad by Ahab).[340] Accordingly, expositors attempt to identify a much more precise mapping of equivalents between the juridical parable and surrounding narrative (Nathan's direct censure included).[341] This is not an easy task since on the one hand, vocabulary in the parable is ambiguous or rare, lending itself to many alternative

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[337] The inclusion of additional characters appears also in the other two juridical parables: 2 *Samuel* 14:1-20; 1 *Kings* 20:35-43.

[338] *See* Jeremy Schipper, *Did David Overinterpret Nathan's Parable in 2 Samuel 12:1-6?*, 126 J. OF BIBLICAL LITERATURE 383, 388 (2007).

[339] *See* ROBERT POLZIN, DAVID AND THE DEUTERONOMIST: 2 SAMUEL 121 (1993); Berman, *supra* note 81, at 11.

[340] 1 *Kings* 20:42; *see also* Berman, *supra* note 81, at 11 (Berman argues that the twin appearance of this formalistic introduction in Nathan's reproof (2 *Samuel* 12: 9, 11) indicates two complementing mappings of the parable offered by Nathan against the two sins David had committed.).

[341] *See also* Berman, *supra* note 81, at 4 (Berman justifies this interpretation move by arguing that the parable should not be read solely as a communication between prophet and king, but also as a communication between the author of the Book of Samuel and the audience of readers and listeners.).

applications, and on the other hand, necessitating dependence on sources outside the surrounding narrative of David and Bathsheba.[342] Moreover, as discussed above, gaps and double meanings are scattered throughout the surrounding narrative, making it difficult to understand and assess David's deeds. Hence interpreters have offered numerous alternative mappings of parables and narratives; some have even suggested multiple complementing mappings.[343]

In conclusion, a wide understanding among scholars holds that David isn't compelled to apply the judgment to himself unless the parable is parallel in significant terms to application. The principles and rules underpinning the parable are used accordingly by Nathan's reproof to evaluate David's deeds. Consequently, the parable should not be read solely as a rhetorical device or a tool to elicit a reaction from the errant king, but rather as a technique used by the prophet to consider the various aspects of David's wicked behavior.

Here, too, I wish to take these interpretations further and suggest that Nathan's reproof should be understood, at least in part, as a primordial application of the legal doctrine of precedents, also known as *stare decisis*, which means "to stand by things decided" in Latin.[344] The doctrine's core meaning in the Anglo-American legal tradition is that the case before the court should be decided in the same manner as the other cases that have previously been decided by the court.[345] In this sense, precedent is the reduction of judicial rule that facilitates future organizational process, and following a precedent is no different from following a recipe. Therefore, the true value of precedent in judicial organizations is that it treats like cases in like manner, which is why precedent is supposedly valued as a good principle. Let me be clear, Nathan was not establishing a precedent, David was. Nathan applied David's judicial ruling to the actual case. Thus, at the heart of

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342 POLZIN, *supra* note 339, at 120.

343 Multiple mappings are suggested by POLZIN, *supra* note 339; Berman, *supra* note 81; Suzanna R. Millar, *The Poor Man's Ewe Lamb (2 Sam 12:1-4) in Intersectional, Interspecies Perspective*, 15 VETUS TESTAMENTUM 1 (2022).

344 C. Sumner Lobingier, *Precedent in Past and Present Legal Systems*, 44 MICH. L. REV. 955 (1946); James C. Rehnquist, *The Power that Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1987).

345 Lobingier, *supra* note 344, at 955-96 ("[T]he principle is inherent in every legal system, at least in its primitive stage, for the earliest form of law is custom, and the 'core of custom' is precedent, not necessarily judicial, but something quite as authoritative.") (footnote omitted).

the juridical parable interpretation lies the need to treat like cases alike (the parable and the actual murder and the taking of the wife should all be judged in the same way). Most of the debate presented above should be understood as a debate about what was the "recipe" that David came up with, and how exactly this recipe was applied by Nathan.

Unsurprisingly, and in light of these virtues, legal scholars have long suggested that the recusal decisions of U.S. Supreme Court Justices be accompanied by a full written explanation including all relevant facts and reasons. The written explanation should be considered a citable precedent that can be used by lawyers and litigants in the process of making and resisting recusal motions.[346] But, our discussion above shows that this suggestion makes sense only if the Court renounces the voluntarist recusal approach and assigns the final decision in motions to recuse a justice to the eight other justices. If every justice is the sole and final arbiter of his impartiality, then requiring a justice to recuse because a precedent was set by a fellow justice seems to be a complete non-sequitur.

I am not the first to suggest Nathan's use of precedent, and Professor Dwight, mentioned above, stated more than a hundred years ago that Nathan presented the first fictitious case to David, acting as judge in the open air, so "when it was decided, startled the monarch by making it a precedent for his own doom."[347] But given what we know today about how precedents work, I wish to make three caveats. First, precedents do not simply dictate the decision in the current case, nor are they merely "found" or "recognized."[348] Identifying, distinguishing, and applying precedents involve creativity and value judgment. The two strands of biblical interpretation are two ways to understand what Nathan was doing: applying the parable narrowly by drawing a single point of comparison or applying it broadly by seeking out close correspondences. No two recusal decisions are the same and applying the previous decision in the current case requires the Court to exercise discretion and make a value judgment.

Second, a precedent regime requires the existence of a set of judgments, a written edited compilation of opinions, available to the

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[346] Stempel, *supra* note 117, at 799; Ifill & Segall, *supra* note 200, at 344; Frost, *supra* note 210, at 589-90; Hume, *supra* note 51, at 649-50; Roberts, *supra* note 51, at 168; Abella, *supra* note 232, at 345; Stempel, *supra* note 117, at 799.

[347] Dwight, *supra* note 175, at 2.

[348] *See* KARL N. LLEWELLYN, COMMON LAW TRADITION: DECIDING APPEALS 119 (1960).

parties and the judges.[349] Nathan's application of David's judgment, along with the two other juridical parables, are of the few examples understood from their specific genre as juridical parables to direct the use of a previous judgment by parties to judicial proceedings. There are additional narrative references to judicial proceedings (e.g., Solomon's handling of the dispute between the two prostitutes, Achan's trial, and the proceedings following the rape and murder of the Levite's concubine), as well as references to laws in biblical texts. Some scholars confer on the biblical text the status of a legal code, namely, that biblical texts were the systemic collection of rules and principles according to which everyday life was conducted in ancient Israel.[350] Nevertheless, it remains an open question as to how it became known what Nathan said to David behind closed doors. Did he disclose it in his private memoirs? Did Nathan precede Chief Justice Lord Edward Coke of the seventeenth century,[351] who published his personal case notes, by more than 2000 years? But the answer to some of these questions may lie in Nathan's direct censure: "For you did it secretly; but I will do this thing before all Israel, and before the sun."[352] The contrast between doing something secretly or openly is at the heart of the David and Bathsheba story.[353] David acted secretly, covering up the adultery and murder, and portrayed the taking of Bathsheba as providing for a fallen soldier's widow. He forced Nathan to bring before the king-judge a disguised judgment. Then, Nathan applied it openly by pointing to David, rehearsing its application, and carrying out the judgment before all of Israel and the sun.

Similarly, scholars recommended creating a written record available on the Court's website and in legal databases such as Westlaw and Lexis, making it easier to determine when recusals are needed in future cases and increase transparency and consequently, public trust in the Court.[354] While the justices did recently issue the *Statement on Ethics Principles and Practices* in addition to the *1993 Statement of Recusal Policy*, these documents do not have the authority

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[349] Henderson, *supra* note 295, at 293.

[350] Bartor, *supra* note 167, at 297 (some scholars question this conclusion).

[351] Henderson, *supra* note 295, at 293.

[352] 2 *Samuel* 12:12.

[353] POLZIN, *supra* note 339, at 126.

[354] Stempel, *supra* note 117, at 799*; see* Eric J. Segall, *Invisible Justices: How Our Highest Court Hides from the American People*, 32 GA. ST. U. L. REV. 787, 818 (2016).

of precedent, and they lack the specificity of real-world cases (e.g., the statement completely ignored recent recusal controversies concerning Justice Thomas or any of the other justices). In their recent statement, the justices wrote that "Recusals are noted in the Court's decisions, both at the certiorari and merits stages," and that a justice "may" provide a "summary" or "extended" explanation.[355] Court watchers, who hoped that the new Statement was a sign of a new recusal policy, were frustrated to find out that justices still diverge in explaining the reason for recusals in the Court's record.[356] But more importantly, the statement falls short of providing systemic and profound court reports that would aid parties and the public to appreciate recusal decisions, sending them to search for additional information in public records or the justices' conference notes and private correspondences.

Third, the tension between common-law precedents (principles and rules) and comprehensive codes (e.g., biblical law, U.S. Constitution, or congressional legislation) may be profound.[357] David's verdict shows this tension: it opens emotionally ("the man that hath done this thing shall surely die") and continues by explicitly citing the biblical law of the thief ("he shall restore the lamb fourfold").[358] The claim that the code controls the issue situates the judge in one of the following positions: 1) The judge can obey the code and strictly follow its rules. 2) The judge can search for gaps or open textures in the code in order to fill them with precedents (judge-made law). 3) The judge can "fix" the code by applying one of the rules or principles embedded in the common law precedents (e.g., *nemo judex in causa sua*, *ex trupi causa non oritur actio*) to the case at hand.[359] Precisely because the taking and slaughter of the lamb were technically legal,[360] David

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[355] *Statement of the Court Regarding the Code of Conduct*, U.S. SUP. CT. (Nov. 13, 2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf.

[356] *See* Jimmy Hoover, *2 Justices Diverge on Explaining Reasons for Recusal*, N.J. L.J., May 31, 2023, at 1.

[357] Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1174 (2006).

[358] 2 *Samuel* 12:5-6.

[359] The first and the third options are illustrated in the majority and dissenting opinions in *Riggs v. Palmer*, 115 N.Y. 506, 510-12 (1889). For an insightful analysis of the *Riggs* decision in light of American legal development of comprehensive codes, see Sean Wilson, *The Truth about Riggs v. Palmer*, (2021), http://undergroundwiki.org/xshow/lecture.php?i=35&t=3.

[360] *See supra* text accompanying notes 156-163.

needed to "fix" the biblical law of the thief. Precisely because the slaying of Uriah and the marriage to Bathsheba were formally lawful,[361] the prophet needed to "fix" it by resorting to a precedent—David's own precedent.

Similarly, Justice Rehnquist in *Laird v. Tatum* "fixed" 28 U.S.C. § 455, which stated explicitly and unequivocally that "Any justice . . . shall disqualify himself in any case in which he . . . has been of counsel, . . . or … connected with any party or his attorney . . . ."[362] He did it by invoking "a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified,"[363] found in caselaw that dealt with disqualification on the part of judges of the district courts and of the courts of appeals, and by reasoning that "the 'equal duty' concept is even stronger in the case of a Justice of the Supreme Court of the United States."[364] The problem is that according to the analysis presented by this Article, this interpretive move was not done behind a veil but rather by Rehnquist as a judge in his own case with a clear and immediate personal interest and consequence. The analysis would have been different if the eight other justices "repaired" the statute in the process of applying it to Justice Rehnquist. In such a case, the veiled Court interprets Congress's law in the process of reviewing and possibly correcting the individual justice's recusal decision. The Court's decision and reasoning will be before all of America and the sun.

IX. CONCLUSION

Allegations that the justices of the United States Supreme Court are judges in their own cases and that they judge themselves leniently are common.[365] These allegations are often accompanied by an association with kings, queens, and monarchy, accountable to no one but their own divine authority.[366] This Article took this association

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[361] Berman, *supra* note 81, at 13.

[362] Laird v. Tatum, 409 U.S. 824, 825 (1972).

[363] *Laird*, 409 U.S. at 837.

[364] *Id.*

[365] Re, *supra* note 49.

[366] *See* Dahlia Lithwick & Mark Joseph Stern, *King Roberts*, SLATE (Apr. 26, 2023, 4:13 PM), https://slate.com/news-and-politics/2023/04/chief-justice-accountability-thomas-gorsuch-royalty.html; Jamelle Bouie, *The Polite Disdain of John Roberts Finds A Target*, N.Y. TIMES (Apr. 28, 2023), https://www.nytimes.com/2023/04/28/opinion/john-roberts-clarence-thomas-supreme-court.html;

seriously and used the biblical story about the reproof King David received from the prophet Nathan to explain the problems, tensions, and conflicting considerations of the contemporary recusal doctrine of the Supreme Court. Indeed, there are striking similarities between the self-judgment narratives of biblical kings and Supreme Court Justices. However, at the end of our journey, we can safely conclude that the practices of Supreme Court Justices are not like those of biblical kings. They are worse, much worse, at least as these practices are reflected in the writings of legal scholars and biblical expositors. The problem is not that the justices judge themselves but rather that the rules and principles that are meant to regulate their self-judgment are almost nonexistent.

According to the analysis presented in the Article, the problem is not that Justice Jackson actually participated in the *Harvard College* case, as some suggested. If she did, it is because the Court de facto enabled her participation by deconsolidating the cases only because she decided to recuse from the *Harvard College* case. The problem is threefold:

1) Jackson did not issue a formal recusal decision stating the facts and reasons that led her to recuse from the *Harvard College* case.
2) The Court did not formally review Justice Jackson's decision and did not provide facts, reasons, and explanations for its order to deconsolidate the cases. By doing so, the Court depicted the rare move as a procedural non-precedential order. But more importantly, it didn't explain why deconsolidation is allowed and under which circumstances.
3) While the deconsolidation order and the oral argument in the *Harvard College* case were heard by a veiled Court, without Jackson's participation, the opinion of the Court, the dissents, and the concurrences tell a different story: justices responding to each other and reshaping their arguments accordingly. This contradicts not only the deconsolidation order but also the statements accompanying the

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Yvonne Abraham, *Every Inch a King*, BOS. GLOBE (May 6, 2023, 1:25 PM), https://www.bostonglobe.com/2023/05/06/metro/every-inch-king/; Chris Williams, *Someone Needs to Tell Alito The Justices Aren't Kings*, ABOVE THE LAW (Aug. 4, 2023, 6:18 PM), https://abovethelaw.com/2023/08/someone-needs-to-tell-alito-the-justices-arent-kings-see-also/.

decision—that Jackson did not participate in the *Harvard College* case.

Taking recusal seriously and earnestly requires the Court to treat it as a strong organizing doctrine in the administration of justice and a primary legal principle ensuring judicial independence and impartiality. But it also requires the Court to treat recusal as a subsidiary generating concepts and principles (e.g., due process, equality, unity, and public confidence).