Conflict in the Court? Supreme Court Recusal from Marbury to the Modern Day

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ABSTRACT

For justices of the U.S. Supreme Court, controversies pitting personal conflicts — whether actual or merely alleged — against the constitutional commitment to the rule of law increasingly form the basis of a caustic and circular national dialogue that generates substantially more heat than light. While the profile of these controversies is undoubtedly waxing, the underlying tensions stretch back at least to Marbury v. Madison. For all its seminal import, in Marbury, Chief Justice John Marshall adjudicated a case involving, inter alia, the validity of judicial commissions Marshall had himself signed and sealed while serving simultaneously as the outgoing Secretary of State and the newly-installed Chief Justice — with, equally remarkably, one of those judicial commissions belonging to Marshall’s own brother James.

In the centuries since, issues of actual and/or alleged high court conflicts have, to varying degrees, colored the context of landmark decisions, as well as the legacies of jurisprudential giants. Exploring many of the most compelling and controversial recusal sagas in the Court’s history, this Article trains attention on the kind of factually-intensive real-world relationships that high court justices have — both to issues and to individuals — that, in today’s statutory disqualification terminology fall — if anywhere — solely into the 28 U.S.C. § 455 nebulous catch-all provision in which a judge must disqualify himself or herself whenever their impartiality “might reasonably be questioned.” The study yields a layered picture that is rich not only in historical imagery, and anecdote, but analytically-critical context. In this respect, the article includes, but is not limited to treatments of the midnight judges in Marbury; the Steel Seizure case and the “damned fool” whom Truman felt was the “biggest mistake he had made” as President; Thurgood Marshall’s long arc with the NAACP; perhaps the best-known duck-hunting trip

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of all time; Justice O’Connor’s election night outburst preceding Bush v. Gore; profound matters of issue identification involving Justices Ginsburg and Breyer; and finally, on the one hand, undisclosed income related to Virginia Thomas’s work in opposition to the health care legislation and on the other, Justice Kagan’s ill-advised e-mails including the memorable “I hear they have the votes, Larry!!”.

The exploration serves as a navigational guide to the difficult but necessary task of separating the shrill cries from the serious constitutional concern of genuine high court conflict. The Article situates the analysis of Supreme Court disqualification practice, and particularly the circumstances involving Justices Thomas and Kagan vis-à-vis the Patient Protection and Affordable Care Act, within the broader, enduring legal dichotomy of rules as opposed to standards. Pointing to Chief Justice Roberts’s recent, relatively bare assertion that when it comes to disqualification, the Supreme Court is simply constitutionally and pragmatically different, the Article asserts that while the Chief Justice’s argument is neither emotionally nor intellectually satisfying, in an imperfect world, his argument is also entirely correct.

Finally, and in light of constitutional structure and historical norms, the Article asserts that it is/was entirely appropriate for both Justices Thomas and Kagan not to recuse from the legal challenge to the Affordable Care Act. That said, the Article asserts that the controversies represent an important teachable moment — a moment in which the justices and the academy alike have the opportunity to elevate, rather than further denigrate, the national dialogue pertaining to high court conflicts.

INTRODUCTION

On perhaps no point of modern legal discourse can such a broad consensus as to fact, if not meaning, be forged than this: when in the hot seat, Chief Justice John Roberts turns to baseball. During his confirmation hearing before the United States Senate, Roberts famously stated: “Umpires don’t make the rules; they apply them . . . . They make sure everybody plays by the rules . . . And I will
remember that it’s my job to call balls and strikes and not to pitch or bat.”

Chief Justice Roberts’s invocation of the judge-as-umpire metaphor was far from the first such invocation, but the prodigious manner in which he deployed it rendered the metaphor a signature calling card for the swiftly-confirmed Chief Justice. Further, Chief Justice Roberts wielded the metaphor so effectively that it has become “accepted as a kind of shorthand for judicial ‘best practices.’” Scholars have noted that the metaphor’s penetration into the confirmation hearing lexicon is so profound that it has played a significant role in framing the hearings and political discourse surrounding the confirmations of now-Justices Samuel Alito, Elena Kagan, and Sonia Sotomayor.

Other scholars, however, have noted that the image of just calling “balls and strikes” but “not to pitch or bat” does not always map easily onto the Roberts Court’s jurisprudence. Still,
notwithstanding these quibbles, given the enduring effectiveness of the metaphor, perhaps it should hardly come as a surprise, that Chief Justice Roberts went back to the baseball well in the effort—which this article finds deeply meritorious—to quell a significant portion of the extreme vitriol and its self-perpetuating false controversy over Supreme Court disqualification practices.6

Beneath the title “2011 Year-End Report on the Federal Judiciary” Chief Justice Roberts wastes no verbiage—spending just three words—before invoking the national pastime. The opening paragraph of the Chief Justice’s report focuses on a decidedly non-metaphorical historical juxtaposition of baseball and judicial ethics:

In 1920, American baseball fans were jolted by allegations that Chicago White Sox players had participated in a scheme to fix the outcome of the 1919 World Series. The team owners responded to the infamous “Black Sox Scandal” by selecting a federal district judge, Kenesaw Mountain Landis, to serve as Commissioner of Baseball and restore confidence in the sport. The public welcomed the selection of a prominent federal judge to purge corruption from baseball. But Judge Landis’s appointment led to another controversy: Could a federal judge remain on the bench while serving as Baseball Commissioner? That controversy brought to the fore a still broader

framers. These are appealing but wholly disingenuous descriptions of what judges—liberal or conservative—actually do.”); Editorial, The Roberts Court Returns, N.Y. Times, Sept. 30, 2007, http://www.nytimes.com/2007/09/30/opinion/30sun1.html (“If the justices act as umpires and call balls and strikes, this term could produce some real victories in voting rights, the death penalty and civil liberties. It could result in some terrible setbacks in these areas, however, if—as critics of the Roberts court have said—the court is calling balls and strikes but has moved the strike zone far to the right.”).

question: Where do federal judges look for guidance in resolving ethics issues?⁷

Chief Justice Roberts notes that “Judge Landis resolved his situation by resigning his judicial commission in 1922 to focus all his efforts on the national pastime,”⁸ then reveals the purpose of detouring, in a 2011 year-end report, into a 1920 baseball scandal, saying: “Some observers have recently questioned whether the Judicial Conference’s Code of Conduct for United States Judges should apply to the Supreme Court. I would like to use my annual report this year to address that issue, as well as some other related issues that have recently drawn public attention.”⁹

Court observers, and particularly members of the Supreme Court Bar familiar with the Court’s relatively unfettered power to manage ministerial internal Court affairs may find Roberts’s next sentences a tad disingenuous. Roberts asserts that “[t]he space constraints of the annual report prevent me from setting out a detailed dissertation on judicial ethics. And my judicial responsibilities preclude me from commenting on any ongoing debates about particular issues. . . .”¹⁰ In terms of the ostensible space constraints, it is worth noting, as just one randomly-selected comparison, that, including the Appendix, the word count of

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Roberts’s 2011 year-end report is only slightly more than half of Chief Justice William Rehnquist’s 2000 year-end report.\textsuperscript{11} Similarly, only the most rigid of formalists could take seriously the assertion that, via the report, Roberts was not “commenting on any ongoing debates about particular issues. . . .”\textsuperscript{12} While formalism necessitates acknowledging that the Chief Justice’s report does not mention Justices Thomas and Kagan by name, Court observers have widely noted that the various references are so thinly-veiled as to leave little doubt as to their functional specificity.\textsuperscript{13} Adam Liptak’s coverage of the report in \textit{The New York Times}, for example, put it this way:

“The chief justice’s comments came in his annual report on the state of the federal judiciary. In it, he made what amounted to a vigorous defense of Justices Clarence Thomas and Elena Kagan, who are facing calls to disqualify themselves from hearing the health care case, which will be argued over three days in late March.”\textsuperscript{14}


\textsuperscript{12} Chief Justice Roberts, \textit{supra} note __, at 3.


To adapt Fitzgerald’s meme, when it comes to recusal, the justices of the United States Supreme Court are different from other jurists. As this article explains, acknowledging and/or asserting consequences of those differences is far from an uncontroversial endeavor. Indeed, the modern analogy to Colum’s dismissive, even flippant reply — that, when it comes to recusal, the only difference between the justices of the Supreme Court and other jurists is that they are justices of the Supreme Court — has substantial support.

Some of the support for what this Article dubs this “fungible” justices-are-just-judges perspective is populist, partisan, and opportunistic. On the other hand, some of the support for is deeply intellectual — grounded in the gravity of genuine conflicts of interest in the nation’s high court. Yet therein lies both the conundrum and the reason the conundrum deserves focused attention. In an increasingly caustic legal and political environment, separating the shrill cries from the serious concerns requires a nuanced consideration of historical context. While, sadly, such historical context is often found wanting in legal analyses, it is virtually always wanting—or worse, twisted—in media, including sound-bite and talk journalism, and perhaps most prominently, in blogs and social media, that, while disseminating news, double as powerful ideological echo chambers in which heat, rather than light, is the coin of the realm.

Against that backdrop, this Article seeks to contextualize the analysis of current high court conflicts issues historically, as well as vis-à-vis changes in judicial disqualification law and practice. Without intending to serve as an exhaustive cataloguing of U.S. Supreme Court disqualification doctrine, Part I of this Article identifies, collects, and describes ten of the most compelling, and in many instances, controversial recusals and non-recusals in the

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15 F. Scott Fitzgerald famously wrote: “Let me tell you about the very rich. They are different from you and me.” A decade after Fitzgerald’s turn of phrase, Ernest Hemingway, over lunch with literary critic Mary Colum, floated a trial balloon based on Fitzgerald’s line, saying, “I am getting to know the rich.” Colum tartly replied, “The only difference between the rich and other people is that the rich have more money.” Letter to the Editor, The Rich Are Different, N.Y. TIMES (Nov. 13, 1988), available at http://www.nytimes.com/1988/11/13/books/l-the-rich-are-different-907188.html.
Court’s history. Part I proceeds chronologically, facilitating parallel consideration of the two-century-long doctrinal trend of ever-heightened recusal standards.\footnote{Technically, the terms “disqualification” and “recusal” connote slightly different meanings—disqualification is mandatory, recusal is voluntary. This Article uses the terms interchangeably. In practice, the difference is greatly blurred because judges so frequently—and, in the instances involving Supreme Court justices, they always—adjudicate their own qualification to sit. Consequently, disqualification functions as recusal. See James Sample, David Pozen, and Michael Young, Fair Courts: Setting Recusal Standards, 36 n.1, BRENNAI CTR. FOR JUST. (2008), available at http://brennan.3cdn.net/1afc0474a5a53d3d0_7tm6brjhd.pdf [hereinafter “Setting Recusal Standards”].}

A combination of historical and jurisprudential factors, mixed with a modicum of self-selection, yields as its byproduct, nearly a dozen recusal controversies involving either historical giants of the Supreme Court, or landmark cases, and in many instances, each simultaneously. The scenarios selected include a who’s who of Supreme Court luminaries, John Marshall, Hugo Black, Jackson, Thurgood Marshall, William Rehnquist, Sandra Day O’Connor, Antonin Scalia, Stephen Breyer, and Ruth Bader Ginsburg. Choosing not to include clear bright line disqualification scenarios—stock ownership in a company litigating before the high court for example\footnote{28 U.S.C. § 455 (d)(4) (2012) (“‘financial interest’ means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that”); see, e.g., Catherines v. Copytele, Inc., 608 F. Supp. 1031, 1031 (E.D.N.Y. 1985)(holding under 28 U.S.C. § 455 (d)(4) the presiding judge was required to recuse himself when one of the parties to the action before him was a wholly-owned subsidiary of a company in which he owned stock).}— the Article instead trains attention on the kind of factually-intensive gray areas of real-world human interaction that, in today’s statutory disqualification terminology fall—if anywhere—solely into the 18 U.S.C. § 455 catch-all provision in which a judge must disqualify himself or herself whenever their impartiality “might reasonably be questioned.”\footnote{28 U.S.C. § 455 (a) (2012).} Finally, Part I closes with a consideration of disqualification scenarios involving U.S. District
Judge Vaughn Walker, and Ninth Circuit Judge Stephen Reinhardt ruling on yet another recent and high-profile legal controversy, California’s Proposition 8, prohibiting same-sex marriage, with the Proposition 8 scenarios, serving the interest, in this article, of offering an illustrative point of departure for comparing the disqualifications of Supreme Court justices and inferior court judges.

Part II of the article follows on the historical norms described in Part I by situating the analysis of the circumstances involving Justices Thomas and Kagan vis-à-vis the Affordable Care Act within the broader, and enduring tension between rules and standards. The article asserts, somewhat unusually for this author particularly on matters of recusal law, that Chief Justice Roberts’s analysis in his year-end statement, while unsatisfying if applied to the lower federal courts, or even to state Supreme Courts, and while the subject of scholarly and media criticism, is the correct approach. The article asserts that Chief Justice Roberts is correct to assert that it “is consequence of the Constitution’s command that there be only ‘one supreme Court’”19 that, at least when it comes to recusal, Supreme Court justices really are—and should be—different from all other jurists. Finally, the author offers his view, that based on context, it is/was entirely appropriate for both Justices Thomas and Kagan not to recuse themselves from challenge to the health care overhaul, but that they, along with similarly situated justices in the future, would serve the national dialectic well, to model the transparently reasoned, and fully-disclosed bases of “non-recusal” decisions of Justices Scalia and Ginsburg, respectively, in the scenarios applicable to each of them, described in Part I.

I. Selected U.S. Supreme Court Recusal Controversies

Chronologically, as the title of the Article suggests, the issue of high court disqualification goes back to the founding,20 and continues

to vex us in the present. That the issue has always existed, however, should not be read to imply that its existence or import has remained static. Over the last two centuries, the rather limited formal rules that apply to disqualification have expanded incrementally.\textsuperscript{21} Judicial vigilance to those expanding rules has generally waxed, even if, as is also true, that waxing has not been universal.\textsuperscript{22} Yet the public’s heightened attention to recusal, and its commensurate use as an impartiality-undermining sword, rather than an impartiality-protecting shield, is comparatively, a rather recent and dramatic development.\textsuperscript{23} If unabated, this trend will produce perceptions of false equivalencies—think, never cry wolf\textsuperscript{24}—that risk delegitimizing recusal as a due process safeguard even in precisely the defense-of-last-resort scenarios in which it is needed most.\textsuperscript{25}

A. Marshall in Marbury: Judge in His Own Case . . . and His Brother’s

gaining in complexity and strength over time” whereas “[u]nder English common law, the only accepted basis for judicial disqualification was financial interest”).


\textsuperscript{23} See generally, M. Margaret McKeown, Don’t Shoot the Canons: Maintaining the Appearance of Propriety Standard, 7 J. APP. PRAC. & PROCESS 45 (2005)

\textsuperscript{24} AESOP, AESOP’S FABLES: THE SHEPHERD’S BOY AND THE WOLF, available at http://classics.mit.edu/Aesop/fab.1.1.html (noting that when the wolf finally did come, the “boy, now really alarmed, shouted in an agony of terror: “Pray, do come and help me; the Wolf is killing the sheep”; but no one paid any heed to his cries.”).

\textsuperscript{25} See Deborah Goldberg, James Sample & David Pozen, The Best Defense: Why Elected Courts Should Lead Recusal Reform, 46 WASHBURN L.J. 503, 534 (2007) (“Invigorating recusal would help courts currently under siege to seize the high ground and recover the respect of a disenchanted public.”)
There is, of course, broad consensus, even among its many critics, that *Marbury v. Madison*\(^{26}\) “is one of the great constitutional documents of American history.”\(^{27}\) Sanford Levinson and Jack Balkin state it well: “*Marbury* is not just any case. It is a veritable symbol of judicial independence and of commitment to the Rule of Law, the hallmarks, most lawyers believe, of the United States Constitution.”\(^{28}\) That said, however, and to illustrate a point quite pertinent to the thesis of this Article, Levinson and Balkin also note that “asking students to recite the facts of *Marbury* at the beginning of their legal careers is also deeply ironic.”\(^{29}\) This is because Marbury’s “greatness” is as much a function of Machiavellian strategy as it is of law, prompting scholars to describe the case as “a political coup of the first magnitude.”\(^{30}\) Scholarly critiques of this nature have appropriately focused on the selective and strategic framing of the case, and the decision’s consequent, far from inevitable, legal rationale vis-à-vis the Court’s tenuous place in the nascent Republic.\(^{31}\)

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26 5 U.S. (1 Cranch) 137 (1803).


In addition to Marbury’s political and legal ramifications, however, the case was also stunningly personal to Chief Justice Marshall. It was personal both in terms of a direct interest in the outcome (even apart from his interests as Chief Justice) and, remarkably, in his entirely direct involvement in the factual scenario underlying the case itself. The case pitted William Marbury, a would-be justice of the peace, who claimed he was entitled to an order from the Court that President Jefferson deliver his judicial commission.”

Levinson and Balkin note that “Chief Justice Marshall takes judicial notice of the fact that Marbury’s commission was signed and sealed by the Secretary of State.” Marshall needs to take this judicial notice because the key affidavit in the case —submitted by none other than his brother James—“does not affirm that Marbury’s was among the commissions scheduled for delivery, only that [James] believed it might have been.” The inadequacy of James Marshall’s affidavit, however, was salved by a rather extraordinary convenience: James’s brother “could take judicial notice of these crucial facts for Marbury’s case.”

This was all possible—even facile—because the exact same individual who was (1) familially, James’s brother John Marshall; was (2) jurisprudentially, the newly-seated Chief Justice John

_of Judicial Review_, 12 MICH. L. REV. 538, 543 (1914) (suggesting that Marshall, on behalf of the Court, “took the engaging position of declining to exercise power which the Constitution withheld from it, by making the occasion the opportunity to assert a far transcendent power.”); David P. Currie, _The Constitution in the Supreme Court: The Powers of the Federal Courts 1801-1835_, 49 U. CHI. L. REV. 646 (1982) (“We also see in Marbury the work of a masterful tactician, for Marshall managed to lay the basis for enormous judicial power in the future by sacrificing a trivial portion of the Court’s jurisdiction in the immediate case.”).

32 Jeff Bleich & Kelly Klaus, _Deciding Whether to Decide_, 48 FED.LAW. 45, 45 (2001).

33 Levinson & Balkin, _supra_ note __, at 264 n.22.

34 Levinson & Balkin, _supra_ note __, at 264 n.22.

35 Levinson & Balkin, _supra_ note __, at 264 n.22.
Marshall, and (3) was also the recently-departed Secretary of State John Marshall “who personally affixed the Great Seal of the United States to Marbury’s commission.” Indeed, as Richard Neumann states, in one of the many quirks of the process, “when Marshall signed the commissions, he was both Secretary of State and Chief Justice.” This commingling of offices owed to the fact that Marshall took the bench on the very same day, February 4 1801, that he had received his own commission, but that President Adams “asked Marshall to continue to serve as Secretary of State until the end of the Adams administration, a month later.” Thus, with the nation in a pendulum-swinging period of political transition from President Adams to President Jefferson, Marbury’s judicial commission—while not trivial to Marbury—was inexorably intertwined not only with that much more substantial transition, but with Marshall himself. Still yet further, Marshall “was a business associate of Charles Lee, Marbury’s lawyer, involved with Lee in the purchase of the Fairfax estate manor lands, and had once offered to

36 Levinson & Balkin, supra note __, at 264 n.22.


38 Richard K. Neumann Jr., The Revival of Impeachment as a Partisan Political Weapon, 34 HASTINGS CONST. L.Q. 161, 203 & n.26 (2007) (citing ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 558-559 (1916) (“The same thing had happened once before. John Jay was both Secretary of State and Chief Justice for six months during the Washington Administration.”)

39 Robert J. Reinstein & Mark C. Rahdert, Reconstructing Marbury, 57 ARK. L. REV. 729, 739 (2005) (“Marbury v. Madison was decided during a period of great political tension in the United States. American democracy had just survived one of its greatest tests when, in the 1800 national elections, the Federalist party lost control of Congress and the presidency to the Republican party. John Adams, the Federalist President, was defeated by the Republican challenger, Thomas Jefferson, and the nation experienced its first transfer of power from one political party to another. In other nations, similar events have proved to be the occasion for a military coup, widespread arrests of political prisoners, or the outbreak of civil war; but in the case of the United States, the transfer of power proceeded peacefully.”)
buy Lee out.”

Marshall’s participation in the decision, despite the depth of his participation in the underlying controversy, was but one example of Marshall’s selective, even idiosyncratic, approach to recusal in cases involving personal, as opposed to pecuniary, relationships.

Perhaps just as pertinently for purposes of this paper, the matter cannot be fully disconnected from the deep personal antipathy between Marshall and Jefferson. Richard Neumann notes that Marshall and Jefferson behaved in surprising ways during this confrontation. For example, Marshall taunted Jefferson by dining with Burr and his lead defense lawyer at the latter’s home immediately after releasing Burr on bail. All of which lends more than just a little bit of credence to Neumann’s caveat that, in the throes of conflicts controversies, it is useful to remember that “[c]ompared with the past, the political context in which we live today is not quite what it appears to be.”

In sum, by the standards applicable today, a Supreme Court justice as conflicted as Marshall in Marbury not only would be required to disqualify himself or herself pursuant to Title 28, United States Code, Section 455, but, if he or she refused to do so, would almost certainly face impeachment, and quite probably, successful impeachment at that. Yet, in contrast, as Cliff Sloan, co-author of The Great Decision: Jefferson, Adams, Marshall, and the Battle for

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41 See Neumann, supra note __, at 165-166.

42 Neumann, supra note __, at 202.

43 Neumann, supra note __, at 166. Neumann’s point, made in discussing impeachment, as opposed to recusal, is equally apt to both.

the Supreme Court, recently told the National Law Journal, “no one objected” at the time.45

This is not to say that judicial disqualification was a complete nullity at the time of Marbury. On the contrary, and in a pattern that continues on the Court to this day, matters of judicial disqualification that fit neatly into a bright-line rules framework, as opposed to standards framework, were indeed taken seriously. Indeed, Marshall himself was notably absent in Fairfax’s Devissee v. Hunter’s Lessee,46 due to an interest he had in the land at issue.47

Nor can Marshall’s participation in Marbury be dismissed as merely the product of an isolated justice’s cavalier approach to conflict. As Sanford Levinson and Jack Balkin note, “Marshall, sitting as a circuit judge, had delivered the lower court opinion in Stuart v. Laird”48 and yet, “[f]or reasons that are unclear, he recused himself from sitting on the appeal to the Supreme Court” despite the fact that “[i]n the early days of the Republic when Justices rode circuit, it was common for them to sit in on appeals of their own decisions, just as members of circuit courts today normally do not recuse themselves when a decision they participated in is appealed to the full court en banc.”49 It warrants acknowledging here that there is not universal agreement as to whether Marshall’s recusal in Stuart was a matter, as Levinson and Balkin imply, of cautious discretion, as opposed to necessity. Louise Weinberg, for example, writes that “Marshall, of course, recused himself of necessity in Laird, because he had decided the case below while sitting on circuit.”50 Even


46 11 U.S. (7 Cranch) 603 (1813)


49 Levinson & Balkin, supra note __, at 260.

50 Weinberg supra note __, at 1265.
setting that sub-debate to the side, however, it is hard to deny that Levinson and Balkin are correct in asserting that “the juxtaposition of Marshall’s recusal in Stuart v. Laird with his notable failure to recuse himself in Marbury v. Madison is particularly striking.”

B. Justice Black and Jewell Ridge

During the Supreme Court’s October 1944 Term, the justices heard arguments and ruled in favor of mine workers in a case implicating the Fair Labor Standards Act. Following the Court’s 5-4 decision in which Justice Hugo Black joined in the majority opinion, the losing coal company filed a petition for rehearing, basing their conflict of interest argument on the fact that the miners were represented by Justice Black’s former law partner and personal lawyer. Justice Black moved to have the issue decided in a per curiam opinion, but Justice Jackson objected and filed a concurrence wherein he noted judicial discretion to recuse in the absence of statutes or advisory opinions promoting a uniform policy on withdrawing from a case.

Justice Jackson’s own thoughts on Jewell Ridge and its consequences are notable. In his biographical recounting of the case and its fallout, Jackson admits he suspected Justice Black was guilty of pressuring the Court into handing down a decision quickly in an attempt to influence contract negotiations in the mines. Justice Jackson also points to a dinner where Black was to receive an award. The sponsors of the dinner were litigants before the Court, including

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51 Levinson & Balkin, supra note __, at 260.

52 Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am., 325 U.S. 161 (1945); see also, Dennis J. Hutchinson, The Black-Jackson Feud, 1988 SUP. CT. REV. 203, 207-209 (1989) (focusing largely on Justice Jackson’s reminiscence of his time on the Supreme Court and his relationship with Justice Black).

53 Hutchinson, supra note __, at 208.

54 Jewell Ridge Coal Corp., 325 U.S. at 161.

55 Hutchinson, supra note __, at 208-209. These admissions were via now notorious cables from Nuremburg.
lawyers awaiting a decision in Jewell Ridge.\textsuperscript{56} “In Jackson’s mind, Black never left the Senate and his constituents.”\textsuperscript{57} The press was similarly exercised, with the \textit{Herald Tribune} calling for a thorough congressional investigation, and the Baltimore \textit{Sun} decrying the Court’s “abandonment” of values.\textsuperscript{58} In Jackson’s mind, the conflict of interest issues led to congressional amendments of both the FLSA as well as the Judicial Code.\textsuperscript{59}

C. \textbf{Steel Seizure Case: Keep Your Friends-on-the-Court Close}

Justice Scalia himself indicated in \textit{Cheney v. U.S. District Court for District of Columbia}, that “[a] no-friends rule would have disqualified much of the Court in \textit{Youngstown Sheet & Tube Co. v. Sawyer}, the case that challenged President Truman’s seizure of the steel mills. Most of the Justices knew Truman well, and four had been appointed by him.”\textsuperscript{60} Focusing particularly on Justice Jackson’s participation in \textit{Youngstown Sheet & Tube Co. v. Sawyer},\textsuperscript{61} more commonly known as the Steel Seizure case, Justice Jackson’s work as attorney general prior to sitting on the Supreme Court bench, along with the views he had expressed expounded on in his \textit{Jewell Ridge Coal Corp. v. Local No. 6167 United Mine Workers of America},\textsuperscript{62} concurrence raised issues of recusal.

As Attorney General to President Franklin D. Roosevelt, then-

\textsuperscript{56} Hutchinson, \textit{supra} note __, at 236-237.
\textsuperscript{57} Hutchinson, \textit{supra} note __, at 241.
\textsuperscript{59} Hutchinson, \textit{supra} note __, at 222.
\textsuperscript{61} \textit{Youngstown Sheet & Tube Co. v. Sawyer}, 343 U.S. 579 (1952).
\textsuperscript{62} \textit{Jewell Ridge Coal Corp. v. Local No. 6167 United Mine Workers of America}, 325 U.S. 897, 897 (1945) (Jackson, J., dissenting).
Attorney General Jackson had defended a very broad view of the President’s seizure power. More specifically, the government in Youngstown primarily relied on the seizure of the North American Aviation Company in 1941 by the Roosevelt administration while Justice Jackson served as attorney general. The Roosevelt administration justified the seizure of the North American Aviation Company by pointing out the Communist involvement of the labor movement and by asserting that the “strike was an act of Communist subversion.” Justice Jackson addressed this in his concurring opinion in Youngstown by suggesting that the similarities between Roosevelt’s and Truman’s seizures were “superficial,” distinguishing Youngstown by noting that the Roosevelt seizure was consistent with congressional policy, and the existence of a government contract and government property at the company.

In addition to Justice Jackson’s duties during his tenure as attorney general, he placed particular pressure on himself in Youngstown when he criticized Justice Black’s refusal to disqualify in Jewell Ridge. In their petition for rehearing, the coal company in Jewell Ridge mentioned the impropriety of Justice Black’s participation in the majority opinion on the ground that the miners were represented by Black’s former law partner. In the Court’s opinion denying rehearing, Justice Jackson’s concurrence acknowledged that there was no legislation that directly dictates the grounds under which a Justice must be disqualified, and therefore the Justices themselves are responsible for determining whether

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66 Youngstown, 343 U.S. at 649 n.17 (Jackson, J., concurring).
67 Hutchinson, supra note __, at 208.
disqualification is appropriate in any particular case. He also indicated, however, that “[p]ractice of the Justices over the years has not been uniform, and the diversity of attitudes to the question doubtless leads to some confusion as to what the bar may expect and as to whether the action in any case is a matter of individual or collective responsibility.”

According to Dennis J. Hutchinson’s recount of the feud between Justice Jackson and Justice Black, Justice Jackson refused to merely issue a per curiam decision and drafted a concurring opinion so as to “nominally dissociat[e] himself from the merits of the ruling and implicitly criticiz[e] Black for hiding behind the denial and not facing the music.”

Justice Jackson, therefore, considered disqualifying himself from the Youngstown case because of the recusal controversies of the Court, which were largely self-created, and his prior work as attorney general. In a draft opinion of his Youngstown concurrence, Justice Jackson “wrote one and a half pages justifying his decision not to recuse: ‘[c]andor requires me to state that I have considered whether I should sit in this case . . . .’” In an even later draft, Justice Jackson further addressed his potential disqualification: “Such a role [in the FDR seizures] might suggest withdrawal from this case. Having weighed all of those considerations, I have concluded instead that I may contribute some teachings of practical experience tempered by a decade of detached reflection.” In the published concurrence, Justice Jackson prefaces his analysis by stating:

> That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal

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68 Jewell Ridge Coal Corp. v. Local No. 6167 United Mine Workers of America, 325 U.S. 897, 897 (1945).

69 Jewell Ridge Coal Corp. v. Local No. 6167 United Mine Workers of America, 325 U.S. 897, 897 (1945).

70 Hutchinson, supra note __, at 208.

71 See Swaine, supra note __, at 278.

72 White, supra note __, at 1129-30.

73 White, supra note __, at 1130 (internal quotation marks omitted).
adviser to a President in time of transition and public anxiety. While an interval of detached reflection may temper teachings of that experience, they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction. But as we approach the question of presidential power, we half overcome mental hazards by recognizing them.74

Justice Jackson thus acknowledged at the very start of his opinion the influence that his prior position as attorney general has had on his views. However, he attempted to assuage concerns of impropriety by suggesting his recognition of its influence had assisted him in partially overcoming it.75

Justice Jackson is not the only Justice whose participation in Youngstown raised potential recusal issues – Chief Justice Vinson, a close friend and appointee of President Truman, had assured President Truman that seizing the mills was within his prerogative and was constitutional.76 Much like Chief Justice Vinson, Justice Clark had also encouraged the constitutionality of the seizure during his tenure as attorney general.77 In 1949, then-Attorney General

74 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).
75 See Swaine, supra note __, at 277-79.
76 See Swaine, supra note __, at n.65 (noting that Chief Justice Vinson had allegedly met with President Truman privately to consult him on the seizure); GARY WILLS, BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE (2010); Jeremy M. Miller, Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance), 33 PEPP. L. REV. 575, 590 (2006); MELVIN I. UROFSKY, DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941-1953 209 (1997). Interestingly, another anecdote illustrating the close personal relationship of Chief Justice Vinson and President Truman is their frequent visits and poker games. JAMES E. ST. CLAIR & LINDA C. GUGIN, CHIEF JUSTICE FRED M. VINSON OF KENTUCKY 190-91 (2002) (illustrating in detail how President Truman routinely sought the Chief Justice’s advice on partisan and other matters).
Clark, in support of a bill to repeal of the Taft-Hartley Act, asserted that the president had implied constitutional power to seize facilities subject to strike. Justice Clark, unlike Chief Justice Vinson, joined the majority finding in favor of the steel companies. While considering the competing interests, Justice Clark met with Chief Justice Vinson and promised the Chief Justice that he would join the majority if three other Justices voted in favor of the seizure. Although Justice Clark was a loyal friend to President Truman, once it became clear that only Chief Justice Vinson and Justices Reed and Minton would vote to uphold the seizure, Justice Clark joined the majority and found in favor of the steel companies on the ground that President Truman had not followed the procedures set forth in Taft-Hartley. After the Youngstown decision, President Truman was most outraged by Justice Clark’s siding with the majority, claiming later that appointing “that damn fool from Texas’ [to] . . . the Supreme Court was the biggest mistake he had made as President . . . ”

D. Thurgood Marshall: The Epitome of Self-RestRAINT?

Nominated to the bench by President Lyndon B. Johnson in 1967, Justice Thurgood Marshall was the first African-American Associate Justice appointed to the United States Supreme Court.

80 See WESTIN, supra note __, at 190; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 660-667 (1952) (Clark, J., concurring).
Marshall, along with Chief Justice Warren and Justice Brennan, the “leaders of the liberal wing,” gave the Court a “solid bloc of five liberal Justices.”83 Prior to his appointment to the Court, Marshall had made a significant mark in the nation’s civil rights jurisprudence as a practicing attorney. After first establishing a one-man private practice in Baltimore,84 just three years after receiving his law degree from Howard University in 1933, Marshall joined the team of staff attorneys in the NAACP’s legal office.85 In 1938, Marshall became the NAACP’s lead chair, and within two short years he earned the title of Chief Counsel of the NAACP Legal Defense and Educational Fund.86

As successor to and protégé of Charles Hamilton Houston, NAACP’s first Special Counsel, colloquially known as “The Man Who Killed Jim Crow” and “Moses of the civil rights movement” for his integral role in dismantling the Jim Crow laws,87 Thurgood Marshall sustained the NAACP’s legal campaign to end segregation.88 Through the mid-1940s, Marshall advocated

83 Tushnet, supra note __, at 2121 (“The potential for sustained liberal control of the Court that Marshall’s appointment may have promised was not realized. . . . James J. Kilpatrick lamented the appointment because it would ‘upset the rough balance of liberalism and conservatism that recently has prevailed upon the high tribunal’ and would place ‘the judicial activists . . . in full control. . . .’ Marshall’s appointment would not skew the Court as much as Kilpatrick and others expected.” (citing James J. Kilpatrick, Marshall’s Appointment Upsets Court Balance, WASH. SUNDAY STAR, June 18, 1967)).

84 See Tushnet, supra note __, at 2111.


numerous cases that expanded the rights of African Americans by collapsing “white primaries” in several southern states,\textsuperscript{89} successfully challenging state laws that enforced segregation on interstate buses and trains,\textsuperscript{90} ending the judicial enforcement of racially restrictive covenants,\textsuperscript{91} and striking down Texas and Oklahoma laws requiring segregated graduate schools.\textsuperscript{92} Each of these landmark cases, independently momentous in their own right, culminated in one of the NAACP’s most significant legal victories and Marshall’s greatest achievement as lawyer—\textit{Brown v. Board of Education}.\textsuperscript{93}

Until retiring from the Supreme Court in 1991, Marshall, in the words of Mark Tushnet, a leading authority on Marshall’s life and work,\textsuperscript{94} “embodied the tradition of the lawyer-statesman.”\textsuperscript{95} Similarly, Anthony Kronman notes that while Justice Marshall was “devoted to the public good,” he was also “keenly aware of the


\textsuperscript{90} See Morgan v. Virginia, 328 U.S. 373 (1946).


limitations of human beings and their political arrangements.” As such, Marshall made it his judicial responsibility to be both mindful of all those concerned yet removed enough to avoid being “swept along by the tide of feeling that any sympathetic identification with a particular way of life . . . can arouse” such that he, as dutiful lawyer-statesman, may be sufficiently impartial and “withdraw to the standpoint of decision.” On the bench, this inherent tension in Marshall’s sense of commitment and oblige was uniquely manifest in the instances in cases involving the NAACP before the nation’s high court.

Various scholars and media reporters have on occasion referenced Thurgood Marshall’s commitment to recuse himself in all cases involving either the NAACP or the NAACP Legal Defense Fund. However, Marshall’s “categorical self-restraint” has, in fact,

97 Kronman, supra note __, at 72.
been peppered with instances of his participation in such decisions. Marshall contributed to the opinions of several NAACP cases as early as 1974, reading “both the Code of Judicial Conduct and advisory opinions to the Code [to] make clear that judges and justices are free to hear argument, where former law firms are counsel, as long as the matter was not in the office when the judge was there, and as long as the judge no longer receives remuneration from the law firm he has left.” Dissenting in *Milliken v. Bradley*, Marshall conspicuously shared his judgment that the Court’s reversal of the lower court’s remedy, (sought by the Detroit branch of the NAACP), to state-imposed segregation, “emasculat[es] our constitutional guarantee of equal protection.”99  

99 *Milliken v. Bradley*, 418 U.S. 717, 782 (1974) (Marshall, J., dissenting); see Davies, *supra* note __ (Marshall’s participation in *Milliken* was not) difficult to detect. He was active at oral argument, and even read aloud an abbreviated version of his opinion when the Court handed down its decision.

The very next year, Marshall joined the opinions of Justice Potter Stewart and Justice Brennan in *Meek v. Pittenger*, in which the appellants, including the NAACP, claimed that a Pennsylvania statute violated the U.S. Constitution’s establishment clause.100


Marshall began a memorandum to the other Justices, dated October 4, 1984, explaining his historic pattern to “routinely disqualif[y] [him]self from all cases in which the NAACP has participated as a party or as an intervenor” since his appointment to the bench.101 Marshall followed that claim with the declaration that his “continued adherence to this self-imposed blanket rule [wa]s no longer necessary” as the 40-plus years since his ties with NAACP were severed has “remove[d] any perceived or actual impropriety that might have attended [his] participation in cases involving the

NAACP. All eight of Marshall’s colleagues voiced their agreement that the distancing effect of time has evaporated any basis for the categorical rule to “quell any appearance of impropriety.” Shortly after “abandoning any pretense of routine recusal,” Marshall joined the majority opinions in *NAACP v. Hampton County Election Commission* (1985) and in *Davis v. Bandemer* (1986), and continued to participate in NAACP cases where he believed his “prior affiliation [did not] create a reasonable appearance of impropriety.”

E. Justice Rehnquist

In *Laird v. Tatum*, a group of anti-war activists challenged the constitutionality of the Army’s domestic surveillance program, which was seen as the Nixon Administration’s attempt to keep a close watch on the activities of American dissidents. Rehnquist sided with a 5-4 majority in finding the issue in *Laird* to be

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102 Marshall Memorandum, *supra* note __.
103 Marshall Memorandum, *supra* note __.
104 Davies, *supra* note __.
nonjusticiable.\textsuperscript{110} Respondents in \textit{Laird} sought Justice Rehnquist’s disqualification based on his leadership role in the Justice Department’s Office of Legal Counsel to the White House at the time the administration instituted the surveillance program,\textsuperscript{111} and the expert testimony he gave before a Senate Committee as an Assistant Attorney General on the very issue before the Court.\textsuperscript{112}

Rehnquist based his denial of the motion to recuse in part on a reading of the governing disqualification statute,\textsuperscript{113} as well as on his observations that federal courts of appeals have consistently identified a federal judge’s “duty to sit”.\textsuperscript{114} For Rehnquist, the Supreme Court has an even stronger duty for, unlike a district court judge, there is no substitute for a justice,\textsuperscript{115} and the “undesirability” of having an affirmation of the judgment below by a 4-4 Court is reason for not “bending over backwards” to disqualify oneself.\textsuperscript{116}

Two years after \textit{Laird}, Congress amended the statute governing disqualification to prohibit a judge from hearing a case in which his or her “impartiality might reasonably be questioned.”\textsuperscript{117} Rehnquist took notice of the amendment and—years later as Chief Justice—remarked on Congress’ intent to change “the previous subjective

\textsuperscript{110} Laird v. Tatum, 408 U.S. 1 (1972). The Court ordered the lower court to dismiss the complaint, effectively foreclosing any possible discovery on Rehnquist’s role in the surveillance program. Stempel, \textit{supra} note __, at 593.

\textsuperscript{111} Rehnquist’s position in the office led the \textit{Laird} respondents to assume the Justice would disqualify himself. Stempel, \textit{supra} note __, at 592.


\textsuperscript{113} Before its amendment two years after \textit{Laird}, the disqualification statute required only that a justice disqualify himself when “he has a substantial interest, has been of counsel, is or has been a material witness, or is so related . . . as to render it improper, in his opinion, for him to sit. . . .” 28 U.S.C. § 455 (2000).

\textsuperscript{114} \textit{Laird}, 409 U.S. at 837.

\textsuperscript{115} \textit{Laird}, 409 U.S. at 837.

\textsuperscript{116} \textit{Laird}, 409 U.S. at 837-838.

\textsuperscript{117} 28 U.S.C. § 455(a); Ifill, \textit{supra} note __, at 616.
standard for disqualification to an objective one.”\textsuperscript{118} However, at the time the Court was deciding \textit{Laird}, Canon 3(c) of the Model Code of Judicial Conduct had already included the objective standard that was soon to become a part of the statute.\textsuperscript{119} Rehnquist dismissed the Model Code’s provisions as being “materially different” from the statutory standards, thus foreclosing their consideration.\textsuperscript{120}

Rehnquist’s approach in denying the \textit{Laird} motion has been criticized for, among other things, mischaracterizing his role in the legal oversight of the surveillance program and misstating the applicable legal standard.\textsuperscript{121} Scholars have also taken issue with Rehnquist’s dismissal of the Model Code’s provisions, finding that the code and the disqualification statute “were far from identical”.\textsuperscript{122} Rehnquist’s approach also presents the predicament of allowing a justice to decide for her or himself whether or not they should recuse.\textsuperscript{123}

While the \textit{Laird} motion to recuse was based on Rehnquist’s involvement with the domestic surveillance issue as an AAG, one scholar looking at the totality of the surveillance cases involving the Nixon Administration argues that Rehnquist’s decisions to recuse in those cases—or not—were dependent upon whether Attorney

\textsuperscript{118} Liljeberg v. Health Servs. Acquisitions Corp., 486 U.S. 847, 872 (Rehnquist, C.J., dissenting). Despite the amendments to overturn Rehnquist’s “duty to sit” doctrine, his reasoning in \textit{Laird} is still popular among federal judges. Ifill, \textit{supra} note __, at 618-619.

\textsuperscript{119} Ifill, \textit{supra} note __, at 618 n.62 (citing \textit{MODEL CODE OF JUDICIAL CONDUCT} Canon 2 (1972)).

\textsuperscript{120}\textit{Laird}, 409 U.S. at 825.

\textsuperscript{121} Stempel, \textit{supra} note __, at 599-604.


General John Mitchell appeared as a party individually or as an attorney for a client.\textsuperscript{124} The argument is based in part on a memorandum Rehnquist distributed to the Court in 1981 explaining why he was sitting on the sidelines in \textit{Kissinger v. Halperin}.\textsuperscript{125} A generous reading of this memo would find both consistency in Rehnquist’s Nixon recusals and non-recusals, and evidence that Rehnquist took the recusal issue seriously enough to explain his decisions to the other justices.\textsuperscript{126} But nine years earlier when \textit{Laird} was before the Court, Justice Rehnquist failed to discuss AG Mitchell’s participation as a factor in his very public justification to participate in the case.

F. \textbf{Justice Scalia}

In the 2004 case of \textit{Cheney v. U.S. Dist. Ct., Dist. Of Columbia},\textsuperscript{127} Vice President Cheney was the named party in an official action lawsuit concerning the National Energy Policy Development Group, of which the Vice President, along with cabinet members and other federal employees, was a member.\textsuperscript{128} The Sierra Club, a party to the consolidated action, filed a motion to recuse Associate Justice Antonin Scalia on the grounds that his friendship with Vice President Cheney had caused “the American public, as reflected in the nation’s newspaper editorials, [to] unanimously [conclude] that there [was] an appearance of favoritism . . . .”\textsuperscript{129} The Sierra Club argued that, by way of public opinion, Justice Scalia’s


\textsuperscript{125} Memorandum from William H. Rehnquist to the Conference, Re: No. 79-880 Kissinger v. Halperin (May 27, 1981); Samahon, \textit{supra} note __, at 207.

\textsuperscript{126} Samahon, \textit{supra} note __, at 206.

\textsuperscript{127} 541 U.S. 913 (2004).

\textsuperscript{128} 541 U.S. at 917-18.

impartiality “might reasonably be questioned,” thus satisfying the standard for recusal of Supreme Court Justices.\textsuperscript{130}

The precise incident that predicated the motion to recuse was a duck-hunting trip attended by both Justice Scalia and Vice President Cheney.\textsuperscript{131} Justice Scalia invited the Vice President to a yearly hunting camp hosted by a close friend who had expressed admiration for the Vice President.\textsuperscript{132} The hunting trip occurred previous to the Court granting certiorari in the case in question and, in fact, before the petition for certiorari was ever filed.\textsuperscript{133}

Justice Scalia accepted passage for himself, his son, and his son-in-law from Washington to Louisiana, the location of the hunting camp, on Air Force Two, Vice President Cheney’s government jet.\textsuperscript{134} However, as Justice Scalia was not returning with the Vice President, he and his family purchased round trip tickets for their return trip since round trip tickets cost less than one-way tickets.\textsuperscript{135} Justice Scalia asserted that the trip in Air Force Two resulted in absolutely no net financial gain and that the invitation was accepted only out of convenience.\textsuperscript{136}

Justice Scalia’s assurances concerning the monetary value of the flight aside, acceptance of a gift is relevant to the impartiality of a


judge, and an “obvious recusal factor.” The relevant standard under 28 U.S.C. § 455(a), the federal disqualification statute, is whether a Justice’s impartiality might reasonably be questioned. Section 455(a) expressly applies to the Supreme Court. Indeed, Justice Scalia has previously recused himself for receiving airfare reimbursement from a party before the Court.

Justice Scalia admits that he and Vice President Cheney were together on the flight, the car ride from the airport to the dock, and the boat ride to the lodge. The Justice asserts, however, that during the trip he was not alone with Vice President Cheney for any appreciable amount of time. All meals were in common, he hunted in a different blind than Vice President Cheney, and the Vice President had a private bedroom. According to Justice Scalia, any alone time with Vice President Cheney was “so brief and unintentional that [he] would not recall them – walking to or from a boat, perhaps, or going to or from dinner.”

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forthrightly denies speaking with the Vice President about the case.\footnote{146} Under § 455(a), however, the veracity of a Justice’s statements is irrelevant, because the query of whether impartiality might reasonably be questioned is left unanswered.\footnote{147} Justice Scalia’s “trust us rationale” simply undervalues the import of friendship in the recusal calculus and runs roughshod over public perception.\footnote{148} Despite Justice Scalia’s denial of impropriety, a reasonable person might question whether ex-parte communications may have transpired on the various planes, trains, and automobiles.\footnote{149} Justice Scalia responded to the accusations of potential favoritism by highlighting the difference between a lawsuit against a private party and an official action lawsuit. Where friendship may be grounds for recusal in the first instance, it is not in the latter instance.\footnote{150} Per Justice Scalia, a recusal standard that mandated a Supreme Court justice to remove him or herself in official action cases involving friends would severely debilitate the Court, as its members are often in the same social circles as members of government.\footnote{151} Additionally, although the decisions of Vice President Cheney may be at issue in the official action suit, the results would have no effect on his “reputation and integrity . . . .”.\footnote{152}
Thus, any incentive for Justice Scalia to exhibit partiality for his friend is missing.

According to Monroe Freedman, however, the matter before the Court was “not a routine administrative matter.”\textsuperscript{153} The issue before the Court, in fact, was whether Vice President Cheney, the chair of the National Energy Policy Development Group, had lied about the composition of the advisory group.\textsuperscript{154} Thus, Vice President Cheney’s “reputation and integrity,” contrary to Justice Scalia’s assertion, could not have been more at risk, especially in an election year.\textsuperscript{155} To wit, the Vice President, as an acknowledged friend of Justice Scalia’s,\textsuperscript{156} personally was significantly more invested than a generic government official who is named the pro forma party in a run of the mill administrative law matter.\textsuperscript{157}

Justice Scalia also clarifies that the question of whether a Justice’s impartiality “might reasonably be questioned” is to be appraised “from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.”\textsuperscript{158} Through a demonstration of the media’s inaccuracies concerning both his relationship with the Vice President and with the law underpinning judicial recusal, Justice Scalia reasonably asserts that the sentiment of the national media, as a proxy for the American public, cannot be


the guidepost for whether a Supreme Court justice should recuse him or herself. However, the Justice’s list of inaccuracies and mischaracterizations are simply not materially prejudicial to the analysis. Even “all the surrounding facts and circumstances” that the Justice presents could lead a reasonable person to question his impartiality in the case. Instead, Justice Scalia has re-framed the focus of the inquiry onto the media and its failings, asking the American public to believe that the editorialists of 8 out of 10 of the newspapers with the largest circulation in the United States and 20 of the 30 largest newspapers are simply unreasonable.

True to form, Justice Scalia finishes his memorandum with a flourish: “If it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined.” Unfortunately, Justice Scalia’s rhetoric continues to shift the frame of focus away from whether his impartiality might reasonably be questioned by the American people to his perception of the unreasonableness of the American people. Justice Scalia is fond of decrying what he calls the “law profession culture” and how it has infected the Supreme Court, resulting in the Court supplanting its own ideology for that of the American public. The Justice should take a page from his own book, and drop the “father knows best” tone. This “trust us” because “Washington officials know the rules” rationale does nothing to alleviate the fear of unchecked power in the hands of a few. The “appearance of impropriety” standard was formulated to alleviate this very fear.

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G. Justice Ginsburg

In 1972, the ACLU Women’s Rights Project was forged, under the leadership of Ruth Bader Ginsburg, to remove “artificial barriers” to men and women standing equal before the law. In 1973, Ginsburg became General Counsel to ACLU and, one year later, joined the Board of Directors. In her role as an attorney for the ACLU, Ginsburg authored briefs and delivered oral arguments in seminal U.S. Supreme Court cases such as Reed v. Reed, which extended the Equal Protection guarantee to women for the first time in the nation’s history, and Frontiero v. Richardson, which fell just one vote short of applying strict scrutiny to gender discrimination. In Weinberger v. Wiesenfeld, Ginsburg argued for the application of intermediate scrutiny to sex discrimination. The Women’s Rights Project filed an amicus brief to the Supreme Court in General Electric Co. v. Gilbert, and while its argument that pregnancy discrimination should be treated as sex discrimination was ultimately rejected by the Court, its efforts led to the passage of the Pregnancy Discrimination Act codifying just that.

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164 Caprice L. Roberts, The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort, 57 Rutgers L. Rev. 107, 120 (2004). (“It is unchecked corruption, especially those in power, which is precisely the fear of the citizens.”).


In 1980, Ginsburg’s work as a litigator for the ACLU came to an end as she was appointed a judge of the United States Court of Appeals for the District of Columbia Circuit. On August 10, 1993, Ginsburg took her seat as an Associate Justice of the Supreme Court after being nominated by President Clinton. On the bench, Justice Ginsburg authored the opinion in *United States v. Virginia et al.*, rejecting the arguments advanced by the Virginia Military Institute (VMI) in support of its male-only admissions policy, on the ground that VMI failed to provide an “exceedingly persuasive justification” for the sex-based discrimination.172

Of particular pertinence and interest for purposes of this article, it is worth comparing the huge, though diffuse, impact of the case for women’s rights — the cause that defined much of Justice Ginsburg’s pre-judicial career, with the trivial, but concentrated, interest in the case of Justice Clarence Thomas’s son, who was then enrolled at VMI. Linda Greenhouse, writing at the end of the Supreme Court term captured this simply:

> In its most important sex-discrimination case in years, the Court ruled 7 to 1 that the men-only admissions policy at V.M.I., a state-supported college, was unconstitutional and that the alternative program the state had devised for women was an inadequate substitute for admitting women to the military college, which is 157 years old. The Court applied a searching standard that Justice Ginsburg called "skeptical scrutiny" in deciding the case.

> Justice Ginsburg wrote the majority opinion, which got six votes, and Chief Justice Rehnquist concurred in a separate opinion. Justice Scalia dissented. Justice Thomas’s son attends V.M.I., so he did not participate in the case.173


The above comparison is not meant to imply that Justice Ginsburg’s decision was incorrect. Nor is the contrast meant to imply that Justice Thomas’s recusal was anything but an easy case — it was precisely that.\textsuperscript{174} Rather, the comparison highlights a recurring paradox of recusal, and one that is most commonly applicable to nominal pecuniary interests — bright-line rules frequently include within their ambit, mandated disqualification in circumstances involving relatively minimal interests, while these same overinclusive bright-line rules are underinclusive as applied to many circumstances in which the interests are, at least arguable, substantially more compelling.

An ACLU tribute to Ginsburg’s WRP work and that of her staff and successors reflects that Ginsburg’s interest in the advocacy aspects of the pursuit of gender equality were not extinguished when she joined the bench. One anecdote — trivial in itself — is noteworthy for its striking resemblance to the congratulatory e-mails of then-Solicitor General Elena Kagan, discussed \textit{infra}.\textsuperscript{175} Mary Heen, a staff attorney at WRP in the early 80s, tells the story: “Ginsburg was appointed to the U.S. Court of Appeals in 1980 before I began as a staff counsel at the ACLU [thus] I never had the opportunity to work with her. However, she sent me a brief note after seeing a letter to the \textit{New York Times} I had written arguing for the elimination of sex discrimination in insurance. It was a

\textsuperscript{174} \textit{See, e.g.}, \textsc{Model Code of Judicial Conduct} Canon 2, R. 2.11(A)(3) (2010) (“A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including [when the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or is a party to the proceeding.”).

\textsuperscript{175} \textit{See infra} Part III.B.
generous and encouraging thing for her to do, and it meant a lot to me to receive it from her.”

Navigating the shoals of that kind of continued personal support for women’s issues only became more challenging after Ginsburg ascended from the D.C. Circuit to the Supreme Court in 1993. In March 2004, thirteen Republican members of Congress asked Justice Ginsburg to “withdraw from all future cases having to do with abortion because of her affiliation with the NOW Legal Defense and Education Fund.”

A Boston Globe columnist, after criticizing Justice O’Connor for what the columnist viewed as excessively warm and “wistful” remarks regarding President Reagan and how Justice O’Connor hoped that Reagan, had he been a live, might have viewed her decisions, demonstrates a striking degree of free association when it comes to recusal scenarios:

There is no question, however, that O’Connor revealed far less of her thinking than her colleagues Antonin Scalia and Ruth Bader Ginsburg have done.

Put aside Scalia's duck-hunting trip with Vice President Dick Cheney and his refusal to recuse himself from a case involving Cheney's energy task force. . . [a] year ago, while the court considered the legality of a Texas law criminalizing sodomy, Scalia gave an unpaid speech to the Urban Family Council of Philadelphia, a group dedicated to overturning gay rights.

Meanwhile. . . Ginsburg, a Clinton appointee, lent her name and presence to the National Organization for Women Legal Defense and Education Fund, which created a Justice Ruth Bader Ginsburg Distinguished Lecture Series.

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Ginsburg, in refusing to recuse herself from cases in which the NOW defense fund took an interest, said of the lectureship: "I think and thought and still think it's a lovely thing. Let the lecture speak for itself."

But since the NOW defense fund is one of the nation's leading supporters of abortion rights, it's not hard to know what the lecture will say: Protect and preserve a constitutional right to abortion.\(^{178}\)

On January 29, 2004, a mere fifteen days after Ginsburg voted in favor of an opinion that challenged a state's duty to provide medical screening for low-income children, consistent with the position of NOW's legal defense fund’s amicus, Justice Ginsburg introduced the advocacy group’s lecture series, curiously – to the GOP lawmakers – titled 4th Annual Ruth Bader Ginsburg Distinguished Lecture Series on Women and the Law.\(^{179}\)

In their letter to Justice Ginsburg, the representatives voiced concern that her endorsement of the series would “call into question [her] ability to rule with impartiality on any case involving abortion.”\(^{180}\) The GOP perspective was one that, even if born of partisan interests, was met with amply credentialed non-partisan support. One of the chief progenitors of the modern field of legal ethics, Monroe Freedman,\(^ {181}\) pointedly agreed: “this crosses the


\(^{180}\) GOP Lawmakers Ask Ginsburg to Withdraw from Abortion Cases, supra note __.

\(^{181}\) Freedman’s contributions to legal ethics earned him the American Bar Association’s highest award for professionalism in recognition of “a lifetime of original and influential scholarship in the field of lawyers’ ethics” and he has been described by the New York Times as “a pioneer in the field of legal ethics,” and in the Harvard Law Bulletin as “a lawyers’ lawyer.” See ABA Michael Franck Award
According to Freedman, justices should "draw the line at cause-oriented litigation organizations. . . . The NOW legal defense fund is an advocacy group that appears regularly before the [Supreme] Court. That's why they exist — to litigate these issues. So the linking of that organization with a justice is a problem." Pennsylvania Law Professor Geoffrey Hazard was slightly more guarded, but nonetheless cautioned: "It is not illegal, but as a matter of judgment I would say appearing before the NOW legal defense fund is inappropriate. It is a demonstration of an affiliation."

According to Freedman, absent recusal, it is precisely that "demonstration of an affiliation" that produced a win-win for NOW, and Justice Ginsburg — but a loss for the public’s faith in the rule of law.

"It's something that is extremely important to this group. They put them together on their website because it's important to their membership and for their fundraising. It says something for them if Justice Ginsburg is associating with them. It also says something that a justice of the Supreme Court should not say."
As noted in the *Boston Globe* excerpt above, Justice Ginsburg, in a step that is hardly a given in the context of Supreme Court justices, chose to respond directly and specifically to the criticisms regarding the lecture series: “It is not a money-making enterprise. I think and thought and still think it's a lovely thing. Let the lecture speak for itself.”\(^{186}\) Even if one draws the line with respect to the lack of a direct pecuniary interest attached to the lecture, it does not mean that Justice Ginsburg had completely severed herself from NOW’s fundraising endeavors. For example, she provided items for NOW auctions, including, notably, what the auction catalog pitched as a “[c]omplete copy of the historic 1996 *United States v. Virginia*, Supreme Court decision which declared it unconstitutional male only admissions to the Virginia Military Institute signed by Supreme Court Justice Ruth Bader Ginsburg.”\(^{187}\)

In a lecture to law students at the University of Connecticut at Hartford in March 2004, Justice Ginsburg spoke forthrightly in attempting to minimize the specific matter. Her words, however, arguably minimized the seriousness of the more general concern by asserting that any apparent controversy was actually just a manufactured byproduct of the sometimes false neutrality of an one-hand-on-the-other-hand media approach.

I don't know where all this is going to lead. I think the *Los Angeles Times* was attempting to appear unbiased. Justice Scalia had been criticized recently for speaking to a group alleged to have supported a measure in Pennsylvania to ban civil unions for gay people. . . . That criticism came from one side of the political spectrum. The next day or so the article about me appeared. It concerned an annual lecture bearing my name. Four years ago, the Bar Association of the City of New York established a Ruth Bader Ginsburg lectureship, co-sponsored by the NOW Legal Defense

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\(^{186}\) Jennings & Razook, *supra* note __.

Fund. Every year, on the date of the lecture, the Great Hall at the City Bar is filled largely by law students from all over town, a spirit-lifting audience for me and other older folk in attendance. It is not a money-making enterprise. The first speaker was Kathleen Sullivan, the next one, Madeleine Albright. I was called yesterday by the Executive Director of the City Bar. She was distressed about the news account. She said the reporters called the Court, they called the NOW Legal Defense Fund, but “No one asked us what we thought of this, and we are the prime movers in this lectureship!”

When our public information officer told me of the question the Los Angeles Times reporter wanted to put to me, I responded: Here are my remarks—the introductory remarks—I’ve made at these lectures. They are short, and can be read and digested easily by reporters interested in understanding the nature of my participation. And the City Bar audiotapes the entire proceedings. I was confident the City Bar would make the tapes available to the reporter. But the reporter apparently wasn’t interested in those materials, that is, in the substance of the lectures. I believe the recorded lectureship speaks for itself. Would anyone who actually read or listened to the proceedings find them problematic? Probably not, I suspect.188

To be sure, and to be fair to the reporter whom Justice Ginsburg references, whether the substance of the lectures — delivered by others being honored by NOW and who, in turn, give the lectures in honor of Justice Ginsburg and NOW — would actually mitigate the perception problem is at best a matter of subjective judgment on which reasonable people disagree. Having now listened to several of

the lectures, and based solely on intuition in the absence of empirical data, it seems quite likely, that the substance of the lectures, along with the corresponding introductions and references to matters of commitment to “gender equity” and of “working to eliminate gender bias in our laws and in our courts” would, if examined by critics and supporters alike, serve merely to reinforce those pre-existing positions.

For her part, Justice Ginsburg not only did not back down from the controversy, but seemed almost to strain in order to continually raise the issue anew — for the purpose of knocking it down, at least from her perspective. For partisans, however, Justice Ginsburg’s comments proved a gift. Take Jed Babbin, deputy undersecretary of defense in the George H.W. Bush administration, turned contributing editor of *The American Prospect*. Writing in September, 2005 (shortly after the confirmation hearings of John Roberts as Chief Justice, and prior to the nomination of Samuel Alito), Babbin reflected on then-Senator Joe Biden’s assertion, regarding the

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191 As an aside, perhaps the most compelling anecdote in those lectures comes from *National Public Radio*’s Supreme Court correspondent, Nina Totenberg. At approximately the 23 minute mark of the following link, Totenberg remarks:

Moving from business to law, it’s a lot easier to spot the icons of our times. They are clearly the first two women to serve on the Supreme Court, Sandra Day O’Connor and Ruth Bader Ginsburg. . . . In the thirteen years that these two women served together, not a single year went by when [no] leading male lawyer at oral argument confused the two — calling one by the other’s name and in case you haven’t noticed, they don’t really look anything alike.

importance of Judge Roberts’s confirmation hearings based on the premise that, “after his confirmation, there would be no way to hold him accountable in his lifetime on the high court.” According to Babbin, “Sen. Biden obviously didn’t know about Title 28, United States Code, Section 455. Which brings us to Justice Ruth Bader Ginsburg and the aforementioned law that bars her from voting in the cases nearest and dearest to her ideology.” Note that if it were a remotely fair representation of § 455 to claim that justices were barred from voting in all cases “nearest and dearest” to their respective ideologies, so many absurd results would obtain for each of the justices as to render the section a nullity.

Nonetheless, and despite Babbin’s dearth of rigor and excess of dudgeon, it’s hard to argue that Justice Ginsburg, speaking on the occasion of the 2005 lecture series that gave rise to the controversy, certainly did her part to provide critics with new material. In Babbin’s framing at the time, Justice Ginsburg, “Speaking to the New York Bar Association . . . Ginsburg delivered herself of comments that were entirely political and -- more importantly -- prove beyond a doubt that she has no intention of approaching certain cases impartially.” Babbin’s basis for that contention is that Ginsburg, speaking at the NOW series, “said that the president should nominate a ‘fine jurist’ to replace Sandra Day O’Connor, and that she -- Ginsburg -- had ‘a list of highly qualified women.’"
Realistically, however, it was Ginsburg’s next comment that lends at least a veneer of substance to Babbin’s critique:

Ginsburg has her list of prospective women nominees, because, as she said, the president must be particular to choose which woman, and just “any woman will not do.” She said there are “some women who might be appointed who would not advance human rights or women's rights.” Advance. Not interpret. Not apply the Constitution according to its principles to protect. Advance. Ginsburg's heartfelt belief is, by her own words, that a Supreme Court justice's job is to decide cases in a manner calculated to advance the ideologies of “human rights” and “women’s rights.”

H. Justice Breyer

From 1979 to 1980, Justice Stephen Breyer served as Chief Counsel to the Senate Judiciary Committee. While Chief Counsel, he played a key role in the crafting and passage of the Sentencing Reform Act. The Sentencing Reform Act, passed in 1984, created the U.S. Sentencing Commission, an independent agency in the judicial branch. One of the Sentencing Commission’s primary purposes is to “establish sentencing policies and practice for the federal courts, including guidelines” that would be consulted by

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federal judges.\textsuperscript{201}

In 1985, while serving as a judge in the U.S. Court of Appeals for the First Circuit, Justice Breyer was appointed to the U.S. Sentencing Commission.\textsuperscript{202} During his time on the Sentencing Commission, Justice Breyer played such an active role in developing the criminal-sentencing guidelines that he is described as their “primary architect.”\textsuperscript{203}

While the Guidelines were being established, a dispute developed in the panel over what would be the best framework for the Guidelines.\textsuperscript{204} Commission staff described Breyer as “a wonderful consensus-builder, a brilliant analyst.”\textsuperscript{205} “He’s responsible for the conceptual framework of the Guidelines and for striking the key compromises.”\textsuperscript{206} “Against strong opposition, he persuaded the other seven judges on the panel to base the guidelines


\textsuperscript{204} See Monroe H. Freedman, Judicial Impartiality in the Supreme Court - The Troubling Case of Justice Stephen Breyer, 30 OKLA. CITY U. L. REV. 513, 529 (2005).

\textsuperscript{205} Naftali Bendavid, Judicial Traitor or Consensus Builder? Breyer's Role as Sentencing Pioneer Still Rankles, LEGAL TIMES, May 16, 1994, at 7.

\textsuperscript{206} Naftali Bendavid, Judicial Traitor or Consensus Builder? Breyer's Role as Sentencing Pioneer Still Rankles, LEGAL TIMES, May 16, 1994, at 7.
on national averages.”207 The Guidelines took effect in 1987; they were not only controversial, but quickly gave rise to claims of unconstitutionality.208

In U.S. v. Wright, before Justice Breyer took the bench on the Supreme Court and while still a judge in the First Circuit, he was the first federal judge to address whether Sentencing Commissioners should recuse themselves in cases involving the application of the guidelines.209 Judge Breyer requested the assigned local United States Attorney and public defender to provide advice on the recusal issue.210 Both the local U.S. Attorney and the public defender agreed that recusal was not warranted.211 They asserted six reasons why it would not be necessary for Sentencing Commissioners to routinely recuse themselves from cases where the guidelines would be applied:

(1) A Sentencing Commissioner's work is “essentially neutral;”

(2) The legislative history of the SRA suggests that Congress did not believe Sentencing Commissioners routinely would recuse themselves from cases involving the guidelines;

(3) Sentencing Commissioners would have particular expertise with the guidelines; this expertise would be lost if they routinely recused themselves from


210Krotoszynski Jr., supra note __, at 433-34.

211Krotoszynski Jr., supra note __, at 433-34.
(4) Judges serving on federal rules committees do not routinely recuse themselves from cases involving the application of those rules;

(5) State court judges serving on state Sentencing Commissions do not routinely recuse themselves from cases requiring them to apply their work product;

(6) Routine recusal would unfairly increase the workload of judges who were not Sentencing Commissioners.212

Judge Breyer concluded that he would not recuse himself, stating: “In light of these considerations, I shall not recuse myself in this case, where no special circumstances are present, nor shall I automatically recuse myself in typical Guidelines cases, unless they involve a serious legal challenge to the Guidelines themselves.”213 However, Judge Breyer would “entertain any motion for recusal that is made.”214

In 1994, Breyer was appointed as an Associate Justice to the U.S. Supreme Court.215 Approximately a decade thereafter, in Blakely v. Washington, the Supreme Court decided in a 5-4 decision that a Washington State sentencing process allowing judges, not juries, to decide facts that enhanced sentences was a violation of the Sixth Amendment.216 Justice Breyer was one of the four dissenters in Blakely.

Prior to Blakely’s determination, however, Justice Breyer

212 Krotoszynski Jr., supra note __, at 434.

213 Krotoszynski Jr., supra note __, at 434.

214 Krotoszynski Jr., supra note __, at 435.


consulted NYU Law’s legal ethics expert, Stephen Gillers, regarding his potential conflict and recusal. In a letter dated July 2, 2004, Gillers told Breyer that “his past involvement with the guidelines was not a bar to his participation in the then-pending litigation over whether the Court's ruling in Blakely, a state sentencing case, would have the effect of invalidating the federal guidelines.” According to Gillers, because Justice Breyer was, at the time, no longer on the Sentencing Commission, “there is no longer any reasonable basis to question your impartiality on the issue of the validity of the guidelines. Nor is there any other basis to question your authority to sit in such a case by virtue of your prior service.”

Gillers’s view was far from unanimous among the giants of legal ethics. In fact, criticism could scarcely have been more pointed: According to Freedman, Justice Breyer “was deciding on the life or death of his own brainchild. . . And what he wrote vindicated himself. When you are sitting in judgment of your own vindication, I think reasonable people might question your impartiality.” Constitutional scholar Erwin Chemerinsky — whom, it’s worth noting, would generally be presumed, in close cases, to be ideologically aligned with Justice Breyer — was similarly unsparing: “My own opinion is that he should recuse himself. I don’t think a member of Congress who participated in


221 Adam Liptak, *Furor Ends in Deanship for Liberal Scholar*, N.Y. TIMES, Sept. 18, 2007 (describing Chemerinsky as a “prominent liberal”).
sponsoring a bill or drafting legislation should then, on the federal court, rule on the constitutionality of that, and I think Justice Breyer is in the same position.”

The Supreme Court Term immediately following Blakely, featured the consolidated cases of U.S. v. Booker, and U.S. v. Fanfan. Booker and Fanfan questioned the constitutionality of the sentencing guidelines and raised the issue of Justice Breyer’s potential recusal. Justice Breyer, however, did not recuse himself from the consolidated cases, and indeed authored part of the majority opinion. Justice Breyer’s opinion held that the Sixth Amendment requirement that a jury finds certain sentencing facts was incompatible with the Federal Sentencing Act, thus requiring the severance of those provisions from the Act that make the guidelines mandatory.

Justice Breyer has recently been quoted on a Supreme Court Justice’s “duty to sit.” According to Justice Breyer, “You have a duty to sit because there is no one to replace me if I take myself out, and that could sometimes change the result.” In fact, Booker was a 5-4 decision, and Breyer’s recusal may have led to a 4-4 decision, thereby upholding the lower court ruling.

228 Devogue, supra note __.
229 See Devogue, supra note __.
I. Proposition 8: A Disqualification “Compare and Contrast” between the Supreme Court and the Lower Courts

On August 4, 2010, U.S. District Judge Vaughn Walker, an appointee of President George H.W. Bush, ruled unconstitutional California Proposition 8, which recognized only marriage between a man and a woman as valid in the State of California. Prop 8’s ban of same-sex marriage was found to offend both the due process and equal protection clauses in that it “enshrined in the California constitution the notion that opposite sex couples are superior to same sex couples” and therefore served no rational interest of the state.

Judge Walker retired in February of 2011, just months after announcing his landmark decision in *Perry*. Not long after announcing his retirement, Judge Walker confirmed long-standing rumors that he is gay. Judge Walker’s 10-year relationship with his partner roused Protect Marriage, the sponsors of the 2008 Proposition 8 initiative, and other proponents of the initiative, to file a motion to vacate the decision in Walker’s anti-Prop 8 judgment on the ground that he improperly failed to recuse himself. The premise asserted by those arguing for Walker’s recusal was that his committed, long-term, same-sex relationship during *Perry* clearly indicated that his


231 Perry, 704 F. Supp. 2d at 1003.


“impartiality might reasonably [have been] questioned.” Judge Walker understood that to recuse based on his sexuality, would be akin to recusing on the basis of ethnicity, national origin, or gender, and would thus be to embark on “a very slippery slope.”

In a June 14, 2011 order, U.S. District Chief Judge James Ware denied the motion to vacate, finding that Judge Walker was not required to remove himself from the case concerning gay marriage simply because he was in a same-sex relationship. Judge Ware warned that requiring Walker to reveal “intimate but irrelevant details of his personal life” would “set a pernicious precedent” forcing judges to disclose personal information and “place an inordinate burden on minority judges.” Such disclosure would not bring courts anywhere closer to interpreting “the subtleties of a judge's personal, and likely ever-changing, subjective states on such intimate matters.” Judge Ware concluded that no judge should be presumed incapable of rendering an impartial decision on the constitutionality of a law “solely because, as a citizen, the judge could be affected by the proceedings.” To do so would cause us to revert back to “precisely where we were 30 years ago with African American and women judges, when those [recusal] motions went down in flames.” The ruling made clear, according to Kate Kendell, head of the National Center for Lesbian Rights, “that

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237 Dolan, supra note __.


240 Dolan, supra note __.
personal characteristics such as sexual orientation cannot be fodder for attacks on judges' integrity.”

In a wrinkle that served to perpetuate the recusal aspect of the *Perry* litigation, Judge Stephen Reinhardt of the Ninth Circuit was one of three judges randomly selected to hear the appeal to Judge Walker’s decision. Judge Reinhardt’s wife, Ramona Ripston, is the former executive director of the American Civil Liberties Union of Southern California, one of many organizations to have participated in the fight for same-sex marriage. Proposition 8 supporters seized on Ripston’s “association with same-sex marriage proponents” as grounds for Reinhardt’s removal. Reinhardt, however, insisted that he would be able to rule impartially, in *Perry*, whereas he routinely recuses himself from cases where there is a conflict of interest or the appearance of one.

In a sequence with almost eerie parallels to that involving Justice Clarence Thomas’s wife, Virginia Thomas, Judge Reinhardt’s wife retired from her position at the ACLU in February of 2011. It certainly warrants considering, even merely rhetorically, just how many or how few of those who see recusal as but a justifiable means to partisan ends would actually recognize the similarities—and, correspondingly, how few or how many would “split” such as to see recusal as justified in one instance but not the other. As Part II of

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241 Dolan, *supra* note __.


243 *Perry v. Schwarzenegger*, 630 F.3d 909 (9th Cir. 2011).


245 See *Perry v. Schwarzenegger*, 630 F.3d 909 (9th Cir. 2011).

246 *Perry v. Schwarzenegger*, 630 F.3d 909 (9th Cir. 2011).

247 See Woo, *supra* note __; *see also* discussion *infra* Part __ (discussing Ginni Thomas’s involvement in opposing the Affordable Care Act).
this article asserts, perhaps the lone truly salient distinction between the matters is that the Supreme Court, by virtue of its finality, simply is different—i.e., the argument Chief Justice Roberts asserts, however unconvincingly, in the year-end report noted at the outset of this article. Further, if one takes that distinction seriously, it serves in this comparison, as a one-way ratchet in that it countenances in favor of Justice Thomas choosing not to disqualify, while making Judge Reinhardt’s decision at least an incrementally closer call simply because—as unsatisfying as it may feel—Supreme Court justices make up the “one Supreme Court” identified in Article III, and are therefore inherently less fungible and replaceable than the judges of the “inferior courts” as “Congress may from time to time ordain and establish.”

In early 2012, Judge Reinhardt authored the Ninth Circuit’s February, 2012 decision striking down Proposition 8 as unconstitutional. Approximately one year prior to the decision on the substance of Proposition 8, however, Judge Reinhardt issued a lengthy memorandum explaining the bases for his denial of the motion for disqualification.

While the substantive decision on Proposition 8 is likely to be either a landmark or a footnote to history for other and more historically important reasons, it is Judge Reinhardt’s separate Memorandum regarding disqualification that warrants [unusually] fulsome and verbatim treatment here. While generally disfavoring extensive block quotes, in this instance, it is my perspective that as with Justice Ginsburg’s comments regarding the NOW lectures, and Justice Scalia’s opinion denying recusal in *Cheney*, both of which stand, by their very candor and transparency, in sharp contrast to most matters of judicial disqualification, Judge Reinhardt’s treatment of the recusal issue in *Perry* provides a rare window into the perspective of a judge targeted for recusal in a high profile matter,

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248 U.S. Const. art.III, § 1.
249 U.S. Const. art.III, § 1.
and consequently, the inclusion of only the most lightly abridged version of his remarks is warranted:

My wife’s views, public or private, as to any issues that may come before this court, constitutional or otherwise, are of no consequence. She is a strong, independent woman who has long fought for the principle, among others, that women should be evaluated on their own merits and not judged in any way by the deeds or position in life of their husbands (and vice versa). I share that view and, in my opinion, it reflects the status of the law generally, as well as the law of recusal, regardless of whether the spouse or the judge is the male or the female.

Proponents’ contention that I should recuse myself due to my wife’s opinions is based upon an outmoded conception of the relationship between spouses. When I joined this court in 1980 (well before my wife and I were married), the ethics rules promulgated by the Judicial Conference stated that judges should ensure that their wives not participate in politics. I wrote the ethics committee and suggested that this advice did not reflect the realities of modern marriage—that even if it were desirable for judges to control their wives, I did not know many judges who could actually do so (I further suggested that the Committee would do better to say “spouses” than “wives,” as by then we had as members of our court Judge Mary Schroeder, Judge Betty Fletcher, and Judge Dorothy Nelson). The committee thanked me for my letter and sometime later changed the rule. That time has passed, and rightly so. In 2011, my wife and I share many fundamental interests by virtue of our marriage, but her views regarding issues of public significance are her own, and cannot be imputed to me, no matter how prominently she expresses them. It is her view, and I agree, that she has the right to perform her professional duties without regard to whatever my views may be, and that I should do the same without regard
to hers. Because my wife is an independent woman, I cannot accept Proponents’ position that my impartiality might reasonably be questioned under § 455(a) because of her opinions or the views of the organization she heads.

Nor can I accept the argument that my wife’s views constitute an “interest” that could warrant my recusal under § 455(b)(5)(iii), as such a reading would require judges to recuse themselves whenever they know of a relative’s strongly held opinions, whether publicly expressed or not. See § 455(b)(5)(iii) (requiring recusal whenever a relative “[i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding”). I likewise cannot conceive how such an “interest” could be said to exist by virtue of the fact that the ACLU/SC as an organization has expressed positions regarding the subject at issue in this case. The ACLU/SC is devoted to advocating for numerous social issues, many of which come before the court, of which same-sex marriage is but one. To suggest that because my wife heads the ACLU/SC she has an “interest” cognizable under § 455(b)(5)(iii) in cases regarding which the organization has expressed a position would be to suggest that I must recuse myself from cases implicating the constitutionality of the death penalty, school prayer, and affirmative action, among many others. Moreover, because § 455(b)(5)(iii) applies not only to the interests of a judge’s spouse, but to the interests of any “person within the third degree of relationship to either” a judge or a judge’s spouse, § 455(b)(5), such a reading would require a judge’s recusal when various other relatives, such as great grandchildren and nephews-in-law, head a public interest organization that has expressed a position concerning a case. ²⁵¹

²⁵¹ Perry v. Schwarzenegger, 630 F.3d 909 (9th Cir. 2011).
Setting aside (because Reinhardt’s remarks in that regard are hopefully the subject of universal agreement) the anachronistic wrong of differential treatment of “wives” as opposed to spouses, it is worth noting that despite the seemingly hard line Judge Reinhardt draws above, he nonetheless acknowledges, in the memorandum, having “long had a policy regarding any conceivable conflict that might result from [ACLU/SC litigation] activities. I do not participate in any actions by this court when the organization of which my wife is the Executive Director makes any appearance or files any brief, amicus or otherwise, before this court.”

The precision of Judge Reinhardt’s wording in the last clause of that last sentence—“before this court”—is certainly not accidental. It is, rather, a clear attempt to bolster the distinction between Perry and the myriad cases involving ACLU/SC from which Reinhardt did disqualify, pursuant to the policy he articulates. In Perry, Reinhardt seized on the fact that ACLU/SC’s participation in the litigation was limited to the District Court level, and was, for that matter, inconsequential.

[Prop. 8 proponents assert that] recusal is required because the ACLU/SC ultimately joined in two amicus briefs and an unsuccessful intervention motion—each on behalf of several Bay Area gay rights groups—filed in the district court by six civil rights organizations and signed by the lawyer for one of the other groups. The two briefs that the ACLU/SC joined were among twenty-four amicus briefs filed in the district court on behalf of 122 organizations and private individuals. The two briefs were not cited in any way in the district court’s findings of fact and law, and the ACLU/SC had no further connection with the case in the district court and none at all as the case came before us.

Because ACLU/SC decided not to participate in the case before the Ninth Circuit — a decision that at the very least implicated questions of correlation or causation — Judge Reinhardt was able to

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252 Perry v. Schwarzenegger, 630 F.3d 909 (9th Cir. 2011).

253 Perry v. Schwarzenegger, 630 F.3d 909 (9th Cir. 2011) (emphasis added).
assert that the organization’s “limited participation in the district court does not endow my wife or the ACLU-SC with any ‘interest that could be substantially affected by the outcome of the proceeding.’”\textsuperscript{254}

Particularly in that last respect, and in a juxtaposition the layers of which would be lost on few close observers of the federal bench (but no doubt on many citizens engaged in heated rhetoric directed at one jurist or the other) the rejoinders favoring Judge Reinhardt’s participation in the Ninth Circuit’s review of Prop. 8 are strikingly similar to the rejoinders favoring Justice Thomas’s participation in the Supreme Court’s review of the Affordable Care Act.

II. Health Care Recusal: Rules v. Standards; Rhetoric v. Reality

The difficulties of precise line-drawing with respect to Supreme Court recusals are, in many respects, a manifestation of the enduring trans-substantive tensions between rules and standards. This tension between rules and standards involves weighing different considerations, such as the value of formal realizability and generality versus particularity.\textsuperscript{255} However, before discussing these considerations, it is beneficial to provide some background between the differences between rules and standards.

Within the realm of positive law, it is prudent to think of rules and standards as legal directives that are compromised of two parts; one being a trigger “that identifies a phenomenon,” and the other being a response that “requires or authorizes a legal consequence when that phenomenon is present.”\textsuperscript{256} Triggers can be either empirical or evaluative, while responses can be determined or guided.\textsuperscript{257} Generally, rules are comprised of hard empirical triggers

\textsuperscript{254} Perry v. Schwarzenegger, 630 F.3d 909 (9th Cir. 2011)(quoting § 455(b)(5)(iii)).

\textsuperscript{255} See, e.g., Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685, 1687-94 (1976).


\textsuperscript{257} Schlag, supra note __, at 382.
and a hard determinate response, whereas standards are generally comprised of soft evaluative triggers and soft guided or modulated responses.258

Within the context of formal realizability of rules,259 the main benefits are the restraint of official arbitrariness and certainty of consequences.260 In the realm of promulgating recusal rules or standards for Justices, the restraint of official arbitrariness through extreme formal realizability removes the possibility of corruption or political bias.261 However, certainty of consequences is much more useful in modifying behavior in regards to private citizens.262 Rather, when promulgating rules, it is important to be cognizant that judges adhere to H.L.A. Hart’s concept of an “internal point of view” of the law under the “rule of recognition.”263 Specifically, judges must acknowledge that any of the established and prevailing rules or standard represent “common standards of official behavior and appraise critically their own and each other's deviations as lapses.”264

258 Schlag, supra note __, at 382-83.
259 According to Duncan Kennedy, extreme formal realizability is characterized as a rule as opposed to a standard. See Kennedy, supra note __ at 1687-88 (“The extreme of formal realizability is a directive to an official that requires him to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way.”).
260 Kennedy, supra note __ at 1688.
261 Kennedy, supra note __.
262 Kennedy, supra note __ at 1688-89.
263 Hart, in describing the rule of recognition, states that it is “. . . in effect a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts.” H.L.A. HART, THE CONCEPT OF LAW 256 (2d ed. 1994). Hart also makes a distinction between the internal and external points of view of the law. See id. at 89 (“[I]t is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the ‘external’ and the ‘internal points of view.’”). See also Stephen Perry, Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View, 75 FORDHAM L. REV. 1171 (2006).
264 Hart, supra note __ at 116.
As a result, judges are not as constrained by certainty of consequences, as opposed to private citizens who may be motivated by the external point of view of the law, as exemplified by Oliver Wendell Holmes’ “bad man” theory.\textsuperscript{265} A standard, as opposed to the rigidity of a formally realized rule, allows a judge “to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard.”\textsuperscript{266}

A second consideration is the measure of generality that is achieved in rules and standards. Particularly, the wider the scope of the rule, the larger measure of imprecision in effectuating its purpose.\textsuperscript{267} However, general rules, with their wide scope, are able to create some trans-substantive uniformity.\textsuperscript{268} Of course, if particularized rules are promulgated, this increases the chances of uncertainty within borderline cases.\textsuperscript{269} Conversely, the application of different factual scenarios to standards will fail to create trans-substantive uniformity. In relation to Supreme Court recusal rules and standards, there is formal realizability in rules concerning

\footnote{265}{In 1897, Oliver Wendell Holmes presented his “bad man” theory of law, where he observed that,}

[i]f you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. . . . The prophecies of what the court will do in fact, and nothing more pretentious, are what I mean by the law.”


\footnote{266}{Kennedy, \textit{supra} note ___ at 1688.}

\footnote{267}{Kennedy, \textit{supra} note ___ at 1689-90.}

\footnote{268}{Kennedy, \textit{supra} note ___ at 1690.}

\footnote{269}{Kennedy, \textit{supra} note ___ at 1690.}
fiduciary or financial interests.\textsuperscript{270} However, matters such as friendships, relationships, spousal interests, or prior involvement on an issue, which are harder to define by the rigidity of formally realized rules, are essentially left to the judgment of the Justices.\textsuperscript{271}

During the Roberts Court Era, no case better demonstrates the modern difficulty of separating recusal rhetoric, from recusal reality, than the legal challenges to President Obama’s 2010 health care overhaul. In the words of Lyle Denniston, “[o]ver the past three years, no issue in American politics has been more polarizing than health care. And, because everyone on all sides expected that the dispute would ultimately be tested in the Supreme Court, the Justices inevitably were going to be drawn into the political fray.”\textsuperscript{272}

In fact, judicial conflict questions in the dispute developed even at the trial court level. With the seeming inevitability that the U.S. Supreme Court would ultimately have its say on the health care law, the lower court conflict kerfuffles seemed to have—and even to acknowledge having—the relatively inconsequential dress rehearsal qualities characteristic of preseason sporting events. In December, 2010, after two federal judges appointed by Bill Clinton had upheld the health care law, U.S. District Court Judge Henry Hudson of Virginia became the first judge to overturn part of the health care law.\textsuperscript{273} In the words of NPR justice correspondent, Carrie Johnson, Judge Hudson “has a colorful background: He's a former deputy sheriff and GOP congressional candidate. He was an anti-

\textsuperscript{270} See, e.g., 28 USC § 455(b)(4).

\textsuperscript{271} Debra Lyn Bassett, \textit{Recusal and the Supreme Court}, 56 HASTINGS L.J. 657, 660 (2005) (“[T]here is no formal procedure for court review of the [recusal] decision of a justice in an individual case. This is because it has long been settled that each justice must decide such a question for himself.”) (quoting William Rehnquist, \textit{Let Individual Justice Make Call on Recusal}, ATLANTA J.-CONST., Jan. 29, 2004, at 15A).


porrnography crusader in the Reagan years. And then there’s this: He has an ownership stake in Campaign Solutions Inc., a Republican consulting firm that has advised conservative political candidates op274 posed to the health care act275 including Virginia Attorney General Ken Cuccinelli who brought the suit on which Hudson ruled.276 After Judge Hudson’s ownership interest in Campaign Solutions was disclosed by The Huffington Post, Cuccinelli cancelled his contract with the firm.277

Hudson severed himself neither from the company nor the case. Although, even on an expedited schedule, high court review of the law was then at least a year away, NPR remarked that “[q]uestions about judges, their spouses and political involvement have been cropping up a lot lately.”278 NPR noted the work of “Virginia Thomas, the wife of Supreme Court Justice Clarence Thomas, at a conservative policy group that has challenged the constitutionality of the Obama health care law,”279 as well as predicted what “could be another round of murmuring when the health care lawsuits finally make their way to the Supreme Court. Republican lawmakers are already trying to get former Obama Solicitor General Elena Kagan,


278 Johnson, supra note __.

279 Johnson, supra note __.
who joined the court earlier this year, to agree to remove herself from hearing the case.”

Once the Court granted certiorari over the consolidated cases challenging the Act, an intense focus on recusal vis-à-vis Justice Thomas and Justice Kagan was nearly immediate—but it was also isolated largely on the fringes. Denniston characterizes the debate’s migration from the periphery to the mainstream by noting that, “[a]t the outer edges of U.S. politics, left and right, a debate has raged over whether two of the Justices ought to take themselves out of any role in deciding the cases,” but that with the Court’s grant of review, “the challenges to Justices Elena Kagan and Clarence Thomas have begun to emerge prominently in the mainstream news media.”

A. Justice and Virginia Thomas

Virginia (Ginni) Thomas, wife of Justice Clarence Thomas, has a long history as a conservative voice in American politics. After earning her law degree Ms. Thomas worked for Republican congressman Hal Daub; she later worked for the U.S. Chamber of Commerce and in the Labor Department under President George H. W. Bush; she then worked for Rep. Dick Armey of Texas. Ms. Thomas joined the Heritage Foundation in 1998, where her work was amplified by the Foundation’s prominence within conservative circles. In 2000, while still at the Heritage Foundation, and during

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280 Johnson, supra note __.
281 Denniston, supra note __.
282 Denniston, supra note __.
the time her husband was deciding Bush v. Gore, Ms. Thomas was recruiting staff for the pending Bush Administration.\footnote{286}

Ms. Thomas spent most of 2010 as a key and highly visible voice in a nationwide campaign against the Obama administration and the health-care reform law in particular.\footnote{287} In January, 2010 Ms. Thomas created Liberty Central Inc.,\footnote{288} a nonprofit lobbying group for conservative principles.\footnote{289} In what Justice Thomas and his supporters would later admit was a misstep, and a repeated misstep at that, Ms. Thomas earned a salary from the group in 2009, yet Justice Thomas failed to disclose this salary on his 2009 federal financial disclosure form.\footnote{290} Since Liberty Central is a 501(c)(4) nonprofit, it largely does not need to disclose its donors.\footnote{291} As a result of Citizen’s United v. FEC (in which Justice Thomas was part of the 5-4 majority)\footnote{292} Liberty Central, as with other 501(c)(4) organizations is free to spend unlimited sums of its general corporate treasury funds in support of federal political candidates.\footnote{293}

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\footnote{286}{Hennessey, supra note __.}

\footnote{287}{Toobin, supra note __, at 46.}

\footnote{288}{Hennessey, supra note __.}

\footnote{289}{Hennessey, supra note __.}

\footnote{290}{Kim Greiger, Group Targets Thomas Again; a Watchdog Says Supreme Court Justice Failed to Report His Wife’s Income, L.A. TIMES, Jan. 22, 2011, at AA1.}

\footnote{291}{Hennessey, supra note __.}


January 2011, Liberty Central had $550,000.00 in donations from unknown donors.\textsuperscript{294} Ms. Thomas left the group in Fall 2010.\textsuperscript{295}

In early 2011 liberal advocacy group Common Cause exposed that Ms. Thomas earned $686,589.00 working for the Heritage Foundation from 2003 to 2007 — a sum Justice Thomas did not disclose on his federal financial disclosure forms.\textsuperscript{296} For Justice Thomas — an renowned proponent of black-letter plain-meaning,\textsuperscript{297} and a stickler for technical compliance, even where balanced against severe criminal consequences for others\textsuperscript{298} the repeated failure, over

\begin{footnotesize}

\textsuperscript{294} Eric Lichtblau, \textit{Thomas Cites Failure to Disclose Wife’s Job}, N.Y. TIMES, Jan. 25, 2011, at A16.

\textsuperscript{295} Eric Lichtblau, \textit{Thomas Cites Failure to Disclose Wife’s Job}, N.Y. TIMES, Jan. 25, 2011, at A16.

\textsuperscript{296} Eric Lichtblau, \textit{Thomas Cites Failure to Disclose Wife’s Job}, N.Y. TIMES, Jan. 25, 2011, at A16.


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the period of years, to comply with the most straightforward of forms — was, at the very least, embarrassing.299

While this article indeed asserts that much of the rhetoric pertaining to Justice Thomas and Justice Kagan alike, particularly with regard to the Affordable Care Act, has generated more heat than light, there are nonetheless certain incontrovertible facts, and few are as stark as this: On a repeated basis, over a period during which his spouse earned $686,589.00 in income from a conservative foundation that opposed the law on both policy and legal grounds, where the federal disclosure form asks, under potential criminal penalty,300 for spousal income, Justice Thomas checked “none.”301

Justice Thomas responded to the firestorm created by the report by filing seven pages of amended disclosures.302 He defended his omission of his wife’s financial information was because he misunderstood the filing instructions.303 In September, 2011 Rep.


Louise Slaughter and nineteen members of Congress sent a letter to James C. Duff, Secretary to the Judicial Conference of the U.S. requesting that the Conference refer the matter involving Justice Thomas’s financial disclosure to the Department of Justice to be investigated, as required under the Ethics in Government Act of 1978. Slaughter contended, “To believe that Justice Thomas didn’t know how to fill out a basic disclosure form is absurd . . . To not be able to do so is suspicious.” In this instance, dismissing Rep. Slaughter’s letter as merely partisan would be a mistake. University of Colorado Law Professor Paul Campos puts the matter bluntly:

Justice Thomas' false statements regarding his wife's income certainly constitute a misdemeanor, and quite probably a felony, under federal law. (They would be felonies if he were prosecuted under 18. U.S.C. 1001, which criminalizes knowingly making false statements of material fact to a federal agency. This is the law Martha Stewart was convicted of breaking by lying to investigators.)

Thomas' defense is that he didn't knowingly violate the law, because he “misunderstood” the filing requirements. This is preposterous on its face. Bill Clinton was impeached—and subsequently disbarred—for defending his false statements about his affair with Monica Lewinsky with an excuse that wasn't as incredible as the one Thomas is now employing.


Common Cause\textsuperscript{307} deserves credit for its work in exposing Justice Thomas’s financial non-disclosures. That said, the organization, whether out of an ends-justify-all-means approach, or perhaps merely having lost a sense of perspective, quickly began to overreach. Following on its wave of success in the disclosure matter, Common Cause released documents purportedly linking Justice Thomas to conservative billionaires David and Charles Koch.\textsuperscript{308} The documents showed that Justice Thomas attended events funded by the Kochs and that Justice Thomas was featured on promotional materials for those events.\textsuperscript{309} Common Cause’s claims, however, veered into the wildly conspiratorial: “Mounting evidence that the justices attended the Koch meetings does not square with the Court’s statements on the controversy to date and requires a full accounting, the [Common Cause} asserted.”\textsuperscript{310} “The justices' association with the Koch events may be grounds for a new hearing in Citizens United, with Thomas and Scalia recused from participation, Common Cause suggested.”\textsuperscript{311} “Did Justice Thomas stay at the

\textsuperscript{307} By way of disclosure, Common Cause is an organization with whom I often agree, though not in this instance, and for whose New York branch I served as counsel in an unrelated matter. Suffice it to say that as the article reflects, I disagree strongly with the organization’s approach to Justice Thomas and the health care litigation.


same posh resort where the Kochs were holding their event or have more extensive involvement with the event or event participants?\textsuperscript{312} Setting aside the conclusory “linking” of Justice Thomas with the Kochs, the attempt to build on that “link” so as to necessitate a disqualification in the health care law case specifically — merely because the Kochs, like many wealthy conservatives, opposed the health care law, is a bridge too far. From a public perspective, however, Common Cause’s effort succeeded in generating attention.\textsuperscript{313} Thus, while the link between the faulty financial disclosures and the health care case is tenuous, in turn, in February, 2011, seventy-four members of Congress called on Justice Thomas to recuse himself from any case involving Obama’s health-care reform specifically because of his wife’s outspoken opposition to the law.\textsuperscript{314} The letter from the Members, addressed directly to Justice Thomas, states in full:

As an Associate Justice, you are entrusted with the responsibility to exercise the highest degree of discretion and impartiality when deciding a case. As Members of Congress, we were surprised by recent revelations of your financial ties to leading organizations dedicated to


\textsuperscript{314} Toobin, supra note __, at 40. At the congressional level, the leader of the Thomas opposition was Rep. Anthony Weiner, of Twitter infamy, a fact that may have ultimately blunted the opposition’s force when Weiner ultimately resigned in disgrace. Id.
lobbying against the Patient Protection and Affordable Care Act. We write today to respectfully ask that you maintain the integrity of this court and recuse yourself from any deliberations on the constitutionality of this act.

The appearance of a conflict of interest merits recusal under federal law. From what we have already seen, the line between your impartiality and you and your wife's financial stake in the overturn of health-care reform is blurred. Your spouse is advertising herself as a lobbyist who has 'experience and connections' and appeals to clients who want a particular decision -- they want to overturn health-care reform. Moreover, your failure to disclose Ginny Thomas's receipt of $686,589 from the Heritage Foundation, a prominent opponent of health-care reform, between 2003 and 2007 has raised great concern.

This is not the first case where your impartiality was in question. As Common Cause points out, you "participated in secretive political strategy sessions, perhaps while the case was pending, with corporate leaders whose political aims were advanced by the [5-4] decision" on the Citizens United case. Your spouse also received an undisclosed salary paid for by undisclosed donors as CEO of Liberty Central, a 501(c)(4) organization that stood to benefit from the decision and played an active role in the 2010 elections.

Given these facts, there is a strong conflict between the Thomas household's financial gain through your spouse's activities and your role as an Associate Justice of the United States Supreme Court. We urge you to recuse yourself from this case. If the U.S. Supreme Court's decision is to be viewed as legitimate by the American people, this is the only correct path.
We appreciate your thoughtful consideration of this request.\textsuperscript{315}

It is reasonable conjecture, although it surely is only that, to anticipate that Justice Thomas was unmoved by the letter. In addition to its partisan ends, however, a few prominent academics echoed the letter’s sentiments. Monroe Freedman, for example, stated that, “Thomas should recuse himself because his wife is a lobbyist for groups that are opposed to the health care law. She has brought in a lot of money in family income opposing the health care law. Thomas has a financial family interest in the success of the opposition to health care.”\textsuperscript{316} Similarly, Michael Gerhardt, who in addition to being a renowned constitutional scholar generally has extensive specific experience in vetting and preparing judicial nominees,\textsuperscript{317} asserts, in Jeffrey Toobin’s \textit{New Yorker} piece on the Justice and Mrs. Thomas, that “I think it is possible she might have significant interests in the dispute before the Court.”\textsuperscript{318}

On the other hand, and even limited solely to that “family interest,” (as opposed to also considering the broader “might reasonably be questioned” standard of Section 455) scholars come to opposing conclusions. Patrick Longan of Mercer University Law School states, “[t]he standard is whether there is something materially to be gained by the judge or his spouse from the outcome of the litigation . . . It’s hard for me to see how his vote in the case would help [Ms. Thomas] materially, one way or the other.”\textsuperscript{319}


\textsuperscript{317} Faculty & Research, Michael J. Gerhardt, UNIV. OF NORTH CAROLINA SCHOOL OF LAW, http://www.law.unc.edu/faculty/directory/gerhardtmichaelj/ (last visited Feb. 27, 2012).

\textsuperscript{318} Toobin, \textit{supra} note __, at 47.

\textsuperscript{319} Toobin, \textit{supra} note __, at 47.
Retired Justice John Paul Stevens defended Justice Thomas, stating that he does not have any concern that justices are failing to disqualify themselves when proper.\textsuperscript{320}

The wrinkle that makes assertions regarding Justice Thomas’s disqualification worth taking seriously is his profound failure—of care; of judgment; and of law—to disclose Ms. Thomas’s substantial income, and the source of that income. The nexus between that failure, however, and the health care litigation is strained at best. If the source of Ms. Thomas’s undisclosed income were General Motors, then Justice Thomas’s failure to comply with the disclosure laws would have been just as egregious, but it would have borne little, if any connection to Justice Thomas’s fitness to participate in the Court’s review of the health care law. It is only because the groups for whom Ms. Thomas worked, and from whom she earned that undisclosed income, are advocacy groups with an ideological disposition against government social programs generally, and against the health care law specifically, that even credibly asserting a problematic nexus is possible.

Chief Justice Roberts’s argument with respect to disqualification that is discussed in the introduction to this article can effectively be reduced to the shorthand: “We’re the Supreme Court, ergo, we’re different.” This article asserts that that argument, however simple, is particularly correct as applied to Justice Thomas and the health care litigation. To wit, consider the comparison of Judge Reinhardt’s participation in the appeal of the Prop. 8 ruling to Justice Thomas’s participation in reviewing the health care law.

The arguments advanced by those favoring disqualification (formally in \textit{Perry} in the Ninth Circuit; publicly, though only informally in the Supreme Court) focus, in each instance, on the activities of the jurists’ respective spouses. Each of those spouses played key leadership roles in prominent public policy and legal advocacy organizations. Each jurist is a veteran of the bench whose respective judicial philosophy on a broad range of legal matters has

\textsuperscript{320} Joan Biskupic, \textit{Retired Justice Stevens Talks Ethics, Thomas and Colbert}, USA TODAY, Oct. 28, 2011, at 2A.
been refined—transparently in the public eye—over decades. Yet only one of the two is, in a sense, judicially fungible: Judge Reinhardt. Indeed, this is a point Judge Reinhardt makes himself in his Prop. 8 memorandum, albeit not consciously in the context of any comparison to Justice Thomas. Judge Reinhardt writes:

I do not participate in any actions by this court when the organization of which my wife is the Executive Director makes any appearance or files any brief, amicus or otherwise, before this court. The clerk’s office was notified of this policy many years ago and it has been implemented in numerous cases. In fact, it is impossible to know how many times I have actually recused myself from such cases because the Clerk’s office automatically assigns cases covered by my policy to panels of which I am not a member rather than to a panel I am on, as a result of this directive. Later, if there is an en banc call, I advise the Clerk to record the fact that I am recused and to notify the court.321

Supreme Court justices, by virtue of their constitutionally unique role as the “one supreme Court” identified by Article III, as opposed to as members of the “inferior courts as Congress may from time to time establish,”322 do not have the luxury of having matters assigned to alternative panels analogous to those to which Judge Reinhardt alludes. Further, and derivatively, it is, of course, impossible for a Supreme Court justice to ever be in the unknowing posture vis-à-vis recusal that applies to Judge Reinhardt. If limited to matters adjudicated in the Supreme Court on the merits, any recusal of a justice is inherently known not only to the justice himself or herself, but to the public as well.

Clearly, the preceding paragraph constitutes little more than basic civics. Yet one important and perhaps under-recognized intellectual consequence of those principles of civics is, assuming arguendo, that all other factors are equal with respect to an alleged

321 Perry v. Schwarzenegger, 630 F.3d 909, 913 (9th Cir. 2011).
322 U.S. Const. art.III, § 1.
conflict in the Supreme Court and an alleged conflict in a lower court, the merits of the case for disqualification are much, much stronger in the lower court. This is true, even if for no other reason than the fact that the lower court jurist is entirely replaceable—even replaceable, as a matter of perfunctory routine and, as Judge Reinhardt’s description reflects, without the jurist’s knowledge. Conceding that there are other minor distinctions (in both directions) with respect to the comparison of Justice Thomas and Judge Reinhardt, the case for Judge Reinhardt’s disqualification in Perry—where the consequence would simply have been that another judge would have heard the appeal — though weak, and in this author’s view, unpersuasive — was nonetheless at least stronger than the case for Justice Thomas’s disqualification from the Court’s review of the health care law.

The fungibility distinction, however, serves only to make Justice Thomas’s non-disqualification case stronger than that of a similarly-situated lower court judge, i.e., in the illustrative example, than that of Judge Reinhardt’s in Perry. Comparing Justice Thomas’s circumstance to the Supreme Court historical norms described in Part I of the article, however, offers yet further support for Justice Thomas’s non-disqualification. Considered at the most general level, Justice Thomas is well-established, across a broad spectrum of legal issues, as one of the Court’s most consistently conservative members. Accordingly, in a close case, he would be among the least likely — and quite arguably the least likely — justice to vote in favor of any sweeping federal regulatory scheme. Moreover, when one considers Justice Thomas’s record there is no indication of any differentiated approach to health care as a field as opposed to any of myriad other substantive areas. In at least this respect, Justice Thomas’s posture vis-à-vis the Affordable Care Act is less closely aligned with any issue-specific viewpoint than the justices in several of the historical examples described in Part I of this article. Surely, if one considers Justice Thomas separately from Ms. Thomas, then, vis-à-vis the health care reform, he has no issue-specific relationship that rises to the level of Chief Justice Vinson,
Justice Clark, or Justice Jackson in the *Steel Seizure* cases;\(^{323}\) no arguably constituent-esque, nor client-esque relationship akin to Justice Black in *Jewell Ridge*;\(^{324}\) no regime-creator-then-adjudicator relationship akin to Justice Breyer in *Booker*;\(^{325}\) and certainly no personal cause-specific connection rising to the almost *raison d’être* levels applicable to Justice Thurgood Marshall nor Justice Ginsburg in the racial and gender rights areas respectively.\(^{326}\)

The arguments favoring Justice Thomas’s disqualification thus rest entirely on his marriage to Ms. Thomas. As is clear by now, this article does not find these marital-derivative arguments persuasive, at least as applied to the scenario involving Justice Thomas. Although Supreme Court justices are not governed by the Code of Judicial Conduct, as Chief Justice Roberts’s year-end report acknowledges, it remains, even for them, a significant guidepost.\(^{327}\) With respect to spouses, consider that the 1972 version of the ABA Code of Judicial Conduct provided that a candidate for judicial office “should encourage members of his family to adhere to the same standards of political conduct that apply to him,”\(^{328}\) Reflecting on that provision years later, federal Judge Roger Miner wrote, “My wife, a well-known political activist at that time, responded: ‘Consider me encouraged,’ and went on to lead some statewide and national campaigns.”\(^{329}\)

When the ABA revised the spousal portion of the Judicial Code in 1990, the new provision indicated that “[t]he encouragement to adhere to judicial conduct rules now applies only in regard to the

\(^{323}\) See supra Part I.

\(^{324}\) See supra Part I.

\(^{325}\) See supra Part I.

\(^{326}\) See supra Part I.


\(^{328}\) MODEL CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(a) (1972).

judge’s own political campaign.”\(^{330}\) The official commentary to that provision indicates further that while “a judicial candidate must encourage members of his or her family to adhere to the same standards of political conduct in support of the candidate that apply to the candidate, family members are free to participate in other political activity.”\(^{331}\) As Judge Miner’s reflections strongly hint, the 1972 spousal prohibitions were anachronisms even in their own time. Case law offers additional evidence of real-world progress outpacing the Code. In *Application of Gaulkin*, a 1976 case, the New Jersey Supreme Court reversed one of its earlier decisions that had prohibited spousal political activities,\(^{332}\) holding, instead that

> [T]he trend of modern law . . . reflects society’s realistic appreciation of the independence of both spouses in marriage and more specifically represents modern awareness and sensitivity to individual freedoms, rights, responsibilities and development.

... All of this bespeaks a realist appreciation of the marriage relationship and the nature of the partnership it embodies: [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. . . [W]e no longer see any confirmed justification for extending [the] prohibition [on political activity] to the non-judicial spouse.\(^{333}\)

As Eugene Volokh notes, whatever the *de jure* provisions, as a *de facto* matter, the spouses of sitting federal judges have included


\(^{332}\) 351 A.2d 740 (N.J. 1976).

\(^{333}\) 351 A.2d at 744-46 (N.J. 1976).
even U.S. Senators and a Governor,\footnote{Eugene Volokh, \textit{Justice Thomas and Judge Reinhardt}, THE VOLOKH CONSPIRACY (Mar. 14, 2010), http://volokh.com/2010/03/14/justice-thomas-and-judge-reinhardt/.} leading Volokh to conclude that he’s “not sure that there’s really a judicial norm that judge’s spouses should stay out of politics, whether partisan politics, advocacy group politics, or public interest litigation (itself a form of politics, at least when done effectively).”\footnote{Eugene Volokh, \textit{Justice Thomas and Judge Reinhardt}, THE VOLOKH CONSPIRACY (Mar. 14, 2010), http://volokh.com/2010/03/14/justice-thomas-and-judge-reinhardt/. Even if a vibrant Code-based prohibition continued to exist, it would, as discussed in Part I, not formally apply to the Supreme Court.}

With only Section 455’s “might reasonably be questioned” provision applicable to Justice Thomas, and with the shift in norms even to those jurists for whom, unlike Justice Thomas, the Code formally applies, it is logical to turn the standard on its head and consider the scenarios in which Ms. Thomas’s connection to the health care law might cause Justice Thomas’s impartiality to “reasonably be questioned.” While acknowledging the eternal difficulty of distinguishing correlation with causation, here there is literally zero evidence that Justice Thomas’s thinking is causally related to Ms. Thomas’s work.

Further, whatever one thinks of Justice Thomas’s jurisprudence, there can be little doubt that he is a highly independent thinker, who frequently comes to legal conclusions that prioritize his principles ahead of any perceived interests. As one commentator notes, “[he] was born dirt poor, experienced appalling racism and still occasionally votes against (perceived) black interests. If he can make that separation, why assume he can’t make this one?”\footnote{Ravi Somaiya, \textit{Three Reasons it’s Fine That Justice Thomas’ Wife is a Tea Partyer}, GAWKER (Mar. 14, 2010, 3:20 PM), http://gawker.com/5493054/three-reasons-its-fine-that-justice-thomas-wife-is-a-tea-partyer.} Of course, in this instance, it’s not at all clear that Justice Thomas’s legal philosophy leaves much room for doubt \textit{ex ante}. To that end, another commentator, reflecting on Jeffrey Toobin’s article about Justice and Ms. Thomas in \textit{The New Yorker}, put it this way: “despite the fact that almost every paragraph of his
piece drips with contempt for Clarence Thomas, Toobin has made a convincing case that Clarence Thomas's views precede by many years the income his wife made by pushing similar views.\textsuperscript{337}

Considered in terms of the concentration of any family interest in the case, one need not be dismissive of Ms. Thomas’s contributions to the efforts in opposition to the health care overhaul to acknowledge that, as a relative matter, her contributions were but a miniscule fraction of the collective efforts serving the same end. Inversely, the relative impact of the constitutionality of a national health care overhaul, as compared to its concentrated impact on Ms. Thomas, and derivatively, Justice Thomas, takes the miniscule fraction and turns it on its head. Are these crude measures of concentration of interest and impact part of any formal, \textit{de jure} disqualification rules? Certainly not, and particularly for members of the Supreme Court to whom the Code does not apply, but within a standards framework, they serve the noble role of elucidating “the facts of a particular situation [so as] to assess them in terms of the purposes or social values embodied in [a] standard\textsuperscript{338} that can helpfully inform the disqualification decision.

Relative concentration of interest and impact indeed served as criteria for the Court in a different, but tangentially connected circumstance of considering the constitutional floor — undoubtedly a standard rather than a rule — for an elected state justice’s disqualification in the context of outsized monetary campaign support. The Court, in \textit{Caperton v. A.T. Massey Coal Inc.}, concluded that:

\begin{quote}
there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a \textit{personal} stake in a particular \textit{case} had a \textit{significant} and \textit{disproportionate} influence in placing the judge on the case by raising funds or directing the judge’s election
\end{quote}


\textsuperscript{338} Kennedy, \textit{supra} note ___, at 1688.
campaign when the case was pending or imminent. The inquiry centers on the contribution’s *relative size in comparison to the total* amount of money contributed to the campaign, the *total amount spent* in the election, and the *apparent effect* such contribution had on the outcome of the election.\(^{339}\)

Each of the italicized portions of the above paragraph from *Caperton* refers, in the context of financial campaign support, to concentration of interest and/or impact measured as a relative matter. In *Caperton* those relative factors were, to use the Court’s own repeatedly emphasized word, “extreme” in their concentration.\(^{340}\) In sharp contrast, even if one were somehow able to monetize Ms. Thomas’s contributions to, or personal stake in, the overall opposition to the health care overhaul, they not only do not rise to the levels applicable in *Caperton*, they fail to even register — considered on a relative scale — as substantial. This is, of course, not to say that the only disqualification standard applicable to Justice Thomas or any other justice of the Supreme Court is the constitutional bare minimum. On the contrary, Section 455’s “might reasonably be questioned” language makes clear that the standard is substantially more stringent than the due process floor at issue in *Caperton*.\(^{341}\) The similar modality of standards-based analysis, however, is nonetheless helpful in placing the relatively insubstantial nature of Ms. Thomas’s contribution to, and interest in, the health care law in proper perspective.

If not for Justice Thomas’s egregious, even potentially criminal failures of financial disclosure, and the loose nexus of the undisclosed income to Ms. Thomas’s work in opposition to the health care overhaul, this article asserts that, on the spectrum of


\(^{340}\) The word “extreme” is used throughout the majority’s opinion, even appearing four times on a single page. See Roy A. Schotland, *Caperton Capers: Comment on Four of the Articles*, 60 SYRACUSE L. REV. 337, 337 n.3 (2010) (citing *Caperton*, 129 S. Ct. at 2265, 2267).

\(^{341}\) See supra discussing section 455.
historical context, Supreme Court practice, and the practices of more fungible inferior court judges, the case against Justice Thomas’s disqualification would be exceptionally strong. The force of those arguments is blunted in some measure by the lack of disclosure. How substantial that blunting is, is a subjective matter involving deficiencies of information, and highly unquantifiable variables. Justice Thomas’s penchant for silence, and thus for avoiding the kind of reasoned, transparent explanation of Justice Scalia in *Cheney* or even Judge Reinhardt in *Perry*, to be sure, exacerbates the informational deficiencies.342

By analogy, if Judge Reinhardt had failed to disclose, over a period of years, Ms. Ripston’s income from the ACLU/SC, could that failure have altered the calculus in his case enough to change the outcome of his decision not to disqualify from *Perry*? Reasonable observers would surely reach opposite conclusions as to the question. In that hypothetical, however, the consequences of disqualification are minimal: another judge is blindly selected to sit; the case moves

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342 This is a point recently made well, if harshly, by Georgia State Professor Eric Segall, who writes in the *Los Angeles Times*:

> [S]adly, I don't expect much from Thomas given his history. At his confirmation hearings, he made the dubious and startling claim that he could not remember, nor did he "personally engage in," a single discussion of Roe vs. Wade (decided 18 years earlier) before that hearing. Add in his consistent, multi-year failure to disclose the sources of his wife's income as federally required, his now six-year silent pout during oral arguments (he hasn't asked a single question), not to mention the Anita Hill allegations, and I would never hold up Thomas as a model of judicial behavior.

If these words appear harsh, it should be remembered that much worse things are being said by journalists and commentators about Newt Gingrich, Mitt Romney and President Obama, among other national political figures, and there is no good reason to immunize Supreme Court justices from similar criticism.

forward with three federal judges; there remains the possibility of en banc review; and the possibility of Supreme Court review, all factors inapplicable to Justice Thomas’s participation in reviewing the Affordable Care Act.

Absent long-term, and arguably far-fetched transformational changes in Supreme Court practices along the lines suggested by Senate Judiciary Chair Patrick Leahy, that are aimed at reducing the consequences of Supreme Court disqualifications by taking advantage of the Court’s “deep bench” of retired Article III Supreme Court justices, the factors pertaining to the finality of a justice’s disqualification will always hold true. Thus, the finality factors, certainly cannot, standing alone, be viewed as talismanic. When those factors are combined with a close examination of the circumstances specific to Justice Thomas’s situation, and are, in turn, examined in light of the historical examples considered in Part I, this article concludes that Justice Thomas’s participation in reviewing the health care law, as with Justice Kagan’s below, is not only warranted under the rule of law, but optimal for its perceived legitimacy.

B. Kagan and the 10th to 9th Difficulty of the Affordable Care Act

There can be little doubt that Justice Elena Kagan takes matters of recusal seriously. So seriously, in fact, that veteran Supreme Court reporter, Bob Barnes’s Washington Post curtain-raiser on the opening day of Justice Kagan’s first term on the high court, opens verbatim, as follows:

343 Senator Leahy’s proposed legislation would have allowed a retired justice to replace a current justice who has recused herself. Leahy hopes this would encourage justices to recuse themselves with less hesitation when there is even “an appearance if partiality.” Robert Barnes, A Deep Bench of Substitute Justices Goes Unused, WASH. POST, Aug. 9, 2010, available athttp://www.washingtonpost.com/wp-dyn/content/article/2010/08/08/AR2010080802629.html?hpid=topnews. Retired justices have remained active in the judiciary. For example, since Justice O’Connor’s retirement from the Supreme Court in 2006, she has filled in on and decided cases with every federal appellate court in the nation, except for the one on which she was appointed in 1981. Id.
Elena Kagan begins hearing cases as the Supreme Court's 112th justice Monday morning. But anyone who wants to see her in action needs to be sharp. Kagan will hear the first case argued before the court, then slip quietly through the burgundy velvet curtains behind the bench. She'll be out of the action in all three cases Tuesday. Her chair will be empty when the court returns next Tuesday and she'll put in a half-day the next day. Kagan's old job as solicitor general - the "10th justice" - is initially making it hard to do her new job as the ninth justice.\footnote{\textit{Robert Barnes, Kagan's Recusals Take Her Out of Action in Many of the Supreme Court's Cases}, \textit{WASH. POST}, Oct. 4, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/10/03/AR2010100303890.html.}

The “10th-to-ninth” difficulty is a near-term challenge for anyone elevated from the position of Solicitor General to Supreme Court justice — a hurdle that may in part explain why, prior to Justice Kagan, such an elevation had not occurred since Thurgood Marshall, for whom Kagan clerked, became a justice via such a sequence.\footnote{\textit{Robert Barnes, Kagan’s Recusals Take Her Out of Action in Many of the Supreme Court’s Cases}, \textit{WASH. POST}, Oct. 4, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/10/03/AR2010100303890.html.} As has proven to be true in Justice Kagan’s instance, as in Justice Marshall’s case, one consequence of the 10th-to-ninth sequence was that he “recused himself from a large portion of cases his first and second years,”\footnote{Robert Barnes, \textit{Kagan’s Recusals Take Her Out of Action in Many of the Supreme Court’s Cases}, \textit{WASHINGTON POST}, Oct. 4, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/10/03/AR2010100303890.html.} though with the perspective of hindsight, no one seriously denies that “his legacy is more about the cases he helped decide than the ones he sat out.”\footnote{Wash. Post, \textit{Elena Kagan’s Old Job as Solicitor General is Having an Effect on Her New One}, \textit{CLEVELAND.COM} (Oct. 3, 2010, 10:38 PM), http://www.cleveland.com/nation/index.ssf/2010/10/elena_kagans_old_job_as_solic.html.}
The Affordable Care Act was signed into law in March, 2010. From the moment, two months later, that then-Solicitor General Kagan was nominated for the Court, the specter of the 10th-to-ninth sequence, and most dramatically, its potential ramifications for any then-hypothetical Supreme Court adjudication on the health care law, was front and center. On day three of her confirmation hearing, the following exchange occurred between Kagan and Oklahoma Senator Tom Coburn:

COBURN: Thank you. And my — I have two final questions. One, was there at any time — and I’m not asking what you expressed or anything else — was there at any time you were asked in your present position to express an opinion on the merits of the health care bill?

KAGAN: There was not.

Republican Senators on the Judiciary Committee were not persuaded. Accordingly, they requested, via follow-up correspondence, more information with Senator Orrin Hatch’s call reflecting the blurring of the lines between Kagan-specific concerns, and the degree to which those concerns merely provided a vehicle for the expression of broader views as to the health law itself: “Elena Kagan was in the unique role of being the nation’s top lawyer, and the American people have the right to know what role she played in defending this unconstitutional law.”

In written responses to the follow-up inquiries from Senator Hatch’s colleagues, Justice Kagan stated: “If I personally reviewed a draft pleading or participated in discussions to formulate the

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government’s litigating position, then I would recuse myself from a case. In my view, this level of participation in a case would warrant recusal.” 351 Kagan indicated further that she would recuse even if she was not the formal decisionmaker, but merely gave advice to those making the decision, “in my view this level of participation in the case would warrant recusal.” 352

Kagan’s answers reflect the portion of Section 455 requiring disqualification “[w]here [the Justice] has served in governmental employment and in such capacity participated as counsel [or] adviser concerning the proceeding or expressed an opinion concerning the merits of the particular case or controversy.” 353 Writing in the Wall Street Journal, former Attorney General Michael Mukasey asserted that for the “counsel or adviser” standard to apply, “Justice Kagan herself would have had to participate in her official capacity as counsel or adviser in the case at any stage, or expressed an opinion in her official capacity about the merits. . . Absent evidence to the contrary, there is no reason not to credit [her] denial.” 354

The additional evidence that does exist—from which partisans on both sides draw diametrically opposing conclusions — is contained in a series of e-mails obtained from the Justice Department as the result of a FOIA request by conservatives opposed to the health care overhaul. With respect to the extent Kagan’s involvement or non-involvement in the DOJ’s consideration of the


353 28 USCS § 455(2012).

potentiality and then (almost instant) actuality of challenges to the law, the e-mails are illuminating though far from conclusive.

The e-mails fall into two categories — those involving other members of the Solicitor General’s office and those involving Kagan’s friend and onetime colleague Laurence Tribe. In the case of the former, the e-mails most notably include the following:

(1) an inquiry from Senior Counsel Brian Hauck in the Associate Attorney General’s (AAG’s) office to Kagan’s then-deputy Neil Katyal stating:

Hi Neal - Tom wants me to put together a group to get thinking about how to defend against the inevitable challenges to the health care proposals that are pending, and hoped that OSG [Office of the Solicitor General] could participate. Could you figure out the right person or people for that? More the merrier. He is hoping to meet next week if we can.\textsuperscript{355}

(2) Katyal responds to Hauck’s inquiry by forwarding the message to Kagan and indicating that he is “happy to do this if [Kagan] are ok with it.”\textsuperscript{356}Kagan response, in full to Katyal states: “You should do it.”\textsuperscript{357}

(3) Katyal then informed the AAG’s office that “Elena would definitely like OSG to be involved in this set of issues,” and that “we will bring Elena in as needed.”\textsuperscript{358}

(4) Katyal copied Kagan on his advice to Associate Attorney General Thomas Perrelli that DOJ “start assembling a


response” to a draft complaint “so that we have it ready to go.”  

(5) On March 21, 2010, Katyal e-mailed Kagan with his advice that she should attend a DOJ meeting with the White House’s health-care policy team with Katyal stating, “I think you should go, no?” since this is “litigation of singular importance.”

On May 17, 2010, Katyal, perhaps following the time-honored tradition of cover-ups more troubling than underlying transgressions forwarded an innocuous and understandable e-mail inquiry from Justice Department spokesperson Tracy Schmaler. Schmaler’s e-mail to Katyal inquired, under the subject line “HCR litigation,” “Has Elena been involved in any of that to the extent that SG office was consulted? Know you’ve been point but expect I’ll get this q.” Katyal responded to Schmaler “No, she has never been involved in any of it. I’ve run it for the Office, and have never discussed the issues with her one bit.” Remarkably, Katyal then forwarded Kagan that response, adding, “This is what I told Tracy about health care.”

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The e-mail exchange between Kagan and another Obama legal advisor, Harvard Law professor Laurence Tribe, while not on point with regard to Kagan’s degree of involvement (if any) in the litigation, has likely generated at least as much attention as all of the other e-mails combined. Referring to the floor votes with respect to the health care bill’s potential, but, at that point not yet actualized passage, Kagan, a friend and former colleague of Tribe’s while she was the Dean at Harvard Law, wrote “I hear they have the votes, Larry!! Simply amazing.”

The Tribe sequence may make for headlines and talk show fodder but, unlike the internal OSG e-mails, it is simply not troubling by the standards of Supreme Court recusal norms. As former Attorney General Mukasey — hardly a person ideologically inclined to be sympathetic to President Obama or sweeping regulatory schemes — argued in his op-ed on the topic, “[s]tatements of opinion to friends or former colleagues do not count here.”

Consider, as a comparative matter, the chasm of difference between Justice Breyer’s involvement, described in Part I, as the primary legislative force behind the sentencing guidelines to Justice Kagan’s e-mail to Professor Tribe. Justice Kagan, in her capacity as a friend and colleague, is not merely not the creator of the scheme, she is simply cheering, to a friend and colleague, a huge legislative development on an issue that had, to varying degrees at different times, gripped and divided the nation at least as far back as Bill Clinton’s first term, in which his administration famously failed in an attempt to overhaul health care. Indeed, the Kagan-Tribe e-mail,

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even in its exclamation points reflecting in-the-moment emotions, call to mind Justice O’Connor’s private outburst at an election-night party in November, 2000. The most detailed reporting on Justice O’Connor’s reaction was done by *Newsweek*, which reported that:

[A]t an election-night party on Nov. 7, surrounded for the most part by friends and familiar acquaintances, [Justice O’Connor] let her guard drop for a moment when she heard the first critical returns shortly before 8 p.m. Sitting in her hostess's den, staring at a small black-and-white television set, she visibly started when CBS anchor Dan Rather called Florida for Al Gore. “This is terrible,” she exclaimed. She explained to another partygoer that Gore's reported victory in Florida meant that the election was “over,” since Gore had already carried two other swing states, Michigan and Illinois.

Moments later, with an air of obvious disgust, she rose to get a plate of food, leaving it to her husband to explain her somewhat uncharacteristic outburst. John O’Connor said his wife was upset because they wanted to retire to Arizona, and a Gore win meant they’d have to wait another four years.

Justice O’Connor, of course, later cast a decisive fifth vote in *Bush v. Gore*, making Justice O’Connor’s decision to participate no doubt a non-disqualification decision presumably favored by many of the partisans now arguing for Justice Kagan’s disqualification. In any event, as UCLA Professor Eugene Volokh wrote on his widely-followed blog, “That she cheered the law’s passage . . . does not require her recusal . . . Even assuming she loves the law, her personal political views

history of the Clinton administration’s defeat in its health reform efforts to obtain universal coverage, employer and individual mandates, competition between private insurers and government regulation).

do not require her to recuse any more than Justice Scalia’s personal or religious views about abortion require his recusal [in abortion-related cases].”

The issue of Justice Kagan’s involvement in the litigation, however, presents a closer call. Much like Justice Thomas’s failure to disclose Ms. Thomas’s income, the case favoring Justice Kagan’s participation is not without a blemish. While the White House’s official posture and Kagan’s direct, unequivocal, oral response to Senator Coburn’s question in her confirmation hearing reflect a Solicitor General who was entirely walled off from any participation in the administration’s litigation strategy in defense of the Affordable Care Act, the internal e-mails indeed reveal a much more equivocal picture.

In Professor Volokoh’s words, “she worked as Solicitor General while the [Act] was in Congress and the Justice Department began developing its defense strategy. Under normal circumstances, the former SG would need to recuse in a case of this sort.” Indeed, even if the effort to wall Kagan off from consideration were more successful than it appears to have been, then, as George Washington Law’s Jonathan Turley noted to the Los Angeles Times, “[t]he prior anticipation of this problem only magnifies the problem on one level. Kagan looks like a pocket justice — someone selected from the president’s inner circle to guarantee a vote on his most important

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legislative matter.” Whether one agrees with Turley’s conclusion or not, the e-mails certainly reveal that the anticipation of the problem was handled in a sub-optimal manner. Thus, to apply former Attorney General Mukasey’s standard of “absent any evidence to the contrary,” there is now, at the least, enough evidence to militate strongly in favor not necessarily of Justice Kagan’s recusal, but of a transparent and reasoned explanation of her decision to participate in the case.

CONCLUSION

This article, authored, in the interest of disclosure, by an academic and citizen who very much hopes to see the health care overhaul upheld, asserts that neither Justice Thomas nor Justice Kagan need[ed] to disqualify from reviewing the law. Relative to the Court’s historical norms, as considered in Part I, Justice Kagan’s decision as to her participation, however, presents a closer call than Justice Thomas’s decision as to his own. Ultimately, the profile of the issue, and the nature of the heat—rather than light that so marked the partisan opportunism and rhetoric surrounding each justice’s participation—presents an important and teachable moment. To that end, Chief Justice Roberts’s focus on disqualification in his year-end report is a positive step.

In the end, Chief Justice Roberts’s defense of the Court’s disqualification practices boils down to the assertion that when it comes to disqualification, the Supreme Court is constitutionally and pragmatically different. If taken too far; if invoked as talisman, that reasoning could easily cause more problems than it solves for the rule of law. The Chief Justice’s argument is neither fully emotionally nor intellectually satisfying. This article asserts, however, that in an imperfect world, his argument is also entirely correct.

Fulsome explanations from Justice Kagan and Justice Thomas—along the lines of Justice Scalia’s memorandum in Cheney and Judge Reinhardt’s similarly thorough analysis of his own

participation in *Perry* — would serve not just one, but two distinct and substantial national interests — the national interest in an elevated dialogue on issues of judicial disqualification and the national interest in the legitimacy and perceived legitimacy of the Court’s present and future rulings on the merits of the Affordable Care Act. In similar future controversies, the Court’s standards-based approach will continue to succeed in warding off rules frameworks, or worse, the imposition of rules frameworks by branches external to the Court, only if the Court’s members are committed to increasing the transparency of the reasoning behind their decisions on disqualification. The teachable moment on disqualification is thus now very much in the Court’s court.