

Summer 2013

Stonewalling, Leaks, and Counter-Leaks: SCOTUS Ethics in the Wake of NFIB v. Sebelius

Steven Lubet

Clare Diegel

Follow this and additional works at: <https://scholar.valpo.edu/vulr>

 Part of the [Law Commons](#)

Recommended Citation

Steven Lubet and Clare Diegel, *Stonewalling, Leaks, and Counter-Leaks: SCOTUS Ethics in the Wake of NFIB v. Sebelius*, 47 Val. U. L. Rev. 1 (2013).

Available at: <https://scholar.valpo.edu/vulr/vol47/iss4/1>

This Tabor Lecture is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



Tabor Lecture

STONEWALLING, LEAKS, AND COUNTER-LEAKS: SCOTUS ETHICS IN THE WAKE OF *NFIB V. SEBELIUS*

Steven Lubet*
Clare Diegel**

I. INTRODUCTION

The Supreme Court litigation over the Patient Protection and Affordable Care Act (“PPACA”) came to a conclusion in the first half of 2012, characterized by a series of surprises. The first surprise occurred when the Court scheduled the case for six hours of oral argument, spread over three days. Such an expanded argument was unprecedented in modern times, leading to much speculation that the issues would be more troublesome for the Court than many observers had previously assumed. Still, even veteran court watchers were further shocked by the combative tone of the oral argument itself, when Justices Scalia, Alito, Kennedy, and Roberts seemed to gang up on Solicitor General Donald Verrilli, who defended the PPACA on behalf of the government. CNN legal correspondent Jeffrey Toobin called the oral argument a “train wreck” for the Obama administration, and he consequently changed his thinking about the outcome of the case, now predicting that the Act’s individual mandate—the central and most controversial provision of the law—was unlikely to be upheld.¹ Toobin’s conclusion was shared by many commentators in the ten weeks between the oral argument and the decision in the case. The political futures market “Intrade” rated the probability of invalidating the Act’s

* Williams Memorial Professor of Law, Northwestern University School of Law. Tabor Lecturer in Legal Ethics, Valparaiso University School of Law, 2012.

** J.D. (2012); L.L.M. in International Human Rights (2013), Northwestern University School of Law.

¹ Noah Rothman, *CNN’s Jeffrey Toobin on Health Care Ruling: This Is a Day ‘For Me to Eat a Bit of Crow’*, MEDIAITE (June 28, 2012, 12:41 PM), <http://www.mediaite.com/tv/cnns-jeffrey-toobin-this-is-a-day-for-me-to-eat-a-bit-of-crow/>; see also *Toobin: Mandate in Grave Trouble* (CNN television broadcast Mar. 27, 2012), available at <http://www.cnn.com/video/#/video/crime/2012/03/27/nr-toobin-mandate.cnn> (providing the video clip of the original television broadcast where Jeffrey Toobin opined that he thought the individual mandate was going to be struck down).

884 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 47]

individual mandate at seventy percent.² This, of course, set the stage for the most significant surprise of all. On June 28, 2012, Chief Justice John Roberts delivered the opinion of the Court, joined by the four most liberal Justices, in which he upheld the individual mandate as a valid exercise of Congress's power under the Taxation Clause of the Constitution.³

The surprises did not end with the resolution of the case. There were three written opinions—Roberts's opinion for the Court, Justice Ginsburg's concurrence, and an unsigned joint dissent by Justices Kennedy, Scalia, Alito, and Thomas—and rumors began to fly as soon as they were distributed to the press. Based on the structure and language of the joint dissent, it was soon suggested that Chief Justice Roberts had initially intended to join his four conservative colleagues in striking down the mandate, but that he had changed his mind at the last minute.⁴ To that reading—which was based on some fairly solid textual clues—various blogs and websites quickly added the innuendo that Roberts had succumbed to outside pressure from President Obama and certain liberal journalists who, it was said, had threatened somehow to “delegitimize” the Supreme Court if key provisions of the PPACA were invalidated.⁵

² See *The U.S. Supreme Court to Rule Individual Mandate Unconstitutional Before Midnight ET 31 Dec. 2012*, INTRADE, <http://www.intrade.com/v4/markets/contract/?contractId=745353> (last visited Sept. 19, 2012) (providing a chart that illustrates the seventy percent probability); see also “*Individual Mandate Likely Ruled Unconstitutional; Will Bring Down ACA*,” SOBER LOOK (June 12, 2012), <http://soberlook.com/2012/06/individual-mandate-likely-ruled.html> (noting Intrade's probability that the individual mandate would get struck down).

³ See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2601 (2012) [hereinafter *NFIB v. Sebelius*] (providing the Supreme Court decision on the individual health care mandate).

⁴ See Chris Gentilviso, *John Roberts Health Care Decision: Supreme Court Chief Justice Switched Sides*, CBS Reports, HUFFINGTON POST (July 1, 2012, 3:32 PM), http://www.huffingtonpost.com/2012/07/01/john-roberts-health-care-decision-supreme-court-chief-justice_n_1641481.html (pointing out that Scalia's response to Roberts is at the end of the dissent, rather than worked into the body).

⁵ See, e.g., Randy Barnett, *More on the Left's Threat to Delegitimize the Supreme Court if It Invalidates the ACA*, THE VOLOKH CONSPIRACY (May 22, 2012, 4:45 AM), <http://www.volokh.com/2012/05/22/more-on-the-lefts-threat-to-delegitimize-the-supreme-court-if-it-invalidates-the-aca/>; David Bernstein, *Was the Dissent Originally a Majority Opinion?*, THE VOLOKH CONSPIRACY (June 28, 2012, 11:23 AM), <http://www.volokh.com/2012/06/28/was-scalias-dissent-originally-a-majority-opinion/> (speculating that Justice Roberts was responding to heat from President Obama and others, preemptively threatening to delegitimize the Court if it invalidated the mandate); John Podhoretz, *Roberts the Coward*, N.Y. POST (July 2, 2012, 10:34 PM), http://www.nypost.com/p/news/opinion/opedcolumnists/roberts_the_coward_rLGKY8EebRuDi8KrIXXAmL (stating that perhaps Justice Roberts changed his vote out of fear of attacks on the Supreme Court's legitimacy); Avik Roy, *Did Roberts Cave to Left-Wing Media Pressure?*, NAT'L REV. ONLINE (July 1, 2012, 2:26 PM), <http://www.nationalreview.com/corner/304516/did-roberts-cave-left-wing-media-pressure-avik-roy> (hypothesizing that

The biggest revelation, however, came on July 1, 2012, when CBS legal correspondent Jan Crawford posted an article describing Roberts's change of heart and Justice Kennedy's "relentless" attempts to bring him back to the conservative side.⁶ According to Crawford, the unsigned joint dissent was thereafter crafted to deliberately ignore Roberts's majority opinion, as a signal that Scalia, Kennedy, Alito, and Thomas "were no longer even willing to engage with him in debate."⁷ Crawford's post (and another a few days later) included many more otherwise confidential details about the Court's drafting and decision process in the PPACA case, indicating that she had obtained multiple interviews with knowledgeable insiders. A consummate professional, Crawford did not reveal the names of her "two sources with specific knowledge of the deliberations," but she included information—such as the initial vote during the post-argument conference and the subsequent "ire" of the four conservatives—that could only have been known by one or more of the Justices themselves.⁸ It is possible, of course, that some of the Justices complained out loud to their clerks, who then spoke to Crawford, although that is improbable.⁹ As Professor Orin Kerr explained on the highly regarded Volokh Conspiracy blog, a clerk's breach of confidentiality would amount to career suicide at a young and promising age, and SCOTUS clerks do not obtain their positions by being incautious.¹⁰ It is therefore much more likely—indeed, almost

Justice Roberts made his decision because of the concern of the Supreme Court's image if the mandate was overturned); Ilya Somin, *The Impact of the Individual Mandate Decision on the Supreme Court's Legitimacy*, THE VOLOKH CONSPIRACY (July 13, 2012, 12:57 PM), <http://www.volokh.com/2012/07/13/the-impact-of-the-individual-mandate-decision-on-the-supreme-courts-legitimacy> (analyzing the impact of the individual mandate decision on the public's view of the Supreme Court); W.W., *Obamacare and the Supreme Court: John Roberts's Art of War*, THE ECONOMIST (June 28, 2012, 9:01 PM), <http://www.economist.com/blogs/democracyinamerica/2012/06/obamacare-and-supreme-court-0> (stating that Justice Roberts was worried about the "liberal freak-out over the mere possibility of a ruling striking down Obamacare").

⁶ Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 1, 2012, 1:29 PM), http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/?tag=contentMain;contentBody.

⁷ See *id.* ("Instead, the four joined forces and crafted a highly unusual, unsigned joint dissent. They deliberately ignored Roberts' decision, the sources said, as if they were no longer even willing to engage with him in debate.")

⁸ *Id.*

⁹ See Nina Totenberg, *SCOTUS Secrets, Leaks & Pizza with Scalia*, BLOOMBERG LAW (July 11, 2012), http://www.youtube.com/watch?v=KW_IdVMEJrk (providing a video broadcast of Nina Totenberg explaining her view that the individual mandate decision was leaked to the public and hypothesizing that the leak came from someone who was angry about Roberts switch, such as another Justice, a clerk, or even a significant other).

¹⁰ Orin Kerr, *Who Leaked?*, THE VOLOKH CONSPIRACY (July 1, 2012, 5:43 PM), <http://www.volokh.com/2012/07/01/who-leaked/>; see also Zach Carter, *Antonin Scalia*

certain—that Crawford’s sources included one or more of the dissenting Justices. It was the dissenters who were aggrieved by Roberts’s perceived betrayal—the liberals had no reason to complain—and they were accordingly most likely to vent their anonymous resentment to Crawford. The leakers’ identities will someday be revealed, although perhaps not until the papers of a current Justice are made available to historians. In the meantime, it is a fair working hypothesis that Crawford’s source was a member of the Court and not a subordinate.¹¹

We must therefore face an uncomfortable question that scholars have seldom seriously asked in American judicial history. Assuming that a Justice breached the confidentiality of the Court, was it unethical?

II. THE SUPREME COURT’S MISSING CODE OF ETHICS

In most situations, there would be an obvious first step in determining whether a judge’s actions were unethical: just look at the relevant version of the *Code of Judicial Conduct*. Every state supreme court has adopted a version of the *Code*, as has the Judicial Conference of

Blasts Health Care Reform Decision, Says Supreme Court Is Not ‘Political,’ HUFFINGTON POST (July 29, 2012, 10:16 AM), http://www.huffingtonpost.com/2012/07/29/antonin-scalia-health-care-reform_n_1715886.html (explaining that in an interview Justice Scalia referred to the leaker as “someone who was breaking the oath of confidentiality”); *Piers Morgan Tonight: Justice Antonin Scalia* (CNN television broadcast July 18, 2012), available at <http://tpmdc.talkingpointsmemo.com/2012/07/antonin-scalia-john-roberts-health-care-ruling.php> (providing a television interview where Justice Scalia denied the accuracy of the leaked information, implying that he had not been the source). See generally Charles W. Sorenson, Jr., *Are Law Clerks Fair Game? Invading Judicial Confidentiality*, 43 VAL. U. L. REV. 1, 22-37 (2008) (explaining the origin of law clerks, the intimate relationship between clerk and judge, and the vitality of confidentiality to the judge-clerk relationship).

¹¹ The most momentous possible leak in Supreme Court history occurred on March 4, 1857, at the inauguration of James Buchanan, when Chief Justice Roger Taney was seen whispering to the President-elect shortly before administering the oath of office. A few minutes later, in his inaugural address, Buchanan stated that the Supreme Court was about to “speedily and finally” resolve the issue of slavery expansion, and he urged all citizens to “cheerfully submit” to the Court’s ruling. Two days later, Taney announced the *Dred Scott* decision, which held, inter alia, that the Congress could not prohibit slavery in the national territories. It was soon rumored that Taney had disclosed the ruling to Buchanan, as part of a pro-slavery cabal. That turns out to have been untrue, but only because it was unnecessary. Buchanan had been in correspondence with several other Justices during the previous months, and he did not need a public tip from Taney to know how the case would be decided. See DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 312-13 (1978) (providing the details of the Buchanan inauguration in relationship to the *Dred Scott* decision); see also Jonathan Peters, *The Supreme Court Leaks: The High Court Has a Long and Storied History of Dishing on Itself*, SLATE (July 6, 2012, 2:25 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/07/the_supreme_court_leaking_john_robert_s_decision_to_change_his_mind_on_health_care_should_not_come_as_such_a_surprise.html (providing a brief history of other major Supreme Court leaks).

the United States (which sets policy for the lower federal courts). The U.S. Supreme Court, however, has steadfastly declined to adopt or announce a code for itself, thus making it the only court in the United States with no clearly defined ethical standards.¹² At the outset of Chief Justice Roberts's tenure, there was some hope that he might lead the Court to promulgate a code, or at least to announce a more definite set of standards for the Justices, but that has not been the case. Consequently, the Court has been repeatedly questioned about the conduct of individual Justices—regarding, for example, the acceptance of gifts, outside speaking engagements, the accuracy of financial disclosure forms, recusal, and now confidentiality—with no simple answers forthcoming.

In reaction to this void in the ethical landscape, 138 law professors wrote to the House and Senate Judiciary Committees on March 17, 2011, urging the consideration of legislation that would require the Supreme Court to adhere to the Judicial Conference's *Code of Conduct*. Although the letter was inevitably politicized, given the nature of the controversies surrounding the Court, its stated goals were politically neutral: "The purpose of this letter is to issue a nonpartisan call for the implementation of mandatory and enforceable rules to protect the integrity of the Supreme Court."¹³ Soon afterward, Congressman Chris Murphy (D-CT) introduced the Supreme Court Transparency and Disclosure Act of 2011 (H.R. 862), which provides that "[t]he Code of Conduct for United States Judges adopted by the Judicial Conference of the United States shall apply to the justices of the United States Supreme Court to the same extent as such Code applies to circuit and district judges."¹⁴ Neither Congress nor the Court took any action regarding the proposed statute, but Chief Justice Roberts evidently took notice of the public concern. He devoted the first half of his *2011 Year-End Report on the Federal Judiciary* to

¹² See James J. Alfani, *Supreme Court Ethics: The Need for Greater Transparency and Accountability*, 21 PROF. LAW., 2012, at 10, 10–14.

¹³ See Letter from 138 Law Professors to the House and Senate Judiciary Comms. (Mar. 17, 2011), available at http://www.afj.org/judicial_ethics_sign_on_letter.pdf (requesting congressional reform of Supreme Court ethical and recusal standards and noting the "[r]ecent media reports [that] have focused public attention" on the issue).

Lubet disclosure: I signed the law professors' letter. In retrospect, I think it might have been preferable to abstain in order to avoid any appearance that politics had intruded into judicial ethics, although I continue to think that the letter's requests were both compelling and apolitical.

¹⁴ Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Cong. § 2(a) (2011).

888 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 47]

a defense of the Court's determination not to promulgate its own ethics code.¹⁵

Chief Justice Roberts began his defense by offering to "provide some clarification on how the Justices address ethical issues and dispel some common misconceptions."¹⁶ He admitted that the *Code* is an appropriate "starting point and a key source of guidance for the Justices."¹⁷ But he also explained that there is "no reason" to adopt it as the Court's "definitive source of ethical guidance" because it is only one of many texts and other authorities the Court can consult for guidance.¹⁸ He added that the *Code* "cannot answer all questions," and "it does not adequately answer some of the ethical considerations unique to the Supreme Court."¹⁹ Finally, Roberts noted that "no compilation of ethical rules can guarantee integrity."²⁰

All of Roberts's observations are accurate enough, but they do not justify, or even explain, the Supreme Court's unwillingness to adopt a code of conduct. Access to multiple additional sources, for example, is equally true for every court in the United States. As Roberts put it, they may all "consult a wide variety of other authorities to resolve specific ethical issues [including] judicial opinions, treatises, scholarly articles, and disciplinary decisions."²¹ And yet no other court has thought that to be a sufficient reason to avoid promulgating its own code.

Likewise, the observation that "no compilation of ethical rules can guarantee integrity" is little more than a platitude.²² It goes without saying that codes, rules, statutes, and even religious vows can all be broken. Nonetheless, we still have laws to govern our actions and to articulate society's expectations about our behavior. Indeed, codes ranging from sacred to mundane—from the Ten Commandments and the Constitution to lawyers' *Rules of Professional Conduct* and municipal building regulations—are violated every day, but few thoughtful people (apart from the occasional anarchist) would suggest that they are therefore meaningless or unnecessary. Chief Justice Roberts's argument to the contrary is deeply unsatisfying. According to Roberts, the Justices have so much integrity that a code is unnecessary, and yet there is no

¹⁵ See CHIEF JUSTICE JOHN ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY (Dec. 31, 2011), <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 5.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 11.

²¹ *Id.* at 5.

²² *Id.* at 11.

guarantee they would adhere to a code if they had one. The Chief would no doubt reject that sort of circular reasoning from a lawyer, and it is no more persuasive coming from the Court.

At the Supreme Court level, the function of a judicial code is not to compel compliance or punish violations—both of which would be impossible. Rather, the purpose of a code would be to set identifiable standards for the Justices' conduct, so that the public may know what to expect of the nine most powerful judges in the nation. Is it right or wrong for Justices to speak anonymously to the press following a controversial decision? Is it acceptable for Justices to appear at political fundraisers or to address partisan legal organizations? To vacation with litigants in the middle of pending proceedings? To endorse candidates for elective office? To solicit charitable contributions? To comment on legal issues or cases pending in other courts? To accept gifts from political activists? To assign clerks or court staff to work on their memoirs or other books? Some of these events have occurred and others have not (although they are all imaginable).²³ When questioned, individual Justices have from time to time stated personal opinions on the virtuousness of their own activities—unsurprisingly, no Justice has ever admitted doing anything wrong—but there is no definitive statement from the Court itself regarding self-imposed limits of propriety.²⁴

²³ See Alfini, *supra* note 12, at 11-13 (noting that Justice Ginsburg and Justice Scalia have appeared as speakers at partisan events, while Justice Alito and Justice Thomas have attended fundraising events for partisan groups and accepted gifts from various organizations). Justice Thomas accepted a bust of Abraham Lincoln valued at \$15,000 from the American Enterprise Institute. *Id.* at 12. Justice Thomas has also acknowledged the assistance of a Supreme Court librarian in writing his memoir. See CLARENCE THOMAS, *MY GRANDFATHER'S SON: A MEMOIR* xii-xiii (2007) ("Patricia Evans at the Supreme Court Library worked tirelessly to track down even the most obscure facts and documents based on my faintest recollections."). Justice Stevens has likewise acknowledged memoir writing assistance from court staff and his clerks. See JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 281-82 (2011) (recognizing the help from his clerk and staff in the acknowledgment section of his memoir). Justice Scalia, on the other hand, told a reporter, "I could not use my law clerks" for research on his books. Jess Bravin, *Writers Bloc: Justice Scalia's Literary Collaborator Tells All*, WALL ST. J. L. BLOG (July 23, 2012, 2:26 PM), <http://blogs.wsj.com/law/2012/07/23/writers-bloc-justice-scalia%e2%80%99s-literary-collaborator-tells-all/>.

²⁴ The only partial exception is the Court's 1993 Statement of Recusal Policy, which applies only to cases where a Justice's relative works for a law firm involved in the litigation. Seven Justices jointly issued the statement as a press release rather than a rule, and it has never been generally available. See Press Release, U.S. Supreme Court, Statement of Recusal Policy (Nov. 1, 1993), reprinted in RICHARD E. FLAMM, *JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES* 1101-03 (2d ed. 2007) (setting out what the recusal policy will be when relatives or partners of those relatives appear before them). The statement was signed by only seven of the then-sitting justices,

890 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 47]

Recall Chief Justice Roberts's observation that the *Code of Conduct* for U.S. Judges, as adopted by the Judicial Conference, "does not adequately answer some of the ethical considerations unique to the Supreme Court."²⁵ Maybe so, although the Chief identified only one such concern—recusal, which is in any event governed by a separate federal statute—that will be addressed in the next section.²⁶ Regarding all other matters, it is difficult to envision situations in which Supreme Court Justices ought to follow different ethical standards than those of lower court judges. Granting Roberts's premise, however, it would be an entirely simple matter for the Supreme Court to adapt the *Code of Judicial Conduct* to its own circumstances. Most state supreme courts have made their own revisions—some modest, some extensive—to the Model Code, and the U.S. Supreme Court could easily take the same approach. Is the *Judicial Conference Code* too restrictive regarding political activity? Is it too permissive when it comes to the use of court staff? Well, fix it. Of course, that would require a public declaration of the Court's own standards on matters, such as confidentiality and political activity, in which case the Justices could then be held accountable for noncompliance—the latter being something they appear to regard with near horror.

Ultimately, it would matter very little what the Supreme Court's code of judicial conduct might say about the confidentiality of deliberations, or anything else, so long as it says something definitive. It is fine and good for the Justices to look to numerous outside sources for

with Justices Blackmun and Souter abstaining. *Id.* at 1101. It is unknown whether Blackmun and Souter thought the Court's approach to recusal was too sweeping or too narrow (or unnecessary in Souter's case, as he was unmarried and childless). Chief Justice Roberts and Justice Alito have since adopted the 1993 statement. Ross E. Davies, *The Reluctant Recusants: Two Parables of Supreme Judicial Disqualification*, 10 GREEN BAG 2D 79, 91-92 (2006). The positions of Justices Kagan and Sotomayor are not currently known (although both are unmarried and childless, so the question of close relatives at law firms may be moot). Davies further provides insight on several of the Court's unannounced recusal policies. *See generally id.* (exploring several situations where Justices have recused themselves). There has been only one instance of an open dispute between Justices regarding an ethics issue, in which Justice Jackson implicitly criticized Justice Black for failing to recuse himself in a case involving his former law partner. *See Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 897, 897-98 (1945) (Jackson, J., concurring) (discussing the lack of uniform practice of Justices recusing themselves); *see also* Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203, 203 (1988) ("Only once in the history of the Supreme Court of the United States has one of its members publicly accused another of unethical behavior and of manipulating the decision-making process for personal ends . . .").

²⁵ ROBERTS, *supra* note 15, at 5.

²⁶ *See id.* at 7 (setting out Chief Justice Roberts's views regarding the recusal of Supreme Court Justices, which is governed by 28 U.S.C. § 455); *see also infra* Part III.B (discussing the written policies that govern recusal of Supreme Court Justices).

“guidance,” as Chief Justice Roberts put it, but a well-articulated code of conduct would actually let the public know what to expect.²⁷

III. THE SUPREME COURT’S RECUSAL PRACTICE

Though important, the ethics of confidentiality and political cheerleading are collateral to judicial decision-making. Recusal practice, in contrast, goes to the heart of judging. Throughout the course of the PPACA litigation, questions were raised about the participation of Justices Clarence Thomas and Elena Kagan. It was suggested that Thomas was disqualified by virtue of his wife’s high-profile opposition to the PPACA, and that Kagan’s recusal was necessary because of her previous position as Solicitor General in the Obama administration.²⁸ There is no need here to review or evaluate the pro-recusal arguments, some of which were more substantial than others. Suffice it to say that both Kagan and Thomas participated fully in *NFIB v. Sebelius*.²⁹ It is fair to assume that both Justices at least briefly considered recusal—given all of the controversy that surrounded them, not to mention the fact that Chief Justice Roberts implicitly addressed the issue in his annual message—but neither Thomas nor Kagan ever publicly explained their individual decisions to remain in the case.³⁰

A. *The Code of Silence*

Kagan’s situation is in some ways the more interesting because she did recuse herself in the contentious Arizona immigration case, *Arizona v. United States*, which was decided just a week before *NFIB v. Sebelius*.³¹ Both the immigration and health care cases were pending during

²⁷ ROBERTS, *supra* note 15, at 5.

²⁸ See Joan Biskupic, *Calls for Recusal Intensify in Health Care Case*, USA TODAY, Nov. 20, 2011, <http://www.usatoday.com/news/washington/story/2011-11-20/supreme-court-obamacare-health/51324806/1> (explaining why some urged that Justices Thomas and Kagan sit out of the Obamacare decision).

²⁹ See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2576, 2609, 2642 (2012) (indicating where either Kagan and Thomas join an opinion on the case).

³⁰ Freedom Watch, a public interest organization, filed an amicus brief in *NFIB* seeking the disqualification of Justice Kagan, as well as a motion requesting to present oral argument on the issue. See Brief of Amicus Curiae Freedom Watch in Support of Neither Party and on Issue of Recusal or Disqualification of Justice Elena Kagan, *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012) (Nos. 11-393, 11-400), 2012 WL 72452. The Court denied the motion to participate in oral argument without comment, except to state that “Justice KAGAN took no part in the consideration or decision of this motion.” *NFIB v. Sebelius*, 132 S. Ct. 1161, 1161 (2012). The Court similarly denied Freedom Watch’s motion to reconsider, again noting that Justice Kagan did not participate in the decision. *NFIB v. Sebelius*, 132 S.Ct. 1652, 1652 (2012).

³¹ *Arizona v. United States*, 132 S. Ct. 2492, 2511 (2012).

892 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 47]

Kagan's tenure as Solicitor General, so it is obvious that she distinguished between the two matters for the purpose of recusal. It appears that she anticipated the challenges to the PPACA and therefore screened herself from any involvement in the litigation while she was Solicitor General, but Kagan herself has never made that explicit, and the precise details of her analysis remain unknown.³²

Justice Kagan's silence follows the practice of the other Justices, who almost never explain the reasons for their recusal or non-recusal decisions.³³ In some cases, of course, a Justice's motivation for recusal is obvious or can easily be inferred. Justice Breyer, for example, always disqualified himself in cases involving his brother, who was, until recently, a U.S. district court judge in San Francisco.³⁴ In many situations, however, the rationale is opaque, as was the case when Justice Kennedy belatedly disqualified himself in *RadLAX Gateway Hotel, L.L.C. v. Amalgamated Bank*.³⁵ Knowledgeable observers have speculated that the recusal had something to do with the financial interests of Kennedy's son, who is a mortgage banker, but the Justice himself declined requests for an explanation.³⁶

The Justices' near total reticence to clarify recusal decisions is almost impossible to understand. Surely there are Court insiders—including former clerks—who are privy to an individual Justice's reasoning, but why withhold the same information from other lawyers and the public?

³² See Biskupic, *supra* note 28 (explaining that Kagan has stated that she had no involvement defending the PPACA); Michael B. Mukasey, *The ObamaCare Recusal Nonsense*, WALL ST. J., Dec. 5, 2011, <http://online.wsj.com/article/SB10001424052970204012004577070162911944188.html> ("There has been no evidence that [Justice Kagan] acted personally in her official capacity as solicitor general in connection with any issue in the [PPACA]."); James Oliphant, *Kagan, Thomas Pressed to Stay out of Healthcare Fight*, L.A. TIMES, Dec. 1, 2011, <http://articles.latimes.com/2011/dec/01/news/la-pn-kagan-thomas-20111201> (noting that in her confirmation hearing, Justice Kagan testified that she played a minimal role in the Justice Department's efforts to develop a litigation strategy to defend the PPACA).

³³ The two remarkable exceptions include the lengthy opinions of the late Chief Justice Rehnquist in *Laird v. Tatum*, and Justice Scalia in *Cheney v. U.S. Dist. Court D.C.* See *Cheney v. U.S. Dist. Court D.C.*, 541 U.S. 913, 929 (2004) (denying a motion that Justice Scalia recuse himself because of his relationship with the Vice President); *Laird v. Tatum*, 409 U.S. 824, 824 (1972) ("While neither the Court nor any Justice individually appears ever to have done so, I [(Justice Rehnquist)] have determined that it would be appropriate for me to state the reasons which have led to my decision with respect to respondents' motion [for recusal].").

³⁴ See *Olympic Airways v. Husain*, 540 U.S. 644, 644–45 (2004) (noting Justice Breyer's recusal on the case tried in the Northern District of California by his brother, Charles R. Breyer).

³⁵ 132 S.Ct. 2065, 2068 (2012).

³⁶ See Tony Mauro, *Family Matters*, NAT'L L.J., June 11, 2012, at 11, 14. (stating that Justice Kennedy declined to publicly explain the reason for his recusal in *RadLAX Gateway Hotel v. Amalgamated Bank*).

And why not establish a body of case law on recusal that would provide guidance for both Justices and lower court judges in the future? The Supreme Court has never offered an explanation for this practice, although several Justices have discussed it off the record with the journalist Tony Mauro, telling him “that they don’t explain their reasons because they would not want to pressure their colleagues into recusing in a similar situation.”³⁷ Then Associate Justice William Rehnquist expressed a similar rationale in 1981 in response to an inquiry from the *Des Moines Register*. “Some of my colleagues would agree” with his recusal decisions, said Rehnquist, but “some would not,” and it was therefore preferable to keep mum about his reasons.³⁸ In other words, the Justices appear to value flexibility—even at the cost of inconsistency and unpredictability—in an area that is supposed to be governed by objective ethical standards. Or, as Mauro astutely put it in a SCOTUSblog symposium, “[t]hat seems to take collegiality too far. And it highlights the problematic fact that Justices stay in or bow out of cases by their own lights, their standards, without review by anyone else.”³⁹

Whatever reasoning was engaged by Justices Kagan and Thomas in *Sebelius*, we know one thing for certain: each Justice made his or her own decision to sit (or to recuse, as did Kagan in *Arizona*) without consideration by the full Court. Under the Supreme Court’s established procedures, all recusal questions are decided solely by the affected Justice. As Justice Breyer explained to the Senate Judiciary Committee, “I have to make up my own mind. Others cannot make it up for me.”⁴⁰ Thus, each Justice is accorded what amounts to absolute and unreviewable discretion to sit in any case, no matter whether there are objecting litigants or widely perceived conflicts of interest. To the

³⁷ Tony Mauro, *Justices in the Media*, SCOTUSBLOG (Nov. 9, 2011, 11:11 PM), <http://www.scotusblog.com/community/justices-in-the-media/>. Justice Frankfurter once suggested to his colleagues “that it is desirable to state why one takes himself out of a case,” but to no avail. Pub. Utils. Comm’n of D.C. v. Pollak, 343 U.S. 451, 467 (1952).

³⁸ Letter from Justice William Rehnquist to *The Des Moines Register* (Dec. 15, 1981), in *The Justices Answer*, DES MOINES REG., Dec. 15, 1991, at 12A. Rehnquist did, of course, explain his most famous nonrecusal decision in *Laird v. Tatum*, notwithstanding the potential disagreement of his colleagues. 409 U.S. 824 (1972).

³⁹ Mauro, *supra* note 37. The Supreme Court Transparency and Disclosure Act of 2011 would require a Justice to “disclose in the public record of the proceeding the reasons for [any] disqualification” as well as for the denial of any recusal motion. Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Cong. § 3(a)(2) (2011).

⁴⁰ *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 28 (2011) (statement of Hon. Stephen Breyer, Assoc. Justice, Supreme Court of the United States).

894 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 47]

Justices, recusal appears to be regarded as a matter of personal conscience rather than a question of law.⁴¹

B. *Solo Decision-Making*

The Supreme Court's recusal policy is mostly unwritten; there is no published rule that governs the recusal process, even in the face of a party's disqualification motion. There is no doubt about the Court's procedure, however, as was made clear in the famous Scalia-Cheney duck hunting case. In response to a motion to disqualify Justice Scalia, filed by the Sierra Club, the Court entered an order providing that "[i]n accordance with its historic practice, the Court refers the motion to recuse in this case to Justice SCALIA."⁴² Needless to say, the longevity of the policy does not make it right, much less uncontroversial. There has been considerable criticism of the each-justice-decides-alone procedure, coming from both scholarly and political quarters. The proposed Supreme Court Transparency and Disclosure Act of 2011 includes a fairly radical provision in which retired Justices and senior circuit court judges could be called upon to participate in the review of an individual Justice's denial of a recusal motion.⁴³ More moderate proposals call for the full Supreme Court itself to rule en banc on the disqualification of a member Justice.⁴⁴ Chief Justice Roberts has made it clear that the Supreme Court is not ready for reform.⁴⁵ In his 2011

⁴¹ As Chief Justice Roberts recognizes, 28 U.S.C. § 455 provides an "objective standard [that] focuses the recusal inquiry on the perspective of a reasonable person who is knowledgeable about the legal process and familiar with the relevant facts." ROBERTS, *supra* note 15, at 7.

⁴² *Cheney v. U.S. Dist. Court D.C.*, 540 U.S. 1217, 1217 (2004).

⁴³ H.R. 862 § 3(b).

⁴⁴ Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification – and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 REV. LITIG. 733, 794 (2011) ("Where the challenge targets a United States Supreme Court Justice . . . the disqualification decision should be made by the entire court.") (footnote omitted); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 644 (1987) (proposing judicial reforms in which "[a]ny party aggrieved by the refusal of a Supreme Court Justice to disqualify himself may, on timely motion, obtain review by the full Supreme Court"); Editorial, *A Way Forward on Judicial Ethics*, N.Y. TIMES, Mar. 11, 2012, <http://www.nytimes.com/2012/03/12/opinion/a-way-forward-on-judicial-ethics.html> (explaining a proposal to amend the Supreme Court Justice recusal process that would potentially result in the all of the Justices ruling on the recusal); Danielle Citron, *Sherrilyn Ifill's The Chief Strikes Out*, CONCURRING OPINIONS (Jan. 4, 2012, 12:14 PM), <http://www.concurringopinions.com/archives/2012/01/sherrilyn-ifills-the-chief-strikes-out.html> (questioning the Supreme Court's current recusal process).

⁴⁵ See ROBERTS, *supra* note 15, at 3 (addressing the public concerns for a Supreme Court judicial code of ethics by providing clarification on how the Justices approach ethical issues and by dispelling some common misconceptions).

Annual Report, he acknowledged that recusal issues had “recently drawn public attention,” while defending the Court’s practice of unilateral and mostly secret decision-making.⁴⁶ The Chief offered three reasons for his position: (1) courts do not normally review the recusal decisions of their own members; (2) review by the full Court could lead to manipulation or strategic conduct; and (3) recusals must be minimized due to the “unique circumstances of the Supreme Court.”⁴⁷

In the first instance, Roberts is simply wrong. In fact, some other courts do review the recusal decisions of their own members. For example, the Supreme Court of Alaska follows a procedure in which all members of the court review denials of disqualification made by any justice.⁴⁸ Michigan has a similar process in which all members of the Michigan Supreme Court review recusal decisions made by their colleagues upon a party’s motion.⁴⁹ In many lower state courts, the denial of a recusal motion may be reviewed by the chief judge. This is the case in Michigan,⁵⁰ California,⁵¹ Oklahoma,⁵² Texas,⁵³ and elsewhere.

In the lower federal courts, it is true that recusal motions are presented in the first instance to the challenged judge pursuant to 28 U.S.C. § 455, but in some cases the motions are nonetheless referred to other judges. As the First Circuit explained, “[A] trial judge faced with a section 455(a) recusal motion may, in her discretion, leave the motion to

⁴⁶ *Id.*

⁴⁷ *Id.* at 7–9.

⁴⁸ See ALASKA STAT. ANN. § 22.20.020(c) (West 2012) (“If a judicial officer denies disqualification the question shall be heard and determined by another judge assigned for the purpose by the presiding judge of the next higher level of courts or, if none, by the other members of the supreme court.”).

⁴⁹ See MCR 2.003(D)(3)(b) (West 2012) (explaining that when a justice’s participation in a case is challenged by motion and that justice still denies the motion, a party may move for the motion to be decided by the entire court).

⁵⁰ See MCR 2.003(D)(3)(a) (providing that a party may request that the motion be referred to the chief justice in a court of two or more judges, or they may request that the motion be referred to another judge by the state court administrator when there is only one judge or the chief justice is the one in question).

⁵¹ See CAL. CIV. PROC. CODE § 170.3(c)(5) (West 2012) (“[If a judge refuses to recuse herself, then] the question of disqualification shall be heard and determined by another judge agreed upon by all the parties who have appeared or, in the event they are unable to agree within five days of notification of the judge’s answer, by a judge selected by the chairperson of the Judicial Council, or if the chairperson is unable to act, the vice chairperson.”).

⁵² See OKLA. STAT. ANN. tit. 12, Ch. 2, App., Rule 15(b) (West 2012). In Oklahoma, the presiding judge of the administrative district hears challenges to the chief judge’s refusal to disqualify himself. *Id.* Additionally, civil cases are appealed to the Supreme Court and criminal cases to the Court of Criminal Appeals. *Id.*

⁵³ See TEX. R. CIV. P. 18a(f)–(g) (West 2012) (stating that the regional presiding judge may refer the recusal motion to the Chief Justice for consideration).

896 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 47]

a different judge.”⁵⁴ The District of Columbia Circuit is in accord—a trial court “may, of course, at its option transfer the matter to another judge for decision”—and the local rules for the Northern District of California specifically recognize the same option.⁵⁵

In most instances, of course, lower court judges do not need to refer recusal motions because their own decisions are subject to appeal or mandamus, or eventually even certiorari, and errors can therefore be corrected by higher courts.⁵⁶ Chief Justice Roberts recognized this distinction, but he drew an odd conclusion. “Like lower court judges,” said Roberts, “the individual Justices decide for themselves whether recusal is warranted,” but the issue then goes no further because “[t]here is no higher court to review a Justice’s decision not to recuse in a particular case.”⁵⁷ Once again, the reasoning is circular. Lower court judges can initially decide recusal for themselves because their decisions are subject to review, but Supreme Court Justices cannot be reviewed and must therefore make recusal decisions alone. Thus, there are precisely nine Judges in the United States who exercise idiosyncratic discretion over their own recusal, because, well, because they like it that way.⁵⁸

There is an obvious further problem with the Chief’s position. He says that there is “no higher court” to review an individual Justice’s decision, but of course there is the full Supreme Court itself.⁵⁹ The Constitution vests the judicial power in “one supreme Court,” not in nine individual Justices, and it is therefore evident that judicial decisions are to be made by a majority of the Court.⁶⁰ The solo recusal practice is

⁵⁴ *In re United States*, 158 F.3d 26, 34 (1st Cir. 1998).

⁵⁵ *United States v. Heldt*, 668 F.2d 1238, 1271 (D.C. Cir. 1981); *see also* N.D. CAL. CIV. LOC. R. 3-15 (explaining that a judge may refer “matters arising under 28 U.S.C. § 455 to the Clerk so that another Judge can determine disqualification”).

⁵⁶ *See, e.g.*, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (finding that a West Virginia Supreme Court Justice’s failure to recuse himself was a violation of due process); *United States v. Estey*, 595 F.3d 836, 842 (8th Cir. 2010) (affirming the district court judge’s denial of defendant’s recusal motion); *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1317 (2d Cir. 1988) (denying plaintiff’s petition for writ of mandamus based on a claim that the district court judge improperly ruled against recusal); *White v. SunTrust Bank*, 538 S.E.2d 889, 892 (Ga. Ct. App. 2000) (reversing the state court’s order denying a motion to recuse).

⁵⁷ ROBERTS, *supra* note 15, at 8.

⁵⁸ Chief Justice Roberts also ignores the great likelihood that lower court practice is influenced by the Supreme Court’s policy. If the Supreme Court Justices were to begin referring recusal motions to colleagues, many lower courts would no doubt follow suit. It makes no sense to suggest that the Supreme Court’s practice is derived from lower courts’ non-referral policies.

⁵⁹ ROBERTS, *supra* note 15, at 8.

⁶⁰ U.S. CONST. art. III, § 1.

therefore a policy choice made by the Justices and not a consequence of the Constitution's structure.

According to Chief Justice Roberts, however, review by the full Court "would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate."⁶¹ This argument fails for two reasons. First, a majority of the Court would never need to "affect the outcome of a case" by disqualifying a colleague, because a majority could always, by definition, control the outcome with or without the participation of the recused Justice. Thus, the scenario that troubles the Chief could never occur in reality.

Roberts's fear of outcome manipulation is untenable for a second, and more important, reason as well. The current disqualification practice depends on the assumption that each individual Justice will decide recusals fairly and dispassionately. Indeed, Roberts assures us that the Justices are all "jurists of exceptional integrity" and that he has "complete confidence in the capability of [his]colleagues to determine when recusal is warranted."⁶² That being the case, why does he worry that five or more Justices—individually towers of rectitude—would suddenly become calculated schemers when acting in concert? By simple force of mathematics, it is more probable that a single Justice would act strategically to remain in a case, rather than that five Justices would connive to exclude a sixth.⁶³

But strategic behavior really has nothing to do with it. Nobody suggests that Supreme Court Justices intentionally participate in cases when they know they should disqualify themselves (much less that a majority would intentionally boot a colleague whom they know to be disinterested and impartial). The real issue is that all individuals—including Justices—are extremely poor arbiters of their own objectivity. This should not come as a surprise to the Supreme Court. Justice

⁶¹ ROBERTS, *supra* note 15, at 9.

⁶² *Id.* at 10.

⁶³ See, e.g., DAVIES, *supra* note 24, at 88 (discussing the only known case of collectively imposed recusal, in which the Justices actually prevented a colleague's disqualification from affecting the outcome of any case). On New Year's Eve, 1974, Justice William O. Douglas suffered a severely debilitating stroke but he refused to resign from the bench. *Id.* After observing Douglas's increasingly uneven behavior both on and off the bench, seven of the other eight Justices made a secret arrangement to deprive Douglas of meaningful voting rights on the Court. *Id.* They agreed that no written opinions would be assigned to Douglas and that "they would not hand down any judgment arrived at by a 5-4 vote where Mr. Justice Douglas is in the majority." *Id.* (quoting Letter from Justice White to Chief Justice Burger and Justices Brennan, Stewart, Marshall, Blackmun, Powell, and Rehnquist (Oct. 20, 1975), reprinted in DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER* WHITE app. 2, at 463 (1998)).

898 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 47]

Frankfurter made just that observation when recusing himself from a case in 1952, recognizing that “reason cannot control the subconscious influence of feelings of which it is unaware.”⁶⁴ There is an enormous literature in psychology that supports this rather obvious conclusion. In fact, it is beyond scientific dispute that we are all profoundly unaware of our own perceptual biases and cognition errors.⁶⁵ The poetic case is equally strong.⁶⁶

As the Supreme Court noted in *Caperton v. A.T. Massey Coal Co.*, one can never know whether a judge has “simply misread[] or misapprehend[ed] the real motives at work in deciding the case,” especially when the sole decision-maker is “the one accused of bias.”⁶⁷ There is an inevitable chance of error when judges are called upon to determine their own neutrality, and it is multiplied when the decision is placed beyond review. Justice Kagan, for example, set up a screen to isolate herself from the health care litigation when she was at the Justice Department, and then, as a Supreme Court Justice, she was the sole evaluator of the screen’s sufficiency. Quite literally, she sat in final judgment of her own earlier actions. Without questioning the rigor of Kagan’s precautions, or her sincerity in believing them adequate, it is still certain that other Justices could have brought greater objectivity to the decision. In *Caperton*, the Court held that the Due Process Clause may sometimes require the disqualification of a judge or justice, even in the absence of actual bias. It is a due process truism that “no man is allowed to be a judge in his own cause,” and there is no exception under

⁶⁴ Pub. Utils. Comm’n of D.C. v. Pollak, 343 U.S. 451, 466 (1952).

⁶⁵ See DANIEL KAHNEMAN, THINKING, FAST AND SLOW 239–40 (2011) (“[T]he confidence that people have in their intuitions is not a reliable guide to their validity. In other words, do not trust anyone—including yourself—to tell you how much you should trust their judgment.”). “We are often confident even when we are wrong, and an objective observer is more likely to detect our errors than we are.” *Id.* at 4. The neuroscientist Tali Sharot uses Justice Scalia’s refusal to recuse himself in *Cheney* to demonstrate “introspection illusion.” TALI SHAROT, THE OPTIMISM BIAS: A TOUR OF THE IRRATIONALLY POSITIVE BRAIN 16–18 (2012). “An introspection illusion is the strong sense that people have that they can directly access the processes underlying their mental states. Most mental processes, however, are largely unavailable for conscious interpretation. The catch is that people are unaware of their unawareness.” *Id.* at 18. Professor Sharot contends that although “Scalia thought he had insight into his inner motives, and mental state . . . [h]e was, at least partially, mistaken.” *Id.* at 17.

⁶⁶ See ROBERT BURNS, *To a Louse*, in THE POEMS AND SONGS OF ROBERT BURNS 141, 142 (Ernest Rhys ed., Everyman’s Library 1906) (1785) (“O wad some Pow’r the giftie gie us/To see oursel as ithers see us!/It wad frae monie a blunder free us.”).

⁶⁷ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883, 885 (2009).

the venerable axiom for Supreme Court Justices ruling on their own recusals.⁶⁸

As Judge Richard Posner has observed, Supreme Court Justices face a special “risk of acquiring an exaggerated opinion of their ability and character” due to the very nature of the job.⁶⁹ There is no need to pose the specter of intentional misconduct—by one or any number of Justices—in order to recognize that collective decision-making is preferable when it comes to identifying subconscious biases or latent and unacknowledged partiality.

C. *The Duty to Sit*

Chief Justice Roberts’s third point is a non-sequitur, but an important one. Noting that Supreme Court recusal involves “an important factor that is not present in the lower courts,” Roberts cautions that disqualification must be invoked sparingly so that the Court does not “sit without its full membership.”⁷⁰ But why raise this issue at all in the context of procedural questions? The posited problem of over-recusal should have no bearing on the locus of the decision—unless, of course, the full Court would be disposed to disqualify Justices who would otherwise choose to sit. And that scenario—which is implicit in Roberts’s rationale—actually establishes the likelihood that individual Justices do indeed err on recusal matters. If individual Justices always got it right, after all, there would never be additional recusals following full Court review.

Nonetheless, the Chief stresses the “duty to sit,” which has been emphasized by Supreme Court Justices from William Rehnquist to

⁶⁸ *Id.* at 870. In an unguarded moment, Justice Scalia once commented, “I do not trust myself to be a good—what should I say? A good interpreter of what modern American values are.” *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the Comm. on the Judiciary*, 112th Cong. 21 (2011) (statement of Hon. Antonin Scalia, Assoc. Justice, Supreme Court of the United States). He was speaking about the concept of cruel and unusual punishment, but the sentiment applies equally well to judicial disqualification. *Id.* In his *Cheney* opinion, however, Justice Scalia confidently opined that no reasonable observer would question his impartiality, notwithstanding his recent duck hunting excursion with the Vice President. *Cheney v. U.S. Dist. Court D.C.*, 541 U.S. 913, 926 (2004). That observation would have been far more compelling if it had come from someone other than Scalia himself. As the Seventh Circuit’s Judge Hamilton recently noted, “The danger, of course, is that this ‘reasonable, objective observer,’ as in most fields of law, tends to sound a lot like the judge authoring the opinion.” *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 857–58 (7th Cir. 2012) (Hamilton, J., concurring).

⁶⁹ RICHARD A. POSNER, *HOW JUDGES THINK* 306 (2008).

⁷⁰ ROBERTS, *supra* note 15, at 9.

900 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 47]

Antonin Scalia and Stephen Breyer.⁷¹ Congress believed it had abolished the duty to sit by amending 28 U.S.C. § 455 in 1974,⁷² but it evidently remains operative in the chambers of the Supreme Court, prompted by the fear of 4-4 outcomes. As Justice Breyer explained in recent Senate testimony, “[I]f I take myself out of the case in the Supreme Court, that could change the result because there is no one else to put in.”⁷³ Justice Scalia has put it even more forcefully, insisting that “[e]ven one unnecessary recusal impairs the functioning of the [Supreme] Court” by creating the possibility of a 4-4 split.⁷⁴ While ties are naturally frustrating in every milieu, the Justices’ fear of such outcomes is tremendously overblown. Although a number of cases are heard each term by only eight Justices, the dreaded 4-4 splits are exceedingly rare. According to a study by two political scientists, there were only eleven such stalemates during the period 1986–2003; fewer than one per year.⁷⁵ During the entire post-war era, 1946–2003, 599 cases were decided by eight-member Courts, but only 49 resulted in 4-4 deadlocks.⁷⁶

But would more frequent recusals—as apparently feared by Chief Justice Roberts in the event of reformed procedures—result in a significantly greater number of unresolved cases? The answer, it can be demonstrated, is almost certainly not. As a starting point, it is obvious that a recusal can only change the outcome of a case that would otherwise be decided by a 5-4 vote. Any other voting pattern would be unaffected by the absence of a single Justice. Moreover, even the 5-4

⁷¹ See *Cheney*, 541 U.S. at 916 (referencing Justice Scalia’s analysis of the duty to sit); *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (providing Justice Rehnquist’s emphasis on the “duty to sit”); *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 4–6 (2011) (statement of Hon. Stephen Breyer, Assoc. Justice, Supreme Court of the United States) (providing the statement of Justice Breyer on the duty to sit).

⁷² H.R. REP. NO. 93-1453, at 5 (1974) (stating that the language of the current statute removes the “so called ‘duty to sit’”); see 119 CONG. REC. 6102, 6113 (daily ed. Mar. 1, 1973) (statement of Sen. Burdick); see also M. Margaret McKeown, *To Judge or Not to Judge: Transparency and Recusal in the Federal System*, 30 REV. LITIG. 653, 662 (2011) (“The 1974 amendment to § 455 abolished the duty to sit doctrine and its corresponding presumption against recusal, and harmonized the statutory and ethical recusal standards.”) (footnote omitted).

⁷³ *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 27–28 (2011) (statement of Hon. Stephen Breyer, Assoc. Justice, Supreme Court of the United States). To state the obvious, recusal can only change a result if it leads to a 4-4 affirmation by an equally divided Court. All other possible voting patterns are unaffected by the absence of a single Justice.

⁷⁴ *Cheney*, 541 U.S. at 916 (quoting Press Release, Supreme Court, Statement of Recusal Policy 1 (Nov. 1, 1993), http://www.eppc.org/docLib/20110106_RecusalPolicy23.pdf).

⁷⁵ Ryan Black & Lee Epstein, *Recusals and the “Problem” of an Equally Divided Supreme Court*, 7 J. APP. PRAC. & PROCESS 75, 90–92 (2005)

⁷⁶ *Id.* at 89–90 (illustrating the rarity of the 4-4 split).

cases would be unaffected by the disqualification of a Justice in the minority – the result would be the same whether the vote was 5-4 or 5-3. And even the disqualification of a Justice in the majority would only change the outcome in cases that would otherwise be reversed, because a 4-4 vote results in affirmance by an equally divided Court.

With those principles in mind, we can now do some calculations to determine the likely maximum number of 4-4 decisions that could be generated by recusal reform. To begin, let us assume, quite unrealistically, that one Justice would then be disqualified in every single case before the Court (realistically, the number would be smaller by at least one order of magnitude). Historically, only about 20-25% of Supreme Court cases each term have been decided by 5-4 votes, so that sets a rough upper limit on the number of decisions that could be changed by a recusal, even if one Justice were to be randomly disqualified in every case of the term.⁷⁷ And even in those cases, of course, 45% of the Justices (four out of nine, and rounding slightly) would have voted in the minority, meaning that only 55% of recusals would matter to the outcome of a case. This further reduces the universe of hypothetically changed decisions to no more than 14% ($.55 \times .25 = .1375$). But that still overstates the potential for changed outcomes, because about 30% of all cases are affirmed, meaning that a 4-4 affirmance would change nothing.⁷⁸ That leaves at most 10% ($.7 \times .14 = .098$) of all cases in the outcome-changing 4-4 category, *even if every single case were to be decided by an eight member Court.*

Needless to say, no conceivable procedural policy would ever lead to such rampant disqualification. It would be far more reasonable, although still expansive, to suppose that any procedural change would result, at most, in nine additional recusals per term – that is, one for each Justice – which will allow us to make some fairly realistic projections based on recent experience. Because she had served as solicitor general, Justice Elena Kagan disqualified herself an unusually large number of

⁷⁷ See Cass R. Sunstein, Editorial, *The Supreme Court's Divided Decisions*, N.Y. TIMES, Oct. 6, 2005, at A37, <http://www.brookings.edu/research/opinions/2005/10/06governance-sunstein>; see also *StatPack for October Term 2011*, SCOTUSBLOG (June 30, 2012), http://dailywrit.com/blog/uploads/2012/06/SCOTUSblog_Stat_Pack_OT11_final.pdf (stating that on average from October 2006 to October 2010, 24% of the Court's decisions were 5-4 splits, and 20% of the Court's decisions in 2011 were 5-4 splits).

⁷⁸ Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, LANDSLIDE, Jan.-Feb. 2010, at 8-12, http://www.americanbar.org/content/dam/aba/migrated/intelprop/magazine/LandslideJan2010_Hofer.authcheckdam.pdf. SCOTUSblog has tallied the number of affirmed cases since 1995, and, based on those numbers, the Court affirms an average of 28.6% of its cases each term. See *Stat Pack for October Term 2010*, SCOTUSBLOG (June 28, 2011), http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_OT10_stat_pack_final.pdf.

902 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 47]

times during her first term on the Court. Although Kagan stepped aside in twenty-eight of the fully briefed cases on the Court's docket, only two of her recusals resulted in 4-4 affirmances.⁷⁹ Assuming that this ratio would more or less hold for all Justices and using the assumption of one more recusal per Justice per year, we could therefore expect to see only two additional 4-4 decisions every three years (nine Justices x three years = twenty-seven recusals; virtually the same as Justice Kagan's twenty-eight, which led to only two stalemates). In short, there is nothing to fear.

IV. THE CHALLENGE

The Chief Justice's arguments may be weak, but his institutional position is powerful. In his *2011 Report*, he rather pointedly remarked that "[t]he limits of Congress's power to require recusal have never been tested."⁸⁰ Although he did not elaborate, Roberts was surely suggesting that recusal is an aspect of "judicial power" under the Constitution and therefore the exclusive province of the judiciary.⁸¹ Perhaps that is so. At least one formidable scholar has argued forcefully that 28 U.S.C. § 455 is unconstitutional when applied to the Supreme Court.⁸² On the other hand, several Justices have implicitly conceded the validity of statutory recusal standards, including Justice Scalia (in his duck hunting opinion) and Justice Breyer (in Senate testimony).⁸³

Unfortunately, no Justice appears ever to have recognized the inherently subjective nature of the underlying value judgment involved in recusal. In simple terms, judicial disqualification policy requires a choice. Which is better for the citizenry, a full Court with a possibly compromised member, or an eight-member Court that may produce a 4-4 result? The current Supreme Court practice clearly favors the first approach—as articulated by Chief Justice Roberts and others—but that is really just a matter of the Justices' own preference. It could be seen as at

⁷⁹ Lisa T. McElroy & Michael C. Dorf, *Coming off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 94 (2011); *Stat Pack for October Term 2010*, *supra* note 77, at 3.

⁸⁰ ROBERTS, *supra* note 15, at 7.

⁸¹ *See id.* (stating that Justices have unique circumstances of recusal due to their position on the Supreme Court).

⁸² *See generally* Louis J. Virelli III, *The (Un)constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181 (2011).

⁸³ *See* *Cheney v. U.S. Dist. Court D.C.*, 541 U.S. 913, 916 (2004) (providing the opinion of Justice Scalia not to recuse himself with regard to the duck hunting case involving Vice-President Dick Cheney); *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 4-6 (2011) (statement of Hon. Stephen Breyer, Assoc. Justice, Supreme Court of the United States).

least equally reasonable to prefer a non-decision to the possibility of a biased one, and that sort of choice – that is, allocating the risk of error – is usually considered an issue for the legislature. Perhaps the public, as represented by Congress, would not be very much bothered by the prospect of a few more tie votes on the Supreme Court each year. In fact, there have been several periods in history when Congress purposely established an even number of Justices. There were only six Justices on the original Court created by the Judiciary Act of 1789, and the seventh was not added until 1807; there were ten authorized seats on the Court from 1863–66, and then briefly eight for over a year until the current nine member Court was established in 1869.⁸⁴ It is therefore evident that the need for a tie-breaker is a matter of legislative policy, and thus it does not fall under the judicial power. The Justices no doubt find it easier to sit with an odd-numbered bench, but that does not mean they are entitled to one.

Chief Justice Roberts's devotion to judge-made recusal rules is somewhat at odds with his opening statement at his confirmation hearing, when he told the senators that "[j]udges are like umpires. Umpires don't make the rules, they apply them."⁸⁵ Despite his commitment to humility, Roberts's *2011 Report* clearly cautioned Congress that the Supreme Court would not necessarily comply with legislation concerning judicial conduct and recusal issues.⁸⁶ It is interesting to contemplate a possible confrontation between Congress and the Supreme Court over the imposition of ethics requirements. The Justices obviously would have the last word about the extent of their own authority. It is the Court, after all, that interprets the Constitution. Then again, Congress has certain coercive powers of its own. For example, a long-sought judicial pay raise could be tied to the Court's adoption of a code of conduct. But it will never come to that. As he has demonstrated many times, Chief Justice Roberts cares deeply about the Court's reputation and legitimacy, and it is all but inconceivable that any Chief Justice would simply ignore ethics legislation, whether it had been "tested" or not. As Roberts noted, concerning statutory financial reporting requirements and limitations on gifts, "The Court has never addressed whether Congress may impose those requirements on the

⁸⁴ RUSSELL R. WHEELER & CYNTHIA HARRISON, *CREATING THE FEDERAL JUDICIAL SYSTEM* 4, 9–11, 16 (3d ed. 2005), [http://www.fjc.gov/public/pdf.nsf/lookup/creat3ed.pdf/\\$File/creat3ed.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/creat3ed.pdf/$File/creat3ed.pdf).

⁸⁵ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55* (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

⁸⁶ See generally ROBERTS, *supra* note 15 (noting the varying source of precedent that governs judicial conduct and recusal).

904 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 47]

Supreme Court. The Justices nevertheless comply with those provisions."⁸⁷

V. CONCLUSION

Chief Justice Roberts often reminds us that he is a great baseball fan, and he enjoys using the national pastime to illustrate legal concepts. For example, he began his *2011 Annual Report* with the story of the 1919 Chicago White Sox, whose conspiracy to fix the World Series led to the appointment of Judge Kenesaw Mountain Landis as the first commissioner of baseball and, indirectly, to the promulgation of the first Canons of Judicial Ethics.⁸⁸ More famously, at his confirmation hearing, Roberts compared himself to an umpire whose job it is simply to call balls and strikes and, he might have added, whose decisions are final.⁸⁹

The Rules of Major League Baseball are markedly similar in some respects to the recusal practice of the Supreme Court. For example, Rule 9.02(b) provides that "[i]f there is reasonable doubt that any umpire's decision may be in conflict with the rules, the [team] manager may appeal the decision and ask that a correct ruling be made. Such appeal shall be made only to the umpire who made the protested decision."⁹⁰ Moreover, Rule 9.02(c) specifies that "[n]o umpire shall criticize, seek to reverse or interfere with another umpire's decision unless asked to do so by the umpire making it."⁹¹ Thus, major league umpires exercise the same sort of unreviewable discretion as do Supreme Court Justices. As Chief Justice Roberts put it in his *Report*, each umpire is "the court of last resort" for his own decisions.⁹²

But not quite. In baseball, there is an exceptional circumstance in which an umpire is required to defer to a colleague. Because of the positioning of the batter and catcher, it is extremely difficult for a home plate umpire to determine when a player has checked his swing, which can make the difference between a ball and a strike. Consequently, the home plate umpire may ask for assistance from either the first or third base umpire (depending on whether the batter is right or left handed).

⁸⁷ *Id.* at 6

⁸⁸ *Id.* at 1. Landis was a graduate of the Northwestern University School of Law. That trivium is irrelevant to this article, but it is irresistible.

⁸⁹ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 31 (2005)* (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

⁹⁰ MAJOR LEAGUE BASEBALL, 2012 EDITION: OFFICIAL BASEBALL RULES 9.02(b), at 80 (2012), available at http://mlb.mlb.com/mlb/downloads/y2012/Official_Baseball_Rules.pdf.

⁹¹ *Id.* 9.02(c), at 80.

⁹² ROBERTS, *supra* note 15, at 9.

2013] *SCOTUS Ethics & NFIB v. Sebelius* 905

And unlike all other situations, “the home plate umpire *must refer to a base umpire for his judgment on the half swing*” when a manager or catcher objects to the initial call.⁹³ The reason for this exception is compelling. The home plate umpire simply lacks the right perspective to make the call, and so the objecting team is entitled to the decision of another umpire who can view the play from an uncompromised angle.

As with umpires and half swings, so it ought to be with Justices and disqualification. No individual can have a clear perspective on his or her own impartiality, and decisions would therefore be better made by objective colleagues. It is time for a new recusal procedure in the Supreme Court, and a comprehensive code of conduct would be a pretty good idea too.

⁹³ MAJOR LEAGUE BASEBALL, *supra* note 90, 9.02(c) cmt., at 80 (emphasis added). The mandatory appeal applies only “when the plate umpire calls the pitch a ball, but not when the pitch is called a strike.” *Id.* In that sense, it is the equivalent of asking the full Supreme Court to rule only when an initial recusal motion has been denied by the subject Justice, but not when it has been allowed.