February 6, 2013

CONTROVERSIAL FIVE-TO-FOUR SUPREME COURT DECISIONS AND THE MAJORITY OF ONE

Steven I. Friedland

Available at: https://works.bepress.com/steven_friedland/9/
Controversial Five to-Four Supreme Court Decisions and the Majority of One

“Everything that can be counted does not necessarily count; everything that counts cannot necessarily be counted.” - Albert Einstein

Steven I. Friedland1
February 1, 2013
All rights reserved
*

Abstract: Five-to-Four Supreme Court decisions in controversial cases have sparked public backlash in recent years, which has served to reframe the decisions as partisan politics. While judicial decision-making is designed to follow the doctrine of stare decisis, the view that Supreme Court justices have become hemmed in by their ideologies – with perhaps the notable exception of the swing vote of Justice Anthony Kennedy -- has been popularized in the media and blogs. While the Court’s decisions might be intersubjective, meaning bounded by moveable and socially constructed understandings, the real danger is for the justices to feed the perception that the Court is indeed governed by ideology over objectivity. This article tracks the significant catalysts in recent years that have propelled the intersubjective narrative, including the enhanced social media coverage of justices, the judicial nomination process, the fewer number of Supreme Court cases briefed and argued, and the core issues decided by the Court in such cases as Roe v. Wade, Bush v. Gore, and Citizens United v. Federal Election Commission. The article argues that the justices can and should be intentional in distinguishing their jurisprudence and overall conduct from partisan politics, thereby diminishing claims of illegitimacy.

I. Introduction

In recent years, Supreme Court cases decided by a five-to-four vote, especially controversial decisions striking down federal or state laws, have been harshly criticized. Decisions resulting from a majority of one have been especially susceptible to charges that the Court is less an august and neutral body than one

1 The author is a Professor of Law, Senior Scholar, and Director of the Center for Engaged Learning in the Law at Elon University School of Law. The author wishes to thank his research assistants, Susanna Guffey and Caroline Johnson for their tireless work, Lisa Watson, librarian at Elon Law who provided invaluable assistance, and his colleague in the Elon University philosophy department and expert on intersubjectivity, Professor Ann Cahill.
operating within the coarse arbitrariness of issue politics. Even the appearance of creeping illegitimacy, particularly in an era of political polarity, damages an institution designed to serve as a check on the capriciousness of the political system.²

As a general principle, Supreme Court decisions are supposed to be based on *stare decisis*, meaning the legal directive to follow precedent. *Stare decisis* is a specialized form of objective, scientific enterprise. Keeping law and politics separate has been critical to the legitimacy of unelected judges interpreting and applying the rule of law.

Yet, the view that the personal philosophy of judges, and not *stare decisis*, governs judicial decision-making persists, especially in an age where information about the Supreme Court and its justices abounds. The ideology-over-objectivity thesis is one piece of a larger intersubjectivity³ analysis, where boundaries and guidelines of decision-making are considered to be socially constructed and moveable, rather than objective and fixed. As a philosophical theory, intersubjectivity contends that social relations shape language, culture and meaning - even within the realm of science⁴ and judicial decision-making – and that people’s tacit commitments and understandings influence behavior. Furthermore, these commitments evolve through consensus and collaboration over time,⁵ rather than stay static or evolve through isolated individual discovery. This conceptualization has promoted a more realistic view of the Supreme Court, while at the same time contributing to the notion of the Court as a partisan entity.

One manifestation of this perception has been the view that the Court was becoming the “Anthony Kennedy court,” dominated by five-to-four decisions controlled by Justice Kennedy’s swing vote.⁶ The idea that Justice Kennedy’s jurisprudence is fluid

---

² As the Court becomes further embedded within the current political warfare, the more five-to-four decisions seem to provoke a crisis of judicial legitimacy.

³ This concept has been explored by such notable philosophers as Kant and Rawls and is directly applicable to understanding whether the notion of intersubjectivity, in the judicial decision-making context, undermines the constitutional legitimacy of the Supreme Court.


⁵ In other words, actions are knowingly impacted by social relations and local cultures over time.

has gained traction over the past several years. For example, the noted constitutional law scholar and advocate, Dean Erwin Chemerinsky, has declared:

Certainly from the perspective of lawyers who write briefs to the Justices and stand before them, there is often a sense of arguing to an audience of one. I filed a brief last term and I will tell you in all honesty, my brief was a shameless attempt to pander to Justice Kennedy. If I could have, I would have put Anthony Kennedy’s picture on the front of my brief. My brief was not unique among those in this case; this case was not unique among those on the docket. Everyone knows, even the Justices know, it is the Anthony Kennedy court.7

This conceptualization is of considerable import and had some basis in fact. For example, of the sixteen cases decided by five-to-four votes in the 2009-2010 term, ten included Justice Kennedy in the majority.8 In the same term, for example, Justice Kennedy was in the majority of 94 percent of the cases decided by the Court, tied for the most cases with Chief Justice Roberts. 9

By implication, the other members of the Supreme Court, with the exception of Justice Kennedy, would not be sufficiently open-minded to make decisions based on the facts and precedent of the case.10 While there have been justices known to have unbending views since the origins of the Supreme Court,11 this alleged judicial


For example since '08 (of all opinions, not just divided), Justice Kennedy has been in the majority as follows:

2008: 73 out of 79
2009: 78 out of 86
2010: 80 out of 82

10 The allegedly conservative bloc of the Court includes Justices Scalia, Thomas, Alito and the Chief Justice, Roberts. Justice Kennedy has been mostly in the majority with these four justices than the other, so-called “liberal” justices, Breyer, Ginsburg, Kagan and Sotomayor. Stat Pack for October Term 2010, supra note 11.
11 Would Chief Justice John Marshall have decided a close case in favor of the states over a federal claim, for example?
intransigence\textsuperscript{12} is now perceived to exist by the public at large and even within some circles of the legal community. The contagion, as it were, involves the belief that Supreme Court justices are predictable in their rulings because of the ideology that purportedly guides their decisions.\textsuperscript{13}

With the 2012 health care decision, \textit{National Federation of Independent Business v. Sebelius},\textsuperscript{14} authored by Chief Justice Roberts, those fears now seem to be overstated, as the justices pulled back from the precipice of a Justice Kennedy-dictated decision in perhaps another “switch in time that saved nine.”\textsuperscript{15} What is not overstated, however, is the dramatic rise in the perceived intersubjectivity of the Court and its decisions.\textsuperscript{16} Specifically, there is a growing perception that Supreme Court decision-making – except perhaps for Justice Kennedy – is triangulated, guided by ideology and individual agendas, as well as by the objective interpretation of the law.

If the boundaries of the Supreme Court’s decision-making are indeed constantly shifting, changing over time and circumstances, and justices are committed to particular interests that are deep-rooted, a one-vote majority is indeed a thin reed.\textsuperscript{17} In the intersubjective narrative, such a small majority is less a declaration of the law than a composite of the implicit commitments and philosophy of the fifth and deciding vote.

\begin{itemize}
\item \textsuperscript{12} This alleged judicial intransigence has the attribute of broad policy viewpoints that are strong enough to influence their vote in a certain manner no matter what is presented to them in briefs and oral argument.
\item \textsuperscript{14} 32 S. Ct. 2566, 183 L. Ed. 2d 450 (2012).
\item \textsuperscript{15} This famous phrase arose after President Franklin D. Roosevelt threatened to go to Congress to expand and in effect “pack” the court to stop it from declaring New Deal legislation unconstitutional.
\item \textsuperscript{16} See, e.g., Adam Winkler, \textit{The Roberts Court is born}, SCOTUSBlog (June 28, 2012, 12:01 PM),http://www.scotusblog.com/2012/06/the-roberts-court-is-born/.
\item \textsuperscript{17} This intersubjectivity has planted the Supreme Court in the realm of politics. This replanting, as this paper argues, has a negative impact on its integrity and legitimacy. The encroachment of politics in the construction and application of judicial interpretive structures is particularly significant.
\end{itemize}
The thesis of this paper is that while these attacks on the Court illustrate the importance of open-minded judicial decision-making and the complexity of the relationships between the justices and the larger society, the claims do not expose any systemic flaws that truly impact the Court’s legitimacy. 18 The post-modernist intersubjective view of Court decisions is not the real problem. The real danger is one of its by-products, the beliefs that Court members are not actually open-minded, are not really listening to the advocates or each other, and are not considering the facts of a case; that instead the justices pre-judge cases with an ossified, inflexible jurisprudence.

This purported inflexibility has been and will continue to be exploited by partisan politics. The partisans aim to use the Supreme Court as a tool, dragging it into the political realm. As one partisan has argued, “It is not just enough to appoint somebody who we know to have the right philosophy – you have to appoint somebody who has shown, either as a judge or perhaps in some other setting, that they will stick with that philosophy even when there’s political pressure to do otherwise.” 19

The paper ultimately suggests that while a political critique of an intersubjective Court will persist as long as there are five-to-four decisions in controversial cases, a more nuanced and sophisticated understanding of the Supreme Court decision-making process within the Court and between the Court and the country 20 will become increasingly important. The justices must be intentional about protecting the Court’s integrity, projecting neutrality through their conduct and opinions. The paper offers some ideas about how the justices can promote their fealty to stare decisis and non-partisan decision-making.

After this introduction, the paper provides a brief overview of the history of five-to-four Supreme Court decisions, stare decisis, and intersubjectivity. The paper then describes how significant events have changed the perception of judicial decision-making.

---

18 Although the division between law and politics might appear to be crumbling under the magnified lens of the micro-blog social culture and 24/7 news cycle, respect for stare decisis and fealty to its interpretive role ought to foster confidence in the Court’s resolution of disputes. In essence, episodic criticism and the turbulence caused by five-to-four decisions do not spell doom.


20 In addition to stare decisis, another inflection point for legitimacy is the Court’s historic role in the Separation of Powers structure of the Constitution. That will not be discussed in this paper, which instead focuses on the judicial decision-making process.
making from one that was essentially immutable to one that is mostly intersubjective. The paper then explores what can be done in the future to maintain the law and politics divide.

II. Background

A. Five-to-Four Supreme Court Decisions

A five-to-four decision in the Supreme Court is as legally binding as a nine-to-zero decision.\footnote{V.L.W., Notes, *Judgments of the Supreme Court Rendered by a Majority of One*, 24 GEO. L. J. 984, 984 (1935-1936).} The precedential value of such a decision is ostensibly not diminished simply because of the strength of the dissents. Even a tie vote, like four-to-four, is considered a *res judicata* affirmation of the decision below.\footnote{*Id.* at 984.} Some of these bare majority decisions occur from reversals of lower court decisions, including several splits in the circuit courts of appeals. Yet, even Supreme Court justices recognize that their decisions are not necessarily correct when viewed from a vantage point of absolute objectivity. As Justice Jackson said in his concurrence in *Brown v. Allen*,\footnote{344 U.S. 443 (1953).}

> Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.\footnote{*Id.* at 540.}

The implications of five-to-four decisions, however, often extend beyond the parties\footnote{Notes, *supra* note 21, at 984.} and become part of larger public issues. This is particularly true in the modern era, when the Internet helps some stories to go “viral.”\footnote{This means the communication about the event can instantaneously be communicated around the world from a variety of platforms, including micro-blogs, Facebook, and Twitter, exacerbating the attention the topic receives.} As one commentator has noted about the 2012 presidential race between President Barak Obama and Governor Mitt Romney, “From racial preferences to gun owners’ rights to immigration to same-sex marriage, you name it – there are so many issues where
the outcome turns on one vote at the Supreme Court and the president could easily be shaping that next vote."27

1. The Early Years of the Supreme Court

In the early years of the Supreme Court, there were many fewer cases decided and reported than in later years. As one commentator noted, "one must not forget that all cases decided during the first seventy years of the republic are contained in 64 volumes of reports, while decisions rendered during the succeeding seventy-five years fill more than 230 volumes."28 For example, there were nineteen Court opinions from cases decided in 1837 and forty-nine opinions decided in 1845.29 When decisions were rendered in the early years of the Court, unanimity was common.

Yet, in that first seventy years of the Supreme Court’s existence, the tradition of dissent was developing. There were some cases involving votes of five-to-four. Concerns about the instability of five-to-four decisions stretch back for almost two centuries. Starting in 1823, Congress considered several proposals to remove the Court’s authority to find state legislation unconstitutional unless there was a vote by a majority greater than five-to-four.30 These proposals were made in response to the Court striking down various state laws during the 1820s,31 upsetting state leaders in the process.32

Such proposals reemerged after the Civil War, when the Court again found itself involved in controversial decisions. For example, the Court ruled five-to-four in *Ex Parte Garland* that the oath taken by lawyers in the south was unconstitutional.33 In the very early part of the 20th Century, unanimity was the norm.34 This tradition

27 [Carrie] Severino [chief counsel and policy director at the Judicial Crisis Network] said. And those concerns extend even to a possible Romney presidency. See also, Curry, supra note 8.
28 Notes, supra note 21, at 1001.
31 “At that time, it will be recalled, the Supreme Court was “under fire” for holding unconstitutional various state laws – ten by the end of the year 1825.” Id. at 985.
32 “Kentucky was particularly incensed after the land-title case of Green v. Biddle, 8 Wheat 1 (1823), which, it was then believed, was concurred in by less than a majority of the court.” Id. at 985.
33 *Ex Parte Garland*, 4 Wall 333 (1867).
34 “In the early decades of this century, ... 5-4 decisions were few and unanimity was the rule...” Riggs, supra note 29, at 667.
changed as the Century wore on, particularly in the years preceding and during the Great Depression.

The early 1920s provoked calls for a super-majority requirement in court decisions, particularly for decisions striking down federal or state laws. Between 1918 and 1922, the Court struck down four different Acts of Congress, including the Child Labor Act and the Income Tax Law of 1916 by five-to-four votes. It did not take long following these controversial decisions for one unhappy Senator to introduce a bill in 1923 to require more than a majority of one.

In the 1930s, deep into the Great Depression, Congress enacted significant legislation to reboot the economy. After the Court found the Railroad Retirement Act unconstitutional by a five-to-four vote in 1935, a flood of proposals to limit the majority of one power occurred in Congress, including a proposed law by a member of the House of Representatives who moved to limit the Court’s appellate jurisdiction over acts of Congress unless seven justices concurred in the result. These proposals ceased when the Court struck down three separate New Deal laws in 1935, including the National Industrial Recovery Act in *Shechter Poultry Corp v. United States* perhaps because the Court did so unanimously, in nine-to-zero fashion. When the Court showed its divisions while striking down a federal law in 1936, even though the ruling was six-to-three, the Congress revisited its displeasure by advancing a bill to curtail the Court’s appellate jurisdiction. While the bill did not gain traction, it indicates the impact in Congress of divided Supreme Court decisions, particularly those that are resolved without a super-majority.

The periodic opposition to five-to-four decisions does not tell the whole story. There were only ten cases holding acts of Congress unconstitutional by a five-to-four decision in the almost seventy-year period between 1867 and 1935, including *Hammer v. Dagenhart* in 1918 and the aforementioned *Railroad Retirement Board*. Yet, the friction caused by some of these cases was palpable and long-

---

35 Notes, supra note 21, at 985.
36 Senator William Borah, from the State of Idaho, introduced the bill, which failed like the others. Id. at 985.
38 There were six proposals in the space of two weeks. Notes, supra note 21, at 986.
39 Id. at 986.
40 295 U.S. 495 (1935).
41 Notes, supra note 21, at 986.
42 “Representative Gillette of Iowa introduced a bill prohibiting the Court, in the exercise of its appellate jurisdiction, from holding an act of Congress unconstitutional and void ‘without the concurrence of seven or more of the justices in the finding or decision of the Court.’” H.R. 10196, 74th Cong. (2nd Sess. 1936). Id. at 986.
43 247 U.S. 251 (1918).
lasting. A greater number of state laws were struck down in this period, 30 in total, by five-to-four decisions, including notable cases such as *Lochner v. New York*[^45] and *Near v. Minnesota*.[^46] A greater number of federal and state laws, respectively, were sustained by majority of one decisions during this period[^47]. Yet, the decisions striking down laws received outsized attention and criticism.

By the end of the 20th Century, single vote decisions had become more common. As one commentator has noted,

> Figures from the past decade indicate how common such single-vote decisions have become. With an average of 150 cases decided by full opinion during the 1981 through 1990 Terms, the number of decisions determined by a single vote averaged 35 per Term, or 23 percent of all cases. The annual variation ranged from 28 of 120 decisions (18.5%) for the 1984 Term to 47 of 152 (31%) for the 1986 Term. By contrast, from 1901 to 1910 such closely divided decisions averaged just 4.8 per Term, 2.6% of all cases[^48].

2. Modern Illustrative Cases[^49]

Yet, even though commonplace in the 21st Century, the more recent five-to-four decisions striking down laws have reverberated further and faster than ever before. Illustrative cases include *Roe v. Wade*,[^50] *Bush v. Gore*[^51] and *Kelo v. City of New London*.[^52]

*Roe v. Wade (1973)*[^53]

*Roe v. Wade*[^54] is a case that struck and still strikes an emotional chord in many people. Its constitutional protection of abortion as part of a right to privacy can be

[^45]: 198 U.S. 45 (1905).
[^46]: 283 U.S. 697 (1931).
[^47]: There were 19 federal laws upheld by five-to-four decisions, including *Champion v. Ames*, 188 U.S. 321 (1903), and 33 state laws, including *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934) and *Nebbia v. New York*, 291 U.S. 502 (1934). Note, supra note 21, at 988 – 995.
[^48]: Riggs, supra note 29, at 669.
[^49]: While the modern case causally linked to the most significant nation-wide protests and backlash was *Brown v. Board of Education*, 347 U.S. 483 (1954), it importantly was not a 5-4 decision but 9-0, minimizing, perhaps, an even greater backlash.
[^50]: 410 U.S. 113 (1973).
[^52]: 545 U.S. 469 (2005).
[^54]: Id.
categorized as an emotionally-charged cross-over decision, relevant and important to the political arena as well as a significant interpretation of the Constitution.\(^55\)

*Roe* set the stage for the type of linguistic denial used by the Court to distance itself from the surrounding cultural debate. While the issue of abortion reverberated around the Court on both political and religious grounds, the Court attempted to say it was only reasoning based on "constitutional measurement"\(^56\) and that to answer the question presented in the case, it "need not resolve the difficult question of when life begins."\(^57\)

Justice White’s dissenting opinion in *Roe* offered his belief that the majority lacked objectivity in reaching its decision:

> I find nothing in the language or history of the Constitution to support the Court’s judgment. The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the woman, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but, in my view, its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.\(^58\)

Given this line of criticism, the Supreme Court appeared to soften the importance of *stare decisis* in a later substantive due process case involving the constitutionality of a state abortion law, exclaiming: "Stare decisis is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes."\(^59\) Such a rationale, however, arguably weakens the objective nature of the decision-making process and expands judicial discretion concerning when “needed changes” might arise.

*Bush v. Gore* (2000)\(^60\)

---

\(^{55}\) Justice Blackmun, who wrote the decision, used to receive hate mail about it. While the decision might be attributable in part to his politics, he was the counsel to the Mayo Clinic while in law practice and this prior experience could have had an impact on his perspective in the area.

\(^{56}\) *Id.* at 116.

\(^{57}\) *Id.* at 159.

\(^{58}\) *Id.* at 125.


\(^{60}\) 531 U.S. 98 (2000).
If there is any one case that triggered a widespread critique of justices and their political affiliations, it was *Bush v. Gore*. In *Bush*, the Court was confronted with the question of whether the Equal Protection Clause applied to a recount of Florida votes in the 2000 presidential election. The outcome of the election hinged on the recount and the Supreme Court intervention had an apparent impact on the outcome. In fact, some viewed the Supreme Court’s decision as a turning point in the 2000 election.

After Al Gore contested the certification of the Florida vote, the Florida Supreme Court ordered a manual recount of several thousand contested ballots and “undervotes” around the state. Undervotes were those ballots that did not indicate a vote for president. The Supreme Court, by a five-to-four vote, held that these manual recounts violated the Equal Protection Clause.

The five justices in the majority were generally considered to be the more conservative justices with perceived connections to the Republicans, either through nomination or apparent ideology -- Chief Justice Rehnquist and Justices O’Connor, Scalia, Thomas and Kennedy. In the dissent were Justices Stevens, Ginsburg, Souter and Breyer, generally considered the more liberal members of the Court with perceived connections to the Democrats, either through nomination or apparent ideology.

---

61 See e.g., Jonathan Chait, *Yes, Bush v. Gore Did Steal the Election*, N.Y. Magazine, May 25, 2010 (also predicting – though incorrectly – that the Court would strike down health care on similar ideological lines), “Nobody knew the outcome of the recount, only that it threatened to make Al Gore president, and stopping it would guarantee Bush’s victory. That is the environment in which five Republican-appointed justices essentially invented a one-time only ruling to stop the recount.” Id.

62 See, Jeffrey Toobin, *Precedent and Prologue*, The New Yorker, Dec. 6, 2010, “[T]he Court stopped the recount before it was completed, and before Florida courts had a chance to iron out any problems – a classic example of judicial activism, not judicial restraint by the majority.” Toobin also compares the Court action there to *Citizens United*, changing campaign financing. He does note, however, that the Court has not once cited *Bush v. Gore* in any subsequent decisions.

63 See, e.g., Id.

64 Conservatives often are believed to be Republicans, while liberals are often thought of as Democrats in party ideology. These generalizations, of course, are not always true, but are widely believed to be so.

65 Of course, the ideology is not necessarily tied to whether the justice’s appointment to the Supreme Court was made by a Republican or Democrat. Justice Stevens was appointed by President Ford, a Republican, and Justice Souter was appointed by President George H. W. Bush, a Republican. Both were considered to fall in the more “liberal” bloc of justices.
Kelo v. City of New London (2005)\textsuperscript{66}

Kelo v. City of New London\textsuperscript{67} was a different kind of controversial decision,\textsuperscript{68} one that sparked legislative reaction. There, the Supreme Court interpreted the Fifth Amendment Takings Clause, permitting the government to take private land for public use provided that just compensation is paid. What constitutes “public use” has been the subject of many cases and occupies numerous legal commentators. In Kelo, the textual requirement of public use was interpreted to mean public purpose. Consequently, the Supreme Court upheld a taking of private property by the City of New London that was designed to be directly given to the pharmaceutical company, Pfizer, to serve an overarching public purpose of diminishing the city’s economic distress. Pfizer had planned to build a multimillion-dollar research facility in the city. The Court found that the public use requirement was satisfied by the City’s public purpose, even given the City’s development plan for the transfer of private land to private owners.\textsuperscript{69}

Significant public backlash to Kelo occurred. Several states responded by enacting laws to protect against such private owner-to-private owner transfers.\textsuperscript{70} The outrage was palpable. Cases such as Kelo can be seen on different levels as reflective of stare decisis or as evidence of dramatic change, emblematic of a continuing public-private distinction or a refracturing of that distinction.\textsuperscript{71} Justice Stevens relied

\begin{itemize}
  \item \textsuperscript{66} 545 U.S. 469 (2005).
  \item \textsuperscript{67} Id.
  \item \textsuperscript{68} Kelo also was a 5-4 decision, adding to its perceived shaky credibility.
  \item \textsuperscript{69} In a dramatic post-script to the case, while Suzette Kelo’s house ended up being moved, the grassy lot on which it stood was not used by the company due to the down-turn in the economy. See Pfizer and Kelo’s Ghost Town: Pfizer Bugs Out Long After Land Grab, THe WAll ST. J., NOv. 11, 2009.
  \item \textsuperscript{70} Wisconsin was one of the states enacting a law limiting the legislature’s power to take private property for another private beneficiary. See, Wis. Stat. §32.03 (West, Westlaw through 2011 Act 286). (“prohibiting the condemnation of property under certain circumstances”); Wis. Stat. § 59.69 (West, Westlaw through 2011 Act 286). (“requiring notice to persons affected by zoning actions and comprehensive plans that change the allowable use of their property”).
  \item \textsuperscript{71} Kelo teaches that the transition from immutable to recalibrated legal rules can depend on the role facts play in the calculus, particularly whether the facts of a current reality, what Geertz calls a local culture, are given a central position in the legal analysis. The further away from the facts the decision-making process moves, the less likely it appears that courts have changed directions or recalibrated doctrine at all. The residents whose homes were taken in New London, as well as those citizens across the country who now feared the same, likely would be disbelievers if told that Kelo simply paid homage to firmly embedded legal principles. Of course, the ultimate irony of Kelo was that the Supreme Court accepted the private property-to-private property taking “as consistent with the
heavily on precedent to explain his holding in the case.\textsuperscript{72} The argument that the Court translated the “public use” requirement, on the other hand, perhaps lies in the local cultures of struggling cities, such as New London, Connecticut, using pragmatic efforts to promote economic growth by increasing their attractiveness to private companies.

\textit{Citizens United v. Federal Election Commission} (2010)\textsuperscript{73}

In this landmark five-to-four decision, the Court struck down provisions of the 2002 Bipartisan Campaign Reform Act, known as the McCain-Feingold Act. The Act prohibited certain kinds of “electioneering communications” prior to elections and primaries. Justice Kennedy’s 57-page majority opinion held that the restrictions on independent corporate expenditures\textsuperscript{74} in political campaigns violated the First Amendment to the Constitution. It reasoned that political spending was a type of speech and that the government could not restrict indirect persuasive speech, such as advertisements, which is different than direct contributions to candidates.\textsuperscript{75}

This decision reverberated through the political world, opening up the opportunity for indirect advocacy by local, national and multinational corporations. In America, these organizations became know by their acronym, “PAC”, Political Action Committee, and super PACs.\textsuperscript{76} Super PACs are those organizations specifically designed spend monies advocating for or against candidates. The money they spend is “independent-expenditure only,” meaning none is directly donated to candidates or their campaigns. As decided in \textit{SpeechNow.org v. Federal Election Commission}\textsuperscript{77} in 2010, shortly after Citizens United, contributions to these organizations can be unlimited.

The \textit{Citizens United} decision threatens to change the face of political campaigns and the influences over campaign outcomes. Those persons and companies who have considerably more money can ostensibly use the media to leverage their message and ensure that their voice is heard.\textsuperscript{78} Some companies are using the removal of public use limitation, while public and legislative outrage showed what the real public thought of the Court’s construction of “public purpose.”


\textsuperscript{73} 558 U.S. 310 (2010).

\textsuperscript{74} While the Court struck down the law as it applied to corporations, the law also included labor unions as well, and thus restrictions on labor unions are likely equally unconstitutional.

\textsuperscript{75} The ban on direct contributions to candidates and their campaigns was not considered in the case.

\textsuperscript{76} In essence, a PAC or super PAC is an organization that advocates for or against political candidates for office.

\textsuperscript{77} 599 F.3d 686 (2010).

\textsuperscript{78} Much has been written, for example, about the Koch brothers, two billionaires who have donated millions of dollars to PACs in the 2012 election cycle.
constraints to suggest to their own employees how to vote. The decision yielded a call for a legislative response from many politicians, including the sitting President. As one commentator argued, “There is no doubt that Citizens United v. Federal Election Commission marks a major upheaval in First Amendment law and signals the end of whatever legitimate claim could otherwise have been made by the Roberts Court to an incremental and minimalist approach to constitutional adjudication, to a modest view of the judicial role vis-à-vis the political branches, or to a genuine concern with adherence to precedent.” The intensity of this and other commentary likely would have been tempered somewhat had the decision been seven-to-two or nine-to-zero.

3. Some Implications of Five-to-Four Decisions

This historical review shows that unlike other decisional configurations, five-to-four votes can readily be extrapolated as representative of broader public concerns. With such extrapolation, the Court’s decision is not seen solely as a decision about

80 President Obama issued a statement on the day the Citizens United decision was announced. The statement said:

“With its ruling today, the Supreme Court has given a green light to a new stampede of special interest money in our politics. It is a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans. This ruling gives the special interests and their lobbyists even more power in Washington--while undermining the influence of average Americans who make small contributions to support their preferred candidates. That’s why I am instructing my Administration to get to work immediately with Congress on this issue. We are going to talk with bipartisan Congressional leaders to develop a forceful response to this decision. The public interest requires nothing less.”

Office of the Press Secretary, Statement from the President on Today’s Supreme Court Decision, THE WHITE HOUSE (January 21, 2010), www.whitehouse.gov/the-press-office/statement-president-todays-supreme-court-decision-0.
82 Even in the 1930s, newspapers commented on the “number of five-to-four decisions.” Notes, supra note 21, at 1001.
the parties, but about larger issues in the popular debate, no matter how far from
the moorings of the case. As one commentator noted almost 80 years ago:

When an act of Congress is declared unconstitutional, the decision of the
Court is likely to antagonize important groups, groups which were
powerful enough to enact the legislation originally. A strong dissenting
opinion concurred in by the minority gives no little solace to those
groups adversely affected by the judgment of the Court. It enables them
to place their objections to the decision, at least ostensibly, on a legal
plane. In recent years such dissents are not infrequently written by
justices possessing a singular command of pithy phraseology. The effect,
therefore, of five-to-four decisions on the popular mind is cumulative.
One decision will adversely affect “labor,” another “agriculture,” another
“vested interests.” In time, such criticism ceases to be directed at the
decision itself. Instead it is directed at the Court as an institution.83

Popular conceptions, though, often do not measure up when observed through a
lens of statistical analysis. For example, Justice Powell was widely believed to be a
swing voter while he was on the Court. One commentator used scalogram analysis84
and bloc analysis85 to assess whether Justice Powell was indeed a swing voter.86 The
commentator, Professor Janet Blasecki, found that he was not, primarily because
Justice Powell “voted too consistently with a conservative bloc....”87

Also, five-to-four decisions have implications based on theories about group
behavior and “minimum winning coalitions” in particular.88 For example, coalition
theory explains, according to one commentator, “how the majority coalitions are
formed or deteriorate. These studies deal with such matters as the effect of opinion
assignment on coalition maintenance, coalition size as affected by external threats
to the authority of the Court, and the breakup of a minimum winning coalition
through defection of one Justice.”89 Despite these studies, the public’s reaction to
and criticism of bare majority decisions striking down laws has been consistent over
the decades and local cultures, transcending the parties of a case and moving the
debate squarely into the political realm.

83 Id. at 984.
84 Scalogram analysis or cumulative scaling is a type of statistical analysis.
Guttman’s scaling methods became the basis for these analyses. See, e.g., Guttman
Scaling, RESEARCH METHODS KNOWLEDGE BASE, (Oct. 20, 2006)
85 Bloc analysis is another type of statistical analysis.
86 Riggs, supra note 29, at 669. (referring to Janet L. Blasecki, Justice Lewis F. Powell:
Swing voter or Staunch Conservative? 52 J. Pol. 530, 532-34 (1990).)
87 Id. at 670.
89 Id. at 670-671.
B. *Intersubjectivity and the Legal System*

Intersubjectivity has been used as a vehicle of critique by philosophers in many different fields. For example, the philosopher, Ann Cahill, has written:

The intersubjective subject of contemporary theory is to be contrasted with the autonomous subject of modern philosophy, one of whose primary goals, with regard to social responsibility, was to safeguard as much personal freedom as possible. This subject was understood as standing apart from other subjects, and the mutual dependence that society presented was not only artificial (for the natural state of “man” was freedom, independence), but also a necessary evil that was to be borne in exchange for the protection that only a group of individuals could provide.  

Professor Cahill then describes the attributes of intersubjective subjects:

The intersubjective subject, however, is understood as necessarily interdependent, marked and constructed by a series of different relationships (some of which demand the subject’s dependence, such as the maternal relationship). The particularities of any one subject – his or her desires, preferences, abilities, fears – are inextricably intertwined with those of the beings encountered throughout the subject’s ongoing development.

This idea of intersubjectivity views human behavior as occurring within social relationships and the particular context, especially over time. Thus, when the American judicial decision-making culture is viewed through a different prism, using background facts and other environmental information as an amalgam of local knowledge, the idea of judicial decision-making is constantly shifting and discontinuous, particularly as it reflects interactive human relationships.

The Supreme Court reflects these intersubjective tenets. For example, the justices do not consider cases autonomously, but in groups – at oral argument, in the follow-up conference with the other justices, and then in discussions with their law clerks. Even reading the draft opinions of other justices is a form of dialogue -- sharing ideas between people. The idea of published opinions recognizes the importance of public access and acceptance of judicial decision-making and the relationship between the Court and the public at large.

Structurally, the Constitution reflects intersubjective values as well. The Constitution requires the President, a partisan figure, to nominate a justice, who must then be approved by the Senate, a broader partisan body. Therefore, the initial relationship between the nominee and the President, and then the

---

91 *Id.* at 128.
92 U.S. Const. art. II, § 2.
relationship between the nominee and the senators become extremely important if the nominee is to be confirmed.\(^{93}\)

The power of the president to nominate justices and shape the Court has received increasing attention in recent times.\(^ {94}\) Connections by justices to people in power prior to being nominated often figure prominently in the justices’ rise in the judicial world. For example, Justice Anthony Kennedy helped then-Governor Ronald Reagan draft California legislation. That led to Governor Reagan recommending Mr. Kennedy to then-president Gerald Ford for a federal judgeship on the Ninth Circuit Court of Appeals. While not his first choice for the position, President Reagan eventually nominated Judge Kennedy for a seat on the Supreme Court.\(^ {95}\)

Within this backdrop, the Court can be perceived as intersubjective,\(^ {96}\) planted within a larger social discourse with interactions that are local and not universal, that are not eternal, but rather shift and turn over time, dependent on such things as the composition of the Court, the particular cases that come before it, the lawyers who argue before it, and the prevailing issues of the day. This localization depends on what the cultural anthropologist, Clifford Geertz, describes as a tacking back and forth, “between law as a structure of normative ideas and law as a set of decision procedures; between pervading sensibilities and instant cases; between legal tradition as autonomous systems and legal traditions as contending ideologies.”\(^ {97}\)

\(^{93}\) This is not to say that a nominee necessarily reflects the President’s politics and values. See, e.g., Justice David Souter, who was appointed by President George H.W. Bush, and who was widely considered to have been more “liberal” than the President who nominated him.

\(^{94}\) “The potential impact of the next president on the Supreme Court is immense,” said Carrie Severino, the chief counsel and policy director at the Judicial Crisis Network, a right-of-center advocacy group. “There could easily be three nominations during the next term. ... Most people expect there to be at least one vacancy.” Curry, supra note 8.

\(^{95}\) Justice Kennedy was not President Reagan’s first choice, however. Kennedy was nominated only after Robert Bork was rejected by the Senate and Douglas Ginsburg withdrew his nomination. The fact that Justice Kennedy was a safe choice, especially within the context of two failed nominations, was reflected by the fact that the confirmation vote by the Senate was unanimous, 97-0. Justice Kennedy replaced Justice Lewis Powell.

\(^{96}\) Intersubjectivity is seldom utilized in legal discussions, but it can help frame legal debates between the objective and subjective perspectives. See, e.g., Douglas Edlin, *Kant and the Common Law: Intersubjectivity in Aesthetic and Legal Judgment*, 23 CAN. J. L & JURISPRUDENCE 429, 430 (2010). Kant views intersubjectivity as “the rational expectation of agreement among different subjects.” Id. At 435.

\(^{97}\) C. GEERTZ, LOCAL KNOWLEDGE 15 (Basic Books 1983).
This tacking may well provide a broader understanding of law, but it also fosters instability. The understanding of judicial decisions as even partly ideological seems to blur the all-important boundary between law and politics. Specifically, if federal judicial decision-making is not only subjective, but that subjectivity is influenced by ideology, effectively a part of politics, then it would not be legitimate when made by unelected judges. The collapse of the law-politics distinction would affect significant constitutional cases before the Supreme Court, such as the challenge to the Patient Protection and Affordable Care Act decided during the 2011-2012 term.

While “Court politics” have existed for decades – Justice Brennan used to say the most important thing in the Court was the number five, which was the number of justices needed to get anything done – this notion of Court relationships has emerged from behind a virtual curtain and leaked into the public domain.

While Americans both inside and outside of the legal community have opinions about the meaning of the Constitution and the justices who are tasked with interpreting it, there are an expanding number of venues through which the public

98 Geertz adds, “It all looks almost experimental: an effort to assay the fact-law formula by seeing what remains of it after it has been wrung through the change of headlong comparative analysis.” Id. at 16.

99 The art and nature of judgment has been the subject of philosophers as well as legal commentators. See, e.g., IMMANUEL KANT, CRITIQUE OF JUDGMENT (1790) (explaining “the power or faculty of judging”). See also, Edlin, supra note 96, at 430.

100 Of course, politics does play a role in the way presidents are given the power to nominate a justice. It is widely known, however, that once justices take their seat on the Supreme Court, they often do not decide as expected. In recent Supreme Court history, one need not look any further than Justice David Souter, whose decisions certainly did not toe the line to the president who nominated him, George H.W. Bush.

101 The fact that judges are unelected is what stands out in a democratic system, particularly since the judges retain their positions for life, so long as there is “good behavior.”


103 One law review article where the “Supreme Court lore” appears, indicating that J. Brennan would ask new law clerk what the most important rule of Constitutional Law was: Richard J. Lazarus, Counting Votes and Discounting Holdings in the Supreme Court Takings Cases, 38 WM. & MARY L. REV. 1099, 1022 (1997). This information also appears frequently in: Mark Tushnet, Themes in Warren Court Biographies, 70 N.Y.U. L. REV. 748 (1995).
can voice those opinions. Particularly in the past several decades, the environment in which legal decisions are made has undergone dramatic change.

The dominance of media acting as a predictive tool has swept across the judicial landscape, with a plethora of insiders and the public, through such Internet sites as Intrade, predicting the outcomes of cases based on the judges’ predilections. The use of social media has magnified and illuminated the judges who make the decisions, providing them with individuality and personality. Outspoken Justices, such as Justice Scalia and former Justice O’Connor, are known outside of legal circles.

The justices have been inserted by the public into the political debate, with “judicial activism” a coin of the political realm. Whether judges recuse themselves in cases or speak to groups outside of their judicial responsibilities, judges are now facing increasing scrutiny even in their extra-judicial conduct. This scrutiny often diminishes the mechanistic idea of complete neutrality of the judicial branch. The judicial nomination process and some key Supreme Court decisions, including Roe v. Wade, and Bush v. Gore, have served as catalysts of public discontent with the judicial system. Of particular concern is the destabilizing force of five-to-four Supreme Court decisions, particularly when the votes lie along the lines of each judge’s purported ideology.

C. Avoiding Intersubjectivity: Using Stare Decisis to Promote Supreme Court Decision-Making as a Grand and Immutable Science

For almost two centuries, judicial decisions involving constitutional law generally evaded the rocky waters of the political sphere and an intersubjectivity critique by framing the judicial decision-making process as a grand and majestic science.

104 The most obvious venue is the Internet and its numerous blogs, Web sites and news outlets that track Supreme Court decisions.
105 For example, Intrade showed odds of 75 percent that the individual mandate, a central part of the health care law and the constitutional challenge to the law, would be declared unconstitutional by the court. See David Leonhardt, Capitol Ideas: When the Crowd Isn’t Wise, Sunday Rev., N.Y. Times, July 8, 2012, at 4. That prediction, like a forecast of rain, turned out to be incorrect.
108 It is no coincidence that the title of a book written by the first female justice appointed to the Supreme Court, Justice Sandra Day O’Connor is The Majesty of the Law: Reflections of a Supreme Court Justice (Random House 2003). This broad view creates a narrative in which law is more than a tradition, but a scientific endeavor based on a series of premises, and then the application of those premises in a systematic fashion.
based on *stare decisis*. Stare decisis in some ways was considered a scientific application of precedent. The doctrine of stare decisis takes its name from the Latin phrase, "*stare decisis et non quieta movere,"* that translates as, "stand by the thing decided and do not disturb the calm." The *stare decisis* principle directs judges to follow precedent unless there is a good reason to overturn it, creating an apparently objective and consistent American legal culture. For these reasons, *Stare decisis* often is used as a point of centrality in judicial opinion writing. For example, in Justice Ginsburg's dissent in *Gonzales v. Carhart*, she took the majority to task for deviating from this principle: “Today's decision is alarming. It refuses to take *Casey* and *Steinberg* seriously . . . It blurs the line firmly drawn in *Casey*, between previability and postviability abortions. And for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health.”

Because of the centrality of precedent, the judicial decision-making culture does not appear as if it changes much over the years, even in volcanic areas such as constitutional law. In fact, the decision-making process can seem to be immutable, a part of a unified field. Even on the occasions when change occurs, due to written opinions and a tradition of dissent, it still approaches a natural evolution.

Within this unified field, judicial decision-making rested comfortably on the assumption that judges engaged in an objective form of problem-solving. Judicial decisions were neither discretionary nor idiosyncratic. Supreme Court Justice Harlan advanced the rationale for this framework:

---

109 This objectivity almost removed the judges from the calculus, resting decisions at times on natural law or an a priori transcendence that did not involve the judges' free will.


114 Constitutional law can be considered “volcanic” because of the potential divisiveness of societal issues that it confronts, from the meaning of equality to the permissibility of government regulation.

115 The importance of the doctrine of *stare decisis* can be seen in the following response to a court that did not follow the guiding rule: “The most egregious act of the Atlantic panel, however, is its defiant disregard, for the first time in this court's nearly ten-year history, of its rule that no precedent can be disregarded or overruled save by an in banc court, on the stated but feeble ground that the authors
Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are [1] the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; [2] the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and [3] the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. 116

Justice Brandeis further articulated the importance of stare decisis in Burnet v. Coronado Oil & Gas Co. 117 in 1932:

[Stare decisis] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact. 118

The idea that the Constitution would be set free from its mooring without judicial fealty to stare decisis was well-entrenched. Justice White observed about Pollock v. Farmers’ Loan & Trust Co., an 1895 case that was overruled in 1988:

The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity and let it be felt that on great constitutional questions this Court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people. 119

of the precedential opinion "ruled without reference to the Supreme Court’s previous cases involving product claims with process limitations."


118 Id. at 412.

Thus, Justice White advanced a far-reaching rationale for strict adherence to *stare decisis*. Without it, not only would constitutional interpretation lack continuity, but the use of opinion by judges would be without a limiting framework and dangerous to human rights.\(^{120}\)

The judicial continuity and scientific alignment of *stare decisis* was a critical theme in the broader culture of law study. Christopher Columbus Langdell, a professor at Harvard Law School in the late 1800s, utilized this concept to legitimate the teaching of law students in a professional school setting,\(^{121}\) transforming law preparation from a system of trade apprenticeships to scientific classroom study. As Langdell stated in the preface to his seminal Contracts case book, one of the first ever books dedicated to the idea of *stare decisis*: “Law, considered as a science, consists of certain principles or doctrines...the growth [of which] is to be traced in the main through a series of cases.”\(^{122}\) Under this view, law advanced through the consistent application of certain processes, producing trust and confidence in outcomes. The focus on objectivity and consistency lent itself to abstraction, not specific, individualized facts or contexts. Thus, law interpretation was an enterprise unlike politics, which could include a set of arbitrary and localized compromises, based less on principle than expediency and the particular facts of the moment.

The fourth Chief Justice, John Marshall, exemplified the grand theory approach to judicial interpretation through sweeping opinions based on the formulation of objective rules. In the seminal case of *Marbury v. Madison*,\(^{123}\) for example, Justice Marshall was confronted with an apparent case of first impression – did the Constitution grant the courts the power to interpret provisions of the Constitution? Instead of conceding the Court lacked precedent, interpretive canons or the tools allowing the Court to decide the issue objectively, the Court attacked the problem as a readily solvable logical dilemma. The Court used the text of the Constitution and the Framers’ Intent to interpret the Constitution’s silence on the issue and give itself the power of judicial review.\(^{124}\) The use of text and Framers’ intentionality provided a semblance of neutrality in the face of an extremely partisan political dispute.\(^{125}\)

---

\(^{120}\) See, e.g., Justice Harlan’s dissent in *Plessy v. Ferguson*, and his prediction about the weak future of the decision. *Plessy v. Ferguson*, 163 U.S. 537 (1896).


\(^{122}\) C. Langdell, Preface to A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871).

\(^{123}\) 531 U.S. (1 Cranch) 137 (1803).

\(^{124}\) Id.

\(^{125}\) Significantly, the results could be viewed as a considerable grab of power, despite the cloak of neutrality.
The specific issue presented in the case was whether Mr. Marbury could properly demand the delivery of a magistrate judge’s commission from the Secretary of State, James Madison. The commission was awarded by the outgoing administration of President John Adams before he left office in 1801 – and prior to the new president, Thomas Jefferson, taking office with his new Secretary of State, Mr. Madison.126

While the political power struggle between President Adams’ loyalists who were leaving office and the supporters of incoming President Jefferson was fierce, there was little outcry over the case128 and its opinion.129 This was less surprising than it might appear. In these early days of the Supreme Court, the vision of the courts as a grand objective arbiter and check on the other branches was not the focus; rather, the justices were simply fighting to avoid becoming the forgotten branch of government. Marbury ruffled the feathers of perhaps only poor Mr. Marbury, the case’s initial loser, whose action was found to be meritorious but simply brought in the wrong court.

Despite its lack of precedent, Marbury offered a fixed point in history by which to commence the grand tradition of constitutional law as majestic and transcendent. Many cases followed Marbury to cement a tradition of grand objectivity. Justice Marshall followed Marbury with others, such as McCulloch v. Maryland,130 to enhance a foundation of perceived immutability. Even Justice Blackmun, in the beginning of his opinion in the controversial abortion decision, Roe v. Wade,131 noted, “Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this....”132

In the early years of perceived judicial transcendence, when judges struck down a law violating the Constitution, the action was considered caused by an errant legislature, not the changing perspectives of judges who happened to identify the errors. The judges were just applying the law. As Justice Holmes observed in his famous dissent in Lochner v. New York133: “[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our

126 In not-so-subtle irony, it was Justice Marshall, acting as Secretary of State as well as Chief Justice under President Adams, who was charged with delivering Marbury’s commission. Justice Marshall’s failure to deliver the commission was a causal predicate to Marbury eventually bringing suit.
127 Other governmental actions were causing a much larger stir.
128 531 U.S. (1 Cranch) 137 (1803).
129 The lack of newsworthy articles and items indicates the dearth of controversy surrounding the decision.
130 17 U.S. 316 (1819).
132 Id. at 116.
133 198 U.S. 45 (1905).
judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”

The judicial method of *stare decisis* promoted lasting values – reliability, confidence and trust by the public. Judges were asked to be experts at applying existing principles, not to add any of their own. Unlike politics, which swayed in the winds of opinion, law reached opinion only in the title of how judges gave notice of their decisions and the method by which those decisions were rendered. Unlike politics, legal problem solving was designed to be predictable.

Within the judicial method of *stare decisis* were interpretive canons to assist judges in their application of the rules. These canons included interpreting the Constitution based on the original intent of its Framers, interpretations based on “plain meaning,” more dynamic interpretive constructs accounting for changing times, the strict construction of provisions, and adherence to other linguistic frameworks adapted to the law. Justice Scalia, for example, is a highly publicized believer in the interpretive method denoted as originalism. He describes originalism as follows:

> Well, I have been very much devoted to textualism and to that branch of textualism that’s called originalism. That is, you not only use the text, but you give the text the meaning it had when it was adopted by the Congress, or by the people, if it’s a constitutional provision. \(^{135}\)

Justice Scalia bases his approach on history: “The process is not novel. I didn’t make it up. It shows that it is historically what American judges did, what English judges did. And it’s the other modes of interpretation that are novel and have to justify themselves.” \(^{136}\)

Significantly, even the objectivist view of judicial decision-making contemplated the use of judgment and reasonable disagreement. This disagreement accommodated dissenting opinions and a divided Court, recognizing that facts change from case to case and that even the consistent application of law could lead to differing results in close and novel situations, particularly those with entrenched disagreement among the circuits. Thus, the grand tradition of filing dissenting opinions was woven into the mosaic of judicial decision-making, contributing to the legitimacy of judicial review. The idea of dissent recognized that at times there were competing themes within the Constitution, and that on occasion interpretive canons accommodated different approaches.

\(^{134}\) *Id.* at 76.


\(^{136}\) *Id.*
Justice Oliver Wendell Holmes was viewed as a great dissenter. He wrote numerous dissents, some regaled even today. For example, in *Lochner v. New York*, Justice Holmes objected to the advancement of an economic theory of due process by his colleague, Justice Rufus Peckham. Justice Holmes stated:

> It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we think as injudicious, [or] tyrannical, and [which interfere] with the liberty to contract.... Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory.

Holmes’ view became the prevailing approach regarding the liberty of contract within the next several decades. The system resurrected his dissent in a civilized transition.

Contributing to the grandeur of legal problem solving was the unanimity of significant cases. The seminal case of *Brown v. Board of Education* is a case in point. In 1954, the Court in *Brown* ruled that intentional, de jure segregation of public schools was an unconstitutional violation of equal protection principles. In an emotionally-charged atmosphere, the justices decided the case unanimously, 9-0. While the decision faced significant backlash, it was at least presented by a

---

137 198 U.S. 45 (1905).
138 *Id.* at 53.
139 *Id.* at 75.
140 See David E. Bernstein, *Lochner Era Revisionism Revised: Lochner and the Origins of Fundamental Rights Constitutionalism, 92 Geo. L. J. 1 (2003)* (In which he calls Holmes and Brandeis “prophetic dissenters”), “These dauntless Justices’ views emerged triumphant when the heroic Franklin Roosevelt stood up to the Nine Old Men and, over time remade the Court in his image”, David E. Bernstein, *Lochner’s Legacy’s Legacy, 82 Tex. L. Rev. 1 (2003)*, *College Sav. Bank v. Florida Prepaid Post Educ. Expense Bd., 527 U.S. 666 (1999)* (Scalia, J.), “We had always thought that the distinctive feature of *Lochner*, nicely captured in Justice Holmes’s dissenting remarks about ‘Mr. Herbert Spencer’s social statics’ was that it sought to impose a particular economic philosophy on the Constitution.” at 691.
142 *Id.*
143 James L. Hunt, *Brown v. Board of Education After Fifty Years: Context and Synopsis, 52 Mercer L. Rev. 549 (2001).* Hunt says, “Macon’s white citizens fully appreciated Brown’s potential to disrupt the settled social order...according to the Telegraph, both Macon’s political leaders and ordinary whites unanimously condemned Brown,” Hunt notes that lawyers, legislators and school leaders rejected the decision, even viewing it as a “flagrant abuse of power”. *Id.* at 550 (quoting United States Senator Richard B. Russell).
united judiciary. If it had been a divided court, it was easy to envision even more determined opposition to the decision.


A. A New Lexicon

The formalist approach that dominated judicial decision-making in the 19th Century gave way in the early 20th Century to a new perspective called legal realism. This transformation was described by one commentator as follows:

Formalist judges of the 1895-1937 period assumed that law was objective, unchanging, extrinsic to the social climate, and, above all, different from and superior to politics.... The Legal Realists of the 1920s and 1930s, tutored by Holmes, Pound, and Cardozo, devastated these assumptions.... They sought to weaken, if not dissolve, the law-politics dichotomy, by showing that the act of judging was not impersonal or mechanistic, but rather was necessarily infected by the judges' personal values.

The rationale for at least part of the realist movement lay in a critique of the lack of completeness of grand theory. A significant proponent of legal realism, Justice Benjamin Cardozo, observed:

---


145 “[R]ealism” about law and judging also conditions this more skeptical awareness with the understanding that legal rules nonetheless can work, that judges can abide by and apply the law, that there are practice-related, social, and institutional factors that constrain judges, and that judges can render generally predictable, legally based decisions (the rule-bound aspect). A realistic view holds that the rule-bound aspect of judging can function reliably notwithstanding the challenges presented by the skepticism-inducing side, although this is an achievement that must be earned, is never perfectly achieved, and is never guaranteed.” Id. at 2. Or Id. at 732 (Tex. L. Rev.).

No doubt there is a field within which judicial judgment moves untrammeled by fixed principles. Obscurity of statute or of precedent or of customs or morals, or collision between some or all of them, may leave the law unsettled, and cast a duty upon the courts to declare it retrospectively in the exercise of a power frankly legislative in function. In such cases, all that the parties to the controversy can do is to forecast the decision the best they can, and govern themselves accordingly. We must not let these occasional and relatively rare instances blind our eyes to the innumerable instances where there is neither obscurity nor collision no opportunity for diverse judgment...  

In the 1970s and 1980s, the ‘deconstruction movement,’ based on philosophy and the reading of texts, further punched holes in a fully objectivist judicial analysis, claiming that texts were indeterminate and that ideas change in varying contexts. This critique, however, seems to collapse within itself over time by failing to replace the existing construct with a viable alternative. Still, these analyses opened up the opportunity for additional critiques of judicial decision-making.

B. The Catalysts of An Intersubjective Critique

In the past several decades, there has been a marked rise in claims that judges pay fealty to ideology rather than stare decisis when making judicial determinations. The Supreme Court’s alleged path toward intersubjectivity has been propelled with ever-increasing speed by various events and trends. Significant catalysts include globalization, advances in technology, especially enhanced social media attention that humanizes and highlights extrajudicial activities of judges, judicial nomination proceedings, particularly those following that of Justice Clarence Thomas, the

149 As Professor Balkin noted, “Deconstruction began as a series of techniques invented by Jacques Derrida, Paul de Man, and others to analyze literary and philosophical texts. These techniques, in turn, were connected to larger philosophical claims about the nature of language and meaning....Both deconstruction and structuralism are antihumanist theories; that is, they emphasize that people’s thought is shaped by structures of linguistic and cultural meaning. Both deconstruction and structuralism asserted that people are culturally and socially constructed, and that they internalize culture in much the same way that they internalize a language.” Id. at 719-720.

150 Most of these claims found their way into some form of media.
public’s response to controversial cases, as epitomized by *Bush v. Gore*, and especially five-to-four decisions, notably those decided along apparent ideological lines drawn between liberals and conservatives generally or along the party lines of Democrats and Republicans. All of these triggers are revamping the way the public perceives *stare decisis* and the rule of law.

1. The Impact of Advances in Communication and the Social Media

Recent advances in communication have had a huge impact on almost every academic discipline, particularly in the way new filters have altered existing perceptions. The new-found communication structures, from the Internet, to blogging, to text messaging, have changed the way judicial decision-making has been received, if not made. The 24-hour news cycle has augmented the scope of news topics, and Supreme Court watching has become an accepted and mainstreamed activity.

These changes in communication have affected the social fabric. Today, the Internet is easily accessible, providing information about just about everything at the click of a mouse, including the legal system and the Supreme Court. There are numerous types of communication, including blogs, Twitter-feeds, and Facebook accounts. People can be technologically connected during all hours of the day or night. There is virtually no isolation, with giant satellite dishes attached to rural houses serving as symbolic and actual connectors, even in remote places.

---

152 As one commentator has noted:

Social structures are clearly real and deceivingly static, as manifested in their manifold and diverse effects. However, they are tangible only in human communication and interaction. Communication, though always in flow, is a more or less stable meeting place between people to express themselves and make themselves understood. It is also the only meeting place between people to make themselves understood. This means that communication, and only communication between people "is" the social sphere, "is" social process, and all the elements of the structure of social process are contained only in communication. Anything about which humans cannot communicate does not exist for them and cannot be operated by them. Anything that does not speak to humans (the universe, the body, the ecosystem, et cetera) is outside the ambit of social structure, does not "obey" humans and remains an object for exploration and mystery. In other words, communication, and with it social structure, are the exclusive creations of the interactions between humans over time, and they bear no relation to the material continuum in which they take place other than through communication. Klaus Ziegert, *Judicial Decision-Making, Community and Consented Values: Some Remarks On Braithwaite’s Republican Model*, 17 SYDNEY L. REV. 373, 374 (1995).
153 A typepad also works, as does Siri, the automated “attendant” responding to voice requests on the i-phone 4i and 5.
Rather than obscuring the justices and their decisions through a filter of limited outlets, such as the national newspapers and television networks, the new reality of micro-broadcasting serves as a magnifying lens, tracking justices and their opinions in entirely new ways. Only a cell phone is needed to provide instant, unfiltered (and unverified) information to persons around the world.

The plethora of information about the Court has many consequences. Rather than a limited understanding of justices, who could more easily be revered and respected behind their black robes, the excessive information embraces more realistic views. The public learns about the propensities, hobbies and interests of justices, humanizing them. Some of the information is used irreverently, such as in Fantasy SCOTUS, described as “The Premier Supreme Court Fantasy League.”\(^{154}\) This website asks participants to predict Supreme Court decisions, awarding prizes to those who are the best prognosticators.\(^{155}\) The Website advertises itself as having more than 10,000 members\(^ {156}\) in its “league.”\(^ {157}\) If further declares it is the “hottest new fantasy-league game,” “a very, very clever idea!,” a “new gold standard in Supreme Court geekery,” and the “toast of the legal world.”\(^ {158}\) With sponsors including the mainstream legal research engine Westlaw,\(^ {159}\) it appears to be a mainstream venture.

The easy access to information also has a flip side, with many sites aggregating information about people and things – including judges and their decisions – for the use of others.\(^ {160}\) Information-gathering, often called data-mining, has become transformed,\(^ {161}\) such that anyone who wants can hire information sleuths to obtain data in a much easier fashion than ever before.\(^ {162}\) Not only is there more information available than in the past, most individuals leave electronic trails, from credit card spending, cell phone calls, and plain cell phone signal tracking. The level of intrusiveness has multiplied along with the broader access. For example, it is much easier to do electronic searches than personal surveillance. Even innocent pieces of information can be aggregated to present a more comprehensive and


\(^{155}\) Id.

\(^{156}\) Id.

\(^{157}\) Id.

\(^{158}\) Id.


\(^{160}\) See, e.g., SCOTUSBLOG, http://www.scotusblog.com (last visited ) which can be accessed through the Internet generally or a conduit like Twitter.

\(^{161}\) Even the types of information available are multiplying. DNA mapping, and biometrics (iris, fingerprints, hair properties) are just some of the new types of evidence.

intrusive narrative of personal lives. While this information separately might be entirely “public,” when placed within one mosaic it provides a very personal picture, such as where someone lives, with whom they live, how old they are, and how they spend their time. 163

These changes have affected the judiciary, which receives much more attention than ever before. Information about time spent prior to becoming a judge, and extrajudicial activities while serving as a judge, often are readily accessible on the Internet. This information individualizes judges beyond their black robes, highlighting associations and speeches that in prior years might have drifted by without notice. While on one level this could create greater connections between the public and judges, the majesty and objectivity of judges could be demythologized by exposing personal preferences and human habits.

2. Enhanced Communication and the Senate Nomination Process

Partially as a result of the 24-hour news cycle and the increased prominence of the Supreme Court in the media and national conscience, the Senate nomination hearing process for Supreme Court justices has become a well-covered and highly publicized event, with considerable commentary and surrounding hoopla. It has become to some observers staged Kabuki Theater – with nominees saying as little as possible and questioning by senators seemingly more about advancing their own agendas than actually vetting the nominee.

Some of the current focus can be traced back to the sensationalism surrounding the nomination process of Justice Clarence Thomas.164 At Justice Thomas’ hearings, a law professor named Anita Hill claimed her then boss Clarence Thomas had sexually harassed her.165 While Justice Thomas ended up being confirmed after a split vote, the claims focused the country on behavior that, if true, would clearly justify non-confirmation. That proceeding set the stage for every nomination process that followed, with intensive scrutiny about the nominee’s background and hearings serving as a predicate to national approval and trust. Yet, as the scrutiny ratcheted

163 See spokeo.com, a data broker that compiles information on individuals from various sites, including Facebook and other social media and sells information to consumers.
164 Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 102nd Cong. 1084 (1991).
165 See, e.g., Maureen Dowd, The Thomas Nomination; Facing Issues of Harassment, Washington Slings the Mud, N.Y. TIMES, Oct. 10, 1991, at B15, describes the hearing as “an extraordinary political psychodrama, nasty charge are flying in Congress about character assassination, ruined lives, chicanery and sandbagging, a legislative process run amok, sex, lies and raunchy movies…Reluctant in the first place to come to grips with the explosive issue of sexual harassment presented by Ms Hill…Senators are now in turmoil about presiding over the first televised Congressional hearing on the subject in history.” [emphasis added]
up, nominees backed-off, realizing that one slip of the tongue could dash their hopes of the nomination.

One example of the intensive examination of prior statements and conduct occurred at Justice Sotomayor's nomination hearing. Almost a decade before her 2009 nomination, while speaking at a conference at the University of California at Berkeley on Latino and Latina judges, she said: "a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life." At the hearings, the statement was offered as important prior behavior that contributed to some people viewing her as an activist judge, a negative label that could be considered code for a judge who conflated judicial interpretation and politics. Justice Sotomayor was forced to defend her decision-making and integrity as a judge.

With continued advances in technology, negative labeling of prior comments and actions will only increase, since nothing that finds its way onto the Internet ever really disappears. Social media sites, such as Twitter and Facebook, will continue to be tools used by critics to fight otherwise qualified nominees. The spotlight will

167 This label was perpetuated and floated in the media. See, e.g., Alex Spillius, Sonia Sotomayor Labelled "Activist Judge" at Confirmation Hearing, TELEGRAPH, July 13, 2009, available at http://www.telegraph.co.uk/news/worldnews/northamerica/usa/5819935/Sonia-Sotomayor-labelled-activist-judge-at-confirmation-hearing.html.
168 Ironically, a statement that could have been construed as outside the stare decisis framework was made by Justice Thomas during his nomination hearing. He opined that a justice must be able to "walk in the shoes of the people who are affected by what the Court does." Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary United States S., 102nd Cong. 1084, pt. 1, at 260 (1991) (statement of J. Thomas).
169 See, e.g., As another commentator has observed, “The ease of storing information has meant asking for more of it. Birth certificates used to include just the information about the child’s and parents’ names, birthplaces, plus the parents’ occupations. Now the electronic birth record includes how much the mother drank and smoke during her pregnancy, whether she had genital herpes or a variety of other medical conditions, and both parents’ social security numbers. Opportunities for research are plentiful, and so are opportunities for mischief and catastrophic accidental data loss. And the data will be kept forever, unless there are policies to get rid of it.” HAL ABELSON, ET AL., BLOWN TO BITS 11 (2008).
shine even brighter on the nominee as a person, and perhaps make the nominee’s specific rulings less important by implication.

**C. An Additional Reason Why Five-To-Four Decisions Can Be So Controversial**

Controversial decisions in the past several decades have fed the politicization of the Court debate, and not just because they were decided by a margin of one. These cases stand out, in part because they are issues disputed in the popular culture and almost invite intersubjective critique. In addition to being located within the popular culture, many of these cases also are being decided along the lines of perceived bloc alignment, where the so-called liberals rule one way, and the conservatives another way. 

The majority of one cases also stand out because of another phenomenon, the change in the Supreme Court’s workload. While several decades ago the Court was deciding more than 200 cases a year, that number has taken a decided downturn. The number of cases that have been both briefed and argued in the past several years has dipped below 100, even to 68 cases. Accompanying the significantly fewer number of cases briefed, argued and decided has been another trend involving much longer opinions. The justices are writing more to explain their decisions. These two trends, for whatever reason, have the added by-product of focusing attention even more on the few controversial cases taken by the court for oral argument and briefing. This attention is magnified if a controversial case is then decided by a five-to-four vote.

Today, especially with the fewer number of decisions, those that appear to be based on bloc alignments stand out. This is particularly true for the one justice who might join either voting bloc, Justice Anthony Kennedy. To no-one’s surprise, Justice Kennedy is in the majority of most five-to-four decisions and aligns often with the majority in the conservative bloc of the court, Justices Roberts, Scalia, Thomas and Alito.

The outcome in the close Justice Kennedy-led decisions can appear to be based on the reasoning – or whim – of a single person, with the assumption that the other justices will decide consistent with pre-formed beliefs. This view denigrates the

170 The conservatives often have the five votes to decide the case.


172 *Id.* at 579-580. One example was the total number of pages written in the Supreme Court’s opinion about the Second Amendment, *McDonald v. City of Chicago*, 561 U.S. 3025 (2010), 116 pages.

173 Justices Scalia and Thomas often agree, for example, sometimes over ninety percent. Similarly, Justices Ginsburg, Breyer and Sotomayor also might be in agreement on over ninety percent of the cases. *Id.*, at 580.
objectivity of eight justices, and diminishes the idea of objective judicial engagement. Even if the idea of a Court guided by a single vote is false, it can undermine legitimacy in the eyes of both attorney advocates and the public.


\textit{National Federation of Business}\textsuperscript{175} provides a case study in the relationship of intersubjectivity and Supreme Court decision-making, particularly in the importance of the decision being perceived as a vote along ideological bloc lines. In it, the Court had several significant decisions to make. The decision concerned the constitutionality of the Patient Protection and Affordable Care Act, (PPACA), passed by Congress in 2010.

One part of the PPACA became known as the individual mandate. This provision mandated that most qualifying American adults maintain a certain minimum level of health care insurance. Some Americans were exempted under the law and others were provided with the opportunity for insurance through their employers. Those people falling outside these groups must purchase insurance on their own or make a "[s]hared responsibility payment" to the government.\textsuperscript{176}

The PPACA also expanded Medicaid coverage for many people. This program assists some groups who otherwise could not obtain medical care in doing so, including children, families earning below a certain income, the blind and disabled, the elderly and pregnant women.\textsuperscript{177} The Medicaid provision included requirements of state assistance in expanding coverage. States were required to meet expanded requirements by the year 2014 or risk losing federal funding for the expanded coverage and all existing Medicaid coverage as well.\textsuperscript{178}

If the Supreme Court reached these substantive questions\textsuperscript{179} and held that either of these pillars of the law was unconstitutional, an additional question would present itself – would the remaining portions of the law be severable and survive, or would the entire law fall?

The Government argued that the individual mandate provision of the PPACA was justified by the Congress' Commerce Clause power, located in Article I, Section 8, Clause 3 of the Constitution. This power to regulate commercial activity extended to

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{174} 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012).
\item \textsuperscript{175} Id.
\item \textsuperscript{176} 26 U.S.C. § 5000A( ).
\item \textsuperscript{177} 42 U.S.C. § 1396d(a)( ).
\item \textsuperscript{178} 42 U.S.C. § 1396c ( ).
\item \textsuperscript{179} A predicate question was whether the suit was barred under the Anti-Injunction Act, that stated, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a)( ).
\end{enumerate}
\end{footnotesize}
farmers growing and consuming their own wheat and individuals growing their own marijuana.

Chief Justice Roberts, who notably stated he would work to uphold precedent as a justice in his confirmation hearings,\textsuperscript{180} wrote the opinion for a plurality of five justices. Justice Roberts found that the individual mandate was constitutional as a tax but not under the Commerce Clause. He also concluded that the Medicaid expansion scheme threatening states with a complete loss of federal Medicaid funding went too far and was unconstitutional. Thus, part of the law remained, with states having an option of complying with the Medicaid expansion or not.

Interestingly, the Chief Justice’s decision on the individual mandate narrowed the Commerce Clause power while finding a path for constitutionality through the taxing power. The Chief Justice wrote:

“The Constitution grants Congress the power to “regulate Commerce.” Art. I, §8, cl. 3 (emphasis added). The power to regulate commerce presupposes the existence of commercial activity to be regulated…. If the power to “regulate” something included the power to create it, many of the provisions in the Constitution would be superfluous. For example, the Constitution gives Congress the power to “coin Money,” in addition to the power to “regulate the Value thereof.” Id., cl. 5. And it gives Congress the power to “raise and support Armies” and to “provide and maintain a Navy,” in addition to the power to “make Rules for the Government and Regulation of the land and naval Forces.” Id., cls. 12–14. If the power to regulate the armed forces or the value of money included the power to bring the subject of the regulation into existence, the specific grant of such powers would have been unnecessary…

Our precedent also reflects this understanding. As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching “activity…."

The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could potentially make within

the scope of federal regulation, and—under the Government’s theory—empower Congress to make those decisions for him.\textsuperscript{181}

A. The Five-to-Four Decision

The fact that the votes again resulted in a 5-4 split of the Court arguably undermined the strength of the decision. The majority of one suggested deep-seated disagreement among the justices and that the issues might be in greater flux, leading to change in the future. Yet, the fact that the law was generally upheld and not struck down struck a conciliatory note for the public at large.

B. Did Chief Justice Roberts “Switch Sides?”

The big surprise related to this long-awaited and closely-watched decision was not that the Chief Justice wrote the opinion – it was his prerogative to assign if he was in the majority – but that he upheld the individual mandate. To some conservatives, Chief Justice Roberts’ vote was almost tantamount to a betrayal. Mr. Curt Levey, the president of a conservative organization that monitors judicial nominations, observed that the Chief Justice’s vote “has made conservatives think somewhat differently” about judicial nominees, in that a conservative justice is supposed to carry that philosophy throughout his or her tenure.\textsuperscript{182} This comment reflects the strong emotion associated with the case and how ideology is intended to be a governing principle, superseding traditional legal interpretation.

Many speculated that the Chief Justice switched sides.\textsuperscript{183} In a widely discussed news article, Jan Crawford discussed how the Chief Justice switched his views.\textsuperscript{184} Crawford wrote:

\textsuperscript{181} Id. at 2586-2588.

\textsuperscript{182} Mr. Levey added: “There’s a lot of sober thinking among conservatives that it is not just enough to appoint somebody who we know to have the right philosophy – you have to appoint somebody who has shown, either as a judge or perhaps in some other setting, that they will stick with that philosophy even when there’s political pressure to do otherwise.” Curry, \textit{supra} note 8.

\textsuperscript{183} For a contrary view, see Professor Orin Kerr’s comments on the \textit{Volokh Conspiracy} Blog on June 29, 2012:

\textsuperscript{184} The Affordable Care Act cases were massive, complicated, and extremely important cases argued near the end of the Term in a marathon 6 hour session. Based on the oral argument, everyone knew that the Court would be sharply divided, with passionate dissents and responses to those dissents. But the Court didn’t have a lot of time to get the cases out. ***

So it might have happened like this. The Justices voted at conference and there were five votes to uphold the mandate on the tax argument and at least five votes to strike down or modify the Medicaid expansion. The first group is Roberts plus the liberals,
It is not known why Roberts changed his view on the mandate and decided to uphold the law. At least one conservative justice tried to get him to explain it, but was unsatisfied with the response, according to a source with knowledge of the conversation.

Some informed observers outside the court flatly reject the idea that Roberts buckled to liberal pressure, or was stared down by the president. They instead believe that Roberts realized the historical consequences of a ruling striking down the landmark health care law. There was no doctrinal background for the Court to fall back on - nothing in prior Supreme Court cases - to say the individual mandate crossed a constitutional line.

The case raised entirely new issues of power. Never before had Congress tried to force Americans to buy a private product; as a result, never before had the court ruled Congress lacked that power. It was completely uncharted waters.\(^\text{185}\)

To strike down the mandate as exceeding the Commerce Clause, the court would have to craft a new theory, which could have opened it up to criticism that it reached out to declare the president' health care law unconstitutional.

\(\text{and the second group is Roberts plus the conservatives. Roberts is the swing vote in this case and this is the biggest case of his time on the Court, so he quite naturally assigns the opinion to himself. Roberts doesn't know how many votes his opinion will get, and he tries to write in a way that might persuade some unlikely votes to join him. Maybe Justice Kennedy will change sides and make the case 6-3, which would avoid the dreaded 5-4 vote. Or maybe he can get some liberal votes to join the section blocking the Medicaid expansion. *** To write the opinion, Roberts needs to cover a lot of ground — anti-injunction act, tax power, Medicaid expansion, etc. Roberts also writes on the Commerce Clause issue, even though it's not needed to reach the result. Why include that section? Perhaps Roberts thinks that his middle-ground opinion that includes a section agreeing with the mandate challengers on the Commerce Clause might pick up Kennedy's vote." Orin Kerr, Did Chief Justice Roberts Change His Vote? Perhaps Not, VOLOKH CONSPIRACY (June 29, 2012, 6:08 AM), http://www.volokh.com/2012/06/29/did-chief-justice-roberts-change-his-vote-perhaps-not/}.


\(\text{\textsuperscript{185} Interestingly, Chief Justice Roberts noted in his confirmation hearing for saying he will uphold precedent (see S.Hrg. 109-158). His approach could be seen as a novel theory, navigating through tricky waters by not focusing on precedent.}\)
Roberts was willing to draw that line, but in a way that decided future cases, and not the massive health care case.

Moreover, there are passages in Roberts’ opinion that are consistent with his views that unelected judges have assumed too much power over American life, and that courts generally should take a back seat to elected officials, who are closer to the people and can be voted out of office if the people don’t like what they’re doing.

As Roberts explained in his opinion:

"The framers created a federal government of limited powers, and assigned to this Court the duty of enforcing those limits. The Court does so today. But the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people."

Regardless of his thinking, it was clear to the conservatives that Roberts wanted the court out of the red-hot dispute. 186

Whether Justice Roberts did or did not switch begs the important question concerning intersubjectivity – the fact that this conversation about “sides” is taking place and with such great interest. It realizes Court decision-making is inexact, mutable and certainly not always a part of a grand theory. “Sides” is something that was discussed more in the context of war, sports and politicians, and in a background of stare decisis and grand theory, seems out of place. Within a context of politics and votes, however, it is commonplace and is becoming a comfortable bedfellow with constitutional decision-making.

C. What Impact Did the Decision Have on How the Court Is Viewed?

Before the Supreme Court’s decision in NFIB v. Sebelius, many predicted the decision would influence public perceptions of the Court and its legitimacy. If a new Rasmussen poll is to believed, the decision has had some such effect already. From a poll summary in July of 2012, the following information was gathered:

A week ago, 36% said the court was doing a good or an excellent job. That’s down to 33% today. However, the big change is a rise in negative perceptions. Today, 28% say the Supreme Court is doing a poor job. That’s up 11 points over the past week.

The new Rasmussen Reports national telephone survey, conducted on Friday and Saturday following the court ruling, finds that 56% believe

---

186 Crawford, supra note 184.
justices pursue their own political agenda rather than generally remain impartial. That’s up five points from a week ago. Just half as many — 27% — believe the justices remain impartial. . . .

Thirty-seven percent (37%) now believe the Supreme Court is too liberal, while 22% think it’s too conservative. A week ago, public opinion was much more evenly divided: 32% said it was too liberal and 25% said too conservative.187

As of November 2012, the polls indicate that 30 percent of those polled believe the Supreme Court is doing a “good to excellent” job, while 24 percent believe it is doing a “poor” job.188

V. Managing a Future of Intersubjective Critique of American Constitutional Law

While the intersubjective critique of judicial opinions likely will persist, this continuation will not necessarily be harmful. A new conflation could emerge for judicial decision-making -- part realist, part objectivist, and part blog-generated analysis, making judicial interpretation better known and even stronger than before. Of course, there remains a need for a safe distance between law and politics, an abyss planned by the Framers and one of the most important separations in the democratic system. The notion of judicial independence readily complements the intentionality of maintaining difference in method, approach and objectivity in law and politics. The distinctiveness of judicial interpretation can be maintained and fostered through engaging justices in the effort to maintain the appearance and actuality of neutrality.

187 Jonathan Adler, The Mandate Decision and Public Perception of the Court, VOLOKH CONSPIRACY (July 1, 2012). That survey contrasts with the more recent July 2012 survey:
Survey of 1,000 Likely Voters July 29-30, 2012 ["How would you rate the way the Supreme Court is doing its job?" Rasmussen Reports, August 1, 2012]

<table>
<thead>
<tr>
<th>Rating</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Excellent</td>
<td>7%</td>
</tr>
<tr>
<td>Good</td>
<td>27%</td>
</tr>
<tr>
<td>Fair</td>
<td>41%</td>
</tr>
<tr>
<td>Poor</td>
<td>22%</td>
</tr>
<tr>
<td>Not Sure</td>
<td>3%</td>
</tr>
</tbody>
</table>

A. Predictability and Local Culture: Using Controlled Judgment

One way the judicial decision-making process could maintain neutrality is by ensuring that decisions are written with specificity, emphasizing the key facts and law of the cases on which new decisions are based. This particularity, a form of controlled judgment, can be critical to public confidence in the system. It is generally helpful for judges to not only explain their conclusions, but the interpretive methodology that got them there. This fosters the distinction between legal analysis and mere political manipulation.

The idea of fuzzy parameters based on the specific facts and environment of the case as well as broad legal rules actually meshes with the doctrine of *stare decisis*, so long as precedent is taken seriously. The legal method utilized in an opinion should be clear to readers and not mix with diatribes about differing conclusions or the gloom and doom that those conclusions will bring.

B. A Focus on Extra-Judicial Behavior: The Doctrine of Unintended Consequences

Several decades ago, justices could walk around in public almost anywhere in the United States without being recognized. That unknown status is undoubtedly not the case anymore. Instead, judges should assume a lack of anonymity in public, a level of recognition on par with celebrities, politicians or members of the royal family. Many activities, when framed and highlighted in a particular manner, can have unintended consequences. These consequences, without the complete story or explanation, are the ones that can go “viral,” transforming the world’s opinion about a justice within minutes.

As a result of the new power of anyone possessing a cell phone with a recording mechanism, extrajudicial activities, such as speeches and participation in organizations, should first be considered carefully and intentionally by judges, with an understanding of how actions could be perceived as a compromise in neutrality. For example, several years ago, Justice Scalia went hunting with then Vice President Dick Chaney. This was a highly publicized incident that was in itself neutral – two friends getting together – but in context seemed worthy of the politics pages.

---

189 While anonymity of federal judges might have been the norm decades ago, it should no longer be considered the default position.

190 In effect, judges should behave in public as if they are celebrities. The image of a judge carries over to non-judicial activities in the 21st Century.


Thus, judges should attempt to diminish political activities and associations, at least in public. If not, they should at least manage expectations by intentionally governing what the public sees. An example of this might be Justice Kagan’s promise to go hunting with Justice Scalia, should she be confirmed, a sign of collegiality between justices who seem to have divergent viewpoints. Justice Kagan apparently followed through on this promise after it was made.

C. The Illumination of Cautious and Explicit Judicial Recusal Rules

The engaged effort to be neutral also applies to judicial recusals. Currently, Supreme Court justices decide for themselves whether they have prejudicial bias and should not sit on a case. In earlier times, the Court might defer a decision, holding reargument in a case or making sure any important argument occurred before a full bench. Today, instead of permitting a bench of justices to hear a case to include those who appear to have biases, based on stock holdings or public statements on the issue in question, the Supreme Court should adopt at a minimum an explicit aspirational standard for when recusal is an appropriate remedy to perceived bias. This call for transparency is not new; it is, though, more important than in prior days when such decision-making occurred to a much larger extent outside of the public eye.

D. Thoughtful, Deliberative and Open-Minded Decision-Making

It is important for the public to believe that judges have open minds regarding each of the cases before it. Although judicial intransigence is not a new phenomenon – Justice Robert Jackson apparently thought some decisions by his colleague, Justice Black, were predetermined – it is especially important in today’s polarized political environment.

---

195 Notes, supra note 21 at 987. (“Not a few five-to-four decisions on constitutional issues have been handed down only after a second argument, either in the hope of avoiding a close decision or with the intention of presenting the case to the entire Court.”)
196 Id. at 987.
197 Dennis J. Hutchison, The Black-Jackson Feud, 1988 SUP. CT. REV. 203, 230 (1988)(“With few exceptions, we all knew which side of a case Black would vote on when he read the names of the parties.”).
While five-to-four decisions are inevitable, it is still important to indicate that it was the nature of the particular case, and not preconceived facts, that swayed the justices. This open-mindedness is especially important in what the public observes in the way judges react in oral argument or write their decisions. While nothing can be done about how the justices vote, a string of these cases weakens the legitimacy of judicial decisions, especially if the overall number of cases briefed, argued and decided keeps shrinking.

It is important, consequently, for justices not to be disparaging of each other when they land on opposite ends of a case that raises their passions. In *Lawrence v. Texas*, for example, a 2003 decision striking down Texas’ anti-sodomy law, Justice Scalia wrote in dissent, “The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are “immoral and unacceptable,” the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality and obscenity…. [Today’s] opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists.” This and other comments have followed Justice Scalia in his public appearances, particularly after the Court has agreed to hear other cases involving homosexuality. For example, in responding to a question about *Lawrence* after a talk at Princeton University in the fall of 2012, Justice Scalia used a *reductio ad absurdum* argument, indicating the absurdity of extending the counter-argument to its inevitable conclusion. Justice Scalia’s comments lit up the blogosphere, with partisan argument and vitriol in the same term the Court had accepted two cases dealing with same-sex marriage.

One way to better communicate with the readers of opinions is to shorten them. It is likely that only the most avid court-watchers, lawyers and law professors read entire, unedited decisions that run-on for hundreds of pages. If justices shorten

---

199 Even a 6-3 opinion changes the dynamic and has a different set of implications.
200 If the justices opt for more cases being briefed and argued, it might not seem that mostly politically charged cases seem to reach the court through briefing and arguing.
202 539 U.S. at ___.
204 Some headlines after Justice Scalia’s comments were reported included: “Scalia Quizzed at NJ’s Princeton on Gay Issue (ABC News); Scalia Princeton Comment Likens Gay Lifestyle to Murder (Politico.com); “Scalia Defends Controversial Opinions About Gays at Princeton (Businessinsider.com)
their opinions, more people will understand the nature of the disagreement and see that it is doctrinally-based and not personal.

Perhaps even more important is the ability to and disagree without being disagreeable. Sometimes, the sharp description of opposing views can undermine the civility of the debate and seem more like the rough and tumble world of politics. If justices opt for respectful disagreement, the tenor of the writing could better illustrate that the conflict is not about ideology, but rather concerns nuanced and complex questions of law.

E. A Perspective of Humility

Judges are public servants who need the public's trust. Arrogance or hubris in either opinion-writing or action does not serve to engender confidence in decision-making. In fact, these traits are more often associated with untrammeled power, not neutrality. Justice Robert H. Jackson, in a famous aphorism, understood the Court's place in the constitutional firmament, noting that the Supreme Court is not a perfect body. He said, "We are not final because we are infallible, we are infallible only because we are final."\(^{205}\)

Justice Jackson also personally illustrated the idea of a justice as a public servant. While he did not graduate from college or law school, Justice Jackson was named as a justice of the Supreme Court only seven years after beginning his public service. Rather than rest on his numerous accomplishments up to and including his tenure as a Justice, he took time off from the Supreme Court to become Chief of Counsel to the prosecution at the Nuremburg Trials following World War II.\(^{206}\) His narrative is the type that generates trust and confidence, not the opposite.

V. Conclusion

Historically, five-to-four Supreme Court decisions striking down federal or state legislation have been criticized to some extent as political. This criticism has been especially strong in the past decade, where some major decisions appear to have been rendered along ideological lines. The post-modern intersubjective critique of decisional influence by environmental factors and circumstances indicates that the decision-making process is less an exercise in grand and majestic objectivity, based on the doctrine of *stare decisis*, than a matter of local culture, such as who is making the decision and under what circumstances. This intersubjective view is fed to the public by advancing interconnectivity, thanks to the Internet and micro-blogging sites such as Twitter,\(^{207}\) Facebook\(^{208}\) and blogs devoted to the Supreme Court.

\(^{205}\) *Brown v. Allen*, 344 U.S. 443, 538 (1953)


\(^{207}\) Twitter conversations can develop in an instant, with a hashtag forming a micro-blog in an instant.
While the reverberations of majority of one cases have seemed to last longer and stretch further in recent years, they do not necessarily signal the demise of Supreme Court legitimacy. The true majesty of judicial decision-making is that it can be equal parts objective, subjective and intersubjective, influenced by local cultures and environmental factors, without losing its legitimacy. While constitutional law is indeed socially embedded, that observation alone does not delegitimize *stare decisis* and the way judges decide cases, especially when judges strive to use objective critical analysis and evaluation. In an age of pervasive information and connectivity, judges should manage the intersubjective circumstances in their opinions and their public lives with intentionality. Judges should continue to pay fealty to precedent as a distinguishing factor of the judicial decision-making process. Public acceptance and respect for judicial decisions made in good faith will be an important step toward maintaining confidence in judicial decision-making and the legal system – and keeping law separate from politics.

---

208 This public company now claims more than one billion users world-wide.