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Keith J. Bybee

Syracuse University, kjbybee@maxwell.syr.edu

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Open Secret:
Why the Supreme Court has Nothing to Fear
From the Internet

Keith J. Bybee[†]

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ABSTRACT

The United States Supreme Court has an uneasy relationship with openness: it complies with some calls for transparency, drags its feet in response to others, and sometimes simply refuses to go along. I argue that the Court's position is understandable given that the internet age of fluid information and openness has often been heralded in terms that are antithetical to the Court's operations. Even so, I also argue the Court actually has little to fear from greater transparency. The understanding of the Court with the greatest delegitimizing potential is the understanding that the justices render decisions on the basis of political preference rather than according to legal principle and impartial reason. Yet this political understanding of the Court cannot be revealed by greater transparency because this understanding is already broadly held and co-exists with the popular view that the Court is an impartial arbiter. The notion that the justices are influenced by politics is, in short, an open secret. Rather than wondering how judicial legitimacy might survive in an era when information continuously floods into the public sphere, I argue that the better question is how judicial legitimacy can be maintained in the first place when the judiciary is widely understood to be partisan and impartial at the same time.

[†] Paul E. and the Hon. Joanne F. Alper '72 Judiciary Studies Professor, Syracuse University College of Law; Professor of Political Science, Syracuse University Maxwell School of Citizenship and Public Affairs; Director, Institute for the Study of the Judiciary, Politics, and the Media at Syracuse University. I thank Carolyn Shapiro and Christopher Schmidt for organizing "The Supreme Court and the Public," the conference for which this essay was written. I also thank the conference participants for their helpful comments.

One way to think about the impact of technology today is to consider the transformation of information. By 2002, the amount of digitally recorded information matched the amount of analog recorded information for the first time in history; five years later the balance had tipped heavily in one direction and digital information accounted for 94% of all the recorded information on the planet.¹ This immense and rapidly growing body of digital data is distinguished by one dominant characteristic: liquidity. “[I]ninitely reproducible, frictionlessly mobile” digital information flows far more quickly and continuously than its analog ancestor ever could.²

With this bonanza of highly fluid digital information, it has become much easier to publicize and distribute the work of governmental institutions like the United States Supreme Court. SCOTUSblog, for example, provides comprehensive coverage of the Court’s docket, broadly disseminating a level of detail that was once known only to a small circle of dedicated Court watchers.³ The Oyez Project maintains a multimedia archive with over 7,000 hours of Court audio, giving the public free access to oral arguments without requiring a journey to the

¹ Andy Greenberg, *THIS MACHINE KILLS SECRETS: HOW WIKILEAKERS, CYPHERPUNKS, AND HACKTIVISTS AIM TO FREE THE WORLD’S INFORMATION* 5 (2012).

² *Id.*

³ SCOTUSblog, *About Us*, available at <http://www.scotusblog.com/about/> (last visited November 1, 2012).

Court to watch the live proceedings or a trip to the National Archives to listen to recordings.⁴ The Legal Information Institute houses a sprawling virtual repository that counts among its holdings every Court opinion produced since 1992 and over 600 historically significant Court decisions.⁵

Enthusiastic support for such access and transparency is easy to find—except on the Supreme Court itself. The Court’s resistance to open communication is at times passive aggressive. For instance, the Court records oral arguments, but it does not allow the audio to be broadcast live as the arguments are occurring.⁶ Instead, the Court usually waits until the end of the term to make the recordings publically available; in exceptional circumstances, the Court will release recordings at the end of the day or week when a given argument occurs.⁷ The Supreme Court also maintains a website where it typically posts the text of opinions within a few minutes of their release from the bench.⁸ The site is not, however, configured to handle the heaviest

⁴ Oyez Project, *About Oyez*, available at <http://www.oyez.org/about> (last visited November 1, 2012).

⁵ Legal Information Institute, *Who We Are*, available at http://www.law.cornell.edu/lii/about/who_we_are (last visited November 1, 2012).

⁶ Lyle Denniston, *Plea to Allow Health Care Broadcast*, June 14, 2012, available at <http://www.scotusblog.com/2012/06/plea-to-allow-health-care-broadcast/> (last visited November 1, 2012).

⁷ *Id.*

⁸ Supreme Court of the United States, *Locating Court Documents and Information*, available at http://www.supremecourt.gov/faq_documents.aspx (last visited November 1, 2012).

traffic and when requests have been made to supplement the site (for example, by emailing the text of the opinion to the press in addition to posting it to the site) the Court has declined to act.⁹

At other times the Court has actively sought to suppress open communication about its work. For years the Court allowed access to oral argument audio recordings solely for purposes of private education and research.¹⁰ These conditions effectively prevented broad dissemination of the recordings and did so intentionally: Chief Justice Warren Burger imposed the restrictions in response to the CBS News broadcast of recordings from the Pentagon Papers¹¹ oral argument (Chief Justice Burger went so far as to request that the FBI investigate how CBS News obtained the tapes).¹² When Peter Irons, a professor at the University of California, San Diego, edited portions of twenty-three historic oral arguments recordings and packaged them for sale,¹³ the

⁹ Tom Goldstein, *We're Getting Wildly Differing Assessments*, July 7, 2012, available at <http://www.scotusblog.com/2012/07/were-getting-wildly-differing-assessments/> (last visited November 1, 2012).

¹⁰ Oyez Project, *supra* note 4.

¹¹ *New York Times Co. v. United States*, 403 U.S. 713 (1971)

¹² Testimony of Peter Irons, Senate Comm. on the Judiciary, *Hearing on Cameras in the Courtroom*, November 9, 2005, available at http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da10c4fec&wit_id=e655f9e2809e5476862f735da10c4fec-3-2 (last visited on November 1, 2012).

¹³ Peter H. Irons and Stephanie Guitton, *MAY IT PLEASE THE COURT* (1993).

Court responded by threatening to pursue legal action against him.¹⁴ Even though Irons had clearly violated the conditions governing the recordings' use, it was the Court that attracted criticism for taking a stand against the public circulation of its work.¹⁵ It was only after this outcry that the Court removed the restriction that the audio tapes may only be used for research and education.¹⁶

The Court has also banned cameras in its courtroom—and here, unlike in the case of audio recordings, public criticism has not yet overcome the Court's active opposition to access. The justices argue that video broadcasts will not only misinform the public by leading viewers to zero-in on dramatic moments, but also distort the judicial process by encouraging participants to play to the cameras.¹⁷ Thus the justices suggest that cameras in the Court will erode judicial independence and legitimacy. Advocates of video counter these claims by arguing that television broadcasts and live streaming will actually educate the public and hold the judiciary

¹⁴ Irons, *supra* note 12.

¹⁵ *Id.* See also *The Sound of Nine Justices Flapping*, NEW YORK TIMES (September 17, 1993), available at <http://www.nytimes.com/1993/09/17/opinion/the-sound-of-nine-justices-flapping.html> (last visited on November 1, 2012).

¹⁶ Linda Greenhouse, *Supreme Court Eases Restrictions On Use of Tapes of Its Arguments*, NEW YORK TIMES (November 3, 1993), available at <http://www.nytimes.com/1993/11/03/us/supreme-court-eases-restrictions-on-use-of-tapes-of-its-arguments.html> (last visited on November 1, 2012).

¹⁷ Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, forthcoming in *ARIZ. ST. L.J.* __, __ (2012). [SECTION IB]

accountable.¹⁸ Advocates also complain that the justices are being too thin-skinned and are simply afraid that widely distributed video recordings might be used to make them look silly¹⁹ (this complaint about exaggerated judicial sensitivity gains force when one considers that many of the justices seem more than happy to air their views when given a chance to address specific audiences that matter to them).²⁰ With the debate over cameras deadlocked, the rushing flow of information has been, as Nancy Marder notes, “stopped cold at the steps to the U.S. federal courthouse.”²¹

The Court’s reluctance to join the digital revolution is understandable. As I will argue in the first part of the essay, the liquidity of digital information has often been heralded in terms that are antithetical to the way in which the Court operates. It is easy to see why members of the Court might be concerned about the destabilizing effects that many believe the new era of ubiquitous, highly transmissible information will bring.

Nonetheless, I think that the Court actually has little to fear from digital information. As I will argue in the second part of the essay, the perception of the Court with the greatest

¹⁸ *Id.* at [Section 1A]

¹⁹ Adam Liptak, *Supreme Court TV? Nice Idea, but Still Not Likely*, NEW YORK TIMES (November 28, 2011), available at <http://www.nytimes.com/2011/11/29/us/supreme-court-tv-still-not-likely-sidebar.html> (last visited on November 1, 2012).

²⁰ Lawrence Baum, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2006); Lawrence Baum and Neal Devins, *Why the Supreme Court Cares About Elites, Not the American Public*, 98 GEO. L.J. 1515 (2010).

²¹ Marder, *supra* note 17 at **XX**.

delegitimizing potential is the perception that it renders its decisions on the basis of personal partisan preference rather than according to legal principle and impartial reason. I argue that a political perception of the Court cannot be revealed by the distribution of more information because this perception is already widely held. Large majorities of Americans already believe that the justices decide cases on political grounds, and this belief co-exists with a widely held belief that the Court is an impartial arbiter of law. The notion that the justices are influenced by partisanship is, in short, an open secret.

In the final section, I will consider the factors that sustain this open secret. I will argue that the Court carries on in the teeth of widespread suspicion because public skepticism about the judiciary is not inevitably tied to a public desire to debunk and reform. Evangelists of digital information often suppose that evidence of a conflict between what officials say and what they do will lead necessarily lead to a reckoning, with a newly informed public taking back the power that has been misused by institutions. This assumption does not hold in when it comes to the judicial process—a context in which a suite of interests, habits, and affections keep people invested in the status quo.

I. Open-Source Politics

Since digital information is easy to duplicate and distribute, it can readily be placed in the hands of ordinary people and used as a check on the abuse of power. This checking function is not merely a matter of identifying and disciplining a few bad apples. As Julian Assange has argued, widely disseminated information may not only expose individual corporate

leaders and public officials using their positions to enrich themselves illegally, but also reveal the wrongdoing that routinely emerges from standard operating procedures among elites: It's "all the regular decisionmaking that turns a blind eye to and supports unethical practices," including the "oversight not done, the priorities of executives [and] how they think they are fulfilling their own self-interest."²² The promise of digital information is that it will allow all decisions at every level to be continuously scrutinized.

Projected into the future, the comprehensive checking function of digital information can be envisioned as the deconstruction of existing schemes of decisionmaking and the founding of a new kind of self-government. Advocates call this vision "open-source politics."²³ Open-source computer programming allows an entire community of software engineers to have access to all of a program's source code all of the time—a method of software development that allows cooperation on a single project without centralized coordination.²⁴ The broad and continuous circulation of digital information permits the logic of open-source programming to be applied to politics. Ordinary people may one day be given access to the all of the materials necessary for

²² Greenberg, *supra* note 1 at 2.

²³ Josh Kron, *Open Source Politics: The Radical Promise of Germany's Pirate Party*, THE ATLANTIC (September 21, 2012), available at <http://www.theatlantic.com/international/archive/2012/09/open-source-politics-the-radical-promise-of-germanys-pirate-party/262646/> (last visited on November 1, 2012).

²⁴ Clay Shirky, *How the Internet Will (One Day) Transform Government*, September 25, 2012, available at http://www.ted.com/talks/clay_shirky_how_the_internet_will_one_day_transform_government.html (last visited on November 1, 2012).

governance all of the time. In such a context, government will be open to the citizenry in the sense that its actions will be totally transparent and fully communicated. Moreover, power will be directly exercised by the public because policy will take its shape and direction from “non-moderated, self-organized” discussion and participation.²⁵ Thus the cooperation-without-coordination of open-source programming will give rise to the digitally-enabled pure democracy of the internet age. Whistleblowers will easily and regularly leak sensitive documents to the public. More importantly, the people themselves will actively gather and disseminate vast amounts of information, and they will also actively critique and judge the official actions that have been exposed. In this way, the public will capture control of the government and “create a transparent society by force.”²⁶

The open-source ideal is obviously at odds with the Court. It is true, of course, that the Court already performs many of its tasks in the open. Oral argument is a public event²⁷ and the Court’s decisions are all published as public documents.²⁸ But the Court is otherwise quite

²⁵ Andreas Nitsche, *Mission Statement: Interactive Democracy Using Liquid Democracy*, available at <http://liquidfeedback.org/mission/> (last visited on November 1, 2012).

²⁶ Greenberg, *supra* note 1 at 317.

²⁷ For the Court’s view, see Supreme Court of the United States, *Visitor’s Guide to Oral Argument*, available at <http://www.supremecourt.gov/visiting/visitorsguidetooralargument.aspx> (last visited on November 1, 2012).

²⁸ For the Court’s view, see Supreme Court of the United States, *Information About Opinions*, available at http://www.supremecourt.gov/opinions/info_opinions.aspx (last visited on November 1, 2012).

secretive. The weekly conference where justices discuss cases and cast their preliminary votes is closed to all but the justices themselves.²⁹ Although the occasional exposé of the Court's internal dynamics appears in the media,³⁰ the interactions between the justices, their clerks, and the staff are usually kept strictly confidential.

The Court is, moreover, insulated from the public by design. Once justices have been confirmed, they hold their positions “during good behavior,” a term that effectively ensures life tenure on the bench.³¹ This is not to say that the Court is completely unconnected from public opinion. Scholars have long argued that the justices must take popular views into account to ensure that their authority is respected and their rulings are implemented.³² Even so, the Court is clearly the least democratic institution in the federal government and, according to the framers, it was precisely this distance from the public that provided “the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.”³³

²⁹ Supreme Court, *supra* note 27.

³⁰ Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 1, 2012), available at http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/?tag=contentMain;contentBody (last visited on November 1, 2012).

³¹ United States Constitution, Art. III, Sec. I.

³² See, for example, Robert G. McCloskey, *THE AMERICAN SUPREME COURT* (1960) at 229.

³³ Alexander Hamilton, *Federalist Paper No. 78*, in *THE FEDERALIST PAPERS* (Clinton Rossiter ed., 1961) at 469.

The Court is also hierarchical. The high bench sits atop a large network of inferior courts that it reviews and directs.³⁴ The justices exercise near total control of over their own docket, and for the most part they make the final determination about which cases they will hear and what questions they will address.³⁵ In this sense, the Court is a very long way away from the historical example of ancient courts that allowed the litigants themselves to select the law that would govern their case as well as to choose the judge who would hear their arguments.³⁶ It is true that the Court relies on litigants to bring cases, but the Court by no means exists only to resolve litigant disputes. The Court rules the legal system through its opinions, and in deciding cases the justices often use the occasion of a specific conflict to establish broad policies that go well beyond the particular interests of the disputing parties. For this reason some commentators have suggested that the Court is less a judicial body concerned with individual-level dispute management than a ministry of justice concerned with system-level control.³⁷ This is all a far cry from open-source principles and members of the Court understandably resist innovations that

³⁴ United States Courts, *Federal Courts' Structure*, available at <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/FederalCourtsStructure.aspx> (last visited on November 1, 2012).

³⁵ *Rules of the Supreme Court of the United States*, (Effective February 16, 2010) at 5-6. Available at <http://www.supremecourt.gov/ctrules/ctrules.aspx> (last visited on November 1, 2012).

³⁶ Martin Shapiro, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 2 (1981).

³⁷ Robert Post, *The Supreme Court Opinion as an Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267 (2001).

have the capacity to create entirely transparent, highly participatory, and non-hierarchical forms of politics.

II. Open Secrets

To say that radical democratic potential of digital information is antithetical to the Court is not to say that the Court actually has anything to worry about. To be sure, the complete realization of the open-source ideal would fundamentally alter politics and society. But the ultimate fulfillment of open-source goals is not immediately at hand and, for the foreseeable future, I would argue that the Court is quite likely to weather the rising tides of liquid information. This is so because the checking function of digital information puts us on the road to open-source politics *only if* the exposure of government action leads to popular protest and reform. Exposure does not, however, always trigger such a public response.

As Evgeny Morozov notes, “Information can embarrass governments but you have to look at the nature of governments as well as the nature of information to measure this embarrassment factor.”³⁸ For example, in many societies, corruption is an open secret, already known to everyone. Publicity in such circumstances does not initiate a cycle of dissent and change. “Just go and take photos of their villas and summer houses they buy with their state

³⁸ Greenberg, *supra* note 1 at 268.

salaries. It's already in the open, but exposure by itself in these countries doesn't lead to democratic change."³⁹

I think the Court is in a somewhat similar position. Consider that the Court has been long been subject to the criticism that it decides cases on the basis of something other than the facts, law, and arguments in the dispute at hand. The Anti-Federalists, for instance, argued against ratification of the Constitution on the grounds that Supreme Court justices would inevitably rule on the basis of their personal political preferences: "independent of the people, of the legislature, and of every power under heaven," the justices were ultimately bound to "feel themselves independent of heaven itself."⁴⁰ This critique undercuts the core justification for the Court's authority, turning the very independence that is supposed to free the Court to be impartial⁴¹ into a reason to distrust judicial power. On this view, the justices have vast opportunities to pursue their own interests under the guise of unbiased adjudication.

One might imagine that the broad circulation of information demonstrating politically motivated decisionmaking by the Court would provoke criticism and calls for change. If this is true, then the age of free-flowing digital information is bound to be an age of judicial crisis. Yet this turns out not to be the case because the belief that the Court operates on the basis of personal

³⁹ *Id.*

⁴⁰ Brutus, *Essays of Brutus*, in THE ANTI-FEDERALIST 183 (Herbert Storing ed., 1985).

⁴¹ See text associated with notes 31-33, *supra*.

preference is already widespread. The politics of Court decisionmaking is an open secret. It is something that everybody already knows.

Evidence of this open secret often surfaces in elite discourse. The argument over Professor Michael Stokes Paulsen's recent criticism of constitutional law provides a good illustration. Paulsen, who is himself the co-author of a constitutional law casebook,⁴² suggested that constitutional law should be removed from the roster of required law school courses because the subject is so saturated with politics that it "teaches bad habits."⁴³ As elaborated by the Supreme Court, constitutional law tells students that "any answer is as good as any other, that there a variety of interpretive approaches from which to choose, and that you should argue from your preferred approach in order to reach your preferred result."⁴⁴ Constitutional law does not belong in the mandatory law school curriculum because it is thoroughly political.

Instead of decrying Paulsen's claims, the professors responding to his critique agreed that the Supreme Court's jurisprudence is essentially a political enterprise.⁴⁵ The idea that

⁴² Michael Stokes Paulsen, Steven G. Calabresi, Michael W. McConnell, and Samuel L. Bray, *THE CONSTITUTION OF THE UNITED STATES: TEXT, STRUCTURE, HISTORY, AND PRECEDENT* (2010).

⁴³ Michael Stokes Paulsen, *The Uselessness of Constitutional Law*, LIBERTY FORUM (January 31, 2012), available at <http://libertylawsite.org/liberty-forum/the-uselessness-of-constitutional-law/> (last visited November 1, 2012).

⁴⁴ *Id.*

⁴⁵ Nelson Lund, *The Usefulness of Constitutional Law*, LIBERTY FORUM (January 31, 2012), available at <http://libertylawsite.org/liberty-forum/the-usefulness-of-constitutional-law/> (last visited November 1, 2012); Sanford Levinson, *Not Contrarian Enough: A Response to Michael*

constitutional law is shot through with political considerations was not a shocking revelation to Paulsen's interlocutors. At the same time, however, the professors debating Paulsen also insisted that constitutional law remains law. Judicial reasoning is results-oriented, but it is also the authoritative language of the courts and mastery of this language "is among the most important skills that competent practicing lawyers must acquire."⁴⁶ "We are training *lawyers*, and, whether we like it or not, it is the essential job of the lawyer to manufacture non-frivolous arguments, whether sincerely believed or not, that are designed to serve the interests of a client."⁴⁷ Constitutional law cannot be purged of either law or politics; it is simultaneously practiced as both.

Given the long history of academic argument portraying the Court as a political actor,⁴⁸ one might expect professors to be unfazed by the assertion that constitutional law is shaped by partisanship and preference. Yet this political understanding of the Court is also shared by the news media. For example, coverage of Supreme Court nominations regularly portrays judicial

Stokes Paulsen's Critique of Contemporary Courses on Constitutional Law, LIBERTY FORUM (January 31, 2012), available at <http://libertylawsite.org/liberty-forum/not-contrarian-enough-a-response-to-michael-stokes-paulsens-critique-of-contemporary-courses-on-constitutional-law/> (last visited November 1, 2012).

⁴⁶ Lund, *supra* note 45.

⁴⁷ Levinson, *supra* note 45, emphasis original.

⁴⁸ Keith J. Bybee, *The Rule of Law Is Dead! Long Live the Rule of Law!*, in *WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE* 306, 314-15 (Charles Gardner Geyh ed., 2011).

decisionmaking as a political activity driven by partisan preference.⁴⁹ This political rendering co-exists in news reports with a conventional presentation of judicial decisionmaking as a principled activity, a matter of conscientiously seeking criteria of judgment beyond the dictates of partisan policymaking.⁵⁰ The thought that justices use their position to advance political goals seems to be no more surprising to journalists than it is to law professors.

A political view of the Court is also held by the public at-large, and this political view exists right alongside a widespread popular belief that the Court is a trusted and fair arbiter. Consider the public perceptions of the Supreme Court's healthcare reform decision, *National Federation of Independent Business v. Sebelius*.⁵¹ Before the Court rendered its landmark decision, there was general speculation that the five conservative justices might vote to strike down all or part of the Affordable Care Act while the four liberal justices would vote to uphold.⁵² The anticipated split on the bench mapped perfectly onto the positions staked out by the political parties and thus fueled a good deal of public discussion about the influence of

⁴⁹ Keith J. Bybee, *Will the Real Elena Kagan Please Stand up? Conflicting Public Images in the Supreme Court Confirmation Process*, 1 WAKE FOREST J. L. & POL'Y 137, 145-52 (2011).

⁵⁰ *Id.*

⁵¹ *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012).

⁵² Neal K. Katyal, *Foreword: Academic Influence on the Court*, 98 VA. L. REV. 1189, 1189-90 (2012).

political factors on judicial decision-making.⁵³ Such political perceptions of the Court were clearly reflected in public opinion polls, with surveys showing the Court's approval rating reaching a new low⁵⁴ and over half of Americans expecting the justices to base their healthcare ruling on something other than legal analysis.⁵⁵ At the same time, there was also clear evidence that the public did not view the Court solely as a political institution. Roughly equal majorities of the healthcare law's supporters and opponents had a favorable view of the Court⁵⁶ and the Court's overall approval rating and level of trust remained higher than other national institutions.⁵⁷ It is true that when given a choice among a number of factors that might influence

⁵³ See, for example, Ezra Klein, *Of Course the Supreme Court is Political*, WONKBLOG, (June 21, 2012), available at <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/06/21/of-course-the-supreme-court-is-political/> (last visited November 1, 2012).

⁵⁴ Adam Liptak and Allison Kopicki, *Approval Rating for Justices Hits Just 44% in New Poll*, NEW YORK TIMES (June 7, 2012), available at <http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html?pagewanted=all> (last visited November 1, 2012).

⁵⁵ Robert Barnes and Scott Clement, *Poll: More Americans Expect Supreme Court's Health-Care Decision to be Political*, THE WASHINGTON POST (April 11, 2012), available at http://www.washingtonpost.com/politics/poll-half-of-americans-expect-supreme-courts-health-care-decision-to-be-political/2012/04/10/gIQAOoqW9S_story.html (last visited November 1, 2012); New York Times/CBS News, *Poll, May 31-June 3, 2012*, NEW YORK TIMES (June 7, 2012), available at <http://www.nytimes.com/interactive/2012/06/08/us/politics/08scotus-poll-documents.html?ref=politics> (last visited November 1, 2012).

⁵⁶ Pew Research Center, *Supreme Court Favorability Reaches New Low*, May 1, 2012, available at <http://www.people-press.org/2012/05/01/supreme-court-favorability-reaches-new-low/?src=prc-headline> (last visited November 1, 2012).

⁵⁷ Liptak and Kopicki, *supra* note 54; Frank Newport, *Americans Trust Judicial Branch Most, Legislative Least*, GALLUP.COM (September 26, 2012), available at

the Court’s healthcare decision large numbers of Americans agreed that “national politics,” “whether the justices’ themselves hold liberal or conservative views,” and “whether a justice was appointed by a Republican or Democratic president” were all likely to play a major role.⁵⁸ Even so, as the date for the Court’s decision grew closer the most important motivating factor for Court action selected by the largest percentage of Americans was “the justices’ analysis and interpretation of the law.”⁵⁹

The Court’s actual decision turned out contrary to general expectations with Chief Justice John Roberts joining the four liberal justices to uphold virtually all provisions of the Affordable Care Act.⁶⁰ The Court’s surprise resolution was greeted with largely the same mix of public views present during the run-up to the ruling. On one hand, political perceptions of the Court were clear: the Court’s approval rating dipped a bit lower after issuing its judgment and over half of Americans thought that the Court’s decision was based on the justices’ personal or political beliefs.⁶¹ On the other hand, the public continued to see the Court as something other

<http://www.gallup.com/poll/157685/americans-trust-judicial-branch-legislative-least.aspx> (last visited November 1, 2012).

⁵⁸ Kaiser Family Foundation, *Topline—Kaiser Health Tracking Poll: April 2012*, at 12-13, available at <http://www.kff.org/kaiserpolls/upload/8302-T.pdf> (last visited November 1, 2012).

⁵⁹ *Id.*

⁶⁰ *National Federation of Independent Business v. Sebelius*, *supra* at note 51.

⁶¹ Adam Liptak and Allison Kopicki, *Public’s Opinion of Supreme Court Drops after Health Care Law Decision*, NEW YORK TIMES (July 18, 2012), available at

than a political institution: the Court’s overall approval rating remained higher than other national institutions⁶² and, when given a choice among a number of possible motivating factors, Americans continued to believe that the single most important influence on the decision was “the justices’ analysis and interpretation of the law.”⁶³

The public’s Janus-faced view of the Court’s healthcare reform decision mirrors the public’s overall assessment of the Supreme Court as well as their views of state courts and of courts in general.⁶⁴ At every level, large majorities of Americans see political influence at work in judicial decisionmaking even as they continue to trust the courts and to support their independence. Given the disposition of popular perceptions, it strains credulity to argue that a new glut of digital information will unmask the Court’s politics. Indeed, rather than wondering how judicial legitimacy might survive in an era when liquid information floods into the public

<http://www.nytimes.com/2012/07/19/us/politics/publics-opinion-of-court-drops-after-health-care-law-decision.html?hpw> (last visited November 1, 2012).

⁶² New York Times/CBS News, *Poll, July 11-16, 2012*, NEW YORK TIMES (July 18, 2012) available at <http://www.nytimes.com/interactive/2012/07/19/us/nytcbspoll-results.html?ref=politics> (last visited November 1, 2012)

⁶³ Kaiser Family Foundation, *Topline—Kaiser Health Tracking Poll: Early Reaction to Supreme Court Decision on the ACA, June 2012*, at 3, available at <http://www.kff.org/kaiserpolls/upload/8329-T.pdf> (last visited November 1, 2012).

⁶⁴ Keith J. Bybee, *ALL JUDGES ARE POLITICAL—EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW 1-18* (2010). See also James L. Gibson, *ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY* (2012).

sphere, the better question is how judicial legitimacy can be maintained in the first place when courts are widely understood to be partisan and impartial at the same time.

II. Interests, Habit, and Affection

The theory behind the checking function of digital information is that officials surreptitiously engage in illegitimate behavior that will be swiftly criticized once the behavior is no longer held in secret.⁶⁵ In the case of the Court, it would appear that the public already believes that illegitimate judicial behavior occurs and nonetheless continues to have trust and confidence in the high bench.⁶⁶ How is the open secret of judicial politics sustained?

The answer, I believe, is that a cluster of factors work to keep ordinary people invested in the status quo, and do so largely because of (rather than merely in spite) the contradictions inherent in our half-law-half-politics judicial process.⁶⁷ Consider first the issue of usefulness. One way to think about the tension between the principled explanations offered by judges and the political motivations already suspected by the public is to say that the tension reflects the essentially procedural nature of the legal system. That is, one could argue that judicial proceedings facilitate engagement and coordination between people who otherwise disagree about substantive ends by creating a formal set of procedures that leave the roots of conflicts largely untouched. On this view, it is unnecessary for disputing parties to be personally transformed or genuinely reconciled in order to reach a settlement because the goal of the judicial process is not to arrive at an objectively correct or perfectly just outcome so much as it is

⁶⁵ See text associated with notes 38-9, *supra*.

⁶⁶ See text associated with notes 52-64, *supra*.

⁶⁷ I develop this argument in detail in Bybee 35-103, *supra* at note 64.

to employ a method for coping with conflicts, a way of negotiating limited areas of consensus while allowing great regions of disagreement to remain intact. Litigants are neither required to abandon their partisan passions at the courthouse door nor asked to realize their significant-yet-ordinarily-unobtainable normative ideals of impartiality and principle; instead, they must only agree to couch their conflict in legal terms.

Such a procedural system makes civil peace possible when the cacophony of competing claims in the community would otherwise defeat efforts to manage conflict. Everyone, including judges, is given the chance to clothe their interests in law's independent tests and doctrines, lending their views an appearance of importance and weight that may not have much of a connection to underlying substance. The presence of so many poseurs in the system naturally leads the public to suspect that the judicial process is subject to instrumental manipulation. Yet even though such suspicions chip away at judicial legitimacy, they also point to the very mechanism that attracts people to judicial dispute management, for it is the possibility of hypocrisy that at once threatens public support for the judiciary and makes the courts useful. The system endures not in spite of the contradiction between instrumental action and impartial principle, but because this contradiction suits law to the individuals who are governed by it. In other words, it is because individuals at once wish to preserve their own particular interests and to feel they are living up to impersonal, coherent standards that the judicial process operates on two conflicting planes at once.

Apart from the interests in dispute management and principled appearances that generally attract people to law, a broad law-sustaining habit can also be found within the larger

community. H.L.A. Hart called it the “habit of obedience,” a general disposition to follow law that manifests itself in daily behavior.⁶⁸ The habit is a reflexive response that can take the form of “unreflective, effortless, engrained” compliance when legal dictates are easy to follow, as in the case of automatically and unthinkingly driving on the right side of the road.⁶⁹ The habit is also a routine behavior that is evident in areas of life in which the demands of law are more exacting and following the rules “runs counter to strong inclinations.”⁷⁰ When it comes to the payment of taxes, for example, the habit of obedience exerts influence as the fact of compliance “for some considerable time past” makes it likely that people will continue to comply in the future.⁷¹

As Hart noted, the habit of obedience requires “no general conception of the legal structure or of its criteria of validity.”⁷² Most people are inclined to follow law either out of deference to the way in which things have always been done or out of fear of being punished should they disobey. The habit of obedience is thus suited to the discordant amalgam of principles and passions within each of us: it breeds attachment to the legal system by relying on

⁶⁸ H.L.A. Hart, *THE CONCEPT OF LAW*, 2nd ed., 24 (1994).

⁶⁹ *Id.*, 52.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*, 114.

the ease of inertia and the interest in avoiding penalty—all without requiring individuals to be persuaded by rational argument, to embody the normative ideals expressed in legal rules, or to possess much legal knowledge.

The judicial process is also bolstered by pleasure. This reliance on pleasure may be somewhat difficult to see, since the judicial process looks like an unlikely place to find any kind of contentment or delight. Indeed, legal procedures are often formal and boring—and this appears to be so on purpose. The dullness of law serves the goal of dispute management, helping to create a procedural rendering of events that is more tractable than the messy particulars of actual experience. And yet law does have its pleasurable features. Law creates a kind of sanctuary in which the brutalities of a dispute may be given a stylized and intellectually refined gloss. In this way, the very legal procedures that induce boredom may also foster an appealing sense of shelter and relief.⁷³ Pleasure is also to be found in the way legal procedures assign and confirm status, conveying a public message about individual worth through the manner in which disputing parties are treated.⁷⁴ When the judicial process deals with litigants in a way that appears to be “polite, respectful, and unbiased,” then people are more likely to accept judicial decisions and rate the legal system positively, more or less regardless of how their case is finally

⁷³ Richard A. Posner, *What Do Judges Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 30 (1993).

⁷⁴ See Tom R. Tyler, *WHY PEOPLE OBEY THE LAW* (1990); and Tom R. Tyler and Yuen J. Hou, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND THE COURTS* (2002).

resolved.⁷⁵ To demonstrate solicitude for complaints and to allow individuals to relate their side of the story is to treat people like rights-bearing subjects that deserve to be valued. This legal showing of respect does not change the fact that one party in a dispute may end up getting the better of the other any more than polite flattery increases the actual beauty of a person's appearance or the true stature of his achievements. In both cases, the pleasure is in how things are said and how affairs are conducted, not in the ultimate outcome or in any concrete change in underlying conditions.

There is much more to be said about the role of interest, habit, and pleasure in sustaining public faith in the judicial process and the rule of law.⁷⁶ The account of these sustaining factors offered here is not designed to paint a complete picture, but to suggest why more publicity about politics of judicial decisionmaking is unlikely to destabilize popular opinion. As I have argued, a large majority of the public already thinks of the courts as hybrid bodies—institutions that at once engage in politics and law as they go about their business of dispute management. Most people do not have a sense of appropriate judicial action that is violated by news about partisan preferences and political considerations on the bench. Contrary to the claims made by advocates of open-source democracy, greater transparency and communication about the judicial action is more likely to confirm than to disrupt the public's contradictory perceptions of the judiciary.

⁷⁵ Tyler and Hou 12, *supra* at note 74.

⁷⁶ See Bybee, *supra* at note 64.

Members of the Supreme Court should realize that when secrets are open, public exposure is not a radical act.