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Table of Contents - Issue 2

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CONTENTS

THE SUPREME COURT AND THE AMERICAN PUBLIC

SYMPOSIUM EDITORS

CAROLYN SHAPIRO AND CHRISTOPHER W. SCHMIDT

INTRODUCTION: THE SUPREME COURT AND
THE AMERICAN PUBLIC *Carolyn Shapiro* 287
and Christopher W. Schmidt

THE SUPREME COURT AND CELEBRITY
CULTURE *Richard A. Posner* 299

Topic 1: The Supreme Court and Technology

OPEN SECRET: WHY THE SUPREME COURT
HAS NOTHING TO FEAR FROM THE INTERNET *Keith J. Bybee* 309

The 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 our digital age of fluid information 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.

THE U.S. SUPREME COURT AND INFORMATION
TECHNOLOGY: FROM OPACITY TO TRANSPARENCY
IN THREE EASY STEPS *Jerry Goldman* 325

In this comment, I focus on three areas in which the Supreme Court of the United States could improve information sharing with the public: accessibility,

data structure, and information standards. I then propose three simple and low-cost steps to address each of these areas.

THE COURT AND THE VISUAL:
IMAGES AND ARTIFACTS IN U.S.
SUPREME COURT OPINIONS

Nancy S. Marder 331

This Article contributes to the literature on the visual and the law by providing new empirical research on the use of images in U.S. Supreme Court opinions. In the trial court, the concern about using images is well known. In the highest court of the land, however, the use of images has been little studied and little discussed. This Article includes a comprehensive review of all images that appear in all opinions between 1997 and 2009. It also examines three paradigmatic images—maps, artifacts, and photos—and how they are used in three opinions. The use of maps and artifacts is the least controversial, especially when they are the focus of discussion in the opinion. The use of photos can be more questionable, especially when the case is emotionally charged and the justices do not discuss the photos in the opinion. Although “a picture is worth a thousand words,” it can be interpreted in many different ways. The justices need to choose their photos carefully and explain why they have included a particular photo and what they think it shows. Justices who see the case differently need to challenge the photo and what they think it depicts, just as they would challenge a precedent or a legal argument.

**Topic 2: Ideology, Neutrality, and Self-Deception:
What the Supreme Court Says and What the Public Hears**

COGNITIVE BIAS AND THE
CONSTITUTION

Dan M. Kahan 367

This article uses insights from the study of risk perception to remedy a deficit in liberal constitutional theory—and vice versa. The deficit common to both is inattention to cognitive illiberalism—the threat that unconscious biases pose to enforcement of basic principles of liberal neutrality. Liberal constitutional theory can learn to anticipate and control cognitive illiberalism from the study of biases such as the cultural cognition of risk. In exchange, the study of risk perception can learn from constitutional theory that the detrimental impact of such biases is not limited to distorted weighing of costs and benefits; by infusing such determinations with contentious social meanings, cultural cognition forces citizens of diverse outlooks to experience all manner of risk regulation as struggles to impose a sectarian orthodoxy. The use of scientific knowledge to mitigate the threat that cognitive illiberalism poses to liberal principles should be a critical shared focus of attention for scholars of both constitutional law and risk regulation.

JUDICIAL OVERSTATING

Dan Simon 411
and Nicholas Scurich

Ostensibly, we are all Legal Realists now. No longer do legal theorists maintain that judicial decision making fits the mechanical and formalist characterizations of yesteryear. Yet, the predominant style of American appellate court opinions seems to adhere to that improbable mode of adjudication: habitually, opinions provide excessively large sets of syllogistic reasons and portray the chosen decision as certain, singularly correct, and as determined inevitably by the legal materials. This article examines two possible explanations for this rhetorical style of Judicial Overstatement. First, we review the psychological research that suggests that judicial overstatement is a product of the cognitive processes by which judges arrive at their decisions. Research on the Coherence Effect suggests that during the decision making process, the cognitive system spreads apart the opposing decisions by inflating one set of arguments and deflating the other, with

the effect of making one decision seem considerably stronger than its rival. This leads the judge to perceive the chosen decision as stronger than it is, and thus to overstate the opinion. It might also be possible that judges resort to overstatement because they believe that this form of reasoning promotes the legitimacy of the judiciary in the eyes of the public. We report on a recent experimental study that was conducted to test this possibility. We found that overstated and monolithic reasons did not promote the evaluations of the judges or of the decisions they rendered. Lay people gave more favorable evaluations when the judges provided nuanced opinions that admitted to the appeal of both sides of the dispute. In sum, judicial overstatement is best understood not as a persuasive device, but as an intra-personal, cognitive phenomenon. The certainty and singular correctness that are habitually reported in judicial opinions are not properties of the law, but artifacts of the judges' constructed representations of it.

DEFERENCE TO AUTHORITY AS A BASIS FOR
MANAGING IDEOLOGICAL CONFLICT

Tom Tyler 433
and Margarita Krochick

Americans are polarized in their views about a variety of social and economic issues. This raises the question how political and legal institutions can develop policies and practices that will be accepted by all the various sides to a public controversy. One approach is to build legitimacy, since people are generally more willing to defer to legitimate authorities. The results of a study in which people are asked about their willingness to accept decisions made by the Supreme Court or Congress suggests that the process through which institutions make policy decisions shapes deference in ways that are distinct from the perceived desirability of the decisions themselves. In particular, institutions gain public deference when they are perceived to consider people's needs and concerns and respect their values. These findings point to the importance of addressing these issues when explaining the process involved in making a political or judicial decision.

CLAIMING NEUTRALITY AND CONFESSING
SUBJECTIVITY IN SUPREME COURT
CONFIRMATION HEARINGS

Carolyn Shapiro 455

Supreme Court confirmation hearings provide a rare opportunity for the American people to hear what (would-be) justices think about the nature of judging and the role of the Supreme Court. In recent years, nominees have been quick to talk about judging in terms of neutrality and objectivity, most famously with Chief Justice Roberts' invocation of the "neutral umpire," and they have emphasized their reliance on legal texts and sources as if those sources can provide answers in difficult cases. Many of the cases heard by the Supreme Court, however, do not have objectively correct answers that can be deduced from the legal materials. Instead, the justices must bring judgment to bear, and that judgment inevitably incorporates subjectivity and reference to values and principles not explicit in the legal sources.

This Article considers the extent to which nominees admit to such subjectivity and the extent to which they claim neutrality or objectivity, looking at all confirmation hearings since 1955 and reporting some preliminary analysis. Through coding the nominees' testimony, the Article identifies some of the circumstances under which these claims and admissions are most likely to be made. Among other findings, this Article reports that Democratic and Republican nominees are equally likely to claim neutrality in colloquy with any particular senator. On the other hand, Democratic nominees are about twice as likely as Republican nominees to admit to a role for subjectivity. Drawing on the insights of cultural cognition scholars, this Article then considers the implications of such findings and raises potential concerns for public perceptions of the Court, especially in light of our current highly polarized political culture.

Topic 3: Journalists' Insights

OPINION ANNOUNCEMENTS

Tony Mauro 477

When the Supreme Court handed down its landmark decision on the fate of the Affordable Care Act on June 28, 2012, several news organizations rushed to report, incorrectly, that the court had overturned the law. Those making the error did not wait for Chief Justice John Roberts Jr. to complete his twenty-minute announcement of the opinion from the bench. But anyone who had listened to the opinion announcement from start to finish would almost certainly have gotten it right.

This article examines the rarely discussed tradition of Supreme Court opinion announcements and their role in the interplay between the court, the public and the news media. Justices of the Supreme Court have announced their opinions from the bench since their first decision in 1792. Members of the court have viewed the practice as an important part of their accountability to the public, even if the audience in the courtroom is small and random.

Possible changes in the court's practice of opinion announcements could enhance public understanding of the court. One would be to release the audio of the opinion announcements on a real-time or slightly delayed basis. Currently, opinion announcements become available only well after the end of the court term in which they were made. Another change to consider would be to release written opinions only at the end of the oral opinion announcement, which would encourage the news media to wait and listen before rushing to report on a just-released decision.

Topic 4: Beyond the Written Opinion: When Justices Speak to the Public

BEYOND THE OPINION: SUPREME
COURT JUSTICES AND
EXTRAJUDICIAL SPEECH

Christopher W. Schmidt 487

This Article examines how and why Supreme Court justices venture beyond their written opinions to speak more directly to the American people. Drawing on the history of the post-New Deal Court, I first provide a general framework for categorizing the kinds of contributions sitting justices have sought to make to the public discourse when employing various modes of extrajudicial speech—lectures, interviews, books, articles, and the like. My goal here is twofold: to provide a historically grounded taxonomy of the primary motivations behind extrajudicial speech; and to refute commonplace claims of a lost historical tradition of justices refraining from off-the-bench commentary about their work. I then turn to an analysis of the risks and opportunities for justices who go beyond their written opinion. I argue that our understanding of the extrajudicial contributions of the justices has too often been clouded by idealized, historically inaccurate assumptions about the Court and by exaggerated assessments of the potential costs of substantive, controversial extrajudicial speech for the Court's legitimacy.

Compared to the typical Supreme Court written opinion, extrajudicial speech allows for, even encourages, more personalized, more accessible, and potentially more effective pathways of communication with a general audience. By identifying the unique value of extrajudicial speech, I intend this Article to serve as an invitation for a more realistic and constructive discussion about the role of Supreme Court justices in our constitutional democracy.

THE PIPER LECTURE

THE GREAT RECESSION AND THE
PRESSURE ON WORKPLACE RIGHTS *Katherine S. Newman* 529

This paper explores the impact of the Great Recession on the rights of workers in the U.S. and overseas. While secular trends in play before the economic downturn began had already eroded employment benefits and workers' right, recent economic conditions have exacerbated conditions for workers. With the Great Recession have come record levels of long term unemployment, a rise in the number of involuntary part-time workers, and a growth in the already high rates of youth unemployment. All of these conditions, along with the decline of union representation, have placed downward pressure on wages and forced workers to give back hard won benefits, thereby increasing inequality within and between groups.

THE STEVENS LECTURE

THE NINTH VOTE IN THE
"STOP THE BEACH" CASE *Justice John Paul Stevens (Ret.)* 553

STUDENT NOTES

THE INTERNATIONAL CRIMINAL COURT'S
UNJUSTIFIED JURISDICTION CLAIMS:
LIBYA AS A CASE STUDY *Jennifer Nimry Eseed* 567

The International Criminal Court (ICC) is a treaty-based court that functions to end impunity for perpetrators of the gravest crimes that concern the international community. As of July 1, 2012, 121 have countries ratified the Rome Statute, the treaty governing the ICC, expressing their acceptance of the Court's jurisdiction. The ICC is fully independent from the United Nations, yet the Rome Statute problematically allows for the United Nation's Security Council to refer an issue to the ICC, whether or not the issue relates to a country that has ratified the treaty. This Note uses the 2011 conflict in Libya to demonstrate that the UN Security Council should not have the power to refer and issue to the ICC in a manner that allows the Court to improperly expand its jurisdictional reach and infringe on the sovereignty of nations.

WHEN DOES SLEAZE BECOME A CRIME?
REDEFINING HONEST SERVICES FRAUD
AFTER *SKILLING v. UNITED STATES* *Teresa M. Becvar* 593

Honest services fraud, which is defined as a scheme or artifice to deprive another of the intangible right of "honest services," is just one tool in the federal government's extensive arsenal used to prosecute public corruption and private corporate fraud. The Supreme Court curtailed the expansion of this versatile theory twice in the past three decades, most recently in June 2010 in *Skilling v. United States*. In *Skilling*, the Court held, inter alia, that the federal honest services statute covers only bribery and kickback schemes and not undisclosed self-dealing. Months later, members of Congress proposed the Honest Services Restoration Act (HSRA) to undo some of the effects of the *Skilling* decision. This Note argues that in some instances the proposed HSRA criminalizes too narrow or too broad a range of conduct. To address concerns about overcriminalization of petty misconduct, abuse of prosecutorial discretion, and violation of federalism principles, any amendment to the honest services statute should draw upon past federal appellate court rationale and implement reasoned limiting principles to clearly define the

scope of the statute. In particular, a reformulated honest services statute should specify 1) the source of the fiduciary duty, the breach of which constitutes fraud; 2) the specific intent to defraud as the mens rea of the crime; and 3) illegitimate gain to the accused or harm to the victim as alternative sufficient limiting principles to ensure that conduct rises to the level of criminal fraud.

PERMITS FOR PUDDLES? THE CONSTITUTIONALITY
AND NECESSITY OF PROPOSED AGENCY
GUIDANCE CLARIFYING CLEAN WATER
ACT JURISDICTION

Jennifer L. Baader 621

The Clean Water Act, enacted and amended in the mid-20th century, was a significant development in the protection and restoration of the Nation's waters. The Act authorized the Environmental Protection Agency and the Army Corps of Engineers to regulate the discharge of pollutants into many types of bodies of water. However, this wide-spread jurisdictional authority was challenged by the Supreme Court in two turn of the century cases which limited the application of the Act to certain waters. In 2011, a draft guidance document was released by the Environmental Protection Agency and the Army Corps of Engineers, which would increase waterway protection by offering more consistent and predictable procedures for identifying waters protected under the Act, as well as clarifying current legal confusion resulting from inconsistent court rulings and agency reports. This Note examines the changes the draft guidance would introduce to the current regulatory scheme should it be adopted. It also addresses potential industry costs and explores concerns that such guidance is an unlawful expansion of the Act's jurisdiction. This Note ultimately concludes that the guidance is an appropriate and constitutional mechanism to institute crucial water protection, and should be followed promptly by a legally binding rulemaking.

BANNING THE *HIJAB* IN PRISONS:
VIOLATIONS OF INCARCERATED MUSLIM
WOMEN'S RIGHT TO FREE
EXERCISE OF RELIGION

Ali Ammoura 657

Muslim American women who wear the *hijab*, or Islamic headscarf, face religious discrimination in nearly every aspect of their public life. They even face it during arrest or incarceration. Law enforcement officials often force Muslim women to remove their *hijab* while in custody, which both degrades and humiliates them in the process. But prison policies that prohibit incarcerated Muslim women from wearing the *hijab* violate their right to free exercise of religion. Penal institutions should not prevent incarcerated Muslim women from wearing a *hijab* without compelling reasons, especially when such policies often arise out of religious discrimination. Courts must protect the right of incarcerated Muslim women to wear the *hijab* if they choose because, like all persons, they have the right to practice their religion free from discrimination, whether incarcerated or not. Under both the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA), wearing the *hijab* at all times is indisputably a religious exercise. And any violation or forcible removal of a woman's *hijab* in front of non-related males substantially burdens her religious exercise under both rational basis and compelling interest standards. This Note argues that prison regulations that prohibit incarcerated Muslim women from wearing the *hijab* undoubtedly violate their right to free exercise of religion, and courts should acknowledge this as a violation under both the First Amendment and RLUIPA.

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