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TOPIC 1

THE SUPREME COURT AND TECHNOLOGY

OPEN SECRET: WHY THE SUPREME COURT HAS NOTHING TO FEAR FROM THE INTERNET

KEITH J. BYBEE*

INTRODUCTION

One way to think about the impact of technology on society 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;¹ five years later, digital information accounted for 94% of all the recorded information on the planet.² The 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 predecessor ever could.³

The bonanza of highly fluid digital information makes it easier than ever to publicize and distribute the work of governmental institutions like the United States Supreme Court. For example, SCOTUSblog provides comprehensive coverage of the Court’s docket, broadly disseminating information that was once known only to a small circle of dedicated Court watchers.⁴ In addition, 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 Court to watch the live proceedings or a trip to the National Archives to listen to recordings.⁵ Another way to access Court-related information is by visiting the Legal Information Institute, which houses a sprawling virtual repository that contains every Court opinion pro-

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

2. *Id.*

3. *Id.*

4. *About Us*, SCOTUSBLOG, <http://www.scotusblog.com/about/> (last visited Mar. 1, 2013).

5. *About Oyez*, OYEZ PROJECT, <http://www.oyez.org/about> (last visited Mar. 1, 2013).

duced since 1992 and over 600 historically significant Court decisions.⁶

Enthusiastic support for such access and transparency is easy to find—except on the Supreme Court itself, where the justices practice a kind of passive aggressive resistance. For instance, the Court records oral arguments, but it does not allow the audio to be broadcast live as oral arguments occur.⁷ Instead, the Court usually waits until the end of the term to make the recordings publically available.⁸ In only the most exceptional circumstances the Court will release recordings at the end of the day or week when a given argument occurs.⁹ The Court also maintains a website where it typically posts opinions within a few minutes of their release from the bench.¹⁰ But the site is not configured to handle the heaviest 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.¹¹

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.¹² These conditions intentionally prevented broad dissemination of the recordings: Chief Justice Warren Burger imposed the restrictions in response to CBS News' broadcast of the Pentagon Papers' recorded oral arguments (Chief Justice Burger went so far as to request that the FBI investigate how CBS News obtained the tapes).¹³

In another matter involving recorded oral arguments, the Court even threatened to pursue legal action.¹⁴ Peter Irons, a professor at the

6. *Who We Are*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/lii/about/who_we_are (last visited Mar. 1, 2013).

7. Lyle Denniston, *Plea to Allow Health Care Broadcast*, SCOTUSBLOG (June 14, 2012), <http://www.scotusblog.com/2012/06/plea-to-allow-health-care-broadcast/>.

8. *Id.*

9. *Id.*

10. *Locating Court Documents & Information*, SUPREMECOURT.GOV, http://www.supremecourt.gov/faq_documents.aspx (last visited Mar. 1, 2013).

11. Tom Goldstein, *We're Getting Wildly Differing Assessments*, SCOTUSBLOG.COM (July 7, 2012), <http://www.scotusblog.com/2012/07/were-getting-wildly-differing-assessments/>.

12. Oyez Project, *supra* note 5.

13. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971). For discussion of Chief Justice Burger's request that the FBI investigate how CBS News obtained the tapes, see *Testimony of Peter Irons, Hearing on Cameras in the Courtroom*, U.S. SENATE COMMITTEE ON THE JUDICIARY, http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da10c4fec&wit_id=e655f9e2809e5476862f735da10c4fec-3-2 (last visited on Mar. 1, 2013) [hereinafter *Testimony of Irons*].

14. *Testimony of Irons, supra* note 13.

University of California, San Diego, edited portions of twenty-three historic oral argument recordings and packaged them for sale.¹⁵ Although Irons had clearly violated the conditions governing the recordings' use, the Court attracted criticism for taking a stand against the public circulation of its work.¹⁶ It was only after this outcry that the Court removed the restrictions limiting the use of audiotapes to research and education.¹⁷

The Court has also banned cameras in its courtroom—and unlike the case of audio recordings, public criticism has not yet overcome the Court's active opposition to public access on this front. The justices argue that video broadcasts will not only misinform the public by leading viewers to focus on dramatic moments, but also distort the judicial process by encouraging participants to play to the cameras.¹⁸ Thus, the justices suggest that cameras in the Court will erode judicial independence and legitimacy. Advocates of video counter by arguing that television broadcasts and live streaming will educate the public and hold the judiciary accountable.¹⁹ 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 silly.²⁰ With the debate over cameras deadlocked, the rushing flow of information has been, as Nancy Marder notes, “[S]topped cold at the steps to the U.S. federal courthouse.”²¹

The Court's reluctance to join the digital revolution is understandable. As I argue in the first part of this 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

15. PETER H. IRONS & STEPHANIE GUITTON, *MAY IT PLEASE THE COURT* (1993).

16. *Id.*; see also *The Sound of Nine Justices Flapping*, N.Y. TIMES (Sep. 17, 1993), <http://www.nytimes.com/1993/09/17/opinion/the-sound-of-nine-justices-flapping.html>.

17. Linda Greenhouse, *Supreme Court Eases Restrictions on Use of Tapes of Its Arguments*, N.Y. TIMES (Nov. 3, 1993), <http://www.nytimes.com/1993/11/03/us/supreme-court-eases-restrictions-on-use-of-tapes-of-its-arguments.html>.

18. Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L.J. 1489, 1511 (2013)

19. *Id.* at 1495.

20. Adam Liptak, *Supreme Court TV? Nice Idea, but Still Not Likely*, N.Y. TIMES (Nov. 28, 2011), <http://www.nytimes.com/2011/11/29/us/supreme-court-tv-still-not-likely-sidebar.html>. 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. See generally LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006); Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American Public*, 98 GEO. L.J. 1515 (2010).

21. Marder, *supra* note 18, at 1491.

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 argue in the second part of this essay, the greatest potential delegitimizing factor for the Court is the perception that the justices render their decisions on the basis of personal partisan preference rather than legal principle and impartial reason. I argue that the distribution of more information will not create a political perception of the Court 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 generally held belief that the Court is an impartial arbiter of law.²² The notion that the justices are influenced by partisanship is, in short, an open secret.

In the final section, I consider the factors that sustain this open secret. I argue that the Court carries on amid widespread suspicion because public skepticism about the judiciary is not 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.²³ This assumption does not apply 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. However, 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

22. 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, & WHAT'S AT STAKE 306, 314-15 (Charles Gardner Geyh ed., 2011) [hereinafter Bybee, *Rule of Law*]; 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, 148-52 (2011) [hereinafter Bybee, *Elena Kagan*]; see generally KEITH J. BYBEE, ALL JUDGES ARE POLITICAL—EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW 1-33 (2010) [hereinafter BYBEE, *JUDGES ARE POLITICAL*].

23. Greenberg, *supra* note 1, at 226-323.

that routinely emerges from standard operating procedures among elites: “All the regular decision-making that turns a blind eye to and supports unethical practices,” including the “oversight not done, the priorities of executives [and] how they think they’re fulfilling their own self-interest.”²⁴ The promise of widespread use of digital information allows 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 decision-making and the founding of a new kind of self-governance. Advocates call this vision “open-source politics.”²⁵ The term borrows from the field of software design: open-source computer programming allows an entire community of engineers to access a program’s entire source code at all times—a method of software development that allows cooperation on a single project without centralized coordination.²⁶

The broad and continuous circulation of digital information permits the logic of open-source programming to be applied to politics. Ordinary people one day may be given access to all of the materials necessary for governance all of the time. In such a context, government will be open to the citizenry, with all official actions totally transparent and fully communicated. Moreover, the public will directly exercise power because policy will take its shape and direction from “non-moderated, self-organized” discussion and participation.²⁷ The cooperation-without-coordination of open-source programming will thus facilitate the digitally-enabled pure democracy of the internet age. Whistleblowers will easily and regularly leak sensitive documents and information to the public.²⁸ More importantly, the people themselves will actively gather and disseminate vast amounts of information, and they will also actively expose, critique, and judge official actions.²⁹ In

24. See generally *id.* at 2.

25. Josh Kron, *Open Source Politics: The Radical Promise of Germany’s Pirate Party*, THE ATLANTIC (Sep. 21, 2012), <http://www.theatlantic.com/international/archive/2012/09/open-source-politics-the-radical-promise-of-germanys-pirate-party/262646/>.

26. Clay Shirky, *How the Internet Will (One Day) Transform Government*, TED (Sep. 25, 2012), http://www.ted.com/talks/clay_shirky_how_the_internet_will_one_day_transform_government.html.

27. Andreas Nitsche, *Mission Statement: Interactive Democracy Using Liquid Democracy*, LIQUID FEEDBACK (Jan. 17, 2013), <http://liquidfeedback.org/mission/>.

28. *Manifesto of the Pirate Party of Germany*, PIRATENPARTEI DEUTSCHLAND 25-26 (Emal Ghamsharik & Julia Reda trans., Apr. 10, 2012), <http://www.piratenpartei.de/wp-content/uploads/2012/04/parteiprogramm-englisch.pdf>.

29. Shirky, *supra* note 26.

this way, the public will capture control of the government and “create a transparent society by force.”³⁰

The open-source ideal is clearly at odds with the Court’s current structure and function. It is true, of course, that the Court already performs many of its tasks in the open. Oral argument is a public event³¹ and the Court’s decisions are all published as public documents.³² But the Court is otherwise quite secretive. The weekly conference where justices discuss cases and cast their preliminary votes is closed to all but the justices themselves.³³ Although an occasional exposé of the Court’s internal dynamics appears in the media,³⁴ the interactions between the justices, their clerks, and the staff are usually kept strictly confidential.

Moreover, the Court is 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.³⁵ This is not to suggest 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.³⁶ 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.”³⁷

The Court is also embedded within a hierarchical judicial bureaucracy and sits atop a large network of inferior courts that it reviews and directs.³⁸ The justices exercise near total control of their own docket, and they largely make the final determination of which cases to

30. Greenberg, *supra* note 1, at 317.

31. See, e.g., *Visitor’s Guide to Oral Argument*, SUPREMECOURT.GOV, <http://www.supremecourt.gov/visiting/visitorsguidetooralargument.aspx> (last visited on Mar. 1, 2013).

32. See, e.g., *Information About Opinions*, SUPREMECOURT.GOV, http://www.supremecourt.gov/opinions/info_opinions.aspx (last visited on Mar. 1, 2013).

33. Supreme Court, *supra* note 31.

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

35. U.S. CONST. art. III, § 1.

36. See generally ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 229 (1960).

37. THE FEDERALIST PAPERS NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

38. *Federal Courts’ Structure*, USCOURTS.GOV, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/FederalCourtsStructure.aspx> (last visited on Mar. 1, 2013).

hear and what questions to address.³⁹ In this sense, the Court is a very long way away from the historical examples of ancient courts that allowed the litigants themselves to select the law that would govern their case and the judge who would hear their arguments.⁴⁰ While the Court relies on litigants to bring cases, the Court does not exist only to resolve individual litigant disputes. The Court governs the legal system through its opinions, and in deciding cases the justices often use a specific conflict to establish broad policies that go well beyond the particular interests of the adverse parties.⁴¹ For this reason, some commentators suggest that the Court is less a judicial body concerned with individual-level dispute management than a ministry of justice concerned with system-level control.⁴² This is a far cry from open-source principles and members of the Court understandably resist innovations that could create entirely transparent, highly participatory, and non-hierarchical forms of politics.

II. OPEN SECRETS

To say the 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 imminent, and for the foreseeable future, the Court is quite likely to weather the rising tides of liquid information. This is because the checking function of digital information puts society on the road to open-source politics *only if* the exposure of government action actually 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.”⁴³ For example, in many societies, corruption is an open secret, already known to everyone. In such circumstances, publicity does not initiate a

39. RULES OF THE SUPREME COURT OF THE UNITED STATES 5-6 (2010), <http://www.supremecourt.gov/ctrules/ctrules.aspx>.

40. MARTIN SHAPIRO, COURTS: A COMPARATIVE & POLITICAL ANALYSIS 2 (1986).

41. Robert Post, *The Supreme Court Opinion as an Institutional Practice: Dissent, Legal Scholarship, & Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1271-76, 1287, 1308-09 (2001).

42. *See id.*

43. Greenberg, *supra* note 1, at 268.

cycle of dissent and change.⁴⁴ “Just go and take photos of their villas and summer houses they buy with their state salaries. It’s already in the open, but exposure by itself in these countries doesn’t lead to democratic change.”⁴⁵

The Court is in a similar position. Consider that the Court has long been subject to criticism that it decides cases on the basis of something other than the facts, law, and arguments in the dispute at hand. For instance, at the time of the Founding the Anti-Federalists argued against the ratification of the Constitution because Supreme Court justices would inevitably rule on the basis of their personal political preferences: “[I]ndependent of the people, of the legislature, and of every power under heaven,” the justices were ultimately bound to “feel themselves independent of heaven itself.”⁴⁶ This critique undercuts the core justification for the Court’s authority, turning the very independence that permits the Court to be impartial⁴⁷ 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 decision-making by the Court would provoke criticism and calls for change. If true, then the age of free-flowing digital information would be bound to create an age of judicial crisis and transformation. Yet this is not the case because the belief that the Court operates on the basis of personal preference is already widespread. The politics of Court decision-making 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 an illustration. Paulsen, who is himself the co-author of a constitutional law casebook,⁴⁸ suggested that constitutional law should be removed from the required law school courses because the subject is so saturated with politics that it “teaches bad habits.”⁴⁹ As elaborated by the Court in its decisions, constitutional law teaches students that “any answer is as good as any other, that there

44. *Id.*

45. *Id.*

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

47. *See supra* text accompanying notes 35-37.

48. MICHAEL STOKES PAULSEN, STEVEN G. CALABRESI, MICHAEL W. MCCONNELL, & SAMUEL L. BRAY, *THE CONSTITUTION OF THE UNITED STATES: TEXT, STRUCTURE, HISTORY, & PRECEDENT* (2010).

49. Michael Stokes Paulsen, *The Uselessness of Constitutional Law*, LIBERTY FORUM (Jan. 31, 2012), <http://libertylawsite.org/liberty-forum/the-uselessness-of-constitutional-law/>.

[are] 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.”⁵⁰ Thus according to Paulsen, constitutional law does not belong in the mandatory law school curriculum because it is thoroughly and inherently political.

Rather than decry Paulsen’s claims, the professors responding to his critique agreed that the Supreme Court’s jurisprudence is essentially a political enterprise.⁵¹ The idea that constitutional law is rife with political considerations was not a shocking revelation to Paulsen’s interlocutors.⁵² At the same time, however, the professors debating Paulsen also insisted that constitutional law remains law.⁵³ 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.”⁵⁴ “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.”⁵⁵ To Paulsen’s respondents, the unsurprising fact of the matter is that constitutional law cannot be purged of either law or politics; it is simultaneously practiced as both.

Given the long history of academic literature portraying the Court as a political actor,⁵⁶ one might expect professors to be unfazed by the assertion that constitutional law is shaped by partisanship and preference. Yet the news media also shares this understanding of the Court. For example, coverage of Supreme Court nominations regularly portrays judicial decision-making as a political activity driven by partisan preference.⁵⁷ Such political renderings in news reports frequently co-exist with conventional presentations of judicial decision-making as a principled activity, a matter of conscientiously seeking criteria of

50. *Id.*

51. Nelson Lund, *The Usefulness of Constitutional Law*, LIBERTY FORUM (Jan. 31, 2012), <http://libertylawsite.org/liberty-forum/the-usefulness-of-constitutional-law/>; Sanford Levinson, *Not Contrarian Enough: A Response to Michael Stokes Paulsen’s Critique of Contemporary Courses on Constitutional Law*, LIBERTY FORUM (Jan. 31, 2012), <http://libertylawsite.org/liberty-forum/not-contrarian-enough-a-response-to-michael-stokes-paulsens-critique-of-contemporary-courses-on-constitutional-law/>.

52. Lund, *supra*, note 51; Levinson, *supra*, note 51.

53. Lund, *supra*, note 51; Levinson, *supra*, note 51.

54. Lund, *supra* note 51.

55. Levinson, *supra* note 51 (emphasis added).

56. Bybee, *Rule of Law*, *supra* note 22, at 314-15.

57. Bybee, *Elena Kagan*, *supra* note 22, at 149-52.

judgment beyond the dictates of partisan policymaking.⁵⁸ 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.

The public at-large also holds a political view of the Court, and this political view exists alongside a widespread 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*.⁵⁹ 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.⁶⁰ The anticipated split mapped perfectly onto the positions staked out by the political parties, fueling great public discussion about the influence of political factors on judicial decision-making.⁶¹ Such political perceptions of the Court were clearly reflected in public opinion polls, with surveys showing the Court's approval rating reaching a new low,⁶² and over half of Americans expecting the justices to base their healthcare ruling on something other than legal analysis.⁶³ 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 Court,⁶⁴ and the Court's overall approval rating and level of trust remained higher than

58. *Id.*

59. Nat'l. Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

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

61. See, e.g., Ezra Klein, *Of Course the Supreme Court is Political*, WONKBLOG (June 21, 2012), <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/06/21/of-course-the-supreme-court-is-political/>.

62. Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in New Poll*, N.Y. TIMES (June 7, 2012), <http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html?pagewanted=all> [hereinafter Liptak & Kopicki, *Approval Rating*].

63. Robert Barnes & Scott Clement, *Poll: More Americans Expect Supreme Court's Health-Care Decision to be Political*, THE WASHINGTON POST (Apr. 11, 2012), http://www.washingtonpost.com/politics/poll-half-of-americans-expect-supreme-courts-health-care-decision-to-be-political/2012/04/10/gIQA0oqW9S_story.html; N.Y. Times/CBS News, *Poll May 31-June 3, 2012*, N.Y. TIMES (June 7, 2012), <http://www.nytimes.com/interactive/2012/06/08/us/politics/08scotus-poll-documents.html?ref=politics>.

64. *Supreme Court Favorability Reaches New Low*, PEW RESEARCH CENTER (May 1, 2012), <http://www.people-press.org/2012/05/01/supreme-court-favorability-reaches-new-low/?src=prc-headline>.

other national institutions.⁶⁵ It is true that when given a choice among a number of factors that might influence 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 as motivating factors.⁶⁶ Even so, throughout the months leading up to the Court's decision, the most important motivating factor consistently selected by the largest percentage of Americans was "the justices' analysis and interpretation of the law."⁶⁷

The Court's actual decision differed from general expectations, with Chief Justice John Roberts joining the four liberal justices to uphold virtually all provisions of the Affordable Care Act.⁶⁸ 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 slightly lower after issuing its judgment, and a majority of Americans thought that the Court based its decision on the justices' personal or political beliefs.⁶⁹ On the other hand, the public continued to see the Court as something other than a political institution: the Court's overall approval rating still remained higher than other national institutions.⁷⁰ Further, 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."⁷¹

The public's Janus-faced view of the Court's healthcare reform decision mirrors the public's overall assessment of the Supreme Court, as

65. Liptak & Kopicki, *Approval Rating*, *supra* note 62; Frank Newport, *Americans Trust Judicial Branch Most, Legislative Least*, GALLUP.COM (Sep. 26, 2012), <http://www.gallup.com/poll/157685/americans-trust-judicial-branch-legislative-least.aspx>.

66. *Kaiser Health Tracking Poll: April 2012*, KAISER FAMILY FOUNDATION 12-13, <http://www.kff.org/kaiserpolls/upload/8302-T.pdf>.

67. *Id.*

68. *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

69. Adam Liptak & Allison Kopicki, *Public's Opinion of Supreme Court Drops after Health Care Law Decision*, N.Y. TIMES (July 18, 2012), <http://www.nytimes.com/2012/07/19/us/politics/publics-opinion-of-court-drops-after-health-care-law-decision.html?hpw>.

70. *N.Y. Times/CBS News Poll July 11-16, 2012*, N.Y. TIMES (July 18, 2012), <http://www.nytimes.com/interactive/2012/07/19/us/nytcbspoll-results.html?ref=politics>.

71. *Kaiser Health Tracking Poll: Early Reaction to Supreme Court Decision on the ACA*, KAISER FAMILY FOUNDATION 5 (June 2012), <http://www.kff.org/kaiserpolls/upload/8329-T.pdf>.

well as their views of state courts and of courts in general.⁷² At every level of the court system, large majorities of Americans see political influence at work in judicial decision-making, 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 sphere, the better question is how the courts manage to maintain legitimacy in the first place when judges are widely understood to be partisan and impartial at the same time.

III. INTERESTS, HABIT, AND AFFECTION

The theory behind the checking function of digital information is that officials surreptitiously engage in illegitimate behavior that the public will swiftly criticize once the behavior is no longer held in secret.⁷³ However, in the case of the Court, it appears that the public already believes that ostensibly illegitimate judicial behavior occurs and nonetheless continues to have trust and confidence in the high bench.⁷⁴ How is the open secret of judicial politics sustained?

The answer is that a cluster of factors work to keep ordinary people invested in the status quo, and does so largely because of, rather than merely in spite of, the contradictions inherent in our hybrid legal-political judicial process.⁷⁵ Consider 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 utility of a highly procedural legal system. That is, 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 personally transform or genuinely reconcile in order to reach a settlement because the judicial process's goal is not to arrive at an objectively correct or perfectly just outcome so much as it is to employ a method for coping with conflicts—a way of negotiating limited areas of

72. See generally BYBEE, JUDGES ARE POLITICAL, *supra* note 22, at 1-18; JAMES L. GIBSON, ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY (2012).

73. See *supra* text accompanying notes 24-30 and 43-45.

74. See *supra* text accompanying notes 59-72.

75. I develop this argument in detail in BYBEE, JUDGES ARE POLITICAL, *supra* note 22, at 35-103.

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.

The procedural system makes civil peace possible when the cacophony of competing claims in the community would otherwise defeat efforts to manage conflict. Everyone, including a judge, is given the chance to frame 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 which it governs. In other words, it is because individuals simultaneously 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.⁷⁶ 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.⁷⁷ The habit is also a routine behavior in areas of life where the demands of law are more exacting and following the rules "runs counter to strong inclinations."⁷⁸ For example, when it comes to paying taxes, the habit of obedience exerts influence and the fact of compliance "for

76. H.L.A. HART, *THE CONCEPT OF LAW* 24 (2d ed. 1994).

77. *Id.* at 52.

78. *Id.*

some considerable time past” makes it likely that people will continue to comply in the future.⁷⁹

As Hart noted, the habit of obedience requires “no general conception of the legal structure or of its criteria of validity.”⁸⁰ 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. Thus, the habit of obedience is suited to the discordant amalgam of principles and passions within each of us. It breeds attachment to the legal system by relying on 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.

Pleasure also bolsters the judicial process. The 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, the very legal procedures that induce boredom may also foster an appealing sense of shelter and relief.⁸¹

Pleasure is also 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.⁸² 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, regardless of how their case is finally resolved.⁸³ To demonstrate solicitude for complaints and to allow individuals to relate their side of the story is to treat people as 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

79. *Id.*

80. *Id.* at 114.

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

82. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); TOM R. TYLER & YUEN J. HOU, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE & THE COURTS* (2002).

83. Tyler & Hou, *supra* at note 82, at 12.

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.⁸⁴ The account of these sustaining factors offered here is not designed to paint a complete picture, but to suggest why more publicity about the politics of judicial decision-making 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 simultaneously engage in politics and law as they conduct 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 of advocates of open-source democracy, greater transparency and communication about judicial action is more likely to confirm than to disrupt the public's contradictory perceptions of the judiciary. Members of the Supreme Court should realize that when secrets are open, public exposure is not a radical act.

84. BYBEE, JUDGES ARE POLITICAL, *supra* note 22.

