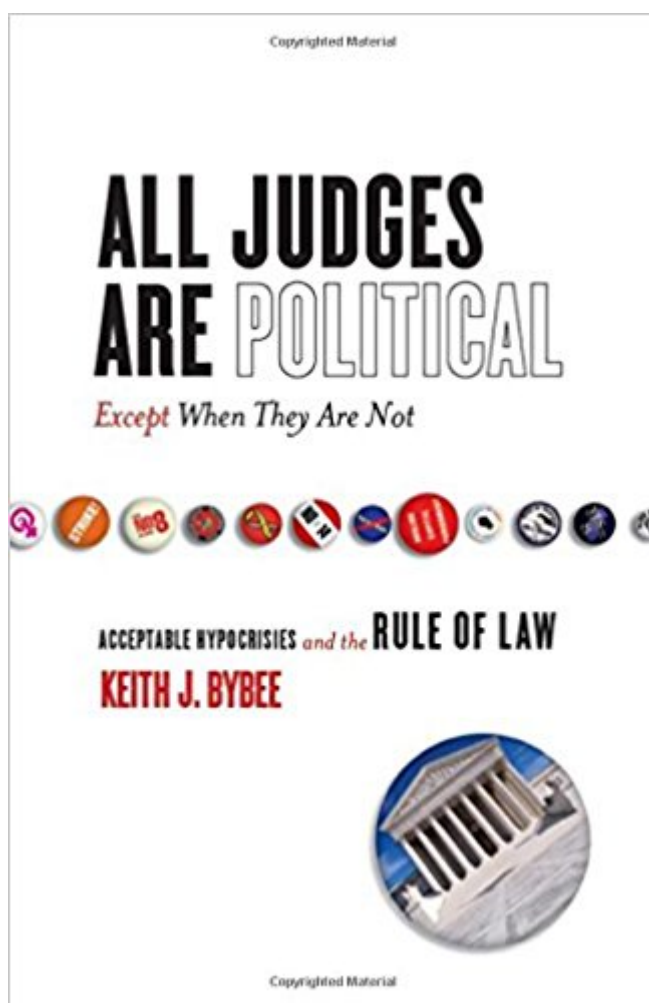


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# All Judges Are Political•Except When They Are Not: Acceptable Hypocrisies And The Rule Of Law (The Cultural Lives Of Law)



## Synopsis

We live in an age where one person's judicial "activist" legislating from the bench is another's impartial arbiter fairly interpreting the law. After the Supreme Court ended the 2000 Presidential election with its decision in *Bush v. Gore*, many critics claimed that the justices had simply voted their political preferences. But Justice Clarence Thomas, among many others, disagreed and insisted that the Court had acted according to legal principle, stating: "I plead with you, that, whatever you do, don't try to apply the rules of the political world to this institution; they do not apply." The legitimacy of our courts rests on their capacity to give broadly acceptable answers to controversial questions. Yet Americans are divided in their beliefs about whether our courts operate on unbiased legal principle or political interest. Comparing law to the practice of common courtesy, Keith Bybee explains how our courts not only survive under these suspicions of hypocrisy, but actually depend on them. Law, like courtesy, furnishes a means of getting along. It frames disputes in collectively acceptable ways, and it is a habitual practice, drummed into the minds of citizens by popular culture and formal institutions. The rule of law, thus, is neither particularly fair nor free of paradoxical tensions, but it endures. Although pervasive public skepticism raises fears of judicial crisis and institutional collapse, such skepticism is also an expression of how our legal system ordinarily functions.

## Book Information

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## Customer Reviews

"Judicial authority is not in grave danger, at least in the terms that some alarmists imagine. In

conversation with mainstream approaches to judicial practice, this remarkably original work contends that law's deceptions sustain order and moderate conflict, all the while sustaining hierarchy. A major accomplishment." (Michael W. McCann University of Washington)"Bybee offers a truly fresh and important response to one of the most important questions in the cultural study of law: how can law sustain its legitimacy in the face of the understanding that it is essentially political? Arguing that law's hypocrisy actually strengthens it, Bybee makes a connection to courtesy that is really quite ingenious and illuminating. This is a wonderful new vehicle for understanding how courts work." (Austin Sarat Amherst College)"Between costly partisan judicial elections and a Supreme Court that appears frozen in an ideological 5-4 split, there has never been a more apt time to answer conclusively the question of whether judges are apolitical oracles or ideological politicians. Bybee's answerâ•they are bothâ•sounds at first like a discomfiting one. But in this fascinating book he shows that the courts' very survival in fact rests on the white lie of this fundamental tension." (Dahlia Lithwick, Senior Editor Slate.com)"In using courtesy to account for the current state of our legal system, Bybee offers a fresh take on debates over judicial legitimacy and legal realism. Rejecting the contention that the public is simply confused, he presents an original answer to the puzzle of the public's paradoxical perceptions of the judiciary. The pull of his explanation and the unconventional but commonsense appeal of his account are engaging and provocative." (Helena Silverstein Law and Social Inquiry)"All Judges Are Politicalâ•Except When They Are Not successfully points out the conflicting roles that judges fill and demonstrates that these roles do not intrinsically compromise legal legitimacy. In the course of achieving this goal, Bybee uses substantive sources and unique comparisons to present intriguing ideas and theories. I recommend the book for anyone with an interest in the subject matter who does not mind a distinctly scholarly approach. The book would make a great addition to collegiate and law school libraries." (Jeff McGowan Law Library Journal)

Keith J. Bybee is Paul E. and the Hon. Joanne F. Alper '72 Judiciary Studies Professor at Syracuse University College of Law. He is the editor of *Bench Press: The Collision of Courts, Politics, and the Media* (Stanford University Press, 2007).

Bybee finds an ingenious theory to solve the intractable problem of wayward judging. The public is aware that judges are bound to be impartial, and at the same time it suspects that many often are not. The fact may be that judges are often biased and hypocritical in that they appear sound impartial in citing law and principles when the decisions were made on other reasons. Bybee recommends that we impose courtesy as a habit so that even judges who have political agendas are compelled

to achieve neutral means that make their decisions acceptable. Bybee thinks that courtesy is the method that best compels them to achieve this. Whether it works is a matter of debate. As another reviewer points out, we should not settle for less than the ideal of impartiality when insisting that judges uphold the rule of law. Bybee's thesis might work, but how do we convince the judges?

Writing of John Maynard Keynes's *General Theory*, Henry Hazlitt once opined that the book contained much that was true, and much that was original. Unfortunately, the parts that were true were not original, and the parts that were original were not true. A similar criticism could be leveled at Keith J. Bybee's new book, *All Judges Are Political - Except When They Are Not*. Bybee's twofold thesis is that (1) judges decide cases based on their personal ideological preferences, but conceal this with rhetoric about being bound by the rule of law; and (2) we should be happy about that, because this sort of hypocrisy is the glue that holds a civil society together. As to the first point, there's no disputing the general truth of Bybee's proposition, because it is uncontroversial. Lots of studies, over many years, have shown that many appellate decisions can be predicted or explained simply by reference to the political party with which judges are affiliated. There's nothing really new here, because Bybee doesn't dig deeply enough to get to the interesting part. Why do some judges subordinate their political views better than others, once they're on the bench? Are judges whose political views are in the minority more likely to issue politically-based rulings, or less so? Why does the political affiliation of judges lose its explanatory power in certain types of cases - notably, those involving property rights? Regrettably, Bybee probes none of these questions. Instead, he draws an extended analogy between law and the rules of etiquette to ground the second part of his thesis - that judicial hypocrisy is actually a good thing, that strengthens our attachment to and support of the legal process. Where this reasoning goes astray is in its failure to distinguish between uniform codes of behavior applicable to all of us simply by virtue of our existence as social creatures, and the more stringent standards we place on individuals in positions of authority over us. Bybee may be correct that most Americans value the ideals of impartiality and principled behavior, but are too consumed by avarice and self-seeking to practice them. But it does not follow from this that "a legal system that gives everyone a chance to appear impartial and principled, without actually requiring them to be so, is a system that has broad appeal" (pp. 101-102). I may embrace the many little social hypocrisies I encounter every day: "Pleased to meet you" (you incredibly boorish dolt); "That pie was delicious" (quick, where's the bicarbonate?); "Your talk had me on the edge of my seat" (it was the only way I could keep from dozing off). But that does not mean I would welcome a similar degree of dissembling on the part of a judge who must determine whether I am liable for another

person's injuries, or whether the Coastal Commission can claim my property for the state without paying for it. Expecting judges to meet their professional responsibilities impartially and in accordance with the requirements of law, to the best of their ability, is neither foolish nor naive. Everyone understands that the judicial profession as a whole does not always live up to those expectations, and in certain instances they may not even make a good pretense of doing so. But that does not mean we should be satisfied with less.

Can a judge truly do his job and remain apolitical? "All Judges are Political: Except When They Are Not: Acceptable Hypocrisies and the Rule of Law" is an analysis of the role of the judge in interpreting the law of America. Keith Bybee comes to readers with an intriguing dissection of the call for and call against the activist judge, stating that observing both rule of law and making political decisions are both qualities of an excellent judge. "All Judges are Political" is a fascinating examination of the role of the Judicial, highly recommended.

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