

Shine a Light: Televised Oral Arguments, Judicial Legitimacy, and Compliance

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EITM Summer Institute 2013





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Our list of answers to commonly asked questions is available [here](#).

LIVE

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LIVE!

Kennedy, joined by the four liberal Justices – Ginsburg, Breyer, Sotomayor, and Kagan.

10:18

Amy Howe: Pages 16-17 of Scalia dissent: he chides the majority for failing to set forth the level of scrutiny that should apply to laws

10:05 **Kali:** Here is the link to the opinion:
http://www.supremecourt.gov/opinions/12pdf/12-307_g2bh.pdf

10:05 **Amy Howe:** There is a "careful consideration" standard: In determining whether a law is motivated by improper animus or purpose, discriminations of an unusual character especially require careful consideration. DOMA cannot survive under these principles.

That is page 20.

The opinion is here: <http://www...> | The opinion is here: <http://ww...>

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COVERITLIVE



Sri Srinivasan



Sri Srinivasan
Agency for International Development
& Alliance for Open Society
4-22-13

Motivation

- Increasingly, the US Supreme Court is being called upon to televise its proceedings.
- However, the Court has been historically apprehensive.



- “...I can tell you the day you see a camera come into our courtroom, it’s going to roll over my dead body.” — former Justice David H. Souter.

Motivation

- Increasingly, the US Supreme Court is being called upon to televise its proceedings.
- However, the Court has been historically apprehensive.
- Debate has been normative—“the Court should televise because to do otherwise is undemocratic,” “televising will have this effect,” etc.—but the decision lies with the justices.

Puzzle

- Observed patterns of televising suggest that other courts may see a benefit to promotion.
 - Second and Ninth Circuit courts of appeal.
 - Pilot district court program started in 2010 (12 of 14 courts have participated.)
 - State and foreign Supreme Courts.

Puzzle

- Existing research suggests courts promote for policy reasons.
- Looking at Mexico, Staton (2006) finds that promotion of the high court's rulings leads to increased compliance if policy not too salient to the executive.
- Is immediate compliance the only rationale for televising?

Research Question

- What policy and legitimacy gains do courts stand to make by televising their oral arguments?

Relevance of Research

“It is fair to conclude that one of the most pressing issues in the study of judicial politics today concerns the ways in which courts acquire and use their legitimacy” (Gibson and Nelson, in April).

Literature

- What is legitimacy?
 - Two forms of support—specific and diffuse (Easton 1965; Caldeira and Gibson 1992).
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- How does legitimacy vary?

TABLE 5. Average Diffuse Support for National High Court among Attentive Publics

| | Mean | Index of Support Std. Dev. | N |
|-----------------|------|-------------------------------|-----|
| Spain (1993) | 46.3 | 22.3 | 258 |
| Bulgaria | 48.8 | 18.4 | 860 |
| Germany (East) | 49.4 | 22.4 | 301 |
| Belgium | 52.2 | 22.0 | 211 |
| Spain (1995) | 53.9 | 17.2 | 658 |
| Ireland | 54.5 | 18.3 | 291 |
| France (1995) | 55.0 | 19.6 | 660 |
| France (1993) | 55.2 | 20.8 | 278 |
| Russia | 56.6 | 14.4 | 360 |
| Hungary | 57.1 | 20.5 | 654 |
| Italy | 57.8 | 23.3 | 271 |
| Great Britain | 58.0 | 20.2 | 295 |
| Luxembourg | 58.8 | 21.5 | 145 |
| Portugal | 61.6 | 22.0 | 235 |
| United States | 62.2 | 19.7 | 804 |
| Poland | 62.5 | 20.5 | 696 |
| Greece | 65.0 | 23.0 | 281 |
| Germany (West) | 65.4 | 20.4 | 194 |
| Denmark | 66.6 | 20.3 | 295 |
| The Netherlands | 69.9 | 22.4 | 282 |

Note: The 100-point summated index is created from responses to the items reported in Table 4. The index is the mean of the responses to the three diffuse support items, minus 1 (to set the bottom of the scale at zero) + 25. The countries are rank ordered on the degree of support for the national high court (lowest to highest).

From Gibson, Caldeira, and Baird 1998, 351.

Literature

- What is legitimacy?
 - Two forms of support—specific and diffuse (Easton 1965; Caldeira and Gibson 1992).
 - Measured with survey questions:
- How does legitimacy vary?
 - Newer courts are often associated with the regime that put them there.

Literature

- How do courts acquire legitimacy?
 - Carrubba 2009: Describes the maturation of a court into a judicial review-wielding body.
 - Positivity bias: “...legal controversies tend to reinforce judicial legitimacy by teaching the lesson that courts are different from other institutions...”(Gibson and Caldeira 2009, 3).

Literature

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 - To gain compliance with preferred policies (Vanberg 2005).
 - ???

Literature

- How do they use their legitimacy?
 - To gain compliance with preferred policies (Vanberg 2005).
 - ???
- How do they protect their legitimacy?
 - Keeping abreast of public opinion (Clark 2009).
 - Not risking overt noncompliance (Staton and Vanberg 2008).

Transparency and Legitimacy

- 2 ways that increased transparency helps.
 - Satisfying necessary condition for enforcement.
 - Building legitimacy through the positivity bias.

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- 2 ways that increased transparency helps.
 - Satisfying necessary condition for enforcement.
 - Building legitimacy through the positivity bias.
- Transparency can also undermine the court, though.
 - “Value of Vagueness” —Staton and Vanberg 2008
- Efforts to increase transparency likely to be conditioned on other factors, like complexity.

Transparency Through Televising

- Television is a powerful medium for:
 - Promoting a positivity bias.
 - Depicting the unique role a judiciary plays.
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- Television is a powerful medium for:
 - Promoting a positivity bias.
 - Depicting the unique role a judiciary plays.
 - Generating greater awareness of the court's actions.
- Televising is a means of increasing transparency.
 - “[T]ransparency...summarizes how easy it is for citizens to discover the relationship between a judicial decision and a...response” (Vanberg05, 23).
 - Other means: websites and press releases (Staton10); opinion specificity (StatonVanberg08).

Why televise? (a judge's perspective)

- “[T]he broadcasting of oral arguments might go a long way towards convincing parties and bystanders alike that appellate judges are competent, careful, and well-intentioned protectors of the ideals of an independent judiciary” (O’Scannlain 2007, 329).

Why televise? (a judge's perspective)

- “[T]he broadcasting of oral arguments might go a long way towards convincing parties and bystanders alike that appellate judges are competent, careful, and well-intentioned protectors of the ideals of an independent judiciary” (O’Scannlain 2007, 329).
- A.k.a. the positivity bias.

Step 1: Concepts

- Theoretical concepts:
 - Decision making.
 - Strategic interaction.
 - Learning.
- Statistical concept:
 - Nominal choice.

Step 2: Theoretical Analogues

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- First, I model the court's decision whether to televise.
 - One actor: court maximizing legitimacy.
- Second, I model judicial review as a strategic interaction.
 - Two actors: court maximizing legitimacy and policy goals; government maximizing policy goals.

Parameters

- (j) Perceived procedural fairness;
- (c) Complexity of case;
- (k) Cost of televising;
- (p) Probability of media coverage;
- (e) Cost of media error;
- (s) Specific support for alternative policy.

Solve for

$$U_{Court}(T) > U_{Court}(\neg T)$$

Model the gain in legitimacy for each choice as

$$\frac{j}{c} - k + s > -pe$$

- The decision-theoretic model describes the legitimacy gained in a general case.
- However, courts are interested in policy as well as their legitimacy.

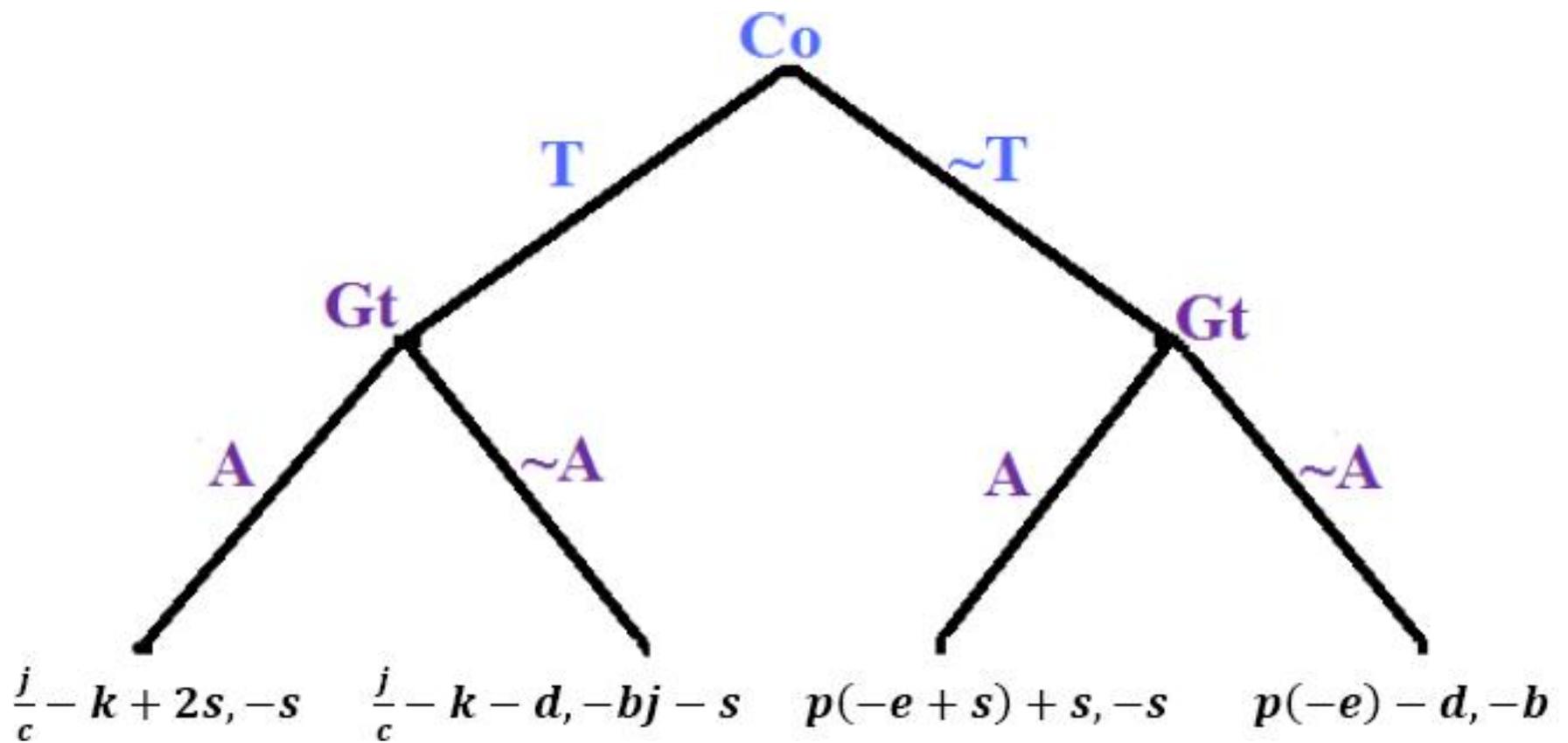
- The decision-theoretic model describes the legitimacy gained in a general case.
- However, courts are interested in policy as well as their legitimacy.
- Assuming the court's policy preferences diverge from the government's, I model a game where the court pursues legitimacy and policy by means of judicial review.

Adding Some More Parameters

- (j) Perceived procedural fairness;
- (c) Complexity of case;
- (k) Cost of televising;
- (p) Probability of media coverage;
- (e) Cost of media error;
- (s) Specific support for alternative policy;
- (d) Cost to court of defiance;
- (b) Institutional support for the court.

Sequence of Events

- A news outlet makes a televising request.
- A court decides whether to televise $\{T, \sim T\}$.
The court knows $c, s, k, d,$ and $e,$ and the distribution of j and $p.$
- During oral arguments, j is revealed. The court strikes down the status quo policy.
- The government decides whether to acquiesce to the ruling $\{A, \sim A\}.$
- Payoffs are distributed.



Step 2: Statistical Analogue

- I am interested in many choices that can (eventually) be tested using discrete choice models.
 - By the media: whether to request televising.
 - By the court: whether to televise; whether to strike down or support a policy.
 - By the government: whether to acquiesce; whether to retaliate.
 - By the public: whether to watch; whether to censure defiance; whether to demand.

Casual Hypotheses

- Courts see televising as an opportunity to reach new audiences.
- A court will balance projecting procedural fairness with case complexity.
- Reported legitimacy and awareness will increase with exposure to televised cases.

Step 3: Unification

- Operationalizing concepts:
 - Fairness of procedure;
 - Complexity;
 - Specific and diffuse support.

Fairness

- Experimental design:
 - Two video vignettes: one emphasizing procedure, one depicting political bickering or bullying.
 - Vary by complexity (more on this soon).
 - Pre- and post-treatment survey with a battery of legitimacy questions.

Fairness

- Experimental design:
 - Two video vignettes: one emphasizing procedure, one depicting political bickering or bullying.
 - Vary by complexity (more on this soon).
 - Pre- and post-treatment survey with a battery of legitimacy questions.
- Other means: coding existing cases; surveying those in jurisdictions with televising.

Complexity

- The literature points to two case elements that add to complexity
 - Types of issues, i.e. antitrust (Vanberg 2005, 104).
 - Number of issues (Carrubba Zorn 2010, 818-819).

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 - Types of issues, i.e. antitrust (Vanberg 2005, 104).
 - Number of issues (Carrubba Zorn 2010, 818-819).
- Other ideas: survey fact recall and understanding.

Future Research

- Improve my model.
 - Model the effect of time and maturation.
 - Possibly also a signaling game, where the court shows resolve by tying hands.
- Test implications using the 9th Circuit and Canadian data.
- Conduct an experiment.
 - Black, Johnson, and Wedeking are studying learning via different media.

- Presentations are now over! Thanks for your attention and comments!

- In the future, I intend to test the implications of this model using case-level data from the 9th circuit's [web site](#).

Games

- Staton10: voter's awareness modifies her legitimacy perceptions in non-salient cases.
 - The role of information; where do people acquire knowledge of the court (def. of awareness).
- Carr09: observer associates court with positive benefits of a regime; comes to believe G defection is self-interested and will punish; C can pursue own policy interests
 - Treats observation as probabilistic, but C influences
- Staton06: C can promote; StatonVanberg08: C controls vagueness

Transparency

- Conditions: Complexity and Awareness
 - Is the public able to evaluate compliance? Is the public likely to be aware of the ruling?
- Complexity
- Awareness: measure with AC briefs for and against gov't (CZ10) and with televising.
 - Court can't influence the former; can the latter.
- Salience (Vanberg 22)