12-18-2012

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Supreme Court Oral Argument Video: A Review of Media Effects Research and Suggestions for Study

Edward L. Carter*

I. INTRODUCTION

As the U.S. Supreme Court prepared to hear three days of oral argument about the constitutionality of the Patient Protection and Affordable Care Act in early 2012,¹ C-SPAN co-founder and CEO Brian P. Lamb wrote a letter to Chief Justice John G. Roberts asking the Court to permit cameras in the courtroom for the arguments. Given the Court’s past rejections of his requests to allow cameras in the courtroom, Lamb tried a targeted approach: “[W]e ask you and your colleagues to set aside any misgivings you have about television in the Courtroom in general and permit cameras to televise live this particular argument.”² In recent decades Lamb and C-SPAN have carried the banner for live video at the Supreme Court, dedicating a prominent portion of the C-SPAN website³ to the effort and regularly discussing the topic on the program “America and the Courts.” In his letter, Lamb appealed to the Justices’ sense of the importance of their work:

We believe the public interest is best served by live television coverage of this particular oral argument. It is a case which will affect every American’s life, our economy, and will certainly be an issue in the upcoming presidential campaign. Additionally, a five-and-a half hour argument begs for camera coverage—interested citizens would be understandably challenged to adequately follow audio-only coverage of an event of this length with all the justices and various counsel participating.⁴

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4. Letter from Brian P. Lamb to John Roberts, supra note 2.
Lamb anticipated that the Court might consider cameras and accompanying electronic broadcast equipment in the courtroom obtrusive, and he promised C-SPAN would minimize disruption of court proceedings and serve as the pool provider to facilitate video access to all interested broadcasters without the need for multiple organizations' cameras.\textsuperscript{5}

Lamb and C-SPAN were not the only ones who thought broadcasting oral arguments in \textit{National Federation of Independent Business v. Sebelius}\textsuperscript{6} would be a good idea. Just weeks before oral argument, Republican Senator Chuck Grassley of Iowa and Democratic Senator Dick Durbin of Illinois introduced a bill in Congress to require television cameras in oral arguments unless a majority of the Justices concluded it would violate the due process rights of at least one participant.\textsuperscript{7} Predictably, the legislation went nowhere. But news media organizations formed a chorus in favor of cameras. In the run-up to the health care oral arguments, news organizations that editorialized in favor of cameras in the Supreme Court included the \textit{St. Petersburg Times}, \textit{Fort Wayne Journal Gazette}, Portland's \textit{Oregonian}, Boston Globe, Huffington Post, Washington Post, and Los Angeles Times.\textsuperscript{8} Former Solicitor General Kenneth Starr wrote an op-ed in the \textit{New York Times} pointing out the irony of the Court's reluctance to allow cameras in light of the Court's own opinions in free-speech cases that manifest a "stubborn insistence on freedom of communication in a democratic society."\textsuperscript{9}

The Justices, apparently, were underwhelmed by it all. Roberts declined the broadcast invitation from Lamb as well as a similar one from Grassley, who responded by taking credit for the Court having released same-day audio recordings in twenty cases since \textit{Bush v. Gore}\textsuperscript{10} in 2000.\textsuperscript{11} In the health-care case, the Court again acquiesced to same-day audio release rather than waiting until the end of the week.\textsuperscript{12} During

\begin{thebibliography}{9}
\bibitem{5} Id.
\bibitem{6} 132 S. Ct. 2566 (2012).
\bibitem{7} Grassley, Durbin Introduce Bill to Require Televising Supreme Court Proceedings, \textit{SENATOR GRASSLEY'S NEWS PAGE} (Dec. 5, 2011), http://l.usa.gov/RwlAWW.
\bibitem{8} See Cameras in the Court Articles, C-SPAN, http://cs.pn/Y4AOIW (last visited Nov. 1, 2012) (compiling articles).
\bibitem{10} 531 U.S. 98 (2000).
\bibitem{11} Supreme Court Responds to Grassley's Request for Audio, Video Coverage of Health Care Reform Arguments, \textit{SENATOR GRASSLEY'S NEWS PAGE} (Mar. 16, 2012), http://1.usa.gov/TZK00t.
\bibitem{12} Press Release, Kathleen Arberg, Supreme Court of the U.S. (Mar. 16, 2012).
\end{thebibliography}
three days of oral argument, the lack of cameras may have contributed to a frenzied atmosphere in which reporters scrambled in and out of the courtroom to provide live updates, and at least one observer was accused of live tweeting from the courtroom in violation of Court rules.\(^\text{13}\)

Although the fight over cameras in the Supreme Court is not new, this Article seeks to shift the debate—in line with invitations from the Justices themselves\(^\text{14}\) and in concert with a thus-far relatively small number of other scholars\(^\text{15}\)—from a legal discussion to a conversation about the effects of televising Supreme Court oral arguments. One of the barriers to resolving the debate about whether cameras should be allowed in the Supreme Court is that, while many people have opinions about what would happen, no direct actual evidence exists.\(^\text{16}\) Because the Court has never allowed cameras, discussion of their effect is necessarily speculative. Still, substantial media effects research exists that could lead

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\(^{13}\) That is not to say there is no relevant evidence, but just to state the obvious that the Court has not previously allowed cameras. For discussion of particularly relevant research, see Paul Lambert, Courting Publicity: Twitter and Television Cameras in Court (2011).
to educated predictions. In the context of that research, this Article seeks to answer a simple but important question: What would have happened if the Supreme Court had allowed C-SPAN to broadcast the oral argument in the challenge to President Barack Obama's signature legislative achievement? The short answer is that existing research suggests televising oral argument would provide some clear benefits as well as some detriments for the Court. Overall, media effects research lends support for a conclusion that the positives outweigh the negatives.

This Article begins in Part II with a review of the traditional arguments for and against televising oral argument in the Supreme Court, as reflected through comments by the Justices themselves. The Justices' statements about cameras are examined in the context of individual oral argument behavior as described by previous scholarship. Part III reviews relevant media effects research. Part IV contemplates some of the uses professional mass communicators might make of Supreme Court video. Part V then discusses possible long-term impacts of Court video on viewers before Part VI offers a brief conclusion.

II. INDIVIDUAL ORAL ARGUMENT BEHAVIOR AND ATTITUDES ABOUT CAMERAS

In general, newer Justices on the Supreme Court tend to be more favorable than their long-serving colleagues toward the idea of televising oral arguments. The two newest Justices on the Court—Elena Kagan and Sonia Sotomayor—appear to be the most in favor of live TV coverage, whereas the longest-serving Justices—Antonin Scalia, Anthony Kennedy, and Clarence Thomas—have expressed the strongest opposition. 17 The other four Justices—John Roberts, Ruth Bader Ginsburg, Stephen Breyer, and Samuel Alito—appear to be lukewarm on the issue and generally of the view that the Court should proceed cautiously while respecting the views of those Justices who feel strongly about it. Ironically, for a group of individuals who have not allowed cameras to observe them at work, the Justices on the Supreme Court have spent a lot of time speaking on camera in settings other than at the Court itself. A portion of that airtime, in academic conferences, lectures,
and other settings, is devoted to discussion of cameras in the Supreme Court, and some of those comments by Justices are reported here.

The reports of Justices’ comments about cameras have been taken from broadcast interviews available online through YouTube and C-SPAN. Each Justice’s views about cameras in court, with the exceptions of Kagan and Sotomayor, for whom data were not available, are contextualized within the results of a previous scholarly study about their individual oral argument behavior. This approach provides context for how the Justices’ views of cameras relate to their larger worldviews of the Court and their own roles on it.

In previous research, the author and another scholar studied the individual behavior of Supreme Court Justices in fifty-seven oral arguments between 2004 and 2009 by categorizing each comment or question by a Justice according to its information-seeking qualities. Based on analysis of more than 13,000 sentences at oral argument, that article discussed an information-seeking behavior profile for each Justice in light of his or her frequency of asking open-ended questions, yes-no questions, leading questions and rhetorical questions, or making statements, at oral argument.

A. Chief Justice Roberts, Gentle and Astute with Cautious Optimism About Cameras

Chief Justice Roberts’s oral argument behavior is characterized by gentle and astute administration of the process, often speaking to keep his colleagues and the advocates focused on the key legal issues in a case. Roberts has proclaimed his role on the Court is to build consensus, and, in his oral argument behavior, he is a consistent centrist who can be pointed with advocates on the issues but who does not engage in extreme behavior.

Justice Roberts’s opinion on cameras in the courtroom reflects his cautious yet forward-looking behavior at oral argument. Speaking to the conference of the U.S. Court of Appeals for the Fourth Circuit in 2011, Roberts responded to a question about cameras in the Supreme Court by talking about the turtles in the lamppost sculptures outside the Supreme

19. Id. at 341-42.
20. Id at 341–44.
Court building, suggesting the Justices were moving toward allowing cameras but doing so very slowly:

We’re having a pilot project right now under the guidance of the judicial conference in terms of the lower courts to experiment with, again on a pilot basis, with television in the courts of appeals, and we’re going to see what the results of that are. Judges in general, the judiciary, and certainly the Supreme Court, we tend to move slowly. Those of you who have been to the Court know that one of the architectural motifs, at the base of our lampposts throughout, is a turtle. And that’s to indicate that we move slowly but surely and on a stable basis. We have made some changes. It used to be we didn’t release transcripts of arguments. Now we release them within, I think, within a half hour. It used to be the audio recordings of the Court’s arguments were released at the end of the Term, and now they’re released at the end of every week. So we are moving in a particular direction.\(^\text{21}\)

Roberts also expressed the view that cameras in the Supreme Court could have some negative effects on the oral argument process itself due to possible “grandstanding” by lawyers and Justices.\(^\text{22}\) He placed much stock in the outcome of the federal court pilot project and said movement would be gradual after the Justices considered those results.\(^\text{23}\) He said others had told him television cameras in the U.S. Senate “ruined” debates there in part because members of the public and even many members of the Senate itself no longer personally attended the Senate sessions that were televised, leaving a lone speaker at the podium addressing the cameras.\(^\text{24}\) Again relying on what “others” had told him, Roberts said that “the way society is these days things don’t really happen unless you can see them on TV.”\(^\text{25}\) However, Roberts said, at least for now, “[t]he Supreme Court is different.”\(^\text{26}\)

B. Justice Scalia, Assertive Law Professor Who Adamantly Opposes Cameras

In terms of oral argument behavior, Justice Scalia has been compared to an assertive law professor because of his aggressive questioning and


\(^{22}\) Id.

\(^{23}\) Id.

\(^{24}\) Id.

\(^{25}\) Id.

\(^{26}\) Id.
acerbic jabs at colleagues and advocates. During oral argument, Justice Scalia rarely asks genuine open-ended questions but instead makes a large number of declarations and asks rhetorical questions, yes-no questions, and leading questions that seem to indicate he has his mind made up before the argument and uses that time to probe and needle his “opponents” both on the Court and at the bar. Scalia is among the least inquisitive members of the Court and he uses humor, among other rhetorical devices, strategically to advance arguments he favors or slow down arguments he disfavors.

With regard to cameras, Scalia pulls no punches. Unlike Chief Justice Roberts, Justice Scalia is not concerned with the impact of cameras on courtroom participants themselves. Instead, he has repeatedly said that video footage would be distorted in the process of preparing it for public broadcast. For example, in 1988 at American University Scalia said, “It isn’t just that people would sit home and watch C-SPAN gavel to gavel. What would happen, of course, is that cutouts from the full day’s proceedings would appear on the evening news.” Nearly two decades later, at the Aspen Institute, Justice Scalia sounded the same tune,

“[W]hat will happen is for every one person who sees it on C-SPAN gavel to gavel, . . . 10,000 will see 15-second take outs on the network news, which I guarantee you will be uncharacteristic of what the Court does. So I have come to the conclusion that it will misinform the public, rather than inform the public, to have our proceedings televised.”

Scalia purported to understand news values and practices: “They want man-bites-dog stories. They don’t want people to watch what the Supreme Court does over the course of a whole hour of argument. People aren’t going to do that.”

C. Justice Kennedy, Cut-to-the-Chase Questioner and Institutionalist

As the perceived, if not actual, swing Justice on a Court with four so-called liberals and four so-called conservatives, Justice Kennedy at oral
argument tends to be very straightforward and desires the same from advocates. Kennedy can sometimes demonstrate impatience at oral argument, but his information-seeking behavior falls in the middle of his colleagues. As for verbosity at oral argument, Kennedy speaks about twice as much as Justice Alito and half as much as Justice Breyer, thus placing Kennedy again at the center of the Court. Unlike some of his colleagues, Justice Kennedy does not usually tip his hand at oral argument through obvious behavior, whether by word count or inquisitiveness.

Befitting his status as a swing Justice, Kennedy has argued both sides of the cameras-in-courtroom case. In 2005 at a meeting of the American Bar Association, he spoke in favor of cameras in the Supreme Court, although he suggested he was just hypothetically arguing the point:

Sometimes if the system is flawed, the people ought to know it. If television shows a flawed system, then we see it. Television can be a teacher. If we're going to have a debate [about] television in the courtroom, and you drew the affirmative side of the debate, you could make, probably, more positive points. We've sometimes wished lawyers were better prepared, but they haven't seen us at work. If they had a videotape or a DVD, they could see it. You could make a lot of arguments for it.

In testimony before Congress, Kennedy on several other occasions also has argued in favor of cameras. In the end, though, Kennedy seems to have come down against cameras in order to preserve the institution of the Court. At the 2005 ABA meeting, for example, he said that fulfilling the Court's constitutional role depended on keeping cameras out:

[B]y not having the press in the courtroom, we also teach. We teach that our court is based on the reasons that we give in our opinions. We will be judged by what's in those opinions in the books that are on the
wall. Our timeline, our language, our grammar, our ethic, our chronology, our dynamic are different from the political branches—not better, not worse, different. And by keeping the TV out, [we] teach that.36

D. Justice Thomas, Reserved Observer Professing to Save Colleagues

Justice Thomas, as is well known, rarely speaks at oral argument and has made that habit a point of personal pride. He has said that oral argument is not helpful because he generally already has his mind made up before he goes on the bench, and that oral argument is for lawyers to speak and not Justices.37 When he does speak, he makes many declarations and asks few open-ended questions, though the small sample size urges caution about definitive conclusions.38

With regard to cameras at oral argument, Justice Thomas has expressed opposition because of the potential impact on his colleagues’ privacy. Perhaps in a rueful nod to the extensive media coverage of his confirmation battle, including sexual harassment allegations by a former coworker, Thomas has said that televising oral argument would not affect him since he is already a public figure:

The primary point for me in the camera in the courtroom issue has been that regular appearances on TV would mean significant changes in the way my colleagues could conduct their lives. My anonymity is already gone, so it’s already affected the way that I can conduct my own life. But for some of my colleagues, they have not yet lost that anonymity. . . . I think the security issues are at foremost of all of our minds now, since 9/11. I think they would certainly become even more significant with more exposure. . . .39

E. Justice Ginsburg, Consummate Academic

Like Justice Scalia, Justice Ginsburg “never asks a question that she does not already know the answer to,” but, unlike Scalia, Ginsburg is not biting at oral argument.40 She agreed with a former colleague who said that appellate judging and law teaching were very similar, and her

36. C-SPAN, Justice Kennedy on Cameras in the Court, supra note 34.
38. Id. at 373.
behavior at oral argument sometimes includes pedagogical devices like lecturing and a gentle application of the Socratic method to enable lawyers to see where their positions will lead. 41 Although not unique in this regard, Ginsburg somewhat tips her hand at oral argument in that the more she speaks to an attorney at oral argument, the more likely that attorney’s client is to lose the case. 42

As a Supreme Court nominee appearing before the Senate Judiciary Committee in 1993, Ginsburg said the televising of oral arguments would have educational benefits: “I think it would be good for the public,” she said. “[I]f it’s gavel to gavel, I don’t see any problem at all in an appellate court.” 43 Ginsburg acknowledged on the same occasion that televising trial court proceedings might pose more challenges, presumably due to potential effects on witnesses and jurors. She also expressed cryptically a concern about “distortion because of the editing, if the editing is not controlled,” perhaps referring to Scalia’s complaints about sound bites being taken out of context. 44

F. Justice Breyer, King of the Hypothetical

Justice Breyer’s oral argument behavior is marked by his extensive use of hypothetical questions. 45 Breyer’s hypothetical scenarios are sometimes long in development, and therefore he monopolizes time at oral argument and sometimes irks his colleagues in the process. Justice Breyer sometimes misses exchanges between other Justices and the advocates who appear before the Court because he is so engaged in his own out-loud thinking. 46 He is also one of the least inquisitive Justices, meaning his participation at oral argument is often in the form of declarations and hypotheticals rather than open-ended, information-seeking questions. 47

Perhaps more than any other Justice, Breyer also has been verbose about cameras in the Supreme Court, articulating pluses and minuses on both sides of the issue. In 2010, Breyer linked the televising of oral

41. Id.
42. Id.
44. Id.
46. Id.
47. Id.
argument with his concern for the impact of individual cases on the larger public:

I know perfectly well that many of these decisions will affect maybe hundreds of millions of people who are not in that room, and they are not being represented. And you’ll never see them on television, even if the television is there. And then, when you look at that on the television, you might think, ‘Well, this is about an oral argument and it’s about which is the better lawyer or which client is more sympathetic.’ That isn’t how I see it, whether the television is there or not. It’s what is the rule that’s going to come out of this case, or the approach that’s going to come out of this case, that will make in this minor or major area of the law a better rather than worse set of rules called laws under which people live.\(^48\)

In the same year, appearing before a House of Representatives subcommittee, Breyer acknowledged an advantage of televising oral argument for the Court would be that the public could see “we do our job seriously.”\(^49\) At the same time, however, he said that the Supreme Court is such a powerful symbol in the United States that, if the Court allows cameras in, virtually no other court—including criminal trial courts, where constitutional problems could arise because of increased publicity—would be able to resist.\(^50\) Further, Breyer echoed Roberts’ concern that the Court should move slowly because “there is no such thing as an experiment on this in the Supreme Court.”\(^51\) Breyer called for “studies, and serious studies, not just ones promoted by the press, serious studies of what’s happened in different places.”\(^52\) He stopped just short of predicting cameras would one day arrive in the Court but did suggest, after a period of study and pilot projects in other courts, “I think eventually we’ll get the comfort level, but I think we’re not there yet.”\(^53\)

\(G. \) The Three Newer Justices: Alito, Sotomayor, and Kagan

With the exception of Justice Alito, the three newest Justices were not included in a previous oral argument behavior study. Although he has


\(^50\). *Id.*

\(^51\). *Id.*

\(^52\). *Id.*

\(^53\). *Id.*
been called “Scalito” or “Little Scalia” for perceived similarities in their backgrounds and jurisprudence, Justice Alito is the polar opposite of Justice Scalia when it comes to oral argument. He is polite but firm in questioning attorneys, and he sometimes tries to help a colleague by clarifying another Justice’s question to an attorney. He does not monopolize oral argument, and his participation tends toward inquisitiveness rather than decidedness. His evenhandedness and reservation at oral argument mean that his behavior there rarely predicts his ultimate vote on the merits of a case. He has said that cameras in the Court’s oral argument could mislead the public because oral argument is only a portion of what the Court does, and cameras might alter the behavior of those in the courtroom itself.

Justices Kagan and Sotomayor were not included in previous oral argument information-seeking behavior research, but both have expressed some degree of support for cameras at oral argument, while acknowledging their views may change as their tenure on the Court grows. At a confirmation hearing in the Senate Judiciary Committee in 2009, Justice Sotomayor said she had voluntarily participated in experiments with cameras in the courtroom as a lower court judge and favored cameras in the Supreme Court. Although saying she would listen to the views of fellow Justices, Sotomayor also promised to do her part to persuade them about the virtues of cameras: “I’m a pretty good litigator,” she said. “I was a really good litigator and I know that when I work hard at trying to convince my colleagues of something after listening to them, they’ll often try it for a while.”

At her own confirmation hearing in 2010, Kagan said, “It would be a terrific thing to have cameras in the courtroom.” Under questioning from Senator Arlen Specter, Kagan said that televising oral argument would help Americans understand the Supreme Court better, and that

55. Id.
56. Id.
57. Id.
60. Id.
understanding ultimately would benefit the Court itself. After serving on the Court for a year, Kagan reiterated in 2011 that she still supported cameras at oral argument and her colleagues with contrary views had failed to persuade her. However, as has been the case with several of her colleagues, Kagan seems to be adopting an increasingly negative view of cameras as she serves longer on the Court, telling a University of Michigan audience in 2012 that “I have a few worries, including that people might play to the camera.”

In general, then, the views of current Supreme Court Justices on televising oral arguments can be divided into camps: (1) the view that broadcast video of oral argument would enhance public understanding of the Court and eventually benefit the Court as public esteem increases (Kagan, Sotomayor); (2) the view that the Court is moving slowly toward televising oral argument (Roberts, Breyer); (3) the view that broadcasts would mislead the public, or distort the Court and its processes (Scalia, Breyer, Kennedy, Ginsburg); (4) the view that the physical presence of courtroom cameras would cause lawyers and Justices to alter their behavior, perhaps grandstanding or “playing” to the cameras (Scalia, Roberts, Alito, Kagan); (5) the view that broadcast video would harm the institution of the Court and inhibit its constitutionally mandated duties (Kennedy); and (6) the view that broadcasting oral argument would destroy the privacy or “anonymity” of the Justices (Thomas).

III. MEDIA EFFECTS RESEARCH

Although an extended discussion is beyond the scope of this Article, it is worth noting here that American law in general and the Supreme Court in particular have an ambivalent relationship with social science research. Although the Supreme Court has relied on empirical research in the famous “Brandeis Brief” to make conclusions about the capacities

65. Note that Justices can be placed in more than one group.
of women,\textsuperscript{67} some scholars have urged the Court to make better use of empirical research.\textsuperscript{68} In the case of video cameras at oral argument, Justice Breyer has specifically called for independent empirical research.\textsuperscript{69} The Court has discussed the need for this research in several opinions on broadcasting and courtroom proceedings.\textsuperscript{70} Yet, scholars point out that Supreme Court Justices still reach empirical conclusions about the impact of cameras without justifiable basis.\textsuperscript{71}

This section does not purport to contain a comprehensive review of media effects research, but instead, some available research has been reviewed in the following areas roughly corresponding to views expressed by the Justices about possible impacts of broadcast video from the Supreme Court: (1) broadcast effects in civic education, including

\begin{quote}
\textsuperscript{67} See Kahn v. Shevin, 416 U.S. 351, 356 n.10 (1974) (referencing the "Brandeis Brief" filed in Muller v. Oregon, 208 U.S. 412 (1908)).

\textsuperscript{68} See, e.g., REYNOLDS \& BARNETT, supra note 66, at xxi ("According to Fargo, the U.S. Supreme Court appears to be more accepting of social science research today, but this acceptance has not played out in a meaningful way for First Amendment cases. Fargo notes that media effects studies rarely make it into court, and when lower courts use these data higher courts often overturn those decisions. He suggests that conducting longitudinal studies, publishing studies that show no effects, and preparing for judicial scrutiny of studies would make social science research more attractive in First Amendment cases.").

\textsuperscript{69} See supra note 52 and accompanying text.

\textsuperscript{70} See Estes v. Texas, 381 U.S. 532, 541 (1965) (plurality opinion) ("It is true that our empirical knowledge of [broadcasting's] full effect on the public, the jury or the participants in a trial, including the judge, witnesses and lawyers, is limited."); Chandler v. Florida, 449 U.S. 560, 576 n.11 (1981) ("Still, it is noteworthy that the data now available do not support the proposition that, in every case and in all circumstances, electronic coverage creates a significant adverse effect upon the participants in trials—at least not one uniquely associated with electronic coverage as opposed to more traditional forms of coverage. Further research may change the picture. At the moment, however, there is no unimpeachable empirical support for the thesis that the presence of the electronic media, ipso facto, interferes with trial proceedings.").

\textsuperscript{71} See James L. Hoyt, Courtroom Coverage: The Effects of Being Televised, 21 J. Broadcasting 487, 489 (1977) ("The overall controversy about cameras in courtrooms is unusual for the lack of specific data which have been brought to bear on the questions raised. When two U.S. Supreme Court Justices suggest, in opinions, that during televised trials witnesses' memories may fail and the accuracy of their statements may diminish, one expects to find compelling supporting data. But such evidence has not been systematically produced."). Hoyt conducted an experiment using college students playing roles as if in a court trial, and he concluded participants' behavior was not impacted by the presence of known hidden cameras when compared to no cameras. See also SUSANNA BARBER, NEWS CAMERAS IN THE COURTHROOM: A FREE PRESS-FAIR TRIAL DEBATE 61 (1987) ("[C]ases involving predictions of human behavior and psychological effects, such as Chandler v. Florida (1981), deserve more legitimate judgment than judicial perceptions of human nature. In its previous 'cameras' decision, Estes v. Texas (1965), the Court decided largely on the basis of speculation, supposition, and personal opinion, and, though the body of empirical literature now available does not answer every question—not even, perhaps, the most important ones—it nevertheless adds a significant new dimension to the complex debate.").
\end{quote}
agenda-setting; (2) broadcast television effects on political attitudes and behaviors, including building and erosion of social capital; (3) broadcast framing; and (4) broadcast comedy news.

Before discussing those areas, however, a basic introduction of media effects research methodology and results is necessary. In one simple application, media studies scholars use content analysis “to describe the nature of the content of communication in a systematic and rigorous fashion.” 72 A content analyst might code a mass media message for manifest and latent content, and then use the results of that coding to systematically study various aspects of the message. Meanwhile, surveys can be used to measure audience behavior and response to media messages. However, establishing a causal link between a mass communication message and audience behavior is no simple task. Among other techniques, researchers devise experiments and try to isolate variables that could cause certain audience behaviors. 73

Early media effects researchers concluded that the effects of media messages were complex and not simply akin to a “magic bullet” that injected audience members with a message leading to certain behavior. 74 Subsequent researchers developed theories of uses and gratifications to explore how people use mass media to meet their own needs; one of various phenomena in this area of study is that people sometimes develop parasocial relationships, meaning viewers feel and even act as if they had real-world relationships with media characters. 75 Albert Bandura is credited with developing social learning theory to explore how media contribute to learned behaviors. 76 Media effects studies have explored various questions relating to media violence, sexual content, persuasion, stereotypes and others. With regard to political media content and general news, researchers have studied how individuals’ need for cognition impacts their media consumption behavior, while many studies have focused on how media framing explains media professionals’

72. Glenn G. Sparks, Media Effects Research: A Basic Overview 20 (3d ed. 2010).
73. Id. at 20–43.
74. Id. at 53–60. Some early opposition to cameras in court seemed to reflect the magic bullet idea of media effects—that broadcast coverage would obviously and automatically result in violations of constitutional rights in trial settings. See, e.g., John A. Sutro, A Lawyer’s View of Courtroom Broadcasting, 12 J. Broadcasting 19, 21 (1967–1968) (“There is an obvious adverse effect of seeing trial episodes on television and hearing accompanying commentary. Such episodes admittedly are selected for their news value and inevitably will distort the juror’s perspective.”).
75. Sparks, note 72, at 63–68.
76. Id. at 85.
decisions about what audio and video to select, emphasize, exclude, and elaborate upon. 77

George Gerbner’s cultivation theory of media effects has been particularly influential to explain why and how “those who spend more time watching television are more likely to perceive the real world in ways that reflect the most common and recurrent messages of the television world, compared to those who watch less television but are otherwise comparable in terms of important demographic characteristics.” 78 Cultivation research has studied, among other things, how viewers’ perceptions of crime in the real world are impacted by their consumption of television news. 79 Cultivation research often considers the long-term impact of media messages.

A significant part of media effects research has focused on television, a nearly ubiquitous medium that so far remains dominant even in the face of new digital communication technology. Television news about Supreme Court cases tends to focus on the reaction to a decision, rather than the content of the opinion itself. 80 Only twenty percent of the Court’s decisions received coverage by network news outlets in one

77. Id. at 178–83.
78. Michael Morgan, James Shanahan & Nancy Signorielli, Growing Up with Television: Cultivation Processes, in MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 34 (Jennings Bryant & Mary Beth Oliver eds., Routledge 3d ed., 2009) (1994). Gerbner delivered a rhetorical blow against cameras in courtrooms when he wrote, immediately after the televised O.J. Simpson criminal trial in California: “It is high time to join other democratic countries in refusing to deliver our courts, juries, and defendants to television exploitation and experimentation whose consequences for lives and justice we may never know.” George Gerbner, Cameras on Trial: The “O. J. Show” Turns the Tide, 39 J. BROADCASTING & ELECTRONIC MEDIA 562, 567 (1995). Reflecting on his cultivation research, Gerbner further wrote:

As any student of communication (or any performer) knows, if you change the audience you change the performance. Televising trials in real time creates media events whose public ramifications feed back into the real-life event. Cameras transport, not just report.

They transport the sights and sounds of selected bits and bites and scenes of an ongoing event that they helped shape in the first place, and that they continuously interpret. That additional audiovisual element is the least informative and most prejudicial aspect of televised trials, an aspect that courtrooms should try to neutralize.

Id. at 563. Nonetheless, Gerbner acknowledged that “the courts and the media are in some ways dependent on each other” and that courts’ public image benefits from media attention, while the news media benefit from telling the dramatic and important stories gained in courtrooms. Id. at 564.
Television news’ need for winners and losers, as well as its reliance on individual anecdotes, can sometimes result in what Supreme Court Justices and others have called distortion. Although the Court’s own practices, chiefly the barring of cameras, undoubtedly complicate depictions of the Court on television, television news actually covers oral argument (albeit without video) better than other aspects of the Court’s work.

A. Media and Civic Education

More than two decades ago, two researchers distinguished between studies that measured mere exposure to media and those that examined attention actually paid to media messages. Unlike mere exposure to media (i.e., hours spent in front of the television), attention to media messages has been shown to contribute positively to various kinds of civic knowledge. Although some scholars had argued that exposure to television news was negatively correlated with public affairs knowledge, Chaffee and Schleuder concluded that attention to television news among adolescents and their parents was positively related to knowledge about political parties, candidates, and issues. In fact, when measuring attention and not merely exposure, television news distinguished itself from newspaper coverage in terms of civic knowledge gained by both adolescents and parents.

About fifteen years ago, two other scholars concluded, after a survey of more than 3,500 adults, that while consumption of regular television news was not more effective than newspaper consumption in obtaining political knowledge, viewing certain specialized television news

81. Id. at 11.
82. Id. at 21. Network TV news’ increasing focus on human interest has resulted in increased sensationalism, potentially distracting from the news’ social responsibility to facilitate self-governance through information. See Karen Slattery, Mark Doremus & Linda Marcus, Shifts in Public Affairs Reporting on the Network Evening News: A Move Toward the Sensational, 45 J. Broadcasting & Electronic Media 290 (2001).
83. SLOTNICK & SEGAL, supra note 80, at 77. An early study of news judgment by television news “gatekeepers” found that the most common elements among stories chosen for broadcast were timeliness and conflict. James K. Buckalew, News Elements and Selection by Television News Editors, 14 J. Broadcasting & Electronic Media 47, 49 (1969).
85. Id.
86. Id. at 92-102.
87. Id. at 102.
programs was highly effective. Viewers who regularly watched MacNeil/Lehrer NewsHour, 60 Minutes, 20/20, or anything on C-SPAN scored higher on a five-item political knowledge quiz than viewers of CNN or listeners of the National Public Radio program All Things Considered. The scholars also concluded that a decline in newspaper readership contributed to an overall decline in political knowledge and that this public affairs knowledge decline would not be reversed by regular television news viewing.

The rise of opinionated broadcast journalism, such as cable-television talk shows, does not necessarily hinder learning. In fact, the emotion, vividness, and value judgments of opinionated broadcasts may actually increase learning, although that increase could be offset by the tendency of viewers who perceive bias to focus on the source of the message rather than the content itself. As Americans’ media usage patterns migrate from newspapers and, to a lesser extent, from television, toward the Internet, there is some early evidence that media consumers will not necessarily become less informed. This research also applied some gloss to the uses and gratifications theory by positing that superiority of the Internet when compared to older media could actually be measured as a factor in media replacement.

One of the most influential articles in media effects research concluded that many people during the 1968 presidential campaign heard the news media, but few listened. However, as the news media repeated certain messages, the media set an agenda that drew attention to those campaign issues frequently discussed in the news media. Thus, it is commonly said that the news media do not tell us what to think, but they can tell us what to think about. More recent research indicates that television news may not only set the agenda for issues but also may have an attribute-priming effect, meaning that television news makes certain

89. Id. at 133.
90. Id. at 135.
92. Id. at 1185-86, 1193.
94. Id. at 200-04.
attributes of an issue easier for the memory to recall. In that sense, then, agenda-setting effects may go beyond simply telling us what to think about and begin to tell us what to think.

B. Political Attitudes and Behaviors, Including Social Capital

The effects of television on political attitudes and behaviors, including the building and erosion of social capital for an entity such as the Supreme Court, will be important areas for continued study as the Supreme Court moves toward allowing cameras at oral argument. Already, significant research exists to provide some insights on the likely impacts of cameras in the Court with regard to Americans’ civic mindset and behavior. Television news coverage of three court-ordered executions in Nebraska prompted two researchers to conclude that in such instances, broadcast news does not merely represent reality, but rather constructs its own reality. This happens because television news coverage may create for viewers a sense of authenticity and participation; in addition, television news may be able to create a more complete view of public events than print and other media. There is also support for the concern, discussed by Justice Breyer, that television news’ need for individual exemplars of widespread phenomena, coupled with the individualized nature of a Supreme Court case, may unduly affect television viewers’ perceptions.

Research has shown some support for the idea that viewing television may be tied to cynicism about politics, but other studies have shown that watching television may contribute to political interest and optimism about political affairs. One researcher argued that television
should not be treated as a monolith, but rather that studies of attitudes and behaviors relating to politics should take into account the type of programming and the television station viewed. Using this approach, Hooghe concluded that viewing television entertainment contributed to negative civic attitudes, but that viewing television news, particularly on a public broadcasting station, affected attitudes about politics in a positive way.

Media, particularly used in a school or other purposefully informational setting, play an important role in the development of social capital in young people. Social capital includes voluntary civic participation and interpersonal trust. While excessive television viewing among adolescents may not contribute to civic engagement, the use of Internet video among other online information could be effective. Contrary to claims that viewing late-night comedy television shows such as The Daily Show causes cynicism among adolescents, one study showed young people who viewed both regular television news and late-night political comedy shows were more likely than others to believe they could have an impact on the political system and to take steps to achieve that impact.

With regard to courts, media depictions are a less important predictor of attitudes than household income of the viewer. One study

101. Id.
102. Id. at 100; see also Pippa Norris, Does Television Erode Social Capital? A Reply to Putnam, 29 POL. SCI. & POL. 474, 479 (1996) ("We get, from American television, a diversity of channels, programs and choices. If some choose C-Span, Meet the Press, and CNN World News, they are likely to end up somewhat more interested in the complex problems and issues facing American government at the end of the twentieth century."). But see Lee B. Becker & D. Charles Whitney, Effects of Media Dependencies: Audience Assessment of Government, 7 COMM. RES. 95, 114 (1980) (concluding that dependency on television news was negatively related to knowledge, comprehension, and trust in government). With reference to this research conclusion by Becker and Whitney, however, another study concluded that while people who relied on television generally did report lower political activity, television was not the cause of that effect. See M. Mark Miller & Stephen D. Reese, Media Dependency as Interaction: Effects of Exposure and Reliance on Political Activity and Efficacy, 9 COMM. RES. 227, 245 (1982).
104. Id. at 65.
105. Id. at 79.
concluded newspaper reading is positively correlated with confidence in the criminal court system but found insignificant effect of political talk radio or television news. Given that reactions to both good and bad news in mass media depend much on audience members’ previously held attitudes toward individuals at the center of news, one might suggest that televising Supreme Court oral arguments would not create new effects but rather magnify already existing effects.

C. Framing

Framing research “offers a way to describe the power of a communicating text” or other mass communication message. Framing research involves the evaluation of choices made by one or more human beings in transferring information to other human beings. By selecting and emphasizing certain pieces of information, frames provide salience or meaning. In the run-up to the Persian Gulf War, for example, news sources adopted two dominant frames: “war now or sanctions now with war (likely) later.” A journalist may be objective and yet, through framing, manipulate news in a way that makes a balanced understanding for recipients difficult if not impossible. Hence much of the public discussion about bias or distortion in news really comes down to which frame a journalist chooses to adopt and impose on a story.

A conflict narrative or frame often reduces important social issues to a “police versus protesters” paradigm that can ignore the real need for public attention and action. News consumers’ sense of importance of a public policy issue can be affected by whether a journalist chooses to

108. Id. at 145–46.
111. Id. at 51–52.
112. Id. at 52.
113. Id. at 55.
114. Id. at 56–57.
frame the issue as one involving a clash of values or a clash of political strategies. The effect of television news frames was demonstrated by an experiment in which viewers watched different versions of a story about a Ku Klux Klan rally. A version of the story that framed the rally as a free-speech issue resulted in higher tolerance for the KKK among viewers than a version of the story that framed the rally as a threat to public order, even though the same set of facts was presented in both versions. When the news media collectively change a common frame for a major public issue such as the death penalty—for example, from a morality-based frame to one emphasizing flaws in the justice system—news consumers’ attitudes can shift significantly, because the new frame signals new information rather than arguments already considered and rejected.

D. Broadcast Comedy News

Much research in recent years has focused on Jon Stewart’s *The Daily Show* and the spin-off *Colbert Report* with Stephen Colbert, as well as other late-night comedy television shows. Research into the effects of these late-night Comedy Central programs is particularly relevant in light of the concerns expressed by Justice Scalia and others that the video of Supreme Court oral arguments would be edited, taken out of context, and used for entertainment purposes. Notwithstanding these criticisms, *The Daily Show* has proven to be effective at helping politically inattentive viewers pay more attention to political issues

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118. Id.


121. For example, two scholars concluded that even though viewers of *The Daily Show* reported more confidence in their own understanding of politics as a result of the show, those viewers also appeared to be more cynical about both electoral politics and the news media. Jody Baumgartner & Jonathan S. Morris, *The Daily Show Effect: Candidate Evaluations, Efficacy, and American Youth*, 34 AM. POL. RES. 341 (2006).
discussed on the show. The Daily Show, along with Jay Leno’s Tonight Show and David Letterman’s Late Show, may serve as a gateway to traditional cable and network news. The effect of late-night comedy on viewing political debates and engaging in political discussions is particularly strong among younger viewers.

As the line between entertainment and politics blurs, Stewart himself claims The Daily Show should not be taken seriously. Scholars, however, study intently the impacts of comedy news programs. One research study concluded Stewart’s show more sharply skewers Republicans than Democrats, and this impacts viewers’ attitudes. Yet another study concluded that Stephen Colbert’s efforts to make fun of conservative political commentators may actually result in increased affinity among viewers for Republican politicians and policies. While “fake news” shows like The Daily Show contain at least factual information, entirely fictional television dramas also impact audience attitudes about real-world topics such as the criminal justice system.

IV. MAKING USE OF SUPREME COURT VIDEO

The media effects studies discussed above could help guide discussion about possible outcomes of oral argument video broadcasts, but that process is complicated by the lack of data to study. In other words, because there are no actual examples of Supreme Court oral argument video, researchers must focus instead on experiments.

123. Lauren Feldman & Dannagal Goldthwaite Young, Late-Night Comedy as a Gateway to Traditional News: An Analysis of Time Trends in News Attention Among Late-Night Comedy Viewers During the 2004 Presidential Primaries, 25 POL. COMM. 401 (2008).
126. Id. at 98–99.
simulations, and comparisons with video taken from other courts. This Article did not undertake a scientific experiment to test effects of oral argument broadcasts, but the author and a group of students did undertake a simple simulation in an effort to generate research questions for future studies.

As a faculty member teaching an undergraduate advanced communications law course, the author led nearly two dozen students of public relations, advertising, journalism, and communications studies in the fall of 2011 to create mass communication content using video from a simulated U.S. Supreme Court oral argument. The purpose of the exercise was neither to exhaust all possible uses of Supreme Court video nor to mimic exactly what content might be produced if and when the Supreme Court authorizes oral argument video broadcasts. Instead, the purpose was simply to generate some of the types of mass communication material that might be produced in an effort to consider possible effects on viewers. Although subjective and speculative in nature, this exercise nonetheless provided some clarity and specificity generally lacking in legal and public policy debates about the relative merits of Supreme Court broadcasts.

A class of twenty-three undergraduate communications students spent several weeks of class time discussing the pros and cons of televising Supreme Court oral arguments. Following the actual arguments in *Golan v. Holder*129 on October 5, 2011, the class simulated oral argument from the case using copies of the transcript from the Supreme Court website. Members of the class took on the roles of Justices and lawyers, using the actual transcript to repeat the oral argument while other class members videotaped the proceedings. The simulation was conducted in a moot courtroom at the university law school.

Student camera operators used three angles—two views of the “Justices” and one view of the “lawyers” arguing the case. The result was a raw video segment that was then copied and distributed to members of the class for use in creating a mass communication project of their choosing. Students were instructed to use the video outtake in producing something they might be asked to produce in their respective fields of journalism, public relations, advertising, and communications studies. Students were encouraged to ground their work in experience gleaned from classes, internships, and part-time jobs in their fields. The

results described here give some indication of how actual Supreme Court oral argument footage might be used: 130

- A group of five broadcast journalism students produced a news segment about the issue of cameras in the Supreme Court, using the mock footage to illustrate what the video might look like. One of the student anchors said on the segment, “Most of the criticism that faces the broadcasting of Supreme Court trials [sic] comes straight from the Justices themselves.” A student reporter said, “What goes on in the Supreme Courtroom [sic] is monumental, and American citizens want to be a part of it. Right now those who somehow score a seat in the tiny courtroom are the only ones who get to see the history made there. But supporters of cameras in the courtroom are speaking loud.”

- A public relations student produced a political advertisement for former Republican presidential candidate Ron Paul. The ad showed a fictional “Justice Kagan” looking bored while an advocate and other Justices talk about the copyright law issues in Golan, and as courtroom dialogue drones on in the background, words appear on the screen: “Supreme Court Justice Elena Kagan . . . appointed by President Obama . . . and struggling to stay awake . . . Would you want her listening to your case? . . . At least she could ACT interested . . . Don’t let Obama fill our courts with incompetent judges . . . Vote Ron Paul for President 2012.” 131

- An advertising student produced a trailer for a new reality television show based on the Supreme Court. As music plays in the background, each Justice is pictured in turn and introduced as a character on the show. This particular episode of the reality show, given that the video came from the mock oral argument in Golan, is titled “Section 514 & American Copyright Law.”

- Two advertising students created a campaign called “Resist the Urge” that advocated against allowing cameras in the Supreme Court. Using video clips and still images taken

130. All projects are in possession of the author.
131. While a fictional Justice Kagan sat in on oral argument during this mock exercise, the real Justice Kagan did not participate in the Golan case. See Golan, 132 S. Ct. at 873.
from the video, the campaign included a billboard showing a couple of tired-looking, bored Justices with the tag line “Resist the Urge” and print ads in a similar vein with the sarcastic headlines “There’s a party on TV and you’re invited . . .” and “The Supreme Court may seem like riveting TV, but . . . .”

• Several communications studies students created a Qualtrics online survey in which they embedded a portion of the oral argument video. The survey involved pre-test questions to be answered before the video was viewed and post-test questions to be answered after viewing the video. Among other questions, survey respondents were asked to say whether they agreed or disagreed with the following: “I feel that the Supreme Court Justices are wise,” “Decisions in the Supreme Court are important,” and “I am interested in the Supreme Court.” In a small convenience sample of forty-nine respondents, forty-one of whom completed the survey, students discovered that more respondents said Supreme Court Justices were wise after viewing the video than before viewing the video.

• Another group of communications studies students created a proposal for a research study of oral argument at the Supreme Court using the broadcast video. Building on past research that has used transcripts,132 the students proposed using the video to measure judicial information-seeking behavior by examining voice inflection, gestures, and other visible and audible behaviors not evident on the written transcripts.

With these and similar mass communication messages in mind, discussion of the possible impacts of Supreme Court video can be relatively targeted. While the Supreme Court Justices may not enjoy being part of a political advertisement, broadcast news segment, research study, public relations campaign, or reality TV show, the effect of those messages on viewers and listeners is not automatically negative or harmful to the Court. Instead, the impacts would have to be tested using existing media effects research as a guide to formulating research questions and methodologies that would lead to empirically based conclusions. This Article does not undertake such research, and therefore

the comments below are merely points of discussion and suggestions for further research rather than conclusions based on scholarly study. The comments are given in the hope of sparking future scholars' interest and attention to the issues discussed.

V. POSSIBLE LONG-TERM EFFECTS OF SUPREME COURT VIDEO

Although the long-term effect on viewers of watching live video broadcasts of U.S. Supreme Court oral argument is necessarily speculative, some information might be gleaned from the experiences of other courts. While a comparison with the experiences of U.S. state courts would be fruitful, one could also turn to the highest national courts in other countries for an arguably better analogy. The purpose of this Article is not to engage in such a detailed analysis, but a few observations are made here that might spark further research by other scholars and that will set the stage for the discussion that follows.

The United States' northern neighbor would provide an excellent source of study. In contrast with the United States, where state courts and some lower federal courts have experimented with cameras in the courtroom but the U.S. Supreme Court has not, Canada generally does not have cameras in lower courts but has long allowed them in its Supreme Court. In the Canadian Supreme Court, "[m]ost courtroom proceedings are Webcast live and are later televised by the Canadian Parliamentary Affairs Channel." Although there is not a constitutional right to shoot video in Canada's courts, the topic of cameras in courtrooms has been discussed heavily in Canada for thirty years, and the Supreme Court has permitted judicial proceedings to be televised there since 1993. A Justice's retirement ceremony in 1980 was the earliest broadcast of any


134. Frequently Asked Questions, supra note 133.

135. See M. David Lepofsky, Cameras in the Courtroom—Don't Make a Constitutional Wrong into a Constitutional Right, 26 NAT'L J. CONST. L. 293, 295 (2010).


kind from Canada’s Supreme Court. 138 In Canada—as in fellow common-law countries England, Scotland, Australia, New Zealand, and the United States—studies have shown cameras do not have a detrimental effect on participants in courtroom proceedings. 139 Despite these findings of no negative impact, many judges continue to frown on cameras in their courtrooms even where court rules allow them. 140

While the Canadian Supreme Court’s practice of allowing cameras has been successful for nearly twenty years, the Canadian Judicial Council continues to oppose cameras in most Canadian courts. 141 One explanation is that there remains “[w]idespread antagonism towards sensationalist U.S. reporting” about court proceedings. 142 The media circus surrounding the mid-1990s O.J. Simpson case in California generally dampened public and judicial enthusiasm in Canada for cameras in courtrooms. 143 The same Canadian Supreme Court Justices whose own proceedings are televised upheld a lower court judgment in 2011 that banned video cameras not only from courtrooms but also from adjacent hallways, and prohibited broadcast of even the court’s official recording of a proceeding, bringing an outcry from journalists and free-speech advocacy groups. 144

The televising of proceedings in the Canadian Supreme Court has not always been flawless. In fact, some trouble arose in 1981 the first time television news crews with video cameras were allowed to cover the issuance of a ruling on live television. The immediacy of live television and the difficulty of interpreting Supreme Court opinions conspired to create an awkward situation for journalists. CBC News correspondent and anchor Peter Mansbridge related what happened:

The decision came down and it was one of these split decisions—no one could figure out what it meant. Trudeau was the prime minister and at that point he was on an overseas trip in Korea. So everybody was waiting to see how he was going to react to this decision. Our chief

139. Stepniak, supra note 137, at 802.
140. Id. at 803.
142. Id. at 335.
political correspondent at that time was David Halton, and he was covering that trip, so he was in Seoul. So suddenly I get word on my headset that Halton was available by phone, so I said something to the effect of, ‘Everyone is waiting for Prime Minister Trudeau’s explanation or answer to this question—what his reaction will be. Right now it’s the middle of the night in Korea. The prime minister is in bed, but David Halton is with him, and we’ve reached him on the phone.’ And I could hear this gasping at the other end of the line. 145

In the United Kingdom, the new Supreme Court allows Sky News to stream its proceedings on the Internet. The stream attracted 139,000 views in the first three months after the Court began hearing cases in 2009. 146 But the lessons that America can learn from the British experience go back more than 200 years to a time when the British House of Lords was still the highest appellate judicial body. Although the House of Lords never permitted video cameras to broadcast its judicial proceedings, the House of Lords did have experience sitting as a judicial body and allowing a new communications medium to observe and report on its proceedings. In the 1770s, the House of Lords allowed print news reporters into its chambers for the first time to directly report on proceedings there, and the lessons learned could have some bearing on the impact of a new communications medium—in this case, broadcast television—in the U.S. Supreme Court. 147

In Parliament in the late eighteenth century, the presence of print news reporters transformed the culture from one of gentlemanly oratory to one marked by public performance. 148 In the House of Commons, the newspapers’ reporting of debates beginning in the 1770s served to better inform the public, but caused the public to question of whether members of Parliament were sincere. 149 One prominent member of Parliament, Edmund Burke, once wrote, “It is very unlucky that the reputation of a speaker in the House of Commons depends far less on what he says there, than on the account of it in the newspapers.” 150

149. Reid, *supra* note 147, at 133–34.
150. *Id.* at 122.
The reluctance of Parliament to allow print reporters with all their accoutrements, however, actually inhibited accurate reporting. Until the mid-1770s, newspaper reporters’ very presence in the parliamentary galleries was often surreptitious by necessity, and it was not until 1783 that the taking of notes was allowed. Thus, many early parliamentary reports were the result of gossip, hearsay, and conversations in corridors or coffee houses. Beginning in about 1774, newspapers more freely published accounts of parliamentary proceedings, although reporters still had to rely on their memories. William “Memory” Woodfall of the London Morning Chronicle is credited with the prodigious feat of memorizing hours of parliamentary debate, though close analysis has shown that he relied also on the accounts of competitors and on transcripts from members of Parliament themselves.

Woodfall played a prominent role in newspaper coverage of what was probably the first judicial appeal to be covered “gavel-to-gavel” in the House of Lords: Donaldson v. Beckett in early 1774. That case pitted a Scottish printer named Alexander Donaldson against a group of London printers over the right to print and distribute copies of the poet James Thomson’s famous literary work The Seasons. The case culminated the decades-long “Battle of the Booksellers” and generated sufficient public and journalistic interest that Woodfall and other newspaper writers devoted hundreds of column inches to recounting speeches by lawyers, judges, and the lords during the course of nearly three weeks. Ultimately, the House of Lords made a strong statement against common-law copyright and in favor of the public domain, though the legal reporting services of the day confused the holding, and it was


153. Id.

154. Id. at 631.


156. Id. at 97.
the newspaper accounts that ultimately proved necessary for the public to understand precisely the rationales of the decision-makers.157

The influential scholar Jürgen Habermas has pointed to the advent of print journalism coverage in Parliament during this time as particularly noteworthy in developing a public sphere that allowed citizens to engage in conversations about official business and thus participate in democracy.158 Habermas posited that it was the news coverage of official activities of government that provided them with legitimacy in the eyes of the public, and therefore transparency is vital for any public institution desiring to engender public trust.159 While it was the expiration of licensing in 1694 that allowed the rise of the modern newspaper in London just a few short years later and thus began the process of forming modern democracy, the rise of mass media, political parties, and special interests ultimately denigrated the public sphere, according to Habermas.160 Thus, while print played a critical role in the rise of the public sphere, broadcast may have contributed to its decline. Still, contemporary scholars argue that public broadcasting, in particular, has opportunities to use its broadcast platform and new technologies to foster and even expand the public sphere.161

These cherry-picked facts from Canada and Great Britain are not meant to be comprehensive, but they do set the stage for discussion of the likely impacts of live Supreme Court broadcasts as they relate to the six positions taken by various Supreme Court Justices: (1) in favor because of educational benefits, (2) resignation that video eventually will arrive at oral argument, (3) against because of distortion, (4) against because of grandstanding; (5) against because of harm to Court as institution, and (6) against because of loss of privacy and “anonymity.”162

One complication, as has been demonstrated in this Article, is that media effects researchers sometimes appear to reach contrary conclusions. Early research seemed to indicate that exposure to television news actually harmed public affairs knowledge, but more recent

157. Id.
159. Id. at 237–38.
160. Id. at 171–81.
162. See supra notes 18–65 and accompanying text.
scholarship demonstrates the opposite. Scholars have concluded viewing television contributes to cynicism, while other researchers have found that television contributes to interest in and optimism about politics. Late-night infotainment television has been said to skew Republicans more than Democrats and thus influence viewers negatively toward Republicans, but other researchers have concluded the satirist Stephen Colbert actually enhances viewers' affinity for Republican figures and positions.

Still, the media effects research is remarkably consistent with regard to one important point. The research overwhelmingly shows that the direct-effect or magic-bullet theory of media effects is misguided and a limited-effect view is much more realistic. Thus, one must be careful about putting too much stock in categorical statements such as the dire predictions by Justice Scalia about harmful distortion and by Justice Thomas about the ruin of his colleagues' privacy and "anonymity." At the same time, overly optimistic predictions about the educational value of Supreme Court oral argument broadcasts, or their effect on civic attitudes and participation, should be moderated with the knowledge that the effects likely would be muted and clearly discernible only over the long term. Social learning and cultivation theories would predict that Supreme Court oral argument broadcasts will influence audience members' attitudes and behaviors with respect to the Court over time. With this major conclusion in mind, discussion turns to what might have been some of the outcomes had the Supreme Court accepted Brian Lamb's invitation for C-SPAN to televise the health-care case arguments. This discussion is limited to the major areas of focus raised by the Supreme Court Justices themselves with regard to the potential impacts of cameras.

A. Educational Benefits

There is support in the media effects literature for the assertions by Justices Sotomayor and Kagan that television broadcasts of oral arguments would increase knowledge about the Supreme Court. In accordance with the research by Robinson and Levy, Chief Justice Roberts and his colleagues could have significantly increased public

163. See Chaffee & Schleuder, supra note 84, at 103–04.
164. See Hooghe, supra note 100, at 84–85.
165. Morris, supra note 125, at 98–99.
166. Baumgartner & Morris, supra note 127, at 622.
understanding of the Court’s decisionmaking process in *National Federation of Independent Business v. Sebelius* had the Court accepted Lamb’s invitation to televise oral arguments in that case (Robinson and Levy noted, however, that only seven percent of the respondents in their survey were C-SPAN viewers\(^{167}\)).

While undoubtedly some ill-informed or imprecise speakers will unwittingly communicate misinformation—one of the broadcast journalism students in a class simulation, for example, referred to Supreme Court oral arguments as “trials”—in television news, the reality is that television broadcasts may be more effective than print in conveying knowledge about the Court.\(^{168}\) This is particularly true with respect to a channel such as C-SPAN, where viewers’ need for cognition might be particularly high. Video could be used for academic studies, such as examining Justices’ information-seeking behavior at oral argument, and would convey information not otherwise readily available for researchers. For example, video could be used to study gestures by Justices at oral argument, as well as to enhance available auditory clues relating to tone and voice inflection. This would contribute to understanding about Justices’ information-seeking behavior and how that might relate to ultimate outcomes of cases before the Court, information that could benefit both scholars and advocates.

Lambert reviewed several research studies, including unpublished dissertations, about the educational impact of television in courtrooms.\(^{169}\) One graduate student surveyed New Yorkers both before and after a state trial court experiment with cameras and concluded that viewers’ knowledge about and confidence in courts did not increase.\(^{170}\) Another doctoral student studied differences between televised court proceedings and those for which only artists’ sketches were available and concluded that television led to information gain but not attitudinal change.\(^{171}\) Commenting on these and other studies, including a pilot project in U.S. federal courts, Lambert concluded that more and better research is needed.\(^{172}\)

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170. *Id.* at 180 (Petkanas study).
171. *Id.* at 181 (Paddon study).
172. *Id.* at 203.
B. Resignation That Video Will Arrive, Concerns About Grandstanding and Loss of Privacy or "Anonymity"

Media effects research, per se, has little to say about whether the arrival of broadcast in Supreme Court oral arguments is inevitable. The statements of Chief Justice Roberts and Justices Breyer, Sotomayor, and Kagan provide the best material for this argument. Unlike Justice Scalia, who said he initially favored cameras in the court but came to oppose the idea over time, Justices Sotomayor and Kagan so far appear to be holding fast to their advocacy of cameras at oral argument. Justice Kagan, however, in 2012 expressed some reservation with respect to how cameras might affect courtroom participants. This concern is not without historical precedent, given that the eighteenth century advent of print reporters in Parliament generally, and the legal cases of the House of Lords particularly, transformed those proceedings into public performances.

Still, with the belief of Chief Justice Roberts that cameras are inevitable and with the arrival of younger Justices presumably more comfortable with television, it seems only a matter of time that a majority of Supreme Court Justices will favor cameras. Although television may create for some viewers its own reality, and may enhance the public-performance nature of oral argument for those being televised, the potential also exists for increased interest and participation from viewer-citizens. Just as the introduction of newspaper coverage in Parliament created public trust and understanding, so too the introduction of cameras at the Supreme Court could carve out a new sphere of public discussion and participation with respect to the Court.

Although Justice Scalia and even Chief Justice Roberts have expressed the fear that cameras would change the behavior of courtroom participants, the Justices retain control over their own behavior as well as the actions of lawyers who appear before them, though to a lesser extent. Although only experience would be definitive, it seems logical that lawyers arguing a case before the Supreme Court would be most motivated to do what will be effective with the Justices in order to win their case rather than scoring some television points in favor of boosting their careers or landing a Hollywood role. C-SPAN’s offer to serve as the pool video operation and provide footage to other outlets means that a large amount of equipment would not be required in the courtroom, and
previous studies have shown hidden cameras have little effect on courtroom behavior in an experimental trial setting.\textsuperscript{173}

Given that same-day audio was released of the health-care case oral arguments in March 2012 and considering that loud complaints have not been heard about lawyers grandstanding because of it, the leap to video may not effect a major change. In fact, the Court has released same-day audio nearly two dozen times in high-profile cases since 2000.\textsuperscript{174} The audio of the health-care oral arguments is available on YouTube\textsuperscript{175} and has been dissected by a scholar and litigation consultant who concluded, among other things, that the Justices spoke for 162 minutes, or 43\% of the time, during the three days of argument.\textsuperscript{176} The researchers also noted "63 episodes of public laughter, or about 10 laughs per hour."\textsuperscript{177} But there has been no outcry from the Justices or others that oral argument behavior is affected by release of same-day audio. The case of National Federation of Independent Business v. Sebelius provides some evidence that the lack of cameras in a high-profile oral argument may actually be more disruptive than cameras would be; journalists are tempted to either provide live updates from the courtroom in violation of the rules or rush in and out of the courtroom to some distraction of others present.\textsuperscript{178} Had the cameras been present in that case, those disruptions would not have been necessary.

Justice Thomas is concerned that cameras in the Court will destroy his colleagues' "anonymity." But Supreme Court Justices were never meant to be anonymous. It's likely that television cameras would make the Justices more recognizable in public, perhaps making them feel more likely to be approached or even threatened. It is possible that some aspect of the Justices' privacy might be at stake, but the personal privacy and reputational concerns of public officials have been of little moment to the Court itself when the opposing values are transparency, accountability, and democracy.\textsuperscript{179}

\textsuperscript{173} See Hoyt, supra note 71.
\textsuperscript{174} Supreme Court Responds to Grassley's Request for Audio, Video Coverage of Health Care Reform Arguments, supra note 11.
\textsuperscript{177} Id.
\textsuperscript{178} See Day Two: Updates on the Supreme Court Hearings on the Health Care Law, supra note 13.
\textsuperscript{179} See, e.g., N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that public officials'
C. Distortion

As is the case above with grandstanding concerns, the fear of distortion that could occur with Supreme Court broadcasts may be mitigated by the Court’s current practice of releasing same-day audio in high-profile cases. If audio “snippets” or sound bites have not caused serious problems, then the same sound bites with video may not do so, either. Of course video may be more attractive to certain television programs, and thus perhaps the audio plus video will be more prominent than audio alone has been. But the advent of video at oral argument seems more likely to enhance current effects than create new ones.

The media effects research demonstrates that distortion in news media is not generally the result of bias. Instead, distortion occurs naturally in the process of transferring three-dimensional reality to two-dimensional media. Journalists, of course, sometimes choose winners and losers, and broadcast journalists focus on individual anecdotes and examples.\textsuperscript{180} Cultivation research suggests that television creates an alternate reality that causes some people to change their view of the reality in which they actually live.\textsuperscript{181} Many of these effects already are present in media coverage of the Supreme Court even without live video, though television could magnify the impact.

In any case, researchers have concluded that even opinionated broadcasts may enhance learning due to emotion and vividness.\textsuperscript{182} Agenda-setting theory makes clear that individuals remain free to choose what they will think about the images and sounds delivered to them on television. Had the Court accepted Lamb’s invitation, and had that resulted in greater use of the oral argument video and more coverage, the result likely would have been that more people would have paid attention to the health-care case, but the video would not necessarily have caused them to think one way or the other about it.\textsuperscript{183}

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\textsuperscript{180.} See SLOTNICK & SEGAL, supra note 80, at 10.
\textsuperscript{181.} Morgan et al., supra note 78, at 34-43.
\textsuperscript{182.} See Feldman, supra note 91, at 1185, 1193.
\textsuperscript{183.} See McCombs & Shaw, supra note 95.
\end{flushright}
D. Harm to the Court

Justice Kennedy’s concern that the very constitutional role of the Court is threatened by the presence of cameras at oral argument has little or no support in the media effects literature. In fact, substantial research suggests that the increased media prominence that video coverage would bring may actually result in greater social capital for the Court among young people and others.\textsuperscript{184} Particularly when viewed and discussed at school and in other educational or information-seeking settings, including on the Internet, Supreme Court video could be effective in helping media consumers to understand the Court better and feel more engaged with its processes and decisions. In any case, socioeconomic and educational factors, rather than television coverage, are major predictors of attitudes toward American courts.\textsuperscript{185}

One study from Israel demonstrated that media frames of a nation’s high court may be beneficial to the Court itself.\textsuperscript{186} If negative frames about an issue change to positive frames, media consumers’ entire paradigm may shift, and previously entrenched views could be ignored in favor of perceived new information.\textsuperscript{187} The advent of Supreme Court video, and its use on late-night infotainment television, could actually engage otherwise inattentive viewers with respect to the Court’s work.\textsuperscript{188} Such use could also lead viewers to other news programs in a gateway effect.\textsuperscript{189}

The potential harm to the Court from video being used in an undignified way is a real concern, although some aspects of the use of video could remain in the Justices’ control. A reality television show about the Court such as the one proposed by one of the students in the class simulation would never happen without the cooperation of the Justices, their clerks and other Court personnel. Since they would be virtually guaranteed not to cooperate in such a venture, the more lurid aspects of today’s television programming would not be likely to occur with regard to the Court. A somewhat more likely outcome would be for the Court video to further drag the Court into politics, such as in the

\textsuperscript{184} See Romer, Jamieson & Pasek, supra note 103, at 79.
\textsuperscript{185} See Moy et al., supra note 107, at 146.
\textsuperscript{186} See Bogoeh & Holzman-Gazit, supra note 15, at 79–82.
\textsuperscript{187} See Dardis et al., supra note 119, at 133–35.
\textsuperscript{188} See Cao, supra note 122; Feldman & Young, supra note 123.
\textsuperscript{189} Feldman & Young, supra note 123, at 416.
fictional Ron Paul TV ad created by one of the class members. But the same ad could be created today using video of a Justice at a law school speech or other setting.

VI. CONCLUSION

The invitation by Justice Breyer for researchers to study the effects of televising judicial proceedings should be heeded. At the same time, the Supreme Court itself should take note of the many media effects studies already in existence, including some that deal directly with televising of high court proceedings in Canada, Israel, and elsewhere. The new UK Supreme Court’s online video streaming of arguments will provide fodder for research. As future studies develop, researchers could focus on the reasons viewers might tune in to Supreme Court TV (uses and gratifications, agenda-setting, framing); the attitudinal effects (social learning theory, cultivation, need for cognition, stereotypes); and the behavioral effects (persuasion, causation, copycat, third-person effect, spiral of silence).

Research studies show that media effects are real but limited. There will not likely be a magic-bullet effect of televising Supreme Court oral arguments. Rather, effects will be subtle and develop over time. Some of the Justices’ fears and concerns about televising oral arguments have basis in the research, while others do not. In the long run, the educational and civic participation benefits for the public, plus the strategic and public relations benefits for the Court, likely outweigh the real, but not overwhelming, negatives in framing or satire. Whether the Court ultimately allows television cameras in oral argument or not, the decision should not be made based on conjecture and personal opinion when relevant empirical research exists.

At the same time, as Justices and scholars have noted, more research is needed. Perhaps the most important conclusion and recommendation of this Article is that, in the absence of actual U.S. Supreme Court oral argument video, simulations such as the simple class exercise discussed here can prove helpful for research purposes. If undertaken on a larger

190. See supra text accompanying note 132.
191. As previously noted, the Justices appear on television remarkably frequently, including at circuit court bar conferences, law schools and other events. So the mere appearance of a Justice on television is not at issue here; rather, the only difference is the Justices appearing in their official role on the Court itself.
192. For an argument in favor of cameras after a review of potential effects, see RONALD L. GOLDFARB, TV OR NOT TV: TELEVISION, JUSTICE, AND THE COURTS (1998).
scale, oral argument reenactments using actual transcripts can provide a body of research data that can then be examined for effects on viewers. Simulations of this type can supplement ongoing research from a lower federal courts pilot project,\textsuperscript{193} with the added benefit that simulated oral argument video would be based on transcripts from actual Supreme Court cases.
