International Judicial Legitimacy: Lessons from National Courts

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How can international courts better establish their legitimacy? We can better answer this question by first focusing on what scholars have learned about how national courts build legitimacy over time. The literature suggests that national courts strategically build legitimacy by balancing their own policy preferences with those of their audiences. In so doing, they attempt to avoid instances of court curbing that can diminish legitimacy over the long run. Applying a similar strategy may be more difficult for international courts for two key reasons: (1) they serve audiences with more diverse preferences than national courts; (2) they are less likely to be able to predict which rulings will result in significant backlashes from these audiences.

Introduction

Why has legitimacy been elusive for many international courts?[1] How can they improve their prospects for legitimacy in the future? This Article argues that we can better understand the problem of international judicial legitimacy by examining similar problems faced by national courts and the ways in which some national courts have overcome them. The mechanisms by which courts can build legitimacy may be similar with respect to both types of courts. By examining these mechanisms, we can, in turn, identify the differences between the strategic settings of international and national courts that may make the use of such mechanisms more cumbersome for international courts.

Scholars have learned much about how national courts establish legitimacy and why some have been more successful than others in doing so. By analyzing this research and focusing on how national and international courts deal with

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1 For evidence that international courts have struggled to build legitimacy, see Erik Voeten, *Public Opinion and the Legitimacy of International Courts*, 14 Theoretical Inquiries L. 411 (2013).

similar problems, I hope to identify some of the key ways in which their strategic settings differ. I focus in particular on permanent international review courts (such as The Court of Justice of the European Union (CJEU), European Court of Human Rights (ECtHR) and Inter-American Court of Human Rights (IACHR)), which have institutional features and strategic settings that are most similar to those of national review courts. For the sake of clarity, when I discuss "international courts" in this Article, I am referring primarily to this type of international court.

I argue that the apparent deficit of international judicial legitimacy — or the frequent doubts about it — may occur in part because of crucial information problems faced by international courts. Judges need information about the preferences of their audiences. Judges on national courts face fewer hurdles in overcoming these information problems, so they are better able to ascertain the preferences of their audiences than are judges on international courts. Also, International courts serve publics with diverse and often conflicting preferences, which exacerbates the problem. As a result, international courts are more likely to make decisions without anticipating the extent to which they may be opposed by national publics and actors, especially constituent governments. In such situations, we often observe instances of court curbing, i.e., the types of rebukes against international courts that call their legitimacy into question. Both national and international courts can use these instances of curbing to overcome their information problems. To the extent that international courts draw lessons from instances in which they overstep the preferences of their audiences, they will be better able to anticipate the responses to their future decisions and, over time, better able to build their legitimacy.

The Article begins in Part I by arguing that, despite their differences, the strategic environments of national and international courts have many similarities. We can therefore learn about the problems facing international courts by examining similar problems facing national courts. Part II continues by focusing on the distinctions between specific support and diffuse support for courts, the determinants of these factors, and their effects. A key determinant of legitimacy appears to be the extent to which publics and other actors perceive judicial decisions to have been made based on legal, rather than political, motivations. Part III notes that this poses a puzzle because the scholarly literature on both national and international courts increasingly points to the extent to which judges are motivated by policy concerns, despite being constrained to some extent by legal rules. Yet, as several scholars have argued, judges have overcome this problem because publics often do not discern the extent to which policy motivates judicial decisions. Part IV compares the strategic environments of national and international courts. It argues that two key differences in these environments that make the problem of legitimacy

more difficult for international courts are the difficulty of ascertaining their audiences' preferences and the diversity of those preferences.

I. Legitimacy of National and International Courts

The distinctions often made between the problems of legitimacy facing national and international courts are partly rooted in longstanding assumptions made by scholars of international relations. The most relevant of these assumptions is that international politics is inherently characterized by anarchy, whereas national politics are hierarchic.[2] If this were so, the legitimacy problems facing these two types of courts would indeed be significantly different. National courts operating under a fully hierarchic system would need to rely relatively little on their own legitimacy, instead relying on the broader legitimacy and coercive power of the national government. International courts, operating in a setting in which they could not rely on other international governmental actors for enforcement, would be significantly dependent on parties to willingly go along with their verdicts or on powerful states to enforce them.

Yet these sharp distinctions are increasingly being challenged by international relations theorists. Many now argue that both national and international politics operate on a continuum between hierarchy and anarchy, with neither fully at either end of this continuum.[3] Thinking of the differences between national and international politics in this way has important implications for the study of courts and their legitimacy. As Jeffrey K. Moore Staton and Will H. Moore recently argued,

> [f]ailing to recognize essential similarities between the problems international and domestic courts face as they attempt to constrain governments retards our progress in understanding judicial power. Empirically, it unnecessarily limits the set of courts on which scholars think to test their claims**.** Theoretically, it obscures critical research questions. Most obviously, if legal hierarchy is constructed domestically, then it is reasonable to ask whether it can be constructed internationally.[4]

Like international courts, national courts face considerable difficulties in establishing their legitimacy. Without direct enforcement powers, national courts

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2 *See* Kenneth N. Waltz, Theory of International Politics (1979).

3 *See, e.g.*, David A. Lake, Hierarchy in International Relations (2009); Helen V. Milner, *Rationalizing Politics: The Emerging Synthesis of International, American, and Comparative Politics*, 52 Int'l Org. 759 (2005).

4 Jeffrey K. Staton & Will H. Moore, *Judicial Power in Domestic and International Politics*, 65 Int'l Org. 553, 556-57 (2011).

must attempt to establish legitimacy so that their decisions will nonetheless be followed. At times, national courts can rely on the enforcement powers of other branches of government,[5] but this approach may not suffice when judicial decisions seek to constrain the power of the other branches. Nonetheless, many national courts do appear to have significant legitimacy. James L. Gibson and Gregory A. Caldeira have recently noted that "[t]he paradox is that though courts have fewer formal powers than most other political institutions — possessing the power of neither the purse nor the sword — some courts seem to have an uncommon ability to get people to abide by disagreeable rulings."[6]

This is not to say that national and international courts are in all ways the same, or that they operate in identical strategic environments. The strategic settings of national and international courts differ in crucial ways, which will be discussed in more detail in Part IV. Nonetheless, we can use what scholars have learned about how national courts establish legitimacy in their strategic settings in order to better understand why doing so appears to be difficult for international courts in different settings.

II. What We Know About the Legitimacy of National Courts

Several ideas from the literature on national courts are relevant to our understanding of international judicial legitimacy, each of which will be discussed in more detail below. The first is the distinction between specific support for a court and diffuse support for a court. The second is the relationship between diffuse support, compliance and legitimacy. The third is the set of key determinants of judicial legitimacy at the national level.

A. Specific Support and Diffuse Support

The distinction between specific support and diffuse support was developed by David Easton.[7] Specific support for an institution is the extent to which

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5 *See generally* Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 Int'l Rev. L. & Econ. 349, 352-58 (1993). A famous example occurred when U.S. President Dwight Eisenhower sent U.S. troops to Little Rock, Arkansas in 1957 to help enforce the U.S. Supreme Court's orders to desegregate public schools.

6 James L. Gibson & Gregory A. Caldeira, *Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court*, 65 J. Pol. 1, 2 (2003).

7 David Easton, A Systems Analysis of Political Life (1965).

individuals find that the institution has fulfilled their demands for policy (or policy preferences). Diffuse support is the extent to which individuals have a favorable disposition toward an institution and are consequently willing to tolerate decisions by that institution that they view negatively.

Diffuse support becomes especially important when an institution creates policies with which many members of its audience disagree. When diffuse support for an institution is sufficiently high and individuals disagree with that institution's decisions, they will nonetheless concede its authority to make those decisions. In the judicial context, diffuse support is therefore crucial when courts decide cases in ways that go against the preferences of the general public. As Caldeira and Gibson argue, "under some circumstances courts achieve a moral authority that places them above politics and allows them the freedom to make unpopular decisions."[8]

Specific support and diffuse support are related. When specific support is low (i.e., a court makes unpopular decisions), that may mean that diffuse support is high,[9] allowing the court the leverage to make those decisions. There is a delicate balance between the two types of support, however; if a court makes too many such decisions, its diffuse support may eventually erode. Among new institutions, specific support may be high but diffuse support low, especially because the latter can take time to build.[10]

B. Diffuse Support, Legitimacy and Compliance

The concept of diffuse support is closely related to legitimacy. Consider the following prominent definitions of legitimacy from the international law and international relations literatures. Thomas Franck argues that legitimacy is "that quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with the right

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8 *See* Gibson & Caldeira, *supra* note 6, at 2; *see also* James L. Gibson & Gregory A. Caldeira, *Changes in the Legitimacy of the European Court of Justice: A Post-Maastricht Analysis*, 28 Brit. J. Pol. Sci. 63 (1998); Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Change*, 2 Law & Soc. Rev. 357 (1968); Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 Nw. L. Rev. 985 (1990).

9 *See* Tom R. Tyler, Why People Follow the Law: Procedural Justice, Legitimacy, and Compliance (1990); James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 Am. Pol. Sci. Rev. 343 (1998).

10 *See* Gibson, Caldeira & Baird, *supra* note 9.

process."[11] Ian Hurd defines it as "the normative belief by an actor that a rule or institution ought to be obeyed. It is a subjective quality, relational between actor and institution, and defined by the actor's perception of the institution."[12]

Several notions underlie both definitions. The first is that legitimacy is ultimately a subjective belief held by individuals who are subjects of the institutions. The second is that legitimacy is a key factor in determining compliance. Of course, actors may have many reasons for complying with a decision, such as coercion, but some compliance may be the result of legitimacy. Finally, both Franck's and Hurd's concepts of legitimacy suggest that it is particularly relevant when actors do not otherwise agree with the decision.[13] All of these notions suggest a conceptual similarity between diffuse support and legitimacy. Both concepts rely on the subjective belief of individuals that a decision should be complied with even if they do not specifically support it. Compliance is an important effect of diffuse support,[14] as it is an important effect of legitimacy.[15]

C. The Determinants of National Court Legitimacy

Scholars have learned much about the determinants of diffuse support for national courts, and we can apply this knowledge to international courts. Three factors appear to be crucial. The first is that individuals who know more about their national courts are more likely to express diffuse support for them.[16] As

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11 Thomas M. Franck, *Legitimacy in the International System*, 82 Am. J. Int'l L. 705, 706 (1988).

12 Ian Hurd, *Legitimacy and Authority in International Politics*, 53 Int'l Org. 379, 381 (1999).

13 *See* Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 Am. J. Pol. Sci. 635 (1992).

14 *See id.*; Samuel C. Patterson, Ronald D. Hedlund & G. Robert Boynton, Representatives and Represented: Bases of Public Support for the American Legislatures (1975).

15 Others go further, arguing that diffuse support is a synonym for legitimacy, *see, e.g.*, James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 Pol. Res. Q. 187, 188 (2005).

16 *See* John R. Hibbing & Elizabeth Theiss-Morse, Congress as Public Enemy: Public Attitudes Toward American Political Institutions (1995); Walter F. Murphy, Joseph Tanenhaus & Daniel Kastner, Public Evaluations of Constitutional Courts: Alternative Explanations (1973); Gregory Casey, *The Supreme Court and Myth: An Empirical Investigation*, 8 Law & Soc. Rev. 385 (1974); Gibson, Caldeira & Baird, *supra* note 9.

a result, when courts fail to recognize the need for diffuse support and pursue their work in anonymity, they may not accrue diffuse support.[17] A corollary to this point is that individuals who know more about politics tend to be biased toward thinking that courts are more legitimate than other political institutions, whereas individuals who do not follow politics closely tend to view courts and other political institutions similarly.[18] A second key factor is that diffuse support for a court does not depend on specific support for a decision. With respect to the U.S. Supreme Court, for example, Caldeira and Gibson found that "the mass public does not seem to condition its basic loyalty toward the Court as an institution upon the satisfaction of demands for particular policies or ideological positions."[19] Finally, levels of diffuse support for national courts change over time, and older courts tend to accrue greater levels of diffuse support. Possible explanations for this are that, over time, judges gain more experience and publics receive more positive signals about courts.[20]

In part, these insights have already been applied to the study of international courts. Caldeira and Gibson conducted surveys across European states to measure levels of specific support and diffuse support for the CJEU. They found that, in general, Europeans tended to have little information about the CJEU. As a result, they tended to form opinions about the CJEU based on their broader opinions of European institutions. This is similar to the finding that individuals who tend not to follow their national courts closely tend to form opinions about those courts based on how they perceive the other branches of their national governments.[21] Caldeira and Gibson also argue that, because the CJEU is a relatively new institution, it cannot rely on the high levels of diffuse support that national courts such as the U.S. Supreme Court have built over time.[22]

Perhaps the most important insight to have emerged from the study of the legitimacy of national courts is that the perception that courts are apolitical

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17 Gibson & Caldeira, *supra* note 6.

18 *See* James L. Gibson & Gregory A. Caldeira, *Confirmation Politics and The Legitimacy of the U.S. Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination*, 53 Am. J. Pol. Sci. 139 (2009).

19 Caldeira & Gibson, *supra* note 13, at 658.

20 *See* Hibbing & Theiss-Morse, *supra* note 16; Gibson, Caldeira & Baird, *supra* note 9; Joseph Tanenhaus & Walter F. Murphy, *Patterns of Public Support for the Supreme Court: A Panel Study*, 43 J. Pol. 24 (1981).

21 *See* Gregory A. Caldeira & James L. Gibson, *The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support*, 89 Am. Pol. Sci. Rev. 356 (1995).

22 *See id.*

is crucial to the development of diffuse support. If individuals believe such decisions were made based on policy-oriented reasons, they are less likely to abide by then. Over time, however, if individuals perceive such decisions to have been made based on legal, nonpolitical principles, diffuse support will accrue, and individuals will abide by such decisions.[23] By contrast, as Staton notes, if the public perceives that judges are acting strategically (i.e., making decisions motivated by reasons other than legal norms), it is unlikely to view judicial decisions as legitimate.[24]

Gibson, Caldeira, and Lester Kenyatta Spence argue that certain individuals have a "positivity bias" toward courts; that is, these individuals are more likely to believe that courts have made legitimate decisions than that other political bodies have done so.[25] Expanding on this, Gibson and Caldeira argue that positivity bias is closely connected to the view that courts are different from other political institutions and that judicial decision-making is largely a nonpolitical process.[26] In other words, when individuals perceive courts as being separate from the political process, they are more likely to express positive bias, or diffuse support, for courts. Why would individuals have such perceptions of courts and not of other government bodies? Gibson, Caldeira and Spence find that, in the United States, the Supreme Court has more institutional legitimacy than Congress because practices such as logrolling, vote-trading and compromise convey the impression that the Congressional process is political rather than impartial.[27]

Closely related to legitimacy and public support for courts is the concept of court curbing. Curbing occurs when a court decision draws a backlash from governmental actors— resulting in a formal or informal diminution of court power. Curbing has several effects on courts. In the short run, the effects can be negative, indicating that the court has made a decision for which there is little specific support, either among the public or the legislature. As Tom

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23 Gibson, Caldeira & Spence, *supra* note 15, at 188; *see also* Allison Marston Danner, *Prosecutorial Discretion and Legitimacy*, 97 Am. J. Int'l L. 510 (2003) (arguing that the International Criminal Court's legitimacy depends in large part on the perceived impartiality of the prosecutor).

24 Jeffrey K. Staton, Judicial Power and Strategic Communication in Mexico (2010).

25 James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47 Am. J. Pol. Sci. 354 (2003); James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 Brit. J. Pol. Sci. 535 (2003).

26 Gibson & Caldeira, *supra* note 18, at 143.

27 Gibson, Caldeira & Spence, *supra* note 15.

S. Clark argues, "political attacks on the Court serve as signals of a lack of specific support for the Court, which in turn indicates that further judicial recalcitrance will not be tolerated and that the Court will not be able to effectively set policy."[28] Courts therefore have an interest in avoiding such confrontations.[29]

Nonetheless, courts can use such instances to update their information about other actors' preferences. In other words, it may be possible for courts to use those instances in which they learn that specific support for decisions is lacking in order to avoid similar situations in the future, thus reducing their tendency to issue rulings with little specific support and, in the long run, allowing them to build diffuse support. As Clark notes with respect to the U.S. Supreme Court, "[b]ecause Congress is more directly connected to the public than the Court, observing institutional signals such as Court curbing can help solve an informational problem confronting a Court concerned about its standing with the public."[30] In other words, while instances of court curbing can have short-term negative impacts for courts, they also have important benefits. Courts, both national and international, can learn from these instances and put themselves in a better position to make decisions that allow them to build their legitimacy.

III. National Courts as Strategic Actors

Based on the literature on national courts discussed so far, the prescription for legitimacy seems simple, then: international courts should gain legitimacy over time if they are perceived to be apolitical or impartial. Yet this notion conflicts with other recent work on both national and international courts, which indicates that both types of institutions are highly policy-oriented and responsive to political pressures. Scholars of U.S. courts, for example, often analyze those institutions using strategic models that assume judges are constrained by other actors, including their colleagues, the public, other courts,

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28 Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 Am. J. Pol. Sci. 971, 974 (2009).

29 *See* Georg Vanberg, The Politics of Constitutional Review in Germany (2005); Staton, *supra* note 24; Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 Am. Pol. Sci. Rev. 1139 (1987); Clifford James Carrubba, *A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems*, 71 J. Pol. 55 (2009); James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction*, 45 Am. J. Pol. Sci. 84 (2001).

30 Clark, *supra* note 28, at 972.

and other political bodies.[31] Many argue that, when making these strategic calculations, judges are concerned with policy outcomes. As David Rohde and Harold J. Spaeth argue, "[e]ach member of the Court has preferences concerning the policy questions faced by the Court, and when the justices make decisions they want the outcomes to approximate as nearly as possible those policy preferences."[32]

There is considerable evidence that these concerns weigh in the minds of judges. On collegial courts, judges tend to vote differently when they are on panels that contain only members of a similar political ideology than when they are on panels that contain judges with multiple political ideologies.[33] Judges also base their citations to precedent, in part, on their policy preferences and their interactions with their colleagues. They cite more authoritative precedent when separate opinions threaten the authority of their own opinions, and they cite more authoritative precedent on ideologically diverse courts in order to maintain a majority coalition.[34]

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31 *See, e.g.*, Lee Epstein & Jack Knight, The Choices Justices Make (1998); Forrest Maltzman, James F. Spriggs II & Paul J. Wahlbeck, Crafting Law on the Supreme Court: The Collegial Game (2000); Lee Epstein & Tonja Jacobi, *The Strategic Analysis of Judicial Decisions*, 6 Ann. Rev. Pol. Sci. 341 (2010); Jeffrey R. Lax & Charles M. Cameron, *Bargaining and Opinion Assignment on the US Supreme Court*, 23 J.L. Econ. & Org. 276 (2007); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va. L. Rev. 1717 (1997); David W. Rohde, *Policy Goals, Strategic Choices, and Majority Opinion Assignments on the U.S. Supreme Court*, 16 Midwest J. Pol. Sci. 652 (1972); Jeffrey K. Staton & Georg Vanberg, *The Value of Vagueness: Delegation, Defiance, and Judicial Opinions*, 52 Am. J. Pol. Sci. 504 (2008).

32 David Rohde & Harold J. Spaeth, Supreme Court Decision Making 72 (1976); *see also* Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (2002); Chris W. Bonneau, Thomas H. Hammond, Forrest Maltzman & Paul J. Wahlbeck, *Agenda Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court*, 51 Am. J. Pol. Sci. 890 (2007); Saul Brenner & Harold J. Spaeth, *Majority Opinion Assignments and the Maintenance of the Original Coalition on the Warren Court*, 32 Am. J. Pol. Sci. 72 (1988); Forrest Maltzman & Paul J. Wahlbeck, *May It Please the Chief? Opinion Assignments in the Rehnquist Court*, 40 Am. J. Pol. Sci. 421 (1996).

33 *See* Revesz, *supra* note 31; Cass R. Sunstein & Thomas J. Miles, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. Chi. L. Rev. 823 (2006); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va. L. Rev. 301 (2004).

34 *See* Yonatan Lupu & James H. Fowler, *Strategic Citations to Precedent on the U.S. Supreme Court*, 42 J. Legal Stud. (forthcoming 2013).

In addition, judges strategically attempt to set precedents that they believe will be followed and implemented by other actors, including political actors.[35] In some situations, empirical evidence indicates that judges consider how their decisions will affect their chances of promotion, particularly when political actors have influence over such decisions.[36] More generally, the court's relationship to the other branches of government, including the political preferences of those branches, has considerable effects on the judicial process.[37] When making their decisions, judges are also influenced by appeals from interest groups and are attentive to public opinion.[38] As an example of the influence of public opinion, the greater the public support for the U.S. Supreme Court, the more likely it is to strike down federal laws.[39] Public support for the U.S. Supreme Court also affects the ideologies of its decisions.[40]

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35 *See* Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 Am. J. Pol. Sci. 1018 (1996).

36 *See* Erin B. Kaheny, Susan Brodie Haire & Sara C. Benesh, *Change over Tenure: Voting, Variance, and Decision Making on the U.S. Court of Appeals*, 52 Am. J. Pol. Sci. 490 (2008); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. Rev. 1377 (1988).

37 *See* Maxwell Stearns, Constitutional Process: A Social Choice Analysis of Supreme Court Decision-Making (2002); Epstein & Knight, *supra* note 31; William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331 (1991); Maltzman, Spriggs II & Wahlbeck, *supra* note 31; Keith E. Whittington, *Interpose Your Friendly Hand: Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 Am. Pol. Sci. Rev. 583 (2005).

38 *See* Thomas Marshall, Public Opinion and the Supreme Court (1989); Vanberg, *supra* note 29; Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 Am. Pol. Sci. Rev. 50 (1976); Paul M. Collins, *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 Law & Soc. Rev. 807 (2004); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J. Pub. L. 279 (1957); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. Pol. 1018 (2004); Jeffrey Staton, *Constitutional Review and the Selective Promotion of Case Results*, 50 Am. J. Pol. Sci. 98 (2006); Georg Vanberg, *Legislative-Judicial Relations: A Game Theoretic Approach*, 45 Am. J. Pol. Sci. 346 (2001).

39 *See* Clark, *supra* note 28.

40 *See* McGuire & Stimson, *supra* note 38. It should be noted that this statistical analysis was careful to control for the ideologies of the justices themselves. By

Evidence that courts are strategic and policy-oriented is certainly not limited to American courts. Georg Vanberg argues that the German Constitutional Court's positions result, in part, from the court taking into account the relationship between its own preferences and those of the government and the public.[41] Staton demonstrates that judges in Mexico take into account their level of public support when deciding to rule against the government.[42] Judges in Argentina have also been shown to behave strategically, carefully considering the government's political power and the importance of cases to the government before deciding to rule against it.[43] These findings suggest that national courts are far from apolitical, but rather operate in a space that is both motivated and constrained by politics. While judges are policy-oriented, they also have a preference for institutional legitimacy and attempt to prevent confrontations that threaten this legitimacy.[44]

IV. Applying These Lessons to International Judicial Legitimacy

Much of the recent literature on international courts suggests that they are affected by many of the same forces as national courts. International judges face political constraints analogous to those faced by domestic judges.[45] They also have differing policy preferences and vary in the ways in which they use their positions to pursue those preferences.[46] Attempting to pursue their policy preferences in the face of constraints by outside actors and their colleagues, international judges respond strategically, in ways analogous to

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doing so, the authors were able to isolate the separate effects of judicial ideology and public ideology.

41 Vanberg, *supra* note 29, ch. 2.

42 Staton, *supra* note 24.

43 *See* Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy*, 96 Am. Pol. Sci. Rev. 291 (2002); *see also* Gretchen Helmke, *The Origins of Institutional Crises in Latin America*, 54 Am. J. Pol. Sci. 737 (2010).

44 *See* Vanberg, *supra* note 29; Caldeira, *supra* note 29; Carrubba, *supra* note 29; Rogers, *supra* note 29; Staton, *supra* note 38.

45 *See* Clifford J. Carrubba, Matthew Gabel & Charles Hankla, *Judicial Behavior Under Political Constraints: Evidence from the European Court of Justice*, 102 Am. Pol. Sci. Rev. 435 (2008).

46 *See* Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 Am. Pol. Sci. Rev. 417 (2008).

national court judges.[47] Like their counterparts on the U.S. Supreme Court, judges on the ECtHR cite case precedents strategically, choosing citations in order to maximize the likelihood that national courts will comply with their decisions.[48] This literature suggests, therefore, that international judges are neither outside nor above politics; while they may be constrained by legal principles, they nonetheless seek certain political outcomes and interact strategically with other political actors.[49]

This poses a puzzle to international judicial legitimacy. On the one hand, the literature on national courts suggests that international judges can promote the legitimacy of their institutions by appearing impartial and apolitical. Over time, they should be able to build diffuse support by making decisions that are specifically supported by their audiences and that give the impression they are based on legal principles. On the other hand, the same judges are politically motivated. How, then, can international courts possibly increase their institutional legitimacy?

A relatively simple answer may be that, although many academics recognize the political motivations of judges, the general public does not. Thus, international courts could continue to base their decisions, in part, on policy concerns, but nonetheless develop legitimacy over time, so long as courts can prevent the public from appreciating their motivations. Tom Tyler and Gregory Mitchell, for example, argue that individuals who follow courts more closely tend to have less realistic ideas of how judges make decisions and that this leads to enhanced judicial legitimacy.[50] This may be because individuals who are more aware of the judicial process tend to be the types of individuals who perceive the process as being apolitical and law-based. Gibson and Caldeira argue that the reason individuals who pay more attention to courts are more likely to find them legitimate is that such exposure to the judicial process causes these individuals to view courts as being outside the

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47 *See* Marc L. Busch & Krzysztof J. Pelc, *The Politics of Judicial Economy at the World Trade Organization*, 64 Int'l Org. 257 (2010); Carrubba, Gabel & Hankla, *supra* note 45; Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 Int'l Org. 339 (2001).

48 *See* Yonatan Lupu & Erik Voeten, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, 42 Brit. J. Pol. Sci. 413 (2012).

49 For a related argument, see Shai Dothan, *How International Courts Enhance Their Legitimacy*, 14 Theoretical Inquiries L. 455 (2013).

50 Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 Duke L.J. 703 (1994).

political process.[51] Likewise, John M. Scheb II and William Lyons identify what they call the "myth of legality" or the belief that "cases are decided by application of legal rules formulated and applied through a politically and philosophically neutral process of legal reasoning."[52]

If the myth of legality is the path to international judicial legitimacy, then that path may appear relatively straightforward at first glance. Yet this notion is not entirely satisfying. Why do we observe international courts making decisions that result in backlashes that put their legitimacy at risk? Consider the recent example of the *Lautsi v. Italy* decision of the ECtHR.[53] In 2009, the Court ruled that, by placing crucifixes in the classrooms of private schools, Italy had violated two provisions of the European Convention on Human Rights[54] guaranteeing religious freedom.[55]

The public outcry over the decision was widespread, not only in Italy but also in several other Member States of the Council of Europe.[56] In the appeal to the Grand Chamber of the ECtHR, thirty-three members of the European Parliament, several prominent NGOs, and over a dozen national governments intervened to attempt to convince the court to uphold or reverse the decision. The Grand Chamber reversed the decision, holding that Italy's actions fell within the margin of appreciation of the Convention and that "the fact that there is no European consensus on the question of the presence of

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51 Gibson & Caldeira, *supra* note 18.

52 John M. Scheb II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 Soc. Sci. Q. 928, 929 (2000); *see also* Dothan, *supra* note 49. With respect to American courts, Gibson and Caldeira refer to this as the belief that "judges make decisions not on the basis of their ideologies but rather strictly according to the syllogisms of stare decisis." Gibson & Caldeira, *supra* note 18.

53 Lautsi v. Italy, App. No.30814/06, Eur. Ct. H.R. (Mar. 18, 2011), *available at* http://www.echr.coe.int/echr/resources/hudoc/lautsi_and_others_v__italy.pdf.

54 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

55 Lautsi v. Italy, App. No.30814/06, Eur. Ct. H.R. (Nov. 3, 2009), *available at* http://hudoc.echr.coe.int/webservices/content/pdf/001-95589?TID=lwiuzrpiwk.

56 *See, e.g.*, Paddy Agnew, *Ruling Against Crucifixes in Italian Schools Sparks Anger*, Irish Times, Nov. 11, 2009, at 9; John Hooper, *Human Rights Ruling Against Classroom Crucifixes Angers Italy*, Guardian, Nov. 3, 2009, http://www.guardian.co.uk/world/2009/nov/03/italy-classroom-crucifixes-human-rights; *Via il crocefisso dalle scuole; Vaticano: Sentenza miope* [*On Crucifixes in Schools; Vatican: Myopic Judgment*, Corriere Della Sera, Nov. 3, 2009, http://www.corriere.it/cronache/09_novembre_03/crocifisso-aule-scolastiche-sentenza-corte-europea-diritti-uomo_e42aa63a-c862-11de-b35b-00144f02aabc.shtml).

religious symbols in State schools . . . speaks in favour of that approach."[57] Now, it might simply be the case that the initial decision was incorrect on purely doctrinal grounds and that the Grand Chamber's ruling corrected that decision. Another interpretation of events, however, would be that, bowing to public and political pressure, the Grand Chamber chose to back off from the earlier decision in order to preserve the standing of the Court.[58]

Although I do not endorse either interpretation, and we may never know the Grand Chamber's intentions, one can plausibly interpret these events in a manner consistent with the theory discussed above. Under such an interpretation, the ECtHR initially made a judgment for which there was insufficient specific support. The resulting backlash included an implicit threat of curbing; an international court can afford to make only so many such decisions before risking its own mandate. Recognizing this, the court backed away from its initial decision. In the process, the initial decision resulted in decreased diffuse support for the court, but the court learned a great deal about how far it could push certain areas of the law without generating a backlash.

If maintaining the appearance that judges are apolitical while making decisions partly motivated by politics is the key to enhancing legitimacy in the long run, then it is not immediately obvious why this should be more challenging for international courts than it appears to be for many national courts. One reason may be that some international courts are relatively new; diffuse support takes considerable time to develop and accrue. Yet several international courts have been in existence for significant amounts of time and have issued many decisions, so this is likely not the only explanation.

This suggests that, despite the similarities in the mechanisms by means of which national and international courts can establish legitimacy, the differences in the strategic settings of these courts can make the use of such mechanisms more cumbersome for international courts. In the remainder of this Article, I will suggest two potential ways in which the strategic settings of national and international courts differ and how these might make the process of accruing

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57 Lautsi v. Italy (2011), at 29.

58 Stanley Fish has argued that the Grand Chamber's decision was highly dubious from a legal perspective — a view which, if accurate, would suggest the Grand Chamber was not acting on doctrinal grounds alone. Stanley Fish, *Crucifixes and Diversity: The Odd Couple*, N.Y. Times, Mar. 28, 2011, http://opinionator.blogs.nytimes.com/2011/03/28/crucifixes-and-diversity-the-odd-couple/ ("What bothers me is the spectacle of a court declaring with a straight face that the state-mandated display of crucifixes has nothing to do with religion or indoctrination, and supporting its conclusion with arguments that don't pass the laugh-test for half a second").

legitimacy more difficult for international courts. These two issues are not mutually exclusive, but, to the contrary, appear to be highly overlapping.

First, international courts may generally have audiences with more diverse preferences than national courts. International courts, on average, have larger audiences than national courts, hearing cases from multiple, often very different countries. Very often this results in a constituency with sharply divided preferences with respect to the interpretation and promulgation of international law. National publics clearly do not have uniform preferences, but nonetheless international courts tend to answer to actors with more diverse preferences by virtue of having jurisdiction over disputes arising from multiple states.

When a court has an audience with more diverse preferences, it is more likely to make controversial decisions. That is, in a group with diverse preferences, a decision that garners specific support from some may result in significant opposition from others. In some cases, those who do not support the decision may simply not comply with it. This is not to say that international courts should or do make decisions based simply on the preferences of governments and publics. Yet courts facing threats to their power from other actors (in particular, challenges to their independence) choose their actions carefully.[59] They may, at times, challenge the preferences of other actors, but doing so excessively can have negative consequences. As Walter Mattli and Anne-Marie Slaughter argue with respect to the CJEU, "[t]he Court could not outrun its constituency without losing its legitimacy"[60] — that is, had the court made too many decisions for which there was little specific support, it would risk losing diffuse support. In addition, they argue that

> judicial decisions that consistently and sharply contradict majority policy preferences are likely to undermine perceptions of judicial legitimacy and can result in legislative efforts to restrict or even curtail judicial jurisdiction — the scope of judicial power over particular classes of cases. An astute judge will anticipate these reactions and seek to avoid them.[61]

Serving audiences with diverse — and often conflicting — preferences, international courts may often find it more difficult to avoid such reactions.

A second possible explanation is that the process of accruing legitimacy is more difficult for international courts than for national courts because

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59 *See* Tom Ginsburg, Judicial Review in New Democracies (2003); Matthew C. Stephenson, *Court of Public Opinion: Government Accountability and Judicial Independence*, 20 J.L. & Econ. Org. 379 (2004).

60 Walter Mattli & Anne-Marie Slaughter, *Revisiting the European Court of Justice*, 52 Int'l Org. 177, 181 (1998).

61 *Id.* at 197-98.

international courts have less information than national courts about their audience's preferences. It seems likely that national court judges similarly face a degree of uncertainty regarding domestic actors' preferences,[62] although this uncertainty is tempered by having more experience with their home country and more direct access to information about public opinion. Especially with a diverse audience, it is often difficult for international courts to discern the preferences of the public and of the political actors in the applicable states.[63]

This level of uncertainty makes it more difficult for international courts to build diffuse support. Vanberg argues that a national court "becomes less deferential and more powerful as the support it can expect from the public in a confrontation with the legislature increases."[64] Yet it is not only necessary for judges (both on national and international courts) to be astute in such situations; they must also have sufficient information regarding their audience's preferences. When a national or international court fails to gauge the preferences of its audience, the response can be some form of court curbing, especially when the applicable legislature takes action to block or undo a judicial decision. In other words, when courts cannot anticipate negative reactions to their decisions, they sometimes make decisions they may not have made had they been able to anticipate such reactions. Thus, the more difficult it is for courts to determine how others may react to their decisions, the more likely we are to observe court curbing and other negative reactions to judicial decisions. In the long run, international courts can use these instances to learn about their audience's preferences and potentially reduce the occurrence of curbing.

Conclusion

What does this mean for the future legitimacy of international courts? I have suggested that we can learn much about this problem by applying the literature on national courts to international courts. The underlying problems faced by both types of courts are similar in many ways, suggesting that international courts can accrue legitimacy over time by making decisions that are — or at least appear to be — motivated by nonpolitical goals. By focusing on the ways in which the problems of international and national judicial legitimacy resemble each other, I have attempted to identify the key ways in which they

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62 *See* Clark, supra note 28.

63 There are, of course, other key differences between national and international courts, including differences in the appointment processes of judges.

64 Vanberg, *supra* note 29.

also differ. I have suggested that the diversity of audience preferences and an uncertainty about those preferences may be crucial ways in which the strategic settings of national and international courts differ.

The significant problems facing international courts can result in frequent curbing of these institutions and in decreased levels of specific support for their decisions in the short run. Nonetheless, to the extent that international courts use these occasions to learn about the preferences of national actors, there is also reason to expect that they will be able to build legitimacy in the long run. These issues bear further research and analysis, especially regarding the ways in which international courts could develop institutional features that may help overcome these problems, including building mechanisms by means of which they can gather information on others' preferences and expectations in advance of judicial rulings.