DOES QUALITY MATTER? THE INFLUENCE OF PARTY BRIEFS AND ORAL ARGUMENTS ON THE U.S. SUPREME COURT

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Briefs are the primary mechanism driving decision making in current appellate advocacy—at least according to advocates, judges, and scholars. Many argue that they provide the most substantial information to the court on which the justices base their decisions. To this point, former Assistant Solicitor General Carter Phillips, who has argued over 80 cases before the United States Supreme Court, asserted "[t]he decision-making process is 99.9 percent based on the briefs. The oral argument is not going to be the basis on which you are going to drive somebody to your side of the case very often, if ever."[1] Along similar lines, Chief Justice John Roberts of the United States Supreme Court said in an interview, "The oral argument is the tip of the iceberg—the most visible part of the process—but the briefs are more important."[2] Justice Ruth Bader Ginsburg agreed: "Of the two components of the presentation of a case, the brief is ever so much more important. It's what we start with; it's what we go back to . . . oral argument is important, but

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1. Carter G. Phillips, *Advocacy Before the United States Supreme Court*, 15 T.M. COOLEY L. REV. 177, 189–90 (1983).

2. Bryan Garner, *Interviews with United States Supreme Court Justices*, 13 SCRIBES J. LEGAL WRITING 1, 6 (2010) (transcript of interview with Chief Justice John G. Roberts, Jr.).

far less important than the brief."[3] The potential for briefs to play major roles in appellate outcomes is also described in scholarly articles on the subject as well.[4]

Professors Timothy Johnson, Paul Wahlbeck, and James Spriggs published a seminal article examining how advocates' oral argument prowess correlates with success before the Court.[5] To do this, the authors utilized a unique dataset composed of Justice Blackmun's oral argument grades based on his assessment of the quality of advocates' oral arguments.[6] The authors' analysis shows a strong correlation between Justice Blackmun's argument scores and justices' votes on the merits.[7] This study was a major advance in our understanding of the role of oral arguments in Supreme Court decision making.

One important caveat of this study is that the study authors do not control for the role of merits briefs. Due to the general legal consensus on the importance of briefs, this empirical element is a potentially important missing piece in the analysis of how the justices come to their decisions since we know that justices rely on both oral arguments and party briefs.[8] Do oral arguments still

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3. *Id.* at 136 (transcript of interview with Justice Ruth Bader Ginsburg).

4. *See, e.g.*, Laura P. Moyer, Todd A. Collins & Susan B. Haire, *The Value of Precedent: Appellate Briefs and Judicial Opinions in the U.S. Courts of Appeal*, 34 JUST. SYS. J. 62 (2013) (describing how more-experienced counsels' briefs often drive judges' use of precedent in their opinions); Ryan C. Black et al., *The Role of Emotional Language in Briefs Before the Supreme Court*, 4 J.L. & CTS. 377 (2016) (arguing that advocates who use emotional language in their briefs lose credibility with the Court, consequently the likelihood justices will vote in their client's favor decreases).

5. Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99 (2006).

6. *Id.* at 104. Blackmun's notes also contained other miscellaneous information ranging from the law school the advocate attended to how he thought other justices would vote in the case. Amanda C. Bryan, Rachael Houston & Timothy R. Johnson, *Taking Note: Justice Harry A. Blackmun's Observations from Oral Argument about Life, the Law, and the U.S. Supreme Court*, 45 J. SUP. CT. HIST. 44, 51–57 (2020).

7. Johnson et al., *supra* note 5, at 108–12.

8. Research shows that the justices are also influenced by lower court briefs and amicus briefs. *See, e.g.*, Pamela C. Corley, Paul M. Collins, Jr. & Bryan Calvin, *Lower Court Influence on U.S. Supreme Court Opinion Content*, 73 J. POL. 31 (2011) (arguing lower court opinions influence the content of Supreme

matter after controlling for party briefs? Are briefs actually more important than oral arguments, as advocates and the justices claim?

Since Blackmun did not measure brief quality the same way he graded oral arguments, there was no overall parallel measure of brief quality at the time of the study by Johnson, Wahlbeck, and Spriggs.[9] With recent advances in software, however, the quality of briefs can now be quantified and analyzed alongside the quality of oral argument. This article applies tools from a piece of software called BriefCatch to provide writing quality scores to the same set of cases analyzed in Johnson et al.'s 2006 article. In doing so we examine the comparative role of briefs and oral argument quality in Supreme Court decision making. While BriefCatch grades are not a perfect companion to Justice Blackmun's grades for oral arguments, especially because they are calculated exogenously from the justices, as opposed to Blackmun's grades, it provides us a measure for brief quality and in doing so allows us to extend the study of the mechanisms affecting Supreme Court decision making beyond what was previously possible. In addition to measuring the writing quality of briefs, we also include another measure of brief quality—the number of Supreme Court precedents cited—in order to capture the legal authority relied on in the brief.[10]

We find that, after controlling for elite attorneys and the quality of oral argument, a higher BriefCatch grade is not associated with the final vote on the merits;

Court opinions when Supreme Court justices perceive incorporating lower-court language will aid in making effective law and policy); Paul Collins, Jr., Pamela C. Corley & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 L. & SOC'Y REV. 917 (2015) (arguing that Supreme Court justices will incorporate amicus brief language into their opinions when doing so will help them make effective law and policy).

9. *See generally* Johnson et al., *supra* note 5.

10. While precedent cited provides a general measure of the law used in a brief's arguments and consequently the robustness of the legal argument, it is only a possible component of brief quality. The potential correlation between precedent cited and brief quality is not causal as we do not speculate on whether the extent of law cited in a brief will necessarily by itself lead to a higher quality brief.

however, there is an association between how well-grounded the brief is in precedent and the final vote on the merits. Furthermore, our study provides continued support for Johnson et al.'s finding that the probability of a justice voting for a litigant increases dramatically if that litigant's lawyer presents better oral arguments than does the competing counsel, a result that holds even after controlling for the quality of the brief.[11] These results are important for three reasons. First, given that the workings of the Court are often shrouded in mystery and the Court was designed as the primary body of the federal government with responsibility to interpret the Constitution, it is important to understand the different components of its decision-making process. Second, the findings inform our understanding of judicial behavior by helping us better gauge the importance of briefs and oral arguments in the decision-making process. The fact that judicial decisions are associated with quality lawyering before the Court suggests the value of looking beyond ideology and strategy to explain Supreme Court decision-making.[12] By showing an association between winning and quality lawyering, we offer practical guidance to practitioners. Our findings suggest important implications for the role of persuasion in politics more generally. For example, recent research suggests that political persuasion in social media is most likely to occur when people are presented with well-reasoned arguments.[13] Thus, it is important to understand whether quality argumentation matters, both orally and in writing.

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11. *See* discussion *infra* part V (Results).

12. *See, e.g.*, *supra* note 5, at 108 ("The results . . . show that the justices do indeed respond to the quality of oral argumentation. Even when controlling for the most compelling alternative explanation—a justice's ideology—and accounting for other factors affecting Court outcomes, the oral argument grades correlate highly with a justice's final vote on the merits.").

13. Homero Gil de Zuniga, Matthew Barnidge & Trevor Diehl, *Political Persuasion on Social Media: A Moderated Moderation Model of Political Discussion Disagreement and Civil Reasoning*, 34 INFO. SOC'Y 302, 310–11 (2018).

We begin by examining the role of briefs in the Supreme Court and the development of measures for the quality of briefs in the Court's decisions. We then discuss some of the current analyses of oral arguments to clarify our current understanding of their role in the decision-making process. We then present our data and methods, our analyses that incorporate briefs into the decision-making process, and lastly present our concluding thoughts.

I. THE IMPORTANCE OF BRIEFS

While briefs clearly play a large role in the Supreme Court advocacy process, this is a role that evolved greatly over time. Historically, briefs were not even necessary in Supreme Court cases and it was not until 1821 that parties before the Supreme Court were formally required to submit briefs.[14] In fact, according to former Chief Justice William Rehnquist, "It would seem that inside of a hundred years the written brief has largely taken the place that was once reserved for oral argument. For that reason, an ability to write clearly has become the most important prerequisite for an American appellate lawyer."[15]

In the early years of the Court, there were few limits on the time allotted to oral arguments. Arguments in *McCullogh v. Maryland*,[16] for instance, ran for six days and ended on a Saturday afternoon.[17] Rehnquist and others explained the rise in the prominence of Supreme Court briefs relative to oral arguments as a time-saving mechanism, since the justices could not spend as much time in oral arguments as their case dockets grew.[18] This

14. William H. Rehnquist, *From Webster to Word-Processing: The Ascendance of the Appellate Brief*, 1 J. APP. PRAC. & PROC. 1, 2 (1999).

15. *Id.* at 3.

16. 17 U.S. 316 (1819).

17. David C. Frederick, *Supreme Court Advocacy in the Early Nineteenth Century*, 30 J. SUP. CT. HIST. 1, 10 (2005).

18. William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 MERCER L. REV. 1015, 1017–19 (1983); Frederick, *supra* note 17, at 12; *see also* Suzanne

time pressure minimized the amount of information advocates could convey during the oral proceedings. Briefs were and are therefore a necessary mechanism of efficiency for the Court. They allow the justices to study the parties' arguments wherever they go and on their own time.[19] They also allow them to distribute their workload among their clerks in ways not possible with oral arguments.[20]

As briefs became a focal point for modern appellate advocacy, lawyers and judges saw less room for oral arguments to add dimensions beyond the parties' arguments already presented in their briefs.[21] Since judges see parties' briefs before oral arguments, they often use them to prepare for arguments and to form initial opinions about the merits of cases.[22] As Black, Owens, Hall, and Ringmuth write: "[B]riefs provide attorneys their only real opportunity to present their best arguments to the Court without interruption. Many judges formulate lasting impressions of a case from the briefs alone."[23] Especially in the last several decades, justices dominate oral arguments with their questions, curtailing advocates' abilities to get through many of their prepared points.[24] This questioning helps the justices focus oral arguments on points not clarified in the briefs but does little to allow advocates to get to their most salient propositions.

Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1179–85 (2004).

19. THE SUPREME COURT: A C-SPAN BOOK FEATURING THE JUSTICES IN THEIR OWN WORDS 112 (Brian Lamb, Susan Swain & Mark Farkas eds., 2011).

20. *See, e.g.*, ISAAC UNAH, THE SUPREME COURT IN AMERICAN POLITICS (2009) (referencing law clerks' roles in reading cert petitions, preparing for cert conference, and assisting the justices during the deliberation process after oral argument).

21. Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 13–14 (1986).

22. Albert Tate, Jr., *The Art of Brief Writing: What a Judge Wants to Read*, 4 LITIG. 11, 13 (1978).

23. *See* Black et al., *supra* note 4, at 380.

24. Patricia M. Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 J. APP. PRAC. & PROCESS 7, 18 (1999).

One piece of evidence supporting the importance of briefs is the justices' regular citations to them in their opinions. During the 2018 Term for instance, the justices cited to briefs in approximately 87 percent of argued cases.[25] These citations may reveal keys to the justices' decisions, as this example from *Mathis v. United States* illustrates:

> In the real world, there are not many cases in which the state courts are required to decide whether jurors in a burglary case must agree on the building vs. boat issue, so the question whether buildings and boats are elements or means does not often arise. As a result, state-court cases on the question are rare. The Government has surveyed all the state burglary statutes and has found only one—Iowa, the State in which petitioner was convicted for burglary—in which the status of the places covered as elements or means is revealed. See Brief for United States 43, and n. 13. Petitioner's attorneys have not cited a similar decision from any other State.[26]

Still, as behavioral studies have shown, justices have unique ideological dispositions toward many issues the Court hears that may strongly impact their decisions.[27] Briefs give the justices the ability to test whether their ideological views align with particular parties' arguments as they help justices form their initial impressions in cases. In this way, the justices may well know whether their views align with a parties' argument before the case is argued. The robust connection between justices' ideological values and votes further accentuates

25. Adam Feldman, *Empirical SCOTUS: What the Justices Cited in OT 2018*, SCOTUSBLOG (July 24, 2019, 11:16 AM), https://www.scotusblog.com/2019/07/empirical-scotus-what-the-justices-cited-in-ot-2018/.

26. 579 U.S. 500, 539 (2016) (Alito, J., dissenting).

27. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002) (scientifically analyzing Supreme Court decisions using an attitudinal model that posits Supreme Court decisions are influenced by the ideological attitudes and values of the justices); LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2013) (explaining judicial behavior through a labor market model where judges are motivated by the same pecuniary and nonpecuniary forces as other workers).

the role that briefs may play in forming justices' views in cases.[28] While none of these studies discount the role of oral argument in decision making, they do show that multiple mechanisms are at play, including several inputs that the justices access prior to oral argument.

II. ORAL ARGUMENTS

Oral arguments play a key role in the Supreme Court advocacy process. They are especially useful for the justices to assess aspects of cases not immediately apparent in briefs. In this way they play an important role in clarifying information for the justices that would not be possible without interaction between attorneys and the justices.[29] They also allow particular justices to gauge other justices' positions on issues prior to the conferences where they give their initial votes on case merits.[30]

There is also empirical support for the influence of oral argument on the content of Supreme Court opinions. Johnson compared the issues raised only in oral arguments with the syllabi of the majority opinions and found that a significant percentage of the syllabi points came from oral arguments, concluding that oral arguments provide an independent source of information that the justices ultimately use in making substantive decisions.[31]

While they may not always lead to the justices' positions in cases, oral arguments are often the first time when the justices give a sense of where they stand on the

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28. *See* Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 817–20 (1995).

29. Timothy R. Johnson, *Information, Oral Arguments, and Supreme Court Decision Making*, 29 AM. POL. RSCH. 331, 346–47 (2001); *see also* EPSTEIN ET AL., *supra* note 27, at 311.

30. *See* Timothy R. Johnson et al., *Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the U.S. Supreme Court?*, 29 WASH. U. J.L. & POL'Y 241, 246 (2009) ("[T]he Justices assert they can determine how their colleagues are going to decide a case based on the type and tone of questions they pose to attorneys during oral arguments.").

31. Johnson, *supra* note 29, at 346–48.

issues in a case. Thus, oral arguments can help others generate predictions on the justices' potential votes in a way that is distinct from other outlets. One way that justices give a sense of how they may vote on the merits is through their questions. Current research indicates that justices tend to ask more questions to the parties that they vote against on the merits.[32]

This predictive quality of oral arguments is also evident in the tone of the justices' questions. One study, using the *Dictionary of Affect in Language*, found that justices tend to use harsher language when questioning the party they will vote against.[33] More recently, several scholars measured the justices' vocal pitches during oral argument.[34] This study showed that when justices display greater emotional arousal, as indicated by higher vocal pitch, during the questioning of one advocate in a case relative to another, this can be a highly predictive sign that the justice will vote against that advocate on the merits.[35]

These uses of oral argument show the multifaceted nature of this interactive environment. They also show that the justices have goals for the arguments that are oftentimes strategic. And, as mentioned previously, Johnson, Walhbeck, and Spriggs found that "the relative quality of the competing attorneys' oral arguments [as defined by Justice Blackmun's oral argument grades] influences the justices' votes on the merits."[36] They reached this conclusion after controlling for variables they asserted most likely as the strongest alternative explanation for the justices' votes: the justices' relative ideological preferences.[37] In the next section, we probe how and why briefs may also help explain the justices'

32. *See, e.g.*, Johnson et al., *supra* note 30, at 259–61; EPSTEIN ET AL., *supra* note 27, at 305–33.

33. Ryan C. Black et al., *Emotions, Oral Arguments, and Supreme Court Decision Making*, 73 J. POL. 572, 579 (2011).

34. Bryce J. Dietrich, Ryan D. Enos & Maya Sen, *Emotional Arousal Predicts Voting on the U.S. Supreme Court*, 27 POL. ANALYSIS 237, 239–42 (2019).

35. *Id.* at 242.

36. Johnson et al., *supra* note 5, at 109.

37. *Id.* at 106–07.

decisions and why briefs should be included in analyses of the factors affecting these decisions.

III. PREVIOUS RESEARCH ON THE INFLUENCE OF BRIEFS

Briefs are often touted as one of the justices' main tools used in their decisions. They give the justices a way to continually review parties' arguments that can be used in ways ranging from helping them decide on a vote to drafting majority or separate opinions.[38] Briefs also give the justices a controlled universe of information about the case. As a result, the justices do not often have to go outside of the briefs to find additional information relevant to the case.[39] Along with the many reasons supporting the proposition that briefs should play an important role in Supreme Court outcomes, several areas of study already present ways in which briefs impact the Court.

Briefs clearly are a utility for the justices that they use as they generate their opinions. Aside from the justices' direct citation to briefs' language in their opinions, the legal and non-legal authorities cited in the briefs often are also cited in the Court decisions.[40] Added to these concrete ways we see briefs implicated in the Court's decisions, the impacts of briefs are visible in several other ways, especially in the Court's decisional language.

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38. *See* Ehrenberg, *supra* note 18, at 1191–93.

39. RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 377–78 (2d ed. 1996) ("Judges work under acute pressure of time and are deprived of many of the methods by which other decision makers inform themselves, but they do have one valuable source of information that is an actual, concrete dispute. The parties' briefs and arguments will focus the judges on the facts of the dispute."); *see also* Mark Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on Their History, Function, and Future*, 10 J. APP. PRAC. & PROCESS 247, 268 (2009) ("[W]ritten persuasion must maintain its central role in our judicial system. Inevitably, the brief must continue to carry the lion's share of the persuasion load.").

40. Moyer et al., *supra* note 4, at 65–67; *see also* William H. Manz, *Citations in Supreme Court Opinions and Briefs: A Comparative Study*, 94 L. LIBR. J. 267, 294–95.

The Court often shares much of its opinion language with parties' merits briefs. Some of the determining factors for whether the Court will share a substantial amount of language with a merits brief includes whether the brief is written by an experienced Supreme Court advocate, the Court's ideological compatibility with the brief, and the political salience of the case.[41] Certain justices are more prone to borrowing language from briefs than others.[42] This is the case both within specific Court eras and across time.[43]

Court opinions have shared noticeably large amounts of language with particular merits briefs. Feldman found 22 cases between 1955 and 1993 where the Court wrote an opinion of at least 1,000 words and shared at least 30 percent of its majority opinion language with a particular merits brief from the case (Justice Blackmun was the most frequent majority author within this set of opinions).[44] This shared language often included large portions of descriptions of facts and characterizations of law that did not directly quote or recite propositions from past cases.[45]

The Court's opinions also share language with amicus briefs filed in cases[46] and with lower court opinions from the same cases.[47] Nonetheless, when comparing language shared between the Courts' opinions with parties' merits briefs, amicus briefs, and lower court opinions, the Court tends to share more

41. Pamela C. Corley, *The Supreme Court and Opinion Content: The Influence of Parties' Briefs*, 61 POL. RSCH. Q. 468, 470–71 (2008).

42. Adam Feldman, *A Brief Assessment of Supreme Court Opinion Language, 1946–2013*, 86 MISS. L.J. 105, 136–41, 148–49 (2017).

43. *Id.* at 148.

44. Adam Feldman, *All Copying is Not Created Equal: Borrowed Language in Supreme Court Opinions*, 17 J. APP. PRAC. & PROCESS 21, 45–46 tbl.2 (2016).

45. *Id.* at 46.

46. Collins et al., *supra* note 8, at 934–40 (demonstrating that the Court sometimes incorporates language from amicus briefs).

47. Corley et al., *supra* note 8, at 40–43 (demonstrating the Court sometimes incorporates language from lower court opinions).

language with merits briefs than with these other sources.[48]

According to the justices, the quality of the brief is important. Chief Justice Roberts stated that "it's just a different experience when you pick up a well written brief: you kind of get a little bit swept along with the argument, and you can deal with it more clearly, rather than trying to hack through . . . it's almost like hacking through a jungle with a machete to try to get to the point."[49] He further expressed that "[y]ou don't have a lot of confidence in the substance if the writing is bad."[50] Justice Scalia agreed, stating that "[i]t really hurts you to have ungrammatical, sloppy briefs."[51] Justice Alito declared: "I think there is a clear relationship between good, clear writing and good, clear thinking. And if you don't have one, it's very hard to have the other."[52]

Indeed, previous research has found that brief-writing quality impacts the Court's decisions. Feldman measured brief quality to include the following factors: wordiness, lively language, passivity, sentence complexity, and emotional sentiment, and found that the justices tend to vote for parties whose attorneys write higher quality briefs.[53] However, Feldman did not control for the quality of oral argument.[54] Black et al. argued that emotional language conveys a lack of credibility to justices and found that parties using less emotional language in their briefs are more likely to win a justice's vote.[55] Although Black et al. controlled for the number of questions asked during oral argument in their main analysis, they only included a control for the

48. Adam Feldman, *Opinion Construction in the Roberts Court*, 39 L. & POL'Y 192, 206 (2017).

49. Garner, *supra* note 2, at 5 (transcript of interview with Chief Justice John G. Roberts, Jr.).

50. *Id.* at 6.

51. *Id.* at 71 (transcript of interview with Justice Antonin Scalia).

52. *Id.* at 170 (transcript of interview with Justice Samuel A. Alito, Jr.).

53. Adam Feldman, *Counting on Quality: The Effects of Merits Brief Quality on Supreme Court Decisions*, 94 DENV. L. REV. 43, 58 (2016).

54. *Id.* at 57–62.

55. Black et al., *supra* note 4, at 378, 397.

quality of oral argument based on Blackmun's grades as a robustness check for their main variable of interest, brief emotion;[56] thus, we do not know how other measures of brief quality compare to the quality of oral argument.

These previous findings help us generate our expectations for when we add our brief writing quality measures alongside Justice Blackmun's oral argument grades. We hypothesize the following: *After controlling for the quality of oral argument, the justices will be more likely to vote for the side with the higher quality brief.*

IV. DATA AND METHODS

To test the above hypothesis, we analyze the extent to which the quality of the brief affects the justices' final votes on the merits. We rely on the downloadable replication dataset from Johnson, Wahlbeck, and Spriggs' paper, which contains a random sample of 539 cases decided between 1970 and 1994. [57] We collected the corresponding merits briefs from Westlaw and Nexis Uni for 489 cases.[58] We excluded the table of contents, table of authorities, and any appendices from analysis.

The dependent variable is each justice's vote, coded 1 if the justice voted to reverse the lower court decision, and 0 if the justice voted to affirm.[59] Given the data are

56. *Id.* at 387 n.7.

57. Johnson et al., *supra* note 5, at 104, 104 n.5.

58. The briefs not covered in our dataset were entirely random. We compiled all briefs carried by Westlaw and Nexis Uni, the two known repositories for full briefs with manipulable text. We only include the briefs where there was at least one brief for each side. The cases not covered in our dataset were not covered in either database, likely due to archival issues not relating to the cases themselves. We use docket number as our unit of analysis.

59. We relied on the Johnson et al. dataset for this, *supra* note 5, at 105, and, according to their article, they relied on the Spaeth Database, *The Supreme Court Database,* WASH. U. L., http://scdb.wustl.edu/analysis.php (last visited Jun. 19, 2023). The Spaeth coding for affirm and reverse is as follows: The petitioning party lost if the Supreme Court affirmed (caseDisposition=2) or dismissed the case/denied the petition (caseDisposition=9). The petitioning party won in part or in full if the Supreme Court reversed (caseDisposition=3), reversed and remanded (caseDisposition=4), vacated and remanded

multi-level in nature, we estimate a multi-level model, with random effects for docket and justice. Since the outcome variable is dichotomous, we use a multi-level logit model.

A. Main Independent Variables

To test whether high quality briefs are more likely to win, we use the following variables to tap into the quality of the brief: *Writing Quality* and *Legal Authority*. We then compare the petitioner's brief in each case with the respondent's brief; thus, each variable measures the difference between the petitioner's brief and the respondent's brief.

1. Writing Quality

BriefCatch is a Word plug-in that offers editing suggestions.[60]According to the website, in using BriefCatch, "[e]ach [numeric score] combines global observations (variation in sentence length, for example) with a sophisticated point system based on wording patterns in various categories."[61] The program helps brief writers shorten words and sentences, write more like top brief writers and judges, punch up verbs, improve and vary transitions, flag unusually long or cumbersome sentences, flag passive voice, and spot grammar errors.[62] BriefCatch also provides an overall grade for each brief, using regression analysis based on

(caseDisposition=5), affirmed and reversed in part (caseDisposition=6), affirmed and reversed in part and remanded (caseDisposition=7), or vacated (caseDisposition=8). The coding is for the overall case and not for specific issues within the case. The Supreme Court Database has a dataset at the question-specific level but Johnson et al. did not use this in coding the initial dataset.

60. *How to Use Brief Catch*, BRIEFCATCH, https://briefcatch.com/how-to-use-briefcatch/ (last visited Jan. 13, 2023).

61. *BriefCatch Scores*, BRIEFCATCH, https://briefcatch.com/scores/ (last visited May 30, 2023).

62. Many endorsements for BriefCatch from legal writing teachers, legal practitioners, and judges can be located on the program's website. *Press Reviews and Testimonials*, BRIEFCATCH, https://briefcatch.com/endorsements/ (last visited Jan. 13, 2023).

the following four individual measures: Concise and Readable, Flowing and Cohesive, Crisp and Punchy, and Clear and Direct.[63] Thus, *Brief Grade* (called the Reader Engagement Score in BriefCatch) is a combination of all four measures.[64] The top score for each measure is 100; however, according to the BriefCatch website, scores above 85 are rare and the average score is around 70.[65]

The Concise and Readable measure analyzes word and sentence length and variation.[66] It also considers wording patterns that indicate readable writing.[67] The Flowing and Cohesive measure considers transitions, modifier use, and patterns at the ends of sentences. According to the website, "[t]his measure is the most clearly linked to elite legal, judicial, and journalistic writing."[68] Crisp and Punchy reflects punchy word choice and avoiding wordy or cumbersome language.[69] Clear and Direct evaluates whether the brief "has a modern feel and avoids jargon and legalese."[70]

Table 1 summarizes the statistics for all of these measures based on the scores for petitioners and those for respondents.

63. *BriefCatch Scores*, *supra* note 61.

64. *See id.* (describing the BriefCatch Scores: "[t]his global measure uses regression analysis to combine the four measures below [referring to Readable, Flowing and Cohesive, Crisp and Punchy, and Clear and Direct]. It considers everything from the length of paragraphs to the rate of select vivid verbs.").

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

Table 1. Summary Statistics for Measures on BriefCatch Scores

Score	Mean	Standard Deviation	Range
Petitioner Concise and Readable	74.14	5.49	58–93
Respondent Concise and Readable	74.43	5.69	60–100
Petitioner Flowing and Cohesive	74.90	4.58	61–100
Respondent Flowing and Cohesive	75.5	4.77	62.5–98
Petitioner Crisp and Punchy	69.46	14.1	10–100
Respondent Crisp and Punchy	69.31	14.29	10.5–97
Petitioner Clear and Direct	76.23	4.27	64–100
Petitioner Clear and Direct	76.68	4.45	64–98
Petitioner Reader Engagement	74.27	4.51	58–97
Respondent Reader Engagement	74.55	4.87	59–92

Once we had these measures, we created a variable that compares the grades, subtracting the respondent's grade from the petitioner's grade, meaning that larger values indicate the petitioner had the strong brief. This variable ranges from -18 to 20, with a mean of -.283 and a standard deviation of 5.61.

2. Legal Authority

In addition to the writing style of the brief, we also include a measure to tap into the legal authority relied on in the brief. The more authority a brief has on its side, arguably the more persuasive the brief will be.[71]

In order to evaluate whether the extent to which the brief relied on legal authority affects the justices'

71. Elizabeth Chika Tippett et al., *Does Lawyering Matter? Predicting Judicial Decisions from Legal Briefs, and What That Means for Access to Justice*, 100 TEX. L. REV. 1157, 1189 (2022); Morgan L.W. Hazelton, Rachael K. Hinkle & James F. Spriggs II, *The Long and the Short of It: The Influence of Briefs on Outcomes in the Roberts Courts,* 54 WASH. U. J. L. & POL'Y 123, 136 (2017) ("Our results show that the more information presented in the briefs—both in terms of words and citations—the more likely a Justice is to vote for that side of the case.").

decisions, we used the Table of Authorities from each brief to create a variable indicating the number of Supreme Court precedents the attorney relied on in each brief. We then created a variable that compares the number of precedents cited in the brief, subtracting the respondent's number from the petitioner's number, with larger values indicating that the petitioner cited more precedent.[72] The Difference in Legal Authority variable ranges from -63 to 167, with a mean of -1.144 and a standard deviation of 19.89.

3. Oral Argument Grade

Johnson, Wahlbeck, and Spriggs relied on the grades Justice Blackmun assigned to attorneys during oral argument.[73] Given that Blackmun changed his grading system,[74] the authors calculated a z-score for each grade, which indicates how many standard deviations a specific grade is from the mean grade in that scale.[75] The authors then created a variable that compares the grades of the attorneys arguing each case, subtracting the respondent's grade from the petitioner's grade.[76] For our data this variable ranges from -4.50 to 2.67, with a mean of -.156 and a standard deviation of 1.06.[77] For our data,

72. Along with potentially supplying a stronger legal argument, a greater volume of precedent may also be used to support the existing state of the law which would theoretically be in favor of the position of the respondent or the party that requests that the Court maintain the status quo.

73. Johnson et al., *supra* note 5, at 104.

74. *See id.* Johnson et al. notes that "[Blackmun] employed three different grading scales: A–F from 1970 to 1974; 1100 from 1975 to 1977; and 1–8 from 1978 to 1993," adding:

> To compare his evaluations of attorneys across these three scales, we standardized the different grading schemes onto a common scale by determining how far away each grade was from the mean grade in that particular scale. More technically, we calculated a z-score for each grade, which tells us how many standard deviations (SDs) a specific grade is from the mean grade in the particular scale.

Id.

75. *Id.* at 104–05.

76. *Id.* at 106.

77. *Id.*

larger values indicate whether the petitioner had the stronger oral argument.[78]

B. Control Variables

1. Ideological Compatibility with Petitioner

To account for the fact that the justices' votes are influenced by their personal policy preferences, we control for their ideological compatibility with the petitioner. Johnson, Wahlbeck, and Spriggs relied on Martin/Quinn scores for each justice who sat during 1970 to 1994.[79] They first determined the ideological direction of both the petitioner and respondent based on Spaeth's measure of the ideological direction of the lower court decision.[80] They then matched the Martin/Quinn score with the ideological direction of the argument they expected the attorney to make (if the lower court ruled in the liberal direction, the petitioner argues for a conservative outcome, and vice versa).[81] They coded the variable as the negative value of the justice's Martin/Quinn score if the attorney argued for the liberal side and coded the variable as the justice's Martin/Quinn score if the attorney argued for the conservative side.[82] Thus, higher values indicate a justice is ideologically closer to the petitioner's position.[83] For our data, this variable ranges from -6.15 to 7.15, with a mean of .443 and a standard deviation of 2.30.[84]

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78. *Id.*

79. *Id.* (referencing Andrew D. Martin and Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002)).

80. *Id.* (referencing Harold J. Spaeth, THE ORIGINAL UNITED STATES SUPREME COURT DATABASE, 1953–2002 TERMS (2004)). The original database referenced by Johnson et al. was housed at the University of Michigan and is no longer available. The updated version of Spaeth's database is currently available at http://scdb.wustl.edu/analysis.php, *supra* note 59.

81. *Id.* at 107.

82. *Id.*

83. *Id.*

84. *Id.*

2. Elite Attorney

An attorney who is considered an elite attorney is more likely to win. If the results show that the quality of a petitioner's brief is associated with an increased likelihood of the justices voting for the petitioner, even after controlling for attorney quality, we can have more confidence that brief quality and quality oral argument plays an independent role in persuading the Court.

Kevin T. McGuire's research indicates that certain attorneys are more credible attorneys who are more likely to provide higher quality arguments. Specifically, his research suggests that attorneys from the Solicitor General's office, federal government attorneys who are not from the Solicitor General's office, attorneys from elite law schools, former Supreme Court clerks, private attorneys from Washington, D.C. (the Washington elite), and law professors are more likely to be successful in litigating before the Supreme Court.[85] Thus, if the petitioner's attorney is one of these elite attorneys and the respondent's attorney is not, the elite attorney is coded 1, and if the respondent's attorney is one of these elite attorneys and the petitioner's is not, the elite attorney is coded -1. If both attorneys are elite attorneys (or neither of them are), the variable is coded 0.

85. KEVIN T. MCGUIRE, THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY (1993); Kevin T. McGuire, *Lawyers and the U.S. Supreme Court: The Washington Community and Legal Elites*, 37 AM. J. POL. SCI. 365, 382–88 (1993) (suggesting that an elite group of lawyers in Washington specialize in Supreme Court litigation and share characteristics like being law school classmates, having experience as law clerks, having tenure in the Solicitor General's office, and having practiced in Washington law firms); Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187, 193–95 (1995) (suggesting that attorneys who practice more often in front of the Supreme Court than opposing counsel are more likely to prevail); Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RSCH. Q. 505, 511–23 (1998) (suggesting the success of the solicitor general in Supreme Court cases can be primarily attributed to litigation experience); *see also* Johnson et al., *supra* note 5, at 101–03 (using McGuire's research to inform their Litigation Experience Hypotheses).

V. RESULTS

Before moving to the impact of briefs and oral arguments, we first consider whether BriefCatch is a reasonable measure of the attorney's writing quality. Similar to Johnson et al., we posit that elite attorneys will receive a higher score.[86] We regress these grades on attorney quality, with brief grade as the dependent variable and attorney quality as the independent variable. As predicted, an elite attorney is more likely to have a higher writing quality score. This indicates that BriefCatch is a reasonable measure of brief quality.

Turning to whether higher quality briefs and oral arguments affect votes on the merits of a case, we estimate a multi-level model, with random effects for docket and justice. Since the outcome variable is dichotomous, we use a multi-level logit model. The purpose behind the multi-level model is that it is designed for correlated observations. Here each set of briefs is correlated since they are components of the same case and so this type of model is better geared to analyzing the data than a normal model that evaluates observations independently. Logit models are designed for binary outcome. Since we are measuring wins and losses, we needed a model that was designed for a binary outcome rather than one that measures outcomes on a continuous spectrum.

The results in Table 2 are somewhat mixed, showing that the justices do somewhat respond to the quality of briefs. Table 2 shows that, even after controlling for oral argument grade and a justice's ideology, the number of Supreme Court precedents cited in the brief is positive and statistically significant, showing a positive relationship between a justice's vote for petitioner and the increasing number of precedents cited in the petitioner's brief. When all the independent variables are set to their mean values, the predicted probability that a justice will vote for the petitioner is .620. A justice's

86. Johnson et al., *supra* note 5, at 101.

predicted probability of voting for the petitioner increases to .687 when the difference between the number of precedents cited is set to one standard deviation above the mean, and the predicted probability increases to .747 when that variable is set to two standard deviations above the mean. Setting that variable to its maximum value, indicating the petitioner cited a much greater number of cases than the respondent, a justice's predicted probability of voting for the petitioner increases to .953.

When the variable is set to one standard deviation below its mean, indicating that the respondent cited more cases than the petitioner, the predicted probability of voting for the petitioner is 54.8 percent. When the variable is set to two standard deviations below its mean, the predicted probability drops to 47.4 percent, and when the variable is set to its minimum value, indicating that the respondent cited a much greater number of cases than the petitioner, a justice's predicted probability of voting to reverse drops to 39.3 percent.

Figure 1 displays the magnitude of the effect of extent of legal authority cited in the briefs on the justices and shows that it is a substantively meaningful predictor of final votes on the merits. Thus, it appears that briefs that are well-grounded in legal authority are more persuasive. This finding supports the argument that legal factors may constrain justices from acting on their personal policy preferences and suggests that the legal arguments contained in the briefs matter when it comes to winning the case.

However, we do not find an association between the writing quality of the brief and the final vote on the merits.[87] Our finding is similar to that of Black et al.,

87. We reran the regression using the four individual BriefCatch scores and no individual score was statistically significant. Additionally, we reran the regression using a different writing quality score (Grammarly) and the results were substantially similar. Although Grammarly is not specific to the legal domain, it is similar to BriefCatch in that it provides an overall writing score for each brief. Grammarly uses several pieces of information to calculate its writing scores. The main components are correctness (are words spelled properly and is the writing grammatically correct), clarity (is the wording correct and can

who found that as the petitioner's brief readability increased, the petitioner was less likely to win and the respondent's brief readability score was not statistically significant for whether a justice voted for the petitioner or the respondent.[88]

Table 2. Multi-Level Logit Model with Random Effects for Justice and Docket: Justices' Vote for Petitioner (1970–1994)

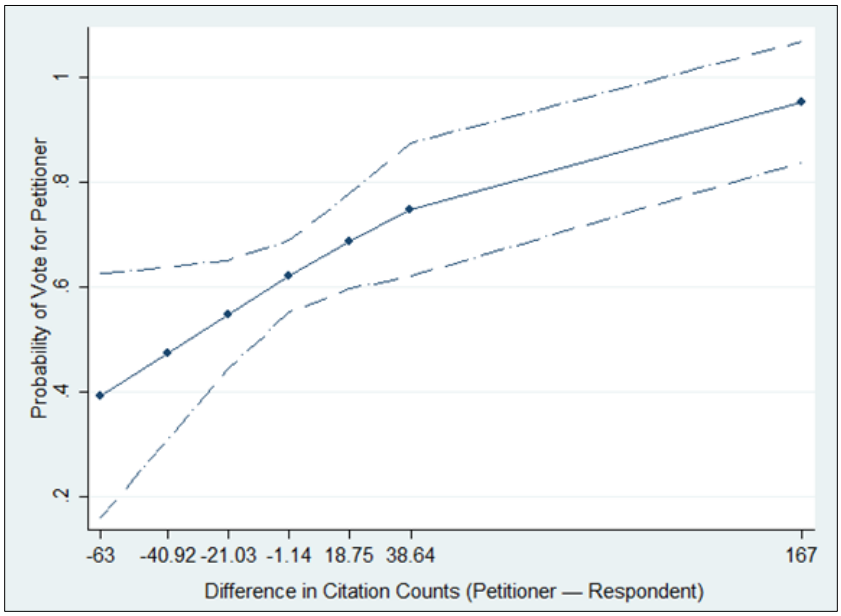
Variable	Coefficient	Standard Error
Difference in Writing Quality of Brief	-.036	.027
Difference in Number of Supreme Court Cases Cited	.015*	.008
Difference in Oral Argument Grade	.522*	.143
Difference in Elite Lawyering	.570*	.217
Ideological Compatibility with Petitioner	.605*	.030
Constant	.309*	.151
Variance Components		
Docket level	7.209	.915
Justice level	1.35e-32	2.58e-17

N = 3,315; *p < .05 (one-tailed);
LR test vs. logistic model: chi2(2): 964.10; Prob>chi2 = .000

certain words be removed without affecting the writing content), engagement (is the writing specific, vivid, and interesting), delivery (measuring friendliness, confidence, and formality), and ordinary readability measures based on word and sentence length. Engagement and delivery scores are based on Grammarly's AI that includes word dictionaries to look for more apt synonyms for the words used in the documents. *How Grammarly Works*, GRAMMARLY, https://www.grammarly.com/how-grammarly-works (last visited Jun. 19, 2023).

88. Black et al., *supra* note 4, at 391, 392 fig.2.

Figure 1. Predicted Probability of Vote for Petitioner with 95% Confidence Intervals Based on Varying Levels of Differences in Citation Counts

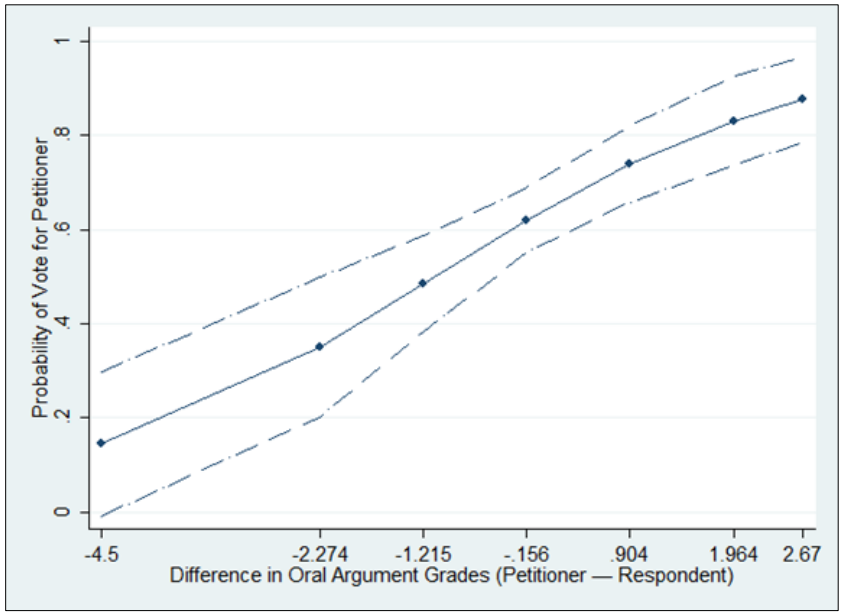


The quality of oral argument is statistically significant, and its substantive significance is considerable, even when controlling for the quality of the brief and for the characteristics of attorneys.[89] When the respondent's attorney is better than the petitioner's attorney (the difference in oral argument grade is set to one standard deviation below the mean), the predicted probability that a justice will vote for the petitioner is .484; this probability increases to .740 when the petitioner's attorney is better (the difference in oral

89. The Johnson replication dataset only provides the difference in oral argument grade, and so we do not have the actual grades for petitioner's attorney versus respondent's attorney. Without this we cannot see if there is a correlation between the oral argument grades and the quality of the attorney according to how we measure that variable (or whether the attorney is an elite attorney). Johnson et al., however run a regression, with all of their different variables to capture quality attorney and they find a statistically significant relationship between OA grade and the following: SG, federal government attorney, attorney attended elite law school, Washington elite, and former court clerk. Johnson et al., *supra* note 5, at 105–06.

argument is set to one standard deviation above the mean). Setting the difference in oral argument grade to two standard deviations above the mean, indicating that the petitioner's attorney is much better than the respondent's attorney, the predicted probability that a justice will vote for the petitioner is .832; when the respondent's attorney is much better than the petitioner's attorney (the difference in oral argument grade is set to two standard deviations below the mean), the predicted probability decreases to .352. Figure 2 displays the predicted probability of a justice voting for the petitioner when varying the oral argument grade difference between the petitioner and respondent.

Figure 2. Predicted Probability of Vote for Petitioner with 95% Confidence Intervals Based on Varying Levels of Differences in Oral Argument Grades



It is not surprising that the substantive significance of the oral argument grade is large given that the data "overwhelmingly indicate Blackmun was concerned

about the substance of arguments."[90] Additionally, the oral argument grade consists of one grade that represents both the substance and style of oral advocacy whereas we use two measures to take into account brief quality, one based on style and the other based on substance. The writing style measure is a comprehensive measure of the writing style of the brief; however, our variable that represents the substance of the arguments contained in the briefs is limited to how well grounded the brief is in precedent, which is just one component of the substance of legal argumentation contained in the brief.

Figures 3 and 4 display the substantive effect of the two control variables, ideological compatibility and attorney quality. Unsurprisingly, a justice is more likely to vote for parties who make ideologically compatible arguments. Less impactful but still influential is whether one side had an elite attorney arguing on its behalf.

90. Johnson et al., *supra* note 5, at 104.

Figure 3. Predicted Probability of Vote for Petitioner with 95% Confidence Intervals Based on Varying Levels of Relative Lawyer Quality

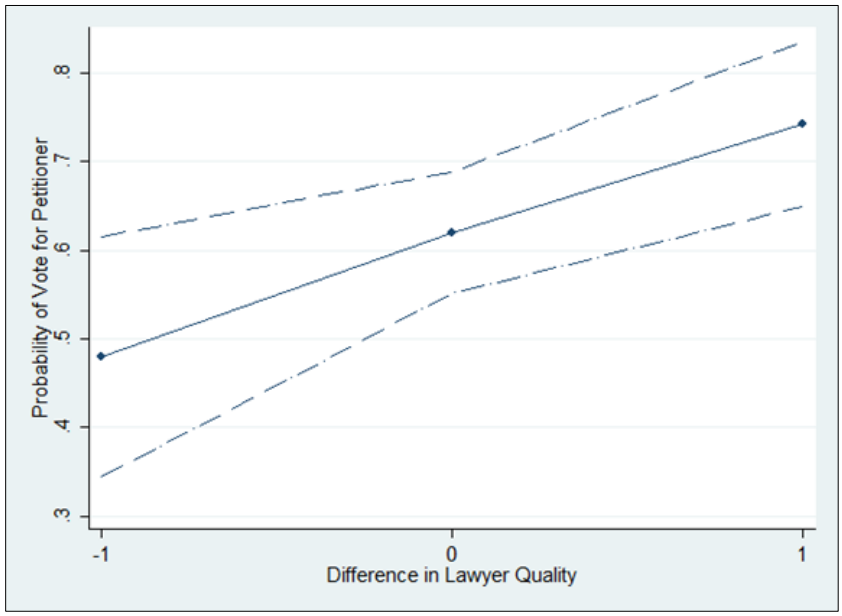
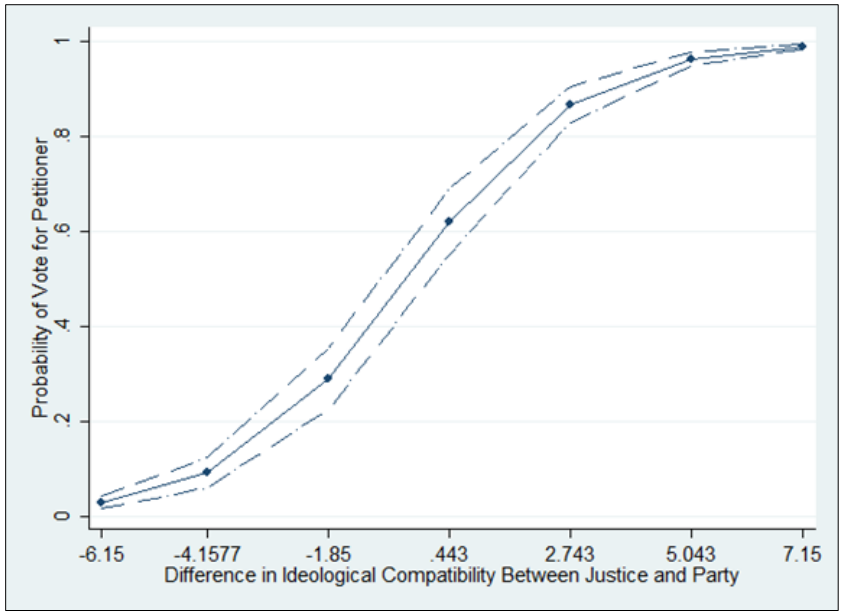


Figure 4. Predicted Probability of Vote for Petitioner with 95% Confidence Intervals Based on Varying Levels Ideological Compatibility Between Justice and Party



While our results show the relative impact of brief quality and legal authority on case success, this study is not without its limitations. Though we used advanced metrics to measure the writing quality of briefs, these measures are imperfect. First, there is no objective definition of quality. We used an off-the-shelf measure, which is one view of quality but clearly is not the only one. Perhaps other measures will be developed that measure quality in a way that better correlates with attorney success.

Creating an index for quality like the one we use in this paper is complicated, and those involved in creating such metrics must make decisions about indicators that they wish to include and exclude. Such decisions can greatly affect how quality is measured. Furthermore, it is highly unlikely that one standard of quality comprises the views of all of the justices.

This limitation based on our choices of measures to employ applies to many of our measures. Citation counts are a rough estimate of the substance of a brief and do not take into account that all precedents are not created equal. Other strategies for measuring precedent may also yield strong results. Possibilities include looking at unique precedent in briefs or looking at the correlation between citations in briefs and those used in the opinions.

Oral argument grades, while correlated strongly with successful case outcomes, are only from the perspective of a single justice, and Justice Blackmun did not differentiate between substance and style. Blackmun also was potentially idiosyncratic among the justices in the type of information he found useful in thinking about attorneys, as he also noted the law school each attorney attended alongside the attorney's oral argument grade. Although likely unattainable, a dataset of every justice's view of each oral argument would present a much clearer picture of the justices' aggregate assessments of a case. Individual models, while providing more overall predictive capacity, would also inhibit the generalizability of a study, especially if each justice used different criteria for oral argument (and for that matter brief) quality. An upside to the use of Blackmun's oral argument scores is this correlation with successful case outcomes as described above, which suggests that Blackmun was not the sole justice to find the arguments of the winning parties more compelling.

VI. CONCLUSION

Do high quality briefs matter? Do the justices vote for the side with the "best" brief? Our results show that, after controlling for the quality of the attorneys and the ideological compatibility between the justice and petitioner, there is no association between the justices' votes on the merits and the writing quality of the brief; however, justices are more likely to vote for the side that cites the most precedent in its brief. Furthermore, even

after controlling for the quality of the brief, there is a correlation between the oral argument grade and the justices' final votes. Taken together, it appears that the justices respond more to substance instead of style. If this is true, then writing quality is not likely to make a difference in an attorney's likelihood of winning or losing. Based on this, many of the justices' comments described above are somewhat misleading if taken as a prescription to winning a case.

This is not to say that writing quality does not matter to the justices at all, and it may be that when it comes to the words used by the Court in its opinion, the writing quality of the brief may influence that language, but it does not appear to affect the outcome of the case. While relative citation counts may not be a perfect proxy for the substance of a brief, the importance of this variable implies that the justices take the quality and extent of the argument seriously and this may help explain our results.

In future research, additional, more robust measures for these and other variables will help with measurement accuracy and provide even clearer pictures of the roles oral arguments and briefs play in case outcomes. Additional studies may also wish to focus on other material that factors into justices' decisions.

Lastly, additional methodologies like machine learning may be used to grasp the relationships between these variables. Supervised learning is used in text analysis to derive an understanding of linguistic importance. This methodology may help with the understanding of how particular language is more forceful and this can be finetuned for specific audiences. Models may be constructed for each of the justices pointing to word choice and sentence structure that they find most powerful. With such tools we may also be a step closer to predicting how justices are going to vote in cases depending on the text of the argument in a brief.