COUNTING ON QUALITY: THE EFFECTS OF MERITS BRIEF QUALITY ON SUPREME COURT DECISIONS

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ABSTRACT

Many legal scholars, academics, and practitioners contend that the quality of merits briefs matters little in the United States Supreme Court. According to this logic, by the time a case has reached the Supreme Court the facts are already clear from the record and experts have meticulously prepared briefs particularly tailored to meet the Justices' informational needs. This Article sets forth a different thesis; specifically that merits brief quality matters even at the upper-echelon of the U.S. Courts. The results of this Article show that merits brief quality affects both case outcomes and the amount of language Supreme Court's opinions share with merits briefs even after controlling for Supreme Court litigation expertise. Due to the lack of existing empirical scholarship on the effects of brief quality, this Article has two objectives. First, it develops a conceptualization of brief quality that can be reliably measured. Second, it tests whether the quality of merits briefs matters by looking at both how this affects case outcomes and the Justices and clerks' likelihood of adopting language from merits briefs in the Court's opinions. To do this, the Article develops a new measure to gauge brief quality and to make comparisons between briefs. The dataset created for this Article consists of 9,498 Supreme Court merits briefs from the 1946 through the 2013 Terms.

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"I'll read good briefs, and I'll understand, that's a good brief. And you'll try to think back at exactly what it was that made it a good brief, and the sentence structure, and how it flowed together. And to a certain extent, your mind internalizes that."[1]

Chief Justice John Roberts

INTRODUCTION

Beginning day-one in law school, aspiring lawyers are taught that success in their future careers is dependent upon becoming good legal writers. This maxim often becomes a reality as attorneys, especially at the appellate level, spend the bulk of their time preparing written documents such as briefs and motions. As mastery of the written word is an essential attribute of a talented attorney, one might expect little variation in the quality of written briefs at the Supreme Court level—the venue of practice for the most talented and experienced legal practitioners. The question of whether the quality of legal briefs affects the Justices' decisions, however, is unexplored scholarly terrain. This is the first article to combine qualitative and quantitative methods to measure brief quality and test its effects on both Supreme Court case outcomes and on opinion content. The dataset consists of nearly 9,500 merits briefs from 1946 through 2013 Supreme Court Terms.

One reason the quality of writing may affect Supreme Court opinion content is that it can affect the Justices and clerks' perceptions of the strength of a party's case. Chief Justice Roberts acknowledges perceptible gradations in the quality of Supreme Court briefs: "*The quality of briefs varies greatly*. We get some excellent briefs; we get a lot of very, very good briefs. And there are some where the first thing you can tell in many of them is that the lawyer really hasn't spent a lot of time on it."[2] According to the Chief Justice's words, attorneys that wish to gain the Court's attention from the outset of a case must begin by taking the quality of the brief into account.

Justice Alito echoes Justice Robert's exhortations about the consequential nature of briefs' quality: "Certainly, I appreciate good writing. It makes my job so much easier. I've seen briefs that are extremely well

1. Bryan A. Garner, *Interviews with United States Supreme Court Justices*, 13 SCRIBES J. LEGAL WRITING 1, 39 (2010) (interviewing Chief Justice John G. Roberts, Jr.).

2. *Id.* at 6 (emphasis added) (interviewing Chief Justice John G. Roberts, Jr.).

written and some that are abysmally written."[3] Justice Scalia makes this point as well: "When you write well, you capture the attention of your audience much better than when you write poorly."[4]

One reason the question of whether brief quality matters remains unanswered is the ambiguity surrounding our conception of "quality." Across disciplines, writing quality is understood as ranging from spelling and word choice to punctuation and ease of readability.[5]

A second reason may have to do with differing views within the legal community about what constitutes a high-quality brief. While judges continuously emphasize the importance of specific aspects of briefs, such as clarity and organization, surveys of lawyers show that they do not accord the same significance to the written argument.[6] This may explain some of the disjuncture about the importance of brief quality within the legal community. Notwithstanding the lack of a clear conceptualization of quality, judges do not dispute that the quality of briefs affects their perceptions of attorneys' cases.[7]

But still we are left with the question of how we measure a concept that has so many potential defining features; a concept that is difficult to measure with any objectivity due to often subjectively defined features such as style.[8] I tackle this question by examining multiple dimensions of briefs to assess a spectrum of features related to the concept of brief quality including sentence length, passivity of writing, use of engaging language, and an overall positive tone. Some of these aspects are particular to legal writing while others are central to writing quality generally.

This Article uses corpus-based techniques to generate an understanding of brief quality. I apply linguistic dictionaries to the texts to

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3. *Id.* at 170 (interviewing Justice Samuel A. Alito, Jr.).

4. *Id.* at 53 (interviewing Justice Antonin Scalia).

5. *See, e.g.*, Tim Loughran & Bill McDonald, *Measuring Readability in Financial Disclosures*, 69 J. FIN. 1643, 1643 (2014) ("We propose defining readability as the effective communication of valuation-relevant information."); K. Sand, N. L. Eik-Nes & J. H. Loge, *Readability of Informed Consent Documents (1987–2007) for Clinical Trials: A Linguistic Analysis*, 7 J. EMPIRICAL RES. ON HUM. RES. ETHICS 67, 74–75 (2012) (examining how the organization of themes in consent agreements impacts readers' comprehension); Yvonne Tsai, *Text Analysis of Patent Abstracts*, J. SPECIALISED TRANSLATION, Jan. 2010, at 61, 78 (explaining that punctuation and word choice affect the readability of patent abstracts).

6. Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 340 (2011) ("Overall, the judges' relative emphasis on written argument contrasts with surveys of practicing lawyers, who see legal writing to be of minor importance."); *see also* Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 LEGAL WRITING 257, 261, 284 (2002) (surveying 355 federal judges' views about the quality of lawyers' writing and finding that those judges were often unimpressed with the quality of legal briefs).

7. *See, e.g.*, Robbins, *supra* note 6, at 269 (listing nine varied writing flaws that surveyed judges identified in lawyers' legal writing).

8. Scott A. Moss, *Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs' Briefs, Its Impact on the Law, and the Market Failure It Reflects*, 63 EMORY L.J. 59, 80–81 (2013) (documenting and demonstrating flaws in the legal writing of a sample of 102 briefs).

measure features of the writing such as passivity. I also measure the sentiment of each brief to analyze the tone of the document.

With these measurement tools I examine two outcomes. The first model examines decision outcomes to verify that winning parties tend to have higher-quality briefs than the losing parties. The second model examines the language in each of the Court's opinions. The outcome variable in that model is the percentage of the language in the opinion that is generated from overlapping language with the brief (referred to as the brief's "overlap score" or "value"). This Article proceeds as follows: in the next Part, I examine existing conceptualizations of brief quality, then I describe the indicators developed to measure brief quality. In the following Part, I test the measures of brief quality on the set of Supreme Court briefs. I conclude by discussing the relevance of the findings and the implications for future inquiry.

I. UNDERSTANDING QUALITY

How do we know that the quality of merits briefs makes a difference? For one thing, Supreme Court opinions tell us just that. For example, in the case *Zablocki v. Redhail*,[9] Justice Thurgood Marshall writing for the majority stated, "With regard to safeguarding the welfare of the out-of-custody children, appellant's brief does not make clear the connection between the State's interest and the statute's requirements."[10] This case concerned a Wisconsin statute that places specific requirements on parents with previous child support obligations that wish to marry.[11] Here, the Court did not give credence to the State's position because the State did not present a sufficient nexus between points in its brief.[12]

Lack of clarity in a brief can also confuse the Justices regarding a party's argument. In *Atwater v. City of Lago Vista*,[13] Justice Souter writing for the majority stated, "[I]t is unclear from Atwater's briefs whether the rule she proposes would bar custodial arrests for fine-only offenses even when made pursuant to a warrant . . . ."[14] In *Atwater*, the Court did not fully comprehend the petitioner's argument from the brief,[15] which may have ultimately affected the Court's response to the petitioner's pleas and led the Court to question the strength of the petitioner's case.

Finally, when both petitioner and respondent's merits briefs in a case may lack the quality that clearly informs the Justices of the case features, the Justices may not feel properly able to adjudicate claims,

9. 434 U.S. 374 (1978).
10. *Id.* at 389.
11. *See id.* at 375.
12. *See id.* at 389–90.
13. 532 U.S. 318 (2001).
14. *Id.* at 346 n.15.
15. *See id.*

especially in cases with far-reaching implications. Justice Blackmun's dissent in *New York Times Co. v. United States*[16] makes such a point.[17] In his dissent Justice Blackmun wrote,

> I therefore would remand these cases to be developed expeditiously, of course, but on a schedule permitting the orderly presentation of evidence from both sides, with the use of discovery, if necessary, as authorized by the rules, and with the preparation of briefs, oral argument, and court opinions of a quality better than has been seen to this point.[18]

Justice Blackmun sought higher-quality briefing in that instance to make a more informed decision in a case with vast First Amendment implications.[19]

From these examples it is apparent that the Justices are concerned with the quality of merits briefs. The Justices and their clerks also prefer merits briefs that clearly lay out all of the party's points and arguments, and these examples present evidence that the Justices may not rule favorably on a party's contentions without such clarity.[20] But what exactly does quality mean in such cases? To gain leverage on the concept of brief quality, I look at statements from legal scholars and from judges. Based on these statements, I develop testable hypotheses that examine whether the features of brief quality that Justices and judges discuss are actually associated with more successful briefs.

Attorney experience is often anecdotally associated with brief quality. It is possible, for instance, that attorneys make marginal improvements in their brief writing with each successive brief they write for the Supreme Court. Justice Thomas relayed this notion in his statement,

> I think you learn over time. You gain kind of a comfort with it. It's like a jazz musician or something. You get a feel for it. You don't just know the law, but you have a feel for it. You have a feel for what the judges are trying to do. And then you know where you can give a little ground without giving up your case.[21]

Similarly, Judge Robert Baldock from the Tenth Circuit Court of Appeals underscored the importance of multiple drafts of briefs stating,

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16. 403 U.S. 713 (1971).
17. *See id.* at 759–63 (Blackmun, J., dissenting).
18. *Id.* at 761–62.
19. *See id.* at 760–62.
20. Although infrequent, there are occasionally opportunities for the parties to clarify statements from their briefs in oral argument. In *Illinois v. Caballes*, 543 U.S. 405 (2004), for example, Justice Ginsburg gave the respondent's attorney a chance to clarify a statement from the brief when she began the question, "There was something you said in . . . your brief hat [sic] I thought was unclear. So may I ask you–" Transcript of Oral Argument at 16, Illinois v. Caballes, 543 U.S. 405 (2004) (No. 03-923), 2004 WL 2663949, at *37.
21. Garner, *supra* note 1, at 109 (interviewing Justice Clarence Thomas).

> Now those who have an appellate practice, who appear before us a lot, their briefs are usually very well done. But with the lawyer who only comes once in a great while, often the product is not good and it's no help. That really irritates me when I haven't been helped at all by a brief and it has wasted my time.[22]

Experience may also help develop an attorney's credibility. Experienced Supreme Court litigators tend to be highly successful on the merits.[23] The credibility of Office of the Solicitor General (OSG) attorneys that is developed with repeat appearances before the Supreme Court, for example, is often cited as a reason for the Justices' trust in them.[24] This credibility may generate a presumption of high-quality briefs that in turn benefits the OSG's likelihood of success.

As this is still a "presumption" of credibility often based on an attorney's experience, it may be rebutted by evidence that trust is unwarranted. Attorneys that present inaccurate information in their briefs or that attempt to deceive judges with skewed portrayals of the facts may lose this credibility and develop notoriety for their lack of candor.[25] Accordingly, for Justice Stevens, honesty is the most important quality of a brief.[26] Judges on federal benches at all levels consistently highlight the necessity of honesty in briefs and how deception can lead to the loss of a judge's trust, which may consequently injure the attorney's reputation.[27]

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22. Robert R. Baldock, Circuit Judge, U.S. Court of Appeals, Tenth Circuit, Carlos F. Lucero, Circuit Judge, U.S. Court of Appeals, Tenth Circuit & Vicki Mandell-King, Chief, Appellate Div., Fed. Pub. Defs. Office, Denver, Colo., What Appellate Advocates Seek from Appellate Judges and What Appellate Judges Seek from Appellate Advocates, Panel Two at the Tenth Circuit Judicial Conference (June 29–July 1, 2000), *in* 31 N.M. L. REV. 265, 274 (2001).

23. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1539–49 (2008) (describing a trend of favorable Supreme Court outcomes for a group of the most experienced litigators over the past several decades).

24. *Id.* at 1545–47; *see also* RYAN C. BLACK & RYAN J. OWENS, THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE BRANCH INFLUENCE AND JUDICIAL DECISIONS 6–7 (2012); LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 4–7 (1987); RICHARD L. PACELLE, JR., BETWEEN LAW & POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURING OF RACE, GENDER, AND REPRODUCTIVE RIGHTS LITIGATION 22–23 (2003); REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW 2–3 (1992); Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505, 506–07 (1998); Matthew Lee Sundquist, *Learned in Litigation: Former Solicitors General in the Supreme Court Bar*, 5 CHARLESTON L. REV. 59, 81–83 (2010); David C. Thompson & Melanie Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 270–71 (2009).

25. THOMAS B. MARVELL, APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM 35 (1978); Steven Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389, 1392 (1984).

26. Garner, *supra* note 1, at 46 (interviewing Justice John P. Stevens).

27. *E.g.*, RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 291 (2d ed. 2003) (quoting Patricia M. Wald, Chief Judge Emeritus, U.S. Court of Appeals for the D.C. Circuit).

Attorneys may also lose credibility through attacks on other parties or entities involved in the case.[28] Since the attorney's goal is to persuade the court, even if the facts are not in the party's favor, attorneys need to tread lightly when trying to portray facts in the most favorable light to their clients while providing accurate statements that do not belittle other actors involved in the litigation.[29]

One feature of a brief that judges repeatedly say can win or lose a case is its clarity.[30] When lawyers do not lay out all of their points clearly, judges may miss important aspects of the party's position. In one instance when Chief Justice Roberts was asked if a bad brief can lose a case, he replied,

> It sure can—because [the Justices] may not see [sic] your strong case. It's not like judges know what the answer is. I mean, we've got to find it out. And so when you say can bad writing lose a strong case, if it's bad writing, we may not see that you've got a strong case.[31]

Answering the same question Justice Alito conveyed, "It can because you may totally fail to convey the point that you want to make to the court. The court just might miss your point. There have been times when I've read a brief, and reread a brief, and I just didn't see what it was saying."[32] The relative clarity of the party's brief may impact the judge's view of the case. Judge Diane Wood from the Seventh Circuit of Appeals explained, "[I]f one side has presented a beautifully organized and written brief, and the other leaves me trying to decide if they've hit the side of the barn or not . . . there's an inherent advantage to the side that's done it well."[33]

The necessity of brief clarity is also one of few factors that has remained of central importance in judges' analyses of advocacy over the last hundred years, and judges describe that the best briefs they read are often the clearest.[34] Along these lines, when writing about judges' expec-

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28. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 64 (1992) ("[A] top quality brief scratches 'put downs' and indignant remarks about one's adversary, the trial judge or the agency. These are sometimes irresistible in first drafts, but attacks on the competency or integrity of a trial court, agency, or adversary, if left in the finished product, will more likely annoy than make points with the bench.").

29. *See id.* at 63; *cf.* Carter G. Phillips, Partner, Sidley Austin LLP, Advocacy Before the United States Supreme Court, Address at the Krinock Lecture Series (1998), *in* 15 T.M. COOLEY L. REV. 177, 181–84 (1998).

30. *See generally* Garner, *supra* note 1.

31. *Id.* at 22 (interviewing Chief Justice John G. Roberts, Jr.).

32. *Id.* at 177 (interviewing Justice Samuel A. Alito, Jr.).

33. Bryan A. Garner, *Interviews with United States Court of Appeals Judges*, 15 SCRIBES J. LEGAL WRITING 1, 103 (2013) (second alteration in original) (interviewing Chief Judge Diane P. Wood).

34. *See* Helen A. Anderson, *Changing Fashions in Advocacy: 100 Years of Brief-Writing Advice*, 11 J. APP. PRAC. & PROCESS 1, 4 (2010) (describing the evolving expectations for the contents and quality of legal briefs in American courts); *see also* Robbins, *supra* note 6, at 282 ("Many judges also indicated that . . . the worst briefs 'read like a Joycean stream-of-consciousness and seem

tations for briefs, Judge Roger Miner unsurprisingly described, "We . . . expect clarity, well-organized argument, and understandable sentence structure. All too often, we find rambling narratives, repetitive discussions, non sequiturs, and conclusions unsupported by law or logic."[35]

Veteran attorneys tend to be keenly aware of the need to set their points out clearly on the page.[36] Supreme Court advocate Robert Stern described that one of the most common faults from inexperienced brief writers is they do not make their arguments sufficiently coherent for judges to understand.[37] According to this logic, when lawyers' writings are muddled in lengthy, inconsequential prose, judges may lose track of the main point of the argument.

While briefs are argumentative in nature, the tone of the brief is still an element that may affect the chances of the brief's success.[38] Accordingly, surveyed judges requested an "appropriate adversarial tone" from brief writers.[39] This can be a fine line for attorneys to follow, especially when confronting contentious issues. There are several factors that judges point to, however, that may contribute to an overly negative tone.

One clear admonishment concerns written attacks directed towards other attorneys or officers of the court. Judge Harry Edwards and Judge Robert Martineau, for instance, both note that such attacks may immediately detract from a judge's focus on a brief's main points.[40] These are not the only judges to acknowledge the toll a negative tone can have on a brief. Judge Harry Pregerson refers to a "shrill tone in a brief" as "ineffective" and "counterproductive"[41] and Judge Miner explains that personal attacks tend only to "weaken the brief."[42]

Taken together, these judges' remarks convey that briefs which include attacks and a negative tone are detrimental to their persuasive powers. Regular use of intensifiers may also be viewed as "loser language" that can attach to the judge's view of a party's position.[43] While

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to have no theme or clear purpose,' 'are anything but' clear, 'muddy up the water,' 'cloud the main issues with trivia,' or contain 'fuzzy, imprecise thinking and writing, leaving the reader to guess or assume as to the meaning.'").

35. Roger J. Miner, *Twenty-Five "Dos" for Appellate Brief Writers*, 3 SCRIBES J. LEGAL WRITING 19, 23 (1992).

36. *See, e.g.*, TOM GOLDSTEIN AND JETHRO K. LIBERMAN, THE LAWYER'S GUIDE TO WRITING WELL 6 (3d ed. 2016) ("Good lawyers revere English - and edit their work one more time to ensure they have expressed their thoughts with the clarity and felicity that they owe to their clients, to the public, and to themselves.").

37. *See* ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES 234–35 (1981).

38. Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L. REV. 431, 436 (1986).

39. *See* Robbins, *supra* note 6, at 264.

40. ROBERT J. MARTINEAU, FUNDAMENTALS OF MODERN APPELLATE ADVOCACY 129 (1985); Edwards, *supra* note 28, at 64.

41. Pregerson, *supra* note 38, at 436.

42. Miner, *supra* note 35, at 24.

43. Lance N. Long & William F. Christensen, *When Justices (Subconsciously) Attack: The Theory of Argumentative Threat and the Supreme Court*, 91 OR. L. REV. 933, 944 (2013) (describing

such language may diminish the effectiveness of the brief, an adversarial tone is still expected. Based on this assessment, judges are looking for a balance between argumentation and overly negative and conflictual statements.

The last two points of brief quality relate to the judge's focus. The first of these factors is brevity. While briefs that lack complete arguments and treatments of the facts will not serve attorneys' purposes, judges do not expect or wish attorneys to expound lengthy prose to make their points. Justice Ginsburg points this out as a flaw in many attorneys' cases: "Lawyers somehow can't give up the extra space, so they fill the brief unnecessarily, not realizing that eye-fatigue and even annoyance will be the response they get for writing an overlong brief."[44] In response to what he finds to be the biggest shortcoming in briefs, Justice Scalia responds, "Prolixity, probably. . . . You don't have to use the 40 pages if that's what you're allotted. Use as much as is necessary to make your point."[45] The Justices clearly demand succinct briefs that only deal with aspects of the case relevant to the Court's inquiry.

The Supreme Court docket has substantially shrunk over the last several decades, and as a consequence the Justices and their clerks may have more time to focus on individual cases.[46] The question on certiorari should be the focus of the brief and straying from this might show the Justices that the attorney is not concerned with issues relevant to the case. Justice Scalia is clear on this point: "The framing of the question is crucial. . . . I have seen that happen: not included within the question presented. So you make that argument and, you know, too bad."[47] Justice Breyer underscored this directive stating, "[W]e've taken the case to decide an issue -- one issue usually, maybe two -- and we are not looking so much at the whole case."[48] Along with a shrinking docket, there has been a substantial growth in the number of amicus briefs filed over recent years.[49] Moreover, there has been stable growth in the rate of petitions for certiorari filed with some notable spikes in filings.[50] The Justic-

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this language as "a defensive emotional response to an expected . . . adverse result in an appellate case").

44. Garner, *supra* note 1, at 137 (interviewing Justice Ruth Bader Ginsburg).

45. *Id.* at 53 (interviewing Justice Antonin Scalia).

46. *See* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1225–27, 1263 (2012) (providing evidence of the shrinking docket as well as explanations, including most prominently ideological cohesion among the Justices).

47. Garner, *supra* note 1, at 72–73 (emphasis omitted) (interviewing Justice Antonin Scalia).

48. *Id.* at 161 (interviewing Justice Stephen G. Breyer).

49. Anthony J. Franze & R. Reeves Anderson, *Justices Are Paying More Attention to Amicus Briefs*, NAT'L L.J., Sept. 8, 2014, at 11, http://www.arnoldporter.com/~/media/files/perspectives/publications/2014/09/justices-are-paying-more-attention-to-amicus-bri__/files/publication/fileattachment/nlj_justices-are-paying-more-attention-to-amicus__.pdf.

50. FED. JUDICIAL CTR., SUPREME COURT OF THE UNITED STATES CASELOAD, 1878–2014, http://www.fjc.gov/history/caseload.nsf/page/caseloads_Sup_Ct_totals (last visited Sept. 29, 2016).

es and their clerks need to process this additional information, which counterbalances their lighter caseload.

The Justices and their clerks are not only concerned with the length of briefs. They also prefer interesting over dull writing.[51] Engaging writing may gain the Justices' attention and focus Justices on the statements made in the brief. This further highlights the importance of a coherent rather than a verbose brief.[52] Scholars allude to the paramount significance of good general writing skills that make central points in the brief easy for judges to comprehend.[53]

The Justices generally agree that well-written briefs gain their attention. For Justice Scalia, this ability to focus the Justice's attention is the main advantage to good writing as he explained with the example: "My attention was fixed on that brief. I'd been reading a lot of other briefs, and they did not grab me the way this one did. That's the payoff. That's the payoff. It is clear."[54] Justice Alito connects good writing to the lawyer's persuasive ability, "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."[55]

There are a slew of examples of attorneys using long-winded and hard-to-follow sentences.[56] These may confuse the Justices about the attorneys' objectives and cause the Justices and clerks to lose their focus on such briefs. How do such phrasings in merits briefs look? In the school desegregation case of *Bradley v. School Board*,[57] the School Board's attorneys include a sentence in the brief:

> In this context, any limitations which failed to extend the scope of the award back to the time of this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) would be arbitrary and productive of the incongruous result that many of the school authorities who, with the massive resources of state treasuries at their disposal, openly defied this Court's earlier mandates against segregated education would escape the reach of any charge for the payment of fees incurred in the

51. *See* Miner, *supra* note 35, at 20 ("Pack the brief with lively arguments, using your own voice and style of expression. We prefer briefs that are not pompous, dull, or bureaucratic.").

52. Girvan Peck, *Strategy of the Brief*, LITIGATION, Winter 1984, at 26, 66.

53. *See* STERN, *supra* note 37, at 233–40; *see also* John D. Feerick, *Writing like a Lawyer*, 21 FORDHAM URB. L.J. 381, 381–83, 386–87 (1994); George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333, 335 (1987); Philip C. Kissam, *Thinking (by Writing) About Legal Writing*, 40 VAND. L. REV. 135, 135–36, 138–39 (1987); Mark K. Osbeck, *What Is "Good Legal Writing" and Why Does It Matter?*, 4 DREXEL L. REV. 417, 426 (2012); Harry Pregerson & Suzianne D. Painter-Thorne, *The Seven Virtues of Appellate Brief Writing: An Update from the Bench*, 38 SW. L. REV. 221, 222 (2008); J. Christopher Rideout & Jill J. Ramsfield, Dedication to Marjorie Dick Rombauer, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 37, 39 (1994); Pamela Samuelson, *Good Legal Writing: Of Orwell and Window Panes*, 46 U. PITT. L. REV. 149, 149 (1984).

54. Garner, *supra* note 1, at 73 (interviewing Justice Antonin Scalia).

55. *Id.* at 170, 179 (interviewing Justice Samuel A. Alito, Jr.).

56. *See, e.g.*, *infra* text accompanying note 58.

57. 416 U.S. 696 (1974).

> torturous litigation which those seeking admission to schools on an equal basis were forced to undergo.[58]

This 100-word sentence makes several contentions which, when combined, become quite difficult to follow. Justices and clerks have to parse such convoluted sentences to make sense of the details of the argument and such complexity may diminish the Court's focus on the brief and potentially lead to less consideration of the points therein.

Scholars and judges make clear that the features of high-quality briefs discussed in this Article are often connected. For instance, well-written briefs should be succinct and clear.[59] In this Article's analysis, I expect many of these factors to be connected. Based on the expectations set forth by the Justices themselves, the primary hypothesis of this Article is

Quality Hypothesis: *Higher-quality briefs will (a) win more cases than lower quality briefs, and (b) the Court will share more of its opinion language with higher-quality briefs.*

Attorney credibility should play a large independent role in the Justices' adoption of language from briefs. While attorneys learn more about the Justices' preferences from increased experience in the Court, by the time attorneys begin their practice in the Supreme Court the quality of their legal writing may be fairly solidified.[60] Even if the Justices share more language on the margins with higher-quality briefs, there is evidence that attorneys with more Supreme Court experience win cases more often and the Court shares more language with briefs from these attorneys than it does with briefs from less experienced attorneys.[61] The second hypothesis for this Article is

Credibility Hypothesis: *Controlling for differences in brief quality, Supreme Court opinions will share more language with more experienced attorneys' briefs.*

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58. Brief of Respondent at 14, Bradley v. Sch. Bd., 416 U.S. 696 (1974) (No. 72-1322), 1973 WL 172306, at *29–30.

59. William H. Rehnquist, *From Webster to Word-Processing: The Ascendance of the Appellate Brief*, 1 J. APP. PRAC. & PROCESS 1, 3 (1999) ("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.").

60. Based on available scholarship I would expect greater differences in brief quality based on attorney experience in lower courts. *See, e.g.*, Kevin T. McGuire, Georg Vanberg & Alixandra B. Yanus, Targeting the Median Justice: A Content Analysis of Legal Arguments and Judicial Opinions 11–15 (Jan. 3–7, 2007) (unpublished manuscript) (presented at the Annual Meeting of the Southern Political Science Association), http://mcguire.web.unc.edu/files/2014/01/targeting_median.pdf.

61. *See* Lazarus, *supra* note 23, at 1539–49; *see also* BLACK & OWENS, *supra* note 24, at 34–39, 102–11; Adam Feldman, *Who Wins in the Supreme Court? An Examination of Attorney and Law Firm Influence*, 100 MARQ. L. REV. (forthcoming 2017).

A. Empirical Understandings of Quality

Empirical work in the area of merits brief quality, especially with large-N samples, is quite sparse. Much of the work that purports to analyze brief quality either does so with unclear conceptual definitions or with proxy measures for quality. One example of this is in Kearney and Merrill's article, *The Influence of Amicus Curiae Briefs on the Supreme Court*.[62] In that paper, the section on brief quality begins, "Because reading and assessing the quality of more than 12,000 individual amicus briefs was a task far beyond our endurance, we had to come up with a proxy for briefs that contain information valued highly by the Court."[63] This proxy measure, also adopted in other scholarly works,[64] is based on attorney experience.[65] Such studies of briefs, however, lack measurements based on the actual words of the brief.

Another proxy measure that is designed to account for brief quality is whether the brief is submitted by the OSG. OSG briefs are often touted as the highest quality.[66] The high quality of briefs from the OSG is often suggested without a definition of the concept of brief quality, and so the measure of quality may be wrapped up with the high regard the Justices hold for the Solicitor General's (SG's) credibility.[67] To this point, Justice Ginsburg said, "It's never a problem with the SG. Even if I disagree with the argument, I know that the brief will give an honest account of the authorities. That's very important; I know I can trust the SG's brief."[68]

One area of scholarship that tackles the question of the relationship between brief quality and brief success is experimental in nature. These studies compare judges' responses to different linguistic framings. Several such studies, for instance, determined that judges found similar arguments written in plain English more persuasive than in legal jargon.[69] While these studies focus more precisely on the relationship between

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62. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000).

63. *Id.* at 810.

64. *E.g.*, Janet M. Box-Steffensmeier, Dino P. Christenson & Matthew P. Hitt, *Quality over Quantity: Amici Influence and Judicial Decision Making*, 107 AM. POL. SCI. REV. 446, 447 (2013); Paul M. Collins Jr., Pamela C. Corley & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 LAW & SOC'Y REV. 917, 931–32 (2015); Pamela C. Corley, *The Supreme Court and Opinion Content: The Influence of Parties' Briefs*, 61 POL. RES. Q. 468 (2008).

65. *See* Kearney & Merrill, *supra* note 62, at 813.

66. *See, e.g.*, PACELLE, *supra* note 24, at 5–6.

67. *See, e.g.*, BLACK & OWENS, *supra* note 24, at 35–36; *see also* Jeffrey A. Segal, *Amicus Curiae Briefs by the Solicitor General During the Warren and Burger Courts*, 41 W. POL. Q. 135, 138 (1988).

68. Garner, *supra* note 1, at 137 (interviewing Justice Ruth Bader Ginsburg).

69. *See* Sean Flammer, *Persuading Judges: An Empirical Analysis of Writing Style, Persuasion, and the Use of Plain English*, 16 LEGAL WRITING 183, 199 (2010); *see also* Robert W. Benson & Joan B. Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 LOY. L.A. L. REV. 301, 313–14 (1987).

words and judges' decisions, they are still purely hypothetical in nature.[70] This Article moves beyond the hypothetical by investigating the relationship between the quality of existing briefs and success before the Court.

Recent forays into the relationship between brief quality and brief success focus on the readability of briefs. These studies utilize readability algorithms such as Flesch Reading Ease scale to determine the ease of reading of existing briefs.[71] The algorithms generate measures based on the relative numbers of words, sentences, and syllables in a text.[72] Studies have still not found a conclusive relationship between a brief's readability and the chances of a brief's success. In one study utilizing readability measures, for instance, the authors found no correlation between the readability of briefs and case outcomes.[73]

Finally, several papers employ automated content analysis to deduce certain aspects of legal texts.[74] These articles use Linguistic Inquiry and Word Count (LIWC) to gauge the complexity of legal opinions and briefs.[75] LIWC uses word dictionaries to measure aspects of sample texts along multiple categories or dimensions. The program then provides an output that includes the percentage of words in a text that belongs to each category. These studies, for example, cluster several word categories that relate to cognitive complexity to generate their metrics.

B. The Role of Brief Quality

Statements from judges clarify that they focus their attention on high-quality briefs. Higher-quality briefs will not lead to favorable outcomes in all cases however. Justice Breyer is keyed into this point, "[I]f you don't have a sound view as to how these cases should come out, how the law should fit together, I doubt that you could make up for it by good writing. If you're very clear, you might just be very clearly wrong."[76] In close cases, a high-quality brief may persuade the Justices and clerks to focus their attention on the arguments from that particular brief. On the other hand, when the law is clear, the brief is limited in its ability to shift the decision outcome. Even if the law is clear, however, well-written

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70. *See, e.g.*, Flammer, *supra* note 69, at 191 (describing the study's methodology of sending Plain English and Legalese writing samples to judges asking the judges which sample was more persuasive).

71. Brady Coleman & Quy Phung, *The Language of Supreme Court Briefs: A Large-Scale Quantitative Investigation*, 11 J. APP. PRAC. & PROCESS 75, 83 (2010).

72. I comparatively examine several of these readability measures in the Appendix. *See infra* Tables 5–6.

73. *See* Long & Christensen, *supra* note 43, at 943–44.

74. *See* Collins, Corley & Hamner, *supra* note 64, at 931–32; *see also* Ryan J. Owens & Justin P. Wedeking, *Justices and Legal Clarity: Analyzing the Complexity of U.S. Supreme Court Opinions*, 45 LAW & SOC'Y REV. 1027, 1039–40 (2011); Ryan J. Owens & Justin Wedeking, *Predicting Drift on Politically Insulated Institutions: A Study of Ideological Drift on the United States Supreme Court*, 74 J. POL. 487, 493 (2012).

75. *See generally* sources cited *supra* note 74.

76. Garner, *supra* note 1, at 159 (interviewing Justice Stephen G. Breyer).

briefs can influence the Court to share more language with a particular brief regardless of whether the brief is written for the winning or losing party.[77]

Based on this notion, I generated a second outcome variable (aside from which side wins the case) derived from the percentage of an opinion's language that is shared with a given merits brief. Although winning briefs typically share more language with the Court's opinions, this is not always the case.[78] A high-quality brief should persuade the Justices and clerks to place greater focus on it during their deliberations. In effect, a lawyer may be able to compensate for a position that is not likely to win with a well-written brief that persuades the Court to share a maximum amount of opinion language with the brief. For attorneys and parties concerned with the Court's shifts in the law over time, such incremental benefits can have large downstream payoffs.[79] Persuasion from losing briefs may also involve limiting the magnitude of a negative outcome.

Here, quality may play a similar role to attorney credibility. While credible attorneys with high levels of experience have the ability to discriminate between cases that are more or less likely to win, inevitably they will represent clients with losing cases. While their briefs cannot change the facts or law relevant to the case, they can persuade the Court that their argument is sound. As Justices and clerks are apt to read briefs from experienced counsel more closely, especially those from the OSG, these briefs can persuade the Court to rely on them in resolving issues extraneous to the main outcome. These issues can also blunt the effect of the main outcome if the outcome is so clear to the Court based on factors extraneous to the briefs.

II. METHODS

To test hypotheses regarding the amount of opinion language shared with briefs, I used two-level hierarchical models on a newly developed dataset composed entirely of orally argued cases with exactly two merits briefs for the 1946 through 2013 Supreme Court Terms. The dependent variables are the case outcomes and the percentage of language in the opinion that is also located in a merits brief.

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77. *See, e.g.*, BLACK & OWENS, *supra* note 24, at 39; Corley, *supra* note 64, at 474–76; Adam Feldman, *A Brief Assessment of Supreme Court Opinion Language, 1946–2013*, 86 MISS. L.J. (forthcoming).

78. *See* Feldman, *supra* note 77.

79. Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 628–29 (2001) ("[W]hen a new precedent emerges, litigants will react to the precedent in ways that further reinforce and contribute to the path indicated by that new precedent: Parties whose favored outcomes become more likely in the wake of the new precedent may be more likely to bring suit and thereby push the law further in that same direction . . . .").

After collecting briefs and opinions for these cases and noting the winning and losing parties, I examined the language overlap between each individual brief and the corresponding opinion. This measure of language overlap suggests that the Court either relied on the language in the brief or found the language sufficiently relevant to be included in the opinion. I created separate text files for each brief and opinion in every case. I then ran the briefs and opinions through the software WCopyfind 4.1.1.[80] This program allows for pairwise comparison of documents to analyze instances of shared language.[81] The user inputs a base document (the opinion) with secondary documents (the case briefs) to locate similarities in the language used. I maintained the program's default settings in a similar manner to Corley and Owens and Black so that the program would highlight exact or extremely similar language.[82] Accordingly, the program was set to pick up phrases of at least 80% overlapping language between the brief and opinion.[83] The minimum length of each phrase was set to six words. These settings were designed to ensure the program focuses on common language in phrases of sufficient length to be meaningful.

I used different model specifications for the two models in the Article, although the models share the same approach. For both models each observation is based on a brief. There tends to be a high level of correlation between the amount of language opinions share with both briefs in the same case. To deal with this feature of brief/opinion relationships, I modeled both briefs in a case as nested in a dyad. I did this by creating separate observations for each brief/opinion relationship, and I also created a common identifier for both briefs in a case. The similarities between briefs in a case can confound standard errors in normal regression models. In these situations multilevel models are appropriate.[84] The dependent variable in the Outcome Model is dichotomous (either the higher-quality brief is associated with the winning or losing model). Due to the dichotomous outcome variable, I applied a multilevel probit model. The outcome in the Language Overlap Model is continuous and so I used a standard multilevel model.

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80. Louis Bloomfield, *WCopyfind*, PLAGIARISM RESOURCE SITE, http://plagiarism.bloomfieldmedia.com/z-wordpress/software/wcopyfind/ (last visited Sept. 26, 2016).

81. *Id.*

82. *See, e.g.*, Corley, *supra* note 64, at 471 (describing the main WCopyfind parameters as setting the shortest phrase to six words and the minimum percentage of perfect matches that a phrase can contain and still be considered a match at eighty).

83. *See* BLACK & OWENS, *supra* note 24, at 103 (measuring overlapping language between Supreme Court opinions and briefs submitted by the Office of the Solicitor General); *see also* Corley, *supra* note 64, at 471–72 (using WCopyfind to analyze the relationship between briefs submitted to the Supreme Court and Supreme Court opinions).

84. DAVID A. KENNY, DEBORAH A. KASHY & WILLIAM L. COOK, DYADIC DATA ANALYSIS 85–87 (2006).

Since scholars cite multiple aspects of writing as consequential for a brief's quality, I measured the quality of briefs along multiple dimensions. The indicators of quality discussed by scholars break down into two categories: those dealing with word choices and those dealing with sentence structure.[85] Judges and Justices appear to be drawn to language and structure that make writing easily comprehensible.

To move beyond past measures, I used dictionary-based software. The first tool, StyleWriter 4,[86] provides the indicators for the bulk of the factors associated with brief quality including wordiness, lively language, passivity, and sentence complexity.[87] StyleWriter is writing editor software with settings that can be modified for specific industries and purposes such as law.[88] StyleWriter has a built-in 200,000 graded word list and 50,000 word and phrase style and usage checker to analyze the use of plain language.[89]

Although StyleWriter measures the quality of writing, it lacks measurement for one very important dimension—a brief's tone or sentiment. Current works in many academic disciplines utilize sentiment analysis to measure the tone of documents.[90] I used a modified version of the SentiWordNet corpus-based dictionary to measure the sentiment of the briefs in the dataset.[91]

To focus on the importance of the factors relating to a brief's quality, I generated multiple control variables.[92] Due to the relationship of the control variables to the dependent variables, some are used in both models while others are used only in the Language Overlap Model. The first of these controls is *Complexity*. *Complexity* is a measure of the number

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85. *See generally* ALDISERT, *supra* note 27, at 277–78, 282.

86. *StyleWriter's Features*, EDITOR SOFTWARE, http://www.editorsoftware.com/StyleWriter_Features.html#advance_writing_statistics_software (last visited Sept. 25, 2016).

87. *Id.*

88. *Id.*

89. *Id.*

90. *See, e.g.*, AFFECTIVE COMPUTING AND SENTIMENT ANALYSIS: EMOTION, METAPHOR AND TERMINOLOGY (Khurshid Ahmad ed., 2011) (describing the use of sentiment analysis in domains ranging from film reviews to homeland security); Cheng-Jun Wang, Pian-Pian Wang & Jonathan J.H. Zhu, *Discussing Occupy Wall Street on Twitter: Longitudinal Network Analysis of Equality, Emotion, and Stability of Public Discussion*, 16 CYBERPSYCHOLOGY, BEHAV. & SOC. NETWORKING 679 (2013) (examining the public discussion about social movements on Twitter with the use of sentiment analysis); Saif Mohammad, From Once upon a Time to Happily Ever After: Tracking Emotions in Novels and Fairy Tales 105–14 (June 24, 2011) (unpublished manuscript) (presented at the 5th ACL-HLT Workshop on Language Technology for Cultural Heritage, Social Sciences, and Humanities), http://dl.acm.org/citation.cfm?id=2107650&CFID=705966001&CFTOKEN=21985198 (using sentiment analysis to track emotions in mail and books).

91. Stefano Baccianella, Andrea Esuli & Fabrizio Sebastiani, SentiWordNet 3.0: An Enhanced Lexical Resource for Sentiment Analysis and Opinion Mining 2200–01, 2204 (May 17–23, 2010) (unpublished manuscript) (presented at the Seventh International Conference on Language Resources and Evaluation), http://www.lrec-conf.org/proceedings/lrec2010/pdf/769_Paper.pdf.

92. Some of the variables are based on those used in previous studies looking at similar relationships. *See, e.g.*, Corley, *supra* note 64, at 474.

of legal provisions relied upon and issues raised in the case as coded in the Supreme Court Database.[93] As case complexity rises, the Justices may look to a larger pool of resources in drafting the opinion. Additional complexity should decrease a brief's overlap value.

Next, *Legal Salience* is a dummy variable that is coded as 1 in cases where the Court strikes down a law as unconstitutional or overturns its own precedent (as coded in the Supreme Court Database).[94] *Political Salience* examines when the case is salient to the public and to elites. When a case is discussed on the front page of the *New York Times* the day after the decision is handed down, I coded *Political Salience* as 1.[95] Both salience factors should also lead the Justices to focus on a larger pool of resources and lower the briefs' overlap values.

The next variables relate to party type and issue area. The first is *Solicitor General*. It is coded as 1 when the party on the brief is the United States or an executive branch agency represented by the OSG. It does not account for individual government employees. The other government variable is *State*. While I expect federal government briefs to carry a strong positive coefficient, the *State* variable should move in the negative direction due to the documented, poor-quality of states' briefs and the often overloaded dockets that states' attorneys face.[96] To combine constitutional issue areas, I clustered the *Civil Liberties* variables together.[97] Based on the assessment that many civil liberties cases are highly salient for the Justices and that the Justices have distinct preferences in such cases, I expect this variable to carry a negative coefficient.[98]

I coded a variable for briefs associated with parties that won by a unanimous decision of the Justices as 1. This is due to the expectation that the role of ideology is minimized in unanimous cases thus enabling the Justices to reach consensus on the opinion's language with fewer conflicting voices.[99] *Unanimous* should carry a positive coefficient. In contrast, I expect ideological friction among the Justices to play a larger role in contested decisions. I coded a dummy variable for cases where

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93. Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534, 538–39 (2002).

94. FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 46 (2000).

95. Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 72–73 (2000).

96. Thomas R. Morris, *States Before the U.S. Supreme Court: State Attorneys General as Amicus Curiae*, 70 JUDICATURE 298, 300, 304–05 (1987).

97. *The Supreme Court Database: Issue Area*, WASH. U. L., http://scdb.wustl.edu/documentation.php?var=issueArea (last visited Aug. 21, 2016) (indicating that the Supreme Court Database issue areas include: Criminal Procedure, Civil Rights, First Amendment, Due Process, and Privacy).

98. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 138, 147 (2002).

99. *See* Lee Epstein, William M. Landes & Richard A. Posner, *Are Even Unanimous Decisions in the United States Supreme Court Ideological?*, 106 NW. U. L. REV. 699, 712–13 (2012); *see also* Owens & Simon, *supra* note 46, at 1224.

the split of the Justices' votes is *Five to Four Vote* and I expect this variable to carry a negative coefficient.

Next, to account for the petitioners' advantage due to the certiorari process and aggressive grants, I coded a dummy variable, *Petitioner's Brief*, as 1 for each brief for the petitioning party and I expect this variable to carry a positive coefficient.[100] Based on the Justices' votes on the merits, I coded a dummy variable *Winning Brief* for the winning party in a case. As the Justices decide the winner of the case in conference prior to drafting the opinion, I expect the winning brief to generally set the bar for the amount of language the Court will share with the briefs in the case.

To measure an attorney's experience in the Supreme Court, the *Attorney Experience* variable tracks the number of times an attorney is listed as the attorney of record on Supreme Court briefs.[101] I generated this variable based on a Westlaw search of briefs for each attorney. Because the distribution of experience is skewed to the low end with a few significant outliers, I used the natural log of this experience variable. The pre-logged number increases by 1 each time the attorney is listed as attorney of record on a merits brief.

I next included a control variable for the Justices' *Ideological Compatibility* with the briefs. This variable accounts for the ideological compatibility between the Justice and brief and controls for the ideological direction of the brief. To code this variable, I used Martin-Quinn (MQ) Scores that measure the Justices' ideological preferences based on their prior votes.[102] I coded the dummy variable 1 when the majority opinion writer's ideological direction accorded with the ideological direction of the brief in the observation and 0 otherwise.[103]

To control for a Justice's relative workload and for the possibility that the number of clerks in a Justice's chamber affects the amount of overlap in a Justice's opinions, I added the variable *Clerks-Per-Chamber*.[104] I expect that the addition of more clerks over time functions as a resource to help gather greater amounts of information so that the

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100. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 80 (1998).

101. This is coded similarly to the brief quality variable in Kearney & Merrill, *supra* note 62, at 814.

102. These scores vary by Supreme Court Term. The scores are negative for liberal and positive for conservative and range from approximately negative six on the liberal side to near six on the conservative side. I only coded for ideological compatibility when the Justices' scores were either less than negative one or more than one indicating that the Justice is not ideologically neutral.

103. This is based on the direction of the lower court decision as coded in the Supreme Court Database. *The Supreme Court Database: Lower Court Disposition Direction*, WASH. U. L., http://scdb.wustl.edu/documentation.php?var=lcDispositionDirection (last visited Aug. 26, 2016).

104. While the majority of the Justices utilize the clerk pool to review certiorari petitions, they engage in their assessment of cases on the merits by individual chamber. *Supreme Court Procedure*, SCOTUSBLOG, http://www.scotusblog.com/reference/educational-resources/supreme-court-procedure/ (last visited Aug. 26, 2016).

overlap value should decrease as the number of clerks increase.[105] Although clerks may have subjective views on the utility of briefs for constructing opinions, multiple clerks in the same chamber should lead to opinion construction based on a greater diversity of sources, notwithstanding the tradition that individual clerks are generally assigned to focus on particular cases.[106]

Central to the analyses in this Article, I generated several indicators to measure the quality of briefs. As these are all indicators of the same overall concept, I used factor analysis to collapse the factors into a latent variable called *Brief Quality*.[107] All but one of the quality indicators were derived using StyleWriter's dictionary-based indices that measure characteristics of writing quality.[108]

The first indicator, *Passivity*, measures the number of passive verbs in the document based on the total number of sentences. *Passivity* makes writing less clear and incoherent. Examples of passivity include verbs preceded by "are" and "be."

The next two measures based on StyleWriter's term dictionaries are *Lively Language* and *Wordiness*.[109] Wordiness measures the inclusion of some of the most common non-pronoun words that are often used to link parts of speech.[110] Overuse of these words may detract from the writing quality. Many of these are also known as stopwords that are often removed from other forms of text analysis.[111] These words include "the," "and," "to," "of," "is," and "for."

Because StyleWriter's indices are term-based, I have a count variable that measures *Sentence Complexity*. This variable is a simple average of the number of words per sentence across a document. Increased sen-

105. There is an underlying issue of a Justice's supervision of clerks in this process. Although there is a possibility of "rogue" clerks that do tend to rely more or less on brief language when assisting in opinion drafting, I expect that as a general matter an increasing number of clerks will also function as a check on other clerks to ensure they are performing their duties in the manner expected of them. *See generally* Corley, *supra* note 64, at 468–69 (discussing the tendency for clerks and judges to borrow language from persuasive briefs).

106. *See* Terry Baynes, *Insight: The Secret Keepers: Meet the U.S. Supreme Court Clerks*, REUTERS (June 14, 2012, 6:18 PM), http://www.reuters.com/article/us-usa-healthcare-court-clerks-idUSBRE85D17120120614 (describing the practice of individual clerks focusing on particular cases).

107. Factor analysis was also used to validate this approach showing that all the brief quality indicators break down to a single factor.

108. For information regarding the disaggregated effects from the brief quality variables, see *infra* Appendix.

109. StyleWriter refers to these as "Pep" words. *StyleWriter's Editions*, EDITOR SOFTWARE, http://www.editorsoftware.com/StyleWriter_Editions.html (last visited Sept. 25, 2016).

110. *See id.*

111. *See* Justin Grimmer & Brandon M. Stewart, *Text as Data: The Promise and Pitfalls of Automatic Content Analysis Methods for Political Texts*, 21 POL. ANALYSIS 267, 273 (2013) ("Often we remove 'stop' words, or function words that do not convey meaning but primarily serve grammatical functions.").

tence complexity tends to create sentences that are dry and harder to follow.

Finally, with SentiWordNet I was able to measure the overall sentiment or tone of each brief. SentiWordNet measures whether a document has a positive or negative polarity based on the WordNet database of synsets (synsets are synonymous terms grouped together in the database).[112] SentiWordNet determines the sentiment of a document by the proportion of positively and negatively classified words assigned a label within it.[113]

Although SentiWordNet has been validated in a variety of studies as a sentiment classifier, it lacks one essential tool for sentiment classification: negation identification.[114] Negation identification is essential to sentiment classification due to a negation's ability to change the meaning of terms immediately following it. A simple example is the comparison of the phrases "the verdict was accurate" and "the verdict was not very accurate." Although "accurate" can convey a positive sentiment, the negation changes the meaning of the term.

To deal with negations, I created a regular expression that eliminates negated terms from sentiment classification in order to prevent these negations from confounding the results.[115] The sentiment scores are, therefore, based solely on non-negated terms, both positive and negative in polarity.

III. RESULTS

To test the importance of brief quality, Table 1 looks at the impact of brief quality on winning in the Supreme Court.

Table 1: Outcome Model
Multilevel Probit Estimates of Likelihood of Winning

Variable		
Petitioner's Brief	0.551^{***}	(0.0325)
Solicitor General	0.402^{***}	(0.0631)
State	0.220^{***}	(0.0343)
Ideological Compatibility	0.378^{***}	(0.0381)

112. *See* Baccianella, Esuli & Sebastiani, *supra* note 91.
113. *See id.* at 2200.
114. *See, e.g.*, Fazal Masud Kundi, Shakeel Ahmad, Aurangzeb Khan & Muhammad Zubair Asghar, *Detection and Scoring of Internet Slangs for Sentiment Analysis Using SentiWordNet*, LIFE SCI. J., May 2014, at 66, 68.
115. For the regular expression code, see *infra* Appendix.

Attorney Experience (Log)	0.0635***	(0.0160)
Brief Quality	0.0373**	(0.0137)
Constant	-0.538***	(0.0225)
N	9498	

Robust standard errors in parentheses

*$p<0.05$, **$p<0.01$, ***$p<0.001$

The dependent variable in Table 1 is dichotomous as it is coded 1 if the brief is for the winning party and 0 if the brief is for the losing party. The results of this model show that the quality of briefs is in fact significant in winning cases as brief quality positively affects the likelihood of winning. The likelihood of winning a case increases by approximately 20% by moving from the low end of the brief quality spectrum to the high end.[116]

Table 2 presents the multilevel model results of the relationship between brief quality and the overlapping language between opinions and briefs.

Table 2: Language Overlap Multilevel Model

Variable		
Complexity	-0.253***	(0.0722)
Legal Salience	-0.724***	(0.200)
Political Salience	-1.379***	(0.188)
Solicitor General	4.006***	(0.279)
State	-0.518***	(0.110)
Civil Liberties	-0.398**	(0.146)
Petitioner's Brief	1.100***	(0.101)
Attorney Experience (Log)	0.315***	(0.0889)
Winning Brief	1.880***	(0.165)
Ideological Compatibility	0.479**	(0.168)

116. This is based on predicted probabilities where all other variables in the models are set to their mean values.

Unanimous	0.654**	(0.207)
Five to Four Vote	-0.765***	(0.179)
Clerks Per Chamber	-0.0818	(0.0772)
Brief Quality	0.794***	(0.0700)
Constant	8.019***	(0.296)
Variance of Constant	1.279***	(0.0305)
Variance of Residual	1.467***	(0.0285)
N	9498	
ICC	.408	
PRE	.2005	

Robust standard errors in parentheses clustered on Supreme Court Term.

*$p<0.05$, **$p<0.01$, ***$p<0.001$

Model fit using maximum likelihood

Before examining the results, there are several checks I performed to ensure that the model is correctly specified and that the multilevel model accounts for the presumed correlation between merits briefs' overlap values in a case. First, a likelihood ratio test between each multilevel model and a linear regression is significant at the 0.001 level. The variance of the residuals is significant at the 0.001 level, which also helps support the presumption that the model is accurately specified. The reduction of error (PRE) in the two-level model over the one-level model is 20.05%. Finally, the intraclass correlation coefficient (ICC) is .408.[117]

As Table 2 shows, brief quality affects the amount of opinion language the Court shares with merits. The control variables all move in the predicted directions. The variables with the greatest magnitudes are for winning briefs, the presence of the Solicitor General, and for petitioner's briefs. These three variables have positive coefficients indicating they lead to a likelihood of more shared language between briefs and opinions.

Both politically and legally salient cases, as well as more complex cases lead, as predicted, to decreased shared language between briefs and opinions. This is not surprising given the expectation that the Justices

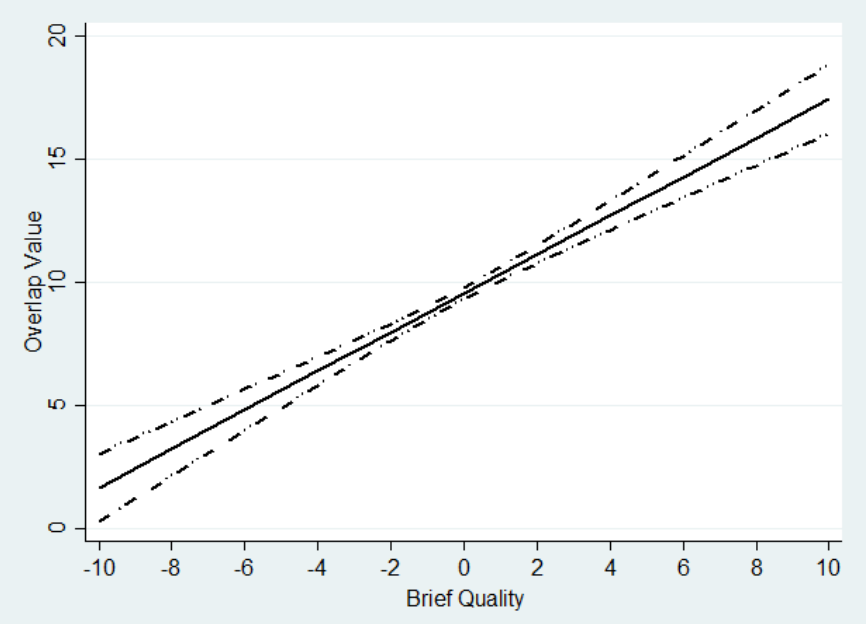
117. This measure was derived with non-robust standard errors, yet its magnitude suggests a substantial portion (over forty percent) of the residual variance is due to the dyadic pairs conditional on the top-level factors of the two-level model.

and clerks look to additional sources in drafting opinions when these factors are present. Also, as predicted, the Court shares less language with states' briefs.

Increased attorney experience positively affects the amount of language opinions shared with merits briefs. This finding supports the proposition that credibility plays a role in the amount of language the Justices and clerks share in their opinions with the briefs. Excluding the quality factors, the Justices share more language with more experienced attorneys' briefs. Opinions also share more language with briefs for winning parties in unanimous decisions and tend to share less language with both briefs in cases decided by five-to-four votes. Finally, and as expected, the Justices tend to share more language with briefs based on their ideological compatibility with the direction of the briefs.

Most importantly, the result for brief quality is significant and moves in the predicted direction. To understand the magnitude of the effect of brief quality, Figure 1 below depicts the marginal effects of increased brief quality on opinions' overlap values.

Figure 1: Marginal Effects of Brief Quality on Overlap Values



Note: Dashed outer lines represent 95% confidence intervals.

The figure shows that as brief quality increases, so does the amount of language the Justices and clerks share with briefs. There is more than a fourfold increase in the amount of language that opinions tend to share

with briefs that meet the upper bounds of the brief quality when compared with briefs at the lower bounds.[118] This suggests that an increased focus on writing quality does indeed enhance the Court's focus and reliance on particular merits briefs.

Table 3 underscores the difference between the amount of language the Court shares with high and low quality briefs. This table examines statistics from the top 100 and bottom 100 briefs based on the quality measure.

Table 3: Overlap Score Statistics for Top and Bottom 100 Brief Quality Scores

Statistic	**Top 100**	**Bottom 100**
Mean	10.32	5.67
Median	9.00	4.50
Variance	28.60	38.85
Skewness	1.37	2.91

Table 3 shows that the average amount of language that the Court shares with the top 100 briefs in the dataset based on brief quality is almost double that for the bottom 100. The overlap values for the top 100 briefs based on brief quality are also less dispersed as the variance and skewness are both smaller than those for the bottom 100 briefs. These values indicate that the top 100 briefs' overlap values are less driven by outliers than the bottom 100 briefs' values.

IV. ATTORNEY EXPERIENCE

Do more experienced Supreme Court attorneys draft higher-quality briefs? On one hand, one might expect that by the time attorneys file briefs in Supreme Court cases they have already honed their legal writing skills through appellate legal practice. Without additional input and writing training, an attorney's writing ability should be well defined by the time practitioners begin writing Supreme Court briefs. On the other hand, experienced Supreme Court practitioners may have gained a skillset, based on their specific knowledge of the Justices, which only those with such experience can acquire. The results in Table 4 provide evidence of the relationship between Supreme Court attorney experience and brief quality and show that to some extent both suppositions are correct.

118. The margins command in Stata bases its results on mean values for all other variables.

Table 4: Overlap Values and Quality Index by Attorney Experience Level

	Overlap Value (mean)	Brief Quality (mean)	N
Overall	9.55	0.00	9498
Repeat Player	11.54	0.05	3415
Non-Repeat Player	8.44	-.03	6063
Difference	3.10	0.08	

Note: Difference in means tests for overlap and quality both show the means are statistically different from each other at the .001 level. Repeat Player refers to attorneys with more than one brief filed in the Supreme Court.

According to Table 4, there is a slight difference in the quality of briefs from more experienced attorneys whose briefs are, on average, higher quality. This may be attributed to their increased Supreme Court brief writing experience. The difference in mean overlap scores between these two groups, however, is quite large at over three-percent per opinion. Differences in brief quality alone cannot account for this large difference in overlap values. This leads to the conclusion that an experienced attorney's credibility before the Court enhances the overlap values of their briefs more than quality alone would indicate.

CONCLUSION

This Article is the first attempt to empirically trace the effects of merits brief writing quality on Supreme Court case outcomes as well as on the amount of language majority opinions share with merits briefs.[119] Perhaps not surprisingly, the main finding is that quality does indeed matter. Higher-quality writing increases the likelihood of winning and increases the amount of language the Court shares with briefs. Low quality writing can have the opposite effect.

These findings are significant in our understanding of the role of Supreme Court advocacy. Well-written briefs may help win otherwise close cases by focusing the Court on a particular party's argument in the merits brief. Even when a party is likely to lose on the merits, however, the insights about increased brief quality can benefit the party on the

119. *See* Ryan C. Black, Matthew E. K. Hall, Ryan J. Owens & Eve M. Ringsmuth, *The Role of Emotional Language in Briefs Before the U.S. Supreme Court*, 4 J.L. & CTS. 377, 378 (2016) (examining whether emotional language in briefs affects a brief's likelihood of success).

margins by leading the Justices and clerks to insert a greater amount of language from the brief in the opinion.

Attorney experience and credibility also play large roles in the Justices' decisions, and their effects are augmented by higher-quality brief writing. When we observe the Court sharing more language with losing rather than winning briefs, the losing brief is often from more experienced attorneys. While the Court may not agree with the losing party's argument on the merits, the attorney's credibility can still lead the Court to share more language with this party's brief. A prime example of this relationship often occurs when the SG loses cases on the merits.

Based on this Article's results, which correspond with the Justices statements, the Justices appear to practice what they preach by favoring and awarding more shared language to higher-quality briefs.

APPENDIX

A. Readability Algorithms

The algorithms found below are alternative readability algorithms that are used in other linguistic studies. The data comparisons below, based on a random sample of 1,000 briefs, show how well these measures compare to the readability measure used in this Article.

Flesch Reading Ease (FRE)

$$FRE=206.835-1.015(W/S)-84.6(Y/W) \quad (1)$$

W=total words, S=total sentences, Y=syllables

Flesch Kincaid Grade Level (FGL)

$$FGL=.39(W/S)+11.8(Y/W)-15.59 \quad (2)$$

Gunning Fog Index (GFI)

$$GFI=.4[(W/S)+100(CW/W)] \quad (3)$$

CW= complex words

Table 5: Comparison of Readability Measures' R2 Values

Metric	**R2**
Quality Measure in this Article	**.0237**
Flesch reading ease	.0072
Flesch Kincaid grade level	.0033
Gunning Fog	.0021

Note: R2 values computed based on linear regression of readability measure on the outcome of overlap value with values clustered on Supreme Court term.

B. Regular Expression Code

```
\b(never|no|nothing|nowhere|noone|none|not|havent|hasnt|hadnt|cant|couldnt|shouldnt|wont|wouldnt|dont|doesnt|didnt|isnt|arent|aint)(?:\W+\w+){0,3}?\W+(.*)\b
```

C. Quality Variables Multilevel Model

Table 6: Multilevel Model with Quality Variables

Variable	Coefficient	Standard Error
Complexity	-0.177*	(0.0719)
Legal Salience	-0.808***	(0.197)
Political Salience	-1.172***	(0.198)
Solicitor General	3.638***	(0.291)
State	-0.712***	(0.115)
Civil Liberties	-0.188	(0.147)
Petitioner's Brief	1.079***	(0.105)
Attorney Experience (Log)	0.344***	(0.0891)
Winning Brief	1.912***	(0.166)
Ideological Compatibility	0.472**	(0.168)
Unanimous	0.679***	(0.205)
Five to Four Vote	-0.688***	(0.177)
Clerks Per Chamber	-0.205*	(0.0804)
Passivity	-0.0289*	(0.0117)
Wordiness	-0.0748*	(0.0326)
Lively Language	0.0261	(0.0329)
Sentence Complexity	-0.285***	(0.0841)
Sentiment	0.143***	(0.0316)
Constant	12.85***	(1.691)
Variance of Constant	1.251***	(0.0304)
Variance of Residual	1.487***	(0.0285)

N	9498

Robust standard errors in parentheses clustered on Supreme Court term.

$^{*}p<0.05$, $^{**}p<0.01$, $^{***}p<0.001$

Model fit using maximum likelihood