

# Who Wins in the Supreme Court? An Examination of Attorney and Law Firm Influence

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# WHO WINS IN THE SUPREME COURT? AN EXAMINATION OF ATTORNEY AND LAW FIRM INFLUENCE

ADAM FELDMAN\*

## *Abstract*

*Who are the most successful attorneys in the Supreme Court? A novel way to answer this question is by looking at attorneys' relative influence on the course of the law. This article performs macro and micro-level analyses of the most successful Supreme Court litigators by examining the amount of language shared between nearly 9,500 Supreme Court merits briefs and their respective Supreme Court opinions from 1946 through 2013. The article also includes analyses of the most successful law firms according to the same metric.*

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## I. INTRODUCTION

Who are the most successful attorneys in the Supreme Court? This article takes a novel approach to answering this question with an analysis of the amount of language Supreme Court opinions share with merits briefs and by tracking the counsel-of-record on each brief. It also examines the most successful law firms according to the same metric.

Briefs are an important starting point for understanding attorneys' influence in the Supreme Court, most notably because Supreme Court litigation is and has historically been brief-centric.<sup>1</sup> It is now dominated by a select few repeat players.<sup>2</sup> This domination has two main sources. Because the federal government is a dominant force in Supreme Court litigation, these repeat players often come from the Office of the Solicitor General (OSG). In recent years multiple retired Solicitors General (SGs) moved into private practice and continued to litigate cases before the Supreme Court. These ex-SGs along with several other attorneys that work in large firms' specialized Supreme Court practices constitute the second main source—what has become colloquially known as the “Supreme Court Bar” of experienced Supreme Court practitioners.<sup>3</sup> These repeat players in the Supreme Court have a very high success rate on the merits.<sup>4</sup> This in turn creates incentives for parties to employ such attorneys rather than seek novices at the Supreme Court level.

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1. Trial practice in the United States has its roots in the written word, which can be traced to the institution of a written constitution. See Mark R. 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, 249 (2009). This can be juxtaposed with the British legacy of focus on oral arguments. The importance of written briefs in the United States evolved as judges sought greater reliance on briefs as reliance on oral argument diminished. See, e.g., Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1162 (2004); William H. Rehnquist, *From Webster to Word-Processing: The Ascendance of the Appellate Brief*, 1 J. APP. PRAC. & PROCESS 1, 3 (1999). For anecdotal support for the proposition that briefs are central in U.S. appellate trial practice see Carter G. Phillips, *Advocacy Before the United States Supreme Court*, 15 T.M. COOLEY L. REV. 177, 189–90 (1998) (“The decision-making process is 99.9% based on the briefs.”); see also Kravitz, *supra*, at 247, 252 (explaining that the bulk of persuading judges is performed through the written brief).

2. Joan Biskupic, Janet Roberts & John Shiffman, *The Echo Chamber*, REUTERS (Dec. 8, 2014), <http://www.reuters.com/investigates/special-report/scotus/#article-1-the-elites> [<https://perma.cc/YAX6-KG42>].

3. There is no precise definition of the Supreme Court Bar. In his article detailing the success of Supreme Court Bar attorneys, Richard Lazarus defines these attorneys as those with “at least five oral arguments before the Court” or an attorney from a firm with at least ten total oral arguments in the Court. See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1490 n.17 (2008). The Supreme Court Bar of experienced attorneys is distinguishable from the Bar of the Supreme Court which has thousands of members and which has minimal criteria to join.

4. See Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187, 187 (1995).

While experience and winning in the Supreme Court often go hand-in-hand, it is less clear how this affects the course of the law. This article focuses on lawyers' abilities to transform the language of Supreme Court opinions in their preferred directions. The main question that this article seeks to answer is whether increased experience writing briefs for the Supreme Court leads the Court to adopt greater amounts of language from these attorneys' briefs in its opinions.

Scholars and jurists recognize the importance of the language of the law<sup>5</sup> and yet empirical analyses of the sources of this language remain elusive. In an article examining the implications of a new Supreme Court Bar of elite attorneys, Richard Lazarus describes, "In the longer term, it is the words that the Court uses throughout its opinion, rather than whether the opinion nominally ends with an 'affirmed' or 'reversed,' that tend to have the most significant impact."<sup>6</sup> The message from this statement is underscored by the words of Chief Justice Roberts: "Language is the central tool of our trade. . . . When we're construing the Constitution, we're looking at words. Those are the building blocks of the law. And so if we're not fastidious, as you put it, with language, it dilutes the effectiveness and clarity of the law."<sup>7</sup>

To understand how briefs directly impact Supreme Court opinions take the example of the Supreme Court case *Steiner v. Mitchell*.<sup>8</sup> In this case, the Court adopted many facts that were set forth by the respondent but were not in the petitioner's brief.<sup>9</sup> The opinion written by Chief Justice Warren discusses the risk of lead poisoning that can result from factory work in a battery plant stating,

The risk is "very great" and even exists outside the plant because the lead dust and lead fumes which are prevalent in the plant attach themselves to the skin, clothing and hair of the employees. Even the families of battery workers may be placed in some danger if lead particles are brought home in the workers' clothing or shoes.<sup>10</sup>

By accepting this portrayal of the facts, the Court not only highlights the

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5. See *supra* note 1.

6. Lazarus, *supra* note 3, at 1522.

7. Bryan A. Garner, *Interviews with United States Supreme Court Justices: John G. Roberts Jr.*, 13 SCRIBES J. LEGAL WRITING 5, 5 (2010).

8. 350 U.S. 247 (1956).

9. Many of the facts highlighted by the petitioner can also be found in lower court transcripts. *Durkin v. Steiner*, 111 F. Supp. 546, 547 (M.D. Tenn. 1953). The theory in this paper is not that lower court opinions are inconsequential to Supreme Court opinion language, but that briefs can and do influence what the Court finds relevant in those opinions.

10. *Steiner*, 350 U.S. at 247-48, 250; Brief for The Secretary of Labor at 4, *Steiner v. Mitchell*, 350 U.S. 247 (1956) (No. 22), 1955 WL 72536.

necessity of the workers' safety procedures, but perhaps more importantly extends the class of potentially harmed future plaintiffs to victims' family. The only two sources of this language organized exactly in this manner are the opinion and the respondent's brief.<sup>11</sup> Because the respondent's brief predates the opinion, there is little reason to doubt that the brief's author, Chief Justice Warren, incorporated the language from the brief in the opinion. By the mere inclusion of such language found in the respondent's brief, the Court provided a basis for a potentially large class of compensation claims.

Choices of whether or not to include language like in the above example are typical decisions the Justices make, all of which may affect an array of rights in previously unforeseen ways. Individuals with greater abilities to mold Supreme Court opinion language thus have power to shape the law and those affected by it.<sup>12</sup> By looking at attributes of attorneys that garner higher levels of shared language between briefs and the Court's opinions this paper also proposes that certain attorneys may predictably have a greater influence on the course of the law. This article, for example, examines the impact experience litigating in the Supreme Court has on opinion language by looking at the amount of language in Supreme Court opinions shared with merits briefs based on attorneys' varying levels of Supreme Court experience.<sup>13</sup> Assessing the impact of attorney experience on success in garnering language overlap between Supreme Court opinions and merits briefs creates an opportunity to reevaluate theories of litigation advantages in a new light.

## II. REPEAT PLAYER ADVANTAGE

Marc Galanter successfully articulated the theory that repeat players disproportionately come out ahead in court compared to "one-shotters" or non-repeat players.<sup>14</sup> While Galanter's argument does not perfectly map onto Supreme Court litigation, it is a useful starting point. In Galanter's study, the advantage for repeat players stems from, among other things, the ability to bear greater costs and the ability to focus on gains in the aggregate through repeat litigation

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11. *Steiner*, 350 U.S. at 250; Brief for The Secretary of Labor, *supra* note 10, at 4.

12. The relative benefit of Supreme Court litigation experience may, however, have diminished over time. See John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 77 (2005) (describing how the reemergence of the Supreme Court Bar created a snowball effect incentivizing additional experienced attorneys and former SGs to join law firms with Supreme Court practices).

13. See discussion *infra* Section III.

14. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-98 (1974).

and by shifting the course of the law over time.<sup>15</sup> Presently, after the Court grants cert in a case, even indigent parties are often represented by multiple attorneys, and generally do not need to worry about bearing the financial burden of litigation.<sup>16</sup> Further, the Supreme Court tends to only take cases where rules of law are at stake and so both parties are incentivized to play for the rules in a manner not necessarily consistent with practice in courts of first impression.

That said, Galanter identified some of the most important advantages of experienced Supreme Court attorneys: their institutional standing and their developed skill litigating in a particular, unique arena and consequent knowledge of the decision-makers.<sup>17</sup> Accumulated practice before the Supreme Court allows attorneys to develop specialized knowledge of the Justices and their specific predilections as well as to develop relationships with the Justices that other attorneys lack.<sup>18</sup>

Related to Galanter's theory, there are several explanations for why experienced Supreme Court litigators may gain an advantage in informing the Justices' and clerks' choices of opinion language: (1) the credibility that accumulates from successive practice; (2) advantages stemming from knowledge and relationship with the Justices; and (3) institutional advantages specifically related to the OSG.<sup>19</sup>

Justices and scholars agree that an attorney's credibility goes a long way in establishing the Justices' trust in certain attorneys.<sup>20</sup> While repeat practice in the Supreme Court may increase an attorney's credibility, an attorney can just as easily squander this credibility through choices made during litigation.<sup>21</sup> One

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15. *Id.* at 100.

16. *Id.* at 116–18.

17. *Id.* at 98–99.

18. Susan Brodie Haire, Stefanie A. Lindquist & Roger Hartley, *Attorney Expertise, Litigant Success, and Judicial Decisionmaking in the U.S. Courts of Appeals*, 33 LAW & SOC'Y REV. 667, 672 (1999).

19. See Thomas G. Hungar & Nikesh Jindal, *Observations on the Rise of the Appellate Litigator*, 29 REV. LITIG. 511, 519 (2010); Matthew L. Sundquist, *Learned in Litigation: Former Solicitors General in the Supreme Court Bar*, 5 CHARLESTON L. REV. 59, 61 (2010). See generally McGuire, *supra* note 4, at 187–89.

20. See RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 24 (2d ed. 2003) (“To gain the judge’s attention, you must immediately establish your credibility as a brief writer. Without credibility you may possibly gain the judge’s attention, but you will never maintain it. Unless you maintain it, you will never induce the judge to accept your conclusion.”); see also Haire, Lindquist & Hartley, *supra* note 18, at 671–72 (describing how well articulated briefs may enhance judges’ perceptions of certain attorneys). See generally Kevin T. McGuire, *Explaining Executive Success in the U. S. Supreme Court*, 51 POL. RES. Q. 505, 506–07 (1998).

21. See Timothy R. Johnson, James F. Spriggs II & Paul J. Wahlbeck, *Oral Advocacy Before the United States Supreme Court: Does it Affect the Justices’ Decisions?*, 85 WASH. U. L. REV. 457, 468 (2007); Christine M. Macey, *Referral is Not Required: How Inexperienced Supreme Court Advocates*

of the main failings that injure attorneys' credibility is when they make false, misleading, or exaggerated statements that are identified by the Justices.<sup>22</sup> Lack of credibility may follow an attorney in subsequent cases before the same judge or justice as well if the judge or justice develops distrust for that attorney.<sup>23</sup> Such distrust may be compounded by the fact that judges put their names on the opinions they author and thus may feel a sense of responsibility for the end product.<sup>24</sup> The Justices' clerks often perform research independent of the briefs from which they derive their assessments of a case and from which they may locate errors (intentional or not) made by attorneys.<sup>25</sup>

Attorneys may also lose credibility by insufficiently focusing on their work product. Judges describe losing trust in attorneys that present poorly constructed case materials.<sup>26</sup> Deceptive tactics can also inhibit an attorney's credibility. Attorneys that try to avoid negative aspects of their cases through crafty or misleading phrasing can equally frustrate judges and injure their own reputations.<sup>27</sup>

Multiple experiences before the Justices can prove beneficial for attorneys in a manner entirely dissociated from their credibility—specifically, their knowledge of the Justices.<sup>28</sup> With increased experience in the Court, attorneys

*Can Fulfill Their Ethical Obligations*, 22 GEO. J. LEGAL ETHICS 979, 982 (2009) (describing that the Justices are likely to accept information provided by credible attorneys with Supreme Court experience).

22. See The Honorable Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 568 (1999) ("Above all, a good brief is trustworthy. It states the facts honestly. It does not distort lines of authority or case holdings. It acknowledges and seeks fairly to account for unfavorable precedent."); see also FREDERICK BERNAYS WIENER, *EFFECTIVE APPELLATE ADVOCACY* 149–62 (Christopher T. Lutz & William Pannill eds., 2004) (describing that when judges find inaccuracies and omissions in an attorney's product they are less likely to find such an attorney persuasive).

23. See THOMAS B. MARVELL, *APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM* 35–36 (1978).

24. See E. Barrett Prettyman, *Some Observations Concerning Appellate Advocacy*, 39 VA. L. REV. 285, 291 (1953).

25. MARVELL, *supra* note 23, at 88.

26. See Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 LEGAL WRITING: J. LEGAL WRITING INST. 257, 278 (2002) ("Whether we mean to or not, we judges tend to become suspect of any argument advanced by an advocate who produced shoddy work. . . . I have little trust in an advocate who files a document that contains misspellings, poor grammar, or citation to 'bad law.'").

27. See Steven Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389, 1392 (1984); see also Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 SUFFOLK U. L. REV. 1, 5 (1997) (describing how poor quality work or deceptive tactics may also lead to court sanctions).

28. RICHARD A. POSNER, *REFLECTIONS ON JUDGING* 110 (2013) ("The lawyer's task [is] to persuade the judge that, properly interpreted, the authoritative materials yielded the answer that favored the lawyer's client to any legal question presented by the case. Sophisticated lawyers know better—

become more acquainted with the Justices' tastes in areas ranging from preferences in types of writing and tone to the types of arguments and policies the Justices prefer.<sup>29</sup>

Exposure to the Justices provides attorneys with insight into what to incorporate and to exclude from their writings.<sup>30</sup> This includes what the Justices might find useful and consequently the type of material that will draw the Justices' attention.<sup>31</sup> Experienced Supreme Court attorneys may be more aware of the Justices' particular foci at a specific point in time as well as the cases they find most persuasive as guiding precedent.<sup>32</sup>

Knowledge of the Justices includes an understanding of how to frame particular arguments. This can also help to focus the Justices' attention on a particular brief.<sup>33</sup> Attorneys learn these tactics and how to use them to their advantage through the Justices' written decisions as well as through interaction with the Justices during oral argument.<sup>34</sup> Many experienced Supreme Court attorneys also clerked for Supreme Court Justices, which provides them with intimate knowledge of Justices that others lack.<sup>35</sup>

Experience clerking for Supreme Court Justices is not the only institutional advantage that benefits certain attorneys. Working in the OSG provides attorneys with both unparalleled Supreme Court litigation experience as well as with

know that in many cases, and those usually the most important ones, matters aren't that simple.").

29. See Lazarus, *supra* note 3, at 1497.

30. See Phillips, *supra* note 1, at 183–84 (explaining that novice Supreme Court attorneys may present the Justices with unnecessary descriptions of case facts or of the trial proceedings).

31. See Richard A. Posner, *From the Bench: Convincing a Federal Court of Appeals*, 25 LITIG. 3, 3 (1999) (discussing how judges appreciate relevant material in briefs that can guide their decisions); see also Hungar & Jindal, *supra* note 19, at 534; Robbins, *supra* note 26, at 276 (discussing the importance of both of a brief's organization and sound analysis).

32. See Hungar & Jindal, *supra* note 19, at 519.

33. See Jeffrey Paul DeSousa & Melissa Meyer, *Equilibrium in High Court Representation for Criminal Defendants: How the Supreme Court Bar Can Champion Civil Liberties*, 26 GEO. J. LEGAL ETHICS 911, 924 (2013) (explaining that a powerful argument in a Supreme Court brief may work on an subconscious level and frame the debate between the Justices on the case issues). See generally Justin Wedeking, *Supreme Court Litigants and Strategic Framing*, 54 AM. J. POL. SCI. 617, 619 (2010) (analyzing the importance of choices in framing arguments based on the direction of the most recent lower court decision in the case).

34. TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 130 (2004) (describing the historic importance of interaction between Justices and attorneys through oral argument).

35. Todd C. Peppers, *William Thaddeus Coleman Jr.: Breaking the Color Barrier at the United States Supreme Court*, in IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES 161, 171–72 (Todd C. Peppers & Artemus Ward eds., 2012); Sundquist, *supra* note 19, at 82–83.



greater knowledge of the Justices.<sup>36</sup> As the Justices often hear litigation involving the federal government, the most common repeat player in the Supreme Court each term is the SG.<sup>37</sup> The SG is often the attorney most trusted by the Justices; so much so that the SG is sometimes referred to as “the Tenth Justice.”<sup>38</sup> The SG is so-dubbed due to the SG’s ongoing interactions with the Justices and the trust that the Justices imbue into the OSG with the expectation that the briefs the OSG presents will tend to give accurate assessments of cases and be of top quality.<sup>39</sup>

The Justices hold the OSG in such high esteem that they often invite the SG to file amicus briefs in cases in which the government is not directly involved in order to get the OSG’s assessment of a case or the government’s position on an issue.<sup>40</sup> In cases where the Justices need a better explanation of the facts, issues, or arguments, the Justices often turn to the SG’s brief to provide these insights with hopes that the assessment will be as objective as possible notwithstanding the SG’s role as an advocate.<sup>41</sup> The SG’s briefs also tend to incur great amounts of language overlap with Supreme Court opinions.<sup>42</sup> Thus, aside from the institutional benefits of association with the OSG, OSG attorneys enjoy the benefits of credibility and knowledge of the Justices that are also associated with this Office.

Experienced Supreme Court attorneys, often former SGs, comprise the modern Supreme Court Bar. These attorneys reap the benefits of knowledge of the Justices and credibility from experience in Supreme Court practice, yet lack the institutional support from the OSG.<sup>43</sup> Table 1 below organizes the expected advantages OSG attorneys, Supreme Court repeat players, and one-shotters (those that have only filed one merits brief) have in the Supreme Court.

36. Sundquist, *supra* note 19, at 61.

37. See LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 4 (1987).

38. See, e.g., *id.* at 3–4; Michael A. Bailey, Brian Kamoie & Forrest Maltzman, *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 AM. J. POL. SCI. 72, 72 (2005); Patrick C. Wohlfarth, *The Tenth Justice? Consequences of Politicization in the Solicitor General’s Office*, 71 J. POL. 224, 224 (2009).

39. See REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 34 (1992) (describing how the OSG’s credibility derives from the consistent accuracy and reliability of its briefs).

40. *Id.* at 145.

41. See WIENER, *supra* note 22, at 12 (explaining that when the Justices are interested in learning about confusing issues or case facts they often turn to the SG’s brief).

42. See RYAN C. BLACK & RYAN J. OWENS, *THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT* 98, 111 (2012) (examining language overlap between OSG briefs and Supreme Court opinions for the 1984–2007 Supreme Court terms).

43. McGuire, *supra* note 4, at 189.

Table 1: Advantages in the Supreme Court by Attorney Type

	Credibility	Knowledge	Institutional Support
<b>OSG Attorneys</b>	Y	Y	Y
<b>Repeat Players</b>	Y	Y	N
<b>One-Shotter Attorneys</b>	N	N	N

*Note:* Y=Yes; N=No

Repeat players and specifically Supreme Court Bar attorneys may somewhat diminish the strength and influence of the OSG due its practitioners' extensive litigation experience.<sup>44</sup> For many years OSG attorneys were the predominant repeat players in the Court, yet with the presence of Supreme Court Bar attorneys, equally or more experienced attorneys are now regularly involved in Supreme Court cases.<sup>45</sup> These attorneys have the resources to extensively research and prepare briefs in a variety of case areas.<sup>46</sup>

Former SGs have the benefit of the extensive brief-writing experience from their time working in the OSG.<sup>47</sup> Former SGs also have a broad network that they can utilize to their advantage. Aside from their knowledge of Supreme Court clerks and Justices, these experienced attorneys have the ability to convince powerful interest groups to file amicus briefs to support their positions.<sup>48</sup> When these attorneys' names are on briefs, they immediately gain the attention of clerks and Justices purely based on name recognition.<sup>49</sup> As this ability to focus clerks' and Justices' attention is divorced from the quality of briefs, it is

44. See Lazarus, *supra* note 3, at 1545–46.

45. See Roberts, *supra* note 12, at 77 (dating the reemergence of the Supreme Court Bar to approximately 1980). See generally KEVIN T. MCGUIRE, *THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY* 21 (1993) (documenting the rise of experienced Supreme Court practitioners in private law practice).

46. See Lazarus, *supra* note 3, at 1549 (describing how members of the Supreme Court Bar have a distinct advantage in complex and technical cases in areas such as patent law because the Justices may lack this specific expertise and these attorneys can prepare extensive materials to explain the dynamics and implications present). But see Macey, *supra* note 21, at 995 (discussing how the Justices may occasionally prefer the informational expertise of local attorneys to that of experienced Supreme Court practitioners); see also Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 745 (2000) (explaining that the explosion of amicus briefs in Supreme Court cases provides the Justices with policy implications that can influence case outcomes).

47. See Sundquist, *supra* note 19, at 85 (conveying that in the 2009 Supreme Court term the OSG filed thirty-seven merits briefs).

48. *Id.* at 87; see also Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J. L. & POL. 33, 50 (2004) (explaining that the Justices and their clerks pay special attention to amicus curiae briefs filed by respected groups such as the ACLU and NAACP).

49. See Sundquist, *supra* note 19, at 83.

an advantage not available to less experienced attorneys.

Based on the theorized relationship between on the one hand attorney credibility, knowledge of the Justices, and institutional support, and on the other hand an attorneys' success in focusing the Justices' attention on particular briefs, a main hypothesis of this article is that the amount of language Supreme Court opinions share with merits briefs should decrease from OSG briefs to briefs from members of the Supreme Court Bar to less experienced attorneys. Stated broadly, the amount of language shared between Supreme Court briefs and opinions should increase with an attorney's experience and institutional advantages. If, as predicted, briefs of high written quality grab the Justices' and clerks' attention, then increased brief quality should increase the amount of language the Justices adopt from certain briefs as well.

### III. METHODS

To examine the relationship between experience and success in the Supreme Court I first aggregated data for all cases and briefs for the relevant timeframe. I gathered briefs and opinions from all of the Court's cases for the Supreme Court Terms ranging from 1946 to 2013 that were orally argued and briefed on the merits, with exactly one main petitioner/appellant and one main respondent/appellee brief.<sup>50</sup>

After obtaining the briefs and opinions from these cases, I examined the language overlap between each individual brief and the corresponding opinion. I used this metric to generate the dependent variable: the percentage of the opinion's language that is shared with language from the brief. This measure of language overlap preliminarily suggests that the Court either relied on the language in the brief or when reviewing the brief found the language sufficiently relevant to include in the opinion. I created text files for each brief and opinion in every case. I then ran the briefs and opinions through WCopyfind.4.1.4.<sup>51</sup> This program allows for pairwise comparison of documents to analyze instances of shared language.<sup>52</sup> The user inputs a base document (the opinion)

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50. With only one merits brief per side I was able to examine the relationship between the brief and the opinion. If I examined more than one merits brief per side, the relative impact of each individual brief would be diminished and this would create difficulties in assessing the relationship between the individual briefs and the opinion.

51. *WCOPYFind*, THE PLAGIARISM RESOURCE SITE, <http://plagiarism.bloomfieldmedia.com/z-wordpress/software/wcopyfind/> [<https://perma.cc/NP48-YG3N>] (last visited Feb. 7, 2017); see Pamela C. Corley, *The Supreme Court and Opinion Content: The Influence of Parties' Briefs*, 61 POL. RES. Q. 468, 469, 471 (2008) (using WCopyfind to analyze the relationship between Supreme Court briefs and opinions over three terms).

52. See *WCOPYFind*, *supra* note 51.

with secondary documents (a case brief) to compare the language used in both. I maintained the program's default settings in a similar manner to previous studies so that the program would pick up exact or extremely similar language.<sup>53</sup> Accordingly, the program was set to pick up phrases that overlapped 80% or more between the brief and opinion. The minimum length of each phrase was set to six words. These settings are designed to ensure the program focuses on common language in phrases of sufficient length to be meaningful.

To illustrate, in the case *Lawson v. FMR*,<sup>54</sup> the sentence in the opinion, "By inflating its expenses, and thus understating its profits, [Fidelity Investments] could potentially increase the fees it would earn from the mutual funds, fees ultimately paid by the shareholders of those funds,"<sup>55</sup> was marked as overlapping because it is also found verbatim in the petitioner's brief. Another instance from this case is the phrase shared by the petitioner's brief and the opinion, "[the Senate Report concludes:] Congress must reconsider the incentive system that has been set up that encourages accountants and lawyers who come across fraud in their work to remain silent."<sup>56</sup> The opinion also shares statutory language with the respondent's brief: "No company with a class of securities registered under section . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any [lawful act done by the employee]."<sup>57</sup>

Additional differences between the phrases, however, prevent the program from finding overlap. For instance, the opinion in this case includes the language, "accountants and lawyers for public companies to investigate and report misconduct, or risk being banned from further practice before the SEC."<sup>58</sup> The respondent's brief has a similar phrase stating, "[u]nder these provisions, a law firm or public accounting firm that engages in retaliation against such whistleblowing can be banned from further practice before the SEC."<sup>59</sup> Even with the similar purpose of the phrases, the program only highlights the overlapping language, "banned from further practice before the SEC."<sup>60</sup> In this sense, the findings of the actual relationship of interest may be underinclusive.

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53. See, e.g., BLACK & OWENS, *supra* note 42, at 97; Corley, *supra* note 51, at 471.

54. 134 S. Ct. 1158 (2014).

55. *Id.* at 1173 (quoting Brief for Petitioners at 3, *Lawson v. FMR*, 134 S. Ct. 1158 (2014) (No. 12-3), 2013 WL 3972434).

56. *Id.* at 1170 (The words in brackets are not in the same position in the petitioner's brief and so are not picked up as overlapping by the program.).

57. *Id.* at 1174 (quoting 18 U.S.C. § 1514A(a) (2012)).

58. *Id.* at 1171.

59. Brief for Respondents at 41, *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014) (No. 12-3), 2013 WL 5441390.

60. *Id.*

I used two tools to control for the quality of writing in briefs. The first, StyleWriter 4, provides indicators for the bulk of the factors associated with brief quality.<sup>61</sup> StyleWriter is writing editor software with settings for specific industries such as law so that the results are tailored based on expectations of legal writing rather than on other types of prose.<sup>62</sup> It also measures several writing dimensions of interest.<sup>63</sup> 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.<sup>64</sup>

Although StyleWriter measures the quality of writing, it lacks measurement for one very important dimension—sentiment. Current works in many academic disciplines utilize sentiment analysis to measure the tone of documents.<sup>65</sup> I used a modified version of SentiWordNet to measure the sentiment of the briefs in the dataset.<sup>66</sup>

Lastly, I merged my data with the United States Supreme Court Database.<sup>67</sup> The Supreme Court Database provides case level information including the author of each opinion, the issue area, the parties involved in the case, and the ideological direction of the Supreme Court and lower court's opinions.<sup>68</sup> This information allowed me to analyze the data along multiple dimensions and to control for a variety of factors. I then disaggregated the dataset breaking it down by attorney and law firm. These data are the objects of analysis in this article.

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61. Professional Proofreading & Editing Writing Software. *See StyleWriter Professional Writing and Editing Software Features*, STYLEWRITER4: PLAIN ENG. EDITOR, [http://www.editorsoftware.com/StyleWriter\\_Features.html](http://www.editorsoftware.com/StyleWriter_Features.html) [<https://perma.cc/DR92-4TR6>] (last visited Feb. 7, 2017).

62. *See id.*; *StyleWriter 4 — Professional Plain English Proofreading and Editing Software*, STYLEWRITER4: PLAIN ENG. EDITOR, <http://www.editorsoftware.com/StyleWriter.html> [<https://perma.cc/56UB-8KLV>] (last visited Feb. 7, 2017).

63. *See StyleWriter Professional Writing and Editing Software Features*, *supra* note 61.

64. *See id.*

65. *See* Marco Guerini, Lorenzo Gatti & Marco Turchi, *Sentiment Analysis: How to Derive Prior Polarities from SentiWordNet*, in 2103 CONFERENCE ON EMPIRICAL METHODS IN NATURAL LANGUAGE PROCESSING 1259, 1259 (2013), <http://www.aclweb.org/anthology/D13-1125> [<https://perma.cc/FNE2-69W2>].

66. *See, e.g., id.* For an example application see Mohamed M. Mostafa, *An Emotional Polarity Analysis of Consumers' Airline Service Tweets*, 3 SOC. NETWORK ANALYSIS & MINING 635, 635 (2013).

67. Harold J. Spaeth et al., *Version 2014 Release 01*, SUP. CT. DATABASE, <http://supremecourtdatabase.org> [<https://perma.cc/P4R4-72KB>] (last visited Feb. 7, 2017).

68. *The Genesis of the Database*, SUP. CT. DATABASE, <http://supremecourtdatabase.org/about.php> [<https://perma.cc/W88L-WUFW>] (last visited Feb. 7, 2017).

## IV. MULTIVARIATE ANALYSIS

To test the relationship between attorney experience in Supreme Court and brief writing success this section begins with a multivariate analysis of the factors associated with the influence of briefs on the language of Supreme Court opinions. To perform the analysis, each observation is a measure of a brief/opinion relationship. Because each observation is a brief nested in a case with two merits briefs (creating a dyad) I use a hierarchical multilevel model.<sup>69</sup> Multilevel models help to account for instances when parameters vary at more than one level and where heteroskedastic errors between observations are likely.<sup>70</sup>

The multilevel model in this paper contains two-levels. The Overlap Equation (1) combines level-one brief and justice fixed-effects from equation (2) and level-two, random-effects that vary between cases from equation (3).

$$\text{Overlap}(\text{BriefLanguageinOpinion})_{ij} = \beta_{0j} + \beta_{1j} \text{CaseSpecifics}_i + \varepsilon_{ij} \quad (1)$$

$$\beta_{0j} = \gamma_{00} + \gamma_{01} + \gamma_{02} \dots + u_{0j} \quad (2)$$

$$\beta_{1j} = \gamma_{10} + \mu_{1j} \quad (3)$$

The model accounts for the assumption that overlap values between briefs and opinions in the same case are highly correlated with one another.<sup>71</sup> Figure 1 presents a histogram of all the briefs' overlap values from the dataset.

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69. See DAVID A. KENNY ET AL., *DYADIC DATA ANALYSIS* 78–79 (2006) (explaining the relevance of multilevel models in situations with data that consists of dyadic pairs).

70. See generally *id.* at 87–95.

71. See *id.* at 91.

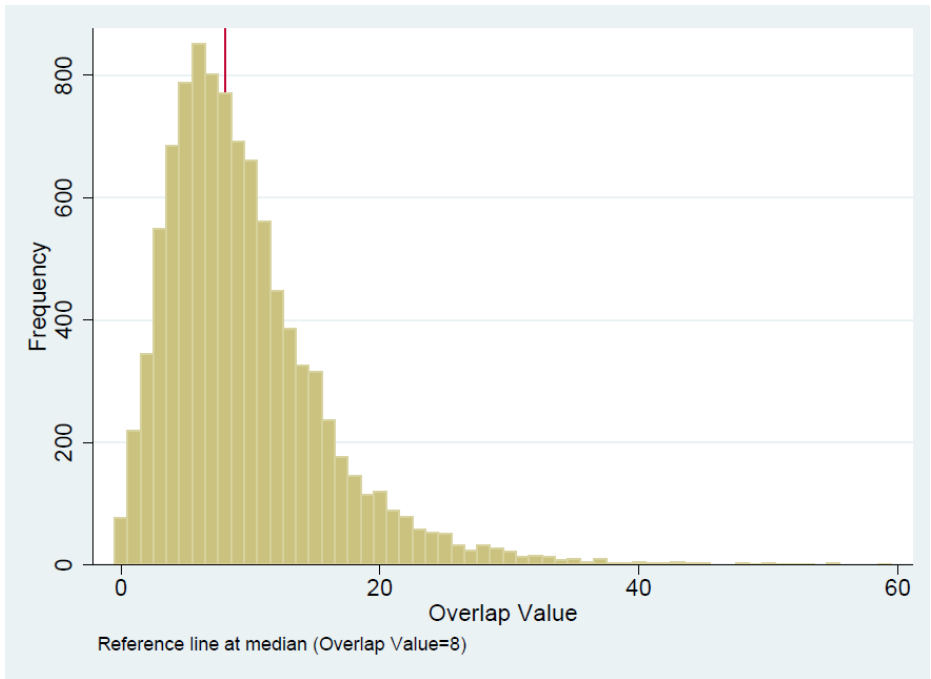


Figure 1: Histogram of % Language Overlap of All Briefs and Opinions: 1946–2013

While most of the opinions share around 10% of their language with briefs, the tail of the curve extends to the right until almost 40% language overlap. At the end of the tail there are eight instances where an opinion shares 50% or more of its language with a brief (the top instance of overlap is 59%).<sup>72</sup> We might infer from this striking similarity in language between a portion of briefs and opinions that there is something inherent in specific briefs or cases that motivates this high level of brief language use in such opinions. The mean overlap value is 9.69% while the median falls at 8%.

To gauge the importance of the factors that impact the amount of opinion language that overlaps with each brief I generated multiple control variables. Some of the variables are based on those used in previous studies looking at

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72. In all of these cases there was a substantially lower percentage of language overlap between the opinion and the other party's brief.

similar relationships.<sup>73</sup> The first of these controls is *Complexity*. *Complexity* is a measure of the number of legal provisions relied upon and issues raised in the case as coded in the Supreme Court Database.<sup>74</sup> As case complexity rises, the Justices may look to a larger pool of resources in drafting the opinion.

The next set of factors has to do with case salience. The first, *Legal Salience* is a dummy variable that is coded 1 in cases where the Court strikes down a law as unconstitutional or overturns its own precedent (as coded in the Supreme Court Database).<sup>75</sup> The second variable, *Political Salience* examines when the case is salient to the public and to elites. It is coded 1 when a case was discussed on the front page of the *New York Times* the day after the decision was handed down.<sup>76</sup>

The next set of variables relates to party type and issue area. The first is *Solicitor General*. It is coded 1 when the party on the brief is the United States or an executive branch agency represented by the OSG. The other party variable is *State*. While I expect SG briefs to carry a strong positive coefficient, the state variable should move in the negative direction due to the documented, poorer quality of states' briefs and the often overloaded dockets that states' attorneys face.<sup>77</sup> To control for salient, constitutional cases, I clustered cases in the *Civil Liberties* issue-areas together.<sup>78</sup> Based on the assessment that many civil liberties cases are highly salient for the Justices and that they have defined views on many of these issues, I expect this variable to have a negative coefficient as the Justices and clerks are likely to utilize a greater array of resources to construct these opinions.<sup>79</sup>

Next, to account the petitioners' advantage due to the certiorari process and aggressive grants I coded a dummy variable, *Petitioner's Brief*, 1 for each brief for the petitioning party. 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

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73. See, e.g., Corley, *supra* note 51, at 470–71.

74. See, e.g., Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534, 537–38 (2002).

75. FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEAGIAL GAME 5, 150–51 (2000) (generating and validating the legal salience metric).

76. See Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 66–73 (2000) (describing the genesis of the political salience measure).

77. Thomas R. Morris, *States Before the U.S. Supreme Court: State Attorneys General as Amicus Curiae*, 70 JUDICATURE 298, 299–301 (1987).

78. *Issue Area*, SUP. CT. DATABASE, <http://scdb.wustl.edu/documentation.php?var=issueArea> [<https://perma.cc/Q5JW-6DBH>] (last visited Feb. 7, 2017) (clustering Criminal Procedure, Civil Rights, First Amendment, Due Process, and Privacy).

79. See 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, 149 (2002).



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.

I coded a variable for briefs that won in *Unanimous* decisions 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.<sup>80</sup> 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 the split of the Justices' votes is five to four (*Five to Four Vote*) and I expect this variable to carry a negative coefficient.

To control for ideology, I apply the variable *Ideological Compatibility*. This variable accounts for the ideological compatibility between the authoring Justice of a given brief and helps to test whether the ideological direction of the brief works as a cue for the Justices. To code this variable I used Martin-Quinn (M.Q.) Scores<sup>81</sup> that measure the Justices' ideologies based on their prior votes. They vary on a term-by-term basis.<sup>82</sup> The scores are negative for liberal and positive for conservative and range from close to -6 on the liberal side to near 6 on the conservative side.<sup>83</sup> I only coded for ideological compatibility when the Justices' scores were either less than -1 or more than 1, indicating that the Justice was more than likely not ideologically neutral in a given term. 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.

I next control for several factors relating to a brief's quality, which I combine into a single factor, *Brief Quality*, using factor analysis. I use StyleWriter's dictionary-based indices as well as SentiWordNet software to measure five dimensions of each brief's written quality.<sup>84</sup>

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80. 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, 702 (2012).

81. See Martin & Quinn, *supra* note 79, at 146.

82. See *id.* at 147.

83. See *id.* at 145-46.

84. StyleWriter is corpus based linguistic software with an over 200,000 term dictionary. The factors I measure with each brief are passivity, lively language, wordiness, and sentence complexity. I use separate software, SentiWordNet, to measure the sentiment of each brief. These five indicators compose the Brief Quality variable.

Finally, to measure an attorney's experience in the Supreme Court, the *Attorney Experience* variable measures the number of times attorneys are listed as counsel of record on Supreme Court merits briefs.

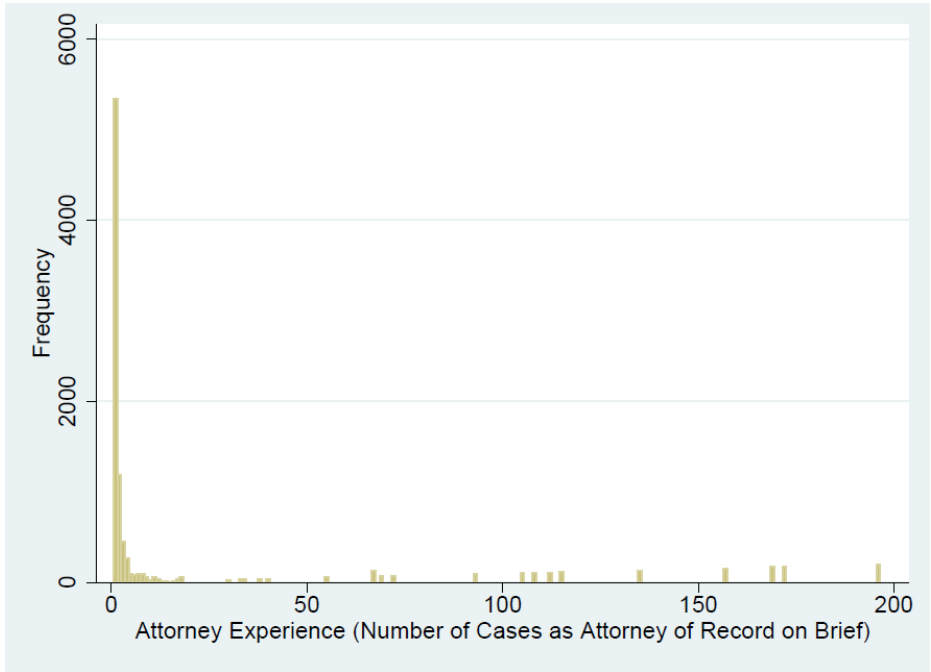


Figure 2: Histogram of Attorney Experience, 1946–2013 Terms

Because the distribution of experience is skewed to the low end with a few significant outliers, as is evident from Figure 2, I use the natural log of this experience variable. To control for the possibility that the experience of the law firm of record in the Court is used as a cue of the brief's credibility, the next variable *Firm Experience* is a similarly coded variable for a firm's experience. For the same reasons as the previous variable, I use the natural log of this value. I expect both variables to have positive coefficients.

Table 2: Two-Level Hierarchical Models of Factors Impacting Supreme Court Merits Brief and Opinion Language Overlap, 1946–2013 Terms

<b>Variable</b>	<b>Coefficient</b>	<b>Robust Standard Error</b>
Complexity	-0.169**	(0.0721)
Legal Salience	-0.832***	(0.203)
Political Salience	-1.135***	(0.190)
Solicitor General	2.522***	(0.392)
State	-1.028***	(0.132)
Civil Liberties	-0.252*	(0.139)
Attorney	0.234***	(0.0867)
Experience (Log)		
Firm Experience (Log)	0.266***	(0.0601)
Winning Brief	1.903***	(0.169)
Petitioner's Brief	1.062***	(0.106)
Ideological	0.466***	(0.169)
Compatibility		
Unanimous	0.687***	(0.207)
Five to Four Vote	-0.680***	(0.179)
Clerks Per Chamber	-0.160**	(0.0750)
Brief Quality	0.0444***	(0.0140)
Constant	7.955***	(0.279)
Variance of Constant	1.250***	(0.0310)
Variance of Residual	1.488***	(0.0283)
PRE	.1984	
ICC	.383	
<i>N</i>	9498	

Robust standard errors in parentheses clustered on Supreme Court Term

\*  $p < .1$ , \*\*  $p < .05$ , \*\*\*  $p < .01$

Model fit using maximum likelihood.

The model is displayed in Table 2 above. There are several checks I performed to ensure the model is correctly specified and that the multilevel model accounts for the presumed correlation between the merits briefs' overlap values in a case. First, a likelihood ratio test between the multilevel model and a linear regression is significant at the 0.001 p-level. The variance of the residuals is significant at the 0.001 p-level indicating that these are accurately specified. The reduction of error (PRE) in the two-level model over the base, one-level

model is 19.84%. Finally, the intraclass correlation coefficient (ICC) is .383.<sup>85</sup>

The results show a strong relationship between all of the hypothesized factors and the amount of language that overlaps between briefs and opinions.<sup>86</sup> All variables move in their predicted directions. To begin with the case salience factors are significant in the negative direction. This emphasizes that as cases are perceived as more important to the Court, the Court is likely to share less opinion language with the briefs. Similarly, and as presumed, *Complexity* is significant and has a negative coefficient.

Briefs for winning and petitioning parties also have strong positive coefficients. Both *State* and *Civil Liberties* share negative coefficients since, as expected, the Justices tend to share less language with briefs from states and in civil liberties cases. The two variables based on the Justices' voting coalitions, *Unanimous* and *Five to Four Vote*, both are significant and move positively and negatively respectively. The *Brief Quality* variable is also significant and moves in the positive direction indicating that on the aggregate, increased brief quality leads to more language shared between the brief and opinion.

In terms of the main factors of interest, the positive significance of *Log Firm Experience* and *Log Attorney Experience* shows that the Justices tend to share more language with attorneys and firms that have greater brief writing experience before the Supreme Court. Also, the large magnitude and high significance level for *Solicitor General* suggests that briefs from the OSG have a strong effect on opinion content.

## V. THE PLAYERS

Armed with the knowledge that the experience variables are significant and move in the predicted, positive direction, this section examines the most successful and most experienced attorneys and law firms according to their overlap scores. It also examines the quality of their respective merits briefs to see if the quality of briefs from more experienced and more successful attorneys and firms is greater than that from Supreme Court novices. This section first compares the attorneys with the most experience as counsel of record. It then examines the firms with the most experience based on the attorneys they employ. It separately examines SGs as they are historically the most successful attorneys in the Supreme Court.<sup>87</sup>

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85. This measure was derived with non-robust standard errors. Its magnitude still suggests a substantial portion (over one-third) of the residual variance is due to the dyadic pairs conditional on the top-level factors of the two-level model.

86. See *supra* Table 2.

87. See BLACK & OWENS, *supra* note 42, at 111 (describing that when matched for equal levels of experience, SGs' briefs shared more language with Supreme Court opinions than their equally experienced counterparts).

Figure 3 looks at the amount of overlapping language between Supreme Court opinions and briefs from three sets of attorneys for the years 1946 through 2013: (1) “one-shotters” or those with only one experience as counsel of record in the Court, (2) “repeat player” attorneys who are listed as counsel of record in more than one case, and (3) SGs.

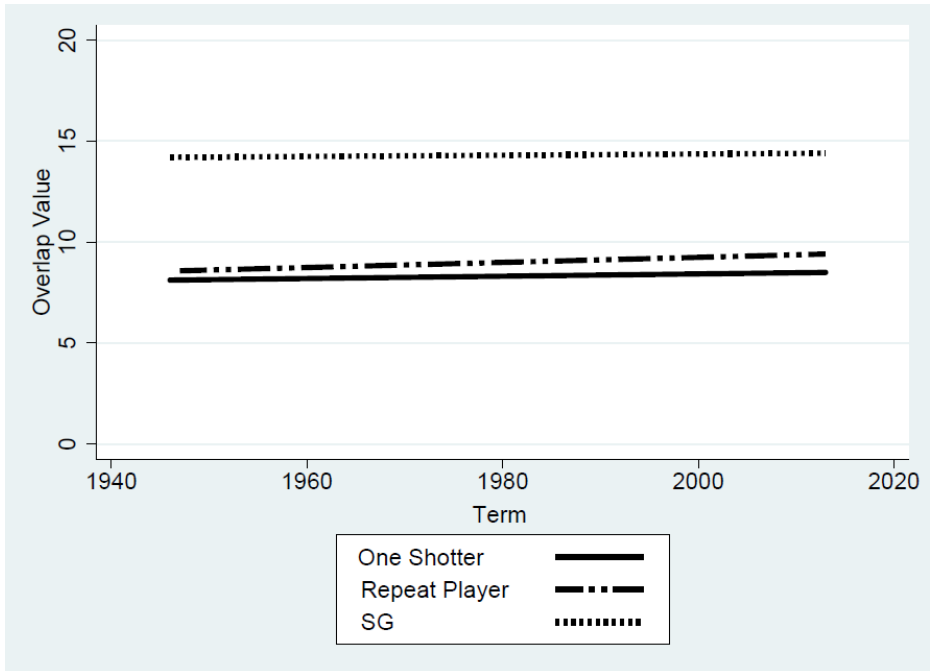


Figure 3: Plot of Mean Overlap Scores by Attorney Experience Type

Figure 3 shows that while there is an advantage that comes with experience, the advantage is nowhere near as significant as that which comes from working in the OSG.<sup>88</sup> There are several likely explanations for this result. First, the repeat player category encompasses significant variation in terms of experience (excluding SGs). Thus, while highly experienced attorneys may fare considerably better, repeat players with only a few experiences drafting briefs for the Supreme Court may drive the low differential between one-shotters and the more experienced attorneys. The SG’s institutional success in the Supreme Court and exponentially greater number of opportunities writing Supreme

88. The most glaring aspect of this figure is the distinction between SGs and all other attorneys. *See id.* (noting that Courts not only borrow more from winning OSG briefs than winning non-OSG briefs, but that Courts also borrow equally from both briefs when the non-OSG party wins and the OSG loses).

Court briefs compared to other attorneys most likely explains the great disparity in overlap values between repeat players and SGs.

Figure 3 also shows a slight divergence between the trajectory of the overlap values for one-shotters and repeat players that becomes more distinct in recent years. This may be due to the success of repeat players associated with the Supreme Court Bar.

This section begins with examining the top non-OSG attorneys according to this article's standard for brief writing success.

#### A. Top (Non-OSG) Attorneys

As the histogram in Figure 2 conveys, the bulk of attorneys that write Supreme Court briefs are one-shotters. The number of repeat players drops precipitously from there. There are only a handful of non-OSG attorneys that are listed on five or more briefs as counsel of record, and many of these are ex-SGs that returned to the private sector.<sup>89</sup> Figure 4 shows the attorneys with the most Supreme Court experience as counsel of record.

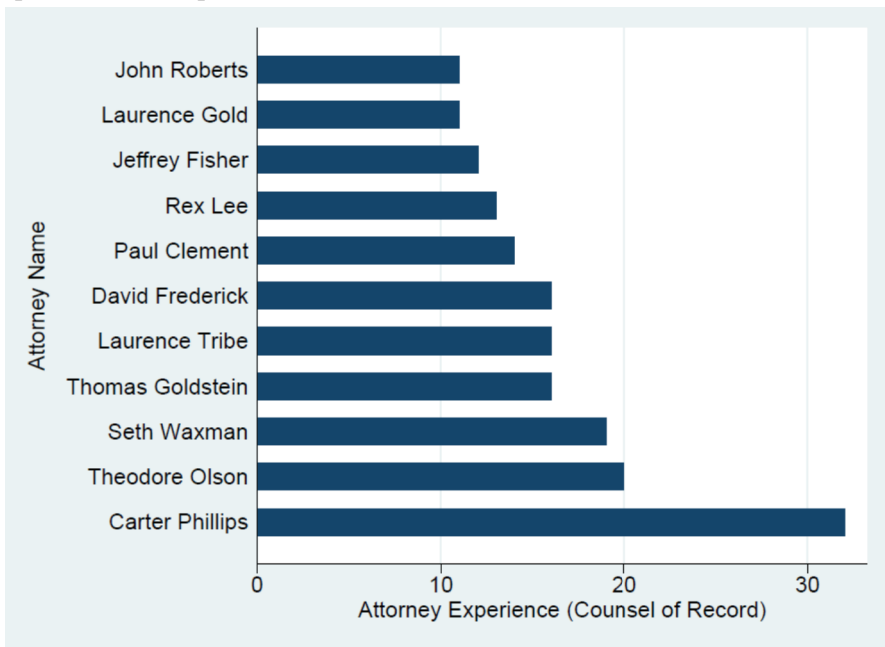


Figure 4: Number of Times Top Attorneys Listed Counsel of Record

*Note:* Includes attorneys listed as counsel of record on 11 or more Supreme Court briefs excluding instances as SG.

89. Lazarus, *supra* note 3, at 1492 (observing that the Supreme Court Bar consists primarily of ex-SGs).

The range of experience for the most experienced non-OSG attorneys is from eleven to thirty-three briefs. Six of the fourteen attorneys listed also worked as the SG,<sup>90</sup> although the attorney with the most non-OSG experience, Carter Phillips, was never Solicitor General.<sup>91</sup> Several of these attorneys were also counsel of record in some of the most high-profile recent Supreme Court cases including Paul Clement in *United States v. Windsor*,<sup>92</sup> Ted Olson in *Citizens United v. FEC*,<sup>93</sup> and Carter Phillips in *FCC v. Fox Television*.<sup>94</sup>

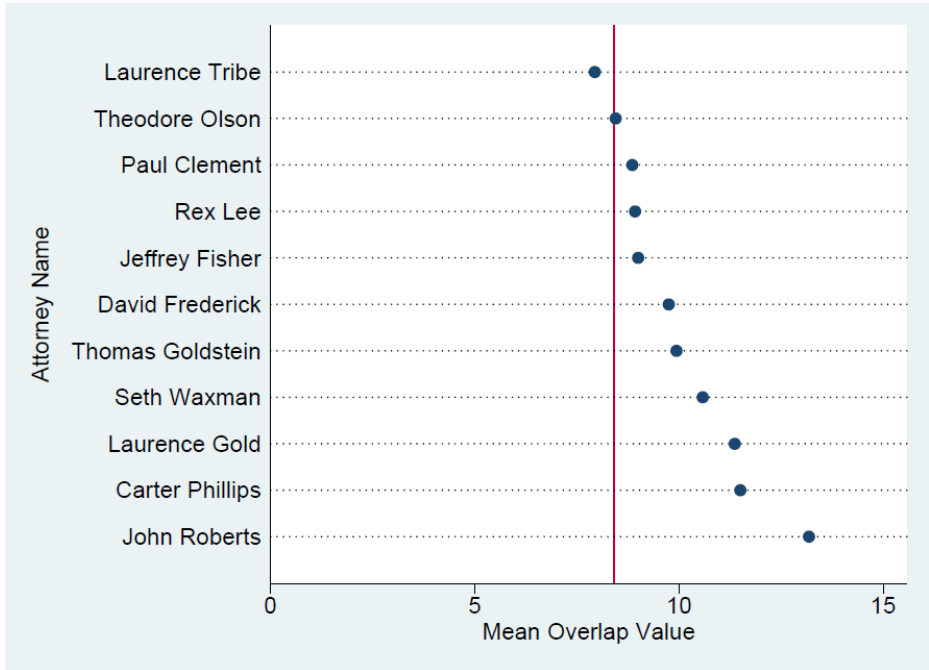


Figure 5: Mean Overlap Scores for Top Attorneys

Note: Excludes instances in OSG; Reference line at mean non-OSG value (8.42).

90. These include John Roberts, Paul Clement, Rex Lee, Thomas Goldstein, Seth Waxman, and Ted Olson.

91. Phillips did clerk at the Supreme Court level for Chief Justice Burger and worked in the OSG as an Assistant to the Solicitor General. See Phillips, *supra* note 1, at 180; see also Carter G. Phillips, SIDLEY, <http://www.sidley.com/people/carter-phillips> [<https://perma.cc/54PP-8AJV>] (last visited Feb. 7, 2017).

92. 133 S. Ct. 2675, 2682 (2013).

93. 558 U.S. 310, 311 (2010).

94. 556 U.S. 502, 504 (2009).

These attorneys specialize in Supreme Court practice.<sup>95</sup> From Carter Phillips' Supreme Court practice group in Sidley Austin's Washington, D.C. office<sup>96</sup> to Thomas Goldstein's boutique Supreme Court litigation firm Goldstein & Russell,<sup>97</sup> these attorneys have developed a particular expertise for trying cases in the Supreme Court.<sup>98</sup> They also tend to fare better than the average Supreme Court brief writer in terms of the amount of language the Justices incorporate from their briefs in the Court's opinions (the mean overlap value for all non-OSG attorneys in the Supreme Court is 8.42%).<sup>99</sup> Figure 5 plots these attorneys' mean overlap scores.

As the figure makes apparent, most of these highly experienced Supreme Court litigators perform near or above the mean level for Supreme Court brief-writers with five attorneys mean overlap scores at 10% or greater. The highest mean overlap score is for the current Chief Justice and ex-acting SG, John Roberts. Roberts was a partner at the firm Hogan & Hartson (now Hogan Lovells) specializing in Supreme Court litigation before becoming a judge.<sup>100</sup> The next most successful attorney is Carter Phillips indicating that not only is Phillips a

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95. *Carter G. Phillips*, *supra* note 91; *Thomas C. Goldstein*, GOLDSTEIN & RUSSELL, P.C., <http://www.goldsteinrussell.com/attorneys/thomas-c-goldstein/> [<https://perma.cc/CCM4-5FP8>] (last visited Feb. 7, 2017).

96. *See Carter G. Phillips*, *supra* note 91.

97. *Firm Overview*, GOLDSTEIN & RUSSELL, P.C., <http://www.goldsteinrussell.com/firm-overview/> [<https://perma.cc/8K56-AFY6>] (last visited Feb. 7, 2017).

98. *See* Joseph W. Swanson, *Experience Matters: The Rise of a Supreme Court Bar and Its Effect on Certiorari*, 9 J. APP. PRAC. & PROCESS 175, 175, 177–78 (2007).

99. Reference lines in all dot plots convey the mean value across all briefs for the measure of interest unless otherwise noted.

100. *See* THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–2012 497 (Clare Cushman ed., 3d ed. 2013).



seasoned Supreme Court litigator, but he is also one of the most successful Supreme Court brief-writers.

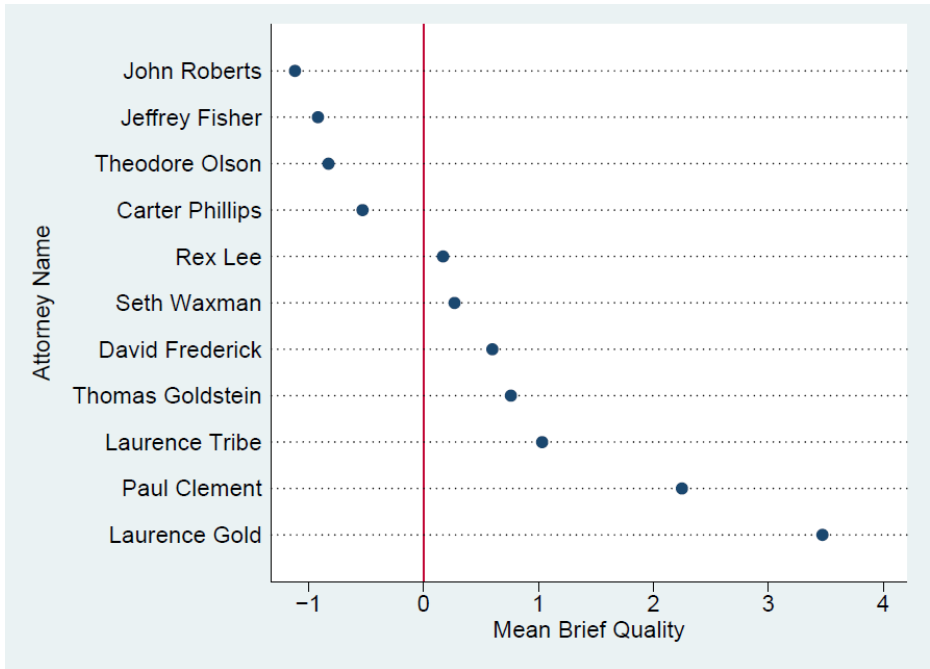


Figure 6: Mean Brief Quality Score for Top Attorneys

*Note:* Reference line at mean brief quality value of 0.00.

Experienced Supreme Court brief-writers generally appear cognizant of the conventions associated with high-quality writing. Figure 6 shows that most of these attorneys write near or above the mean quality level for Supreme Court briefs. It also shows, however, that for experienced attorneys, the quality of brief writing may not make a large impact. The top two attorneys in terms of overlap value, John Roberts and Carter Phillips are both below the mean for brief quality. This indicates that the Court focuses on their briefs based on factors such as their credibility, which is not necessarily associated with their writing quality.

### B. Top Law Firms

While attorneys' successes in the Supreme Court are documented and supported by the analyses in this article, the successes of law firms are more opaque. Intuitively, the firms that employ successful Supreme Court attorneys should constitute the majority of firms that produce briefs with the highest mean overlap scores. This section examines the firms with the most Supreme Court experience. Figure 7 presents the number of times the most experienced firms employed the counsel of record on Supreme Court briefs.<sup>101</sup>

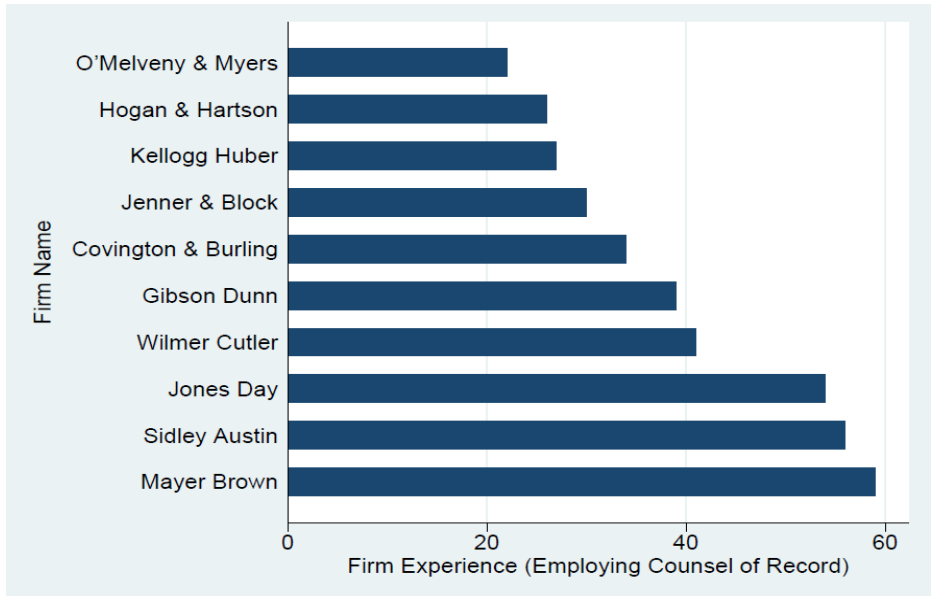


Figure 7: Number of Times Top Firms Employed Counsel of Record

Figure 7 corroborates the supposition that the firms that employ the most experienced attorneys in the Supreme Court are also the most experienced Supreme Court firms. The most experienced firm, Sidley Austin employs the most experienced attorney, Carter Phillips. Mayer Brown and Jones Day were two of the first large firms to create dedicated Supreme Court practices.<sup>102</sup> Chief Justice Roberts worked at Hogan & Hartson before his appointment to the D.C. Circuit Court of Appeals.<sup>103</sup>

Figure 8 shows the mean overlap values for these experienced firms' briefs.

101. Firms in this category employed the counsel of record on a Supreme Court merits brief on more than twenty occasions.

102. See Lazarus, *supra* note 3, at 1500.

103. *Id.* at 1499–1500.

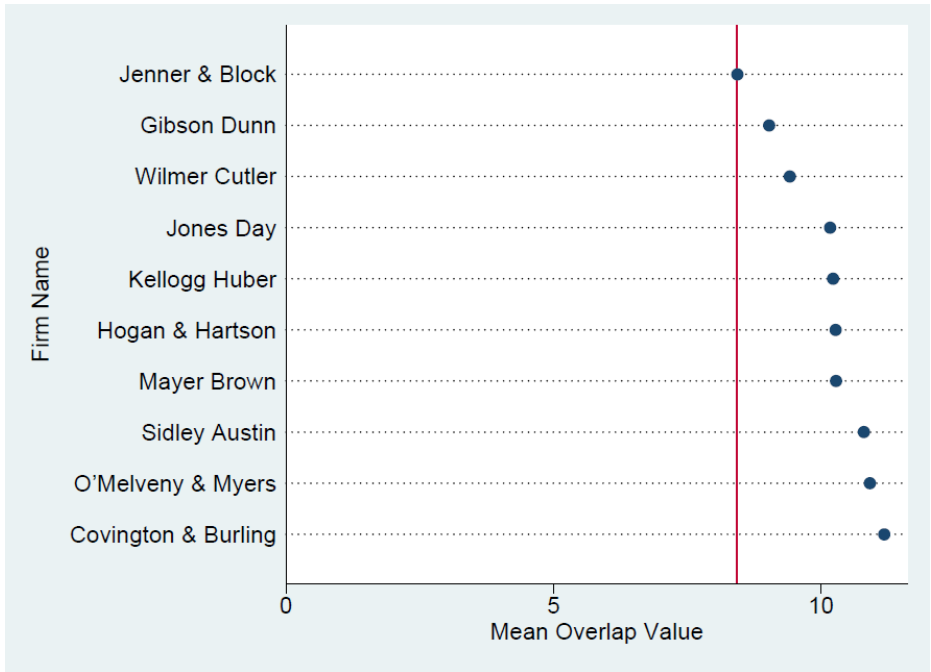


Figure 8: Mean Overlap Values for Top Firms

*Note:* Reference line at mean non-OSG value (8.42).

The correlation between the success of the most experienced attorneys and the most experienced firms is not stark. While Chief Justice Roberts was the most successful of the most experienced attorneys, Hogan & Hartson is not in the top three most successful firms in this experienced group and Sidley Austin is only the third most successful firm. The top two large firms in terms of overlap scores are Covington & Burling and O'Melveny & Myers.

The mean overlap values for these experienced firms cluster around 10% with only slight variation. While practically all of these firms have higher mean overlap values than the mean non-OSG brief value, there is a high level of similarity in the mean overlap values for these firms' briefs. The implication from this figure is that the top firms tend to employ attorneys that perform better than the average Supreme Court attorney, but that there is similar output from all of these top firms.

Figure 9 looks at the brief quality from these experienced firms.

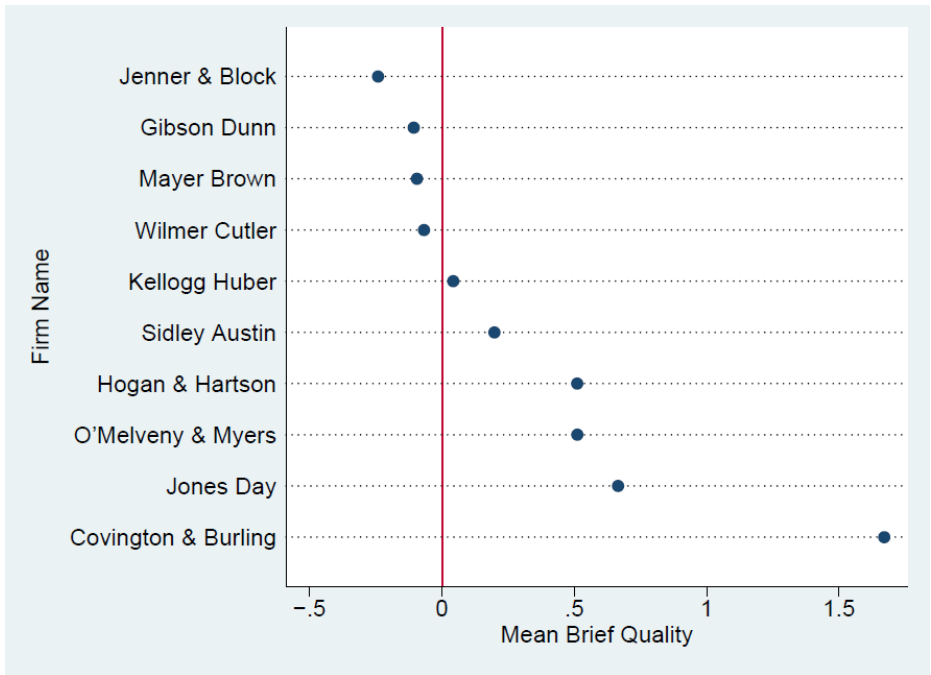


Figure 9: Mean Brief Quality Score For Top Firms  
*Note:* Reference line at mean sentiment score of 4.17.

The top two performing firms in terms of overlap values also have average brief quality scores above the mean. The mean brief quality for Covington & Burlings' attorneys is notable as well as it is above the value for any of the other top firms. The relationship between the top firms' brief quality and overlap values hints at the possibility that brief quality plays a more important role for top firms than it does for top attorneys. This makes intuitive sense given experienced attorneys' names will be familiar to the Court and this familiarity likely comes with preconceptions about these attorneys' outputs. Attorneys that draft briefs for top firms are a mix of more and less well-known names, and so brief quality may supplement name recognition at the top law firm level.

### C. Solicitors General

Over the last several decades, the most successful brief writers in the Supreme Court come from the Office of the Solicitor General.<sup>104</sup> This is apparent at both the aggregate level in terms of the mean overlapping language between

104. See, e.g., BLACK & OWENS, *supra* note 42, at 23, 27.

the OSG's briefs and Supreme Court opinions (as is apparent in Figure 3) as well as on the qualitative level. The language from briefs filed by the OSG very clearly makes its way into Supreme Court opinions.<sup>105</sup>

Some of the SGs' successes in the Court may be related to the number of opportunities these attorneys have before the Court. This number tends to far exceed those for even the most experienced Supreme Court attorneys in private practice. Figure 10 shows the number of times each SG was listed as counsel of record on the federal government's merits briefs from 1946 through 2013.

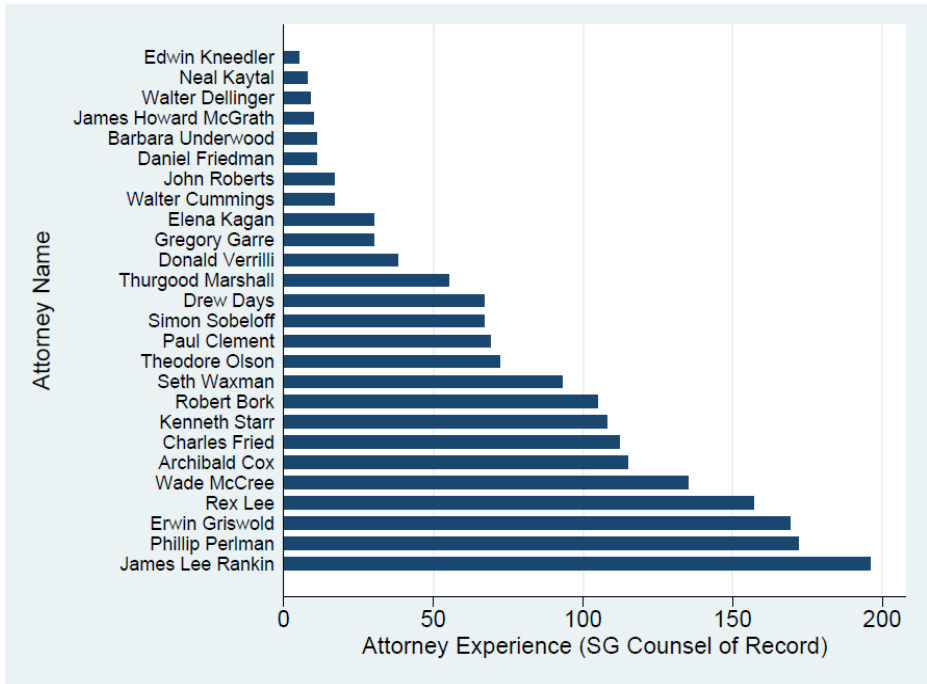


Figure 10: Number of Times Solicitors General Listed Counsel of Record

The attorneys in Figure 10 were either appointed SGs or acting SGs between appointments. Their high level of experience is apparent with most listed as counsel of record on more than fifty Supreme Court briefs and several listed as counsel of record on over one hundred Supreme Court briefs. The bars in Figure 10 also exclude the times these attorneys appeared as counsel of record in private practice.

105. See LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* 113 (1992) (describing the Court's insertion of language directly from Solicitor General Bork's brief in its opinion).

Although there is evidence that SGs write more successful briefs than most other attorneys in the Supreme Court, it is less clear whether there is variation in the success of SG's.<sup>106</sup> Figure 11 shows the mean overlap values for these attorneys.

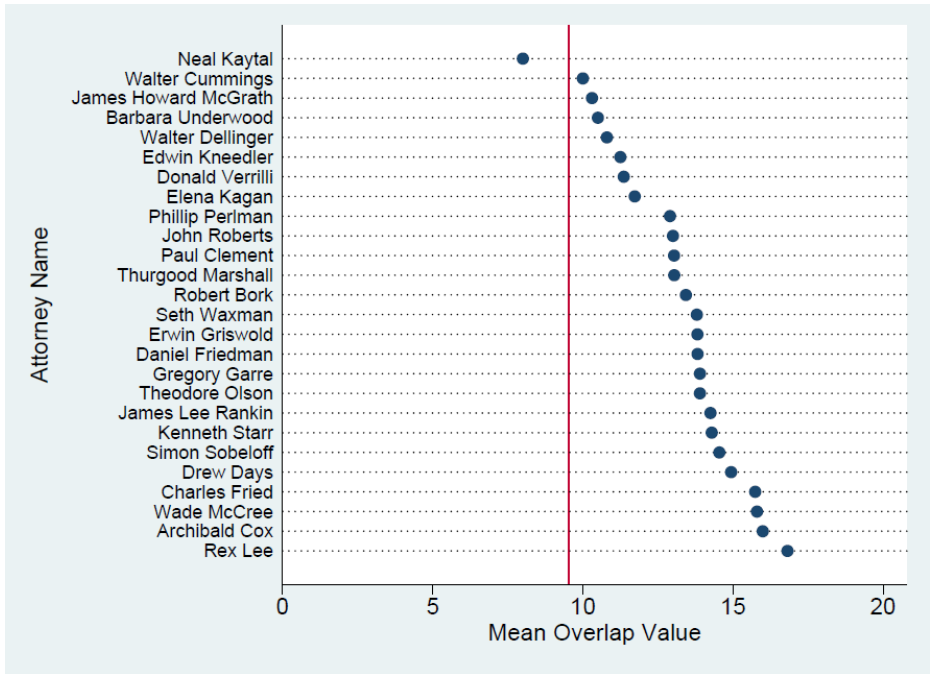


Figure 11: Mean Overlap Values for Solicitors General

*Note:* Reference line at mean overall overlap value including OSG Attorneys (9.54).

The reference line in this figure is placed at 9.54%, which is the mean brief overlap value including briefs submitted by the OSG. Only one attorney from the OSG has a mean overlap value below this level and all appointed SGs' mean overlap values are above the overall mean value. Taking into account the number of times these attorneys are listed as counsel of record on briefs, they are quite successful.

The three most recent SGs, Neil Katyal (acting), (current justice) Elena Kagan, and Donald Verrilli, are on the low end of this group's mean overlap values, while past-SGs such as Rex Lee, Archibald Cox, and Wade McCree are

106. For a discussion of how ideology may play a role in creating variation between various SGs' successes with the Court see generally Bailey, Kamoie & Maltzman, *supra* note 38, at 73–76, 83.

the most successful. Their success is even more impressive given Lee and McCree were listed as counsel of record nearly 150 times each and Cox was so listed over 100 times. While there is a tendency for the most recent SGs not to be as successful as SGs from further in the past, more recent SGs Garre, Olson, Star, and Days performed quite successfully on average compared to all other SGs.

Figure 12 presents the mean quality of the SGs briefs and show that the SGs tend to write briefs that are above the mean value for brief quality.

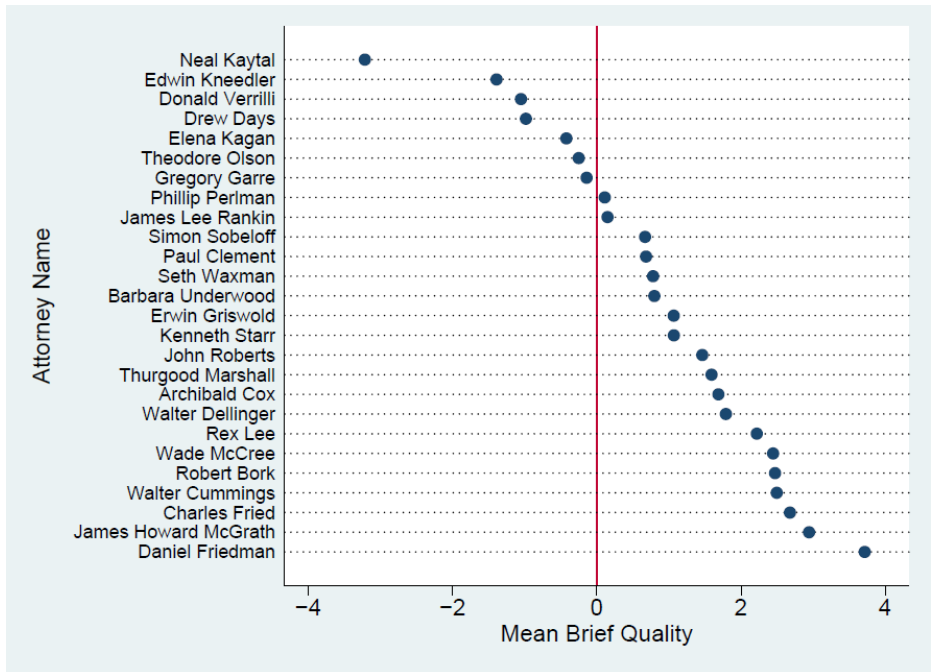


Figure 12: Mean Brief Quality for Solicitors General

*Note:* Brief Quality Score of 0.00.

Interestingly, the more recent SGs scored on the lower end for brief quality as well relative to the rest of the SGs. While this may relate to their overlap scores, evidence from the top attorneys tends to discount this possibility. The differences in brief quality may also be a byproduct of different conventions for brief writing in the OSG over time that are associated with lower quality briefs.

## VI. CONCLUSION

Experience plays a key role in attorneys' success in the Supreme Court and

this accords with the many theories regarding the importance of attorney credibility. Beyond this at the aggregate level, factors such as the writing quality are also relevant to the brief writer's success. Looking at individual attorneys, however, creates a more complex picture.

The most experienced attorneys and firms predominately write briefs that are more successful (based on the overlap measure) than those from other attorneys.<sup>107</sup> Their briefs are also generally of a higher than average writing quality for briefs submitted to the Supreme Court.<sup>108</sup>

The SGs' briefs follow a similar pattern. The SGs are highly experienced attorneys with briefs of generally high writing quality. While their overlap scores are on the whole much greater than those for other Supreme Court attorneys, there are many factors working to their advantage including, most prominently, the SG's institutional standing in the Court.<sup>109</sup> Even among SGs, however, there is variation in both the quality of the briefs and in their mean overlap values. This shows that while the Office of the Solicitor General may benefit from the SG's perpetual brief writing success, the Office does not guarantee a threshold of such success.<sup>110</sup>

On the whole, there are several ways to think of the most successful Supreme Court brief writers. When examining attorneys in private practice (generally within big law firms' specialized Supreme Court practices), the most experienced attorneys are predominately successful brief writers and many of these attorneys had prior experience working in the OSG.<sup>111</sup> Beyond its relationship to experience, success is somewhat less predictable. All-in-all, attorney experience, institutional expertise, and brief quality appear the best predictive factors of successful Supreme Court briefs.

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107. See *supra* Figures 5 and 8.

108. See *supra* Figures 6 and 9.

109. See *supra* Figure 11.

110. See *supra* Figure 12.

111. See *supra* Section V.