
Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?

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A good deal of scholarly evidence suggests that the decisionmaking of the U.S. Supreme Court is affected by legal argument. At the same time, it seems clear that in a great many cases the justices have enduring, strongly held views. In such cases, they should be impervious to the effects of advocacy. When are the justices apt to be influenced by the Court's legal community, and when will lawyers be less relevant? The answer, we think, has to do with the salience of the issue before the Court. We suspect that in nonsalient cases the justices have less-intense preferences and therefore are open to the persuasion of lawyers. In salient cases, by contrast, the content of legal policy matters much more to the justices. As a result, they are less amenable to legal argument and adhere more strictly to their personal policy preferences. Our empirical tests support this orientation.

The idea that the members of the U.S. Supreme Court can be affected by legal arguments is hardly new. At least as far back as the Marshall Court, there is evidence that the justices have been responsive to legal advocacy. In *McCulloch v. Maryland* (1819), for example, one of the Court's earliest repeat players, William Pinkney, sought to frame an interpretation of the Necessary and Proper Clause that was solicitous to the preferences of Chief Justice John Marshall; indeed, the chief justice found it so appealing that it was adopted wholesale into the Court's written opinion (White 1988:248–50). Of course, as a staunch Federalist, Chief Justice Marshall was doubtless sympathetic to any argument that favored expanding the reach and influence of the new national government. In fact, it was widely believed, even before the Court heard arguments in *McCulloch*, that the Marshall Court would support the existence and independence of the Bank of the United States (Warren 1922:508–9). Chief Justice Marshall may well have employed Pinkney's arguments in his written opinion, but given

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the chief justice's strong views on this issue of national prominence, it seems quite unlikely that Chief Justice Marshall would have declared the Bank unconstitutional, had the government's case been entrusted to the hands of a less-capable attorney. Did Pinkney actually influence Chief Justice Marshall, or did Chief Justice Marshall's opinion simply reflect his steadfast commitment to Federalist principles in a case where the legal and political stakes were especially high? This question, posed in a contemporary context, is the principal concern of this article.

Specifically, we posit that the impact of legal advocacy in the U.S. Supreme Court is conditioned by issue salience. Using available data from the Burger Court, we find that in salient cases—cases in which we presume the justices care a good deal about the outcome—legal advocacy carries no empirical weight. In nonsalient cases, by contrast, the justices still follow their policy preferences, but because they are less resolute about case outcomes, they are more amenable to legal persuasion. These results persist even after controlling for the preferences of the justices as well as their ideological sympathy for litigants of different status. We conclude that, when the justices' informational needs are high and the intensity of their predispositions is low, the members of the Court pay a good deal of attention to the competing visions of legal policy presented before them.

Scholarly Perspectives on Legal Arguments

Legal advocacy is generally regarded as a significant influence in the modern Supreme Court. For their part, members of the legal community view the justices as highly sensitive to the ideas and information contained in briefs and oral arguments (Baker 1996; Enns 1998; Ennis 1984; Stern et al. 2002; Sungaila 1999). Scholarly studies of the Court's litigators have long highlighted the vital role that lawyers play in formulating the law (Casper 1972; Vose 1957), and over the last decade a good deal of systematic evidence has suggested that the Court's policies are affected by legal advocacy. Most recently, the quality of oral advocacy has been shown to have a measurable influence on the votes of the justices (Johnson et al. 2006), and in individual issue areas as well as across the plenary docket, expertise among appellate lawyers helps shape the Court's outcomes (McGuire 1993; Wahlbeck 1997). Similarly, amicus briefs are important resources from which the justices derive critical information (Collins 2004; Spriggs & Wahlbeck 1997).

This impact seems to have sustained itself, despite changes in the Court's policy orientations. Even as the Court has grown increasingly conservative, for example, carefully crafted legal

arguments have successfully limited that conservatism in areas such as abortion, capital punishment, religious establishment, and legal representation for the poor (see, e.g., Epstein & Kobylka 1992; Kobylka 1995; Lawrence 1990). By these accounts, the arguments presented to the Court are part of a legal model of decisionmaking, one in which their quality and intellectual force can persuade judges not only to interpret existing precedents in particular ways but also to develop new legal rules that channel decisionmaking in future cases (see, e.g., Wahlbeck 1997; see also Vigilante et al. 2001). Findings such as these suggest that the justices take their cues from lawyers despite—not because of—whom they represent.

At the same time, there is no doubt that the justices base their decisions substantially upon their personal policy preferences—preferences that often correspond with an affinity for various institutional interests, such as corporations or governments (Segal & Spaeth 2002). Because these repeat players often enjoy the benefit of experienced advocacy, the empirical effects of legal expertise may, in fact, represent ideological support for interests that are coincidentally capable of commanding better legal counsel. Thus, what appears to be the influence of legal arguments may be little more than ideological sympathy toward like-minded litigants (see, e.g., Kearney & Sheehan 1992; Sheehan et al. 1992).

By this account, the Court's seeming sensitivity to the subtlety of legal reasoning may be little more than a spurious artifact of ideological affinity toward those interests that can (coincidentally) command better representation. In our view, therefore, an adequate test of legal arguments would assess their influence while holding constant both the status of the litigants and the preferences of the justices.

As we develop our model, we assume that the justices, like all governmental decision makers, face certain informational constraints. In particular, they lack full information regarding available policy alternatives, and what information they do have cannot necessarily be regarded as reliable (see, e.g., Johnson 2004; Johnson et al. 2006; McGuire 1993; McGuire & Caldeira 1993). These needs, we think, will be especially acute in cases of low issue salience, where the justices may not have intense ideological preferences and therefore may care less about the legal policy that is ultimately adopted.¹

¹ In this sense, we adopt a rationale similar to Perry (1991), who in the context of agenda-setting develops a model in which justices follow either a "jurisprudential mode" or a "policy mode" in selecting cases. The mode a justice follows in a case is governed by whether that justice cares about how the case will ultimately be resolved on the merits. If the outcome matters to a justice, he or she makes a decision based largely on a mix of ideological and strategic considerations. If that justice is indifferent to the outcome on the merits, he or she decides principally upon the legal necessities of a case.

Under such conditions, a sophisticated lawyer will have greater opportunity to provide the justices with the kind of information that invites a favorable disposition toward his or her arguments. Faced with a wide range of possible legal positions, some lawyers may employ heresthetic, adjusting their arguments strategically in order to appeal to one or more justices, while other lawyers may rely upon rhetoric and simply seek to persuade a justice as to the wisdom of their positions (Riker 1990). By either method, “interested litigators can use the law—in this case, precedents and the reasoning that supports them—to condition, channel, and, in some instances, frustrate the process of legal change” (Kobylka 1995:94). At the same time, the justices also require knowledge regarding the implications that a decision will have on public policy. Not only do the justices value this information, but it has historically played a significant role in guiding case outcomes (Barker 1967; Collins 2004; Vose 1957; see also Spriggs & Wahlbeck 1997). This need for reliable information is endemic to appellate courts, and it is scarcely a wonder that appellate lawyers serve a similar function in non-American courts as well (see, e.g., Flemming 2005; Szmer et al. 2007). So we believe that good advocates will be prepared to offer arguments about the practical consequences of the Court’s decisions as well as more abstract legal reasoning.

Regardless of the tack they take, these sophisticated actors are repeat players. As such, they value their long-term reputations with the Court and therefore should try to provide the kind of information that will enable the Court to realize its goals and yet still view their arguments in a favorable light (see Galanter 1974). Because they wish to be taken seriously by the justices in the future, experienced Supreme Court lawyers should seek to provide the kinds of arguments and information that are suited to achieving the justices’ goals. We hypothesize that such a lawyer should be more likely than others to win a justice’s vote.

A Model of Judicial Decisionmaking

Our plan is to build from simplicity to complexity. We begin by examining the impact that the experienced legal advocates have on the votes of justices and then assessing the extent to which any measured effects of advocacy are contingent upon the ideological positions that such lawyers represent. From there, we build a larger statistical model, introducing a number of important statistical controls. In particular, we allow the preferences of the justices to vary and to interact with both the status of the litigants and the ideological direction of the lower court. In this way, we are able to assess the empirical consequences of legal arguments while holding

constant any ideological affinity that the justices may have for either the parties or the arguments used to support them. Finally, we develop a conditional predictive model that allows us to compare the impact of these variables in both salient and non-salient cases.

Our analysis is based upon a sample of cases from the Burger Court. We rely upon the data of Johnson et alia (2006), who estimate the impact of the quality of oral advocacy on the Court by using the “grades” assigned by Justice Harry Blackmun to the attorneys who appeared before him. From their sample of decisions, we culled the orally argued cases decided from 1977 to 1982. We selected this time frame because available data sets covering this period contain two pieces of information that are crucial to our statistical tests. First, we have data on the actual amount of prior Supreme Court experience of the lawyers who argued cases on the merits for these six terms of the Court. Second, we have data on the relative status of the direct litigants. With these two variables, we can assess the impact of advocacy, independent of the other advantages that are presumptively associated with institutional litigants.

Testing the Impact of Advocacy

In order to develop a baseline against which to compare our more comprehensive tests, we formulate a series of predictive models that examine how the quality of advocacy affects the votes of individual justices under a few important conditions. Taking our lead from Johnson and colleagues (2006), we calculate an indicator of legal expertise based on the relative prior experience in the Supreme Court of the lawyers who appear in oral arguments in a case. In particular, we utilize the difference in the logs of each lawyer’s number of prior cases, a measure that assumes that only incremental benefits obtain from each successive case.² By related

² To be precise, we constructed a measure designed to capture the impact of previous experience whose value would take account of the diminishing returns that likely accrue from successive cases. For each lawyer who delivered an oral argument on the merits during our six-year time period, we utilized Lexis-Nexis Academic to determine the number of previous oral arguments that each lawyer made before the Supreme Court. Our measure was then derived by taking the natural log of 1 plus the number of prior oral arguments made by each attorney. (We added 1 to each lawyer’s experience, since this value is undefined for any lawyer whose previous number of arguments is 0.) We then subtracted this transformed measure of experience for the respondent’s lawyer from that same measure for the petitioner’s lawyer. In this way, we assess the impact of the prior experience of the lawyers in a case in a way that gives greater weight to a lawyer’s earlier experience while adding comparatively less weight for later cases. In other words, we assume that a lawyer’s advantage of, say, two cases, matters a good deal more for competing lawyers with three and one prior arguments than it would for lawyers with 23 and 21 prior arguments. For another explanation and use of this same measure, see Johnson et alia 2006.

indexes, scholars have shed a good deal of light on the role of legal advocacy in appellate courts in the United States and other nations (see, e.g., Fleming & Krutz 2002; Kearney & Merrill 2000; McGuire 1993; Szmer et al. 2007; Wahlbeck 1997), and similar evidence exists for trial courts as well (Eisenstein et al. 1988; Heumann 1978). Our intuitions are straightforward; a lawyer who has had more previous experience in the Supreme Court is more likely to persuade a justice than one with less experience.

We model the actual vote choice of the individual justices, their votes to reverse or affirm the ruling of a lower court, coded 1 and 0, respectively.³ In each case, our measure of the relative experience of the lawyers is the number of prior Supreme Court arguments made by the lawyer for the petitioner minus the corresponding experience of the lawyer who argued on behalf of the respondent (with each number being first transformed through its natural log). Using this indicator, we pool all of the justices' votes into a single model and employ probit analysis, with robust standard errors to correct for the downward bias that might otherwise result from analyzing clusters (i.e., justices).

Naturally, any analysis of the independent effect of advocacy in the Court can be complicated by the participation of the Court's quintessential lawyer, the U.S. Solicitor General. Scholars are divided on why (and even whether) the solicitor general carries greater weight than other lawyers (see, e.g., Bailey et al. 2005; Johnson 2003; McGuire 1998). So initially we conduct our analysis by excluding those cases in which members of the solicitor general's office appeared before the Court. Accordingly, we estimate the impact of experienced advocacy in cases to which the United States was not a party.⁴

The simple bivariate impact of lawyer experience is presented in Model 1 of Table 1. It suggests that experienced advocacy has a significant effect on the justices' votes. Because it is based upon the difference of two logged values, however, the coefficient is not readily interpretable. By selecting values of interest for the lawyers, one can readily transform their values and calculate an estimated effect. Suppose, for example, that all else being equal a justice is inclined to follow the Court's historical norm and votes to reverse

³ The justices whose votes we analyze are Harry Blackmun, William Brennan, Warren Burger, Thurgood Marshall, Sandra Day O'Connor (for the 1981–1982 time period), Lewis Powell, William Rehnquist, John Paul Stevens, Potter Stewart (for the 1977–1980 time period), and Byron White.

⁴ We are also interested in comparing the impact of experience to a lawyer's performance at oral argument, and doing so requires that we employ an indicator derived from the grades assigned by Justice Blackmun to a lawyer's performance (Johnson et al. 2006). These data are derived from a sample of cases in which Justice Blackmun participated, so our analysis in this section is limited to those cases in which Justice Blackmun's grades are readily available.

Table 1. Impact of Experienced Lawyers on the Votes of the Justices

Variable	Non-Solicitor General Cases			All Cases	
	1	2	3	4	5
Difference in lawyer experience	0.162*** (0.036)	—	0.147*** (0.036)	0.093** (0.034)	—
Difference in oral argument grades	—	0.412*** (0.061)	0.408*** (0.061)	0.340*** (0.048)	0.343*** (0.046)
Solicitor general	—	—	—	0.094 (0.077)	—
Difference in lawyer experience, non-solicitor general cases	—	—	—	—	0.154*** (0.035)
Difference in lawyer experience, solicitor general cases	—	—	—	—	0.088** (0.044)
Constant	0.159 (0.046)	0.169 (0.049)	0.152 (0.049)	0.118 (0.050)	0.115 (0.050)
N	712	712	712	954	954
Wald chi-square (degrees of freedom)	19.76*** (1)	46.37*** (1)	80.95*** (2)	115.78*** (3)	132.60*** (3)

Note: Dependent variable equals 1 if the justice voted to reverse, 0 if the justice voted to affirm. All coefficients are probit estimates. Robust standard errors, which appear in parentheses, are calculated by clustering on individual justices. Difference in oral argument grades is the standardized grade assigned by Justice Blackmun to the petitioner's lawyer minus the comparable grade for the respondent's lawyer. Difference in lawyer experience is the logged number of previous arguments made by the lawyer arguing for the petitioner minus the comparable value for the respondent's lawyer.

** $p < 0.01$; *** $p < 0.001$, one-tailed test.

the lower court roughly 67 percent of the time. If the petitioner's lawyer had three prior arguments and the respondent's counsel had none, the likelihood of voting to reverse increases to 76 percent.⁵ If that same differential were to favor the respondent, the probability of voting to reverse drops to 58 percent. By this accounting, lawyers who are repeat players fare significantly better than their inexperienced counterparts.

Of course, a lawyer's chances of success are likely to be affected by the quality of his or her performance during oral argument, regardless of whether that lawyer has litigated other cases before the Court. After all, even inexperienced lawyers can be quite effective advocates, just as experienced lawyers can offer inferior presentations. One indicator of this quality is the grade assigned by Justice Blackmun to each lawyer's performance before the Court, a variable which is a strong predictor of how a justice will react to a case (Johnson et al. 2006). In the second model, the relative difference in Justice Blackmun's grades of the lawyers arguing in each

⁵ To illustrate, the calculation would be as follows: $\log[3 \text{ prior cases} + 1] - \log[0 \text{ prior cases} + 1] = 1.39 - 0 = 1.39$. This value multiplied by the value of the coefficient—0.16 in Model 1 of Table 1—is equal to 0.222, or an area of 0.09 under the normal curve. Thus, from a baseline probability of 0.67 of voting to reverse, an advantage of three versus zero prior cases increases or decreases that likelihood to 0.76 and 0.58, respectively.

case is used to predict the justices' votes.⁶ Model 2 confirms the statistical significance of a lawyer's performance at oral argument: the greater the disparity between the petitioner's lawyer and the respondent's, the more likely the justices are to vote to reverse the lower court decision under review.

Taken individually, both previous experience before the Court and a strong performance at oral argument seem to return significant benefits. How do they fare when in competition with one another? Testing their simultaneous effects, the third equation models the justices' votes as a function of both past litigation experience and the quality of contemporaneous performance. In this equation, the estimates remain virtually identical to the bivariate models, and their statistical significance remains unchanged.

The evidence thus far confirms the relevance of prior litigation experience, even after holding constant the quality of a lawyer's oral argument. So quite apart from how well an attorney performs in the instant case, his or her prior appearances before the Court clearly redound to his or her benefit. Because the data exclude cases in which the solicitor general was involved, however, the analysis does not reveal how the effectiveness of experienced lawyers compares to the impact of the lawyers in the solicitor general's office. Model 4 makes this comparison by including the cases in which the interests of the United States were involved and assessing the impact of the solicitor general as a litigant (coded as 1 if the solicitor general appeared on behalf of the petitioner, -1 if on behalf of the respondent, and 0 otherwise). Accounting for the participation of the federal government, however, does not add substantially to the empirical picture. After controlling for litigation experience and the quality of oral argument, the model reveals that the solicitor general's office itself carries no significant weight.

Even if there are no institutional effects from the solicitor general's office, it is still possible that the litigation experience of the individual lawyers within that office makes a qualitatively greater contribution to their success than comparable levels of prior advocacy by other appellate practitioners. Model 5 in Table 1 tests this possibility, comparing the impact of lawyer experience in the solicitor general's cases against its effect in cases in which the federal government was not a party. Does the advantage in litigation experience—something the government's lawyers typically enjoy—matter more for the solicitor general's share of the Court's caseload? According to these results, it does not. The estimate for prior

⁶ The details regarding the construction of this variable—which is the numeric value assigned to the grade of the petitioner's lawyer minus the comparable value for the respondent's lawyer—can be found in Johnson et alia 2006:106. Despite the potential endogeneity complication, we include Justice Blackmun's votes in the analysis. Excluding Justice Blackmun's vote produces no meaningful differences in the empirical results.

experience in cases involving the solicitor general is actually a bit smaller than its estimated effect in other cases. Although both are statistically significant, they are effectively indistinguishable from one another.⁷

Thus, whatever advantages in prior experience the government's lawyers bring to the Supreme Court, those advantages do not appear to be any different from the beneficial effects enjoyed by other lawyers. There is some evidence to suggest that the solicitor general's impact is no greater on the merits than that of other experienced advocates (McGuire 1998), and these results are consistent with that finding.

An Explanatory Model of Voting

The story to this point emphasizes how experienced Supreme Court advocates affect the votes of the justices. By merging a sample of our data with the Blackmun grades collected by Johnson et alia (2006), we have seen that previous litigation experience matters, even while controlling for the quality of oral arguments. Still, we cannot be confident about the role of experienced advocacy until we sort out the influence of other rival effects. So in the following section, we test a more complete cohort of explanatory variables.⁸

In constructing our larger model, we incorporate a number of factors, in addition to prior experience and oral argument performance, that may well figure into the votes of the individual justices. Because litigation expertise generally travels with litigants of higher status, for example, it is especially important to control for the types of parties that compete over policy in the Court. At the same time, the effects of quality representation may actually mask ideological support for various parties (Sheehan et al. 1992). So the impact of legal representation on a justice who favors the social and economic "haves" may be statistically significant, but that effect could easily be a consequence of an ideological affinity for litigants that happen to have superior litigation resources. Likewise, a justice who tends to favor the "underdogs" of society may turn out to

⁷ Testing for the difference between the two coefficients that estimate the impact of prior experience shows that the two are not significantly different from one another ($X^2 = 1.80$, 1 df, $p = 0.180$).

⁸ The data analyzed by Johnson and colleagues (2006) are taken from a sample of cases in which Justice Blackmun participated from 1970 to 1994. Our data on lawyer experience and other relevant variables are taken from all orally argued cases from 1977 to 1982. Thus, the data we employ in this analysis are restricted to those cases in our sample for which Johnson et alia (2006) collected Justice Blackmun's oral argument grades. A replication data set, as well as our complete data set on lawyers' previous experience, is available at <http://www.unc.edu/~kmcguire/data.html>.

be highly sensitive to legal arguments, once the identity of the parties making those arguments is held constant.

To assess the relevance of party status, we order the litigants according to the advantages and resources that they are thought to possess. By this accounting, each party is assigned a value along an ordinal scale, one in which governments and corporations enjoy the highest status and poor individuals and minorities have the fewest advantages.⁹ This variable, and others like it, have been employed with considerable utility in illuminating the decision-making of the U.S. Supreme Court as well as the supreme courts of the states (McGuire 1995; Sheehan et al. 1992; Wheeler et al. 1987). By subtracting the respondent's status value from the petitioner's, we derive a readily interpretable index of the relative differences between the parties. The larger the absolute value of this difference, the greater the disparities between the litigants, while the sign of the variable indicates which party has the advantage, the petitioner (positive) or the respondent (negative).

As noted previously, one litigant that has long been presumed to enjoy a special relationship with the Supreme Court is the solicitor general, and research has demonstrated over and over again that the U. S. government is far more successful than any other party or *amicus curiae*. (See Pacelle [2003] for an excellent review of this extensive literature.) To capture any effects of the solicitor general over and above those that might be reflected in the litigant status variable, we include an indicator for the presence of the United States as a litigant, coded as 1 when the solicitor general was the petitioner, -1 when appearing as the respondent, and 0 otherwise.

As an *amicus curiae*, the voice of the solicitor general is at least as relevant, if not more so, when compared to its influence as a direct party (Deen et al. 2003; Segal 1988). Accordingly, we include a comparable measure of the federal government's involvement as a friend of the Court, coded as 1 when the solicitor general filed a brief in support of the petitioner, -1 for the government's *amicus* brief on behalf of the respondent, and 0 otherwise.

Of course, the solicitor general is but one of numerous *amici* who press their views upon the Court each year. Less is known about the general impact that *amicus* briefs have on the justices. It seems clear, though, that they provide the Court with valuable information about the likely policy consequences of a decision (Collins 2004; Spriggs & Wahlbeck 1997), and there is good reason

⁹ Information on the identity of the parties is taken from the *U.S. Supreme Court Judicial Database*. The parties are coded as follows: 1 for poor individuals, 2 for minorities, 3 for individuals, 4 for unions, 5 for small businesses, 6 for businesses, 7 for corporations, 8 for local governments, 9 for state governments, and 10 for the federal government.

to believe that the justices are reluctant to make decisions that will disaffect significant numbers of organized interests (Hausegger & Baum 1999). For that reason, we think that the number of amicus briefs filed on each side of a case provides the justices with a rough sense of how a decision is likely to be received by the various constituents of judicial policy. Assuming that the members of the Court would prefer to make decisions that are received favorably by society, we hypothesize that this creates an incentive to make a decision that favors the party that enjoys greater amicus support. Our indicator of amicus pressure is simply the number of briefs filed in support of the petitioner minus the number filed in support of the respondent.

Among the possible determinants of the justices' votes, perhaps the most significant is their policy preferences (Segal & Spaeth 2002), and because we pool the justices' votes, treating each vote in each case as a separate observation, we can readily incorporate information about the justices' preferences into the model. Our specific measure is the set of estimated dynamic ideal points of the justices, derived by Martin and Quinn (2002). Because the justices' attitudes have no direct theoretical bearing upon our dependent variable—the vote to reverse or affirm the lower court—the preferences of the justices enter the model in a multiplicative fashion. That is, we assume that the justices' preferences affect their votes to reverse or affirm only in relation to whether the lower court was liberal (coded as 0) or conservative (coded as 1). So the more liberal a justice is—that is, the lower the score for that justice's estimated ideal point—the more likely he or she is to vote to reverse a conservative lower court. The more conservative a justice is—that is, the higher that justice's ideal point—the more likely he or she is to vote to reverse a liberal lower court.

Finally, we employ that same multiplicative strategy in assessing the relevance of litigant status. The logic here is the same: however able the lawyers in a case may be, conservative justices will still favor, say, large corporations, just as liberal justices will still favor, say, criminal defendants. In short, whether a justice favors the "haves" or the "have nots" is quite likely to be conditioned by his or her policy preferences.

Armed with these data, we re-examine the relationships modeled in Table 1, testing the impact of lawyer experience in the face of these control variables. The results of this exercise are presented in Table 2 under the column labeled as the Additive Model.

The results testify to the continued relevance of litigation experience, even after taking account of a number of competing considerations. Most notably, the relative degree of prior experience in the Supreme Court retains its significant effect on the votes of the justices, after holding constant the preferences of the justices as well

Table 2. Full Models of the Impact of Experienced Lawyers on the Supreme Court

Variable	Additive Model	Conditional Model	
		Salient	Nonsalient
Difference in lawyer experience	0.119** (0.047)	-0.091 ^w (0.175)	0.194** (0.065)
Difference in oral argument grades	0.363*** (0.045)	0.205 (0.241)	0.399*** (0.044)
Solicitor general as a party	0.246*** (0.079)	-0.561 ^w (0.444)	0.301*** (0.084)
Solicitor general as an amicus	-0.017 ^w (0.064)	0.075 (0.484)	-0.058 ^w (0.079)
Relative litigant status	-0.019 ^w (0.010)	0.147*** (0.038)	-0.029 ^w (0.009)
Relative amicus support	0.091*** (0.017)	0.104 (0.062)	0.081*** (0.022)
Justice ideology	0.214*** (0.011)	0.719*** (0.182)	0.188*** (0.014)
Ideological direction of lower court	-0.089 (0.065)	0.811** (0.347)	-0.165** (0.072)
Justice ideology X ideological direction of lower court	-0.361*** (0.024)	-1.20*** (0.22)	-0.313*** (0.019)
Justice ideology X relative litigant status	0.015** (0.007)	0.085** (0.016)	0.014** (0.004)
Salient case	—		-0.544 (0.437)
Constant	0.230 (0.026)		0.268 (0.042)
Log likelihood	-549.14		-525.86
% correctly predicted	69%		71%
PRE	31%		36%

N = 954. Dependent variable equals 1 if the justice voted to reverse the lower court, 0 if the justice voted to affirm the lower court. All coefficients are probit estimates. Robust standard errors, which appear in parentheses, are calculated by clustering on individual justices. “w” signifies wrongly signed estimate. PRE signifies proportional reduction of error.

p* < 0.01; *p* < 0.001, one-tailed test.

as the quality of a lawyer’s performance during oral argument. Thus, veteran counsel make it significantly more likely that the justices would vote to reverse the lower court, all else being equal.

The estimated probabilities associated with this coefficient readily illustrate its effects, which are especially pronounced when the lawyer has relatively modest levels of previous experience. For example, when the lawyer for the petitioner has three previous cases compared to one previous case for the respondent’s lawyer, the likelihood of a justice voting to reverse is 0.70, compared to the 0.65 baseline expectation. If that same differential favors the respondent’s advocate, the probability of voting to reverse drops to 0.60. These are noteworthy changes, especially in light of other prominent variables that are included in the model. At the same time, there are obvious diminishing effects associated with prior experience. At greater levels of experience, the same difference between the lawyers—in this example, two previous cases—has only negligible effects. For instance, a lawyer for the petitioner with

13 prior cases who argues against a lawyer for the respondent with 11 previous appearances offers virtually no substantive advantage, increasing the probability of a reversal vote from 0.65 to 0.66. Obviously, beyond the first few appearances, the impact of litigation experience in the Court offers diminishing returns.

The model also confirms the significant effect of the justices' preferences. The positive coefficient associated with a justice's ideology indicates that, when reviewing the liberal policy of lower courts—that is, when the ideological direction of the lower court is equal to zero and therefore drops out of the equation along with its interaction term—the more conservative a justice is, the more likely he or she is to vote to reverse. When the lower court is conservative, the net effect of the ideology variable, the direction of the lower court, and the interaction between the two produces a negative estimate; thus, the more conservative a justice, the less likely he or she is to vote to reverse a conservative ruling.

Ideology also colors how the members of the Court regard the parties to litigation. Indeed, justices of competing policy orientations regard the disparities between litigants quite differently. The positive and significant coefficient for the interaction between the justices' preferences and the disparity between the litigants confirms that when institutional interests, such as major corporations, challenge the lower court victories of parties of lesser status, conservative justices vote to overturn the lower court victories of the underdogs while their more liberal brethren vote to preserve them. By contrast, when more individual interests, such as minorities or criminal defendants, petition the Court, seeking to undo the successes of their better-situated opponents, it is the liberals who are anxious to reverse the decisions of lower courts and the conservatives who are keen to keep them intact. Thus, the combined effects of ideology and litigant status reveal that liberal justices favor the social and economic underdogs, while more conservative justices support the interests of wealthier, institutional litigants. These effects are significant, because they underscore that, although the justices clearly act on the basis of their policy preferences and evaluate competing interests in light of those preferences, experienced advocacy nonetheless maintains an influential role, guiding the votes of the justices. Legal argument, it would seem, has a generic importance in Supreme Court decisionmaking.¹⁰

¹⁰ Interestingly, Johnson et al. (2006) find that, controlling for other factors, litigation experience actually has a significantly negative effect on the votes of the justices. This, we think, is likely to be a function of their data that measure a lawyer's previous experience before the Court. Although we measure lawyer experience in identical fashion, the correlation between our respective measures is only 0.62. Although we do not question their measure, we are confident in our own data, if only because we collected them ourselves.

Leaving aside the justices' ideological orientations toward the litigants, the voice of the solicitor general, at least as a litigant, carries a good deal of weight. As an amicus, however, the federal government has no discernible impact above and beyond what is captured by the comparative number of amicus briefs more generally.

That the impact of lawyer experience remains strong across the justices, even in the face of variables likely to undermine its effects, is certainly noteworthy. Our theory, however, suggests that what makes experienced advocacy so useful to the justices is that it enables them to overcome their lack of complete information. It would be useful, therefore, to buttress the analysis with evidence that arguments take on greater significance in those cases where the justices have fewer fixed ideas about how issues should be decided. If a case involves a highly conspicuous legal or policy question, the members of the Court are likely to have given the issue a good deal of thought and to have formed reasonably strong preferences about the options for resolving it. If the justices come to a case with their minds already made up, it is doubtful that argument will have much of an effect. Where an experienced lawyer has a greater chance of affecting the justices' thinking are the cases involving issues that are less central to public discourse. Where the justices do not have firm preconceptions, there are greater opportunities for experienced lawyers to provide them with persuasive information.

An effective way to test this hypothesis is to analyze the impact of legal experience in salient and nonsalient cases. Scholars of the Supreme Court have long known that salient cases are the ones over which the justices labor longer than any other. Indeed, both the legal doctrines and the policy outcomes in these cases matter a good deal to the justices (Epstein & Knight 1997). Accordingly, we examine the impact of our explanatory variables in the context of salient and nonsalient cases (Epstein & Segal 2000), with the expectation that legal experience should matter less in salient cases and more in nonsalient ones.

One analytic approach might be to run separate models for salient and nonsalient cases. Because we are interested in making direct statistical comparisons between these two groups, though, a useful alternative is to construct a single conditional model in which each predictor is included in the model twice, once for its relevance under each of the separate conditions of interest (Wright 1976).¹¹

¹¹ Operationally, the model is constructed by using the dummy variable for salient cases to construct a second dummy variable for nonsalient cases, which simply mirrors the first. That is, we began with two dummy variables, one for salient cases (coded as 1, otherwise 0) and one for nonsalient cases (coded 1, otherwise 0). We then interacted each of the additive model's predictors with each of these dummies. By so doing, we created two

The results of this modeling strategy, reported in the second and third columns in Table 2 and labeled as the Conditional Model, reveal some important differences that conform to our beliefs about the informational role of experienced lawyers. Leaving aside the handful of differences in the behavior of the control variables across the two equations, the story that we see within these models is that lawyers have influence when the justices actually need lawyers to better inform their decisionmaking.

In salient cases, neither previous litigation experience nor oral argument performance has any significant influence over the justices. As expected, the legal community matters less, if at all, when the justices already have strong preferences. In nonsalient cases, however, veteran lawyers of Supreme Court advocacy provide an advantage, regardless of whether they represent the petitioner or the respondent and regardless of whether they are arguing for a liberal or conservative outcome. A formal comparison of the relevant coefficients confirms these differences: the coefficient for previous experience in nonsalient cases differs significantly from its estimate in salient ones ($X^2 = 3.76$, 1 df, $p = 0.053$).

Experienced appellate advocacy, therefore, makes a significant contribution to the Court's consideration of the legal questions that, though they may merit the Court's attention, are not ones in which the justices themselves are heavily invested. In cases at the forefront of the judicial agenda—cases about whose outcomes the justices may care considerably—neither experienced members of the Court's legal community nor an impressive appearance before the justices can regularly persuade the justices to reconsider their views.

Of course, the relevance of advocacy in nonsalient cases is only part of the story. By our lights, the impact of the justices' preferences should be more pronounced in salient cases, and indeed these are precisely the effects that we observe. Though significant for both case types, the justices' attitudes have considerably greater weight in salient cases.¹² The same can also be said with respect to the justices' ideological propinquity to litigants of different status. In salient cases, liberals consistently favor the underdogs, just as conservatives support the advantaged interests of society. In

sets of predictors. In one set, the variables can take on nonzero values in salient cases, and in the other set, in nonsalient cases. We then re-ran our analysis including both sets of predictors, along with the single dummy for salient cases. By creating these "dummy slopes," we have allowed different slopes for the same variables to be conditional upon their relevance in salient and nonsalient cases. This method is mathematically equivalent to running separate regressions for the two sets of cases, but it has the advantage of readily allowing for tests of the difference between coefficients across the two groups.

¹² This is true of ideology, regardless of whether the lower court was liberal ($X^2 = 8.13$, 1 df, $p = 0.004$) or conservative ($X^2 = 2.81$, 1 df, $p = 0.094$).

nonsalient cases, however, this ideological effect is less pronounced.¹³ So while the justices' preferences are always in play, their role is more pronounced in the policy domains that have the most legal and political relevance. Given the significance attached to these issues, the justices pursue policy single-mindedly, apparently without regard to the arguments made by even the Court's veteran practitioners.

Further reinforcing the importance of advocacy in nonsalient cases, at least two predictors that reflect the nature of legal argument take on statistical significance, along with the Court's lawyer variables. The appearance of the solicitor general as a litigant, which has no discernible impact in salient cases, emerges as highly relevant in the nonsalient policy domains.¹⁴ Moreover, to the extent that members of the Court regard each party's amicus support as an indicator of how different social and economic interests will react to a decision (Hausegger & Baum 1999), the justices appear to consider their voices with some care.¹⁵ Seen in this way, advocacy of various kinds matters when the justices need it the most.

Conclusion

Members of the U.S. Supreme Court need reliable information. Experienced lawyers know how to provide it. By a number of different empirical tests, we have shown that the quality of legal advocacy has a marked effect on the members of the Court. In this sense, our results conform to the growing body of evidence that testifies to the important role that legal arguments play in the justices' decisionmaking. In particular, we have found that, however significant the justices' ideological orientations may be toward the parties that appear on the Court's plenary docket each term, their legal arguments are often considered with a surprising amount of dispassion by the justices. To a certain extent, "the haves come out ahead" in the Court because they are the parties to which the

¹³ Specifically, testing differences across the two set of cases in the combined effects of party status, the justices' ideology, and the interaction between the two demonstrates that their impact is not equivalent ($X^2 = 15.91$, 1 df, $p = 0.000$).

¹⁴ The estimate for the solicitor general in salient cases is negative and thus wrongly signed, but we cannot reject the hypothesis that the coefficient differs significantly from zero.

¹⁵ In a statistical sense, the coefficients for the solicitor general as a litigant differ significantly between salient and nonsalient cases, while the comparison of the coefficients that measure amicus support do not achieve a standard threshold of significance.

justices we analyzed were more sympathetic. In light of that fact, one might well expect that the impact of legal advocacy would also be governed by similar ideological considerations. As it turns out, this is not the case. Despite their ideological alignment with various parties, the justices often emerge as discriminating consumers of legal arguments.

Overall, the experienced members of the Supreme Court's legal community have a major impact on the votes of the justices. This impact is not a manifestation of a more general set of advantages that institutional litigants possess. Nor is it a consequence of the justices' ideological affinity for one brand of litigant over another. To be sure, the justices are ideologically predisposed to favor either the advantaged litigants or the legal system's underdogs, and of course the justices' preferences are surely the key determinant of their choices. Still, experienced lawyers seem to offer a substantial benefit, and through their expertise they can provide the Court with useful information in the cases where the justices will be most receptive to it.

It is especially striking that the effects of experienced advocacy hold up, even when measured against the justices' policy preferences. But those effects seem to be exclusive to nonsalient cases. In salient decisions, the justices' attitudes trump other considerations and seem to exclude a role for advocacy. In nonsalient cases, strong ideological influences remain, of course, but the justices become especially attentive to the arguments of sophisticated lawyers. We cannot say for certain precisely how argument affects the justices. One possibility is that experienced lawyers are strategic and adjust their positions in order to make arguments more appealing to centrist members of the Court. Another possibility is that the impact of advocacy is a signal that the justices care about making sensible legal policy and therefore evaluate cases, at least to some extent, on the basis of how they are presented—couched in the context of statutory construction, legislative intent, the written and the historic Constitution, precedents, and a host of other legally relevant considerations.

It seems quite likely that sophisticated litigators understand that the justices need a variety of information to aid them in their decisionmaking. Nonsalient cases, we think, provide strategic lawyers with precisely this kind of opportunity. Their success in securing the votes of the justices under these conditions hardly suggests that cases are won and lost based upon the experience of the lawyers. It does suggest, however, that at the margins the justices are often capable of being persuaded. In a court whose decisions are governed so strongly by ideological considerations, strategic advantages of this sort surely have a hand in guiding the direction of judicial policy.

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