Legal Argumentation before the U.S. Supreme Court

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Abstract

We posit that Supreme Court oral arguments represent a cheap-talk institutional device that can provide the justices with useful information for deciding a case. Using assumptions from cheap talk theory along with a dataset constructed from newly-discovered material in the archives of Justice Harry Blackmun, we ask two questions: (1) what factors lead some attorneys to provide higher quality oral arguments than others; and (2) does the quality of oral arguments affect the justices’ final votes on the merits? We answer the first question by exploring grades Blackmun assigned to attorneys who appeared at oral arguments. The results indicate that his evaluations of attorneys’ oral arguments are the product of two key features of cheap talk: the credibility of the attorney and the ideological compatibility between the attorney and Blackmun. We answer the second question by demonstrating that the quality of oral arguments, as assessed by Blackmun, influences the votes of his colleagues on the bench. In so doing, we show that justices on the Supreme Court respond to a legally-relevant factor, the quality of oral arguments.
Lawyers frequently wonder whether, when a case has been fully briefed, the oral argument is important. If the briefs have been read, can the argument make any meaningful contribution to the judges’ understanding of the case?  

Stern, Gressman, and Shapiro (1993, 569)

Conventional wisdom in judicial politics suggests that oral arguments presented to the Supreme Court generally have no impact on how the justices decide. As Segal and Spaeth argue, there is no indication oral argument “regularly, or even infrequently, determines who wins and who loses” (2002, 280). Despite this claim, there is growing evidence that what transpires during these proceedings can affect how the justices decide cases (Johnson 2001, 2004), especially when a case is complex and justices are uncertain about how they should act (Johnson 2004). We still have much to learn, however, about the role of oral argumentation before the Court. Most notably, we do not know how justices explicitly evaluate legal positions provided at these proceedings or whether these legal arguments affect their final votes on the merits. In this paper, we answer directly these two questions for the first time.

We posit that information conveyed by attorneys during oral arguments helps Supreme Court justices come to terms with the legal issues presented by a case and, in so doing, helps them choose a policy consistent with their goals. To support this claim, we contend that these proceedings may be understood as cheap talk, or costless signals, sent from the attorneys to the justices. Indeed, attorneys often use oral arguments to communicate to the justices which positions are most important for their case (Rehnquist 1987; Johnson 2004), but these arguments are, for the most part, costless to make. Justices, in turn, often take this information to help them coordinate the legal arguments they will ultimately use to decide a case (Cohen 1978; Benoit 1989; Johnson 2004). They hope that the attorneys are experienced enough to provide a high level of argumentation to help them make this determination. As Chief Justice Burger wrote to
Justice Powell in *Zobel v. Williams* (1982): “This is a very important question deserving the level of advocacy of an Erwin Griswold or Bernard Segal. I am considering moving for reargument and inviting competent *amici* to give us the kind of assistance the case deserves.” In short, oral arguments can be seen as an institutional device that can reduce the justices’ uncertainty and possibly influence their choices.

We offer a unique look into this understudied aspect of the Court’s decision-making process by analyzing newly discovered and unique archival evidence – evaluations made by Justice Harry Blackmun of the arguments presented by each attorney who participated in oral arguments before the Supreme Court. While we already know that justices discuss and critique the oral arguments in their personal writings, these data go well beyond those more general comments.1 Indeed, Justice Blackmun made an effort to assess systematically the quality of each attorney’s argument before the Court by assigning them a specific grade for their effort.

This analysis is significant for several reasons. First, and most importantly, we offer direct evidence that the outcome of cases – what we operationalize as the final votes on the merits of Harry Blackmun’s colleagues – is the product of both a justice’s ideological preferences and the quality of legal arguments presented to them. While we already have good evidence that both legal and extra-legal factors affect decisions on the merits (see, e.g., Richards and Kritzer 2002; George and Epstein 1992), these findings are grounded in fact-based models that can only indirectly demonstrate the role law plays in the Supreme Court’s decision-making process. In contrast, we provide systematic evidence that an element of the law – the quality of

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1 For instance, at the end of the oral arguments in *United States v. 12 200 Foot Reels of Film* (1973) Justice Powell wrote, “[A]rgument was helpful, especially as a summary of previous law – read transcript.” Again, in *EPA v. Mink* (1973) Powell notes to himself that Assistant Attorney General Crampton provided an “excellent argument (use transcript if I write).”
oral arguments, and more specifically Justice Blackmun’s evaluation of their quality – has an
effect on case outcomes. Our analysis therefore speaks to one of the most divisive issues within
the study of judicial politics.

Second, in contrast to existing studies that seek to demonstrate the efficacy of arguments
on the Court’s opinions (Epstein and Kobylka 1992; Johnson 2004), we have Justice Blackmun’s
actual evaluation of these arguments. This point is particularly significant because, until now,
scholars have not been able to demonstrate the causal link between attorneys’ arguments and
opinions. Some, like Spriggs and Wahlbeck (1997), have examined the extent to which justices’
reasoning comports with that presented by amici or parties to the case. It is, of course, difficult
to conclude, armed with this correlation, that the Court’s opinion was influenced by those
arguments and that the justices would not have independently developed those arguments. With
the present analysis we are able to take a step in that direction. That is, we are able to observe
and explain the intermediate link between arguments and outcomes – namely the justices’
receptivity to a legal argument – that is missing from many analyses of how legal arguments
affect outcomes (see, e.g., Epstein and Kobylka 1992; Wahlbeck 1997).

Third, we confirm existing studies that demonstrate the role legal expertise and
experience play in determining the success of litigants before the Court (Galanter 1974; McGuire
1993a, 1993b, 1995). That is, we find that lawyers who are more equipped to provide better and
more credible arguments are evaluated more highly and win more often as a result. However, as
with our second contribution we make a significant improvement over existing works.
Specifically, previous analyses rely on a correlation between experience and case outcomes, but
cannot explain the intermediate step – namely why does experience matter? We address this
issue directly by providing systematic evidence that the missing link is the justice’s evaluation of the arguments with which they are presented.

Finally, our analysis makes an important contribution to the game theoretic cheap talk literature by providing a large-n quantitative test of hypotheses derived from this theory. Most of the models that focus on how cheap talk can lead to outcomes that are mutually beneficial to political actors are only tested with anecdotal examples. We take the underlying assumptions of cheap talk theory and test them on a large sample of cases in which cheap talk takes place. Overall, we make important theoretical and empirical contributions to literature that seeks to explain how Supreme Court justices decide, as well as to literature that seeks to more generally explain how information is transmitted and received between political actors.

**Information and Legal Argument**

A number of scholars suggest that lawyers can affect Court decisions by providing information that is useful in deciding a case. Epstein and Kobylka (1992), for instance, contend that how attorneys craft legal arguments often determines the process of legal change. Their analysis of abortion and death penalty decisions concludes that the arguments presented by attorneys were the decisive factor in the path the law took in both issue areas. Ultimately, “it is the arguments they [the justices] hear and make that . . . seem to most clearly influence the content and direction of the legal changes that results (Epstein and Kobylka 1992, 302). Similarly, Lawrence (1990) suggests that the Legal Services Program, an organized interest advocating the rights of the poor, was able to help shape law in cases that concerned the poor. Other scholars offer compelling evidence to corroborate these two works (see e.g., McGuire 1990; Hagle 1991; Richards and Kritzer 2002).
Beyond the literature that more generally focuses on legal arguments, recent research shows that oral arguments can affect decisions justices make. For instance, Johnson (2001, 2004) provides evidence that justices use these proceedings to gather information to help them reach decisions as close as possible to their desired outcomes even in the face of constraints from other political institutions or from institutional rules. Finally, as noted in the introduction, Johnson (2004) demonstrates that justices are most likely to use information from oral arguments in their majority opinions when they are uncertain about the outcome of a case and when the case is more complex legally. Others corroborate many of Johnson’s findings with in-depth analyses of specific cases or issues areas (see, e.g., Wasby, D’Amato, and Metrailer 1976; Cohen 1978; Benoit 1989).

While evidence suggests that arguments presented to the Court affect the justices’ decisions, scholars also contend that not all lawyers are equally positioned to have their arguments achieve this goal. Scholars argue that more experienced and well-trained attorneys are better able to sway the Supreme Court to rule in favor of their clients (George and Epstein 1992; Sorauf 1976; Galanter 1974; Vose 1959). McGuire (1990, 1993a, 1993b, 1995) corroborates these claims by demonstrating that members of the elite bar – especially those who have experience before the Court – provide higher quality and more reliable arguments than other attorneys.² The reason for this is that these lawyers “are better placed to provide the kind of briefs and arguments that the justices find most valuable in their decision making” (McGuire 1993a, 193). It is also one reason why the Solicitor General is so successful at the Supreme

² Certainly, as McGuire notes, first time and one-shot attorneys can do well. This is seen in cases such as Elk Grove Unified School District v. Newdow (2004) where Newdow argued pro se, and was widely reported to have made an excellent argument before the Court (see, e.g., Mauro 2004).
Court (Salokar 1992; Segal 1990, 1988). In short, according to the literature, experienced attorneys are more likely to present articulate, accessible, and credible arguments to the Court. As a result, lawyers with experience are better equipped to craft arguments that may persuade the justices to reach a particular outcome.

**Cheap Talk, Oral Arguments, and the Court**

As the above discussion indicates, there are good reasons to expect that legal arguments – including those presented at oral arguments – can affect justices’ decisions. However, for arguments to have an impact they need lawyers who will provide “a clear presentation of the issues, the relationship of those issues to existing law, and the implications of a decision for public policy” (Wahlbeck 1998, 783). That is, the justices need sufficient information about the case and the law in order to set policy in ways that will promote their goals. It is in this context that lawyers appear before the Court and attempt to craft their arguments in ways they anticipate will be best suited for providing the justices with information that will help their cause.

To guide our understanding of oral arguments, we turn to game theoretic cheap talk literature. We begin with a general discussion of this theory and then we turn to how these signals – sent by attorneys to the Court – can help the justices as they make decisions on the merits.

**Cheap Talk Signals**

Generally, cheap talk is defined as costless signals sent between decision makers where the cheap talk reveals private information known to the sender but not the receiver. The talk is cheap in the sense that it does not directly affect the payoffs of the sender or receiver (Farrell 1987). Rather, effective cheap talk alters the beliefs of the receiver, leading her to update her understanding of the fit between different choices and her goals. As Austen-Smith (1990, 125)
argues about legislative debate, information can help legislators determine “how particular pieces of legislation translate into final consequences.” Cheap talk thus can affect the payoffs of actors involved in an exchange of information, but it does so indirectly by influencing which choice the receiver deems most compatible with her preferences over outcomes.

Many scholars suggest that, under certain conditions, cheap talk can be an effective method of communication when decision makers are asymmetrically informed (Morrow 1994; Farrell 1987; Crawford and Sobel 1982). But, it is important to point out that cheap talk is also often ignored; if all the actors in a decision-making setting believe that their signals will go unheeded, nobody will listen to or believe the information contained in the signals (Farrell 1987). Game theorists refer to this outcome as a “babbling” equilibrium, meaning that the receiver always ignores the cheap talk (Farrell and Rabin 1996). This equilibrium can result, for example, if the sender and receiver have diametrically opposed interests. In this setting, the sender has a strong incentive to dissemble (lie), and thus the receiver ignores the communication because it is not credible. Ultimately, cheap talk signals will not help actors coordinate in this scenario and therefore they will have no effect on the outcome of the interaction.

Although cheap talk may be uninformative under the above conditions, there are times when it can help actors coordinate strategies for their mutual benefit and therefore reach an equilibrium outcome (Farrell 1987; Farrell and Gibbons 1986; Farrell and Saloner 1985; Crawford and Sobel 1982). Specifically, there are three basic conditions under which it is likely that a receiver will rely on the information provided by the sender. First, the extent to which cheap talk communicates information hinges on the credibility of the message. The traditional way in which game theorists think about credibility is the overlap in the interests of the sender and the recipient of a signal (see, e.g., Austen-Smith 1993; Lupia and McCubbins 1998; Farrell
and Rabin 1996; Crawford and Sobel 1982). If they share preferences over outcomes, the sender will have little incentive to relay information to the receiver that does not accurately reveal her private information. Rather, the sender will have every incentive to convey information that will help the receiver choose an action that both find acceptable. As Lupia and McCubbins (1998, 50) explain, “…persuasion does not occur if the principal believes that the speaker is likely to have conflicting interests. If, however, the principal believes that common interests are more likely, then persuasion is possible.” Morrow suggests that legislative debate helps legislators with similar preferences coordinate with one another because, “[m]embers are unlikely to take cues from those whose underlying values are greatly different from their own” (1994, 256).³

Second, the credibility of signals also hinges on whether the recipient believes the sender to be well informed on the subject of the communication. The reason why is intuitive: if the receiver considers the sender to be ill-informed then any information conveyed is likely to be discounted as being possibly inaccurate. Austen-Smith (1993), for example, argues that members of Congress are more likely to listen to lobbyists when they perceive them to be well-informed about the issue at hand. Finally, for cheap talk to be relevant there must be an information asymmetry between the sender and the receiver where the sender has information relevant for the choice being made (see Austen-Smith 1990, 126). If the sender has no private information then there is literally nothing relevant to communicate to the receiver.

³ Note that if the sender’s preferences are perfectly aligned with the recipient’s then the sender has no incentive to hide private information or to lie. Farrell and Rabin (1996) refer to this as a “self-signaling” scenario, and in such a situation the recipient always listens to and acts based on the sender’s message. When there is a conflict of interest, however, the recipient must determine whether the message is credible.
Supreme Court Oral Arguments as Cheap Talk

We posit that Supreme Court oral arguments can be viewed as an institutional cheap-talk device to help justices reduce their uncertainty about a case. Indeed, oral argument messages can allow coordination between litigants, who are trying to produce the outcome they desire, and justices, who are trying to develop policy that will foster their preferred legal and political consequences. However, the information that litigants provide during these proceedings is largely costless. Oral arguments are thus similar to hearings (Diermeier and Fedderson 2000), the committee system (Gilligan and Krehbiel 1987, 1989, 1990), and legislative debate (Austen-Smith 1990) in Congress – all of which serve as sources of information for legislators. As Oleszek (1984, 13, quoted in Austen Smith 1990) puts it, legislative debate “enables members to gain a better understanding of complex issues, and it may influence the collective decisions of the House.”

While the written briefs present various legal positions that may lead to a particular outcome, at oral arguments the attorneys must more narrowly focus on the most important and relevant issues in the case. These proceedings therefore have the potential to crystallize the justices’ views in a case, or to perhaps even move them towards a particular outcome (see, e.g., Wasby, D’Amato, and Metrailer 1976; Johnson 2004). This relationship is evident in attorneys who try to pinpoint arguments to particular justices in order to have a better chance of winning. For example, Lawrence Tribe says crafts his arguments to appeal to a majority of the Court and therefore focuses on whatever will “get him five votes” (Toobin 1996).

Generally, then, positions taken by attorneys during oral arguments constitute cheap talk signals sent to the justices because the arguments are costless and nonbinding. More specifically, these proceedings mirror the three conditions set out by game theorists under which
cheap talk can be informative. First, as cheap talk literature makes clear, a justice should be more likely to listen to arguments made by an attorney whose preferences are similar to the justice’s. The reason is that a lawyer has an incentive to give this justice information that will lead her to the outcome that both she and the justice prefer. Thus, if a justice is ideologically conservative, she is more likely to listen to the arguments forwarded by the attorney advocating the more conservative position in a case. In addition to following directly from the cheap talk literature, this hypothesis dovetails with conventional wisdom in the judicial politics literature which suggests justices decide cases based on their ideological predispositions (Segal and Spaeth 2002).

The second element of credibility pertains to the message sender’s level of information on the subject at hand. There is ample evidence to suggest that the content and credibility of information provided by attorneys can shape case outcomes (Galanter 1974; McGuire 1993a, 1993b). In other words, oral arguments will only be effective at communicating information if a justice believes the lawyers are well informed and can provide them with the best possible legal arguments. As Galanter (1974), McGuire (1993a, 1993b), and others (e.g., Wahlbeck 1997) demonstrate, this aspect of credibility varies based on characteristics of the lawyer, such as experience and training. In this sense, less credible lawyers are simply less able to present useful arguments to the Court.

Finally, we argue that an asymmetry of information at oral arguments exists between the bench and the bar because the lawyers have access to an immense amount of information about the case that the justices have not yet examined. While the justices often come to these proceedings after reading the written briefs and the lower court record, oral arguments themselves can provide additional and relevant information to the Court (see e.g., Johnson 2004;
Johnson 2001; Wasby, D’Amato, and Metrailler 1976). In fact, Johnson (2004, 5) provides evidence that justices often “seek new information during these proceedings…” Additionally, he demonstrates that justices are most likely to use information procured from the oral arguments when they are more uncertain about how to act and when a case is more complex (2004).

Justices themselves substantiate these scholarly accounts. For instance, Chief Justice Rehnquist (1987, 277) explains how these proceedings can matter: “But if an oral advocate is effective, how he presents his position during oral arguments will have something to do with how the case comes out. Most judges have tentative views of the case when they come to the bench...[and may] find [themselves] falling short in one aspect or another of either the law or the facts. Oral argument can cure these shortcomings.” Justice Brennan agrees with this assessment as he asserts that, “I have had too many occasions when my judgment of a decision has turned on what happened in oral argument...” (in Stern and Gressman 1993, 732). He goes on to suggest that, while not controlling his votes, this process helps form his substantive thoughts about a case: “Often my idea of how a case shapes up is changed by oral argument...” (in Stern and Gressman 1993, 732).

**Hypotheses**

Relying on the theoretical assumptions from the cheap talk literature discussed in the previous section, as well as on their application to Supreme Court oral arguments, we seek to better understand the relationship between legal arguments and Supreme Court decision making. To do so, we test a number of hypotheses regarding, first, the factors that will lead a justice (in this case Justice Blackmun) to evaluate an attorney’s arguments in a particular manner. Second, we examine whether the quality of oral arguments actually influences the final votes on the merits of Blackmun’s colleagues.
Explaining the Quality of Oral Arguments

As we note above, for cheap talk to be effective the sender and the receiver of a signal need to have compatible interests because the communication is more credible under this condition (Crawford and Sobel 1982; Farrell 1987). Additionally, there is a vast literature on Supreme Court decision making that suggests ideology drives how justices decide (see, e.g., Segal and Spaeth 2002; Spaeth and Segal 1999). Combined, these literatures demonstrate that the ideological content of the information and its compatibility with a justice’s policy preferences affects how the justice will view it. This leads us to predict:

Ideological Compatibility Hypothesis: Attorneys who present arguments ideologically closer to Justice Blackmun are more likely to earn high marks for their oral arguments.

Based on the cheap talk literature, we also argue that a number of factors may affect the quality of argumentation and the credibility of the arguments attorneys present. Several scholars (see, e.g., McGuire 1993a, 1993b, 1995, 1998; George and Epstein 1992; Galanter 1974; Vose, 1959) make strong cases that experience plays a key role in how successful attorneys are before the Court. In fact, McGuire finds that attorney experience affects the Court’s agenda as well as case outcomes (1993b, 1995). Based on these earlier findings we hypothesize:

Experience Hypothesis: Attorneys who have more experience arguing before the Court will earn higher evaluations from Justice Blackmun.

Beyond the general conception of experience, several other factors that indicate experience, qualifications, or ability might help an attorney present compelling legal arguments to the Court. First, it is well known among judicial scholars that the Solicitor General is the most experienced (Segal 1988, 1990) and also the most successful advocate to appear before the
Court; in fact the Solicitor General’s office wins well over 70 percent of the cases in which the government participates (Caplan 1987; Salokar 1992; Johnson 2003; Bailey, Kamoie, and Maltzman N.d.). While there are various explanations offered in the literature about why the Solicitor General is so successful, it is generally agreed that many of the nation’s best attorneys often work for this office and are among the most experienced attorneys to appear before the Court (McGuire 1998). The experience of attorneys in this office means the justices often want to hear from them. As Justice Powell (1982) wrote to Chief Justice Burger in one case: “the importance of this case – and the interest of the government – justify giving the Solicitor General 15 minutes [for oral argument]. . . . He may be more helpful than the more partisan counsel.” As such, we hypothesize:

_Solicitor General Hypothesis:_ Attorneys from the Solicitor General’s office are more likely to earn high marks from Justice Blackmun.

While the Solicitor General’s office argues the vast number of cases for the federal government, there are cases when attorneys from a particular agency argue or when the attorney general personally argues. We posit that these attorneys can be seen similarly to the Solicitor General in terms of experience and should therefore be treated separately. Our expectations, however, are the same. Thus, we predict:

_U.S. Attorney Hypothesis:_ Federal government attorneys beyond the Solicitor General should receive higher grades from Justice Blackmun than private attorneys.

An attorney’s credibility is also tied to the legal training she has received. We expect that more highly trained attorneys are more likely to offer credible legal arguments that will garner high marks from the justices (McGuire 1993b). We also know that Justice Blackmun was
cognizant of where those appearing at oral arguments attended law school. For instance, in *Southland Corporation v. Keating* (1984) he notes of John F. Wells (counsel for appellees): “This guy was #2 at Stanford when [Rehnquist] was #1 and [O’Connor was] #3.” Similarly, in *Monroe v. Standard Oil Company* (1981) he indicates that appellee attorney Paul S. McAuliffe had a degree from Yale. McGuire’s findings, combined with Blackmun’s attention to this detail, lead us to predict that:

*Elite Law School Hypothesis:* Attorneys from more prestigious law schools are more likely to earn high marks from Blackmun.

McGuire (1993a) finds evidence that members of, what he terms, the Washington Elite are much more successful at placing cases on the Court’s docket. These attorneys are often seen as providing more credible, and simply better, arguments for the justices. This may be due to their relationship with the Court or, as McGuire notes, their proximity to it (1993a, 183). This leads us to hypothesize:

*Washington Elite Hypothesis:* Private attorneys practicing in Washington, D.C. are more likely to earn higher evaluations than are attorneys from outside the beltway.

Academic lawyers and lawyers for interest groups are often viewed as “notable practitioners,” and they often have more experience than most other attorneys who practice outside of the Washington D.C. area (McGuire 1993a). We expect, then, that academic counsel such as Lawrence Tribe, Alan Dershowitz, and Eugene Gressman would be held in higher regards by the justices than would non-academic counsel, and that attorneys who argue for interest groups would enjoy a similar status. Thus, we predict:
Law Professor Hypothesis: Law school professors who appear before the Court should garner higher grades than non-law school faculty.

Amicus Attorney Hypothesis: Attorneys who participate at oral arguments on behalf of interest groups should garner higher grades at oral arguments.

Finally, former Supreme Court clerks may have an enhanced ability to offer arguments that will sway the justices (McGuire 1993a, 1993b). After working at the Court for a year or two clerks become adept at understanding which arguments are likely to garner five votes, and which arguments will not have any effect on the outcome of a case. As a result, McGuire (1993a, 163) suggests that “former clerks are highly valued as Supreme Court litigants.” As with law school prestige, Justice Blackmun seemed to think this factor was important at oral arguments; in Daniels v. Williams (1986) he describes attorney Stephen Allan Saltzburg as a “[Marshall] clerk.” Further, in United States v. American Bar Endowment (1986) he notes that Francis M. Gregory was a “[Brennan] clerk.” These and other examples in Blackmun’s notes lead us to predict that:

Former Clerk Hypothesis: Former Supreme Court clerks who appear at oral arguments are more likely to earn high marks than are attorneys who are not former clerks.

Explaining Final Votes on the Merits

Although it is important to understand how Justice Blackmun evaluated the arguments presented to the Court, this does not suffice as evidence that the justices weigh legal concerns in their decision making. Indeed, in games of cheap talk, the receiver’s payoffs are tied to how she evaluates the sender’s signals. Thus, we must dig deeper to understand whether the quality of oral arguments affect the justices’ votes. By taking this next step, we are able to draw a direct
link between the presentation of legal arguments (the cheap talk signals sent during oral arguments) and votes (the receiver’s evaluation of the signals).

First, however, we must take a step back to discuss our focus in this section. Clearly, the hypotheses in the previous section are directed at Justice Blackmun’s behavior. We cannot, however, simply regress Blackmun’s votes on his evaluation of the attorneys’ arguments because of the inherent endogeneity we would face in so doing. That is, it is possible Justice Blackmun assigned higher grades to litigants for whom he anticipated voting. This means that we need to find another way to test whether votes are affected by the quality of oral arguments, as indicated by Blackmun’s grading of attorneys. While there are many solutions, we chose to examine the influence of oral arguments on all of Justice Blackmun’s colleagues, thereby excluding him from the analysis.\(^4\) In so doing, we avoid the possible endogeneity issue; in fact, to the extent that there is endogeneity it should serve to stack the deck against finding an effect for justices other than Blackmun – especially for those justices who are ideologically at odds with Blackmun. With this in mind we now turn to our three case outcome hypotheses.

First, legal scholars and judicial politics scholars alike have long held that judges are unique decision makers inasmuch as their decisions rest on neutral principles of law (Wechsler 1959). More recently, scholars have theorized that the law and legal precedent serve as a constraint on the justices’ pursuit of their sincere policy preferences (Epstein and Knight 1998; 4 Another way around this problem would have been to examine Justice Blackmun’s votes through the use of an instrumental variable regression. But this approach requires us to find a variable(s) that is (are) highly correlated with the quality of oral argumentation but uncorrelated with his vote in the case. We currently have no such variables that meet these criteria. Note, however, that when we use Justice Blackmun’s vote as the dependent variable the results are quite strong for our grade variable (results available from the authors upon request). Despite this fact, we still cannot be sure that this result is not due to the endogeneity of the equation.
George and Epstein 1992). In particular, justices are thought to be constrained by the norm of stare decisis, which calls for compliance with past legal decisions. Scholars have demonstrated the impact of the law using case-fact models (Segal 1984; George and Epstein 1992), although Segal and Spaeth (2002) argue that these findings also are consistent with preference-based explanations. If legal arguments provided by attorneys affect Court decisions, the justices’ decisions should be affected by the quality of the arguments presented by attorneys. This is consistent with cheap talk theory, whereby a receiver must evaluate the veracity of the signal sent. If he evaluates that the signal is credible and reliable, then the receiver should use the signal when making the choice of how to act. As such, we hypothesize that:

*Oral Argument Hypothesis:* Justices are more likely to side with the attorney who presents better legal arguments at orals.

The second dominant explanation of judicial behavior places its emphasis on the role of policy preferences for decision making. Judicial scholars have argued for decades that Court decisions are influenced by the justices’ policy views (see, e.g., Pritchett 1948; Schubert 1965; Rohde and Spaeth 1976). While some have asserted that policy preferences alone explain decisions, others have maintained that maximization of policy goals is preeminent (Maltzman, Spriggs, and Wahlbeck 2000; Murphy 1964). Indeed, one of the principal contributions by political scientists who study the Supreme Court is an examination of the avenues through which policy preferences affect decision making at various stages of this process: agenda setting (Caldeira and Wright 1988), opinion writing (Maltzman, Spriggs, and Wahlbeck 2000), and decisions on the merits (Segal and Cover 1989). Thus, we expect that:

*Policy Preference Hypothesis:* Justices are more likely to side with the attorney whose position is closer to the justices’ policy preferences.
Beyond the key factors of ideological proximity and credibility, the cheap talk literature suggests that effectiveness of information may be linked to a justice’s level of information about a case. In some instances, a justice’s need for information will be higher, and an attorney who provides credible information should be positioned to have more of an effect on the outcome of the case. Indeed, it is under conditions of information asymmetry that justices’ beliefs about the payoffs they will receive from different choices can be swayed the most. Chief Justice Rehnquist (1987, 276) indicates that oral arguments sometimes help alleviate this information deficit: “I find that it [oral arguments influencing his view of the case] is most likely to occur in cases involving areas of the law with which I am least familiar.”

While a number of factors may indicate that justices need additional information to decide a case, the most pertinent is a highly complex set of legal issues (Maltzman, Spriggs, and Wahlbeck 2000). In fact, cases that come to the Supreme Court often focus on several issue dimensions, as well as on more than one constitutional or statutory issue. It is these cases where lawyers, who have literally spent years researching the case, have more information than the justices, even after briefs have been submitted. Because of the need for information in complex cases, justices should be more receptive to quality arguments.5 This leads us to predict that:

5 Case complexity should affect the extent to which the justices take oral advocacy into consideration (as manifested in their votes) but it should not affect Blackmun’s evaluation of the quality of oral argument. Thus, we include case complexity in the vote model but not in Blackmun’s evaluation of attorney arguments. While the other two factors related to the effectiveness of cheap talk (i.e., preference compatibility and source credibility) may directly influence the evaluation of the value of communication, information asymmetry is more likely to only affect the weight accorded information when evaluating the payoffs a recipient will receive from a choice. That is, for case complexity to affect Blackmun’s evaluation of attorneys, he would have to evaluate all attorneys arguing in complex cases more highly than attorneys in non-complex cases. Instead we argue that justices, facing information
Information Need Hypothesis: Justices are more likely to be influenced by higher quality arguments in complex cases where they have a greater need for information.

Data and Methods

To determine how Justice Blackmun evaluated attorneys’ legal arguments, and to determine whether such evaluations affected other justices’ final votes on the merits, we use the grades he assigned to attorneys during oral arguments in a random sample of 481 cases between 1970 and 1994. Based on these data we test our argument that Blackmun’s evaluations and his colleagues’ final votes are based on the three criteria set out by cheap talk theory.

Dependent Variables

Oral Argument Grade. Using Justice Blackmun’s grades as a dependent variable requires us to consider two key issues. First, it is possible that the grades in Blackmun’s notes do not reflect his evaluation of the quality of oral arguments presented by the attorneys. However, given the explicit records Blackmun kept we are confident these grades are based almost entirely on his evaluation of the arguments presented by the attorneys. This assumption is hardly a stretch given that he took extensive notes of the arguments presented, offered a grade for almost asymmetry, will weigh highly credible information more heavily. The results in Table 2, however, do not differ much if we also include the complexity variable.

6 The oral argument notes can be found in each case files in Justice Blackmun’s personal papers at the Library of Congress. Our data include nine cases where Blackmun’s case file contained more than one set of oral argument notes due to a reargument. We include in our first model the grades from both arguments, but in the outcome model we obviously only include one observation for each justice in each case, and we use the data on the reargument to measure the quality of the oral argumentation.

7 For an example see his oral argument notes for Younger v. Harris (1971) in the appendix.
every attorney who appeared before the Court, and even changed some of the grades of the first arguing attorneys after comparing their initial grade with the second attorney’s presentation.8

Additionally, beyond recording grades, Blackmun wrote comments such as “pretty bad,” or “very good argument” in many cases. These observations seem to highlight whether an attorney earned a particularly high or low grade. For example, in California v. Carney (1985) he noted that Louis R. Hanoian, Deputy Attorney General of California, was “better than I thought he would be.” Hanoian’s performance that day garnered a 5 on Blackmun’s 8-point scale. He also wrote that the Deputy Solicitor General who argued United States v. Locke (1985), was “better than usual” when assigning her a score of 5. He even exclaimed, in Johnson v. Mayor and City Council of Baltimore (1985), that the respondent’s 31 year old attorney, facing Solicitor General Rex Lee at oral arguments, was a “6, really,” adding that this attorney, L. William Gawlik, was articulate and used no notes during the proceedings.

In contrast, Blackmun sometimes offered a harsher evaluation of some attorneys. In Williams v. Vermont (1985) he wrote, “curious argument on both sides” to accompany scores of “3/4” to each attorney. He also commented on the argument presented by the Nebraska Assistant Attorney General in Murphy v. Hunt (1982), by noting “very confusing talk about Nebraska’s

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8 We include in the first model all attorneys who receive a grade, but exclude from the second model cases where Blackmun did not assign a grade to both the appellant’s and appellee’s attorney. We must do so because we must compare both attorneys’ grade to assess the effect of oral advocacy on the justices’ votes. One reason he may have failed to give grades in a particular case is that he may not have been fully engaged with the argument. For instance, in Local No. 82, Furniture & Piano Movers, Furniture Store Drivers, Helpers, Warehousemen & Packers v. Crowley (1984), Blackmun did not assign a grade to Mark D. Stern, the respondent’s attorney. He wrote in his notes, “I am sleepy and drowsed off. Hope I was not observed by spectators or Rehnquist [who sat next to Blackmun].”

9 Blackmun used a set of cryptic abbreviations in his notes. Specifically, here, he wrote, “Better tn I thot he wd b.”
bail statutes;” the attorney received a grade of 4. Further, Blackmun concluded that the assistant state’s attorney general who argued *Finley v. Murray* (1982), and received a score of 3, “…does not do very well.” Reflecting his expectations given the qualifications of the attorney arguing the case, Blackmun responded to one attorney, who was appointed by the Court to represent an indigent respondent, “disappointing argument for a good firm” (*United States v. Euge* 1980). This attorney received a score of 3 out of 8. Finally, in *Michigan v. Clifford* (1984), the petitioner’s attorney received a score of 2 out of 8 from Blackmun, who remarked that her argument was “terrible.”

The second issue we must confront is that Justice Blackmun’s grading system changed over the course of his tenure on the Court. In fact, he employed three different grading scales: A-F scale from 1970-1974; 1-100 from 1975-1977; and 1-8 from 1978 to 1993 (see tables 1a-1c for the frequency with which he assigned grades to attorneys under each grading scheme). We therefore have to determine the most appropriate way to make his evaluations of attorneys across these three scales comparable to one another. While one could simply assume that a B- on the first scale is equivalent to an 83 on the second scale, and a 6 on the third scale, we think doing so requires making some rather restrictive assumptions.

We therefore chose to standardize the different grading schemes onto a common scale by determining how far away each grade was from the mean grade in that particular scale. More technically, we calculated a z-score for each grade, which tell us how many standard deviations a

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10 In other cases, Blackmun changed grades. Indeed, one attorney initially earned a 5 but slipped to a 4 and then ultimately to a 3.
specific grade is from the mean grade in that scale.\textsuperscript{11} Because the z-scores are on a continuous scale, we estimate an OLS regression. Because an attorney may appear multiple times before the Court as an oral advocate, we employ robust standard errors clustered on each attorney. We do so because while our data contain 1,136 observations, only 867 different attorneys argued before the Court. Thus, clustering in this manner allows for errors to be correlated within a particular attorney across different cases.\textsuperscript{12}

\textit{Justices’ Vote.} To evaluate the extent to which the quality of legal arguments affected the justices’ decisions in a case, we examine whether each justice, excluding Blackmun, voted to reverse the lower court decision. Using Spaeth (2004), we code such votes as 1 and assigned a justice’s vote the score of 0 if she voted to affirm the lower court. Justices voted to reverse the lower court in 57.3 percent of the observations. Note that we do not include observations for Justice Blackmun’s votes because of the possible endogeneity between his evaluation of attorneys and his votes (see the discussion above and footnote 4).

\textit{Independent Variables – Oral Argument Grades}

\textit{Ideological Compatibility with Attorney.} We first determine the ideological direction of both the petitioner and respondent based on Spaeth’s (2004) measure of the ideological direction

\textsuperscript{11} Our results are not sensitive to how we precisely measure these grades. The results are largely comparable if we instead use a measure that simply linearly transforms the 1-8 scale into a 0-100 scale. We also operationalized the variable by determining the mean grade for each scale, and then placing each attorney in one of three categories: above average, below average, or average, and the results are comparable. All of these are available from the authors upon request.

\textsuperscript{12} An alternative way to cluster would be on each case, which would allow the errors to be correlated across the different attorneys in the same case. The standard errors are slightly larger when we cluster on lawyers, and in the interest of being conservative in rejecting the null hypothesis we cluster on that characteristic.
of the lower court decision. If the lower court made a liberal ruling, we assume the petitioner seeks a conservative ruling and the respondent seeks a liberal ruling from the U.S. Supreme Court. Second, we employ Martin/Quinn (2002) scores to determine Justice Blackmun’s year to year ideology over his entire Court career. Martin/Quinn scores are “similar in spirit to D-Nominate scores,” which are used to measure congressional preferences (see Poole and Rosenthal 2000), but are created in a much different manner (Martin and Quinn 2002). Specifically, using a dynamic item response model with Bayesian inference, Martin and Quinn fit multivariate dynamic linear models to create measures of justices’ ideology across time and across issue areas (for a full derivation of their procedure see Martin and Quinn 2002). Larger values on this measure indicate that a justice is more conservative.

We then matched our ideological measure with the ideological direction of argument we expect each attorney to make. If an attorney argued for the liberal side in a case during that term, we code this variable as the Martin/Quinn score. Alternatively, if the attorney argued for the conservative side we code it as 1 minus Blackmun’s Martin/Quinn score. Higher values therefore indicate Blackmun is ideologically closer to the attorney’s position. This variable ranges between -1.90 and 1.90, with a mean of .005 and a standard deviation of .059.

**Attorney Experience.** Using McGuire’s (1993a) definition of experience, we code for the number of times an attorney previously appeared before the U.S. Supreme Court at oral arguments. We gathered these data through searches on Lexis/Nexis for each attorney’s name to determine past cases in which they appeared. A case was only counted if the attorney in the present case was listed previously as having been the one to argue (merely being on a brief does not count for this purpose). The mean number of oral arguments appearances is 4.09 with a standard deviation of 11.11.
Solicitor General. To determine whether the Solicitor General argued we coded Justice Blackmun’s oral argument notes as well as the Court opinions in either Lexis/Nexis or FindLaw to determine whether a title was attached to an attorney. Specifically, we looked for “assistant solicitor general” or “solicitor general.” Based on previous findings (Segal 1988, 1990) that demonstrate the Solicitor General is more successful before the Court than assistant solicitors general, we created two separate variables. First, if the attorney arguing is the Solicitor General personally, we created a variable that is coded 1, and that is coded 0 for all other attorneys. We created a similar variable for assistant solicitors general; if they argue it is coded 1, while all other attorneys take on a value of 0. The Solicitor General constitutes 2.6 percent of the attorneys in our sample, and the Assistant Solicitor General appeared as the attorney in 12.9 percent.

U.S. Attorney. Using the same search as we used for Solicitors General, we code for Federal government attorneys, excluding Solicitors General, who appeared before the Court. Government attorneys are coded 1 and all other attorneys are coded 0. Approximately 12 percent of the attorneys in our sample represented the Federal Government (but were not from the Solicitor General’s office).

Attorney Argues for Interest Group. Sometimes the Court allows attorneys, beyond those representing the litigants, to appear at oral arguments. If the attorney appeared in this capacity we coded this variable as 1. All other attorneys are coded 0. Just over one percent of attorneys represented an interest group at oral arguments.

Attorney Attended Elite Law School. We obtained these data from Lexis/Nexis, Westlaw, or from the Martindale Hubbell directory (the issue published during the year the case was argued). Attorneys who attended one of the elite law schools (Harvard, Yale, Columbia,
Stanford, Chicago, Berkeley, Michigan, and Northwestern) are coded 1, while all other attorneys are coded 0. This variable’s mean value is .39.

*Washington Elite.* We coded the address for the arguing attorney as it appeared on the briefs submitted to the Court in each case. If an address was found in Washington D.C. (excluding federal government attorneys) this variable is coded 1. All other attorneys are coded 0. Just over ten percent of the attorneys in our sample were private attorneys from Washington D.C.

*Law Professor.* We used the Martindale Hubbell directory for the year the case was argued as well as the address listed on the briefs to code this variable. If an attorney is listed as a professor at a law school it is coded 1 and all others are coded 0. Nearly two percent of attorneys arguing before the Court were law professors at the time.

*Former Court Clerk.* These data were obtained from the Clerk’s office at the U.S. Supreme Court. The list includes all clerks who worked at the Court from 1932-1991. Former clerks are coded 1, and all others are coded 0. Nearly 6.6 percent of the attorneys in our sample previously worked as a clerk for one of the justices.

Finally, we included *Appellant Attorney* as a control variable in the model. Because the Court is predisposed to reverse lower court decisions (Provine 1980; Palmer 1982), we might expect Justice Blackmun to be predisposed to find petitioners’ arguments more favorable. Thus, we include a dummy variable that equals 1 when the attorney represents the petitioner and 0 otherwise.

**Independent Variables – Final Vote on the Merits**

*Oral Argument Grade.* We created a variable that compares the grades of the attorneys arguing in each case. We did so by subtracting the appellee’s grade z-score from the appellant’s
z-score. Higher grades indicate the appellant had the stronger legal argument.\footnote{If more than one attorney argued on a side, which happens in a handful of cases, we use the highest grade earned by an attorney on that side.} This variable ranges from -3.77 to 6.22, and has a mean of -.041 and standard deviation of 1.10.

**Ideological Compatibility with Appellant.** We created a variable, constructed similar to **Ideological Compatibility with Attorney** above, containing the Martin-Quinn score (2002) of each justice who sat during the time span covered by our sample. We first determined the ideological direction of both the petitioner and respondent based on Spaeth’s (2004) measure of the ideological direction of the lower court decision. If the lower court made a liberal ruling we assume the petitioner seeks a conservative outcome and the respondent seeks a liberal outcome from the U.S. Supreme Court. We then matched this ideological measure with the ideological direction of argument we expect each attorney to make. If an attorney argued for the liberal side in a case during that term, we code this variable as the Martin/Quinn score. Alternatively, if the attorney argued for the conservative side we code it as 1 minus the justice’s Martin/Quinn score. Higher values therefore indicate a justice is ideologically closer to the attorney’s position. This variable ranges from -6.15 to 7.15, with a mean of .469 and standard deviation of 2.43.

**Case Complexity.** To capture the information need of the Court, we use the complexity of a case. To measure case complexity we conducted a factor analysis of all cases decided by the Supreme Court between the 1970 and 1993 terms. Using Spaeth (2004), we counted the number of legal issues raised in the case and the number of legal provisions at issue. The factor analysis results in a single factor with an eigenvalue greater than one. We assign the factor score that resulted from this analysis for each case. The average Case Complexity measure in our sample was -0.007 with a standard deviation of .39.
Finally, we must be clear about why this model does not include variables for attorney characteristics, such as prior experience before the Court. The reason is that those effects are already present in this model in the oral argument variable, which we measure using Blackmun’s evaluations of the attorneys’ arguments. As demonstrated in Table 2 the quality of oral arguments is in part a function of those very attorney characteristics. It would therefore be redundant to include those variables in the outcome model. In fact, their inclusion could actually bias the estimate for oral arguments because attorney characteristics are causally related to it. Our results, however, do not appreciably change if we include control variables for all of the covariates in our first empirical model (see footnote 17). In addition, we should also note that the policy preference variable in this model is not endogenous with attorney grades because it measures the policy preferences of justices other than Blackmun.

Results

One of the key insights from the cheap talk literature is that the credibility of a message sender will affect her ability to influence the receiver. The importance, relevance, and accuracy of the information being conveyed by a lawyer, this theory suggests, will vary systematically with that person’s credibility. As such, more credible attorneys should present more articulate and persuasive oral arguments before the Court. Our results in Table 2 provide strong support for this hypothesis. Indeed, attorneys who are more experienced and qualified garner higher evaluations from Justice Blackmun.

[Insert Table 2 about Here]

We begin, however, with our expectation that attorneys putting forward positions more ideologically compatible with Justice Blackmun’s policy views will receive higher grades. Recall that the cheap talk literature suggests that messages from such a sender are more
believable than are messages coming from senders with interests in opposition to the recipient. The coefficient for \textit{Ideological Compatibility with Attorney} is appropriately signed and is clearly distinguishable from a null effect based on a one-tailed significance test.\footnote{We also measured ideology by using the percent of decisions in which Justice Blackmun voted liberally during his tenure on the Court. The results are nearly identical to those we present. The advantage of the Martin/Quinn scores is that they vary over time, and conventional wisdom and the data indicate that Justice Blackmun became more liberal the longer he sat on the Court.} Its substantive effect, however, is marginal; a one-unit change in the Martin/Quinn score leads Justice Blackmun to increase a lawyer’s grade by .38 points on the hundred point grade scale.\footnote{The coefficient of .059 means that a one-unit change in \textit{Ideological Compatibility with Attorney} leads to a .059 standard deviation change in the dependent variable. To determine how this translates into points on the grade scale, we multiply the coefficient by the standard deviation of the unstandardized grade variable (on the 100-point scale), which is 6.41. This then results in .38 point change. We calculate the other independent variable effects in the same way.} The magnitude of this substantive effect means that even when Blackmun was as ideologically close to the litigant’s position as possible, he only increased a lawyer’s grade by about one point (on the hundred point scale).

The second set of predictions we derived from the cheap talk literature holds that attorneys who appear more credible on non-ideological grounds will be more persuasive. We posited a series of hypotheses about a lawyer’s experience and qualifications, and the data support nearly all of them. As we predicted, attorneys with greater prior experience before the Court do present better oral arguments. Consistent with our expectations, our data also show that attorneys from the U.S. government – especially those from the Solicitor General’s office – provide more compelling oral advocacy. In fact, when the Solicitor General personally argues,
his grade is 3.1 points higher than other attorneys, while an assistant solicitor general earns a grade that is 1.8 points higher than other attorneys. U.S. attorneys not in the Solicitor General’s office fair better than other attorneys, too, as they earn grades 1.4 points higher than other attorneys.

Beyond the signals sent by government attorneys, other factors of credibility also affect the quality of oral advocacy. Attorneys who attend elite law schools earn grades almost two points higher than the average attorney.\(^\text{16}\) Second, we corroborate McGuire’s (1993a) research that Washington D.C. insiders are seen as more credible by the justices. Combined, these findings suggest that the credibility of the sender plays a major role in Justice Blackmun’s grading scheme.

What should be obvious is that the magnitude of these variables’ impact on Justice Blackmun’s evaluations of attorney’s oral arguments is not sizable. What this means, we think, is that his evaluations were, in most instances, truly reflective of the attorneys’ quality of argumentation, but that quality is not just a function of observable indicators of attorney experience, education, training, work experience, and the like. Despite the somewhat weak, but statistically significant, effects of these variables on Blackmun’s evaluations of attorney arguments, we show in the next section that these evaluations have a pronounced influence on his colleagues’ votes on the merits. The significant effect of ideology in this model makes the empirical connection between these evaluations and his colleagues’ votes even more impressive.

**Do Attorney Arguments Affect the Justices’ Votes?**

\(^\text{16}\) Some have argued that affiliations with law schools may communicate ideological information to the Court (see Byrne 1993). While some law schools have reputations as liberal or conservative bastions, alumni do not select cases strictly on the basis of the ideological position of the litigant. Graduates of Harvard and Yale, for instance, systematically represent parties on both sides of ideological divide.
We now turn to our examination of the influence of oral argumentation on the justices’ final votes on the merits. Recall that in this model we examine the votes of all justices on the Court except Blackmun. In this way, we can remove any possibility that the evaluation of the attorney is tainted by Blackmun’s anticipated position in the case. In addition, to test the cheap talk hypotheses, we have interacted Blackmun’s evaluations of the attorneys with: (1) each justice’s ideological distance from the appellant and; (2) the complexity of the case. In this way, we can test whether the justices are more likely to use the information from attorneys more ideologically proximate to them and in cases where they have a greater level of uncertainty.\textsuperscript{17}

The results in Table 3 show that the justices do indeed respond to the quality of oral argumentation. Even when controlling for the most logical alternative explanation – ideology – the grades still correlate highly with final votes on the merits. This is illustrated with the substantive results of this model. When all independent variables are held at their mean values, there is a 58.3 percent chance that a justice will vote to reverse. If we set the value of *Oral Argument* at one standard deviation above its mean (meaning the appellant’s attorney offered a higher quality argument) then this probability increases to 64.3 percent. The difference is seen more clearly as the difference between competing counsel increases; when the difference is at its greatest point there is an 85.6 percent chance that a justice will vote for the petitioner. This confirms the assumption from cheap talk theory that more credible arguments are likely to affect

\textsuperscript{17} Since the oral argumentation grade variable is driven, in part, by the attorney’s credentials (e.g., experience and pedigree), we do not incorporate those variables in this model because doing so could result in biased coefficients. We, however, also estimated their effects after controlling for the variables in the attorney grade model, and the coefficients (and standard errors) are the following: *Ideological Compatibility with Appellant* .313 (.040); *Oral Argument Grade* .160 (.037); *Ideological Compatibility * *Oral Argument Grade* .016 (.009); *Complexity * *Oral Argument Grade* -.067 (.086).
how the receiver – in this case a Supreme Court justice’s vote on the merits – will act. We can contrast this effect size with that for ideology; when ideology is at its maximum value (a justice favors the appellant) the probability of the justice voting to reverse is 91.2 percent.

[Table 3 about here]

The second assumption of cheap talk, that recipients will be more likely to listen to cheap talk from speakers sharing their interests, also finds considerable support in the data. Specifically, the effect of the difference between the petitioner’s and respondent’s oral argument quality varies based on whether the justice is ideologically supportive of the lawyer’s position. This relationship is evident in the positive coefficient for Ideological Compatibility * Oral Argument Grade. Importantly, the effect of Oral Argument Grade is positive and statistically significant through the entire range of Ideological Compatibility. This means, for example, that even when a justice is ideologically opposed to the lawyer who presents the better legal argument at orals, that justice has an enhanced tendency to vote for that lawyer. The magnitude of the effect is sizable, as Figure 1 indicates. This figure shows that all justices are influenced by the quality of oral arguments, but that those justices who are ideologically more proximate to a lawyer’s position have an enhanced tendency to support that lawyer if she presents better oral advocacy than the opposing counsel.

[Figure 1 about here]

For instance, let us consider a justice who is ideologically opposed to the petitioner (specifically, a justice who is a standard deviation below the mean on this variable). This justice has a 30.1 percent chance of supporting the petitioner when the respondent presents oral advocacy that is considerably better than the petitioner’s. By contrast, the likelihood of voting for the petitioner’s position increases to .503 when this justice encounters a petitioner who
outmatches the respondent’s attorney at oral arguments.\textsuperscript{18} As seen in Figure 1, the magnitude of the effect of oral advocacy is even more pronounced for justices who are ideologically supportive of the attorney with the stronger oral argument.

The final element of our cheap talk story does not work as we expected it would. Specifically, we suggested that when the justices had a greater need for information they would be more likely to listen to the information being presented to them. Our measure of this condition, legally complex cases (as seen in Ideological Compatibility \(*\) Case Complexity) offers no leverage on this question. One reason why this variable may not support our argument is that it may not tap information asymmetry as much as it taps an information environment that is difficult for both attorneys and justices. As such, we cannot confirm the final assumption of cheap talk theory.

**Discussion**

This analysis makes a variety of notable contributions to the literature that seeks to explain decision making on the U.S. Supreme Court, as well as to game theoretic cheap talk literature. Most generally, we provide the first systematic evidence to demonstrate that Supreme Court justices actually consider, evaluate, and are influenced by arguments with which they are presented. Beyond this generally important finding, we consider several more specific contributions in turn.

First, we add a new level of understanding about how legal arguments affect justices who sit on the U.S. Supreme Court. The evidence that we have to date that focuses on this

\textsuperscript{18} We set Oral Argument Grade at two standard deviations above its mean to represent an appellant whose oral advocacy is considerably better than the appellee’s and set it at two standard deviations below its mean value to represent the opposite situation.
relationship is largely based on anecdotal correlations between briefed or oral arguments submitted to the Court, and the justices’ ultimate response to those arguments. We cannot be sure, however, that it was the arguments presented that lead the Court to a particular decision. It is possible that the justices would have reached the same conclusions, using the same arguments without the help of the attorneys. This is certainly what adherents of the attitudinal model would argue (see Segal and Spaeth 2002). Our findings speak directly to this debate, and offer strong support that justices listen to, consider, and ultimately evaluate the arguments with which they are presented. Most notably, we clearly demonstrate that the quality of oral advocacy influences the justices’ votes on the merits, even after controlling for other indicators of attorney experience and ideological considerations. This result is new to the literature and indicates that legally-relevant factors do indeed enter into Supreme Court decision making.

Second, and closely related, our findings add another level to the debate among Court scholars about whether the law or attitudes drive justices’ actions. Indeed, while there is a strong relationship between ideology and Justice Blackmun’s grades, there is still also a clear relationship between attorney credibility and grades. This finding suggests that, even in the face of evidence from the attitudinal model, justices do not seem to simply look for arguments to justify their predetermined decisions as the attitudinal model would suggest. Rather, our findings suggest that the credibility of attorneys presenting the arguments and, in turn, the quality of arguments they present, have an impact on how justices view a case. This point cannot be overlooked, as it goes to the very heart of one of the most divisive contemporary debates among scholars of the U.S. Supreme Court: whether law influences the justices’ decisions.

Third, we are able to extend McGuire’s findings about the experience of attorneys. While McGuire shows strong correlations between experience and case outcomes, he does not
provide direct evidence to explain the mechanism by which experience affects decisions. Here we provide such evidence. Specifically, we are able to demonstrate clearly that justices evaluate arguments presented by more experienced attorneys more highly than the arguments presented by less experienced counsel.

Fourth, we add to the growing literature that focuses on the role oral arguments play in the Supreme Court’s decision-making process. We corroborate existing findings, as well as justices’ own accounts, that these proceedings can and do help the justices evaluate legal arguments presented to them. Adding this evidence makes an even more convincing case that oral arguments must not be ignored when scholars seek to understand the relationship between legal argumentation and how justices decide.

Finally, our results strongly corroborate two of the three requirements that make cheap talk effective. Indeed, we are able to demonstrate that receivers who are ideologically compatible with a sender are more likely to find the sender’s argument credible. At the same time, if the sender is highly credible in ways beyond ideological compatibility – in this case based on legal training and experience – receivers will find signals highly credible and therefore worthy of high evaluations. These finding suggests that analyses based on cheap talk theory should consider weighing the credibility of the sender as they seek to explain how signals can affect outcomes.

At the end of the day, our analysis of new archival data derived from Justice Harry Blackmun’s case files suggests that he finds oral arguments to be an important part of the Court’s decision-making process, and that the quality of arguments affects his colleagues’ evaluation of them. This is an important result, and should help build Supreme Court scholars’ understanding of the relationship between law, ideology, and decisions justices make.

No. 2 - *Younger v. Harris*

Argued: November 16, 1970

10 In Younger Ct lay Cal A & B. young, usual, present, plaintiff. Well, typically,
A Ct had no D to pass on all entries. First: only 1 section on which cases were involved
WL & A. We ask t & C. take a & D in & approach.

19% is a separate chapter. 5 2383. Otherwise a means of enforcement.
As to contempt v D. But it may not be applied only on W to a summary
onement. Thus brings it wni. November 16.

16 Mr. Wm. B. here.

We do not mean to hold the dissent & adverse action to costs.
We find all these acts delin.
WL & A. We seek to do in.
We find it wide, wide v D v no & J & I & J & K & L & M & N & O & P & Q & R & S & T & U & V & W & X & Y & Z & a & b & c & d & e & f & g & h & i & j & k & l & m & n & o & p & q & r & s & t & u & v & w & x & y & z.

16 In Younger II.
References


Mauro, Tony. 2004. “Pledge Challenger Faces the Justices; Hearing suggests Court unlikely to speak with one voice when ruling on constitutionality of phrase ‘under God’.” Legal Times, March 29.


Figure 1: The Effect of Oral Advocacy Conditional on Justice Ideology

![Graph showing the effect of oral advocacy on probability of justice voting to reverse, conditional on justice ideology. The graph plots probability of justice voting to reverse against quality of oral argumentation, with two lines representing different levels of ideology.]

Note: Quality of Oral Argumentation represents the difference between the quality of oral advocacy by the appellant’s and appellee’s attorneys, with larger scores indicating the appellant presented better arguments.
Table 1a: Frequencies of Justice Blackmun’s Evaluations of Attorney Oral Arguments 1970-1974

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Table 1b: Frequencies of Justice Blackmun’s Evaluations of Attorney Oral Arguments 1975-1977

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Table 1c: Frequencies of Justice Blackmun’s Evaluations of Attorney Oral Arguments 1978-1994

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Table 2: OLS Regression Estimates of Justice Blackmun’s Assessment of the Quality of Oral Argumentation before the Court

<table>
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<th>Variable</th>
<th>Coefficient</th>
<th>Robust Standard Error</th>
<th>Significance (one-tailed test)</th>
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<td>Attorney Experience</td>
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Number of Observations: 1136

R²: .16

S.E.E.: .92
Table 3: Logit Estimates of the Justices Propensity to Reverse a Lower Court’s Decision

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<th>Variable</th>
<th>Coefficient</th>
<th>Robust Standard Error</th>
<th>Significance (one-tailed test)</th>
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<td>Case Complexity</td>
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Number of Observations 3783
Log Likelihood -2361.41
Model $\chi^2$ 81.29