

**Targeting the Median Justice:
A Content Analysis of Legal Arguments and Judicial Opinions**

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Abstract

The median has long been thought to occupy a special position in Supreme Court decision-making. Given the central importance of the median justice, we would expect litigants and their lawyers to pay special attention to trying to craft arguments that will appeal to this 'swing' vote. In this paper, we make use of a new content analysis procedure to provide systematic, quantitative evidence for this hypothesis. We test this proposition through an analysis of the 2004 term of the Court. By analyzing the content of the Court's opinions relative to the content of litigant briefs --- and demonstrating that opinions are more likely to incorporate arguments presented in litigant briefs the closer the opinion author is to the median justice --- we provide indirect evidence to support the claim that litigants do, in fact, target the median.

Introduction

Strategic litigation is a frequent focus for analysts of the U.S. Supreme Court. Through the selection of cases and crafting of arguments, sophisticated litigants are thought to succeed in their policy ambitions by taking into account the legal and political environment in which the justices operate. A great many studies, both classic and contemporary, testify to the importance of a developed plan of litigation in achieving success before the Court (see, e.g., Barker 1967; Epstein and Kobylka 1992; Kluger 1976; Tushnet 1996; Vose 1957), and yet have comparatively little systematic knowledge about precisely how and in what ways such strategies succeed.

A common theme to much of this research is that sophisticated litigants understand the importance of minimum winning coalitions on the Court and therefore develop policy positions calculated to satisfy the median justice. Of course, scholars have long reckoned that the median justice should hold the key to case outcomes (Giles 1977; Rohde 1972), and researchers often structure their analyses around assessing the relevance of the ideological center of the Court (Bailey et al. 2005; Martin, Quinn, and Epstein 2004-2005).

In recent years, political scientists have made considerable strides in developing precise estimates of the policy orientations of the median justice (Grofman and Brazill 2002; Martin and Quinn 2002; Martin, Quinn, and Epstein 2004-2005), yet despite this precision, there has been no similar effort to assess the location of the litigants' arguments relative to the median justice. To what extent do litigants craft arguments with an eye toward securing the vote of the median justice? And, to the extent that they aim to secure the Court's center, what difference does it make?

In this paper, we offer one perspective on these issues by quantifying the content of both the merits briefs of the parties and the justices' written opinions. Our method is the Wordscore procedure, a computerized form of content analysis developed to place written texts on an ideological scale (Laver, Benoit, and Garry 2003). To preview our analysis, we determine whether the degree to which the opinion approximates the winning party's brief can be explained by the opinion author's ideological location. That is, we test whether the justices closer to the center find the winning party's brief more appealing than the justices at the ideological extremes. Our hypothesis is that, if a litigant's arguments appeal to the Court's center, the justice in the center should write an opinion that approximates those arguments. By this method, we find strong circumstantial evidence that litigants craft their arguments with an eye towards securing the median justice.

Theoretical Orientations

The late Justice William Brennan famously remarked that "Five votes can do anything around here" (Simon 1995, 6). Similarly, reflecting on what facilitates success in the U.S. Supreme Court, Carter G. Phillips, an alumnus of the solicitor general's office and one of the Court's preeminent practitioner, observed that "[o]ne of the tricks of this trade is learn how to count to

five” (1998, 187). These maxims from bench and bar underscore the importance of minimum winning coalitions in the Supreme Court. In a Court whose decisions are driven largely by policy preferences (Segal and Spaeth 2002), the outcome depends on securing the support of the median justice. From this general observation, we develop more specific expectations and propose a test of whether litigants craft strategic arguments aimed at securing the median justice.

The intuitions that guide our analysis are straightforward enough. With justices making decisions based upon their preferences --- and with litigants aware of that fact --- litigants will act rationally, seeking to maximize their gains by garnering the votes of a bare majority of the justices. This is achieved by advancing a set of arguments designed to secure the support of the median justice. Developing a testable hypothesis is more problematic, since there is no way to divine, across cases and litigants, the parties’ ideal points and thus no way to estimate the extent to which they might deviate from them to win the median’s vote. Alternatively, we might try to fix the parties’ stated positions in ideological space, but absent some comparably declared position of the justices, we cannot calculate each justice’s relative proximity to parties.

What then is the solution? To give a practical form to our expectations, we develop our hypothesis around the stated positions that we do have readily available from both the justices and the litigants --- the parties’ briefs on the merits and the Court’s written opinion.

We begin with a consideration of the eventual opinion author of a decision. Naturally, a number of forces conspire to determine who writes the opinion in a case (Matzman, Spriggs, and Wahlbeck 2000), but for our purposes we may put them aside. Our concern is only with the ideological location of that justice relative to other members of the Court.

We assume that, regardless of ideological location, the author will draft an opinion that approximates that justice’s ideal point along the Court’s ideological continuum, all else being equal.

In maximizing that ideal, the author might draw from a number of sources --- relevant precedent, canons of statutory interpretation, textual analysis, and constitutional or legislative history, to name but a few --- and one set of resources that helps bring these considerations to the fore is the merits briefs of the litigants.

How likely is it that a justice would draw from one or the other (or both) of the litigants' briefs? The answer depends, we think, on the ideological location of the opinion author and --- crucially --- the ideological positions staked out by each party. In a non-strategic environment, litigants would myopically argue their sincere policy preferences, without regard to their plausibility to the Court. Under such circumstances, the likelihood of the opinion author relying upon any written briefs would be subject to chance, since there are no a priori notions about where the litigants will be located.

If litigants are strategic, by contrast, they should adjust their arguments to the degree necessary to secure a minimum winning coalition (Riker 1990). Of course, the precise degree of adjustment will likely be a function of a variety of factors, such as the issues involved, the sophistication of the litigant, and whether the litigant is pursuing short- or long-term goals. In the main, however, we expect that the parties will develop the arguments that they believe are necessary to win and therefore will focus on securing the support of the median justice. Those who do so most successfully should perform prevail.

Under such conditions, a comparison of the written briefs to the Court's final opinion should reveal that, ideologically speaking, the written opinion is closer to the winning litigant's brief than to the loser's. Taken by itself, this would not be evidence of a strategic appeal to the median justice; one would be surprised if the opinion announced by the Court looked more the arguments it rejected than those it endorse. Considering the proximity of opinions to winning briefs *in relation to*

the identity of the opinion writer, however, should serve to document strategic legal argument. If litigants target the median justice in their briefs, then the closer any opinion writer is to the median justice, the closer the proximity should be between the written opinion and the winning party's brief.

Suppose, for example, that the author of a given opinion is the median justice. In writing that opinion, this justice would find much in the winning party's brief with which she agreed. After all, the brief was written precisely to appeal to her. If the opinion author is not the median justice, though, he should incorporate fewer arguments from within the winning party's brief, which would be scarcely surprising inasmuch as it was written to appeal to a justice with a different set of preferences. So, the farther a justice is from the median, the more that justice should disagree with the median and, not coincidentally, the brief written to appeal to the median's policy preferences.

In the following section, we explain how we translate into data our ideas about the relative appeal of litigants' briefs to Court's opinion writer. We then subject those data to some simple statistical tests.

Analysis

In order to estimate where the Court's opinion is relation to the written briefs, we need a measure of similarity between the opinion, on the one hand, and the written briefs on the other. To generate these estimates, we rely upon the Wordscore procedure, a computational program for content analysis that "reads" texts estimates their similarity to a set of reference texts provided by the analyst. Originally, the program was developed to locate the platforms of political parties in ideological space, but its application is generalizable to any situation in which one is interested in estimating the location of one or more written texts, relative to some reference texts against which they may be compared (Laver, Benoit, and Garry 2003; see also Laver and Garry 2000).

Fortunately, the Supreme Court provides us with just such a scenario. We have the parties' written briefs that stake out their respective policy positions, and we have the Court's own position as reflected in its written opinion. With Wordscore, it is a simple matter to determine in each case whether the Court's opinion is closer to, say, the petitioner or the respondent, and by what degree.

The details of the Wordscore program are ably laid out by its authors (Laver, Benoit, and Garry 2003), and we have elsewhere outlined the mechanics of the Wordscore program and its potential application to the study of the Supreme Court (McGuire and Vanberg 2005). For our purposes here, we simply reiterate its basic logic, which is that texts that are ideologically proximate will use the same words and with comparable frequency. Wordscore analyzes only how often different words appear in texts to derive its estimates; it does not require any knowledge of the meaning of those words.

In order to generate its estimates, Wordscore requires at least two reference texts that are utilized to establish a baseline against which the analyst may then locate in ideological space one or more texts of interest. To illustrate, one might be interested in estimating the degree to which the policies of individual justices change over time in an area such as criminal procedure. Thus, one might, for example, select as reference texts two opinions from that issue area from a given year (say, 1980), one written by Justice William Brennan and another then-Associate Justice William Rehnquist. Assuming that these two opinions stake out distinctive policy positions --- Brennan's opinion, we might safely assume, would be somewhere to the left of Rehnquist's --- those texts can serve as references against which to compare the various opinions written in criminal procedure cases by those two justices in subsequent years. By this exercise, one could find (although it seems unlikely) that Brennan's opinions drifted in a conservative direction over time, such that Brennan circa 1990 might be closer to Rehnquist's opinions of a decade earlier than to his own opinions written at that

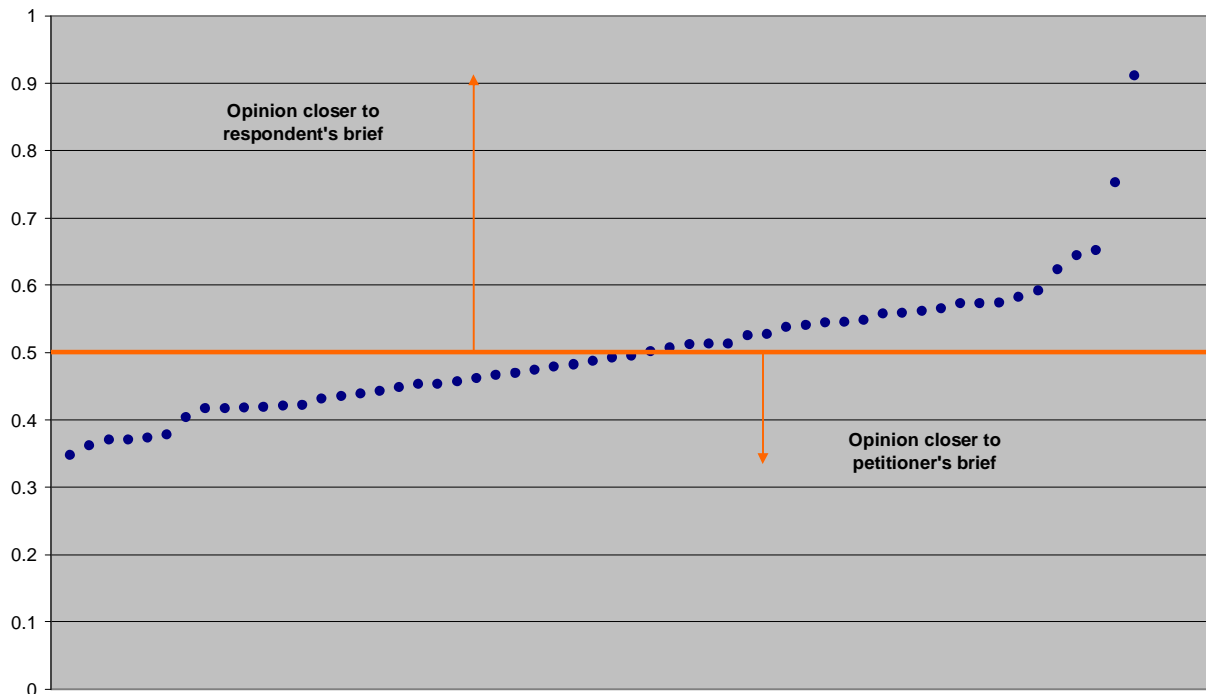
same time.

In our context, we similarly employed the brief for the petitioner and the brief for the respondent to serve as our reference texts for a sample of cases decided by full opinion during the 2004 Term of the Court. For each case, Wordscore first “read” the briefs and the accompanying opinion, after which we assigned an ideological reference score to each merits brief. Because we have only nominal-level data regarding the content of the written briefs --- we know only that one is the petitioner’s and the other the respondent’s --- we arbitrarily assigned a value of 0 to the petitioner’s brief and 1 to the respondent’s.¹ Wordscore then scored the written opinion; that is, it estimated the degree to which the opinion approximated the content of the briefs.² These scores are presented in Figure 1.

These scores represent the theoretical distance between the petitioners’ brief and the Court’s opinion. Although they do not have an inherent statistical meaning, they may be readily interpreted as an estimate of whether the Court reversed or affirmed the decision of the lower court. Thus, if the Court’s opinion was closer to the brief for the petitioner (i.e., if the distance between the petitioner’s brief and the opinion was below the .50 level), one would expect the justices to have reversed the lower court. Likewise, when the opinion more closely tracked the respondent’s brief (i.e., if the distance between the petitioner’s brief and the opinion was above the .50 level), one would anticipate that the Court affirmed the lower court outcome.

¹ We could, of course, have classified briefs as “liberal” and “conservative,” rather than “petitioner” and “respondent,” but since we are only interested in an opinion’s degree of proximity to the briefs, not the direction of the decision, it make no difference how we proceed.

Figure 1. Ideological Distance between the Petitioner's Brief and Opinion of the Court



Note: Distance between the respondent's brief and the opinion of the Court is simply 1 minus this value

If there is validity to these distance measures, then they should be a reasonably good predictor of the Court's decision. Specifically, as the distance between the petitioner's brief and the Court's opinion increases, the likelihood of the petitioner prevailing should decrease. Table 1 provides the result of this exercise, confirming our intuitions. According to this probit model, petitioner's who arguments are close to the Court's public policy bear a strong relationship to the decision to reverse the lower court. The more the petitioner's brief departs from the Court's written opinion (and thus the closer the respondent's brief to the opinion), the greater the likelihood that the justices will affirm the lower court's decision.

² Because, in making its estimates, Wordscore transforms the values of the reference texts as well as the texts to be scales, we introduced a slight transformation of each set of scores so that the values of the reference texts were returned to their original value of 0 and 1 (see Martin and Vanberg 2006).

Table 1. Supreme Court Outcome as a Function of Petitioner's Proximity to the Court's Opinion

<i>Variable</i>	<i>Probit coefficient</i>	<i>Standard error</i>	<i>Significance</i>
Petitioner's proximity	- 4.29	1.90	.024
Constant	2.73	1.01	---

Note: Dependent variable equals 1 if the Supreme Court reversed the lower court, 0 if the Court affirmed; N = 40; - 2LLR = 5.19, prob = .023.

By itself, this result is not really explanatory. It serves merely as a robustness check by confirming that the less similar the opinion is to the merits brief, the lower the likelihood that the party filing that brief won, in fact. Armed with this result, however, we can with greater confidence proceed to examine the relevance of this distance to the ideological location of the opinion writer and test our theory more directly.

Having seen that the winning party's brief provides the kind of arguments that are appealing to the opinion writer, we can now determine whether the extent of that appeal varies by opinion writer. Assuming that strategic briefs make arguments that are designed to appeal to the preferences of the median justice, then the median justice --- given the opportunity³ --- will draft an opinion that

³ Recall that, in an ideal world, we would have the policy positions of every justice articulated in every case. That is, each justice would write an opinion in each case. The Court has long since abandoned the practice of issuing opinions seriatim --- the breakdown in consensus and fragmentation of opinion coalitions, notwithstanding. We have no reason to think that the factors that drive opinion assignment are in any way related to how closely a merits brief approximates the views of the median justice.

is proximate to the winning brief. The farther an opinion writer is from the median, the greater the departure from the arguments contained in the winning party's brief

We begin our test by creating a measure of the distance between the Court's opinion and the brief of the party that prevailed on the merits. We have already estimated how far the written opinion is from both the petitioner's brief (i.e., the values in Figure 1) and the respondent's brief (i.e., 1 minus the values in Figure 1). We simply select the opinion's proximity to either the petitioner or the respondent, depending upon whether the Court reversed or affirmed the lower court.

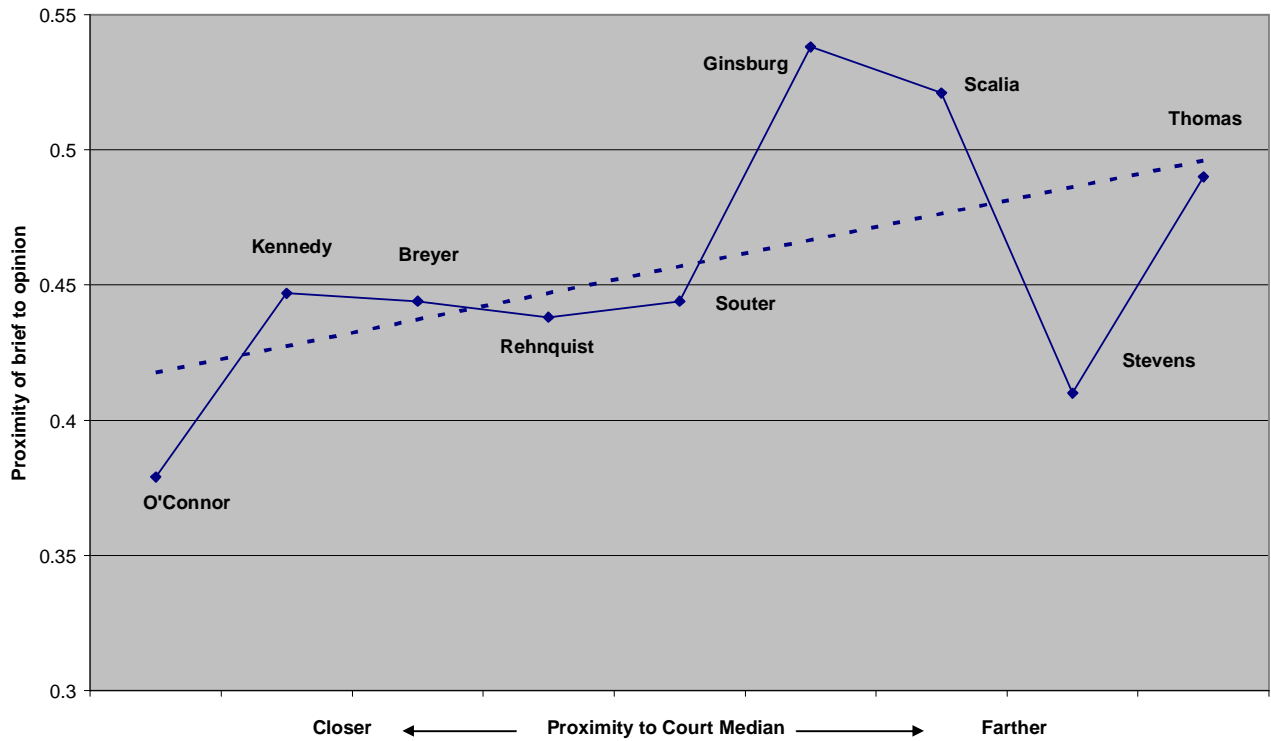
Next, we determine the distance between the author of the opinion and the median justice by relying upon the ideal point estimates for each of the justices (Martin and Quinn 2002).⁴ For the 2004 Term of the Court, the median justice was Justice O'Connor. Because we are concerned only with each opinion author's relative distance to O'Connor, we calculate the absolute value of the difference between each opinion author's ideal point and Justice O'Connor's.

One way to estimate whether litigants are targeting the center of the Court is to determine whether the distance from each justice's opinion to the winning brief increase, on average, the farther that justice is from the Court's median. We present this information in Figure 2. Of course, the number of opinions written by each justice in any give term is small, and thus these summary statistics are highly sensitive.⁵ The data in this figure are instructive nonetheless, indicating a linear relationship between a justice's ideological proximity to the Court's median and the similarity of her opinions to the winning parties' briefs. Importantly, as the median justice, O'Connor shows the closest correspondence between the briefs of the prevailing parties and her own opinions. Stated

⁴ The justices' ideal point estimates for the 2004 Term may be found at <http://adm.wustl.edu/supct.php>

⁵ The numbers of opinions written by each justice are as follows: O'Connor (5), Kennedy (4), Breyer (2), Rehnquist (5), Souter (4), Ginsburg (5), Scalia (6), Stevens (3), Thomas (6).

Figure 2. Mean Proximity of Winning Merits Brief to Written Opinion, Sorted by Author's Proximity to Court Median



differently, the opinions that Justice O'Connor authors are comparatively close to the positions articulated by litigant she supports.

By contrast, as the ideological distance between O'Connor and her fellow justices increases, the justices find that they have less and less in common with her and thus with the arguments made by the parties they support. The justices who are farthest from O'Connor --- Ginsburg and Stevens, to the left, and Thomas and Scalia, to the right --- draft opinions that are more prone to depart from the arguments presented by the litigants whose causes they nevertheless underwrite. Absent some reason to suspect that one justice is more inclined than another to write an opinion that adheres to the argument outlined in the winning litigant's brief, it seems quite plausible to conclude that the

reason for these differences is the strategic decision by parties to pitch their cases to the center of the Court.

Useful as the data in Figure 2 may be, they still warrant a formal statistical test. Does this relationship hold up under closer scrutiny? To conduct this test, we model the distance between the Court's opinion and the winning party's brief (as measured by Wordscore) as a function of the opinion author's distance from the Court (as measured by the absolute difference in ideal points). Our expectation, by this point, should be fairly obvious: we anticipate that the larger the distance between the opinion author and the median justice, the larger the distance between that justice's opinion and the arguments made by the winning party.

The results of this regression are presented in Table 2. By this account, we find reasonably strong evidence of parties aiming at the median justice. The closer one gets to the median, the more closely a justice's opinion will resemble the arguments laid out in the merits briefs of the successful litigant. As one moves to either end of the Court's ideological spectrum, the justices are less inclined to take the merits briefs to heart --- even though they are voting in favor of those who submit them. The simplest and (we think) most plausible interpretation of these data is that sophisticated actors who are seeking to maximize their chances of success in the Court carefully construct their legal arguments so as to secure the support of the median justice.

Table 2. Do Written Opinions Resemble the Winning Litigants' Briefs?

<i>Variable</i>	<i>OLS coefficient</i>	<i>Standard error</i>	<i>Significance</i>
Opinion writer's proximity to median justice	.029	.015	.057
Constant	.411	.031	---

Note: Dependent variable is the Wordscore distance between winning party's merits brief and the Court's majority opinion; N = 40; R-squared = .09.

Despite the relatively small sample size, the opinion writer's proximity to the median emerges as a significant predictor of the correspondence between litigant argument and judicial policy. Following convention, we report the level of significance for a two-tailed test, a threshold our estimate barely crosses. Given that we clearly expect this coefficient to be positive, however, a one-tailed test would easily confirm the significance of our estimate.⁶

It bears emphasizing that there is nothing preventing any justice from drafting an opinion that relies, in one way or another, upon the merits brief in a case. How closely such an opinion might parallel a written brief in any absolute sense, though interesting, is not as critical as how that propensity varies across the justices. We have good reason to expect that litigants will stake their cases on winning a majority --- parties, so far as we know, do not seek systematically seek

⁶ Note that because each case is self-contained --- that is, we compare texts within cases, rather than between them --- we are not limited to analyzing any specific issue area. For any given case, regardless of subject, we can determine the proximity of the Court's opinion to the merits briefs. Of course, it is possible that the precision of these estimates might vary from one case to the next as a function of, say, issue area, and if so there might be a kind of non-uniformity that would be reflected in the linear estimations to which they are put to use. We simply acknowledge our awareness of it here, and we leave a more detailed examination of this question for another day.

supermajorities in the Court --- and therefore we anticipate that those to whom arguments are directed will naturally adapt them to their own devices more readily than others. This is precisely what we find.

Conclusions

We have offered an empirical estimate of the tendency for litigants to target strategically the median member of the U.S. Supreme Court. Our evidence is consistent with our expectations, but our evidence is only circumstantial; we cannot observe litigants deviating from their ideal point, nor do we know how closely litigants come to approximating the views of each of the justices in any given cases. The data that we do have, however, suggest that opinion writers embrace what is contained in the winning party's brief with varying degrees of enthusiasm and that the level of that enthusiasm is strongly conditioned by a justice's location on the Court's ideological lineup. If strategic litigants address their brief to the concerns of the median justice, then that justice (and others close to her) will find much with which they agree when writing their opinion. Thus, the opinions of justices closer the Court's center are significantly more likely to resemble the winning party's brief than are those written by the justices who populate the outer edges of it ideological lineup.

In conducting this analysis, we are aided tremendously by the Wordscore procedure, which readily enables us to calculate one of the most crucial pieces of information, the similarity between the briefs of the parties and the Court's majority opinion. Having seen its usefulness here, we think scholars of the Court ought to begin to think about the various creative ways in which Wordscore might be exploited to analyze the various written texts that structure judicial decision making.

We are, of course, necessarily limited in what we may claim based upon these results. We do

not, for example, posit a general theory of opinion writing and must be cautious in making claims about the justices specifically utilizing the contents of briefs in their written opinions. To be sure, they can and do employ opinions in this way (see, e.g., Spriggs and Wahlbeck 1997), but our analysis reveals only their general ideological similarities. And doubtless there are other factors --- some systematic, some idiosyncratic --- that might affect how closely the majority opinion resembles one or more merits briefs.

We think that future analyses, employing a larger set of observations, will facilitate the comparison of the strategic advantages of different types of litigants and lawyers. For the present, however, we think that the evidence presented here provides good reason to believe that, across a broad spectrum of cases, there is a good deal of strategic planning on the part of litigants and that these strategies, when well executed, offer considerable payoffs.

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