

# Supreme Court Litigants and Strategic Framing

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*Although litigants invest a huge amount of resources in crafting legal briefs for submission to the Supreme Court, few studies examine whether and how briefs influence Court decisions. This article asks whether legal participants are strategic when deciding how to frame a case brief and whether such frames influence the likelihood of receiving a favorable outcome. To explore these questions, a theory of strategic framing is developed and litigants' basic framing strategies are hypothesized based on Riker's theory of rhetoric and heresthetic as well as the strategic approach to judicial politics. Using 110 salient cases from the 1979–89 terms, I propose and develop a measure of a typology of issue frames and provide empirical evidence that supports a strategic account of how parties frame cases.*

Do litigant briefs affect Supreme Court decision making? There is an extensive literature devoted to gauging how much influence parties have on U.S. Supreme Court decisions. For example, scholars have examined the economic status of the parties (Sheehan, Mishler, and Songer 1992), litigant resources (Wahlbeck 1997), attorney experience (McGuire 1995) and attorney status (McGuire 1993), the bias of the Court toward petitioners (Palmer 1982; Provine 1980), and the quality of legal argument given at oral argument (Johnson, Wahlbeck, and Spriggs 2006).<sup>1</sup> However, these explanations ignore the most tangible and substantive object from the litigants, the written briefs (but see Corley 2008). This is surprising given that legal arguments from the parties' briefs presumably provide a basis for the Court to make sound and legitimate legal decisions (Epstein, Segal, and Johnson 1996).

Given that litigant briefs are neglected, it should not be surprising that we know little about what policy the Court will enact. For example, Bonneau et al. write, "After a half century of research on decision making by the Supreme Court, a critical question remains unanswered: what policy will be prescribed by the Court's majority opinion in each case?" (2007, 890). One exception,

however, found that how the parties *frame* the law and their legal arguments mattered a great deal for explaining changes in the law (Epstein and Kobylka 1992). This suggests that a particularly productive strategy for investigating the Supreme Court as a policy maker should first examine how litigants select the issue frames they employ in their briefs and then determine whether there is a connection between those frames and the Court's decisions.

What are frames and to what extent are they employed in the legal arena? Frames are defined as a small collection of related words that emphasize some aspect of an issue at the expense of others. Framing is the selection of one particular frame over another, and framing effects occur when a frame shapes the thoughts and behavior of others.<sup>2</sup> Unfortunately, relatively little is known about how political elites adopt some frames over others, and scholars readily admit that we need a better understanding of the strategic nature with which elites employ frames (Druckman 2001a; Gamson 2001). In fact, Druckman argues that "an understanding of framing requires linking how citizens psychologically process frames with how elites strategically choose frames" (2001a, 247). Issue frames are important because they structure expectations (Tannen 1993) and establish a common language around

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<sup>1</sup>*Petitioner* and *appellant* (or *respondent* and *appellee*) are used interchangeably.

<sup>2</sup>See Druckman (2001a) for a discussion of the various definitions of frames.

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which discussion takes place (Entman 1993). How we think about any particular issue, and more importantly, *what* we think about, depends on how the issue was framed in previous discussions. While issue framing is widely studied in public opinion research, it has received much less attention with regard to the Court.<sup>3</sup>

While legal scholars may not use the same terminology, it is clear that concepts like framing are assumed to have a similar effect on jurors and judges. For example, when advocating before a judge, attorneys are often instructed to make arguments in ways that are consistent with the concept of framing. Sokol (1967, 155–78) refers to a process of selectively using words as “phrasing the issue.” Attorneys are trained to state the facts and argument by picking words with favorable interpretations and connotations (e.g., Tepy 1990, 333). Moreover, when writing appellate briefs, attorneys are taught to focus on affirmatively presenting their own argument first as a far more effective strategy than negatively focusing on opponents’ arguments, possibly even shortening or potentially removing statements of opponents’ arguments (Edwards 1999, 368). By selectively picking favorable words and arguments, frames establish a common language (Entman 1993); words and frames come to characterize an issue and help citizens negotiate meaning (Gamson and Modigliani 1987). Thus, frames in the legal sphere operate in a similar fashion to the public opinion realm. An established frame influences ensuing discussions, decision making, and policy outputs of other elites who must communicate using established terminology.

There are additional reasons why litigants must be strategic in how they frame issues to the Court. When presenting case facts and relevant legal precedent, attorneys are ethically obligated to include all materially relevant case facts, and they cannot fail to disclose any adverse

<sup>3</sup>One reason may be the assumption that elites are not susceptible to framing effects and studies showing that ordinary citizens are less susceptible to framing effects when they are more sophisticated (e.g., Zaller 1992), have strong prior opinions (Druckman and Nelson 2003; Peffley and Hurwitz 2007), are exposed to competing issue frames (Sniderman and Thierault 2004), or subjected to frames from less credible sources (Druckman 2001b). At the same time, however, several studies find judges and elites to be susceptible to framing. For example, Guthrie, Rachlinski, and Wistrich (2001) found federal magistrate judges to be susceptible to framing and four other kinds of cognitive illusion (see also Epstein and Kobylka 1992). Additionally, Nelson, Oxley, and Clawson (1997, 235) found that framing effects were stronger for more sophisticated individuals in two of the three experiments and concluded that political knowledge and sophistication seemed to promote framing effects, not insulate one from them. Further, Druckman and Nelson (2003) found that highly knowledgeable people who did *not* have strong prior opinions were susceptible to framing effects, while Chong and Druckman (2007a) found competition did not completely eliminate framing effects.

legal authority (Edwards 1999, 250–52). In fact, neglecting or excluding important facts may damage the credibility of the attorney and even prove harmful to the effectiveness of the legal argument (cf. Druckman 2001b on source credibility; and Chong and Druckman 2007a for limitations of weak arguments). A primary weapon that legal elites have is how they frame issues with the strategic use of words, and even single words influence public opinion (cf. Jerit 2006). In order for attorneys and justices to achieve their policy goals while confronting legal constrictions, they must be strategic in how they shape language and meaning through their choice of words. This is consistent with the strategic account of judicial politics that suggests judicial actors will frame a case with their most preferred terms but are limited by the law, context, and the preferences of other political actors (Epstein and Knight 1998). Accordingly, in a strategic account of framing, the litigants play a key role in how issues are shaped and presented to the Court because the Court largely chooses from frames that are made available in the briefs (Epstein, Segal, and Johnson 1996).<sup>4</sup> The underlying implication is that how the Court frames a case is likely to be partially constrained or influenced by what frames the parties use.<sup>5</sup> Thus, legal actors try to control which frame is operative for a case, but are hindered by the presence of other frames in the surrounding environment. This suggests that how the parties frame the case matters for how the Court makes decisions through the parties’ structuring of information. But how do the parties strategically choose which frames to employ?

## Strategic Framing

Riker’s theory of rhetoric and heresthetics serves as a useful starting point for a theory of strategic framing. Rhetoric is the attempt to persuade individuals to view issues a particular way. Heresthetics is the art of setting up situations by “composing the alternatives among which political actors must choose—in such a way that even those who do not wish to do so are compelled by the structure of the situation to support the heresthician’s purpose” (Riker 1996, 9). For the purposes of this article, rhetoric and

<sup>4</sup>Justices are not ignorant or passive in determining what choices they are left with. Justices decide which cases to hear. Justices may also order parties to brief additional issues and ask questions relating to new issues at oral argument, but these are exceptions, not the rule.

<sup>5</sup>This is consistent with research that argues precedent and law constrain the Court (e.g., Richards and Kritzer’s 2002 jurisprudential regimes).

heresthetics are combined into one concept, the manipulation of rhetorical dimensions.<sup>6</sup> Thus, the goal of strategic framing for legal actors is to manipulate the *rhetorical dimension* on which cases are discussed.

Riker's theory of heresthetics suggests the loser at the previous stage has a strong incentive to reframe the issue by offering an alternative dimension, or frame, on which to base the decision (Riker 1986, 1990, 1996). The motivation of heresthetics is straightforward. The loser offers a new frame to split the previous winning coalition just enough to change the political outcome from an apparent loss to a victory, or as others say, "[s]natching victory out of the jaws of defeat" (Epstein and Shvetsova 2002, 93). The restructuring of heresthetics works by redefining the situation. This redefinition causes the alternative dimension to become more salient, leading to a more favorable reinterpretation of the issue (Riker 1990). Others then join this position, not necessarily because they were persuaded or because their underlying belief system changed, but because others want to join or feel "forced by the circumstances of the situation" to join (Riker 1996).<sup>7</sup> For example, Baumgartner, De Boef, and Boydston (2008) illustrate how this process transformed the death penalty debate by linking the decline of the death penalty with a rise in the innocence frame. Adapting Riker's theory to legal actors before the Supreme Court, the loser is the petitioner. Petitioners have an incentive to reframe the case because they lost at the lower court and are generally asking the Supreme Court for a decision in their favor and a change in legal policy. The winner at the previous stage is the respondent.

Taking a strategic approach to framing suggests how one legal actor frames the case influences how other legal actors decide to frame a case. The rules of the Supreme Court foster a situation for briefs to be framed strategically because the briefs are required to be filed in an ordered, sequential fashion. For example, petitioners are required to file a brief within 45 days of certiorari being granted; the respondent then has 30 days after the petitioner (Rule 25; Supreme Court Rules). Thus, petitioners can observe how lower courts frame issues and respondents can observe how petitioners frame issues.

<sup>6</sup>Riker's main concepts are combined because Riker believed the distinction between rhetoric and heresthetic to be "wavy and uncertain" and that the two are "inseparably linked and must be analyzed together" (1996, 9–10). Further, Riker (1996) concludes it was *both* rhetoric and heresthetics that mattered in achieving a stable equilibrium.

<sup>7</sup>The idea of emphasizing a more favorable rhetorical dimension is consistent with Petrocik's (1996) theory of issue ownership that argues candidates should emphasize issues they own.

The sequential nature of the process poses a dilemma for the petitioner, whether to offer an alternative frame that is potentially perceived as too disconnected from the important issues in a case while respondents maintain the advantage of filing afterwards and can reemphasize the points from the lower court opinion. The alternative for petitioners is to frame the case based largely on the issues raised in the lower court opinion. Using the terms of the debate established by lower courts is consistent with recent work that suggests to be effective in achieving policy change, there needs to be a "healthy dose of engagement" (Jerit 2008, 17; see also Sigelman and Buell 2004). This suggests that, because the petitioner knows the respondent does not have to file until after they do, they cannot simply frame a case differently from the lower court. This differs from Riker's theory that suggests losers should *frequently* try to manipulate the rhetorical dimension (Riker 1986, 150). Part of this difference with Riker's theory is driven by the fact that previous legal decisions embed language within the law and may reify a particular frame that, given basic legal rules, others must confront because without it an argument may be dismissed as non-germane or lacking credible grounds. Thus, it becomes difficult to offer clearly and persuasively a new alternative frame if legal arguments have a tendency to be focused on the prevailing frame. Moreover, to reframe the terms of the debate that were originally reified by a previous decision often takes another legal decision that is well grounded within the law.

Another difference with Riker's theory is that, in contrast with an election, the legal system imposes more constraints on the number of "input" opportunities and vantage points to influence the process. Courts are a passive institution relative to the legislative and executive branches. After the trial court, a case has unfavorable odds to be heard by an appellate court, and if the appeal is heard, the litigants are limited to filing briefs and, under limited situations, holding oral arguments. After that, for a very small percentage of cases, the Supreme Court may decide the issue, where the parties can typically file one or two briefs (including reply briefs) and have 30 minutes at oral argument. In contrast, two politicians campaigning for office (e.g., Riker's example of Lincoln at Freeport [1986, 1–9]) often have several opportunities to propose their ideas to the voters while on the campaign trail, where the primary restraint to reframing an issue is the date of the election. The question still remains, however, if legal actors frame cases strategically, what frames are they selecting from and which frames will they select? The next section outlines a typology of frames that describes how strategic framing can be examined across institutions and issue areas.

## A Typology of Frames

I posit that there are two basic types of frames: (1) prevailing and (2) alternative. All issues have a prevailing frame, which is the most common frame used in elite discourse. At any given moment, the prevailing frame represents how most people are talking and thinking about the issue and is similar to the policy status quo.<sup>8</sup> Issues come to the Supreme Court with a preexisting prevailing frame that was established by other elites and the media and may or may not have been adopted by the lower court. In other words, because the Supreme Court cannot actively pursue cases like the president or members of Congress, the Court usually does not establish the prevailing frame unless it arises from a previous decision. If a legal actor chooses the prevailing frame when describing an issue, that actor is choosing to endorse the status quo, and hence, is not advocating policy change.<sup>9</sup>

Alternative frames are other ways of viewing an issue that tap into a fundamentally different dimension or thought structure. There can be more than one secondary frame and there can either be a complementary frame, whose outcome is congruent with the prevailing frame, or a counterframe, whose outcome is incongruent with the prevailing frame. Any frame that emerges from discourse that did not exist before is considered an alternative frame.

This typology takes a more generalized or deductive approach to measuring frames that focuses on a more general or abstract level by removing issue-specific aspects. It isolates the framing decision as a choice of whether to advocate for policy change. Thus, if we understand how the Court frames the issue in relation to whether it uses the prevailing frame, we can understand one important aspect of policy—i.e., when the Court advocates changing policy. This deductive approach differs from one offered by several others who inductively identify an initial set of frames to create a coding scheme (see Chong and Druckman 2007b, 106–8, for a review of this process). If framing is to be understood as more than just elite-mass interactions, then scholars need a framework that allows them to analyze framing from a broader perspective. For the

<sup>8</sup>The term “prevailing” instead of “dominant” frame is used because there may be three or more frames and the most popular frame may garner only a plurality. The label is unimportant, but what it represents is important. “Prevailing” does not mean it automatically wins against other frames, just that it occurs more frequently. Also, lower courts do not establish prevailing frames.

<sup>9</sup>This article makes no claims about the source of prevailing frames. A prevailing frame could originate from a previous Court decision or other elite discourse. However, for the purposes of this article, it is only important to understand that cases arrive at the Supreme Court with a prevailing frame, not where such frames originate.

purposes of this article, a deductive approach is preferred because it enables comparisons to be made across issues and time that are not possible with inductive approaches because issues evolve and frames become obsolete. A generalized approach sheds light on how elites struggle with other elites to frame messages. Elite-elite interactions are important because framing is a political game in the fight for policy that involves actors from different institutions who ultimately have different audiences to please. With this typology in mind, the important question becomes, how do legal actors choose which frames to use?

## Choosing a Frame: Prevailing Frame versus Alternative Frame

Riker’s theory suggests petitioners prefer to select an alternative frame anytime the lower court uses a prevailing frame. Epstein and Knight’s (1998) strategic account of judicial politics suggests this preference, however, is likely to be affected by other legal actors and the environment. Petitioners are primarily concerned with how the lower court frames the case and their ability to differentiate their own message from the lower court. Those concerns are important because petitioners need to successfully communicate with their primary audience, the Court. Petitioners are constrained, however, by the necessity of using a common language or rhetorical dimension. Given the context of the situation, how the lower court frames the case often establishes the baseline for a common language. If petitioners choose an alternative frame, they risk having their message not understood or ignored because it strayed outside the bounds of the established terminology. Thus, petitioners’ ability to select an alternative frame is constrained by how lower courts frame the case.

Respondents are also faced with a basic choice of how to frame cases. Respondents may choose to either frame a case in terms of the status quo by selecting the prevailing frame, or select an alternative frame. Riker’s theory suggests respondents generally prefer to choose the frame the lower court used because they won at the previous stage. According to the strategic approach, however, respondents are also concerned with how the lower court framed the case and how the petitioner framed the case.

Respondents’ decisions are influenced by what frame petitioners select. This is where the sequential nature of the process is critical in enabling respondents to heretically maneuver. Respondents may consider defecting from using the same frame as the lower court when a petitioner’s argument falls along a different rhetorical dimension than the lower court argument. One reason

why respondents want to frame a case in such a way that appears to advance a rhetorical dimension on which they lack ownership (i.e., a dimension different from one used by the lower court) is respondents have incentives to be wary of adhering to rigid and potentially outdated legal reasoning (e.g., Epstein and Kobylka 1992). Additionally, respondents' strategically advancing an alternative frame is also consistent with a "cover all bases" strategy, where the respondent believes if the lower court uses the prevailing frame, then it would be advantageous for respondents to frame the case differently, ensuring that the Court could have more than one possible frame to choose from when it writes an opinion.

The theoretical argument consists of two parts. First, the decision by the petitioners and respondents on which rhetorical dimension to frame the issue should account for how the earlier actors framed the issue. Second, if these framing decisions are strategic in the sense that they are influenced by how other political actors frame issues, the strategic framing decisions should influence the parties' success in gaining a favorable outcome.

### Expectations of Framing Decisions

First, how do parties frame cases? Do parties typically use a prevailing frame or select alternative frames? Examining the distribution of how legal actors chose to frame the case provides a better understanding of whether a strategic approach to framing accurately portrays how litigants present arguments to the Court. To accomplish this, the expectations from a strategic actor are contrasted with a naively sincere actor who *only* considers his or her own actions.

If naively sincere petitioners and respondents were hypothetically observed, one would expect strongly skewed distributions. Specifically, a naively sincere petitioner would reframe the issue by selecting the alternative frame and rarely invoke the prevailing frame. Naively sincere respondents would be expected to emphasize prevailing frames at overwhelming rates. Lastly, given that appellate courts are concerned with following Supreme Court precedent and established norms, naively sincere appellate courts would predominantly use prevailing frames.

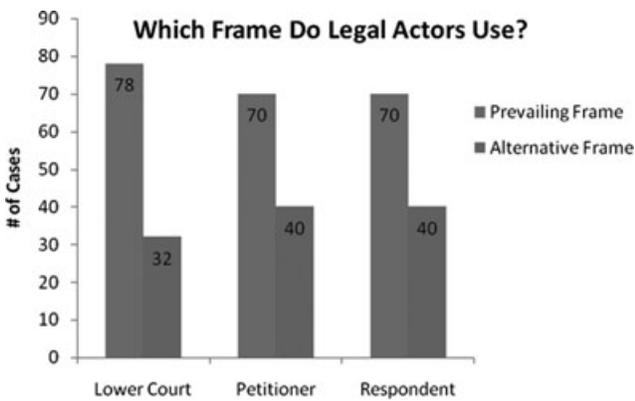
In contrast, the strategic approach to framing suggests different expectations. Petitioners and respondents are likely to take into account other considerations while choosing frames. For example, petitioners should select prevailing frames more often than alternative frames because they are constrained by the need to communicate with their audiences. Also, while petitioners ideally want

to frame the case using their preferred terminology, they are also pressured by the need to confront the decision from the lower court (engagement) and clearly explain why it was decided incorrectly. Additionally, if petitioners were to use an alternative frame in every case, that would not be an ideal strategy because they have to file briefs before the respondent. Strategic respondents, on the other hand, based on the reasons above, should select prevailing frames at a higher rate than alternative frames, but also select alternative frames a nontrivial number of times because they have incentives to behave strategically and manipulate the rhetorical dimension on which they advocate in order to gain a more favorable policy outcome.

To examine the distribution of framing decisions, 110 salient cases were sampled from the 1979–89 terms (the second half of the Burger Court and first four terms of the Rehnquist Court), using the Gibson (1997) data, as updated and backdated by Hansford and Spriggs (2006). The 1979 term serves as the starting point because that is the first year for which transcripts of all oral arguments and briefs become available. After selecting the appropriate terms, the cases were sorted by salience, as determined by the number of briefs filed by *amicus curiae*, and any case with nine or more briefs was selected.<sup>10</sup> Salient cases were sampled because that is, presumably, where policy stakes are the highest and likely to see more intense framing battles.

Next, to generate measures of how various parties framed the case, an adapted method of measuring frames developed by Simon and Xenos (2004) and explained further in the appendix was applied to legal documents associated with the 110 cases to ascertain whether each actor used a prevailing or alternative frame. The first step of the frame measurement process gathers texts associated with a Supreme Court case (e.g., certiorari petitions, party merit briefs, *amicus curiae* briefs) to content analyze with a program that generates data identifying the most important or central words in a document. The result is a  $d \times w$  matrix of interval-level data, where  $d$  is the number of documents for a case and  $w$  is the number of important words for a case. The second step performs 110 factor analyses on the document data from each case to determine the number of latent factors, where a factor is equivalent to a frame. The factor analysis enables a document to be associated with a particular frame. In sum, the data for 110 cases were extracted from over 2,500 text documents associated with those cases. Prevailing frames are operationally defined as the factor that explains

<sup>10</sup>The arbitrary cut-point of nine briefs provided a reasonable size sample while ensuring these cases attracted a lot of attention.

**FIGURE 1** Legal Actors and Issue Frames

Measures of Statistical Association, Cross-Tabulations

Lower Court & Petitioner:  $\chi^2 = 24.59$ ,  $p < .001$ ,  $N = 110$

Lower Court & Respondent:  $\chi^2 = 20.46$ ,  $p < .001$ ,  $N = 110$

Petitioner & Respondent:  $\chi^2 = 9.43$ ,  $p < .002$ ,  $N = 110$

the most variance, while alternative frames explain less variance than the prevailing frame, but have eigenvalues over 1.

Figure 1 shows distributions of framing decisions by legal actors. All three actors—the lower courts, petitioners, and respondents—have similar distributions, with petitioners and respondents’ distributions being identical. However, lower courts use prevailing frames at a slightly higher rate, consistent with the notion of following precedent.

But lower courts do not only use prevailing frames, supporting the idea that lower courts are strategic and not naively sincere. Moreover, the distributions of both respondents and petitioners support the strategic approach to framing and are inconsistent with expectations from naively sincere participants. This suggests other factors are taken into consideration besides the participants’ own concerns.

The similarity of distributions is a striking finding and, at first, appears counterintuitive. This pattern is consistent with the sequential, ordered nature of the process, where litigants file briefs after the lower court and their attorneys are expected to engage the legal opinions and not ignore adverse legal precedent. Another possible explanation, consistent with the theory above, is that the similarity illustrates the law has a strong “path dependent” component, where it is very difficult to advocate a new frame while ignoring arguments that previous legal actors make. While a legal actor may prefer to advocate a different frame, failure to account for prior legal arguments can be embarrassing for attorneys, as they risk

failing to properly communicate with their intended audience (justices) if they do not use the previously established common language (Entman 1993). The similar distribution is also consistent with Richards and Kritzer’s jurisprudential regimes that structure decision making “by establishing which case factors are relevant . . . and/or by setting the level of scrutiny the justices are to employ in assessing case factors” (2002, 315). Subsequent legal actors must then act within the confines of an established jurisprudential regime. Measures of statistical association listed below Figure 1 reinforce the idea that legal actors’ framing decisions are related and that their distributions are not random.

### Are Litigants Influenced by Others in Choosing How to Frame Their Briefs?

The theory and evidence presented above suggest that petitioners’ decisions on which rhetorical dimension to use are likely affected by decisions of other legal actors. Specifically, petitioners are influenced by how the lower court frames the case because it is the primary constraint to successfully communicating with the Court. This is in accordance with framing theory that suggests individuals need to communicate in a common language (Entman 1993), which constrains their ability to heresthetically manipulate the dimension of conflict (Riker 1986). Thus, I hypothesize: *petitioners are less likely to choose an alternative frame when lower courts use a prevailing frame.* This expectation differs from a naively sincere petitioner, whose framing decision would not be influenced by other legal actors.

Respondents’ framing decisions are concerned with two separate factors—how the lower court and petitioner framed the case. Based on the theory above that states lower courts are concerned with following precedent, the respondents prefer to adhere to the prevailing frame if the lower court used the prevailing frame. Thus, I hypothesize: *respondents are less likely to choose an alternative frame when the lower court opinion uses a prevailing frame.* However, respondents’ decisions are also strongly influenced by what frame the petitioners select. Based on the theory above that states respondents are wary of adhering to rigid and outdated legal reasoning, respondents will act strategically and choose an alternative frame if the petitioner is able to successfully manipulate the dimension of conflict (Riker 1986) by reframing the situation with an alternative frame, even if the lower court selects a prevailing frame. Thus, I hypothesize: *respondents are more likely to choose an alternative frame when petitioners use a different frame than the lower court.* In

contrast, a naively sincere respondent's framing decision would not be affected by how other parties make framing decisions.

There are two dichotomous dependent variables: (1) whether petitioners chose an alternative frame; and (2) whether respondents chose an alternative frame, coded as "1" if the petitioner/respondent used an alternative frame, "0" otherwise. The main explanatory variable for petitioners is whether the lower court uses a prevailing frame (coded "1") or an alternative frame (coded as "0"). For the respondent, the main explanatory variables are how the lower court frames the case and whether the petitioner uses a different frame from the lower court, coded as "1" if it uses a different frame than the lower court, "0" otherwise.

Several control variables are included to account for alternative explanations for a party's framing decision. First, whether the Solicitor General (SG) is the litigant in the case is included because the SG enjoys a higher success rate (e.g., Bailey, Kamoie, and Maltzman 2005). If the SG is either the petitioner or the respondent, it is coded "1," "0" otherwise. The status of petitioners and respondents is included based on research by McGuire (1995) and Sheehan, Mishler, and Songer (1992) that found that status is important in explaining outcomes. High- and low-status litigants should not use the same frames because of differing perspectives on the status quo, and their ability to provide resources that enable attorneys to better frame their case and hire more experienced and Washington-based attorneys. Litigant status is coded as an ordinal scale used by others (McGuire 1995; Sheehan, Mishler, and Songer 1992); the values are "1" poor individuals, "2" minorities, "3" individuals, "4" unions, "5" small businesses, "6" businesses, "7" corporations, "8" local governments, "9" state governments, and "10" federal government. Given that experienced attorneys raise a party's success (McGuire 1995), and consistent with that finding, more experienced attorneys should be better able to advocate for the litigant's preferred frame. To measure attorney experience, which follows a method used in prior research (Johnson, Wahlbeck, and Spriggs 2006, 105, footnote 11), LexisNexis searches were used to count the number of times the oral argument attorney had appeared before the Court on prior occasions.<sup>11</sup>

Other controls include elite status of the attorney based on McGuire's (1993) finding that attorneys practicing in Washington, DC, are the prominent experts involving litigation before the Supreme Court. Thus, part of

that expertise involves knowing how to effectively frame the case to their client's advantage. To measure the elite status of attorneys, the address listed on the brief for the lead attorney of each party was examined. If the address was found in Washington, DC, the variable is coded "1"; any other address is coded "0." The ideological direction of the lower court is included based on previous research showing it to be influential in litigation (McGuire 1995) and controls for the possibility that liberal petitioners may choose different frames than conservative petitioners. Lower court direction uses the "lctdir" variable of Spaeth (2008). Liberal lower court decisions are coded "1," conservative "0." The model also includes whether there was a lower court dissent (e.g., Caldeira and Wright 1990) because a dissent signals a potentially viable solution for the Court and provides support for petitioners in establishing a common language that gives future usage of a frame more credibility within the legal community and, eventually, a chance to become embedded within the fabric of the law. Lower court dissents are taken from Spaeth's (2007) Expanded Burger Court Judicial Database from the variable "lodissent," coded "1" if there was a lower court dissent, "0" otherwise.<sup>12</sup>

The estimated results for the petitioners' and respondent's framing decisions are shown in Table 1. Entries are logit coefficients because the dependent variable is dichotomous. All framing variables are statistically significant and signed in the expected direction. Focusing on the petitioner's equation, when the lower court uses a prevailing frame it decreases the likelihood of a petitioner using an alternative frame. This is consistent with the argument presented above that how the petitioner frames the case is closely tied to how the case was framed by the lower court. In other words, once an issue frame becomes embedded in a legal decision, it becomes difficult for other legal actors to reframe the argument because they are forced to address a legal argument that uses unfavorable terms and conditions. The only other significant explanatory variable is attorney experience, and the negative coefficient suggests that petitioners with more experienced attorneys are less likely to pick alternative frames, presumably because greater experience equips attorneys to engage the issue on less favorable terms.

Focusing on the respondent's equation on the right side of Table 1, when lower courts use a prevailing frame, respondents are less likely to use an alternative frame. However, when petitioners use a different frame than the lower court, respondents are more likely to choose an alternative frame. This finding complements the result

<sup>11</sup>The results for the framing variables in Table 1 remain unchanged if "litigant status" and "Washington Attorney" are omitted from the equation.

<sup>12</sup>For the cases from the 1986–89 terms, LexisNexis searches determined if a lower court dissent was present.

**TABLE 1** Analysis of How Litigants Frame Briefs

	Petitioner	Respondent
Lower court uses prevailing frame	-2.26*** (.366)	-2.06*** (.445)
Petitioner uses different frame than lower court	~	.898** (.487)
Petitioner/respondent is Solicitor General	.714 (.839)	1.65** (.932)
Petitioner/respondent status	.106 (.090)	-.242*** (.081)
Washington elite attorney	.279 (.462)	.423 (.645)
Attorney experience	-.049** (.021)	-.043* (.029)
Ideological direction of lower court decision	-.428 (.336)	.203 (.767)
Lower court dissent present	-.249 (.313)	-.478 (.387)
Constant	.637 (.719)	1.99** (1.02)
N	110	110
Pseudo R-squared	.196	.231
Log pseudo-likelihood	-57.95	-55.47
Wald chi-squared (df)	166.73*** (7)	96.16*** (8)
% Correctly classified	76.4%	77.3%
% in Modal category	63.6%	63.6%
Proportional reduction in error	35.0%	37.5%

\*\*\*p < .01, \*\*p < .05, \*p < .10 (one tailed).

Dependent variable is coded "1" if party used alternative frame, "0" if prevailing frame.

Cell entries represent logit coefficients with robust standard errors in parentheses.

from the petitioner's equation that found a legal actor's decision is contingent on the actions of others. In other words, how a respondent frames a case is partially shaped by how the lower court and petitioner framed the case previously. For the control variables, attorney experience is significant and the direction is consistent with the petitioner's equation, suggesting the possibility that more experienced attorneys are better able to manipulate prevailing frames to their advantage. If the Solicitor General is the respondent, there is an increased likelihood of respondents selecting an alternative frame, which is consistent with the idea that the Solicitor General enjoys a special status and behaves differently than regular litigants. Litigant status is significant for respondents, with higher-status parties being less likely to pick an alternative frame.

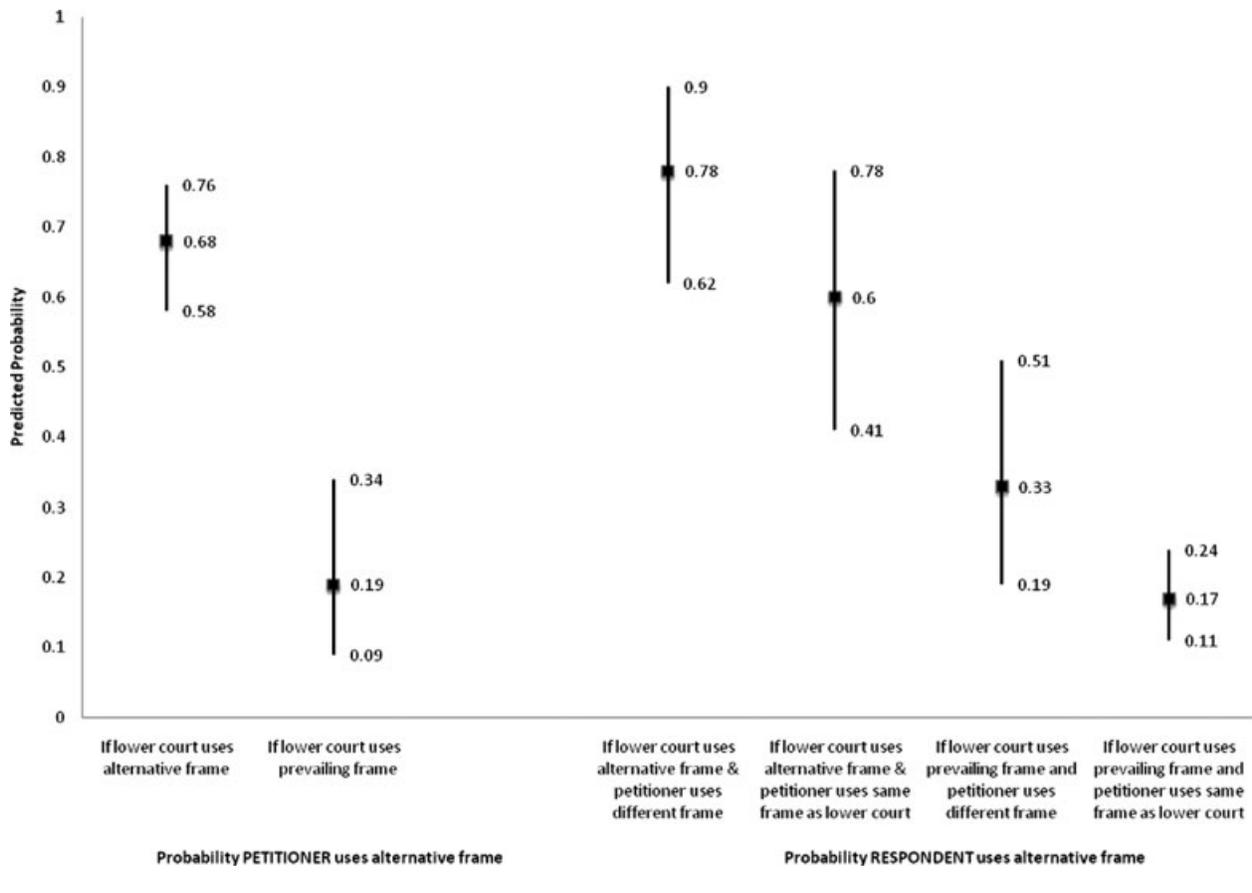
To better estimate the magnitude and uncertainty of the effects of the framing variables, predicted probabilities and 95% confidence intervals were generated with CLARIFY (King, Tomz, and Wittenberg 2000) and are displayed in Figure 2. All variables were set to their mean/modal values and the variables of interest were manipulated. For the petitioner, how the lower court frames the opinion has a large influence on its framing decision. When the lower court uses an alternative frame, the probability the petitioner uses an alternative frame is .68, but that probability drops to .19 when the lower court uses a prevailing frame, and the confidence intervals are distinct from one another. Respondents are similarly affected by how lower courts frame issues, with the means ranging from .78 to .17. In sum, the results support the petitioner and respondent hypotheses and are consistent with the argument that legal actors strategically select frames, but does strategic framing help litigants win cases?

### Does Strategically Choosing a Frame Influence Winning?

According to Riker's (1986) theory, petitioners try to gain success by splitting the opposing coalition by heresthetically manipulating the conflict onto a different rhetorical dimension. However, according to the strategic theory outlined above, petitioners' probability of using an alternative frame is hindered by the lower court. Moreover, because framing is a competitive process, petitioners' chances of winning are not determined solely by their own decision to frame a case, but will be more successful when they are able to manipulate the dimension from which other legal actors evaluate the issue. For this reason, I hypothesize: *petitioners are more likely to win cases when they use a different frame from the lower court.* This is consistent with the Court often taking cases to reverse them on alternative legal grounds, and the fact that the Court reversed 50%–70% of lower court decisions during the time period under study (Epstein et al. 2007, 244–45). But a petitioner's success is also influenced by its ability to engage and speak in a common language. In the case of the Supreme Court, the lower court contributes to a common language and generally prefers to use the prevailing frame because it is generally more consistent with precedent. Thus, I hypothesize: *petitioners are less likely to win cases when lower courts use a prevailing frame.*

Next, given that respondents take their cues from both the lower court and petitioner, respondents have an incentive to behave strategically and use an alternative

**FIGURE 2 Predicted Probabilities and 95% Confidence Intervals of Using an Alternative Frame**



frame for several reasons. First, the reasoning used by the lower courts may no longer be viable. Second, respondents may be trying to “cover all bases” and maximize the chances of winning. Third, respondents are able to look at past trends of the Court and observe that the Court has a strong tendency to reverse cases. Thus, if respondents want to “win” at the Supreme Court, they know they have to evolve their framing of an issue, otherwise the percentages are not in their favor. Thus: *respondents are more likely to win when using an alternative frame*. The expectation of an increased likelihood of winning for respondents when they pick alternative frames is consistent with respondents’ trying to anticipate how the Supreme Court often takes cases to reverse them, often based on alternative legal grounds.

The dependent variable is a dichotomous case outcome measure traditionally used in the Court voting behavior literature: whether the petitioner receives a favorable ideological outcome (coded “1” for favorable, “0” otherwise). Favorable ideological judgments are determined by matching the ideology of the petitioner constructed from the opposite direction of the lower

court ruling (“*lodir*”) and the ideological direction of the Court’s decision (“*dir*”). Because the dependent variable is dichotomous, logistic regression is used.<sup>13</sup> The three main explanatory variables are the framing variables and originate from the analysis above. The framing variables represent the strategic choice of how each participant frames the issue: (1) whether the lower court used the prevailing frame (coded “1” for prevailing frame, “0” otherwise); (2) whether the petitioner used a different frame from the lower court (coded “1” if yes, “0” otherwise); and (3) whether the respondent selected an alternative frame (coded “1” if yes, “0” otherwise).

Control variables are included for difference in attorney experience, difference in litigant status, difference in Washington elite attorney, difference in the degree of support by the Solicitor General, and the difference in support from amicus curiae. These are coded directionally, with larger values favoring the petitioner. For attorney

<sup>13</sup>While the analyses in Table 1 are clustered by issue area using the “value” variable from Spaeth (2007), the models in Table 2 cluster cases by a term-issue variable, a necessity given that the model estimates more parameters than the number of issues.

experience, litigant status, and Washington elite attorney variables, the directional scales are created by subtracting the respondents' value from the petitioners' value (higher values favor petitioners). The scales are generated from the same measures used in Table 1. The degree of support from the Solicitor General makes use of new information at this later stage in the case. For example, the SG's office has chosen to participate in different ways, either appearing at oral argument, having an assistant appear, and in other cases, the SG only participates by filing a brief. Thus, a seven-point directional measure, where "3" indicates the SG appeared at oral arguments favoring petitioner or appeared as petitioner, "2" an assistant appeared, "1" only a brief was filed favoring the petitioner, "0" no involvement by SG office, "-1" brief favoring respondents, "-2" an assistant appeared, and "-3" when the SG appeared at oral arguments favoring respondents.

Also included are controls for whether there was a lower court dissent and the difference in degree in how much the Supreme Court favors the petitioner (Palmer 1982; Provine 1980). A more liberal (conservative) Supreme Court should strongly favor liberal (conservative) petitioners and also accounts for the general ideological predisposition of the Court. This measure incorporates the median ideology of the Court for each term using Martin and Quinn (2002) scores. The Martin-Quinn score is made positive for lower court conservative rulings (because those petitioners would be liberal) and negative for liberal lower court rulings.

Oral arguments also play an important informational role by providing justices with additional information through their legal arguments (Johnson 2004). Thus, a control is included that captures the difference in the quality of legal arguments between petitioners and respondents (Johnson, Wahlbeck, and Spriggs 2006), measured by the difference in grades assigned by Justice Harry A. Blackmun, with the respondents' oral argument grade subtracted from the petitioners' oral argument grade. Amicus curiae, or friends of the Court, adds to the information environment and lends greater credibility and importance to an argument (Caldeira and Wright 1990). The difference in amicus curiae support measures the difference in the number of briefs filed in support of respondents subtracted from the number of briefs supporting petitioners.

To better gauge the importance of frames for gaining a favorable ideological outcome, two models are estimated. The first model examines only the effects of the control variables, while the second model includes the framing variables. The results are listed in Table 2, and entries represent logit coefficients. Overall, the model fit statistics support the inclusion of the framing vari-

**TABLE 2** Analysis of Whether a Petitioner Wins the Case

	Favorable Ideological Outcome for Petitioner	
Lower court uses prevailing frame	~	-1.05** (.549)
Petitioner uses different frame than lower court	~	1.08** (.607)
Respondent uses alternative frame	~	-1.59** (.695)
Degree of support from Solicitor General	.007 (.170)	-.104 (.184)
Difference in support from amicus curiae	.110** (.066)	.176** (.082)
Degree the Court favors petitioners	.260 (.474)	.120 (.486)
Difference in attorney experience	.038 (.032)	.049* (.034)
Difference in party status	.065 (.060)	.114** (.069)
Difference in Washington elite attorneys	.401 (.438)	.329 (.496)
Lower court dissent present	.482 (.473)	.361 (.526)
Difference in quality of oral argument	.155 (.197)	.026 (.206)
Constant	-.428 (.392)	.589 (.760)
<i>N</i>	110	110
Pseudo <i>R</i> -squared	.113	.179
Log pseudo-likelihood	-66.81	-61.86
Wald chi-squared (df)	16.66**(8)	29.68***(11)
% Correctly classified	70.0%	71.8%
% in Modal category	56.4%	56.4%
Proportional reduction in error	31.2%	35.4%
AIC	151.63	147.72

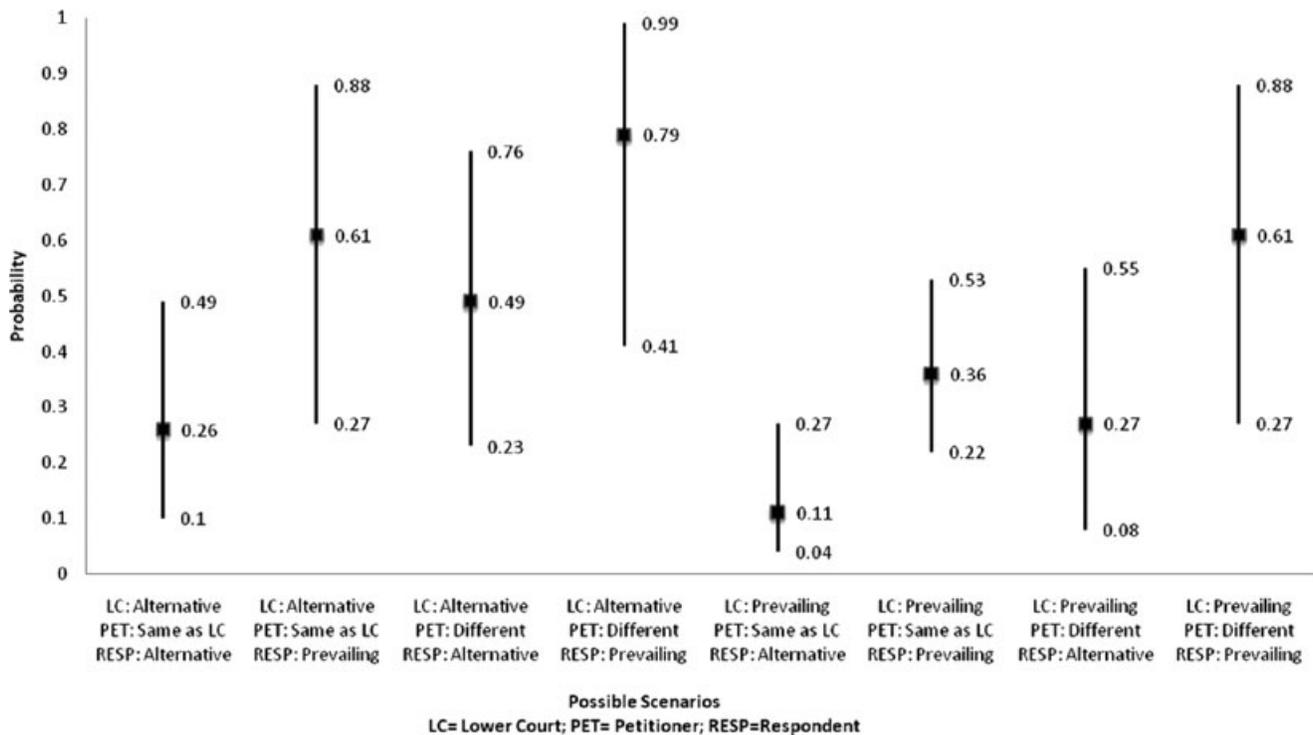
\*\*\**p* < .01, \*\**p* < .05, \**p* < .10 (one tailed).

Dependent variable is coded "1" if petitioner received favorable ideological decision, "0" if unfavorable.

Cell entries represent logit coefficients with robust standard errors in parentheses.

ables, with modest improvements in correct prediction of cases (70% to 71.8%), proportional reduction in error (31.2% to 35.4%), pseudo *R*-squared (.113 to .179), and AIC (151.63 to 147.72). Focusing on the control variable model, only the difference in amicus curiae support emerges as significant. More briefs filed in favor of the petitioner increases the likelihood of the petitioner receiving a favorable outcome. The degree to which the

**FIGURE 3 Predicted Probabilities and 95% Confidence Intervals of a Petitioner Receiving a Favorable Ideological Outcome**



Solicitor General supports the litigants is not significant and raises the possibility that the Solicitor General has its effect early in the process, through the framing of the briefs or at oral argument.

Shifting the focus to a comparison of the two estimated models, all three framing variables are significant. The direction of the significant coefficients can, partly, shed light on what type of effect each actor has on the success of the petitioner. If the lower court uses a prevailing frame, the petitioner is less likely to receive a favorable outcome. If the petitioner is able to reframe the case, or shift the conflict onto another dimension as Riker (1996) suggests, then the likelihood of a favorable outcome increases. If the respondent uses an alternative frame, however, the likelihood of an ideologically favorable outcome for the petitioner is reduced. For the control variables, the difference in amicus support, difference in attorney experience, and difference in party status emerge as statistically significant and are positively signed. Thus, as the petitioner enjoys advantages from “friends of the court,” more attorney experience, and higher status, the petitioner has an increased likelihood of winning the case. The other control variables do not reach conventional levels of statistical significance.

Additionally, another conclusion drawn from Table 2 is that the effect of framing on case outcomes is a joint

effect. While the petitioner and respondent each frame a case to increase the likelihood of their side benefitting, their own actions do not solely determine the outcome. Moreover, because this is a nonlinear model, the effect of the individual variables cannot be fully understood in isolation. Rather, the effect of each variable is contingent on others included in the model, and this is addressed in Figure 3. In sum, how litigants frame a case does affect the likelihood of receiving a favorable ideological decision even after accounting for other potential explanations, but under what conditions and how much does framing affect winning?

Figure 3 graphs the predicted probabilities of petitioners achieving a favorable ideological outcome based on how legal actors frame the case (respondents’ probabilities can be calculated from the graph with  $1 - p$ ). The difference between the left and right side of the graph illustrates the strong influence lower appellate courts have on outcomes. If the lower court frames the case using the prevailing frame (the four probabilities on the right side), the probability of a petitioner receiving a favorable outcome is greatly diminished in three of the four scenarios. However, if the lower court tries to become a policy entrepreneur by choosing an alternative frame (the four probabilities on the left side), the probability the petitioner receives a favorable outcome is

relatively higher in three out of four conditions. One possible explanation for the increased probability of success under those conditions might be due to the Court punishing the lower court for trying to reframe the issue when the Court preferred the prevailing frame, although this cannot be definitively discerned from the evidence presented.

From the petitioner's point of view, the results illustrate how the sequential ordering of filing briefs can reduce the petitioner's chances of winning. For example, examining the left side of Figure 3 (if the lower court chooses an alternative frame), if the petitioner uses the same frame as the lower court, the two means are .26 and .61. But if the petitioner frames the case differently from the lower court, the probabilities become .49 and .79. While there is no pure dominant strategy for petitioners because the timing of the process does not enable them to observe what arguments respondents will make because the respondent's legal arguments partially determine the outcome, it appears the petitioner could reduce the probability of losing by selecting an alternative frame. The same degree of uncertainty for petitioners can be seen on the right-hand side (if the lower court chooses a prevailing frame).

From the respondent's point of view, the results offer some support for the strategy of choosing an alternative frame. In most cases (comparing means with the petitioner and lower court's choices held constant) respondents are more likely to receive a favorable outcome when they choose an alternative frame (using  $1 - p$  to calculate respondent probabilities). For example, if the lower court chooses a prevailing frame and the petitioner chooses a different frame, the respondent's prospects are better off when choosing an alternative frame, even though respondents have a major incentive to use the prevailing frame that "won" at the lower court. While this result seems counterintuitive, there are some plausible explanations.

First, while respondents are generally considered the "winners" at the lower court, respondents are not always satisfied with the outcome or legal rule. For example, in *Bowers v. Hardwick* (1986), Hardwick "won" when the lower court ruled that the Georgia sodomy statute implicated his right to privacy. Hardwick, however, did not receive his most preferred outcome from the lower court because the lower court did not strike down the sodomy statute as unconstitutional. Rather, the lower court remanded the case back down to the trial court, where the state had the opportunity to prove it had a compelling interest in regulating the behavior and that it was narrowly drawn. Second, the strategy of respondents selecting an alternative frame is consistent with the possibility that respondents are trying a "cover all bases" strategy. Simi-

larly, respondents know that the Court often takes cases to reverse them, often on alternative legal grounds. Thus, because the Court reverses approximately 50%–70% of the time (Epstein et al. 2007), adhering to the legal arguments framed by lower courts represents a risky proposition (Epstein and Kobylka 1992). Knowing this, respondents may feel their interests are best served by using an alternative frame.

## Conclusion

The results of this study support the argument that litigants are strategic in how they choose to frame a case at the Supreme Court based on the evidence that litigants' decisions are affected by what frames previous legal actors selected. In other words, if petitioners and respondents were naively sincere in their preference on how to frame the case, there would be little reason to expect their framing decisions to be related to each other, let alone how the lower court framed the case. However, because petitioners lost at the lower court, one might expect them to try to reframe the case by heresthetically manipulating the dimension of conflict with little regard for the terminology and frame selected by the lower court. The results here, however, tell a different story. Namely, the frame used by the lower court does exert a powerful influence on what frames petitioners select, suggesting that petitioners are not unconstrained in their ability to offer a new frame and heresthetically manipulate the dimension of conflict.

Moreover, how litigants choose to frame their legal argument in the merits brief does affect Supreme Court decision making in terms of petitioners receiving more or less favorable outcomes, but neither party can provide a completely decisive framing of the case. Rather, litigants' influence on the outcome of a case is a cumulative process structured by the ordered, sequential nature of the procedures of the institution. In other words, a party may prefer to frame a case a particular way, but using that frame does not guarantee a favorable outcome and may be counterproductive based on what frame others use. For example, respondents have a large incentive to use the prevailing frame whenever the lower court uses it because they won at the lower court. However, the results show that if the respondents fail to evolve their framing strategy by not accounting for when petitioners reframe their argument, respondents are unlikely to receive favorable decisions. Furthermore, the results support the conditional effect of framing on winning, consistent with Baumgartner, De Boef, and Boydston's (2008, 219) conclusion that no single actor was responsible for causing change, but rather the system as a whole responds.

This article also builds on a fundamental question in the literature, namely, what policy will be selected by the court. This article suggested that it was the policy prescriptions proposed by how litigants framed the issue in their legal briefs that was responsible for bringing about legal change. Indeed, this is one of the first studies to show a link between litigant briefs and case outcomes, even after controlling for several other factors (see also Corley 2008). By including a measure of whether litigants are framing the policy in terms of the status quo or whether their framing indicates policy change, this article has advanced our understanding of where the Court selects its policy from by focusing on the content of legal arguments found in legal briefs and how those legal arguments were framed. Without any link to the content, we have a limited ability to infer why the Court chose to affirm or reverse, something that is crucial for explaining changes in the law (e.g., Epstein and Kobylka 1992). Additionally, this article advanced our understanding by developing a typology (prevailing and alternative frames) that furthers our ability to gauge when litigants are trying to promote legal change and also test whether litigants are responsible for driving legal change.

There are a few caveats. First, the analysis examines a sample of 110 salient cases over 11 terms. While these cases may not be representative of the “average” case, using the most salient cases does present a stringent test because research has shown that justices are believed to hold more intense preferences over salient cases (McAtee and McGuire 2007). Second, one drawback is that it does not shed light on the particular frames used in any particular case (but it can when inductive methods are added; see the online appendix at [http://www.uky.edu/~jpwede2/online\\_appendix.pdf](http://www.uky.edu/~jpwede2/online_appendix.pdf)). For example, scholars who examined affirmative action (e.g., Gamson and Modigliani 1987) identify and describe specific frames (e.g., “delicate balance frame” or “no preferential treatment frame”). This description provides leverage in understanding how citizens negotiate meaning and helps us understand elite-mass interactions. The deductive approach taken in this article reflects a preference for understanding how elites select frames that translates across issues and over time and is ideal for elite-elite interactions. This is a necessary step if we are “to link how citizens psychologically process frames with how elites strategically choose frames” (e.g., Druckman 2001a, 247).

In future work on Supreme Court decision making we must incorporate the content of legal arguments to account for when the Court advocates policy change. If the essence of frames suggests policy remedies merely by describing an issue, then previous studies of Supreme Court decision making have limitations because they are

silent on how decisions relate to how an issue is portrayed; this is especially true if the goal is to explain the Court’s role as a policy maker in the larger policymaking arena.

## Appendix

Measuring issue frames continues a trend in the courts literature that treats words as data (e.g., Evans, McIntosh, Lin, and Cates 2007; Wahlbeck, Spriggs, and Sigelman 2002). The measurement strategy goes beyond using simple word frequencies by employing the Crawdad Text Analysis (CTA) system (Corman, Kuhn, McPhee, and Dooley 2002), a content analysis program that incorporates networks and a theory in linguistics based on centering resonance analysis to identify words that are more “central” or “important” to a text. The program has been shown to accurately represent texts in a way that is similar to how humans represent them—as a network of interconnected words containing information about the contents of the text (Corman et al. 2002). CTA uses the

**Table A1** Measuring Issue Frames in *Bowers v. Hardwick*

Document	Factor 1	Factor 2	Factor 3
Several amici not shown	Not	Shown	
Amicus: Lambda Legal and Educ. Fund	.150	.374	<b>.518</b>
Amicus: Lesbian Rights Project	.138	.058	<b>.760</b>
Amicus: National Gay Rights Advocates	-.086	<b>.938</b>	-.006
Amicus: Presbyterian Church	-.004	.383	<b>.544</b>
Amicus: Rutherford Institute	<b>.735</b>	.131	.084
Lower Court Majority	<b>.507</b>	.467	-.182
Petitioner Brief on Merits	<b>.940</b>	-.013	.007
Petitioner Certiorari Petition	<b>.890</b>	.089	-.119
Petitioner Reply Brief	<b>.741</b>	.016	-.026
Respondent Brief on Merits	.046	<b>.922</b>	-.015
Respondent Petition Deny Certiorari	.774	.127	-.119
Eigenvalue	10.16	1.70	1.13

*N* = 225; Iterated Principal Factor Analysis, promax rotation. Bold highlights the respective frame/factor each document was scored as loading on.

structural properties of the estimated word networks to estimate a word's centrality or influence in a text. The program generates word centrality values for approximately 250 words in any text or set of texts.

The first step in the measurement process gathers a set of texts associated with a specific case and content analyzes the texts using CTA to generate the data. The second step performs exploratory factor analysis on the content analysis data to identify the key factors, or frames, from a set of case texts (e.g., Simon and Xenos 2004; see also Baumgartner, De Boef, and Boydston 2008 for a related approach). To ensure the measurement of issue frames used by the litigants and outside parties precedes the involvement of the Court at oral argument or with opinion writing, three rounds of factor analyses are performed. The first round consists of lower court majority opinion, petitioner and respondent briefs on merits and certiorari, and all amici briefs. The next round uses all texts from the earlier round with the petitioner's and respondent's transcripts from oral arguments, and the final round uses all texts from the first two phases, plus the majority opinion, and any concurrences and dissents.

To illustrate, Table A1 contains output from the first round of factor analysis of *Bowers v. Hardwick* (1986), a case addressing privacy rights and a Georgia sodomy law that was decided by a 5–4 conservative vote in favor of the petitioner. In *Bowers*, three factors, or frames, emerge from the data. Nine texts load on the first factor, five texts load on the second factor, and four texts load on the third factor. The first factor is coded as the prevailing frame, and the second and third factors are coded as alternative frames. Additionally, the table shows that the lower court opinion is associated with both the prevailing frame and an alternative frame, which is unusual and suggests that the lower court discussed both frames, but is coded as using the prevailing frame because it is higher and did not clearly distinguish its message. The petitioner's merit brief is coded as using the prevailing frame while the respondent's merit brief is coded as using an alternative frame. See the online appendix for a content check of the prevailing and alternative frames in *Bowers v. Hardwick*.

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