Call and Response: Legal Entrepreneurship and Attorney Success at the U.S. Supreme Court*

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Abstract

When attorneys approach Supreme Court justices, they find themselves attempting to answer legal questions that the brightest minds in the lower courts failed to resolve. The Supreme Court's job is to address as-yet-unanswered questions, but the adversarial legal system requires attorneys do the work of finding the proposed answers and providing them to the justices first. Because attorneys do this in the one-sided written merits brief, however, approaching the justices also provides them with an opportunity to persuade and influence. Attorneys do this using one of two tactics: they can adopt the prevailing argument in a legal area and suggest the justices merely need to apply it in a new manner, or they can try to transform the justices' understanding of an issue area by engaging in legal entrepreneurship. Using data from 1,509 cases the Supreme Court heard between the 1984 and 2007 terms, I examine how attorneys' decisions to engage in legal entrepreneurship influences outcomes at the Court. I find that entrepreneurial arguments are common but offer limited advantages. Entrepreneurial arguments can help inexperienced and resource-poor petitioners win, but for everyone else, the approach neither helps nor hurts their odds of securing the justices' votes.

*Prepared for the New Directions in Law and Society Conference at UMass Amherst, October 7-8, 2022. Originally presented at the 2022 Annual Meeting of the Southern Political Science Association and the 2019 Annual Meeting of the American Political Science Association, Washington, D.C., August 29 to September 1, 2019. Thank you to Morgan Hazelton, Matt Hitt, Mike Nelson, Kirk Randazzo, Doug Rice, and Michael Salamone for their helpful comments on early drafts; to Lauren Bolt, Steven Dyke, Christine Francoeur, Josie Jasmine, Michelle Nowicki, and Maysa Sitar for their research assistance; and to Ryan Black, Ezra Brooks, Jonathan King, Elizabeth Lane, and Cory Smidt for help preparing this manuscript.

When Ruth Bader Ginsburg established the Women's Rights Project at the American Civil Liberties Union in 1971, she did so with a mandate: develop a legal strategy for improving gender equality in the United States (Campbell 2003). She decided equality had to come from the Supreme Court and set her sights on establishing that all laws separating the sexes needed to pass a strict scrutiny test (Hirshman 2015). To get there, she would have to approach the nine male justices and convince them that the "preferential" treatment women received was discriminatory, something they had long refused to do (Hirshman 2015). Ginsburg had to find a believable way to make a new and innovative argument. Starting with her first Supreme Court brief in *Reed v. Reed* (1971), Ginsburg suggested the justices needed to overturn their past decisions on sex-based discrimination and then drew a parallel between the racial discrimination cases the Court reviewed in the 1950s and 1960s and her cases (DeHart 2018). She suggested that sex discrimination and racial discrimination were similar (though not equally oppressive) problems that required the same solution (DeHart 2018). The Court had already decided that discrimination on the basis of race was both impermissible and worthy of the highest form of scrutiny, so why not take the argument one step further? Ginsburg's decision to align her radical argument with a familiar one eventually worked, too (DeHart 2018). She eventually got the justices to rule that any legislation that separated the sexes deserved at least some level of scrutiny, if not the strictest level.

Like Ginsburg, attorneys who appear before the Supreme Court face the difficult task of deciding how to use the Supreme Court's past decisions to direct the justices toward a desired new outcome. By design, the Supreme Court uses its opinions to resolve legal conflict and important, unanswered legal questions (Perry 1991), and parties appeal to the Court precisely because they want the clarity and finality that lower courts failed to provide. But while the justices can locate cases worthy of examination, they need help navigating to the eventual result. Attorneys are the ones who put together initial thoughts on the relevant case law and offer the justices legal arguments about the situation at hand (Garner 2003). They compose merits briefs for the justices' use and, in the process, establish the legal boundaries

of a case while shaping the justices' responses to it (Epstein, Segal and Johnson 1996). Doing this requires attorneys make a key strategic decision regarding the construction of the legal argument: do they work within the prevailing legal framework and find a way to wedge their issue into it, or do they, like Ginsburg, offer a wholly new and entrepreneurial argument that redefines the justices' thoughts about an area of case law? This paper addresses that question.

To examine this facet of attorney strategy, I introduce the concept of legal entrepreneurship, which occurs when attorneys attempt to push the law in new or radical directions in order to upend the legal status quo. I develop an original measure of legal entrepreneurship to systematically study how innovative legal arguments influence the justices' votes in a case. Using data from 3,018 merits briefs across 1,509 cases the Court heard between the 1984 and 2007 terms, I find that attorneys' decision to engage in legal entrepreneurship can have very real consequences on their ability to win their cases. More specifically, I find that attorneys representing the petitioner are more likely to win a justice's vote if they engage in legal entrepreneurship, but respondents gain no advantage from doing the same. Additionally, I find that engaging in legal entrepreneurship helps inexperienced petitioners or petitioners representing resource-poor litigants gain a clear advantage. These results indicate that, in certain circumstances, attorneys can benefit from using a more radical argument in their briefs.

These findings make two new and important contributions to the literature. First, my results suggest that learning *how* and *when* to make a certain type of argument is a crucial piece of being a winning (good) attorney. Attorneys are more successful when they are credible (Wedeking 2010). The well-developed literature on attorney experience shows that experienced attorneys are more likely to win before the Supreme Court (McGuire 1993, 1995) and see their arguments appear in the justices' opinions (Corley 2008). The authors of these works universally point to established credibility as an explanation for this success. My research goes beyond the outcomes to show *how* attorneys appeal to the justices and build

credibility with them. It proposes that knowing when and how to make novel arguments – that is, knowing when to use the prevailing frame and when to be entrepreneurial – is a necessary tool in any winning advocate's toolbox.

Secondly, I offer one of the first systematic analyses of attorney decision making. Much of what political scientists understand about attorney strategy and legal change comes from the two most famous examples of successful cause lawyering: Thurgood Marshall's twenty-year fight for racial equality (Haygood 2016) and Ruth Bader Ginsburg's aforementioned battle for women's rights in the 1970s (DeHart 2018). Scholars are well-versed in the language of big legal movements, but they understand much less about how members of the Supreme Court bar generally build arguments and present them to the justices in order to nudge the law in their preferred directions (though see Wedeking 2010 and Hazelton, Hinkle and Spriggs 2019 for exceptions). By studying legal entrepreneurship more broadly, I draw attention away from the legal giants and their success stories and place it on the more typical attorney practices that dominate the Court's docket.

Attorneys, Briefs, and the Law

In the United States, legal change starts with attorneys, not with judges. The federal judiciary's adversarial structure empowers litigants and their attorneys to identify legal problems or conflicts, bring suit, and then go before judges and present arguments to resolve the issues (Kagan 2003). Judges must wait for attorneys to first put cases on their dockets (Baird 2004) and later provide them with the information needed to rule on them (Garner 2003). While the judges are the ones who ultimately decide the cases and offer the legal rationale for getting there, the attorneys are the ones who put issues in front of them and offer the initial arguments that eventually shape judges' understandings of the law.

When attorneys present a case to the Supreme Court, they have the opportunity to change the law and policy on a nationwide scale. Cases that go before the Court involve legal questions that the lower courts failed to answer with any level of certainty (Perry 1991),

and by accepting these cases for review, the justices agree to provide an answer the federal courts can uniformly implement. Yet before the justices can answer a question, they do what all judges do: they ask the attorneys to take the first pass at an answer and provide a legal argument that walks the justices from the conflict to a proposed resolution. In so doing, the justices give attorneys the opportunity to shape the decision the Court will eventually make, as the justices depend on attorneys' information and expertise to get them through the case (Garner and Thomas 2010; Garner and Roberts 2010; Johnson 2004). Attorneys get two opportunities to do this: first in written merits briefs and then later during oral argument.

Merits briefs are supposed to make the justices' jobs easier (Scalia and Garner 2008). Each party submits a brief, which, per Supreme Court Rule 24, provides information the justices need to review and understand the case, including procedural background, the legal questions at hand, the party's proposed solution, and accompanying legal reasoning. The justices also expect attorneys to do the legal heavy lifting in a case; they want attorneys to, as Justice Clarence Thomas explained, really "tee it up" and make a tough case look simple and easy to resolve (Biskupic, Roberts and Shiffman 2014, Part 3). The justices are clear about what they want in a brief – reliable information, good writing, and brevity (Garner and Kennedy 2010; Garner and Roberts 2010; Garner and Ginsburg 2010; Totenberg 2011) – and they are equally clear that good advocates do those things in their briefs (Garner and Scalia 2010). Research also suggests the justices favor briefs that are easy to read and lack affective language (Black et al. 2016; Feldman 2016).

While merits briefs ostensibly exist to help the justices, they also provide attorneys with their best opportunity to influence the justices' approach to a case. By nature of being a one-sided legal document, the merits brief gives an attorney space to make an uninterrupted and coherent argument, which means she can put her most persuasive spin on the case, bolstering her argument while downplaying the opposition's (Black et al. 2016; Black and Owens 2012*b*; Johnson 2001). She has to be informative and cannot lie, misrepresent, or overstate the issues in the case (Garner 2003), but she does this in a manner that best helps

her client. Importantly, the attorney has to do this in the brief and not at oral argument, as the justices use oral argument to engage in their own information-gathering activities and leave little time for attorneys to make full arguments (Black, Johnson and Wedeking 2012; Johnson 2004).

The key to persuasion is a solid legal argument. Legal writing guides abound with suggestions like Dorrill and Harwell's (1987) comment that "to persuade [judges], you have to offer them sound reasons for believing as you do" (as cited in Garner 2003, 105), or Garner's (2003) note that "When you write a brief, your implicit promise is that you'll give the judge good reasons for ruling as you request" (ix). Attorneys need to take the justices from the conflict at the center of the case to its proposed solution in a manner so elegant the justices cannot help but accept the argument (Garner and Roberts 2010), perhaps even going so far as to use the attorneys' words as their own when writing their opinions (Corley 2008). Having that winning argument anchoring a brief is crucial for success; as Garner (2003) points out, technical excellence and great writing can enhance a good argument and make persuasion easier, but those skills cannot overcome a brief with a weak and unconvincing argument. Given the justices' well-documented proclivity for siding with experienced attorneys over novices (McGuire 1993, 1995; Nelson and Epstein 2019), it is not difficult to surmise that learning how to write a solid legal argument takes time.

Legal Entrepreneurship and Innovation

Preparing an argument for review at the Supreme Court requires careful consideration of a multitude of factors. Attorneys need a strategy for appealing to a majority of the justices, nine legal elites whose personalities, policy preferences, and social circles help guide their decision making (Baum 2006; Black et al. 2020; Epstein and Knight 1998; Hall 2018; Segal and Spaeth 2002). Petitioners must decide how to respond to a lower-court loss, while respondents decide how to approach a reverse-prone Court (Wedeking 2010), and both sides have to produce briefs that sound credible and authoritative about the issues at hand.

To do this, attorneys have to position their arguments alongside existing precedent (Black and Spriggs 2013; Hansford and Spriggs 2006), but the common-law system only offers so much guidance to attorneys seeking to resolve cases that currently lack clear solutions. Consequently, attorneys find themselves constructing arguments that venture into unknown legal territory in what they hope is the most believable manner possible. Figuring out how to use past Supreme Court precedents to suggest answers to otherwise-unanswerable questions is an art, and attorneys do it in every case.

To see how this works in practice, consider Jan Walls Anderson's brief for Charles Acevedo, the respondent in the search and seizure case *California v. Acevedo* (1991). Anderson wrote that,

> The factor that distinguishes this case from *United States v. Ross*, 456 U.S. 798, 823 (1982) is that in *Ross* the police had probable cause to believe that the vehicle and the trunk of the vehicle specifically contained narcotics. Here, as in *United States v. Chadwick*, 433 U.S. 1 (1977), the only connection the contraband has with the vehicle is the fact that the container carrying it was placed into the trunk of the vehicle.

Anderson's goal was to get the justices to side with Charles Acevedo, who claimed police used an illegal search to find marijuana in a paper bag in his trunk. The Court did not have a ruling that directly addressed searches of paper bags in car trunks (*Acevedo* would become that precedent), but Anderson found other rulings to help her make her point. She identified two precedents that were relevant to her argument, *Ross* and *Chadwick*, and discussed their application to the case. The ruling in *Ross*, a well-cited search and seizure case in which the justices upheld a trunk search for drugs, was not favorable to her argument, so she sought to differentiate her case from it. But the Court's decision in *Chadwick* was useful to her, given the Court ruled that a warrantless search of locked luggage in a vehicle violated the Fourth Amendment, so she talked about its relevancy to her case. Anderson, like other attorneys who appear before the Court, identified relevant case law and then used her merits brief to carefully walk through the precedents and explain their application (or lack thereof) to the situation at hand.

When putting together these arguments, attorneys can use one of two competing frames to aid construction: they can use a prevailing legal argument, or they can engage in legal entrepreneurship. When attorneys use a prevailing argument, they situate their arguments on top of the Court's recent rulings in an issue area, suggesting the justices already have the answer to the case if they just take the argument one step further. This is what Anderson is doing in her argument, trying to convince the justices that *Acevedo* is just like *Chadwick* and not at all like *Ross*. Her goal is to show the justices their existing rulings placed easily-applicable boundaries around the case. Briefs that use a prevailing argument should look and read like the Court's more recent opinions in an area of case law. They should cite the same cases the Court did and they should discuss those cases in the same manner.

Attorneys should default to using the prevailing argument for one simple reason: they are easier for the justices to consume and process. The justices want attorneys to make simple arguments that are familiar, repetitive, and relatively easy to understand (Garner 2003; Hazelton, Hinkle and Spriggs 2019). They like legal efficiency – that is, rules that are easy to apply – and ideally aim to create "bright-line" rules that simplify decision making (Niblett, Posner and Shleifer 2010). When the law is inefficient, the justices spend time and energy identifying answers to legal questions (Gennaioli and Shleifer 2007), something they do in place of pursuing their personal interests, which they also like to do (Epstein and Knight 2013). Beyond mere inefficiency, the justices are also, for the most part, institutionally averse to overturning existing precedent (Hansford and Spriggs 2006) and are wary of anything that suggests they distinguish or eliminate their own precedents. Importantly, prevailing arguments are also easier to identify and work with, which should help eliminate some of the difficulty surrounding an attorney's venture into the legal unknown.

Entrepreneurial arguments, on the other hand, are anything but familiar and easy. When attorneys engage in legal entrepreneurship, they act like legal renegades. They introduce new arguments that seem out of place in the Court's recent jurisprudence – they can suggest the Court overturn its existing approach to an area of case law, apply a dif-

ferent line of jurisprudence, or build a case around a long-ignored precedent. Ruth Bader Ginsburg did this in her sex-based discrimination arguments, asking the justices to overturn valid precedents like *Muller v. Oregon* (1908) and *Hoyt v. Florida* (1961) while venerating the justices' decision in *Brown v. Board of Education* (1954) and drawing parallels between two otherwise-different areas of case law. She tried to win by changing the conversation and forcing the justices to reexamine their approach to an area of case law.

Using an entrepreneurial argument is a high-risk, high-reward enterprise. When attorneys write an entrepreneurial brief, they ask the justices to go through the mentally-taxing exercise of looking at an established area of case law in a brand new light. Convincing experienced legal minds they missed something in the law or, worse, made a mistake and need to correct it, is not an easy task (Mauro 2019). Moreover, given the justices' preferences for efficiency and familiarity, entrepreneurial arguments would seem to guarantee failure. But Supreme Court justices are also strategic seekers of policy who will occasionally invite inefficiency for the sake of policy gains (Epstein and Knight 2013; Niblett, Posner and Shleifer 2010), and the justices are willing to use the law to bolster their policy pursuits (Hansford and Spriggs 2006). There is just enough uncertainty in the law and the justices' decision-making processes to make entrepreneurship an intriguing option for attorneys who, like Ginsburg, could not possibly win using prevailing arguments. When you have nothing to lose, why not try for the legal equivalent of a Hail Mary pass? If an attorney can get the argument just right and persuade the justices toward her side, the decision to go entrepreneurial could pay off handsomely.

Importantly, however, entrepreneurship should not work equally well in all situations. For one thing, engaging in legal entrepreneurship should benefit the petitioner more than the respondent. Recall that the petitioner appeals to the Court with a loss already in hand, which would suggest the prevailing case law – as understood by the lower court judges – already worked against her once (Wedeking 2010). Using a prevailing argument is consequently less appealing, all else being equal. If the petitioning attorney can find a way to believably and

credibly appeal to the justices using an entrepreneurial argument, she might have a better opportunity to secure their votes. On the other hand, the respondent does not have these same advantages and therefore should not benefit from using an entrepreneurial argument. He already won at the lower court, which would suggest the prevailing understanding of the Court's past rulings works in his desired direction. Moreover, because the respondent files his brief after seeing the petitioner's brief, he runs the risk of looking desperate (and perhaps not credible) if he tries to respond using an entrepreneurial argument.

Additionally, engaging in legal entrepreneurship should help attorneys representing the petitioner who are inexperienced or working for resource-poor clients, but not offer the same boost to experienced attorneys. An attorney's experience, his position as an attorney in the Office of the Solicitor General, and a party's economic status offer built-in advantages before the Supreme Court (Black and Boyd 2012; Black and Owens 2012*a*; McGuire 1995; Nelson and Epstein 2019). These traits signal to the justices that an expensive (and by proxy, good) attorney is about to present an argument the justices know they can blindly trust to be correct (Biskupic, Roberts and Shiffman 2014; Garner and Roberts 2010). These briefs make the justices' jobs easier and the justices will default to their judgments. When an unknown attorney appears before the Court, however, she is going to make the justices' jobs harder no matter what she writes. The justices do not know her, they cannot trust her, and they consequently have to study her argument with care. Given the justices' focus, inexperienced and resource-poor attorneys have a real opportunity to land an entrepreneurial argument in this case; if they can construct the argument properly, the justices are listening.

Data and Measures

To better understand the value of employing prevailing and entrepreneurial arguments, I create a new measure of legal entrepreneurship and use it alongside Black et al.'s (2016) data on merits briefs and judicial decision making. The data encompass 13,387 justice-votes cast between the 1984 and 2007 terms, covering 1,509 cases in which the Court received only

one brief from the petitioner and one brief from the respondent.[1] My dependent variable is the justice's vote, specifically whether she voted for (1) or against (0) the petitioner.

Identifying Entrepreneurship

The decision to use a prevailing argument or engage in legal entrepreneurship is the key factor under analysis here, so I operationalize it using two dichotomous variables: one for the petitioning attorney's decision to engage in legal entrepreneurship (1) rather than use the prevailing argument (0), and one for the responding attorney's decision to do the same. To identify these attempts to alter the legal status quo, I essentially need to replicate the analysis I conducted on Jan Walls Anderson's brief in *California v. Acevedo* – break each brief down to its citations and the attorney's discussion of them – and then compare each brief's arguments with the Court's own approach to that particular area of the law. Doing this by hand for the 1,509 cases under examination here would be inadvisable, however; data suggests it would take an experienced coder more than two years' worth of 40 hour work weeks to read the briefs, break them down into citations, and identify the attorney's application of each citation (Schoenherr and Black 2019). I consequently automate the process using a combination of human-assisted and machine learning techniques.

The automated analysis unfolds over four steps, which I outline here and discuss in more detail below. In the first step, I take text files of the "Arguments" sections of the merits briefs and use a computer program to identify each mention of a citation in the documents.

[1] An astute observer will notice the Supreme Court reviewed almost 2,400 cases during this time period, so I am only looking at 63% of the cases the Court reviewed. Cases are missing for one of three different reasons: (1) the briefs were not available in LexisNexis or Westlaw; (2) the cases had more than one brief for each party; or (3) other datasets did not have observations for these cases. Beginning with the first, both Westlaw and LexisNexis were missing briefs for about 5% of the Court's cases during this time period. These missing briefs were mostly (but not exclusively) from cases the Court reviewed in the early 1980s. Per a conversation with Westlaw's product management team, the missing briefs were not converted to a digital format and were therefore never put into their online repository. These briefs are simply missing and will never go into the dataset. Regarding the second category of missing data, approximately 22% of cases are missing because the parties submitted more than one brief for each side (e.g., two petitioner briefs for one case). I purposefully omitted these cases in order to deal with potential endogeneity problems associated with the justices receiving multiple arguments from the same side in a case. The remaining 10% of cases are missing here because they were missing from the datasets I used for control variables.

I then create and utilize a dictionary that identifies attorneys' application of those citations within the briefs, creating data I then use to identify each brief's central arguments. Finally, I use Hansford and Spriggs's (2006) precedent vitality data to compare the briefs' key legal arguments with the Court's and identify instances of legal entrepreneurship.

For the first step of the process, I wrote a computer program that utilizes R's *tidyverse* suite to turn text documents into sentence-level citation data whose content can be analyzed using mechanized processes. Or, more simply, I extract the core pieces of an attorney's legal argument for later analysis. The program identifies the "Arguments" section of each brief, breaks the section into sentences, and searches for mentions of a Supreme Court opinion within the sentence.[2] When the program finds a citation, it saves the citation as well as the sentence that precedes it, which I use in the next step to identify the attorney's application of that precedent. At the end of this step, I have a list of every readily-identifiable mention of a citation as well as the sentence from which it came.[3] At this point, there are 187,764 mentions of just over 10,000 Supreme Court precedents across the 3,018 briefs under analysis, an average of 62 mentions of 26 precedents per brief.

In the second step, I create a dictionary of terms associated with attorneys' application of citations and then use that dictionary to actually identify the attorneys' treatment of each citation in their briefs (applicable, not applicable, or a neutral statement of fact). These applications map directly to the positive (applicable), negative (not applicable) and neutral treatments identified by Shepard's Citations (Hansford and Spriggs 2006; Spriggs and Hansford 2000); I modify my language here for simple ease of explanation. My decision to use a dictionary-based approach departs from the current trend of using more high-

[2]Because Supreme Court justices are only bound by Supreme Court precedent, I do not use state court decisions or lower federal court decisions in my analysis. I also eliminate references to the federal code (e.g., 18 U.S. Code §1657).

[3]By convention, attorneys typically cite a Supreme Court case using its name followed by the U.S. Report citation and the year the justices published the opinion, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968). Inevitably, however, attorneys turn to shorthand to save space in their briefs, and the formal citation eventually gets reduced to *Terry v. Ohio* or 392 U.S. 1 and, at some point, all the way down to merely *Terry*. The program identifies full citations and short hand and then uses the *quanteda* package (Benoit et al. 2017) and its word frequency statistics to identify and include these less-formal citations as well. When compared to hand-coded data, the program identifies more than 90% of the total number of citations mentioned in a brief.

powered, black-box models for sentiment classification (Grimmer and Stewart 2013), but I argue the dictionary-based approach is more useful in this context. Both approaches offer accuracy and efficiency at some cost; dictionaries require constant validation and are context-dependent, while using a more complicated modeling technique like a random forest or support vector machines requires training data and offers less concrete information about *why* the classification scheme is accurate (Corley and Wedeking 2014; Kuhn and Johnson 2016; Rice and Zorn 2019). Here, the dictionary-based approach offers information about the words associated with application while simultaneously being created and validated to identify sentiment in this specific context, making it an ideal tool for analysis and later use.

Logistically, I follow a process similar to that of LexisNexis's Shepard's Citations, which identifies current opinions' treatment of past precedent (Hansford and Spriggs 2006). Employing information from three different sources – LexisNexis's list of shepardization terms and treatments, Spriggs and Hansford's (2000) overview of the shepardization process, and hand-coded sentiment data gathered from 57 randomly-selected search and seizure cases and 10 privacy cases – I developed a list of 525 words and phrases that uniquely identify attorneys' decisions to classify a precedent as relevant to the current case ("apply," "establish," "mandate") or dismiss a precedent as irrelevant ("distinguish," "nullify," "overrule"). All other citations are considered neutral statements of fact. With the help of the *quanteda* package (Benoit et al. 2017), I apply the dictionary to the sentence associated with a citation to identify the attorney's singular treatment of it, then aggregate that information to create an overall measure of precedent treatment. At this point, I have a list of every case cited in a brief as well as the attorneys' overall treatment of that case, a list of almost 80,000 brief-citation pairs. The data now show, for example, that the attorney representing the petitioner in *Planned Parenthood v. Casey* (1992) treated *Roe v. Wade* (1973) as relevant, applicable precedent to the situation at hand, while the responding attorney suggested *Roe* did not apply and should, in fact, be overturned.

After aggregating the data, I identify the parts of the argument most central to each

brief and restrict my analysis to those precedents. The average merits brief cites approximately 26 different Supreme Court precedents, but the distribution of those citations is bimodal, with most cases getting a single, obligatory mention and a few central precedents receiving repeated attention. According to the justices, their attention goes straight to those central precedents (Garner and Thomas 2010; Garner and Stevens 2010), and legal scholars encourage brief writers to focus their attention on these cases as much as possible (Garner 2003). I consequently restrict my analysis to these well-cited precedents, removing all cases that get mentioned a below-average number of times. This resulted in looking at about 6 cases per brief rather than 26 while eliminating a substantial amount of noise from data.[4] At this point, I have data on the key arguments in each of the 3,018 briefs under analysis here.

In the fourth and final step, I examine the central precedents in order to identify entrepreneurial arguments in the petitioner and respondent briefs. To do this, I search the arguments for instances of an attorney engaging in any one of three entrepreneurial acts: (1) suggesting a reversal of the Court's reigning approach; (2) applying an older, forgotten line of jurisprudence; or (3) building the case around a precedent the Court has long since ignored.

Operationally, an attorney suggests a reversal of the Court's current approach to the law when she alone of the two attorneys in a case argues against the Court's current treatment of a past opinion. To identify instances of this occurring, I searched for situations where attorneys cited the same cases but applied them differently – situations where one attorney said the case applied and the other said the case did not. Every time one of the attorneys argued against the Court's prevailing approach (that is, whether the Court's opinions indicated the justices favored or disfavored the precedent), that attorney engaged in

[4]Looking at all the cases mentioned in each brief ultimately resulted in the suggestion that *every* brief contained an entrepreneurial argument. Why? Because there was so little consistency in approach to these one-off citations that keeping them in the analysis made each brief's argument appear more unique than it really was. By focusing on the important cases, I am making an actual apples-to-apples comparison of only the crucial cases.

legal entrepreneurship. To identify the Court's prevailing approach, I used Hansford and Spriggs's (2006) measure of precedent vitality. Precedent vitality is essentially a running tally of the Court's treatment of a case over time, providing term-by-term data on how the Court applies its own past decisions. Positive precedent vitality scores indicate the Court currently favors a precedent, while negative precedent vitality scores suggest the Court has distinguished or even overturned the precedent in question. So, returning to the earlier example from *Planned Parenthood v. Casey* (1992), the petitioning attorney suggested *Roe v. Wade* (1973) was applicable and the responding attorney argued the opposite. At the time the Court heard *Casey*, *Roe* had a precedent vitality score of +164. In this case, then, the petitioner would align with the Court's view, while the respondent would be making an entrepreneurial argument.

Attorneys can also be entrepreneurial by bringing up different lines of jurisprudence or by building their case around precedents that the Court has never discussed again. In the first case, these entrepreneurial acts would manifest in attorneys citing older lines of case law, appealing to the justices using arguments that are valid but unused. To identify these instances of entrepreneurship, I again use the precedent vitality data, which also provide information on the Court's most recent use of a past precedent. I consider an attorney to be engaging in legal entrepreneurship if she mentions a case the Court has not used in an opinion in the last ten years. In the second case, I identify instances in which attorneys engage in legal entrepreneurship by centering their arguments around cases so obscure that even the justices have never cited the opinions again. I again use the precedent vitality data to identify these cases.

With the acts identified, I count an attorney as engaging in legal entrepreneurship in a brief if she argued against the Court's approach to a case, brought up an old area of case law, built a case around a never-used precedent, or used some combination of these three tactics. Any attorney who did not use these tactics used a prevailing argument instead. The results of this analysis suggest that attorneys regularly engage in legal entrepreneurship, making

the decision to go for the entrepreneurial argument about 52% of the time. The attorney representing the petitioner does so 51% of the time, while the attorney representing the respondent goes entrepreneurial at the slightly higher rate of 53%.

Additional Variables

Given the justices' well-documented preference for arguments made by experienced attorneys who either work for the government or have significant resources backing their work, I include six different variables in my model to study the relationship between attorney status, the decision to engage in legal entrepreneurship, and the justices' votes. These variables come from Black et al.'s (2016) analysis of merits briefs.

Because experienced attorneys are more likely to win the justices' votes (McGuire 1995; Nelson and Epstein 2019), the first two variables I include are the petitioner and respondent's previous experience at oral argument. To create this variable, Black et al. (2016) take the natural logarithm of each attorney's previous oral argument experience, more specifically, ln(previous experience + 1). Additionally, given the Solicitor General's disproportionately large win rate before the justices (Black and Owens 2012*b*; Wohlfarth 2009), I employ two dichotomous variables to control for his presence in a case as the petitioner or respondent. Finally, I control for each party's status, as parties with more resources have advantages that weaker parties do not (Black and Boyd 2013). Following the procedure originally outlined by Collins (2004, 2007), Black et al. (2016) use the Supreme Court Database's party codes to categorize each party into one of 10 groups, with the weakest parties – poor individuals – coded as 1 and the strongest party – the U.S. government – coded as 10.

I also interact each of these six variables with their respective entrepreneurship variables (e.g., petitioning attorney experience x petitioner decision to engage in legal entrepreneurship) in order to study the relationship between entrepreneurship and resources.

I additionally include 11 different variables in the model to control for factors that are known to influence a justice's decision to side with the petitioner. First, I include a variable

that identifies cases in which the Supreme Court's opinion noted a lower-court dissent, which comes from the Supreme Court Database (Spaeth et al. 2017). This variable is a proxy for case quality, as Black et al. (2016) suggest that the justices' decision to note a dissent in their majority opinion could indicate the petitioner had a particularly strong legal argument. In the same vein, I include a dichotomous indicator of the presence of lower court conflict, as its existence can alter the justices' decision-making process (Perry 1991).[5]

Additionally, because the justices might modify their behavior when dealing with a more salient case (Lax and Cameron 2007), I control for case salience. To do this, I employ Clark, Lax and Rice's (2015) measure of latent case salience. The higher the value, the higher the salience. Following Black et al. (2016), I also control for the ideological congruence between the justices and the direction of the lower court's decision. If the lower court decision was liberal, then the ideological congruence variable takes the value of the justice's Segal-Cover score, and if the lower court decision was conservative, then the ideological congruence variable is 0.

Next, I control for the readability of the petitioner and respondent briefs, as the justices are more likely to side with attorneys who submit readable briefs (Feldman 2016). Black et al. (2016) measure readability using the Coleman-Liau Index, which uses word and sentence length to calculate complexity. The higher the value of the Coleman-Liau Index, the less readable the brief, and the less likely the justices are to side with that party.

As Collins (2008) points out, parties can also gain an advantage through amicus participation in their case, so I include a count of the amicus briefs submitted in support of the petitioner and the respondent. I also control for the Solicitor General's presence as an amicus favoring the petitioner or the respondent. Finally, I also include control variables for the number of questions asked of the petitioner and respondent during oral argument, as the side that receives more questions is more likely to lose (Johnson et al. 2009).

[5]The Supreme Court Database *certReason* variable identifies the reason the Supreme Court gave for reviewing a case. The variable has thirteen categories, five of which deal with conflict in the lower courts (categories 2-6). If the Court listed reasons two through six as their reason for reviewing the case, I coded this variable as 1. Otherwise, it took the value of zero.

Methodology and Empirical Results

To reiterate, I expect to find that the justices are more likely to side with the petitioner when the petitioning attorney engages in legal entrepreneurship. I do not expect the justices to alter their voting behaviors at all in response to a respondent doing the same. Additionally, I expect the justices should be more likely to vote in favor of an inexperienced attorney or an attorney representing a low-status client when that attorney engages in legal entrepreneurship while expecting that experienced attorneys gain no advantage from doing to the same.

Because my dependent variable is dichotomous, I use a logistic regression model for the analysis (Long 1997) and, following Black et al. (2016), I estimate the model using standard errors that are clustered by justice. Due to the non-linear nature of the model, which makes interpretation of the coefficients difficult, I used predicted values to address the results, which I calculate using the observed-value approach (Hanmer and Kalkan 2013). Additionally, for ease of interpretation, I reversed the axis on all graphs involving the respondent so that the graphs show the probability the justice votes with the respondent, rather than the petitioner.

The results of the logistic regression model of the likelihood a justice votes with the petitioner in a case are shown in Table 1. My analysis begins with Figure 1, which addresses the probability that a justice sides with the petitioner based on her decision to use a prevailing or entrepreneurial argument.

Table 1: Logistic Regression Results, Justice Votes in Favor of the Petitioner

	Coefficient (Standard Errors)
Entrepreneurial Petitioner	0.370***
	(0.098)
Entrepreneurial Respondent	0.190*
	(0.096)
Petitioner Experience	0.123***
	(0.028)
Respondent Experience	−0.049
	(0.030)
OSG Petitioner	0.096
	(0.111)
OSG Respondent	−0.155
	(0.106)
Petitioner Status	0.047***
	(0.014)
Respondent Status	−0.030*
	(0.013)
Entrepreneurial Petitioner x Petitioner Experience	−0.102**
	(0.037)
Entrepreneurial Petitioner x Petitioner OSG	0.118
	(0.146)
Entrepreneurial Petitioner x Petitioner Status	−0.033*
	(0.016)
Entrepreneurial Respondent x Respondent Experience	0.014
	(0.040)
Entrepreneurial Respondent x Respondent OSG	−0.206
	(0.145)
Entrepreneurial Respondent x Respondent Status	−0.021
	(0.016)
Dissent Noted in Lower Court	0.131**
	(0.043)
Lower Court Conflict	−0.297***
	(0.041)
Ideological Congruence	−1.392**
	(0.083)
Latent Case Salience	−0.057*
	(0.028)
Petitioner Readability	−0.029*
	(0.013)
Respondent Readability	−0.011
	(0.013)
OSG Amicus for Petitioner	0.757***
	(0.057)
OSG Amicus for Respondent	−0.809***
	(0.065)
Petitioner Amicus Support	0.050***
	(0.008)
Respondent Amicus Support	−0.044***
	(0.008)
Questions for Petitioner	−0.019***
	(0.001)
Questions for Respondent	0.019***
	(0.001)
Constant	1.423***
	(0.340)
Observations	13,387
AIC	16556.2
BIC	16758.76
Log Likelihood	−8251.1

Standard errors clustered by justice
* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Starting with the petitioning attorney's decision to engage in legal entrepreneurship in Figure 1, I find that Supreme Court justices are significantly more likely to side with the petitioner when the petitioner uses an entrepreneurial argument. When the attorney representing the petitioner uses a prevailing argument, there is a 0.57 probability the justice sides with the petitioner. This probability increases slightly but significantly to 0.59 if the petitioner engages in legal entrepreneurship. As I expected, going entrepreneurial can benefit the petitioner.

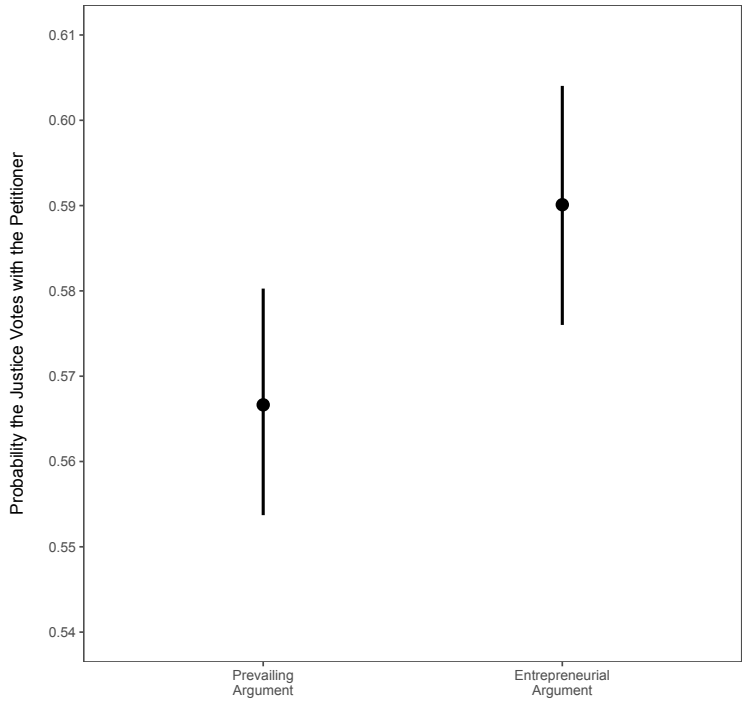

Figure 1: Probability a Supreme Court justice votes with the petitioner based on the decision to use a prevailing (left) or entrepreneurial (right) argument. Vertical lines identify 95% confidence intervals. Predicted probabilities calculated using the observed-value approach.

The respondent does not gain the same benefit. As the results in Figure 2 show, an attorney who uses a prevailing argument to represent the respondent has a 0.43 probability of securing the justice's vote. If that same attorney uses an entrepreneurial argument instead, the probability decreases slightly, to 0.42, but the difference is not statistically significant. Just as I suggested, engaging in legal entrepreneurship neither helps nor hurts the attorney

representing the respondent in a case.

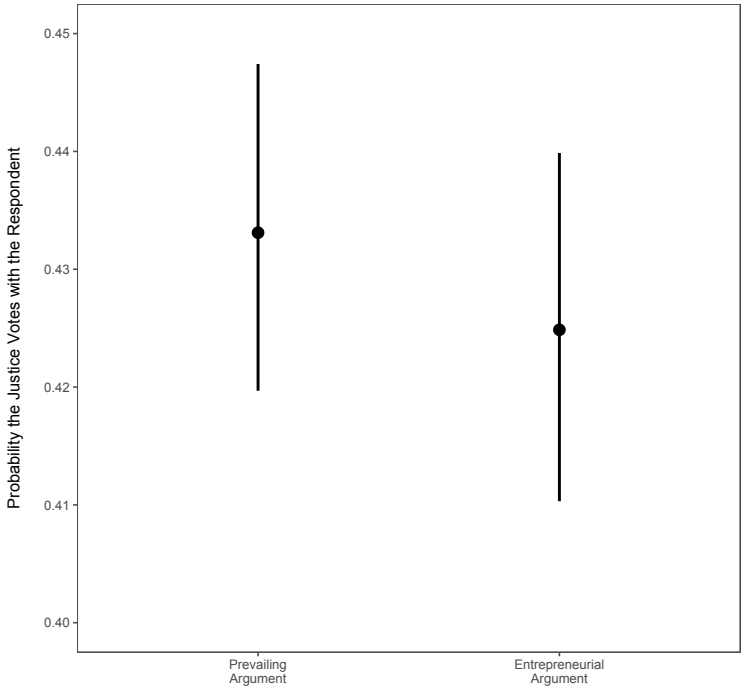

Figure 2: Probability a Supreme Court justice votes with the respondent based on the decision to use a prevailing (left) or entrepreneurial (right) argument. Vertical lines identify 95% confidence intervals. Predicted probabilities calculated using the observed-value approach.

While the baseline figures suggest a petitioning attorney benefits from an entrepreneurial argument and the responding attorney does not, the results suggest an attorney's experience before the Court complicates this relationship. Turning first to the left panel of Figure 3, the results suggest that the justices are more likely to side with an experienced petitioning attorney when the attorney uses a prevailing argument. An inexperienced attorney with no prior Supreme Court appearances has a 0.55 probability of securing a justice's vote when she uses a prevailing argument, while a veteran Supreme Court advocate with 30 past appearances under his belt (natural log value of 3.4) has a 0.63 probability of securing a justice's vote. This significant eight-percentage-point increase suggests that experienced petitioning attorneys hold the advantage before the justices when it comes to constructing a prevailing argument.

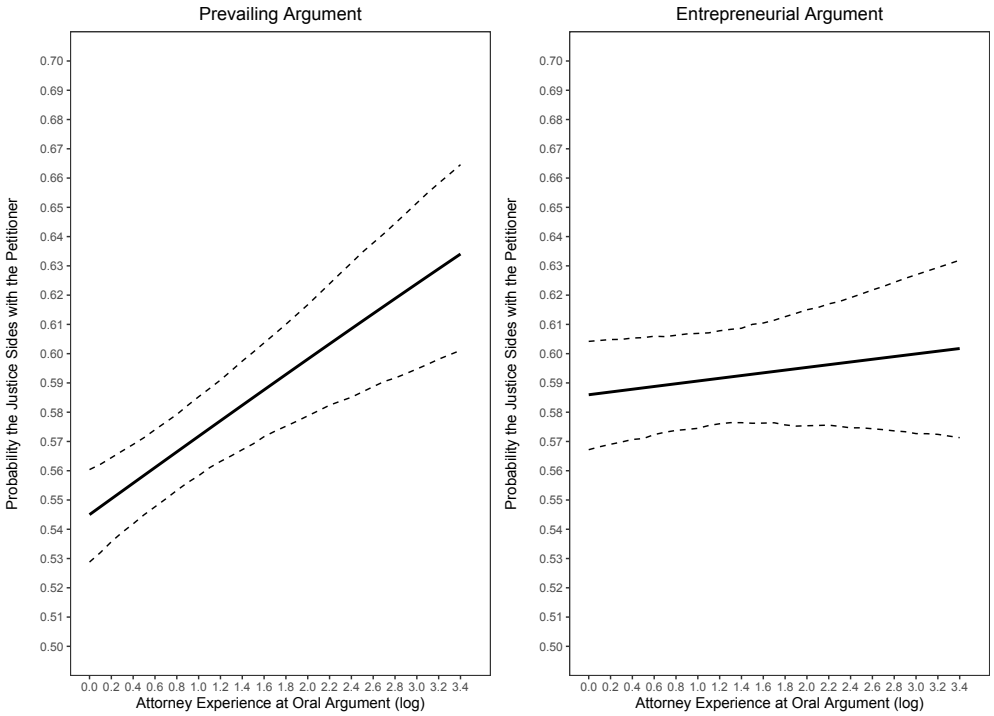

Figure 3: Probability a Supreme Court justice votes with the petitioner based on the decision to use a prevailing (left) or entrepreneurial (right) argument and the attorney's level of experience. Dashed lines are 95% confidence intervals around those estimates. Predicted probabilities calculated using the observed-value approach.

The right panel of Figure 3 shows that, as I expected, an inexperienced attorney who makes an entrepreneurial argument is as likely as an experienced attorney to gain a justice's vote. An attorney representing the petitioner who has no prior experience before the Court has a 0.59 probability of winning a justice's vote after using an entrepreneurial argument, while the experienced attorney has a 0.60 probability of doing the same. This difference is not statistically significant. Importantly, a justice is significantly more likely to side with an inexperienced attorney when she makes an entrepreneurial argument, while an inexperienced attorney gains no significant advantage. In short, while Figure 1 suggests the petitioner might benefit from engaging in legal entrepreneurship, the results in Figure 3 suggest that inexperienced attorneys are the ones who truly benefit from using a radical, innovative argument.

Interestingly, the attorneys representing the respondent do not have an experiential ad-

vantage before the justices, regardless of their decision to use a prevailing or entrepreneurial argument. As the left side of Figure 4 shows, an inexperienced attorney representing the respondent who has never appeared before the Supreme Court has a 0.43 probability of winning a justice's vote when using a prevailing argument, while the experienced attorney in the same situation has a 0.46 probability of winning a justice's vote. The difference is not statistically significant. The right side of Figure 4 tells the same story: an inexperienced attorney representing the respondent who engages in legal entrepreneurship has a 0.42 probability of winning a justice's vote, while an experienced attorney has a 0.44 probability of doing the same. Again, the difference is not statistically significant. Experience offers no advantage when making the responding argument, regardless of whether the attorney makes a prevailing or entrepreneurial argument.

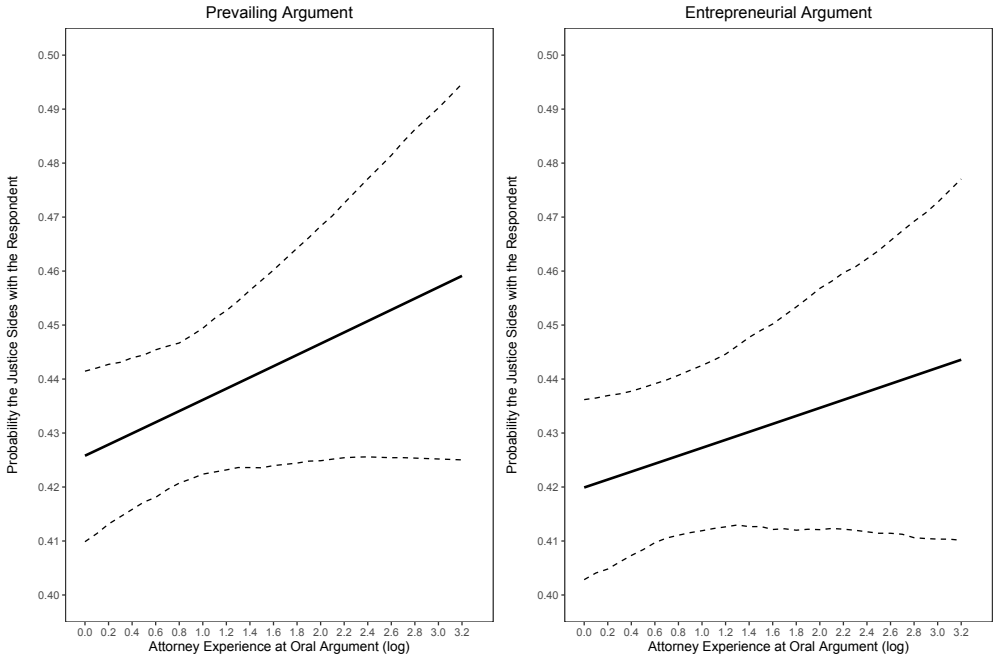

Figure 4: Probability a Supreme Court justice votes with the respondent based on the decision to use a prevailing (left) or entrepreneurial (right) argument and the attorney's level of experience. Dashed lines are 95% confidence intervals around those estimates. Predicted probabilities calculated using the observed-value approach.

Turning next to attorney status, the results suggest that engaging in legal entrepreneurship can help the economically-disadvantaged client as well. The left panel of Figure 5 shows

that the justices are significantly more likely to vote in favor of high-status petitioners like the United States government when their attorneys use a prevailing argument. An attorney representing a low-status petitioner has a 0.52 probability of securing a justice's vote, while an attorney representing a high-status petitioner has a 0.61 probability of doing the same. The right panel of Figure 5 shows that inexperienced attorneys receive major benefits from engaging in legal entrepreneurship; an attorney using an entrepreneurial argument to represent a low-status petitioner has a 0.57 probability of winning a justice's vote, while an attorney doing the same in representation of a high-status petitioner has a 0.60 probability of winning a justice's vote. Again, the difference is not statistically significant. The results also suggest the justices are significantly more likely to vote in favor of a resource-poor litigant who uses an entrepreneurial argument than they are to vote in favor of a similar litigant who uses a prevailing one. The same relationship does not hold for petitioning attorney representing a resource-rich litigant, who is no more or less likely to win by going entrepreneurial.

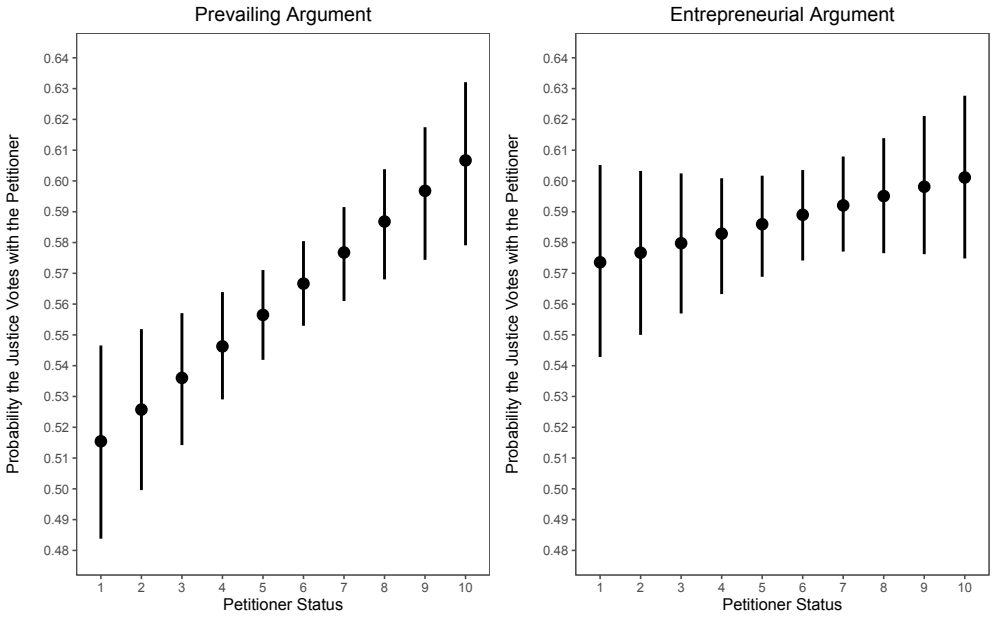

Figure 5: Probability a Supreme Court justice votes with the petitioner based on the decision to use a prevailing (left) or entrepreneurial (right) argument and the petitioner's status. Dashed lines are 95% confidence intervals around those estimates. Predicted probabilities calculated using the observed-value approach.

Attorneys representing a resource-rich respondent maintain their advantage, however. As both panels of Figure 6 shows, the justices are more likely to vote with a well-resourced respondent, regardless of whether the attorney uses a prevailing or entrepreneurial argument. The results also suggest engaging in entrepreneurship never gives the respondent any added advantage – he is as likely to win using a prevailing or entrepreneurial argument. A resource-poor respondent has a 0.40 probability of securing a justice's vote when he uses a prevailing argument. This decreases slightly to 0.37 if he uses an entrepreneurial argument, but the difference is not statistically significant. This holds for resource-rich respondents as well; an attorney using a prevailing argument to represent a wealthy respondent has a 0.46 probability of securing a justice's vote, and that probability increases slightly but not significantly to 0.47 when the attorney uses an entrepreneurial argument. The results continue to show that entrepreneurship is a useful strategy for petitioners but not respondents.

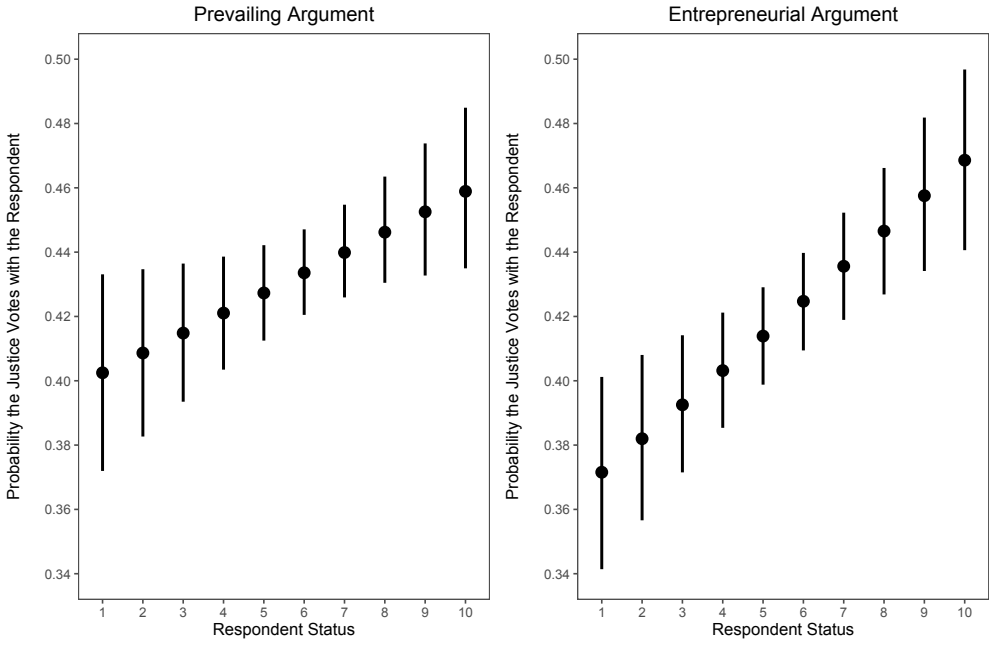

Figure 6: Probability a Supreme Court justice votes with the respondent based on the decision to use a prevailing (left) or entrepreneurial (right) argument and the respondent's status. Dashed lines are 95% confidence intervals around those estimates. Predicted probabilities calculated using the observed-value approach.

Turning away from the key independent variables and toward the controls, the results

suggest that the justices are significantly more likely to side with the petitioner when they notice a lower court dissent in the case and when there is lower court conflict. The justices are also significantly less likely to side with the petitioner when a case is ideologically aligned with them or when the case is salient. Additionally, the readability of the petitioner's brief can significantly influence the outcome in a case, though the readability of the respondent's case cannot.

Notably, while the Solicitor General's presence as a party to the case does not significantly influence the outcome in a case, filing an amicus brief in favor of the petitioner or respondent does. Overall amicus support is also crucial for success for any party, and the more support they have, the more likely they are to receive a justice's vote. Finally, the number of questions the attorneys receive during oral argument are statistically-significant factors in a justice's decision to side with the petitioner.

Discussion

Near the end of the Supreme Court's 2018 term, the *National Law Review* interviewed former Solicitor General Paul Clement about his strategy for asking the justices to overturn precedent (Mauro 2019). Precedent vitality was a hot topic on the Court at the time: a five-justice majority had just overturned a fifty-year-old precedent with its decision in *Franchise Tax Board of California v. Hyatt* (2019), and Justice Stephen Breyer responded with a blistering dissent that accused the majority of devaluing precedent and inviting litigants to freely challenge long-standing decisions (Mauro 2019). Clement, an elite attorney presented more than 90 cases to the justices (Kirkland and Ellis 2019), offered less-experienced attorneys some advice: overturning precedent is a long and slow process in which the justices "chip away at cases in various steps so that the day the case is actually overruled it's really not even news" (Mauro 2019). Trying to overturn a problematic precedent in one fell swoop is probably not a successful strategy before the current Court.

In this paper, I set out to determine whether making entrepreneurial arguments of any

kind is a useful strategy for attorneys. Using a new data processing technique, I developed a method for identifying legal entrepreneurship and used it to see how an attempt to change an area of case law influences the justices' decisions regarding a case. My results suggest that entrepreneurship can be a useful strategy for some attorneys, particularly those who are petitioning the Court despite being inexperienced or representing resource-poor clients. For experienced attorneys, attorneys representing wealthy clients, or attorneys representing the respondent, engaging in legal entrepreneurship offers no added advantage. The results suggest that for most attorneys, using either argument type offers some advantages but nothing like the absolute advantage it offers inexperienced petitioners. Clement suggested that slow innovation might be the right answer, but for new attorneys who are making the first move in a case on behalf of the petitioner, trying to change the world with their first crack might be *exactly* the right strategy.

There are, of course, limitations to this paper's approach. Because of data availability limitations my analysis ends at the 2007 term. I am currently working on collecting data through the 2018 term and plan on updating this data at the end of over term. With this data, I can gain more insight into entrepreneurship's benefits and drawbacks, especially on the Roberts Court, where wealthy litigants and experienced attorneys control much of the docket (Biskupic, Roberts and Shiffman 2014). Adding more data to the analysis is crucial for gaining a complete picture of what strategies are successful at the Supreme Court over a long period of time. Having the data collection tools already developed and in place should make adding data relatively easy.

Additionally, supervised machine learning is not a perfect process. It requires constant monitoring, validation, and correction in order to function properly (Grimmer and Stewart 2013; Schoenherr and Black 2019), and even then, it can still produce errors that human coders would not make. Consider, for example, that an attorney's typo regarding a U.S. Report volume number could cause my program to identify a case as *Californians v. California*, 393 U.S. 1 (1968), rather than *Terry v. Ohio*, 392 U.S. 1 (1966). Continuing

to employ human-assisted coding alongside the automated process is ideal for ensuring the results are valid and close to what human coders could get.

Moving forward, someone could use a more complicated measure of precedent treatment to tease out innovation more fully. I use a collapsed relevant-not relevant-neutral scale (more commonly known as positive-negative-neutral in Shepard's Citations parlance), but LexisNexis classifies treatment using a six-point scale (warning, questions, caution, positive, neutral, cited by). Introducing more complexity into the data collection process and, consequently, the identification of entrepreneurial arguments could produce a different look into innovation than the one presented here.

Another possible avenue for future research would involve an over-time analysis of attorneys' decisions to innovate. Was entrepreneurship more common when during the Warren Court, when the justices broke down standing rules to allow more people access? Or perhaps it was more common during the Burger Court, when the Nixon four offered conservative groups the chance to overturn hated precedents like Miranda? Are attorneys more likely to engage in legal entrepreneurship when the Court gets a new member? These are all questions that can be answered using the approach I outlined here.

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