

ATTORNEYS, MERITS BRIEFS, AND U.S. SUPREME COURT DECISION MAKING

By

Jessica Ann Schoenherr

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ABSTRACT

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Attorneys are key players in the U.S. Supreme Court decision-making process who use their legal arguments to influence the justices' decisions. Tasked with preparing merits briefs that make initial forays into the legal issues in a case, attorneys use that space to limit the range of possible outcomes and direct the justices' focus toward certain (favorable) areas of the law. Yet scholars understand very little about this process because they have struggled to empirically identify and examine legal arguments and their impact on the Court's decisions. In response to this problem, I use a combination of human-assisted coding and machine learning techniques to develop a method of extracting the core components of a legal argument for analysis. Using data collected from the legal arguments in more than three thousand briefs from 1,509 different cases the Court reviewed between the 1984 and 2007 terms, I study attorneys' use of the law, focusing on their decision to frame their arguments using prevailing case law or a wholly new, entrepreneurial argument. I show that attorneys' decisions regarding the framing of their arguments – whether to align their argument with the Court's prevailing approach or to use an entrepreneurial argument to radically change an area of case law – can alter the justices' decisions in a case. I use that same data to show that attorneys are strategic in their deployment of these frames, looking for signs the justices might respond positively to one type over the other if the argument is made well.

To my parents, for teaching me that Schoenherrs never say “can’t”

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Writing a dissertation was the most solitary thing I did in graduate school. While political science continues to move toward collaboration and coauthorship, I still had to complete this one project that will bear only my name, and I am reasonably confident this will be the *only* thing I ever write with that particular distinction. But it is absolutely incorrect to say that I wrote this dissertation alone. It took an army of family, friends, and faculty to get me to the finished product. And now, like in the liner notes to a great album, I get to thank all of those people for everything they did. How great is that?

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Or a cat. Or a fish. Or maybe a frog. I was obviously not very convincing.

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Which brings us to the end, where I say try to thank my committee for all of their help

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TABLE OF CONTENTS

LIST OF TABLES	x
LIST OF FIGURES	xi
CHAPTER 1 INTRODUCTION	1
1.1 Attorneys, the Law, and Legal Entrepreneurship	3
CHAPTER 2 USING TEXT ANALYSIS OF MERITS BRIEFS TO STUDY AT- TORNEYS' ROLE IN THE U.S. SUPREME COURT DECISION- MAKING PROCESS	7
2.1 Briefs and Judicial Behavior	10
2.2 Using Citations to Study Attorney Strategy	12
2.3 Data Collection	14
2.4 Analysis	18
2.5 Conclusion	28
CHAPTER 3 CALL AND RESPONSE: LEGAL ENTREPRENEURSHIP AND ATTORNEY SUCCESS AT THE U.S. SUPREME COURT	31
3.1 Attorneys, Briefs, and the Law	33
3.2 Legal Entrepreneurship and Innovation	36
3.3 Data and Measures	40
3.3.1 Identifying Entrepreneurship	41
3.3.2 Additional Variables	46
3.4 Methodology and Empirical Results	48
3.5 Discussion	57
CHAPTER 4 PUSHING THE BOUNDARIES: DECIDING TO ENGAGE IN LE- GAL ENTREPRENEURSHIP AT THE U.S. SUPREME COURT	60
4.1 Appealing to the Justices in the Merits Brief	63
4.2 Making the Decision to go Entrepreneurial	66
4.3 Data and Methods	69
4.3.1 Dependent Variable: Legal Entrepreneurship	70
4.3.2 Independent Variables: Opportunity, Environment, and Resources	75
4.4 Methodology and Empirical Results	77
4.5 Discussion	85
CHAPTER 5 CONCLUSION	88
APPENDICES	90
APPENDIX A CHAPTER 3 APPENDIX	91
APPENDIX B CHAPTER 4 APPENDIX	95

BIBLIOGRAPHY	97
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LIST OF TABLES

Table 2.1: Summary Statistics for Citation Patterns in Briefs	26
Table 3.1: Logistic Regression Results, Justice Votes in Favor of the Petitioner . . .	49
Table 4.1: Logistic Regression Results, Attorney Decision to Engage in Legal En- trepreneurship	78
Table B.1: Alternative Logistic Regression Results, Attorney Decision to Engage in Legal Entrepreneurship	96

LIST OF FIGURES

Figure 2.1:	Citation Patterns in Supreme Court Merits Briefs Over Time – Open dots indicate the average total number of citations in a merits brief (left) and the average number of cases cited in a brief (right) between the 1984 and 2007 terms. The lines are non-parametric lowess curves of the overall trend.	19
Figure 2.2:	Histogram of Mentions of a Case in a Brief – This histogram shows the number of times a case got mentioned in a brief.	20
Figure 2.3:	Trends in Citation Treatment Over Time – Hatch marks indicate the average number of citations (left) of positively-discussed cases (right) in a brief per term. Xs show the same for negatively-discussed cases, and open dots represent the neutrally-discussed cases. The solid (positive), dashed (negative), and dotted (neutral) lines are non-parametric lowess curves of the overall trend.	21
Figure 2.4:	Trends in Citation Treatment for Petitioners, Respondents, Winners, and Losers Over Time – Hatch marks indicate the average number of positive citations in a brief per term. Xs show the same for negatively-discussed cases, and open dots represent the neutrally-discussed cases. The solid (positive), dashed (negative), and dotted (neutral) lines are non-parametric lowess curves of the overall trend.	22
Figure 2.5:	Heat Map of the 20 Most-Cited Supreme Court Precedents – Each box represents the average number of times attorneys mentioned that precedent in their briefs that term; the darker the color, the higher the average.	23
Figure 2.6:	Heat Map of the 20 Most-Cited First Amendment Precedents – Each box represents the average number of times attorneys mentioned that precedent in their briefs that term; the darker the color, the more they mentioned the case.	28
Figure 3.1:	Probability a Supreme Court Justice Votes with the Petitioner By Argument Type – Left side shows the probability a justice votes with the petitioner when the petitioner uses a prevailing argument, right side shows the probability a justice votes with the petitioner when the petitioner uses an entrepreneurial argument. Vertical lines identify 95% confidence intervals. Predicted probabilities calculated using the observed-value approach.	50

Figure 3.2:	Probability a Supreme Court Justice Votes with the Respondent By Argument Type – Left side shows the probability a justice votes with the respondent when the respondent uses a prevailing argument, right side shows the probability a justice votes with the respondent when the respondent uses an entrepreneurial argument. Vertical lines identify 95% confidence intervals. Predicted probabilities calculated using the observed-value approach.	51
Figure 3.3:	Probability a Supreme Court Justice Votes with the Petitioner Based on Argument Type and Attorney Experience – Probability a Supreme Court justices votes with the petitioner based on attorney experience and the decision to use a prevailing (left) or entrepreneurial (right) argument. Dashed lines are 95% confidence intervals around those estimates. Predicted probabilities calculated using the observed-value approach.	52
Figure 3.4:	Probability a Supreme Court Justice Votes with the Respondent Based on Argument Type and Attorney Experience – Probability a Supreme Court justices votes with the respondent based on attorney experience and the decision to use a prevailing (left) or entrepreneurial (right) argument. Dashed lines are 95% confidence intervals around those estimates. Predicted probabilities calculated using the observed-value approach.	54
Figure 3.5:	Probability a Supreme Court Justice Votes with the Petitioner Based on Argument Type and Attorney Status – Probability a Supreme Court justice votes with the petitioner based an attorney status and the decision to use a prevailing (left) or entrepreneurial (right) argument. Dashed lines are 95% confidence intervals around those estimates. Predicted probabilities calculated using the observed-value approach.	55
Figure 3.6:	Probability a Supreme Court Justice Votes with the Respondent Based on Argument Type and Attorney Status – Probability a Supreme Court justice votes with the respondent based an attorney status and the decision to use a prevailing (left) or entrepreneurial (right) argument. Dashed lines are 95% confidence intervals around those estimates. Predicted probabilities calculated using the observed-value approach.	56

Figure 4.1:	Probability an Attorney Engages in Legal Entrepreneurship as Ideological Congruence Increases – Probability an attorney engages in legal entrepreneurship as the ideological congruence between the lower court’s decision and the Supreme Court median increases. Dashed lines are 95% confidence intervals around those estimates. Predicted probabilities calculated using the observed-value approach.	80
Figure 4.2:	Probability an Attorney Engages in Legal Entrepreneurship by Issue Area – Probability an attorney engages in legal entrepreneurship based on the issue area into which the case falls. Vertical lines are 95% confidence intervals. Predicted probabilities calculated using the observed-value approach.	81
Figure 4.3:	Probability an Attorney Engages in Legal Entrepreneurship When Lower Court Conflict Exists – Probability an attorney engages in legal entrepreneurship when lower court conflict exists (right) or does not (left). Vertical lines identify 95% confidence intervals. Predicted probabilities calculated using the observed-value approach.	82
Figure 4.4:	Probability an Attorney Engages in Legal Entrepreneurship When a Lower Court Judge Dissents – Probability an attorney engages in legal entrepreneurship when the Supreme Court does not note a lower court dissent (left) or writes about a lower court dissent in the eventual opinion (right). Vertical lines identify 95% confidence intervals. Predicted probabilities calculated using the observed-value approach.	83
Figure 4.5:	Probability an Attorney Engages in Legal Entrepreneurship Based on Attorney Experience – Probability an attorney engages in legal entrepreneurship as the attorney’s past experience at oral argument increases. Dashed lines are 95% confidence intervals around those estimates. Predicted probabilities calculated using the observed-value approach.	84
Figure A.1:	Difference in Probability a Justice Sides with the Petitioner Based on Decision to Engage in Legal Entrepreneurship and Attorney Experience – Probability a justice sides with the petitioner, based on petitioner experience, when the petitioner engages in legal entrepreneurship minus the probability a justice sides with the petitioner, based on petitioner experience, when the petitioner uses a prevailing argument. Dashed lines are 95% confidence intervals around those estimates. Predicted probabilities calculated using the observed-value approach.	91

Figure A.2: Difference in Probability a Justice Sides with the Respondent Based on Decision to Engage in Legal Entrepreneurship and Attorney Experience – Probability a justice sides with the respondent, based on respondent experience, when the respondent engages in legal entrepreneurship minus the probability a justice sides with the respondent, based on respondent experience, when the respondent uses a prevailing argument. Dashed lines are 95% confidence intervals around those estimates. Predicted probabilities calculated using the observed-value approach.	92
Figure A.3: Difference in Probability a Justice Sides with the Petitioner Based on Decision to Engage in Legal Entrepreneurship and Litigant Status – Probability a justice sides with the petitioner, based on petitioner status, when the petitioner engages in legal entrepreneurship minus the probability a justice sides with the petitioner, based on petitioner status, when the petitioner uses a prevailing argument. Dashed lines are 95% confidence intervals around those estimates. Predicted probabilities calculated using the observed-value approach.	93
Figure A.4: Difference in Probability a Justice Sides with the Respondent Based on Decision to Engage in Legal Entrepreneurship and Litigant Status – Probability a justice sides with the respondent, based on respondent status, when the respondent engages in legal entrepreneurship minus the probability a justice sides with the respondent, based on respondent status, when the respondent uses a prevailing argument. Dashed lines are 95% confidence intervals around those estimates. Predicted probabilities calculated using the observed-value approach.	94

CHAPTER 1

INTRODUCTION

In the middle of *The Brethren*, Bob Woodward and Scott Armstrong tell a fascinating story about the Supreme Court's decision to overturn the death penalty in *Furman v. Georgia* (1972). They explain that the justices had long struggled to reach an agreement regarding the death penalty and finally decided to face the problem head-on during the 1971 term (Woodward and Armstrong 1979). The justices took four radically different death penalty cases, bundled them together, and agreed to use those cases to resolve the issue once and for all. Seeing the justices' struggle, the attorney tasked with convincing the justices to abolish the death penalty, Anthony Amsterdam, decided to go big with his argument, appealing to the justices using every argument he could reasonably employ. He said the death penalty discriminated against minorities and the poor; that states imposed it in an arbitrary fashion; that states imposed it so infrequently it could not possibly serve a deterrent purpose; and that contemporary society rejected it. This multi-pronged approach got Amsterdam the result he sought. Four of the justices (Marshall, Brennan, Douglas, and White) agreed with some part of his argument, while a fifth (Stewart) refused to cast the deciding vote in favor of the death penalty. For the next five years, no one in the United States was executed. Woodward and Armstrong were quick to point out the legal reasoning behind that decision was anyone's guess.

In a literature that focuses almost exclusively on how Supreme Court justices' ideological preferences and personalities influence their decisions, scholars have long struggled to incorporate a story like this into their models. Scholars can utilize well-established measures of a justice's ideological proclivities to see how they influence decision making (Epstein et al. 2007; Martin and Quinn 2002; Segal and Cover 1989); they can use new measures of personality to see if their personal preferences and quirks played a role in the decision (Black

et al. 2020; Epstein and Knight 2013; Hall 2018); they can even look at how institutional rules and norms, including the law, might have affected the justices' behavior (Bailey and Maltzman 2011; Hansford and Spriggs 2006; Hitt 2019; Maltzman, Spriggs and Wahlbeck 2000). Almost none of this literature considers the possibility that the attorneys – the very people who brought these cases to the Court and argued them before the justices – might influence judicial decision-making with their legal arguments (but see Corley 2008, Hazelton, Hinkle and Spriggs 2019, and Wedeking 2010 for exceptions).

My goal over the next 100 pages is to correct this oversight by showing that attorneys are key players in the Supreme Court decision-making process. In an adversarial legal system like the one that exists in the United States, attorneys are the ones who make the initial foray into a case's legal issues and, in the process, place boundaries around where the justices can legally roam (Epstein, Segal and Johnson 1996, but see McGuire and Palmer 1995). Attorneys make decisions regarding the more technical aspects of a brief that can alter the justices' responses to a party's argument (Black, Hall, Owens and Ringsmuth 2016; Corley 2008; Feldman 2016), and their decisions regarding framing can do the same (Wedeking 2010). Their experience and familiarity with the justices can even aid their ability to appeal to the justices in a winning manner (McGuire 1995; Nelson and Epstein 2019). Attorneys also make legal arguments that influence the justices' understandings of a case, but scholars have struggled to understand how the justices respond to these arguments. The struggle stems from an empirical problem – studying the law is hard (Hansford and Spriggs 2006). I develop a method of examining the legal arguments in briefs and use that method to collect data on the arguments in more than three thousand briefs from 1,509 different cases. I then employ that data to study how attorneys' arguments influence the justices and, consequently, the law.

Across the next three chapters, I address three different questions: (1) How can scholars study the legal arguments in briefs and their potential influence over the justices? (2) Can

attorneys use their legal arguments to influence the justices' approach to a case and the law? and (3) What drives an attorney to use one legal argument over another? I suggest that scholars can study briefs by breaking them down into their constituent parts, namely mentions of the Court's past opinions and attorneys' application of those precedents to the situation at hand, and then design an automated process to collect those arguments. I then use that data to show that attorneys' decisions regarding the framing of their arguments – specifically, whether to use a prevailing legal argument or an entrepreneurial one – can alter the justices' decisions regarding a case. I finally examine attorneys' strategy regarding the employment of those arguments and find that attorneys look for signs that the justices might respond positively to one type over the other. The last few pages contain a brief review and some final thoughts about this project.

1.1 Attorneys, the Law, and Legal Entrepreneurship

When facing the Supreme Court, having a good attorney matters. Experienced attorneys are more likely to win before the justices (McGuire 1993, 1995; Nelson and Epstein 2019) and wealthy clients are all too happy to pay the otherwise-daunting \$2000-an-hour fee if it means they are more likely to win their cases (Biskupic, Roberts and Shiffman 2014; Rubino 2016). The assumption is that experienced attorneys have valuable skills, and anecdotal evidence suggests that one of those skills is knowing how to frame a legal argument in the most appealing manner possible (Garner and Roberts 2010). Good attorneys know how to use the law to persuade the justices toward a preferred outcome (Garner 2003). They do this in the merits brief, a written document in which attorneys make their only complete and coherent appeal to the justices. Yet research on merits briefs focuses almost exclusively on the more technical aspects of a brief, examining word choice and readability and not the law (Black, Hall, Owens and Ringsmuth 2016; Feldman 2016). The work that does examine the full brief focuses on overall language and not the law itself, let alone its persuasive capacity (Black and Owens 2012c; Corley 2008; Feldman 2016; Wedeking 2010). This work is, I

suggest, the legal equivalent of studying scoring in the National Hockey League by looking at the size of the goaltenders' pads – important, yes, but maybe not where all of scholars' analytical focus should go. Scholars need to focus on the legal arguments in the briefs, too.

Scholars have failed to study attorneys' legal contributions to the decision-making process because the law is empirically difficult to analyze in the best situations (Hansford and Spriggs 2006) and even more difficult to examine when studying a document like a legal brief. Empirical political scientists have successfully studied the justices' use of the law in their opinions by breaking a legal argument down into parts, specifically citations to the Court's past precedents and the justices' discussions of those precedents (Black and Spriggs 2013; Clark and Lauderdale 2010). But this work is entirely dependent on pre-existing data from legal research services, namely the citation treatment data from Shepard's Citations (Spriggs and Hansford 2000). LexisNexis provides this service because it has value – attorneys need to know what the Court thinks about a past precedent, and they typically need to identify that information quickly. The same need does not exist for an attorney's discussion of a past precedent in an old brief, so legal research services do not offer the same information about briefs. As a result, scholars have been unable to take advantage of these methodological advances to study attorneys' arguments.

Thankfully, advances in text analysis and machine learning have made it possible to replicate the hand-coded process that LexisNexis utilizes and then apply it to Supreme Court merits briefs. So I do that. After studying the "shepardization" process, I wrote a set of programs in R that can take a brief and break it down into its argument's constituent parts for later analysis. This data offers political scientists their first look at how attorneys treat the Court's past precedents in their briefs and how attorneys construct a legal argument. I walk through this process and the data I collect from it in Chapter 2.

Knowing that it is possible to identify the legal arguments in briefs, the next objective is understanding how attorneys use them to appeal to the justices. When attorneys appear

before the Supreme Court, they do so with a mandate: win the case for their client (Garner 2003). But, by nature of appearing before the Supreme Court, attorneys are attempting to do so by answering legal questions that even lower court judges failed to answer with any level of satisfaction (Perry 1991). Every time an attorney appears before the Supreme Court, then, she is essentially venturing into the legal unknown, trying to make her way through the Court's precedents toward an acceptable answer without knowing exactly what the *right* answer is. I suggest that attorneys use one of two different approaches to structure the process: they can use a prevailing argument and align their brief with the justices' opinions in an area of case law, or they can engage in legal entrepreneurship and use a new and innovative argument to push the law in radical new directions. Both have their benefits and drawbacks, but legal entrepreneurship is an especially risky enterprise when approaching justices who favor simplified decision making processes (Gennaioli and Shleifer 2007; Niblett, Posner and Shleifer 2010) and are notoriously averse to overturning their own rulings (Hansford and Spriggs 2006).

Using the data collection process that I outlined in Chapter 2, I collect data on 3,018 briefs associated with 1,509 cases the Supreme Court heard between the 1984 and 2007 terms and identify attorneys' use of prevailing and entrepreneurial arguments. I find that entrepreneurial arguments are common but offer limited advantages to the attorneys who use them. More specifically, my results suggest that entrepreneurial arguments can help inexperienced and resource-poor petitioners win. They do not offer other attorneys any added advantage for securing the justices' votes, however. At the end of Chapter 3, I conclude that attorneys can use their legal arguments to influence the justices' approach to a case and, consequently, to the law itself.

My last objective is to see when attorneys decide to employ one type of argument over the other – that is, to see if attorneys are strategic in their use of entrepreneurial arguments. Recall that the merits brief provides attorneys with their best opportunity to frame the

justices' perceptions' of a case and color their approach to its resolution (Black, Hall, Owens and Ringsmuth 2016). Attorneys have to decide whether to go with the safe, prevailing argument or to go with the messier entrepreneurial one. How do attorneys make that decision? Research suggests the justices look for signs of acceptance before making legal change, including considering political opportunities, interest group advocacy work, and membership changes (Clark 2019; Epstein and Kobylka 1992), so I suggest that attorneys do the same. I suspect that attorneys consider large-scale political opportunities (new members, political mood), the legal environment surrounding a case (the rigidity of the law in an issue area, signals from the lower court that something in the law is problematic), and the attorneys' own skills and resources before they decide to make an entrepreneurial argument.

Using the same data that I employed in Chapter 3, I find that attorneys are more likely to engage in legal entrepreneurship when the legal environment surrounding their cases suggests they should. The results also suggest that more experienced attorneys are more likely to engage in legal entrepreneurship, as their experience aids their ability to identify opportunities for change. Unlike the justices, attorneys do not pay attention to the political environment surrounding a case, caring less about the politics and more about the case in front of them. In my final chapter, then, I show that attorneys look for certain signals that an entrepreneurial argument might be worth their time.

After three chapters of analysis, my conclusion is that scholarship can, in fact, offer a fuller explanation of why Justices Marshall, Brennan, Douglas, White, and Stewart voted to overturn the death penalty in 1972. Policy preferences can explain part of their decision, as can personality, the Court's internal rules, and their understanding of the law. But, as I hope these pages show, Anthony Amsterdam's decision to appeal to the justices using every argument he could find mattered too, and now scholarship can integrate that explanation as well.

CHAPTER 2

USING TEXT ANALYSIS OF MERITS BRIEFS TO STUDY ATTORNEYS' ROLE IN THE U.S. SUPREME COURT DECISION-MAKING PROCESS

In 1992, the Supreme Court agreed to hear arguments in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a case challenging a restrictive Pennsylvania abortion law. Tasked with presenting the justices with a merits brief in the case, Kathryn Kolbert, Planned Parenthood's lead attorney, had to decide how to use her brief to appeal to the justices (Toobin 2008). She knew the Court did not particularly favor her client's pro-choice stance, as the justices had spent much of the 1980s chipping away at abortion rights and showed no sign of curbing that trend (Mezey 2003). Kolbert needed the Court to reverse its course, so she decided to explicitly remind the justices they had past rulings to uphold. She began her legal argument by asserting, in all capital letters, that "[t]his Court must reaffirm the central holding of *Roe v. Wade* that the right to choose an abortion is a fundamental right protected by the Constitution," and went on to argue the justices could not uphold Pennsylvania's Abortion Control Act without overturning *Roe*'s promise of constitutional protection for women seeking to terminate their pregnancies (Hull and Hoffer 2001). Her brief reminded the justices they were duty-bound to uphold past rulings, and *Roe* could not be the exclusion. Kolbert did not do this on accident – she knew the justices found overturning precedent distasteful and hoped her decision to focus on precedent would turn the Court in her favor (Toobin 2008). She had to do what was best for her client, and this strategic argument was the only way to do that.

When Kathryn Kolbert wrote her brief, she, like every attorney who files a merits brief with the Supreme Court, sought to direct a majority of justices toward her preferred outcome. Attorneys actually have two opportunities to do this at the Supreme Court: first, in written form via the merits brief and then again through the question-and-answer process of oral

argument (Johnson 2004). Because merits briefs come first, and because the justices control the tempo, pace, and content of oral argument (Black, Johnson and Wedeking 2012), merits briefs provide attorneys with their main (and sometimes only) opportunity to frame the justices’ perceptions of a case (Black, Hall, Owens and Ringsmuth 2016). So after working through a case’s background and lower court history in the first few pages, an attorney then proceeds to construct complete and coherent legal argument that guides the justices through the relevant case law and explains how the Court’s past decisions apply to the case at hand. They offer suggestions about how the justices can use the law to reach a desired outcome, essentially supplying valuable legal advice with a persuasive, self-serving spin. Briefs are documents that can and do influence outcomes at the United States Supreme Court.

While briefs are clearly important, scholars have struggled to understand how the *legal arguments* outlined in briefs influence the justices. A well-developed line of research shows that technical factors, like word choice and readability, can influence outcomes at the Court (Black, Hall, Owens and Ringsmuth 2016; Corley 2008; Feldman 2016; Wedeking 2010), but that research almost never extends to the legal argument itself (see Hazelton, Hinkle and Spriggs 2019 for an exception). This oversight exists because studying “the law” in an empirically-rigorous manner remains a challenge for anyone studying the judiciary (Hansford and Spriggs 2006). This paper changes that. I suggest that it is possible to break a brief down into analyzable parts, namely citations of past precedent and attorneys’ discussions of those citations. By looking at briefs in this manner, I can then use a combination of hand-coding and machine learning techniques to collect data on the legal arguments contained in briefs. After walking through the development of this tool, I use it to study the legal arguments in 4,812 briefs from 2,232 cases the Supreme Court reviewed between the 1984 and 2007 terms. My analysis suggests that the legal arguments in briefs are worthy of study and can be used to better understand attorney strategy at the Supreme Court.

In developing this tool and using it study briefs and attorney decision-making, I con-

tribute to the literature in three significant ways. First, I show that merits briefs offer a comprehensive look at how Supreme Court opinions get used in practice. Scholars study the legal arguments in Supreme Court opinions because opinions are supposed to be the definitive legal authority on an issue (Clark and Lauderdale 2010). But Supreme Court opinions can be maddeningly unclear (Black, Owens, Wedeking and Wohlfarth 2016; Hitt 2019; Maltzman, Spriggs and Wahlbeck 2000) and can sometimes create more confusion than they relieve. Briefs, however, offer insight about how attorneys – people who work with the law for a living – understand those opinions. Attorneys discuss the precedents that work and the precedents that do not. They show the justices where opinions are misapplied or need further clarification. Studying the legal content of briefs thus allows scholars to study case law in its most practical, rather than its most idealistic, form.

Second, I incorporate attorneys into the judicial decision-making process as active players, joining scholars like McGuire (1993, 1995), Nelson and Epstein (2019), and Wedeking (2010) who examine attorneys’ contributions to the justices’ opinions. When scholars study Supreme Court decision making, they frequently imply the justices are all-knowing legal oracles who make decisions based on what they already know about the law. Yet the justices themselves have frequently pointed out they are policy generalists who depend on the briefs to guide them through certain issue areas (Garner and Roberts 2010; Garner and Thomas 2010), and research confirms they will use attorneys’ own words in their opinions (Corley 2008; Black and Owens 2012*c*). As Chief Justice Roberts explained “You may be the world’s leading expert in a particular question in patent law, and more power to you; I’m not. And so if you can’t translate that expertise down to my level, you’re not going to reach me, and it’s not going to help you at the end of the day” (Garner and Roberts 2010, 27). The justices admit they need attorneys to set up a case and help them think it through, so the literature should include attorneys as active influencers as well.

Finally, the process I establish for studying briefs can be used on *any* legal document,

from cert petitions to merits briefs to amicus briefs to opinions. By automating the process of extracting and analyzing citation patterns, I provide judicial scholars with a tool they both need and seriously lack. Scholars have long avoided studying legal texts because they are difficult to parse in an empirically-rigorous manner (Hansford and Spriggs 2006). The ability to use tools like Shepard’s Citations made it easier to understand the legal arguments in opinions (Clark and Lauderdale 2010; Spriggs and Hansford 2000), but those tools are not available for studying every legal document. My tools are.

2.1 Briefs and Judicial Behavior

After granting certiorari and agreeing to review a case, the Supreme Court asks attorneys to provide information about their cases through two different mediums: the written merits briefs and oral argument. These two opportunities to discuss a case with the justices serve very different purposes. Merits briefs offer information about the case record and legal arguments surrounding review (Garner and Ginsburg 2010; Johnson 2004), while oral argument is for addressing information in the briefs and asking about the policy implications of parties’ arguments (Black, Johnson and Wedeking 2012; Johnson 2001). Attorneys create a case’s market of ideas with their briefs, and the justices use oral argument to separate the signal from the noise. Both the merits briefs and oral argument help the justices reach decisions in a case (Black et al. 2011; Corley 2008), but they do so in very different ways.

As the written record of each party’s position and argument, Supreme Court merits briefs “make the court’s job easier” (Scalia and Garner 2008, 59) by reducing the legal research each justice must complete before deciding a case. The justices clearly tell the attorneys what to cover in their briefs; according to Supreme Court Rule 24, briefs must include ten different pieces of information, including the questions presented, a list of the parties involved in the case, a statement of the case facts, a recounting of the lower courts’ decisions, a presentation of legal arguments, and the suggested case outcome. The justices expect these documents will be well-written (Garner and Roberts 2010), succinct (C-SPAN

2009; Garner and Ginsburg 2010; Totenberg 2011), and entertaining (Garner and Scalia 2010), and they respond positively to briefs that are readable (Feldman 2016), written in an unemotional and detached manner (Black, Hall, Owens and Ringsmuth 2016), and presented by experienced attorneys (McGuire 1995; Nelson and Epstein 2019). Attorneys must provide this information in a clear, logical, and factual manner and avoid mischaracterizing their cases or lying outright (Garner 2003). Their job is to provide the facts.

Briefs are in no way neutral, unbiased documents, however. They are an attorney's only opportunity to provide the justices with a complete, uninterrupted explanation of the case at hand (Black, Hall, Owens and Ringsmuth 2016), which means attorneys purposefully turn briefs into persuasive documents, providing the justices with one-sided logic and reasoning that bolsters one argument while downplaying the other (Johnson 2004). Because the justices observe the norm of *sua sponte* and restrict their decisions to the issues outlined by the briefs (Black, Hall, Owens and Ringsmuth 2016 and Epstein, Segal and Johnson 1996, but see McGuire and Palmer 1995), attorneys use the brief to set boundaries around the case and limit the scope of the justices' ruling. They walk the justices through complicated areas of unfamiliar case law and put just the right spin on the precedents to ensure the law favors their clients (Garner and Roberts 2010), and they offer the justices policy options that might align with their preferences (and, incidentally, those of the attorney) (Johnson 2001) while giving the justices legal reasoning to legitimize these more policy-oriented pursuits (Hansford and Spriggs 2006). Attorneys provide information to the justices, but they do so in the manner that will best help them secure a win for their clients.

The key to writing a good merits brief is constructing a well-reasoned legal argument because, as noted legal scholar Bryan Garner points out, no amount of technical expertise or great writing can overcome a weak or unconvincing argument (Garner 2003). These arguments have to be solidly based in the law – the United States has a common law system, after all, so the justices expect to see explanations of how their past decisions will lead them

to their current outcomes. The justices expect to see a legal argument that is both carefully constructed and carefully explained (Garner and Stevens 2010; Garner and Thomas 2010), and they will borrow wording from the brief itself for their opinions if this is done well (Black and Owens 2012c; Corley 2008). The heart of the brief is the legal argument, and the justices respond positively to briefs that offer a “good, clear explanation of what the law is” (Garner and Roberts 2010, 5). Attorneys just need to align that explanation with a majority of the justices’ preferences regarding both the law and policy. Their job is to write the kind of argument that appeals to the justices and wins them over.

2.2 Using Citations to Study Attorney Strategy

While researchers and the justices alike acknowledge that the legal arguments contained in briefs are influential, studying them is an empirically-challenging task. As Hansford and Spriggs (2006) point out in their analysis of precedent, the law is “a difficult concept to measure” because it is “a complex and multifaceted phenomenon that includes a wide variety of components” (4-5). It is hard to put data-driven parameters around something as complicated as the law. As a result of this problem, the research on briefs typically takes one of two tracks. In the first, scholars use historical and legal analyses to study a single issue area, like abortion or the death penalty (see, for example, Cushman 1998; Epstein and Kobylka 1992; Gillman 1993; Mezey 2003; Perry 2007). This type of high-depth, low-breadth work is incredibly useful for scholars looking to better understand changes in case law within a small area of the law, but it has limited generalizability to scholars’ comprehensive understanding of how attorneys use briefs to influence the justices. Alternatively, scholars focus on the more technical aspects of a brief, offering data-driven analyses of things like readability and language (Black, Hall, Owens and Ringsmuth 2016; Corley 2008; Feldman 2016; Wedeking 2010). These analyses offer information about how to produce a well-written brief while skirting around the more important issue of writing a well-reasoned brief. Neither of these two approaches offer an answer about how to study the law in an empirically-rigorous

and comprehensive manner.

Thankfully, a well-developed literature on Supreme Court opinion-writing suggests a way forward. By looking at the cases the justices cite in their opinions as well as their discussion of those citations, scholars have successfully managed to study the law. They developed models of the “legal importance” of cases using data on the justices’ discussion of past cases (Fowler et al. 2007); they examined “precedent vitality,” or the rigidity with which precedent gets followed and used (Black and Spriggs 2013; Hansford and Spriggs 2006); and they studied how the justices use existing precedent to reach conclusions in their opinions (Clark and Lauderdale 2010). By looking at citation-level data, scholars found a way to look at legal arguments. Their work requires one assumption: that legal arguments are, most simply, discussions about how the Court’s past decisions apply (or do not apply) to the situation at hand.

To study the legal arguments in opinions, scholars use citation-level opinion data that comes from legal research services like LexisNexis, which owns the Shepard’s Citations tool. For almost 150 years, LexisNexis has kept a running list of the citations used in Supreme Court opinions as well as their “treatment” by the justices in those opinions. The treatment indicates whether the justice who wrote the opinion considered the cited precedent to be applicable to the situation at hand (positive treatment), wholly different and inapplicable to the situation at hand (negative treatment), or just a statement of fact (neutral treatment) (Spriggs and Hansford 2000). Attorneys use this tool to quickly check the status of a precedent before including it in a brief. Scholars use this data to study the law.¹ So, for example, Clark and Lauderdale (2010) use the treatment data to build a case proximity model that

¹Westlaw also offers a shepardization service, which it calls KeyCite. The company has its own approach to classifying citations, including not coding cases as positively treated and providing information about the level of discussion given to a citation. I am ambivalent about which system is objectively better at classifying treatment and I focus on LexisNexis strictly because its coding process is well documented and well tested in political science (Clark and Lauderdale 2010, 2012; Hansford and Spriggs 2006; Spriggs and Hansford 2000).

clusters positively cited cases on one side of a scale and groups negatively cited cases on the other. The end result is a fine-grained examination of where justices place opinions in relation to existing precedent and how their own preferences relate to their final opinions. For the low cost of about \$125 a month, this data is available for the taking, and scholars have benefited greatly from using it.

While the literature on opinions offers a way forward for studying the legal arguments in briefs, obstacles abound. It is easy enough to define the legal argument in a brief as a discussion of how past precedents apply to the situation at hand. In fact, recent work by Hazelton, Hinkle and Spriggs (2019) offers promising evidence that examining citations can produce new information about attorneys’ legal strategies. But no legal research service “shepardizes” the citations attorneys use in their briefs. LexisNexis offers the service because attorneys need to look at opinions quickly and get the information they need; the same need does not exist for reviewing a legal argument in a brief from 1984. In order to get data similar to that which scholars use to study opinions, someone would need to shepardize briefs as well. Advances in text analysis and machine learning make this possible (Schoenherr and Black 2019*b*), so I utilize a combination of human-assisted coding and machine learning techniques to train a computer to collect this much-needed data.

2.3 Data Collection

To generate the citation and treatment data and get a first look at the legal arguments in briefs, I studied LexisNexis’s shepardization process and then developed an automated version of it. I followed a three-step process: (1) identify each mention of a precedent in a brief; (2) develop and use a dictionary of legal sentiment to identify each precedent’s treatment; (3) convert the sentence-by-sentence treatment into a summarized indicator of how the attorney treated each precedent mentioned in the brief. I use this process to collect data on the legal arguments contained in 4,812 merits briefs submitted to the Court in 2,232

cases the Court reviewed between the 1984 and 2007 terms.²

In the first step of the process, I downloaded the texts of the briefs from LexisNexis and Westlaw and then broke those briefs down into their legal arguments, specifically the citations and the attorney’s discussion of those citations. I began by writing a program that utilized R’s *tidyverse* suite to identify the “Argument” section of each brief. This section, which appears after the attorneys walk through the case facts and lower court history, is typically the longest part of the document, and it contains the attorney’s legal analysis. After locating the arguments section of each brief, I then broke that section down into sentences and identified all sentences that clearly cited at least one Supreme Court case.³ My program then separated the citation from the sentence and matched that citation to data in the Supreme Court Database (Spaeth et al. 2017). At the end of this step, I had a list of every readily-identifiable mention of a precedent as well as the sentence from which they came, amounting to 282,815 mentions of 12,172 different Supreme Court precedents.⁴

In the second step, I created my own dictionary of terms associated with positive and

²About 5% of the cases the Court reviewed during this time period are missing from my analysis. This is almost exclusively due to the briefs not being available for download from either LexisNexis or Westlaw. Per conversation with Westlaw’s product management team, these briefs were never converted to a digital format and are simply missing as a result. The other cases are missing because they are original jurisdiction cases and, given their unique nature, I removed them from the analysis.

³I focus on Supreme Court cases and ignore references to state court decisions or lower federal court decisions. Restricting my analysis to Supreme Court cases is crucial, because those are the only precedents that bind the justices’ behavior; the justices do not have to follow the lower federal courts or state courts. I also eliminate references to the federal code (i.e., 18 U.S. Code §1657).

⁴By 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.

negative treatment and used it to identify the treatment of each citation. Dictionary-based text analysis takes human-created dictionaries and uses word counts to “score” documents based on their similarity to the dictionary (Monroe, Colaresi and Quinn 2008; Rice and Zorn 2019). I purposefully decided to use a dictionary-based approach rather than employing one of the more popular black-box models, like a random forest. The dictionary-based approaches do a good job of identifying sentiment as long as the dictionary accurately reflects the words associated with those sentiments (Corley and Wedeking 2014; Grimmer and Stewart 2013). I created this citation-treatment dictionary because no pre-existing sentiment dictionary could accurately reflect the words used in legal documents – the law is, after all, its own specialized language (Rice and Zorn 2019).⁵

To understand how the dictionary works in practice, consider that writers can “positively” cite cases that are similar to the case’s outcome, like Kathryn Kolbert did when she suggested the guarantees outlined in *Roe v. Wade* applied to *Casey*. They can also treat cases “negatively” and suggest a past precedent does not apply or should be overturned, as Kolbert did when discussing *Harris v. McRae* (1980). Or they can discuss cases in a neutral, fact-based manner, as Kolbert did when discussing *Griswold v. Connecticut* (1965). Essentially, attorneys use certain words to indicate treatment – they “apply” a past precedent to the current case, or they encourage the justices to “distance” the current case from a past one. To find these sentiment-specific words and create a dictionary of legal sentiment, I utilized data from three different sources: (1) LexisNexis’s list of shepardization terms and their associated treatments; (2) the shepardization guides provided by Spriggs and Hansford

⁵As a thorough political scientist, I should note that I did attempt to classify sentiment using three different supervised machine learning approaches: naive Bayes, support vector machines, and random forest (Kuhn and Johnson 2016). After wasting two beautiful summer days at my laptop, the results suggested the dictionary did the best job of correctly identifying attorneys’ treatments of citations. Importantly, the dictionary also did the best job of directing mis-categorized treatments toward the neutral category, rather than putting them in the opposite category (e.g., true negative treatments being categorized as positive treatments).

(2000) and Hansford and Spriggs (2006); and (3) information gathered from 57 randomly-selected search and seizure cases and 10 privacy cases that I, along with a team of research assistants, hand coded for treatment. After engaging in an iterative process of creating a dictionary, testing it against additional hand-coded data, correcting it, and beginning the process again, I ended up with a dictionary containing 525 words associated with attorneys' treatment of citations. With the help of the *quanteda* package in R (Benoit et al. 2017), I applied the dictionary to the sentences associated with each citation to identify positive and negative treatment of each citation. Anything not marked as positive or negative got treated as a neutral, fact-based citation.

In the third step, I took the sentence-by-sentence treatment of each citation and created an overall measure of precedent treatment. I shepardized at the sentence level in order to avoid the dictionary identifying a citation as both positive and negative, something that happened repeatedly when conducting this analysis at the paragraph level. As a result, however, I had multiple mentions of the same precedent, which meant that I had to create some sort of summary measure. Consider, for example, that the attorneys representing the petitioners in *Lawrence v. Texas* (2003), which overturned sodomy laws in the United States, mentioned *Planned Parenthood v. Casey* (1992) 21 times in their brief. To create my summary measure, I summed the number of times the case got treated positively and then subtracted from it the summed number of times the case got treated negatively. Cases that maintained a positive number got treated as positive; cases that maintained a negative number got treated as negative. If the summation process resulted in a zero (i.e., the attorney treated the citation positively and negatively, and distributed that treatment equally), I manually checked the citations to determine the correct direction of the treatment. So, continuing with the *Lawrence* example, the attorney who wrote the brief treated *Casey* positively six times and negatively once. Because five minus one is a positive number, the summary measure indicates that *Lawrence* treated *Casey* positively overall. Anything with

no directionality got treated as a neutral citation.⁶ At the end of this step, I had a list of 122,299 unique brief-citation pairings, as well as the attorneys' treatment of those citations.

2.4 Analysis

With the data collected, the question becomes: what can scholars do with it? I have two main goals for my exploration of it: to better understand briefs' *content* and to better understand how briefs *relate* to each other. I aim, in short, to show this data offers valuable insight into how attorneys use the law to appeal to the justices. To do this, I use a combination of lists and descriptive statistics culled from the citation and treatment data I collected. For the most part, I analyze the briefs as a collective block of information, but I do also split the data into issue areas in order to examine how attorneys work within an area of law.⁷

Beginning first with citation trends over time, the left panel of Figure 2.1 shows that attorneys discuss significantly more precedents in their briefs over time. The right panel of Figure 2.1 suggests attorneys are also citing significantly more cases while doing it. An average brief submitted in during the 1984 term mentioned 21 cases 47 times. But an average brief submitted during the 2007 term had 76 mentions of 31 cases. While the data suggest attorneys maintain a constant average of just over two mentions of each case per brief, the citation trend suggests that as the Court establishes more precedents, attorneys simply cite more cases. Attorneys are not necessarily replacing old precedents with new, but rather are adding more cases to the existing list.

⁶I manually checked the direction of any precedent that got mentioned 15 or more times. This amounted to somewhere around 1-2 cases per brief. To be clear, the aggregation method worked for almost every citation. I looked at these high-mention cases to be sure an attorney did not repeatedly praise a case and then end the brief with "The Court should overturn *Roe v. Wade* (1973)." This did happen occasionally.

⁷The Supreme Court Database separates each case into one of 14 distinct issue areas, including civil rights, criminal procedure, and privacy law (Spaeth et al. 2017). I follow their categorization scheme for my own discussion, but should note that none of the cases I examine fell under one issue area, so I ultimately only look at cases covering 13 different areas of the law.

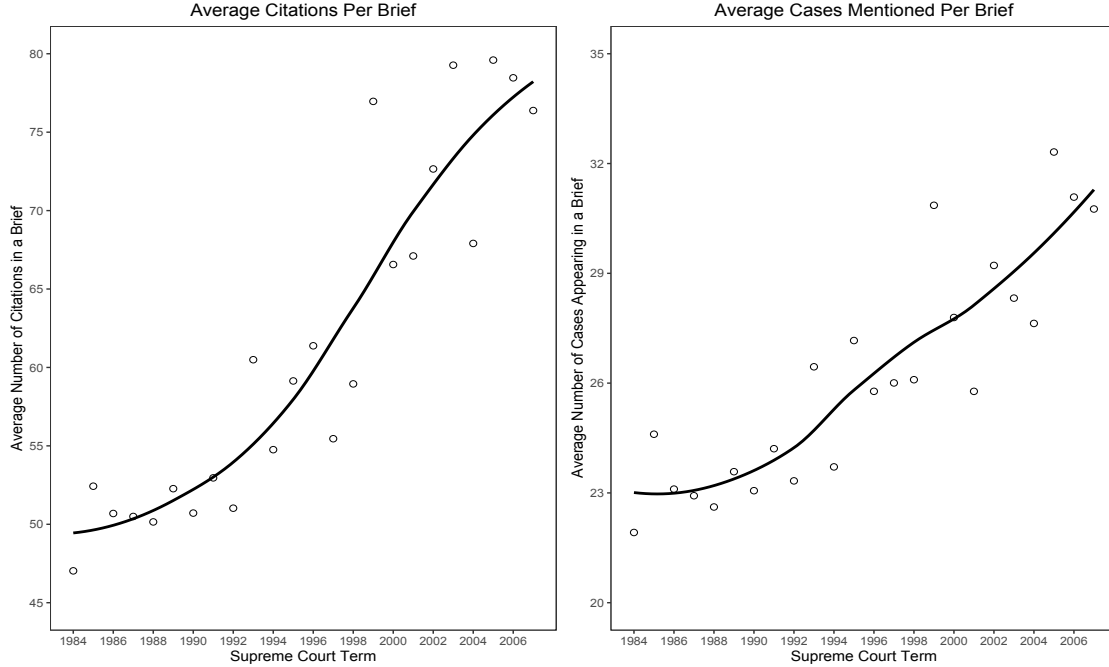


Figure 2.1: **Citation Patterns in Supreme Court Merits Briefs Over Time** – Open dots indicate the average total number of citations in a merits brief (left) and the average number of cases cited in a brief (right) between the 1984 and 2007 terms. The lines are non-parametric lowess curves of the overall trend.

Importantly, however, attorneys’ discussions of cases vary dramatically. Figure 2.2 is a histogram of the number of times attorneys discuss a case in a brief, going from 1 mention to 17 mentions, which covers 99% of the data under study here.⁸ According to Figure 2.2, attorneys typically only mention a case once – they cite it and then move on. There are, however, several cases in each brief that get mentioned repeatedly, and occasionally exhaustively. These, I suggest, are the central precedents, the cases worthy of deep examination and explanation (Garner 2003), and the cases around which the justices focus their analysis (Garner and Stevens 2010; Garner and Thomas 2010). The data make it easy for scholars to identify these cases based on citation patterns and can help them better understand how core arguments influence outcomes at the Court.

⁸There are briefs where attorneys mention the same case more than 100 times, like the United States government did in *Rasul v. Bush* (2004) when it repeatedly brought up *Johnson v. Eisentrager* (1950). I eliminate these outliers from the histogram to better show the distribution of the data and offer a more useful plot.

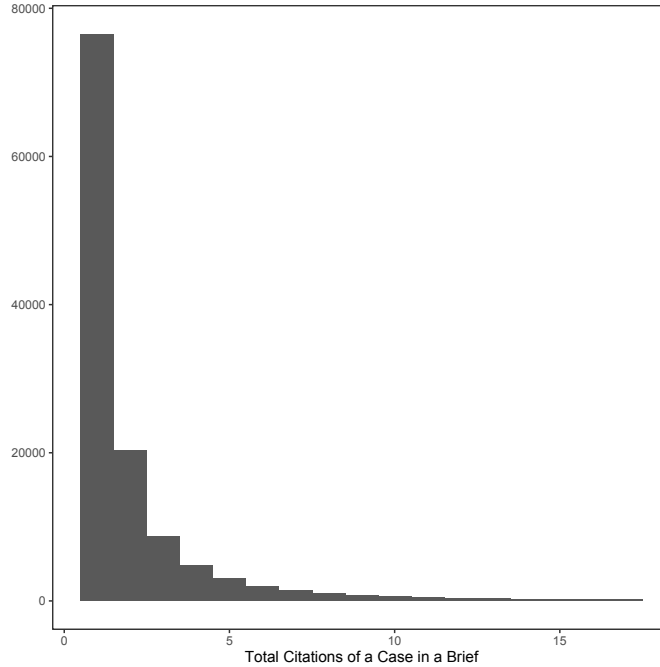


Figure 2.2: **Histogram of Mentions of a Case in a Brief** – This histogram shows the number of times a case got mentioned in a brief.

Turning next to attorneys’ treatment of the citations they utilize, the data in Figure 2.3 suggest attorneys like to focus on the cases that apply and proceed carefully with the cases they believe are inapplicable to the situation at hand. Figure 2.3 also shows that the increase in citations noted in Figure 2.1 stems from the increased use of positive citations. Beginning first with the hatch marks, which represent the average number of positive citations (left) and cases mentioned (right) in a brief, the data suggest attorneys spend most of their brief discussing the past precedents that apply to the situation at hand, and have leaned into that role over time. In the 1984 term, an average brief put a positive spin on 14 cases that got mentioned 34 times. By the 2007 term, that number increased to briefs discussing an average of 20 positively-treated cases 57 times. Negative and neutral citations appear significantly less often and do not exhibit the same growth trend over time. As the Xs on Figure 2.3 show, attorneys’ use of negative citations stayed relatively constant over time, shifting from 7 mentions of 3 inapplicable precedents to 10 mentions of 4. The open dots, which indicate neutral citation patterns, show the same unmoving trend, going from 9 mentions of 6 neutral

cases to 11 mentions of 8 neutral cases.

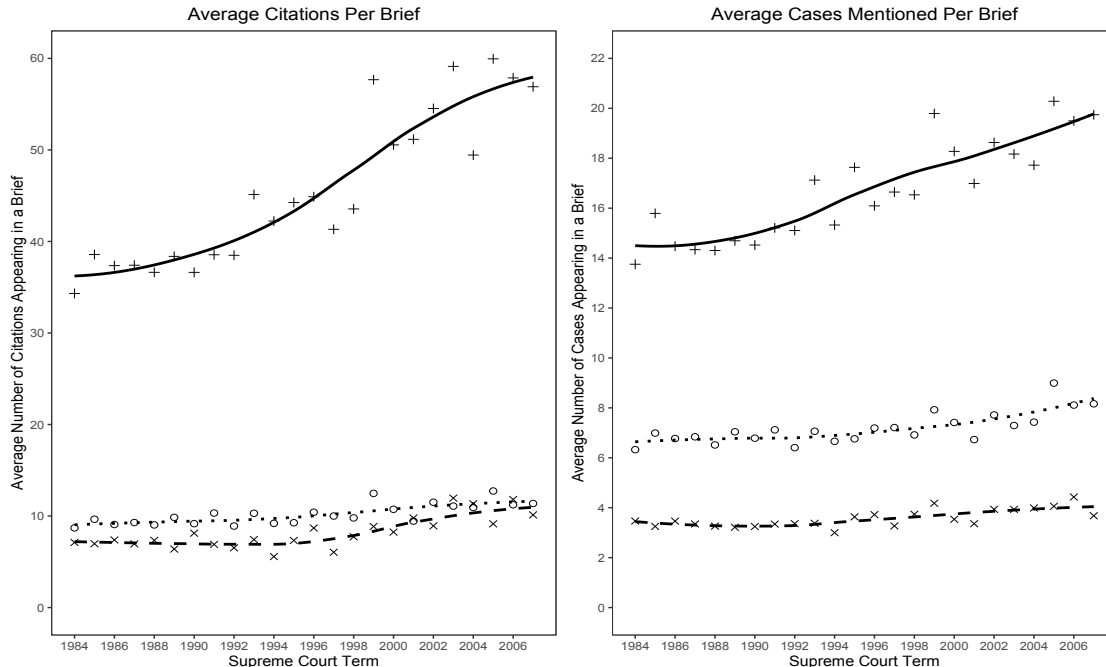


Figure 2.3: **Trends in Citation Treatment Over Time** – Hatch marks indicate the average number of citations (left) of positively-discussed cases (right) in a brief per term. Xs show the same for negatively-discussed cases, and open dots represent the neutrally-discussed cases. The solid (positive), dashed (negative), and dotted (neutral) lines are non-parametric lowess curves of the overall trend.

These trends do not change between briefs. The top two panels of Figure 2.4 show that petitioners and respondents follow the same citation habits, and the bottom two panels show that, on average, the winners and losers of a case do the same. This would seem to suggest that writing a brief is a reasonably formulaic process in terms of basic construction, with attorneys focusing on the cases that help their argument and saving pointed criticism for the ones that do not.

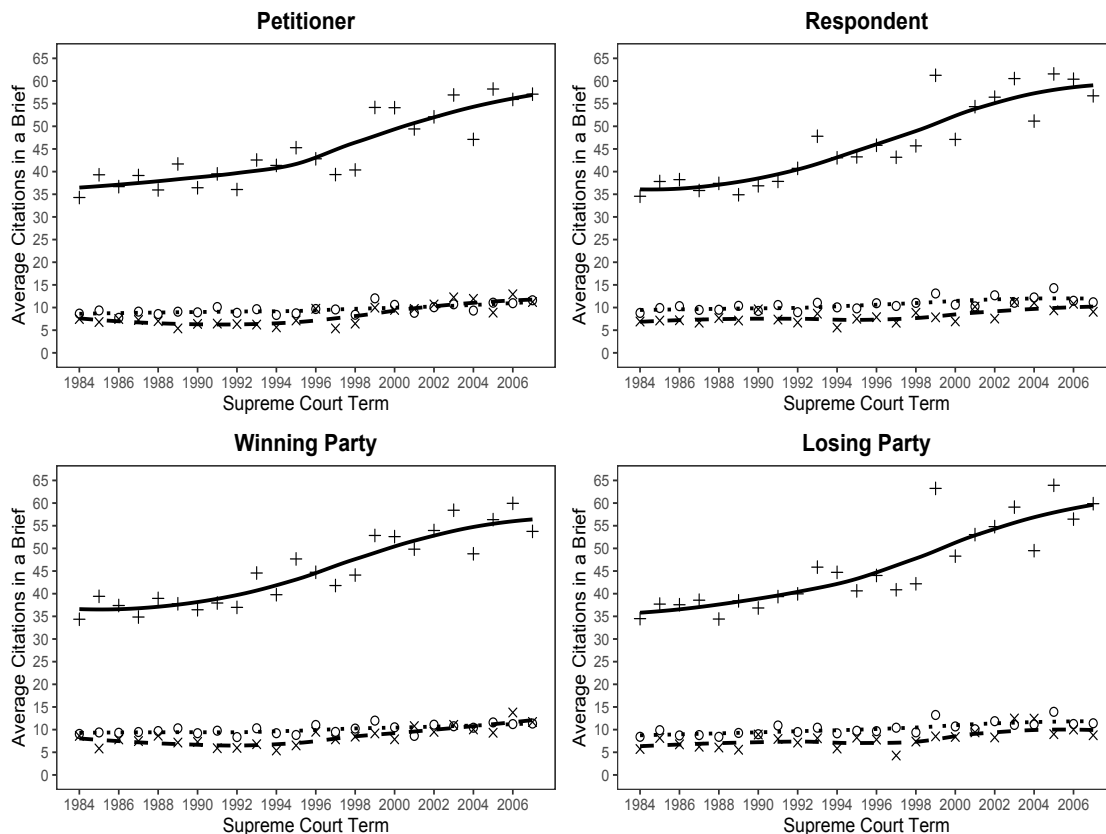


Figure 2.4: **Trends in Citation Treatment for Petitioners, Respondents, Winners, and Losers Over Time** – Hatch marks indicate the average number of positive citations in a brief per term. Xs show the same for negatively-discussed cases, and open dots represent the neutrally-discussed cases. The solid (positive), dashed (negative), and dotted (neutral) lines are non-parametric lowess curves of the overall trend.

While looking at this over-time citation data can help scholars understand how attorneys broadly approach their briefs, examining the same data on a case-by-case basis offers insight into how attorneys use these citations to build their arguments. Figure 2.5 is a heat map of the 20 most-cited cases between the 1984 and 2007 terms. The case names are listed on the y-axis, and the Supreme Court term is listed on the x-axis. Each box represents the average number of times a brief mentioned that precedent in that term, with the darker colors signaling more frequent use of the citation. More simply, the heat map shows how often attorneys treat these heavily-cited cases as a central part of their arguments. So, for example, Figure 2.5 shows that *Miranda v. Arizona* (1966) was a well-utilized precedent through much of the 1980s and early 1990s. Attorneys mentioned it 25 times in their briefs

in the 1984 term, and 20 times in each brief in the 1993 term. The heavy citation indicates attorneys who brought up *Miranda* were actually building their arguments around it. Over time, however, *Miranda*'s popularity tailed, and by the 2007 term, attorneys were giving it a single, obligatory mention in their briefs before focusing on other precedents. The data in Figure 2.5 also shows that precedent like *Chevron U.S.A., Inc. v. National Resource Defense Council* (1984) is frequently utilized in briefs but rarely the central precedent around which attorneys build their arguments.

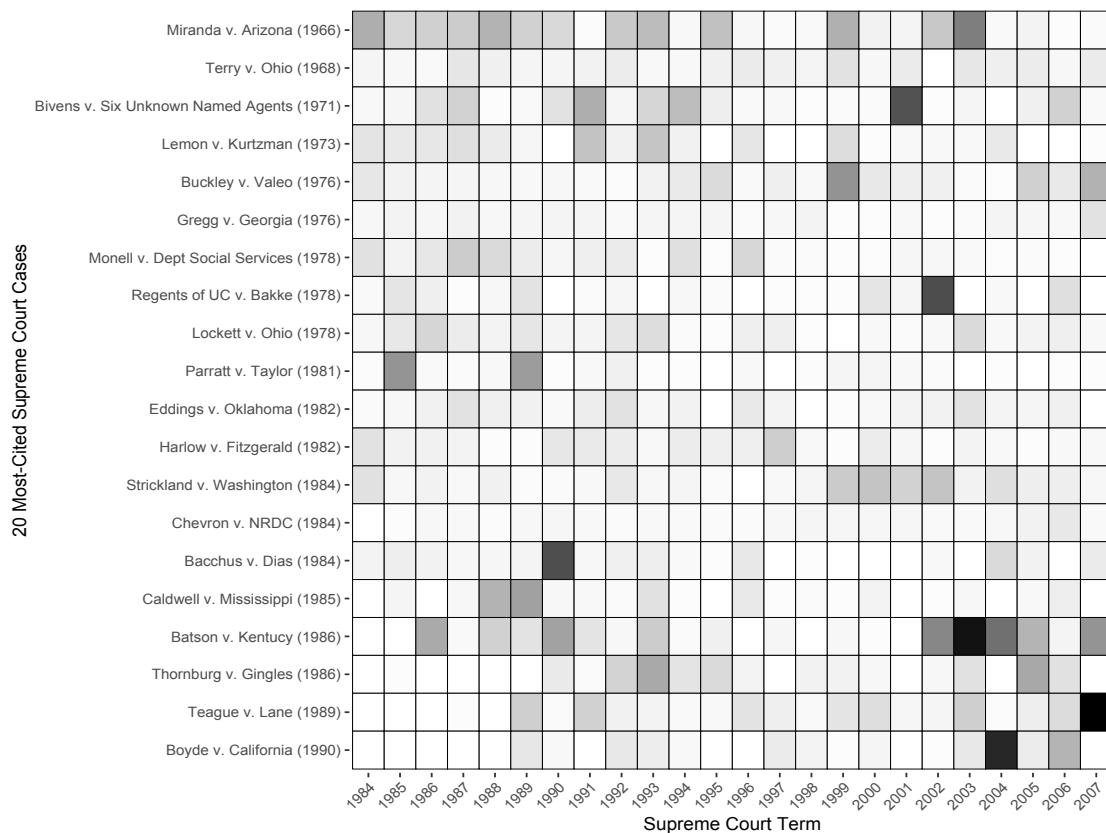


Figure 2.5: **Heat Map of the 20 Most-Cited Supreme Court Precedents** – Each box represents the average number of times attorneys mentioned that precedent in their briefs that term; the darker the color, the higher the average.

Additionally, scholars can also use this data to identify new issues that are making their way to the Court. Consider, for example, the citation trend of *Regents of the University of California v. Bakke* (1978), which upheld affirmative action programs in higher education.

As Figure 2.5 shows, attorneys used *Bakke* with some frequency in the mid-1980s, mentioning it about five times a brief, but attorneys eventually stopped citing it, at least in part because the Court was not reviewing affirmative action programs. But *Bakke* made a reappearance in the 2000 term, around the time interest groups began putting affirmative action in college admissions back on the lower courts' dockets (Perry 2007). By the time the Court heard oral arguments in the two University of Michigan affirmative action cases during the 2003 term, *Bakke* was again a central precedent in the briefs that used it. The data reflect these changes.

Finally, Figure 2.5 also shows how quickly attorneys might begin using the justices' new decisions in their briefs. While the Court settled many of these cases in the 1970s and early 1980s, 8 of the 20 most-cited cases under study here were decided during or after the 1984 term. The data in Figure 2.5 suggests that, with the understandable exception of *Thornburg v. Gingles* (1986), a redistricting case that would not become important until after the 1990 census, attorneys begin citing the Court's recent opinions within a term of the original decision. *Batson v. Kentucky*, the Court's 1986 decision that attorneys could not use peremptory challenges to strike jurors based on their race, was particularly well-cited during the 1986 term.⁹ Attorneys begin using the Court's decisions as soon as they relevantly can, and they begin building their cases around the new precedents as well.

While Court-wide trends are important, the data can also offer an interesting look at area-specific trends as well. Table 2.1 shows summary statistics for each of the thirteen issue areas under study here. More than 70% of the cases come from four issue areas: criminal procedure, economic activity, civil rights, and judicial power. These types of cases dominate the Court's docket, giving attorneys more opportunities to appeal to the justices in those

⁹This is not at typo, a fundamental misunderstanding of how time works, or some sort of Hermione Granger Time Turner Escapade. Supreme Court terms run from October to June and are identified by the year in which they start, e.g., the 1986 term began in October 1986. The Court decided *Batson* during the 1985 term but released the opinion in April of 1986, and attorneys began citing *Batson* in October 1986.

areas. There are three things worth noting in this table. First, note that the most-cited cases in Table 2.1 are not always the most-mentioned cases; in privacy cases, for example, the most-cited precedent is *Planned Parenthood v. Casey* (1992), but the citation that appears in most briefs is *Roe v. Wade* (1973). Second, it is worth mentioning that while attorneys are most likely to treat *Miranda v. Arizona* (1966) as a centralized precedent, they are more likely to at least offer an obligatory mention of *Chevron U.S.A., Inc. v. National Resource Defense Council* (1984). Finally, many of these cases are older precedents. This is not unexpected – as Hansford and Spriggs (2006) point out, new cases have simply had less time to make their appearances.

Table 2.1: Summary Statistics for Citation Patterns in Briefs

Issue Area	Cases	Briefs	Most Mentioned Precedent	Precedent with Most Appearances
Criminal Procedure	563	1,137	<i>Miranda v. Arizona</i> (1966)	<i>Miranda v. Arizona</i> (1966)
Civil Rights	342	745	<i>Miranda v. Arizona</i> (1966)	<i>Chevron U.S.A., Inc. v. N.R.D.C.</i> (1984)
First Amendment	168	385	<i>Buckley v. Valeo</i> (1976)	<i>Buckley v. Valeo</i> (1976)
Due Process	99	215	<i>Loretto v. Teleprompter Manhattan</i> (1982)	<i>Penn Central Transportation Co. v. N.Y.C</i> (1978)
Privacy	43	97	<i>Planned Parenthood v. Casey</i> (1992)	<i>Roe v. Wade</i> (1973)
Attorneys	41	83	<i>Hensley v. Eckerhart</i> (1983)	<i>Hensley v. Eckerhart</i> (1983)
Unions	61	140	<i>Abood v. Detroit Board of Education</i> (1977)	<i>Chevron U.S.A., Inc. v. N.R.D.C.</i> (1984)
Economic Activity	402	892	<i>Bivens v. Six Unknown Fed. Agents</i> (1971)	<i>Chevron U.S.A., Inc. v. N.R.D.C.</i> (1984)
Judicial Power	309	669	<i>Batson v. Kentucky</i> (1986)	<i>Chevron U.S.A., Inc. v. N.R.D.C.</i> (1984)
Federalism	132	295	<i>Cipollone v. Liggett Group, Inc.</i> (1992)	<i>Hines v. Davidowitz</i> (1941)
Interstate Relations	2	4	<i>Nevada v. Hall</i> (1979)	<i>Pacific Ins. Co. v Industrial Acc. Comm.</i> (1939)
Federal Taxation	61	124	<i>National Carbide Corp.v. Commissioner</i> (1949)	<i>National Muffler Dealers Assn. v. U.S.</i> (1979)
Miscellaneous Cases	9	26	<i>I.N.S. v. Chadha</i> (1983)	<i>I.N.S. v. Chadha</i> (1983)
Overall	2,232	4,812	<i>Miranda v. Arizona</i> (1966)	<i>Chevron U.S.A., Inc. v. N.R.D.C.</i> (1984)

Finally, Figure 2.6 shows a heat map of the 20 most-cited First Amendment cases. Some of the Court's most-cited cases from Figure 2.5 make an appearance here as well, including *Lemon v. Kurtzman* (1973) and *Buckley v. Valeo* (1976). Given the low number of First Amendment cases the Court reviews, the high citation rates of these cases suggest their relevance might transcend their issue area. But for the most part, the cases that appear in Figure 2.6 are the cases one would expect to see cited in a First Amendment case, including *Tinker v. Des Moines* (1969) and *Lynch v. Donnelly* (1984). This issue-area specific data also makes it easier to identify cases that are typically cited together, like *Buckley* and *McConnell v. F.C.C.* (2003), while also making it easy to identify when one precedent replaces another, like when attorneys stopped using *Sherbert v. Verner* (1963) after the Court replaced it with *Employment Division of Oregon v. Smith* in 1990. This particular data makes it easier to understand the logistics of First Amendment briefs and perhaps identify how one should look.

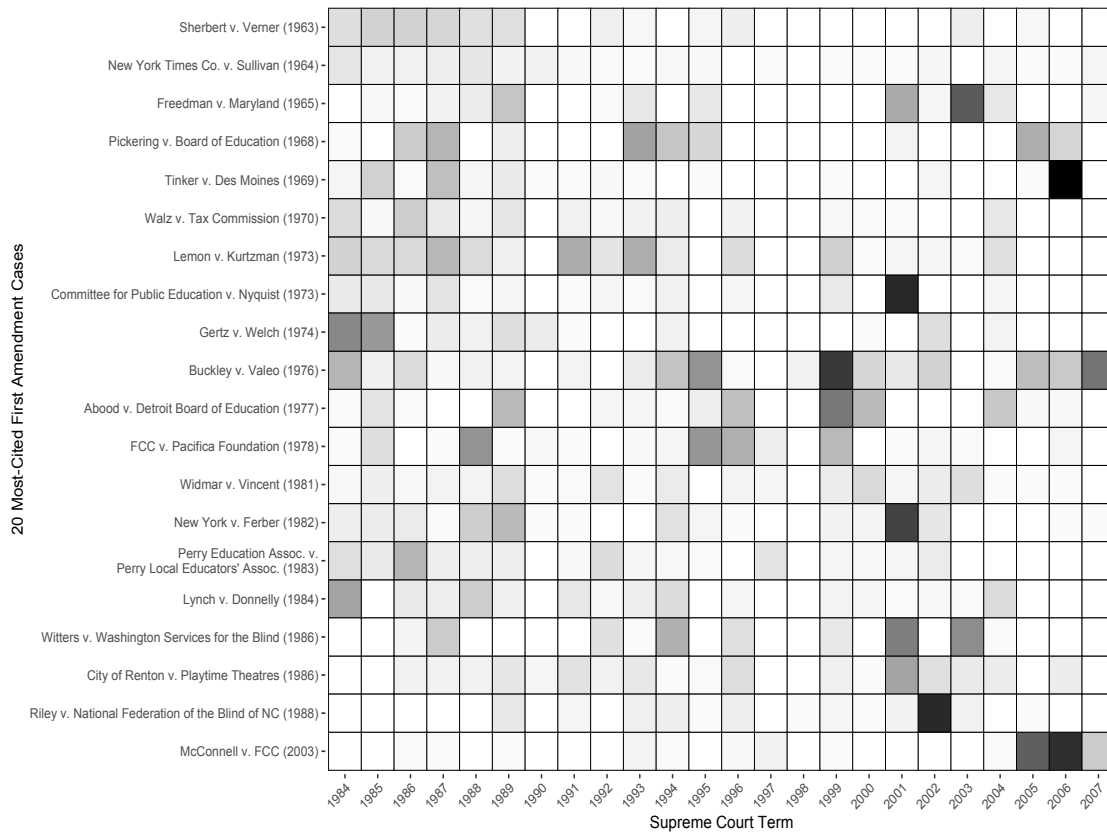


Figure 2.6: **Heat Map of the 20 Most-Cited First Amendment Precedents** – Each box represents the average number of times attorneys mentioned that precedent in their briefs that term; the darker the color, the more they mentioned the case.

These figures collectively show that the legal arguments in Supreme Court merits briefs offer valuable insights into attorney strategy and influence. Having this kind of data opens up the study of briefs specifically and the law more broadly. While I simply use descriptive data here, scholars could use this data for more empirically-rigorous pursuits, including a study of how attorneys use precedent to sway the justices.

2.5 Conclusion

When Kathryn Kolbert argued in her merits brief in *Planned Parenthood v. Casey* that upholding the Pennsylvania Abortion Control Act would overturn *Roe v. Wade*, she ran the risk of angering the justices. As journalists have documented, the justices purposefully tried to move her argument away from *Roe*, and Kolbert's refusal to do so frustrated the justices

during oral argument (Toobin 2008). Indeed, the justices nearly decided that *Casey* was the proper vehicle for overturning *Roe* and allowing states ban abortions completely (Toobin 2008). But Kolbert was savvy, and her decision to frame *Casey* as a referendum on *Roe* paid off. Three justices – O’Connor, Souter, and Kennedy – were uncomfortable with the idea of overturning such a long-lasting and controversial precedent, so they formed the now-famous “troika” that saved the “essence” of *Roe*. In writing the argument the way she did, Kolbert managed to persuade the justices toward her side; her brief influenced their approach toward the case.

Engaging with Supreme Court justices and trying to persuade them toward a side is a delicate task. Attorneys balance legal arguments with ideological appeals, carefully weighing everything from their phrasing to their off-the-cuff responses in oral argument, all in the name of trying to win. In this paper, I suggest that merits briefs are important and understudied legal documents that can influence the justices’ decision-making processes. I then introduce a new approach for empirically examining the legal arguments in briefs. Following work by Hansford and Spriggs (2006) and Clark and Lauderdale (2010), I apply machine learning techniques to a large corpus of data to extract information about the content of merits briefs and their relationships to each other. I then walk through the data to show its value and offer potential avenues for later analysis. Studying briefs is possible as long as scholars use the right tools.

As with any text analysis project, there are limitations to what the data can accomplish. For one thing, text analysis requires clean data, something that is not always readily available. Given the time period under examination here, digitization mistakes were not unexpected – taking documents originally created on typewriters or early word processors and turning them into searchable text files is a messy process (Lane and Schoenherr 2019), even when done by professionals like LexisNexis or Westlaw. The text files are occasionally missing words or they repeat sections, though they seem to do so in a mostly random

manner.

Additionally, attorneys sometimes make mistakes, and I am helpless against their errors. 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). People who are reading the briefs line by line will catch these mistakes – in fact, Justice Blackmun would correct them in his copies of briefs, occasionally adding a less-than-polite comment about the attorney who made them. I sadly do not have Justice Blackmun correcting the briefs here. If an attorney put down the wrong information, that case will simply be miscoded in my data. Both issues are things that constant supervision and validation of the data can help eliminate (Grimmer and Stewart 2013) and I have worked hard to keep these issues at bay.

Moving forward, my first goal is to apply this tool to merits briefs up to the 2018 term, and to continue updating this data moving forward. When the data is completely collected, cleaned, and ready to merge with the Supreme Court Database, researchers can use it (and the method to get it) to provide fresh perspectives on existing and important debates. Consider, for example, that scholars could update Johnson's (2004) analysis of the information overlap between briefs and oral argument. They could see if Johnson's contention that the justices use oral argument to reconcile information biases is still true today.

Additionally, I ultimately would like to follow Clark and Lauderdale (2010) and use the citation patterns to place the briefs into ideological space. Early attempts suggest this task is more difficult with briefs, as attorneys will never mention a brief again and it is therefore difficult to reliably identify briefs' ideological positions over time. I will continue to push forward on this front, however, in hopes to eventually be able to see how the briefs ideologically compare to the eventual Supreme Court opinions.

CHAPTER 3

CALL AND RESPONSE: LEGAL ENTREPRENEURSHIP AND ATTORNEY SUCCESS AT THE U.S. SUPREME COURT

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 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 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.

3.1 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 (Johnson 2004; Garner and Roberts 2010; Garner and Thomas 2010). 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 Ginsburg 2010; Garner and Kennedy 2010; Garner and Roberts 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, Hall, Owens and Ringsmuth 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 and Owens 2012*c*; Black, Hall, Owens and Ringsmuth 2016; 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.

3.2 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 precedent 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. This is how attorneys credibly build an argument.

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 different 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 chance of securing 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 are easy to consume and they consequently make the justices' jobs easier. 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.

3.3 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, Hall, Owens and Ringsmuth'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)

¹An 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 four different reasons: (1) the briefs were not available in LexisNexis or Westlaw; (2) the cases had more than one brief for each party; (3) other datasets did not have observations for these cases; or (4) the case was an original jurisdiction case. 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 15% 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. About 10% of cases are missing because they were missing from the datasets I used for control variables. The remaining cases were original jurisdiction cases, or cases in which the Supreme Court acts as the trial court. Given the unique nature of these cases, I removed them from the analysis.

the petitioner.

3.3.1 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*b*). 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. 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 each 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-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

²Because 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).

³By 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.

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 suggests most of these cases receive a single, obligatory mention and only a few central precedents

receive repeated attention. According to the justices, their attention goes straight to those central precedents (Garner and Stevens 2010; Garner and Thomas 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 prevailing approach (and, by implication, replacing it with something else); (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 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

⁴Looking 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.

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 prevailing 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%.

3.3.2 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, Hall, Owens and Ringsmuth'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, Hall, Owens and Ringsmuth (2016) take the natural logarithm of each attorney's previous oral argument experience, more specifically, $\ln(\text{previous experience} + 1)$. Additionally, given the Solicitor General's disproportionately large win rate before the justices (Black and Owens 2012c; 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 less-wealthy parties do not (Black and Boyd 2013). Following the procedure originally outlined by Collins (2004, 2007), Black, Hall, Owens and Ringsmuth (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 conditional 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, Hall, Owens and Ringsmuth (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, Hall, Owens and Ringsmuth (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, Hall, Owens and Ringsmuth (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 par-

⁵The 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.

icipation 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).

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

Because my dependent variable is dichotomous, I use a logistic regression model for the analysis (Long 1997) and, following Black, Hall, Owens and Ringsmuth (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 3.1. My analysis begins with Figure 3.1, which addresses the probability that a justice sides with the petitioner based on her decision to use a prevailing or entrepreneurial argument.

Table 3.1: 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
<i>AIC</i>	16556.2
<i>BIC</i>	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 3.1, I find that Supreme Court justices are significantly more likely to side with the petitioner when the petitioning attorney 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.

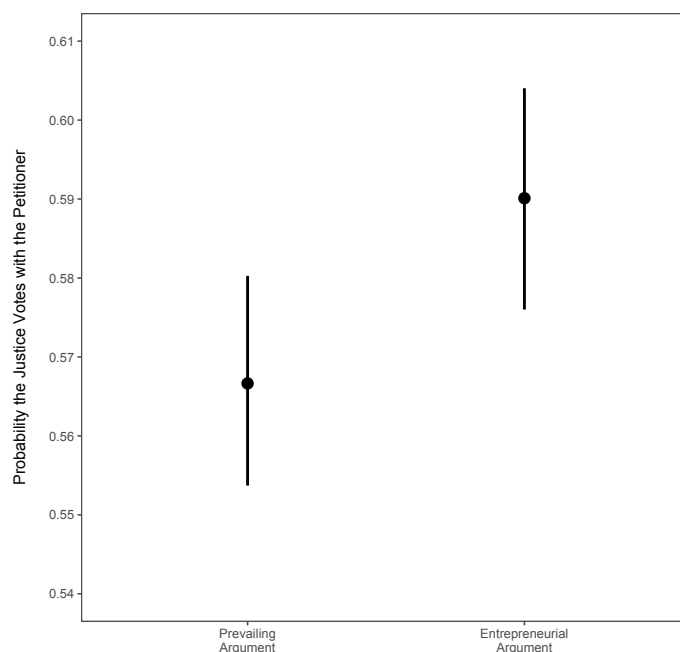


Figure 3.1: **Probability a Supreme Court Justice Votes with the Petitioner By Argument Type** – Left side shows the probability a justice votes with the petitioner when the petitioner uses a prevailing argument, right side shows the probability a justice votes with the petitioner when the petitioner uses an entrepreneurial 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 3.2 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.

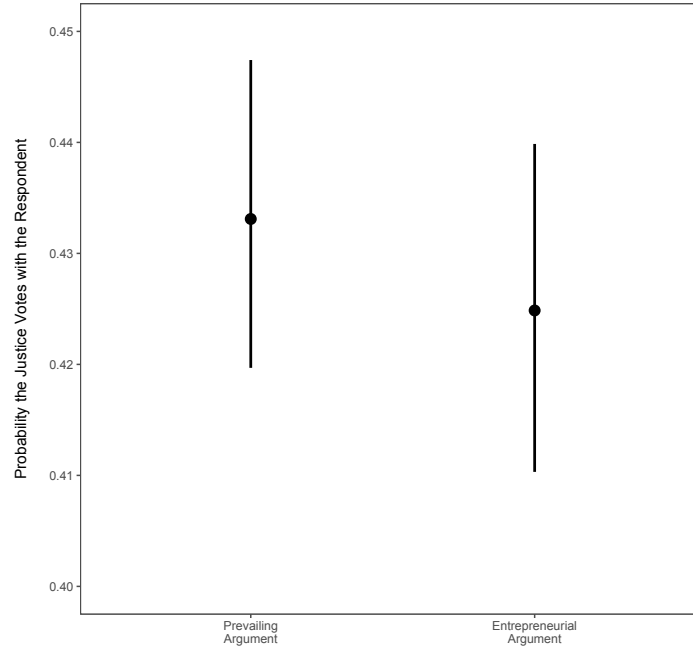


Figure 3.2: **Probability a Supreme Court Justice Votes with the Respondent By Argument Type** – Left side shows the probability a justice votes with the respondent when the respondent uses a prevailing argument, right side shows the probability a justice votes with the respondent when the respondent uses an entrepreneurial 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 3.3, the results suggest that a justice is more likely to side with an experienced petitioning attorney when that attorney uses a prevailing argument. An inexperienced attorney with no prior Supreme Court experience has a 0.55 probability of securing a justice’s vote when she uses a prevailing argument, while a veteran Supreme Court advocate with 29 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 have an advantage before the justices when using a prevailing argument.

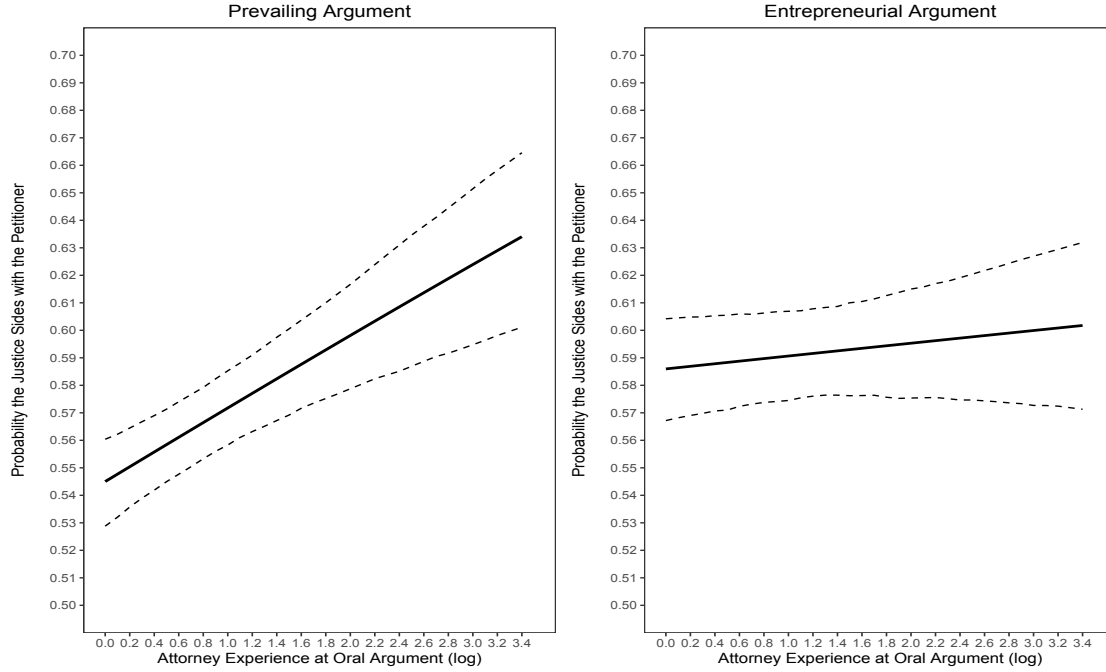


Figure 3.3: **Probability a Supreme Court Justice Votes with the Petitioner Based on Argument Type and Attorney Experience** – Probability a Supreme Court justices votes with the petitioner based on attorney experience and the decision to use a prevailing (left) or entrepreneurial (right) argument. Dashed lines are 95% confidence intervals around those estimates. Predicted probabilities calculated using the observed-value approach.

The right panel of Figure 3.3 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.⁶ In short, while Figure 3.1 suggests the petitioner might benefit from engaging in legal entrepreneurship, the results in Figure 3.3 suggest that inexperienced attorneys are the ones who truly benefit from using a radical, innovative argument.

⁶See Figure A.1 in the appendix.

Interestingly, the attorneys representing the respondent do not have an experiential advantage before the justices, regardless of their decision to use a prevailing or entrepreneurial argument. As the left side of Figure 3.4 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 3.4 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.⁷ Experience offers no advantage when making the responding argument, regardless of whether the attorney makes a prevailing or entrepreneurial argument.

⁷See Figure A.2 in the appendix.

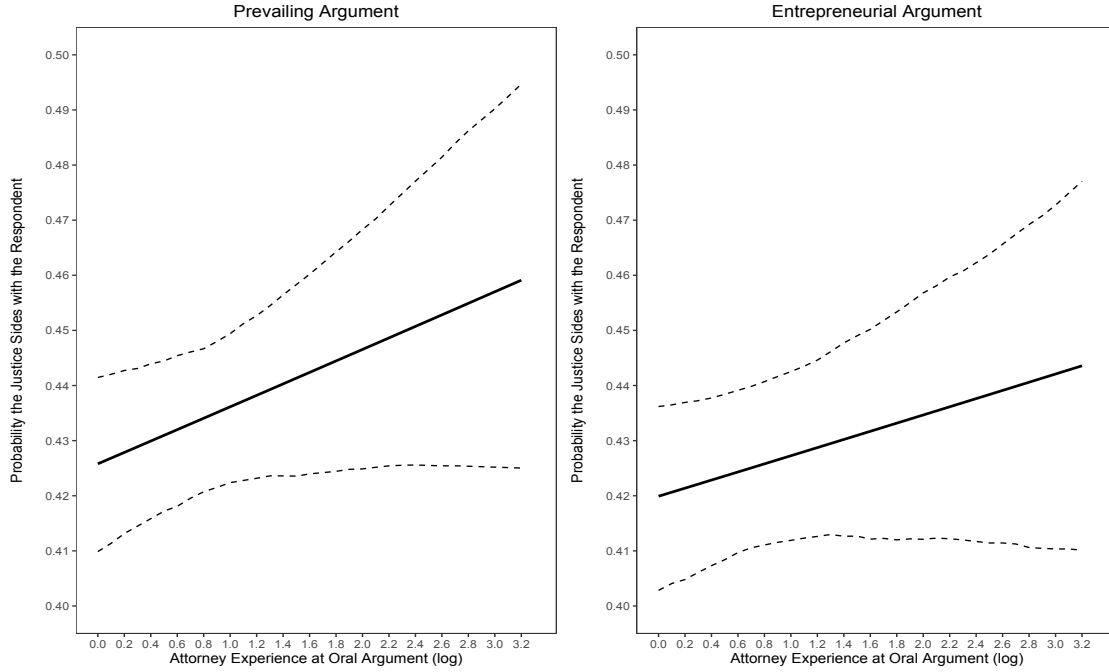


Figure 3.4: **Probability a Supreme Court Justice Votes with the Respondent Based on Argument Type and Attorney Experience** – Probability a Supreme Court justices votes with the respondent based on attorney experience and the decision to use a prevailing (left) or entrepreneurial (right) argument. Dashed 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 3.5 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 using a prevailing argument to represent a low-status petitioner has a 0.52 probability of securing a justice’s vote, while an attorney using a prevailing argument to represent a high-status petitioner has a 0.61 probability of doing the same. The right panel of Figure 3.5 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. The difference between the low-status petitioner and the high-status petitioner is

not statistically significant.⁸ The results do 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 a petitioning attorney representing a resource-rich litigant, who is no more or less likely to win by going entrepreneurial.

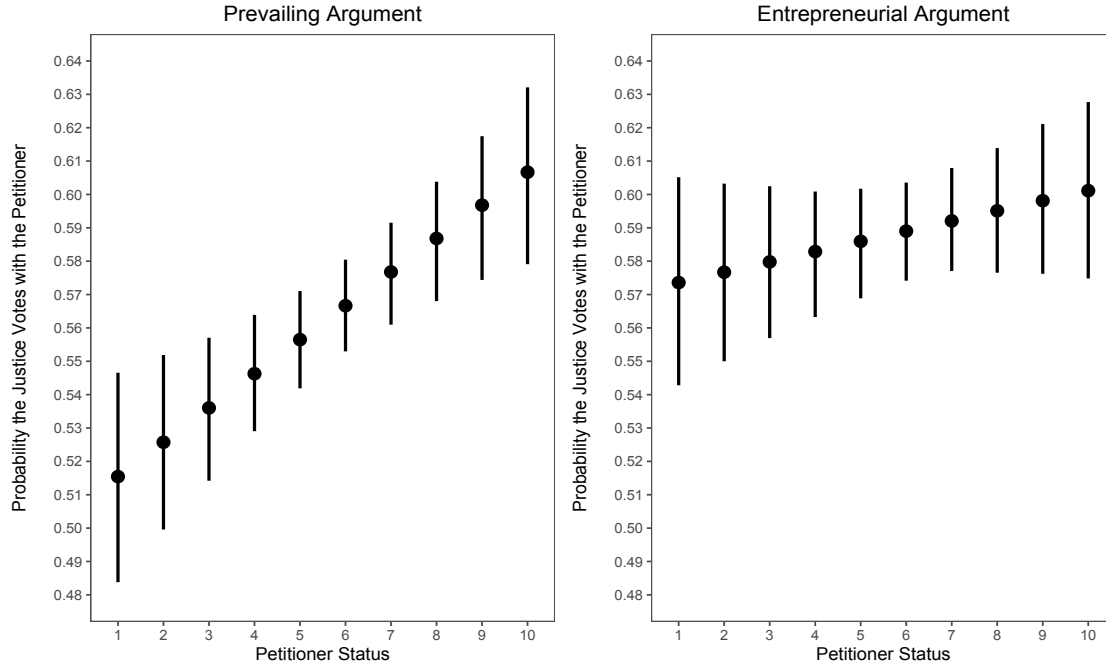


Figure 3.5: **Probability a Supreme Court Justice Votes with the Petitioner Based on Argument Type and Attorney Status** – Probability a Supreme Court justice votes with the petitioner based on attorney status and the decision to use a prevailing (left) or entrepreneurial (right) argument. Dashed lines 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 3.6 show, 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

⁸See Figure A.3 in the appendix.

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.⁹ The results continue to show that entrepreneurship is a useful strategy for petitioners but not respondents.

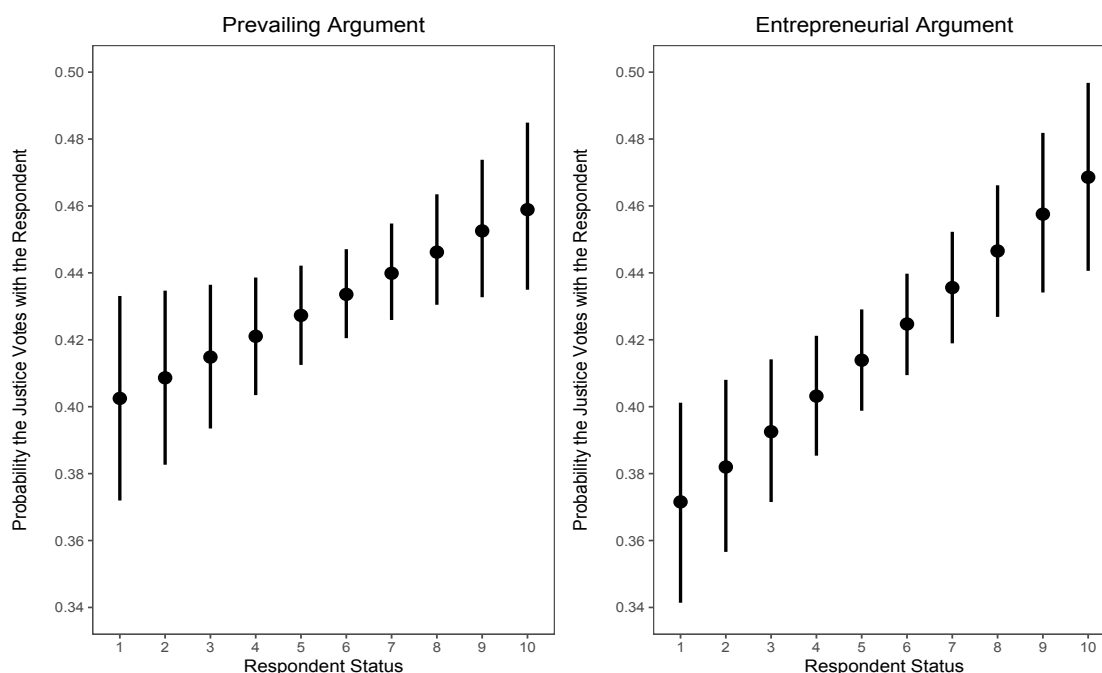


Figure 3.6: **Probability a Supreme Court Justice Votes with the Respondent Based on Argument Type and Attorney Status** – Probability a Supreme Court justice votes with the respondent based on attorney status and the decision to use a prevailing (left) or entrepreneurial (right) argument. Dashed lines 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 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

⁹See Figure A.4 in the appendix.

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 case outcome, 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.

3.5 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 who had 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). He suggested that 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, both argument types offer value, but neither one offers an absolute advantage like the one provided to inexperienced and resource-poor petitioners using entrepreneurial arguments. 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 every 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 2019b), 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.

CHAPTER 4

PUSHING THE BOUNDARIES: DECIDING TO ENGAGE IN LEGAL ENTREPRENEURSHIP AT THE U.S. SUPREME COURT

In late 2002, attorneys representing two men accused of violating the Texas Homosexual Conduct Law were preparing to challenge their clients' convictions (and sodomy laws more broadly) at the Supreme Court. They just had to figure out *how* to appeal to the justices. The approach had to be just right; the Court had refused to overturn these types of sodomy laws less than 20 years earlier in *Bowers v. Hardwick* (1986) and membership changes made the Court even more conservative than it had been when it decided *Bowers* (Frank 2017). But at the same time, the world was changing. Courts in several states had issued pro-gay rights decisions, as had the Supreme Court itself in *Romer v. Evans* (1996) (Kaplan 2018). After examining the state of the world, the attorneys opted to make what they later called "the most conservative argument possible for a constitutional right to sex" (Carpenter 2012, 194). Their merits brief presented an argument that carefully aligned with the Court's more recent jurisprudence regarding due process and privacy, praising Justice Anthony Kennedy's opinion in *Romer* and following the Court's own lead in suggesting it was time to set *Bowers* aside (Carpenter 2012). They did this while avoiding the more radical sex and sexual orientation discrimination arguments that were popular at the time (Carpenter 2012). In a 6-3 ruling in *Lawrence v. Texas* (2003), the Supreme Court ultimately validated these choices by vacating the men's convictions and declaring the Texas Homosexual Conduct Law unconstitutional; a five-justice majority also voted to overturn *Bowers v. Hardwick* as well (Carpenter 2012).

When attorneys like the ones representing Tyron Garner and John Geddes Lawrence present their cases to the Supreme Court in a merits brief, they make a thousand different decisions about how best to appeal to the justices. They make choices about phrasing (Garner and Kennedy 2010; Feldman 2016), about tone (Black, Hall, Owens and Ringsmuth

2016), and about ease of presentation (Garner and Roberts 2010). Beyond the more technical aspects of a brief, attorneys also have to decide how to lead the justices from the legal question at hand to their proposed answer by way of the Court's own precedents (Garner 2003). This could mean providing the justices with a legal explanation for the ideological result they seek (Hansford and Spriggs 2006), or it could mean presenting a legal argument so well constructed the justices feel like it is the only possible answer (Garner and Roberts 2010). But the key to writing a good brief is writing a persuasive legal argument, and attorneys approach this task using one of two opposing frames. Their first option is going with what I call the prevailing argument and aligning their argument as closely as possible with the Court's own words and thoughts, similar to what the petitioning attorneys did with their brief in *Lawrence*. The alternative is making what I call an entrepreneurial argument and offering the justices a fundamentally new way of looking at an area of case law, like those attorneys could have done with the sex discrimination argument. Why do attorneys pick one over the other?

My research suggests that attorneys are strategic in their employment of legal entrepreneurship. Prevailing arguments are, all else equal, safer arguments to make because they appeal to the justices' preferences for simplified decision-making (Gennaioli and Shleifer 2007; Niblett, Posner and Shleifer 2010). But attorneys also want to win, which can mean getting entrepreneurial when the prevailing approach to the law fails to aid their clients. Using a novel dataset that identifies attorneys' use of legal entrepreneurship between the 1984 and 2007 Supreme Court terms, I find that attorneys let the legal environment surrounding the case, as well as their own skill, direct their decision to engage in legal entrepreneurship. External political opportunities, including new justices on the bench and the public's overall feelings toward certain policies, do not play a role in this decision. I show, in short, that attorneys are strategic in how they use the law to appeal to the justices in their merits briefs.

In reaching this conclusion, I make two main contributions to the literature on Supreme

Court decision making. The first is offering one of the first examinations of attorney strategy. Research shows that an attorney's decisions regarding wording (Corley 2008), framing (Wedeking 2010), and case citations (Hazelton, Hinkle and Spriggs 2019) in merits briefs influence the justices' behavior. Yet scholars understand very little about why attorneys make the decisions they do; research begins with attorneys' product, not with attorneys' initial forays with the judicial decision-making process. My suggestion that attorneys strategically engage in legal entrepreneurship is a logical conjecture that is well-backed by anecdotes (see, for example, DeHart 2018 on the Women's Rights Project or Kaplan 2018 on campaign finance), if not academic research. By introducing the concept of legal entrepreneurship and examining attorneys' decision to engage in it, I am one of the first to empirically show that attorneys are strategic decision makers, just like the justices to whom they appeal.

By discussing attorneys' role in shaping the justices' understanding of the law, I am also expanding scholars' understanding of the factors that constrain the justices' ability to pursue policy outcomes. The research that builds on Epstein and Knight's (1998) near-rule that Supreme Court justices are strategic seekers of policy suggests the law can act as a constraint on judicial behavior (Bailey and Maltzman 2011; Bartels 2009; Richards and Kritzer 2002). Yet all too often, work on the law's constraining capacity implicitly assumes the justices independently decide the legal rationale for a case (see, for example, Hansford and Spriggs 2006 or Clark and Lauderdale 2010). In reality, by writing the briefs, the attorneys actually set boundaries around the case and direct the justices toward certain legal arguments in the process (Black, Hall, Owens and Ringsmuth 2016; Epstein, Segal and Johnson 1996, but see McGuire and Palmer 1995). When working through an opinion, the justices' decisions are even more constrained than most research would suggest. My research incorporates attorneys' decisions into scholars' understanding of the choices the justices make, adding another layer of complexity to an already convoluted process.

4.1 Appealing to the Justices in the Merits Brief

An attorney’s job is to win the case. Whether motivated by payment, fame, ideological idealism, or just a desire to see a case through, her goal is to get the Court to side with her client. At the Supreme Court, attorneys have two opportunities to engage with the justices and try to win them over: first, in the written merits brief, and then again during oral argument. Merits briefs are informational documents in which each party provides the justices with an overview of the case’s background and procedural history, as well as the attorney’s proposed solution and the legal reasoning she used to get there (Schoenherr and Black 2019*b*). Oral argument supplements the briefs, giving the justices the opportunity to request clarifications, poke holes in arguments, and ask policy-oriented questions about a case’s outcome (Johnson 2004). While attorneys present legal arguments in both situations, the merits brief is the only place where they can make a complete, coherent, and uninterrupted argument in favor of their clients (Black, Hall, Owens and Ringsmuth 2016). This is an attorney’s chance to “give the judge good reason for ruling as you request” (Garner 2003, IX) by presenting, organizing, and framing a case in just the right manner. Writing a persuasive merits brief is a key to winning a case.

Writing a persuasive merits brief means leading the justices to an answer while avoiding their irritants. At a minimum, the justices expect a brief that is technically correct (Garner and Kennedy 2010), well-written (Garner and Roberts 2010), and succinctly presented (Scalia and Garner 2008; Totenberg 2011). They also favor briefs that are readable (Feldman 2016), detached and unemotional (Black, Hall, Owens and Ringsmuth 2016), and prepared by experienced attorneys with multiple appearances before the Court (Nelson and Epstein 2019). Beyond the more mechanical aspects of the brief, the justices also expect attorneys will identify the relevant legal issues and thoroughly explain their importance and application to the situation at hand (Garner and Stevens 2010; Garner and Thomas 2010). As Chief Justice John Roberts explained, “I, as a judge, have a responsibility to try to get the right

answer on the law. This brief is going to help me one way or another, and I want to get that help out of it. And if you can't express clearly what your position is, that's not helping me" (Garner and Roberts 2010, 28). The justices ask attorneys to be their legal escorts, leading them from the case facts to the case disposition by way of the law. Attorneys are responsible for finding the credible path to the mountain's apex (Garner 2003). If they get the justices lost or lead them into a crevasse, their client loses the case and they fail.

Credibly making it through the law requires skill in the face of the unknown. Federal law is complicated at a minimum; even the justices periodically fail to reach an agreement regarding the legal reasoning in a case and issue "unreasoned opinions" that simply state the case disposition (Hitt 2019). Moreover, by nature of appealing to the Supreme Court, an institution whose very function is to ensure uniform interpretation of federal law, attorneys who approach the Court are trying to credibly answer legal questions that other brilliant legal minds failed to answer to any level of satisfaction or uniformity.¹ They do this knowing the justices are strategic seekers of policy who may simply be using the law to bolster and legitimize their pursuit of policy outcomes (Hansford and Spriggs 2006). In short, attorneys have to figure out how to work through this complicated fray and appeal to the justices in a manner that will secure a majority of their votes, and they do so without knowing exactly which answer the justices want to find. Tasked with this duty, I suggest that attorneys work through the fray by framing their brief using one of two different argument types: they can use a prevailing legal argument, or they can engage in legal entrepreneurship. Each argument type has its own rules and those rules help attorneys simplify the legal universe, identify the relevant precedents, and make a credible appeal to the justices.

¹As Alexander Hamilton explained in "Federalist 80," the Founders created the Supreme Court because somebody had to be responsible for "uniformity in interpretation of the national laws" as without one, "nothing but contradiction and confusion can proceed" (Hamilton 2001, 412). Additionally, Supreme Court Rule 10 explicitly states the justices are more likely to review cases that involve some sort of lower court conflict (between federal courts of appeal, between state courts of last resort, or some combination of the two) or an important federal question (Perry 1991).

When attorneys use a prevailing argument, they commit to using the Court’s recent jurisprudence to explain the situation at hand. Their goal is to build arguments that show similarities between the current case and the Court’s past decisions. Attorneys traffic in the familiar, citing the same cases the justices used in this area of case law before and discussing them with the same reverence or disdain. Recall that in *Lawrence v. Texas* (2003), the attorneys representing the petitioners wrote a brief that hailed *Romer v. Evans* (1996) and advocated for the elimination of *Bowers v. Hardwick* (1986). In so doing, they celebrated a recent privacy opinion while parroting its arguments.² The attorneys wanted to show the justices how similar the two cases were and thus suggest the Court should reach the same result. This is what a prevailing argument does. These are conservative arguments, to be sure, as they do not push the law too far, but simply ask the justices to uphold the legal status quo. They appeal to the justices’ preferences for familiar arguments (Hazelton, Hinkle and Spriggs 2019) and so-called “bright-line” rules that simplify the decision-making process (Niblett, Posner and Shleifer 2010). Finding a prevailing argument should, consequently, be a dependable, credible, relatively low-cost strategy for constructing a legal argument.

Alternatively, attorneys can engage in legal entrepreneurship and consciously abandon the familiar in exchange for new and innovative arguments that, if accepted, would fundamentally change the Court’s entire approach to an area of case law. When attorneys construct these types of arguments, they look completely out of place in the Court’s recent jurisprudence. They suggest the justices generalize precedents they sought to limit, or they suggest the justices limit the reach of a popular precedent, or they develop an argument that looks completely out of place next to the Court’s recent decisions in that area of case law. Consider, for example, Jay Sekulow’s argument in *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus* (1987), where he abandoned the commonly-

²According to Hansford and Spriggs’s (2006) measure of precedent vitality, *Romer* had a score of +8 at the start of the 2002 term, indicating the justices cited the case positively, while *Bowers* had a score of -6, suggesting the justices were already treating the precedent with caution by the time *Lawrence* hit their docket.

used Establishment Clause framework and successfully convinced the justices that a ban on handing out religious literature at an airport was an unconstitutional restriction of free speech (Toobin 2008). The legal status quo did not appear to work for Sekulow, so he sought to change the conversation entirely. When attorneys use entrepreneurial arguments, they try to persuade the justices to their side by showing them a viable alternative to the legal status quo. Making these arguments is costly on a Court that is both institutionally averse to overturning precedent and looking for legal efficiency (Niblett, Posner and Shleifer 2010; Hansford and Spriggs 2006), but the justices are occasionally willing to accept change when it is both credible and helps them reach desired outcomes (Gennaioli and Shleifer 2007; Wedeking 2010). Attorneys consequently need to look for signs that the justices might be willing to invest in an entrepreneurial argument.

4.2 Making the Decision to go Entrepreneurial

While neither prevailing nor entrepreneurial arguments are easy to construct, an entrepreneurial argument's newness makes it more costly, as new arguments reach credibility limits much sooner than prevailing arguments do (Wedeking 2010). Attorneys consequently need some sort of sign that the justices might support their decision to abandon the prevailing approach in favor of something different. I theorize that attorneys ultimately make a decision about whether to engage in legal entrepreneurship or stick with the prevailing argument by looking at the political and legal world surrounding a case. More specifically, I suggest that attorneys make the decision to engage in entrepreneurship based on three sets of conditions: (1) large-scale political opportunities, specifically the presence of a new justice and the public's overall policy mood; (2) the legal environment surrounding the case, including the lower court's understanding of the law and the issue area involved; and (3) the attorneys' own resources and skills.

Changes in the national political environment should create opportunities for legal change and, consequently, signal to attorneys that an entrepreneurial argument might be worth it.

While legal change can be “hydra-headed” (Epstein and Kobylka 1992, 5), scholars have identified a few factors that definitively drive legal change at the Supreme Court. Clark (2019) finds that “social conditions met with clever lawyering” drive justices to reconsider their approach to an area of case law (5), suggesting that lawyers who take advantage of the electoral politics of the day can secure large-scale changes in the law. Epstein and Kobylka (1992) suggest that, in addition to public mood, changes in the Court’s membership contribute to legal change as well, as new justices can alter the Court’s approach to an area of case law (Epstein and Kobylka 1992).

Knowing this, I develop two hypotheses regarding attorneys’ willingness to engage in legal entrepreneurship based on the national political environment. To address the social conditions of the era, I first theorize that *attorneys will be more likely to engage in entrepreneurship when public opinion favors one party over the other*. I do not have any predictions about the direction of the shift (e.g., attorneys are more likely to make an entrepreneurial argument when public mood turns more liberal), but simply posit that attorneys should alter their behavior regarding legal entrepreneurship based on so-called “public mood” (Stimson 2018). In acknowledgment of the havoc that membership changes can cause, I also suggest that *attorneys will be more likely to engage in legal entrepreneurship when a new justice joins the Court*, as the uncertainty should create opportunity for an entrepreneurial argument to land.

Of course, attorneys have to consider the legal environment surrounding a case before they can make a decision about how to proceed. The first consideration is the ideological congruence between the lower court’s decision and the ideological tilt of the Supreme Court. Research suggests the Court is more likely to review cases from ideologically-distant lower courts and then overturn them (Black and Owens 2012b; Bryan and Owens 2017). When the Supreme Court is aligned with the lower court’s decision, it is consequently more likely to affirm. I suggest that *if the justices are ideologically predisposed to favor the lower court’s decision, then attorneys should be less likely to engage in legal entrepreneurship*. After all,

why go for something new when the law already works in your favor?

The second consideration is the issue area under which the case falls. Some issue areas, like criminal procedure or First Amendment law, have long-standing bright-line rules that are difficult to eliminate or overturn (Graetz and Greenhouse 2016; Richards and Kritzer 2002). It is more difficult to make an entrepreneurial argument in those areas than it is to make one in an area like privacy law, where the justices constantly reevaluate the law and are willing to modify past precedent, if not overturn it outright (Hull and Hoffer 2001; Kaplan 2018). I thus theorize that *attorneys are more likely to make entrepreneurial arguments in some issue areas than they are in others*.

I also believe that *attorneys will be more likely to engage in legal entrepreneurship when a case is salient*. Attorneys know when they might have an important case before the justices (Clark, Lax and Rice 2015) and might be more likely to try an entrepreneurial argument when they know the justices will be carefully considering the ramifications of the case, especially given that salience can alter the justices' behavior (Lax and Cameron 2007).

The lower courts' behavior is also part of the legal environment and should matter as well. Lower court judges can send signals to the justices about legal activity in the rest of the judiciary (Beim, Hirsch and Kastellec 2015) and the justices respond to those signals in different ways (Black, Owens, Wedeking and Wohlfarth 2016; Perry 1991). Consequently, I suggest that attorneys respond to those same lower court signals. First, I theorize that *attorneys are less likely to engage in legal entrepreneurship when there is lower court conflict*. Lower court conflict indicates the lower courts on the whole are struggling to use existing precedent to answer certain legal questions (Perry 1991). In these situations, the right prevailing argument can answer the question, and an entrepreneurial argument would simply add to the cacophony of legal arguments already being used.

Alternatively, I also suggest that *attorneys are more likely to engage in legal entrepreneurship when the lower court issues a dissent*. When a lower court judge files a dissent in a

case, he sends a high-cost signal about problems with the majority decision. After all, lower court norms suggest judges avoid writing separately whenever possible (Epstein, Landes and Posner 2013). While large-scale legal conflict in the lower courts should scare attorneys away from entrepreneurial arguments, a single dissent filed by a time-strapped lower court judge should give attorneys a more individualized push to keep pointing out the issues with the majority's approach to the law; if the judge took the time to point out issues with the majority's approach, then an enterprising attorney just might have a chance with an entrepreneurial argument.

Finally, the last thing attorneys consider when deciding how to frame their argument is their own ability to pursue a new line of legal reasoning. Attorneys should be more entrepreneurial when they are experienced and well-funded. The justices are more likely to vote in favor of an experienced attorney (McGuire 1995) and they are more likely to borrow language from an experience attorney's brief (Corley 2008). The Solicitor General enjoys privileged status with the justices (Black and Owens 2012*c*) while also being one of the winningest advocates before them (Wohlfarth 2009). Well-funded, high-status attorneys are also advantaged at the Court (Black and Boyd 2012). These facts would suggest that experienced and high-status attorneys know how to approach the justices and are thus better able to employ entrepreneurial arguments. I thus theorize that *attorneys will be more likely to engage in legal entrepreneurship when they are experienced, in the Office of the Solicitor General, or hold a high status.*

4.3 Data and Methods

To better understand attorneys' decision to engage in legal entrepreneurship, I develop an original dataset of the legal arguments contained in merits briefs and identify attorneys' use of entrepreneurial arguments. I then employ this variable in concert with several measures of political opportunity, legal environment, and attorney resources and skills so that I can study attorney strategy regarding legal entrepreneurship. The data encompass 3,018 attor-

ney decisions regarding entrepreneurship that occurred between the 1984 and 2007 terms, covering 1,509 cases in which the petitioner and respondent submitted one initial merits brief each.

4.3.1 Dependent Variable: Legal Entrepreneurship

The dependent variable in this model is a dichotomous indicator of whether an attorney did (1) or did not (0) utilize an entrepreneurial argument in his merits brief. Recall that legal entrepreneurship is the decision to engage with the justices using new and innovative legal arguments that would alter the justices' current approach to an area of case law. Operationally, then, legal entrepreneurship occurs when attorneys decide to either (1) suggest the justices treat certain cases differently than they have in the past; (2) cite new cases that look completely out of place in the Court's more recent jurisprudence; or (3) employ some combination of the two. To identify an attorney's use of an entrepreneurial argument in a brief, I follow a three-step process in which I use text analysis to identify an attorney's use of entrepreneurial arguments in a merits brief.

In the first step of the process, I used text analysis tools to identify the contents of the legal arguments contained in each merits brief submitted to the Supreme Court between the 1984 and 2007 terms. By the contents of the legal arguments, I explicitly mean the cases the attorneys cited as well as their discussion of those cases, specifically the sentence that preceded each case mention. To do this, I began by using a combination of Westlaw and LexisNexis to locate the texts of the briefs associated with these cases.³ I limited my data collection to cases that had only one petitioner brief and one respondent brief, which

³Both Westlaw and LexisNexis were missing briefs for about 5% of the Court's cases during this time period. These missing briefs are mostly (but not exclusively) from cases the Court reviewed in the early 1980s. Per a conversation with several members of Westlaw's product management team, the missing briefs were difficult to convert to a digital format and therefore not included in their online repository. Westlaw is currently working to rectify the problem.

covers approximately 85% of the cases the Court heard during that time period (Black et al. 2020).⁴ With the texts downloaded, I used a program I wrote in R to identify the “Arguments” section of each brief, or the part of the brief that walks through a party’s legal reasoning for moving from the legal question at hand to their proposed answer. The program then worked through the argument section line by line to locate every mention an attorney made of a Supreme Court precedent.⁵ Upon finding a citation, the program collected both the citation and its context, specifically the sentence that preceded it.⁶ At the end of this step, I had information about the citations contained in the 3,018 briefs associated with the 1,509 cases heard between the 1984 and 2007 terms that are under analysis here, totaling almost 190,000 mentions of past precedent in the briefs.

With the citations located, the next step was to identify attorneys’ treatment of those citations. To complete this part of the process, I used a combination of hand-coding and machine-learning techniques to create a dictionary of terms associated with attorneys’ discussion of the Court’s past decisions, then employed that dictionary to identify attorneys’ treatment of the citations they mentioned.⁷ The dictionary separates discussions of prece-

⁴I did this to help eliminate potential endogeneity problems, particularly issues that might stem from the justices hearing different arguments for the same side in a case (e.g., two different arguments from the petitioner). Importantly, the Court prefers parties consolidate their arguments into one; in fact, Supreme Court Rule 28 says that, with some exceptions, “only one attorney will be heard for each side” at oral argument, essentially forcing the parties to reach an agreement regarding their arguments well before the justices hear a word from them.

⁵Because 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.)

⁶By convention, attorneys typically cite a Supreme Court case using its name, followed by the United States Report citation, and then the year the justices published the opinion, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966). Inevitably, however, attorneys turn to shorthand to save space in their briefs, and the formal citation gets reduced to *Miranda*. The program I wrote identifies full citations and partial citations (e.g., references to either *Miranda v. Arizona* or 384 U.S. 436), and then uses word frequencies to identify the shorthand citations as well. When compared to hand-coded data, the program correctly identifies more than 90% of the total number of citations mentioned in a brief.

⁷As I discuss in Chapters 2 and 3, I purposefully use a dictionary here. While both

dent into one of three different categories: situations where the case applies to the situation at hand, situations where the case does not apply, and simple statements of fact. These applications map to the positive, negative, and neutral treatments used by Shepard’s Citations, respectively (Spriggs and Hansford 2000). The dictionary contains a list of 525 words and phrases that uniquely identify attorneys’ decisions to treat a precedent as applicable to the current case (“apply,” “establish,” “mandate”) or dismiss a precedent as inapplicable (“distinguish,” “nullify,” “overrule”).⁸ I used Benoit et al.’s (2017) *quanteda* package to apply this dictionary to the attorney’s discussions of the citations, then aggregated that information to create an overall measure of precedent treatment for each individual case in each brief.⁹ All other citations were treated as neutral statements of fact. By the end of this step, I had data on attorneys’ treatment of each case mentioned in the argument section of a brief, covering almost 80,000 unique brief-citation pairings. So, for example, the data now explicitly reflect the fact that the attorneys representing the petitioners in *Lawrence* said the Court’s ruling in *Romer* applied to the situation at hand and that *Bowers* did not.

With the data on attorneys’ legal arguments collected, I moved to the final step, in which I identify attorneys’ use of entrepreneurial arguments. To do this, I began by making a necessary simplifying assumption: that entrepreneurship appears in the most-cited cases in

dictionary-based approaches and more high-powered black-box models offer accuracy and efficiency (Grimmer and Stewart 2013) and I achieve similar results using either classification scheme, I ultimately settled on the dictionary-based approach because it also offers information about the words associated with the treatments, which is useful for scholars seeking to better understand how attorneys make arguments.

⁸I developed this list using 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 outline this process more clearly in Chapter 2.

⁹For the most part, the aggregation process was a simple summation of treatment across the mentions of a case. For any citation that got mentioned more than 15 times in a brief (i.e., the one-to-two most-cited cases in each brief), I manually confirmed the attorney’s treatment of the case by reading the brief. To be clear: simple summation would still get the right answer almost every time, but validation is essential to successful text analysis (Grimmer and Stewart 2013).

a brief. As I explained in Chapter 2, an average merits brief references about 26 past Supreme Court decisions. The modal number of times a citation gets used is one, while the average is almost three. This disparity suggests that attorneys mention most of their citations only once but mention a few central cases repeatedly. Interviews with the justices confirm this is both what they expect to see and what good attorneys tend to do (Garner and Stevens 2010; Garner and Thomas 2010), and guides to legal writing are adamant that attorneys focus on the important cases and try to avoid the one-off citations as much as possible (Garner 2003). Given the evidence, I look for entrepreneurial behavior in the cases that get mentioned an above-average number of times in a case. Typically, this resulted in looking at about 6 cases per brief, rather than looking at 26. Making this decision eliminated a significant amount of noise from the data; there was little consistency in the citation patterns of these one-off cases and they essentially overwhelmed the analysis.¹⁰

With that simplifying assumption made, I turn to defining legal entrepreneurship. Recall there are two ways to be entrepreneurial: first, to suggest the Supreme Court alter its treatment of a certain precedent, and second, to use unique citations, or citations that appear out of place in the Court's jurisprudence. Beginning first with variation in treatment, I proceed in three steps: (1) identify the cases that got cited in both briefs; (2) within that set of citations, identify the situations where attorneys applied the cases differently; and (3) find the attorney that argued against the Court's treatment of the case. To do step 3, I used Hansford and Spriggs's (2006) measure of precedent vitality to identify the attorney who argued against the Court's current approach to the case. Their measure is essentially a running tally of the Court's treatment of its own decisions over time. Cases that the Court repeatedly treats positively are considered high-vitality cases (e.g., the Court's reverence for *Brown v. Board of Education* [1954]), while rulings that the Court distinguishes, questions,

¹⁰More specifically, looking at all the cases mentioned in each brief ultimately suggested that *every* brief had an entrepreneurial argument. The wide variation in cases cited and attorneys' discussions of them made each brief look like it had a more unique argument than it did.

and overturns are considered low-vitality cases (e.g., the Court’s discussion of a case like *Korematsu v. United States* [1944]). If an attorney suggested overturning a high-vitality case or venerated a low-vitality case, he made an entrepreneurial argument.

The second way to be entrepreneurial is to bring a unique argument to the table, specifically to cite precedents that have not been used in the Court’s recent jurisprudence. To identify these instances of entrepreneurship, I again turn to Hansford and Spriggs’s (2006) precedent vitality data, which also notes the frequency with which the justices cite past precedents. I consider an attorney to be behaving in an entrepreneurial manner if he cites a case the Court has never cited. If the Court has never felt the need to revisit the precedent, then the attorney bringing it up is an entrepreneurial act. I also consider an attorney to be engaging in legal entrepreneurship if he mentions a case the Court has not used in an opinion in the last ten terms. I consider these cases to be “out of sight, out of mind” precedents, and attorneys who mention them are bringing them back for a new viewing.

In summary, then, an attorney used an entrepreneurial argument in his brief if he did any or all of the following three things in his brief: (1) he and another attorney based their arguments on the same case but his discussion alone suggested the Court should reverse its current approach; (2) he built his argument around a case the Court never cited in a later opinion; or (3) one of his main citations is a case the Court has not cited in the last ten years. Entrepreneurship is consequently a dichotomous variable that indicates the attorney did (1) or did not (0) engage in legal entrepreneurship.¹¹

¹¹Given the way I measured legal entrepreneurship, it is possible to measure it on an additive, continuous scale. There is no theoretically sound reason to do this, however, as I am unwilling to assume that entrepreneurship is additive. But I did run this same model using OLS and the continuous dependent variable. The results are in Model 1 in the appendix and are substantively the same.

4.3.2 Independent Variables: Opportunity, Environment, and Resources

As I suggest earlier in the paper, attorneys, much like the justices themselves, should look for an opportunity to change the current approach to an area of case law, and they do so across three different sets of conditions: large-scale political opportunities, the legal environment surrounding the case, and the attorneys' own resources and skills.

Beginning first with the large-scale political opportunities, there are two factors to consider: the social conditions of the time period as well as membership changes on the bench. To measure social conditions, I use Stimson's (2018) measure of *public mood*. Using scaling techniques on a series of public policy questions asked over time, Stimson's measure identifies public support for government programs on a 0-to-100, liberal-to-conservative scale, with larger values indicating support for more liberal policies (Yglesias 2019). In order to study membership changes on the bench, I include a dichotomous indicator of whether or not a *new justice* joined the bench that term.¹²

When examining the legal environment surrounding the case, I suggest that attorneys consider five different factors: ideological congruence between the lower court decision and the Supreme Court, the issue area under which the case falls, the salience of the case, the presence of lower court conflict, and the presence of a lower court dissent. To measure ideological congruence, I first identify the median justice's Judicial Common Space (JCS) score (Epstein et al. 2007). I use the median justice as a proxy for the Court's ideology; if the median is conservative, then so is the majority of the Court, and vice versa. JCS scores measure a justice's ideology on a -1 to 1 scale, with more positive scores correlating to more conservative justices (or, in this case, more conservative medians). I then use the Supreme Court Database to identify if the lower court decision was conservative or liberal

¹²Given the nature of the Supreme Court's docket and calendar, the justices often grant certiorari in cases in one term and then review it in another. As a result of this quirk, I also ran these models with an indicator for a new justice appearing in one of the last two years. These results, which are in Model 2 the appendix, remain substantively the same.

(Spaeth et al. 2017). Because the median on the Court is always conservative in this time period, I code *lower court decision congruence* as the median justice’s JCS score if the lower court decision was in a conservative direction, and if the lower court decision was liberal, congruence is the negative value of the median justice’s JCS score.

To identify the second factor, issue area of a case, I use the Supreme Court Database to identify the issue area into which each case falls and then create ten dichotomous *issue area* variables, one for each area under study.¹³ To examine a case’s salience, the third legal environment factor, I use Clark, Lax and Rice’s (2015) measure of latent case salience to examine how an attorney’s decision to engage in legal entrepreneurship might change when dealing with a salient case.

Finally, I also employ two variables to deal with behavior at the lower court level. To identify instances of lower court conflict, I again turn to the Supreme Court Database, this time using the *certReason* variable to find the cases in which the justices pointed to any type of lower court conflict as a reason for reviewing the case. I then create a dichotomous *lower court conflict* variable.¹⁴ To identify lower court dissents, I employ the Supreme Court Database’s *lower court disagreement* dichotomous variable here.

The final set of variables that I include in my model deal with attorney resources, specifically their experience, position as a member of the Office of the Solicitor General, and status. I use Black, Hall, Owens and Ringsmuth’s (2016) data for all of these measures. *Attorney experience* is the natural log of (one plus) the attorney’s past oral argument experience, to

¹³The Supreme Court Database places each case into one of fourteen exclusive issue area categories. None of the cases under study here fall into the eleventh, thirteenth, or fourteenth categories (interstate relations, miscellaneous cases, and private action cases). That leaves the cases in eleven issue areas for analysis. I treat economic activity cases (category eight) as the baseline category simply because it is the largest category.

¹⁴The Supreme Court Database *certReason* variable has thirteen categories, five of which involve conflict between lower courts (categories 2-6). If the Court listened reasons two through six as their reason for granting certiorari in the case, the *lower court conflict* variable took the value of 1.

see if more experienced attorneys are more likely to engage in entrepreneurship.¹⁵ *Solicitor General's presence* is a dichotomous indicator of whether or not the Solicitor General is the party putting together the merits brief. Finally, Black, Hall, Owens and Ringsmuth (2016) created the measure of *attorney status* by following a procedure originally outlined by Collins (2004, 2007) that uses the Supreme Court Database's party codes to categorize each party in a case into one of 10 groups. The weakest parties – poor individuals – are coded as 1 while the strongest party – the U.S. Government – is coded as 10.

The last variable I include in this model is a control for whether or not the attorney making the entrepreneurial argument is the *petitioner*. As Wedeking (2010) explains, the petitioner lost at the lower court and therefore might seek to employ a new argument before the justices – after all, the last one did not work. When combined with the fact that the petitioner presents her brief first, these factors might suggest the petitioner is more willing to engage in legal entrepreneurship than the respondent might be.

4.4 Methodology and Empirical Results

Because my dependent variable is dichotomous, I use a logistic regression model for the analysis (Long 1997), and I estimate the model using standard errors that are clustered by case. Table 4.1 shows the results of the model of the likelihood an attorney engages in legal entrepreneurship. Given the non-linear nature of the model, I use predicted values to address the results rather than looking strictly at the coefficients, and I calculate these using the observed-value approach best associated with Hanmer and Kalkan (2013).

¹⁵Experience at oral argument is an accepted proxy for overall attorney experience on a brief (Black, Hall, Owens and Ringsmuth 2016; Black et al. 2020; Corley 2008). Multiple attorneys work on a brief, but anecdotes suggest the most experienced attorney will be the one who argues the case (Biskupic, Roberts and Shiffman 2014). If several novices write the brief, then a novice is going to argue it as well; consider stories of new state attorneys general who have catastrophic showings before the justices because they refused to accept help from more experienced litigators (Toobin 2008). And while experienced attorneys may take over cases they believe in, those attorneys are also going to help write the brief, as they have to defend that brief during oral argument.

Table 4.1: Logistic Regression Results, Attorney Decision to Engage in Legal Entrepreneurship

	Coefficient (Standard Errors)
New Justice	-0.108 (0.080)
Public Mood	0.015 (0.011)
Ideological Congruence	-0.325** (0.110)
Criminal Procedure Case	0.300* (0.117)
Civil Rights Case	0.104 (0.135)
First Amendment Case	0.078 (0.177)
Due Process Case	0.196 (0.199)
Privacy Case	0.299 (0.323)
Attorneys Case	-0.190 (0.286)
Unions Case	-0.579* (0.269)
Judicial Powers Case	0.466*** (0.137)
Federalism Case	-0.222 (0.181)
Federal Taxation Case	0.194 (0.245)
Latent Case Salience	0.090 (0.054)
Lower Court Conflict	-0.187* (0.080)
Dissent Noted in Lower Court	0.187* (0.085)
Attorney Experience	0.098** (0.038)
U.S. Government Attorney	0.020 (0.147)
Attorney Status	-0.029 (0.016)
Petitioning Attorney	-0.093 (0.074)
Constant	-0.787 (0.695)
Observations	3,018
<i>AIC</i>	4144.832
<i>BIC</i>	4271.091
Log Likelihood	-2051.416

Standard errors, clustered by case, in parentheses

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

I begin my analysis by first examining how large-scale political opportunities – a new justice joining the Supreme Court and overall public mood – influence the probability an attorney engages in legal entrepreneurship. Beginning with the new justice variable, I find that attorneys are no more or less likely to make an entrepreneurial argument when a new justice joins the Court. Attorneys who face a stable, familiar bench have a 0.53 [0.51, 0.55] probability of engaging in entrepreneurship. When the justices lose an old friend and gains a new colleague, that probability decreases to 0.50 [0.47, 0.53], but the difference is not statistically significant. In short, despite my expectations, I do not find that attorneys treat membership changes as a signal to be entrepreneurial.¹⁶

The results also suggest attorneys are no more or less likely to engage in legal entrepreneurship when public mood changes. As public mood moves from more conservative to more liberal (specifically, from 56 to 66, covering 95% of the data under study here), the probability an attorney engages in legal entrepreneurship in the brief increases slightly, from 0.50 [0.46, 0.54] when the mood is more conservative to 0.54 [0.51, 0.57] when the mood takes a moral liberal turn. Again, the difference is not statistically significant, suggesting that attorneys do not change their approach based on public mood. This result goes against my theory, but it does make sense, given recent work by Devins and Baum (2019) that suggests the justices respond to elite-level opinion and not broad public mood. On the whole, these results regarding membership changes and public mood suggest that large-scale political opportunities are not related to an attorney’s decision to engage in legal entrepreneurship.

Turning next to the variables that identify the legal environment surrounding the case,

¹⁶One could argue that the truly important changes on the Court are the so-called “move-the-median” confirmations (Krehbiel 2007), which occur when a new justice replaces an ideologically-distant justice, like when Clarence Thomas replaced Thurgood Marshall. To see if this understanding of membership changes is the true difference maker, I replace the *new justice* variable with an indicator for a *median-moving justice* joining the bench and run the same model. As Model 3 in the appendix shows, having a median-moving justice join the bench does not significantly alter the probability an attorney engages in legal entrepreneurship.

the results suggest attorneys are more likely to engage in legal entrepreneurship when the environment signals they should. Starting with Figure 4.1, I find that the probability an attorney engages in legal entrepreneurship decreases as ideological congruence increases. As the left side of Figure 4.1 shows, the probability an attorney engages in legal entrepreneurship when the lower court decision and the Supreme Court median are incongruent is 0.55 [0.53, 0.58]. That is, an attorney has a 55% likelihood of making an entrepreneurial argument in a brief when the lower court decision is liberal and the Supreme Court median is conservative. But, when the lower court decision aligns with the Supreme Court median (i.e., the lower court decision is conservative and so is the median), the probability an attorney engages in legal entrepreneurship decreases significantly, to 0.49 [0.46, 0.52]. This six-percentage-point decrease would suggest that, as I expected, attorneys are less likely to engage in legal entrepreneurship when they believe the median’s preferences, and therefore the preferences of the majority of the Court, align with the lower court’s decision.

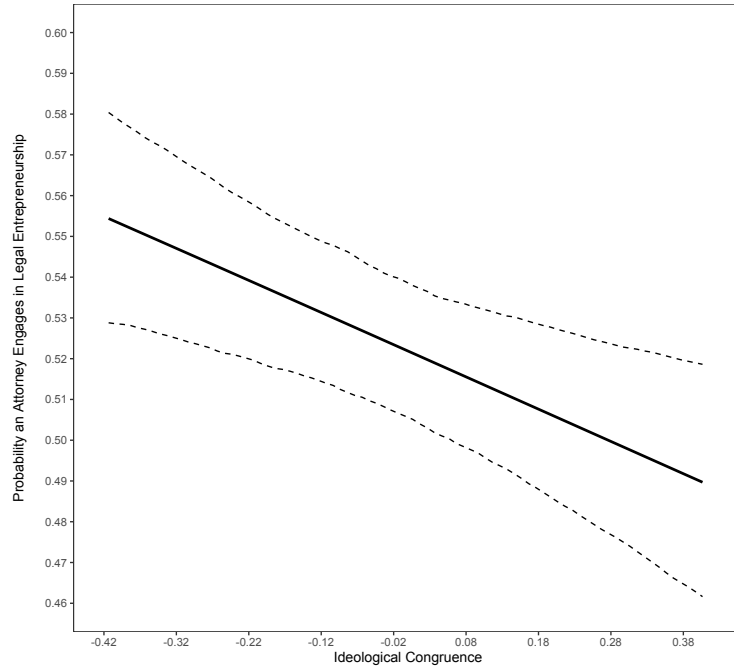


Figure 4.1: **Probability an Attorney Engages in Legal Entrepreneurship as Ideological Congruence Increases** - Probability an attorney engages in legal entrepreneurship as the ideological congruence between the lower court’s decision and the Supreme Court median increases. Dashed lines are 95% confidence intervals around those estimates. Predicted probabilities calculated using the observed-value approach.

My results also show that attorneys are more likely to engage in legal entrepreneurship in some issue areas than others. As Figure 4.2 shows, attorneys modify their approach based on the issue area. They are slightly more likely to engage in entrepreneurship in privacy cases (probability of 0.56) or cases involving questions of judicial power (probability of 0.60), while they are less likely to make an entrepreneurial argument when arguing in a case involving unions (probability of 0.35) or federalism (probability of 0.43). In short, as I suggested earlier, attorneys look for opportunities in certain issue areas and are less likely to try entrepreneurial arguments in others.

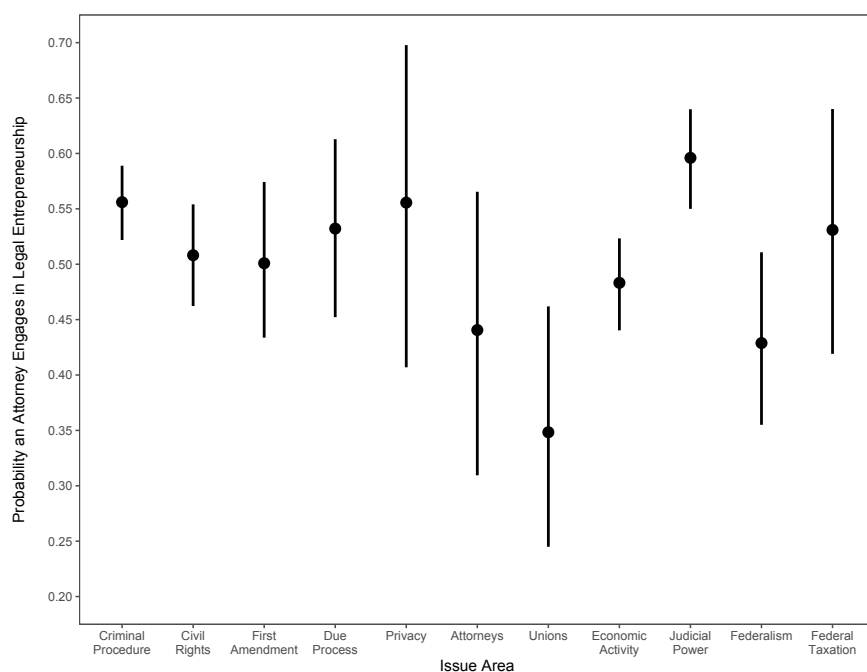


Figure 4.2: **Probability an Attorney Engages in Legal Entrepreneurship by Issue Area** – Probability an attorney engages in legal entrepreneurship based on the issue area into which the case falls. Vertical lines are 95% confidence intervals. Predicted probabilities calculated using the observed-value approach.

The results also suggest that attorneys are less likely to engage in legal entrepreneurship when lower court conflict exists. Figure 4.3 shows that attorneys are significantly more likely to engage in legal entrepreneurship when lower courts do not conflict on an issue (probability of 0.54 [0.52, 0.56]) than they are when the lower courts produce conflicting opinions (probability of 0.50 [0.46, 0.52]). Attorneys are equally likely to select a prevailing

or entrepreneurial argument when the lower courts struggle to find a valid answer, which suggests, as I expected, that wide-scale conflict might dampen an attorney’s willingness to be entrepreneurial.

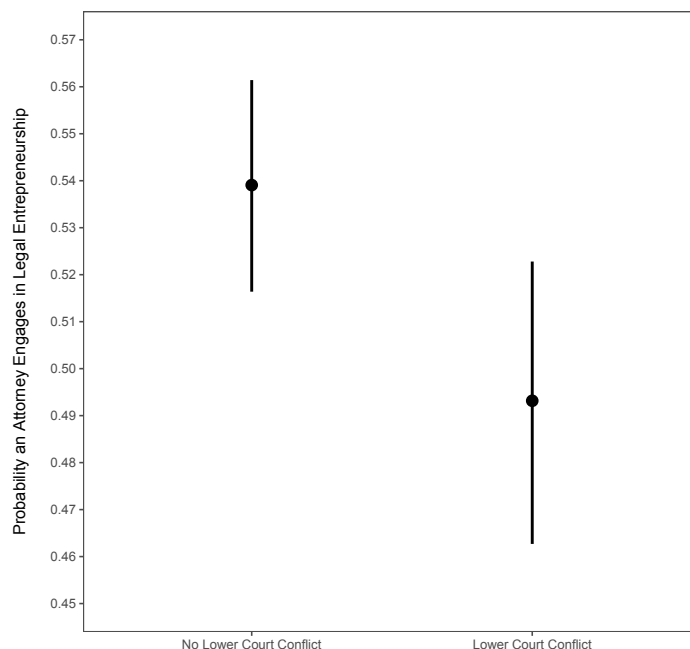


Figure 4.3: **Probability an Attorney Engages in Legal Entrepreneurship When Lower Court Conflict Exists** – Probability an attorney engages in legal entrepreneurship when lower court conflict exists (right) or does not (left). Vertical lines identify 95% confidence intervals. Predicted probabilities calculated using the observed-value approach.

Additionally, attorneys are significantly more likely to make an entrepreneurial argument when a lower court justice filed a dissent. The left side of Figure 4.4 shows that an attorney has a 0.51 [0.49, 0.53] probability of using an entrepreneurial argument when the justices fail to notice a lower court dissent. But, when the dissent is prominent enough that it draws the justices’ attention, that probability increases by five percentage points to 0.56 [0.52, 0.59], as seen on the right side of Figure 4.4. These results suggest attorneys recognize that a lower court dissent might signal issues with the majority’s approach to the law and give attorneys the push they need to make an entrepreneurial argument.

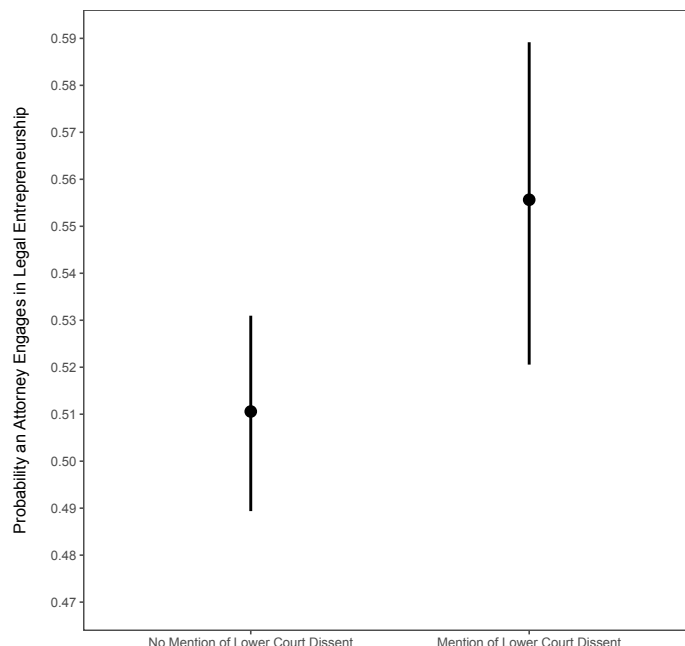


Figure 4.4: **Probability an Attorney Engages in Legal Entrepreneurship When a Lower Court Judge Dissents** – Probability an attorney engages in legal entrepreneurship when the Supreme Court does not note a lower court dissent (left) or writes about a lower court dissent in the eventual opinion (right). Vertical lines identify 95% confidence intervals. Predicted probabilities calculated using the observed-value approach.

Reaching the final legal environment variable, I find that, contrary to my expectations, attorneys are no more or less likely to make an entrepreneurial argument when a case is salient. When a case is low salience, attorneys have a 0.50 [0.47, 0.53] probability of engaging in legal entrepreneurship, while they have a 0.55 [0.51, 0.59] probability of doing the same when the case is high salience. While the numbers would suggest attorneys are more likely to use an entrepreneurial argument in salient cases, the difference is not statistically significant.

The last set of variables under study here are the ones concerning attorney resources. Starting first with attorney experience, which is presented in Figure 4.5, I find that more experienced attorneys are significantly more likely to engage in legal entrepreneurship than are their less-experienced colleagues. Moving from the low value of no experience before the justices (logged value of 0) to an otherwise extraordinary 29 past appearances before the justices (logged value of 3.4), the inexperienced attorney has a 0.50 [0.48, 0.52] probabil-

ity of engaging in entrepreneurship, while the experienced attorney has a 0.58 [0.53, 0.64] probability of doing the same. This eight-percentage-point increase suggests that attorneys feel more confident making novel arguments when they are more familiar with the Supreme Court’s ebbs and flows.

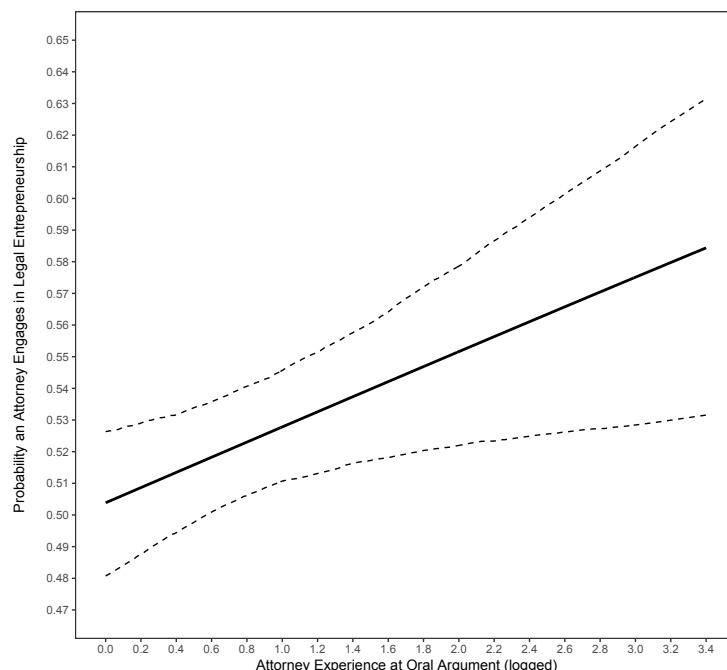


Figure 4.5: **Probability an Attorney Engages in Legal Entrepreneurship Based on Attorney Experience** – Probability an attorney engages in legal entrepreneurship as the attorney’s past experience at oral argument increases. Dashed lines are 95% confidence intervals around those estimates. Predicted probabilities calculated using the observed-value approach.

Interestingly, the results suggest attorney experience is the only resource that matters. According to the results, the Solicitor General is no more or likely to make an entrepreneurial argument than his colleagues; he has a 0.54 [0.47, 0.60] probability of making an entrepreneurial argument, while other attorneys are two percentage points less likely to do the same. The difference is not statistically significant. Attorneys representing high-status clients are less likely to make entrepreneurial arguments than are attorneys representing economically-disadvantaged clients, with the probability of making an entrepreneurial argument decreasing from 0.57 to 0.49, but that difference is not statistically significant either. Finally, the results suggest the petitioner and respondent are equally likely to make an en-

entrepreneurial argument. Despite perhaps having more reason to go entrepreneurial, attorneys representing the petitioner are not more willing to partake in entrepreneurial behavior.

4.5 Discussion

Twelve years after the Supreme Court's decision in *Lawrence v. Texas* (2003), Justice Anthony Kennedy delivered another majority opinion in support of same-sex rights, this time ruling that the same Due Process Clause that protected same-sex couples from intrusion into their bedrooms also guaranteed same-sex couples the right to marry (Frank 2017). When Kennedy announced the decision in *Obergefell v. Hodges* (2015), he did so in a world that was dramatically different from the one in which Garner and Lawrence's attorneys originally approached the Court – public opinion had shifted in favor of gay rights, same-sex marriage was already legal in 37 states and the District of Columbia, and the Obama administration even helped the six same-sex couples argue their case before the Court (Carpenter 2012; Kaplan 2018). But the attorneys who represented those couples did not approach the Court simply because times had changed; they also did so because, after *Lawrence*, they knew they could win (Frank 2017). Had the attorneys representing Tyron Garner and John Geddes Lawrence misread the signs or misinterpreted the need to use a conservative argument in *Lawrence v. Texas*, *Obergefell* could have taken much longer than twelve years to happen.

Every day, attorneys make decisions that can change the direction of future cases. They decide which words to use, which appeals to make, which cases to cite, and how to discuss them. And, importantly, they make a decision about how to frame their arguments, deciding whether to stick with the familiar and prevailing or engage in entrepreneurial behavior. As the results I present here show, attorneys are strategic about when to employ a new argument and when to stick with the prevailing one, modifying their behavior based on greater forces surrounding their cases. While membership changes and public mood may not influence their decisions, attorneys really do pay attention to the legal environment surrounding their cases. They look for signs from the lower courts that the justices might be willing to accept

entrepreneurial arguments, and they are more willing to try these arguments in some situations than in others. Experienced attorneys are more likely to engage in entrepreneurship than novices, but other resources do not help them make decisions regarding their argument framing. Attorneys, in short, make strategic decisions that can eventually change outcomes on the U.S. Supreme Court.

While I am confident in the results presented in this paper, there are, as always, limits in its approach. For one thing, I treat entrepreneurship as a singular activity – attorneys either engage in it, or they do not. But the attorneys themselves suggest their entrepreneurial endeavors can be either gradual or dramatic, suggesting that a more complicated entrepreneurship scale might be more appropriate at some point (Toobin 2008; Mauro 2019). In the future, I could develop a more refined measure of engagement with entrepreneurial arguments to see if attorneys work by degrees.

Additionally, the supervised machine learning processes I use here are not prefect. Reliable machine learning and text analysis requires constant monitoring, validation, and correction (Grimmer and Stewart 2013; Schoenherr and Black 2019b); to get data that is akin to human coding, scholars have to invest significant time in checking the computerized output. And even then, the computer can still produce errors that human coders would not make, or find itself unable to correct errors that humans might find. Consider, for example, that it is almost impossible for a computer to differentiate between casual mentions of any case name shortened to *Johnson*¹⁷ or *Smith*.¹⁸ While a human coder could identify these casual mentions based on context, the computer cannot, and these short-hand citations are consequently left out of my analysis. Additionally, attorneys make mistakes in the text itself.

¹⁷A short list would include *Johnson v. United States* (2015), a criminal rights case, and *Texas v. Johnson* (1989), the famous flag-burning cases, which should not be confused with *Johnson v. Texas* (1993), another criminal rights case.

¹⁸A non-comprehensive list would include *Employment Division v. Smith* (1990), a religious rights case, *Smith v. Texas* (2007), on jury instruction, or *Smith v. Berryhill* (2019), a Social Security case.

They occasionally mis-cite cases, which humans can find and computers cannot.¹⁹ Attorneys also make typos; one slip of the finger could change a discussion of *Terry v. Ohio*, 392 U.S. 1 (1966) into a study of *Californians v. California*, 393 U.S. 1 (1968) in my data. Continuing to employ human-assisted coding along the automated process would help mitigate some of these problems, but they will probably always exist in some form.

My goal here was to present an exploratory analysis of what attorneys might consider when deciding how to approach the justices. Moving forward, then, scholars should continue to identify and test other factors that might influence attorneys' decisions. Is it possible that attorneys, like the justices, pay attention to how many amicus briefs get filed along their petition for writ of certiorari (Caldeira and Wright 1988; Schoenherr and Black 2019a), and therefore modify their approach to case based on anticipated levels of support? Anecdotal evidence from the Women's Rights Project suggests that Ruth Bader Ginsburg was able to line up support and therefore expand her argument beyond the pages of her own brief (DeHart 2018); is it possible that other attorneys are more likely to engage in legal entrepreneurship when they know they can do the same?

Another possible avenue for future research would involve an over-time analysis of attorneys' decisions to innovate. Were attorneys more likely to make the decision to innovate when certain justices were the median? Or were they more likely to use prevailing arguments when worried the newer, more conservative Burger Court would overturn Warren Court precedents? These are all questions worth greater investigation using the approach that I outlined here.

¹⁹Hilariously, Justice Harry Blackmun would correct citations in his copies of briefs while also noting his irritation that the attorney could not find the right citation.

CHAPTER 5

CONCLUSION

Most of the time, when people – consumers of news, reporters, judicial politics scholars, or lawyers – talk about the Supreme Court, they tend to develop narratives about how the justices’ personalities and ideological preferences drive outcomes at the Court. When the Court upheld key provisions of the Affordable Care Act in *National Federation of Independent Businesses v. Sebelius* (2012), journalists and academics alike told the tale of Chief Justice Roberts’s heroic decision to side with the liberal justices in order to maintain the legitimacy of the institution he steered (Biskupic 2019; Toobin 2012). For at least a ten-year period, any discussion of an important case included commentary on how Justice Anthony Kennedy, a man the *New Yorker* once branded “the agonizer,” would make the decisive vote in the case (Kaplan 2018; Lithwick 2015; Rosen 1996; Tribe and Matz 2014). And before Kennedy, there was Justice Sandra Day O’Connor, who, the reporters pointed out, was a no-nonsense Goldwater Republican from rough-and-tumble Arizona whose judicial philosophy (or lack thereof) perpetually kept the Court’s decisions from moving too far away from public opinion (Biskupic 2005; Thomas 2019; Toobin 2008).

Academic research does this too. Segal and Spaeth (2002) looked at voting patterns to establish that “Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal” (86). Epstein and Knight (1998) and later Bailey and Maltzman (2011) offered the correction that Supreme Court justices are *strategic* seekers of policy who must deal with institutional and legal constraints before they can vote in a policy-minded manner, a suggestion that led to a thousand pieces of research on the constraints (for a quick sampling, see Baum 2006; Black and Owens 2009; Caldeira, Wright and Zorn 1999; Clark 2009; Hansford and Spriggs 2006; Johnson, Wahlbeck and Spriggs 2006). And even more recent work by Black et al. (2020) and Hall

(2018) point out that the justices' own personality profiles can alter their behavior on the Court. Again, the emphasis is clear: the justices' ideological preferences and personalities are driving outcomes at the Supreme Court.

My goal in these pages was to show that the justices alone are not driving outcomes at the United States Supreme Court. All too often, the research on the Court's decision-making process implicitly assumes that the justices independently identify the legal rationale for their decisions – that is to say, that the justices' knowledge of the law alone controls their decision-making calculus. They do not. At the justices' request, attorneys provide the justices with their initial exposure to the legal arguments involved in a case and set boundaries around it (Epstein, Segal and Johnson 1996). Attorneys and the legal arguments they make consequently play a major role at the Supreme Court. While the justices' personalities and preferences undoubtedly influence outcomes at the Supreme Court, attorneys' arguments matter too. Attorneys help push the justices toward certain choices, and their decisions matter and deserve study in dissertations well beyond this one.

APPENDICES

APPENDIX A

CHAPTER 3 APPENDIX

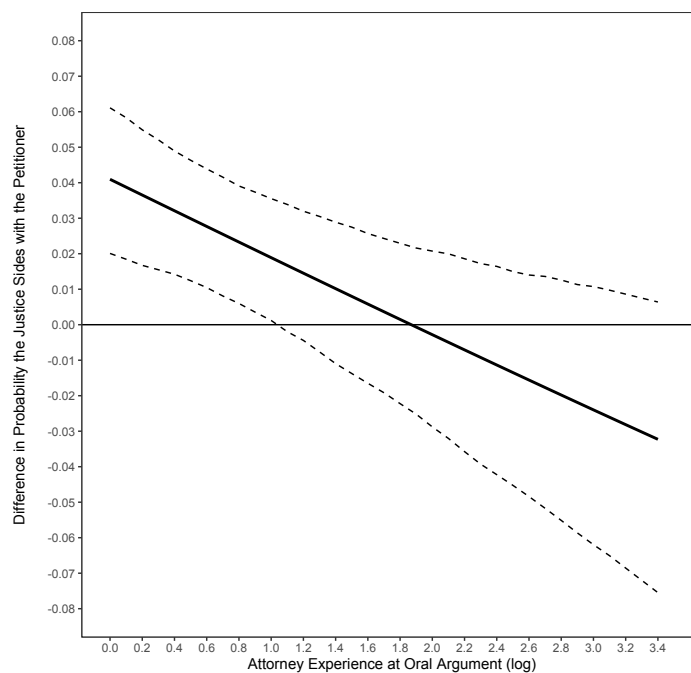


Figure A.1: **Difference in Probability a Justice Sides with the Petitioner Based on Decision to Engage in Legal Entrepreneurship and Attorney Experience** – Probability a justice sides with the petitioner, based on petitioner experience, when the petitioner engages in legal entrepreneurship minus the probability a justice sides with the petitioner, based on petitioner experience, when the petitioner uses a prevailing argument. Dashed lines are 95% confidence intervals around those estimates. Predicted probabilities calculated using the observed-value approach.

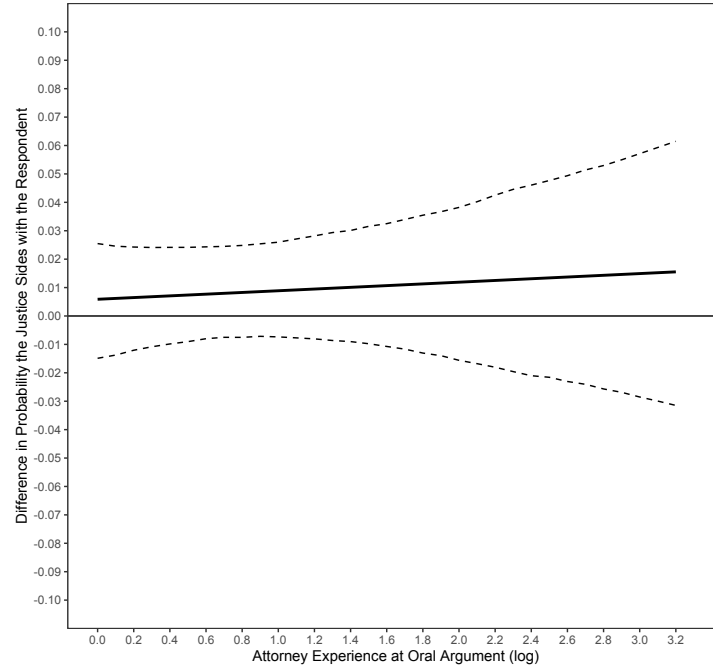


Figure A.2: **Difference in Probability a Justice Sides with the Respondent Based on Decision to Engage in Legal Entrepreneurship and Attorney Experience** – Probability a justice sides with the respondent, based on respondent experience, when the respondent engages in legal entrepreneurship minus the probability a justice sides with the respondent, based on respondent experience, when the respondent uses a prevailing argument. Dashed lines are 95% confidence intervals around those estimates. Predicted probabilities calculated using the observed-value approach.

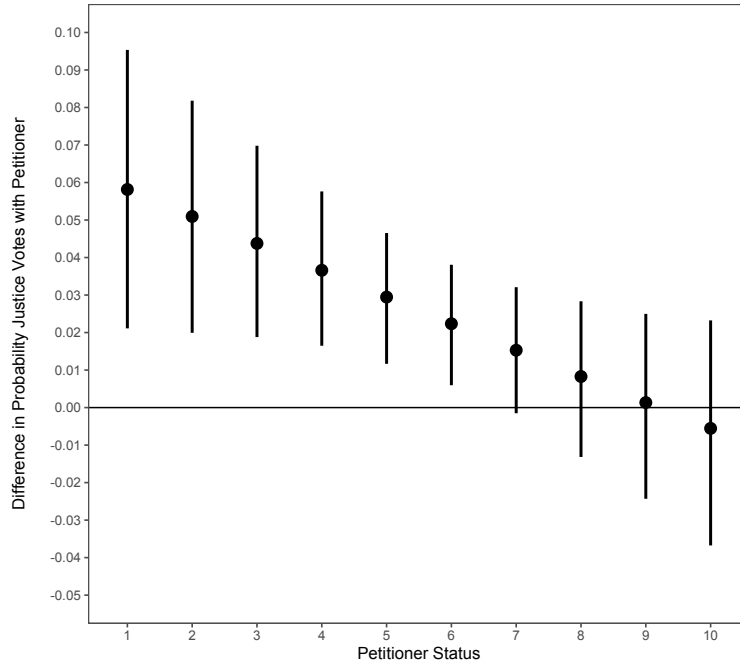


Figure A.3: **Difference in Probability a Justice Sides with the Petitioner Based on Decision to Engage in Legal Entrepreneurship and Litigant Status** – Probability a justice sides with the petitioner, based on petitioner status, when the petitioner engages in legal entrepreneurship minus the probability a justice sides with the petitioner, based on petitioner status, when the petitioner uses a prevailing argument. Dashed lines are 95% confidence intervals around those estimates. Predicted probabilities calculated using the observed-value approach.

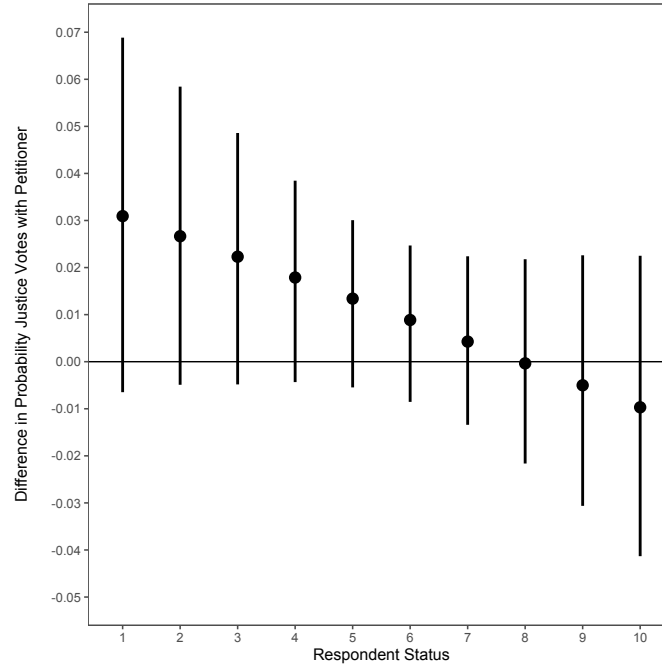


Figure A.4: **Difference in Probability a Justice Sides with the Respondent Based on Decision to Engage in Legal Entrepreneurship and Litigant Status** – Probability a justice sides with the respondent, based on respondent status, when the respondent engages in legal entrepreneurship minus the probability a justice sides with the respondent, based on respondent status, when the respondent uses a prevailing argument. Dashed lines are 95% confidence intervals around those estimates. Predicted probabilities calculated using the observed-value approach.

APPENDIX B

CHAPTER 4 APPENDIX

I considered several alternate specifications when constructing my model of an attorney's decision to engage in legal entrepreneurship in Chapter 4. I present them here. Table B.1 contains three models. Model 1 is an ordinary least squares (OLS) regression on an alternative specification of the dependent variable, namely a continuous indicator of attorneys engaging in 1, 2 or 3 different entrepreneurial acts. Model 2 is a logistic regression of an attorney's decision to engage in legal entrepreneurship, but I replace the new justice indicator with one that identifies if a new justice joined the Court over the last two terms. Finally, Model 3 is also a logistic regression of an attorney's decision to engage in legal entrepreneurship, but I replace the new justice indicator with a variable that identifies when a justice who moved the Court's median joined it. Following the model in the paper in Table 4.1, Models 2 and 3 have standard errors clustered by case.

Table B.1: Alternative Logistic Regression Results, Attorney Decision to Engage in Legal Entrepreneurship

	Model 1	Model 2	Model 3
New Justice	-0.055 (0.029)		
New Justice In Last Two Terms		-0.112 (0.076)	
Move the Median Justice			0.211 (0.143)
Public Mood	0.007 (0.004)	0.017 (0.011)	0.007 (0.012)
Ideological Congruence	-0.099* (0.040)	-0.322** (0.110)	-0.331** (0.110)
Criminal Procedure Case	0.150*** (0.042)	0.294* (0.117)	0.306** (0.117)
Civil Rights Case	0.055 (0.049)	0.100 (0.135)	0.109 (0.135)
First Amendment Case	0.075 (0.064)	0.078 (0.177)	0.071 (0.177)
Due Process Case	0.058 (0.072)	0.191 (0.199)	0.191 (0.199)
Privacy Case	0.119 (0.116)	0.295 (0.323)	0.316 (0.323)
Attorneys Case	0.005 (0.104)	-0.186 (0.286)	-0.188 (0.286)
Unions Case	-0.197* (0.094)	-0.574* (0.269)	-0.584* (0.269)
Judicial Powers Case	0.173*** (0.049)	0.465*** (0.137)	0.457*** (0.137)
Federalism Case	-0.075 (0.065)	-0.233 (0.181)	-0.225 (0.181)
Federal Taxation Case	0.004 (0.090)	0.207 (0.245)	0.199 (0.245)
Latent Case Salience	0.021 (0.020)	0.091 (0.054)	0.085 (0.054)
Lower Court Conflict	-0.105*** (0.029)	-0.190* (0.080)	-0.195* (0.080)
Dissent Noted in Lower Court	0.069* (0.031)	0.188* (0.085)	0.193* (0.085)
Attorney Experience	0.029* (0.014)	0.098** (0.038)	0.099** (0.038)
U.S. Government Attorney	0.020 (0.053)	0.019 (0.147)	0.014 (0.146)
Attorney Status	-0.009 (0.006)	-0.029 (0.016)	-0.029 (0.016)
Petitioning Attorney	-0.038 (0.027)	-0.093 (0.074)	-0.093 (0.074)
Constant	0.226 (0.252)	-0.888 (0.703)	-0.354 (0.737)
Observations	3018	3018	3018
<i>AIC</i>	6729.843	4144.492	4144.473
<i>BIC</i>	6862.115	4270.751	4270.733
Log likelihood	-3342.922	2051.246	-2051.237

Standard errors in parentheses

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

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