

# Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar

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*During the past two decades, the Supreme Court has witnessed the emergence of an elite private sector group of attorneys who are dominating advocacy before the Court to an extent not witnessed since the early nineteenth century. This development is significant for the simple reason that advocacy matters, including before the Supreme Court. Better, more effective advocates influence the development of the law, and there is generally no court where such advocacy can wield more far-reaching influence than the Supreme Court. And that is precisely what the modern Supreme Court Bar has quietly and increasingly been accomplishing in recent years. The Court grants the petitions filed by the expert members of the Bar at a significantly higher rate, and they also prevail on the merits more frequently. This Article documents the extent of the modern Bar's domination of the Court's docket, arguments, and rulings, considers the extent to which business interests who serve as the Bar's primary clients are enjoying heightened success before the Court as a result, and suggests ways of promoting a fairer allocation of Supreme Court advocacy expertise in the future.*

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### INTRODUCTION

The fourth Wednesday in April is typically the last regularly scheduled day of oral arguments before the Supreme Court of the United States. For the most recently completed October Term 2006, the date was April 25, 2007, and the Court closed its argument session by hearing two hours of oral argument presented by six advocates in three cases, the first two of which were consolidated for purposes of argument.<sup>1</sup> The Court's rulings on the merits several months later garnered, as to be expected, significant attention from the national news media<sup>2</sup> and will invariably generate a spate of commentary in the nation's law reviews. What is wholly absent, however, from that media scrutiny and scholarly commentary is any recognition of the significance for the Supreme Court and the nation's laws, of the identity of the advocates who argued before the Court on April 25, 2007.

The six advocates before the Court on that final day of argument underscore the emergence of a modern Supreme Court Bar whose expertise in Supreme Court advocacy has quietly transformed the Court's docket and its substantive rulings. In sharp contrast to the typical attorney appearing before the Justices throughout much of the twentieth century, each of the six attorneys was an experienced Supreme Court advocate. The attorney with the least experience had filed briefs in twenty-five cases before the Court and this was his fifth oral argument since 2002.<sup>3</sup> Each of the five other attorneys had all appeared before

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1. During the two hours of oral argument, the Court considered a total of three cases. The first two cases were consolidated cases raising an as-applied challenge to the constitutionality of federal campaign finance law (*Federal Election Commission v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007), and *McCain v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007)), and the third case concerned the applicability of a federal law providing for removal of actions from state to federal court (*Watson v. Philip Morris Cos., Inc.*, 127 S. Ct. 2301 (2007)).

2. See, e.g., Robert Barnes, *5-4 Supreme Court Weakens Curbs on Pre-Election TV Ads; Ruling on McCain-Feingold Law Opens Door for Interest Groups in '08*, WASH. POST, June 26, 2006, at A1; Linda Greenhouse, *Justices Loosen Ad Restrictions in Campaign Law*, N.Y. TIMES, June 25, 2007, at A1.

3. James Bopp, counsel for respondent Wisconsin Right to Life, previously presented oral argument before the Court in *Wisconsin Right to Life v. Federal Election Commission*, 546 U.S. 410 (2006);

the Court on multiple occasions that Term and more than twenty other times during their careers.<sup>4</sup> They included the current Solicitor General,<sup>5</sup> who was arguing his eighth case during October Term 2006, an Assistant to the Solicitor General,<sup>6</sup> who has argued thirty-six cases, two former Solicitors General,<sup>7</sup> who have argued before the Court fifty and forty-six times, respectively, and one former Assistant to the Solicitor General,<sup>8</sup> who was not only presenting his twenty-first oral argument, but had argued a little over a week before in another case.<sup>9</sup>

No doubt today's Supreme Court Bar pales in several respects in comparison to the Bar's heyday in the early nineteenth century when a few extraordinary attorneys dominated oral argument before the Court. Arguing as many as three hundred cases, Walter Jones, Daniel Webster, William Wirt, William Pinkney, Thomas Emmett, Littleton Tazewell, Frances Scott Key, and Luther Martin, among a handful of others, presented argument in some of the young nation's most famous cases, including *M'Culloch v. Maryland*,<sup>10</sup> *Trustees of Dartmouth College v. Woodward*,<sup>11</sup> *Martin v. Hunter's Lessee*,<sup>12</sup> and *Gibbons v. Ogden*.<sup>13</sup> The Supreme Court Bar today is certainly far less flamboyant—one is unlikely to see a prominent advocate nowadays arguing, like William Pinkney, with “amber-colored doeskin gloves”<sup>14</sup> on, or, like Luther Martin, intoxicated and

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*Randall v. Sorrell*, 126 S. Ct. 2479 (2006); *Federal Election Commission v. Beaumont*, 539 U.S. 146 (2003); and *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

4. The number of oral arguments for attorneys in these cases and other cases in this Article was determined based on a series of steps. The first step was a LEXIS search of the counsel's name within a prescribed number of words of the word “argued,” which is how the Court describes the counsel presenting oral argument. The range of words used was deliberately large so that more than the correct number of cases were captured by the search. To identify which of those cases were ones in which counsel in fact presented oral argument, each individual case was examined in order to eliminate from the list cases where counsel's name was listed, but he was actually serving in that case as a co-counsel not presenting oral argument, or the person presenting argument was in fact a different person with a similar last name. More recent cases were also double-checked by reference to the Supreme Court's online database. One had to be careful not to require both first and last names for the initial searches because counsel who present argument in their capacity as government lawyers are typically referred to in the U.S. Reports only by their title and last name (for example, Solicitor General Seth Waxman is described only as Solicitor General Waxman). Finally, for some of the advocates with higher numbers, those individuals were e-mailed to see if their personal counts coincided with my own.

5. Solicitor General Paul Clement.

6. Assistant to the Solicitor General Irving L. Gornstein.

7. Former Solicitors General Seth Waxman, now with WilmerHale, and Ted Olson, now with Gibson, Dunn & Crutcher.

8. Former Assistant to the Solicitor General David C. Frederick, now with Kellogg, Huber, Hansen, Todd, Evans & Figel.

9. Frederick served as counsel of record for petitioner in *Powerex Corp. v. Reliant Energy Services, Inc.*, 127 S. Ct. 2411 (2007) (the case was argued April 16, 2007).

10. 17 U.S. (4 Wheat.) 316 (1819).

11. 17 U.S. (4 Wheat.) 518 (1819).

12. 14 U.S. (1 Wheat.) 304 (1816).

13. 22 U.S. (9 Wheat.) 1 (1824).

14. David C. Frederick, *Supreme Court Advocacy in the Early Nineteenth Century*, 30 J. SUP. CT. HIST. 1, 4–5 (2005).

wearing soiled, old-fashioned clothes.<sup>15</sup> Nor would an advocate today be likely to replicate Daniel Webster's reported feat of "interrupt[ing] oral argument when a bevy of admiring ladies entered the courtroom to listen to him—and beg[inning] again from the beginning for their benefit."<sup>16</sup>

Perhaps because today's Supreme Court advocates lack any comparable color, what has gone wholly unrecognized by all, including legal scholars, is how the re-emergence of a Supreme Court Bar of elite attorneys similar to the early-nineteenth-century Bar in its domination of Supreme Court advocacy is quietly transforming the Court and the nation's laws.<sup>17</sup> The influence of expert advocates is likely greatest at the jurisdictional stage when the Court's resources are stretched the most and the Court most depends on the skills of the advocates in sifting through the thousands of petitions seeking review. But there is good reason to believe that their influence reaches the Court's rulings on the merits as well, just as it did in the early nineteenth century. Indeed, the influence of these new elite lawyers is no longer confined to advocacy *before* the Court. It now extends to advocacy *within* the Court itself as the modern Supreme Court Bar has become a training ground for the Justices themselves, as realized in the President's selection of the newest Chief Justice.

This Article explores the emergence of a new elite Supreme Court Bar and the resulting transformation of the Court, its plenary docket, and its rulings. The first Part of the Article describes the re-emergence in recent decades of an elite group of private and public sector lawyers who practice before the Court. The second Part of the Article considers several possible explanations for the rise of the modern Bar, including the paradox presented by the re-emergence of a Supreme Court Bar at precisely the time when the Court's merits docket has been significantly decreasing. The third Part of the Article evaluates the significance of the Bar's increasing domination of advocacy before the Court and concludes that it is likely affecting the Court's docket and its rulings on the merits because of the impact of better advocacy before the Court and, with a member of the Bar now on the Court, also because of the potential for better advocacy within the Court. Most notable is the remarkable success recently enjoyed by the business community in both obtaining Court review and then in prevailing on the merits. The U.S. Chamber of Commerce during the most recently completed October Term 2006 had its "highest winning percentage in

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15. G. Edward White, *The Marshall Court and Cultural Change, 1815–1835*, in 3 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 230, 237, Paul A. Freund & Stanley N. Katz eds., 1988 (internal citations and quotations omitted).

16. S.W. Finley, *Daniel Webster, Packed 'Em In*, 1979 SUP. CT. HIST. SOC'Y Y.B. 70, 70.

17. For the purposes of this Article, my measure of an expert Supreme Court advocate is someone who has either him- or herself presented at least five oral arguments before the Court or works with a law firm or other organization with attorneys who in the aggregate have presented a total of at least ten arguments before the Court. See *infra* note 73 and accompanying text.

its 30-year history,” winning thirteen out of fifteen cases,<sup>18</sup> which appears to be directly traceable to the rise of the modern Supreme Court Bar. For this same reason, however, there is cause for concern that the re-emergence of a dominant Supreme Court Bar may be skewing disproportionately the Court’s docket and rulings on the merits in favor of those monied interests more able to pay for such expertise. The Article concludes by discussing this possibility as well as methods for its redress.

### I. THE MODERN RE-EMERGENCE OF A SUPREME COURT BAR

Strictly speaking, to be a member of the Supreme Court Bar today is not a big deal. Although attorneys routinely tout their membership in the Bar as a meaningful credential of distinction, the Supreme Court Bar is one of the least discerning clubs. The Court itself has characterized an attorney advertisement that emphasizes the fact of membership in its Bar as “at least bad taste.”<sup>19</sup>

The qualifications for membership are minimal: three years as a practicing lawyer admitted to any bar of any state, a certificate of good standing from that bar, sponsorship by two current members of the bar, and a \$200 check payable to the Court.<sup>20</sup> According to a recent American Bar Association survey, there are currently 1,116,967 licensed lawyers in the United States.<sup>21</sup> The Supreme Court reports that there are 262,684 members of the Supreme Court Bar.<sup>22</sup> Of course, relatively few of the thousands of members of the Supreme Court Bar have ever filed a brief in the Court, let alone represented a party in a case granted review or presented oral argument before the Justices.

Nor, until relatively recently, had those few members of the Bar who do appear before the Court formed the kind of identifiable group of expert Supreme Court practitioners, such as Webster, Jones, and Wirt, that dominated advocacy before the Court during the nineteenth century.<sup>23</sup> The virtual monopoly that a

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18. Michael Orey, *The Supreme Court: Open for Business: The Roberts Court Is Showing a Willingness to Referee Corporate Concerns*, BUS. WK., July 9, 2007, at 30; see *infra* text accompanying notes 283–91.

19. See *In re R.M.J.*, 455 U.S. 191, 205 (1982) (“The emphasis of this relatively uninformative fact is at least bad taste. Indeed, such a statement could be misleading to the general public unfamiliar with the requirements of admission to the Bar of this Court.”).

20. SUP. CT. R. 5. The membership fee was only \$100 from 1979 until July 2007, when the Court upped the amount to \$200, effective October 1, 2007.

21. AMERICAN BAR ASSOCIATION, LAWYER DEMOGRAPHICS (2006), [http://www.abanet.org/marketresearch/lawyer\\_demographics\\_2006.pdf](http://www.abanet.org/marketresearch/lawyer_demographics_2006.pdf).

22. E-mail from Jennifer Locke Davitt, Faculty Services Librarian, Georgetown University Law Center, to author (Jan. 31, 2007) (on file with author) (number provided by clerk of bar admissions at the Supreme Court for the United States). One limitation of the Court’s listing of members of the Supreme Court Bar is that the Court does not require any kind of annual fee or re-enrollment to maintain membership. Upon joining once, an attorney is a permanent member of the Court’s Bar absent a formal disbarment action by the Court. KEVIN T. MCGUIRE, *THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY* 30 (1993).

23. According to a compilation prepared by the Supreme Court, Walter Jones, Daniel Webster, and William Wirt are the top three oral advocates before the Court in terms of frequency of appearances,

handful of lawyers possessed over Supreme Court advocacy during that early part of the nation's history was largely the result of geography. Washington, D.C., was literally a swampland, and travel from major cities such as New York City or Boston was too difficult for leading members of their respective bars.<sup>24</sup> That is why lawyers from Maryland, Virginia, and Pennsylvania enjoyed such prominence before the High Court. “[O]ne-fifth to one-fourth of all the cases appearing in the volumes of the reporters, Henry Wheaton and Richard Peters . . . were argued by Francis Scott Key, John Law, Thomas Swann, Walter Jones or Richard S. Coxe—all local counsel residing in or about Washington.”<sup>25</sup> But, for that same reason, as travel became easier, the Supreme Court Bar naturally and gradually lost its cohesiveness by the latter-half of the nineteenth century.<sup>26</sup>

Throughout most of the twentieth century, there were similarly only a few identifiable, highly skilled individuals, such as John W. Davis, Charles Evans Hughes, Charles E. Hughes, Jr., Thomas D. Thacher, Thurgood Marshall, Erwin Griswold, and Archibald Cox, who appeared regularly before the Justices. Most lawyers with Supreme Court cases were newcomers, most likely arguing for the first time. But in no event was there a discrete, coherent group of private lawyers dominating the cases before the Court, capable of boasting a sustained, continuous Supreme Court practice.

The only significant, ongoing concentration of Supreme Court expertise during this time period was in the Office of the Solicitor General, representing the United States before the Court. Not coincidentally, Davis, Thacher, Marshall, Griswold, and Cox each served as Solicitor General.<sup>27</sup> Attorneys in that small office regularly filed briefs and presented oral argument in cases before the Court. The ten attorneys who have argued the most cases before the Court since the beginning of the twentieth century all worked with the Solicitor General's Office for a significant part of their careers.<sup>28</sup> Only one attorney in the

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although for each the Court notes that there is some dispute about the precise total number of cases argued. *See* Supreme Court of the United States, Information Sheet: Most Argued Supreme Court Cases (Aug. 2005) (on file with author).

24. *See* WHITE, *supra* note 15, at 202 (“As late as 1812 Joseph Story anticipated that the trip from Washington to Boston would take twelve days; from Washington to Charleston took even longer.”).

25. MCGUIRE, *supra* note 22, at 13–14 (quoting CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 368 (1939)).

26. *Id.* at 19.

27. LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 668–69 (4th ed. 2003).

28. According to an official compilation prepared by the Supreme Court in August 2005, the following attorneys, each of whom worked for the Solicitor General's Office, presented (from highest to lowest) the most oral arguments before the Court since the beginning of the twentieth century: Lawrence G. Wallace (157); John W. Davis (140); Erwin N. Griswold (118/124/127); Edwin Kneedler (89); Archibald Cox (85); Daniel M. Friedman (80); John Sergeant (63); Andrew Frey (62); Michael Dreeben (57); and Jeffrey Minear (56). The Court reports multiple numbers for Griswold because of some uncertainty in counting cases. *See* Supreme Court of the United States, Information Sheet: Most Argued Supreme Court Cases (Aug. 2005) (on file with author). Because Edwin Kneedler, Andrew

top twenty and only two out of the top thirty did not work with that Office.<sup>29</sup> The percentage of non-government attorneys regularly and repeatedly appearing before the Justices steadily declined from the heights achieved by the private Supreme Court Bar in the nineteenth century.<sup>30</sup>

The resulting advantage in expertise that attorneys within the Solicitor General's Office gained is one reason for the high rate of success that the federal government has enjoyed before the Court in recent decades. The Court plainly provides the Solicitor General's legal arguments with heightened respect because of the nature of his client—the United States—and the deference that the judicial branch naturally owes in many legal settings to the views of counsel representing the interests of the two other branches of government. But, the Solicitor General's influence is not simply a reflection of the nature of the client interests being represented. As a repeat player before the Court, the Solicitor General and attorneys within that Office work hard to gain the Court's trust and to earn a reputation for integrity in a way that only a repeat player has an opportunity to do. And, for much of the twentieth century, the Solicitor General's Office stood alone in that respect, especially as the rise of the national government inevitably thrust the Solicitor General into an increasing percentage of the Court's docket.

The Court grants the Solicitor General's petitions for writ of certiorari at a rate of several orders of magnitude higher than anyone else's—about 70% of the time compared to less than 3–4% for others.<sup>31</sup> The Court almost always

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Frey, Michael Dreeben, and Jeffrey Minear have each argued additional cases since the Court's compilation in 2005, each of their totals is now even higher.

29. Larry Gold of Bredhoff & Kaiser is the only attorney listed in the top twenty who did not once work in the Solicitor General's Office, and Laurence Tribe is the only additional attorney in the top thirty not to have done so. *See* Supreme Court of the United States, Information Sheet: Most Argued Supreme Court Cases (Aug. 2005) (on file with author).

30. A canvassing of the attorneys appearing before the Justices in the 1840, 1900, and 1940 Terms illustrates the trend. *See* Jennifer Locke Davitt, Oral Advocates Before Supreme Court Terms 1840, 1900, and 1940 (Sept. 2006) (unpublished document prepared for author by Georgetown University Law Center Library, on file with author).

	<b><u>1840 Term</u></b>	<b><u>1900 Term</u></b>	<b><u>1940 Term</u></b>
Total Number of Advocates	44	271	296
Advocates Arguing Two or More Cases	12 (27%)	51 (19%)	37 (13%)
Non-Government Advocates Arguing Two or More Cases	11 (25%)	45 (17%)	20 (7%)
Advocates Arguing One Case	32 (73%)	220 (81%)	259 (88%)

31. Corey A. Ditslear, Office of the Solicitor General Participation Before the U.S. Supreme Court: Influences on the Decisionmaking Process 32 (2003) (unpublished Ph.D. dissertation, Ohio State University) (on file with author); Mark A. Jones, An Influence Above the Federal Interest: The Solicitor General's Pervasive Participation in Supreme Court Litigation 16 (April 2006) (unpublished manuscript, on file with author) (statistical survey of Solicitor General's Participation in Supreme Court as petitioner, respondent, and amicus curiae); *see* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN

grants the Solicitor General permission to participate in oral argument as *amicus curiae*, yet rarely grants similar permission to any other *amicus*.<sup>32</sup> The Court uniquely invites the Solicitor General to file an *amicus* brief advising the Court at the jurisdictional stage whether review should be granted in a host of cases each year,<sup>33</sup> and almost every time the Court follows the Solicitor General's advice.<sup>34</sup> And, on the rulings on the merits, the Solicitor General wins in the vast majority of cases in which the federal government participates either as a party or as an *amicus*.<sup>35</sup> Like all other parties, its success rate is much higher as a petitioner or an *amicus* supporting a petitioner than as a respondent or *amicus* supporting respondent, but the federal government has historically enjoyed far more favorable rulings in all of these roles than have others. In recent decades, when on petitioner's side (either as the petitioner or as supporting *amicus*), the Solicitor General won 75% of the time, compared to petitioners otherwise winning 61% of the time, and when the Solicitor General filed on respondent's side, that position prevailed in 52.4% of the time, compared to a success rate of only 35.4% for respondents in the absence of the Solicitor General's support.<sup>36</sup> A petitioner's chances of winning increase by an average of 17% if supported by an *amicus* brief filed by the Solicitor General and decrease by an average of

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THE UNITED STATES SUPREME COURT 128–33 (1991) (discussing Solicitor General's office and its success appealing to the Court).

32. For instance, during October Terms 2005 and 2006, the Solicitor General moved to participate in oral argument as *amicus curiae* a total of seventy-nine times and the Court denied the Solicitor General's motion only once. See *Martin v. Capital Franklin Corp.*, 545 U.S. 1162 (2005) (denying Solicitor General's motion to participate in oral argument as *amicus curiae*).

33. REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 142–45 (1992).

34. For instance, during October Term 2004, the Supreme Court invited the Solicitor General to express the views of the United States in eleven cases. The Court followed the Solicitor General's recommendation in all eleven cases, granting review in *Texaco v. Dagher*, 543 U.S. 1143 (2005) (requesting Solicitor General's opinion), *cert. granted*, 545 U.S. 1138 (2005); *IBP, Inc. v. Alvarez*, 541 U.S. 1028 (2004) (requesting Solicitor General's opinion), *cert. granted*, 543 U.S. 1144 (2005); *Merck KGaA v. Integra Life Sciences I, Ltd.*, 543 U.S. 805 (2004) (requesting Solicitor General's opinion), *cert. granted*, 543 U.S. 1041 (2005); and *American Trucking Ass'n v. Michigan Public Service Commission*, 541 U.S. 1084 (2004) (requesting Solicitor General's opinion), *cert. granted*, 543 U.S. 1086 (2005); and denying review in *Honeywell International Inc. v. Hamilton Sundstrand Corp.*, 543 U.S. 954 (2004) (requesting Solicitor General's opinion), *cert. denied*, 545 U.S. 1127 (2005); *Bank of China v. NBM L.L.C.*, 543 U.S. 923 (2004) (requesting Solicitor General's opinion), *cert. dismissed*, 546 U.S. 1026 (2005); *Comstock Resources, Inc. v. Kennard*, 543 U.S. 923 (2004) (requesting Solicitor General's opinion), *cert. denied*, 545 U.S. 1139 (2005); *McFarling v. Monsanto Co.*, 543 U.S. 923 (2004) (requesting Solicitor General's opinion), *cert. denied*, 545 U.S. 1139 (2005); *Keup v. Wisconsin Department of Health and Family Services*, 543 U.S. 806 (2004) (requesting Solicitor General's opinion), *cert. denied*, 545 U.S. 1149 (2005); *Hewlett-Packard Co. Employee Benefits Organization Income Protection Plan v. Jebian*, 542 U.S. 935 (2004) (requesting Solicitor General's opinion), *cert. denied*, 545 U.S. 1139 (2005); and *Ward v. South Carolina*, 541 U.S. 1040 (2004) (requesting Solicitor General's opinion), *cert. denied*, 543 U.S. 808 (2004). See also SALOKAR, *supra* note 33, at 136 (noting that the Court agreed with the Solicitor General's jurisdictional recommendation in twenty-six out of thirty cases during October Term 1984).

35. SALOKAR, *supra* note 33, 142–50.

36. Ditslear, *supra* note 31, at 34–35. In October Term 2001, the Solicitor General enjoyed an extraordinary 84% success rate. See Tony Mauro, *Shadows and Light for Solicitor General Ted Olson, It Was a Year of Unexpected Triumph and Unimaginable Loss*, LEGAL TIMES, July 1, 2002, at 1.

approximately 26% if the Solicitor General instead files an amicus brief in support of respondent.<sup>37</sup>

While the Solicitor General's Office's most high profile responsibilities are the filing of merits and presentation of oral arguments before the Supreme Court, the fifteen to twenty attorneys within that Office have broader responsibilities, which no doubt also play a role in their high degree of success before the Court. They file hundreds of oppositions to petitions for writ of certiorari in cases the federal government won below, trying to keep cases and issues from the Court, especially when presented in potentially unfavorable postures. The Solicitor General is also responsible for deciding whether the government can appeal from any loss suffered in district court.<sup>38</sup> This oversight role helps ensure that the government is not making meritless arguments before the courts of appeals in general and, more particularly, decreases the chances that the government will prevail in federal appellate court on a theory that the Solicitor General would find indefensible in the Supreme Court. When that does happen, the Solicitor General will confess before the Court, something that happens a handful of times each year.<sup>39</sup>

Commentators have offered competing theories for why the Solicitor General does so well before the Supreme Court, including the Office's willingness, not easily replicated by many private counsel, to decline a client's entreaty to seek Supreme Court review or to press certain arguments.<sup>40</sup> The Solicitor General's longer-term interest in representing the United States—and not just a particular client in a particular case—provides the Solicitor General with far more independence and authority in crafting litigation strategies before the High Court.<sup>41</sup> The Solicitor General's conception of the interests of the "United States" may or may not coincide precisely with the narrow concerns of the particular client that is more directly and immediately involved in the specific case than before the Court.<sup>42</sup> More than just a craftsman taking the legal arguments of others and

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37. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 803–04 (2000).

38. Drew S. Days, III., *No Striped Pants and Morning Coat: The Solicitor General in the Lower Federal Courts and State Courts*, 11 GA. ST. U. L. REV. 645, 646–50 (1995).

39. See David W. Rosenzweig, Note, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079, 2080 (1994) ("While precise figures are not available, Solicitors General have confessed error in the Supreme Court approximately 250 times in the past 100 years, or two to three times per term on average.").

40. See, e.g., SALOKAR, *supra* note 33, at 175–80; Michael Bailey et al., *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decisionmaking*, 49 AM. J. POL. SCIENCE 72, 73 (2005).

41. Drew S. Days, III., *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 KY. L.J. 485, 487–88 (1995).

42. Rex E. Lee, *Lawyering for the Government: Politics, Polemics and Principle*, 47 OHIO ST. L.J. 595, 597 (1986) ("[T]here is a widely held, and I believe substantially accurate, impression that the Solicitor General's office provides the Court from one administration to another—and largely without regard to either the political party or the personality of the particular Solicitor General—with advocacy which is more objective, more dispassionate, more competent, and more respectful of the Court as an institution than it gets from any other lawyer or group of lawyers.").

making them sound more persuasive, the Solicitor General routinely rejects legal arguments that the government has advanced (even successfully) in the lower courts in favor of new and often radically different legal theories that it believes possess greater validity, more force, and are more likely to lead to a ruling favorable to the broader interests of the United States.<sup>43</sup>

The Court, moreover, is aware of the kind of judgment exercised by the Solicitor General in deciding which cases warrant the Court's review and what arguments possess sufficient merit to be pressed, which naturally enhances the credibility of those cases and arguments when advanced before the Court.<sup>44</sup> The Solicitor General authorizes a petition for a writ of certiorari in only a small fraction of the cases that the United States loses in the lower courts.<sup>45</sup> Former Solicitor General Rex Lee estimated that he declined five out of every six client agency requests for Supreme Court review "not because he disagree[d] with [his client agency's] position, but solely because he perceive[d] that filing that case might affect his relationship with the Court."<sup>46</sup>

But one factor that plainly plays a significant role in the Solicitor General's success is the sheer expertise in Supreme Court advocacy of the attorneys in

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43. Indeed, based on my own experience as an Assistant to the Solicitor General in the Office, my years since litigating in cases in which the Solicitor General is involved, and in now preparing advocates for oral argument before the Court, the Solicitor General's practice of reformulating legal arguments before the Supreme Court seems virtually routine. Opposing counsel just as routinely complain bitterly about these shifts in the government's legal arguments. But the Court generally seems less bothered, perhaps just viewing the shifts as the inevitable changes that occur if, as the Court hopes will happen, the Solicitor General is constantly rethinking the validity and the force of the government's arguments to ensure that the Court has before it the best legal arguments possible.

44. Interviews with the Justices and their law clerks have confirmed that the Court is aware of the Solicitor General's practice of rigorously screening client agency requests for authorization to file a petition for Supreme Court review and, as a result, the Justices and their clerks give the Solicitor General's petitions, when filed, special deference. See PERRY, *supra* note 31, at 128–33.

45. According to one study of the Solicitor General's Office practices from 1952 through 1962, the Solicitor General authorized appeal in only 43.6% of the government's district court losses and certiorari petitions in only 11% of all cases lost in the federal courts of appeals. See SALOKAR, *supra* note 33, at 18. Not all those requests for certiorari, however, are truly requests for plenary Court review. For instance, that same study states that during October Term 1979 the Solicitor General filed 67 petitions for a writ of certiorari and declined agency requests 426 times. *Id.* at 3. The number "67," however, could be misleading to some readers because it invariably includes a host of protective petitions routinely filed by the Solicitor General to allow the Court to hold a case pending its disposition of a related case already before the Court and therefore is not a true candidate for plenary review. The Solicitor General routinely files such protective petitions numerous times during the course of a Term because the United States is litigating the same legal issue before the Court in other cases and wants to allow its lower court cases to stay alive pending the Court's ruling. For instance, during October Term 2000, the Court granted, vacated, and remanded twelve cases for further consideration in light of its ruling in a federal immigration law case, *Zadvydas v. Davis*, 533 U.S. 678 (2001). See *INS v. Khorn*, 533 U.S. 943 (2001); *INS v. Mounsaveng*, 533 U.S. 943 (2001); *Fasano v. Phan*, 533 U.S. 943 (2001); *INS v. Srimeenagsam*, 533 U.S. 943 (2001); *INS v. Nguyen*, 533 U.S. 944 (2001); *INS v. Chhun*, 533 U.S. 944 (2001); *Ashcroft v. Lim*, 533 U.S. 944 (2001); *INS v. Tran*, 533 U.S. 944 (2001); *INS v. Ourk*, 533 U.S. 944 (2001); *INS v. Phetsany*, 533 U.S. 944 (2001); *INS v. Le*, 533 U.S. 944 (2001). The Court acts on those protective petitions within a few weeks of handing down its ruling on the merits in the cases accepted for plenary view.

46. Lee, *supra* note 42, at 598.

that Office. Because they immerse themselves in the work of the Court, the attorneys of the Solicitor General's Office, unlike many of their opposing counsel, become completely familiar with the Justices and their precedent, including their latest concerns and the inevitable cross-currents between otherwise seemingly unrelated cases that would be largely invisible to those who focus on just one case at a time. They are also comfortable at the lectern, for the simple reason that they have been there often before at least as co-counsel, if not lead counsel, presenting argument. They work hard as repeat litigants to establish their credibility with the Justices. They know how to write briefs for that audience, how to utilize precedent, and how to anticipate problems and exploit opportunities. The Supreme Court law clerks regularly comment on how the Solicitor General "knows all the catchwords, and they know just how to write them in a brief,"<sup>47</sup> and that Office has a "well deserved reputation for excellent written and oral advocacy."<sup>48</sup>

During the first half of the Twentieth Century, several former Solicitor Generals went to New York City law firms where they sought to establish Supreme Court practices: John W. Davis went to Davis Polk where he was the most successful, with 139 career arguments; Charles Evans Hughes, Jr., went to Hughes, Hubbard & Reed where his father practiced before the Court both after resigning his Associate Justice position in 1916 to run for President and before becoming Chief Justice in 1930; and Thomas D. Thacher went to Simpson & Thacher where he had a steady Supreme Court practice. But, by the mid-1980s, there was no coherent private sector Supreme Court Bar able to compete with the Solicitor General's Office. To be sure, there was a smattering of individuals, more likely to be affiliated with an organization like the American Civil Liberties Union or the AFL-CIO<sup>49</sup> than a private law firm who had appeared more than once before the Court, but those non-Solicitor General Office attorneys were the rare exception. Indeed, in commenting on how infrequently he would see a private sector lawyer argue more than once in the same Term, Chief Justice William Rehnquist remarked not long after his appointment in 1986 that "there is no such Supreme Court bar at the present time."<sup>50</sup>

Beginning first slowly in 1985, however, and then quickly accelerating, a private Supreme Court Bar capable of replicating the expertise of the Solicitor General's Office began to develop. Ironically, while leading law firms headquar-

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47. PERRY, *supra* note 31, at 132.

48. Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 47 (2004); see LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987); MCGUIRE, *supra* note 22, at 160–61.

49. See MCGUIRE, *supra* note 22, at 140–42. Five noteworthy exceptions affiliated with law firms were Robert Stern with Mayer, Brown & Platt, Larry Gold and Michael Gottesman of Bredhoff & Kaiser, E. Barrett Prettyman of Hogan & Hartson, and Erwin Griswold of Jones Day. See *id.* at 141–42. But while these attorneys appeared relatively frequently before the Court for the time, the frequency of those appearances pales in comparison to what the leaders of the Supreme Court Bar regularly achieve today.

50. Tony Mauro, *Appealing Practice*, LEGAL TIMES, Oct. 9, 2007, at 14.

tered at several of the nation's largest cities can now boast of significant Supreme Court practices, the only city which could have claimed dominance in the Supreme Court Bar in the first half of the twentieth century, New York City,<sup>51</sup> has noticeably failed to join the field.

The modern transformation of the Bar began when Sidley Austin hired Rex Lee, following his resignation as President Ronald Reagan's first Solicitor General in the summer of 1985, to create a Supreme Court and appellate practice in Sidley's D.C. office. Lee set out to establish a highly visible Supreme Court and appellate practice that could provide to private sector clients the kind of outstanding expert advocacy that the Solicitor General's Office had provided federal agencies. Lee was enormously successful from the outset. During the second half of October Term 1985, almost immediately after leaving office, Lee presented two oral arguments.<sup>52</sup> And then during October Term 1986, the first full Term after Lee's post-government recusal period had expired, he presented oral argument in six different cases before the Court<sup>53</sup>—then a strikingly high number for a private sector lawyer and effectively matching the number of arguments typically presented by the Solicitor General himself. And, in every case but one,<sup>54</sup> Lee represented the petitioner who had successfully obtained Supreme Court review. Just as significant were the identities of Lee's clients. These were not pro bono cases on behalf of individual criminal defendants or nonprofit entities or, with one exception, even state or local agencies for which private sector attorneys would quickly and dramatically reduce their billable rates for the prestige and visibility associated with Supreme Court advocacy. Lee had been hired by a virtual Who's Who of the nation's major industries. In separate cases, he had argued on behalf of leading representatives of the banking, mining, railroads, electric utility, and telecommunication industries.

In one single Term before the Supreme Court, the former Solicitor General had accomplished what no one had done for decades and what the Bar had assumed was no longer economically feasible: he had developed a highly profitable Supreme Court practice on behalf of private sector corporate business

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51. As described above, three former Solicitors General (and one future Chief Justice) had significant Supreme Court practices in the first half of the twentieth century at Davis Polk, Hughes, Hubbard & Reed, and Simpson & Thacher. None of those firms, or any other law firm headquartered in New York today, is one of the nation's leading Supreme Court practices.

52. See *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) (argued April 21, 1986); *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643 (1986) (argued January 22, 1986).

53. See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (argued March 31, 1987); *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27 (1987) (argued April 20, 1987); *Burlington N. R.R. Co. v. Bhd. of Maint. of Way Employees*, 481 U.S. 429 (1987) (argued February 23, 1987); *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987) (argued December 1, 1986); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (argued November 10, 1986); *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130 (1986) (argued October 6, 1986).

54. The only exception was *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130 (1986), in which Lee represented the county government.

clients. The advantages were not, moreover, confined to that practice alone. Such a practice also provided the law firm with enormously favorable visibility with the potential for both enhancing its overall client base beyond the Court and its recruitment of the most sought-after young associates: recent Supreme Court law clerks.<sup>55</sup>

The impact on the private bar of Lee's success at Sidley was immediate and has been long-lasting for more than two decades. A rival Chicago law firm, Mayer Brown & Platt, which had boasted of a Supreme Court practice but never achieved such prominence before the Court,<sup>56</sup> quickly responded to Lee's success with an unprecedented raid of much of the top talent in the Solicitor General's Office during the spring of 1986.<sup>57</sup> Mayer Brown used partnership offers to lure three senior attorneys away from the Office, including two highly regarded veteran Deputies Solicitor General. Mayer Brown then undertook a further campaign to hire other former and current attorneys from the Solicitor General's Office and Supreme Court law clerks in order to compete with Rex Lee at Sidley for private sector clients—a virtual private sector replication of the Solicitor General's Office that became known as “The Shadow Solicitor General's Office.”<sup>58</sup>

In obvious response, two other major Chicago law firms, Jenner & Block and Kirkland & Ellis joined the competition by establishing in D.C. their own Supreme Court practices. Kirkland hired former Solicitor General Ken Starr at the end of the Bush Administration, and Jenner created a Supreme Court practice by merging in 1988 with a boutique appellate law firm headed by a former Assistant to the Solicitor General,<sup>59</sup> thus further increasing the number of firms vying for recent Supreme Court clerks interested in Supreme Court advocacy.

Within D.C., Hogan & Hartson, which had a longstanding, but still fairly small practice focused on its celebrated attorney E. Barrett Prettyman, brought in John Roberts—first from the White House and a second time from his

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55. The interest in Supreme Court law clerks has only escalated since that time. See Carrie Johnson, *Snagging Supreme Court Law Clerks: Firms Love Them, But Associates Fear the Fight for Partnership*, LEGAL TIMES, Nov. 25, 1996, at 1; Tony Mauro, *Big Bucks Used to Woo Clerks at High Court*, LEGAL TIMES, June 21, 2004, at 1.

56. Mayer Brown's Supreme Court practice was headed by Robert Stern, a highly regarded former Assistant to the Solicitor General and Deputy Solicitor General, who was in the Solicitor General's Office during the 1940s and 1950s. Stern argued more than thirty cases while in the Solicitor General's Office. After leaving the office in 1956, he argued only a handful of cases during the next several decades. See *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Ass'n for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965); *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961); *Offutt Hous. Co. v. County of Sarpy*, 351 U.S. 253 (1956); *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

57. *Amateur Hour*, LEGAL TIMES, Mar. 10, 1986, at 3; *Which Side Are You On?*, LEGAL TIMES, Aug. 4, 1986, at 3.

58. Jill Abramson, *Mayer, Brown's "Shadow" Solicitors*, LEGAL TIMES, Nov. 24, 1986, at 1; Nathan Koppel, *Mayer, Brown: A Private SG's Office*, LEGAL TIMES, Oct. 30, 2000, at 16.

59. *Ennis Dissolves*, LEGAL TIMES, July 18, 1988, at 3 (“D.C.’s Ennis, Friedman & Bersoff has dissolved with three of the firm’s four partners joining the D.C. office of Chicago’s Jenner & Block.”).

position as Principal Deputy Solicitor General under Solicitor General Starr—to raise the law firm’s profile and marketability in Supreme Court advocacy. Covington & Burling hired a series of Assistants to the Solicitor General in response, but it was not until eight years later, when Wilmer Cutler (now WilmerHale) brought on board former Clinton Solicitor General Seth Waxman at the close of the Clinton Administration, that a D.C.-based firm sought to create a Supreme Court practice of the size and depth of that trumpeted by Sidley and Mayer Brown.<sup>60</sup> Waxman has since sought to match the successes achieved by both Sidley and Mayer Brown by hiring a substantial number of attorneys from the Solicitor General’s Office and recent Supreme Court law clerks.<sup>61</sup>

While these D.C. firms were responding to the competitive challenge presented by Sidley Austin, firms headquartered in other cities likewise sought to create their own Supreme Court practices in branch offices located in Washington, D.C. First came Jones Day, where former Solicitor General Erwin Griswold had long been a partner, which dramatically expanded to bring on board a former Deputy Solicitor General (Donald Ayer) and several Assistants to the Solicitor General. Next came the California law firms: Gibson, Dunn & Crutcher (former Solicitor General Ted Olson), Morrison & Foerster (former Solicitor General Drew Days), O’Melveny & Myers (former Acting Solicitor General Walter Dellinger), Latham & Watkins (former Deputy Solicitor General Maureen Mahoney), and even more recently Quinn Emmanuel (Stanford Law Professor Kathleen Sullivan).<sup>62</sup> The Texas law firms have decided to join the fray. Baker Botts, Akin Gump, and Fulbright & Jaworski have all established Supreme Court practices within the past few years, led by accomplished Supreme Court advocates, including Harvard Law Professor Laurence Tribe and well-known Supreme Court advocate Tom Goldstein, both of whom are now affiliated with Akin Gump.<sup>63</sup>

The private sector bar has been so successful that it has even begun to spin off new Supreme Court practice law firms. Mayer Brown alone has had two such highly successful spin offs: Kellogg, Huber, Hansen, Todd & Evans, in the mid-1990s,<sup>64</sup> and more recently, Robbins, Russell, Englert, Orseck, Untereiner

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60. Robert Lennon, *Free Agents*, AM. LAW., Feb. 2002, at 97, 97 (“Wilmer managed a major coup in nabbing Waxman, reminding better-known Supreme Court appellate hotshots that it’s no slouch either.”).

61. See Tony Mauro, *Fewer Firms are Arguing More and More of the Court’s Shrinking Docket*, LEGAL TIMES, July 14, 2003, at 10.

62. Other law firms located in Washington, D.C. that trumpet at least one Supreme Court appellate expert include Miller & Chevalier, Morgan Lewis, Howrey & Simon, Kilpatrick Stockton, and Williams & Connolly.

63. See Peter Lattman, *Akin Gump Will Name Tribe of Harvard Law as Consultant*, WALL ST. J., Dec. 12, 2006, at B11; Noam Scheiber, *Meet Tommy Goldstein. The Hustler*, NEW REPUBLIC, Apr. 10, 2006, at 14.

64. *Dialing Up a Change*, LEGAL TIMES, Apr. 5, 1993, at 3.

& Sauber.<sup>65</sup> Even one two-person law firm, Farr & Taranto, consisting only of the two named partners who are alumni of the Solicitor General's Office, is well known for the high quality of its advocacy before the Court.<sup>66</sup>

This resurgence of a highly active, successful, specialized Supreme Court Bar has not been confined to the private law firms. In recent years, the states have responded in kind. Several states have created or rejuvenated the position of State Solicitors General modeled after the U.S. Solicitor General. In addition to having primary responsibility for arguing cases before their own state supreme courts, these state solicitors general have increasingly focused their attention on the need to possess expertise in advocacy before the U.S. Supreme Court. Accordingly, Ohio, New York, Illinois, Texas, Alabama, and others recruited to their solicitor general offices highly credentialed attorneys, often former clerks to U.S. Supreme Court Justices, to work within or run those Offices. These state solicitors general now routinely appear before the Court and are quickly developing their own expertise in High Court advocacy.<sup>67</sup> Both the National Association of Attorneys General and the State and Local Legal Center also now commit considerable resources to assisting state and local governmental lawyers with cases before the Court.<sup>68</sup>

Some organizations within the nonprofit sector, such as the ACLU, possess longstanding Supreme Court expertise,<sup>69</sup> but most have little in-house expertise in Supreme Court practice and, as a result, are highly dependent on the willingness of the private law firms to take on their matters on a pro bono basis. The principal exception is Public Citizen's Supreme Court practice, which has long provided high-quality assistance in the preparation of briefs and presentation of oral argument to public interest advocates with cases before the Court.<sup>70</sup>

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65. Tony Mauro, *A Firm Arguing Its Way to the Top*, LEGAL TIMES, Dec. 16, 2002, at 1.

66. Farr & Taranto was previously a four-person law firm known as Klein, Farr, Smith & Taranto. One commentator described the "emergence of this firm" in July 1991 as "signal[ing] the return of the Supreme Court practitioners." MCGUIRE, *supra* note 22, at 26.

67. Tony Mauro, *Stating Their Case*, LEGAL TIMES, Aug. 11, 2003, at 1. For more on the work of state solicitors general and their growing importance in the judicial system, see generally James R. Layton, *The Evolving Role of the State Solicitor: Toward the Federal Model?*, 3 J. APP. PRAC. & PROCESS 533 (2001).

68. See National Association of Attorneys General, Supreme Court Project Homepage, [http://www.naag.org/supreme\\_court.php](http://www.naag.org/supreme_court.php) (last visited Mar. 10, 2008); United States Conference of Mayors, State and Local Legal Center Homepage, [http://www.usmayors.org/uscm/uscm\\_projects\\_services/legal\\_advocacy/state\\_local\\_legal.html](http://www.usmayors.org/uscm/uscm_projects_services/legal_advocacy/state_local_legal.html) (last visited Mar. 10, 2008); see also Tony Mauro, *States' Advocate Welcomes Days in Court*, LEGAL TIMES, Mar. 14, 1988, at 5 (discussing the State and Local Legal Center).

69. MCGUIRE, *supra* note 22, at 32, 67, 120–21, 141–42 (internal citations and quotations omitted). The NAACP Legal Defense Fund certainly was a major repeat player before the Court in early decades, and its in-house counsel, such as Thurgood Marshall, achieved a level of success unmatched by any other organization. See generally MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961* (1994). However, they have not maintained that historic leadership presence within the Supreme Court Bar.

70. See Alan B. Morrison, *Afterword* to BARBARA HINKSON CRAIG, *COURTING CHANGE: THE STORY OF THE PUBLIC CITIZEN LITIGATION GROUP* 337, 358–60 (2004); Tony Mauro, *Moving On: A Nader Protégé with Friends in High Places*, LEGAL TIMES, May 24, 2004, at 1 ("The Supreme Court Assistance Project,

More intriguing still has been the recent proliferation in many of the nation's leading law schools of Supreme Court clinics, in which law students—closely supervised by law faculty and many of these same private law firm lawyers—take on pro bono cases on behalf of individuals and organizations. Within just the past five years, Stanford, Harvard, Yale, Virginia, Northwestern, Texas, and New York University have each established such clinics, all based on a similar model. Except for New York University's clinic, which just began in the fall of 2007,<sup>71</sup> each has already had cases before the Court, with Stanford's being the first and the most successful so far.<sup>72</sup>

## II. EXPLAINING THE RISE OF THE MODERN SUPREME COURT BAR

For the purposes of this Article, an expert in Supreme Court advocacy is an attorney who has either him- or herself presented at least five oral arguments before the Court or is affiliated with a law firm or other comparable organization with attorneys who have, in the aggregate, argued at least ten times before the Court. Because Supreme Court oral arguments are highly prized and a rare occurrence, they tend to understate an individual attorney's expertise. Attorneys who have argued as many as five cases are likely to have filed briefs in far more cases on the merits either as *amicus curiae* or as co-counsel in at least five times that number. The reason for including as an "expert" someone who may be presenting her first argument but who is affiliated with an organization of attorneys with at least ten total arguments in the aggregate is the expert advice that the former inevitably receives from professional colleagues. For this reason, even attorneys in the Solicitor General's Office who are presenting their first oral argument can justifiably be considered "experts" in Supreme Court advocacy, especially as compared to those without such support. The new Solicitor General attorneys receive significant assistance from their colleagues in the drafting of the brief and the preparation of oral argument.<sup>73</sup>

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which [Alan] Morrison launched 13 years ago, has helped dozens of lawyers polish their briefs and arguments in cases . . ."). Public Citizen's Supreme Court Assistance Project has enjoyed the leadership of a series of first-rate Supreme Court advocates: Alan Morrison, David Vladeck, and most recently, Scott Nelson.

71. See Press Release, Jones Day, Jones Day Attorneys Lead Supreme Court Litigation Clinic at New York University (July 2007), [http://www.jonesday.com/news/news\\_detail.aspx?newsID=S1101](http://www.jonesday.com/news/news_detail.aspx?newsID=S1101).

72. See Tony Mauro, *Students End Term with a Perfect Score*, LEGAL TIMES, July 12, 2004, at 8 (discussing the success of the Stanford Clinic); Tony Mauro, *Tribal Law*, LEGAL TIMES, Dec. 18, 2006, at 3; Tony Mauro, *Yale, UVA Launch Supreme Court Clinics*, LEGAL TIMES, July 17, 2006, at 3 ("The model for the ventures, all concede, is Stanford Law School's Clinic . . ."). For more on the Stanford Supreme Court Litigation Clinic, see Pamela S. Karlan et al., *Go East, Young Lawyers: The Stanford Law School Supreme Court Litigation Clinic*, 7 J. APP. PRAC. & PROCESS 207 (2005).

73. Similarly, for the purposes of this Article, an attorney at a law firm like Mayer Brown, WilmerHale, or Sidley Austin would be considered an expert even if presenting her first argument because of the accumulated expertise at her law firm. So too would an attorney at a public interest organization with such collective expertise. I have not, however, similarly treated as an "expert" advocate a legal academic presenting her first argument even if there are other law faculty at that same institution who have collectively argued at least ten cases. I have not been willing to presume that the

The remarkable re-emergence of a private Supreme Court Bar possessing such Supreme Court advocacy expertise is likely the product of a confluence of factors, some driven by supply and some by demand. Clearly, Rex Lee's entrepreneurial ability played a significant role both by offering a supply of Supreme Court expertise, and in turn, by generating demand upon persuading the business community that enlisting such expertise could yield favorable results before the High Court. When other leading corporate law firms responded, not by refuting Lee's claims of the value to clients of Supreme Court expertise, but by echoing it and offering their own in competition, the firms succeeded together in generating more and not less business for them all.

Lee, however, also likely benefited from other factors that made the mid-1980s an especially opportune time to persuade the business community that both the Supreme Court and expert Supreme Court counsel were in its interest. By the fall of 1986, just when Rex Lee was entering private practice, President Ronald Reagan had already made three successful nominations to the Supreme Court—Sandra Day O'Connor as Associate Justice in September 1981, and both Antonin Scalia as Associate Justice and William Rehnquist from Associate Justice to Chief Justice in September 1986—and within a year would be nominating a replacement for Justice Lewis Powell. The business community had reason to hope that the Rehnquist Court, like the President who had nominated its new members,<sup>74</sup> would be more responsive to their concerns and legal arguments.

Two factors, however, played particularly significant roles in both promoting and shaping the Supreme Court Bar's development in the mid-1980s. The first was a parallel effort by the industry, perhaps prompted by the same developments in national politics, to enlist an expert bar in its effort to achieve favorable Supreme Court precedent. The second was the Rehnquist Court's dramatic shrinking of the Court's docket that, somewhat paradoxically, created opportunities for its domination rather than undermining the Bar by decreasing

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same kind of collaboration that occurs in a governmental, private, or public interest law office occurs in legal academia. Although several of the law firms that meet the standard are, like Mayer Brown, WilmerHale, and Sidley Austin, national law firms with many offices around the United States and the world, the ten-argument standard is met by looking to only one office of that firm in a single city and not by aggregating arguments presented by different attorneys in far-flung uncoordinated offices around the globe. In the modern Bar, Supreme Court advocacy expertise tends to be heavily concentrated in one of the firm's offices, and not spread across all offices around the country, although there are some firms such as Mayer Brown and Sidley Austin that have more than one city office that easily would independently cross the ten-argument hurdle.

74. From the very outset, President Ronald Reagan made clear that a central tenet of his Administration would be to free the business community from what he viewed to be unnecessary federal regulation that impeded economic growth and prosperity. *See, e.g.*, President Ronald W. Reagan, Address to the Nation on the Economy, 1981 PUB. PAPERS 79, 81 (Feb. 5, 1981) ("We invented the assembly line and mass production, but punitive tax policies and excessive and unnecessary regulations plus government borrowing have stifled our ability to update plant and equipment. When capital investment is made, it's too often for some unproductive alterations demanded by government to meet various of its regulations.").

demand for its expertise.

#### A. THE TRANSFORMATION OF THE CORPORATE BAR

At the same time, the corporate bar was also undergoing its own transformation in a manner that made it more open to availing itself of such expertise. Until the early to mid-1980s, most of the nation's leading corporations did not possess their own significant in-house corporate counsel, but instead relied on outside counsel supplied largely by one major law firm. Corporate counsel often saw themselves as dependent on a single outside law firm to whom the company had been attached for many years<sup>75</sup>—the law firms were the “captains.”<sup>76</sup> Strong in-house legal departments were uncommon; generally, the in-house department would handle only routine matters, relying on a single firm to handle all of the more sophisticated work. That single firm acted, in effect, as the corporation's counsel for both transactional and litigation matters.<sup>77</sup> Client corporations did not “shop around” for legal representation on a piecemeal basis.

Largely in response to increasing legal costs, major corporations began to build their in-house counsel offices to save money. The American Bar Association reported in the early 1980s that “80 percent of U.S. corporations had doubled, tripled, or even quadrupled the size of their in-house legal staffs” since the early 1970s.<sup>78</sup> In-house corporate counsel were no longer seen in the profession as second-class lawyers, and prominent law firm partners more routinely took positions in general counsel offices.<sup>79</sup>

The relevance for the development of a distinct Supreme Court Bar is direct. Those same law firms that essentially served as a major corporation's in-house counsel were extremely unlikely to look to hire expert Supreme Court counsel at another firm when faced with the possibility of Supreme Court litigation either as a petitioner or respondent. They would instead have every incentive to keep any such cases to themselves, both because of the associated prestige and also because it would undermine their ongoing relationship with the client corporation to suggest that another law firm could better handle the matter. Moreover, the law firm did not have any strong incentive to develop its own Supreme Court expertise when none was necessary to retain major clients.

For that same reason, however, as major corporations in the 1980s began to develop their own significant in-house expertise, they also became more recep-

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75. John M. Conley & Scott Baker, *Fall from Grace or Business as Usual? A Retrospective Look at Lawyers on Wall Street and Main Street*, 30 LAW & SOC. INQUIRY 783, 796 (2005).

76. Michael Orey, *Robert Banks: Because with His High-Profile Assertion that Corporate General Counsel Should Assume a Preeminent Role, He Led the Way in Righting the Balance Between Outside Lawyers and Their Corporate Clients*, AM. LAW., Mar. 1989, at 152, 154.

77. John Gibeaut, *The Outside Looking In*, 90 A.B.A. J. 46, 49 (2004).

78. Robert Lamb, *New Twists in Corporate Legal Strategy*, J. BUS. STRATEGY, Winter 1982, at 78, 78.

79. See Orey, *supra* note 76, at 172; see also Carol Kleiman, *In-House Lawyers Making a Comeback*, CHI. TRIB., Mar. 31, 1991, at C1.

tive to hiring law firms with expertise relevant to specific types of matters, including Supreme Court litigation. They recognized that there were still significant areas of law for which they could benefit from expertise that they did not possess in-house.<sup>80</sup> They also recognized that by not routinely giving all their business to one law firm, they could promote competition between law firms and reduce billable rates.<sup>81</sup>

Possibly because of their shared perception that the federal judiciary, including the Supreme Court, would be increasingly sympathetic to their concerns, in-house counsel of major corporations also began during this same time to work together to develop broader, longer-term litigation strategies. Corporate counsel created the American Corporate Counsel Association (now the Association of Corporate Counsel) in 1982 to address their particular needs and interests.<sup>82</sup> As a result, there was now a ready forum for claims by Rex Lee and others following his lead who were contending that business would fare better if they took advantage of Supreme Court litigation expertise.<sup>83</sup>

Corporate counsel ultimately formed organizations to coordinate their shared interest in making arguments before the Court, both as parties and as *amicus curiae*, designed both to persuade the Court to hear certain legal issues in the first instance and to rule in certain ways on the merits. The Chamber of Commerce of the United States' involvement in Supreme Court litigation is the paradigmatic example of this phenomenon. Indeed, it is an especially remarkable story given that it originated from a recommendation of a private attorney who later himself became a Supreme Court Justice.

On August 23, 1971, two months before he became a Supreme Court Justice, Lewis Powell, as a private attorney in Richmond, Virginia, wrote a memorandum to the Chamber of Commerce that set forth the very blueprint for Supreme Court litigation that the Chamber has since followed.<sup>84</sup> That memorandum, entitled "Attack on American Free Enterprise System," argued that the Chamber needed to defend the American economic system and, to that end, should focus on the U.S. Supreme Court. Powell described the federal judiciary and the Supreme Court as perhaps "the most important instrument for social, economic, and political change."<sup>85</sup> Powell specifically recommended that the Chamber enlist "a highly competent staff of lawyers . . . , lawyers of national standing and reputation," to represent the interests of the Chamber before the Supreme Court

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80. Lamb, *supra* note 78, at 80; *see* Gibeaut, *supra* note 77, at 49.

81. Gibeaut, *supra* note 77, at 49.

82. Orey, *supra* note 76, at 156.

83. *See* Stephen Wermiel, *More Litigants Turn to Appeals Specialists*, WALL ST. J., July 5, 1989, at B3 ("Increasingly, companies with cases that are bound for the Supreme Court are turning to specialists with Supreme Court experience, rather than the companies' usual attorneys, to write and argue their appeals."); *see also* Arthur S. Hayes, *Supreme Court Specialty: Does It Work?*, AM. LAW., June 1989, at 65, 65 (describing success of Mayer Brown's Supreme Court Practice).

84. *See* Memorandum from Lewis F. Powell to Mr. Eugene B. Sydnor, Jr., Director, U.S. Chamber of Commerce (Aug. 23, 1971) (on file with author).

85. *Id.*

as amicus and to “select[] the cases in which to participate, or the suits to initiate.”<sup>86</sup>

The Chamber’s affiliated organization—the National Chamber Litigation Center (NCLC)—commenced in 1977 for the purpose of advocating fair treatment of business in the courts and of challenging “anti-business” laws.<sup>87</sup> A board of directors and six legal advisory committees on specific topics advise the NCLC as to litigation strategy.<sup>88</sup>

The NCLC filed its first brief on the merits in the Supreme Court on behalf of the Chamber in June 1977<sup>89</sup> and has increased its participation in the Supreme Court, primarily as amicus curiae, ever since. During October Term 1987, the Chamber filed twelve briefs as amicus curiae in support of business concerns in nine cases before the Court either at the jurisdictional stage or on the merits.<sup>90</sup> During the two most recently completed Supreme Court Terms—October Terms 2005 and 2006—the Chamber participated as amicus or as a party in fifteen cases before the Court by filing briefs on the merits in addition to the cases in

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86. *Id.*

87. See U.S. Chamber of Commerce, About NCLC, <http://www.uschamber.com/nclc/about/default> (last visited Dec. 21, 2007).

88. *Id.*

89. The Chamber filed its first amicus brief on the merits in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, in June 1977. National Chamber Litigation Center, 30th Anniversary Report: 1977–2007, at 12 (2007), <http://www.uschamber.com/nclc/default.htm?n=bt> (follow “NCLC’s 30th Anniversary Report” hyperlink).

90. See Brief for the Chamber of Commerce of the United States as Amicus Curiae Supporting Respondents, *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229 (1989) (No. 87-1252) (filed on June 17, 1988); Brief for the Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioner, *Mead Corp. v. B.E. Tilley*, 490 U.S. 714 (1989) (No. 87-1868) (filed on June 16, 1988); Brief for the Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioner, *Amerada Hess Corp. v. Dir., Div. of Taxation, N.J. Dep’t of Treasury*, 490 U.S. 66 (1989) (Nos. 87-453, 87-464) (filed on June 30, 1988); Brief for the Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioner, *Amerada Hess Corp. v. Dir., Div. of Taxation, N.J. Dep’t of Treasury*, 490 U.S. 66 (1989) (Nos. 87-453, 87-464) (filed on Oct. 21, 1987); Brief for the Chamber of Commerce of the United States as Amicus Curiae Supporting Respondent, *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (No. 86-1879) (filed on June 16, 1988); Brief for the Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioner, *Trans World Airlines, Inc. v. Indep. Fed’n of Flight Attendants*, 489 U.S. 426 (1989) (No. 87-548) (filed on May 26, 1988); Brief for the Chamber of Commerce of the United States and the National Association of Manufacturers as Amici Curiae Supporting Petitioners, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) (No. 87-1054) (filed on June 9, 1988); Brief for the Chamber of Commerce of the United States and the National Association of Manufacturers as Amicus Curiae Supporting Petitioners, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) (No. 87-1054) (filed on Jan. 22, 1988); Supplemental Brief for the Chamber of Commerce of the United States as Amicus Curiae Supporting Respondent, *Boyle v. United Tech. Corp.*, 487 U.S. 500 (1988) (No. 86-492) (filed on Apr. 13, 1988); Brief for the Chamber of Commerce of the United States as Amicus Curiae Supporting Respondent, *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) (No. 87-259) (filed on Jan. 22, 1988); Brief of the Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioner, *Harbison-Walker Refractories v. Brieck*, 485 U.S. 958 (1988) (No. 87-271) (filed on May 5, 1988); Brief for the Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioner, *The Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) (No. 86-1461) (filed on Aug. 21, 1987).

which the Chamber filed amicus briefs at the jurisdictional stage.<sup>91</sup>

It is hard, of course, to sort out to what extent the consequent rise in the Supreme Court Bar was primarily supply- rather than demand-driven. What seems most likely is that a symbiotic relationship arose between the two. Each encouraged the other: the rising private sector Supreme Court Bar made the case to private business interests of the need for expert Supreme Court counsel, and the increasingly sophisticated corporate counsel and their affiliated support organizations promoted the Bar by hiring them as counsel in cases before the Court.

#### B. THE PARADOX OF THE COURT'S SHRINKING DOCKET

In all events, what makes this overall resurgence of a Supreme Court Bar and the related increase in participation by organizations such as the Chamber of Commerce over the past several decades all the more remarkable is that the number of cases that the Court hears on the merits has effectively halved during the same time period. If the Court were deciding more cases, it would be no great surprise that the Supreme Court Bar correspondingly increased in size. There would, after all, be more business for Supreme Court lawyers. But there has been no such increase in the Court's rulings on the merits since the mid-1980s—just the opposite.<sup>92</sup> During the recently completed October Term

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91. During October Term 2005, the Chamber filed briefs in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006); *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006); *Sereboff v. Mid-Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006); *Merrill Lynch v. Dabit*, 547 U.S. 71 (2006); *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006); *Bank of China v. NBM, L.L.C.* 546 U.S. 1026 (2005); *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006); *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006); *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2006). During October Term 2006, the Chamber filed briefs in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007); *Tellabs Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007); *Credit Suisse Securities (USA) L.L.C. v. Billing*, 127 S. Ct. 2383 (2007); *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331 (2007); *Beck v. Pace International Union*, 127 S. Ct. 2310 (2007); *Safeco Insurance Co. of America v. Burr*, 127 S. Ct. 2201 (2007); *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007); *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007); *BCI Coca-Cola Bottling Co. v. E.E.O.C.*, 127 S. Ct. 1931 (2007); *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007); *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007); *Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423 (2007); *Rockwell International v. United States*, 127 S. Ct. 1397 (2007); *Mohawk Industries, Inc. v. Williams*, 127 S. Ct. 1381 (2007); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007); *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).

92. See, e.g., David R. Stras, *The Supreme Court Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 964–68 (2007) (reviewing TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006) and ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006)) (discussing the declining plenary docket). See generally Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737 (2001); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403 (1996); David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL'Y 779 (1997); David M. O'Brien, *The Rehnquist Court's Shrinking Plenary*

2006, the Court handed down sixty-seven signed opinions after oral argument.<sup>93</sup> Two decades ago, during October Term 1986, the Court issued 153 signed opinions—more than twice the number issued in 2006.<sup>94</sup> A century earlier, the Court issued as many as 300 signed opinions per Term.<sup>95</sup> What makes this precipitous decline even more remarkable is that the number of cases filed in the federal courts of appeals has nearly doubled since the mid-1980s, from approximately 30,000 cases to nearly 60,000 cases.<sup>96</sup>

Others have written about the possible causes of the shrinking docket, which reportedly even mystifies the Justices themselves.<sup>97</sup> The most likely explanations focus on Chief Justice Rehnquist's possible belief when he became Chief in 1986 that the Court was granting review in too many cases; the appointment of new Justices—especially Antonin Scalia—who were either sympathetic to the then-new Chief's view or were perhaps even the primary proponents of the reduced docket;<sup>98</sup> Congress's elimination in 1988 of much of the Court's mandatory appellate jurisdiction;<sup>99</sup> possible unintended consequences of the

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*Docket*, 81 JUDICATURE 58 (1997); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363 (2006).

93. GEORGETOWN UNIVERSITY LAW CENTER SUPREME COURT INSTITUTE, SUPREME COURT OF THE UNITED STATES OCTOBER TERM 2006 OVERVIEW 7 (2007).

94. *See Stras*, *supra* note 92, at 965 & fig.1.

95. *Id.* at 965 fig.1.

96. *Id.* at 965 fig.2.

97. Linda Greenhouse, *Case of the Dwindling Docket Mystifies the Supreme Court*, N.Y. TIMES, Dec. 6, 2006, at A1.

98. The best evidence that Chief Justice Rehnquist favored a trimming of the docket and did not embrace the view that circuit conflicts presumptively presented legal issues worthy of the Court's attention is the sheer coincidence of the decline of the docket with his ascension to the Chief Justice slot. Professor Thomas Merrill notes this possibility, however, he makes a strong case that Justice Antonin Scalia, who joined the Court at the same time, may in fact be the true agent of change within the Court. *See* Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 643–44 (2003). What is far more clear is that the departure of Justice Byron White in June 1993 contributed to the decline. Justice White made quite clear his belief that the Court should routinely grant review to resolve circuit conflicts, and he complained in dissent when the Court, under Rehnquist, began to shift approaches; no one since White has advanced a similar view. Relatedly, the departures of Justices like William Brennan, Thurgood Marshall, Harry Blackmun, and Lewis Powell likely reduced the number of grants because each frequently filed “join 3” notices at the jurisdictional stage, meaning that they would provide the fourth vote necessary to grant review if there were otherwise three Justices who favored review. The obvious practical effect of a “join 3” is to reduce the number of votes needed for certiorari from four to three. *See* O'Brien, *supra* note 92, at 798–99. Rehnquist, moreover, further raised the hurdle to a grant of certiorari by reportedly establishing a new procedure for automatically relisting, rather than immediately granting, any petition for a writ of certiorari that received the bare minimum of four votes necessary for review. The purpose of the automatic delay was to provide those who voted in favor of review a chance to reconsider in light of the fact that there were only four votes for review. PERRY, *supra* note 31, at 50–51 (“Once in a while a vote will fall away.”) (quoting an anonymous Justice).

99. At least two Supreme Court Justices contend that another change that has affected the number of cases granted plenary review by the Court was Congress's amendment in 1988 of the statutory bases for the Court's review. *See* David R. Stras, *Opening the Doors to the Supreme Court: A Solution to the Declining Plenary Docket* 14–15 & nn.38–39 (Nov. 18, 2007) (unpublished manuscript, on file with author) (describing statements made by Chief Justice William Rehnquist and Justice Anthony Kennedy). The Court has three types of jurisdiction: original, appellate, and certiorari. Only certiorari is wholly

increasing pooling by the Justices of their respective efforts to review ever-increasing numbers of certiorari petitions;<sup>100</sup> Internet-based communications technology that makes it far easier for differing circuits to track each other's rulings and therefore potentially reduce the number of circuit conflicts; and a significant decrease since the 1990s of congressional passage of the kind of sweeping new legislative programs most likely to produce over time legal issues ultimately requiring the Court's attention.<sup>101</sup> This latter external factor may also explain the significant drop of certiorari petitions filed by the Solicitor General; because the Court grants such a high percentage of Solicitor General petitions, that decrease alone may well explain a substantial percentage of the Court's

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discretionary in nature. For both original and appellate, the Court is required to accept review upon concluding that the case meets the statutorily prescribed criteria. However, with the support of all nine Justices on the Supreme Court in a joint letter, Congress in the Supreme Court Selection Act of 1988 eliminated almost all of the Court's mandatory appellate jurisdiction. *See* Supreme Court Selection Act of 1988, Pub. L. No. 100-352, 102 Stat. 662 (1988). The practical effect was to shift a large group of possible cases that had fallen within the Court's mandatory appellate jurisdiction over to the Court's discretionary certiorari jurisdiction. A recent statistical analysis of the Court's docket concludes that the elimination of mandatory appellate jurisdiction has led to a 10% decrease in the number of plenary cases heard by the Court. This number is determined by comparing the number of cases heard by the Court in recent years that fall within the scope of the former four categories of mandatory appellate jurisdiction with the number heard by the Court when jurisdiction was still mandatory before the 1988 congressional amendment. *See* Cordray & Cordray, *supra* note 92, at 755–58; Hellman, *supra* note 92, at 408–12; Stras, *supra*, at 13–17 (discussing the impact but concluding that while “elimination of mandatory jurisdiction played a negligible role in the contraction of the Court's merits docket,” it may still be an “important reason why the Court's docket has not reversed the downward trend in recent years”).

100. Another oft-cited cause for the Court's shrinking plenary docket is the rise of the “cert pool memo” process within the Court. *See* Starr, *supra* note 92, at 1376–77; Stras, *supra* note 92, at 953. Several Justices created the cert pool in response to the growing number of petitions for a writ of certiorari being filed. *See* ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 125–26 (2006). What the cert pool allows for is multiple chambers in effect to pool their efforts by dividing up which chamber takes the lead in taking a closer look at a petition for all chambers in the pool, with the other chambers providing only more perfunctory review for their own chambers. The benefits of such a procedure are clear: by reducing the number of petitions each chamber must examine closely, the law clerks can spend more time analyzing those petitions they do review. Some commentators, however, have suggested that the cert pool process may also have caused the diminishing docket, especially now that eight of the nine Justices (all except Justice Stevens) have joined the pool. *See* Starr, *supra* note 92, at 1377; Stras, *supra* note 92, at 968–96. The concern is that the law clerk writing the pool memo is likely to be more conservative in recommending in favor of cert when writing, in effect, for an audience of eight chambers. *See* Stras, *supra* note 92, at 974–76, 992. Clerks understand that their personal accountability in recommending *against* cert is very low. Even if they are mistaken in that judgment, the odds of any significant second guessing is extremely low. By contrast, a recommendation *in favor* of review could be the subject of great oversight and even personal embarrassment should the Court grant review and the case prove not to be an effective vehicle. *See* Starr, *supra* note 92, at 1376–77.

101. *Chief Justice Roberts Ponders Court's Declining Caseload*, NAT'L J.'S CONGRESS DAILY, May 4, 2007; Greenhouse, *supra* note 97. There is some historical force to this proffered reason. Since congressional gridlock set in the aftermath of the 104th Congress in 1994, there has been relatively little new major federal legislation. While there is invariably a significant time delay between congressional enactment and Supreme Court review, clearly a substantial portion of the Court's docket is concerned with legal issues raised by new federal statutory programs, especially those that raise serious constitutional issues or those the sheer complexity of which are more likely to generate circuit conflicts.

docket decline.<sup>102</sup>

But, for the purpose of this Article the relevant issue is the relationship between the Court's declining docket and the rise of the Bar. Two obvious questions arise. The first is whether the Bar has itself somehow contributed to the decline in the Court's plenary docket. Have the activities of the Bar either deliberately or incidentally promoted the Court's granting fewer cases for review? The second question is how the rise in the Bar could have occurred, notwithstanding the declining number of cases. After all, typically the demand for legal expertise goes down, not up, when there is less business. So, what explains the exploding levels of Supreme Court expertise just at a time when there is seemingly less need for it?

With regard to the first question, there is certainly little intuitive reason to suppose that the modern Supreme Court Bar deliberately aimed to shrink—or succeeded in shrinking—the Court's plenary docket. Their common interest would seem to favor more cases for the simple reason that more cases would mean increased demand for their work. There are, however, several ways in which the new Supreme Court Bar may have played some role in the shrinking docket.

First, Supreme Court expert advocates do not always support certiorari. To the extent that parties seek assistance from expert Supreme Court advocates at the cert stage in fashioning briefs in opposition to cert petition, such expertise is being affirmatively enlisted in an effort to persuade the Court not to grant review. When respondents to a cert petition see that petitioners have resorted to Supreme Court experts in the drafting of a cert petition, respondents are more likely to do the same in crafting the response.

An effective brief in opposition taps into the concerns of the Court at the cert stage to persuade the Court to deny review in cases where, absent such a brief, the Court might well have granted review. The brief in opposition is a less well-appreciated expertise in Supreme Court advocacy, but no less important because the document is, by its very nature, so counter-intuitive for most lawyers to prepare. An effective opposition must steadfastly avoid stating anything that unwittingly adds credence to petitioner's claim that the legal issue presented is important, should avoid in-depth defense of the merits, and instead should focus almost exclusively on the distinct issue of why Supreme Court review is not warranted.<sup>103</sup>

Seasoned Supreme Court advocates not only know how to stress the kinds of arguments that make a case seem most attractive for review, but also how most effectively to tap into the kinds of concerns that are likely to make a law clerk wary of recommending in favor of plenary review.<sup>104</sup> They appreciate matters such as the potential vulnerability of a new law clerk in the summer months

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102. See Cordray & Cordray, *supra* note 92, at 764–65; Greenhouse, *supra* note 97; Hellman, *supra* note 92, at 417; Start, *supra* note 92, at 1373–74.

103. See ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 450–62 (8th ed. 2002); Timothy S. Bishop, *Opposing Certiorari in the U.S. Supreme Court*, *LITIGATION*, Winter 1994, at 31, 32.

104. See PERRY, *supra* note 31, at 218–20 (describing the “presumption against a grant” of certiorari).

working on his or her first cert pool memo, invariably hesitant to go out on a limb and recommend to eight other chambers that review be granted. They pay close attention to cert-grant patterns over the course of a Term and when the chambers are more, rather than less, likely at the margin to be prone to grant review.<sup>105</sup> The experts use to their strategic advantage their knowledge of what other cases and petitions are already pending before the Court, what cases are about to be decided by the lower courts, what other cases have been recently denied review, what legislation is pending before Congress, what rulemaking proceedings are pending before federal agencies, and how all of these other cases and matters bear on the certworthiness of the petition they seek to oppose. The experts consciously use the timing of filing to promote the result they seek, seeking additional time to take cases out of certain decisionmaking time periods or, for the same reason, filing the brief in opposition several weeks early.<sup>106</sup> They may even try to influence external factors to undermine the petition, such as by having related legislation introduced before Congress or persuading a federal agency to put out a notice of possible rulemaking.<sup>107</sup> The expert Supreme Court advocates know the Court and understandably work every relevant dimension of the Court's decisionmaking process to their client's advantage.

Unfortunately, it is not possible to discern the full extent to which expert Supreme Court counsel are being hired to oppose cert petitions for the simple reason that those briefs are quite often ghost written, without the names of those expert Supreme Court advocates actually appearing anywhere on the brief itself. The reason is simple: there is no general requirement that the names of any attorneys who helped on a brief, including a brief in opposition, appear on the cover and signature brief, and there are good strategic reasons for not doing so on a brief in opposition. The entire purpose of a brief in opposition is to send the Court a clear message that the case presents no important legal issue warranting the Court's attention. Placing a prominent Supreme Court advocate's name on the cover of the brief tends to undermine that central message. That is why one tends to see those prominent names only on petitions for writs of certiorari, and not on briefs in opposition, even though listed counsel may have in fact done nothing more than read the brief once, and even though those not

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105. See Margaret Meriwether Cordray & Richard Cordray, *The Calendar of the Justices: How the Supreme Court's Timing Affects Its Decisionmaking*, 36 ARIZ. ST. L.J. 183, 212 (2004).

106. For instance, in *Cooper v. IBM Personal Pension Plan*, 457 F.3d 636 (7th Cir. 2006), cert. denied, 127 S. Ct. 1143 (2007), respondents filed their brief in opposition more than two weeks early, only eighteen days after the petition was filed, apparently in order to minimize the possibility that a case then pending before another federal court of appeals might both get decided while the Court was considering the petition and create a circuit conflict. See U.S. Supreme Court, Docket, *Cooper v. IBM Pers. Pension Plan* (No. 06-760), available at <http://www.supremecourtus.gov/docket/06-760.htm> (last visited Feb. 8, 2008).

107. The introduction of legislation before Congress or a notice of a proposed rulemaking undermines a pending cert petition by raising a question concerning the longer-term significance of the lower court ruling in light of the possibility that the law will soon be changing prospectively.

listed may have in fact drafted the entire document.<sup>108</sup>

The second reason is that the new Supreme Court Bar may have, by the high quality of their own filings, effectively raised the bar for everyone else. Most simply put, a petition these days must be much better than a petition a few decades ago to persuade the Court to grant review. The competition is keener because of the sheer number of petitions competing for the Court's limited attention. But the competition is also greater because of the sheer quality of the petitions being filed by those Supreme Court experts who know far better than most how to strike the chords most likely to attract the Court's attention at the jurisdictional stage. A few decades ago, a petition filed without those trappings might nonetheless have been persuasive. The Justices would not have expected the fuller, more forceful presentation. Today, however, the private bar petitions are much better and the expectations of the chambers concerning what a petition must accomplish to make out the case for Supreme Court review are correspondingly greater as well.

The second question relates to the paradox presented by the rise of a modern Supreme Court Bar at a time when the Court's plenary docket is shrinking. In short, how can supply be increasing when there is reason to believe that demand is decreasing? One answer to the riddle is that the number of cases on the plenary docket does not, standing alone, serve as a reliable proxy for the amount of Supreme Court litigation. The business of Supreme Court lawyers is not limited to the number of hours of oral argument heard each year. A case has many dimensions, and even while the single dimension of the number of cases may be decreasing, the other dimensions can be increasing.

First, there is the business conducted at the jurisdictional stage: the filing of petitions, oppositions, replies, and amicus briefs. The major private bar Supreme Court law firms now file more petitions for writs of certiorari than ever. Decades ago, it would have been unusual for a private law firm to file more than one petition a year. More than five petitions in a twelve-month period would have been considered extraordinary. Not so today; a large number of the law firms now offering experts in Supreme Court advocacy routinely file ten or more petitions a year. For instance, Sidley Austin filed seventeen, twenty-four, nineteen, and fifteen petitions in October Terms 1997, 2000, 2002, and 2005, respectively; Mayer, Brown, Rowe & Maw filed twenty, eighteen, twenty-five, and eighteen petitions during those same Terms.<sup>109</sup> That is a strikingly high

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108. This observation is based on conversations with law firm counsel at leading Supreme Court practices.

109. These statistics are based on the number of petitions filed between July 1st of one year and June 30th of the succeeding year. For example, for October Term 1997, the total number of petitions considers those filed by a particular law firm between July 1, 1997, and June 30, 1998, even though the Court's October Term 1997 does not, as a formal matter, commence until the Court convenes in October 1997. The reason for the earlier July date is because that is when the Court adjourns for the summer, having released all of its opinions for the prior Term, and the Clerk's Office begins numbering the petitions for a writ of certiorari and other jurisdictional filings with a docket number corresponding with the upcoming fall Term. In all events, so long as the method for counting is consistent in its

number, greater in some years than the number of petitions filed by the Solicitor General on behalf of the entire federal government.<sup>110</sup>

The filing of these petitions also generates the demand for the filing of additional briefs at the jurisdictional stage. The petitions have a significant multiplier effect. In addition to the briefs in opposition that are increasingly drafted by competing law firms with their own Supreme Court expertise, the petitioners invariably try to seek out parties interested in filing an amicus brief in support of the petition. It is settled wisdom in the Supreme Court Bar that such amicus support is often essential to establishing a persuasive case that Supreme Court review is warranted. The amicus briefs, more than the mere self-interested *ipse dixit* of the petitioner, can demonstrate that the legal issue is important. Members of the elite Supreme Court Bar, accordingly, affirmatively recruit the filing of amicus especially at the certiorari stage.<sup>111</sup> The filing of a cert petition, therefore, triggers the need for the filing of multiple additional briefs.

Even though the number of cases granted review and the number of paid petitions have gone down during the past several decades, the number of amicus briefs filed in support of certiorari has gone up both absolutely and relatively.<sup>112</sup> There were approximately 240 amicus briefs filed in support of 119 of the total 1906 paid cert petitions filed during October Term 1982.<sup>113</sup> And, although the Court during October Term 2005 acted on only 1523—or 20% fewer—paid cert

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treatment of Terms by dates, the precise starting and stopping dates for the statistical compilation have no independent significance.

The number of jurisdictional filings for each law firm and counsel was determined by a search of the online version of the “Supreme Court Today” component of the BNA’s *United States Law Week*, which provides, in electronic searchable form, lists of all jurisdictional filings with the Supreme Court, including names of counsel, by date of their filing.

110. For instance, during October Term 2002, the Solicitor General filed only twenty-two petitions for a writ of certiorari, and even that number exaggerates how many times the Solicitor General was truly seeking the Court’s plenary review because several were merely “protective petitions” in which the Solicitor General was just asking the Court to hold a case for appropriate disposition following the Court’s ruling in a related case already before the Court. *See supra* note 45. During October Term 2002, four of the twenty-two petitions filed by the Solicitor General were protective petitions. *See* Petition for Writ of Certiorari at 19, *Office of Indep. Counsel v. Favish*, 538 U.S. 1012 (2003) (No. 02-954); Petition for Writ of Certiorari at 17, *Westinghouse Elec. Corp. v. Freier*, 538 U.S. 998 (2003) (No. 02-1036); Petition for a Writ of Certiorari at 11, *INS v. Silva-Jacinto*, 537 U.S. 1100 (2003) (No. 02-377); Petition for Writ of Certiorari at 5, *United States v. Vicente Pineda-Torres*, 537 U.S. 1066 (2002) (No. 02-112).

111. *See* MCGUIRE, *supra* note 22, at 122–25.

112. This Part of the Article presents a series of statistics related to the number of amicus briefs filed during October Term 2005. The various numbers presented were all calculated by going through the Official Journal of the Supreme Court for October Term 2005, which is prepared by the Clerk’s Office and sets forth the official minutes for each day of the Term, including the filing of every brief. The number can also be derived from the Court’s online docket by looking up the docket number for every case argued that Term; the docket includes a listing of all the amicus briefs filed. For the Supreme Court Journal for October Term 2005, see <http://www.supremecourtus.gov/orders/journal/jnl05.pdf>. For the Court’s online docket, see <http://www.supremecourtus.gov/docket/docket.html>.

113. *See* Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1116, 1119 (1988).

**Table 1. Number of Amicus Briefs Filed per Term on the Merits<sup>118</sup>**

<b>Term</b>	<b>Average Total Amicus Briefs Filed per Term</b>	<b>Average Number of Amicus Briefs Filed per Case Heard on the Merits</b>	<b>Percentage of Cases with Amicus Briefs</b>
1946–1955	53	0.5	23%
1976–1985	418	2.9	73%
1986–1995	490	4.3	85%
2005	645	9	96%

petitions, counsel filed 270 amicus briefs in support of petitions in 144 cases—for an absolute increase of 12.5%—and a relative increase in the rate of amicus filing of more than 40%.<sup>114</sup>

The same trend is true for cases heard on the merits. Because of the increase in amicus participation, there are now far more briefs filed on the merits than just those filed by the parties (Table 1). Consequently, even if the number of cases heard on the merits has gone down by 50%, the number of amicus briefs filed in those cases can more than make up for that reduction by increasing by more than 100%. And that is precisely what has happened. From October Term 1976 through October Term 1985, there were 4182 amicus briefs filed, for an average of about 418 per Term.<sup>115</sup> From October Term 1986 through October Term 1995, the total number filed was 4907, averaging about 490 per Term.<sup>116</sup> The total number of amicus briefs filed in October Term 2005 was 645,<sup>117</sup> notwithstanding once again the dramatic decrease in the number of cases heard on the merits between the 1980s and the present. That increase (from 490 to 645) amounts to a 32% absolute increase. Taking into account the precipitous drop in the number of cases now heard on the merits as compared to that earlier time period, the increase in the rate of filing is even more remarkable. There was an average of just under three amicus briefs filed for every case heard on the merits from 1976 through 1985, compared to an average of about nine amicus briefs filed for every case heard on the merits in October Term 2005—a more than 300% relative increase.

Nor are these numbers merely the product of one or two cases. Advocates filed amicus briefs in October Term 2005 in seventy of the seventy-three cases

114. *See supra* note 112.

115. *See* Kearney & Merrill, *supra* note 37, at 752 fig.1.

116. *See id.*

117. *See supra* note 112.

118. The statistics reflected in this Table are derived from the statistical analysis of amicus filings published by Professors Kearney and Merrill in 1999, contrasted by the more recent data from October Term 2005. *See* Kearney & Merrill, *supra* note 37, at 752 fig.1, 753 fig.2.

for which the Court issued opinions on the merits, or about 96% of the cases.<sup>119</sup> That compares to a filing rate of approximately 23% for the Court's decisions on the merits between 1946 and 1955 and of about 54% between 1966 and 1975.<sup>120</sup> However the measure, the implication of the substantial increase for Supreme Court advocacy is the same. The dramatic increase in amicus briefs filed per case heard on the merits more than overcame the negative effect caused by the decrease in the number of total cases heard on the merits. The Supreme Court Bar managed to discover more, rather than less, in what otherwise appeared to be a shrinking universe.

The second explanation for why the Supreme Court Bar could expand while the number of merits cases was in decline is the more telling for the significance of the modern Bar's rise: the Bar has increasingly dominated the cases before the Court. Hence, while the number of cases has gone down, their involvement as counsel of record in the cases heard by the Court has simultaneously gone up.<sup>121</sup> And, here too, the increase more than makes up for the decrease in terms of the amount of business available. Indeed, as discussed further below, that the increase occurred notwithstanding the decrease in the overall number of cases further magnifies the significance of the Supreme Court Bar's resurgence.

The increased presence of the Supreme Court Bar in the Court's docket can be measured in several different ways. One of the most significant measures focuses on the rate of success of petitions for a writ of certiorari. In the world of Supreme Court advocacy, persuading the Court to grant a petition is the single most difficult challenge. As described by one prominent advocate, a major league baseball player may make the Hall of Fame if he gets a hit thirty percent of the time he is up to bat.<sup>122</sup> A Supreme Court advocate who manages to get 30% of her cert petitions granted would be beyond outstanding, given that the Court grants fewer than 1% of all petitions filed.<sup>123</sup> Yet, it is quite clear that the modern Supreme Court Bar is disproportionately successful at the jurisdictional stage. Even though the leading private law firms are filing as many as twenty or more petitions per term, the Court is granting those petitions at a far higher rate than 1% and as high as almost 25% for some years. For Mayer Brown, the Court granted four of twenty, three of eighteen, six of twenty-five, and three of eighteen petitions filed in October Terms 1997, 2000, 2002, and 2005, respectively.<sup>124</sup> For the same Terms, the Court granted three, five, four, and four of

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119. See *supra* note 112.

120. Kearney & Merrill, *supra* note 37, at 753 & fig.2.

121. See Tony Mauro, *At the High Court: The Chosen Few*, LEGAL TIMES, July 12, 2004, at 1; Tony Mauro, *Fewer Firms Are Arguing More and More of the Court's Shrinking Docket*, LEGAL TIMES, July 14, 2003, at 10; Tony Mauro, *High Court's Exclusive Club*, LEGAL TIMES, Oct. 7, 2002, at 10.

122. See Carter G. Phillips, *Providing Strategies for Success: Petitioning the Supreme Court for Certiorari*, FOR THE DEFENSE, Apr. 2004, at 22, 22.

123. Stras, *supra* note 92, at 968.

124. The number of petitions filed each Term was calculated based on records maintained by BNA's *United States Law Week* as described *supra* note 109. The grant percentages were accordingly derived by then seeing how the Court disposed of each petition. "Granted" for the purposes of this statistic includes both granted for

Sidley Austin's seventeen, twenty-four, nineteen, and fifteen petitions.<sup>125</sup>

Consider the increase in the dominance of the successful petitions for a writ of certiorari filed by expert Supreme Court counsel since October Term 1980. Putting aside the petitions filed by the Solicitor General in October Term 1980, the Court granted 102 cases during October Term 1980. Out of those 102 successful petitions, only 6 were filed by law firms or organizations with significant expertise in Supreme Court advocacy, defined for the purposes of this Article as including an attorney serving as counsel of record with at least five prior oral arguments or an affiliation with a legal organization with at least ten prior argued cases before the Court.<sup>126</sup> Those six petitions amounted to 5.7% of the total.

By contrast, as described in Table 2, during October Term 2000, the number

**Table 2. Total Number and Percentage of Successful Certiorari Petitions Filed by Expert Supreme Court Advocates<sup>127</sup> (Excluding U.S. Solicitor General's Office)**

<b>October Term</b>	<b>Total Number of Certiorari Petitions Granted (Excluding U.S. Solicitor General's Office)</b>	<b>Successful Petitions Filed by Expert Counsel</b>	<b>Percentage of Successful Petitions Filed by Expert Counsel</b>
1980	102	6	5.7%
2000	68	17	25%
2005	67	24	36%
2006	64	28 <sup>128</sup>	44%
2007 (as of 1/28/08)	65	35	53.8%

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plenary review on the merits and granted, vacated, and remanded for further consideration in light of an intervening development. The shorthand reference for the latter kind of Court disposition is a GVR, which the Court routinely does after ruling in one case in order to dispose of multiple pending petitions that raise the same or potentially related legal issues. For examples of GVR dispositions, see the discussion of *Zadvydas v. Davis*, 533 U.S. 678 (2001), *supra* note 45.

125. *See supra* note 124.

126. *See supra* note 17.

127. This table considers only cases granted by the Court for plenary review, including oral argument. It does not consider cases in which the Court grants, vacates, and remands in light of an intervening development, summarily reverses, or otherwise issues a per curiam opinion in the absence of oral argument. The data were derived by simply identifying the counsel for petitioner in all of the granted cases for each of the four Terms and applying the measure of Supreme Court advocacy expertise set forth in this Article to those counsel.

128. Includes three former Supreme Court law clerks who succeeded in securing Supreme Court review. None of the former clerks are formally affiliated with an organization that meets the "expert" counsel criteria, but each worked in the past with such an organization or consulted closely with them in preparing the petition. The successful clerks were: Sean Donahue (Petition for Writ of Certiorari, *Envtl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423 (2007) (No. 05-848) (petition filed on Dec. 28,

of successful cert petitions filed by firms and organizations with the same level of Supreme Court expertise had increased. The veterans accounted for seventeen of the sixty-eight successful petitions, or 25%, for an absolute increase of approximately 300% and a percentage increase of more than 400%. In October Term 2005, the numbers were greater still. Twenty-four of the sixty-seven successful cert petitions were filed by the so-called experts, or 36% of the total. That amounts to a 400% increase since October Term 1980 in absolute numbers of cert petitions granted and a percentage increase of more than 600%. In October Term 2006, the numbers increased even more, with the veterans accounting for twenty-five of the sixty-four petitions granted, or 39% of the total. If, moreover, one adds the three successful petitions filed by three former Supreme Court clerks now working on their own, but previously affiliated with expert organizations, that percentage increases to 44% of successful petitions. As this Article was going to press, a similar percentage applied for cases to be heard in October Term 2007, with veterans accounting for thirty-five of the sixty-five cases granted, or 53.8% of the total, excluding the six petitions filed by the Solicitor General. And, even these statistics likely understate the impact of the modern Bar, as they often supply critical amicus briefs at the jurisdictional stage in support of petitions filed by non-expert counsel.

There is even reason to speculate that the elite members of the Supreme Court Bar may have succeeded in discouraging others from filing cert petitions at all. Petitions for review are filed with the Court from both state and federal court rulings. Considering just the potential number of cases coming from the federal courts, there is good reason to suppose that the number of cert petitions would have grown exponentially over the years for the straightforward reason that the number of cases filed in the federal courts of appeals has also grown exponentially. Since 1980, the number of filings in the federal courts of appeals has doubled from roughly 30,000 to 60,000.<sup>129</sup> In 1960, the number of filings was only about 5000.<sup>130</sup>

But, while the number of cert petitions and appeals has increased from 1980 to the present, both the absolute and relative number of paid petitions and appeals has gone steadily down. In 1980, the Court received 4280 appeals and petitions, 2256 of which were paid. By October Term 1990, the Court received 5412 appeals petitions, 1986 of which were paid. And finally, for October Term 2005, while the Court received 8204 petitions, only 1663 of them were paid. That amounts to more than a 26% *decrease* in absolute terms and almost a 60% decrease in relative terms.<sup>131</sup>

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2005)); Eric Grant (Petition for Writ of Certiorari, *Osborn v. Haley*, 127 S. Ct. 881 (2007) (No. 05-593) (petition filed on Nov. 7, 2005)); and Jordan Steiker (Petition for Writ of Certiorari, *Smith v. Texas*, 127 S. Ct. 1686 (2007) (No. 05-11304) (petition filed on May 30, 2006)).

129. Stras, *supra* note 99, at 11 & chart 7.

130. *Id.*

131. These data are derived from the "Final Disposition of Cases" tables that are included in "The Statistics" published each year in the November issue of *The Harvard Law Review*, reporting on the previous Term. See *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 339, 342 tbl.II & n.a (1981); *The Supreme Court, 1990 Term*, 105 HARV. L. REV. 419, 423 tbl.II & n.a (1991); *The Supreme Court, 2005 Term*, 120 HARV. L. REV. 372, 379 tbl.II & n.b (2006).

Commentators have recently proffered a variety of reasons for the decline, largely focusing on the law and economics rational actor notion that as the probability of securing Supreme Court review has gone down, so too has the willingness of parties to file paid petitions to try to obtain review.<sup>132</sup> I would like to suggest a related notion, more directly linked to the emergence of a modern Supreme Court Bar expert in Supreme Court advocacy. Most simply put, this Bar may be serving a useful screening function.

As previously described, the Solicitor General is well known for declining agency requests to file petitions for writs of certiorari unless the Solicitor General independently concludes that it is in the interest of the federal government to file the petition.<sup>133</sup> Private sector attorneys are assumed not to enjoy the same kind of latitude to say “no” to an important client that wishes to seek Supreme Court review, particularly where the financial stakes are great. But that does not mean that the private sector Supreme Court expert who appears repeatedly before the Court is not concerned about maintaining the credibility of her advocacy before the Court, and she is therefore more likely to advise such a client candidly about the reason why review is not warranted. Both Supreme Court counsel and their clients report just such behavior.<sup>134</sup> Supreme Court counsel advise clients against filing petitions, although that eliminates a business opportunity, and some reportedly may even use language in a petition that makes clear, to the more practiced eye, a tacit acknowledgment that the case for review is in fact less than compelling.<sup>135</sup> There is no paper trail to document this conduct. Petitions that might have been, but were not filed are, by definition, not available to be counted, nor is language that might have been used.

Relatedly, the presence of an elite Supreme Court Bar may have raised the financial bar for the simple reason that such lawyers’ expertise is costly for those wishing to hire them. While the elite Supreme Court advocates are frequently willing to file pro bono cases because of personal interest and to maximize their presence before the Court, these attorneys do not sell their expertise cheaply when it comes to paying clients. A cert petition can easily cost one \$100,000, and there are petitions that can cost even more than that because of the significant work these experts put into a case at the jurisdictional stage to persuade the Court to grant certiorari. The high cost of those

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132. See Posting of David Stras to SCOTUSblog, <http://www.scotusblog.com/wp/commentary-and-analysis/more-on-the-curious-decline-in-paid-petitions/> (Mar. 2, 2007, 16:55 EST) (“More on the Curious Decline in Paid Petitions.”).

133. See PERRY, *supra* note 31, at 130–31; SALOKAR, *supra* note 33, at 107–16; see also *supra* notes 44–46 and accompanying text.

134. See MCGUIRE, *supra* note 22, at 178 (quoting Supreme Court counsel as saying that he spends considerable time “trying to talk people out of filing cert petitions that I think aren’t going to get anywhere”); Tony Mauro, *Carter Phillips’ Power of Persuasion*, LEGAL TIMES, Nov. 10, 2000, at 13 (“If [Carter Phillips] says that we don’t have a prayer that the Supreme Court will accept a case, we take his advice and don’t file. He saves us a lot of money.”).

135. See MCGUIRE, *supra* note 22, at 119, 175–76.

petitions likely gives some pause not only to those who can afford it, but also to those who cannot because the lesser quality product that they can afford from a non-expert has, in the face of such competition, no real chance of success.

The significantly higher frequency of expert Supreme Court counsel serving as counsel of record also certainly understates the involvement of these lawyers in the litigation before the Court. Even when lower court counsel bend to the professional and personal pressures many feel to retain primary control over a case, they often seek significant help from experts in Supreme Court practice both in the drafting of the brief and in the preparation of the oral argument.<sup>136</sup> Sometimes, the Supreme Court counsel is formally listed on the brief as co-counsel.<sup>137</sup> Serving as consultants, Supreme Court counsel often play significant roles in the researching and drafting of the brief and in assisting the oral advocate in preparing for the oral argument. Both formally and informally, the Bar itself provides practice argument sessions for counsel with cases about to be argued before the Court. In some cases, the participating attorneys are paid for their time; in other contexts, they donate their time.<sup>138</sup> In either instance, they can have a considerable impact on the litigation and the substance of the arguments being presented.<sup>139</sup>

Finally, experienced Supreme Court advocates also make up for the shrinking docket by dominating the oral arguments before the Court. This is apparent even if one takes out of the equation attorneys from the Solicitor General's Office, who now present oral argument in a far higher percentage of the cases than they did in 1980,<sup>140</sup> also no doubt in response to the shrinking docket.

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136. *See id.* at 110–13.

137. Some counsel prefer not to acknowledge formally that they received outside assistance, in which case the name of the Supreme Court consultant does not appear on the brief. Based on personal experience, this is often true for state agencies and the offices of state attorneys general.

138. The time can be donated because the Supreme Court counsel is working on a pro bono basis. When local counsel has decided to remain as lead counsel, it is also not unusual for other interested parties worried about the ramifications of the Court's ruling on their business to pay the Supreme Court expert to serve as a consultant to the counsel of record.

139. For instance, Georgetown University Law Center's Supreme Court Institute, for which I serve as the Faculty Director, provides on a strictly pro bono basis a rigorous moot court practice session for counsel with cases before the Supreme Court. The "Justices" for these sessions are mostly attorneys with significant personal experience arguing before the Court, often current or former members of the Solicitor General's Office and former Supreme Court law clerks. During October Term 2006, the Institute provided this assistance in more than 90% of the cases before the Court. More often than not, advocates significantly change their legal arguments based on the expert advice they receive.

140. During the past several decades, the Solicitor General has substantially changed the standard it applies in deciding whether to seek oral argument time in cases where it is participating as *amicus curiae*. In October Term 1980, the Solicitor General sought permission to participate in the oral argument as *amicus curiae* on twelve occasions, and the Court granted permission in all but one of those cases. By contrast, in October Term 2005, the Solicitor General sought permission to participate in oral argument in forty-nine cases in which it was participating as *amicus curiae*. The Court granted the motion all forty-nine times. That constitutes a more than 400% absolute increase since 1980, once again notwithstanding the fact that the overall number of cases being heard on the merits otherwise dropped by roughly one-half during that same time period. There are several obvious explanations for

**Table 3. Percentage of Total Oral Arguments Presented by Experienced Oral Advocates  
(Excluding U.S. Solicitor General's Office)<sup>141</sup>**

<b>October Term</b>	<b>Percentage First-Time Argument (Absolute Number)</b>	<b>Percentage with Ten or More Prior Arguments (Absolute Number)</b>	<b>Percentage with More than One Argument in Same Term (Absolute Number)</b>
<b>1980</b>	<b>76% (179)</b>	<b>2% (7)</b>	<b>3% (8)</b>
<b>2000</b>	<b>59% (80)</b>	<b>9% (12)</b>	<b>14% (19)</b>
<b>2005</b>	<b>56% (79)</b>	<b>16% (22)</b>	<b>18% (26)</b>
<b>2006</b>	<b>58% (76)</b>	<b>23% (30)</b>	<b>17% (22)</b>
<b>2007</b>	<b>43% (50)</b>	<b>28% (32)</b>	<b>24% (28)</b>

As set forth in Table 3, in October Term 1980, 76% of those presenting oral argument before the Court were doing so for the very first time. In October Terms 2000 and 2005, the number had dropped to 62% and 58%, respectively. During October Term 2006, the percentage of first-timers had gone down even further to 52%. That constitutes almost a 50% decline from 1980 to the present.

Just as remarkably, the number of oral advocates during each of those Terms who had presented oral argument on ten or more prior occasions has risen dramatically. For October Term 1980, only 3% of the total non-Solicitor General arguments included such an expert oral advocate, but that percentage jumped to 9% in 2000 and to 16% in 2005. Even though the total number of cases argued in 1980 was almost double the number in 2000 and 2005, the absolute number of oral arguments by advocates who had previously argued before the Court at least ten times nonetheless managed to increase ultimately by more than 300%: from seven in 1980 to twelve in 2000 and to twenty-two in 2005.

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the change in behavior. The first, of course, could be that the Solicitor General has simply decided based on years of experience that the interests of the United States are better served if the Solicitor General provides the Court with its considerable expertise and important perspective at the argument itself. Another explanation, at least as plausible, is that the decrease in the Court's plenary docket has led to an increase in the percentage of Solicitor General motions for divided arguments for more practical, bureaucratic reasons. The size of that Office is essentially the same as it has always been and the attorneys in that Office are often there primarily because of the thrill and challenge of presenting oral argument before the Court. The bureaucratic pressures within that Office to seek argument time in a higher percentage of cases, therefore, naturally go up as the number of cases go down. *See SALOKAR, supra* note 33, at 64–65 (“Oral arguments are the bread and butter for the attorneys in the [S]olicitor [G]eneral’s [O]ffice . . . . You don’t pay them much . . . [b]ut that’s the coin you pay them in.”) (internal quotation marks omitted).

141. These statistics were derived from an examination of the Court's records of arguing counsel in each of the relevant Terms.

Nor has the trend shown any sign of decreasing. Again, not including members of the Solicitor General's Office, on thirty and thirty-two different occasions during October Terms 2006 and 2007, respectively, the advocate appearing before the Justices had argued on at least ten prior occasions. That is more than a four-fold increase in absolute numbers since October Term 1980. Taking into account that the total number of advocates presenting oral argument has decreased by approximately 50% since 1980, this is a relative increase of significantly more than 1000%. The number of first-time advocates for October Term 2007 decreased to significantly below 50%—43%<sup>142</sup>—for the first time and the number of advocates who presented more than one argument during the Term jumped to 24%, an 800% relative increase since October Term 1980 and a 41% relative increase from the year before, October Term 2006.

Finally, the expert Bar's increasing dominance is evidenced by the rising percentage of oral advocates appearing more than once within a single Term—a feat most typically accomplished only by attorneys within the Solicitor General's Office. In absolute numbers, 8 out of a total of 237 non-Solicitor General arguments were presented by attorneys who argued more than once in 1980. In 2000, the number of arguments by attorneys appearing more than once in a single term more than doubled to 19, even though the number of non-Solicitor General arguments nearly halved from 237 to 135. In October Terms 2005 and 2006, there were again twenty-six and twenty-two arguments, respectively, by such repeat advocates within a single Term.

That is why the final two hours of oral argument on April 25, 2007, were so telling. Only one of the six advocates appearing that day had argued fewer than ten cases, and it was his fifth argument. The other five, including the Solicitor General and an Assistant to the Solicitor General, had each argued more than twenty times in the past. And four of the five had argued on more than thirty-five prior occasions. The modern Supreme Court Bar had arrived.

### III. THE SIGNIFICANCE OF THE MODERN SUPREME COURT BAR FOR THE COURT AND THE NATION'S LAWS

The rising dominance of the modern Supreme Court Bar naturally raises the question whether there is any broader significance to that development beyond the implications within the legal profession itself. In the early 19th century, the general consensus was that the extraordinary individuals within the Bar, including Webster, Wirt, and Pinkney, played a major role in influencing no less than the development of the basic legal doctrine upon which the nation, two centu-

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142. The 43% figure is also somewhat misleadingly high. Of the 50 "first-timers" that make up the 43% of all arguments, 9 of those counsel are closely affiliated with leading Supreme Court practices, such as Sidley Austin, Jones Day, WilmerHale, and Robbins Russell, and are arguing before the Court partly because the firm already has so many cases that they are more willing and able to spread the oral arguments around to more junior counsel.

ries later, is still based.<sup>143</sup> Can the Bar today make a comparable claim?

Of course, the phenomenon of the re-emerging Supreme Court Bar is still too new for history to evaluate, but the preliminary indications are that the Bar is having a significant, long-term substantive impact. The Bar appears to be having a profound effect on the identity of cases on the Court's plenary docket, shifting that docket to topics more responsive to the concerns of private business. Second, there is good reason to believe that the new Bar is also influencing the Court's rulings on the merits. Better advocates not only win more often, but even more importantly, they influence the content of the opinions themselves, including the words used and the breadth of the ruling or, conversely, the lack thereof. In the longer term, it is the words that the Court uses throughout its opinion, rather than whether the opinion nominally ends with an "affirmed" or "reversed," that tend to have the most significant impact.

There is further reason to speculate that the rise in the professional prestige of the Supreme Court Bar may even be able to change the Court from within. Because of their renewed prominence as leaders of the legal profession, the new, elite Supreme Court advocates have themselves recently become an attractive proving ground for Supreme Court nominees, as demonstrated by the new Chief Justice, John Roberts, whom President Bush plainly picked based on Roberts's record as a leading Supreme Court advocate rather than his judicial record.<sup>144</sup> Not only do their advocacy skills offer the potential of making them effective within the Court, but they can defend whatever positions they have argued as simply those of a lawyer representing a client and do not have the kind of baggage of controversial scholarly writing or judicial opinions that can quickly prove fatal to a judicial nomination.

Finally, precisely because of the potential significance of the modern Supreme Court Bar for the Court's docket, rulings on the merits, and even membership, there is reason for concern that the re-emergence of a Supreme Court Bar may disproportionately favor those monied economic interests more able to afford to pay for such private sector expertise. While better advocacy is generally a good thing, able advocacy on all sides of a case before the Court is the best outcome by far.

#### A. SHIFTING THE PLENARY DOCKET

The modern Supreme Court Bar's clearest impact is the significant role that it is playing in establishing the Court's agenda. One of the Court's greatest powers is also, somewhat paradoxically, a source of its greatest vulnerability. The Court's jurisdiction is almost all discretionary. With very few, limited exceptions, the Court has complete authority to decide what legal issues it wishes to address. As any of the thousands of state and federal trial and appellate court

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143. See White, *supra* note 15, at 288–91.

144. Chief Justice Roberts had been a federal court of appeals judge for little more than two years at the time of his nomination to the Supreme Court.

judges who lack such discretion would quickly attest, that is an extraordinary power because it allows for the study and reflection necessary for significant rulings of law.

The paradox for the Justices is that there are so many possible cases from which to choose that the Justices are, as a practical matter, heavily dependent on the quality of the advocacy in the jurisdictional pleadings. The Court cannot, of course, unilaterally decide to consider a legal issue—even one that a majority of the Justices strongly wishes to address—unless and until an advocate files a timely petition properly preserving and presenting the issue to the Court.<sup>145</sup> But even more significantly, the Bar heavily influences which cases the Justices take because the Court is heavily dependent on skilled advocates to provide them with the information they need to decide whether certiorari is warranted. The Justices are likely more dependent on the advocates at the jurisdictional stage than at any other stage in the litigation.

The reason is entirely practical. The Court receives over 9,000 petitions seeking Supreme Court review each year. Even if every Justice were to spend a full forty hours a week, fifty weeks a year, just reviewing cert petitions and doing nothing else, each Justice would be able to devote little meaningful time to each petition: about twelve minutes in total. This would not be sufficient time even to read the petition, let alone the brief in opposition, the reply brief, the lower court opinion, amicus briefs, or any of the potentially hundreds of legal authorities cited by those briefs. If, moreover, one accounts for all of the other pressing activities in which Justices routinely engage in deciding on cases granted plenary review, the number of minutes each Justice could in theory commit to each petition on average quickly dwindles to about one or two minutes, if not fewer than sixty seconds.

The fact is, of course, that the Justices do not read all the petitions or even a significant fraction of them. They do not have the time.<sup>146</sup> And several members have publicly acknowledged just that.<sup>147</sup> They read at most the memoranda prepared by the clerks and rarely the briefs themselves at the jurisdictional

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145. See VANESSA A. BAIRD, *ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA* 3 (2007). Although the Justices today lack power to initiate the litigation themselves, that was apparently not always true, at least informally. In the early years of the Court, some of the Justices reportedly took “shrewd advantage of their jurisdictional powers, devot[ing] a portion of their energies to channeling lower court cases up to the Supreme Court.” WHITE, *supra* note 15, at 164. For instance, reportedly no less than Chief Justice John Marshall drafted the party’s petition for review and then enlisted the assistance of Justice Bushrod Washington to secure the Court’s jurisdiction to hear *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816), a case from which Marshall was recused because of personal interest. See White, *supra* note 15, at 165–68.

146. See WARD & WEIDEN, *supra* note 100, at 125–27.

147. Justice Stevens, the only Justice whose chambers does not formally participate in the cert pool, does not look at the petitions “in over eighty percent of the cases.” *Id.* at 126 (quoting Stevens, J.). Former Chief Justice William Rehnquist reported that, as soon as he concluded that the relevant law clerk was reliable, he just took the word of the law clerks and pool memo writer and would only possibly look at the papers if the case looked like a potential cert candidate. See WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS*, 264–65 (1987).

stage.<sup>148</sup>

The Justices accordingly must and do delegate much of the real work of scrutinizing pleadings at the jurisdictional stage to the law clerks, reserving for themselves only the job of deciding which cases should be granted certiorari out of those that the law clerks bring to their attention. The important point here is that it is the clerks who dominate that process within the Court. And, while the Justices can effectively second guess a clerk's recommendation that the Court grant a case for review, they are not well positioned to devote meaningful time to second-guessing the failure of the clerks to recommend plenary review.

The clerks are, in turn, more heavily influenced by the advocates at the cert stage than at any other. Neither the cert pool process utilized by eight of the chambers nor the fact that many of the thousands of petitions are obviously not certworthy frees up individual clerks enough to eliminate their dependency on the quality of the advocacy. Even with the aid of both, the sheer number of petitions to be processed and the amount of other work that the clerks must accomplish renders their review more akin to a sprint than an opportunity for sustained reflection and thought. In no event is there the time required for a thorough and independent examination of the relevant precedent being debated to discover conflicts not mentioned in the petition or to discover legal importance not there stressed.<sup>149</sup>

The clerk has to be able to pick up a petition and make a fairly quick judgment whether a case warrants more than the relatively short time that she can afford to give most cases. It is precisely because of the need to make that quick judgment that advocacy at the cert stage matters so much. An attorney who does not understand the Court well can easily fail to send the necessary signals for why a case is certworthy. And, by contrast, those who understand the Court extremely well know precisely how to take a case and frame it in a way that increases significantly its chances of receiving a closer review.

The law clerks are, after all, just that: law clerks. They have only recently graduated from law school, and, notwithstanding their spectacular academic records, they are not seasoned, experienced lawyers. Apart from the most obvious instances, such as the striking down of a federal statute as unconstitutional, they possess virtually no, or at most little, basis for quickly and independently judging the relative importance of the legal issues being presented. Not infrequently, they possess no background or experience at all in the legal issues being raised in a particular case.<sup>150</sup>

The expert Supreme Court advocates, by contrast, tend to share all the same

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148. Sally J. Kenney, *Puppeteers or Agents? What Lazarus's Closed Chambers Adds to Our Understanding of Law Clerks at the U.S. Supreme Court*, 25 LAW & SOC. INQUIRY 185, 196 (2000).

149. A student in my Supreme Court Advocacy class recently published an article that, following up on this thesis, closely examines the effective advocacy utilized in three successful cert petitions filed by expert Supreme Court counsel. See Joseph W. Swanson, *Experience Matters: The Rise of a Supreme Court Bar and Its Effect on Certiorari*, 9 J. APP. PRAC. & PROCESS 175, 188–203 (2007).

150. See PERRY, *supra* note 31, at 77–84.

basic outstanding academic credentials of the clerks—often including a Supreme Court clerkship—but then possess something much more: years of advocacy experience before the Court, settled expertise in the workings of the Court, and in-depth knowledge of the concerns and predilections of the individual Justices. Their expertise lies in determining how best to pitch a case, how to strike a theme of interest to particular Justices, and how to secure the filing of amicus briefs that will most effectively buttress their arguments and distinguish their petition from the mounds of others. They know how to frame a petition in order to best support a claim of a circuit conflict, the legal importance of an issue, or the pressing need for immediate Supreme Court review.

The Supreme Court advocates also have one other important thing the clerks do not possess at the jurisdictional stage: time. Those preparing the jurisdictional papers at the firms and organizations expert in Supreme Court advocacy spend hundreds of hours crafting their documents. They comb records, federal appellate reporters, and law review articles to “discover” circuit conflicts at varying levels of specificity and generality to buttress claims of importance.<sup>151</sup> They push hard for amici support, generate stories in the national news print and broadcast media, and prompt the publication of op-eds in the nation’s leading newspapers, all to coincide with the timing of the Court’s consideration of the cert petition. For instance, such well-timed, sympathetic op-eds appeared in *The Wall Street Journal* just as the Court was considering whether to grant review in *Bell Atlantic Corp. v. Twombly*,<sup>152</sup> *Credit Suisse Securities (USA) v. Billing*,<sup>153</sup> and, even more recently, *Exxon Shipping Co. v. Baker*,<sup>154</sup> and the Court granted review in all three cases.<sup>155</sup>

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151. See, e.g., Podcast: Jason Harrow, SCOTUSblog, *Podcast #11: More on Petitioning with No Circuit Split*, (May 23, 2007), <http://www.scotusblog.com/wp/multimedia/podcast-11-more-on-petitioning-with-no-circuit-split/>.

152. 127 S. Ct. 1955 (2007).

153. 127 S. Ct. 2383 (2007). The case was originally filed as *Credit Suisse First Boston Ltd. v. Billing*. However, Credit Suisse changed its corporate name during the litigation to Credit Suisse Securities (USA) LLC. See *First Boston’s Last Day in Credit Suisse Name*, INT’L HERALD TRIB., Jan. 16, 2006, at 15.

154. 490 F.3d 1066 (9th Cir.), cert. granted, 128 S. Ct. 492 (2007).

155. See Paul Atkins, Editorial, *A Serious Threat to Our Capital Markets*, WALL ST. J., June 10, 2006, at A12; Theodore J. Boutrous, Jr., Editorial, *Due Process for Exxon*, WALL ST. J., Oct. 23, 2007, at A18; Editorial, *Calling All Plaintiffs*, WALL ST. J., May 2, 2006, at A16. In the *Credit Suisse* article (authored by Atkins), the author was a commissioner of the Securities & Exchange Commission, and the petitioners used the occasion of the op-ed’s publication as the exclusive basis for the filing of a supplemental brief in support of the petition. See Supplemental Brief for Petitioners at 1, *Credit Suisse Securities (USA) LLC v. Billing*, 127 S. Ct. 2383 (No. 05-1157) (“Petitioners submit this supplemental brief pursuant to Rule 15.8 to call the Court’s attention to an article written by SEC Commissioner Paul Atkins, published after petitioners filed their reply briefs.”). It is, of course, not just counsel for business clients that effectively use such tactics. At the petition stage, the petitioner in *Kelo v. City of New London*, succeeded in obtaining an article in *The New York Times* and a story on National Public Radio’s *Morning Edition* on the Court’s consideration of their claim that the Court should consider petitioner’s claim that the municipality had exceeded its eminent domain authority. See Terry Pristin, Op-Ed., *Connecticut Homeowners Say Eminent Domain Isn’t a Revenue-Raising Device*, N.Y. TIMES, Sept. 8, 2004, at C8; *Morning Edition: Profile: Eminent domain in New London, Connecticut, will go*

Interviews with former clerks confirm the obvious: the clerks pay special attention to the petitions filed by prominent Supreme Court advocates and to the amicus briefs those advocates succeed in having filed in support of review.<sup>156</sup> When they see the name of an attorney whose work before the Court they know, at least by reputation, that attorney's involvement in the case, by itself, conveys an important message about the significance of the legal issues being presented and the credibility of the assertions being made.<sup>157</sup>

A statistical study examining the impact of experienced Supreme Court advocates during the 1980s, long before the modern Bar truly re-emerged, found that advocacy experience was an important predictor of the Court's granting review.<sup>158</sup> The probability of certiorari being granted rose to 22% with experienced Supreme Court counsel, compared to 6% for cases where counsel lacked experience. For Washington, D.C. counsel with more than one case during the five previous terms, the certiorari grant rate was even higher: 26%.<sup>159</sup>

These findings cannot be easily dismissed on the ground that the experienced counsel are simply picking the better cases. Further statistical analysis explored that possibility by controlling for other explanatory factors, including dissents in the lower court, alleged and actual conflicts, and the conservative or liberal nature of decision.<sup>160</sup> Once again, Supreme Court advocacy experience mattered. Controlling for those other factors, there was still a statistically significant correlation between grants of certiorari and the advocate's experience. Non-Washington expert counsel with one to three prior merits cases in recent years did much better in obtaining Supreme Court review than counsel with no prior Court experience, and then the numbers continued to improve if the counsel had more than three prior merits cases.<sup>161</sup> If, moreover, the Supreme Court counsel was a Washington, D.C.-based expert with one to three prior merits cases in the last five years, the rate of cert grants was higher still, with the highest grant rate for those D.C.-based experts with more than three prior merits cases in the last five years.<sup>162</sup>

Because both the number of experienced advocates and the standards to be considered an experienced advocate have dramatically increased,<sup>163</sup> there is good reason to presume that the impact on certiorari is now even greater still. A

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*before the U.S. Supreme Court for a ruling* (NPR radio broadcast Sept. 17, 2004). The unavoidable effect of such national press attention is to bolster the petitioner's claim that the legal issue is important.

156. MCGUIRE, *supra* note 22, at 179–80; Kenney, *supra* note 148, at 198 n.33.

157. MCGUIRE, *supra* note 22, at 175–76.

158. *Id.* at 181–82.

159. *Id.*

160. *Id.* at 182.

161. *Id.* at 182 & tbl.8.1.

162. *Id.*

163. As the number of attorneys who have appeared frequently before the Court has increased, the number of appearances required to be considered an "expert" naturally also increases. For the purposes of this Article, for instance, the standard is considerably higher than one to three merits briefs used in the earlier statistical analysis just discussed above. See *supra* text accompanying notes 158–162.

review of the Court's docket and jurisdictional rulings suggest just that. Indeed, the percentage of granted cert petitions being filed by expert Supreme Court advocates has increased from just a few percentage points over twenty years ago to almost 50% today. As described above, in October Term 1980, the Court granted only six requests for full review on the merits (either cert petitions or jurisdictional statements) by non-Solicitor General attorneys who possessed significant Supreme Court advocacy expertise out of a total of 102 such grants. By contrast, as this Article was going to press during the current October Term 2007, as many as thirty-five of the sixty-five successful non-Solicitor General cert petitions were filed by the so-called experts, or 53.8% of the total. That amounts to almost a 600% increase since October Term 1980 in absolute numbers of cert petitions granted and a percentage increase just shy of 1000%.<sup>164</sup>

No doubt one reason that this has occurred is that the Bar's expert members are filing an ever increasing number of petitions: some firms are filing as many as twenty-five petitions a year.<sup>165</sup> But their total number still remains an extremely small fraction of the 10,000 petitions filed overall, while their overall share of the docket is quite extraordinary. So too is their grant percentage. It is not unusual for many of these advocates to have 20% of their cert petitions granted.<sup>166</sup> While that number remains far lower than that of the Solicitor General, who possesses much more discretion to decline a client's request for a cert petition to be filed,<sup>167</sup> 20% is an order of magnitude higher than the less than 1% figure that applies to cert petitions in general.

The Stanford Supreme Court Litigation Clinic in its very first year persuaded the Court to grant its first four petitions.<sup>168</sup> Not so long ago, only the most accomplished private sector Supreme Court advocates could claim to have persuaded the Court to grant four petitions in an entire career; four petitions in a row would have been beyond Herculean. Today, such once-unprecedented streaks seem to appear with some regularity. Sidley Austin recently had the Court grant three of their petitions in three successive order lists.<sup>169</sup> A Mayer Brown partner had a streak of five consecutive grants of certiorari.<sup>170</sup> A Kellogg Huber partner recently enjoyed a three-grant streak, which led to his arguing both the first and last days of the two-week argument session ending April 25,

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164. See *supra* Table 2 accompanying note 127.

165. See *supra* text accompanying note 109.

166. See *supra* Table 2 accompanying note 127.

167. See *supra* text accompanying note 40.

168. *Law Students Enjoy Supreme Success*, STAN. MAG., Jan.–Feb. 2005, available at <http://www.stanfordalumni.org/news/magazine/2005/janfeb/farm/news/law.html>.

169. See *Mohawk Indus. v. Williams*, 546 U.S. 1075 (2005) (granting certiorari), *judgment rendered*, 547 U.S. 516 (2006); *Burlington N. & Santa Fe Ry. v. White*, 546 U.S. 1060 (2005) (granting certiorari), *judgment rendered*, 548 U.S. 53 (2006); *eBay v. MercExchange, LLC*, 546 U.S. 1029 (2005) (granting certiorari), *judgment rendered*, 547 U.S. 388 (2006).

170. Tony Mauro, *Fewer Firms Are Arguing More and More of the Court's Shrinking Docket*, LEGAL TIMES, July 14, 2003, at 3.

2007.<sup>171</sup>

At least statistically, the effective use of amicus briefs at the jurisdictional stage that endorse the significance of the legal issues being presented appears to be one way that the veteran Supreme Court advocates are tilting the odds decidedly in their favor (Table 4). The veterans know, often from personal experience based on their own clerkships at the Court, how the presence of multiple amicus briefs can persuade the law clerk that a case is certworthy. They also possess the connections within the Supreme Court Bar itself to get the briefs filed. It is, after all, a small club of professionally, and often socially, interconnected individuals.

So, while it is of course theoretically possible that some of these amicus briefs would be filed on their own initiative if a case is of potential legal significance, most are in fact filed because counsel for petitioner proactively alerts potential amici that a petition has been filed, which is not something that would otherwise necessarily be known. Those counsel further lobby possible amici to file briefs in support of certiorari, and they lobby other members of the Supreme Court Bar, with whom they frequently work closely on other matters, to persuade them to seek out possible clients for an amicus submission. All members of the Bar share an interest in promoting such work at the jurisdictional stage, especially when the number of merits cases (and therefore opportunities for arguments and merits briefs) is otherwise shrinking.<sup>172</sup>

In October Term 1982, only 119 of the 1906 paid petitions had at least one amicus brief filed in support of the Court's granting jurisdiction—a mere 6%.<sup>173</sup> However, in October Term 2005, the percentage had increased to approximately 10%, with amicus briefs filed in support of 144 of the 1523 paid petitions. The need for amicus support, moreover, is statistically greater than it was twenty years ago. The odds of the Court's granting a paid petition in absence of amicus support in October Term 1982 was 5%, compared to approximately 2% today. With amicus support, however, the odds jump considerably. If there was at least one amicus brief filed in support, the odds of certiorari being granted in October Term 2005 was just shy of 20%. If there were at least four amicus briefs filed in support of the paid petition, the odds jumped even higher to 56%.

It is also quite clear that the successful amicus efforts at the jurisdictional

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171. See *Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 1144 (granting certiorari), *judgment rendered*, 124 S. Ct. 2411 (2007); *Watson v. Philip Morris Cos.*, 127 S. Ct. 1055 (granting certiorari), *judgment rendered*, 127 S. Ct. 2301 (2007); *Altadis USA, Inc. v. Sea Star Line*, 127 S. Ct. 853 (granting certiorari), *cert. dismissed*, 127 S. Ct. 1209 (2007). The *Altadis* case was not argued because the parties settled after the grant and the Court accordingly dismissed the petition.

172. No member of the Supreme Court Bar would dispute the existence of this practice, which, as the statistical analysis confirms, is by now both routine and effective. Nor would anyone, including me, suggest that there is anything remotely inappropriate about such a strategy. Quite the opposite, it would be strikingly poor advocacy in almost all instances for a private sector attorney filing a cert petition not to seek out the filing of amicus briefs in support of review.

173. Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1116 (1988).

**Table 4. Number of Amicus Briefs Filed in Support of Non-Solicitor General Paid Petitions for a Writ of Certiorari and Rates of Grants of Certiorari for October Term 2005<sup>174</sup>**

<b>Number of Amicus Briefs</b>	<b>Number of Cases</b>	<b>Percentage of Total Cases</b>	<b>Number Granted</b>	<b>Percentage Granted</b>
0	1379	90.54%	30	2.18%
1	88	5.78%	13	14.77%
2	29	1.90%	4	13.79%
3	11	0.72%	2	18.18%
4	6	0.39%	3	50.00%
5	1	0.07%	0	0%
6	5	0.33%	3	60.00%
7	2	0.13%	2	100.00%
8	0	0.00%	0	0%
9	2	0.13%	1	50.00%
<b>Total</b>	<b>1523</b>	<b>99.99% (due to rounding)</b>	<b>58</b>	<b>3.75%</b>
2-3	40	2.63%	6	15.00%
4+	16	1.05%	9	56.25%

stage are being dominated by the repeat players. Of the twenty-eight cases granted review during October Term 2005 with amicus support, the petitions in seventeen of those twenty-eight were filed by our expert Supreme Court advocates. In the remaining eleven cases without a seasoned counsel of record, the successful petitions were supported in eight of those cases by at least one amicus brief filed by such a veteran. In almost 90% of the cert petitions granted review with amicus support, therefore, veteran Supreme Court advocates had signaled the Court that review was warranted.

What makes this accomplishment most significant is that the expert Supreme Court advocates have achieved such success at the jurisdictional stage not simply by discerning the priorities and interests of the Justices but by changing

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174. The various statistics in this table are based on a review of the official Journal of the Supreme Court for October Term 2005, prepared by the Clerk's Office, and the Court's online docket system. The Journal sets forth the official daily minutes of the Court, including the filing of every petition for a writ of certiorari and all amicus briefs filed at the jurisdictional stage. The online docket provides, by docket number, the same information. Both sources were consulted to maximize the accuracy of the information necessary to determine how many amicus briefs were filed related to each petition. For the Journal of the Supreme Court for October Term 2005, see <http://www.supremecourtus.gov/orders/journal/jnl05.pdf>. For the Court's online docket, see <http://www.supremecourtus.gov/docket/docket.html>.

them. For the former, the skill of the advocates lies primarily in their ability to respond to signals from the Justices concerning what legal issues and cases most interest them and then go out and find those cases and properly present them before the Court. Described as “cue theory” by political scientists, the expert advocates help the Justices overcome their own inability to initiate litigation and otherwise affect the cases brought to them.<sup>175</sup> The upshot is that the Justices get the cases and legal issues before them that they believe are important for the Court to decide, and the skilled advocates obtain the professional success and prestige related to being an elite member of the Supreme Court Bar with repeated cases before the Court.

No doubt such entrepreneurship is part of the jurisdictional equation. But it is not the most significant part because it underestimates the extent of the power of effective advocacy. The expert Supreme Court advocates do not merely discern the existing priorities of the Justices. They deliberately and systematically educate the Justices concerning what the priorities should be. Through repeated filings of cases and amicus support from weighty authorities and interest groups, the advocates identify for the Court what legal issues are sufficiently important for the Court to resolve. They demonstrate that controversy in the lower court arising from an existing Supreme Court precedent, federal constitutional provision, or federal statute or regulation warrants the Court’s attention. They establish the serious practical consequences of the problem. And, even if their presentation is not enough, standing alone, to convince the Court to grant review, the expert advocates at least persuade the Court to ask the Solicitor General to file an amicus brief at the jurisdictional stage addressing the question whether certiorari is warranted.<sup>176</sup>

Nor are those who today are succeeding as members of the Supreme Court Bar in influencing the Court’s docket the kind of interest groups that political scientists have identified in the past as “agenda setters” before the Court, such as the American Civil Liberties Union, NAACP Legal Defense Fund, and

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175. See BAIRD, *supra* note 145, at 3–8, 24–27.

176. For instance, in *Quanta Computer, Inc. v. LG Electronics, Inc.*, 453 F.3d 1364 (Fed. Cir. 2006), *cert. granted*, 128 S. Ct. 28 (2007), counsel for petitioner was Maureen Mahoney, a former Deputy Solicitor General and expert Supreme Court advocate who heads the Supreme Court practice at Latham & Watkins. The Court in *Quanta Computer* did not grant the petition in the first instance, but instead invited the views of the Solicitor General to address the question of whether review was warranted. After the Solicitor General recommended in favor of review, the Court granted the petition. See U.S. Supreme Court, Docket, *Quanta Computers, Inc. v. LG Elecs., Inc.* (No. 06-937), available at <http://www.supremecourtus.gov/docket/06-937.htm> (last visited Feb. 8, 2008); see also Brief for the United States as Amicus Curiae, *Quanta Computer, Inc. v. LG Elecs.*, No. 06-937 (U.S. Aug. 24, 2007). The Jones Day law firm was similarly successful in obtaining Supreme Court review following the Court’s inviting the Solicitor General to file a brief at the cert stage in *Chamber of Commerce of the United States v. Lockyer*, 463 F.3d 1076 (9th Cir. 2006), *cert granted sub nom. Chamber of Commerce of the United States v. Brown*, 128 S. Ct. 645 (2007). See U.S. Supreme Court, Docket, *Chamber of Commerce of the United States v. Brown* (No. 06-939), available at <http://www.supremecourtus.gov/docket/06-939.htm> (last visited Feb. 8, 2008); see also Brief for the United States as Amicus Curiae, *Chamber of Commerce of the United States v. Brown*, No. 06-939 (U.S. Oct. 19, 2007).

AFL-CIO.<sup>177</sup> Indeed, the attorneys who represent these kinds of organizations, to the extent that they are repeat players before the Court at all, typically do so as or in support of respondents rather than petitioners before the Court.<sup>178</sup> They are simply trying to maintain the status quo or preserve a lower court victory rather than persuade the Court to grant review and reverse a lower court ruling or otherwise move the law in a particular direction.

The individuals dominating the Supreme Court Bar today as petitioners are mostly private sector attorneys working with law firms and representing business interests. This should not be surprising given the origins of the Bar's modern re-emergence. What former Solicitor General Rex Lee showed the business community and the legal profession in the mid-1980s was that both could benefit from more effective representation of business interests before the Supreme Court. And that is primarily what they have accomplished.

At the beginning, the emerging private sector Supreme Court Bar publicly complained to the Court that it was not granting review in enough business cases. Former Solicitor General Ken Starr, while in private practice, even publicly ridiculed the Court's case selection and singled out for criticism the Court's failure to grant review in sufficient business cases.<sup>179</sup> Also in private practice representing business interests, former Deputy Solicitor General Paul Bator struck a similar theme in describing what was "wrong" with the Supreme Court.<sup>180</sup> With the benefit of twenty years of hindsight, what is now evident is that just such a pro-business shift in the Court's docket was then underway at the instigation of the Bar and has since succeeded.

During the most recently completed Term, October Term 2006, there were only sixty-seven signed opinions. Thirty-four of the signed opinions were cases

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177. MCGUIRE, *supra* note 22, at 31–32.

178. For instance, looking to briefs filed either by or on behalf of the ACLU between July 1, 2006 and June 30, 2007, nine of those briefs were filed on behalf of respondents and two were filed on behalf of petitioner. Of course, this is not a statistically significant analysis and is proffered only as anecdotal support. See Brief for ACLU et al. as Amici Curiae Supporting Respondents, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908); Brief for ACLU as Amici Curiae Supporting Respondents, *FEC v. Wis. Right to Life*, 127 S. Ct. 2652 (2007) (No. 06-969); Brief for ACLU et al. as Amici Curiae Supporting Respondents, *Hein v. Freedom from Religion Found.*, 127 S. Ct. 2553 (2007) (No. 06-157); Brief for ACLU et al. as Amici Curiae Supporting Petitioners, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007) (No. 06-484); Brief for ACLU et al. as Amici Curiae Supporting Petitioner, *Brendlin v. California*, 127 S. Ct. 2400 (2007) (No. 06-8120); Brief for ACLU and ACLU of Washington as Amici Curiae Supporting Respondent, *Uttecht v. Brown*, 127 S. Ct. 2218 (2007) (No. 06-413); Brief for Respondents, *Sole v. Wyner*, 127 S. Ct. 2188 (2007) (No. 06-531); Brief for ACLU and ACLU of Georgia as Amici Curiae Supporting Respondent, *Scott v. Harris*, 127 S. Ct. 1769 (2007) (No. 05-1631); Brief for Stephen Chasen, M.D., et al. as Amici Curiae Supporting Respondents, *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (No. 05-380); Brief for ACLU et al. as Amici Curiae Supporting Respondents, *Gonzales v. Planned Parenthood Fed'n of Am.*, 127 S. Ct. 1610 (2007) (No. 05-1382); Brief for ACLU et al. as Amici Curiae Supporting Petitioners, *Jones v. Bock*, 127 S. Ct. 910 (2007) (No. 05-7058).

179. Kenneth W. Starr, Editorial, *Rule of Law: Supreme Court Needs a Management Revolt*, WALL ST. J., Oct. 13, 1993, at A23.

180. Paul Bator, *What is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 683 (1990).

of significant interest to business concerns, and business interests were the petitioners in twenty-six of those cases. This is why both commentators and Supreme Court counsel uniformly declared the Term the best for business in recent memory.<sup>181</sup> What even these statistics mask, moreover, is the substantive shift in the nature of the business cases. What the private Supreme Court Bar has accomplished over the past decade is to persuade the Court to enter into areas of law of interest to the regulated community to correct what business perceives as problematic legal doctrine. These grants of review are not simply a reflection of outstanding advocates anticipating legal issues the Justices already care about and then simply finding clients that raise those issues. The private Supreme Court Bar has instead influenced the thinking of the Court, persuaded them that certain areas of law require their attention, and then, on that basis, secured grants of certiorari.

The Bar's impact on the Court's docket in this respect is evident in a host of areas important to the business community that serves as the Bar's primary client base. Some of the most obvious, including antitrust law and tort liability, are highlighted below.

### 1. Antitrust Law

The impact of the Supreme Court Bar is most likely why there has been a recent resurgence of antitrust issues before the Court. During the ten-year period between the end of October Term 1992 and the end of October Term 2002, the Court heard a total of two antitrust cases on the merits: *State Oil Co. v. Khan*<sup>182</sup> in 1997, and *NYNEX Corp. v. Discon, Inc.*<sup>183</sup> in 1998. Since October Term 2003, however, the Court has heard eleven antitrust cases, including four in both 2003 and 2006.<sup>184</sup>

But most revealing are the identities of the petitioner and petitioner's counsel in each of these cases. In all eleven, the petitioners who were successful in securing Supreme Court review were the defendants in the antitrust action. There were no successful antitrust plaintiffs at the jurisdictional stage. Petition-

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181. The business cases heard in October Term 2006 were dominated by four antitrust cases, four environmental law cases, four tort liability cases, three energy regulation cases, and three patent law cases. The other significant areas of interest to business included labor law, employment discrimination, tax, securities law, federal preemption of state business regulation, dormant Commerce Clause, and bankruptcy. For post-Term commentary by business leaders on the Term, see *infra* text accompanying notes 283–286.

182. 522 U.S. 3 (1997).

183. 525 U.S. 128 (1998).

184. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007); *Credit Suisse Sec. (USA) v. Billing*, 127 S. Ct. 2383 (2007); *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007); *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006); *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004); *U.S. Postal Serv. v. Flamingo Indus.*, 540 U.S. 736 (2004); *Verizon Commc'ns, Inc. v. Trinko*, 540 U.S. 398 (2004); see also *infra* Table 5.

**Table 5. Supreme Court Antitrust Cases Since October Term 2003  
Jurisdictional Stage**

Term	Case Name	Petitioner Counsel (Number of Oral Arguments), Firm	Number of Amicus Briefs in Support	Antitrust Defendant Petitioner?
2006	<i>Leegin Creative Leather Products, Inc. v. PSKS, Inc.</i> , 127 S. Ct. 2705 (2007)	Ted Olson (46), Gibson Dunn	6	Yes
2006	<i>Credit Suisse Securities (USA) v. Billing</i> , 127 S. Ct. 2383 (2007)	Stephen Shapiro (25), Mayer Brown	3 <sup>186</sup>	Yes
2006	<i>Bell Atlantic Corp. v. Twombly</i> , 127 S. Ct. 1955 (2007)	Michael Kellogg (11), Kellogg Huber	8	Yes
2006	<i>Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.</i> , 127 S. Ct. 1069 (2007)	Andrew Pincus (15), Mayer Brown	8	Yes
2005	<i>Illinois Tool Works, Inc. v. Independent Ink, Inc.</i> , 547 U.S. 28 (2006)	Andrew Pincus (14), Mayer Brown	4	Yes
2005	<i>Texaco, Inc. v. Dagher</i> , 547 U.S. 1 (2006)	Glen Nager (11), Jones Day	4	Yes

ers' counsel in all of these eleven cases were upper echelon Supreme Court advocates—all veterans of the Solicitor General's Office—having litigated literally dozens of prior Supreme Court cases, and having presented oral argument in no fewer than ten cases and well over thirty for several of the advocates.<sup>185</sup> Not surprisingly, with the exception of the one case in which the petitioner was

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185. The number of arguments listed after the name of the advocates in Table 5 refers to the number of arguments as of the date of the specific case in the Table in which the advocate presented oral argument, including that argument. For the purposes of this Table, counsel who reargued a case was credited with two arguments. Each argument total is based on a LEXIS search by name of arguing counsel and individual contacts with the attorneys for confirmation purposes because of some unreliability in LEXIS.

**Table 5. Supreme Court Antitrust Cases Since October Term 2003  
Jurisdictional Stage (Continued)**

<b>Term</b>	<b>Case Name</b>	<b>Petitioner Counsel (Number of Oral Arguments), Firm</b>	<b>Number of Amicus Briefs in Support</b>	<b>Antitrust Defendant Petitioner?</b>
2005	<i>Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.</i> , 546 U.S. 164 (2006)	Roy Englert (15), Robbins Russell	3	Yes
2003	<i>Intel Corp. v. Advanced Micro Devices, Inc.</i> , 542 U.S. 241 (2004)	Seth Waxman (39), WilmerHale	3	Yes
2003	<i>F. Hoffmann-La Roche Ltd. v. Empagran S.A.</i> , 542 U.S. 155 (2004)	Stephen Shapiro (23), Mayer Brown	2	Yes
2003	<i>U.S. Postal Service v. Flamingo Industries</i> , 540 U.S. 736 (2004)	Solicitor General	0	Yes
2003	<i>Verizon Communications, Inc. v. Trinko</i> , 540 U.S. 398 (2004)	Richard Taranto (18), Farr & Taranto	3	Yes

the Solicitor General representing the U.S. Post Office as an antitrust defendant, in all of the cases the petitioner antitrust defendant had succeeded in securing the filing of multiple amicus briefs in support of the petition at the jurisdictional stage.

## 2. Tort Liability

The private bar has also succeeded in persuading a majority of the Court to pick up the issue of whether there are federal constitutional limits on the

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186. The number of amici in *Credit Suisse Securities*, however, understates the showing at the jurisdictional stage. Aligned together as co-counsel on the petitioner's brief were a total of fourteen different law firms and forty-two individually named lawyers, including many of the leading Supreme Court practices and counsel in the nation.

imposition of punitive damages under state tort law. These arguments faced considerable hurdles from the outset. There was little, if any, existing Supreme Court precedent in support of the claim of federal constitutional limits. And there was reason to expect that it would be hard to persuade the Court to embrace a more aggressive view of federal constitutional limitations on state law because the Justices who would have to be persuaded were precisely those likely to be less intuitively inclined to do so. While the more conservative Justices were the ones who were more likely to be troubled by the potential for unchecked punitive damages to impose unfairly excessive awards on businesses, they were also the Justices generally opposed to invoking the federal constitution, particularly notions of substantive due process, to second guess the operation of state law. Such constitutional doctrine risked offending both their notions of the properly limited role of the federal judiciary in constitutional interpretation as well as general federalism concerns related to respecting the autonomy of States as sovereigns.

Yet, incrementally over almost twenty years, that is precisely what expert Supreme Court advocates have accomplished on behalf of business interests. They have persuaded the Court that unchecked punitive damages are a problem. They have prevailed upon the Court on eight separate occasions to grant review in cases that raise the question of whether the federal constitution imposes limits on jury awards of punitive damages. And, they ultimately secured from the Court new constitutional doctrine in favor of just those limits. Each of those petitions and briefs on the merits combined over time to draw a picture for the Justices of a state tort system out of control that required federal judicial supervision in the form of federal constitutional review.

The counsel of record in all but one of those eight cases is today a leader in the private Supreme Court Bar, and all are alumni of the Solicitor General's Office who have personally argued almost fifty or more cases before the Court.<sup>187</sup> Ted Olson of Gibson Dunn was the lead counsel and oral advocate in the first two cases, *Aetna Life Insurance Co. v. Lavoie*<sup>188</sup> and *Bankers Life & Casualty Co. v. Crenshaw*.<sup>189</sup> Sidley Austin's Carter Phillips was lead counsel in one of the cases, *TXO Production Corp. v. Alliance Resources Corp.*<sup>190</sup> Andrew Frey of Mayer Brown was lead counsel for the tort defendants as petitioners first in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,<sup>191</sup> and then in three additional cases: *Honda Motor Co. v. Oberg*,<sup>192</sup> *BMW of North*

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187. The number of arguments listed after the name of the advocates in Table 6, *supra*, refers to the number of arguments as of the date of the specific case in the table in which the advocate presented oral argument, not the number of arguments as of the completion of October Term 2006.

188. 475 U.S. 813 (1986).

189. 486 U.S. 71 (1988).

190. 509 U.S. 443 (1993).

191. 492 U.S. 257 (1989).

192. 512 U.S. 415 (1994).

**Table 6. Supreme Court Cases Concerning  
Federal Constitutional Limits on State Law Tort Damage Awards  
Jurisdictional Stage**

<b>Term</b>	<b>Case Name</b>	<b>Petitioner Counsel (Number of Oral Arguments), Firm</b>	<b>Number of Amicus Briefs in Support</b>	<b>Tort Defendant Petitioner?</b>
2006	<i>Philip Morris USA v. Williams</i> , 127 S. Ct. 1057 (2007)	Andrew Frey (64), Mayer Brown	12	Yes
1995	<i>BMW of North America, Inc. v. Gore</i> , 517 U.S. 599 (1996)	Andrew Frey (62), Mayer Brown	19	Yes
1993	<i>Honda Motor Co. v. Oberg</i> , 512 U.S. 415 (1994)	Andrew Frey (61), Mayer Brown	6	Yes
1992	<i>TXO Production Corp. v. Alliance Resources Corp.</i> , 509 U.S. 443 (1993)	Carter Phillips (17), Sidley Austin	15	Yes
1990	<i>Pacific Mutual Life Insurance Co. v. Haslip</i> , 499 U.S. 1 (1991)	Bruce Beckman (1), Beckman, David, Smith & Ruddy	24	Yes
1988	<i>Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.</i> , 492 U.S. 257 (1989)	Andrew Frey (57), Mayer Brown	16	Yes
1987	<i>Bankers Life &amp; Casualty Co. v. Crenshaw</i> , 486 U.S. 71 (1988)	Ted Olson (4), Gibson Dunn	4	Yes
1985	<i>Aetna Life Insurance Co., v. Lavoie</i> , 475 U.S. 813 (1986)	Ted Olson (2), Gibson Dunn	5	Yes

*America, Inc. v. Gore*,<sup>193</sup> and *Philip Morris USA v. Williams*.<sup>194</sup> In only one of the eight cases, *Pacific Mutual Life Insurance Co. v. Haslip*,<sup>195</sup> was industry's lead counsel a non-expert in Supreme Court advocacy, and it was precisely because his performance was so poorly received that the tort defense bar has relied exclusively on expert Supreme Court advocates such as Phillips and Frey ever since.<sup>196</sup>

### 3. Norfolk Railway

A third recent example of the persuasive power of elite Supreme Court advocates to persuade the Justices of the relative importance of issues concerning their business clients relates to the disproportionately large number of cases in recent years in which the petitioner has been either the Norfolk & Western Railway or the Norfolk & Southern Railway. This is a far more incidental topic, but it is for that reason arguably even more telling. Notwithstanding the Court's shrinking docket, the Court has granted five of thirteen petitions for such cases filed by Sidley Austin since 1995, including three since just 2002 (Table 7). A 38% grant rate, standing alone, is astoundingly high.

None of these five cases, moreover, presented an especially compelling legal issue. A few were at most plausible cert candidates that would have resulted in cert denials in the hands of anyone but an extremely skilled advocate, while several were quite far-fetched. For instance, in *Norfolk & Western Railway Co. v. Ayers*<sup>197</sup>—one of the weakest cert petitions imaginable—the Court agreed to review a trial court's decision to deny a motion for a new trial, in the absence of any written opinion by that court or by the state supreme court that declined to exercise its discretionary authority to review that denial. Yet in the absence of any lower court opinion or even a pretense of a circuit conflict, the Supreme Court granted plenary review.<sup>198</sup> Even more recently, in *Norfolk & Southern Railway Co. v. Sorrell*,<sup>199</sup> the Court held that the Missouri Supreme Court erred in allowing differing jury instructions regarding the standards of causation applicable to the defendant's negligence and the petitioner's negligence under the Federal Employees Liability Act. The issue was so incidental that even petitioner, conveniently after cert was granted, sought to completely switch the question presented to one it cared about, but could not base a petition on it

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193. 517 U.S. 559 (1996).

194. 127 S. Ct. 1057 (2006).

195. 491 U.S. 1 (1991).

196. Tony Mauro, *Damaging the Anti-Punitive Crusade*, LEGAL TIMES, Oct. 8, 1990, at 10 ("For one painful half-hour last week, Bruce Beckman proved that, alas, even the deep pockets of business could not purchase the best legal talent of the day to argue what could be the most important business case of the decade.").

197. 538 U.S. 135 (2003).

198. Only in the *Ayers* case did the Court rule against petitioner. Needless to say, I would like to believe that the identity of opposing counsel played at least some role in that outcome, given that I served as counsel of record for respondents, a fact that I need in all events disclose.

199. 127 S. Ct. 799 (2001).

**Table 7. Recent Norfolk Railway Cases Before the Supreme Court**

Term	Case Name	Petitioner Counsel (Number of Oral Arguments), Firm	Railroad Defendant Petitioner?
2006	<i>Norfolk &amp; Southern Railway Co. v. Sorrell</i> , 127 S. Ct. 799 (2007)	Carter Phillips (51), Sidley Austin	Yes
2003	<i>Norfolk &amp; Southern Railway Co. v. Kirby</i> , 543 U.S. 14 (2004)	Carter Phillips (42), Sidley Austin	Yes
2002	<i>Norfolk &amp; Western Railway Co. v. Ayers</i> , 538 U.S. 135 (2003)	Carter Phillips (35), Sidley Austin	Yes
1999	<i>Norfolk &amp; Southern Railway Co. v. Shanklin</i> , 529 U.S. 344 (2000)	Carter Phillips (30), Sidley Austin	Yes
1995	<i>Norfolk &amp; Western Railway Co. v. Hiles</i> , 516 U.S. 400 (1996)	Carter Phillips (21), Sidley Austin	Yes

because it rested on a legal argument diametrically opposed to what petitioner had argued in the lower courts.<sup>200</sup>

What is, of course, most significant about these cases is not their strict holdings, but that petitioners persuaded the Court to grant review in each case and then obtained a favorable result for the railroad industry almost every time. Notwithstanding the Court's ever-shrinking docket and correspondingly heightened standards for the Court to deem a case certworthy, expert Supreme Court counsel repeatedly succeeded in securing review for legal issues that, while no doubt important to his clients, would hardly seem to qualify as the most

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200. *Id.* at 803–04 (“In briefing and argument before this Court, Norfolk has attempted to expand the question presented to encompass what the standard of causation under FELA should be, not simply whether the standard should be the same for railroad negligence and employee contributory negligence.”).

pressing and important legal issues facing the nation. Yet, the petitions, invariably supported by a bevy of orchestrated amici, anticipated precisely how to convince the clerks and the Justices of the need for the Court's plenary review.

The antitrust, tort liability, and railway cases, moreover, represent just a few of the most obvious areas of law in which the private Supreme Court Bar has succeeded in persuading the Court to grant cert in a series of cases of unique interest to the business community. Other prominent examples include cases raising federal preemption<sup>201</sup> and dormant Commerce Clause challenges to state regulation of business.<sup>202</sup> Not only has business overcome the bias against business cases that triggered Ken Starr's lament in the mid 1990s, but the Bar may have even done more than achieve the parity that it was due: it has arguably achieved favorable treatment.

#### B. CHANGING THE OUTCOME

While the Bar's influence is likely greatest at the jurisdictional stage for the simple reason that the Court is then most susceptible to the expert advocate's powers of persuasion, what the Bar's clients care most about is winning on the merits before the Court. The Supreme Court advocate who succeeds in obtaining review has no doubt accomplished much simply by persuading the Court to grant review against high odds. But that is little consolation to the client who then subsequently loses on the merits, especially when the upshot may be to convert a narrow lower court loss into a sweeping Supreme Court defeat.

The reason why it is fair to assume that the Bar has greater influence at the jurisdictional stage than on the merits derives from the limited amount of time the clerks—and certainly the Justices—can devote to a case at the former stage. But, once the Court grants plenary review, the Justices and their clerks can and do commit substantial time to the case. This is especially true now that the number of cases on the Court's plenary docket is so much lower than it used to be. Each Justice and his or her respective chamber can naturally spend more time on each case when deciding only seventy cases per term. The individual chambers now possess the time necessary to read the briefs closely, scrutinize the competing authorities proffered by the opposing parties and their respective amici, and reflect at greater length on the potential implications of the Court's ruling one way or another.

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201. For examples of preemption challenges brought to Court by business petitioners, see *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 541 U.S. 246 (2004); *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001); *United States v. Locke*, 529 U.S. 89 (2000); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); and *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993).

202. For examples of dormant Commerce Clause challenges brought to the Court by business petitioners, see *DaimlerChrysler v. Cuno*, 126 S. Ct. 2961 (2006); *Hunt-Wesson, Inc. v. Franchise Tax Board of California*, 528 U.S. 458 (2000); *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999); *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93 (1995); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

Less relative influence on the merits, however, does not mean the amount of influence that the Bar possesses is small or otherwise unimportant. First, as suggested by the cases just discussed relating to antitrust law, tort liability, and the Norfolk railway, one striking measure of the Bar's success is that its members are serving in almost all of these cases as counsel for petitioner who, for that reason, has already succeeded by persuading the Court to grant review. For petitioner, these days, moreover, success tends not to end once cert is granted. While the Court plainly grants review not just to reverse, and often affirms a lower court judgment, the Court reverses far more often than they affirm. The Court clearly is moved somewhat by the merits at the jurisdictional stage. As a result, the successful petitioner will not always win, but the successful petition will more likely than not result in a win. In only three Terms since 1946 has the Court affirmed more than it reversed in orally argued cases: 1951 (36.4% reversed); 1953 (47.7% reversed); and 1993 (44.4% reversed).<sup>203</sup> During all the other 52 Terms, the Court has reversed more than half the cases, typically approximately 65% of the time,<sup>204</sup> but in some Terms the percentage has been much higher: 1962 (74.8%), 1963 (76.1%), 1964 (72%), 1965 (72.2%), 1983 (72.6%), and 2001 (70.8%).<sup>205</sup> By persuading the Court to grant review, therefore, the expert advocate serving as counsel for the petitioner has already gone a long way towards winning on the merits.

The experienced Supreme Court advocate, however, is likely to be even more successful than the norm whether serving as counsel for petitioner, counsel for respondent, or counsel for amicus in support of either. The same skills that make the Supreme Court expert more successful at the jurisdictional stage continue to operate in the expert's favor on the merits, even if dampened by the Court's ability to spend more time on the case. The expert knows how to better pitch a case and, very often, how to pitch a case differently than it has been pitched before. Supreme Court advocacy more often than not requires that counsel completely rethink a case from the way that it was litigated and argued below. And, that is true whether representing petitioner or respondent.

Respondents are frequently well advised to abandon the way they argued in the lower courts or the rationale of the judgment of the lower court in their favor. What will fly in the lower courts may well be a total nonstarter in the Supreme Court, and this may even be why the Court granted review. The best Supreme Court advocates understand this. They do not simply repeat successful lower court arguments in the Supreme Court and are always ready to rethink and reformulate their legal position as necessary to maximize the odds of winning before the Court. What constitutes weighty precedent and legal argument in the lower courts is regularly completely different than what constitutes

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203. EPSTEIN ET AL., *supra* note 27, at 244.

204. Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187, 192 tbl.1, 193-94 (1995).

205. EPSTEIN ET AL., *supra* note 27, at 244-45.

the same before the Supreme Court.

Supreme Court cases typically lend themselves to being pitched in multiple ways. The challenge the expert advocate faces is, first, to conceptualize those several possibilities and, second, to determine which framework is the one that maximizes the chances of securing the minimum of five votes necessary for a favorable outcome.<sup>206</sup> Doing so may require the development of entirely new legal arguments. It may require conceding away certain points and arguments, even ones successful below, or at least de-emphasizing them from obvious viewing. If viewed as an “environmental protection case,” the five votes may not be obtainable. But, if viewed as a “plain meaning” case or an opportunity to bolster the view that legislative history should not trump statutory language, a case can quickly become a winner rather than a loser.<sup>207</sup>

Sometimes, however, the mark of distinction for a Supreme Court advocate is being able to recognize that a case is going to be lost before the High Court: a favorable lower court judgment is going to be reversed or an unfavorable one affirmed. The corresponding challenge is far more subtle and instrumental than simply going full steam ahead, thereby demonstrating to the client one’s sincere zeal for the client’s position. Not all losses are the same. The expert’s task in such circumstances, which is not all infrequent, is candidly to explain the situation to the client, and to develop a legal strategy for optimizing the possibility of what is often dubbed a “soft landing.”<sup>208</sup> In some circumstances, this may even prompt counsel to recommend that the case be quickly settled, with a dismissal of the petition, in order to avoid the possibility of Supreme Court precedent damaging to business interests.<sup>209</sup>

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206. Cf. John W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 895–96 (1940) (noting that “in the argument of an appeal the advocate is angling, consciously and deliberately angling, for the judicial mind. Whatever tends to attract judicial favor to the advocate’s claim is useful. Whatever repels it is useless or worse” and advising that “to adapt yourself to [a judge’s] methods of reasoning is not artful, it is simply elementary psychology.”). See generally FREDERICK BERNAYS WIENER, *BRIEFING AND ARGUING FEDERAL APPEALS* 37–128 (1967) (discussing the “essentials of an effective brief”).

207. For an example of such a reframing strategy, see Richard J. Lazarus & Claudia M. Newman, *City of Chicago v. Environmental Defense Fund: Searching for Plain Meaning in Unambiguous Ambiguity*, 4 N.Y.U. ENVTL. L.J. 1 (1995).

208. A soft landing refers to a ruling by the Court that will minimize the harm either on remand in the particular case at issue, or in subsequent cases of concern to the client. For many clients, especially respondents before the Supreme Court, a successful soft landing can amount to more than mere mitigation of harm and successful dodging of a bullet. It can, as a practical matter, amount to a longer-term win. See, e.g., Richard J. Lazarus, *Litigating Suitum v. Tahoe Regional Planning Agency in the United States Supreme Court*, 12 J. LAND USE & ENVTL. L. 179, 200–02 (1997) (discussing a takings case in which the respondent agency preferred the reversal of a favorable judgment on narrow, case-specific grounds that would not harm the agency in other takings cases rather than a broad ruling that the availability of transferable development rights was not relevant to the question of whether a land use restriction constitutes an unconstitutional taking).

209. An example of a recent settlement immediately after oral argument that led to the petition’s dismissal is *Klein & Co. Futures, Inc. v. Board of Trade*, 127 S. Ct. 2431 (2007). A recent example of a settlement immediately after the Court granted cert that similarly led to the petition’s dismissal is *Huber v. Wal-Mart Stores, Inc.*, 128 S. Ct. 1116 (2008). Finally, a recent example of a case that was settled after the merits briefs were filed, but just a week before the oral argument had been scheduled, is *BCI*

Interviews with Supreme Court law clerks further evidence the degree of influence that the expert advocates can have on the merits. Eighty-eight percent of former Supreme Court law clerks interviewed in one study acknowledged that they read more carefully and gave more initial weight to merits amicus briefs filed by attorneys that the law clerks considered experts in Supreme Court advocacy.<sup>210</sup> While a prominent attorney or academic can garner such an advantage, most of the clerks “specified that only established members of the Supreme Court Bar—the inner circle . . . —would always receive closer consideration.”<sup>211</sup> The true “insiders have earned the mark of credibility.”<sup>212</sup>

Not surprisingly, Supreme Court advocates often boast that their arguments made the difference. Daniel Webster reportedly claimed that the Court’s decision in *Gibbons v. Ogden*,<sup>213</sup> was “little else than a recital of my argument,” and that Chief Justice Marshall, the author of *Gibbons*, had “take[n] in” Webster’s argument “as a baby takes in its mother’s milk.”<sup>214</sup> Boasting aside, the parallels between the arguments of the advocates and the language of the Court’s opinion are often so striking as to leave little doubt about the impact of the former on the latter. The arguments of William Pinkney, for instance, in both *M’Culloch v. Maryland*<sup>215</sup> and in *Cohens v. Virginia*,<sup>216</sup> “bear striking resemblance to the positions taken by Marshall for his opinion for the Court in those cases.”<sup>217</sup>

There are plenty of more contemporary examples of the Court relying heavily on novel legal arguments raised by Supreme Court counsel, sometimes even on a verbatim basis.<sup>218</sup> One well-documented example is the brief filed by the

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*Coca-Cola Bottling Co. of Los Angeles v. Equal Employment Opportunity Commission*, 127 S. Ct. 1931 (2007), although the business motivation for elimination of that case might well have extended to the potential for adverse publicity associated with the employer’s legal arguments, rather than a strict assessment of the likelihood of prevailing on the merits. The case concerned the extent to which an employer is responsible for the allegedly racially discriminatory conduct of one of its agents directed at one of its employees. See Brief for Respondent, at i (Question Presented: “Whether, and in what circumstances, an employer can be liable for racial discrimination in violation of Title VII of the Civil Rights Act of 1964 . . . based on the alleged bias of a supervisor, where the supervisor did not take the adverse employment action himself but is alleged to have caused that action.”).

210. Lynch, *supra* note 48, at 56.

211. *Id.* at 54–55.

212. McGUIRE, *supra* note 22, at 189.

213. 22 U.S. (9 Wheat.) 1 (1824).

214. White, *supra* note 15, at 247 n.215, 287 & n.405 (quoting Daniel Webster to Peter Harvey, in P. HARVEY, REMINISCENCES AND ANECDOTES OF WEBSTER 142 (1877)) (internal quotations omitted). A close analysis of the Court’s opinion and the arguments of counsel in that case suggest, however, that although the Court embraced argument of counsel, it was the legal argument of Webster’s rival advocate, William Wirt, and not Webster, that Marshall’s opinion for the Court adopted. See *id.* at 286–87.

215. 17 U.S. (4 Wheat.) 316 (1819).

216. 19 U.S. (6 Wheat.) 264 (1821).

217. White, *supra* note 15, at 247, 248–50 (reproducing three sets of parallel columns displaying similarities between Pinkney’s arguments and Marshall’s opinions for the Court in *M’Culloch* and *Cohens*).

218. In response to an email I sent to leaders of the Supreme Court Bar who regularly file briefs and present oral argument before the Court, I received numerous descriptions of instances in which the

petitioner AFL-CIO and the United Steelworkers in *United Steelworkers v. Weber*.<sup>219</sup> At issue in *Weber* was whether Title VII of the Civil Rights Act of 1964 barred a private employer from adopting a racial quota to remedy societal discrimination.<sup>220</sup> Counsel of record for petitioner was a veteran Supreme Court advocate, Michael Gottesman,<sup>221</sup> who devised an original legal argument, based on a theme of voluntarism,<sup>222</sup> in an effort to obtain the vote of Justice Potter Stewart and also possibly allow Justice Lewis Powell to distinguish *Weber* from his recent opinion for the Court in *University of California v. Bakke*.<sup>223</sup> Not only did the Court's opinion by Justice William Brennan embrace that precise argument, but the since-revealed personal papers of the Justices establish that the advocacy did in fact make the difference. It was the voluntarism argument that led to a 5-2 rather than a 4-3 vote (there were only seven Justices participating), enhancing the precedential value of the ruling.<sup>224</sup>

A second example is supplied by the Solicitor General's amicus brief in *Commonwealth Edison Co. v. Montana*.<sup>225</sup> In *Commonwealth Edison*, the Supreme Court affirmed by a 6-3 vote the constitutionality of a state coal severance tax of 30% of the value of the coal extracted, which coal companies claimed amounted to an undue burden on interstate commerce in violation of the dormant Commerce Clause and was also preempted by various federal mineral leasing and environmental protection statutes.<sup>226</sup> The Solicitor General advised the Court that both constitutional claims lacked merit and the Court not only agreed, but adopted the Solicitor General's brief essentially verbatim.<sup>227</sup>

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arguments of the advocates (sometimes their own but also often those of other attorneys, including their opponents) had wholly transformed the litigation and thereby influenced the outcome of the case. The three examples described in the text above are just a few of many described in those e-mails.

219. Brief for Petitioner, *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (Nos. 78-432, 78-435, and 78-436).

220. See *Weber*, 443 U.S. at 197.

221. Michael Gottesman is widely considered one of the nation's preeminent Supreme Court labor lawyers. See MCGUIRE, *supra* note 22, at 32-33; Lynch, *supra* note 48, at 55.

222. See Brief for Petitioner, *supra* note 219.

223. 438 U.S. 265 (1978) (holding that using racial quotas to achieve diversity violates the Equal Protection Clause of the Fourteenth Amendment).

224. See JUDITH STEIN, *RUNNING STEEL, RUNNING AMERICA: RACE, ECONOMIC POLICY, AND THE DECLINE OF LIBERALISM* 189 (1998) ("Michael Gottesman, the union's specialist on Title VII matters, . . . thought that an argument rooted in voluntarism would win the vote of Potter Stewart . . . The notes of the justices reveal that it was this argument that won over Stewart . . . The oral argument demonstrated how critical the distinction was."). See generally Deborah Malamud, *United Steelworkers of America v. Brian Weber*, in *EMPLOYMENT DISCRIMINATION STORIES* 173, 173-224 (Joel Wm. Friedman ed., 2006).

225. Brief for the United States as Amicus Curiae, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (No. 80-581).

226. See *Commonwealth Edison*, 438 U.S. at 636-37.

227. The Court's entire opinion is replete with lengthy verbatim repetitions of the government's amicus brief, absent any acknowledgment. The major difference was limited to changing the Solicitor General's references from "This Court" to "We." To the extent that this example is based on a brief filed by the Solicitor General and not the private Bar, it does not directly demonstrate the ability of effective advocacy by the private Bar to persuade the Court. That gap is filled, however, by the fact that the attorneys in the Solicitor General's Office drafting these briefs are the same attorneys now in the private

Finally, no doubt the most well-known recent example of a filing by an expert Supreme Court advocate apparently influencing the outcome of a case occurred in *Grutter v. Bollinger*,<sup>228</sup> which raised an equal protection challenge to the University of Michigan Law School's affirmative action program. The amicus brief filed by Sidley Austin<sup>229</sup> on behalf of retired military generals and in support of the University's program has been described as possibly "the most influential amicus brief in the history of the Supreme Court."<sup>230</sup> During the oral argument, there were at least nineteen questions posed by the Justices in reference to the amicus brief.<sup>231</sup> The most telling moment was when Justice Stevens pointedly asked the Solicitor General what he thought of the "Carter Phillips brief,"<sup>232</sup> thus referring to the brief by the name of the head of Sidley's Supreme Court practice rather than by the name of the amici on whose behalf the brief was filed, as is customary. Justice O'Connor's majority opinion for the Court directly cited to the amicus brief no fewer than five times, directly quoting at length from the language of the brief on multiple occasions.<sup>233</sup> In short, like the legal arguments advanced by both Michael Gottesman in *Weber* and the Solicitor General in *Commonwealth Edison*, Sidley's amicus brief in *Grutter* was perfectly pitched to its judicial audience.

Statistical analysis of Supreme Court rulings in cases involving expert Supreme Court advocates further supports the view that such advocacy can have a profound impact on the outcome. According to several statistical examinations of the impact of experienced counsel on the outcome of Supreme Court litigation,<sup>234</sup> whether counsel in a Supreme Court case is an experienced Supreme Court advocate is a significant determinant in the outcome of the case, even holding everything else equal, including: whether counsel is representing petitioner or respondent, the number of amicus briefs filed in support of the parties, the participation of the Solicitor General, and the ideological direction of the lower court ruling under review.<sup>235</sup> Because, moreover, the expert

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sector filing amicus briefs on behalf of private clients. The primary differences are that they are now more experienced and able to spend more time on their cases than when in the government.

228. 539 U.S. 306 (2003).

229. Consolidated Brief of Lt. Gen. Julius W. Becton et al. as Amici Curiae in Support of Respondents, *Grutter*, 539 U.S. 306 (No. 02-241) (the brief was written by Carter Phillips).

230. Jeffrey Toobin, *Gerald Ford's Affirmative Action*, N.Y. TIMES, Dec. 30, 2006, at A19.

231. See Transcript of Oral Argument at 7, *Grutter*, 539 U.S. 306 (No. 02-241) ("May I call your attention in that regard to the brief that was filed on behalf of some retired military officers . . .?") (Ginsburg, J.); *id.* at 7-12, 19-21 (questions posed by Stevens, O'Connor, Kennedy, & Souter, JJ.).

232. *Id.* at 19. It should be noted that while Carter Phillips was listed as one of the counsel for that brief, counsel of record was in fact another Sidley Austin attorney, Virginia Seitz, a long time collaborator with Phillips in written Supreme Court advocacy and a similarly highly regarded advocate.

233. See *Grutter*, 539 U.S. at 331.

234. See generally MCGUIRE, *supra* note 22; Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505 (1998) [hereinafter, McGuire, *Explaining Executive Success*]; McGuire, *supra* note 204.

235. McGuire, *supra* note 204, at 188 (statistical study concluding that holding all things equal, "lawyers who litigate in the high court more frequently than their opponents prevail substantially more

advocates are often able to influence several of these factors, especially the number of supporting amicus briefs filed, such independent variable analysis is likely to understate the expert's impact on outcome.

The statistical studies that do exist, moreover, predate the most significant rise in Supreme Court advocacy expertise. A study of advocates from October Term 1977 through October Term 1982 found that, excluding the Solicitor General's Office, petitioner's success rate went from 65.1% for all petitioner's counsel to 75.3% for petitioners represented by more experienced Supreme Court counsel.<sup>236</sup> Indeed, a subsequent analysis concluded that the impact of more experienced counsel on litigation outcome in the Supreme Court was so great as to overwhelm any distinct impact that might be caused by the involvement of the Solicitor General's Office on one side or the other. In other words, the Solicitor General's Office's ability to prevail more than other advocates was exclusively derived from having more experienced counsel and disappeared altogether when no such experience advantage was present.<sup>237</sup>

For this additional reason, the emergence of a private Supreme Court Bar capable of matching and sometimes even bettering the Solicitor General in

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often"); see also McGUIRE, *supra* note 22, at 191–92 & tbl.8.3 (showing that the experience of Supreme Court advocates is strongly correlated with the outcomes of cases); McGuire, *Explaining Executive Success*, *supra* note 234 (same).

236. See McGuire, *supra* note 204, at 192–93 & tbl.8.3. Professor McGuire measured experience by counting the number of cases in which individual attorneys participated between October Term 1977 and October Term 1982. Those who participated in more cases were, for that reason, deemed more "experienced." One limitation in his analysis is that the "experienced" label was determined based on the entire six year period and, accordingly, did not vary within the six-year period. So an individual attorney's "experience" score was determined based on the six years, but then in effect retroactively applied in assessing the impact on wins and losses during the period. An attorney's score did not change during the relevant time period even though plainly the amount of experience did, in varying ways for different attorneys. In addition, when there were multiple attorneys involved in a specific case, whichever side had the most experienced individual attorney was deemed the more experienced side. *Id.* at 191–92, 236 n.7. Each of these measures plainly adds an unfortunate level of imprecision to the analysis and McGuire's conclusion. In a later publication covering the same years, McGuire's findings were roughly the same, but slightly smaller in magnitude. He concluded that while petitioner's counsel generally won 66% of the time, that winning percentage rose to 73% when petitioner's counsel was more experienced. McGuire, *supra* note 204, at 193–94.

237. McGuire asks:

What happens to the predictive power of the Solicitor General, though, once overall litigation experience is introduced into the equation? It turns out that the apparent independent influence of the executive branch is illusory. In model 2, experience emerges as a highly significant predictor of litigation success, and the role of the federal government, formerly so strong in model 1, is not simply diminished; rather, it disappears completely.

McGuire, *Explaining Executive Success*, *supra* note 234, at 515. My own intuition based on involvement in literally hundreds of cases before the Court is that McGuire's analysis significantly overstates the extent to which litigation experience eliminates the distinct impact that the Solicitor General's Office has on the Court's decision. Supreme Court advocacy expertise plays a significant role in why the Solicitor General so often persuades the Court, but it is not the only reason. The Court cares deeply about the views of the Solicitor General not just because of advocacy expertise but also because of substantive expertise related to the impact of possible rulings on the national government and the general public.

Supreme Court advocacy experience is particularly significant because it is reducing the Solicitor General's disproportionate influence on substantive outcome. For instance, in October Term 1980, the Court decided 123 cases following oral argument, with the Solicitor General participating either as counsel for a party or as an amicus in 61 of those cases. In only seven of those sixty-one cases was there another attorney presenting oral argument who had argued at least five cases before the Court. And in only three of the sixty-one cases was there another attorney who had argued at least ten cases.<sup>238</sup> The Solicitor General possessed a virtual monopoly on advocacy expertise in almost all of the cases in which his Office was appearing.

By contrast, in October Term 2006, the Solicitor General's monopoly had disappeared, even though the Solicitor General now participates in a much higher percentage of the Court's docket than it did in October Term 1980. In the latter Term, the Solicitor General participated in 61 out of 123 cases, or just shy of half of all the argued cases. In October Term 2006, however, the Solicitor General participated in fifty-four out of seventy-one cases, or seventy-six percent of the cases. But now in twenty-five of those cases, the Solicitor General was not the only counsel with significant Supreme Court cases. In twenty-five, or almost half of the cases, another attorney presenting oral argument in the case had argued at least on five prior occasions and, even more remarkably, in twenty-three of the cases, a competing attorney had argued at least ten prior times before the Court.<sup>239</sup> So, while the absolute number of cases

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238. The cases in which another attorney presented oral argument who had previously argued at least five and fewer than ten prior times were *CBS, Inc. v. FCC*, 453 U.S. 367 (1981) (Floyd Abrams); *Haig v. Agee*, 453 U.S. 280 (1981) (Melvin Wulf); *University of Texas v. Camenisch*, 451 U.S. 390 (1981) (Stephen Pollak); and *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77 (1981) (Philip Lacovara). The cases in which a competing advocate had argued at least ten prior times were *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490 (1981) (Robert Bork); *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U.S. 378 (1981) (Erwin Griswold); and *Maryland v. Louisiana*, 451 U.S. 725 (1981) (Eugene Gressman).

239. The two cases in which a competing advocate had argued at least five previous times but fewer than ten were *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) (Michael Kelllogg) and *Burton v. Stewart*, 127 S. Ct. 793 (2007) (Jeffrey Fisher). The twenty-four cases in which a competing advocate had argued at least ten previous times were *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (Ted Olson and Barbara Underwood); *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) (Seth Waxman); *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (Kenneth Starr); *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007) (Laurence Tribe); *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553 (2007) (Andrew Pincus); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007) (Carter Phillips); *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*, 127 S. Ct. 2489 (2007) (Maureen Mahoney); *Powerex Corp. v. Reliant Energy Services, Inc.*, 127 S. Ct. 2411 (2007) (David Frederick); *Credit Suisse Securities (USA) v. Billing*, 127 S. Ct. 2383 (2007) (Steve Shapiro); *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007) (H. Bartow Farr); *Watson v. Philip Morris Cos.*, 127 S. Ct. 2301 (2007) (Ted Olson and David Frederick); *Safeco Ins. Co. of America v. Burr*, 127 S. Ct. 2201 (2007) (Maureen Mahoney); *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007) (Glen Nager); *Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746 (2007) (Ted Olson and Seth Waxman); *KSR Intern. Co. v. Teleflex Inc.*, 127 S. Ct. 1727 (2007) (Thomas Goldstein); *Watters v. Wachovia Bank*, 127 S. Ct. 1559 (2007) (Robert Long); *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 127 S. Ct. 1513 (2007) (Roy Englert); *Environmental Defense*

being heard in oral argument decreased from 123 in October Term 1980 to 71 in October Term 2006, the absolute number of cases in which the Solicitor General was involved and another oral advocate could boast at least 10 prior arguments increased from 3 to 23. Indeed, in five of those 23 cases, there were two members of the private Supreme Court Bar with at least five prior arguments presenting argument in addition to the Solicitor General's Office.<sup>240</sup>

To be sure, in some of those cases the experienced private Bar member and the Solicitor General's Office were aligned on the same side. But that does not detract from the substantive significance of the rise in the private Bar's comparative expertise. First, the alignment of the Solicitor General's Office with the private Bar expert may well be yet another result of the latter's expertise. Just as the private Supreme Court Bar is expert at influencing the Court, it is skilled in influencing the Solicitor General's Office, and often succeeds in persuading that Office to file a brief in support of its position. Particularly because many were once in that Office, these experts know both the importance of Solicitor General support and how to work through client agencies and other executive branch channels to maximize the possibility of securing it. Second, even when parties are aligned in favor of affirming or reversing a judgment, there may also be considerable distance between the legal theories being advanced by the Solicitor General and the private Bar.<sup>241</sup> It is, accordingly, important to the Bar's clients to ensure that the Court is fully apprised of that difference and the reasons why the business community believes that its legal theories are stronger than those being promoted by the federal government.

An examination of some of the results in a few of the areas in which the rising Supreme Court Bar has secured Supreme Court review provides further evidence of the extent to which they are not just shifting the Court's agenda but also changing the law, with a distinct tilt in favor of the interests of business. In the 1980s, business interests were frustrated by the poor quality of the advocacy representing their positions in too many cases, and openly "wondering whether

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*v. Duke Energy Corp.*, 127 S. Ct. 1423 (2007) (Carter Phillips); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 127 S. Ct. 1069 (2007) (Andrew Pincus); *Rockwell International Corp. v. United States*, 127 S. Ct. 1397 (2007) (Maureen Mahoney); *Norfolk & Southern Railway Co. v. Sorrell*, 127 S. Ct. 799 (2007) (Carter Phillips); *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764 (2007) (Maureen Mahoney); *BP America Production Co. v. Burton*, 127 S. Ct. 638 (2006) (Jeffrey Lamken); and *Lopez v. Gonzalez*, 127 S. Ct. 625 (2006) (Robert Long).

240. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (Ted Olson and Barbara Underwood); *FEC v. Wis. Right to Life*, 127 S. Ct. 2652 (2007) (Seth Waxman and James Bopp); *Watson v. Philip Morris Cos.*, 127 S. Ct. 2301 (2007) (Ted Olson and David Frederick); *Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746 (2007) (Ted Olson and Seth Waxman); *Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.*, 127 S. Ct. 1513 (2007) (Roy Englert and Jeffrey Fisher).

241. Typically, the federal government's legal theory is more nuanced and less far-reaching than that advocated by regulated business. See, e.g., Reply Brief for Petitioners at 8–9, *Credit Suisse Securities (USA) v. Billing*, 127 S. Ct. 2383 (2007) (No. 05-1157) ("The United States, in a brief signed by the SEC, Antitrust Division, and FTC, agrees with much of our legal analysis . . . The Solicitor General nonetheless proposes a different test . . . That novel test misperceives this Court's precedents and fails to protect the regulatory scheme—the very purpose of implied immunity.").

the time ha[d]n't come for the corporate-conservative legal community to band together to increase the quality of their arguments before the Court."<sup>242</sup> Twenty years later, business had clearly met that objective.

Antitrust law is a clear example. As previously described, expert Supreme Court counsel has persuaded the Court to grant review in eleven antitrust cases in recent years, all on behalf of antitrust defendants. The success did not end, however, at the grant of review. It has extended to a series of rulings on the merits favorable to such defendants.

In the last ten cases, the Court has reversed lower court rulings in favor of antitrust plaintiffs. These victories have not been merely the occasion for the High Court to rein in an errant lower court decision. The Court has even overruled its own precedent, which had been properly applied by the lower courts.<sup>243</sup> To persuade the Supreme Court to overrule its own precedent is never easy, especially when the legal issues are ultimately a matter of statutory construction and not federal constitutional law.

The private Supreme Court Bar has not enjoyed similarly unqualified success in its effort to persuade the Court to impose constitutional limits on state tort damage awards, but the victories that business interests have obtained in the High Court are significant nonetheless. First, the Bar clearly succeeded in persuading the Court that supervision of the lower courts' administration of tort damages is warranted. That, alone, is no small feat. It requires careful case selection, incremental and strategic arguments, and effective use of amicus filings. Significantly, business defendants have been on the petitioner's side in every one of these cases. The tort plaintiff has not once obtained Supreme Court review. And, while the private Bar representing business tort defendants has not won all of their cases on the merits, they have achieved—and are likely to continue to achieve now that they have attracted a conservative Court's interest—significant law reform. While plainly not as socially transformative as what the NAACP achieved in the litigation leading up to *Brown v. Board of Education*, the basic blueprint is not dissimilar and certainly patterned after the kind of strategic, step-by-step litigation before the Court for which the Solicitor General is best known. And, in the last three cases, *Honda Motor Co. v. Oberg*,<sup>244</sup> *BMW of North America, Inc. v. Gore*,<sup>245</sup> and *Philip Morris USA v. Williams*,<sup>246</sup> just

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242. Tony Mauro, *Corporate Lawyer "Quayles" Before Court*, LEGAL TIMES, Oct. 24, 1988, at 8.

243. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2710 (2007), *overruling* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 42 (2006), *abrogating* *Int'l Salt Co. v. United States*, 332 U.S. 392 (1947).

244. 512 U.S. 415 (1994) (reaffirming that the Constitution limits the size of punitive damage awards and holding that a state constitutional amendment limiting judicial review of punitive damage awards to situations where there was no supporting evidence violated the Due Process Clause of the Fourteenth Amendment).

245. 517 U.S. 559 (1996) (holding, under a reasonableness inquiry, that a punitive damage award equal to 500 times the amount of actual harm was constitutionally impermissible).

246. 127 S. Ct. 1057, 1060 (2007) ("We are asked whether the Constitution's Due Process Clause permits a jury to base that award in part upon its desire to punish the defendant for harming persons

this past Term, they finally succeeded in securing favorable judicial precedent limiting business liability for punitive damage awards.

Finally, there is particular reason to believe that the Justices might be especially susceptible to good advocacy in the area of business law. With some exceptions, the business cases on the Court's docket do not tend to be the most high profile cases of the Term to which the Justices and their law clerks naturally devote the most time. Cases involving complex and technical areas of law, such as antitrust, environmental, patent, or employee benefits law, are also more likely to be areas where the Justices and their law clerks lack meaningful expertise and therefore are more dependent on the advocates for an understanding of both the competing legal arguments and the practical ramifications of alternative rulings of law. The Justices are not similarly dependent when ruling on a high-profile abortion rights or affirmative action case, so the impact of the relative skills of the advocates on the judicial outcome is likely fairly small.

To the extent, moreover, that some statistical analysis has been performed on the potential difference that advocacy may play in different kinds of Supreme Court cases, the results support the basic intuition that advocacy matters in what political scientists deem the "nonsalient" cases, but that it does not matter in "salient" cases.<sup>247</sup> The former label refers to the lower-profile cases in which the Justices are less likely to take the time or have the background necessary to learn all the relevant information on their own. The "salient" cases are, by contrast, those in which the Justices do commit that time and otherwise are more likely to have strongly held views on the legal issues raised. One recent statistical analysis concluded that advocacy expertise has no effect in the salient cases, but has a significant impact in the nonsalient cases: "In nonsalient cases, . . . veteran lawyers of Supreme Court advocacy provide an advantage, regardless of whether they represent the petitioner or the respondent and regardless of whether they are arguing for a liberal or conservative outcome."<sup>248</sup> Business cases are generally considered nonsalient cases, as measured by political scientists.<sup>249</sup>

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who are not before the court (e.g., victims whom the parties do not represent). We hold that such an award would amount to a taking of "property" from the defendant without due process.").

247. See Andrea McAtee & Kevin T. McGuire, *Convincing the Court: Two Studies of Advocacy: Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?*, 41 LAW & SOC'Y REV. 259 (2007); see also Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66 (2000).

248. McAtee & McGuire, *supra* note 247, at 273. There are several aspects of this quantitative analysis, however, that are more than a bit squishy. First, the authors use the scores that Justice Blackmun assigned to advocates in his notes on oral argument in deciding which advocates were superior. *Id.* at 263. I am not so confident that Blackmun's measure is especially accurate, and it may ultimately reveal more about Blackmun than provide a meaningfully objective assessment of the quality of the advocacy in the case. But no doubt I am not objective myself here because Blackmun applied such a measure to my own arguments before the Court on several occasions. Nor am I particularly comfortable with the objectivity of the measure underlying the determination whether a specific case is "salient."

249. See Epstein & Segal, *supra* note 247, at 74 tbl.3 (indicating that issues involving economics are substantially less salient than issues involving civil liberties).

## C. CHANGING THE COURT

The re-emergence of a Supreme Court Bar also could change the Court itself, which has the potential for an even longer-term effect on the Court's docket and rulings. President Bush picked the new Chief Justice, John Roberts, partly because of his potential to apply within the Court the same superior advocacy skills that he had demonstrated before the Court.<sup>250</sup> And, advocacy within the Court is no less important than advocacy before the court. It matters in the initial deliberations and voting at Conference at both the jurisdictional stage and on the merits. It also matters during the drafting and circulation of opinions on the merits, as Justices seek the votes of the majority necessary to transform an opinion of one individual Justice into an opinion of the Court and, therefore, binding law.

The selection of a Justice based on his or her reputation as an outstanding advocate before the Court is certainly not without historical precedent. Justices who were highly acclaimed advocates before joining the Court include Louis Brandeis,<sup>251</sup> Robert Jackson,<sup>252</sup> and Thurgood Marshall.<sup>253</sup> Before joining the Court, Brandeis was widely considered one of the best lawyers in the nation, so much so that even a century later the name "Brandeis brief" retains distinct meaning as a particularly effective method of advocacy before the Court.<sup>254</sup> Justice Marshall's advocacy before the Court in the strategic effort to persuade the federal judiciary of the unlawfulness of racial segregation in education, employment, housing, public accommodations, and transportation is legendary in terms of its impact on the nation's history.<sup>255</sup>

Nor is there any serious dispute that such advocacy skills have often distinguished the truly great Justice or Chief Justice from a less successful one. Widely considered the greatest Chief Justice, John Marshall was well known for his ability to persuade others. He had been an accomplished lawyer before joining the Court,<sup>256</sup> but it was as Chief Justice that his advocacy skills flourished as a natural byproduct of his "abundant charm, sociability, kindness,

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250. See *infra* text accompanying notes 273–276.

251. See Melvin I. Urofsky, *Louis D. Brandeis: Advocate Before and on the Bench*, 30 J. SUP. CT. HIST. 31 (2005).

252. See E. Barrett Prettyman, Jr., *Robert H. Jackson: "Solicitor General for Life,"* 1992 S. CT. HIST. SOC'Y Y.B. 75.

253. See Mark Tushnet, *Lawyer Thurgood Marshall*, 44 STAN. L. REV. 1277 (1992). Justice Arthur Goldberg was also a highly regarded Supreme Court advocate before joining the Court, although plainly not someone who achieved Justice Marshall's historic stature. See Abner Mikva, *Arthur J. Goldberg, The Practitioner*, 1990 S. CT. HIST. SOC'Y Y.B. 1 (describing Arthur Goldberg as the best advocate in the Steel Seizure case and the consensus choice of the Supreme Court law clerks that Term as the best they saw in any case).

254. Urofsky, *supra* note 251, at 32–36.

255. TUSHNET, *supra* note 69.

256. Although not considered a great orator, Marshall was an acclaimed advocate known for his persuasive reasoning and brilliance. See LEONARD BAKER, *JOHN MARSHALL: A LIFE IN LAW* 86–87, 353 (1981).

and unaffected modesty.”<sup>257</sup> Chief Justice “Marshall’s skill in establishing convivial personal relations among his fellow justices helped him to cement the Court’s authority at a vulnerable moment in its early history.”<sup>258</sup> Marshall had a “unique talent for getting along with those who disagreed with him and for leading by gentle persuasion.”<sup>259</sup> It was this special skill as an advocate that allowed Marshall “to steer the Court toward a middle ground and to speak for a unanimous Court on the most divisive issues of his age.”<sup>260</sup>

In contrast, Chief Justice Fred Vinson fell short precisely where Marshall excelled. While President Harry Truman nominated Vinson because he thought Vinson possessed the personal advocacy skills required to bring together what was then a sharply and often bitterly divided Court,<sup>261</sup> no such skills were evident in his actual performance. He proved to be an “unsubtle advocate rather than a skilled mediator” and exacerbated rather than diminished the divisions within the Court.<sup>262</sup> In fact, Vinson reportedly threatened to punch Justice Felix Frankfurter in the nose after one particular altercation.<sup>263</sup> And, underscoring the extraordinary degree of then-existing rancor, Justice Frankfurter reportedly declared upon first hearing of Chief Justice Vinson’s death, “This is the first indication I have ever had that there is a God.”<sup>264</sup>

Two liberal icons, Justices William Brennan and William O. Douglas, provide another example in contrast. Brennan had a well-known reputation for being able to forge unlikely coalitions as necessary to create a majority opinion more in line with his view of the correct outcome in a case before the Court.<sup>265</sup> If compromise was necessary, Brennan would do just that. A personally charming, modest, and kind person, Brennan was an extremely effective advocate within the Court, shaping some of the Court’s most significant rulings.<sup>266</sup> Justice

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257. Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice*, 154 U. PA. L. REV. 1421, 1424 (2006).

258. JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 12 (2007).

259. *Id.* at 32.

260. *Id.* at 12. As described earlier, Chief Justice Marshall’s advocacy sometimes blurred the distinction between advocacy within the Court and before the Court as he worked to channel cases of interest to him, even including cases in which that interest otherwise precluded his formal participation in the decisionmaking process. See *supra* note 145.

261. *Id.* at 9.

262. *Id.*

263. *Id.*

264. *Id.*

265. See Thurgood Marshall, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 1, 5 (1990); Abner J. Mikva, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 9, 10 (1990); Richard A. Posner, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 13, 14 (1990); Nina Totenberg, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 33, 37–38 (1990).

266. At the close of each Term, Justice Brennan would have his clerks write up case histories of several of the more significant decisions of the Term. These histories sought to describe from Brennan’s perspective the decisionmaking process within the Court, including Brennan’s own efforts to influence the result. See Jim Newton, *Brennan on Burger*, SLATE, Jan. 9, 2007, <http://www.slate.com/id/2156940/entry/2157320/>. These histories include the description by Brennan’s chambers of how he worked to move from a Court that in 1972 had only one Justice opposed to the death penalty to a Court where a

Douglas was decidedly not such an effective advocate and, as a result, underperformed on the Court in terms of influencing the law. His opinions were cryptic, poorly written, made little effort to engage in the kinds of conventional legal arguments likely to influence others on the bench, and “ultimately harmed the cause of liberalism rather than help[ed] it.”<sup>267</sup>

In choosing John Roberts as Chief Justice, President Bush made a calculated effort to add a Chief to the Court who would be an effective advocate within the Court.<sup>268</sup> In announcing Chief Justice Roberts’s nomination, the President stressed just that skill and desire for the new Chief.<sup>269</sup> It is well known that conservatives in the White House were determined not to repeat the mistake of the President’s father in picking David Souter, who quickly frustrated the desire of conservatives for another reliable conservative vote on the Court.<sup>270</sup> But no less important, though far less prominent, was the desire of the President not to repeat the mistake of President Ronald Reagan, who believed, incorrectly, that Justice Antonin Scalia possessed the skills of an advocate that would allow him to persuade other Justices to join his views.<sup>271</sup> Once on the Court, Justice Scalia was more prone to condemn those who failed to embrace his views, especially those like Justices Sandra Day O’Connor and Anthony Kennedy, who he thought should, as conservatives, perceive legal issues the way he did. The unfortunate upshot was that Scalia frequently had the opposite effect of that anticipated by some of those who had promoted his appointment. He often drove away the moderates, thereby undermining a more conservative judicial agenda.<sup>272</sup>

The President’s selection of Roberts sought to avoid any repetition of that

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majority was willing to strike down the death penalty as applied; reaching this result required Brennan’s willingness to embrace a narrower position advocated by Justices Byron White and Potter Stewart and also Brennan’s stopping Justice Douglas from filing an opinion that attacked White for hypocrisy. *Id.*

267. ROSEN, *supra* note 258, at 172.

268. Like Roberts, Justice Samuel Alito, subsequently nominated by President Bush, was formerly an attorney in the Solicitor General’s Office. Never before have there been two alumni of that Office on the Court at the same time. A disproportionately large number of the other individuals reported as being considered for the openings on the Court likewise had distinguished themselves as Supreme Court advocates with experience in the Solicitor General’s Office, including Ted Olson, Maureen Mahoney, Judge Michael McConnell, and Miguel Estrada. See JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 199, 248, 252 (2007); see also Peter Baker, *Possible Court Nominees Pose a Quandary for Bush; A Conservative Anchor vs. an Ethnic First*, WASH. POST, June 19, 2005, at A1.

269. See *infra* note 273 and accompanying text.

270. See GREENBURG, *supra* note 268, at 107 (“Once on the Court, Souter would quickly become one of its most liberal justices, ending for a time any hope of cementing a conservative majority.”).

271. See GREENBURG, *supra* note 268, at 83 (quoting Justice O’Connor’s expression of dislike for Justice Scalia’s style of advocacy); ROSEN, *supra* note 258, at 193 (“[W]itnesses predicted that Rehnquist would be a loner as chief justice but that Scalia would be a masterful consensus builder because of his wit and charm. In fact, the opposite came to pass.”).

272. GREENBURG, *supra* note 268, at 83; ROSEN, *supra* note 258, at 193, 199. For an in-depth description of the impact of Justice Scalia’s tendency to push away conservative, yet more moderate Justices in the property rights area, see Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court*, 57 HASTINGS L.J. 759 (2006).

prior error. The President was aware of Roberts's accomplishments as an advocate and, in first announcing his appointment on national television, quoted at length from a bipartisan letter signed by leading Supreme Court advocates extolling Roberts's skills and integrity as a Supreme Court advocate.<sup>273</sup> And, as accomplished as the advocacy records of past Justices upon their respective nomination to the Court may have been, Roberts's experience and acclaim as an advocate remain historically distinctive. Considered one of the leading Supreme Court advocates of his generation, Roberts has argued thirty-nine cases before the Court,<sup>274</sup> significantly more than any other Justice ever on the Court.

President Bush reportedly concluded that Roberts possessed the personal qualities and advocacy skills important for the job and "wouldn't alienate other justices" on the Court.<sup>275</sup> He subsequently nominated him for Chief Justice because Roberts had already demonstrated as a nominee for the Associate Justice position the kind of interpersonal skills necessary to manage the Court, earn the respect of other Justices, and overcome divisions within the Court.<sup>276</sup>

During his first Term on the Court, October Term 2005, Chief Justice Roberts openly embraced John Marshall's vision for a Court that emphasized consensus over division,<sup>277</sup> albeit based on a role for the federal judiciary in which judges purposefully favored narrower rather than broader rulings as a means of promoting agreement.<sup>278</sup> Some Court watchers immediately drew the potential historic parallel to Chief Justice Marshall, noting his easy-going personal manner, apparent judicial temperament, and announced intent to promote consensus opinions within the Court.<sup>279</sup> Roberts's first Term as Chief was notably marked by a seemingly unprecedented degree of consensus, at least for modern times, with the Court at one point issuing eleven opinions in a row absent a single dissenting vote.<sup>280</sup> The new Chief's second Term, however, was marked by much less consensus, a stark reminder that the position of Chief on the Court lacks the authority necessary to dampen disagreements on difficult and contentious issues that, as the number of cases heard on the merits diminishes, are

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273. Press Release, The White House, President Announces Judge John Roberts as Supreme Court Nominee (July 19, 2005), <http://www.whitehouse.gov/news/releases/2005/07/20050719-7.html>.

274. *Id.*

275. GREENBURG, *supra* note 268, at 205.

276. *Id.* at 239.

277. As his second Term as Chief was coming to a close, Roberts reiterated in a question-and-answer session with students that John Marshall was the Chief he most hoped to model himself after. See *Chief Justice Roberts Responds to Questions Posed by Holy Cross Seniors* (May 24, 2007), [http://www.holycross.edu/publicaffairs/features/2006-2007/roberts\\_qa](http://www.holycross.edu/publicaffairs/features/2006-2007/roberts_qa).

278. See *Chief Justice Says His Goal Is More Consensus on the Court*, N.Y. TIMES, May 22, 2006, at A16; Chief Justice John Roberts, Commencement Address at Georgetown University Law Center (May 21, 2006), <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=144> (click on "play audio" to hear the address).

279. ROSEN, *supra* note 258, at 223–24.

280. See *id.* at 222. The Court's eleven-opinion streak without dissent for cases subject to plenary review commenced on February 21, 2006, with the issuance of the opinion in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), and ended one month later on March 21, 2006, with the Court's unanimous opinion that day in *United States v. Grubbs*, 547 U.S. 90 (2006).

likely to constitute an increasingly high percentage of the plenary docket. However, it is plainly too soon to gauge both whether the new Chief will decide to make the promotion of narrow decisionmaking and consensus rulings a long term project and, if so, whether he will then be able over the long term to persuade his current and future colleagues to embrace his preferred vision for the Court. But what does seem clear is that the President considered the new Chief's proven ability as an advocate before the Court as a strong qualification for serving on the Court, thereby raising the further possibility of future appointments to the Court from the Bar's most celebrated members as its prestige continues to rise.

#### D. PROMOTING PARITY IN SUPREME COURT ADVOCACY

As a general matter, the promotion of more effective advocacy both before and within the Court should be considered a positive development. Neither the Justices nor their law clerks are omniscient. They are to be sure extremely able, but they generally need effective, skilled advocates in order to reach well-considered, thoughtful rulings.<sup>281</sup> Absent such external input, the chambers simply do not have the resources to craft significant rulings with the necessary awareness of their likely implications. So too is it generally positive to have effective advocates within the Court itself. The Court works best not when the Justices act as separate fiefdoms but when they work together as a Court, which occurs only when there is a true deliberative process and exchange of ideas. Skilled advocates within the Court can promote just that kind of discussion and exchange. And while such deliberation may or may not lead to greater consensus, it almost always leads to better decisionmaking wholly apart from whichever ideological ends happen to prevail in individual cases.

But better decisions require better advocacy on all sides, not just on behalf of some sides. And, as suggested above, there is reason for concern that some business interests before the Court are receiving a disproportionate amount of the talent available in the modern day Supreme Court Bar and yielding the related benefits of the resulting advocacy advantage: a Supreme Court docket and rulings on the merits more responsive to their economic concerns.<sup>282</sup>

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281. Soon after he became Chief Justice, Rehnquist during oral argument volunteered a wonderful statement that acknowledged the tendency of others to underappreciate the inevitable limitations on the Court's decisionmaking:

[Counsel]: Mr. Bird is a little slender to play Tweedledum, but that's what he's trying to do. He wants words to mean what he says they mean . . . . And that didn't fool Alice, and I doubt very much that it will fool this Court.

QUESTION [Chief Justice Rehnquist]: Don't overestimate us.

(Laughter.)

Transcript of Oral Argument at 37, *Edwards v. Aguillard*, 482 U.S. 578 (1987) (No. 85-1513).

282. A different kind of parity implicated by the rise of the modern Supreme Court Bar, but beyond the scope of this Article, relates to the impact on the legal profession of the lack of women and racial minorities present in such a prestigious area of legal practice. Former Solicitor General Drew Days,

The decidedly pro-business tilt of the Court's docket and rulings was certainly a major theme of those assessing the first full Term of the Roberts Court. *Business Week* headlined that the Supreme Court is "Open for Business" with an unprecedented "willingness to referee corporate concerns."<sup>283</sup> *The Washington Post's* similar headline declared that a "Pro-Business Decision Hews to Pattern of Roberts Court;"<sup>284</sup> the *Los Angeles Times* announced that the "High Court has been good for business; rulings have benefited corporations by making it harder to sue them or limiting lawsuit awards;"<sup>285</sup> and the *Legal Times* described the Court in October Term 2006 as having "A Mind for Business."<sup>286</sup>

Nor were business interests or their Supreme Court counsel shy about touting their High Court success. The head of the National Chamber Litigation Center, an affiliate of the U.S. Chamber of Commerce that represents business interests before the Court, claimed that it was its "strongest showing since the inception" of the Center over thirty years ago.<sup>287</sup> The Chamber filed fifteen amicus briefs and won thirteen of those cases—"the [C]hamber's highest winning percentage in its 30-year history."<sup>288</sup> One Supreme Court counsel asserted that "[t]here wasn't a significant case in which a business argument was made where the business side did not prevail."<sup>289</sup> Another similarly argued that the "'Roberts court is even better for business' than the [C]ourt led for two decades by the late Chief Justice William H. Rehnquist."<sup>290</sup> All extolled the Court's apparent willingness to hear more business cases than ever, even at a time when the docket overall was otherwise shrinking in size.<sup>291</sup>

From a historical perspective, the success of the dominant private sector Supreme Court Bar could be seen as the result of marrying the Supreme Court

with 24 oral arguments, seems to be the only current African-American who is an active member of the Bar with a high number of oral arguments. Miguel Estrada, with Gibson Dunn, has argued 16 times before the Court and appears to be the Hispanic-American with the highest number of arguments before the Court. And while there are currently several very highly regarded women Supreme Court advocates both in private practice and in the Office of the U.S. Solicitor General, they constitute a relatively small percentage of the leading advocates in terms of numbers of oral arguments. Historically, moreover, there have been women lawyers with at least as many if not more appearances before the Court. See Clare Cushman, *Women Advocates Before the Supreme Court*, 26 J. SUP. CT. HIST. 67, 77-78 (2001).

283. Orey, *supra* note 18, at 30.

284. Robert Barnes & Carrie Johnson, *Pro-Business Decision Hews to Pattern of Roberts Court*, WASH. POST, June 22, 2007, at D1.

285. David G. Savage, *High Court Has Been Good For Business; Rulings Have Benefited Corporations by Making It Harder to Sue Them or Limiting Lawsuit Awards*, L.A. TIMES, June 21, 2007, at A1.

286. Tony Mauro, *High Court Reveals A Mind for Business*, LEGAL TIMES, July, 2, 2007, at 8.

287. *Id.*

288. Orey, *supra* note 18, at 30.

289. Mauro, *supra* note 286 (quoting Mark Levy, head of Kilpatrick Stockton's Appellate and Supreme Court Practice).

290. Savage, *supra* note 285 (quoting Maureen Mahoney).

291. Mauro, *supra* note 286, at 8 ("Moreover, even at a time when the Court's docket is shrinking, the Court's interest in business cases seems to be on the rise. Fully half of the Court's 71 cases involved business."); Orey, *supra* note 18, at 30 ("Of 73 cases heard by the court in the current term, 29 (40%) involved or were significant to business, according to statistics compiled by Akin Gump Strauss Hauer & Feld, a law firm with an active practice before the court.").

litigation strategies and expertise of two of the nation's top Supreme Court advocates of the mid-twentieth century—former Solicitor General John W. Davis and then-future Solicitor General and Supreme Court Justice Thurgood Marshall—who served as opposing counsel in one of the nation's most famous cases ever: *Brown v. Board of Education*.<sup>292</sup> Davis was the leading Supreme Court advocate for the first half of the twentieth century, widely heralded as the “lawyer’s lawyer,” a master in crafting written and oral legal arguments based on rigorous analysis of judicial precedent and the record in a case. Davis served as industry’s principal lawyer in the Supreme Court, challenging rising federal and state regulation of business, including the New Deal.<sup>293</sup> Marshall was Davis’s virtual opposite in personal background and style, and embraced a very different litigation style and vision of the judicial function. Both were top-notch lawyers, but while Davis abhorred legal realism, policy arguments, and notions of enlisting the judiciary to apply a dynamic understanding of the meaning of the Constitution,<sup>294</sup> policy arguments and just such a view of the Constitution were central to Marshall’s effort to persuade the Supreme Court to provide the relief from segregation that racial minorities had been unable to obtain from the States or the other two branches of the federal government.<sup>295</sup> Marshall famously held conferences of scholars to develop litigation strategies and legal arguments.<sup>296</sup>

The modern Supreme Court Bar and the business community today combine these two approaches. They include attorneys who rival Davis in the rigor and thoroughness of their legal analysis and preparation for argument. But they also include strategists, such as the National Chamber Litigation Center and other business organizations, which work closely with their Supreme Court counsel to develop long-term litigation strategies before the Court. Like Marshall on behalf of very different social interests, the new Bar carefully selects its arguments and its cases.

Of course, in many respects, this phenomenon is simply yet another iteration of the unsurprising advantages that the “haves” inevitably possess over the “have-nots” in legal and political processes. As applied to the legal profession, the “haves” are naturally more able to pay for the lawyers who, because of their status as repeat players, possess the expertise that allows them to be more successful in obtaining favorable results from governmental decisionmakers for their clients.<sup>297</sup> The repeat players offer such an advantage before myriad

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292. 347 U.S. 483 (1954).

293. See WILLIAM H. HARBAUGH, *LAWYER’S LAWYER: THE LIFE OF JOHN W. DAVIS* 264–65, 357–82 (1973).

294. See *id.* at 414–20.

295. See generally ROGER GOLDMAN & DAVID GALLEN, *THURGOOD MARSHALL: JUSTICE FOR ALL* 98–99 (1992); TUSHNET, *supra* note 69.

296. See GOLDMAN & GALLEN, *supra* note 295, at 57–58, 100–01; TUSHNET, *supra* note 69, at 81–98, 196–98.

297. See generally Marc S. Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC’Y REV.* 95 (1974).

executive, judicial, and legislative lawmaking fora, and the Supreme Court is simply no different.

Fortunately, to some extent, market forces, the significant professional prestige closely associated with Supreme Court advocacy, and the personal commitment of some attorneys to provide able representation to under-represented interests afford some of the incentive necessary to close the advocacy gap. Because there are only seventy to eighty cases decided by the Court following oral argument each term, and only a fraction of those cases have the potential to generate billable hours at a high hourly rate, the elite Supreme Court Bar members are well aware of the necessity to participate in many cases on what is effectively a “loss-leader” basis. Otherwise, their practices will be too small to impress well-paying clients. Indeed, for this reason, the competition between expert Supreme Court counsel for pro bono cases can be quite keen. With so many law firms (and law school clinics) looking for Supreme Court work, an attorney with a pro bono client can quickly be inundated with competing offers from many of the nation’s most celebrated Supreme Court advocates willing to take on the case for no charge.

The best Supreme Court advocates are therefore routinely willing to take on an obviously pro bono matter, such as a criminal defense death penalty case, at little or no charge so long as they can assume full responsibility for the litigation, including oral argument presentation. There are also plenty of clients that they are willing to take on a significantly reduced fee basis, such as state and local government agencies. While these cases do not themselves generate significant fees, they bolster the attorney’s overall credentials as a Supreme Court practitioner for those cases that *do* have the potential for generating significant fees. The prestige associated with an active Supreme Court practice also promotes an attorney’s general appellate practice before the lower courts, where there is no similarly limited number of cases to be briefed and argued. An active Supreme Court practice can also serve as an extremely effective basis for recruiting some of the best new attorneys to a firm, including Supreme Court clerks for whom the competition between law firms is quite keen. Finally, of course, for some Supreme Court advocates, participating as pro bono counsel in Supreme Court cases is not merely good business strategy; it is the part of their practice they enjoy and believe in the most. The paid cases allow for the pro bono cases, but it is the latter that they consider their most meaningful work.<sup>298</sup>

Seth Waxman of WilmerHale, accordingly, served as lead counsel of record in *Roper v. Simmons*,<sup>299</sup> in which he successfully argued that the imposition of the death penalty on juveniles was unconstitutional. Paul Smith, of Jenner & Block, represented the plaintiff in *Lawrence v. Texas*,<sup>300</sup> successfully arguing

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298. See Tony Mauro, *Supreme Effort: Jenner and Block’s Donald Verilli Has Become a Passionate Advocate for the Rights of Capital Defendants at the Supreme Court*, AM. LAW., July 2007, at 111.

299. 543 U.S. 551 (2005).

300. 539 U.S. 558 (2003).

that the application of criminal sodomy laws against homosexuals violated substantive due process. Former Solicitor General Ken Starr, of Kirkland & Ellis, represented the school district in *Morse v. Frederick*<sup>301</sup> in defense of their suspension of a high school student for displaying a banner that school officials believed violated school policy. And, of course, Carter Phillips, of Sidley Austin, filed the amicus brief for retired military officials in *Grutter v. Bollinger*.<sup>302</sup> Virtually all of the best-known Supreme Court advocates participate on a pro bono basis in a handful of cases each Term, at least by way of amicus curiae briefs.<sup>303</sup>

It is also possible that any current discrepancy in the allocation of Supreme Court expertise is simply a temporary phenomenon that will naturally correct itself over time. Now that business interests have demonstrated the success that can be achieved before the Court by enlisting such expertise, other interest groups will respond by developing their own. Professors Tom Merrill and Joseph Kearney proffered such an “arms race” hypothesis several years ago as a possible explanation for the dramatic increase they observed in amicus filings before the Court<sup>304</sup>—a trend that has accelerated since their sample, which ended in 1995.<sup>305</sup>

The more recent rise of State Solicitor General Offices, described at the outset of this Article,<sup>306</sup> is arguably just such a response within the profession consistent with the Merrill-Kearney “arms race” hypothesis. The States recognize that they need to be able to compete more effectively before the Court with the private sector Supreme Court Bar. So too could be viewed the recent spate of law school Supreme Court clinics, also previously described,<sup>307</sup> which

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301. 127 S. Ct. 2618 (2007).

302. 539 U.S. 306 (2003).

303. For instance, Carter Phillips filed what appear to be pro bono amicus briefs on behalf of “Former Prosecutors and Judges” in *Miller-El v. Dretke*, 545 U.S. 231 (2005) (No. 03-9659) (filed September 2, 2004); “Amicus Professors” in *Mayle v. Felix*, 545 U.S. 644 (2005) (No. 04-563) (filed March 22, 2005); “National Association of Criminal Defense Lawyers” in *Samson v. California*, 547 U.S. 843 (2006) (No. 04-9728) (filed November 28, 2005); “Judicial Ethics and Constitutional Law Scholars” in *Dimick v. Republican Party of Minnesota*, 546 U.S. 1157 (2006) (No. 05-556) (filed January 4, 2006); “American Medical Women’s Association” in *Gonzalez v. Carhart*, 127 S. Ct. 1610 (2007) (Nos. 05-380, 05-1382) (filed September 20, 2006); and “Interested Former Oklahoma City Bombing Prosecutors” in *Roper v. Weaver*, 127 S. Ct. 2022 (2007) (No. 06-313) (filed February 26, 2007). Seth Waxman filed what appear to be pro bono amicus briefs on behalf of the “American Bar Association” in *House v. Bell*, 547 U.S. 518 (2006) (No. 04-8990) (filed September 22, 2005), *Halbert v. Michigan*, 546 U.S. 605 (2005) (No. 03-10198) (filed December 22, 2005), and *Kowalski v. Tesmer*, 543 U.S. 125 (2004) (No. 03-407) (filed June 7, 2004); “Habeas Law Scholars” in *Mayle v. Felix*, 545 U.S. 644 (2005) (No. 04-563) (filed March 22, 2005); “National Security Studies and the Constitution Project” in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184) (filed January 6, 2006); “Environmental Law Institute” in *Rapanos v. United States*, 547 U.S. 715 (2006) (Nos. 04-1034, 04-1384) (filed January 13, 2006); and “The Constitution Project” in *Smith v. Texas*, 127 S. Ct. 1686 (2007) (No. 05-11304) (filed November 20, 2006).

304. Kearney & Merrill, *supra* note 37, at 821–25.

305. See *supra* notes 115–120 and accompanying text.

306. See *supra* notes 67–68 and accompanying text.

307. See *supra* notes 71–72 and accompanying text.

provide pro bono representation to parties and amici in the Court. To the extent that their formation is driven by the demand of clients not able to secure representation from expert private law firms,<sup>308</sup> the clinics could help to restore balance in Supreme Court advocacy, so long as those at the clinics ultimately responsible for drafting the briefs and presenting the arguments are themselves skilled Supreme Court advocates, whether they are academics or private attorneys serving as adjunct law faculty. Working with the newly established Supreme Court clinic at Yale Law School, seasoned Supreme Court advocates at Mayer Brown during October Term 2006 served as counsel of record in one case and filed five amicus briefs, all on a pro bono basis.<sup>309</sup> During October Term 2007, the Stanford Supreme Court Litigation Clinic represented parties in seven cases on the merits, presenting the oral arguments in six of those cases, and having successfully obtained certiorari as counsel for petitioners in four of the seven cases.<sup>310</sup> Seven cases represents approximately ten percent of the Court's merits docket.

Relatedly, the Supreme Court Institute at Georgetown University Law Center also seeks to equalize the playing field for one aspect of Supreme Court advocacy: the oral argument.<sup>311</sup> The Institute, founded in 1999, provides on a strictly pro bono, nonpartisan basis, rigorous moot court practice sessions for counsel of record with cases before the Supreme Court. In the most recently completed October Term 2006, the Institute provided such assistance to counsel

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308. For instance, in announcing the creation of a clinic with New York University, Jones Day announced "pro-bono representation of prisoners (both prisoner appeals and civil action seeking affirmative relief) and others bringing immigration, environment, civil rights, and other claims against federal, state, and local governments." Press Release, *supra* note 71. It is, however, far from clear that the primary impetus for the formation of law school Supreme Court clinics is the demand of clients rather than a different kind of "arms race" between law schools, each seeking the prestige of Supreme Court advocacy to enhance its own academic reputation.

309. The Yale Law School Supreme Court Clinic, taught primarily by attorneys from Mayer Brown, represented the petitioner in *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553 (2007), and filed pro bono amicus curiae briefs on behalf of the "National Immigration Project of the National Lawyers Guild," in *Gonzalez v. Duanes-Alvarez*, 127 S. Ct. 815 (2007) (No. 05-1629) (filed November 20, 2006); "National Association of Counties et al.," in *Scott v. Harris*, 127 S. Ct. 1769 (2007) (No. 05-1631) (filed December 13, 2006); "National Association of Criminal Defense Lawyers," in *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007) (No. 05-1575) (filed December 18, 2006); "Americans United for Separation of Church and State et al.," in *Soule v. Wyner*, 127 S. Ct. 2188 (2007) (No. 06-531) (filed March 28, 2007); and "International Municipal Lawyers Association and U.S. Conference of Mayors," in *The Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352 (2007) (No. 06-134) (filed March 30, 2007).

310. The Stanford Clinic is serving as counsel of record for a party in *Virginia v. Moore*, No. 06-1082 (counsel for respondent); *Meacham v. Knolls Atomic Power Laboratory*, No. 06-1505 (counsel for petitioner); *Burgess v. United States*, No. 06-11429 (counsel for petitioner); *Crawford v. Marion County, Indiana*, No. 07-21 (co-counsel for petitioner); *Riley v. Kennedy*, No. 07-77 (counsel for respondent); *Greenlaw v. United States*, No. 07-330 (counsel for petitioner); and *Kennedy v. Louisiana*, No. 07-343 (counsel for petitioner).

311. As described in an initial footnote, the author serves as the Faculty Director of the Georgetown University Law Center Supreme Court Institute. See *supra* note \*.

in more than 90% of the cases argued before the Court.<sup>312</sup>

My own view is that one cannot safely rely on the gap to close on its own and that affirmative steps are necessary to promote such a closure. The pro bono assistance that the Supreme Court practices at the various leading law firms provide is significant, but largely ad hoc. There is no systematic effort to ensure adequate representation to under-represented interests, and those interest groups that are best able to secure such outstanding pro bono counsel tend, naturally, to be those that are already well-connected within the legal profession.<sup>313</sup> Without such background connections, counsel and clients with less experience before the Supreme Court are less likely to be able to know how to secure expert pro bono assistance or, just as importantly, to know how to evaluate the competing credentials of the many attorneys who not infrequently barrage lower court counsel, or the client directly, with offers to assist with a case at the Court. Many such volunteer counsel are not especially able, and some are far worse than that.<sup>314</sup>

There are also areas of law in which the vast majority of the private Supreme Court Bar regularly declines to serve as pro bono counsel because of its concern that doing so will upset some of its most financially important business clients. For that reason, almost all of the practices refuse to provide such help to plaintiffs involved in employment discrimination, tort, and environmental pollution control cases. To the extent, moreover, that almost all of the Supreme Court clinics recently established at leading law schools are taught principally by attorneys from those same firms, those same issues of possible conflict limit the ability of the clinics to fill the gap.<sup>315</sup>

There also appear to be areas of the legal profession with an embedded

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312. See Georgetown University Law Center Supreme Court Institute, Frequently Asked Questions, <http://www.law.georgetown.edu/sci/moot.html> (last visited March 21, 2008).

313. The one notable exception would be Sidley Austin, which for several years has provided a mostly unheralded effort to provide pro bono assistance to defense counsel, by helping in the drafting of petitions for writs of certiorari, filing amicus briefs in support of review or on the merits, and assisting in the preparation of counsel for oral argument. According to Sidley Austin firm records, since October Term 1994, the firm has assisted defense counsel in drafting seventeen petitions and thirty-two briefs on the merits, by filing twenty-two amicus briefs (typically on behalf of the National Association of Criminal Defense Lawyers) and providing assistance in the preparation of oral argument in nine cases. See Sidley Austin, Washington, D.C. Office Supreme Court Pro Bono Case Chart (Nov. 15, 2007) (table compiled by Sidley Austin, on file with author).

314. See Tony Mauro, *A Week to Forget: High Court Endures String of Desultory Arguments*, LEGAL TIMES, Nov. 15, 1999, at 1 (reporting on poorly received oral argument by Ronald Maines following efforts by Maines to substitute himself for lower court counsel).

315. In addition to attorneys from Mayer Brown overseeing Yale's clinic, Harvard's clinic will be taught by attorneys from O'Melveny & Myers, Virginia's by attorneys from Robbins Russell, Northwestern's by Sidley Austin, Texas's by Kellogg Huber, and New York University's by attorneys from Jones Day. The major exception to this conflict problem is Stanford's Clinic because although the attorney who originally created the Clinic, Tom Goldstein, is now with Akin Gump, Stanford alone has two full-time faculty members expert in Supreme Court litigation who run the Clinic, and the law firm principally affiliated with the Clinic is primarily a public interest law firm without the kinds of significant conflicts that limit the practice of the other firms.

culture that is more likely to resist offers to help out at the Supreme Court. The criminal defense bar is the most prominent example. Many criminal defense attorneys, including counsel appointed at trial who may not themselves have significant criminal law expertise, not only insist on maintaining their status as lead counsel once it has become a Supreme Court case, but decline the offers of experts in Supreme Court advocacy for significant assistance in the preparation of briefs and the presentation of oral argument. While in some instances those novice Supreme Court counsel can in fact do an outstanding job, few can do so without at least some assistance by Supreme Court experts.

Finally, virtually none of the private Supreme Court Bar offers significant, on-going pro bono assistance at the certiorari stage which, as described above, is when expert advocacy tends to be the most influential.<sup>316</sup> It is at the certiorari stage that many well-represented petitioners persuade the Court to grant review in cases that may not be particularly certworthy and also bolster the chances of winning before the Court through the strategic selection of especially favorable factual contexts. By contrast, at the jurisdictional stage, respondents who lack effective Supreme Court counsel often lose their best chance of preserving their lower court victory, which is to persuade the Court to deny review in the first instance or at least to limit the issues granted review by ensuring that petitioners are not permitted to change legal arguments or raise new issues not pressed in the lower courts. They also fail to raise arguments in the brief in opposition and, under the Court's rules, unwittingly waive their right to make that argument should the Court subsequently grant review.

Given the abundance of resources now available with the emergence of a modern Supreme Court Bar, none of these hurdles to further reducing the gap in advocacy expertise should be insurmountable. Indeed, the potential for a fair distribution of advocacy expertise before the Supreme Court is much greater than it is before any other significant lawmaking forum. After all, the Court handles only relatively few matters compared to the hundreds, if not thousands of potentially significant matters being debated before Congress or within executive branch agencies. The Court's systematic method for decisionmaking, moreover, provides an opportunity for much more meaningful access for interested parties than those of the other two branches of the federal government. It certainly requires far fewer resources in terms of numbers of hours to draft an outstanding Supreme Court brief than to lobby Congress on a bill or an agency about a proposed rulemaking. The former requires a commitment of a few hundred hours applied to a discrete period of time, while the latter two are more likely to require not only more aggregate time, but much wasted effort because the legislative and agency decisionmaking process is much more diffuse and

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316. The exception is the Public Citizen Litigation Group, which does provide, to the extent that its limited resources will allow, assistance to legal services attorneys, solo practitioners, and small firm litigators at all phases of Supreme Court litigation in cases where the interests being represented coincide with that organization's general ideological mission. See MCGUIRE, *supra* note 22, at 111.

temporally indefinite.

The Supreme Court Bar can itself take the initiative to create mechanisms to ensure a fairer distribution of the Bar's expertise, both for cases being reviewed on the merits and at the jurisdictional stage, especially in areas such as criminal defense, where the existing gap is especially troublesome. The Bar can replace the current totally ad hoc approach with a more systematic program to allocate its resources, perhaps in conjunction with the growing set of Supreme Court clinics at some of the nation's leading law schools. The Bar need not and should not strive to replace all non-expert lawyers as counsel of record and insist on doing the arguments themselves. Properly assisted, many of those counsel who handled the case below can do a fine job in the High Court so long as they are in fact willing to commit the hundreds of hours typically required for preparation. And, there are benefits to the legal profession and the Court to allowing those counsel to present argument. But, in order to provide the necessary assistance to such counsel or to assume the counsel of record position, the Bar needs to be more willing to overcome "conflicts" that have no true legal ethical dimension but merely reflect a desire to avoid advancing legal arguments that might upset business clients. This desire is no bar to legal representation, and the Bar should not acquiesce in its becoming so.

Finally, the Court should itself take steps to reduce the advocacy gap. The Court can do so by appointing expert Supreme Court advocates in criminal defense cases where counsel is lacking more frequently. And the Court can promote better legal arguments by more readily agreeing to allow organizations represented by outstanding advocates to present oral argument as *amicus curiae*. The Court routinely grants motions for divided argument filed by the Solicitor General as *amicus curiae*, even in cases in which the federal interest hardly seems central to the case, traditionally because of the reputation of the Solicitor General's Office for outstanding advocacy. While the Court currently routinely denies almost every request by *amicus* to present oral argument, the Court should now be willing to grant motions for divided argument on behalf of interests not so well represented before the Court by the parties themselves, such as criminal defendants. The Court's recent decision to grant a series of motions by State Solicitor Generals to participate as *amicus curiae* is a step in the right direction,<sup>317</sup> but there is no compelling reason to confine that practice to government lawyers. There are nongovernmental entities with significant substantive and Supreme Court advocacy expertise whose participation as *amicus curiae* could similarly aid the Court's decisionmaking process.

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317. See *United States v. Atl. Research Corp.*, 127 S. Ct. 1932 (2007) (granting motion of Washington State Attorney General to participate in oral argument as *amicus curiae*); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 1507 (2007) (granting motion of New York State Solicitor General to participate in oral argument as *amicus curiae*); *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 844 (2006) (granting motion of New York State Solicitor General to participate in oral argument as *amicus curiae*).

## CONCLUSION

The emergence of the modern Supreme Court Bar is significant because advocacy matters. Better, more effective advocates influence the development of the law and there is generally no court where such advocacy can wield more far-reaching influence than the Supreme Court. And, although the modern Bar is still relatively young, it already has had a profound effect on the development of the law both by setting the Court's agenda and then by influencing the rulings themselves. The impact can be gleaned from seemingly inconsequential cases<sup>318</sup> to cases involving no less than the election of the President of the United States.<sup>319</sup> In recent years, the impact is expressed by a rise in the Court's business docket as the Court has responded favorably to the legal arguments raised on behalf of business interests that serve as the private Supreme Court Bar's primary clients.

To date, the modern Bar's impact has principally been as advocates before the Court. The prominent role that the new Chief Justice played within that Bar before joining the bench raises, however, the potential for that Bar's influence to extend within the Court as well where advocacy also matters. The most effective Justices have been those, like Chief Justice Marshall and Justice Brennan, who can work effectively with their colleagues on the Court—to persuade, listen, and cajole—in forging the compromises necessary to resolve the nation's most challenging legal issues. An effective advocate within the Court need not be a neutral mediator simply seeking consensus for the sake of consensus regardless of the substantive outcome and without harboring any strong, personal, passionately held views on the law and the proper role of the courts. Certainly no one would claim that either John Marshall or, more

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318. See, e.g., *Bell Atl. v. Twombly*, 127 S. Ct. 1955 (2007) (holding that a complaint alleging a Sherman Act violation must set forth sufficient factual information that an agreement was made, and a mere allegation of parallel conduct and bare assertion of conspiracy will not suffice).

319. Not surprisingly, members of the private Supreme Court Bar were heavily involved on both sides of the briefing and argument in *Bush v. Gore*, 531 U.S. 98 (2000), and the fact that the Court had the opportunity to hear and decide the case at all was certainly the product of expert Supreme Court lawyering. The Solicitor General's Office was not, for obvious reasons, involved in the case at all, only private lawyers representing both sides. Almost immediately after the Florida Supreme Court ordered a recount for a second time, then-Governor Bush's lawyers sought and obtained from the Supreme Court a stay of the Florida Supreme Court's order, stopping the recount almost as soon as it had begun. See *id.* Bush's lawyers filed a petition and stay application on Friday evening, December 8th, the Court granted the stay and petition to hear the case on Saturday, December 9th, ordered briefs to be filed the next day, Sunday, December 10th, heard oral argument just one day later, Monday, December 11th, and issued its decision on the merits on the very next day, Tuesday, December 12th. See *id.* Veteran Supreme Court advocates who represented George Bush before the Court included Ted Olson, Miguel Estrada, Tom Hungar, and John Manning. See Brief for Petitioners, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949). Veteran Supreme Court advocates who represented Al Gore before the Court included Laurence Tribe, David Boies, and Tom Goldstein. See Brief for Respondent Albert Gore, Jr., *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949). And, those few names mask the much larger number of behind-the-scenes attorneys helping in the litigation. For instance, now-Chief Justice John Roberts reportedly gave legal advice to then-Governor Jeb Bush during the Florida recount. See R. Jeffrey Smith and Jo Becker, *Record of Accomplishment – and Some Contradictions*, WASH. POST, July 20, 2005, at A1.

recently, William Brennan lacked such ardor and, in fact, just the opposite is true. Indeed, such passion and commitment are often the fuel for the effective advocate, who simply has to combine that passion with an ability to determine how best to appeal to others and precisely when to step back and reach agreement rather than narrowly pursue one's own singular view.

Finally, the emergence of a modern Supreme Court Bar has the potential for being a positive development for the legal profession and for the Court itself. But it also generates a heightened responsibility within that Bar, as officers of the Court, to strive to ensure that all interests receive a share of such talent, including those not able to pay private market rates for expert Supreme Court advocates. Otherwise, the emergence of a modern Supreme Court Bar risks perversely increasing the advocacy gap in the Court between those who can pay and those who cannot, which would be bad for the legal profession, the Court, and its rulings. Both the Bar and the Court itself should take steps to guard against that result. Sufficient resources are present and need only now to be effectively exploited.