

William & Mary Law School

William & Mary Law School Scholarship Repository

Supreme Court Preview

Conferences, Events, and Lectures

9-2015

Section 7: Supreme Court Bar

Institute of Bill of Rights Law, William & Mary Law School

Follow this and additional works at: <https://scholarship.law.wm.edu/preview>



Part of the [Supreme Court of the United States Commons](#)

Repository Citation

Institute of Bill of Rights Law, William & Mary Law School, "Section 7: Supreme Court Bar" (2015).
Supreme Court Preview. 251.

<https://scholarship.law.wm.edu/preview/251>

Copyright c 2015 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/preview>

VII. Supreme Court Bar

In This Section:

- “AT AMERICA’S COURT OF LAST RESORT, A HANDFUL OF LAWYERS NOW DOMINATES THE DOCKET” p. 349
Joan Biskupic, Janet Roberts and John Shiffman
- “ANALYZING THE IMPACT OF THE SUPREME COURT BAR” p. 358
Janet Roberts
- “ELITE LAW FIRMS SPIN GOLD FROM A RAREFIELD NICHE: GETTING CASES BEFORE THE SUPREME COURT” p. 361
John Shiffman, Janet Roberts and Joan Biskupic
- “CHAMBER OF COMMERCE FORMS ITS OWN ELITE LAW TEAM” p. 368
John Shiffman
- “FORMER CLERKS: TODAY’S PROSPECTS, TOMORROW’S ELITE” p. 370
John Shiffman
- “IN AN EVEN-CLUBBIER SPECIALTY BAR, 8 MEN HAVE BECOME SUPREME COURT CONFIDANTS” p. 372
Janet Roberts, Joan Biskupic and John Shiffman
- “INNOVATIVE LAWYER CHANGED THE WAY TOP FIRMS OPERATE” p. 379
John Shiffman
- “THE CASE AGAINST GAY MARRIAGE: TOP LAW FIRMS WON’T TOUCH IT” p. 381
Adam Liptak
- “ADVOCACY MATTERS BEFORE AND WITHIN THE SUPREME COURT: TRANSFORMING THE COURT BY TRANSFORMING THE BAR” p. 384
Richard J. Lazarus

“At America’s Court of Last Resort, a Handful of Lawyers Now Dominates the Docket”

Reuters

Joan Biskupic, Janet Robets and John Shiffman

December 8, 2014

The marble façade of the U.S. Supreme Court building proclaims a high ideal: “Equal Justice Under Law.”

But inside, an elite cadre of lawyers has emerged as first among equals, giving their clients a disproportionate chance to influence the law of the land.

A Reuters examination of nine years of cases shows that 66 of the 17,000 lawyers who petitioned the Supreme Court succeeded at getting their clients’ appeals heard at a remarkable rate. Their appeals were at least six times more likely to be accepted by the court than were all others filed by private lawyers during that period.

The lawyers are the most influential members of one of the most powerful specialties in America: the business of practicing before the Supreme Court. None of these lawyers is a household name. But many are familiar to the nine justices. That’s because about half worked for justices past or present, and some socialize with them.

They are the elite of the elite: Although they account for far less than 1 percent of lawyers who filed appeals to the Supreme Court, these attorneys were involved in 43 percent of the cases the high court chose to decide from 2004 through 2012.

The Reuters examination of the Supreme Court’s docket, the most comprehensive ever, suggests that the justices essentially have added a new criterion to whether the court takes an appeal – one that goes beyond the merits of a case and extends to the merits of the lawyer who is bringing it.

The results: a decided advantage for corporate America, and a growing insularity at the court. Some legal experts contend that the reliance on a small cluster of specialists, most working on behalf of businesses, has turned the Supreme Court into an echo chamber – a place where an elite group of jurists embraces an elite group of lawyers who reinforce narrow views of how the law should be construed.

Of the 66 most successful lawyers, 51 worked for law firms that primarily represented corporate interests. In cases pitting the interests of customers, employees or other individuals against those of companies, a leading attorney was three times more likely to launch an appeal for business than for an individual, Reuters found.

THE NATURE OF THE BUSINESS

“Working for corporate clients is the bread and butter of our practice,” said Ashley Parrish, a partner at King & Spalding whose

success rate in getting cases before the court ranks him among the top handful of lawyers in America. “As a large national firm, we are generally conflicted from representing individuals and advocacy groups in litigation against corporations,” he said. “They are typically suing our clients or prospective clients.”

The firm takes some criminal defense and First Amendment cases pro bono. But like other firms with Supreme Court practices, such cases are the exception.

“It’s the nature of the business,” Parrish said.

As a consequence, individuals seeking to challenge large companies are left to seek counsel from a pool of attorneys that’s smaller and, collectively, less successful.

The court generally has a conservative, pro-business majority, but even one of its most liberal justices, Ruth Bader Ginsburg, accepts the corporate tilt of the specialist bar that dominates the docket.

“Business can pay for the best counsel money can buy. The average citizen cannot,” Ginsburg said. “That’s just a reality.”

Chief Justice John Roberts declined to comment on the Reuters analysis. But exclusive interviews with eight of the nine sitting justices indicate that most embrace the specialty Supreme Court bar. To them, having experienced lawyers handling cases helps the court and comes without any significant cost. Effective representation, not

broad diversity among counsel, best serves the interests of justice, they say.

The growing power of the specialist bar worries some leading lawyers, however. Michael Luttig, general counsel for aerospace giant Boeing Co., understands the advantages of hiring from that group; he has done so when the company has had a case before the justices. But as a former U.S. appeals court judge who earlier served as a Supreme Court clerk, he says he also sees a downside.

“It has become a guild, a narrow group of elite justices and elite counsel talking to each other,” Luttig said. The court and its bar have grown “detached and isolated from the real world, ultimately at the price of the healthy and proper development of the law.”

CHIEF’S LEGACY

Although the Supreme Court is the most diverse it has ever been – three of the nine justices are women and two are minorities – the elite bar is strikingly homogeneous: Of the 66 top lawyers, 63 are white. Only eight are women.

It’s also a self-replicating group of insiders, many of whom previously held positions that offer them deep insight into how the court operates. Among the 66 leading lawyers, 31 worked as a clerk for a Supreme Court justice; in that role, they wrote memos for the justices that summarized petitions and highlighted cases that might be worth hearing. Twenty-five worked in top posts in the U.S. Office of the Solicitor General,

whose lawyers represent the federal government before the court.

Like 14 others, lawyer Neal Katyal held both jobs.

At age 44, Katyal is a relative newcomer to this upper echelon of attorneys. But last term, Katyal argued four cases before the high court, second most among the bar's top advocates. This term, he expects to argue at least three.

In his rise to the top, Katyal has patterned himself after a man who was once one of the most successful members of the court's elite bar: John G. Roberts.

Before becoming chief justice in 2005, Roberts served in the solicitor general's office and then built a thriving Supreme Court practice at the law firm where Katyal now works. From 1989 through 2003, Roberts appeared 39 times before the court.

During interviews, Katyal often cites his admiration for the chief justice, recounting the words of another attorney who encouraged Katyal to take a summer associate position working for Roberts in private practice. As Katyal recalled, the conversation went like this: You know that G in John G. Roberts? the lawyer asked him. The G is for God. (It actually stands for Glover.)

Today, Katyal oversees the practice the chief justice shaped, and he continues to follow the Roberts model. "Every day I'm conscious of

the chief's legacy at the firm and in the Supreme Court bar," he said.

TOP LAWYERS KEY

The rise of that specialty bar can be traced to the mid-1980s, when President Reagan's first solicitor general, Rex Lee, joined the Washington office of Sidley Austin.

Demand had grown for lawyers who could help corporations roll back workplace, environmental and consumer regulations that had roots in the late 1960s and early 1970s. At Sidley Austin, Lee launched a high court practice focused on business clients. In the next two years, he argued a remarkable eight cases before the Supreme Court.

By the time Lee died in 1996, other large firms were creating their own Supreme Court practices, largely on behalf of business interests.

The star appellate lawyers, by virtue of the appeals they write and sign, help the justices winnow the pool of cases the court considers. Typically, the Supreme Court agrees to hear just 5 percent of the petitions filed by private attorneys. It accepts 21 percent of the cases bearing the name of a leading advocate.

"They basically are just a step ahead of us in identifying the cases that we'll take a look at," said Justice Anthony Kennedy. "They are on the front lines and they apply the same standards" as the justices do.

Some scholars say reliance on the expert bar has made for a far more insular court. "We don't want the justices to filter cases through

advocates,” said Jenny Roberts, associate dean at American University’s law school. “If this is happening, delegating the discretion of cases to a sort of sub-Supreme Court when so much is at stake is troublesome. It’s fine if you trust and agree with those in control, but what happens when you don’t?”

To identify lawyers who enjoyed the most success before the high court, Reuters examined about 10,300 petitions for writ of certiorari, the documents that launch an appeal, filed by private attorneys during a nine-year period. Reuters excluded the large volume of appeals filed by convicts and others without a lawyer; rarely are those cases accepted by the court. The analysis also excluded petitions filed by government lawyers.

At this critical first stage of the process, justices have wide discretion to decide whether to hear a case. For a petition to be accepted – known in Supreme Court parlance as “granting cert” – four of the nine justices must vote to take the case and hear oral arguments.

Each of the 66 lawyers Reuters identified filed an average of at least one petition a year from 2004 to 2012. And each had at least three petitions that were granted in that period. Both criteria put these lawyers far above the norm.

Reuters identified about 1,500 petitions filed during those nine years in which the interests of companies were arrayed against those of customers, employees or other individuals.

These appeals included employment discrimination cases, benefits disputes and antitrust cases.

In these cases, the elite lawyers were three times more likely to petition the court on behalf of businesses. And the appeals brought by a leading attorney were six times more likely to be heard than those that were not.

The pro-business predilections of the Roberts court come as no surprise to those who follow its rulings. During the first nine years under Roberts, Reuters found, the court ruled for business parties 60 percent of the time, compared with 48 percent during the court’s last nine years under Chief Justice William Rehnquist.

That divergence extends to which cases the court is willing to hear, says law professor Alan Morrison. “It’s very hard to get a consumer, environmental or workers case up, compared to business,” said Morrison, who teaches at George Washington University. Morrison is the former director of Public Citizen Litigation Group, the liberal advocacy organization that he founded with Ralph Nader in 1972.

LIBERAL STRATAGEM

Some justices said any perception of a tilt toward corporate America might stem from the nature of litigation today. First, the court is seeing more patent and intellectual property cases, which tend to involve business-related matters. Second, the court is hearing challenges to laws that were enacted

following the 2008 financial crisis and involve new regulatory issues.

In addition, some liberal advocates are unwilling to bring certain cases to a conservative-leaning high court, fearing an unfavorable decision that would set a nationwide precedent. Like their business-oriented counterparts, public interest lawyers effectively influence the court's agenda, too. They do so by declining to draft petitions for some kinds of civil rights and consumer cases. Their rationale: They do not want the Supreme Court to revisit decades-old decisions that tend to favor the liberal agenda.

"You don't want to go up and make matters worse," said Scott Nelson, a lawyer at Public Citizen and one of the most successful attorneys at getting cases before the justices.

Given the current makeup of the high court, his advocacy group focuses more resources on opposing the petitions filed by business. "Sometimes when I'd rather not take a case, I emphasize my limited time and resources," Nelson said. "Talking about resources is a nicer way of no, than telling someone, 'You don't have a good case.' "

Measuring the impact of these elite attorneys on how the court ultimately rules is difficult. Many factors affect how justices interpret the Constitution and federal statutes. "It's not like we're judging a moot court: Which lawyer is better?" said Justice Samuel Alito. "It's the case, not the lawyer."

But the involvement of attorneys recognized for their Supreme Court experience can influence whether a case simply makes it before the court, a prerequisite to a decision affecting the law of the land.

"If you know you have a solid beginning, two people making the best argument on both sides, that makes it less anxious for you," said Ginsburg, the senior liberal on the court.

An absence of skilled lawyers also makes a difference.

"Any number of people will vote against a cert petition if they think the lawyering is bad," said Justice Clarence Thomas, a conservative. He said such decisions stem from the justices' desires to ensure that both sides have strong representation.

Justice Antonin Scalia, also a conservative, acknowledged that in some instances he will vote against hearing a case if he fears it will be presented poorly and he expects another opportunity to rule on the issues the case presents. "I have never voted to take a case only because a good lawyer was on it," Scalia said. "But I have voted against what would be a marginally granted petition when it was not well presented.... where the petition demonstrates that the lawyer is not going to argue it well."

The justices say that some top advocates do champion individuals against corporations. They frequently cite two lawyers.

One is Jeffrey Fisher, who leads Stanford Law School's Supreme Court clinic, a group

that represents criminal defendants and employees, consumers and other individuals. Law clinics, which don't charge clients, were created to give students hands-on appellate experience. Fisher has argued about two dozen cases before the high court.

Clinics are a limited counterweight to the elite bar, however. Some are associated with top corporate lawyers, which means the clinics steer clear of some of the same business cases that leading law firms avoid. And most clinics are tiny – staffed by two professors and a rotating cast of students. “We can only do so much,” Fisher said.

The other lawyer often cited by the justices as a counterbalance to the corporate-focused bar is David Frederick. A former Supreme Court clerk and assistant solicitor general, Frederick is among the private lawyers who have appeared most before the court during the last decade.

Even so, Frederick is just one lawyer handling a handful of Supreme Court cases a year; corporate firms account for more than half of the court's docket. Frederick also noted that he has represented corporations as well as individuals at the high court.

“Are we a valid alternative? We certainly could handle responsibly a few more cases,” Frederick said. “But for the large quantity of cases your data reflects, it would not be realistic to call us the alternative.”

ART OF PERSUASION

The court provides loose guidelines on the kinds of cases it will take. It typically seeks

cases that give it the opportunity to settle disagreements between lower regional courts of appeals – so-called circuit splits. The idea is to ensure a consistent interpretation of the law and the Constitution.

The justices may decide to take cases that do not include a circuit split if the case involves issues of immediate and national importance, such as President Obama's health care program, the Affordable Care Act. Unlike in the lower courts, where dozens of issues may be debated, the Supreme Court generally limits its review to one or two discrete issues per case.

When lawyers submit a petition to the high court, their names are on the cover of the filing. Supreme Court clerks provide the initial screening of these petitions. Eight of the justices participate in a “cert pool,” a process in which one of their clerks summarizes a case for the other justices to consider. Alito does not participate in the cert pool and has his own clerks review every petition.

One fact a clerk may highlight in the memo is the presence of a prominent, highly regarded lawyer who's involved in the case.

Morrison, the George Washington law professor, said clerks may be reluctant to back an inexperienced lawyer, fearing that doing so might lead to the acceptance of a case that's poorly presented or based on a moot legal question. Playing it safe spares the court the embarrassment of having to dismiss a flawed case after it has been fully argued.

Conversely, the clerks know which advocates the justices respect and admire.

“The cert pool memo certainly creates additional barriers” for lawyers who aren’t well-known to the court, Morrison said.

Familiarity with certain advocates might make the difference in whether an ambivalent justice votes to take up a case, said Eugene Fidell, a longtime Washington lawyer now teaching at Yale Law School. That means the specialty bar may be able to skew the court’s docket toward the litigation agendas of their clients, Fidell said.

“There is something disturbing, on a symbolic level, about an important national institution looking like an inside-the-Beltway club,” he said.

POWER BAR

Reuters identified about 1,500 Supreme Court petitions filed from 2004 to 2012 in which the interests of companies were arrayed against those of customers, employees or other individuals. Businesses filed 55% of the cases. Elite lawyers filed about one out of seven of all appeals - usually for business:

The elites were:

• Three times as likely to appeal on behalf of business:

77%

of elite lawyers represented businesses

23%

of elite lawyers represented individuals

• A big advantage for their business clients:

23%

of business petitions were accepted when filed by an elite

7%

of business petitions were accepted when filed by a non-elite lawyer

• And a big equalizer for the few individuals able to hire them:

30%

of individuals’ petitions were accepted when filed by an elite

1%

of individuals’ petitions were accepted when filed by a non-elite lawyer

A NEW INSIDER

One of the fastest-rising members of that club is Katyal, the lawyer who emulates Chief Justice Roberts.

In at least one sense, Katyal is atypical of the elite bar: A Hindu who was born to Indian immigrants, he is one of just three racial minorities in the top five dozen.

In all other respects, Katyal fits the paradigm. Like 31 of the top 66, he went to one of America's top two law schools (Yale). And he cultivated the right mentors, having worked directly for three of the current justices: Roberts, Breyer and Elena Kagan.

When discussing his work, Katyal often talks of the chief justice. He mentions one particularly notable instance, when he interviewed with Roberts for a summer job after law school. Before accepting, he asked Roberts, a Republican, whether Roberts would be comfortable working with a Democrat.

"Not only would I be comfortable with it," Katyal quoted Roberts as saying, "I want you here because I want to learn what others who may at times see the world differently than I think."

Katyal cited that conversation in a 2002 letter he wrote to the U.S. Senate Judiciary Committee in support of Roberts' nomination to an appeals court.

Katyal later joined the Obama administration as the principal deputy solicitor general in 2009 – the same title, he notes, that Roberts had in the George H.W. Bush administration. After Kagan left as solicitor general to become a justice in 2010, Katyal tried for the top job but lost to the more experienced Donald Verrilli.

"It was probably the hardest professional thing that I have gone through," Katyal said. Still, he said, he quickly realized the opportunities that a Supreme Court specialty afforded.

"I had calls from a bunch of law firms," he said. "So many sweet things happened."

Attorney General Eric Holder hosted a farewell party for him, he said, and Justices Roberts, Breyer and Kagan attended.

Then, Katyal was hired to take over the appellate practice at Roberts' former firm, Hogan Lovells. He arrived to great news. "The day I walked in here," Katyal said, "there was a letter waiting for me from the chief." Katyal had been appointed by his former mentor to a prestigious judicial committee.

Since he joined Hogan Lovells three years ago, Katyal has worked hard to build the practice. He tapped college and law school connections and reached out to tech companies, knowing of the high court's growing interest in lucrative patent disputes. He also burnished his pro-business bona fides in order to better attract deep-pocketed corporations. He even offered to represent some litigants for free.

Among Katyal's successes: In July, he persuaded the justices to take up an appeal by his client, a group of gas companies accused of manipulating prices. Katyal is seeking to reverse a lower-court ruling that allowed the

antitrust case against the traders to go forward. The appeal will be heard in January.

At stake, Katyal asserted in court filings: hundreds of millions and perhaps billions of dollars for corporations.

“We’re not where the chief was when he was here,” Katyal said of his firm’s Supreme Court practice. “But that’s where we want to go. That’s our goal.”

“Analyzing the Impact of the Supreme Court Bar”

Reuters

Janet Roberts

December 8, 2014

Our reporting team used a wide array of data and computing tools to produce the most comprehensive analysis to date of the U.S. Supreme Court private bar.

The documents

To determine which lawyers succeeded in getting the most cases before the high court, we used data from online legal research service Westlaw, a unit of Thomson Reuters. The data contained appeals filed during Supreme Court terms beginning in 2004 through 2012. At the time we began our analysis, it was the most complete data available. The data included about 14,400 petitions for writ of certiorari, formal requests for a Supreme Court hearing.

We focused our research on the influence of private lawyers. As a result, the analysis omitted some 1,300 petitions filed by government lawyers. Also omitted: about 2,800 self-filed paid petitions and tens of thousands of petitions in which petitioners, typically prisoners, file unpaid appeals without a lawyer. (These are rarely taken up by the court.) We also chose not to consider automatic appeals – jurisdictional statements guaranteed to be heard under the law – and petitions the court adjudicated without hearing arguments.

This left about 10,300 petitions. We attempted to verify petition lists with top lawyers and firms and to correct errors or

omissions. Nevertheless, a small number of petitions may be missing from the analysis.

The petition document is what the Supreme Court refers to when it chooses to grant or deny an appeal. That decision leads to clear data that can be analyzed: a “yes” or “no” on each lawyer-filed petition.

The Supreme Court paper trail also includes response briefs and friend-of-the-court, or amicus curiae, briefs. Lawyers say well-written briefs can persuade the justices to accept or reject a case. But because the response and amicus briefs produce no clearly measurable results, we did not include them in our analysis.

Categorizing the petitions

We categorized the petitions by lawyer, firm, type of case and type of petitioner. That work enabled the reporters – two of whom are attorneys – to identify 66 lawyers and 31 law firms most active and successful before the court. When the names of two or more lawyers appeared on a brief, that petition was counted toward each lawyer’s totals. For group counts, however, such as the number of petitions filed by the top lawyers, petitions with multiple lawyers were counted once.

Identifying “Big Business”

One Calais, a Thomson Reuters-owned document-analysis software program, was used to identify companies that petitioned the

court. We defined “Big Business” as companies that were listed in the S&P 1500 Composite Index, the MSCI All Country World Index, the Forbes list of largest private U.S. companies, and Hoovers.com listings of foreign companies with more than \$1 billion in annual sales.

Exploring the petitions

We used a machine-learning method known as latent Dirichlet allocation to identify the topics in all 14,400 petitions and to then categorize the briefs. This enabled us to identify which lawyers did which kind of work for which sorts of petitioners. For example, in cases where workers sue their employers, the lawyers most successful getting cases before the court were far more likely to represent the employers rather than the employees. For this work, Reuters was advised by James Cochran, a statistics professor at the University of Alabama, and Andrew Nystrom, a former Thomson Reuters research engineer with expertise in machine learning.

Identifying top petitioners and firms

Top petitioners were defined as those who filed at least nine petitions from 2004 through 2012 – an average of at least one per year – and had at least three of those petitions granted certiorari. These 66 lawyers are extreme outliers among the 17,000 private lawyers who petitioned the court in those years, and their success rate in getting appeals accepted is four times higher than average. The 31 top firms had to meet our criterion of filing at least 18 petitions – an average of two a year – in the period, making them extreme outliers among the 8,000 firms that filed

appeals. In addition, at least 10 percent of a firm’s petitions – and a minimum of three – had to have been granted certiorari, a success rate that is double the average.

Exploring oral arguments

To explore which lawyers dominated the crucial job of making oral arguments before the court, we used the Supreme Court’s official journals, which list every argument. Case numbers, titles and the names of lawyers were taken from the journals to build a database of all arguments from the 1994 through 2013 terms. To identify the winning party in each case, we consulted The Supreme Court Database, archived by Washington University, and The Oyez Project, an archive of Supreme Court arguments and opinions at the Illinois Institute of Technology Chicago-Kent College of Law.

Identifying top oral advocates

We defined a top oral advocate as anyone who argued at least five cases during the last decade. Just 34 lawyers qualified. Within this group, an elite group of eight lawyers each argued 15 or more cases in that period.

Some lawyers worked as government attorneys before entering private practice. Any work from their days on a government payroll was excluded from the tally, because the reporting focused on the private bar and paying business. Our counts do include cases in which the government hired a private lawyer for a case.

Occasionally, cases are re-argued before a decision or, in rare cases, are argued on

consecutive days. In such cases, a lawyer's multiple appearances counted as one argument.

“Elite Law Firms Spin Gold from a Rarefied Niche: Getting Cases before the Supreme Court”

Reuters

John Shiffman, Janet Roberts and Joan Biskupic

December 8, 2014

On a March morning in 2011, lawyer Ted Boutros approached the lectern at the U.S. Supreme Court. Boutros represented the world’s largest retailer, Wal-Mart, in one of the most anticipated business cases in years. A trial judge had certified a class of more than 1.5 million female employees who alleged systematic gender discrimination.

If the women prevailed, Wal-Mart stood to lose tens of billions of dollars. Yet before Boutros even began – “Mr. Chief Justice and may it please the Court...” – he had already succeeded in one significant way: As a result of his work on the case, Wal-Mart was becoming a premier client of his law firm, Gibson, Dunn & Crutcher.

Today, Gibson Dunn handles real estate, securities, corporate, environmental and other legal matters for Wal-Mart – work that has generated more than \$50 million in new revenues for the firm, say people familiar with the relationship.

Gibson Dunn is not the only law firm to turn Supreme Court appearances into gold. After the firm Sidley Austin won a Supreme Court patent case for eBay, it earned at least \$10 million in unrelated legal fees from the online retailer, say people with knowledge of the account. Likewise, the firm Jones Day secured Westinghouse/CBS as a major client following a successful high court case. In the

years that followed, the relationship generated more than \$10 million in fees, sources say.

Securing profitable, long-term relationships with America’s largest corporations is one reason major law firms began creating Supreme Court practices in the late 1980s and early 1990s.

Now, corporate firms so dominate the Supreme Court bar that they boast outsized access to a high court that’s already inclined to support corporations over individuals.

A Reuters examination of about 10,300 court records filed over a nine-year period shows that lawyers at a dozen law firms, including Gibson Dunn, Sidley Austin and Jones Day, have become extraordinarily adept at getting cases before the Supreme Court. The news agency analyzed petitions filed by private attorneys, not those submitted by government lawyers or prison inmates and others who lack representation. Although the high court typically agrees to hear 5 percent of the petitions it receives from private attorneys, Reuters found that lawyers at the top dozen firms were successful 18 percent of the time.

These firms were involved in a third of the cases the high court accepted, Reuters found. When the justices agreed to hear cases

brought on behalf of Big Business, top firms were involved 60 percent of the time.

A slightly larger group – 31 firms – accounted for 44 percent of all cases the court accepted.

The domination of the Supreme Court docket by firms that commonly represent business interests has a direct, largely unseen effect on consumers seeking to sue corporations: These individuals must select from a much smaller and, in many instances, less successful pool of lawyers to handle their cases.

The reason: Many elite law practices won't take those cases. The activities of the firms' corporate clients are so broad, and their concerns so intertwined, that the lawyers point to disqualifying conflicts of interest – some specific, some general.

An elite firm might refuse to represent an individual suing a corporation on a labor issue, for example, because it fears that winning the case could create a precedent that might hurt top clients in other industries. Large firms do take cases pro bono on behalf of the indigent. But those appeals are generally related to criminal law or social causes such as gay marriage – topics unlikely to affect U.S. business interests.

“We do not take cases that could make negative law for our clients,” said Jones Day's Glen Nager, who has argued 13 cases before the Supreme Court.

The heads of several Supreme Court practices dispute whether public interest or consumer groups are truly disadvantaged when seeking effective counsel. “There are some practitioners out there who specialize in taking the cases the larger corporate firms can't take,” said Jonathan Franklin, a former law partner of now-Chief Justice John Roberts and head of the Supreme Court practice at Norton Rose Fulbright. “There is a sufficient pool of capable lawyers to take those cases, even if it's a smaller pool.”

But for many of the top firms, such conflicts mean declining to represent environmental organizations, labor unions, employees suing employers, or consumers filing class actions; each kind of case might conflict with the general interests of their clients.

“It's not that there aren't lawyers at these large firms who aren't public-spirit minded and don't want to do these cases. It's that their business model won't allow it,” said Joseph Sellers, a lawyer for the mid-sized firm Cohen Milstein, who argued against Wal-Mart at the Supreme Court.

“In terms of access to justice, the ability of individuals to get their issues raised in the Supreme Court is more limited,” Sellers said. “Our side just doesn't have the resources.”

“CUTTHROAT ENVIRONMENT”

At their core, Supreme Court practices, like many things in the nation's capital, are about money and proximity to power.

“If you want your firm to be viewed as a Washington institution, you have to have a Supreme Court practice,” said Pratik Shah, who leads the group at Akin Gump.

Chris Landau agrees. From his office, he has one of the best power views in Washington, looking directly toward the eastern side of the White House. When he works late, Landau can watch the president’s helicopter lift off into the sunset. On the windowsill before this vista, he has placed an autographed picture of himself standing beside Justice Clarence Thomas.

Landau runs the Supreme Court practice at Kirkland & Ellis, one of the older and most profitable law firms in America. His career arc, as well as the evolution of his firm’s high court practice, is typical of peers.

Landau graduated from Harvard Law School. He clerked for Thomas and for Justice Antonin Scalia, and joined Kirkland’s appellate practice in 1993, the same year as former Solicitor General Ken Starr.

The evolution of specialized, corporate-focused Supreme Court practices at Kirkland and other firms came as the justices began taking fewer cases – from about 150 annually in the 1980s to half as many today. That makes competition among lawyers fierce: More than 500 attorneys in Washington tout Supreme Court expertise on firm websites.

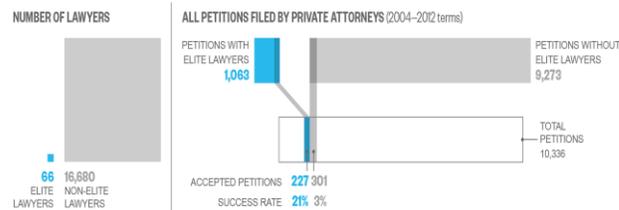
“It’s a very cutthroat environment,” Landau said.

Often, several veteran lawyers said privately, landing a Supreme Court case is almost as important to their firms as prevailing in court. On website biographies, lawyers and firms routinely list the number of Supreme Court arguments they’ve made and briefs they’ve filed; rarely do they list a win-loss record. Simply appearing before the top court brings with it prestige and publicity that firms believe help them recruit new corporate clients and lure the next generation of top attorneys.

A persuasive few

Just 0.4%, or 66, of the lawyers who petitioned the court ...

Accounted for 43% of the 528 cases the justices agreed to hear over the past decade.



Source: Reuters analysis of Westlaw data

Most firms brand these lawyers not only as Supreme Court specialists but as appellate experts. Almost all of the lawyers, including Landau, spend more time arguing in U.S. courts of appeals, one rung below the Supreme Court. They assist partners in trial courts, and the firms work outside of the courtroom, advising corporations and trade associations on regulatory matters.

With Congress gridlocked, the court’s role has become more prominent, so much so that the nation’s most influential business lobby, the U.S. Chamber of Commerce, has hired five former Supreme Court clerks. (See related story)

Supreme Court cases themselves aren’t usually as directly profitable as other types of

litigation because they generally require fewer lawyers and less research. By contrast, trial and due diligence can involve teams of lawyers to review reams of paperwork and evidence. In just one month, a large trial can generate \$1 million or more in fees. Firms typically charge far less to handle an entire Supreme Court case: The bill might range from \$50,000 to \$500,000 but has, in some cases, reached beyond \$1 million.

Besides petitioning the court to have cases heard, the top firms file “briefs in opposition,” aimed at dissuading the Supreme Court from granting an appeal if the client won in the lower court. They also frequently file “friend of the court” or amicus briefs. Most top firms submitted several dozen opposition and amicus briefs during the period Reuters examined. Records show their focus seldom varied: Whatever the type of brief, it largely reflected the interests of corporate America.

Like other firms that dominate the Supreme Court bar, Landau’s Kirkland clients are almost exclusively corporations. He has represented Morgan Stanley, BP, Dow Chemical, ConAgra Foods, Raytheon, Nationwide Mutual Insurance, Motorola, W.R. Grace and Union Carbide.

The roster of clients makes Kirkland extremely unlikely to represent an individual suing a corporation, Landau acknowledged. “The last thing we want,” he said, “is to make one of our long-standing clients unhappy with what we do.”

ROLE REVERSAL

Increasingly, the elite Supreme Court practices at firms are led by rainmakers, lawyers who have parlayed their government service into private sector profit. These lawyers are advocates not lobbyists, but they use their skills, experience, influence and connections in similar ways.

At the very top are many former solicitors general and their assistants. These attorneys gain unsurpassed experience before the Supreme Court by arguing on behalf of the federal government. Some solicitors general have argued scores of cases. Because this advocate has such a close relationship with the court, the solicitor general has sometimes been called the 10th justice.

Six former solicitors general now play a major role in a Supreme Court practice in Washington. Another recent solicitor general, Elena Kagan, is the court’s newest justice.

Firms and clients covet former solicitors general because they are consummate government insiders. To prepare to appear before the justices, solicitors general and their assistants meet face-to-face with senior officials throughout the government. They are often wooed by special interest groups that have stakes in cases.

Law firms also use lawyers with solicitor general experience to pitch regulatory and legislative work to clients. It is not unusual for a firm handling a Supreme Court case to remain involved long after a decision is issued, as lower courts implement the ruling

and as the losing side lobbies Congress to alter or reverse it. Mayer Brown’s Andrew Pincus, for example, frequently appears before all three branches of government.

A former assistant solicitor general who has argued 23 Supreme Court cases, Pincus regularly files regulatory comments, testifies before Congress and writes remarks for others on his areas of expertise – antitrust, securities, patent, arbitration and financial issues. Sometimes, he testifies or advocates on behalf of business interests generally, sometimes on behalf of specific clients.

“I tell clients that the same skills I use at the Supreme Court – oral arguments and writing briefs – can be brought to bear elsewhere in government,” Pincus said.

As demand for specialization increases and the elite Supreme Court bar shrinks, some corporations now compete against one another to secure the top lawyers.

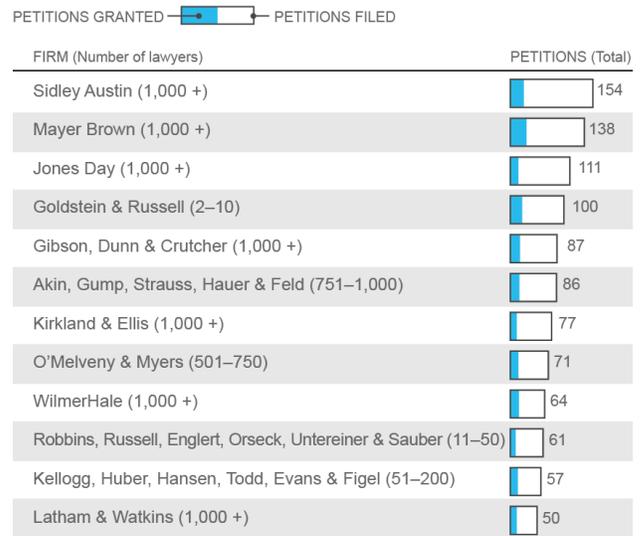
During his stints as the top attorney at Aetna and CBS/Westinghouse, Louis Briskman hired outside counsel in more than a half dozen Supreme Court cases from 1989 to 2013.

“It’s radically changed in the last 10 years,” Briskman said. “Back then, you looked for a specialist in an area of the law. Now, you are not going to go with the specialist who won for you at the trial court in Pittsburgh. You want the guy who knows the justices and the justices know. There are 12 lawyers and firms that keep coming up.”

Briskman said that the dozen includes two advocates he retained for Aetna and CBS: Miguel Estrada of Gibson Dunn and Paul Clement of Bancroft PLLC. Clement is a former solicitor general, and Estrada is a former assistant in the office. As cases move from trial to appellate courts, corporations often try to box each other out by retaining firms with superstar lawyers.

“These days,” Briskman said, “before you even finish your circuit appeals, the other side has already put down money on an Estrada or a Clement.”

Top petitioning law firms



Source: Reuters analysis of Westlaw data

SHAPING THE LAW

Law firms have different goals than advocacy groups – profit, for one – but their Supreme Court practices often share an ideological interest in shaping the law for clients. For firms that are most active before the high court, those clients are more often than not corporations.

The Wal-Mart case illustrates not only how a Supreme Court victory helped a firm secure future business, but also how firms look for ways to use the high court to benefit all their corporate clients.

For Ted Boutros, the route to the Supreme Court lectern in 2011 began decades earlier. As early as 1989, Boutros and mentor Ted Olson began advocating for change on behalf of business to the courts, media and Congress. They were especially critical of punitive damages and class-action lawsuits, the legal process by which individuals band together as a group to sue over a common issue.

Throughout the 1990s, lawyers at Gibson Dunn and other large firms argued that class-action court rules were too favorable to consumers and encouraged spurious lawsuits. A potential turning point came in 1998, when all federal courts adopted a procedural rule change that made defending large class action suits easier for corporations accused of wrongdoing.

Under the previous rule, once a judge certified a class during pre-trial proceedings, appealing that decision became extremely difficult until after a trial had ended. The effect was pronounced: After a class was certified, most companies settled rather than risk large trial expenses and punitive damages. Because few cases were tried and appealed, there was a dearth of Supreme Court rulings on class action litigation.

The rule change adopted in 1998 permitted a company to lodge an immediate appeal on the

issue of class certification. Shortly afterward, Boutros, Olson and other Gibson Dunn partners began strategizing ways they could use the new rule to help corporate clients.

The Wal-Mart case caught the attention of Boutros in 2004, shortly after a federal judge in San Francisco certified the class of 1.5 million women, the largest class in American history. Before moving forward with an appeal, Wal-Mart, the top Fortune 500 company, began looking for a new firm to handle the case. Many attorneys who were interviewed hedged their analysis, but the Boutros pitch was different, recalls Michael Bennett, Wal-Mart's general counsel for litigation.

"He told us there that in all probability the Supreme Court was looking for a case like this," Bennett said. At that point, Bennett said, few companies had the resources to risk the appellate costs and potentially punitive penalties that come with forgoing a settlement for trial. "Wal-Mart happened to be a client with enough staying power."

The case took six years to wend its way through the liberal-leaning 9th U.S. Circuit Court of Appeals. Judges ruled against Wal-Mart three times, including a 6-5 full court opinion in 2010. As Wal-Mart prepared to file a petition to the high court, however, Boutros advised Wal-Mart that the Supreme Court's make-up had become more favorable during the appeals process, lawyers involved in the case said. The 2005 and 2006 appointments of Roberts and Alito strengthened the pro-business orientation of a

court already shedding its 1970s-era reputation as consumer-friendly.

The Wal-Mart appeal became the first Supreme Court case heard under the 1998 rule change. A few months after Boutros made his oral argument before the court, Wal-Mart won. In a 5-4 ruling, the court determined that the class of 1.5 million was too large to prove a pattern of discrimination.

Afterward, the opposing lawyer, Sellers, said the decision overturned four decades of class-action jurisprudence. The business community hailed the decision as one that would curtail specious suits. Gibson Dunn posted a letter to clients the day after the ruling.

“This is an extremely important victory for all companies, large and small, and for their employees,” the letter said.

During a legal seminar that fall, Gibson Dunn attorneys demonstrated the stakes involved by displaying a PowerPoint slide with the logos of corporations that supported Wal-Mart at the Supreme Court – FedEx, Bank of America, Microsoft, Cigna, Kimberly-Clark,

Walgreens, Dole, DuPont, Tyson, General Electric, Pepsi and Del Monte.

Last year, the firm scored two more Supreme Court class-action victories. One was on behalf of Comcast, which had been sued by cable subscribers in the Philadelphia region. The other was on behalf of Standard Fire Insurance, a subsidiary of Travelers, which had been sued by homeowners in Arkansas.

In the months that followed, Gibson Dunn lawyers said, the firm was approached by potential clients – corporations seeking help with class actions or other possible Supreme Court cases. The new clients include Toyota, Yamaha and Wackenhut (now G4S Secure Solutions).

The fallout from the decision in the Wal-Mart gender discrimination case, meanwhile, has created another source of revenue for the top firms: Because the high court ruled that a nationwide class of 1.5 million was too large, smaller groups of women began filing similar lawsuits across the country.

Each new filing created more business for plaintiff's lawyers - and for Wal-Mart's law firm, Gibson Dunn.

“Chamber of Commerce Forms its own Elite Law Team”

Reuters

John Shiffman

December 8, 2014

Advocacy groups have long played an important role in Supreme Court litigation, crafting amicus or “friend of the court” briefs in significant cases. The American Civil Liberties Union and consumer-oriented Public Citizen regularly make such filings.

But perhaps no other national advocacy organization has so embraced the trend toward Supreme Court specialization as the chief American business lobby, the U.S. Chamber of Commerce.

The chamber has created the equivalent of a boutique law firm at its headquarters, one whose roster of talent now rivals some of Washington’s most elite practices.

A few other advocacy groups have one or two former Supreme Courts clerks on staff; the chamber employs five. One of those former clerks was among the George W. Bush Administration lawyers who prepped Chief Justice John Roberts and Justice Samuel Alito for their confirmation hearings.

The lobby’s formal effort to use the courts to influence the government can be traced to a 1971 memo sent to a Chamber of Commerce official from Virginia lawyer Lewis F. Powell.

Powell wrote the memo just five months before he became a justice himself. In it, he called on the chamber to create a legal staff

to represent business interests before the court. The court’s influence in American life was growing: Civil rights, labor and consumer rights groups were prevailing in the courts – “often at business’ expense,” Powell wrote. “Other organizations and groups, recognizing this, have been far more astute in exploiting judicial action than American business.”

The U.S. Chamber Litigation Center was created in 1977 and filed scores of friend-of-the-court briefs over the next three decades. In 2008, the center’s director was featured in a New York Times Magazine cover story about the Roberts court’s pro-business rulings.

But inside the organization, some clamored for a more aggressive approach.

In 2010, chamber CEO Thomas Donohue began replacing the longtime legal team with former Bush Administration appointees.

As a result, say senior lawyers at prominent Washington firms, the chamber became more active before the Supreme Court and throughout the U.S. court system. The chamber still hires outside counsel to help write its briefs, but it has increased its filings nationwide from about 100 last year to about 150 this year, chamber lawyers said. Part of the strategy, they said, is to follow through and write briefs that help enforce pro-

business Supreme Court decisions in the lower courts.

Donohue's first hire, chamber officials said, was Lily Fu Claffee, a senior Bush official at the treasury, justice and commerce departments. Claffee earns more than \$900,000 a year, significantly more than her predecessor, the most recent tax records show. Claffee used her experience in her previous job – the partner responsible for hiring lawyers in Mayer Brown's

Washington office – to create her own boutique shop at the chamber. In addition to five former Supreme Court clerks, half of the eight lawyers are Harvard Law School graduates.

“We hired people with commitment, belief and purity of purpose,” said Claffee, who can quote by heart phrases from Powell's 1971 memo. “It's all part of strengthening our brand and our substance.”

“Former Clerks: Today’s Prospects, Tomorrow’s Elite”

Reuters

John Shiffman
December 8, 2014

If a handful of former solicitors general are considered veteran free agents, then the three dozen young clerks who depart the high court each summer are hot draft prospects.

On Nov. 3, six clerks from the most recent Supreme Court term assembled on a top floor of Jones Day’s building, which overlooks the U.S. Capitol and is leased as a backdrop for network TV telecasts. A firm photographer began to arrange a portrait, one intended for the Jones Day website and trade publications.

Supreme Court clerks are so prized that the market-rate signing bonus is \$300,000. They are presumed to be among the smartest young lawyers in America. As important is the prestige that comes with such high-profile hires – firm partners say it helps them recruit other lawyers and impress current and prospective clients.

The process repeats itself every summer, as a class of clerks finishes its one-year term and is replaced by a new class: four clerks hand-picked by each sitting justice. The jobs are so selective that although the justices sometimes directly choose from the pool of top law school graduates at the best schools, they also pick attorneys who have clerked for appellate judges or have spent several years practicing law.

Former clerks also are presumed to have a unique perspective on how the court and the

justices operate. Clerks write memos that help the justices decide which cases to accept and which ones to reject. Some firms believe the experience gives clerks insight into how successful petitions are framed – and perhaps how the justices themselves think.

In a 2012 pitch letter to a potential client, Gibson Dunn boasted of 12 former high court clerks on staff, adding: “We know how to customize and tailor arguments to particular justices who may be skeptical or swing votes.” The firm now has 23 clerks on staff.

Forty-four percent of all successful petitions filed to the Supreme Court from 2004 through 2012 contained the name of a former clerk.

In the last three years, Jones Day has nearly doubled its roster of former clerks, which now stands at 38; Jones Day hired six clerks in 2012 and again in 2013. This year, it has hired seven.

Beth Heifetz, the Jones Day partner who recruits former Supreme Court clerks, was a clerk for Justice Harry Blackmun in 1985-1986. Despite the \$300,000 signing bonuses, she said her firm would have hired more if more had been available. Beside her computer, she has hung a picture from last year’s class of six clerks. It’s akin to a trophy.

“There’s going to be a number that’s too high, but I haven’t gotten there yet,” said Heifetz. “This is a talent business.”

“In an Even-Clubbiest Specialty Bar, 8 Men Have Become Supreme Court Confidants”

Reuters

Janet Roberts, Joan Biskupic and John Shiffman

December 8, 2014

About 30 seconds into an appearance before the U.S. Supreme Court this fall, lawyer Paul Clement was interrupted by a question.

It came from Justice Elena Kagan, and it cut to the heart of his case. But during Clement's response, another justice jumped in: his former boss, Justice Antonin Scalia. He suggested a different answer to the question that his fellow justice had posed.

Clement, once a clerk for Scalia, took the cue. “You could definitely say that, Justice Scalia...”

“You could not only say it,” Scalia replied, “it seems to be true.”

“Well, all the better, then,” Clement said, drawing light laughter from the usually reserved audience.

The exchange illustrates the familiarity that distinguishes a handful of lawyers from more than a thousand other attorneys who have appeared before the Supreme Court during the past two decades.

Previous stories in this series explored how five dozen top lawyers and their firms have enjoyed remarkable success at persuading the high court to accept their clients' appeals. But an even smaller, more elite group of attorneys, including Clement, has come to

dominate the final phase of a case: the oral arguments. That phase, a direct give-and-take with the justices, is an attorney's last chance to sway the decision. A knack for connecting with the justices is crucial.

A Reuters analysis of high court records shows that a group of eight lawyers, all men, accounted for almost 20 percent of all the arguments made before the court by attorneys in private practice during the past decade.

In the decade before, 30 attorneys accounted for that same share.

In this ever more intimate circle, lawyers say, chemistry with the court is key. The October case was a milestone for the 48-year-old Clement: It marked the 75th time he had appeared before the high court, second most among active lawyers in private practice. The following week, at a party celebrating the feat, veteran attorney Lisa Blatt toasted Clement's success.

“The justices love Paul,” Blatt declared. “They visibly relax when Paul stands up and they are smiling when he sits down.”

TEEING UP A CASE

In exclusive interviews, many of the justices acknowledge the growing specialization of the Supreme Court bar, and they largely

welcome it. They speak glowingly of the repeat performers, explaining that elite lawyers help them understand and sift through complex legal issues.

“The problem is when you have a tough case, you need really good lawyers to tee it up, to make the best arguments,” said Justice Clarence Thomas. “That’s what you are looking for.”

A lawyer’s arguments can affect the outcome – not often, but often enough, said Justice Anthony Kennedy. The swing vote in many high-profile cases, Kennedy said a lawyer can change minds by framing a case or issue in ways the justices hadn’t considered.

“I go in with an inclination, underscore inclination,” Kennedy said. “Not a two-week sitting goes by that a justice doesn’t say, ‘I went in with this idea,’” and then heads in a different direction.

As retired Justice John Paul Stevens explained, “They earn respect by their performances. And because they have respect, they are more successful. I am not aware of any downside.”

Charles Ogletree, a professor at Harvard Law School, disagrees. “I think that hearing different voices, from more women and people of color, would change the way the court looked at cases and analyzed them,” Ogletree said.

No matter; the club is only growing tighter. In the last term alone, 53 percent of the cases the court heard featured at least one lawyer –

in government service or private practice – who had clerked for a sitting justice. That’s three times more often than 20 years earlier, Reuters found.

The eight lawyers who have appeared most often before the court have especially deep connections to justices past and present. All but one have worked in the powerful U.S. Solicitor General’s office (whose lawyers are constantly at the court representing the federal government), or for a justice as a law clerk, or both.

Justice Stephen Breyer values their understanding of how the high court operates. “The Supreme Court is not the CIA,” Breyer said. “I want people to know how the court works.”

The eight advocates have represented a varied clientele. Lawyer Ted Olson not only advocated for George W. Bush in *Bush v. Gore* but also on behalf of same-sex marriage. Attorney Seth Waxman has represented Bank of America and death-row inmates. Gregory Garre defended the University of Texas’ affirmative action policy. And David Frederick won a judgment from pharmaceutical maker Wyeth for a woman who lost an arm to gangrene after taking an anti-nausea drug.

But like Clement, this group as a whole primarily represents corporate America. In the last 10 years, Reuters found, half of their arguments were for businesses.

FRIENDS OF THE COURT

The connections between justice and lawyer extend beyond the courtroom and into social life.

Olson is perhaps the best known of the elite. After helping Bush win the 2000 election case, he became the new president's first solicitor general. Olson returned to private practice and in 2010 prevailed in the Citizens United decision, which allows corporations and labor unions to spend unlimited amounts of money on political campaigns.

So familiar is Olson that justices referred to him by his first name in interviews. As Thomas put it, "You want to hear what Ted has to say."

When Olson married in 2006, Justice Kennedy and retired Justice Sandra Day O'Connor were among the guests at the ceremony in Napa Valley, California. Olson and Scalia regularly attend an intimate New Year's Eve dinner. The location: Justice Ruth Bader Ginsburg's apartment at the Watergate complex. Last year, Kagan went, too.

Another prominent lawyer, Carter Phillips, has remained friends with Justice Samuel Alito since the two worked in the solicitor general's office in the 1980s. Phillips is the only attorney in private practice who has appeared more often before the Supreme Court than Clement.

Two other leading Supreme Court advocates, Waxman and Blatt, appeared in a Shakespeare Theatre Company mock trial of Coriolanus last year, co-starring justices Ginsburg, Breyer and Alito. Waxman, a U.S.

solicitor general during the Clinton administration, often crosses path with Scalia, too.

When a C-SPAN host once asked Scalia about a jocular exchange the justice had with Waxman during an oral argument, Scalia responded matter-of-factly. "I know Seth," he said, "and consider him a friend."

Law professors say such relationships should be of little concern. "It's true of every court where people specialize, and people who specialize are going to become familiar to the judges," said Steven Lubet of the Northwestern University Law School. But while all other federal judges have policies on socializing with lawyers, Lubet said, the top court does not.

"The U.S. Supreme Court, because it has never set any standard like that, basically is saying, 'Trust us,'" Lubet said. "I don't think anyone is doing anything wrong, but it would be good to know."

Familiar faces



*Includes government lawyers
Source: Reuters analysis of Supreme Court data

RECUSAL RARE

Justices rarely disqualify themselves from cases. When they have done so, it was usually for financial reasons – such as owning stock in a corporation appearing before the court – not social ones.

No specific rules govern friendships between justices and those who come before the court. And in the past, the justices have considered their social lives to be largely irrelevant.

In 1942, Supreme Court Justice Robert Jackson spent a weekend with President Franklin D. Roosevelt in the Virginia countryside. The next month, Jackson heard a major court case about the administration's powers, and later wrote the opinion that favored the president. In 1963, Justice Byron White went skiing in Colorado with Attorney General Robert Kennedy. A few weeks later, Kennedy personally argued a case before White and the other justices.

“I see nothing wrong with Justice White's and Justice Jackson's socializing,” Scalia wrote in an unusual 2004 memorandum, citing those trips when he himself was under scrutiny. Friendships shouldn't trigger automatic recusals, he said.

Scalia's comments came after he took a duck-hunting trip with Vice President Dick Cheney. The court was considering a case in which environmentalists sought records from an energy committee led by Cheney. After the trip, the Sierra Club called on Scalia to recuse himself. He declined.

Recusal should be rare, Scalia said, because justices who bow out cannot be replaced, and

those appealing to the high court may be disadvantaged: With only eight remaining on the bench, it becomes harder to secure four votes necessary to get the court to take a case, and later, five votes needed to win a decision.

“A rule that required members of this court to remove themselves from cases in which the official action of friends were at issue would be utterly disabling,” Scalia said.

Richard Painter, a University of Minnesota law professor, agrees that a strict rule would be a bad idea. A crafty lawyer could find ways to bump a particular justice.

“If there's too much made of these recusals, you can game the system,” he said.

SPEAKING THE LANGUAGE

The Supreme Court's culture changes over time, and the court of Chief Justice John Roberts has developed its own character. No matter their political leanings, today's justices are temperamentally more suited toward technical arguments than sweeping philosophical statements, says Evan Caminker, a University of Michigan law professor. Attorneys who want to win should play to such inclinations, he says.

“It becomes more important that you speak their language,” said Caminker.

A strong defender of a specialized bar, lawyer Clement says that's what he does with the justices, translating technical statutes or difficult constitutional questions. He does so succinctly and without notes, a combination

that distinguishes him from most of the lawyers who argue before the high court.

“There are definite ways that the justices want their questions answered,” Clement said. “If you know that, you can tailor your answers and presumably have better effect.”

In his spare time, Clement listens to tapes of lawyers arguing before previous courts. He said he’s amazed at how different the Roberts court is from its predecessors, especially in terms of the rapid-fire questions from the bench and the justices’ interest in the technical intricacies of a case.

“I’ve grown up with this court,” Clement said. “To me it’s natural: The art of Supreme Court advocacy is going to be the art of answering questions, as opposed to giving grand speeches.”

That inside knowledge, say attorneys who aren’t a part of the elite specialty bar, can be crucial in gaining access to the nation’s highest court.

Consider the case brought to the Supreme Court in 2010 by Pennsylvania attorney Robert Goldman. A former federal prosecutor, Goldman had 30 years of trial experience, including handling complex international arms smuggling cases. But as Goldman faced a Supreme Court deadline, he was struggling to write a cert petition for his client, a woman convicted of trying to poison her husband’s pregnant paramour.

On a Friday afternoon, five days before the petition was due, he received a call from an

associate of Clement. Would Goldman be interested in having Clement argue the case on his behalf?

“Mama didn’t raise no fool,” Goldman said. “I put my ego aside for the client.”

Clement helped draft the briefs, and he argued the case. They won 9-0, and the decision overturned the woman’s conviction and six-year sentence.

‘WE NEED A HEAVY HITTER’

Michael Costello, a Michigan insurance company lawyer, made the same calculation in a civil rights case.

Two policy holders – New Jersey counties that operated jails – were defending a practice of strip-searching people detained for even minor offenses. Costello’s insurance company would be on the hook for any damages. He recalled a colleague’s advice as the case headed to the Supreme Court in 2011. Their opponents had already hired appellate specialist Thomas Goldstein, one of the eight lawyers who has appeared before the court most frequently. Goldstein was working with Stanford Law School professor Jeffrey Fisher, another of the eight.

“They’ve got a heavy hitter,” Costello’s colleague told him. “We need a heavy hitter.”

Costello hired Phillips, the lawyer who has appeared most often before the high court in private practice. He won on a 5-4 vote.

Labor, consumer and civil rights advocacy groups traditionally have sought to put forth an attorney who shares their ideology. But they, too, have begun to turn to specialists. For a case this year, the Service Employees International Union hired Paul Smith of Jenner & Block, a former Supreme Court clerk. The union lost, but not as badly as it feared.

The rise of the Supreme Court specialty bar is not universally embraced by the profession. But it is by the justices. Two, in particular, lamented the refusal of some criminal defense lawyers to turn over high court cases to specialists.

“It is as if they are arguing with one hand tied behind their back,” Kagan said.

Said Justice Sonia Sotomayor: “I think it’s malpractice for any lawyer who thinks this is my one shot before the Supreme Court and I have to take it.”

Last year, leading criminal defense attorneys unsuccessfully urged one trial lawyer to relinquish a capital case. If San Antonio lawyer and Supreme Court novice Warren Wolf lost the case, they worried, it could create a harmful precedent for others on death row in Texas. “People said, ‘You’ll ruin it for everybody,’” Wolf recalled.

Wolf declined to step aside. But he accepted the help of Waxman, a former solicitor general who has also defended death row inmates pro bono.

In the well of the Supreme Court, Waxman sat close to Wolf as the Texas attorney debuted at the lectern. Sometimes, Waxman passed Wolf notes. Two justices appeared piqued when Wolf did not directly answer their questions.

Wolf, with an assist from Waxman, won a 5-4 decision for his client. “I owe a lot to a lot of people,” Wolf said afterward, “but ultimately, I’m the guy who stood up there and did it.”

St. Louis lawyer Bob Marcus also got help from a top Supreme Court lawyer. In 2011, he recalled, his firm was preparing a Supreme Court brief on behalf of an injured railroad worker against CSX. That’s when he received a call from Frederick, one of the few top lawyers who will oppose big business before the court. Marcus had received offers for help from other lawyers and declined. But none matched Frederick’s stature. The brief was due in about a week.

“The best three words I heard in the entire case came during that call,” Marcus said. “And they were David Frederick saying, ‘I’ll do it.’”

Marcus said Frederick quickly redrafted the brief in a way “that took it to a whole new level.” They won the case on a 5-4 decision.

But what also impressed Marcus is what happened in the minutes before the oral argument.

Waiting in a lounge outside the Supreme Court chamber, Marcus watched Frederick

chat amicably with a casually dressed woman he did not recognize. Shifting nervously as he anticipated the biggest case of his life, Marcus asked Frederick about the hallway

encounter. “Who was that woman?” he wondered.

“Oh,” Frederick answered matter-of-factly, “that was Justice Alito’s wife.”

“Innovative Lawyer Changed the Way Top Firms Operate”

Reuters

John Shiffman

December 8, 2014

Although large firms dominate the list of those that are most successful at getting cases before the U.S. Supreme Court, there are a handful of exceptions.

Perhaps the most notable is the unusual four-lawyer firm run by Thomas Goldstein in a Washington suburb 10 miles from the high court.

Some of Goldstein’s success can be traced to innovations he brought to the Supreme Court practice – approaches once derided but now copied by white-shoe firms. These include using algorithms to identify cases the court might take; cold-calling and aggressively courting potential clients; strengthening firm brand by developing close links to the news media; and aligning the firm with prominent law school clinics.

Goldstein even created his own online publication – SCOTUSblog.com, short for Supreme Court of the United States.

“There was a wide open playing field in 1996...I just had the right attitude that fit the moment in time,” Goldstein said. “All of this was inevitable.”

When Goldstein entered the market, he stood out for all the wrong reasons. He didn’t have an Ivy League pedigree. He hadn’t held the requisite legal apprenticeships. He didn’t even have a downtown office.

“I had graduated from American University law school. I had no experience,” he said. “I hadn’t worked at the solicitor general’s office. I hadn’t clerked at the Supreme Court. I wasn’t in a big firm. I was working out of our third bedroom. I had to be aggressive.”

But as Goldstein identified cases that the justices were likely to take, worked with the mainstream media to brand himself as an expert, and built SCOTUSblog into a popular Supreme Court site, his practice grew. Goldstein and his partner represent a varied group: workers and investors suing companies, criminal defendants, and a smattering of business clients.

Goldstein now ranks among the eight private lawyers who’ve made the most oral arguments before the high court in the last decade. He spawned another development that helped a fellow member of that elite group of attorneys. In 2004, Goldstein helped start a Supreme Court law clinic at Stanford University, which law professor Jeffrey Fisher joined two years later. Fisher is a former law clerk to retired Justice John Paul Stevens. In 2005, Goldstein began a similar program at Harvard.

Goldstein no longer needs to chase clients. This term, the court has agreed to hear four of his cases; two more cert petitions are pending.

On Dec. 9, Goldstein is scheduled to argue his 33rd case before the Supreme Court. He will be opposed by a lawyer who has appeared even more often before the high

court: Seth Waxman, a former solicitor general. Waxman has argued twice as many as cases, and leads the Supreme Court practice at the law firm WilmerHale.

“The Case against Gay Marriage: Top Law Firms Won’t Touch It”

The New York Times

Adam Liptak

April 11, 2015

The stacks of Supreme Court briefs filed on both sides of the same-sex marriage cases to be heard this month are roughly the same height. But they are nonetheless lopsided: There are no major law firms urging the justices to rule against gay marriage.

Leading law firms are willing to represent tobacco companies accused of lying about their deadly products, factories that spew pollution, and corporations said to be complicit in torture and murder abroad. But standing up for traditional marriage has turned out to be too much for the elite bar. The arguments have been left to members of lower-profile firms.

In dozens of interviews, lawyers and law professors said the imbalance in legal firepower in the same-sex marriage cases resulted from a conviction among many lawyers that opposition to such unions is bigotry akin to racism. But there were economic calculations, too. Law firms that defend traditional marriage may lose clients and find themselves at a disadvantage in hiring new lawyers.

“Firms are trying to recruit the best talent from the best law schools,” said Dale Carpenter, a law professor at the University of Minnesota, “and the overwhelming majority of them want to work in a community of respect and diversity.”

But some conservatives say lawyers and scholars who support religious liberty and oppose a constitutional right to same-sex marriage have been bullied into silence. “The level of sheer desire to crush dissent is pretty unprecedented,” said Michael W. McConnell, a former federal appeals court judge who teaches law at Stanford.

Representing unpopular clients has a long and proud tradition in American justice, one that experts in legal ethics say is central to the adversarial system. John Adams, the future president, agreed to represent British soldiers accused of murder in the 1770 Boston Massacre. Clarence Darrow defended two union activists who dynamited the Los Angeles Times building in 1910, killing 21 workers. Leading law firms today have lined up to defend detainees at Guantánamo Bay, Cuba, some accused of ties to Al Qaeda.

The Supreme Court has said criminal defendants are entitled to a lawyer. There is no right to counsel in civil cases, but most lawyers do not lightly turn away paying clients. Some lawyers, though, have been forced out of their firms for agreeing to take on clients opposed to same-sex marriage.

Whatever the reason, there is a yawning gap between the uniformity of views among legal elites and the more mixed opinions of the American public and the members of the Supreme Court. Polls indicate that while a

slim majority of Americans support same-sex marriage, many remain skeptical, and the court's decision, expected in June, is likely to be closely divided.

In earlier eras, the opposing sides were more evenly matched in landmark civil rights cases. One of the lawyers who argued in favor of segregated public schools in 1953 in *Brown v. Board of Education* was John W. Davis, a leader of the glittering New York law firm now known as Davis Polk & Wardwell. He was the Democratic nominee for president in 1924, the ambassador to Britain and the solicitor general, and he once held the record for most Supreme Court arguments in the 20th century.

Mr. Davis was "the most accomplished and admired appellate lawyer in America," Richard Kluger wrote in "Simple Justice," a history of the *Brown* case, which Mr. Davis lost in a unanimous 1954 ruling.

When the Supreme Court hears arguments on April 28 in the marriage cases, among them *Obergefell v. Hodges*, No. 14-556, the main lawyer opposing same-sex marriage will be John J. Bursch, who practices at a medium-size firm in Michigan. He served as the state's solicitor general and has argued eight cases in the Supreme Court. But his firm, Warner Norcross & Judd, will not be standing behind him.

"When the State of Michigan asked me to handle the case, I asked the firm's management committee about the engagement, and the management committee declined the representation," Mr. Bursch said. "I am still a partner at Warner Norcross,

but the firm has no involvement at all in the marriage case."

Douglas E. Wagner, the firm's managing partner, said the case was just too controversial. "This is an issue that engenders strong emotions on both sides for our clients, attorneys and staff," he said.

Mr. Bursch's experience was similar to that of Paul D. Clement, who served as solicitor general in the George W. Bush administration and has argued more than 75 cases in the Supreme Court. He defended a federal law, the Defense of Marriage Act, that denied benefits to married same-sex couples, losing in the Supreme Court in 2013 by a 5-to-4 vote. He is conspicuously absent this time around.

Mr. Clement seems to have learned a bitter lesson from the last case, *United States v. Windsor*. In 2011, as it was heating up, his law firm, King & Spalding, withdrew from the case under pressure from gay rights groups. Mr. Clement quit, moving to a smaller firm and continuing to represent his clients.

"I resign out of the firmly held belief," he wrote at the time, "that a representation should not be abandoned because the client's legal position is extremely unpopular in certain quarters." Mr. Clement did not respond to a request for comment.

Ryan T. Anderson, a fellow at the Heritage Foundation who opposes same-sex marriage, said the episode was a turning point. "When the former solicitor general and superstar Supreme Court litigator is forced to resign

from his partnership,” Mr. Anderson said, “that shows a lot.”

Gay rights advocates offer their own reason for why prominent lawyers are lined up on one side of the marriage cases. “It’s so clear that there are no good arguments against marriage equality,” said Evan Wolfson, the president of Freedom to Marry. “Lawyers can see the truth.”

The current attitude among elite lawyers about same-sex marriage grew very quickly, said Kenji Yoshino, a law professor at New York University.

“It usually takes much longer for a position to become so disreputable that no respectable lawyer will touch it,” said Professor Yoshino, a writer for The Ethicists column in The New York Times Magazine and the author of “Speak Now,” a history of the challenge to Proposition 8, California’s ban on same-sex marriage. (In 2013, the Supreme Court dismissed a case on Proposition 8, which had been overturned by a Federal District Court,

without ruling on whether there was a constitutional right to same-sex marriage.)

Charles J. Cooper, who argued for Proposition 8, filed a supporting brief in the new cases. In 2009, he explained that he was able to handle the Proposition 8 case because he worked at a small firm. “The issue is too volatile, too controversial, too much of a tear in the fabric of the partnership” for a major law firm, he told The Legal Intelligencer. He declined a request for an interview.

The current climate, Professor McConnell of Stanford said, means that important distinctions are being lost. One is that it is possible to favor same-sex marriage as a policy matter without believing that the Constitution requires it.

But this is, he said, a topic he has learned to avoid. “You’re going to shut up, particularly if you don’t care that much,” he said. “I usually just keep it to myself.”

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

The Georgetown Law Journal
Richard J. Lazarus

[Excerpt; some sections, citations, and footnotes omitted]

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.

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,⁷⁴ 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 demand for its expertise.

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. During the recently completed October Term 2006, the Court handed down sixty-seven signed opinions after oral argument. Two decades ago, during October Term 1986, the Court issued 153 signed opinions—more than twice the number issued in 2006. A century earlier, the Court issued as many as 300 signed opinions per Term. 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.

Others have written about the possible causes of the shrinking docket, which reportedly even mystifies the Justices themselves. 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; Congress's elimination in 1988 of much of the Court's mandatory appellate jurisdiction; possible unintended consequences of the increasing pooling by the Justices of their respective efforts to review ever-increasing numbers of certiorari petitions; 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. 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 docket decline.

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.

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. They appreciate matters such as the potential vulnerability of a new law clerk in the summer months 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. 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. 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. 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 listed may have in fact drafted the entire document.

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. That is a strikingly high number, greater in some years than the number of petitions filed by the Solicitor General on behalf of the entire federal government.

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 mereselected *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. The filing of a cert petition, therefore, triggers the need for the filing of multiple additional briefs.

Table 1. Number of Amicus Briefs Filed Per Term on the Merits

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

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. There were approximately 240 amicus briefs filed in support of 119 of the total 1906 paid cert petitions filed during October Term 1982. And, although the Court during October Term 2005 acted on only 1523—or 20% fewer—paid cert 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%.

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.¹¹⁵ From October Term 1986 through October Term 1995, the total number filed was 4907, averaging about 490 per Term.¹¹⁶ The total number of amicus briefs filed in October Term 2005 was 645,¹¹⁷ 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 for which the Court issued opinions on the merits, or about 96% of the cases. 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. 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. 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.¹²² 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. 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. For the same Terms, the Court granted three, five, four, and four of Sidley Austin's seventeen, twenty-four, nineteen, and fifteen petitions.

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. Those six petitions amounted to 5.7% of the total.

Table 2. Total Number and Percentage of Successful Certiorari Petitions Filed by Expert Supreme Court Advocates (Excluding U.S. Solicitor General’s Office)

October Term	Total Number of Certiorari Petitions Granted	Successful Petitions Filed by Expert Counsel	Percentage of Successful Petitions Filed by Expert Counsel
1980	102	6	5.7%
2000	68	17	25%
2005	67	24	36%
2006	64	28	44%
2007 (as of 1/28/08)	65	35	53.8%

By contrast, as described in Table 2, during October Term 2000, the number 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 petition 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. In 1960, the number of filings was only about 5000.

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.

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. 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. 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.¹³⁴ 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. 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 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. Sometimes, the Supreme Court counsel is formally listed on the brief as co-counsel. 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. In either instance, they can have a considerable impact on the litigation and the substance of the arguments being presented.

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, also no doubt in response to the shrinking docket.

Table 3. Percentage of Total Oral Arguments Presented by Experienced Oral Advocates (Excluding U.S. Solicitor General’s Office)

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

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.

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%¹⁴²—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.

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.

That is why the final two hours of oral argument on April 25, 2007, were so