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The Elitification of the U.S. Supreme Court and Appellate Lawyering

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THE ELITIFICATION OF THE U.S. SUPREME COURT AND APPELLATE LAWYERING

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I. INTRODUCTION

Developments in law and judicial behavior receive much attention from legal academics, political scientists, and other scholars of law and courts—developments in lawyering, not so much.[1] Over the last two decades, significant developments in lawyering in the United States have gone unnoticed by many, or at least have not received the attention they deserve from academics. These developments involve appellate advocacy. First, there has been a dramatic change in who argues before the Supreme Court.[2] Second, significant changes have taken place with regard to appellate advocacy in the private bar.[3] Finally, considerable changes have occurred in appellate advocacy in both federal and state governments.[4] These separate developments are important by themselves, but their *convergence* magnifies their effects. Taken together, these changes have implications that go far beyond lawyering. They have resulted in a dramatic "elitification" of U.S. Supreme Court and appellate advocacy. They are also spawning a new sort of legal mobilization. This Article documents these changes, demonstrates that they are related, and argues that their confluence is important and deserves more attention and study.

In other areas of law and politics, scholars pay much attention to those who attempt to influence decision makers.[5] That same attention is not found when it comes to the relationship of appellate lawyers and courts. Appellate courts have long been understood to play a significant role in our society beyond simply functioning as courts. While obviously important in our legal structure, what they do comports with the two most famous definitions of politics: "the authoritative allocation of values"[6] and "who gets what, when, how."[7] Appellate courts—especially the Supreme Court—authoritatively allocate values, and they decide who gets what, when, and how. Scholars almost always focus on the Justices and judges rather than the lawyers. Appellate advocates, however, play an important role in those outcomes.[8]

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1. *See generally* LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 65–99 (2013) (reviewing empirical literature studying judicial behavior). *But see* sources cited *infra* note 14.

2. *See infra* Part II.

3. *See infra* Part III.

4. *See infra* Part IV.

5. *See, e.g.*, HAROLD D. LASSWELL, POLITICS: WHO GETS WHAT, WHEN, HOW 3 (1950).

6. DAVID EASTON, A FRAMEWORK FOR POLITICAL ANALYSIS 50 (1965).

7. LASSWELL, *supra* note 5.

8. For an example of work showing the importance of oral arguments and their influence on the developments of the law, see TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 125 (2004) (asserting that the Justices use

Thus, appellate advocacy deserves more and broader scholarly attention, especially in light of the significant changes that have occurred and converge.

This Article proceeds in seven Parts. Part II documents the "elitification" of those who argue before the Court from the private bar—individuals and law firms—and recounts how this came to be. Part III discusses changes in the private bar more generally and links these changes to those discussed in Part II. Part IV focuses on government lawyers—federal and state—who argue in the Court and describes significant changes that have occurred. Part V digs deeper into the concept of elitification of the Supreme Court. Part VI examines changes in elite legal mobilization. Finally, Part VII offers some concluding thoughts.

II. THE ELITIFICATION OF THE SUPREME COURT BAR

The study of politics is the study of influence and the influential.[9]

—*Harold Lasswell*

In 1993, Kevin McGuire wrote a path-breaking book entitled *The Supreme Court Bar: Legal Elites in the Washington Community.*[10] This book detailed the nature and importance of the Washington legal elite, particularly focusing on elite lawyers appearing before the Court.[11] McGuire's arguments are even more relevant today as a small elite group of lawyers has come to dominate advocacy before the Court.[12] The extent to which this occurs often comes as a surprise except to those who follow the weekly happenings at the Court such as law firms with Supreme Court practices, a few Supreme Court

oral argument to gather information); RYAN C. BLACK ET AL., ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT 3–4 (2012).

9. LASSWELL, *supra* note 5, at 3.

10. KEVIN T. MCGUIRE, THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY (1993).

11. *Id.* at 47.

12. *Id.* at 30.

journalists, or some of us Supreme Court junkies.[13] With some notable exceptions, elitification has not been the focus of much scholarship.[14]

A. Oral Argument

Throughout much of modern history, it was very rare for a private lawyer to have the chance to argue before the Supreme Court, and if one were so lucky, it usually would have been just once. How things have changed. The story now is one of "repeat players."[15] For example, in October Terms 2013 to 2019, Paul Clement argued thirty-two cases. In one term alone (OT15), he argued six cases, and two terms earlier (OT13) he argued five cases.[16] Not far behind was Neal Katyal who argued twenty-four cases in the same seven Terms. He, too, argued six cases in one term (OT16) and argued four in OT15.[17]

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13. I have given presentations on this topic to law and political science faculties. Most scholars were unaware of how dramatic the elitification has become, if they were aware of the issue at all. It is well known to some Supreme Court watchers—mostly journalists and bloggers. See, for example, the work of Tony Mauro and Marcia Coyle in *The National Law Journal*, Adam Liptak in the *New York Times*, or Nina Totenberg with *National Public Radio*. For an extended discussion of this topic, see Joan Biskupic et al., *The Echo Chamber*, REUTERS (Dec. 8, 2014, 10:30 AM), http://www.reuters.com/investigates/special-report/scotus/ [https://perma.cc/D46T-2BZ9]. SCOTUSblog provides a daily update on the Court that includes discussions of the players. It also provides excellent statistics compiled by Kedar Bhatia and now Adam Feldman. Adam Feldman's blog provides extensive data about the Supreme Court often over a longer time horizon. EMPIRICAL SCOTUS, https://empiricalscotus.com/ [https://perma.cc/FE2V-NFFH].

14. Few academic articles focus on who argues before the Court and its elitification. I discussed the importance of elite counsel, as well as counsel who were not highly regarded, which was reported to me in interviews with the Justices and their clerks. H.W. PERRY JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 127 (1991). As noted, Kevin McGuire wrote a book about the legal elite and continued his work on the topic in subsequent articles. *See, e.g.*, Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187–88 (1995). Law professor Richard Lazarus wrote a seminal article on this topic, which is discussed in more detail throughout this article. Richard Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1490 (2008). Adam Feldman, in addition to his blog, has also examined this topic in a scholarly paper. Adam Feldman, *Who Wins in the Supreme Court? An Examination of Attorney and Law Firm Influence*, 100 MARQ. L. REV. 429, 430 (2016). Allison Orr Larsen and Neal Devins draw on these and other works and add their own data as they focus on the changing role of amici. Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1903 (2016).

15. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974).

16. *See infra* Table 1.

17. *See infra* Table 1.

From the 2013 Term to the 2019 Term, the Court heard 465 cases that had oral arguments.[18] Only nine private lawyers accounted for 157 of the arguments in those cases![19] In percentage terms, those nine lawyers argued in over one-third of all cases that had oral argument.[20] The top twenty private lawyers appeared in more than half of the cases.[21] A mere forty-four private attorneys made 323 arguments.[22] In percentage terms, these private repeat players appeared in almost 70% of all cases argued during these seven Terms.[23] Table 1 lists all private lawyers that argued three or more cases between 2013 and 2019. In addition to these lawyers, an additional thirty-eight lawyers argued twice while 232 lawyers made only one appearance before the Court. Repeat players have become the norm.[24]

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18. I collected data as follows. I started with the Supreme Court Database for the 2013–2019 Terms, to identify the cases with oral arguments. *See* Harold Spaeth et al., *The Supreme Court Database*, WASH. UNIV. L. (Sept. 13, 2019), http://supremecourtdatabase.org/data.php [https://perma.cc/DES5-7VLM]. For the 2019 Term, I used the Supreme Court's Granted & Noted Cases List. *See Granted & Noted List: October Term 2019 Cases for Argument*, U.S. SUP. CT. (July 9, 2020), https://www.supremecourt.gov/orders/19grantednotedlist.pdf [https://perma.cc/EAB3-U42F]. Between these two sources, I compiled a list of docket numbers for a total of 576 cases across the Terms. However, several cases were companioned and collapsed into one oral argument. This removed fifty-five cases from the total. Forty-nine cases had no oral arguments for Terms 2013–2018. With the onset of precautions surrounding COVID-19, several cases originally docketed and granted oral argument for 2019 Term were rescheduled. Twenty-four of the eighty-five cases docketed for 2019 did not hold oral arguments. My calculations show that for the seven Terms examined, there were 465 cases with oral argument. I then went to Supreme Court docket sheets to code the identity of the attorney delivering oral arguments in the cases. Much of my data maps on to those reported by Bhatia in his impressive SCOTUSblog's stat pack. *Stat Pack Archive*, SCOTUSBLOG, https://www.scotusblog.com/reference/stat-pack/ [https://perma.cc/F4Q2-56SN]. Our numbers differ at times because we are comparing slightly different things, or we may treat something differently such as how we consider two cases when they are combined for a single opinion. I also wanted to collect data on a more extensive list of attorneys than he reports. His data are invaluable as a starting point for any researcher. However, I derived my data as described above and look at the data over several Terms rather than as Bhatia does focusing on each Term individually. I also cross-referenced my collection with the Oyez database of oral arguments. *See About Oyez*, OYEZ, https://www.oyez.org/about [https://perma.cc/9T3W-CRYX].

19. Throughout this Article, the term "private lawyers" refers to nongovernment lawyers.

20. *See infra* Table 1.

21. This does not mean that the lawyers made 50.54% of all arguments. Rather, it means that they argued in half of the cases. Every case has arguments made by two sides, doubling the number of total arguments, and in some cases more than one lawyer argues for each side—especially when the Office of the Solicitor General participates. The government is often granted additional time to argue as an amicus, though this is rare for private counsel.

22. *See infra* Table 1.

23. *See infra* Table 1.

24. *See* Biskupic et al., *supra* note 13.

Table 1. Oral Arguments by Private Counsel[25]
October Terms 2013–2019

Attorney	Oral Arguments	Running Total	Percent Running Total
Paul D. Clement	32	32	6.88%
Neal K. Katyal	24	56	12.04%
Jeffrey L. Fisher	18	74	15.91%
Seth P. Waxman	16	90	19.35%
Thomas C. Goldstein	15	105	22.58%
Kannon K. Shanmugam	15	120	25.81%
David C. Frederick	14	134	28.82%
Carter G. Phillips	12	146	31.40%
Shay Dvoretzky	11	157	33.76%
E. Joshua Rosenkranz	9	166	35.70%
Daniel L. Geyser	9	175	37.63%
Adam G. Unikowsky	9	184	39.57%
Paul W. Hughes	8	192	41.29%
Lisa S. Blatt	7	199	42.80%
Paul M. Smith	7	206	44.30%
Gregory G. Garre	6	212	45.59%
Michael B. Kimberly	6	218	46.88%
Christopher Landau	6	224	48.17%
Christopher G. Michel	6	230	49.46%
Andrew J. Pincus	5	235	50.54%
Danielle Spinelli	5	240	51.61%
Peter K. Stris	5	245	52.69%
Michael A. Carvin	4	249	53.55%
Marc E. Elias	4	253	54.41%
James A. Feldman	4	257	55.27%
Mark C. Fleming	4	261	56.13%
Douglas Hallward-Driemeier	4	265	56.99%
Allyson N. Ho	4	269	57.85%
William M. Jay	4	273	58.71%
Erin E. Murphy	4	277	59.57%
Theodore B. Olson	4	281	60.43%
Mark A. Perry	4	285	61.29%

25. The term "Running Total" refers to the total number of arguments made by that attorney and those who preceded him or her in the table. So, for example, Clement, Katyal, and Fisher argued seventy-four cases combined. The term "Percent Running Total" indicates that of the 465 cases with oral argument, Clement, Katyal, and Fisher argued in 15.91% of them.

Table 1. Oral Arguments by Private Counsel[25]
October Terms 2013–2019

Attorney	Oral Arguments	Running Total	Percent Running Total
Kevin K. Russell	4	289	62.15%
Eric Schnapper	4	293	63.01%
Stephanos Bibas	3	296	63.66%
John J. Bursch	3	299	64.30%
Catherine M.A. Carroll	3	302	64.95%
Erwin Chemerinsky	3	305	65.59%
Thomas H. Dupree Jr.	3	308	66.24%
John P. Elwood	3	311	66.88%
Miguel A. Estrada	3	314	67.53%
Noel J. Francisco	3	317	68.17%
Jonathan D. Hacker	3	320	68.92%
Donald B. Verrilli Jr.	3	323	69.56%
Attorneys with 2 Arguments	38	—	—
Attorneys with 1 Argument	232	—	—

Despite the influence repeat advocates wield, apart from a few names, most repeat players on this list are likely unknown to students of the Supreme Court—whether political scientists, sociologists, historians, or law professors. It is not only an issue of name recognition, scholars and the public know little about these lawyers' social, economic, or political networks.[26] Generally, scholars of power who study other institutions are keenly aware of important players' names and other information about them, particularly when these players attempt to influence decision makers.[27] This is not so for lawyers before the Court.

To realize how staggering these numbers are, one must recall how rare it was for any given private counsel to appear frequently before the Court in years past.[28] In the 1980 Term, fewer than 20% of private counsel had appeared before the Court previously. The rest were first-timers.[29] Of those 20% repeat players, none came close to the number of arguments by today's key players: Paul Clement with over 100 cases (many in private practice),

26. *But see* MCGUIRE, *supra* note 10, at 28–46.

27. *See* LASSWELL, *supra* note 5, at 3.

28. *See* Lazarus, *supra* note 14, at 1492; *see also* John G. Roberts Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 75–76 (2005).

29. Roberts, *supra* note 28, at 75.

Carter Phillips with eighty-eight cases (most in private practice), Thomas Goldstein with forty-four cases, and Lisa Blatt with forty cases.[30]

The increasing "elitification" of those practicing before the Court has been a trend for a while. In 2004, then-Judge Roberts—now Chief Justice Roberts—gave a lecture addressing the increased attention to appellate advocacy in the private bar generally but focusing particularly on the U.S. Supreme Court.[31] He opened the lecture by saying, "[o]ver the past generation, . . . there has been a discernible professionalization among the advocates before the Supreme Court, to the extent that one can speak of the emergence of a real Supreme Court bar."[32]

Chief Justice Roberts used the term "re-emergence" in the title of his lecture because in the early days of the Court, there were a handful of well-known and frequent advocates, like Daniel Webster and William Pinkney.[33] In the 1814 Term, for example, Pinkney argued half of the Court's cases.[34] That phenomenon ended. In modern times, most repeat players were government lawyers from the Office of the Solicitor General, with a few exceptions from the private bar.[35] Today, several lawyers from the private bar are now prominent repeat players, as Table 1 shows.

The evidence Chief Justice Roberts presented about a revitalized Supreme Court bar came not only from his own experience as one of the elite group of lawyers appearing with some frequency before the Court but also from empirical work done for the lecture.[36] He compared the 1980 and 2002 Terms.[37] Looking at private attorneys in the 1980 Term, he found that "fewer than [20%] of the advocates had ever appeared before the Supreme Court before."[38] By contrast, in the 2002 Term, over 44% of appearing lawyers were repeat players.[39] Chief Justice Roberts then went on to examine what he called

30. *See supra* Table 1.

31. Roberts, *supra* note 28, at 80.

32. *Id.* at 68. It is important to understand Roberts' use of the modifier "real." He meant those who actually practice before the Court. *See id.* at 79. In 2013, the Supreme Court estimated that there were about 230,000 members of the Supreme Court Bar. The Supreme Court Bar technically refers to those who have been admitted to practice in the Supreme Court, but at most, only a handful will ever appear there. The fee is cheap, and lawyers want a credential that may look good to the public. The requirements for admission are minimal. *See* SUP. CT. R. 5. For a detailed account of the Supreme Court bar, both "real" and otherwise, see MCGUIRE, *supra* note 10.

33. Lazarus, *supra* note 14, at 1489.

34. G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815–1835, at 208 (1998).

35. Roberts, *supra* note 28, at 76.

36. *Id.* at 75.

37. *Id.*

38. *Id.*

39. *Id.*

"experienced advocates or recidivists."[40] He defined those as lawyers with at least three previous arguments before the Court.[41] In 1980, only 10% were experienced counsel by his definition.[42] In 2002, the number more than tripled to 33%.[43] His criterion of three arguments as denoting experienced counsel appears quite modest compared to the data in Table 1, with some lawyers having argued over 100 cases.[44] Chief Justice Roberts also noted that in the 2002 Term, "there were fourteen different non-Solicitor General repeat performers who argued at least twice—accounting for fully [24%] of the non-Solicitor General argument slots, a tenfold increase."[45]

Four years after Chief Justice Roberts's lecture, law professor Richard Lazarus published a seminal article detailing the rise of the modern Supreme Court bar.[46] Lazarus noted that, "what has gone wholly unrecognized by all, including legal scholars, is how the re-emergence of a Supreme Court Bar of elite attorneys similar to the early-nineteenth-century Bar in its domination of Supreme Court advocacy is quietly transforming the Court and the nation's laws."[47] Well, not wholly unrecognized—Kevin McGuire and Chief Justice Roberts wrote and spoke about this, and he gave them due credit—but the Lazarus article was a thorough documentation and analysis of the phenomenon in 2008, and he raised many questions about why this must be a concern.[48] His article became a touchstone for future references to the phenomenon, reinforcing McGuire's and Chief Justice Roberts's findings that the trend of repeat players was continuing.[49] As one example, in the 1980 Term, of those private lawyers who argued, only 2% had made ten or more previous arguments before the Court, and only 3% had more than one argument that Term.[50] In comparison, in the 2007 Term, 28% had ten or more arguments before the Court, and 24% argued more than one case in that term.[51] His data show that the trend noted by Chief Justice Roberts not only continued but also was more significant, in light of the fact that the number of argued cases per term had decreased.

Table 1 demonstrates that the presence of repeat players observed by McGuire, Lazarus, and Chief Justice Roberts has increased significantly and is even more noteworthy in light of the fact that today, there are significantly

40. *Id.* at 75–76.
41. *Id.* at 76.
42. *Id.*
43. *Id.*
44. *See supra* Table 1.
45. Roberts, *supra* note 28, at 76.
46. Lazarus, *supra* note 14, at 1490.
47. *Id.*
48. *See id.* at 1521–62.
49. Lazarus, *supra* note 14, at 1490; *see, e.g.*, Feldman, *supra* note 14, at 431.
50. *See* Lazarus, *supra* note 14, at 1520.
51. *See id.*

fewer oral arguments that occur in the Supreme Court. In the 1981 Term, there were 167 written opinions.[52] In the 2016 Term, there were only sixty-two.[53] For many years now, the number of argued cases with signed opinions has hovered in the sixties.[54] With a few repeat players making more of the arguments in fewer cases, the elite have become, and are becoming, even more elite.

Today, argument by private lawyers in the Court is dominated not only by an elite group of lawyers but also by relatively few powerful law firms. For example, in the 2013 through 2019 Terms, lawyers from Kirkland & Ellis appeared in thirty-one cases followed closely by Wilmer Cutler Pickering Hale and Dorr lawyers with thirty appearances and Jones Day lawyers with twenty-nine.[55] These three firms appeared in 25% of all cases argued.[56] Lawyers from only nine law firms appeared a total of 229 times, meaning they argued in almost 50% of cases across those seven Terms.[57] The top twenty-six law firms, plus three law school clinics, argued in almost 83% of all cases.[58]

Table 2. Oral Arguments by Law Firm or Clinic[59]
October Terms 2013–2019

Law Firm or Clinic	Oral Arguments	Running Total	Percent Running Total
Kirkland & Ellis LLP	31	31	6.67%
Wilmer Cutler Pickering Hale and Dorr LLP	30	61	13.12%
Jones Day	29	90	19.36%

52. *The Statistics*, 96 HARV. L. REV. 304, 304 tbl.1 (1982).

53. *See also* Kedar Bhatia, *Stat Pack for October Term 2016*, SCOTUSBLOG 27 (June 28, 2017), https://www.scotusblog.com/wp-content/uploads/2017/06/SB_Stat_Pack_2017.06.28.pdf [https://perma.cc/3LWC-6MWL].

54. Adam Feldman, *Final Stat Pack for October Term 2019*, SCOTUSBLOG 12 (July 10, 2020) [hereinafter Feldman, *OT19 Stat Pack*], https://www.scotusblog.com/wp-content/uploads/2020/07/Final-Statpack-7.20.2020.pdf [https://perma.cc/2P9Q-L39A].

55. *See infra* Table 2.

56. *See infra* Table 2.

57. *See infra* Table 2.

58. *See infra* Table 2. As in Table 1, the Percent Running Total refers to cases not all oral arguments. Therefore, of all the cases that had oral argument, the first four firms appeared in 25.16% of those cases.

59. Table 2 also contains three law school clinics. They are included to give an overall picture of all nongovernment repeat players. Clinics might not be thought of as similar to for-profit law firms, and much of their representation involves criminal defendants. However, oral arguments by the clinics are done by elite repeat player lawyers, such as Jeffrey Fisher, Thomas Goldstein, and Pamela Karlan.

Table 2. Oral Arguments by Law Firm or Clinic[59]
October Terms 2013–2019

Law Firm or Clinic	Oral Arguments	Running Total	Percent Running Total
Hogan Lovells US LLP	27	117	25.16%
Mayer Brown LLP	23	140	30.11%
Gibson Dunn & Crutcher LLP	23	163	35.06%
Goldstein & Russell, P.C.	23	186	40.00%
Jenner & Block LLP	22	229	49.25%
Sidley Austin LLP	21	207	44.52%
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.	18	247	53.12%
Stanford Law School, Supreme Court Litigation Clinic	18	265	56.99%
Williams & Connolly LLP	18	283	60.86%
Bancroft PLLC	12	295	63.44%
Orrick, Herrington & Sutcliffe LLP	10	305	65.59%
Goodwin Procter LLP	9	314	67.53%
O'Melveny & Myers LLP	9	323	69.47%
Stris & Maher LLP	8	331	71.19%
Latham & Watkins, LLP	8	339	72.91%
Geyser P.C.	7	346	74.41%
Quinn Emanuel Urquhart & Sullivan, LLP	6	352	75.70%
Vinson & Elkins LLP	5	357	76.78%
Arnold & Porter LLP	4	361	77.64%
Consovoy McCarthy Park PLLC	4	365	78.50%
Perkins Coie LLP	4	369	79.36%
University of Washington School of Law	4	373	80.22%
Morgan, Lewis & Bockius LLP	3	376	80.86%
McDermott Will & Emery LLP	3	379	80.51%
Ropes & Gray LLP	3	382	82.15%
University of Pennsylvania Law School Supreme Court Clinic	3	385	82.80%

By any measure, these data demonstrate an extraordinary concentration of access and power in very few firms. While legal scholars are more familiar

with these firms than they are with many of the individual lawyers, it is unclear how much is known about these firms as power brokers in society.[60] For example, who are their clients? What are their criteria when deciding which clients to represent and which not to represent? Do they refuse representation simply because of a client's inability to afford their representation, or are there other systematic considerations?[61]

B. Certiorari

An equally important and powerful determination related to who argues before the Court is success at getting to the Court in the first place. Today, only about 1% of cases seeking review are granted certiorari (or cert).[62] Even in the 1980s, this percentage was low with the Court granting cert in less than 5% of cases.[63] McGuire found that from 1977 to 1982, 22% of cases granted review were filed by "experienced" private counsel.[64] Lazarus reported that in the 2006 Term, 44% of cases granted review were filed by lawyers he labeled "expert Supreme Court advocates."[65] In the 2014 Term, this rate was 57.5% (thirty-eight of fifty-six cases).[66] The importance of these repeat players, then, is not only their influence through briefs and oral arguments but also their leverage in the agenda setting process. Oral advocates often oversee certiorari work, but this effort frequently involves other first-rate appellate lawyers within large powerful firms.[67]

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60. Of course, most of the lawyers in Table 1 are members of these firms, but in some instances, lawyers moved around within this group.

61. I collected additional data such as whether the law firm (or specific lawyers) tended to represent petitioners or respondents more, the win loss records, and the subject matter of the cases. No remarkable differences appeared in the first two categories, but one would not necessarily expect meaningful differences. As for the subject matter, the categorizations in the Spaeth data set were examined, but they are not sufficiently nuanced to draw any conclusions for the purposes of this Article. Further research should look into the nature of the cases, the clients, and more broadly, the law firms themselves. *See* Biskupic et al., *supra* note 13.

62. *See* Adam Feldman & Alexander Kappner, *Finding Certainty in Cert: An Empirical Analysis of the Factors Involved in Supreme Court Certiorari Decisions from 2001–2015*, 61 VILL. L. REV. 795, 798 (2016) (discussing the Court's choices to hear cases regarding issues of controversial public concern).

63. PERRY, *supra* note 14, at 22.

64. Lazarus, *supra* note 14, at 1526.

65. *Id.* at 1516 tbl.2. He defined expert as 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. *Id.* at 1490 n.17.

66. For an empirical overview of certiorari over a long history that addresses the role of amici, see Feldman & Kappner, *supra* note 62, at 806–08. *See also* Larsen & Devins, *supra* note 14, at 1902–03.

67. Feldman & Kappner, *supra* note 62, at 803.

The business of appellate lawyering is not only about getting cert granted; it is also about getting cert denied.[68] In my interviews with Justices and clerks about the certiorari process, they told me that experienced Supreme Court advocates and lower court judges are good at knowing how to "certproof" a case.[69] Skillful attorneys do this in their brief in opposition to certiorari, and judges who do not want to be reviewed do it with their opinions.[70] Given that so few cases are granted review,[71] one might conclude that engaging high-priced elite lawyers would be irrational when the chances of the Court granting a petition are so low. Apparently, however, ensuring that a favorable ruling that is being appealed will not be reviewed in the Court is worth big money, especially for the wealthy and powerful.[72]

C. Growth of the Elite Supreme Court Bar

How did these powerful repeat players come to be? Lazarus tells the following story:

> The modern transformation of the Bar began when Sidley Austin hired Rex Lee, following his resignation as President Ronald Reagan's first Solicitor General in the summer of 1985, to create a Supreme Court and appellate practice in Sidley's D.C. office. Lee set out to establish a highly visible Supreme Court and appellate practice that could provide to private sector clients the kind of outstanding expert advocacy that the Solicitor General's Office had provided federal agencies. Lee was enormously successful from the outset . . . . Just as significant were the identities of Lee's clients . . . . Lee had been hired by a virtual Who's Who of the nation's major industries. . . .
>
> In one single Term before the Supreme Court, the former Solicitor General had accomplished what no one had done for decades and what the Bar had assumed was no longer economically feasible: he

68. *Id.* at 807.

69. PERRY, *supra* note 14, at 139, 286–87.

70. *Id.*

71. Feldman & Kappner, *supra* note 62, at 795.

72. People often "irrationally" respond to the possibility of loss, or as Kahneman and Tversky put it, "the cognitive error of loss aversion." That is, potential losses loom larger than potential gains. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 279 (1979); *see also* CASS SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 64, 84 (2013); Minette E. Drumwright et al., *Behavioral Ethics and Teaching Ethical Decision Making*, 13 DECISION SCI. J. INNOVATIVE EDUC. 431, 434 (2015).

> had developed a highly profitable Supreme Court practice on behalf of private sector corporate business clients.[73]

Other law firms responded. One example is Chicago-based law firm Mayer Brown & Platt, which reacted "with an unprecedented raid of much of the top talent in the solicitor general's office during the spring of 1986."[74] The rivalry among powerful law firms to have successful Supreme Court practices has continued and is fierce,[75] though some lawyers have left big firms to set up boutique appellate practices,[76]

The contagion of creating Supreme Court practices might seem expected. But as discussed earlier, recall that the growth of Supreme Court practices was occurring when the Court was drastically reducing its docket. In the 1981 Term, for example, the Burger Court issued 167 written opinions.[77] During the Rehnquist Court, however, the caseload began a steady decline that has continued with the Roberts Court.[78] From the 2013 Term to the 2018 Term, the number of cases consisting of oral argument and signed opinions per term were sixty-four, sixty-five, sixty-one, sixty-one, fifty-five, and sixty-one, respectively.[79] In short, because the opportunities to argue before the Court are dramatically lower, the economics of expensive Supreme Court practices is puzzling on its face. The explanation lies in the context changes in law firms more generally.

III. THE RISE OF SPECIALIZATION IN PRIVATE APPELLATE PRACTICE

> *The skills needed for effective appellate advocacy are not always found—indeed, perhaps are rarely found—in good trial lawyers.*[80]
>
> *—Judge Laurence Silberman, U.S. Court of Appeals for the D.C. Circuit*

It may come as a surprise to learn that historically those who specialized in appellate work were few. It was not until 1990 that the "American Academy of Appellate Lawyers was founded" and not until 2000 that "the American

73. Lazarus, *supra* note 14, at 1498–99.

74. *Id.* at 1499.

75. Lazarus, *supra* note 14, at 1500–01.

76. The most notable of these is Thomas Goldstein. According to his website, he left Akin, Gump, Strauss, Hauer & Feld and formed a boutique that is now Goldstein & Russell, P.C. *See Firm Overview*, GOLDSTEIN & RUSSELL, P.C., http://www.goldsteinrussell.com/firm-overview/ [https://perma.cc/VP83-QX5Z].

77. *See The Statistics*, *supra* note 52.

78. Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1339 (2010).

79. *See* Spaeth et al., *supra* note 18.

80. Laurence H. Silberman, *Plain Talk on Appellate Advocacy*, 20 LITIG. 3, 3 (1994).

Bar Association established its Council of Appellate Lawyers . . . ."[81] Many state bar associations have only recently created special divisions devoted to appellate advocacy.[82] In his 2004 speech, Chief Justice Roberts briefly noted "the rise of Supreme Court and appellate practice departments in major law firms."[83] Evaluating the reason for this change, he suggested:

> If one side hires a Supreme Court specialist to present a case, it may cause the client on the other side to think that they ought to consider doing that as well. This is just a variant on the old adage that one lawyer in town will starve, but two will prosper.[84]

Nonetheless, this observation and the Rex Lee story told by Lazarus fail to explain how Supreme Court practices within law firms can be sustained if there are increasingly less opportunities to appear before the Court. Something more must be going on. Actually, during this time period much was going on (and continues to go on) in the restructuring of the legal profession, especially with regard to large law firms often referred to as "big law."[85]

Marc Galanter and Thomas Palay, in their book *Tournament of Lawyers*, detailed a "crisis" in the legal profession.[86] They described many changes and were highly critical of some of the results.[87] Notably, they argued that the crisis made large law firms abandon professional norms in pursuit of growing profits.[88] Others, however, put a positive spin on the changes.[89] Andrew Bruck and Andrew Canter argued that "[i]n spite of these developments, and partly because of them, the legal profession also faces an exciting new opportunity. The shift towards commercialism has introduced external market forces to an industry long insulated from them."[90] Whatever the normative assessment of these changes in the legal profession should be, suffice it to say that some of the changes have encouraged the rise of appellate specialization, especially in large firms. Having a Supreme Court practice can help sustain a robust appellate practice and vice versa.[91] A reputable Supreme Court practice

81. James C. Ho, *Defending Texas: The Office of the Solicitor General*, 29 REV. LITIG. 471, 473 (2010).

82. *Cf. id.* The Texas Bar, for example, did not have an appellate section until 1987. *Id.*

83. Roberts, *supra* note 28, at 77.

84. *Id.*

85. MARC GALANTER & THOMAS PALEY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 1–3 (1991).

86. *Id.* at 3.

87. *Id.* at 136–37.

88. *Id.* at 137–38.

89. *See* Andrew Bruck & Andrew Canter, Note, *Supply, Demand, and the Changing Economics of Large Law Firms*, 60 STAN. L. REV. 2087, 2088 (2008).

90. *Id.* at 2088.

91. *See* Lazarus, *supra* note 14, at 1498–99; Bruck & Canter, *supra* note 89, at 2089.

makes a firm a hotspot for other appellate work.[92] This is true both in terms of attracting wealthy clients and in recruiting top-notch lawyers.[93] In these times, when partners come and go rather than spend their lives at one firm, a Supreme Court practice is a market advantage for recruiting top talent.[94]

A Supreme Court practice also helps recruit some of the most talented new young lawyers within the market, many of whom have served as law clerks to appellate judges. Only the top-tier of students have a shot at these clerkships, and when obtained, they dramatically heighten the student's elite status.[95] A few clerks will go on to be Supreme Court clerks, which becomes an even better ticket to enormous salaries and "big law" prestige.[96] Each year, there are roughly twenty-five to thirty Supreme Court clerks in the job market as well as highly talented clerks from the federal courts of appeal.[97] These young lawyers are prized recruits, and big law firms fight to get them.[98] They are already an elite group, almost always having gone to elite law schools and graduating at the top of their class.[99] After clerkships, the work these lawyers do is generally appellate work.[100] Still, at some point, there must be a market to sustain all of this. Thomas Hungar, one of the elites who frequently argues before the Court and who co-chairs the appellate practice group at Gibson Dunn, detects a market-based explanation.[101] He and his co-author wrote:

> Our contention is that the external factor that drove all of these pioneers to start private appellate practices at essentially the same time was the changing economics of large-firm law practice in the

92. *See* Lazarus, *supra* note 14, at 1498–99.

93. *Id.* at 1499.

94. *Id.*

95. *See* Catherine Rampell, *Judges Compete for Law Clerks on a Lawless Terrain*, N.Y. TIMES (Sept. 23, 2011), https://www.nytimes.com/2011/09/24/business/judges-compete-for-law-clerks-on-a-lawless-terrain.html [https://perma.cc/M7LV-CNXZ]; David Lauter, *Clerkships: Picking the Elite*, NAT'L L.J., Feb. 9, 1987, at 1; John Shiffman, *Former Clerks: Today's Prospects, Tomorrow's Elite*, REUTERS (Dec. 8, 2014, 5:52 AM), https://www.reuters.com/article/us-scotus-firms-clerks/former-clerks-todays-prospects-tomorrows-elite-idUSKBN0JM10Y20141208 [https://perma.cc/K69G-V3UU].

96. *See, e.g.*, *Jones Day Lands a Record 11 Supreme Court Law Clerks as Associates*, NAT'L L.J., Nov. 13, 2018, at 1.

97. *Id.*

98. The *National Law Journal*, especially articles by Tony Mauro, frequently reports on the recruitment efforts by law firms, both with regard to "raids" among the firms for high powered lawyers to things like which law firm recruited the most Supreme Court law clerks every year. *See, e.g.*, Tony Mauro, *How Jones Day Cornered the Market on SCOTUS Clerks*, NAT'L L.J., Dec. 12, 2017, at 1, 2.

99. Shiffman, *supra* note 95.

100. *See id.*

101. Thomas G. Hungar & Nikesh Jindal, *Observations on the Rise of the Appellate Litigator*, 29 REV. LITIG. 511, 521–22. (2009).

> 1980s. During that period, with the newly competitive market for legal services, law firms scrambled to find ways to distinguish themselves from their peers. One way in which they did this was by establishing appellate practice groups.[102]

Only recently has information about law firms become easily attainable.[103] Citing Galanter and Palay,[104] Bruck and Canter,[105] and others, Hungar and Jindal observed:

> Corporate counsel began to abandon their long-standing relations with a single firm and shop for the best value in legal services. This competitiveness reached new heights after the Supreme Court struck down the bar on law firm advertising in 1977. Publications like *The American Lawyer* and *The National Law Journal* began ranking law firms. For the first time, law firms knew what their peer firms were charging, who their clients were, what their partners were making, and how they stood relative to one another. . . .
>
> Starting an appellate practice—particularly one centered on well-known Supreme Court advocates—was one way firms could distinguish themselves. . . . Moreover, firms could often bill top dollar to clients for the high-caliber and big-name legal expertise required for Supreme Court practice.[106]

Another change in the legal profession that has an interesting effect on appellate lawyering is the growth of those working as in-house counsel. As legal fees continued to grow, companies began handling more legal business in-house.[107] This encouraged law firms, particularly large firms, to develop specialties not suited to in-house counsel. Hungar and Jindal argued, "[a]s appellate representation has evolved as a specialty practice area, even general litigators find that it is good practice to enlist experienced appellate specialists, or at the very least experienced appellate co-counsel, when a case is appealed (if not before)."[108]

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102. *Id.*

103. Though it is hard to imagine today, when I began my research involving interviews with former Supreme Court law clerks, it was not easy even to find their names. The Court would not release the names of former clerks and the only way I could find their names was to know clerks willing to provide this information. *See* PERRY, *supra* note 14, at 10.

104. Hungar & Jindal, *supra* note 101, at 522 nn.57–58.

105. Bruck & Canter, *supra* note 89.

106. Hungar & Jindal, *supra* note 101, at 522–23.

107. *Id.* at 523.

108. *Id.* at 524.

Yet another potential reason for the increased demand of high-priced appellate lawyers is that the federal judiciary, and the current Court in particular, has become more receptive to business interests.[109] Individual litigants want to win their cases, and quality appellate counsel is often worth the money.[110] Sometimes, however, it is about more than just winning a particular case. Sophisticated business players understand the importance of trying to change the law to make it more business friendly.[111] This requires an appellate strategy beyond any one case.[112]

If firms continue to grow their appellate practices, increasing supply will necessitate stimulating demand.[113] Though examining the consequences of this is beyond the scope of this Article, it is worth noting that this will result in more incentives to recruit clients for appellate challenges and not to dissuade them from choosing to appeal. Additionally, as the amicus market continues to grow, much of that business is stimulated by big law firms.[114] This ramped up appellate activity will change the volume and lobbying efforts brought to appellate courts in addition to the Supreme Court. Increased appellate activity will ultimately effect doctrine.[115] For example, it is not uncommon to see opinions adopt reasoning that was found in litigant or amici briefs or at oral argument.[116] If this is so at the Supreme Court, it seems even more likely that lawyers have the opportunity to shape doctrine in other courts with far heavier caseloads and less support—where judges rely on lawyers to bring them information far more often than the Court does.[117] Paying for more lawyering, especially from the Am Law 100 firms, will surely draw a distinctive clientele likely to be disproportionately wealthy and powerful. The

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109. Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES (Mar. 16, 2008), http://www.nytimes.com/2008/03/16/magazine [https://perma.cc/P23C-HLRG].

110. Hungar & Jindal, *supra* note 101, at 525.

111. *Id.*

112. *See supra* Part III.

113. *Id.* at 523; *see also* Lazarus, *supra* note 14, at 1503 (providing an overview of appellate practice supply and demand).

114. The literature on the role of amici is extensive in both law and political science. *See, e.g.*, Larsen & Devins, *supra* note 14, at 1907. In addition to its own important contributions, it is a good source for seeing the wide range of research done on amicus curiae.

115. *See* H.W. Perry Jr. & Patrick Keyzer, *Human Rights Issues in Constitutional Courts: Why Amici Curiae are Important in the U.S., and What Australia Can Learn from the U.S. Experience*, 36 LAW IN CONTEXT (forthcoming 2020) (manuscript at 8) (on file with author).

116. *See, e.g.*, James F. Spriggs II & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RSCH. Q. 365, 376 (1997).

117. Judge Jeffrey S. Sutton, United States Court of Appeals for the Sixth Circuit, in comments made at a Mini-Symposium on 51 IMPERFECT SOLUTIONS at the University of Texas at Austin School of Law (Feb. 4, 2020). *See generally* Allison Lucas, *Friends of the Court? The Ethics of Amicus Brief Writing in First Amendment Litigation*, 26 FORDHAM URB. L.J. 1605, 1610 (1999) (providing examples where lower courts "indicated that the views of amici influenced their opinions").

logic here seems sound, but questions about the effect that a growth in elite appellate lawyering undoubtedly will have on law and doctrine needs systematic empirical investigation beyond the scope of this Article.

Up to this this point, two related but separate trends in appellate advocacy have been discussed: (1) the nature of the modern Supreme Court Bar being dominated by a relatively small group of private lawyers and law firms and (2) the creation and expansion of elite appellate law practices. This Article now turns to a third trend involving changes in appellate advocacy by the federal government and state governments.

IV. APPELLATE ADVOCACY BY GOVERNMENTS

> *The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory, but to establish justice.*
>
> —*Solicitor General Simon E. Sobeloff*[118]

Significant changes have occurred in the lawyering and the lawyers who represent the federal and state governments before the Court.[119] In some ways, these changes mirror trends in the private bar,[120] and the changes in each sector may be influencing the other.

A. The Solicitor General of the United States

The Solicitor General of the United States (SG) sits atop the appellate structure for the entire federal government.[121] Effectively, no one gets to the Court but through the SG.[122] No government lawyer—whether agency counsel, U.S. Attorney, or head of a division at the Justice Department—can appeal a case without the approval of the SG.[123] The SG's judgment is rarely overturned by the Attorney General or the President.[124] Attorneys General and Presidents came to realize long ago that it is in their long-term interest to defer

118. Simon E. Sobeloff, *Attorney for the Government: The Work of the Solicitor General's Office*, 41 A.B.A. J. 229, 229 (1955).

119. *See* Lazarus, *supra* note 14, at 1504–05.

120. *Id.*

121. REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW 2 (1992).

122. *See id.* at 4–5.

123. *See id.* at 108.

124. *See generally* Drew S. Days III, *When the President Says No: A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence*, 3 J. APP. PRAC. & PROCESS 509, 509–19 (2001) (providing examples of the President overruling the SG).

to the SG about litigation strategies.[125] It is rare for the SG not to decide what to appeal and how to argue the appeal.[126]

The Office of the Solicitor General (OSG) is the epitome of elite lawyering and repeat players. Justice Thurgood Marshall said that being SG was "the best job I've ever had, bar none!"[127] Former SG Rex Lee recalled, "When I heard that I was being considered, I was very much hoping that I would be picked because that is, very simply . . . one of the creamiest, . . . no, it is probably the creamiest lawyering job in the country."[128] The OSG has always been the workplace of choice for many of the best appellate lawyers in the nation.[129] As such, the government has extraordinary lawyers representing it before the Court. But the importance of the OSG does not stop there. It is hard to overstate the role that the SG has traditionally played in setting the Court's agenda.[130] Over the years, the SG's petitions for a writ of certiorari are granted at vastly higher rates than other parties. There are many reasons for this difference. One of the Court's primary considerations for granting cert is the importance of the case.[131] The SG has an advantage in getting cases before the Court because it represents the United States, whose interests are important by definition.[132]

Another factor is that for decades, the OSG has been a crucial aid to the Justices in their burdensome task of screening thousands of cases each Term.[133] Justices across the legal and political spectrum have come to rely on and trust the OSG, especially in the cert process.[134] As the quintessential repeat player, the OSG understands not only how the Justices see their role but also what the Justices are looking for.[135] The OSG assists the Justices in

125. *Id.* at 509.

126. *See id.*

127. LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 261 (1987).

128. SALOKAR, *supra* note 121, at 33.

129. *See* PERRY, *supra* note 14, at 132–33.

130. *Id.* at 132–33; *see also* SALOKAR, *supra* note 121, at 8–9; Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RSCH. Q. 505 (1998); and RICHARD L. PACELLE, BETWEEN LAW & POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURING OF RACE, GENDER, AND REPRODUCTIVE RIGHTS LITIGATION (2003). For an example of more recent work, see Christine Bird, Blessed and Highly Favored: The Office of the Solicitor General's Policy Agenda (July 1, 2020) (unpublished manuscript) (on file with author).

131. PERRY, *supra* note 14, at 253–54 (discussing categories of important cases).

132. *Id.* at 254.

133. Throughout this Article, I use the terms "OSG" and "SG" almost interchangeably. The SG is often represented at the Court by a Deputy SG or an Assistant to the SG. When I speak of the functions or the reputation of the SG, it includes those in the OSG. Over the years, many of the lawyers in that office have served different SGs across administrations.

134. PERRY, *supra* note 14, at 128–29.

135. *See id.* at 128.

this function by being highly selective in the cases that it chooses to petition for review or to enter as amicus curiae. It also writes briefs in opposition to certiorari as a party or an amicus to the case, identifying problems in support of a denial.[136] Though an advocate, the OSG understands the needs of the Court and tries to accommodate those needs even if it frustrates the government in the short term. The Court so values the OSG in that if the SG has not weighed in, the Court often "calls for the views of the Solicitor General" (CVSG) both for its certiorari decision as well as for its decision on the merits.[137]

Service to the Court by the SG is not wholly altruistic. As a repeat player, it is in the OSG's long-term interest to be absolutely candid with the Justices and helpful to them. Because the Justices trust the OSG to shoot straight with them and to look out for the Court's interest as well as its own, the OSG's credibility translates into a success rate for cert grants.[138] When the OSG says to the Court, "you ought to take this case," it often does.[139] That is not to say that as an advocate, the OSG does not strongly advocate for the government's position; it should, and it does. But SGs are unique among advocates in viewing their responsibility as being broader than winning a particular case as Solicitor General Sobeloff put it in the epigraph above.[140] As yet another example of this, attorneys in the OSG will confess error.[141] This would be a dicey proposition for private counsel.

The OSG's reputation carries over to its role when filing amicus briefs. Attorneys often try to get the OSG to file an amicus brief on behalf of the client. Sometimes the OSG will file an amicus brief on its own initiative.[142] The SG's amicus briefs are always accepted by the Court, and the SG is often given time at oral argument, whether or not the litigant they are supporting wants to share time with them.[143] As noted above, the Court frequently calls for the views of the SG to serve as an amicus.[144]

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136. *Id.* at 49–50.

137. *Id.*

138. *Id.* at 128.

139. *Id.* at 130–33. For a possible exception, see CAPLAN, *supra* note 127, at 260 (suggesting that under the tenure of Charles Fried, this trust was damaged). Grumblings have started to emerge about President Trump's SG and the Administration's use of the Supreme Court. *See* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 124 (2019).

140. Simon E. Sobeloff, *Attorney for the Government: The Work of the Solicitor General's Office*, 41 A.B.A. J. 229, 229 (1955).

141. *Id.* at 230.

142. Cordray & Cordray, *supra* note 78, at 1331.

143. *Id.*; SUP. CT. R. 37.4.

144. Cordray & Cordray, *supra* note 78, at 1331.

1. Changes in the Solicitor General's Court Participation

A significant change has occurred regarding the OSG's participation in the Supreme Court that is not often discussed. During roughly the same period of growth in the elite cadre of private counsel and decline in Court's docket, petitioning for certiorari by the OSG has declined dramatically, decreasing the cases in which the United States is a party.[145] This decline does not mean that the OSG's grants are rejected more often; rather, it means that the OSG is now seeking far fewer grants.[146] From the 2008 Term to the 2019 Term, requests declined precipitously.[147] For example, in the 1985 and the 1986 Terms, the OSG filed fifty-seven and fifty-six petitions for certiorari respectively.[148] For the Terms covered in this Article, the respective numbers of petitions were only fourteen, seventeen, fifteen, twenty-five, twenty-two, thirteen, three, nineteen, seventeen, thirteen, twenty-three, and twenty-six.[149] The simultaneous changes of the declining docket, decreasing role of the SG as a litigant, and increasing role of cases argued by the private bar may not be causal, but the intersection is consequential.

Though the OSG seeks fewer grants and argues in fewer cases, it would be a mistake to conclude that the government has gone away. Instead, the OSG has shifted the manner in which it participates in Court. It participates now in greater numbers as an amicus rather than as a party.[150] And the role the OSG plays as amicus has changed as well. In the early 1980s, the OSG participated in oral argument in approximately 10% of the cases in which it was an amicus.[151] Now, the OSG participates in oral argument for most cases in which it is an amicus.[152]

Perhaps what is most interesting for the purposes of this Article is that as the OSG seeks fewer spots on the docket for its own cases, there are more slots available for others, notably private parties and state governments.[153] With the decrease in the OSG's share of the docket as litigant, private interests

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145. *See id.* at 1323 (analyzing the reduction of petitions for certiorari and other changes in the OSG). *See generally* Chris Nicholson & Paul M. Collins, *The Solicitor General's Amicus Curiae Strategies in the Supreme Court*, 36 AM. POL. RSCH. 382, 400–06 (2008) (discussing the OSG's amicus strategies).

146. Cordray & Cordray, *supra* note 78, at 1347.

147. *Id.* at 1342.

148. *Id.* at 1348.

149. I derived these numbers from the OSG's database collecting the Office's Supreme Court Briefs, which date back to 1985. *Supreme Court Briefs*, U.S. DEP'T OF JUST., https://www.justice.gov/osg/supreme-court-briefs [https://perma.cc/8VFU-6KBE].

150. Cordray & Cordray, *supra* note 78, at 1323; Lazarus, *supra* note 14, at 1493–94.

151. Cordray & Cordray, *supra* note 78, at 1355.

152. *Id.* at 1355–56.

153. This is not a zero-sum game: there is not a set number of cases for a Term. Nevertheless, in a given era, the Court's docket seems to grant about the same number of cases.

play an increasingly important role as agenda setters who are represented by elite repeat players. There is some indication that the Court is seeing private counsel in ways that once were reserved for the OSG.[154] In referring to the elite private lawyers, Justice Kennedy said, "'[t]hey are on the front lines and they apply the same standards' as the justices do."[155] This type of language was once reserved only for the lawyers in the OSG.

2. Change in Career Patterns

Finally, SGs usually come and go with their President, though Erwin Griswold served both Johnson and Nixon; but in the past, lawyers in the OSG often served many years, their tenure spanning several SGs.[156] A prime example of this is Deputy Solicitor General Lawrence Wallace who served for thirty-five years and by most accounts was highly influential as SGs came and went. Now, many work at the OSG for a few years and then move quickly into private practice.[157] Among the new group of elite private lawyers arguing before the Court, many formerly worked in the OSG.[158] In fact, of the top ten lawyers in the Terms studied in this Article, six had either served as the SG or worked in the OSG.[159]

B. Elite Litigators for States: The Rise of State Solicitors General

> *Appellate litigation is a distinct specialty and the reason for that is clear. Legal disputes are different from factual disputes. They involve different audiences, tap into different skills, and require different strategies. And clients are increasingly noticing the difference—including states.*[160]
>
> *—James C. Ho, Former Solicitor General of Texas*

When I interviewed the Justices and clerks years ago for my book on agenda setting in the U.S. Supreme Court, one complaint I heard frequently

154. *See* Biskupic et al., *supra* note 13.

155. *Id.*

156. *See* SALOKAR, *supra* note 128, at 62–63.

157. *See* Ryan C. Black & Ryan J. Owens, *The Success of Former Solicitors General in Private Practice: Costly and Unnecessary?*, 2016 MICH. ST. L. REV. 325, 342.

158. *Id.* ("[F]ormer OSG attorneys are involved in nearly half the cases on the Court's docket.").

159. *See infra* Table 4. The success of these former OSG attorneys, however, is debatable. *Id.* at 364 ("Former OSG attorneys are skilled and successful . . . . But it does not appear that they are any more likely to win their cases than attorneys with similar experiences and characteristics who never worked in the OSG.").

160. Ho, *supra* note 81, at 509.

from both Justices and clerks was how bad the lawyers were who represented states in the U.S. Supreme Court.[161] I was told that they were generally "awful" appellate lawyers, with one exception that many mentioned—Slade Gorton, who had been the attorney general for the state of Washington.[162] The low quality seemed to be a particular frustration for the Justices who were trying to reinvigorate federalism and state power, but the assessment was widespread among personnel at the Court irrespective of their attitudes toward federalism.[163] Many of my informants suggested that state attorneys general were usually in their positions because they were good politicians, not because they were great lawyers—certainly not first-rate appellate lawyers—and a successful political career was usually their goal.[164] When a case made it to the Court, the state attorney general often could not resist arguing the case.[165] It is a rare opportunity and a thrill for any lawyer to argue before the Court.[166] It is also good politics for a politician. Depending upon the case, the attentive public may reach beyond his or her state, which can help a politician aspiring to higher office. From the Justices' perspective, however, the thirty minutes of fame for the state attorney general was frustrating.[167] The problem was not always attorneys general. Some states allowed (and still do) the person who started the case to carry through until the end.[168] These attorney generals (AGs) and trial attorneys were generally not practiced in the role of appellate argument.[169] The lack of good appellate lawyering not only hampered oral argument, but it also often meant the briefs were often poor quality.[170]

As the Ho quotation above suggests, in the last several years, things began to change and continue to do so. Many states have come to understand that in

161. PERRY, *supra* note 14, at 127.

162. *Id.*

163. *See also* Ryan J. Owens & Patrick C. Wohlfarth, *State Solicitors General, Appellate Expertise, and State Success Before the U.S. Supreme Court*, 48 LAW & SOC'Y REV. 657, 667 (2014).

164. PERRY, *supra* note 14, at 127.

165. *See also* Owens & Wohlfarth, *supra* note 163, at 667.

166. Justice Sotomayor lamented about the lure as well, although her complaint was not limited to state attorneys general. She explained: "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." Janet Roberts et al., *In Ever-Clubbier Bar, Eight Men Emerge as Supreme Court Confidants*, REUTERS (Dec. 8, 2014, 5:57 AM), https://www.reuters.com/article/us-scotus-advocates-specialreport/special-report-in-ever-clubbier-bar-eight-men-emerge-as-supreme-court-confidants-idUSKBN0JM11E20141208.

167. *See also* Thomas R. Morris, *States Before the U.S. Supreme Court: State Attorneys General as* Amicus Curiae, 70 JUDICATURE 298, 300 (1987).

168. *See, e.g.*, Symposium Transcript, *The Rise of Appellate Litigators and State Solicitors General*, 29 REV. LITIG. 545, 650 (2010) [hereinafter *Symposium*].

169. See Hungar & Jindal, *supra* note 101, at 529–36, for a discussion of the different skill sets needed for trial lawyers and appellate litigators.

170. *See* Morris, *supra* note 167, at 300.

order to be more effective, they need better appellate lawyering, certainly in the U.S. Supreme Court but also in federal courts of appeal as well as within their own supreme and appellate courts.[171] Many states have responded by creating the role of state solicitor general (SSG) or an analogous position.[172] Sometimes the role involves only one person, but other times the state's goal is to become more like the U.S. Solicitor General and develop a corresponding office of the state solicitor general (OSSG).[173] The trend in states is obvious. Beginning in the 1980s and 1990s, there was dramatic growth in the creation of SSGs.[174] Before 1980, only seven states had a position similar to an SSG.[175] Starting in the 1980s, however, states started moving to some form of an appellate specialist.[176] By 1988, there were eleven states and by 2001, twenty-four.[177] In 2014, there were approximately forty-three including the District of Columbia, Puerto Rico, and the Virgin Islands.[178]

Lately, scholars have begun to write more about states' evolving roles in litigation. The focus is often on the state attorney general (AG) or the states as legal entities.[179] But little scholarly attention has been paid to SSGs.[180]

171. Layton, *supra* note 121, at 542.

172. The name may be something different. Some, for example, are called "Appellate Chief." Now, most are called "Solicitor General." In a few states, the SSG is a statutorily created position, but in most states, it is a creation of the AG. The SSG serves at the AG's pleasure (not that of the governor or legislature). Banks Miller, *Describing the State Solicitors General*, 93 JUDICATURE 238 (2010).

173. Unlike at the federal level, in most states, there is usually a distinction between civil and criminal jurisdiction. At the state level, criminal prosecution usually resides with elected district attorneys (DAs) who are not under the AG, and many SSGs have limited authority in the criminal realm. Layton, *supra* note 121, 538–41.

174. Banks Miller suggests there may be various explanations for the growth. Acknowledging that some attorneys general felt the need for better state level advocacy, he nonetheless tries to develop a more systematic explanation. He suggests that adoption came in three waves, and he looks at state and case statistics to try to predict early adopters. He also suggests that there could be a diffusion of innovation model at work. Miller, *supra* note 172.

175. *See* Layton, *supra* note 121, at 536. New York was probably the first to create such a position.

176. *See* Ho, *supra* note 81, at 471–72.

177. Layton, *supra* note 121, at 534.

178. Told to the author by Dan Schweitzer, head of the Supreme Court Project at the National Association of Attorneys General (NAAG).

179. *See, e.g.*, PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA 3 (2015); Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as Nation Policymakers*, 56 REV. POL. 525, 525 (1994); Cornell W. Clayton & Jack McGuire, *State Litigation Strategies and Policymaking in the U.S. Supreme Court*, 11 KAN. J.L. & PUB. POL'Y 17 (2001). Numerous law professors have written on this as well. *See, e.g.*, Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 43 (2018).

180. One of the first scholars to focus on the rise of SSGs in detail was Banks Miller, *supra* note 174, at 238. Some legal journalists have written about SSGs as well. *See, e.g.*, Marcia Coyle,

When trying to understand the evolution to SSGs for appellate work, many point to the role played by the National Association of Attorneys General (NAAG) and its "Center for Supreme Court Advocacy" headed by Dan Schweitzer, the Supreme Court counsel for that organization.[181] Today, NAAG plays a critical support role for both AGs and SSGs.[182] It helps facilitate joint efforts among states, often arranging high-level moots for state counsel who are going to argue in the Supreme Court.[183] Schweitzer has been and continues to be an important figure, certainly encouraging the development of SSGs.[184] Missouri Solicitor General Layton explained NAAG's importance as follows:

> I don't want to say that it was NAAG itself that . . . gets the credit for it [the growth of SSGs], but it is instrumental in it happening . . . . [With the creation of the Supreme Court Project] NAAG created an entity within the organization that was dedicated to improving the quality of advocacy by the states in the United States Supreme Court. So for the first time, NAAG had some place within its organization that was worried about appellate practice. . . . Also, in the 1980s the conferences of the chief deputies were developed.[185]

Layton then went on to recount several meetings involving SSGs, and policy entrepreneurs who pushed for the idea of states adopting the SSG model.[186]

Justices Listen to a Key Voice; State Solicitors General Get More Time in High Court, NAT'L L.J. (Apr. 7, 2008), https://www.law.com/nationallawjournal/almID/900005507976/ [https://perma.cc/Y9R8-4YF9]; Tony Mauro, *Stating Their Case*, LEGAL TIMES (Aug. 11, 2003, 12:00 AM), https://www.law.com/almID/900005392144/ [https://perma.cc/BZ82-59ZP]. A symposium at the University of Texas Law School that involved SSGs, state and federal judges, appellate specialists, and others has been a "go to" cite for many subsequent articles and knowledge about SSGs. *Symposium*, *supra* note 168. Other scholars, such as Owens & Wohlfarth, *supra* note 163, have brought quantitative rigor to examine the effectiveness of SSGs. Their methodology and findings are complex, and they conclude that having SSGs improves the effectiveness of states in court. Little, however, has been written about the internal workings of SSGs and their offices. Articles dealing with state litigation usually refer to the AGs because much of the discussion does not involve appellate litigation, and it understates the involvement of SGs in state litigation strategy. More direct examination of SGs and their offices is needed. To that end, I have been interviewing current and former SSGs and lawyers in their offices (OSSGs) to learn more about them and their efforts.

181. *NAAG Center for Supreme Court Advocacy*, NAT'L ASS'N ATT'YS GEN., https://www.naag.org/naag/about_naag/center-supreme-court.php [https://perma.cc/8WJK-DXYB].

182. *Id.*

183. *Id.*

184. *See Symposium*, *supra* note 168, at 710.

185. *Id.* at 638.

186. *Id.*

Though there has been dramatic growth and movement toward SSGs, most are relatively new and many different models have developed among states.[187] First is the difference in size, funding, and staffing.[188] One state SG told me "I have basically a desk in an office and most of what I do is try to help other state lawyers by reviewing their appellate briefs and making suggestions."[189] At the other end of the spectrum is a relatively large office with high-powered appellate lawyers resembling the OSG in many ways.[190] New York and Texas fit this model.[191] The New York office is one of the oldest and most prestigious, but the Texas position was not created until 1999.[192] Ohio also played an important role by example through the leadership of Richard Cordray and Jeffrey Sutton (now a federal judge).[193] Though not known for big government or well-paid government employees, the relatively young Texas office quickly came to be one of the largest and among the best.[194] Several of its SGs have served as law clerks at the appellate level, including for the U.S. Supreme Court and U.S. Court of Appeals for the Fifth Circuit, while others have served in high positions throughout the state and federal governments.[195] The Texas OSSG has a large budget and many lawyers, many of whom either came from, or went to, elite law firms with specialized appellate practices.[196]

The size, importance, wealth, or complexity of legal issues of a state are not necessarily correlated with having an SSG or the size of the OSSG. For example, two rich, important, large states with complex legal issues are newcomers. In 2013, Massachusetts created the position under AG Martha

187. Interestingly, details of the organization of state legal offices are not easy to find. In many of their publications and websites, the descriptions are minimal. In fact, it is not easy to find out in many states if they even have an SSG or an OSSG.

188. *See* Kevin C. Newsom, *The State Solicitor General Boom*, 32 APP. PRAC. 6, 7 (2013).

189. Interview with Anonymous (confidential transcript on file with author).

190. Miller, *supra* note 174, at 240.

191. Ho, *supra* note 81, at 473; Miller, *supra* note 174, at 240.

192. Layton, *supra* note 121, at 536; *see also* Newsom, *supra* note 188, at 7.

193. *See Symposium*, *supra* note 168, at 639, 703; Newsom, *supra* note 188, at 6.

194. The Texas SG often coordinates efforts among red states when filing an amicus brief in the U.S. Supreme Court and has won several "Best Brief Awards" from the NAAG. Ho, *supra* note 81, at 480, 482. Texas was the first state office where the U.S. Supreme Court "CVSG'd" an SSG comparable to what it does with the SG. The case was *Rhine v. Deaton*, 558 U.S. 811 (2009). *Id.* at 478 n.24. *See also* Emma Platoff, *As Solicitor General, Kyle Hawkins Will Lead Texas Fights Against the Federal Government*, TEX. TRIB. (Sept. 19, 2018), https://www.texastribune.org/2018/09/19/Texas-solicitor-general-kyle-hawkins-scott-keller-ken-paxton/ [https://perma.cc/2LVX-4PJB].

195. Ho, *supra* note 81, at 476.

196. *See id.* at 475–76;

Coakley[197] and California first did so under AG Kamala Harris.[198] California's first SG has just recently stepped down, and its second SG was appointed in 2019.[199] Massachusetts and California, similar in many respects, have differing structures. In Massachusetts, the first SSG was Peter Sacks, a long-time, well-respected member of the Massachusetts AG's office who had overseen appeals in Massachusetts for years.[200] The original SSG structure consisted of only Sacks and one other person.[201] Unlike Massachusetts, California anticipated a growing operation and selected an outsider.[202] Its first SSG, Edward DuMont, was a Californian who built his legal career on the East Coast.[203] He served under Seth Waxman in the OSG and as U.S. Deputy Attorney General.[204] He was also nominated by President Obama to the U.S. Court of Appeals for the Federal Circuit, but the nomination stalled in Congress.[205] Some smaller states recruit from within their state AG's office or bring in an appellate lawyer from a local law firm who is expected to have a short stint.[206] Sometimes, it is even a law professor on leave.[207]

What is striking for the purposes of this Article is how many states, even some smaller states, are seeking to recruit SSGs of the same caliber as those who practice in the federal OSG. For example, West Virginia hired Elbert Lin as its first SG; Lin was a Yale law graduate and U.S. Supreme Court law clerk practicing law in D.C. with no ties to West Virginia at the time.[208] In 2017,

197. Brandon Gee, *Coakley's Creation of 'State Solicitor' Part of Nationwide Trend*, MASS. L. WKLY. (Aug. 15, 2013), https://masslawyersweekly.com/2013/08/15/coakleys-creation-of-state-solicitor-part-of-nationwide-trend/ [https://perma.cc/UNB3-LBTW].

198. Press Release, Office of the Attorney General of California, Attorney General Kamala D. Harris Announces Appointment of California Solicitor General (Oct. 28, 2013) [hereinafter DuMont Press Release], https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-appointment-california-solicitor [https://perma.cc/2UNS-ZUG5].

199. Press Release, Office of the Attorney General of California, Attorney General Becerra Announces Appointment of Michael Mongan as California Solicitor General (July 19, 2019), https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-appointment-michael-mongan-california [https://perma.cc/YA4P-VFPN]. Technically California had a position of an "SG" prior to this one, but the role was not one in the way we think of SGs.

200. *See* Gee, *supra* note 197.

201. *Id.*

202. *See* DuMont Press Release, *supra* note 198.

203. *Id.*

204. *Id.*

205. Sheri Qualters, *Edward DuMont Asks Obama to Withdraw His Nomination to Federal Circuit*, NAT'L L.J. (Nov. 9, 2011), https://www.law.com/nationallawjournal/almID/120253104 1506/ [https://perma.cc/KS67-WJSE].

206. *See* Platoff, *supra* note 194.

207. *See* Mary Wood, *Professor Toby Heytens Named Virginia Solicitor General*, UNIV. VA. (Jan. 9, 2018), https://www.law.virginia.edu/news/201801/professor-toby-heytens-named-virginia-solicitor-general [https://perma.cc/84BC-7ZAJ].

208. Eric Eyre, *WV AG Morrisey's Solicitor General Lin to Resign*, CHARLESTON

Lin resigned and has been rumored to be a possible appointee to a federal judgeship. A closer examination of the credentials of SSGs appears in Part V.C below.

As I interviewed SSGs, many of these high-powered types talked about how they saw states as now a satisfying place for them to work. Only so many can go to the U.S. OSG, and some of them are not interested in being in the big law world, at least while they are wanting to start families. They may well end up there, but they said that state appellate work no longer seemed like a backwater. Part of the reasoning for that follows.

The nature of state legal appellate structures is not only changing in terms of the creation of more professionalized appellate lawyers such as SSGs but also is changing in some of its emphases, particularly in the U.S. Supreme Court. State legal entities have often bonded across state lines to resist federal encroachment on state power.[209] Much of the newfound interest in legal federalism suggests that states can and do profitably cross party and ideological lines.[210] However, in these hyper-partisan times, a new sort of cooperation has emerged or, more precisely, has grown exponentially. As states have become more red or blue, they also have become more partisan in their legal presence as litigants but particularly as amici.[211] In 1999, five Republican AGs formed The Republican Attorneys General Association (RAGA).[212] According to their website, RAGA's mission was not only to elect Republican AGs but also "to address the lack of commitment by their Democrat counterparts to defend federalism, adhere to the law, and apply a commonsense, free market approach to governing."[213] Their website proceeds to highlight their national partisanship:

- Republican AGs have been instrumental in unraveling policies enacted by the Obama Administration, including the EPA's Clean Power Plan and various rules including Waters of the U.S., the Department of Labor's overtime rule, the Consumer Financial Protection Bureau's Arbitration Rule, and many others.[214]

GAZETTE-MAIL (Aug. 17, 2017, 12:00 AM), https://www.wvgazettemail.com/news/politics/wv-ag-morrisey-s-solicitor-general-lin-to-resign/article_f4cd7af8-be56-516e-9d3c-1bf6107f588f.html [https://perma.cc/DX3A-VDVC].

209. *See* NOLETTE, *supra* note 179, at 41–42.

210. *See id.* at 28; Lemos and Young, *supra* note 179, at 91.

211. *See* NOLETTE, *supra* note 179, at 188–89.

212. *About RAGA*, REPUBLICAN ATT'YS GEN. ASS'N, https://republicanags.com/about/ [https://perma.cc/5APM-BA2H].

213. *Id.*

214. *See Rutledge Applauds the EPA's Commitment to the American Worker*, REPUBLICAN ATT'YS GEN. ASS'N (Oct. 10, 2017), https://republicanags.com/2017/10/

> "Republican AGs are actively working with the Trump Administration to restore the rule of law and correct previous unconstitutional overreaches."[215]

- Since President Trump was sworn into office, Republican AGs and RAGA have been interfacing directly with the Trump Administration and spearheading efforts to preserve, promote, and protect fundamental beliefs in limited government and the rule of law.[216]

Democratic AGs got off to a much slower start, which frustrated some because there was a lot to do in order for them to catch up with RAGA.[217] On the Democratic Attorneys General Association (DAGA) website, the association describes its founding and then proceeds to show its identification with national partisan struggles.[218] DAGA also touts journalists' depictions of its organization:

> Founded in 2002 by California AG Bill Lockyer, Iowa AG Tom Miller, and New Mexico AG Patsy Madrid, DAGA began as a part-time political committee based in Denver, Colorado. To better support our Democratic AGs and candidates in executing our

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10/rutledge-applauds-epas-commitment-american-worker/ [https://perma.cc/ZX5F-E7VT]; *ICYMI: Republican AGs Score Victory Against Costly Obama Overtime Rule*, REPUBLICAN ATT'YS GEN. ASS'N (Sept. 1, 2017), https://republicanags.com/2017/09/01/icymi-republican-ags-score-victory-costly-obama-overtime-rule/ [https://perma.cc/2747-UU7Z]; *Most Americans Support Trump Rewriting Obama's 'Waters of the US' Rule*, REPUBLICAN ATT'YS GEN. ASS'N (Dec. 7, 2017), https://republicanags.com/2017/12/07/poll-americans-support-trump-rewriting-obamas-waters-us-rule/ [https://perma.cc/4L5C-WSSU]; Ann Maher, *Republican AGs Who Railed Against CFPB Anti-Arbitration Rule, Now on Board with Banning Arbitration #MeToo*, LEGAL NEWSLINE (Feb. 24, 2018), https://legalnewsline.com/stories/511350518-republican-ags-who-railed-against-cfpb-anti-arbitration-rule-now-on-board-with-banning-arbitration-metoo [https://perma.cc/Q7VX-RJJ8].

215. *2019, A Historic Year for RAGA*, REPUBLICAN ATT'YS GEN. ASS'N (Dec. 31, 2019), https://republicanags.com/2019/12/31/2019-a-historic-year-for-raga/ [https://perma.cc/CN7Y-2CDD].

216. *Id.*

217. Interview with Anonymous (confidential transcript on file with author); *see also* Harry Jaffe, *Meet the Man Curbing Trump's Power Without Anyone Noticing*, POLITICO MAG. (Feb. 23, 2019), https://www.politico.com/magazine/story/2019/02/23/karl-racine-profile-attorney-general-emoluments-lawsuit-trump-2020-225200 [https://perma.cc/BJ5X-9RZU] (asserting that Democratic AGs have formed "a judicial wall against the Trump [A]dministration"); Stef W. Kight & Sara Fischer, *Democratic State AGs Are Leading the Resistance*, AXIOS (July 31, 2019), https://www.axios.com/democrat-state-attorney-general-fighting-trump-6d6d145b-2ff6-420e-a84a-3fe42ec727d1.html [https://perma.cc/ZCC9-6BS7] (arguing that Democratic AGs are "some of the most powerful forces fighting [against] the Trump White House").

218. *About DAGA*, DEMOCRATIC ATT'YS GEN. ASS'N, http://dems.ag/about/ [https://perma.cc/5MN8-JXFJ].

> mission, the committee moved its operations from Denver, CO to Washington, DC in 2016 and expanded to a full-time professional staff that covers campaigns, recruiting, data analysis, communications, policy, politics, and fundraising.[219]
>
> Since 2016, Democratic AGs have seen major successes in taking on the Trump Administration's repeated attempts to undermine the rule of law and rollback key protections. . . .
>
> *POLITICO Magazine: Democratic AGs have formed "a judicial wall against the Trump administration"*
>
> *Axios: Democratic AGs are "some of the most powerful forces fighting the Trump White House"*

It is, of course, the SSGs who effect the dreams of the Republican and Democratic AGs through appellate litigation.[220] As a result, the rise of SSGs has brought about significant changes to appellate litigation, while also increasing its elitification.

V. ELITIFICATION: MORE EVIDENCE, MORE QUESTIONS

> *On the one hand, on the other hand.*
>
> —*Tevye (Fiddler on the Roof)*[221]

Terms such as "elite" and "elites" often denote a negative connotation and convey a problematic sense that something either is wrong or justifies concern. One need only listen to the rhetoric of political candidates or the public generally to realize that the power of elites or insiders is not something that is normally lauded. It comes from both sides of the ideological divide. On the other hand, one's response to the elitification of appellate law might be "bravo" or "elitism in this context is different." Elitism can connote meritocracy and high quality.[222] Americans often value elitism though they resist the term. One rarely hears complaints about the fact that one's doctor went to the best medical school and is the "go to" person for the rich and powerful. Nor do Americans protest if their child is admitted to one of those "elite" colleges or universities, or if they become faculty at such places. On

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219. *Id.*

220. *See generally* Dan Schweitzer, *Who Argues for the States in the U.S. Supreme Court?*, 2 NAGTRI J., Nov. 2017, at 7, 7.

221. FIDDLER ON THE ROOF (United Artists 1971).

222. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 736 (1961).

the other hand, modern society generally begins to express concern when institutions become dominated by elites. This concern may be especially true now that the American educational system—traditionally the engine of social mobility—is becoming increasingly bifurcated at both the secondary and college levels.[223] American incomes, health, neighborhoods, houses of worship, sources of news and information, and many other things are becoming increasingly segregated and bimodal.[224] When this occurs, it is usually not a good thing and it becomes increasingly difficult to reverse. On the other hand, elitism can be beneficial in certain contexts, especially in situations where expertise is valued, and the benefits of expertise are not limited to fellow elites. Obviously "elite" can have both positive and negative connotations and consequences. Nonetheless, the dramatic increasingly elite nature of the Supreme Court should give some pause and cause reflection. When elitism occurs, it deserves scrutiny even if it is ultimately seen as a desirable and positive trend.

Parts I and II of this Article described the private lawyers who argue before the Supreme Court as "elite" because these lawyers comprise such a small group—by definition elite.[225] However, these lawyers are also elites in a different sense because of their pedigrees, their wealth, and their workplaces.

Most lawyers who make it to the elite status of frequent oralist in the Supreme Court start with impressive pedigrees—their law schools and class rank. Table 3 reports which law schools are represented most by those who argue before the Supreme Court.[226] This table includes private and government lawyers. Again, the percentages are based on cases, not total arguments.[227]

Table 3. Arguments by Law School Alumni
October Terms 2013–2019

Law School	Total Oral Arguments	Percent of Cases
Harvard	242	52.04%
Yale	175	37.63%

223. *See* ROBERT D. PUTNAM, OUR KIDS: THE AMERICAN DREAM IN CRISIS 188 (2015).

224. Many have written on this. For a particularly insightful examination, see ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000). *See also* PUTNAM, *supra* note 223, at 44.

225. *See* discussion *supra* Parts I–II.

226. I tried to obtain information about every lawyer who argued in the Supreme Court for the seven Terms, the 2013 Term through the 2019 Term. In a few instances, I was unable to find relevant information about where the lawyer attended law school or clerkships. As such, the numbers here and in Table 3 may not be exact, but they are close and the story of the eliteness would be the same.

227. *See supra* note 18 and accompanying text.

Table 3. Arguments by Law School Alumni
October Terms 2013–2019

Law School	Total Oral Arguments	Percent of Cases
Chicago	83	17.85%
Columbia	52	11.18%
Stanford	49	10.54%
Virginia	43	9.25%
Texas	42	9.03%
Michigan	36	7.74%
George Washington	35	7.53%
Georgetown	28	6.02%
Pennsylvania	27	5.81%
Duke	23	4.95%
NYU	23	4.95%
Minnesota	21	4.52%
Northwestern	17	3.66%
American	15	3.23%

In the 465 cases that had oral argument, approximately 52% of those cases had a lawyer who attended Harvard Law School, and 38% of the cases had a lawyer who attended Yale Law School. Table 3 only reports the top eighteen law schools who were in double digits or more.[228] Of course, this table only reflects seven Terms. One might think these data are specific to the terms studied, but Table 4 suggests the predominance of a few elite law schools will continue when considering where repeat players went to school.[229]

A. The Private Bar

Becoming an elite lawyer usually starts with a law school pedigree, but it does not stop there. That pedigree is closely related to the next step up the eliteness ladder: clerkships in the federal courts of appeal and especially in the Supreme Court. Table 4 reports these data for private counsel. It also

228. *See supra* note 18 and accompanying text.

229. *See also* Tony Mauro, *SCOTUS Clerks: The Law School Pipeline*, NAT'L L.J. (Dec. 11, 2017), https://www.law.com/nationallawjournal/sites/nationallawjournal/2017/12/11/scotus-clerks-the-law-school-pipeline/ [https://perma.cc/RGA8-HBDB] (noting that an increasing percentage of Supreme Court law clerks went to Harvard or Yale).

indicates which lawyers spent time in the OSG—another leg up when being recruited into a law firm with a powerful Supreme Court practice.[230]

Table 4. Private Counsel Law School, Clerkship, and SG Experience
October Terms 2013–2019

Attorney	Oral Arguments	Law School	Clerkship	SG Experience
Paul D. Clement	32	Harvard	Scalia	Yes
Neal K. Katyal	24	Yale	Breyer	Yes
Jeffrey L. Fisher	18	Michigan	Stevens	No
Seth P. Waxman	16	Yale	Brennan	Yes
Thomas C. Goldstein	15	American	Wald (D.C. Cir.)	No
Kannon K. Shanmugam	15	Harvard	Scalia	Yes
David C. Frederick	14	Texas	White	Yes
Carter G. Phillips	12	Northwestern	Burger	Yes
Shay Dvoretzky	11	Yale	Scalia	No
E. Joshua Rosenkranz	9	Georgetown	Brennan	No
Daniel L. Geyser	9	Harvard	Kozinski (9th Cir.)	No
Adam G. Unikowsky	9	Harvard	Scalia	No
Paul W. Hughes	8	Yale	Motz (4th Cir.)	No
Lisa S. Blatt	7	Texas	Ginsburg (D.C. Cir.)	Yes
Paul M. Smith	7	Yale	Powell	No
Gregory G. Garre	6	George Washington	Rehnquist	Yes
Michael B. Kimberly	6	Yale	Hawkins (9th Cir.)	No
Christopher Landau	6	Harvard	Scalia and Thomas	No
Christopher G. Michel	6	Yale	Roberts	Yes
Andrew J. Pincus	5	Columbia	Greene (D.D.C.)	No
Danielle Spinelli	5	Harvard	Breyer	No
Peter K. Stris	5	Harvard	Unknown	No

230. *See* discussion *infra* Section V.B.

Table 4. Private Counsel Law School, Clerkship, and SG Experience
October Terms 2013–2019

Attorney	Oral Arguments	Law School	Clerkship	SG Experience
Michael A. Carvin	4	George Washington	Unknown	No
Marc E. Elias	4	Duke	Unknown	No
James A. Feldman	4	Harvard	Brennan	Yes
Mark C. Fleming	4	Harvard	Souter	No
Douglas Hallward-Driemeier	4	Harvard	Kearse (2d Cir.)	Yes
Allyson N. Ho	4	Chicago	O'Connor	No
William M. Jay	4	Harvard	Scalia	Yes
Erin E. Murphy	4	Georgetown	Roberts	No
Theodor B. Olson	4	U.C. Berkeley	Unknown	Yes
Mark A. Perry	4	Chicago	O'Connor	No
Kevin K. Russell	4	Yale	Breyer	No
Eric Schnapper	4	Yale	Unknown	No
Stephanos Bibas	3	Yale	Kennedy	No
John J. Bursch	3	Minnesota	Loken (8th Cir.)	No
Catherine M.A. Carroll	3	Michigan	Souter	No
Erwin Chemerinsky	3	Harvard	Unknown	No
Thomas H. Dupree Jr.	3	Chicago	Smith (5th Cir.)	No
John P. Elwood	3	Yale	Kennedy	Yes
Miguel Estrada	3	Harvard	Kennedy	No
Noel J. Francisco	3	Chicago	Scalia	Yes
Jonathan D. Hacker	3	Michigan	Unknown	No
Donald B. Verrilli Jr.	3	Columbia	Brennan	Yes

As discussed in Part II, having served as a Supreme Court clerk makes these lawyers highly sought-after by the big, powerful, influential, elite law firms.[231] Of the forty-four top private advocates for the seven Terms, twenty-eight (63.6%) clerked for a Supreme Court Justice and usually a Circuit Court of Appeals judge as well, and eight (18.2%) who did not clerk in the Supreme Court clerked for a federal judge on the Court of Appeals. Only eight either

231. *See* Shiffman, *supra* note 95.

did not clerk for an appeals court judge or there was no evidence of having done so.

Recently, it was reported by various sources that the signing bonus for Supreme Court law clerks offered by several large law firms was $400,000.[232] As these young lawyers rise to stardom, they are also able to command very high fees from clients.[233] Though lawyers' fees are often negotiated with clients, most of the attorneys listed in Table 1 can afford to say no. One way to learn about their fees is through publicly filed documents.[234] Former Obama Administration SG Donald Verrilli (Munger Tolles) reported billing at an hourly rate of $1,300. Thomas Goldstein, founder of an appellate boutique, charged $1,350 per hour. Paul Clement (#1 on Table 4) charged a whopping $1,745 per hour. Christopher Landau (Kirkland & Ellis at the time and now President Trump's Ambassador to Mexico) charged a mere $1,075 per hour while working with his partner Paul Clement and representing an offshore drilling company.[235]

To be sure, sometimes famous lawyers and large law firms represent clients for slightly reduced charges or for free, but typically, star attorneys serving as repeat players in the Supreme Court are affordable by only certain types of clients.[236] And the salaries of such lawyers continue to rise.[237] In the current climate, lawyers are willing to move to a rival firm, and bidding wars to "steal" talent are common.[238] The *National Law Journal* often reports on such movement.[239] Reading these reports is almost like reading the sports pages about star players being recruited once their contracts expire. Even

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232. *See, e.g.*, Adam Liptak, *Law Firms Pay Supreme Court Clerks $400,000 Bonuses. What Are They Buying?*, N.Y. TIMES (Sept. 21, 2020), https://www.nytimes.com/2020/09/21/us/politics/supreme-court-clerk-bonuses.html [https://perma.cc/9T56-WUAH].

233. *See* Biskupic et al., *supra* note 13 (noting the profitability stemming from Supreme Court litigation).

234. *See, e.g.*, Declaration of Thomas C. Goldstein in Support of Appellant's Motion for Attorney's Fees at 31, Patel v. City of Los Angeles, 738 F.3d 1058 (9th Cir. 2013) (No. 08-56567).

235. Mike Scarcella & Marcia Coyle, *What New Supreme Court Cases Reveal About Big Law Billing Rates*, NAT'L L.J. (Aug. 27, 2019), https://www.law.com/nationallawjournal/2019/08/27/what-new-supreme-court-cases-reveal-about-big-law-billing-rates/ [https://perma.cc/MN7Q-G4KC].

236. *See* Biskupic et al., *supra* note 13.

237. *See* Scarcella & Coyle, *supra* note 235.

238. Meghan Tribe & Kimberly Strawbridge Robinson, *Big Law's Supreme Court Star Power Competes for Smaller Pie*, BLOOMBERG L. (Aug. 13, 2019, 4:56 AM), https://news.bloomberglaw.com/us-law-week/supreme-court-practices-are-fools-gold-without-appellate-focus [https://perma.cc/TA93-RH2K].

239. *See, e.g.*, Dan Packel, *Mueller, Trump and Appellate Musical Chairs: Key D.C. Firm Moves in 2019*, NAT'L L.J. (Dec. 27, 2019), https://www.law.com/nationallawjournal/2019/12/27/mueller-trump-and-appellate-musical-chairs-key-d-c-firm-moves-in-2019/ [https://perma.cc/7H3N-MR6T].

better, these lawyer stories get to report surprise moves that appear to be unexpected.

B. United States Office of the Solicitor General

Part IV focused on government attorneys who are elites in a different way from their sisters and brothers (mostly brothers) in the private bar; they are not making huge salaries compared to the private law world, and they are often not representing the rich and powerful. But in other ways, they are very similar to those in the private bar. They are drawn from the same elite pool of law schools and federal clerkships as is reflected in Table 5.

Table 5. U.S. OSG Law School and Clerkship Experience Among Those Who Argued a Minimum of Two Times
October Terms 2013–2019

Attorney	Position	Oral Arguments	Law School	Clerkship
Malcolm L. Stewart	SG Deputy	27	Yale	Brennan
Donald B. Verrilli, Jr	SG	20	Columbia	Brennan
Edwin S. Kneedler	SG Deputy	19	Virginia	Browning (9th Cir.)
Michael R. Dreeben	SG Deputy; Asst.	17	Duke	Williams (5th Cir.)
Anthony A. Yang	SG Asst.	17	Yale	Michael (4th Cir.)
Jeffrey B. Wall	SG Deputy; Acting	16	Chicago	Thomas
Noel J. Francisco	SG	16	Chicago	Scalia
Eric J. Feigin	SG Asst.	15	Stanford	Breyer
Ann O'Connell	SG Asst.	14	George Washington	Roberts and Rehnquist
Ian H. Gershengorn	SG Deputy	13	Harvard	Stevens
Sarah E. Harrington	SG Asst.	12	Harvard	Barkett (11th Cir.)
Nicole A. Saharsky	SG Asst.	12	Minnesota	King (5th Cir.)
Rachel P. Kovner	SG Asst.	12	Stanford	Scalia
Brian H. Fletcher	SG Asst.	11	Harvard	Ginsburg
Allon Kedem	SG Asst.	11	Yale	Kagan and Kennedy
Curtis E. Gannon	SG Asst.	10	Chicago	Scalia

Table 5. U.S. OSG Law School and Clerkship Experience Among Those Who Argued a Minimum of Two Times
October Terms 2013–2019

Zachary D. Tripp	SG Asst.	10	Columbia	Ginsburg
Elaine J. Goldenberg	SG Asst.	10	Harvard	Lynch (1st Cir.)
Ilana H. Eisenstein	SG Asst.	10	Pennsylvania	Becker (3d Cir.)
Ginger D. Anders	SG Asst.	9	Columbia	Ginsburg
John F. Bash	SG Asst.	9	Harvard	Scalia
Roman Martinez	SG Asst.	7	Yale	Roberts
Jonathan C. Bond	SG Asst.	6	George Washington	Scalia
Elizabeth B. Prelogar	SG Asst.	6	Harvard	Kagan
Jonathan Ellis	SG Asst.	6	Pennsylvania	Roberts
Erica L. Ross	SG Asst.	6	Stanford	Kagan
Christopher G. Michel	SG Asst.	6	Yale	Roberts
Morgan L. Ratner	SG Asst.	5	Harvard	Roberts
Michael R. Huston	SG Asst.	5	Michigan	Roberts
Frederick Liu	SG Asst.	5	Yale	Roberts
Sopan Joshi	SG Asst.	3	Northwestern	Scalia and Alito
Robert A. Parker	SG Asst.	3	Yale	Unknown
Melissa Sherry	SG Asst.	3	Virginia	Stevens
Joseph R. Palmore	SG Asst.	3	Virginia	Ginsburg
Irv Gornstein	SG Counselor	2	Boston U.	Unknown
Matthew Guarnieri	SG Asst.	2	Columbia	Unknown
Benjamin J. Horwich	SG Asst.	2	Stanford	O'Connor and Alito

As discussed in Section IV.A, the OSG has long been populated by many of the nation's best appellate lawyers coming from the top of their classes at the most elite law schools.[240] Perched atop most other offices in Main Justice, the OSG is an elite place to work,[241] not only because of the pedigrees and abilities of those who work there but also because of the unique and special relationship they have with the Justices.[242] The SG has often been referred to

240. *See* discussion *supra* Section IV.A.
241. *See* CAPLAN, *supra* note 127, at 3.
242. *See id.* at 19–32.

as the tenth Justice.[243] These lawyers see their role as both advocates and servants committed to helping the Court. In fact, many OSG members seem more interested in pleasing the Justices than the President or the Attorney General.[244] These dynamics present some interesting separation of powers issues, but that is a topic for another day.

As described in Part IV.A, the frequent interaction between the Justices and the lawyers in the OSG leads to mutual respect and a knowledge of each other.[245] It is heady company. They are among the few amici who can often be seen as true "friends" of the Court. Members of the OSG have unique access to the Court—the SG even has an office at the Court.[246] They are the quintessential repeat players, and the Justices come to know them well, and they knew many of them already as their former clerks.

Continuing the theme of this Article of the convergence of changes in the appellate world, there have been notable changes in the OSG that were documented earlier. One change worth returning is to the fact that for many years, it was common for lawyers in the OSG either to spend their entire careers in the office or stay there for an extended period of time.[247] Now, many serve for only a few years before leaving to enter the private sector.[248] Most lawyers in the OSG were already high-profile law clerks[249] and after serving in the OSG, they enter the private sector with extraordinary experience arising from more interactions with the Justices than is typical among other lawyers. In fact, they are in even more demand than clerks coming straight from the Supreme Court, and the fight to recruit them is intense.[250] Interestingly, under the Trump Administration, more individuals are coming to the OSG from big law firms with significant experience.[251] Most will likely stay for a short time before returning to the private sector, as is typical with SSGs. In sum, those who work for the government in the OSG do not look very different from their big law counterparts. They arrive as elites and become even more valuable to the private sector.

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243. *Id.* at 3.

244. Interview with Anonymous (confidential transcript on file with author); *see also* CAPLAN, *supra* note 127, at 34–38.

245. PERRY, *supra* note 14, at 132.

246. Vladeck, *supra* note 139, at 123.

247. *See* Lazarus, *supra* note 14, at 1492; *see also supra* Section IV.A.2.

248. *See, e.g.*, Tony Mauro, *Solicitor General's Office Fills Ranks with Big Law Hires*, NAT'L L.J. (Aug. 30, 2017), https://www.law.com/nationallawjournal/almID/1202796881204/ [https://perma.cc/Q64S-GFLQ].

249. Biskupic et al., *supra* note 13.

250. *See, e.g.*, Sara Randazzo, *California Law Firm Hires Former Solicitor General for Washington, D.C., Office*, WALL ST. J. (Sept. 28, 2016), https://www.wsj.com/articles/california-law-firm-hires-former-solicitor-general-for-washington-d-c-office-1475089202 [https://perma.cc/NP7B-4BVZ].

251. *See* Mauro, *supra* note 248.

C. State Solicitors General

State SGs and AGs are beginning to look more like their federal counterparts. Table 6 shows who argued over the seven Terms studied in this Article. As can be seen, their pedigrees are also impressive and becoming more elite over time. Particularly interesting is how many have clerked for Supreme Court Justices. Elitism abounds even in state capitals.

Table 6. State SGs and AGs Arguing Before the Court
October Terms 2013-2019

Attorney	Position	Oral Arguments	Law School	Supreme Court Clerkship
Scott A. Keller	SG Tex.	11	Texas	Kennedy
Eric E. Murphy	SG Ohio	4	Chicago	Kennedy
Frederick R. Yarger	SG Colo.	4	Chicago	Unknown
Derek L. Schmidt	AG Kan.	3	Georgetown	Unknown
Andrew L. Brasher	SG Ala.	3	Harvard	Unknown
Noah Purcell	SG Wash.	3	Harvard	Souter
John J. Bursch	SG Mich.	3	Minnesota	Unknown
Steven M. Sullivan	Asst. AG Md.	3	Harvard	Unknown
Aaron D. Lindstrom	SG Mich.	2	Chicago	Unknown
Jonathan F. Mitchell	SG Tex.	2	Chicago	Scalia
David L. Franklin	SG Ill.	2	Chicago	Ginsburg
Allen Winsor	SG Fla.	2	Florida	Unknown
Toby Crouse	SG Kan.	2	Kansas	Unknown
Elizabeth Murrill	SG La.	2	LSU	Unknown
Robert C. Montgomery	Senior Deputy AG N.C.	2	North Carolina	Unknown
Ruth Botstein	Asst. AG Alaska	2	Stanford	Unknown
Toby J. Heytens	SG Va.	2	Virginia	Ginsburg
Tyler R. Green	SG Utah	1	Berkeley	Unknown
Jennifer Grace Miller	Asst. AG Mass.	1	Boston University	Unknown
Joseph F. Whalen	Assoc. SG Tenn.	1	Boston University	Unknown
Carolyn E. Shapiro	SG Ill.	1	Chicago	Breyer

Table 6. State SGs and AGs Arguing Before the Court
October Terms 2013-2019

Attorney	Position	Oral Arguments	Law School	Supreme Court Clerkship
Michael J. Fischer	Deputy AG Pa.	1	Columbia	Unknown
Matthew W. Sawchak	Dep't Just. N.C.	1	Duke	Unknown
Sarah Hawkins Warren	SG Ga.	1	Duke	Unknown
Matthew R. McGuire	AG Va.	1	George Mason	Unknown
Randall E. Ravitz	Asst. AG Mass.	1	Georgetown	Unknown
Misha Tseytlin	SG Wis.	1	Georgetown	Kennedy
Barbara D. Underwood	AG N.Y.	1	Georgetown	Unknown
Erin E. Murphy	Wash. State Senate		Georgetown	Unknown
Beth A. Burton	Deputy AG Ga.	1	Georgia	Unknown
Andrew S. Oldham	Deputy SG Tex.	1	Harvard	Alito
D. John Sauer	SG Mo.	1	Harvard	Unknown
Lindsay S. See	AG W. Va.	1	Harvard	Unknown
Trevor S. Cox	SG Va.	1	Harvard	Unknown
Todd Kim	SG D.C.	1	Harvard	Unknown
Ryan Park	Deputy SG N.C.	1	Harvard	Ginsburg
Oramel H. Skinner	Ariz. SG	1	Harvard	Unknown
Mithun Mansinghani	Okla. SG	1	Harvard	Unknown
Carey R. Dunne	N.Y. Cnty. DA's Off.	1	Harvard	Unknown
Thomas M. Fisher	SG Ind.	1	Indiana	Unknown
Stephen R. McAllister	SG Kan.	1	Kansas	White
Brett E. Legne	SG Ill.	1	Loyola Chicago	Unknown
Elizabeth Murrill	SG La.	1	LSU	Unknown
Julia Doyle Bernhardt	Asst. AG Md.	1	Maryland	Unknown

Table 6. State SGs and AGs Arguing Before the Court
October Terms 2013-2019

Attorney	Position	Oral Arguments	Law School	Supreme Court Clerkship
Valerie Newman	Mich. Asst. State Pub. Def.	1	Michigan	Unknown
Dario Broghesan	Alaska Dep't of Law	1	Michigan	Unknown
John G. Knepper	SG Wyo.	1	Michigan	Unknown
Eric R. Olson	SG Colo.	1	Michigan	Unknown
John J. Bursch	Special AG Mich.	1	Minnesota	Unknown
Kyle D. Hawkins	SG Tex.	1	Minnesota	Unknown
James D. Smith	SG Neb.	1	Nebraska	Unknown
Marcus J. Rael Jr.	AG N.M.	1	New Mexico	Unknown
Christine Van Aken	S.F. Deputy City Att'y	1	NYU	Souter
Daniel Rogan	Hennepin Cnty. Att'y's Off.	1	NYU	Unknown
Philip J. Weiser	AG Colo.	1	NYU	Unknown
Patrick R. Wyrick	SG Okla.	1	Oklahoma	Unknown
Carl J. Withroe	DA Gen. Idaho	1	Oregon	Unknown
Ronald Eisenberg	Deputy DA Phila.	1	Pennsylvania	Unknown
Marty J. Jackley	AG S.D.	1	South Dakota	Unknown
Edward C. DuMont	SG Cal.	1	Stanford	Unknown
Joshua A. Klein	Cal. Dep't of Just.	1	Stanford	Unknown
Michael J. Mongan	SG Cal.	1	Stanford	Unknown
Luther J. Strange, III	SG Ala.	1	Tulane	Unknown
Jeffrey M.K. Laurence	Supervising Deputy AG Cal.	1	UC Hastings	Unknown
Louis W. Karlin	Deputy AG Cal.	1	UCLA	Unknown
Mark Brnovich	AG Ariz.	1	University of San Diego	Unknown

Table 6. State SGs and AGs Arguing Before the Court
October Terms 2013-2019

Attorney	Position	Oral Arguments	Law School	Supreme Court Clerkship
Mark Brnovich	AG Ariz.	1	University of San Diego	Unknown
Robin Urbanski	Deputy AG Cal.	1	University of San Diego	Unknown
Kathryn Keena	Asst. Dakota Cnty. Att'y	1	Hamline	Unknown
David J. Lynch	Iowa Utils. Bd. Gen. Couns.	1	Iowa	Unknown
Susan R. Lenz	Asst. AG Ky.	1	Unknown	Unknown
David A. Curran	State Senior Asst. AG Ark.	1	Univ. of Texas	Unknown
Dale Schowengerdt	SG Mont.	1	Regent	Unknown
Daniel D. Domenico	SG Colo.	1	Virginia	Unknown
Stuart A. Raphael	State SG Va.	1	Virginia	Unknown
Kenneth K. Jorgensen	SG Idaho	1	William Mitchell	Unknown
Bridget C. Asay	SG Vt.	1	Yale	Unknown
Richard P. Dearing	N.Y.C. Law Dep't	1	Yale	Unknown
Michael Scodro	SG Ill.	1	Chicago	Unknown
Thomas R. Govan	SG Ala.	1	Unknown	Unknown
Richard M. Summa	Fed. Pub. Def.	1	Unknown	Unknown

D. The Justices

Though this Article concentrates on lawyers, it is well to remember that the Justices themselves usually come from elite ranks[252]—if not from birth,

252. William Wan, *Every Supreme Court Justice Attended Harvard or Yale. That's a Problem, Say Decision-Making Experts*, WASH. POST (July 11, 2018), https://www.washingtonpost.com/news/speaking-of-science/wp/2018/07/11/every-supreme-court-justice-attended-harvard-or-yale-thats-a-problem-say-decision-making-experts/ [https://perma.cc/N5C7-VNVK].

certainly by the time they become Justices. Today, all Justices come from the most elite law schools, and most have spent their careers relatively isolated as federal judges.[253]

As with any group of elites, there are often close personal ties and networks within. According to one journalistic account:

> [W]hen [elite lawyer Ted] 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 [Justice] Scalia regularly attend an intimate New Year's Eve dinner. Location: Justice Ruth Bader Ginsburg's apartment at the Watergate complex. Last year, [Justice] Kagan went too.[254]

This is not to suggest anything untoward or inappropriate. Connections like this abound in most elite circles. Social and professional relations present potential conflicts in all aspects of government, business, and education, and they must be negotiated. It has always been thus, but there are reasons to worry a bit more about it now.[255] As Robert Putnam demonstrated, social networks are getting more homogeneous, and increasingly, individuals are socializing more with those they know—often to the exclusion of others.[256] But there is something about the social networks of judges that is a bit disquieting when they are friends, former bosses, or mentors of those who argue before them. Other federal courts have policies on socializing with lawyers, but the Supreme Court does not.[257] Justice Scalia recognized this: "[A] rule that [would] require[] members of this [C]ourt to remove themselves from cases in which the official action of friends were at issue would be utterly disabling."[258]

The worry is not that the Justices rule in favor of their clerks; rather, it is the appearance of a very intimate insiders' network. What might present more of a problem than appearances is if the Court is what Joan Biskupic and her colleagues referred to as "an echo chamber."[259] When the Justices are deciding cases, the arguments they are reading and hearing come from people much like themselves—the same law schools, same social class, same social circles, even the same experiences. They are hearing from people whom they trained as their former clerks and mentees and from lawyers whose experiences in the legal profession are much like their own. Echo chambers

253. *See id.*
254. Biskupic et al., *supra* note 13.
255. PUTNAM, *supra* note 223, at 27.
256. *Id.*
257. Biskupic et al., *supra* note 13.
258. *Id.*
259. *Id.*

abound in our society, but the concern of an echo chamber is greater for judges than other governmental leaders because judges lead a more insular life, and they are not as free to seek outside input or information unless it is brought to them by a case or counsel. Of course, amici play an important role in this regard, but amici are rarely allowed time at oral argument; so many amicus briefs are filed, it is unclear how many are actually read by the Justices or even by their clerks.[260] Perhaps more importantly, amici are increasingly being orchestrated by the litigants' lawyers.[261]

E. The Justices' Views on Elitism

Whatever the potential problems of an echo chamber and elitism, the Justices are not only not troubled by it, they are in favor of it irrespective of their legal, ideological, or political stripe.[262] When asked about the specialized Supreme Court bar, Justice Kagan said, "we all hope that it will continue . . . good lawyering helps for better decision-making."[263] In describing the current Court as "the really hot bench," she suggested that appellate specialists are almost a necessity.[264] When discussing trial lawyers in the Supreme Court, she said they "occasionally will be really good, but often they are not. Supreme Court specialists . . . know what kind of questions we ask, the information we need or want."[265] Justice Kagan also said she is troubled by the "real disparity" between the government and defense lawyers in criminal cases, and she has mentioned this on several occasions.[266]

Further, Justice Sotomayor noted that state advocacy in the Court has improved greatly, but defense trial lawyers sometimes persist from the local court level all the way to the Supreme Court with bad results.[267] Justice Kennedy was quoted on this topic, showing his approval of the elite bar as well.[268] In response to questions about an elite and specialized Supreme Court bar, Justice Thomas said: "[T]he problem is when you have a tough case, you need really good lawyers to tee it up, to make the best arguments. That's what

260. Lazarus, *supra* note 14, at 1523–24.

261. Larsen & Devins, *supra* note 14, at 1903.

262. *See* Biskupic et al., *supra* note 13.

263. Tony Mauro, *Kagan Dishes on Supreme Court Bar, State of the Union, and Law Schools*, LEGAL TIMES (Feb. 4, 2015) (internal quotation marks omitted), http://www.nationallawjournal.com/legaltimes/id=1202716979048/Kagan-Dishes-on-Supreme-Court-Bar-State-of-the-Union-and-Law-Schools [https://perma.cc/QU92-CZGA].

264. *Id.* (internal quotation marks omitted).

265. *Id.* (internal quotation marks omitted).

266. *Id.*

267. Marcia Coyle, *Where Are All the Good Criminal Advocates?*, 2 NAT'L L.J. 21, 21 (2018).

268. *See* Biskupic et al., *supra* note 13.

you're looking for."[269] Retired Justice Stevens likewise observed, "they earn respect by their performances. And because they have respect, they are more successful. I'm not aware of any downside."[270] The late Justice Ginsburg also noted: "If you know you have a solid beginning, two people making the best argument on both sides, that makes it less anxious for you."[271]

Before coming to the Court, Chief Justice Roberts had a more nuanced view. He put it this way:

> Obviously better advocacy—if in fact that is what comes with more experienced advocates—is a good thing. A well-argued case will not necessarily be well decided; sometimes the judges get in the way. But there is a significant risk that a poorly argued case will be poorly decided. That is a risk of our adversary system. More experienced, better advocates should be a good thing.[272]

But he then went on to acknowledge the pitfall of elitism with the Supreme Court bar, stating a point-of-view rarely said around the Court these days by either Justices or active Supreme Court practitioners:

> [T]here is no denying that something is lost as the bar becomes more specialized. The Chief Justice [Rehnquist] has referred to the "intangible value of oral argument," the point at which counsel and Court look each other in the eye and have a public "interchange" about the case. If you have a case arising in Iowa that works its way through the Iowa courts, goes to the Iowa Supreme Court, and works its way to Washington, I think there is something beneficial both for the U.S. Supreme Court and certainly for the Iowa bar to have Iowa attorneys present that case. That is true, of course, only to the extent that those attorneys are able and willing to learn what practice before the Supreme Court is like and what it demands of them. . . . It may be that not many lawyers with different practices to maintain can set aside the months necessary effectively to brief and to prepare for argument in a case before the Supreme Court.[273]

269. *Id.*
270. *Id.*
271. *Id.*
272. *See* Roberts, *supra* note 28, at 79.
273. *Id.*

F. Criticisms of Elitism

Michael Luttig, who clerked for Justice Burger and for then-Judge Scalia and who formerly served as a judge on the U.S. Court of Appeals for the Fourth Circuit, was more blunt than Chief Justice Roberts:

> It has become a guild, a narrow group of elite justices and elite counsel talking to each other . . . detached and isolated from the real world, ultimately at the price of the healthy and proper development of the law.[274]

Though not a precise analogy to the lack of diversity among the Court, there are reasons why law schools and, even more so, university departments rarely hire their own. Academic departments worry about hiring too many employees from the same university. This is not because they do not want first-rate scholars on their faculty; rather, they do not want ideas exchanged and argued among individuals from the same place or perspective. Having faculty from a diverse set of universities improves a school or department by enhancing the chance of getting fresh, novel perspectives. It is also why universities want to recruit students from all fifty states with diverse backgrounds even if doing so might slightly lessen the median LSAT or SAT score. All things being equal, diversity is a good thing. It is the first part of this sentence that troubles the Justices. All things are not equal, and they want the very best, or who they perceive to be the very best, whenever they can have it. Of course, the Justices want high quality advocacy, and that is a good thing. But surely having the same lawyer arguing five or six cases term after term reduces input and perspective. It is a false choice to say that the Court must trade quality appellate argument to have a wider range of inputs. No great physics department, political science department, law school, or medical school is willing to reduce the quality of its faculty simply to seek a more diverse faculty; but they do want to assure that they are creating an environment where fresh insights are being considered to address old and new problems.

The consequences of an absence of such diversity is an old story. Harvard law professor Charles Ogletree put it this way: "I think hearing different voices, from more women and people of color would change the way the court looked at cases and analyzed them[.]"[275] In a nine-year study, Reuters

274. Biskupic et al., *supra* note 13.
275. *Id.*

identified sixty-six lawyers with the highest rate of granted petitions.[276] Of the sixty-six, sixty-three are white, and only eight are women.[277]

Though things have improved, women constitute a minute percentage of those who argue before the Court.[278] In the 2018 Term, for example, of 184 appearances before the Court, only thirty-one were women, ten of whom were from the OSG.[279] It is difficult to determine the race of lawyers who have argued before the Court, but there are very few black lawyers that have ever argued before the Court, especially after the Civil Rights movement.[280] An article in *Mother Jones* could only identify fewer than a half dozen black women who argued in the Court from 1999 to 2016.[281]

There is, however, more information about the lack of minority representation among Supreme Court law clerks. In a study done by the *National Law Journal*, from 2005 to 2017, 85% of law clerks were white.[282] Of the 487 clerks, twenty were African-American and nine were Hispanic.[283] Given the pathway to the elite private bar that this Article demonstrates, prospects for the future are not promising for more minorities to get into the club.

There are reasons to celebrate the growth of an elite private bar. The federal government has long had many of the best appellate lawyers in the nation. Indeed, for a long time, the federal government had almost a monopoly on those lawyers who had vast experience before the Court. Given the importance of the issues that the Court decides, it may be good that a private bar of repeat, elite players now confronts government lawyers with equal wit and power. It is tempting to think of private elite lawyers as only representing the rich and powerful. However, those without power have increasingly become represented by elite lawyers before the Court. Law schools have developed legal clinics appealing to the Supreme Court, and they are

276. *Id.*

277. *Id.*; *see also* MCGUIRE, *supra* note 10, at 35.

278. *See* Tony Mauro, *At the Supreme Court, Where Are the Women Advocates?*, NAT'L L.J. (Oct. 2, 2019), https://www.law.com/nationallawjournal/2019/10/02/at-the-supreme-court-where-are-the-women-advocates/ [https://perma.cc/Z9WS-HQ99]; Kimberly Strawbridge Robinson, *An Uphill Climb for Women Supreme Court Advocates Gets Steeper*, BLOOMBERG L. (May 15, 2020) https://news.bloomberglaw.com/us-law-week/an-uphill-climb-for-women-supreme-court-advocates-gets-steeper [https://perma.cc/34AJ-SKG9].

279. Mauro, *supra* note 278; Robinson, *supra* note 278.

280. *See, e.g.*, Stephanie Mencimer, *A Black Woman Is Arguing a Big Supreme Court Case Today*, MOTHER JONES (Oct. 5, 2016), https://www.motherjones.com/politics/2016/10/buck-v-davis-christina-swarns/ [https://perma.cc/6W6Y-9Q9K].

281. *Id.*

282. Tony Mauro, *Shut Out: SCOTUS Law Clerks Still Mostly White and Male*, NAT'L L.J. (Dec. 22, 2017), https://www.law.com/ctlawtribune/sites/ctlawtribune/2017/12/22/shut-out-scotus-law-clerks-still-mostly-white-and-male-2/ [https://perma.cc/6HYW-MLVK].

283. *Id.*

represented by lawyers who themselves are repeat players.[284] Superstar Thomas Goldstein, for example, helped found clinics at Harvard and Stanford.[285] Likewise, Jeffrey Fisher, one of Justice Stevens's former clerks, joined the program at Stanford and is himself one of the elite.[286]

It would be a mistake to conclude that the scales are even though. As Fisher noted: "We can only do so much."[287] Of the top forty-four oral advocates in Table 1, many are known to sympathize with the less powerful in society and have argued before the Court on their behalf.[288] Moreover, because of the prestige of arguing before the Court, many top advocates and those seeking to become top advocates will take cases pro bono just to appear before the Court.[289] These advocates are selective in the cases they agree to take, however, because success on their part could lead to policies that disadvantage their major clients.[290] In fact, lawyers from two of the elite law firms often appearing before the Court have said as much. Glen Nager, an attorney with Jones Day, said: "We do not take cases that could make negative law for our clients."[291] And Christopher Landau, formerly with Kirkland Ellis (which represents some of the nation's largest corporations), asserted, "The last thing we want is to make one of our long-standing clients unhappy with what we do."[292]

G. Control over Agenda Setting

What may be as important than who argues before the Court is the increasing power of the elite private bar in the agenda-setting process. When analyzing the Supreme Court, most attention focuses on the Court's decision on the merits.[293] Much less attention is given to how the case made it onto the Court's relatively small docket. As John Kingdon said in his classic book on agenda setting in governmental institutions:

> We know more about how issues are disposed of than we know about how they came to be issues on the governmental agenda in the first place, how the alternatives from which decision makers chose were

284. Lazarus, *supra* note 14, at 1502.
285. Biskupic et al., *supra* note 13.
286. *Id.*
287. *Id.*
288. Lazarus, *supra* note 14, at 1557.
289. *Id.*
290. Biskupic et al., *supra* note 13.
291. *Id.*
292. *Id.*
293. *See* PERRY, *supra* 14, at 5–7; Feldman, *supra* note 14, at 430; EPSTEIN ET AL., *supra* note 1, at 66.

> generated, and why some potential issues and some likely alternatives never came to be the focus of serious attention.[294]

Kingdon's insights are particularly relevant for the Supreme Court. Even more so than other governmental institutions, the Court is largely dependent on issues being brought to it. To be sure, the Court is not as constrained in setting its agenda as the textbook model suggests; the Court has all sorts of ways to encourage someone to bring a case to them, and it has virtually complete discretion in selecting which cases to review.[295] Nevertheless, the parties and their counsel play a particularly important role. Moreover, when a particular case is chosen to resolve an issue, the way in which the case is presented often frames the issue, providing and restricting the Court's alternatives in the ultimate decision.

As E.E. Schattschneider famously said, "[t]he definition of the alternatives is the supreme instrument of power."[296] Accordingly, focusing on who helps shape that agenda is particularly important:

> Sometimes who counsel is . . . is important for the [J]ustices. [Some attorneys] are known by the Court as being particularly good. When the Court has an opportunity to pick among cases to resolve an issue, the case with good counsel will usually be chosen. Unfortunately for the Court, however, the ability to choose a case based on the quality of counsel occurs only rarely.[297]

Times have changed. The names of high-powered appellate attorneys are plentiful in petitions these days, and by the Justices' own admissions, the quality of counsel seems to matter a lot to them.[298] Who counsel is matters positively and negatively. In fact, Justice Thomas confessed that "[a]ny number of people will vote against a cert petition if they think the lawyering is bad."[299] Similarly, Justice Scalia acknowledged that although he never voted to grant certiorari solely on the basis of the quality of counsel, he had "voted against what would be a marginally granted petition when it was not well presented . . . where the petition demonstrate[d] that the lawyer [was] not going to argue it well."[300]

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294. JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 1 (1984).

295. PERRY, *supra* 14, at 125

296. ELMER ERIC SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 68 (1960).

297. PERRY, *supra* note 14, at 127. This phenomenon has been referred to as "signaling." *See generally id.* at 121–24 (discussing signaling).

298. *See* discussion *supra* Section V.E.

299. Biskupic et al., *supra* note 13.

300. *Id.*

The Justices rely on all sorts of screening mechanisms to help manage the extraordinary burden of selecting some sixty odd cases out of almost ten thousand petitions. They and their clerks give more attention to some petitions than others.[301] They look for certain signals. Who will serve as counsel has become a prominent one as the Justices indicated above. Seeing the name of the Solicitor General, Paul Clement, or Neal Katyal on a petition sends a clear signal that it deserves closer scrutiny. The SG has always played an important role in this process as the Court relies on the SG to help winnow cases.[302] Now, however, elite private attorneys are doing serious screening before they choose to put their name on a case.[303] But as law professor Jenny Roberts stated, "We don't want the [J]ustices to filter cases through advocates. If this is happening, delegating the discretion of cases to sort of sub-Supreme Court when so much is at stake is troublesome."[304] Interestingly, in the 1980s when the Court felt the burden of having to screen so many cases in the certiorari process, there was a serious proposal for a National Court of Appeals to screen cases and refer them to the Court.[305] The Justices would have none of this.[306] They were unwilling to delegate such authority to other federal judges.[307] It is a bit ironic that now that function is done somewhat by private counsel.

One might argue that private lawyers serving as repeat players are not that different from OSG lawyers who long played a role in screening judges. However, there is a difference between the OSG screening and having private counsel screen. There are public checks on government lawyers.[308] The attentive public has some sense of what the priorities of the government are in a particular Justice Department. At least in theory, when the government is giving priority to certain concerns over others, the decision can be argued publicly and ultimately controlled through the political process. Also, internal arguments occur within the OSG that focus on long-term institutional

301. Lazarus, *supra* note 14, at 1523–24 (asserting that the reason is "entirely practical" because neither the Justices nor clerks have the time to spend the same amount of time on all petitions seeking review); *see also* PERRY, *supra* note 14, at 121–24.

302. Cordray & Cordray, *supra* note 142, at 1336; *see* discussion *supra* Section III.IV.A.

303. *See* PERRY, *supra* note 14, at 128.

304. Biskupic et al., *supra* note 13.

305. *See* PERRY, *supra* note 14, at 264 (discussing the proposed function of the National Court of Appeals).

306. *See id.* at 67 (construing Justice Brennan's opposition to the National Court of Appeals due to the importance of case selection and that case selection is not a duty that can be given to another court).

307. *Id.*

308. 28 U.S.C. § 541(a) (2012) ("The President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district."). Thus, because the President and Congress are elected by the people, the people serve as a check to the actions of government lawyers. Although the public cannot vote the government lawyer out, the public may vote against the president who appointed the lawyer, or the senator who confirmed him.

credibility. Maintaining this credibility is one of the OSG's highest priorities, and it is generally more interested in developing doctrine in particular ways rather than winning an individual case.[309] The same dynamic is not in play with private counsel. Both entities may be equally competent to understand which cases are good vehicles in jurisprudential matters, such as unclear facts and other issues making a case problematic.[310] But for Supreme Court review, there is more to the screening function than sifting through good and bad cases. SGs fill a dual responsibility: they are both an advocate for their client and a government representative required to further justice—sometimes at the expense of their client.[311] Such a perspective is inappropriate for private counsel.

Again, it makes sense that when the Court chooses to wrestle with a difficult issue, it wants a highly skilled advocate. But not all clients can afford these advocates. As Justice Ginsburg observed: "[B]usiness can pay for the best counsel money can buy. The average citizen cannot. That's just a reality."[312] However, there is a related but more serious problem that goes beyond the disadvantages to individual litigants—a systematic relationship between the types of issues that do and do not appear before the Court due to money.

Former Director of Public Citizen Litigation Group and current law professor, Alan Morrison, said, "It's very hard to get a consumer, environmental or workers case up, compared to business."[313] Justices usually do not see themselves on the bench to do justice in individual cases but rather to resolve larger issues of law so that the rest of the judiciary can apply the proper understanding of the law.[314] They see cases as fungible.[315] The Court presumes that if an issue is important, it will rise again; therefore, passing on an individual case is no big deal.[316] These days, when the SG is petitioning fewer cases and the elite bar is so tiny and insular, Justices may not be as certain that cases are so fungible and that all important issues will continue to arise or be argued in the same way. With a smaller docket and fewer lawyers disproportionately representing wealthy clients, these changes may not only

309. *See* Cordray & Cordray, *supra* note 142, at 1329; Lazarus, *supra* note 14, at 1495–96; H.W. Perry Jr., *United States Attorneys—Whom Shall They Serve?*, 61 LAW & CONTEMP. PROBS., 138–39 (1998) (noting that this, incidentally, is often a source of frustration to other lawyers in Main Justice, not to mention U.S. attorneys and other government lawyers).

310. PERRY, *supra* note 14, at 234–36.

311. *See* Cordray & Cordray, *supra* note 142, at 1381–82 (noting the decreased number of cases for which the OSG is seeking certiorari).

312. Biskupic et al., *supra* note 13.

313. *Id.* (internal quotation marks omitted).

314. PERRY, *supra* note 14, at 220.

315. *Id.* at 220–21 (highlighting that it is the *issue* that the case raises, not the specific case itself, that is important (emphasis added)).

316. *Id.* at 221.

affect individual litigants but also the nature of the agenda more generally. Whether the existence of a very small group of elite counsel has skewed outcomes in either agenda setting or the direction of the law is up for debate, and it deserves more systematic analysis.

H. Elitism and Democracy

No one seems to doubt the elitification of the Court, and the Justices, in fact, see it as laudable. Scholars who study elites undoubtedly could raise many more problems that typically arise when relatively small and powerful elites control access to an institution—no matter how honorable those elites are. The effects and normative conclusions are likely debatable but understanding the elitification of appellate courts is surely worth documenting and worthy of more systematic and empirical study by social scientists, legal scholars, and others.

In a democratic society and regime, there are particular reasons to be concerned about the concentration of power in elites, especially when governing institutions become dominated by elites and access to those institutions is increasingly controlled by them. Sociologists and political scientists have long paid attention to the roles and importance of elites.[317] In 1956, C. Wright Mills published his influential book *The Power Elite* and demonstrated how different elites came to play roles of dominance.[318] More recently, a leading scholar on elites, G. William Domhoff, demonstrated how elites working in various ways can control important issues in policy making despite democratic elections.[319] In 2014, Martin Gilens and Benjamin Page empirically tested four theoretical traditions in the study of American politics.[320] Their multivariate analysis "indicates that economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while average citizens and mass-based interest groups have little or no independent influence."[321] There is no reason to believe *ex ante* that these concerns about elites would not be true for legal institutions.

317. *See, e.g.*, C. WRIGHT MILLS, THE POWER ELITE (1956); G. WILLIAM DOMHOFF, WHO RULES AMERICA? POWER AND POLITICS, AND SOCIAL CHANGE (5th ed. 2006).

318. MILLS, *supra* note 317, at 28.

319. *See* DOMHOFF, *supra* note 317, at 111–12.

320. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POL. 564, 564 (2014).

321. *Id.*

VI. ELITE LEGAL MOBILIZATION

[B]oth the policy preferences of judges and the meaning of constitutional rights are partly constituted by the political economy of appellate litigation, particularly the distribution of resources necessary for sustained constitutional litigation.[322]

—Charles R. Epp

[T]he judiciary may be the most important instrument for social, economic and political change. . . . This is a vast area of opportunity for the Chamber, if it is willing to undertake the role of spokesman for American business . . . . the Chamber would need a highly competent staff of lawyers. In special situations it should be authorized to engage, to appear as counsel amicus in the Supreme Court, lawyers of national standing and reputation. The greatest care should be exercised in selecting the cases in which to participate, or the suits to institute. But the opportunity merits the necessary effort.[323]

—Lewis Powell (future Justice Powell)

I go to the office. I sue the federal government. And then I go home.[324]

—Former Texas Attorney General Greg Abbott

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322. CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, & SUPREME COURTS IN COMPARATIVE PERSPECTIVE 5 (1998).

323. Memorandum from Lewis F. Powell Jr., to Eugene B. Sydnor Jr., Chairman of the Educ. Comm., U.S. Chamber of Com. (Aug. 23, 1971) [hereinafter Powell Memo] https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1000&context=powellmemo [https://perma.cc/UFL4-4DWH]).

324. Manny Fernandez, *Texas Attorney General to New Yorkers: Come on Down, with Guns*, N.Y. TIMES (Jan. 20, 2013) http://www.nytimes.com/2013/01/21/us/texas-attorney-general-invites-new-yorkers-to-bring-their-guns.html [https://perma.cc/4MQW-X6V2].

For some time, scholars have understood the importance of the idea of legal mobilization.[325] In a classic piece, Fran Zemans accused political scientists of viewing law too narrowly and presented a more interactive view.[326] She saw legal mobilization as invoking legal norms as a form of political activity.[327] Michael McCann later emphasized the importance and politics of legal mobilization in his examination of worker's rights.[328] Susan Lawrence also wrote about the needs for the poor in court and the importance of the legal services corporation for legal mobilization.[329] Charles Epp examined the concept of legal mobilization in detail, both theoretically and cross-nationally.[330] The list goes on.

Legal mobilization is usually thought of as a tool possessed by the relatively powerless to use the law for change.[331] Now, legal mobilization is increasingly used by the powerful—governments and wealthy business interests.[332] To be sure, the rich and powerful have always used law to achieve their ends, but the coordination implied by the concept of legal mobilization gives it a different twist. Justice Powell's quotation above from when he was a private lawyer suggests that the idea for business interests to mobilize legally came relatively late.[333] Attorney General (now governor) Abbott is quite blunt in how he sought to use litigation to achieve political ends, which was usually not done on behalf of the poor and politically powerless. The less powerful still legally mobilize, but these days, the judiciary is increasingly less hospitable to many of their causes,[334] thereby making legal mobilization a less valuable strategy. This is, in part, a function of ideological predispositions of

325. In his early reflections on American politics and highlighting the importance of legal mobilization, Tocqueville famously observed "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 AM. POL. SCI. REV. 690, 690 (1983) (internal quotation marks omitted). "Political participation is implied in the very notion of democracy." *Id.* at 692.

326. *Id.* at 690.

327. *Id.*

328. *See generally* MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 9 (1994).

329. *See generally* SUSAN E. LAWRENCE, THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING 3–15 (1990).

330. *See generally* EPP, *supra* note 322, 14–15.

331. Zemans, *supra* note 325, at 700 ("The law is thus mobilized when a desire or want is translated into a demand as an assertion of one's rights.").

332. *See, e.g.*, *supra* notes 150–152 and accompanying text (discussing governmental mobilization efforts through the use of amicus briefs); *see also* Rosen, *supra* note 109 (discussing business mobilization efforts by the Chamber of Commerce through lobbying and the filing of amicus briefs).

333. Powell Memo, *supra* note 323 (asserting that American businesses are "under broad attack" and noting that "the hour is late"); *see also* Rosen *supra* note 109 (analyzing the Memo and its effects on business mobilization).

334. Rosen, *supra* note 109.

the judges. But there are increasing difficulties brought about by things such as stricter requirements for standing, more difficult certification for class actions, or the sheer cost of litigation.[335] For now, the best use of time and money for the less powerful may be to focus elsewhere.[336] That debate aside, it is worth thinking about legal mobilization occurring in the private bar and by government lawyers.

A. Mobilization Within the Private Bar

Justice Powell's memo to the Chamber of Commerce demonstrates a conscious effort to mobilize the business community. Using legal argument to achieve preferred outcomes for business (or any other interest) is not new or problematic.[337] What is noteworthy, though, are the increased efforts at coordination for appellate advocacy.[338] Few would doubt that over the past decade, the Court has been a business-friendly Court.[339] The U.S. Chamber of Commerce "was on the winning side in thirteen out of fifteen cases in which it filed amicus briefs in [OT] 2007."[340] Moreover, the Court has ruled in favor of business interests on many issues—ranging from punitive awards to standing—and even the liberals on the Court are relatively pro-business.[341] There are some, however, who argue that the claim of pro-business is overstated.[342] The question is one of correlation versus causation. Pro-business outcomes can be explained simply by the Justices' identities and philosophies, having little to do with powerful counsel and law firms. On the other hand, perhaps elite private counsel have been very effective in efforts to set the agenda and bring the right cases (and avoid bringing the wrong cases). In any event, the arguments in this Article suggest this question deserves further systematic study.

The private bar will always have incentives to pay attention to individual cases because the rewards can be high. However, with so few legal advocates from so few firms doing most of the work at the Supreme Court, the elite private bar has become more able to handpick cases with the best potential to come before the Court, win, and move the law in a particular direction. Having

335. The literatures on the increased difficulty of certifying a class or increased barriers to standing as well as other procedural barriers are extensive. *See, e.g.*, Behrend v. Comcast Corp., 569 U.S. 27, 28 (2013); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011).

336. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008).

337. For discussion on how interest groups have implemented legal mobilization to achieve favorable outcomes, see sources cited *supra* notes 325–331.

338. *See* Lazarus, *supra* note 14, at 1499–1500; Larsen & Devins *supra* note 14, at 1915.

339. Hungar & Jindal, *supra* note 101, at 527.

340. *Id.* at 528.

341. Lazarus, *supra* note 14, at 1526–27, 1534–35; Rosen, *supra* note 109.

342. *See* Hungar & Jindal, *supra* note 101, at 528 n.80.

a small, elite set of appellate attorneys playing such important roles provides more opportunity for them to engage in longer term strategies. They have the "political economy" as described in the Epp quotation above, "particularly the distribution of resources necessary for sustained constitutional litigation."[343]

In the Supreme Court, the task often involves turning the law in such a way that will benefit some and hurt others. It is not just about the powerful versus the less powerful. The contenders may be corporations versus entrepreneurs or powerful industries fighting over aspects of the internet. For this, the Court needs a wide range of input. In theory, this is what amici should provide, and at times they do; but usually, it is the particular case and the way the case is framed by the parties that matters most.[344] Just because a lawyer is a great advocate does not guarantee the type of input Justices need to hear. Scholars need to understand better the underlying dynamics of legal mobilization in the private bar—within firms and between firms. Scholars also need to understand better the effect of having the same lawyers continuously framing issues, not only because of their personal beliefs but also because of underlying systemic concerns driving the legal market.

B. Mobilization Within and Among State Governments

One relatively new form of legal mobilization is coming not from society but from governments. Normally, society perceives governmental entities as having legal power rather than needing to mobilize.[345] However, the SG has long engaged in legal mobilization to achieve its long-term goals.[346] It has extraordinary power to marshal resources, stimulate amici, be they private or state governments, and it is very savvy about strategies about bringing cases to the Court.[347] That story is well known. However as demonstrated above, state solicitors general are now involved in legal mobilization at the appellate level. Like the U.S. OSG, the new structure of an SSG allow them to better control appellate litigation within their state whether it is going to state or federal court. Coordination among state governments on legal strategy is becoming more common.[348] This is true in terms of working with states on

343. EPP, *supra* note 322, at 5.

344. Lazarus, *supra* note 14, at 1523.

345. *See* Cordray & Cordray, *supra* note 142, at 1323 (noting that the federal government used to have more control over the judiciary's agenda setting).

346. *Id.* at 1324; *see also supra* Section IV.A.1 (discussing the SG's role in governmental mobilization efforts through the use of amicus briefs).

347. Cordray & Cordray, *supra* note 142, at 1324.

348. *See* Greg Goelzhauser & Nicole Vouvalis, *State Coordinating Institutions and Agenda Setting on the U.S. Supreme Court*, 41 AM. POLS. RSCH. 819, 819 (2013) (noting that state coordination occurs internally when states file amicus briefs and externally through the creation of SSG offices).

federalism issues, torts and liability actions, and other ventures. Others have written impressively on this topic.[349] Also as discussed in Part IV.B, they are mobilizing as red states and blue states. Many of the things that Charles Epp argues are necessary for mobilization by the less powerful are also necessary for the states, albeit easier for states to obtain.[350] For example, Epp referenced the importance and necessity of a support structure in order for legal mobilization to occur.[351] He particularly focused on material resources, stating:

> The pressure consisted of deliberate, strategic organizing . . . and sources of financing, particularly government-supported financing . . . [c]ooperative efforts among many rights advocates, rely on resources for rights litigation—financing, organizational support, and willing and able lawyers—provided the raw material for the rights revolution."[352]

Epp went on to say that the logic behind the support structure explanation depends on widespread and sustained litigation.[353] States already possess the tools that Epp claims are necessary for legal mobilization, and as they coordinate, states are able to have widespread and sustained litigation.[354] States have vast resources to sustain continued litigation if they so choose—witness Greg Abbot's quotation in the epigraph that begins Part VI. More importantly, however, states are coordinating with each other by bringing suits and writing amicus briefs at unprecedented levels.[355] This coordination at the appellate level is largely happening through the relatively new SSG structures.

Legal mobilization is aided by NAAG and Democratic and Republican Attorneys General Associations.[356] NAAG helps facilitate information sharing among states.[357] Like-minded SSGs are advising each other on lawsuits, and states actively seek other states either to join them on amicus

349. *See* NOLETTE, *supra* note 179, at 41; Lemos & Young, *supra* note 179, at 46.

350. *See generally* EPP, *supra* note 322, at 11–70 (discussing that many factors in the United States allow the states to mobilize, such as the Constitutional structure, judicial structure, and social policy).

351. *Id.* at 2–5.

352. *Id.*

353. *See id.* at 11–30.

354. *Id.*

355. *See* Goelzhauser & Vouvalis, *supra* note 348, at 819.

356. *See* discussion *supra* Section IV.B.

357. *See NAAG Center for Supreme Court Advocacy*, *supra* note 181.

briefs or write briefs of their own.[358] The U.S. Supreme Court has even begun "calling for the views" of SSGs,[359] a phenomenon likely to increase in the coming years.

In short, given the increasingly sophisticated nature of SSGs, they are becoming a much more potent force to engage in effective mobilization. As discussed in Section IV.B and by other scholars, sometimes the causes are ones that affect states as states,[360] and other causes are ones ideological in nature—think abortion restrictions—such that conservative states seek out compatriots and liberal states do the same.[361] As discussed above, I interviewed various SSGs, who reported that those with a conservative agenda took advantage of the coordination and legally mobilized earlier than did their liberal counterparts; now, it is occurring on both sides. In sum, elite groups of government lawyers of one persuasion or the other are mobilizing through SSGs for change at the Supreme Court level (as well as at the trial and appeals court levels). This phenomenon is often being driven by an increased attention to, and the improved capability of, state appellate advocacy.

VII. CONCLUSION

Dramatic changes have occurred and are continuing to occur in appellate advocacy. At first blush, focus on lawyering and changes in appellate advocacy can seem rather esoteric. Esoteric they may be, but inconsequential they are not. These changes have occurred and are occurring in different contexts: oral advocacy in the U.S. Supreme Court, the private appellate bar, the Office of the U.S. Solicitor General, the rise of state solicitors general, and appellate legal mobilization. These changes are important in and of themselves, but their *convergence* gives them heightened importance. They reinforce each other in many ways and are catalytic. One result is the elitification of the Supreme Court and appellate advocacy more generally. This elitification is certainly deserving of notice, analysis, and further study.

Appellate advocacy has always played a crucial role in shaping American jurisprudence. Appellate lawyers' arguments frame the issues of a case, and their arguments are often the ones that judges or Justices adopt, not only to justify the outcome in a particular case but also to establish doctrine for future cases. Such doctrines are obviously important for the law, but they also

358. Goelzhauser &Vouvalis, *supra* note 348, at 819; Dan Schweitzer, *The Modern History of State Attorneys Arguing as Amici Curiae in the U.S. Supreme Court*, 22 GREEN BAG 2D 143, 144 (2019).

359. Corday & Corday, *supra* note 142, at 1331–32 nn.40–41.

360. *See* NOLETTE, *supra* note 179, at 28, 41–42; Lemos & Young, *supra* note 179, at 91; H.W. PERRY JR., THE RISE AND IMPORTANCE OF STATE SOLICITORS GENERAL 8 (2011) (arguing there are similar issues across states).

361. *See* NOLETTE, *supra* note 179, at 28, 41–42; Lemos & Young, *supra* note 179, at 91.

determine the authoritative allocation of values in our society—who gets what when and how. Sometimes cases and the importance of legal tests are monumental and obvious: separate but equal is unequal;[362] one person one vote;[363] money is speech;[364] dignity is a part of liberty and equal protection.[365] Other times, the changes in legal tests and doctrine may be subtle and go relatively unnoticed in society outside of the legal profession; but they are powerful nonetheless. What determines a constitutional versus prudential rule of standing?[366] What are the rules for certifying a class action?[367] What are the limits on punitive damages?[368] When are lawsuits in states preempted?[369]

Justice Frankfurter, when he was Professor Frankfurter, spoke about the importance of procedure. One could substitute the words appellate advocacy for procedure and it would be equally true.

> The role of procedure [appellate advocacy] in the evolution and activity of political institutions has been little heeded by political scientists . . . the formalities and modes of doing business, which we characterize as procedure [appellate advocacy], though lacking in dramatic manifestations, may, like the subtle creeping of the tide, be a powerful force in dynamic process of government. . . .[370]

The elitification of the Supreme Court and appellate advocacy seems only likely to increase. Be it for good or ill, or maybe a bit of both, it matters.

362. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (concluding that the concept of separate but equal is inherently unequal).

363. *See, e.g.*, Reynolds v. Simms, 377 U.S. 533, 563 (1964); Baker v. Carr, 369 U.S. 186, 242 (1962).

364. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339 (2010).

365. *See, e.g.*, United States v. Windsor, 570 U.S. 744, 775 (2013).

366. *See* Lexmark Int'l, Inc. v. Static Control Components, 572 U.S. 118, 125–29 (2014).

367. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348 (2011).

368. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

369. *See, e.g.*, AT&T Mobility v. Concepcion, 563 U.S. 333, 352 (2011) (holding that the Federal Arbitration Act of 1925 preempts state laws that prohibit contracts from disallowing class-action lawsuits).

370. FELIX FRANKFURTER & JAMES LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM, at vi–vii (1928).