

# THE MAKING OF THE SUPREME COURT BAR: HOW BUSINESS CREATED A SOLICITOR GENERAL FOR THE PRIVATE SECTOR

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## INTRODUCTION

This Essay tells a simple but important story about power and the law: that of the rise of the modern Supreme Court bar. Since 1985, a small cadre of private attorneys has come to dominate Court advocacy.<sup>1</sup> While the share of lawyers making their first arguments before the justices fell from 76% to 43% between 1980 and 2007, the fraction with ten or more arguments under their belt rose from 2% to 28%.<sup>2</sup> Similarly, while litigators with five or more previous arguments were responsible for 5.8% of the case petitions granted in October Term 1980, that quotient soared to 55.5% by 2008.<sup>3</sup>

This elite bar disproportionately influences the Court's activity. Of the 17,000 lawyers who petitioned the Court from 2004 to 2012, the top sixty-six succeeded in getting their cases heard six times more often than their competitors.<sup>4</sup> Interviews with former Supreme Court clerks, who read and summarize cert petitions for the justices, confirm that they place outsized weight on briefs filed by prominent advocates.<sup>5</sup> Statistical analysis further

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1. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1497–1500, 1516–17 (2008).

2. *Id.* at 1520.

3. Richard J. Lazarus, *Docket Capture at the High Court*, 119 YALE L.J. ONLINE 89, 90 (2009).

4. Joan Biskupic et al., *The Echo Chamber*, REUTERS (Dec. 8, 2014, 10:30 AM), <https://www.reuters.com/investigates/special-report/scotus/> [<https://perma.cc/F4UF-ZMEW>].

5. KEVIN T. MCGUIRE, *THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY* 179–80 (1993).

shows that these lawyers significantly raise a party's chance of success on the merits.<sup>6</sup>

Indeed, elite bar members have a unique relationship with the justices. Many clerked at the Supreme Court after graduating from law school.<sup>7</sup> A significant number also worked in the Solicitor General's Office, which represents the federal government before the Court and offers unmatched training on how to prepare briefs and oral arguments.<sup>8</sup> Most importantly, these litigators reap the benefits of acting as repeat players on the law's most exacting stage. As Andrew Frey, a senior partner at Mayer Brown, has emphasized, "Supreme Court practice is not like practice before other courts. . . . It is in fact a huge advantage to the client to have a litigator who knows the Court."<sup>9</sup>

Unfortunately, this bar does not distribute its talents equally. Instead, it overwhelmingly favors big business. Of the past decade's sixty-six most prominent advocates, 51 worked for firms that mainly represent corporations.<sup>10</sup> In cases pitting employees or consumers against business, these attorneys were three times more likely to launch an appeal for the latter.<sup>11</sup> This pattern has reinforced itself with time: the more business patrons law firms have taken on, the less inclined they have become to serve plaintiffs who might forge bad precedent for corporations.<sup>12</sup>

The bar's success on behalf of business has induced a form of "docket capture."<sup>13</sup> As legal scholar Richard Lazarus has observed, the bar has forced a surge in antitrust cases that has softened anti-monopolistic doctrine and cleared the way for aggressive mergers.<sup>14</sup> It has similarly managed to

6. Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187 (1995).

7. Lazarus, *supra* note 1, at 1528.

8. Matthew L. Sundquist, *Learned in Litigation: Former Solicitors General in the Supreme Court Bar*, 5 CHARLESTON L. REV. 59 (2010).

9. Telephone Interview with Andrew L. Frey, Senior Partner, Mayer Brown LLP (Apr. 15, 2016).

10. Biskupic et al., *supra* note 4.

11. *Id.*

12. *See id.*

13. Lazarus, *supra* note 3, at 89.

14. Lazarus, *supra* note 1, at 1532. The Court heard eleven antitrust cases between 2003 to 2008, and in all but one of them, the court ruled in favor of the defendant petitioner. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006); *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004); *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004); *Verizon Commc'ns Inc. v. Trinko, LLP*, 540 U.S. 398 (2004).

persuade the justices to limit punitive damages in mass tort litigation.<sup>15</sup> The bar has therefore played a crucial role in making today's Court one of the most business friendly in the nation's history.<sup>16</sup>

Despite the bar's rapid ascent and skewed influence, scholars know little about its origins. Prior studies have hypothesized reasons for its emergence. Thomas Hungar and Nikesh Jindal have suggested that law firms created appellate practices to compete for increasingly demanding clients.<sup>17</sup> Lazarus has posited that corporate-friendly politics and advocacy in the last half century crafted an ideal setting for elite attorneys.<sup>18</sup> To date, however, no study has tested these theories. The question therefore remains: why did private Supreme Court practices arise and thrive in the mid-1980s?

This Essay provides an empirical answer based on primary sources and original interviews with the elite bar's founders. Broadly confirming Professor Lazarus's hypothesis, it argues that the bar's business tilt is anything but an accident. Rather, private Supreme Court practices were the product of a sustained corporate effort to shape judicial outcomes from the 1970s onward. This organizing took place in two phases. First, by raising demand for expert lawyers and developing rich litigation support systems, corporations fostered an ecosystem geared toward elite advocates. Second, and partly in response to these forces, politically savvy business leaders founded private appellate groups molded after the Solicitor General's Office.

The discussion proceeds in two parts. Part I sets the stage by explaining that the bar flourished in the midst of a revolution in corporate political activism—one in which business began to organize far more effectively to advance its interests in Washington. Part II then situates the bar's rise within this larger narrative.

#### I. BUSINESS ENTERS THE POLITICAL ARENA

Any history of the elite bar must begin by accounting for the peculiar context in which it emerged. The mid-1980s marked a period of profound structural change in the United States. Following a string of legislative and judicial defeats, business leaders escalated their political activity through a web of new interest groups. The think tanks, lobbies, and action committees they created elevated corporate political influence to heights unseen since the nineteenth century. Scholars have thus far only explored how business used this power to alter the congressional landscape. By highlighting the need to study corporate organizing, however, their work has provided important clues about the elite bar's roots.

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15. *Id.* at 1534–35.

16. Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1469–72 (2013).

17. Thomas G. Hungar & Nikesh Jindal, *Observations on the Rise of the Appellate Litigator*, 29 REV. LITIG. 511, 512 (2010).

18. Lazarus, *supra* note 1, at 1507.

*A. Business Confronts a New Era of Regulation*

During the 1960s, the business community enjoyed relative policy stability.<sup>19</sup> President Kennedy signed only one bill into law that a majority of corporations opposed—a small increase in the federal minimum wage.<sup>20</sup> Businesses went on to win significant tax cuts in 1964.<sup>21</sup> While corporate lobbies remained unsophisticated, they were able to weaken the period's main regulatory efforts, including the 1962 Food and Drug Act amendments and the 1965 Cigarette Labeling and Advertising Act.<sup>22</sup>

This state of affairs abruptly unraveled in the 1970s.<sup>23</sup> As political scientist David Vogel has explained, “[F]rom 1969 through 1972, virtually the entire business community experienced a series of political setbacks without parallel in the postwar period.”<sup>24</sup> Though Republican Richard Nixon sat in the White House, Congress muscled through a package of regulations meant to curb corporate excesses. Unlike in prior years, “many of the regulatory laws enacted . . . were broader in scope and more ambitious in their objectives,” representing “a kind of Great Society for the private economy.”<sup>25</sup>

From that point onward, business lost ground in nearly every policy area. The Tax Reform Act of 1969 raised corporate rates to unprecedented levels to pay for middle-class tax breaks.<sup>26</sup> Congress expanded corporate liability by empowering two new agencies, the Consumer Product Safety Commission and the Occupational Health and Safety Administration.<sup>27</sup> Legislators also strengthened environmental protections; by setting pollution controls, bolstering the Clean Air Act, and establishing an Environmental Protection Agency, Congress forced industry to take responsibility for harmful modes of production.<sup>28</sup>

Business fared little better in court. As the 1970s progressed, a wave of public interest organizations—including Common Cause, the Natural Resource Defense Council, and Public Citizen—made it their mission to enforce new regulations.<sup>29</sup> During this time, the number of such groups with D.C. offices correspondingly increased.<sup>30</sup> The nation's capital similarly

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19. DAVID VOGEL, *FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA* 16–36 (1989).

20. *Id.* at 16.

21. *Id.* at 22–23.

22. *Id.* at 26.

23. *Id.* at 59–92.

24. *Id.* at 59.

25. *Id.*

26. *Id.* at 61–64.

27. *Id.* at 83–89.

28. *Id.* at 64–83.

29. *See id.* at 60, 104, 110.

30. *See id.* at 94.

counted more than 80 public law firms by the end of the 1970s.<sup>31</sup> As these associations became entrenched in the political landscape, they steered precedent away from corporate preferences.

### *B. Corporations Fight Back*

These developments alarmed business leaders. On August 23, 1971, soon-to-be Supreme Court Justice Lewis Powell, then a prominent corporate lawyer, penned a memorandum to the Chamber of Commerce to catalyze change.<sup>32</sup> Powell decried what he perceived as an “assault on the enterprise system”<sup>33</sup> and a business community that “responded—if at all—by appeasement, ineptitude and ignoring the problem.”<sup>34</sup> To help corporate leaders reverse their fortunes, he outlined political strategies to make government more business friendly.

Powell stressed that “[b]usiness must learn the lesson . . . that political power is necessary; that such power must be assid[u]ously cultivated; and that . . . it must be used aggressively and with determination.”<sup>35</sup> His prescriptions all revolved around one theme: meticulous organizing. “Strength,” he underlined, “lies in . . . careful long-range planning and implementation, in consistency of action over an indefinite period of years, in the scale of financing available only through joint effort, and in the political power available only through united action and national organizations.”<sup>36</sup>

Corporations did not take long to heed Powell’s call. As political scientists Jacob Hacker and Paul Pierson have shown, business began its offensive in the legislative arena.<sup>37</sup> The number of companies “with public affairs offices in Washington grew from 100 in 1968 to over 500 in 1978.”<sup>38</sup> While approximately 175 corporations had registered congressional lobbyists in 1971, almost 2,500 did just ten years later.<sup>39</sup> Corporations multiplied the number of political action committees (PACs) they used to fund elections from under 300 to over 1,200 between 1976 and 1980.<sup>40</sup> Though business PACs trailed those backed by labor in the 1970s, they

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31. *Id.*

32. Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman of Educ. Comm., U.S. Chamber of Commerce (Aug. 23, 1971), <http://law2.wlu.edu/deptimages/Powell%20Archives/Powell%20MemorandumTypescript.pdf> [<https://perma.cc/X3NC-VNDU>].

33. *Id.* at 2.

34. *Id.* at 8.

35. *Id.* at 25–26.

36. *Id.* at 11.

37. JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010).

38. *Id.* at 118.

39. *Id.*

40. *Id.*

surpassed their expenditures just a few years later.<sup>41</sup> By 2010, corporations spent over \$2 billion a year on federal lobbying.<sup>42</sup>

Last but not least, business deployed a powerful set of issue advocacy groups. The Chamber of Commerce ramped up its legislative activism as its budget tripled and membership doubled from 1974 to 1980.<sup>43</sup> Alongside it, a slew of new think tanks, including the Heritage Foundation and the American Enterprise Institute, worked to push public debate in pro-business directions.<sup>44</sup>

This organizational revolution produced swift and lasting victories. By the late 1970s, business interests had all but halted progressive legislation.<sup>45</sup> Though Americans elected Democrat Jimmy Carter to the White House in 1976, his policy record reflected corporations' newfound strength. Efforts to create a consumer agency, expand public healthcare, update labor laws, and increase the minimum wage faltered in a Congress flooded by corporate lobbyists.<sup>46</sup> As the decades wore on, business continued to use this clout to reorder the country's economy—successfully keeping corporate taxes low, obstructing laws designed to slow unions' decline, and opposing attempts to control the financial sector.<sup>47</sup>

### C. Lessons Learned

This chronology hints at both why and how the elite bar stormed the national stage in the 1980s. In the face of an increasingly hostile regulatory environment, corporations learned to become more disciplined political actors. They joined forces to found organizations that could lobby Congress and shape national opinion on the issues that mattered to them. They achieved policy change by engaging in hard-fought mobilization over a span of decades. Importantly, the business groups that best leveraged expert advocates encountered the greatest success.<sup>48</sup>

Supreme Court precedent is as important a policy prize as congressional enactments. Just as spotlighting business organizations has revealed the extent to which they molded legislation, so too should it clarify the efforts these groups made to affect the Court's decisions.

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41. *Id.* at 121.

42. Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, ATLANTIC (Apr. 20, 2015), <https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/> [<https://perma.cc/K4HE-BZAS>].

43. HACKER & PIERSON, *supra* note 37, at 119.

44. *Id.* at 122–23.

45. See, e.g., Jacob S. Hacker & Paul Pierson, *After the “Master Theory”: Downs, Schattschneider, and the Rebirth of Policy-Focused Analysis*, 12 PERSP. ON POL. 643, 654–55 (2014).

46. HACKER & PIERSON, *supra* note 37, at 99.

47. Hacker & Pierson, *supra* note 45.

48. *Id.*

## II. BUSINESS ENTERS THE JUDICIAL ARENA

It turns out that corporate leaders did not just set their sights on Congress. To combat unwelcome regulation, they also sought to improve their Supreme Court records. Like in the legislative sphere, they united to create structures that could guide long-term victories. Their efforts nurtured a bar that offered business a level of advocacy matched only by the Solicitor General of the United States.<sup>49</sup>

This organizing took place in two phases. First, corporations generated intense demand for a new class of advocate. The nation's largest companies expanded in-house legal offices and formed the Association of Corporate Counsel (ACC) to improve the advice they received. They also established the National Chamber Litigation Center (NCLC) to coordinate businesses' Court petitions and amicus briefs. Sectorial groups, such as the Product Liability Advisory Council (PLAC) and the American Tort Reform Association (ATRA), soon arose to buttress the NCLC.<sup>50</sup> Collectively, these organizations fostered an environment primed for expert attorneys.

Second, politically savvy business leaders wasted little time assembling this class of expert lawyers. With direct guidance from Lewis Powell, former Solicitor General Rex Lee started an appellate division at Sidley Austin in 1985.<sup>51</sup> Former Assistant to the Solicitor General Stephen Shapiro did the same at Mayer Brown the following year.<sup>52</sup> By importing best practices from the federal government, these men launched a revolution in business advocacy before the Court.

### *A. Corporations Demand Expert Representation*

#### 1. The Association of Corporate Counsel

During the 1980s, demand for expert advocates swelled rapidly as companies grew their in-house legal staffs. Few corporations hired in-house lawyers before that point. Federal regulation remained minimal, keeping the legal terrain that business faced simple.<sup>53</sup> According to former Ernst & Young General Counsel Carl Liggio, "many companies . . . did not perceive the need to maintain an internal legal" office because "most business matters

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49. Lazarus, *supra* note 1, at 1496–99.

50. *Id.* at 1505–06.

51. *Id.* at 1498.

52. *A Legal Academic - High Court Litigator Takes Special Pride Seeing Name on Book*, MAYER BROWN (Mar. 18, 1996), <https://www.mayerbrown.com/a-legal-academic--high-court-litigator-takes-special-pride-seeing-name-on-book-03-18-1996/> [<https://perma.cc/7MH8-ZH3U>].

53. See Carl D. Liggio, *The Changing Role of Corporate Counsel*, 46 EMORY L.J. 1201, 1203–04 (1997).

could be resolved by the application of common sense and good business practice.”<sup>54</sup>

The regulatory surge of the 1970s pushed companies to think differently. As Liggio has stressed, “by the mid-80s [businesses had] gone from needing to understand four federal agencies, to more than 83.”<sup>55</sup> Corporations significantly enlarged their in-house departments to cope with this heightened complexity.<sup>56</sup> In the words of one top industry analyst from the era, “in-house law [was] one of the fastest growing sectors of the legal profession. The reason stem[med] directly from the ever-increasing regulation of business by the government.”<sup>57</sup>

As companies were forced to become more sophisticated legal consumers, they sought stronger advocacy from outside counsel.<sup>58</sup> Veteran Supreme Court lawyer Stephen Shapiro has recalled that early clients were “frustrated with the quality of the work they were getting in the appellate courts, the quality of the arguments, [and] the quality of the appellate briefs.”<sup>59</sup> To marshal the clout needed to demand more from outside counsel, in-house managers had to organize.

On December 1, 1981, Liggio, Chamber of Commerce General Counsel Lawrence Kraus, and the in-house lawyers for seven major corporations met to draft a plan addressing this problem.<sup>60</sup> Just three months later, the group established the Association of Corporate Counsel (ACC) “to increase the . . . sophistication and recognition of the in-house bar.”<sup>61</sup> The ACC served as a networking hub for corporate counsel across the country. The organization grew to encompass 8,000 members in less than ten years.<sup>62</sup> By offering a platform through which in-house attorneys could unite to extract better results from outside firms, the ACC definitively altered the parties’ relationship.<sup>63</sup> As Liggio underlined years after the group was founded, the

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54. Carl Liggio, *A Look at the Role of Corporate Counsel: Back to the Future—Or Is It the Past?*, 44 ARIZ. L. REV. 621, 623 (2002).

55. ACC DOCKET, *30 YEARS OF RAISING THE IN-HOUSE BAR: ASSOCIATION OF CORPORATE COUNSEL 1982–2012* 6 (Oct. 2012), <https://www.acc.com/aboutacc/30th/upload/acc-30-anniversary.pdf> [<https://perma.cc/9LQH-6B97>].

56. Liggio, *supra* note 54, at 623–25.

57. John P. Lynch III, *The Growth of In-House Counsel*, 65 ABA L.J. 1403, 1403 (1979).

58. Telephone Interview with Nancy Nord, Former Founding Exec. Dir., Ass’n Corp. Counsel (Apr. 27, 2016).

59. Telephone Interview with Stephen Shapiro, Senior Partner, Mayer Brown LLP (Apr. 8, 2016).

60. Ass’n of Corp. Counsel, *supra* note 55, at 5.

61. *Id.* at 8.

62. *Id.* at 10.

63. Telephone Interview with Nancy Nord, *supra* note 58.



ACC “raised the prestige of the in-house bar, and made them more than an equal player” capable of leveraging expert services.<sup>64</sup>

## 2. The National Chamber Litigation Center

Business also worked to improve the advocacy it received by directly intervening in Supreme Court litigation. In his memorandum, Lewis Powell had urged the Chamber of Commerce to “undertake the role of spokesman for American business.”<sup>65</sup> The organization obliged by creating the National Chamber Litigation Center (NCLC) in 1977.<sup>66</sup> As the group stressed in its *30th Anniversary Report*, it sought “to help support business in response to the increased activity in the 1970s by labor unions and their allies, including consumer advocates and environmental groups.”<sup>67</sup> The NCLC committed to shifting precedent by acting as a clearinghouse for corporate suits.<sup>68</sup>

The group honed two methods by which to advance disputes. First, it drafted amicus briefs to train justices’ attention on business matters.<sup>69</sup> By expanding parties’ arguments and exposing broad support for a cause, these briefs were built to help cases attain certiorari and victory on the merits.<sup>70</sup> Second, the NCLC established a rigorous moot court system. By replicating the Court’s intense style of questioning, the organization aimed to “assist[] companies . . . involved in litigation by preparing their outside counsel for oral argument.”<sup>71</sup>

Both strategies proved successful. From 1977 to 2007, the NCLC participated in more than one thousand cases as a party or amicus at the state and federal levels, many of them at the U.S. Supreme Court.<sup>72</sup> It also arranged close to sixty moot courts to drill elite attorneys before oral arguments.<sup>73</sup> Along with an increasingly conservative Court, these tactics helped raise the NCLC’s victory rate.<sup>74</sup> Veteran Supreme Court litigator Carter Phillips has aptly summarized the group’s record: “[e]xcept for the Solicitor General representing the United States, no single entity has [had]

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64. Ass’n of Corp. Counsel, *supra* note 55, at 7.

65. Memorandum from Lewis F. Powell, Jr., *supra* note 32, at 27.

66. Thomas J. Donohue, *A Perspective*, in NAT’L CHAMBER LITIG. CTR., 30TH ANNIVERSARY REPORT 3 (2007).

67. *Id.*

68. Telephone Interview with David Vladeck, Former Lead Attorney, Pub. Citizen (Apr. 15, 2016).

69. NAT’L CHAMBER LITIG. CTR., 30TH ANNIVERSARY REPORT 8 (2007).

70. See Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 603–08 (1984).

71. NAT’L CHAMBER LITIG. CTR., *supra* note 69, at 7.

72. *Id.* at 12–27.

73. *Id.* at 28.

74. See Doug Kendall, *Not So Risky Business: The Chamber of Commerce’s Quiet Success Before the Roberts Court*, CONST. ACCOUNTABILITY CTR. (May 2, 2013), <https://www.theconstitution.org/blog/not-so-risky-business-the-chamber-of-commerces-quiet-success-before-the-roberts-court-an-early-report-for-2012-2013/> [<https://perma.cc/GA95-CQ4J>].

more influence on what cases the Supreme Court decides and how it decides them than the National Chamber Litigation Center.”<sup>75</sup>

### 3. Other Pro-Business and Sectorial Interest Groups

Business did not solely rely on the Chamber to enable expert attorneys. Many sectors also funded associations to file amici and pressure law firms to provide high-quality advocacy.<sup>76</sup> Innocently named groups like the Washington Legal Foundation and the Product Liability Advisory Council crowded the Court’s docket by the 1980s.<sup>77</sup> As Stephen Shapiro has noted, these organizations “ha[d] people who really concentrate[d] on appellate briefs and . . . kn[ew] the good from the bad.”<sup>78</sup>

Some of the most active organizations arose in the areas of product liability and mass torts. As safety regulations multiplied in the 1970s and consumer groups took offenders to court, companies suddenly found themselves liable for multi-million-dollar awards.<sup>79</sup> Business wasted little time organizing a response. As a senior industry observer reported at the time, manufacturers “declared war” on what they viewed as “frivolous and unwarranted . . . suits.”<sup>80</sup> In 1983, they formed the Product Liability Advisory Council (PLAC) to counter consumer class actions.<sup>81</sup> Three years later, they founded the American Tort Reform Association (ATRA) to fend off mass tort litigation.<sup>82</sup> Both organizations received heavy funding from Fortune 500 companies.<sup>83</sup> Like the NCLC, they focused on developing amicus briefs.<sup>84</sup>

75. NAT’L CHAMBER LITIG. CTR., *supra* note 69, at 8.

76. Telephone Interview with Stephen Shapiro, *supra* note 59; *see, e.g., Washington Legal Foundation*, DESMOG, <https://www.desmogblog.com/washington-legal-foundation> [<https://perma.cc/42NL-KLWP>] (detailing the funding one prominent, pro-business association has received from major industries and corporations in the past two decades).

77. *See* Ann Southworth, *What Is Public Interest Law? Empirical Perspectives on an Old Question*, 62 DEPAUL L. REV. 493, 503–04 (2013); *Amicus Program*, PLAC, [https://plac.com/PLAC/About\\_Us/Amicus/PLAC/Amicus.aspx?hkey=a41dcccc-0b57-40ae-ac23-8e91d9f03bca](https://plac.com/PLAC/About_Us/Amicus/PLAC/Amicus.aspx?hkey=a41dcccc-0b57-40ae-ac23-8e91d9f03bca) [<https://perma.cc/LWJ4-9NEU>].

78. Telephone Interview with Stephen Shapiro, *supra* note 59.

79. Ted Gest, *Why the Injured Lose Suits*, U.S. NEWS & WORLD REP., Apr. 8, 1991, at 52–53.

80. Wayne Quinton & Alvin Richards, *Collapsing Chairs: A Source of Liability*, 36 CORNELL HOTEL & REST. ADMIN. Q. 75, 78 (1995).

81. *About Us*, PROD. LIABILITY ADVISORY COUNCIL, [https://plac.com/PLAC/About\\_Us/Background/PLAC/About.aspx?hkey=77f1861e-6c7f-4d84-93b8-ec59f904cf67](https://plac.com/PLAC/About_Us/Background/PLAC/About.aspx?hkey=77f1861e-6c7f-4d84-93b8-ec59f904cf67) (on file with the *Michigan Law Review*).

82. *ATRA at a Glance*, AM. TORT REFORM ASSOC., <http://www.atra.org/about> [<https://perma.cc/NV4P-J6FC>].

83. *Fact Sheet: American Tort Reform Association*, CENTER FOR JUSTICE AND DEMOCRACY (2018), <https://centerjd.org/content/fact-sheet-american-tort-reform-association> [<https://perma.cc/7REJ-ZP7Z>]; *About Membership*, PLAC,

These groups have come to rival the Chamber's clout and output. PLAC now counts a membership of more than 80 product manufacturers and suppliers and 350 defense counsels.<sup>85</sup> ATRA similarly boasts 300 organizational members and a mailing list of 135,000.<sup>86</sup> Since 1983, the two organizations have filed over 1,000 amicus briefs across the country, including many at the U.S. Supreme Court.<sup>87</sup> By helping lower the number of suits that manufacturers have had to defend, these briefs have helped save billions of dollars for the chemical, tobacco, pharmaceutical, and auto industries.<sup>88</sup>

#### 4. Awaiting the Expert Bar

In short, by the mid-1980s, corporations hungered for expert litigators. As they built in-house legal offices to respond to the prior decade's regulatory surge, they scrutinized outside counsel more closely and joined forces to push their consultants to deliver better advocacy. Large companies then formed an array of organizations to provide outside lawyers with the tools to succeed. The NCLC coordinated corporate strategy by mooting attorneys for important cases and drafting amicus briefs. New sectorial groups like PLAC and ATRA also marshalled extensive amicus filings. By 1985, the only element missing was an elite cadre of lawyers who could take advantage of this ecosystem. Corporate stewards did not have to wait long to find them; within a few years, a group of politically savvy business leaders emerged to fill the void.

#### *B. Political Entrepreneurs Respond*

##### 1. Sidley Austin

As President Reagan began his second term in office, his outgoing Solicitor General faced a dilemma. Rex Lee was a star in the conservative legal movement.<sup>89</sup> He had served as founding dean of the law school at Brigham Young and on the board of the rightwing Mountain States Legal

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[https://plac.com/PLAC/Membership/PLAC/About\\_Membership.aspx?hkey=5af52cb4-3ace-4bc2-8532-b7531e086d8b](https://plac.com/PLAC/Membership/PLAC/About_Membership.aspx?hkey=5af52cb4-3ace-4bc2-8532-b7531e086d8b) [https://perma.cc/EDH7-UUPS].

84. See *Amicus Briefs*, AMERICAN TORT REFORM ASSOCIATION, <http://www.atra.org/resources/amicus-briefs> [https://perma.cc/9RCK-SLFF]; *Amicus Program*, PLAC, *supra* note 77.

85. *About Membership*, PLAC, *supra* note 83.

86. ATRA, *supra* note 82; *Fact Sheet: American Tort Reform Association*, *supra* note 83.

87. *About Us: Amicus Program*, PLAC, [https://plac.com/PLAC/About\\_Us/Amicus/PLAC/Amicus.aspx?hkey=a41dcccc-0b57-40ae-ac23-8e91d9f03bca](https://plac.com/PLAC/About_Us/Amicus/PLAC/Amicus.aspx?hkey=a41dcccc-0b57-40ae-ac23-8e91d9f03bca) [https://perma.cc/LWJ4-9NEU]; *Amicus Briefs*, ATRA, <http://www.atra.org/resources/amicus-briefs/> [https://perma.cc/9RCK-SLFF].

88. *Gest*, *supra* note 79.

89. Lauren Milicov & Susan Pettit, *The Private Life of Rex Lee*, L.A. LAW., Mar. 1987, at 9, 11.

Foundation.<sup>90</sup> His books had helped develop the conservative concept of “judicial restraint.”<sup>91</sup> Yet, he frequently sparred with conservatives who urged him to push abortion and Establishment Clause doctrines in directions he disagreed with because of the negative impact it would have on his influence with the Supreme Court.<sup>92</sup> Lee was passionate about business cases and loved arguing before the Court.<sup>93</sup> Though he yearned to keep doing appellate work, he was unsure where he might next find it.<sup>94</sup>

Lee decided to seek advice from his old friend Lewis Powell, by then an associate justice of the Supreme Court. After Lee’s resignation in the summer of 1985,<sup>95</sup> the two met to discuss how to pursue Court practice beyond public service.<sup>96</sup> Powell had continued to think about how to strengthen business representation in the years after writing his memorandum. He understood corporations’ rising demand for expert advocates and believed he had found a way to meet it.<sup>97</sup> As Lee’s long-time collaborator Carter Phillips has recalled, “Justice Powell . . . had seen enough [Court] advocacy to know that the Solicitor General had a comparative advantage.”<sup>98</sup> Because the office’s lawyers spent nearly all their time representing the United States before the Court, “[t]hey kn[ew] how to argue, they kn[ew] how to write briefs, and they kn[ew] how to influence the Justices.”<sup>99</sup> Powell put forward a simple proposal: to create a “Solicitor General for the business community” by replicating its expertise at private law firms.<sup>100</sup>

In order to put this plan into action, Lee needed to find a firm that met two criteria. First, it had to be large enough that it could leverage corporate contacts into new business.<sup>101</sup> Second, it needed to provide him with sufficient freedom to build a practice from the ground up.<sup>102</sup> Chicago-based Sidley Austin fit the bill. By the 1980s, it was one of the fastest-growing defense firms in the nation and served a long list of corporations.<sup>103</sup> Its

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90. *Id.*

91. *See id.*

92. *See id.* at 9–12.

93. *See id.* at 15; Lazarus, *supra* note 1, at 1498.

94. Telephone Interview with Carter Phillips, Exec. Comm. Chair, Sidley Austin LLP (Apr. 5, 2016).

95. Lazarus, *supra* note 1, at 1498.

96. Telephone Interview with Carter Phillips, *supra* note 94.

97. *See id.*

98. Telephone Interview with Carter Phillips, *supra* note 94.

99. *Id.*

100. *Id.*

101. *Id.*

102. Telephone Interview with Ben Heineman, Managing Partner, Sidley Austin LLP (Apr. 14, 2016).

103. Telephone Interview with Carter Phillips, *supra* note 94. Sidley Austin Brown & Wood History, FUNDING UNIVERSE, <http://www.fundinguniverse.com/company-histories/sidley-austin-brown-wood-history/> [https://perma.cc/Q6SK-6H6Q].

managers also adopted deferential attitudes toward high-profile partners; when Lee pitched his vision to the firm, they were eager to give him the latitude to pursue it.<sup>104</sup>

Lee, Ben Heineman, and Carter Phillips founded the appellate division in the fall of 1985 and met instant success. Within less than a year, their Supreme Court practice attracted some of the nation's largest corporations, including AT&T, Citicorp, and the R.J. Reynolds Tobacco.<sup>105</sup> Lee and his partners managed to get the Court to certify three cases in 1985.<sup>106</sup> That figure jumped to eight the following year.<sup>107</sup> In Heineman's words, "Rex . . . gave [the practice] a rocket shot."<sup>108</sup>

## 2. Mayer Brown

Down the street, a rival firm also recognized the demand for elite advocates. Like Lee, Mayer Brown's Stephen Shapiro had burnished his credentials in the Reagan administration.<sup>109</sup> He shared Powell's belief that the Solicitor General offered a model for a new league of private lawyers.<sup>110</sup> Having served as an assistant to the Solicitor General, Shapiro understood the benefits of devoting a full practice to Supreme Court litigation. He saw "this critical mass of talent . . . that did this year-in-and year-out . . . [and] thought . . . if the government gets this specialized expertise, why not the private sector?"<sup>111</sup>

In 1986, Shapiro channeled the Solicitor General's power by hiring several of the office's top lawyers.<sup>112</sup> Each shared Shapiro's conviction about the need to reproduce the government's skill for corporations.<sup>113</sup> As one partner, Andrew Frey, has pointed out, "people who weren't from the [Solicitor General's] office could [not] have gotten this started."<sup>114</sup> At that "office, you learned how to think like the Court thinks . . . you had

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104. Telephone Interview with Ben Heineman, *supra* note 102.

105. SIDLEY AUSTIN LLP, *Supreme Court Cases in Which the Firm Has Filed Merits briefs on Behalf of a Party or Amicus*, <https://www2.sidley.com/files/upload/Supreme%20Court%20Cases%20on%20the%20Merits.pdf> [<https://perma.cc/ZB8T-RNZJ>].

106. *Id.*

107. *Id.*

108. Telephone Interview with Ben Heineman, *supra* note 102.

109. *An Interview with Steve Shapiro*, MAYER BROWN (Winter 1997), <https://www.mayerbrown.com/an-interview-with-steve-shapiro-12-01-1997/> [<https://perma.cc/6RCU-XF3Q>].

110. Telephone Interview with Stephen Shapiro, *supra* note 59.

111. *Id.*

112. See Lazarus, *supra* note 1, at 1499.

113. Telephone Interview with Andrew Frey, *supra* note 9; Telephone Interview with Andrew Pincus, Senior Partner, Mayer Brown LLP (Feb. 24, 2016).

114. Telephone Interview with Andrew Frey, *supra* note 9.

experience arguing before the Court . . . [and] you had a pretty good idea [of] what to expect from the various Justices.”<sup>115</sup>

Like Sidley Austin, Mayer Brown enjoyed rapid success. The firm matched its rival in clout within just a few years.<sup>116</sup> As it did so, it continued to attract both Solicitor General’s alumni and former Supreme Court clerks.<sup>117</sup> With the help of these superstar lawyers, Mayer Brown’s Court practice quickly became the most coveted in Washington.<sup>118</sup>

### 3. The Bar Expands

Dedicated political entrepreneurs were crucial to the elite bar’s resurgence. Lee and Shapiro’s ties to business alerted them to the rising demand for expert advocates. Because both had spent years at the Solicitor General’s Office, they understood that specialized practices could strengthen corporate access to the justices. Their decision to found such divisions at private law firms represented the last step in business’s drive to reshape advocacy before the Court.

Once in motion, the elite bar took on a life of its own. Sidley Austin and Mayer Brown’s achievements quickly attracted competitors’ attention. “[A]s soon as one firm [did] it,” Shapiro has recalled, “[it was] necessary for other firms with litigation practices to do the same.”<sup>119</sup> Throughout the 1980s and 1990s, several large firms, including Jenner & Block, Kirkland & Ellis, and Hogan & Hartson, opened appellate departments.<sup>120</sup>

Much of this expansion was driven by prestige.<sup>121</sup> As Sidley Austin’s Carter Phillips has remarked, managing partners understood that “there’s not a Supreme Court case that’s not going to create a headline . . . , [a]nd [that] the right Supreme Court cases will create huge headlines.”<sup>122</sup> Regardless of new entrants’ intentions, however, their collective effect was soon unmistakable: by lifting corporate clients to unseen heights, they fulfilled Justice Powell’s vision of creating a Solicitor General for the private sector.<sup>123</sup>

### CONCLUSION

This Essay has aimed to improve scholars’ understanding of the power dynamics that shape Supreme Court precedent. It has argued that the

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115. *Id.*

116. Lazarus, *supra* note 1, at 1499–1500.

117. *Id.*

118. *Id.* at 1499.

119. Telephone Interview with Stephen Shapiro, *supra* note 59.

120. Lazarus, *supra* note 1, at 1499–1500.

121. Telephone Interview with Carter Phillips, *supra* note 94.

122. *Id.*

123. Lazarus, *supra* note 1, at 1498–1502; Biskupic et al., *supra* note 4.

Supreme Court bar heavily favors big business because it was built for that purpose. In response to the regulatory surge of the 1970s, corporate forces mobilized to better promote their interests before the justices. Like in the legislative sphere, they succeeded by relying on disciplined organizing. To raise demand for expert lawyers, companies founded interest groups that increased pressure on outside counsel and supplied them with extensive litigation support tools. Politically savvy business leaders then responded by creating private appellate practices molded after the Solicitor General's Office. It remains unclear whether public interest advocates will rebalance the Court's scales in the coming years. Should they try, they will have to heed the advice that their opponents long ago internalized: "political power is necessary; . . . such power must be assid[u]ously cultivated; and . . . it must be used aggressively and with determination."<sup>124</sup>

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124. Memorandum from Lewis F. Powell, Jr., *supra* note 32.