

LITIGATOR INVOLVEMENT AND SUCCESS IN THE U.S. COURTS OF APPEALS
AND SUPREME COURT

Alixandra B. Yanus

A thesis submitted to the faculty of the University of North Carolina at Chapel Hill in partial fulfillment of the requirements for the degree of Master of Arts in the Department of Political Science

Chapel Hill
2007

Approved by:

Kevin T. McGuire

Georg Vanberg

Virginia Gray

ABSTRACT

ALIXANDRA B. YANUS: Litigator Involvement and Success in the U.S. Courts of Appeals
and Supreme Court
(Under the direction of Kevin T. McGuire)

Literature on test case litigation has led researchers to expect that familiarity with case facts may increase a lawyer's likelihood of victory before the U.S. Supreme Court. However, this question has not been examined empirically. Here, I consider this question. I use data on all federal cases orally argued before the Court during its 2000-2004 terms. I find that interest group lawyers are the only kind of attorneys that are significantly more likely to become involved in the courts of appeals. Early involvement, however, does not affect the probability that a party will win before the Supreme Court.

TABLE OF CONTENTS

LIST OF TABLES	iv
LITIGATOR INVOLVEMENT AND SUCCES IN THE U.S. COURTS OF APPEALS AND SUPREME COURT	1
Test Case Litigation in Practice	2
Existing Research	5
Hypotheses	7
Data and Methods.....	9
Dependent Variables.....	10
Independent Variables.....	10
Control Variables.....	12
Findings	13
Preliminary Observations.....	14
Involvement in the Court of Appeals.....	16
Success Before the Supreme Court.....	18
Discussion	19
Conclusion	20
REFERENCES	25

LIST OF TABLES

Table

1. Predictors of Participation in the Court of Appeals.....	23
2. Predictors of Litigator Success Before the Supreme Court	24

LITIGATOR INVOLVEMENT AND SUCCESS IN THE U.S. COURTS OF APPEALS AND SUPREME COURT

How important is planned litigation in the U.S. Supreme Court? More than fifty years of literature on test case litigation has led scholars to expect that identifying cases early in the judicial process and shepherding them through the federal courts can lead to landmark legal change. Scholars of interest group litigation such as Vose (1957, 1959, 1972, see also Cowan 1976, Sorauf 1976, O'Connor 1980, Friendly 1982, Greenberg 1994) have long pointed to the importance of foresight for interest group litigators fashioning planned litigation strategies. Lawyers such as the NAACP LDF's Thurgood Marshall have identified cases early in the litigation process and expended tremendous effort and resources shepherd them through the judicial system in order to achieve social and legal change.

The expectation that having a lawyer who is familiar with the case at hand will increase a party's probability of victory before the Supreme Court has not, however, been empirically tested. This paper attempts to do just that, by tracking the involvement of the lawyers who argued more than 300 Supreme Court cases from 2000-2004. I first consider when lawyers become involved in litigation, and then turn my attention to the question of how early involvement affects the probability that a party will win before the U.S. Supreme Court.

I find that governmental lawyers—especially those working in the Solicitor General's office—that argue before the Supreme Court are significantly less likely than other lawyers

to become involved in lower courts. The same is true of lawyers based in Washington, D.C. On the other hand, interest group lawyers who argue before the Supreme Court are more likely than their counterparts to appear on briefs in the courts of appeals. These findings hold true regardless of case type and whether the attorney is arguing for the petitioner or the respondent. Being involved in the courts of appeals, however, does not appear to have a significant impact on the probability that a lawyer will win their case before the Supreme Court. This finding has major consequences for the understanding of strategic litigation campaigns.

Test Case Litigation in Practice

Test case litigation is not a new phenomenon. The earliest illustrations of this sort of strategic work date from the nineteenth century. In July of 1890, for example, an interest group called the American Citizens' Equal Rights Association (ACERA) designed a plan to challenge a Louisiana statute that mandated segregated railroad cars. (Woodward 1987).

On the very day that the bill was signed into law, two members of ACERA, Louis A. Martinet and Rudolphe L. Desdunes, published editorials in the *New Orleans Crusader*, a weekly newspaper devoted to the cause of equal rights for African Americans, urging a legal challenge to the statute. Wrote Martinet, "The next thing is... to begin to gather funds to test the constitutionality of this law. We'll make a case, a test case, and bring it before the Federal Courts" (Martinet 1890 as quoted by Woodward 1987: 161).

Soon after, an ad hoc interest group, the Citizens' Committee to Test the Constitutionality of the Separate Car Law, was created. The group quickly hired a lawyer, who began to orchestrate a strategic challenge to the Louisiana statute. A black passenger

would attempt to ride in a “white car,” and one of the white passengers would challenge their presence (Woodward 1987).

The first individual to attempt to carry out this plan was Desdunes’ son, Daniel. Although Daniel was arrested, the state supreme court eventually dismissed his case on a technicality. The Citizens’ Committee decided to test the law again. One week later, a one-eighth black man with blond hair and blue eyes named Homer Plessy carried out the plan. He, too, was arrested. Plessy’s case was heard first in municipal court, where a judge upheld his conviction and ruled the law constitutional. The state supreme court also upheld the law. When a petition for rehearing was denied, the Citizens’ Committee appealed the case to the United States Supreme Court, which accepted the case of *Plessy v. Ferguson* in October of 1895 (Woodward 1987).

Although the Citizens’ Committee effectively lost its challenge when the Court upheld the constitutionality of the Louisiana statute, *Plessy* represents one of the earliest examples of planned test case litigation (Woodward 1987).¹ With the support of interest groups such as ACERA and the Citizens’ Committee, Martinet and Desdunes were able to move the case through the appellate process to the United States Supreme Court. In time, *Plessy* became a template for other disadvantaged groups and individuals seeking to use the courts to achieve social change.

The NAACP LDF was one of the first groups to develop such a strategy. First in housing discrimination and later in educational discrimination, the group carefully chose plaintiffs and venues in order to achieve incremental policy change in the civil rights arena (Vose 1959). The groups’ most significant victory came in the educational equity case of

¹Other early examples include the women’s rights cases of *Bradwell v. Illinois* (1873) and *Minor v. Happersett* (1875).

Brown v. Board of Education (1954). In this case, the Supreme Court effectively overturned the separate-but-equal standard established in *Plessy*. The NAACP LDF attorney who guided *Brown* and its predecessors through the court, Thurgood Marshall, was later appointed as the first African American to serve on the U.S. Supreme Court.

Women's rights groups also used planned litigation to achieve their goals. The American Civil Liberties Union's Women's Rights Project, led by future Supreme Court justice Ruth Bader Ginsburg, was often at the forefront of this work. The Women's Rights Project litigated a number of cases under the Fourteenth Amendment's Equal Protection clause and brought about significant legal change. Examples of their work include cases such as *Reed v. Reed* (1971), which dealt with sex discrimination in will administration, and *Frontiero v. Richardson* (1973), in which the Court found that military benefits must be distributed equally, regardless of gender (O'Connor 1980).

More recently, gay rights groups have employed this strategy in their efforts to legalize same-sex marriage (O'Connor and Yanus 2007a). Though their work has largely been in state supreme courts, organized interests such as Gay and Lesbian Advocates and Defenders, the American Civil Liberties Union's Gay and Lesbian Rights Project, Lambda Legal, and Freedom to Marry have designed legal strategies designed to persuade judges that the right to marry should be extended to same-sex couples. The most notable victory of this movement came in the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Public Health* (2003).

Notably, an experienced and well-respected litigator, Evan Wolfson, has often masterminded the efforts of these groups. Wolfson, formerly of Lambda Legal, is the founder and chief counsel of the recently created Freedom to Marry. Some commentators

have compared Wolfson to Marshall and Ginsburg, noting that he has the vision and ability to see the big picture that many other competent lawyers within the gay rights movement lack (Mauro 2004b).

Existing Research

The seemingly overwhelming evidence of the significance of legendary litigators, especially in the civil and women's rights movements, was important in laying the groundwork for understanding the crucial role played by lawyers in the legal process. In the American context, this research is most extensive at the Supreme Court level. Much of this owes to the work of McGuire (1993a, 1993b, 1995), who undertook an exploration of all of the lawyers who argued before the Supreme Court from 1977-1982. He then identified an elite subset of lawyers who had argued more than three cases before the Court during this time period.

McGuire found that lawyers played an essential role at every stage in Supreme Court practice. They wrote briefs for *certiorari* and on the merits, composed *amicus curiae* briefs for interest groups, and often helped less experienced practitioners shape their case for the Court by offering advice on briefs or serving as members of moot courts (McGuire 1993b). They were also adept at identifying cases that were likely to be reviewed by the Court. Further, when elite attorneys presented oral arguments, the parties they represented were more likely to emerge victorious.²

Other scholars have more completely explored the role of lawyers in presenting oral arguments before the Court. In a study using Justice Harry A. Blackmun's ratings of lawyers appearing before the Court in oral arguments, for example, Johnson, Wahlbeck, and Spriggs

²The value of lawyer experience is not as clear in the comparative context. In Canada, for example, Flemming and Krutz (2002) found that lawyer experience actually had a negative impact on a party's likelihood of victory before the nation's high court.

(2006) found that the quality of the lawyer's oral argument affected the party's likelihood of victory before the Court.³ Consistent with expectations, lawyers who received higher ratings were more likely to win than their lower rated counterparts. Not surprisingly, representatives of the federal government, former Supreme Court law clerks, elite law school graduates, or lawyers employed by Washington, D.C. firms generally received these higher ratings. The characteristics of these litigators were strikingly similar to those of the elite lawyers observed by McGuire (1993b).

Haire, Lindquist, and Hartley (1999) have also examined the effects of lawyer expertise using data from the courts of appeals. Their analysis focused on products liability cases and supported previous scholarship. The authors found that expertise was one of the most important advantages that a lawyer could bring to the courtroom. Lawyers that had either a legal specialization in products liability or had appeared previously before that court of appeals were more likely than their counterparts to win in the final decision.

Studies such as these have quantified lawyers' experience as the number of previous cases an attorney has argued before a court. But, literature from the test case litigation tradition leads us to believe that familiarity with a preceding, measured as how long a lawyer has worked with that particular case, should also breed success. This question, however, has not received empirical attention.

A systematic analysis of this question will shed light on how strategic litigants should act within the federal court system. If, as the test case litigation literature suggests, early involvement breeds familiarity and leads to more favorable outcomes before the Supreme Court, strategic litigants should seek to identify lawyers and involve them in litigation as

³Justice Blackmun evaluated each lawyer who argued before the Court. These evaluations can be found in his notes on oral argument, which are stored in his papers in the Library of Congress. Depending on the time period, ratings range from A-F, 1-100, or 1-10.

soon as possible. Such a proposition is extraordinarily costly and would imply that the “haves” (Galanter 1974, Wheeler et al. 1987, Songer and Sheehan 1992) possess an even greater advantage in the American judicial system than originally expected.⁴

If, however, familiarity does not have an effect on case outcomes, a strategic litigant would be wise to use qualified, but perhaps less costly, attorneys until bringing their case before the Supreme Court. This finding would bode at least somewhat better for traditionally disadvantaged parties. It would also call into question the advisability of traditional test case litigation strategies.

It is worth noting that scholars are not universally convinced that interest groups engage in carefully planned test case litigation. Wasby (1984) for example, used elite interviews with representatives from the NAACP LDF to demonstrate that groups are not always able to perfectly plan and control litigation. He notes that resource shortages, political circumstances, outside events, and popular demands may substantially alter the agenda of a group.

Hypotheses

With respect to when lawyers get involved in litigation, I have a number of expectations. First, I hypothesize that lawyers from the Solicitor General’s office will be unlikely to appear on lower court briefs. This is a function of the structure of the U.S. Justice Department. Typically, regional U.S. Attorneys handle lower court litigation, leaving the solicitor and his deputies to handle only a select number of politically or socially important cases when they reach the Supreme Court.

⁴Evidence from other nations, most notably the Philippines, suggests that the “haves” are not advantaged in all judicial systems (Haynie 1994, 1995).

Washington attorneys should also be less likely to appear on court of appeals briefs. Many of these attorneys specialize in preparing briefs and oral argument for Supreme Court litigation. As such, they may not be admitted to the bar outside of Maryland, Virginia, and the District of Columbia.

In contrast, I expect that lawyers representing other governments should be more likely to appear on lower court briefs. If a state or local government is appearing in any federal court, it is reasonable to expect that they would want to be represented by their most expert attorney in any court.

Similarly, I expect that interest group attorneys should be more likely to appear on lower court briefs. This expectation is grounded in the extensive literature on test case litigation, which demonstrates that a number of organized interests identify cases early in the litigation process and expend a tremendous amount of effort and resources shepherding them through the judicial system (Vose 1957, 1959, 1972, Cowan 1976, Sorauf 1976, O'Connor 1980, Friendly 1982, Greenberg 1994).

With respect to the effects of familiarity on success before the Supreme Court, I expect that the petitioner will be more likely to win the case when they are represented by an attorney based in Washington, D.C. or a lawyer from the office of the Solicitor General. These expectations follow from previous research on success before the Court, which found that expert lawyers such as these enjoy a number of advantages before the Court that are not accorded to other litigators (Caplan 1987, Salokar 1992, McGuire 1993b).

Similarly, I expect that when an interest group lawyer represents a party, they will be more likely to win before the Supreme Court. This expectation follows from the test case litigation literature. Analyses of the NAACP LDF and women's rights groups such as the

American Civil Liberties Union's Women's Rights Project have demonstrated that lawyers representing these organized interests have attained elite status before the Court (Vose 1972, O'Connor 1980).

The test case litigation literature also leads me to believe that a lawyer's familiarity with a case should lead to success. I test the accuracy of this hypothesis by first examining what distinguishes Supreme Court lawyers who were involved in the courts of appeals from those who became involved in a case only after the court of appeals decision. I then further explore the question of whether this early involvement increases a lawyer's probability of victory before the Supreme Court.

Data and Methods

To conduct this analysis of interest representation, I use data from all cases orally argued during the 2000-2004 terms of the U.S. Supreme Court. For the purposes of information accessibility and because state court cases are apt to have different dynamics than their federal counterparts, I select only those cases that moved through the federal court system. This yields a total of 314 individual case citations and 628 lawyer observations (one for the petitioner and one for the respondent in each case). These cases were selected using the U.S. Supreme Court Judicial Database.

I conduct two separate analyses. The first examines when lawyers get involved in litigation. This analysis looks at whether the lawyer who orally argued the case before the Supreme Court also appeared on the court of appeals brief.

The second analysis explores at the effects of case familiarity. It asks whether a lawyer that is involved in the court of appeals has a greater probability of victory before the Supreme Court.

Dependent Variables

I treat the analysis of when lawyers get involved in litigation separately from the analysis of how involvement affects success. The dependent variable in the analysis of lawyer involvement is a dichotomous variable that measures whether a lawyer who orally argued a case before the Supreme Court also represented that party in proceedings before the court of appeals. This variable was coded 1 if a lawyer appeared on the circuit court brief and 0 otherwise.

In instances where more than one lawyer argued for the petitioner or respondent in a single case citation, a consolidated observation was created. This observation measures whether any one of the lawyers arguing before the Supreme Court participated at the circuit court level. For example, four lawyers argued for the respondents in the campaign finance case of *McConnell v. Federal Election Commission* (2003). Although only a few of these lawyers appeared on a brief in the court of appeals, the consolidated observation reads 1 for participation in that court.

The dependent variable in the analysis of lawyer success is taken from the U.S. Supreme Court Judicial Database. I use the “win” variable, which is a dichotomous measure of whether the petitioner won the case before the Supreme Court. It is coded 1 in the case of a petitioner victory and 0 otherwise.

Independent Variables

I employ a number of independent variables, each of which measures a lawyer’s professional characteristics and affiliations. Information on each of these characteristics was obtained from Supreme Court briefs and records, as well as supplemental searches of the Martindale-Hubbell directory of lawyers.

First, I examine whether a lawyer was affiliated with the Office of the Solicitor General. I expect that lawyers from the Solicitor General's office are less likely to get involved in litigation in the courts of appeals than other attorneys. Additionally, a number of studies have shown that the Solicitor General is the ultimate repeat player before the U.S. Supreme Court, and as such, he enjoys advantaged status before the Court. One of the attendant benefits of this advantage before the Court is that the Solicitor and his deputies are more likely to win than any other type of litigant (Caplan 1987, Salokar 1992, McGuire 1998).

Similarly, there exists a class of private attorneys who are more likely than their counterparts to win cases before the Supreme Court. Research by McGuire (1993b) has shown that many of the members of this elite Supreme Court bar are based in Washington, D.C. Thus, I consider whether the lawyer practiced in the nation's capital.⁵ The inclusion of this variable is consistent with usage in other studies of lawyer expertise (Johnson, Wahlbeck, and Spriggs 2006).

I also consider whether the lawyer represented an interest group. As previously discussed, lawyers representing organized interests such as the NAACP LDF and women's rights groups, for example, have attained elite status before the Court (Vose 1972, O'Connor 1980). Literature on test case litigation would also lead us to believe that having lawyers that shepherd cases through the judicial process may increase a party's probability of victory before the U.S. Supreme Court.

Finally, I control for whether the lawyer was affiliated with another government (i.e. township, city, county, state). I expect that these attorneys should be more likely to be

⁵The Washington, D.C. lawyer variable excludes attorneys based in the Office of the Solicitor General even though these lawyers technically have offices in Washington, D.C.

involved in litigation in the courts of appeals. Previous research has also shown that these attorneys are uniquely disadvantaged before the Supreme Court, and may actually be less likely to win than their counterparts (O'Connor and Epstein 1987).

The coding for these variables was straightforward in the analysis of lawyer involvement. Each lawyer was given a 1 if they met the characteristic and 0 otherwise. So, for example, if the petitioner's lawyer was a Washington attorney who was not the Solicitor General, a representative of another government, or an interest group, they were coded 1, 0, 0, 0.

In the analysis of success, lawyers for the petitioner and respondent were combined into one observation, because the unit of analysis is the case and not the individual lawyer. Each characteristic was coded 1 if it was true only of the petitioner's lawyer, -1 if it was true of only the respondent's lawyer, and 0 if it was true of both or neither of the petitioner and respondent's lawyers. Therefore, if the Solicitor General (0, 1, 0, 0) opposed the petitioner's lawyer from the previous illustration, the case was coded 1, -1, 0, 0.

In addition to the variables noted above, the success analysis also includes a variable that measures whether the attorney who orally argued before the Supreme Court appeared on the brief in the court of appeals. This is the key variable of interest in this analysis.

Control Variables

I also include several control variables. First, in the involvement model, I include a control for whether the lawyer represented the petitioner (1) or the respondent (0). This is a necessary control because it is possible that different representational dynamics may be present on each side of the case. Parties who lose before the court of appeals (the petitioner),

for example, may be less likely to retain their lawyer in Supreme Court proceedings than their counterparts who have won before the lower court (the respondent).

I also include several dichotomous variables that control for the type of case. These variables are derived from the U.S. Supreme Court Judicial Database's "value" variable. Using the information contained in this variable, I separate the cases into criminal, civil rights and liberties, economic, and all other cases.⁶ I expect that there may be variation across case types because different types of cases are likely to attract different kinds of parties. Previous research has demonstrated that these parties vary widely in the resources they devote to litigation (Sheehan, Mishler, and Songer 1992).

In the success model, I use several different controls. First, I consider the direction of the lower court's decision. This variable is taken from the U.S. Supreme Court Judicial Database's "lctdir" variable. It is coded 0 if the lower court made a conservative decision and 1 if the lower court made a liberal decision. This control is used following prior studies that have demonstrated that lower court decisions can affect lawyers' success before the Court (McGuire 1995).

I also control for case salience, since McGuire and McAtee (2007) have found that salience affects the impact that lawyers have on case outcomes. I consider the model using both the *New York Times* measure developed by Epstein and Segal (2000) and an alternate measure developed by *Congressional Quarterly*. These measures are taken from the *Supreme Court Compendium* (Segal et al. 2006).

Findings

⁶Criminal cases are those where value=1, civil rights and liberties cases are those where value=2, 3, 4, or 5, and economic cases are those where value=8.

Before exploring whether early involvement affects a litigator's success before the Supreme Court, it is necessary to consider the lawyers' characteristics and when they become involved in cases within the federal court system. I examine these questions in greater detail in the sections that follow.

Preliminary Observations

Of the 628 total observations from 2000 to 2004, 44 percent of lawyers who argued before the Supreme Court also appeared on a brief in the court of appeals. This percentage is smaller than some observers might anticipate. When coupled with additional findings about the identities of lawyers who argue before the Court, however, it may be suggestive of the increasing specialization of the Washington bar.

Interest groups employed only 5 percent of lawyers arguing before the Court during this time period. This suggests that interest groups may not be employing their own lawyers to do litigation work, perhaps choosing to work with private, pro bono attorneys who come at no additional cost (O'Connor and Yanus 2007b).

Lawyers from the Solicitor General's office comprised 22 percent of the population. This percentage is slightly larger than the 15 percent of lawyers from the Solicitor General's office observed by Johnson, Wahlbeck, and Spriggs (2006), and may be reflective of the fact that my analysis captures only those cases that moved through the federal court system, and not all cases heard by the Supreme Court. Presumably, cases coming from the federal court system are more likely to have the federal government as a party to litigation than their counterparts coming out of state judicial systems.

The large proportion of lawyers that come from the Solicitor General's office may also reinforce the idea that attorneys from the Solicitor General's office may be advantaged

before the Court not only because they represent the federal government, but also because they are the ultimate repeat players (McGuire 1998). Furthermore, if lawyers from the Solicitor General's office appear before the Court in an increasingly greater proportion of cases, presumably their advantages before the Court may also increase.

Lawyers who appeared on behalf of another government made up an additional 18 percent of attorneys. Thus, nearly half of all lawyers who appeared before the Supreme Court during this time period represented governments. This finding is reflective of the Court's docket composition, where an increasingly substantial percentage of cases involve governmental litigants.

Washington, D.C. lawyers were similarly well represented. Even after eliminating those lawyers who work in Washington because they are employed by the Solicitor General's office, 21 percent of lawyers who argued before the Supreme Court from 2000 to 2004 worked in the capital city. This number represents a significant increase in the percentage of Washington lawyers observed by Johnson, Wahlbeck, and Spriggs (2006). In their study of lawyers appearing before the Court from 1970 to 1994, the authors found that 11 percent of the attorneys in their sample were lawyers based in Washington, D.C.

The growing percentage of the Supreme Court bar that is either a government lawyer or practicing in Washington, D.C. is most likely reflective of the growing specialization required by attorneys that argue before the Supreme Court. One observer, for example, notes:

If Supreme Court advocacy has always been the Matterhorn of the American legal profession, in recent years it has become the litigator's Mt. Everest, a challenge requiring the best sherpas money can buy. In part because more law firms want the prestige that comes with a Supreme Court practice, and in part because the shrinking of the court's docket--the justices hear half as many cases today as two decades ago--has spurred competition for the business that remains, Supreme Court litigation has

become a highly specialized trade. Lawyers who want to go before the court must know everything from how to handle the lectern to what color the cover of their legal briefs must be (Mauro 2004a: 8).

No longer can an attorney appear before the Court without hours of legal training and preparation. And, while in the past, it was impossible to make a living solely off of Supreme Court practice, modern-day attorneys such as Thomas Goldstein have proved that it is possible today.

Appearing before the Supreme Court does not tell us the whole story about interest representation. Understanding when these lawyers get involved in cases—and what the implications of that involvement might be—is far more important to the broader analysis of how familiarity with a case affects success before the Supreme Court.

Involvement in the Court of Appeals

The findings of the probit analysis shown in Table 1 are largely consistent with expectations. As shown in Table 1, only three of the characteristics included in the model attain statistical and substantive significance. Lawyers who are employed by the Solicitor General and lawyers who work in Washington, D.C. are significantly less likely than other lawyers to appear on a brief in the court of appeals. This is what we would expect; after all, the Solicitor General and the Washington bar engage in very specialized practice and have significant advantages before the U.S. Supreme Court. Their incentive to become involved in the lower courts, thus, should be very low.

On the other hand, lawyers employed by interest groups are more likely than their peers to appear on briefs in the court of appeals. This is consistent with the image of interest groups as the classic test-case litigators who attempt to identify cases early in the judicial process and stick with them throughout subsequent legal proceedings.

The effects of each of these variables are quite substantial.⁷ Lawyers from the Solicitor General's office, for example, are 47 percent less likely than their counterparts to appear on briefs in the court of appeals. Lawyers employed by Washington firms are a similarly high 37 percent less likely than their counterparts to appear in the court of appeals.

The effects for interest group lawyers are somewhat smaller, although still significant. Lawyers affiliated with interest groups are 25 percent more likely than other lawyers to appear on the briefs in the court of appeals.

Interestingly, lawyers that work for other governments are not significantly different from other litigators in their participation. This finding is somewhat unexpected. Since state government lawyers are notoriously poor litigators, it would seem that states would be likely to deploy their best lawyer in any federal court in an effort to overcome this deficit. This, however, does not appear to be the case. One possible explanation for this turnover could be changes in state bureaucracies as a result of elections or new appointments. Alternately, it may be that the disadvantages suffered by state attorneys general in the O'Connor and Epstein (1987) analysis are an artifact of another time. Further research is necessary to better understand the nature of this relationship.

Finally, both control variables fail to exercise any significant effect on whether a lawyer who argued a case before the Supreme Court also appeared on a brief in the court of appeals. It appears that the effects of lawyer characteristics are consistent regardless of case type or whether the lawyer represents the petitioner or respondent.

Success Before the Supreme Court

⁷The effects noted here are predicted probabilities calculated using Stata's `prchange` command. Because all of the variables are dichotomous variables, I note only the change from maximum value to minimum value.

Knowing when lawyers get involved is certainly an important part of the story, but if some lawyers systematically engage earlier in the legal process, it is at least in part because they estimate that they will have a greater likelihood of success before the Supreme Court. In this section, I test whether this probability is actually higher by modeling lawyer success as a function of involvement in the courts of appeals.

Interestingly, few variables appear to have any significant effect on whether a lawyer wins before the Supreme Court. Of the independent variables, only being represented by the Solicitor General appears to affect the petitioner's likelihood of victory. When the Solicitor represents the petitioner, the petitioner is approximately 15 percent more likely to win their case than under other conditions.⁸

Whether the lawyer is a Washington attorney or the representative of an interest group has no effect. The same holds true of the key independent variable, which measures whether a lawyer appeared on the court of appeals brief. That is, early involvement in a case does not seem to increase a lawyer's probability of victory before the Supreme Court. These findings hold true regardless of case salience or the direction of the lower court's decision.

These findings suggest that anecdotal evidence from successful planned litigation campaigns such as the one that resulted in *Brown v. Board of Education* (1954) may have given observers a biased view of the impact of strategic litigation before the Supreme Court. They also lend some credence to Wasby's (1984) findings that groups and litigants are not able to plan their litigation strategies as completely as they might like. Wasby's findings about the importance of public pressure on organized interests involvement in litigation may

⁸The effects noted here are predicted probabilities calculated using Stata's `prchange` command. Because all of the variables are dichotomous variables, I note only the change from maximum value to minimum value.

even be more important in the modern world, where technology has made political news and interest group activity more accessible to the constituent public.

These findings do not, however, suggest that representation is unimportant in the American legal system. However, they may indicate that the emphasis many observers have placed on litigants' efforts to develop a case for argument before the Supreme Court have been too extreme.

Discussion

The results of the analysis of lawyer involvement confirm what scholars have long believed: lawyers get involved in litigation in systematic ways. Many of these tactics are a function of legal specialization and institutional structures.

This specialization, perhaps, leads us to find that familiarity with a case—measured as involvement with a case in the court of appeals—does not have a significant effect on the Supreme Court's decision. This finding may implicitly validate earlier research about the importance of experience before a single court. Lawyers such as those employed in the Solicitor General's office and members of the Washington bar do not shepherd cases through the judicial process. However, this decision does not appear to damage their likelihood of victory in this ultimate tribunal.

These findings have several important practical implications. First, they suggest that while the “haves” are certainly advantaged in the legal process, this advantage may not be as significant as it could be. Of course, the haves still have the wherewithal to hire the most experienced Supreme Court litigators, but there may not be as much of a carry-over effect from lower courts as might be expected.

Second, these findings question some of the assumptions made by scholars of interest group litigation, who implicitly or explicitly seem to assume that identifying a case early in the process and shepherding it through trial and appellate courts is a way to achieve legal change. The case studies of groups such as the NAACP LDF and the American Civil Liberties Union's Women's Rights Project, as well as the work of litigators such as Thurgood Marshall and Ruth Bader Ginsburg, may be extraordinary examples that do not represent the norm of working before the Court. The case facts and particular political circumstances which surrounded the cases these groups brought before the Court may be as important as their leadership in getting the cases there.

Generally speaking, therefore, it may be more efficient and effective for parties to litigation to use serviceable representation throughout the legal process, and resort to hiring or attracting the best (and, perhaps, most experienced) representation only when the case faces the prospect of being heard by the Supreme Court. This finding may be especially true for groups that have limited financial resources and must make decisions about when to begin retaining legal counsel.

Conclusion

This research demonstrates empirically that—regardless of the ideological leanings of a lower court's decision or case salience—getting a lawyer involved earlier in the judicial process does not appear to have a significant effect on the outcome of a case. This finding calls into question the exportability of theories about interest group litigation and suggests that strategic litigants may be wise to use skilled, but not necessarily elite attorneys when litigating before the courts of appeals. Using limited resources toward elite representation can perhaps be reserved for the Supreme Court.

There is, however, much that cannot be said from the results of this analysis. First, the effects of having a lawyer who is familiar with the case file a brief for certiorari are not examined in this analysis. Moreover, the differences in the characteristics of the lawyers that appear on the briefs filed with the Supreme Court and the actual lawyers that present oral arguments are not examined in this study.

Second, I do not control for a lawyer's expertise measured as the number of previous cases an attorney has argued before the Court; this factor may have a significant impact not only on when lawyers get involved in litigation, but on their likelihood of victory before the Court. Furthermore, there may be important interactions between experience before the Court and familiarity with a case that are worth considering. Notably, the interest group lawyers who are the foundation for many of the anecdotes about the importance of case familiarity were also very experienced litigators before the Supreme Court. Both Thurgood Marshall and Ruth Bader Ginsburg argued a number of cases before the Court before they were able to secure significant legal change.

In addition, there may be other judicial and institutional characteristics that affect the importance of case familiarity. Some justices, for example, may be more susceptible to the types of arguments made by attorneys who follow cases throughout the judicial process.

Alternately, different classes of litigants may handle their legal proceedings differently, bringing attorneys into the process at different points in time. Criminal defendants who file cases *in forma pauperis*, for example, are likely to have an experienced Washington attorney appointed to represent them before the Supreme Court; this attorney would not argue before lower courts. Businesses, in contrast, may have the financial wherewithal to hire experienced attorneys throughout the judicial process.

Finally, the case's circuit of origin could affect patterns of lawyering. More prestigious circuits, such as the D.C. Circuit or the 9th Circuit may be likely to attract higher quality attorneys earlier in the judicial process than cases that are drawn from circuits that receive less national attention.

Predictor	Estimate	Std. Error
Solicitor General	-1.525**	.165
Other Government	-.159	.149
D.C. Lawyer	-1.112**	.149
Interest Group	.647*	.279
Petitioner	-.147	.113
Criminal Case	.263	.167
Civil Rights/Liberties Case	.244	.151
Economic Case	.189	.167
Constant	.252	.137
ℓ	-332.625	
Wald χ^2	154.38	
P	.000	
$R^2_{M\&Z}$	0.334	

Notes: $n=597$. ** $p < .01$, * $p < .05$ (two-tailed).

Table 1. Predictors of Participation in the Courts of Appeals

Table 2. Predictors of Litigator Success Before the Supreme Court

Predictor	Estimate	Std. Error
On Court of Appeals Brief	.152	.131
Solicitor General	.493**	.158
D.C. Lawyer	.229	.154
Interest Group	-.153	.274
Salience	-.324	.219
Lower Court Direction	.008	.167
Constant	.532**	.127
ℓ	-174.82	
Wald χ^2	13.43	
p	0.04	
$R^2_{M\&Z}$.08	

Notes: $n=293$. ** $p < .01$, * $p < .05$ (two-tailed).

Salience measure shown is *New York Times*; CQ measure is virtually the same.

REFERENCES

- Caplan, Lincoln. 1987. *The Tenth Justice: The Solicitor General and the Rule of Law*. New York: Knopf.
- Cowan, Ruth B. 1976. "Women's Rights through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-1976." *Columbia Human Rights Law Review* 8: 373.
- Epstein, Lee, and Jeffrey A. Segal. 2000. "Measuring Issue Salience." *American Journal of Political Science* 44: 66-83.
- Flemming, Roy B., and Glen S. Krutz. 2002. "Selecting Appeals for Judicial Review in Canada: A Replication and Multivariate Test of American Hypotheses." *Journal of Politics* 64: 232-248.
- Friendly, Fred W. 1982. *Minnesota Rag*. New York: Vintage Books.
- Galanter, Marc. 1974. "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change." *Law & Society Review* 9: 95-160.
- Greenberg, Jack. 1994. *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution*, reprint ed. New York: Basic Books.
- Haire, Susan Brodie, Stefanie A. Lindquist, and Roger Hartley. 1999. "Attorney Expertise, Litigant Success, and Judicial Decisionmaking in the U.S. Courts of Appeals." *Law & Society Review* 33: 667-684.
- Haynie, Stacia. 1994. "Resource Inequalities and Litigation Outcomes in the Philippine Supreme Court." *Journal of Politics* 56: 752-772.
- Haynie, Stacia. 1995. "Resource Inequalities and Regional Variation in Litigation Outcomes in the Philippine Supreme Court, 1961-1986." *Political Research Quarterly* 48: 371-380.
- Johnson, Timothy R., Paul J. Wahlbeck, and James R. Spriggs II. 2006. "The Influence of Oral Arguments on the U.S. Supreme Court." *American Political Science Review* 100: 99-113.
- Mauro, Tony. 2004a. "Paper Chaser: How a Young, Self-Employed Lawyer Became the Best Supreme Court Litigator in Washington." *Washington Monthly* 36: 8-11.
- Mauro, Tony. 2004b. "Trailblazer: Wolfson's Fight for the Freedom to Marry: Same Sex Marriage Advocate Sees Historical Parallels in Struggle." *Legal Times* (June 7): 1.
- McGuire, Kevin T. 1993a. "Lawyers and the U.S. Supreme Court: The Washington Community and Legal Elites." *American Journal of Political Science* 37: 365-390.

- McGuire, Kevin T. 1993b. *The Supreme Court Bar: Legal Elites in the Washington Community*. Charlottesville: University of Virginia Press.
- McGuire, Kevin T. 1995. "Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success." *Journal of Politics* 57: 187-196.
- McGuire, Kevin T. 1998. "Explaining Executive Success in the U.S. Supreme Court." *Political Research Quarterly* 51: 505-526.
- McGuire, Kevin T., and Andrea McAtee. 2007. "Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?" *Law and Society Review* 41: 259-278.
- O'Connor, Karen. 1980. *Women's Organizations' Use of the Courts*. Lexington, MA: Lexington Books.
- O'Connor, Karen, and Alixandra B. Yanus. 2007a. "'Til Death—Or the Supreme Court—Do Us Part: Litigating Gay Marriage." In Craig Rimmerman and Clyde Wilcox, eds. *The Politics of Same-Sex Marriage*. Chicago: University of Chicago Press, 291-311.
- O'Connor, Karen, and Alixandra B. Yanus. 2007b. "Where Have All of the Pro-Choice Lawyers Gone? An Analysis of Post-Roe Reproductive Rights Lawyering" *Law and Policy* 29: 367-378.
- O'Connor, Karen, and Lee Epstein. 1987. "States Before the U.S. Supreme Court: Sponsorship of Cases Involving Criminal Rights, 1969-1984." *Judicature* 70: 298-305.
- Salokar, Rebecca Mae. 1992. *The Solicitor General and the Politics of Law*. Philadelphia: Temple University Press.
- Segal, Jeffrey A., Harold J. Spaeth, Lee Epstein, and Thomas G. Walker. 2006. *The Supreme Court Compendium*, 4th ed. Washington, DC: CQ Press.
- Sheehan, Reginald S., William Mishler, and Donald R. Songer. 1992. "Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court." *American Political Science Review* 86: 464-471.
- Songer, Donald R., and Reginald S. Sheehan. 1992. "Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals." *American Journal of Political Science* 36: 235-258.
- Sorauf, Frank J. 1976. *The Wall of Separation: The Constitutional Politics of Church and State*. Princeton: Princeton University Press.

- Vose, Clement E. 1957. "The National Consumer's League and the Brandeis Brief." *Midwest Journal of Political Science* 1: 267-290.
- Vose, Clement E. 1959. *Caucasians Only*. Berkeley: University of California Press.
- Vose, Clement E. 1972. *Constitutional Change*. Lexington, MA: Lexington Books.
- Wasby, Steven L. 1984. "How Planned Is 'Planned Litigation?'" *American Bar Foundation Research Journal* 9: 83-138.
- Wheeler, Stanton, et al. 1987. "Do the Haves Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970," *Law and Society Review* 21: 403-445.
- Woodward, C. Vann. 1987. "The Case of the Louisiana Traveler." In John A. Garraty, ed. *Quarrels that Have Shaped the Constitution*. New York: Harper & Row, 145-158.