

The Revolving Door in Judicial Politics: Former Clerks and Agenda Setting on the U.S. Supreme Court

Huchen Liu
Department of Politics
Princeton University
huchenl@princeton.edu

Jonathan P. Kastellec
Department of Politics
Princeton University
jkastell@princeton.edu

May 26, 2021

Abstract

We examine the role of former clerks to justices of the U.S. Supreme Court on the Court's agenda setting process. Using both existing and original data, we find that when a former clerk is the attorney on either a cert petition or an amicus brief, the Court is more likely to hear a case, compared to advocacy by a non-former clerk, *ceteris paribus*. To help explain these patterns, we draw on the broader interest group literature on “revolving door” politics. We argue that the most plausible mechanisms are either that former clerks are more effective advocates at the agenda setting stage due to their relationships with justices and knowledge of the Court's processes, or that their presence in a case signals its importance to the Court. Alternatively, former clerks may be better at recognizing the cases that the Court is likely to grant *ex ante*, and thus choose to select into such cases. While we cannot definitively disentangle these competing mechanisms, the strong patterns in the data suggest that the importance of the revolving door in judicial politics extends quite broadly into the domain of agenda setting, and is thus worthy of further investigation.

1 Introduction

A key institutional feature of the modern-day United States Supreme Court is that the number of cases the Court *could* hear and the number of cases the Court *does* hear have moved in strikingly opposite directions over the last few decades. Due in part to the growth in general of the federal government and the creation of federally judicially enforceable individual rights, the number of cases in which litigants have sought review by the Court—that is, the Court’s docket—has exploded over the last 75 years. As seen in Figure 1, the number of cases on the Court’s docket has roughly quintupled since 1950, going from around 1,300 cases that year to about 7,500 in 2015, following a peak of about 10,000 in 2006.¹

Because the Supreme Court has nearly complete discretion over the cases it hears, the size of its docket is the upper bound on the number of actual decisions on the merits it makes. That number is determined by the number of certiorari (or “cert”) petitions the Court grants in a given term. In stark contrast to the Court’s rising docket numbers, the number of cert petitions granted by the Court has declined dramatically. This can be seen in Figure 2, which depicts the number of cert petitions granted between 1970 and 2015. The graphs make clear the steep decline in grants; the Court now gives full consideration to only about 80 cases a year, or about one percent of the number of cases that enter the docket each year.²

The diverging paths of the Court’s docket and the number of cases it “decides to decide,” to borrow H.W. Perry’s (1991) famous phrase, are of course well known among those who study the Supreme Court. But a key implication of this divergence is often underappreciated. If we want to look for external influences on the decision making of the justices, the starting point is *not* necessarily the set of cases given full consideration, including oral

¹Figures 1 and 2 are updated versions of graphs presented on the Federal Judicial Center’s website: www.fjc.gov/history/exhibits/graphs-and-maps/supreme-court-caseloads-1880-2015

²A very small number of cases come to the Court in the form of mandatory appeals, which comprise the narrow set of cases over which the Court does not have discretion in case selection. Including such cases in the numerator does not affect the overall picture.



Figure 1: *The Supreme Court's Caseload, 1878-2017.* The graph depicts the total number of cases on the Court's docket, for each term.

argument, by the Court.³ Rather, the place to look for such influence is the set of cases the Court *could* decide to weigh in, simply because statistically it is so rare that a case on the docket will be formally decided by the Court (that is, decided in a manner other than a cert denial).

In this paper, we examine a particular avenue for influencing the Court's agenda: the role of former law clerks for the justices. The potential influence of former clerks has received scholarly attention with respect to their effectiveness at oral arguments (McGuire 2000, Black and Owens 2020). And more generally, scholars have recognized the importance of clerks for the ability of justices to manage the flow of cases coming to the Court and to help them draft opinions (Peppers 2006, Ward and Weiden 2006); this influence, of course, can only

³By full consideration, we mean cases for which the Court holds oral arguments and issues signed opinions; these are sometimes referred to as "merits cases." There are other classes of cases in which the Court grants cert but disposes of a case in a more succinct fashion. This includes cases in which the Court "grants, vacates, and remands," or GVR (Hellman 1983, Benesh et al. 2014). In addition, over the past few years the Court has issued more decisions via its "shadow docket," in which the Court makes speedy decisions, often in the form of summary reversals that have the weight of cases traditionally given full consideration, but without the benefit of full briefings and/or oral arguments (Baude 2015).

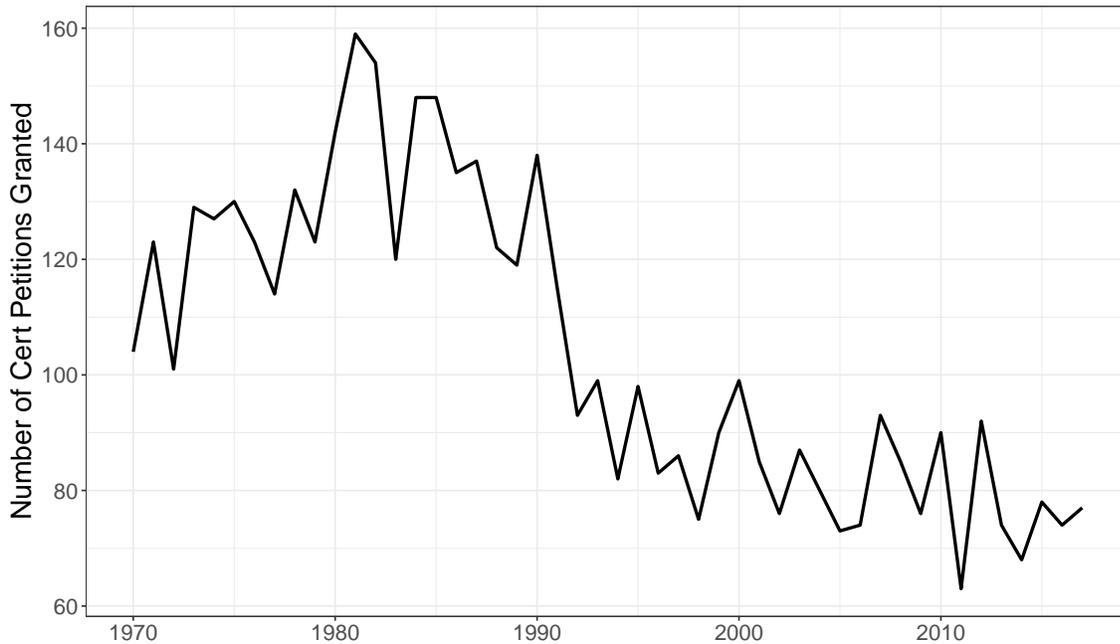


Figure 2: Cert Petitions Granted by the Supreme Court per term, 1970-2017.

arise during a clerk’s short time (usually one term) working for a single justice. But, to the best of our knowledge, no study has yet examined whether *former* clerks exert any influence at the agenda setting stage. In this paper, we do exactly that.

In particular, we combine existing and original data to examine whether the presence of a former clerk on a case is associated with a higher likelihood of the Court granting cert. Our theoretical expectations here are drawn from the broader literature on “revolving door” politics, in which individuals move from government jobs into lobbying. In particular, we focus on two pathways through which former clerk influence might play out in the cert process. The first is by *direct representation*; that is, when a former clerk represents a party in a suit and directly files a cert petition seeking Supreme Court review of the case. The second is by *indirect representation*; here the former clerk does not directly represent a party to the case, but still becomes involved by authoring an amicus brief that urges the Court to take the case. In this form of indirect representation, attorneys often assist organized interests that lobby the Court as amici curiae. With our newly collected data, we are able

to examine former clerks' potential advantage in both capacities during the cert process.

For both types of representation, we find that the presence of a former clerk in the case is associated with a substantially higher likelihood of the Court granting cert compared to advocacy by a non-former clerk, *ceteris paribus*. In addition, the estimated magnitude of these differences is quite substantial. For cert petitions, our best estimate is that the probability of cert grant is in the range of 12 to 15 percent when a former clerk writes a cert petition, compared to about six percent when a roughly comparable non-former clerk writes a petition. For amicus briefs, our best estimate is that the probability of cert grant is in the range of 40 to 55 percent when a former clerk authors a brief, compared to about 20 to 30 percent when a roughly comparable non-former clerk authors a brief. (As we explain below, amicus briefs at the cert stage are quite relatively rare, which helps explain the differences in the grant rates between petitions and briefs.)

As we detail in the paper, given the nature of the observational data we are working with, there are significant hurdles to concluding that this relationship is causal. With these identification concerns in mind, we apply insights from the “revolving door” literature to understand the different channels through which the relationship between former clerk involvement and a higher chance of a cert grant could occur. For example, we know revolving-door lobbyists derive an advantage from the political connections or knowledge that their government experience gives them (Bertrand, Bombardini and Trebbi 2014). In a similar fashion, former clerks may be more effective advocates at the agenda setting stage due to their relationships with justices and knowledge of the Court's processes. A second potential mechanism is that the presence of a former clerk on a cert petition or amicus brief may signal to the Court that a case is more worthy of review. Importantly, under either of these mechanisms, the presence of former clerks would causally affect the likelihood of a cert grant. Alternatively, former clerks may be better at recognizing the cases that the Court is likely to grant *ex ante*, and thus choose to select into such cases. Under this scenario, there would be no causal relationship between former clerks' advocacy and the likelihood of cert. While we cannot

definitively disentangle these competing mechanisms, the strong patterns in the data suggest that the importance of the revolving door in judicial politics extends quite broadly beyond oral arguments and into the domain of agenda setting.

2 The Revolving Door, Agenda Setting, and Former Clerks

The federal judiciary is not the most natural setting to study revolving door politics. For one, unlike many legislators and executive branch officials, the justices themselves do not “revolve” at all, since being on the Court is the last meaningful job they will have.⁴ Yet, the regularized movement of law clerks from the chambers of the justices (clerks generally serve for a single term) into the wider attorney community means that the scope of revolving door politics in the judiciary and the legal system more broadly is potentially quite large.⁵

How do revolving-door lobbyists benefit from their connections in government? First, government experience provides connections with officials and knowledge of processes; both are valuable assets to hold when government personnel walks through the revolving door to help outside actors navigate politics. For example, government connections give lobbyists useful contacts whenever the need for communication arises. Lobbyists who served in government start with much stronger and more numerous contacts with officials and staffers than those who did not (Salisbury et al. 1989); such contacts provide an audience for attempts at communication and persuasion. Lobbying clients believe that lobbyists’ connections are valuable. The lobbying market rewards connected lobbyists with higher revenue (LaPira and Thomas 2017, Bertrand, Bombardini and Trebbi 2014), and ex-staffers demonstrably lose lobbying revenue when their former bosses in Congress leave office (Blanes i Vidal, Draca and Fons-Rosen 2012).

⁴This, notably, is a relatively recent phenomenon, as many justices used to serve relatively short terms before resigning and moving to a different position (Crowe and Karpowitz 2007). James Byrne, for example, served for just one year before resigning from the Court in 1942 to lead the Office of Economic Stabilization. The last justice who left the Court for a different position was Arthur Goldberg, who resigned in 1965 to become U.N. ambassador. Since then, every justice has either exited the Court into retirement, or died while still on the Court.

⁵As we describe in the data section below, 488 unique individuals served as Supreme Court clerks during the period covered by our data (2003-2015).

Lobbying is often construed as the transfer of information from lobbyists to officials (Austen-Smith 1995, Lohmann 1995). Lacking sufficient technical information and in-house resources to make policy, government officials rely on outside input, whose quality can be hard to discern particularly when policy is highly technical. A lobbyist’s ultimate currency is politicians’ trust in her advice (Levine 2009, Andres and Hernnson 2015). Relatedly, organized interests and their lobbyists have an easier time supplying policy-relevant information to allies in government (Hall and Deardorff 2006). Government experience gives lobbyists an enormous reputational edge by making them known quantities to like-minded politicians even as they start out. Much more than unfamiliar names, they likely enjoy the perception that they are able to provide information that helps elected officials make policy, explain their decisions, and win elections.

2.1 Lobbying the Supreme Court

Before we can ask how revolving door lobbying might operate in the federal judiciary, we should start with the prior question of what exactly “lobbying” means in the context of judicial decision making. Unlike in legislatures, advocates do not informally stop judges in the halls outside chambers to make their case; indeed, procedural rules generally bar such *ex parte* communications, except in rare circumstances.⁶ Instead, lobbying occurs in a much more structured and formalized manner.

First, while not generally referred to lobbying as such, advocacy by lawyers on behalf of their client can be thought of as a type of lobbying. Legal advocacy is, of course, a multifaceted activity that is highly contextual, but in some sense the core job of an attorney is to offer judges both arguments and information in an effort to have her client emerge victorious, whether it be in a civil or criminal context (Dewatripont and Tirole 1999). Such advocacy occurs both at the trial stage and the appellate stage—the latter is relevant when studying cert decisions.

⁶See e.g. the American Bar Association’s rules on *ex parte* communications: https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_9expartecommunications/.

Second, a perhaps more natural way to think about lobbying in judicial politics is with respect to the role that organized interests play in advocacy. Lobbying, of course, more generally focuses on the role of organized interests in pushing their favored policies with legislatures and executives. In the judiciary, advocacy by organized interests generally comes in the form of amicus briefs, which consist of supplemental arguments written by a third party to a case that advocates, based on the interests of the group, that a court decide in one direction or another. In terms of the Supreme Court, there are two stages at which organized interests have the option of weighing in. The first is at the cert stage, when the Court is deciding whether to grant a cert petition; here organized interests can urge the Court to either take the case or to deny the petition. The second is at the merits stage, when the Court has agreed to hear a case and now is open to arguments from third parties about which side to favor in its ultimate ruling on the merits.

What does the judicial politics literature tell us about the effectiveness of both types of lobbying? Both the justices themselves and many qualitative accounts of the Court stress that the quality of advocacy matters a great deal (Casper 1972, Rehnquist 2002). With respect to the quality of advocacy, scholars in search of systematic evidence for its effectiveness have primarily focused on oral arguments on the Supreme Court. As a general matter, scholars have found suggestive evidence that higher quality arguments by advocates at oral argument is associated with a higher likelihood of a particular side winning the case (Johnson, Wahlbeck and Spriggs 2006). Relatedly, a number of studies have found that greater attorney experience in litigation before the Supreme Court is associated with a higher likelihood of winning on the merits (McGuire 1993; 1995, McAtee and McGuire 2007).⁷ By comparison, we know very little about the role of attorney quality at the cert stage.

Turning to the role of organized interests in litigation, the influence of interest groups

⁷If we expand our lens beyond the Supreme Court, Haire, Hartley and Lindquist (1999) show that attorney experience is also correlated with litigation success in the U.S. Courts of Appeals, while Szmer, Johnson and Sarver (2007) show a similar tendency exists in the Supreme Court of Canada. Attorney experience is a subset of the many dimensions by which the quality of advocacy may matter for judicial outcomes. This literature is too vast to summarize here, but see Szmer, Johnson and Sarver (2007, 280-83) for an excellent review.

in litigation has been a longstanding concern in judicial politics. On the qualitative side, numerous studies have examined how particular groups have shaped momentous changes in the law.⁸ On the quantitative side, a rich set of studies have examined whether the influence of amicus briefs on the Court’s decision making at the merits stage (Collins Jr 2008; 2007, Box-Steffensmeier, Christenson and Hitt 2013, *inter alia*). The upshot of these studies is that the number of briefs supporting a particular side is associated with a higher likelihood of the Court agreeing with that position—however, whether this relationship is causal remains up for debate (Collins Jr 2018, Bils, Rothenberg and Smith 2020, Dean and Cameron 2021).

If we switch our focus to the cert stage, Caldeira and Wright’s (1988) seminal article shows that the filing of amicus briefs at the cert stage is associated with a significantly higher likelihood of the Court granting cert in a given case. In their telling, “amicus curiae participation by organized interests provides information, or signals—otherwise largely unavailable—about the political, social, and economic significance of cases on the Supreme Court’s paid docket and that justices make inferences about the potential impact of their decisions by observing the extent of amicus activity.” While Caldeira and Wright’s paper focused on a single term (1982), follow-up work by Schoenherr and Black (2019) confirms the general relationship between amicus briefs and cert. However, as with merits briefs, the extent to which this relationship is causal remains unclear. In addition, the few studies in this area have not examined the possible role of attorney quality in crafting briefs, instead focusing of the *quantity* of briefs as the main covariate of interest.

2.2 Former Clerks and the Certiorari Process

Let’s now return to the potential influence of former clerks at the cert stage. As we noted in the introduction, the possibility that former clerks exert outsized influence on the Court’s decision making has been examined at the merits stage. McGuire (2000)—who, to the best of our knowledge, introduced the notion of the revolving door with respect to

⁸A famous example is the NAACP’s role in bringing *Brown v. Board of Education* to the Supreme Court (Klarman 2006). More generally, see Epp (1998) on how interest groups in several countries have facilitated the judicial expansion of rights.

former clerks—found that parties represented by former clerks (at either oral arguments or in merits briefs) were more likely to win their cases before the Court. More recently, Black and Owens (2020) conducted a fine-grained study of oral argument and showed that, *ceteris paribus*, former clerks are more likely to see their former justice vote for their side—but this effect does not extend to the other justices whom the clerk did not work for.

While important, the extent of any influence of former clerks on the merits stage is limited. First, there is the simple fact that influence at this stage can only extend to the relatively few cases that reach the merits stage each year. Second, the fact that revolving door influence only appears to extend to the particular justice a clerk worked for means that the potential causal effect on the Court’s policy making is quite limited, as it would only change the outcome of the case in the relatively rare instance where the vote breakdown is 5-4 *and* a former clerk was involved in the case.

Accordingly, we argue that the cert stage is where former clerks are likely to exert a much larger influence on the Court’s decision making.⁹ Why? Returning to the broader revolving door literature, the answer does not lie in any sort of procedural advantage. For both cert petitioners and amicus groups, the process to make their case to the Court is clearly laid out and does not give former clerks any type of advantage. If a party is unsatisfied with a lower court ruling, the justices will consider its cert petition whether or not its attorney is a former clerk. Likewise, any individual or group can file amicus briefs as long as they can secure the consent of all parties, and the Court will receive the briefs whoever their authors are. Compared to the political branches of government where political connections do open doors, the way to communicate to the Court is formal and transparent.

Instead, any advantage accrued by former clerks likely rests on an *informal channel*. With respect to individual justices, having worked alongside them, former clerks surely understand their judicial philosophies better than other attorneys. This type of knowledge may account

⁹In the conclusion to his article McGuire (2000, 136-7) noted this possibility: “Given the central role played by clerks in the process of case selection, for instance, one could imagine that, as practitioners, Washington clerks would play an even more prominent role in capturing the Court’s attention at the certiorari stage.”

for former clerks’ greater success at oral argument, as found by Black and Owens (2020).

Yet the more important type of knowledge may be *institutional*. Specifically, the vast majority of a clerk’s working time on the Court is spent reviewing cert petitions (Perry 1991). Whether a clerk works for a justice who is the “cert pool” or not, a clerk’s main job is to wade through hundreds of cert petitions in a given term and make recommendations as to whether the Court should grant or deny them.¹⁰ This experience carries two immediate benefits. First, clerks are exposed to a range of cert petitions, which vary both in quality and style. Second, clerks can observe the mapping between the quality and content of cert petitions and the likelihood of a grant.

Once they leave the Court and begin their post-clerk careers, former clerks who choose litigation as a career path can leverage this experience and knowledge in the cases they work on. How might this matter? We posit three potential mechanisms: persuasion, signaling, and selection.

Persuasion In the persuasion story, former clerks leverage their experience to craft better arguments than other highly trained lawyers. These arguments, in turn, help convince current clerks and justices to grant cert based on the merits of the argument. We might expect this mechanism to be more at play when it comes to cert petitions, relative to amicus briefs. This is because of the simple fact that the bar for a grant is so high that an effective advocate can make a difference at the margins. Scott Nelson, an attorney at the Public Citizen Litigation Group, puts it like this:

The overwhelming majority of cases decided by federal courts of appeals and state supreme courts are not credible candidates for certiorari. Even most cases in which petitions are filed are not credible candidates. And even the best and most experienced Supreme Court advocate cannot make a silk purse out of a

¹⁰In the 1970s, the Court created a mechanism by which the clerks from multiple justices would “pool” together to review cert briefs, in order to reduce the per-clerk and per-justice workload, which was suffering due to the rise in the Court’s docket we discussed above (Black and Boyd 2012). Since then, the number of justices in the pool has fluctuated, although there has always been at least one justice who does not participate in the pool. As of March 2021, Justices Alito and Gorsuch were not members of the cert pool (as of this writing, it is unclear whether Justice Barrett decided to join the cert pool upon taking the bench in October 2020). According to Ward and Weiden (2006, 142), the average number of cert petitions reviewed by clerks per term in the cert pool has hovered in the 2000s since the pool was introduced in 1972.

sows ear; indeed, lawyers who specialize in Supreme Court advocacy regularly turn down paying clients who want to file petitions for certiorari for precisely this reason. They don't want to waste their time, their credibility, or their clients' money on a useless exercise. But an advocate's understanding of what makes for an effective petition probably can make a difference as to whether one of the perhaps 200 cases annually that have a realistic shot at certiorari ends up being one of the about 80 actually chosen. Certainly a poorly done petition can result in denial in a case where a better petition could make the difference. The most effective advocacy will reveal itself in those cases that are on the margin.

It seems reasonable to think that the experience of former clerks in reading cert petitions can translate to that difference on the margin when they move to writing petitions.

Signaling The next potential mechanism occurs through what we call “case signaling.” Consider here, in particular, the role of amicus briefs. In an important recent article, Larsen and Devins (2016, 1908) document the rise of the “amicus machine,” a term they use to describe how the coordination and filing of amicus briefs has come to be a highly regularized process overseen by a “clubby” and “elite” group of lawyers. Former clerks are surely part of this elite club; moreover, because former clerks maintain a tight network with the justices they worked for, *current clerks* are aware of who former clerks are (as, of course, are the justices themselves). The importance of former clerks in this network is apparent. As Larsen and Devins (p. 1934) note, when the Court decides to appoint an attorney to make an argument that neither party wants to make at the merits stage, it almost always chooses a former clerk.¹¹

As Caldeira and Wright (1988) documented, the very presence of an amicus brief at the cert stage signals to the current clerks and justices that the case is potentially cert-worthy, given their relative rarity. Larsen and Devins (2016, 1937), in turn, claim that that the “identity of the lawyer on the amicus brief matters.” Citing Lynch (2004), they note that

¹¹The endogeneity issue that this practice raises for any study of the effectiveness of former clerks on *merits* decision making is obvious and immediate. Fortunately, for our research design purposes, the practice of appointing amici does not occur with any regularity at the cert stage. (Shaw (2015, 1548) notes that the Court has occasionally “appointed outside counsel when an unrepresented in forma pauperis (IFP) party who successfully petitions the Court for certiorari requests such an appointment (or when the Court chooses to make such an appointment even absent a request).”)

about 9 out of every 10 clerks “admitted that they paid careful attention to amicus briefs written by renowned attorneys.” While not all former clerks fall under the category of “renowned attorneys” (though many certainly do), it seems plausible that current clerks are more likely to take seriously both amicus briefs and cert petitions written by former clerks.

Importantly, notice that if this mechanism is operative, the influence of former clerks on the cert process could exist orthogonally to their ability to make more effective arguments. Of course, the two mechanisms are not mutually exclusive; indeed, they could go hand-in-hand.

Selection The final potential mechanism involves former clerks’ selection into certain disputes. In this telling, former clerks may be more likely to see cases they are involved in granted cert not because of anything they do; instead, their experience as a clerk may make them better at discerning the cert-worthiness of cases, allowing them to choose to work on cases *ex ante* that are more likely to receive a grant. Relatedly, well-resourced litigants and interest groups may choose to hire former clerks in cases that they believe are likely to reach the court. Such a strategy could fit within a general “organizational maintenance” rationale that some scholars have posited as a reason that groups choose to file amicus briefs (Collins Jr 2018). From our perspective, selection is the least interesting mechanism, as it means that the presence of a former clerk is mostly “window dressing” on a dispute and does not causally affect the likelihood that the Court grants cert. (In causal inference terms, the presence of a former clerk on a case would be endogenous to the cert outcome.)

As we detail below, our data does not allow us to definitely adjudicate between these three mechanisms. Still, we believe it valuable to lay them out here, in the hopes of motivating future research in this area.¹²

¹²Completely disentangling the selection mechanism from the persuasion or signaling mechanism would require some sort of quasi-experiment with exogenous variation and/or an instrumental variables approach in which a third variable predicts the presence of a former clerk on a brief or petition but does *not* directly affect the likelihood of cert. Unfortunately, we cannot think of such a variable.

3 Data

To test our expectations about former clerks' advantage in the certiorari process, we require a variety of data, which we describe in this section.

Cert Decisions and Petitioners Our key dependent variable is whether or not the Supreme Court grants cert in a given case. We examine every petition filed to the Supreme Court between the 2003 and 2015 terms.¹³ While cert data exists prior to 2003, we require information on the attorneys for the litigants on both sides, obtained from online case summaries, which we explain shortly.¹⁴ This leaves us with 91,360 cert petitions filed between 2003 and 2015, of which 997 (1.1%) were granted. For every cert petition, we then identified the petitioners by looking up and extracting information from case summaries on the Supreme Court's website.¹⁵ This information includes the petitioners' names (which can be organizations or individuals) and the attorneys who represented them (and filed the cert petitions on their behalf). Using the attorneys' names, we obtained information on whether they had Supreme Court clerkship experience and their educational background, as described below.

Amicus Briefs Next, for each cert petition, we searched for and downloaded amicus briefs submitted to the Supreme Court. Specifically, we searched for amicus briefs in the Westlaw legal database (westlaw.com). Using the search term "curiae & certiorari," we searched the database for documents whose titles contained the two key words, and downloaded the full texts of all results. The top panel in Figure 3 shows an example of what the briefs look like, with the two key words highlighted by Westlaw in the search process.

We focus exclusively on amicus briefs submitted at the cert stage—that is, before the Court makes its cert decision—and thus exclude amicus briefs submitted at the merits stage.

¹³This data was provided to us by Benjamin Johnson, whom we thank for generously sharing the data.

¹⁴This data is available beginning in 2000, but we remove the first three years; as it turns out, we found it much more challenging to extract attorney information reliably for 2000-2002 cases due to web page encoding of the online case summaries.

¹⁵<https://www.supremecourt.gov/docket/docket.aspx>.

2012 WL 1514402 (U.S.) (Appellate Petition, Motion and Filing)
 Supreme Court of the United States.

RECTOR, WARDENS AND VESTRYMEN OF CHRIST CHURCH IN SAVANNAH, et al.,
 Petitioners,
 v.
 BISHOP OF THE EPISCOPAL DIOCESE OF GEORGIA, INC., et al., Respondents.

No. 11-1166.
 April 25, 2012.

On Petition for a Writ of **Certiorari** to the Supreme Court of Georgia

**Motion for Leave to File Brief Amici Curiae by the Parish of St. Paul's Episcopal Church Darien, Rector, Wardens
 and Vestry, et al. and Brief Amici Curiae in Support of Petitioners**

Barbara J. Dupont, Counsel of Record, **Ralph P. Dupont**, The Dupont Law Firm, LLP, One Stamford Plaza, 263 Tresser
 Boulevard, 9th Floor, P.O. Box 3325, Stamford, CT 06905, (203) 965-8355, radlaw1@att.net, Attorneys for Amici **Curiae**.

~~Name~~~~~	~~~~~Address~~~~~	~~Phone~~~
Attorneys for Petitioner:		
Michael B. Bigelow	331 J Street, Suite 200 Sacramento, CA 95814 mbigelow6401@sbcglobal.net	(916) 443-0217
Party name: Bernard Rhodes		

*Figure 3: Illustrations of data collection processes. **Top)** title section of an amicus brief. **Bottom)** counsel section of a case summary.*

In our data, 3,144 amicus briefs were filed from 2003 to 2015 (the same period as our cert petitions), of which 3,116 urged the Court to grant certiorari on a case and 28 urged the Court to deny cert.¹⁶ Of the briefs filed in favor of cert, for 1,352, or 43.0%, the cert petition that the brief accompanied was granted cert. A small number of briefs—106—were filed in connection to IFP petitions. The cert rate for such petitions is exceedingly low, and hence it is not surprising that our data reveals very low amicus participation in such case. Of these 106 cases, all but three were written in support of cert.

For each brief, we parsed the text and gathered several key pieces of information from its header section, including case identifying information (through which we linked briefs to

¹⁶For simplicity, we exclude the 28 briefs opposing cert from analysis. All of these briefs target cases for which briefs in support of cert were filed, which are of course included in analysis.

cert decisions and case characteristics) and the attorneys in charge.¹⁷ The bottom panel in Figure 3 shows an example of the counsel section of a case summary.

Attorneys, Clerkship Experience, and Education Our key independent variable is whether attorneys involved in seeking Supreme Court review have past experience clerking for a Supreme Court justice. To gather this information, we linked the attorney data across petitions and briefs to rosters of clerks obtained from Wikipedia.¹⁸ These rosters of clerks usefully display which law schools the clerks attended and when they graduated. Not surprisingly, almost all Supreme Court clerks attended top law schools. Of the 488 attorneys who clerked for Supreme Court justices from 2003 to 2015, Harvard and Yale alone graduated 235 of them. For both the cert petitions and amicus briefs in our data, only a select portion of attorneys are former clerks—182 (1.3%) of the 13,920 distinct attorneys filing cert petitions and 63 (2.7%) of the 2,354 filing amicus briefs.

One important confounding possibility that we will need to consider is the following. Perhaps clerkship experience exerts no independent impact on attorneys’ performance. Instead, it could be the case, that a correlation between higher cert grant rates and the participation of former clerks is due simply to their underlying quality as advocates—i.e., they are simply better lawyers and would still be better lawyers if they had not clerked. Importantly, this has long been the “null hypothesis” underlying research on revolving door lobbyists (Heinz, Laumann and Nelson 1993, Blanes i Vidal, Draca and Fons-Rosen 2012). If anything, the

¹⁷We were not able to gather a potentially useful type of information from the amicus briefs—the identity of the groups (or individuals, as is the case from time to time) that formally file them. Certainly, this untapped information on groups is valuable for studying the dynamics of interest group mobilization and alliances in judicial politics (see e.g. Box-Steffensmeier and Christenson 2014)). For our study, group attributes may also serve as a useful set of controls. Nevertheless, it has proven very challenging to accurately and efficiently gather this information from many thousands of amicus briefs over many years. Because the groups are listed in the briefs in several different fashions, accurately and fully recording the groups likely requires significant manual coding. Since our focus is on the individual attorneys writing the briefs regardless of which groups enlisted them for the task, we have chosen to omit the study of these group dynamics in favor of studying attorneys’ performance over many years.

¹⁸Lists of clerks by year for each Supreme Court seat are linked in https://en.wikipedia.org/wiki/Lists_of_law_clerks_of_the_Supreme_Court_of_the_United_States. We checked the Wikipedia lists against a few provided by the Court-watching blog “Above the Law” in recent years such as <https://abovethelaw.com/2016/07/supreme-court-clerk-hiring-watch-the-official-list-for-ot-2016/> and found no discrepancies.

case for the predominance of underlying ability is more plausible in the procedurally transparent and merit-driven judicial branch. That clerks may simply be better attorneys even without the clerkship is supported by their recruitment: Supreme Court clerks almost always graduate near the top of their class at some of the best law schools, known as feeder schools.¹⁹ As much as a Supreme Court clerkship adds to their distinction, these graduates are likely well on their way to professional success in any case. To account for underlying ability as much as we can, we control for attorneys' law school attendance, as well as their career lengths, in our analyses below.

To obtain the educational background of the attorneys in our database, we searched for each attorney in `martindale.com`, an online legal database.²⁰ For all attorneys, we searched the Martindale database, identified correct matches and dropped evidently wrong matches, and scraped their professional profiles in the database to obtain their educational information. We also coded the number of years that had elapsed since attorneys' attainment of their law degrees, as a measure of professional experience.²¹ Unfortunately, the educational background of the attorneys in our database is not always available. We managed to gather this information for 33,362 (just over a third) of all 91,360 cert petitions, and dropped those observations for which we could not find attorney background (note that no former clerks fall in this category). This missing data problem arises primarily from the lack of many attorney profiles in the Martindale database. Martindale is a paid service that lawyers can purchase to increase their online presence, so the decision to join likely tilts toward lawyers who are in lucrative practices and/or looking for more clients. Consequently, the availability of attorney profiles is not random.

Table 1 compares the cert petitions for which we obtained attorney information and those for which we did not. Compared to dropped petitions, those in our analysis include more

¹⁹<https://abovethelaw.com/2020/08/supreme-court-clerk-hiring-watch-a-closer-look-at-the-clerk-class-of-october-term-2020/>

²⁰Owned by the company Martindale-Hubbell, the Martindale database has been used successfully in several judicial politics papers. See Hall (2001), Bonica and Sen (2017), Bonica et al. (2017), *inter alia*.

²¹This variable also serves as a proxy for age, given that most attorneys graduate from law school in their mid-20s; see e.g. <https://tinyurl.com/s59xe24z>.

	<i>Attorney Profile on Martindale</i>	
	Available	Unavailable
Total	33,362	57,998
Filed by U.S. government	86 (0.3%)	79 (0.1%)
IFP	23,730 (71.1%)	48,280 (83.2%)
Median term	2009	2009
Grant rate	473 (1.4%)	524 (0.9%)

Table 1: Comparison of cert petitions by availability of attorney profiles.

filed by the U.S. government and more paid petitions, compared to IFP. Public defenders, typically the filers of IFP petitions, are apparently less likely to have profiles on Martindale. As government petitions are more likely to be granted than others and IFP petitions are extremely unlikely to be granted, both of these factors work in concert to elevate the cert grant rate among our kept petitions (1.4%) slightly above the overall grant rate across the board (1.1%). The availability of attorney background does not appear to favor more recent cases, as one might suspect. Overall, while we can't be sure, we do not believe that any of the differences between the kept and dropped cases shown in Table 1, while systematic, should threaten our goal of determining the existence of an advantage for former clerks in the cert petition process.

This missing data problem exists for amicus briefs as well. But, because we do not explicitly account for attorneys' educational background when analyzing amicus briefs due to the nature of the data, as explained below, this missing data problem does not affect that analysis.

4 Results

We begin our analysis with a descriptive look at the data. We first present descriptive results for cert petitions and then turn to amicus briefs.

Cert petitions Table 2 depicts the cert grant rate for petitions authored by former clerks versus those not authored by former clerks. The table breaks down the grant rates by paid and IFP petitions. Beginning with paid petitions, we see that the grant rate for petitions authored by former clerks is 18%. This rate is more than five times that seen for petitions

Filed by former clerk	<i>Paid</i>		<i>IFP</i>	
	N	Cert granted (%)	N	Cert granted (%)
Yes	1,078	197 (18.3%)	58	4 (6.9%)
No	8,554	221 (2.6%)	23,672	51 (0.2%)
All	9,632	418 (4.3%)	23,730	55 (0.2%)

Table 2: Former clerks and cert petitions. The N's provide counts of the number of cases that fall into a given cell; for example, there are 8,554 cases in our data in which a paid cert petition was filed by a non-former clerk. The cert granted columns show, respectively, the number of cert grants and the rate of grants for given cell—for example, 197 of 1,078 (18.3%) of paid petitions written by former clerks were granted cert.

filed by non-former clerks (under 3%). This difference is quite sizable given the low baseline rates at which cert petitions are granted.

Turning to IFP petitions, Table 2 makes clear that former clerks author such petitions very rarely (in only 58 cases), compared to paid petitions. Still, while the numbers are quite small, four (7%) of these petitions were granted, a proportion that is much higher than among non-former clerks (.2%).

Amicus briefs Next, we turn to amicus briefs. Table 3 depicts the grant rates for cert petitions, by whether they were supported by amicus briefs filed by outside parties seeking to push the Court to grant cert and, if so, whether any former clerks signed on to any of these amicus briefs. Again we separate paid petitions from IFP petitions due to their large baseline difference in cert grant rates. Overall, we can see that the grant rate is much higher whenever one or more amicus briefs are filed at the cert stage, consistent with Caldeira and Wright (1988). Note that this analysis of amicus briefs is based on all 91,360 cert petitions from 2003 to 2015 rather than the third for which we obtained the filing attorney's educational background from Martindale. The table shows that former clerks' presence on amicus briefs is associated with another substantial increase in cert grant rates. On one hand, the likelihood for paid petitions increases from 29% to 54% with a former clerk's presence on amicus briefs. On the other hand, it is exceedingly rare for former clerks to write amicus briefs in support of IFP petitions, but the Court granted cert on three of these five cases.

Amicus briefs	<i>Paid</i>		<i>IFP</i>	
	N	Cert granted (%)	N	Cert granted (%)
None	17,836	423 (2.4%)	71,932	87 (0.1%)
Without former clerks	1,436	415 (28.9%)	73	27 (37.0%)
With former clerks	78	42 (53.8%)	5	3 (60%)
All	19,350	880 (4.5%)	72,010	117 (0.2%)

Table 3: Former clerks and amicus briefs in favor of certiorari. The *N*'s provide counts of the number of cases that fall into a given cell; for example, there are 17,836 cases in our data in which a paid cert petition was filed and there were no amicus briefs. The cert granted columns show, respectively, the number of cert grants and the rate of grants for given cell—for example, 42 of 78 (53.8%) of paid petitions with supporting amicus briefs written by former clerks were granted cert.

Thus, we find clear descriptive evidence that the participation of a former clerk on either a cert petition or an amicus brief at the cert stage is associated with a substantially higher likelihood of the Court granting cert. This suggests that the potential influence of former clerks works through both *direct representation* (working for petitioners) and *indirect representation* (working for amicus groups). We now turn to investigate whether these relationships hold up when we account for potential confounding variables.

4.1 Regression Analyses

The cert petitions and amicus data present different advantages and disadvantages in terms of analyzing them in a regression framework. Accordingly, for each we pursue somewhat different, though overlapping analytical strategies. For both cert petitions and amicus briefs, we choose to focus just on paid petitions and exclude IFP petitions due to their large differences in quality and likelihood to succeed. Former clerks' involvement in IFP petitions, whether by directly petitioning the Court or by supporting cert petitions with amicus briefs, occurs so rarely that these cases are not very comparable to paid cases. In addition, the very small number of cases both in which IFP petitions are granted and in which former clerks represent such defendants (see Tables 2 and 3 above) makes it effectively impossible to statistically distinguish former clerks from non-former clerks in such cases.

For both types of lobbying, the potential confounds fall into two categories: attorney-

related and case-related. For attorneys, as we noted above, the educational background of attorneys is a key variable, and the success of former clerks in getting the Court to grant cert could simply be a function of their superior legal training. For each attorney in our databases, we code whether they attended a “Top-14” law school and whether they attended either Harvard or Yale (a subset of the Top 14).²² We also code *Career length*, which we measure as the number of years between the year a given attorney graduated from law school and the year of the case (as noted above, this is also a proxy for age). All attorneys may become better advocates as they gain experience.

In terms of cases, former clerks are of course not randomly assigned to write petitions or briefs, so it is important to account for certain case-level covariates that are associated with a higher likelihood of cert. Besides excluding all IFP petitions from our analysis for comparability, we control for whether the U.S. government is the petitioning party. This variable, another known strong correlate of cert grants, effectively accounts for U.S. solicitors general with clerkship experience—most famously, perhaps, future Supreme Court Justice Elena Kagan, who clerked for Justice Thurgood Marshall during the 1987 term. A third case attribute we control for is whether the respondents filed a brief in opposition to the cert petition.²³ Respondents’ decision to file an opposition brief may paradoxically be associated with a greater likelihood of cert grants because it indicates respondents’ recognition of legal merit in the cert petition (Prettyman Jr 1975).

In estimating regression models, we take into account which covariates are measured “pre-treatment” and which are measured “post-treatment,” where the treatment here can be thought of as the “assignment” of a former clerk to a case. When undertaking causal inference, including covariates measured post-treatment can lead to biased estimates of an

²²The Top-14 is a commonly used classification scheme in the legal world to denote the top tier of law schools. It includes: Yale, Stanford, Harvard, University of Chicago, Columbia, New York University, University of Pennsylvania, University of Michigan-Ann Arbor, UC-Berkeley, University of Virginia, Duke, Northwestern, Cornell, and Georgetown.

²³While such a reply brief is mandatory in capital cases, it is optional in all other cases. See Rule 15 in the *Rules of the Supreme Court*, which is available at <https://www.supremecourt.gov/filingandrules/2019RulesoftheCourt.pdf>.

	Model 1	Model 2	Model 3
Former clerk	2.132* (0.165)	1.456* (0.161)	1.232* (0.168)
U.S. government		1.701* (0.139)	1.750* (0.265)
Opposition brief		2.095* (0.262)	2.056* (0.261)
Harvard/Yale			0.563* (0.173)
Career length			-0.018* (0.006)
Constant	-3.630* (0.091)	-5.127* (0.235)	-4.725* (0.306)
N	9,632	9,632	9,632
Log Likelihood	-1538.718	-1425.001	-1408.981
AIC	3081.435	2858.001	2829.961

*Table 4: Logit regressions of cert decisions on petitioning attorneys’ clerkship experience. Standard errors clustered by attorney. * $p < .05$*

average treatment effect (see e.g. Rosenbaum 1984, Montgomery, Nyhan and Torres 2018). In practice, we do not actually know when this occurs in our observations; some attorneys see a case from its origins up through the judicial hierarchy, while other times an attorney may be brought in at the cert stage. However, we can use our qualitative judgments to characterize certain covariates as falling clearly in the post-treatment category. For example, the presence of opposition briefs may predict whether the Court is likely to grant cert. However, by definition, opposition briefs are filed after cert petitions are filed, meaning opposition briefs are filed after the petitioner’s attorney is known, rendering them clearly post-treatment. Conversely, an attorney’s law school is obviously pre-treatment.

In light of the fact that our available covariates comprise a mix of pre-treatment and post-treatment predictors, our general analytical strategy is as follows. For both cert petitions and amicus briefs, we begin by presenting regression models with the full set of covariates. The purpose of these models is to provide a more precise estimate of the descriptive relationship between former clerks’ participation and cert grant rates, while controlling for other confounders. Then, for the cert petitions we employ only the set of covariates that are measured pre-treatment, and then use matching in an attempt to more carefully estimate

the causal effect of former clerks—subject to potential endogeneity concerns, as we discuss below.²⁴ (We are not able to use matching in the analysis of amicus briefs, for reasons we discussed below.)

4.1.1 Cert Petitions

We begin by examining former clerks’ potential influence when they author cert petitions. Table 4 presents a set of logistic regression models; in each the dependent variable is whether or not the Court granted cert. In each model, we cluster the standard errors by attorney, to account for non-independence across cases petitioned by the same attorney. The main predictor in each model is whether an attorney was a *former clerk* for a Supreme Court justice. Model 1 simply shows the bivariate relationship between attorneys’ clerkship experience and cert results. Model 2 adds in the two case controls—whether the U.S. government filed the petition and the presence of an opposition brief. Model 3 further adds the two attorney controls: attending either Harvard or Yale Law School, as well as career length since graduating from law school.

We can see that the coefficient on former clerk is positive and statistically significant in each model, showing that the association between former clerks writing petitions and grant rates persists even when accounting for other predictors of cert. For the most part, the case and attorney controls obtain consistent and expected estimates: positive for U.S. government petitions, positive for opposition briefs, and positive for Harvard- or Yale-educated attorneys. Interestingly, attorneys’ career length appears slightly negatively associated with cert grants, though its predictive effect size is quite small.

Next, we turn to our matching analyses. In terms of potential confounders, most importantly, our data shows that clerkship experience is highly correlated with educational pedigree. About 41% of attorneys filing cert petitions and 52% of those filing amicus briefs went to Harvard or Yale. Among non-former clerks, Harvard and Yale graduates make up

²⁴Matching, of course, is not a silver bullet that can automatically identify a causal effect but rather a tool to improve balance and common support across predictors. For a good overview of the strengths and limitations of matching, see Cunningham (2021, pp. 175-204).

just 3.6% of the attorneys in petitions and 10% in amicus briefs. In addition, former clerks are overrepresented in U.S. government petitions.

To account for this, we perform a form of coarsened exact matching (Iacus, King and Porro 2012). Specifically, for education, we match attorneys based on the exact school attended, and categorize attorneys' career lengths into 3-year intervals in order for the matching procedure to keep more cases.²⁵ The matching procedure greatly improves the covariate balance between petitions filed by former clerks and those filed by non-former clerks. In Table 5, we compare the two sets of cases before and after matching in terms of the characteristics listed in the first column. Each column depicts the distribution of a covariate among cases in which a non-former clerk appears and in which a former clerk appears, for both the pre-matched and post-matched data. It turns out that all U.S. government petitions are filed by former clerks; all five Solicitors General or Acting SGs in our data are former clerks,²⁶ causing the matching process to drop all U.S. government petitions. The table shows a significant balance improvement on education variables. For instance, in the pre-matched data, only 25% of non-former clerk attorneys attended a Top-14 law school, compared to 88% of former clerks. In the post-matched data, the respective percentages are 87% and 89%, meaning we are much more likely to be comparing apples to apples when comparing former clerks to non-former clerks, in terms of attorney ability.

With the matched data in hand, we can now return to our analysis of whether the relationship between former clerks' participation in a cert petition and grant rates continues to hold. Table 6 presents a simple cross-tab of former clerk versus cert granted in the matched data. Consistent with the earlier analyses, former clerks are almost three times more likely to get their cert petitions granted than other attorneys.

Next, Table 7 presents three regression models based on the matched data. As in Table

²⁵The results we obtain are very similar when conducting exact matching without coarsening career length.

²⁶They are Paul Clement (2005-2008), Gregory Garre (2008-2009), Elena Kagan (2009-2010), Neal Katyal (2010-2011), and Don Verrilli (2011-2016). Though the SG (or Acting SG) often delegates the preparation of petitions and briefs to deputies and assistants, who are less likely to be former Supreme Court clerks, the SG ultimately decides which cert petitions to file and is always listed as the attorney in charge on U.S. government cert petitions (see <https://www.justice.gov/osg/about-office-1>).

	<i>Pre-Matching</i>		<i>Post-Matching</i>	
	Non-Fmr. Clerk	Fmr. Clerk	Non-Fmr. Clerk	Fmr. Clerk
All petitions	8,554	1,078	1,663	978
<i>Petition Characteristics</i>				
By U.S. Govt.	0	86 (8.0%)	0	0
<i>Attorney Characteristics</i>				
Top-14 school	2,113 (24.7%)	950 (88.1%)	1,450 (87.2%)	867 (88.7%)
Harvard/Yale	636 (7.4%)	456 (42.3%)	618 (37.2%)	418 (42.7%)
Career length (med. [Q1, Q3])	25 [17, 33]	22 [16, 29]	25 [18, 32]	22 [16, 28]

Table 5: Balance of cert petitions by attorney clerkship before and after coarsened exact matching.

Filed by former clerk	N	<i>Paid</i>
		Cert granted (%)
Yes	978	154 (15.7%)
No	1,663	98 (5.9%)
All	2,641	252 (9.5%)

Table 6: Former clerks and cert petitions, in the matched sample generated by coarsened exact matching.

	Model 1	Model 2
Former clerk	1.093*	1.031*
	(0.177)	(0.168)
Harvard/Yale		0.316
		(0.170)
Career length		-0.022*
		(0.009)
Constant	-2.771*	-2.360*
	(0.135)	(0.254)
N	2641	2641
Log Likelihood	-798	-791
AIC	1600	1590

Table 7: Logit regressions of cert decisions on petitioning attorneys' clerkship experience based on sample produced by coarsened exact matching. Standard errors clustered by attorney. * $p < .05$

2, the dependent variable is whether cert was granted. In these models, we use only the predictors (or subset thereof) that were included in the matching equation. The table shows quite clearly that former clerk experience remains a very strong predictor of cert being granted.

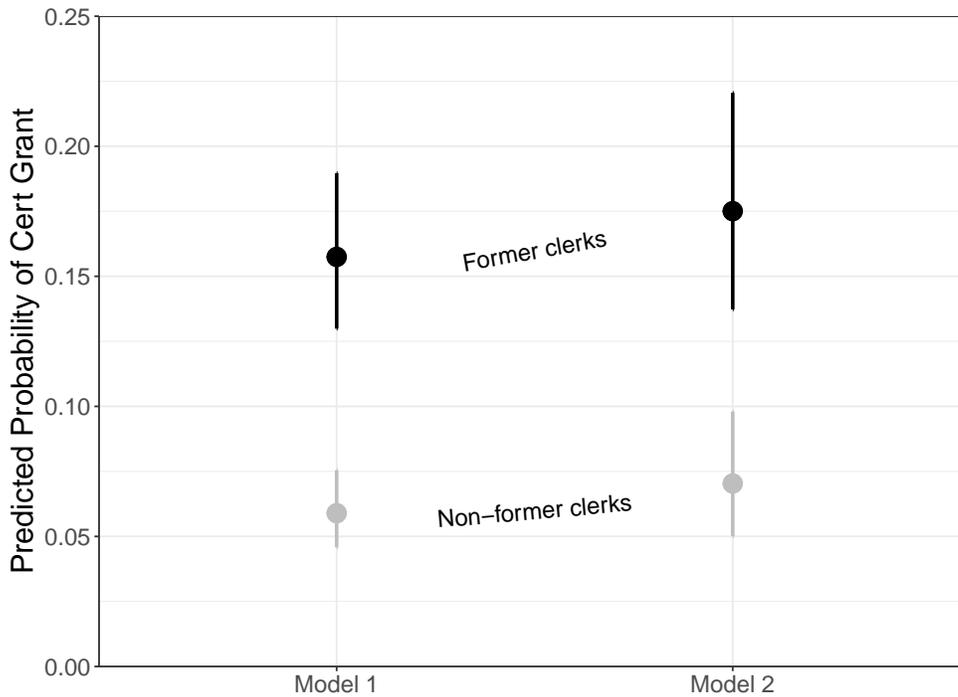


Figure 4: Predicted probabilities of cert grants based on post-matching regressions. Errors bars denote 95% confidence intervals.

What is the substantive magnitude of this difference? For each model in Table 7, we generated the predicted probability of cert being granted, across whether the petitioner was represented by a former or clerk or not, along with 95% confidence intervals. We set the Harvard/Yale variable at yes and set career length at its mean (24.2). Figure 4 depicts these predicted probabilities and shows a sizable difference: the estimated predicted probability of cert when a former clerk represents a petitioner is 15-18%, compared to about 5-8% for a similarly situated non-former clerk.

4.1.2 Amicus Briefs

Next, we turn to analyzing the potential influence of former clerks when participating in amicus briefs. Recall from Table 3 that the raw data showed a sizable difference in grant rates when a former clerk signed on to a brief.

Here it is important to note two important features that distinguish amicus briefs from cert petitions. The first is that the amicus process often features collaboration between attorneys on the same brief. The second is that many cases will see multiple briefs written

by different groups. Compared to cert petitions, it is much more common for multiple attorneys to collaborate on amicus briefs; in some instances, these multiple attorneys may represent different interest groups who are on the same side of a legal fight. In addition, while only the respondent in a given case can file a cert petition, different groups or alliances can file their own amicus briefs, sometimes resulting in multiple briefs on high-profile cases. We tailor our regression analyses specifically in light of these facts.

Table 8 displays four logit models drawing on the full set of non-IFP cert petitions—of which there are 19,350—again with cert grants as the dependent variable. Amicus briefs were filed at the cert stage in 1,514 cases, or 7.8 percent of all cases. As with Table 4, here we include predictors measured both pre-treatment and post-treatment—in particular, in some models we control for the overall number of briefs filed in support of a given cert petition, which is post-treatment. We do not, however, perform any matching analyses here, because the data structure of the amicus briefs analysis is not well-suited to a matching setup.²⁷

Let’s begin with Model 1 in Table 8. Here we include only two indicator variables: one if an amicus brief was written by at least one former clerk and one if an amicus brief was written without any former clerks. Accordingly, the strategy here is to dichotomize the presence of a former clerk on a brief, without regard to either the number of overall attorneys taking part in the brief or whether there are multiple former clerks on the same brief. The omitted category is thus the absence of amicus briefs in a given case. (Essentially, then, Model 1 parallels the descriptive results shown in Table 3.) The coefficient on both indicators are positive and significant, indicating, unsurprisingly, that cases accompanied by amicus briefs are more likely to be granted cert than cases without. More important for our purposes is that the coefficient on “amicus brief with former clerks” is greater than the coefficient for “amicus brief without former clerk.” The last line in the table presents a

²⁷In particular, the prevalence of collaboration between multiple attorneys constitutes a challenge for matching. In theory, we could conduct matching within the set of cert petitions where a single author filed amicus briefs in support. This subset would allow us to match cases which differ with respect to attorneys’ clerkship experience but closely resemble each other not only on case characteristics but also on attorneys’ educational background and career lengths. Unfortunately, within this subset of 718 cases, only in three of them is the solo attorney a former clerk, which precludes meaningful statistical analysis.

	Model 1	Model 2	Model 3	Model 4
Amicus brief with former clerks	3.872*	3.563*		
	(0.232)	(0.252)		
Amicus brief without former clerk	2.817*	2.549*		
	(0.076)	(0.084)		
Number of former clerks on brief			0.328	
			(0.265)	
Number of non-former clerks on brief			0.073	
			(0.038)	
Number of former clerks per amicus brief				0.867*
				(0.405)
Number of non-former clerks per amicus brief				0.249*
				(0.045)
Number of amicus briefs			1.009*	0.984*
			(0.064)	(0.045)
U.S. government		2.885*	2.701*	2.747*
		(0.200)	(0.195)	(0.196)
Petition by former clerk		1.615*	1.801*	1.742*
		(0.094)	(0.094)	(0.095)
Constant	-3.718*	-4.036*	-3.902*	-3.931*
	(0.049)	(0.056)	(0.052)	(0.053)
N	19,350	19,350	19,350	19,350
Log Likelihood	-2917	-2582	-2553	-2540
AIC	5841	5174	5119	5092
F-test of former clerk > non-former clerk	20.2	15.9	0.9	2.3
	(p<0.01)	(p<0.01)	(p=0.34)	(p=0.13)

*Table 8: Logit regressions of cert decisions on amicus group attorneys’ clerkship experience. Standard errors displayed in parentheses. The F-test line reports F-statistics and associated p-values from F-tests on equality of coefficients of two main predictors in each model related to former clerks and non-former clerks. * $p < .05$*

F-test of the null hypothesis that the two coefficients are equal, which can easily be rejected.

Next, Model 2 in Table 8 adds controls for case characteristics. These include whether the petition was filed by the U.S. government, as well as whether a former clerk filed the cert petition itself, since we observed a consistently strong relationship between of former clerks’ participation on cert petitions and grant rates. As cert petitions are filed before amicus briefs, this control is pre-treatment. The coefficients on these three control variables are significant in the expected direction. Returning to our key question, the coefficient on “amicus brief with former clerks” remains larger than the coefficient for “amicus brief without former clerk,” and an F-test confirms this difference is itself statistically significant.

Next, in Models 3 and 4 we seek to account for the potential impact of collaboration

on amicus briefs. Regardless of clerkship experience, multiple attorneys urging the Court to grant cert on a case—perhaps by writing separate briefs—may be more effective than a single attorney acting alone. In other words, we try to detect a kind of “dosage effect” of attorneys. To this end, we replace the two dummies with *counts* of both former clerks and non-former clerks authoring amicus briefs. In addition to the case characteristics used in Model 2, we add the overall number of amicus briefs filed in support of each cert petition, which has a positive effect as shown by Caldeira and Wright (1988). The coefficients on “Number of former clerks on brief” and “Number of non-former clerks on brief” are positive but imprecisely estimated. Accordingly, we cannot reject the null hypothesis of no difference between the two. (Recall from Table 3 that the number of amicus briefs with former clerks is quite small, which certainly contributes to the statistical imprecision here.)

Finally, in Model 4, we use an alternative measure of the dosage of the two kinds of attorneys: the number of former clerks and non-former clerks, respectively, per amicus brief filed. A large number of former clerks per brief, for example, indicates a high level of concentration of former clerks among the participants. Controlling for the same case characteristics as Model 3, the coefficient on “Number of former clerks per amicus brief” is now both positive and statistically significant, as is the coefficient on “Number of non-former clerks per amicus brief.” Although the former is more than three times as large as the latter, an F-test comparing the two fails to reject the null hypothesis that the two are the same, with a p-value of 0.13, mainly because the coefficient for former clerks per brief is imprecisely estimated.

All-in-all then, we see fairly convincing evidence that the presence of a former clerk on an amicus brief is associated with a higher likelihood of cert being grant. Given one former clerk urging the Court to grant cert, however, the addition of more former clerks is not associated with a substantially better chance of success. In Figure 5, we plot the predicted probability of cert across across briefs with and without former clerks on them, based on Models 1 and 2 in Table 8. For Model 2, the U.S. government and “petition by former clerk” variables are held at their modal categories (no, no). We can see that the predicted probability of

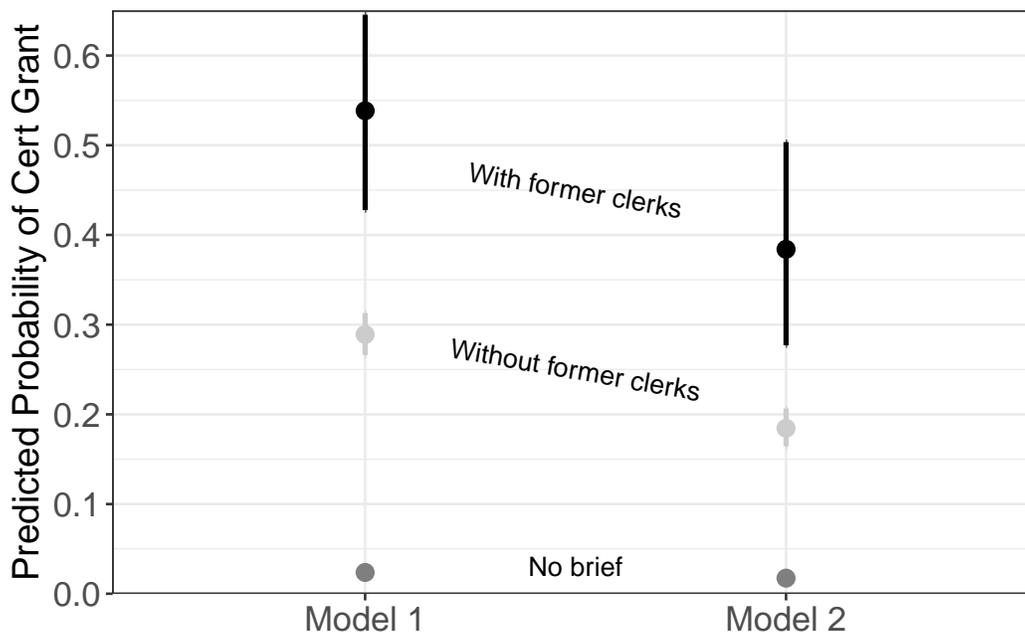


Figure 5: Predicted probabilities of cert grants based on Models 1 and 2 in Table 8. Errors bars denote 95% confidence intervals.

a cert grant when a former clerk is involved is substantively quite large, given the overall rarity of cert: 54% and 38%, respectively, in Models (1) and (2). This is larger than the comparable grant rates seen for non-former clerk involvement (29% and 19%). Conversely, when no amicus briefs are filed at the cert stage, the likelihood of cert is very close to zero.

4.2 Persuasion or selection?

In Section 2.2, we outlined three potential mechanisms through which the presence of a former clerk could lead to a higher likelihood of cert being granted. Unfortunately, the nature of our data does not allow for an adjudication of these mechanisms. We believe that it is wholly plausible that both persuasion and case signaling explains a good deal of the correlations we have documented above. That is, we believe it likely that clerks leverage their past direct experience working for the justices (and as part of the cert process) to craft more effective arguments than their other highly skilled lawyers who nevertheless lack this experience. Alternatively, the mere presense of a former clerk on a cert petition or amicus brief may be a signal to the Court that a cert petition is worth a closer look. Note that while these mechanisms operate somewhat differently, they still point to a causal effect of former

Petitioned by former clerk	Opposition brief	N	Cert granted (%)
Yes (N = 588)	Not filed	74	3 (4.1%)
	By non-former clerk	371	15 (4.0%)
	By former clerk	153	28 (18.3%)
No (N = 5,638)	Not filed	2,403	4 (0.2%)
	By non-former clerk	2,866	24 (0.8%)
	By former clerk	369	56 (15.2%)

Table 9: *Cert petitions, opposition briefs, and former clerks. Counts are for paid (non-IFP) petitions on cases to which the U.S. government was not a party.*

clerks on briefs, since the counterfactual world in which a former clerk was *not* a participant would mean a reduced likelihood of cert.

However, absent a quasi-experimental design where we can leverage some sort of exogenous variation, we cannot rule out the alternative explanation that former clerks may be selecting into cases that are *ex ante* more likely to be granted cert. Indeed, here we can present some suggestive evidence of this sort of selection effect. To do so, we return to an analysis of cert petitions. In particular, an interesting feature of cert petitions is the option of the respondent(s) in the case to file a brief in opposition to certiorari.²⁸ The option to oppose offers a deeper look into the nature of former clerks’ observed advantage. As many of these opposition briefs are filed by former clerks as well, we leverage the occasional dueling between former clerks on opposite sides to shed more light on how attorneys’ clerkship experience relates to cert outcomes. In Table 9, we again look at how a former clerk’s authorship relates to the success rate of cert petitions, but also categorize the petitions according to whether an opposition brief was filed and, if so, whether it was filed by another former clerk.²⁹

Table 9 shows that former clerks’ descriptive advantage in successfully petitioning for cert exists regardless of whether an opposition brief was filed and whether another former clerk

²⁸While such a reply brief is mandatory in capital cases, it is optional in all other cases. See Rule 15 in the *Rules of the Supreme Court*, which is available at <https://www.supremecourt.gov/filingandrules/2019RulesoftheCourt.pdf>.

²⁹In this table, we include only paid petitions on cases to which the U.S. government was not a party in order to remove these two strong correlates of cert results from the comparisons. These filters do not substantively affect the differences.

filed it. In particular, for every “level” of opposition brief, the cert grant rate is higher when the cert petition is authored by a former clerk than when it is not. For example, in cases where no opposition brief is filed, former clerks have a success rate of about 4%, compared to .2% for non-former clerks. A similar pattern exists when we focus on opposition briefs filed by non-former clerks.

Interestingly, we see a less sizable difference when we focus on opposition briefs that are also filed by former clerks. When a former clerk files an opposition brief, petitions by former clerks are still more likely to be granted cert, but the relative grant rates are 18% versus 15%—a relatively marginal difference. The counts in Table 9 indicate that this small difference may be driven in part by former clerks’ strategic selection of cert-likely cases to pursue. Opposition briefs written by a former clerk are paradoxically associated with a much *higher* cert grant rate compared to opposition briefs written by non-former clerks. The clerk-versus-clerk scenario in particular corresponds to a grant rate of close to 20%.

Why is this interesting? One possibility is that the success of former clerk in urging cert somehow turns to failure when they oppose cert. But this seems unlikely. Rather, it is much more likely that respondents hire former clerks in the hope that they can dissuade the Court from granting cert on cases they believe to be *ex ante* cert-worthy.

Of course, whether some selection exists that explains some of our findings is perhaps not the most interesting question, as the answer is surely yes. Rather the more interesting question is whether it explains a great deal of our findings, or even something like a third (given that we have three explanations). Of course, we can’t say for sure, but given the relatively rarity of cert, even in cases where former clerks are involved, we would argue that it is just as plausible that persuasion or case signaling explains a great deal of the correlation between former clerks and cert rates we have documented in this paper.

5 Conclusion

To be selected by a Supreme Court justice for a clerkship is to enter rarified air. Of the thousands of recent law school graduates who potentially might be interested in working at

the highest court in the land, only about 36 are selected each term to serve as clerks. While their tenure only lasts for a single year, most clerks are able to parlay this experience into lucrative positions with high-profile law firms (Ward, Dwyer and Gill 2014).

In this paper we combined existing and original data to study the potential influence of former clerks on the cert process. While, given the nature of our data, our results are only suggestive rather than dispositive, we document a strong correlation between former clerks taking part in a request for the Court to review a case and an increased likelihood of the Court doing so. We found such a connection both with respect to former clerks' direct involvement in cert petitions as well as former clerks authoring amicus briefs supporting a grant of cert. Given the overall rarity of cert, the magnitude of the differences between former clerks and non-former clerks is quite striking.

Since our results are only suggestive, any normative conclusions we might reach from these findings must be tentative. With that in mind, if indeed former clerks have a causal influence on the likelihood of cert, this results would lend further credence to concerns about advocacy before the Court being increasingly dominated by an elite cadre of lawyers (Lazarus 2007). Given the fact that Supreme Court clerks are disproportionately drawn from the law schools of Harvard and Yale (Peppers 2006, 72), this means any post-clerkship influence of Supreme Court clerks would propagate existing inequalities that can arise from the concentration of clerks (as well as justices) at these two elite institutions. Such a propagation would illustrate the need for further study of the role of former clerks—and other elite lawyers more generally—in the process of legal advocacy before the Supreme Court, and indeed, all courts.

More broadly, the influence of former clerks in the cert process also reaffirms the value of previous government experience in political advocacy. In adapting key insights from the literature on revolving door lobbying to Supreme Court agenda setting, we sought to examine how judicial processes may also reward advocates who had the rare opportunity to accumulate relationships, name recognition, and institutional expertise inside government

itself (Bertrand, Bombardini and Trebbi 2014). Despite the important differences between the judicial branch and legislative and executive branch processes, our results suggest that the “revolving door” of former clerks in the broader legal profession does have important consequences for judicial outcomes of interest.

References

- Andres, Gary and Paul Hernnson. 2015. *Lobbying Reconsidered: Politics Under the Influence*. Routledge.
- Austen-Smith, David. 1995. “Campaign contributions and access.” *American Political Science Review* 89(3):566–581.
- Baude, William. 2015. “Foreword: The Supreme Court’s Shadow Docket.” *New York University Journal of Law & Liberty* 9:1–63.
- Benesh, Sara C, Jennifer K Jacobson, Amanda Schaefer and Nicole Simmons. 2014. “Supreme Court GVRs and lower-court reactions.” *Justice System Journal* 35(2):162–177.
- Bertrand, Marianne, Matilde Bombardini and Francesco Trebbi. 2014. “Is It Whom You Know or What You Know? An Empirical Assessment of the Lobbying Process.” *American Economic Review* 104(12):3885–3920.
- Bils, Peter, Lawrence S Rothenberg and Bradley C Smith. 2020. “The Amicus Game.” *The Journal of Politics* 82(3):1113–1126.
- Black, Ryan C and Christina L Boyd. 2012. “The Role of Law Clerks in the US Supreme Court’s Agenda-Setting Process.” *American Politics Research* 40(1):147–173.
- Black, Ryan C. and Ryan J. Owens. 2020. “The Influence of Personalized Knowledge at the Supreme Court: How (Some) Former Law Clerks Have the Inside Track.” *Political Research Quarterly* p. 1065912920948138.
- Blanes i Vidal, Jordi, Mirko Draca and Christian Fons-Rosen. 2012. “Revolving Door Lobbyists.” *The American Economic Review* 102(7):3731.
- Bonica, Adam, Adam S Chilton, Jacob Goldin, Kyle Rozema and Maya Sen. 2017. “Measuring Judicial Ideology Using Law Clerk Hiring.” *American Law and Economics Review* 19(1):129–161.
- Bonica, Adam and Maya Sen. 2017. “A Common-Space Scaling of the American Judiciary and Legal Profession.” *Political Analysis* 25(1):114–121.
- Box-Steffensmeier, Janet M and Dino P Christenson. 2014. “The Evolution and Formation of Amicus Curiae Networks.” *Social Networks* 36:82–96.

- Box-Steffensmeier, Janet M, Dino P Christenson and Matthew P Hitt. 2013. "Quality over Quantity: Amici Influence and Judicial Decision Making." *American Political Science Review* pp. 446–460.
- Caldeira, Gregory A. and John R. Wright. 1988. "Organized Interests and Agenda Setting in the US Supreme Court." *The American Political Science Review* pp. 1109–1127.
- Casper, Jonathan D. 1972. *Lawyers Before the Warren Court: Civil Liberties and Civil Rights, 1957-66*. Urbana: University of Illinois Press.
- Collins Jr, Paul M. 2007. "Lobbyists Before the US Supreme Court: Investigating the Influence of Amicus Curiae Briefs." *Political Research Quarterly* 60(1):55–70.
- Collins Jr, Paul M. 2008. *Friends of the Supreme Court: Interest Groups and Judicial Decision Making*. Oxford University Press.
- Collins Jr, Paul M. 2018. "The Use of Amicus Briefs." *Annual Review of Law and Social Science* 14:219–237.
- Crowe, Justin and Christopher F Karpowitz. 2007. "Where Have You Gone, Sherman Minton? The Decline of the Short-term Supreme Court Justice." *Perspectives on Politics* 5(3):425–445.
- Cunningham, Scott. 2021. *Causal Inference: The Mixtape*. Yale University Press.
- Dean, Julian and Charles M. Cameron. 2021. "Do Amicus Briefs change Supreme Court Decisions?" Princeton University working paper.
- Dewatripont, Mathias and Jean Tirole. 1999. "Advocates." *Journal of Political Economy* 107(1):1–39.
- Epp, Charles R. 1998. *The Rights revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. University of Chicago Press.
- Haire, Susan Brodie, Roger Hartley and Stefanie A Lindquist. 1999. "Attorney Expertise, Litigant Success, and Judicial Decisionmaking in the U.S. Courts of Appeals." *LAW & SOCIETY REV.* 33:667.
- Hall, Melinda Gann. 2001. "State supreme courts in American Democracy: Probing the Myths of Judicial Reform." *American political Science review* pp. 315–330.
- Hall, Richard L and Alan V Deardorff. 2006. "Lobbying as legislative subsidy." *American Political Science Review* 100(1):69–84.
- Heinz, John P, Edward O Laumann and Robert L Nelson. 1993. *The Hollow Core: Private Interests in National Policy Making*. Harvard University Press.
- Hellman, Arthur D. 1983. "Granted, Vacated, and Remanded-Shedding Light on a Dark Corner of Supreme Court Practice." *Judicature* 67:389.

- Iacus, Stefano M, Gary King and Giuseppe Porro. 2012. "Causal Inference without Balance Checking: Coarsened Exact Matching." *Political analysis* pp. 1–24.
- Johnson, Timothy R, Paul J Wahlbeck and James F Spriggs. 2006. "The Influence of Oral Arguments on the U.S. Supreme Court." *American Political Science Review* pp. 99–113.
- Klarman, Michael J. 2006. *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*. Oxford University Press.
- LaPira, Timothy M and Herschel F Thomas. 2017. *Revolving Door Lobbying: Public Service, Private Influence, and the Unequal Representation of Interests*. University Press of Kansas.
- Larsen, Allison Orr and Neal Devins. 2016. "The Amicus Machine." *Virginia Law Review* 102:1901.
- Lazarus, Richard J. 2007. "Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar." *Georgetown Law Journal* 96:1487–1564.
- Levine, Bertram J. 2009. *The Art of Lobbying*. SAGE.
- Lohmann, Susanne. 1995. "Information, Access, and Contributions: A Signaling Model of Lobbying." *Public Choice* 85(3-4):267–284.
- Lynch, Kelly J. 2004. "Best friends-Supreme Court Law Clerks on Effective Amicus Curiae Briefs." *JL & Pol.* 20:33.
- McAtee, Andrea and Kevin T McGuire. 2007. "Lawyers, Justices, and Issue Salience: When and How do Legal Arguments affect the U.S. Supreme Court?" *Law & Society Review* 41(2):259–278.
- McGuire, Kevin T. 1993. *The Supreme Court bar: Legal elites in the Washington community*. University of Virginia Press.
- McGuire, Kevin T. 1995. "Repeat Players in the Supreme Court: The Role of Experienced Lawyers in the Litigation Success." *The Journal of Politics* 57(1):187–196.
- McGuire, Kevin T. 2000. "Lobbyists, Revolving Doors and the US Supreme Court." *Journal of Law & Politics* 16:113.
- Montgomery, Jacob M, Brendan Nyhan and Michelle Torres. 2018. "How Conditioning on Posttreatment Variables can Ruin Your Experiment and What to do About It." *American Journal of Political Science* 62(3):760–775.
- Peppers, Todd C. 2006. *Courtiers of the marble palace: The rise and influence of the Supreme Court law clerk*. Stanford University Press.
- Perry, Jr., H.W. 1991. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge: Harvard University Press.

- Prettyman Jr, E Barrett. 1975. "Opposing Certiorari in the United States Supreme Court." *Virginia Law Review* pp. 197–209.
- Rehnquist, William H. 2002. *The Supreme Court*. Vintage.
- Rosenbaum, Paul R. 1984. "The Consequences of Adjustment for a Concomitant Variable that has Been Affected by the Treatment." *Journal of the Royal Statistical Society: Series A (General)* 147(5):656–666.
- Salisbury, Robert H., Paul Johnson, John P. Heinz, Edward O. Laumann and Robert L. Nelson. 1989. "Who You Know Versus What You Know: The Uses of Government Experience for Washington Lobbyists." *American Journal of Political Science* pp. 175–195.
- Schoenherr, Jessica A. and Ryan C. Black. 2019. "Friends with Benefits: Case Significance, Amicus Curiae, and Agenda Setting on the U.S. Supreme Court." *International Review of Law and Economics* 58:43–53.
- Shaw, Katherine. 2015. "Friends of the Court: Evaluating the Supreme Court's Amicus Invitations." *Cornell L. Rev.* 101:1533.
- Szmer, John, Susan W. Johnson and Tammy A. Sarver. 2007. "Does the Lawyer Matter? Influencing Outcomes on the Supreme Court of Canada." *Law & Society Review* 41(2):279–304.
- Ward, Artemus, Christina Dwyer and Kiranjit Gill. 2014. "Bonus Babies Escape Golden Handcuffs: How Money and Politics Has Transformed the Career Paths of Supreme Court Law Clerks." *Marq. L. Rev.* 98:227.
- Ward, Artemus and David L Weiden. 2006. *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court*. NYU Press.