

POLICY COORDINATION: THE SOLICITOR GENERAL AS AMICUS CURIAE IN THE FIRST TWO YEARS OF THE ROBERTS COURT

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This Note examines the success of the Solicitor General as amicus curiae before the Supreme Court of the United States, with a particular focus on the first two years of the Roberts Court. Between 2005 and 2007, the Court ruled in favor of the party supported by the Solicitor General in 89.06 percent of the cases decided on the merits. This success-rate exceeds both the historical average—about 75 percent—and the success rate of any prior Solicitor General. The high success rate has its own significance, because it indicates the (relatively and absolutely) high coordination between the policy outcomes of the Court’s decisions and the policy preferences of the Executive. Both the historical success rate of the Solicitor General and its particularly high success before the Roberts Court pose a number of interesting and important causal questions. While the Note examines many of the possible causal explanations for its findings, it ultimately determines that accurate conclusions about causation require information and analysis beyond its scope.

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INTRODUCTION

The Solicitor General represents the Executive Branch of the federal government before the Supreme Court of the United States.¹ One of its chief functions is to file *amicus curiae* (“friend of the court”) briefs for litigants before the Court when the United States is not a direct party.² Between the Fall 2005 and Spring 2007 terms of the Supreme Court, the Solicitor General submitted *amicus* briefs on the merits in seventy-one cases.³ Previous empirical studies demonstrate the Solicitor General’s dramatic historical success⁴ as *amicus curiae*.⁵ While there are several possible causal explanations for this success, the coincidence of the Solicitor General’s support and the Court’s decisions is meaningful in and of itself. The Solicitor General’s high success rate indicates that the Court’s decisions are generally in line with the Executive Branch’s policy preferences.

This Note empirically examines how often the young Roberts Court and its individual Justices ruled in favor of the position supported by the Solicitor General’s office. I find that the Court sided with the Solicitor General in nearly 90 percent of the cases examined. This rate of success far exceeds those obtained in studies of earlier periods. I argue that this correlation is meaningful in that it demonstrates systematic policy coordination between the executive and judicial branches. Part I of this Note will provide background on the history of *amicus curiae* participation in the Supreme Court, the function of the Solicitor General, and prior empirical studies of the influence of the Solicitor General and other *amicus curiae* in the Supreme Court. Part II will present original data regarding

¹ See Office of the Solicitor General, About the Office of the Solicitor General, http://www.usdoj.gov/osg/about_us.htm (last visited Feb. 13, 2008); see also Jeffrey A. Segal, *Amicus Curiae Briefs by the Solicitor General During the Warren and Burger Courts: A Research Note*, 41 W. POL. Q. 135, 135 (1988).

² Segal, *supra* note 1, at 135.

³ See Office of the Solicitor General, Type of Filing by Term, <http://www.usdoj.gov/osg/briefs/brieftype.htm/> (last visited Feb. 13, 2008) (making available all briefs submitted by the Office of the Solicitor General from 1997 through 2007). This Note only offers analysis of sixty-four cases. Cases in which either the Solicitor General or the Court’s decision was unclear were omitted from the sample.

⁴ By “success,” I mean instances in which the Court ruled in favor of the side supported by the Solicitor General. I use the word cautiously, given the theoretical role of an *amicus curiae* as a source of new information and legal argument, rather than an interested party. See *infra* pp. 543–44.

⁵ See Karen O’Connor, *The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation*, 66 JUDICATURE 256, 261 (1983) (“[T]he solicitor general’s success rate as *amicus curiae* surpasses the high win-loss ratio that the government enjoys as a party to a suit . . .”). See generally Segal, *supra* note 1, at 136 (finding that the Solicitor General won about 75 percent of the time in the Warren and Burger Courts, confirming the results of three other studies).

how often the Court and each Justice accepted the position supported by the Solicitor General from the Fall 2005 term through the Spring 2007 term. Part III compares the findings from Part II to those from earlier empirical studies and interprets these new findings. The final section concludes.

I. BACKGROUND

A. *The History of Amicus Participation in the Supreme Court*

Supreme Court Rule 37 governs amicus curiae participation.⁶ The Supreme Court Rules have in broad outline remained unchanged since they were first promulgated in 1939.⁷ As they now stand, the rules permit government representatives like the Solicitor General, federal agencies, or individual states to file amicus curiae briefs in any case.⁸ Non-governmental entities may file an amicus curiae brief in any case if they obtain the consent of all parties or leave to file from the Court itself.⁹ Despite the literal translation of amicus curiae, amici briefs are not neutral sources of information; they are “most commonly submitted to the Court urging the Justices to rule in favor of one litigant over another.”¹⁰

The last century has seen a major transformation in the extent to which “non-parties participate in the Court’s decision-making process through the submission of amicus curiae briefs.”¹¹ Not only are more cases attracting amicus filings, but the intensity of participation is also rising.¹² While amicus briefs were filed in only about 23 percent of the Court’s cases from 1946–1955, amicus briefs were filed in 85 percent of the Court’s cases argued from 1986–1995.¹³ Between 1946 and 1995, the average number of amicus briefs per case jumped from about 0.50 per case to 4.23 per case—an 846 percent increase.¹⁴ In the same period,

⁶ SUP. CT. R. 37.

⁷ Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 761 (2000). Kearney and Merrill later make note of a significant 1997 amendment, requiring the disclosure of certain relationships between the parties to the case and any person or entity that files an amicus brief. *See id.* at 766. However, the rules explicitly exempt from this requirement certain governmental representatives, including the Solicitor General. SUP. CT. R. 37.6.

⁸ *See* SUP. CT. R. 37.4.

⁹ *See* SUP. CT. R. 37.3. In practice, the requirement of consent or leave is only a formal obstacle, as the Court has come to grant nearly all motions for leave to file as amicus curiae. *See* Kearney & Merrill, *supra* note 7, at 762 & n.58 (reporting that the Rehnquist Court denied only one out of 115 motions for leave to file in 1990).

¹⁰ Paul M. Collins Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC’Y REV. 807, 808 (2004).

¹¹ *See* Kearney & Merrill, *supra* note 7, at 744.

¹² *See id.* at 754.

¹³ *See id.* (basing their figure on original data).

¹⁴ *See id.* (noting also that the mean number of amicus briefs per case, when expressed in terms of the cases in which one or more amicus briefs were filed, rose from 2.12 to 5.00).

the median number of briefs jumped from one to three.¹⁵ This increased participation has not gone unnoticed by the members of the Court. In cases where at least one amicus curiae filed a brief, the percentage of decisions referencing an amicus rose from 18 percent between 1946 and 1955 to 37 percent between 1986 and 1995.¹⁶ Similarly, in cases where at least one amicus curiae filed a brief, the percentage of decisions actually quoting one or more of the amici's briefs from 1986–1995 was about double that of the previous three decades.¹⁷

Members of the legal community have put forth several competing hypotheses regarding the utility and impact of amicus filings.¹⁸ The critical variable that divides these perspectives is the model of judicial decision-making underlying each.¹⁹ The Legal Model is perhaps most familiar to lawyers.²⁰ This model “posits that Justices resolve cases in accordance with their understanding of the requirements of the authoritative sources of law relevant to the question presented.”²¹ Accordingly, under the Legal Model, amicus curiae briefs that provide new information or legal arguments can, and should, aid the Court in making its decisions.²² Skeptics of the Legal Model contend that it merely serves to rationalize judicial decisions based on other grounds.²³

The Attitudinal Model provides an alternative to the Legal Model and has become the predominant model in political science scholarship.²⁴

¹⁵ See *id.*

¹⁶ See *id.* at 757. Kearney and Merrill mention higher figures from another study, but dismiss these figures because of the study's methods. See *id.* at 757 n.42 (discussing the results from Lee Epstein, *Interest Group Litigation During the Rehnquist Court Era*, 9 J.L. & POL. 639, 650 (1993)).

¹⁷ See Kearney & Merrill, *supra* note 7, at 758.

¹⁸ See *id.* at 774–87 (exploring three competing models of judicial behavior and each model's corresponding view of amicus filings).

¹⁹ See *id.* at 747.

²⁰ See *id.* at 775.

²¹ *Id.* at 775–76.

²² See *id.* at 748; see also SUP. CT. R. 37.1 (“An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court.”); cf. Collins Jr., *supra* note 10, at 815 (describing how *Mapp v. Ohio*, 367 U.S. 643 (1961), applied the exclusionary rule to the states when the issue was ignored by both parties and raised only by an amici, the American Civil Liberties Union). Under the same logic, briefs that do not provide new information or logic do not (and should not) influence decisions and merely burden the court. See Kearney & Merrill, *supra* note 7, at 776; see also SUP. CT. R. 37.1 (noting that briefs that do not provide new information are “not favored”).

²³ See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 66–75, 86 (2003) (questioning the value of the Legal Model in light of the fact that “various aspects of the legal model can support either side of any given dispute that comes before the Court”).

²⁴ See, e.g., Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 Nw. U. L. REV. 251, 252 n.4 (1997) (“The attitudinal model has achieved predominance in political science scholarship.”).

This model posits that Justices decide cases in accordance with their political beliefs,²⁵ which are assumed to be fixed by the time a Justice is appointed to the Court.²⁶ In its basic form, the Attitudinal Model suggests that amicus briefs will have no discernable impact on judicial decision-making,²⁷ though individual exceptions are easily conceived.²⁸ It should be noted that skeptics of the Attitudinal Model regard it as overly reductionistic.²⁹

Some scholars have expanded the Attitudinal Model in accordance with the Strategic Actor Model.³⁰ Under this expansion, Justices modify their voting behavior in order to maximize the chances of their ideological preferences actually being adopted as policy.³¹ As a result, advocates of the Strategic Actor strand of the Attitudinal Model predict that Justices pay close attention to amicus briefs from key institutional actors (such as the Solicitor General) who represent parties responsible for adopting policy.³²

Finally, the Interest Group Model hypothesizes that “Justices will seek to resolve cases in accordance with the desires of the organized groups that have an interest in the controversy.”³³ Not only has this model gained acceptance amongst some legal scholars,³⁴ but it may be the “dominant conception” amongst amicus filers.³⁵ The central criticism of the Interest Group Model is that Supreme Court Justices, who

²⁵ See SEGAL & SPAETH, *supra* note 23, at 86.

²⁶ See generally *id.* at 86–97.

²⁷ See Kearney & Merrill, *supra* note 7, at 781 (“In short, the attitudinal model generates what statisticians would call the null hypothesis: amicus briefs will have no discernible impact on outcomes.”); SEGAL & SPAETH, *supra* note 23, at 237–38 (noting that their research on the impact of Solicitor General amicus briefs demonstrates that the Solicitor General may have non-attitudinal influence on the Court).

²⁸ See Collins Jr., *supra* note 10, at 816 (“[A] [J]ustice not particularly pleased by the arguments of the direct party to litigation, but leaning toward supporting a disposition favoring that party, may do so because of arguments found in an amicus brief in support of that party.”); Kearney & Merrill, *supra* note 7, at 781 n.129 (imagining individualized exceptions to this generalization, where amici clarify ambiguity over which position would conform to the Justice’s beliefs).

²⁹ See, e.g., Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 235 (1999) (“Judging is a complex, case-specific, and subtle task . . . ; reducing the process to the level of checking a box on a ballot discredits the responsibility with which federal judges have been entrusted.”).

³⁰ See, e.g., Kearney & Merrill, *supra* note 7, at 781–82.

³¹ See, e.g., *id.* at 782.

³² See *id.*

³³ See *id.* at 782–83.

³⁴ See e.g. NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 18–28, 123–50 (1994).

³⁵ Kearney & Merrill, *supra* note 7, at 783; see also Andrew P. Morriss, *Private Amici Curiae and the Supreme Court’s 1997-1998 Term Employment Law Jurisprudence*, 7 WM. & MARY BILL RTS. J. 823, 829 (1999) (“[A]mici’s view of their own efforts is akin to that of groups lobbying before Congress.”).

have lifetime tenure and guaranteed compensation, should not care about the political demands of organized groups.³⁶ However, numerous studies show that the Supreme Court reacts to changes in public opinion.³⁷ Because disparities in amicus support demonstrate where public opinion lies, the Interest Group Model predicts that the greater the disparity of support for one side, the more likely the Court will rule for that particular side.³⁸ Thus, “[t]he fact that [an] organization saw fit to file the brief is the important datum, not the legal arguments or the background information set forth between the covers of the brief.”³⁹

Joseph D. Kearney and Thomas W. Merrill took a major step toward resolving the debate with their comprehensive analysis of amicus participation from 1946 through 1995.⁴⁰ The authors assembled a database of every argued case during the time period and recorded the outcome of the case, the number of amicus briefs supporting each party, and whether certain key institutional litigants⁴¹ filed amicus briefs in the case.⁴² They assessed the impact of amicus filers by comparing success rates to a benchmark rate of success for petitioners and respondents without regard to amicus support.⁴³ Over the period examined, amici supporting petitioners had little impact; they succeeded at a rate less than 1 percent higher than the benchmark rate.⁴⁴ In contrast, amici supporting respondents succeeded at a rate more than 7 percent higher than the benchmark rate.⁴⁵

³⁶ See Kearney & Merrill, *supra* note 7, at 784–85 (offering two possible rebuttals: Justices may adopt the positions of the most influential interest groups because they are concerned with (1) enhancing their own reputations or (2) legitimizing the Court, itself).

³⁷ Collins Jr., *supra* note 10, at 810. Collins also suggests an interesting potential intersection between the Interest Group and Strategic Actor Models: “[T]he [J]ustices only share policymaking authority with the other branches of government. Should they stray too far from public opinion on an issue, it is likely that the legislature may attempt to alter or override their decision or the executive may indifferently enforce the decision.” *Id.* at 812–13.

³⁸ See Kearney & Merrill, *supra* note 7, at 786 (“Insofar as the Justices are assumed to try to resolve cases in accordance with the weight of public opinion, they should look to amicus briefs as a barometer of opinion on both sides of the issue.”).

³⁹ *Id.* at 786.

⁴⁰ See *id.* at 744. *But cf.* Collins Jr., *supra* note 10, at 828 (noting that the Kearney & Merrill study did not control for established influences on litigation success).

⁴¹ Kearney and Merrill looked specifically at the Solicitor General, the ACLU, the AFL-CIO, and state attorneys general. Kearney & Merrill, *supra* note 7, at 801.

⁴² *Id.* at 749.

⁴³ See *id.* at 789–90 (finding that petitioners are successful 60 percent of the time, respondents are successful 37 percent of the time, and that there are mixed results 3 percent of the time).

⁴⁴ See *id.* at 791 fig.7, 792 (noting variation amongst decades, with success as low as 4.38 percent below the benchmark from 1946–1955 and as high as 8.97 percent above the benchmark from 1956–1965).

⁴⁵ See *id.* at 792 (highlighting that filers supporting respondents have consistently outperformed the benchmarks during the period examined).

Each of the institutional litigants examined had success rates that exceeded the benchmark rate, whether supporting the petitioner or respondent.⁴⁶ However, only the Solicitor General had a statistically significant impact on outcomes for both petitioners and respondents.⁴⁷ The Solicitor General also had the most extensive impact on outcomes, roughly doubling the odds of a petitioner win when supporting the petitioner and halving the odds of a petitioner win when supporting the respondent.⁴⁸ The study also found that “amicus briefs cited by the Court appear to be no more likely to be associated with the winning side than briefs not cited by the Court” and that “briefs filed by more experienced lawyers may be more successful than briefs filed by less experienced lawyers.”⁴⁹

Kearney and Merrill cautiously interpret their results as providing the most support for the Legal Model.⁵⁰ The results threaten the Attitudinal Model because amicus briefs appear to affect success rates in a variety of contexts.⁵¹ The results also challenge the Interest Group Model because large disparities of amicus support for one side relative to the other do not result in a substantially greater likelihood of success for the supported party.⁵² Consistent with the Legal Model, amicus briefs generally succeed more often when filed by experienced lawyers and institutional litigants—filers with a better sense of what information the Court finds useful.⁵³ Kearney and Merrill do not suggest that the Legal Model provides the sole explanation for Supreme Court decisions or that their study provides no support for the rival models.⁵⁴ They simply interpret their findings to suggest that amicus briefs that speak to the requirements of the law exert some influence on the outcomes reached by the Court.⁵⁵

Paul Collins further illuminated the impact of amici participation by empirically testing two hypotheses: (1) an Affected Groups Hypothesis, which posits that an advantage of amicus *participants*, relative to one’s

⁴⁶ See *id.* at 803–10 (providing graphical representations of success against the benchmark for each litigant by decade).

⁴⁷ See *id.* at 810–11 (finding that the ACLU had a statistically significant impact only on the petitioner’s side and that the AFL-CIO and state attorneys general had statistically significant impacts only on the respondent’s side).

⁴⁸ See *id.*

⁴⁹ Kearney & Merrill, *supra* note 7, at 749.

⁵⁰ *Id.* at 750.

⁵¹ See *id.*

⁵² See *id.*; see also Collins Jr., *supra* note 10, at 825 (“With results indicating that cosigning amicus briefs does not play a statistically significant role in increasing litigation success, a consideration of why groups choose to pursue this method of participation is clearly warranted.”).

⁵³ See Collins Jr., *supra* note 10, at 827.

⁵⁴ See Kearney & Merrill, *supra* note 7, at 819.

⁵⁵ See *id.*

opponent, will increase the likelihood of litigation success,⁵⁶ and (2) an Information Hypothesis, which posits that an advantage of amicus *briefs*, relative to one's opponent, will increase the likelihood of litigation success.⁵⁷ His analysis "shows strong support that it is amicus *brief* support that increases the probability of litigation success, and not amicus participant support."⁵⁸ Consistent with Kearney and Merrill's appraisal, Collins' findings suggest that "the Court values the information found *within* amicus briefs and not the information found on the covers of these briefs."⁵⁹ Importantly, Collins' analysis also revealed that "[w]hen a petitioner of a certain ideology argues that position before a Court of the same ideology, the likelihood of success increases ten percentage points."⁶⁰

Like Kearney and Merrill, Collins concludes that neither the Attitudinal nor Interest Group Models adequately depict the Court's decision-making.⁶¹ "While ideological factors do play an important role in party success before the Court, [Collins'] results indicate that so too do legal factors."⁶² Further, the Justices do not appear to respond to the influence of interest group opinion on a case-by-case basis.⁶³ Collins ultimately prefers an integrated model for the Court's decision that recognizes its complexity and incorporates numerous approaches.⁶⁴

B. *The Function of the Solicitor General*

"[T]he Solicitor General is responsible for any and all actions on behalf of the United States government before the Supreme Court."⁶⁵ That responsibility brings the Solicitor General before the Court with singular frequency; between 1959 and 1989, the Solicitor General participated in 48.5 percent of all cases decided on the merits and 58.8 percent of all cases argued orally.⁶⁶ The Solicitor General decides which cases warrant a petition for certiorari, writes briefs in support of or opposing certiorari, writes briefs on the merits, presents oral arguments on the gov-

⁵⁶ See Collins Jr., *supra* note 10, at 815.

⁵⁷ See *id.* at 816.

⁵⁸ *Id.* at 822.

⁵⁹ *Id.*

⁶⁰ *Id.* at 823.

⁶¹ See *id.* at 827.

⁶² *Id.*

⁶³ *Id.* In his conclusion, however, Collins recognizes that he did not test the possibility that the Court reacts to affected groups in the form of briefs and not participants. See *id.* at 828.

⁶⁴ *Id.* at 827 ("As such, I believe that judicial scholars may be better served by approaching Supreme Court decisionmaking as a complex phenomenon, perhaps best explained through the integration of numerous approaches, rather than by outright adopting a particular perspective on the choice justices make.").

⁶⁵ REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 13 (1992).

⁶⁶ See *id.* at 21.

ernment's behalf before the Court or authorizes others to do so, and submits amicus curiae briefs to the Court when the government has a particular interest in the case.⁶⁷

The Solicitor General has shown tremendous success in its various duties.⁶⁸ The Solicitor General has been 5 percent more successful than the average litigant at opposing certiorari.⁶⁹ The Solicitor General's success as a petitioner is astounding—it successfully obtains review fourteen times as often as private litigators.⁷⁰ The Solicitor General maintains its success at the merits stage of the trial where, between 1959 and 1989, the government's position prevailed 67.6 percent of the time, clearly failed 26.8 percent of the time, and obtained some mixed result 4.8 percent of the time.⁷¹ All other factors being equal, if the Solicitor General is present as a petitioner, the odds of a petitioner win are effectively doubled and the Solicitor General is present as a respondent, the odds of a petitioner win are effectively halved.⁷² The Solicitor General also maintains extensive success as an amicus curiae, which I detail in the remaining sections.

C. *Previous Studies of the Solicitor General as Amicus Curiae*

Several other authors have empirically examined the Solicitor General's amicus curiae participation.⁷³ In their comprehensive study of amicus influence, Kearney and Merrill took particular note of the Solicitor General.⁷⁴ They dubbed the Solicitor General the “king of the citation-frequency hill” as the Court referred to the Solicitor General's brief in just over 40 percent of the cases in which the Solicitor General appeared as an amicus curiae between 1946 and 1995.⁷⁵ “Significantly, the frequency of the Court's citation of the Solicitor General as amicus rises each decade, roughly doubling between the first decade of [the] study and the [last].”⁷⁶ Kearney and Merrill interpret this finding to suggest

⁶⁷ *Id.* at 12–13.

⁶⁸ *See generally id.* at 22–30 (chronicling the Solicitor General's successes in its various roles between 1959 and 1989).

⁶⁹ *See id.* at 25 (noting the Solicitor General's 96 percent success rate, compared to the overall success rate of 91 percent between 1959 and 1989).

⁷⁰ Between 1959 and 1989, the Solicitor General successfully obtained review 69.78 percent of the time, compared to the 4.9 percent success rate of private litigation. *See id.* (attributing this success to the Solicitor General's opportunity to select cases which would likely warrant petition).

⁷¹ *See id.* at 29.

⁷² Kearney & Merrill, *supra* note 7, at 800.

⁷³ *See generally* SALOKAR, *supra* note 65, at 145–50 (surveying the existing empirical literature on the success of the Solicitor General as an amicus curiae in the Supreme Court).

⁷⁴ *See* Kearney & Merrill, *supra* note 7, at 749–50.

⁷⁵ *See id.* at 760.

⁷⁶ *Id.*

that the Court has come to rely more heavily on the Solicitor General's amicus filings in the writing of opinions.⁷⁷

More importantly, Kearney and Merrill uncovered an impressive success rate and impact on outcomes for the Solicitor General as amicus curiae. When the Solicitor General supported the petitioner, the petitioner won 76.3 percent of the time.⁷⁸ When the Solicitor General supported the respondent, the petitioner won just 34.1 percent of the time.⁷⁹ These rates depart significantly from the historical petitioner win rate of 59.8 percent.⁸⁰ After conducting a multivariate regression,⁸¹ Kearney and Merrill found that the Solicitor General exerted a statistically significant influence on outcomes for both the petitioner's and respondent's side.⁸² The Solicitor General more than doubles the odds of a petitioner win when supporting the petitioner and halves the odds of a petitioner win when supporting the respondent, as compared to cases where the Solicitor General had not filed as a party or amicus.⁸³

Jeffery A. Segal conducted a thorough examination of the Solicitor General's amicus participation in the Warren and Burger Courts.⁸⁴ Over those thirty years, the Solicitor General won about 75 percent of the time,⁸⁵ and "no administration won less than 65 percent of its cases as amicus."⁸⁶ The most successful administration of the period was Kennedy's—the Court ruled in favor of the party supported by the Solicitor General in 87.5 percent of the cases in which it filed an amicus curiae brief.⁸⁷ Segal then looked at the success of each Solicitor General, finding a similar range of success rates—a low of 66.7 percent and a high of 87.7 percent.⁸⁸ The Solicitor General's high success rate remained consistent, even when briefs were broken down by issue, liberal versus conservative, and the presiding Chief Justice.⁸⁹

⁷⁷ *Id.*

⁷⁸ *See id.* at 790, 803. The figure of 76.3 percent was obtained by adding the historical petitioner win rate and the percentage change in petitioner win rate for cases where the Solicitor General appears as amicus supporting petitioner.

⁷⁹ *See id.* at 790, 804. The figure of 34.1 percent was obtained by subtracting the percentage change in petitioner win rate for cases where the Solicitor General appears as amicus supporting respondent from the historical petitioner win rate.

⁸⁰ *See id.* at 790.

⁸¹ *See id.* 847–55 (explaining and presenting the results of the multivariate regression).

⁸² *Id.* at 810.

⁸³ *See id.* at 811, 852 (finding that the presence of the Solicitor General as an amicus for the petitioner increases the odds of a petitioner win by a factor of 2.5006 and that the presence of the Solicitor General as an amicus for the respondent reduces the odds of a petitioner win by a factor of 0.3657).

⁸⁴ *See Segal, supra* note 1, at 135.

⁸⁵ *Id.* at 136.

⁸⁶ *Id.* at 138.

⁸⁷ *Id.*

⁸⁸ *Id.* at 139 tbl.5.

⁸⁹ *See id.* at 137, 139–41 tbls.2, 6, 7, & 8.

Segal also analyzed the behavior of each Justice that served in the Warren and Burger Courts.⁹⁰ After Justice Burton, who only participated in twenty-two cases where the Solicitor General filed an amicus brief, Chief Justice Warren voted for the party supported by the Solicitor General most often (79.7 percent), followed by Justice Goldberg (76.7 percent).⁹¹ Justice Stevens was the only Justice to side with the Solicitor General less than half the time (49.1 percent).⁹² He was followed by Justice Harlan (50.3 percent), and after that then-Associate Justice Rehnquist (51.1 percent).⁹³ Segal further found that thirteen of the twenty Justices examined registered statistically significant differences in their reactions to liberal and conservative briefs.⁹⁴ Of those Justices registering statistically significant differences, Justice Marshall sat at one extreme, supporting 86 percent of liberal briefs and only 26 percent of conservative briefs.⁹⁵ Then-Associate Justice Rehnquist was at the other extreme, supporting 77 percent of conservative briefs and just 39 percent of liberal briefs.⁹⁶

Using the same data set as Segal, Collins calculated the change in predicted probability of a petitioner win caused by the Solicitor General filing an amicus brief.⁹⁷ When supporting the petitioner, the Solicitor General raised the probability of a petitioner win by 14.8 percent.⁹⁸ When supporting the respondent, the Solicitor General lowered the probability of a petitioner win by 23.6 percent.⁹⁹

II. EMPIRICAL STUDY OF THE SOLICITOR GENERAL AS AMICUS CURIAE

A. *Methods*

This Note analyzes the sixty-four cases during the 2005–2006 and 2006–2007 Supreme Court terms in which the Solicitor General filed an amicus brief on the merits that clearly supported one party and the Court issued a decision on the merits that clearly supported one party. Data collection began by searching the Solicitor General’s website, which lists all briefs submitted by the office since 1998.¹⁰⁰ I examined the briefs

⁹⁰ See *id.* at 141 tbl.8.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 141–42 (employing the ideology coding used in Spaeth’s Supreme Court database).

⁹⁵ *Id.* at 141 tbl.8, 142.

⁹⁶ *Id.*

⁹⁷ See Collins Jr., *supra* note 10, at 821–23, 824 tbl.3.

⁹⁸ *Id.* at 823 tbl.2.

⁹⁹ *Id.*

¹⁰⁰ See Office of the Solicitor General, *supra* note 3.

submitted on the merits in 2005 and 2006 to determine the cases in which the Solicitor General clearly supported a party. Using Westlaw, I determined which of these cases had decisions on the merits that clearly favored a party. These searches yielded the sixty-four cases listed in Appendix A.

For each case, I determined which party the Solicitor General supported by referencing its brief or, if the brief was unclear, the case's syllabus.¹⁰¹ I established which party the Court's decision and each Justice favored by examining each opinion.¹⁰² Finally, I searched the text of each set of opinions for the words "amici" or "amicus" to determine whether the majority opinion cited or made explicit reference to the Solicitor General or the Solicitor General's brief.

The statistical results presented *infra* Part II.B were calculated with simple counting and arithmetic. Because the analysis is neither predictive nor a random sampling to describe a greater population, significance or confidence calculations are inappropriate. The analysis is instead intended to describe the sample itself.

B. Results

TABLE A: DATA ON COURT TOTALS

Number of Cases (N)	64
Number of Cases Won by Party Supported by SG	57
Percentage of Cases Won by Party Supported by SG	89.06%

Of the sixty-four cases in which the Solicitor General filed an amicus brief on the merits that clearly supported one party and the Court issued a decision on the merits that clearly supported one party, the decision favored the party supported by the Solicitor General in fifty-seven (89.06 percent) of the cases. (See Table A.)

¹⁰¹ As implied above, if neither the brief nor the syllabus were clear, I left the case out of the analysis. *See supra* note 3.

¹⁰² I recognize a degree of inaccuracy presented by ignoring the fact that concurring or dissenting Justices may have concurred in only part of the judgment, meaning that their actual positions, with reference to the parties, are somewhat mixed. If a Justice concurred in the judgment, I listed that Justice as favoring the same party as the Court. If a Justice dissented in the judgment, I listed that Justice as favoring the opposite party as the Court.

TABLE B: DATA ON RESPONDENTS

Number of Cases (N)	64
Number of Respondent Wins	19
Percentage of Cases Won by Respondent	29.69%
Number of Cases Where SG Supported Respondent	22
Number of Respondent Wins When SG Supported Respondent	17
Percentage of Cases where SG Supported Respondent Won by Respondent	77.27%

Of the sixty-four cases in the sample, the Court ruled in favor of the respondent in nineteen (29.69 percent) of the cases. (See Table B.) The Solicitor General supported the respondent in twenty-two cases. The respondent won judgment in seventeen (77.27 percent) of those cases.

TABLE C: DATA ON PETITIONERS

Number of Cases (N)	64
Number of Petitioner Wins	45
Percentage of Cases Won by Petitioner	70.31%
Number of Cases Where SG Supported Petitioner Wins	42
Number of Petitioner Wins When SG Supported Petitioner	40
Percentage of Cases where SG Supported Petitioner Won by Petitioner	95.24%

Of the sixty-four cases in the sample, the Court ruled in favor of the respondent in forty-five (70.31 percent) of the cases. (See Table C.) The Solicitor General supported the respondent in forty-two cases. The petitioner won in forty (95.24 percent) of those cases.

It may be illustrative to state these statistics from the perspective of the parties. While respondents won judgment in 29.69 percent of all cases, they won 77.27 percent of the cases where they were supported by the Solicitor General and just 4.76 percent of the cases where they were opposed by the Solicitor General. Alternatively, while petitioners won judgment in 70.31 percent of all cases, they won 95.24 percent of the cases where they were supported by the Solicitor General and 22.73 percent of the cases where they were opposed by the Solicitor General.

TABLE D: DATA ON UNANIMOUS DECISIONS

Number of Cases (N)	64
Number of Unanimous Decisions in Sample	33
Percentage of Sample with Unanimous Decisions	51.56%
Number of Cases Won by Party Supported by SG	57
Number of Unanimous Decisions in Favor of Party Supported by SG	30
Percentage of Cases Won by Party Supported by SG with a Unanimous Decision	52.63%
Percentage of Unanimous Decisions Won by the Party Supported by the SG	90.91%

Thirty-three (51.56 percent) of the sixty-four cases in the sample had unanimous decisions.¹⁰³ (See Table D.) Thirty (52.6 percent) of the fifty-seven cases won by the party supported by the Solicitor General had a unanimous decision. Of the cases with a unanimous decision, 90.91 percent of those cases were won by the party supported by the Solicitor General.

TABLE E: DATA ON INDIVIDUAL JUSTICES

Justice	Number of Cases Participated in	Number of Cases Decided in Favor of Same Party Supported by Solicitor General	Percentage of Cases Decided in Favor of Same Party Supported by Solicitor General	Rank (From highest % to lowest)
Roberts	63	54	85.71%	3
Stevens	64	35	54.69%	9
Scalia	64	53	82.81%	4
Kennedy	63	58	92.06%	2
Souter	64	46	71.88%	6
Thomas	62	51	82.26%	5
Ginsburg	64	45	70.31%	7
Breyer	64	44	68.75%	8
Alito	51	47	92.16%	1

The newest Justice, Justice Alito, voted in favor of the party supported by the Solicitor General at a higher rate—92.16 percent—than any of his colleagues (See Table E). Justice Kennedy follows closely behind with a rate 92.06 percent. Chief Justice Roberts ranks third, siding with the Solicitor General 85.71 percent of the time. The most senior Justice, Justice Stevens, voted in favor of the party supported by the Solicitor General least often, at a rate of 54.69 percent. Justice Breyer is far

¹⁰³ By “unanimous,” I mean that all Justices participating in the case favored the same party.

behind Alito with the next lowest rate, 68.75 percent. The data and statistics for the other Justices are listed on Table E.

TABLE F: DATA ON REFERENCES

Number of Cases (N)	64
Number of Majority Opinions with Explicit Mentions of the SG	18
Percentage of Majority Opinions with Explicit Mentions of the SG	28.13%
Number of Majority Opinions with Explicit Mentions or Citations	27
Percentage of Majority Opinions with Explicit Mentions or Citations	42.19%
Number of Cases in which Any Opinion Explicitly Mentions or Cites the SG	34
Percentage of Cases in which Any Opinion Explicitly Mentions or Cites the SG	53.13%
Number of Cases Won by the Side Supported by the SG	57
Number of Cases Won by the Side Supported by the SG where the Majority Opinion Explicitly Mentioned or Cited the SG	21
Percentage of Cases Won by the Side Supported by the SG where the Majority Opinion Explicitly Mentioned or Cited the SG	36.84%
Number of Cases Lost by the Side Supported by the SG	7
Number of Cases Lost by the Side Supported by the SG where the Majority Explicitly Mentioned or Cited the SG	6
Percentage of Cases Lost by the Side Supported by the SG where the Majority Explicitly Mentioned or Cited the SG	85.71%
Percentage of Cases where the Majority Opinion Explicitly Mentioned or Cited the SG Won by the Side Supported by the SG	77.78%
Percentage of Cases where the Majority Opinion Explicitly Mentioned or Cited the SG Lost by the Side Supported by the SG	22.22%

In thirty-four (53.13 percent) of the cases, at least one opinion explicitly mentioned or cited the Solicitor General or his amicus brief. The majority explicitly mentioned or cited the Solicitor General in twenty-seven (42.19 percent) of the sixty-four cases. (See Table F.) The side supported by the Solicitor General won in 77.78 percent of the cases where the majority explicitly mentioned or cited the Solicitor General. The majority explicitly mentioned or cited the Solicitor General in 36.84 percent of the cases won by the party supported by the Solicitor General and 85.71 percent—all but one—of the cases lost by the party supported by the Solicitor General.

IV. DISCUSSION OF FINDINGS

A. *Comparison to Prior Findings*

The Solicitor General clearly experienced greater success as an amicus curiae between the Fall 2005 and Spring 2007 terms than it had dur-

ing earlier periods.¹⁰⁴ The Solicitor General's success rate from this period (89.06 percent) exceeds the success rate from the Warren and Burger Courts (about 75 percent).¹⁰⁵ The success rate in my sample also exceeds the success rate of the most successful Solicitor General in Segal's study, J. Lee Rankin (87.5 percent).¹⁰⁶

The win rate for petitioners supported by the Solicitor General from this period (95.24 percent) far surpassed the rate from the period between 1946 and 1995 (76.3 percent).¹⁰⁷ The win rate for respondents supported by the Solicitor General from 2005 to 2007 (77.27 percent) also significantly exceeded the rate from 1946 to 1995 (65.9 percent). These statistics may be misleading because the voting pattern of the Court between 2005 and 2007 was different than it was between 1946 and 1995. Whereas petitioners won 70.31 percent of the cases in my sample,¹⁰⁸ they won 59.8 percent of the cases between 1946 and 1995.¹⁰⁹ Part of this difference can be explained by the fact that Kearney and Merrill included cases with mixed results, which accounted for about 3 percent of the cases.¹¹⁰ But even if those mixed results are removed from the sample, petitioners won only 61.65 percent of the cases in their sample.¹¹¹ The historical comparison is more accurate, therefore, if stated in terms of differences in win rates. Between 1946 and 1995, petitioners supported by the Solicitor General won 16.5 percent more often than the average petitioner;¹¹² between 2005 and 2007, that figure rose to 24.93 percent—a difference of 8.43 percent. While the Solicitor General's recent success as an amicus supporting petitioners has soundly exceeded historical rates in recent years, its success supporting respondents has increased even more dramatically. Between 1946 and 1995, respondents supported by the Solicitor general won 25.7 percent more often than the average respondent;¹¹³ between 2005 and 2007, that figure spiked to 47.58 percent—a difference of 21.88 percent.

The individual Justices are now siding with the Solicitor General more often as well. Whereas only one Justice voted for the party sup-

¹⁰⁴ See generally Collins Jr., *supra* note 10; Kearney & Merrill, *supra* note 7.

¹⁰⁵ See Segal, *supra* note 1, at 136. The Kearney & Merrill study did not provide a total success rate for the Solicitor General. See Kearney & Merrill, *supra* note 7.

¹⁰⁶ See Segal, *supra* note 1, at 138.

¹⁰⁷ See Kearney & Merrill, *supra* note 7, at 790, 803. Win rate for petitioners supported by the Solicitor General is calculated by using the benchmark rate of success (Figure 6) plus the percentage change in petitioner win rate for cases where the Solicitor General appears as amicus for the petitioner (Figure 13). *Id.*

¹⁰⁸ The statistic for the time-frame would be more accurate if the study examined all cases decided by the Court on the merits.

¹⁰⁹ See Kearney & Merrill, *supra* note 7, at 790.

¹¹⁰ See *id.*

¹¹¹ See *id.*

¹¹² *Id.* at 790, 803

¹¹³ *Id.*

ported by the Solicitor General more than 80 percent of the time between 1953 and 1982,¹¹⁴ five Justices fell into that category between 2005 and 2007. Justice Alito had the highest rate of agreement in my sample, with 92.16 percent, edging out Justice Burton, who had the highest rate in Segal's sample, with 90.9 percent.¹¹⁵ The agreement rates of the Justices from the Warren and Burger Courts dropped off after Justice Burton—the next highest were Chief Justice Warren, with 79.7 percent, and Justice Goldberg, with 76.7 percent.¹¹⁶ In contrast, Justice Alito was followed closely by Justice Kennedy, with 92.06 percent. Chief Justice Roberts was not far behind with 85.71 percent. Although Justice Stevens remained the strongest opponent of the Solicitor General, his rate of agreement rose from 49.1 percent¹¹⁷ to 54.69 percent.

Given the Solicitor General's increased success, it is no surprise that the Court referenced the Solicitor General about 13 percent more often between 2005 and 2007 than it did been between 1946 and 1995.¹¹⁸

B. *Interpretation of Findings*

The results of this study should be considered in light of the reasons for and limitations resulting from the sample used. The purpose of this Note was to answer a simple, empirical question: How often has the young Roberts Court (and its constituent Justices) ruled (or voted) in favor of the party supported by the Solicitor General? Accordingly, the sample of cases analyzed was limited to the sixty-four cases during the 2005 and 2006 Supreme Court terms in which (1) the Solicitor General filed an amicus brief on the merits that clearly supported one party and (2) the Court issued a decision on the merits that clearly supported one party. This sample pales in comparison to the hundreds of cases analyzed by Kearney and Merrill and by Segal.¹¹⁹ Their studies were each more ambitious, attempting to explain the Court's behavior.¹²⁰ This Note is primarily descriptive—any inferences from the results regarding causation or future behavior are made cautiously due to the limited sample size and simplicity of analysis.

These restrictions also prevent fully comprehensive analysis of the Solicitor General's amicus participation because the sample ignores two

¹¹⁴ See Segal, *supra* note 1, at 141 tbl.8.

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See Kearney & Merrill, *supra* note 7, at 760.

¹¹⁹ See generally Kearney & Merrill, *supra* note 7 (using a sample of cases from 1946–1995); Segal, *supra* note 1 (using a sample of cases from 1953–1982).

¹²⁰ See generally Kearney & Merrill, *supra* note 7 (analyzing three models of judicial decision-making); Segal, *supra* note 1, at 141–42 (discussing factors affecting Justices' support for the solicitor general).

categories of what I will call “mixed” cases: (1) cases where the Solicitor General argued for a legal position that was not in line with the position of either party and (2) cases where the Court issued a decision that was not clearly in either party’s favor. In both sets of cases, the Solicitor General may have a meaningful, though subtle, interaction with the Court. However, this Note is far less concerned with those causal interactions than the sheer degree of agreement between the Court and the Solicitor General. Inclusion of the mixed cases would severely complicate the analysis while not revealing anything further about the branches’ concord. Future, intricate analysis should include these cases to obtain a better reflection of the Solicitor General’s role as an *amicus curiae*.

As alluded to above, the key contribution of this Note is the determination that the Roberts Court sided with the parties supported by the Solicitor General 89.06 percent of the time during its first two terms. Stated another way, when the Solicitor General was not a party, the party whose position was more in line with executive policy won judgment nearly nine times out of ten. As discussed below, the Court may or may not share the policy *preferences* of the executive branch. But speaking strictly in terms of policy *outcomes* and assuming that the Solicitor General bases its support on executive policy preferences, the Roberts Court has generally facilitated those policy preferences. As demonstrated in Part II.A, this degree of policy coordination is historically unparalleled.¹²¹ By the same token, the individual Justices’ votes are also coordinated with executive policy preferences at historic rates. Justices Kennedy and Alito both sided with the Solicitor General more than nine times out of ten. Even the so-called “liberal [J]ustices,”¹²² with the exception of Justice Stevens, all voted for the party supported by the Solicitor General in over 68 percent of the cases in the sample.

Causal issues aside, the Court also seems to have a clear consciousness of the Solicitor General’s participation. Within the sample, the majority explicitly mentioned the Solicitor General in more than one quarter of the cases, and at least one opinion either explicitly mentioned or cited the Solicitor General in more than half the cases. Interestingly, however, reference in opinions did not translate into success within the sub-sample of cases where the Solicitor General is explicitly mentioned by the majority; the Solicitor General actually had a lower success rate (77.78 percent) than it did in the entire sample (89.06 percent). This drop-off results from the fact that the majority opinion mentioned the Solicitor

¹²¹ This assertion comes with the caveat that I could not find studies of the Solicitor General’s *amicus* participation from 1995–2005.

¹²² See generally Alexander Tahk & Stephen Jessee, Supreme Court Ideology Project, <http://sct.tahk.us/> (last visited September 30, 2008) (using Bayesian ideal point estimation to measure the Justices’ ideologies).

General in all but one of the cases that it “lost,” and only 36.84 percent of the cases that it “won.” I hesitantly interpret these statistics to suggest that the Court feels a degree of accountability toward the Solicitor General. When the Court decides against the Solicitor General, it may feel the need to justify any departures from the government’s position. This accountability, if actually present, might be evidence of the Solicitor General’s authority before the Court and of its influence on the Court’s decisions. This chain of inferences is patently attenuated, however. If accountability exists, it may be merely nominal, existing in the absence of influence. The accountability itself may be absent as well. That inference is drawn from a sample of the Solicitor General’s seven losses—hardly a large enough sample to warrant confident generalization. With that in mind, the best conclusion that can be drawn from the Court’s reference to the Solicitor General is that the Justices at least take notice of its arguments, especially when it disagrees with them.

Despite these analytical difficulties, nihilism toward the causal question would be cowardly. The Court behaves differently when the Solicitor General is an amicus. A petitioner supported by the Solicitor General is more likely to win than the average petitioner, and a respondent supported by the Solicitor General is more likely to win than the average respondent. This variation must be caused by something.¹²³ We can make at least modest progress toward finding out what that *something* is with this Note’s analysis and the aid of previous studies of amicus participation. Broadly speaking, there seem to be three potential causal explanations for the fact that the Court usually rules in favor of the party supported by the Solicitor General:

- (1) The Court, in its decisions, is influenced by the Solicitor General’s position;
- (2) The Solicitor General, in selecting which party to support, is influenced by how the Court is likely to rule; or
- (3) The Court’s judgment and the Solicitor General’s decision over which party to support are caused by external variables, rather than any interaction between the two actors.

There are reasons for accepting and rejecting each explanation. Further, it is possible that more than one of these explanations work in combination.

The first causal explanation has two primary variants, corresponding to different models of judicial decision-making. Under the Legal

¹²³ I will spare the reader a metaphysical discourse on whether everything is necessarily caused by something else.

Model,¹²⁴ the Solicitor General's success should be attributable to its ability to provide the Court with persuasive legal arguments. The Solicitor General's office "repeatedly receives high grades for the quality of its legal arguments."¹²⁵ The conventional wisdom is that the Solicitor General is uniquely successful because it "speaks with special authority."¹²⁶ Still, the same realist skepticism that is levied against the Legal Model itself can be deployed against this explanation.¹²⁷ Alternatively, the Court may simply defer to the interests of the executive branch under a more Attitudinal- or Interest Group-based Model.¹²⁸ This conception also has its weaknesses. While one might suggest that Justices defer to the views of the Solicitor General for strategic reasons or because they assume that the executive branch will endorse politically popular positions, the Solicitor General often files amicus briefs on issues as to which the executive branch has had little or no views or preferences¹²⁹

Claims that the Solicitor General brings a distinctive and influential reputation to the Supreme Court have little empirical foundation.¹³⁰ No direct evidence suggests that the Solicitor General's success results from careful case-selection or a reputation for neutrality and political independence.¹³¹ Like this study, prior empirical assessments of the Solicitor General's success tend to consider only the Solicitor General's presence or absence in litigation, and neglect the extent to which qualities attributed to the Solicitor General might be found amongst other parties and amici appearing before the Court.¹³² The key to the Solicitor General's success may simply be the Office's extraordinary experience before the Court.¹³³ Repeat players enjoy "a substantial measure of success over the less frequent litigant."¹³⁴ "They benefit from advance intelligence, access to specialists, a wide range of resources, expertise, opportunities to build informal relations with the Court, and a high degree of credibil-

¹²⁴ See *supra* text accompanying notes 18–23.

¹²⁵ See Segal, *supra* note 1, at 138 (offering Justice Brennan's observation that the "ablest advocates in the U.S. are advocates in the Solicitor General's Office")

¹²⁶ See Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505, 510 (1998) (quoting Joseph Tanenhaus et al., *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, in JUDICIAL DECISION-MAKING 112, 115 (Glendon Schubert ed., 1963)).

¹²⁷ See *supra* note 23 and accompanying text.

¹²⁸ See *supra* text accompanying notes 24–39.

¹²⁹ See Kearney & Merrill, *supra* note 7, at 818.

¹³⁰ See McGuire, *supra* note 126, at 505. "The great difficulty with such analysis is that its theoretical foundation rests on a circular argument: The basis for the prediction that the solicitor general will win—that the federal government will succeed because of its unique status in the eyes of the Justices—is based largely upon the knowledge that the solicitor general prevails more often than any other litigant." *Id.* at 508.

¹³¹ See *id.* at 507.

¹³² See *id.* at 507–08; see, e.g., Kearney & Merrill, *supra* note 7.

¹³³ See McGuire, *supra* note 126, at 506–07.

¹³⁴ See SALOKAR, *supra* note 65, at 31.

ity before the Court.”¹³⁵ In fact, Kevin McGuire’s work indicates that the impact of Solicitor General on outcomes (when appearing at oral argument) disappears completely when one controls for overall litigation experience.¹³⁶

McGuire’s findings deserve three important qualifications, however. First, his data set is limited to cases argued between 1977 and 1982.¹³⁷ Because his results were statistically significant, the narrowness of his data set is not much of a problem itself. However, the age of his data set makes extrapolation of his findings difficult. The nature of the Solicitor General’s impact on outcomes may look different now than it did twenty five years ago; its success certainly does. Second, McGuire only considered the impact of litigants appearing at oral argument,¹³⁸ failing to focus on the particular impact of *amici curiae*. The Solicitor General may influence Court outcomes differently as an *amicus* than it does in the broader sample of cases in which it appears as a party. Finally, even if the Solicitor General’s success “is simply an artifact of superior litigation experience,”¹³⁹ the Solicitor General still holds a unique role. It is the definitive repeat player.¹⁴⁰ While the Court might not respond directly to the fact that the Solicitor General speaks for the federal government, the Solicitor General’s unparalleled litigation experience, to which the Court apparently does respond, is surely attributable to its unique client. Stated otherwise, while the Solicitor General may differ from other Supreme Court litigants only in degree and not in kind, that difference is enormous and results directly from the fact that it represents the executive branch. All of that aside, McGuire’s work does not really challenge the hypothesis that the Solicitor General’s presence as an *amicus* influences Court outcomes; at most, he bounds that influence and rejects its conventional justification.

The second causal hypothesis is that the Solicitor General succeeds so often because it simply supports the side most likely to win. This hypothesis does find some support in the results of this Note’s analysis. If the Solicitor General supported “favorites” with some regularity, unanimous decisions should tend to fall with the party supported by the Solicitor General. This prediction is based on the conservative premise that cases with unanimous decisions—uniting an ideologically diverse

¹³⁵ *See id.*

¹³⁶ *See* McGuire, *supra* note 126, at 511–16 (analyzing data on all orally argued cases in the Supreme Court from 1977 to 1982). McGuire also tested the hypothesis that litigation experience had a disproportionate benefit on the Solicitor General’s success and found no unique effect. *See id.* at 519–20.

¹³⁷ *Id.* at 511–12.

¹³⁸ *Id.* at 512.

¹³⁹ *Id.* at 511.

¹⁴⁰ SALOKAR, *supra* note 65, at 31.

Court—were probably doctrinally easy cases with predictable outcomes. Indeed, 90.91 percent of the unanimous decisions in the sample favored the party supported by the Solicitor General.¹⁴¹ Positing for the moment that the Solicitor General placed its support with projected winners, the Solicitor General got most of the easy cases right. But considering that only 52.63 percent of the Solicitor General's wins had unanimous decisions, a large portion of its success is left unexplained. The Solicitor General was only slightly less successful in cases without unanimous decisions, supporting the winning party in 87.1 percent of those cases. Although it is possible that the Solicitor General bases its support on remarkable predictive skills, there is no clear empirical support for that conclusion in my analysis.

Collins tested the general hypothesis that amici are a priori more likely to file briefs with the winning side.¹⁴² During the period examined, 1953–1985, petitioners and respondents were supported by roughly the same number of amicus briefs and participants, despite the petitioner's well-recognized advantage in the Court.¹⁴³ Further, the mean number of briefs filed in support of the predicted winner differed minimally and statistically insignificantly from the number filed in support of the predicted loser.¹⁴⁴ “These tests provide evidence that amici do not self-select winners, or that they are not very good at it if they do”¹⁴⁵ However, the Solicitor General may be an exception to this general rule for at least two reasons. First, the Solicitor General appears before the Court more often than other amici¹⁴⁶ and, as such, may be especially self-conscious of its reputation before the Court. In cases where the Executive has only marginal policy preferences, the Solicitor General may support a predicted winner in order to bolster its reputation for objectivity. Second, the Solicitor General succeeds far more frequently than the average amicus.¹⁴⁷ In light of this singular success, facts regarding the strategic behavior of the average amicus curiae should not be hastily applied to the Solicitor General.

The final hypothesis is that the Solicitor General's success results neither from the Solicitor General's influence on the Court nor a tendency for the Solicitor General to support the party most likely to win; instead, some independent forces cause the Solicitor General and the

¹⁴¹ See *supra* tbl.D.

¹⁴² See Collins Jr., *supra* note 10, at 821–22.

¹⁴³ See *id.* at 821.

¹⁴⁴ See *id.* at 821–22 (predicting winners by running a logic model without amicus curiae variables).

¹⁴⁵ *Id.* at 822.

¹⁴⁶ See *id.* (dubbing the Solicitor General the quintessential repeat player in Supreme Court adjudication).

¹⁴⁷ See *supra* note 1–5 and accompanying text.

Court to favor the same parties. This hypothesis encompasses several possible explanations, but I will focus on two. First, the Justices may vote according to their own policy preferences, which just so happen to be in line with the policy preferences of the Executive Branch. Unlike the attitudinal variant of the first hypothesis—that the Court sides with the Solicitor General out of deference to Executive policy preferences—this hypothesis suggests that judges base their voting on independent policy preferences.¹⁴⁸ This explanation is threatened by the finding that liberal Justices voted for the party supported by a Solicitor General under the direction of a Republican administration at relatively high rates.¹⁴⁹ The response is that conventional liberal policy preferences are not that far from the conservative preferences of the Bush administration. This response is, however, empirically unfounded¹⁵⁰ and anecdotally suspect. If this variant were accurate, there would have been greater variation in the Solicitor General's success rates across the different administrations.¹⁵¹

A second variant of the final hypothesis, in line with the Legal Model, is that the Executive's policy preferences happen to be aligned with the policy outcomes resulting from the Justices' legal approaches. This variant seems better able to explain the across-the-Court coordination with the Solicitor General than the attitudinal variant. The premise that outstanding jurists tend to agree on legal issues seems more intuitively plausible than the premise that they tend to have similar policy preferences. But despite this intuitive appeal, the policy outcomes resulting from judges' votes actually vary significantly when all cases are examined.¹⁵² Accordingly, the legal variant also fails to fully explain the phenomenon.

In the end, the causal force behind the Solicitor General's success as an amicus remains veiled. Each of the hypotheses suggested above has its merits, and each is readily susceptible to criticism. McGuire's legal experience explanation is probably the least-contested explanation, but it does not carry the inquiry particularly far from the starting point. Perhaps the Solicitor General's extraordinary experience does account for

¹⁴⁸ Indirectly, the Executive still would play a role, because it is appointing the Justices. However, the current Executive would not have the Court-wide influence that it would under the attitudinal variant of the first hypothesis, because it would only have appointed a few Justices.

¹⁴⁹ See McGuire, *supra* note 126, at 512–13.

¹⁵⁰ One might argue that the liberal Justices' rates of agreement are evidence that their policy preferences are not far from "conservative" policy preferences. This argument puts the cart before the horse, assuming what is to be proved—namely, that Justices vote according to their policy preferences. Such a premise requires independent proof.

¹⁵¹ See Segal, *supra* note 1, at 139 tbl.4 (listing the success rates for Solicitors General, by administration, during the Warren and Burger Courts).

¹⁵² See Tahk & Jessee, *supra* note 122.

most of its success as an amicus; but what does that mean? Does this experience actually influence the Court's decision-making? If so, how does that experience translate into influence? Does the experience influence the Solicitor General's choice over which party to support? Or does the experience operate in some other way?

The Solicitor General's success is probably best explained by a combination of causes, in proportions yet unknown. My impression is that the Solicitor General's success is mostly attributable to agreement between the Executive Branch's policy preferences and the policy outcomes resulting from the Justices' legal approaches. Although the so-called "liberal" Justices may be clearly distinguishable from the so-called "conservative" Justices, the possibility that the divergence between the two sets of Justices is qualitatively not that great and quantitatively not that frequent seems entirely reasonable. Nine of the nation's greatest jurists *should* substantially agree on doctrine, disagreeing only at the margins. If this explanation is valid, the Solicitor General's spike in success before the Roberts Court should be unsurprising. A Solicitor General representing a Republican administration should be more successful when five conservative appointees sit on the court.¹⁵³ Presumably, nominees are selected for their likelihood to rule in favor of the administration's, and consequently, the political party's policy preferences.¹⁵⁴ But despite the intuitive appeal of these explanations, they are empirically unfounded or, at most, as empirically founded as the other explanations presented above. The results of my analyses have presented two interesting questions: first, why was the Solicitor General so successful during this period, and second, why was the Solicitor General more successful during this period than it has been historically? I suspect that the ultimate answers to these two questions will be related. For now, however, the purely descriptive conclusion—the Solicitor General's immense success as an amicus—must suffice.

CONCLUSION

This Note analyzed the Solicitor General's success as an amicus curiae before the Supreme Court during the first two years of the Roberts Court. It found that the party supported by the executive's advocate won judgment nearly 90 percent of the time. This rate of success far sur-

¹⁵³ See generally Robert Barnes, *In Second Term, Roberts Court Defines Itself; Many 5 to 4 Decisions Reflect Narrowly Split Court That Leans Conservative*, WASH. POST, June 25, 2007, at A3.

¹⁵⁴ This *political* explanation of judicial results does not require us to accept the Attitudinal Model of judicial decision-making. Judges may decide cases in accordance with their understanding of the requirements of the authoritative sources of law relevant to the question presented although the results obtained coincide with a distinctive policy outlook, like the Executive's. See *supra* text accompanying notes 18–23.

passes those from earlier periods. Correspondingly, the individual Justices consistently sided with the Solicitor General. All of the Justices voted for the party supported by the Solicitor General more than half the time, and all but one of the Justices did so more than two thirds of the time.

The safest conclusion to be drawn from the analysis is purely descriptive: when the Solicitor General supported a party as an amicus, that party won judgment at an exceptionally high rate. From this, we can probably infer that the Court's policy outcomes were highly coordinated with the Bush administration's policy preferences. Nonetheless, even this seemingly safe inference requires the assumption that the Solicitor General selects which party to support based upon its policy preferences. The possibility that selections are based on other criteria, i.e., which party is more likely to win is plausible and has not been empirically rejected. However, the nature of the Solicitor General as the Executive's advocate creates a strong intuitive impression that it most likely adopts the position best aligned with the administration's policy preferences. Consequently, I cautiously conclude that there has been a relatively high degree of policy coordination between the Executive and the Judiciary during the first two years of the Roberts Court.

Policy coordination has independent significance, because it represents how much, or, as in this case, how little, opposition the executive faced in its policy goals from the judiciary. Many will be concerned with the low level of opposition both in terms of the political result and the structural implication. Those opposed to the policies of the Bush administration will be understandably concerned with the fact that the Court tends to issue decisions in line with the administration's policies. The Court may continue its alignment with the next administration if that administration maintains policies substantially similar to those of the Bush administration or it may offer significant resistance to an administration with substantially different policies. The Solicitor General's success may also have an implication that transcends mere partisanship and goes to the structural root of our democracy. It may signal the erosion of the separateness between the Executive and Judicial branches. The policy coordination revealed in this Note may be systematic rather than merely coincidental. Perhaps the Court is abdicating its independence by deferring a priori to the position of the presidential administration.

This separation of powers concern is certainly reasonable, but it depends upon causal inferences from the data. As Part II.B should have demonstrated, there is no clear explanation for the Solicitor General's success as of yet. Finding that explanation will take more intricate and creative analysis than this Note—and, for that matter, the existing literature—has been able to muster. As is the custom in empirical work, I

conclude by inviting further study of this curious phenomenon. While this Note examined the period at the very beginning of the Roberts Court, it also examined the end of the Bush administration. Time will tell if the high degree of policy coordination was merely an aberration, resulting from the particular administration, or a fairly stable phenomenon, resulting from the make-up of the Roberts Court, or a new fixture, resulting from the nature of the modern Supreme Court.

APPENDIX A: CASE DATA¹

Case Name	Solicitor General	Court ²	Roberts	Stevens	Scalia	Souter	Thomas	Kennedy	Breyer	Ginsburg	Alito ³	Mention or Citation in Majority Opinion ⁴	General Mention or Citation ⁵
IBP, Inc. v. Alvarez ⁶	R	R(St)	R	R	R	R	R	R	R	R		M	Yes
Wagon v. Prairie Band Potawatomi Nation ⁷	R	P(Th)	P	P	P	P	P	R	P	R		M	Yes
Texaco v. Dagher ⁸	P	P(Th)	P	P	P	P	P	P	P	P		None	No
Oregon v. Guzek ⁹	P	P(Br)	P	P	P	P	P	P	P	P		None	No
Arbaugh v. Y & H Corp. ¹⁰	P	P(Gi)	P	P	P	P	P	P	P	P		C	Yes
Martin v. Franklin Capital ¹¹	R	R(Ro)	R	R	R	R	R	R	R	R		M	Yes
Ayotte v. Planned Parenthood ¹²	P	P(O'C)	P	P	P	P	P	P	P	P		None	No

¹ Listed below are all United States Supreme Court cases heard between the Fall 2005 and Spring 2007 in which the Solicitor General filed an amicus brief on the merits that clearly supported one party, and the Court issued a decision on the merits that clearly supported one party. See Office of the Solicitor General, <http://www.usdoj.gov/osg/briefs/brieftype.htm/> (last visited Feb. 13, 2008). "P" or "R" indicates whether the Solicitor General, the Court, or a particular justice support the petitioner or respondent. "DNP" indicates that the justice did not participate in the decision.

² This column references which side the majority opinion supported as well as the author of the Court's majority opinion, abbreviated by the first two letters of the Justice's last name.

³ The Honorable Samuel A. Alito, Jr. took his seat as an Associate Justice on February 16, 2006. 546 U.S. Part 2, I.

⁴ This column references whether the majority opinion explicitly mentioned or cited the Solicitor General or its brief. "M" and "C" distinguish between a mention and a citation. In almost every case, an explicit mention is followed by a citation, but a citation may appear without an explicit mention.

⁵ This column references whether there was an explicit mention or citation to the Solicitor General or its brief in any opinion written for the case, generally.

⁶ 546 U.S. 21 (2005).

⁷ 546 U.S. 95 (2005).

⁸ 547 U.S. 1 (2006).

⁹ 546 U.S. 517 (2006).

¹⁰ 546 U.S. 500 (2006).

¹¹ 546 U.S. 132 (2005).

¹² 546 U.S. 320 (2006).

Case Name	Solicitor General	Court	Roberts	Stevens	Scalia	Souter	Thomas	Kennedy	Breyer	Ginsburg	Alito	Mention or Citation in Majority Opinion	General Mention or Citation
Wachovia Bank v. Schmidt ¹³	P	P(Gi)	P	P	P	P	DNP	P	P	P		C	Yes
Scheidler v. Nat'l Org. for Women ¹⁴	P	P(Br)	P	P	P	P	P	P	P	P		C	Yes
Day v. McDonough ¹⁵ (Day)	R	R(Gi)	R	P	P	R	P	R	P	R	R	None	No
Illinois Tool Works v. Indep. Ink ¹⁶	P	P(St)	P	P	P	P	P	P	P	P		None	No
Hudson v. Michigan ¹⁷	R	R(Sc)	R	P	R	P	R	R	P	P	R	None	Yes
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit ¹⁸	P	P(St)	P	P	P	P	P	P	P	P		None	No
Jones v. Flowers ¹⁹	R	P(Ro)	P	P	R	P	R	R	P	P		M	Yes
ADHHS v. Ahlborn ²⁰	P	R(St)	R	R	R	R	R	R	R	R	R	M	Yes
S.D. Warren Co. v. Maine Bd. of Env'tl. Prot. ²¹	R	R(So)	R	R	R	R	R	R	R	R	R	None	No
Marshall v. Marshall ²²	P	P(Gi)	P	P	P	P	P	P	P	P	P	None	No
N. Ins. Co. v. Chatham County ²³	P	P(Th)	P	P	P	P	P	P	P	P	P	None	No

¹³ 546 U.S. 303 (2006).
¹⁴ 547 U.S. 9 (2006).
¹⁵ 547 U.S. 198 (2006).
¹⁶ 547 U.S. 28 (2006).
¹⁷ 547 U.S. 586 (2006).
¹⁸ 547 U.S. 71 (2006).
¹⁹ 547 U.S. 220 (2006).
²⁰ 547 U.S. 268 (2006).
²¹ 547 U.S. 370 (2006).
²² 547 U.S. 293 (2006).
²³ 547 U.S. 189 (2006).

Case Name	Solicitor General	Court	Roberts	Stevens	Scalia	Souter	Thomas	Kennedy	Breyer	Ginsburg	Alito	Mention or Citation in Majority Opinion	General Mention or Citation
<i>Beard v. Banks</i> ²⁴	P	P(Br)	P	R	P	P	P	P	P	R		None	No
<i>Samson v. California</i> ²⁵	R	R(Th)	R	P	R	P	R	R	P	R	R	C	Yes
<i>Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy</i> ²⁶	P	P(Al)	P	R	P	R	P	P	R	P	P	None	No
<i>Sanchez-Llamas v. Oregon; Bustillo v. Johnson</i> ²⁷	R	R(Ro)	R	P	R	P	R	R	P	R	R	M	Yes
<i>Washington v. Recuenco</i> ²⁸	P	P(Th)	P	R	P	P	P	P	P	R	P	None	No
<i>eBay, Inc. v. MercExchange, L.L.C.</i> ²⁹	R	P(Th)	P	P	P	P	P	P	P	P	P	None	No
<i>Empire Healthcare Assurance, Inc. v. McVeigh</i> ³⁰	P	R(Gi)	R	R	R	P	R	P	P	R	P	M	Yes
<i>Burlington N. & Santa Fe Ry. v. White</i> ³¹	R	R(Br)	R	R	R	R	R	R	R	R	R	M	Yes
<i>Sereboff v. Mid Atl. Med. Servs., Inc.</i> ³²	R	R(Ro)	R	R	R	R	R	R	R	R	R	None	No
<i>Woodford v. Ngo</i> ³³	P	P(Al)	P	R	P	R	P	P	P	R	P	M	Yes

²⁴ 548 U.S. 521 (2006).

²⁵ 547 U.S. 843 (2006).

²⁶ 548 U.S. 291 (2006).

²⁷ 548 U.S. 331 (2006).

²⁸ 548 U.S. 212 (2006).

²⁹ 547 U.S. 388 (2006).

³⁰ 547 U.S. 677 (2006).

³¹ 548 U.S. 53 (2006).

³² 547 U.S. 356 (2006).

³³ 548 U.S. 81 (2006).

Case Name	Solicitor General	Court	Roberts	Stevens	Scalia	Souter	Thomas	Kennedy	Breyer	Ginsburg	Alito	Mention or Citation in Majority Opinion	General Mention or Citation
Brigham City v. Stuart ³⁴	P	P(Ro)	P	P	P	P	P	P	P	P	P	None	No
MedImmune, Inc. v. Genentech, Inc. ³⁵	P	P(Sc)	P	P	P	P	R	P	P	P	P	None	No
Davis v. Washington ³⁶	R	R(Sc)	R	R	R	R	R	R	R	R	R	M	Yes
Hammon v. Indiana ³⁷	R	P(Sc)	P	P	P	P	R	P	P	P	R	M	Yes
Clark v. Arizona ³⁸	R	R(So)	R	P	R	R	R	P	P	P	R	None	Yes
Hill v. McDonough ³⁹	R	P(Ke)	P	P	P	P	P	P	P	P	P	M	Yes
KSR Int'l Co. v. Teleflex, Inc. ⁴⁰	P	P(Ke)	P	P	P	P	P	P	P	P	P	None	No
Powerex Corp. v. Reliant Energy Servs., Inc. ⁴¹	P	P(Sc)	P	R	P	P	P	P	R	P	P	M	Yes
Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co. ⁴²	P	P(Th)	P	P	P	P	P	P	P	P	P	None	No
Whorton v. Bockting ⁴³	P	P(Al)	P	P	P	P	P	P	P	P	P	None	No
Global Crossing Telecommc'ns, Inc. v. Metrophones Telecommc'ns, Inc. ⁴⁴	R	R(Br)	R	R	P	R	P	R	R	R	R	None	No

³⁴ 547 U.S. 398 (2006).
³⁵ 549 U.S. 118 (2007).
³⁶ 547 U.S. 813 (2006).
³⁷ *Id.*
³⁸ 548 U.S. 735 (2006).
³⁹ 547 U.S. 573 (2006).
⁴⁰ 550 U.S. 398 (2007).
⁴¹ 551 U.S. 224 (2006).
⁴² 549 U.S. 312 (2007).
⁴³ 549 U.S. 406 (2007).
⁴⁴ 550 U.S. 45 (2007).

Case Name	Solicitor General	Court	Roberts	Stevens	Scalia	Souter	Thomas	Kennedy	Breyer	Ginsburg	Alito	Mention or Citation in Majority Opinion	General Mention or Citation
Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 ⁴⁵	P	P(Ro)	P	R	P	R	P	P	R	R	P	None	Yes
Meredith v. Jefferson County Bd. of Educ. ⁴⁶	P	P(Ro)	P	R	P	R	P	P	R	R	P	None	Yes
Winkelman v. Parma City Sch. Dist. ⁴⁷	P	P(Ke)	P	P	P	P	P	P	P	P	P	None	Yes
Marrama v. Citizens Bank ⁴⁸	R	R(St)	P	R	P	R	P	R	R	R	P	M	Yes
Microsoft Corp. v. AT&T Corp. ⁴⁹	P	P(Gi)	DNP	R	P	P	P	P	P	P	P	M	Yes
Ledbetter v. Goodyear Tire & Rubber Co. ⁵⁰	R	R(Al)	R	P	R	P	R	R	P	P	R	None	No
Bell Atl. Corp. v. Twombly ⁵¹	P	P(So)	P	R	P	P	P	P	P	R	P	C	Yes
Credit Suisse Sec. v. Billing ⁵²	P	P(Br)	P	P	P	P	R	DNP	P	P	P	M	Yes
Watson v. Philip Morris Cos. ⁵³	P	P(Br)	P	P	P	P	P	P	P	P	P	None	No
Watters v. Wachovia Bank, N.A. ⁵⁴	R	R(Gi)	P	P	P	R	DNP	R	R	R	R	C	Yes

⁴⁵ 551 U.S. 701 (2007).

⁴⁶ *Id.*

⁴⁷ 550 U.S. 516 (2007).

⁴⁸ 549 U.S. 365 (2007).

⁴⁹ 550 U.S. 437 (2007).

⁵⁰ 550 U.S. 618 (2007).

⁵¹ 550 U.S. 544 (2007).

⁵² 551 U.S. 264 (2007).

⁵³ 551 U.S. 142 (2007).

⁵⁴ 550 U.S. 1 (2007).

Case Name	Solicitor General	Court	Roberts	Stevens	Scalia	Souter	Thomas	Kennedy	Breyer	Ginsburg	Alito	Mention or Citation in Majority Opinion	General Mention or Citation
Beck v. PACE Int'l Union ⁵⁵	P	P(Sc)	P	P	P	P	P	P	P	P	P	C	Yes
Scott v. Harris ⁵⁶	P	P(Sc)	P	R	P	P	P	P	P	P	P	None	No
Washington v. Washington Educ. Ass'n; Davenport v. Washington Educ. Ass'n ⁵⁷	P	P(Sc)	P	P	P	P	P	P	P	P	P	None	No
Safeco Ins. Co. of Am. v. Burr; GEICO Gen. Ins. Co. v. Edo ⁵⁸	P	P(So)	P	P	P	P	P	P	P	P	P	M	Yes
Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp. ⁵⁹	P	P(Gi)	P	P	P	P	P	P	P	P	P	None	No
Permanent Mission of India to the U.N. v. City of New York ⁶⁰	P	P(Th)	P	R	P	P	P	P	R	P	P	None	Yes
Morse v. Frederick ⁶¹	P	P(Ro)	P	R	P	R	P	P	P	R	P	C	Yes
Uttecht v. Brown ⁶²	P	P(Ke)	P	R	P	R	P	P	R	R	P	None	No
Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad. ⁶³	P	P(St)	P	P	P	P	P	P	P	P	P	None	No

⁵⁵ 551 U.S. 96 (2007).⁵⁶ 550 U.S. 372 (2007).⁵⁷ 551 U.S. 177 (2007).⁵⁸ 551 U.S. 47 (2007).⁵⁹ 549 U.S. 422 (2007).⁶⁰ 551 U.S. 193 (2007).⁶¹ 551 U.S. 393 (2007).⁶² 551 U.S. 1 (2007).⁶³ 551 U.S. 291 (2007).

Case Name	Solicitor General	Court	Roberts	Stevens	Scalia	Souter	Thomas	Kennedy	Breyer	Ginsburg	Alito	Mention or Citation in Majority Opinion	General Mention or Citation
Leegin Creative Leather Prods., Inc. v. PSKS, Inc. ⁶⁴	P	P(Ke)	P	R	P	R	P	P	R	R	P	M	Yes
Tellabs, Inc. v. Maakor Issues & Rights, Ltd. ⁶⁵	P	P(Gi)	P	P	R	P	P	P	P	P	P	C	Yes
Sole v. Wyner ⁶⁶	P	P(Gi)	P	P	P	P	P	P	P	P	P	None	No
Long Island Care at Home v. Coke ⁶⁷	P	P(Br)	P	P	P	P	P	P	P	P	P	None	No
Fry v. Piller ⁶⁸	R	R(Sc)	R	R	R	R	R	R	R	R	R	None	Yes
Bowles v. Russell ⁶⁹	R	R(Th)	R	P	R	P	R	R	P	P	R	None	No

⁶⁴ 551 U.S. 877 (2007).

⁶⁵ 551 U.S. 308 (2007).

⁶⁶ 551 U.S. 74 (2007).

⁶⁷ 551 U.S. 158 (2007).

⁶⁸ 551 U.S. 112 (2007).

⁶⁹ 551 U.S. 205 (2007).

