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LAWYERS, ORGANIZED INTERESTS, AND THE LAW OF OBSCENITY: AGENDA SETTING IN THE SUPREME COURT

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Each year thousands of cases and litigants come to the Supreme Court. How can the Court find the most important cases to decide? The law of obscenity illustrates particularly well the Court's problem as it constructs its plenary agenda. Using data drawn from petitions for certiorari and jurisdictional statements filed with the Supreme Court from 1955 to 1987, we formulate and test a model of case selection in which professional obscenity lawyers and organized interests figure as critical elements in the process of agenda building. We also encounter strong evidence of the Court's differential treatment of several different litigants. Moreover, the calculus of selection changed markedly over time, as the Court itself changed; the Burger Court and Warren Court weighed several of the criteria quite differently.

From thousands of candidates each term, the Supreme Court chooses one hundred or so cases for plenary review. This is one of the most important facets of the Court's job in the political process, for its agenda reflects choices on policy. And case selection is not a simple matter. The Court must look not only for appropriate legal vehicles and likely targets for reversal but also for cases of political, social, and economic import. A great deal is known about how the Court, in general, selects cases (see, e.g., Caldeira and Wright 1988, 1990; Perry 1991; Ulmer 1984)—but next to nothing about how this winnowing takes place in particular areas of law. We shall analyze litigation in the law of obscenity, a relatively well defined area. This set of cases permits us to illustrate the generic problems of agenda building in a richer context—the interplay of policy and doctrine, factual situations, and combinations of litigants. The multitude of peculiar, often bizarre sets of facts and conflicting legal assertions associated with this area magnifies the Court's more general problem of locating and utilizing reliable information in the development of a plenary docket and makes it an especially good target for research on agenda setting.

Friends of the court constitute one credible source of assistance in this process. Caldeira and Wright (1988, 1990) have demonstrated the force of organized third parties in the formation of the Court's agenda. We build on that theoretical and evidentiary base but weave an additional thread into the fabric—the role of the bar in these choices. We set forth a theoretical framework in which both organized interests and professional obscenity litigators figure prominently in the selection of cases. To create its agenda of cases in the law of obscene expression, the Court relies not only on the briefs of third parties but also on the presence or absence of members of the libertarian "obscenity bar" (a set of litigators experienced in these issues) to draw its attention to the cases of potentially broad impact on public policy. We ask the questions, Do experienced litigators make a difference, above and beyond the usual considerations? If so, how and why? Did organized interests as amici increase the chances of cases? Did the Supreme Court respond differentially to the claims of different classes of litigants? Did the calculus of the Court in the law of obscenity shift as the membership turned over and the Burger Court emerged?

THE CONTEXT OF OBSCENITY LITIGATION

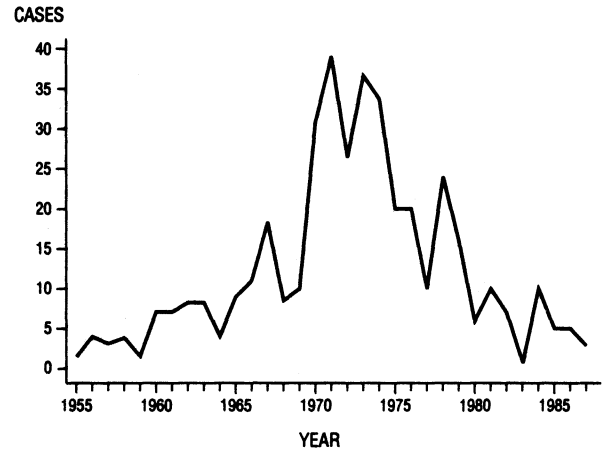
Deciding what constitutes obscene expression and by what means the state may legitimately control it has been the source of considerable frustration for the justices. The difficulty associated with that process is reflected, at least in part, in the Court's jagged jurisprudence in this area (Kalven 1960; Krislov 1968; Lockhart and McClure 1954; Magrath 1966; Schauer 1976; Stone et al. 1986; Tribe 1988). Finding the most appropriate cases for resolving these issues has proved equally problematic for the Court, since so many of the petitions, while advancing broad constitutional claims, are punctuated by peculiar erotica. Obscenity, therefore, provides a useful setting for exploring how lawyers and organized interests assist the Court in the complex process of locating issues of true national consequence.

Figure 1 provides a traceline of filings on obscenity in the Supreme Court from 1955 through 1987. By our definition of obscenity, litigants filed 410 cases in this period. This number includes petitions for certiorari and writs of appeal from both libertarian claimants and governmental agencies. Prior to and immediately after the Court's initial ruling in *Roth* v. *United States* (1957), libertarians filed only a handful of cases each term. *Roth*, however, apparently invited further litigation, as the number of filings began a secular trend upward, albeit around a couple of valleys.

Opinions among the justices on the appropriate

FIGURE 1

Obscenity Petitions before the Supreme Court, 1955–87



standards for obscene expression soon became fractured. For several years, beginning in *Redrup* v. *New York* (1967), the Court gave up altogether the quest for a standard and adopted the practice of *per curiam* reversals of convictions for the sale or exhibition of materials if five or more members, using various tests, did not view the materials in question as obscene. A good many emboldened libertarians of one sort or another responded in kind, petitioning the Court with greater frequency. Lawyers for libertarian losers in the lower courts, under *Redrup*, had little to lose and much to gain from a try in the Supreme Court.

Enter the Burger Court. In *Miller* v. *California* (1973), the Court abandoned the practice of *Redrup* and a majority adopted a new test, one that clearly took a much dimmer view of obscene matter than had the Warren Court (Lockhart 1975; Schauer 1979). From that point, we see a secular decline in obscenity filings; and this actually understates the proportional decline, since the caseload of the Court was much smaller in the 1950s and 1960s. For several years after *Miller*, the Court maintained a heavy dose of obscenity cases on its docket, as libertarians and proscriptionist litigants explored the limits of the doctrine of *Miller*. By the 1980s, however, the flow of cases had subsided. All of these numbers suggest in broad terms a connection between the actions of the Court as a policymaker and the choices of litigants in the courts below regarding whether to seek review in the Supreme Court. Many of those choices were shaped by organized interests and professional litigators, actors who have had a major hand in the development of the law of obscenity in the Supreme Court.

From the mid-1950s to the present, obscenity litigation has provided fertile ground for organized efforts of various sizes and kinds.[1] Twenty-four organizations participated, in one guise or another, in support of the libertarian position during the period of our research. Some of the organizations represented "commercial" interests, such as the American Booksellers Association and the Adult Film Association of America; others stood up for professional and occupational interests, such as the Authors League and the American Library Association. One or more of these organizations participated, in some fashion or another, in more than a half of the obscenity cases decided on the merits in the Court.

In contrast, organized interests filed a brief amicus curiae prior to certiorari or jurisdiction in only 24 of the 410 cases in our sample. This number seems small, but it actually compares favorably with the rate of briefs amicus curiae filed prior to certiorari or jurisdiction in a recent term of the Court (Caldeira and Wright 1988, 1990). Nevertheless, the contrast between the density of participation in agenda setting and the decision on the merits strikes us as noteworthy. Participation prior to certiorari or jurisdiction entails greater costs and has a higher threshold. Of the 24 organizations that filed a brief amicus curiae on the merits, only a handful filed one or more during the formation of the Court's plenary agenda. Most of these organizations filed or joined only a single brief prior to certiorari or jurisdiction but several did participate on multiple occasions. Among those endorsing the libertarian interests were the American Civil Liberties Union, the Authors League, the American Book Publishers Council, the Council for Periodical Distributors Association, and the National Association of Theatre Owners. On the proscriptionist side, the Citizens for Decency through Law and the State of Georgia took part as amici prior to the merits.

Over the years, many lawyers for libertarian clients gained experience, expertise, and reputation. These private lawyers and law firms soon constituted an "obscenity bar"—a set of practitioners who regularly litigated questions of obscene expression and who gained prominence as defenders of libertarian positions and people. Indeed, by the mid-1970s, these lawyers had founded a professional organization, the First Amendment Lawyers Association, to which some 125 practitioners belonged. By our counting, members of the obscenity bar appeared for a petitioner in substantially more than half of the cases filed in the Court from 1955 through 1987. The obscenity bar's extraordinary rate of participation as direct representatives of libertarian claimants helps to make sense of the relatively low density of organized efforts as amici curiae prior to the decision on the merits. Obscenity lawyers can serve as the functional equivalents of interest groups in experience, access to information, and reputation in the Supreme Court (see McGuire 1993).

In short, despite the frivolous nature of many of the cases in this issue area, litigation on obscenity has featured an environment rich with organizational participation and sophisticated litigators who have served to articulate significant concerns to the members of the Supreme Court. What role, then, did these interest groups and the appellate practitioners play in the process of agenda building?

THEORETICAL FRAMEWORK

We assume a set of justices who prefer some policies on the restriction or protection of sexual expression over others on ideological or other grounds, who normally seek to implement these goals and do so by selecting a set of cases with the greatest potential consequences for the direction of the law of obscenity. Normally, the ideological values in collision will stand out in a case, and the members of the Court, or the law clerks, will require no subtle analysis of the political consequences of a dispute. The law of obscenity, however, is quite a different matter. A cursory glance at the summary of the argument in the petitioner's brief (or, in the more sensational cases, the name of the petitioner) will readily communicate the nature of the ideological conflict. It is a good deal more difficult to discern the social, political, economic, or legal importance of a case, given the general lack of classic indicators of cert-worthiness, such as conflict between circuits or the participation of the United States (see Baker 1984; Frey, Geller, and Harris 1987), as well as the dubious nature of many of the claims advanced by liberal petitioners. The Court, therefore, often lacks a solid lodestone for the selection of cases in this field. How then does the Court determine the "importance" of a case when the issues are apparently trivial at best and when the traditional signposts of cert are absent?

Members of the Court use the participation of organized interests as amici curiae prior to certiorari or jurisdiction as an indicator of the importance of a case among those other than the immediate parties (Caldeira and Wright 1988, 1990; Ennis 1984; Perry 1991; Spence 1974).[2] The participation of an obscenity litigator as a direct representative of a libertarian petitioner sends another strong signal of the importance of a case. The mere presence of a repeat player as counsel goes a long way toward demonstrating the seriousness of the petitioners. Few practitioners file more than one petition for certiorari or argue more than one case in a life time. Thus experience is a valuable and valued commodity among appellate lawyers. Members of the "obscenity bar" acquired experience by taking part in litigation on obscenity as a large and regular part of their business. These lawyers should enjoy the advantages of "repeat players" (Galanter 1974).

If an organized interest planned to participate in only one case, it might have an incentive to communicate inaccurate information about the importance of a case to the Supreme Court. For, after all, organized interests and the Supreme Court do not have the same goals, interests, and values. Organized interests initially possess more information about a case than does the Supreme Court, and the reliability of organized interests is not easily discerned in the short run. But organized interests participate in the Court repeatedly and develop reputations among the justices (see, generally, Kreps 1990; Spence 1974). Justices may check the recommendations and assertions of an organized interest against the outcomes of agenda setting: experience then translates into reputation. The repetitive nature of these interactions lowers the costs of monitoring for the Court. As a consequence of reputation, not all organized interests will carry the same weight. The Court rewards with attention those who repeatedly demonstrate credibility, and payoffs of attention for faithful claims of importance reinforce truthfulness (Ennis 1984).

Much the same logic applies to lawyers before the Court. Lawyers seek to gain access to the Supreme Court to win a lawsuit for clients, and this no doubt provides a strong incentive to exaggerate the importance of a case. To be sure, lawyers are "officers of the court," but the strong divergence of interest reduces their credibility as honest brokers of the importance of a case. Lawyers, after all, must deal with multiple actors, including clients, the Court, and partners. For a lawyer who files a petition or jurisdictional statement only once in his or her professional life, it is sensible to misrepresent the importance of a case. Cheating has low costs; monitoring costs run high; and if the Court believes the claim, counsel may obtain a plenary review. Of course, members of the Court are well aware of the incentives for "one-shotters" in the formation of the agenda. Repetitive participations permit the Court to observe the reliability of a lawyer's legal and factual claims. Those who bring cases to the Court over and over again build up a reputation in the eyes of the Court, a costly and valuable asset (McGuire 1993). Reputation not only helps to attract and maintain clients but also translates into influence in the Court. Thus, lawyers and other repeat players have a strong interest in maintaining credibility in the Court. To discover the importance of cases, then, the Court takes advantage of the self-interested behavior of amici and professional litigators.

The incentives of professional obscenity litigators make them less reliable than amici curiae as sources on the importance or quality of a case. Importance of a case represents only one among many reasons a lawyer chooses to take a case to the Court. For example, a client may wish to delay a final judgment such as a large financial payment. Lawyers normally do not have the luxury of selecting the ideal vehicle from a large pool. In contrast, amici curiae can survey the cases filed in the Supreme Court and support those best suited to plenary consideration. And amici curiae need not take into account the interests or concerns of a client. (For more on these differences, see Caldeira and Wright 1989.)

These considerations lead us to several hypotheses. The appearance of a professional obscenity lawyer for a petitioner or the support of an organized interest as amicus curiae should increase the probability of the Supreme Court's granting a particular case. One or the other form of participation should provide the signal required to alert the Court of the importance of the case. Thus, in light of the structure of incentives, the Supreme Court should weigh the participation of an amicus curiae more heavily than

the presence of a professional obscenity lawyer as counsel for a petitioner.

Competing Explanations

The presence of a professional obscenity litigator and amici curiae in support of the petitioner are, of course, only two of many considerations in the calculus of the Court. Prior research points to a wide range of other forces at work (Armstrong and Johnson 1982; Brenner 1979; Caldeira and Wright 1988, 1990; Perry 1991; Provine 1980; Songer 1979; Tanenhaus et al., 1963; Teger and Kosinski 1980; Ulmer 1978, 1983, 1984). Variables in play might include the presence or absence of "conflict" between or among lower courts or the allegation of such a conflict; the route by which a petitioner brings a case, since the Court has tended to review writs of appeal at a higher rate than writs of certiorari; disagreement between the lower courts; dissent in the court below; the nature of the issue area; and the ideological direction of the outcome in the federal or state appellate court.

Quite apart from these indices, the Court also accords parties differential treatment, at times favoring "underdogs" and at other times favoring "upperdogs" (Caldeira and Wright 1989; Ulmer 1978). The solicitor general of the United States does much better than any other party in gaining access to and victories on the merits in the Supreme Court (Caldeira and Wright 1988; Caplan 1987; Segal 1988; Segal and Reedy 1988). By contrast, state and localities do much worse. Traditionally, the regulation of obscenity has fallen to state and local governments under the "police powers" of the states. We might, therefore, expect the Court to recognize the unique needs of individual states in abating pornographic expression and to give careful attention to their petitions for plenary consideration of losses in the lower courts. To be sure, until the last few years, state governments have fared poorly in the Court in part because of poor representation and in part because of the ideological predispositions of the Court (Perry 1991, 127; but see also Epstein and O'Connor 1988). We might also expect local governments to receive disproportionate access to the Supreme Court. Local governments are arguably best equipped to judge whether certain materials offend community standards, but they are also the most likely to engage in excesses. Communities can enact ordinances with relative ease; and local majorities may tyrannize otherwise legitimate, protected expression.

Some of the libertarian petitioners are respectable individuals and organizations; others, specialists in pornographic materials. The nature of the parties might well reflect on the credibility of the petitioners. It is plausible to imagine the Court taking a dim view of pornographers—just as, for example, Justice Marshall has expressed wariness of drug dealers. We consider four broad categories of libertarian petitioners.[3]

Corporations generally receive favorable treatment in litigation but do not fare so well in the formation of the Court's agenda (Caldeira and Wright 1989; Galanter 1974; see also Sheehan, Mishler, and Songer 1992). Parties such as magazine distributors or motion picture companies are probably the most respectable of the libertarian petitioners in litigation on obscenity. Because these parties often deal in a wide range of materials, they are arguably less likely to be perceived as pornographers. Parties such as bookstores and theaters, however, in litigation on obscenity, usually deal in a narrow range of sexually explicit materials. These are generally "adult" bookstores and theaters. We would not expect these parties to find favor in the Supreme Court. Individuals figure as petitioners in a number of cases. These cases involve a conviction for a violation of a regulation of obscenity, including the distribution of obscene materials, transportation of them across state lines, or attempts to import them into the United States. Individuals generally do not do well in the Supreme Court (Caldeira and Wright 1989), and the association with the purveying of sexually explicit materials should not help.

The Court, as our model implies, pursues policy objectives as well as legal criteria in composing the plenary agenda. Thus, the responses of the justices to legal arguments, stipulated and contested facts, and the severity of the regulation in question in large part reflect the policy preferences of the Court.

Governmental actions with the potential to infringe upon freedom of expression receive particularly close scrutiny from the Court. In general, we would expect the Court to examine more carefully the most stringent forms of regulation of obscenity. Governments have devised a number of ways of dealing with obscenity, some benign, others posing a significant threat to legitimate expression. Prosecution for violation of a valid law is the most innocuous of these methods.

Injunctions against the distribution of obscene materials may pose a serious threat to freedom of expression (e.g., *Vance* v. *Universal Amusement Company* 1980). Of course, injunctions do not issue without the independent judgment of a third party, but there is clearly a possibility of a prior restraint of expression. Searches and seizures are not always conducted with the sanction of a magistrate. Thus, the seizure of allegedly obscene materials may encroach upon libertarian rights (e.g., *Marcus* v. *Search Warrant* 1961), and licensing raises grave constitutional dangers (e.g., *Freedman* v. *Maryland* 1965). Governmental schemes for clearing proposed communications effectively place in the hands of officeholders a means of exercising censorship of the free flow of ideas. Accordingly, we expect the Court to grant a review in more of these cases than in others.

Legal claims might also raise the salience of a case. Other things being equal, a claimed violation of the First Amendment should raise the probability of a plenary grant. Most, but not all, of the petitioners in our sample claimed a violation of the First Amendment (72%).[4] Petitioners or appellants claimed "redeeming literary value" for the materials in question in 35% of the cases. Thus, the materials may be sexually explicit, but the petitioners claim legal pro-

TABLE 1

Probit Coefficients for Plenary Review in Law of Obscenity

VARIABLE	COEFFICIENT	STANDARD ERROR	T-STATISTIC
Intercept	−.71	.70	−1.01
Professional obscenity lawyer	.97	.39	2.49*
Brief amicus curiae	1.45	.60	2.42*
State government as petitioner	−.70	1.02	−.69
Bookstore as petitioner	−.62	.46	−1.35
Theater as petitioner	−2.62	.87	−3.01**
Individual as petitioner	−1.27	.62	−2.05*
Corporation as petitioner	−.53	.52	−1.02
Severity of regulation	−.07	.20	−.35
First Amendment	.51	.55	.93
Literary value	1.75	.41	4.27***
Writ of appeal	1.07	.43	2.49*
Alleged conflict	−.71	.45	−1.58
Reversal between lower courts	−.93	.94	−.99
Burger Court	−.90	.82	−1.10
Professional obscenity lawyer × Burger Court	−.67	.47	−1.43
Brief amicus curiae × Burger Court	.12	.74	.16
Solicitor general as petitioner × Burger Court	1.99	.62	3.21**
State government as petitioner × Burger Court	1.49	1.14	1.31
Local government as petitioner × Burger Court	.22	.54	.41
Bookstore as petitioner × Burger Court	.25	.53	.47
Theater as petitioner × Burger Court	2.65	.91	2.91**
Individual as petitioner × Burger Court	1.10	.72	1.53
Corporation as petitioner × Burger Court	.34	.60	.57
Severity of regulation × Burger Court	.18	.24	.75
First Amendment × Burger Court	−.61	.66	−.92
Literary value × Burger Court	−1.11	.48	−2.31*
Writ of appeal × Burger Court	−.57	.49	−1.16
Alleged conflict × Burger Court	.74	.52	1.42
Reversal between lower courts × Burger Court	1.12	.99	1.13

Note: N = 410 (95 grants, 315 denials); dependent variable equals 1 where the justices granted certiorari or noted probable jurisdiction, 0 otherwise; −2 log likelihood ratio = 149.28; pseudo R^2 = .47.
*$p < .05$.
**$p < .01$.
***$p < .001$.

tection under the Court's doctrines. To stake a claim for the redeeming social value of one's film or magazine invites the Court to judge for itself. Participants are well aware of the scant social and literary value of most of these materials. Thus a claim of literary or social significance suggests to the Court that the material may not be obscene as a matter of law, or that the petitioner does not conceive of them as obscene and has made a bet on this belief, or both.

The ideological and partisan balance of the Court makes a difference in both decisions on the merits and on composition of the agenda (Caldeira and Wright 1988, 1990; George and Epstein 1992; Segal 1984, 1985). Turnover in membership should translate into shifts in judicial policy and in the composition of the agenda. During the second half of the period of our study, the Supreme Court showed much less sympathy to libertarian claims in litigation on obscenity (e.g., Hagle 1991; McGuire 1990) and gave the issue lower priority on the plenary agenda (see Figure 1).[5] We would expect the successors to the Warren Court to rank litigation on obscenity as a lower priority. And we would expect the Warren and Burger courts to have responded somewhat differently to the various considerations in decisions on the composition of the agenda. Many would point to the doctrinal shift in *Miller* v. *California* as demarcating the differences in the Court's approach to obscenity. Our data, however, reveal that the justices' treatment of petitions in this area began to shift several years earlier, just after Warren Burger was elevated to the chief justiceship.[6] The collective effects of the four Nixon appointees produced a strong disinterest in devoting the Court's resources to the area (see Woodward and Armstrong 1979). Thus, the conservative doctrine codified by *Miller* and its progeny manifested a marked change that apparently had been in the making for some time.

THE DATA

To test our propositions, we gathered data from the set of all paid cases on obscenity filed in the Supreme

Court from 1955 through 1987 (N = 410). Libertarians (i.e., petitioners who sought to vindicate a claim based on the First Amendment and who had lost in the lower court immediately below)[7] brought 84% of these cases. We identified our cases from the summaries of filings in *United States Law Week*. To qualify for our sample, a case had to involve a government's seeking to eliminate or limit some form of allegedly lascivious expression. These forms of expression most commonly include magazines, books, newspapers, pictures, and films. This rule excluded cases in which offensive speech or restrictions based on time, place, or manner figure as the main issues.[8] The cases we have chosen dealt squarely with the question of obscenity, unadorned by related issues.

The data come from the original petitions and responses, briefs amicus curiae, opinions, and records filed at the Supreme Court Law Library and from microformed and microfilmed versions of those same materials in the Bureau of National Affairs' *Briefs and Records of the Supreme Court of the United States*. For our dependent variable, we have chosen the Court's decision to grant or deny certiorari or to note probable jurisdiction or not on a writ of appeal from a decision in a lower court. It is coded as 1 where the justices granted certiorari or noted probable jurisdiction, and 0 otherwise. The justices granted review in 23% of these cases (95 grants, 315 denials)—well above the normal rate, in part because we have so many appeals. We operationalize professional obscenity litigator as any lawyer who represented a libertarian client in two or more cases.[9] These lawyers took part in 189 of the 410 cases; amici curiae, in 24.

THE RESULTS

Simple bivariate analyses of decisions on plenary review and the participation of professional obscenity lawyers and amici curiae indicate strong preliminary support for our chief hypotheses. If a brief amicus curiae supported a libertarian petitioner, the Court granted review in 71% of the cases, in contrast to 20% in the entire sample. Libertarian amici fared significantly better than did proscriptionists. Thus, if a libertarian amicus filed in support of certiorari or jurisdiction, the Court granted plenary jurisdiction in 88% of the cases; for a proscriptionist amicus, only 38%. The result for a professional obscenity litigator is not quite so sharp; but in the presence of one of these experienced lawyers, the Court granted certiorari or noted probable jurisdiction in 26% of the cases. If neither a professional obscenity lawyer nor an amicus curiae were present, the Court bound over only 18% for full treatment. Bivariate results for the Warren and Burger courts illustrate significant changes in the positions of litigators and amici. If an amicus curiae filed a brief or a professional obscenity litigator participated, the Warren Court granted plenary review in 75% and 60%, respectively, of the cases; the Burger Court, 67% and 13%.

Do these results persist in the midst of multivariate controls? We specify the probability model of the Court's granting certiorari or noting probable jurisdiction of an appeal on the *i*th case on the docket as follows:

x_{i1} = 1 if a professional obscenity litigator (a lawyer who had filed two or more petitions on obscenity cases in the Supreme Court) appeared for the petitioner, 0 otherwise
x_{i2} = 1 if one or more amicus briefs were filed in support of the petitioner, 0 otherwise
x_{i3} = 1 if the United States was the petitioner, 0 otherwise
x_{i4} = 1 if a state was the petitioner, 0 otherwise
x_{i5} = 1 if a local government was the petitioner, 0 otherwise
x_{i6} = 1 if a bookstore was the petitioner, 0 otherwise
x_{i7} = 1 if a theater was the petitioner, 0 otherwise
x_{i8} = 1 if an individual was the petitioner, 0 otherwise
x_{i9} = 1 if a corporation was the petitioner, 0 otherwise
x_{i10} = 0 if no discernible regulation was mentioned in the brief or if the government prevailed in the court below—otherwise, 1 for prosecutions, 2 for injunctions that were not prior restraints, 3 for seizures, 4 for licenses, and 5 for injunctions that were prior restraints[10]
x_{i11} = 1 if the libertarian petitioner alleged a violation of the First Amendment, 0 otherwise
x_{i12} = 1 if the libertarian petitioner claimed that the allegedly obscene materials were of literary value or not obscene as a matter of law, 0 otherwise
x_{i13} = 1 if the case was an appeal, 0 otherwise
x_{i14} = 1 if the petitioner alleged a conflict between two or more lower courts or between the Supreme Court and a lower court, 0 otherwise
x_{i15} = 1 if the court immediately below had reversed the trial court or equivalent, 0 otherwise
x_{i16} = 1 if the case was disposed of by the Burger Court; 0, if by the Warren Court.[11]

Because it is quite plausible to anticipate important differences in the calculi of the Warren and Burger Courts in granting and denying plenary review, we also specify a series of multiplicative terms to pick up changes in the slopes for the other independent variables in the model. We estimated the coefficients in the model through a maximum likelihood probit procedure. The estimated coefficients and the associated t-statistics appear in Table 1.[12]

Our statistical results indicate strong support for the primary hypotheses. The presence of a professional obscenity litigator and an amicus curiae in support of a libertarian petitioner both increased the likelihood of review. These coefficients, as we shall see shortly, carry substantial weight and are statistically secure. The size and strength of these coefficients are all the more impressive in light of the large number of variables in the statistical model. If, for example, we constrain the value of all of the independent variables to their means and assume that no professional obscenity lawyer were present, the prob-

ability of plenary review is .12. Then, if we assume that a petition were brought by expert counsel, the probability of plenary review increases to .24. More impressively, this same exercise shows a increase from .15 to .70 for the presence of one or more briefs amicus curiae throughout the Warren and Burger Courts. If a professional obscenity litigator and an amicus curiae appeared in the same case, the probability of plenary jurisdiction soared to .77. Just as we had anticipated, the Court weighed the participations of amici curiae more heavily than it did professional obscenity litigators. Of course, both counted for a great deal; but for the reasons we noted earlier, the amici curiae are more credible—and therefore more potent—indicators of importance.

The results show starkly the changed situation for professional obscenity litigators under the Burger Court. We see a significant decrease in the ability of these experienced litigators to succeed in obtaining plenary review in the Supreme Court. For example, if we assume the presence of a professional obscenity litigator and constrain all of the remaining independent variables to take on their mean value, the probability of plenary review drops to .18 for the Burger Court.

Overall, the Court showed a pronounced antipathy toward three of the four varieties of libertarian litigants. The presence of a theater or individual as a petitioner actually decreased the chances of a grant; and the sign for bookstores, although marginally insignificant, indicates a similar relationship. Corporate status of a petitioner did not carry any weight one way or the other. The justices of the Burger Court did show more interest in the libertarian petitions of both individuals and theaters, but only relative to the treatment those parties received during the Warren Court. Since these litigants were so disadvantaged during the Warren era, their increased "success" under the Burger Court still did not translate into a significant number of their petitions being granted.

The paucity of cases in which the federal and local governments petitioned the Supreme Court during the Warren Court precludes the computation of coefficients for these variables, but we find no evidence of differential treatment of state governments in the sample as a whole. We do encounter strong evidence of success on the part of the United States as a petitioner during the years of the Burger Court. A positive though statistically insignificant coefficient for state governments in the Burger Court suggests a modest improvement in their fortunes.[13]

In the midst of multivariate controls, the severity of the regulation at issue made no difference in the probability of plenary review. And there is no significant difference between the responses of the Burger and the Warren courts to our indicator of the severity of regulations. Of course, in the bivariate case, both the Warren Court and the Burger Court showed a marked tendency to grant plenary review in the more extreme examples of proscriptive zeal. Our results suggest, instead, the direct impact of other variables in the model.

The results also suggest the importance of legal claims in the calculus of the Court in agenda setting. If, for example, a libertarian petitioner put forth a claim of "literary value" in defense of expression, the Supreme Court was much more likely to grant a plenary review than in the absence of such an argument. In broad terms, it bears noting that while the coefficients for the libertarian interests are negative, the parameters associated with their claims are positive. In other words, although the justices were disdainful of many liberal petitioners, the Court nonetheless took the substance of their claims quite seriously. This general tendency did not persist in the Burger Court: despite the apparent shifting fate of some of the liberal petitioners, their legal claims were viewed with considerably greater skepticism. The attraction of claims of literary value, for instance, plummeted during the Burger Court. It showed much less inclination to grant plenary review to examine whether the materials in a particular case met the often-vague standards of literary value. We see a similar, though less pronounced, decline in the impact of the First Amendment as a claim in cases on obscenity in the years of the Burger Court.

The procedural advantage of appeal over certiorari shows up in our data, but for the most part this advantage disappeared under the Burger Court. Contrary to our expectations, allegations of conflict carried a negative but marginally insignificant coefficient: the more allegations of conflict, the lower the probability of plenary review. Few, if any, of the cases in our sample contained clear conflicts between lower courts, so this result may reflect the lack of credibility of such claims. In contrast to the justices of the Warren Court, the Burger Court responded in a moderately positive fashion to allegations of conflict. Last, reversals between the lower courts did not incline the Supreme Court toward plenary review, and there is actually a negative coefficient. For reversal in the lower courts, as for allegations of conflict, we see something of a change in the years of Chief Justice Burger. The coefficient for reversals is positive for the Burger Court, but when it is discounted by the Warren Court's negative approach, the Burger Court appears to have been largely indifferent to reversals.

In general, the Warren and Burger Courts brought unique perspectives to case selection in obscenity, placing different weights on several of the criteria in our model. Different judges and different weights resulted in few cases on the plenary agenda. But as the coefficient for the Burger Court indicates, we find only modest evidence of a linear effect; the Burger Court did not simply lower the rate at which it reviewed cases in obscenity.

Overall, the statistical support for our primary hypotheses strikes us as strong and impressive. Of course, not everyone accepts at face value the causal nature of the relationship between the participation of lawyers and interest groups and the Court's decision on plenary review. Critics have accused litigators and organized interests of choosing the "sure winners" among the various available cases in order to

build up an impressive record of victories. For example, an organized interest might scan a case for major indicators of "importance" and then file a brief if its leadership believed the Court would grant certiorari. Similarly, a lawyer who specialized in litigation on obscenity might push forward only those cases he or she saw as clearly eligible for review. Lawyers and interest groups, the argument goes, would simply simulate the decisional calculus of the Supreme Court, so we could not impute influence to either one.

We find no support for this view. In the law of obscenity, amici curiae responded to quite different considerations in comparison to professional obscenity litigators. From the Warren to the Burger Courts, the amici curiae, like the specialized practitioners, exhibited sharp departures in the set of criteria to which they responded. Importantly, professional obscenity litigators and amici curiae used criteria to choose cases quite different from those of the Supreme Court. Our additional analyses of these data strongly suggest the independence of the decision-making processes of lawyers, amici curiae, and the Supreme Court.[14]

CONCLUSION

For our set of terms in the Supreme Court, lawyers make a significant difference in the shape of the agenda in the law of obscenity. Libertarian petitioners represented by a professional obscenity litigator enjoyed an important advantage in the stage of case selection. Organized interests did not appear as often as amici in support of petitioners, but when they did, their presence carried considerable weight in the decisional calculus of the Supreme Court. Indeed, the presence of an amicus curiae raised the probability of plenary review even more than did the appearance of a professional obscenity lawyer. Under the regime of the Burger Court, the influence of professional obscenity litigators declined sharply, but organized interests as amici curiae continued to make an important contribution in the selection of cases on obscenity.[15]

Our research raises a number of issues for future research. Is the role of lawyers and organized interests similar to the pattern we observed here in other areas of the law? We can envision some areas in which repeat lawyers and organized interests would participate less often and hold less sway than in the law of obscenity. For example, organized interests participate less often as amici curiae prior to plenary review in the criminal law. We adopted a simple measure of professional litigator. The impact of professional litigators might emerge even more clearly if scholars create refined measures of this concept. We offered an account of the clout of professional obscenity litigators and organized interests but would like to pin down the bases of influence in agenda building more precisely. We still know very little about the strategies of organized interests and professional litigators in the selection of cases for filing appeals even though our data shed some light on these calculations. We would do well in the future to focus directly on these crucial actors in the formation of the Supreme Court's agenda.

Recent developments in the Supreme Court underscore the importance of our results. In the last several years, the Court has placed fewer and fewer cases on the plenary agenda. Some commentators and practitioners attribute this decline to the elimination of the writ of appeal in most cases and to the decrease in the number of intercircuit conflicts as Reagan and Bush appointees have come to dominate the intermediate appellate courts. Year in and year out, conflicts and appeals have occupied a substantial portion of the Court's plenary agenda. Now, as a result of the decline of these categories, the Supreme Court's task of identifying important cases has become even more difficult than in the past (see Greenhouse 1992, 7). Without traditional indicators such as the writ of appeal or intercircuit conflicts, the Supreme Court in composing the plenary agenda may well rely even more heavily on experienced lawyers and amici curiae to differentiate the important from the unimportant cases.

Notes

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1. For our account of the organizational politics of obscenity, we rely heavily on Kobylka 1987 and 1991, now the authoritative works on this subject, and on our own research in the *Records and Briefs of the Supreme Court of the United States*.

2. Of course, organized interests perform an important, sometimes crucial, role on the merits (in the Supreme Court and elsewhere) as amici, direct representatives, consultants, and the like (see Epstein 1990; Epstein and Rowland 1991).

3. Our categories do not exhaust the kinds of petitioners. A number of cases involve arcades, newsstands, and the like.

4. Many of the libertarian petitioners concentrate on other legal questions, including due process of law, *scienter*, and prior adversary hearings.

5. Justice Stevens noted the change in the mid-1970s: "There is no reason to believe that the majority of the Court which decided *Miller v. California* . . . is any less adamant than the minority. Accordingly, regardless of how I might vote on the merits after full argument, it would be pointless to grant certiorari in case after case of this character only to have *Miller* reaffirmed time and time again" (*Liles* v. *Oregon* 1976).

6. Examination of individual cases points to *Miller* as a lagging indicator of a shift in the Burger Court's priorities.

7. On occasion, a libertarian claimant who had won below sought certiorari or probable jurisdiction to vindicate legal arguments on which the respondent had prevailed in the court immediately below or filed a cross-petition in response to an opponent's petition for certiorari.

8. Other scholars have included either or both of these kinds of cases for understandable reasons (e.g., Hagle 1991; Kobylka 1987); but we think our approach isolates the perennial issues of obscenity from more general questions of criminal procedure, regulatory policy, and other varieties of offensive speech (see Stone et al. 1986, 1114–45). Accordingly,

we have discarded some of the better-known cases often considered under the rubric of obscenity. For instance, we exclude *Cohen* v. *California* (1971), *Erznoznick* v. *Jacksonville* (1971), *Schad* v. *Borough of Mount Ephraim* (1981), and *Young* v. *American Mini Theatres* (1976).

9. This is, we admit, a fairly liberal definition. Remember, however, that we are employing cross-sectional data and have no way of knowing a priori whether a single appearance by a lawyer is his or her sole appearance or representative of a pattern of participation. We can make credible assumptions about some attorneys (e.g., the solicitor general) regardless of the number of appearances he might make across a given time period. We do not suspect that a second case heaps additional benefit on a lawyer and advantages him over counsel with only one case. Rather, we are simply assuming, absent other indicators of differences between counsel, that a lawyer with multiple cases is probably different along some qualitative dimension from a lawyer with only a single case. For more on this point, see McGuire 1993.

10. We established this ordering based on our reading of the cases and commentary and our sense of the severity of the threat to expression each poses. Then we tested our notions against the data. We used a set of dummy variables for each of these conditions. The size of the coefficients associated with the dummies confirms our ordering.

11. The reader might note that our data extend into the early tenure of the Rehnquist Court. This involves only a handful of cases and changes none of the results.

12. We have considered a wide range of other independent variables. None of those excluded in our final model proved significant in preliminary analyses. For example, while Hagle (1991) demonstrates the important effect of region on outcomes on the merits in cases on obscenity, we found no evidence of regional influences in our data. Our probit analyses yielded no evidence of any influence, one way or the other, of "fact patterns" or other legal arguments in the decision on plenary review in either the Burger or Warren Courts.

13. Epstein and O'Connor (1988) establish that state governments with expertise in litigating before the Court tend to enjoy more favorable treatment from the justices (see also George and Epstein 1992). Therefore we thought it important to differentiate between repeat players and one-shotters. Unfortunately, there are too few cases to distinguish the effects of different states during the Warren Court from their effects under the Burger Court; thus although there are good theoretical reasons for estimating such an equation, we cannot do so. We were, however, able to test for the influence of these two different types of state governmental petitioners in general and found no evidence that repeat players were any more advantaged in case selection than were one-shotters.

14. In particular, we ran a two-stage probit analysis in which we created an instrument in the first stage for professional obscenity litigators. There is no evidence of simultaneity in these results.

15. Of course, our approach examines but one slice of the Court's agenda building. The process of case selection is not isolated by issue area; petitions for review in the law of obscenity compete not only with one another but with pleadings from myriad other issues, as well.

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