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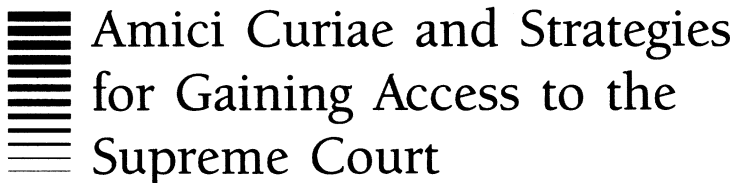

Amici Curiae and Strategies for Gaining Access to the Supreme Court

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In the process of case selection in the U.S. Supreme Court, lawyers try to secure space on the justices' plenary agenda; through briefs amicus curiae, interest groups try to advance their policy views. Thus, both seek access to the Court. What brings lawyers and organized interests together? In this article, I develop a model which examines when and why lawyers who represent petitioners build coalitions with groups. Using survey data from the 1986–87 Term of the Court, I show that lawyers–particularly lawyers with expertise in the agenda setting process–actively recruit the support of interests as amici curiae. Solicitation of amici most often occurs when lawyers and interest groups share similar goals, specifically, the desire for the justices to speak authoritatively on an issue of national importance. Consistent with the literature on organized interests, the results serve to explain why so few lawyers seek the support of amici curiae, despite their impact on the justices' decision making.

In the U.S. Supreme Court, the participation of organized interests assumes several forms, not the least of which is the filing of briefs amicus curiae. It is well established that, once the Court agrees to hear a case, there is considerable coordinated activity between the litigants, their lawyers, and outside interests. What remains less clear, however, is the manner in which interest groups become activated as amici curiae at the agenda stage (but see Caldeira and Wright 1989). Scholars and practitioners alike stress the importance of participation by organized interests at this stage; one would suspect, therefore, that lawyers frequently solicit their assistance. Ironically, relatively few petitions are brought to the Court bearing endorsements from amici curiae. Why?

Utilizing survey data from a sample of lawyers who served as counsel for petitioners during the 1986–87 Term of the Court, I examine the role that lawyers play in attracting the support of organized interests at the agenda stage. The

NOTE: I appreciate the thoughtful comments of Gregory A. Caldeira, John A. Clark, Walter J. Stone, John R. Wright, and the anonymous reviewers.

results show that veterans of Supreme Court practice, well-aware of the need to underscore the importance of cases, actively seek to engage the participation of interest groups as a means of cultivating access to the Court's plenary agenda. In addition, I demonstrate that many practitioners in the Supreme Court engage amici curiae only when they perceive that their cases present issues of national consequence sufficient to warrant review by the justices. Importantly, in-depth interview data with a number of experienced Supreme Court practitioners, also reported here, provide corroborative support for these results.

Organized Interests and Lawyers in the Supreme Court

Scores of lawyers annually petition the Supreme Court on behalf of their clients, seeking review of lower court decisions. In this sense – that is, as representatives of their clients' interests – they are seeking access to the Court. Organized groups, of course, have long sought access to judicial decision makers, as well (Barker 1967; Truman 1951), and their most common mode of participation has become the filing of briefs amicus curiae (O'Connor and Epstein 1982; Schlozman and Tierney 1986: 372; see also Berry 1989: 158–59; Krislov 1963). These briefs have a considerable impact on the justices' agenda setting (Caldeira and Wright 1988; see also Baker 1984; Ennis 1984; Frey, Geller, and Harris 1987; Stern, Gressman, and Shapiro 1986: 394–97). Consequently, to the extent that the goals of lawyers and organized groups intersect, their mutual interests create incentives to build coalitions with one another.

Interest group involvement is intensive at the merits stage of the Court's decision making, and a good deal is known about the manner in which interests are mobilized to file briefs once the justices have agreed to hear a case (Epstein 1985; Kluger 1975; O'Connor 1980; Sorauf 1976; Vose 1959). While amicus briefs appear far less often during the process of case selection, the involvement of organized interests at this stage is at least as important as their participation at the merits. Reflecting the significance of amici at the petition stage, recent scholarship has documented what motivates interest groups to participate as amici curiae, as well as when, how often, and with what effects (Caldeira and Wright 1988, 1989, 1990). Still, the issue of *how* organized interests become involved as the justices consider petitions for review remains somewhat of an open question. Faced with thousands of potential cases in which to participate, interest groups must identify those in which they will choose to devote their scarce resources as amici curiae. Naturally, many such groups are often active in the politics of the Court; they follow closely the Court's docket and are themselves capable of determining whether a case is an appropriate vehicle for advancing their goals. Even these groups, though, are faced with myriad choices. Moreover, other interests that are not necessarily frequent players in the amicus game occasionally enter a case on behalf of a petitioner. Groups –

whether regularly active as amici or not—must still locate the best cases for their participation. What, then, brings interest groups and petitions for review together? I assert that the answer lies, at least in part, in the nature of the legal representation for the petitioners and the factors that motivate them to litigate.

The notion that lawyers matter in the Supreme court is not new. There are sophisticated counsel who litigate in the Court, and their expertise has genuine ramifications for judicial outcomes (see, e.g., Caldeira and Wright 1988; Casper 1972; Epstein 1985; Epstein and O'Connor 1988; George and Epstein 1992; Irons 1982; Lawrence 1990; McGuire 1993; Perry 1991; Segal and Reedy 1988; Sorauf 1976; Twiss 1942; Vose 1959). Such expertise is particularly important in the case selection process because, unlike many appellate courts in which the petitioner is entitled to an appeal as a matter of right, the Supreme Court has a discretionary docket (Stern, Gressman, and Shapiro 1986: 188–96). Accordingly, the lawyer seeking access to the Court must first demonstrate that his or her case is worthy of the Court's attention—a critical, though often overlooked factor (Baker 1984). Indeed, as former Chief Justice Vinson once remarked, "Lawyers might be well advised, in preparing petitions for certiorari, to spend a little less time discussing the merits of their cases and little more time demonstrating why it is important that the Court should hear them."[1] How, then, do lawyers go about articulating the importance of their pleadings to the Court at the petition stage?

I adopt a theoretical perspective in which sophisticated lawyers cultivate access the Court by encouraging organized interests to support their petitions with briefs amicus curiae. I assume that amicus briefs are costly to groups and that groups generally monitor the Court's docket, making strategic calculations regarding which cases best serve their goals (Caldeira and Wright 1989). The volume of potential cases in which to participate at the case selection stage, however, is so great as to make lawyers petitioning the Court one of several plausible means of reducing the opportunity costs of learning about various legal vehicles that might be of interest to groups. After all, thousands of petitions are filed annually with the Court, making the monitoring of litigation a difficult and costly enterprise. Furthermore, at the case selection stage, many petitions will raise similar issues (Perry 1991), and, given the relatively modest litigation budgets of most organized interests (Caldeira and Wright 1988), finding the most appropriate case in which to participate is apt to be a formidable task. Enter counsel for the petitioner. As interest groups engage in the process of locating suitable cases, lawyers who recognize the potential importance of a case—and who understand the message that amici convey to members of the Court—will encourage groups to cast their lots with counsel's pleadings.

[1] Quoted in Stern, Gressman, and Shapiro (1986: 373).

Lawyers, then, *should* seek to engage the backing of amici curiae. What a petition requires, though, is a lawyer who (1) is aware of the value of amicus briefs, and (2) perceives the issues presented to be of sufficient importance to attract the assistance of outside groups. In the following sections, I bring systematic data to bear to test these assumptions.

Soliciting the Support of Amici Curiae

Do lawyers seeking access to the Supreme Court cultivate interest group support? To the extent they do, what forces guide their coalition building? In order to address these issues, I conducted a mail survey of lawyers who served as counsel of record in cases at the agenda stage in the U.S. Supreme Court during the 1986–87 Term. Drawing from petitioners as well as respondents, I drew a random sample of approximately 700 lawyers, of whom nearly 50 percent responded.[2] Of these respondents, 177 indicated that they had served as counsel for the petitioners. In addition, as a part of a larger study of the bar of the Supreme Court, I interviewed, on an anonymous basis, 19 experienced Supreme Court practitioners.[3] These data provide the empirical and contextual basis for the analysis.

The Decision to Solicit Support

When lawyers petition the Supreme Court for review, they face the issue of how best to support their pleadings. Because the amicus curiae brief is a signifi-

[2] Of 688 potential respondents, 327 returned a questionnaire. For a term in which some 2,071 paid cases were filed (*United States Law Week* 1987: 3102), this is a comfortable sample size for the purposes of statistical inference (see Scheaffer, Mendenhall, and Ott 1986: 56–61). Their names and addresses were easily obtained, as they are for all counsel in Supreme Court litigation, from the *Briefs and Records of the United States Supreme Court.* Overall, the sample appears to be quite representative; indeed, lawyers in different employment settings responded in virtually the same proportions in which they were sampled. The addresses and affiliations for the potential respondents shows lawyers in the following settings: private practice, 78.4 percent; state and local government, 15.4 percent; organized interest group, 3.5 percent; law school, 1.2 percent; legal aid or public defender, 1.0 percent; in-house corporate counsel, 0.6 percent. These proportions compare favorably with those who actually responded, differing by only 1.1 percent, on average. One should note that lawyers who litigate on behalf of the federal government were not sampled. This fact poses minimal theoretical concerns: given the solicitor general's success in case selection, we have no reason to suspect that he would have occasion to solicit interest group support. This assumption has considerable empirical validity: potential amici are well aware of the high success rate of the solicitor general in the case selection process and, therefore, tend not to invest their resources when the federal government petitions the Court (see Caldeira and Wright 1988, 1989).

[3] Although anonymity was a condition of these interviews, I can discuss their backgrounds. All of the lawyers who are quoted in this article were private practitioners in large firms

cant mechanism for signaling the importance of a case to the members of the Court, "[c]ounsel may well want to stimulate amicus briefs at the cert. stage" (Perry 1991: 135). But do lawyers, in fact, turn to outside interests and encourage them to file amicus briefs? One former associate of the solicitor general, as well as most of the lawyers whom I interviewed, said:

> Sure they do, especially at the petition stage. I think it makes a big difference in the perception of the case, whether there are amici or not. And it's important to get them. I think it's somewhat less important at the merits stage.

Similarly, another practitioner offered this perspective:

> Whenever I have a case that's going up to the Supreme court on certiorari, I look for amicus help. After it's granted, it's not as important. But [on certiorari] you want something that will flag the Court to the importance of your case.

The survey data support these impressions. Respondents were asked if, at the case selection stage, they encouraged other parties or organized interest to file amicus briefs in support of their pleadings,[4] and some 23 percent of the lawyers petitioning the Court indicated that they solicited amici on their behalf.[5] The interests they sought to mobilize assumed many forms—peak and trade associations, corporations, and public interests groups, to name but a few.

Some of these potential amici were contacted with regularity, evidently reflcting the view expressed by one veteran that "for some cases it is important to get a particular group or coalition of groups on the briefs, just so you'll get noticed." Among them, the single most sought-after amicus curiae was the federal

in Washington D.C. Most had served either as clerks to members of the Court or as lawyers in the solicitor general's office, and each has handled multiple cases on the merits in the Supreme Court. Accordingly, while their views cannot be considered representative of the bar as a whole, they certainly can be regarded as informed elite opinion.

[4] The respondents were asked a series of questions relating to the participation of outside interests in their cases. The text of these questions was as follows: "In your case from the 1986–87 Term, did you encourage other parties or organized interests to file amicus briefs in support of your case? If so, at what stage? If so, what kinds of organizations were invited to participate as amici? Were amicus briefs filed as a result of your encouragement?"

[5] The reader should note that the analysis in this article is based upon a weighted file structure. A common problem in survey research is that strata in a sample are not proportional to their actual number in the population. In this instance, 39 percent of the petitioners indicated that the Court granted review in their cases, a considerable overestimate, given that the Court granted review in only 6.9 percent of the cases on its paid docket during the 1986–87 Term (see *United States Law Week* 1987: 3102). This difficulty is easily overcome by post-sample stratification, that is, by weighting the sample's estimates according to their known proportions in the population (Scheaffer, Mendenhall, and Ott 1986: 110–12).

government. In fact, attempts to secure secondary support from the office of the solicitor general accounted for approximately 15 percent of all requests for help. The value of an amicus brief filed by this office, writes a former deputy solicitor general, can hardly be overestimated:

> The government's help is most critical at the certiorari stage, where the solicitor general's amicus support dramatically increases a private litigant's chances of securing review by the Supreme Court. The catch is that the Office of the Solicitor General rarely supports a private petition for certiorari – maybe two times a term – in the absence of an invitation from the Court. (Roberts 1993: 30.)

Many experienced lawyers in the Court recognize the value of this brief. As one Supreme Court practitioner counsels his fellow litigators, "The best possible amicus support for a petitioner is the Solicitor General. . . . Try to drum up support for your position in the affected federal agencies and encourage them to communicate their views to the Solicitor General. Then ask for a meeting with the Solicitor General or one of his deputies" (Baker 1984: 626–27). When one of his cases involved an issue of state taxation, for example, this Supreme Court practitioner sought and obtained the backing of the Justice Department in the following manner:

> I thought that the federal government had an interest in the outcome of that case and asked the Treasury which in turn asked the solicitor general to consider filing an amicus brief. And they did. They supported our position, because they felt our position was in the interest of the United States.

Apart from the solicitor general, other Supreme court heavyweights, such as the American Federation of Labor-Congress of Industrial Organizations, the American Civil Liberties Union, and the NAACP Legal Defense Fund were viewed as valued resources and were lobbied by counsel over and over again.[6]

Some counsel do, in fact, lobby particular interests, encouraging them to file briefs amicus curiae. What is especially interesting however is that, despite the conventional wisdom, only a relatively small number of lawyers try to mobilize interest group support. Why?

[6] This investment of time and effort in the solicitation of these amici curiae paid substantial dividends for at least some litigators. Indeed, 30 percent of the 23 percent who sought to engage the participation of organized interests indicated that amicus briefs were filed at their behest. Of course, amicus briefs may be filed in *opposition* to certiorari, but, since my analysis is restricted to counsel for petitioners, I do not specifically address the extent to which counsel for respondents encourage amicus briefs. Briefly, however, I should note that only a scant few of the counsel in opposition – fewer than 5 percent – solicited amici; that nearly six times as many petitioners sought to engage organized interests suggests that lawyers are aware that amicus briefs opposing review serve only to make cases *more* viable candidates for certiorari (see Baker 1984; Caldeira and Wright 1988).

Explanations of Interest Solicitation

The basic hypothesis is that a lawyer will attempt to build coalitions with outside interests when that lawyer is aware of the importance of amicus briefs and when the factors that influence the decision to petition the Court are congruous with the goals of potential amici. Among those counsel who file petitions for certiorari, is there evidence to support such a theoretical assumption?

Lawyer's experience in the Supreme Court. One reason why so few petitioners seek amicus support might lie in the sophistication of counsel; that is, many lawyers are simply unaware of the potent effect of amicus briefs. At first blush, this may seem obvious, but it cannot be assumed a priori that the average lawyer who files a petition for certiorari is (or is not) conversant in the agenda setting process, as one alumnus of the solicitor general's office explains:

> At the cert stage, amicus support is particularly important. Many people don't realize this. Because the Court has to judge, "How important is this issue?" it helps if other people come in and say, "Even though we don't have a stake in this litigation, we believe this legal issue is important and you ought to hear it."

To test whether a lawyer's petitioning experience bears upon the decision to seek amici curiae, I utilize two measures. The first is the number of previous petitions for review brought to the Supreme Court. There is a good deal of variation in the amount of experience that lawyers have with the Court's agenda setting, and it is reasonable to assume that a lawyer who has petitioned the Court with some frequency has a better sense of the mechanics of case selection than the lawyer who is drafting his or her first petition for certiorari. Still, it is quite possible that a lawyer may file multiple petitions and yet never acquire any measurable degree of sophistication with respect to the factors that influence the selection of cases; since the Court almost never explains why it denies a petition, a lawyer may well be repeatedly rejected by the justices and yet receive little or no feedback. Thus, quite apart from a lawyer's experience, it is important to consider counsel's success in gaining access to the Court's plenary docket. I operationalize a lawyer's success rate at the ptition stage as the number of times a lawyer reported success in gaining review divided by the total number of previous petitions. All things being equal, then, the expectation is that the greater the number of petitions and the greater the lawyer's success at the agenda stage, the more keen one's appreciation of the case selection process becomes and, therefore, the greater the likelihood that the lawyer will attempt to solicit interest group support in the form of amicus curiae briefs.

Of course, whether or not a lawyer attempts to mobilize interests might also be a function of a more specific awareness of the importance of amici in the Court's selection of cases. For instance, a lawyer who has actually drafted

and submitted amicus briefs that urge review by the justices is likely to recognize the extent to which those briefs amplify a petitioner's claims. So, prior experience with amici curiae—the number of amicus briefs lawyers report having filed in the Supreme Court in support of certiorari or jurisdiction—should increase the likelihood of lawyers seeking the same kind of support that they themselves have provided in other cases.

All three of these measures are related to the decision to encourage interest participation at the agenda stage: lawyers seeking amici, on average, bring more petitions, have a higher percentage of those petitions granted, and file more amicus briefs urging review than lawyers who do not solicit such support. Such differences would seem to indicate that the importance of amici curiae is not widely known; instead, this intelligence appears to be concentrated among the Court's accomplished lawyers. As one veteran practitioner observed:

> It's been the exception rather than the rule. Amicus support has come from the amicus groups, rather than from the parties, for the most part. In the last five years, Supreme Court practitioners have started more conscientiously soliciting amicus support than they used to. I think now the really sophisticated Supreme Court practitioners would think of that, right from the beginning.

At least some amount of interest group activity at the certiorari stage, therefore, might not reflect a unilateral decision to enter on behalf of a petitioner; instead, counsel—particularly counsel with extensive experience litigating in the Court—may solicit the contributions of organized interests as a means of maximizing the probability of gaining access to the justices' plenary agenda.

Motives for litigation. In considering the strategic politics of case selection, it is instructive to bear in mind that a lawyer's approach to a case is quite likely to be a function of the interests that he or she represents. As one scholar observes, "A good many of the differences in litigating strategies between major groups and the individual plaintiff of the ad hoc group grow from differences in the objectives they pursue" (Sorauf 1976: 92). Since Casper's (1972) study of libertarian lawyers in the Warren Court, scholars have recognized that there are systematic differences in how lawyers manage litigation in the Court. Some are largely constrained (see Galanter 1974; Heinz and Laumann 1982); they have no far-reaching litigation strategies and are concerned primarily with securing legal victories on behalf of their clients. Their main interest turns on the immediate results of cases—whether their clients win or lose—and they have only incidental concern for the larger ramifications their cases may raise for public policy. Other attorneys may be less client-oriented and see their individual cases as vehicles for resolving important social and economic questions.

Casper (1972) originally applied such distinctions to lawyers before the Court in civil liberties cases, but there is no theoretical reason not to extend

a similar classification to the bar as a whole; cases involving economic policy no doubt invite similar forms of legal involvement. On the one hand, some lawyers provide the traditional, results-oriented form of representation; a corporate lawyer might want only to protect a client's patent or secure an exemption from antitrust law. On the other hand, other practitioners – counsel to organized labor, for instance – might litigate for more long-term benefits.

One of the factors that the Court says it takes into account when setting its agenda is the importance of the legal questions raised by a case; that is, the justices are apt to select "only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."[7] It is a plausible hypothesis, therefore, that the greater the breadth of the perceived interests in a case – the wider the implications of its resolution – the greater the likelihood that lawyers will seek outside support. Counsel for the petitioner, aware of the important signaling function of briefs amicus curiae, is most likely to seek amici if the issues are of a breadth sufficient to kindle the interest of the potential amicus.

Of course, a lawyer's view of a case's importance might be shaped by a variety of factors – the presence of judicial conflict or the salience of the issue in the elected branches, interest group circles, or mass publics, to name but a few. Several items in the survey asked about such issues and their relative importance for the decision to seek review.[8] Two considerations – having lost in the lower court and the client's desire to seek review – arguably reflect the extent to which lawyers are driven to petition the Court by their clients' interests. In contrast, three other factors that potentially motivate review invoke concerns that transcend the individual case – the perceived need for a national standard on the issue raised in the case, the desire to resolve an issue previously not addressed by the Court, and the existence of conflict among courts. While these items are no doubt imprecise and obviously do not exhaust the list of factors that might influence the decision to seek certiorari, they do provide clear and distinctive examples of the differences that exist in the motives for litigation; that is, they are reasonable reflections of the kinds of client- and policy-orientations that could guide a lawyer's decision making.[9]

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[7] Chief Justice Frederick M. Vinson, quoted in Stern, Gressman and Shapiro (1986: 191).

[8] Specifically, respondents were asked, "How important was each of the following considerations in the decision to seek review? Lost in the lower court; client wanted to seek review; conflict existed among courts; sensed the need for a national standard; to resolve a previously unanswered issue; other (please specify)." Respondents indicated the relative importance of these motives for appeal as "very important," "somewhat important," or "not important."

[9] Still, these five choices apparently provided sufficient choices for most of the lawyers: the respondents were given the opportunity to volunteer other factors that influenced the decision to seek review; almost none, however, exercised this option.

Lawyers who view client-centered issues as paramount in seeking review should show little alacrity for lobbying organized interests. If a lawyer petitions the justices solely to vindicate the rights of the client, he or she might not consider it worthwhile to spend time campaigning for external support for the case, since counsel's goals are theoretically distinct from those of likely amici. Alternatively, for the counsel who is concerned with utilizing his or her case as a means of influencing the development of national policy, what better way to promote that goal than by demonstrating to the Court that the issues of the case are significant to an outside set of public interests? A former associate of the solicitor general expresses this view:

> I think most of the petitioners' counsel encourage amicus support when it makes sense. That is, you don't just go out and get people to file briefs for the sake of filing briefs. But if there are legitimate, more or less neutral, more or less reputable organizations out there who can straight-facedly say that this is an important issue that requires resolution for the benefit of their members or for the benefit of their group or for the benefit of whatever institution is being represented, that's a major help.

Accordingly, petitions motivated by larger policy considerations are those in which lawyers should seek to build alliances with organized groups who have a vested interest in the Court's granting review. It is scarcely surprising, therefore, that briefs amicus curiae were solicited by roughly one third of the lawyers who indicated that the need to establish a national standard was a very important consideration when deciding whether to petition the Court.

Analysis

This general overview provides preliminary support for the hypotheses regarding which lawyers build coalitions with organized groups and when. Still, the precise magnitude of their individual and collective effects requires more systematic scrutiny. Thus, I propose a model in which both the motives for petitioning the Court and the sophistication of counsel are used to predict whether lawyers encourage interest groups to enter cases as amici. The dependent variable—whether the lawyer for the petitioner sought the support of amici curiae at the stage of case selection—is coded as 1 if the lawyer actively encouraged organized interests to file amicus briefs, 0 if the lawyer did not.

Among the predictors is the importance a lawyer attached to each motive for petitioning the Court: they are coded as 3 for "very important," 2 for "somewhat important," or 1 for "not important." The more narrow, client-oriented variables should decrease the probability of seeking amicus support, while the broader, policy-driven variables ought to increase the likelihood of coalition building. In addition, a lawyer's experience and expertise in the process of agenda setting in the Court, as well as having supported other petitions as counsel for amici,

are included in the model. All three of these indicators–experience, expertise, and direct experience as counsel to amici–should make a lawyer more disposed to solicit briefs at the petition stage.[10]

The equation is estimated using probit analysis (Aldrich and Nelson 1984), and the results are presented in Table 1. Encouragingly, all of the eight estimators have the expected sign. Of course, much of the story remains to be told; only three of the predictors reach standard levels of statistical significance, and the R^2 is relatively modest. Accordingly, interpretation of the model requires some caution.

One aspect of the results that can be confidently highlighted is that lawyers with petitioning expertise are the most likely to drum up support from outside interests. This tendency persists, even when the number of previous petitions and amicus briefs filed by counsel are taken into account. Successful Supreme Court practitioners, it would seem, recognize that at the stage of case selection it is imperative to demonstrate to the justices that cases have implications beyond the immediate interests of the litigants; these are the lawyers who try to generate the interest of affected organized groups. Naturally, some lawyers are more active in the Court's agenda setting than others, but this fact has no particular effect on the decision to approach potential amici. This reflects what common sense would indeed suggest: genuine expertise, as distinct from simple experience–that is, quality, not quantity–is the driving force.

Aside from the lawyers themselves, their motivations for petitioning the justices also illuminate when friends are likely to be called to add support. Lawyers who are guided by client-oriented considerations, for example, are not especially given to the solicitation of amici curiae. Conversely, practitioners who

Table 1

MODEL OF INTEREST SOLICITATION IN THE U.S. SUPREME COURT

Variable	*b*	*t*
Constant	-1.34	-1.80
Petitioning experience of lawyer	.01	.09
Petitioning expertise of lawyer	.71	2.01 *
Amicus experience of lawyer	.05	.36
Lost in the lower court	-.15	-.67
Client wanted to seek review	-.06	-.40
Conflict existed among courts	.07	.46
Resolution of unaddressed issue	.22	1.71 *
Need for a national standard	.24	1.75 *

Note: $N = 173$; Pseudo $R^2 = .19$; -2LLR = 7.20; * $p < .05$

[10] Interested readers can find measures of central tendency for all of the variables presented in the Appendix.

see their cases as broad legal vehicles on questions of public policy are significantly more likely to stimulate amicus activity.

A useful way to examine the specific conditions under which lawyers are disposed to encourage group participation is to estimate the probability of a lawyer seeking amicus briefs, given variations in the factors that influence the decision to seek review. These data are contained in Table 2 and illustrate quite vividly that coalition building with organized interests is driven by policy considerations, not client concerns.[11]

It is clear that the lawyers whose approach to Supreme Court litigation is dominated by client interests alone are relatively unconcerned with generating outside support for their cases. For instance, the lawyer whose lower court loss was a significant influence of the decision to seek review shows very little interest in seeking amici. The probability of such a lawyer trying to generate support is only .05. Similarly, a client anxious to take a case to the Supreme Court does not figure prominently in the activation of amici. Indeed, a client's growing insistence on pressing the petition in the Court leaves the likelihood of engaging outside interests almost unchanged.

In sharp contrast to the client-oriented counsel are the lawyers whose petitions were motivated by issues of public policy. If a case presents a novel issue that the party feels is in need of authoritative resolution by the Supreme Court, for example, then the lawyer is generally disposed to stimulate the support of other interests. Thus, as the clarification of a legal question previously unaddressed by the Court becomes more important to the petitioner, so too does

Table 2

ESTIMATED EFFECTS OF MOTIVES FOR LITIGATION ON THE PROBABILITY OF INTEREST SOLICITATION

How important were these factors?	Not important	Somewhat important	Very important
Lost in the lower court	.09	.07	.05
Client wanted to seek review	.11	.10	.09
Conflict existed among courts	.13	.15	.16
Resolution of an unaddressed issue	.17	.23	.30
Need for a national standard	.17	.24	.32

the probability of seeking amici curiae, increasing from .17 to .30. Similarly, lawyers pursue organized support when the petitioner senses the need for a national standard on the issues posed in the case. When this consideration is unimportant to the party, the likelihood of kindling amici is only .17; when

[11] For the calculation of these probabilities, the coefficients for experience, expertise, and prior amicus activity have been constrained to their means.

the need for a nationwide standard is very important, however, the probability is doubled. This practitioner, for example, highlights these findings:

> I have sought amici. Particularly when representing a client in an industry where the industry is likely to be adversely affected by the outcome of a case, I have encouraged trade associations to file amicus briefs.

Thus, as expected, when the breadth of the perceived interests at stake are substantial–when the implications of the case transcend the specific litigant and affect broader segments of society–petitioners turn to others for support. Of course, not all policy concerns are uniform in their effects, as evidenced by the absence of any meaningful effect of conflict on the decision to invite outside briefs.[12]

It bears mentioning that, for the most part, the client-centered and policy oriented considerations work independently of one another. When client concerns predominate (i.e., when lower court losses and client demand are very important), the probability of seeking amici is .03. In contrast, when broader issues are most significant (i.e., when a new issue and a judicial conflict are coupled with a chance to set national policy), the probability of encouraging amicus support jumps to .66. Coalition building with outside interests, therefore, occurs most commonly when cases introduce issues of broad national import, as this veteran litigator explains:

> It's my personal opinion that the cert stage is the place where amicus briefs are most important, especially if it's a case where cert is based not on conflict between circuits but is based on the nationwide importance of the question. If you've got nationwide organizations saying, "This case is important to us, not just to the parties," that's the most powerful argument you've got. So, if I've got a client who wants to have cert granted, I do encourage amicus briefs at the cert stage.

These results are particularly reassuring, because they conform well to our understanding of why interest groups participate as friends at the stage of case selection. That is, the reasons that lawyers seek amicus support are precisely the same reasons that groups elect to participate in that capacity: interest groups, although motivated by a number of factors, are most likely to file amicus briefs when the case has economic, political, or social importance to their members; the quality of a case as legal vehicle helps account for why groups file briefs at the petition stage; and conflict has only a marginal effect on the decision

[12] Alternative specifications of the model, not presented here, do not provide as strong a set of results as those I have reported. When the "very important" and "somewhat important" categories are collapsed into a single category, for instance, the results do not change appreciably, their effects being only moderately diminished.

to participate as amicus curiae (Caldeira and Wright 1989). To the extent that the goals of lawyers and organized interests converge, then, counsel are apt to seek the support of amici in the Supreme Court.

Quite apart from the forces that drive lawyers to spark the interest of outside groups, it is clear that not all lawyers seek to cultivate access to the Court with comparable frequency. As we have seen, some lawyers clearly stimulate amicus activity, but those who do it most often are those who are aware of its importance. As the petitioning expertise of the lawyer increases, so too does the likelihood of the lawyer seeking amici curiae. If, for example, a lawyer has succeeded at the petition stage in one of ten cases, he or she has a .21 probability of seeking amici; as counsel's success rate approaches 100 percent, the likelihood of trying to mobilize interest groups increases nearly threefold to .57.[13] The role of litigating expertise stands in sharp contrast to the role of simple experience with the case selection process. Those lawyers who build alliances with groups have no more experience with the justices' agenda than those who do not, once one controls for the lawyers' successes and failures. A genuine appreciation of the case selection process, as evidenced by an ability to gain plenary review, is a prominent force that affects the solicitation of interest group participation. Furthermore, that having filed amicus briefs in other cases fails to exercise a significant influence supports this interpretation. Finally, to underscore the model's general predictive capacity, it is worth noting that these results persist, even when one controls for other competing explanations in alternative specifications.[14]

Overall, I have argued that the cultivation of interest group support requires a lawyer, aware of the importance of amici, whose petition presents issues of importance sufficient to attract them. One prominent member of the Supreme Court bar echoes this view:

> Lawyers certainly encourage amicus activity. I think that's something any experienced Supreme Court litigator will do. Bear in mind, though, that the amicus activity is useful only if it demonstrates widespread concern about the problem.

Organized interests are no doubt mobilized countless times in the absence of solicitation. Still, it is clear that lawyers—particularly those with expertise in

[13] In calculating these probabilities, I constrained the five factors that affect the decision to seek review to their mean values.

[14] For instance, the quality rating of a lawyer's law school as well as work experience either in the federal government or as a clerk to a justice on the Court are, by themselves, only weakly associated with the decision to seek amici; moreover, once placed in competition with other predictors in the multivariate model, their modest effects disappear.

the process of agenda setting–seek to facilitate access by alerting groups of potential–and worthy–amicus opportunities and letting them know that their voices would be welcomed additions to their pleadings.

Conclusion

These results make clear that organized interests are often actively recruited by lawyers who hope to attract attention to their petitions. These efforts at coalition building by counsel occur at a time when even the most savvy of interest groups is likely to be faced with an abundance of candidates for potential participation; it is here where experienced counsel may play an important role. For a group that is anxious to express its views on an issue, an experienced lawyer who has a case that presents an attractive vehicle might be persuasive. In these instances, effective lawyers serve to lubricate the process by which cases and organized interests are brought together. Moreover, for the intermittent amici, lawyers might take on even greater significance.

Not all cases are equally attractive candidates, however. Lawyers pursue outside support more vigorously when they feel that broad issues of public policy are at stake, specifically, when they view cases as vehicles for the resolution of novel legal questions and when they perceive a need for the justices to enunciate national standards. Interest group support is sought less often, if at all, when more narrowly focused issues tether lawyers to the immediate interests of their clients. The results make good sense, because they comport well with the explanations that interest groups themselves have offered for the decision to file amicus briefs. Lawyers and interest groups both need to cultivate access to the Court, and lawyers attempt to build alliances with interests in the name of furthering their mutual goals.

Very few lawyers seek to build such coalitions. This is an especially intriguing finding, since it runs contrary to the established wisdom regarding the influence of amicus briefs at the case selection stage. The analysis, as well as the theoretical perspective that undergirds it, provide an effective explanation of why. Lawyers do no recruit amicus briefs unless they are cognizant of their importance in the Court's agenda setting; those with records of petitioning expertise in the Court, therefore, try to amplify their claims through amici. Obviously, the sophisticated practitioners know that interest group support raises significantly the likelihood of the justices granting review. Why else would they bother to muster the backing of organized interests? Expertise alone, however, is not sufficient; broad policy concerns–issues with implications beyond the instant case–must be at stake.

There can be little doubt that interest groups are among the most influential players in judicial politics, irrespective of what role lawyers may play. I have chosen to examine the process of litigation through the lens of the lawyers who

petition the Court. Thus, an important story remains to be told from the perspective of the interest group: what forces, other than lawyers, determine how interests are drawn into litigation? Nonetheless, the results suggest the need for further exploration of the implications of sophisticated representation in the Supreme Court.

References

Aldrich, John H., and Forrest D. Nelson. 1984 *Linear Probability, Logit and Probit Models*. Beverly Hills: Sage.

Baker, Stewart A. 1984. "A Practical Guide to Certiorari." *Catholic University Law Review* 33: 611–32.

Barker, Lucius J. 1967. "Third Parties in Litigation: A Systemic View of the Judicial Function." *Journal of Politics* 29: 41–69.

Berry, Jeffrey M. 1989. *The Interest Group Society*. Boston: Little, Brown.

Caldeira, Gregory A., and John R. Wright. 1988. "Organized Interests and Agenda Setting in the U.S. Supreme Court." *American Political Science Review* 82: 1109–27.

______. 1989. "Why Organized Interests Participate as Amici Curiae in the U.S. Supreme Court." Presented at the annual meeting of the American Political Science Association, Atlanta.

______. 1990. "Amici Curiae before the Supreme Court: Who Participates, When, and How Much?" *Journal of Politics* 52: 782–806.

Casper, Jonathan D. 1972. *Lawyers before the Warren Court: Civil Liberties and Civil Rights, 1957–1966*. Urbana: University of Illinois Press.

Ennis, Bruce J. 1984. "Effective Amicus Briefs." *Catholic University Law Review* 33: 603–9.

Epstein, Lee. 1985. *Conservatives in Court*. Knoxville: University of Tennessee Press.

Epstein, Lee, and Karen O'Connor. 1988. "States and the U.S. Supreme Court: An Examination of Litigation Outcomes." *Social Science Quarterly* 68: 660–74.

Frey, Andrew L., Kenneth S. Geller, and Daniel Harris. 1987. "Opposing Review: The Art of Finding 'Uncertworthiness.' " *Inside Litigation* 1: 27–30.

Galanter, Marc. 1974. "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change." *Law and Society Review* 9: 95–160.

George, Tracey E., and Lee Epstein. 1992. "On the Nature of Supreme Court Decision Making." *American Political Science Review* 86: 323–37.

Heinz, John P., and Edward O. Laumann. 1982. *Chicago Lawyers: The Social Structure of the Bar*. New York: Russell Sage Foundation.

Irons, Peter H. 1982. *The New Deal Lawyers*. Princeton, NJ: Princeton University Press.

Kluger, Richard. 1975. *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality*. New York: Knopf.

Krislov, Samuel. 1963. "The Amicus Curiae Brief: From Friendship to Advocacy." *Yale Law Journal* 72: 694–721.

Lawrence, Susan E. 1990. *The Poor in Court: The Legal Services Program and Supreme Court Decision Making*. Princeton, NJ: Princeton University Press.

McGuire, Kevin T. 1993. *The Supreme Court Bar: Legal Elites in the Washington Community*. Charlottesville: University Press of Virginia.

O'Connor, Karen. 1980. *Women's Organizations' Use of the Courts*. Lexington, MA: Lexington Books.
O'Connor, Karen, and Lee Epstein. 1982. "Amicus Curiae Participation in the U.S. Supreme Court: An Appraisal of Hakman's Folklore." *Law and Society Review* 16: 311–20.
Perry, H. W., Jr. 1991. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge, MA: Harvard University Press.
Roberts, John G., Jr. 1993. "Riding the Coattails of the Solicitor General." *The Legal Times* 29 (March): 30–31.
Scheaffer, Richard L., William Mendenhall, and Lyman Ott. 1986. *Elementary Survey Sampling*. 3rd ed. Boston: PWS-Kent Publishing Company.
Schlozman, Kay L., and John T. Tierney. 1986. *Organized Interests and American Democracy*. New York: Harper & Row.
Segal, Jeffrey A., and Cheryl D. Reedy. 1988. "The Supreme Court and Sex Discrimination: The Role of the Solicitor General." *Western Political Quarterly* 41: 553–68.
Sorauf, Frank J. 1976. *The Wall of Separation: The Constitutional Politics of Church and State*. Princeton, NJ: Princeton University Press.
Stern, Robert H., Eugene Gressman, and Stephen M. Shapiro. 1986. *Supreme Court Practice*. 6th ed. Washington, DC: Bureau of National Affairs.
Truman, David B. 1951. *The Governmental Process: Political Interests and Public Opinion*. New York: Knopf.
Twiss, Benjamin R. 1942. *Lawyers and the Constitution*. Princeton, NJ: Princeton University Press.
United States Law Week. 1987. 11 August.
Vose, Clement E. 1959. *Caucasians Only*. Berkeley: University of California Press.

Appendix

MEANS AND STANDARD DEVIATIONS FOR VARIABLES IN MODEL OF INTEREST SOLICITATION

Variable	Mean	Standard Deviation
Lawyer solicited amicus briefs	.23	.42
Petitioning experience of lawyer	4.01	12.05
Petitioning expertise of lawyer	.14	.30
Amicus experience of lawyer	.28	.76
Lost in the lower court	2.80	.50
Client wanted to seek review	2.39	.81
Conflict existed among courts	1.80	.83
Resolution of unaddressed issue	1.89	.90
Need for a national standard	1.93	.87

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