INTEREST GROUP PARTICIPATION IN THE UNITED STATES SUPREME COURT

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ABSTRACT

This essay provides an international perspective on public interest litigation by discussing organizational participation in the Supreme Court of the United States. I begin with a treatment of the various methods American interest groups use to further their policy agendas in the legal system, focusing primarily on the American analogue to Canadian intervention: the amicus curiae ("friend of the court") brief. It is demonstrated that amicus curiae participation is firmly ingrained in U.S. Supreme Court litigation and that a wide variety of organizations find a voice in that Court. I also provide a treatment of studies of amicus curiae influence on the U.S. Supreme Court that evince the ability of interest groups to shape judicial decision making. I close with a brief discussion of the limits of these studies, in addition to suggesting directions for future research on public interest litigation in North America and beyond.

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I. INTRODUCTION

Interest groups participate in virtually all aspects of the American political and legal systems. In electoral politics, organizations regularly make campaign donations to candidates and many groups endorse individuals seeking political office. In the legislative sphere, interest groups draft legislation, testify in front of committees, and meet with legislators in hopes of having their preferred policies written into law. In the executive branch, organizations monitor the implementation of policies, testify before regulatory boards, and work with bureaucrats in an attempt to ensure that their prerogatives are reflected in policy implementation. More generally, interest groups mount grassroots lobbying campaigns, aimed at building public support for the groups' goals, in addition to engaging in orchestrated efforts to educate the public regarding their agendas and policy objectives.[1] And, of course, groups are no strangers to the American judiciary. In recent years, interest groups have participated in more than 90% of cases decided by the U.S. Supreme Court.[2] In fact, the long history of organizational participation in the U.S. Supreme Court served as a motivating factor behind efforts by interest groups to liberalize the Supreme Court of Canada's own policies regarding intervention in the late-1980s.[3]

The purpose of the essay is to explore the role of interest groups in the United States Supreme Court. I focus primarily on interest group amicus curiae ("friend of the court") participation. This method of lobbying is a staple of interest group activity in the American legal system and, as discussed below, it is very similar to intervention in the Canadian legal system. In Part II, the various methods of interest group litigation in the American courts are addressed, with a

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[1] For a general introduction to the roles of interest groups in American politics, see Jeffrey M. Berry & Clyde Wilcox, *The Interest Group Society, 5th Edition* (New York: Pearson Longman, 2009) and Allan J. Cigler & Burdett A. Loomis, *Interest Group Politics, 7th Edition* (Washington: CQ Press, 2006).

[2] Paul M. Collins, Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (New York: Oxford University Press, 2008), at 47.

[3] Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (Albany: State University of New York Press, 2002), at chapter 2.

particular focus on the similarities between the U.S. amicus curiae and the Canadian intervener. Part III provides a treatment of the frequency of amicus briefs in the U.S. Supreme Court. It is illustrated that, in recent years, virtually all U.S. Supreme Court cases are accompanied by amicus curiae briefs and these briefs are filed across a wide spectrum of issue areas. In Part IV, I discuss the types of organizations that file amicus briefs in the U.S. Supreme Court. I provide evidence that a wide array of interest groups actively participate, indicating that a host of organizations find a voice in the Court. Part V provides an overview of extant scholarship on amicus influence on the U.S. Supreme Court. This essay closes with a brief conclusion section suggesting directions for future research on amicus curiae participation in the American courts, intervenor participation in the Canadian legal system, and interest group litigation in other judicial venues.

II. INTEREST GROUP LITIGATION IN THE AMERICAN LEGAL SYSTEM

In the U.S. courts, interest groups have four primary means of participation. First, interest groups can initiate test cases. Using this strategy, interest groups can either challenge a law or policy in their own name (provided they can secure standing), or, alternatively, orchestrate litigation on behalf of an individual (or individuals) who can demonstrate standing to sue.[4] An example of former occurred in *Ysursa v. Pocatello Education Association*,[5] in which a coalition of labor unions unsuccessfully sued State of Idaho officials challenging a state law that prohibited payroll deductions for "political activities" on the grounds that it violated the First Amendment's freedom of speech clause. Perhaps the most famous example of the latter occurred in *Brown v. Board of Education*.[6] In that case, the NAACP (National Association for the Advancement of Colored People) Legal Defense and Education Fund recruited litigants in Topeka, Kansas, and other cities, to challenge the practice

[4] Under U.S. law, the doctrine of standing dictates that, in order to bring a suit, an individual or entity (such as an interest group) must demonstrate that an actual controversy exists that will significantly impair its interests. See, e.g., Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, and Kenneth S. Geller, *Supreme Court Practice: For Practice in the Supreme Court of the United States, 8th Edition* (Washington: Bureau of National Affairs, 2002), at 810.

[5] 172 L. Ed. 2d 770 (2009).

[6] 347 U.S. 483 (1954).

of racial segregation in public schools, resulting in the Supreme Court's landmark desegregation decision.

A second method of interest group participation in the American legal system involves case sponsorship. Like test cases, under this strategy, an organization provides attorneys, staff, and other resources for a party in exchange for using the litigation to pursue its policy goals. This means of participation differs from test cases in that case sponsorship occurs after the initial litigation has already commenced. In this sense, groups look for "targets of opportunity" by taking over cases that individuals have begun once the litigation reaches the appellate courts. For example, *Moore v. Dempsey*[7] began when twelve black sharecroppers were convicted of first-degree murder in Arkansas for allegedly killing five whites during a riot. At their trials, a veritable mob of heavily armed whites stood outside of the courtroom, demanding guilty verdicts and the death sentence for each defendant. Moreover, the crowd made it clear that, should the judge fail to return death sentences for the defendants, the mob would lynch them. The accused met their attorneys for the first time when the trail began, their lawyers failed to produce witnesses on their clients' behalves, and the defendants did not testify. The jury returned guilty verdicts for all of the defendants in less than ten minutes and the judge subsequently sentenced the defendants to death. Upon becoming informed of the case, the NAACP sent Walter White to investigate. Concluding that the trials were a sham, White convinced the NAACP to sponsor an appeal. The case ultimately reached the U.S. Supreme Court, which concluded that the defendants' rights to due process of law were violated.[8]

A third method of interest group involvement in the American legal system involves intervention. To be sure, the American version of intervention is quite different from Canadian

[7] 261 U.S. 86 (1923).

[8] Richard C. Cortner, *A Mob Intent on Death: The NAACP and the Arkansas Riot Cases* (Middletown: Wesleyan University Press, 1988).

intervention and it is used far less frequently in U.S. courts as compared to Canada.[9] Under Federal Rule of Civil Procedure 24(a), organizations, and other interested entities, have the opportunity to intervene in a case as a matter of right, while Rule 24(b) authorizes intervention, not as a matter of right, but when the prospective intervenor "has a claim or defense that shares with the main action a common question of law or fact." Rule 24(a) specifies that an organization seeking intervenor status must demonstrate either that it is authorized to intervene under federal statute or that it has "an interest relating to the property or transaction that is the subject of the action," such that the disposition of the litigation would impair the prospective intervenor's interests. Moreover, the would-be intervenor must illustrate that its interests would not be adequately represented by the direct parties to litigation. Should an organization successfully obtain intervenor status, the intervenor becomes, in effect, a full blown participant in litigation, bound by the resulting judgment in the case, not only as a matter of precedent, but as a matter of res judicata. This holds that the judgment of the court is conclusive and binding for both the litigants and intervenors in any future cases involving the same cause of action.[10] Attesting to the reality that intervenors in American law are effectively litigants, they are authorized to make motions, introduce new legal arguments, and, at the trial court level, present evidence and witnesses.

While Rule 24(a) seems to indicate that there are few procedural barriers to becoming an intervenor as a matter of right, in practice, American courts treat all requests to intervene as discretionary decisions.[11] That is, the U.S. Supreme Court has failed to articulate a bright line rule (that is, a rule subject to minimal interpretation) as to exactly what an applicant must show to

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[9] For discussions of the limits and frequency of interest group intervention in the American courts, see Michael K. Lowman, "The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?" (1992) 41 American University Law Review 1243 and Katharine Goepp, "Presumed Represented: Analyzing Intervention as of Right When the Government is a Party" (2002) 24 Western New England Law Review 131. For information on the frequency of intervention in the Canadian Supreme Court, see Brodie, supra, note 3, at 37.

[10] Donald Hilliker, "Rule 24: Effective Intervention" (1981) 7 Litigation 21.

[11] Carl Tobias, "Standing to Intervene" (1991) 1991 Wisconsin Law Review 415; Hilliker, supra, note 10.

intervene under Rule 24(a); this responsibility has been left to lower federal courts, which have applied myriad standards with regard to allowing intervention as a matter of right.[12] Because of the various standards utilized to determine whether an organization is authorized to intervene, and because many courts deny motions to intervene, concluding that the prospective intervenor was not able to demonstrate a clear interest in the litigation, a practical impairment, or inadequate representation by the parties, this method of interest group litigation is used rather sparingly. Instead, organizations most commonly advance their interests through the American analogue to Canadian intervention: the amicus curiae brief.[13]

Amicus curiae briefs act as the primary method of interest group involvement in the U.S. courts.[14] It is important to note at the outset that the American amicus curiae is a distinct entity from the Canadian amicus curiae, which is appointed by the court under Supreme Court of Canada Rule 92. In America, amici participate at their own discretion, provided proper consent is obtained.[15] While the literal translation of amicus curiae, "friend of the court," implies neutrality, these briefs are, in fact, used as adversarial weapons, providing a means for organizations to pursue their interests in the adversarial system that is American law.[16] Indeed, there was never a time in American jurisprudence that amici acted as solely as neutral third parties.[17] As amici curiae, organizations pursue their policy goals by providing courts with information not addressed by the direct parties to

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[12] Tobias, supra, note 11, at 415.

[13] See Goepp, supra, note 9, and Hilliker, supra, note 10, at 23.

[14] Collins, supra, note 2, at 26. In addition to filing amicus briefs, on rare occasions, amici may be granted the opportunity to participate in oral arguments in appellate courts. Attesting to the scarcity of this method of amicus participation, from 1953 to 1985, amici presented oral arguments to the U.S. Supreme Court in less than 6% of cases. An amicus participating in oral arguments must also file an amicus brief with the Court. Collins, supra, note 2, at 38.

[15] On rare occasions, the U.S. Supreme Court may invite the participation of an amicus curiae. These invitations are most commonly extended the United States Solicitor General, the chief attorney for the executive branch in the Supreme Court, or to federal agencies, and are almost always accepted. See Chris Nicholson and Paul M. Collins, Jr., "The Solicitor General's Amicus Curiae Strategies in the Supreme Court" (2008) 36 American Politics Research 382, at 385.

[16] Samuel Krislov, "The Amicus Curiae Brief: From Friendship to Advocacy" (1963) 72 Yale Law Journal 694.

[17] Stuart Banner, "The Myth of the Neutral Amicus: American Courts and Their Friends, 1790-1890" (2003) 20 Constitutional Commentary 131.

litigation, presenting alternative or reframed legal arguments, and addressing the far ranging policy implications of a court's decisions. In addition, because many amici are specialists in particular areas of economic, legal, or social policy, they frequently supply courts with social scientific information to further their policy agendas.[18]

The rules and norms governing amicus curiae participation in the U.S. Supreme Court are quite similar to the Canadian Supreme Court's formal and informal policies regarding intervention. This is likely no mere coincidence. As Brodie[19] cogently outlines, at the beginning of the Charter period, Canadian interest groups battled with the Canadian Supreme Court over its rules regarding intervention. Seeking to liberalize the Canadian Supreme Court's policy toward interveners, organizations, such as the Women's Legal Education and Action Fund, pointed to the U.S. Supreme Court's openness to amici as a model of amenability to the participation of outside interests. As a result of this clash, the Canadian Supreme Court amended its rules regulating intervention in 1987. While organizations were initially unhappy with the rules change, viewing the new rules as more restrictive than the old, it was the Canadian Supreme Court's interpretation of its rules—to grant almost all applications for intervener status—that dramatically increased intervener activity in the Canadian Supreme Court.[20]

The U.S. Supreme Court maintains an open door policy with regard to the participation of organized interests.[21] Under Supreme Court Rule 37, private amici must obtain written permission from the parties to litigation to file an amicus curiae brief. However, representatives of state, local, and territorial governments, as well as the federal government, need not fulfill this procedural

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[18] Michael Rustad and Thomas Koenig, "The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs" (1993) 72 North Carolina Law Review 91.
[19] Brodie, supra, note 3, at 32-36.
[20] Brodie, supra, note 3, at 36.
[21] Collins, supra, note 2, at 42; Joseph D. Kearney and Thomas W. Merrill, "The Influence of Amicus Curiae Briefs on the Supreme Court" (2000) 148 University of Pennsylvania Law Review 743, at 761.

requirement.[22] Practically speaking, the requirement of party of consent is negligible, as virtually all litigants willingly comply with requests by amici. Should one (or both) of the litigants fail to provide consent to file, the prospective amicus may petition the Court for leave to file. This motion must be accompanied by the amicus brief. The Court's treatment of these motions—to almost always grant motions for consent to file, provided they are timely—further evidences its open door policy. For example, during the 1994 term, the Court granted 99.1% of motions for leave to file amicus briefs, denying only a single motion.[23]

Though both the Canadian Supreme Court's policy regarding applications to intervene and the U.S. Supreme Court's rules involving permission to file amicus briefs promote the participation of outside interests, one primary difference does exist. That is, under Canadian Supreme Court Rule 55, motions for intervention are made to the Court. Thus, the onus on granting consent to intervene in the Canadian Supreme Court rests with the Court, while responsibility for authorizing consent to file an amicus curiae brief in the U.S. Supreme Court belongs primarily to the litigants. Nevertheless, it is apparent that the Canadian Supreme Court implements its policy similarly to its American counterpart. For example, in 1999, the Canadian Supreme Court accepted 93% of applications for leave to intervene.[24]

Aside from the rules stipulating exactly how permission to file an amicus brief in the U.S. or to intervene in Canada is obtained, the two high courts exhibit similar regulations regarding the type of information that is to be provided by amici and interveners. Under U.S. Supreme Court Rule 37, amici are directed to indicate the position taken in the brief (i.e., affirmance or reversal of the lower

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[22] The U.S. Supreme Court's rule, exempting governmental representatives from the requirement of party consent to participate as amicus, is analogous to Canadian Supreme Court Rule 61(4), which authorizes attorneys general to intervene without being required to obtain leave to intervene in constitutional cases.

[23] Lee Epstein and Jack Knight, "Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae," In *Supreme Court Decision Making: New Institutionalist Approaches*, ed. Cornell W. Clayton and Howard Gillman (Chicago: University of Chicago Press, 1999), at 225.

[24] Brodie, supra, note 3, at 37.

court) and are instructed to provide a statement of interest, outlining how the case affects their well-being. Similar directions are found in Canadian Supreme Court Rule 57, which requires interveners to describe their interest in the proceeding, including any prejudice they may suffer if the application for intervention was denied.

Moreover, both courts make it clear that they do not favor the input of third parties that merely repeat the arguments raised by the litigants. U.S. Supreme Court Rule 37 is unambiguous on this point: "An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored." Canadian Supreme Court Rule 57 is also clear: "A motion for intervention shall...set out the submissions to be advanced by the person interested in the proceeding, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties." In what can appropriately be viewed as an effort to enhance the ability of amici to reduce the repetition of arguments raised by the litigants, in 2007, the U.S. Supreme Court amended its rule governing the due dates for amicus briefs filed in its decisions on the merits. Prior to this rule change, amicus briefs were due on the same date as the brief of the party the amici supported. This rule change extended this by a week, requiring that amici submit their briefs no later than seven days after the brief of the party they support is filed with the Court.[25]

While the Canadian Supreme Court's policies regarding intervention and the U.S. Supreme Court's rules and norms governing amici curiae share much in common, two significant differences do exist. First, under Canadian Supreme Court Rule 59, "an intervener is not permitted to raise new

[25] This rule change applies to amicus briefs filed in the Court's decisions on the merits. Because the U.S. Supreme Court has discretionary jurisdiction over almost all appeals, its decision making takes place in two stages. At the agenda setting stage, the Court determines which cases will be fully briefed and orally argued. At the merits stage, the Court disposes of cases. Amicus curiae briefs may be filed at either stage of decision making, although they are relatively rare at the agenda setting stage. See Gregory A. Caldeira and John R. Wright, "Organized Interests and Agenda Setting in the U.S. Supreme Court," (1988) 82 American Political Science Review 1109.

issues unless otherwise ordered by a judge." This stands in stark contrast to the reality that American amici curiae regularly introduce new legal arguments that are not addressed by the parties to litigation.[26] Second, a 1997 amendment to U.S. Supreme Court Rule 37 requires that amici divulge whether the attorneys for the parties to litigation authored the amicus briefs, in whole or in part, and additionally compels amici to indicate whether any entities, other than those listed as amici curiae, made monetary contributions to fund the preparation of the amicus brief. The Supreme Court of Canada's rules lack such a directive. Although the U.S. Supreme Court provided no justification for this rule change, Kearney and Merrill[27] suggest that a likely explanation for the former points to the Court's concern that attorneys for the litigants were "ghostwriting" amicus briefs. As to the latter, it is plausible that that the justice's may have feared amicus briefs were being manipulated as a means of showing apparently broad support for a cause of interest.[28]

III. AMICUS CURIAE PARTICIPATION IN THE U.S. SUPREME COURT

Organized interests have long used the U.S. Supreme Court to pursue their policy goals. The first amicus brief filed by a non-governmental interest group occurred in 1904 when the Chinese Charitable and Benevolent Association of New York acted as an amicus in *Ah How (alias Louie Ah How) v. United States*,[29] a case involving the deportation of Chinese immigrants in New York.[30] In the following decades, a wide range of organizations filed amicus briefs in the Court, including the American Civil Liberties Union, American Farm Bureau Association, League for Economic Equality, NAACP, National Consumer's League, and the National Association of Cotton

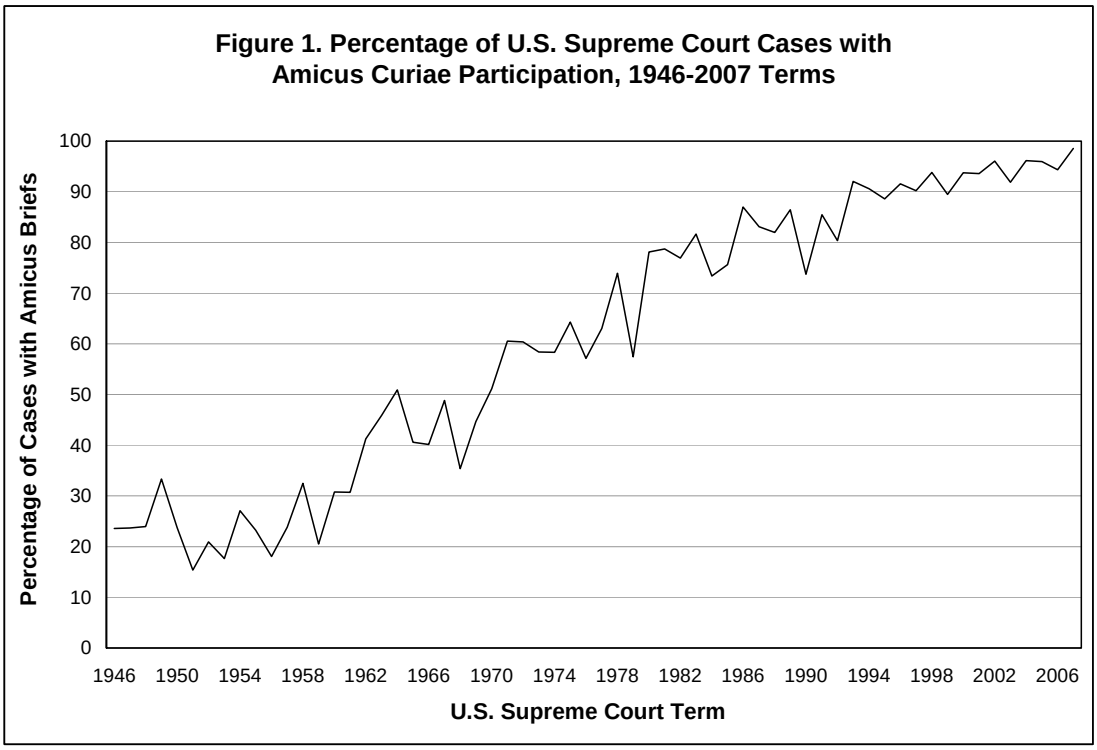
[26] Collins, supra, note 2, at 63-71.

[27] Kearney and Merrill, supra, note 21, at 767.

[28] In addition to these regulations, the U.S. Supreme Court has a variety of more mundane rules regarding amicus curiae participation. For example, Rule 9 specifies that amicus briefs must be filed by members of the Supreme Court Bar. Rule 33 contains the guidelines regarding the format of amicus briefs, including word limits (6,000 words at the agenda setting stage and 9,000 words for decisions on the merits) and the color of the briefs' covers. Similarly, Canadian Supreme Court Rule 42 specifies that intervener factums not exceed 20 pages (unless a judge orders otherwise) and Canadian Supreme Court Rules 27, 42, 44, and 45 dictate that materials submitted by interveners have blue covers.

[29] 193 U.S. 65 (1904).

[30] Krislov, supra, note 16, at 707.



Manufacturers.[31] By the post-World War II era, amicus participation was a regular occurrence in the Court.

Figure 1 plots the percentage of U.S. Supreme Court cases, decided with oral argument, in which at least one amicus curiae brief was filed during the Court's 1946-2007 terms.[32] As this figure makes clear, there has been a marked rise in the percentage of cases with amicus participation over the course of the last sixty years. From 1946-1960, the percentage of cases with amicus briefs was relatively stable, averaging 23%. A rather dramatic surge occurred during the 1960s, when the percentage of cases with amicus participation increased from 31% in 1961 to 44% in 1969. This swell in amicus participation is no doubt due in part to the striking increase in the number of interest groups operating in American politics during this period.[33] Following the explosion of amicus

[31] Collins, supra, note 2, at 41.

[32] The data in Figures 1, 2, and 3 were obtained from Kearney and Merrill, supra, note 21, for the 1946-1995 terms; Collins, supra, note 2, for the 1996-2001 terms; and were collected by the author for the 2002-2007 terms. The U.S. Supreme Court's term opens on the first Monday in October and traditionally extends to July 1st of the following year.

[33] Jeffrey M. Berry, *The Interest Group Society, 3rd edition* (New York: Longman, 1997), at chapter 2.

participation in the 1960s, later decades witnessed more stable increases. For example, the percentage of cases with amicus briefs in the 1970s was 60% and the 1980s saw this number increase to 80%. By the mid-1990s, the percentage of cases with amicus briefs effectively stabilized at over 90%, reaching a high of 98% in 2007. As such, these data make clear that it is a rare occurrence in the contemporary U.S. Supreme Court that a case is *not* accompanied by the participation of amici curiae.

While Figure 1 provides useful information regarding the overall percentage of cases in which amicus briefs are filed, it cannot speak to whether certain issue areas exhibit more or less amicus activity. Figure 2 provides this information by graphing the percentage of cases in which at least one amicus brief was filed in five issue areas during the chief justiceships of Vinson (1946-1952), Warren (1953-1969), Burger(1970-1985), Rehnquist (1986-2004), and Roberts (2005-2007).[34] Civil rights cases include disputes involving criminal procedure, civil rights, the First Amendment (which contains protections related to the freedoms of religion, speech, and the press, along with the rights to assembly and petition), due process of law, privacy, and attorneys' rights (which typically involve attorneys' commercial speech rights). Economics cases include issues related to economic and union activity, such as liability claims and union arbitration. Judicial power cases involve controversies surrounding the authority of the federal courts, such as federal court deference to the proceedings of state courts. Federalism disputes encompass the power of the federal government vis-à-vis that of state or local governments. Federal taxation cases include primarily issues related to the Internal Revenue Code.[35]

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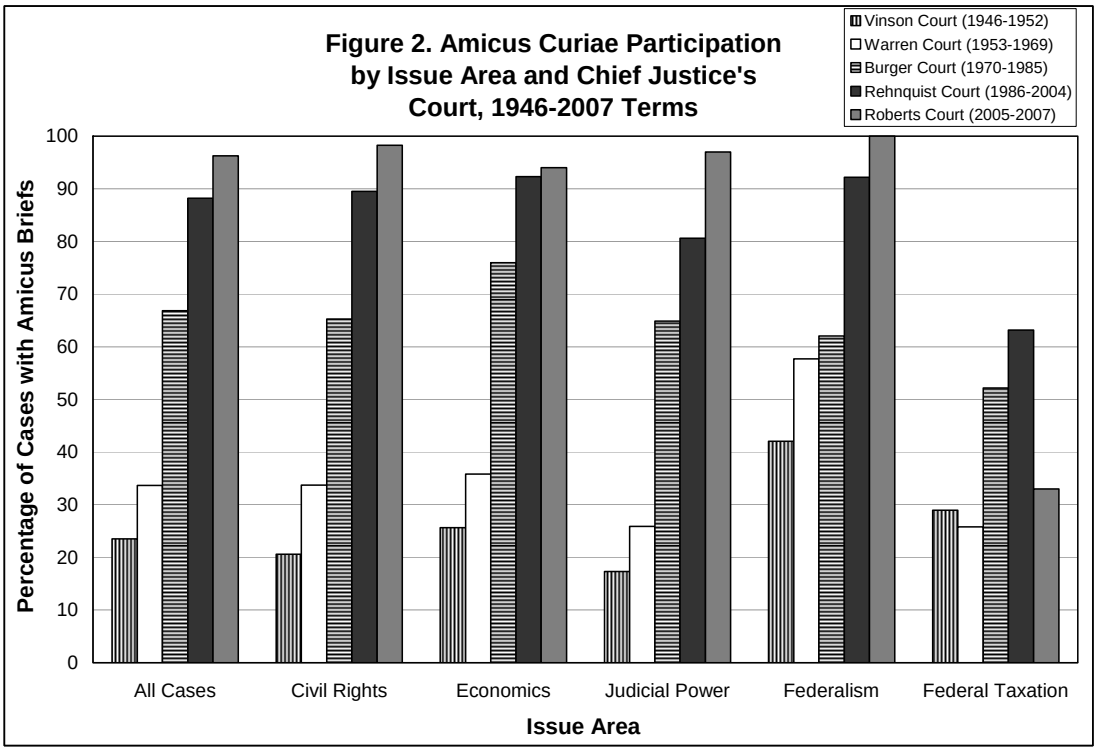
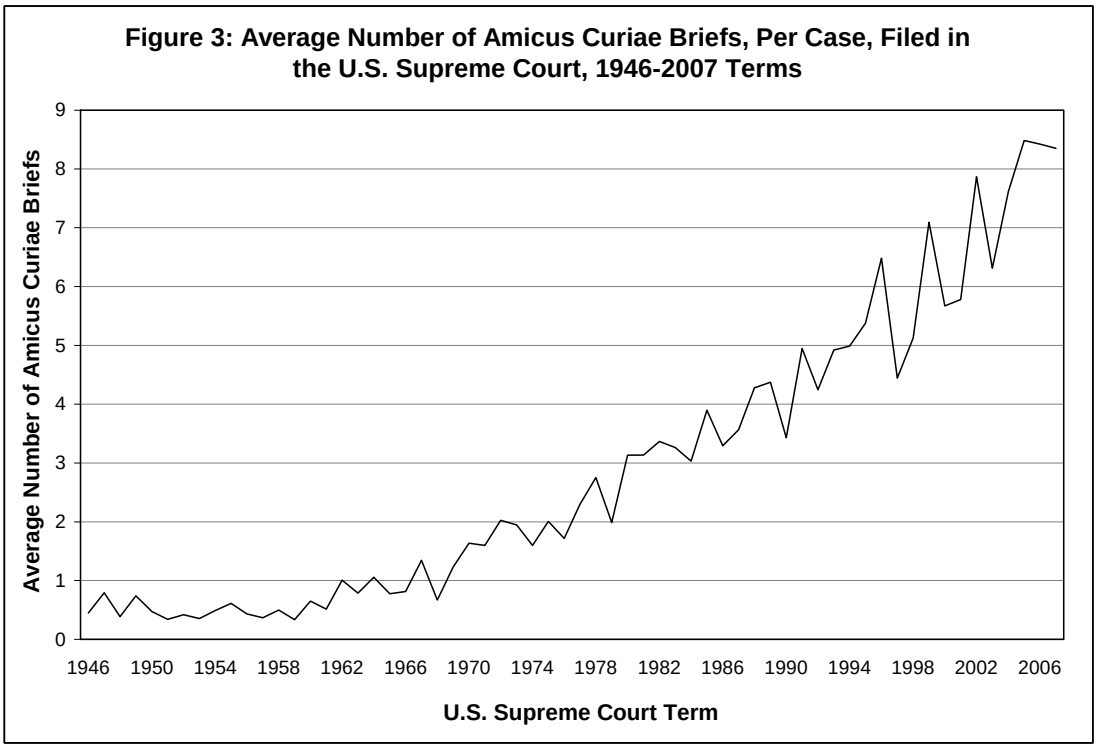
[34] In studies of the U.S. Supreme Court, it is common to break down periods of the Court in terms of the individual serving as Chief Justice of the United States.

[35] The issue areas presented in Figure 2 were derived from Harold Spaeth, *The Original United States Supreme Court Database, 1953-2007 Terms* (East Lansing: Department of Political Science, Michigan State University, 2009) and Harold Spaeth, *The Vinson-Warren Supreme Court Judicial Database, 1946-1968 Terms* (East Lansing: Department of Political Science, Michigan State University, 2002). Both are available at http://www.cas.sc.edu/poli/juri/sctdata.htm.



Several notable points emerge from this figure. First, it is evident that the percentage of cases with amicus participation rose over time for virtually all issue areas. Second, it is clear that amici participate in all of the issue areas presented in Figure 2, although some issue areas exhibit higher levels of participation. That is, amicus briefs are most commonly filed in cases involving civil rights, economics, federalism, and judicial power. Relatively few amicus briefs are filed in federal taxation cases. Finally, this figure corroborates the reality that, with the exception of federal taxations cases, virtually all disputes in the contemporary Roberts Court witness the participation of organized interests, regardless of the substance of the litigation.

Figures 1 and 2 plainly indicate that amicus curiae participation is a staple of interest group activity in the U.S. Supreme Court. However, they do not evince how many amicus briefs are filed at the Court. Figure 3 contains this information by tracking the average number of amicus briefs, per case, filed during the 1946-2007 terms. From 1946-1969, the justices could expect a single amicus brief in any given case. This rose to two amicus briefs during the 1970s and increased more



dramatically to four amicus briefs in the 1980s. During the 1990s, the justice could expect to see an average of five amicus briefs per case, while an average of eight amicus briefs were filed, per case, in the 2000s. As such, this figure makes it perspicuous that, not only has the percentage of cases with amicus briefs dramatically intensified over time, but the average number of amicus briefs filed per case has increased more than eight-fold since the 1950s.

IV. THE DIVERSITY OF ORGANIZED INTERESTS IN THE U.S. SUPREME COURT

Extant research indicates that a wide array of organizations find a voice in the U.S. Supreme Court.[36] That is, moneyed interests, such as businesses and corporations, do not dominate amicus activity in the Supreme Court. Rather, a wide array of organizations participate in the Court's jurisprudence, including public advocacy organizations, public interest law firms, and ad hoc associations of individuals. This separates the U.S. Supreme Court from Washington lobbying more

[36] Paul M. Collins, Jr. and Lisa A. Solowiej, "Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court" (2007) 32 Law & Social Inquiry 955; Gregory A. Caldeira and John R. Wright, "Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?" (1990) 52 Journal of Politics 782.

generally, in that there is substantial evidence of an upper-class bias in terms of the types of groups represented in the U.S. capital, with most lobbying activity conducted by institutional interests, such as corporations.[37] In part, this distinction is likely due to the fact that all non-governmental organizations face the same procedural requirements to participate as amici, and none of these requirements is especially burdensome. Conversely, there is evidence that, absent a geographic tie to a member of Congress, access to legislators is governed by campaign donations.[38]

To provide some perspective on the diversity of interest groups participating as friends of the court, Table 1 presents a classification of amici curiae in *District of Columbia v. Heller*.[39] This case marked the first time in 70 years that the U.S. Supreme Court considered the meaning of the Second Amendment to the U.S. Constitution, which reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." At issue in the case was the constitutionality of a District of Columbia law that, among other things, effectively outlawed the possession of handguns within the district.[40] The respondent, a security guard, argued that the handgun ban violated his right to keep and bear arms. In so doing, Heller asked the Court to embrace the position that the Second Amendment inferred an individual right to gun ownership, irrespective of one's connection to a militia. The District of Columbia argued that the ban was fully within its power because the Second Amendment granted only a collective right to gun ownership, contingent on one's official connection to a governmental militia. In a 5-4 decision,

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[37] Robert H. Salisbury, "Interest Representation: The Dominance of Institutions" (1984) 78 American Political Science Review 64; Kay Lehman Schlozman, "What Accent the Heavenly Chorus? Political Equality and the American Pressure System" (1984) 46 Journal of Politics 1006.

[38] Laura I. Langbein, "Money and Access: Some Empirical Evidence" (1986) 48 Journal of Politics 1052; John R. Wright, "PAC Contributions, Lobbying, and Representation" (1980) 51 Journal of Politics 713.

[39] 171 L. Ed. 2d 637 (2008).

[40] In addition to highlighting the diversity of amici, *District of Columbia v. Heller* provides a recent example of a test case. Seeking to have the Supreme Court clarify the meaning of the Second Amendment, Robert A. Levy, a senior fellow at the Cato Institute, a non-profit public policy research foundation, orchestrated and personally financed the litigation. Levy interviewed dozens of potential plaintiffs in the District of Columbia, settling on six plaintiffs from diverse backgrounds to challenge the handgun ban. See Adam Liptak, "Carefully Plotted Course Propels Gun Case to Top" (2007) New York Times, December 3, at A16.

the Supreme Court endorsed the respondent's position, determining that the Second Amendment protects an individual's right to possess a firearm, regardless of that individual's connection with a militia, so long as the firearm is used for traditionally lawful purposes, such as self-defense.

The amicus effort in *Heller* was staggering. Sixty-seven amicus briefs were filed in the case: 20 supported the District of Columbia's handgun ban, while 47 sought to overturn the prohibition. Though this case is unusual with regard to the number of amicus briefs filed—it ranks third in terms of Supreme Court cases with the most amicus filings[41]—it nonetheless highlights the diversity of interests at the Court. The amici in Table 1 were coded into each typology based on a well-established methodology that focuses on their membership characteristics.[42] The information used to classify organizations was taken from the "Statement of Interest" section of each amicus brief, a required component of amicus briefs under Supreme Court Rule 37.

Individuals include amicus briefs that were filed by ad hoc organizations of individuals, such as academics, police chiefs, and members of Congress. Corporations, of which there were none in *Heller*, encompass businesses and corporations that are identified by their corporate monikers. Amicus briefs filed by the United States are most commonly submitted by the Solicitor General (as was the case in *Heller*), although they are occasionally filed by the Solicitor General and cosigned by another executive branch official or bureaucracy. Amici classified as state and territorial governments include the U.S. states, as well as territories and possessions. Local governments are made up of governments below the state level, such as cities, counties, school boards, and the like. Public advocacy amici are composed of groups whose membership is individuals, regardless of their occupational status, and who pursue primary political, as opposed to economic goals, such as non-

[41] More than 100 amicus briefs were filed in the University of Michigan affirmative action cases, *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), which centered on the use of racial preferences in college admissions. Seventy-eight amicus briefs were filed in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), a case involving restrictions on a woman's access to an abortion.

[42] Collins, supra, note 2, at 56-63; Collins and Solowiej, supra, note 36; Caldeira and Wright, supra, note 36.

profit charities, community organizations, and groups who represent the interests of the disadvantaged. Public interest law firms are non-profit legal organizations who provide attorneys to represent individual litigants or initiate lawsuits themselves in pursuit of their interests. The distinguishing characteristic of a professional association is that its membership is based on occupation in a specific profession. In addition, professional associations tend to pursue economic, as well as political, benefits for its members. Amici are classified as unions if they identify themselves as a union representing the interests of its members who serve in a particular occupation. Peak associations are, in effect, organizations of organizations. That is, peak associations are organizations who do not have members in the ordinary sense; rather, their membership is comprised of other institutions, such as labor unions, businesses, and interest groups. Finally, organizations that do not fit into any of the categories previously discussed are identified as "other" organizations. In *Heller*, this included two political parties: the DC Statehood Green Party and the Libertarian National Committee.

The first column in Table 1 indicates the number of briefs on which each category of amici appeared. Because different categories of amici frequently cosign a single amicus brief, the percentages (indicated in parentheses) do not sum to 100. The second column provides information regarding the number of amici participating in the case, thus offering insight into how frequently the justices observe each category of amicus. Beginning with column 1, it is evident that a wide assortment of interest groups participated as amici curiae. Public advocacy organizations appeared on the largest number of amicus briefs, almost 50%, followed by individuals (36%), public interest law firms (19%), and professional associations (16%). The categories of amici who appeared on the fewest number of amicus briefs were corporations (0%), the federal government (1.5%), unions (1.5%), and peak associations (1.5%).

Table 1. Amicus Curiae Participation in *District of Columbia v. Heller* (2008)

Amicus Curiae Type	Number of Briefs	Number of Amici	Examples
Individuals	24 (35.8)	672 (70.7)	academics, district attorneys, members of Congress, military officers, police chiefs, state legislators
Corporations	0 (0)	0 (0)	none
United States	1 (1.5)	1 (0.1)	United States Solicitor General
State & Territorial Governments	3 (4.5)	38 (4.0)	Hawaii, New York, Puerto Rico, Texas, Wyoming
Local Governments	3 (4.5)	26 (2.7)	Board of Education of the City of Chicago, City of San Francisco, Maricopa County Attorney's Office
Public Advocacy	33 (49.3)	160 (16.8)	American Hunters and Shooters Association, Congress of Racial Equality, Heartland Institute, NAACP, Women Against Gun Violence
Public Interest Law Firms	13 (19.4)	13 (1.4)	Legal Community Against Violence, Mountain States Legal Foundation, NAACP LDF, NRA Civil Rights Defense Fund, Rutherford Institute
Professional Associations	11 (16.4)	36 (3.8)	Association of American Physicians and Surgeons, American Bar Association, American Public Health Association, United States Conference of Mayors
Unions	1 (1.5)	1 (0.1)	International Brotherhood of Police Officers
Peak Associations	1 (1.5)	2 (0.2)	ACTION OHIO, National Network to End Domestic Violence
Other	2 (3.0)	2 (0.2)	DC Statehood Green Party, Libertarian National Committee
Totals	67	951	

Entries in parentheses indicate within column percentages. These were computed by dividing the total number of times each category of amicus curiae appeared on a brief by the total number of amicus curiae briefs filed (column one) or the total number of amici curiae participating in the case (column two).

Column two speaks the overall number of amici participating in *Heller*, providing information regarding the coalitional activity of organized interests. Individuals made up the largest category of amici, representing 71% of all amici. This indicates that, on average, 28 individuals appeared together on the same amicus brief. However, it should be noted that a single amicus brief

was filed by 306 members of the U.S. Congress: 250 members of the House, 55 senators, and the vice president of the United States in his capacity as president of the Senate. Following individuals, 160 public advocacy organizations participated, comprising 17% of all amici. On average, a brief filed by a public advocacy organization was cosigned by 4 other public advocacy groups. Thirty-eight states and territorial government appeared as amici on three briefs. Two of these briefs were filed in opposition to the District of Columbia's handgun ban, one of which was submitted by the State of Wisconsin, while the other was cosigned by 31 states. Supporting the District's prohibition, New York, Hawaii, Maryland, Massachusetts, New Jersey, and Puerto Rico filed a joint brief. The fourth largest category of amici in *Heller* was comprised of professional associations. Thirty-six trade associations appeared on 11 amicus briefs.

Table 1 speaks to three significant points. First, it is evident that a diverse assortment of interest groups utilized the amicus brief in *Heller* in pursuit of their policy goals. Moreover, moneyed interests, such as professional associations and corporations, far from dominated the amicus activity in this case. Rather, the Court heard perspectives on the Second Amendment from ad hoc associations of individuals, governmental entities, public advocacy organizations, and public interest law firms. Second, the amicus effort in *Heller* provides an excellent example of the reality that coalitional amicus participation is the norm in the Court. Indeed, 951 distinct amici participated, appearing on 67 briefs. This suggests that groups recognize the benefits of coalitional amicus strategies, whether the show broad support for a cause of interest or to reduce the costs of filing a brief by a single organization.[43] Finally, note the absence of corporate amici in *Heller*. To be sure, this is an anomaly. For example, during the 1995 term, corporations appeared on 12% of amicus briefs,

[43] For a discussion of the effectiveness of coalitional amicus briefs, see Paul M. Collins, Jr. "Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation" (2004) 38 Law & Society Review 807.

comprising 7% of all amici.[44] Although one can only speculate, the absence of business interests, such as handgun manufacturers, may be a partial function of the fear that the Court might view them as motivated by economic self-interest, as opposed to being genuinely concerned with the sensitive legal and social policy issues implicated in the case.

V. THE IMPACT OF AMICUS CURIAE BRIEFS ON THE U.S. SUPREME COURT

There is a voluminous body of scholarship devoted to ascertaining the influence of amici curiae on the U.S. Supreme Court. While a complete review of this literature is beyond the purview of this essay, it is nonetheless useful to engage a sample of this research.[45] My purpose here is two-fold. First, by discussing the conclusions drawn from extant research, I hope to provide the reader with a sense of whether or not amicus briefs influence Supreme Court decision making. Second, in examining this scholarship, I intend to shed light on the diverse range of methodologies used to examine interest group effectiveness in the Supreme Court. Scholars studying the impact of amici curiae employ a range of research methods and analyze a variety of possible influences on the Court and it is clear that no single methodological approach dominates the scholarly examination of friends of the court.

Prior to discussing the approaches taken by scholars analyzing amicus influence in the Supreme Court, it is useful to provide a brief treatment of the primary theoretical perspective shared by many of these studies. That is, scholars have generally approached the analysis of amici curiae by presenting a theory of amicus impact based on the informational value of amicus briefs.[46] These scholars posit that amicus briefs are influential inasmuch as they provide the justices with new or reframed perspectives of the legal issues facing the Court, discuss the wide ranging economic, legal,

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[44] Collins and Solowiej, supra, note 36, at 967.

[45] For a concise review of the more than 40 published studies examining the influence of amicus briefs on the U.S. Supreme Court, see Collins, supra, note 2, at 4-10.

[46] See, e.g., Collins, supra, note 2; Collins, supra, note 43; Epstein and Knight, supra, note 23; Kearney and Merrill, supra, note 21; Caldeira and Wright, supra, note 25; James F. Spriggs, II and Paul J. Wahlbeck, "Amicus Curiae and the Role of Information at the Supreme Court" (1997) 50 Political Research Quarterly 365.

and social policy implications of the decision, in addition to presenting the justice with information regarding the preferences of outside actors, including the public, Congress, the executive branch, and state and local governments. Because American jurisprudence is based on the adversarial system—in which litigants and amici must marshal the language of the law in pursuit of their goals—the information supplied by amici is said to be capable of persuading the justices to endorse particular positions or legal rules and, indeed, there is empirical evidence to support this perspective.

The most common method of analyzing amicus influence on the Supreme Court involves large-n statistical studies that tend to focus on a relatively large time frame. While these studies share a common methodological approach, they differ in terms of the phenomena (i.e., dependent variable) under examination. For example, Caldeira and Wright[47] analyze the influence of amicus curiae briefs at the Supreme Court's agenda setting stage. They uncover evidence that petitions for a writ of certiorari—the primary vehicle by which cases arrive at the Supreme Court—are far more likely to be granted when accompanied by one or more amicus briefs. They conclude that, because amicus briefs at the agenda setting stage are so rare, the briefs provide information regarding the salience of the case for the justices, thus making review more likely.

A second quantitative approach to analyzing amicus influence focuses on examining litigation outcomes; that is, whether the Court ruled in favor of the petitioner or respondent.[48] These studies seek to determine if the party supported by the largest number of amicus briefs is more likely to prevail. For example, Collins[49] scrutinizes litigation success from 1953-1985 and discovers that the litigant supported by the largest number of amicus briefs was more likely to win.[50] Such is said to be

[47] Caldeira and Wright, supra, note 25.

[48] See, e.g., Collins, supra, note 43; Kearney and Merrill, supra, note 21; Donald R. Songer and Reginald S. Sheehan, "Interest Group Success in the Courts: Amicus Participation in the Supreme Court" (1993) 46 Political Research Quarterly 339.

[49] Collins, supra, note 41.

[50] Several studies of intervener success in Canada incorporate this methodology into the analysis of the effectiveness of the Women's Legal Education and Action Fund, providing evidence of this organization's influence on judicial decision

the case because a relatively large number of amicus briefs filed in support of a litigant provide the justices with myriad legal arguments supporting that litigant's position.

More recently, Collins[51] has posited that scholars studying the influence of amici curiae are better suited by examining the ideological direction (i.e., liberal or conservative) of the Court's decisions and that of the individual justice's votes, rather than focusing on litigation success. Collins argues this dependent variable is desirable because the primary goal of amici is not to ensure that a particular litigant wins or loses, but instead is to influence the ideological direction of the Court's policy outputs. In his book length treatment of friends of the Court,[52] Collins reveals that amici are capable of shaping the ideological direction of the individual justice's votes. Moreover, the influence of amici is so strong that the justices' attitudes do not necessarily diminish the significance of the arguments raised by amici. That is, conservative amici are capable of persuading liberal justices to cast conservative votes, while liberal amici are capable of persuading conservative justices to cast liberal votes.[53]

A fourth quantitative approach to studying amicus influence focusing on exploring the ability of amici to shape the language used by the justices in the Supreme Court's opinions. Frequently, this is accomplished by counting citations to amicus briefs in the justice's opinions. For example, Kearney and Merrill[54] examine citations to amicus briefs in the Supreme Court's majority, concurring, and dissenting opinions from 1946-1995. Their results indicate that amicus briefs were

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making. See, for example, Christopher P. Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (Vancouver: University of British Columbia Press, 2004) and F. L. Morton and Avril Allen, "Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada" (2001) 34 Canadian Journal of Political Science 55.

[51] Collins, supra, note 2; Paul M. Collins, Jr. "Lobbyists before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs" (2007) 60 Political Research Quarterly 55.

[52] Collins, supra, note 2.

[53] Morton and Allen, supra, note 50, utilize a similar methodological strategy by investigating the ability of feminist groups to alter the policy change enunciated in Canadian court opinions.

[54] Kearney and Merrill, supra, note 21. See also Ryan J. Owens and Lee Epstein, "Amici Curiae During the Rehnquist Years" (2005) 89 Judicature 127.

cited by the Court's majority in 28% of cases in which an amicus brief was filed. Moreover, they show that amicus briefs were directly quoted in 9% of cases accompanied by at least one amicus brief.[55] Spriggs and Wahlbeck[56] take an alternative approach to examining the justices' incorporation of the arguments of amici curiae into the Court's majority opinions. Those authors sought to determine whether the Court was more likely to adopt arguments forwarded by amici depending on whether the arguments reiterated the briefs of the litigants or presented novel information. Interestingly, they find that the Court was more likely to adopt the positions advanced by the amici if those arguments reiterated the points raised by the parties, suggesting amici influence may not be due to the original information presented in the briefs.

In addition to the aforementioned quantitative approaches to studying the influence of amicus curiae briefs on the U.S. Supreme Court, a number of scholars have utilized more qualitative methods to examine amicus impact. Through these approaches, scholars are enabled to provide a rich understanding of how amicus briefs shape the legal doctrines enunciated in the Court's opinions, in addition to offering insights into the views of, for example, the law clerks who work with the justices. Epstein and Kobylka[57] examine the role of amici curiae in the Supreme Court's death penalty and abortion jurisprudence. These authors provide persuasive evidence as to the ability of amici to shape the justice's decision making in these issue areas by illustrating how the arguments presented by the amici found there way into the Court's majority, concurring, and dissenting opinions. Using a similar research strategy, Samuels[58] demonstrates how friends of the court shaped the nature of the Court's decision making in privacy disputes, including abortion,

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[55] Manfredi, supra, note 50 also incorporates citation counts into his study of the Women's Legal Education and Action Fund's influence on the Supreme Court of Canada.

[56] Spriggs and Wahlbeck, supra, note 46.

[57] Lee Epstein and Joseph F. Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* (Chapel Hill: University of North Carolina Press, 1992).

[58] Suzanne Uttaro Samuels, *First among Friends: Interest Groups, the U.S. Supreme Court, and the Right to Privacy* (Westport: Praeger Publishers, 2004).

assistance in dying, and protected relationships. In addition to providing evidence as to the Court's heavy reliance on citations to amicus briefs in its privacy opinions, Samuels illuminates how many of the arguments forwarded by the amici found there way into the Court's opinions without attribution.[59]

Using a novel methodological approach to examine the influence of amicus briefs on the Supreme Court, Lynch[60] conducted seventy interviews with former Supreme Court law clerks for the purpose of providing insight into how law clerks view amicus submissions.[61] Among other things, the clerks indicated that they read virtually all of the amicus briefs, that amicus briefs were most helpful in highly technical cases, and were given more attention if they presented social scientific data. The clerks also revealed that briefs filed by highly experienced advocates were considered more carefully than briefs filed by relatively inexperienced litigators and that they would overwhelmingly prefer to see more collaboration on amicus briefs and less repetition of the arguments advanced by the parties to litigation.

VI. CONCLUSIONS

The purpose of this essay was to shed light on the American equivalent of Canadian intervention: the amicus curiae brief. As the above discussion makes clear, this method of interest group litigation is firmly ingrained in the U.S. Supreme Court's jurisprudence. In fact, it is a rarity that a U.S. Supreme Court case is not accompanied by at least one amicus brief. In part, this is due to the Supreme Court's open door policy toward the participation of organized interests. Inasmuch

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[59] In his book length treatment of the influence of the Women's Legal Education and Action Fund on the Supreme Court of Canada, Manfredi, supra, note 50, employs a mixed-methods approach, although the primary research style follows that of Epstein and Kobylka.

[60] Kelly J. Lynch, "Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs" (2004) 20 Journal of Law and Politics 33.

[61] At the U.S. Supreme Court, law clerks play a number of significant roles, including reviewing and making recommendations to the justices regarding certiorari petitions and drafting judicial opinions. See Artemus Ward and David L. Widen, *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court* (New York: New York University Press, 2006).

as the Court's rules present few real barriers to amicus participation, the amicus practice is allowed to proliferate. While the exact mechanisms for the participation of interveners in the Supreme Court of Canada differ somewhat, that institution is likewise welcoming to interest groups.[62] Thus, the two courts share much in common regarding their attitudes toward the importance of obtaining the views of organizations who are not direct parties to the litigation. Insofar as the participation of interest groups may better enable judges to render efficacious decisions, this can be viewed as a desirable state of affairs. For example, U.S. Supreme Court Justice Stephen Breyer articulated his view of the utility of amicus briefs in no uncertain terms in noting that amicus "briefs play an important role in educating the judges on potentially relevant technical matters, helping make us not experts, but moderately educated lay persons, and that education helps to improve the quality of our decisions."[63]

In addition to providing a treatment of the amicus practice in the U.S. Supreme Court, this essay also discussed extant research regarding the influence of amicus briefs. Although this literature has made a great deal of strides in enhancing our understanding of interest group litigation, there are still a variety of questions whose answers are less clear, in terms of American amici curiae, Canadian interveners, and interest group participation beyond North America. For example, we know relatively little about the perspectives of interest groups regarding the effectiveness of amicus curiae briefs and intervention or how groups choose to target certain cases. Moreover, relatively little is known regarding under what circumstances organizations choose to join together to form coalitions

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[62] Brodie, supra, note 3.

[63] Stephen Breyer, "The Interdependence of Science and Law" (1998) 82 Judicature 24, at 26. It should be noted that not all American jurists subscribe to Breyer's view. In particular, Judge Richard Posner of the Seventh Circuit Court of Appeals has been rather vocal regarding his resistance to the amicus practice. For example, in Voices for Choices v. Illinois Bell Telephone Company, 339 F.3d 542, at 545 (2003), Posner stated the following: "The fact that powerful public officials or business or labor organizations support or oppose an appeal is a datum that is irrelevant to judicial decision making, except in a few cases, of which this is not one, in which the position of a nonparty has legal significance. And even in those cases the position can usually be conveyed by a letter or affidavit more concisely and authoritatively than by a brief."

in pursuit of their interests. While quantitative studies can provide insight into these questions, so too can interviews with representatives from interest groups. There has likewise been limited attention to determining whether certain organizations are especially effective amici or interveners, a question with enormous normative significance since it speaks to possible biases in the administration of justice. Further, we know relatively little about how judges view the participation of outside interests. Finally, because much of the literature on interest group litigation has focused on the high courts in the U.S., Canada, and in other nations, relatively little is known regarding organizational participation in lower judicial bodies. To be sure, the participation of organized interests is an important part of democracy, in the U.S., Canada, and beyond. While substantial gains have been made toward enhancing our understanding of the roles of interest groups in the courts, a host of questions still await scholarly analysis.