Organized Interests and Agenda Setting in the Supreme Court

Gregg Caldeira and John Wright 1988 APSR article - abridged.

Each year a multitude of interest groups participate in various guises before the Supreme Court. It is clear that in the last couple of decades interest groups have stepped up their activities before the courts, just as they have in other political arenas. Interest groups can of course choose to take part before the Supreme Court in many different roles, and they most often do so as amici curiae. Organized interests have long participated actively as amici curiae for decisions on the merits: But political scientists, with few exceptions, have not measured the impact of these briefs, and no one has done so for decisions on writs of certiorari and appeal.

We contend that not only are amicus curiae briefs important, but that the decision to review a case ranks as important as—if not more important than— the decision on the merits. In setting its agenda, the Supreme Court each year determines new winners and losers in the struggle for economic, political, and social power. We believe, therefore, that powerful interests will not stand by passively as the Supreme Court legitimizes literally hundreds of decisions in the lower courts each year and calls many others into question. And so, as Justice Brandeis once remarked, “the most important thing the Court does is not doing.” Thus we ask, to what extent does amicus curiae participation by organized interests influence the Supreme Court’s selection of cases for plenary hearing? . . .

The idea that interest groups have significance in litigation before the Supreme Court goes back at least as far as Bentley’s Process of Govt (1908): "So far from being a sort of legal machine, courts are a functioning part of this government, responsive to the group pressures within it, representatives of all sorts of pressures and using their representative judgment to bring these pressures to balance, not indeed in just the same way, but on just the same basis that any other agency does.” The tactics groups can use to influence legislation are considerable, including "class actions” and test cases; participation as amici curiae; giving of advice and service; expert testimony, and financial assistance; and taking control of the law suit. Vose (1959) blazed a trail with his meticulous and intriguing case study of how the NAACP Legal Defense Fund used a variety of strategies and tactics in its campaign of litigation to end the restrictive covenant in housing. . . .

Scholars have demonstrated over and over again the vigorous, extensive, and continuing efforts on the part of interest groups to lobby the courts. At least since the 1960s evidence of the participation of interest groups as amici curiae or sponsors has virtually leaped from the pages of the United States Reports even on. the most cursory inspection.

Although the filing of amicus curiae briefs is just one of many tactics available to organized interests, participation as amicus has figured as an indicator of interest group activity in virtually every pertinent study. More important, we have good reason to believe that such filings are consequential. The filing of an amicus brief, apart from the quality or persuasiveness of the arguments presented, provides the justices with an indication of the array of social forces at play in the litigation In Bakke v Regents of the University of California, for example, the Court had fifty-seven briefs from "friends" and without doubt obtained a vivid picture of whose interests were at risk. The Supreme Court as Krislov has remarked, sometimes views the amicus as a “potential litigant in future cases, as an ally of one of the parties, or as the representative of an interest not otherwise represented.”. . .

So, clearly, interest groups have used the vehicle of amicus briefs often and, in recent years, with increased frequency. There is, in addition, some fragmentary evidence that participation as an amicus curiae constitutes an efficacious route for interest groups to take in their attempt to influence the Court. Puro found that groups on the "liberal" side participated more often as friends of the Court and were. more likely than conservatives to triumph on the merits.

We, too, believe that amici curiae make a difference in litigation. And we propose that their impact will be apparent at the agenda-setting phase. The presence of amici during case selection communicates to the Supreme Court information about the constellation of interests involved, and this information, we suggest, is both valued and heeded by the justices and their clerks . . .

Quite simply, our theory assumes that the potential significance of a case is proportional to the demand for adjudication among affected parties and that the amount of amicus curiae participation reflects the demand for adjudication. We propose that amicus curiae participation by organized interests provides information, or signals—otherwise largely unavailable—about the political, social, and economic significance of cases on the Supreme Court's paid docket and that justices make inferences about the potential impact of their decisions by observing the extent of amicus activity. Although potential amici have the option of filing briefs either in support of, or in opposition to, petitions for writs of certiorari, our theory suggests that both types of briefs should have the same effect—that is, increase the likelihood of a grant. The reason is simply that both kinds of briefs draw attention to the potential significance of a case. Consequently, the mere presence or absence of a brief amicus curiae may weigh in more heavily than the substantive arguments presented. . . .

Our primary hypothesis [then] is that the greater number of amicus curiae briefs filed for a given case—either in favor of, or in opposition to, certiorari—~ the greater the likelihood that the case will be granted a writ of certiorari. We test this hypothesis using data we have collected on all paid cases in' which the Supreme Court granted or denied a writ of certiorari or affirmed, dismissed, re- versed, or noted probable jurisdiction on a writ of appeal during the 1982 term (2,061). Of these 2,061 cases, 1,906 involved petitions for writs of certiorari, and the rest were decided on appeal. We confine our analysis to petitions for writs of certiorari, of which 145 (7.6 percent) succeeded. . . .

A simple . . . analysis of decisions on certiorari and filing of amicus briefs in~ dicates considerable preliminary support for our main hypothesis. At least one brief was filed in 148 of the 1,906 petitions (108 cases with briefs in support only, twenty-nine cases with briefs in opposition only, and eleven with briefs both for and against), and the Court granted certiorari in fifty-four, or 36 percent, of these cases. In contrast, when no one filed an amicus brief on a petition, the Court granted. only 5 percent of the cases.

Not only does one brief in favor of certiorari significantly improve the chances of a case being accepted, but two, three, and four briefs improve the chances even more. [This finding holds even after we (statistically) take into account other important forces in the certiorari process, such as whether conlfict existed in the lower courts] . . .

Importantly [too] briefs amicus curiae in <u>opposition</u> to a petition for certiorari significantly increase—-rather than decrease—the likelihood that my Supreme Court will grant a review. This result is not nearly so striking as that for briefs in support of certiorari, but [it is statistically significant.) . . . In any event, this result further supports our theory that an amicus brief at the agenda-setting stage is a signal by organized interests to the Supreme Court about the practical importance of a case. The direction of the statistical result suggests that what matters most is

the presence or absence of an amicus brief per se, not the direction of the substantive arguments presented. If justices were strongly influenced by the contents of the briefs themselves, it is quite unlikely that briefs in opposition to certiorari would significantly increase the likelihood of certiorari being granted. Briefs amicus curiae in opposition, plainly and simply, pique the Court's interest in a case. . . .

We believe this result is important both for understanding judicial behavior and for understanding the strategies and influence of organized interests in national politics. The US. Supreme Court, in our estimation, is quite responsive to the demands and preferences of organized interests when choosing its plenary docket. In this regard, the Supreme Court is very much a representative institution, and we think it both useful and important to analyze the Court from this perspective. We View the Court's openness to outside demands when choosing its plenary docket as not only necessary for a smoothly functioning representative polity but also as a natural consequence of rational political decision making. To be sure, how well or whether judicial responsiveness to the demands of organized interests comports with more traditional theories of decision making is a matter of considerable controversy and is best left for fuller treatment elsewhere.

Organized interests are generally influential during the Court's agenda phase because they solve an informational problem for the justices. Through participation as amici, organized interests effectively communicate to the justices information about the array of forces at play in the litigation, who is at risk, and the number and variety of parties regarding the litigation as significant. Obtained elsewhere, this information would surely be much more costly than as provided through amicus participation, if it could be obtained elsewhere at all. In this regard, organized interests function effectively as interest articulators, a result that generally adds stability to political systems.