Information, Constraints, and the Decision to Submit an Amicus Curiae Brief in a U.S. Supreme Court Case

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Abstract

I contribute to the literature on the involvement of organized interests at the Court as well as the broader body of research on interest group lobbying strategies by developing a theoretical explanation for how organized interests select the Supreme Court cases in which to file amicus curiae briefs. Starting with the assumption that organized interests pursue policy influence, my argument is that organized interests will submit amicus curiae briefs in the Court cases that provide the greatest opportunity for the interest to influence the legal rules that will be established in the majority opinion. Further, membership-based organized interests will also have to consider the effect of their case-selection decisions on their ability to attract and retain membership support. I test my hypotheses with data on a large random sample of organized interests and their amicus curiae brief filings in U.S. Supreme Court cases from the 1991-1995 terms. The results of this analysis support all of my hypotheses and indicate that organized interests seek out cases in which the justices are relatively information-poor. Membership-based interests also choose cases that allow for visible and apparently “successful” participation.
One of the more critical strategic decisions that organized interests make involves selecting when and where to lobby. Although most traditional interest group research investigates the involvement of interests in Congress (e.g., Hojnacki and Kimball 1998), organized interests can also pursue their policy goals in the judicial branch (Barker 1967; Cortner 1968). Viewing the participation of organized interests in the courts as a particularly interesting phenomenon, scholars have generated a substantial body of research indicating, for instance, that a wide variety of organized interests participate at the U.S. Supreme Court as amicus curiae (Caldeira and Wright 1990), the level of interest participation has increased over the last few decades (Epstein 1993), and organized interest advocacy may have some effect on Court decisions and opinions (Epstein and Kobylka 1992). Other studies are dedicated to explaining why organized interests might incorporate litigation into their repertoire of lobbying activities (e.g., Kobylka 1991; Scheppele and Walker 1991).

What this line of research has not done, however, is develop an explanation for how organized interests choose the specific court cases in which they will participate. In the one published study that systematically investigates the case-selection decision, Tauber (1998) analyzes the decision of the NAACP’s Legal Defense Fund to sponsor litigation in capital punishment cases heard in the U.S. Courts of Appeals and finds very little support for the influence of legal variables (e.g., whether aggravating circumstances were present) on the LDF’s choices. While it is important to understand the litigation patterns of a high-profile organized interest such as the LDF, it is impossible to draw generalizations regarding the behavior of the organized interest population when studying only one interest. Thus, we know very little about the factors that explain how organized interests select the Court cases in which to participate.
Even outside of the context of the courts, interest group scholars have not paid much attention to explaining how organized interests select the specific situations in which to engage in lobbying activity (Baumgartner and Leech 1998). Recent studies, for example, analyze the decision to lobby a specific member of Congress (e.g., Hojnacki and Kimball 1998), but generally do not investigate why an interest may or may not lobby a member of Congress during a specific policy debate.

In this paper, I attempt to contribute to the literature on the involvement of organized interests at the Court as well as the broader body of research on interest group lobbying strategies by developing a theoretical explanation for how organized interests select the cases in which to file amicus curiae briefs. Starting with the assumption that organized interests pursue policy influence, my argument is that organized interests will submit amicus curiae briefs in the Court cases that provide the greatest opportunity for the interest to influence the legal rules that will be established in the majority opinion. This potential to influence the Court will depend on several conditions, dealing primarily with the extent to which the Court is operating in a relatively information-poor environment. The second element of my argument is that membership-based organized interests (as opposed to interests of an institutional nature) will face an important constraint when selecting Court cases. That is, membership-based interests will have to consider whether the case in question allows for the sort of visible and apparently successful lobbying activity that makes it easier to attract and retain membership support.

I test my hypotheses with data on a large random sample of organized interests and their amicus curiae brief filings in U.S. Supreme Court cases from the 1991-1995 terms. With these data, I estimate a logit model in which the dependent variable is whether an organized interest submitted an amicus curiae brief in a given Court case. The results of this analysis conform with
all of my specific hypotheses, and thus support the broader argument I make about organized interests and their lobbying strategies.

**A Theory of Case Selection**

Each term, the U.S. Supreme Court hears a multitude of important cases that will ultimately establish significant policy outcomes. If an organized interest views the Court as a policy venue worth lobbying (see Hansford 2000), the interest must then choose the specific case or cases in which to file amicus curiae briefs. This represents an important strategic decision for an organized interest because the extent to which the interest can obtain its goals will depend upon the nature of the cases in which it becomes involved. Moreover, the decision of an organized interest to file a brief in a given case is significant because these briefs may influence the Court’s decision on the merits (Kearney and Merrill 2000; McGuire 1990; cf. Songer and Sheehan 1993) or the nature of the legal rules established by the Court’s majority opinion (Epstein and Kobylka 1992). The question then is, how do organized interests make this choice?

To answer this question, I start with the assumption that organized interests pursue the goal of policy influence. An organized interest engages in lobbying activity in order to attain governmental policies that are as close as possible to the positions or ideal point held by the interest. Successful policy influence is only likely to occur under a set of specific conditions (Baumgartner and Leech 1998), so organized interests will prefer to select the cases in which these conditions are present. Further, a subset of the organized interest population faces a significant constraint when making its case-selection decisions. That is, membership-based interests (e.g., public interest groups) will have to consider the effect of their lobbying decisions on their ability to attract and retain membership support. Organized interests that are
institutional in nature (e.g., corporations) will not face this same constraint since they do not need to make membership appeals. In short, all interests base their case-selection decisions on the extent to which they can expect to successfully influence policy outcomes. Membership-based interests, however, must also keep an eye on the connection between lobbying activities and the of maintaining membership support.

The Conditional Nature of Policy Influence

When the U.S. Supreme Court decides a case, there are two relevant policy outcomes. First, there is the case disposition or decision on the merits, which simply affirms or reverses the lower court’s decision and thus rules in favor of one litigant over the other. The second and ultimately more important outcome involves the legal rule established in the Court’s majority opinion. A legal rule establishes referents for behavior by providing decision makers with information necessary to develop expectations about how courts will handle similar cases and information on sanctions for noncompliance. While the decision on the merits affects the immediate litigants, it is the legal rule articulated in the Court’s majority opinion that sets the broader policy affecting interests and institutions that are not directly involved in the litigation.

When organized interests lobby the Court they do so in an attempt to influence the content and scope of the Court’s legal rules. More precisely, successful policy influence occurs when the information or argument provided by an organized interest has the intended effect on the legal rule established by the Court’s majority opinion and this legal rule ultimately yields the intended societal or political outcome.

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1 I define an organized interest as an organization that uses political action to achieve its ends (see Schlozman and Tierney 1986). I use the term organization in a broad sense and include, for instance, public interest groups, corporations, trade associations, unions, and state and local governments.

When Supreme Court justices are engaged in the opinion-writing process, they seek to shape legal policy in a manner congruent with their policy preferences (Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000). But, the justices do not have complete information on the ultimate effect that a legal rule will have. Indeed, justices may have a greater need than legislators for the information provided by organized interests because there is far less policy specialization at the Court than in Congress. Members of Congress can rely on committees and subcommittees to act as informed policy specialists (Krehbiel 1991) while there is no equivalent specialization on the Supreme Court.3

By submitting amicus curiae briefs, organized interests can provide the justices with information on the potential political, social, and legal implications of a Court ruling (Barker 1967; Epstein and Knight 1999). It is through this provision of information that organized interests can influence the nature of the policy set by the justices. Indeed, there is evidence that Court opinions incorporate the information provided by amicus curiae (Spriggs and Wahlbeck 1997) and that the arguments made by organized interests can have a real effect on the legal rules set by the Court (Epstein and Kobylka 1992). Further still, the justices themselves acknowledge the potentially important informational role played by amicus curiae briefs (Breyer 1998).

While the legal rules established by the Court can be influenced by the information and arguments provided by organized interests, it is fairly clear that organized interests do not always influence the Court’s policy output (see Songer and Sheehan 1993).4 Further still, there may be situations in which influence over the Court’s ruling does not ultimately yield the desired policy outcome. Thus, organized interests are only likely to influence policy under certain conditions.

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3 Research on the assignment of majority opinions indicates that there may exist a degree of policy specialization on the Court (Maltzman, Spriggs, and Wahlbeck 2000). The point here is that the justices have less opportunity and incentive to specialize than members of Congress.
Organized interests will behave strategically and will be most likely to lobby the Court when these conditions are present. The question then is, what are the conditions that affect the likelihood of an organized interest influencing policy?

Elsewhere, I suggest that an organized interest can expect to have a greater chance of influencing the Court’s opinions when the Court is politically receptive to the positions espoused by the interest (Hansford 2000). The Court’s political receptiveness is defined as the extent to which the Court’s policy positions and agenda space allocations are congruent with the positions and agenda pursued by the interest. Because this conceptualization of political receptiveness varies only over time, this concept is less helpful when explaining the case-selection decision within a term or small set of terms.5 Thus, when examining the case-selection decision, it is important to consider case-specific attributes that affect the probability of the Court incorporating the information provided by an interest and the likelihood of the Court’s legal rule leading to significant policy outcomes. More specifically, I argue that an organized interest is most likely to exert successful policy influence by lobbying the Court in cases in which the Court has the greatest opportunity to set long-lasting policy and the Court is acting in a relatively information-poor setting.

When the Supreme Court issues a legal ruling, it establishes a policy outcome. However, these policy outcomes are not equally definitive. For example, when the Court hears a case involving the interpretation of a statute, its decision may only stand for a brief period of time before being overridden by Congress. Indeed, congressional overrides of the Court’s statutory decisions are not all that infrequent (Eskridge 1991). Even just the threat of a congressional

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4 As noted by Baumgartner and Leech (1998), the same can be said for the lobbying efforts of organized interests in Congress.  
5 As will be discussed shortly, I control for the annual political receptiveness of the Court through the inclusion of the Baseline Likelihood of Lobbying the Court variable.
override may constrain the set of potential legal rules that the Court might set in a statutory case (see Hansford and Damore 2000; Spiller and Gely 1992). Thus, when the Court is deciding a statutory case, it is not handing down a decision that will necessarily lead to significant, long-lasting policy change. Congress, however, cannot easily overturn the Court’s constitutional decisions. For this reason, the Court’s constitutional decisions are more likely to have an enduring effect on policy. A policy-motivated organized interest will therefore prefer to lobby the Court when it is deciding a constitutional case because the potential for a long-lasting policy victory is greater.

Hypothesis 1: Organized interests will be more likely to submit amicus curiae briefs in constitutional cases.

Regardless of the potential for a Supreme Court case to enact significant policy change, the information and arguments provided by organized interests have a greater chance of influencing the nature of the legal rule established by the Court when the Court is operating in a relatively information-poor setting. The less relevant information that the justices have regarding the likely effects of the different legal rules that could be established in a case, the more they will need the information that can be provided by organized interests. The extent to which the justices need information regarding a case and the issues in dispute will depend, in part, on the nature of the case itself. Some cases are inherently more complicated than others and thus lead to greater levels of uncertainty regarding the likelihood that a particular legal rule will ultimately achieve the justices’ desired outcome. The more complicated a case is, the more the justices will pay attention to the information provided in amicus curiae briefs. Therefore, I hypothesize that:
Hypothesis 2: Organized interests will be more likely to submit amicus curiae briefs in complex cases.

When the justices feel that they lack all the information necessary to develop a legal rule that will successfully achieve the desired outcome, they will often ask the solicitor general to file a brief expressing the view of the executive branch. This request for additional information should represent a significant signal to organized interests that the Court is acting in a relatively information-poor setting and may be particularly receptive to the information provided in amicus curiae briefs. This should, in turn, affect the probability of an interest filing a brief.

Hypothesis 3: Organized interests will be more likely to submit amicus curiae briefs when the Court has asked the solicitor general to file an amicus curiae brief.

The Court may also find itself wanting for information when the attorneys for the litigants involved in the case are ineffective in briefing and arguing the case. McGuire (1995) demonstrates the importance of attorney experience and it is likely that attorneys experienced in the nuances of Supreme Court litigation will be more effective in providing relevant information to the justices. If the attorneys representing the litigants in the case do a poor job of conveying relevant information to the justices, then the justices will be forced to rely more on any amicus briefs that have been filed. Therefore, organized interests will consider the experience of the litigants’ attorneys when deciding whether to lobby the Court in a given case (see Wasby 1984).

Hypothesis 4: Organized interests will be more likely to submit amicus curiae briefs when the litigants’ attorneys are lacking in experience.

The Membership Constraint

While seeking policy influence, membership-based interests (as opposed to organized interests that are institutional in nature – e.g., corporations) must also consider the effect of their
lobbying activities on their ability to attract and retain membership support. There is fierce competition between membership groups over the finite set of potential members or supporters (Gates 1998). If a group that relies on members for the provision of necessary resources fails to maintain a certain minimal level of membership support, then it will cease existing. At a minimum, a group struggling to maintain itself will have difficulty mounting an effectual lobbying campaign and thus have a hard time achieving policy influence.

Membership-based interests attract supporters by providing them with various selective incentives. In addition to material incentives, these groups often rely on purposive incentives to garner membership support (Clark and Wilson 1961; Cook 1984; Moe 1980; Walker 1991). To provide purposive incentives, a group needs to make its members feel that the group is actively pursuing its stated policy goals and successfully influencing policy outcomes. In this sense, the nature of a membership-based interest’s lobbying activities determines the extent to which the interest can offer purposive incentives to current or potential members. If a membership-based interest engages in lobbying behavior that increases the level of purposive incentives it offers, then it will have greater success in maintaining or increasing membership support. Therefore, when making choices regarding lobbying activities, membership-based interests will need to take into account the likely effect of these choices on their ability to offer purposive incentives.

When a membership-based interest is choosing the Court cases in which to file an amicus brief, it can maximize the amount of purposive incentives offered by selecting cases that allow for visible and apparently “successful” participation. Lobbying activities provide more purposive incentives for members when these activities are visible. If a membership-based

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6 It is important to note that purposive incentives are selective. Only members of the group can benefit from feeling that they are helping the group achieve its policy goals.

7 Moe (1980) argues that, due to incomplete information and the strategic behavior of group leaders, rational individuals may believe that their participation in the group leads to greater policy influence than it actually does.
interest can claim to have been involved in a Court case of which its members are aware, this will yield greater purposive incentives than involvement in a Court case unknown by its members. The more visible the lobbying effort, the more likely it is that members will know and care about it. As a result, membership-based interests will need to participate in highly visible Court cases. This may explain why scholars find that some organized interests appear to seek out the high-profile “test” cases as opposed to potentially more significant, but lower-profile, enforcement cases (e.g., Halpern 1976). Because the degree to which a Court case is visible will largely depend on the amount of media coverage given to the case, I hypothesize that:

Hypothesis 5: A membership-based interest will be more likely to submit an amicus curiae brief when it expects that the case will receive media coverage when the Court decides it.

A member of an organized interest also derives purposive benefits from believing that the interest is achieving a degree of success in its lobbying campaigns. There is not a perfect correlation between an interest actually achieving policy influence and the provision of purposive incentives. Indeed, it is difficult even for policy experts to identify the effect of an interest’s involvement on governmental policy. Current and potential members of the organized interest will find this even more problematic and will clearly have incomplete information on the degree to which the group is actually influencing the policy process.

Due to the low levels of information that a member has about the actual policy influence exerted by an organized interest, a membership-based interest must focus on appearing to be successful in its policy battles. While the interest prefers to influence the nature of the legal rule being established by the Court, it is difficult to communicate this type of success. It is much easier to communicate the fact that the litigant supported by the interest won the case. In fact, some organized interests list the percentage of court cases they have “won” in their promotional
The “membership constraint” leads a membership-based interest to participate in cases in which the position supported by the interest is likely to emerge victorious on the merits, regardless of any influence exerted by the interest. This type of behavior is analogous to the credit-claiming behavior that members of Congress exhibit (Mayhew 1974).

**Hypothesis 6:** A membership-based interest will be more likely to submit an amicus curiae brief in a case when it expects that its position on the merits will win.

In summary, I am arguing that all organized interests select the cases in which to file amicus curiae briefs based, at least in part, on the likelihood of influencing relevant policy. This likelihood is at its greatest with constitutional cases in which the justices have particularly incomplete information about the available policy alternatives and their likely effects. Membership-based interests, however, face a constraint that institutional interests need not worry about. In order to maintain membership support through the provision of purposive incentives, a membership-based interest will seek out cases with high levels of visibility and in which the interest’s position on the merits will be supported by the Court.

**Data and Methods**

Even the more comprehensive studies of organized interest involvement in the judiciary examine only the interests that did, in fact, participate in the courts (e.g., Caldeira and Wright 1990; Tauber 1998). In an effort to avoid this type of selection bias, I randomly sampled 735 organized interests from *Washington Representatives*, regardless of whether they have ever been involved in litigation, and then compiled data on these interests and their participation histories at the Court. This sample includes a mix of membership-based and institutional interests such as

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8 Defenders of Property Rights, for example, provide information on their “winning” percentage on their website.

9 There are three primary listings of organized interests that have been used in prior research: *Washington Representatives* (Salisbury 1984; Schlozman and Tierney 1986), *Washington Information Directory* (Walker 1991),
as public interest groups, trade associations, corporations, labor unions, and local governments. For 579 of these interests, I was able to gather data on whether they are membership-based or institutional, the issues with which they are concerned, and the positions taken on these issues.¹⁰

To generate some of the independent variables discussed below, it was necessary to develop a comprehensive issue typology that would accommodate the diverse set of interests represented in the sample. I accomplished this task by employing a slightly modified version of the issue typology introduced by Baumgartner and Jones in their Agendas Project Data Set.¹¹ This modified typology includes 28 categories ranging, for example, from defense to crime to civil rights to agriculture. For each organized interest, I used a set of coding rules to ascertain the issue(s) of concern to the interest. I also coded the ideological direction (liberal, moderate, conservative) of the position held by the interest on each of the relevant issues.¹² For many of the organized interests in the sample, this meant content-analyzing and categorizing the position statements provided by the interests.¹³ Most of the institutional interests, however, do not

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¹⁰ Here, I primarily relied on four sources of information. First, I collected data from a variety of publications such as *Encyclopedia of Associations* and *Public Interest Law Groups: Institutional Profiles*. Second, I consulted the materials published by the organized interests themselves (brochures, websites, etc.). Finally, I was also able to directly contact many of the interests and have them provide information that I could not obtain elsewhere.

¹¹ For information on Baumgartner and Jones’ Agendas Project Data Set, navigate to http://depts.washington.edu/ampol/agendasproject.html.

¹² I used Spaeth’s (1998) guidelines for what constitutes a liberal or conservative position on these issues.

¹³ To assess the reliability of my coding of the relevant issues and policy positions for an interest, I had a second coder code the issues and positions for a random sample of 25 of the interests. The rate of agreement between my coding of the issues and that of the reliability coder ranges from 88% to 100%. In order to determine the degree to which these rates of agreement compare with the agreements expected by chance, I calculated Kappa statistics (see Cohen 1960) for each issue category. For all but two of the 28 issue areas, Kappa is greater than .6, indicating substantial agreement between the two coders (Landis and Koch 1977). I thus conclude that my assignment of issue categories to the organized interests in my sample is sufficiently reliable.

Regarding the policy position codes, there are four possible codes for each issue area for each interest: liberal position, moderate position, conservative position, issue not relevant to the interest. Inter coder agreement again ranges from 88% to 100% and all but two of the Kappa statistics are greater than or equal to .6. Based on these results, it appears that these data are reliable.
provide public statements regarding their policy interests and positions, so for these interests I
developed rules to impute the relevant issues and positions for the interest. ¹⁴

Dependent Variable

I gathered data on the amicus curiae brief filings of these organized interests from United
States Reports, Briefs and Records of the United States Supreme Court, and Lexis. With the
amicus curiae data and the data on the organized interests, I compiled a dataset in which the unit
of analysis is the organized interest – case dyad. There is an observation for each organized
interest in my sample for each case orally argued before Court from the 1991 to 1995 terms (N =
266,441).¹⁵ The dependent variable equals one for each instance in which the organized interest
in question submitted an amicus curiae brief in the given case, and zero otherwise.

The advantage of this research design is twofold. First, it allows me to examine both
case-specific variables as well as variables that are specific to the organized interest-case dyad.
Second, by including data on all 579 of the interests in my sample regardless of whether they
ever filed a brief at the Court, I am able to avoid the selection bias problem encountered by most
prior studies of organized interest involvement in the courts (e.g., Caldeira and Wright 1990).¹⁶

With these data, I estimated a logit model in which the dependent variable is whether an
organized interest submitted an amicus curiae brief in a U.S. Supreme Court case. The standard

¹⁴ This imputation process was fairly straightforward. For example, all businesses were coding as having
interest in the general economic policy categories as well as any specific categories into which the business might
fall (e.g., agriculture, energy, transportation, etc.). When imputing the policy positions held by institutional
interests, I used a second set of coding rules. Examples of such coding rules include the following. Businesses were
coded as holding conservative positions on economic issues (see McCarty and Poole 1999; Schlozman and Tierney
1986). Cities were coded based on the policy positions specifically outlined by the National League of Cities.
Counties were coded based on the policy positions expressed by the National Association of Counties.
¹⁵ A handful of the organized interests in my sample were not formed until after 1991. For these interests, I
include observations for all Court cases starting in the year the interest was formed and ending in the 1995 term.
¹⁶ The nature of the data used here does present one concern. Of the 266,441 observations, there are only 526
instances in which the dependent variable equals one. Thus, the dependent variable is highly skewed. In order to
assess the degree to which this may influence my results, I also estimated my model as a rare events logit model (see
King and Zeng 2001). The rare events logit model produced estimates that are virtually indistinguishable from the
errors were estimated with a robust variance estimator that allows for the errors to be correlated across the multiple observations associated with a given organized interest.

**Independent Variables**

*Constitutional Case.* This variable is coded as one if, based on Spaeth (1998), the case dealt with a constitutional issue, and zero otherwise.

*Case Complexity.* To generate a measure of case complexity, I summed two indicators of complexity: number of legal provisions involved in the case and number of issues raised (Spaeth 1998; see Maltzman, Spriggs, and Wahlbeck 2000).

*Solicitor General’s Position Requested.* This variable is coded as one if the Court requested that the solicitor general file a brief expressing the view of the executive branch, and zero otherwise.17

*Attorney Experience.* To measure the collective Court experience of the litigants’ attorneys, I counted the number of times that each attorney arguing the case had previously represented a litigant in a U.S. Supreme Court case. For example, if the attorney for the petitioner had been before the Court three previous times while the attorney for the respondent had been before the Court four times, this variable would equal seven.18

*Media Coverage.* I measured this variable as a four-point scale based on the extent to which the New York Times had covered the Court’s decision to hear the case.19 If the case received no such coverage, this variable is coded as 0. If the decision to hear the case is mentioned in an article but is not the lead story in the article, then it is coded as 1. For cases in

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results of the standard logit model. Therefore, it appears that the skewed distribution of the dependent variable is not affecting the coefficient estimates.

17 These data were gathered by examining the Court’s memorandum decisions regarding each case included in the analysis.

18 In order to gather these data, I performed a search in Lexis to determine all the previous Supreme Court cases in which the attorney had been counsel to a litigant.
which the Court’s decision to grant a writ of certiorari is the focus of an article, this variable equals 2. Finally, *Media Coverage* is coded as 3 if the decision to hear the case is the lead story in a front-page article. It should be safe to assume that the more coverage that a case gets simply for being placed on the Court’s docket, the more coverage it will get once the Court hands down a decision. I argue that the more media coverage that a case is being given at the certiorari stage, and thus will be given at the merits stage, the more likely it is that membership-based interests will submit amicus curiae briefs. In order to test this hypothesis, I interacted the *Media Coverage* variable with a variable designating whether the organized interest is membership-based (*Membership-Based Interest*) and expect the estimate for this variable to be positive in direction. For estimation purposes, I also included *Media Coverage* in the model on its own.

*Likelihood of Winning.* To generate a measure that captures the expectation of the direction in which the Court will rule in a given case, I utilized three variables that are generally viewed as reasonable predictors of the Court’s decisions on the merits and that could be observed by an organized interest that is considering filing a brief: the ideological direction of the lower court decision, the involvement of the solicitor general as a litigant, and the ideological position of the median justice on the Court.\(^{20}\) Using these variables, I estimated a logit model in which the dependent variable is the ideological direction of the Court’s decision.\(^ {21}\) I then use this model to generate the predicted linear index of the Court’s likelihood of ruling in a liberal

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\(^{19}\) I could not include coverage of the Court’s decision on the merits because the decision on the merits obviously occurs well after organized interests decided whether to submit amicus curiae briefs in the case.  
\(^{20}\) The ideological direction of the lower court decision is taken from Spaeth (1998) while the involvement of the solicitor general is coded from *United States Reports*. The median justice’s ideological position is based on the percentage of time the justice voted for the liberal outcome over his or her career in the issue area dealt with by the case in question (see Epstein et al. 1996, Table 6-2).  
\(^{21}\) The direction of the Court’s decision is taken from Spaeth (1998). The estimated model used is: Likelihood of a liberal decision = -.84*(Liberal Lower Court Decision) + .30*(Solicitor General Advocates Liberal Decision) - .67*(Solicitor General Advocates Conservative Decision) + .02*(Median Justice’s Ideological Position) - .41.
manner for each case in the dataset. Negative values of this index are associated with a greater than 50% chance of a conservative decision while positive values represent a greater than 50% chance of a liberal outcome. This index equals zero when there is an equal chance of either a conservative or liberal outcome.

If the organized interest in question holds a liberal position on the issue involved in the case, then Likelihood of Winning equals the predicted index described above. If the organized interest holds a conservative position, then Likelihood of Winning equals the reverse of this predicted linear index (i.e., - (index)). If the interest holds a moderate position on the issue, then Likelihood of Winning equals 0, which is the equivalent of a .5 probability of emerging victorious. I argue that the greater the likelihood of “winning” on the merits, the more likely it is that a membership-based interest will participate in a case as amicus curiae. Therefore, I interact Likelihood of Winning with Membership-Based Interest and expect the coefficient for this variable to be positive in direction. Likelihood of Winning is also included separately in the model, in order to properly estimate the coefficient for the interaction term.

Membership-Based Interest. This variable is coded as one if the organized interest has voluntary members, and zero otherwise. Thus, a group like Citizens for Law and Order is coded as one while Continental Grain Company is coded as zero. I only expect this variable to condition the effects of Media Coverage and Likelihood of Winning, but, for estimation purposes, Membership-Based Interest is also included separately in the model.

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22 The predicted linear index of a logit model is simply $x\beta$. I use this instead of the predicted probability that can be calculated from the linear index because the index is linear and unbounded while a probability is not.

23 Since membership in labor unions is often not completely voluntary, unions are coded as zero. Organized interests that do not technically have “members” but actively seek contributions (e.g., Center for Community Interest) are coded as one because, functionally speaking, they will behave like a membership group and compete for voluntarily contributed resources.
The model also includes two control variables. *Case Relevance* equals one if a case deals with an issue that is relevant to the organized interest in question, and zero otherwise. Baseline Likelihood of Lobbying the Court is the predicted linear index from a model developed elsewhere that explains the decision of an organized interest to lobby the Court in a given year (see Hansford 2000). This variable simply presents a parsimonious way of capturing the combined effect of variables that vary on an annual basis on the baseline propensity of an organized interest to lobby the Court in a given year. The inclusion of this variable allows the baseline probability of each organized interest to vary across the five Court terms included in this analysis.

**Results**

The results of the logit model are presented in Table 1. The chi-squared statistic is statistically significant (p < .05), indicating that the inclusion of the explanatory variables yields a better-fitting model than a constant-only model. Further, the coefficient estimates for all six of the variables suggested by my hypotheses are in the expected direction and are statistically significant.

*** Table 1 Here ***

I have argued that all organized interests want to participate in cases that have the potential for setting enduring policy. Thus, interests will prefer to lobby the Supreme Court

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24 This is determined by comparing the issue(s) of concern to the interest with the issue involved in the case as determined by Spaeth (1998). To do this, I matched the 28 issues of the modified Baumgartner and Jones issue typology with Spaeth’s Issue variable.

25 More specifically, the model producing the predicted likelihood of an interest lobbying the Court in a given year is defined as follows:

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P(\text{lobby Court}) = (0.007*\text{Court Policy Congruence})+(0.031*\text{Court Agenda Congruence})-(0.025*\text{Congressional Policy Congruence})+(0.000*\text{Congressional Agenda Congruence})+(0.002*\text{Presidential Policy Congruence})+(0.512*\text{Previous Court Involvement})+(3.074*(\text{Media Coverage}^*\text{Membership-Based Interest}))-(0.012*(\text{Opposing Interest Involvement}^*\text{Membership-Based Interest}))-(1.360*\text{Media Coverage})+(0.017*\text{Opposing Interest Involvement})+(0.110*\text{Membership-Based Interest})+(0.080*\text{Calendar Time})-(0.0013*\text{Calendar Time}^2)-
\]

\[+(0.123*\text{Duration})+(0.0025*\text{Duration}^2)+(1.501*\text{State Government})-4.784\]

I employed data from the organized interests’ participation at the Court from 1947 to 1990 to generate the estimates I use to predict Baseline Likelihood of Lobbying the Court. To avoid endogeneity issues, I do not include the 1991-1995 data analyzed in this paper to generate the parameter estimates used to predict this variable.
when the Court is hearing a case dealing with a constitutional issue. The results of the model support this argument as the estimate for *Constitutional Case* is positive and statistically significant. An organized interest has a greater probability of submitting an amicus brief in a constitutional case than in other types of cases (e.g., statutory interpretation cases).

It has also been my contention that organized interests choose to lobby the Supreme Court when the Court is most needful of the information that can be conveyed in amicus curiae briefs. It is in this situation that organized interests can expect to have the greatest chance of exerting influence over the legal rules established by the Court. The estimated coefficient for *Case Complexity* conforms to my expectation as it is positive in direction and statistically significant. The more complex a case, the more likely it is that the justices will need externally-provided information in order to write a legal rule that will ultimately achieve the desired policy effect. Organized interests appear to respond to this need and are more likely to file briefs in complex cases.

The results for the other variables indicating the extent to which the Court is operating in a relatively information-poor context also support my argument. The positive and statistically significant estimate for *Solicitor General’s Position Requested* provides evidence for my hypothesis that when the Court asks the solicitor general to file a brief presenting the position of the United States, organized interests will see this as a signal that the Court needs more information in this particular case and will thus be more likely to lobby the Court in such a case. Based on the estimated coefficient for *Litigant Attorney Experience*, it also appears that organized interests are less apt to submit amicus briefs when the attorneys representing the litigants are experienced in arguing cases before the Court. Conversely, the presence of inexperienced attorneys increases the probability of organized interests lobbying the Court.
While the results so far apply to all types of organized interests, the results for the two interaction terms in the model support my argument that membership-based interests will also consider the effect of their lobbying activities on their ability to maintain membership support. The estimate for Media Coverage * Membership-Based Interest is positive and significant, demonstrating that membership-based interests need to consider the level of media coverage that will surround a Court case. The more the media covers the Court’s decision to hear a case, the more media attention will be paid to the Court’s ultimate decision in the case, and thus the greater the probability of a membership-based interest submitting an amicus brief in the case.

As evidenced by the estimate for Likelihood of “Winning” * Membership-Based Interest, membership-based interests prefer to participate in cases in which the position they support is likely to win on the merits. Such behavior allows an interest to claim to its members that its role in the litigation may have generated the victory, and thus increase the provision of purposive incentives to these members.

The estimates for the two control variables included in the model are worth discussing very briefly. Not surprisingly, an organized interest is more likely to submit a brief when the case deals with an issue that is relevant to the interest. In addition, Baseline Likelihood of Lobbying the Court is positively associated with probability of filing a brief in a case.

To further assess the substantive effect of the independent variables of theoretical interest on the likelihood of an organized interest filing an amicus brief in a Court case, Table 2 presents predicted probabilities generated from the model reported in Table 1. I calculated these predicted probabilities for situations in which the case deals with an issue relevant to the organized interest and the organized interest has an above average baseline likelihood of
lobbing the Court in that given year. All other independent variables are held at their means while the variable of interest is moved from its minimum value found in the data to its maximum value.

*** Table 2 Here ***

The predicted probabilities displayed in the table lead to three general conclusions. First, the substantive effect sizes of all four variables related to the ability of an organized interest to affect policy by participating at the Court are quite similar. Second, Media Coverage clearly has the largest substantive effect on the probability of a membership-based interest filing a brief. If a case gets front-page treatment by the New York Times when the Court decides to hear it, a membership-based interest has a .175 probability of submitting a brief in the case, as compared to a .030 probability if the case is not discussed by the New York Times when the Court grants cert. The third conclusion that can be drawn from this table is that all of the predicted probabilities and effect sizes are quite small. This result should not be too surprising given that the probability of any given organized interest participating in any given Supreme Court case is naturally very small.

Nonetheless, the predicted probability of filing a brief grows considerably if several of the independent variables move in the necessary direction. For example, if the case is constitutional and complex in nature, the litigants’ attorneys have no Court experience, and the solicitor general’s input has been requested, a membership-based interest has a 11.9% chance of filing a brief even if the case received no coverage by the New York Times when it was placed on the docket. If the case did receive front-page coverage when certiorari was granted, then the likelihood of a membership-based interest submitting a brief jumps to 48.6%.

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26 Specifically, Case Relevance equals one and Baseline Likelihood of Lobbying the Court is set at 15, several standard deviations above the mean but well below the maximum value found in the data.
The relationship between *Media Coverage* and the probability of the two different types of organized interest submitting an amicus brief is further demonstrated in Figure 1. The likelihood of an institutional interest submitting a brief is actually higher than that of a membership-based interest when a case has little or no coverage at the certiorari stage. As the amount of pre-decision media coverage increases, the probability of a membership-based interest submitting a brief increases substantially and overtakes the equivalent probabilities for an institutional interest.

*** Figure 1 Here ***

**Discussion**

Despite providing contributions on a number of fronts, prior research on the involvement of organized interests at the Court has not developed a general explanation for how organized interests choose the specific cases in which they will participate. In an attempt to build on this literature, I have argued here that the decision of an organized interest to lobby the Court in a given case will depend on whether there is a chance for the Court’s decision to set long-lasting policy and the extent to which the Court is operating in an information-poor context. Membership-based interests also have to consider the likely effect of participation on their ability to maintain membership support. In short, all interests select Court cases based on their desire to maximize the probability of exerting policy influence, while a subset of interests are further constrained by organizational maintenance concerns. The results of my statistical model provide evidence for this general argument and for the specific hypotheses tested.

My theory and empirics yield several interesting implications. To start, it appears that Tauber’s (1998) conclusion that the Legal Defense Fund’s participation decisions in the U.S. Courts of Appeals are not systematic in nature does not generalize to the participation decisions

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27 These probabilities were calculated in the same manner as in the preceding paragraph.
made by the broader organized interest population. There is, in fact, a systematic element to the
decision of organized interests to submit amicus curiae briefs at the U.S. Supreme Court.

One of the systematic components involves the information context in which the justices operate when deciding a case. The amount of information regarding the availability and likely effect of potential legal rules that could be created with the decision varies across cases. Although basing their decisions on the likelihood of achieving their own policy goals, organized interests appear to play a potentially beneficial role at the Court in the sense that they are more likely to file amicus curiae briefs in the cases in which the Court is relatively information-poor. It is in the cases that are particularly complicated, involving inexperienced attorneys, and in which the Court signals a need for additional information that organized interests are most likely to provide information by submitting amicus curiae briefs. While this additional information is not necessarily beneficial to the justices and the pursuit of their own policy goals, it may act to alleviate the occasional information-poor case context. For this reason, Justice Breyer has publicly made a call for the participation of amici in certain types of cases (Breyer 1998).

A third implication drawn from the analysis presented here is that scholars studying media coverage of Court cases should be aware that some organized interests seek out cases that are likely to get coverage once they are ultimately decided on the merits. Slotnick and Segal (1998), for example, conclude that the number of amicus curiae briefs filed in a Court case is a strong predictor of television news coverage of Court’s decision on the merits of the case. My results, however, suggest that membership-based interests gauge the likely coverage of a Court decision and participate in cases that received media coverage when the Court placed the case on its docket. Thus, it is not clear to what extent scholars can assume that the presence of amicus
curiae briefs causes the media to cover a Court decision on the merits. Some organized interests will attempt to participate in cases that are going to get significant media attention.

On a similar note, scholars need to be careful when ascertaining the effect of amicus curiae briefs on the Supreme Court’s decisions on the merits (e.g., Kearney and Merrill 2000; McGuire 1990). The results of my model indicate that membership-based interests may select cases based in part on the likelihood of their position winning on the merits. Thus, membership-based interests may appear to have influenced the Court’s decision on the merits, while in fact the Court’s probable decision direction influenced the organized interests’ choice to participate in the case. This result makes it much more difficult for researchers to estimate the actual causal effect of amicus curiae briefs on the decisions on the merits. The mere presence of a correlation between number of amicus curiae briefs supporting a position on the merits and the Court’s decision in this case will not be sufficient to demonstrate causation.

Finally, my analysis has implications for the broader literature on interest group lobbying strategies and tactics. The evidence outlined here suggests that when deciding when and where to lobby, organized interests seek out situations in which policy makers have less than optimal information, relatively speaking. It is in these situations in which organized interests can expect to have the greatest probability of exerting some influence over policy outcomes. In addition, the results of this analysis indicate that membership-based interests behave differently than their institutional counterparts when it comes to making strategic lobbying decisions. This difference in behavior can be explained by the need of a membership-based interest to make lobbying decisions based in part on the impact of these decisions on the ability to maintain the vitality of the organization. These elements of my argument should be applicable to the lobbying decisions made by organized interests that are active in policy venues other than the courts.
References


Slotnick, Elliot E., and Jennifer A. Segal. 1998. *Television News and the Supreme Court: All the News that’s Fit to Air?* New York: Cambridge University Press.


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<th>Independent Variable</th>
<th>Estimated Coefficient</th>
<th>Robust Standard Error</th>
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<td>Constitutional Case</td>
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<td>.091</td>
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<tr>
<td>Case Complexity</td>
<td>.116*</td>
<td>.060</td>
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<tr>
<td>Solicitor General’s Position Requested</td>
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<td>.209</td>
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<tr>
<td>Membership-Based Interest Likelihood of “Winning” *</td>
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**Control Variables:**

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**Component Terms:**

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<tr>
<td>Likelihood of “Winning”</td>
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<tr>
<td>Constant</td>
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<tr>
<td>Number of Observations</td>
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<td>Log Likelihood</td>
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<tr>
<td>Chi-Squared (11 d.f.)</td>
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* p ≤ .05 (one-tailed test)

^ p ≤ .05 (two-tailed test, for the component terms about which there is no hypothesized effect)
Table 2  
Predicted Probabilities of an Organized Interest Submitting an  
Amicus Curiae Brief in a Supreme Court Case

<table>
<thead>
<tr>
<th>Independent Variable</th>
<th>Probability of a Membership-Based Interest Filing a Brief</th>
<th>Probability of an Institutional Interest Filing a Brief</th>
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<tbody>
<tr>
<td>Constitutional Case</td>
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<td></td>
</tr>
<tr>
<td>Not constitutional (0)</td>
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<td>.044</td>
</tr>
<tr>
<td>Constitutional (1)</td>
<td>.055</td>
<td>.074</td>
</tr>
<tr>
<td>Case Complexity</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Least complex (1)</td>
<td>.035</td>
<td>.047</td>
</tr>
<tr>
<td>Most complex (6)</td>
<td>.060</td>
<td>.081</td>
</tr>
<tr>
<td>Solicitor General’s Position Requested</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not requested (0)</td>
<td>.037</td>
<td>.050</td>
</tr>
<tr>
<td>Requested (1)</td>
<td>.061</td>
<td>.081</td>
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<tr>
<td>Litigant Attorney Experience</td>
<td></td>
<td></td>
</tr>
<tr>
<td>No experience (0)</td>
<td>.044</td>
<td>.059</td>
</tr>
<tr>
<td>Highly experienced (40)</td>
<td>.028</td>
<td>.037</td>
</tr>
<tr>
<td>Media Coverage</td>
<td></td>
<td></td>
</tr>
<tr>
<td>No coverage (0)</td>
<td>.030</td>
<td></td>
</tr>
<tr>
<td>Front-page coverage (3)</td>
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<td></td>
</tr>
<tr>
<td>Likelihood of Winning</td>
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<td></td>
</tr>
<tr>
<td>Least likely (-1.41)</td>
<td>.023</td>
<td></td>
</tr>
<tr>
<td>Most likely (1.41)</td>
<td>.060</td>
<td></td>
</tr>
</tbody>
</table>

Note: See text for discussion.
Figure 1
The Effect of Media Coverage on the Probability of an Organized Interest Submitting an Amicus Curiae Brief

Note: See text for a description of the Media Coverage variable and a discussion of how these probabilities were calculated.