American Politics Research

http://apr.sagepub.com

Counteractive Lobbying in the U.S. Supreme Court

Lisa A. Solowiej and Paul M. Collins, jr

American Politics Research 2009; 37; 670
DOI: 10.1177/1532673X08328674

The online version of this article can be found at:
http://apr.sagepub.com/cgi/content/abstract/37/4/670

Published by:
SAGE
http://www.sagepublications.com

American Politics Research
Volume 37 Number 4
July 2009 670-699

10.1177/1532673X08328674
http://apr.sagepub.com
hosted at
http://online.sagepub.com

Counteractive Lobbying in the U.S. Supreme Court

Lisa A. Solowiej
Paul M. Collins Jr.
University of North Texas, Denton

Theories of counteractive lobbying assert that interest groups lobby for the purpose of neutralizing the advocacy efforts of their opponents. We examine the applicability of counteractive lobbying to explain interest group amicus curiae participation in the U.S. Supreme Court's decisions on the merits. Testing the counteractive lobbying hypotheses from 1953 to 2001, we provide strong support for the contention that interest groups engage in counteractive lobbying in the nation's highest court. Our findings indicate that, like the elected branches of government, the Supreme Court is properly viewed as a battleground for public policy in which organized interests clash in their attempts to etch their policy preferences into law.

Keywords: *counteractive lobbying; interest groups; amicus curiae; U.S. Supreme Court*

Writing in 1908, Arthur Bentley was among the first social scientists to recognize the significant roles organized interests play in American government. According to Bentley, to understand the political system, it is imperative to think in group terms. Any investigation into executive action, congressional legislation, or judicial decision making must be attentive to the roles of pressure groups, which use these venues in an attempt to etch their policy preferences into law (Bentley, 1908). Although Bentley's seminal—and

Authors' Note: We thank Chris Nicholson for his excellent research assistance; Joseph Kearney and Thomas Merrill for sharing their data with us; and Tom Brunell, Pam Corley, Matt Eshbaugh-Soha, Tom Hansford, Wendy Martinek, Tetsuya Matsubayashi, Kirk Randazzo, the editor, and the anonymous reviewers for their insightful comments on this and related research. Collins thanks the National Science Foundation for its financial support under grant SES-0350416. A previous version of this article was presented at the 2008 Annual Meeting of the Southern Political Science Association. Naturally, we bear all responsibility for any remaining errors. Please address correspondence to Paul M. Collins Jr., Department of Political Science, University of North Texas, 125 Wooten Hall, 1155 Union Circle #305340, Denton, Texas 76203-5017; phone: 940-369-8892; fax: 940-565-4818; e-mail: pmcollins@unt.edu.

radical—contribution to the study of politics initially fell largely on deaf ears, the post–World War II era saw a rebirth of scholarship devoted to the scientific study of interest group activity in American government (e.g., Bauer, Pool, & Dexter, 1963; Milbrath, 1963; Schattschneider, 1960; Truman, 1951). We now know, for example, a great deal about the scope and bias of the pressure group system (e.g., Schlozman, 1984), how groups recruit and retain members (e.g., Salisbury, 1969), and the influence of pressure groups across the political system (e.g., McCubbins & Schwartz, 1984; Vose, 1959; Wright, 2003). More recently, scholars have focused their attention to systematically investigating interest group lobbying decisions (e.g., Hansford, 2004; Hojnacki & Kimball, 1998; Holyoke, 2003; Tauber, 1998), frequently through the application of counteractive lobbying theory.

At its core, counteractive lobbying asserts that organizations will lobby for the purpose of negating the advocacy efforts of their opponents.[1] Theories of counteractive lobbying, broadly defined, are ubiquitous in social science scholarship and have been used to explain interest group formation (e.g., Epstein, 1985; Lowery, Gray, Wolak, Godwin, & Kilburn, 2005; Truman, 1951), why organizations lobby their legislative friends (Austen-Smith & Wright, 1992, 1994, 1996; Baron, 2006; Baumgartner & Leech, 1996a, 1996b; Hojnacki & Kimball, 1998; Sloof, 1997), the decisions of organized interests to lobby federal bureaucracies (e.g., Ando, 2001, 2003; McKay & Yackee, 2007), groups' strategic choices to target particular venues (e.g., Gormley & Cymrot, 2006; Holyoke, 2003), and patterns of industry campaign contributions (e.g., Hansen & Mitchell, 2000; Leaver & Makris, 2006; Mitchell, Hansen, & Jepsen, 1997).[2] Our purpose here is to join this significant line of inquiry by exploring the applicability of counteractive lobbying to organizational amicus curiae[3] activity in the U.S. Supreme Court's decisions on the merits.

Investigating counteractive lobbying in the Supreme Court is noteworthy for a number of reasons. First, it is consistent with Bentley's (1908) affirmations regarding the import of viewing policy-making institutions with a careful eye toward the role of interest groups.[4] Scholars have long recognized the Supreme Court as a national policy maker (e.g., Dahl, 1957) and extant research confirms the reality that the Supreme Court acts as a battleground for public policy in which organized interests marshal the language of the law in their pursuit of favorable outcomes (e.g., Tamanaha, 2006). Indeed, it is well established that organized interests play an important role in shaping the Court's agenda-setting decisions (e.g., Caldeira & Wright,

1988), the votes justices cast (e.g., Collins, 2004, 2007; Kearney & Merrill, 2000), and the content of the Court's opinions (e.g., Epstein & Kobylka, 1992; Samuels, 2004). Given that groups play such a significant role in the Court, it is imperative that we address the motivations for organizational participation in the judiciary. Second, understanding the incentives for group activity in the Court is consequential in that it speaks to normative concerns about possible biases in the administration of justice. On one hand, if there is little organizational competition in the judiciary, this suggests that judges hear from only one side of the debate. Provided that judges genuinely care about deciding cases consistent with the public interest, a lack of competition in the judiciary might induce judges to render decisions in a manner that follows from a biased, and sometimes erroneous, understanding of the public interest (Collins & Solowiej, 2007). If, on the other hand, groups compete with one another for the purposes of counteracting the persuasion attempts of their opponents, this suggests that interest group participation can potentially improve the quality of judicial decision making by compelling judges to more seriously consider a broad range of perspectives on the public interest (e.g., Ginsburg, 2001). In this sense, just as counteractive lobbying reduces a group's incentive to provide misleading information to legislators (Austen-Smith & Wright, 1994), so too can group competition in the judiciary compel organizations to provide credible information to judges. Finally, this research is motivated by our desire to investigate the applicability of a general theory of organizational activity to a venue overlooked by the counteractive lobbying literature. By examining counteractive lobbying in the Supreme Court, we hope to illustrate how theories developed with respect to a particular institution are translatable to other venues. This is a particularly compelling incentive given that social scientists have long been attentive to the desirability of developing generalizable theories that are applicable to numerous fields of inquiry.

We begin our analysis by discussing the application of counteractive lobbying to the Court, building on the seminal research of Austen-Smith and Wright (1994). Recognizing that institutional differences exist with respect to organizational participation in the Court and Congress, we discuss the role of interest groups as amici curiae, paying careful attention to the context of group involvement in the Court. Next, we discuss our data and methodology, followed by an interpretation of our results. We close with a summary of our conclusions and provide a discussion of where future research in this area might head.

Counteractive Friends of the Court

Counteractive lobbying occurs when groups lobby to neutralize their opponents' advocacy efforts. Indeed, this phenomenon is evident even at the broadest level of the interest group system, constituting a key basis for Truman's (1951) disturbance theory for the formation of organized interests. Moving beyond explanations for interest group formation, Austen-Smith and Wright (1994, 1996; see also Austen-Smith & Wright, 1992) provided a formative contribution to the study of counteractive lobbying by focusing on interest group participation in the Senate during the failed confirmation hearing of Robert Bork. In part, Austen-Smith and Wright's (1994) motivation for investigating counteractive lobbying was to determine why groups lobby legislators who are predisposed toward endorsing the groups' causes (p. 25). These authors provided evidence that, when groups lobby their *ex ante* supporters, they do so in part to counteract the lobbying efforts of their opponents. In response to Austen-Smith and Wright's analysis of counteractive lobbying, Baumgartner and Leech (1996a, 1996b) presented a number of criticisms of Austen-Smith and Wright's application of counteractive lobbying, focused, among other things, on the myriad methods for group participation in the Senate and the sequence of group lobbying efforts. By removing counteractive lobbying from the congressional setting, and considering it instead in the Supreme Court, we are able to apply counteractive lobbying theory to an institution that strictly regulates the timing of interest group participation, tightly constrains the methods with which interest groups can interact with decision makers, and generally makes lobbying efforts transparent. Thus, by studying the general phenomena of counteractive lobbying in the Supreme Court, we bring new evidence to bear on the theory's applicability to organizational activity, while avoiding many of the errors Baumgartner and Leech (1996a, 1996b) contribute to Austen-Smith and Wright's analysis. To illustrate counteractive lobbying in the Supreme Court, we juxtapose interest group strategies in the judiciary with organizational activity in Congress.

In Congress, organizations have a multitude of decisions with regard to their lobbying efforts. Although the initial decision involves the choice of whether to lobby, after this decision is made, groups are then faced with a number of alternative strategies. Typically, groups will choose to engage in either direct or indirect lobbying, although many groups will employ both strategies. Groups opt to lobby indirectly to apply pressure to legislators through the grassroots lobbying of the groups' constituents (e.g., Kollman, 1998). These strategies include using the media (e.g., holding press conferences,

buying television or newspaper ads) and organizing their members to engage in, for example, letter writing campaigns or protests (Kollman, 1998, p. 35; Schlozman & Tierney, 1983). If groups choose to directly lobby Congress, they have a wide range of choices, including contributing to electoral campaigns, testifying in front of committees, and contacting individual members of Congress to present them with relevant information and/or drafts of proposed legislation (e.g., Kollman, 1998, p. 35; Schlozman & Tierney, 1983).

The variety of tactics groups can employ in the judiciary is much more constrained. Most obviously, groups are forbidden from personally contacting the justices. Indeed, Thomas G. "Tommy the Cork" Corcoran's unsuccessful attempt to lobby Justice Black has become part of Supreme Court lore. When Corcoran entered Black's chambers to lobby the justice to grant a rehearing of *Utah Public Service Commission v. El Paso Natural Gas Co.* (1969), "Black was shocked. No one came to the Supreme Court to lobby, even to 'put in a good word' for a petitioner. The mere mention of a pending case at a cocktail party was forbidden" (Woodward & Armstrong, 1979, pp. 79-80). Similarly, when *New York Times* vice president James "Scotty" Reston telephoned Chief Justice Burger in an attempt to discuss *New York Times v. United States* (1971), Burger quickly ended the conversation. On hearing of Reston's attempt to directly lobby Burger, Justice Harlan responded that "Reston was lucky not have been held in contempt" (Woodward & Armstrong, 1979, p. 148). Thus, if groups want to lobby the Court, directly engaging the justices is out of the question. Instead, groups can only pursue one of three primary tactics: (a) filing lawsuits, (b) sponsoring cases that others bring into the courts, and (c) filing amicus curiae briefs.[5] Given the high costs associated with test cases and case sponsorship, groups rely on these strategies far less frequently than the primary mechanism for lobbying the courts: the amicus curiae brief (e.g., Collins, 2004, 2007; Kearney & Merrill, 2000; Wasby, 1995).[6] Thus, when we discuss interest group lobbying in the Supreme Court, we are referring to organizations' attempts to persuade the justices to endorse policies favorable to their interests through the filing of amicus curiae briefs.[7]

It is well established that amicus curiae briefs are a staple of interest group activity in the Supreme Court (Banner, 2003; Collins, 2004, 2007; Kearney & Merrill, 2000; Koshner, 1998). In recent terms, more than 90% of cases disposed of on the merits in the Supreme Court were accompanied by amicus curiae briefs (e.g., Collins, 2007). In part, this is a function of the Court's open door policy toward amicus briefs. Private amici, such as organized interests, must obtain the permission of the parties to litigation to file amicus briefs, which is almost always granted.[8] If one or both of the

parties deny amici consent to file, the amici may then petition the Court for leave to file amicus briefs: These petitions are almost automatically granted, provided the briefs are filed in accordance with the Court's rules regarding the timing of the submission of amicus briefs (e.g., Bradley & Gardner, 1985; O'Connor & Epstein, 1983; Stern, Gressman, Shapiro, & Geller, 2002). Thus, procedurally speaking, there are effectively no barriers to interest group amicus participation in the Court. This indicates that the Court values amicus briefs because the briefs provide the justices with information that assists them in resolving the uncertainty surrounding legal controversies. Justice Breyer (1998) articulated this point decisively 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" (p. 26).

The Court's open door policy toward amici differs quite dramatically from Congress, where campaign donations and geographical ties to a legislator heavily govern access (e.g., Wright, 2003). Moreover, interest group participation in the Supreme Court is distinct from Congress in that groups are unable to lobby particular justices. In this sense, although groups can choose to lobby any one of 535 legislators in Congress, groups cannot opt to lobby individual justices.[9] Instead, by filing an amicus brief, a group lobbies the Court as a whole. Thus, groups do not have to evaluate whether a particular justice is a friend or enemy in making their lobbying decisions.

The Supreme Court's rules regarding the timing of amicus briefs also separate the Court from Congress and allow us to overcome Baumgartner and Leech's (1996b) criticism of Austen-Smith and Wright (1994) involving the timing of groups' lobbying decisions. That is, unlike Congress, in which groups may lobby anticipatorily, simultaneously, or responsively, the Court mandates a strict timeline for the filing of amicus briefs, structured by the litigant the amici support. For amici supporting the petitioner, Court rules require that the amicus briefs must be submitted within 45 days of the date the case was granted certiorari or probable jurisdiction was noted. Amici supporting the respondent then have 30 days from the date in which the petitioning party's briefs (and petitioner amicus briefs) have been submitted to file their briefs.[10] The purpose of this rule is to give groups supporting the respondent (and the respondent party) sufficient time to review—and oppose—their adversaries' argumentation. Thus, lobbying in the Supreme Court is structured such that it allows us to investigate counteractive lobbying in a setting that not only takes into account the timing of groups' advocacy efforts but also is organized in a manner that potentially promotes counteractive lobbying.[11]

The Court's rules, allowing groups the opportunity to lobby counteractively, are consistent with the fact that American law is based on the adversarial system (e.g., Kagan, 2002). Under adversarialism, litigants and amici are required to act as their own advocates, presenting courts with information and evidence that promotes their particular policy preferences at the expense of their opponents. As such, the Supreme Court is a particularly appropriate venue to examine counteractive lobbying because it is organized around a system that values the airing of opposing positions as something beneficial for the creation of effective law. Concrete evidence of this fact is made apparent both by the rules regarding the timing of the submission of briefs and by the Court's rules directing amici to identify the party they supported in amicus briefs (Banner, 2003, p. 111). Indeed, the adversarial system is so engrained with respect to amicus practice that there was never a point in American law that amici acted solely as neutral advisors to the courts; instead, amicus briefs have always been exploited as an adversarial weapon (Banner, 2003; Krislov, 1963).

To sum, counteractive lobbying occurs when organized interests lobby to neutralize the advocacy efforts of their opponents. Interest groups are motivated to counteract the lobbying activity of their adversaries to minimize their opponents' influence on the fate of public policy. If political actors, such as judges, hear only from groups who represent one side of a given issue, this enhances the likelihood that those actors' decision making will be swayed toward the side of the debate that they are lobbied (e.g., Collins, 2004, 2007; Kearney & Merrill, 2000; Schattschneider, 1960; Wright, 2003). Recognizing this, opposing groups are invigorated to lobby the very actors who are lobbied by their opponents. This is done in an attempt to both negate their opponents' influence and to etch their own policy preferences into law. Groups recognize the reality that their influence on governmental policy relies heavily on competing truths—in that groups marshal facts and argumentation most favorable to their causes—and that, in practice, no single group or vision is capable of cornering the market on the truth (Berry, 1997, p. 171; Tamanaha, 2006). Because organizations comprehend that there are no objectively correct truths with respect to pressing debates involving public policy, they are motivated to respond to their opponents' lobbying efforts by following suit. Applying this theory to the Supreme Court, we expect that organized interests supporting the respondent party will file amicus briefs in response to the amicus activity of opponent organizations that support the petitioner. Thus,

Responsive counteractive lobbying hypothesis: Organized interests supporting the respondent will respond to the number of amicus curiae briefs supporting the petitioning party. As the number of amicus briefs filed for the petitioner increases, so too will the number of amicus briefs filed for the respondent.

Although most analyses of counteractive lobbying focus on the ability of groups to respond to their opponents' lobbying activity, the Court's rules afforded us the opportunity to evaluate the extent to which groups engage in *anticipatory* counteractive lobbying (see also Hansen & Mitchell, 2000; McKay & Yackee, 2007; Mitchell et al., 1997). Accordingly, we investigate whether the number of amicus briefs filed for the respondent influences the number of amicus briefs filed for the petitioning party. Because amicus briefs supporting the petitioner are filed before those briefs supporting the respondent, this offers us leverage over whether interest groups anticipate the amicus activity of their opponents. That is, it allows us to examine counteractive lobbying in those circumstances under which groups are not yet aware that amicus briefs have been filed for the respondent.

Although groups who file briefs for the petitioning party are not privy to the briefs of the respondent amici, because they are not yet tendered to the Court, there is nonetheless reason to believe that petitioner amici are capable of anticipating their opponents' actions. Most obviously, groups can amass reasonable estimates of their opponents' participation through Supreme Court precedent. Because authoritative sources of Supreme Court opinions, such as U.S. Reports, catalog the positions and identity of amici, this provides a transparent and easily accessible record of allied and opponent amici who participated in previously decided cases. For example, Samuels (2004) notes that the amici involved in abortion litigation were highly cognizant of both their allies and opponents and "participants in the abortion controversy were able to identify which amici might be most helpful or most damaging to their cause and they spent significant energies trying to either shore up or to undermine these briefs" (p. 212). Similarly, Kobylka (1987, p. 1076) reveals that the rise of feminist antipornography organizations and conservative decency groups motivated libertarian groups to step up their participation in obscenity litigation for the purposes of negating the claims of their adversaries; such counteractive lobbying can occur both in response to and in anticipation of an opponents' participation. In addition, amici are able to recognize the salience of a case to their own causes and to those of their adversaries. Indeed, even when an organization views a particular case as a less than ideal vehicle for etching its policy preferences into law, that group still might file an amicus brief anticipating

that its absence would go noticed by the justices, who might give more weight to the group's opponents who decide to file an amicus brief (e.g., McGuire, 1993, p. 125: Wasby, 1995, p. 226). In this sense, groups anticipate both their opponents' amicus activity and the justices' expectations of their own participation (Samuels, 2004, p. 145). Last, Supreme Court rules, prohibiting the submission of reply briefs from amici, provide a substantial incentive for groups to engage in anticipatory counteractive lobbying. That is, because petitioner amici are not given the opportunity to respond to the arguments of their opponents, if they want to neutralize their opponents' advocacy efforts, they are forced to anticipate those arguments. One appellate practitioner corroborated this sentiment with no ambiguity in her discussion of efficacious amicus briefs by advising that, because the Court does not allow amici to file reply briefs, "It is therefore imperative that you anticipate your opposition's arguments in your brief and address them" (Arkin, 2007, p. 44). Because the Supreme Court limits the length of amicus briefs, this suggests that, to most comprehensively address their opponents' argumentation, petitioner amici will file a multitude of amicus briefs in an effort to negate their oppositions' influence on the Court (e.g., Collins, 2004, p. 815). Therefore,

> *Anticipatory counteractive lobbying hypothesis:* Organized interests supporting the petitioner will anticipate the number of amicus curiae briefs supporting the respondent party. As the number of amicus briefs filed for the respondent increases, so too will the number of amicus briefs filed for the petitioner.

Data and Method

To subject these counteractive lobbying hypotheses to empirical validation, we use the case as the unit of analysis.[12] This allows us to investigate the extent to which (a) respondent amici react to the amicus activity of petitioner amici and, as a result, engage in responsive counteractive lobbying and (b) petitioner amici anticipate the amicus activity of respondent amici by engaging in anticipatory counteractive lobbying. Because the Court's rules require that petitioner amicus briefs are filed before respondent amicus briefs, this provides an auspicious opportunity to evaluate counteractive lobbying in a setting that accounts for the timing of groups' lobbying efforts (Baumgartner & Leech, 1996b). Rather than study a particular Supreme Court case, or a small subset of such cases, we provide a longitudinal analysis of group participation by analyzing all orally argued cases decided during the 1953 to

2001 terms, thus allowing us to avoid the more limited generalizability associated with case studies (Baumgartner & Leech, 1996b, p. 531). The data on amicus activity come from Kearney and Merrill's (2000) amicus database for the 1953 to 1995 terms. Using the coding rules established by Kearney and Merrill, we updated this database through the 2001 term. We then merged this data set with Spaeth's (2003) database, allowing us to incorporate information on the cases under analysis, which were identified using the case citation as the unit of analysis, decided during the 1953 to 2001 terms (in Spaeth's, 2003, database, analu = 0 and dec_type = 1, 4, 5, 6, and 7).[13]

Our two dependent variables, the number of amicus curiae briefs filed for the respondent and the number of amicus curiae briefs filed for the petitioner, coupled with our theoretical expectations, require us to employ a model that is able to capture two facets of information. First, both dependent variables are counts, and thus cannot take on negative values, making ordinary least squares regression inappropriate. Second, our theory predicts that these dependent variables are correlated. Accordingly, we use a seemingly unrelated Poisson regression model, developed by King (1989). This model provides a maximum likelihood solution to simultaneously estimate the relationship between two count dependent variables that are correlated and provides substantial efficiency gains on equation-by-equation Poisson estimates (King, 1989). Furthermore, the seemingly unrelated Poisson regression model estimates a parameter, ξ, allowing us to compare the model with two equation-by-equation Poisson models. If the estimate of ξ is statistically significant, this indicates that the seemingly unrelated Poisson regression model is superior to the equation-by-equation estimators (King, 1989, p. 249).

Because we employ virtually identical model specifications in each equation to test the two counteractive lobbying hypotheses, we begin with a discussion of the equation that evaluates responsive counteractive lobbying. In this equation, our dependent variable is a count of the number of amicus briefs filed in support of the respondent (i.e., arguing for the affirmance of the lower court decision). Our key independent variable, "petitioner amicus briefs," is a count of the number of amicus briefs filed for the petitioner (i.e., arguing for a reversal of the lower court's decision). Consistent with the responsive counteractive lobbying hypothesis, we expect this variable will be positively signed, indicating that the number of respondent amicus briefs will increase as the number of amicus briefs filed for the petitioner increase.

Although our central purpose is to evaluate the counteractive lobbying hypotheses, it is necessary to control for a variety of other factors that

contribute more generally to amicus activity in the Supreme Court. We use five variables that capture factors related to the attractiveness of the case to organized interests. First, we control for the informational environment at the Court by including a "solicitor general invite" variable, scored 1 if the Court invited the U.S. solicitor general—the executive branch attorney who handles Supreme Court litigation—to file an amicus brief and 0 if the Court did not issue such an invitation.[14] When the Court invites the solicitor general to file an amicus brief, it sends an unambiguous signal that the Court is operating in an information-poor environment (Hansford, 2004, p. 221). As such, we expect interest groups will be attentive to this and, seeking to provide the justices with information regarding the correct application of the law in cases where the Court signals its desire for such input, will be increasingly likely to participate as amicus curiae. We expect this variable will be positively signed, indicating that the number of respondent amicus briefs will increase in cases in which the Court invited the solicitor general to participate.

We also anticipate that a case's broad political salience will influence the number of amicus briefs filed for the respondent. In cases that have far-reaching policy importance, interest groups are increasingly likely to participate as amici in an attempt to etch their policy preferences into law. If successful, groups are enabled to claim credit for victories that have profound impacts on the American polity. To evaluate this consideration, we include a "case salience" variable, scored 1 if the case appeared on the front page of the *New York Times* on the day after the decision and 0 if it did not.[15] We expect this variable will be positively signed.

We also believe that organized interests will be increasingly likely to participate as amici curiae in complex cases. In such cases, there is a substantial amount of uncertainty as to the correct application of the law as a result of numerous issues and legal provisions the justices must consider. As such, potential amici are likely to be attracted to these cases as the justices might find the information provided in the briefs particularly useful for creating efficacious law (e.g., Hansford, 2004). We use two variables to capture a case's complexity. "Total laws" reflects the number of legal provisions implicated by the case as identified in the Spaeth (2003) database. "Total issues" is composed of the number of issues raised in the case as identified in the Spaeth database. We expect these variables will be positively signed.

Following from the idea that interest groups are increasingly likely to participate as amici in cases that have broad societal importance, we hypothesize that the nature of the lawsuit will influence the number of respondent amicus briefs. When the Court is adjudicating a decision based

on constitutional law, the Court's decision is final, save for a constitutional amendment overturning it. Conversely, when the Court is involved in statutory interpretation, its decision runs the risk of being overturned by Congress (e.g., Katzmann, 1997; Segal, 1997). Because statutory cases might face a congressional override, the Court's decisions in such cases are not necessarily final. Attentive to this, interest groups are less likely to file briefs in such cases, preferring to instead participate in cases that will have long-lasting policy consequences (Hansford, 2004). To examine this possibility, we include two variables in the model. "Statutory case" is scored 1 if the case involved statutory interpretation and 0 otherwise. "Constitutional case" is scored 1 if the case involved the interpretation of some aspect of the Constitution and 0 otherwise. The excluded category contains cases in which the Court adjudicated a dispute under its original or diversity jurisdiction as well as those cases concerning the interpretation of judge-made rules (Spaeth, 2003).

We also believe interest groups will be particularly attracted to cases that involve the constitutionality of an act of Congress. In cases challenging congressional legislation, organized interests are likely to file amicus briefs to provide the justices with information regarding the implementation of the congressional law at issue as a result of their monitoring activities (e.g., McCubbins & Schwartz, 1984). Moreover, interest groups may be attracted to such cases because these cases are likely to implicate legislation interest groups shaped in Congress (e.g., Wright, 2003). In this sense, groups might participate in the Court to protect gains they secured in Congress or, alternatively, to mount challenges against their opponents' congressional victories (Olson, 1990). To evaluate this possibility, we include a "congressional challenge" variable, scored 1 if the case implicates the constitutional or statutory interpretation of an act of Congress and 0 otherwise (Spaeth, 2003). We expect this variable will be positively signed.[16]

Akin to the friendly lobbying that takes place in Congress (e.g., Bauer et al., 1963; Hojnacki & Kimball, 1998; Kollman, 1997; Milbrath, 1963), students of organizational activity in the judicial arena are attentive to the fact that interest groups might strategically file amicus briefs in cases they are predisposed toward winning (e.g., Collins, 2004, 2007; Hansford, 2004). In so doing, a group is able to illustrate to its members, patrons, and shareholders not only that the organization is active on relevant policy manners but is also achieving gains in the judiciary. In this sense, groups might be attracted to cases in which the Court is predisposed toward endorsing the groups' position(s) for the purposes of appearing efficacious. We include three variables related to a case's perceived winnability to respondent

amici. The first of these variables captures the ideological proximity between the Court and the respondent party. This variable is intended to account for the reality that the justices overwhelmingly render decisions that are consistent with their policy preferences (e.g., Segal & Spaeth, 2002). To capture the ideological congruence between the respondent party and the Court, we use the Judicial Common Space scores, which provide ideal point estimates for the median member of the Court (Epstein, Martin, Segal, & Westerland, 2007), based on the Martin and Quinn (2002) scores. To derive our measure of "court ideological congruence," we adopt the method developed by Johnson, Wahlbeck, and Spriggs (2006). If the respondent party advocates a conservative outcome, this variable is the ideology score of the median justice multiplied by +1. If the respondent party advocates a liberal disposition, this variable is the median justice's ideal point multiplied by −1. Because positive values on the Judicial Common Space are assigned to more conservative justices, higher values on this score reflect increased proximity to the median justice on the Supreme Court. If groups are increasingly likely to file amicus briefs when the Court is ideologically predisposed toward rendering a decision in their favor, we expect this variable will be positively signed, indicating that an increasing number of amicus briefs will be filed for the respondent when the Court is predisposed toward supporting that litigant's position.

In addition to the Court's ideology, the resources available to a litigant play an important role in shaping litigation success (e.g., Collins, 2004, 2007; McGuire, 1995). Such is the case because high-resource litigants are better equipped than low-resource parties to employ highly experienced advocates, perform extensive research, and develop reputations as credible information sources (Galanter, 1974). To determine whether organized interests take advantage of the resources of the litigant they support, we include two variables based on the following resource continuum: poor individuals = 1, minorities = 2, individuals = 3, unions/interest groups = 4, small businesses = 5, businesses = 6, corporations = 7, local governments = 8, state governments = 9, and the federal government = 10.[17] "Petitioner resources" represents the petitioner's resource score and "respondent resources" represents the respondent party's resource score. If groups file amicus briefs based on a case's winnability, we expect that the "respondent resources" variable will be positively signed, indicating that when a respondent ranks high on the resource continuum, more amicus briefs will be filed supporting the respondent's position. Conversely, we expect that the "petitioner resources" variable will be negatively signed, indicating that fewer respondent briefs will be filed when the petitioner ranks high on the resource continuum.

The final variables are intended to capture the fact that amicus briefs are more common in certain areas of the law and to account for the increase in amicus participation over time (e.g., Koshner, 1998).[18] To control for issue area effects, which capture the density of organizations within a policy area (e.g., Lowery & Gray, 1995), we include four variables, derived from the Spaeth (2003) database. "Civil rights" is scored 1 if the case involves civil rights, due process, privacy, the First Amendment, and the rights of attorneys (which typically involve attorneys' free speech) and 0 otherwise. "Criminal procedure" is scored 1 if the case involves the rights of the criminally accused and 0 otherwise. "Economics" is scored 1 if the case involves economic activity, federal taxation, or unions and 0 otherwise. "Federalism" is scored 1 if the case implicates federalism or interstate relations and 0 otherwise. Cases involving judicial power are the excluded category. To account for the increase in amicus participation over time, we include a "time" variable, scored such that 1953 = 1, 1954 = 2, and so on.[19]

To investigate whether organized interests anticipate the amicus activity of their opponents, the second equation in the seemingly unrelated Poisson regression model uses the number of amicus briefs filed for the petitioner as the dependent variable. The key independent variable is the number of amicus briefs filed for the respondent ("respondent amicus briefs"). To control for other factors related to the number of amicus briefs filed for the petitioner, we estimate the equation with the same independent variables discussed above. Because the "court ideological congruence" variable is scored to reflect the respondent's ideological proximity to the Court, we anticipate that this variable will be negatively signed. We also expect that the variables capturing litigant resources will be signed in the reverse of our expectations with respect to Table 1 (the responsive counteractive lobbying equation).

Counteractive Lobbying Results

Table 1 reports the results of the first equation of the seemingly unrelated Poisson regression model that predicts the number of amicus briefs filed for the respondent party. The estimate of ξ is statistically significant, indicating the seemingly unrelated Poisson regression model provides a better fit of the data than the equation-by-equation Poisson estimators (King, 1989, p. 249).[20] Because the magnitude of the parameter estimates of the seemingly unrelated Poisson model cannot be interpreted directly, Table 1 also reports the marginal effects for each independent variable in

Table 1
Equation I: Seemingly Unrelated Poisson Estimates of the Number of Amicus Curiae Briefs Filed for the Respondent in the U.S. Supreme Court, 1953 to 2001 Terms

Variable	Coefficient	Marginal Effect[a]
Responsive counteractive lobbying		
Petitioner amicus briefs [+]	.068 (.003)**	+9.0
Case attractiveness		
Solicitor general invite (+]	.258 (.052)**	+17.8
Case salience [+]	.618 (.032)**	+51.9
Total laws [+]	.135 (.023)**	+4.7
Total issues [+]	.045 (.044)	n.s.
Statutory case [–]	–.026 (.037)	n.s.
Constitutional case [+]	.100 (.040)*	+6.4
Congressional challenge [+]	.103 (.035)**	+6.6
Winnability factors		
Court ideological congruence [+]	–.109 (.116)	n.s.
Petitioner resources [–]	.036 (.005)**	+6.8
Respondent resources [+]	–.037 (.005)**	–5.9
Issue area controls[b]		
Civil rights	.177 (.048)**	+11.7
Criminal procedure	–.636 (.058)**	–28.6
Economics	.113 (.048)*	+7.3
Federalism	.313 (.063)**	+22.6
Temporal control		
Time	.050 (.001)**	+54.6
Constant	–1.99 (.097)**	
ξ	.053 (.007)**	
N	5,842	

Note: Entries in parentheses are standard errors. The expected direction of the parameter estimates of the independent variables appears in brackets.
a. Indicates percentage change in the predicted number of amicus briefs filed for the respondent corresponding to one standard deviation change in continuous and count variables and a 0 to 1 change in dichotomous variables, holding all other variables constant at their mean or modal values.
b. Judicial power cases are the excluded category.
*$p < .05$. **$p < .01$ (one-tailed tests). n.s. = not significant.

the model that achieves statistical significance at conventional levels ($p < .05$). The marginal effects indicate the expected percentage change in the number of amicus briefs filed for the respondent corresponding to a one standard deviation increase in continuous and count variables and a 0 to 1

increase in dichotomous variables, holding all other variables at their mean or modal values, as appropriate.

The key independent variable, "petitioner amicus briefs," serves to evaluate the extent to which respondent amici react to their opponents' amicus activity and thus engage in responsive counteractive lobbying. We find strong support for this counteractive lobbying hypothesis. In substantive terms, a one standard deviation increase in the number of amicus briefs filed in support of the petitioner (one to three) increases the number of amicus briefs filed for the respondent by 9%. For example, compared with a case with a single amicus brief filed for the petitioner, in a case with 12 amicus briefs supporting the petitioner, we can expect to see the number of amicus briefs filed for the respondent increase by 68%. This provides particularly compelling evidence that organized interests respond to the actions of their opponents and, seeking to counter their oppositions' influence on the Court, file their own amicus briefs. Because our results reveal that organizations file amicus briefs as a function of counteractive lobbying, this indicates that groups are able to alter the information environment in the Court by providing the justices with information regarding their own subjective interpretations as to the correct application of the law in a case, which run counter to those positions espoused by their opponents (e.g., Collins & Solowiej, 2007). Potentially, this might improve the justices' ability to make efficacious law in that a group's ability to refute its opponents' participation provides a strong incentive for that group to provide the justices with credible information (e.g., Austen-Smith & Wright, 1994). Indeed, Justice Ginsburg (2001), who served as counsel for the liberal American Civil Liberties Union before her appointment to the bench, articulated the benefits derived from organizational competitiveness in the judiciary unambiguously in noting that

> Our system of justice works best when opposing positions are well represented and fully aired. I therefore greet the expansion of responsible public-interest lawyering on the "conservative" side as something good for the system, not a development to be deplored. (p. 8)

In addition to providing support for the responsive counteractive lobbying hypothesis, Table 1 also reveals that factors related to the attractiveness of the case play an important role in predicting the number of amicus briefs filed for the respondent. First, it is clear that organized interests respond to the Court's signals that it is operating in an information poor environment, information obtained through the Court's invitations to the solicitor

general. When the Court invites the solicitor general to file an amicus brief, the number of amicus briefs filed for the respondent party increase by 18%. Interest groups are also attracted to cases that have broad policy significance: Compared with a relatively trivial dispute, in a salient case, the number of briefs filed for the respondent increases by 52%. This illuminates that organizations are attentive to a case's political salience and make a concerted effort to influence the justices' decision making in these landmark cases. The number of legal provisions implicated in the case also motivates interest group participation, corroborating our expectation that groups seek out complicated cases in which their expertise might be particularly valuable to the justices. For example, compared to a case with a single legal provision, in a case with three legal provisions, the number of amicus briefs supporting the respondent increases by 18%. However, we do not find a relationship between the number of issues implicated in the case and the number of briefs filed for the respondent. We do uncover evidence that interest groups are especially likely to participate in cases that involve constitutional interpretation. Compared with cases involving the Court's diversity jurisdiction, original jurisdiction, and the interpretation of judge-made laws (which are contained within the reference category), in a case concerning the application of some aspect of the Constitution, there is a 6% increase in the number of amicus briefs filed for the respondent. We do not, however, find a statistically significant difference between statutory interpretation cases and those cases involving diversity jurisdiction, original jurisdiction, and the treatment of judge-made law. Table 1 also indicates that organizations are particularly attracted to cases involving challenges to congressional legislation: We can expect a 7% increase in the number of amicus briefs supporting the respondent party in cases involving the adjudication of an act of Congress. This provides support for the idea that because organizations play an important role in the legislative branch, they will often use the judicial branch in an attempt to defend their victories in Congress or to negate their opponents' victories in the legislative arena (e.g., Olson, 1990).

Our results with respect to factors related to the winnability of a case are particularly interesting. We fail to find evidence for our expectation that interest groups supporting the respondent will file an increasingly large number of amicus briefs before a Court that is ideologically predisposed toward endorsing the respondent's position. This suggests that groups lobby Courts that are both favorably disposed and unfavorably disposed toward supporting their positions (see also Collins, 2004, 2007). In lobbying

unfriendly Courts, it is clear that groups do so in part to counterbalance the lobbying efforts of their opponents. This is a significant finding in light of the voluminous amount of literature demonstrating that interest groups are more likely to lobby their friends, as opposed to their enemies, in Congress (e.g., Bauer et al., 1963; Hojnacki & Kimball, 1998; Kollman, 1997; Milbrath, 1963). This clearly indicates that theories of friendly lobbying, so ubiquitous in congressional scholarship, are likely inapplicable to the Supreme Court. In part, this is because of the number of access points available to interest groups in Congress vis-à-vis the Court. In the contemporary American system, organizations have 535 access points in the legislative area. Recognizing that geographical and monetary constraints influence the decision whom to lobby (e.g., Wright, 2003), this reality still provides ample access points to target friendly legislators. Conversely, the increasingly long tenures of justices on the Supreme Court (e.g., Crowe & Karpowitz, 2007), coupled with the difficulties associated with predicting vacancies on the bench, has resulted in a situation in which, if an organization wants to target a friendly Court, it might have to wait decades to do so. Indeed, the Court's stable nature, coupled with the common law tradition of *stare decisis*, contributes to the attractiveness of the Court as a venue for interest group lobbying, even for those groups who find the justices unfriendly to their causes. In this sense, even if an organization views the Court as a less than hospitable environment to exercise its influence, that group still might file an amicus brief on the off chance the justices will endorse its positions. As Wasby (1995) notes,

> Judicial decisions, particularly Supreme Court rulings on constitutional matters, are difficult to dislodge. Thus a victory there is more permanent, decreasing uncertainty and stabilizing the environment, than one in Congress or in presidential administrations, which will be affected by election shifts. (p. 105)

The results fail to confirm our expectations with regard to the two other variables associated with the perceived winnability of a case. First, the results indicate that amicus briefs filed for the respondent are not more prevalent when the respondent party ranks high on the resource continuum. In fact, we find just the opposite: As the resource status of the respondent party decreases, the number of amicus briefs supporting that party increases. A one standard deviation increase in the respondent's position on the resource continuum (six to nine) results in a 6% increase in the number of amicus briefs filed for the respondent. Although inconsistent with the winnability argument, this finding can nonetheless be explained by organizations' willingness to file amicus

briefs when they perceive that the respondent party might be incapable of marshaling the best arguments as a result of a lack of resources and/or expertise (e.g., Hansford, 2004; Wasby, 1995, p. 224). In other words, it appears that groups actively seek out those cases in which the justices might rely more on the persuasion forwarded in their amicus briefs because of an inability of the respondent party to convey relevant information. Second, divergent from our expectations, the results indicate that the number of amicus briefs supporting the respondent increase in tandem with the resources available to the petitioning party. This suggests that rather than target cases based on their perceptions of a case's winnability, respondent amici are more likely to challenge high-resource litigants, presumably in an attempt to negate the persuasion attempts forwarded by high-status litigants, thus leveling the playing field (e.g., Songer, Kuersten, & Kaheny, 2000). In substantive terms, a one standard deviation increase in the petitioning party's position on the resource continuum (six to nine) results in a 7% increase in the number of amicus briefs filed for the respondent.

The results also reveal that there exist significant differences in the number of amicus briefs filed for the respondent depending on the issue area implicated in the case. Compared with cases involving judicial power (the baseline category), we can expect to see 23% more amicus briefs filed for the respondent in federalism cases, 7% more in economics cases, 12% more in civil rights cases, and 29% fewer amicus briefs supporting the respondent in criminal disputes. We also find that the number of briefs filed for the respondent has increased over time, which is consistent with the rise in amicus participation since the 1950s (e.g., Collins, 2007; Kearney & Merrill, 2000; Koshner, 1998). For example, compared with the 1976 term, during the 1990 term, the model predicts a 60% increase in the number of amicus briefs filed for the respondent.[21]

Table 2 reports the second equation of the seemingly unrelated Poisson regression model that predicts the number of amicus briefs filed for the petitioning party, thus evaluating the validity of the anticipatory counteractive lobbying hypothesis. The results provide strong support for our contention that organized interests anticipate their oppositions' amicus activity by filing briefs supporting the petitioner. This indicates that not only do groups respond to the participation of their opponents but they also anticipate the briefs filed by their adversaries. In substantive terms, a one standard deviation increase in the number of amicus briefs filed for the respondent (one to three) increases the number of amicus briefs filed for the petitioner by 14%. For example, compared with a case in which a single amicus brief is filed for the respondent, in a case with 12 briefs for the respondent, we can expect a 138% increase in the number of amicus briefs filed for the

Table 2
Equation II: Seemingly Unrelated Poisson Estimates of the Number of Amicus Curiae Briefs Filed for the Petitioner in the U.S. Supreme Court, 1953 to 2001 Terms

Variable	Coefficient	Marginal Effect[a]
Anticipatory counteractive lobbying		
Respondent amicus briefs [+]	.112 (.004)**	+14.2
Case attractiveness		
Solicitor general invite [+]	.386 (.048)**	+26.6
Case salience [+]	.530 (.032)**	+39.4
Total laws [+]	.019 (.029)	n.s.
Total issues [+]	.070 (.046)	n.s.
Statutory case [–]	–.056 (.036)	n.s.
Constitutional case [+]	.246 (.039)**	+15.7
Congressional challenge [+]	.117 (.035)*	+7.0
Winnability factors		
Court ideological congruence [–]	–.081 (.086)	n.s.
Petitioner resources [+]	–.042 (.005)**	–6.5
Respondent resources [–]	–.029 (.005)**	–4.4
Issue area controls[b]		
Civil rights	.200 (.050)**	+12.5
Criminal procedure	–.370 (.057)**	–17.5
Economics	.267 (.049)**	+17.3
Federalism	.363 (.065)**	+24.7
Temporal control		
Time	.045 (.001)**	+44.3
Constant	–1.43 (.098)**	
ξ	.053 (.007)**	
N	5,842	

Note: Entries in parentheses are standard errors. The expected direction of the parameter estimates of the independent variables appears in brackets.
a. Indicates percentage change in the predicted number of amicus briefs filed for the petitioner corresponding to one standard deviation change in continuous and count variables and a 0 to 1 change in dichotomous variables, holding all other variables constant at their mean or modal values.
b. Judicial power cases are the excluded category.
*$p < .05$. **$p < .01$ (one-tailed tests). n.s. = not significant.

petitioner—an effect substantially larger than that of our responsive counteractive lobbying results. Thus, counteractive lobbying is applicable to organizational activity in the Supreme Court regardless of whether it is viewed as anticipatory or responsive, clearly supporting the contention that

the Supreme Court operates as a policy-making institution in which organizations battle on the content of federal law (e.g., Tamanaha, 2006).

The results of the other variables in Table 2 largely mimic those presented in Table 1, with two exceptions. First, we fail to uncover evidence that petitioner amici are more likely to file amicus briefs in cases involving myriad legal provisions. Second, unlike respondent amici, the resources status of the opposing party does attenuate the number of amicus briefs filed for the petitioner. Table 2 indicates that the number of amicus briefs filed for the petitioner decrease by 4% for a one standard deviation increase in the respondent's position on the resource continuum (from six to nine). Although statistically significant, the substantive effects of this variable are somewhat marginal, but nonetheless provide modest support that petitioner amici strategically target cases based on their perceptions of the case's winnability.

Conclusions

Our purpose in this article was to evaluate the application of counteractive lobbying theory to explain organizational amicus curiae participation in the U.S. Supreme Court. We expected that, *ceteris paribus*, interest groups will respond to the lobbying efforts of their opponents and seeking to counterbalance those efforts, will file amicus briefs providing the justices with their own perspectives as to the correct application of the law. The results of our 49-term analysis provide strong support for this contention, even after controlling for a host of other factors that contribute to organizational participation in the Supreme Court. In addition, we examined whether interest groups anticipate the amicus curiae activity of their opponents. Our results provide robust evidence that groups engage in this form of anticipatory counteractive lobbying. Taken as a whole, this research indicates that, like the elected branches of government, the judicial arena is appropriately viewed as a battleground for public policy in which organizations clash in an attempt to etch their policy preferences into law. This is consistent with Bentley's (1908) century-old perspective on American government:

> There is no political process that is not a balancing of quantity against quantity. There is not a law that is passed that is not expression of force and force in tension. There is not a court decision or an executive act that is not the result of the same process. (p. 202)

In providing evidence for counteractive lobbying in the Supreme Court, this research corroborates the utility of applying generalizable theories of interest groups across a host of venues. Extant research on counteractive lobbying overwhelmingly focuses on explaining group participation in Congress (Austen-Smith & Wright, 1992, 1994, 1996; Baron, 2006; Baumgartner & Leech, 1996a, 1996b; Hojnacki & Kimball, 1998; Sloof, 1997). In investigating the application of this theory to explain group activity in the Supreme Court, we have provided an example of the theory's broad relevance. As such, this research contributes to, but does not resolve, the contentious debate regarding counteractive lobbying as an explanation for interest group participation in American government (e.g., Ainsworth, 1997; Baumgartner & Leech, 1996a, 1996b; Hall & Deardorff, 2006). Accordingly, we encourage other researchers to explore this theory in other political arenas. For example, one might investigate counteractive lobbying in the federal and state bureaucracies, lower federal and state courts,[22] in addition examining whether this theory is capable of explaining patterns of political action committees' campaign contributions and interactions with White House liaisons. Future researchers might also examine counteractive lobbying in congressional agenda setting and during the Supreme Court's case selection process. Of course, it is important to note that one must pay close attention to the institutional features of interest group activity in each venue by accounting for the rules and norms regarding interest group participation in the venue under analysis.

It will also prove useful to examine how this type of interest group competition affects public policy outcomes and the decision making of political actors. Surely, not all bills, court cases, and bureaucratic rule making will necessarily involve counteractive lobbying. But for those that do, this form of aggressive competition can potentially play a major role in the fate of public policy. Students of interest groups have long recognized that the number of allies and opponents of an organization can play a major role in the creation of public law (e.g., Bentley, 1908; Schattschneider, 1960; Truman, 1951). By incorporating theories of counteractive lobbying into systematic research on the influence of interest groups, we are confident that much will be learned about the significant role organized interests play throughout the political system.

Appendix

Summary Statistics

Variable	*M*	*SD*	Minimum	Maximum
Petitioner amicus briefs	1.05	1.98	0	34
Respondent amicus briefs	1.02	1.93	0	21
Solicitor general invite	.043	.204	0	1
Case salience	.154	.361	0	1
Total laws	1.25	.552	1	6
Total issues	1.08	.297	1	5
Statutory case	.368	.482	0	1
Constitutional case	.335	.472	0	1
Congressional challenge	.198	.398	0	1
Court ideological congruence	–.018	.149	–.358	.358
Petitioner resources	6.21	2.90	1	10
Respondent resources	6.43	2.82	1	10
Civil rights	.316	.465	0	1
Criminal procedure	.218	.413	0	1
Economics	.290	.454	0	1
Federalism	.049	.217	0	1
Time	24.3	13.0	1	49

Notes

1. In their landmark research on counteractive lobbying, Austen-Smith and Wright (1992, 1994) present a theory of counteractive lobbying to explain why groups lobby their *ex ante* supporters in Congress, positing that groups do so to counteract the advocacy efforts of their opponents. We employ a consistent, but slightly broader, definition of counteractive lobbying here: lobbying for the purpose of neutralizing the advocacy efforts of a group's opponents. This definition provides leverage over why interest groups lobby courts that are favorably disposed toward their positions (e.g., why the American Civil Liberties Union, a liberal organization, lobbies a liberal Supreme Court), while recognizing that interests groups are unable to lobby individual members of the Supreme Court (as we discuss below).

2. In addition to these venue-specific analyses, a number of scholars have examined competitive lobbying as a more general phenomenon (e.g., Becker, 1983; Browne, 1990; Nownes, 2000; Salisbury, Heinz, Laumann, & Nelson, 1987).

3. Amicus curiae ("friend of the court") briefs are legal briefs filed by entities other than the direct parties to litigation (i.e., organized interests) that advocate for a particular disposition in the courts (e.g., Banner, 2003; Krislov, 1963). Although amicus briefs can be filed at either the certiorari or merits stages in the Supreme Court, we focus our attention here on the latter because prior research reveals that there is little organizational participation and competition at the case selection stage (e.g., Caldeira & Wright, 1988).

4. Following Schlozman and Tierney (1986), we define interest groups as "the wide variety of organizations that seek joint ends through political action" (p. 11). Included in this definition are corporations, governments, public advocacy groups, public interest law firms, trade associations, and the like.

5. Although we recognize the importance of studying test cases and case sponsorship, we limit our attention here to amicus participation as a partial function of data limitations. Namely, collecting reliable data on test cases and case sponsorship over a long time period is extremely difficult, particularly because authoritative sources of Supreme Court decisions, such as U.S. Reports, do not typically indicate whether a particular attorney was connected to an interest group.

6. Groups will occasionally orchestrate grassroots lobbying efforts targeted at the justices though mass mailings of postcards or petitions (e.g., Harper & Etherington, 1953). However, like attempting to directly contact a justice, these grassroots efforts are viewed as unethical and are ignored. For example, in response to such lobbying efforts in obscenity cases, Justice Black explained in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts* (1966) that "we do not bow to them. I mention them only to emphasize [that their presence indicates] the lack of popular understanding of our constitutional system" (383 U.S. 413, at 428).

7. Because of the highly transparent procedures and limited methods for lobbying the Court, by focusing on this institution, we are able to partially overcome Baumgartner and Leech's (1996b) criticism that Austen-Smith and Wright (1994) failed to examine the wide array of tools at the disposal of interest groups in Congress, in that Austen-Smith and Wright focusing solely on direct contacts with the senator or the senator's staff (Austen-Smith & Wright, 1994, p. 37).

8. Entities of state governments and the federal government are not required to obtain permission from the parties to file amicus briefs.

9. Of course, this does not negate the possibility that groups might target particular justices in their amicus briefs (e.g., Kolbert, 1989). Rather, the important point is that groups are unable to submit amicus briefs to particular justices, while withholding the briefs from other justices.

10. These rules apply to the amicus briefs filed under the time frame under analysis here (1953 to 2001). Recently, the Court amended Rule 37, requiring that amicus briefs filed after October 1, 2007, must be submitted within 7 days following the submission of the brief of the party the amici support. For example, under the previous version of the rules, amici supporting the petitioner had 45 days from the date in which the case was granted certiorari to submit the briefs. The amended rule grants amici supporting the petitioner 52 days to file their amicus briefs (provided the petitioning party files its brief at the 45 day deadline).

11. It is a convention in the Supreme Court that briefs—both litigant and amicus curiae—are filed at or extremely close to the deadline for the due dates of the briefs (e.g., Schweitzer, 2003). For example, we examined a random sample of 50 cases with amicus curiae briefs and found that all of the amicus briefs supporting the respondent were filed after the amicus briefs supporting the petitioner, overwhelmingly on the due date for the briefs. Collins and Solowiej (2007) corroborate this fact, revealing that 15% of amicus briefs filed for the respondent during the 1995 term cited amicus briefs supporting the petitioner by name for the purpose of neutralizing the argumentation in those briefs.

12. We recognize that a number of candidates can be used as the unit of analysis (e.g., Ando, 2001, 2003; Austen-Smith & Wright, 1996; Baumgartner & Leech, 1996b; Gormley & Cymrot, 2006; McKay & Yackee, 2007; see also Hansford, 2004; Martinek, 2006, p. 813). Most obviously, we might employ the group–case dyad to investigate counteractive lobbying, by tying each interest group to each case decided by the Court. We rejected this approach for three reasons. First, this strategy is limited in that there is a substantial amount of ambiguity as to the manner in which one appropriately identifies the universe of interest groups that might potentially participate as amicus curiae (Hansford, 2004, p. 223). Second, using the

group–case dyad is unsuitable because it assumes that every interest group is equally likely to file an amicus brief in every case. Finally, we forgo using this approach because it assumes that each group makes its decision to file an amicus brief independently of allied and opposing organizations (Austen-Smith & Wright, 1996, p. 558). This ignores the fact that amicus activity might be orchestrated among a number of distinct organizations who work together in the pursuit of a common goal (e.g., Behuniak-Long, 1991; Kolbert, 1989; Moorman & Masteralexis, 2001; Samuels, 2004, p. 212; Wasby, 1995, p. 234). Moreover, this approach is limited in that it assumes that groups file amicus briefs in response to a particular amicus on the other side of the controversy rather than responding to the overall amount of amicus activity by opposition organizations.

13. The data on amicus curiae briefs were collected on the basis of information obtained from the Reporter of Decisions as published in U.S. Reports. Because the reporter only identifies the position advocated in an amicus brief if that position was distinguished in the conclusion section of the brief (Kearney & Merrill, 2000), and because not all amicus briefs follow this convention, we were unable to identify the position advocated in 18% of amicus briefs and, as such, excluded these briefs. To ensure these excluded briefs would not bias the findings reported in this project, we analyzed a random sample of 256 amicus briefs coded as not having advocated for a particular disposition. Of those amicus briefs, 127 supported the petitioner (49.6%), 113 supported the respondent (44.1%), and 16 supported neither party (6.3%). *T* tests, comparing these figures to the distribution of litigants supported in the universe of cases, failed to achieve statistical significance, indicating that the excluded amicus briefs are randomly dispersed in their support for petitioners and respondents (see also Collins, 2004, 2007; Kearney & Merrill, 2000).

14. Invitations to the solicitor general to file amicus briefs are almost exclusively made before the Court grants certiorari, thus preceding the ability of organizational amici to file amicus briefs for both the petitioner and respondent (e.g., Bailey & Maltzman, 2005; Hansford, 2004). In these invitations, the Court invites the solicitor general to express the views of the United States, but does not specify whether the solicitor general should support the petitioner, respondent, or neither party; that decision is left to the solicitor general. We collected this data using Lexis-Nexis, a database that contains the universe of invitations from the Court.

15. The data on this variable were collected by Epstein and Segal (2000) for the 1953 to 1995 terms and collected by the authors for the remaining terms. In the data under analysis, 20% of cases with amicus briefs were reported on the front page of the *Times*, compared with 9% of cases without amicus briefs. We acknowledge that this surrogate for case salience is not without its problems. Accordingly, we checked the robustness of our results using two alternative measures. First, we included a variable indicating whether a case appeared on the *Congressional Quarterly* list of major Supreme Court decisions (Savage, 2004). Second, we used a variable scored 2 if the case appeared on both the *Congressional Quarterly* list and on the *New York Times* list, 1 if the case was present on one list (but not the other), and 0 if the case appeared on neither list (Brenner & Arrington, 2002). We obtain substantively identical results using those proxies for case salience.

16. In the cases under analysis, 62% of challenges to congressional legislation involved constitutional interpretation, whereas the remaining 38% of decisions rested solely on statutory interpretation (Spaeth, 2003).

17. Although we recognize that this resource continuum is an imperfect proxy for litigant resources, it has been successfully employed by a range of scholars studying litigation outcomes in the Supreme Court (e.g., Collins, 2004, 2007; McGuire, 1995; Sheehan, Mishler, & Songer, 1992). As an alternative to the resource continuum used here, we estimated models

using a variety of other coding schemes, such as moving unions/interest groups up the resource scale, moving local governments below corporations, combining litigants into broader categories, in addition to using dummy variables for the categories of litigants. The results of those models remain consonant with the findings presented here.

18. We also ran a model that included variables capturing amici's ideological congruence with the median member of Congress and the president to evaluate whether amici are more likely to file amicus briefs when they are ideologically distant from the elected branches of government. We operationalized those variables akin to our "Court ideological congruence" variable discussed above by employing the Judicial Common Space scores for the median member of Congress and the president, respectively. Neither of those variables attained statistical significance and, as such, we exclude them from the results reported here.

19. As an alternative to this temporal control variable, we also estimated the model including a square of the "time" variable, the results of which are consistent with those reported here.

20. The superiority of the seemingly unrelated Poisson model, as compared with the equation-by-equation Poisson models, is confirmed through the use of a likelihood ratio test ($\chi^2 = 58.6$).

21. Through the use of predicted probabilities, we examined whether counteractive lobbying was influenced by the rise in amicus briefs over time. Although the model indicates that the number of amicus briefs has increased throughout the time period under analysis, we uncovered no evidence that this growth in amicus participation affected the levels of responsive or anticipatory counteractive lobbying.

22. Examining counteractive lobbying by amici in lower courts might prove particularly useful given that the rules governing amicus participation in lower federal courts (e.g., Martinek, 2006, p. 806) largely mimic those of the U.S. Supreme Court, inclusive of the staggered due dates for amicus briefs depending on the amici's supported litigant. Although there is more variation in state court rules governing amicus submissions as compared with federal court rules (e.g., Comparato, 2003), many of the core findings reported here are nonetheless applicable to state judiciaries.

References

A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413 (1966).

Ainsworth, S. H. (1997). The role of legislators in the determination of interest group influence. *Legislative Studies Quarterly*, *22*, 517-533.

Ando, A. W. (2001). Economies of scope in endangered-species protection: Evidence from interest-group behavior. *Journal of Environmental Economics and Management*, *41*, 312-332.

Ando, A. W. (2003). Do interest groups compete? An application to endangered species. *Public Choice*, *114*(1-2), 137-159.

Arkin, S. J. (2007). Making friends with the court: Using amicus letters and briefs to help your case. *Orange County Lawyer*, *49*(March), 38-44.

Austen-Smith, D., & Wright, J. R. (1992). Competitive lobbying for a legislator's vote. *Social Choice and Welfare*, *9*, 229-257.

Austen-Smith, D., & Wright, J. R. (1994). Counteractive lobbying. *American Journal of Political Science*, *38*, 25-44.

Austen-Smith, D., & Wright, J. R. (1996). Theory and evidence for counteractive lobbying. *American Journal of Political Science*, *40*, 543-564.

Bailey, M. A., & Maltzman, F. (2005, April). *So what do you think? Inviting the Solicitor General to participate.* Paper presented at the annual meeting of the Midwest Political Science Association, Chicago.

Banner, S. (2003). The myth of the neutral amicus: American courts and their friends, 1790-1890. *Constitutional Commentary*, *20*(1), 131-150.

Baron, D. P. (2006). Competitive lobbying and supermajorities in a majority-rule institution. *Scandinavian Journal of Economics*, *108*, 607-642.

Bauer, R. A., Pool, I. de Sola, & Dexter, L. A. (1963). *American business and public policy: The politics of foreign trade.* New York: Atherton.

Baumgartner, F. R., & Leech, B. L. (1996a). Good theories deserve good data. *American Journal of Political Science*, *40*, 565-569.

Baumgartner, F. R., & Leech, B. L. (1996b). The multiple ambiguities of "counteractive lobbying." *American Journal of Political Science*, *40*, 521-542.

Becker, G. S. (1983). A theory of competition among pressure groups for political influence. *Quarterly Journal of Economics*, *98*, 371-400.

Behuniak-Long, S. (1991). Friendly fire: Amici curiae and *Webster v. Reproductive Health Services. Judicature*, *74*(5), 261-270.

Bentley, A. F. (1908). *The process of government: A study of social pressures.* Chicago: University of Chicago Press.

Berry, J. M. (1997). *The interest group society* (3rd ed.). New York: Longman.

Bradley, R. C., & Gardner, P. (1985). Underdogs, upperdogs, and the use of the amicus brief: Trends and explanations. *Justice System Journal*, *10*(1), 78-96.

Brenner, S., & Arrington, T. S. (2002). Measuring salience on the Supreme Court: A research note. *Jurimetrics*, *43*(Fall), 99-113.

Breyer, S. (1998). The interdependence of science and law. *Judicature*, *82*(1), 24-27.

Browne, W. P. (1990). Organized interests and their issue niches: A search for pluralism in a policy domain. *Journal of Politics*, *52*, 477-509.

Caldeira, G. A., & Wright, J. R. (1988). Organized interests and agenda setting in the U.S. Supreme Court. *American Political Science Review*, *82*, 1109-1127.

Collins, P. M. (2004). Friends of the court: Examining the influence of amicus curiae participation in U.S. Supreme Court litigation. *Law & Society Review*, *38*, 807-832.

Collins, P. M. (2007). Lobbyists before the U.S. Supreme Court: Investigating the influence of amicus curiae briefs. *Political Research Quarterly*, *60*, 55-70.

Collins, P. M., & Solowiej, L. A. (2007). Interest group participation, competition, and conflict in the U.S. Supreme Court. *Law & Social Inquiry*, *32*, 955-984.

Comparato, S. A. (2003). *Amici curiae and strategic behavior in state supreme courts.* New York: Praeger.

Crowe, J., & Karpowitz, C. (2007). Where have you gone, Sherman Minton? The decline of the short-term Supreme Court justice. *Perspectives on Politics*, *5*, 425-445.

Dahl, R. A. (1957). Decision-making in a democracy: The Supreme Court as a national policy-maker. *Journal of Public Law*, *6*(Fall), 279-295.

Epstein, L. (1985). *Conservatives in court.* Knoxville: University of Tennessee Press.

Epstein, L., & Kobylka, J. K. (1992). *The Supreme Court and legal change: Abortion and the death penalty.* Chapel Hill: University of North Carolina Press.

Epstein, L., Martin, A. D., Segal, J. A., & Westerland, C. (2007). The judicial common space. *Journal of Law, Economics, and Organization*, *23*, 303-325.

Epstein, L., & Segal, J. A. (2000). Measuring issue salience. *American Journal of Political Science*, *44*, 66-83.

Galanter, M. (1974). Why the "haves" come out ahead: Speculations on the limits of legal change. *Law & Society Review*, *9*, 95-160.

Ginsburg, R. B. (2001). In pursuit of the public good: Access to justice in the United States. *Washington University Journal of Law and Policy*, *7*(1), 1-15.

Gormley, W. T., & Cymrot, H. (2006). The strategic choices of child advocacy groups. *Nonprofit and Voluntary Sector Quarterly*, *35*, 102-122.

Hall, R. L., & Deardorff, A. V. (2006). Lobbying as legislative subsidy. *American Political Science Review*, *100*, 69-84.

Hansen, W. L., & Mitchell, N. J. (2000). Disaggregating and explaining corporate political activity: Domestic and foreign corporations in national politics. *American Political Science Review*, *94*, 891-903.

Hansford, T. G. (2004). Information provision, organizational constraints, and the decision to submit an amicus curiae brief in a U.S. Supreme Court case. *Political Research Quarterly*, *57*, 219-230.

Harper, F. V., & Etherington, E. D. (1953). Lobbyists before the court. *University of Pennsylvania Law Review*, *101*, 1172-1177.

Hojnacki, M., & Kimball, D. (1998). Organized interests and the decision of whom to lobby in Congress. *American Political Science Review*, *92*, 775-790.

Holyoke, T. T. (2003). Choosing battlegrounds: Interest group lobbying across multiple venues. *Political Research Quarterly*, *56*, 325-336.

Johnson, T. R., Wahlbeck, P. J., & Spriggs, J. F. (2006). The influence of oral arguments on the U.S. Supreme Court. *American Political Science Review*, *100*, 99-113.

Kagan, R. A. (2002). *Adversarial legalism: The American way of law.* Cambridge, MA: Harvard University Press.

Katzmann, R. A. (1997). *Courts and Congress.* Washington, DC: Brookings Institution.

Kearney, J. D., & Merrill, T. W. (2000). The influence of amicus curiae briefs on the Supreme Court. *University of Pennsylvania Law Review*, *148*, 743-853.

King, G. (1989). A seemingly unrelated Poisson regression model. *Sociological Methods and Research*, *17*, 235-255.

Kobylka, J. F. (1987). A court created context for group litigation: Libertarian groups and obscenity. *Journal of Politics*, *49*, 1061-1078.

Kolbert, K. (1989). The *Webster* amicus curiae briefs: Perspectives on the abortion controversy and the role of the Supreme Court. *American Journal of Law and Medicine*, *15*, 153-168.

Kollman, K. (1997). Inviting friends to lobby: Interest groups, ideological bias, and congressional committees. *American Journal of Political Science*, *41*, 519-544.

Kollman, K. (1998). *Outside lobbying: Public opinion and interest group strategies.* Princeton, NJ: Princeton University Press.

Koshner, A. J. (1998). *Solving the puzzle of interest group litigation.* New York: Praeger.

Krislov, S. (1963). The amicus curiae brief: From friendship to advocacy. *Yale Law Journal*, *72*, 694-721.

Leaver, C., & Makris, M. (2006). Passive industry interests in a large polity. *Journal of Public Economic Theory*, *8*, 571-602.

Lowery, D., & Gray, V. (1995). The population ecology of Gucci Gulch, or the natural regulation of interest group numbers in the American states. *American Journal of Political Science*, *39*, 1-29.

Lowery, D., Gray, V., Wolak, J., Godwin, E., & Kilburn, W. (2005). Reconsidering the counter-mobilization hypothesis: Health policy lobbying in the American states. *Political Behavior*, *27*, 99-132.

Martin, A. D., & Quinn, K. M. (2002). Dynamic ideal point estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999. *Political Analysis*, *10*, 134-153.

Martinek, W. L. (2006). Amici curiae in the U.S. Courts of Appeals. *American Politics Research*, *34*, 803-824.

McCubbins, M. D., & Schwartz, T. (1984). Congressional oversight overlooked: Police patrols versus fire alarms. *American Journal of Political Science*, *28*, 165-179.

McGuire, K. T. (1993). T*he Supreme Court bar: Legal elites in the Washington community.* Charlottesville: University of Virginia Press.

McGuire, K. T. (1995). Repeat players in the Supreme Court: The role of experienced lawyers in litigation success. *Journal of Politics*, *57*, 187-196.

McKay, A., & Yackee, S. W. (2007). Interest group competition on federal agency rules. *American Politics Research*, *35*, 336-357.

Milbrath, L. M. (1963). *The Washington lobbyists.* Chicago: RAND.

Mitchell, N. J., Hansen, W. L., & Jepsen, E. M. (1997). The determinants of domestic and foreign political activity. *Journal of Politics*, *59*, 1096-1113.

Moorman, A. M., & Masteralexis, L. P. (2001). Writing an amicus curiae brief to the United States Supreme Court, *PGA Tour*, *Inc. v. Martin:* The role of the disability sport community in interpreting the Americans with Disabilities Act. *Journal of Legal Aspects of Sport*, *11*, 285-315.

New York Times v. United States, 403 U.S. 713 (1971).

Nownes, A. J. (2000). Policy conflict and the structure of interest communities: A comparative state analysis. *American Politics Research*, *28*, 309-327.

O'Connor, K., & Epstein, L. (1983). Court rules and workload: A case study of rules governing amicus curiae participation. *Justice System Journal*, *8*(1), 35-45.

Olson, S. M. (1990). Interest-group litigation in federal district court: Beyond the political disadvantage theory. *Journal of Politics*, *52*, 854-882.

Salisbury, R. H. (1969). An exchange theory of interest groups. *Midwest Journal of Political Science*, *13*(1), 1-32.

Salisbury, R. H., Heinz, J. P., Laumann, E. O., & Nelson, R. L. (1987). Who works with whom? Interest group alliances and opposition. *American Political Science Review*, *81*, 1217-1234.

Samuels, S. U. (2004). *First among friends: Interest groups*, *the U.S. Supreme Court*, *and the right to privacy.* New York: Praeger.

Savage, D. (2004). *Guide to the U.S. Supreme Court* (4th ed.). Washington, DC: CQ Press.

Schattschneider, E. E. (1960). *The semisovereign people: A realist's view of democracy in America.* New York: Holt, Rinehart & Winston.

Schlozman, K. L. (1984). What accent the heavenly chorus? Political equality and the American pressure system. *Journal of Politics*, *46*, 1006-1032.

Schlozman, K. L., & Tierney, J. T. (1983). More of the same: Washington pressure group activity in a decade of change. *Journal of Politics*, *45*, 351-377.

Schlozman, K. L., & Tierney, J. T. (1986). *Organized interests and American democracy.* New York: Harper and Row.

Schweitzer, D. (2003). Fundamentals of preparing a United States Supreme Court amicus brief. *Journal of Appellate Practice and Process*, *5*, 523-542.

Segal, J. A. (1997). Separation-of-powers games in the positive theory of Congress and courts. *American Political Science Review*, *91*, 28-44.

Segal, J. A., & Spaeth, H. J. (2002). *The Supreme Court and the attitudinal model revisited.* New York: Cambridge University Press.

Sheehan, R. S., Mishler, W., & Songer, D. R. (1992). Ideology, status and the differential success of direct parties before the Supreme Court. *American Political Science Review*, *86*, 464-471.

Sloof, R. (1997). Competitive lobbying for a legislator's vote: A comment. *Social Choice and Welfare*, *14*, 449-464.

Songer, D. R., Kuersten, A., & Kaheny, E. (2000). Why the haves don't always come out ahead: Repeat players meet amici curiae for the disadvantaged. *Political Research Quarterly*, *53*, 537-556.

Spaeth, H. J. (2003). *The original United States Supreme Court database*, *1953-2002 terms.* East Lansing: Michigan State University, Department of Political Science.

Stern, R. L., Gressman, E., Shapiro, S. M., & Geller, K. S. (2002). *Supreme Court practice: For practice in the Supreme Court of the United States* (8th ed.). Washington, DC: Bureau of National Affairs.

Tamanaha, B. Z. (2006). *Law as a means to an end: Threat to the rule of law.* Cambridge, UK: Cambridge University Press.

Tauber, S. C. (1998). On behalf of the condemned? The impact of the NAACP Legal Defense Fund on capital punishment decision making in the U.S. Courts of Appeals. *Political Research Quarterly*, *51*, 191-219.

Truman, D. B. (1951). *The governmental process: Political interests and public opinion.* New York: Knopf.

Utah Public Service Commission v. El Paso Natural Gas Co., 395 U.S. 464 (1969).

Vose, C. E. (1959). *Caucasians only: The Supreme Court*, *the N.A.A.C.P.*, *and the restrictive covenant cases.* Berkeley: University of California Press.

Wasby, S. L. (1995). *Race relations litigation in an age of complexity*. Charlottesville: University of Virginia Press.

Woodward, B., & Armstrong, S. (1979). *The brethren: Inside the Supreme Court*. New York: Simon & Schuster.

Wright, J. R. (2003). *Interest groups and Congress: Lobbying*, *contributions*, *and influence.* New York: Longman.

Lisa A. Solowiej is an assistant professor of political science at the University of North Texas. Her research interests include the U.S. Congress, interest groups, and gender studies. Her work has appeared in *Law & Social Inquiry*, *Party Politics*, and *Political Research Quarterly.*

Paul M. Collins Jr. is an assistant professor of political science at the University of North Texas. His research focuses primarily on appellate court decision making with a special interest in psychological theories of judicial choice. His scholarship has been published in a wide array of the leading journals in political science and law, and he is author of *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (Oxford University Press).