

A Comparative Analysis of the Evolution, Rules,
and, Usage of Amicus Curiae Briefs in the U.S. Supreme Court
and in State Courts of Last Resort*

Lee Epstein
Southern Methodist University

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I. Introduction

That amicus curiae briefs have become significant, institutionalized parts of U.S. Supreme Court litigation is hardly in dispute. Since 1969, such participation occurs in well over half of all Court cases; in fact, the "typical" Supreme Court case decided on the merits draws 2.4 amici per brief.¹ Even more intriguing is that amicus curiae briefs play important roles at various points in the Court's decisional process: some suggest that they significantly increase the probability that the Court will grant plenary hearing;² others find that the Court incorporates their arguments into its opinions.³ In short, amicus curiae briefs provide an economical vehicle through which non-parties-- including corporations, individuals, governments, and public interest groups-- can present their views to the apex of the federal judiciary,⁴ where policy-making has become the norm.

What we contemplate here is amicus curiae participation in litigation heard by state courts of last resort.⁵ More specifically, we seek to compare the development, rules, and usage of the brief amicus curiae in state high courts and the U.S. Supreme Court.

This seems to us a timely undertaking as the past two decades have witnessed tremendous changes in the function and role of state supreme courts. Today, "the earlier propensity of state courts to follow the Federal Supreme Court's leadership almost without exception has given way to a healthy skepticism and growing sense of independence;"⁶ indeed, many now claim that state high courts are important policy makers, rendering decisions affecting interests beyond the immediate parties, lower state courts,⁷ other state supreme courts,⁸ and the U.S. Supreme Court.⁹

Several factors account for this rather dramatic transformation. First, and perhaps foremost, was the Burger Court's widely recognized embracement of a "new federalism," a policy "characterized by deference to state and local governments in areas as diverse as criminal justice, education, apportionment, censorship, welfare assistance, state commerce, and labor-management..."¹⁰ Legal

analysts widely agree that the net result of "new federalism" was to encourage state Justices to engage in a greater policy-making posture,¹¹ an opportunity that many seemed quick to "seize." As one state supreme court justice claimed, "The...Burger Court 'retrenchments' require federal courts to show greater deference to the role of state courts in constitutional adjudication...State judges will be losing a golden opportunity...if they do not seize the moment to dust off their state constitutions..."¹²

A second factor widely expanding the role of state supreme courts is a bit more tangible-- the U.S. Supreme Court's workload. As it has escalated over recent decades, the proportion of cases the Court formally hears and decides has diminished with similar speed.¹³ Consider the 1986 Term: the Supreme Court placed 4,339 cases on its appellate, miscellaneous, and original dockets; it disposed of 175 by written opinions, only 62 of which came from state courts.¹⁴ What this strongly implies is that state courts not only are policy makers. They are "the final decision-makers on most issues of commercial, property, family, inheritance, tort and criminal law as well as state constitutional issues of local governmental powers and procedural issues."¹⁵

Finally, through the creation of intermediate appellate courts, many states have provided increased opportunities for their highest courts to exercise policy-making functions.¹⁶ Such courts, as they do in the federal system, act as "screening devices," thereby giving those above them more discretion over their dockets. Presumably, courts in such states will spend less time and resources on "trivial" disputes and more on those with significant policy implications.¹⁷

Taken together, these factors can lead to but one conclusion: in terms of their policy-making potential and capacity and, relatedly, the overall significance of their decisions, state supreme courts bear an increasingly marked resemblance to the U.S. Supreme Court. Applying this conclusion to the subject of our inquiry-- amicus curiae participation-- we certainly possess every reason to suspect that a range of interests now would find these state courts important forums in which to participate.

Since the overall topic of amicus curiae participation in the 50 states has received virtually no attention

over the past 20 years,¹⁸ and only limited treatment before then,¹⁹ we begin by comparing the evolution of and rules governing these briefs in the states and the U.S. Supreme Court. We then move to an examination of amicus curiae participation across time, issues, and parties.

II. The Development and Nature of Amicus Curiae Participation

The source of the amicus curiae is a matter of some dispute: several argue that the practice owes its origins to Roman law in which a judge would often appoint a *consilium* (officer of the court) "to advise him on points on which he [was] in doubt;"²⁰ others, pointing to flaws in this explanation,²¹ claim that it was developed during the English common law period.²² Regardless, legal analysts do agree that amicus curiae played a significant, albeit changing, role in English courts during the late 1600s and 1700s.²³ Until then, the amicus was probably nothing more than a neutral "oral 'Shepardiz[er]'" "bringing up...cases not known to the judge."²⁴ But, by the early 1700s, their role shifted; for example, they were often used "to call attention to collusive suits."²⁵ This alteration led one author to write that "even in its native habitate [of England], the amicus curiae brief early underwent changes that ultimately were to have profound repercussions. A step had been taken toward change from neutral friendship to positive advocacy and partisanship."²⁶

The Supreme Court of the United States

The development and nature of amicus curiae participation in the U.S. Supreme Court is a well-told story,²⁷ but one which bears repeating if only to facilitate later comparisons with the states. As one scholar suggests, "The amicus practice crossed the Atlantic with the first lawyer to bring along his Coke's Institute."²⁸ In light of Krislov's work,²⁹ which indicates that the first amicus curiae brief was not filed until 1823 in *Green v. Biddle*,³⁰ this would seem an overtly simplistic conclusion. Yet, it may be the more accurate portrayal. At least twice prior to *Green*, in 1813 and again in 1814, the U.S. Attorney General filed briefs amicus curiae.³¹ Even more startling was the presence of a friend-of-the-court brief in a 1790 Pennsylvania Supreme Court case.³²

Beyond these initial cases, legal analysts point to several key developments in its evolution before the Supreme Court.³³ The first was the increasing and changing use of the amicus brief made by the federal government and the states. Participation by the states was not particularly surprising; they merely followed the federal government's lead. More unusual was that by the early 1900s both ceased viewing the amicus curiae as a "friend-of-the-court;" rather, they both used it to act as a "friend-of" a particular party, as a method of "lobbying" the judiciary.³⁴ Observers largely credit Attorney General Bonaparte with "effectuating" this transformation.³⁵ "He, if anyone, seems to have been the innovator of a positive use of governmental amicus briefs, not merely to vindicate specific statutes, but with a broader aim of effectuating major social change and implementing broad public choices."³⁶

Second, was use of the amicus curiae brief made by non-governmental litigants, generally organized interest groups.³⁷ Even before Bonaparte's ascension to the apex of the Justice Department, pressure groups filed friend-of-the-court briefs. As several scholars claim,³⁸ the Chinese Charitable and Benevolent Association of New York was probably the first such participant, filing a brief in *Ah How v. United States*.³⁹ After that case and the concomitant use of amicus by the United States, numerous other groups followed suit. In *United Dictionary Co. v. G. & C. Merriam Co.*,⁴⁰ the American Copyright Association participated as an amicus. And, seven years later, the newly formed National Association for the Advancement of Colored People filed its first friend-of-the-court brief.⁴¹

Hence, in the final analysis, these general trends-- increasing use of the amicus curiae by governmental bodies and organized interests-- transformed the amicus from a "neutral amorphous embodiment of justice"⁴² to an "active participant" in the litigation process.⁴³ This is largely the role it continues to play in the U.S. Supreme Court.

State Courts of Last Resort

The rather small body of literature describing the development of the amicus curiae in state courts of last resort⁴⁴ generally agrees that it was the Illinois Supreme Court which first "recognized" the

practice in the 1859 case of *Ex parte Guernsey*.⁴⁵ Yet, state supreme courts actually acknowledged amicus curiae briefs *prior* to the U.S. Supreme Court. In *Vasse v. Spicer*,⁴⁶ a 1790 case, the Supreme Court of Pennsylvania cited such a participant's argument: "And, Lewis, as amicus curiae, observing that the question was of general importance, hoped that the Court would take this opportunity of correcting what he considered to be an unreasonable and unwarrantable practice."⁴⁷ The same year the Illinois Supreme Court decided *Guernsey*,⁴⁸ the Texas high civil court dealt with a motion to dismiss a case filed by an amicus curiae as advocate.⁴⁹ The Court rejected the movant's request, stating that: "A motion made by an attorney as a friend of the Court cannot be treated as the exception of the parties. And the Court can do, on such a motion, only what it would do, if properly informed, without a motion."⁵⁰

During the latter part of the Nineteenth Century, at least ten other state supreme court opinions made mention of the amicus curiae,⁵¹ suggesting that they embraced this form of participation in a pattern paralleling that of the U. S. Supreme Court; yet, this view contains several flaws. First, although many states recognized the amicus curiae shortly after the U. S. Supreme Court, the sorts of "friends" wishing to participate differed substantially. Early amici at the federal level tended to be governmental units -- the United States and the states; amici at the state level tended towards private attorneys engaged in similar litigation in other courts.⁵² Indeed, among the earliest state court amici, not one was a government or an organized interest.

Another early difference was the varying degrees of receptivity state supreme courts afforded to potential amici. After 1821, the Supreme Court *generally* looked upon amicus participants with favor, allowing them to file briefs, present particular and pointed arguments, and even orally argue causes.⁵³ Despite Beckwith and Sobernheim's statement that state courts had a "favorable attitude toward the amicus,"⁵⁴ they were apparently far less so than the U.S. Supreme Court. During the Nineteenth Century, state courts generally opted to limit the role amicus could play in litigation.⁵⁵ Moreover, most clung to the view of amicus curiae as "neutral" participants, not as partisans representing the interests of one party. Thus, they would refuse permission to participate unless the "friend" acted as a

"resource" for the Court or possessed otherwise "pertinent information."⁵⁶

As the practice evolved and developed among the states in the Twentieth Century, we cannot discern generalizable patterns.⁵⁷ Some states continued to limit amicus curiae briefs to those filed by true "friends" of the Court and not allies of a party. As one author studying the Alabama high court noted, "Amicus curiae has not been discussed in [the state's] case law and from 1888...until 1974..., amicus activities were confined to the traditional role as neutral friends of the Court."⁵⁸ Other states limited the function of these briefs, rather than their role. The Supreme Court of Maine, for instance, stated that the amicus curiae privilege ended "when one participant called the attention of the court...to certain suggestions in matters of law..."⁵⁹ and that "it is not the function of an amicus curiae to take it upon himself the management of the cause."⁶⁰

At the other end of the spectrum were those courts which allowed amicus curiae to take on similar functions and roles as did the U.S. Supreme Court. In *Muskogee Gas and Electric Co. v. Haskell*,⁶¹ eight attorneys and taxpayers filed a motion as amicus curiae asking the Oklahoma Supreme Court to dismiss a case on the ground that it was "wholly fictitious and originated in collusive acts of the parties, for the purposes of serving private interests."⁶² After some discussion of the role of amicus curiae participants, the Court concluded that:

The authority of third persons, as amicus curiae, to intervene in a cause and call the attention of the court to the fact that the issues therein are feigned and fictitious or that the suit is being prosecuted by collusion of the parties is well-settled.⁶³

Consider, too, the Supreme Court of Michigan's view of the amicus curiae: "in cases involving questions of important *public interest*, leave is generally granted to file a brief as amicus curiae"⁶⁴ (emphasis added).

Some scholars rely on that particular statement to support the more general view that "state courts have been in the vanguard of encouraging amicus curiae participation."⁶⁵ As Beckwith and Sobernheim claim, "The favorable attitude of most state courts towards [the amicus curiae] is

well-expressed in the oft-referred-to statement of the Supreme Court of Michigan."⁶⁶ Indeed, they even imply that state courts took a far more liberal approach to the friend-of-the-court participant than did the U.S. Supreme Court. As we can see, however, that is hardly the case. Rather, there was "considerable variation in the mode of permitted appearances, their frequency and the reluctant, tacit, or expressed welcome"⁶⁷ by state courts.

III. Rules Governing Amicus Curiae Participation

The Supreme Court of the United States

Prior to 1903, the Court maintained no rules, formal or otherwise, governing participation as amicus curiae. In that year,⁶⁸ the Court indicated "that amicus need only demonstrate an interest in the issues at hand in order to participate."⁶⁹ Although it did not define the term "interest in the issues," the Justices probably meant to encourage participants who demonstrated a legal concern in common with the parties, while discouraging those "having only a generalizable interest in the outcome of the litigation."⁷⁰ Moreover, it always required potential participants to file a motion for leave "except where the Court on its own initiative requested the appearance."⁷¹

As the number of interests wishing to file briefs increased,⁷² the Court adopted Rule 27(9) in 1938.⁷³ It required amici curiae to obtain "written consent of all parties" unless the brief was "presented by the United States or an officer or agency thereof and sponsored by the Solicitor General, or by a State of a political subdivision thereof."

Just over a decade later, some of the Justices began to clamor for even more stringent rules, believing that the amicus was playing an increasingly "political" role in litigation. Writing in October 1949, Justice Felix Frankfurter claimed: "I do not like the Court exploited as a soap box or as advertising medium, or as the target, not of arguments but mere assertion that this or that group has this or that interest in a question to be decided."⁷⁴

Based on such remarks and the overall belief among the Justices that amicus curiae had become "repetitious" and "propaganda efforts,"⁷⁵ the Court amended its rules in 1949.⁷⁶ Key changes came in Sections a and b.

(a)*Brief of an amicus curiae in cases before the Court on the merits.* A Brief of an amicus curiae may be filed only after order of the Court when accompanied by written consent of all parties to a case and presented promptly after announcement postponing or noting probable jurisdiction on appeal, granting certiorari, or pertinent action in a case upon the original jurisdiction.

(b)*Brief of an amicus curiae prior to consideration of jurisdictional statement or a petition for writ of certiorari.* A Brief of an amicus curiae filed with consent of parties, or motion, independent of the brief, for leave to file when consent is refused may be filed only if submitted a reasonable time prior to the consideration for a jurisdictional statement or a petition for writ of certiorari. Such motions are not favored...

The effect of these new rules was immediate: After 1949, the Court rejected 76 percent of the motions it received; so too the Solicitor General of the United States, a party in many suits of interest to amici, almost routinely withheld consent.⁷⁷ In short, while amicus curiae briefs were filed in 31.6 percent of the 98 cases the Court decided in 1949, they were present in only 13 of the 95 cases decided in 1951.⁷⁸

The marked decrease in amicus curiae participation did not go unnoticed. Writing in 1952, Harper and Etherington criticized both the Court and the Solicitor General for discouraging participants who file briefs of "genuine merit."⁷⁹ Likewise, Justice Hugo Black complained that he had

never favored the almost insuperable obstacles of rules put in the way of briefs sought to be filed by persons other than the actual litigants. Most of the cases before the Court involve matters that affect far more than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against amicus curiae briefs.⁸⁰

Even Justice Frankfurter took issue with the Solicitor General's policy, claiming that it defeated the

rule's purpose "because his blanket denial only increased the number of motions that Court would have to hear."⁸¹ As he wrote in *Lee v. United States*,⁸²

[I]f all litigants were to take the position of the Solicitor General, either no amicus curiae briefs...would be allowed or a fair sifting process for dealing with such applications would nullify and undue burden cast upon the Court. Neither is conducive to the wise disposition of the Court's business.⁸³

Taking cues from these remarks, the Solicitor General substantially liberalized his policy, granting consent far more frequently. This change, coupled with an emerging view among the Justices that the "amicus curiae aided both the Court and the litigant," led to a record number of briefs filed during the Court's 1960 Term.⁸⁴ Hence, in the final analysis, the 1949 rule made "no substantial changes in the provisions governing briefs amicus curiae."⁸⁵ Indeed, if anything, the Court's attitude toward the amicus curiae grew increasingly tolerant. Between 1969 and 1981, it denied only 11 percent of the 832 motions for leave to file as amicus curiae. This was in spite of the fact that participation as a "friend" had skyrocketed.⁸⁶

These two trends-- the Court's "liberal" attitude and increasing usage-- have led to a number of hypotheses about the possible utility of briefs amicus curiae. Although some Justices have complained about their sheer numbers,⁸⁷ it is clear that they assist the Court in determining which cases deserve plenary review,⁸⁸ developing legal arguments,⁸⁹ and generally "permitting [it] to view the controversy in somewhat the same perspective as decision-makers in other policy-making arenas...[by focusing] attention on the broad interests involved."⁹⁰ It is less than coincidental, then, that the Justices have grown highly tolerant of the amicus curiae practice.

State Courts of Last Resort

As the brief amicus curiae evolved in state court litigation, many adopted the rather "liberal" rule that participants receive permission from the Court alone.⁹¹ Yet, until the late 1970s, only a handful of states actually codified such a policy;⁹² mostly, they specified their views in relevant cases.⁹³

For various reasons,⁹⁴ since the 1960s the vast majority of states promulgated more formal guidelines to govern amicus curiae participation. As Table 1 depicts, however, most merely codified the "traditional" policy that amici need only obtain permission from the Court.

(Table 1 about here)

As we also can see, several states deviated from this overall pattern. Some adopted the U.S. Supreme Court's more stringent policy of obtaining the written consent of the parties and, then, if they refused, permission of the Court.⁹⁵ Pennsylvania simply suggested that "Anyone interested in the question involved in any matter pending in an appellate court, although not a party, may, without applying for leave to do so, file a brief amicus curiae in regard to those questions."⁹⁶

"Rules," of course, often belie the overall receptivity Courts afford to amici curiae; the Supreme Court's "reinterpretation" of its own policies well-illustrates this.⁹⁷ The same holds true for "state" courts of last resort. Consider Arkansas, which maintains the less restrictive policy of obtaining the Court's consent, and the District of Columbia, which holds the more stringent rule of obtaining the parties' permission. Yet, in *Ferguson v. Brick*,⁹⁸ the Arkansas Supreme Court denied a movant consent to participate because the Court anticipated that it would "discuss nothing of legal significance and that the proposed amicus curiae brief would be solely for the purpose of judicial lobbying." In short, that Court "will deny permission to file amicus curiae briefs when the purpose is nothing more than to make a political endorsement of the basic brief."⁹⁹ The District of Columbia Court of Appeals, in contrast, has bemoaned the lack of third party briefs. In *Marshall & Associates, Inc. v. Burleson*,¹⁰⁰ the Court stated:

Unfortunately, we did not have the benefit of an amicus curiae. Prior to the scheduled argument in this case, the Clerk by direction of the court, communicated with the Unauthorized Practice of the Law Committee of the Bar Association of the District of Columbia and the American Collectors Association, Inc., indicating that the court would welcome the filing of briefs amicus curiae, but none was forthcoming. We thought their views would have been useful.¹⁰¹

The Colorado high court, which possesses the same rules as Arkansas', will not consider "any

additional questions presented in a brief filed by an amicus curiae..."¹⁰² Mississippi, on the other hand has taken a broader view, suggesting that amicus can demonstrate that "there are matters of fact or law that may otherwise escape the Court's attention."¹⁰³

In short, state supreme courts have promulgated diverse rules to govern amicus curiae participation. This should hardly be surprising given the varying evolution and development of amicus curiae among the states. How much those policies actually affect potential amici, of course, remains open to the interpretation of the individual Courts.

IV. Amicus Curiae Participation Across Time, Issues, and Participants: A Comparative View of the U.S. Supreme Court and State Courts of Last Resort

Frequency of Participation

Table 2 compares the frequency¹⁰⁴ of amicus curiae participation in the U.S. Supreme Court and in five "state" courts of last resort.¹⁰⁵ As we can see, the data confirm the "new" conventional wisdom regarding participation as amicus curiae in the U.S. Supreme Court: groups, firms, governments, and other interests are using the friend-of-the-court strategy in record numbers.¹⁰⁶

Yet, the percentage of cases containing at least one amicus has not increased: during the 1969 and 1984 Terms, briefs accompanied approximately 50 percent of all full opinion cases. Rather, the growth has come in the average number of briefs filed per "amici" case: 2.5 in 1969 versus 3.8 in 1984. In relative terms, then, recent Court cases are attracting no more amicus curiae briefs than they did fifteen years ago; but, the number of briefs filed has escalated substantially.

(Table 2 about here)

What about the frequency of amicus curiae submissions before state supreme courts? Only two previous studies looked at this question, with both reaching the same conclusion: participation was so meager as to be largely irrelevant. A "Comment" published in the *Northwestern University Law Review* in 1960,¹⁰⁷ revealed that only 84 briefs were filed in the Illinois Supreme Court between

1938 and 1958. Writing in 1971, Glick¹⁰⁸ found that between 1965 and 1966 groups participated in only 11 New Jersey court cases, 8 of Massachusetts', 15 of Pennsylvania's, and only 2 of Louisiana's. He concluded, rightfully so, that "the total number of cases in which organized groups were litigants is a very small percentage of the Courts' total workload."¹⁰⁹

As we suggested earlier,¹¹⁰ we suspect that this conclusion is no longer apt, that instead interests may be viewing the state judicial systems as increasingly viable targets of influence. Table 2, however, provides only partial support for this expectation. Despite the District of Columbia's interest in briefs amicus curiae and Idaho's "open door" policy,¹¹¹ neither's Court cases attracted many briefs. Indeed, the number of participants in Idaho Supreme Court cases actually decreased from 6 in 1970 to 0 in 1985.

Colorado, Illinois, and especially Florida present a rather different picture. All three experienced increases in amicus curiae participation over the 15 year period. Colorado cases (1970 versus 1985) exhibited a four-fold increase, despite the fact that the number of cases "disposed of by written opinion" actually decreased.¹¹² Florida's cases also were more likely to attract amicus curiae participants in 1985 than in 1970, though the Court issued more opinions in 1985.¹¹³ The Supreme Court of Illinois evinced similar trends: between 1938 and 1958, only 84 briefs were filed;¹¹⁴ 60 briefs were filed during the years 1985 and 1980, alone.

Like the U.S. Supreme Court, those in Colorado, Florida, and Illinois also received increasing numbers of briefs per "amicus" case. In 1970, the average number of briefs filed across the three states was 1.3; in 1985 this increased to 1.6.

In sum, the data provide mixed support for our proposition. Some states attract virtually no interest from potential "amici;" others-- far more. Of those falling into the latter category, we note two trends: both the number of cases attracting amicus curiae participation and the number of briefs filed have increased over the past decade and a half.

Issues Attracting Amicus Curiae Participation

Table 3 depicts the distribution of legal issues in 1985 cases in which at least one amicus curiae brief was present.¹¹⁵ Although a relatively high degree of dispersion exists, one trend emerges. Cases involving labor relations/professional regulations drew a substantial amount of amicus curiae interest at both the state and federal levels. They are second only to "Finances" in the U.S. Supreme Court and to "Torts" in the Florida court; they rank first in both Colorado and Illinois. This finding comports rather nicely with existing treatments of amicus curiae participation, indicating high levels of interest in this area generally.¹¹⁶

(Table 3 about here)

Beyond "labor relations," the Courts' cases drawing amici differ somewhat. "Finances," for instance, attracted amici in the U.S. Supreme Court, but less so in Illinois and Colorado. Moreover, if we divide the cases into two categories, the commercial /non-commercial distinction used by Hakman,¹¹⁷ substantial differences emerge between the U.S. Supreme Court and the states. More than 25 percent of the federal Court's cases attracting amici involved non-commercial issues; that figure falls to 4 and 12 percent for Florida and Illinois.¹¹⁸

In general, then we can reach no firm conclusions. On one hand, the states and the Court evince similar patterns on issues of labor relations and professional regulations. On others, the Courts differ substantially.

Amicus Curiae Participants

Table 4 depicts the kinds of "interests" which filed briefs amicus curiae in 1985 Court cases.¹¹⁹ Once again, we observe some similarities and differences between the U.S. Supreme Court and the states.

(Table 4 about here)

The fact that state governments/agencies/organizations rank as top participants in all Courts is certainly one commonality. Such interests were responsible for at least 25 percent of the briefs within each Court; in Colorado, they filed two-thirds of all 1985 briefs. This finding is not particularly surprising. Work by Caldeira and Wright¹²⁰ on amicus curiae participation in all 1982 U.S. Supreme Court cases suggests

that states account for the largest proportion of total amici...The states, although few in number compared with other types of groups, participate often, comprising 39 percent of all appearances as amicus before the Court at the certiorari...stages and more than one-fourth of all appearances at the plenary stage.¹²¹

They conclude that "What the [U.S.] Supreme Court does is clearly of interest to the states."¹²² We could add the business of state supreme courts to that statement, as well.

Likewise, we are hardly surprised by the participation of corporations and business/trade/professional associations. For one thing, these interests dominate "pressure group politics" in other spheres and processes of government.¹²³ Relatedly, those studying the strategies of judicial "lobbying," particularly participation as amicus curiae, have found business interests equally omnipresent. As Bruer notes in his analysis of "amici" submissions during the Court's 1984 Term, "though no single organizational category overwhelmingly predominates, commercial interests represented by corporations and business and trade associations together constitute one-third of the amicus organizations."¹²⁴ If we combine the two "commercial" participants contained in Table 4-- corporations and business/trade/professional associations-- they account for almost 35 percent of the 428 total amicus curiae briefs filed in the four Courts.

We do, however, find two major differences between the U.S. and the state supreme courts. First, the U.S. government, as represented by the Solicitor General in the Supreme Court, takes little interest in state court litigation. Again, this is hardly surprising. After all, the "U.S." government looks toward the creation of national, not state, policy.¹²⁵

What is somewhat startling is the dearth of participation by "cause" groups in state supreme courts.

Most literature on the amicus curiae practice in the high Court strongly implies that they are among the most active participants;¹²⁶ indeed, the American Civil Liberties Union,¹²⁷ the NAACP LDF,¹²⁸ and the American Jewish Congress,¹²⁹ among many others, are regular and skilled amici in the high Court. Our data certainly confirm this general supposition. Yet, such groups do not seem particularly attracted to state supreme court litigation.

Based on our modest data, we can only speculate as to why "cause" groups have failed to move into state arenas. One possible explanation, it seems to us, is the overall national orientation of these organizations. Not only are many located in Washington, D.C.,¹³⁰ but they also may view their goals as best accomplished in a forum which sets policy for the "Nation," not just for a "locality."¹³¹ Another explanation might contemplate the differing agendas of state courts and the U.S. Supreme Court. Even though state courts are increasingly moving into areas of interest to "cause" groups, apparently the balance of their cases still involve "commercial" and "criminal" law. Finally, many cause groups have never ventured into state courts; and those that have, often confronted numerous obstacles.¹³² Hence it may be too soon to tell if these groups will maintain their traditional emphasis on federal litigation or will come to view state courts as equally significant spheres in which to pursue policy objectives.

V. Conclusion

The initial premise of this paper was that a range of interests may be viewing state supreme courts as increasingly significant entities in which to pursue policy objectives vis-a-vis the amicus curiae brief. Because of the limited amount of attention given to this topic, however, we first traced the development and rules governing amicus curiae briefs in state courts and in the U.S. Supreme Court.

That step proved useful. It indicated that the brief amicus curiae evolved somewhat differently in state arenas than in federal forums. Although state supreme courts apparently recognized the practice several decades before the U.S. Supreme Court, it took them far longer to view amici in anything less than

hostile terms.

This "lag" is evident today. Potential amici only recently have begun to file briefs in any significant numbers. Yet, in states where the practice has taken hold, patterns of participation mirror those in the U.S. Supreme Court. Examples of this include: the increasing numbers of briefs per "amici" case, the prevalence of amici in labor cases, and the usage by state governments.

In the final analysis, though, this article raises a great many questions. For one, does the increasing presence of amici in state courts indicate even greater group presence as "sponsors" of litigation? Certainly, that seemed to be the case for the U.S. Supreme Court. Whether or not it holds true for state courts is fodder for further study. For another, what sorts of differences exist *among* the states? This research sought to compare the U.S. Supreme Court and state courts of last resort. But, our exploration, however inadvertently, also unearthed some variations among the states (*e.g.* frequency of amicus curiae participation, issue areas attracting attention). Finally, and perhaps most important, do briefs amicus curiae have any effect on the decisional processes of state supreme court justices? Their utility in U.S. Supreme Court litigation has been demonstrated; whether they are equally efficacious at the state level remains a matter of paramount concern. These and other questions beg for systematic treatment if we are to understand fully the role of organized pressures, business, and governments in the litigation process.

Notes

¹Caldeira & Wright, *Amici Curiae before the Supreme Court: Who Participates, When, and How Much?*, paper delivered at the Midwest Political Science Association meeting, Chicago (1988); O'Connor & Epstein, *An Appraisal of Hakman's 'Folklore,'* 16 *Law & Soc'y Review* 701 (1982).

²In Caldeira & Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 *Am. Pol. Sci. Rev.* 1122 (1988), the authors provide substantial statistical evidence indicating that "When a case involves real conflict or when the federal government is a petitioner, the addition of just one amicus curiae brief in support of certiorari increases the likelihood of plenary review by 40% to 50%. Without question, then, interested parties can have a significant and positive impact on the Court's agenda by participating as amici curiae prior to the Court's decision on certiorari or jurisdiction."

³See O'Connor & Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 *Just. Sys. J.* 35 (1983) in which the authors find that the Justices cite amicus curiae briefs in opinions written in 18 percent of all cases in which such briefs were filed.

⁴For more detail on the efficacy of amicus curiae participation, see Bruer, *Amicus Curiae and Supreme Court litigation*, paper delivered at the Law & Soc'y Association meeting, Vail, Colorado, (1988); Barker, *Third Parties in Litigation: A Systematic View of the Judicial Function*, 29 *J. of Pol.* 41 (1967); Puro, *The Role of Amicus Curiae in the United States Supreme Court, 1920-1966* (1971) (unpublished Ph.D. dissertation, State University of New York at Buffalo).

⁵From hereinafter, we shall refer to these as "state supreme courts," recognizing, of course, that many states use different referents. The highest court in New York State, for example, is called the Court of Appeals.

⁶Friedelbaum, *Independent State Groups: Contemporary Invitations to Judicial Activism* in M.C. Porter & G.A. Tarr, *State Supreme Courts- Policymakers in the Federal System* 24 (1982) [hereinafter cited as Porter & Tarr]. See also , Kagan, et al., *The Evolution of State Supreme Courts*, 76 *Mich. L. Rev.* 961 (1977); M.C. Porter and G.A. Tarr, *State Supreme Courts in State and Nation* (1988) [hereinafter cited as Porter & Tarr, *State Supreme Courts*].

⁷See Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 *Yale L.J.* 1191 (1978).

⁸Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 Am.Pol.Sci. Rev. 178 (1985); Harris, *Difficult Cases and the Display of Authority*, 1 J. Law Eco. & Org. 209 (1985).

⁹Porter, *Introduction*, in Porter & Tarr, *supra* note 6, at xii; Brennan, *Some Aspects of Federalism*, 39 N.Y.U.L. Rev. 945 (1964); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

¹⁰Porter, *State Supreme Courts and the Legacy of the Warren Court: Some Old Inquiries for a New Situation*, in Porter & Tarr, *supra* note 6, at 3. To this list we could add sex discrimination (see Driscoll & Rouse, *Through a Glass Darkly: A Look at State Equal Rights Amendments*, 8 Suffolk L.Rev. 1282 (1978)); individual rights, generally (see Brussack, *Note: Of Laboratories and Liberties: State Supreme Court Protection of Political and Civil Rights*, 10 Ga. L. Rev. 533 (1975-1976)); and torts (see Canon & Baum, *Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrine*, 75 Am.Pol.Sci. Rev. 977 (1981)).

¹¹Literature on the implications of "new federalism" is abundant. Some of the more influential works include: *Developments in the Law-- The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324 (1982); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 Va. L. Rev. 874 (1976); *The New Federalism: Toward a Principled Reinterpretation of State Constitutional Rights*, 29 Stan. L. Rev. 297 (1977); Brennan, *supra* note 9; S. Fino, *The Role of State Supreme Courts in New Judicial Federalism* (1987).

¹²Douglas, *State Judicial Activism-- The New Role for State Bill of Rights*, 12 Suffolk L.Rev. at 1123 (1978). We also should note that the ideological posture of the Burger Court *per se* and as part and parcel of "new federalism," spurred litigants to seek redress in state courts. As one source noted, "when the Burger Court sought to curtail rulings of the Warren Court...Defendants who had previously sought federal review, under the rubric of 'the new judicial federalism' [raised] issues of defendants' rights under state bills of rights," Porter & Tarr, *State Supreme Courts*, *supra* note 6, at 26.

¹³A voluminous literature exists on the Court's workload. See Casper & Posner, *A Study of the Supreme Court's Caseload*, 3 J. Leg. Stud. 339 (1974); Note, *Of High Designs: A Compendium of Proposals to Reduce the Workload of the Supreme Court*, 97 Harv. L. Rev. 307 (1983); Stewart & Heck, *Caseloads and Controversies: A Different Perspective on the 'Overburdened' U.S. Supreme Court*, 12 Just. Sys. J. 370 (1988).

¹⁴*The Supreme Court, 1986 Term*, 101 Harv. L. Rev. 366 (1987).

¹⁵J.W. Meeker, *State Supreme Court Litigants and Their Disputes-- The Impact of Socioeconomic Development from 1870-1970* 3 (1986); See Kagan, et al., *The Business of State Supreme Courts, 1870-1970*, 30 Stan. L. Rev. 121 (1977).

¹⁶Currently, 36 states possess intermediate appellate courts. But, such courts "are of fairly recent origin. Only 13...existed in 1911," H. Stumpf, *American Judicial Politics* (1988).

¹⁷See Fino, *supra* note 10; Groot, *The Effect of an Intermediate Appellate Court on the Supreme Court Work Product: The North Carolina Experience*, 7 Wake Forest L. Rev. 548 (1971); Atkins & Glick, *Environmental and Structural Variables as Determinants of Issues in State Courts of Last Resort*, 20 Am. J. Pol. Sci. 103 (1976). On other effects of state court structure on decision-making, see Canon & Jaros, *External Variables, Institutional Structure and Dissent on State Supreme Courts*, 4 Polity 185 (1970); Hall, *Docket Control as an Influence on Judicial Voting*, 10 Just. Sys. J. 243 (1985); Emmert, *Judicial Review in State Supreme Courts: Opportunity and Activism*, paper delivered at the Midwest Political Science Association meeting, Chicago (1988).

¹⁸*But see* Wiggins, *Quasi-Party in the Guise of Amicus Curiae*, 7 Cum. L. Rev. 293 (1976); H.R. Glick, *State Supreme Courts* (1971).

¹⁹See Angell, *The Amicus Curiae: American Development of English Institutions*, 16 Int'l & Comp. L.Q. 1017 (1967); Beckwith & Sobernheim, *Amicus Curiae- Minister of Justice*, 17 Ford. L. Rev. 38 (1948); Covey, *Amicus Curiae: Friend of the Court*, 9 Depaul L. Rev. 30 (1959); Piper, *Amicus Curiae Participation- At the Court's Discretion*, 55 Ky. L. J. 864 (1967); Comment, *The Amicus Curiae*, 55 Nw. U. L. Rev. 469 (1960).

²⁰Covey, *supra* note 19, at 33. *See also*, Angell, *supra* note 19; 1 *Bouvier's Law Dict.* 188 (1946).

²¹Covey, *supra* note 19 at 34 argues, for example, that *consilium* could only act "on the request of the court."

²²This school of thought argues that during the 1300s and 1400s, when the criminally accused lacked the right to counsel, amicus curiae (or some form thereof) would step forward to ensure that the process was error-free. Covey, *id.* This view finds support in Coke's early writings

and some early cases. *See*, The Year Book Cases, Y.B. Hil. 26 Ed. III 65 (1353).

²³*See* Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 Yale L. J. 694 (1963); Angell, *supra* note 19; Covey, *supra* note 19.

²⁴Krislov, *supra* note 23, at 695.

²⁵*Id.* at 696. *See also*, Angell, *supra* note 19.

²⁶Krislov, *supra* note 23, at 697.

²⁷The seminal work in this area is Krislov, *supra* note 23. *See also* Harper & Etherington, *Lobbyists Before the Court*, 101 U. Pa. L. Rev. 1172 (1953); Note, *Amici Curiae*, 34 Harv. L. Rev. 773 (1921); Angell, *supra* note 19; Barker, *supra* note 4; Caldeira & Wright, *supra* note 1; Covey, *supra* note 19; O'Connor & Epstein, *supra* note 3; Puro, *supra* note 4.

²⁸Covey, *supra* note 19 at 35.

²⁹*Supra* note 23.

³⁰21 U.S. (8 Wheat.) 1.

³¹*Beatty's Administrator v. Burnes's Administrators*, 12 U.S. 98 (1813) and *Livingston v. Dorgenois*, 11 U.S. 577 (1814). In all fairness to Krislov, he did indicate that prior to *Green*, the Justices increasingly saw the utility of permitting non-parties to participate. In *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812), for example, the Court allowed the United States to intervene. Moreover, *Green* might have been the first showing of a non-governmental amicus. There, the Court allowed Henry Clay to appear as a "friend-of-the-court" because it suspected collusion between the parties.

³²*Vassie v. Spicer*, reported in 2 U.S. 111 (1790).

³³Besides those we mention, Krislov, *supra* note 23 and Angell, *supra* note 19, note several others. In *Florida v. Georgia*, 58 U.S. (17 How.) 478 (1854), the Court was forced to decide whether the United States could participate as an amicus curiae despite opposition from state parties. In *The Gray Jacket*, 72 U.S. (5 Wall.) 342 (1866), the Court addressed the problem of agencies of government as "opponents" in litigation.

³⁴Hakman, *Lobbying the Supreme Court-- An Appraisal of 'Political Science Folklore'* , 35 Fordham L. Rev. 15 (1966). *See also* Krislov, *supra* note 23.

³⁵Bonaparte served as Attorney General for 1905-1909. Many consider him to be one of the more successful and innovative Attorneys General. Of the 56 cases he prepared for U.S. Supreme Court review, he won nearly 70 percent. He also developed "the idea for a 'special detective force' in the Department of Justice, which eventually led to the establishment of the Federal Bureau of Investigation." *See* C.E. Vose, *Constitutional Change* 25 (1972).

³⁶Krislov, *supra* note 23, at 705.

³⁷Corporations, too, early on recognized the utility of amicus curiae participation. *See* Krislov, *supra* note 23, at 704-705 and D.B. Truman, *The Governmental Process* (1951).

³⁸*See e.g.*, Krislov, *supra* note 23; Angell, *supra* note 19, at 1018.

³⁹193 U.S. 65 (1904).

⁴⁰208 U.S. 260 (1908).

⁴¹Guinn v. United States, 238 U.S. 347 (1915).

⁴²Krislov, *supra* note 23, at 703.

⁴³*See* D.B. Truman, *supra* note 37; Barker, *supra* note 4; Puro, *supra* note 4; O'Connor & Epstein, *supra* note 1; L. Epstein, *Conservatives in Court* (1985).

⁴⁴*See supra* notes 18 and 19.

⁴⁵21 Ill. (11 Peck.) 243; *See e.g.*, Covey, *supra* note 19.

⁴⁶Reported in 2 U.S. 111 (1790).

⁴⁷*Vasse*, 2 U.S. at 111.

⁴⁸1859.

⁴⁹*Andrews v. Beck*, 23 Tex. 455 (1859).

⁵⁰*Id.*

⁵¹*Nauer v. Thomas*, 95 Mass. (13 Allen) 572 (1866); *Jones v. City of Jefferson*, 1 S.W. 903 (1866); *Martin v. Tapley*, 119 Mass. 116 (1875); *Taft v. Transportation Co.*, 56 N.H. 414 (1876); *State v. Wilson*, 70 Tenn. (2 Lea.) 204 (1879); *Texas v. Jefferson Iron Co.*, 60 Tex. 312 (1883); *In re St. Louis Institute of Christian Science*, 27 Mo. App. 633 (1887); *People v. Gibbs*, 38 N.W. 257 (1888); *Ex parte Henderson*, 84 Ala. 36 (1888); and, *City of Charleston v. Cadle*, 49 N.E. 192 (1897).

⁵²*See e.g.*, *Nauer v. Thomas*, 95 Mass (13 Allen) 572 (1866).

⁵³For a brief period in the early 1950s, the Court attempted to dissuade such participation. *See infra*.

⁵⁴*Supra* note 19; *see also* *Covey*, *supra* note 19.

⁵⁵*See e.g.*, *Ex parte Henderson*, 84 Ala. 36 (1888). *But see* *Texas v. Jefferson Iron Co.*, 60 Tex. 312 (1883).

⁵⁶For an overview of this policy, see *People v. Gibbs*, 38 N.W. 257 (1888).

⁵⁷This supports Angell's conclusion, *supra* note 19, at 1025, that "Genuine welcome or half-grudging consent seems to differ in marked degree from one state to another..."

⁵⁸*Wiggins*, *supra* note 18, at 301. The Wisconsin Supreme Court apparently adopted a similar view. In *In re Stolar*, 214 N.W. 379 (1927) the Court expressed outrage at a brief that was submitted solely to influence its decision. It stated that "If this was done deliberately and with the purpose of influencing the court, it was reprehensible..."

⁵⁹*Hamlin v. "Particular Baptist Meeting House"*, 69 A. 315 at 318 (1907).

⁶⁰*Id.* at 319. *See also*, *Blanchard v. Boston & M.R.R.*, 167 A. 158 at 160 (1933).

⁶¹132 P. 1098 (1913).

⁶²*Muskogee*, 132 P. at 1099.

⁶³*Muskogee*, 132 P. at 1100. Not only did it "accept" this form of amicus curiae participation, but it agreed with the argument and dismissed the suit.

⁶⁴*City of Grand Rapids v. Consumers' Power Co.*, 185 N.W. 852 (1921).

⁶⁵*Piper*, *supra* note 19, at 873.

⁶⁶*Supra* note 19, at 40.

⁶⁷*Angell*, *supra* note 19, at 1024.

⁶⁸*Northern Securities Co. v. United States*, 191 U.S. 555 (1903).

⁶⁹*O'Connor & Epstein*, *supra* note 3, at 36.

⁷⁰*Id.*, at 36-37. *See also*, *Beckwith & Sobernheim*, *supra* note 19.

⁷¹*Angell*, *supra* note 18, at 1023.

⁷²*Puro*, *supra* note 4.

⁷³306 U.S. 708-709 (1938).

⁷⁴Memoranda for the Conference, October 28, 1949, Earl Warren Papers, Library of Congress. Quoted in *Caldeira & Wright*, *supra* note 1, at 4.

It is somewhat unclear as to whether a particular case triggered such a strong reaction from Justice Frankfurter. Harper & Etherington, *supra* note 27, at 1173, claim that by 1949 "the Supreme Court was on the way to a serious loss of dignity. More and more, the Court was being treated as if it were a political-legislative body, amenable and responsive to mass pressure from any source. "The final straw," according to this authority, was *Lawson v. United States*, *cert. denied*, 339 U.S. 934 (1950), a case involving the "Hollywood Ten," in which 40 groups submitted briefs "with complete indifference" to existing rules. Yet, the year/citation of this case antedated Frankfurter's remarks and

the subsequent rule change.

⁷⁵Weiner, *The Supreme Court's New Rules*, 68 Harv. L. Rev. 20, 80 (1954).

⁷⁶338 U.S. 959-960 (1949)

⁷⁷O'Connor & Epstein, *supra* note 3, at 37.

⁷⁸Puro, *supra* note 4.

⁷⁹*Supra* note 27, at 1174.

⁸⁰346 U.S. 947 (1954).

⁸¹O'Connor & Epstein, *supra* note 3, at 38.

⁸²344 U.S. 924 (1952).

⁸³342 U.S. at 942 (1954).

⁸⁴Puro, *supra* note 4, at 42, 57.

⁸⁵Weiner, *supra* note 75, at 80.

⁸⁶O'Connor & Epstein, *supra* note 3.

⁸⁷Interviews conducted (by the author and Karen O'Connor) with several Justices of the Supreme Court, 1983.

⁸⁸Caldeira & Wright, *supra* note 2.

⁸⁹O'Connor & Epstein, *supra* note 3.

⁹⁰Barker, *supra* note 4, at 56.

⁹¹Beckwith & Sobernheim, *supra* note 19, at 44.

⁹²*E.G.*, Colorado and Oregon. See Angell, *supra* note 19, at 1024; Beckwith & Sobernheim, *supra* note 19, at 44; Comment, *supra* note 19, at 477.

⁹³*E.G.*, The Supreme Court of Illinois in Froehler v. North American Life Insurance Co., 27 N.E. 2d 833 (1940).

⁹⁴Some modified specific procedural "traditions." Illinois explained that "Rule 345 was new in 1967. It conformed generally to the practice in the Supreme Court prior to its adoption" with some minor adjustments (e.g. , filing times). Florida expanded its former rule to "recognize the power of the Court to request amicus curiae briefs," Fla.R.A.P. 9.370.

Other states specifically modeled their policies on Fed.R.A.P. 29. Delaware's is a "simplified version of Rule 29 of Federal Rules of Appellate Procedure and is in substantial compliance with ABA standard 3.33(b)(2)," Del.Sup.Ct.R. 28. Still others followed suit, but noted specific modification. North Dakota stated that its "rule is based on Rule 29 of F.R.App.P. It does omit the provision of that rule that consent is not required for the state or federal government to file an amicus curiae brief," R.A.P. 29. some "borrowed" from their sister states and from the federal rules. Wyoming noted that its rule "contains exact wording of Colorado Appellate Rule 29, which is only modified slightly from Rule 29 F.R.A.P.," Wy.R.A.P. 5.12.

New Jersey explained simply that its "rule was adopted...to formalize the amicus curiae practice. Although no substantial change in the...informal practice was intended, the rule was designed to encourage amici to enter the proceedings as early a stage as possible," N.J.R.A.P. 1:13-9.

⁹⁵Clearly, many states recognized that this was indeed a more stringent criterion. Alabama amended its old policy of "permitting the filing of an amicus curiae brief by consent of all parties" because it "felt that such consent would so rarely be granted as to make the provision meaningless," Ala. R.A.P. 29. *See also*, R.Ct.App. Tenn. 31.

⁹⁶Pa.R.A.P. 531.

⁹⁷*See supra* pp. 7-9.

⁹⁸279 Ark. 168 (1983).

⁹⁹*See* R.Sup.Ct.Ark. 19.

¹⁰⁰313 A. 2d 587 (1973).

¹⁰¹313 A. 2d, at n. 32.

¹⁰²Denver U.S. National Bank v. People ex rel. Dunston, 29 Colo. App. 93 (1970).

¹⁰³Miss.Sup.Ct. 29; *see* Taylor v. Roberts, 475 So. 2d 150 (1985).

¹⁰⁴More specifically, we offer two indicators of participation. "Cases" refers to the number of cases decided by the courts with full opinions in which at least one amicus curiae brief was filed. "Briefs" denoted the number of amicus curiae briefs filed. Briefs submitted by individuals on behalf of themselves or other individuals were excluded.

¹⁰⁵We offer no compelling theoretical reason for selecting these courts. Rather, we included them because 1)of the availability of data and 2)they possess differing rules governing amicus curiae participation. We therefore make no claims about their "representativeness" relative to other states.

¹⁰⁶McIntosh, Amici in U.S. Courts of Appeals, paper delivered at the annual meeting of the Law & Soc'y Association, Chicago (1986), finds similar, though less startling, increases at the lower appellate level of the federal judiciary.

¹⁰⁷*Supra* note 19.

¹⁰⁸*Supra* note 18, at 143.

¹⁰⁹*Id.*, at 144.

¹¹⁰*See supra* pp.1-2.

¹¹¹*See supra* p. 10; Table 1.

¹¹²That figure decreased from 346 during Fiscal Year 1970-71 to 222 for Fiscal Year 1985-86. Data supplied by Nancy V. Jordan, Staff Assistant, Office of the State Court Administrator, Colorado Judicial Department.

¹¹³318 versus 624. Data supplied by Sid J. White, Clerk of the Supreme Court of Florida.

¹¹⁴Comment, *supra* note 19.

¹¹⁵For purposes of comparability, we use the 1984 Term of the Supreme Court of the United States.

¹¹⁶O'Connor & Epstein, *supra* note 1, reported that U.S. Supreme Court cases involving "unions" (1969-1980) attracted the greatest number of amicus curiae briefs.

¹¹⁷*Supra* note 34.

¹¹⁸This finding may speak more to the differences in agendas between the federal and state courts. On the U.S. Supreme Court, *see* Pacelle, *The Supreme Court and the Growth of Civil Liberties: The Process and Dynamics of Agenda Change*, paper delivered at the annual meeting of the American Political Science Association, Chicago (1987). On state supreme courts, *see* Kagan, et al., *supra* note 15; Fino, *supra* note 17; Meeker, *supra* note 15.

¹¹⁹We included only the interest filing the brief, not co-signers.

¹²⁰*Supra* note 1.

¹²¹*Id.*, at 12.

¹²²*Id.*

¹²³*See* K.L. Schlozman & J.T. Tierney, *Organized Interests and American Democracy* (1986); Wilson, *American Business and Politics*, in A.J. Cigler & B.A. Loomis, *Interest Group Politics* (1986); L.J. Sabato, *PAC Power* (1985).

¹²⁴*Supra* note 4, at 12.

¹²⁵An address before the American Bar Association, July 9 (1985), by former Attorney General Edwin Meese, provides a good example of this point. In that speech, Meese implored the U.S. Supreme Court to adopt a "Jurisprudence of Original Intent," stating that: "It has been and will continue to be the policy of this administration to press for [the doctrine]. In the cases we file and *those we join as amicus*, we will endeavor to resurrect the original meaning of the constitutional provisions and statutes as the only reliable guide for judgment" (emphasis added). *See also*, Segal, *Supreme Court support for the Solicitor General*, paper delivered at the annual meeting of the Midwest Political Science Association, Chicago (1986); Krislov, *The Role of the Attorney General as Amicus Curiae*,

in L.A. Huston, *Roles of the Attorney General of the United States* (1968); Puro, *supra* note 4.

¹²⁶*E.G.*, Caldeira & Wright, *supra* note 1; Bruer, *supra* note 4; O'Connor & Epstein, *The Rise of Conservative Interest Group Litigation*, 45 J. Politics 479 (1983).

¹²⁷*See* Kobylka, *A Court-Created Context for Group Litigation: Libertarians and Obscenity*, 49 J. Politics 1061 (1987); *see generally*, K. O'Connor, *Women's Organizations' Use of the Courts* (1980).

¹²⁸*See* O'Connor & Epstein, *The Importance of Interest Group Involvement in Employment Discrimination Litigation*, 25 How. L.J. 709 (1982). *See generally*, Wasby, *The Multi-Faceted Elephant: Litigator Perspectives on Planned Litigation for Social Change* 15 Cap. U. L. Rev. 143 (1986).

¹²⁹*See* Pfeffer, *Amici in Church-State Litigation*, 44 Law & Cont. Probs. 83 (1981). *See generally*, F. Sorauf, *The Wall of Separation* (1976).

¹³⁰Council for Public Interest Law, *Balancing the Scales of Justice* (1976); K. O'Connor & L. Epstein, *Public Interest Law Groups* (forthcoming, 1989).

¹³¹Many organizations, in fact, participate exclusively in U.S. Supreme Court litigation, eschewing even the lower federal courts for this very reason. *See* L. Epstein, *supra* note 43.

¹³²*See* C.E. Vose, *Caucasians Only* (1959); C.E. Vose, *supra* note 35; R. Kluger, *Simple Justice* (1976).

Table 1
Rules Governing Amicus Curiae Participation in
State Courts of Last Resort

By Permission, Request, Order, or Leave of the Court Only

Alabama, Arizona, Arkansas, California^c, Colorado, Connecticut, Delaware, Hawaii^a, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts^a, Michigan, Minnesota, Mississippi^a, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, South Dakota, Tennessee, West Virginia^a, Wisconsin^c, Wyoming

By Consent of the Parties, then By Leave of the Court

Alaska^f, District of Columbia^b, Florida, Iowa, Maine^a, Missouri^a, Montana, Nevada^b, New Hampshire^a, North Dakota, Oklahoma, Rhode Island^b, Utah, Vermont^b, Virginia^b, Washington

No Formal Application, Consent, or Motion

Idaho, Nebraska^d, Pennsylvania, Texas

^aExcept Attorney General of the State and/or State agencies

^bExcept the United States and/or State

^cAmendments under consideration

^dAccording to Rule 9(4): "Briefs of amicus curiae may be filed without leave of court in any case before it is placed in the Call. After the case is on the Call, leave of court must be obtained."

^ePermission of Chief Justice

^fConsent of Parties or by Leave of the Court

Table 2
 Frequency of Amicus Curiae Participation Before the
 U.S. Supreme Court and Select State Supreme Courts*

Court	Years							
	1985		1980		1975		1970	
	cases ^a	briefs	cases	briefs	cases	briefs	cases	briefs
Colorado	12	18	12	24	13	18	3	3
D.C.	5	6	2	2	4	4	2	3
Florida	48	74	16	43	16	22	11	13
Idaho	0	0	1	1	0	0	4	6
Illinois	17	30	21	33	17	26	6	10
U.S. Supreme Court ^c	81	306	76	266	70	184	45	112
Totals	163	434	128	369	120	254	71	147

*Data collected by author. Excludes briefs filed by individuals on behalf of themselves or other individuals.

^aNumber of cases containing briefs amicus curiae.

^bNumber of briefs filed, not the number of interests participating.

^cFor purposes of comparability, data on the U.S. Supreme Court come from the 1984, 1979, 1974, 1969 Terms, not years.

Table 3
Distribution of Issues in Cases With
Amicus Curiae Participation, 1985

Issue	Supreme Court	Colorado	Florida	Illinois
	n= (%)	n= (%)	n= (%)	n= (%)
Administrative Law	6 (7)	1 (8)	3 (6)	1 (6)
Civil Procedure	--	-	4 (8)	2 (12)
Copyright/Patent	2 (3)	-	--	-
Criminal Law	7 (9)	2 (17)	1 (2)	1 (6)
Discrimination	5 (6)	-	--	1 (6)
Domestic Issues	--	-	4 (8)	1 (6)
Electoral Issues	3 (4)	-	--	-
Energy/Environment	4 (5)	2 (17)	3 (6)	-
Expression/Religion	6 (7)	2 (17)	1 (2)	-
Federalism/Intra-St.	3 (4)	-	2 (4)	1 (6)
Finances/Taxes	13 (16)	1 (8)	5 (10)	2 (12)
Indian Law	5 (6)	-	--	-
Labor/Professional	12 (15)	3 (25)	5 (10)	4 (24)
Property	4 (5)	-	1 (2)	1 (6)
Torts (non-workplace)	3 (4)	1 (8)	13 (27)	2 (12)
Miscellaneous	7 (9)	-	6 (13)	1 (6)
Totals	81	12	48	17

*1984 Term of the U.S. Supreme Court

^aPercentages rounded to nearest whole number.

Table 4
Amicus Curiae Participants, 1985*

	Supreme Court		Colorado		Florida		Illinois	
	n= (%)		n= (%)		n= (%)		n= (%)	
Corporations/ Business	37	(12)	5	(28)	13	(18)	4	(13)
Business/Trade/ Prof. Asso.	53	(17)	--		23	(31)	13	(43)
Labor Unions	20	(7)	--		--		1	(3)
Citizen/Cause/ Groups ^a	97	(32)	1	(6)	3	(4)	2	(7)
U.S. Government	20	(7)	--		1	(1)	2	(7)
St. Government/ Agency/Group	79	(26)	12	(67)	34	(46)	8	(27)
Totals	306		18		74		30	

*We included only the interest filing the brief, not "co-signers."

^aIncludes public interest groups, religions, and indian tribes.