
SUPREME COURT
DECISION-MAKING

New Institutional Approaches

EDITED BY
Cornell W. Clayton
and Howard Gillman

Mapping Out the Strategic Terrain: The Informational Role of *Amici Curiae*

Lee Epstein and Jack Knight

Without a doubt, most members of Congress (MCs) seek to be reelected to their positions; indeed, some scholars suggest that this is their primary goal (Mayhew 1974). If that is so, then we would expect MCs to take into account the preferences of their constituents when deciding whether or not, say, to vote for a bill. But from where do legislators learn about the desires of their constituents? The answer, according to many legislative specialists, is from interest groups. On this account, lobbyists provide information to MCs about the consequences of alternative courses of action (such as voting for or against a bill). With this information in hand, MCs can then make rational choices, that is, choices designed to maximize their preference for reelection as opposed to electoral ouster.¹ This is one reason why reelection rates for MCs remain so high. Or so the argument goes.

In this chapter, we argue that organized interests—participating as *amici curiae*²—play a role for justices similar to that lobbyists play for legislators: they provide information about the preferences of other actors, who are relevant to the ability of justices to attain their primary goal—to generate *efficacious* policy that is as close as possible to their ideal points.³ In other words, just as information permits legislators to make rational decisions, so too does it enable justices to make choices to maximize their preferences. Perhaps that is why Congress so rarely overturns Supreme Court decisions.

Since this argument follows from a more general account of Supreme Court decision-making—what we call a strategic account—we begin by providing a brief summary of it.⁴ Within this discussion, we lay out our assumptions about the goals of justices. This is a necessary step because we can hardly talk about organized interests as helping justices to maximize their preferences if we do not specify the nature of those preferences. The discussion also helps to establish why it is that justices

require information. Next, we describe the sources from which justices can gather information (with particular emphasis on briefs *amicus curiae*) and consider the evidence bearing on our argument. Finally, we provide some directions for future research adopting strategic approaches to study the role of organized interests in court.

A Strategic Account of Judicial Decisions

Throughout this chapter, we invoke a strategic account of judicial decisions. This account rests on a few simple propositions: justices may be primarily seekers of legal policy, but they are not unsophisticated actors who make decisions based merely on their own ideological attitudes; instead, justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, of the choices they expect others to make, and of the institutional context in which they act. We call this a strategic account because the key ideas it contains are drawn from the rational-choice paradigm,⁵ an approach that has been advanced by economists and political scientists working in other fields.⁶ We can, thus, state our primary argument as follows: we can best explain the choices of justices as strategic behavior, and not merely as responses to ideological values.

Shortly we detail how *amici curiae* fit into this account. For now, we simply want to be clear about its major components: justices' actions are directed toward the attainment of goals, justices are strategic, and, institutions structure justices' interactions.

JUSTICES AS GOAL-ORIENTED ACTORS

A key assumption of rational-choice explanations is that actors make decisions consistent with their goals and interests. Indeed, we say that a "rational" decision occurs when an actor takes a course of action (makes a decision) that satisfies her desires most efficiently. All this means is that when a political actor selects, say, between two alternative courses of action, she will choose the one that she thinks most likely to help her attain her goals; all we need to assume is that she acts "intentionally and optimally" toward some specific objective.

To give meaning to this assumption, namely, that people maximize their preferences, however, we must specify the content of actors' goals.⁷ And that is where the notion of justices as "seekers of legal policy" comes in. On our account, a major goal of all justices is to see the law—over the long term—reflect their preferred policy positions, and that they will take actions to advance this objective.⁸

This is not a particularly controversial claim. Justices may have goals other than policy,⁹ but no serious scholar of the Supreme Court would claim that policy is not prime among them. Indeed, this is perhaps one of the few things over which most students of the judicial process agree.

STRATEGIC JUSTICES

The second part of the rational-choice account ties back to the first: For justices to maximize their preferences, they must act strategically in making their choices. By "strategic," we mean that judicial decision-making is interdependent. That is, a justice acts strategically when she realizes that her fate depends on the preferences of other actors and the actions she expects them to take (not just on her own preferences and actions) (Cameron 1994).

For obvious reasons, justices who care about policy must take account of what other Court members will do.¹⁰ But strategic considerations do not simply involve calculations over the preferences and likely actions of colleagues. Justices must also consider the preferences of other key political actors, including members of the elected branches of government and the American people. The logic here is as follows.¹¹ As all students of U.S. politics recognize, two key concepts undergird our constitutional system. The first is the separation of powers doctrine, under which each of the branches has a distinct function: the legislature makes the laws, the executive implements those laws, and the judiciary interprets them. The second is the notion of checks and balances: each branch of government imposes limits on the primary function of the others. For example, as figure 10.1 shows, the judiciary may interpret federal laws (and even strike them down as being in violation of the Constitution). But congressional committees can introduce legislation to override the Court's decision; if they do, Congress must act by adopting a committee's recommendation, adopting a different version of it, or rejecting it. If Congress takes action, then the President has the option of vetoing the law. In this depiction, the last "move" rests again with Congress, which must decide whether to override the President's veto.¹²

It is just these kinds of checks that lead policy-oriented justices to concern themselves with the positions of Congress, the President, and even the public.¹³ For if their objective is to see their favored policies become the ultimate law of the land, then they must take into account the preferences of the key actors and the actions they expect them to

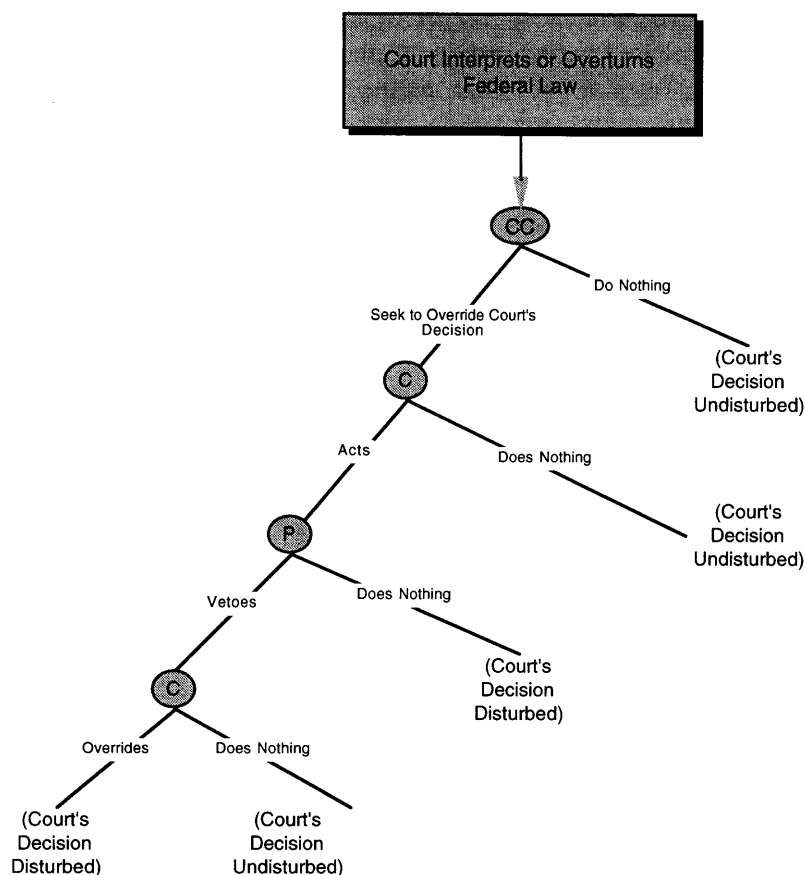


Figure 10.1 The Separation of Powers/Checks and Balances in Action: An Example.

take. Or else they run the risk of seeing Congress replace their most preferred position with their least. Or the risk of massive noncompliance with their rulings, in which case their policy fails to take on the force of law.¹⁴

INSTITUTIONS

Even from this brief discussion, we can see that policy-oriented justices face a complex strategic decision in their efforts to affect the nature of the law. In attempting to create policies that reflect their own preferences, they must take account of two sets of rules governing two different strategic relationships: 1) the *internal* relations among the justices, and 2) the relations between the Court and relevant *external* actors, such as members of the other branches of government and the American

people. Their success in creating particular laws depends on their ability to anticipate the reactions of those other actors in these relationships to their own decisions. That is, the effectiveness of a particular justice is in part a function of how well she is able to develop reliable expectations of the actions of others. It is in this important task of expectation formation that social and political institutions—sets of rules that structure social interactions in particular ways—play a crucial role.

There are many *internal* Court rules that assist the justices in this way. The requirement of a majority for precedent is certainly one. Under this norm, justices know that they must attain the signatures of at least four justices for their decisions to become precedent. The “Rule of Four” is another institution that provides information to assist justices in making choices. Most obvious is that justices know that they *generally* must attract at least four votes to hear a case. If they do not, they will need to bargain with their colleagues to attain the requisite number.¹⁵

More relevant to our immediate concerns about the role of organized interests in litigation, however, are those rules that govern the relationship between the Court and *external* actors—with an especially important one being an institution underlying the U.S. Constitution, the separation of powers system.¹⁶ As we have already noted, that system, along with informal rules that have evolved over time (such as the power of judicial review), endows each branch of government with significant powers and authority over its sphere. At the same time, it provides explicit checks on the exercise of those powers such that each branch can impose limits on the primary functions of the others (see, generally, figure 10.1).

Seen in this way, the rule of checks and balances inherent in the system of separation of powers provides justices (and all other governmental actors) with important information: *policy in the United States emanates not from the separate actions of the branches of government but from the interaction among them.* Thus, it follows that for any set of actors to make efficacious policy—be they justices, legislators, or executives—they must take account of this institutional constraint by formulating expectations about the preferences of the other relevant actors and what they expect them to do when making their own choices.

SOURCES OF INFORMATION

But from where do justices obtain the information necessary to formulate such beliefs? This is a critical question, for, if justices cannot obtain the neces-

sary information, they cannot act in the manner we suggest or, at the very least, cannot do so effectively. That is, just as members of Congress require information to help them to make decisions that will enhance their chances of reelection, justices need information to guide them toward making choices that will maximize their preferences for establishing law that is as close as possible to their ideal points—and efficacious law at that. This is not to say that justices need know with certainty where other political actors stand on particular issues; it is just to say that they must be able to make some calculation about the nature of the political context in which they are operating.

Two sources, it seems to us, have the potential to supply the information necessary to enable justices to formulate such beliefs. The first is the media. Simply put, we have no reason to suspect that justices, just like other Americans, do not obtain information about current events from television, the radio, and newspapers. Indeed, all the available evidence suggests that justices do, as the saying goes, “follow the election returns.” For example, because so many Court members held political positions prior to their ascension to the bench,¹⁷ it would be virtually impossible to believe that they give up their interest in politics when they don their black robes any more than they shed their political preferences (see Baum’s chapter in this volume). Moreover, as we know from our research into the private papers of Justices Marshall, Brennan, and Powell, Court members regularly clip articles and editorials about specific cases—those the Court has decided and those awaiting action. At the very least, this suggests that justices are paying attention to how the press reports on their activities; and we can hardly imagine that these are the only articles that they read.

From journalistic accounts justices—like all of us—are able to formulate *general* beliefs about the political environment. Based on the results of the 1996 election, for instance, current Court members know that Congress is led by the Republican Party and that the President is a Democrat, suggesting that Clinton is to the left of (more liberal than) the median members of the House and the Senate.

This sort of information, of course, was also available to justices of earlier eras. From press reports—coupled with their own political insights—they too could make guesses about the preferences and likely actions of other political actors. And these guesses, as accounts of cases of historical import suggest, often turned out to be good ones (See Murphy 1964; Epstein and Walker 1995; Knight and Epstein 1996a:87–120). The 1803 case of *Marbury v. Madison* provides a good example. At issue here were several judicial appointments that President John Adams

had made but that the incoming president, Thomas Jefferson, refused to deliver. When some of the men denied their commissions (William Marbury et al.) brought suit, the Supreme Court, led by Chief Justice John Marshall, had to decide whether or not to force the new administration to deliver the commissions. To be sure, Marshall, himself an Adams appointee, wanted to give Marbury his appointment. But his political instincts and his reading of the newspapers of the day suggested that such a move would be risky: forcing the administration to deliver Marbury’s commission, Marshall believed, would lead Jefferson to initiate an effort to have him impeached—an effort Congress would have supported. *Marbury*, thus, posed a dilemma for the Chief Justice: vote his sincere political preferences and risk the institutional integrity of the Court (not to mention his own job) or act in a sophisticated fashion with regard to his political preferences and elevate judicial supremacy in a way that Jefferson could accept. Perhaps not so surprisingly, Marshall chose the latter course of action, which proved to be a rational one in light of the politics of the day.

In some sense, Marshall was quite fortunate: he was able to formulate an accurate guess about the nature of the political environment. But, because that guess was based on sketchy and imprecise information, it could have turned out, like all guesses, to have been wrong.¹⁸

Today’s justices, we believe, are less handicapped. For, in addition to journalistic accounts, they can draw on a second source of information—briefs *amicus curiae*. And, even more to the point, these submissions potentially enable them to make more *precise* calculations.

We base these assertions on three factors. First, and most obvious, is that briefs *amicus curiae* are now an ever present part of the Court’s litigation environment, as figure 10.2 shows. Whereas in John Marshall’s day—and even into the Warren Court era—friend-of-the-court submissions were rare,¹⁹ contemporary justices can expect to receive at least one *amicus curiae* brief in virtually all of the cases they accept for review; in fact, the typical *amicus* case (a case with one or more *amicus curiae* briefs) contains not one but 4.4 such briefs (see Epstein 1993:639–717).

Second, because *amicus curiae* briefs almost always take a position on a case, they not only inform the justices that a particular constituency is concerned with their decision but of the preferences of that constituency as well. This information can be especially valuable when it comes from briefs submitted by members of Congress or the U.S. Solicitor General (SG), who represents the United States in the Supreme Court. Since such participation is voluntary (that is, these political actors usu-

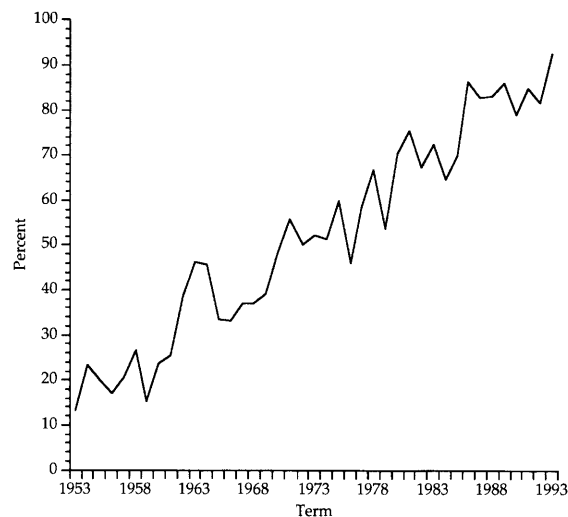


Figure 10.2 Percent of U.S. Supreme Court Cases Containing at Least One *Amicus Curiae* Brief, 1953–1993 Terms.

ally file briefs *amicus curiae* at their discretion),²⁰ it provides a seemingly reliable indication of where members of the other branches stand on matters of public policy. Indeed, scholars have used the position taken in *amicus curiae* briefs filed by the SG, in particular, to gauge the President's preferences.²¹ We suspect that justices do the same.

The final factor centers on the content of *amicus curiae* briefs. It is eminently plausible to believe that organized interests, in filing such briefs, seek to provide information about the preferences of actors (such as Congress, the President, the states, and the public) who are relevant to the justices' ability to attain their policy goals—just as lobbyists provide information to members of the legislature about their constituents' preferences. In other words, we argue that in their friend-of-the-Court submissions, organized interests engage in preference delineation, pointing out to the justices where various political actors stand on the extant policy.²² And that such information helps the justices to formulate more accurate beliefs about the context in which they are operating than, say, information they obtain from journalistic accounts.²³

AN EMPIRICAL ASSESSMENT OF THE ACCOUNT

We are, of course, not the first to view organized interests in these terms. As we have already noted, scholars studying legislative politics have long viewed lobbyists as the bearers of information relevant to

the ability of members of Congress to attain their goals. Caldeira and Wright have also applied similar logic to briefs *amicus curiae* (1988). They posit that *amicus* submissions filed by organized interests on *certiorari* reduce the U.S. Supreme Court's uncertainty about the importance of a case—in other words, such briefs provide information about the economic, political, and social significance of a petition, thereby increasing the likelihood that the Court will hear it. Their data, consisting of petitions the Court granted and denied during the 1982 term, support this prediction. When more than one *amicus* brief supports review, the probability of review jumps from .08 to .35; even briefs filed against *certiorari* increase the likelihood that the Court will review the case, because, however inadvertently, they too signal that a case is sufficiently important to generate participation. Finally, in a paper advancing a theoretical argument akin to ours, Spriggs and Wahlbeck present empirical evidence to show that *amici* often submit new information to the justices, that is, information not present in the briefs of the parties (forthcoming).

These works suggest the plausibility of our argument but they fall short of providing empirical support for it. Caldeira and Wright focus exclusively on the *certiorari* stage and Spriggs and Wahlbeck, while showing that *amici* provide new information, do not specify the nature of that information. Hence, in what follows, we turn to the task of providing some documentation for the informational role of friends of the Court.

INDIRECT EVIDENCE

There are several pieces of evidence, albeit of an indirect nature, that lend support to our argument. One comes from the rules that the justices have promulgated over time to govern *amicus curiae* participation.

Throughout most of its history, the Court maintained a simple, informal rule regarding *amici*: they need only demonstrate "an interest" in the extant case in order to participate (see *Northern Securities Company v. United States* 1903). But, largely because of ambiguity created by this policy (it was unclear to potential *amici* what the Court meant by "interest"), in 1938 the justices found it necessary to generate a formal rule:

A brief *amicus curiae* may be filed when accompanied by written consent of all parties to the case, except that consent need not be had when the brief is presented by the United States or an officer or agency thereof and sponsored by the Solicitor General, or by a State or a political subdivision

thereof. Such brief must bear the name of the bar of this Court.²⁴

Since 1938, the Court has revised the rule several times, with the current version as follows:

An *amicus curiae* brief submitted before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ, may be filed if accompanied by the written consent of all parties. . . . When a party to the case has withheld consent, a motion for leave to file an *amicus curiae* brief before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ may be presented to the Court

No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.²⁵

Two aspects of the evolution of this rule are relevant to our concerns. Note, first, the plain words of both the 1938 and the current policy: all interests wishing to participate as *amici curiae* must obtain the consent of the parties—with the exception of governments.²⁶ That the Court has always excluded governments from this requirement is quite consistent with our account. For, from these briefs, the justices learn (with some degree of precision) the preferences of sets of actors who are relevant to their ability to attain their goals. It is no wonder, then, that the Court has attempted to facilitate their discretionary participation. Worth noting too is that the justices occasionally invite governments—especially the United States—to participate as *amici* when they have not submitted briefs. Such requests further facilitate the Court's efforts to assess the desires of these important political actors. To see this, we only have to consider the 1993 term, during which the justices issued eighty-four signed opinions. Of those eighty-four, the U.S. government was a party to twenty-one, a voluntary *amicus curiae* in thirteen, and an invited "friend" in five;²⁷ in other words, in nearly half the opinions

issued that term did the justices have some idea of the preferences of the United States.

The second aspect concerns a change in the rules. Note that the 1938 rule provided nongovernmental *amici* with only one way to participate: they had to obtain the permission of the parties to the case. The present rule includes an escape valve. If the parties withhold consent, *amici* can petition the Court. Of course, this valve would not be so important if the Court rejected most of the requests. But that is hardly the case. A study by O'Connor and Epstein shows that between 1969 and 1981, the Court granted 89 percent of the 832 total motions it received.²⁸ Updated data suggest that the Court has become even more willing to grant such requests; during its 1994 term it denied only one of the 111 motions.²⁹ Such figures—not to mention the change in rules itself—are again consistent with our account. If we are correct and justices obtain valuable information from these briefs, they would have every reason to create a liberal rule and, in turn, apply that rule leniently.

Another piece of evidence in support of our account comes from data on the participation of the Solicitor General as an *amicus curiae*. It follows from our argument that, if it wanted to create efficacious policy, the Court would pay a good deal of attention to information contained in *amicus curiae* briefs reflecting the interests of the United States Congress, and, at the very least, the preferences of the President. This seems to be the case, as figure 10.3 shows. Overall, between the 1954 and 1993 terms, the Court adopted the disposition advocated by the Solicitor General in 72 percent of the 691 cases in which his office participated as an *amicus*. These findings, as Segal shows, hold regardless of presidential administration (Segal 1991; see also Puro 1971). In other words, even when the United States presents liberal arguments to a conservative Court (and vice versa), it does quite well.

MORE DIRECT EVIDENCE

Certainly, we recognize that the evidence offered above, while consistent with our account, is indirect at best,³⁰ and that to provide more direct support for it we require data to gauge whether *amici curiae* are actually providing information to the justices about the larger political context.

To make this assessment, we drew a random sample of cases decided during the Court's 1983 term.³¹ We then read the *amicus curiae* briefs filed in the cases and coded the kinds of information presented as falling into five possible preference-delineation categories: 1) preferences

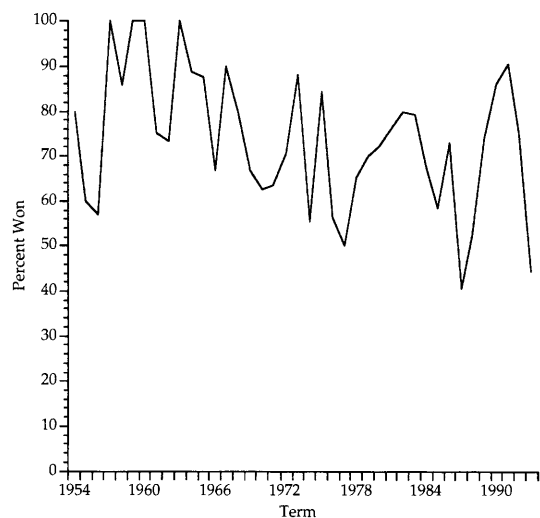


Figure 10.3 Success Rate of the Solicitor General as *Amicus Curiae*, 1954–1993 Terms.

of the enacting (state or national) legislature; and the current preferences of 2) members of the U.S. legislative branch, 3) members of the U.S. Executive Branch, 4) the states, and 5) the public.³² By preferences of the enacting legislative body, we mean claims in *amicus curiae* briefs about intent, such as “Congress [in Title VII of the Civil Rights Act of 1964] intended to eradicate barriers preventing women and minorities from reaching all rungs of professional life and contemplated no exemption for lawyers.”³³ Illustrations of the current preferences of the U.S. Congress and Executive are mentions in briefs of recent action (or inaction) on the matter at hand, including reports and proposed legislation / rules; and citations to the positions taken by legislators and the Solicitor General in *amicus curiae* briefs. More concretely, we coded the following assertion, from a brief filed by several states in *United States v. Leon* (1984),³⁴ as containing information on the current preferences of members of Congress and the Executive: “Several justices have expressly stated that the exclusionary remedy is not of constitutional dimension, and *this view is concurred in by the current President [Reagan] and a number of members of Congress.*”³⁵

We take information about the current preferences of states to include references to the number that engage (or do not engage) in a particular practice, as when one *amicus* pointed out that “[t]wenty-four states have some form of percentage limit on fund raising costs.”³⁶ Finally, evidence of current public preferences could take the form of statements about the interests of the American people or citations to

Table 10.1
Preference Delineation in Briefs *Amicus Curiae*

Preference Delineation	Cases (N = 12)		Briefs (N = 58)	
	% yes	n =	% yes	n =
Mention Preferences of Enacting Legislature	33.3	4	32.8	19
Mention Current Preferences of Congress	41.7	5	22.4	13
Mention Current Preferences Executive	66.6	8	50	29
Mention Current Preferences of States	66.6	8	29.3	17
Mention Current Preferences/Interest of Public	91.7	11	62.1	36

Note: Data collected by the authors from *U.S. Supreme Court Records and Briefs*, BNA’s Law Reprints.

public opinion data, such as this argument (also made in *Leon*): “According to figures cited by Attorney General William French Smith, the percentage of the public which felt that the courts do not deal harshly enough with criminals reached 90% by 1981. Though the exclusionary rule is certainly not entirely responsible for this perception of undue judicial leniency, it cannot have failed to contribute to it.”³⁷

With these coding rules noted, let us turn to the results of our analysis, displayed in table 10.1. Looking first at the cases in our sample, we note that organized interests filed *amicus curiae* briefs in 75 percent (twelve of sixteen) of cases, a figure well in line with the population.³⁸ Note, too, the degree of preference delineation that occurred in these twelve cases: in nearly half did at least one of the briefs make an assertion about the current preferences of Congress; that figure was over 90 percent for the interests of the American people. To think about the data in another way, in all but 16.6 percent of the cases were justices able to learn about the preferences of at least two actors relevant to the attainment of their goals.

Consider now the fifty-eight *amicus curiae* briefs filed in the twelve cases. As table 10.1 shows, half or more paid heed to the preferences of the current Executive and the public. And while *amici* were somewhat less attentive to the preferences of the other actors, they did not ignore them completely: 20 percent or more made some assertion about the preferences of the enacting legislature, and of the current preferences of Congress and the states.

In fact, we came across only three briefs that did not delineate one or more of the preferences we considered. But, it is important to note, even those briefs provided valuable information to the justices, though not of the sort we coded. For example, in *Nix v. Williams*,³⁹ the Legal Foundation of America et al. made several arguments about the poten-

tial impact of a Court decision affirming the lower court (which excluded evidence gathered by police), including this one:

In the present case, there has been exclusion of the most relevant evidence, the fact that defendant led officers to the body of the [victim]. Excluding evidence that the State would have found in any event . . . would go far beyond the appropriate confines of the deterrence function [of the exclusionary rule]. In fact, it would deter good police work . . . and such efforts should not be discouraged.

By the same token, the National School Boards Association's submission—another brief containing none of the attributes for which we coded—in *Board of Education v. Vail* (1984) contained a pointed discussion of precedent:

The court below grants short shift to *Parratt*⁴⁰ on the ground that the precedent in the case was, in the court's opinion below, laid to rest by [the Supreme] Court in its decision in *Logan v. Zimmerman*.⁴¹ That is incorrect. The Supreme Court carefully distinguished *Parratt* from *Zimmerman* by stating that, unlike *Parratt*, *Zimmerman* dealt with an established state procedure that destroyed the "liberty" interest of the complainant without according him proper procedural safeguards. . . . *Zimmerman* in no way limits the clear ruling in *Parratt*.

Surely both kinds of information assist the justices in making their strategic calculations. From the Legal Foundation of America's brief, the justices may have learned something about the potential effect of their decision, which itself speaks to broader issues of compliance and efficacy; from the School Board submission they could have taken away information about how their opinion should treat previously decided cases, which in turn has implications for the opinion's legitimacy and ultimate acceptance by the community (Knight and Epstein 1996b).⁴²

On the whole, then, what do we learn from our analysis? The most important lesson is this: Despite the limitations of the data (particularly the fact that we coded only certain types of information), we believe that they provide a convincing case for the informational role of organized interests. At the very least, they show that *amici curiae* more than occasionally provide justices with information about the preferences of actors relevant to their ability to attain their goals.

Discussion

We began this chapter by noting that information from lobbyists helps members of Congress to make rational decisions—ones designed to

facilitate their goal of reelection. This provides at least one explanation as to why MCs are so often able to attain their objectives. The argument we have made in this chapter is that *amici curiae* play a similar role in the Supreme Court. They too provide information to the justices. But, of course, since justices do not need to attain reelection to retain their jobs, the information *amici curiae* provide is of a different sort. Largely it is information about the preferences of other governmental actors, who are relevant to the ability of justices to achieve their primary goal—to generate efficacious policy which is as close as possible to their ideal points. Perhaps that is why Congress, while it often considers overturning Supreme Court decisions, rarely does so (Esckridge 1991a).

And yet, ours is just the beginning of an inquiry into the role played by *amici curiae* as information transmitters. Because we have only dealt with information provided by organized interests, important questions remain about the recipients of their information: the justices. For example, do justices attempt to formulate beliefs about the preferences and likely actions of other governmental actors based on the information they obtain from *amici*? Surely we have several reasons to suspect that the answer is yes. For one thing, the fact that *amici* so often include information about the other political units in their written submissions suggests that they believe that justices do engage in expectation formation. After all, given length constraints on briefs, why would *amici* include this information if they thought it would be trivial to justices?

It is also true, as table 10.2 shows, that justices of the current Court regularly cite briefs *amicus curiae* in their opinions, and that at least some of these citations pertain directly to information about preferences. Consider, for example, *Morse v. Republican Party of Virginia* (1996), in which the Court considered whether the Republican Party of Virginia could charge a registration fee to citizens who wanted to become delegates to a convention to nominate the party's candidate for U. S. Senator. Two individuals challenged this policy on the grounds that it violated sections 5 and 10 of the Voting Rights Act of 1965. A three-judge District Court dismissed the suit, concluding that the general rule—that section 5 covers political parties conducting primary elections—does not apply to the selection of nominating convention delegates under a regulation promulgated by the U.S. Attorney General. In his opinion/judgment for the Court, Justice Stevens cited (with approval) the current preferences of the United States on the matter at hand: "[B]oth in its brief *amicus curiae* supporting appellants in this case and in its prior implementation of the regulation, the Department of Justice has interpreted it as applying to changes affecting vot-

Table 10.2
Citations to *Amicus Curiae* Briefs by Justices
of the Supreme Court

Justice	Number of Citations to <i>Amici Curiae</i>	Number of Citations to <i>Amici Curiae</i> Divided by Total Opinions Written
Breyer	9	.26
Ginsburg	17	.27
Kennedy	107	.52
O'Connor	311	.65
Rehnquist	474	.66
Scalia	192	.53
Souter	31	.25
Stevens	636	.65
Thomas	33	.30
Total	1810	.59

Source: Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker (1996), by the authors using the same data collection strategy as the *Compendium*.

Note: Total Number of Opinions Written includes opinions of the Court, judgments, and dissenting and concurring opinions.

ing at a party convention. We are satisfied that the Department's interpretation of its own regulation is correct."

Finally, we know from our previous research that justices attempt to formulate beliefs about other governmental actors during their conferences.⁴³ An examination of Justice Brennan's conference memoranda⁴⁴ and the notes he took during the justices' private discussions of cases orally argued during the 1983 term reveals that in more than half the cases at least one justice explicitly stated beliefs about the preferences and likely actions of other governmental actors. Exemplary are Brennan's comments in *Norfolk Redevelopment and Housing Authority v. Chesapeake & Potomac Telephone Company* (1983), in which the Court was asked to determine whether a utility company is a "displaced person" within the meaning of the Uniform Relocation Act of 1970. After noting his view of Congress's intent in the legislation at hand, Brennan said, "Congress is in the process of enacting legislation which would prospectively overrule the Fourth Circuit's holding, while also allowing utilities to obtain relocation assistance in certain limited circumstances. It is interesting to note that even if applicable, none of these circumstances would cover the present case." In other words, Brennan attempted to formulate beliefs about congressional preferences and likely actions by looking at the legislature's intent and its current behav-

ior. Interesting too is that Congress was not the only actor to whom Brennan was attentive. In *Immigration and Naturalization Service v. Phinpathya* (1984), involving the meaning of the term "continuous physical presence" within the Immigration and Nationality Act, Brennan stated his belief that Congress's purpose was not to punish aliens who left the country to avoid "undue hardship." And that he drew "support for this position from the Attorney General's acquiescence in *Wadman*⁴⁵ in 1964, combined with his [position] in this case."

These bits and pieces of data are suggestive; they tell us that attorneys believe that justices find useful information about the preferences and likely actions of other actors; and that justices, at the very least, attempt to engage in expectation formation in their opinions and at their private conference discussions. But, clearly, the data do not allow us to say definitely that justices formulate beliefs about other relevant actors based on information they obtain from *amici*. To make that claim, more systematic research is required to map out the relationship between, say, justices' conference comments and information provided by Court "friends."

Nor does this evidence enable us to answer yet another question we have left unaddressed—one that centers on effect: Do justices' beliefs about the preferences and likely actions of other governmental actors affect the choices that they make?⁴⁶ On our theoretical account, the answer, again, is yes. Because the institution of the American separation of powers system (along with other norms structuring the relationship between the Court and external actors⁴⁷) serves as a constraint on justices acting on their personal preferences, we would expect to find evidence of the constraint operating on many of the choices justices make and, ultimately, affecting the law that they create. Since scholars are only beginning to study this important issue, it is one that is quite ripe for future research. And we hope the data presented here, at the very least, will help to advance this line of inquiry. For they provide support for an assumption embedded in most of the existing studies, namely, that justices can obtain information about the preferences and likely actions of other relevant political actors in a great many of their cases.

Notes

This research was supported by the National Science Foundation (SBR-9320284) and the Center for Business, Law and Economics at Washington University. We also thank the editors of this volume for their help as we were developing the chapter. Some of our data come from the Papers of Justice Wil-

liam J. Brennan. We are, thus, grateful to Justice Brennan for allowing us to use his collection and to Mary Wolfskill and David Wigdor of the Library of Congress for easing considerably the data compilation process.

1. For interesting examples, see Caldeira and Wright (1995) and Hansen (1991).

2. *Amicus curiae* means "friend of the court," even though most *amici* support one party over the other.

3. By "efficacious" policy, we mean policy that other political actors and society as a whole will follow and respect. By "ideal point," we mean the justice's preferred position on the policy.

4. We offer a full version of the strategic conception of Supreme Court decisions in our book *The Choices Justices Make* (1998).

5. See Ordeshook (1992). We refer to nonparametric or strategic-choice accounts. Under these, individuals make rational decisions but the rational course of action is contingent upon their expectations about what other players will do unless they have a dominant strategy (a particular strategic choice that will produce the best outcome regardless of what the others do).

6. It also has been applied to the Court. In fact, in a book written over thirty years ago, *Elements of Judicial Strategy*, Murphy (1964) paints a portrait of shrewd justices, who anticipate or know the responses of their colleagues and of other relevant actors, and take them into account in their decision-making; of a group that would rather hand down a ruling that comes close to, but may not exactly reflect, its preferences than, in the long run, see another political institution (e.g., Congress) completely reverse its decisions or move policy well away from its ideal points. *Elements*, in other words, elucidates the strategic nature of judicial decision-making, just as does our account. As such, our intellectual debt to Murphy is huge.

We also owe a good deal to a group of (mainly) law and business school professors who have, in recent years, adopted rational-choice theory to study the role of the Court in the governmental system. See, for example, Eskridge (1991a), Farber and Frickey (1991), Ferejohn and Weingast (1992), Rodriguez (1994), Spiller and Gely (1992).

7. If we do not, then our resulting explanations take on a tautological quality, "since we can always assert that a person's goal is to do precisely what we observe him or her to be doing" (Ordeshook 1992:10–11).

8. By emphasizing "over the long term," we mean that justices wish to create efficacious policy. See note 3.

9. For other goals, see Baum (1994b; and his contribution to this volume).

10. For example, justices know that for an opinion to become the law of the land, at least five members of the Court must join it. (Opinions that fail to obtain the signatures of a majority become "judgments of the Court," which lack precedential value. This majority requirement for precedent is one of the Court's many norms, a subject we take up shortly.) This means that justices who care about maximizing their policy preferences (that is, most justices) are not necessarily free to craft majority opinions that reflect their most preferred positions; rather, they must take account of the preferences and likely actions of their colleagues.

11. We adopt this discussion from Epstein and Walker (1995).

12. In this figure, we depict a sequence in which the Court makes the first "move" and Congress the last. Of course, it is possible to lay out other sequences and to include other (or different) actors (see Zorn 1995). For example, we could construct a scenario in which the Court moves first; congressional committees and Congress again go next but, this time, they propose a constitutional amendment (rather than a law); and the states (not the President) have the last turn by deciding whether or not to ratify the amendment.

13. Virtually every study examining the separation of powers/checks and balances system lends support to this claim. See, e.g., Pritchett (1961), Murphy (1964), Eskridge (1991a), Spiller and Gely (1992), and Cohen and Spitzer (1994).

An important exception is Segal (1997:42–43), which provides a good deal of empirical evidence to show that "the institutional protections granted the Court mean that with respect to Congress and the presidency" the justices almost never need to vote other than sincerely.

Whether Segal's conclusion will hold as scholars continue to produce research on this important topic (see, for example, Martin 1996) we cannot say at this point. But, as noted above, the great bulk of the research to date surely supports our assertion in the text.

14. They also open themselves up for other forms of retaliation on the part of Congress and the President: legislation removing their ability to hear certain kinds of cases and impeachment, to name just two (see Murphy 1964).

15. Such bargaining typically takes the form of a threat to publish a dissent from a *certiorari* denial. For more, see Epstein and Knight (1998) and Perry (1991).

16. There are other institutions structuring the relations between justices and external communities, such as legitimacy norms (e.g., the norm favoring respect for precedent and the norm disfavoring the creation of new issues). For more details, see Knight and Epstein (1996b), and Epstein, Segal, and Johnson (1996).

17. Eighty-nine of the 107 justices (including eight of the nine justices serving in 1998) engaged in some sort of political activity before ascending to the high Court. See Epstein, Segal, Spaeth, and Walker (1996:table 4.8).

18. Marshall did not know with certainty whether President Jefferson favored judicial review and whether Congress would have supported the President had Jefferson decided to seek Marshall's impeachment. For more on these points, see Knight and Epstein (1996a).

19. The *amicus curiae* practice traces back to Roman law but the first brief was not filed in the U.S. Supreme Court until 1823. In that year, in *Green v. Biddle* (1823), the justices permitted Henry Clay to participate as an *amicus* because they suspected collusion between the parties. See Wiggins (1976) and Krislov (1963). Although we lack data on the period between 1823 and 1927, Hackman reports that from 1928 through 1952, only seventy of the Court's 549 noncommercial cases contained briefs *amicus curiae* (see Hackman 1969).

20. Occasionally, as we discuss later, the justices will request the U.S. Solicitor General to file an *amicus curiae* brief. But, even in those instances, the Solicitor General will typically take a position on the case.

21. See, e.g., Stimson, MacKuen, and Erikson (1995). Further support for this claim comes from studies showing that the position of Solicitor Generals varies

by administration, with those serving under Democratic Presidents filing more liberal briefs than those working for Republicans. See Epstein, Segal, Spaeth, and Walker (1996[1994]:table 7.14).

22. This is not to say that parties to cases could not also provide such information. But, as Spriggs and Wahlbeck (forthcoming) note, "Since litigants are more likely to be narrowly focused on the case outcomes, the broader policy ramifications of the decision may not be discussed in their briefs." The Court's own rules (37.1) make the same point: "An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored." Moreover, participation as an *amicus curiae* is typically discretionary. This fact, as we note in text, is important for our account.

23. In this chapter, we beg the important question of whether information from *amicus curiae* briefs is credible and, thus, potentially able to influence the choices justices make. Suffice it to note here that, while organized interests have goals (and, certainly, present information that helps them to attain their objectives), this does not mean that the information they present to the justices is not credible. Indeed, the very fact that *amici curiae* incur costs in acquiring the information they put in their briefs, and that justices realize this, provides "a natural indication of credibility." For only if information is costly will there be asymmetry between the *amicus curiae* and the justice; otherwise the justice would be fully informed in which case the information provided by groups would not be influential (see Austen-Smith and Wright 1992:231).

24. Rule 27(9) at: 306 U.S. 708–709 (1938).

25. Rules of the Supreme Court of the United States, Rule 37, available at: <http://www.law.cornell.edu/rules/supct/overview.html#24>

26. The current rule enables *amici* to motion the Court for consent to file, if the parties refuse. We discuss this change momentarily.

27. The figure of five is not atypical. During the 1995 term, the Court issued seven invitations to the Solicitor General to "submit his views" as an *amicus curiae*; that number was five for the 1994 term. We collected these data via a LEXIS search.

28. The exceptions, as O'Connor and Epstein show, are readily explicable. Seven of the ninety-one leaves denied during this period were untimely, while sixteen were sought by groups represented by pro-life attorney Alan Ernest on behalf of Children Unborn or the Legal Defense Fund for Unborn Children. When these denials are excluded, the Court rejected only sixty-eight of the 832 motions. See O'Connor and Epstein (1983:40–41).

29. Data collected by the authors using the same procedure as did O'Connor and Epstein in "Court Rules and Workload."

30. For example, there are explanations other than the one we offer for the success of the Solicitor General as an *amicus curiae*. See Puro 1971, Segal 1991, Scigliano 1971.

31. Since there is nothing particularly unusual about *amicus curiae* participation during the 1983 term, we have no reason to believe that our sample is not representative of briefs filed in that term, or in earlier or later ones.

32. We obtained the *amicus curiae* briefs from U.S. Supreme Court Records and

Briefs, BNA's Law Reprints. We examined only briefs filed on the merits of cases. Data are available from the authors upon request. E-mail Epstein at: epstein@artsci.wustl.edu.

33. Brief Amici Curiae for California Women Lawyers, et al., filed in *Hishon v. King & Spaulding* (1984), no. 82-940. We do not include in this category the preferences of the framers of constitutions. These drafters are hardly able to override the decisions of justices or to pose threats to the institutional integrity of the Court.

34. *Leon* created a good faith exception to the exclusionary rule.

35. Our emphasis. Brief Amici Curiae filed by Kansas et al., in *Leon*, no. 82-1771.

36. Brief Amicus Curiae on Behalf of Independent Sector, et al., filed in *Secretary of State of Maryland v. J. H. Munson Co.* (1984).

37. Our emphasis. Brief of Amici Curiae filed by Kansas et al., in *Leon*, 82-1771.

38. Of the cases decided during the 1983 term, 72.3 percent contained at least one *amicus curiae* brief. Epstein, Segal, Spaeth, and Walker (1996[1994]:table 7.27).

39. *Nix v. Williams* (1984), establishing the inevitable discovery exception to the exclusionary rule. Under this exception, evidence discovered as a result of an illegal search can still be introduced in court if it can be shown that the evidence would have been found anyway.

40. *Parratt v. Taylor* (1981), asking whether negligent actions by state officials can be a basis for an action under 42 U.S.C. 1983.

41. (1982), asking the Court to determine whether a State may terminate a "complainant's cause of action because a state official, for reasons beyond the complainant's control, failed to comply with a statutorily mandated procedure."

42. One potential criticism of our study is that we operate under the assumption that justices (or their clerks) read briefs *amicus curiae*, when that may not be the case. To this, we offer two responses. First, as table 2 (and our discussion of it later in the text) indicates, justices regularly cite these briefs in their opinions. This provides evidence that the justices (or their clerks) read at least some of the submissions. Second, as we have learned from our examination of various *certiorari* and merits memoranda, clerks occasionally delineate the positions taken and rationales invoked by *amici*. Once again, this lends support to the notion that the briefs are getting perused.

43. We report these data, along with the coding procedures, in Epstein and Knight (1998:chap. 5). We obtained them from the Papers of Justice William J. Brennan, Jr., Library of Congress.

44. These are typed versions of the statements Brennan made at conference.

45. *Wadman v. Immigration and Naturalization Service* (1964), in which a lower federal appellate court wrote that a strict construction of the relevant section of the Immigration Act is "inappropriate."

46. Highly pertinent to the question of influence is the credibility issue. See note 23.

47. See note 16.