FIRST AMONG FRIENDS

Interest Groups, the U.S. Supreme Court, and the Right to Privacy

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To my partner and best friend, Steven

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Foreword

First among Friends is a groundbreaking study that examines the role of amici curiae, or "friends of the Court," briefs on the Supreme Court's handling of cases involving the right to privacy. By relying on the personal papers of the Justices, as well as the briefs of the parties and thei amici, Samuels is able to track the influence of interest groups on the Court's decision-making process. She looks at cases involving abortion, aid in dying, family relationships, and antisodomy statutes and concludes that interest groups have played a central role in presenting the Justices with information and helping them to craft legal arguments in these cases. *First among Friends* highlights the importance of certain amici, especially government agencies, well-established civil rights and civil liberties organizations, and groups with extensive scientific or medical expertise.

Often, the Justices are compelled to choose between dueling experts, each presenting either different information or a different analysis of the same information. *First among Friends* shows that the Justices not only are adept at choosing between friends, but are increasingly reliant upon their briefs. These trends were clear in the 2002–2003 term, when the Justices decided *Lawrence v. Texas.* In this landmark case, the majority embraced an analysis of the historical basis for antisodomy laws that had been offered by many amici, but rejected by the Court's majority, in the 1986 *Bowers* ruling.

The role of amici will likely become even more prominent in the future, as the Justices are called upon to evaluate laws that involve increasingly complex scientific and technological issues. *First among Friends* makes a significant contribution to our understanding of how the Justices reach decisions, especially in the controversial and important area of constitutional privacy.

Nadine Strossen
President, ACLU

Preface

"Choose a research project that interests you," I counsel my undergraduates, "something that makes you angry, intrigues you, or simply makes you want to know more." My interest in law and fascination with how judges decide cases began when I was an undergraduate myself, and was piqued by my graduate and law study at the University at Buffalo. While in the J.D./Ph.D. program at Buffalo, I was very interested in understanding how social movements and pressure politics affected judicial lawmaking. Many of our law professors urged us to reject the conception of law as insulated from the larger society and to think instead about law as part of the social and political landscape.

The seeds of *First Among Friends* were planted when I began to think seriously about what role groups had in the decision-making process. I must admit that I was at first thrilled by the possibility that groups, particularly those seeking to protect individual rights and liberties, might be able to influence this process. I was fairly idealistic, and hoped that well-informed and well-meaning judges might be able to craft policy that took into account the needs of those individuals and groups that were poorly represented in the more "democratic" legislative and executive branches. Over time, I became skeptical about interest group lobbying, particularly in the courts, and began to worry that some groups might be able to "capture" the courts as they had many agencies and legislative bodies.

First Among Friends is the culmination of nearly a decade of my work on interest group lobbying and the U.S. Supreme Court. It proceeds from the assumption that groups try to influence policy by employing all available avenues and that they lobby courts as they do the other branches of government. I have always been interested in the right to privacy, and as this project began to take shape, I knew that I wanted

to focus on this right, because it is almost entirely a creation of the U.S. Supreme Court. I also knew that I wanted to do a qualitative study. Precisely because I was interested in the development of law over time, I decided that my study would be one that focused on how interest groups influenced the opinions written by the Justices, and not just their votes. *First Among Friends* is an examination of how amici curiae briefs are incorporated into all the Justices' opinions—majority, concurring and dissenting. There are some instances in which the Justices rely very heavily upon these briefs, even using whole portions of the briefs without attribution. Focusing on the arguments and data provided me with a rich opportunity not only to learn a lot about some of the most controversial issues facing our society, but to discern how the amici briefs were employed by the Justices.

I have thoroughly enjoyed working on this project, and much of this enjoyment has come from the encouragement and support of my colleagues. I presented parts of this book at the annual meetings of the American Political Science Association, Midwest Political Science Association, Northeast Political Science Association, and Law and Society Association. I am thankful to my colleagues at these organizations for their enthusiasm about this project, and especially to Sue Behuniak, Lee Epstein, and Nadine Strossen for their strong support and wonderful collegiality. Thanks also to Steve Halpern for first encouraging me to work on this project. I am indebted to the estates of Justices Hugo Black and Thurgood Marshall for granting me access to their personal papers. I am also grateful to the librarians at the Manuscript Division of the Library of Congress for helping me to access the personal papers of Justices Hugo Black, William Brennan, John Harlan and Thurgood Marshall, and to the Woodrow Wilson School at Princeton University for offering access to the papers of Justice William O. Douglas.

I am also very thankful to my colleagues and friends at Seton Hall University, especially Mary Boutilier, Jo Renee Formicola, Joe Marbach, and Jeff Togman. They provided not only strong encouragement for me to move forward, but a very supportive environment in which to do so. I will always be in debt to my students at Seton Hall, especially my seminar students, who saw this project at different stages and were always eager to learn more about it. Thanks to the Seton Hall University Research Council for providing travel funds to support my research at the Library of Congress and Princeton University. I am grateful to Stacey Lee Donohue, who was always there to lend a listening ear (and a reading eye!) and for whose friendship I am so very thankful. Thanks also to my mother, Camille Uttaro Stern, and to my brothers, sisters-in-law, nieces and nephews, who asked about "that book" and then listened, and listened, and listened.

This book spanned two lifetimes—one before children, the other after, and as many of us know, these two lifetimes bear little resemblance to each other. My children, Charlotte Rose and Sebastian Raphael, are the brightest stars in my sky, and as perhaps only small children can, they helped me to keep it all in perspective. Just when I could have been swallowed up by this project, they were there asking me to tell them "just one more story," or to play chase, or to help them create a dinosaur cave in our living room. Finally, as always, I am grateful for the companionship and loving support of my husband and partner, Steven, who helped me to stay focused on this project through all of its iterations. He knows more about amicus curiae participation than perhaps any other physician, and he is also very good at doing laundry, cleaning the bathroom and doing the food shopping! I dedicate *First among Friends* to him with my warmest love and deepest gratitude.

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Introduction: Decision-Making in the U.S. Supreme Court

Throughout our nation's history, we have pondered the role of the U.S. Supreme Court in the larger polity. In Federalist Paper No. 78, Alexander Hamilton attempted to allay the fears of those who argued that the Court would undermine the fledgling democracy and threaten the rights of both individuals and states by contending that the judiciary was the least dangerous branch of government, because it lacked the powers of sword and shield.[1] Hamilton contended that an independent judiciary was necessary to guard against what he called "the occasional ill-humors in the society."[2] Others, perhaps most notably Thomas Jefferson, argued that the Court was in essence antidemocratic, since the Justices were not elected by the people and might have the power to strike down laws passed by the democratically chosen branches. This debate about whether courts are or should be independent of the either of the other branches of government or the people continues to rage. Furthermore, the debate has intensified in the second half of the twentieth century, as the Supreme Court increasingly has been called upon to adjudicate cases involving highly controversial issues that implicate federal, state, and local laws.

At the heart of much of this debate are discussions about how Supreme Court Justices arrive at decisions in hotly contested cases. While Hamilton and others claimed that the Justices would rely only on strict rules and precedents in reaching decisions, most scholars now understand that these rules or laws are often not strict and that this precedent is malleable. Ambiguities in the law and conflicting legal precedents

enable Justices to exercise significant discretion in reaching decisions, especially where an issue is novel or highly controversial. Moreover, instead of being insulated from political pressures, scholars have discovered that the Justices are influenced, both directly and indirectly, by a number of outside actors, among them interest groups, the media, public opinion, Congress, and the executive branch.[3]

This book focuses on one group of actors, the community of private and public interest groups that participate in Supreme Court cases, and explores how these groups have influenced the Court's decision-making process. Specifically, this book examines the role of individuals and groups filing amicus curiae briefs in cases involving the right to privacy and aims at assessing whether interest-group participation has made the Court more or less democratic. The right to privacy was first recognized by the Court in the 1965 case *Griswold v. Connecticut*, a case that examined a state contraceptive ban. Over the last thirty-five years, the Court has considered whether to extend the right to privacy to protect an individual's right to choose abortion, to hasten his or her own death, to engage in consensual sexual relations with a same-sex partner, and to be recognized as part of a nontraditional family. In some instances, the Court has extended this right; in others, it has not.

In the years since the *Griswold* decision, a variety of groups have lobbied the Court in an attempt to influence the Court's interpretation of privacy doctrine. While some have attempted to file as formal parties and others have sponsored litigation, the vast majority have employed amici curiae briefs, and there has been an explosion of amici briefs in abortion, aid in dying, family associational, and gay and lesbian rights cases. This book aims at assessing the impact that amici have had on judicial decision-making and uses these cases as a prism through which to evaluate this influence.

THE COURT AND CONSTITUTIONAL DEMOCRACY

Alex deTocqueville's well-known observation that hardly any issue arises in the United States that is not resolved sooner or later into a judicial question has never been truer than it is today. Our federal courts, especially the Supreme Court, occupy a unique but in many ways difficult position in our polity. Federal judges and justices are appointed and have life tenure, and the electoral checks placed upon the other two branches are not directly applied to these courts. Not only are Supreme Court Justices unelected, but under the fiat of judicial review, they are called upon to consider the constitutionality of laws promulgated by the elected branches. Alexander Bickel and others have

counseled the Justices to adopt the passive virtues and, perhaps most important, an attitude of disinterestedness.[4] However, the Justices have chosen to hear cases that turn on interpretations of these laws, and while the Court only infrequently overturns these laws, the countermajoritarian dilemma of judicial review remains.

Analysts disagree about whether the Court's decisions run counter to the law-making majority; some argue that the Justices only rarely oppose such majorities, even where they threaten to curtail the rights of the numeric minority.[5] Others have contended that the Court is not separate from the other branches, but is a part of the whole, constrained by both external and internal influences including Congress, the president, public opinion, the appointment process, and the Justices' own values and behavior.[6] While some see the Court as primarily a majoritarian institution, others claim that the Court does, and should, protect the rights of the individual, even where these rights do not have the support of the majority.[7]

The large-scale entry of interest groups into the judicial arena has blurred the lines between the branches and has affected the way our democracy functions. Interest-group lobbying of the Court has altered the decision-making process and, it could be argued, has made the Court a more majoritarian, or perhaps pluralist, institution. Just as David Truman and others looked at interest-group lobbying in Congress and the agencies as promoting a more responsive, more democratic government, some have argued that a heightened interest-group presence in litigation before the Court has the potential to make the Court a more democratic institution.[8] Amici briefs were initially intended to circumvent one of the most difficult issues in the adversary system, that is, the lack of representation for parties affected by a dispute but outside the formal boundaries of the litigation. Viewed in this light, the amicus brief permits the Justices to consider many viewpoints and to adopt a decision that takes into account information from a variety of sources. Consistent with the pluralist model of democracy, these briefs compete with each other. The Justices integrate more information and formulate better decisions than they would without interest-group participation. This model of pluralism assumes that the Justices consider all briefs and that amici participation is open to any party that wishes to provide additional information. The Justices are not, however, equally receptive to all amici.

Many scholars assume that interest-group lobbying of the courts is much like lobbying the two elected branches. In fact, much of the literature about group participation seeks to analogize adjudication to other forms of policy-making. The courts are seen as simply another forum for governmental decision-making, and Justices and their decisions are scrutinized by scholars seeking to establish that they have

acted out of political or strategic motivations. The literature on interest-group participation in the courts in many ways builds upon this assumption. While groups may not lobby the Court with financial contributions or the promise of votes, they do provide the one resource that the Justices increasingly need, that is, information. In the latter part of the twentieth century, the Court has been called upon to resolve issues that require an arsenal of data that Justices, judges, and lawyers do not necessarily have at their disposal. Interest groups may provide this information; in some instances, Justices and judges have relied upon this information to resolve highly complex and technical issues. As Caldeira and Wright have noted, the Court has become increasingly receptive to these briefs, even as the sheer number of briefs has climbed, largely because the Justices recognize that "most matters before [them] have vast social, political and economic ramifications, far beyond the interest of the immediate parties."[9] More recently, Epstein and Knight have argued that some interest groups, particularly governmental entities, provide the Justices with indispensable information about the policy preferences of other governmental actors. They contend that this information allows the Justices to "generate efficacious policy that is as close as policy to their ideal points."[10] Several analysts have discussed this information function and have hinted that amici aid courts by providing them with information about relevant precedents or policy ramifications for cases.[11]

Viewed in this light, amici briefs provide the Justices with a more comprehensive understanding of the issues at play in a case and help them to overcome one of the most serious shortcomings of the adversary system, that is, that only a limited number of options are presented to courts by litigants. Moreover, it could be argued that by enabling interest groups to enter the decision-making process, pluralism has flourished in this ostensibly least-democratic of the three branches. In 1963, before the boom in amici filings, Samuel Krislov claimed that the use of the amicus brief might be viewed as "mirror[ing] the controversy over the Court's law-making function."[12] Krislov contended that Justices Hugo Black and Felix Frankfurter, often at odds about the Court's role in the polity, sparred about the place of the amicus brief in Supreme Court litigation. According to Krislov, Justice Frankfurter wanted to place the amici firmly within the control of the litigating party, as a way of fitting amici within the adversary framework, while Justice Black strongly supported the expansion of the amici role in order to provide more neutral information to the Justices in their decision-making.[13] This book argues that both Justices "won" this debate: amici increasingly cooperate with the formal parties, but their primary function is to provide medical, scientific, historical, and sociological information to the courts.

By allowing amici entry into Supreme Court debates, the Court's functioning may appear to be consistent with the pluralist model of democracy, but the pluralism that has flourished on the Court has many of the elitist tendencies apparent when one looks at Congress and the agencies. Amici briefs do not ensure that all groups are provided access to the Court; in fact, a number of interests go unrepresented. In 1963, Krislov noted that more sophisticated and better-funded groups had clear advantages in filing amici briefs.[14] Similarly, in 1984, Steven Shapiro concluded that even though many people are affected by Supreme Court litigation, relatively few groups actually file briefs.[15] This book underscores the conclusions of both Krislov and Shapiro and argues that the amici in privacy cases have become even more elite over time. Relatively few individuals file amici briefs, and the briefs that seem to provide the Court with information increasingly are filed by mainstream organizations. These amici are well represented in the administrative and legislative realms and vigorously lobby these other branches. This examination reveals that interest-group influence is far more subtle in the courts than in the other branches and is often apparent only from careful examination of the Justices' decisions and personal papers. Over the last thirty-five years, the Justices have become adroit at integrating amici arguments and data into their decision-making process; as a result, their opinions bear the clearly recognizable imprint of the amici briefs.

The Court is not a legislature: its output is clearly different, and the Court is constrained by distinct and different pressures. Perhaps most significant, the Court must make its decisions by weighing the inputs, that is, by considering the briefs presented by the formal parties and perhaps by the amici curiae. The Court's options are probably significantly more limited than are those of Congress or the agencies. Unlike these other branches, the Court is not free to choose among all alternatives. There is an institutional imperative that the Justices consider only those issues raised in the litigation and that they choose only from the options presented by the litigants. This bounded policy space creates both limitations and opportunities for interest groups participating in litigation. Amici curiae are increasingly important in expanding this policy space by providing information about the policy ramifications of various options considered by the Justices. This is especially true in the realms of abortion, aid in dying, and family and associational relations.

In these cases, the Justices have faced novel issues that require either the creation of new legal theories or the processing of somewhat sophisticated medical and scientific data for their resolution. It may be true that the potential for amici influence is significant in other areas, for example, in statutory or regulatory interpretation. In the constitutional realm, however, amici participation is profound, and many groups file

briefs in an attempt to influence the Court's interpretation of constitutional provisions. Constitutional adjudication in many ways raises the stakes in terms of potential impact, and I assume that interest-group participation in privacy cases sparks widespread participation by diverse interest groups. This diversity and the sheer presence of many amici provide an excellent opportunity to examine the role of interest-group participation and to compare the relative successes of the "friends."

Lobbying the Court

As interest-group litigation has become commonplace in cases before the Supreme Court, some scholars and lawyers have treated interest-group litigation as simply another tool in the lobbyist's bag of tricks. Writing in 1976, Jonathan Casper noted that the Court had an important role to play in the American democracy, because it could help "provide effective access [by] placing issues on [its] agenda [and] providing the imprimatur of legitimacy that may affect the ability [of groups] to attract adherents, mobilize resources and build institutions."[16] Others have noted that interest groups make excellent use of the Supreme Court to accomplish their policy goals. Among these scholars are Susan Behuniak, who concluded that the 1989 abortion case *Webster v. Reproductive Health Services* demonstrated the burgeoning of interest-group politics before the Court,[17] and Christopher Zorn and others, who have sought to establish that groups serve as intermediaries between the Court and Congress and have developed an "interest-group model" of the legislative-judicial relationship.[18] In discussing the evolution of judicial policy, Richard Pacelle has employed much of the literature used to describe policy-making in the legislative and administrative realms.[19]

Interest groups seeking to affect the adjudication of cases in the Supreme Court may use a number of routes. First, the interest group can attempt to influence the nomination process for the Justices, usually by providing information about the nominee to the Senate Judiciary Committee. Throughout the 1980s and early 1990s, this information role became increasingly common. Groups can also seek to affect the Court's handling of particular issues at either the plenary or the merit stage. At the plenary stage, it appears that the content of briefs is relatively unimportant, as the Justices simply seem to be taking account of the *number* of briefs filed in support or in opposition to a writ of certiorari.[20] Some scholars have concluded that the Supreme Court is a representative body because it allows groups to help set the agenda by choosing which cases to hear by looking at how interested groups are in each case.[21]

Groups may also seek to influence the Court's handling of cases at the merit stage by using one of two alternatives. The group either may sponsor a case, by directly engaging in litigation and providing most or all litigation support, or may file an amicus curiae brief, which supplements the efforts of the formal parties to provide information or make alternative legal arguments. Very few groups perform the sponsorship role because of the costs and procedural obstacles inherent in this course of action. In contrast, there are far fewer procedural limitations to filing an amicus brief, and while the cost of filing an amicus brief may amount to tens of thousands of dollars, many well-established groups do not find this cost to be insurmountable. In fact, the use of amici curiae briefs, once a relative anomaly in litigation, has become commonplace and, some would argue, ubiquitous.[22]

Historical Foundations of Amici Curiae Participation

Our historical record of amici participation reaches back to ancient Rome, where the briefs were utilized as purely informational devices.[23] In the fourteenth century, judges began to employ amici briefs as a mechanism to give voice to those interests that were left unrepresented in the adversary system. Amici were expected to provide impartial information to the judge; they often served the function of "oral shepardizing," that is, informing the judges of case law that the parties ignored or overlooked.[24] This neutrality was central to the amici role. In the medieval period, a revival of the amicus role coincided with the expanded use of group litigation. During this era, such litigation was frequent and appears to have reflected the communal nature of social life,[25] and such lobbying of the courts was commonplace in sixteenth-century England. A shift toward individual, rather than communal, rights and responsibilities, which was at the heart of the Renaissance and carried over to the revolutions of the seventeenth and eighteenth centuries, slowly eroded group litigation. When lawyers and judges rediscovered group litigation in the nineteenth and twentieth centuries, they needed what Stephen Yeazell has termed "elaborate justifications" for allowing such litigation.[26] The most widely accepted form of group litigation in the United States during the 1800s and well into the 1900s was the class action suit.

The first amicus curiae to participate in a case before the U.S. Supreme Court was Henry Clay, who represented the State of Kentucky in an 1819 case involving Kentucky land titles. This case, *Green v. Biddle*, threatened to raise federalism issues, and for this reason, Kentucky sought representation.[27] Throughout the 1800s, amici curiae were almost always lawyers representing governmental entities, and not until the early 1900s did the Court allow private litigants to participate as

amici. The seeds for a greater amicus role were planted in the early 1900s by the legal realist movement, which called for judges to incorporate social science data into their decisions.[28] Samuel Krislov contends that governments participating as amici assumed the traditional role of neutral observer; however, this changed when private litigants began to file briefs. According to Krislov, the amicus brief has been transformed throughout the last century, from an instrument of "neutrality to partisanship, from friendship to advocacy" and has increasingly been used as a tactical device.[29]

In the late 1940s, several groups, most notably the National Association for the Advancement of Colored People, the American Civil Liberties Union (ACLU), and the American Jewish Congress, employed litigation as a key lobbying tactic.[30] In the landmark *Brown v. Board of Education* cases of 1954 and 1955, a brief by noted social scientists about the effects of segregation on American society provided much of the empirical evidence used by the Justices to strike down school desegregation.[31] Amici were very active in church-state litigation; as Leo Pfeffer has noted, the ACLU, the American Jewish Congress, and Americans United for the Separation of Church and State led the way in filing briefs in cases involving free exercise and the establishment clause.[32] In most areas of the law, however, amicus participation had been negligible up until the mid-1960s. In the period between 1928 and 1966, groups filed amici briefs in 20 percent of cases heard on the merits.[33] By the 1980s, however, interest-group litigation in the Supreme Court had become much more democratic; many more groups and much more diverse groups sought to participate in cases before the Supreme Court.

Amicus Curiae Participation during the Modern Era

There can be no doubt that interest groups have increasingly sought an audience before the Supreme Court. Books and articles in journals and law reviews underscore the great extent to which groups use the Court to press their grievances and advance their interests. Beginning in the early 1960s, scholars have attempted to determine which groups would use the courts. Samuel Krislov argued that groups that were weak in lobbying the other branches had been the leaders in using amici briefs in the 1930s, 1940s, and 1950s.[34] Similarly, examining the strategy employed by the National Association for the Advancement of Colored People, Richard Cortner concluded that groups that could not garner sufficient support for their policy goals in the elected branches could nevertheless succeed in the courts.[35] In 1985, Bradley and Gardner contended that these disadvantaged groups, whom they termed "underdogs," had greatly increased their filing of amici briefs from 1954 to 1980.[36]

Who files and why?

Writing in 1990, Caldeira and Wright concluded that amicus participation was "organizational by nature" and that states made up the largest number of amici at the certiorari stage.[37] State attorneys general have wide discretion in deciding whether to file an amicus brief,[38] and the quality of the states' briefs is perceived by the Justices to be variable, with California and New York filing briefs that appear to be well-regarded by the Court.[39] Over the last twenty-five years, states not only have sought to improve their win rates, especially against the private bar, but often have cooperated with each other in the preparation and filing of briefs, frequently signing on to each other's briefs.[40] Among public and private interest groups, both conservative and liberal groups use the courts, but they differ in their tactics.[41] While liberal groups have tended to assume both a direct sponsorship and amicus role, conservative groups have relied almost exclusively on the amicus brief. At the plenary level, however, the states are clearly outnumbered and outmatched by the Solicitor General's office, which participates often and has a very high success rate.[42] Public interest law firms and citizen groups have become much more visible at this stage; however, business, trade, and professional associations seem to be the most active groups and file the largest number of briefs at both the plenary and cert stages.[43]

There tends to be a significant degree of cooperation among amici and between amici and the formal parties. They share information, create strategies, and divide up arguments.[44] It bears noting, however, that groups tend to file independently, despite the costs attendant to an individual brief.[45] This decision to file a separate amicus brief rather than joining with other like-minded friends is probably motivated by their belief that the sheer number of briefs filed in support of a particular litigant could have an impact on the Court's adjudication.[46]

Attorneys for amici are often drawn from the elite legal circle of Washington lawyers, and these lawyers are often very closely involved in coordinating party and amici activity.[47] Many of these lawyers specialize in appellate advocacy and are repeat players before the Supreme Court.[48] Widespread amicus participation is a characteristic of the U.S. Supreme Court; there is significantly less amicus participation at the lower levels.[49] Despite the small number of amici in the lower courts, these briefs are cited with relative frequency by the federal intermediate courts and state courts.[50] Amici may be either single-issue or multiple-issue groups. In some issue areas, like abortion, single-issue groups tend to predominate,[51] while in other areas, multiple-issue groups are more common. Many groups that file amici briefs can, and do, participate in other activities aimed at influencing governmental policy. Groups have a multitude of reasons for employing judicial tactics: some

of these derive from internal stresses; others are the result of external pressures.[52] Clearly, the ability of a group to pursue a litigation strategy is dependent upon there being sufficient organizational, monetary, and political resources.[53] The amicus role is central for some groups, and amicus committees within these groups regularly review court dockets and select cases in which to participate. For some groups, amicus participation is a key element of public or constituent relations and allows for heightened visibility.[54]

In addition to the internal constraints that drive or permit interest-group participation in the courts, significant external pressures encourage participation. Interest groups enter the courts because they seek to influence policy-making. For these groups, litigation is, first and foremost, a form of political action, and amici file briefs because they think that they can influence the disposition of a case before the Court.[55] For prospective amici, these briefs fulfill a variety of functions. Perhaps most obvious, groups filing these briefs seek to provide the Court with information about the issue under consideration. In some cases, these groups add to the data presented by the formal parties, by offering the Court new sources and information or by helping to flesh out arguments made by the parties in abbreviated form.

Amici may also offer new arguments that the formal parties are unable or unwilling to effectively make. For example, Joseph Kobylka argues that amici served to ensure "argumentational pluralism" in establishment-clause cases, providing the Court with a multitude of approaches to these cases.[56] In some instances, an argument is better made by an amicus, because the formal party lacks credibility to raise a particular issue or makes the decision that it is unable to raise an issue for tactical or political reasons. Where a group has recognized expertise or technical skills, they may file a brief to perform an informational function. Moreover, these briefs may bring a new perspective to the Court and may help the Justices to gain greater insight into the ramifications of the case before it. They may serve as "interest articulators" for the Justices.[57] These briefs may perform this function well in some cases, in others, poorly.[58]

The decision to file a brief also appears to be motivated by a desire to respond either to nemesis groups or to Justices or judges. The altered context created by other groups entering the legal arena or by prior decisions can often propel groups to file amici briefs. Shifting legal norms, texts, institutions, and tactics may shape interactions among conflicting groups over time,[59] and litigation may be employed to either maintain[60] or stunt social movements.[61] For example, Woliver concluded that the rhetoric and symbols used by prolife and prochoice groups in *Webster* shaped the wider abortion debate and influenced each side's approach.[62] Other commentators have noted that in some

instances, amici have attracted widespread media attention and have driven issues onto the public agenda.[63] Furthermore, the increase in amici filings is likely also the result of actions taken by the three branches. Koshner contends that the Supreme Court, Congress, and the executive branch facilitated interest-group participation by taking certain affirmative steps. For example, Koshner contends that docket changes and a period of judicial activism encouraged amici filings, as did an increase in legislative activity and an expanded role for the Solicitor General in Supreme Court litigation.[64]

How have changes in the Supreme Court rules altered amicus participation?

The enormous influx of amici briefs into Supreme Court litigation in the last three decades has paralleled changes in the Court's rules governing amicus curiae filing. If the Justices chose to do so, they could use these rules to significantly limit the scope of amicus participation. Most of the rules for amicus participation are encompassed in Rule 37. For example, the Court requires that all amici acquire the written consent of each of the two parties and requires, if such consent is denied, that amici apply to the Court directly for leave to file. According to Rules 37 (2) and (3), such a motion will not be favored. This rule does not apply to amici briefs filed by the Solicitor General, the representative of the federal government in litigation before the Court, nor does it apply to representatives of any federal agency, or to the attorney general of any state, commonwealth, territory, or possession, or to law officers representing any city, county, or town.[65] Despite the existence of these rules, the Justices rarely deny a motion for leave to file submitted by an amicus whose brief has been objected to by one of the parties.[66] Moreover, Justices rarely avail themselves of Rule 37(1), which requires that amici briefs provide only information that is not encompassed in the party briefs and warns against repetitive amici briefs. The Justices may allow an amicus to file, even over the objections of the parties and in spite of the fact that the brief is redundant, because they value these devices for their broad informational function.

While the Court does not usually employ its rules to bar amicus curiae participation, the rules do require that amici reveal important information about who they are and where their interests lie. For example, Rules 37(2)(a) and (b) and 3(a) and (b) require that the amicus specify whether consent was granted by the parties and that it identify which party it supports on the cover of its brief. By complying with these rules, amici provide information to the Justices that assists in sorting out the briefs.[67] Similarly, a highly controversial rule adopted by the Court in 1997 serves another important informational function. Rule 37(6), adopted after substantial notice and comment by interested parties, has two requirements. First, the rule mandates that nongovern-

mental amici disclose whether counsel for a formal party actually authored either the whole amicus brief or a part of it; second, the rule requires that amici reveal whether an outside party made a monetary contribution to the preparation or filing of the brief.[68] Some analysts have contended that the Court adopted this new rule in response to the attempt by some formal parties to use the amici briefs to expand on arguments not presented in party briefs. Since 1984, the Court has imposed a fifty-page limitation on party briefs, and some parties may be using the amicus brief, with its thirty-page limit, to provide additional "space."[69]

The second aspect of Rule 37(1), which requires disclosure of third-party contributions to the preparation or filing of an amicus brief, may be an attempt by the Justices to sort out the briefs. This disclosure may alert the Justices that there has been extensive coordination between individuals and groups in the creation and filing of briefs and may allow the Justices to readily discern which briefs are merely "seconding" or "thirding" an argument made by someone else. This sorting device could be very useful, especially in cases where the Justices are faced with the daunting task of sorting through twenty or more amici briefs. Taken together, the two aspects of the rule reveal that the Justices have long since ceased regarding amicus briefs as impartial devices. The Court now recognizes that these "friends of the Court" are better described as friends of the parties. The new rules could help the Justices to more clearly delineate the roles of parties and amici, a distinction that has become even more clouded as more amici have filed briefs.[70]

What impact do amici briefs have on the Court?

The impact of amici on the adjudication of Supreme Court cases may be assessed in a number of ways. For example, we may conclude that an interest group has influenced the Court whenever it brings issues to the Court that would otherwise not have been considered or influences the views of the Justices about some wider issue. Casper called for an expanded definition of litigant success, contending that such success could be measured by the degree to which the Court provided "effective access" to those seeking to participate.[71] Most commentators, however, use a narrower definition of impact and aim at assessing whether amici have had an influence on how the Justices have decided a case. Nearly all studies have used direct citations as the principal indicator of impact.[72] There are significant limitations to this approach; perhaps the most important is that Justices have become less willing to directly cite to amici briefs, especially in highly controversial cases. Despite this limitation, many studies have employed this approach, and nearly all have concluded that amici have influenced the Court.

Some studies have argued for a study of indirect reliance, contending that amici influence can be discerned even in the absence of direct cites to these briefs. In fact, the first account of amicus influence was given by Alexander Bickel, who employed this broader approach, noting that in *Brown v. Board of Education*, amicus Solicitor General was successful in convincing the Court that local school boards should be responsible for formulating desegregation plans.[73] In the last several decades, amici influence has been discerned in a wide variety of contexts, including abortion, capital punishment, criminal due process, employment discrimination, antitrust, and copyright.[74] In most of these cases, the Justices employed the arguments and data of amici, often without direct attribution.

Among those amici with the greatest influence appear to be the quintessential repeat players, who are usually well known in litigation and are probably recognized as experts by the Justices. The Solicitor General has a unique role in Supreme Court litigation: he or she does not have to receive the permission of the parties to file an amicus brief and is, for all practical purposes, the only amicus that the Court invites to file briefs. The inclusion of a brief from that office greatly increases the chances that the Court will hear the case in question, and the Solicitor General also appears to have an impact on the adjudication of the case at the merit stage.[75] It may be that the filing of an amicus brief by the Solicitor General is used as a cue as to both cert-worthiness and merit-worthiness since the Justices seem to perceive these briefs to be among those of the highest quality that they receive.[76] There has been little examination of the relative positions of other amici filing in the Supreme Court. The few studies that have been done suggest strongly, however, that repeat players are favored over one-shotters in at least some cases.[77]

OBJECTIVE AND OUTLINE OF THIS BOOK

It is difficult to assess interest-group influence in Supreme Court litigation; the decision-making process is shrouded in mystery, and there is no obvious record of which factors may have swayed the Justices. Congress has a legislative record that allows for the examination of the testimony of invited individuals and groups. Similarly, under the Administrative Procedures Act, all comments gathered from interested individuals and groups about proposed administrative rules and regulations are published in a reporter. To determine whether these individuals and groups have influenced either Congress or the administrative agencies, we can examine the legislative or administrative record and compare it to the laws or regulations that are

ultimately adopted. Both bodies usually respond to the inputs of interested groups and individuals, especially where there is a groundswell of opinion about some topic. Through the legislative and administrative record, we can create a rough blueprint of the decision-making process for Congress and the agencies. Moreover, we expect that these organizations will be representative and that they will take into account the information offered from interested outsiders about some policy position.

It is much more difficult to shed light on the decision-making process of the Supreme Court Justices. Scholarship has helped us to determine that key actors have a role to play in Supreme Court litigation, but we lack any definitive findings about the role that interest groups play in the plenary stage, that is, in the actual decision handed down by the Justices on the merits of the case. As has been noted, most studies of amicus influence have explored whether the Justices have directly cited a brief in majority, plurality, concurring, or dissenting opinions. This narrow approach may provide little insight into the Justices' use of amici arguments or data, and for this reason, I argue that a broader examination of impact must be undertaken.

This study examines the role of the interest-group community in the adjudication of privacy cases. These cases, especially those that evaluate federal and state abortion laws, bring into stark relief the role of the Supreme Court in our constitutional democracy. I have chosen to explore a relatively fluid area of law, the right to privacy, because it has few statutory or administrative underpinnings. The Justices considered this right for the first time in 1960 and recognized it only in 1965. Moreover, the Court's application of the right corresponds with the proliferation of amici briefs in the 1970s, 1980s, and 1990s. It is my assumption that this judicially created right, which hinges solely on constitutional guarantees, allows the Justices the greatest degree of flexibility in crafting decisions and, for this reason, permits interest groups to exercise maximum influence. Furthermore, interest-group participation in this area is widespread: a large number of interest groups have filed briefs in these cases, and the groups have tended to be diverse. Within this doctrinal area, I explore the role of interest groups in four issue domains: abortion, euthanasia or physician-assisted suicide, family relations, and gay and lesbian rights.

Privacy cases present the Justices with two problems. First, these cases call upon the Justices to evaluate information that is often scientific in nature and almost always outside their field of knowledge and expertise.[78] Perhaps even more important, law and science derive from two distinct methodologies. Researchers in the natural and social sciences use the empirical method and typically aim at exploring a problem from various vantage points. Their goal is to arrive at generally

applicable truths about relationships or phenomena. In contrast, lawyers—and the Justices—have been trained as advocates and generally confine their inquiry to the arguments and data presented by the two opposing sides. In litigation, science is employed selectively—the goal of lawyers and expert witnesses is to use whatever data are helpful, not to present the judges or Justices with the universe of data about a particular problem. Since the issues of physician-assisted suicide, euthanasia, abortion, and to a lesser extent, gay and lesbian rights have been presented to the Court as issues that turn on scientific findings, and because the formal parties are not likely to be seen as experts on these issues, the amicus role can be assumed to be an important one. In addition, since these cases call upon the Justices to reevaluate legal theories and for the first time to apply these theories to individual actions and relationships, amici input can be assumed to be welcomed.

Second, these cases not only implicate technical issues that are typically beyond the knowledge of the Justices, they also present some of the most contentious questions in American politics. The issues underlying these cases have been the center of public debate and the subject of numerous statutes and regulations. For example, the renewed debate about abortion in the 1980s and early 1990s has provoked much public attention, with the federal, state, and local governments attempting to craft laws to regulate the abortion procedure. Similarly, during this period, some state and local legislatures acted to create a right to physician-assisted suicide. Such a right derives largely from the movement towards patient rights of the late 1980s and 1990s. And finally, the call for gay and lesbian rights was heard by a number of state and local lawmakers during this period, and these lawmakers responded by crafting laws both in support of and in opposition to these rights. These issues raise the ever-present question about the proper role of the Court in a democratic state and present the Justices with a formidable dilemma. The Justices need the data presented in the amici briefs, but in their decision-making they are expected to maintain at least a veneer of impartiality. If the Justices are perceived to be open to lobbying, especially lobbying by interest groups also active in the other branches, they may risk being seen as too partisan.

The Justices are clearly concerned about these perceptions, and at times they have complained about popular attempts to influence their decisions. For example, in his majority opinion in *Roe v. Wade*, Justice Harry Blackmun claimed that the Court's responsibility was to decide the abortion issue "free from emotion and predilection."[79] Similarly, in *Webster v. Reproductive Health Services*, Justice Antonin Scalia criticized his brethren for refusing to overturn *Roe,* saying that because of this refusal, the Justices could "look forward to at least another term with carts full of mail from the public and streets full of demonstrators

urging us—their unelected and life-tenured judges who have been awarded those extraordinary, undemocratic characteristics precisely in order that we might follow the law despite the popular will—to follow the popular will."[80] Despite these complaints, this study assumes that the Justices are neither immune to nor wholly disdainful of such influence. Moreover, the right to privacy itself seems to require that the Justices be aware of the public's perceptions of some acts or relationships. The Court's 1965 decision in *Griswold v. Connecticut,* which established the right to privacy, required that the Justices consider the nation's "history and traditions" when assessing whether such a right exists. Over time, this formula has been used to confer protections only on those rights that have been embraced by the numeric majority. These cases present perhaps the ideal opportunity for democratic rule to manifest itself.

This book aims at achieving an expansive understanding of amicus influence in Supreme Court cases involving the right to privacy. As has been noted, a number of excellent studies assess impact by examining direct citations to amici briefs. These studies, however, do not provide a comprehensive picture of the amicus role, especially in privacy cases. This is especially true because, over the last thirty-five years, the Justices have become less willing to directly cite to amici briefs, especially in controversial cases. Other studies have attempted to assess influence by looking at the success scores for particular groups, that is, whether they were on the winning or losing side of cases, and others have provided case studies of particular interest groups. As Epstein has noted, these case studies have often been based upon generalizations and have not provided information that can be extrapolated to other cases or interest groups.[81] This book fills a void in our literature about decision-making by undertaking a contextual approach to assessing influence. It assesses whether the arguments and data provided by amici are adopted by the Justices in their opinions. Analysts have urged that such an approach is necessary to assess whether amici briefs influence the choices that Justices make.[82]

To assess impact, I employ two distinct methodologies. First, I provide a detailed analysis of eleven cases heard by the Court between 1960 and 1997. Two of these cases, *Poe v. Ullman* and *Griswold v. Connecticut*, resulted in the recognition of the constitutional right to privacy; four cases evaluated laws barring or regulating abortion (*Roe v. Wade*, *Harris v. McRae*, *Akron v. Akron Center for Reproductive Health*, and *Casey v. Planned Parenthood of Southeastern Pennsylvania*); three examined the issue of aid-in-dying (*Cruzan v. Director, Missouri Department of Health*, *Washington v. Glucksberg*, *Vacco v. Quill*); and two assessed family or associational rights (*Moore v. East Cleveland*, *Bowers v. Hardwick*). I examine the Justices' majority, plurality, concurring,