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INTEREST GROUPS AND SUPREME COURT COMMERCE CLAUSE

REGULATION, 1920-1937

by

Barrett L. Anderson

A thesis submitted in partial fulfillment  
of the requirements for the degree

of

MASTER OF SCIENCE

in

Political Science

Approved:

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Logan, Utah

2018

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## ABSTRACT

Interest Groups and Supreme Court Commerce Clause Regulation, 1920-1937

by

Barrett L. Anderson, Master of Science

Utah State University, 2018

Major Professor: Dr. Robert Ross  
Department: Political Science

Did interest groups influence the Supreme Court's interpretation of federal economic regulatory authority under the Commerce Clause leading up to the Supreme Court's 1937 reversal? Recent scholarship has begun a renewed study of this tumultuous era seeking alternative explanations for the Court's behavior beyond the conventional explanations concerning Roosevelt's court packing plan. I build on this literature by extending the discussion to the influence that interest groups may have had on the Court. I propose that interest groups served as a supporting and influential audience for the Supreme Court as the justices' institutional legitimacy became threatened by both the political pressure and legal changes that the Court faced during this era.

To test these theoretical assumptions, I compiled a dataset of Supreme Court cases using the *U.S. Supreme Court Library Official Reports Database* ranging from the beginning of the 1920 Supreme Court term through the end of the 1937 term. Cases were included if 1) the case had one or more filed amicus briefs; and 2) the questions and arguments in the case were based on the Commerce Clause or legislation that relies

wholly or in part on the Commerce Clause. Applying a basic logit model, I find support for the assumption that amicus briefs influenced the Court by providing the justices with a supporting audience. To further test the influence of amicus briefs, I compare the arguments and information provided exclusively by amicus briefs in this group of cases to the Supreme Court majority's opinions to test for similar content. Amicus briefs are considered influential if the Court included information exclusively from an amicus in their majority opinion. I find that in the largest number of cases, amici influenced the Court majority's opinions in favor of their preferred litigant when they provide unique arguments and information. Consequently, I find moderate support for the influence of interest groups on the Court both externally by providing a supporting audience and internally by providing the Court with supporting information.

(95 pages)

## PUBLIC ABSTRACT

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Barrett L. Anderson



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## INTRODUCTION

The conflict between Franklin Delano Roosevelt and the Supreme Court is one of the most consequential struggles in American constitutional history. Scholars seeking to explain judicial behavior, American constitutional law, contemporary economic regulation, presidential power, and so much more have sought answers among the political and legal struggles that played out during this progressive era. Despite the wealth of information that the events of this period provide to multiple lines of scholarship, one of the most telling and well-studied aspects is that concerning judicial behavior. The 1920s and early 1930s were dominated by a Supreme Court that was ideologically opposed to the economic agenda of a growing majority of Americans, rising labor unions, and a popular political regime, which eventually led to a constitutional crisis and a threat to the legitimacy of the judicial branch. Contemporary wisdom views the rise of Roosevelt and his court packing plan as the salvation of the American worker from the economic elites and an activist Supreme Court intent on enshrining laissez faire economic principles into the Constitution. This almost storybook version has only recently come to be challenged by serious scholarship seeking a more robust understanding of the influences of this era and the Supreme Court's behavior.

Despite the renewed interest in studying judicial behavior during this struggle, the studies are somewhat homogenous and lack alternative explanations concerning potential influences on the Court. A deeper understanding of what influences the Court faced and how these factors affected judicial-decision-making can provide insights into the legal foundations that were set during this period for America's entire economic system and regulatory apparatus. Contemporary federal regulation is still heavily dependent on the New Deal programs

established by Congress and declared constitutional by the Court after its shift from a narrow to a broad legal interpretation of the Commerce Clause (Gifford 1984). The principal point of conflict between the Court and the political branches during this period was over the federal government's authority over economic regulation and came to center on the authority of Congress to regulate interstate commerce. The Court's interpretation of commerce power underwent significant changes during the shift from the end of the *Lochner* Era until the solidification of New Deal policies under the Roosevelt Court (Stern 1946, 1946a). During this 17-year period, federal regulations based on Congress's authority to regulate interstate commerce skyrocketed (Law and Kim 2011, xvi; Sunstein 1987, 421-422; White 1972, 1003) and the Court was forced to determine the scope of governmental authority over the economy. After significant political and legal pressure, the Court eventually broadened the scope of congressional commerce power. This study seeks to explain what influences interest groups may have had on the Supreme Court's shifting decisions in cases concerning economic regulation and the Commerce Clause during this foundational period in American history.

Future expansions or restrictions of federal power are likely to depend on the Court's interpretation concerning congressional authority to regulate commerce. Although a return to the pre-1937 narrow view of the Commerce Clause is unlikely, contemporary justices have shown a willingness to reassess the scope of congressional authority under the Commerce Clause as evidenced in recent cases such as *United States v. Lopez* (1995), *United States v. Morrison* (2000), and *Seminole Tribe v. Florida* (1996). With a conservative majority currently on the Court, the judicial branch could become more active in scrutinizing regulation and the seemingly endless authority given Congress and delegated to different federal agencies to regulate the economy and commerce.

From 1920 to 1937 the Supreme Court faced mounting legal and political pressure due to the rise of legal realism,<sup>1</sup> the Great Depression, increasing economic inequality between classes, and the rise of a political regime that was hostile to the Court majority's free market ideology. Consequently, the Court needed to rely on someone to lend its decisions legitimacy in the face of such significant pressure. I predict that economic interest groups naturally filled this role as a judicial audience by participating in Court decisions through the submission of amicus briefs. This partnership between the Supreme Court and economic special interests naturally flourished due to their shared opposition to economic regulation and support of a free market. The Supreme Court is an institution that lacks the authority to implement its own decisions and is wholly dependent on the cooperation of the other two federal branches (Epstein and Knight 1998, xii-xiii). As such, the justices' decisions must be accepted as legitimate by a large enough audience that the decisions cannot be ignored. These judicial "audiences" lend legitimacy to the Court's decisions in cases where the Court faces opposition to its legal interpretation from the other branches of government (Baum 2006, Ch. 3; Epstein and Knight 1998, xiii). Consequently, economic interest groups could have naturally filled this role as the Court's audience due to the political pressure that the Court faced. Furthermore, legal opposition to the Court's traditional interpretive methods also mounted during the early 1900s. The rise of legal realism presented the justices with opposition from within its own legal circles to established interpretive practices and precedents that had been used to protect economic freedoms. This new interpretive method forced the Court to reconsider its constitutional interpretation of the Commerce Clause and

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<sup>1</sup> Legal realism is defined by two principal beliefs: 1) That justices must base their decisions off of the real-world implications of their decisions rather than abstract formal principles; 2) That justices are influenced in their decision-making by their political, social, and religious beliefs.

further opened legal decisions to influence from external real-world information, which I predict came from interest groups in the form of amicus briefs.

Using amicus briefs that were filed in commerce and economic related cases between 1920 and 1937, accessed through the *U.S. Supreme Court Library Official Reports Database*, I attempt to determine 1) whether amicus briefs were influential in determining which litigant won their case and 2) how these briefs influenced the Court's decisions in relation to the federal government's authority to regulate economic and commercial matters. The selected timeframe (1920-1937) begins in 1920 due to the increasing regularity of amicus briefs and closes at the end of the struggle between the Roosevelt Administration and the Supreme Court due to the appointment of new justices. I use cases concerning economic regulation that rely on the Commerce Clause due to it being the principal issue in the struggle between the Court and the political branches. To determine whether amicus briefs influenced the Court, I employ a logit model to test whether amicus briefs were a significant factor for the Court in the 119 cases with a filed amicus brief on the merits during this period. To assess how these amicus briefs may have influenced the Court, I compare the content in the 206 amicus briefs that were filed on the merits to the litigant briefs that the amici supported in order to identify arguments made solely by the amicus. I then compare the exclusive amicus arguments and information to the Court majority opinions to test whether the amici were influential in affecting the content of the justices' opinions.

In what follows, I situate this study within the general literature concerning the influences on the Court during this period as well as the corresponding models of judicial behavior. I then build on existing literature concerning the efficacy of amicus briefs by extending the timeframe of amicus studies back into the 1920s. I further build on amicus literature by testing the Court's

reactions to amicus briefs during an era in which the justices faced significant pressure from hostile groups and needed to rely on ideologically similar special interest groups. I continue by tying amicus literature to theories of judicial audiences and judicial legitimacy to construct a theoretical framework explaining how the Court may have used interest groups as an audience to lend their decisions greater legitimacy. Finally, I test my two hypotheses using a quantitative logit model and a qualitative comparison of the content in amicus briefs, litigant briefs, and majority opinions by the Supreme Court. Using both tests, I attempt to show the influence of interest groups on the Court utilizing both the strategic and legal model of judicial decision-making.

### **The Switch in Time and Influence on the Judiciary**

In the early 20<sup>th</sup> century, the Supreme Court took a narrow view of commerce authority and repeatedly struck down acts of Congress that sought to implement broad federal regulations. However, in 1937 the Court reversed course and began to rule in favor of expansive New Deal acts that relied on a broad interpretation of the commerce power. Contemporary scholarship attributes the “switch in time that saved nine” to different external pressures that were placed on the Court during this vital era. One of the most widely accepted explanations for the Court’s switch in legal interpretation is that the justices succumbed to the mounting public and political pressure that they faced under President Franklin D. Roosevelt’s court packing plan (Leuchtenburg 1985, 673-674). According to this conventional explanation, Roosevelt placed increasing pressure on the Court to uphold New Deal programs, many of which the Court struck down as unconstitutional. After repeated losses in the court room, Roosevelt was finally forced to introduce his court-packing plan, which caused the justices to abandon their laissez faire extremism and uphold vital New Deal programs. Consequently, scholars that adhere to this



conventional narrative view the Court's switch as being motivated by external pressures and a desire by the justices to avoid a confrontation with Roosevelt over the judiciary's institutional legitimacy. Thus, Roosevelt and the New Deal are seen as having saved the economically beleaguered American working class while the majority of justices on the Supreme Court are seen as out of touch economic elitists intent on enshrining their economic ideologies into the Constitution (McKenna 2002, 555-563; Shesol 2010, 501-530).

Additional scholarship lends strength and depth to the conventional narrative that Roosevelt and other external factors caused a switch in the majority of the Court's legal interpretation (Ariens 1994, 620-630). Caldeira (1987) provides evidence that public opinion may have played a significant role in influencing the Court to change its economic interpretation due to the people's opposition to the justices' decisions concerning economic freedom. During the 1920s and early to mid 1930s, progressive reformers, liberal activists, and a majority of the public supported increased economic regulation and New Deal measures, which provided Roosevelt and his allies with the ability to publicly criticize and pressure the Court without much political risk (1141-1145). Furthermore, studies of the Court's reaction to these external pressures also strengthen the conventional narrative. Gely and Spiller (1989) found that the Court took great lengths in their opinions during the 1930s to avoid conflict with Congress and different state legislatures, which signals the Court's concern over its legitimacy through the justices' attempts to avoid disagreements with the other political branches when possible (6; Currie 1987; Funston 1975, 800-807).

Other scholars argue that the Court's shift in economic interpretation was due to internal factors rather than external pressure. Legal thought was rapidly evolving prior to the New Deal from a long-held acceptance of legal formalism, or classical legal thought, to legal realism. This

new interpretive method strayed from the previously dominant formalistic approach in several ways. First, realists argued that the justices had to consider the real-world implications of their decisions rather than relying on abstract legal principles. Second, realists argued that justices were fundamentally political and that their decisions were made based off of their ideological preferences, which cast the Court into an entirely new political light (Kalman 1986, 1-2; White 1972, 1015-1016).

As this new view of the judiciary began to take hold law school staff, academics, students, and leaders in legal circles became increasingly influenced by legal realism (Macaulay 2005, 370-377). Upcoming generations of lawyers, judges, and a minority group of Supreme Court justices began to influence interpretation of the law in a more realist direction and away from the formalist precedent that had dominated the Court for so long. Page (1995) highlights how progressives and Democrats used the rise of legal realism to argue for more liberal decisions in cases concerning economic regulation (3-4). Consequently, commercial and economic regulations were caught in a legal tug of war between formalist and realist judges. Internalist scholars argue that the Court gradually shifted from formalism to realism in many of its commerce related opinions.<sup>2</sup> Thus, internalists point to these changes in the dominant legal theory as the driving factor behind a more gradual shift in the justices' interpretation of economic issues, which they argue came to a head in 1936 and 1937. Most internalist scholars also maintain that the swing justices Owen J. Roberts and Chief Justice Charles Evans Hughes employed a consistent legal interpretation of the government's regulatory authority in economic matters prior to, and after, what externalist scholars have dubbed the Court's switch (Cushman

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<sup>2</sup> For example, see differences in legal interpretation between *United States v. E.C. Knight Co.* 156 US 1 (1895) and *Houston, East and West Texas Railway Co. v. United States* 234 US 342 (1914) or differences between *ALA Shechier Poultry Corp. v. United States* 295 US 495 (1935) and *Wickard v. Filburn* 317 US 111 (1942).

1992, 147-154; 1994; 2000, 1149-1150). Consequently, internalists argue that the changing understanding of legal interpretation led to a broader construction of government authority to regulate economic matters under the Commerce Clause.

Despite the internalist and externalist debates over what influenced the Court's change in economic interpretation, neither explanation takes into consideration if and how interest groups may have affected this pivotal moment in history. New Deal programs significantly affected the majority of industries throughout the nation. Although these groups were heavily impacted, little has been written concerning their reactions or efforts to influence the Court's decisions on New Deal programs and the increasing regulation leading up to the New Deal. A few early studies focus on the campaign of the American Liberty League to influence both the public and the Court against Roosevelt and the New Deal, but these studies are narrow in their focus. The American Liberty League was an interest group made up of free market politicians, industry giants, and other organization leaders that opposed Roosevelt, however the league focused more on swaying public relations against Roosevelt and the New Deal and never filed an amicus brief for the organization during its existence from 1934-1940 (Richman 1982; Rudolph 1950, 21-23). Consequently, there is no measurable way to know whether or not the Court listened to or was influenced by the public relations campaign of the League. Furthermore, groups that are recognized for their influence with the Supreme Court, such as the American Civil Liberties Union (ACLU) or the National Association for the Advancement of Colored People (NAACP), did not really become active in lobbying the Court until the 1940s and 1950s (Puro 1971, 6). Consequently, there are few studies concerning the influence of interest groups on the Court during the beginning America's modern era of government.

Despite the lack of early interest group studies, beyond those focused on the American Liberty League, there is clear evidence that interest groups were becoming increasingly active. Leading up to the Court's reversal in 1937, the justices faced an influx of pressure from external organizations in the form of amicus curiae briefs (Fowler and Etherington 1953; Puro 1971, 6), which raises the question whether these groups may have influenced the Court during this vital period and if so, how?

### **Amicus Briefs and Judicial Behavior**

Beginning in 1920, amicus briefs really started to make their appearance with the Court. Interest groups' principal tool for influencing the Supreme Court is through the use of amicus briefs (Caldeira and Wright 1988, 1111; Epstein 1991). Amicus briefs provide special interests with the ability to act as an official participant in court cases as both advocates and affected parties. The Supreme Court's unwritten rules during this era required that all non-governmental amicus briefs be granted leave by the Court to file, indicating that the justices were required to pay at least some attention to amicus briefs in order to allow their filing (Krislov 1963, 713). The Court later formalized these rules into written requirements in 1937. The Court, as a matter of process and respect, generally requested the mutual consent of both parties to the case prior to granting leave. Furthermore, the Court rarely denied amici the chance to participate in different cases until the justices implemented significant rule changes in 1949, which resulted in stricter requirements for filing an amicus brief (Krislov 1963, 713). Amicus briefs were fairly uncommon during this period unlike today when multiple briefs are filed for each litigant in a majority of cases.

The impact of amicus briefs on judicial decision-making is debated amongst scholars. Many studies discount the effectiveness that amicus briefs play (Songer and Sheehan 1993;

Stumpf 1998; Walker and Epstein 1993), arguing that outside briefs rarely change a justice's mind or cause a justice to vote against his or her policy preferences (Segal and Spaeth 1993). Scholars that doubt the efficacy of amicus briefs generally point to the Court's independence from constituents or need for re-election. Thus, these independent justices are free in theory to vote completely in line with their ideological beliefs and do not need to seriously consider outside influences such as amicus briefs (Segal and Cover 1989, 822-823; Segal and Spaeth 2002, 86-95).

According to the literature known as the attitudinal model, the justices' ideological beliefs dictate their vote (Pritchett 1941; Segal 1997; Segal and Cover 1989; Segal and Spaeth 1993; Schubert 1965) rather than external factors. Segal and Spaeth (1993) summarized this viewpoint well, "Simply put, Rehnquist votes the way he does because he is extremely conservative, Marshall voted the way he did because he is extremely liberal" (65). Consequently, if an amicus brief does happen to support the winning litigant it is likely because the amici agreed with or supported a justice's existing ideological views, not because the brief swayed a justice in one direction or the other (Kearney and Merrill 2000, 779-782). The outcome of many cases can be predicted based on the ideological majority on the Court. Justices need little information beyond the "Questions Presented" in both litigants' briefs and their own ideological views to decide a case (Kearney and Merrill 2000, 781). While this model holds significant merit and has a host of supporting literature, the attitudinal model generally focuses on judicial decision-making in more recent eras during which the Court has been stable as an institution and faced only minor political opposition from the elected branches (Whittington 2007, Ch. 5). No studies utilizing the attitudinal model have sought to observe the influence of interest groups during periods of uncertainty and institutional weakness for the Court, which would likely

change the Court's decision-making behavior considerably. Consequently, the attitudinal model fails to explain the Court's sudden switch away from their previously dominant ideological preferences toward economic regulation or the events that led to the switch.

Other scholars have found that amicus briefs increase the legal fortunes of the parties for which they are filed in multiple different types of cases. Studies supporting the efficacy of amicus briefs range from state supreme courts (Songer and Kuersten 1995) to the efficacy of amicus briefs on both grants of certiorari (Caldeira and Wright 1988, 1122-1123; Perry 1991) and decisions on the merits in the Supreme Court (Kearney and Merrill 2000, 828-830; McGuire 1990; 1995; Puro 1971, 105-107). Furthermore, scholars in the internalist camp have found that amicus briefs influence the ideological direction (Collins 2007) and content of the Court's opinions (Collins, Corley, and Hamner 2015).

Scholars finding amicus briefs influential fall into two camps when it comes to their models of judicial behavior. The strategic camp generally questions the absolute independence of the Supreme Court from both the public and political branches due to their interconnectedness and the significant impacts that each institution's decisions and policy preferences have on the other. Interest groups, alongside the political branches and other institutions, are a strategic player in this game where the goal of each party is to maximize its policy preferences, which may come at the expense of opposing institutions. However, while the justices act to implement their ideological preferences, they also must consider the institutional restraints they face both within and outside the Court (Maltzman, Spriggs, and Wahlbeck 1999). Whittington (2007) and other scholars argue that the justices must strategically consider their constraints in relation to other political institutions as well as the public when attempting to implement their policy preferences (75; Friedman 1993, 607-609; Murphy 1964). Gibson (1983) summarizes the

strategic model of judicial decision-making in his statement that, “judges’ decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do” (7).

History is rife with examples of justices being pressured into deciding cases strategically. That is, in a manner that was not clearly consistent with their preferred outcomes (Knight and Epstein 1996; Murphy 1964, 26-28; Whittington 2003). Kearney and Merrill (2000) observe that under the strategic model, amicus briefs filed by institutions responsible for implementing the Supreme Court’s decisions, such as Congress, the president, the states, or other powerful institutions should hold significant weight with the justices (782). Consequently, this camp of scholars find that amicus briefs can prove useful to the justices because they provide external information concerning the support or opposition to the justices’ potential decisions by the public, political branches, and interest groups. Amicus briefs can therefore be beneficial to the Court depending on the policy preferences of the justices and the support or opposition that the Court expects to receive from the institutions tasked with enforcing their judgements.

The second camp of scholars who supports the effectiveness of amicus briefs adhere to the legal model of judicial behavior. These scholars consider the Court as an institution that is wholly independent of not only the political branches, but also from external ideological and political influences (Gillman 2006). Under this model, rather than political pressure, justices decide cases according to their understanding of how the cases at hand interact with previous precedent and existing legal doctrines (Fowler and Jeon 2008, 17; Tiller and Cross 2006, 532-533). Kearney and Merrill (2000) highlight that under the legal model justices rely on the text of cases, the applicable constitutional and statutory provisions, the history behind the applicable provisions, and arguments over policy outcomes to make their decisions (776). Selznick (1996)

also explains how the Court is influenced by the ideas and traditions of past and current justices alongside a web of different social and legal patterns from which it is inseparable (274; Smith 1988, 94; 1996). Furthermore, most Supreme Court Justices claim to adhere to the legal model as evidenced by statements such as those by Supreme Court Justice Samuel Alito, “A judge can’t have any preferred outcome in any particular case. The judge’s only obligation – and it’s a solemn obligation – is to the rule of law” (as cited in Greenburg 2006) and Justice Stephen Breyer in his statement that, “[Judicial] Independence doesn’t mean you decide the way you want...Independence means you decide according to the law and the facts” (Moyers 2015).

Under the legal model, amicus briefs can prove to be influential depending on the quality of the information that they provide (Collins 2004, 828-829). The Court’s rules reflect the legal model of thinking in its guidance to groups wishing to file amicus briefs.

*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 (Sup. CT. R. 37.1).

Thus, to legal scholars, many Supreme Court justices, and the legal community amicus briefs are only as effective as the quality of the arguments and information that they provide the justices. The potential impact that Supreme Court cases may have on different groups of all kinds leads to the expectation that organizations would willing to dedicate substantial time and resources into providing high quality amicus briefs. Consequently, the legal model expects that amicus briefs have the potential to be extremely influential with the justices.

Despite the significant amount of literature studying the efficacy, or lack thereof, of amicus briefs and their effects on judicial behavior, the majority of these studies focus on the latter half of the 20<sup>th</sup> century due to the prevalence and accessibility of briefs filed by interest groups. Only Puro (1971) reaches as far back as 1920, however his study focuses on the shift in



the role of amicus briefs from briefs filed by neutral affected parties to briefs that actively advocate for one side's position (Ch. 4). This study provides a comprehensive summary of amicus participation and its changes during the early years of the Court. He reveals that as early as 1920, amicus briefs were being used increasingly as a means of advocacy by interest groups rather than a neutral tool for affected parties to voice their concerns. He also clearly outlines the significant increase in the amount of amici participation between 1920 and 1966. His study does not, however, answer whether interest groups affected the Supreme Court during this early period.

Consequently, no studies have considered the efficacy of interest groups during this early era under a legal or strategic model, despite clear evidence that the Court was facing pressure from both external political institutions and internal legal circles. Such a large gap in the literature is significant and an improved understanding of this era will benefit judicial and economic scholars in the future. In summary, literature on the Court during this period lacks any real study into how interest groups influenced the Court's interpretation of federal power to regulate commerce or their reversal in legal interpretation of such laws. Studies concerning the efficacy of amicus briefs are also lacking during this early period in American history during which the foundation for America's modern form of government and economic regulation was established. Filling this gap in the literature will provide a more comprehensive and robust understanding of the history behind America's regulatory structure, judicial behavior, and potential future legal developments in federal economic regulatory authority.

### **Judicial Audiences and Institutional Legitimacy**

Internalist and externalist scholars see their theories concerning influences on judicial decision-making as mutually exclusive. New scholarship, however, has begun to take a more

comprehensive view of the Supreme Court and incorporated both internalist legal arguments and externalist strategic arguments into explanations of the judiciary (George and Epstein 1992, 333-334). I follow this dual route and suggest that during this formative period (1920-1937), amicus briefs played an important role in influencing the Court's commerce related decisions due to both the external political pressure and the internal legal pressure that the justices faced. Determining influences on a justices' decision making is a difficult task that has long been a struggle for judicial scholars. Identifying the thoughts and rationale that led to the decisions of historical figures provides a host of difficulties. However, controlling for other factors beyond amicus briefs, we can measure whether amicus briefs had an effect on the Court's decisions (Collins 2004, 816). The effects of amicus briefs are one of many influences that the justices face. Interest group studies do not purport that amicus briefs cause justices to abandon ideology and vote in favor of opposing viewpoints. Rather, amicus briefs are another influence that must be balanced due to the political, social, and legal information that they provide. For the externalist strategic portion of this study, the "influence" of an amicus brief is defined as whether or not the brief is significant in increasing or decreasing the likelihood of a win for the amici's supported litigant. For the internalist legal portion of this study, the "influence" of an amicus brief is defined as whether or not any content provided exclusively by an amicus brief is included in the Supreme Court majority opinion.

Most studies of judicial decision-making focus on more recent Supreme Courts that have not faced a significant political threat to their legitimacy in decades (Ferejohn 1999; Gibson 1989; 2007, 6; Whittington 2003; 2005; 2007, Ch. 5). Contemporary courts have enjoyed a relatively stable amount of support for their authority as an institution from the public and the politically elected branches even in moments of controversy (Gibson, Caldeira, and Spence

2003, 553-556; Nicholson and Howard 2003, 692-693; Whittington 2005, 593-594). Earlier courts on the other hand faced significant institutional challenges from political branches on multiple occasions (Dahl 1957; Gillman, Graber, and Whittington 2013). Consequently, a significant number of studies concerning the effects of interest groups on judicial decision-making fail to consider the Court during periods of pressure and strife when its legitimacy is threatened. I seek to remedy this issue by observing the effects of interest groups during what could be described as one of the Court's greatest moments of pressure from the political branches, the public, and even from their own legal circles. Although an understanding concerning the influence of interest groups during this particular era is the focus of the study, this period had a host of rare events that created a unique situation for the Court. This timeframe was selected because it is one of the most tumultuous and unstable in the history of this nation for both the Supreme Court and legal theory. Consequently, this study may lack the potential for generalization and applicability into other eras of the Supreme Court. Such significant events are rare, especially for the Supreme Court due to the justices' lifetime appointments and its institutional independence from the public and other political branches. Thus, although the specificity of this study and the rare events of this time period may restrict its generalization, the advances in understanding concerning the role of interest groups during this foundational period is a valuable contribution.

The Court's need to maintain institutional legitimacy clearly affects its behavior and decision-making (Bickel 1986; Epstein and Knight 1998). Before the Court can act to achieve their preferred policies, they must first ensure that their institutional authority is legitimate (Gibson 2014, 206-208; Gillman, Graber, and Whittington 2013, 16). Without the other branches accepting the Court's decisions as legitimate and enforcing its interpretation of the law the

justices are powerless. Epstein and Knight (1998) clearly articulated the necessity that justices decide cases strategically to maintain their legitimacy in the statement that “their [Supreme Court justices] ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act” (pp. ii). The establishment and maintenance of institutional legitimacy is therefore a logical necessity for the justices to achieve their policy preferences. This assumption falls in line with a long line of studies showing that the Court’s decisions reflect its need to maintain institutional legitimacy (Caldeira 1987, 1145-50; Caldeira and Gibson 1992; 1995; Clark 2009; Hausseger and Baum 1999; Stephenson 2004). That is, justices must consider the likelihood that external institutions will enforce and respect their interpretation of the law and they must also be cognizant of the different external variables that may affect the implementation of their opinion as they rule on different cases.

One of the principal external variables that the justices must consider in relation to the Court’s institutional legitimacy is whether or not the Court has a supporting audience. Baum (2006) studies the personal audiences that have been influential with many of the past justices. Although his study focuses on the judges’ individual audiences, taking the Court majority and aggregating each justice’s audiences into groups according to their similarity provides a clearer picture on what the Court’s audience would be as an institution (50-60). I extend Baum’s (2006) theory of personal audiences to that of an audience for the Court as an institution, with the Court majority’s audience serving as the Court’s audience as an institution. In his study of Supreme Court opinions, Wells (2007) loosely links the ideas of judicial audiences with judicial legitimacy in a study on how the justices use opinions to play to different audiences (1040, 1054). The Court’s decisions are considered legitimate when it has a supporting group or

“audience” to legitimize its decisions and ensure that the Court’s interpretation is enforced (Baum 2006, Ch. 3; Black *et al.* 2016). The Court, therefore, needs to attract an audience powerful enough to legitimize its decisions in the eyes of the political branches tasked with enforcing and funding the Court’s decisions. The Court is able to attract these audiences because both it and its audience “serve one another’s needs” (Friedman and Delaney 2011, 1182).

Gibson (2007) outlines the Court’s reliance on supporting audiences to maintain legitimacy and shows how the Court can lose legitimacy if it repeatedly votes against the interests of specific groups (6). Because the Court does not possess the authority to enforce or fund their own decisions, the justices’ rulings must have enough support that the decision will be deferred to and enforced by the other two branches (Mondak and Smithey 1997, 1114-1115; Schauer 2004, 1049). When the Supreme Court is faced with an administration intent on reconstructing constitutional theory away from the judiciary’s interpretation, the Court is forced to either rely on an audience that is powerful enough to pressure the elected branches into enforcing its decisions, defer to the elected branches, or risk compromising the legitimacy of the Court as an institution by repeatedly voting against the majority (Whittington 2007, Ch. 3). The Court can ensure deference from the other two branches by either ruling in the manner that the executive and or legislative branches desire, deciding the case in a favorable manner for a powerful enough audience to ensure deference from the political branches, or build coalitions that support the Court’s preferred position (Dahl 1957, 283-291). Without a supporting audience, the Supreme Court is powerless when compared to the other two branches (Friedman and Delaney 2011, 1172). The Court has faced this problem with political branches on numerous occasions, highlighted by the Jefferson, Jackson, and Lincoln Administrations, when one or both of the elected branches ignored and even actively fought the Court (Dahl 1957, 283, 293). When

the Court's legitimacy is threatened, they are more likely to adhere to the influences of their supporting audiences depending on the level of influence that the audience wields in society (Canon and Johnson 1999). Thus, the support of an audience can legitimize the justices' decisions and protect their opinions from being overturned by the political branches, especially in cases that the Court opposes other branches of the federal government.

The Court's need to maintain institutional legitimacy does not suggest that the justices merely adhere to the most influential viewpoint of the day. Strategic justices are rational actors with ideological and policy preferences that consider both their external and internal restraints (Epstein and Knight 1998, xii-xiii). Many of the Court's internal constraints include precedents, the need to base all decisions in legal doctrine to avoid the appearance of political motivations, and most importantly according to most literature, the justices' own personal ideological and policy preferences that they wish to see implemented. Thus, it is highly unlikely that the justices of the Supreme Court merely follow the political preferences and passions of the most influential group of their time; however, they are also not immune to these external influences. Rather, the justices face a balancing act between personal preferences, precedent and other legal constraints, and the expected reactions and pressures of other institutions.

There are various groups that could comprise an audience. The obvious conclusions are the President and Congress who have the authority to execute and fund all laws (Dahl 1957, 284-285; Mondak and Smithey 1997, 1114-1115). But, the general public is a strong audience as well because the elected branches are beholden to them for re-election (Baum 2006, Ch. 3; Friedman 2003, 2610-2613). If the public supports the Court's decisions, there is little that the elected branches can do to oppose the judiciary. Interest groups, businesses, corporations, and different industries can also make up an audience due to their ability to sway the public for or against

certain members of the elected branches (Anzia 2011, 423-425; Grossman and Helpman 1996, 265-266), their command of substantial resources (Dur and Bievre 2007, 5), and their ability to organize committed groups of individuals behind specific causes (Anzia 2011, 423-425; Leighley 1996, 459-460). Interest groups and business also possess resources that elected officials need to seek reelection and can pressure Congress and the president by withholding those resources (Grossman and Helpman 1996, 271). Box-Steffensmeier, Christenson, and Hitt (2013) find that the more powerful and well-known interest groups often have a greater influence on the Court when they file an amicus brief (458-459). In addition to the power of the filing group, the number of amicus briefs and participants in a case can also act as a crude indicator to the Court concerning the importance of the case to external institutions and the public (Kearney and Merrill 2000, 821). Consequently, the justices must consider how their decisions may affect the institutional legitimacy of the Court by considering what impacts they may have on the public, other government branches, and finally interest groups (Bartels and Johnston 2013, 184-185; Bickel 1986). Amicus briefs can provide this political information to the justices, making it easier for the Court to issue decisions that both maximize their own policy preferences while garnering enough support from the political branches, the public, or certain interests to maintain institutional legitimacy. The litigant with an advantage in the number of amicus briefs should, in theory, have a higher likelihood of a favorable Court decision (Hojnacki 1997, 84-85).

During the studied time period, rising opposition by the general public and the political branches seemingly threatened the Court's institutional legitimacy (Caldeira 1987; Caldeira and Gibson 1992, 638; Clark, 2009; Stephenson, 2004; Whittington 2007, 266). As the 1920s progressed, the public showed an increasing appetite for government regulation of the economy to supposedly improve the lot of the working man. Furthermore, the rise of Franklin Delano

Roosevelt and the progressive Democrats to power in the latter half of the era between 1920 and 1937 created a significant threat to the conservative dominated Supreme Court. Both Roosevelt and the Democratic Congress enjoyed substantial support from the majority of Americans (Baum and Kernell 2001, 200; Berinsky *et al.* 2011, 517-518; Cushman 2002, 15-18). Despite this rising popularity, support for the Roosevelt Administration was divided along class lines, with the upper economic class generally supporting Republicans and the Court's majority while the working class and unions supported Democrats and the Court's minority coalition (Baum and Kernell 2001, 199-200). The economic calamities of this era caused the public to demand greater governmental involvement in the market, which led to a transformed and expanded role for the federal government. This transformation in the role of government, and the rapidly nationalizing economy, placed pressure on the court to adapt their interpretations and precedents to a new way of thinking about the government's role in society. As this expansion of economic regulation became reality, the theoretical battle between Democrats and the Court came to center on economic issues with the authority of Congress to regulate interstate commerce as one of the principal conflicts.

With the majority of the public widely in support of the progressive political branches and both Congress and the presidency dominated by Democrats during the most contentious years of this study, the most plausible externalist explanation is that the Court turned to the economic upper class and interest groups that supported their free market ideology in an attempt to help lend their decisions legitimacy. I expect to find that interest groups naturally filled this role as the Court's audience through their submission of amicus briefs due to their shared interests in beating back growing government regulation and their adherence to free market principles. Thus, the theory contends that amicus briefs played the role of providing the Court



with an audience and support for the justices to defy the political branches in their legal decisions. Following this theory, my expectation is that amicus briefs were influential in determining the winning litigant with the Supreme Court. These theoretical expectations lead to my first hypothesis:

*H1: The litigant with the larger number of amicus briefs will have an increased likelihood of a favorable court decision.*

### **Interest Groups and Legal Realism**

Studying this same era from the internalist legal model perspective, alongside the externalist strategic model, I also suggest that amicus briefs played an important role in influencing the Court's early commerce related decisions due to the legal pressure that the justices faced. The legal model of judicial decision-making was the dominant view of the Court for the nation's first 150 years (Huhn 2003, 305-306) and legal formalism was the Court's accepted and dominant interpretive method (Horwitz 1992, 16-17). Horwitz (1975) traces the underlying factors that drove the judiciary into establishing legal formalism as the dominant view of the Supreme Court's decision-making in the 1850s. During the 1820s and 1830s, the judiciary was put on the defensive by the growing "codification" movement among politicians who argued that judicial policymaking was fundamentally political and that the political branches needed to codify in legislation common law practices to reduce judicial autonomy. To counter this movement, the judiciary stressed the legal (rather than political) aspects of its decision-making in different cases. These steps included stressing the apolitical decision-making process used by the justices to decide cases and a strong push for a more professionalized science of reason in an attempt to clearly show the separation of law from politics (255-257). These formalistic arguments were successful in establishing a view of the Court as a non-political

institution up until legal formalism faced the new rising challenge of legal realism in the early 20<sup>th</sup> Century.

Beginning in the early 1900's, legal realism began to gain greater prominence in both legal circles and American society as a whole (Kalman 1986, Ch. 1). Realism caused a major shift in legal thought in the early 1900s and eventually led to a shift in the Court majority as well. Scholars were quickly abandoning the long-held support of legal formalism in favor of the rising theory of legal realism (White 1972, 1003-1012). The rise of legal realism was one of the first real challenges to the Supreme Court's methods of decision-making from within the legal community and was widely accepted among the political branches and public (Kalman 1986, Ch. 1). Many newcomers to the Court were pushing legal realism in their opinions and pressuring their elder colleagues to alter their interpretative methods. Legal realists argued two principal points that were in contrast with the majority of the justices' formalistic approach: first, legal realists attempted to meld law and the social sciences together to predict the real-world consequences of judicial decisions (Posner 1986, 180-182; Singer 1988, 468-470). Using arguments concerning the necessity of policy consideration and the implications of the justices' decisions, realists sought to liberalize the Court's economic views on federal commerce regulation, arguing that the Court had to consider how their decisions would affect individuals in the real world (Feldman 2010). These arguments were strengthened by the social and economic calamities facing the nation during the early years of this period, including the Great Depression, two world wars, and the economic disparity between America's economic classes.

Furthermore, legal realists took a new view of judicial behavior, arguing that judges made decisions based on their personal ideologies and policy preferences rather than the previously held view that the justices were beholden strictly to a formal interpretation of the law

(Singer 1988, 468-470). Legal realists argued that judges were unable to divorce themselves from their personal biases, political partisanship, and ideological views just like other political actors (Fuller 1934, 449). The realist view of political judges cast the Court into an entirely new political light and attacked previously held notions concerning the Court's strictly legal nature (Scheb and Lyons 2000, 183). Consequently, realist views placed the Court on the same level as other political actors and strengthened questioning sentiments concerning the Court's authority to interpret the Constitution over the other branches.

As legal challenges to economic regulation mounted, formalist justices were forced to cope with a flood of new cases that provided realists with the opportunity to challenge established formalist precedents. Furthermore, the Court was divided between formalist justices and new realist justices who, alongside an increasingly vocal segment of realists in the legal community, were applying pressure on the Court majority to implement a new method of interpreting the law and abandon past formalist precedents. This new theory of legal thought forced a Court that was still dominated by formalist judges to reconsider a lifetime of legal thought and precedent (Kalman 1986, Ch 1; White 1972, 1000). Legal pressure, coupled with increasing attacks from political circles and greater public demand for governmental regulation in the market left the Court in a uniquely difficult position.

A prime example of this split between legal realism and legal formalism comes from the majority opinion and dissents of *Lochner v. New York* (1905). *Lochner* kicked off the Court's era of conservative economic interpretation and was one of the principal cases cited during this period when invoking the much-used tool of the "right of contract" under the Fourteenth Amendment to strike down expansive regulatory legislation. The majority opinion of the Court ruled that a New York law regulating the maximum hours that a baker could work violated both

the employee and employer's rights to contract. According to the majority, the employee and employer had a right to negotiate their contract unimpeded by the state government. This ruling was consistent with the Court's previous line of precedent concerning labor law and the state's authority under the police power (Gillman 1993). The majority opinion upheld the formalistic idea of a right to contract because the health of employees in the baking industry was not vital to the general welfare of the people, and thus, did not fall under the police powers of the state. However, this case drew harsh dissents from the more liberal justices who employed realist arguments against the majority.

Associate justice John Marshall Harlan authored the minority's dissent, which used a statistics report by the state of New York, two peer reviewed studies, and various policy arguments to show the real-world implications of the majority's opinion (*Lochner v. New York* 1905, 69-73). The minority argued that these external studies and statistics had to be considered when deciding the case because they signified what was happening in reality. Additionally, Justice Oliver Wendell Holmes authored a dissent that echoed realist arguments against the majority. In Holmes' now famous dissent, he accused the Court's majority of deciding the case based purely off of their personal beliefs in a free market ideology. Holmes also employed realist arguments that the Court's decisions should not oppose what the majority of the country sought in his statement that:

“This case is decided upon an economic theory *which a large part of the country does not entertain*....I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to *embody their opinions in law*” [emphasis added] (*Lochner v. New York* 1905, 75).

The *Lochner* example clearly shows the split in the Court's interpretive views and the rising prevalence of legal realism. As realism became increasingly dominant in American legal circles

and society during this period, the expectation is that amicus briefs would become more effective with the Court due to the information that they provide to the justices.

Scholars who adhere to the legal model as well as scholars who adhere to internalist views of the Court are faced with the same difficulty as externalist scholars in determining how different factors influence the Court's decision-making. It is clear that Supreme Court justices function and make decisions with imperfect information (Epstein and Knight 1999, 219-222; Maltzman, Spriggs, and Wahlbeck 2000; Murphy 1964, 146-147). No matter how learned the justice is, the wide variety of cases that come before the Court make expertise concerning each issue impossible. Like most other actors, justices surely obtain some of their information via the media including the television, radio, newspapers, etc. (Epstein and Knight 1998; 1999, 219-222). However, these sources are generalized and lack expertise and specificity to the case at hand. A Court that is under pressure to understand how its decisions will affect the real world, and to justify its decisions through the use of external information, can face significant information deficits due to the wide variety and complicated nature of the issues that the justices face. The well-established information hypothesis argues that the benefits of amicus briefs come from the social, scientific, or legal information (Bailey, Kamoie, and Maltzman 2005, 73; Solberg and Heberlig 2004, 593) that these briefs provide to the justices (Rustad and Koenig 1993, 99-100; Spriggs and Wahlbeck 1997, 366-369). Amicus briefs are submitted by interested and affected parties who generally specialize or are heavily involved in the issues surrounding each case. Amici can act as experts who have an interest in the outcome and who have constructed their arguments to fit the facts of the case. These briefs are prepared to strengthen the litigants' arguments and can provide the justices with high-quality and easily accessible information that is relevant to the justices' decisions (Collins 2004, 810). Consequently, the

expectation is that quality information from amicus briefs would be influential in swaying the Court to rule in favor of litigants that are supported by the amicus brief.

A common tool of internalist scholars is to analyze the Court majority's opinion for signs that certain arguments or information from litigant and amicus briefs were influential through their inclusion in the Court's majority opinion (Collins, Corley, and Hamner 2015; Corley 2008, 477). I adopt this measure and define "influence" as the inclusion of content provided exclusively by the amicus brief in the Court majority's opinion. The pressure that was placed on the Court from legal realists, coupled with the political pressure externally leads to my second hypothesis concerning how amicus briefs may have influenced the Supreme Court:

*H2: Successful amicus briefs influence the Supreme Court by providing unique information beyond that provided by the litigants.*

### **Evaluating Amicus Influence on Petitioner**

Amicus brief databases are lacking for the studied time period. For example, the most commonly used database for amicus studies, the *U.S. Supreme Court Amicus Curiae Database*, begins in 1946. Other amicus databases begin even later in 1953 (Collins 2004, 811). Consequently, the data for this study were compiled from a search of all Court cases from the 1920 term through the 1937 term in the *U.S. Supreme Court Library Official Reports*. The selected cases had to meet the following criteria: 1) the case had to have at least one filed amicus brief on the merits; 2) the case had to either rule on the Commerce Clause or rule on a federal act that was based wholly or in part on the Commerce Clause.<sup>3</sup> To determine whether specific acts

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<sup>3</sup> The full list of acts or statutes that are based on the Commerce Clause includes the Commerce Clause, Fourteenth Amendment, Fifth Amendment, Sherman Antitrust Act, Interstate Commerce Act, National Banking Act, Food and Drug Act, Merchant Marine Act, Transportation Act of 1920, Trading with the Enemy Act, Cummins Amendment, Federal Employers Liability Act, Federal Farm Loan Act, Prohibition Act, Arbitration Act, Federal Trade Commission Act, Federal Home Owner's Loan Act, Bituminous Coal Conservation Act, Agricultural Adjustment Act, Cotton Control Act, Emergency Banking Act, National Labor Relations Act, Social Security Act, California Caravan Act, Railway Labor Act, Federal Motor Carrier Act, National Industrial Recovery Act, Navigable Waters, Securities Act, Natural Gas Act, Fair Labor Standards Act, Federal Communications Act, Bankruptcy Act, Admiralty Act, Federal Power Act, Clayton Antitrust Act, Emergency Price Control Act, Longshoremen's & Harbor Workers' Compensation Act, Railroad Retirement Act, Jones Act, Public Utility Holding Act, Norris La Guardia Act,

were reliant on Congress's commerce power, I searched the Library of Congress congressional debates over each of the acts listed in the footnotes for references to the act relying on Congress's commerce power. Using this list of acts, the final results were 119 commerce related cases that had a total of 114 petitioner amicus briefs and 95 respondent amicus briefs filed on the merits.

Determining the effects of interest groups on judicial decision-making requires that alternative explanations be controlled for. Segal and Spaeth (1993) articulate this necessity clearly:

Before influence can be inferred, we must show that an actor in the Court's environment had an independent impact after controlling for other factors (237).

To measure whether or not interest groups had any external strategic effects on the Court's interpretation of federal regulation under the Commerce Clause (*H1*), this paper employs a logit model similar to those that have been used previously by scholars (Collins 2004, 823). A logit model is sufficient because the dependent variable, petitioner win, is dichotomous where a 1 = a petitioner winning the case. To measure whether amicus briefs give litigants an advantage, I use four explanatory variables and four control variables.

The principal explanatory variables used to test *H1* are *Petitioner Amicus* and *Respondent Amicus*, which represent the number of amicus briefs filed on behalf of each litigant (Collins 2004, 817). I also include the *Petitioner Amicus Participants* and *Respondent Amicus Participants* variables, which measure the total number of amicus participants filing for each litigant to test whether larger number of participants on a brief increases influence. Furthermore,

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Robinson-Patman Act, Warehouse Act, Commodity Exchange Act, Home Owner's Loan Act, Labor Management Relations Act, Alaska's White Act, Civil Aeronautics Act, Miller-Tydings Act, Emergency Housing Act, and the Agricultural Market Agreement Act.

I include a separate variable for federal government briefs to control for the well-established success of the government when it files an amicus brief (Bailey, Kamoie, and Maltzman 2005, 73; Caldeira and Wright 1988, 1115; Deen, Ignagni, and Meernik 2003, 71; O'Connor 1983, 264; Segal 1988, 142-143), coded 1 if a federal brief is filed and a 0 if no federal brief was filed.

To control for the varying ideological composition of the Supreme Court during this study, I utilize an *Ideological Congruence* score (Collins 2004, 818-819). This score represents the difference in the average ideology of the Court's majority and the liberal or conservative disposition of the lower court's decision. The Court's average ideology is computed by estimating the average percentage of liberal versus conservative votes by the Court's majority for each term and labeling the Court as conservative or liberal for that term. Although this is a crude indicator of ideology, more sophisticated judicial ideological scores do not reach as far back as 1920. Other studies that seek to measure judicial ideology during historical periods with no existing data employ similar methods to determine judicial ideology (Bailey 2016, 34-35). I then use the Supreme Court Database's *Lower Court Disposition* variable to measure the liberal or conservative disposition of the lower court case and compare the disposition of the lower case to the ideology of the Court majority. Thus, this study's *Ideological Congruence* variable is coded 1 if the lower court case disposition is opposite the ideology of the Supreme Court majority (i.e. a case with a conservative disposition coming into a liberal majority Supreme Court or vice versa) and 0 if the lower court case disposition is the same as the Supreme Court majority's ideology (i.e. a case with a liberal disposition coming into a liberal Supreme Court majority).

An additional variable that must be controlled for is the resources available to different parties to the case. Resource levels have long been found important in determining litigant success (Sheehan, Mishler, and Songer 1992, 469-470; Songer, Kuersten, and Kaheny 2000,



552-553). Multiple scholars have successfully used the practice of ranking broad categories of litigants according to their likely resources and using the difference between ranks as a variable to measure the effects of resources on litigation success (McGuire 1998, 507-509; Sheehan, Mishler, and Songer 1992, 465-466). I follow the same methodology to rank the following categories according to expected resource levels: individuals = 1, small business = 2, unions = 3, businesses = 4, corporations = 5, local governments = 6, state governments = 7, federal government = 8. To control for resource advantages between parties, I subtract the petitioner's resource rank from the respondent's resource rank and code the difference as the control variable *Resources*. A case with a state government petitioner versus a business respondent would be coded as -3 showing that the state government had a resource advantage. The final control variable that must be considered is whether the case came before the Supreme Court through a grant of certiorari. Justices often grant certiorari on cases that they seek to overturn (Boucher and Segal 1995, 826; Cameron, Segal, and Songer 2000, 113-115; Segal and Spaeth 1993), thus giving petitioners an advantage. To control for this advantage, I include a *Certiorari* control variable coded 1 if the case was heard through a grant of certiorari and 0 if it was not.

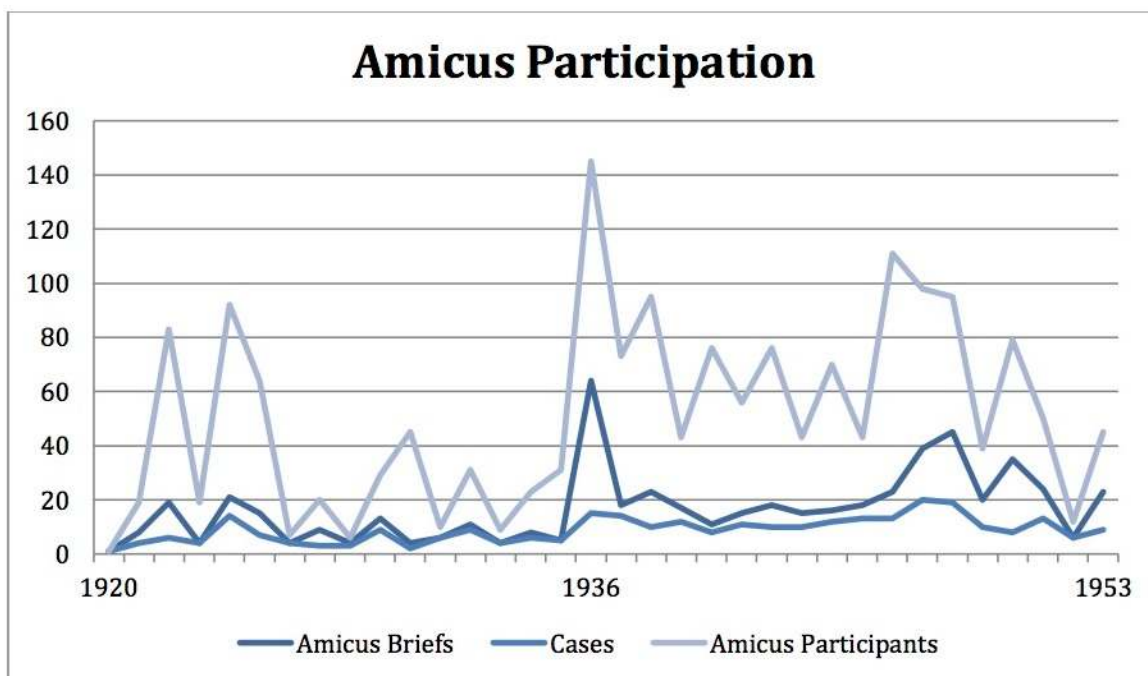
To test *H2* and the internalist legal theory of influence on the Court, I employ a comparative study of the content in amicus briefs, litigant briefs, and Court majority opinions. I first compare the content of the amicus briefs to the litigant's brief whom the amici support to determine if the amici provided a unique argument or information beyond the litigant's brief. I then compare any arguments or information presented exclusively by the amicus briefs to the rationale of the Court in its majority opinions to determine whether the information from the amici is reflected in the Court's opinion. Specifically, I search for 1) direct citations or references to the amicus briefs, 2) the use of any information or statistics provided exclusively by the

amicus, 3) arguments made exclusively by the amicus, or 4) whether the Court relies significantly on precedent provided exclusively by amicus.

## Results

From 1920 to 1937, amici participated in a total of 324 cases (Puro 1971, 54), with 119 of those cases related to commercial and economic regulation. The distribution of these 119 cases over time shows higher levels of amicus participation during the early years of this study and a steep increase in amicus participation toward the end of the study. This group includes cases in which both government and non-government actors are parties to the case, cases where both government and non-government actors are the victorious litigant, and cases in which government actors prevailed over non-government and vice versa. Figure 1 summarizes the distribution of amicus briefs over time.

**Figure 1: Amicus Participation Over Time**



The steep increase in amicus participation as Roosevelt came into office (1932) generates the expectation that amicus briefs opposing the federal government's expansions of authority under

the New Deal would be both common and influential with the Court as the free market leaning majority was forced to rule on issues concerning the New Deal. This expectation falls in line with both the externalist and internalist theories that interest groups served as an audience to the Court as well as the expectation that this spike in amici provided important information that would help the Court rule against New Deal legislation due to its potential impacts on industry and the free market.

Table 1 presents the basic descriptive statistics for the variables included in the model. An observation of these statistics shows that the respondents have an advantage in the number of cases they won, as evidenced by the mean value of the dependent variable .386 petitioner wins (suggesting that the outcome of interest was only observed approximately 38.6 percent of the time). Consequently, of the 119 cases, petitioners won 46 and respondents won 73. The sample cases also had a total of 114 petitioner non-governmental amicus briefs and 95 respondent non-governmental amicus briefs, showing that petitioners had an average of 0.95 briefs filed per case while respondents had only 0.79. The results seem to suggest that respondent amicus briefs have a much larger impact than petitioner briefs concerning which litigant wins the case. Thus, despite the data that shows an advantage in petitioner amicus briefs, their aggregate win rate is less than that of respondents. This seems to run counter to assumptions that an advantage in amicus briefs raises the likelihood of victory for a litigant. A closer look at the breakdown of cases with amicus briefs shows that at least one petitioner amicus brief was filed in 65 of the 119 cases while at least one respondent amicus brief was filed in 62 of 119 cases. Petitioners advantage in amicus briefs did not translate into much higher win rates because petitioners had numerous cases with large numbers of amicus while respondent briefs were much more evenly distributed across cases. Furthermore, respondents had a slight advantage in the number of participants (377) that

signed on to their 95 briefs while participants had 351 respondents that signed on to their 114 briefs. Consequently, a preliminary look at the data suggests that respondent briefs were more influential than petitioner briefs during this period.

**Table 1: Descriptive Statistics**

Variable	Obs	Mean	Std. Dev.	Min	Max
PetWin	119	.3865546	.4890191	0	1
FGPet	119	.0420168	.2014758	0	1
FGResp	119	.0588235	.236289	0	1
Pet	119	.9579832	1.428493	0	9
Resp	119	.7983193	1.070243	0	6
PetPar	119	2.94958	6.347092	0	52
RespPar	119	3.168067	5.903632	0	38
IdCong	119	.5378151	.5006761	0	1
Resources	119	.7394958	3.292164	-7	7
Certiorari	119	1	0	1	1

The small number of cases during this time period presents potential bias away from the null hypothesis. Firth (1993), along with other scholars, have shown that small  $n$  logit studies can result in biases that overestimate the odds of an event occurring. An average rule of thumb is that logit studies should have at least 10 observations per explanatory variable to maintain an acceptable amount of bias (36-37; Harrell, Lee, and Mark 1996, 364). Further studies debate the minimum required observations with some arguing that these numbers can be as low as between 4 and 9 observations (Vittinghoff and McCulloch 2007, 716-718) while other scholars argue that they should be as high as 20 or 50 observations to shrink the coefficient, reduce bias, and increase accuracy (Steyerberg *et al.* 2000). I believe the current sample size and an ordinary logit model are sufficient for the purposes of this study for the following reasons: 1) the theoretical parameters for this study restrict the data from stretching further into the late 1930s and early

1940s to increase the study size. In addition, stretching the study further back into the early 1900s is not feasible due to a lack of filed amicus briefs in earlier years. This study is focused on explaining interest group influence during a specific era for the Court due to the theoretical expectations of this period concerning the justices' behavior; 2) the sample data is the entire population of commerce related cases during the studied time period. Further increasing the number of observations would require a new theoretical explanation and a new measurement tool besides cases with amici participation; 3) the model is being used as a rough indicator to determine the effectiveness of amicus briefs. Precise measurements are not the goal of this model; rather, determining if the explanatory variables had any type of effect on the dependent variable is the main goal with more precise observations to follow in the second qualitative model; 4) this model was tested for robustness by applying two other more precise models and the results for statistically significant variables remained the same.<sup>4</sup>

Table 2 presents evidence that interest groups were influential with the Supreme Court through their submission of amicus briefs.

### **Table 2: Amicus Significance Model**

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<sup>4</sup> Results were tested for robustness under a Firth (1993) Logit Model and a Linear Regression Model. Statistically significant results remained the same with only slight changes in results.

PetitionerWin	Odds Ratio	Std. Err.	z	P> z	[95% Conf. Interval]	
FederalPetitioner	2.401868	2.404488	0.88	0.381	.3376127	17.08753
FederalRespondent	.2470725	.2432095	-1.42	0.156	.0358865	1.70105
PetitionerAmicus	2.210773	.6360881	2.76	0.006 *	1.257867	3.88556
RespondentAmicus	.3230565	.112522	-3.24	0.001 *	.1632305	.639375
PetitionerParticip~t	.8480388	.0746822	-1.87	0.061	.7136003	1.007805
RespondentParticip~t	1.023868	.0420607	0.57	0.566	.9446616	1.109715
Congruence	.7370493	.3282579	-0.69	0.493	.3078924	1.764388
Resources	.9201487	.0621732	-1.23	0.218	.8060156	1.050443
Certiorari	1	(omitted)				
_cons	1.32135	.5905956	0.62	0.533	.5502522	3.17303

As the above table shows, both petitioner and respondent amicus briefs are a significant factor in determining whether or not the petitioner wins when measured at a 99 percent confidence interval. The significance of both variables provides support for *H1* and the contention that those litigants with an advantage in amicus briefs have an increased likelihood of a favorable decision from the Supreme Court. The results show that amici were serving the Court as an audience and having some effect on the Court's decisions. Furthermore, at least one amicus brief was filed in favor of the winning litigant in 76 of the 119 sample cases, or 64 percent. Thus, the model's results provide support for the theoretical assumption that amici were serving as an external audience for the Court.

There were also several variables that interestingly did not reach statistical significance. Most surprising was the fact that the Court's ideology, as included in the *Ideological Congruence* measure, did not turn out to be significant. The lack of statistical significance for ideology may be due to the construction of the *Ideological Congruence* measure. This variable attempted to control for the ideology of the Court by determining the ideological disposition of the lower court decision and measuring only those cases where the disposition of the lower court is opposite the ideological majority of the Supreme Court. Collins (2004) successfully employs

this variable in previous studies to control for the Court's ideology. My use of an accepted academic method leads to the assumption that ideology may not have been as significant of a factor as conventional wisdom believes during this period. This finding would support the assumptions of the study due to the expected strategic, rather than ideological, decisions by the Court to maintain institutional legitimacy. Additionally, the Court was closely divided between liberal and conservative justices during the majority of this period with a few swing justices. Consequently, the flip flop of the swing justices may have influenced the lack of significance for ideology as well.

The acceptance of ideology as one of the principal influences on judicial decision-making is supported by numerous studies employing sophisticated statistical models as well as in depth qualitative studies. The lack of significance for judicial ideology in this simple model with a very limited sample size is grossly inadequate to infer that ideology was not a major driving factor in the Court's decisions.

### **Evaluating Amicus Influence on Court Majority Opinions**

Finding statistical significance for the petitioner and respondent amicus briefs, although evidence that amici were influencing the Court, does not explain the type of influence that these briefs were having. Were the briefs supporting industry against regulation according to theoretical expectations? Table 2 provides evidence that amicus briefs had a favorable impact for their preferred litigant, however, it fails to clarify how amicus briefs influenced the Court or highlight the interaction and relationship between interest groups, the Court, and the federal government. The Court was faced with several different competing influences during this struggle including interest groups, progressive political branches, the public, new legal theories, past precedent, and the justices' own ideological preferences. A better understanding of the role

that amicus briefs played during this period requires more than statistical modeling. A breakdown of the cases, coupled with evidence from Table 2, shows that external pressures were having some effect on the Court. The raw number of amicus wins reflect this as well. At least one amicus brief was filed in favor of the winning litigant in 64 percent of cases. These amici, however, were filed both in favor and against federal regulation. In fact, the federal government surprisingly won half (59 out of 119) of the sample cases. Such high success rates for the government runs counter to expectations due to the ideological divide between the Court and the federal government when it came to economic issues. Thus, a deeper understanding of why the government was so successful and in what types of cases is needed. The following table presents a breakdown of the case data.

**Table 3: Amicus and Government Wins**

	Amicus Win, Government Win	Amicus Loss, Government Win	Amicus Win, Government Loss	Amicus Loss, Government Loss	Total Cases
Cases	30	29	46	14	119
Percentage	25.3%	24.3%	38.7%	11.7%	100%

To test how amicus briefs influenced the Court and to further test whether amici were actually influencing the Court's decisions, I group amicus cases into four categories depending on whom the amici supported and the results of the case: 1) *amicus win, government win*; 2) *amicus loss, government win*; 3) *amicus win, government loss*; and 4) *amicus loss, government loss*. Understanding who amici were supporting and whether they were effective in influencing the Court's decision in favor of their preferred litigant is necessary to both strengthen the evidence that the amici had an effect on the Court's decisions in favor of their preferred litigant and to determine how interest groups were affecting the Court's decisions in commerce related



cases. After grouping the cases, I test *H2* within each group by comparing the content of the amicus briefs to their supporting litigant's briefs to assess whether amici provided unique arguments and information or whether they merely repeated the arguments made by the litigants. I then compare any arguments provided exclusively by the amici to the content of the Court's majority opinion to determine whether the amici arguments and information were included and thus, influential. Specifically, I search the Court majority opinions for 1) direct citations or references to the amicus briefs; 2) the use of any information or statistics provided exclusively by the amicus; 3) arguments made exclusively by the amicus; or 4) whether the Court relies significantly on precedent provided exclusively by amicus.

### **Amicus Win, Government Loss**

The *Amicus Win, Government Loss* cases provide the strongest support for the hypothesis that interest groups were serving as the Court's audience and influenced the justices through the submission of amicus briefs. Due to the Court majority's ideological opposition to federal economic regulation, amicus briefs arguing against government regulation should have been the most influential because they supported the Court majority's ideological leanings and provided the Court with an audience to oppose the federal government. Furthermore, the ideological divide between the Court and the federal government during most of this period leads to an expectation that the Court would rule against the government more often than not. After dividing the cases, the results confirm that the largest group of cases was comprised of challenges in which amicus briefs were filed in favor of the winning litigant and resulted in a loss for the federal government. Forty-six total cases fall into this category (about 39 percent of total cases during this period). Because the federal government is not always a party to each case, a loss is defined as 1) striking down a federal law; 2) restricting the scope of any federal law or

regulation; or 3) cases in which a federal entity is the losing litigant. These cases are fairly evenly distributed across the studied timeframe, not showing any unusually high groupings in certain years, which removes concerns that specific one-time incidents may have allowed interest groups to capture the Court's ear temporarily. Thus, throughout the 17-year period of this study, amicus briefs supported the winning litigant over the government's interests more than any other type of case. The fact that this group contains the largest number of cases provides support for the contention that interest groups were serving as an audience to the Court.

Comparing the arguments and information from amicus briefs to the arguments made by litigants, I was able to identify that the majority of amicus briefs in this group of cases provided arguments and information that were not included in the litigants' briefs. Furthermore, this information was used in the Court majority's opinion in more than half of the 46 cases in which amicus helped the litigant beat the government. These cases covered a wide range of issues within the realm of economic regulatory authority ranging from interstate and intrastate railroad regulation to more significant issues such as the power of Congress and the states to regulate and tax businesses. Table 4 breaks down the results of the comparison between exclusive amicus content and Court majority opinions.

**Table 4: Amicus Win Efficiency Comparison**

Amicus provided additional information/arguments	Amicus influential in Court opinion	Amicus repeated litigant arguments and were not influential	Full amicus text not available
30 cases	26 cases	8 cases	8 cases

The comparison of unique amicus arguments to Court majority opinions shows that in 65 percent of cases in this sample group, the amici were influential in affecting the Court's majority opinion through the information and arguments that they submitted. These results provide greater

support for *H1* by strengthening the contention that interest groups were influencing the Court through their submission of amicus briefs as well as support for *H2* by confirming the information hypothesis. It appears that the Court favored litigants that provided quality amicus briefs when ruling against the government, which fits expectations that this would occur due to the justices' need for an audience to legitimize their decisions when ruling against the government.

Several cases from this sample group highlight how amicus briefs were influencing Court majority opinions with unique arguments and information.<sup>5</sup> In each of these example cases the Court directly adopts information and arguments made exclusively by amici in their majority opinions. In some cases, amici provide precedent that the Court relies on in its majority opinion. In other cases, the arguments made in the amicus briefs alter the overall focus of the case beyond the arguments of the litigants. Finally, in most cases, unique amicus information and arguments are included as support, but appear to be included on the margins rather than as the core arguments. It must be noted, however, that although amicus content may only seem to be included in the margins of a majority opinion, inclusion in a majority opinion shows significant influence by an amicus brief for several reasons. First, the inclusion of amicus content in a Court majority opinion is influential because majority opinions set precedent for future courts. Therefore, all of the content in the Court majority's opinion will have lasting influence for future courts. Second, and more importantly, the very role of an amicus brief generally restricts the brief's influence to the margins of a case. Amicus briefs are written to provide supplemental content to the principal arguments made by the parties to the case, not to dictate the core issues under consideration in the case. The questions that the Supreme Court considers, the arguments,

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<sup>5</sup> For a complete list of the cases included in this sample group see Appendix A.

and the main evidence to support those arguments are provided by the litigants. Expectations that an amicus brief provide the principal information or arguments on which the Court majority decides a case are unrealistic due to the very nature and function of an amicus brief. As such, influence by an amicus brief on the Court majority opinion, even if it is only marginal, shows that the amicus brief is fulfilling its role and influencing the Court.

To avoid overemphasizing the influence that amicus briefs had on the Court, I have implemented controls by only considering an amicus brief influential if the Court majority adopts its arguments or information, rather than including concurring or dissenting opinions. Restricting influence to Court majority opinions provides a higher threshold for amicus briefs to be considered influential. The content in majority opinions is carefully selected, edited, and argued between the justices due to its precedent setting authority and importance for legal precedent (Spriggs, Maltzman, and Wahlbeck 1999, 503).

The first example case that is reflective of this sample set is *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Company* 257 U.S. 563 (1922). In 1922, the Interstate Commerce Commission (ICC) ordered an across the board increase in passenger and baggage rates for intrastate travel within Wisconsin in an attempt to force intrastate carriers to charge more. Interstate lines were losing business to less expensive intrastate carriers. The ICC ordered that intrastate passenger and baggage rates correspond with interstate rates to prevent intrastate carriers from gaining an advantage over interstate carriers and creating “barriers to interstate commerce”. Previously, in 1914 the Supreme Court ruled in *Houston East and West Texas Railroad Co. v. U.S.* (1914), commonly known as the *Shreveport Rate Case*, that under its authority to regulate interstate rates some incidental management of intrastate rates may be necessary. Congress later amended the Transportation Act in 1920 to reflect the Court’s ruling

in *Shreveport*, granting the ICC authority under the Transportation Act to remove injurious practices that created an undue burden on interstate commerce. Prior to *Wisconsin v. Chicago*, the Court had shown great deference to the authority of the ICC to regulate railroad rates. The Interstate Commerce Act was repeatedly held constitutional by the Court as far back as the late 1800s and had well established precedent and strong support for its constitutionality by 1922.<sup>6</sup> Despite the Court's past deference to the ICC, the justices ruled against the government and in favor of the litigant supported by the amicus briefs.

The winning litigant in this case argued that the ICC overstepped its authority to remove injurious barriers to interstate commerce under Section 15 of the Transportation Act of 1920 (Defendant Brief, 5-6). Extensive arguments were employed by the defendant in favor of state sovereignty and questioning the authority of the ICC to dictate intrastate rates (5). As support, the litigant relies heavily on the language and legislative history of the Transportation Act as well as the common authority and history of state sovereignty. Additionally, in its supporting precedent the litigant's brief uses a long list of cases. However, their arguments only briefly reference *Shreveport*, acknowledging the authority of the ICC to incidentally manage some intrastate rates if they are injurious and present a barrier to interstate commerce before moving on to argue that the language in the Transportation Act makes the ICC's action null and void (21-22). The Court, on the other hand, explicitly rejected several of the litigant's principal arguments including the authority of the ICC to regulate intrastate rates that are a burden on interstate commerce (*Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Company*, 1922, 590) as well as the litigant's use of the legislative history of the Transportation Act (588-589). The Court majority ended up relying on two principal arguments to overturn the

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<sup>6</sup> See *Minnesota Rate Cases* 230 U.S. 352 (1913) and *Houston & Texas Railway v. United States* 234 U.S. 342 (1914).

ICC's rate increase. The majority accepted arguments from the defendant alleging that the ICC's rates were not just nor reasonable according to the Transportation Act and adopted the interpretation *Shreveport* made by an amicus brief.

Amici supporting the defendant submitted a brief that goes into detail concerning the effects that *Shreveport* should have on the Court's ruling. The main argument from this amicus brief is that the scope of the ICC's regulation in *Wisconsin v. Chicago* is much greater than that permitted under *Shreveport* and the Transportation Act. The brief points out that in *Shreveport*, local rates on two short tracks that were absolutely necessary for interstate travel across the Texas-Louisiana border were kept arbitrarily low, which constituted an undue burden on interstate commerce (Amicus Brief, 8-9). The fact that these rates occurred on tracks that were on the border justifies the ruling in *Shreveport* while the case at hand attempts to extend the ICC's authority to remove barriers to interstate commerce to the "whole body of intrastate rates, fares and charges applying on every mile of track within the state" (9). The amicus argues that, although *Shreveport* declared the ICC's authority to remove injurious practices and barriers to interstate rates constitutional (including intrastate rates), the ICC's order dealing with all statewide intrastate rates in *Wisconsin* was much too wide in scope and should be restricted to "specific, isolated state rates" (8). The amicus reads:

In the *Shreveport* Case, only certain specific, isolated state rates were involved. The doctrine as announced in that case can have application, therefore, only to similar situations and not to cases where the whole body of state rates, fares and charges is involved (8).

The amicus continues attacking the scope of the ICC's order, arguing that the authority delegated to the ICC by the Transportation Act of 1920 was only an attempt by Congress to reaffirm the doctrine given in *Shreveport*. The brief cites congressional testimony from Senator Cummins, chairman of the Senate Interstate Commerce Committee as support (7) and contends

that the authority delegated by the Transportation Act cannot exceed the scope of the authority stated in *Shreveport*. Although the Court majority also rebuked the amicus' argument concerning legislative intent, the justices adopt the argument concerning the scope of regulation over intrastate rates in *Wisconsin* as compared to *Shreveport*. The Court majority states:

The order in this case, however, is much wider than the orders made in the proceedings following the *Shreveport* and *Illinois Central* cases. There, as here, the report of the Commission showed discrimination against persons and localities at border points, and the orders were extended to include all rates or fares from all points in the state to border points. But this order is not so restricted. It includes fares between all interior points, although neither may be near the border and the fares between them may not work a discrimination against interstate travelers at all. Nothing in the precedents cited justifies an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class (*Railroad Commission of Wisconsin v. Chicago Burlington & Quincy Railroad*, 1922, 580).

The Court finishes its opinion by overruling the ICC's order, relying on the defendant's argument concerning just and reasonable rates as well as relying heavily on the amicus' interpretation of *Shreveport*.

*Appalachian Coals Inc. v. United States* 288 U.S. 344 (1933) was brought against the government by a corporation of coal producers who had been forced to disband through a lawsuit brought by the federal government under the Sherman Anti-Trust Act. The members of the corporation produced 73 percent of the coal in the nearby region and, due to the small demand for coal within their immediate vicinity, sold the majority of their product outside of the region in more competitive markets, many of which were located in different states. The corporation's contract collected a fee from each member to pay for a combined marketing and sales representative, but each company maintained full control over their production. Additionally, members of the corporation had exclusive access to shared information such as research, market prices, and techniques while non-members would not (374).

Under the Sherman Anti-Trust Act, the Justice Department and private parties are allowed to bring suit against companies that 1) have anticompetitive agreements and 2) conduct themselves in a way that monopolizes or attempts to monopolize the market. The corporation's unique organization, keeping production separate and only merging marketing and sales, was unique for its time. In its suit, the government argued that this organizational structure showed a clear intent to restrain trade through an informational, technological, and sales monopoly (Brief for United States, 56). The principal argument employed by the Justice Department focused on how the details of the corporation's merger and contract clearly violated previous case law that outlined acceptable mergers and corporations. According to the government, the way that the corporation was set up showed a clear intent to restrain trade and reduce competition (47). Furthermore, the government argued that this merger empowered the corporation to restrain trade through price controls in multiple interstate markets (83).

In response to the government's arguments, the coal corporation focused its brief on refuting the government's critiques of its organizational structure and contract, going into specific details about each in an attempt to prove its legality. The brief argued extensively that the corporation's actions adhered to complicated protocols laid out in precedent and were within the parameters set by the Sherman Act (Appellant's Brief, 87). The producers pointed to the fact that member of the corporation formed voluntarily to reduce the conflict between companies, stop injurious market practices, and that improved efficiency in coal sales was a lawful end to which the corporation was formed (80). Coal consumption in the corporation's region was much lower than production, thus producers sold most of their product in larger distant markets. However, mid-size coal producers were unable to break into larger markets relying solely on their own resources. Therefore, the coal producers argued that the corporation was a necessity for



the lawful end of marketing their coal despite the fact that it may reduce competition between the companies that joined the organization (65).

The supporting amicus brief, however, avoided wading into arguments over the specific details of the organizational structure or contract and focused more on the overarching intent of the Sherman Anti-Trust Act. The amicus brief's arguments were uniquely different than those of the corporation's in several different ways. First, the amicus argues against the government's attempt to connect concerted action among competitors with the failure of competition. It states:

Not every form of concerted action among competitors...is unlawful *per se* as being necessarily inconsistent with the maintenance of an effectively functioning competitive system" (Amicus Brief, 2).

The amicus then goes on to argue that the fundamental purposes of anti-trust laws are to maintain "an effectively functioning competitive system of industry", rather than restrict all concerted action by competitors (2). According to the amicus, the corporation's formation would not harm marketplace competition in the larger markets and may even improve competition by introducing a new source of coal. Because these midsize coal companies were unable to effectively market their product in larger markets alone, the amicus contends that the corporation's formation would merely allow these midsize coal producers to compete in an already competitive market. Thus, the corporation's formation would not result in a monopoly or dominance by the corporation over existing producers in that market as they government contended (21-22). The amicus states:

It is highly important to look at the concerted action of this particular group of producers in the light of those facts in order to gauge the relation to, and effect on, the competitive system, of such action. What they have done, as we have said, is to set up a new competitive unit in marketing [coal in those markets] (22).

Beyond these arguments, the amicus also attacks part of the ruling by the lower court concerning the ability of the corporation to "affect prices". The lower court opinion had based its

opinion partially on the fact that the judge determined that the corporation's merger held the potential to affect prices in both the region where these companies produced their coal as well as the larger markets where they were beginning to sell their product (19-20). The brief argues that the corporation's ability to affect prices does not equal the ability arbitrarily set or control prices, which constituted an undue burden on interstate commerce according to case law and the Sherman Act. In response to the lower court's determination, the amicus contends that the lower court failed to define what it meant by "affects" on prices, which could be both positive or negative. Furthermore, the amicus brief contends that the lower court's determination in no way shows (nor attempts to even argue) that the affects that the corporation's creation could have would arbitrarily set or influence prices. The amici's argument concludes by positing that the ability to affect prices cannot serve as a violation of the Sherman Act in and of itself (23-27).

The amicus reads:

This new unit, it is found, will not have the power to set a market price. The Court below states that the formation of this new competitive unit by this particular group of producers may "affect" price but does not define the term (23)...the Court in no way indicates how it conceives that the offering of this volume [of coal] competitively through a single channel will so affect the general market price (24)...For any accurate gauging of the economic and legal effect of any such plan as that of the defendants, it is therefore essential that those very circumstances of an industry which the Court below excluded from its consideration be looked at with care. In them are to be found the indicia of the actual functioning of the competitive system in an industry (27).

Overall, the amicus brings to *Appalachian Coals* a unique argument concerning the overarching purpose of the Sherman Anti-Trust Act and how the coal corporation's formation actually fulfilled the purposes of the act rather than violate them. In its majority opinion, the Court adopts several of the arguments made exclusively by the amici.

In the opening of its majority opinion, the justices began by restating the amici's interpretation of the purpose of the Sherman Act and broadening the scope of the case beyond

questions of whether the structure and contract of the corporation were legal to questions concerning the affects that this corporation may have on the market. From the start, the amicus was able to shift the discussion to a larger scale debate concerning the purpose of the Sherman Act and whether or not the corporation violated that purpose:

The purpose of the Sherman Act is to maintain the freedom of interstate commerce in the public interest: its restrictions are not mechanical or artificial but are to be construed by the essential standard of reasonableness...[the act] does not prevent those engaged in that commerce from adopting reasonable measures to protect it from injurious and destructive practices and to promote competition (*Appalachian Coals Inc. v. United States* 288 U.S. 344, 1933, 359).

The majority then continues by addressing questions concerning whether the corporation's structure and contract showed intent to restrain trade, which it ultimately denied. The majority then explicitly adopts two arguments advanced solely by the amicus brief. First, the Court majority adopts the amicus brief's argument that the corporation would not reduce competition or be able to fix prices in the larger markets that it was targeting. The justices state:

As already noted, the district court found that "the great bulk" of the coal produced in Appalachian territory is sold "in the highly competitive region east of the Mississippi River and north of the Ohio River"...Elaborate statistics were introduced with respect to the production and distribution of bituminous coal...but an examination of it fails to disclose and adequate basis for the conclusion that the operation of the defendant's plan would produce an injurious effect upon competitive conditions (369)...A cooperative enterprise is not to be condemned where the change would be in mitigation of recognized evils and would not impair, but rather would foster, fair competitive opportunities (373).

The justices then go on to adopt the amicus' argument and explicitly reject the lower court's determination that the corporation's ability to "affect" prices violated the Sherman Act. The Court states:

The plan [of the corporation] cannot be said either to contemplate or to involve the fixing of market prices...the facts found do not establish, and the evidence fails to show, that any effect will be produced which, in the circumstances of this industry, will be detrimental to fair competition. A cooperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions (373-374).

Overall, the amicus brief in *Appalachian Coals Inc. v. United States* provided the Supreme Court with arguments that expanded the scope beyond what the litigants were contending. The Court continued to reference this big picture rationale throughout its majority opinion, focusing on how the coal corporation's purposes and actions met the overall purpose of anti-trust legislation.

Although the Court relied partially on detailed arguments concerning corporation's structure and contract. It also relied on arguments concerning the larger affect that the corporation's existence may have had on the market, the majority of which were contributed by an amicus brief.

*Carter v. Carter Coal Co. et al.* 298 U.S. 238 (1936) provides a further example of the influence that amicus briefs with unique content can have on the Supreme Court. In *Carter*, the stockholder of a coal company brought a lawsuit against the company in an attempt to keep them from paying newly established taxes for noncompliance with the Guffey Coal Act. The Guffey Act was passed by Congress in 1935 to reduce the enormous amount of conflict between coal producers, which was resulting in volatile energy markets and constantly fluctuating coal prices. The government's solution was to implement federal regulation that would incentivize coal producers to halt injurious practices and provide a steady stream of coal to meet public demand. The act divided the country into geographic regions and set up regulatory boards within each region that had the authority to set minimum coal prices, minimum wages, maximum hours, and dictate fair market practices within the coal industry. Compliance with the act was voluntary, however the federal government heavily incentivized companies to participate by establishing new taxes on coal producers, which the companies could receive tax refunds from if they were compliant with the standards set forth in the Guffey Act. Coal producers were split on their support for the act with factions both favoring and opposing its passage. After the act passed, the opposing coalition organized and brought suit against the federal government.

In its challenge, the petitioner relied on numerous different arguments to attack the validity of the Guffey Act. The petitioner's primary arguments revolved around four main points: 1) the purpose of the act was not to promote the free flow of interstate commerce but rather to control it; 2) Congress did not have authority under the Commerce Clause to delegate the regulation of labor standards to private advisory boards; 3) the act violated both state sovereignty under the 10<sup>th</sup> Amendment and economic rights under the 5<sup>th</sup> Amendment; and 4) the provisions of the act were inseparable and if a part were unconstitutional then the whole act had to be held unconstitutional (iii-v). The petitioner's brief and amicus brief both sought to prove that the act did not fall under congressional authority to regulate commerce, however they employ much different approaches in their arguments. The petitioner's first and main contention was that the overarching purpose of the Guffey Coal Act was not even to regulate interstate commerce and, therefore, did not qualify under the Commerce Clause as a legitimate governmental purpose. Rather, the petitioner argued that the government sought to stabilize and control the entire coal industry under the guise of promoting economic competition and providing for the general welfare (Petitioner's Brief, 82-91). The key method of achieving these goals was through the act's use of price fixing schemes and the excise tax (92-93). While arguing against the price fixing scheme, which was the cornerstone of the act, the petitioner states:

This necessary effect of the Act is not the by-product of the regulation of interstate commerce. Its purpose is not to foster and promote interstate commerce in any proper sense of those words. Its intended purpose is not only to permit, but to require, such allocation as a necessary means of "stabilizing" the industry...Congress is without the power to say to West Virginia or Illinois how much coal it shall produce and where it shall sell it (93).

As a secondary argument, the petitioner posited that if the purpose of the Guffey Act did fall within the ends of the Commerce Clause it should still be considered unconstitutional for two reasons. First, the petitioner's brief outlined that the labor provisions violate the Commerce

Clause because they conflict with past precedent (114-115). Second, the petitioner argued that Congress could not delegate regulatory authority to the private regional boards in charge of dictating the standards for labor because they were not governmental entities (122-124). The petitioner also briefly argued that the Guffey Act constituted a violation of state sovereignty (140-142) but did not employ arguments concerning the differences between interstate and intrastate commerce like the amicus brief did. Thus, the petitioner's arguments focused less on the distinction between interstate and intrastate commerce and focused on proving that the purpose and regulatory structure of the act violated the Commerce Clause.

The amicus brief took a different approach in its arguments against congressional commerce authority to regulate the coal industry, which the Court majority ended up partially adopting. First, the amicus contended that the both the mining and production of bituminous coal did not constitute a part of interstate commerce and, therefore, could not be regulated under the Commerce Clause. Rather, the amicus contended that the mining and production of coal was an intrastate activity, which was subject to regulation by the states but not the federal government. The amicus showed that significant amounts of coal were produced and sold solely within state lines, having no effect on interstate commerce. Despite this coal never crossing state lines, the Guffey Act contained a blanket regulation on all coal and thus violated the Commerce Clause's authority (Amicus Brief, 11-19). Past Court decisions had left ambiguity in the realm of what constituted interstate and intrastate commerce and recent decisions by the Court were mixed concerning the authority of the federal government to incidentally regulate intrastate commerce if it had a direct effect on interstate commerce.<sup>7</sup> However, the Guffey Coal Act did not even attempt to address these differences in commercial activity. The amicus reads:

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<sup>7</sup> See *Schechter Poultry Co. v. United States* 295 U.S. 495 (1935) and *Houston East and West Texas Railroad Co. v. U.S.* 234 U.S. 342 (1914).

In no instance is any distinction drawn between interstate and intrastate activities...this Act undertakes to regulate the production of this [intrastate] coal and to fix the price at which it must be sold in purely intrastate markets (7).

The amicus brief points out that the lack of distinction drawn between interstate and intrastate coupled with the all-inclusive language of the Guffey Act provided clear evidence of Congress overstepping its authority under the Commerce Clause. According to the amicus brief, the attempt to regulate intrastate commerce is therefore “clearly outside the scope of the commerce power” (8).

The amicus brief continues to build its argument that blanket regulation of coal extended to activities that were intrastate in nature and thus fell outside the scope of interstate commerce. In its oral argument, the government claimed that the production and stability of the coal market were of national interest and that all coal production affected competition across the entire market (*Carter v. Carter Coal Co. et al.*, 1936, 261-262). The amicus pushed backed by pointing out that the Guffey Act would also apply to “Captive Coal”, which is the portion of coal produced purely for the consumption of the producers, which is never marketed.

As pointed out above, there is a large amount of coal consumed in the same state in which it is produced that does not come into competition with coal from other states. The sale or disposal of such coal cannot directly affect interstate commerce in the coal produced in other states...The Act constitutes an effort on the part of Congress to regulate an immense volume of purely intrastate business and commerce and is beyond the power of Congress even under the theory of the Government (29-30).

The amicus points to the inclusion of both captive coal and coal that was produced, marketed, sold, and consumed strictly within state lines as proof that the Guffey Coal Act violated the authority of Congress to regulate interstate commerce. These arguments proved partially successful with the Court majority. The justices relied on both amicus and petitioner arguments in striking down the Guffey Act as unconstitutional.

The Court majority establishes the distinctions between interstate and intrastate commerce as one of the key measurements in judging the constitutionality of the Guffey Act, which was brought to its attention solely by the amicus brief. The Court's majority opinion reads:

The distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system (307).

Making the distinction between interstate and intrastate commerce as well as their effects on each other a principal issue in its decision shows influence from the amicus brief and sets up the majority opinion to adopt amicus arguments that coal production and mining did not fall under the Commerce Clause later in its decisions. Using this distinction and echoing amicus arguments concerning the local nature of coal production, the Court strengthened the legal definitions of intrastate commerce by stating that manufacturing and mining were local activities and thus removed completely from the realm of interstate commerce:

Production and manufacture of commodities are not commerce, even when done with the intent to sell or transport the commodities out of the state (241)...Commerce in the coal is not brought into being by force of these purely local activities, but by negotiations, agreements and circumstances entirely apart from production (241-242)...The want of power in the federal government is the same whether the wages, hours of service, and working conditions and the bargaining about them, are related to production before interstate commerce has begun, or to sale and distribution after it has ended (242).

During this era, if an action constituted commerce it could be regulated under the Commerce Clause, while if an action was local in nature it was a part of intrastate commerce and could only be regulated by states under their police power (Gillman 1993). Thus, the amicus' argument in *Carter* was a factor in the Court's decision to significantly strengthen the precedent and doctrine concerning what constituted intrastate commerce. A later Court overturned this distinction



almost entirely, however at the time the amicus' argument was able to influence an important legal doctrine concerning federal authority to regulate interstate commerce.

Returning to the Guffey Act, the amicus brief's argument concerning the scope of the Guffey Act provided the Court majority with additional content to include in its opinion. The Court majority also adopts arguments from the amicus brief that the Guffey Act's language shows an attempt by Congress to regulate coal outside its authority under the Commerce Clause.

The majority opinion states:

The exaction applies to all bituminous coal produced whether it be sold, transported or consumed in interstate commerce, or transactions in respect of it be confined wholly to the limits of the state. It also applies to "captive coal" – that is to say, coal produced for the sole use of the producer (288-289).

Coupled with the amicus' previous two arguments, the adoption of this argument by the Court shows that amici provided influential arguments against the Guffey Act's constitutionality under the Commerce Clause. The Court additionally relied on the petitioner's arguments that the act had to be struck down completely rather than just certain regulatory aspects. Furthermore, the petitioner was influential with the Court in arguing that the intent of the Guffey Coal Act was to control the market rather than promote interstate commerce and a healthy market. Despite the influence of the petitioner's brief, the amici in this case were able to provide arguments that the Court found convincing enough to include in its majority opinion.

The majority of cases in which amicus were on the winning side over the government contain situations similar to the examples given above where an amicus brief contributes information, arguments, or precedent of some sort that are included in the Court's opinion. Although the types of information, arguments, and ways in which the Court used information from amici varied widely, these results support the theoretical expectations of this study suggesting that amici were influential with the Court when ruling against the government, thus

serving as an audience, and that their influence came through the unique information that they provided the justices in these cases. Appendix A contains a complete list of the cases in this sample group along with brief descriptions concerning the influence that the amicus brief had on the majority opinion.

### **Amicus Win, Government Win**

An understanding of the Supreme Court's ideology during this period leads to expectations that the Court would rarely rule in favor of the government unless the justices had little other choice. However, cases that resulted in both a government win and amicus win fit theoretical expectations because the Court lacked a supporting audience in these instances. Thus, if the Court was under significant pressure, the expectation is that the justices would rule in favor of the government and its supporting amici to avoid threats to its institutional legitimacy.

Although amicus briefs and their litigants beat government more than any other type of case, there is still a significant number of cases in which amicus supported a government win. To improve understanding in cases where the federal government won with a supporting amicus, a deeper look at the content of the amicus briefs and the types of cases is needed. Amicus supported the government in 30 cases (25 percent of the total sample) in which it won. These cases covered a wide range of issues within the realm of economic regulatory authority, challenging both new and old precedents as well as diving into uncharted territory with no existing precedent. Table 5 breaks down the results of the comparison between exclusive amicus content and Court majority opinions.

**Table 5: Government Win Efficiency Comparison**

Amicus provided additional information/arguments	Amicus influential in Court opinion	Amicus repeated litigant arguments and were not influential	Full amicus text not available
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8 cases	7 cases	15 cases	7 cases
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Only 23 percent of the cases in this group were influential. Additionally, amicus briefs filed in these cases are significantly different than the amici in the previous group of sample cases due to this group's lack of unique arguments and information. The majority of amicus briefs in these cases merely copy the arguments of the litigants. These differences between amici in groups raise three questions: 1) were the interest groups filing amicus briefs in favor of the government fundamentally different than those filing in opposition to the government; 2) why did the amici that filed in favor of the government not provide unique arguments and information; and 3) were amici influential with the Court when filing in favor of the government?

First, the interest groups that were participating as amici in support of the government were not significantly different than interest groups that were actively opposing the government in the previous sample set. Both groups were made up mainly of large corporations and businesses with smaller pockets of state and municipal governments, and a few unions and individuals. Second, interest groups may have been less likely to provide unique arguments and information beyond the arguments made by the federal litigant due to the substantial personnel and resources that allow the government to provide comprehensive briefs. Such high-quality briefs would in theory make it more difficult for amici to find relevant arguments or information that were not already covered by the government. Furthermore, interest groups supporting the government may have conserved resources by merely filing a brief as a signal to the Court and allowed the government to expend their time and resources to make comprehensive arguments. An observation of the federal litigant's briefs in these thirty cases show that the average length of

litigant briefs by the federal government are almost 45 pages longer than non-federal briefs for this same time period. This finding lends support to the assumption that the resource differences between the government and private groups filing amicus briefs may have been the reason for the lack of unique amicus arguments in cases where amici supported the federal government.

Third, amicus briefs that provided additional arguments beyond those of their supported litigant were still influential in the Court majority opinions, however, fewer amici submitted unique arguments. In the 7 cases where amicus briefs were influential, four of those cases had to do with long established regulations that the Court had consistently upheld since the early 20<sup>th</sup> century.<sup>8</sup> Two major landmark cases of this period went against the justices' prior ideological preferences and were influenced by the submission of amicus briefs. *Nebbia v. New York* 291 U.S. 502 (1934) was a significant victory for progressives seeking to liberalize the Court's decisions concerning economic regulation. Swing justices Owen Roberts and Charles Evans Hughes voted with the liberal bloc to uphold a New York law regulating the price of milk under the police power of the state. One of the most resounding declarations in *Nebbia* was not the question of the case pertaining to whether the state could regulate certain activities and industries under the police power. The police power doctrine had long been recognized by the Court as a proper tool for regulation (Gillman 1993). The resounding declaration in this case was the Court's statement that:

Under our form of government the use of property and the making of contracts are normally matters of private and not public concern. The general rule is that both shall be free of governmental interference. *But neither property rights nor contract rights are absolute*; for government cannot exist if the citizen may at will use his freedom of contract to work them harm. *Equally fundamental with the private right is that of the*

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<sup>8</sup> One case was based off of the 18<sup>th</sup> Amendment and prohibition; the second case featured a litigant that was completely neutral and was only seeking clarification concerning a regulation; and the final two cases were influential only in very technical matters that did not influence the outcome of the case necessarily (i.e. the wording in a definition and whether petitioners' real names should be parties to the case).

*public to regulate it in the common interest* [emphasis added] (*Nebbia v. New York*, 1934, 523).

Despite similar declarations by prior Courts concerning the lack of absolute property rights, the sitting justices had recently treated property and contract rights as almost sacred and untouchable. This declaration came as a surprise due to the Court's prior treatment of this doctrine and ideological preferences. With this statement, the Court strengthened the police power of the states and signaled less robust protections under the 14<sup>th</sup> Amendment, the right to contract, and the right to property. The justices made this declaration despite expectations that their ideology would influence them to avoid adopting such strong language. However, this treatment concerning the rights to contract and property was not a contention of either litigant. Rather, this argument came from an amicus brief, which stated:

The so-called right of liberty of contract, the protection of which is usually invoked in cases of this type, *is not an unlimited or unbridled right or privilege* but is a right or privilege which is subordinate to any legislative enactment...*This court has held that there is no such thing as the absolute liberty of contract* [emphasis added] (Amicus brief No. 531, 2).

Thus, an amicus brief proved both influential with the Court as well as beneficial for the government in this controversial case.

Amicus briefs were also influential in the landmark case of *West Coast Hotel v. Parrish* 300 U.S. 379 (1937), which officially signaled the Court's switch to a broader interpretation of the government's regulatory authority under the Commerce Clause. At issue in this case was a finding of the Washington State Supreme Court upholding the constitutionality of a minimum wage law for women. Elsie Parrish, who was an employee of the West Coast Hotel, was paid wages below those required by state statute. She brought and won a lawsuit in state court to recover the differences, which was appealed to the Supreme Court. The language submitted by the amicus brief in this case was adopted by the Supreme Court majority in their majority

opinion. The litigant's brief was only five pages long and focused on the latitude of state legislative police power and making the distinctions between *Parrish* and *Adkins v. Children's Hospital* 261 U.S. 525 (1923). The litigant brief argued that:

In passing the minimum wage law the Legislature of the State of Washington had under consideration the needs of the people of that state or in other words, the general welfare of the people..." (Defendant's Brief, 2).

The litigants, however, never dove into the details to connect the overall health and morals of women to the general welfare of the state of Washington, which was one of the principal arguments cited in the Court's decision. This connection was argued exclusively by the amicus brief, as evidenced by the following excerpt:

The health and welfare of women in the performance of physical labor is held so fundamentally to affect the public welfare and to be so much an object of public interest and concern, that legislation designed for their special protection has been sustained even when like legislation for men might not be (Amicus Brief, 21).

The Court used these amicus arguments and rationale heavily in its majority opinion concerning the authority of state legislatures to regulate specific industries under the police power:

The State has a special interest *in protecting women* against employment contract which *through poor working conditions, long hours, or scant wages* may leave them *inadequately supported* and *undermine their health*...A state law for the setting of minimum wages for women is not an arbitrary discrimination *because it does not extend to men* [emphasis added] (*West Coast Hotel v. Parrish*, 1937, 300).

The Court adopted two arguments submitted exclusively by amicus in their rationale for declaring the Washington State law constitutional. First, the amicus brief argued that the tie between the wages and working conditions, the health of women, and the general welfare was such that the Court could regulate conditions that affect women's health (Amicus Brief, 16-17). Second, the amicus brief acknowledge that the law was constitutional due to the fact that it was restricted to a minimum wage for women and may have been arbitrary and unconstitutional if the minimum wage extended to men (22). The Court made other important declarations concerning

the right to contract and the power of the 14<sup>th</sup> Amendment in this case that were not submitted in either the amicus or the litigant briefs, however amicus were influential in the Court majority's opinion.

These two cases were influential with the Court when ruling in favor of the government, however, the majority of cases in this category merely parroted the litigants' arguments. Consequently, the lack of measurable interest group influence in cases where amicus support a government win makes it difficult to determine whether or not amici were really influential in assisting the government or not. The results of this section do seem to support the theory that the Court requires the support of an audience. In these cases, the Court did not have the support of interest groups through amicus briefs, however they may have ruled in favor of the government because both the government and interest groups supported the same results. Consequently, the results of this comparison suggest support for *H2* due to the influence of amicus briefs with exclusive arguments on the Court opinion as well as support for the externalist theory concerning the Court's need for a supporting audience.

### **Amicus Loss, Government Win**

One of the more perplexing results from the entire set of reviewed cases is the fact that the government won fifty percent of the cases during this period, half of which occurred despite opposition from amicus briefs. The most difficult type of cases to explain under the theory put forth by this paper are those cases in which the government won and amicus lost. Due to the ideology of the Court majority, the expectation is that the government would rarely win, especially in cases where the government's opposition has the support of outside interest groups that could serve as an audience to the Court. The government defeated litigants with supporting amicus briefs in 29 cases (just under 25 percent of the total sample). In all of these cases the

government lacked a supporting amicus brief and prevailed over opposition from litigants supported by amici. Table 6 breaks down the results of the comparison between exclusive amicus content and Court majority opinions.

**Table 6: Amicus Loss Efficiency Comparison**

Amicus provided additional information/arguments	Amicus influential in Court opinion	Amicus repeated litigant arguments and were not influential	Full amicus text not available
6 cases	3 cases	19 cases	4 cases

Amici in this category had little effect on the Court as measured by content in the justices' majority opinion, which does not fit with theoretical expectations. The theory employed in this paper leads to the expectation that the Court would rule in favor of the government only when they lack an audience or agree ideologically, however neither of those situations apply in this group of cases. In this group, the justices seemingly ruled against their own ideologies and a potential audience that opposed the government and supported their ideological preferences. These contradictory results raise questions over whether there is something unique about this group of cases or the content of these amicus briefs. The types of groups filing amicus briefs in this sample group are no different than amici from previous types of cases, consisting mainly of businesses and corporations with smaller numbers of state and local governments as well as individuals.

Amicus briefs filed in these cases rarely provided any unique arguments; rather, the overwhelming majority of these amici merely copy the arguments made by the litigants. The lack of unique amicus content supports the contention in *H2* that amicus briefs with unique arguments increase the likelihood of a win for their litigant. However, *H1* leads to the expectation that these



amici would still be influential with the Court due to the signal of support that they could provide and the legitimacy that these groups could lend to the justices' decisions. This leads to the question why a Court ideologically opposed to regulation ruled in favor of the government despite a potential supporting audience.

Closer scrutiny of the types of cases in this group show two similar patterns and a few outliers. First, a majority of cases concerned challenges to laws that had been consistently upheld by the Court prior to this period and were backed by strong Supreme Court precedent. A third of these cases, for example, challenge the authority of the Interstate Commerce Commission (ICC), which was established by the Interstate Commerce Act of 1887 in an attempt to break up monopolistic practices by the railroad industries. This act was repeatedly held constitutional by the Court as far back as the late 1800s and had well established precedent and strong support for its constitutionality from the judiciary when the issues in these sample cases arose (Stern 1946a).<sup>9</sup> Second, the remainder of the cases in which the government won over an amicus brief concerned very technical matters, such as whether certain taxes could be deducted prior to paying estate taxes.<sup>10</sup> Third, there were two outlier cases in which the Court ruled in favor of the government on significant issues that do not fit these patterns. In these cases, the Court upheld a Social Security tax and the authority of the government to sell power under the Tennessee Valley Authority.<sup>11</sup> The Tennessee Valley Authority decision was made during the middle of the struggle over Roosevelt's Court packing plan before it had met defeat in Congress and the Social Security case came out after conservative justice Willis Van Devanter had announced his

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<sup>9</sup> See *Minnesota Rate Cases* 230 U.S. 352 (1913) and *Houston & Texas Railway v. United States* 234 U.S. 342 (1914).

<sup>10</sup> For example, see *Stebbins and Hurley v. Riley* 270 U.S. 280 (1926).

<sup>11</sup> *Steward Machine Co. v. Davis* 301 U.S. 548 (1937) and *Ashwander v. Tennessee Valley Authority* 297 U.S. 288 (1936).

retirement from the Court. Both of these significant events may have had some influence on these decisions, but it is difficult to know for sure.

**Table 7: Amicus Loss Sample Group Key Issues**

Established Precedent	Technical Issues	Other Issues
21 cases	6 cases	2 cases

Despite the existence of some outliers, the Court's decisions in a majority of these cases can be explained by the internal restraints that the justices face through established precedent. As referenced in the theory section, Court justices face a balancing act between internal restraints such as precedent and existing legal theories surrounding the issue at hand, external restraints from political actors, and their own policy preferences (Selznick 1996). Looking at the types of cases in this group under the lens of internal restraints and judicial ideology, it becomes clearer why the Court ruled in favor of the government rather than amici. The Court ruled in favor of the government in the majority of these cases due to the strength of precedent surrounding many of the issues. The sample cases in this group are heavily centered around issues that the other two groups did not have significant amounts of cases dealing with. Both of the other groups had a fairly even spread of economic regulatory issues. However, this group is heavily centered on three issues: the authority of the ICC, taxation and the Commerce Clause, and war powers.

The authority of the Interstate Commerce Commission (ICC) was the one issue that dominated the largest group among these sample cases. In earlier decisions, the Court had forcefully upheld the authority of the ICC to regulate interstate commerce as evidenced in its statement that:

The United States is a government of limited and delegated powers, but in respect to the powers delegated, including that to regulate commerce between the states, the power is

absolute except as limited by other provisions of the Constitution (*Atlantic Coast Line R. Co. v. Riverside Mills* 219 U.S. 186, 1911, 187).

In *Atlantic Coast*, the justices declared the authority of the ICC, as delegated by Congress, as absolute unless those regulations violated another portion of the federal Constitution. The Court's only major restriction on the authority of the ICC came in 1897 when the justices struck down an attempt to set maximum and minimum rates nationwide (*Interstate Commerce Commission v. Cincinnati, N.O. & Texas Pacific Ry. Co.* 167 U.S. 479, 1897). However, the Court further strengthened the authority of the ICC by requiring that challenges over whether rules and rates were discriminatory be filed first with the ICC to be resolved and only come to federal courts if the groups could not reach an agreement (*Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.* 204 U.S. 426, 1906). Furthermore, the justices repeatedly established a precedent of deferring to the facts finding reports of the ICC beginning in the early 1900s when making their decisions (Lee 1948, 534-537). Consequently, the Court had a long history of ruling favorably for the ICC, which explains its continued support for cases involving this agency despite theoretical expectations that the Court would rule in favor of opposing amici.

Additional case types that had strong existing precedent prior to these decisions were cases concerning the ability of Congress and the states to implement taxes, many of which directly affected commerce issues as well as taxes that affected trades that occurred across state lines. Two of these cases, for example, involved a state attempting to tax individuals receiving inheritance despite the assets being in a separate state. These issues involved both the Commerce Clause and Congress's taxation power, which enjoyed strong precedent ruling in its favor. The federal estate tax, which the Court relied on to reject the states' claims, was declared constitutional by the justices in 1875 where the Court majority stated:

It is clear that the tax or duty levied by the act under consideration is not a direct tax...Instead of that it is plainly an excise tax or duty, authorized by section eight of article one, which vests the power in Congress to lay and collect taxes (*Scholey v. Rew* 90 U.S. 331, 1875, 347).

*Knowlton v. Moore* 178 U.S. 41 (1900) further clarified estate tax law by declaring that each family member could only be required to pay taxes on the amount that they were left rather than each paying the taxes on the entire estate. Moreover, in both estate tax cases the Court dove even further into the technical issues surrounding what charges and taxes could be deducted from the estate tax in *New York Trust Co. v. Eisner* 256 U.S. 345 (1921). The Court had strong precedent concerning the authority of the federal and state governments to concurrently tax specific industries and activities stretching all of the way back to *McCulloch v. Maryland* 17 U.S. 316 (1819) (Hellerstein and Hennefeld 1941). In both challenges to estate tax law the Court easily disposed of the challenges by pointing to its previous decisions. Finally, several cases were decided concerning the wartime authority of Congress to freeze and hold enemy owned assets. The Court had consistently supported<sup>12</sup> a broad and progressive interpretation of Congress's war powers (Bishop 1949), which the justices continued to support in the several cases from this sample group.

The unusually strong precedent in the majority of the sample cases from this group provides mixed support for the theoretical expectations concerning the Court's behavior. The justices were hearing cases that had clear and well-established precedent in favor of the government. Ruling in favor of the amicus would have likely required that the Court alter or even overrule past decisions, which the Court rarely does due to its need to maintain legal consistency and institutional legitimacy. Furthermore, the amicus briefs in this group of sample

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<sup>12</sup> See *Great Northern Railway et al. v. Sutherland* 273 U.S. 182 (1927) or *Cummings et al. v. Deutsche Bank* 300 U.S. 115 (1937).

cases provided the Court with little to no unique arguments, which supports *H2*. Consequently, the Court lacked support from the amicus in the form of additional arguments and information and either did not view amicus as an audience when it came to these issues, supported government regulation and intervention in these specific issue areas, or strategically chose to follow precedent and rule in favor of the government to avoid potential confrontation. The political signals from the amici were not as influential with the Court in these types of cases, which seems to be due to the strength of precedent and long establishment of regulation in these areas.

In summary, the three sections above show an interesting pattern in the Court's use of information from amicus briefs. Amicus briefs were most influential in cases where the Supreme Court opposed the federal government. These amici also were the group that provided the most unique content to the Courts beyond the information and arguments provided by litigants. I find support for the contention that amicus briefs served as an audience for the Court against the federal government as well as support for the contention that amici with unique content are more influential. Results from the last two sections are not as clear cut; however, they still provide support for this paper's theories with some caveats. First, amici that win alongside the government are still influential in the Court majority's opinion when they submit unique arguments, however they rarely submit these quality briefs when filing in support of the government. These amicus briefs may still serve as an audience to the Court as evidence by the fact that amicus file alongside the winning side in 65 percent of cases as well as the statistical significance of these briefs found in the logit model. Finally, cases in which amicus briefs lost to the federal government have two similar threads: they are centered on content that had very strong established precedent prior to these decisions and they are technical cases. Thus, it

appears that external pressure was much less a factor than the Court's internal reliance on precedent when ruling against amici and in favor of the government.

### **Conclusion**

This era is significantly understudied when it comes to interest group Supreme Court interactions. The 1920s and 1930s were a vital period for the Supreme Court and the national system of government. The political branches during this period became consistently more progressive in their push for economic regulation. There is, however, little understanding concerning the influence of interest groups on the Supreme Court during this period. I contend that the justices' decisions can be explained by a strategic-legal model of behavior where the Court relied on interest groups that oppose the government to lend their decisions legitimacy. Basic modeling shows that interest groups were statistically significant in influencing the Court's decisions concerning the winning litigant. Furthermore, qualitative studies comparing the unique content of amicus briefs to the majority opinions of the Court show that amicus were influential as well. Amici were most influential through the unique information that they provided the Court beyond the arguments of the litigants. When amicus briefs are filed against the government and they provide unique arguments, they have a bigger impact on Court majority's opinions than when amici are filed in support of the government or when amicus briefs fail to provide unique arguments. I find overall moderate support for the contention that interest groups acted as an audience to the Court when the justices opposed government economic regulation.

In my study of judicial behavior and amicus briefs during this era, I identified multiple areas that could provide greater insight into the influence of interest groups during this foundational period. First and foremost, using amicus briefs as the measurement for interest group influence on the Supreme Court limits the number and types of cases that are included in

this study. As noted above, amicus briefs were fairly rare during this period and not all of the Court's important Commerce Clause cases are included in this study due to a lack of amici participation. Cases with important constitutional questions concerning the Commerce Clause such as *A.L.A. Schechter Poultry Corp. et al. v. United States* 295 U.S. 495 (1935) and *National Labor Relations Board v. Jones & Laughlin Steel Corp* 301 U.S. 1 (1937) have no filed amicus briefs while other constitutionally significant cases do. Scholars interested in the interaction between the Supreme Court and interest groups should expand studies into why amici participated in some cases and not others. Second, amicus briefs are not the only way that interest groups can influence the Supreme Court. The American Liberty League, for example, ran a significant public information campaign bent on influencing the Court and the public against Roosevelt and the New Deal. The League was not active in filing amicus briefs themselves; however, it did employ a professional legal committee that made public determinations on the constitutionality of controversial legislation prior to the judiciary. A deeper study into the methods and efficacy of the American Liberty League's legal committee would greatly benefit future academic understanding of the role that interest groups played during this period. Third, a more robust study of the notes, oral argument, and internal memos of the Court may provide additional insight into the justices' perception of different interest groups and how they may have influenced the thinking of the Court.

What does a deeper understanding of the role of interest groups during this period provide? First, it sheds light on additional explanations concerning the U.S. Supreme Court's most dramatic reversal in constitutional interpretation. Second, it provides a better understanding of judicial independence from interest group influence. Third, it studies judicial behavior in times of crisis. Fourth, it provides further understanding concerning how interest groups may be

able to influence the Supreme Court. Understanding the roots of America's modern regulatory apparatus and how the Supreme Court and interest groups interacted during its establishment provides insights into America's legal foundations.



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## APPENDICES

### Appendix A: Table of Amicus Win, Government Loss Cases

Term	Case Name	Notes
1920	Underwood Typewriter Company v. Chamberlain	NA
1921	LaBelle Iron Works v. United States	The amicus successfully contends that the Court needed to consider the differences between profit and surplus as well as the differences between earned profits and realized profits when calculating the value of ore lands for taxation purposes.
1922	Corneli v. Moore	Amicus provided a unique but unsuccessful argument that the Court should restrict private individuals from withdrawing alcoholic beverages from government warehouses even if the beverages were stored prior to the passage of the National Prohibition Act.
1922	Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Company	Amicus successfully argued that the scope of the action taken by the Interstate Commerce Commission greatly exceeded the authority acknowledged by the Court ( <i>Houston East and West Texas Railroad Co. v. U.S. (1914)</i> ) and the Transportation Act, which the Court accepted as a partial reason to overturn.
1922	United Mine Workers of America et al. v. Coronado Coal Company et al.	NA
1922	Heisler v. Thomas Colliery Co.	Amicus successfully argued that the state could not tax property that was moving in interstate commerce. However, the Court did rule that the state could reasonably tax goods prior to them entering into the stream of interstate commerce.
1922	Pennsylvania Coal Company v. Mahon et al.	Amicus unsuccessfully argued that Pennsylvania's law taking land for coal mining from unwilling private property owners was a valid exercise of the police power due to the volatile market conditions of the coal industry at the time and the public's dependence on having available coal.
1923	Cunard Steamship Co. Ltd. et al. v. Mellon	Amicus successfully argued that the National Prohibition Act did not give jurisdiction to the federal government to confiscate alcoholic beverages from the store of a merchant ship that were not removed from the ship itself.
1924	Interstate Commerce Commission v. National Council of	Amicus copied respondent arguments concerning the authority of the Interstate Commerce Commission (ICC) to determine rates as long as they are just and reasonable.

	Traveling Salesman's Associations et al.	
1924	First National Bank in St. Louis v. State of Missouri	Amicus successfully argued that national banks should be subject to state laws with the caveat that these laws cannot impair the basic function and purpose of the bank.
1924	Packard v. Banton et al.	Amicus successfully argued that a New York state law placed an undue burden on taxi drivers by unjustly classifying them as an industry into a high business tax bracket.
1924	Gorham Manufacturing Company v. State Tax Commission of the State of New York	NA
1924	In the Matter of Petition of East River Towing Co. Inc. for Limitation of Liability of the Steamtug Edward, Her Engines, etc.	Amicus successfully argued that, under the Merchant Marine Act, Seamen were extended the same rights as other workers under the Employer's Liability Act.
1924	Bass, Ratcliff & Gretton v. State Tax Commission	NA
1924	Alpha Portland Cement Company v. Commonwealth of Massachusetts	Amicus successfully argued that the state cannot impose an excise tax on a foreign corporation that only has interstate commerce within the state's borders.
1925	Maple Flooring Manufacturers Assn. et al. v. United States	NA
1925	Real Silk Hosiery Mills v. City of Portland et al.	Amicus successfully presents statistics to show that a licensing requirement on their business (the majority of which constituted interstate commerce) would constitute an undue burden.
1925	Hicks, Alien Property Custodian, et al. v. Guinness et al.	Amicus successfully argued that prior to World War II debts that were suspended during the war should be recoverable after the war with interest.
1925	Barrett, as President of the Adams Express Company v. Van Pelt	Amicus copied petitioner's arguments that a company was not liable to be sued for delays in shipping if that company did not file its claim within the appropriate timeframe.

1926	United States v. Chemical Foundation Inc.	Amicus successfully argued for a more liberal interpretation of the Trading with the Enemy Act than the defendant argued for.
1927	Blodgett v. Holden, Collector	Amicus argued that certain sections of the Revenue Act violated the 5th Amendment because they prohibited private gifts, however the Court did not include these arguments in its majority opinion.
1928	Jackson et al. v. S. S. Archimedes	Amicus successfully argued that foreign seamen were not subject to tariffs if paid advance wages while in American ports.
1928	Louis K. Ligget Company v. Baldrige, Attorney General of Pennsylvania	NA
1929	Douglas v. New York, New Haven and Hartford Railroad Company	Amicus successfully argued that ambiguity in state law should lead to an interpretation first that does not violate federal law and should only be struck down if an interpretation to avoid violations of federal law is impossible.
1929	St. Louis and O'Fallon Railway Company et al. v. United States et al.	Amicus successfully argues that rate regulation and the value of the company that determines the formula used for such regulation are inseparable and cannot be considered independent of one another.
1929	Ex Parte Worcester County National Bank of Worcester	Amicus unsuccessfully argued that a national bank should always be considered the trustee in cases of merger with state banks.
1929	Wheeler v. Greene, Receiver of the Bankers Joint Stock Land Bank of Milwaukee	Amicus copied petitioner's argument that joint stock land banks should be subject to less regulation than normal banks because of their narrower focus in agricultural loans and lack of ordinary banking functions.
1929	Interstate Commerce Commission v. United States ex rel. Los Angeles	Amicus unsuccessfully contends that Congress does not have the authority to require interstate railway carriers to abandon existing passenger stations and terminals to construct a new station according to the city's wishes.
1930	Cincinnati v. Vester - Same v. Richards et al. - Same v. Reakirt	NA
1931	Lewis-Simas-Jones Co. v. Southern Pacific Co.	Amicus successfully contributes new precedent to the Court majority's reasoning by arguing the applicability of News Syndicate Co. v. New York Central, 275 U.S. 179.

1931	Memphis and Charleston Railroad Company v. Pace et al.	Amicus successfully contends that the state should have the authority to determine how wide a group of citizens should have a tax levied on them to pay for a new road that affects interstate commerce, not the federal government.
1932	Heiner, Collector of Internal Revenue, v. Donnan et al.	Amicus successfully argued that the Revenue Act contained arbitrary definitions concerning what constituted a gift that was made "in contemplation of death".
1932	General Motors Acceptance Corp. v. United States	Amicus copied petitioner's arguments that the petitioners should have been tried under the National Prohibition Act rather than the Tariff Act.
1933	Nashville, Chattanooga & St. Louis Railroad Co. v. Wallace	NA
1933	Texas & Pacific Railway Co. et al. v. United States et al.	Amicus copied petitioner's arguments that the term "localities" in the Interstate Commerce Act included ports.
1933	Appalachian Coals Inc. et al. v. United States	Amicus successfully argued that 1) the Court needed to consider the purpose of the Sherman Anti-Trust Act rather than focus on the details of the coal corporation's contract and structure; 2) the creation of a corporation would not harm market competition and may even enhance it; and 3) that the lower court erred in determining that the ability to "affect" prices constituted a violation of the Sherman Act.
1934	City of Marion v. Sneed	Amicus successfully argued that a bank that was not located within the state should not be able to pledge its assets to secure deposits.
1935	Morehead, Warden, v. New York ex rel. Tipaldo	Amicus successfully argued that a New York state law empowering a commission to set a minimum wage in relation to the class of service rendered violated the state's constitution alongside other federal laws.
1935	Jennings, Receiver, et al. v. United States Fidelity & Guaranty Co.	Amicus successfully argued that insolvent national banks should be subject to fund tracing to track whether illegal action had taken place.
1935	West et al. v. Chesapeake & Potomac Telephone Company of Baltimore	Amicus copied respondent's arguments that the Court should give deference to the facts provided by the Interstate Commerce Commission.
1936	Whitfield v. Ohio	Amicus provided an extensive list of precedent showing that the states' police power enabled them to prohibit the sale of

		prison made goods, which list the Court cited repeatedly in its majority opinion.
1936	Carter v. Carter Coal Company	Amicus successfully argued that the Court needed to consider the distinctions between interstate and intrastate commerce. Furthermore, the amicus presents evidence that coal production is intrastate in nature and points out that the Guffey Coal Act attempted to regulate all coal production.
1936	United States v. Butler	Amicus successfully argued that the taxation scheme in the Agricultural Adjustment Act was designed to compel member of the agricultural industry to participate and the voluntary aspect of the program was illusory.
1936	Rickert Rice Mills, Inc. v. Fontenot, Collector of Internal Revenue	Amicus successfully argued that the petitioners' impounded funds should be returned immediately regardless of the Court's decision because they had been illegally impounded.
1936	Ashton et al. v. Cameron County Water Improvement	Amicus successfully contends that quasi-government agencies are agents of the state and thus their action should be treated as such.
1936	United States v. Elgin, Joliet, and Eastern Railway Co.	Amicus copied defendant's argument that the Commodities Clause does not prohibit industrial ownership of railroads nor prohibit a railroad subsidiary.
1937	Washington, Virginia, & Maryland Coach Co. v. National Labor Relations Board	Amicus successfully argued that Texas & New Orleans R.R. v. Brotherhood was a controlling precedent in this case.