Research Note

AMICUS CURIAE PARTICIPATION IN U.S. SUPREME COURT LITIGATION: AN APPRAISAL OF HAKMAN'S "FOLKLORE"

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In 1969 Nathan Hakman published a report of his investigation of the role of interest groups in Supreme Court litigation. He found that interest groups filed amicus curiae briefs in only 18.6 percent[1] of the 1,175 "noncommercial"[2] cases decided by the Supreme Court between 1928 and 1966. Participation as amicus curiae illustrates only one aspect of litigation activity, and at that one of the most limited, but Hakman took this as a reliable indicator that interest group activity in the courts was less frequent than was commonly supposed. Based on these findings, Hakman attacked the view that amicus participation was a form of political action. Such a view, he argued, was mere "scholarly folklore" (Hakman, 1969: 199).

Hakman's observations can be understood best in the context of the research tradition which they rejected. Arthur Bentley, writing in 1908, may have been the first social scientist to comment systematically on group influence on the judiciary (Bentley, 1908: 382-399), but it was David Truman's *The Governmental Process* (1951) which offered the first thorough assessment of group lobbying in the judicial arena. Truman offered no quantitative data, but showed how organized interests promoted the selection of "right"-thinking judges, promoted test cases, filed amicus briefs, and otherwise

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[1] It would appear from the numbers Hakman presents that interest groups actually filed amicus curiae briefs in 18.8 percent of the cases, but an apparent error in addition in one of his tables results in the lower percentage.

[2] Hakman's categorization of noncommercial litigation is puzzling. For example, he includes litigation involving labor unions in this category.

provided a key linkage between the legislative and judicial arenas. His examples of litigation activity, given the time period he was describing, necessarily focused on cases which involved the clash of economic interests and generally ignored the litigious activities of noncommercial disadvantaged groups. But his discussion of the inevitably political role of the courts made it clear that interests of all kinds would find it useful and even necessary to move into the judicial arena. In particular he noted the tendency of groups, whatever interests they represented, to seek redress in the courts when their political strength elsewhere had diminished.

Clement Vose's study of the NAACP and restrictive housing covenants was probably the first in-depth analysis of a single group's litigation activities. He was able to describe in minute detail the NAACP's strategy to end housing discrimination. He concluded that its effectiveness was the product of several factors, including the selection of appropriate test cases, the hiring and retention of skilled attorneys, and the longevity and stability of the organization. Vose's approach to the study of interest group litigation strategy later was applied to other groups by Manwaring (1962), Cortner (1968), and Wood (1968). Hakman argued, however, that these group litigation activities were not representative of Supreme Court cases. He found little evidence that organizations actually select test cases. Most noncommercial litigation, he concluded, is highly technical and not of test-case quality (Hakman, 1969: 230).

Hakman went further to contend that groups generally do not engage in judicial lobbying, and that they rarely have "strategies" for doing so. Based on responses to two questionnaires sent to interest group leaders in 1955 and 1961, Hakman maintained that even "'established' or 'permanent' organizations do not play a significant role in influencing the scope or conduct of courtroom controversies" (1969: 245).

Whatever the validity of Hakman's conclusions for the time period he studied, current research on interest group participation casts doubt on their current utility. A legion of scholars has described the judicial lobbying efforts of interest groups. The NAACP Legal Defense Fund's efforts to prevent resumption of capital punishment (Meltsner, 1973), the continuing school desegregation and busing controversy (Kluger, 1976), the never-ending issues of separation of church and state (Morgan, 1968; Sorauf, 1976), and the more recent controversies over gender discrimination (Cowan, 1976; O'Connor, 1980) and abortion (Epstein, 1981), all demonstrate continuing, extensive, and significant interest group activity before the courts.

Meltsner, for example, claimed that the Legal Defense Fund's "cunning staff," of whom he was one, was the key to victory in the death penalty case, *Furman* v. *Georgia* (1972). Belton's study of employment discrimination cases (1978) suggested that control of the litigation, though difficult to achieve, was crucial to interest group success in the courts. Sorauf (1976) found that most of the church-state litigation he studied was controlled by two opposing coalitions of interest groups. Cooperation among organizations in the "separationist" coalition was an important factor in the Supreme Court's acceptance of their position.

O'Connor's *Women's Organizations' Use of the Courts* represents the most recent attempt to examine particular litigation strategies (1980: 16). She found a number of factors contributing to court success.[3] The importance of each factor, however, varied with particular litigation strategies.[4] O'Connor classified the strategies of women's rights organizations according to whether they were oriented toward court victories, publicity, or involvement as amicus curiae. Contrary to Hakman's assumptions, she found that women's organizations had participated in the vast majority of sex-discrimination claims brought to the Court and that the kind of involvement by each group was based on its adoption of a particular strategy (1980: 16). Organizations submitted amicus curiae briefs for a variety of reasons, but chief among them was a group's inability to fund major litigation from the trial court stage. Through interviews with most of the case sponsors, as well as with lawyers who submitted the amicus curiae briefs, she found no women's rights organizations in agreement with Hakman's conclusion that there were but "few instances . . . in which attorneys considered the amicus procedure to be an important part of their litigation strategy" (Hakman, 1969: 237).

The amicus activity of these women's rights organizations reflected Samuel Krislov's observation that "the amicus is no longer a neutral amorphous embodiment of justice, but an active participant in the interest group struggle" (Krislov, 1963:

[3] These factors are: longevity, full-time staff, sharp issue focus, financial resources, technical data, well-timed publicity, coordination with other organizations, coordination between national organization and affiliates, and Solicitor General assistance.

[4] A litigation strategy involves the bringing of test cases in a particular sequence to have the Court expand its earlier decisions.

703). According to Krislov, the Court recognizes this emergent role and often treats the amicus "as a potential litigant in future cases, as an ally of one of the parties, or as the representative of an interest not otherwise represented" (Krislov, 1963: 704). There is other evidence that amicus participation is an important facet of Supreme Court litigation and an effective way for some groups to lobby the courts. Steven Puro, in a longitudinal study of amicus activity in the period 1920 through 1966, examined several organizations' participation and motives for involvement in Supreme Court cases. He found that "underdog groups and those who espouse liberal positions [were] more likely to appear as amicus curiae . . . [and] that their positions were more likely to prevail there" (Puro, 1971: 254-255). Even though Puro found rates of *overall* amicus activity identical to those found by Hakman, who observed noncommercial cases alone, he did identify certain groups that regularly participated and, perhaps more importantly, believed their participation to be important.

Virtually all recent research, therefore, has found evidence of a significant systematic organizational role in Supreme Court litigation. It is time again to ask, like Hakman, whether these well-documented reports are merely idiosyncratic and thus not representative of Supreme Court litigation as a whole, or whether they are merely the most visible instances of a dynamic now deeply embedded in the litigation process.[5]

Amicus curiae participation is but one facet of interest group participation in litigation; certainly it does not mark the limits of such activity. Nevertheless, it is the measure Hakman used and is probably still the best quantitative indicator available. Since Hakman's study, federal court rules concerning standing and class actions have been liberalized in ways which provide some additional incentives to group litigation (Orren, 1976). The rules governing amicus submissions to the Supreme Court have remained uniform,[6] however, and thus it is possible to approximate Hakman's study in a later time period.

Hakman divided all full-opinion Supreme Court decisions from 1928 to 1966 into two groups, "noncommercial" and others,

[5] It is also important to "update" Hakman because his study has been reprinted as late as 1978. See Goldman and Sarat (1978).

[6] According to Robert Scigliano, for a brief period after 1949 the Court appeared "to want the Solicitor General to be more stringent in passing upon *amicus* requests, and he responded (or perhaps overreacted) by denying a large number of them" (1971: 167). However, this short-term phenomenon does not appear to have had any effect on Hakman's findings.

and worked exclusively with the former. He further subdivided his sample into four major categories: civil liberties, political offenders, race relations, and serious social offenders. Each of these categories was further subdivided into specific issue areas.[7]

An exact replication of Hakman's study is impossible for several reasons. Some of his categories are outdated. More important, his classifications could not have anticipated recently developed areas of constitutional litigation such as gender discrimination. Thus, our study maintained the general distinction between "noncommercial" cases and others, but could not use Hakman's subcategories. We therefore classified all 841 noncommercial, full-opinion, Supreme Court cases decided between 1970 and 1980 into 15 subject categories[8] (see Appendix A). Amicus participation was determined by consulting the *United States Reports* and *The Lawyer's Edition of the Supreme Court Reports*. *Per curiam* decisions were excluded because no reporter routinely lists amicus participation in these cases. Like Hakman, we excluded amicus curiae briefs submitted by the Justice Department, state attorneys general, or municipal governments. No distinction was made between amici who merely submitted briefs and those few who also shared in oral argument before the Court.

Hakman divided his sample into three time periods: 1928-1940; 1941-1952; and 1953-1966. He reported that nongovernmental amicus briefs were filed in only 1.6 percent of the noncommercial cases in the first period, 18.2 percent in the second, and 23.8 percent in the third, for an overall rate of amicus participation of 18.6 percent (219 out of 1,175 cases). Because the 1.6 percent figure reported by Hakman for the first time period seemed unduly low, we recounted amicus seemed participation in those cases. The corrected figure, according to our estimates, is 6 percent. Thus, the adjusted "overall" rate of amicus participation from 1928 to 1966 is 19.3 percent.

Even with this adjustment it is clear, as shown in Table 1, that interest group amicus participation in noncommercial cases before the Supreme Court was nearly nonexistent until World War II, that it rose significantly after the war, and that it then accelerated very rapidly in the late 1960s and 1970s.

[7] For a precise breakdown see Hakman (1969: 247-248).

[8] The 1970-1980 period included in this research covers all the noncommercial signed Supreme Court decisions listed in *The Lawyer's Edition of the Supreme Court Reports*, Volumes 27 to 63.

Indeed (though this is not shown in Table 1), in some years in the late 1970s participation was exceptionally high. For example, in 1979, interest groups filed amicus curiae briefs in 67.8 percent of the noncommercial cases (59 out of 87) decided by the Court.

Table 1. Amicus Curiae Participation in Supreme Court Cases 1928-1940, 1941-1952, 1953-1966, and 1970-1980

Years	Percentage with Amicus Briefs N=2016		Total Number of Cases
1928-1940	1.6%	(3)	181
1941-1952	18.2	(67)	368
1953-1966	23.8	(149)	626
1970-1980	53.4	(449)	841

Source: For the 1928-1966 figures, Hakman (1969: 209-210).

Table 2 provides a subject matter breakdown of amicus participation during the 1970s. If we eliminate criminal cases, which are significantly less likely to attract amicus support for reasons advanced by Hakman and others (Hakman, 1969: 228; Casper, 1972), we find that the rate of amicus participation has risen substantially, to 63.8 percent. Since there were relatively few criminal cases on the Supreme Court's docket during the first 20 to 25 years covered in Hakman's sample, it seems appropriate to compare his (adjusted) total of 19.3 percent to the curent 63.8 percent excluding criminal cases. On the basis of these figures, we can easily conclude that amicus

Table 2. Amicus Curiae Participation in Supreme Court Cases 1970-1980

	Percentage With Amicus Briefs		Percentage Without Amicus Briefs		Total Number of Cases per Category
		N=		N=	
Unions	87.2%	(75)	12.8%	(11)	86
Sex Discrimination	77.5	(31)	22.5	(9)	40
Race Discrimination	67.7	(42)	32.3	(20)	62
Free Press	66.7	(16)	33.3	(8)	24
Information Act	63.6	(7)	36.4	(4)	11
Church-State	62.9	(22)	37.1	(13)	35
State-Federal Employees	55.0	(11)	45.0	(9)	20
Military	52.9	(9)	47.1	(8)	17
Indigents	52.5	(32)	47.5	(29)	61
Obscenity	51.6	(16)	48.4	(15)	31
Conscientious Objectors	50.0	(5)	50.0	(5)	10
Elections	48.9	(23)	51.1	(24)	47
Free Speech	44.8	(13)	55.2	(16)	29
Criminal	36.8	(120)	63.2	(206)	326
Others	64.0	(27)	36.0	(15)	42
Totals	53.4	(449)	46.6	(392)	841

participation today is over three times what it was about 40 years ago.

The increase in amicus participation is seen even more clearly by looking at specific issue categories. Four of our coding categories appear to approximate Hakman's. In each of these, as shown in Table 3, interest group participation is now extensive; indeed, in cases involving labor unions it appears to be a regular part of the litigation process.

Table 3. Amicus Curiae Participation in Supreme Court Cases 1928-1966* and 1970-1980

Case Type	Percentage of Cases With Amicus Briefs, 1928-1966 N=		Percentage of Cases With Amicus Briefs, 1970-1980 N=	
Unions	51.2%	(41)	87.2%	(86)
Free Press	46.8	(32)	66.7	(24)
Race Discrimination	27.3	(157)	67.7	(62)
Church-State	26.8	(67)	62.9	(35)

*Source: For the years 1928-1966, Nathan Hakman (1969: 209-210).

Hakman reported that interest groups rarely participated as amicus curiae in noncommercial litigation before the Supreme Court. The term "rarely" might seem inappropriate for describing amicus practice during the last period of Hakman's sample, when such participation occurred in nearly a quarter of the cases. But it seems fair enough to say that amicus participation at that time, though not unusual, was certainly not common. Hakman only measured the number of cases in which at least one amicus brief was filed. Another measure is the average number of amicus briefs filed per case. A measure such as this, which we have not calculated for 1928-1966, would be at least an indicator of the intensity of amicus efforts.

In contrast, we found that amicus briefs are now filed in more than half of all noncommercial full opinion cases, and in two-thirds of the cases when criminal cases are excluded. Multiple submission of amicus curiae briefs also is common. In 26.7 percent of the cases for the 1970-1980 period (n=120) where at least one brief was filed, four or more amicus briefs were submitted by interest groups. The number of briefs reached as high as 57 in *Regents of the University of California* v. *Bakke* (1978). It seems fair enough to conclude, even from this brief

analysis, that amicus curiae participation by private groups is now the norm rather than the exception. Whether or not Hakman was correct in disparaging the "folklore" of studies of judicial interest group activity, the same conclusion could not be drawn today. Like Hakman, we recognize that there are other indicators of interest besides amicus participation. We are now involved in a systematic and comprehensive study of interest group use of the courts. Our preliminary observations certainly accord with the data reported in this note and with the conclusions of many other contemporary students of the subject.

APPENDIX

Classification Scheme for 1970-1980

United States Supreme Court "Noncommercial" Decisions

Elections
1. apportionment
2. voter requirements
3. candidate requirements
4. type of election

Free Speech
1. expression
2. assembly
3. association/loyalty
4. distribution
5. general

Free Press
1. libel
2. prior restraint
3. general

Indigents
1. court fees
2. housing/zoning
3. general

Military
1. court martials
2. general

Race Discrimination
1. employment
2. busing
3. general

Freedom of Information

Others
1. aliens
2. illegitimate children
3. immigrants
4. juvenile delinquents
5. mental health
6. schools

Sex Discrimination
1. employment
2. benefits
3. abortion/birth control
4. general

Unions
1. employee-employer
2. internal affairs
3. federal/state laws
4. general

Criminal
1. search/seizure
2. court procedure
3. habeas corpus
4. prisoner treatment
5. evidence
6. death penalty
7. incrimination/immunity
8. double jeopardy
9. probation/parole
10. attorney
11. speedy trial
12. contempt
13. general

State/Federal Employees

Church-State
1. religious establishment
2. free exercise

Conscientious Objectors

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