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Of a Particular Interest to the United States Supreme Court*

By Bobby Thumma, Senior, Political Science

A member of Highland Enterprises schedules a dinner meeting with an up-and-coming Senator from the state of Delaware. The two have dinner, exchange compliments, and finally talk business. The lobbyist reminds Mr. Senator of the important contributions Highland Enterprises made to the Senator's recent election bid. He tells him that his vote is pivotal in fighting off an environmental bill that would critically wound the company for years. The senator nods, smiles, shakes hands with the man, and finally departs.

This is often the face of interest group influence in politics today. It is a system where money means access, which translates into power. Whether log-rolling in the corridors of Capitol Hill or making phone calls to the President, interest groups have a very large foot in the door of American politics. Interests can directly lobby members of Congress and the executive because such persons are elected, and they must respond to the needs of constituents. Much the same as John Doe, interest groups are constituents; they just happen to have a bigger microphone. But if interest groups are part of the popular political culture, and the Supreme Court, as inferred by Alexander Hamilton in *Federalist 78*, is supposed to operate above the fray of such popular sentiment, can it then be inferred that they have no access to the Supreme Court?

The answer to this question is a firm no. Although one will never see a member of an interest group taking William Rehnquist out to lunch to discuss the Court's business, interest groups are an ever-present and ever-visible aspect of the Supreme Court. The difference between interests involved with the Court and with Congress can be established by examining the tactics that they use. Congressional interest groups may log roll, threaten campaign funds, and challenge voter support, but these tactics simply will not work when one is dealing with nine people who serve for life. The tactics used by court interest groups have evolved into four main strategies: participation in the nomination process, the filing of amicus curiae briefs, the sponsorship of test cases, and the use of media blitzes. With these tactics groups attempt to influence the court as they do other branches of government.

Before diving into the tactics and methods used by these groups, let us examine exactly who these groups are and why they participate. The Supreme Court Database Project, 1952 to 1986, found that "...nearly 75 percent of all organizations have litigated at least once" Court scholar Lee Epstein examined data from 1986-1990; her effort focused the microscope a little further and found that the top filers of amicus curiae briefs are governments at the state, local, and federal level with 24.3%, commercial interests with 24.3%, legal groups with 12.9%, and finally, civil liberties groups with 10.7%. Following these groups, with much smaller percentages, were religious groups, women's groups, labor unions, consumer advocacy groups, and finally, public affairs groups. This trend also holds true for the court's 2000-2001 Docket. From data collected by the author on 72 out of 96 cases, the top filers of briefs continued to be government with 25.3% and businesses with 24.3%. Following these two interests, legal groups had 16.9%, civil liberty groups 12.3%, and public affairs groups 6.4%. As was the case in the Epstein data, the list was rounded out with trace amounts of participation from religious, women's, labor, and health groups.

From all of this data, one can begin to conceptualize some stunning facts. If most of us were to free associate the words "interest group," we would think of organizations such as Greenpeace or the NRA, and probably not Bethlehem Steel or General Motors. Hardly anyone thinks of businesses as interest groups. The fact is that these entities are the major players in court participation. Businesses account for more court participation than religion, women's, labor, and consumer advocacy groups combined. As Epstein states, "...if we exclude governmental concerns, commercial interests sponsored more litigation efforts than all others combined." Corporate America has so much power in the courts that Cynthia Cates and Wayne McIntosh suggest that the gatekeepers of free speech and thus the First Amendment, are increasingly corporations. This is a significant source of power for individuals who cannot be held democratically accountable, but who, in practice, act as the guardians of the First Amendment. If our founders saw the courts as a bastion for individuals to petition their grievances, the founders' vision has been altered considerably. In fact, it seems that the same power circles that operate within the executive and the legislature also operate within our nation's judiciary. The only difference is that these interests and power groups function in a different way. Regardless of the way interests participate, the fact remains that they undeniably *do* participate.

The way that interest groups participate in the court's business is quite different from how they approach elected representatives on issues. One of the favored tactics of groups, especially in recent decades, has been to challenge Supreme Court nominees. In high school civics classes, we are taught that justices are impartial guardians of the law. In fact, we know the reality of the situation is that justices bring a certain ideological scope and perceptual lens to the court. This ideology can have an immediate impact on the court, as coalitions and voting blocs can be formed almost overnight. It is in the best interests of many groups, therefore, to attack a justice's ideology at the onslaught before it turns into full-scale warfare in the court. Karen O'Conner explains that interest groups use their lobbyists to make direct appeals to elected representatives in the same way that they approach them to support a piece of legislation.

Groups also frequently use grassroots campaigns, the media, and member support to pressure representatives. The most obvious examples of these tactics in action were apparent in the nomination processes of Robert Bork and Clarence Thomas. Both men were feared by

liberals, who thought that their nominations could mean the end to the court's leftist leaning on issues such as abortion, civil rights, criminal justice, and First Amendment issues. The two served as a call-to-arms for liberal interest groups, who came out in full force to protest and fight the nominations. As soon as the liberal groups came to the front prepared for battle, the conservative groups flexed their muscle in support of the nominees. The interesting aspect of the Thomas nomination was that many liberal interests that would normally support each other were in conflict due to the fact that Thomas was African-American. Since over 100 groups appear to have participated in the nominations of Thomas and Bork, there can be no doubt that interests are an ever-present body in court nominations.

In addition, groups may directly participate in confirmation hearings before the Senate Judiciary Committee. O'Connor explains, "Since John Paul Stevens was appointed to the court by Gerald R. Ford in 1975, 170 pressure groups have testified for, against, or about the ten nominations that have resulted in senate confirmation hearings." Interests can summon important members of the civic, legal, or economic communities to testify for or against the nominee. This was the case in the Thomas nomination, as prominent members of the NAACP testified for him and prominent members of women's rights groups testified against him. Groups often call on lower court judges, historians, and respected law professors to aid in the confirmation hearings. Interests hope that, by doing so, they can present compelling evidence for Representatives to take the preferred course of action regarding the nomination. The truly provocative aspect of each of these approaches is that they enter public opinion and popular sentiments into the one branch of government that was designed to be void of these two characteristics. Of course, this is not done directly, since justices are not elected, but through the subtle pressures of interest groups, the public's sentiments do seem to enter the marble building that sits on East Capitol Street. Maybe this is why Justices experience the so-called "confirmation conversions" during Senate questioning. Could it be that they switch ideologies during questioning to please interests and thus, the general public if their own ideology is not in sync with that of the rest of the nation? It would certainly make sense for a nominee to answer questions in a way that would please the general public so that they are easily confirmed. However, regardless of whether or not confirmation conversions are caused by public or interest pressures, it can be stated that the confirmation process is touched by popular politics as much as a Senate or Presidential campaign. No office of the Federal government is out of the fray of the political will of the nation and the Supreme Court is no different.

Moving away from the nomination and confirmation tactics groups use to influence the court's make up, there are also tools available to groups to pressure the court directly. The first of the two methods is the sponsorship of a test case. In a study conducted by Patrick Bruer of 712 interests, it was found that they would sponsor litigation for a variety of reasons. His study concluded that groups participate based on "...policy opposition faced by the group in other areas, the scope of the group's interests and its policy focus, and the legal environment." The sponsorship of a test case can serve as an important litmus test in determining the feel of the legal environment. Groups often sponsor a case solely for the purpose of determining whether or not the court considers an issue ripe for adjudication. In this aspect, a group has nothing to lose and certainly something significant to gain if the court chooses to grant certiorari.

Along with determining the contemporary legal environment, test cases may also represent the only available venue to politically disadvantaged groups. In this aspect, test cases

can also serve as an important stepping-stone for social or Constitutional questions. Many groups recognize the permanence of a Supreme Court ruling and have thus been compelled to sponsor litigation. Using this tactic, groups monetarily sponsor litigation by claiming the group itself has standing to sue or, if they do not have standing, by paying for a case that someone else is bringing forth. The NAACP, in its sponsorship of *Brown v. Board of Education of Topeka Kansas*, utilized a classic example of this method. Through the case, the NAACP won an important civil rights victory that may have taken years if traditional legislative lobbying efforts had occurred. By sponsoring such lawsuits, groups that may not have the political clout to pursue interests in the executive or legislature can go on the offensive and challenge statutes or policy decisions head on. Epstein explains, "...groups often supply litigants with attorneys and present legal arguments to the court." When appeals to Congress and to the President have been exhausted, there cannot be a better way of pushing an initiative than having one of your own attorneys argue your side before the Supreme Court, especially if you face a political disadvantage. This is apparent in Richard Cortner's argument that if such groups "...are to succeed at all in the pursuit of their goals they are almost compelled to resort to litigation."

Although supplying the funding for a case is a crucial step, it is simply not enough. Over the past few decades, it has been beneficial for sponsors to "prime" the case for the court. Lee Epstein explains that groups utilize social science evidence to highlight implications of a court ruling on certain members of society who are usually represented by the interest. Louis Brandeis, who represented the National Consumers' League in *Muller v. Oregon* to secure protective rights for women workers, made this tactic famous. While on the case, he called upon the NCL to gather facts and statistics, which were then compiled and submitted to the court. The court esteemed the brief, which was 113 pages long and only contained about 2 pages of legal argument, and thus, the famous "Brandeis Brief" was born. Since then, groups now utilize a combined approach to test cases. First, they will supply the funds and attorneys to try a case, and secondly, they will submit a detailed brief filled with graphs, charts, and statistics showing the court the harms or benefits of a particular ruling. As was observed in the confirmation process, information can be an influential element in the process. The only stumbling block to this method is the tremendous cost a group can incur from undertaking it. This cost is the main reason why businesses are so influential in American politics today. Simply put, they can afford it.

For those groups who cannot afford test case sponsorship, and those who can, there is another avenue open for case participation. This strategy is the submission of an amicus curiae brief. Amicus curiae, when translated from Latin, literally means "friend of the court;" groups utilize these briefs to let their opinions on a particular case be known. At one time, such briefs were considered neutral, but as Karen O'Connor explains, "...amici are now more appropriately viewed as friends of one of the parties involved." In this respect, groups are not befriending the court; but rather, they are showing their support for the appellant or appellee. Although research and time is put into these briefs, they are nowhere near as expensive as other methods of influence. Groups hope that by submitting such briefs they can provide the justices with new types of insights and information that will influence the outcome of a case. Significant amounts of research usually go into the briefs, which can contain graphs, charts, spreadsheets, and statistics. Groups will often utilize these briefs to state an opinion in a particular case without becoming directly involved. Throughout recent years, amicus participation has skyrocketed, and

the trend continues to this day. The briefs, which can be one to several hundred pages in length, have become an important vehicle for groups to express their ideological, economic, political, ethical, and even religious convictions over a case. Some have also suggested that groups file amicus briefs in order to assist in “paring down other issues.” These other issues may seem minor to the two groups involved directly in the conflict, but there could also be groups whom are indirectly involved and thus, the decision could cause harm or gain for a group not involved. An example of this would be if a case that sought to limit carbon-dioxide emissions from chemical plants came before the Court. Although not directly involved in the case, an owner of a pool company may submit an Amicus brief showing the damage that will be done to his business because of high chemical prices if the court were to decide against the chemical company and make them clean up the carbon-dioxide emissions. The pool company owner has absolutely no standing in the case but he brings in other factors and variables that may be overlooked or forgotten when the justices decide.

Along with the need of some interests to illustrate to justices the minor and major issues of a case, groups may also participate at the request of other groups (Epstein 346). For example, if the Ford Motor Company were involved in a labor rights dispute, it may call upon other industries to file briefs to show the impact of a court decision on the entire automobile industry. Using such a tactic, groups often form coalitions and support each other on many different occasions. Next, amicus briefs may be filed if an interest supports a case, but is unhappy with the argument that is being put forth by those directly involved. This is basically a concurring opinion in which groups state that they agree with the underlining question that is being asked of the court but for different reasons. Epstein explains “like-minded groups use amicus filings as a way of presenting arguments that cannot be made by the party to the lawsuit.” In this regard, an amicus curiae petition can bring issues and concerns into a case that may have been ignored otherwise. The bottom line in amicus curiae participation is the presumption, be it true or false, that a well researched and well written amicus brief could be the ultimate determining factor in a case. Although this presumption may seem naïve in nature, for some groups it is the only path open for them to impact the courts and society.

The final tactic that interest groups often use to influence the court, and one that is usually accompanied by one of the previously mentioned strategies, is manipulation of the external environment. By taking actions such as sponsoring vigils, marches, protests, and commercials, groups attempt to influence court decisions. As David Easton states in his *Analysis of Political Systems*, variables such as economics, demography, personalities, and political and social structures “constitute a major set of variables...that help to shape the kinds of demands entering the political system.” In this example, the political system is the United States Supreme Court, and the interest groups are supplying the demands in the form of environmental stresses that occur when public opinion is entered into the equation of a court case. By staging protests and blitzing the media, groups can accomplish a number of things. First, they can gain public exposure, which increases issue saliency and can increase membership roles. Second, by using these tactics, groups can inevitably bring a case into the public arena and affect public perceptions and sentiments. A good example of the use of this strategy can be found by examining the time period when the court decided *Webster v. Reproductive Health Services* (492 U.S. 490). During this time, pro-life and pro-choice groups held vigils, marched down the Mall, and were basically at each other’s throats on the steps of the Supreme Court. As Lee Epstein

explains, "...pro-life and pro-choice forces treated the court as if it were Congress considering a piece of legislation, not a judicial body deliberating points of law." Although we will never know the full impact, if any, of approaches such as vigil holding and marches on court psychology, it can be stated that the justices are aware of such activity, and they *may* consider it when ruling on a case.

Along with these more forceful approaches, interest groups have other means at their disposal for environment manipulation. Groups will often utilize media blitzes to raise public awareness and to rally public support for a cause. This tactic can effectively turn a case into a national question rather than just simple cut and dry litigation between two parties. By buying media time for commercials or advertisements, interests can often get other interests and members of government involved in the conflict at hand. This, in turn, can change the way the case is debated and turn the case onto the full national spotlight. Once groups have gotten the media's attention, they then resort to spin techniques to effect how the media is reporting the case before and after it is decided. The latter is most important because an interest can influence public perceptions of a ruling almost immediately after it is handed down. This can cause the public, and legislators, to question the legitimacy of a court ruling if the case is spun the correct way. The spin that is placed on a ruling can determine whether it is esteemed or loathed by the public, and this is a very powerful tool that interests have at their disposal. As is stated in O'Connor's piece, groups "...attempt to put a positive or negative spin on a judicial decision immediately after it is handed down much in the way campaign aides try to spin reporters after major Presidential debates." The bottom line is that groups utilize the media to affect public opinion and to highlight cases for public review. Anyway, isn't it rather amiable of these interests to bring such matters to the public eye? After all, our government is by the people and for the people, and we should hold government officials accountable, right? The problem here is two-fold. First, only the groups with proper influence and money have access to media manipulation techniques and thus it is the powerful interest groups and the media that decide which cases should be put under the microscope of public scrutiny. Second, the Supreme Court was designed by our founders to be a non-political body that would not be swayed by the popular sentiments of the nation that are fickle and ever-changing. While these ideals may seem Cinderella-like today, since we know that the court is inevitably a political body, they were nonetheless ideals under which the court is supposed to operate. This is simply not the case if the court is being affected by interest-influenced media coverage and, thus, public opinion. The frightening aspect of this is the degree to which popular opinion, supported by interest groups and not law, influences court decisions. Although such a degree cannot be quantified since justices by no means discuss factors behind their rulings other than those based on the law, the fact is that modern psychological studies indicate that tactics such as protests, marches, vigils, and especially the media influence the perceptions of all of us, no matter how intelligent or prestigious we may be. But, if the Court is affected by public opinion at all, it is probably most influenced by elitist opinion and not that of average Americans marching in the streets for a cause that they feel is just and true in their hearts.

In *Federalist 78*, Hamilton argues that "...the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in capacity to annoy or injure them." Hamilton also explains that the justices should act as "...guardians of the Constitution, where legislative invasions of it had been instigated by the

major group of the community.” Could it then be inferred that Hamilton was speaking of organized interests, or “factions,” as they were known at the time, when he argued for the court and its justices being the protectors of the Constitution against the encroachments of the “major group of the community?” If this is the case, then the Hamiltonian view of the Supreme Court has been eroded immeasurably as interests have plagued the court like an exponentiating bacterium in greater amounts each year. After John Marshall’s decision in *Marbury v. Madison*, which gave the court ultimate and final judicial review, can it also be argued that the court is right in line with the executive and legislative branches as a possible offender to the Constitution? If this is the case, then the prevalence of organized interests in the process of judicial decisions is a very frightening monster. Throughout the nomination and confirmation processes, by sponsoring test cases, filing amicus curiae briefs, and manipulating the media, groups have no doubt cracked the Enigma code for access to the Supreme Court. So is it truly the courts that are the guardians of the American Holy Grail, the Constitution, or is it some of the organized interests who have the power, money, and influence to get a foot in the door of the Marble Temple? It is a question that is both provocative and yet frightening at the same time, and it is one that I will let you decide.

* Sources used in this essay may be obtained by contacting Bobby Thumma, Thumma33@aol.com or Cindy Cates, ccates@towson.edu

Keeping the Federal Government In Check

By Anthony Dudek, Senior, Law and American Civilization

In recent years the Supreme Court has heard a number of cases concerning the distribution of power between the states and the federal government. Over the course of American history, the Court has had a difficult time finding the proper federal balance. This essay briefly explores the changing balance of power between governments in our federal system. Recent changes, I contend, are putting us back on the right course.

While the Constitution (particularly, Article IV and Amendment X) sets federal boundaries, they are, at best, vague, leading to over two centuries worth of battles over demarcation. One thing, however, is clear. To the framers, federalism – properly balanced – was essential to liberty. Federalism, according to Madison, was “a double security . . . to the rights of the people.” This concern for proper balance is evident throughout the Federalist Papers.

During the early years of our republic, federalism tended to operate on a comparatively simple bi-level model, involving relatively separate and independent sovereigns, nation and states. We can trace these roots of the "separate and independent" to the earliest days of the Republic. But, it wasn't until the 1830's that Andrew Jackson, a champion of local and state power, raised the bi-level theory to the status of an official constitutional doctrine. Dual federalism, as we have come to call it, emphasized the separateness of national and state action. Jackson saw government as "sovereign" within its sphere, with each sovereign looking after its own business. Each state had the power to build its own roads, enforce contracts, charter new cities, and the police power, to ensure domestic tranquility and order commercial bargaining among citizens.

The 1930's brought a radical change, ushering in an era of seemingly unlimited national governmental powers. President Roosevelt and his advisers felt that there needed to be more federal authority in order to control states. FDR's "brain trust" emphasized central planning and a synoptic or comprehensive view of government. In order to achieve this, they proffered broad interpretations of Article I, §8, including a vast expansion of the "commerce power" and a generous construction of what was "necessary and proper" for implementing all of the national government's delegated authority. This led, over the course of the latter 20th century, not only to increasing the scope of the national government's economic powers, but to vastly mounting health, welfare, and police powers – traditional realms of state authority. Throughout this time frame, the Supreme Court largely acquiesced to the rise in federal – and what many saw as a corresponding decline in state – control.

Recently, however, the Supreme Court has shown a renewed interest in balancing the powers of federalism. A case in point is *United States v. Morrison* [529 U.S. 598 (2000)]. Christy Brzonkala, a student at Virginia Tech, after being raped, filed suit against her attackers under the federal *Violence Against Women Act (VAWA)*. VAWA provided a federal civil remedy for the victims of gender-motivated violence. In a strongly worded opinion, Chief Justice Rehnquist declared VAWA unconstitutional, for creating a federal remedy for a legal area reserved to state courts. "Every law enacted by Congress," said Justice Rehnquist, "must be based on one or more of its powers enumerated in the Constitution." Rejecting Congress' assertion that the VAWA was well-grounded in the commerce power, the Chief Justice countered that "gender-motivated crimes of violence are not, in any sense, economic activity." Following on the heels of another case overruling the federal *Gun-Free School Zones Act (United States v Lopez, 514 US 549, 1995)*, Morrison signals the willingness of at least five justices (Rehnquist, O'Connor, Scalia, Kennedy, and Thomas) to reassess the large role of the federal government in the federal system.

This reappraisal is long overdue. The Federal government must respect the states' laws and not interfere with the states reserved powers. As the Chief Justice put it, "Constitution requires a distinction between what is truly national and what is truly local."

On Patriotism: Response to a Changed Nation ***By Joe Esmont, Freshman, Political Science***

This essay is not in response to any particular action or rhetoric, but rather it is in response to many of the things I have seen and heard over the past months – the months since September 11th. It is difficult for me to say this, but I feel I must. For those who wish to flame me, to call me un-American, don't bother. For, perhaps the greatest way to show respect for the lives lost protecting our rights is to use those rights. So I beg my 1st Amendment right to say something that is perhaps controversial, that is perhaps not politically correct. I need no conscience other than that of my own.

Many won't want to hear this, but when I hear that those who refuse to repeat a formulaic sentence or stanza are not worth living, and when I hear that we should not afford a trial to a foreigner accused of a heinous crime, and when I hear that we should slaughter their families, I

am afraid I must find and show fault in the logic of the hate spurned by such a fierce love as patriotism. I hope only that my simple rhetoric will not put a damper on the many good qualities brought about by love of our great nation.

I suppose the first thing to put out here is this: I am not a traditional patriot. Not because I dislike our government. On the contrary, it is an amazing well-designed entity. Not because I don't praise those who died to ensure the freedoms of this land -- they have my thanks and praise *ad infinitum*. Not because I don't have feelings for my countrymen, but I love no man more because of where he was born. Not because I'm a rebellious youth disconnected from the government. Before the events of September 11th, I approved of the government far more than most did, and afterwards my admiration has only increased. Not because I'm a cold, heartless monster. In the days following 9-11, I allowed myself to cry, to show my pain, to empathize with the others who lost friends and family. None of these reasons explain why I'm not a patriot. I am not a patriot because patriotism, religious fervor, extreme loyalty to anything, is often group thought – or perhaps, I should say, group thoughtlessness.

I admit that patriotism may have some benefits: sparking unity with others, inciting harder work, and inspiring the better off to give to the poor. But patriotism has a dark side as well. Sadly, history has all too often shown that there is a fine line between patriotism and xenophobia. For patriotism breeds unthinking loyalty, and it is *that* which scares me. It breeds changes in the psyche that can alter what someone is willing to do. It can make us unwilling or unable to compromise. In its largest, most pervasive, form it breeds a kind of mass tyranny. The French Revolution and Germany following World War I are perhaps the most blatant examples of patriotism gone awry – gone to xenophobia.

At this moment, we face a national choice. Arab-Americans, Indians, anyone with a middle-eastern appearance are persecuted by a frustrated public seeking vengeance, throwing unjust blame on anyone they can associate with the crime of September 11th, guilty or not. Such sentiments breed hate crimes by Americans against Americans inspired by the dark feelings patriotism brings with it.

When the “war” began, many said that we should bomb every city in Afghanistan. They felt this way, even as evidence pointed to the transnational funding and location of Al Qaeda. They felt this way even though the attacks would (and did) harm many innocent civilians, people who did no more to harbor terrorist than you or I. Missiles know no friends. “You killed our innocent people, we'll kill yours.” Fair trade, right? I say, “wrong.”

Others propose condemning the “guilty” without full due process. But to this I must ask: Should we deny those whom our admittedly imperfect government accuses the basic opportunities to prove their innocence? Remove Lady Justice's blindfold and offer the beast of ethnic hatred his next meal... in the ranks of our own government? Give even a minute chance, Sacco and Venzeti, the almost automatic condemnation of blacks accused of crimes against whites, or the French Revolution could bear repetition.

Patriotism isn't inherently evil. In its purest form, it can bring forth compassion. Look at the unity of our nation since September 11th. Look at the outpouring of concern for the victims.

But always, *always* remember that patriotism is no excuse for murder, for hatred, for committing the evils committed against us. Pure patriotism brings justice. Not a bullet more, not a drop of blood less.

Among this country's most cherished values are religious tolerance and legal due process.

True patriotism – moderated by thought, not driven by thoughtlessness – should inspire us to protect and defend these values, not to brush them aside in the name of war or anti-terrorism.

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