

Lobbyists before the U.S. Supreme Court

Investigating the Influence of Amicus Curiae Briefs

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Despite the fact that amicus curiae participation is the most common method of interest group activity in the judicial arena, there is little consensus as to whether this means of participation influences the decision making of the U.S. Supreme Court. To redress this state of affairs, this research investigates the affect of amicus briefs on the ideological direction of the Court's decisions, with particular attention given to theoretical and methodological issues that have gone unexplored in previous studies. Analyzing group influence during the 1946 to 1995 terms, the results provide particularly robust evidence that pressure groups are effective in shaping the Court's policy outputs. These findings therefore indicate that elite decision makers can be influenced by persuasive argumentation presented by organized interests.

Keywords: *Supreme Court; interest groups; pressure groups; amicus curiae*

Interest groups are a mainstay in American politics. In their most quixotic form, representatives from pressure groups filled the smoky hallways of the House and Senate patiently waiting for representatives and senators to emerge and willingly hear from the voices of the citizenry. While pressure politics have lost much of this sense of romanticism, due in part to allegations of scandal and corruption, interest groups nonetheless remain a permanent force in Washington politics. And despite the fact that groups are most commonly associated with the elected branches of government—be it through the financing of political campaigns, the dissemination of information to executive agencies, or the everyday lobbying of congresspersons—groups nevertheless play a major role in judicial politics, particularly at the Supreme Court. By setting up test cases and sponsoring cases that others bring into the appellate stages, organized interests are a visible force in the judicial arena. Although interest groups pursue the aforementioned methods with some regularity (e.g., Epstein and Rowland 1991; Wasby 1995), the predominant method of interest group participation in the courts is filing amicus curiae briefs (Caldeira and Wright 1988; Collins 2004). As “friends of the court,” groups present jurists with legal, policy, and social scientific information aimed at the broader policy ramifications of a court's decisions. Furthermore, despite the fact that the name implies neutrality, amicus briefs are, in truth, adversarial, almost always urging the courts to endorse a particular policy outcome (Banner 2003).

While amicus participation is a common occurrence in lower federal courts (e.g., Martinek 2006) and state courts of last resort (e.g., Songer and Kuersten 1995), the most prevalent venue for amicus participation is the U.S. Supreme Court. In recent terms, more than 90 percent of the Court's cases were accompanied by amicus filings (Kearney and Merrill 2000).

Given the frequency with which groups participate in the Supreme Court, it should not be surprising that scholars have dedicated a great deal of research to examining whether these briefs influence the choices justices make (e.g., Collins 2004; Epstein 1993; Heberlig and Spill 2000; Ivers and O'Connor 1987; Kearney and Merrill 2000; McGuire 1990, 1995; O'Connor and Epstein 1982, 1983; Samuels 2004; Songer and Sheehan 1993; Spriggs and Wahlbeck 1997; Vose 1955, 1959). While there is compelling evidence that amicus briefs influence the justices' decisions to grant certiorari (Caldeira and Wright

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1988), there is little consensus as to whether amicus briefs influence the justices' decisions on the merits (McLauchlan 2005, 10; McGuire 2002, 156; Segal and Spaeth 1993, 241; Stumpf 1998, 401; Walker and Epstein 1993, 139). This confusion has manifested itself for a number of reasons.

First, many of these studies have examined only a few groups (e.g., Harper and Etherington 1953; Ivers and O'Connor 1987) or issue areas (e.g., McGuire 1990; O'Connor and Epstein 1982). While these studies may provide valuable theoretical insight into interest group impact on the Court (e.g., Vose 1955; Wasby 1995), such studies are limited in terms of generalizability beyond the foci of their attention. For example, although Hassler and O'Connor (1986) provided evidence that specific groups' amicus briefs play an important role in environmental litigation, it is unclear whether this group influence is limited to environmental law, a function of the groups being studied, or is more generally applicable to Supreme Court litigation as a whole. Second, much of this research analyzes interest group influence over a relatively short period of time (e.g., Epstein 1993; McGuire 1995). As such, these studies' findings may be an artifact of the time period under analysis and therefore limited in terms of applicability beyond the period under investigation. Third, existing research has used imprecise or incomplete measures to gauge the influence of amicus briefs on Supreme Court decision making. The most common method used to measure the impact of amicus briefs on the Court is to calculate the proportion of winning litigants with amicus briefs supporting their position (e.g., Kearney and Merrill 2000; McLauchlan 2005; Morris 1987; O'Connor and Epstein 1982; Rushin and O'Connor 1987; Songer and Sheehan 1993). Typically speaking, this is simply the number of times the litigant with amicus support prevailed divided by the total number of times that litigant participated in the Court. While this measure may appear intuitively appealing, it is, in fact, quite problematic. Specifically, scholars using this measure to determine the influence of amicus briefs on the Court fail to control for more established influences on judicial decision making, most notably the justices' ideological preferences (but see Songer and Sheehan 1993). As such, illustrating a simple correlation between interest group involvement and the Court's decisions does not provide support for a causal relationship between the two. "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"

(Segal and Spaeth 1993, 237). An alternative strategy for investigating amicus influence on the Court involves tallying citations to amicus briefs found in the justices' opinions (e.g., Behuniak-Long 1991; Epstein 1993; Harper and Etherington 1953; Hedman 1991; Kearney and Merrill 2000; Kolbert 1989; Parker 1999). However, this "blunt indicator" is not without its own problems. For example, justices may adopt arguments or respond to amicus briefs without making a direct reference to the briefs (O'Connor and Epstein 1983).¹ Finally, scholars have generally failed to address methodological concerns that implicate evaluating whether amicus briefs influence the justices. In particular, no research has investigated if the influence of amicus briefs is attenuated in cases attracting a large number of amici. This is a particularly serious issue given the dramatic increase in amicus participation over time. Taken as a whole, previous work has clearly resulted in a literature that grows but does not accumulate (Baumgartner and Leech 1998). As such, it should not be surprising that only befuddlement exists as to whether amicus briefs influence the justices' decision making.

To remedy this state of affairs, I investigate a number of unresolved issues dealing with amicus influence in the Court. I begin by establishing that the primary motivation for participating as amicus curiae is to have the justices endorse policies favorable to the groups' interests. This is vital, as virtually all previous quantitative studies (other than those using citation counts) utilize litigation success as the dependent variable. Inasmuch as solicitude for litigation success is only a secondary concern for organized interests, these studies are plagued by the fact they analyze the wrong dependent variable. Next, I discuss why amicus participation is expected to influence the justices' decision making, building on the notion that the amici provide the justices with persuasive communication regarding the broader political implications of a case. I then present my research design and methodology, followed by the empirical results. I close with a discussion of the limits of this analysis, as well as directions for future research.

The Goal(s) of Amicus Participation on the Merits

Interest groups participating as amici curiae pursue policy goals. This is the fundamental assumption underlying most analyses of organized interest participation in the Court, whether it is explicitly acknowledged

(e.g., Collins 2004; Epstein and Rowland 1991; Hansford 2004a, 2004b; Koshner 1998; Krislov 1963; Spriggs and Wahlbeck 1997) or simply implicit in a study's research design (e.g., Caldeira and Wright 1988; Kearney and Merrill 2000; Songer and Sheehan 1993).² At the merits stage, amici pursue their policy goals in at least two interrelated ways. First, interest groups seek to influence the outcome of the Court's decision as it immediately relates to the *parties* to litigation. In civil rights cases, this might mean attempting to secure relief for a particular litigant or supporting the government's alleged infringement on that litigant's rights. However, due to the very nature of the Court's jurisprudence, this goal is likely only an afterthought for organized interests. Because the Court's role is deciding primarily those cases that have substantial importance beyond the particular litigants involved—and because interest groups are surely aware of this fact (e.g., Wasby 1995; Vose 1958)—an amicus curiae is, instead, likely to argue a cause beyond the specific facts at hand in an attempt to influence the Court's decisions as it applies to other citizens who are, or will be, similarly situated as the amicus's supported litigant (e.g., Epstein and Kobylka 1992).

For example, in *Texas v. Johnson* (1989), a case involving the constitutionality of a Texas statute that made it a crime to desecrate an American flag, the amicus brief of Jasper Johns and fifteen other artists, several of whom had been previously convicted under similar flag desecration laws, focused their argument not on relieving Johnson's conviction but instead on limiting the government's ability to impose criminal penalties for artistic expression through the use of an American flag. Simply put, the amici sought to persuade the Court to include flag burning as a protected form of First Amendment expression. Conversely, amicus Legal Affairs Council, a conservative public interest law firm, argued that the flag deserves special protection due to its status as a venerated object. Though these amici offered distinctly different arguments, neither focused on Johnson's conviction; instead they sought to either constitutionally protect flag burning under the First Amendment (the artists' brief) or create a constitutionally acceptable exception to otherwise protected First Amendment rights (Legal Affairs' brief).³ Thus, it should be clear that, even though amici curiae almost always support a particular litigant, it is not primarily for the immediate purpose of relieving or ensuring that litigant's conviction. Instead, they argue their positions for the primary purpose of shaping the Court's policy output as it will affect others in similarly situated positions.

Therefore, the paramount goal of amicus participation is to influence the outcome of the Court's decision as it relates to the *policy* announced in the case (e.g., Epstein 1985; Epstein and Kobylka 1992; Wasby 1995). This differs from focusing on the outcome of a case as it relates to the litigants in that the group might attempt to establish new constitutional rights through precedential rulings or develop favorable guidelines through the Court's interpretation of statutes. *On a case-by-case basis then, the goal of organized interests is to have the justices endorse policies favorable to those groups' interests.*⁴ This follows from the notion that the central significance of the Court in American government is not the Court's individual decisions but instead the general policies it announces through a series of decisions (e.g., Canon 1973). Through a sequence of such decisions, the Court is able to directly shape the decisions of lower courts, who dispose of the vast majority of legal controversies in the United States (e.g., Songer, Segal, and Cameron 1994; Songer and Sheehan 1990), as well as the policies of federal agencies, who are charged with implementing the Court's decisions (e.g., Spriggs 1996). Thus, by influencing the ideological direction of the Court's policy outputs on a case-by-case basis, interest groups, in turn, indirectly influence the ideological dispositions of lower court decisions and the policies of federal agencies, thus seeing their optimal policy preferences etched into law, first by the Supreme Court, and later via responsive lower courts and government bureaucracies. In this sense, the influence of amicus participation follows the hierarchy of the justice system. If groups can shape the ideological directions of the Supreme Court's decisions, and if the Supreme Court's decisions directly affect the ideological directions of lower court decisions, then interest groups are able to indirectly influence the entire justice system. This is likely one of the primary reasons that amicus briefs are such an everyday occurrence in the Supreme Court but are relatively rare in the lower courts.⁵ Having established that the primary goal of amicus participation is to influence the Court's policy outputs, I now move onto a discussion of how amici can influence judicial decision making.

Amici Influence on the Supreme Court

Just as interest groups pursue policy goals in the judicial arena, so too do U.S. Supreme Court justices (Segal and Spaeth 1993). However, the ability of the justices to see their preferred policy preferences

etched into law is inhibited by the fact that the Court is composed primarily of policy generalists. In other words, despite the fact that the justices have attained the experience and education necessary to reach the pinnacle of the judicial hierarchy, they nonetheless operate in an environment of incomplete information (Epstein and Knight 1998, 1999; Maltzman, Spriggs, and Wahlbeck 2000; Murphy 1964). Although some justices may be considered experts in particular areas of public policy, the complexity and diversity of the Court's workload limits the ability of the justices to become specialists in all areas of social policy (Breyer 1998). Thus, to reach decisions that maximize their policy preferences and create what they believe to be efficacious law, the justices often must seek out information to realize these goals. While the lower court record and litigant briefs often contain such information, these sources are generally limited in scope, focused only on the outcome of the case at hand as it relates to the parties and not the broader policy implications of a decision (Birkby and Murphy 1964; McGuire 1993). Contrary to this, amicus briefs often inform the justices of the far-reaching societal consequences that may result from a particular decision (Spriggs and Wahlbeck 1997; Epstein and Knight 1998, 1999). Often, information presented by the amici frames the case in a different legal perspective, provides important technical or background information, discusses the broader policy consequences of a potential decision, and remarks on norms with respect to the interpretation of precedents and legislation (Kearney and Merrill 2000, 745; Spriggs and Wahlbeck 1997, 372). Furthermore, amicus briefs constitute the primary mechanism for the dissemination of statistical information regarding the likely social impact of a decision in the Court (Rustad and Koenig 1993, 94).

Insofar as the justices are interested in the societal consequences of a case, they should be especially receptive to information that speaks to these broader policy concerns. For example, as Collins (2004, 816) noted, justices who are unwilling to discover issues for themselves often seek out this information in amicus briefs. Likewise, justices not persuaded by the arguments of one of the parties, but leaning toward endorsing the policy advanced by that party, may do so because of arguments forwarded in amicus briefs (see also Johnson, Wahlbeck, and Spriggs [2006] on this point with regard to oral argument). In this capacity, amicus briefs "play a role for justices similar to that lobbyists play for legislators: they provide information about the preferences of other actors, who are relevant

to the ability of justices to attain their primary goal—to generate *efficacious* policy that is as close as possible to their ideal points. In other words, just as information permits legislators to make rational decisions, so too does it enable justices to make choices to maximize their preferences" (Epstein and Knight 1999, 215).

Justices themselves corroborate the important role that amicus briefs play in providing them with relevant information regarding the policy impact of a particular decision. For example, Justice O'Connor (1996, 9) explained that "the 'friends' who appear today usually file briefs calling our attention to points of law, policy considerations, or other points of view that the parties themselves have not discussed. These amicus briefs invaluable aid our decision-making process and often influence either the result or the reasoning of our opinions." Justice Breyer (1998, 26) substantiated this assessment by pointing out that "[amicus] briefs play an important role in educating the judges on potentially relevant technical matters, helping make us not experts, but moderately educated lay persons, and that education helps to improve the quality of our decisions" (see also Douglas 1962). In addition, the fact that the Court does not limit amicus participation, despite its increasingly heavy workload, suggests the justices view these briefs as beneficial to their decision making (Caldeira and Wright 1990, 786).

Furthermore, the notion that policy-oriented justices should be receptive to arguments made by amici is consistent with the advice of the leading appellate advocates in the Court, who stress emphasizing how a decision will affect persons who are, or will be, in a similar situation as a party to the case (Stern et al. 2002, 664). Indeed, this is exactly what amicus briefs do—offer the justices alternative and reframed legal arguments aimed at the broader societal ramifications of the case, while advocating for a particular policy outcome (Spriggs and Wahlbeck 1997; Epstein and Knight 1998, 1999). Relating this to the central component of American jurisprudence, the adversarial system, it follows that the justices should act favorably toward the position most persuasively argued. By providing the justices with a plethora of information regarding the likely social consequences of a decision—at the same time advocating for a specific ideological outcome—the amici strengthen the arguments of the direct parties to litigation, buttressing the overall persuasiveness of a particular side of the debate. And although the justices pursue policy goals, they are also "legal thinkers," which implies that they should be receptive to these tools of persuasion

(Epstein and Kobyłka 1992, 310; Spriggs and Wahlbeck 1997, 368). As instruments of persuasive argumentation, it is expected that amicus briefs will lead the justices toward endorsing the “correct” policy outcome, within the constraints they face as ultimately legal decision makers. Put succinctly, it is expected that the justices will endorse the outcome most persuasively argued, not because the amicus briefs mandate this conclusion, but instead because “the methodological and professional conventions of judging make some arguments more persuasive than others” (Lindquist and Klein 2006, 138). Accordingly, the expectation is that, as the number of amicus briefs advocating for the conservative (liberal) position increases, so too will the likelihood of observing a conservative (liberal) decision.⁶

Modeling the Influence of Amici Curiae

To determine whether the proposed hypothesis comports with reality, I examine the influence of amicus briefs on the ideological direction of the Court’s decisions during the 1946 to 1995 terms in all orally argued cases. The data on the Court’s decisions were derived from the Spaeth (2002, 2003) judicial databases, as were most independent variables (with exceptions discussed below). The data on amicus curiae submissions come from the Kearney and Merrill (2000) amicus data set.⁷ Following standard practice (e.g., Segal et al. 1995), the unit of analysis is the case citation plus split vote. The dependent variable captures the ideological direction of the Supreme Court’s decision, scored 1 for a liberal decision and 0 for a conservative decision. Although this dependent variable is an imperfect measure of the Court’s policy outputs, in that it is unable to capture the influence of amici on the policies articulated in the Court’s opinions, it has three advantages over previous studies that utilize litigation success as the dependent variable. First, as argued above, it is entirely consistent with the principal goal of interest groups participating as amici curiae: to influence the Court’s policy outputs. In this capacity, it is able to account for the fact that some amici advocate for conservative policies, while others lobby for liberal policies. As a result, it is a substantially more appropriate dependent variable for gauging the influence of amici than litigation success because it is congruous with interest groups’ primary goal in the Court. Thus, its use has the potential to rectify the confusion surrounding the influence of amici in the Court stemming from previous studies’ use of a

dependent variable that is only of secondary import to pressure groups. Simply put, if amici are effective in shaping the justices’ decision making, this influence should be especially evident through the use of a dependent variable that is compatible with the paramount goal of amici in the Court. Second, this dependent variable is a valid measure of the Court’s policy outputs in that it is able to distinguish decisions based on the ideological direction of the policy, rather than whether the petitioner won or lost. Therefore, unlike a measure of litigation success, this dependent variable is able to recognize, for example, that *Roe v. Wade* (1973) was a liberal policy as the Court determined that a woman’s discretion to have an abortion is encompassed by the right to privacy. As such, it provides information about the broader social impact of the decision (e.g., that the Supreme Court is favorable or unfavorable toward reproductive rights) that cannot be captured by knowing whether the petitioner won or lost the case (unless, of course, one knows that the petitioner argued the liberal or conservative position). Because this information is important for lower courts and federal agencies that alter their behavior on the basis of the ideological direction(s) of the Court’s decisions (e.g., Songer, Segal, and Cameron 1994; Spriggs 1996), this further makes the use of this dependent variable appropriate. Finally, in addition to the theoretical reasons for focusing on the ideological direction of the Court’s decisions, there exists an important methodological benefit in doing so. Namely, since judicial ideology is the most significant predictor of the Court’s dispositions (Segal and Spaeth 1993), by investigating the influence of amicus briefs on the ideological direction of the Court’s policy outputs, judicial attitudes can be controlled for in a much more rigorous manner than previous studies. For example, Collins (2004) controlled for ideology with a simple dummy variable indicating whether the petitioner argued a position congruent with the mean ideology of the Court, while Songer and Sheehan (1993) accounted for judicial attitudes using a precision matching technique. Although tapping into the concept of judicial attitudes, these methods fail to account for variability in the ideological extremism of the Court and preference changes that might manifest themselves over time (e.g., Martin and Quinn 2002).

The key independent variables, *Liberal Amicus* and *Conservative Amicus*, represent the number of liberal and conservative amicus briefs filed in each case, respectively.⁸ To determine the ideological direction of the amicus briefs, I used the direction of

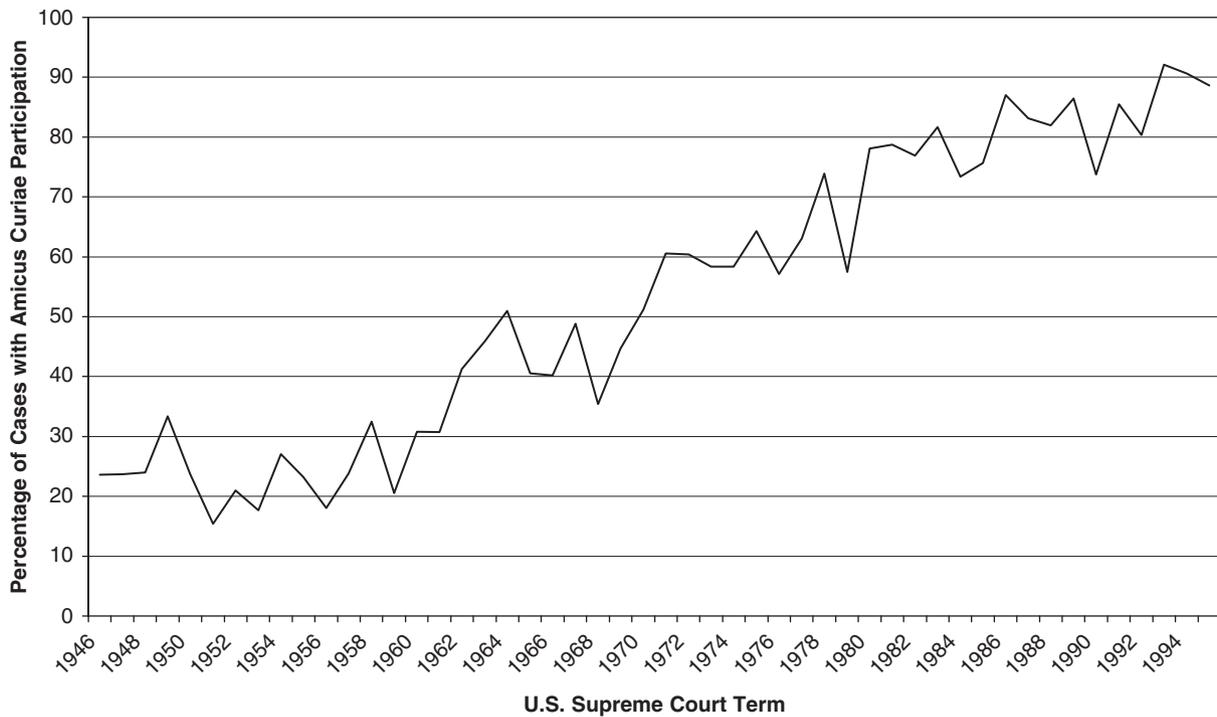
the lower courts decision (as identified in the Spaeth databases) and the litigant the amici supported (as reported in the Kearney and Merrill database); this allowed me to put the ideological direction of the amicus briefs on the same dimension as the ideological direction of the Court's decisions (see also Johnson, Wahlbeck, and Spriggs 2006). For example, if the lower court handed down a liberal decision and six amicus briefs were filed for the petitioner, these briefs are coded in support of the conservative position. Conversely, if the lower court's decision was liberal and six briefs were filed in support of the respondent, these briefs are coded as liberal. A score of 0 for either of these variables indicates that no briefs were filed in support of either the liberal or conservative position, respectively.⁹

To account for other influences on judicial decision making in the Court, I include several additional variables. To control for the influence of the solicitor general (SG) as amicus curiae (e.g., Bailey, Kamoie, and Maltzman 2005; Deen, Ignagni, and Meernik 2003; O'Connor 1983), two variables are used: *SG Liberal* and *SG Conservative*. These variables are scored 1 if the SG filed an amicus brief arguing the liberal or conservative position, respectively, and 0 otherwise. The expectation is that the Court will hand down a decision in line with the position advocated by the SG. To account for the Court's well-known practice of accepting cases on appeal it seeks to reverse (Caldeira and Wright 1988; Segal and Spaeth 1993), I include a variable labeled *Lower Court Direction*, coded 1 if the decision of the lower court the Supreme Court is reviewing was liberal in direction and 0 if it was conservative. The expected sign of this variable is negative, indicating that the Court is more likely to rule in the conservative direction given that the lower court handed down a liberal decision. To control for the import of party resources in judicial decision making (Galanter 1974; Sheehan, Mishler, and Songer 1992), I utilize two variables: *Liberal Resources* and *Conservative Resources*. These are based on the status continuum of litigants adopted generally from Sheehan, Mishler, and Songer (1992; see also Collins 2004). That is, I ranked litigants, according to increasing resources, as follows: poor individuals = 1, minorities = 2, individuals = 3, unions/interest groups = 4, small businesses = 5, businesses = 6, corporations = 7, local governments = 8, state governments = 9, and the federal government = 10. It is expected that the sign of the *Liberal Resources* variable will be positive, indicating that the Court is more likely to rule in the liberal direction

when a high-resource litigant advocates that position. Conversely, it is expected that the *Conservative Resources* variable will be negative in direction, indicating that the Court is more likely to hand down a conservative decision when a highly capable litigant advocates the conservative position. To capture the Court's policy preferences, I utilize the Martin and Quinn (2002) ideology score of the median justice serving on the Court for each term under analysis. These scores are based on a dynamic item response model with Bayesian inference and thus vary over time, with higher scores reflecting more conservative ideologies. Accordingly, the expected sign of this variable, *Ideology*, is negative in direction, indicating that a Court whose median member is conservative will be more likely to hand down a conservative decision.

In addition to these standard control variables, I also include four interaction terms that are intended to capture circumstances that might attenuate the influence of amicus briefs on the Court. First, some suggestive evidence indicates that justices rely more on their ideological preferences in salient cases than in relatively trivial cases (Segal 1986, 939; Spaeth and Segal 1999, 309-11; Unah and Hancock 2006). Such is said to be the case because salient cases are thought to alter the informational environment in which the justices operate (Unah and Hancock 2006). Specifically, salient cases stand out on the Court's docket and are thus accorded a disproportionate amount of attention by the justices and the public. This results in the justices asking more questions during oral argument, pressing for greater clarity on issues, and engaging in more intracourt bargaining than in nonsalient cases (Unah and Hancock 2006; see also Epstein and Knight 1998, 74; Schubert et al. 1992). Inasmuch as the justices are expected to rely more on their attitudes in salient than nonsalient cases, the expectation is that the influence of amicus briefs will be attenuated in these salient cases. To investigate this possibility, I include a variable, *Case Salience*, in the model that is interacted with the *Liberal* and *Conservative Amicus* variables. Following Brenner and Arrington (2002), the *Case Salience* variable is scored 2 if the case appeared on both the *Congressional Quarterly* list of salient decisions and on the front page of the *New York Times* (Epstein and Segal 2000) following the decision, 1 if the case appeared on one list (but not the other), and 0 if the case appeared on neither list. If case salience diminishes the influence of amicus briefs, the expectation is that the interaction between case salience and liberal

Figure 1
Percentage of U.S. Supreme Court Cases with Amicus Curiae Participation, 1946 to 1995 Terms



amicus briefs will be negatively signed, while the interaction between case salience and conservative briefs will be positively signed.¹⁰

Second, I account for the increase in amicus participation over time in two ways. As Figure 1 illustrates, the number of amicus briefs has increased dramatically over the time period under analysis. For example, during the 1946 to 1955 terms, amicus briefs were present in an average of 23 percent of cases; this number increased to 34 percent during the 1956 to 1965 terms, and jumped to 52 percent during the 1966 to 1975 terms. The heaviest period of amicus participation occurred during the 1990 to 1995 terms, where at least one amicus brief was filed in almost 90 percent of cases before the Court. Given this striking increase in the number of briefs filed, it is plausible that the justices view briefs differently in cases attracting a large number of briefs. Indeed, as one Supreme Court law clerk put it, “Sometimes there were one or two amicus briefs, sometimes there were dozens; you would give more attention to the briefs if there were fewer” (as quoted in Lynch 2004, 45). To account for this possibility, I include a variable, *Amicus Proportion*, in the model that is interacted with the *Liberal* and *Conservative Amicus*

variables. This variable represents the proportion of briefs, per term, accounted for in the case. Thus, cases with extraordinarily high levels of amicus participation, such as *Webster v. Reproductive Health Services* (1989; seventy-eight briefs) and *Regents of the University of California v. Bakke* (1978; fifty-four briefs), are differently treated by these interaction terms. If the influence of amicus briefs is attenuated in cases with relatively large numbers of amicus briefs, the expected sign of the interaction term between the proportion of briefs and liberal amicus briefs is negative, while the expected sign between the proportion of briefs and conservative amicus briefs is positive in direction.

To further capture any remaining effects of the drastic increase in amicus participation over time, and to account for the fact the data is in time-series cross-section format with a dichotomous dependent variable, I include a dummy variable for each Supreme Court term save one and estimate the model using probit, as suggested by Beck, Katz, and Tucker (1998). In so doing, the model is able to account for any temporal dependence between observations (cases). In addition to dependence that may be attributed to amicus briefs, other sources include alterations in the Court’s agenda

Table 1
The Influence of Amicus Curiae Briefs on the U.S. Supreme Court, 1946 to 1995 Terms

Variable	Model I	Model II	Model III	Model IV
Liberal amicus	.065*** (.012)	.068*** (.016)	.078*** (.017)	.078*** (.019)
Conservative amicus	-.041*** (.012)	-.038** (.015)	-.039* (.017)	-.036* (.018)
Solicitor general (SG) liberal	.462*** (.070)	.448*** (.071)	.471*** (.071)	.469*** (.071)
SG conservative	-.473*** (.076)	-.481*** (.076)	-.468*** (.076)	-.467*** (.076)
Liberal resources	.041*** (.007)	.042*** (.007)	.041*** (.007)	.042*** (.007)
Conservative resources	-.053*** (.007)	-.055*** (.007)	-.053*** (.008)	-.056*** (.008)
Lower court direction	-.517*** (.035)	-.513*** (.035)	-.519*** (.035)	-.512*** (.035)
Ideology	-.577*** (.051)	-.564*** (.151)	-.579*** (.150)	-.566*** (.151)
Constant	.414*** (.122)	.403*** (.122)	.421*** (.122)	.416*** (.122)
Case salience		.177*** (.044)		.206*** (.047)
Liberal Amicus × Case Salience		-.018 (.015)		-.022 (.016)
Conservative Amicus × Case Salience		-.013 (.016)		-.023 (.017)
Amicus proportion			-3.76 (2.81)	-7.36** (3.04)
Liberal Amicus × Amicus Proportion			-.177 (.548)	.425 (.650)
Conservative Amicus × Amicus Proportion			.259 (.458)	.673 (.516)
Likelihood ratio tests (distributed by χ^2), excluding:				
Liberal Amicus × Case Salience		1.43 [.23]		1.80 [.18]
Conservative Amicus × Case Salience		0.63 [.42]		1.91 [.17]
Liberal Amicus × Amicus Proportion			0.10 [.75]	0.45 [.50]
Conservative Amicus × Amicus Proportion			0.32 [.57]	1.70 [.19]
<i>N</i>	6,162	6,162	6,162	6,162
χ^2	834.6***	851.1***	836.9***	857.2***
Percentage correctly predicted	64.8	65.0	65.0	64.8
Percentage reduction in error	26.8	27.3	27.2	26.9

Note: Numbers in parenthesis indicate standard errors. Numbers in brackets indicate significance levels for likelihood ratio tests. All models include forty-eight temporal dummy variables (results not shown).

* $p < .05$. ** $p < .01$. *** $p < .001$ (one-tailed).

(Pacelle 1991), the changing membership of the Court (Segal and Spaeth 1993), as well as factors exogenous to the Court, such as the makeup of executive and legislative branches (Epstein and Knight 1998).

Analysis

Table 1 reports the results of the probit models that estimate the influence of amicus curiae briefs on the ideological direction of the Court's decisions. Model I excludes the interaction terms and the constituent variables that are not hypothesized to have a directional influence on the Court's decisions. Model II reports the results from the case salience interactions only, while model III reports the coefficients from the amicus proportion interactions only. Model IV reports the parameter estimates from the model with all interactive terms and constituent variables.¹¹ Beginning with model diagnostics, it is clear that neither case salience nor the proportion of amicus briefs

accounted for in the case diminish the overall influence of amicus briefs. This is evidenced by the insignificance of the likelihood ratio tests for these interaction terms, which compare the log-likelihood values of the models including the interaction effects to the log-likelihood values of the constrained (non-interactive) model: none of the interaction terms contribute to the overall explanatory powers of the model.¹² Furthermore, when the technique proposed by Norton, Wang, and Ai (2004) is applied to calculate the parameter estimates and standard errors of these interaction terms, additional evidence is provided to support these findings: none of the interaction terms achieve statistical significance at any conventional levels. In addition, one can observe the overall predictive capabilities of the models to reach this conclusion in a less rigorous manner: all of the models correctly predict roughly 65 percent of decisions, for a percentage reduction in error of about 27 percent. Given this, accompanied by the fact there is no theoretical reason to keep the *Amicus Proportion*

and *Case Salience* variables in the model, the remaining interpretation of the results is based on model I.¹³ To more lucidly illustrate the substantive implications of the results, I rely on a discussion of changes in predicted probabilities for variables of interest, while holding all other variables at their mean or modal values.

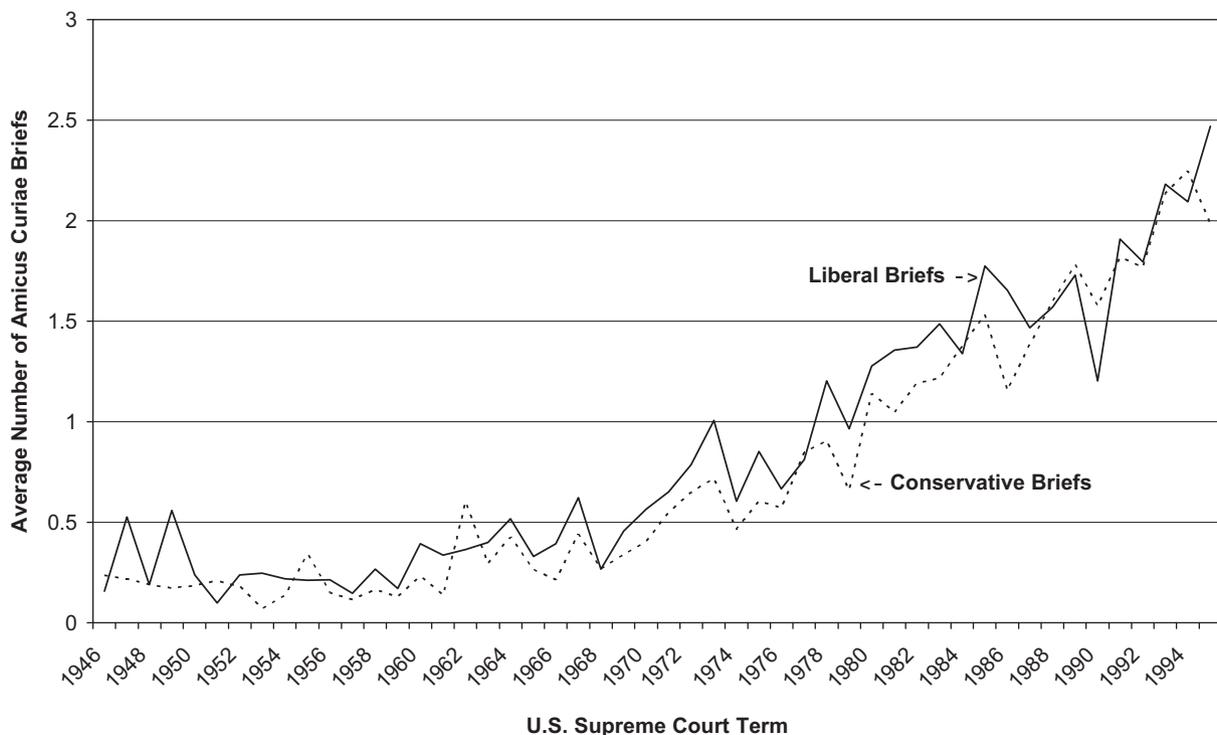
As Table 1 makes clear, amicus briefs play a significant role in shaping the ideological direction of the Court's decisions. When the number of liberal briefs increases from one to three (approximately one standard deviation above the mean), the Court is 5 percent more likely to hand down a liberal decision. Conversely, when the number of conservative amicus briefs increases from one to three (approximately one standard deviation above the mean), the Court is 3.5 percent more likely to rule in the conservative direction. Given this, while there is a statistically significant influence of amicus briefs on the ideological direction of the Court's decisions, the substantive effect of only a few briefs is somewhat marginal. However, when a case is accompanied by lopsided amicus participation—in that a large number of briefs are filed supporting only one ideological position—the influence of the briefs is rather dramatic. For example, when ten briefs are filed in support of the liberal position and no briefs are filed supporting the conservative position, the Court is almost 25 percent more likely to decide a case liberally, relative to a case in which a single amicus brief is filed for each outcome. When twenty-five briefs support the liberal position and ten briefs advocate for the conservative side of the debate, the Court is 39 percent more likely to render a liberal decision, compared to a case in which five briefs are filed for each position. In contrast, when thirty briefs advocate for the conservative position and ten briefs support the liberal perspective, the Court is 30 percent less likely to decide the case in a liberal manner, compared to a case with ten briefs for each side. The substantively significant impact of a large number of amicus briefs urging a particular disposition likely offers partial leverage over decisions such as the affirmative action case of *Grutter v. Bollinger* (2003) in which the conservative Rehnquist Court handed down a liberal decision on a significant issue of public policy; in *Grutter*, more than seventy amicus briefs were filed supporting the liberal position, compared to only fifteen for the conservative side of the debate.¹⁴

However, it is important to note that there are diminished returns once the number of amicus briefs advocating a particular outcome becomes relatively large, thus evidencing that the influence of amicus

briefs is not linear. This fact is accounted for by the probit model since it does not assume, or preclude, a linear influence of the briefs (e.g., Greene 2000, 812-27). In other words, the results indicate that, for example, the substantive effect of a change from zero to five briefs is different than a change from twenty to twenty-five briefs. More specifically, as the number of liberal amicus briefs increases from zero to five, the Court is 13 percent more likely to render a liberal decision. But this influence decreases quite dramatically: the marginal impact of a change from ten to fifteen liberal briefs is 11 percent, the change from twenty to twenty-five is 7 percent, and the change from thirty to thirty-five only increases the likelihood of observing a liberal decision by 3 percent. As such, these results illustrate that, once a case has been thoroughly briefed by organized interests, the addition of concomitant briefs attenuates the overall influence of the briefs.¹⁵

Also note that all of the control variables are signed in the correct direction and achieve statistical significance. First, these results indicate strong support for the important role amicus briefs filed by SGs play in the Court. When the SG argues a liberal position, the Court is 18 percent more likely to hand down a liberal decision; conversely, when the SG advocates for the conservative position, the likelihood of observing a conservative disposition increases by 17 percent. The results also indicate that, as a litigant moves up the resource continuum reported above, the Court is increasingly likely to support that litigant's position. For example, compared to an individual litigant, when a state government argues the conservative position, this results in a 12 percent increase in the probability of observing a conservative decision. Furthermore, the results reveal that, when the Supreme Court is reviewing a liberal decision, the Court is 18 percent more likely to render a conservative decision than when the Court is reviewing a conservative decision by a lower court, thus providing additional support for the Court's practice of taking cases on appeal to reverse the lower courts' decisions. Finally, observe the strong role of ideology in the justices' decision making. For example, compared to the heyday of the liberal Warren Court (1967, median Martin and Quinn score = $-.843$), the most conservative Rehnquist Court (1988, median Martin and Quinn score = $+1.007$) is 40 percent more likely to decide a case in the conservative direction, thus providing robust support for the notion that ideology ranks among the most important influences on the Court's decision making.

Figure 2
Average Number of Amicus Curiae Briefs Advocating the
Liberal and Conservative Positions, 1946 to 1995 Terms



Although the results in Table 1 reveal strong support for the influence of amicus briefs on the ideological direction of the Court's decision making, a plausible counterargument, largely ignored in the literature (but see Collins 2004; Hansford 2004a), can be made that the findings are an artifact of an endogeneity issue surrounding interest group motivations for filing amicus briefs in the Court. Namely, it is reasonable to expect that organized interests might file amicus briefs in cases they are predisposed toward "winning," to appear influential to their members and patrons (but without actually influencing the Court's decision making). In other words, interest groups may not influence the ideological direction of the Court's decisions, but rather the ideological direction of the Court's (likely) decision might influence groups' decisions to participate. I evaluate this possibility in two manners. First, Figure 2 reports the average number of amicus briefs filed for the liberal and conservative positions during the 1946 to 1995 terms. If amici take cues from the ideological makeup of the Court, we would expect to see an increase in the number of liberal briefs (and a decrease in the

number of conservative briefs) filed as the Court moved out of the Vinson era (1946-1952) and into the liberal Warren Court era (1953-1968). Immediately following Warren's tenure as chief justice, we would expect to see an increase in the number of conservative briefs (and a decrease in the number of liberal briefs) throughout the conservative Burger (1969-1985) and Rehnquist Courts (1986-1995). As Figure 2 reveals, this expectation does not comport with reality. The levels of conservative and liberal amicus participation effectively matched one another for virtually all terms under analysis. In fact, the overall correlation between the average number of liberal and conservative briefs is an astonishing .97. Thus, rather than providing evidence for endogeneity, Figure 2 provides strong support that both liberal and conservative interests find a voice in the Court.

An alternative, and more rigorous, method for investigating the possibility of endogeneity is to examine factors that shape the number of briefs filed at the Court in each case. To do this, I regress the variables reported in Table 1 (excluding the variables related to amicus participation) on a dependent variable

Table 2
Endogeneity Analysis: The Effect
of Independent Variables in Table 1
on the Difference in Liberal and
Conservative Amicus Curiae Briefs

Variable	Coefficient	95 Percent Confidence Interval
Ideology	-.152 (.195)	-.536: .231
Lower court direction	-.007 (.046)	-.098: .083
Liberal resources	-.046*** (.009)	-.064: -.029
Conservative resources	.020* (.010)	.0003: .039
Constant	.138 (.160)	-.177: .452
<i>N</i> = 6,162		
<i>R</i> ² = .0171		

Note: Numbers in parenthesis indicate standard errors. Model includes forty-eight temporal dummy variables (results not shown). **p* < .05. ****p* < .001.

that captures the net difference in the number of liberal and conservative amicus briefs.¹⁶ If groups file in cases they are likely to “win,” it is expected that liberal briefs will outnumber conservative briefs when (1) the Court is liberal, (2) the lower court handed down a conservative decision, (3) the liberal litigant ranks highly on the resource continuum, and (4) the conservative litigant ranks relatively low on that continuum. As Table 2 reveals, there is no evidence of endogeneity with regard to the influence of amicus briefs on the Court. First, note that both the ideology and lower court direction variables fail to achieve statistical significance, thus providing no support for the contention that liberal briefs outnumber conservative briefs when the median justice on the Court is liberal or when the lower court handed down a conservative decision. Furthermore, examinations of the confidence intervals surrounding the model’s predictions lend additional support for these findings as the confidence intervals straddle zero (Gill 1999). Second, the coefficients for both the liberal and conservative resource variables are statistically significant and signed in the wrong direction. This indicates that, counter to what one would expect if groups filed in cases they were likely to “win,” liberal briefs outnumber conservative briefs when the liberal litigant ranks relatively low on the continuum and the conservative litigant ranks relatively high. In both circumstances, the liberal position is *less* likely to prevail.¹⁷ Given the above analyses, I can reasonably conclude that the robust support for the influence of amicus briefs on the Court’s decision making is not a function of an endogeneity issue with respect to the

motivations for participating as amici curiae (see also Collins 2004) but instead reflects the important role organized interests play in Supreme Court decision making.

Discussion

This analysis makes a notable contribution to the literatures on judicial decision making and interest group politics in several important regards. First, by explicitly investigating both theoretical and methodological issues that implicate examining the influence of amicus briefs in the Court, this research provides particularly rigorous evidence that elite decision makers can be influenced by persuasive argumentation presented to them by organized interests. Furthermore, by working within a relatively established theoretical framework, examining the influence of amici over a long period of time, and paying close attention to the context of pressure group involvement in the Court, this research is noteworthy in that it is consistent with characteristics Baumgartner and Leech (1998) posited as desirable for adding to the accumulation of knowledge regarding the effectiveness of pressure groups in American politics. Given that so much confusion has manifested itself with regard to the influence of amici in the Court, this is an especially important contribution. Finally, and with particular regard to the study of judicial politics and behavior, this research reveals that decision making on the Supreme Court is more than a function of the justices’ attitudes and values. While it is clear that judicial attitudes are an exceptionally strong predictor of Supreme Court decision making, factors unrelated to this also structure judicial choice. As such, increased attention to the importance of variables related to how norms and other methods of persuasion shape the justices’ decision making will surely benefit our understanding of the choices justices make.

Inclusive of this research, it is now clear that organized interests play an important role in shaping both the Court’s agenda-setting decisions (Caldeira and Wright 1988) and the ideological direction of cases disposed of on the merits. However, it is important to note that this research is limited in that it does not address more subtle forms of amici influence. Although groups are surely interested in shaping the direction of the Court’s decisions, pressure groups are also concerned with having the justices endorse their policy arguments in the Court’s opinions. For example,

in *Texas v. Johnson*, if the Court decided to endorse flag desecration *only* as a means of artistic expression, that could clearly be viewed as a victory for Jasper Johns and the other artists. While I have argued that opinions incorporating the arguments of amici do not necessarily provide evidence of influence, that criticism does not diminish the import of such research. After all, opinions, while an inapposite source for determining the causes of judicial choice, do matter as authorities for the entire U.S. judicial system. As such, future research along these lines will surely contribute to our knowledge regarding the nuanced ways amici can alter doctrinal change in the Court. Although there are a number of analyses that examine whether the Court cites amicus briefs in its opinions, surprisingly little attention has been paid to investigating how argumentation presented to the justices in amicus briefs relates to the development of legal rules and precedents (but see Epstein and Kobylka 1992; Samuels 2004). Undoubtedly, this complementary line of inquiry will aid in our understanding of the considerable roles organized interests play in judicial politics.

Notes

1. In addition to the aforementioned research strategies, Collins (2004) and McGuire (1990, 1995) employed multivariate analyses to examine the influence of amicus briefs on litigation success, while Epstein and Kobylka (1992) and Spriggs and Wahlbeck (1997) investigated whether the justices make use of amicus briefs in their opinions, without counting citations to the briefs.

2. Studies that make policy goals implicit do so by utilizing a dependent variable that measures the amici's influence on the Court's policy outputs. For example, Caldeira and Wright (1988) did not explicitly acknowledge that amici seek to influence the Court's selection process, but then tested to determine if they do, thereby implicitly assuming that amici seek to influence the Court's certiorari decisions. Similarly, Kearney and Merrill (2000) and Songer and Sheehan (1993) did not specifically state that amici seek to influence the Court's decisions on the merits, but then tested for such influence. In so doing, these authors implied that amici pursue policy goals.

3. Of the three additional briefs filed in *Texas v. Johnson* (1989), none of the amici focused their arguments on relieving or upholding Johnson's conviction. The Washington Legal Foundation et al. argued that, because the antidesecration statute regulates specific destructive conduct, and not speech, such a law is perfectly permissible as the state has a compelling interest in preventing breaches of the peace that may result from burning an American flag. The Christic Institute et al. focused its arguments on establishing that flag burning is a form of symbolic speech, requiring stringent First Amendment protection. The American Civil Liberties Union joined the Christic Institute with regard to the symbolic speech issue and also highlighted to the justices how upholding the Texas statute might affect other forms of symbolic political expression.

4. Related to this, interest groups also attempt to influence the rule of law announced by the Court in its opinions (e.g., Behuniak-Long 1991; Spriggs and Wahlbeck 1997). In this role, amici curiae attempt to persuade the justices to adopt, in their opinions, various interpretations of the Constitution or statutes furthered by the amici for the purposes of establishing favorable precedents for similarly situated or future litigants. While clearly an important line of inquiry, it is not addressed here because the focus of this research is determining whether amici *influence* the Court's outputs. Comparing, for example, the arguments advanced by the amici to the justices' opinions does not establish influence since the justices might use references to amicus briefs, similar to precedent, merely as post hoc rationalizations for decisions made on the basis of other influences (e.g., Benoit 1989, 24; Segal and Spaeth 1993).

5. In addition, some note that an attendant goal of membership-based interests is the pursuit of organizational maintenance (e.g., Wasby 1995, 116; see also Moe 1980). The notion that organizational maintenance constitutes a goal for membership-based interest groups stems from the reality that such organizations must consider the effect of their lobbying decisions on their ability to attract and maintain membership support. In contrast, institutional amici (e.g., corporations) do not face this constraint in their lobbying decisions because they do not make membership appeals (e.g., Salisbury 1984). But when analyzed in more detail, it becomes clear that organizational maintenance represents a constraint on membership-based interests or, at best, a secondary goal (e.g., Collins 2004). Such is the case because membership-based interests, identical to institutional amici, pursue policy goals (e.g., Hansford 2004a, 2004b). However, unlike institutional amici, they must consider their ability to both maintain their current base of support and attract new members when making lobbying decisions. Should the group fail to maintain a minimal level of support, it will cease to exist. Given this, attempts to maintain and attract membership support represent a constraint that only membership-based interests face. In other words, organizational maintenance is a necessary condition for the group's survival, but not in and of itself a goal.

6. This hypothesis is consistent with research in social psychology (e.g., Calder, Insko, and Yandell 1974; Chaiken 1980; Insko, Lind, and LaTour 1976) and judicial decision making (e.g., Collins 2004; Johnson and Roberts 2003; Songer and Kuersten 1995; Vigilante, Hettinger, and Zorn 2001), demonstrating that an increasing number of arguments presented on a subject positively influences persuasion.

7. To determine the validity of Kearney and Merrill's (2000) database, I performed a reliability analysis on that data. Specifically, I extracted a random sample of 155 (approximately 2.5 percent) cases from the whole data set. Because it is unlikely that Kearney and Merrill's database reports amicus participation in a case where no such participation occurred, I oversampled cases with amicus participation. That is, the random sample includes 117 cases (approximately 75 percent) where Kearney and Merrill indicated amicus briefs were filed and 38 cases (approximately 25 percent) where Kearney and Merrill indicated no amicus briefs were present. Upon checking Kearney and Merrill's data, no discrepancies were discovered between the data I collected and that data reported by Kearney and Merrill for any of the variables utilized in this project.

8. The data on amicus briefs used in this analysis were collected on the basis of information provided by *U.S. Reports*,

which only reports the positions of the briefs if the positions were identified in the "conclusion" section of the briefs. Because not all amici report their desired result in the "conclusion" section, this resulted in a loss of 18 percent of amicus briefs. To verify that the exclusion of these briefs would not bias the findings, I collected a random sample of forty amicus briefs that the reporter listed as failing to identify their preferred disposition in their "conclusion" section. Of these randomly sampled briefs, twenty advocated the liberal position, nineteen advocated the conservative position, and one was filed for neither party. I further analyzed the types of litigants supported, issue areas in which they fell, terms in which they were filed, and the identity of the amici. No obvious patterns emerged. For similar results with respect to the distribution of "other" briefs as they relate to petitioners and respondents, see Collins (2004) and Kearney and Merrill (2000).

9. I ran auxiliary models using three alternative specifications to capture the influence of amicus briefs. First, I utilized a net advantage variable that was computed by subtracting the number of conservative briefs from the number of liberal briefs. Second, I utilized the log transformation of the *Liberal Amicus* and *Conservative Amicus* variables. Third, I used the square-root transformation of those variables. Substituting these specifications for the variables reported here does not substantively alter the findings, although the log transformation does enhance the extent to which additional briefs reflect attenuated influence on the Court (see also Collins 2004, 818).

10. When the *New York Times* and *Congressional Quarterly* measures are used as dummy variables in independent models, the results do not substantively differ from those reported here. In addition, I ran an alternative model by interacting the salience measure with the variables representing the Solicitor General's (SG's) amicus participation in a case. Neither of those interaction terms achieved statistical significance.

11. The purpose of presenting the four model specifications is to establish whether certain interaction terms achieve statistical significance, independent of other interaction terms, given the high amount of collinearity in model IV (e.g., Brambor, Clark, and Golder 2006).

12. I also examined whether the influence of amicus briefs is enhanced in particularly complex cases by interacting the case complexity measure developed by Maltzman, Spriggs, and Wahlbeck (2000, 46) with the amicus variables. Those interaction terms failed to achieve statistical significance, thus indicating that amicus briefs are not especially effective in legally complex cases, as compared to relatively routine cases.

13. A likelihood ratio test that excludes the *Amicus Proportion* variable indicates that this variable does not contribute to the predictive power of the model. Interestingly, the same test on the *Case Salience* variable indicates that it should be included in the model. As there is no theoretical reason to support the contention that case salience would lead the Court toward a liberal disposition, this finding is likely a result of the *New York Times* overreporting liberal decisions (Epstein and Segal 2000, 76).

14. Of course, it is important to note that, in 2003, the Court also handed down its decision in *Gratz v. Bollinger* (2003), striking down the University of Michigan's undergraduate affirmative action policy for not providing the individualized review of each applicant Justice Powell contemplated in *Regents of the University of California v. Bakke* (1978).

15. I have also investigated whether the influence of amicus briefs diminishes over time by examining the relative impact of

the briefs holding specific terms constant. In short, there was no evidence that an attenuation effect occurs over time. For example, when the number of liberal briefs increases from one to three during the 1950 term, the change in predicted probability is 5.0 percent; during the 1970 term, it is 5.1 percent; and for the 1990 term, it is 5.2 percent.

16. I also examined alternative specifications that (1) used the ratio of liberal and conservative briefs as the dependent variable in a regression model; (2) employed a count of the number of liberal and conservative briefs filed per case in separate ordinary least squares (OLS), ordered logit, and poisson models; (3) utilized the aforementioned tests in a model that included only cases in which at least one amicus brief was filed; and (4) performed Granger causality tests with respect to the change in the number of liberal and conservative amicus briefs filed per term and the median ideology of the Court. All of those results are consistent with the findings reported above.

17. When the SG variables are included in the model (and the dependent variable is adjusted to remove the SG's amicus briefs), the results indicate that liberal briefs outnumber conservative briefs when the SG files a liberal amicus brief (and the opposite when the SG files a conservative amicus brief). Though statistically significant, the effect of an amicus brief filed by the SG increases the difference in liberal and conservative briefs by less than one-third of a brief, thus providing further support that endogeneity is unproblematic in this analysis.

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