12-2013

Friendly Fire: Amicus Curiae Participation and Impact at the Roberts Court

David Hooper Scott
University of Tennessee - Knoxville, dscott19@utk.edu

To the Graduate Council:

I am submitting herewith a dissertation written by David Hooper Scott entitled "Friendly Fire: Amicus Curiae Participation and Impact at the Roberts Court." I have examined the final electronic copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in Political Science.

John M. Scheb, Major Professor

We have read this dissertation and recommend its acceptance:

Anthony J. Nownes, Michael R. Fitzgerald, Patricia F. Freeland, Carl A. Pierce

Accepted for the Council:
Carolyn R. Hodges

Vice Provost and Dean of the Graduate School

(Original signatures are on file with official student records.)

Friendly Fire: Amicus Curiae Participation and Impact at the Roberts Court

A Dissertation Presented for the
Doctor of Philosophy
Degree
University of Tennessee, Knoxville

David Hooper Scott
December 2013

Dedication

To *Natalie*, my cherished wife, who has empowered me to carry this project from genesis to fruition in a timely manner.

To *Caleb*, my little buddy, whose smile brightens my days, and whose sanguine soul brings joy to my life.

Acknowledgments

I owe a deep gratitude to many who have mentored and assisted me on this project. First, I thank my dissertation committee chair, Dr. John Scheb, whose guidance has proved invaluable as he has shepherded me through this dissertation from conception to completion. His knowledge and practicality have greatly improved this work, both theoretically and methodologically. More importantly, his example of professionalism and interest in my success in graduate school and beyond is greatly appreciated. I also thank Dr. Anthony Nownes for his extensive contributions to this dissertation – not only for his substantive guidance pertaining to interest group literature and methodological considerations, but also for his sage advice that kept me focused on the task at hand, that steered me clear of common pitfalls that many who enter the dissertation labyrinth fall prey, and for his refrain that the search for the perfect can often be the enemy of the good.

I also thank Dr. Michael Fitzgerald, Dr. Patricia Freeland, and Dr. Carl Pierce, who have graciously devoted their time and energies serving on my committee. My dissertation is better because of their presence and constructive comments and suggestions. I owe Dr. Fitzgerald an extra measure of gratitude for the mentoring that he has provided me throughout my time as a graduate student at the University of Tennessee. Dr. Fitzgerald has been a role model to me for what it means to teach with excellence in the academy, while genuinely caring for students, both in and out of the classroom. I thank him for his advice and example.

I am also grateful to Dr. Hemant Sharma for his generous assistance with much of the statistical analysis that is contained in this dissertation. His keen knowledge helped me navigate through unfamiliar statistical waters in which I might have drowned without his aid.

Lastly, I must thank my family. I thank my parents, Frank and Diane, for all the love and spiritual, emotional, and financial support that they have provided to me over the years. They have encouraged me to pursue my education and to not underestimate myself. I hope that this dissertation, in some small way, honors all that they have poured into me. Most importantly, I thank my wife, Natalie, who gave me her heart and who has given me her support throughout our marriage. She willingly embraced my decision to change careers and pursue this doctoral degree, and she has been unwavering in her encouragement ever since. She has motivated me when I needed motivation, and she has stood beside me throughout. I thank her for joining with me in my pursuit of this academic vocation.

Abstract

This dissertation explores the nature and extent of amicus curiae participation and impact at the Roberts Court. While previous literature has addressed amicus activity and influence in prior eras of the Court, in specific issue areas, and in specific cases, none has focused in a systematic way on the Roberts Court. Compiling data from the 2007-08 through 2011-12 terms of the Roberts Court, this study first examines the levels and categories of amicus participation during this time period. Amicus activity at the Roberts Court is ubiquitous, and exhibits an "arms race" phenomenon, being relatively ideologically balanced.

Second, this study analyzes the impact of amici on the ideological direction of the justices' votes at the Roberts Court. To address this topic, a number of statistical models are estimated, controlling for other known influences on judicial decision-making. The results demonstrate that amicus briefs positively impact the direction of justice votes across the ideological spectrum in both routine and politically salient cases. When, how, and to what degree amicus briefs matter depends on the level of amicus brief disparity, the ideology of the justice, the issue area of the case, and the prestige of the amicus participants involved. The greater the amicus brief advantage in a case, the greater the amicus influence. Moderate justices, as a rule, are more influenced by amicus briefs than more ideologically extreme justices. However, unlike amicus briefs, an advantage of amicus cosigners in a case typically does not impact the direction of the justices' votes.

These findings shed light on the larger debate in the judicial behavior literature regarding whether justice votes are simply a result of judicial attitudes (attitudinal model), or if legal rules and arguments (legal model), and/or public opinion (interest group model) shape judicial decision-making. While affirming that judicial attitudes are the most significant predictors of the

justices' votes, the results indicate that the legal persuasion model best describes amicus influence. Amicus curiae briefs matter for the relevant information they provide to the justices, and most justices, regardless of ideology, are impacted by this information.

.

Table of Contents

List of Tables

List of Figures

Chapter 1: Introduction and Literature Review

The federal courts were intended by the Founders to be the protectors of fundamental rights and independent, dispassionate arbiters of constitutional meaning. The contention of the Founders was that courts would be the "least dangerous branch" (lacking force and will, but merely possessing judgment) (*Federalist No. 78*, Hamilton 1788), and the history of federal judiciary shows that it has been the least powerful of the three branches (Mondak and Smithey 1997; Silverstein and Ginsburg 1987). The federal courts are constrained by presidential appointment power and congressional control over their jurisdiction, organization, and size. Thus, the Judiciary is dependent upon its own mythology (Casey 1974), popular support (Adamany and Grossman 1983; McGuire and Stimson 2004), and the support of the other branches to compensate for its political weaknesses (Dahl 1957; Flemming and Wood 1997). Because of this, federal courts have generally acquiesced to the expansion of federal power (Silverstein and Ginsburg 1987), and the ideological orientation of the Supreme Court generally corresponds to attitudes/mood of the electorate (Dahl 1957; Funston 1975; Mishler and Sheehan 1993; Flemming and Wood 1997; McGuire and Stimson 2004). Inconsistent with its popular countermajoritarian reputation, the literature shows that the Supreme Court is often a part of the dominant national political coalition (Dahl 1957; Funston 1975), and its decisions are most often consistent with public preferences, even when they protect minority interests (Barnum 1985). Accordingly, despite the Judiciary's status as an independent institution, it is evident that justices adjust their decisions at the margins "toward a compromise that avoids active political opposition and pays some attention to what the public wants" (Flemming and Wood 1997, 494).

Scholars have long known that judges are influenced by a number of political and extra-legal actors, including the other branches of government, the media, public opinion, and, most

germane to this study, interest groups. Ambiguities in the law and conflicting legal precedents allow judges to exercise significant discretion in reaching decisions (Samuels 2004, 1-2). This context makes the United States Supreme Court (USSC) ripe for amicus curiae influence.

The most controversial and closely watched case of the Roberts Court era – *National Federation of Independent Business v. Sebelius* (2012),[1] involving the constitutionality of the Patient Protection and Affordable Care Act (PPACA) – is illustrative of the impact that amici curiae can have on the USSC in an uncertain and hotly contested legal context. In an unforeseen move to most USSC observers, the Roberts Court ruled 5-4 that, although the PPACA's individual mandate, which required an individual to purchase health insurance or pay a fine, was not a valid exercise of Congress's commerce power, the mandate was constitutional under Congress's taxing power. Yet, also as part of the holding, the Roberts Court ruled 6-3 that the PPACA's Medicaid expansion exceeded Congress's powers by unduly coercing states to adopt such an expansion.

The consolidated PPACA case was full of intrigue, involving the signature legislative achievement of Barack Obama's presidency, and decided in the height of a hotly contested presidential election. The case attracted a record-breaking 136 separate amicus briefs, plus two USSC-appointed amici.[2] It was not surprising that the case split 5-4 amongst the justices

[1] *National Federation of Independent Business v. Sebelius* (2012) was the lead docket (11-393) of the broader consolidated PPACA case, including *Department of Health and Human Services v. Florida* (11-398) (2012), and *Florida vs. Department of Health and Human Services* (11-400) (2012).

[2] A flavor of the variety of amici curiae participating in the in the PPACA consolidated case: the American Association of Retired Persons (AARP), American Academy of Actuaries, Blue Cross and Blue Shield of Massachusetts, Cato Institute, Montana Shooting Sports Association, U.S. Senator Rand Paul (R-KY), U.S. Speaker of the House John Boehner (R-OH), U.S. Senate Majority Leader Harry Reid (D-NV), NAACP Legal Defense and Educational Fund, Inc., Lambda Legal Defense Fund, Inc., Governor of Washington Christine Gregoire, AFL-CIO, Benjamin Rush Society, Alliance Defense Fund, American Nurses Association, American Center for Law and Justice, Foundation for Moral Law, Liberty Legal Foundation, Rutherford Institute, state of Oklahoma, state of Maryland, Independent Women's Forum, National Restaurant Association, American Medical Student Association, American Cancer Society, Christian Medical and Dental Association, Washington and Lee University School of Law Black Lung Clinic, Tax

regarding the primary constitutional question of the case. What was of great surprise, however, was the fact that Chief Justice John Roberts – and not the usual "swing justice" Anthony Kennedy – served as the pivotal 5th vote, joining with the four liberal justices to form the majority.[3] The decision in the PPACA case was widely viewed as a defining moment for the Roberts Court and for the Chief Justice. Roberts was praised by many observers, particularly those who agreed with the decision, for tactfully and wisely rising above partisan concerns, avoiding judicial overreach, and recognizing the importance of maintaining the legitimacy of the USSC. Others noted that Roberts strategically planted seeds of conservative victories in federalism cases down the line in his opinion by soundly rejecting the Obama administration's arguments basing the constitutionality of the PPACA on Congress's power to regulate interstate commerce. Seen in this light, the Chief Justice was not a traitor to the conservative cause, but a Trojan horse who allowed liberals to achieve a Pyrrhic victory, with the aim of winning the longer war.

The two Court-appointed amici were requested to advocate positions not supported by any of the parties in the case, but which the USSC wished to consider. The first Court-appointed amici – H. Bartow Farr, III – was asked to advance the position that the individual mandate could be completely severed from the rest of the PPACA, saving the remainder of the legislation if the individual mandate was struck down. Given the majority's opinion upholding the individual mandate, it was not necessary for the majority to address this position. The second

---

Foundation, along with many individual economists, constitutional law scholars and law professors, physicians, and state legislators, among numerous others.

[3] This phenomenon only occurred one time in the Roberts Court era prior to the 2011 term (Howard 2012, 87) (See *Jones v. Flowers*, 547 U.S. 220, 239 (2006)). Interestingly, this same voting alignment appeared once more in the 2011 term, in the much anticipated case of *Arizona v. United States* (2012), in which Chief Justice Roberts joined with the four liberal justices in striking most sections of Arizona's immigration law based upon the doctrine of federal preemption.

Court-appointed amici – Robert A. Long, Jr. – was requested to advocate the position that the Anti-Injunction Act deprived the USSC of jurisdiction to hear challenges to the constitutionality of the individual mandate. Ultimately, the majority opinion considered and rejected the arguments of Robert Long regarding the Anti-Injunction Act serving as a jurisdictional bar.

In addition to the two Court-appointed amici, by my count, the justices explicitly cited or referenced 13 different amicus briefs in their majority, concurring, and dissenting opinions in the PPACA case: Brief of United States (multiple times); Brief for America's Health Insurance Plans et al. (once).; Brief for Economists (twice); Brief for Sen. Harry Reid et al. (once); Brief for Service Employees International Union et al. (once); Brief for David Satcher et al. (once); Brief for National Health Law Program et al. (once); Brief for State of Maryland and 10 Other States et al. (twice); Brief for Barry Friedman et al. (once); Brief for Commonwealth of Massachusetts (twice); Brief for American Association of People with Disabilities et al. (twice); Brief for Governor of Washington Christine Gregoire (once); and Brief for Health Care for All, Inc., et al. (once). Of these amicus briefs, the Brief of the United States provided by the Solicitor General was, not surprisingly, given the most attention in the justices' opinions. While many of these 13 amicus briefs were cited or quoted to support the justices' opinions, others were cited or quoted by the justices to argue against the position which the brief advanced.

However, it seems that the amicus curiae briefs which had the most impact on the holdings of the PPACA case were briefs that were not explicitly cited by the justices. Two amicus briefs in particular stand out in this regard. First, Vanderbilt University Law Professor James Blumstein's amicus brief has been credited with shaping that portion of the USSC's decision pertaining to the constitutionality of the PPACA's Medicaid expansion (Patterson 2012; Greenblatt 2012). The rationale of Chief Justice Roberts in his majority opinion supporting the

position that the PPACA's Medicaid expansion mandate on the states was unenforceable seemed to be directly drawn from the legal arguments advanced in Blumstein's brief. Under the terms of the PPACA, the states were obligated to expand their Medicaid coverage for all those whose incomes were under 133 percent of the federal poverty line, significantly increasing the costs of coverage for the states. If states did not accept the mandated expansion of coverage eligibility, they would no longer be eligible to receive Medicaid matching funding from the federal government.

Blumstein was the driving force behind persuading the state of Florida to make the Medicaid challenge a part of their litigation before the USSC. In his amicus brief (2012, 2), he argued that "Medicaid, enacted under the federal government's spending power, is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." Citing precedent in his brief that the USSC had previously held that the relationship between the states and the federal government was analogous to a contract, Blumstein argued that it was coercive for the federal government to change the terms of the contract by conditioning the receipt of funding for existing Medicaid programs on acceptance of new terms (2-3). Blumstein's brief goes on to argue that the Medicaid expansion was a form of bait-and-switch that the states could not have reasonably foreseen when they originally signed up for Medicaid: "[a]cting as a contract modification, [the PPACA Medicaid mandate] is coercive because it puts states to a set of choices that the federal government may not impose on states" (3). Referring to prior legal precedent, Blumstein adds that the Medicaid expansion "also violates the *Pennhurst* clear-notice obligation because that obligation accrues in this case at contract formation, not contract modification" (3).

In his opinion, Chief Justice Roberts essentially adopted this contractual argument advanced by Blumstein (45-51). The Chief Justice argued that the legitimacy of Spending Clause legislation depends upon whether a state voluntarily and knowingly accepts the terms of such a program. Roberts went on to argue that a state could hardly anticipate that Congress's reservation of the right to "alter" or "amend" the Medicaid program included the power to transform it so dramatically. Thus, Roberts concluded that the Medicaid expansion violates the Constitution by threatening states with the loss of their existing Medicaid funding if they decline to comply with the expansion (51-55).

Secondly, one amicus brief in particular – Brief of Constitutional Law Scholars Jack M. Balkin, Brian Galle, Edward Kleinbard, Gillian E. Metzger, and Trevor W. Morrison (2012) – is viewed as providing the intellectual ammunition for that portion of Chief Justice Robert's opinion upholding the individual mandate as within Congress's taxing power (Mauro 2012). Rosen (2013) has speculated that, even if this Balkin et al. brief did not decisively influence Chief Justice Roberts' majority opinion, it did at least provide a way for Roberts to take the long view and ostensibly put the institutional interests of the USSC above ideological agendas. That is, the brief provided the Chief with a greater array of options for how to decide the case consistent with his strategic goals. The Balkin et al. brief was the only amicus brief, along with the Brief of Service Employees International Union, of the 136 briefs that were submitted in the PPACA case, which argued that Congress had the power to impose a tax on those without health insurance under the Spending Clause. The basic structure of the argument set forth in Balkin et al.'s amicus brief is as follows. According to a long-line of precedent, Congress's taxing power is broad, and the individual mandate falls within this expansive taxing power. The minimum coverage provision of the PPACA (i.e., you must have health insurance or pay a "fine") serves

the general welfare, is reasonably related to raising revenue, and does not infringe on constitutionally protected rights. Finally, the minimum coverage provision should be treated like a tax because Congress did not clearly intend otherwise, even though Congress did not call the provision a "tax."

In his majority opinion, Chief Justice Roberts adopts the essentials of the foregoing argument. He argues that the minimum coverage provision is akin to a tax, even if it is labeled a "penalty" by Congress. In effect, Roberts argues that failure to purchase insurance under the minimum coverage provision is a choice, not an unlawful act: "[t]hat Congress apparently regards such extensive failure to comply with the mandate as tolerable suggests that Congress did not think it was creating four million outlaws. It suggests instead that the shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance" (35-40). While the degree to which the Chief Justice relied on these two amicus briefs cannot be conclusively demonstrated, the evidence suggests that these two particular amicus briefs played a significant role in shaping the most high-profile decision of the Roberts Court era.

As a further indicator of the influence of amici curiae, Franze and Anderson (2012, 3) show that during the 2011-12 term of the Roberts Court, amici curiae were cited by justices in 63 percent of cases with only a five or six member majority coalition. In contrast, the justices only cited amici curiae in 29 percent of the cases where the decision was unanimous or 8-1. This finding suggests that amicus briefs may have a greater effect on the USSC in the most controversial and salient cases. While amicus citation rates are admittedly a blunt indicator, of amicus impact, they do show that the justices pay attention to the briefs, keeping the arguments provided by amici curiae in their arsenal when writing their opinions. At a minimum, the

foregoing statistics and anecdotal evidence provide a reasonably strong inference that amici curiae matter and that they can play a powerful role in shaping the course of our nation's legal and public policy.

What follows is an exploration of nature, extent, and influence of amicus curiae participation on the Roberts Court. While a large body of literature has addressed the topic of amicus curiae activity and influence in prior terms and eras of the Court, in specific issue areas, and in specific cases, none has focused in a systematic way on the Roberts Court. Further, this study will shed light on the larger debate in the judicial behavior literature as to whether justice votes are simply a result of judicial attitudes/ideology (attitudinal model), or if legal rules and arguments (legal model) and/or public opinion (interest group model) shape judicial decision-making at the USSC. Each of these views leads to different hypotheses about the expected influence of amici, and this study will provide information as to which view better captures the reality of amicus influence on the Roberts Court.

A. What Is an Amicus Curiae and What Is Its Function?

Amicus curiae[4] – Latin for "friend of the court" – refers to the tradition of courts permitting third parties to litigation to submit their opinions on issues pertaining to the case at hand (Krislov 1963, 694). Black's Law Dictionary (1979, 75) defines "amicus curiae" this way: "[a] person with a strong interest in or views on the subject matter of an action [who] …. petition[s] the court for permission to file a brief, ostensibly on behalf of a party, but actually to suggest a rationale consistent with its own views." Amici curiae have long been of interest to

[4] "Amicus curiae" is the singular form of the term. "Amici curiae" is the plural form ("friends of the court"). Throughout this work, I will use "amicus curiae" or "amicus" to refer to a single third party friend of the court; likewise, I will use "amici curiae" or "amici" to refer to two or more third party friends of the court. While these terms are often used interchangeably in the literature, I strive to be accurate in my usage of the terms in this study.

judicial researchers. Amici curiae serve to link broad interests in society to individual parties of interest in court cases (Vose 1958). While scholarly opinion regarding the propriety and efficacy of amici is mixed, the conventional wisdom is that amicus participants can influence the judicial process.

"Interest groups" (or "organized interests") – broadly defined – are the primary filers of amicus briefs. This study adopts Schlozman and Tierney's (1986, 11) classic definition of organized interests: "a variety of organizations that seek joint ends through political action." As such, interest groups can include corporations, businesses, governments, public interest law firms, public advocacy organizations, professional and trade associations, nonprofits, universities, churches, and unions, among others. Even individuals who collaborate together to cosign amicus briefs can loosely fit within this broad definition if they are a group of individuals jointly pursuing political activity. Throughout the remainder of this study, I use the terms "organized interest," "group," or "interest group" interchangeably.

Interest groups are active as litigation participants, by either sponsoring "test cases" brought in the name of private parties, or by filing amicus curiae briefs (Vose 1958; Barker 1967; Rushin and O'Connor 1987). Vose (1958), who undertook the first systematic study of interest groups' use of the courts, contends that organizations or "pressure groups" support legal action because individuals lack the necessary, time, money, and skill to influence cases. Krislov (1963, 711) argues that amicus briefs can become very important "when there is evidence of some weakness in the legal talent arrayed by the principal party," but also acknowledges that amicus briefs can play an important "subsidiary role" by drawing the USSC's attention to the wider interests implicated in the case and by providing useful social science data. As Barker (1967, 60) suggests, "[t]he amicus brief, in a sense, also allows the Court to weigh 'political'

information in a judicial way." Judges make policy choices just as legislators do, and these choices involve more than strictly legal considerations. Thus, the involvement of third parties in litigation is an example of the blurring of the separation of powers doctrine.

Amicus participation goes as far back as Ancient Rome (Simmons 2009, 192; Krislov 1963, 694; Harper and Etherington 1953). Originally, amicus curiae briefs were designed to aid judicial decision-making by providing a court with impartial legal information outside of its knowledge or expertise (Simmons 2009, 192; Krislov 1963). In the fourteenth century, judges began to use amicus briefs as mechanisms to give voice to those interests that were left unrepresented in the adversarial system. English common law viewed amicus curiae as a "selfless servant of the court" (Kaye 1989, 10). The amicus played the role of the impartial informant: often amici would serve the function of "oral shepardizing" – informing the judges of case law that the parties ignored or overlooked; pointing out "manifest error" in the cases; informing the court of legislative intent; and remedying defects in the adversarial process (Krislov 1963, 695-697; Samuels 2004, 7; Roberts 2009, 9). Such assistance was welcomed because of the presumption that "it is for the honor of a court of justice to avoid error" (Krislov 1963, 695).

The first amicus curiae to participate in a case before the USSC was Henry Clay, who represented the state of Kentucky in a case involving federal supremacy and Kentucky land titles – *Green v. Biddle* (1823) (Krislov 1963, 700). Initially, the state of Kentucky was without representation in the case, and Clay, acting on behalf of Kentucky, successfully petitioned for rehearing and was allowed to argue as amicus. Notably, Clay's appearance as amicus was in a dual role: both advisor to the USSC and advocate. Throughout the 1800s, amici curiae were virtually always lawyers representing government (federal or state) interests. It was not until the

1900s that the USSC allowed private litigants to participate as amici (Samuels 2004, 7-8). The case of *Ah How (alias Louie Ah How) v. United States* (1904) presented the first instance of the appearance of an amicus curiae brief filed by a nongovernmental interest group in the USSC. The Chinese Charitable and Benevolent Association of New York filed the brief, urging the USSC to reverse the lower court's decision ordering removal of the appellants from the United States back to their Chinese homeland. In its amicus brief, the group highlighted alleged abuses of Chinese immigrants in New York City by the government (Collins 2008, 40-41). However, the filing of this brief did not have the intended effect, as the USSC affirmed the lower court ruling.

Another shift in the amicus role also occurred during the early 1900s: traditionally, the authoring attorney was viewed as the amicus, not the organization he represented; however, by the 1930s the emphasis on the professional role of the amicus dissipated and briefs came to be openly identified with the sponsoring group (Roberts 2009, 10). Throughout the first half of the twentieth century, widespread involvement by private interest groups in litigation or amicus activity was not typical, with the notable exceptions of church-state litigation (Pfeffer 1981), racial minority groups (most notably the National Association for the Advancement of Colored People (NAACP)), some prominent civil rights groups (most notably the American Civil Liberties Union (ACLU) and the American Jewish Congress), railroad interests, labor groups, and securities and insurance interests (Krislov 1963). It was not until the 1950s and 1960s that amicus activity became truly prevalent.

The entrance of private parties as amici inaugurated a dramatic evolution in the amicus role over time. As noted by Barker (1967) and Krislov (1963), the amicus role has evolved from a neutral friendship to a partisan advocacy of specific positions, and amicus participation has

made our adversarial system of justice "multi-sided." In recent decades, litigation at the USSC has taken on an appearance of group warfare as organized interests lobby the USSC to support their preferred policy positions. Epstein (1985, 156) describes a situation in which the USSC now effectively serves as a mediator between competing interest groups due to the proliferation of amicus activity. In fact, some scholars now contend that "friend of a party" is a more accurate term than "friend of the court" to describe amicus activity. (Simmons 2009, 192; Munford 1999; Caldeira and Wright 1990). No longer neutral informants, amici are now seen as defenders of third party rights and interests (Simard 2007-08, 676; Krislov 1963).[5] Justice Antonin Scalia lent credence to this viewpoint when, in his dissenting opinion in *Jaffee v. Redmond* (1996, 35-36)[6] he wrote that there is "no self-interested organization out there devoted to the pursuit of truth in the federal courts."

This evolving function of amicus curiae can be attributed, in part, to evolving jurisprudential norms. As legal realism supplanted legal formalism as the dominant jurisprudential paradigm during in the 20th century, the courts increasingly embraced extra-legal facts and social science evidence provided by progressive amicus participants in politically charged cases (Simmons 2009, 195).[7] This trend was inaugurated in *Muller v. Oregon* (1908) when Louis Brandeis submitted his famous "Brandeis Brief" on behalf of the state of Oregon presenting the USSC with statistical evidence regarding the detrimental mental and health effects that result from women working long hours (Collins 2008, 41). The growth of amicus

[5] See however, Banner (2003, 113), who examines amicus activity in the nineteenth century in the United States and concludes that there never was a time in American jurisprudence that amici acted in a solely neutral and advisory capacity; instead the partisan role of the amicus has always been the norm (Collins 2008, 40).

[6] 518 U.S. 1

[7] Legal formalists argue that the USSC is not inherently political or subject to interest group pressures that plague the other branches of government; rather judges can be constrained by legal doctrine and objective in their application of it. In contrast, legal realists assert that ideology and contextual factors are the driving force behind judicial decision-making, not simply doctrine (Simmons 2009, 188 fn.6).

participation can also be attributed to the proliferation of the bureaucracy and the emergence of the modern welfare state, serving as a catalyst for group organization as governmental policies increasingly affected various stakeholders (Krislov 1963). Lastly, the relatively recent emergence of the public law model of litigation, first described by Chayes (1976), which focuses on the vindication of constitutional and statutory policies rather than private disputes, has created an environment ripe for interest group participation and influence in the judicial process.

By the 1950s, the use of amicus briefs became so prevalent at the USSC that some scholars perceived them to be a "genuine problem" for the USSC, characterizing the briefs as "repetitious at best and emotional explosions at worst" (Harper and Etherington 1953, 1172). To these scholars, amicus participation created the impression that the USSC was a "political legislative body, amenable and responsive to mass pressures from any source" (Harper and Etherington 1173). It is no surprise then that many observers view amicus participation with suspicion, often characterizing it as "judicial lobbying" (e.g., Harper and Etherington 1953; Rushin and O'Connor 1987; Frey 2006). This concern has persisted among scholars and practitioners over the last sixty years,[8] yet most scholars have now accepted this proliferation and perceived influence as normal and emblematic of the representative and responsive nature of the USSC.

Rather than viewing amicus activity as a threat to judicial independence and individual rights, it can be argued that a strong and varied amici presence before the USSC is quintessentially American in character, as it affords a tangible opportunity for freely associating individuals to petition government for the achievement of common goals (e.g., Vose 1958, 31).

[8] For example, Kurland and Hutchinson (1983, 647) assert that amicus briefs are a "waste of time, effort, and money in a useless function." See also, Richard Posner, Chief Judge of the Seventh Circuit Court of Appeals, who writes that amicus briefs filed in his court provide little or no assistance to judges because they largely duplicate the positions and arguments advanced by the parties (*Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner,J., in chambers).

Viewed in this light, amicus participation is an expression of the values that underlie the First Amendment – i.e., freedom of speech, freedom of association; freedom to petition government for redress of grievances (e.g., Garcia 2007). In a similar vein, Simmons (2009, 190) argues that amicus activity serves an important symbolic role that buttresses the democratic nature of the USSC:

> [A]micus curiae participation is a form of political symbolism reflecting the [USSC's] irreconcilable role in American democracy as a quasi-representative policy making institution. Specifically, the political symbolism of amicus curiae participation reassures the public, particularly vulnerable groups, of the Court's democratic character. Amicus participation dispels external public criticism that the Court is detached and indifferent to the public, without significantly undermining the Court's independence. Ultimately, the Court's institutional legitimacy rests upon the dual pillars of independence and inclusion. Amicus participation contributes significantly to the latter.

In sum, the history of amicus curiae evolution has shown it to be a flexible legal tool to address the shortcomings of the adversarial litigation process. It has played roles as varied as friend of the court, lobbyist, advocate, and vindicator of the politically powerless (Lowman 1992, 1244).

At its essence the amicus brief is a mechanism by which various types of information are brought to the attention of the court. Most agree that this informational aspect lies at the heart of amicus influence (Barker 1967; Hansford 2004a; Collins 2008; Ennis 1984; Samuels 2004). Comparato (2003, 40) argues that the two most important sources of information available to justices making a decision are information received directly from litigant briefs and information from amicus briefs. Organized groups seek out situations in which the USSC has less than optimal information when deciding whether or not to file an amicus brief, because it is in these low-information settings that groups are most likely to exert some influence over policy decisions of the USSC (Hansford 2004a). By participating as amici curiae, interest groups can assist courts with their fact-finding and legal interpretation roles by raising issues not addressed

by the direct parties to the litigation, and by presenting broad political, social, historical, and scientific information to the USSC. Thus, amici inform the courts of the broader policy implications of their decisions (Barker 1967; Collins 2008).

Amici provide information to courts by supplementing legal arguments, by signaling the preferences of external actors, and by informing courts of the likely impact of their decisions (Barker 1967; Pfeffer 1981; Ennis 1984; Caldeira and Wright 1988; Spriggs and Wahlbeck 1997; Epstein and Knight 1999; Collins 2004; Collins 2008).[9] Amici usually provide new legal authorities beyond those cited in party briefs (Collins 2008, 66). About 70 percent of amicus briefs offer justices information that is not found in the party briefs (Collins 2008, 66; Spriggs and Wahlbeck 1997). Amicus briefs may also present alternative legal arguments or suggest alternative dispositions that the parties may have failed to consider or are constrained from addressing (Flango, Bross, and Corbally 2006, 182; Puro 1971).

Apart from the quality or persuasiveness of the arguments presented, the simple act of filing an amicus brief provides the justices with an indication of the array of social forces at play in the litigation (Caldeira and Wright 1988; Flango, Bross, and Corbally 2006). The simple presence of a number of amici groups can focus the USSC's attention by highlighting case salience or broader public opinion (Spriggs and Wahlbeck 1997; Caldeira and Wright 1988; Kearney and Merrill 2000).

[9] See also Puro (1971, 21), who describes three basic functions of amicus briefs: (1) to strengthen, through repetition and endorsement, the arguments of one of the litigants; (2) to supplement the arguments by using materials or slants that are not purely legal and might not be suitable for the principal's use; and (3) to frame arguments that raise legal issues of broader implication than those raised by the counsel for the principal.

B. Who Participates and How Often?

At the USSC, interest groups can participate as litigants, litigant sponsors, or amicus curiae (this latter form is most common) (Vose 1958; Rushin and O'Connor 1987; Samuels 2004). Very few groups act as litigant sponsors because of the costs and procedural obstacles inherent in this course of action (Samuels 2004, 7).[10] Further, amicus curiae participation can take place at three stages before the USSC: (1) at the agenda-setting stage (i.e., petitions for writ of certiorari); (2) at the merits stage; and (3) at oral argument. Amicus participation is most common on the merits, less so during agenda-setting,[11] and rarest at oral argument.[12]

The USSC's liberal rules governing amicus participation (Simmons 2009; Kearney and Merrill 2000, 761-65) encourage such participation. It is rare for the USSC to reject a petition to file an amicus brief.[13] The USSC promulgated its first rule governing amicus participation in 1938. USSC Rule 37 requires groups and individuals that want to be amici to obtain permission from both parties involved in the litigation, and this permission is typically granted. If either party refuses permission, the entity wishing to participate must file a motion for leave to file an amicus curiae brief. Despite its discretionary power to do so, the USSC rarely denies a motion for leave to file an amicus brief (Simmons 2009, 196; O'Connor and Epstein 1983). Unlike private entities, governmental entities (e.g., Solicitor General, states, and local governments) do

[10] However, see Barker (1967), who details the dramatic participation of interest groups in the areas of racial segregation and legislative redistricting. In particular, Barker highlights the success of the NAACP in its litigation sponsorship strategy in a series of segregation cases to achieve its policy goals, culminating in *Brown v. Board of Education of Topeka* (1954).

[11] Caldeira and Wright (1990) show that all types of amici (except the United States and counties) participated more often at the merits stage than at the certiorari stage.

[12] Gibson (1997) shows that from 1953 to 1997, amici presented oral argumentation in less than six percent of orally argued cases before the USSC.

[13] For example, O'Connor and Epstein (1983) report that, from 1969 to 1981, the USSC denied permission to file in only eleven percent of motions for leave.

not need either party's permission to file an amicus brief. Further, the USSC does not permit amicus briefs to be filed by non-lawyers or those lawyers who are not members of the Supreme Court Bar (Simpson and Vasaly 2004, 17).

After the adoption of its 1938 rule governing amicus participation, the USSC often received briefs that did not follow the simple rules of the USSC, that were perceived as being of low quality and containing meritless propaganda, and that burdened the USSC. Therefore, in 1949, the USSC amended its formal rules governing amicus curiae filings to emphasize that the consent of all parties was required for a private amicus to file and reasserting the proper procedures for filing a motion for leave to file if consent was denied (Kearney and Merrill 2000, 763). Further, the USSC adopted an unwritten policy of denying virtually all motion for leave to file when party consent was withheld (Collins 2008, 43). However, comments made by Justices Felix Frankfurter and Hugo Black in their opinions in *On Lee v. United States* (1952) ultimately caused the USSC to reverse course and jettison this unwritten policy.[14] By the early 1960s, the USSC was granting motions for leave to file amicus briefs in the vast majority of cases once again (Collins 2008 44-45; Krislov 1963, 715-16).

Nevertheless, in 1990 the USSC issued a rule discouraging the gratuitous filing of amicus briefs after it was inundated with eighty amicus briefs in an abortion case (Simpson and Vasaly 2004). Supreme Court Rule 37(1) states: "An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored."

[14] Justice Black stated, "the Court's rule regarding the filing of briefs amici curiae should be liberalized" (343 U.S. 924, at 925). Justice Frankfurter's opinion suggested the same and implied that amicus briefs improve the decision-making of the justices.

While written advocacy via the submission of amicus briefs is the most common method by which amici participate in the judicial process, it is not the only one. Amici also participate in oral arguments before the USSC. In order to participate as an amicus at oral argument, the consent of both parties must typically be obtained, or an invitation must be extended by the USSC. While it is relatively rare for amici to participate in this fashion,[15] they can have a statistically significant impact on case outcomes and justice votes (Roberts 2009).

Additionally, one other special category of amicus activity should be noted: invitation by the USSC. While it is rare for the USSC to invite a private group to participate as amicus curiae, the USSC regularly invites the Solicitor General (SG) to participate in a case in this fashion, and occasionally invites administrative agencies of the federal government as well. Such invitations are viewed more as a summons and are virtually always accepted (Salokar 1992, 143). According to Pacelle (2006, 322), when the SG's amicus briefs are divided into voluntary and invited briefs, one finds a clear distinction in the arguments of the SG: in cases where the SG was invited, the arguments provide neutral information and are not statistically connected to presidential ideology, while the opposite is true for cases where the SG's involvement is voluntary (Roberts 2009, 15).

The USSC has seen a dramatic rise of amicus briefs and also an increase in the number of cosigners[16] of these briefs since the early 1960s (Kearney and Merrill 2000; Collins 2004; Spriggs and Wahlbeck 1997; Hansford 2004). O'Connor and Epstein (1982, 318) declare that "amicus curiae participation by private groups is now the norm rather than the exception."

[15] According to Roberts (2009, 51-52), between 1953 – 1985 433 amici presented oral arguments before the USSC in 347 different cases. The United States accounted for 276 of these appearances.

[16] The term "cosigners" is sometimes used to distinguish the individual or group that initiated the brief from others that signed onto it. Following Box-Steffensmeier and Christenson (2012) and Gibson (1997), I use the term to refer to every amicus participant listed on the brief.

However, this has not always been the case. According to Kearney and Merrill (2000, 753), amici curiae participated in only about 23 percent of cases from 1945 to 1956. At the genesis of the Burger Court (1969), amici participated in fewer than four in every ten cases, but by 1985 participation had almost doubled to seven in ten cases. Between 1986 and 1995, this number rose even higher to 85 percent participation (Franze and Anderson 2012). By 2001, during the Rehnquist Court, USSC amicus participation rose as high as about 95 percent of cases. In recent terms this trend has remained steady, as amicus briefs have accompanied more than 90 percent of USSC cases (Owens and Epstein 2005; Kearney and Merrill 2000). In the 2010-2011 term, the USSC had 93 percent participation in cases with signed opinions, and during the 2011-12 term, 95 percent of cases with signed opinions included at least one amicus brief at the merits stage. Due to this high level of amicus participation, 2011 has been called the "year of the amicus" because of the prominent role amicus briefs played during this term (Franze and Anderson 2012, 1).

Not surprisingly, as the percentage of amicus participation has continued on its upward trajectory over the last 60 years, so have the absolute numbers of briefs filed per case and per term. Between 1946 and 1955, the USSC averaged fewer than one amicus brief per case, but by the 1990s the USSC was averaging about five amicus briefs per case (Kearney and Merrill 2000, 752-54, 765). This average doubled in the 2011-12 term to about 10 amicus briefs per case (Franze and Anderson 2012, 1). More detailed information is included below in Chapter 4 regarding levels of amicus participation during the Roberts Court era.

As one would expect, politically salient cases (e.g., cases involving abortion, eminent domain, free speech, capital punishment, and affirmative action) typically attract the highest levels of amicus participation (Simmons 2009, 197; Kearney and Merrill 2000, 754-56). During

the Rehnquist Court years, the case that attracted the highest level of amicus curiae participation – and set the all-time USSC record up to that point – was *Grutter v. Bollinger* (2003), involving affirmative action in higher education admissions, attracting more than 80 briefs from a wide range of organized interests. This record was broken most recently in the 2011-12 consolidated health care case over the constitutionality of the Patient Protection and Affordable Care Act, which saw a record-breaking 136 amicus briefs, plus two court-appointed amici (Franze and Anderson 2012, 1).

At one time, the political disadvantage theory of interest group litigation was widely accepted within the discipline (Olson 1990). This theory holds that that interest group litigation mainly concerns groups that are disadvantaged in majoritarian politics because of their lack of resources, or unpopular views or behaviors, or their experience of discrimination. These groups depend, therefore, on the judicial processes to pursue their policy interests, which they cannot achieve in the electoral process. In essence, groups litigate because they lack access to traditional political forums and find a safe haven in the courts (Collins 2008, 20). Early scholars studying interest group activity in the courts, such as Vose (1955) and Barker (1967), promoted this understanding.

However, a number of studies of amicus participation call this theory into question by showing that the USSC is not biased towards any one type of interest. Rather it is remarkably accessible to a diverse array of organized interests at both the certiorari and merits stage of decision (Caldeira and Wright 1990; Collins 2008; Collins and Solowiej 2007). The levels of conservative and liberal amicus participation have been essentially the same at the USSC between 1946 – 2001 (Collins 2008). Corporations and professional associations do not dominate the Court's amicus activity. While amicus participation is most frequent in civil rights

and liberties cases, all issue areas draw considerable amicus attention (Collins 2008). In terms of amicus participation, state governments, trade associations, public advocacy organizations, and businesses tend to be the most involved categories of interest groups (Collins and Solowiej 2007; Calderia and Wright 1990). Thus, amicus participation is pluralistic both in terms of types of organizations that appear before the USSC, and in terms of the ideological spectrum of amicus participants (Collins 2008). This supports the pluralist theory of interest groups, i.e., a diverse array of interest groups find a voice at the USSC (Collins 2008; Calderia and Wright 1990). In sum, Schattschneider's (1960) description that "the heavenly chorus sings with a strong upper-crust accent," does not properly apply to amicus participation at the USSC. The interest group system in the USSC "reflects a much more diverse set of interests than Washington lobbying activity more generally" (Collins 2008, 63). This conclusion enhances the institutional legitimacy of the USSC by lending credence to the notion that the USSC is a quasi-representative institution that, at least procedurally, embodies the norm of democratic inclusion (Simmons, 2009).[17]

The research of Dunworth, Fischman, and Ho (2009) provides a detailed picture of the most active amicus groups during the 1979 to 2006 terms of the USSC. Using semi-automated information extraction software, the authors compile a database of over 14,000 briefs filed on the merits during this time period by over 600 of the most active amicus participants before the USSC. Unlike most prior studies, Dunworth et al.'s database is able to provide data on the actual amici groups that participate, rather than merely raw brief counts. Focusing only on amicus

[17] Despite a countermajoritarian reputation, the literature shows that the USSC is often a part of the dominant national political coalition (Dahl 1957; Funston 1975) and its decisions are most often consistent with public preferences, even when they protect minority interests (Barnum 1985). Accordingly, despite the Judiciary's status as an independent institution, it is evident that justices adjust their decisions at the margins "toward a compromise that avoids active political opposition and pays some attention to what the public wants" (Flemming and Wood 1997, 494).

briefs filed by interest groups, as opposed to those filed by governments or individuals, Dunworth et al. are able to compile a list of the top 100 most active amicus participants from 1979-2006 in terms of number of briefs on which they appeared in cases on the merits. Table 1.1 lists the 15 most active amici groups from 1976-2006 according to Dunworth et al.

Table 1.1. Top 15 Amici Groups, 1976-2006 USSC Terms

Rank	Amicus Group	Number of Briefs
1	American Civil Liberties Union (ACLU)	430
2	National Association of Criminal Defense Lawyers (NACDL)	262
3	National Association of Counties	242
4	National League of Cities	236
5	U.S. Conference of Mayors	234
6	International City Management Association	227
7	Washington Legal Foundation (WLF)	206
8	Council of State Governments	191
9	Chamber of Commerce of the United States of America (CofC)	179
10	National Conference of State Legislatures	175
11	AFL-CIO	169
12	National Governors Association	159
13	National Association for Advancement of Colored People (NAACP) and NAACP Legal Defense Fund	156
14	Criminal Justice Legal Foundation	139
15	Pacific Legal Foundation (PLF)	138

Chandler (2013) conducted a recent study of amicus participation at the certiorari stage from May 2009 to August 2012 at the USSC to determine which interest groups were certiorari-stage amicus "all-stars"(1). Chandler finds that 1,750 organizations filed amicus briefs at the certiorari stage during the three year time period (up approximately 65 percent from May 2004 – August 2007).[18] Table 1.2 lists Chandler's results regarding the "Sweet Sixteen" – i.e., those groups most frequently filing certiorari stage briefs, along with each of their success rates.

Table 1.2. "Sweet Sixteen": Cert-Stage Amicus All-Stars, May 2009- August 2012

Rank		Party	Briefs		Grant %	
1	1	Chamber of Commerce of the United States of America	54	55	32.0%	26.0%
2	2	National Association of Criminal Defense Lawyers	41	33	25.6%	31.3%
3	4	Pacific Legal Foundation	37	25	20.0%	28.0%
4	---	Cato Institute	30	2	22.2%	---
5	3	Washington Legal Foundation	29	26	24.0%	39.1%
6	---	Center for Constitutional Jurisprudence	21	1	30.0%	---
6		DRI - The Voice of the Defense Bar	21	0	23.8%	
8	5	National Association of Manufacturers	19	23	5.6%	31.6%
9	---	National Federation of Independent Business	16	4	26.7%	---
10	8	International Municipal Lawyers Association	15	10	7.7%	30.0%
11	15	AARP	13	8	10.0%	25.0%
11	11	Pharmaceutical Research and Manufacturers of America	13	9	23.1%	25.0%
13	---	Allied Educational Foundation	10	6	28.6%	---
13	---	American Bankers Association	10	5	11.1%	---
13	---	American Center for Law and Justice	10	3	10.0%	---
13	8	Mountain States Legal Foundation	10	10	50.0%	22.2%

* Table reproduced from Chandler (2013, 1). Figures from May 2004 – August 2007 are shaded.

[18] Chandler excludes governmental entities and individuals from his analysis.

Chandler makes a couple of notable observations from his findings regarding the "Sweet Sixteen." First, the Chamber of Commerce filed the most certiorari stage briefs, and they had the second highest grant rate (highest grant rate was Mountain States Legal Foundation). Second, the ideological cast of the new entrants on the list from that of five years ago is more conservative, anti-regulatory, and pro-business (2).

Even though the top amici participants lists of Dunworth, Fischman, and Ho (2009) and Chandler (2013) deal with different time frames (1979 – 2006 vs. 2009-2012) and relate to differing stages of USSC litigation (merits vs. certiorari), it is notable the groups that appear in the top 15 of both lists: National Association of Criminal Defense Lawyers (NACDL); Chamber of Commerce (CofC); Washington Legal Foundation (WLF); and the Pacific Legal Foundation (PLF). These four groups in particular fit the category of experienced, repeat amicus players before the USSC.

Individuals also participate as amici before the USSC. While these individuals vary greatly, they are typically academics, attorneys, legislators, former government officials, or scientists. While Caldeira and Wright (1990) find that only six percent of amici during the 1982 term were individuals, Collins and Solowiej (2007, 967) show that individuals accounted for over 22 percent of amici in the 1995 term. Analyzing the 1950, 1968, 1982, and 1995 terms of the USSC, Collins (2008, 61), finds that individuals file 7.4 percent of amicus briefs, account for 12.1 percent of amicus participants, and appear in 20.9 percent of cases.

Amicus participation is increasingly marked by coalition formation (Collins and Solowiej 2007). Experienced lawyers often seek to build coalitions of amici (McGuire 1994). Amici tend to coordinate to reinforce one another's arguments (Caldeira and Wright 1990), to stretch thin resources to maximize their effect (Wasby 1983), and to be efficient (Hojnacki 1997). This

collaboration and coordination is most evident when organizations choose to become amicus participants as amicus brief cosigners. Collins (2008, 58 fn.59) provides a number of reasons why this is an attractive option: "groups may do so to lighten the financial burden that accompanies filing an individual brief, to build relations with like-minded organizations, and/or as a low-cost means of pursuing organizational maintenance."

Given the advantages of collaboration, it is perplexing that, based on their study of all amicus briefs filed during the 1982 term of the USSC, Calderia and Wright (1990) conclude that patterns of alliance among amici revealed little formal coalition activity. The dominant pattern they found, instead, was for organizations to file multiple and separate briefs rather than to coalesce on a single brief. Calderia and Wright think this tendency supports the theory that amicus briefs must involve costly signaling in order to be useful to the Court. This finding also provides some support for the informational hypothesis of amici influence, discussed in further detail in Chapter 3, which states that the influence of amici springs not primarily from their simple presence, but instead from the information that their briefs impart.

Collins and Solowiej (2007) reach similar conclusions to Calderia and Wright (1990) based on their study of the 1995 term of the USSC regarding coalition activity among groups. However, they show that two particular categories of amici – states and individuals – do evidence strong coalitional activity in comparison to other categories of amici.

C. Why Do Interest Groups File Amicus Briefs?

Organizations or "pressure groups" support legal action because individuals often lack the necessary, time, money, and skill to influence cases (Vose 1958). By filing amicus briefs, interest groups "lobby" the USSC in an effort to influence legal policy (Barker 1967). The main

goal motivating the lobbying choices made by interest groups is the desire to have the justices endorse policies favorable to those groups' interests (Collins 2008; Collins 2007; Hansford 2004a; Solberg and Waltenburg 2006; Wasby 1983). In order to achieve their goals, interest groups file briefs that inform the justices of the broad legal and policy ramifications of the Court's decisions (Collins 2008). Wasby (1984, 114) noted three reasons amici typically seek out a case: (1) to reinforce a litigant's position by adding their voice to others; (2) to reframe a party's case to better fit the amicus' needs or preferences; and (3) to offer supplemental information or arguments that go beyond those of the party. Through repeated use of the courts, interest groups can become "repeat players" who have an advantage in the choice of cases they pursue, the forum in which they pursue them, and their ability to manipulate the law to their own advantage (Wasby 1983; Galanter 1974).

In addition to the desire to influence policy, prior literature has suggested multiple rationale for interest group involvement in litigation: to counteract political disadvantage (political disadvantage theory); because they have resource advantages or want to equalize the litigation playing field (party capability theory) (Solowiej and Collins 2009; Solberg and Waltenburg 2006); to protect gains already won in other venues (Kobylka 1987); because of the peculiar characteristics of the group (Wasby 1983); and for organizational maintenance purposes (to attract and retain membership support) (e.g., Solberg and Waltenburg 2006; Hansford 2004a; Wasby 1983).

Further, other prior studies (e.g., Collins and Solowiej 2009; Wasby 1983; Holyoke 2003; Solberg and Waltenburg 2006; Hansford 2004a; 2004b) have shown that a range of factors influence amicus participation and strategy: Solicitor General invitation; political salience; political atmosphere (court's substantive rulings, public opinion, legislative and administrative

actions); case complexity; available venue (e.g., federal or state court); type of case; area of law; ideological proximity of the court to the filing party; attorney experience; media coverage; likelihood of winning; litigant resources; group resources (budget, funds, attorneys, size of membership, etc.); intraorganizational factors; timing of a group's involvement (e.g., earlier the participation, the greater the control); group's longevity and continuity; group's ideological commitment; size of group's legal staff; organizational structure (membership vs. nonmembership group); interorganizational factors; number of groups litigating in particular policy area; and level/magnitude of cooperation/competition among groups in particular policy areas.

Studies are mixed regarding whether the probability of litigation success influences the decision to participate as amicus curiae. Amici may appear to have influenced the USSC's decision on the merits, when in fact the USSC's probable decision direction instead influenced the amici's choice to participate in the case. This is the causal challenge of the findings (Hansford 2004a). Participating in cases that have a good chance of success can help with a group's membership base because it can lead to a demonstrated track record of success (Epstein 1991; Hansford 2004a; Kearney and Merrill 2000; Collins 2004).

This selective behavior confounds the question of amicus influence. Solberg and Waltenburg (2006) and Hansford (2004a) show that the likelihood of success influences a group's calculation of whether or not to file briefs and engage the courts. However, Collins' (2007; 2004) findings suggest that amicus influence is *not* a function of selective behavior – i.e., groups do not file briefs in cases they are more likely to "win." Rather, groups file amicus briefs on behalf of litigants they genuinely support, regardless of their probability of litigation success (Collins 2004).

The presence of counteractive lobbying – or the arms race phenomenon (Solowiej and Collins 2009; Collins and Solowiej 2007; Hansford 2011; Solberg and Waltenburg 2006; Farber 2007) – has been recognized among amici. Amici frequently file on opposite sides of an issue, competing directly with one another. Collins and Solowiej (2009) show that organized interests supporting the respondent respond to the number of amicus curiae briefs supporting the petitioning party. As the number of amicus briefs filed for the petitioner increases, so too does the number of amicus briefs filed for the respondent (responsive counteractive lobbying hypothesis). Organized interests supporting the petitioner will anticipate the number of amicus curiae briefs supporting the respondent party. As the number of amicus briefs filed for the respondent increases, so too does the number of amicus briefs filed for the petitioner (anticipatory counteractive lobbying hypothesis). This counteractive lobbying phenomenon can confound those who seek to determine amicus influence on judicial decision-making, as the relative advantage of amicus participants on one side versus another dissipates.

Litigant resources are another factor influencing amici participation. Solowiej and Collins (2009) find that as the resource status of the respondent party decreases, the number of amicus briefs supporting that party increases. This finding shows organizations' willingness to file amicus briefs when they perceive that the respondent party might be incapable of marshaling the best arguments as a result of a lack of resources and/or expertise. In addition, the number of amicus briefs supporting the respondent increases in tandem with the resources available to the opposing party. This suggests that rather than target cases based on their perceptions of a case's "winnability," respondent amici are more likely to challenge high-resource litigants, presumably in an attempt to negate the persuasion attempts forwarded by high-status litigants, thus leveling the playing field (e.g., Songer, Kuersten, and Kaheny 2000). The implication is that the theory

of friendly lobbying found in Congressional lobbying literature – i.e., interest groups are more likely to lobby their friends – may not apply in the context of the USSC. A theory of counteractive lobbying – in which interest groups lobby for the purpose of negating the advocacy effects of their opponents – seems more accurate in the context of interest group activity in the litigation area (Solowiej and Collins 2009).

Thus, the decision to file an amicus brief is a function of the presence of other opposing amici, the anticipated receptiveness of the USSC, the USSC's need for information, and the potential for this form of advocacy to allow membership-based groups to attract support (Hansford 2004a and b). An interest group is more likely to submit amicus curiae briefs to the USSC if the USSC is receptive and if the interest group has had previous interactions with the USSC (Hansford 2004b). Interest groups are less likely to submit briefs when the parties in a case are represented by experienced attorneys (Hansford 2004a). Likelihood of media coverage has the largest substantive effect on the probability of a membership-based interest filing an amicus brief (Hansford 2004b). Hansford's (2004a and b) studies suggest that the information function is probably the most significant factor underlying a group's decision of whether or not to participate as an amicus curiae: organized groups seek out situations in which the USSC has less than optimal information when deciding whether or not to file an amicus brief, because it is in these low-information settings that the group is most likely to exert some influence over policy decisions of the USSC.

D. Do Amicus Participants Influence Judicial Decision-making at the USSC?

It is thought that the USSC justices use amicus briefs to aid their efforts to reach the best and most accurate legal conclusions. Due to the time and resource constraints USSC justices

face, due to the subjective and indeterminate nature of the law, and due to the USSC's permissive attitude towards amicus participation, the environment is ripe for interest group influence on the justices (Collins 2008).

However, evidence of amicus impact is inconclusive and sometimes contradictory. For example, Ennis (1984, 603) argues that amicus briefs are impactful in shaping case outcomes: sometimes judges decide cases on a grounds suggested by an amicus, not the parties; and sometimes judicial rulings are narrower or broader than the parties urged because of persuasive amicus briefs. This leads Ennis to conclude that amicus briefs are not simply "icing on the cake," but instead "are often the cake itself" (603). Caldeira and Wright (1990, 786) point to the fact that the USSC seldom limits amicus participation as a sign that amicus briefs are valuable to the justices. Yet, the authors of one of the leading studies regarding amicus participation and influence at the USSC concede that "attitudes within the legal community about the utility and impact of amicus briefs vary widely" and that the existing studies seeking to determine the impact of the briefs on the USSC "reach strikingly inconsistent conclusions" (Kearney and Merrill 2000, 745,769). Various studies acknowledge that it is not entirely clear the causal effect, if any, amicus briefs have on the USSC's decisions (Collins 2007; Songer and Sheehan 1993; Spriggs and Wahlbeck 1997). As mentioned previously, the tendency of amicus briefs to be evenly distributed on both sides of a case ("arms race phenomenon" or "counteractive lobbying") may explain, in part, why it is often difficult to detect the substantive impact of amicus briefs on case outcomes (Kearney and Merrill 2000). Or, it may be that this amicus proliferation and arms race phenomenon does not merely mask, but instead dilutes, amici's effectiveness. This may be related to the indication that judges' interest in reading briefs is inversely proportional to the sheer number of briefs filed (Simpson and Vasaly 2004, 15).

Individual amicus briefs may be influential in particular cases, even if aggregate studies of amici determine that, on balance, they are not. Much anecdotal evidence of amicus brief influence in particular cases certainly exists. For example, scholars have noted the impact of amici in such landmark USSC cases as the following: *Brown v. Board of Education* (1954) – in which the USSC cited information provided by amici that segregation generates a feeling of inferiority among persons of color; *Mapp v. Ohio* (1961) – in which the USSC extended the exclusionary rule to the states based upon an argument raised solely in the ACLU's amicus brief (Collins 2008, 142); *Roe v. Wade* (1973) – in which the USSC expressly referred to positions urged by amici and relied upon information supplied by amici describing the risks of abortion and discussing beliefs regarding the beginning of life (Simard 2007-08, 671) – and companion case *Doe v. Bolton* (1973) – in which the majority expressly relied on data provided by amici showing that facilities other than hospitals are adequate to perform abortions (Sungaila 2010, 3); *Epperson v. Arkansas* (1968) – in which the USSC struck down a state statute prohibiting the teaching of human evolution in public schools based on grounds raised solely in an amicus brief by the ACLU and the American Jewish Congress (Pfeffer 1981, 108); *Metromedia, Inc. v. San Diego* (1981) – in which Justice White authored a plurality opinion striking down San Diego's billboard ban due to the influence of the ACLU's amicus brief (Ennis 1984, 607; Hedman 1991, 190); *Webster v. Reproductive Health Services* (1989) – an abortion rights case with 85 amicus briefs; *Grutter v. Bollinger* (2003) and *Gratz v. Bollinger (2003)* companion cases – in which the USSC relied upon information supplied by high ranking retired military personnel, including General Norman Schwarzkopf, about the importance of diversity among military officers coming from the service academies and the universities to national security (Simpson and Vasaly 2004, 9); and *Lawrence v. Texas* (2003) – a gay rights case in which the USSC noted the filing of

"scholarly amicus briefs" and cited those briefs in deciding to strike down an anti-sodomy law (Simpson and Vasaly 2004, 10).

Similarly, some studies have attempted to discern the impact of amici on specific areas of litigation, including church-state relations (Ivers 1992; Ivers 1990; Pfeffer 1981), gender discrimination (Wolpert 1991), women's rights (O'Connor 1980), privacy (Samuels 2004), rape (Coleman 2008), environmental protection (Hedman 1990), affirmative action (O'Neill 1985), abortion (Kolbert 1989; Behuniak-Long 1991), free speech (Rushin and O'Conner 1987), race relations (Wasby 1995), obscenity law (McGuire 1990), federalism (Chen 2006), and business interests (Franklin 2009), or involving certain amicus participants, including the Solicitor General (Solimine 2012; Segal 1988; Deen, Ignagni, and Meernik 2003; O'Connor 1983), the ACLU and Americans for Effective Law Enforcement (Ivers and O'Conner 1987), and the Chamber of Commerce (Franklin 2009). While important and informative, it is difficult to draw generalizable conclusions regarding amicus influence from these contextualized studies.

Prominent judges themselves have occasionally commented on the usefulness and efficacy of amicus briefs. As noted by Simard (2007, 681), Justice Stephen Breyer has described the amicus brief as a valuable tool in educating judges, particularly on technical matters (*NY Times* 1998). Likewise, Justice Samuel Alito has written that "an amicus who makes a strong but responsible presentation in support of a party can truly serve as the court's friend" (293 F.3d 128, 131 (3d Cir. 2002)). And former Justice Sandra Day O'Connor has acknowledged that "[t]he 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 invaluably aid our decision-making process and often influence either the result or the reasoning of our opinions" (O'Connor 1996, 9). On the other hand, USSC Justice Antonin Scalia has suggested that amici curiae are a form of interest group lobbying, and has expressed concern

that overrepresentation by well-organized interest groups has the potential to impact USSC decisions, adding that "[t]here is no self-interested organization out there devoted to the pursuit of truth in the federal courts" (*Jaffee v. Redmond*, 518 U.S. 1, 35-36 (1996)). Seventh Circuit Court of Appeals Judge Richard Posner has been critical of the inefficiencies created by amicus briefs, noting that "[t]he vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs," "have not assisted the judges," and are an "abuse" of non-party participation. (125 F.3d 1062, 1063 (7th Cir. 1997)).

One of the first empirical studies to investigate the efficacy of amici on the USSC was a 1971 doctoral dissertation by Steven Puro. His dataset included amicus briefs filed in USSC cases from 1920-1966. Puro determined the "success rate" (i.e., those that supported the winning side) of amicus briefs and concluded that these briefs had a success rate of 55 percent, and that this rate had increased over time. Puro noted that the Solicitor General, ACLU, and AFL-CIO had success rates higher than the amicus average.[19] However, Puro's methodology was incapable of showing whether or not a causal relationship existed between amicus briefs and judicial decision-making. That is, calculating overall success rates for amicus filers merely shows that such briefs happened to be filed in support of the winning side, not necessarily the degree of amicus influence.

Some studies call into question the ability of organized interests generally, and amici specifically, to influence judicial decision-making. First, Hakman (1966-67, 50) reviewed amicus participation at the USSC from 1958-1965 and concluded that amici influence was not significant and that their purported influence was an example of "Political Science Folklore." Second, although not related directly to amicus briefs, Epstein and Rowland (1991) show that

[19] Puro (1972, 101,103-04) found that the Solicitor General had a success rate of 77 percent, the ACLU 65 percent, and the AFL-CIO 66 percent.

there is no statistical difference in the litigation success rates of groups and nongroups at the U.S. trial court level, calling into question the legal clout of organized interests more generally. Third, Songer and Sheehan (1993) show that the presence of an amicus brief in support of a party has no effect on the likelihood of winning a case at the USSC when the other party has no amicus support; neither does a greater presence of amicus briefs on one side compared to another (3 to 0) enhance the likelihood of success. Specifically, Songer and Sheehan's methodology examines match-paired cases from a twenty year period (1967-87) that involve one case that has at least one amicus brief filed and another case that has no briefs filed and that display no significant difference in the outcome. The matched pairs were decided in the same term, involved parties of the same status, and involved the same issue. They remove from consideration cases in which amicus briefs were filed by the government or private individuals, cases in which briefs were filed on both sides, and cases where there were no briefs on either side. Songer and Sheehan find that the success rate of parties supported by amici was identical to those without support. Songer and Sheehan's findings bolster University of Chicago constitutional law scholar Kurland's (1983) earlier conclusion that amicus briefs are, by in large, ineffective and a waste of time.

Yet, other studies validate the influence of amicus briefs on judicial decision-making. In an analysis of the 1982 term of the USSC, Caldeira and Wright (1988) show that the filing of amicus briefs in opposition to a petition for certiorari actually increases the likelihood that the USSC will grant review. Thus, an important factor in deciding whether or not certiorari is granted is the presence or absence of an amicus brief per se, not the direction of the substantive arguments presented. For Caldeira and Wright (1988), when organized interests file amicus briefs for or against the granting of certiorari, they serve as costly signals about the policy

significance of the case. In this way, certiorari stage amici primarily function as interest articulators by providing information to the justices about the array of forces in play in the litigation.

However, in a recent follow-up study of amicus certiorari stage influence, Caldeira, Wright, and Zorn (2012) reach some differing conclusions which qualify the earlier findings of Caldeira and Wright (1988). Analyzing the 1968, 1982, 1990, and 2007 terms of the USSC, Caldeira, Wright, and Zorn (2012) find that certiorari petitions with amicus briefs are granted at a much higher rate than those without. However, they also find that there has been a steady decline in the influence of amicus briefs in support of certiorari between 1968 and 1990, with this decline holding steady through the 2007 term. Moreover, in contrast to the earlier study, the authors find no evidence that the number of briefs filed in opposition to certiorari influences the USSC's grant rate. These findings lead Caldeira, Wright, and Zorn (2012, 9) to conclude that "[a]t the same time the number of amicus filings on certiorari have grown – and perhaps owing to it – the influence of those briefs has steadily declined." Therefore, the authors conclude that, despite increasing amici presence, the USSC appears to be less influenced by organized interests than they have been in the past at the certiorari stage.

But what about amicus impact on USSC decisions on the merits? McGuire (1994, 1990) shows that the probability of success increases for parties supported by amicus curiae who provide experienced attorneys, and that the probability of success in obscenity cases is significantly related to the level of amicus support received by the party. More impressive is an extensive empirical study of amicus influence on the USSC from 1946-1995 by Kearney and Merrill (2000), in which the authors conclude that amicus briefs do impact USSC case

outcomes.[20] Notably, their study assesses the efficacy of amicus briefs through the lens of three basic models of judicial decision-making: the legal model, the attitudinal model, and the interest group model. Using a benchmark rate of success for both respondents and petitioners without amicus support as their baseline for comparison, they reach six primary conclusions from their analysis: (1) amicus briefs supporting respondents enjoy higher success rates than do amicus briefs supporting petitioners -- this greater success rate associated with amicus briefs supporting respondents can be explained by the supposition that respondents are more likely than petitioners to be represented by inexperienced lawyers in the USSC and thus are more likely to benefit from supporting amici; (2) small disparities of one or two briefs for one side with no briefs on the other side may translate into higher success rates but larger disparities do not; (3) amicus briefs cited by the USSC appear to be no more likely to be associated with the winning side than briefs not cited by the USSC; (4) amicus briefs filed by more experienced lawyers may be more successful than briefs filed by less experienced lawyers; (5) the Solicitor General enjoys much higher success as an amicus filer than the average amicus filer; (6) the ACLU and AFL-CIO, and the States, also enjoy somewhat higher success rates than the average amicus filers, but not to the same degree as the Solicitor General; and (7) it appears that amicus briefs filed by institutional litigants and by experienced lawyers – filers that have a better idea of what kind of information is useful to the USSC – are generally more successful than are briefs filed by irregular litigants and less experienced lawyers.

Kearney and Merrill cautiously interpret their results as supportive of the legal model of judicial decision-making, which will be discussed in more detail below. It is important to note,

[20] Kearney and Merrill's (2000) study is based upon counts of the total number of amicus briefs filed on behalf of the petitioner and the respondent from 1946-1995. The study also tracks the success rates of four institutional litigants – Solicitor General, ACLU, AFL-CIO, and the States – and compares them to the benchmark rate of success.

however, that Kearney and Merrill's research is frequency based and does not control for other variables influencing judicial decision-making.

Lynch (2004) conducts a comprehensive study surveying 70 former USSC law clerks from 1966 to 2001 to determine the impact of amici on the USSC. Lynch's study addresses four primary questions: (1) when are amicus briefs most useful?; (2) does the identity of the amicus filer or author matter?; (3) what is the impact of a collaborative amicus brief?; and (4) what is the role of social science data? Based upon the law clerks answers to the previous questions, Lynch concludes that amicus briefs can have an impact in certain circumstances. First, amicus briefs are most useful in cases involving highly technical and specialized areas of law, as well as in complex statutory and regulatory cases. Second, amicus briefs are helpful in cases where the parties' merits briefs are deficient. Third, since majority of law clerks agreed that "most amicus briefs filed with the Court are not helpful and tend to be duplicative, poorly written, or merely lobbying documents not grounded in sound argument," (44) briefs that do not evidence these qualities will likely be given greater attention.

Fourth, close consideration of amicus briefs is highly dependent on the brief's quality, and a brief's perceived quality is often related to the source of the brief. Solicitor General amicus briefs are given higher levels of consideration than those from any other source because they are generally considered of the highest quality, followed by amicus briefs filed by the ACLU and state and local governments. The clerks also indicated that briefs filed by prominent academics and reputed attorneys are given greater consideration.

Fifth, there is an advantage to amicus collaboration (multiple groups signing the same brief) and coordination (groups filing separate briefs each tackling different arguments by design): 90 percent of clerks expressed a preference for collaborative amicus briefs, with one

clerk commenting that "the more groups that come together on a brief, the more impressive it is that they hold the same view" (57-58). Still, collaboration and coordination by themselves are not definitive, but rather the groups who are collaborating make the most difference in the consideration likely to be given the brief. Particularly likely to be given consideration are briefs in which organizations who are not traditional ideological allies collaborate. Sixth, a slight majority of clerks indicated that briefs providing social science data can be particularly helpful because such briefs often provide new information not contained in the party briefs.

Based upon this survey data, Lynch offers the following recommendations to maximize the effectiveness of amicus briefs. First, "to the greatest extent possible, avoid repeating the information presented in the merits brief of the party it supports and in the other amicus briefs. Clerks cited *verbatim iteration* to be the fatal flaw of an amicus brief. A serviceable brief must be additive to the party discussion" (Lynch 2004, 67). Second, keep the brief short. Third, make sure the brief is well written. Finally, the name on the brief matters, as greater attention is given to frequent and prominent amicus filers ("repeat players"), such as institutional litigants.

Collins (2007) concludes that amicus briefs do play a significant role in shaping the ideological direction of the USSC's decisions. Analyzing amicus influence during the 1946-1995 terms of the USSC, and controlling for other known variables influencing the USSC (e.g., Solicitor General; justice ideology; litigant resources, lower court conflict), Collins finds that the provision of liberal briefs enhances the probability of a liberal decision by the USSC, and the provision of conservative briefs by amici enhances the probability of a conservative decision by the USSC. This is particularly true when the case is accompanied by lopsided amicus participation. Also, counter to conventional wisdom, Collins finds that groups do not file more

amicus briefs in cases that they think they are likely to win, but that actually the opposite trend exists.

Collins (2008) provides the most extensive and theoretically rich study to date on the influence of amici on the USSC. In this study, Collins purposefully chooses *not* to focus upon the influence of amicus briefs on the USSC's decision outcomes (using litigation success as the dependent variable (i.e., win or lose) and treating the USSC as a unitary actor). Instead, Collins undertakes to address a different and more theoretically interesting question: do amicus briefs influence the ideological directional of the votes of the individual justices (i.e., liberal or conservative)? He demonstrates that amicus briefs have a discernible impact on how individual justices vote on the merits of a case, even when controlling for judicial ideology.

For the overwhelming majority of the court, ideology does *not* act as a mediating variable conditioning how the justices process the information contained in amicus briefs. That is, regardless of ideology, the justices become more likely to vote liberally as the number of liberal amicus briefs increases, and more likely to vote conservatively as the number of conservative briefs increases. However, Collins shows that justices who sit at or near the ideological center of the USSC are especially susceptible to the persuasive legal arguments contained in amicus briefs. Such evidence bolsters the utility of targeting the median (swing) vote through amicus briefs (Collins 2008). This is a particularly significant finding, as studies have shown the median justice is the most influential player in determining USSC case outcomes and opinion content (e.g., Martin, Quinn, and Epstein 2005; Schmidt and Yalof 2004). In addition, Collins finds that increasing numbers of amicus briefs in a case increase a justice's likelihood of writing or joining a concurring or dissenting opinion, as these briefs highlight the uncertain and indeterminate nature of the law.

Since it has been shown that amici can influence judicial behavior, another important question concerns whether or not all amici are created equal in influence. The short answer is "No." Generally, it is already known that experienced advocates enjoy greater success at the USSC and are more likely to have their arguments adopted by the USSC in their written opinions (McAtee and McGuire 2007; McGuire 1994; McGuire 1995). As discussed previously, scholars have posited and found some support for the notion that the prestige and experience of the amicus participant may influence judicial behavior (e.g., McGuire 1994; Kearney and Merrill 2000; Lynch 2004; Collins 2004; Simard 2007; Chandler 2013). Repeat players, or institutional litigants, before the USSC typically have resource, expertise, and credibility advantages over other amicus participants.

Kearny and Merrill (2000, 788-89) choose to set aside and separately track the amicus curiae participation of four "institutional litigants" – the Solicitor General, the ACLU, the AFL-CIO, and the States – that had been identified in previous literature[21] as being especially successful in influencing the USSC via amicus curiae briefs. These institutional litigants were frequent amicus participants during the scope of Kearney and Merrill's 50 year study and, at least in the case of the Solicitor General, ACLU, and AFL-CIO, known for their high quality briefs. Kearney and Merrill find that each of these four institutional litigants achieved litigant success rates modestly above the benchmark average, and the positive effect was strongest in the case of the Solicitor General. Lynch's (2004) survey results of former USSC law clerks accords with this finding regarding the influence of the Solicitor General, the ACLU, and the state governments, as does Simard's (2007) survey of appellate judges, which shows that judges are more likely to value prestigious briefs.

[21] See e.g., Ivers and O'Conner (1987), studying the success rate of the ACLU; also Puro (1971), discussing the success rates of each of these four amici.

In Simard's (2007) survey, three USSC justices indicated that they are moderately influenced by the identity, prestige, and experience of the amicus curiae (688). Of particular note is Simard's revelation of her telephone interview of Justice Ruth Bader Ginsburg, in which Justice Ginsburg said that "her clerks often divide the amicus briefs into three piles: those that should be skipped entirely, those that should be skimmed, and those that should be read in full" (688). Those amicus briefs featuring experienced attorneys were most likely to be placed in the high priority pile.

Thus, group influence varies based upon the reputation of the group and the perceived quality of the information provided in their brief. This makes good sense, as busy justices and law clerks who are inundated with petitions, party briefs, and amicus briefs, are most likely to pay attention to those briefs that come from the most prestigious and reputable sources.

A continual refrain in the literature, and made clear in the foregoing discussion, is this: the Solicitor General is the most prominent and influential amicus participant (e.g., Puro 1972; O'Connor 1983; Segal 1988; Kearney and Merrill 2000; Lynch 2004; Franze and Anderson 2012; Corley, Collins, and Hamner 2013). The SG plays a dual role: the chief advocate before the USSC for the executive branch, as well as an informal advisor to the USSC. Due to the SG's prominence, some even refer to the SG as the "tenth justice" (Wohl 1996, 48). Reviewing the 1952 -1982 terms of the USSC, Segal (1988) found that the SG's amicus filings supported the winning side approximately 75 percent of the time. This finding accords with that of Salokar (1992), who reviewed all amicus cases decided by the USSC between 1959 and 1986 and found that the SG supported the winning side in 72 percent of the cases in which he filed an amicus brief, with no significant variations from one administration to the next. Further, briefs submitted by the SG are much more likely to be cited (e.g., Franze and Anderson 2012; Kearney

and Merrill 2002), and the arguments contained therein more likely to be adopted in the USSC's opinion (Corley, Collins, and Hamner 2013), than any other amicus participant.

The research of Box-Steffensmeier, Christenson, and Hitt (2013) adds important insights to these prior studies on amicus prestige and experience. Their research is notable because, unlike the studies mentioned above, it does not base its measure of amicus power on whether the amicus has a prestigious reputation or on whether the amicus has a success rate before the USSC higher than other groups. Instead, drawing from the insights of network theory, Box Steffensmeier et al. measure amicus power based upon the degree to which the amicus group is central to a network of groups appearing before the USSC. They propose that amici that are central to the network of groups appearing before the USSC will be considerable more likely to exert influence. The authors posit the amicus influence hypothesis: "for an amicus brief to influence a justice, two conditions must be met: first, the brief must attract the attention of the justice and her clerks enough to merit a close reading; second, the brief must contain novel, high-quality information and advocacy that does not replicate the arguments of the litigants' briefs" (4). High status amici are much more likely to meet these two conditions than other amici. Given that briefs are expensive to produce (Caldeira and Wright 1988; Lynch 2004), high status amici have an advantage in that they are generally in a better position to retain experienced counsel and support the necessary research to produce high quality briefs (Box-Steffensmeier et al., 4). Collins (2008, 183) affirms the perspective: "[a]s applied to amicus briefs, this [i.e., the advantage of those with higher status and resources] implies that courts might be particularly attentive to the arguments advanced by highly experienced advocates, giving those briefs favorable attention."

Box-Steffensmeier et al. design an empirical study to test whether or not all amici are created equal at the USSC – i.e., whether the interest groups with more power make a difference in the justices' behavior. Controlling for other variables known to influence justice voting behavior (justice ideology, lower court decision direction, litigant resources, and the presence of the SG as amicus), Box-Steffensmeier et al. measure the influence of all interest groups appearing as amici from 1946 to 2010 by operationalizing interest group power using a foundation network centrality statistic. The methodology of arriving at the measure is quite sophisticated,[22] but in essence, the centrality of a group within a network serves as a measure of its power. Powerful groups are those groups that are more connected with other interest groups and collaborate with other well-connected groups. This centrality score is represented as a continuous variable of the maximum power of interest groups that signed briefs on each side (liberal or conservative) of a case. Because networks vary over time along with interest group power, the authors use different scores for each decade instead of using a single score to measure interest group power. This enables the authors to capture the reality that some interest groups are more powerful and present in some periods rather than in others (8).[23]

[22] The authors use eigenvector centrality to capture the notion that the groups best positioned in the network are pivotal actors before the USSC. As explained by Box-Steffensmeier et al. (2013, 6-7), "[e]igenvector centrality refers to the value of the first eigenvector of the network with respect to the sum of the interest groups to which it is connected in every decade …. it weights relationships between nodes according to their centralities, not just the number of connections, which means that both direct and indirect relationships are accounted for with this measure. In the context of our interest group network, measuring power with eigenvector centrality suggests that the quality of ties are an important consideration, not just the number of them. Interest groups that are tied to well-connected groups are taken to be more powerful than groups who have a similar number of connections to less connected groups."

[23] Interestingly, the authors find that the five most powerful (i.e., highest eigenvector centrality scores) groups in the 2000's are as follows: (1) American Farm Bureau; (2) American Soybean Association; (3) Oregon Cattlemen's Association; (4) New Mexico Cattle Grower's Association; and (5) Wyoming Stock Growers. Each of these five groups are agricultural, and none would likely be identified either in legal circles or in the common public discourse as among the most powerful and influential amici. Likewise, the five most powerful amicus groups in the 1990's are as follows: (1) American Association of University Women; (2) Northwest Women's Law Center; (3) California Women's Law Center; (4) National Council of Jewish Women; and (5) Connecticut Women's Educational and Legal Fund. Notably, each of these are women's groups. Given that none of these ten groups would likely be recognized by legal practitioners, scholars, or

The results of their study suggest that when there is a big (at least three brief) ideological advantage in terms of amicus briefs, interest group power has little direct relation to justice vote. However, when the two sides have relatively equal amicus participation, the power measures are statistically significant (10). Given that the majority of cases before the USSC have roughly equal amicus participation on both sides, this is a significant finding. Further, Box-Steffensmeier et al. find that the influence of interest group power is attenuated by justice ideology: liberal justices are more likely to vote liberally when powerful liberal interest groups are present than conservative justices, and conservative justices are more likely to vote conservatively when powerful conservative interest groups are present than liberal justices. And interestingly, for the more conservative justices, the presence of a powerful liberal amicus actually *decreases* their probability of casting a liberal vote. Yet, this same phenomenon does not hold true for the more liberal justices: the presence of a powerful conservative amicus decreases their probability of casting a liberal vote (11).

In sum, Box-Steffensmeier et al.'s study demonstrates that differences in the power and prestige of interest groups can explain why some groups find more success in achieving their political objectives than others as amicus participants. Stated differently: *who* files a brief may be as important as *how many* briefs are filed or *how many* amici participate. Groups that exhibit both higher informational resources and greater credibility should be more likely to persuade the USSC and emerge victorious on the merits (Box Steffensmeier et al. 3).

However, this finding comes with two crucial qualifications. First, the influence of powerful groups seems to be only operative when amicus participation is relatively balanced in a case. Second, the influence of powerful interest groups is not uniform amongst the justices.

---

common folk as among the most powerful and influential interest groups, I interpret the findings of Box-Steffensmeier et al. (2013) with caution.

Liberal and conservative justices respond differently to the presence of powerful interest groups of the opposing ideology. At least for the more conservative justices, the presence of a powerful liberal amicus group can act as a signal to vote against the party that group supports. This particular finding undermines the legal persuasion model of decision-making and supports the attitudinal model.[24] At the same time, liberal justices are less likely to vote liberally in cases involving a powerful conservative amicus. This finding is supportive of the legal persuasion model.

Another pressing question is whether the USSC is more influenced by the simple presence of amicus curiae or by the actual amicus briefs themselves. The literature does not provide a definitive answer, although some empirical studies have attempted to test this question. One theory – the interest group theory (discussed in greater length below) – posits that the number of amicus participants (filers and cosigners) matters because "having a large number of participants listed on a brief signals to the court that a greater number of groups, and by implication their members, will be impacted by the decision" (Collins 2004, 811-12). That is, even though amicus cosigners do not add any legal or social scientific information, the number of cosigners can provide a crude barometer of public opinion (Collins 2004; Kearney and Merrill 2000).

As mentioned above, Caldeira and Wright (1988) find that mere amici presence matters when the USSC is deciding whether or not to grant certiorari (i.e., the agenda-setting stage): the more amicus participation, the more likely the USSC is to grant certiorari, regardless of whether or not the amicus is urging the USSC to grant or deny cert. However, empirical studies of amici at the merits stage of the USSC have failed to demonstrate that the number of groups cosigning

[24] The legal (and legal persuasion), attitudinal, and interest group models of judicial decision-making are discussed in greater detail later in this chapter.

an amicus brief has a statistically significant impact on USSC decisions on the merits (Collins 2004, 822; Caldeira and Wright 1990, 800; Collins 2008, 179– 80). Likewise, survey data provided by Lynch (2004, 59) also provides moderate support for the view that the sheer number of amicus brief cosigners is not a significant factor for consideration according to 50 percent of the former USSC clerks surveyed. Instead, Lynch generally found that the identity of the amicus participants was more important than the number of groups involved.

Another potential mechanism of amicus influence that scholars have studied is the degree to which judges reference or cite amicus briefs in their opinions. Kearney and Merrill (2000) show that USSC justices have been increasingly citing amicus briefs over time. O'Connor and Epstein (1983, 42) show that non-governmental amicus briefs are cited in majority, concurring or dissenting opinions in 18 percent of the cases decided by the USSC from 1969 to 1981. Epstein and O'Connor (2005) show that during the Rehnquist Court years, the USSC's majority opinion references at least one amicus brief in 38 percent of the cases in which at least one amicus brief was filed. Most recently, in its 2010-11 and 2011-12 terms, the USSC cited amicus briefs in 63 and 46 percent of cases with amicus participation, respectively (Franze and Anderson 2012, 2). This is a notable increase over prior years, as the USSC majority, plurality, concurring, and dissenting opinions combined referenced amicus curiae briefs in just 24 percent of cases between 1946-85 (Kearney and Merrill 2000 at 758). Majority opinions in cases involving privacy rights and civil rights are most likely to reference amicus briefs, whereas cases involving federal taxation and criminal procedure are least likely to cite such briefs. Further, Spriggs and Wahlbeck (1997, 373-74) point out that the USSC is more likely to cite arguments raised in briefs supporting the petitioner than those supporting the respondent.

It could be simply that the USSC is referencing more amicus briefs than ever before because more briefs are being filed than ever before; alternatively, the USSC could be referencing more briefs than before because briefs are having more influence than before. Either way, simply looking to the number of citations (explicit references) of amicus briefs in judicial opinions is at best a "blunt indicator" of amicus influence (O'Connor and Epstein 1983) and potentially problematic because it may understate or overstate the influence of amici (Franklin 2009; Samuels 2004). For example, focusing on privacy cases, Samuels (2004, xii) found that the USSC regularly made use of arguments and information provided by amici without providing proper attribution.[25] Even if it appears that the USSC is adopting arguments presented by amici, this could be simply because the amici are reinforcing the arguments already made by the parties. Further, amicus briefs are often cited by the justices simply to describe, or even rebut, an argument. And a citation itself conveys little about whether the justices would have arrived at the same idea independently (Franklin 2009, 1027-28).

Studies are mixed regarding whether the USSC is more likely to use information from amicus briefs that repeat the parties' arguments or rather those briefs that provide original information. Spriggs and Wahlbeck (1997) examine the 1992 term of the USSC and demonstrate that amicus briefs usually provide information that is not contained in the party briefs, in addition to reiterating the arguments made in the party briefs and reinforcing the party positions. This finding accords with Collins' (2008) finding that more than 70 percent of amicus briefs offer justices information that is not found in the party briefs. Notably, however, Spriggs and Wahlbeck show that the USSC is more likely to *use* information from amici that repeat

[25] Another example: in *Romer v. Evans* (1996, 517 U.S. 620), a case involving a Colorado voters' initiative barring the enactment of laws protecting homosexuals from discrimination, majority opinion author Justice Kennedy adopted arguments put forward by amici Laurence H. Tribe, along with several other constitutional scholars. However, Justice Kennedy never cited Tribe's amicus brief in his opinion (Simpson and Vasaly 2004, 14).

existing arguments rather than those that provide original information. Briefs that exclusively reiterate arguments were referred to 63 percent of the time compared to only 26 percent for those that exclusively added (379–80). Spriggs and Wahlbeck conclude that reiteration of parties' arguments is more important to the justices than new information provided by amici. This finding accords with prior research (Pfeffer 1981). Yet it goes against the findings of survey data of federal judges and former USSC clerks that caution amici against merely restating party arguments (Lynch 2004; Simard 2007), as well as against the advice of other scholars who caution against wisdom of amici providing redundant arguments and information (e.g., Ennis 1984; Sungaila 2010).

Perhaps the most pertinent question of all pertaining to amicus impact on the USSC is whether or not amici affect the content of the justices' opinions, and by extension, the evolution of legal rules and precedent. Surprisingly, only a small amount of empirical literature has pursued an answer to this question (e.g., Epstein and Kobylka 1992; Spriggs and Wahlbeck 1997; Samuels 2004). Epstein and Kobylka (1992) show that amici have played an important role in shaping abortion and death penalty litigation. Corley, Collins, and Hamner (2013) provide the most systematic and comprehensive attempt to answer this question by using plagiarism detection software to investigate USSC majority opinion content during the 2002-2004 terms. Specifically, Corley et al. (2013) analyze the instances in which the USSC incorporated arguments made by amici into their majority opinions. They find that arguments from amicus briefs that are cognitively clear and that use plain language are more likely to be incorporated into the USSC's majority opinion than other amicus briefs. They also find that the USSC majority opinion is more likely to incorporate arguments from amici that repeat the

arguments of the litigant briefs and other amici. This finding accords with that of Spriggs and Wahlbeck (1997), discussed above.

Consistent with the attitudinal model, the authors find that liberal majority opinions are more likely to incorporate the arguments of liberal amicus briefs, and conservative majority opinions are more likely to incorporate the arguments of conservative amicus briefs. Additionally, majority opinions in salient cases are less likely to incorporate arguments of amici than in others. Lastly, Corley et al. (2013, 19) find that the SG is the most influential amicus in terms of having its arguments incorporated in the majority opinion of the USSC. Compared to other amici, majority opinions adopt 367 percent more language from amicus briefs filed by the SG. This finding is consistent with those of Kearney and Merrill (2000, 760), who term the SG the "king of the citation-frequency hill" because the SG is cited more frequently than all other amicus participants – in about 40 percent of the cases in which the SG appears as amicus.[26]

In conclusion, although consensus is lacking, various studies have shown that amici influence exists on the USSC, and that this influence depends upon multiple factors: the nature and salience of the case (Lynch 2004; Unah and Hancock 2006; Corley, Collins, and Hamner 2013); the prestige and experience of the amicus participant (McGuire 1994; Kearney and Merrill 2000; Lynch 2004; Simard 2007; Box-Steffensmeier, Christenson, and Hitt 2013); the resources of the party whom the amicus supports (McGuire 1994; Collins 2008); whether the brief supports the respondent or the petitioner (Kearney and Merrill 2000); the disparity in the number of briefs offered by each side (Kearney and Merrill 2000; Collins 2008; Collins 2007); the ideology of the justice reading the brief (Collins 2008; Box-Steffensmeier, Christenson, and

[26] This finding also is consistent with the those of Franze and Anderson (2012, 2) who find that the justices cited the SG's amicus briefs in 79 percent of cases in which the SG filed a brief during the 2010 term, and 44 percent of such cases in the 2011 term. This compares to the justices citing only 13 percent of amicus briefs filed by state and local governments and 11 percent of amicus briefs filed by nongovernment groups during the 2011 term.

Hitt 2013) – with those at the ideological center being persuadable (Collins 2008); the quality of the brief itself (Lynch 2004; Simard 2007; Collins, Corley, and Hamner 2013; Box-Steffensmeier, Christenson, and Hitt 2013); whether the amicus collaborated with others (Lynch 2004; Box-Steffensmeier, Christenson, and Hitt 2013); and whether the brief reiterated the parties' arguments or provided new information (Spriggs and Wahlbeck 1997; Collins 2008).

E. Amicus Participation and Influence in Lower Federal Courts and State Courts

While most studies of amicus participation and influence focus on the USSC, fewer studies have examined amicus activity in state courts (e.g., Epstein 1994; Comparato 2003; Corbally, Bross and Flango 2004; Flango, Bross and Corbally 2006; Songer and Kuersten 1995; Laroche 2009) and lower federal courts (e.g., Martinek 2006; McIntosh and Parker 1986; Harrington 2005; Collins and Martinek 2010; Simard 2007; Rice 2012).

In the U.S. Courts of Appeals (USCA), amicus participation is rather anemic compared to the USSC. Martinek (2006) shows that the percentage of cases in the USCA with at least one amicus filer in the time period from 1960-1996 hovers between 2 and 7 percent. Still, due to the sheer caseload volume in the USCA, amicus participation is not insignificant. In fact, in raw numbers, amicus participation at the USCA exceeds that at the USSC. For example, Harrington (2005) reports that in 2003 there were 413 cases with at least one amicus brief in the USCA. It is notable that more cases involve amicus support for appellants than for appellee at the USCA, and cases involving economic activity and regulation attract the most absolute amicus participation (Collins and Martinek 2010, 401).

Some USCA judges have criticized the lack of scrutiny in granting leave to file amicus briefs and the Seventh Circuit has articulated a policy limiting the types of amici it will allow

(Simard 2007, 672-73). However, the Third Circuit has been more supportive of an open door policy giving wide latitude to amicus filings, rejecting concerns that amici must be impartial and devoid of pecuniary interest in the case (Simard, 673).

Collins and Martinek (2010) employ a probit model to determine the influence of amici on the USCA from 1997-2000. Their results indicate that amicus curiae briefs supporting the appellant enhance the litigant's likelihood of success; however, those amicus briefs supporting the appellee do not make a difference. Collins and Martinek contend that this finding makes sense given the strong propensity for the USCA to affirm lower court decisions (ruling in favor of the appellee around 70 percent of the time), because amicus briefs supporting the appellant are able to level the playing field between appellants and appellees (411).

Simard (2007) surveyed three USSC Justices, 60 USCA judges coming from every circuit, and 227 federal district court judges to gather their insights and thoughts regarding the usefulness and efficacy of amici curiae. U.S. district court (USDC) judges reported nominal amicus participation (from 0 to less 5 percent of their docket), and USCA judges reported 5 to 15 percent of their docket involved amici curiae (685-86). All three USSC justices, and the majority of USCA and USDC judges, acknowledged that they are influenced by the identity, prestige, and experience of the amicus curiae. The three USSC justices unanimously agreed that the number of amicus briefs filed had zero influence on their decision, while only one agreed that the number of amici curiae (including cosigners) had some moderate influence. The vast majority of USCA and USDC judges (around 80 percent) indicated that neither the number of amicus briefs filed in a case nor the number of amicus curiae cosigners had any influence on their decision-making. Taken at face value, these findings seem to strike a blow to the interest group theory of amici influence on judicial decision-making. However, judges may be reticent

to admit such influence out of concerns for the integrity of the legal process, while still being subjected to such influence.

Simard also found widespread agreement among USSC, USCA, and USDC judges that amici can be helpful when they offer legal arguments that are absent from the parties' briefs, and when they focus the court's attention on matters that impact a direct interest that is likely to be materially affected by the case (692). A majority of USCA and USDC judges also claimed that amici are helpful when they support a party who is not adequately represented. In addition, all three levels of federal judges surveyed indicated that the government is the most helpful amicus curiae, particularly the SG. A majority of all levels of federal judges also found interest groups and law professors to be useful as amici. From her survey of federal judges, Simard (711) concludes – similar to Lynch (2004) – that "me too" briefs which merely repeat arguments that have already been fully vetted and briefs containing skewed or unreliable information offer no significant utility to the court, while briefs that educate the court on complex technical matters or inform the court of potential impacts of a decision on non-parties can influence the decision-making process.

State courts have traditionally been less open to amicus participation than the federal courts (Laroche 2009, 708). State rules governing amicus participation vary widely today. Epstein (1994) studied the filing of amicus briefs in sixteen state courts between 1965 and 1990 to determine if interest group involvement in courts has been increasing over time. Just like the pattern in federal courts, the filing of amicus briefs in state courts increased over this time frame dramatically, tripling from 4.3 filings per state before 1975 to 12.7 per state in the 1980s. While Epstein found evidence of a wide range of organized interests as amicus filers, she noted that the amicus activity was uneven amongst the states. Brace and Butler (2001, 253) extended that

research to all states and found that in a third of the states less than 5 percent of the cases involved amici participation, whereas in California, Michigan, New Jersey, Oklahoma, and Oregon over a quarter of all cases had amici participation.

Corbally, Bross, and Flango (2004, 53) confirm that the filing of amicus briefs in state courts of last resort has been on an upward trend over the past 40 years, and that there is a great variation in the extent to which amicus briefs are used in different states. Using a sample of cases from all state courts of last resort from 1998-2000, Corbally, Bross, and Flango (2004) show that a small number of states accounted for the majority of amicus filings. The ten states with the highest levels of amicus participation (in alphabetically order) were Alabama, California, Florida, Massachusetts, Michigan, New Jersey, New York, North Carolina, Ohio, and Washington They also show that amicus filings were most common in tort cases, followed by criminal cases. Further, Corbally, Bross and Flango find that one third of the cases in their sample cited or acknowledged amicus briefs, and that in 82 percent of this subset, the court both directly cited and discussed arguments made in the amicus briefs.

Other studies have attempted to more directly assess the efficacy of amici in state courts. Songer and Kuersten (1995) explored the success of amici in three state supreme courts' (Georgia, South Carolina, and North Carolina) decisions on the merits from 1983 -1990. They employed three different methodologies gauging success: (1) simple win/loss ratios; (2) matched-pairs analysis in which cases involving the same issue and type of litigant, yet without amicus support, were compared with those with amicus support; and (3) a multivariate logit model. Each of the three methodologies employed produced the same result: amicus support significantly increases the chances of litigant success in state supreme courts, regardless of whether the amici supports the appellant or respondent.

Songer, Kuersten, and Kaheny (2000) provide an answer to the question of why amicus support increases a litigant's chance of success. Consistent with party capability theory, they show that interest groups who partner (as amicus) with individuals with low levels of resources (the "have nots") in state supreme courts greatly increase the chances of success for the "have nots." In contrast, however, repeat players (i.e., institutional litigants) do not appear to benefit from the additional support of amici. Thus, amici support appears to overcome the normal disadvantages of one-shot litigants with inferior resources.

Essentially, Songer, Kuersten, and Kaheny demonstrate that adding an experienced, talented amicus to the representation of a "one-shotter" can effectively turn the one-shot litigant into a repeat player. However, the addition of amicus representation to repeat players (like big business and government), does not impact the success rate of such litigants, probably because the amicus adds little additional expertise or experience to the repeat player. The implication is that who is supported may have as much to do with the chances of amicus success at the state level as the characteristics of the group that files an amicus brief.

Flango, Bross, Corbally (2006) surveyed the chief justices or appellate court clerks of 39 state courts of last resort in 2001 regarding the efficacy of amicus briefs in their courts and determined that moderate support existed for the usefulness of amicus briefs. In response to the request – "please check the percentage range that most accurately describes the number of *amicus curiae* briefs in your court which are influential" – 27 percent of the justices and appellate court clerks regarded fewer than a quarter influential, 32 percent considered between a quarter and one half influential, and 36 percent considered between one half and three quarters influential (185). Amicus briefs were found to be most useful to state courts of last resort when they provide legal citations, policy considerations, social science data, and economic data that

would not otherwise be brought to their attention (185). While most survey respondents welcomed amicus participation, they did indicate that consolidation of briefs and coordination among the parties and amicus participants to avoid repetition is a welcome and wise practice. This finding accords with Lynch's (2004) survey research of former USSC clerks.

Laroche (2009) studies amicus participation and influence at the New York State Court of Appeals (NYSCA – New York's state court of last resort) by examining all cases at the NYSCA with published opinions from 1998-2007, as well as 1959, 1969, and 1979. Noting the NYSCA open door policy towards amicus participation, Laroche shows that amicus participation steadily increased during 1998-2007, averaging 62 briefs per year during this period (711-12). The most frequent amici participant was the New York State Attorney General, and criminal cases were the category most likely to have amicus participation (14 percent). Amicus briefs were cited by the NYSCA in 16 percent of the cases with at least one amicus brief (721).

Regarding amicus influence on the NYSCA, Laroche (2009, 751-52) reaches three conclusions: (1) filing an amicus brief does influence the decision of the NYSCA as amicus support increases both the respondent and appellant's win rate compared to the benchmark rate without amicus support; (2) the New York Attorney General has the greatest influence of any amicus filer (in terms of success rate when controlling for other variables); and (3) the information hypothesis (legal model) is the most likely mechanism of amicus influence, and the affected groups hypothesis (interest group model) is also moderately supported.

In sum, although fewer studies explore amicus activity and influence in the state and lower federal courts than in the USSC, similar conclusions have been reached about amicus influence in such courts: the prestige and experience of the amicus participant can make a difference; amicus support can increase the chances of litigant success by leveling the playing

field between litigants with less resources and those with more resources; and adding new information is seen as more valuable than reiterating information already provided by the parties.

F. What Model of Judicial Decision-making Best Explains Amicus Influence?

i. Attitudinal Model: "Attitudinal Congruence" Hypothesis

The prevailing view among judicial scholars studying USSC decision-making is the attitudinal model, which predicts that judges will vote consistent with their ideological preferences, and not necessarily with the side who makes the most persuasive legal arguments in a case (Collins 2008; Kearney and Merrill 2000). Simply put, the attitudinal model holds that judges make decisions based upon their attitudes and values, which spring from their life, rearing, education, and experience. The lead proponents of the attitudinal model, Segal and Spaeth (2002), describe the attitudinal model as asserting that justices make decisions based on their own political values vis-à-vis the case facts. This model equates "the ideological attitudes and values of the justices" with their political leanings (Segal and Spaeth 2002, 86). The attitudinal model is the opposite of the legal model, which depicts judicial decision making as the product of the interplay between law and fact (Segal and Spaeth, 48). The attitudinal model posits that judges have fixed ideological preferences, and that case outcomes are a product of the summing of the preferences of the participating judges, with legal norms serving only to rationalize outcomes after the fact (Kearney and Merrill 2000, 748; Segal and Spaeth 1993). Many scholars hypothesize that if the attitudinal model is correct, then no amicus influence should be detected because judges simply vote their attitudes and ideologies (e.g., Kearney and Merrill 2000; Laroche 2009).

Collins (2008) explains that the attitudinal model may still allow for amicus influence insofar as the amicus brief reinforces or bolsters judges' pursuit of their policy preferences. Collins cites social psychology research in support of this claim. For example, "when confronted with ideologically congruent information, receivers are less motivated to develop counterarguments or ignore this information and instead use this information to develop thoughts favorable to their ideological predispositions" (93). Yet, when confronted with information that contradicts their predetermined attitudes, receivers tend to ignore or discount that information. Thus, Collins posits the "Attitudinal Congruence Hypothesis: As the number of liberal (conservative) amicus curiae briefs increases, so too will the likelihood of observing a liberal (conservative) justice cast a liberal (conservative) vote" (93). Notably, however, under the attitudinal congruence hypothesis, justices will *not* be more likely to vote against their policy preferences simply because more briefs are filed supporting the position that the judge is not inclined to agree with.

Also of note, the attitudinal model applies mainly to those justices who have relatively extreme policy preferences, and thus, is less predictive of the moderate justices on the Court. Under the attitudinal model, the expected influence of amicus briefs on moderate justices is the same as the in the information/legal persuasion hypothesis. This is because the preferences of moderate justices should not be extreme enough to mediate the influence of amicus briefs. Instead, moderate justices are expected to respond to the presence of amicus briefs by becoming more likely to vote consistent with the positions advocated by the briefs (Collins 2008, 96-97).

ii. Legal Model: "Information" or "Legal Persuasion" Hypothesis

Simply put, the legal model states that sources of law, precedents, and legal arguments influence judicial decision-making (Kearney and Merrill 2000). The traditional view of the legal model understands judges to be neutral decision-makers who set their personal preferences aside when rendering their decisions. The justices are thus expected to rule consistent with their legal training by attempting to discover correct legal answers (Collins 2008, 9). Under the legal model, amicus briefs are influential to the extent they provide quality information related to the legal issues presented in a case (Simard 2007, 682).

A nuanced variant of this model is proposed by Collins (2008) – the "legal persuasion" model – in which the justices are influenced by the information they receive from amici, including information about both the legal and broader policy consequences of their decisions. Collins contends the legal persuasion model is more realistic in that in takes into account the indeterminate nature of the law, without discounting the importance of the law to judicial decision-making. The USSC justices look to amicus briefs to provide social science evidence along with policy and other extra-legal arguments by which to gauge the impact of their decisions upon society. Collins argues that amicus briefs "present the justices with numerous alternatives or reframed legal arguments … [which] serve to persuade the justices that the amici's preferred disposition is the decision most consistent with their legal training" (pg. 90).

In this way, justices use amicus briefs to aid their efforts to reach the best and most accurate legal conclusions. It is the subjective and indeterminate nature of the law that opens the door for interest groups to influence judicial choices via the submission of amicus briefs. Under the legal persuasion model, amicus briefs are effective because they provide courts with added information that buttress the arguments of the direct litigants (Collins 2004, 815; Simard 2007).

Such information can come in many forms: the presentation of legal arguments from another perspective; the presentation of policy consequences of particular legal interpretations; providing common interpretation of relevant laws; and presenting social science information that is lacking from the appellate record (Simard 2007-08, 682). The information/legal persuasion hypothesis flows out of the legal model: a positive correlation should exist between the number of briefs filed in a particular ideological direction, and the justice's likelihood of voting in that direction, regardless of the justice's ideology

iii. Interest Group Model: "Affected Groups" Hypothesis

At its core, the interest group model is essentially a public opinion based explanation for amicus influence. The larger the number of cosigners on an amicus brief, the stronger the public support appears for the position advocated by the brief. Much prior literature has shown that the justices of the USSC care about public opinion out of their concern for institutional legitimacy and policy enforcement (e.g., Collins 2004; Epstein and Knight 1998; Stimson, MacKuen and Erickson 1995; Flemming and Wood 1997; Mishler and Sheehan 1993). This truth is concisely stated by Caldeira (1986, 1209): the USSC "must depend to an extraordinary extent on the confidence, or at least the acquiescence, of the public." To the extent that the USSC cares about its democratic legitimacy, it should recognize the value of including affected groups within the process and providing them an opportunity to influence the outcome (Simard 2007, 682).

The interest group model is cogently described by Kearney and Merrill:

> Insofar as the Justices are assumed to try to resolve cases in accordance with the weight of public opinion, they should look to amicus briefs as a barometer of opinion on both sides of the issue. Moreover, the information that amicus briefs convey about organized opinion is such that it can largely be assimilated simply by looking at the cover of the brief. The Justices can scan the covers of the briefs to see which organizations care strongly about the issue on either side. The fact that the organization saw fit to file the

> brief is the important datum, not the legal arguments or the background information set forth between the covers of the brief (2000, 785).

Thus, the interest group model holds that amicus briefs are influential because they signal to the USSC which and how many groups and individuals will be affected by the decision (Collins 2004). It is the mere presence of a large number of interests on one side relative to the other that is the mechanism of amici influence (Collins 2004, 814). In short, the interest group model suggests that amici have utility not because of the legal arguments or information they provide, but simply because they are participating as brief filers or cosigners (Simard 2007, 281). The affected groups hypothesis flows from this model: "an advantage of amicus participants, relative to one's opponent, will increase the likelihood of litigation success" (Collins 2004, 814-15). If the justices respond to the number of amicus cosigners on amicus briefs, then it would appear that public opinion matters to the USSC. On the other hand, if, consistent with the information/legal persuasion hypothesis, the justices value the information content of the briefs, it is expected that an advantage of amicus briefs, relative to one's opponent, will increase the likelihood of litigation success, irrespective of the number of cosigners on the briefs (Collins 2008, 179).

iv. Empirical Evidence

To test whether the information/legal persuasion hypothesis or the affected groups hypothesis is a better explanation of amicus influence, Collins (2004) designed a study to see if the number of amicus briefs, or the number of amicus brief cosigners, has greater impact on USSC case outcomes. If the information hypothesis is accurate, then a greater number of briefs will have more of an impact, while if the affected groups hypothesis is accurate, then greater numbers of cosigners will have more of an impact. While not necessarily providing more

substantive information to the USSC, having more amicus brief cosigners does provide the USSC with a means of assessing the number of groups which will be affected by the decision (and may serve as a crude barometer of public opinion). Controlling for other known influences on USSC decision-making (e.g., SG participation; party resources; ideological congruence; lower court direction; lower court conflict), Collins' (2004) results indicate that it is the number of amicus briefs, and not the number of cosigners of briefs, that have an impact. Thus, the affected group hypothesis was not supported, but the informational hypothesis was moderately supported. This indicates that the legal model better captures the reality of amicus impact than the interest group model.

In a more rigorous and comprehensive study, Collins (2008) confirms his earlier findings failing to garner empirical support for the interest group model of amicus influence: "the justices do not respond to the number of cosigners on amicus briefs but do respond to the number of amicus briefs" (179-80). Significantly, however, Collins does find that not only do amicus briefs influence the decision-making of USSC justices, but also that for the overwhelming majority of the USSC, ideology does *not* act as a mediating variable conditioning how the justices process the information contained in amicus briefs (pg. 172-73). Regardless of ideology, a justice is more likely to vote conservatively the greater the number of conservative amicus briefs filed, and conversely, a justice is more likely to vote liberally the greater the number of liberal briefs filed. It is notable, however, that this amicus brief effect was attenuated in both the conservative and liberal ideological extremes of the USSC. Further, the only justices found not to be influenced by attitudinally incongruent briefs were extremely conservative justices. This is Collins' only finding that supports the attitudinal explanation for amicus influence.

Taken as a whole, Collins (2008) shows that the decision-making of the vast majority of the USSC justices is more than simply a function of the justices attitudes and values (as the attitudinal model would predict). Collins' findings provide strong evidence that justices engage in "top-down cognition" – i.e., a justice responds to the persuasive arguments presented by amici that are attitudinally incongruent with the justice's ideology because the justice aims to reach accurate legal answers. Further, Collins (2008, 111) finds that the justices who sit at or near the ideological center of the USSC are especially susceptible to the persuasive legal arguments contained in amicus briefs. Such evidence bolsters the utility of targeting the median (swing) vote through amicus briefs (Ennis 1984; Kolbert 1989).

On the whole, Collins' (2008) comprehensive study provides support for the legal persuasion model of judicial decision-making, as it shows that justices – even those not attitudinally predisposed to the amici's arguments – respond to the information conveyed in amicus briefs. Ultimately, Collins concludes that the law matters and that the legal persuasion model best explains the influence of amicus briefs on the USSC. However, the research of Box-Steffensmeier, Christenson, and Hitt (2013), discussed above, provides an important qualification to Collins' general conclusion that the legal persuasion model best explains amicus influence. Their findings suggest that whether the legal model or attitudinal model better explains amicus influence depends on both the power of the amici and the ideology of the justice. Specifically, recall that Box-Steffensmeier et al. find that liberal and conservative justices respond differently to the presence of powerful interest groups of the opposing ideology. The more conservative justices tend to view the presence of a powerful liberal amicus group as a signal to vote against the party that group supports. This particular finding undermines the legal persuasion model of decision-making and supports the attitudinal model. At the same time,

liberal justices are more likely to vote conservatively in cases involving a powerful conservative amicus. This finding is supportive of the legal persuasion model. Similarly, the research of Corley, Collins, and Hamner (2013), discussed above, and Unah and Hancock (2006), discussed below in Chapter 3, indicate that amici have less impact in salient cases, as justices are more likely to decide consistently with their attitudes in such cases. In short, which model of decision-making best explains the impact of amicus curiae depends on the case context and the actors involved.

Chapter 2: The Roberts Court

In order to provide context and frame the subsequent description and analysis of amicus participation and impact on the Roberts Court, it is appropriate to include a brief overview, along with descriptive statistics, of the Roberts Court era (2005 – 2012 terms of the USSC). The Roberts Court has seen four new justices join its ranks since its inception. Two justices were appointed by President Bush – Roberts and Alito – and two were appointed by President Obama – Sotomayor and Kagan. Of the eleven justices who have served on the Roberts Court since its inception in 2005, seven have been appointed by Republican presidents (Stevens, Souter, Scalia, Thomas, Alito, Kennedy, and Roberts), while only four have been appointed by Democratic Presidents (Ginsburg, Breyer, Sotomayor, and Kagan). The advantage of Republican appointees on the Roberts Court provides an indication of its conservative leaning. There is general consensus amongst scholars and practitioners of the justices whom constitute the left and right of the Roberts Court. Justices Scalia, Thomas, Alito, and Roberts make-up the conservative wing of the Roberts Court, while current Justices Ginsburg, Breyer, Sotomayor, and Kagan (and formerly Souter and Stevens) occupy the liberal camp. Justice Kennedy typically falls in the middle of these two camps – the metaphorical "swing" justice of the Roberts Court.

A. Literature and Case Law Review

One constant on the Roberts Court has been the reliability of Justice Kennedy as the pivotal "swing" vote. In this vein, *Time Magazine* (2012) has labeled Justice Kennedy "The Decider." In fact, Kennedy has played the role of what Epstein & Jacobi (2008, 41) refer to as a "super-median": a member of the Court "so powerful that they [are] able to exert significant control over the outcome and content of the Court's decisions." SCOTUSblog (2013, 2012)

reports that Kennedy has been the justice most likely to be in the majority of a 5-4 decision each term of the Roberts Court. Kennedy joined the majority coalition in 87 percent of the Roberts Court's 5-4 decisions in 2012, 80 percent in 2011, 88 percent in 2010, 69 percent in 2009, 78 percent in 2008, 67 percent in 2007, 100 percent in 2006, and 75 percent in 2005. Justice Kennedy is also the justice at the Roberts Court most likely to appear in a majority opinion, regardless of vote tally: 91 percent of cases in the majority in 2012, 93 percent in 2011 and 2010, 91 percent in 2009, 92 percent in 2008, and 86 percent in 2007.

While Justice Kennedy is viewed as the median or "swing" justice on the Roberts Court, he generally aligns himself with the conservative wing of the USSC, siding almost twice as often with the conservatives as with the liberals. According to the Martin-Quinn judicial ideology scores,[27] developed by judicial scholars Andrew Quinn and Kevin Martin, Justice Kennedy is very conservative by historical standards for the median justice of the USSC. Thus, while Kennedy is typically viewed as the median of the Roberts Court, his is not necessarily viewed as a true moderate. Perhaps the most accurate description of Justice Kennedy's ideology is provided by Knowles (2009), who, in her book – *The Tie Goes to Freedom: Justice Anthony M. Kennedy on Liberty* – characterizes Kennedy's jurisprudence as "modestly libertarian." Knowles (2009, 5) goes on to qualify this label by asserting that Kennedy's documented embrace of judicial activism (i.e., his willingness to strike down state and federal laws) is part and parcel of his modestly libertarian philosophy: "his requirement that governmental actions pass far more stringent tests when they impinge upon liberty in ways that demean the individual, negatively affect a person's dignity, diminish personal responsibility, or treat in a particular way because of their race is entirely consistent with the tenets of libertarian thought."

[27] The Martin-Quinn scores are discussed in much greater detail in Chapter 3, but suffice it here to say that these scores are based upon statistical Bayesian techniques that score justices on a conservative-liberal continuum.

According to the Martin-Quinn judicial ideology scores, which go back to 1937, the Roberts Court is the most conservative of the modern USSC era. Many USSC observers agree with this statistical conclusion. The conservative orientation of the Roberts Court can be explained by the following factors: (1) the rightward shift of public opinion over time, which has, in turn, impacted the USSC; (2) the replacement of the more moderate Justice Sandra Day O'Connor with the more conservative Justice Samuel Alito; and (3) the numerical advantage of Republican appointees on the USSC.

In his statements before the Senate Judiciary Committee during his confirmation hearing during 2005, Chief Justice John Roberts pledged to respect the other branches of government as co-equals, to make a renewed push for consensus on the USSC, to reach narrow rulings designed to build broad coalitions, and to seek a jurisprudence characterized by modesty and humility (Winkler 2012). He likened the role of USSC justices to umpires:

> Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ballgame to see the umpire … I will remember that it's my job to call balls and strikes and not to pitch or bat (Roberts 2005).

Critics of the Roberts Court claim that Chief Justice Roberts has led a Court that has not lived up to his promises by frequently ignoring or changing precedent with which it disagrees (e.g., Coyle 2013; Winkler 2012; Toobin 2009; Nichol 2011; Greenhouse 2013). Such critics point to controversial rulings of the Roberts Court striking down limits on corporate and union campaign spending, allowing for new restrictions on abortion, curtailing the reach of environmental protection regulations, striking down gun regulations, and rolling back civil rights protections in the area of race, particularly involving affirmative action and voting rights, as evidence of this claim.

Other scholars disagree with this characterization of the Roberts Court as activist and ultra-conservative (e.g., Adler 2010, Rhodes 2011). For example, in an empirical and doctrinal analysis comparing the Roberts Court to its predecessor Courts, Rhodes (2011) concludes that the Roberts Court has a better record of adhering to constitutional precedent than any other Court over the past 50 years, and that it invalidates fewer state and local laws than any of these Courts as well. Given his findings, Rhodes' concludes that the decisions of the Roberts Court typically evidence the principle of judicial minimalism: the Roberts Court avoids constitutional questions when possible, respects the holdings of prior decisions, and relies on incremental and narrow approach to constitutional rule-making and statutory interpretation. Seen in this context, it is understandable why the Roberts Court has shown a propensity to decide more civil procedure cases than its predecessors, placing a renewed emphasis on legal disputes involving questions of pleadings, class actions, joinder, choice of law, personal jurisdiction, subject matter jurisdiction, and appellate review (Rhodes 2011; Wasserman 2012). Even *New York Times* columnist Adam Liptak (2013b), a consistent critic of the Roberts Court as activist and too far right, acknowledges that the most recent term of the Roberts Court (2012) evidenced a form of judicial modesty: the USSC "declined to do away with affirmative action, gave Congress another shot at salvaging the Voting Rights Act, and refused to find a constitutional right to same-sex marriage." Liptak even goes on to describe Chief Justice Roberts' leadership as "patient and methodical" and one which takes "the long view," proceeding incrementally.

Of course, the Roberts Court has issued its fair share of controversial, high-profile decisions, the most notable of which has been the 2012 decision involving the PPACA, discussed in the introduction. In the area of campaign finance, the Roberts Court has left its mark by striking down or narrowing campaign finance laws in the name of the First Amendment's

protection of political speech, most notably in *Citizens United v. FEC* (2009). [28] In the area of gun control, the Roberts Court has struck down laws that ban the possession of hand guns as violating the Second Amendment's right to bear arms for purposes of self-defense in *District of Columbia v. Heller* (2008) and *McDonald v. City of Chicago* (2010). In *Arizona v. United States* (2011) the Roberts Court struck down most aspects of Arizona's highly-publicized immigration law on the ground that they were preempted by existing federal law, while allowing the portion pertaining to immigrant status checks to remain. In the cases of *Hamdan v. Rumsfeld* (2006) and *Boumediene v. Bush* (2006) the Roberts Court pushed back against broad war power claims of the Executive branch, stating that military tribunals for Guantanamo detainees violate military law and the Geneva Conventions, and striking down a portion of the Military Commissions Act of 2006 by ruling that Guantanamo terror detainees have a right to seek their release in federal courts via *habeas corpus* relief. Lastly, in its most recent term the Roberts Court issued landmark decisions regarding same-sex marriage, invalidating that portion of the federal Defense of Marriage Act which denies federal benefits to married gay and lesbian couples in those states where same-sex marriage is legal on equal protection and due process grounds (*United States v. Windsor* (2013)); and holding that a federal district court ruling that struck down California's Proposition 8 ban on same-sex marriage could not be challenged because the ban's supporters lacked legal standing (*Hollingsworth v. Perry* (2013)).

A review of the literature indicates that the Roberts Court has left an indelible mark in four particular areas of the law: business, the First Amendment, criminal procedure, and federalism (e.g., Howard 2012). The decisions of the Roberts Court involving business interests seemed to have attracted the most attention and commentary of USSC observers. The Roberts

[28] Also *Davis v. FEC*, 128 S. Ct. 2759 (2008), and *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 131 S. Ct. 2806, 2813 (2011).

Court is generally regarded as being business-friendly in comparison with previous Courts (Epstein, Landes, and Posner 2013; Coyle 2013; Franklin 2009; Chemerinsky 2008; Rosen 2008; Liptak 2013a; Liptak 2010). For example, USSC observer and *New York Times* Columnist Adam Liptak (2013a) claims that the Roberts Court is friendlier to business than any Court since World War II. As evidence of this, Liptak (2013a) claims the following: "In the eight years since Chief Justice Roberts joined the Court, it has allowed corporations to spend freely in elections in the *Citizens United* case, has shielded them from class actions[29] and human rights suits,[30] and has made arbitration the favored way to resolve many disputes.[31]" More specifically, one observer has noted that the Roberts Court tends to be skeptical about attempts to regulate business via litigation, and that business defendants, not business parties in general, are the primary beneficiaries of the Roberts Court (Franklin 2009, at 1021).

Epstein, Landes, and Posner (2013) provide confirmation of the pro-business orientation of the Roberts Court. In what is perhaps the most comprehensive and methodologically sophisticated study to date regarding the influence of business on the USSC from 1946 to 2011, Epstein, Landes, and Posner find that the Roberts Court has been more friendly to business generally than prior Courts and that five of the ten justices who have been the most favorable to business over this time period are currently serving on the Roberts Court, including the top two justices – Samuel Alito and John Roberts.

The Roberts Court also stands out in the realm of the First Amendment, particularly freedom of expression. Former Solicitor General Ken Starr (2011) has declared that the Roberts Court is "the most free speech Court in American history," and ACLU's legal director Steve

[29] *Wal-Mart Stores, Inc. v. Dukes* (2011)

[30] *Kiobel v. Royal Dutch Petroleum, Co.* (2012)

[31] *AT&T v. Concepcion* (2011)

Shapiro has acknowledged the "expansive view of the First Amendment" (Howard 2012, 82) taken by the Roberts Court. In addition to the controversial *Citizens United* ruling, protecting the spending rights of corporations and unions in campaigns, the Roberts Court has issued many other significant rulings fortifying protections of speech. For example, in *United States v. Stevens* (2010), the Roberts Court protected offensive and appalling speech involving videos depicting animal cruelty. Similarly, in *Brown v. Entertainment Merchants Association* (2011), the USSC struck down a California law prohibiting the sale or rental of violent video games to minors based on the First Amendment. In *Snyder v. Phelps* (2011), the USSC said that protests and picketing by the controversial Westboro Baptist Church at military funerals was protected speech despite the tendency of such actions to arouse contempt. And in *United States v. Alvarez* (2011), the USSC struck down the Stolen Valor Act, which made it illegal to lie about military decorations.

However, the picture is not entirely rosy at the Roberts Court for proponents of an absolute and all-encompassing protection of speech. The Roberts Court has issued opinions curtailing student speech (*Morse v. Frederick* (2007)), government employee speech (*Garcetti v. Ceballos* (2006)), and prisoner speech (*Beard v. Banks* (2006)). All in all, the Roberts Court has issued 30 opinions pertaining to freedom of expression during its first eight terms. According to USSC observer Ronald Collins (2013), the Roberts Court affirmed a First Amendment free expression claim in 13 of these 30 opinions; it was unanimous in seven of the cases in which it denied such claims; it divided 5-4 in six of the 30 cases; and the Chief Justice along with Justices Kennedy and Scalia authored two-thirds of these opinions, with the Chief Justice in the lead, authoring 10 of the 30 opinions.

The Roberts Court's criminal procedure decisions cannot be lumped together and characterized as generally conservative or generally liberal. Instead, they evidence shifting coalitions that vary across the ideological spectrum. Nevertheless, some distinctive trends in the criminal procedure jurisprudence of the Roberts Court are manifest. Criminal defendants, the accused, and those in prison have achieved some substantial victories. For examples, in *Roper v. Simmons* (2005), *Graham v. Florida* (2010), and *Miller v. Alabama* (2012), the Roberts Court curtailed states' power to punish juvenile offenders. In *Kennedy v. Louisiana* (2008), the Court barred the death penalty for child rape. And in *Brown v. Plata* (2010), the Roberts Court ordered California prisons to reduce overcrowding to improve health conditions. The Roberts Court has also afforded criminal defendants greater protections against out-of-court testimonial statements, denials of their choice of counsel, punishment enhancements without jury findings, and ineffective counsel (Rhodes 2011, 60).

In search and seizure cases implicating the Fourth Amendment, the Roberts Court has struggled to find a unifying principle to guide its jurisprudence. In this vein, law professor Erwin Chemerinsky (2012) claims the following regarding the Roberts Court approach to the Fourth Amendment: "I have long thought that the Supreme Court's Fourth Amendment decisions can be explained by a simple predictive principle: if the justices can imagine it happening to them, then it violates the Fourth Amendment." For example, the Court has struggled to coalesce around a rationale for how the Fourth Amendment applies in this new technological era. In *United States v. Jones* (2012), the USSC held that attaching a GPS tracking device to a vehicle and then using that device to monitor the vehicle's movements constituted a search under the Fourth Amendment, but split as to why. Some of the justices viewed the government action as a form of trespass, others as a violation of a citizen's reasonable expectation of privacy.

Four search and seizure cases from the most recent term of the Roberts Court provide further evidence of the highly context-dependent nature of these Fourth Amendment rulings. In *Florida v. Jardines* (2013), a 5-4 Court ruled that bringing a trained police dog onto someone's front porch for purposes of obtaining evidence with which to secure a warrant is a search in violation of the Fourth Amendment. However, the Roberts Court was unanimous in *Florida v. Harris* (2013), ruling that when the police provide evidence of a drug-sniffing dog's satisfactory performance in a certification or training program, the dog's alert can provide probable cause to search a vehicle in the absence of a warrant. In *Missouri v. McNeely* (2013), the USSC ruled 5-4 that nonconsensual, warrantless blood draws in drunk-driving cases violate a person's right to be free from unreasonable searches and seizures. On the other hand, in *Maryland v. King* (2013), the Roberts Court ruled 5-4 that taking and analyzing a cheek swab of an arrestee's DNA is reasonable and is not a violation of the Fourth Amendment, as it is akin fingerprinting and photographing. In summary, in the same term, the Roberts Court ruled that dog searches are unconstitutional in absence of a warrant at someone's front porch, but constitutional if involving the sniffing of a vehicle. And the Court ruled that warrantless blood draws of suspected drunk drivers are unconstitutional, but that DNA swabs of arrestee's are constitutional.

In the context of inmates, the Roberts Court has been unwilling to embrace more expansive Fourth Amendment protections, tending to give deference to the decisions of law enforcement authorities in the field. For example, in *Florence v. Board of Chosen Freeholders of Burlington County* (2012), the Roberts Court held that jailhouse strip-searches do not require reasonable suspicion, even for minor offenses. Regarding warrants and the exclusionary rule, the Roberts Court seems to be moving away from a categorical warrant requirement towards case-by-case reasonableness determinations, and away from the conclusion that all errors by law

enforcement authorities should result in the suppression of evidence at trial (O'Neill 2009). For example, in *Hudson v. Michigan* (2006), the Court held that evidence need not be suppressed simply because law enforcement authorities violated the knock-and-announce rule. And in *United States v. Herring* (2009), the USSC limited the use of the exclusionary rule to reckless or intentional mistakes by police, saying that the exclusionary rule did not apply to mistakes made in "good-faith."

Lastly, in the area of federalism, the Roberts Court has departed in some noticeable ways from the Rehnquist Court. With its rulings, the Rehnquist Court helped to bring about the "new federalism" – a renewed emphasis on the role of the states in our federal system of government and an attempt to put some teeth back into the Tenth Amendment, which some contend had become almost an afterthought. The Rehnquist Court had a reliable bloc of five conservative pro-state justices who helped to bring about this "new federalism" era. However, the Roberts Court has no such consistent alignment of justices. At the Roberts Court, the conservative justices are often as likely to favor the federal government as the states (Shortell 2012).

According to Shortell (2012), the Roberts Court has departed from its predecessor in three primary ways in the realm of federalism. First, the Roberts Court has focused its federalism decisions on the doctrine of preemption, instead of the Commerce Clause and sovereign immunity (as did the Rehnquist Court). Second, the Roberts Court, unlike the Rehnquist Court, has chosen to focus on questions of statutory interpretation rather than constitutional interpretation. Third, with the replacement of Justices Rehnquist and O'Connor, the Roberts Court lacks an identifiable group of justices who are strong supporters of state authority, who have experience with state government, and who come from the western conservative tradition.

Many important federalism cases have been decided by the Roberts Court. First, in *Gonzalez v. Oregon* (2006), the USSC ruled 6-3 that the U.S. Attorney General was not authorized to suspend the licenses of doctors prescribing a lethal dose of medication under Oregon's physician-assisted suicide law. While this was a victory for "state's rights," it did not fit neatly within typically ideological lines, as supporters of euthanasia are typically viewed as liberal. Likewise, in *Wyeth v. Levine* (2008), the liberal justices were joined by Kennedy and Thomas in holding that a Vermont medical liability law was not preempted by FDA requirement, with the effect of allowing failure-to-warn suits in state courts against drug-manufacturers despite federal regulation. This result also blurred ideological lines, as it was another victory for state's rights, but one that reached a conclusion embraced by more liberals than conservatives.

On the other hand, in the following cases, the Roberts Court ruled in favor of federal preemption, with the conservative bloc of justices joining the majority in each. In *Riegel v. Medtronic, Inc.* (2008), the USSC 8-1 barred state court lawsuits for FDA-approved medical devices, concluding that federal law preempted state tort law. Likewise in *PLIVA, Inc. v. Mensing* (2011), the USSC favored federal preemption, blocking state court lawsuits over warning labels for generic drug manufacturers in a 5-4 decision along traditional conservative-liberal lines. Once again, in *AT&T Mobility v. Concepcion* (2011), the USSC divided along traditional conservative-liberal lines, ruling 5-4 that federal law preempted state class action lawsuits under arbitration agreements. And in *National Meat Association v. Harris* (2012), the USSC unanimously struck down a California slaughterhouse regulation law on federal preemption grounds. The federal government prevailed in these cases, in which the outcome was generally welcomed by conservatives, and frowned upon by many liberals.

Thus, the Roberts Court federalism cases do not fall neatly along traditional liberal-conservative fault lines. As further corroboration of this point, one need look no further than the highest profile cases of the last two terms of the Roberts Court. The PPACA case, discussed in the introduction, resulted in the Roberts Court coming down on the side of federal Congressional taxing power (5-4) against the states on the main constitutional question regarding the individual mandate. However, the USSC took the side of the states (6-3) in the Medicaid state coercion argument, narrowing the PPACA's Medicaid expansion. Likewise, the 2012 Arizona immigration law case found the liberal justices, joined by Justices Kennedy and Roberts, prevailing in striking down most provisions of Arizona's immigration law on preemption grounds. Justice Kennedy, writing for the Court, emphasized the federal government's "broad, undoubted power over immigration." These two cases were clear, although not complete, victories for federal power, and were widely cheered by liberals and resoundingly criticized by conservatives.

Similarly, the major twin decisions of the 2012 term involving same-sex marriage, *United States v. Windsor* (2013) and *Hollingsworth v. Perry* (2013), were seen as big victories for state's rights, but also as liberal victories (and conservative defeats) regarding social policy. In *Windsor,* Justice Kennedy, writing the majority opinion for deeply divided 5-4 Court, held that the federal DOMA was unconstitutional, in part, on federalism rationale, as the regulation and definition of marriage is within the realm and authority of the separate states. In *Hollingsworth*, the USSC also ruled 5-4 that private parties do not have standing to defend a state statute where state officials have chosen not to do so. So once again, in a high profile case implicating federalism, the Roberts Court came down on the state's rights side on the fence in a federalism case to reach a liberal decision. Finally, in the other major case of the 2012 term – *Shelby*

County v. Holder (2013) – a fractured 5-4 Court dividing along expected lines, ruling that section 4(b) of the Voting Rights Act of 1965 was unconstitutional on principles of federalism and equal state sovereignty, saying that the formula used to identify state and local governments that have to abide by federal preclearance requirements was out-of-date, resulting in unequal treatment. This was victory for proponents of state's rights, and was a decision widely hailed by conservatives and decried by liberals.

Thus, analyzing a sample of the most notable federalism cases decided by the Roberts Court leads one to the conclusion that these cases do always not fall along easily identifiable ideological fault lines. Sometimes the liberal justices embrace a state's rights position, and sometimes the opposite, and likewise with conservatives. The Roberts Court has not settled on a consistent rationale or voting bloc in these cases, instead balancing the question of the proper division of federal and state powers as the context and legal arguments of the case dictate.

In conclusion, the Roberts Court is still relatively young, entering only its ninth year. It is still developing its identity and its jurisprudence. As with every Court, it has its champions and its detractors. Some view the Roberts Court as activist; some view it as minimalist and restrained. Some view the Court as too far right; others view it as modestly conservative. Some view the Roberts Court as one in which politicians masquerade as judges; while others view the Roberts Court as a body who is dedicated to following the law wherever it leads – akin to umpires simply calling balls and strikes with no interest in the outcome of the game. It is most likely, of course, that the truth lies somewhere between these two extremes. This truth is evidenced by the fact that both conservatives and liberals tend to complain about the Court – it is either not conservative enough or not liberal enough for each of these groups. The variation in the Roberts Court's opinions indicate that trying to predict judicial votes and case outcomes

based upon a purely ideological and simplistic conservative-liberal dichotomy is often inaccurate, as it fails to take into account the influence of case context, other branches of government, public opinion, and the nuanced and complex nature of legal controversies and arguments. If this is true, then it opens the door to for amici to influence the justice's decisions.

B. Descriptive Statistics on the Roberts Court and Comparison To Past Courts

The following tables and graphs provide a detailed picture of the behavior of the Roberts Court in comparison to past Courts. In the following tables and graphs, I use the data contained in the Spaeth US Supreme Court Database (SCDB) 2013 Release 01 (accessed at http://scdb.wustl.edu/index.php). The SCDB contains over two hundred pieces of information about each case decided by the USSC between the 1953 and 2012 terms. Specifically, I use the case citation as the unit of analysis, unless otherwise noted, and consider all orally-argued cases[32] before the USSC during the 2005 – 2012 terms.

Figure 2.1 shows the total number of cases decided each term, and the total number of cases over the entire Roberts Court era. During this eight year period, the Roberts Court decided 586 total cases, for an average of 73.25 cases per term. In comparison, during the 19 terms of the Rehnquist Court (1986-2004), the Court decided 1,878 cases, for an average of 98.84 cases per term. During the 17 terms of the Burger Court (1969-1985), the Court decided 2,439 cases, for an average of 143.47 cases per term. And during the 16 terms of the Warren Court (1953-1968), the Court decided 1,816 cases, for an average of 113.5 per term. Thus, the Roberts Court took on the lowest case volume of the most recent Courts, and the Burger Court

[32] These include opinions of the Court, judgments of the Court, per curiam decisions, and equally divided vote decisions.

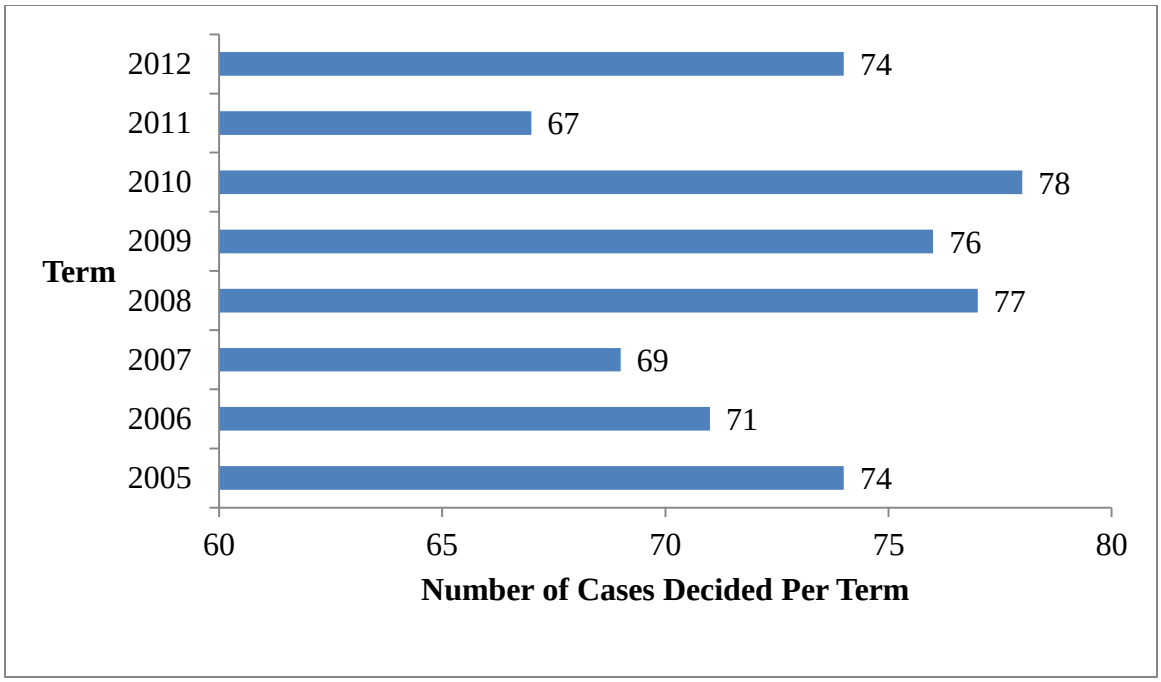

Figure 2.1. Number of Orally-Argued Cases Decided Per Term at Roberts Court

took on the highest case volume (practically doubling the Roberts Court in cases decided per term).

Figure 2.2 shows the number of cases decided in a conservative and liberal direction each term and over the entire period of the Roberts Court. Of the Roberts Court 586 cases, 317 (54.10 percent) were conservative, 262 (44.71 percent were liberal), and 7 (1.19 percent) were unspecifiable. In comparison, of the 1,878 cases decided during the Rehnquist Court, 1,007 (53.62 percent) were conservative, 839 (44.68 percent) were liberal, and 32 (1.70 percent) were unspecifiable. Of the 2,439 cases decided during the Burger Court, 1,319 (54.08 percent) were conservative, 1,093 (44.81 percent) were liberal, and 27 (1.11 percent) were unspecifiable. Thus, the Roberts, Rehnquist, and Burger Courts are virtually the same in terms of the split of cases decided conservatively versus the split of cases decided liberally. This is a notable finding, as it would indicate that the ideological bent of the USSC (in terms of its decisional outcomes) has

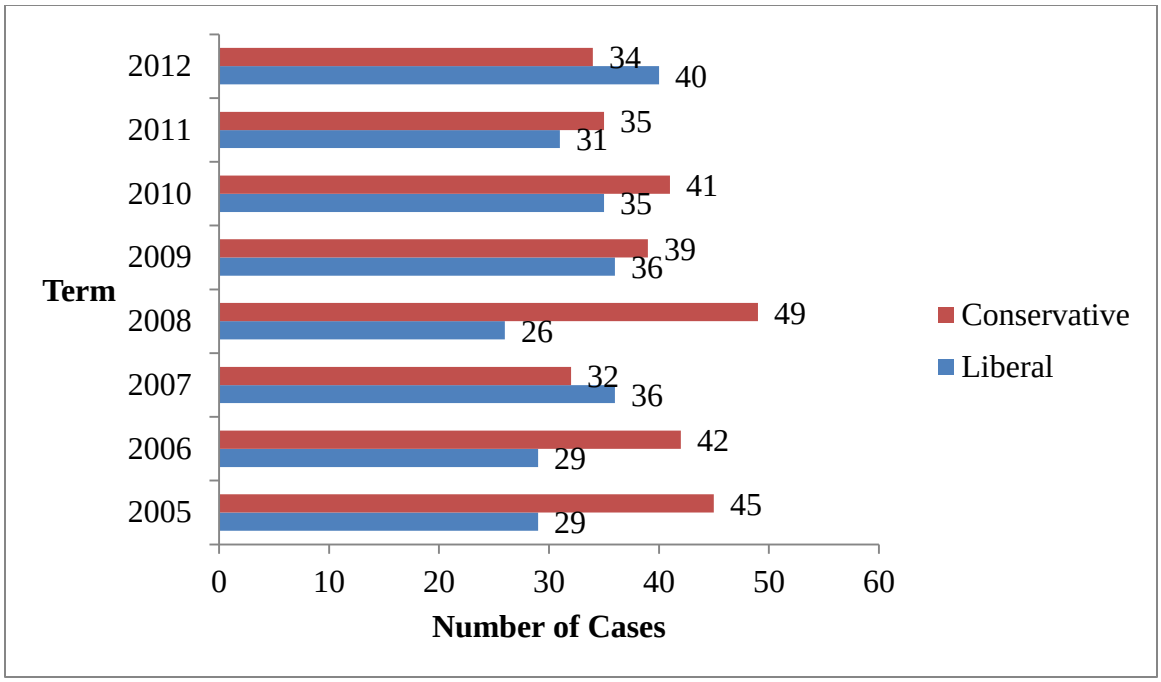

Figure 2.2. Number of Liberal and Conservative Decisions Per Term at Roberts Court

remained stable and slightly conservative for over the last 40 years. In contrast, of its 1,816 cases, the Warren Court decided 614 cases conservatively (33.81 percent), 1,182 cases liberally (65.09 percent), and 20 cases (1.10 percent) were unspecifiable. Clearly, the Warren Court was the most liberal of the USSC Courts over the last 60 years.

Figure 2.3 depicts the percentage of cases in which the Roberts Court struck down laws as unconstitutional compared to prior Courts. The Roberts Court struck down laws as unconstitutional in 22 of the 586 cases (or 3.75 percent of cases). In comparison, the Rehnquist Court struck down laws as unconstitutional in 119 of the 1,878 cases (or 6.34 percent of cases). The Burger Court struck down laws as unconstitutional in 217 of its 2,439 cases (or 8.9 percent of cases). The Warren Court struck down laws as unconstitutional in 127 of its 1,816 cases (or 7.0 percent of cases). Thus, the Rehnquist Court struck down laws at a higher rate than the Roberts Court, the Warren Court struck down laws at a higher rate than the Rehnquist Court, and

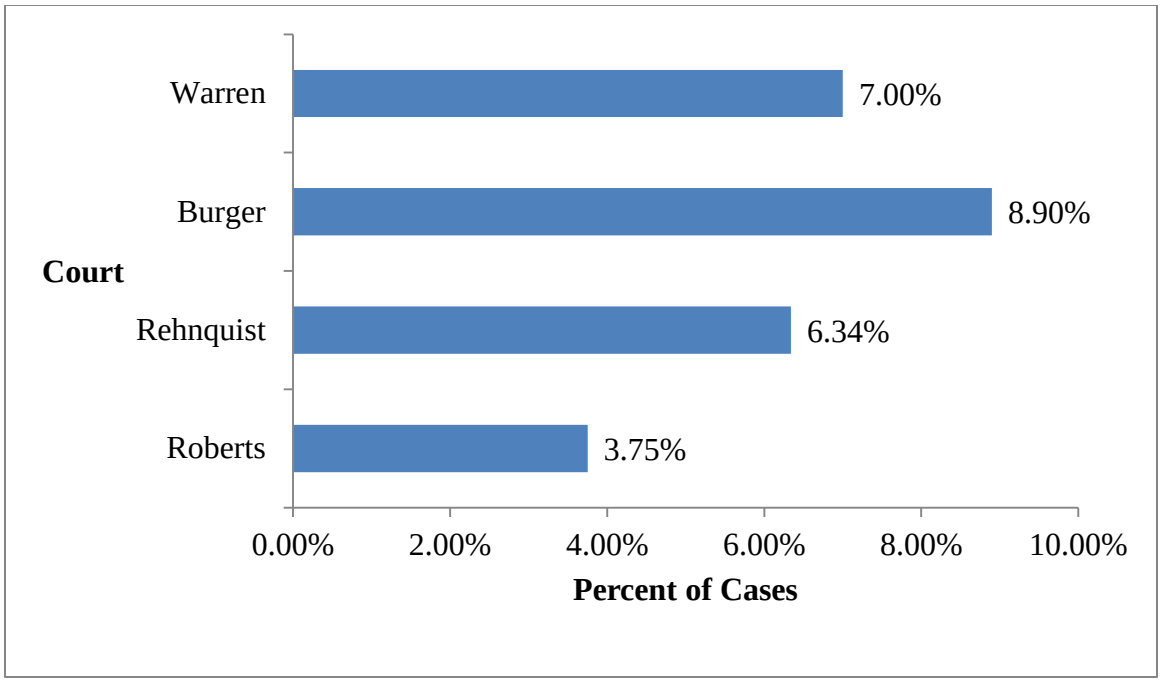

Figure 2.3. Percentage of Cases Striking Down Laws as Unconstitutional at USSC

the Burger Court struck down laws at a higher rate than the Warren Court. If one measures judicial activism by the percentage of cases where laws are struck down, the Burger Court was the most activist, and the Roberts Court the least activist in the USSC's last 60 years.

This result contradicts the narrative that is advanced among some USSC observers that the Roberts Court is an activist one. Further empirical contradiction of this narrative is provided by Epstein and Martin (2011). In a study analyzing the 1969 – 2009 terms of the USSC, Epstein and Martin conclude that the Roberts Court does not differ significantly in its level of activism from its predecessors. Epstein and Martin demonstrate that a clear pattern emerges from analysis of the Burger, Rehnquist, and Roberts Courts: liberal justices exercise judicial restraint when confronted with liberal laws, but are much more likely to strike down conservative laws. Conversely, conservative justices exercise judicial restraint when confronted with conservative laws, but are much more likely to strike down liberal laws. Yet Epstein and Martin do find that

liberal justices on the Roberts Court are less willing to strike down liberal laws than liberal justices on predecessor Courts, and similarly, conservative justices on the Roberts Court are less willing to strike down conservative laws than conservative justices on predecessor Courts. This suggests an increasing ideological polarization on the USSC, but this suggestion comes with a caveat: liberal justices on the Roberts Court are also less likely to strike conservative laws than liberal justices on the Rehnquist Court. Interestingly, Justice Kennedy, the "super median" justice on the Roberts Court, is more likely to strike down liberal laws than conservative laws. This finding would help to explain the Roberts Court modest conservative bent.

Figure 2.4 shows the percentage of cases in which the Roberts Court ruled in favor of petitioner. In 381 cases (65.02 percent), the Roberts Court ruled in favor of the petitioner. In comparison, the Rehnquist Court ruled in favor of the petitioner in 1,118 cases (59.53 percent). The Burger Court ruled in favor of the petitioner in 1,560 cases (63.96 percent). Lastly, the Warren Court ruled in favor of the petitioner in 1,180 cases (64.98 percent). Thus, over the last 60 years, the USSC rules in favor of the petitioner about 60-65 percent of the time on average. It is clear then that petitioners have the upper hand at the USSC, and this advantage spans across various natural Courts.

Figure 2.5 shows the percentage of cases in which the Roberts Court formally altered precedent. In 575 of the cases (98.12 percent), the Roberts Court made no determinable alteration of precedent, compared to only 10 cases (1.71 percent) in which precedent was formally altered. In comparison, the Rehnquist Court made no determinable alteration of precedent in 1,833 cases (97.60 percent), compared to only 45 cases (2.4 percent) in which precedent was formally altered. The Burger Court made no determinable alteration of precedent in 2,392 cases (98.07 percent), compared to only 47 cases (1.93 percent) in which precedent was

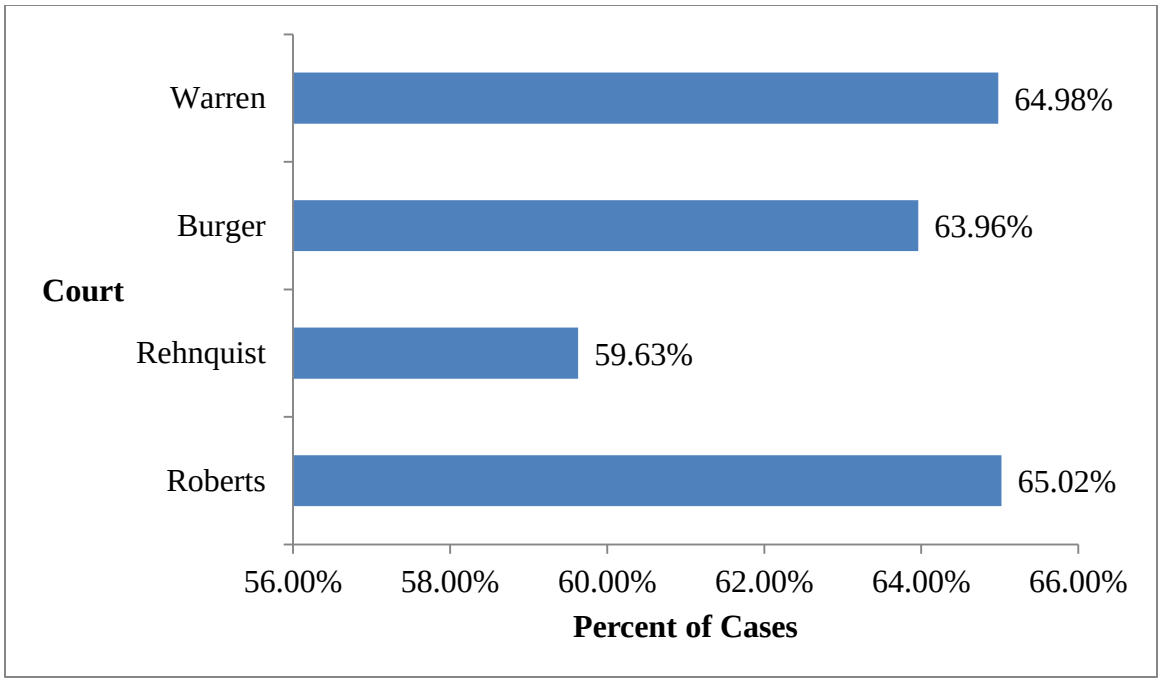

Figure 2.4. Percentage of Cases in Which USSC Ruled in Favor of Petitioner

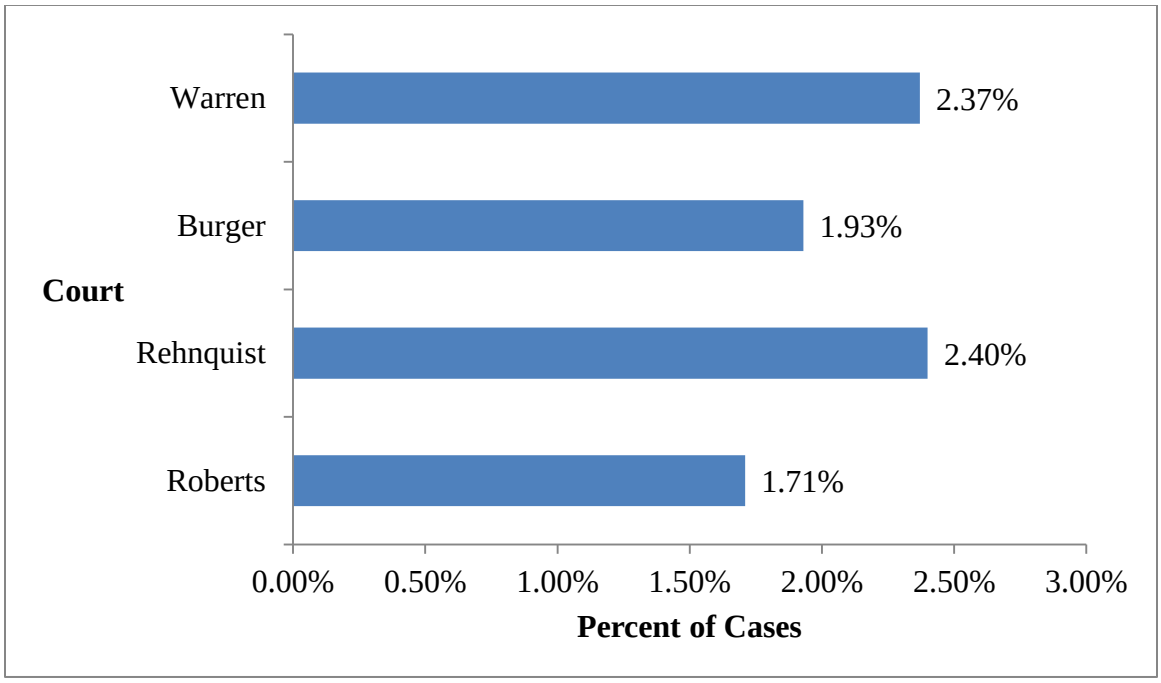

Figure 2.5. Percentage of Cases in Which USSC Formally Altered Precedent

formally altered. Lastly, the Warren Court made no determinable alteration of precedent in 1,773 cases (97.63 percent), compared to only 43 cases (2.37 percent) in which precedent was formally altered. Therefore, while each of these Courts is similar in terms of their percentage of altering precedents, the Rehnquist and Warren Courts were most willing to alter precedent, and the Roberts Court has been least willing to alter precedent. This finding provides further confirmation that the Roberts Court is not activist compared to its predecessors; if anything, it is more restrained.

Figure 2.6 details the percentage of five vote majority cases and unanimously decided cases occurring in the Roberts Court. 153 of the 586 cases (26.11 percent) were decided by only a five vote majority coalition, whereas 197 (33.62 percent) were decided by a unanimous vote of all nine justices. Notably, 91 of the 153 five vote majority cases (59.5 percent) were decided conservatively, while 59 of the five vote majority cases (38.6 percent) were decided liberally. Of the 197 unanimous nine vote decisions, 95 (or 48.2 percent) were conservative, while 99 (or 50.3 percent) were liberal.

In comparison, 417 of the 1,878 cases (22.2 percent) decided by the Rehnquist Court were only by a five vote majority, whereas 680 of the 1,878 (36.2 percent) were decided by a unanimous vote of all nine justices. Notably, 253 of the 417 five vote majority cases (60.7 percent) were decided conservatively, while 162 of the five vote majority cases (38.8 percent) were decided liberally. Of the 680 unanimous nine vote decisions, 331 (or 48.7 percent) were conservative, while 339 (or 49.9 percent) were liberal.

At the Burger Court, 515 of the 2,439 cases (21.12 percent) were decided by a five vote majority, while 595 (24.4 percent) were decided by a unanimous vote of all nine justices. 309 of the 515 five vote majority cases (60.0 percent) were decided conservatively, while 206 (40.0

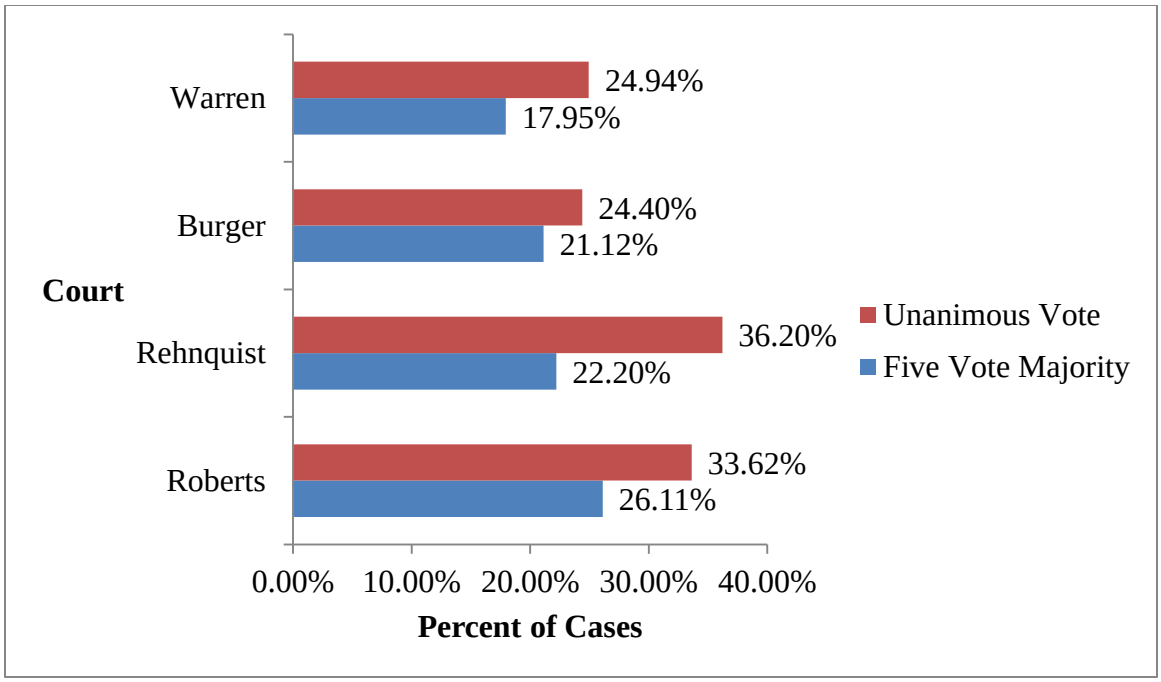

Figure 2.6. Percentage of Five Vote Majority and Unanimous Cases at the USSC

percent) of the five vote majority cases were decided liberally. Of the 595 unanimous nine vote decisions, 266 (44.76 percent) were decided conservatively, and 323 (54.3 percent) were liberal.

At the Warren Court, 326 of the 1,816 cases (17.95 percent) were decided by a five vote majority, while 453 (24.94 percent) were decided by a unanimous vote of all nine justices. 142 of the 326 five vote majority cases (43.6 percent) were decided conservatively, while 182 (55.8 percent) of the five vote majority cases were decided liberally. Of the 453 unanimous nine vote decisions, 101 (22.3 percent) were decided conservatively, and 346 (76.4 percent) were liberal.

Therefore, the Roberts, Rehnquist, and Burger Courts exhibited remarkable consistency in the percentage of five vote majority decisions that were decided conservatively – each at about 60 percent. In close cases, these Courts swung conservatively in six out of ten cases. But each of these conservative Courts were also slightly more likely to have their unanimous decisions be liberal. This observation is most noticeable at the Burger Court. Not surprisingly given its

reputation, the Warren court was slightly more likely to issue liberal five vote majority decisions than the other Courts, and much more likely to issue unanimous liberal decisions. Also worth highlighting is the fact that the percentage of five vote majority decisions continue to rise during each Court over the last sixty years. The Roberts Court is the most likely of these Courts to issue a five vote majority opinion, which would seem to indicate increasing division and polarity on the USSC.

However, the Rehnquist and Roberts Courts were much more likely to issue unanimous nine vote decisions than the Burger or Warren Courts. Instead of increasing polarity, this finding indicates increasing like-mindedness on the USSC over the last 60 years. Perhaps the USSC's decreasing caseload also plays a role here, as the Roberts Court may be more likely to take the more difficult cases as its caseload decreases, increasing the possibilities for division on the USSC. If this is so, then the fact that the Roberts Court issues unanimous decisions in at least a third of its cases could be seen as quite an accomplishment in comparison to past Courts.

Lastly, Figure 2.7 depicts the number of cases in separate issue areas considered by Roberts Court, along with the number of cases decided liberally or conservatively in each area. It is apparent that criminal procedure, economic activity, civil rights, and judicial power cases dominate the Roberts Court docket. Further, the Roberts Court is more likely to decide criminal procedure (56 percent), economic activity (61 percent), judicial power (59 percent), first amendment (69 percent), and privacy (79 percent) cases in a conservative direction.[33] On the other hand, the Roberts Court is more likely to decide federalism (70 percent), due process (79 percent), and federal taxation (88 percent) cases in a liberal direction. Decisions involving civil rights, unions, and attorneys are essentially ideologically balanced at the Roberts Court.

[33] Chapter 3 will discuss in greater detail how the SCDB codes decisions as liberal or conservative in various issue areas.

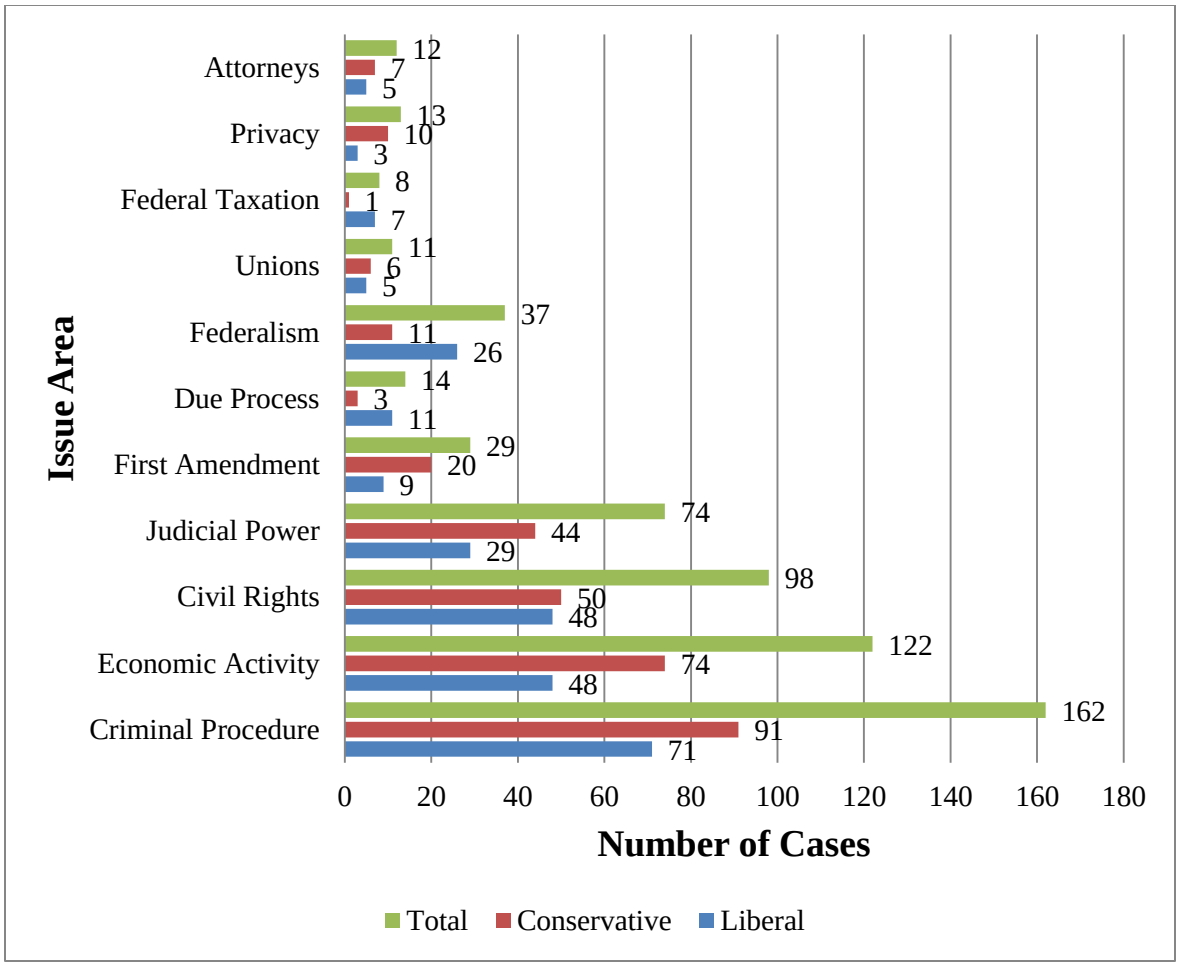

Figure 2.7. Number of Cases Decided by Issue Area and Decision Direction at Roberts Court

C. Conclusion

In conclusion, this chapter has provided an overview of the Roberts Court and its significant decisions, along with supporting descriptive statistics. It should be evident from the above discussion that, while some have referred to the current USSC as Justice Kennedy's Court given his prominence as the "swing" vote, over its 9 years this manifestation of the USSC has truly become the "Roberts Court," bearing his fingerprints and led by his influence. The

foregoing descriptive statistics show that the Roberts Court's behavior is more alike its predecessors than it is different. The differences, while not insignificant, tend to lie at the margins. Yet, it is often the margins where critical distinctions are made and where major decisions and legal developments hang in the balance. The Roberts Court will continue to remain front and center in the public spotlight, as it will continue to be called upon to decide some of the most controversial legal, and ultimately political, disputes we face as a society. This being the case, the Roberts Court will remain squarely within amici cross-hairs, marked as a target for friendly fire.

Chapter 3: Hypotheses and Research Design

I seek to determine if prior findings of amici influence on the Supreme Court (e.g., Collins 2008; 2007; Kearney & Merrill 2000) hold true at the Roberts Court. Collins' findings (i.e., the presence of amicus briefs has a discernible impact on how individual justices vote on the merits of a case, even when controlling for judicial ideology: the provision of more liberal briefs enhances the probability of a liberal vote, and the provision of more conservative briefs by enhances the probability of a conservative vote) support the legal persuasion model of judicial decision-making. I expect to find similar results for amicus impact on the Roberts Court. I expect that amicus briefs will influence the ideological direction of each of the justices' votes, and that this effect will become stronger the more ideologically moderate the justice. This expectation is consistent with the legal persuasion model of judicial decision-making, which suggests that a justice should respond to both those briefs which are in accord with his/her predispositions and attitudes and as well as those that do not align with his/her ideology.

In addition, although Collins (2008; 2004) did not find that the number of amicus cosigners influences the justices of the USSC, consistent with the interest group model, I do expect to find such influence over justice votes. Moreover, although also not modeled by Collins (2008), I expect that prestigious amicus participants will have a greater influence on justice votes than other amici. Lastly, I will explore whether a case's political salience mediates the influence of amicus briefs on justice votes. Unlike run of the mill cases, I expect that a politically salient case will condition the justices' response to amicus briefs by enhancing the likelihood of an attitudinal vote by the justices.

A. Hypotheses

H1 and H2 [Information/Legal Persuasion Hypotheses]:

- H1: As the number of liberal amicus curiae briefs increases relative to the number of conservative amicus briefs, so too will the likelihood of observing a liberal vote, regardless of the justice's ideology.
- H2: As the number of conservative amicus curiae briefs increases relative to the number of liberal amicus briefs, so too will the likelihood of observing a conservative vote, regardless of the justice's ideology.

As explained by Collins (2008), the rationale behind these hypotheses is that justices, consistent with their legal training, explore alternative perspectives to reach what they believe to be the correct legal decision. Amicus briefs thus serve to convince the justices of the correctness of the amici's position.

In addition to the informational content provided by their briefs, amici also serve as barometers of public opinion via their involvement in a case. The USSC justices take public opinion into consideration when making decisions for strategic and reputational reasons (e.g., Kearney and Merrill 2000). Amici can serve as proxies of public opinion and as indicators of the array of social forces at play in the litigation. Because of this, the interest group model of amicus influence suggests that a justice should respond positively to the number of amicus brief cosigners in a case regardless of whether or not they align with that justice's ideology. Thus:

H3 and H4 [Affected Group Hypotheses]:

- H3: As the number of liberal amicus curiae cosigners increases relative to the number of conservative cosigners, so too will the likelihood of observing a liberal vote, regardless of the justice's ideology.

- H4: As the number of conservative amicus curiae cosigners increases relative to the number of liberal cosigners, so too will the likelihood of observing a conservative vote, regardless of the justice's ideology.

Finally, consistent with both the legal persuasion and interest group models of judicial decision-making, I expect that justices who sit at or near the ideological center of the USSC will be particularly susceptible to amicus influence as their attitudes are not as rigid. Thus:

H5 and H6 [Median Justice Information/Legal Persuasion Hypotheses]:

- H5: The closer the justice is to the ideological center of the Court, the greater the likelihood that the justice casts a conservative vote as the number of conservative amicus briefs increases relative to the number of liberal amicus briefs.
- H6: The closer the justice is to the ideological center of the Court, the greater the likelihood that the justice casts a liberal vote as the number of liberal amicus briefs increases relative to the number of conservative amicus briefs.

H7 and H8 [Median Justice Affected Groups Hypotheses]:

- H7: The closer the justice is to the ideological center of the Court, the greater the likelihood that the justice casts a conservative vote as the number of conservative amicus cosigners increases relative to the number of liberal amicus cosigners.
- H8: The closer the justice is to the ideological center of the Court, the greater the likelihood that the justice casts a liberal vote as the number of liberal amicus cosigners increases relative to the number of conservative amicus cosigners.

Prior research has shown that justices rely to a greater extent on their attitudes and ideological preferences in politically salient cases than in less salient ones (e.g., Segal 1986; Spaeth and Segal 1999, 309-11; Unah and Hancock 2006; McAtee and McGuire 2007).

Politically salient cases are those cases that are particularly important to the public (Collins and Cooper 2012, 397). The issues raised in salient cases reference justices' attitudes more directly by raising justices' interest and attention (Spaeth and Segal 1999, 309, Unah and Hancock 2006, 297) to a greater degree than those cases deemed less significant. The issues presented in such cases are usually politically controversial and have larger policy ramifications than issues raised in more routine cases. As a result, judges rely more upon their attitudes and preferences in deciding high salience cases (297). That is, the ideological preferences of the justices are more likely to override outside attempts at influence on those issues of greatest concern to them (Songer and Sheehan 1993, 346). The justices are also more likely to negotiate, make suggestions and threats in the opinion writing process, and author separate opinions in salient cases (Epstein and Knight 1998, 98; Spriggs, Maltzman, and Wahlbeck 1999).

Unah and Hancock describe salient cases as "those that 'stand out' in the Supreme Court plenary agenda in the sense that they involve important issues of public policy and are therefore likely to receive a disproportionate amount of attention and involvement from justices throughout and from court-watchers, such as journalists" (297). In salient cases, a justice's position is relatively fixed and the chance is relatively low that new information will change that position (Unah and Hancock 2006). Thus, fluidity is less likely in such salient cases (Hagle and Spaeth 1991).

In salient cases involving civil rights before the Supreme Court, Unah and Hancock (2006) find that justices primarily vote their attitudes regardless of the information provided by the Solicitor General or by interest groups. Unah and Hancock think their findings also apply to other areas such as the right to privacy, the First Amendment, and criminal procedure. They conclude that the attitudinal model of judicial decision- making has more predictive and

explanatory accuracy in high salience cases than in low salience ones (314-15). The more salient the case, the more justices will draw upon their own ideological predispositions in reaching a decision. This conclusion is buttressed by Corley, Collins, and Hamner (2013), who find that amicus briefs are not as likely to be cited in the majority opinion of the USSC in salient cases compared to non-salient cases.

Therefore, the attitudinal model should be a better predictor of judicial behavior in politically salient cases than in non-salient cases. According to the attitudinal model, justices will *not* be more likely to vote against their policy preferences simply because more briefs are filed supporting the position they are not inclined to agree with, as it is hypothesized that such briefs are simply ignored or discounted by the justices (Collins 2008, 97-98). In politically salient cases (those in which attitudinal factors are likely to predominate), a net advantage of amicus briefs that are incongruent with a justice's ideology should not meaningfully influence that justice to vote against his ideological preference.

However, as mentioned above, the attitudinal model still allows for amicus influence in salient cases insofar as the amicus brief reinforces or bolsters judges' pursuit of their policy preferences. Collins' (2008, 93) attitudinal congruence hypothesis flows from this understanding: as the number of liberal (conservative) amicus curiae briefs increases, so too will the likelihood of observing a liberal (conservative) justice cast a liberal (conservative) vote" (93). However, as mentioned above, under the attitudinal congruence hypothesis, justices will *not* be more likely to vote against their policy preferences simply because more briefs are filed supporting the position that the judge is not inclined to agree with. Thus:

H9, H10, H11, and H12 [Political Salience Attitudinal Hypotheses]:

- H9: In politically salient cases, as the number of liberal amicus briefs (and cosigners) increases relative to the number of conservative briefs (and cosigners), so too will the likelihood of observing a liberal justice casting a liberal vote.
- H10: In politically salient cases, as the number of conservative amicus briefs (and cosigners) increases relative to the number of liberal briefs (cosigners), so too will the likelihood of observing a conservative justice casting a conservative vote.
- H11: In politically salient cases, an advantage in the number of liberal amicus curiae briefs (cosigners) relative to conservative amicus briefs (cosigners) will have no meaningful effect on the likelihood of observing a conservative justice casting a liberal vote.
- H12: In politically salient cases, an advantage in the number of conservative amicus curiae briefs (cosigners) relative to liberal briefs (cosigners) will have no meaningful effect on the likelihood of observing a liberal justice casting a conservative vote.

Finally, none of the foregoing hypotheses takes into account differences in the prestige and experience of amici. Each of these hypotheses assumes that amici, and the substantive information they impart, are equally valuable, regardless of the reputation of the amici. However, as discussed above, scholars have found support for the notion that the prestige and experience of the amicus participant may influence judicial behavior (e.g., McGuire 1994; Kearney and Merrill 2000; Lynch 2004; Collins 2004; Simard 2007; Box-Steffensmeier et al. 2013; Chandler 2013). While the influence of powerful groups has been found to be present when amicus participation is relatively ideologically balanced in a case (Box-Steffensmeier et al.

2013), I expect an ideological advantage of prestigious amici in a case to impact a justice's vote, regardless of the relative ideological advantage of all amici in the case. Thus:

H13 and H14: [Prestigious Amicus Hypotheses]:

- H13: As the number of prestigious liberal amici increases relative to prestigious conservative amici, so too will the likelihood of observing a liberal vote, regardless of the justice's ideology.
- H14: As the number of prestigious conservative amici increases relative to prestigious liberal amici, so too will the likelihood of observing a conservative vote, regardless of the justice's ideology.

B. Research Design: Data and Methods

To test these hypotheses, I employ a methodology similar to Collins (2008) and estimate statistical models that calculate the influence of liberal and conservative amicus briefs and cosigners on the likelihood of observing a justice cast a liberal vote for all orally argued cases decided on the merits during the 2007 – 2011 terms of the USSC. Although the Roberts Court began in 2005, I have decided to only examine orally argued cases from 2007 through 2011 terms of the USSC, as the amicus data is more difficult to access prior to the 2007 term. I compile this data from four sources. First, the American Bar Association's Preview of United States Supreme Court cases website (http://www.americanbar.org/publications/preview_home.html) lists the amicus briefs filed (with links to the actual brief itself) in all orally argued cases decided on the merits during the 2007-08 through 2011-12 terms of the Court. This site also lists on whose behalf (Petitioner, Respondent, Neither party, etc.) the amicus brief was filed. Second, SCOTUSblog's website

(http://www.scotusblog.com/) contains essentially the same information for the same time frame.[34] Third, the LexisNexis U.S. Supreme Court Briefs database includes a listing of amicus curiae briefs filed for all cases since 1979, along with information on which party the amici supported, and a link to the actual brief itself.[35] Fourth, the official website of the USSC (http://www.supremecourt.gov/docket/docket.aspx) allows one to search each case by docket number and lists all amicus briefs filed for each case during the relevant time period. While this listing is exhaustive and the most reliable of the four sources, the U.S. Supreme Court site does not include information on which party the amicus brief supports, nor does it have a link to the actual brief, as do the other three sources. Thus, I cross-check each of these four sources for each case to ensure the accuracy and comprehensiveness of my data collection.

In constructing my dataset, I create variables using data from existing sources regarding judicial ideology, judicial moderation, and political salience. I then use my own original data collection to create variables for each case regarding party resources, total amicus participation, liberal amicus participation, conservative amicus participation, liberal-conservative amicus participation difference, prestigious liberal amicus participation, prestigious conservative amicus participation, prestigious liberal-conservative amicus participation difference, Solicitor General liberal and conservative participation, State, Local, and Foreign governments liberal and conservative amicus participation, and Individuals liberal and conservative amicus participation to conduct my analysis. Finally, I merge this amici and other data that I gather on the Roberts

[34] These two websites, SCOTUSblog and American Bar Preview, are user-friendly. While neither is entirely exhaustive in their listing of amicus briefs in every case, the vast majority of briefs are listed on both of these sites. Occasionally, one or both sites will overlook a brief that is listed on either the Supreme Court's website or in the Lexis Nexis Supreme Court Briefs database. Thus I cross-reference all four sources mentioned above for each case to ensure that I am including a comprehensive account of amicus participation.

[35] The LexisNexis database gathers its amicus information from the *U.S. Reporter*. It allows you to search each case by docket number, providing a listing of all the briefs filed (with links to the actual brief itself) for the chosen docket number.

Court with the Spaeth US Supreme Court Database (SCDB) 2012 Release 01 (accessed at http://scdb.wustl.edu/index.php). The SCDB contains over two hundred pieces of information about each case decided by the Court between the 1953 and 2011 terms.

Similar to Kearney and Merrill (2000) and Collins (2008), I examine amicus curiae briefs filed at the merits stage of each orally argued case. To identify the cases to use in my analysis, I use the SCDB, which provides a decision-type variable. Included in my analysis are the overwhelming majority of cases, including DEC_TYPE=1 (formally decided full opinion cases with oral argument), DEC_TYPE=5 (equally divided vote), DEC_TYPE=6 (per curiam, orally argued), and DEC_TYPE=7 (judgments of the Court, orally argued). The only decision types excluded from my analysis are non-orally argued decisions[36], memorandum cases[37], decrees[38], and orally-argued original jurisdiction cases, as these cases contain little, if any, amicus participation, are rather infrequent, and are of much less significance.[39] After taking these steps, the assembled dataset contains 3,571 observations, each row corresponding to each individual

[36] Non-orally argued (per curiam) decisions (DEC_TYPE=2) are excluded in this analysis because they are infrequent, of lesser importance, are typically disposed of by the justices based solely on the lower court record, and because the amicus curiae data for these cases is more difficult to access. Only 50 such cases occurred during this five year period. Further, non-orally argued cases tend to attract significantly less amicus participation and tend to be clearly settled by existing precedent (Kearney and Merrill 2000, 835; Collins and Solowiej 2007).

[37] Memorandum cases (DEC_TYPE=3) have been removed from the SCDB for both substantive and technical reasons, and thus are not included in this analysis.

[38] Decrees (coded DEC_TYPE=4) are not included because they are very infrequent, arrive under the USSC's original jurisdiction, usually involve state boundary disputes, and typically are handled by a special master's report, which becomes the basis of the Court's decision. In fact, no decrees were issued by the USSC in the five year period of my analysis. Thus, I do not include decrees because there are none to include.

[39] Only five such orally argued original jurisdiction cases were found during this five year period of analysis. They each involved disputes between states, and were each coded as decided in an Unspecifiable direction in the SCDB. Thus, these five cases are excluded from analysis.

justice participating in each of the 397 cases that occurred over this five term period when using the docket number as the unit of analysis.[40]

Typically, when analyzing USSC decision-making, researchers will use the case citation as the unit of analysis. This is because the USSC routinely combines several cases with similar factual circumstances under one case citation that disposes of each case with a single opinion. Thus, one record exists for the case. However, when using the docket number as the unit of analysis, records exist for each case that is consolidated under the same opinion (Collins 2008, 191 fn. 152). In this study, I choose to use the docket number as the unit of analysis, as opposed to the case citation, for both substantive and methodological reasons. First, other prominent researchers studying amicus participation and influence use the docket number as their unit of analysis (e.g., Collins 2008; Spriggs and Wahlbeck 1997; Gibson 1997). Second, using the docket number allows for a more complete accounting of amicus participation and influence. Commonly, when the USSC takes a consolidated case, amicus participants will file one brief that applies to each of the docket numbers being consolidated. For example, a situation might arise in which the consolidated case includes the filing of six unique amicus briefs, but each of the six briefs is meant to apply to each of the docket numbers included in the consolidated case.[41] In such a situation, I would record the filing of six briefs for each docket number. Therefore, because I am using the docket number as the unit of analysis, instead of the case citation, the

[40] During the five terms of my data collection, the USSC decided 29 consolidated cases. These 29 consolidated cases included 61 separate docket numbers. Thus, if using the case citation instead of the docket number as the unit of analysis, my dataset would only include 365 cases, instead of 397, corresponding to 288 less observations.

[41] For example, the consolidated cases of *Dorsey v. United States* (2011) and *Hill v. United States* (2011) have the same case citation, raise the same basic issue – i.e., whether the Fair Sentencing Act applies to all sentencings occurring after its effective date or only to crimes committed after the statute became effective – and were decided by the same opinion. The same six amicus briefs were filed for each docket number. I recorded the filing of six briefs for each docket number. Because I used the docket number as the unit of analysis, instead of the case citation, the total amicus count for the consolidated case is recorded as 12 instead of 6, even though only six unique briefs were filed.

total amicus count for this consolidated case would be recorded as 12 instead of 6, even though only six unique briefs were filed.[42]

However, on other occasions, amicus participants will file a brief in the lead case, or in one of the non-lead cases of the consolidated case, that is only meant to apply to the specific docket number and not to the other docket numbers in the consolidated case. For example, consider a situation in which thirteen different amicus briefs are filed, but ten of these briefs are only filed in the first docket number and the other three briefs are only filed in the second docket number. In this situation, each of the briefs is distinct and only meant to apply to its corresponding docket number.[43] In such a situation, I record the filing of ten briefs for the first docket number and three briefs for the second docket number, totaling 13 briefs for the entire consolidated case.

My base statistical model (which excludes the interaction term) and primary all-inclusive statistical model (which includes the interaction term) will estimate the influence of amicus briefs/cosigners on all justices in all cases during the 2007-2011 terms of the USSC. In addition, I will provide multiple subsidiary models to investigate in a targeted manner whether the justices

[42] In such situations, it could be argued that amicus participation is being double-counted, thus inflating amici participation levels and potentially overstating their influence on the justices' voting. However, I think this method of counting is more appropriate than the alternative for two primary reasons. First, it more closely captures the amicus curiae's interest in the case because the amicus intends the brief to apply to each instance of litigation instead of just to one docket number. Second, because such a counting better approximates the legal salience of the case in the sense that the justices are taking the consolidated case to resolve two or more cases raising the same basic issue that have worked their way through the justice system, indicating the broader impact of such a ruling.

[43] For example, the consolidated cases of *Republic of Iraq v. Beaty* (2009) and *Republic of Iraq v. Simon* (2009) have the same case citation – 556 U.S. 848. However, each of these cases has its own docket number, 07-1090 and 08-539, respectively. The basic issue in these two cases was the same – whether U.S. courts have jurisdiction over Iraq in claims involving alleged misdeeds that occurred during Saddam Hussein's regime – so the USSC consolidated the cases and decided them together with a single opinion. However, in the lead case, docket number 07-1090, only three amicus briefs were filed; whereas in docket number 08-539, 10 briefs were filed. So, 13 total briefs were filed in the consolidated case, but the amicus participation was different in each of the docket numbers.

on the Roberts Court are more or less prone to amicus influence in certain categories of cases. Therefore, after estimating my base and primary all-inclusive models, I will test each of the foregoing hypotheses using five separate models that include smaller samples representing the following categories of cases: politically salient; criminal procedure; civil rights and liberties; economics; and judicial power and federalism.[44] Out of the 397 orally argued cases decided by the Roberts Court, 66 are politically salient.[45] The Criminal Procedure category represents 107 cases; the Civil Rights and Liberties category represents 122 cases; Economics represents 94 cases; and Judicial Power and Federalism represents 72 cases.

In addition, I will estimate four additional subsidiary statistical models in order to assess whether conservative and liberal justices respond differently to the persuasive attempts of amici. The first of these models will only include conservative justices in all cases; the second will only include liberal justices in all cases; the third will only include conservative justices in salient cases; and the fourth will only include liberal justices in salient cases. Altogether, I will estimate eleven separate statistical models to explore the impact of amici on the Roberts Court. Further detail about the specification of each of these models is included below.

My models will contain the following variables:

- **Dependent Variable**

My dependent variable is whether the justice issued a *Liberal Vote* or *Conservative Vote*. I use the justice vote as the basic unit of analysis. The dependent variable is based upon the Spaeth SCDB "DIR" variable which describes the direction of the decision with regards to the

[44] These four separate categories are derived from the Spaeth SCDB (2012) Release 01 issue areas variable. Civil Rights and Liberties category includes cases involving civil rights, the First Amendment, due process, privacy, and attorneys. Economics category includes cases involving economic activity, unions, and federal taxation. The Criminal Procedure and Judicial Power and Federalism categories include cases involving what their category name implies.

[45] A discussion of how cases are categorized as politically salient is included later in this chapter.

primary issue it addresses. The dependent variable captures the ideological direction of the individual justice's voting behavior, scored 1 for a liberal decision and 0 for a conservative decision.[46] The SCDB codes this variable according to contemporary definitions of liberalism and conservatism. "Liberal" or "conservative" labels are designated according to whether the case outcome favors a particular category of party before the USSC. For example, in civil liberties cases, liberal votes support the litigant claiming violation of its freedoms, (such as free expression, freedom of religion, and the right to privacy), while conservative votes are the opposite. In criminal cases, liberal votes support the rights of the criminally accused, while conservative votes favor the government. In the context of cases involving economic activity and unions, liberal votes are anti-business, anti-employer, pro-liability, pro-union, pro-debtor, pro-consumer, etc., while conservative votes are the opposite. In federalism cases, liberal votes are pro-federal power, anti-states, and pro-executive power in executive/congressional disputes, while conservative votes are the opposite. In cases involving judicial power, liberal votes are pro-exercise of judicial power and pro-judicial activism, while conservative votes are in favor of judicial restraint. Importantly, judicial votes are coded according to the main issue area involved in the case, not secondary issue areas.

While the approach employed by the Spaeth SCDB characterizing judicial votes as "liberal" or "conservative" is common and widely accepted in empirical judicial behavior

[46] I was unable to code the decision direction of the justices as liberal or conservative in 18 cases. In such instances, I simply code the decision direction as unspecifiable. These 18 cases were classified as unspecifiable for one of three reasons: (1) no specifiable decision direction was included by the SCDB for the justice vote; or (2) the lower court decision was in the same ideological direction as the USSC' decision, but the Petitioner was listing as the winning party; or (3) the lower court decision direction was in a different ideological direction from the USSC's decision, but the Petitioner was classified as the losing party. For example, in the second instance, the lower court direction is listed as conservative, along with the USSC decision, but the SCDB classifies the Petitioner as winning the case. Or, an example in third instance would be when the lower court direction is listed as conservative, while the USSC decision is listed as liberal, but the SCDB classifies the Petitioner as losing the case. In these three situations, it is not possible to make a principled determination as to whether the justice actually voted in a conservative or liberal direction because the party outcomes do not align with ideological coding of lower court and USSC decision directions.

scholarship, such an approach does have limitations. First, the terms "liberal" and "conservative" admittedly conceal a range of heterogeneity that traditional binary ideological coding does not reflect. In real life, case ideological outcomes vary markedly on the conservative-liberal spectrum, and this variance cannot be captured by a measure that only includes two discrete polls (Sag 2009). Second, a judge may vote conservatively in some issue areas and liberally in others – what scholars term the "challenge of multidimensionality" (Fischman and Law 2009, 19). In the Spaeth SCDB, this challenge is addressed by taking a more specific issue area approach to coding justice votes as liberal or conservative, as described above. Nevertheless, this is still problematic, as the delineation of the primary issue area itself can be somewhat subjective, since cases that present multiple issues can defy easy categorization and assignment of priority (Fischman and Law, 26). Complex cases do not always fit neatly into one category or issue area. Despite these problems, the prevailing view in the literature is that a single left-right dimension underlies virtually all USSC cases in virtually all areas of law (Epstein, Martin, Quinn and Segal 2012, 716).

Because ordinary least squares regression is inappropriate when the dependent variable is dichotomous, I estimate logit models. These methods estimate the parameters of a model's independent variables in terms of the contribution each makes to the probability that the dependent variable falls into one of the designated categories (e.g., a liberal or conservative vote) (Songer and Tabrizi 1999, 512). A logit model is an appropriate choice because it does not assume the influence of amici is linear (Collins 2004, 817, fn. 16). For each independent variable, a maximum likelihood estimate (MLE) is calculated along with its standard error (SE). Each MLE represents the change in the logistic function that results from a one unit change in the independent variable. I will also calculate marginal effects of substantively interesting

changes in the values of each of the independent variables on the likelihood that a justice will cast a liberal vote. I will then use the results of the logit models to graphical plot the influence of the amici on the likelihood of observing a liberal vote across varying levels of judicial moderation, as appropriate.[47] Lastly, I will also include predicted probabilities tables to accompany my primary all-inclusive model and my salient cases model, which will depict the probability of justices of various moderation levels casting a liberal vote as the ideological amicus brief advantage increases and decreases in a case by substantively interesting amounts.

- **Independent Variables**

The first independent variable of interest represents the difference in the number of liberal and conservative amicus briefs filed in each case: *Liberal - Conservative Amicus Briefs Difference*. To determine the ideological direction of the amicus brief, I use the direction of the lower court's decision (as identified by the SCDB) along with the litigant the amici supported (Petitioner or Respondent). This allows for the ideological direction of the amicus brief to be put on the same dimension as the ideological direction of the justice vote. For example, if the lower court handed down a liberal decision and four amicus briefs were filed for the petitioner, these briefs are coded in support of the conservative position.[48] A value of 0 on *Liberal - Conservative Amicus Briefs Difference* means that either no briefs were filed in support of either the liberal or conservative position, or that the same number of liberal and conservative briefs were filed in the

[47] Like Collins (2008, 100), I will calculate the marginal effects of the noninteractive variables by altering the variables of interest from 0 to 1 (or modal to non-modal category) for dichotomous variables and from the mean to one standard deviation above the mean for continuous variables, holding all other variables at their mean or modal values. The marginal effects for the interactive variables, and their constituent terms, will be calculated using the method described in Brambor, Clark, and Golder (2006).

[48] However, because 18 cases in my dataset had to be classified as unspecifiable for the reasons discussed above, each of the amicus briefs in the cases also had to be classified as ideologically unspecifiable. Basically, since the ideological direction of the justice vote did not align with the winning party and the lower court decision direction according to the SCDB, the amicus briefs were not able to be assigned an ideological direction. Thus, in these 18 cases, it is not possible to determine whether amici influence exists given my research design.

case. A positive value indicates that liberal briefs outnumber conservative briefs in the case, while a negative value indicates the opposite. I expect this variable to be signed positively, indicating that a relative advantage of liberal briefs in a case increases the likelihood of a justice voting liberally. This finding would support the legal persuasion model (information/legal persuasion hypotheses) of amicus influence.

The second independent variable of interest represents the relative advantage of liberal amicus participants in a case: *Liberal - Conservative Amicus Cosigners Difference*. This variable reflects not only the number of amicus brief filers, but also amicus co-signers in each case. I use the same basic methodology as described in the *Liberal - Conservative Amicus Briefs Difference* variable description above. A positive value indicates that liberal amicus signers outnumber conservative amicus signers in a case, while a negative value indicates the opposite. I expect this variable to be signed positively, indicating that a relative advantage of liberal signers in a case increases the likelihood of a justice voting liberally. This finding would support the interest group theory (affected groups hypotheses) of amicus influence.

The third independent variable of interest is judicial ideology: *Ideology*. As the Court's ideology is a well-known predictor of judicial outcomes, I control for judicial ideology (policy preferences) by using the Segal and Cover (1989) ideology scores, which are based on newspaper editorial commentary involving the justices' perceived ideologies made between their presidential nomination and Senate Confirmation. The Segal-Cover ideology scale runs from 0 to 1.0, with 0 being the most conservative and 1.0 being the most liberal.[49] Table 3.1 lists the

[49] As described by Segal and Cover (1989, 559), their ideology scores are derived by content analyzing each paragraph in the relevant newspaper editorials for signs of political ideology as follows: "Paragraphs were coded as *liberal, moderate, conservative* , or *not applicable*. Liberal statements include (but are not limited to) those ascribing support for the rights of defendants in criminal cases, women and racial minorities in equality cases, and the individual against the government in privacy and First Amendment cases. Conservative statements are those with an opposite direction. Moderate statements include those that

Segal-Cover scores of each of the justices on the Roberts Court during the 2007-2011 terms from highest (most liberal) to lowest (most conservative).

Table 3.1 Justice Segal-Cover Scores Ranked Most Liberal to Most Conservative, 2007-2011 Terms of the USSC

Ranking	Justice	Segal-Cover Score
1	Sonya Sotomayor	0.78
2	Elena Kagan	0.73
3	R.B. Ginsburg	0.68
4	Stephen Breyer	0.475
5	Anthony Kennedy	0.365
6	David Souter	0.325
7	J.P. Stevens	0.25
8	Clarence Thomas	0.16
9	John Roberts	0.12
10	Samuel Alito	0.1
11	Antonin Scalia	0

explicitly ascribe moderation to the nominees or those that ascribe both liberal and conservative values" (559). Segal and Cover then measure judicial ideology by subtracting the fraction of paragraphs coded conservative from the fraction of paragraphs coded liberal and dividing by the total number of paragraphs coded liberal, conservative, and moderate. The resulting scale of policy preferences ranges from 0 (unanimously conservative) to .5 (moderate) to 1 (unanimously liberal).

Segal-Cover scores are widely accepted and are consistent with common perceptions of justice ideology (Martin, Quinn, and Epstein 2005).[50] The most liberal justice in the Roberts Court dataset measures at .78 (S. Sotomayor), while the most conservative scores a 0 (A. Scalia). The overall mean justice ideology between 2007-2011 terms of the Roberts Court is .327 (which is closet to Justice D. Souter, whose score is .325, and second closest to Justice A. Kennedy, whose score is .365), with a standard deviation of .252.[51] The expected sign of this variable is positive, indicating that liberal justices are more likely than the conservative justices to cast liberal votes.

In using the Segal-Cover scores as my measure of judicial ideology, I deviate from Collins (2008), who uses the Martin and Quinn (2002) (MQ) judicial ideology scores.[52] Many researchers prefer MQ scores over the Segal-Cover scores because MQ scores reflect

[50] Although J. Souter and J. Stevens are widely regarded as being much more liberal in their voting record than their Segal-Cover score would indicate.

[51] It bears noting that the Court's ideologically median justice is not necessarily the same thing as the Court's most ideologically moderate justice. According to Epstein and Jacobi (2008, 45), to be the Court's median justice is to be "the Justice in the middle of a distribution of Justices, such that half of the justices are to the right of (more 'conservative' than) the median and half are to the left of (more 'liberal' than) the median." That is, the median justice is the justice who sits in the exact middle of Court (see also Martin, Quinn, and Epstein 2005). To be a "moderate" is to have a decreased commitment to either the liberal or conservative points of view or to hold ideological views than run in the middle of the two ideological poles. For example, using Segal-Cover scoring, a score of .5 would be the most ideologically moderate. When using a score of .5 as the standard for moderation, Justice Stephen Breyer – with a Segal-Cover score of .475 – becomes the closest justice to a moderate ideology in the Roberts Court to date. Yet, Justices Souter and Kennedy are closest to USSC's median during the time frame under analysis.

[52] If I were using the Martin-Quinn scores as my measure of judicial ideology, the most liberal justice in the Roberts Court dataset would measure at -1.406 (Justice J.P. Stevens during the 2007 term), while the most conservative would score 4.629 (Justice C. Thomas during the 2007 term). The overall mean ideology would be 1.407 (which is closet to Justice A. Kennedy's score during the 2011 term, whose score is 1.403, second closest to Justice A. Kennedy's score of 1.521 during the 2010 term, and third closet to Kennedy's score of 1.236 during the 2009 term), with a standard deviation of 1.829. After Justice Kennedy, the closet Justice to the MQ mean ideology score is Chief Justice J. Roberts during the 2007 term with a score of 1.99. Justice R.B. Ginsburg, with scores of .011 and -.011 in the 2010 and 2011 terms, respectively, is actually the closest justice to the historic mean of the USSC during the time frame under analysis using MQ scoring. However, unlike the Segal-Cover scores, the MQ scores are not able to capture actual ideological "moderation" as well as they capture the median justice, because, as described above, the MQ ideal points are arrived at by analyzing voting coalitions and comparisons to justices one another over time, not by measuring ideology in reference to how any particular case outcome aligns with subjective assessments of where cases should fall on the conservative-liberal ideological spectrum.

longitudinal changes in an individual justice's ideology (Roberts 2009, 107). Martin and Quinn have shown that using a static score for one justice throughout tenure does not as accurately capture ideology. Instead, justices evolve over time and the MQ scores reflect that change. Each justice has a score for every term calculated with a dynamic probability model with Bayesian inference. MQ scores are based upon a justice's actual voting record each term. Specifically, Martin and Quinn make inferences from patterns of voting coalitions observed during cases to arrive at a justice's ideal point. Each justice's ideal point represents the overall preferred position of that justice in the aggregate. A positive score reflects a more conservative ideology, while a negative score reflects a liberal ideology. A score of zero represents the historical mean of the USSC since 1937. These scores are theoretically unbounded, but currently range from -6 (Justice W. Douglas, very liberal) to +4.6 (Justice C. Thomas, very conservative).

It is crucial to note that the MQ ideology measures have been described as an "agnostic" method of coding (Fischman and Law 2008, 30-31) because they do not require the researcher to make a subjective assessment of the ideological direction of the case outcome or justice vote. Rather, MQ scores estimate the ideological direction of the outcome/vote from the actual voting alignment of the justices. That is, MQ scores makes inferences from the observed voting coalition patterns by considering all possible combinations of justice's preferences that could explain these observed voting patterns (Epstein and Jacobi 2008, 47). Basically, MQ scoring constructs a liberal-conservative scale that treats judges who represent the ends of the ideological spectrum as anchor points. Thus, a liberal vote is "Brennan-like" and a conservative vote is "Rehnquist-like" (Fischman and Law 2008, 30-31). As Fischman and Law (2008, 30) point out, the challenge of this type of agnostic coding is that the ideology of the justices must be inferred from their votes at the same time that the directionality of each case is inferred from the justice's

positions. This then is the main critique of the MQ scores: they are endogenous to justice votes, as they measure ideology by how often particular justices vote with each other, not necessarily by how often they support particular ideological outcomes.

Admittedly, any attempt to measure judicial ideology presents challenges and trade-offs. MQ scores are often preferred by judicial researchers because they are more methodologically sophisticated and have been demonstrated to better predict a justice's actual voting record than alternative measures such as Segal-Cover scores (Fischman and Law 2009). I choose to use the Segal-Cover scores because they are exogenous measures of judicial ideology – i.e., they measure judicial attitudes independent of their votes, unlike the more fashionable MQ ideology scores. As explained above, using MQ scores introduces the problem of endogeneity into the analysis: i.e., the MQ scores, being based on a justice's actual voting records, potential already capture the influence of amicus curiae briefs and other non-ideological factors. Because MQ scores are derived from the justices' votes, using these same scores to study the effect of ideology on votes amounts to using votes to predict votes (Epstein, Martin, Quinn, and Segal 2012, 713). As Segal and Cover (1989, 558) bluntly state: "One cannot demonstrate that attitudes effect votes when the attitudes are operationalized from those same votes." And as stated by Epstein et al. (2012, 708), "When the goal is to explain the effect of ideology on the judges' votes, scholars typically prefer exogenous measures because explaining votes with measures derived (even in part) from those very same votes involves a degree of circularity." Thus, by using the Segal-Cover scores, I avoid the problem of circularity in my causal findings.[53]

[53] The Segal-Cover scores are admittedly static – i.e., they do not change over the course of a justice's career, even though research shows that most justices become more liberal or conservative during their tenure on the USSC (e.g., Epstein et al. 2007). This is one reason that many scholars prefer the MQ ideology measures, as they are dynamic and change over time. Additionally, while Segal-Cover scores have been shown to have strong explanatory power in civil rights cases, the same is not true for cases involving unions, federalism, or taxation as the primary issue area (e.g., Epstein and Mershon 1996). The MQ scores have been shown to have more predictive power in these areas.

My fifth independent variable is *Prestigious Liberal – Conservative Amicus Difference*. This variable represents the relative advantage of prestigious liberal amicus participants in a case as compared to prestigious conservative amicus participants. As discussed above, scholars have found some support for the notion that the prestige and experience of the amicus participant may influence judicial behavior (e.g., McGuire 1994; Kearney and Merrill 2000; Lynch 2004; Collins 2004; Simard 2007; Box-Steffensmeier et al. 2013). In coding this variable, I have identified 10 private interest groups that, based upon prior literature and their frequency of amicus participation, represent the most prestigious and experienced amici: ACLU, AFL-CIO, American Association of Retired Persons (AARP), NAACP and NAACP Legal Defense Fund,[54] Washington Legal Foundation (WLF), Pacific Legal Foundation (PLF), National Association of Criminal Defense Lawyers (NACDL), American Bar Association (ABA), American Medical Association (AMA), and the Chamber of Commerce of the United States (CofC). These ten groups were chosen because each has been identified in the literature as either (1) having higher success rates than the average for amici, or (2) more frequently participating as amici, or (3) having a strong reputation among legal practitioners, judges, and scholars, or (4) a combination of the prior three.[55] This group of 10 prestigious amici comprises seven groups that are commonly viewed as liberal in their ideological orientation – ACLU, AFL-CIO, AARP, NAACP, NACDL, ABA, and AMA, and three groups viewed as conservatively inclined – CofC, WLF, and PLF.

---

[54] For purposes of this analysis, although technically separate organizations, I treat the NAACP and NAACP Legal Defense Fund as the same entity.

[55] This list of ten prestigious groups is not meant to be exhaustive, but it is meant to be accurate and representative of the most prestigious, powerful, institutional amici to appear at the USSC: the quintessential "repeat players." There is no one accepted list or ranking of the most prestigious amicus groups. My list is culled from various sources in the extant literature and is subject to judgment calls.

The ACLU is consistently identified in the literature as one of the most prestigious and experienced amici (e.g., Krislov 1963; Barker 1967; Puro 1972; Ivers and O'Conner 1987; Kearney and Merrill 2000; Lynch 2004; Dunworth, Fischman, and Ho 2009; Unah and Hancock 2006; Box-Steffensmeier et al. 2013). Likewise, the AFL-CIO's prominence is widely documented (e.g., Puro 1972; Kearney and Merrill 2000; Lynch 2004; Dunworth, Fischman, and Ho 2009); the American Association of Retired Persons (AARP) is widely regarded as one of the most powerful interest groups in Washington and as one of the most active amicus participants (e.g., Chandler 2013; Nownes 2013); the NAACP and NAACP Legal Defense Fund have historically been among the most regarded, active, and influential interest groups in the judicial process (e.g., Vose 1957; Krislov 1963; Lynch 2004; Unah and Hancock 2006); the Washington Legal Foundation (WLF) is acknowledged as a leading amicus participant and conservative voice (e.g., Lynch 2004; Dunworth, Fischman, and Ho 2009; Chandler 2013) ; likewise, the Pacific Legal Foundation (PLF) is one of the most active and prestigious amicus participants with a conservative/libertarian bent (e.g., Dunworth, Fischman, and Ho 2009; Chandler 2013) ; the National Association of Criminal Defense Lawyers (NACDL) is the most active amicus in the realm of criminal procedure and one of the most active amici generally (e.g., Dunworth, Fischman, and Ho 2009; Chandler 2013); the American Bar Association (ABA), along with the American Medical Association (AMA), are two of the most prestigious professional association amici (e.g., Lynch 2004); and lastly, the prevalence and influence of the Chamber of Commerce of the United States (CofC) as amici in the judicial sphere has been widely documented (e.g., Lynch 2004; Franklin 2009; Chandler 2013). I expect *Prestigious Liberal – Conservative Amicus Difference* to be signed positively, indicating that a relative advantage of prestigious liberal briefs in a case increases the likelihood of a justice voting liberally.

- **Interaction Term**

In addition to the foregoing independent variables, I include an interaction term in my model[56] – *Judicial Moderation x Liberal-Conservative Amicus Briefs Difference* – in order to examine whether or not all justices respond uniformly to the persuasion attempts of amici, or if amici have greater effects on the more moderate justices, with this effect diminishing the more ideologically extreme the justice becomes.[57] Mishler and Sheehan (1996, 197) show that moderate ("swing") justices are most likely to be receptive to the influence of public opinion. Similarly, and akin to the findings of Collins (2008) discussed above, I expect that the influence of amicus briefs will be present for all justices, with this effect becoming more pronounced the more moderate the justice.

As a component of the interaction term, I create a variable to capture the level of ideological moderation of each of the eleven justices who have served on the Roberts Court during the 2007-2011 terms: *Judicial Moderation*. For purposes of this *Judicial Moderation* variable, I choose to use the Martin-Quinn (MQ) ideology scores, instead of the Segal-Cover scores. I do so because, as discussed in more detail above, it is accepted that the MQ scores are more descriptively nuanced and accurate than any of the existing exogenous measures (e.g., Segal-Cover scores) (Epstein, Martin, Quinn, and Segal 2012, 714).[58] Further, I am able to avoid the circularity problem associated with the MQ scores, as I am not asserting that judicial moderation is directly causally related to whether or not a justice votes liberally or

[56] This interaction term is not included in the base model reported in the Appendix in Table A.3.

[57] As described by Brambor, Clark, and Golder (2006), the purpose of using interaction terms is to capture the conditional relationship between two or more variables. In this work, the interaction term is included to determine whether or not all justices respond uniformly to amicus briefs or whether a justice's response is conditioned by his/her judicial ideology.

[58] The MQ scores are able to capture a justice's ideological drift over time, while Segal-Cover scores are not. Additionally, MQ scores are more predictive of a justice's votes across various issue areas than are Segal-Cover scores.

conservatively. Instead, for purposes of this interaction term, I am assuming that ideology has an effect on voting, and I am then asserting that a justice's moderation level conditions his/her response to amicus briefs. As explained by Epstein, Martin, Quinn, and Segal (2012, 708), when researchers want to take the effect of ideology as a given and wish to describe how it works, endogenous approaches are preferable as they are more precise.

Therefore, as my measure of *Judicial Moderation*, I create a score for each justice for each term that captures his/her level of ideological moderation. My scale ranges from 0 to 4.02, with 0 representing the most ideologically extreme justice score, and 4.02 representing the most ideologically moderate justice score in the dataset. To arrive at this measure, I begin with each justice's MQ score for the relevant term. I then subtract this MQ score from the MQ score for the median justice for that term, to show the distance of each justice from the median justice for the term. I then take the absolute value of this distance (as MQ scores can be either positive or negative, with 0 representing the historical mean of the USSC), resulting in a value of zero representing the median justice and higher values representing greater ideological extremism. I then multiply this number by -1 to reverse the scores, making -4.02 the value of the most ideologically extreme justice, and making 0 the score of the mean justice for the term. I then add 4.02 to each value (representing the distance of the justice furthest from 0), thus making 0 the new score for the most ideologically extreme justice, and 4.02 the new score for the most ideologically moderate (mean) justice. The formula described is as follows: -1 * abs(MQMeanJustice - MQIdeology) + 4.02. The higher the justice's *Judicial Moderation* score, the more pronounced positive effect I expect amicus briefs/signers difference to make. Table 3.2 lists the mean moderation score of each justice serving during the 2007-2011 terms, based upon the above-described transformation, from most to least moderate.

Table 3.2. Justice Moderation Scores, From Most to Least Moderate, 2007-2011 Terms of the USSC

Rank	Justice Name	MQ Moderation Mean
1	**Anthony Kennedy**	4.02
2	**John Roberts**	2.89
3	**Elena Kagan**	2.86
4	**Sonya Sotomayor**	2.80
5	**Stephen Breyer**	2.66
6	**Samuel Alito**	2.61
7	**R.B. Ginsburg**	2.51
8	**David Souter**	2.15
9	**J.P. Stevens**	1.99
10	**Antonin Scalia**	1.69
11	**Clarence Thomas**	0.65

As described by Collins (2008, 101) and Ai and Norton (2003), in nonlinear models such as logit, it cannot be inferred from the sign, magnitude, or statistical significance of the coefficient of the interaction term whether the conditioning variable (*Judicial Moderation*) mediates the influence of amicus briefs, therefore it is necessary to calculate the marginal effects and confidence intervals for this interaction term, holding all other variables at their mean (for continuous variables) or modal (for dummy variables) values. To do this, I, like Collins (2008), use the technique developed by Brambor, Clark, and Golder (2006).

- **Control Variables**

In addition to my independent variables, and my interaction term, I include four control variables to account for well-documented influences on the decision-making of the USSC justices. My first two control variables – *SG Liberal Amicus* and *SG Conservative Amicus* – control for the long-recognized impact of the most influential amicus participant – the Solicitor General (e.g., Deen et al. 2003; Kearney and Merrill 2000; Spriggs and Wahlbeck 1997; Lynch 2004; Segal 1988; McGuire 1994; O'Connor 1983). They are scored 1 if the SG filed an amicus brief arguing the liberal or conservative position, respectively, and 0 if otherwise. The expected sign of *SG Liberal Amicus* is positive, while the expected sign of *SG Conservative Amicus* variable is negative, indicating that a justice is more likely to vote liberally in cases where the SG advocates the liberal position, and that a justice is more likely to vote conservatively in cases where the SG supports the conservative position.

Lower Court Direction controls for the Court's well-known practice of accepting cases on appeal that it seeks to reverse (Caldeira and Wright 1988; Segal and Spaeth 1993). This variable is coded 1 if the decision of the lower court that the USSC is reviewing was liberal and 0 if it was conservative. The expected sign of this variable is negative, indicating that a justice is more likely to vote conservatively in a case in which the lower court handed down a liberal decision.

Lastly, *Liberal — Conservative Party Resources Difference* controls for the impact of party resources on judicial decision-making, and is based on the status continuum of litigants adopted by Collins (2008) from Sheehan, Mishler, and Songer (1992). Prior research on the field of judicial behavior indicates that the resources a litigant possesses influences judicial decision-making – i.e., the judiciary favors the "haves" over the "have nots," due in part to their ability to

hire better lawyers, expert witnesses, etc. (Galanter 1974; Wheeler, Cartwright, Kagan, and Friedman 1987; McGuire 1995; Songer, Kuersten, and Kaheny 2000; Collins 2004; Collins 2007).[59] As acknowledged by Black and Boyd (2012, 288), "resource-endowed litigants have expertise, bargaining credibility, flexibility in long-term strategy and litigation, continuity in legal services, and fewer cost and delay barriers," and these characteristics often translate into a higher likelihood of victory for such litigants.

I classify the litigants' resource levels in each case by first referring to the Spaeth SCDB (2012) Release 01 (accessed at http://scdb.wustl.edu/index.php), which includes variables identifying the petitioner and respondent parties in each case. Second, I decide which party is liberal or conservative by finding the ideological direction of both the USSC and lower court decisions in the case, and then coupling this finding with whether the petitioner won or lost the case according to the SCDB.[60]

Following Collins (2008), litigants are ranked according to increasing resources, as follows: poor individuals = 1,[61] minorities = 2,[62] individuals = 3,[63] unions/interest groups = 4,[64]

[59] But compare Sheehan, Mishler, and Songer (1992), who fail to find a party status/ resources effect on the chances of judicial success at the USSC. This finding may be explained, in part, by McAtee and McGuire's research (2007, 271), which shows that justice ideology at the USSC mediates the influence of litigant resources: "liberal justices favor the social and economic underdogs, while more conservative justices support the interests of wealthier, institutional litigants." Thus, the liberal and conservative justices may often cancel each out, muting the discernible effect of party resources on justice votes.

[60] In 18 of the 397 cases under review, I was not able to classify the resource levels of the parties as either liberal or conservative, as the ideological direction of the USSC's decision in the case was unspecifiable. In such instances, I did not fill in values for the Liberal and Conservative Party Resources variable.

[61] I code Poor Individuals as those who were proceeding via *in forma pauperis* petitions, as well as those who were coded as indigent defendants, persons convicted of crimes, welfare recipients, and prisoners in the SCDB (2012) Release 01.

[62] I code Minorities as including those classified in the SCDB as minority employees or job applicants, other racial or ethnic minorities, lesbian, gay, or bisexual individuals, handicapped individuals, aliens, and Indians or Native American tribes.

[63] I code Individuals as including those classified in the SCDB as private persons, voters, attorneys, physicians, defendants, children, females, employees, and any other individuals not included categories 1 or 2.

small businesses = 5, businesses = 6, corporations = 7,[65] local governments = 8,[66] state governments = 9,[67] and the federal government = 10.[68] [69] It is expected that the sign of *Liberal—Conservative Party Resources Difference* will be positive, indicating that the USSC is more likely to rule in the liberal direction when the liberal party has greater resources than the conservative party. Conversely, it is expected that when the conservative party's resource level exceeds that of the liberal party, the USSC is more likely to hand down a conservative decision.

As mentioned previously, after estimating my base and primary all-inclusive logit models, I estimate multiple subsidiary logit models in order to provide a more contextualized analysis of amici impact. Because the primary model relies on a measure of judicial moderation instead of a direct measure of judicial conservatism or liberalism, it is necessary to include two

---

[64] Unions/Interest Groups include those classified as unions, professional organizations, political action committees, private colleges and universities, religious organizations and institutions, nonprofit groups, environmental organizations, public interest organizations, etc., in the SCDB.

[65] I follow Sheehan et al. (1992, 470, fn. 1), and code Corporations as including very large business entities (e.g., airlines, railroads, banks, insurance companies, oil companies, telecommunications companies, etc.) and national corporations (e.g. Amazon, Microsoft, General Electric, etc). Small Businesses include those which are more likely to have an individual owner-proprietor, e.g., bookstores, realtors, restaurants, theaters, and so-called "mom and pop" establishments. Lastly the Businesses category includes those businesses in between these other two categories or whose size is ambiguous.

[66] I code Local Governments as both municipalities, counties, and their respective officials.

[67] I code State Governments as including the 50 U.S. states, the District of Columbia, and U.S. territories, and their respective officials. I also include Foreign Governments in this category, as I expect their resource levels to be typically higher than local governments but lower than the U.S. federal government.

[68] I code Federal Government as instances where the United States, or one of its bureaucratic departments or agencies, or top officials is a party. The Solicitor General is always the legal representative before the USSC in such instances speaking on behalf of the federal government.

[69] While the party resource continuum adopted in this study is admittedly subject to arbitrariness and overgeneralization at times, this is true of any parsimonious ranking of litigant resources. Nevertheless, such a continuum remains a "pragmatic solution" (Wheeler et al. 1987, 413). Similar litigant resource continuums have been widely accepted in the literature (see e.g., Black and Boyd, 2012; Wheeler et al. 1987; Sheehan et al. 1992; Collins 2004, 2007, 2008). As noted by Black and Boyd (2012, 293), despite minor variations, scholars are in widespread agreement as to the general scaling of parties: individuals are the least powerful and have the lowest resource levels, while businesses have the next level of power because they are better organized and have a larger pool of resources to draw from. Lastly, governments are placed at the top of the rankings because they are frequently involved in litigation and have a nearly limitless pool of resources.

separate logit models to assess whether or not conservative and liberal justices respond in the same way to amicus briefs. The first of these models includes only liberal justices and the second includes only conservative justices for all cases at the Roberts Court. This will allow for a comparison of liberal and conservative justices to see if they respond similarly or differently to amici. Liberal justices are identified as those justices that have Martin-Quinn ideology scores of less than .4; conservative justices are those that have MQ scores of greater than .4.[70] Table 3.3 ranks each of the eleven justices that have served on the Roberts Court between the 2007-2011 terms from most conservative to least conservative according to their mean MQ ideology score over that five term span.

These two ideology models are specified the same as the primary all-inclusive model, except that they exclude the variable controlling for judicial ideology along with the interaction variable, as ideology in essence will already be controlled for since these models will only be focused on liberal justices, and conservative justices, respectively. Thus, the influence of amici on these two categories of justices will be directly observable without need for the inclusion of an interaction term or a separate control variable for judicial ideology.

Next, another subsidiary logit model is included that only focuses on politically salient cases. This salience model includes the same variables and interaction term as the primary all-inclusive model. The inclusion of this model allows for an examination of how the salience of a case blunts or heightens the impact of the persuasion attempts of amici. I provide this model

[70] I chose .4 as the conservative/liberal break-point for a couple of reasons. First, it was a natural break-point when looking at the alignment of justices when arrayed from highest MQ scores (most conservative) to lowest MQ scores (most liberal). Second, it was the dividing line between the highest MQ score of the least liberal of those justices widely considered to be a part of the liberal bloc on the Roberts Court (Elena Kagan in 2011 term: .392 MQ score), and the lowest MQ score of the least conservative of the justices considered to be part of the conservative bloc of the Roberts Court (Anthony Kennedy in the 2007 term: .609).

Table 3.3. Ranking of Justices According to Their Martin-Quinn Mean Ideology Scores, 2007-2011 Terms

Rank	Justice Name	MQ Ideology Mean
1	**Clarence Thomas**	4.53
2	**Antonin Scalia**	3.49
3	**Samuel Alito**	2.57
4	**John Roberts**	2.29
5	**Anthony Kennedy**	1.16
6	**Elena Kagan**	0.31
7	**S. Sotomayor**	0.17
8	**Stephen Breyer**	-0.2
9	**R.B. Ginsburg**	-0.35
10	**David Souter**	-1.06
11	**J.P. Stevens**	-1.08

because I expect the influence of amicus briefs to be different in salient cases from others. In salient cases, a justice's ideology should play a more prominent role, reducing the likelihood of observing a judge casting an ideologically incongruent vote, and enhancing the likelihood of observing a judge cast an ideologically congruent vote. Because of this, an ideologically advantage of amicus briefs/signers that is in the opposite direction of a justice's ideology should not have as much sway over the justice in salient cases as in non-salient cases. However, an ideologically advantage of amicus briefs/signers that is in the same direction of a justice's

ideology should positively influence the justice in both salient and non-salient cases, as such briefs/signers simply reinforce the justice's natural tendencies. Therefore, amici influence can be expected in these salient cases, but only for those justices ideologically aligned with the amicus. Consequently, the level of amici influence should be less pronounced in the salience model than in the primary all-inclusive model. In addition, I include two more subsidiary logit models focusing on salient cases – one for conservative justices, and one for liberal justices – to determine if the justices respond differently to amici in salient cases.

To identify those cases which are politically salient, I use the list of top ten major cases compiled by CQ Press for each USSC term, which is published in its annual *Supreme Court Yearbook*. The selection is based on such factors as the rulings' practical impact; its significance as legal precedent; the degree of division on the Court; and the level of attention among interest groups, experts, and news media (Jost 2012).[71] In the model including only politically salient cases, I expect the results to show that a relative advantage of amicus briefs that are incongruent with a justice's ideology will not meaningfully influence that justice to vote inconsistent with her

[71] In using this Congressional Quarterly measure, I depart from Collins (2008, 124-125) and Epstein and Segal (2000) who determine political salience based upon whether the case appeared on the front page of the *New York Times* following the decision. However, access to such *New York Times* data is only available through the 2009 term of the USSC, thus it is not appropriate for this study. The Congressional Quarterly salience measure has been used in prior literature and is one of the two measures (along with the *New York Times*), that is used in the Spaeth SCDB Salience Measures, located at http://scdb.wustl.edu/data.php?s=5. The CQ Press measure of issue salience indicates if the case appears on the list of landmark decisions in Congressional Quarterly's *Guide to the U.S. Supreme Court* (Savage 2010) (located at http://library.cqpress.com/supremecourtguide/). A number of leading scholars in the field have used this CQ measure of case salience (e.g., Collins 2008; Brenner and Arrington 2002; Epstein and Knight 1998; Segal and Spaeth 1996; Brenner and Spaeth 1995). Epstein and Segal (2000) acknowledge the validity of the CQ Press salience measure, but level two primary criticisms against it: (1) it is biased towards cases involving civil rights and liberties; and (2) it is primarily a measure of retrospective case salience as determined by scholars, instead of a contemporaneous measure. However, this second criticism does not apply with much force in this study, as I am only using the CQ press measure for recent terms of the USSC. Thus, my CQ Press salience measure is quite contemporaneous. Moreover, as the last date of publication of CQ's *Guide to the U.S. Supreme Court* was 2010 (which does not contain data on the 2010 and 2011 terms of the USSC), I chose instead to use the list of major cases for the 2007 – 2011 terms of the USSC that is published by CQ Press in its annual *Supreme Court Yearbook*.

ideological preference, but that a relative advantage of amicus briefs that are congruent with a justice's ideology will make it more likely for that justice to vote consistently with her ideology.

Further, to investigate whether amici influence differs across issue areas, I include four other subsidiary logit models corresponding to the four main case issue areas confronting the justices: criminal procedure; civil rights and liberties; economics; and judicial power and federalism. These issue area models will provide an assessment as to whether the impact of amici is uniform across various issue areas, or whether amici have a differential impact depending on the type of case confronting the justices. These four issue area models will include the same variables and interaction term as the primary all-inclusive model.

Lastly, in addition to the logit models described above, I provide tables detailing the Pearson's correlation between the ideological direction of a justice's vote and the amicus variables (*Liberal–Conservative Amicus Brief Difference; Liberal–Conservative Amicus Cosigner Difference; Prestigious Liberal-Conservative Amicus Difference; SG Liberal Amicus*; *SG Conservative Amicus*) for each of the eleven justices that served during the 2007-2011 terms. The purpose of these tables is to compare and contrast the influence of amici on each individual justice who has served at the Roberts Court. These models, graphs, and tables will provide ample opportunity to assess the impact of amici on the Roberts Court in a variety of contexts.

Chapter 4: Amicus Participation at the Roberts Court

This chapter provides a detailed description of amicus participation during the 2007-2011 terms of the USSC. By the conclusion of this chapter, I will demonstrate that amicus participation at the Roberts Court is prolific, and that this phenomenon is relatively consistent across individual terms, across various issue areas, and among differing categories of amicus participants. Specifically, this chapter includes the following information regarding amici at the Roberts Court: the number and percentage of cases with amicus participation across the 2007-2011 terms, across individual terms, and across issue areas; the numbers, percentages, and averages of liberal, conservative, and total amicus briefs and cosigners across the 2007-2011 terms, and across individual terms, issue areas, and amici categories; the percentage of amicus participation that each amicus category and subcategory represents; the number and percentage of cases involving various amicus categories; a ranking of the cases involving the most amicus briefs and amicus signers; a listing of the most frequent tracked amicus participants; the most frequent tracked conservative amici; the most frequent tracked liberal amici; and lastly, a ranking of those tracked amici who have the highest winning percentage at the Roberts Court.

A. Amicus Participation by Issue Area

Table 4.1 presents information on the total amount of amicus briefs filed during the 2007-2011 terms, as well as across four basic issue areas. The first row indicates the percentage of cases with at least one amicus brief for each issue area, and all areas combined. Notably, amicus briefs were present in over 96 percent of all cases, and in at least 95 percent of cases in every issue area. Not surprisingly, civil rights and liberties cases experienced the highest percentage of amicus participation (99.18 percent), but each of the other areas very closely followed.

Table 4.1. Amicus Curiae Briefs by Issue Areas, 2007-2011 Terms

	Criminal Procedure	Civil Rights and Liberties	Economics	Judicial Power and Federalism	Totals*
Percent of Cases with Amicus Briefs	95.18% (98)	99.18% (121)	97.87% (92)	97.22% (70)	96.47% (383)
Number of Briefs Filed	637	1,209	955	815	3,639
Number of Liberal Briefs Filed	367	633	417	345	1,762
Number of Conservative Briefs Filed	255	493	402	386	1,535
Number of Unspecifiable Briefs Filed	15	86	132	83	339
Mean Briefs Per Case	5.95	9.91	10.15	11.31	9.17
Mean Liberal Briefs Per Case	3.43	5.19	4.44	4.79	4.44
Mean Conservative Briefs Per Case	2.38	4.04	4.27	5.36	3.86
Mean Unspecifiable Briefs Per Case	0.14	0.7	1.46	1.15	0.87
Maximum Number of Briefs in a Case	68	53	69	87	87.00
Percent of Total Amicus Briefs	17.50%	33.22%	26.24%	22.40%	100%
Percent of Cases Decided	26.95% (107)	30.73% (122)	23.68% (94)	18.14% (72)	100% (397)

*The total column includes the two cases from this time frame that do not fit into the four issue areas listed here. Numbers in parentheses indicate the number of observations.

Rows 2 through 5 of Table 4.1 present the total number of amicus briefs filed in each issue area, as well as the total number of liberal, conservative, and unspecifiable briefs filed. 3,639 amicus briefs were filed from 2007-2011 terms, with civil rights and liberties cases having the most briefs filed (1,209), followed, in order, by economics (955), judicial power and federalism (815), and criminal procedure (637) cases. As one can see, almost twice as many briefs were filed in civil rights and liberties cases as in criminal procedure cases.

As rows 3 and 4 show, the total number of conservative and liberal amicus briefs is relatively balanced at the Roberts Court (1,762 to 1,535), with liberal briefs having a modest advantage. Rows 3 and 4 also demonstrate that liberal amicus briefs outnumber conservative briefs in all issue areas except judicial power and federalism cases. This is understandable considering the fact that governments, which generally advocate the conservative position as amici, are particularly likely to be affected by this category of cases.

Row 6 of Table 4.1 presents the mean number of total amicus briefs per case. Notably, the Roberts Court averaged over 9 amicus briefs per case during the 2007-2011 terms. Judicial power and federalism cases attracted the most mean amicus briefs per case (over 11), followed closely by economics (over 10) and civil rights and liberties cases (almost 10). Criminal procedure cases attract the least number of briefs per cases (at almost 6). Thus, in both absolute numbers and case averages, criminal procedure cases attract the least amount of amicus brief filings. This finding could be explained by the fact that criminal defendants and prisoners tend to be low on the political resources, power, and sympathy scales. Nevertheless, amicus brief filings are quite robust even in this category of cases.

Rows 7 and 8 present the mean number of liberal briefs per case (4.44), and the mean number of conservative briefs per case (3.86), respectively. For every conservative amicus brief

that was filed, 1.15 liberal briefs were filed at the Roberts Court. Liberal amicus briefs comprised 48.42 percent of total amicus briefs, while conservative amicus briefs comprised 42.18 percent of total briefs (with unspecifiable amicus briefs accounting for the remaining 9.32 percent). These findings confirm that liberal and conservative briefs are relatively balanced at the Roberts Court. It appears, then, that counteractive lobbying is occurring among amici at the Roberts Court. Liberal amicus briefs attract conservative responses, and vice versa. These findings also provide evidence that amici do not simply file briefs in cases they are predisposed to winning. If this were the case, we would expect to see more conservative amicus briefs filed than liberal ones at the conservative Roberts Court. But the opposite is true. Liberal amicus briefs maintain an over .5 brief advantage on average over their conservative counterparts in all cases.[72] This finding is significant in that liberal amicus briefs still have a modest advantage in terms of participation on what is widely regarded as a conservative Court. Liberal amici apparently do not feel that lobbying the modestly conservative Robert Court is a lost cause; on the contrary, they seem to relish the challenge.

Comparing the issue areas, rows 7 and 8 show that liberal and conservative briefs are most closely balanced in economics cases (4.44 vs. 4.27); while civil rights and liberties cases have the greatest difference between liberal and conservative briefs per case (5.19 vs. 4.04). Judicial power and federalism is the only category of cases in which conservative brief outnumber liberal briefs on average (5.36 to 4.79).

[72] Judicial power and federalism is the only issue area that is not characterized by a liberal amicus brief advantage.

Row 10 of Table 4.1 shows the maximum number of briefs filed in a case for each issue area, and all areas combined.[73] *Department of Health and Human Services v. Florida* (2011 term) attracted the most amicus briefs of any case, with 87 briefs filed. This particular case was a part of the broader consolidated health care law case involving the constitutionality of the Patient Protection and Affordable Care Act, which consolidated three docket numbers into one case: *Department of Health and Human Services v. Florida* (11-398; 87 briefs); *Florida vs. Department of Health and Human Services* (11-400; 52 briefs); and *National Federation of Independent Business vs. Sebelius* (11-393; 29 briefs). Altogether, this consolidated health care law case was accompanied by the filing of 168 amicus briefs, 136 of which were unique, and 32 of which were the same brief filed in more than one of these three docket numbers. This case set the all-time USSC record for number of amicus brief filings. The criminal procedure case that attracted the most amicus participation (68 briefs) was *District of Columbia v. Heller* (2007 term), involving the constitutionality of District of Columbia's gun restrictions and whether the Second Amendment protects an individual's right to own a firearm for purposes of self-defense. The civil rights and liberties case with the most amicus briefs (53) was *Citizens United v. Federal Election Commission* (2009 term), regarding whether the First Amendment prohibits the government from restricting independent political expenditures by corporations, associations, and labor unions. The economics case having the most amicus briefs (69) was *Bilski v. Kappos* (2009 term), involving a patent dispute over whether business methods could be patented.

Table A.1, located in the Appendix, lists a ranking of all cases during the 2007-2011 terms of the Roberts Court that were accompanied by at least 25 amicus briefs. This table provides information regarding the case name, docket number, term, vote, ideological direction

[73] These maximum brief numbers are based on specific docket numbers. For consolidated cases (those with multiple docket numbers), the actual number of briefs filed will often be higher.

of the decision, specific number of amicus briefs, net difference in the number of liberal and conservative briefs in the case, along with a brief description of the case holding.

Row 12 demonstrates that the USSC decides more civil rights and liberties cases than any other category, followed by criminal procedure, economics, and judicial power and federalism cases, respectively. This helps explain, in part, why civil rights and liberties cases attract more amicus briefs, in absolute numbers, than the other categories, as we know from Row 6 that economics and judicial power and federalism cases attract slightly more amicus briefs on average per case than do civil rights and liberties cases.

Table 4.2 presents information on the total number of amicus brief cosigners during the 2007-2011 terms, as well as across four basic issue areas. Rows 1 and 2 of Table 4.2 present the total number of amicus cosigners in each issue area, along with the ratio of cosigners to briefs in each issue area. 24,476 amici signed briefs from 2007-2011 terms, with judicial power and federalism cases having the most cosigners (7,484), followed, in order, by criminal procedure (7,131), civil rights and liberties (6,132), and economics (3,632) cases. Comparing the total number of amicus cosigners (24,476) to the total number of amicus briefs (3,639) at the Roberts Courts, we see that for every one amicus brief that is filed, an average of 6.7 amici cosign such briefs. It should be obvious then, that one must look beyond simply amicus briefs, to amicus cosigners, when assessing amicus participation, otherwise one is left with an incomplete picture of the nature and extent of amicus participation and impact at the Roberts Court.

When comparing Tables 4.1 and 4.2, one can see that amicus cosigner participation presents quite a different story to that of amicus brief participation across issue areas. While judicial power and federalism cases ranked third in terms of numbers of briefs filed, they ranked first in the number of amicus cosigners of the four issue areas. And while criminal procedure

Table 4.2. Amicus Curiae Cosigners by Issue Areas, 2007-2011 Terms

	Criminal Procedure	Civil Rights and Liberties	Economics	Judicial Power and Federalism	Totals
Number of Amicus Cosigners	7,131	6,132	3,632	7,484	24,476
Ratio of Cosigners to Briefs	11.2 to 1	5.1 to 1	3.8 to 1	9.2 to 1	6.7 to 1
Number of Liberal Amicus Cosigners	3,440	3,289	1,841	3,738	12,308
Number of Conservative Amicus Cosigners	3,655	2,405	1,376	3,355	10,791
Number of Unspecifiable Amicus Cosigners	36	438	415	391	1,377
Mean Amicus Cosigners Per Case	66.64	50.26	38.73	103.94	61.69
Mean Liberal Cosigners Per Case	32.15	26.96	19.63	51.92	31.02
Mean Conservative Cosigners Per Case	34.16	19.71	14.67	46.6	27.20
Mean Unspecifiable Cosigners Per Case	0.33	3.59	4.43	5.42	3.47
Maximum Number of Amicus Cosigners in a Case	1,622	249	178	1,928	1,928
Percent of Total Amicus Cosigners	29.13%	25.05%	14.84%	30.58%	100%
Percent of Cases Decided	26.95% (107)	30.73% (122)	23.68% (94)	18.14% (72)	100% (397)

*The total column includes the two cases from this time frame that do not fit into the four issue areas listed here. Numbers in parentheses indicate the number of observations.

cases had the lowest number of amicus briefs of any of the four issue areas, they had the second most amicus cosigners. Also of note, while economics cases had the second most amicus briefs filed, they had the least number of amicus cosigners of any of the issue areas.

In fact, criminal procedure amicus cosigners outnumbered economics cosigners by an almost 2:1 ratio; and judicial power and federalism amicus cosigners outnumbered economics cosigners by an over 2:1 ratio. In economics cases amici are much less likely to collaborate together on briefs, whereas amici in judicial power and federalism and criminal procedure cases are much more likely to collaborate. This finding could be explained, in part, by the fact that state and local government amici often collaborate together on briefs, and these amici are more likely to be directly affected by criminal procedure and judicial power and federalism cases, than the other two issue areas. The lesser willingness of amici to collaborate in economics cases might be explained by the fact that amici in economics cases are typically business interests, which are likely to have more resources than many other amici, and thus feel less need to pool resources and collaborate on the filing of amicus briefs. The ranking of amici collaboration from greatest to least across issue areas is as follows: criminal procedure; judicial power and federalism; civil rights and liberties; and economics.

Rows 3-5 of Table 4.2 show the number of liberal, conservative, and unspecifiable amicus cosigners in total, and across issue areas. Consistent with the findings regarding amicus briefs, we see once again that total liberal cosigners outnumber total conservative cosigners, but that this liberal advantage is modest. The ratio of liberal to conservative amicus cosigners is 1.14 to 1, which is almost identical to the ratio of liberal to conservative amicus briefs (1.15 to 1). Criminal procedure is the only issue area in which conservative cosigners outnumber liberal ones. This can be explained by the predominance of governmental amici in criminal procedure

cases. By contrast, civil rights and liberties cases exhibit the greatest advantage of liberal cosigners of the issue areas. This finding should not come as a surprise, as those amici most attracted to civil rights and liberties cases tend to be more liberal in their orientation, as they typically side with the interests of the pro civil rights and liberties claimant against the interests of governmental regulation.

When comparing the collaboration levels of total liberal and conservative amici at the Roberts Court (as evidenced by their willingness to cosign briefs instead of filing separate briefs), one reaches a notable conclusion: the ratio of cosigners to briefs for both liberal and conservative amici is virtually identical: 6.99 liberal amici cosign together for every liberal brief that is filed, while 7.03 conservative amici cosign together for every conservative brief that is filed on average. Thus, collaboration is the very common among both conservative and liberal amici, and this collaboration tends to be strikingly balanced. This is one more finding bolstering the conclusion that amici are engaged in an ideological arms race, and that they engage in counteractive lobbying behavior.

However, upon examination of the four issue areas, we see that differences do exist in the collaboration levels of liberal and conservative amici. The ratio of liberal to conservative cosigners for each amicus brief across issue areas is as follows: criminal procedure – 9.37 to 14.33; civil rights and liberties – 5.20 to 4.87; economics – 4.41 to 3.42; and judicial power and federalism – 10.33 to 8.69. The main conclusion regarding amicus collaboration drawn from these cosigner ratios is that liberal amici exhibit slightly higher collaboration levels than do conservative amici in every issue area except criminal procedure. The criminal procedure anomaly is likely due to the fact that states typically cosign amicus briefs together rather than filing separately, and that states are predominant amici in criminal procedure cases, and that

states in criminal procedure cases usually represent the conservative position. In short, while amicus briefs and cosigners are relatively ideologically balanced at the Roberts Court, liberal amici are slightly more likely to file briefs, and also slightly more likely to collaborate in most issue areas.

Row 6 of Table 4.2 presents the mean number of total amicus cosigners per case. Notably, the Roberts Court averaged almost 62 cosigners per case during the 2007-2011 terms. Judicial power and federalism cases attracted the most mean amicus cosigners per case (almost 104), followed by criminal procedure (over 66), civil rights and liberties cases (over 50), and lastly economics (almost 39). Thus, in both absolute numbers and case averages, economics cases attract the least amount of amicus cosigners, despite having the second highest amicus brief filings in absolute numbers and mean briefs per case. As stated above, this indicates that amici in economics cases are more likely to choose to file solo briefs, rather than to collaborate compared to amici in other issue areas. As mentioned previously, this finding is likely due, in part, to the higher resource levels possessed by economic amici compared to others.

Rows 7 and 8 of Table 4.2 present the mean number of liberal cosigners per case (31.0), and the mean number of conservative cosigners per case (27.2), respectively. Therefore, a 3.8 liberal amicus cosigner advantage over conservative cosigners exists on average for each case at the Roberts Court. As stated previously, for every conservative amicus cosigner, 1.14 liberal cosigners are present on average at the Roberts Court. Liberal amicus cosigners comprise 50.29 percent of total amicus cosigners, while conservative amicus cosigners comprise 44.09 percent of total cosigners (with unspecifiable amicus cosigners accounting for the remaining 5.63 percent). These findings provide further confirmation of the relatively ideologically balanced nature of amicus participation at the Roberts Court, with a slight liberal advantage.

Similar to the findings regarding amicus briefs, these findings regarding amicus cosigners provide additional evidence that amici do not simply participate in cases they are predisposed to winning. If this were the case, we would expect to see more conservative amicus cosigners than liberal ones at the conservative Roberts Court, but the opposite is true. Once again, liberal amici are not reluctant to lobby at the Roberts Court, indicating that they do not think that such lobbying is a waste of time, money, or effort.

Comparing the issue areas, Rows 7 and 8 show that liberal amici enjoy an approximately seven cosigner advantage over conservative amici on average in civil rights and liberties cases, and approximately a five cosigner advantage on average in economics and judicial power and federalism cases. On the other hand, criminal procedure cases have two more conservative amicus cosigners than liberal ones on average.

Row 11 of Table 4.2 shows the maximum number of cosigners filed in a case for each issue area, and all areas combined.[74] Just as is with case with amicus briefs, *Department of Health and Human Services v. Florida* (11-398) (2011 term) attracted the most amicus cosigners (1,928) of any case during the 2007-2011 terms of the Roberts Court. As stated previously, *Department of Health and Human Services v. Florida* was a part of the broader consolidated health care law case involving the constitutionality of the Patient Protection and Affordable Care Act, which consolidated three docket numbers into one case: *Department of Health and Human Services v. Florida* (11-398; 1,928 cosigners); *Florida vs. Department of Health and Human Services* (11-400; 1,413 cosigners); and *National Federation of Independent Business vs. Sebelius* (11-393; 450 cosigners). Altogether, this consolidated health care law case was

[74] These maximum cosigner numbers are based on specific docket numbers. For consolidated cases (those with multiple docket numbers), the actual number of cosigners will often be higher.

accompanied by 3,791 cosigners (some of which are duplicative, as some of the same briefs were filed in a couple of docket numbers).

The criminal procedure case that attracted the most amici cosigners (1,622 cosigners), was *McDonald v. City of Chicago* (08-1521) (2010 term), involving the constitutionality of Chicago's gun restrictions and whether the Second Amendment's right to bear arms limits the ability of states and local governments to restrict guns. The civil rights and liberties case with the most amicus cosigners (249) was *Christian Legal Society v. Martinez* (08-1371) (2009 term), regarding whether, consistent with the First Amendment, a public law school could bar recognition of student campus chapter of the Christian Legal Society because it required students to subscribe to a "statement of beliefs" and refrain from proscribed behavior, including homosexuality, in order to become a member. The economics case having the most amicus cosigners (69) was *Microsoft v. i4i Limited Partnership* (10-249) (2010 term), involving whether the Patent Act requires an invalidity defense to be proved by clear and convincing evidence.

Table A.2, located in the Appendix, ranks all of the cases during the 2007-2011 terms of the Roberts that possessed at least 125 amicus cosigners. This table provides information regarding the case name, docket number, term, vote, ideological direction of the decision, specific number of amicus cosigners, and net difference in the number of liberal and conservative cosigners in the case, along with a brief description of the case holding.

B. Amicus Participation by Term

Table 4.3 presents information regarding amicus brief filings by term of the Roberts Court. The percentage of cases each term accompanied by at least one amicus brief was remarkably consistent, ranging from just over 95 percent of cases to just over 97 percent of cases

over the 5 terms. The 2011 term had the highest percentage of cases with amicus participation, but each of the other terms closely followed. Row 2 of Table 4.3 shows that the 2010 term of the Roberts Court had the most amicus briefs (834), followed by the 2011 term (754). The 2008 term had the fewest amicus briefs (659). Rows 3-5 of Table 4.3 show the number of liberal, conservative, and unspecifiable briefs filed each term. Liberal amicus briefs outnumbered conservative briefs in every term, with the liberal advantage being greatest in the 2007 term (111 liberal brief advantage over conservative briefs).

Row 6 depicts the mean number of amicus briefs filed each case during each term. The 2010 and 2011 terms had the greatest mean number of amicus briefs per case – both at 9.8 briefs per case. By contrast, the 2008 term had the fewest amicus brief filings per case (7.75). Rows 7-9 illustrate the mean number of liberal, conservative, and unspecifiable amicus briefs per case, respectively. While more liberal amicus briefs were filed per case in every term, the liberal advantage was greatest during the 2007 term (1.52 brief advantage), and was smallest during the 2009 term (.17 brief advantage).

Row 10 of Table 4.3 shows the maximum number of amicus briefs filed in a case each term. 2011 had the case with the most amicus briefs, *Department of Health and Human Services v. Florida* (11-398) (87 briefs). The case accompanied by the most amicus briefs in the 2009 term was *Bilski v. Kappos* (08-294) (69 briefs). The case in the 2007 term with the most amicus briefs was *District of Columbia v. Heller* (07-290) (68 briefs). *Microsoft v. i4i Limited Partnership* (10-290) (48 briefs) had the most amicus briefs filed in the 2010 term. Lastly, the case with the most amicus briefs from the 2008 term was *Wyeth v. Levine* (06-1249), in which the USSC decided to allow failure-to-warn suits in state court against drug makers despite federal regulation.

Table 4.3. Amicus Curiae Briefs by Term

	2007-08	2008-09	2009-10	2010-11	2011-12	Totals
Percent of Cases with Amicus Briefs	97.26% (71)	96.47% (82)	96.10% (74)	95.29% (81)	97.40% (75)	96.47% (383)
Number of Briefs Filed	661	659	731	834	754	3,639
Number of Liberal Briefs Filed	359	298	328	413	364	1,762
Number of Conservative Briefs Filed	248	277	315	392	303	1,535
Number of Unspecifiable Briefs Filed	55	84	88	28	87	342
Mean Briefs Per Case	9.07	7.75	9.49	9.81	9.79	9.17
Mean Liberal Briefs Per Case	4.93	3.51	4.26	4.86	4.73	4.44
Mean Conservative Briefs Per Case	3.41	3.26	4.09	4.61	3.94	3.86
Mean Unspecifiable Briefs Per Case	0.76	0.99	1.14	0.33	1.17	0.87
Maximum Number of Briefs in a Case	68	30	69	48	87	87.00
Percent of Total Amicus Briefs	18.16%	18.11%	20.09%	22.92%	20.72%	100%
Percent of Cases Decided	18.39% (73)	21.41% (85)	19.40% (77)	21.41% (85)	21.41% (77)	100% (397)

Numbers in parentheses indicate the number of observations.

Row 11 of Table 4.3 demonstrates that each term was roughly equivalent in terms of its share of the total percentage of amicus briefs, ranging from a low of just over 18 percent in the 2008 term, to a high of almost 23 percent in the 2010 term. Likewise, Row 12 shows that each term was roughly equivalent in terms of its share of the total caseload, ranging from just over 18 to just over 21 percent.

In similar fashion, Table 4.4 presents information regarding amicus cosigners by term of the Roberts Court. Row 1 of Table 4.4 shows that the 2011 term by far had the most amici participation in the form of brief cosigners (7,307), followed by the 2009 term (4,969). Not only did the 2010 term have the fewest amicus briefs, it also had the fewest cosigners (3,744). Rows 2-4 of Table 4.4 show the number of liberal, conservative, and unspecifiable amicus cosigners each term. Liberal amici outnumbered conservative amici cosigners in three (2007, 2008, 2011) of the five terms, with the liberal cosigner advantage being greatest in the 2007 term (1,415 liberal cosigner advantage). In fact, of the five terms, the 2007 term exhibited the greatest liberal amicus advantage both in terms of briefs and cosigners. In both the 2009 and 2010 terms, the number of conservative amici cosigners outnumbered liberal cosigners, with this conservative amici advantage being greatest in the 2009 term (986 conservative cosigner advantage).

Row 5 depicts the mean number of amicus brief cosigners for each case during each term. The 2011 term had the greatest mean number of amicus cosigners per case (94.9), due in large part to the impact of the consolidated health care law cases, which had a total of 3,791 cosigners and significantly elevated the means for the 2011 term. The mean number of amicus cosigners per case in the 2011 term more than doubled the mean number of cosigners in the 2008 and 2010 terms, with 45 and 44 cosigners per case, respectively. Rows 6-8 illustrate the mean number of

Table 4.4. Amicus Curiae Cosigners by Term

	2007-08	2008-09	2009-10	2010-11	2011-12	Totals
Number of Amicus Cosigners	4,597	3,859	4,969	3,744	7,307	24,476
Number of Liberal Amicus Cosigners	2,908	1,858	1,812	1,790	3,940	12,308
Number of Conservative Amicus Cosigners	1,493	1,478	2,798	1,903	3,119	10,791
Number of Unspecifiable Amicus Cosigners	196	523	359	51	248	1,377
Mean Amicus Cosigners Per Case	63.16	45.4	64.53	44.05	94.9	61.69
Mean Liberal Cosigners Per Case	39.96	21.86	23.53	21.06	51.17	31.02
Mean Conservative Cosigners Per Case	20.51	17.39	36.33	22.39	40.51	27.2
Mean Unspecifiable Cosigners Per Case	2.69	6.15	4.67	0.6	3.22	3.47
Maximum Number of Amicus Cosigners in a Case	920	228	1,622	182	1,928	1,928
Percent of Total Amicus Cosigners	18.78%	15.77%	20.30%	15.30%	29.85%	100%
Percent of Cases Decided	18.39% (73)	21.41% (85)	19.40% (77)	21.41% (85)	21.41% (77)	100% (397)

Numbers in parentheses indicate the number of observations.

liberal, conservative, and unspecifiable amicus cosigners per case. Liberal amicus cosigner advantage per case was most pronounced in the 2007 (19 liberal cosigner advantage) and 2011 (almost 11 cosigner advantage) terms. On the other side, conservative cosigner advantage per case was greatest during the 2009 term (almost 13 conservative cosigner advantage), and also present during the 2010 term (over 2 cosigner advantage).

Row 9 of Table 4.4 shows the maximum number of amicus cosigners in a case each term. Just as with amicus briefs, the case with the most amicus cosigners in the 2011 term was *Department of Health and Human Services v. Florida* (11-398) (1,928 cosigners), a part of the larger consolidated health care law case. The case accompanied by the most amicus cosigners in the 2009 term was *McDonald v. City of Chicago* (08-1521) (1,622 cosigners). Just as with amicus briefs, the case in the 2007 term with the most amicus cosigners was *District of Columbia v. Heller* (07-290) (920 cosigners). *Republic of Iraq v. Simon* (08-539) (228 cosigners) had the most amicus cosigners in the 2008 term (along with its companion case *Republic of Iraq v. Beaty* (07-1090) (which had 217 cosigners, most of which were identical to those in *Republic of Iraq v. Simon*). This case involved the question of whether the U.S. courts have jurisdiction over Iraq for claims involving alleged misdeeds that occurred during Saddam Hussein's regime. Lastly, the case with the most amicus cosigners from the 2010 term was *Brown v. Entertainment Merchants Association* (182 cosigners), in which the USSC struck down a California law banning the sale or rental of violent video games to minors based upon the First Amendment.

C. Amicus Participation by Amicus Category

In this section, I investigate the nature of the amici who participate at the Roberts Court. I have categorized all amici as falling into one of three basic categories: (1) interest groups; (2) governments; or (3) individuals. Governmental amici include the Solicitor General, state governments,[75] local governments,[76] and foreign governments. Individuals include any person who signs their individual name on an amicus brief. Common examples of amici individuals are academics, scientists, members of Congress, state legislators, governors, and other current and former government officials. Interest groups are all amici who are not governments or individuals. Interest groups take many forms, including corporations (AT&T, General Electric, Google, WalMart, Microsoft), public advocacy organizations (ACLU, Mothers Against Drunk Driving, NAACP, National Rifle Association, PETA, Sierra Club, National Organization for Women), public interest law firms (American Center for Law and Justice, Pacific Legal Foundation, Mental Health Law Project, Rutherford Institute), trade associations (American Sociological Association, American Bankers Association, American Bar Association), unions (United Mine Workers, American Federation of Teachers, National Education Association), and peak associations (Chamber of Commerce of the United States, AFL-CIO, National League of Cities). Other examples of interest groups include churches and religious organizations, political parties, political action committees, charities, universities and colleges, think tanks, and ad hoc coalitions.

Table 4.5 presents information on the levels of participation by each of the categories of amici during the 2007-2011 terms. Column 2 reports the number and percentage of total amici that each amici category and subcategory represents. Interestingly, individuals are the most

[75] I code state governments as including the 50 U.S. states, the District of Columbia, and U.S. territories.

[76] Local governments include municipalities, counties, and any subdivisions thereof.

frequent amici category at the Roberts Court, comprising 47.3 percent of total amici. This finding is noteworthy, as it differs sharply from prior findings regarding the prominence of individuals as amici at the USSC. For example, Caldeira and Wright (1990) find that only six percent of amici during the 1982 term were individuals. Collins and Solowiej (2007, 967) show that individuals accounted for only about 22 percent of amici in the 1995 term. And in an analysis of the 1950, 1968, 1982, and 1995 terms of the USSC, Collins (2008, 61) finds that individuals accounted for only 12.1 percent of amicus participants. Thus, the Roberts Court has seen a significant increase in the percentage of individuals who are participating as amici.

Interest groups account for 35.75 percent of all amici at the Roberts Court. This finding is noteworthy in that it also departs from Collins' (2008, 61) findings, in which interest groups (excluding governments and individuals) constituted 56.8 percent of all amici during the 1950, 1968, 1982, and 1995 terms of the USSC. In addition, I find that governments constitute almost 17 percent of amici at the Roberts Court. This finding also departs from those of Collins (2008), who shows that governmental amici accounted for just over 31 percent of total amici. Thus, the percentage of individuals participating as amici is significantly higher at the Roberts Court than in prior terms of the USSC, and the percentage of interest groups and governments is significantly lower. Perhaps individuals are more aware today than in times past of the prominent role the USSC plays in shaping public policies, as well as more aware of the potential of amici to influence judicial outcomes at the USSC. The increased presence of individual amici might also be a testament to the increased ability of individuals to share information and communicate efficiently in our technological age, thus making it easier to collaborate and pool resources for the purposes of filing amicus briefs.[77]

[77] Of course, this phenomenon would hold true for interest groups and governments as well, but perhaps the barriers to amicus collaboration previously faced by individuals have been reduced to a greater extent by this

Table 4.5. Amicus Curiae Participation by Amicus Category, 2007-2011 Terms

Amicus Category	Number of Amici*		Number of Cases**
Interest Groups	8,750 (35.75%)		370 (93.20%)
Liberal Interest Groups		4,582 (52.37%)	319 (80.35%)
Conservative Interest Groups		3,545 (40.51%)	257 (64.74%)
Unspecifiable Interest Groups		623 (7.12%)	
Governments	4,148 (16.95%)		251 (63.22%)
Liberal Governments		997 (24.04%)	84 (21.16%)
Conservative Governments		2,839 (68.44%)	157 (39.55%)
Unspecifiable Governments		312 (7.52%)	25 (6.30%)
Individuals	11,578 (47.30%)		227 (57.18%)
Liberal Individuals		6,682 (57.73%)	161 (40.55%)
Conservative Individuals		4,459 (38.51%)	106 (26.70%)
Unspecifiable Individuals		437 (1.79%)	29 (7.30%)
Totals	24,476 (100%)		383 (96.47%)

***** Numbers in parentheses in the "Number of Amici" column reflect percentage of total amici each category or subcategory represents.
**Numbers in parentheses in the "Number of Cases" column reflect percentage of total cases in which each category or subcategory participated.

Looking once again at Column 2 of Table 4.5, one can see the percentages of each amicus category that are liberal, conservative, or unspecifiable in terms of the ideological positions advanced by the amici. A total of 4,582 interest group amici (52.37 percent) advocated a liberal position, compared to 3,545 interest group amici (40.51 percent) who advocated a conservative position. The ratio of liberal interest group amici to conservative ones is 1.29 to 1. Liberal amici individuals also possess an advantage over their conservative counterparts. 6,682

phenomenon than for governments and interest groups, who have long had networks and resources that aid collaborative efforts.

individual amici (57.73 percent) advocated a liberal position, compared to 4,459 individual amici (38.51 percent), who advocated a conservative position. The ratio of liberal individual amici to conservative ones is 1.50 to 1. These numbers indicated that liberal interest groups and liberal individuals more often participate as amici at the Roberts Court than do conservative ones.

However, governmental amici participation tells a different story. Conservative governmental amici account for over 68 percent of governmental amici, while only 24 percent of governments advocate a liberal position. The ratio of conservative governmental amici to liberal ones is 2.85 to 1. Obviously, government amici are much more likely to advance a conservative position than a liberal one. This finding can be explained, in part, by the fact that the SCDB typically characterizes a pro-government decision as a conservative outcome.

Column 3 of Table 4.5 indicates the number of cases in which at least one member of the amicus category appeared on an amicus brief. This information shows how often each amicus category (or subcategory) participates in cases before the Roberts Court. Take note that the numbers in parentheses do not total 100 percent because different types of amici often appear in the same case. Examining Column 3, one observes that interest groups participate in a higher percentage of cases (93 percent) than either individuals (57 percent) or governments (63 percent). Therefore, while individual amici appear more often in total numbers at the Roberts Court than the other amici categories, they appear in the fewest cases. This finding indicates that individual amici concentrate their participation in fewer cases than governments or interest groups, and that they are more likely to collaborate together on amicus briefs than governments or interest groups. In fact, in those 227 cases in which at least one individual amici appears, an average of 51 individuals appear per case. By comparison, in the 370 cases in which at least one interest group appears, an average of 23.65 interest groups appear per case. And, in the 251

cases in which at least one government amici participates, an average of 16.53 governments participate per case.

Looking at the participation of the amicus subcategories in cases as reflected in Column 3 of Table 4.5, one finds that liberal interest groups participate in a higher percentage of cases as amici (80.35 percent) than do conservative interest groups (64.74 percent). But one also finds that, in the cases in which they participate, both liberal and conservative interest groups average about 14 amici per case. These findings provide further confirmation that liberal interest groups are more frequent participants at the Roberts Court than conservative groups. On the other hand, for government amici, those that advocate a conservative position appear in a higher percentage of cases (39.6 percent) than do those that advance a liberal position (21.2 percent). In the cases in which they participate, liberal government amici average almost 12 amici per case. In contrast, in cases in which at least one conservative government amici participates, an average of just over 18 conservative government amici appear. Lastly, liberal individual amici appear in a higher percentage of cases (40.6 percent) than do conservative individual amici (26.7 percent). However, both liberal and conservative individual amici average about the same amount of participants per case (42) in which they appear. In short, these findings demonstrate that liberal interest group amici and liberal individual amici have an advantage over their ideological counterparts at the Roberts Court, but that conservative government amici have the advantage over liberal ones.

Table 4.6 provides a more in-depth examination of amicus curiae participation by governments at the Roberts Court. Column 2 reports the number and percentage of total amici that each government amici category and subcategory represents. As is plain, state governments

Table 4.6. Amicus Curiae Participation by Governments, 2007-2011 Terms

	Number of Amici	Number of Cases
Solicitor General	163 (3.93%)	163 (41.06%)
Liberal Solicitor General	69 (42.33%)	69 (17.38%)
Conservative Solicitor General	77 (47.24%)	77 (19.40%)
Unspecifiable Solicitor General	17 (10.43%)	17 (4.28%)
State Governments	3,746 (90.31%)	176 (44.33%)
Liberal State Governments	798 (21.30%)	56 (14.11%)
Conservative State Governments	2,707 (72.26%)	120 (30.23%)
Unspecifiable State Governments	241 (6.43%)	14 (3.53%)
Local Governments	202 (4.87%)	39 (9.82%)
Liberal Local Governments	142 (70.30%)	19 (4.79%)
Conservative Local Governments	51 (25.25%)	19 (4.79%)
Unspecifiable Local Governments	9 (4.46%)	1 (0.25%)
Foreign Governments	38 (0.92%)	5 (1.26%)
Liberal Foreign Governments	34 (89.47%)	3 (0.76%)
Conservative Foreign Governments	4 (10.53%)	2 (0.50%)
Unspecifiable Foreign Governments	0 (0%)	0 (0%)
Totals	4,148 (100%)	251 (63.22%)

***** Numbers in parentheses in the "Number of Amici" column reflect percentage of total amici each category or subcategory represents.
**Numbers in parentheses in the "Number of Cases" column reflect percentage of total cases in which each category or subcategory participated.

are the most frequent government amici (3,746 times) at the Roberts Court by a wide margin, constituting over 90 percent of all government amici, followed by local governments (202 times – almost 5 percent), the Solicitor General (SG) (163 times – almost 4 percent), and foreign governments (38 times – almost 1 percent).

Looking once again at Column 2 of Table 4.6, one can see the percentages of each government amicus category that are liberal, conservative, or unspecifiable. In all, 798 state government amici (21.3 percent) advocated a liberal position, compared to 2,707 state government amici (72.26 percent) which advocated a conservative position. The ratio of conservative state government amici to liberal ones is 3.39 to 1. Conservative state government amici clearly predominate over liberal state government amici. However, the reverse is true when it comes to local governments. Liberal local government amici possess a sizeable advantage over their conservative counterparts. A total of 142 liberal government amici (70.3 percent) advocated a liberal position, compared to 51 local government amici (25.25 percent) who advocated a conservative position. The ratio of liberal local governments to conservative ones is 2.78 to 1. Lastly, in the 2007-2011 terms, the SG participated as amicus 163 times: 69 times the SG supported the liberal position (42.33 percent), 77 times the SG supported the conservative position (47.24 percent), and 17 times the SG's position was ideologically unspecifiable (10.43 percent). Therefore, the SG was much more ideologically balanced that other government amici, and slightly favored the conservative position. This finding is interesting, because in at least four of the five terms of the Roberts Court, the SG represented the interests of the Obama administration, which is viewed as liberal in orientation. However, the modest conservative slant of the SG's amicus activity can likely be explained, in part, by the nature of the SCDB's ideological coding, in which the pro-government position is more often than not deemed the conservative one, particularly in civil rights and liberties, criminal procedure, and judicial power cases.[78]

[78] However, this is not true in all areas. For example, in federal taxation cases, the pro-United States position is liberal; and in federalism cases, the pro-federal power position is liberal, as is the pro-executive power position.

Column 3 of Table 4.6 indicates the number of cases in which at least one member of the government amicus category appeared on an amicus brief. Once again, note that the numbers in parentheses do not total 100 percent because different types of amici often appear in the same case. The states participate in the highest percentage of cases (44.33 percent) of any government amicus category, appearing in a total of 176 cases. The SG closely follows, appearing in just over 41 percent of cases. Local governments only appear in approximately 10 percent of cases as amici, while foreign government amici only appear in just over 1 percent of cases. Even though the states and the SG appear in a similar percentage of cases, the SG rarely collaborates with other amici on briefs, while states (and to a lesser extent local governments) frequently do. This is understandable, as the SG does not have the need to collaborate with others, given its resource advantages and inherent prestige. Further, while local government amici appear more often in total numbers at the Roberts Court than the SG, they appear in far fewer cases. This finding indicates that local government amici concentrate their participation in fewer cases than the SG, and are more likely to collaborate together. In those 176 cases in which at least one state amici appears, an average of 21.28 states appear per case. By comparison, in the 39 cases in which at least one local government appears, an average of 5.17 local governments appear per case.

Looking at the participation of the government amicus subcategories in cases as reflected in Column 3 of Table 4.6, one finds that the SG participates in a higher percentage of cases as a conservative amicus than as a liberal amicus, but the difference is only about two percent. Conservative state government amici participate in a higher percentage of cases (30.23 percent) than liberal ones (14.11 percent). In the cases in which they participate, liberal government amici average over 14 amici per case. In contrast, in cases in which conservative government

amici participate, they average 22.6 amici per case. Interestingly, liberal local government amici appear in the same percentage of cases (4.79 percent) as do conservative local government amici, even though liberal local government amici significantly outnumber their conservative counterparts (142 to 51). In the cases in which they participate, liberal local governments average 7.47 amici per case, while conservative local governments only average 2.68 amici per case. Finally, foreign government amici appeared in only five cases in the 2007-2011 terms.[79] Liberal foreign governments appeared in three cases, and conservative foreign government amici in two cases. However, in the three cases in which they participated, liberal foreign governments averaged over 11 amici per case, while conservative foreign governments averaged only two amici per case.

In brief, these findings demonstrate that conservative government amici are more prevalent than liberal government amici because of the predominance of conservative state amici at the Roberts Court. Local government and foreign government amici exhibit a liberal bent, while the SG is relatively ideologically balanced.

It is worth noting here that the SG often participates in a case before the USSC not as an amicus, but as a party representing the interests of the federal government. In fact, the SG was a party in 124 cases between 2007-2011 terms. The SG was a liberal party in 23 cases (18.5 percent), a conservative party in 98 cases (79.03 percent), and an unspecifiable party in 3 cases (2.42 percent). Collins (2008, 105) reports that during the 1946-2001 terms of the USSC, the SG served as a party in more than 41 percent of all cases argued before the USSC. This compares to 31 percent of cases in which the SG appeared as a party during the 2007-2011 terms of the

[79] The five cases in which foreign government amici appeared are as follows: (1) *Medellin v. Texas* (06-984) (2007 term – 15 liberal amici); (2) *Ali Samantar v. Yousef* (08-1555) (2009 term – 1 conservative amicus); (3) *Morrison v. National Australia Bank Ltd.* (08-1191) (2009 term – 3 conservative amici); (4) *Minneci v. Pollard* (10-1104) (2011 term – 1 liberal amicus); (5) *Arizona v. United States* (11-182) (2011 term – 18 liberal amici; 1 unspecifiable amicus).

USSC. Therefore, when the SG is a party, the SG is much more likely to advocate a conservative position (almost 80 percent of the time) than when the SG is an amicus (about 47 percent of the time) at the Roberts Court. Regardless, in either capacity, the SG is more likely to assume a conservative stance, which is notable, as the SG has predominantly represented the interests of the liberal Obama administration during the 2007-2011 terms of the Roberts Court.

D. Frequency of Participation and Winning Percentage of Prestigious Amici

Table 4.7 ranks the most frequent amicus participants on the Roberts Court of the ten prestigious interest groups that I chose to track for purposes of this study. As stated in Chapter3, these ten interest groups are representative of the most prestigious, experienced, and prominent amici, based upon the literature. Table 4.7 ranks these ten groups based upon their total amicus participation during the 2007-2011 terms of the Roberts Court. In addition, this table provides information on the number of conservative, liberal, and unspecifiable amicus briefs that each group submitted. The NACDL is the most active amicus participant at the Roberts Court, submitting 100 total briefs, 90 of which were liberal. The Chamber of Commerce is the second leading amicus participant, submitting 79 amicus briefs, 61 percent of which were conservative. The ACLU ranks third, filing 75 amicus briefs, 84 percent of which were liberal. Rounding out the top five are the AARP, and the Washington Legal Foundation, submitting 60 and 51 briefs, respectively. In all, 70 percent of the AARP's briefs were liberal, while 70.5 percent of WLF's briefs were conservative. Looking at rankings six through ten, 67 percent of the Pacific Legal Foundation's briefs were conservative; 75 percent of the NAACP's briefs were liberal; 82 percent of the ABA's briefs were liberal; 76 percent of the AFL-CIO's briefs were liberal; and 64 percent of the AMA's briefs were conservative.

Table 4.7. Most Frequent Tracked Amicus Interest Groups, 2007-2011 Terms

Rank	Amicus Name	Liberal Amicus	Conservative Amicus	Unspecifiable Amicus	Total Amicus
1	**National Association of Criminal Defense Lawyers**	90	5	5	100
2	**Chamber of Commerce**	24	48	7	79
3	**American Civil Liberties Union**	63	8	4	75
4	**American Association of Retired Persons**	42	9	9	60
5	**Washington Legal Foundation**	13	36	2	51
6	**Pacific Legal Foundation**	8	29	6	43
7	**NAACP / NAACP Legal Defense Fund**	30	4	6	40
8	**American Bar Association**	28	3	3	34
9	**AFL-CIO**	13	4	0	17
10	**American Medical Association**	2	9	3	14

Comparing Table 4.7 to the Table 1.1, which lists the top 15 amicus participants between 1976-2006, as compiled by Dunworth, Fischman, and Ho (2009), one sees many similarities. The ACLU and the NACDL were ranked first and second, respectively, in Table 1.1 WLF was ranked seventh; the Chamber of Commerce ninth; ALF-CIO eleventh; NAACP thirteenth; and the PLF fifteenth. So there is continuity in terms of prestigious amicus participation at the Burger, Rehnquist, and Roberts Courts.

A few other observations regarding these tables are in order. First, the AARP and CofC have become even more active amicus participants than in prior years. Second, the conservative leaning interest groups – CofC, WLF, and PLF – do seem to have increased their amicus participation at the Roberts Court compared to past Courts, accounting for three of the top five groups. But this phenomenon holds true for most interest groups across the ideological spectrum. And third, the NACDL's prominent role can be explained by the fact that the group rarely misses an opportunity to represent a criminal defendant or prisoner when criminal procedure cases come before the USSC, and many times it is the only amicus to advance the interests of these parties.

Table 4.8 simply ranks the same ten tracked interest groups by the number of conservative amicus briefs filed. As is plain, the CofC, WLF, and PLF are the predominant conservative interest group amici at the Roberts Court. Likewise, Table 4.9 ranks the groups by the number of liberal amicus briefs filed. The NACDL, ACLU, AARP, NAACP, and ABA are the most prominent and frequent liberal amici groups. Altogether, these ten groups filed a total of 313 liberal amicus briefs, 155 conservative amicus briefs, and 45 unspecifiable amicus briefs. Thus, the ten prestigious interest groups that I chose to track clearly had a liberal slant, with liberal briefs outnumbering conservative briefs by an over 2 to 1 margin.[80]

[80] I did not purposely choose for my ten groups to have a liberal slant. But I also did not want to select my ten prestigious groups by cherry-picking the five conservative and five liberal groups that I thought to be most prestigious, as I was concerned this method might skew the data, as it might not be emblematic of the most prestigious groups. Put differently, my purpose was not to evenly weight conservative and liberal prestigious interest groups, but to select, based upon the literature, ten groups that I decided were representative of the most prestigious interest groups.

Table 4.8. Most Frequent Tracked Conservative Amicus Interest Groups, 2007-2011 Terms

Rank	Amicus Name	Conservative Amicus
1	**Chamber of Commerce**	48
2	**Washington Legal Foundation**	36
3	**Pacific Legal Foundation**	29
4	**American Association of Retired Persons**	9
5	**American Medical Association**	9
6	**American Civil Liberties Union**	8
7	**National Association of Criminal Defense Lawyers**	5
8	**NAACP / NAACP Legal Defense Fund**	4
9	**AFL-CIO**	4
10	**American Bar Association**	3

Table 4.9. Most Frequent Tracked Liberal Amicus Interest Groups, 2007-2011 Terms

Rank	Amicus Name	Liberal Amicus
1	**National Association of Criminal Defense Lawyers**	90
2	**American Civil Liberties Union**	63
3	**American Association of Retired Persons**	42
4	**NAACP / NAACP Legal Defense Fund**	30
5	**American Bar Association**	28
6	**Chamber of Commerce**	24
7	**Washington Legal Foundation**	13
8	**AFL-CIO**	13
9	**Pacific Legal Foundation**	8
10	**American Medical Association**	2

Table 4.10. Winning Percentage of Tracked Prestigious Amici, 2007-2011 Terms

Rank	Amicus Name	Winning Side	Losing Side	Winning Percentage
1	**Solicitor General**	108	42	72.00%
2	**Pacific Legal Foundation**	28	11	71.79%
3	**American Bar Association**	23	10	69.70%
4	**State Governments**	2,323	1414	62.16%
5	**Washington Legal Foundation**	31	20	60.78%
6	**Chamber of Commerce**	45	31	59.21%
7	**Local Governments**	97	67	59.15%
8	**Foreign Governments**	21	17	55.26%
9	**National Association of Criminal Defense Lawyers**	49	49	50.00%
10	**American Association of Retired Persons**	29	31	48.33%
11	**American Medical Association**	5	7	41.67%
12	**AFL-CIO**	7	10	41.18%
13	**American Civil Liberties Union**	30	43	41.10%
14	**NAACP / NAACP Legal Defense Fund**	13	23	36.11%

Lastly, Table 4.10 presents the winning percentage of the prestigious amicus interest groups and governments that I tracked for purposes of this study. As discussed in Chapter 1, these winning percentages, by themselves, are not proof of amicus influence. However, these percentages provide *prima facie* evidence and indications of amicus influence. All things being equal, it is likely that the groups that exhibit the highest winning percentages at the Roberts

Court are likely to be more influential. This is particularly likely, as the evidence does not support the conclusion that amici are cherry-picking cases in which to file briefs based upon a belief that they are likely to prevail.

The SG is clearly the most successful prestigious amicus participant in terms of winning percentage at the Robert Court between the 2007-2011 terms. The SG supported the winning side in 108 cases; supported the losing side in 42 cases; and either supported neither side or supported an unspecifiable position in 13 cases, for a total winning percentage of 72 percent as an amicus before the Roberts Court. This compares to a winning percentage of 85 percent at the Warren Court and 73 percent at the Rehnquist Court (Deen, Ignani, and Meernik 2003). This finding reaffirms what prior studies have shown – the SG is consistently the most influential and effective amicus at the USSC – and is consistent with the historic success rate of the SG at the USSC.[81] The SG is not only the "king of the citation frequency hill" (Kearney and Merrill 2000), but also sits on the throne as the king of the amici.

Of course, the SG's influence extends beyond its amicus activity. Between 1946-2001, the SG prevailed 61 percent of the time when appearing as a party at the USSC. During the 2007-2011 terms, by comparison, the SG prevailed 14 out of 23 times as when appearing as a liberal party (60.87 percent of the time); and the SG prevailed 49 out of 98 times when appearing as a conservative party (50.00 percent of the time). Combined, the SG's win percentage as a party between the 2007-2011 terms is 52.07 percent. Therefore, the SG appears to be more influential as an amicus participant than as a party, both at the Roberts Court, and in past Courts. Further, compared to prior eras, the SG as a party is appearing in a smaller percentage of cases with the Roberts Court, and has a lower winning percentage with the Roberts Court than with

[81] Segal (1988) shows that the SG had a winning percentage of 75 percent during the 1952-1982 terms of the USSC. Sakolar (1992) reaches a similar conclusion based upon an analysis of the 1959-1986 terms: 72 percent winning percentage for the SG.

prior Courts. It appears that the influence of the SG as a party is diminishing slightly in comparison to past Courts.

In total, the SG participated in 287 out of 397 cases (or 72.29 percent) as either a party or an amicus between 2007-2011. In those cases in which the SG appeared either as a party or an amicus, the SG supported the winning side in 63.10 percent of cases. By winning over 6 out of 10 cases in which it appears, the SG's influence on the Roberts Court is apparent and strong.

Continuing with the examination of Table 4.10, one notices the winning percentage of the conservative-libertarian leaning Pacific Legal Foundation rivals that of the SG at 72 percent. Using this measure, PLF is the most successful prestigious interest group of those tracked at the Roberts Court. This should not come as a total surprise, as the PLF is one of the most prestigious conservative amici and is self-described as the "oldest and most successful public interest legal organization that fights for limited government, property rights, individual rights, and a balanced approach to environmental protection."[82] As such, one would expect the modestly conservative Roberts Court to be receptive to their arguments.

Also notable is the finding that the American Bar Association, a left-leaning professional organization, has the third highest winning percentage at the Roberts Court, winning almost 70 percent of its cases. This is particularly striking, as over 80 percent of its amicus briefs advocate the liberal position. Perhaps it should not be that much of a surprise, however, that the nation's leading association of attorneys would produce high-quality, influential amicus briefs. Ranking fourth in winning percentage are state government amici, whose amicus briefs support the winning position over 62 percent of the time. This is expected, as the states have been long known for their influence and high quality briefs (Kearney and Merrill 2000; Lynch 2004), and

[82] Accessed at http://www.pacificlegal.org/about

as the conservative leaning Roberts Court is likely to be receptive to the arguments advanced by the conservative leaning states.

Table 4.10 shows that conservative amici WLF and the Chamber of Commerce rank fifth and sixth in winning percentage, at about 60 percent each. Thus, of the top six amici according to their winning percentage at the Roberts Court, four are conservatively oriented (PLF; states; WLF; CofC), one is liberally inclined (ABA), and one is relatively ideologically balanced (SG). Local and foreign government amici are ranked seventh and eighth, with winning percentages of 59 percent and 55 percent, respectively. Therefore, it can be safely concluded that government amici in general experience success at the Roberts Court: the SG wins 72 percent of the time; the states 62 percent of the time; localities 59 percent of the time; and even foreign governments support the winning side over half the time (although the sample size is admittedly small). If one were the betting sort, one would be well advised to put money on the side of the table where the majority of governmental amici gather at the Roberts Court.

Ranking ninth in winning percentage at the Roberts Court is the NACDL, prevailing in exactly half of the cases in which they participate and in which a winner can be discerned. It might seem that this means the success of the NACDL is simply akin to a coin flip. However, when one views the NACDL's winning percentage in light of the fact that they typically advance the liberal position, and that they typically support those parties who are low in resources and public sympathy, a 50 percent winning percentage becomes more impressive. The prominence of the AFL-CIO, ranking twelfth, seems to be diminishing, as it filed only 17 briefs and won only 41 percent of the time. This finding is probably linked to the broader decline of political power and influence of unions and organized labor in our political process.

Lastly, those amici ranked tenth through fourteenth in Table 4.10 each have winning percentages of less than 50 percent, with the ACLU (41 percent success rate) and NAACP (36 percent success rate) assuming the bottom two positions. This finding is a bit surprising, even given the liberal character of these two organizations, since these two groups have historically been seen as among the most prestigious amici, and have been at the vanguard of interest group litigation and amicus participation in American legal history, particularly in the realm of civil rights and liberties. Perhaps the declining influence of these groups is related to a sense that the major civil rights battles of the past are behind us as a society and that it is now time to move on to a differing vision of legal equality, particularly in the realms of gender and race. Or perhaps the lower success rate of these groups owes to the fact that they typically represent minority and/or politically unpopular voices in our society. The lower success rate of these two prominent groups in particular should provide a caveat to assuming that winning percentage before the USSC is equivalent to influence, as it is hard to detect how the parties these amici groups support would have fared in the absence of these amici.

E. Conclusion

Amicus participation at the Roberts Court is robust and at all-time high levels. Governments, individuals, and interest groups submit briefs regularly. On average, over 96 percent of the cases at the Roberts Court have amicus participation, over 9 amicus briefs are filed per case, and over 61 amici are present each case. While levels of amicus participation vary by case issue area, all areas attract significant amicus activity. In total, over 3,600 amicus briefs, and over 24,400 cosigners appeared in just five terms of the Roberts Court. Saying that amicus participation is the norm at the Roberts Court is not adequate to describe its intensity. The terms

"counteractive lobbying" or "arms race" are more apt monikers for describing amicus activity at the Roberts Court, particularly since the ideological persuasion of amici are relatively balanced, though leaning slightly liberal. The Roberts Court is a firing range in which organized interests set their aim and target the justices to hit their legal goals and to leave their mark on public policy. In this sense, the "friends" of the Roberts Court are truly engaging in "friendly fire."

Chapter 5: Amici Impact on Justice Votes

As a means of showing whether or not, and to what extent, amici impact the way justices vote at the Roberts Court, this chapter presents the results and interpretation of the various statistical logit models that were described in Chapter 3. Along with this presentation and interpretation, this chapter will also discuss how the results support, or fail to support, the hypotheses listed in Chapter 3. Lastly, I will conclude this chapter by highlighting some implications of my findings.

A. Results and Interpretation of Logit Models

The results of my primary all-inclusive logit model (Model 1) are reported in Table 5.1. Model 1 estimates the influence of the net difference of liberal-conservative amicus briefs, the net difference of liberal-conservative amicus cosigners, and the net difference of prestigious liberal-conservative amici in a case on the ideological direction of the justices' votes, controlling for other known influences on justice decision-making. Included are the constituent variables and their MLE coefficients. The chi square test for the model is statistically significant, which means that all the variables considered together in the model are significantly different than zero. The model correctly predicts 64.99 percent of the outcomes on the dependent variable (liberal vote), which is a 27.15 percent reduction in error in the absence of the model (liberal votes actually occurred 48.06 percent of the time).

It is essential to recognize that, as emphasized by Brambor, Clark, and Golder (2006) and Ai and Norton (2003), it cannot be inferred from the sign, magnitude of the coefficient, and significance of the interaction term whether the conditioning variable mediates the influence of the conditioned variable. Therefore, I have no expectations as to the direction or significance of

Table 5.1. Primary Logit Model of the Impact of Amici on Ideological Direction of Justice Votes at the Roberts Court with Interaction Term, 2007 – 2011 Terms

Variable	MLE Coefficient	Odds Ratio	Marginal Effect
Amicus Brief Difference	0.015 (.024)	1.015	1.7%
Moderation	-0.050 (045)	0.951	-1.1%
Moderation x Amicus Brief Difference	0.015 (.009)	1.015	See Figure 5.1
Ideology	1.987 (0.166)****	7.295	11.8%
Amicus Cosigner Difference	-0.001(0.000)	0.999	-1.2%
SG Lib Amicus Brief	0.620 (0.108)****	1.860	15.3%
SG Con Amicus Brief	-0.760 (0.105)****	0.468	-16.1%
Prestigious Amicus Difference	0.063 (0.034)*	1.066	1.9%
Lower Court Direction	-0.750 (0.076)****	0.472	-18.5%
Resource Difference	0.057 (0.009)****	1.059	6.5%
Constant	-0.033 (0.128)		
N	3,264		
Prob > chi2	0		
Percent Correctly Predicted	64.99		
Percent Reduction in Error	27.15		

Dependent variable indicates the ideological direction of the individual justices' vote (1 = liberal, 0 = conservative). Numbers in parentheses indicated standard errors. *p< .07, **p<.05, ***p<.01, ****p<.001 (one-tailed).

the interaction term. Instead, the magnitude of the interaction effect depends on the values of all the covariates in the model. Accordingly, I employ the method developed by Brambor, Clark, and Golder (2006) to evaluate interaction terms. I calculate marginal effects and confidence intervals for all non-interactive terms in Model I by altering the variables of interest from 0 to 1 for dichotomous variables and from the mean to one standard deviation above the mean for continuous and count variables, while holding all other variables at their mean or modal values, as appropriate.[83]

Further, I graphically illustrate the marginal effect of amicus brief advantage on the ideological direction of the vote across the observed range of judicial moderation, as depicted in Figure 5.1. I employ this same interpretive approach for the other five interaction models that follow. As an alternative interpretation to marginal effects, I report odds ratios for each of the constituent variables in my models. The odds ratio simply reflects the proportionate change in the dependent variable (ideological direction of justice vote) that coincides with a single unit difference on the independent variable (a change for 0 to 1 for dummy variables). Stated another way, the odds ratio tells how the presence of each independent variable increasing by one unit increases or decreases the odds of observing the presence of the dependent variable (i.e., a liberal justice vote). If the odds ratio is less than 1, then the odds of a liberal justice vote decrease with a one unit increase in the independent variable. If the odds ratio is greater than 1, then the odds of a liberal justice vote increase with a one unit increase in the independent variable.

[83] Also, for purposes of interpreting the marginal effect of the non-interactive terms in Model I, I hold the interactive term (*Judicial Moderation x Liberal-Conservative Amicus Brief Difference*) constant at the product of the mean value of its constituent terms: 1.36. I follow this same approach for interpreting the marginal effects in the other five interactive models as well.

While the MLE coefficient for *Liberal-Conservative Amicus Briefs Difference* does not rise to the level of statistical significance in Model 1, it is shown to be statistically significant and in the expected direction when I estimate this same model without the judicial moderation variable and without the interaction term (*Judicial Moderation x Liberal-Conservative Amicus Briefs Difference*) – what I term the "Base Model." The results of this Base Model are reported in the Appendix in Table A.3. The remainder of the results of the Base Model are consistent with those of the Model 1, and have a similar interpretation, thus it is not necessary to include further discussion of the Base Model here. Because the MLE coefficient for *Liberal-Conservative Amicus Briefs Difference* is significant and in the expected direction in the Base Model, the inclusion of the interaction term in Model 1 is justified, enabling me to determine the effect of an amicus brief advantage across a range of judicial moderation scores.

In Model 1, the MLE coefficient on *Liberal-Conservative Amicus Briefs Difference* (.015) indicates the influence of amicus briefs when the interaction term (*Moderation x Liberal-Conservative Amicus Briefs Difference*) is held at the product of the means of its constituent variables. The odds ratio of *Liberal-Conservative Amicus Briefs Difference* is 1.015, indicating that the odds of liberal justice vote increase in Model 1 by 1.015 times when there is a one unit increase in a liberal brief advantage. The marginal effects of *Liberal-Conservative Amicus Briefs Difference* reveals that a justice whose moderation score is at 2.44 (i.e., the mean moderate justice – closet to Justice Ginsburg's mean moderation score of 2.51) is 1.7 percent more likely to cast a liberal vote as the *Liberal-Conservative Amicus Briefs Difference* in the case increases from .57 (the mean) to just over 5 (approximately one standard deviation above the mean). Yet, as none of the observations actually involve a *Judicial Moderation* score at the mean, and as the sign or significance of the interaction term cannot be interpreted from its MLE coefficient

(Brambor, Clark and Golder 2006), it is necessary to graphically illustrate the marginal effects of *Liberal-Conservative Amicus Briefs Difference* on the ideological direction of the vote across the observed range of *Judicial Moderation* (as shown in Figure 5.1.) to properly assess whether the effects of *Liberal-Conservative Amicus Briefs Difference* on justice votes rise to the level of statistical significance as they vary across a range of *Judicial Moderation.*

As noted by Collins (2008, 101-102) when interpreting an interaction term, one must pay close attention to not only the slope of the effect but also the confidence intervals surrounding the slope which indicate significance levels. The marginal effects are significant whenever the upper *and* lower bounds of the confidence intervals are *both* above (or below) the zero line.

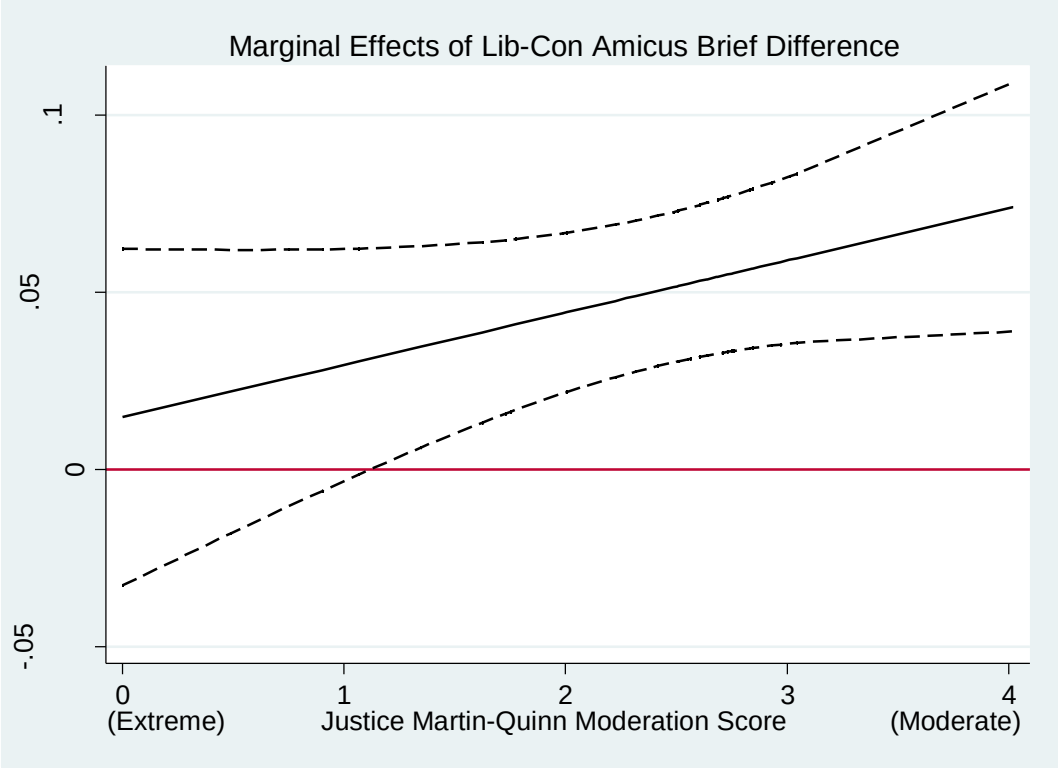

Figure 5.1 Marginal Effect of *Liberal-Conservative Amicus Brief Difference* on Ideological Direction of Justice Vote Across Varying Levels of Judicial Moderation

The solid line in the figure indicates how the marginal effects of *Liberal-Conservative Amicus Brief Difference* vary across a range of justice moderation scores. The 95 percent confidence intervals drawn around this solid line indicate significance levels. Figure 5.1 reveals that a justice's moderation level does indeed mediate the influence of amicus briefs, and that this effect is in the expected direction and statistically significant for all justices with a *Judicial Moderation* score greater than 1 – which is every justice except Clarence Thomas (who has a mean moderation score of .65). As justices become more moderate, they are more influenced by a liberal-conservative amicus brief difference. So, every justice on the Roberts Court except Thomas is more likely to vote in a liberal direction when there is an advantage of liberal amicus briefs in a case, holding all else equal. The marginal effects graph shows that there is an approximately 4 percent increase in the likelihood of a liberal vote for justice with a moderation score of 1.69 (Scalia), and a 7.5 percent increase in the likelihood of a liberal vote for a justice with a moderation score of 4.02 (Kennedy) when there is an advantage of liberal briefs.

These results demonstrate that amicus briefs influence almost all of the justices on the Roberts Court (except for Justice Thomas), and that this influence becomes more pronounced as the justices become more moderate in their ideologies. These results are consistent with the findings of Collins (2008) regarding amicus influence on the USSC justices between 1946-2001. These findings support my information/legal persuasion hypotheses and my median justice hypotheses regarding amicus brief influence.

Although there is clearly a statistically significant influence of amicus brief advantage for all but one of the justices, the above information is limited in that it does not adequately depict how the impact of amicus briefs in a case changes as both the numerical advantage of amicus briefs increases or decreases and as judicial moderation scores vary in other meaningful ways.

Thus, Table A.4, located in the Appendix, provides predicted probabilities of observing a liberal justice vote at varying levels of amicus brief advantage and judicial moderation, holding all other variables at their mean or modal values. For purposes of Table A.4, the mean moderate justice is classified as having a judicial moderation score at the mean (2.43), the less moderate justice is classified as having a judicial moderation score at the 25th percentile (2.0), the more moderate justice is classified as having a moderation score at the 75th percentile (2.84), the least moderate justice has a moderation score of 0, and the most moderate justice has a moderation score of 4.02.

Table A.4 conveys two significant pieces of information regarding amicus brief influence that bolster the findings of the marginal effects graph and the primary all-inclusive logit model. First, as expected, Table A.4 shows that when the justices encounter an increasing ideological advantage of briefs, the influence of those briefs increases, as the justices become more likely to vote in the direction of amicus brief advantage as the advantage becomes more pronounced. This effect holds true for justices across varying moderation levels. Second, Table A.4 shows that as the justices become more moderate, they are more susceptible to amicus impact, as they typically become even more likely to vote in the direction of the amicus brief advantage as their moderation levels increase.

For example, compared to a case in which there is an 1 brief conservative advantage, in a case in which there is an 1 brief liberal advantage, the least moderate justice is 1 percent more likely to vote liberally, the less moderate justice is 2 percent more likely to vote liberally, the mean moderate justice is 2.4 percent more likely to vote liberally, the more moderate justice is 3 percent more likely to vote liberally, and the most moderate justice is 3.4 percent more likely to vote liberally. Compared with a case in which there is a 3 brief conservative advantage, in a case

in which there is a 3 brief liberal advantage, the least moderate justice is 2 percent more likely to vote liberally, the less moderate justice is 6 percent more likely to vote liberally, the mean moderate justice is 6 percent more likely to vote liberally, the more moderate justice is 7 percent more likely to vote liberally, and the most moderate justice is 10 percent more likely to vote liberally. Also, compared with a case in which there is a 10 brief conservative advantage, in a case in which there is a 10 brief liberal advantage, the least moderate justice is 7 percent more likely to vote liberally, the less moderate justice is 21 percent more likely to vote liberally, the mean moderate justice is 24 percent more likely to vote liberally, the more moderate justice is 26 percent more likely to vote liberally, and the most moderate justice is 33 percent more likely to vote liberally. And compared to a case in which there is a 15 brief conservative advantage, in a case in which there is a 15 brief liberal advantage, the least moderate justice is 11 percent more likely to vote liberally, the less moderate justice is 30.7 percent more likely to vote liberally, the mean moderate justice is 34.7 percent more likely to vote liberally, the more moderate justice is 39 percent more likely to vote liberally, and the most moderate justice is almost 48 percent more likely to vote liberally.

In short, Table A.4 shows that the greater the amicus brief advantage in a case, the more pronounced the impact of the amicus advantage. Further, the greater the moderation of the justice, the greater the influence of amicus brief advantage becomes. These results corroborate the findings of Model 1 and Figure 5.1. The degree of amicus brief impact in a case is related to both the numerical ideological disparity of briefs and the moderation levels of the justices. These results provide strong support for my information/legal persuasion hypotheses and my median justice hypotheses, and support the legal persuasion model of amicus influence.

On the other hand, the results of Model 1 show that amicus cosigner disparity does not rise to the level of statistical significance, and is signed in an unexpected direction.[84] This result confirms Collins (2004, 2008) prior findings that it is the number of amicus briefs, not amicus cosigners, which influence justice votes. This is a consequential finding, as it fails to provide support for the interest group model of amicus influence. An ideological advantage of amicus cosigners does not seem to impact the justices in the same way that an ideological advantage of amicus briefs does. Therefore, my affected group hypotheses are not confirmed. The impact of amici must come from the substantive information they impart, as opposed to merely a simple tally of which side has a numerical advantage of affected groups. As the MLE coefficient for *Liberal-Conservative Amicus Cosigner Difference* is not statistically significant, it is not necessary to provide an interpretation of its odds ratio or marginal effect.

However, *Prestigious Liberal-Conservative Amicus Difference* is statistically significant and signed in the expected direction. The odds ratio of *Prestigious Liberal-Conservative Amicus Difference* is 1.066, indicating that the odds of liberal justice vote increase in Model 1 by 1.066 times when there is a one unit increase in a prestigious liberal amicus advantage. The marginal effects of *Prestigious Liberal-Conservative Amicus Difference* reveals that a justice is 1.9 percent more likely to cast a liberal vote as the *Prestigious Liberal-Conservative Amicus Difference* in the case increases from .39 (the mean) to 1.62 (one standard deviation above the mean), and 13.4 percent more likely to cast a liberal vote as the *Prestigious Liberal-Conservative Amicus Difference* in the case increases from the least liberal advantage (-5) to the greatest liberal advantage (4). This result supports my prestigious amicus hypotheses, indicating that,

[84] I even estimated an alternative model that included an additional interaction term (*Lib-Con Amicus Cosigner Difference x Moderation*) to determine if amicus cosigner influence could be demonstrated at statistically significant levels across a range of judicial moderation. However, these results and marginal effects graph of the interaction term demonstrated that an amicus cosigner ideological advantage does not impact the justices on the Roberts Court, regardless of their level of moderation.

although the effect is relatively small, the justices respond favorably to an advantage of prestigious amicus briefs, even when controlling for an ideological advantage of total briefs and cosigners in a case.

Further, all of the control variables are signed in the expected direction and statistically significant in Model 1. First, Model 1 confirms the strong and statistically significant role of *Ideology* in predicting how a justice will vote. The odds ratio of *Ideology* is 7.295, indicating that the odds of liberal justice vote increase in Model 1 by 7.295 times when there is a one unit increase in judicial ideology. The marginal effect of *Ideology* is 11.8 percent, indicating that a justice whose Segal-Cover score is at .579 (one standard deviation above the mean – closest to Justice Ginsburg at .68, and second closest to Justice Breyer at .475) is 11.8 percent more likely to cast a liberal vote than a justice whose Segal-Cover score is at the mean (.327) (closet to Justice Souter's score of .325, and second closest to Justice Kennedy's at .365). Further, the marginal effects reveal that, compared with the most conservative justice – Justice Scalia (Segal-Cover score of 0) – the most liberal justice – Justice Sotomayor (Segal-Cover score of .78) – is 36.24 percent more likely to cast a liberal vote. These findings are expected and are consistent with the attitudinal model of judicial decision making. Ideology is among the strongest, if not the strongest, predictor of how a justice will vote.

Second, the importance of the Solicitor General as both a conservative and liberal amicus in confirmed. The odds ratio of *SG Liberal Amicus* is 1.860, indicating that the odds of a liberal justice vote is 1.860 times higher when the SG is a liberal amicus than when the SG is not. Further, the marginal effects reveal that the when the SG argues the liberal position, a justice is 15.3 percent more likely to cast a liberal vote than when the SG does not advance the liberal position as an amicus. Conversely, the odds ratio of *SG Conservative Amicus* is .468, indicating

that the odds of a liberal justice vote decrease by 2.14 times when the SG advocates the conservative position as amicus than when the SG does not. Likewise, the marginal effects reveal that when the SG argues the conservative position, a justice is 16.1 percent less likely to cast a liberal vote, than when the SG does not advocate the conservative position as an amicus.

Third, the *Lower Court Direction* variable is statistically significant and, as expected, negatively signed. This odds ratio of .472 indicates that when the Roberts Court is reviewing a liberal decision, a justice is 2.12 times less likely to issue a liberal vote than when the Roberts Court is reviewing a conservative decision. Similarly, the marginal effects reveal that when the Roberts Court reviews a liberal decision, a justice is 18.5 percent less likely to issue a liberal vote. This result confirms the known propensity of justices to vote to overturn cases that they review.

Fourth and finally, the *Liberal – Conservative Resource Difference* variable is statistically significant and signed in the expected direction. The odds ratio of *Liberal – Conservative Resource Difference* is 1.059, indicating that a justice is 1.059 times more likely to issue a liberal ruling in Model 1 when there is a one unit increase in *Liberal – Conservative Resource Difference*. The marginal effect of *Liberal – Conservative Resource Difference* is 6.5 percent, indicating that in a case in which the liberal party's resource advantage is .97 (one standard deviation above the mean), a justice is 6.5 percent more likely to cast a liberal vote than in a case where the liberal party's resource advantage is -3.78 (the mean). Further, the marginal effects reveal that a justice is 24.82 percent more likely to cast a liberal vote in a case where liberal party resource advantage is at its highest value (9), than in a case where liberal resource advantage is at its lowest value (-9).

In sum, the results and interpretation of Model 1 (my primary, all-inclusive model) show that, when considering all cases, an ideological advantage of amicus briefs does influence the direction of all the justice votes except Justice Thomas at the Roberts Court. The marginal effects are statistically significant, varying from about 4 percent to 7.5 percent as the justice becomes more moderate. However, these effects become much larger as conservative or liberal amicus brief advantage increases in a case, as shown by Table A.4. Similar findings regarding the impact of a prestigious amici advantage are also present. An ideological advantage of amicus cosigners, however, does not have a statistically significant impact on the votes of the justices. Thus, justices seem to be influenced by who is filing amicus briefs, as well as how many briefs are filed. These findings support my information/legal persuasion hypotheses, my median justice hypotheses, and my prestigious amicus hypotheses. My findings do not support my affected groups hypotheses. Therefore, Model 1 indicates that the legal model is a better explanation for amicus impact on the Roberts Court than the interest group model. While attitudes are very strong predictors of justice votes, justices across the ideological spectrum do respond to the arguments put forward by amici in their briefs, and this impact generally becomes more evident at the justices become more moderate, and as the ideological advantage of amicus briefs increases.

The results of my logit model considering only criminal procedure cases at the Roberts Court (Model 2) are reported in table 5.2. Model 2 was estimated using the same variables and methodology as Model 1, and will be interpreted in the same manner as Model 1. The chi square test for the model is statistically significant, which means that all the variables considered together in the model are significantly different than zero. The model correctly predicts 64.72 percent of the outcomes on the dependent variable (liberal vote), which is an 11.28 percent

Table 5.2. Logit Model of the Impact of Amici on Ideological Direction of Justice Votes at the Roberts Court, 2007 – 2011 Terms: Criminal Procedure Cases

Variable	MLE Coefficient	Odds Ratio	Marginal Effect
Amicus Brief Difference	-0.031 (.044)	0.970	-3.8%
Moderation	-0.055 (.085)	0.947	-1.2%
Moderation x Amicus Brief Difference	0.038 (.017)*	1.039	See Figure 5.2
Ideology	2.421 (.314)***	11.253	14.77%
Amicus Cosigner Difference	-0.001 (.001)	0.999	-3.9%
SG Lib Amicus Brief	-0.048 (.428)	0.953	-1.2%
SG Con Amicus Brief	-0.173 (.180)	0.841	-4.3%
Prestigious Amicus Difference	-0.001 (.083)	0.999	0%
Lower Court Direction	-0.755 (.165)***	0.470	-18.31%
Resource Difference	0.051 (.031)	1.053	1.2%
Constant	-0.233(.327)	0.327	
N	927		
Prob > chi2	0		
Percent Correctly Predicted	64.72		
Percent Reduction in Error	11.28		

Dependent variable indicates the ideological direction of the individual justices' vote (1 = liberal, 0 = conservative). Numbers in parentheses indicated standard errors. *p<.05, **p<.01, ***p<.001 (one-tailed).

reduction in error in the absence of the model (liberal votes actually occurred 48.12 percent of the time).

As with Model 1, while the MLE coefficient for *Liberal-Conservative Amicus Briefs Difference* does not rise to the level of statistical significance in Model 2, it was shown to be statistically significant and in the expected direction when I estimated this same model without the interaction term. This result justified the inclusion of the interaction term in Model 2 so that I could determine the effects of an amicus brief advantage across a range of judicial moderation scores. In Model 2, the MLE coefficient on *Liberal-Conservative Amicus Briefs Difference* (-.031) indicates the influence of amicus briefs when the interaction term (*Moderation x Liberal-Conservative Amicus Briefs Difference*) is held at the product of the means of its constituent variables. The odds ratio of *Liberal-Conservative Amicus Briefs Difference* is .970, indicating that the odds of a liberal justice vote decrease in Model 2 by 1.03 times when there is a one unit increase in a liberal brief advantage. The marginal effects of *Liberal-Conservative Amicus Briefs Difference* reveals that a justice whose moderation score is at 2.42 (i.e., the mean moderate justice – closet to Justice Ginsburg's mean moderation score of 2.51) is 3.8 percent less likely to cast a liberal vote as the *Liberal-Conservative Amicus Briefs Difference* in the case increases from 1 brief (the mean) to 6 briefs (approximately one standard deviation above the mean). Yet, as none of the observations actually involve a *Judicial Moderation* score at the mean, and as the sign or significance of the interaction term cannot be interpreted from its MLE coefficient, it is useful to graphically illustrate the marginal effects of *Liberal-Conservative Amicus Briefs Difference* on the ideological direction of the vote across the observed range of *Judicial Moderation* (as shown in Figure 5.2.) in order to properly assess whether the effects of *Liberal-Conservative Amicus Briefs Difference* on justice votes rise to the level of statistical significance

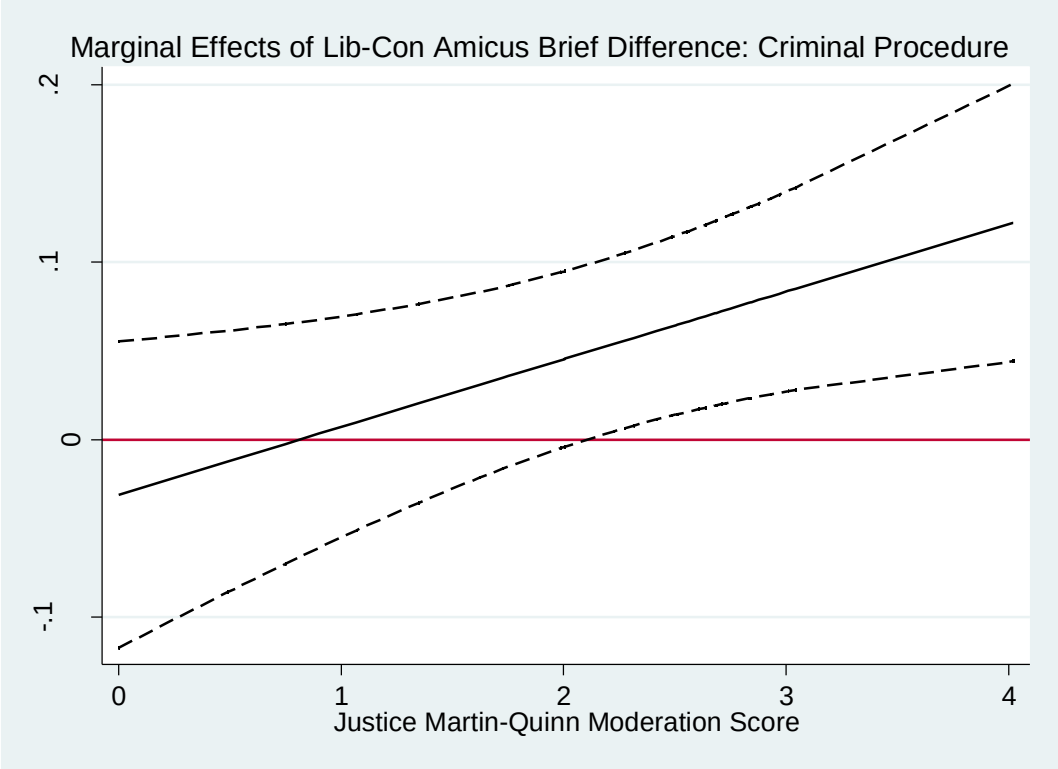

Figure 5.2. Marginal Effect of *Liberal-Conservative Amicus Brief Difference* on Ideological Direction of Justice Vote Across Varying Levels of Judicial Moderation in Criminal Procedure Cases

as they vary across a range of *Judicial Moderation* in criminal procedure cases at the Roberts Court.

As with Figure 5.1, in Figure 5.2 the solid line indicates how the marginal effects of *Liberal-Conservative Amicus Brief Difference* vary across a range of justice moderation scores in criminal procedure cases. The 95 percent confidence intervals drawn around these lines indicate significance levels. Figure 5.2 reveals that a justice's moderation level does indeed mediate the influence of amicus briefs in the expected direction, but this effect is only statistically significant for those justices with *Judicial Moderation* scores above 2 (which is every justice except for

Justices Scalia, and Thomas, and Justice Stevens in 2008). Thus, the influence of amicus briefs on justice votes in criminal procedure cases exists for 9 out of the 11 justices who have served on the Roberts Court. As justices become more moderate, they are more susceptible to the influence of an ideological advantage of amicus briefs in criminal procedure cases. The marginal effects graph shows that there is an approximately 4 percent increase in the likelihood of a liberal vote for justice with a moderation score of 2.1 (Stevens and Souter in 2007 term), and a 12 percent increase in the likelihood of a liberal vote for a justice with a moderation score of 4.02 (Kennedy) when there is an advantage of liberal briefs.

Together, Table 5.2 and Figure 5.2 demonstrate that amicus briefs influence the vast majority of the justices on the Roberts Court in criminal procedure cases and that this influence becomes more pronounced as the justices become more moderate in their ideologies. These findings support my information/legal persuasion hypotheses and my median justice hypotheses regarding amicus brief influence.

On the other hand, the results of Model 2 show that the number of amicus cosigners does not rise to the level of statistical significance, and is signed in an unexpected direction. This result is consistent with the results of Model 1 and confirms that it is the number of amicus briefs, not amicus cosigners, which influence the justice's votes in criminal procedure case. This finding fails to provide support for my affected groups hypotheses and the interest group model of amicus influence. This provides further evidence that the impact of amici spring from the substantive information they impart, as opposed to simple numerical advantage of amicus groups and individuals. As the MLE coefficient for *Liberal-Conservative Amicus Cosigner Difference* is not statistically significant, it is not necessary to provide an interpretation of its odds ratio or marginal effect.

Neither is *Prestigious Liberal-Conservative Amicus Difference* statistically significant nor signed in the expected direction. Therefore, it is not necessary to provide an interpretation of its odds ratio or marginal effect. While an ideological advantage of amicus briefs matters, an ideological advantage of prestigious amici do not seem to have an impact in criminal procedure cases.

Interestingly, only two of the control variables are statistically significant in Model 2 – *Ideology* and *Lower Court Direction*. First, Model 2 confirms the strong and statistically significant role of *Ideology* in predicting how a justice will vote in criminal procedure cases. The odds ratio of *Ideology* is 11.253, indicating that the odds of liberal justice vote increase in Model 2 by 11.253 times when there is a one unit increase in judicial ideology. The marginal effect of *Ideology* is 14.77 percent, indicating that a justice whose Segal-Cover score is at .568 (one standard deviation above the mean – located between Justice Ginsburg at .68 and to Justice Breyer at .475) is 14.77 percent more likely to cast a liberal vote than a justice whose Segal-Cover score is at the mean (.321) (closet to Justice Souter's score of .325, and second closest to Justice Kennedy's at .365). Further, the marginal effects reveal that, compared with the most conservative justice (Justice Scalia, Segal-Cover score of 0)), the most liberal justice (Justice Sotomayor (Segal-Cover score of .78)) is 43.35 percent more likely to cast a liberal vote. These findings are expected and are consistent with the attitudinal model of judicial decision-making. Ideology is a very strong predictor of how a justice will vote in criminal procedure cases.

Second, the *Lower Court Direction* variable is statistically significant and, as expected, negatively signed. This odds ratio of .470 indicates that when the Roberts Court is reviewing a liberal decision in criminal procedure cases, a justice is 2.13 times less likely to issue a liberal vote than when the Roberts Court is reviewing a conservative decision. Similarly, the marginal

effects reveal that when the Roberts Court reviews a liberal decision, a justice is 18.31 percent less likely to issue a liberal vote. This result again confirms the known propensity of justices to vote to overturn cases that they review.

Notably, the *SG Liberal Amicus* and *SG Conservative Amicus* variables, along with the *Liberal – Conservative Resource Difference* variable, are not statistically significant, and the *SG Liberal Amicus* variable is signed in the unexpected direction. These are surprising findings, as the SG does not seem to impact the criminal procedure votes of the justices on the Roberts Court. Further, party resources do not seem to play much of a role either. Typically, in criminal procedure cases, the party that is the accused (or the prisoner) is much lower on the resource continuum than the government. Taken together, these findings indicate that the Roberts Court does not give as much deference either to the federal government as a party, or to the SG representing the federal government, or to the state governments, in criminal procedure cases, as one might expect. This finding should provide some comfort for those who are concerned about the ability of criminal defendants to receive a fair and just outcome at the Roberts Court. Instead, when predicting justice votes in criminal procedure cases, one should primarily look to the justice's ideology, the direction of the lower court decision, and which side has an advantage of amicus briefs, and this should give you a fairly accurate indication of how the case will be decided. In short, while attitudes are very strong predictors of justice votes in criminal procedure cases, most of the justices (except Scalia and Thomas, and Justice Stevens during the 2008 term) do respond to the persuasive arguments put forward by amici in their briefs, and this impact generally becomes more evident as the justices become more moderate.

The results of my logit model considering only civil rights and liberties cases at the Roberts Court (Model 3) are reported in table 5.3. Model 3 was estimated using the same

Table 5.3. Logit Model of the Impact of Amici on Ideological Direction of Justice Votes at the Roberts Court, 2007 – 2011 Terms: Civil Rights and Liberties Cases

Variable	MLE Coefficient	Odds Ratio	Marginal Effect
Amicus Brief Difference	-0.007 (.056)	0.993	-0.7%
Moderation	0.067 (.094)	1.069	1.2%
Moderation x Amicus Brief Difference	0.006 (.020)	1.006	See Figure 5.3
Ideology	2.793(.329)***	16.333	14.5%
Amicus Cosigner Difference	0.010 (.003)***	1.010	6.9%
SG Lib Amicus Brief	0.562 (.203)**	1.755	12.8%
SG Con Amicus Brief	-0.934 (.237)***	0.393	-15.2%
Prestigious Amicus Difference	0.242 (.063)***	1.274	6.9%
Lower Court Direction	-1.644 (.153)***	0.193	-38.9%
Resource Difference	0.064(.020)***	1.066	5.9%
Constant	-0.234 (.398)		
N	1025		
Prob > chi2	0		
Percent Correctly Predicted	73.76		
Percent Reduction in Error	44.98		

Dependent variable indicates the ideological direction of the individual justices' vote (1 = liberal, 0 = conservative). Numbers in parentheses indicated standard errors. *p<.05, **p<.01, ***p<.001 (one-tailed).

variables and methodology as the prior models, and will be interpreted in the same manner. The chi square test for the model is statistically significant, which means that all the variables considered together in the model are significantly different than zero. The model correctly predicts 73.76 percent of the outcomes on the dependent variable (liberal vote), which is a 44.98 percent reduction in error in the absence of the model (liberal votes actually occurred 47.70 percent of the time).

As with the prior logit models, the MLE coefficient for *Liberal-Conservative Amicus Briefs Difference* does not rise to the level of statistical significance in Model 3. However, unlike the prior logit models, *Liberal-Conservative Amicus Briefs Difference* was not statistically significant when I estimated this same civil rights and liberties model without the interaction term. Therefore, an ideological advantage of amicus briefs does not appear to influence the direction of justice votes in civil rights and liberties cases at the Roberts Court. This is a significant finding, as it shows that the level of amicus brief impact on the justices varies by issue area.

To confirm this conclusion, I included the same interaction term in Model 3 as in the prior models. However, when I produced a graph of the marginal effects of *Liberal-Conservative Amicus Briefs Difference* on the ideological direction of the vote across the observed range of *Judicial Moderation*, the marginal effects graph confirmed that at no level of judicial moderation was the impact of *Liberal-Conservative Amicus Briefs Difference* statistically significant. Thus, I can conclude that an ideological advantage of amicus briefs does not impact the way the justices vote in civil rights and liberties cases. This finding fails to provide support for my information/legal persuasion hypotheses in the context of civil rights and liberties cases. As *Liberal-Conservative Amicus Briefs Difference* is not statistically significant,

it is not necessary to interpret the odds ratios or marginal effects. Consequently, unlike the other models, I do not include a marginal effects graph for the interaction term of *Judicial Moderation x Liberal-Conservative Amicus Briefs*.

Yet importantly, also unlike the prior logit models, Model 3 demonstrates that the MLE coefficient on *Liberal-Conservative Amicus Cosigner Difference* (.010) is statistically significant and signed in the expected direction. The odds ratio of *Liberal-Conservative Amicus Cosigners Difference* is 1.010, indicating that the odds of liberal justice vote increase in Model 3 by 1.010 times when there is a one unit increase in a liberal cosigner advantage. The marginal effects of *Liberal-Conservative Amicus Cosigner Difference* reveals that a justice whose moderation score is at 2.44 (the mean moderate justice) is 6.9 percent more likely to cast a liberal vote as the *Liberal-Conservative Amicus Cosigners Difference* in the case increases from 7 cosigners (the mean) to 39 cosigners (approximately one standard deviation above the mean). As I am interested in how judicial moderation levels affect the impact of amicus cosigners on justice votes, I estimated an alternative logit model that was the same in all respects to Model 3, except that it substituted a new interaction term (*Judicial Moderation x Liberal-Conservative Amicus Cosigners Difference*) for the amicus brief interaction term. I ran this alternative model so that I could graphically illustrate the marginal effects of *Liberal-Conservative Amicus Cosigner Difference* in civil rights and liberties cases on the ideological direction of the vote across the observed range of *Judicial Moderation* (shown in Figure 5.3.)

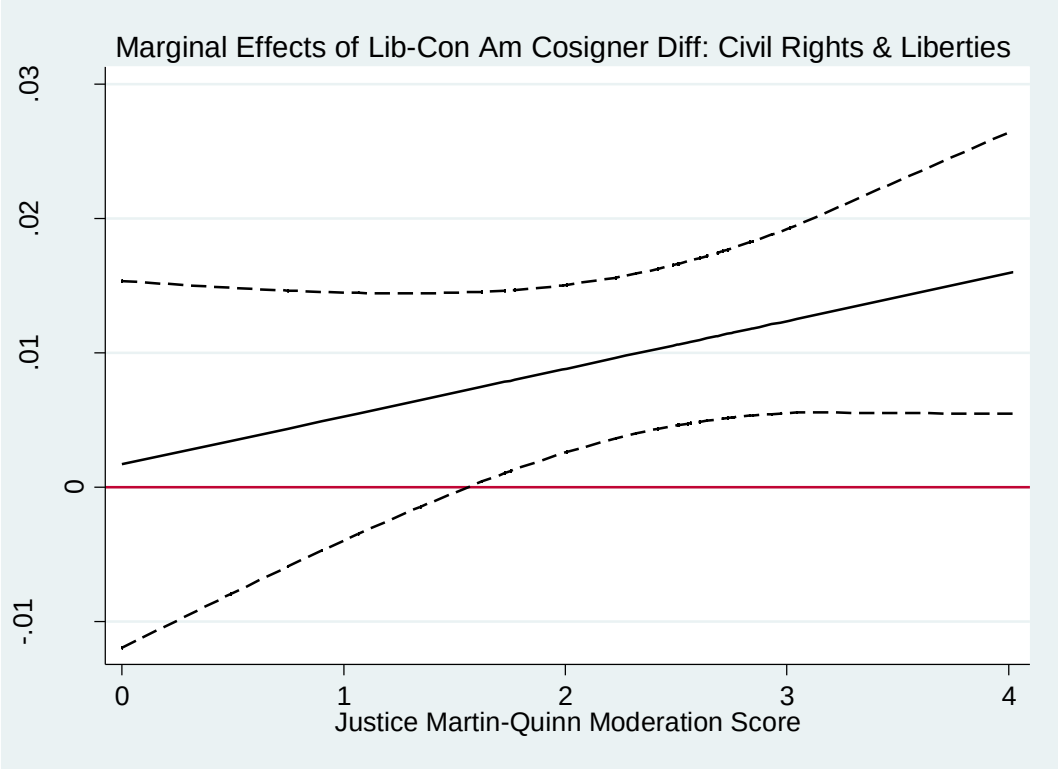

Figure 5.3. Marginal Effect of *Liberal-Conservative Amicus Cosigner Difference* on Ideological Direction of Justice Vote Across Varying Levels of Judicial Moderation in Civil Rights and Liberties Cases

Figure 5.3 reveals that a justice's moderation level mediates the influence of amicus cosigners in civil rights and liberties cases, and that this effect is in the expected direction and statistically significant for all justices with a *Judicial Moderation* score greater than 1.6 – which is every justice except Justice Thomas and Justice Scalia in 2007. The marginal effects graph shows that as justices become more moderate, they are more influenced by a liberal-conservative amicus cosigner difference. So, each justice on the Roberts Court except Thomas and Scalia during 2007 is more likely to vote in a liberal direction when there is an advantage of liberal amicus cosigners in a case, holding all else equal. The marginal effects graph shows that there is

an approximately .75 percent increase in the likelihood of a liberal vote for justice with a moderation score of 1.6 (Scalia), and a 1.75 percent increase in the likelihood of a liberal vote for a justice with a moderation score of 4.02 (Kennedy) when there is an advantage of liberal cosigners. While this effect is admittedly small, it is statistically significant.

These results demonstrate that amicus cosigners do have a small influence on almost all of the justices on the Roberts Court in civil rights and liberties cases, and that this influence becomes more pronounced as the justices become more moderate in their ideologies. These findings support my affected groups hypotheses and my median justice hypotheses regarding amicus cosigner influence. Taken together with the fact that amicus briefs do not seem to impact the justices votes, these findings suggest that amicus influence in civil rights and liberties cases does not come from the informational content they impart, but from their sheer numerical advantage. This further implies that the justices approach civil rights and liberties cases in a different manner than other cases, seemingly being more sensitive to the array of affected groups with an interest in the outcome of the litigation. At a minimum, this finding suggests the justices are more attuned to public opinion in civil rights and liberties cases than in others.

However, the results of *Prestigious Liberal-Conservative Amicus Difference* provide an important caveat to the conclusion that amicus briefs do not matter in civil rights and liberties cases. *Prestigious Liberal-Conservative Amicus Difference* is statistically significant and signed in the expected direction in Model 3. The odds ratio of *Prestigious Liberal-Conservative Amicus Difference* is 1.274, indicating that the odds of a liberal justice vote increase in Model 3 by 1.274 times when there is a one unit increase in a prestigious liberal brief advantage. The marginal effects of *Prestigious Liberal-Conservative Amicus Difference* reveals that a justice is 6.9 percent more likely to cast a liberal vote as the *Prestigious Liberal-Conservative Amicus*

Difference in the case increases from .38 (the mean) to 1.73 (one standard deviation above the mean), and 33.6 percent more likely to cast a liberal vote as the *Prestigious Liberal-Conservative Amicus Difference* in the case increases from the least liberal advantage (-5) to the greatest liberal advantage (3). This result supports my prestigious amicus hypotheses, indicating that the justices respond favorably to an advantage of prestigious amicus briefs, even when controlling for an ideological advantage of total briefs and cosigners in a case. This result implies that the justices respond to the presence of prestigious amici and that they are influenced by the informational content of prestigious amicus briefs. Thus, in civil rights and liberties cases, the justices seem to care more about who is filing briefs than the simple quantity of briefs, but they also respond in a limited way to a numerical advantage of amicus cosigners in a case. Taken together, the results suggest that the justices do approach civil rights and liberties cases more like a popularity contest than other cases, responding to the arguments of powerful amici over run-of-the mill amici, yet also susceptible to influence by the side with the net amici advantage.

Further, all of the control variables are signed in the expected direction and statistically significant in civil rights and liberties cases. First, Model 3 confirms the strong and statistically significant role of *Ideology* in predicting how a justice will vote. The odds ratio of *Ideology* is 16.33, indicating that the odds of liberal justice vote increase in Model 3 by 16.33 times when there is a one unit increase in judicial ideology. The marginal effect of *Ideology* is 14.5 percent, indicating that a justice whose Segal-Cover score is at .584 (one standard deviation above the mean) is 14.5 percent more likely to cast a liberal vote than a justice whose Segal-Cover score is at the mean (.33). Further, the marginal effects reveal that, compared with the most conservative justice (Justice Scalia), the most liberal justice (Justice Sotomayor) – is 45.15 percent more likely to cast a liberal vote. These findings are expected and are consistent with the attitudinal model of

judicial decision making. Ideology is the strongest predictor of how a justice will vote in civil rights and liberties cases. This is consistent with much prior literature confirming the impact of judicial attitudes in this category of cases (e.g., Unah and Hancock 2006).

Second, the impact of the Solicitor General as both a conservative and liberal amicus in civil rights and liberties is confirmed by Model 3. The odds ratio of *SG Liberal Amicus* is 1.755, indicating that the odds of a liberal justice vote is 1.755 times higher when a SG is a liberal amicus than when the SG is not. Further, the marginal effects reveal that the when the SG argues the liberal position, a justice is 12.8 percent more likely to cast a liberal vote than when the SG does not advance the liberal position as an amicus. Conversely, the odds ratio of *SG Conservative Amicus* is .393, indicating that the odds of a liberal justice vote decrease by 2.54 times when the SG advocates the conservative position as amicus than when the SG does not. Likewise, the marginal effects reveal that when the SG argues the conservative position, a justice is 15.2 percent less likely to cast a liberal vote, than when the SG does not advocate the conservative position as an amicus.

Third, the *Lower Court Direction* variable is statistically significant and, as expected, negatively signed. The odds ratio of .193 indicates that when the Roberts Court is reviewing a liberal decision, a justice is 5.18 times less likely to issue a liberal vote than when the Roberts Court is reviewing a conservative decision. Similarly, the marginal effects reveal that when the Roberts Court reviews a liberal decision, a justice is 38.9 percent less likely to issue a liberal vote. This result again confirms the known propensity of justices to vote to overturn cases that they review.

Fourth and finally, the *Liberal – Conservative Resource Difference* variable is statistically significant and signed in the expected direction. The odds ratio of *Liberal –*

Conservative Resource Difference is 1.066, indicating that a justice is 1.066 times more likely to issue a liberal ruling in Model 3 when there is a one unit increase in *Liberal – Conservative Resource Difference*. The marginal effect of *Liberal – Conservative Resource Difference* is 5.9 percent, indicating that in a case in which the liberal party's resource advantage is .26 (one standard deviation above the mean), a justice is 5.9 percent more likely to cast a liberal vote than in a case where the liberal party's resource advantage is -4.15 (the mean). Further, the marginal effects reveal that a justice is 23.99 percent more likely to cast a liberal vote in a case where liberal party resource advantage is at its highest value (8), than in a case where liberal resource advantage is at its lowest value (-9).

The results of my logit model considering only economics cases at the Roberts Court (Model 4) are reported in Table 5.4. Model 4 was estimated using the same variables and methodology as the prior models, and will be interpreted in the same manner. The chi square test for the model is statistically significant, which means that all the variables considered together in the model are significantly different than zero. The model correctly predicts 69.45 percent of the outcomes on the dependent variable (liberal vote), which is a 38.67 percent reduction in error in the absence of the model (liberal votes actually occurred 49.82 percent of the time).

As with Models 1 through 3, the MLE coefficient for *Liberal-Conservative Amicus Briefs Difference* does not rise to the level of statistical significance in Model 4, even though it is signed in the expected direction. Further, *Liberal-Conservative Amicus Briefs Difference* is also not statistically significant when I estimate this same economics model but without the interaction term. Therefore, an ideological advantage of amicus briefs does not appear to influence the direction of justice votes in economics cases at the Roberts Court.

Table 5.4. Logit Model of the Impact of Amici on Ideological Direction of Justice Votes at the Roberts Court, 2007 – 2011 Terms: Economics Cases

Variable	MLE Coefficient	Odds Ratio	Marginal Effect
Amicus Brief Difference	0.06 (.07)	1.061	6.0%
Moderation	-0.19 (.10)*	0.827	-4.2%
Moderation x Amicus Brief Difference	0.00 (.02)	0.995	See Figure 5.4
Ideology	1.94 (.36)***	6.976	11.9%
Amicus Cosigner Difference	0.00 (.00)	1.000	0.1%
SG Lib Amicus Brief	0.67 (.19)***	1.961	15.5%
SG Con Amicus Brief	-1.52 (.26)***	0.219	-33.9%
Prestigious Amicus Difference	0.41 (.10)***	1.507	9.7%
Lower Court Direction	0.23 (.18)	1.256	5.7%
Resource Difference	0.06 (.07)***	1.129	10.9%
Constant	.04 (.90)		
N	743		
Prob > chi2	0		
Percent Correctly Predicted	69.45		
Percent Reduction in Error	38.67		

Dependent variable indicates the ideological direction of the individual justices' vote (1 = liberal, 0 = conservative). Numbers in parentheses indicated standard errors. *p<.05, **p<.01, ***p<.001 (one-tailed).

To confirm this conclusion, I produced a graph of the marginal effects of *Liberal-Conservative Amicus Briefs Difference* on the ideological direction of the vote across the observed range of *Judicial Moderation* for economics cases (see Figure 5.4). The marginal effects graph confirms that at no level of judicial moderation is the impact of *Liberal-Conservative Amicus Briefs Difference* statistically significant (as the dotted lines representing the 95 percent confidence intervals are never *both* above or below zero). As a result, just as with civil rights and liberties cases, I conclude that an ideological advantage of amicus briefs does not impact the way the justices vote in economics cases at the Roberts Court. This finding fails to support my information/legal persuasion hypotheses or my median justice hypotheses in the context of economics cases. As *Liberal-Conservative Amicus Briefs Difference* is not statistically significant, it is not necessary to interpret the odds ratios or marginal effects. This result is notable, as it provides further evidence that the level of amicus brief impact on the justices varies by issue area.

In addition, Model 4 demonstrates that *Liberal-Conservative Amicus Cosigner Difference* is not statistically significant, even though it is signed in the expected direction. Thus, my affected groups hypotheses are not supported. As *Liberal-Conservative Amicus Cosigner Difference* is not statistically significant, it is not necessary to interpret the odds ratios or marginal effects.

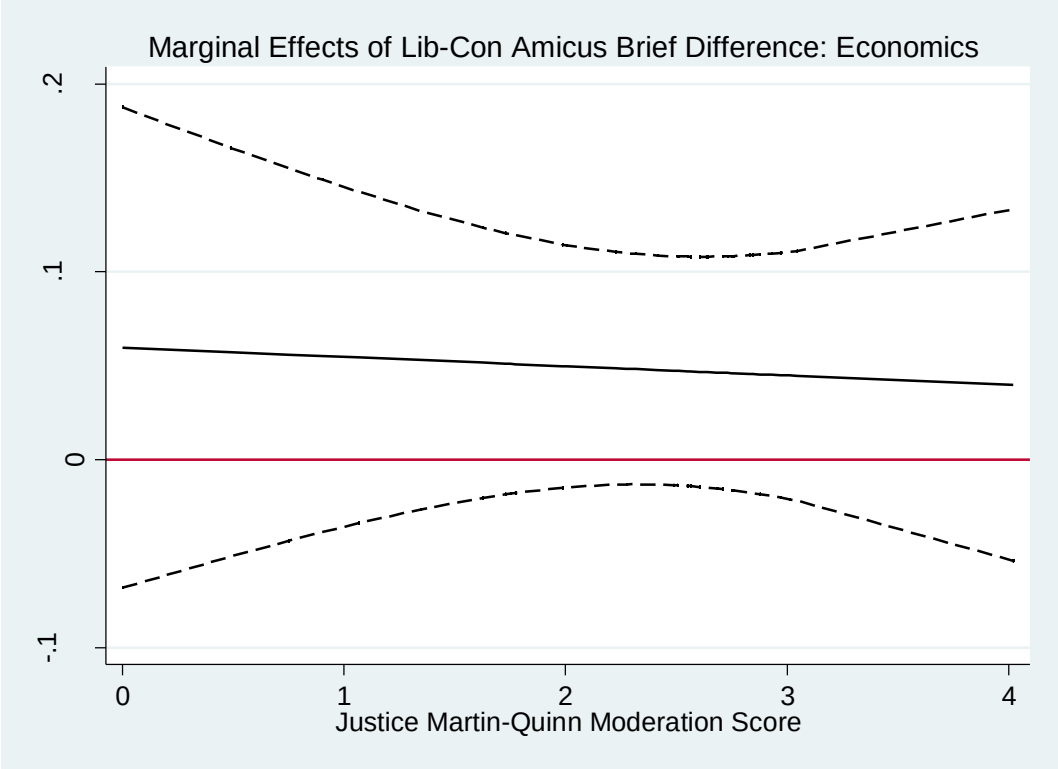

Figure 5.4. Marginal Effect of *Liberal-Conservative Amicus Brief Difference* on Ideological Direction of Justice Vote Across Levels of Judicial Moderation in Economics Cases

However, the results of *Prestigious Liberal-Conservative Amicus Difference* tell a different story than *Liberal-Conservative Amicus Brief Difference* or *Liberal-Conservative Amicus Cosigner Difference* in Model 4. *Prestigious Liberal-Conservative Amicus Difference* is statistically significant and signed in the expected direction in economics cases. The odds ratio of *Prestigious Liberal-Conservative Amicus Difference* is 1.507, indicating that the odds of a liberal justice vote increase in Model 4 by 1.507 times when there is a one unit increase in a prestigious liberal brief advantage. The marginal effects of *Prestigious Liberal-Conservative Amicus Difference* reveals that a justice is 9.7 percent more likely to cast a liberal vote as the *Prestigious Liberal-Conservative Amicus Difference* in the case increases from -.27 (the mean)

to .66 (one standard deviation above the mean), and 53.73 percent more likely to cast a liberal vote as the *Prestigious Liberal-Conservative Amicus Difference* in the case increases from the least liberal advantage (-3) to the greatest liberal advantage (3). This result supports my prestigious amicus hypotheses, indicating that the justices respond favorably to an advantage of prestigious amici, even when controlling for an ideological advantage of total briefs and cosigners in a case. Thus, in economics cases, the justices are more persuaded by who is filing amicus briefs than the simple quantity of briefs or cosigners in a case. In economics cases, the question of "who files?" is more important than a simple count of "how many file?" or "how many sign?" The main lesson is that an ideological advantage of prestigious amici matter in economics cases, and the justices seem to resist the persuasion attempts of amici otherwise. These findings provide qualified support for both the legal and interest group models of amicus influence, but only insofar as they pertain to powerful groups.

Further, all of the control variables are signed in the expected direction and statistically significant in economics cases, except *Lower Court Direction*. First, Model 4 continues to confirm the strong and statistically significant role of *Ideology* in predicting how a justice will vote. The odds ratio of *Ideology* is 6.976, indicating that the odds of liberal justice vote increase in Model 4 by 6.976 times when there is a one unit increase in judicial ideology. The marginal effect of *Ideology* is 11.9 percent, indicating that a justice whose Segal-Cover score is at .579 (one standard deviation above the mean) is 11.9 percent more likely to cast a liberal vote than a justice whose Segal-Cover score is at the mean (.33). Further, the marginal effects reveal that, compared with the most conservative justice (Justice Scalia), the most liberal justice (Justice Sotomayor) is 35.27 percent more likely to cast a liberal vote. These findings are expected and

are consistent with the attitudinal model of judicial decision making. As with the other issue areas, *Ideology* is the strongest predictor of how a justice will vote in economics cases.

Second, the powerful impact of the Solicitor General as both a conservative and liberal amicus in economics cases is confirmed by Table 5.4. The odds ratio of *SG Liberal Amicus* is 1.961, indicating that the odds of a liberal justice vote is 1.961 times higher when the SG participates as a liberal amicus than when the SG does not. Further, the marginal effects reveal that the when the SG argues the liberal position, a justice is 15.5 percent more likely to cast a liberal vote than when the SG does not advance the liberal position as an amicus. Conversely, the odds ratio of *SG Conservative Amicus* is .219, indicating that the odds of a liberal justice vote decrease by 4.57 times when the SG advocates the conservative position as amicus than when the SG does not. Likewise, the marginal effects reveal that when the SG argues the conservative position, a justice is 33.9 percent less likely to cast a liberal vote, than when the SG does not advocate the conservative position as an amicus.

Third, and interestingly, the *Lower Court Direction* variable is not statistically significant and is not signed as expected. This result goes against the typical findings that the USSC considers cases that they have a tendency to reverse. It would appear that the justices on the Roberts Court are not more likely to take cases they tend to reverse in economics cases to any statistically significant degree.

Fourth and lastly, the *Liberal – Conservative Resource Difference* variable is statistically significant and signed in the expected direction. The odds ratio of *Liberal – Conservative Resource Difference* is 1.129, indicating that a justice is 1.129 times more likely to issue a liberal ruling in Model 4 when there is a one unit increase in *Liberal – Conservative Resource Difference*. The marginal effect of *Liberal – Conservative Resource Difference* is 10.9 percent,

indicating that in a case in which the liberal party's resource advantage is 2.71 (one standard deviation above the mean), a justice is 10.9 percent more likely to cast a liberal vote than in a case where the liberal party's resource advantage is -.84 (the mean). Further, the marginal effects reveal that a justice is 44.87 percent more likely to cast a liberal vote in a case where liberal party resource advantage is at its highest value (7), than in a case where liberal resource advantage is at its lowest value (-9).

To conclude, when it comes to economics cases before the Roberts Court, judicial ideology matters a great deal, as does the presence of the SG as either a liberal or conservative amicus. Party resources also matter to a lesser extent. An advantage of amicus briefs or cosigners do not seem to make a difference, but an advantage of prestigious liberal amici does make a significant impact in the ideological direction of the justice vote. In short, in economics cases, prestigious amici persuade the justices, others do not.

The results of my logit model considering judicial power and federalism cases at the Roberts Court (Model 5) are reported in table 5.5. Model 5 was estimated using the same variables and methodology as the prior models, and will be interpreted in the same manner. The chi square test for the model is statistically significant, which means that all the variables considered together in the model are significantly different than zero. The model correctly predicts 68.54 percent of the outcomes on the dependent variable (liberal vote), which is a 36.25 percent reduction in error in the absence of the model (liberal votes actually occurred 49.36 percent of the time).

As with Models 1 through 4, the MLE coefficient for *Liberal-Conservative Amicus Briefs Difference* does not rise to the level of statistical significance in Model 5, even though it is signed in the expected direction. Moreover, *Liberal-Conservative Amicus Briefs Difference* is

Table 5.5. Logit Model of the Impact of Amici on Ideological Direction of Justice Votes at the Roberts Court, 2007 – 2011 Terms: Judicial Power and Federalism Cases

Variable	MLE Coefficient	Odds Ratio	Marginal Effect
Amicus Brief Difference	0.069 (.060)	1.071	8.9%
Moderation	-0.060 (.111)	0.942	-1.3%
Moderation x Amicus Brief Difference	-0.013 (.022)	0.987	See Figure 5.5
Ideology	0.849 (.388)*	2.338	5.4%
Amicus Cosigner Difference	0.000 (.001)	1.000	-0.2%
SG Lib Amicus Brief	1.021 (.287)***	2.776	24.0%
SG Con Amicus Brief	-1.278 (.247)***	0.279	-27.4%
Prestigious Amicus Difference	-0.278 (.084)***	0.757	-8.1%
Lower Court Direction	-0.374 (.163)*	0.688	-9.3%
Resource Difference	0.013 (.020)	1.013	1.6%
Constant	0.259 (.296)	0.296	
N	569		
Prob > chi2	0		
Percent Correctly Predicted	68.54		
Percent Reduction in Error	36.25		

Dependent variable indicates the ideological direction of the individual justices' vote (1 = liberal, 0 = conservative). Numbers in parentheses indicated standard errors. *p<.05, **p<.01, ***p<.001 (one-tailed).

also not statistically significant when I estimate this same judicial power and federalism model but without the interaction term. Therefore, an ideological advantage of amicus briefs does not influence the direction of justice votes in judicial power and federalism cases at the Roberts Court.

To confirm this conclusion, I produce a graph of the marginal effects of *Liberal-Conservative Amicus Briefs Difference* on the ideological direction of the vote across the observed range of *Judicial Moderation* for judicial power and federalism cases (see Figure 5.5). The marginal effects graph confirms that at no level of judicial moderation is the impact of *Liberal-Conservative Amicus Briefs Difference* statistically significant (as the dotted lines representing the 95 percent confidence intervals are never both above or both below zero). As a result, just as with civil rights and liberties and economics cases, I conclude that an ideological advantage of amicus briefs does not impact in a significant manner the way the justices vote in judicial power and federalism cases at the Roberts Court. This finding fails to support my information/legal persuasion hypotheses or my median justice hypotheses in the context of judicial power and federalism cases. As *Liberal-Conservative Amicus Briefs Difference* is not statistically significant, it is not necessary to interpret the odds ratios or marginal effects.

In addition, Model 5 demonstrates that *Liberal-Conservative Amicus Cosigner Difference* is not statistically significant in judicial power and federalism cases. Thus, my affected groups hypotheses are not supported either. As *Liberal-Conservative Amicus Cosigner Difference* is not statistically significant, it is not necessary to interpret the odds ratios or marginal effects.

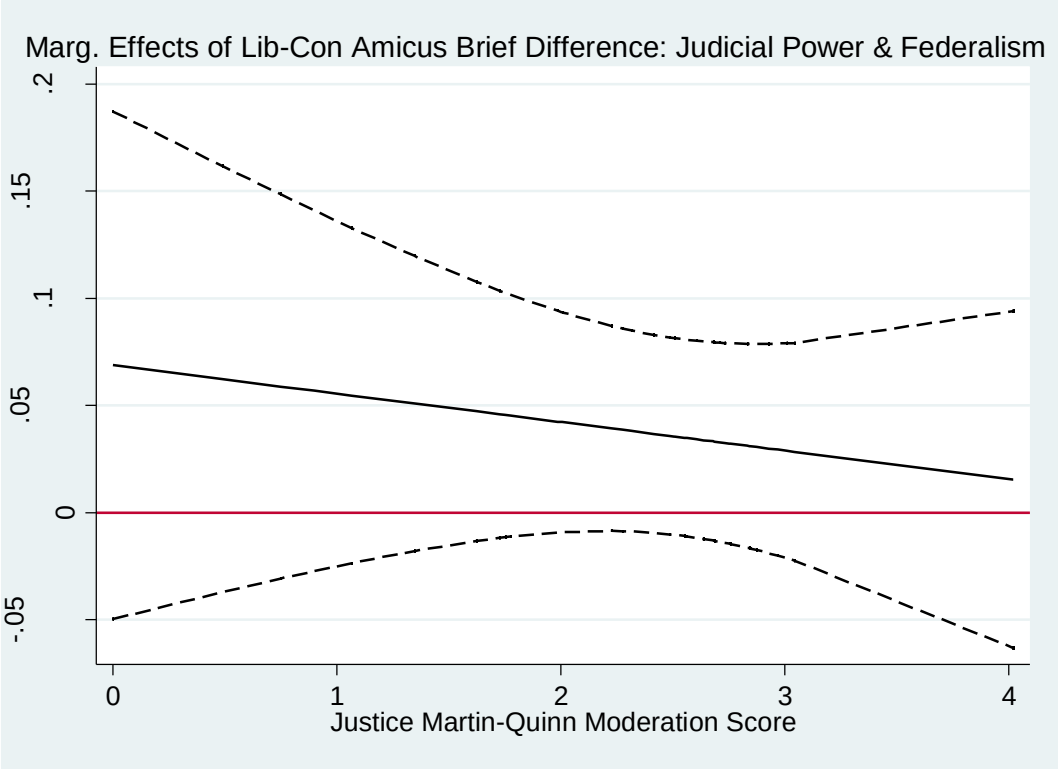

Figure 5.5. Marginal Effect of *Liberal-Conservative Amicus Brief Difference* on Ideological Direction of Justice Vote Across Varying Levels of Judicial Moderation in Judicial Power and Federalism Cases

Perplexingly, the results of *Prestigious Liberal-Conservative Amicus Difference* are significant in judicial power and federalism cases, but the effects are not in the expected direction. The odds ratio of *Prestigious Liberal-Conservative Amicus Difference* is .757, indicating that the odds of a liberal justice vote decrease in Model 5 by 1.32 times when there is a one unit increase in a prestigious liberal amici advantage. The marginal effects of *Prestigious Liberal-Conservative Amicus Difference* reveals that a justice is 8.1 percent *less* likely to cast a liberal vote as the *Prestigious Liberal-Conservative Amicus Difference* in the case increases from .20 (the mean) to 1.1 (one standard deviation above the mean), and 33.20 percent *less* likely to

cast a liberal vote as the *Prestigious Liberal-Conservative Amicus Difference* in the case increases from the least liberal advantage (-2) to the greatest liberal advantage (3). This result contradicts my prestigious amicus hypotheses, indicating that the justices respond with some hostility to an advantage of prestigious amici. In judicial power and federalism cases, the justices seem more persuaded to vote against the preferences of the net prestigious advantaged amici's side. Perhaps this result can be explained by attitudinal model of judicial decision making. In fact, it may be the case, as suggested by Box-Steffensmeir et al. (2013, 12), that the justices in judicial power and federalism cases use the presence of those prestigious amici of the opposing ideological orientation as heuristic for identifying the policy position they disagree with, and vote accordingly. Put more simply, perhaps the justices take the presence of amici that they are inclined to disagree with as a signal to vote against the ideological position they advance. If this is so, further research should explore why the justices would respond this way in judicial power and federalism cases to the presence of prestigious amici, but not in other issue areas. The main take-away here is that an ideological advantage of prestigious amici do matter in judicial power and federalism cases, but not necessarily in the way one would expect. This particular finding provides support for the attitudinal model of judicial decision-making.

Finally, all of the control variables are signed in the expected direction and statistically significant in judicial power and federalism cases, except *Liberal-Conservative Resource Difference*. Model 5 provides further support for the statistically significant role of *Ideology* in predicting how a justice will vote. The odds ratio of *Ideology* is 2.34, indicating that the odds of liberal justice vote increase in Model 5 by 2.34 times when there is a one unit increase in judicial ideology. The marginal effect of *Ideology* is 5.4 percent, indicating that a justice whose Segal-Cover score is at .59 (one standard deviation above the mean) is 5.4 percent more likely to cast a

liberal vote than a justice whose Segal-Cover score is at the mean (.33). Further, the marginal effects reveal that, compared with the most conservative justice (Justice Scalia), the most liberal justice (Justice Sotomayor) is 16.4 percent more likely to cast a liberal vote. These findings are expected and are consistent with the attitudinal model of judicial decision making, although not as strong as in the three other issue areas.

Second, Table 5.5 confirms the powerful impact of the Solicitor General as both a conservative and liberal amicus in judicial power and federalism cases. The odds ratio of *SG Liberal Amicus* is 2.776, indicating that the odds of a liberal justice vote is 2.776 times higher when the SG participates as a liberal amicus than when the SG does not. Further, the marginal effects reveal that the when the SG argues the liberal position, a justice is 24.0 percent more likely to cast a liberal vote than when the SG does not advance the liberal position as an amicus. Conversely, the odds ratio of *SG Conservative Amicus* is .279, indicating that the odds of a liberal justice vote decrease by 3.58 times when the SG advocates the conservative position as amicus than when the SG does not. Likewise, the marginal effects reveal that when the SG argues the conservative position, a justice is 27.4 percent less likely to cast a liberal vote, than when the SG does not advocate the conservative position as an amicus.

Third, the *Lower Court Direction* variable is statistically significant and signed as expected. The odds ratio of .688 indicates that when the Roberts Court is reviewing a liberal decision, a justice is 1.45 times less likely to issue a liberal vote than when the Roberts Court is reviewing a conservative decision. Similarly, the marginal effects reveal that when the Roberts Court reviews a liberal decision, a justice is 9.3 percent less likely to issue a liberal vote. This result indicates that in judicial power and federalism cases, the justices are more likely to vote against the ideological direction of the lower court decision. Lastly, as *Liberal – Conservative*

Resource Difference is not statistically significant, it is not necessary to provide an interpretation of its odds ratio or marginal effects. A party resource advantage simply does not matter in most judicial power and federalism cases.

To conclude, when it comes to judicial power and federalism cases before the Roberts Court, judicial ideology matters, as does the direction of the lower court decision. Further, the presence of the SG as either a liberal or conservative amicus is a significant predictor of how the justices will vote. However, an advantage of amicus briefs or cosigners does not make a statistically significant impact on how the justices vote, and an advantage of prestigious liberal amici actually makes it less likely for justices to respond positively to the arguments advanced by the prestigious amici. In short, it appears that amici matter less in judicial power and federalism cases than in every other issue area.

The results of my logit model considering salient cases at the Roberts Court (Model 6) are reported in table 5.6. Model 6 was estimated using the same variables and methodology as the prior models, and will be interpreted in the same manner. The chi square test for the model is statistically significant, which means that all the variables considered together in the model are significantly different than zero. The model correctly predicts 72.44 percent of the outcomes on the dependent variable (liberal vote), which is a 40.40 percent reduction in error in the absence of the model (liberal votes actually occurred 53.76 percent of the time).

The MLE coefficient for *Liberal-Conservative Amicus Briefs Difference* does not rise to the level of statistical significance in Model 6, and is negatively signed. However, *Liberal-Conservative Amicus Briefs Difference* is statistically significant and signed in the positive (expected) direction when I estimate this same salience model but without the interaction term. Therefore, an ideological advantage of amicus briefs does appear to influence the direction of

Table 5.6. Logit Model of the Impact of Amici on Ideological Direction of Justice Votes at the Roberts Court, 2007 – 2011 Terms: Salient Cases

Variable	MLE Coefficient	Odds Ratio	Marginal Effect
Amicus Brief Difference	-0.009 (.033)	0.991	-2.0%
Moderation	-0.046 (.120)	0.955	-0.9
Moderation x Amicus Brief Difference	0.020 (.012)	1.020	See Figure 5.6
Ideology	4.782 (.521)***	119.396	28.9%
Amicus Cosigner Difference	-0.001 (.001)	0.999	-5.1%
SG Lib Amicus Brief	-0.673 (.386)	0.510	-16.7%
SG Con Amicus Brief	-0.845 (.265)***	0.429	-20.8%
Prestigious Amicus Difference	0.207 (.068)**	1.230	8.6%
Lower Court Direction	-0.171 (.182)	0.843	-4.1%
Resource Difference	0.010 (.024)	1.011	1.4%
Constant	-1.018 (.335)		
N	508		
Prob > chi2	0		
Percent Correctly Predicted	72.44		
Percent Reduction in Error	40.40		

Dependent variable indicates the ideological direction of the individual justices' vote (1 = liberal, 0 = conservative). Numbers in parentheses indicated standard errors. *p<.05, **p<.01, ***p<.001 (one-tailed).

justice votes in salient cases at the Roberts Court, but it is necessary to produce a marginal effects chart to depict the influence of *Liberal-Conservative Amicus Briefs Difference* across a range of *Judicial Moderation* values (see Figure 5.6). In Figure 5.6 the solid line indicates how the marginal effects of *Liberal-Conservative Amicus Brief Difference* vary across a range of justice moderation scores in salient cases. The 95 percent confidence intervals drawn around these lines indicate significance levels.

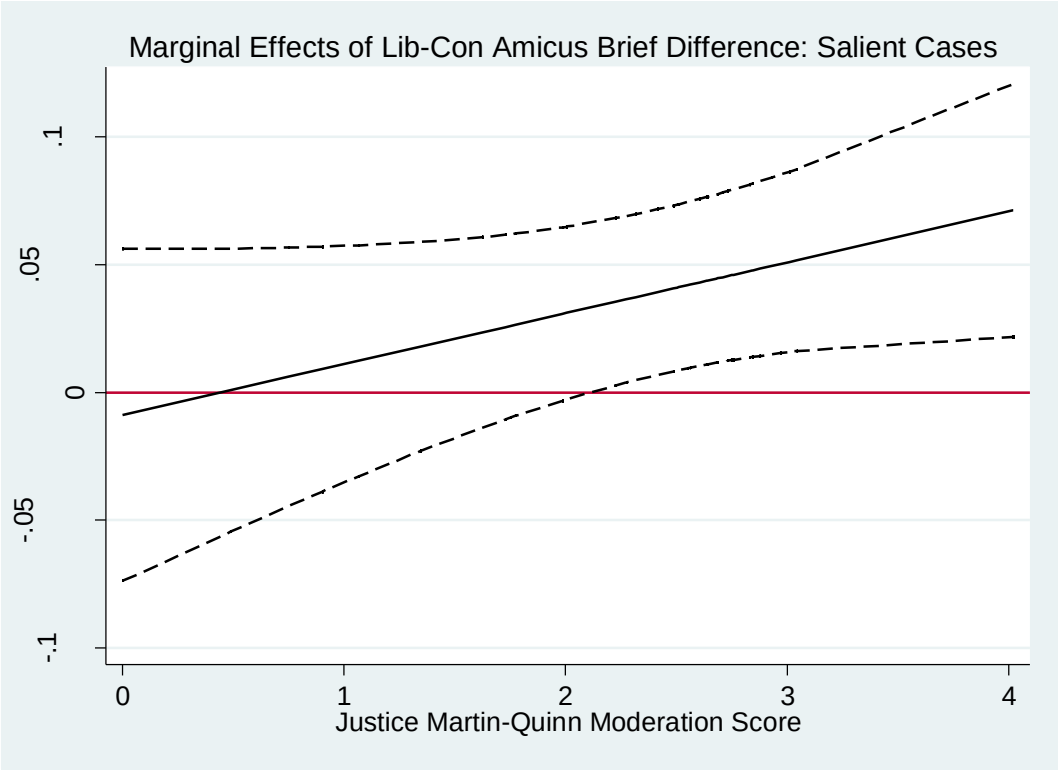

Figure 5.6. Marginal Effect of *Liberal-Conservative Amicus Brief Difference* on Ideological Direction of Justice Vote Across Varying Levels of Judicial Moderation in Salient Cases

Similar to the findings in criminal procedure cases at the Roberts Court, Figure 5.6 reveals that a justice's moderation level does indeed mediate the influence of amicus briefs in the expected direction for those justices with *Judicial Moderation* scores above 2 (which is every justice except for Justices Scalia and Thomas, and Justice Stevens in 2008). Thus, the influence of amicus briefs on justice votes in salient cases exists for 9 out of the 11 justices who have served on the Roberts Court. As justices become more moderate, they are more susceptible to the influence of an ideological advantage of amicus briefs in salient cases.

The marginal effects graph shows that there is an approximately 3 percent increase in the likelihood of a liberal vote for justice with a moderation score of 2.1 (Stevens and Souter in 2007 term), and a 7 percent increase in the likelihood of a liberal vote for a justice with a moderation score of 4.02 (Kennedy) when there is an advantage of liberal briefs.

Figure 5.6 demonstrates that an ideological advantage of amicus briefs influences the vast majority of the justices in salient cases before the Roberts Court and that this influence becomes more pronounced as the justices become more moderate in their ideologies. While these findings do support my information/legal persuasion hypotheses and my median justice hypotheses regarding amicus brief influence, I did not expect this in result in salient cases. Figure 5.6 fails to support my political salience attitudinal hypotheses H11 and H12. This is because H11 and H12 stated that amicus influence would be less in salient cases, as only justices that were on the same ideological side as the amicus brief advantage would succumb to amicus influence. Yet this does not appear to be the case, as conservative justices Roberts, Alito, and Kennedy each have judicial moderation scores above 2.1, and Figure 5.6 evidences liberal amicus brief influence over these conservative justices. Further, each of the liberal justices score above 2.1 on the judicial moderation scale, and each of these justices evidences conservative amicus brief

influence. Thus, contrary to my expectations, an ideological advantage of amicus briefs in salient cases does make all of the justices (except Justices Thomas and Scalia) more likely to vote in the direction supported by the most amicus briefs, and this effect crosses ideological lines, becoming more pronounced as the justices become more moderate. This is a very important finding, as it indicates that amicus briefs impact the way the justices vote in the cases that matter the most at the Roberts Court. The vast majority of the justices do not simply vote their ideological preferences in salient cases, but are open to the persuasive attempts of amicus briefs. Therefore, the legal persuasion model does describe amicus brief influence in salient cases.

Although Table 5.6 and Figure 5.6 show there is a statistically significant influence of amicus brief advantage for all justices with moderation scores above 2.0 (all but two the justices) in salient cases, the above information is limited in that it does not adequately depict how the impact of amicus briefs in a salient case changes as both the numerical advantage of amicus briefs increases or decreases across a range of values and as judicial moderation scores vary. Therefore, Table A.5, located in the Appendix, provides predicted probabilities of observing a liberal justice vote in salient cases at varying levels of amicus brief advantage and judicial moderation, holding all other variables at their mean or modal values. As with Table A.4, for purposes of Table A.5, the mean moderate justice is classified as having a judicial moderation score at the mean (2.43), the less moderate justice is classified as having a judicial moderation score at the 25th percentile (2.0), the more moderate justice is classified as having a moderation score at the 75th percentile (2.84), the least moderate justice has a moderation score of 0, and the most moderate justice has a moderation score of 4.02.

Table A.5 demonstrates the same two basic but significant pieces of information regarding amicus brief influence that Table A.4 also demonstrated. First, Table A.5 shows that when the justices encounter an increasing ideological advantage of briefs in salient cases, the influence of those briefs increases, as the justices become more likely to vote in the direction of amicus brief advantage as the advantage becomes more pronounced, regardless of judicial ideology. This effect holds true for justices across varying moderation levels, except for the least moderate justice – Justice Thomas.[85] Second, Table A.5 shows that as the justices become more moderate, they are more susceptible to amicus impact in salient cases, as they typically become even more likely to vote in the direction of the amicus brief advantage as their moderation levels increase.

For example, compared to a case in which there is an 1 brief conservative advantage, in a case in which there is an 1 brief liberal advantage, the less moderate justice is 1.5 percent more likely to vote liberally, the mean moderate justice is 2 percent more likely to vote liberally, the more moderate justice is 3.3 percent more likely to vote liberally, and the most moderate justice (Kennedy) is 3.5 percent more likely to vote liberally in salient cases. Compared with a case in which there is a 3 brief conservative advantage, in a case in which there is a 3 brief liberal advantage, the less moderate justice is 4.5 percent more likely to vote liberally, the mean moderate justice is about 6 percent more likely to vote liberally, the more moderate justice is 7 percent more likely to vote liberally, and the most moderate justice is over 10 percent more likely to vote liberally. Also, compared with a case in which there is a 10 brief conservative advantage, in a case in which there is a 10 brief liberal advantage, the less moderate justice is 15

[85] Unlike the other justices, Justice Thomas actually becomes less likely to vote liberally in salient cases as conservative amicus brief advantage decreases and as liberal amicus brief advantage increases. This indicates that Justice Thomas either ignores the persuasive attempts of amicus briefs in salient cases or filters them attitudinally, i.e., as a signal to vote against the side they support.

percent more likely to vote liberally, the mean moderate justice is 19 percent more likely to vote liberally, the more moderate justice is 22 percent more likely to vote liberally, and the most moderate justice is 33.5 percent more likely to vote liberally. And lastly, compared to a case in which there is a 15 brief conservative advantage, in a case in which there is a 15 brief liberal advantage, the less moderate justice is 22 percent more likely to vote liberally, the mean moderate justice is 28.3 percent more likely to vote liberally, the more moderate justice is 33.6 percent more likely to vote liberally, and the most moderate justice is almost 48 percent more likely to vote liberally.

Thus, Table A.5 shows that the impact of amicus briefs on justice votes in salient cases is very similar to the impact of amicus briefs when considering all cases together. The percentage change in the predicted probability of a liberal vote as amicus brief advantage and judicial moderation levels vary in salient cases closely mirrors the changes seen in the predicted probabilities of a liberal vote in all cases. In sum, as with Table A.4, and apart from the least moderate justice (Thomas), Table A.5 shows that the greater the amicus brief advantage in a salient case, the more pronounced the impact of the amicus advantage, regardless of judicial ideology. I did not expect this effect to be as pronounced as it is, given my hypothesis that attitudinal factors would predominate in salient cases, thus limiting the influence of amicus curiae in salient cases for those justices not predisposed to agree with the side with the amicus brief advantage. Further, the greater the moderation of the justice, the greater the influence of amicus brief advantage becomes in salient cases. These results corroborate the findings of Model 6 and Figure 5.6. Therefore, as with all cases considered together, the degree of amicus brief impact in a salient case is related to both the level of numerical ideological advantage of briefs and the moderation level of the justice. These results provide additional compelling

support for my information/legal persuasion hypotheses and my median justice hypotheses, as well as support for the legal persuasion model of amicus influence. Amicus influence in salient cases appears to follow the same pattern as amicus influence in all cases. The information that amicus briefs provide matter in both routine and salient cases, and the overwhelming majority of justices are responsive to this information.

However, Model 6 demonstrates that *Liberal-Conservative Amicus Cosigner Difference* is not statistically significant, and is negatively signed. This result fails to support my affected groups hypotheses, but this result was partially expected, as I thought attitudinal factors would predominate over public opinion influence in salient cases. As *Liberal-Conservative Amicus Cosigner Difference* is not statistically significant, it is not necessary to interpret the odds ratios or marginal effects. It appears then, that in salient cases, the justices of the Roberts Court respond to the persuasive arguments and information contained in amicus briefs, but not to the simple numerical majority of amici in a case. These findings should be encouraging to proponents of the legal model, who expect justices to attempt to reach the most accurate legal rulings, putting aside as much as possible extra-legal influences.

Prestigious Liberal-Conservative Amicus Difference is statistically significant and signed in the expected direction. The odds ratio of *Prestigious Liberal-Conservative Amicus Difference* is 1.230, indicating that the odds of liberal justice vote increase in Model 6 by 1.230 times when there is a one unit increase in a prestigious liberal brief advantage. The marginal effects of *Prestigious Liberal-Conservative Amicus Difference* reveals that a justice is 8.6 percent more likely to cast a liberal vote as the *Prestigious Liberal-Conservative Amicus Difference* in the case increases from .32 (the mean) to 2.0 (one standard deviation above the mean), and 39.14 percent more likely to cast a liberal vote as the *Prestigious Liberal-Conservative Amicus Difference* in

the case increases from the least liberal advantage (-5) to the greatest liberal advantage (3). This result supports my prestigious amicus hypotheses, indicating that the justices respond favorably to an advantage of those amici that matter most in those cases that matter most. This is a noteworthy finding, and taken together with the findings regarding amicus brief influence, demonstrate that amicus briefs filed by powerful amici make a significant impact in salient cases. While the justices are more likely to reference their attitudes in deciding salient cases than other cases, they are also responsive to the persuasive arguments included in amicus briefs. Therefore, both attitudinal and legal factors influence judicial decision-making at the Roberts Court in salient cases.

Turning to an examination of the control variables in salient cases in Table 5.6, some notable results stand out. First, as I expected, *Ideology* matters in salient cases, and it matters a great deal. The odds ratio of *Ideology* is 119.396, indicating that the odds of liberal justice vote increase in Model 6 by 119.396 times when there is a one unit increase in judicial ideology. The marginal effect of *Ideology* is 28.9 percent, indicating that a justice whose Segal-Cover score is at .59 (one standard deviation above the mean) is 28.9 percent more likely to cast a liberal vote than a justice whose Segal-Cover score is at the mean (.33). Further, the marginal effects reveal that, compared with the most conservative justice (Justice Scalia), the most liberal justice (Justice Sotomayor) is 69.90 percent more likely to cast a liberal vote. Comparing these results with the prior logit models shows conclusively that *Ideology* matters more in salient cases than in all other types of cases. These findings are expected and are consistent with the attitudinal model of judicial decision-making, and prior literature (e.g., Segal and Spaeth 1999, Unah and Hancock 2006).

Interestingly, the results of Model 6 demonstrate that the impact of the SG as amicus depends upon the ideological direction advanced in salient cases. When the SG files a conservative amicus brief in a salient case, the justices are likely be influenced positively; when the SG files a liberal brief, the justices do not respond in a statistically significant matter (and the sign is even in the negative direction). As *SG Liberal Amicus* is not statistically significant, I report only the odds ratios and marginal effects of the *SG Conservative Amicus*. The odds ratio of *SG Conservative Amicus* is .429, indicating that the odds of a liberal justice vote decrease by 2.33 times when the SG advocates the conservative position as amicus than when the SG does not. Likewise, the marginal effects reveal that when the SG argues the conservative position, a justice is 20.8 percent less likely to cast a liberal vote, than when the SG does not advocate the conservative position as an amicus.

Therefore, when the justices encounter salient cases at the Roberts Court, they respond to the persuasion attempts of the conservative SG amicus brief, but not the liberal SG amicus brief. Of relevance here is the fact that the SG has filed 14 conservative briefs, 7 liberal briefs, and 3 unspecifiable briefs in salient cases before the Roberts Court during the 2007-2011 terms. Thus, not only is the SG more likely to assume a conservative stance as an amici in salient cases, but the SG is also most likely to be persuasive taking a conservative position in these cases. Perhaps this sheds some small light on why the Roberts Court has developed a more conservative reputation, as it appears to be more persuaded by the federal government when the government advances a conservative position rather than a liberal one in those cases that matter most.

Lastly, and of note, while signed in the expected direction, neither *Lower Court Direction* nor *Liberal – Conservative Resource Difference* is statistically significant in Model 6. This indicates that the justices are not more likely to a statistically significant extent to reverse the

decision of the lower court in salience cases, nor are they influenced by the party with a higher level of resources in salient cases. This implies that the justices agree to hear salient cases not necessarily to reverse decisions they disagree with, but also to affirm lower court decisions that they consider correctly decided.

In sum, while attitudes are the strongest predictor of how the justices will vote in salient cases, amicus briefs and prestigious amici do impact the way the justices vote at the Roberts Court in these high profile disputes. This implies that in salient cases, justices are likely to "tune-in", striving to reach the best and most accurate legal conclusions because of the high stakes involved. Thus, amici play an important role in shaping the direction of our nation's jurisprudence, as they shape, if even at the margins, the most noteworthy decisions of the USSC. The fact that the justices who occupy the positions at or near the ideological center of the Roberts Court are particularly susceptible to amicus influence in both salient and other cases affirms the value of amicus curiae targeting the moderate or swing justices.

In order to determine whether liberal justices on the Roberts Court respond in a similar fashion to the persuasion attempts of amici as conservative justices in salient cases, I estimated two further logit models (Models 7 and 8), the first focusing only on liberal justices in salient cases, and the second only on conservative justices in these same cases. The results of these two logit models are listed in Tables 5.7 and 5.8, respectively. Comparing Models 7 and 8, one notices both some similarities and some significant differences in the predictors of how conservative and liberal justices vote in salient cases. First and importantly, both liberal and conservative justices respond to the persuasive attempts of amici in salient cases. However, the marginal effects reveal that the 5 conservative justices are more persuadable, as a matter of degree, than the 4 liberal justices. The marginal effect is only 2.9 percent for liberal justices,

Table 5.7. Logit Model of the Impact of Amici on Ideological Direction of Justice Votes at the Roberts Court, 2007 – 2011 Terms: Salient Cases – Liberal Justices Only

Variable	MLE Coefficient	Odds Ratio	Marginal Effect
Amicus Brief Difference	0.054 (.030)*	1.055	2.9%
Amicus Cosigner Difference	-0.001 (.001)	0.999	-0.8%
SG Lib Amicus Brief	-0.190 (.686)	0.827	-11.7%
SG Con Amicus Brief	0.176 (.525)	1.193	0.9%
Prestigious Amicus Difference	0.648 (.141)****	1.911	6.5%
Lower Court Direction	1.469 (.448)****	4.346	15.7%
Resource Difference	0.005 (.056)	1.005	0.2%
Constant	1.030 (.321)		
N	225		
Prob > chi2	0		
Percent Correctly Predicted	88.0		
Percent Reduction in Error	33.99		

Dependent variable indicates the ideological direction of the individual justices' vote (1 = liberal, 0 = conservative). Numbers in parentheses indicated standard errors. *p<.08 **p<.05, ***p<.01, ****p<.001 (one-tailed).

while being 7.7 percent for conservative justices. However, the higher degree of amicus brief impact on conservative justices can probably be explained by the fact that Justice Kennedy is included with this group, and given his moderation level, is most likely to welcome amicus influence. Regardless, the basic narrative is the same: amicus briefs matter in salient cases.

Table 5.8. Logit Model of the Impact of Amici on Ideological Direction of Justice Votes at the Roberts Court, 2007 – 2011 Terms: Salient Cases – Conservative Justices Only

Variable	MLE Coefficient	Odds Ratio	Marginal Effect
Amicus Brief Difference	0.041 (.024)*	1.042	7.7%
Amicus Cosigner Difference	-0.001 (.001)	0.999	-4.0%
SG Lib Amicus Brief	-1.877 (.65)***	0.153	-21.4%
SG Con Amicus Brief	-2.880 (.630)****	0.056	-24.7%
Prestigious Amicus Difference	0.015 (.090)	1.015	0.5%
Lower Court Direction	-1.143 (.287)****	0.319	-26.6%
Resource Difference	0.069 (.039)*	1.071	7.1%
Constant	0.277 (.232)	1.042	
N	283		
Prob > chi2	0		
Percent Correctly Predicted	79.50		
Percent Reduction in Error	34.61		

Dependent variable indicates the ideological direction of the individual justices' vote (1 = liberal, 0 = conservative). Numbers in parentheses indicated standard errors. *p<.09 **p<.05, ***p<.01, ****p<.001 (one-tailed).

Second, neither liberal nor conservative justices are significantly affected by a numerical advantage of amici in a case, confirming the results of Model 6. Third, only the liberal justices in salient cases appear to respond to the persuasive attempts of prestigious amici. Thus, the liberal justices are more responsive to "who" is filing amicus briefs in salient cases, while

conservative justices respond more to the simple ideological advantage of briefs in salient cases. Fourth and finally, there is a marked difference in how the two groups of justices respond to presence of the SG as amicus in salient cases. Liberal justices appear to ignore the persuasion attempts of the SG, both when the SG is advancing the liberal position and when the SG is advancing the conservative position. This may imply that the liberal justices are less willing to show deference to the preferences of the Executive branch in salient cases than conservatives, and implies that liberal justices, as a group, are perhaps more activist and more skeptical of the government's persuasion attempts. On the other hand, the conservative justices are significantly impacted by SG amicus briefs in salient cases. However, while the conservative justices are shown to respond positively to the persuasion attempts of the conservative SG (becoming 24 percent less likely to vote liberally), they respond negatively and significantly to the persuasion attempts of the liberal SG (becoming 21 percent less likely to vote liberally). This finding indicates that the conservative justices are generally only open to persuasion when the SG advocates the position they are inclined to agree with, and they use the presence of the liberal SG as a heuristic to vote against the preferences of Executive branch. In short, in salient cases, conservative justices appear to respond in an attitudinal fashion to the SG as amicus, whereas the liberal justices do not seem to put much account in the SG's preferences either way.

Lastly, Tables 5.9 and 5.10 are provided to demonstrate whether liberal justices respond in a different manner to the persuasion attempts of amici than do conservative justices, when one steps back and considers all cases decided during the 2007-2011 terms of the Roberts Court. Tables 5.9 and 5.10, respectively, include the results of my final logit models (Models 9 and 10), the first focusing only on liberal justices in all cases, and the second only on conservative justices in all cases. In comparing Models 9 and 10, important conclusions can be reached.

Table 5.9. Logit Model of the Impact of Amici on Ideological Direction of Justice Votes at the Roberts Court, 2007 – 2011 Terms: All Cases – Liberal Justices Only

Variable	MLE Coefficient	Odds Ratio	Marginal Effect
Amicus Brief Difference	0.054 (.017)***	1.055	6.2%
Amicus Cosigner Difference	0.000 (.001)	1.000	-0.3%
SG Lib Amicus Brief	1.206 (.200)***	3.340	23.9%
SG Con Amicus Brief	-0.617 (.145)***	0.539	-15.3%
Prestigious Amicus Difference	0.082 (.053)	1.085	2.5%
Lower Court Direction	-0.393 (.111)***	0.675	-9.1%
Resource Difference	0.031 (.014)*	1.032	3.6%
Constant	0.799 (.114)		
N	1428		
Prob > chi2	0		
Percent Correctly Predicted	66.11		
Percent Reduction in Error	7.88		

Dependent variable indicates the ideological direction of the individual justices' vote (1 = liberal, 0 = conservative). Numbers in parentheses indicated standard errors. *p<.05, **p<.01, ***p<.001 (one-tailed).

First, both liberal justices and conservative justices respond to the persuasion attempts of amicus briefs in the numerically advantaged side, evidencing similar marginal effects (6.2 percent and 4.8 percent, respectively). Second, a numerical advantage of amicus cosigners does not influence either liberal or conservatives justices when considering all cases as a whole. Third,

Table 5.10. Logit Model of the Impact of Amici on Ideological Direction of Justice Votes at the Roberts Court, 2007 – 2011 Terms: All Cases – Conservative Justices Only

Variable	MLE Coefficient	Odds Ratio	Marginal Effect
Amicus Brief Difference	0.056 (.015)***	1.057	4.8%
Amicus Cosigner Difference	-0.001 (.001)	0.999	-1.8%
SG Lib Amicus Brief	0.335 (.138)**	1.399	6.7%
SG Con Amicus Brief	-1.017 (.164)***	0.362	-13.9%
Prestigious Amicus Difference	0.045 (.046)	1.046	1.1%
Lower Court Direction	-1.159 (.110)***	0.314	-26.2%
Resource Difference	0.084 (.012)***	1.088	7.4%
Constant	0.288**		
N	1836		
Prob > chi2	0		
Percent Correctly Predicted	68.30		
Percent Reduction in Error	12.55		

Dependent variable indicates the ideological direction of the individual justices' vote (1 = liberal, 0 = conservative). Numbers in parentheses indicated standard errors. *p<.05, **p<.01, ***p<.001 (one-tailed).

neither liberal nor conservatives justices are significantly influenced by an ideological advantage of prestigious amici, when considering all cases as a whole. Fourth, liberal justices are impacted by the persuasion attempts of the liberal SG amicus (23.9 percent marginal effect), and to a slightly lesser degree, the persuasion attempts of the conservative SG amicus (15.3 percent

marginal effect). Similarly, conservative justices are impacted by the persuasion attempts of the conservative SG amicus (13.9 percent marginal effect), and to a lesser extent, the persuasion attempts of the liberal SG amicus (6.7 percent marginal effect). In sum, it appears to be the case that conservative and liberal justices are more alike than they are different when it comes to amicus impact in all cases. Both conservatives and liberals respond to amicus brief persuasion attempts, both respond to the persuasion attempts of the SG as amicus, and both groups are not significantly impacted by a numerical advantage of amicus cosigners or prestigious amici.

I think that seven basic conclusions can be drawn from the presentation and interpretation of the foregoing logit models, graphs, and predicted probabilities tables. First, an ideological advantage of amicus briefs influences how the justices vote on the Roberts Court when considering all cases, criminal procedure cases, and salient cases. While the marginal effects and impact of amicus brief advantage is relatively small when the briefs are more closely numerically balanced in a case, they are statistically significant and in the expected direction. This effect only increases in magnitude as the amicus disparity increases in a case.

Second, the influence of amici depends on the case context. An advantage of amicus briefs was shown to matter in all cases, in criminal procedure cases, and in salient cases, but not in civil rights and liberties cases, economics cases, or judicial power and federalism cases. Amicus cosigner advantage was shown not to matter in any set of cases except those involving civil rights and liberties. Prestigious amici advantage was shown to matter in all sets of cases except those involving criminal procedure.

Third, the influence of amici depends on a justice's level of moderation. The marginal effects graphs of those models depicting statistically significant amicus influence each show that the justices become more responsive to amici as they become more moderate in their ideologies.

Justices Thomas and Scalia (to a lesser extent) are the only two justices who resist amicus brief influence.

Fourth, the influence of amici often depends on their identities. An ideological advantage of prestigious amici was shown to matter in all sets of cases except those involving criminal procedure. Further, an ideological advantage of prestigious amici was shown to matter even in those issue areas where total amicus advantage did not, including civil rights and liberties cases, economics cases, and judicial power and federalism cases.

Fifth, the justices generally respond favorably to the SG's amicus persuasion attempts, and the marginal effects are substantial. The only issue area in which the SG amicus did not exert a significant impact was criminal procedure, and also among liberal justices in salient cases.

Sixth, there is not much difference in the way that conservative and liberal justices respond to amicus briefs. Other than conservative Justices Thomas and Scalia (sometimes), both liberal and conservative justices generally respond positively to amicus attempts at influence.

Seventh, attitudes matter, and they matter a lot. The most consistent predictor variable across the models and the one of greatest magnitude was the influence of judicial ideology on the direction of the justice vote. This is expected and consistent with the attitudinal model of judicial decision-making. Conservatives tend to vote conservatively and liberals tend to vote liberally at the Roberts Court. However, despite this natural observation about human nature, it has been shown that amicus briefs are often able to buck the natural tendencies of justices, at least at the margins, by appealing to the justice's "better natures" and their sense of fidelity to the law.

B. Pearson's Correlation Tables and Interpretation

Each of the above logit models is useful for assessing the impact of amici on the ideological direction of justice votes on the Roberts Court while controlling for other known predictors of justice votes. However, none of these models provide a means of directly and easily comparing the impact of amici on the justices side-by-side. In order to provide a more readily intelligible comparison of amicus impact on the various justices of the Roberts Court, Tables 5.11- 5.15 rank the influence of amici on the justices based upon a measure of the Pearson correlation coefficient between the specific justice and the amicus variable of interest. The Pearson correlation coefficient is a measure of how well two variables are related, showing the linear relationship between two variables. The coefficient measures between -1.0 and 1.0. A coefficient of -1.0 means that there is a perfect negative correlation between the two variables, while a coefficient of 1.0 means that there is a perfect positive correlation between the two variables. A coefficient of 0 shows that there is no linear relationship between the two variables.

For purposes of this dissertation, a coefficient of .1 or higher will be deemed not only statistically significant, but also substantively meaningful, meaning that the amicus variable of interest is correlated in a significant way with the ideological direction of the justice vote. While a Pearson's Correlation of .1 or higher does not prove the amicus variable of interest impacted the ideological direction of the justice's vote, it does indicate a significant level of association between the two. Further, such a measure allows for a direct, side-by-side comparison of the justices, shedding light on which justices are most and least influenced by amici.

Table 5.11. Ranking of Roberts Court Justices Based Upon Pearson Correlation Between Ideological Direction of Justice Vote and *Liberal-Conservative Amicus Brief Difference*

Rank	Justice	Amicus Brief Diff
1	**Elena Kagan**	.219**
2	**Anthony Kennedy**	.174****
3	**David Souter**	.152*
4	**Stephen Breyer**	.122**
5	**Ruth Bader Ginsberg**	.112**
6	**John Paul Stevens**	.094
7	**Sonia Sotomayor**	.072
8	**Samuel Alito**	.064
9	**John Roberts**	.057
10	**Clarence Thomas**	.055
11	**Antonin Scalia**	.032

*p<.10 **p<.05, ***p<.01, ****p<.001 (two-tailed)

Table 5.11 ranks the justices of the Roberts Court based upon the Pearson correlation between the justice and *Liberal-Conservative Amicus Briefs Difference.* Table 5.11 shows that Justice Kagan has the highest Pearson correlation of the justices (.219), suggesting that Justice Kagan is the justice who is most influenced by an ideological advantage of amicus briefs. Justice Kennedy ranks second, with a Pearson's correlation of .174. Justices Souter, Breyer, and Ginsburg also show a statistically significant correlation between their votes and an ideological advantage of amicus briefs. Justices Thomas and Scalia have the lowest Pearson correlation scores, and are not statistically significant. This is an interesting finding, as Justices Thomas and Scalia are the two most conservative justices (as measured by either Segal-Cover or Martin-Quinn scores), and as they are also the two least ideologically moderate justices according to my *Judicial Moderation* measure. Thus, the two most conservative (and least moderate) justices

seem to be most resistant to the influence of amicus briefs. This confirms the findings of my logit models above. However, the most moderate justice (Kennedy) and the third most moderate justice (Kagan) evidence the greatest amicus brief influence. This is also generally consistent with the findings of the logit models included above.

The influence of an ideological advantage of amicus briefs on Justice Kagan is also notable as she is the newest member of the Roberts Court, joining the USSC for the 2010 term. Perhaps the "freshman effect" (or "acclimation effect") plays a role here in making it more likely for amicus briefs to influence Justice Kagan than the other justices. Various studies have shown that new Supreme Court justices ("freshman" in their first couple of years on the Court) are more ideologically moderate, restrained, indecisive, and susceptible to influence than those justices who have sat on the USSC for longer periods or than that same justice at a later point in his/her career (e.g., Brenner 1983; Hagle 1993; Hurwitz and Stefko 2004). Thus, the significant correlation between the ideological direction of Justice Kagan's votes and an advantage of amicus briefs in the same ideological direction may be related both to her ideological moderation, and to her newness on the Court. Further, her susceptibility to amicus brief influence may also by related to the fact that immediately prior to her confirmation to the USSC, Kagan served as the U.S. Solicitor General for the Obama Administration. One would expect that the person who has held the highest office as the nation's leading advocate on behalf of the United States before the USSC would have a particular appreciation for, and be amenable to, cogent and persuasive legal arguments contained within amicus briefs in her search to reach the most accurate resolutions to cases and controversies that come before her.

A final note regarding Table 5.11 is in order. Those justices viewed as liberal, together with the consummate "swing" Justice Kennedy, are ranked 1-7, while the four justices deemed to

be most conservative rank 8-11. This would indicate that the liberal justices, as a bloc, are more receptive to amicus brief influence than are the conservatives on the Roberts Court. This result may be related to a difference between liberal and conservative justices as to how they view the judicial role, or it could simply be that the conservative justices, as a group, are less likely to vote against their ideological tendencies than liberal justices, regardless of outside attempts at influence.

Table 5.12 ranks the justices of the Roberts Court based upon the Pearson correlation between the justice and *Liberal-Conservative Amicus Cosigners Difference.* Table 5.12 shows that Justice Kagan, once again, has the highest Pearson correlation of the justices (.230), suggesting that Justice Kagan is the justice who is most influenced by an ideological advantage of amicus cosigners. Justice Kennedy, once again, ranks second, with a Pearson's correlation of .121. These are the only two justices who have a statistically significant relationship between the ideological direction of their vote and an ideological advantage of amicus cosigners, which should not be surprising given their high moderation levels. Justices Thomas and Scalia actually have negative correlations – not surprising given their seeming resistance to amicus influence. Most of the discussion surrounding Table 5.11 applies to table 5.12. Other than these similarities, the main conclusion to draw from Table 5.12 is that, across the board, apart from Justice Kagan, the impact of amicus cosigners is less than the impact of amicus briefs on the justices, if present at all. This finding is consistent with the results of foregoing logit models.

Table 5.13 ranks the justices of the Roberts Court based upon the Pearson correlation between the justice and *Prestigious Liberal-Conservative Amicus Difference.* Table 5.13 shows that Justice Kagan, for the third straight time, has the highest Pearson correlation (.190) of the

Table 5.12. Ranking of Justices Based Upon Pearson Correlation Between Ideological Direction of Justice Vote and *Liberal-Conservative Amicus Cosigner Difference*

Rank	Justice	Amicus Cosigner Diff
1	**Elena Kagan**	.230***
2	**Anthony Kennedy**	.121**
3	**David Souter**	.07
4	**Ruth Bader Ginsberg**	.066
5	**Stephen Breyer**	.06
6	**Sonia Sotomayor**	.037
7	**John Roberts**	.019
8	**John Paul Stevens**	.015
9	**Samuel Alito**	.005
10	**Clarence Thomas**	-.022
11	**Antonin Scalia**	-.031

*p<.10 **p<.05, ***p<.01, ****p<.001 (two-tailed)

Table 5.13. Ranking of Justices Based Upon Pearson Correlation Between Ideological Direction of Justice Vote and *Prestigious Liberal-Conservative Amicus Difference*

Rank	Justice	Prestigious Amicus Diff
1	**Elena Kagan**	.190**
2	**Anthony Kennedy**	.100*
3	**Sonia Sotomayor**	0.059
4	**Ruth Bader Ginsberg**	0.026
5	**Antonin Scalia**	0.011
6	**John Roberts**	0.006
7	**Stephen Breyer**	0.004
8	**John Paul Stevens**	0.002
9	**Clarence Thomas**	-.033
10	**Samuel Alito**	-.052
11	**David Souter**	-.092

*p<.10 **p<.05, ***p<.01, ****p<.001 (two-tailed)

justices, suggesting that Justice Kagan is the justice who is most influenced by an ideological advantage of prestigious amici in a case. Likewise, Justice Kennedy ranks second, with a Pearson's correlation of .100. Just as with the relationship between justice votes and *Liberal-Conservative Amicus Cosigners Difference*, these justices are the only two who have a statistically significant relationship between the ideological direction of their vote and an ideological advantage of prestigious amicus. If nothing else, one should be detecting a recurring theme regarding amicus influence: Justices Kagan and Kennedy lead the pack. Justices Thomas, Alito, and Souter actually have negative correlations, but these are not statistically significant. The main conclusion to draw from Table 5.13 is that, considering all cases between 2007-2011 terms, apart from Justices Kagan and Kennedy, the impact of an advantage of prestigious amici is not discernible for justices on the Roberts Court.

Turning to Table 5.14, one observes a different story altogether. Looking at the Pearson's correlation between a justice's vote and *SG Liberal Amicus*, one sees that all justices at the Roberts Court evidence a statistically significant correlation. This indicates that all justices are statistically more likely to vote liberally when the SG files a liberal amicus brief in a case than when the SG does not file a liberal brief, even Justices Scalia and Thomas. As expected, liberal justices tend to be more receptive to the influence of *SG Liberal Amicus* than conservative justices. Justice Sotomayor ranks first (.269), with Justices Breyer (.251) and Ginsburg (.205) following. Still, Table 5.14 demonstrates the deference that the justices give to the Solicitor General, regardless of ideology or moderation levels. Interestingly, Justice Alito is the conservative justice who seems most responsive to the SG when the SG advocates a liberal position – ranking higher than the moderately conservative Justice Kennedy, as well as higher than liberal Justices Souter, Kagan, and Stevens. Also worth highlighting is the fact that Justice

Table 5.14. Ranking of Justices Based Upon Pearson Correlation Between Ideological Direction of Justice Vote and *SG Liberal Amicus*

Rank	Justice	SG Liberal Amicus
1	**Sonia Sotomayor**	.269****
2	**Stephen Breyer**	.251****
3	**Ruth Bader Ginsberg**	.205****
4	**Samuel Alito**	.189****
5	**David Souter**	.172**
6	**Elena Kagan**	.163*
7	**Anthony Kennedy**	.148***
8	**John Roberts**	.146***
9	**John Paul Stevens**	.131**
10	**Antonin Scalia**	.106**
11	**Clarence Thomas**	.106**

*p<.10 **p<.05, ***p<.01, ****p<.001 (two-tailed).

Kagan, the only former Solicitor General of the justices, responds significantly the persuasive attempts of the *SG Liberal Amicus,* but is not the leader as with the other amicus variables of interest.

Lastly, Table 5.15 tells a similar story in many ways to that of Table 5.14. Looking at the Pearson's correlation between a justice's vote and *SG Conservative Amicus,* one sees that all justices at the Roberts Court evidence a statistically significant correlation. The negative Pearson correlation coefficients show that all justices are statistically less likely to vote liberally when the SG files a conservative amicus brief in a case than when the SG does not file a conservative brief. Like Table 5.14, Table 5.15 demonstrates the deference that the justices give to the SG, regardless of ideology or moderation levels. Noteworthy is the fact that Justice Breyer, generally considered to be liberal, demonstrates the highest correlation between his votes and *SG*

Conservative Amicus of all the justices. Perhaps this can be attributed to Justice Breyer's pragmatic jurisprudence, which emphasizes interpreting the law according to its purposes and consequences, instead of simply according to text, tradition, and precedent. In this light, Breyer (2011) has written the following: "What does it mean for the Court to take a 'practical' attitude toward legal interpretation? It means the Court will maintain strong workable relationships with other governmental institutions. It means the Court will take into account the constitutional role of other institutions, including their responsibilities, their disabilities, and the ways in which they function." Given this approach, Breyer's deferential attitude toward the interests of the Executive Branch can be explained by his stated desire to maintain a strong workable relationship with the other branches of government.

Table 5.15. Ranking of Justices Based Upon Pearson Correlation Between Ideological Direction of Justice Vote and *SG Conservative Amicus*

Rank	Justice	SG Con Amicus Brief
1	**Stephen Breyer**	-.232****
2	**Anthony Kennedy**	-.228****
3	**John Paul Stevens**	-.225****
4	**John Roberts**	-.221****
5	**Samuel Alito**	-.218****
6	**Clarence Thomas**	-.190****
7	**Elena Kagan**	-.173**
8	**Sonia Sotomayor**	-.163**
9	**David Souter**	-.159**
10	**Antonin Scalia**	-.159**
11	**Ruth Bader Ginsberg**	-.109**

*p<.10 **p<.05, ***p<.01, ****p<.001 (two-tailed)

Also of consequence is the fact that, while Justice Kennedy's votes significantly correlate with both the *SG Liberal Amicus* and *SG Conservative Amicus* variables, the correlation is stronger when the SG advocates the conservative position. This correlation may help to explain the conservative bent of the Roberts Court, as the "swing" justice on the Roberts Court is slightly more impacted by the persuasion attempts of the conservative SG than the liberal SG.

Together, Tables 5.14 and 5.15, provide strong evidence of the SG's impact on the justices of the Roberts Court. These two tables suggest that the Roberts Court is similar to its predecessors in terms of the deference it affords the SG. Further, these tables indicate that the justices respect and respond to the arguments of the SG when the SG appears as an amicus, irrespective of judicial ideology. This finding is generally consistent with the results of my logit models, and makes sense in the context of a separation of powers model of judicial decision making (e.g., Epstein and Knight 1999). This model argues that the justices generally endeavor to avoid disposing of cases in a manner which is inconsistent with the preferences of the other branches of government. This is so because the USSC depends, in part, on the support of the other branches to compensate for its political weaknesses (Dahl 1957; Flemming and Wood 1997). Therefore, it is understandable that the justices would be receptive to the SG, who represents the interests of the Executive branch before the USSC.

Further, the impact of the SG as amicus on the ideological direction of the justice votes is consistent with Funston's (1975) conclusion that the USSC is primarily a legitimating agency. Funston shows that during periods of national partisan and electoral realignment, the USSC is more likely to declare federal legislation unconstitutional (805), but over time through justice replacement the USSC comes back in line with law-making majorities. Funston concludes that the "traditional concept of the Court as the champion of minority rights against majority

demands is *largely* incorrect" (809), and that the Court's power to annul is what gives its validation worth. In this light, *McCulloch v. Maryland* (1819), upholding the expansion of federal powers under the Necessary and Proper clause, and not *Marbury v. Madison* (1803), asserting the USSC's authority to declare federal laws unconstitutional, is really the most important case in American constitutional law (809).

Lastly, this finding of a significant correlation between SG amicus persuasion attempts and justice votes also provides an indication that the Roberts Court may be fulfilling the Chief Justice's stated goal of guiding a Court that is modest and restrained, that proceeds with humility, and that issues decisions that respect the other branches of government as co-equals.

C. Conclusions and Implications

The interpretation of the logit models, marginal effects graphs, predicted probabilities tables, and the Pearson correlation tables provided in this chapter lead to five basic conclusions regarding amicus impact at the Roberts Court. First, when the SG files an amicus brief, that brief is likely to significantly impact the direction of a justice's vote, regardless of ideology. This evidences the deference the justices accord to the Executive branch. Second, an advantage of amicus briefs in a case, whether total or prestigious, typically impacts the justices more than an advantage of amicus cosigners. Third, this amicus brief impact is more pronounced for moderate justices than less moderate ones. Specifically, Justices Kagan and Kennedy are the two justices who appear to be most swayed by the persuasion attempts of amici, and they are the only two justices who respond significantly to each of the amicus variables of interest, according to the Pearson's correlation tables. I interpret this finding as further support for my hypotheses that moderate justices are those most likely to be impacted by amici. In Justice Kagan's case, amicus

impact may also be attributable to the documented "freshman" (or "acclimation") effect, as well as to her former position as Solicitor General. Fourth, the greater the ideological disparity of amicus briefs in a case, the greater the impact on the direction of the justices' votes. Fifth and finally, while the attitudinal model still best captures the reality of judicial decision-making at the Roberts Court, the legal persuasion model best captures the reality of amicus impact. In varied contexts, the justices respond positively to the persuasive attempts of amici, and this impact is apparent across most levels of judicial ideology.

I think that four basic implications flow from the findings of this chapter that are particularly relevant to legal practitioners and scholars. First, a party or amicus seeking to have maximum impact on the justices should attempt to coordinate with other amici, urging them to file as many separate briefs as possible in support of their preferred party in a case. Marshaling a coalition of amicus briefs in a case is more effective than marshaling a coalition of amicus cosigners. This is because amicus briefs matter more for their informational content than for the number of amici that sign onto the briefs. Inundating the justices with information in the form of multiple amicus briefs appears to be an effective strategy, despite the concerns of some about information overload.

Second, a party or amicus seeking maximum impact on the justices should attempt to persuade as many prestigious amici as possible to file briefs supporting their preferred position, and the marshaling of these prestigious amici should be given priority over other amici. This is because those amici with more power, experience, and prestige appear to have more sway over the justices. All of the USSC's friends are not created equal. Third, and relatedly, a party or amicus seeking maximum impact on the justices should attempt to persuade the SG and as many

state governments as possible to file amicus briefs in support of their preferred position, as the SG and state governments have higher success rates at the USSC than most amici.

Fourth and finally, given the tendency for moderate justices to be more responsive to amicus influence, an amicus should attempt to tailor the arguments and information contained in its brief to capture the attention of and appeal to the moderate justices, most notably current Justices Kennedy and Kagan. An amicus' efforts are best spent on crafting arguments tailored to convince those justices most likely to be swayed, and less time and energy should be devoted to trying to persuade those justices that are more extreme in their ideologies, as they are less likely to be moved.

Chapter 6: Conclusion

According to Sunstein (2003, 150), the greatest invention of the Founders of our democratic-republic consisted in "their skepticism about homogeneity, their enthusiasm for disagreement and diversity, and their effort to accommodate and to structure that diversity." The Founders purposed to design a deliberative democracy, "one which combined accountability to the people with a measure of reflection and reason-giving" (150). With this in mind, the institutions of the Constitution "reflect a fear of conformity, cascade effects, and polarization, creating a range of checks on ill-considered judgments that emerge from these processes" (150).

In *Federalist Nos. 10* and *51* (1788), James Madison confronted the threats posed by factions and special interest groups to minority rights and to the effective functioning of a democratic-republic. Madison's solution to the problem posed by factions was novel and somewhat counterintuitive: first you multiply them, then you divide them, and by doing this you can control their ill effects:

> Whilst all authority in it will be derived from and dependent upon the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority, will be in little danger from interested combinations of the majority. In a free government, the security for civil rights must be the same as for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects. The degree of security in both will depend on the number of interests and sects; and this may be presumed to depend upon the extent of the country and number of people comprehended under the same government.

Thus, *The Federalist* envisioned a large, extended republic as an antidote to the tyranny of factions and as essential to the success of federalism. Madison wrote in *Fed. No. 10*:

> Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.

By increasing their number, factions are forced to compromise and form coalitions to accomplish their goals. This has the effect of diluting power so no one faction can control another. In this way, the democratic-republic envisioned by our Founders checks the potential tyranny of factions by multiplying and dispersing them. Thus, a basic Founding idea was to design a system that, taking the realities of human nature as given, encouraged the formation of a pluralistic society in which no one interest group could easily dominate, yet in which deliberation amongst "We the people" and accountability to "We the people" was encouraged.

Amicus curiae participation in the judicial process is a natural and welcome manifestation of this intended design. Amici curiae briefs serve two core functions that are critical to the healthy functioning of a deliberative democratic-republic. First, amici curiae are, by nature, reason-giving: they provide arguments and evidence to support the positions they advance. They are meant to be more than mere opinions or bald assertions of self-interest; rather, they are meant to provide reasons that judges (and fellow citizens) can, in principle, accept as persuasive upon deliberation. Second, amicus curiae briefs are a vehicle by which interest groups and individuals of all stripes bring their concerns, perspectives, and policy preferences before the courts (and fellow citizens) for consideration. In this way, amici curiae promote the free exchange of ideas, which is an essential basis for wise legal and policy judgments and, ultimately, governmental accountability.

A. Summary of Chapters

Chapter 1 provided a review of the literature pertaining to the function and influence of amicus curiae in our society. First, the evolution of the role of the amicus curiae in American history from "friend of the court" to "friend of the party" was highlighted, along with reasons for

this evolution. Second, the essential function of amici as information bearers was described. Third, attention was drawn to the continuing debate amongst scholars over the value of amicus curiae, and whether amici enhance or impair the functioning of our legal and political systems. Fourth, the liberal rules governing amicus participation were described. Fifth, the increasing presence of amici curiae at the USSC was shown, highlighting the growing phenomenon of counteractive lobbying by interest groups and its implications. Amicus participation has accompanied over 90 percent of cases over the last couple of decades, and it tends to be relatively ideologically balanced. Sixth, it was noted that certain amicus participants stand out in terms of their frequency of appearance before the USSC in the last three decades – e.g., the ACLU, the NACDL, the Chamber of Commerce, the Washington Legal Foundation, and the Pacific Legal Foundation. Seventh, Chapter 1 described the often collaborative nature of amicus enterprise. Eighth, Chapter 1 provided a number of reasons why interest groups file briefs and the various strategies they employ in this effort.

The bulk of the literature review in Chapter 1, however, focused on the thorny issue of whether or not amicus curiae influence judicial decision-making, and if so, what theory best accounts for this influence. The basic conclusions that can be gleaned from this literature review are as follows. First, it is typically difficult to detect whether or not amici curiae influence the way justices vote because judges rarely provide a window into their decision-making process. The statements of judges themselves are cagey and sometimes at odds with one another regarding the usefulness and efficacy of amicus curiae. Second, studies are mixed regarding whether or not, the degree to which, and in what context amici influence judges, but the weight of the literature indicates that amici can and do impact the judicial process. Examples of amicus influence in specific USSC cases, and in specific issue areas, abound. The two most extensive

and rigorous studies to date on amicus influence demonstrate that a litigant's winning percentages can be enhanced with the aid of amicus briefs (Kearney and Merrill (2000)), and that justices across the ideological spectrum respond to the persuasive attempts of amici by becoming more likely to vote consistently with the position advanced by the amicus than they otherwise would be (Collins 2008). Third, pointing to amicus citation rates in judicial opinions is a valid indicator of amicus influence, but it is a rather crude measure, as it can be misleading, and often fails to capture amicus impact.

Fourth, the prevailing view is that the potential impact of an amicus is related to its prestige, power, and experience. It could be said that not all amici are created equal in the eyes of the USSC. For example, widespread agreement exists on the prominence and effectiveness of the Solicitor General as an amicus participant before the USSC. Other "repeat players" or "institutional litigants", such as the states, the ACLU, the ALF-CIO, and the Chamber of Commerce also are seen as more persuasive. Fifth, amicus impact has also been found to be related to the salience of the case, the resources of the party whom the amicus supports, the disparity in the number of briefs offered by each side, whether or not the amicus collaborated with others, and the ideology of the justice reading the brief – with those at the ideological center being most persuadable. Finally, although fewer studies explore amicus activity and influence in the state and lower federal courts than in the USSC, and although amicus activity is not as widespread in these courts, similar conclusions have been reached about amicus influence in these courts.

The remainder of Chapter 1 is devoted to the question of what model of judicial decision-making – the attitudinal model, the legal model, or the interest group model – best accounts for amicus influence. According to the attitudinal model, amicus briefs should have either no

influence on judicial decisions, or should have influence insofar as they reinforce a judge's ideology. According to the legal model, amicus briefs should influence judges regardless of ideology, as justices seek to reach the most accurate legal conclusions and amicus briefs can provide helpful information in this regard. According to the interest group model, amicus briefs should influence judges who are concerned with the institutional legitimacy and representativeness of the court, as amici serve as barometers of public opinion and an indication of the array of social interests involved in the litigation. While not discounting the predictive accuracy of the attitudinal model nor the importance of public opinion, the authors of the leading empirical studies addressing this question (e.g. Collins 2008; 2007; 2004; Kearney and Merrill 2000) conclude that the legal model best explains the impact of amici curiae: amicus briefs matter insofar as the provide legally relevant information that assists judges in reaching the most accurate resolutions.

Chapter 2 provided an overview of the Roberts Court: its justices, its ideological orientation, its major decisions, its supporters and critics, its impact on particular areas of the law, and how it compares with prior Courts. To supplement this discussion, statistics and charts describing the Roberts Court were listed. The jury of scholarly opinion is divided on whether the Roberts Court has lived up to the Chief Justice's pledge to be respectful of the other branches of government as co-equals, to make a renewed push for consensus, to reach narrow rulings designed to build broad coalitions, and to seek a jurisprudence characterized by modesty and humility. What can be concluded is that the Roberts Court is more like its predecessor Courts than it is different. It is a modestly conservative Court which issues fewer decisions than its predecessors. It exercises as much, if not more, restraint than prior Courts. While it issues a higher percentage of 5-4 decisions that past Courts, it also issues a high percentage of unanimous

decisions. Lastly, and most relevant to this study, it is an amicus battleground, attracting more friendly fire than any prior Court in our nation's history.

Chapter 3 set forth my hypotheses, described the process by which I collected amicus data, and detailed the methodology by which I tested for amicus impact at the Roberts Court. I hypothesized that an ideological advantage of amicus briefs would influence the way justices vote, independent of judicial ideology (information/legal persuasion hypotheses). I also hypothesized that an ideological advantage of amicus cosigners in a case would influence justice votes, independent of ideology (affected groups hypothesis). My median justice hypotheses stated that the influence of amicus briefs and cosigners would become more pronounced as the justices became more moderate. My political salience hypotheses stated that amicus influence would be less in salient cases, as only the justices that were on the same ideological side as the amicus brief advantage would succumb to amicus influence, due to the strong influence of judicial attitudes in salient cases. Lastly, my prestigious amicus hypotheses stated that an ideological advantage of prestigious amici would increase the likelihood that justices would vote in the ideological direction of the prestigious amicus advantage.

To test these hypotheses, I presented 11 separate logit models, with the ideological direction of the justice vote as my dependent variable. Controlling for other known predictors of judicial decision-making (i.e., judicial ideology; party resources; lower court decision direction), these separate models examine amicus influence in all cases, in salient cases, in criminal procedure cases, in civil rights and liberties cases, in economics cases, in judicial power and federalism cases, on liberal justices in all cases, on conservative justices in all cases, on liberal justices in salient cases, and on conservative justices in salient cases.

Chapter 4 discussed my findings regarding amicus participation during the 2007-2011 terms of the Roberts Court. A plethora of information regarding the participation levels of amici by issue area, by term, by case, and by amicus category was provided. I highlight here some particularly noteworthy conclusions. First, amicus participation is virtually ubiquitous at the Roberts Court. On average, over 96 percent of the cases at the Roberts Court have amicus participation, over 9 amicus briefs are filed per case, and over 61 amici on average participate in each case. In total, over 3,600 amicus briefs, and over 24,400 cosigners participated in just five terms of the Roberts Court. Second, while more liberal amici participate at the Roberts Court than conservative amici, the overall levels are relatively balanced, thus confirming the existence of an amicus "arms race" at the Roberts Court. Third, amici participate in significant numbers across all issue areas at the Roberts Court. Fourth, amici frequently act in coalition with one another: for every one amicus brief that is filed, an average of 6.7 amici cosign such briefs at the Roberts Court. Fifth, individuals are increasing as a percentage of total amici, and are the most frequent amicus category at the Roberts Court, accounting for 47 percent of total amici. However, these individuals typically collaborate together on briefs, for example "brief of economics scholars", "brief of law scholars", "brief of state legislators", etc.

Chapter 4 also listed the most frequent amicus participants of ten tracked prestigious interest groups at the Roberts Court, with the NACDL, Chamber of Commerce, and ACLU ranking as the top three. Of these ten groups, the NACDL, ACLU, and AARP were the most frequent liberal amici; while the Chamber of Commerce, Washington Legal Foundation, and Pacific Legal Foundation were the most frequent conservative amici. Lastly, Chapter 4 showed those tracked amici who had the highest winning percentage at the Roberts Court. As expected, the Solicitor General was the most successful amicus, supporting the winning position in 72

percent of its cases, followed, in order, by the Pacific Legal Foundation (71 percent), American Bar Association (69 percent), the States (62 percent), and Washington Legal Foundation (60 percent). While these winning percentages do not necessarily prove amicus impact, they do indicate such. In sum, Chapter 4 shows that prestigious conservative amici tend to fare better than their liberal counterparts, but that liberal amici do not seem to think that lobbying the modestly conservative Roberts Court is a lost cause, as they still participate at higher rates than conservative amici.

The main purpose of Chapter 5 was to assess the impact of amicus curiae at the Roberts Court. Through the presentation and interpretation of various logit models, marginal effects graphs, predicted probabilities tables, and Pearson's correlation tables, I attempted to discern if, when, how, and to what degree amici influence the ideological direction of justice votes. The totality of Chapter 5 demonstrates that amicus curiae do matter, and that when, how, and to what degree they matter depends on the level of amicus brief disparity in the case, the ideology of the justice, the issue area of the case, and the prestige of the amicus participants involved. Not surprisingly, the greater the numerical amicus brief advantage in a case, the greater the impact of those briefs. Moderate justices, as a rule, are more influenced by amicus briefs than more ideologically extreme justices. Justices Kennedy, the "swing" justice, and Kagan, the "freshman" justice, appear to be the two justices on the Roberts Court most influenced by amicus briefs. Salient cases, as well as those involving criminal procedure, are most susceptible to the influence of an ideological advantage of amicus briefs. Civil rights and liberties cases are the only category of cases amenable to amicus cosigner influence. Justice votes in all cases, salient cases, civil rights and liberties cases, economics cases, and judicial power and federalism cases are

influenced by an ideological advantage of prestigious amici. And the SG as amicus has a consistent and powerful impact on justice votes, irrespective of judicial ideology.

Four basic but significant implications for legal academics and practitioners were drawn from the results of Chapter 5. First, a party or amicus seeking to have maximum impact on the justices should attempt to coordinate with other amici, urging them to file as many separate briefs as possible in support of their preferred party in a case. Second, a party or amicus seeking maximum impact on the justices should attempt to persuade as many prestigious amici as possible to file briefs supporting their preferred position, and the marshaling of these prestigious amici should be given priority over other amici. Third, and relatedly, a party or amicus seeking maximum impact on the justices should attempt to persuade the SG and as many state governments as possible to file amicus briefs in support of their preferred position, as the SG and state governments have higher success rates at the USSC than most amici. Fourth and finally, an amicus should attempt to tailor the arguments and information contained in its brief to capture the attention of and appeal to the moderate justices, as those justices are the ones most likely to be swayed.

My findings of amicus brief advantage influence support my information/legal persuasion hypotheses. My findings regarding the influence of amicus brief advantage on moderate justices support my median justice information/legal persuasion hypotheses. My findings of prestigious amici advantage support my prestigious amicus hypotheses. On the other hand, except for civil rights and liberties cases, none of my affected groups hypotheses were supported. Also, my political salience attitudinal hypotheses were only partially supported. The influence of amicus briefs in salient cases was not limited to those justices ideologically predisposed to agree with

the briefs, as I expected, but bridged the ideological divide. Thus, the information/legal persuasion hypotheses are also applicable to salient cases.

While not discounting the importance of the attitudinal model of judicial decision-making, these findings regarding amicus influence at the Roberts Court lend credence to Collins' (2008) "legal persuasion" model. Amici provide the justices with myriad information and arguments regarding the correct application of the law in a case, and highlight diverse perspectives on the broader policy implications at stake. Due to the subjective and indeterminate nature of the law, the justices explore alternative avenues to reach what they believe to be the correct decision in a case. It is in this context that the justices are most ripe for amicus influence. Justices use amicus briefs to aid their efforts to reach the best and most accurate legal conclusions. The justices of the Roberts Court, in various contexts and in diverse ways, are influenced by the information they receive from amici, including information about both the legal and broader policy consequences of their decisions.

B. Areas of Future Research

Future research should focus on when and how amicus briefs actually shape the contents of the USSC's opinions. Due to the quantitative nature of this study, I was unable to evaluate the content of amicus briefs to determine when and how the briefs themselves impact the justices' opinions and legal reasoning (apart from the brief analysis provided in Chapter1 regarding the impact of amicus briefs in the PPACA case). For example, what kinds of arguments and information included in amicus briefs are most influential in shaping judicial opinions? In addition, based upon my findings regarding the susceptibility of moderate justices to amicus influence, future research should explore whether or not amici tailor their arguments specifically

to persuade the moderate or median justices on the USSC, and if so, how successful these efforts have been.

Future research should also expand the focus beyond the governments and ten prestigious amicus groups that I tracked in this study to determine the winning percentage and influence of other amicus groups at the USSC, in particular those amici whom the USSC invites to participate. Additionally, future research should examine more closely the context in which prestigious amici are most and least likely to influence the USSC. For example, are prestigious amici more or less likely to influence justice votes when the overall amicus participation in the case is ideologically balanced or when it is lopsided? Further, studies should address whether amicus briefs are more influential when they are collaborative in nature (have multiple cosigners), or rather when they stand alone (are only filed by one amicus group). Lastly, additional research should be devoted to exploring the participation and impact of amici in state supreme courts, as this is an area that is underexplored and seemingly underappreciated.

In conclusion, the Roberts Court is akin to a "friendly" firing range, where amici curiae target the justices in their pursuit of hitting their policy goals and impacting the development of the law. The black robes worn by the justices of the Roberts Court are like "bullet-proof vests", symbolizing impartiality, fidelity to the law, and imperviousness to social pressures. Amici curiae attempt to penetrate these "vests" by finding the areas of susceptibility, by strategically firing "bullets" (amicus briefs) designed for maximum impact, designed to convince the justice that the amici's preference is the right course of action, the action most consistent with the letter and the spirit of the law.

List of References

Ah How alias Louie Ah How. v. United States. 1904. 193 U.S. 65.

Ali Samantar v. Yousef. 2010. 560 U.S. 305.

Arizona Free Enterprise Club's Freedom Club PAC v. Bennett. 2011. 564 U.S. __, 131 S. Ct. 2806.

Arizona v. United States. 2012. 567 U.S. __, 132 S. Ct. 2492.

AT&T Mobility v. Concepcion. 2011. 563 U.S. __, 131 S. Ct. 1740.

Beard v. Banks. 2006. 548 U.S. 521.

Bilski v. Kappos. 2010. 561 U.S. __, 130 S. Ct. 3218.

Boumediene v. Bush. 2008. 553 U.S. 723.

Brown v. Board of Education of Topeka. 1954. 347 U.S. 483.

Brown v. Entertainment Merchants Association. 2011. 564 U.S. __, 131 S. Ct. 2729.

Brown v. Plata. 2011. 563 U.S. __, 131 S. Ct. 1910.

Christian Legal Society v. Martinez. 2010. 561 U.S. __, 130 S. Ct. 2971.

Citizens United v. FEC. 2010. 558 U.S. 310.

Davis v. FEC. 2008. 554 U.S. 724.

Department of Health and Human Services v. Florida. 2012. 567 U.S. __, Docket No. 11-398.

District of Columbia v. Heller. 2008. 554 U.S. 570.

Doe v. Bolton. 1973. 410 U.S. 179.

Dorsey v. United States. 2011. 567 U.S. __, 132 S. Ct. 2321.

Epperson v. Arkansas. 1968. 393 U.S. 97.

Florence v. Board of Chosen Freeholders of Burlington County. 2012. 566 U.S. __, 132 S. Ct. 1510.

Florida v. Harris. 2013. 568 U.S. __.

Florida v. Jardines. 2013. 569 U.S. 1.

Florida v. Department of Health and Human Services. 2012. 567 U.S. __, Docket No. 11-400.

Garcetti v. Ceballos. 2006. 547 U.S. 410.

Gonzalez v. Oregon. 2006. 546 U.S. 243.

Graham v. Florida. 2010. 560 U.S. 48.

Gratz v. Bollinger. 2003. 539 U.S. 244.

Green v. Biddle. 1823. 21 U.S. 1.

Grutter v. Bollinger. 2003. 539 U.S. 306.

Hamdan v. Rumsfeld. 2006. 548 U.S. 557.

Hill v. United States. 2011. 567 U.S. __, 132 S. Ct. 2321, Docket No. 11-5721.

Hollingsworth v. Perry. 2013. 570 U.S. __, 133 S. Ct. 2652, Docket No. 12-144.

Hudson v. Michigan. 2006. 547 U.S. 586.

Jaffee v. Redmond. 1996. 518 U.S. 1.

Jones v. Flowers. 2006. 547 U.S. 220.

Kennedy v. Louisiana. 2008. 554 U.S. 407.

Kiobel v. Royal Dutch Petroleum Co. 2013. 569 U.S. __, 133 S. Ct. 1659.

Lawrence v. Texas. 2003. 539 U.S. 558.

Mapp v. Ohio. 1961. 367 U.S. 643.

Marbury v. Madison. 1803. 5 U.S. 137.

Maryland v. King. 2013. 569 U.S. __, 133 S. Ct. 1958.

McCulloch v. Maryland. 1819. 17 U.S. 316.

McDonald v. City of Chicago. 2010. 561 U.S. 3025.

Medellin v. Texas. 2008. 552 U.S. 491.

Metromedia, Inc. v. San Diego. 1981. 453 U.S. 490.

Microsoft v. i4i Limited Partnership. 2011. 564 U.S. __, 131 S. Ct. 2238.

Miller v. Alabama. 2012. 567 U.S. __, 132 S. Ct. 2455.

Minneci v. Pollard. 2012. 565 U.S. __, 132 S. Ct. 617.

Missouri v. McNeely. 2013. 133 S. Ct. 832.

Morrison v. National Australia Bank Ltd. 2010. 561 U.S. __, 130 S. Ct. 2869.

Morse v. Frederick. 2007. 551 U.S. 393.

Muller v. Oregon. 1908. 208 U.S. 412.

National Federation of Independent Business v. Sebelius. 2012. 567 U.S. __, 132 S. Ct. 603, Docket No. 11-393.

National Meat Association v. Harris. 2012. 565 U.S. __, 132 S. Ct. 965.

Neonatology Assocs. v. Comm'r of Internal Revenue. 3d Cir. 2002. 293 F.3d 128.

On Lee v. United States. 1952. 343 U.S. 747.

PLIVA, Inc. v. Mensing. 2011. 564 U.S. __, 131 S. Ct. 2567.

Republic of Iraq v. Beaty. 2009. 556 U.S. 848, Docket No. 07-1090.

Republic of Iraq v. Simon. 2009. 556 U.S. 848, Docket No. 08-539.

Riegel v. Medtronic, Inc.. 2008. 552 U.S. 312.

Roe v. Wade. 1973. 410 U.S. 113.

Romer v. Evans. 1996. 517 U.S. 620

Roper v. Simmons. 2005. 543 U.S. 551.

Ryan v. Commodity Futures Trading Comm'n.7th Cir. 1997. 125 F.3d 1062.

Shelby County v. Holder. 2013. 570 U.S. __, 133 S. Ct. 2612.

Snyder v. Phelps. 2011. 562 U.S. __, 131 S. Ct. 1207.

United States v. Alvarez. 2011. 567 U.S. __, 132 S. Ct. 2537.

United States v. Herring. 2009. 555 U.S. 135.

United States v. Jones. 2012. 565 U.S. __, 132 S. Ct. 945.

United States v. Stevens. 2010. 559 U.S. 460.

United States v. Windsor. 2013. 570 U.S. __, 133 S. Ct. 2675, Docket No. 12-307.

Wal-Mart Stores, Inc. v. Dukes. 2011. 564 U.S. __, 131 S. Ct. 2541.

Webster v. Reproductive Health Services. 1989. 492 U.S. 490.

Wyeth v. Levine. 2008. 555 U.S. 555.

Adamany, David, and Joel B. Grossman. 1983. "Support for the Supreme Court as a National Policymaker." *Law & Policy* 5(4): 405-437.

Adler, Jonathan H. August 1, 2010. "Court Under Roberts Is Most Restrained in Decades." The Volokh Conspiracy. Accessed at http://www.volokh.com/2010/08/01/court-underroberts-is-most-restrained-in-decades/.

Ai, Chungron, and Edward C. Norton 2003. "Interaction Terms in Logit and Probit Models." 80 *Economics Letters* 123-129.

Bailey, Michael A., Brian Kamoie, and Forrest Maltzman. 2005. "Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision-making." *American Journal of Political Science*: 49 (January): 72-85.

Baird, Vanessa A. 2004. "The Effect of Politically Salient Decisions on the U.S. Supreme Court's Agenda," *Journal of Politics* 66 (August): 755-72.

Balkin, Jack M., Brian Galle, Edward Kleinbard, Gillian E. Metzger, and Trevor W. Morrison. 2012. Brief of Constitutional Law Scholars as *Amici Curiae* in Support of Petitioners (Minimum Coverage Provision). *Department of Health and Human Services v. Florida* (11-398) (2012).

Banner, Stuart. 2003. "The Myth of the Neutral Amicus: American Courts and Their Friends, 1790-1890." *Constitutional Commentary* 20(1): 131-150.

Barker, Lucius J. 1967. "Third Parties in Litigation: A Systemic View of the Judicial Function." *The Journal of Politics*. 29(1): 41-69.

Barnum, David G. 1985. "The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period." *The Journal of Politics* 47(2):652-666.

Behuniak-Long, Susan. 1991. "Friendly fire: Amici curiae and Webster v. Reproductive Health Services." *Judicature* 74 (5): 261-270.

Black, Ryan C. and Christina L. Boyd. 2012. "US Supreme Court Agenda Setting and the Role of Litigant Status." *Journal of Law, Economics, & Organization* 28(2): 286-312.

Blacks Law Dictionary. 1979. 5th edition. St. Paul MN: West Pub. Co.

Blumstein, James F. 2012. Amicus Curiae Brief of James F. Blumstein in Support of Petitioners (Medicaid Issue). *Florida v. Department of Health and Human Services* (11-400) (2012).

Box-Steffensmeier, Janet M., and Dino P. Christenson. 2012. "The Evolution and Formation of Amicus Curiae Networks." *Social Networks*. *http://dx.doi.org/10.1016/j.socnet.2012.07.003*

Box-Steffensmeier, Janet M., Dino P. Christenson, and Matthew P. Hitt. August 2013. "Quality Over Quantity: Amici Influence and Judicial Decision Making." *American Political Science Review*.

Brace, Paul, and Kellie S. Butler. 2001. "New Perspectives for the Comparative Study of the Judiciary: The State Supreme Court Project." *The Justice System Journal*: 243-262.

Brambor, Thomas, William Roberts Clark, and Matt Golder. 2006. "Understanding interaction models: Improving empirical analyses." *Political Analysis* 14(1): 63-82.

Brenner, Saul. 1983. "Another Look at Freshman Indecisiveness on the Supreme Court." *Polity* 16: 320-328.

Brenner, Saul, and Theodore S. Arrington. 2002. "Measuring salience on the Supreme Court: A research note." *Jurimetrics* 43: 99.

Brenner, Saul, and Harold Spaeth. 1995. *Stare Indecisis: The Alteration of Precedent on the Supreme Court, 1946-1992*. Cambridge: Cambridge University Press.

Caldeira, Gregory A. 1986. "Neither the purse nor the sword: Dynamics of public confidence in the Supreme Court." *The American Political Science Review*: 1209-1226.

Caldeira, Gregory A., and John R. Wright. 1988. "Organized Interests and Agenda Setting in the U.S. Supreme Court." *The American Political Science Review* 82(4): 1109-1127.

Caldeira, Gregory A., and John R. Wright. 1990. "Amici Curiae before the Supreme Court: Who Participates, When, and How Much?" *Journal of Politics* 52(3): 782-806.

Caldeira, Gregory, John Jack Wright, and Christopher Zorn. 2012. "Organized Interests and Agenda Setting in the US Supreme Court Revisited." *Available at SSRN 2109497*.

Casey, Gregory. 1974. "The Supreme Court and Myth: An empirical investigation." *Law & Society Review* 8(3): 385-419.

Chayes, Abram. 1976. “The Role of the Judge in Public Law Litigation.” 89 *Harvard Law Review* 1281.

Chemerinsky, Erwin. 2012. “It’s Now the John Roberts Court.” 15 *Green Bag* 2D: 389-403. http://www.greenbag.org/v15n4/v15n4_articles_chemerinsky.pdf

Chemerinsky, Erwin. 2008. “The Roberts Court at Age Three." *Wayne Law Review* 54: 947.

Chen, Paul. 2006. “Information Role of Amici Curiae Briefs in Gonzales v. Raich, The.” *S. Ill. ULJ* 31: 217.

Coleman, Ellen. 2008. Doctoral Dissertation. *Amicus curiae briefs and their effect on United States Supreme Court decisions involving rape convictions from 1950--1999*. ProQuest.

Collins, Paul M., Jr. 2008. *Friends of the Supreme Court: Interest Groups and Judicial Decision Making.* New York, NY: Oxford University Press. *Amicus Curiae data 1946-2001*.

Collins, Paul M., Jr. 2007. “Lobbyists before the U.S. Supreme Court.” *Political Research Quarterly* 60(1): 55-70.

Collins, Paul M., Jr. 2004. “Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation.” *Law and Society Review* 38(4): 807-832).

Collins, Paul M., Jr. and Lisa A. Solowiej. 2007. “Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court.” *Law and Social Inquiry* 32(4): 955 – 984.

Collins Jr, Paul M., and Wendy L. Martinek. 2010. “Friends of the Circuits: Interest Group Influence on Decision Making in the US Courts of Appeals.” *Social Science Quarterly* 91(2): 397-414.

Collins, Ronald. July 9, 2013. “The Roberts Court and The First Amendment.” Accessed at http://www.scotusblog.com/2013/07/the-roberts-court-and-the-first-amendment/.

Collins, Todd A., and Christopher A. Cooper. 2012. “Case Salience and Media Coverage of Supreme Court Decisions Toward a New Measure.” *Political Research Quarterly* 65(2): 396-407.

Comparato, Scott A. 2003. *Amici Curiae and Strategic Behavior in State Supreme Courts*. Westport, CT: Praeger Publishers.

Corbally, Sarah F., Donald C. Bross, and Victor E. Flango. 2004. “Filing of amicus curiae briefs in state courts of last resort: 1960-2000.” *Justice Systems Journal* 25: 39.

Corley, Pamela, Paul M. Collins, Jr. and Jesse Hamner. 2013. "The Influence of Amicus Curiae Briefs on US Supreme Court Opinion Content." *APSA 2013 Annual Meeting Paper*.

Coyle, Marcia. 2013. *The Roberts Court: The Struggle for the Constitution*. New York, NY: Simon & Schuster.

Dahl, Robert. 1957. "Decisionmaking in a Democracy: The Supreme Court as a National Policymaker." *Journal of Public Law* 6: 279-95.

Deen, Rebecca E., Joseph Ignagni, *and* James Meernik. 2003. "The solicitor general as amicus, 1953-2000: How influential?" *Judicature* 87(2): 60-71.

Dunworth, Alexandra, Joshua Fischman, and Daniel E. Ho. Oct. 30, 2009. "Policy Voting: What Amici Tell Us About Law." Unpublished manuscript. Accessed at http://dho.stanford.edu/research/amici.pdf.

Ennis, Bruce J. 1983. "Effective Amicus Briefs." *Cath. UL Rev.* 33: 603.

Epstein, Lee. 1985. *Conservatives in Court*. Knoxville: University of TN Press.

Epstein, Lee. 1994. "Exploring the Participation of Organized Interests in State Court Litigation." *Political Research Quarterly*, *47*(2), 335-351.

Epstein, Lee, and Jack Knight. 1998. *The Choices Justices Make*. Washington, DC: CQ Press.

Epstein, Lee, and Jack Knight. 1999. *Mapping out the strategic terrain: The informational role of amici curiae.* In Supreme Court decision making: New institutionalist approaches, ed. Cornell W. Clayton and Howard Gillman. Chicago: University of Chicago Press.

Epstein, Lee, William M. Landes, and Richard A. Posner. 2013. "Volume 97 Lead Piece: How Business Fares in the Supreme Court." *Minnesota Law Review* 97: 1431-1507.

Epstein, Lee. 1991. *The American courts: A critical assessment*. Washington, DC: CQ Press.

Epstein, Lee, and Carol Mershon. 1996. "Measuring political preferences." *American Journal of Political Science*: 261-294.

Epstein, Lee, and C.K. Rowland. 1991. "Debunking the Myth of Interest Group Invincibility in the Courts." *The American Political Science Review* 85(1): 205-217.

Epstein, Lee, and Tonja Jacobi. 2008. "Super Medians." 61 *Stanford Law Rev*iew 37.

Epstein, Lee, Andrew D. Martin, Kevin M. Quinn and Jeffrey A. Segal. 2007. "Ideological Drift Among Supreme Court Justices: Who, When, and How Important?" *Northwestern University Law Review* 101: 1483-1542.

Epstein, Lee Andrew D. Martin, Kevin Quinn, and Jeffrey A. Segal. 2012. "Ideology and the Study of Judicial Behavior." In *Ideology, Psychology, and Law,* ed. Jon Hanson. Oxford University Press.

Farber, Daniel A. 2007. “When the Court Has a Party, How Many Friends Show up-A Note on the Statistical Distribution of Amicus Brief Filings.” *Constitutional Commentary* 24: 19.

Fischman, Joshua B., and David S. Law. 2009. “What is Judicial Ideology, and How Should We Measure It?” *Journal of Law and Policy.*

Flango, Victor E., Donald C. Bross, and Sarah Corbally. 2006. "Amicus Curiae Briefs: The Court's Perspective." *Justice Systems Journal* 27:180.

Flemming, Roy B., and B. Dan. Wood. 1997. “The public and the Supreme Court: Individual justice responsiveness to American policy moods.” *American Journal of Political Science*: 468-498.

Franklin, David. 2009. “What kind of business-friendly court? Explaining the Chamber of Commerce's success at the Roberts Court.” *Santa Clara Law Review* 49.

Franze, Anthony J., and R. Reeves Anderson. Sept. 24, 2012. “The Supreme Court’s Reliance on Amicus Curiae in the 2011-12 Term.” *The National Law Journal.*

Frey, Andrew. 2006. “Amici Curiae: Friend of the Court or Nuisances?” 33 *Litigation* 5.

Funston, Richard. 1975. “The Supreme Court and Critical Elections.” *The American Political Science Review* 69(3): 795-81.

Galanter, Marc. 1974. Why the “haves” come out ahead: Speculations on the limits of legal change. *Law and Society Review* 9(1): 95-160.

Garcia, Ruben J. 2007. “A Democratic Theory of Amicus Advocacy.” *Florida State University Law Review* 35: 315.

Gibson, James L. 1997. United States Supreme Court Judicial Data Base—Phase II. *University of Houston.*

Giles, Micheal W., Bethany Blackstone, and Richard L. Vining Jr. 2008. "The Supreme Court in American democracy: Unraveling the linkages between public opinion and judicial decision making." *Journal of Politics* 70(2): 293-306.

Giles, Michael W., and Christopher Zorn. 2000. “Gibson versus case-based approaches: Concurring in part, dissenting in part.” *Law and Courts* 10(2): 10-16.

Greenblatt, Alan. July 9, 2012. “Court Gives States Ammunition in Health Care Battle.” Accessed at http://www.npr.org/2012/07/08/156466010/congress-big-stick-just-got-a-little-shorter.

Greenhouse, Linda. 2013. June 29, 2013. "The Real John Roberts Emerges." *The New York Times: Opinion Pages.* Accessed at http://opinionator.blogs.nytimes.com/2013/06/29/the-real-john-roberts-emerges/.

Hagle, Timothy. 1993. "Freshman Effects for Supreme Court Justices," *American Journal of Political Science* 37: 1142-1157.

Hagle, Timothy M., and Harold J. Spaeth. 1991. "Voting Fluidity and the Attitudinal Model of Supreme Court Decision Making." *Western Political Quarterly* 44(1): 119-128.

Hakman, Nathan. 1966. "Lobbying the Supreme Court--An Appraisal of Political Science Folklore." *Fordham Law Review* 35: 15.

Hamilton, Alexander, James Madison, and John Jay. 2003 (1788). in Terence Ball (ed.). *The Federalist with Letters of "Brutus."* Cambridge: Cambridge University Press.

Hansford, Thomas G. 2004a. "Information Provision, Organizational Constraints, and the Decision to Submit an Amicus Curiae Brief in a U.S. Supreme Court Case." *Political Research Quarterly* 57(2): 219-230.

Hansford, Thomas G. 2004b. "Lobbying Strategies, Venue Selection, and Organized Interest Involvement at the U.S. Supreme Court." *American Politics Research* 32: 170-197.

Harper, Fowler V., and Edwin D. Etherington. 1952. "Lobbyists before the Court." *University of Pennsylvania Law Review* 101: 1172.

Harrington, John. 2005. "Amici Curiae in the Federal Courts of Appeals: How Friendly Are They." *Case Western Reserve Law Review* 55: 667.

Hedman, Susan. 1991. Friends of the earth and friends of the Court: Assessing the impact of interest group amici curiae in environmental cases decided by the Supreme Court. *Virginia Environmental Law Journal* 10 *(2):* 187-212.

Hojnacki, Marie. 1997. "Interest groups' decisions to join Alliances or work alone." *American Journal of Political Science* 61–87.

Holyoke, Thomas T. 2003. "Choosing battlegrounds: Interest group lobbying across multiple venues." *Political Research Quarterly* 56(3): 325-336.

Howard, AE Dick. 2012. "Out of Infancy: The Roberts Court at Seven." *Virginia Law Review. In Brief* 98: 76-76.

Hurwitz, Mark S., and Joseph V. Stefko. 2004. "Acclimation and attitudes: "Newcomer" justices and precedent conformance on the Supreme Court." *Political Research Quarterly* 57(1): 121-129.

Ivers, Gregg. 1992. “Religious Organizations as Constitutional Litigants.” *Polity* 25(2): 243-266.

Ivers, Gregg. 1990. “Organized Religion and the Supreme Court.” *Journal of Church and State* 32: 775.

Ivers, Gregg, and Karen O'Connor. 1987. “Friends as foes: The amicus curiae participation and effectiveness of the American Civil Liberties Union and Americans for Effective Law Enforcement in criminal cases, 1969-1982.” *Law and Policy* 9(2): 161-178.

Jost, Kenneth. 2012. "CQ Press's Major Cases: U.S. Supreme Court, 2011—2012 Term." In *Supreme Court Yearbook, 2011-2012* Washington, DC: CQ Press, 2012. Accessed at http://library.cqpress.com.proxy.lib.utk.edu:90/scyb/scyb11-1386-79303-2493502.

Jost, Kenneth. 2011. "CQ Press's Major Cases: U.S. Supreme Court, 2010—2011 Term." In *Supreme Court Yearbook, 2010-2011* Washington, DC: CQ Press, 2011. Accessed at http://library.cqpress.com.proxy.lib.utk.edu:90/scyb/scyb10-1270-72831-2396980.

Jost, Kenneth. 2010. "CQ Press's Major Cases: U.S. Supreme Court, 2009—2010 Term." Supreme Court Yearbook Online Edition, Last modified 2010. Accessed at http://library.cqpress.com.proxy.lib.utk.edu:90/scyb/scyb09-1175-63040-2281991.

Jost, Kenneth. 2009. "CQ Press's Major Cases: U.S. Supreme Court, 2008—2009 Term." Supreme Court Yearbook Online Edition, Last modified 2009. Accessed at http://library.cqpress.com.proxy.lib.utk.edu:90/scyb/scyb08-1085-52873-2185004.

Jost, Kenneth. 2008. "CQ Press's Major Cases: U.S. Supreme Court, 2007-2008 Term." Supreme Court Yearbook Online Edition, Last modified 2008. Accessed at http://library.cqpress.com.proxy.lib.utk.edu:90/scyb/scyb07-995-46668-2078042.

Kaye, Judith S. 1989. “One Judge's View of Academic Law Review Writing.” *Journal of Legal Education* 39: 313.

Kearney, Joseph D., and Thomas W. Merrill. 2000. “The Influence of Amicus Curiae Briefs on the Supreme Court.” *University of Pennsylvania Law Review* 148(3): 743-853.

Knowles, Helen J. 2009. *The Tie Goes to Freedom: Justice Anthony M. Kennedy On Liberty*. Rowman & Littlefield.

Kobylka, Joseph F. 1987. "A Court-Created Context for Group Litigation: Libertarian Groups and Obscenity." *Journal of Politics* 49: 1061-78.

Kolbert, Kathryn. 1989. *“*The Webster amicus curiae briefs: Perspectives on the abortion controversy and the role of the Supreme Court*.” American Journal of Law and Medicine* 15(2)*:* 153-168.

Krislov, Samuel. 1963. "The Amicus Curiae Brief: From friendship to advocacy." *Yale Law Journal* 72(4): 694-721.

Kurland, Philip B., and Dennis J. Hutchinson. 1983. "The business of the Supreme Court, OT 1982." *The University of Chicago Law Review*: 628-651.

Laroche, Matthew. 2009. "Is the New York State Court of Appeals Still Friendless-An Empirical Study of Amicus Curiae Participation." *Albany Law Review* 72: 701.

Liptak, Adam. 2010. The Court Under Roberts Is Most Conservative in Decades. *The New York Times.* July 24, 2010. Accessed at http://www.nytimes.com/2010/07/25/us/25roberts.html?ref=therobertscourt.

Liptak, Adam. 2013a. "Corporations Find a Friend in the Supreme Court. May 4, 2013. *The New York Times.* Accessed at http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?pagewanted=all.

Liptak, Adam. 2013b. "Roberts Pull Supreme Court to the Right Step by Step." *The New York Times.* June 27, 2013. Accessed at http://www.nytimes.com/2013/06/28/us/politics/roberts-plays-a-long-game.html?pagewanted=all&_r=0.

Lynch, Kelly J. 2004. *"*Best friends? Supreme Court law clerks on effective amicus curiae briefs*." Journal of Law and Politics* 20(1): 33-75.

Maltzman, Forrest, and J. Paul Wahlbeck. 2003. "Salience or Politics." *New York Times*: 3-6.

Martin, Andrew D. and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis* 10:134-153.

Martin, Andrew D., Kevin M. Quinn and Lee Epstein. 2005. "The Median Justice on the U.S. Supreme Court." *North Carolina Law Review* 83:1275–1322.

Martinek, Wendy L. 2006. "Amici curiae in the U.S. courts of appeals." *American Politics Research* 34 (6): 803-24.

Mauro, Tony. July 2, 2012. "For Pincus, tax issue was always at center of health care case." *The National Law Journal: Supreme Court Insider*. Accessed at http://www.law.yale.edu/documents/pdf/News_&_Events/For_Pincus_tax_issue_was_always_at_center_of_HC_case.SCI.PDF.

McAtee, Andrea, and Kevin T. McGuire. 2007. "Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the US Supreme Court?" *Law and Society Review* 41(2): 259-278.

McGuire, Kevin T. 1995. "Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success." *Journal of Politics* 57: 187.

McGuire, Kevin T. 1994. "Amici Curiae and Strategies for Gaining Access to the Supreme Court." *Political Research Quarterly* 47(4): 821-837.

McGuire, Kevin T. 1990. "Obscenity, libertarian values, and decision making in the Supreme Court." *American Politics Research* 18(1): 47-67.

McGuire, Kevin T., and James A. Stimson. 2004. "The least dangerous branch revisited: New evidence on Supreme Court responsiveness to public preferences." *Journal of Politics* 66(4): 1018-1035.

McIntosh, Wayne V., and Paul Parker. 1986. "Amici Curiae in the Courts of Appeals." Paper presented at the annual meeting of the Law and Society Association, Chicago.

Mishler, William, and Reginald S. Sheehan. 1993. "The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions." *American Political Science Review* 87(1): 87-101.

Mondak, Jeffery J., and Shannon Ishiyama Smithey. 1997. "The dynamics of public support for the Supreme Court." *The Journal of Politics* 59(04): 1114-1142.

Munford, Luther T. 1999. "When Does the Curiae Need an Amicus." *Journal of Appellate Practice and Process* 1: 279.

Nichol, Gene. 2011. "Trumping Politics: The Roberts Court and Judicial Review." *Tulsa Law Review* 46: 421-429.

Nownes, Anthony J. 2013. *Interest Groups in American Politics: Pressure and Power*. 2nd edition: New York, NY: Routledge.

O'Connor, Karen. 1980. *Women's Organizations' Use of the Courts.* Lexington, MA: Lexington Books.

O'Connor, Karen. 1983. "The amicus curiae role of the U.S. solicitor general in Supreme Court litigation." *Judicature* 66 (5): 256-264

O'Connor, Karen, and Lee Epstein. 1982. "Amicus Curiae Participation in US Supreme Court Litigation: An Appraisal of Hakman's" Folklore"." *Law and Society Review* 16(2): 311-320.

O'Connor, Karen, and Lee Epstein. 1983. "Court rules and workload: A case study of rules governing amicus curiae participation." *Justice System Journal* 8(1): 35-45.

O'Connor, Sandra Day. 1996. "Henry Clay and the Supreme Court." October 4, 1996. Speech delivered to the Henry Clay Memorial Foundation. http://www.henryclay.org/sc.htm.

Olson, Susan M. 1990. "Interest-Group Litigation in Federal District Court: Beyond the Political Disadvantage Theory." *Journal of Politics* 52(3): 854-882.

O'Neill, Michael E. 2009. "(Un)Reasonableness and the Roberts Court: The Fourth Amendment in Flux." *Cato Supreme Court Review.* Cato Institute.

O'Neill, Timothy J. 1985. *Bakke and the Politics of Equality: Friends and Foes in the Classroom of Litigation*. Middletown, CT: Wesleyan University Press.

Owens, Ryan J., and Lee Epstein. 2005. "Amici curiae during the Rehnquist years." *Judicature* 89: 127.

Pacelle, Richard L., Jr. 2006. "Amicus curiae or amicus praesidentis? Reexamining the role of the solicitor general in filing amici." *Judicature* 89 (May-June): 317–325.

Patterson, Jim. July 3, 2012. "Vanderbilt law professor influences SCOTUS health care decision." *Vanderbilt News.* Accessed at http://news.vanderbilt.edu/2012/07/aca-scotus/.

Pfeffer, Leo. 1981. "Amici in Church-State Litigation." *Law and Contemp. Probs*. 44: 83.

Puro, Steven. 1971. "The Role of Amicus Curiae in the United States Supreme Court: 1920-1966." Unpublished Ph.D. dissertation, State University of New York at Buffalo.

Rhodes, Charles. 2011. "What Conservative Constitutional Revolution? Moderating Five Degrees of Judicial Conservatism after Six Years of the Roberts Court." *Rutgers Law Review* 64: 1.

Rice, Douglas. 2012. "Friends in Low (er) Places: Interest Group Participation as Amicus Curiae in Lower Federal Courts." Unpublished manuscript.

Roberts, John. 2005. Confirmation Hearing Opening Statement to Senate Judiciary Committee. Accessed at http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/index.html?_s=PM:POLITICS.

Roberts, Matthew M.C. 2009. Ph.D. Dissertation: "The Amicus Curiae at Oral Argument: New Evidence of How and Why Third Parties Shape Supreme Court Decisions." Advisor Timothy R. Johnson. http://purl.umn.edu/57307.

Rosen, Jeffrey. 2013. "How New Is the New Textualism?." *Yale JL & Human.* 25: 43-149.

Rosen, Jeffrey. 2008. "Supreme Court Inc." *The New York Times.* March 16, 2008. Accessed at http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html?pagewanted=all.

Rushin, Robert, *and* Karen O'Connor. 1987. "Judicial lobbying: Interest groups, the Supreme Court, and issues of freedom of expression and speech." *Southeastern Political Review* 15(1): 47-65.

Sag, Matthew and Tonja Jacobi. 2009. "Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases." *Georgetown Law Journal* 98(1).

Salokar, Rebecca Mae 1992. *The Solicitor General: The Politics of Law*. Philadelphia: Temple University Press.

Samuels, Suzanne U. 2004. *First among Friends: Interest Groups, the U.S. Supreme Court, and the Right to Privacy*. Westport, CT: Praeger.

Savage, David. 2010. *Guide to the U.S. Supreme Court*, 5th ed. Washington, DC: CQ Press.

Schattschneider, E. E. 1960. *The Semisovereign People.* New York: Holt, Rinehart, and Winston.

Schlozman, Kay Lehman, and John T. Tierney. 1986. *Organized interests and American democracy*. New York: Harper & Row.

Schmidt, Patrick D., and David A. Yalof. 2004. "The 'Swing Voter' Revisited: Justice Anthony Kennedy and the First Amendment Right of Free Speech." *Political Research Quarterly* 57: 209–217.

SCOTUSblog, June 30, 2012. "Memorandum: End-of-Term Statistical Analysis – October Term 2011." Accessed at http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/SCOTUSblog_Summary_Memo_OT11.pdf.

Segal, Jeffrey A. 1986. "Supreme Court justices as human decision makers: An individual-level analysis of the search and seizure cases." *Journal of Politics* 48 (4): 938-955.

Segal, Jeffrey A. 1988. "Amicus Curiae Briefs by the Solicitor General During the Warren and Burger Courts." *Western Political Quarterly* 41: 135.

Segal, Jeffrey A., and Harold J. Spaeth. 1993. *The Supreme Court and the Attitudinal Model.* Cambridge, UK: Cambridge University Press.

Segal, Jeffrey A., and Harold J. Spaeth. 1996. "The influence of stare decisis on the votes of United States Supreme Court justices." *American Journal of Political Science*: 971-1003.

Segal, Jeffrey A., and Harold. J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge, UK: Cambridge University Press.

Segal, Jeffrey. A., and A.D. Cover. 1989. "Ideological values and the votes of US Supreme Court justices." *The American Political Science Review*: 557-565.

Sheehan, Reginald S., William Mishler, and Donald R. Songer. 1992. "Ideology, status, and the differential success of direct parties before the Supreme Court." *The American Political Science Review*: 464-471.

Shortell, Christopher. 2012. "The End of the Federalism Five? Statutory Interpretation and the Roberts Court." *Publius* 42 (3): 516-537.

Silverstein, Mark, & Ginsberg, Benjamin. 1987. The Supreme Court and the new politics of judicial power. *Political Science Quarterly* 102(3): 371-388.

Simpson, Reagan W., and Vasaly, Mary R. 2004. *The Amicus Brief: How to Be a Good Friend of the Court*. 2nd edition. Chicago: American Bar Association Press.

Spaeth, Harold J. 2012. The United States Supreme Court Judicial Database 1946–2011 terms. 2012 Release 01. *East Lansing, MI: Michigan State University*. Accessed at http://scdb.wustl.edu/.

Spaeth, Harold J. 2013. The United States Supreme Court Judicial Database 1946–2011 terms. 2013 Release 01. *East Lansing, MI: Michigan State University*. Accessed at http://scdb.wustl.edu/.

Spaeth, Harold J., and Jeffrey A. Segal. 1999. *"*Majority rule or minority will: Adherence to precedent on the U.S. Supreme Court*."* Cambridge, UK: Cambridge University Press.

Simard, Linda S. 2007. "Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism." *Review of Litigation* 27: 669.

Simmons, Omari S. 2009. "Picking friends from the crowd: Amicus participation as political symbolism." *Connecticut Law Review* 42(1): 185.

Solberg, Rorie S. and E.N. Waltenburg. 2006. "Why Do Interest Groups Engage the Judiciary? Policy Wishes and Structural Needs." *Social Science Quarterly* 87: 558–572.

Solowiej, Lisa A., and Paul M. Collins, Jr. 2009. "Counteractive Lobbying in the U.S. Supreme Court." *American Politics Research* 37(4): 670-699.

Songer, Donald R. and Ashlyn Kuersten. 1995. "The Success of Amici in State Supreme Courts." *Political Research Quarterly* 48(1) 31-42.

Songer, Donald R., Ashlyn Kuersten, and Erin Kaheny. 2000. "Why the Have Don't Always Come Out Ahead: Repeat Players Meet Amici Curiae for the Disadvantaged." *Political Research Quarterly* 53(3): 537-556.

Songer, Donald R., and Reginald S. Sheehan. 1993. "Interest Group Success in the Courts: Amicus Participation in the Supreme Court." *Political Research Quarterly* 46(2): 339-354.

Songer, Donald R., and Susan J. Tabrizi. 1999. "The religious right in court: The decision making of Christian evangelicals in state supreme courts." *The Journal of Politics* 61(02): 507-526.

Spriggs, James F., and Paul J. Wahlbeck. 1997. "Amicus Curiae and the Role of Information at the Supreme Court." *Political Research Quarterly* 50(2): 365-386.

Spriggs, James F., Forrest Maltzman, and Paul J. Wahlbeck. 1999. "Bargaining on the US Supreme Court: Justices' responses to majority opinion drafts." *Journal of Politics* 61: 485-506.

Stimson, James A., Michael B. MacKuen, and Robert S. Erikson. 1995. "Dynamic Representation." *American Political Science Review*: 543-565.

Sungaila, M.C. March 2010. "A Friend in Need is a Friend Indeed: The Increased Prevalence and Influence of Amicus Briefs." *International Association of Defense Counsel, Appellate Practice Newsletter.*

Sunstein, Cass R. 2003. *Why Societies Need Dissent*. Harvard University Press.

Starr, Kenneth. March 18, 2011. Address at the Pepperdine Judicial Law Clerk Institute.

Time Magazine. June 18, 2012. "The Decider." Accessed at http://content.time.com/time/covers/0,16641,20120618,00.html.

Toobin, Jeffrey. May 25, 2009. "No More Mr. Nice Guy: The Supreme Court's Stealth Hard-Liner." *The New Yorker*. Accessed at http://www.newyorker.com/reporting/2009/05/25/090525fa_fact_toobin.

Unah, Isaac, and Ange-Marie Hancock. 2006. "U.S. Supreme Court Decision Making, Case Salience, and the Attitudinal Model." *Law and Policy* 28(3): 295- 320.

Vose, Clement E. 1958. "Litigation as a Form of Pressure Group Activity." *Annals of the American Academy of Political and Social Science* 319: 20-31.

Wasby, Stephen L. 1983. "Interest Groups and Litigation." *Policy Studies Journal* 11: 657–670.

Wasby, Stephen L. 1984. "How Planned Is "Planned Litigation?" *Law and Social Inquiry* 9(1): 83-138.

Wasby, Stephen L. 1995. *Race relations litigation in an age of complexity*. Charlottesville: University Press of Virginia.

Wasserman, Howard M. 2012. "The Roberts Court and the Civil Procedure Revival." *Review of Litigation* 31: 311-315.

Wheeler, Stanton, Bliss Cartwright, Robert A. Kagan, and Lawrence M. Friedman. 1987. "Do the'Haves' Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970." *Law and Society Review* 21: 403.

Winkler, Adam. June 28, 2012. "The Roberts Court is Born." Accessed at http://www.scotusblog.com/2012/06/the-roberts-court-is-born/.

Wohl, Alexander. 1996. "Friends with Agendas: Amicus Curiae Briefs May Be More Popular Than Persuasive." *American Bar Association Journal* 46.

Wolpert, Robin M. 1991, April. "Explaining and Predicting Supreme Court Decision-Making: The Gender Discrimination Cases, 1971-1987." In *annual meeting of the Midwest Political Science Association, Chicago*.

Appendix

Table A.1. List of Cases Attracting At Least 25 Amicus Briefs, 2007-2011

Rank	Case Name and Docket Number	Term	Vote	Decision Direction	Number of Amicus Briefs	Liberal - Conservative Amicus Brief Difference	Holding*
1	*Department of Health and Human Services v. Florida* 11-398	2011	5-4	Liberal	87	-16	Upholds Affordable Care Act; narrows enforcement of Medicaid expansion (7-2)
2	*Bilski v. Kappos* 08-964	2009	9-0	Liberal	69	6	Allows patents for some "business methods"
3	*District of Columbia v. Heller* 07-290	2007	5-4	Conservative	68	-28	Strikes down D.C. gun ban
4	*Citzens United v. Federal Election Commission* 08-205	2009	5-4	Conservative	53	-17	Permits corporations to spend own money on political campaigns
5	*Florida v. Department of Health and Human Services* 11-400	2011	5-4	Liberal	52	6	Upholds Affordable Care Act; narrows enforcement of Medicaid expansion (7-2)
6	*McDonald v. Chicago* 08-1521	2009	5-4	Conservative	51	-15	Applies Second Amendment gun rights to state and local governments
7	*Microsoft v. i4i Limited Partnership* 10-290	2010	8-0	Liberal	48	5	Patent Act requires an invalidity defense to be proved by clear and convincing evidence

Table A.1. Continued

Rank	Case Name and Docket Number	Term	Vote	Decision Direction	Number of Amicus Briefs	Liberal - Conservative Amicus Brief Difference	Holding*
8	*Arizona v. United States* 11-182	2011	5-3	Liberal	47	4	Strikes three parts of state immigration law; allows immigration status checks (8-0)
9	*Crawford v. Marion County Election Board* 07--21	2007	6-3	Conservative	41	8	Upholds state voter ID law
9	*Indiana Democratic Party v. Rotika* 07--25	2007	6-3	Conservative	41	8	Upholds state voter ID law
11	*Christian Legal Society v. Martinez* 08-1371	2009	5-4	Conservative	39	6	Upholds public law school's nonrecognition of campus group that excludes gays
12	*American Electric Power Co. v. Connecticut* 10-174	2010	8-0	Conservative	33	-13	Bars climate change suit in federal court against major electric utilities
13	*Brown v. Entertainment Merchants Association* 08-1448	2010	7-2	Liberal	31	21	Strikes down California law banning the sale or rental of violent video games to minors
13	*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* 10-553	2011	9-0	Liberal	31	11	Exempts religious organizations from antidiscrimination laws in hiring of clergy
15	*Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.* 06-43	2007	5-3	Conservative	30	0	Limits security fraud suits against companies vendors, customers

Table A.1. Continued

Rank	Case Name and Docket Number	Term	Vote	Decision Direction	Number of Amicus Briefs	Liberal - Conservative Amicus Brief Difference	Holding*
15	*Wyeth v. Levine* 06-1249	2008	6-3	Conservative	30	-14	Allows failure-to-warn suits in state court against drugmakers despite federal regulation
15	*Salazar v. Buono* 08-472	2009	5-4	Conservative	30	-8	Deflects Establishment Clause challenge to a Christian cross erected on public land as a memorial to veterans
18	*Quanta Computer, Inc. v. LG Electronics, Inc.* 06-937	2007	9-0	Liberal	29	-3	Extends the doctrine of patent exhaustion to method patents, and removes the ability of patentees to rely on patent law to restrict authorized sales of products embodying their inventions
18	*Wal-Mart Stores, Inc. v. Dukes* 10-277	2010	5-4	Conservative	29	-1	Rejects class action sex discrimination suit against Wal-Mart
20	*National Federation of Independent Business v. Sebelius* 11-393	2011	5-4	Liberal	29	-1	Upholds Affordable Care Act; narrows enforcement of Medicaid expansion (7-2)

Table A.1. Continued

Rank	Case Name and Docket Number	Term	Vote	Decision Direction	Number of Amicus Briefs	Liberal - Conservative Amicus Brief Difference	Holding*
21	*Ricci v. DeStefano* 07-1428	2008	5-4	Conservative	28	1	Requires employers to have a "substantial basis" to fear disparate-impact liability before adopting race-conscious policies to avoid liability
21	*Alford v. Greene* 09-1478	2010	7-2	Liberal	28	-10	A government official can ask the USSC to review a lower court's ruling that he violated the Constitution, even if the lower court ultimately concluded that he could not be sued for that conduct.
23	*Ricci v. DeStefano* 08-328	2008	5-4	Conservative	27	0	Requires employers to have a "substantial basis" to fear disparate-impact liability before adopting race-conscious policies to avoid liability
23	*Camreta v. Greene* 09-1454	2010	7-2	Liberal	27	-10	A government official can ask the USSC to review a lower court's ruling that he violated the Constitution, even if the lower court ultimately concluded that he could not be sued for that conduct.

Table A.1. Continued

Rank	Case Name and Docket Number	Term	Vote	Decision Direction	Number of Amicus Briefs	Liberal - Conservative Amicus Brief Difference	Holding*
23	*Sorrell v. IMS Health Inc.* 10-779	2010	6-3	Liberal	27	7	Vermont's Prescription Confidentiality Law is subject to heightened judicial scrutiny because it imposes content- and speaker-based burdens on protected expression
23	*Mayo Collaborative Services v. Prometheus Laboratories, Inc.* 10-1150	2011	9-0	Liberal	27	0	Process patents that incorporate laws of nature are not eligible for patents
23	*First American Financial Corporation v. Edwards* 10-708	2011	9-0	Unspecifiable	27	0	USSC dismissed the writ of certiorari as improvidently granted
28	*Boumediene v. Bush* 06-1195	2007	5-4	Liberal	26	20	Strikes down Military Commissions Act; extends habeus corpus to Guantanamo detainees
28	*Khalad A.F. Al Odah v. United States* 06-1196	2007	5-4	Liberal	26	20	Strikes down Military Commissions Act; extends habeus corpus to Guantanamo detainees

Table A.1. Continued

Rank	Case Name and Docket Number	Term	Vote	Decision Direction	Number of Amicus Briefs	Liberal - Conservative Amicus Brief Difference	Holding*
28	*Northwest Austin Municipal Utility District No. 1 v. Holder* 08-322	2008	8-1	Liberal	26	0	Expands eligibility for municipalities to "bail out" of preclearance requirement in Voting Rights Act; constitutional challenge left unresolved
28	*Doe v. Reed* 09-559	2009	8-1	Conservative	26	7	Upholds disclosure law for ballot measure petition signers
28	*AT&T v. Concepcion* 09-893	2010	5-4	Conservative	26	4	Allows companies to bar class actions under arbitration agreements
33	*Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* 10-238	2010	5-4	Conservative	25	11	Strikes down "matching-fund" provision in Arizona public campaign financing law

*****Description of holding is borrowed from Jost's (2012, 2011, 2010, 2009, 2008) list of major cases published annually in CQ Press' *Supreme Court Yearbook.*

Table A.2. List of Cases Attracting At Least 125 Amicus Cosigners, 2007-2011

Rank	Case Name and Docket Number	Term	Vote	Decision Direction	Number of Amicus Cosigners	Liberal - Conservative Amicus Cosigner Difference	Holding*
1	*Department of Health and Human Services v. Florida* (11-398)	2011	5-4	Liberal	1,928	-94	Upholds Affordable Care Act; narrows enforcement of Medicaid expansion (7-2)
2	*McDonald v. Chicago* (08-1521)	2009	5-4	Conservative	1,622	-1,269	Applies Second Amendment gun rights to state and local governments
3	*Florida v. Department of Health and Human Services* (11-400)	2011	5-4	Liberal	1,413	348	Upholds Affordable Care Act; narrows enforcement of Medicaid expansion (7-2)
4	*District of Columbia v. Heller* (07-290)	2007	5-4	Conservative	920	-482	Strikes down D.C. gun ban
5	*Boumediene v. Bush* (06-1195)	2007	5-4	Liberal	625	603	Strikes down Military Commissions Act; extends habeus corpus to Guantanamo detainees
5	*Khalad A.F. Al Odah v. United States* (06-1196)	2007	5-4	Liberal	625	603	Strikes down Military Commissions Act; extends habeus corpus to Guantanamo detainees
7	*Arizona v. United States* (11-182)	2011	5-3	Liberal	528	219	Strikes three parts of state immigration law; allows immigration status checks (8-0)

Table A.2. Continued

Rank	Case Name and Docket Number	Term	Vote	Decision Direction	Number of Amicus Cosigners	Liberal - Conservative Amicus Cosigner Difference	Holding*
8	*National Federation of Independent Business v. Sebelius* (11-393)	2011	5-4	Liberal	450	-181	Upholds Affordable Care Act; narrows enforcement of Medicaid expansion (7-2)
9	*Christian Legal Society v. Martinez* (08-1371)	2009	5-4	Conservative	249	7	Upholds public law school's nonrecognition of campus group that excludes gays
10	*Miller v. Alabama* (10-946)	2011	5-4	Liberal	237	191	Bars mandatory life-without-parole sentence for juvenile muderers
10	*Jackson v. Hobbs* (10-947)	2011	5-4	Liberal	237	191	Bars mandatory life-without-parole sentence for juvenile muderers
12	*Republic of Iraq v. Simon* (08-539)	2008	9-0	Conservative	228	226	U.S. Courts do not have jurisdiction over Iraq in claims involving alleged misdeeds that occurred during Saddam Hussein's regime

Table A.2. Continued

Rank	Case Name and Docket Number	Term	Vote	Decision Direction	Number of Amicus Cosigners	Liberal - Conservative Amicus Cosigner Difference	Holding*
13	*Republic of Iraq v. Beaty* (07-1090)	2008	9-0	Conservative	217	215	U.S. Courts do not have jurisdiction over Iraq in claims involving alleged misdeeds that occurred during Saddam Hussein's regime
14	*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (10-553)	2011	9-0	Liberal	195	-31	Exempts religious organizations from antidiscriminatio n laws in hiring of clergy
15	*Citzens United v. Federal Election Commission* (08-205)	2009	5-4	Conservative	192	-22	Permits corporations to spend own money on political campaigns
16	*Brown v. Entertainmen t Merchants Association* (08-1448)	2010	7-2	Liberal	182	146	Strikes down California law banning the sale or rental of violent video games to minors

Table A.2. Continued

Rank	Case Name and Docket Number	Term	Vote	Decision Direction	Number of Amicus Cosigners	Liberal - Conservative Amicus Cosigner Difference	Holding*
17	*Northwest Austin Municipal Utility District No. 1 v. Holder* (08-322)	2008	8-1	Liberal	179	0	Expands eligibility for municipalities to "bail out" of preclearance requirement in Voting Rights Act; constitutional challenge left unresolved
18	*Microsoft v. i4i Limited Partnership* (10-290)	2010	8-0	Liberal	178	-27	Patent Act requires an invalidity defense to be proved by clear and convincing evidence
19	*Bilski v. Kappos* (08-964)	2009	9-0	Liberal	166	46	Allows patents for some "business methods"
19	*American Electric Power Co. v. Connecticut* (10-174)	2010	8-0	Conservative	166	4	Bars climate change suit in federal court against major electric utilities
21	*Kennedy v. Louisiana* (07-343)	2007	5-4	Liberal	165	89	Bars death penalty for child rape
22	*Speaker of the Arizona House of Representatives v. Flores* (08-294)	2008	5-4	Conservative	152	24	State can determine its own requirements with regard to English Language Learner instruction

Table A.2. Continued

Rank	Case Name and Docket Number	Term	Vote	Decision Direction	Number of Amicus Cosigners	Liberal - Conservative Amicus Cosigner Difference	Holding*
23	*Sorrell v. IMS Health Inc.* (10-779)	2010	6-3	Liberal	146	-58	State's Prescription Confidentiality Law is subject to heightened judicial scrutiny because it imposes content- and speaker-based burdens on protected expression
24	*Cuomo v. The Clearinghouse Association, LLC.* (08-453)	2008	5-4	Conservative	145	0	Allows state enforcement of fair-lending laws against national banks despite federal regulation
25	*Doe v. Reed* (09-559)	2009	8-1	Conservative	144	7	Upholds disclosure law for ballot measure petition signers
26	*Exxon Shipping Co. v. Baker* (07-219)	2007	5-3	Conservative	143	103	Cuts punitive damages for *Exxon Valdez* oil spill
27	*Snyder v. Phelps* (09-751)	2010	8-1	Liberal	142	-51	Allows peaceful protests at military funerals
28	*Crawford v. Marion County Election Board* (07-21)	2007	6-3	Conservative	141	60	Upholds state voter ID law

Table A.2. Continued

Rank	Case Name and Docket Number	Term	Vote	Decision Direction	Number of Amicus Cosigners	Liberal - Conservative Amicus Cosigner Difference	Holding*
28	*Indiana Democratic Party v. Rotika* (07-25)	2007	6-3	Conservative	141	60	Upholds state voter ID law
28	*CBOCS West, Inc. v. Humphries* (06-1431)	2007	7-2	Liberal	141	135	Allows anti-retaliation suit under Civil-War era civil rights law
28	*United States v. Stevens* (08-769)	2009	8-1	Liberal	141	28	Strikes down federal "animal cruelty" law
32	*Graham v. Florida* (08-7412)	2009	6-3	Liberal	139	69	Bars life without parole for juveniles
33	*AT&T v. Concepcion* (09-893)	2010	5-4	Conservative	135	75	Allows companies to bar class actions under arbitration agreements
34	*Wyeth v. Levin* (06-1249)	2008	6-3	Conservative	131	-101	Allows failure-to-warn suits in state court against drugmakers despite federal regulation
35	*Horne v. Flores* (08-289)	2008	5-4	Conservative	129	41	State can determine its own requirements with regard to English Language Learner instruction

Table A.2. Continued

Rank	Case Name and Docket Number	Term	Vote	Decision Direction	Number of Amicus Cosigners	Liberal - Conservative Amicus Cosigner Difference	Holding*
36	*Maples v. Thomas* (10-63)	2011	7-2	Liberal	126	84	Death row inmate showed the requisite "cause" to excuse his procedural default, which occurred when his lawyer missed a filing deadline

*****Description of holding is borrowed from primarily from Jost's (2012, 2011, 2010, 2009, 2008) list of major cases published annually in CQ Press' *Supreme Court Yearbook.* Some holding descriptions also provided by http://www.scotusblog.com/.

Table A.3. Base Logit Model of the Impact of Amici on Ideological Direction of Justice Votes at the Roberts Court, 2007 – 2011 Terms

Variable	MLE Coefficient	Odds Ratio	Marginal Effects
Amicus Brief Difference	0.051 (.011)***	1.052	5.8%
Amicus Cosigner Difference	-0.001 (.000)	0.999	-1.3%
SG Lib Amicus Brief	0.623 (.107)***	1.865	5.7%
SG Con Amicus Brief	-0.761 (.105)***	0.467	-7.3%
Prestigious Amicus Difference	0.066 (.034)*	1.068	2.0%
Ideology	1.935 (.155)***	6.927	11.53%
Resource Difference	0.057 (.009)***	1.059	6.5%
Lower Court Direction	-0.747 (.076)***	0.474	-9.5%
Constant	-0.144 (.088)		
N	3,264		
Prob > chi2	0		
Percent Correctly Predicted	65.66		
Percent Reduction in Error	28.55		

Dependent variable indicates the ideological direction of the individual justices' vote (1 = liberal, 0 = conservative). Numbers in parentheses indicated standard errors. *p<.05, **p<.01, ***p<.001 (one-tailed).

Table A.4. Predicted Probabilities of Observing a Liberal Justice Vote Across Range of Judicial Moderation and Amicus Brief Advantage Values for Primary All-Inclusive Model

Lib-Con Amicus Brief Diff	**Percent Probability of Liberal Vote: Primary All-Inclusive Model (Model 1)**				
	Least Moderate Justice ***MQModeration=0*** Thomas(.65)	**Less Moderate Justice** ***MQModeration =25th Percentile=2.0*** Stevens(1.99) Souter(2.15) Scalia(1.69)	**Mean Moderate Justice** ***MQModeration =2.43*** Ginsburg(2.51) Alito(2.61)	**More Moderate Justice** ***MQModeration =75th Percentile=2.84*** Kagan(2.86) Sotomayor(2.80) Roberts (2.89) Breyer (2.66)	**Most Moderate Justice** ***MQModeration =4.02*** Kennedy(4.02)
-15	36.49	25.02 *	22.87 *	20.98 *	16.15 *
-10	38.22	29.39 *	27.64 *	26.06 *	21.82 *
-5	39.98	34.19 *	32.99 *	31.88 *	28.78 *
-3	40.69	36.21 *	35.27 *	34.39 *	31.92 *
-1	41.11	38.28	37.61 *	36.99 *	35.22 *
0	41.77	39.33	38.81 *	38.32 *	36.93
0.57 (Mean)	41.97	39.94	39.50 *	39.09	37.92
1	42.13	40.39	40.02 *	39.67	38.67
3	42.85	42.54 *	42.48 *	42.42 *	42.24
5	43.57	44.72 *	44.97 *	45.21 *	45.89 *
10	45.40	50.24 *	51.29 *	52.27 *	55.12 *
15	47.24	55.75 *	57.57 *	59.25*	64.01 *

*Prediction is significant at $p < .05$.

Table A.5. Predicted Probabilities of Observing a Liberal Justice Vote Across Range of Judicial Moderation and Amicus Brief Advantage Values for Salient Cases Model

Lib-Con Amicus Brief Diff	**Percent Probability of Liberal Vote: Salient Cases (Model 6)**				
	Least Moderate Justice ***MQModeration=0*** Thomas(.65)	**Less Moderate Justice** ***MQModeration =25th Percentile=2.0*** Stevens(1.99) Souter(2.15) Scalia(1.69)	**Mean Moderate Justice** ***MQModeration =2.43*** Ginsburg(2.51) Alito(2.61)	**More Moderate Justice** ***MQModeration =75th Percentile=2.84*** Kagan(2.86) Sotomayor(2.80) Roberts(2.89) Breyer(2.66)	**Most Moderate Justice** ***MQModeration =4.02*** Kennedy(4.02)
-15	64.04	47.21	43.41*	40.11*	30.85*
-10	63.01	51.08	48.36*	45.95*	38.91*
-5	61.98	54.94	53.34*	51.91*	47.63
-3	61.56	56.47	55.31*	54.29*	51.19
-1	61.15	57.99	57.28*	56.64	54.73
0	60.94	58.74	58.25*	57.81	56.49
0.53 (Mean)	60.82	59.14	58.76*	58.43	57.42
1	60.73	59.49	59.22*	58.97	58.23
3	60.30	60.98	61.13*	61.26	61.65
5	59.88	62.44	63.00*	63.5*	64.96
10	58.88	66.00	67.52*	68.83*	72.58*
15	57.74	69.39	71.73*	73.71*	79.08*

*Prediction is significant at $p < .05$.

VITA

David Hooper Scott was born in Oklahoma City, Oklahoma, raised as a child in Dallas, Texas, and spent his teenage and collegiate years in Nashville, Tennessee. David went to Lipscomb University, where he received his Bachelor of Arts in Philosophy in 2002, graduating in the Honors Program and as Co-Valedictorian. David was a four year member of Lipscomb's Intercollegiate Cross Country team, being named the Lipscomb Men's "Most Valuable Runner" his junior and senior seasons, as well as NCAA Verizon First Team Academic All-American his senior year.

David received his Juris Doctorate from Pepperdine University School of Law in Malibu, California in 2006, along with a Master's Degree in Dispute Resolution from Pepperdine University in 2007. While at Pepperdine, David competed on the Interschool Appellate Advocacy Team, and won second place at Pepperdine's 2004 Armand Arabian Oral Advocacy competition. He also served as the Law Student Ministries coordinator for two years at Pepperdine School of Law.

David worked as Assistant Director of Lipscomb University's Institute for Conflict Management in 2007-2008. In July 2008, David married his wife, Natalie, and moved to Greeneville, Tennessee, where he joined the Milligan & Coleman law firm, practicing civil law in the areas of insurance and municipal defense. In August 2009, David enrolled as a full-time graduate student at the University of Tennessee – Knoxville to pursue a Ph.D. in Political Science. He was named a Graduate Teaching Associate. During his four years as a GTA at UT, David taught *U.S. Government and Politics, Introduction to Political Science, Law in American Society*, and *Judicial Process and Policymaking*. While a graduate student at UT, he also taught courses an adjunct instructor at Carson Newman University (*American Government*), at

Tusculum College (*Civil Rights & Liberties*), and at Walters State Community College (*Introduction to American Government*).

David will graduate from UT with his Ph.D. in Political Science in December 2013. His major field of doctoral study is American Politics with a focus in Public Law, and his cross field concentration is Public Policy. During his third year in the program, David was awarded the Otis Stephens Fellowship in Public Law. His primary research interest pertains to interest group influence on the judicial process. Other research interests include American constitutional law, and the influence of religion on the American political and legal landscapes.