

THE PENNSYLVANIA STATE UNIVERSITY  
SCHREYER HONORS COLLEGE

DEPARTMENT OF POLITICAL SCIENCE

ACLU INFLUENCE ON SUPREME COURT DECISIONS THROUGH AMICUS CURIAE  
BRIEFS

SHANNON DANIELLE AZZARO  
Spring 2012

A thesis  
submitted in partial fulfillment  
of the requirements  
for baccalaureate degrees  
in Political Science and English  
with honors in Political Science

Reviewed and approved\* by the following:

Christopher Zorn  
Liberal Arts Research Professor  
Thesis Supervisor

Michael Berkman  
Professor and Director of Undergraduate Studies  
Honors Adviser

\* Signatures are on file in the Schreyer Honors College.

## **ABSTRACT**

I examine the factors that affect the influence of interest groups, specifically the ACLU, on the Supreme Court's decisions through amicus curiae briefs from 1969-2005. As one of the most active advocates of civil rights and liberties, the ACLU has historically played a large role in shaping the Court's opinions. I explore the factors that have led the ACLU to continue to play an important role in the court: brief effectiveness, filing strategy, recognition, and the ACLU's case-selection strategy. I examine when the ACLU files briefs and analyzing brief effectiveness by measuring success rates against the success rates of cases without an ACLU brief. In addition, I measure success rates across issue areas and when the ACLU files to affirm or reverse the lower court's decision. I draw a comparison between cases in which the ACLU files alone and cases in which the ACLU files with others as a part of a coalition. In order to better depict the ACLU's effectiveness on the micro-level, I also examine success at the individual justice-vote level. These quantitative measures are interwoven with insight into the ACLU's history and inner workings drawn from an interview with the legal director of the ACLU and a qualitative analysis of the ACLU's filing strategy.

## Table of Contents

<b>List of Figures</b> .....	ii
<b>List of Tables</b> .....	iii
<b>Acknowledgements</b> .....	v
<b>Introduction</b> .....	1
<b>Amicus Briefs in the U.S. Supreme Court</b> .....	4
<b>Analysis of ACLU Filing Trends in Issue and Chief Justice</b> .....	9
Hypotheses .....	9
Methods .....	10
Results .....	11
Discussion.....	14
<b>ACLU Effectiveness in Aggregate (Case) Outcomes</b> .....	16
Hypotheses .....	16
Methods .....	16
Results .....	17
Discussion.....	24
<b>ACLU Influence on Justices' Votes</b> .....	25
Hypotheses .....	25
Methods .....	26
Results .....	26
Discussion.....	32
<b>Qualitative Analysis with Interview of Legal Director of the ACLU</b> .....	33
<b>Conclusion</b> .....	38
<b>References</b> .....	41
<b>Appendices</b> .....	44
<b>VITA</b> .....	57

**LIST OF FIGURES**

**Figure 1: Equation of Influence of ACLU .....9**

**Figure 2: Number of Amicus Curiae Briefs Filed by the ACLU by Term, 1969-2005  
..... 11**

**Figure 3: Frequency of ACLU Amicus Briefs, by Term and Coalition..... 12**

**Figure 4: Proportion of ACLU Briefs Filed Alone, By Term ..... 13**

**Figure 5: Number of State/ Local Affiliates Involved in Each Case, By Chief Justice  
..... 13**

**Figure 6: Success Rates of Likely Issue Cases based on the ACLU Briefs Goal to  
Reverse of Affirm the Lower Court’s Disposition ..... 24**

**Figure 7: Liberal Voting Percentage Comparison by Justice.....27**

**Figure 8: Comparison of Odds Ratio and Ideology ..... 30**

**LIST OF TABLES**

**Table 1: The ACLU Has a Higher Success Rate in Burger Court than Rehnquist Court. .... 14**

**Table 2: ACLU Brief Percentages by Issue Area..... 17**

**Table 3: ACLU Brief Filing and Coalition Patterns by Issue Area. .... 18**

**Table 4: Cases with an ACLU Brief Result in More Liberal Decisions..... 19**

**Table 5: The ACLU is More Successful When Filing as a Member of a Coalition..... 19**

**Table 6: Direction of Lower Court Decision being Reviewed..... 20**

**Table 7: The ACLU is Most Successful in Cases with a Conservative Lower Court Disposition Where the ACLU is Asking to Reverse. .... 20**

**Table 8: The ACLU is Most Influential in Cases with a Liberal Lower Court Disposition Where the ACLU is Asking to Affirm..... 20**

**Table 9: Logistic Regression of ACLU Brief Influence on Liberal Disposition, More Influential on Cases Where the Lower Court Disposition is Liberal (Asking to Affirm) ..... 21**

**Table 10: Decision Direction by Issue Area (Likely Issue) for All Supreme Court Cases..... 23**

**Table 11: Decision Direction by Issue Area (Likely Issue) for Cases in which ACLU files a Brief..... 23**

**Table 12: Decision Direction by Issue Area (Likely Issue) for Cases in which ACLU wants Affirmance..... 23**

**Table 13: Decision Direction by Issue Area (Likely Issue) for Cases in which ACLU wants Reversal. .... 23**

**Table 14: Logistic Regression of ACLU Brief Influence on Liberal Vote: ACLU More Influential when Lower Court Disposition is Liberal (Seeking to Affirm). .... 28**

**Table 15: Effect of Presence of ACLU Brief on Individual Justice Votes in the Liberal Direction and Justice Segal-Cover Ideology Score. .... 29**

## **Acknowledgements**

I would like to thank my Thesis Supervisor, Professor Christopher Zorn, for his guidance and support, without which this thesis would not be possible. His skill and understanding in the area has been vital to the development of my project. Also, my Honors Advisor, Professor Michael Berkman, has been invaluable throughout every stage of my project and academic career.

I would like to extend a special thank you to Steven Shapiro, Legal Director of the ACLU, for allowing me to interview him as a part of the qualitative section of my project.

## **Introduction**

Historically, amicus curiae (“Friend of the Court”) briefs have been seen as the “catch-all device for dealing with some of the difficulties in the common law system of adversary proceeding” (Krislov 720). Recently, amicus curiae briefs have done just that by attracting a diverse pool of amici on both sides of every case. Although it is essentially up to the parties and the Court as to whether they allow amici, most welcome the support and the Court may decide to hear amici regardless of the parties’ decisions. There has been an upward trend in the number of amicus curiae briefs filed, with more cases carrying amici and more amici filing jointly or as a part of a coalition with other groups with related interests or an interest in the issues of the case. From 1946 to 1955, 23.45% of cases in the Supreme Court had amicus briefs whereas from 1986 to 1995, 85.1% had amicus briefs (Kearney & Merrill). This increase may be related to an increased understanding of the usefulness and effectiveness of amicus curiae briefs as a tool to advance the interests of the parties of Supreme Court cases and the special interest groups which support them. Interest groups inform the justices of the issues surrounding cases and any information that might be useful to reaching a decision. With this fourfold increase in utilization of amicus briefs also comes an increase in the importance of understanding if, when, and how they influence court decisions and which organizations exert the most influence on such decisions when they file.

The ACLU was founded in 1920, and was a trailblazer in First Amendment rights and Civil Liberties. According to the ACLU’s website,

The U.S. Supreme Court had yet to uphold a single free speech claim when Roger Baldwin, Crystal Eastman, Albert DeSilver and others formed the ACLU in 1920.

Activists languished in jail for distributing anti-war literature. State sanctioned violence against African Americans was routine. Women won the right to vote only in August of that year. Constitutional rights for lesbians and gays, bisexual and transgender people in those days were unthinkable (American Civil Liberties Union, 2012).

Largely untested, the rights and liberties guaranteed to all citizens in the Constitution were vague and difficult to understand. Liberties were not guaranteed to all, especially not to all genders, races, sexual orientations, and people with disabilities. The nuances of freedom of speech and religion as well as the right to privacy remained unsettled in 1920.

Since then, principles of individual freedom, protection against arbitrary government action, freedom of religion, freedom of speech and press, due process of law, equal protection and privacy have become codified in our laws and their protections widely enforced. The advancement of civil liberties over the past century represents one of the most significant developments in American history, and the ACLU has been integral to this process (American Civil Liberties Union, 2012).

The ACLU has been involved in major cases from the Scopes trial to *Brown v. Board of Education* to *Roe v. Wade* and beyond. Major victories for civil liberties, free speech, and privacy have been established with the help of the ACLU in the courtroom. Outside of litigation, which the ACLU participates in regularly, the ACLU frequently files amicus curiae briefs to express their views on a case (at a rate of about 10-15 per year).

Due to its historically established reputation and highly respected status in the Court, the ACLU is an ideal group to examine to determine the amount of influence amicus curiae can potentially have on the Supreme Court. Are civil liberties cases in the Supreme Court accompanied by amicus curiae briefs by the ACLU more likely to have a favorable ruling? This question is important because it is relevant to understanding how a non-profit interest group or organization can influence Supreme Court decisions. The ACLU is one of the most influential special interest groups existing today, and historically it has contributed greatly to shaping the civil liberties framework that now stands as precedent. In a changing world with more and more civil liberties issues arising, it is important to see how justices are influenced by the filing of briefs as well as in which types of civil liberties cases the briefs are most effective. By examining a period spanning two ideologically different courts across five fast-changing decades in the Court as well as the United States, I will be able to determine how justices of different ideologies are influenced by amicus curiae briefs and use that to project future influence as well.

I will first examine the filing patterns of the ACLU with respect to number of briefs filed each year, filing by issue area, coalitional filings, and filing patterns by Court. Then, I analyze the ACLU's success rates in cases in which they file amicus curiae briefs (in comparison to other cases in the same issue areas in which they do not file a brief). Specifically, I analyze success and influence by issue area, coalition, and lower court disposition. At this point, I transition to examining individual votes rather than cases. In my analysis of the justice-centered data, I examine the ACLU's influence on individual Supreme Court justices. I perform a logistic regression of justices' votes on ACLU participation. I examine this effect for justices with different (Segal-Cover) ideology scores in order to determine if the effect is different for different justice ideologies. Segal-Cover ideology scores measure how liberal or conservative the

justice is based upon their voting record upon their nomination to the Supreme Court. I conclude with a qualitative section analyzing ACLU brief filing strategy drawn from an interview with their legal director.

### **Amicus Briefs in the U.S. Supreme Court**

Although many have examined amicus curiae briefs and special interest groups' influence in the Supreme Court, very few have done more than touch on the influence of highly active groups such as the ACLU and the different factors that influence their success. One study that has come closest to analyzing the influence of the ACLU is that by Kearney and Merrill who examine the influence of the ACLU on the Court (up to 1995) and comment briefly on the comparative success of the ACLU in cases for or against the petitioner. I draw from this study, but expand the dates 10 years to 2005, focusing on different factors that contribute to the ACLU's influence, while controlling for the issue in the case. Their study states that the

ACLU has achieved fluctuating, but usually favorable, rates of success relative to the benchmark when it files briefs supporting the petitioner. In two of the decades, the p-win rate when the ACLU filed is higher than the benchmark rate by more than 10%. For the 1966-1975 decade, however, the p-win rate when the petitioner was supported by the ACLU as amicus is actually lower than the benchmark by nearly 8%. For the entire fifty-year period, the ACLU achieved a positive differential of just under 6% in cases supporting petitioner (Kearney and Merrill 805).

Support for their claims can be seen in Figures 15 and 16 of Kearney and Merrill's study (Appendix B). Kearney and Merrill's findings provide evidence that claimant success not only

depends on the organization, but also the type of case and other such conditions. The ACLU is more successful in some cases than others. In my study, I examine the factors that affect success as well as the ACLU's case-selection process, and rather than measuring filing for and against the petitioner, I examine filings for the affirmance of liberal dispositions and for the reversal of conservative dispositions to better control for the success rate of a favorable (liberal) outcome.

Since Kearney and Merrill's study ends in 1995, the influence of the ACLU on civil liberties cases has not fully been analyzed for the span of the entire Burger and Rehnquist Courts. In my study, I include the entire span of the Rehnquist Court and conduct a comparative analysis with the Burger Court. As part of my mixed-method analysis, I corroborate my quantitative analysis with qualitative elements drawn from my interview with the legal director of the ACLU. In this interview, I address issues such as the ACLU's case-selection process and filing strategies. I believe that the mixed-method analysis helps bring light to how and why the amicus curiae briefs are so effective when filed by such experienced litigants as the ACLU.

In "Debunking the Myth of Interest Group Invincibility in the Courts", Epstein and Rowland argue that groups are no more likely than non-groups to win a Supreme Court case. Others such as Paul Collins argue that groups exert a great deal of influence on the Supreme Court. In "Lobbyists before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs", (in which he explored the effect of amicus briefs on the ideological direction of the Court's decisions by analyzing group influence during the 1946 to 1995 terms) Collins finds that the justices are heavily influenced by organized interests. Collins' study was highly influential on my own study, and my analysis of ideological variables. I argue against the idea that groups do not have any influence and hope to show that the litigation experience of the ACLU gives them more influence than others. Additionally, with the rising number of briefs

filed in each case, it would be difficult to find cases without some degree of group involvement. Although I believe that groups have a great deal of influence, I choose to examine the influence of amicus curiae briefs filed by the ACLU or a coalition including the ACLU on vote direction and decision direction. As one of the most prominent of amici, it is only fitting to compare the effectiveness of the ACLU's amicus curiae briefs against cases without ACLU involvement.

Segal's "Amicus curiae Briefs by the Solicitor General during the Warren and Burger Courts: A Research Note" examines amicus curiae briefs filed from 1953 until 1982 (during the Warren and Burger Courts) and looks into the ideological direction of the briefs and the success rate of the Solicitor General. As a part of his coding, he notes that

If the solicitor filed a brief for the petitioner or appellant, he is coded as winning if the Court reversed, reversed and remanded, vacated and remanded, or vacated the lower court's decision. If the solicitor filed a brief for the respondent or appellee, he is coded as winning if the Court affirmed the lower court's decision or dismissed the appeal (Segal 135).

Segal's coding was an appropriate basis for my coding scheme to determine ACLU success, however, I code ACLU success as a liberal disposition on the merits, and I examine reverse/affirm success rates individually (as the ACLU will always be filing for the side advocating a liberal disposition). Segal found that each solicitor had at least a 65% success rate, but also that some were higher than others. Also, the likelihood of winning did not vary by type of issue or inclusion of oral argument from the office of the solicitor, however if the solicitor general him/herself provided oral argument, litigants were more likely to win (also more likely to win as petitioners than respondents.) This lays a foundation for my theory that the involvement

of the ACLU (historically a very influential organization in the Court) would similarly lead to high claimant success rates; however, it is unlikely that any interest group can have as much influence as the Solicitor General.

Hansford asked how organized interests select cases to file amicus curiae briefs for. In “Information Provision, Organizational Constraints, and the Decision to Submit an Amicus curiae Brief in a U.S. Supreme Court Case”, he proposed that “an organized interest will submit amicus curiae briefs in the cases that provide the greatest opportunity for the interest to influence the content of the majority opinion” while interests that are based on membership must select cases based upon their effect on the ability to attract/retain membership (Hansford 219). I investigate this point in my qualitative analysis of how the ACLU selects cases to get involved in. As a membership based organization with a clear ideology, I do not believe that the ACLU acts solely on the basis of trying to boost membership; rather, they file where they know they can make a difference and contribute to the argument.

In a period when the number of briefs per case is soaring, writing an effective amicus curiae brief often means forming a coalition. In a study of brief effectiveness performed through interviews with former law clerks, Lynch found that “strange bedfellows” in brief filing piques the interest of clerks reading briefs,<sup>1</sup> stating, “Many clerks said that they would read a brief filed by unexpected allies simply because they would be interested to see what it said” however while “curiosity might influence the order in which these clerks read the briefs, but after the first few pages, considerations of actual quality would quickly prevail” (Lynch 62). Lynch also notes that 90% of clerks prefer collaborative briefs and goes on to express the amount of

---

<sup>1</sup> As I will explain in the qualitative section, Steven Shapiro, the Legal Director of the ACLU also emphasized the effectiveness of “strange bedfellow” briefs.

consideration that particular groups receive, noting that after the Solicitor General and the states, the ACLU receives the most consideration with 33% of clerks citing the public interest group due to the quality of the briefs filed by the ACLU. “As one clerk put it, certain groups that are habitually better filers—such as the ACLU—always make the “first cut” of amicus review” and “while a few clerks noted an ideological preference for ACLU briefs, most clerks’ comments related to the excellence of the staff attorneys and their ability to raise the most salient legal arguments” (Lynch 48).

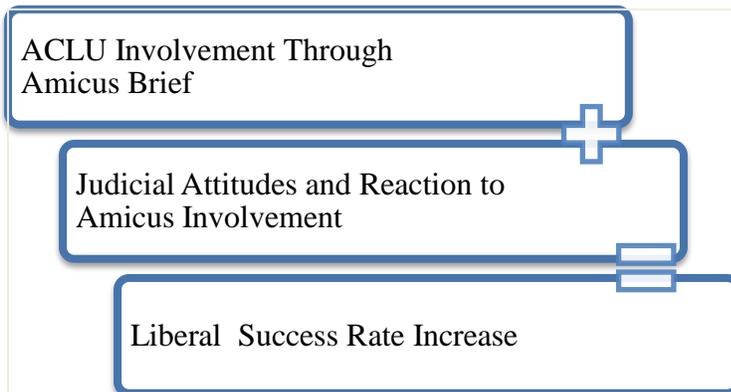
In fact, the ACLU’s briefs get read across the board: “a clerk for Justice Ginsburg explained that she “always reads the briefs from the ACLU, because she wants to know what arguments they have raised,” and multiple clerks from both Justice Scalia’s and Justice Thomas’ chambers listed the ACLU as an organization that always receives closer attention” (Lynch 48). This is partially due to the fact that the justices wish to prepare themselves for the strong counterarguments proposed by groups such as the ACLU. Nonetheless, it is very clear that any study of interest group influence on the Supreme Court must include the ACLU due to their experience and their frequency and volume of filing. If these assertions are accurate and my hypotheses are confirmed, then the ACLU can function as an example for other less experienced brief filers.

## Analysis of ACLU Filing Trends in Issue and Chief Justice

### Hypotheses

In this section, I examine the overall amicus curiae brief filing patterns by the ACLU in the Supreme Court. My hypothesis is that, in comparison with the Burger Court, the presence of an ACLU brief for a civil liberties case in the Rehnquist court would have less influence due to the Court's increased conservatism. I also hypothesize that the ACLU will have increased its filing over the past 50 years (as overall filing has increased) and that it will have decreased its filing alone because with an increase in filing, filing as a coalition would, theoretically, become the dominant strategy to have one's brief read, therefore it can be assumed that the ACLU would

**Figure 1: Equation of Influence of ACLU**



know this and act accordingly. Additionally, as

seen in Figure 1, the general equation for influence (from ACLU involvement to justice ideology to claimant success) follows how the ACLU would, theoretically, in filing a brief, combine with justice

ideology to reach the liberal success rate.

In my analysis, I take into account and control for differences in the time of filing, the level of influence, and the ACLU's experience in the issue area, and later examine justice ideology and lower court disposition. By controlling for these variables, I am able to account for

their influence on the results and reduce the confounding effect of variations in these variables which may affect my dependent variable (ACLU success rate). These hypotheses are related to my research question as they relate to the relative influence of the ACLU briefs in different time periods, case issue areas, coalitional situations, and lower court dispositions.

## Methods

I operationalize my key variables by measuring the claimant's success as a liberal outcome in cases in which the ACLU is involved and comparing it to cases in which the ACLU is not involved. I condition on the tendency of the ACLU to file in a specific issue area by filtering out areas in which the ACLU files in less than 5% of cases,<sup>2</sup> as well as for the possibility of selection bias (by measuring success rates independently for the ACLU filing for affirmance of the liberal disposition of the lower court and the ACLU filing for reversal of the conservative disposition of the lower court)<sup>3</sup>. I also examine the term of filing, whether or not the ACLU filed alone (with just the national organization and/or local affiliates) or as a part of a coalition (with other groups such as the NAACP, Brennan Center for Justice, or AFL-CIO) in order to examine their filing strategy and in which cases the ACLU is most successful.

### *Coding*

---

<sup>2</sup> Unless otherwise indicated, for the balance of the thesis, I will be using the numbers controlled for likely issue (in other words, cases classified as an issue area in which the ACLU files in more than 5% of all cases) in order to exclude issue areas in which the ACLU is unlikely to get involved and thus would have no influence over disposition and therefore not be relevant to my study and would only confound my variables. As the ACLU would not be likely to file in such issue areas and any filings in those issue areas would likely be for other reasons related to the case, I find it more useful to compare the success of the ACLU at obtaining a liberal disposition to the success of cases in similar issue areas. Using STATA, I sorted the percentages of ACLU briefs per issue area which helped me to generate this control (this can be seen in Table 2). I generated a variable called *Likely Issue* for the issue areas in which the ACLU filed a brief in at least 5% of all possible cases.

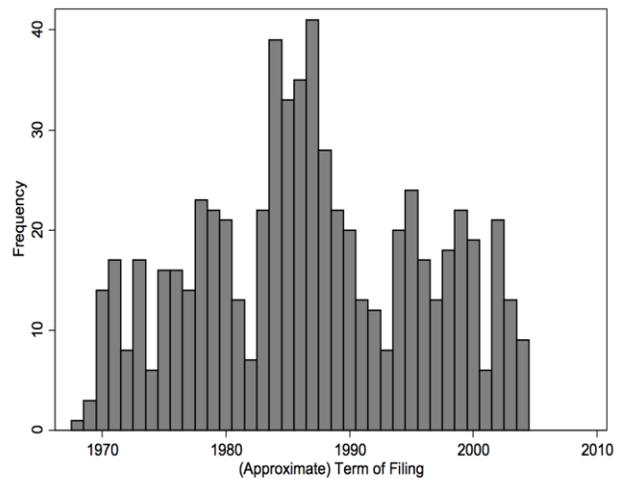
<sup>3</sup> All statistical analysis performed using STATA version 11. All of my coded data and replication data is available upon request at [shannon.azzaro@gmail.com](mailto:shannon.azzaro@gmail.com).

I coded my cases from LexisNexis and Westlaw by searching for Supreme Court cases with amicus curiae briefs filed by or including the ACLU or an ACLU affiliate. I coded the number of affiliates on the brief, national presence (0 for no national presence, 1 for national presence), the involvement of the ACLU Foundation (0 for no involvement, 1 for national foundation involvement, 2 for local foundation involvement, 3 for both national and local foundation involvement), and whether the ACLU was filing alone (1) or with Others (0).<sup>4</sup> My coding spans the years 1969-2005 to cover the span of the Burger and Rehnquist Courts. This yielded 643 cases in which the ACLU filed a brief (607 after controlling for likely issue) and 5,540 (3,957 after controlling for Likely Issue) cases total (from the Supreme Court Database).<sup>5</sup>

## Results

As seen in Figure 2, there has been a great deal of variation in the ACLU's frequency of filing in the Supreme Court. Warren Burger served as Chief Justice of the Supreme Court from June 23, 1969 to September 26, 1986, and William Rehnquist served as Chief Justice of the Supreme Court from September 26, 1986 to

**Figure 2: Number of Amicus Curiae Briefs Filed by the ACLU by Term, 1969-2005**



September 3, 2005. There appears to be an upward trend leading up to the spike in the late 1980's (at the beginning of the Rehnquist Court) and then a decline leading to the end of the

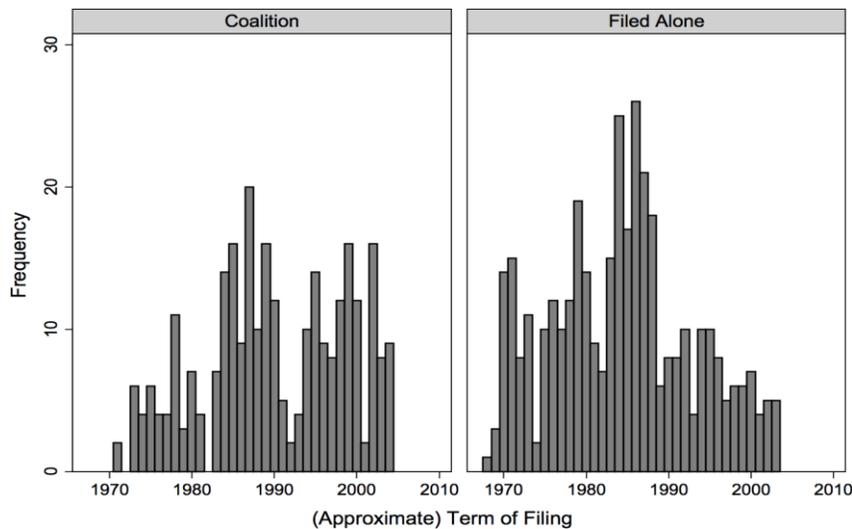
<sup>4</sup> Originally, I examined the issues surrounding whether the ACLU or a local or state affiliate was named in the brief, however Shapiro confirmed for me that there was no real difference in quality between briefs naming the national membership organization, the affiliates, or even the ACLU Foundation (which actually employs the lawyers).

<sup>5</sup> The SCDB (Supreme Court Database) is a Database collected and maintained by Harold Spaeth. I utilize Spaeth's database includes Case-Centered and Justice-Centered data as well as supplements for Ideology (Martin-Quinn and Segal-Cover Scores).

Rehnquist Court. However, this figure does not tell the whole story. There has been an overall downward trend in the size of the Supreme Court's docket; yet despite the fact that there appears to be a downward trend in the number of cases in which the ACLU has filed briefs from the late 1980s onward, the number remained roughly proportional to the number of cases in the Court. Also, in Figure 2, we see the same variables, *Frequency* and *Term of Filing*, to be divided into two categories, *Coalition* (cases in which ACLU filed with others) and *Filed Alone* (cases in which the ACLU filed alone or just with affiliates). From the late 1980's onward, it appears that the frequency of filing alone has decreased significantly and the frequency of filing as a coalition has increased. This can be explained by the general upward trend of amicus curiae filings in the Supreme Court. With many more filers and a higher proportion of cases with briefs attached, coalition filing is becoming more and more common: groups with similar goals or similar

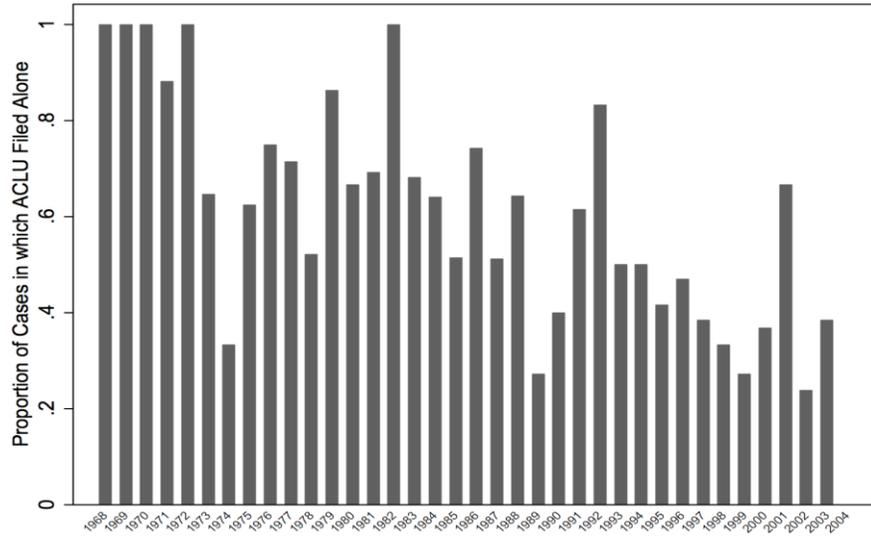
ideology will  
 together in  
 more  
 and to  
 risk of  
 of briefs  
 would  
 annoyance  
 and perhaps  
 brief from being read).

**Figure 3: Frequency of ACLU Amicus Briefs, by Term and Coalition**



sign onto briefs  
 order to be  
 effective  
 avoid the  
 repetition  
 (which  
 become an  
 to the court  
 prevent the

**Figure 4: Proportion of ACLU Briefs Filed Alone, By Term**



**Figure 5: Number of State/ Local Affiliates Involved in Each Case, By Chief Justice**

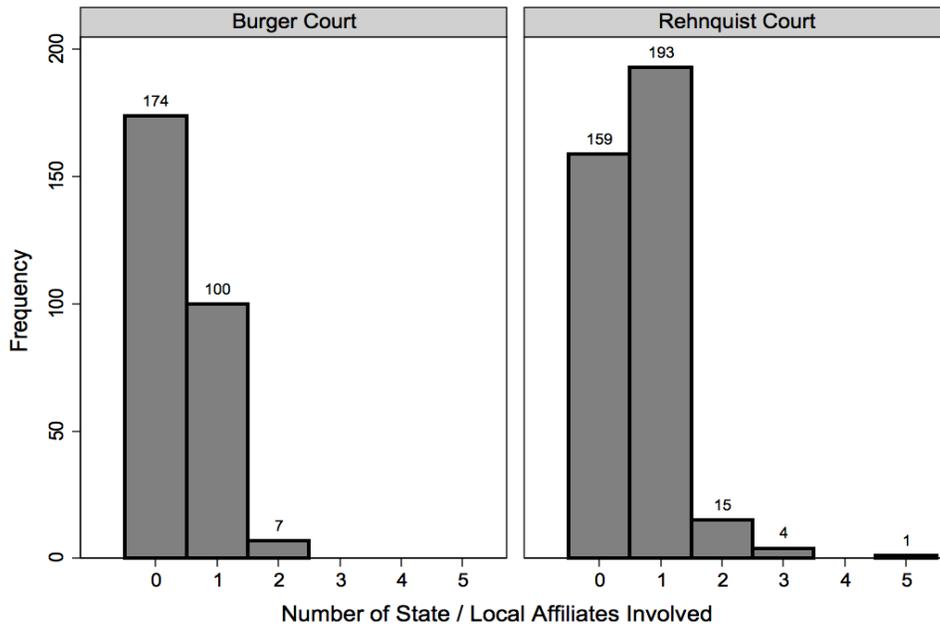


Figure 4 illustrates the general downward trend in the proportion of cases in which the ACLU filed alone over the years. Despite a few of spikes in 1982, 1991, and 2001, there is a significant decrease from a nearly 100% rate in the late 1960s to around 40% in the 2000s. This confirms the findings evidenced in Figure 4 regarding the frequency of coalitional filing.

As seen in Figure 5, the Burger Court included significantly fewer local affiliates than the Rehnquist Court (61.92% of cases in Burger court included zero affiliates, vs. 42.74% in the Rehnquist court). There are also a significantly higher number of cases in the Rehnquist court in which the ACLU filed (372 vs. 281). This upward trend in filing fits my hypothesis that filing has increased over the past 20 years. Together with the increased ACLU filing and decreased total number of cases heard by the Supreme Court during the Rehnquist Court era, the ACLU

<b>Table 1 The ACLU Has a Higher Success Rate in Burger Court than Rehnquist Court</b>			
Decision Direction	Burger Court	Rehnquist Court	Total
Conservative	140 (52.24%)	195 (57.52%)	335 (55.19%)
Liberal	128 (47.76%)	144 (42.48%)	272 (44.81%)
Total	268	339	607

filed in a higher proportion of cases overall during the Rehnquist Court.

As seen in Table 1, a smaller proportion of cases taken by the Rehnquist Court in which the ACLU filed ended in a liberal disposition (42.5%) than in

the Burger Court (47.8%). This is unsurprising as the Rehnquist Court was known for its conservatism. My hypothesis of higher brief effectiveness in the more liberal Court cannot be tested through these simple results alone, and will be left to my later discussion of individual justices' votes and ACLU brief influence.

## **Discussion**

This section serves to introduce the ACLU filing patterns and a foundation for the next two sections, which discuss the ACLU's success comparatively against the average Supreme

Court case and the ACLU's influence on individual justices' votes. The overall trends towards filing more often and filing less alone contribute to my analysis of the ACLU's overall success rate and the positive effect that coalitions have on its success rate. Additionally, as the results in Table 1 suggest, the ACLU saw a rather higher success rate (about 4 points) during the Burger Court than the Rehnquist Court.

Although one cannot draw full conclusions about the ideology of a court based on the Chief Justice, it is particularly intriguing that there are significant differences in the proportion of cases with a liberal outcome. During Burger's tenure, despite his conservatism, the Court made significant decisions about abortion (*Roe v. Wade* (1973)) and desegregation (*Swann v. Charlotte-Mecklenburg Board of Education* (1971)) while during Rehnquist's tenure, the Court's tendency was to regulate Congress' power through the Commerce Clause. Rehnquist dissented in cases involving abortion and gay rights, and his tendency was to generally support less speech in First Amendment claims. According to Geoffrey R. Stone, a law professor at the University of Chicago,

In his more than 30 years on the Supreme Court, Rehnquist participated in 259 decisions involving these [First Amendment] freedoms. In these cases, Rehnquist voted to support the 1st Amendment claim only 20 percent of the time. In these same cases, the other justices with whom he sat (Blackmun, Brennan, Breyer, Burger, Douglas, Ginsburg, Kennedy, Marshall, O'Connor, Powell, Scalia, Souter, Stephens, Stewart, Thomas and White) voted to uphold the 1st Amendment claim 53 percent of the time. Thus, Rehnquist's colleagues were 2.6 times more likely than Rehnquist to hold a law in violation of "the freedom of speech, or of the press" (Stone).

Despite these assertions about the behavior of the chief justices, it remains important to analyze ACLU influence on the individual justices on a vote basis. I will analyze the justice-centered data after I analyze the case-centered data in the next section.

### **ACLU Effectiveness in Aggregate (Case) Outcomes**

#### **Hypotheses**

I hypothesize that in comparison with cases where the ACLU might be expected to file but does not, cases in which the ACLU files will have a higher success rate (i.e. will be more likely to yield a liberal disposition). Additionally, cases in which the ACLU seeks to have a lower court decision reversed will have a higher success rate than cases in which the ACLU seeks an affirmance and cases in which the ACLU files as a part of a coalition will have higher success rates than cases in which the ACLU files alone. I also hypothesize that the ACLU will be more successful with First Amendment cases than any other type of civil liberties case, as they have the most experience with cases involving the First Amendment.

#### **Methods**

In this section, I utilize the Supreme Court Database's Case Centered Dataset (merged with my data for the variables defining whether the ACLU filed a brief and whether the ACLU filed a brief as a part of a coalition or alone) (Spaeth, 2010). I sorted the cases by issue area and my coalitional variable to examine which cases the ACLU is most likely to be the sole filer in. I then compared the results for the presence of an ACLU brief against the ideological direction of the decision and the direction of the lower court's decision and compared cases in which the

ACLU files as a coalition against cases in which the ACLU files alone. I ran comparative analyses on decision direction by *Issue Area* as well as *Issue Area* and *Lower Court Decision Direction*. I examined overall influence by court (Rehnquist v. Burger) in order to show the change in influence over time. Lastly, I estimated a logistic regression for ACLU brief influence and ACLU brief interaction with *Lower Court Decision Direction*.

## Results

Table 2 ACLU Brief Percentages by Issue Area			
Issue Area	No ACLU Brief	ACLU Brief	Total
Criminal Procedure	1,088 88.53	141 11.47	1,229
Civil Rights	880 81.71	197 18.29	1,077
First Amendment	314 69.47	138 30.52	452
Due Process	228 89.06	28 10.94	256
Privacy	87 80.56	21 19.44	108
Attorneys	61 83.56	12 16.44	73
Unions	183 95.81	8 4.19	191
Economic Activity	955 98.45	15 1.55	970
Judicial Power	692 90.81	70 9.19	762
Federalism	258 96.27	10 3.73	268
Interstate Relations	66 100.00	0 0	66
Federal Taxation	146 99.32	1 0.68	147
Miscellaneous	20 95.24	1 4.76	21
Total	4,978 88.58	642 11.42	5,620

Table 2 categorizes all Supreme Court cases into Issue Areas and shows the proportion of cases in each issue area in which the ACLU filed a brief. As seen in Table 2, the three largest issue areas for the ACLU to file in are Criminal Procedure, Civil Rights, and First Amendment. These are the issue areas to watch for higher success rates. Other areas such as Privacy and Due Process may also be important to watch as they involve civil liberties issues, and Privacy often includes very hotly debated issues such as abortion rights.

Table 3 breaks down the issue areas in which the ACLU files by whether the ACLU files alone or as a coalition. This is relevant as while the ACLU files alone in the majority of First

<b>Table 3 ACLU Brief Filing and Coalition Patterns by Issue Area</b>			
Issue Area	Coalition	Filed Alone	Total
Criminal Procedure	40(28.37%)	101(71.63%)	141
Civil Rights	105(53.30%)	81(46.70%)	197
First Amendment	60(43.48%)	78(56.52%)	138
Due Process	6(21.43%)	22(78.57%)	28
Privacy	12(57.14%)	9(42.86%)	21
Attorneys	7(58.33%)	5(41.67%)	12
Unions	2(25.00%)	6(75.00%)	8
Economic Activity	4(26.67%)	11(73.33%)	15
Judicial Power	29(41.43%)	41(58.57%)	70
Federalism	8(80.00%)	2(20.00%)	10
Federal Taxation	1(100.00%)	0(0.00%)	1
Miscellaneous	1(100.00%)	0(0.00%)	1
Total	275(42.83%)	367(57.17%)	642

Amendment and Criminal Procedure cases (56.52% and 71.63% respectively), they only file alone in 46.70% of Civil Rights cases. This could be due to the fact that the ACLU would file with groups concerned with the same civil rights issue such as those representing underrepresented minorities or women. For such hot button issues, it would not be

advantageous for the ACLU to file alone as there are so many organizations with similar interests such as the NAACP, NOW, and other various interest groups. Additionally, cases in which the ACLU files alone have different success rates than cases in which the ACLU files as a coalition, therefore it is helpful to understand when they are more likely to be a sole filer.<sup>6</sup>

Table 4 compares the success rates of the cases with ACLU briefs. Once the cases are filtered out by *Likely Issue*, the proportion of success (defined as reaching a liberal direction) is clearly higher for cases accompanied by an ACLU brief than for cases without an ACLU brief. This is an indicator of the skill, experience, and influence of the ACLU in the areas in which it is likely to file, such as cases involving civil rights or the First Amendment.

<sup>6</sup> In my interview, Shapiro raised the issue of the particular effectiveness of filing as a part of a coalition of “strange bedfellow” coalitions (right-left briefs). I examined the coalitions on the 643 briefs included in my study and found insufficient data to pursue an analysis of “strange bedfellow” coalitions.

As seen in Table 4, when controlling for likely issue, the ACLU’s success rate is approximately 44.81% (meaning that about 45% of the time when the ACLU files a brief, there will be a liberal outcome) as compared to 40.61% without an ACLU brief. This can be broken down to a 49.03% success rate for coalitions containing the ACLU and a 41.67% success rate for the ACLU as a sole brief filer. This suggests that briefs filed by coalitions tend to be much more effective than those filed by non-coalitions.

<b>Table 4</b>			
<b>Cases with an ACLU Brief Result in More Liberal Decisions</b>			
Decision Direction	Conservative	Liberal	Total
No ACLU Brief	1,989 (59.39%)	1,360 (40.61%)	3,349
ACLU Brief	335 (55.19%)	272 (44.81%)	607
Total	2,324 (58.75%)	1,632 (41.25%)	3,956

<b>Table 5</b>			
<b>The ACLU is More Successful When Filing as a Member of a Coalition</b>			
Decision Direction	Coalition	Filed Alone	Total
Conservative	132 (50.97%)	203 (58.33%)	335 (55.19%)
Liberal	127 (49.03%)	145 (41.67%)	272 (44.81%)
Total	259	348	607

As seen in Table 5, the success rate for coalitional filing (cases in which the ACLU filed with other organizations) is much higher than the success rate when filing alone (49.03% versus 41.67%). This supports the hypothesis that coalitional filing is a dominant strategy, resulting in higher success rates. Clearly, as mentioned before, justices and their clerks prefer coalitional briefs; therefore this preference even with the ACLU is not surprising. However, this does not paint the whole picture, as one can see in Tables 6, 7, and 8.

<b>Table 6</b>				
<b>Direction of Lower Court Decision being Reviewed</b>				
	Conservative	Liberal	Unspecified	Total
No ACLU Brief	1,677 50.06	1,643 49.04	30 0.90	3,350
ACLU Brief	257 42.34	347 57.17	3 0.49	607
Total	1,934 48.88	1,990 50.29	33 0.83	3,957

<b>Table 7</b>			
<b>The ACLU is Most Successful in Cases with a Conservative Lower Court Disposition Where the ACLU is Asking to Reverse</b>			
	Conservative Outcome	Liberal Outcome	Total
No ACLU Brief	788 47.02	888 52.98	1,676
ACLU Brief	110 42.80	147 57.20	257
Total	898 46.45	1,035 53.54	1,933

<b>Table 8</b>			
<b>The ACLU is Most Influential in Cases with a Liberal Lower Court Disposition Where the ACLU is Asking to Affirm</b>			
	Conservative Outcome	Liberal Outcome	Total
No ACLU Brief	1,192 72.55	451 27.45	1,643
ACLU Brief	223 64.27	124 35.73	347
Total	1,415 71.11	575 28.89	1,990

In the court as a whole (without the ACLU's involvement), the success rate for affirmance with a liberal outcome is 27.45% whereas the success rate of the ACLU's brief filing for affirmance with a liberal outcome is 35.73%. The Supreme Court's tendency to reverse is very evident in these trends; however the effect of the ACLU's brief is stronger in cases in which they are seeking affirmance. This difference is considerably more significant than the differential for cases where the ACLU is asking to reverse. This is especially clear in the logistic regression analysis of the effect of ACLU briefs on liberal outcomes seen in Table 9, in which the effect of briefs in cases asking to affirm (where the lower court disposition is liberal) is more significant than those asking to reverse. The p-values and confidence intervals show that overall

ACLU brief effectiveness when lower court disposition is liberal is significant, while that when lower court disposition is conservative is not significant.

<b>Table 9</b> <b>Logistic Regression of ACLU Brief Influence on Liberal Disposition</b> <b>ACLU is More Influential on Cases Where the Lower Court Disposition is Liberal (Asking to Affirm)</b>					
	Odds Ratio	Std. Err.	Z	P>z	[95% Conf. Interval]
ACLU Brief	1.22	.12	2.04	0.04	1.008 1.469
Lower Court Disposition Conservative	1.09	.15	0.60	0.53	.828 1.426
Lower Court Disposition Liberal	1.34	.17	7.80	<0.001	1.003 1.676

The interaction between the presence of an ACLU brief and lower court disposition is equal to an odds ratio for the lower court disposition being conservative is 1.09, whereas the odds ratio for the lower court disposition being liberal is 1.34. This equates to a small, non-significant effect of about a 9% positive differential for an ACLU brief in a case in which the lower court disposition was conservative, but a very significant effect of about a 34% positive differential for an ACLU brief in a case in which the lower court disposition was liberal.

The ACLU also has a considerable amount of influence on reversal with a liberal outcome (57.20% success rate with an ACLU brief versus 52.98% success rate without an ACLU brief). Despite the fact that the ACLU’s brief has influence above that of the average case without the ACLU when seeking reversal, it is clear that the ACLU has the most influence (despite the comparatively lower success rate) in cases when asking for affirmance.

As we see in Table 10, the issue areas in which the decision direction is most liberal for all cases (not just ACLU cases) are Civil Rights (48.1%), First Amendment (50.4%), Due Process (46.9%), and Attorneys (48.6%). When we examine ACLU brief cases in Table 11, this number

changes slightly: Civil Rights cases are 56.9% liberal, First Amendment cases are 52.9%, and Due Process becomes 53.6%. Attorneys is no longer a relevant issue area, as there is a decrease in the liberal percentage (and there are only 10 cases). More interesting is the increase in liberal disposition for Privacy cases, from 33.3% of all cases to 52.4% when the ACLU files a brief. As suggested by the general trend of the court to reverse, Tables 12 and 13 show that the ACLU has more success when filing to reverse (for example, the proportion is 69.5% liberal for Civil Rights cases versus 45.1% liberal for Civil Rights cases seeking to affirm, and 64.7% liberal for First Amendment cases to reverse and 45.4% liberal to affirm). This confirms that the earlier analysis of higher overall success rates for reversal but higher positive differential for affirmance applies across the range of individual issue areas.

Figure 5 graphically demonstrates this effect by showing the proportion of liberal decisions by issue area, whether the aim is to reverse or affirm, and whether or not there is an ACLU brief filed. We see a strong positive effect for both affirm and reverse for ACLU briefs in the areas of Civil Rights, First Amendment, Due Process, and Privacy (in the case of Privacy, the effect is overwhelmingly positive). These issue areas fit closest to the traditional areas in which the ACLU files briefs, therefore it is not surprising that the effect is greatest in these areas. It is also clear that the effect is strong for cases where the ACLU seeks to affirm, while the overall liberal disposition percentage in these cases is relatively lower than cases where the ACLU seeks to reverse.

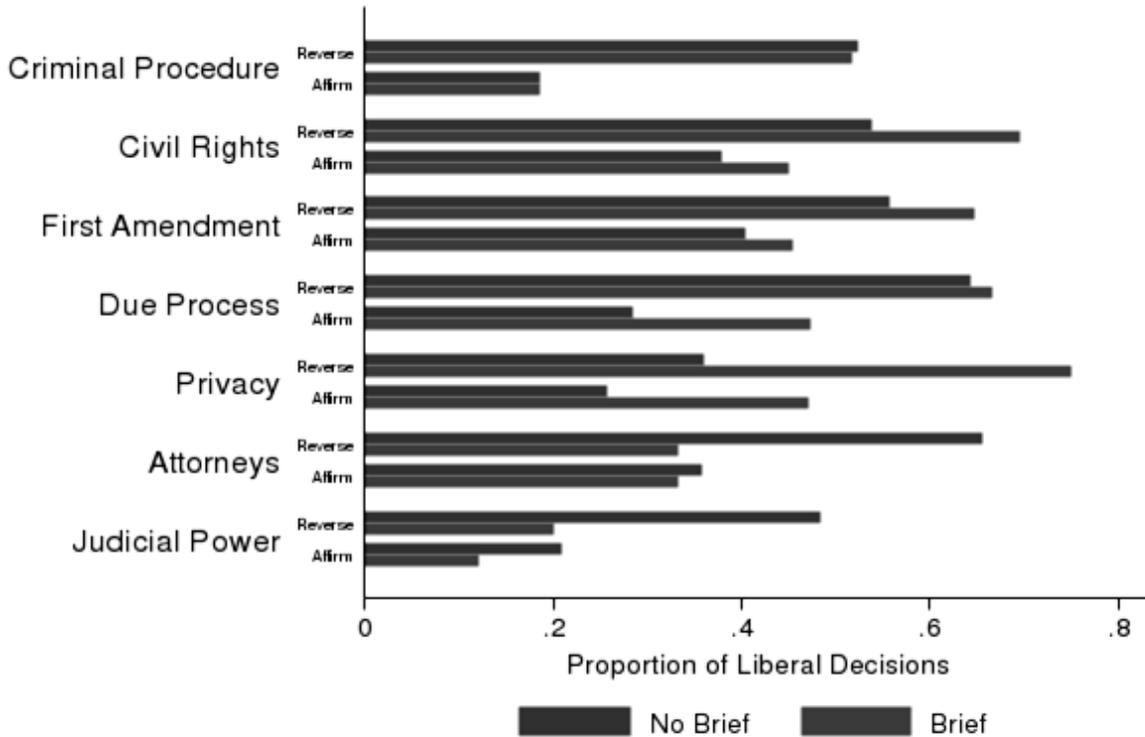
<b>Table 10</b>							
<b>Decision Direction by Issue Area (Likely Issue) for All Supreme Court Cases</b>							
	Criminal	Civil Rights	First Amendment	Due Process	Privacy	Attorneys	Judicial
Conservative	788 64.12	559 51.90	224 49.56	136 53.12	72 66.67	37 51.39	508 66.67
Liberal	441 35.88	518 48.10	228 50.44	120 46.88	36 33.33	35 48.61	254 33.33
Total	1229	1077	452	256	108	72	762

<b>Table 11</b>							
<b>Decision Direction by Issue Area (Likely Issue) for Cases in which ACLU files a Brief</b>							
	Criminal	Civil Rights	First Amendment	Due Process	Privacy	Attorneys	Judicial
Conservative	95 67.38	85 43.15	65 47.10	13 46.43	10 47.62	8 66.67	59 84.29
Liberal	46 32.62	112 56.85	73 52.90	15 53.57	11 52.38	4 33.33	11 15.71
Total	141	197	138	28	21	12	70

<b>Table 12</b>							
<b>Decision Direction by Issue Area (Likely Issue) for Cases in which ACLU wants Affirmance</b>							
	Criminal	Civil Rights	First Amendment	Due Process	Privacy	Attorneys	Judicial
Conservative	66 81.48	56 54.90	47 54.65	10 52.63	9 52.94	6 66.67	29 87.88
Liberal	15 18.52	46 45.10	39 45.35	9 47.37	8 47.06	3 33.33	4 12.12
Total	81	102	86	19	17	9	33

<b>Table 13</b>							
<b>Decision Direction by Issue Area (Likely Issue) for Cases in which ACLU wants Reversal</b>							
	Criminal	Civil Rights	First Amendment	Due Process	Privacy	Attorneys	Judicial
Conservative	29 48.33	29 30.53	18 35.29	3 33.33	1 25.00	2 66.67	28 80.00
Liberal	31 51.67	66 69.47	33 64.71	6 66.67	3 75.00	1 33.33	7 20.00
Total	60	95	51	9	4	3	35

**Figure 6: Success Rates of Likely Issue Cases based on the ACLU Briefs Goal to Reverse or Affirm the Lower Court's Disposition**



**Discussion**

The fact that the ACLU is more effective when it comes to filing as a coalition can be seen as a comment on the effectiveness of the ACLU’s strategy in filing as a part of a coalition, its influence in lending its support to an already existing coalition, or as an indication of the overall strength of the case (attracting a large number of interest groups rather than just the ACLU). This likelihood of success and strength of case issue is also explanatory of what may seem to be a “low” (50%) success rate for the ACLU. Overall in the Court, the trend is to reverse, not to affirm: on average 61% of liberal cases will be reversed to a conservative disposition, and 63% of conservative cases will be reversed to a liberal disposition. By

examining when the ACLU files to gain affirmance and when they file to gain reversal, we can better understand the strategy and actual influence of the ACLU brief filed. The ACLU is filing for affirmance nearly 57% of the time, which suggests that most of the time, the ACLU is not filing with the clearly “winning” side.

The overall positive differential of the ACLU’s success rates can be projected to be about 4% (that is about 4% higher for reversal and 8% higher for affirmance) which is considerably higher than Kearney and Merrill’s prediction (6% higher for cases supporting the petitioner and about 1% lower for cases supporting the respondent). Although the effect for petitioner and respondent may coincide with reverse/affirm, it is more effective to calculate the overall, issue area, and coalitional success rates as well. Also, this different may be partially accounted for by the fact that the Kearney and Merrill study ranges from 1946-1995 while mine ranges from 1969-2005. It is also important to note not only the differential, but also the tendency of the court and the baseline when comparing the results from my study with those of Kearney and Merrill’s study. By tracking effectiveness on many different levels, it is evident that the ACLU is most “successful” in reversal cases; however the differential is much higher for affirmance cases.

### **ACLU Influence on Justices’ Votes**

#### **Hypotheses**

I hypothesize that more liberal justices will be more likely to vote liberally, and to exhibit a greater influence from ACLU briefs. However, I believe that the influence will be most evident among moderates or “swing votes” (who would be the most important votes overall, as liberal justices would typically vote liberally). I propose that there would be a strong correlation

between a higher Segal-Cover score and a higher odds-ratio (that is, an interaction between ACLU brief and Liberal Disposition).

## **Methods**

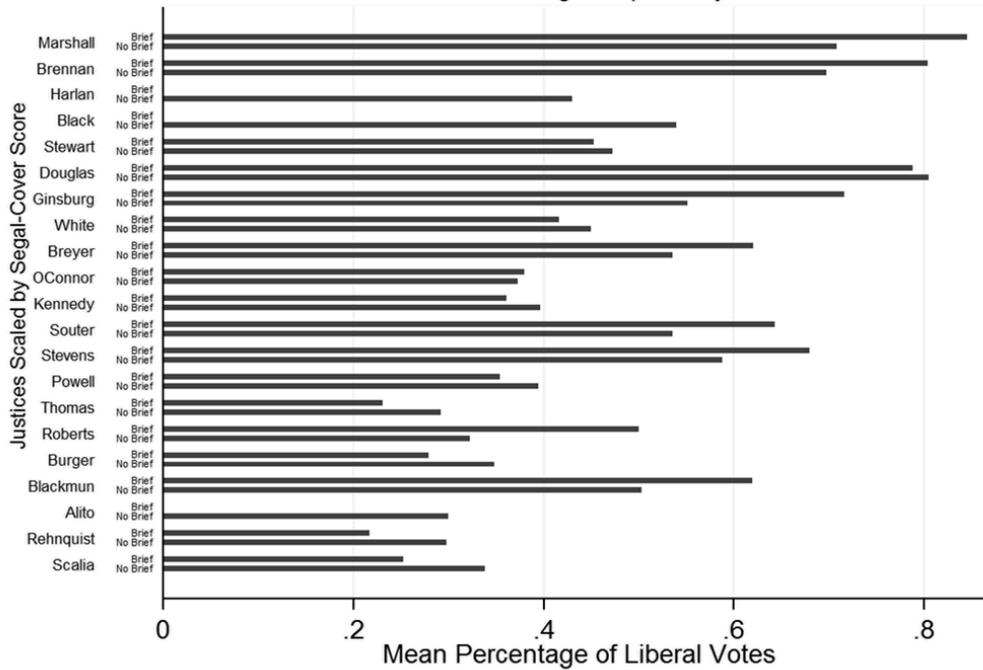
Using the Justice-Centered Data of the SCDB and the Segal-Cover (1984) and Martin-Quinn (1999) scores supplement of the SCDB, I estimated a logistic regression of the effect of the presence of an ACLU brief on individual justice votes in the liberal direction. I then compared the odds ratio (percentage change influence accounted for by the ACLU brief) against each justice's ideology (measured as their Segal-Cover score). I also created baselines for hypothetical conservative, liberal, and moderate justices to compare the odds ratios against (where the Segal-Cover ideology score for conservative=0, liberal=1, and moderate=.5). Additionally, I analyze the comparative percentage of liberal votes by justice for cases with ACLU briefs and cases without ACLU briefs.

## **Results**

In order to both confirm earlier results with relation to brief effectiveness and to examine the real effect of briefs on Supreme Court decisions, it is important to look at the individual votes of justices. On the justice level, we can see the change in votes associated with the brief as well as the ideological target of the brief. Justices, as individuals, may be swayed to vote differently by a brief filed by the ACLU. They also have their own unique ideology, which can be measured by their Segal-Cover score. Segal-Cover ideology scores assess how liberal or conservative Supreme Court nominees are. While justices can change voting behavior over time, Segal-Cover scores are an excellent indicator of justice behavior and voting patterns. Ranging

from 0 (most conservative) to 1 (most liberal), Segal-Cover scores account for the wide spectrum of justices on the Court.<sup>7</sup>

**Figure 7: Liberal Voting Percentage Comparison by Justice**



In Figure 7, I present a bar chart depicting the liberal voting percentage for each of the justices serving on the court between 1969 and 2005. The justices are listed from top to bottom in order of most liberal to most conservative (in order to put the differences into perspective). As can be expected, the most liberal justices presented high liberal vote percentages and relatively high positive differentials between cases with and without ACLU briefs. This trend continues into the moderates, with some (such as Ginsburg) exhibiting high differentials, but with the effect decreasing into the conservatives. The most conservative justices present very low liberal voting percentages (with some exceptions, such as Blackmun). For the purposes of the following statistical analysis, Justices, Harlan, Black, Alito, and Roberts are omitted due to insufficient data.

<sup>7</sup> Note: I performed the same analysis with Martin-Quinn scores and received comparable results.

<b>Table 14</b>					
<b>Logistic Regression of ACLU Brief Influence on Liberal Vote: ACLU More Influential when Lower Court Disposition is Liberal (Seeking to Affirm)</b>					
	Odds Ratio	Std. Err.	Z	P>z	[95% Conf. Interval]
ACLU Brief	1.16	.077	2.18	0.029	1.015 1.316
Lower Court Disposition Conservative	1.05	.110	0.46	0.643	.855 1.290
Lower Court Disposition Liberal	1.24	.096	13.00	<0.001	1.057 1.432

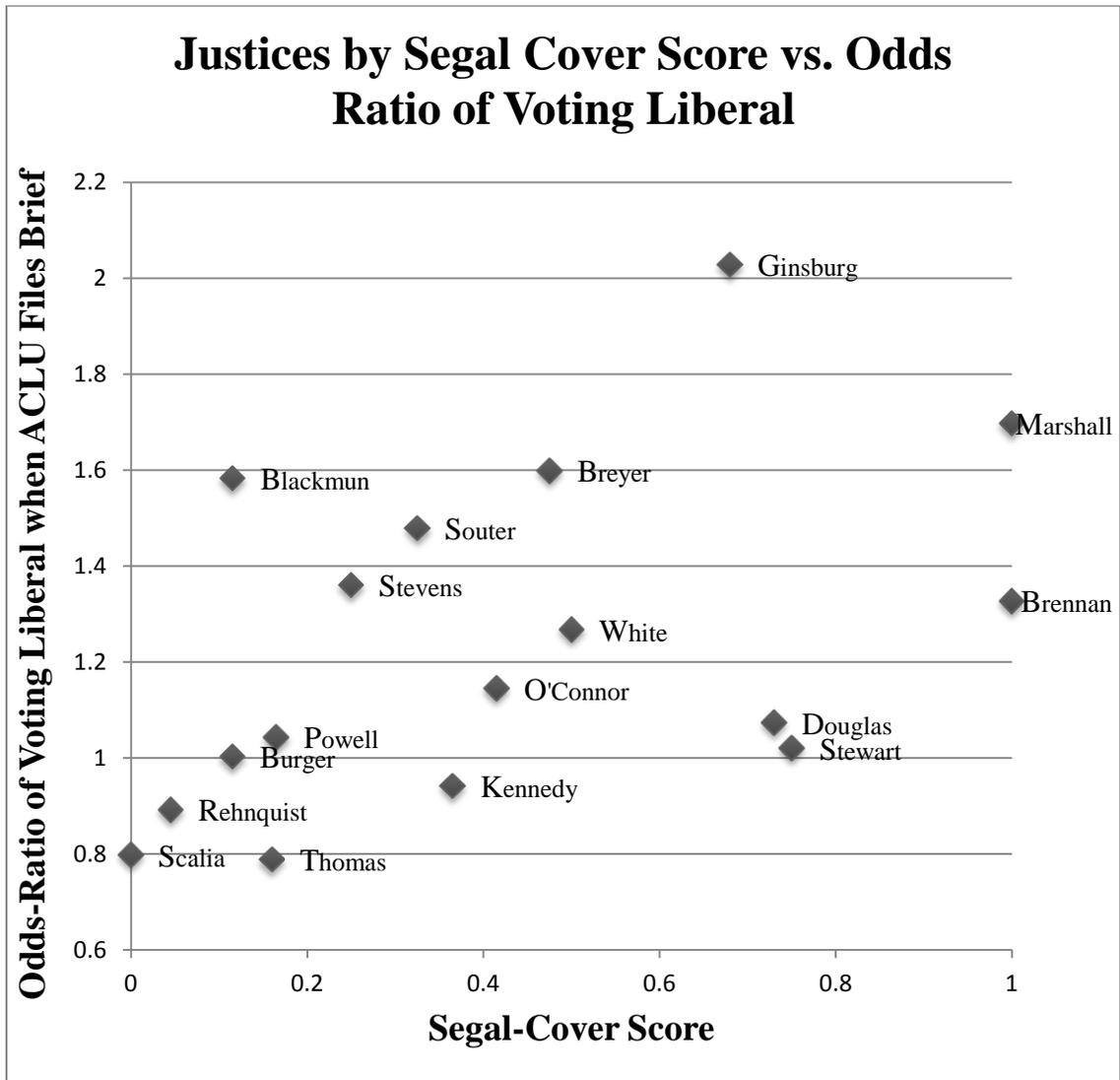
In Table 14, it is evident that the logistic regression on the ACLU’s brief influence on the justice-centered data indicates an overall odds ratio of 1.16 and an odds ratio of 1.05 (5% influence) and 1.24 (24% influence) for lower court conservative and liberal (reverse and affirm) respectively. While the p-values and confidence intervals confirm high statistical significance for the ACLU brief as a whole and for cases in which the lower court disposition was liberal, they do not indicate much significance for cases in which the lower court disposition was conservative. This means that there is a significant influence of the ACLU brief’s presence overall on individual liberal votes and an even stronger significant influence when looking specifically at cases with a liberal lower court disposition (in which the ACLU would be filing to affirm the lower court’s decision).

**Table 15**  
**Effect of Presence of ACLU Brief on Individual Justice Votes in the Liberal**  
**Direction and Justice Segal-Cover Ideology Score**

Justice	Segal-Cover Score	Odds Ratio	Std Err	Z	P> z	95% Confidence Interval
Conservative Baseline	0	.958	.084	-0.50	0.620	.807, 1.137
Moderate Baseline	0.5	1.273	.094	13.49	0.000	1.088,1.458
Liberal Baseline	1	1.692	.175	9.68	0.000	1.349,2.035
Scalia	0	.797	.117	-1.54	0.124	.597, 1.064
Rehnquist	0.045	.892	.114	-0.89	0.372	.695, 1.146
Blackmun	0.115	1.583	.179	4.04	0.000	1.267, 1.97
Burger	0.115	1.003	.168	0.02	0.985	.723, 1.392
Thomas	0.16	.788	.164	-1.14	0.252	.525, 1.184
Powell	0.165	1.043	.159	0.28	0.782	.774, 1.405
Stevens	0.25	1.360	.144	2.91	0.004	1.105,1.674
Souter	0.325	1.479	.238	2.43	0.015	1.078,2.028
Kennedy	0.365	.942	.138	-0.41	0.681	.707, 1.255
O'Connor	0.415	1.144	.137	1.12	0.262	.904, 1.448
Breyer	0.475	1.598	.312	2.41	0.016	1.091,2.342
White	0.5	1.267	.150	2.00	0.046	1.004,1.598
Ginsburg	0.68	2.028	.381	3.76	0.000	1.403,2.931
Douglas	0.73	1.073	.435	0.17	0.862	.484, 2.377
Stewart	0.75	1.020	.179	0.11	0.911	.723, 1.439
Brennan	1	1.327	.196	1.92	0.055	.994, 1.772
Marshall	1	1.697	.260	3.45	0.001	1.257, .292

As seen in Table 15, there is a strong correlation between Segal-Cover score and the odds ratio that a particular justice will vote liberally in cases when the ACLU files a brief. By performing a logistic regression of justice vote while controlling for *Issue Area*, *Chief Justice*, *Ideology*, and *Lower Court Disposition*, I was able to produce the odds ratio (chance that the justice of a particular ideology score would vote liberally in any particular case). In order to better understand the relationships between the odds ratio of liberal voting and Segal-Cover Score, Figure 8 plots the two against each other for each individual justice.

**Figure 8: Comparison of Odds Ratio and Ideology**



The predicted outcomes can be seen in the conservative, moderate, and liberal baselines. For example, with an odds ratio of .958, the conservative baseline (or a justice who would be most conservative in ideology) would be theoretically about 4.24% less likely to vote liberally in a case in which the ACLU has filed a brief. However, as justices are, themselves, human, this model varies in practice. This can be seen in the voting patterns of Scalia (who has a Segal-Cover score of zero). His odds ratio is about .797 which would translate into him being approximately 20.3% less likely to vote liberally in cases in which the ACLU files a brief. While justices' voting behavior may change over time, and voting may be influenced by other variables which cannot be controlled for, the numbers correlate strongly with their ideology and the presence of ACLU briefs. Two particularly interesting examples are Blackmun and Burger. Both have Segal-Cover ideology scores of .115, and theoretically they should have similar voting patterns when encountering ACLU briefs. However, in practice these two individual justices are influenced very differently by the presence of an ACLU brief. Blackmun has an odds ratio of 1.583 (which means that he is 58.3% more likely to vote liberally when there is an ACLU brief present) whereas Burger has an odds ratio of 1.003 (which means that he is no more likely to vote liberally when there is an ACLU brief present). Meanwhile, another surprising result Justice Ginsburg, who has a relatively high Segal-Cover score of 0.68 and an odds ratio of 2.028 (which would indicate a 102.8% increase in liberal voting when a case is accompanied by an ACLU brief). This is relatively high compared to others which are more comparable to the baselines. Likewise, Douglas and Stewart have relatively low Odds Ratios of 1.073 and 1.020 to accompany their relatively high Segal-Cover scores of .73 and .75 respectively. Not surprisingly, Justices Brennan and Marshall, both with Segal-Cover scores of 1, have relatively high odds ratios. However, even these are fairly different from each other. With an odds ratio of 1.697,

Marshall is almost precisely on the Liberal baseline, whereas Brennan has a lower odds ratio of 1.327.

## **Discussion**

Despite the projections of the conservative, moderate and liberal baselines to be fairly linear and many of the justices falling into that line, there were certainly justices who fit more into my hypothesis that moderate justices would be more influenced by ACLU briefs than liberal justices. This is seen in Justices Ginsburg, Souter, Stevens, and Breyer. Even Justice Blackmun's voting pattern exhibits a surprising amount of ACLU influence. Segal-Cover scores do not necessarily represent the justices' voting pattern throughout their entire tenure on the court as they are measured at the time of the justice's nomination to the court. Ideologies and voting patterns may change while the justice is on the court and new issues may arise which the justice may have a different opinion on. Another thing to keep in mind is the fact that among moderate and liberal justices, there may be a predisposition to vote liberally on many issues, therefore the differential between ACLU brief and no ACLU brief may be smaller in certain cases.

Overall, the most liberal justices had the highest percentage of liberal votes and despite the most conservative justices and a couple of moderates (namely Douglas and Stewart) showing no influence, most moderates and liberals showed a considerable amount of ACLU brief influence on their liberal votes. This supports not only my hypothesis about the relationship between justice ideology and ACLU influence but also offers strong support for my claims regarding overall ACLU influence.

In comparison with the logistic regression I estimated on the case-centered data (which indicated an odds ratio of 1.22 overall, a 22% positive influence on liberal dispositions split into 9% and 34% for reverse and affirm respectively), the logistic regression on the justice-centered data indicates an overall Odds Ratio of 1.16 (split into 5% and 24% for petitions to reverse and affirm respectively). Thus, the justice-centered data yields similar results to the case-centered data though naturally when counting proportions of individual votes versus liberal success rates is going to be slightly different. This is because typically the number of votes needed would be 5 and there is always a likelihood of dissent in the justice-centered data whereas with the case centered data it is coded as either a win or a loss.

### **Qualitative Analysis with Interview of Legal Director of the ACLU**

In order to corroborate my results, I interviewed Steven Shapiro, the Legal Director of the ACLU to gain more insight into the ACLU's brief filing process and strategy. It is important to understand the decision making process of the ACLU to make sense of the numbers in my quantitative analysis. A full transcript of my interview with Steven Shapiro can be found in Appendix A.

The ACLU is a very structured hierarchical organization. Every piece of paper must pass through the hands of the Associate Legal Director and the Legal Director. Steven Shapiro, the current Legal Director, has held both positions, he provided considerable insight into the process of the ACLU's filing process. He supervises the ACLU's amicus docket, and the decision to file rests with him (in consultation with the affected affiliate and/or in-house subject-matter lawyers). In addition, he tracks all cert grants<sup>8</sup> and makes the initial cut to determine which cases involve

---

<sup>8</sup> I chose not to look into briefs at the cert stage, as Shapiro asserted that the ACLU does not file at the cert stage except in rare circumstances, even though many other groups are doing so at increasing rates with high success

civil liberties issues, and then determines how significant the question of the case is and whether the ACLU has something distinct to add and whether they have the resources and capacity to file a brief in the case in question. As per the general strategy for filing effective briefs, the ACLU tries to avoid repeating the arguments of others; this may take the form of not filing, or of signing onto a brief as a part of a coalition. The ACLU has no set number or quota of cases to file in per year, though they tend to take on approximately 15-20 cases per year. Overall, there has been a decrease in the Supreme Court's docket size over the past 20-30 years; Shapiro stated that, since the number of cases heard each year has decreased from about 140 to about 80, the ACLU has been "filing in 20% of cases on the court's docket, a significant number of which are not civil liberties cases at all so I would estimate that we file in about 50% of all of the cases in which we could conceivably file because the issue is within our area of interest." While his estimate of the ACLU's involvement in 20% of the docket may be accurate (which would be about 15 cases per year), his estimate of 50% of all possible cases views possible cases slightly more narrowly than my study. Certainly, the ACLU narrows down the cases it gets involved in based on whether it can contribute to the discussion, and it is difficult to say whether cases they do not get involved in would have merited their attention or given them anything to contribute. Additionally, as Shapiro noted, many cases taken by the Supreme Court are to settle disagreements among courts of appeal on highly technical issues, not issues in which the ACLU would necessarily be interested. The ACLU is drawn to cases with significant issues relevant to their areas of expertise.

Shapiro asserted that subject does matter in the success of a brief. As seen in my quantitative results regarding their high success rates in First Amendment and Civil Rights cases, he

---

rates. It is, however, difficult to say whether the groups filing at the cert stage have selection bias, choosing to file in the best, most important cases.

confirmed that they find the most success in traditional First Amendment cases (that have historically been a main concern of the ACLU), and he stated that they “generally support more speech rather than less speech.” This “has been a predisposition of even the more recent and conservative Supreme Courts”, however, “it gets harder when you get to criminal cases because as the court has gotten more conservative they have gotten less hospitable to defendants’ rights cases”.

When asked about how the ACLU goes about filing as part of a coalition, Shapiro made some insightful remarks about the role of coalitions in brief filing and coalitional strategy. He acknowledged the “proliferation of amicus briefs,” and said that “the number of amicus brief filings has exploded over the past two decades and has increased to beyond the point where it is helpful to most members of the Court”. The ACLU will work collaboratively when given the opportunity as there is a tactical advantage to reducing the number of briefs per case. He continued to state that, “If you submit 6 amicus briefs in a case they are more likely to be read than 16 so I certainly have nothing against joining a coalition and sometimes strange bedfellow coalitions can really catch somebody’s eye. We filed a brief with the Cato Institute, for example, which is a left-right brief and somebody may notice that and pay attention to it just because of the coalition.” The truth behind the tactical advantage is covered in the survey of clerks in the Supreme Court by Kelly Lynch I mention in the section on Amicus Briefs in the U.S. Supreme Court, and the overall much higher success rate of coalitions is seen in the section on the case-level data.

With regard to briefs’ influence on individual justices’ votes, Shapiro admits that the personalities and ideologies of the justices are kept in mind when crafting the ACLU’s briefs. However, he refutes the argument that others have made that the ACLU would turn off more

conservative justices, asserting that even the most conservative justices, such as Scalia and Thomas, have admitted to reading and valuing ACLU briefs. The ACLU has gained credibility in the Court over the years and yet Shapiro does not overestimate the influence of the ACLU's name. He states, "Individual justices may agree or disagree with us on a point but I think that they read our arguments for whatever value they find in the merits of the argument. I don't think the ACLU identity either gains or losses votes on its own, I think that it's the value of the argument that's between its covers." He also noted that briefs are often written with the swing vote in mind, stating, "it is certainly true that a lot of briefs including ACLU briefs are written with Justice Kennedy in mind but he is never the exclusive focus ... there are confrontation clause cases for example where Justice Scalia often takes a civil liberties side and in those cases your goal may be to provide ammunition to Justice Scalia." He goes on to state that "good amicus briefs, good briefs are not written in a vacuum, they are written with knowledge of the justices, what they have said on these issues on prior occasions." The chief justice, however, is less of a concern, as a change in chief justice means less for the makeup of the court than other personnel changes with varying ideologies. Thus, his statement that "if you look at the current Court, the substitution of Chief Justice Roberts for Chief Justice Rehnquist is less significant in terms of voting patterns than the substitution of Justice Alito for Justice O'Connor" was particularly effective at illustrating the changing dynamics of the court. Considering my findings on the justice-centered data, it is clear that by substituting one very conservative justice for a moderate or liberal justice (or vice versa) could potentially have a great influence on liberal vote percentage, and potentially (in the case of a swing vote) on the entire direction of the Court. Such changes on the Court can also have the potential influence how influential the ACLU's amicus curiae briefs are. For my purposes, therefore, it is useful to examine the different time

periods of the two chief justices I examine as they represent two different time periods in the court (as far as Court makeup and number of cases granted cert). It is more useful to examine my results in the justice-centered data on a vote-by-vote basis which provide a more complete view of how ACLU briefs affect each ideologically different member of the court.

The quality of the brief is, indeed, key. Over and over again, clerks and justices comment on the superior and consistent quality of the ACLU's amicus curiae briefs. These high-quality briefs stem both from the ACLU's decision-making process in selecting cases in which they can contribute positively to the argument and their level of experience as habitual filers in the Supreme Court. The quality of the party's brief also impacts ACLU's amicus curiae brief. If the brief is of high quality, there is less concern, however if the "party's lawyers are not as good, a case without amicus briefs might have holes in it and the Court can decide the cases unaware of issues or facts that might have been relevant had it been brought to their attention." This makes the ACLU the ideal group to examine for brief effectiveness as they file what have been called high quality, well-written briefs and it is evident that they have an understanding of the court, when the parties need more help, and the benefits of filing as a part of a coalition. Shapiro did not comment on how effective he believes his briefs to be compared to briefs of other organizations, and he noted that he cannot measure his briefs effectiveness except through comments made by clerks and justices about their quality and any citations of the briefs in court opinions. He asserted that his briefs cannot be completely accountable for the success of a case as it is difficult to measure how much of that success is due to the arguments provided in the brief. Additionally, he noted that even in a loss, a brief may lead to the opinion being written more narrowly, or there may be dissent that is written as a result of the brief. Indeed, measuring brief effectiveness statistically can only go so far. I have attempted to examine effectiveness

from many different angles: affirm/reverse, issue area, court, justice vote, justice ideology, and every combination of these variables. Through all of these variables and by performing both statistical analysis and logistic regressions on the interactions between these variables and my data on the presence of an ACLU brief, I have certainly discovered a positive effect which is at least partially accounted for by the presence of an ACLU brief. There are many other “soft” factors that contribute to success which would be difficult to measure as they exist predominantly in the heads of the justices sitting on the court.

### **Conclusion**

Despite the difficulty in knowing precisely how much influence each ACLU brief has on a case, the ACLU’s overall impact on the Court is clearly significant. The ACLU is most influential as a part of a coalition and in cases where the lower court disposition is liberal, especially in cases involving issues where they typically file (such as Civil Rights or the First Amendment). Although the level of influence on more liberal justices is higher (in terms of a higher percentage of liberal votes), there was little influence on some liberal justices and considerable influence on some moderate and more conservative justices. Individual justices are influenced in different ways, and although conservative justices show no influence and liberal justices show a great deal of influence (with moderates in between), there are several who do not fit in line with the others.

Among the implications of the results of my study is the suggestion that despite the fact that there is a higher overall success rate for obtaining a liberal disposition when the lower court disposition is conservative, ACLU briefs would have a higher probability of changing the decision direction if the lower court disposition is liberal. This implies that those who file in

favor of reversal might think twice about devoting all of their resources towards those briefs, and instead pool more resources to file more briefs to affirm, although they are less likely to win when asking to affirm, even if their impact/effectiveness is greater. Additionally, the results regarding coalitional filing and implying high coalitional success may have wider implications for the number of briefs filed in each case. Recently, there has been some debate over whether the number of briefs filed in the Court should be limited (due to the ever-increasing filing of amicus curiae briefs in the Court and the skyrocketing number of cases with multiple briefs attached). Although there have been assertions that generally the ACLU briefs are read by the entire Court, this is not true for all briefs, and all briefs are not created equal. Strong, high quality briefs with a lot to offer the Court in terms of unique arguments and information go a long way. National groups would find it in their best interests to seek out coalitions, especially coalitions representing a wide range of ideologies and interests. Despite the fact that I did not have sufficient information to examine the effects of “strange bedfellow” coalitions, I maintain that such coalitions have wide appeal on the Court and their briefs are almost certain to be influential as they draw from the left and the right, if not simply for the fact that they are unique.

With the ever-increasing number of briefs filed, over the next decade I believe that one will be hard pressed to find a case without any amicus curiae briefs. The question is no longer about whether there is a brief (or multiple) filed in the case but of the quality of the brief(s) and the brief filer(s). These filers can take a page out of the ACLU’s brief in filing strategy. With talented lawyers specializing in various issues and centralized docket supervision, the ACLU understands the dominant brief-filing strategy. Their understanding of the Court and what makes a good brief contribute greatly to their briefs’ consistently high quality. If the ACLU does not have a good argument to make or does not have the resources to devote to the brief, they do not

file. An interest group is more likely to be influential if they consistently file high-quality briefs. A brief cannot influence the Court if the clerks and justices do not deem it to be useful and if it is of high quality with quality arguments, it is likely to have some influence on the ruling. Therefore, influence all stems from quality (and filing strategy of course, as seen in the differences by issue area, coalitional filing, and lower court disposition). The Court's tendencies are already there: the justices, their ideologies with respect to each issue area, and their tendency to reverse. What the amici must know to do is to appeal to these tendencies and use them to their advantage. What will get a brief read and what will help the amicus to win over justices is the application of their skills and understanding of the Court's tendencies. The influence of the ACLU on many Supreme Court justices as well as certain issue areas is very clear. The ACLU has successfully improved upon the Court's tendencies to push the decision direction towards liberal in most areas. As it is difficult to argue with their influence in civil liberties cases, the ACLU is one of the ideal and most powerful amici in the Supreme Court today.

## References

"About the ACLU." *American civil liberties union..* ACLU, n.d. Web. 28 Mar 2012.

<<http://www.aclu.org/about-aclu-0>>

"ACLU History." *American civil liberties union.* ACLU, 2012. Web. 28 Mar 2012.

<<http://www.aclu.org/aclu-history>>.

Caldiera, Gregory A., and John R. Wright. "Amici Curiae before the Supreme Court: Who

Participates, When, and How Much?" *The Journal of Politics* 52.3 (1990): 782-806.

*JSTOR*. Cambridge University Press on Behalf of the Southern Political Science

Association. Web. 5 Oct. 2010. <<http://www.jstor.org/stable/2131827>>.

Caldiera, Gregory A., and John R. Wright. "Organized Interests and Agenda Setting in the U.S.

Supreme Court." *The American Political Science Review* 82.4 (1988): 1109-127. *JSTOR*.

American Political Science Association. Web. 4 Oct. 2010.

<<http://www.jstor.org/stable/1961752>>.

Collins, P. M. "Lobbyists before the U.S. Supreme Court: Investigating the Influence of Amicus

Curiae Briefs." *Political Research Quarterly* 60.1 (2007): 55-70.

Collins, Paul M., Jr. 2008. *Friends of the Supreme Court: Interest Groups and Judicial Decision*

*Making*. New York, NY: Oxford University Press.

Epstein, Lee, and C.K. Rowland. "Debunking the Myth of Interest Group Invincibility in the

Courts." *The American Political Science Review* 85.1 (1991): 205-17. *JSTOR*. American Political Science Association. Web. 4 Oct. 2010. <<http://www.jstor.org/stable/19628862>>.

Hansord, Thomas G. "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 (2004): 219-30. *JSTOR*. Sage Publications, Inc. on Behalf of the University of Utah. Web. 4 Oct. 2010. <<http://www.jstor.org/stable/3219866>>.

Kearney, Joseph D. and Thomas W. Merrill. "The Influence of Amicus curiae Briefs on the Supreme Court". *University of Pennsylvania Law Review*, Vol. 148, No. 3 (Jan., 2000), pp. 743-855. *The University of Pennsylvania Law Review*. <http://www.jstor.org/stable/3312826>

Krislov, Samuel. "The Amicus curiae Brief: From Friendship to Advocacy." *The Yale Law Journal* 72.4 (1963): 694-721. *JSTOR*. The Yale Law Journal Company, Inc. Web. 4 Oct. 2010. <<http://www.jstor.org/stable/794698>>.

Lynch, Kelly J. "Best Friends? Supreme Court Law Clerks on Effective Amicus curiae Briefs." *Journal of Law & Politics*. 20.33 (2004): 33-73. Web. 28 Mar. 2012. <[http://www.sidley.com/files/Publication/e3d7e495-1fd2-4bc3-adc2-ead76f830df5/Presentation/PublicationAttachment/2e13e162-4951-4f68-a1dd-eb4bde663103/Best Friends.pdf](http://www.sidley.com/files/Publication/e3d7e495-1fd2-4bc3-adc2-ead76f830df5/Presentation/PublicationAttachment/2e13e162-4951-4f68-a1dd-eb4bde663103/Best%20Friends.pdf)>.

Segal, Jeffrey. "Perceived Qualifications and Ideology of Supreme Court Nominees, 1937-2005" <<http://www.stonybrook.edu/polsci/jsegal/qualtable.pdf>>

Segal, Jeffrey A. "Amicus curiae Briefs by the Solicitor General during the Warren and

Burger Courts: A Research Note." *The Western Political Quarterly* 41.1 (1988): 135-44.

*JSTOR*. University of Utah on Behalf of the Western Political Science Association. Web.

4 Oct. 2010. < <http://www.jstor.org/stable/448461>>.

Spaeth, Harold. The Supreme Court Database. 2010. <<http://scdb.wustl.edu/data.php>>

Stone, Geoffrey R.. "Rehnquist's Legacy Doesn't Measure Up." *University of Chicago*

*Law School*. Chicago Tribune, 06092005. Web. 28 Mar 2012.

<<http://www.law.uchicago.edu/news/stone090605>>.

## Appendix A

### **Interview with Legal Director of the ACLU, Steven Shapiro**

Note: My questions and comments are in BOLD. Shapiro commenced the interview by introducing a few caveats to performing statistical analysis on the ACLU's brief effectiveness, therefore the transcript commences there.

**Steven Shapiro:** Although everybody loves to do it I think that there's an inherent limitation in just adding up wins and losses and the limitation is that it assumes that all cases are created equal in terms of their significance in terms of civil liberties significance to the ACLU, significance to the development of the law and significance politically and that is simply not the case there are some cases that are more important than others and any strict arithmetical win-loss tally to cases has a built in bias to it. I don't know what to do about that but it is worth keeping in the back of your mind. The second thing is, I am sure you recognize this, while the ACLU participates in a lot of cases as amicus, we also have a lot of our own direct cases in front of the Supreme Court and so if one were trying to measure the ACLU's impact on the Supreme Court, a study that omits the cases where we have the greatest influence on how the arguments are presented to the Court. So focusing solely on amicus briefs while I think a worthwhile and useful thing to do it's only a slight sense of the tie and I think you ought to make that clear. The third thing is, and I know these are only intended as yellow light signals and not to discourage you from performing the study, it is very hard if you just focus on the amicus briefs when you look at a case in which we filed if our side won to say that the ACLU influenced the result, the case may have won with or without the brief and likewise when we lose or support a side that loses, the losing opinion may be written differently or more narrowly and there might be some questions that the Court

specifically reserves for another case rather than deciding in the case before it which is a form of victory where you actually narrow the loss. Those things are hard to quantify as well. All those things are just to say that it is a very complex and nuanced evaluation process and I do not have any suggestions to you on how to address all of those things. I just think that it is worthwhile to look at them.

**Shannon Azzaro: Thank you and I completely agree. That is why I wanted to look at it both quantitatively and qualitatively because there is story behind the numbers that you don't really get to see if you just look at it statistically.**

**SS:** There is a story behind the numbers that even I don't often know because there is just little way of knowing unless a brief is expressly cited in a Supreme Court opinion the extent that it was discussed when the justices wrote the opinion. Maybe someday when these justices retire and their papers become public we can learn more about this but there is a lot of reading of tea leaves here that is sometimes accurate and sometimes not. What we have, from my parochial point of view here at the ACLU is the statement that law clerks find the ACLU briefs reliable, dependable, and helpful and that various members of the Court over the years have said similar things which is all very nice but it is hard to know how to translate that into a number.

I have been the legal director since 1993 and from 1987 to 1993, I was the Associate Legal Director so in that capacity I have supervised the ACLU Supreme Court Docket since 1987 (for the past 25 years) so functionally every piece of paper that goes to the Supreme Court is reviewed by me. While the ACLU is a decentralized organization, all of the work gets centralized around the Supreme Court and all of that comes through my office.

**SA Question #1: What is the process by which the ACLU gets involved in Supreme Court cases they are not a party to? Who is involved in this process? Is it bottom up (local chapters feeding to National organization) or top down?**

**SS:** The short answer is that is a decision that is delegated to me and that I make in consultation with the effected affiliate and I make in consultation with the subject matter experts in the office, for example if it is an abortion case I consult with the people that do abortion work and if it is an immigration case I talk to the people who do immigration work. At the end of the day, it is a decision that I make.

**SA Question 2: What are the criteria to make decisions as to which cases to get involved in?**

**SS:** I track, obviously, all of the cert grants and I pay attention to all of the cases to which the Supreme Court grants review. Then I make an initial cut which is which ones involve civil liberties issues and which ones do not and focus only on the ones that involve civil liberties issues and on those that involve civil liberties issues, I usually try to determine a variety of things. One is how significant I think the question is. Secondly, we ask, do we have something distinctive to add? As an organization that is a repeat player in the Supreme Court, I feel very strongly that we should only be filing in cases where we can offer something to the supreme court and if they are merely repeating arguments that people are raising themselves either the parties or other amicus briefs then we are not doing the court a service and under those circumstances they will simply stop reading our briefs so the question is do we have anything additional to add or to say to the Court. The third question often is do we have the resources and the capacity to do the brief in the time allotted because Supreme Court briefing schedules tend to be very tight.

**SA Question 3: How do you determine how many cases to get involved in per year?**

**SS:** There is no set number. That number is determined in any given year by the criteria we just discussed. In some years there will be more important civil liberties cases on the docket and some years there will be fewer and sometimes there are issues where we feel like we have something to add and sometimes there aren't and we just go through the process and we wind up with whatever number we wind up with. I must say that the Supreme Court, over the course of my tenure, as you probably know has dramatically decreased the size of their docket. Back in the late 80s when I was just starting this, they were hearing and deciding 140 cases a year and they now decide about 80 cases a year and of those cases I'd say that we file between 15 and 20 amicus briefs in any given year. That is a sort of an average.

**SA Question 4: How do you decide whether the national organization should get involved or whether local chapters or the ACLU Foundation should get involved?**

**SS:** The issue that you alluded to about whether the brief gets filed by the ACLU, the ACLU Foundation or an ACLU affiliate is sort of a red herring because what typically happens with the ACLU is that the amicus party, not all briefs were as careful about this in the past, but the amicus party is the membership organization, the ACLU. If you read our statement of interest at the beginning of a brief it will say, "The ACLU is a nationwide nonpartisan organization with over 500,000 members...this issue is important to the ACLU and its membership". The lawyers, like me, are employed by the ACLU Foundation while the amicus party is the membership organization. The general rule of thumb is that if the national office is filing an amicus brief, I will generally include on that amicus brief the affiliate in the state in which the controversy arose. There are times when that does not happen when we are participating in a coalition on a brief with other national groups and so the only names that are going on the brief are national groups and the affiliate just drops off. I don't think that there is anything to be read into that one

way or the other and I am certain that none of that has any effect on how influential or not the brief is in the Court.

There are some occasions where we file amicus briefs as the lawyers and not the organization. That is less common but not uncommon. That arises where there is another set of individuals who have a particular stake in the outcome of the cases and we serve as their lawyers rather than the ACLU.

**SA Question 5: What draws you to a new case? What details or peculiarities make a case more appealing? Does likeliness to garner sympathy from specific justices have an impact?**

**SS:** What draws us to a new case has to do with the significance of the issues it presents and the extent to which the issues are ones we both care about and have some expertise that we think we can share with the court either legal or factual. A case is more appealing to the court and when we are deciding whether or not to go to the Supreme Court has to do with the facts of the case, the strength or weakness of the lower court opinion being appealed and various other things. If you are an amicus, those decisions are not in our hands. Those decisions are being made by the lawyers to the parties and at the time when we are being engaged, the Supreme Court has decided for better or for worse to take on the issue so those considerations that would be important if I was deciding to seek cert drop out when you get to the merits. Sometimes, I suppose if a case seems to be such a dead loser if it's an issue we care about, we will decide not to file and reserve our resources for a case where we think we can make a difference but that is not a common reaction. Sympathy is not a word I would use but it is certainly true that when we craft a brief to the Supreme Court whether we are doing it on behalf of our own clients and they are a party to the case or as an amicus brief, one of the things that you are constantly thinking about is how do you put together 5 votes in order for their side to win. One of the considerations

in every discussion when we are talking about the arguments to make is who will those arguments appeal to and what will be helpful to get to 5. Arguments are crafted with the personalities and ideologies of the justices in mind. I don't believe what some have said that it will not be helpful to have an ACLU brief that it can be a lightning rod that maybe it will turn off some justices and hurt rather than help. I think there's no evidence either empirically or anecdotally that the most conservative justices on the Court, Scalia and Thomas at this point, have said repeatedly that they read, that they rely on, and they find value in the ACLU amicus briefs and I think as an organization that has participated as frequently and as long of a period of time in the Court we have established our credibility with the court as serious and professional advocates. Individual justices may agree or disagree with us on a point but I think that they read our arguments for whatever value they find in the merits of the argument. I don't think the ACLU identity either gains or losses votes on its own, I think that it's the value of the argument that's between its covers.

**SA Question 6: From 1969 to 2005, there were approximately 3991 cases which involved civil rights and liberties, due process, and prisoners rights, all areas in which you frequently file. According to my calculations, you file in approximately 20% of possible cases. Can you discuss your decision making process in cherry-picking cases? Why file in some cases over others?**

**SS:** That number doesn't seem to be right. That's a 45 year period?

**SA:** I ran a filter on the Supreme Court Database and filtered by issue all of the issues that are related to areas that you will file in.

**SS:** My instinct tells me that that number is high but taking it at face value, since the number of cases has been 80, we have been filing in 20% of cases on the Court's docket, a significant

number of which are not civil liberties cases at all so I would estimate that we file in about 50% of all of the cases in which we could conceivably file because the issue is within our area of interest. This may include some issues of habeas corpus or criminal procedure which may be very small and technical.

**SA: I cast a broad net to include anything that you would conceivably file in.**

**SS:** Making the first cut here it just depends on our evaluation of the significance of the issue and our ability to make a difference and provide added value to the discussion. The Court takes cert for a variety of reasons: one is the importance of the case and the other is because there is a conflict in the lower courts. Sometimes that is important but other times it is because it is very technical. The Supreme Court takes it because it is two courts of appeal disagreeing with each other and that is unlikely the kind of case we would want to weigh in on.

**SA Question 7: Do you consider certain justices to be more open to briefs from the ACLU?**

**Do you tailor your briefs to certain justices? Is your target audience generally the more moderate justices/swing votes?**

**SS:** I think it is just empirically the case that the position we are supporting in the Supreme Court is more likely but not always to be aligned with the liberal or moderate wing of the Court than the conservative wing of the Court. That is not always the case, for example, in campaign finance. It is generally true that our bottom line is likely to be the same bottom line as the liberal wing of the court. That may mean that at the end of the day those justices are more receptive to the arguments we make but again there have been many statements including one by Justice Scalia just a couple of months ago in which he said that there are so many amicus most of them are not helpful and I don't read them that's why I have clerks- the clerks read them and he said that there are a few exceptions and he listed the ACLU as one of the briefs that he personally

reads. Whether or not it ultimately persuades, our message gets through to the entire court. As I said, I think that we have gained credibility in the court over the years. In terms of whether you are pitching arguments to particular arguments- often but not always- and who you have in mind when you craft the arguments- it all depends on the issues and it all flows from the calculation about the best chance to get 5 votes on your side- who those justices are who might be persuadable and who might not be. For most issues, the swing vote on the court right now is Justice Kennedy and it is certainly true that a lot of briefs including ACLU briefs are written with Justice Kennedy in mind but he is never the exclusive focus but there are a variety of reasons depending on strategy that make an argument that appeals to somebody else as well. There are 4th Amendment cases for example where it is possible to get Justice Scalia there are confrontation clause cases for example where Justice Scalia often takes a civil liberties side and in those cases your goal may be to provide ammunition to Justice Scalia but good amicus briefs, good briefs are not written in a vacuum, they are written with a knowledge of the justices, what they have said on these issues on prior occasions and you have an amicus strategy to try to appeal to as many parts of the Court that you arrive at 5 votes at the end of the day.

**SA Question 8: Have you noticed a difference over the years with the changing court and different chief justices in voting behavior?**

**SS:** I don't think that is a function of the chief so much. The Chief Justice has significant power but he only has one vote at the end of the day. Every change in personnel matters on the Supreme Court: it matters not only because it can alter the voting patterns but also because it can alter the personal dynamic. It may have been Justice Stevens or somebody else who said that every time there is a new person on the court, it is essentially a new court. I think that there is some truth to that. If you look at the current Court, the substitution of Chief Justice Roberts for

Chief Justice Rehnquist is less significant in terms of voting patterns than the substitution of Justice Alito for Justice O'Connor. The nomenclature: the Burger Court, the Roberts Court, is more of a convenience than a reality. The power the Chief Justice has is to assign the opinion and that decision is only made after the vote is taken.

**SA Question 9: Do you find it more effective to file alone versus with other**

**NGO/nonprofit/special interest groups? How do such coalitions typically work?**

**SS:** We do both: we file some briefs alone, in the name of others, we join briefs of others by signing our name to it. I don't think there is any hard and fast rule to it. I think that one of the things that everybody on the court is now complaining about is the proliferation of amicus briefs. The number of amicus brief filings has exploded over the past two decades and has increased to beyond the point where it is helpful to most members of the court. If there is the opportunity to work collaboratively, we do that. If we can reduce the number of briefs in a case there is a tactical advantage. If you submit 6 amicus briefs in a case they are more likely to be read than 16 so I certainly have nothing against joining a coalition and sometimes strange bedfellow coalitions can really catch somebody's eye so we filed a brief with the Cato Institute, for example, which is a left-right brief somebody may notice that and pay attention to it just because of the coalition so it's a tactical question and we make that decision on a case by case basis.

**SA Question 10: As the amicus curiae brief is a vehicle to show support and provide information to the court, how might a case fare without such support? At the decision stage? At the cert stage?**

**SS:** On the merits stage, the short answer is that it depends largely on the quality of the party's brief. The first brief that any justice is going to read is the brief written by the parties and if the parties are well represented and they write good briefs, the amicus briefs still have value but at

least you can have confidence that the basic issues will be covered. If the party's lawyers are not as good, a case without amicus briefs might have holes in it and the court can decide the cases unaware of issues or facts that might have been relevant had it been brought to their attention. So first the issue is the quality of the party's briefs. Beyond that, there are some very prominent recent examples where we know that amicus briefs have made a difference: the University of Michigan affirmative action case, *Grutter*, is one of them which went out of its way to point out the importance of the brief filed on behalf of major us corporations and the us military talking about the importance of affirmative action in preparing a workforce for the 21st century and a military force for the 21st century so I think that amicus briefs really can matter if they are well done.

At the cert stage there is an increasing body of thought that because there are so many petitions filed with the Supreme Court that amicus briefs filed at the cert stage can be very influential and effective in the decision of which cases the court agrees to hear and which cases the Court doesn't agree to hear. We do not file briefs at the petition stage here at the ACLU except in very rare circumstances because we try to focus our resources at the merits stage but increasingly other organizations are filing at the petition stage and there are statistics that say that petitions accompanied by more amicus briefs are more likely to be granted than petitions that are alone but there is a chicken and egg problem: you don't know if the cases are granted cert because they are accompanied by amicus briefs or if the amicus briefs are filed because it is an important case. It is certainly the case that there are an increasing number of briefs at the petition stage just not by us.

**SA Question 11: Given your history of involvement in many monumental cases, do you find that your support garners more pull or attention than the support of other organizations?**

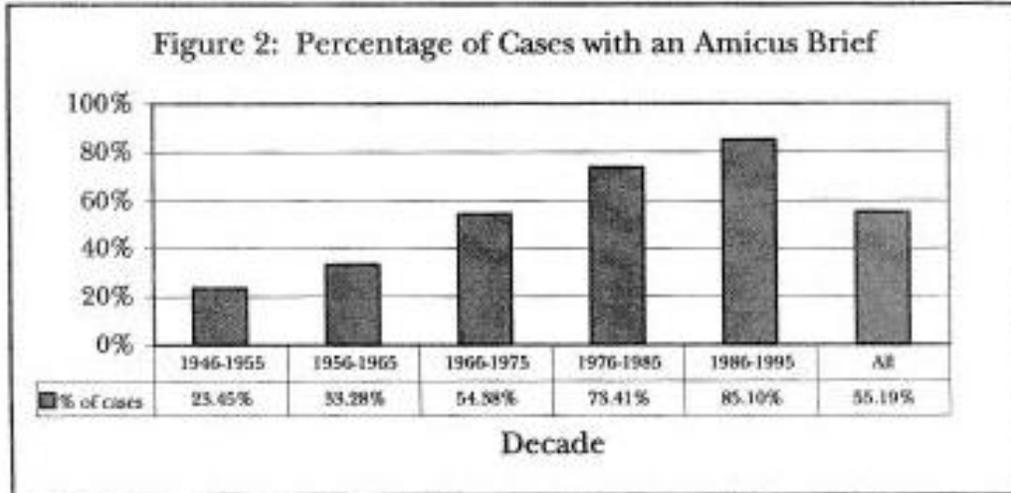
**SS:** That is a hard thing for me to assess. I do feel confident and comfortable with the idea that our briefs are read by the court that they are respected by the court and that they can matter depending on the cases but I cannot weigh that against other organizations.

**SA Question 12: Do you find that you have more success in filing in certain areas over others?**

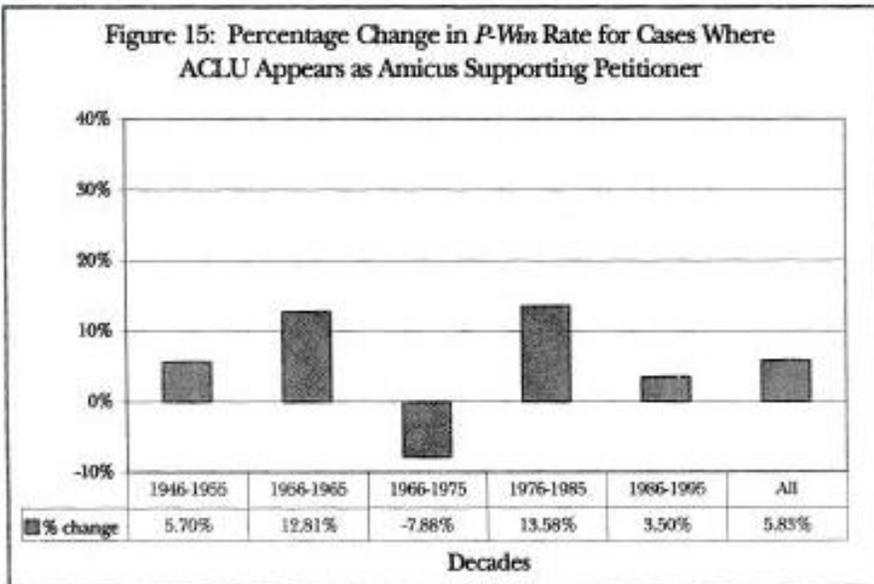
**SS:** It depends upon the composition of the Court but it is probably true that we have the most success with traditional First Amendment cases because even as we have gone through the Burger, Rehnquist, and now the Roberts Court, a sequence of increasingly conservative Courts, the Court has remained fairly good on First Amendment issues. The First Amendment has been a principal concern of the ACLU and we generally support more speech rather than less speech that has been a predisposition of even the more recent and conservative Supreme Courts and so our record in First Amendment cases has been pretty good. It gets harder when you get to criminal cases because as the court has gotten more conservative they have gotten less hospitable to defendants' rights cases, so yes the subject matters.

Appendix B

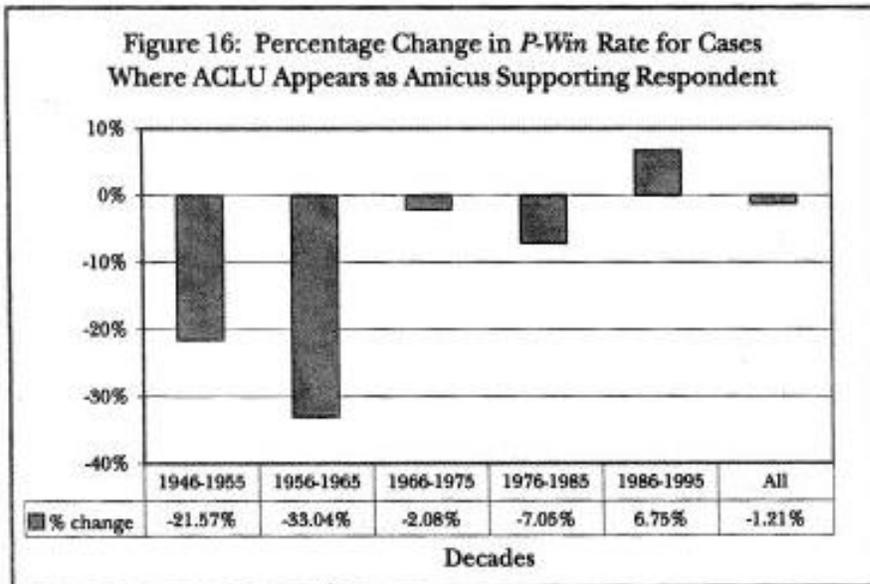
Kearney and Merrill Results



<i>Data Underlying Figure 2</i>	1946-1955	1956-1965	1966-1975	1976-1985	1986-1995	All
Number of Cases with Amicus Briefs	250	391	714	1052	982	3389
Total Number of Cases	1066	1175	1313	1433	1154	6141



<i>Data Underlying Figure 15</i>	1946-1955	1956-1965	1966-1975	1976-1985	1986-1995	All
Number of Cases	33	43	45	56	73	250



<i>Data Underlying Figure 16</i>	<i>1946-1955</i>	<i>1956-1965</i>	<i>1966-1975</i>	<i>1976-1985</i>	<i>1986-1995</i>	<i>All</i>
Number of Cases	3	7	44	103	94	251

Source: (Kearney and Merrill 753, 805-806)

## **ACADEMIC VITA of Shannon D. Azzaro**

Shannon D. Azzaro  
165 Vreeland Ave.  
Bergenfield, NJ 07621  
shannon.azzaro@gmail.com

### Education:

Bachelor of Arts Degree in Political Science and English, The Pennsylvania State University,  
Spring 2012  
Minors in Psychology and French  
Honors in Political Science  
Thesis Title: —ACLU Influence on Supreme Court Decisions through Amicus curiae Briefs  
Thesis Supervisor: Christopher Zorn

### Awards and Honors:

Donald and Diane DiFrancesco Scholarship in Political Science: 2010 - 2011; 2011- 2012  
Brunhouse Endowed Scholarship in the Liberal Arts: 2011- 2012  
College of the Liberal Arts Enrichment Award: Summer 2011  
Schreyer Ambassador Travel Grant Summer: 2010 & 2011  
Erim Fund in Political Science Summer Enrichment Award Recipient: 2010  
Dean's List: 2008-Present

### Association Memberships:

Phi Beta Kappa Honor Society  
Golden Key International Honor Society  
Pi Sigma Alpha National Political Science Honors Fraternity  
Phi Eta Sigma National Honors Society  
Phi Sigma Pi National Honors Fraternity