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THE CHANGING EFFECT OF AMICUS CURIAE BRIEFS ON THE UNITED STATES SUPREME COURT

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ABSTRACT

This thesis builds upon the existing literature on the United States Supreme Court and amicus curiae ("friend of the court") briefs. It examines the influence of amicus briefs during the Court's gatekeeping decisions and final case rulings. In order to provide a more comprehensive analysis of the Court's behavior over time, I independently collected data relating to amicus brief advocacy on writs of certiorari petitions during the 2007 term. I propose and test explanations for amicus briefs' varied impact at both the United States Supreme Court's gatekeeping and final case ruling stages. I hypothesize that amicus briefs will have a stronger impact on the likelihood of the Court granting certiorari when the Court receives a greater number of petitions for review. Second, I argue that amicus briefs will be more influential on case rulings when the Court's ideology closely mirrors a brief's ideological disposition. My results indicate that the role of amicus curiae briefs at the gatekeeping stage is more nuanced and irregular than the current literature may suggest, while the effect of amici at the merits stage is largely shaped by justice ideology.

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CHAPTER ONE: LITERATURE REVIEW

Introduction

In 1988, Caldeira and Wright's seminal work, "Organized Interests and Agenda Setting in the U.S. Supreme Court," led to a surge in the study of the high court, judicial decision making, and interest group lobbying of the American courts. Students of judicial politics over the past two decades have directed much time and energy to evaluate the influence of pressure groups on the judicial process. Given the powerful role the judiciary and interest groups play in the American political system and policy creation, such attention is remarkably valuable. Though interest groups participate at each level of the court system, scholarly focus has been largely directed toward examining interest group lobbying of the United States Supreme Court through amicus curiae ("friend of the court") briefs. While the literature has shown that amici curiae can partly shape the Supreme Court's decisions, it fails to provide a comprehensive understanding of why this effect fluctuates in strength and directionality. Absent the literature's assessment of the varying nature of the amicus impact on the Court's certiorari[1] and case merits decisions, I propose and examine two possible explanations in this thesis.

General Theories of Judicial Behavior

Before examining the state of the literature on amicus briefs, it is important to briefly discuss the theoretical underpinnings of the study of judicial politics more generally. As George and Epstein note, the division between positivist and political jurisprudence has largely dominated the field (1992). Much of the work within the judicial politics discipline has treated

[1] The manner in which the Supreme Court decides which cases it will review is determined by grants and denials of petitions for writs of certiorari. These petitions are submitted by litigants seeking the Court's review of a lower court ruling. The Supreme Court decides to grant or deny "cert" based on the "rule of four," whereby four justices' approval is needed to review a case.

these two approaches as mutually exclusive ventures and has exaggerated each theory's successes and the other's failures. Both theories, in reality, have strengths and weaknesses in their explanatory and predictive power.

Adherents to the jurisprudential model claim that legal factors are the primary determinants of judicial behavior. These positivists assert that the rule of stare decisis and similar legal principles dominate judicial decision making (see e.g., Knight and Epstein 1996 and George and Epstein 1992). Legal principles, judges and proponents of the legal model claim, ensure consistency in the law by adhering to long lines of legal reasoning. Scholars like Epstein and Knight (1996) have likewise described the Court's respect of stare decisis[2] as a constrictive norm on the Court's behavior. Richards and Kritzer have similarly characterized the jurisprudential regimes rooted in long lines of precedents as determinative of how justices weigh case facts and applicable laws to reach legal conclusions (2002). The legal model ultimately rests upon the idea that the law is the conclusive causal mechanism of judicial behavior.

Conversely, many scholars have argued that political and extralegal factors are more apt explanations of judicial decision making. This side of the literature is most defined by its roots in behavioralism and social-psychology response patterns. Segal and Spaeth (2002) have been the most vocal supporters of the extralegal model, specifically stressing the role of judges' political attitudes. Under their model, legal decisions are simply means to advance a judge's preferred policies. This conception contradicts the conventional description of the Court as an almost robotic arbiter of the law as famously set forth by now Chief Justice Roberts, who began his confirmation hearings by stating, "Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role (Weber 2009)." The courts, according to the extralegal

[2] Stare decisis is the legal principle of deferring to legal precedent as a method of deciding cases.

model, are no different from other policy making bodies. Segal and Spaeth find little usefulness in the legal model, writing, "…we argue that the legal model and its components serve only to rationalize the Court's decisions and to cloak the reality of the Court's decision-making process (2002, 53)." The extralegal model instead purports that the Court, as a result of its uniquely well-entrenched institutional framework, is able to act according to its ideological and policy preferences (Segal and Spaeth 2002). Empirical evidence has been supportive of the attitudinal theory. For instance, using an exogenous measure of justice ideology derived from newspaper editorials written about the justices at the time of their confirmation, Segal and Cover found considerable evidence that ideology accounts for a large percent of the justices' behavior (1989).

Other theories have sprung from within this extralegal vein of the study of judicial politics. Building upon attitudinal models, Tate (1981) and Gibson (1974) have put forth explanations of judicial behavior that emphasize personal attributes and role orientations, respectively. Strategic choice models have likewise emerged from the argument that judges are policy motivated. These models concentrate on judges' desire to enact ideal policies through sincere (i.e., voting strictly according to their policy preferences without any sort of forward thinking) or strategic behavior and how this behavioral division can influence judicial processes. For example, Caldeira, Wright, and Zorn (1999) observed that justices, based on their perceptions of a case's likely outcome on the merits, may use strategic voting, in lieu of acting sincerely, when voting to grant or deny certiorari petitions.

The legal and extralegal approaches to the study of the U.S. Supreme Court have both strengths and weaknesses as outlined in George and Epstein's study of death penalty cases (1992). This work evaluated the explanatory strength of both models, eventually showing that each performed well independently but failed to account for a sizable portion of the Court's

behavior (George and Epstein 1992). Nevertheless, these basic theoretical frameworks have extended into other judicial behavioral studies, including those pertaining to interest group participation in Supreme Court litigation.

Interest Groups, Amici Curiae, and the U.S. Supreme Court

Interest groups can actively shape the courts' policy making through a variety of practices: sponsoring class actions and test cases; providing legal advice, expert testimony, and financial assistance; and submitting amicus curiae ("friend of the court") briefs. One of the most empirically investigated methods of interest group lobbying of the Supreme Court is the filing of amicus curiae briefs (see e.g., Caldeira and Wright 1988; Collins 2004; Kearney and Merrill 2000). The Court has, through a liberal application of Supreme Court Rule 37 (the rule governing amici participation), allowed essentially all interested parties to submit amicus briefs. The only prerequisite for amicus participation is that the groups obtain permission from the case litigants or the Court itself (in cases where the former is refused, the latter is almost always given). The vast majority of interest groups' amicus filings occur once a case is granted certiorari. But many groups still file amicus briefs at the certiorari level. By granting or denying cert petitions, the Court decides whether or not to review a case, thereby strictly controlling its policy agenda (Caldeira and Wright 1990). Both avenues for amicus participation in Supreme Court litigation have been scrutinized repeatedly. To promote understanding of the current state of amicus curiae brief literature, it is necessary to first consider the research regarding the motivations that drive interest groups to act as amici.

Interest groups, as advocates, inherently want to promote their preferred policies. A central goal in interest group behavior is to expand resources and membership rosters to that end. Greater resources and membership enable interest groups to pursue vital policy goals. Solberg

and Waltenburg (2006) argue and find support for the proposition that interest groups engage the judiciary out of concern for both policy formation and organizational maintenance (i.e., retaining membership and constituency support). Hansford has found additional evidence that particularly membership, rather than institutional or corporation, based organized interests' amicus behavior is constrained by the need to retain constituency strength (2004). Economic interests, mainly state governments and corporations, have generally been more active amicus participants in the Court's agenda setting decisions (Caldeira and Wright 1990). Pressure groups also engage the judiciary because it is often a more favorable venue when groups have supportive institutional resources, like in-house legal counsel, or when they encounter heavy competition to maintain constituency support within an issue area (Solberg and Waltenberg 2006).

Interest groups are also more likely to file briefs, either on certiorari or case merits, in poor-information settings (as indicated by the quality of litigant counsel, complexity of the legal issue, and invitations extended to the Solicitor General to participate in a case) and a significant likelihood of litigation success. Low information settings allow groups to maximize their informational role and thus exert the greatest possible influence on the Court (Hansford 2004). Interest group activity can even be prompted by the Court's issuance of politically salient decisions in a given issue area (Baird 2004). The Court's ruling on an issue indicates to interest groups a willingness to hear further litigation on the matter.

The literature's explanations of the factors motivating interest group involvement in litigation are important concerns for any study of the impact of amici curiae. Based on these current findings, cases receiving amicus participation will be more likely to present salient and complex policy conflicts that offer groups the greatest opportunity to influence policy makers and demonstrate the group's effectiveness to their constituencies. This potentially introduces

selection bias, as the cases receiving amicus attention may already be those most likely selected for plenary review. McGuire and Caldeira's (1993) study of obscenity cases and amicus curiae fortunately provides some insight into this perplexing relationship. They found that amici and experienced obscenity lawyers representing case litigants acted differently when deciding which cases to bring before the Court. Assuming that experienced lawyers typically prefer litigation success, behavioral deviation between the amici and litigant counsel would seem to partially indicate that amici do not solely pick cases in which litigation success is nearly predetermined (McGuire and Caldeira 1993). Groups seeking merely to show active policy engagement, therefore, may not be as concerned with the actual success of a brief arguing for certiorari but may instead be focused on showing their constituencies that they are engaged on the issues. Studies on interest groups, taken as a whole, provide an important understanding of why and when interest groups decide to engage the judiciary. Moreover, they indicate the importance of controlling for other factors that influence cert-worthiness in order to observe the true effect of amici curiae on cert decisions.

The Role of Amicus Curiae Briefs in Supreme Court Litigation

Political scientists have meticulously studied amicus curiae briefs and the United States Supreme Court with respect to both agenda setting and rulings on case merits. As outlined below, research shows that amici have an inconsistent influence on the Supreme Court's decision making across these two areas. I now discuss the present state of the amicus literature.

Caldeira and Wright's groundbreaking (1988) study, which collected and analyzed amicus certiorari data for the 1982 term, found that amicus presence increases the likelihood of plenary review. As they explain, the briefs act as powerful signals of a case's policy importance without necessarily convincing the Court of the legal merits of a given petition (Caldeira and

Wright 1988). This inference is strengthened by the observation that even amici that oppose a grant of cert increase the likelihood of a petition's plenary review.[3] That is, the signaling effect of an amicus remains partially intact even if the party opposes the Court's review of the case. Later work by Caldeira and Wright (1990) showed that the amicus effect on cert decisions extends to the Court's use of "discuss lists." The list typically includes 20-30% of all certiorari petitions received throughout a given term and the Court then picks from that list those cases to receive full review. Amicus briefs were found to play a major role in the Court's "discuss list" formation and subsequent selection of cases for review (Caldeira and Wright 1990).

Others in the field have corroborated the work of Caldeira and Wright (1988; 1990) on certiorari decisions. McGuire (1994) found that "repeat players," attorneys with Supreme Court litigation experience, strategically assemble amicus coalitions to increase the likelihood of the Court's plenary review. Within specific issue areas, Caldeira and Wright's (1988) original conclusions also have empirical support. McGuire and Caldeira (1993), for instance, demonstrated that amicus curiae briefs submitted by libertarian and proscriptionist groups in obscenity cases act as signs of case importance and increase the likelihood of a grant of cert. In general, the literature strongly suggests that amicus curiae briefs play a powerful part in increasing the probability of the Supreme Court's decision to review an appealed case.

Students of judicial politics have even more rigorously examined interest groups' amicus filings at the Court's plenary review stage. Unlike those submitted during the Court's agenda setting stage, the effect of amicus curiae briefs on the Supreme Court's final rulings is a subject of significant scholarly debate. Similar to certiorari petitions, the Court has widely accepted amicus briefs which argue for the particular disposition of a case (Spriggs and Wahlbeck 1997).

[3] Plenary review refers to the Court's full and final review of a legal case or issue.

These filings reinforce the arguments made by the party litigants or introduce new legal and policy reasoning and information (Spriggs and Wahlbeck 1997).

Judicial and interest group scholars have gathered persuasive evidence that amicus support can positively affect a litigant's chances of success (Hassler and O'Connor 1986; Kearney and Merrill 2000; Collins 2004). Some have presented empirical support arising from single issue areas. For instance, Hassler and O'Connor (1986) claim that amicus curiae briefs have a significant impact on a party's success, specifically citing the success of environmental interest groups.

Conversely, some in the field remain opposed to the claim of an independent amicus effect on case rulings. Songer and Sheehan's 1993 study, "Interest Group Success in the Courts: Amicus Participation in the Supreme Court," is emblematic of this opposition. In that work, Songer and Sheehan found through precision matching of similar cases with and without amicus briefs that there is no significant amicus impact upon the Court's decisions once important spurious factors were controlled statistically. Songer and Sheehan did, however, acknowledge that the effect of amicus curiae briefs varied based on issue area and the presiding Court (1993). Taken in the aggregate, the field has thus far presented empirical analyses suggesting that the effect of amicus curiae briefs on the Supreme Court's rulings is by no means a determinative factor. Rather, as some advance, it seems to be only one of many elements that collectively shape the judiciary.

The Varying Nature of the Amicus Effect

The inconsistent nature of the amicus effect, across the Court's certiorari decisions and case rulings, gives rise to a question largely unaddressed in the literature: Has the influence of amicus curiae briefs on the Supreme Court's behavior changed over time? Previous research

designs are inadequate to answer this crucial question. Studies of amicus curiae briefs' effect on the Supreme Court's certiorari deliberations have been quite limited, largely due to a lack of a comprehensive database, and have examined single isolated Court terms (e.g., Caldeira and Wright 1988). Similarly, studies of the amicus effect on case rulings have generally been either issue specific (e.g., Hassler and O'Connor 1986) or aggregated analyses (e.g., Kearney and Merrill 2000). This gap in the amicus literature unfortunately clouds our more complete understanding of the American political system.

Before attempting to tackle this issue, the theories underlying the nature of the amicus effect must be revisited to provide proper context. The traditional argument made about the success of interest groups appearing in Supreme Court litigation is that the groups are effective coalition builders and policy advocates that enjoy a "repeat player" advantage over the many "one shotters" appearing before the Court (see e.g., Epstein and Rowland 1991).[4] Although theories set forth explaining the amicus effect at cert and case rulings echo these general sentiments, each vary slightly.

Most of the literature, as embodied by Caldeira and Wright (1988), purports that amicus briefs increase the likelihood of cert because they act as powerful signals of a case's importance. Caldeira and Wright state that the amici briefs' "'statement of interest' permits the amicus to communicate a great deal of information about the social, political, and economic implications of the Court's decision; and, in turn, the justices have ready access to data about which kinds of interests have expressed which preferences (1990)." The briefs subsequently help reduce the problem of incomplete information presented by the Court's policy formation decisions (Spriggs and Wahlbeck 1997). The presence of amici at the cert level is a relatively infrequent event,

[4] Repeat players are parties that have accumulated litigation experience through participating in multiple cases before the Court. "One shotters" are parties without significant Supreme Court litigation experience and often have only participated in single cases before the high court.

partially because the odds of convincing the Court to grant cert in any given case are incredibly low. Parties generally have little incentive to expend resources if the chance of review is so negligible. The extreme cost of drafting an amicus brief also disincentives their frequent use. Caldeira and Wright (1990) revealed that only 29% of amicus curiae briefs submitted to the Court are filed at cert with the vast majority (71%) submitted on the merits. When amicus parties do spend the considerable resources to hire experienced appellate litigators, it is a distinctive cue that the petition merits the Court's attention (Caldeira and Wright 1988).

The proffered explanation of amicus success on cert is entirely reasonable and empirically supported. The question then becomes whether the strength of this signal varies or is comparatively stable. Prior studies offer little examination of the amicus impact at the cert level across time. If the amicus cue does fluctuate in power, it will be important to determine why the literature has not yet found that inconsistency. It seems more likely that the effect would differ with the changing climate of the Court.

I believe that the answer can be found in the current petition trends. Even over the relative short term, there has been a rapid increase in the number of petitions presented to the Court. At the same time, the number of petitions accepted for plenary review has remained fairly constant, numbering around one hundred (Caldeira and Wright 1990). Case in point, the literature has noted that the number of total cert petitions increased from 1,906 in the 1982 term to over 8,000 in 2006 (cf. Caldeira and Wright 1988 and Epstein and Walker 2007, 12).

On the other side of the picture, the explanations offered for the effect of amicus curiae briefs on the Supreme Court's final rulings are more complicated and mixed. The work most on point is Collins' (2004) study, "Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation." Collins sets forth two theories explaining the

amicus effect: the affected group hypothesis and the informational hypothesis. The former asserts that briefs are effective because they give the Court a barometer of a decision's impact on a constituency (see also McAtee and McGuire 2007). The latter claims the amicus effect is the product of the supplemental legal and policy information provided within the brief. Collins found empirical support in favor of the informational hypothesis while the affected group hypothesis was not supported by his analysis (2004). The informational hypothesis has also received corroboration from other works. For example, McGuire and Palmer's examination of the justices' willingness to expand case issues (as a de facto function of the Court's agenda setting powers) lends evidence to the informational impact of amicus briefs (1996). As they note, amici in *Mapp vs. Ohio*, not the actual parties to the case, introduced the exclusionary rule as a relevant issue (McGuire and Palmer 1996). Moreover, Spriggs and Wahlbeck (1997) found that during the 1992 Court term an overwhelming majority of amici offered information and arguments not initially presented by case litigants. Supplemental arguments, although more likely to be rejected by the Court, are frequently accepted in the Court's decision if they reinforce a party litigant's reasoning (Spriggs and Wahlbeck 1997).

Collins' recent work connecting amicus briefs' effects and social psychology further illuminates why the briefs' influence on the Supreme Court's final decisions may fluctuate (2008). His attitudinal congruence theory, building upon the behavioralism and social psychology aspects of the judicial literature, purports that ideological arguments presented by amici are most likely to resonate with similarly attitudinally aligned justices. Thereby, conservative justices are more likely to favor the arguments and information presented by conservative amici (whether or not the information is new or simply reiterates the arguments presented by other parties) than liberal justices and vice-versa (Collins 2008, 87). The bulk of

judicial literature that characterizes ideology as a defining aspect of judicial decision making and interest group decisions to lobby the courts supports this theory of the conditional success of amicus briefs. Hansford (2004) has shown that interest groups, in order to guarantee favorable policy creation, are more likely to lobby the Court when the group's ideology is more closely aligned with the Court. Hansford's and Collins' observations ultimately suggest how amicus curiae briefs' effect may vary at the plenary review level.

The connection between the dynamic effect of amici curiae and justice ideology resonates with the literature's description of the Court's changing environment. Followers of the Supreme Court have traditionally marked the Warren Court's tenure by its liberal decisions and aggressive use of judicial review with a high percentage of anti-government rulings in civil rights and criminal cases (McCloskey 1965). Protecting equal rights for minorities is another prevalent theme in the study of the Warren Court (Beaney 1968). In contrast, scholars describe the Burger Court as a more fragmented jurisprudence and ideology (O'Brien 1987), more restricted institutional access (Rathjen and Spaeth 1979), and more moderate use of judicial review (Lindquist and Spill Solberg 2007). The judicial politics literature has characterized the Rehnquist Court as a more conservative body (Hensely and Smith 1995) that established limited institutional access and expressed an increased willingness to strike down established legal precedent (Lindquist and Spill Solberg 2007).

The reader should note that the Court's changing ideological composition has been shown to be not a mere function of the retirement and replacement of sitting justices. It is also partially the product of the ideological drift of the justices (Epstein et al. 2007). The literature on the ideological and deliberative nature of the Court shows that shifting ideology is an important factor in the judicial process and cannot be ignored. Justices, often serving for many decades,

are certainly capable of changes of the heart. One of the most frequently cited examples is Justice Harry Blackmun's shift in opinion on the death penalty. As a result of these ideological changes, amicus curiae briefs may be more or less accepted depending upon their attitudinal position relative to the Court.

To review, the literature presents a broad range of findings concerning the Supreme Court, judicial politics, and interest group activity. Empirical studies have repeatedly confirmed the rational behavior of interest groups and justices when advancing their policy goals. Research has additionally provided strong evidence that justices are motivated by ideology and desires to create effective public policy. The literature is also unanimous in its portrayal of the ever-evolving Supreme Court environment. Yet it is largely incomplete in terms of its analysis of the amicus effect on the Court's cert and plenary review decisions. Namely, past studies have not conclusively shown why and how the influence of amicus curiae briefs on the United States Supreme Court's decision making changes over time.

CHAPTER TWO: THEORETICAL FRAMEWORK

Theories for the Varying Nature of the Amicus Effect

Building upon the existing literature, we can gain additional insight regarding the relatively unanswered question of whether amicus effects are static or dynamic. In this chapter, I explicitly outline my arguments, partially introduced in the preceding section, explaining the changing amicus effect on cert and case rulings. Each of these theories is rooted in past empirical research of amicus curiae briefs and the United States Supreme Court.

First, I assert that, based on the strongly supported signaling effect theory, amicus curiae briefs will be more influential on certiorari decisions in recent Court terms when the Court has received greater volumes of total petitions for review.[5] As alluded to previously, the Court will likely come to rely increasingly upon cues of case importance as its workload, partly determined by the number of total submitted cert petitions, increases. I assume that the Court will want to alleviate the heavy workload resulting from the increase in cert petitions in order to remain an effective policy maker. It is a reasonable presumption that a rational body, like the Court, will seek out practices and procedures that promote productivity and efficiency. Amicus briefs are an effective and low-cost measure of case saliency and a ruling's repercussions. The amicus signal, in terms of both policy development as well as constituency impact, is incredibly useful to the justices and their clerks.

Using the Court term as a proxy for the number of petitions received (the number of has steadily increased over the years), more recent Court terms will expectedly show a greater influence of amicus curiae briefs on cert decisions. Older terms with lower numbers of petitions for plenary review would, in turn, present a slightly weaker, albeit still significant, signaling

[5] The qualifier of "total" number of petitions for review is an important one. The number of paid and unpaid, or in forma pauperis, petitions vary across each term. But the total volume of petitions has risen consistently in the recent past.

effect. In those terms, the Court would arguably be less overwhelmed with petitions and would not need to as readily resort to time-saving practices, like identifying amicus filings, to ascertain case importance. One final assumption of this theory is that the number and frequency of amicus curiae briefs on cert will not drastically increase as the total number of petitions continues to rise. This last premise is grounded in the interest groups' continued focus on the Court's plenary review stage to the exclusion of the initial gatekeeping step. Taken together, these conceptions form hypothesis one.

Hypothesis One: The greater the number of total petitions for writ of certiorari submitted to the Supreme Court, the greater the amicus effect on the likelihood of cert. The smaller the number of total petitions for writ of certiorari filed with the Supreme Court, the smaller the amicus effect on the probability of cert.

In order to successfully evaluate this hypothesis, we need the most comprehensive time-series data to observe different trends in the volume of petitions submitted to the Court. Since the literature lacks previous comparative time-series study of the amicus-cert effect, my theory takes for granted that the amicus effect fluctuates across time. This assumption is justified because of the changing nature of Court in terms of its behavior, cases selected for review, and underlying political climate. The gradual evolution of the Court makes it probable that the Court would treat amicus curiae briefs at the certiorari level irregularly in different terms.

Second, with respect to the decision on the merits, I argue that the Court's changing ideology, either through shifting or static membership, causes a varying amicus effect. I base this argument on several reasonable assumptions about the Court. First, I assume that justices are policy-oriented and desire to produce policy outcomes consistent with their political views.

Second, I presume that the justices recognize that they possess limited information and will look to other sources, like amicus curiae briefs, to develop the most efficacious policy.

Following Collins' arguments, I believe that the usefulness of amicus-provided arguments and information will be conditioned by ideological compatibility between the amicus and justices. I expect that as a justice moves farther to the liberal side of the ideological spectrum, amicus briefs filed on behalf of a liberal party will have a greater effect on the Court's decision (and vice-versa). The explanatory power of this hypothesis will be most evident at the individual (justice) level which allows for a clear comparison of the justice's and amicus' ideology. Examining this theory at the justice level, furthermore, most faithfully complies with the process by which justices and their clerks individually examine and scrutinize the case facts and briefs and then discuss the legal issues with the other justices.

My hypothesis is rooted in the attitudinal model. Confirmation bias is a primary applicable theory, whereby the justices are most likely to believe information or propositions that confirm to their preexisting beliefs. It seems wholly illogical that a conservative-minded justice, when presented with a difficult or ambiguous legal issue, would be swayed by derivative or even innovative arguments presented by a liberally minded amicus curiae brief. The same reasoning suggests the improbability of other incompatible pairings of justice and amicus ideology resulting in an amicus' strong persuasive power. Simply put, I argue that the ideological distance between the justice and the amicus brief will determine the persuasiveness of the brief and its effect on a justice's decisions. Regardless of whether this ideological congruence takes place at a subconscious or conscious level, minimal ideological separation between the justice and amicus will lead to the brief's heightened persuasiveness while greater distance will result in a less consequential brief. These ideas comprise hypothesis two.

Hypothesis 2: The smaller the ideological distance between justice and amicus, the more effective the brief will be on the merits. The greater the ideological distance between justice and amicus, the less effective the brief will be on the merits. "Effective" means that the justice is more likely to vote for the position supported by the amicus.

These separate but wholly compatible theories potentially explain why the amicus effect on the Court's gatekeeping and plenary review stages has been the product of consistent empirical verification on certiorari while determinations of amici impact on case rulings have been inconclusive. The proposed necessary conditions for a positive and significant amicus effect on cert were present throughout the past decades. The total numbers of petitions for review has remained high and continually increased. Conversely, the receptiveness of the ideological environment for amicus filings on case merits has been more averse to a reliable impact on the Court's decisions. This is the natural result of changes in the ideological composition of the Court as justices retire and are replaced.

Past research designs, as discussed, have been generally inadequate to test these claims of shifting amicus impact. The testing of these theories demands comprehensive coverage of the Court's behavior over time. Unfortunately, the lack of compiled amicus data at the cert level has long plagued the judicial politics literature. For my purposes, I compare the effects of amicus curiae briefs filed on cert and plenary review across four Court terms: 1968, 1982, 1990, and 2007. These terms conveniently provide a sample of the Court's distinctive behavior during the Warren, Burger, Rehnquist, and Roberts Courts. To analyze the amicus effect on case rulings during the four terms, I use the amicus dataset assembled by Kearney and Merrill (2007) and updated by Collins (2008).

Songer and Sheehan (1993) previously investigated the inconsistent efficacy of amicus briefs over periods of the Warren, Burger, and Rehnquist Courts, finding a notable change in the amicus effect between the Warren and subsequent Courts. Their comparative study is a useful example and is indicative of the potential utility of my approach. Court data on both cert and case rulings will be cross-analyzed and compared to determine the validity of my proposed explanations of the changing amicus effect. This approach offers the best compromise between minimizing research costs and using a sample as generalizable as possible.

Alternative Explanations of Court Behavior

Revisiting the literature reveals other important factors shaping the Supreme Court's decision making. These elements must be noted and controlled for so that the hypothesis may be accurately tested; otherwise, their presence could cloud our understanding of the Court's decisions as shaped by amicus curiae briefs. These variables include justice ideology, legal conflict, and Solicitor General participation in a case.

The effect of ideology in judicial deliberations is one that extends to the early literature on the high court. Scholars have noted that justices are more likely to vote to grant cert in cases wherein they wish to overturn ideologically incongruent lower court rulings (Caldeira and Wright 1988; Caldeira, Wright, and Zorn 1999). Caldeira and Wright (1988) provide compelling evidence in support of this claim, finding that the more conservative Burger Court in 1982 was more likely to review liberally decided lower court cases. Similarly, as championed by attitudinal and extralegal proponents (e.g., Segal and Spaeth 2002), justice ideology is a crucial causal factor in the Court's decisions on case merits.

In 1984, Ulmer established that conflict[6] is a stronger predictor of grants of cert than any other single variable despite its variance in strength across the Vinson, Warren, and Burger Courts. Conflict as an indicator of cert is fully supported by Court's the institutional and legal framework. Through Supreme Court Rule 10 and Article III of the U.S. Constitution, the Court may only take cases involving significant legal conflicts or controversies. Indeed, Caldeira and Wright (1988) later confirmed Ulmer's initial findings in their study of certiorari decisions during the 1982 term, showing that the Court is more likely to take cases that allow it to promote unity of the law. Within that same work, Caldeira and Wright (1988) revealed that the Court is more likely to take appeals that involve dissents among lower court panels of judges. Again, this implicates the Court's objective of promoting a unified implementation of the law: both conflict among the lower courts and the Supreme Court as well as lower court dissents are ultimately signals to the Court of its needed intervention to ensure consistency in federal law. These factors, much like amicus curiae briefs, build upon cue theory: both conflict and dissent are viable signals of a petition's significance. To more accurately evaluate the amicus effect, specifically on certiorari, the following analyses must control for legal conflict and disagreement.

Caldeira and Wright (1988) as well as Bailey et al. (2005) have also persuasively argued that the presence of the Solicitor General in a given case can affect the Court's decision making. The Solicitor General, who represents the United States' interests before the high court, acts as an agent of the Court and provides useful information regarding a ruling's impact. Considering the respect that the Solicitor General commands as the "Tenth Justice," its success with the Court is more likely, compared to other litigants, on both certiorari and case merits decisions.

[6] Conflict refers to disputes, in terms of legal interpretations and conclusions, between the Supreme Court and lower courts as well as inter-circuit disagreements.

Accounting for these cases where the Solicitor General appears as a party litigant or amicus is necessary to avoid confounding influences.

To recap, the dynamic environment of the Court, in terms of workload and ideology, suggest an explanation of the erratic amicus effect. Increasing numbers of petitions requesting the Court's review presents a burden on the Court's policy making powers. Using amicus briefs at the cert level as flags of a petition's significance would potentially allow the Court to minimize resource costs at the agenda setting stage and create more successful legal policies. The Court's shifting ideological environment likely conditions the effect of amicus briefs submitted on the case merits. Justices, like most people, are shaped by predispositions, biases, and internal beliefs. The literature's identification of other influences on the Court, including legal conflict, Solicitor General advocacy, and justice ideology, introduces another layer into our understanding of the role of amicus curiae briefs and the United States Supreme Court. When moving forward to assess the two proposed hypotheses, these confounding variables must be controlled for in order to isolate the true connection between amici curiae and the high court.

CHAPTER THREE: ANALYSIS OF THE CHANGING EFFECT OF AMICUS CURIAE BRIEFS ON THE COURT'S GATEKEEPING BEHAVIOR

Methodology: Certiorari Petitions and Amicus Curiae Briefs

In the following two chapters, I set forth descriptions of the methodology and tests used to evaluate the two proposed hypotheses relating to the varying effect of amicus curiae briefs on the Court's decision making processes. For sake of organizational simplicity, I separate the methodology and statistical testing sections by hypothesis. I conclude with a cumulative discussion of the findings. In this chapter, I examine the relationship between writs of certiorari petitions and amicus briefs.

We now turn attention to testing the first hypothesis, which asserts that amicus curiae briefs will show a more powerful effect on the probability of cert in more recent Court terms. In this chapter, I begin by outlining the methodology used to test this first hypothesis. Then I outline the general trends in the Court's gatekeeping behavior to give the reader a more complete picture of the period under analysis. I conclude by introducing and evaluating a statistical model of the Court's certiorari decisions and the impact of amicus curiae briefs.

Due to the absence of a comprehensive database on the Court's cert decisions and amicus briefs, I use four terms to represent the behavior of the most recent periods of the high court. Data for the first three terms, the 1968 (Warren Court), 1982 (Burger Court), and 1990 (Rehnquist Court), were graciously provided by Gregory Caldeira and John Wright. Cert and amicus data for the 2007 term (Roberts Court) were collected via a coding protocol identical to that employed by Caldeira and Wright (1988).[7] I obtained all data through official Supreme Court reports and records as well as the legal databases Westlaw Campus (2010) and LexisNexis (2011). Although this sampling has limited generalizability (at least in comparison to collecting

[7] Please see Appendix A for the coding protocol used when collecting data for the 2007 Court term. Upon request, I can provide the data collected for the 2007 term to the reader.

data for every term in the Court's recent history), it offers a reasonable compromise between burdensome time and resource constraints and data coverage. Additionally, there is little evidence that the selected terms represent a significant deviation from the general behavior of their respective Court periods. The following analysis, therefore, proceeds under the assumption that the four terms of study provide data adequate to investigate the first hypothesis.

In accordance with the literature's identification of other confounding influences on the likelihood of the Court's grant of cert, numerous variables are included in the statistical models in order to control for their effects. These controls include: the United States Government's appearance as a petitioner, alleged legal conflict between lower courts and the Supreme Court, civil rights and liberties cases, constitutional claims, dissent in the lower court, and lower court ideology.[8]

The most pertinent variables for this study describe amicus curiae brief filings. I separated amicus activity into three indicator variables: petitions with one amicus brief arguing in favor of cert, petitions with two or more amicus briefs arguing in favor of cert, and petitions with one or more amicus briefs arguing against cert. These categories offer complete coverage of amicus behavior and allow for consistent testing across the 1968, 1982, 1990, and 2007 terms.[9]

[8] The ideological classification of the lower court rulings was divided into "liberal" and "conservative" variables for each petition. Since the Court receives numerous petitions with lower court rulings that lack a clear ideological valence, this classification best allows for the interpretation of ideological effects, whether it be a conservative Court wishing to overturn a liberal lower court opinion or vice-versa.

[9] Data collected by Caldeira and Wright for the 1990 term do not specify the actual number of amicus briefs appearing with petitions. Rather, they simply note amicus activity falling into the three aforementioned categories. While I recorded the exact number of amicus briefs in favor of or against cert for each paid petition of the 2007 term, I used Caldeira and Wright's variables in order to guarantee consistency among the models for each of the four terms. The demarcation between petitions with one single amicus brief and those with two or more briefs arguing for the Court's review helps demonstrate the signaling effect of multiple amici.

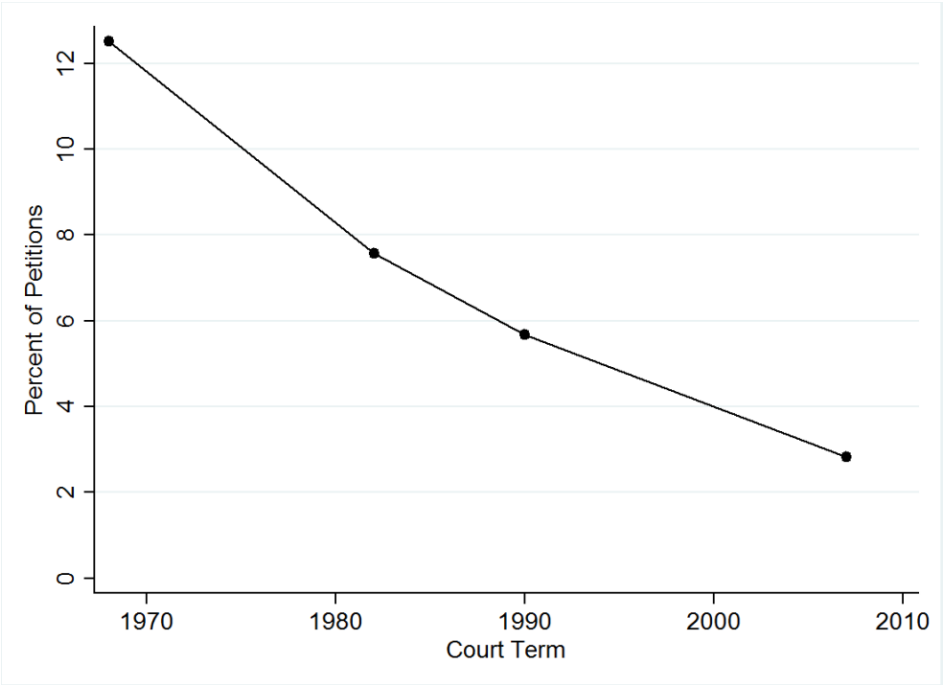
Since the Court's choice to grant or deny cert is binary, this analysis employs logit regression models to assess the relationship between amicus curiae briefs and grants of cert.[10] More specifically, I use Firth (1993) logit models because logit models could not be fully generated for the 2007 term with respect to the variable regarding the amicus curiae briefs arguing against cert. Although "regular" logit models could be estimated for the 1968, 1982, and 1990 terms, for the sake of methodological consistency, I utilized Firth Logit models across all four terms.

Descriptive Statistics: Certiorari Petitions and Amicus Curiae Briefs

Before proceeding to review the logit model results, it is essential to first note a few general trends in the Court's gatekeeping behavior over time. These movements paint a complex picture of the Court's behavioral patterns. First, as shown in Figure 1, there is a clear trend toward increasing selectiveness in the Court's decisions to grant petitions for writ of certiorari.

[10] Consistent with Caldeira and Wright's work (1988), granted petitions were only those in which the Court granted cert, accepted briefs on the case merits, and heard oral arguments. Petitions subjected to the Court's grant, reverse, and remand order were coded as denials.

Figure 1: Percent of Petitions Granted by Term



Source: Caldeira and Wright 1988; Caldeira and Wright 1990

In 1968, the Court granted over 12% of the petitions requesting certiorari. Then we see a steady and considerable decline across the selected terms, eventually reaching a grant rate of 3% of petitions granted in 2007. This 75% decrease in the percent of petitions granted in a given term strongly indicates that the Court is being more selective and discriminatory in its selection of cases for plenary review. Such an observation cannot be explained merely by an increase in the number of paid petitions reviewed, because there were a fairly consistent number of paid petitions submitted to the Court each term. This is evidenced in Table 1. It also seems unlikely that increasing selectivity could be explained by a smaller percentage of salient and attractive petitions sent to the Court for possible review.

Table 1: Number of Paid Petitions by Court Term[11]

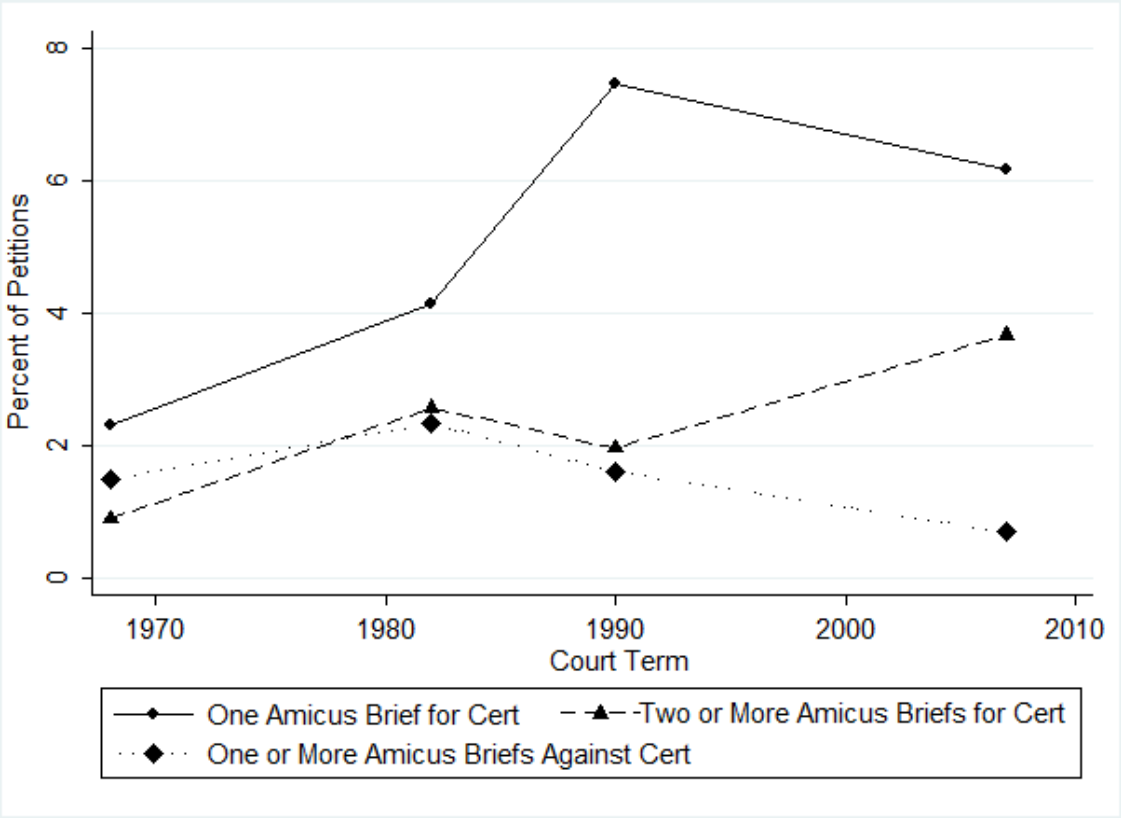
Term	Number of Paid Petitions
1968	1,134
1982	1,891
1990	1,957
2007	1,447

Source: Caldeira and Wright 1988; Caldeira and Wright 1990

Second, there do not seem to be any clear trends in the behavior of parties submitting amicus briefs, either arguing for or against cert, across the four terms. Figure 2, produced immediately below, shows these patterns in amici activity on cert.

[11] The reader should note that the number of paid petitions across each of the four terms is fairly consistent, as shown in Table 1, even though the total number of petitions, which also includes in forma pauperis petitions, has increased.

Figure 2: Percent of Petitions with Amicus Brief Participation



Source: Caldeira and Wright 1988; Caldeira and Wright 1990

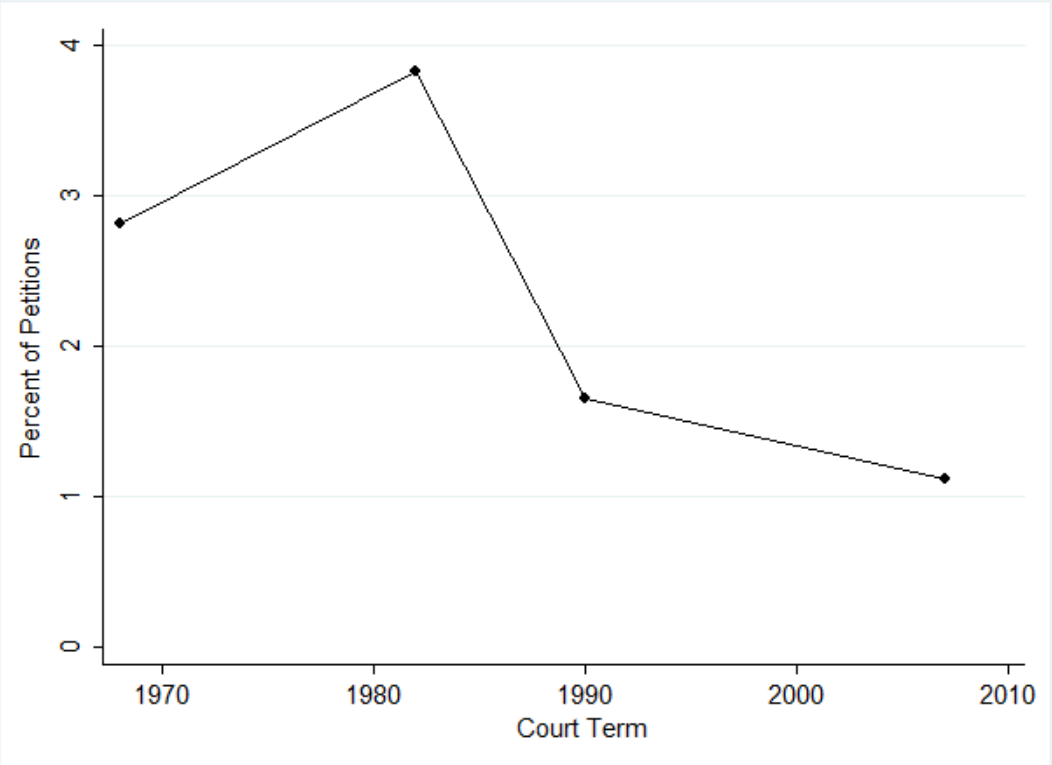
The percent of petitions with one brief arguing in favor of cert increased from 1968 to 1982 and then again, more drastically, from 1982 to the 1990 term. It then dropped slightly in the 2007 term. Interestingly, the percentage of petitions with two or more amicus briefs arguing for cert as well as the percentage of petitions with amici arguing against cert followed divergent patterns, aside from the fact that both increased from the 1968 to the 1982 term. Perhaps the most consistent trend in the amicus filings is the steady decline in the percentage of amicus briefs arguing against cert from 1982 to 2007. This decline could be evidence of the impact of Caldeira and Wright's (1988) well-publicized study that found amicus briefs submitted against cert have the unintended effect of increasing the odds of the Court's grant of cert. None of these patterns appear to correlate with the Court's recent ideological shifts. Consequently, there does not

appear to be any immediately discernable movement in amicus brief filings across the 1968, 1982, 1990, and 2007 terms.

On the other hand, we can draw important comparisons between the overall percentages of petitions with amicus briefs. In all four terms, the percentage of petitions with a single amicus brief in favor of cert outnumbered the percentage of those petitions with two or more amici supporting cert as well as those with amici against cert. With the exception of the 1968 term, the percentage of petitions with two or more amicus briefs supporting cert generally outnumbered the percentage of those petitions with amicus briefs filed against cert. The most notable observation is that the percentage of cases with amicus activity remains quite minute as the percent of petitions with one brief vary from approximately 2% to 7%, the percent with two or more briefs vary from 1% to 3%, and the percent with briefs against cert vary from less than 1% to 2%.

Inquiries in the field have long noted the influence that the Solicitor General wields as the United States Government's representative before the high court. Any study of the Supreme Court must take into account the litigation behavior of the U.S. Government. Shown in Figure 3 are the percentages of cases in which the Solicitor General's office sought to have the Court review a lower court opinion that was decided against the interests of the United States.

Figure 3: Percent of Petitions with the U.S. Government as Petitioner by Court Term



Source: Caldeira and Wright 1988; Caldeira and Wright 1990

First and foremost, it is evident that the Solicitor General is highly selective in the cases that it chooses to appeal to the Supreme Court. Although the percentage of cases in which the United States appears as a petitioner fluctuates, it never surpasses four percent of the number of paid petitions. Again this increasing rarity cannot be explained by an increase of paid petitions (not total petitions) since that number has remained relatively stable.[12] This finding is highly indicative of a body of yearly petitions in which the U.S. Government's presence as petitioner is by far the exception rather than the rule. The percentage of petitions with the U.S. Government as petitioner declined significantly over recent years, to just over 1% in the 2007 term. A drop of

[12] The number of paid petitions across each of the four terms is pretty consistent even though the total number of petitions (which also includes in forma pauperis petitions) has increased.

this magnitude suggests that the Solicitor General's office is becoming more selective when deciding which cases to appeal.

While the aforementioned trends are those most germane to this study, movement in the other variables in the model is nevertheless important. Table 2 provides a set of summary statistics for the independent variables across the 1968, 1982, 1990, and 2007 terms.

Table 2: Independent Variable Frequencies

Independent Variables	1968 Term: Percent of Petitions (%)	1982 Term: Percent of Petitions (%)	1990 Term: Percent of Petitions (%)	2007 Term: Percent of Petitions (%)
One Brief in Favor of Cert	2.31	4.13	7.47	6.16
Two or More Briefs in Favor of Cert	0.89	2.57	1.96	3.67
Briefs Against Cert	1.49	2.33	1.60	0.69
Constitutional Issue	60.70	56.17	61.24	64.42
Civil Rights and Liberties	45.57	47.28	35.21	23.51
U.S. as Petitioner	2.81	2.72	1.65	1.11
Dissent in the Lower Court	14.60	11.36	16.29	12.28
Alleged Conflict	51.49	66.41	55.88	63.91
Conservative Lower Court Ruling	62.41	56.55	63.18	70.41
Liberal Lower Court Ruling	32.79	36.60	35.27	28.00

Source: Caldeira and Wright 1988; Caldeira and Wright 1990

These statistics are, for the most part, unremarkable. The presence of any amicus activity with a petition is very rare, especially those with two or more briefs arguing in support of cert and amici opposing cert. More than half of the petitions throughout the four terms presented constitutional claims and alleged legal conflict between the lower courts and the Supreme Court. The majority of the petitions appealed during these terms were those with conservative lower court opinions despite the Court's gradual shift to the right. A significant minority of petitions

included civil rights and liberties issues, more so during the more liberal and moderate tenures of the Warren and Burger Courts, in 1968 and 1982, respectively. Few cases involved dissents in the lower court.

On the face of things, the prevalence of particular case issues and ideology do not correlate well with the Court's increasing conservatism. We might imagine that some petition claims, namely those implicating constitutional and civil rights and liberties issues, would be sympathetically received by the liberal courts. A greater number of parties may make constitutional and civil rights and liberties allegations when the Court is comparatively liberal or perhaps even moderate. Indeed, this projection is consistent with the frequency of civil rights and liberties claims. Such allegations were more frequent during the tenure of the liberal Warren Court and the moderate Burger Court in comparison to the conservative Courts under Rehnquist and Roberts. However, constitutional claims remained fairly steady regardless of the Court's ideological shift to the right. This suggests that constitutional claims are not necessarily ideologically skewed on average, though this observation may be equally reflective of the stubbornness of liberal petitioners who persist in filing claims that are unlikely to be well-received by the conservative Courts in the 1990 and 2007 terms. On the other hand, it is also plausible that liberal and conservative parties equally resort to constitutional litigation to advance policy goals.

Most importantly, the frequencies of appealed petitions from liberal and conservative leanings do not mirror the movement of the high court. Litigants, cognizant of the ideological compatibilities between the Court and how these equivalencies can have substantial implications for their litigation success, will probably be less likely to file cert petitions advocating positions unfavorably received by the Court. This is an entirely logical inference given the assumed

rationality of the parties filing amicus curiae briefs. In the 1968 and 1982 terms, the data in Table 2 support this expectation. Conservative lower court opinions are more frequently appealed to the Court than liberal opinions as the Court went through a more liberal period. Surprisingly, the percent of petitions appealing a conservative lower court opinion remained fairly constant even as the Court became more conservative. The exact opposite movement is expected, and is oddly absent in the data. This finding may be a sign that liberally minded parties are more likely to resort to litigation, relative to conservatives, to pursue their policy objectives.

Model Results: Certiorari Petitions and Amicus Curiae Briefs

With these descriptive statistics in mind, we can proceed to address the results of the logit models produced for the 1968, 1982, 1990, and 2007 Court terms. Table 3 presents the logit coefficient estimates and associated standard errors produced by the model with a grant or denial of cert as the dependent variable along with the ten independent variables.

Table 3: Logit Coefficients Estimates for Certiorari Models by Term

Independent Variables	1968 Term: Coefficient (Standard Error)	1982 Term: Coefficient (Standard Error)	1990 Term: Coefficient (Standard Error)	2007 Term: Coefficient (Standard Error)
One Brief in Favor of Cert	2.828 (0.540)	2.016 (0.316)	1.550 (0.321)	2.218 (0.427)
Two or More Briefs in Favor of Cert	3.369 (1.177)	2.806 (0.369)	1.028 (0.488)	2.413 (0.491)
Brief Against Cert	0.428 (0.845)	0.916 (0.455)	-0.062 (0.646)	-0.926 (1.489)
Constitutional Issue	0.341 (0.263)	0.030 (0.235)	-0.274 (0.235)	-0.337 (0.373)
Civil Rights and Liberties	0.447 (0.263)	0.457 (0.244)	0.236 (0.250)	0.202 (0.433)
U.S. as Petitioner	3.753 (0.526)	4.271 (0.409)	3.709 (0.472)	4.025 (0.651)
Dissent in the Lower Court	0.712 (0.260)	0.860 (0.263)	1.062 (0.244)	1.253 (0.385)
Alleged Conflict	1.486 (0.246)	1.410 (0.323)	1.617 (0.320)	1.651 (0.696)
Conservative Lower Court Ruling	0.769 (0.683)	-0.489 (0.594)	-1.001 (0.90)	-0.803 (1.511)
Liberal Lower Court Ruling	-0.427 (0.715)	1.094 (0.5693)	-0.780 (0.901)	-0.247 (1.508)
Constant	-4.260 (0.670)	-5.129 (0.635)	-3.757 (0.921)	-5.310 (1.602)

Number of Observations: 1968 Term: 1,124; 1982 Term: 1,891; 1990 Term: 18,818; 2007 Term: 1,372

Source: Caldeira and Wright 1988; Caldeira and Wright 1990

To aid in our discussion and analysis of the comparative effect of these variables, i.e., those relating to amicus curiae briefs' effect on the likelihood of cert, the following table includes the estimated odds ratios for each of the independent variables in the four logit models. For these models, the odds ratios reflect the increased or decreased probability of the Court voting to grant cert associated with each independent variable, controlling for all other included variables.

Table 4: Estimated Odds Ratios for Certiorari Models by Term

Independent Variables	1968 Term: Odds Ratio (Standard Error)	1982 Term: Odds Ratio (Standard Error)	1990 Term: Odds Ratio (Standard Error)	2007 Term: Odds Ratio (Standard Error)
One Brief in Favor of Cert	16.914 (9.129)	7.506 (2.374)	4.707 (1.510)	9.191 (3.923)
Two or More Briefs in Favor of Cert	29.048 (34.191)	16.549 (6.108)	2.796 (1.363)	11.168 (5.489)
Brief Against Cert	1.535 (1.297)	2.498 (1.136)	0.940 (0.607)	0.396 (0.590)
Constitutional Issue	1.406 (0.370)	1.030 (0.242)	0.761 (0.179)	0.714 (0.2664)
Civil Rights and Liberties	1.563 (0.412)	1.580 (0.385)	1.266 (0.316)	1.224 (0.530)
U.S. as Petitioner	42.654 (22.437)	71.604 (29.284)	40.809 (19.263)	55.957 (36.42)
Dissent in the Lower Court	2.036 (0.529)	2.364 (0.622)	2.892 (0.705)	3.50 (1.347)
Alleged Conflict	4.421 (1.087)	4.097 (1.324)	5.040 (1.615)	5.214 (3.629)
Conservative Lower Court Ruling	2.157 (1.473)	0.613 (0.364)	0.367 (0.331)	0.448 (0.677)
Liberal Lower Court Ruling	0.653 (0.467)	2.987 (1.701)	0.458 (0.413)	0.781 (1.177)

Number of Observations: 1968 Term: 1,124; 1982 Term: 1,891; 1990 Term: 1,818; 2007 Term: 1,372

Source: Caldeira and Wright 1988; Caldeira and Wright 1990

Before shifting focus to the primary objective of this chapter, we should consider the effects of the other independent variables. Several variables' presence in a given petition, holding all else constant, clearly and uniformly increases the chance of the Court's review. These include the presence of civil rights and liberties issues, alleged conflict between the lower courts and the Supreme Court, dissent in the lower court, and the United States Government appearing as the petitioner.

These effects unsurprisingly varied to some degree during the four terms. Civil rights and liberties issues had a greater impact in the 1968 and 1982 terms and then declined slightly in

the 1990 and 2007 terms. This trend is probably explained by the declining salience of civil rights issues in the country as a whole. Conversely, dissent in the lower court has consistently increased in magnitude over the four terms in question. The United States government's appearance as a party petitioner has remained, despite some variation, tremendously powerful in terms of increasing the odds of the Court's review. For instance, in 1990, even when the variable exhibited its weakest effect on cert, the Solicitor General's position as a petitioner increased the odds of review, holding all else constant, by nearly forty times. This finding is hardly surprising given the body of literature observing that the Solicitor General, as a seasoned Supreme Court litigator able to strategically select those cases most likely of review for appeal, is more successful before the high court. Alleged conflict has also remained a fairly strong predictor of the Court's likely interest and review of a case.

The movement of the odds ratios estimates for constitutional claims and the two ideology variables is less clear. During the 1968 and 1982 terms, the presence of a constitutional issue increased the likelihood of the Court's review, holding all else constant, though the later effect fails to attain statistical significance. In the 1990 and 2007 terms, conversely, constitutional claims actually decreased the probability of cert. These trends suggest that the more liberal and moderate courts, the Warren and Burger Courts, were interested in examining constitutional claims while the conservative courts under Rehnquist and Roberts were not. A growing body of liberal petitioners asserting constitutional challenges could also explain the shift.

The attitudinal model predicts that justices will take cases to actively advance their own policy goals. The conservative and liberal lower court rulings estimated odds ratios are in the anticipated directions for the 1968 and 1982 terms, whereby the comparatively liberal Warren Court was more likely to review a conservative lower court ruling (and vice-versa). As the Court

became increasingly conservative under Burger's leadership, it was more likely to review a liberal lower court ruling (and vice-versa).

The ideology variables' odds ratios and coefficients estimates for the 1990 and 2007 terms are unanticipated. While the attitudinal model would predict that these conservative courts would be more prone to review liberal lower court rulings, the Rehnquist and Roberts Courts were less likely to review a petition if it was the product of either a liberal or conservative lower court ruling. This confusing finding may be partly explained by the small number of petitions granted during these terms. Non-ideological petitions that are nonetheless granted cert may be obscuring the true relationship between ideology and the chances of the Court's review.

With those variables' effects in mind, we direct our attention toward the amicus variable estimates. I first discuss amicus variables separately, focusing on their magnitude and change over the four terms. Then I compare the effect of these variables to one another.

First, the effect of one amicus curiae brief arguing that the Court should grant cert has remained a fairly powerful independent effect on the Court's likelihood of granting certiorari across the four terms. In 1968, the effect of filing one amicus brief in favor of cert had the greatest impact on a petition's chances of review, increasing the probability by 1,591%, holding all else constant. The effect of a single amicus brief decreased during the 1982 and 1990 terms, but then increased in the 2007 term. The lowest odds ratio estimate was in the 1990 term when one brief increased the chances of the Court's plenary review by 370%, keeping all else constant. In general, these findings indicate that the signaling effect of a single amicus brief has remained more or less present through the current Roberts Court.

Second, as indicated by the estimated odds ratios in each of the four terms, the effect of two or more amicus curiae briefs arguing in favor of the Court's review appears to have an even

more powerful effect on the likelihood of cert. Indeed, as with the single amicus variable, the effect was most pronounced in the 1968 term, leading to a 2,805% increased likelihood of a grant, controlling for the other variables. On the other hand, the 1990 term, again like the single amicus brief variable, had the smallest impact on the likelihood of cert. The presence of two or more amicus briefs supporting cert increased the odds of the Court's review only by 180% in the 1990 term. The overall trends in the changing effect of two or more amicus curiae briefs in favor of cert mirror those of the single amicus variable in the model: a peak in 1968 with declines across 1982 and 1990 and then an increase in 2007.

Third, the odds ratios estimates for amicus briefs arguing against cert are particularly intriguing. As referenced at numerous points in this paper, the literature established by Caldeira and Wright (1988) states that amicus briefs arguing for the denial of a cert petition have the opposite effect of their intentions: despite their arguments, these briefs indicate a case's importance to the Court and thus increase the probability of a grant of cert (Caldeira and Wright 1988). This explanation is certainly consistent with the logit model results for the 1968 and 1982 terms. In the 1982 term, the effect was most severe, increasing the probability of cert by about 150%, holding all else constant. But Caldeira and Wright's description does not seem to carry to the 1990 and 2007 terms. In 1990, the presence of one or more amicus briefs arguing against cert decreased the likelihood of cert by 6%, holding all other variables static. And in 2007, amicus briefs opposing cert decreased the probability of review by approximately 60%, holding all else constant. These trends contradict Caldeira and Wright's findings (1988) and suggest that the effect of amicus briefs opposing cert may not necessarily be skewed in one direction or another. It may instead be time-bound or dependent on some factor of the changing Court environment.

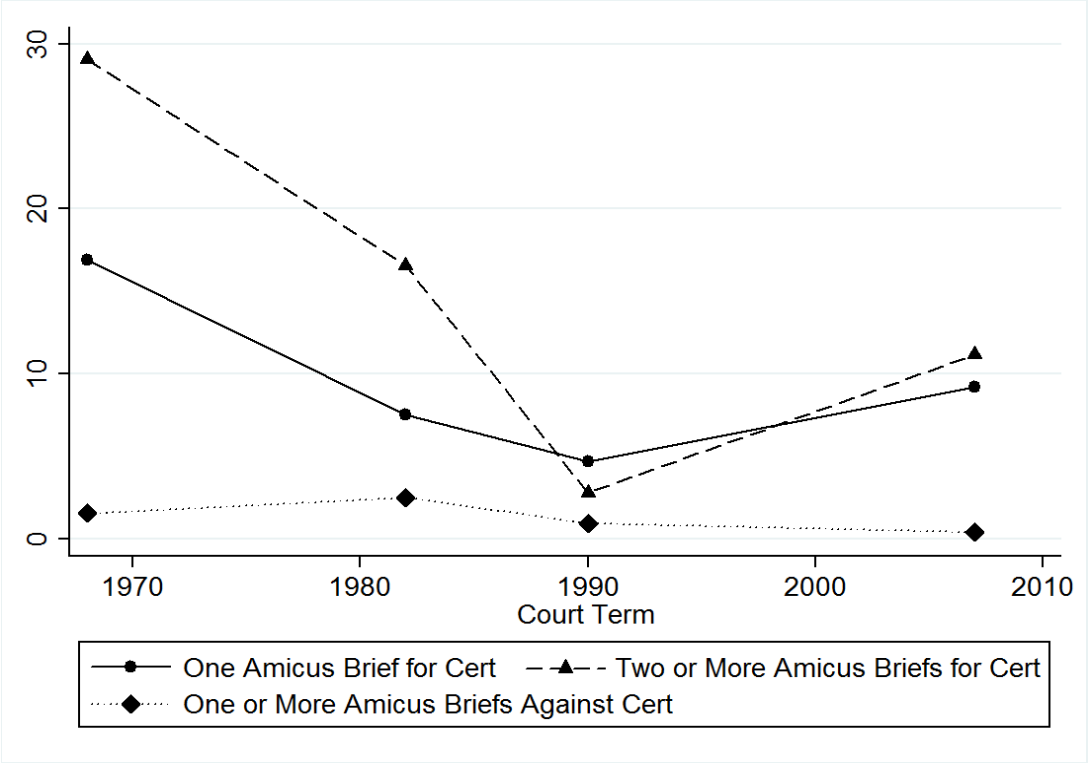
Another possible explanation is that the declining presence of amicus briefs opposing certiorari across these four terms has led to a situation where the Court only receives the most compelling briefs against cert since parties are more cautious when employing that strategy. In other words, parties opposing cert recognize that their efforts as amici may be counterintuitive and are thus more selective in their decisions to file briefs against cert. Then they may only file amici against petitions whenever the odds of success seem high.

The unpredicted effect in 2007, in terms of both direction and magnitude, could also be explained by the presence of several petitions in which the Solicitor General submitted amicus briefs against cert.[13] When the Solicitor General files amicus against cert, it is a very powerful signal that the Court should not accept the petition as it is contrary to the interests of the United States Government. There are very few petitions that have accompanying amici opposing cert each term. For example, only 0.69% of paid petitions had such amici in 2007. The Solicitor General's "stopping power" on even a few cases could account for amici against cert having a considerable negative rather than positive effect on cert in the 2007 model.

These aforementioned trends in the estimated odds ratios for the three amicus variables are expressed in Figure 4.

[13] As discussed in the preceding methodology section, data collected during the 2007 term had to be adapted to match the variables collected by Caldeira and Wright. While I collected information on the amicus behavior of the United States Government, Caldeira and Wright did not include such notations in their datasets. Consequently, it was impossible to distinguish those briefs filed by the Solicitor General's office in the four models across the 1968, 1982, 1990, and 2007 terms.

Figure 4: Estimated Odds Ratios for Amicus Curiae Brief Variables[14]



Source: Caldeira and Wright 1988; Caldeira and Wright 1990

Considering the scope of this paper, it is essential to reflect on the comparative effects of the amicus curiae briefs variables. The first major observation from the data is that the amicus effect in the form of one brief in support of cert is almost always less powerful than that of two or more amicus briefs favoring cert. Across the 1968, 1982, and 2007 terms, the odds ratios estimates are larger for petitions with two or more amicus briefs in comparison to those with one single brief. The only term in which this relationship reversed was 1990, in which both the effect of one brief and two or more briefs was much lower than in the other terms. This trend suggests that the Court is more likely to favorably treat petitions with two or more amicus curiae

[14] Please reference the figures presented in Appendix B in conjunction with Figure 4. As a result of exceptionally wide confidence intervals for the variables during the 1968 term, the figures with confidence intervals were not easily readable. For that reason, I did not include the confidence intervals in the figures within this analysis section. Separate figures, containing both estimated odds ratios and confidence levels, however, are provided for the reader in Appendix B.

briefs than those with only one amicus in support. In other words, the signaling effect is unsurprisingly more pronounced when the strength of the signal, as expressed in terms of the number of briefs, is greater. This finding reflects that of Collins (2004), who found evidence that the Court favors a greater number of briefs over a greater number of cosigners on a single brief. In the end, it mirrors the literature's understanding of amicus briefs as signals to the Court of the various parties impacted by a case.

On the other hand, the comparative influence of amici against cert is much lower than that of the other two amici variables, regardless of the former's shifting directionality. The effect of one or more amicus curiae briefs opposing cert, holding all other variables in the model constant, is significantly smaller than the effects of both a single amicus or two or more amici in favor of cert, also holding all else constant. This indicates that the Court is less likely to equally weigh the contributions of amici arguing for and against review. Such an inference, if true, may slightly undermine Caldeira and Wright's (1988) argument that the amicus curiae briefs arguing against cert may nonetheless serve a signaling effect. If the briefs still serve a signaling effect, then it seems unusual that their signal would have lesser magnitude than those arguing for cert. The depreciated effect may simply be the result of the brief's arguments asserting why a lower court case should not be reviewed. Arguments against cert could serve to moderate or negatively condition the signaling effect of those amici.

As discussed, the three amicus variables exhibited unexpected movement in their directionality and effect across the four terms. The motivating hypothesis purports that the more recent terms in which the Court receives a greater number of total petitions for review would show an increase in the briefs' influence. In these terms, the amici would conceivably lighten the Court's workload by clearly signaling to the justices and their clerks cases worthy of review.

Yet after using the Court term as a proxy for the workload of the Court, we do not see a uniform increase in the effect of a single amicus or multiple briefs favoring cert.

Unfortunately, there does not seem to be a single parsimonious explanation accounting for all of these discrepant findings. Our current understanding of the Court does, however, point to several potential scenarios that could be consistent with the results. I now assess each in terms of its motivating logic and explanatory power.

One possible explanation is that the ideological leanings of the Court predispose it to be more or less receptive to the amicus signal at the gatekeeping level. One might claim that liberal justices are more likely to be influenced by outside parties and conservative justices are not likely to positively receive the contributions of external parties to the litigation. This account has some grounding in the observation that the greatest effect for both single and multiple amicus briefs in favor of cert took place during the liberal Warren Court. Furthermore, the effect of single and multiple amicus briefs supporting the Court's review steadily declined as the Court became more conservative in the Burger and Rehnquist Courts. Nevertheless, this explanation falls short as both variables' odds ratios estimates increased from 1990 to 2007, even as the Court became more conservative. Another serious fault in its logic is that it presumes the conservative justices see the bulk of amici parties as ideologically incompatible with their own policy goals and therefore disregard their arguments. One espousing this view could argue that a conservative justice may reflexively reject the actual arguments in favor of cert proposed by liberal parties like the American Civil Liberties Union (ACLU) with no consideration of the arguments presented in the brief. This assumption does not appear to be rooted in the data since many of the most prominent and active amicus parties represent conservative interests. For instance, the United States Chamber of Commerce, an interest group representing conservative

business causes, frequently files amicus briefs with the Supreme Court. There appears to be a diverse ideological body of amici filings on cert. Nonetheless, the data do not contain ideological measures for the amicus briefs filed at the cert. Future study could benefit by definitively testing whether or not the ideological inclinations of amicus curiae briefs submitted at the gatekeeping level help explain their varying influence.

Even while we do not have precise measurements of the ideology of amici on cert, we can use the positions taken by the amici on lower court rulings as a proxy of their attitudes. If a party submits an amicus brief opposing cert, we can be relatively certain that the party agreed with the lower court's holding and its ideology. And if a group files an amicus brief supporting cert, we can usually assume that the party disagreed with the directionality of the lower court ruling. This assumption does not necessarily hold in all cases, however, as some parties could conceivably support cert in the hopes that the Supreme Court would extend a lower court ruling to the rest of the country. But generally, for our purposes, I maintain that favoring cert indicates ideological opposition to the lower court ruling and opposing cert indicates ideological agreement with the lower court ruling.

We can see a rough picture of conservative and liberal amici activity at the Court's gatekeeping stage by using differences of the means tests between amici activity on liberal and conservative lower court decisions for the 1968, 1982, 1990, and 2007 terms. For the 1968 term, liberal lower court rulings, on average, had a 0.012 greater proportion of cases with one or more amicus briefs in support of cert ($t=1.08$) and a 0.005 larger percentage of cases that had any amici against cert ($t=0.66$) than conservative decisions. Since the t-statistics are so small and lack statistical significance, we cannot conclude that there were any differences in amici participation during the 1968 term. In the 1982 term, however, conservative lower court rulings

received more amici filings than liberal rulings, with a 0.096 higher proportion of cases with any amici supporting cert (t=-7.25) and a 0.03 greater percentage of cases with one or more amici opposing cert (t=-4.33). And we see the opposite relationship in 1990, where liberal lower court decisions had, on average, a 0.07 higher percentage of cases with one or more amici favoring cert (t=5.04) and a 0.01 greater proportion of cases with amici opposing cert (t=2.00), in comparison to conservative rulings. Finally, in 2007, conservative lower court rulings, on average, had a 0.16 greater proportion of cases with any amici supporting cert (t=-7.44) and a 0.01 larger proportion of cases with amicus briefs opposing cert than liberal lower court rulings (t=-1.72).

From these calculations, we can loosely infer the behavior of conservative and liberal amici across a wide time period. In 1968, given the value of the t-statistics, there were essentially no important differences in amici activity in that year. More liberal amici supported cert and more conservative parties filed against cert in 1982. We then see that in 1990, more conservative amici argued for the Court's review of petitions, with more liberal groups opposing cert. In the 2007 term, more liberal parties argued in favor of cert whereas more conservative amici opposed cert.

These differences of the means tests paint a general picture of the ideological evolution of amici filings across the four terms. Instead of observing relatively equal advocacy by conservative and liberal amici at cert, participation in favor and against cert by each varied, depending on the term in question. It is not unreasonable to assume that the differential participation of liberal and conservative amici is at least partially a function of the Court's evolving ideology. These findings powerfully suggest possible connections between the ideology of the lower courts, Supreme Court, and amici curiae to be explored in future analyses.

Another plausible explanation of the model's results is that the coefficient estimates increase as amicus briefs become less represented in the whole body of petitions during the term. This account is logical insofar as the amicus signal by mere repetition would be arguably less informative to the Court. If more and more petitions receive some sort of amicus activity, then an amicus brief filed with a petition is less remarkable. But if there are very few amicus briefs, their presence is all the more extraordinary.

The trends for the effect of a single brief on the likelihood of cert fit with this account. For that variable, the odds ratios estimates increased when the percent of petitions with a single amicus brief decreased in a given term and vice-versa. However, this account fails to adequately correspond with the full results of cert-amici interactions. This is the case with two or more amicus briefs supporting cert: the percent of petitions with multiple amici supporting cert decreased from the 1982 to the 1990 terms with no predicted increase in its effect on the likelihood of cert. Similarly, this explanation does not correlate with trends in the representation of amicus briefs arguing against cert.

If we examine all petitions with any sort of amicus activity, then the explanation is somewhat more consistent with the movement in both the single and multiple amici favoring cert variables. But as evidenced below, the total percentage of petitions with any amicus activity increased slightly in 2007, relative to the 1990 term. Yet this increase was not met by the expected decrease in the effect of the amicus variables.

Figure 5: Percent of Petitions with Any Amicus Activity

Source: Caldeira and Wright 1988; Caldeira and Wright 1990

The trends from 1968 to 1990, moreover, do not match the variance in the effect of the amicus curiae briefs opposing cert. This second account is thus limited and most applicable to explain the changing effect of amicus curiae briefs supporting a grant of cert. And even then, these correlations may be simple coincidence rather than evidence of a causal relationship between amicus saturation and the effectiveness of briefs arguing in favor of the Court's review.

This explanation may hold more sway if the saturation of amicus curiae briefs has a lagged effect rather than a contemporaneous one. A lagged effect of the oversaturation of amicus briefs has some grounding in the fact that the Court does not collectively review all of the cert petitions at one point. Rather, justices and their clerks review cert petitions on a rolling basis. Therefore, if the Court receives an amicus curiae brief with a petition after a period of amicus inactivity, then it seems reasonable to predict that the amicus in question would have a more powerful signaling effect. Additionally, amicus saturation may have a lagged effect so that

amici are comparatively less effective until some sufficient amount of time has passed for the justices and clerks to again find their presence remarkable. The testing of such a lagged effect is a complex and detailed endeavor that is, unfortunately, beyond the scope of this thesis.

One final explanation for the variant effect of amicus curiae briefs, in their three represented forms, is that the interest groups were just more successful in presenting their arguments in favor of or opposition to cert in different Court terms. If true, this would certainly account for the fluctuating odds ratios that do not correspond with the Court's ideological salience or saturation of amicus briefs. This account is inherently difficult to verify or falsify. Assembling an objective, reliable, and valid measure of the persuasiveness of a brief's arguments is nearly impossible because of the individual justice's subjective evaluations.

These potential explanations clearly have their faults and are little more than mere conjecture at this point. Future work in the field could nevertheless benefit through their testing in addition to the inclusion of supplemental information like the ideological alignment of the briefs at the cert level. Even more useful to our collective understanding of the Court's treatment of amicus curiae briefs at the gatekeeping stage would be the creation of a more comprehensive amicus-cert dataset. Using four single terms to approximate the Court's behavioral changes, with respect to cert, clearly has its limitations. Admittedly, it is possible that the 1968, 1982, 1990, and 2007 terms were atypical. Greater data coverage in future models would provide much more information from which to infer the Court's behavior over time. At this point, it appears that the changing amicus effect at the gatekeeping stage is not due to one element but many within the institutional framework of the Court.

To summarize, this chapter explored my first hypothesis that argued the amicus influence at the cert level would increase as the Court received a greater volume of total petitions. The

underlying logic of this theory was that the Court, in an effort to maximize productive policy output, would increasingly rely upon amicus curiae briefs as cues of a petition's significance and worthiness of review. Unfortunately, empirical analysis of the 1968, 1982, 1990, and 2007 Court terms did not evidence a consistent rise in the amicus effect, even as the Court took in increasingly greater numbers of petitions requesting review. Ideological incongruence between the Court and amici at the cert level and amici oversaturation do not seem to explain this unexpected result. At this point, the amicus effect at the gatekeeping level remains much of a mystery and perhaps varies naturally as part of the Supreme Court's institutional framework.

CHAPTER FOUR: ANALYSIS OF THE CHANGING EFFECT OF AMICUS CURIAE BRIEFS ON THE COURT'S FINAL RULINGS

Methodology: Rulings on Case Merits and Amicus Curiae Briefs

In this chapter, I test the validity of my second hypothesis. I proceed by outlining the applicable variables and methodology. Then I evaluate a series of descriptive statistics outlining the general developments in amicus behavior on the case merits throughout the 1946-2001 terms. Finally, we will discuss the results of the statistical model.

The motivating theory is that the effect of amicus curiae briefs submitted at the Court's plenary review stage will vary as a function of the justice's ideology. Practically speaking, conservative justices will be more likely to be influenced by arguments presented by ideologically conservative amici and vice-versa. I investigate this hypothesis at the individual justice level in accordance with the proposed interaction between justice ideology and amicus effectiveness.

The amicus curiae brief dataset created by Kearney and Merrill (2000) and updated by Collins (2008) is used to evaluate this theory. This dataset provides a substantial amount of information regarding amici participation on the cases for which the Court reviews and issues formal rulings. Since the total number of cases in which the Court annually hears oral arguments and releases definitive legal conclusions is so small, numbering from eighty to one hundred cases, the dataset is much more detailed and comprehensive than that available for certiorari petitions. It covers the period from 1946 (the Vinson Court) to 2001 (the Rehnquist Court). Although the database lacks coverage of the current Roberts Court, it provides a broad survey of the Court's behavior over a fifty-five year span. The Court went through several notable ideological changes, from the liberal Warren Court to the more moderate Burger Court, and then to the conservative Rehnquist Court, throughout this period. So, the collective ideological drift

of the Court, and its composite justices, in this dataset is sufficient to test whether or not the fluctuating impact of amicus curiae briefs on the merits is moderated by justice ideology.

The dependent variable in the Court's case rulings model is the ideological directionality of an individual justice's vote, that is: whether or not the justice voted for the conservative or liberal outcome in a given case. The most pertinent independent variables are those relating to amicus curiae briefs, the number of liberal amici and conservative amici submitted with a case. Within this dataset, amici ideology is determined by whether or not they oppose or support a lower court ruling of a particular ideological direction.

As the case with certiorari petitions, there are a number of additional variables included in the model in order to take account of their effect on the justice's voting behavior. These include justice ideology, the Solicitor General's liberal or conservative advocacy, and resources of the liberal and conservative litigants. Justice ideology is incorporated to control for its effect independent of amici curiae. In some instances, we can easily imagine that justices could vote in a particular manner purely because of policy aims rather than anything else. For these purposes, I utilize both Segal-Cover (1989) and Martin-Quinn attitudinal scores for the justices (Epstein et al. 2007).

These ideological measures of the high court have both strengths and weaknesses. The Segal-Cover scores are powerful measurements because of their exogenous nature. Through analyzing and coding the newspaper coverage (a combination of several major publications) during a justice's confirmation hearing, Segal and Cover have determined ideological scores for each of the justices (1989). The major drawback to these scores is that the justices' assigned ideological values are treated as fixed positions. Drawing from the literature review section, the most effective measurements of justice ideology consider potential drift (Epstein et. al 2007).

Martin and Quinn's ideological scores effectively address this weakness by providing measurements that adjust over a justice's tenure (Epstein et al. 2007). Martin-Quinn scores are created from the justices' votes on civil rights and liberties issues as well as economic cases during a term (Epstein et. al 2007). While the Martin-Quinn scores benefit by accounting for ideological drift, they are endogenous given their origin in the justices' votes themselves. In this sense, the joint use of Segal-Cover and Martin-Quinn scores address each of the other measure's weaknesses and offer a strong overall measurement of justice ideology.

A whole branch of the literature establishes the Solicitor General's influence and success lobbying the high court (see e.g., Bailey et al. 2005). Controlling for the Solicitor General's presence is thus an important concern in uncovering the extent to which ideologically prone amici can influence the Court during its case rulings. The Solicitor General's advocacy on behalf of both conservative and liberal parties is noted within Kearney and Merrill (2000) and Collins' amicus curiae brief dataset (2008). Conservative and liberal parties are identified by their positions respective to the lower court ruling.

Also included in the model are the resources of the liberal and conservative parties. Party resources are a well-documented element in the calculus of litigant's relative likelihood of success (see e.g., McGuire 1995). It is usually assumed that more advantaged parties have access to superior legal representation, in terms of expertise and experience, and therefore enjoy a higher rate of litigation success. Conversely, parties with relatively scant resources will not typically enjoy the advantages of the most expensive and experienced appellate attorneys.

It is also conceivable that party resources could also influence the decision making pattern of amicus curiae briefs participating on the merits. A very resourceful conservative litigant matched with a poorly supported liberal litigant could attract conservative amici eager to

latch onto the coattails of the powerful litigant in order to appear effective to their constituencies. In the same scenario, liberal amici would conceivably be dissuaded from participating because the conservative litigant's resource advantage would make a liberal victory unlikely. Interest groups, even those with deep pockets, will assumedly only participate in cases in which their resources will go to good use.

Party resources could play a part in amici involvement in a very different situation. It seems reasonable to predict that ideologically prone amici would be pushed to file a brief on the merits in highly salient cases in which their matched litigant is at a resource disadvantage. Their participation would serve two ends: demonstrate to supportive constituencies their active role in the policy making process and help balance the scales between the parties. Party resources would arguably influence amici involvement in either of these two circumstances in addition to potentially independently influencing the justices (through the quality of legal counsel). Consequently, I incorporate measures of party resources in the model assessed below.

The theory tested in this section states that liberal or conservative amicus curiae briefs will be more influential when submitted to an ideologically sympathetic justice. It seems fairly inconceivable that a conservative justice would be open to the arguments proposed by an amicus arguing in support of a prisoner's rights, holding all other elements of the case equal. The conservative justice would instead likely disregard the arguments and information contained with the brief when making his or her decision on the case. Ideologically aligned amicus briefs will be most effective when reviewed by an attitudinally compatible justice. Otherwise, I assert that they will play no independent role in the decision making process (they will not increase or decrease the probability of a liberal or conservative vote). Given the nature of this relationship,

the hypothesis should be tested at the level of the individual justice. The dependent variable is the probability of the justice voting for a liberal or conservative outcome.[15]

The cases included across the 1946-2001 Court terms constitute a large volume of data for each of the nine justices' votes. In each case, up to nine justices may vote (the exact number of participating justices varies based on recusals) for a particular case outcome. Within this panel data, the values of the independent variables (number of liberal and conservative amicus briefs, Solicitor General participation, and party resources) will remain constant across the justices. The type of the relationship under question, between amicus briefs and justice ideology, requires multiplicative variables to be included within the model. I argue that the effect of an amicus brief from a liberal or conservative party will be conditioned by justice ideology. Including only the number of liberal and conservative amicus briefs in a logit regression would not assess the interaction between amici and justice ideology. Direct variable terms, the number of liberal and conservative amici as well as justice ideology, and these interaction terms are used in the model.

One of the most challenging aspects of constructing models of Supreme Court decision making is the effect of case level differences due to the individual fact scenarios presented by each (see e.g. Zorn and Bowie 2010). Each case the Court reviews has eccentricities that cannot be accounted for by traditional controls. Some cases' fact scenarios are such that even the most purist conservative and liberal justices will be forced to vote against their policy preferences. Random effect estimates are included in the model to control for these case-level differences when assessing the Court's decision making processes. In the following, I employ a logit model for panel data incorporating multiplicative variables and random effects controls.

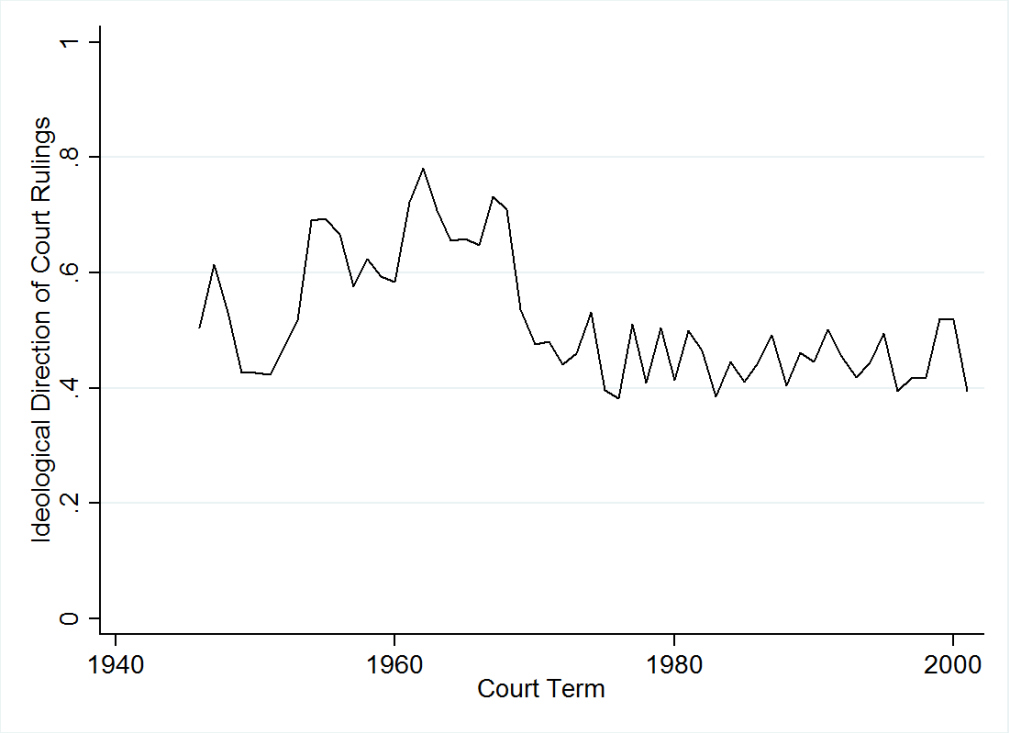
[15] As stated repeatedly through section, the ideological outcome of a case is determined by referencing the ideology of the lower court ruling. For example, reversing a liberal lower court ruling would be a conservative outcome while affirming a liberal lower court ruling would be a liberal outcome.

Descriptive Statistics: Rulings on Case Merits and Amicus Curiae Briefs

Attention now shifts toward the Court's decision making behavior throughout the 1946-2001 terms with respect to the two primary focuses: amicus curiae brief filings and justice ideology. The broad patterns and trends in these two areas provide a strong basis for the accompanying discussion of the linkage between the amicus effect and justice attitudes.

First, there was an overall shift to a larger volume of conservative rulings during the identified period. The average ideological direction of the Court's rulings by term was more liberal during the latter portions of the Vinson Court and throughout the tenure of the Warren Court. Such directionality is consistent with the mass of literature that characterizes these Courts as more liberally minded than other recent Courts (e.g., Beaney 1968). Starting with the retirement of Chief Justice Warren, the mean directionality of the Court's rulings shifted conservatively with the Burger and Rehnquist Courts, carrying up through the 2001 term. The Court consistently ruled conservatively throughout the 1980s and 1990s. Though there were certainly fluctuations throughout the 1946 to 2001 terms, the general trends in the data are more important for the present discussion. Movement in the ideology of the mean Court rulings is depicted in Figure 6 (where higher values denote a greater proportion of liberal rulings).

Figure 6: Mean Ideological Direction of Court Rulings by Court Term

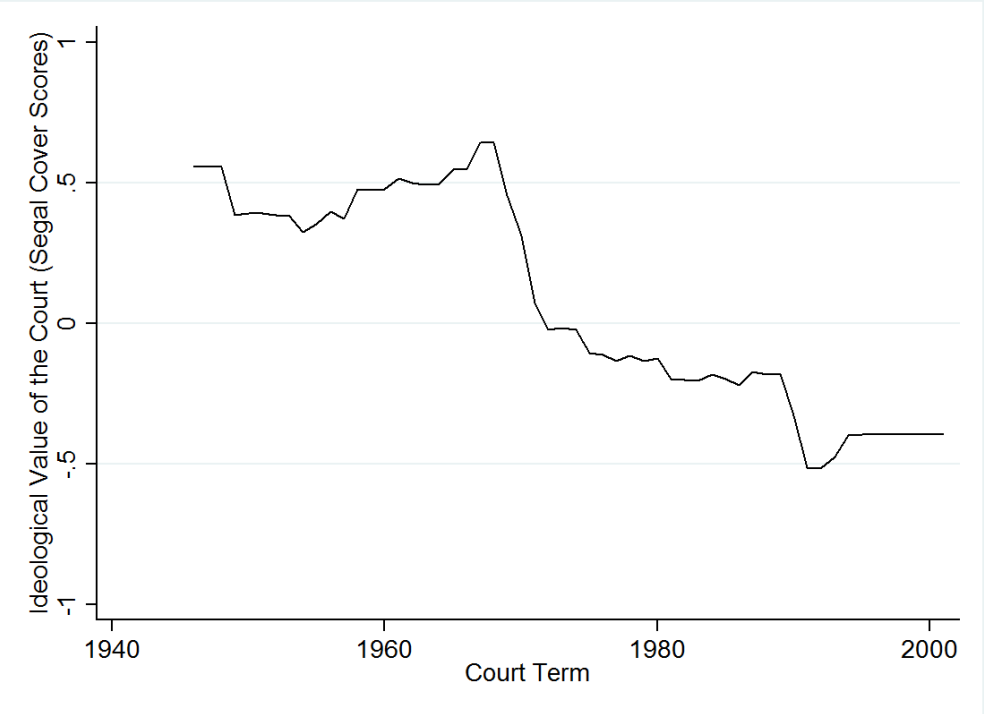


Source: Kearney and Merrill 2000; Collins 2008

The intimate connection between justices' attitudes and their decision making, as often discussed in judicial politics literatures, then predicts that the Court's mean ideological alignment would mirror the movements in the Court's mean ideological rulings. Indeed, the mean ideology of the Court, as assessed by the Segal-Cover scores (1989), was liberal during the Vinson and Warren Courts and conservative during the Burger and Rehnquist Courts. From the late 1950s to the end of the 1960s, as Warren and other liberal justices took the bench, the mean ideological position of the Court slowly became more liberal. In the very late 1960s and early 1970s, the Court took a shift to the right, coinciding with Warren's retirement and the appointment of conservative justices by President Nixon. In the 1980s and 1990s, the Court continued its conservative movement as William Rehnquist became Chief Justice and the liberal remnants of the Warren Court were replaced by justices moderate and conservative in

comparison. It should be mentioned that the Court's ideological center never drifted too far to the ideological extremes, always remaining moderately conservative or liberal, depending on the term and justices present. Figure 7 shows the Court's average ideological changes over time (in this case, 1=perfectly liberal justices, 0=moderate justices, and -1=perfectly conservative justices). Though the figure does not specify individual justice attitudinal movement, it is still a useful description of the Court's environment over the period.

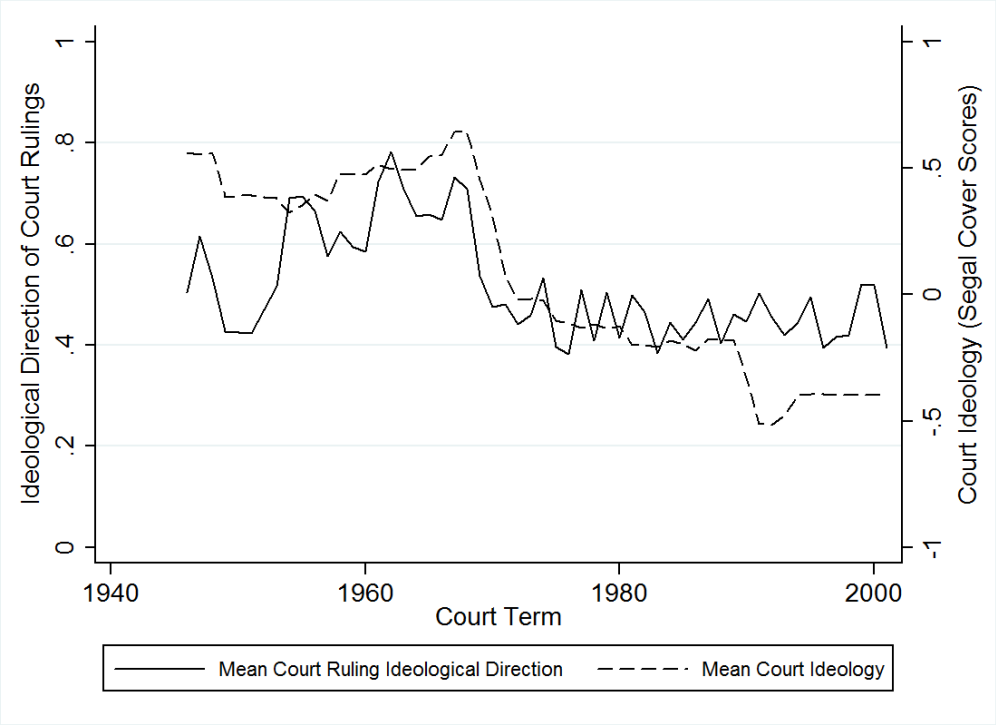
Figure 7: Mean Ideological Value (Segal-Cover Scores) of the Court by Court Term



Source: Kearney and Merrill 2000; Collins 2008

On the whole, the movements in the mean ideological alignment of the Court and its rulings occurred in tandem. Both are plotted in Figure 8.

Figure 8: Mean Ideological Value of the Court and Mean Ideological Direction of Court Rulings by Court Term



Source: Kearney and Merrill 2000; Collins 2008

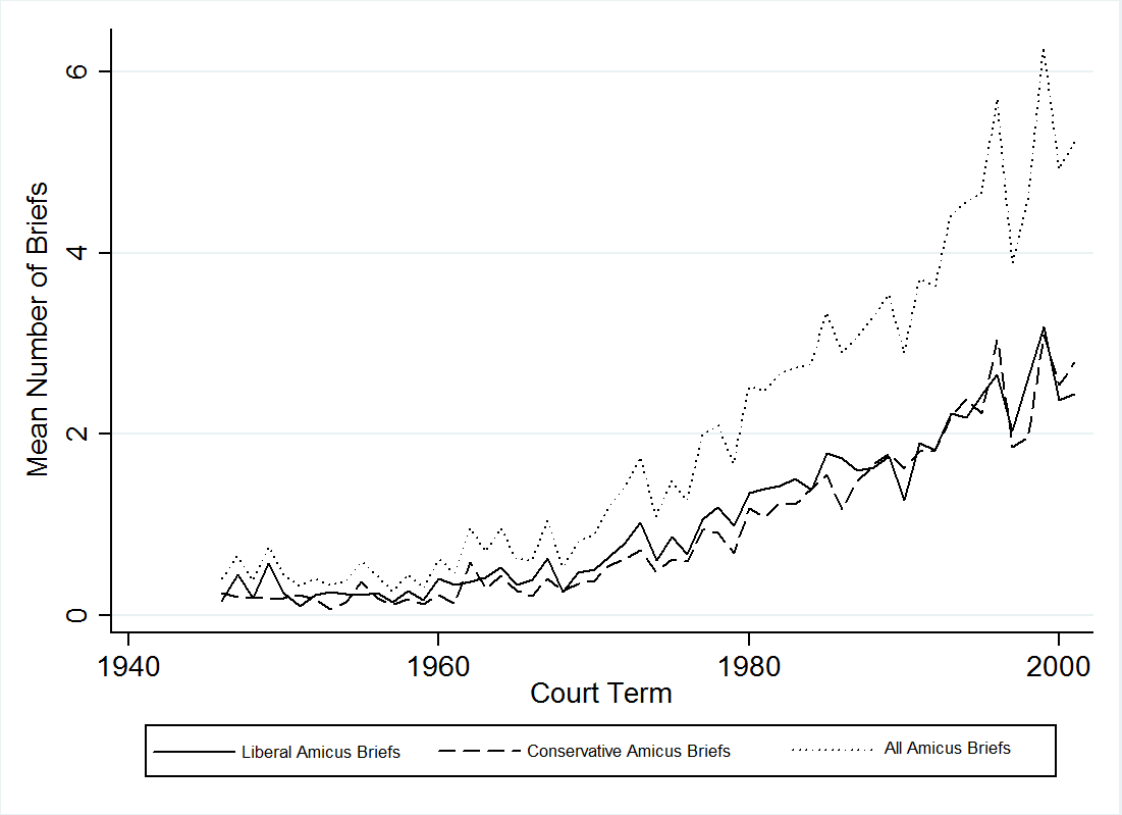
The mean ideological values of rulings and justices do not trend together perfectly. Still, the general movement of each aligns very well with the expectation that attitudinal preferences will strongly influence a justice's decision making. We can safely assume from this gauge of the Court's collective ideology that individual justice preferences changed during the examined period.

The second major aspect of the theory is the activity of amicus curiae briefs from 1946 to 2001. The participation of liberal and conservative amici is the specific target of interest. Though subject to some spikes, there was an overall increase in the number of total amicus briefs submitted to the Court on cases under review. This rise is also reflected in the mean number of liberal and conservative amicus briefs filed on a case. With regards to all amicus briefs, the

average number of briefs filed with each case increased from near zero in 1946 to four or five in 2001.

The mean number of liberal and conservative briefs submitted on any one case increased from approximately zero in 1946 to two in 2001. Interestingly, despite the ideological shifts in the Court, the mean numbers of liberal and conservative briefs increased consistently and uniformly. That is, the mean number of liberal or conservative briefs does not appear to vary as a result of the Court's own ideological drift. Assuming the amici parties are more or less aware of the Court's ideological center, it appears that amici would be less likely to file with an ideologically hostile Court. Traditionally liberal amici like the American Civil Liberties Union (ACLU), for instance, would probably be less likely to succeed before the Court as it became more conservative under Burger and Rehnquist's leadership. But such expectations are not manifested in the data as both liberal and conservative briefs increased at a relatively identical rate. This finding suggests that ideologically aligned amici do not base their decision to participate in a case entirely upon the Court's ideological center but weigh a series of factors to gauge the probability of success on the merits. It also undermines Hansford's findings that amici are more likely to act when the Court is ideologically similar (2004). Trends in amicus involvement on the merits are displayed in Figure 9.

Figure 9: Amicus Brief Activity on the Merits by Court Term



Source: Kearney and Merrill 2000; Collins 2008

Model Results: Rulings on Case Merits and Amicus Curiae Briefs

I now move to examine the results of the logit models of a justice's vote and amicus curiae briefs. As outlined in the methodology section, Segal-Cover scores suffer from their inability to account for ideological drift during a justice's time on the Court while Martin-Quinn scores suffer from their endogeneity. For that reason, I present two separate models that utilize Segal-Cover and Martin-Quinn ideological measurements. The purpose of incorporating both attitudinal measurements is to account for ideological drift while accommodating the weakness of the Martin-Quinn scores' endogeneity. If the results from the different models are relatively

similar, then it would seem that the collective analysis of the models accounts for the individual weaknesses of the Segal-Cover and Martin-Quinn scores.

The reader should first note the influence of random effects in the model. In both, case level differences accounted for a large volume of the variation in the data. Random effects comprised 66.8% of the variation in the Segal-Cover model and 74.0% in the Martin-Quinn model. Including random effects in the logit model allows for the measurement of the independent variables' effect on the directionality of the justice's vote without the confounding influence of case facts differences. The logit coefficient estimates for both the Segal-Cover and Martin-Quinn models are shown together in Table 5.

Table 5: Logit Coefficient Estimates for Segal-Cover and Martin-Quinn Models

Independent Variable	Logit Coefficient Estimates (Standard Error) Segal-Cover Model	Logit Coefficient Estimates (Standard Error) Martin-Quinn Model
Number of Liberal Amicus Briefs	0.225 (0.023)	0.316 (0.044)
Number of Conservative Amicus Briefs	-0.180 (0.022)	-0.276 (0.040)
Interaction Term: Liberal Amicus Briefs and Justice Ideology	0.045 (0.014)	-0.017 (0.005)
Interaction Term: Conservative Amicus Briefs and Justice Ideology	-0.011 (0.014)	0.002 (0.005)
Justice Ideology	1.314 (0.027)	-0.655 (0.010)
Solicitor General's Support of Liberal Position	0.990 (0.131)	1.237 (0.154)
Solicitor General's Support of Conservative Position	-1.061 (0.097)	-1.194 (0.114)
Liberal Party Resources	-0.045 (0.018)	-0.048 (0.021)
Conservative Party Resources	-0.041 (0.018)	-0.053 (0.021)
Constant	0.784 (0.181)	1.087 (0.212)
Rho	0.668 (0.007)	0.740 (0.006)

Number of Observations: Segal-Cover: 57,327; Martin-Quinn: 57,327
Source: Kearney and Merrill 2000; Collins 2008

To facilitate the interpretation of these results, Table 6 presents the estimated odds ratios from each model. Discussion of the relative effects of these variables is oriented around these estimates. For these logit models, the odds ratios reflect the increased or decreased odds of a justice voting for the liberal outcome in the case, holding all else constant.

Table 6: Estimated Odds Ratios for Segal-Cover and Martin-Quinn Models

Independent Variable	Estimated Odds Ratios (Standard Error) Segal-Cover Model	Estimated Odds Ratios (Standard Error) Martin-Quinn Model
Number of Liberal Amicus Briefs	1.252 (0.028)	1.372 (0.060)
Number of Conservative Amicus Briefs	0.835 (0.018)	0.759 (0.030)
Interaction Term: Liberal Amicus Briefs and Justice Ideology	1.046 (0.015)	0.983 (0.005)
Interaction Term: Conservative Amicus Briefs and Justice Ideology	0.989 (0.014)	1.002 (0.005)
Justice Ideology	3.721 (0.102)	0.519 (0.005)
Solicitor General's Support of Liberal Position	2.691 (0.352)	3.445 (0.530)
Solicitor General's Support of Conservative Position	0.346 (0.034)	0.303 (0.035)
Liberal Party Resources	0.956 (0.017)	0.953 (0.020)
Conservative Party Resources	0.960 (0.017)	0.949 (0.020)
Rho	0.668 (0.007)	0.740 (0.006)

Number of Observations: Segal-Cover: 57,327; Martin-Quinn: 57,327
Source: Kearney and Merrill 2000; Collins 2008

Putting aside the amicus variables and interaction terms for the moment, there are several vital inferences to be drawn. These observations implicate the other variables included in the model: justice ideology, Solicitor General participation, and litigant resources. Each of these variables appears to have played some part in the Court's decision making across the 1946-2001 terms.

First, justice ideology is a strong and independent factor determining the ideology of the justice's vote. Segal-Cover scores range from -1, a perfectly conservative justice, to 0, a moderate justice, to +1, a unanimously liberal justice. From the model results, a perfectly liberal

justice will be 272.1% (Segal-Cover model) more likely to vote liberally, than a moderate one, holding all other variables in the model constant and accounting for case level differences. The Martin-Quinn scores have a different ideological scale, where zero denotes a moderate justice, larger positive scores indicate a conservative justice, and larger negative values indicate liberal alignment. The odds ratio estimate for the Martin-Quinn model show that a one unit increase in the Martin-Quinn score corresponds to a justice who is 48% less likely to vote liberally in case, controlling for case level effects and the other variables. The reader should be mindful that the interpretations of the effect of justice ideology hold conservative and liberal amici at the reference values of zero. In the end, these findings are hardly surprising and offer further substantiation of the attitudinal model: justice ideology, even after accounting for case level differences and the presence of various other factors, is a powerful force in judicial decision making.

Second, the Solicitor General's advocacy of both the conservative and liberal position within a case plays a role in shaping the directionality of a justice's vote. The Solicitor General's support of the liberal position increases the odds of the justice voting liberally by 169.1% (Segal-Cover model) or 244.5% (Martin-Quinn model), holding all else equal in the model. Conversely, the Solicitor General's conservative advocacy decreases the likelihood of a justice's liberal vote by 65% (Segal-Cover model) and 69.7% (Martin-Quinn model. These findings are consistent with the judicial politics research that describes the Court as deferential to the expertise of the Solicitor General and its representation of the interests of the United States Government. It is somewhat peculiar, however, that the magnitude of the Solicitor General's advocacy effect seems to vary, depending on whether it supported the liberal or conservative position. One possible explanation of the slight disparity is that the Solicitor General may more frequently

appear as a litigant in support of conservative issues. If that is the case, as it likely is in criminal and civil rights cases, then its endorsement of liberal positions may appear particularly significant to the Court. In addition, the cases in which the Solicitor General argues a liberal outcome may be those in which desiring a "liberal" outcome are not very "liberal" stances in the traditional sense.

Third, the resources of a party have little impact on the voting patterns of the justices. With liberal litigants, greater party resources actually decrease the probability of the justice voting in a liberal direction by 4.4% (Segal-Cover model) or 4.7% (Martin-Quinn model). The resources of the conservative party played a similarly trivial part in the model. Greater conservative party resources also decrease the likelihood of the justice's liberal vote by 4% (Segal-Cover model) or 5.1% (Martin-Quinn model). These effects are statistically significant but very small in magnitude. If anything, these estimates suggest that institutionalized parties with greater resources, on both sides of the ideological spectrum, slightly discourage liberal voting. I will not spend any further time discussing their almost entirely negligible effect on the directionality of the justice's vote.

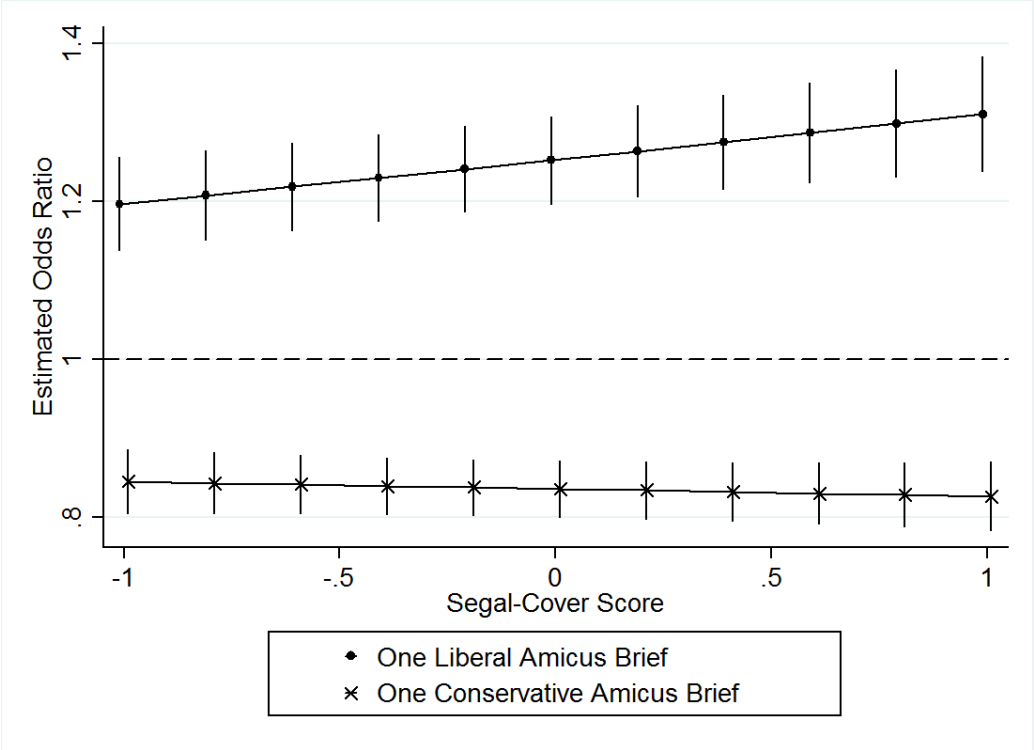
With these findings in mind, we move toward assessing the relationship between the amicus effect and Court ideology. Prior to examining the interaction terms, I briefly consider the individual amicus variables. Amici, as identified by the separate variables for liberal and conservative parties, clearly affect the justice's voting preferences. In the Segal-Cover model, the addition of one liberal amicus brief filed at the merits will increase the odds of a moderate justice voting liberally by 25.2%, holding all else equal. With respect to the Martin-Quinn model, a single liberal amicus increases the odds of a moderate justice voting liberally by 37.2%. Regarding conservative amici, an increase in one conservative amicus on the merits decreases

the chances of a moderate justice voting liberally by 16.5% in the Segal-Cover model. Results for the Martin-Quinn model show that one conservative amicus brief will decrease the likelihood of a liberal vote by 24.1% for a moderate justice, controlling for the other variables in the model.

Examining the odds ratios of liberal and conservative amici illustrates the amicus effect on the voting behavior of the justices. Moderate justices, as shown in both the Martin-Quinn and Segal-Cover models, will be pushed by conservative and liberal amici to vote as the amici intend. Liberal amici increase the likelihood of a moderate justice voting liberally while conservative amici decrease the likelihood of a liberal vote.

In order to accurately appraise the conditional impact of justice ideology on liberal and conservative amici effects, Figure 9 shows the change in the estimated odds ratios for amici as justice ideology, as measured by Segal-Cover scores, fluctuates.

Figure 10: The Marginal Effect of Amicus Briefs as Conditioned by Segal-Cover Scores[16]



Source: Kearney and Merrill 2000; Collins 2008

It is clear that the estimated odds ratios of a single liberal amicus brief increase with more liberal justices, those most sympathetic to amicus' policy positions. The addition of one liberal amicus brief has a positive effect on the justice's likelihood of voting liberally, holding all else equal. This effect rises as the justice has higher liberal ideology scores (further to the right on the x-axis).

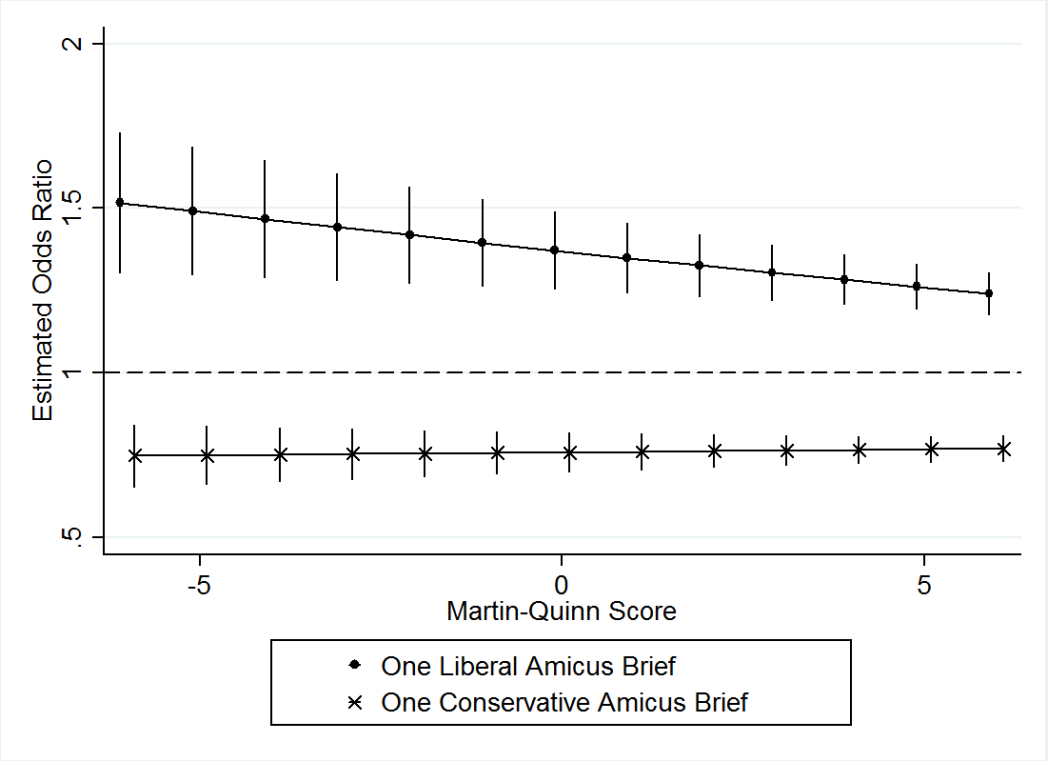
With the addition of one conservative amicus brief, the odds ratio stays essentially constant as the justice becomes moderate and then liberal (moving from right to left on the x-axis). It has a negative effect on the justice's likelihood of voting liberally, controlling for everything else in the model. The effect of this conservative amicus remains fairly uniform even

[16] To remind the reader of the scale of the Segal-Cover scores: -1 represents a perfectly conservative justice, 0 is a moderate justice, and +1 represents a perfectly liberal justice.

as the justice slides to the left of the ideological scale. These findings largely support the second hypothesis which argues that justice ideology has a moderating effect on the impact of amicus curiae briefs.

To further the discussion and determine whether or not these findings change based on a different measurement of justice attitudes, one that incorporates ideological drift over time, displayed below is a graphical representation of the estimated odds ratios of amici curiae as conditioned by Martin-Quinn ideological scores.

Figure 11: The Marginal Effect of Amicus Briefs as Conditioned by Martin-Quinn Scores[17]



Source: Kearney and Merrill 2000; Collins 2008

[17] To remind the reader of the scale of the Martin-Quinn scores: a -6 represents a perfectly liberal justice, with zero being a moderate justice, and +6 representing a perfectly conservative justice. The direction of the scale is reverse that of the Segal-Cover scores.

The Martin-Quinn model yields more fruitful observations. Here, the movement in the odds ratios is identical to that in the Segal-Cover model. The trends for the effect of a single liberal amicus brief, as conditioned by justice ideology, are quite transparent. A single liberal amicus has a greater odds ratio at high negative Martin-Quinn scores. That is, it has a greater effect of increasing the odds of a justice voting liberally when the justice has a higher liberal ideological score (as indicated by greater negative values on the left of the x-axis). As the justice's ideology moves to the right, thus becoming more moderate and then conservative, the impact of the one liberal amicus brief on the likelihood of a liberal vote decreases accordingly.

The Martin-Quinn results for the conditional effect of one conservative amicus brief are entirely consistent with those produced in the Segal-Cover model. The addition of a single conservative amicus decreases the likelihood of the justice voting liberally, controlling for the other variables in the model. This effect remains more or less constant even as the justice moves to the right of the ideological spectrum. Amicus impact for neutral justices is as expected: the introduction of a liberal amicus increases the likelihood of a liberal vote and the introduction of a conservative amicus slightly decreases the likelihood of a liberal vote.

On the face of things, there appear to be significant differences between the estimated odds ratios of liberal and conservative amici as conditioned by justice ideology between the Segal-Cover and Martin-Quinn models. First, it is clear from both models that the moderating effect of ideology is more pronounced for liberal amicus briefs. There is a very noticeable decrease in the estimated odds ratio for liberal amici as the justice becomes more conservative. This finding conforms to the dictates of hypothesis two.

Yet the conditional effect of a single conservative amicus brief does not match our expectations. The motivating hypothesis states that the effect of a conservative amicus on the

probability of a justice voting liberally would decrease as the justice shifted to the left of the ideological spectrum. And with totally liberal justices, conservative amici would have no impact whatsoever on the directionality of the justice's vote (i.e., an odds ratio at one). This expectation was grounded in the premise that liberal justices would be less likely to be persuaded by ideologically incongruent parties. However, liberal justices seem to treat the presence of a single conservative amicus brief much in the same way as a conservative justice. Conservative amici decrease the likelihood of the liberal justice voting according to his or her political attitudes.

An explanation for this unexpected observation can be found by examining the nature of the liberal amicus effect, as conditioned by justice ideology, on a justice's voting patterns. We see the estimates always remain above a value of one. Introducing a liberal amicus curiae brief, no matter if the justice is liberal, moderate, or conservative, always has a positive influence on the likelihood of that justice voting liberally, holding all else constant. The marginal effect certainly declines in magnitude with conservative justices. Nevertheless, it maintains its positive directionality. Given these findings, it seems less surprising that justices, even liberal ones, would be less likely to vote in a liberal direction, holding all else constant, if a conservative amicus brief was filed. The trends in both liberal and conservative amici odds ratios movement actually are fairly consistent with one another.

The results, consequently, provide an interesting twist to the hypothesis' expectations. Ideologically opposed amici continue to have their desired impact on a justice despite the distance between their attitudinal positions. Case in point, the odds ratios for a single conservative amicus for a liberal justice was below the threshold of one (which would denote no impact on the justice's inclination to issue a liberal vote), indicating a negative effect on that justice's probability of voting liberally. This observation suggests that although justice ideology

is a powerful force in conditioning the marginal effect of amicus curiae briefs, it is not altogether determinative. It would seem that amici, regardless of ideological compatibility with a justice, have a reasonable expectation of affecting the Court's behavior in the desired manner. Justices of all ideological stripes are apparently able to recognize the argumentative merits presented by liberal and conservative amici.

Analyses using the Segal-Cover and Martin-Quinn measures provide strong support for the theory that the impact of amicus curiae briefs is partially conditioned by justice ideology. This is most apparent in the effect of introducing a single liberal amicus brief, at various levels of justice ideology, on the odds of casting a liberal vote. Yet the amicus impact is not wholly dictated by justice ideology. Liberal and conservative amici curiae can influence a justice's vote, holding all else equal, in their preferred directions. Ultimately, the analysis supports the hypothesis that ideology moderates the effect of amicus curiae briefs over time.

To review, this chapter tested the second hypothesis that justice ideology moderates the effect of amicus curiae briefs submitted during the Court's final case reviews. This second hypothesis emerged from Collins' attitudinal congruence theory that arguments will be more persuasive if on a similar ideological footing as the recipient. The chapter began by observing that the Supreme Court, in terms of its collective ideology and case rulings, has evolved over the past fifty years as the number of liberal and conservative amici at the merits has risen dramatically. Through the use of a logit model, one incorporating multiplicative interaction terms and random effects controls, for panel data, we saw that the effect of amicus curiae briefs at the merits stage is largely shaped by the attitudinal distance between justice and amicus. Liberal justices were more likely to favorably treat liberal amici while conservative justices were

noticeably less likely to do so. This chapter, on the whole, provides additional confirmation of the persuasiveness of justice ideology in the Supreme Court's decision making processes.

CHAPTER FIVE: DISCUSSION

This thesis builds upon the rich scholarly literature on the United States Supreme Court, judicial decision making, and interest groups. Studies of amicus curiae briefs at the gatekeeping level have been primarily isolated to single-term analyses while those evaluating amicus participation at the Court's plenary review stage have yielded inconclusive results. The dearth of longitudinal study of the amicus-cert effect and the unsettled findings on the amici influence on the Court's case rulings motivated this study. Its goal was to assess whether or not the amicus effect varies as a function of a changing Court environment. As result of this thesis, we can gain important insights of the Supreme Court amici curiae relationship.

The amicus impact at the Court's gatekeeping and plenary review stages is clearly not consistent. At the certiorari level, amicus briefs had an inconsistent effect across four different periods of the Court as assessed in data gathered from the 1968, 1982, 1990, and 2007 terms. The amicus-cert relationship remains unclear despite this paper's cross-analysis of the amicus effect over those terms. Evidence did not support the asserted hypothesis that amicus curiae briefs filed at the certiorari stage will increase in effectiveness as the Court receives a greater volume of petitions. Instead, the effect of amicus curiae briefs supporting and opposing cert inconsistently varied in magnitude and directionality. Proposed explanations of an over-saturation of the amicus effect or differential treatment by liberal and conservative justices do not appear to be consistent with the data.

One of the most intriguing findings regarding the amicus-cert effect concerns amicus briefs opposing cert. Caldeira and Wright (1988) established the idea that amicus filings against cert were counter-productive and only served to increase the odds of the Court's review. The

analyses here showed otherwise, as the effect fluctuated in both magnitude and directionality. Research in the future could examine the Solicitor General's filing of amici against cert. Caldeira and Wright's (1988) expectation about amici opposing cert may be modified by the Solicitor General's successful use of the practice.

Deeper insight regarding the relationship between the Court's cert decisions and amici curiae filings would undoubtedly be gained through more comprehensive study. Though this paper analyzed an unprecedented volume of data on cert, using four terms to make inferences of the Court's behavior over forty years is hardly ideal. Students of judicial politics would surely benefit from the collection of more terms' data on certiorari and amicus briefs. Including additional information about the Solicitor General's participation as amicus at cert would be particularly rewarding, especially when its briefs opposing cert are considered. The dominant nature of the Court's agenda setting power in the American judiciary is worth the time and energy required to develop more comprehensive gatekeeping datasets.

Study of the amicus effect at the Court's plenary review stage was quite fruitful. Empirical analysis of the Court's behavior throughout the 1946-2001 terms supported the proposition that justice ideology shapes the effect of amicus curiae briefs. Hence, the examination adds to the body of evidence that justice ideology is an expansive factor in the Court's evaluation of case facts and briefs (including amici). Yet there is a caveat to the broad-reaching influence of the Court's political attitudes. Namely, we see that politically charged amici were able to overcome potentially hostile justices. The effect of adding one liberal or conservative amicus brief to a justice of any ideological position always had the intended effect, albeit to different degrees. At no point did the inclusion of a brief ideologically opposed to a justice have no effect on the directionality of the justice's vote, nor did it ever have a reverse

effect and increase the justice's likelihood of voting against the amicus' policy goals. This indicates that the moderating effect of justice ideology has its limits. A liberal or conservative justice would otherwise simply disregard an amicus that argued against his or her preferred policy formations. But otherwise, ideology does condition the amicus effect at the Court's plenary review stage.

In conclusion, these findings advance the literature's understanding of the intricate relationship between the United States Supreme Court and interest groups. The power of amicus briefs is in flux across the Court's gatekeeping and plenary review stages. While a definitive moderator of the amicus effect at cert could not be determined, it is clear that future study requires greater specification of the Court's behavior, in terms of collecting more terms' data, ideological measures of amicus briefs, and data on the Solicitor General's amicus participation. Finally, I found a partial answer to the literature's long-standing dispute over the effect of amici at the merits. The amicus impact on the Court's final rulings is largely, but not exclusively, influenced by ideological congruence with a justice. On the whole, the examination of these two hypotheses has promoted our understanding of the Supreme Court.

CHAPTER SIX: CONCLUSION

In this thesis, I proposed and tested two hypotheses that attempted to explain why and how the influence of amicus curiae briefs varies at the Court's gatekeeping and merit stages. Each theory was based on past work within the field and sought to address the gaps within the literature's understanding of the relationship between interest groups and the Supreme Court. Empirical analysis did not support the first hypothesis, the claim that amicus briefs submitted at cert will increase in their effect in more recent terms. The amicus-cert effect appears to naturally vary across time without being a function of any one element in the Supreme Court institutional framework. Yet the statistical testing of over fifty years' worth of Supreme Court behavior supported the second hypothesis, which reasoned that the amicus effect on the merits is conditioned by justice ideology. However, the moderating effect of justice ideology was not conclusive in determining the impact of amici submitted on the merits. Although justice ideology conditioned the strength of the amici effect, amicus briefs consistently made the justice more likely to vote in the ideological direction intended by the amicus. This finding gives weight to the well-established significance of justice ideology but, at the same time, implies that its effect on decision making has its limits. In closing, these findings provide further insight into the connection between amicus curiae briefs and the decisions made by the United States Supreme Court.

APPENDIX A: CODING PROTOCOL

Data used in Chapter Three were collected from the United States Supreme Court website and Westlaw Campus and LexisNexis. Order lists from the 2007 term provide the list of petitions for writ of certiorari. Cert petitions serve as the cases of analysis (this includes cases with docket numbers with both "06" and "07" prefixes). Westlaw Campus (2010) and LexisNexis (2011) archives were used to gather information on a series of twelve variables that could potentially affect the relationship between amicus curiae briefs and the cert decisions made by the Supreme Court.

The protocol describes the variables to be coded for each certiorari petition in 2007 term. Variables will be described by the following fields:

Variable Name: The alphanumeric variable name.

- Description: A description of the variable.
- Format: The coding format of the data contained in the variable.
- Coding: A detailed description of the coding itself.
- Notes: Any other relevant information about that variable.

There are twelve variables that will be coded for each case/petition: Docket number, case name, case disposition, United States as a party, United States as amicus curiae, amici for the petitioner, amici for the respondent, constitutional issue, civil rights and liberties issue, disagreement in the lower court, lower court ideology, and conflict. Coding standards are adapted from Spaeth (1999), Caldeira and Wright (1988), and the Supreme Court Dataset (2010).

Variables

1. Dnumber
   - *Description:* The docket number assigned to the petition by the Supreme Court.
   - *Format:* String
   - *Coding:* Natural.
   - *Notes:* The docket number will be taken verbatim from the Supreme Court's documentation (e.g., "06-1149" and "07-101"). Docket numbers should be taken from the order lists for the 2007 term, including all cert petitions that were either granted or denied. Together with the case name, the docket numbers assigned by the Court will serve to identify each petition. Only paid petitions should be considered. In forma pauperis (IFP) petitions should not be included in the cases of analysis. Paid petitions are identified by their docket number so that docket numbers between "07-1" and "07-4999" indicate paid petitions. Any case that receives a docket number greater than "5000" is an IFP petition and should not be included.

2. Cname
   - *Description:* The name of case as presented in the petition for writ of certiorari.
   - *Format:* String
   - *Coding:* Natural.

- *Notes:* The first party listed is the petitioner (in the case of multiple parties, all parties listed before "vs." are the petitioners and all parties listed after the "vs." are considered the respondents) while the second party is the respondent. For example, in the case of *Smith vs. Jones*, Smith is the petitioner and Jones is the respondent.

  The case name should be taken verbatim from the Supreme Court's documentation (i.e., the petitions for writ of certiorari and the order lists for 2007 term) for each paid petition. Again, IFP petitions should not be coded or included in the data collection.

3. Disp
   - *Description:* Whether or not the Supreme Court granted the writ of certiorari, thereby agreeing to a full review of the case.
   - *Format:* Categorical
   - *Coding:*
     - 0=Denied writ of certiorari
     - 1=Granted writ of certiorari
     - 2=Granted writ of certiorari, reversed, and remanded.
   - *Notes:* In addition to simple grants and denials of petitions, the Supreme Court issues grant, reverse, and remand orders. These orders are given when petitions present issues that can be addressed and resolved by the lower courts in the light of recent rulings by the Supreme Court. As these petitions are not actually given a full and independent review by the Court, they ought to be considered separately. Additionally, cases that arrive on appeal will be coded as "1" if probable jurisdiction is noted and "0" if probable jurisdiction is not noted.

4. AmiciP
   - *Description:* The number of amici that filed briefs in support of the petitioners and, subsequently, the Supreme Court's review of the case.
   - *Format:* Continuous
   - *Coding:* The total number of briefs supporting the petitioner should be documented.
   - *Notes:* The amicus curiae briefs for each case should be assessed to conclude whether or not they declare arguments in favor or against plenary review. As the amicus briefs are argumentative in nature, amici will openly advocate their support or opposition to the case's review. Any amicus brief supporting plenary review should be coded as a brief aligned with the petitioner.
   .
5. AmiciR
   - *Description:* The number of amicus curiae briefs filed in opposition to the petition's grant of certiorari and plenary review.
   - *Format:* Continuous
   - *Coding:* The total number of briefs supporting the respondent should be documented.
   - *Notes:* The amicus curiae briefs for each case will be assessed to determine if they declare arguments in favor or against plenary review. As the amicus briefs are argumentative in nature, amici will openly advocate their support or opposition to the case's review. Any amicus brief opposing plenary review should be construed as a brief aligned with the respondent.

6. Usparty
    - *Description:* Whether or not the United States government is a named party to the case.
    - *Format:* Categorical
    - *Coding:*
        - 0=United States government is not a party.
        - 1=United States government is the petitioner.
        - 2=United States government is the respondent.
    - *Notes:* The case name will list the United States as a party (if true). Cases that involve federal agencies as parties (for example, the Department of Justice) should likewise be coded as 1 or 2, where appropriate.

7. Usamici
    - *Description:* Whether or not the United States government appears as amicus curiae in the case, either supporting or opposing cert.
    - *Format:* Categorical
    - *Coding:*
        - 0=United States government does not participate as amicus curiae.
        - 1=United States government participates as amicus curiae, supporting grant of cert.
        - 2=United States government participates as amicus curiae, opposing grant of cert.
    - *Notes:* Given the tremendous influence that the United States Solicitor General wields with the Supreme Court (see e.g., Caldeira and Wright 1988), its participation as amicus curiae should be separately noted. Otherwise, the overall effect of amici participation in the gatekeeping process may be overstated. This variable, although excluded from my analysis in order to be consistent with Caldeira and Wright (who did not include this variable in their data collection), may be useful to further study.

8. Const
    - *Description:* Whether or not the petition presents legal issues regarding the United States Constitution.
    - *Format:* Binary
    - *Coding:*
        - 0=Case presents no constitutional issues.
        - 1=Case presents constitutional issues.
    - *Notes:* Only potential federal constitutional issues should be coded for this variable. Constitutional issues should be coded for by reading the petitions for writs of certiorari. If, and only if, the petition discusses violations or implications of the United States Constitution should it be considered a constitutional case. The petition will typically frame the legal question or issue presented by the case as constitutional or statutory in nature. In other cases, the petitioner will identify constitutional elements involved in the litigation when identifying the applicable statutory and constitutional provisions.

9. Civilrt
    - *Description:* Whether or not the petition introduces civil rights issues.
    - *Format:* Binary
    - *Coding:*
        - 0=No civil rights issues presented by the petition.
        - 1=Civil rights issues are presented by the petition.
    - *Notes:* Spaeth's standard coding method (as employed in the United States Supreme Court Judicial Database) should be employed to note civil rights cases. To that end, civil rights cases includes non-First Amendment freedom cases which implicate classifications based on race (including American Indians), age, indigency, voting rights, residency, military or handicapped status, gender, and alienage. Cases with privacy implications should also be designated as civil rights cases (Spaeth 1999).

10. Lowerdisagr
    - *Description:* Whether or not one or more members of the lower court dissented from the ruling that the petition seeks to have reviewed by the United States Supreme Court.
    - *Format:* Binary
    - *Coding:*
        - 0=No dissents in the lower court.
        - 1=One or more dissents in the lower court.
    - *Notes:* The ruling of the lower court should be examined to determine whether or not one or more members dissented. Dissents are clearly identified in each ruling issued by the lower courts. Opinions that concur or dissent in part should be considered as dissents as well.

11. Lowerideo
    - *Description:* The ideological disposition of the lower court's ruling on the case.
    - *Format:* Categorical
    - *Coding:*
        - -1=Liberal
        - 1=Conservative
        - 0=Nonideological
    - *Notes:* The standards for ideological coding of the lower court's ruling will be adapted from Spaeth's Supreme Court dataset (1999). In cases of procedure, civil rights, the First Amendment, due process, and privacy, positions in support of defendants, civil liberties/civil rights claimant, indigent persons, affirmative action, neutrality in religion cases, women's rights in abortion cases, due process claimants, and attorneys will indicate a liberal ruling. In economic and tax cases, pro-union, anti-business, anti-employer, pro-competition, pro-liability, pro-injured persons, pro-United States government (in tax cases), pro-consumer, pro-Indian, pro-environmental protection, pro-accountability in government corruption, pro-debtor, pro-bankrupt, and pro-indigent positions signal a liberal ruling. Rulings in support of the federal government in federalism issues and judicial power or "activism" should be construed as liberal rulings. The opposite stance in these areas indicates conservative positions. Cases that involve matters with no apparent ideological

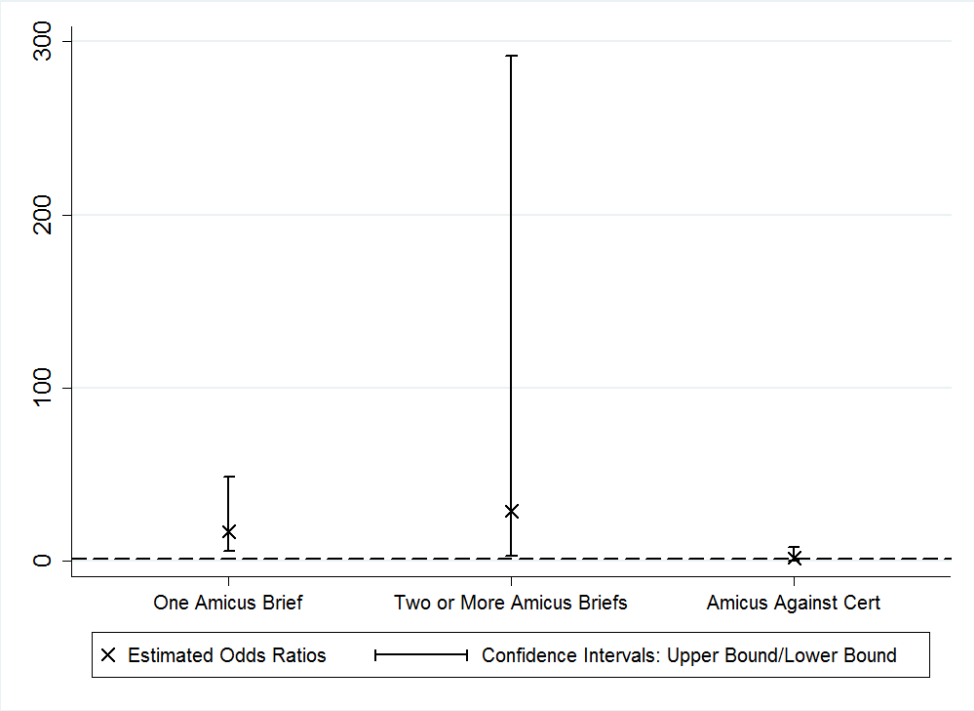
valence should be coded as such. For instances, cases involving divorce proceedings often contained little, if any, true ideological dispositions. If further explanation is needed, refer to the Spaeth's coding protocol (Spaeth 1999).

12. Aconflict
    - *Description:* Whether or not the petition asserts that the case presents legal conflict between the lower courts.
    - *Format:* Binary
    - *Coding:*
        - 0=No conflict
        - 1=Conflict
    - *Notes:* This variable will be coded by using a keyword search in the petitions for writs of certiorari. Applicable searches include "conflict," "lower court," "disagreement," "appellate court," "dispute," etc. Since parties have an incentive to mention the presence of legal disputes among the lower courts, in order to increase the likelihood of review, a keyword search should identify allegations of legal conflict between the appellate courts. However, because of this incentive, parties may exaggerate or over-report conflict. There is no feasible alternative available since identifying lower court disagreements independently would require legal expertise and resources presently unavailable. Those using this protocol, therefore, should approach this variable with caution as it represents "alleged" rather than "real" conflict. Only conflict between federal circuit courts and conflict between the Supreme Court and other lower appellate courts should be considered for this variable.

APPENDIX B: ADDITIONAL FIGURES AND STATISTICAL ANALYSIS

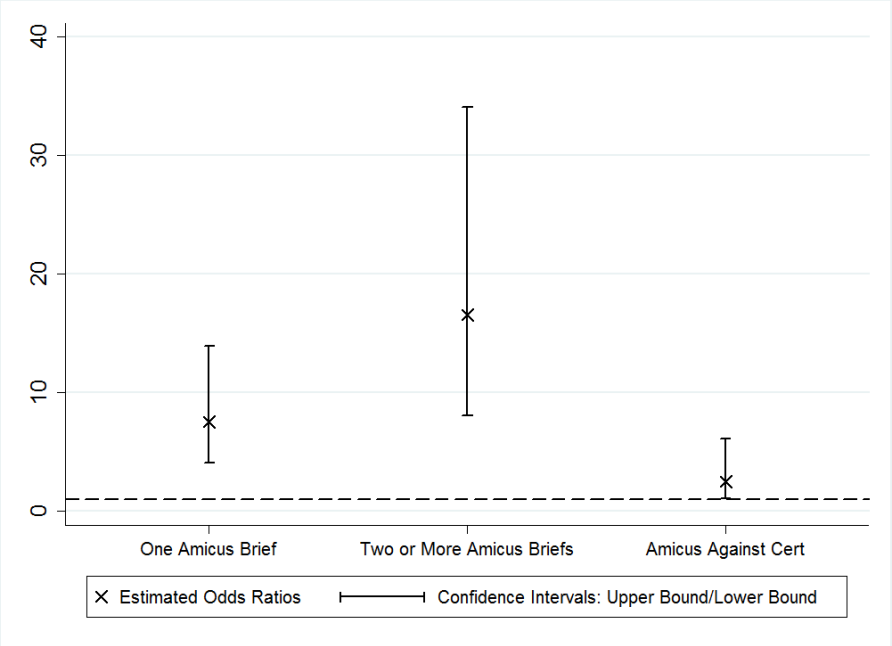
Chapter Three of this thesis dealt with the effect of amicus curiae briefs on the likelihood of the Court's grant of certiorari. The extreme range in the confidence intervals for the estimated odds ratios of two or more amicus brief for cert variable made the inclusion of the intervals problematic for the reader. In an effort to completely provide relevant information, I now include figures with both the estimated odds ratios and confidence intervals for all three of the germane amici variables across the 1968, 1982, 1990, and 2007 gatekeeping activity. The inferences and observations made in the preceding sections apply to these figures as the information expressed in each is the same, aside from the inclusion of the confidence intervals. Below are four separate figures for the each of the investigated terms. Reference lines are provided to indicate an odds ratio of one.

Figure 12: Estimated Odds Ratios and Confidence Intervals for Amici Variables in the 1968 Court Term



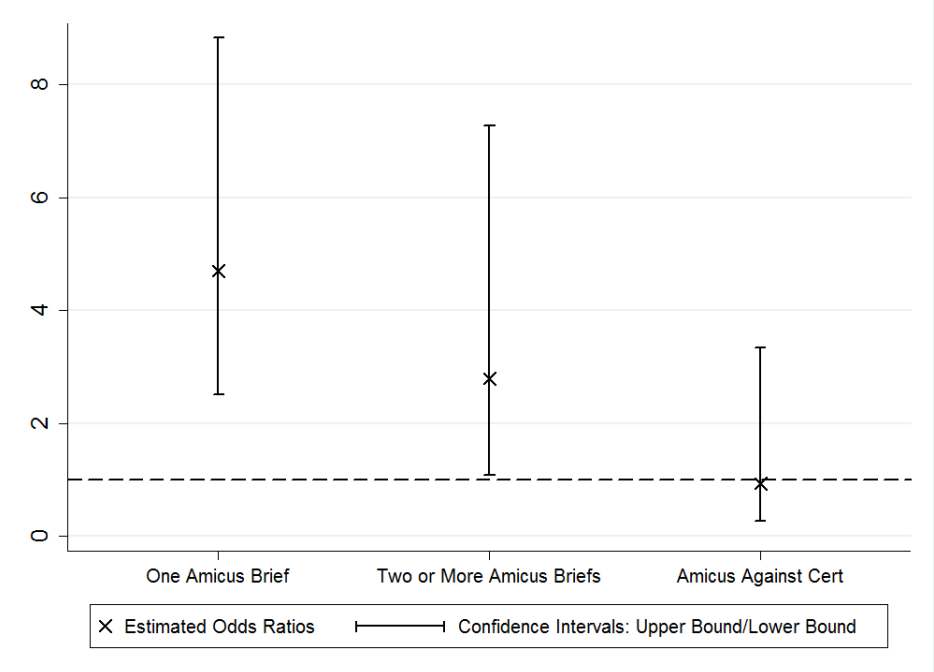
Source: Caldeira and Wright 1988; Caldeira and Wright 1990

Figure 13: Estimated Odds Ratios and Confidence Intervals for Amici Variables in the 1982 Court Term



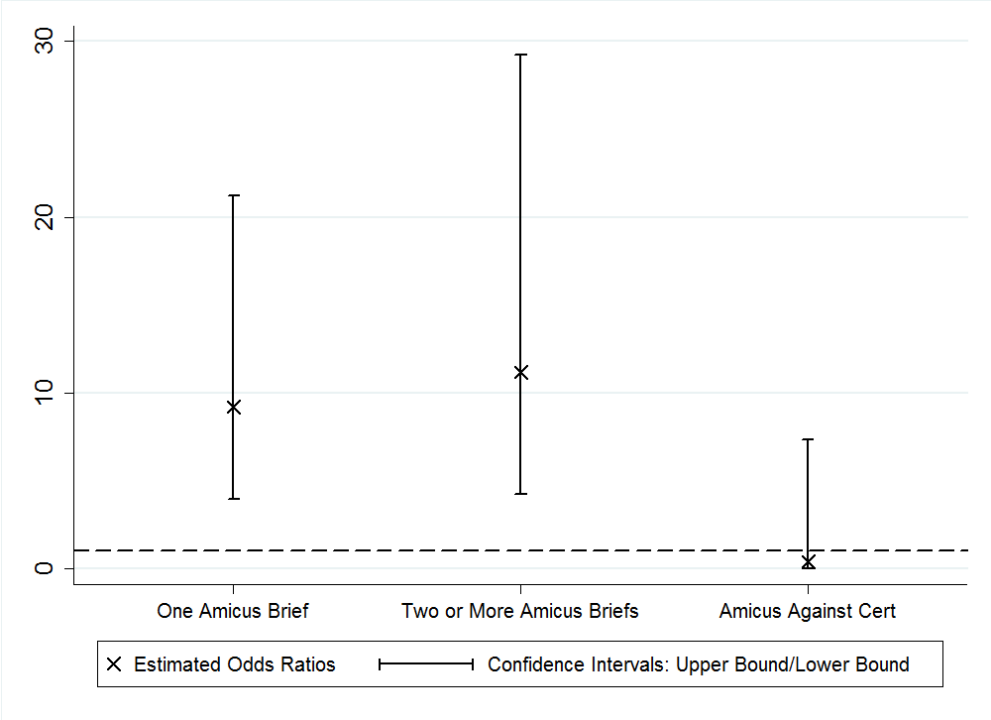
Source: Caldeira and Wright 1988; Caldeira and Wright 1990

Figure 14: Estimated Odds Ratios and Confidence Intervals for Amici Variables in the 1990 Court Term



Source: Caldeira and Wright 1988; Caldeira and Wright 1990

Figure 15: Estimated Odds Ratios and Confidence Intervals for Amici Variables in the 2007 Court Term



Source: Caldeira and Wright 1988; Caldeira and Wright 1990

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