

The Supreme Court and Citations to Legitimacy-Inducing Amicus Curiae in Majority Opinions

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Abstract

For decades scholars have investigated the role of amicus curiae briefs in Supreme Court decision-making. Existing work on the influence of these briefs on opinion content focuses exclusively on the use of “borrowed language” where the justices take language directly from the briefs and incorporate it into their majority opinions (Collins, Corley, & Hamner 2015). Most of the time justices borrow language without attribution. However, much less often, they decide to cite the amici. These two types of use are distinct in that one is revealed to the reader and the other is often not. This presents an interesting puzzle—which amicus curiae filers do the justices decide to cite and which do they borrow language from? I propose a theory that suggests the justices will be more likely to cite legitimacy-inducing interests, since this type of use is revealed, but that they will be more likely to borrow language from ideologically congruent interests since this type of use is concealed. I am able to test the implications of this theory using a novel dataset containing ideal point estimates for 600 organized interests (Hansford, Depaoli, & Canelo, w.p.). My preliminary results suggest that the justices do not rely on the ideological orientation of the interests when determining whether to cite a brief, but that they borrow more language from amicus briefs filed by interests that are ideologically congruent to their own preferences. These findings are interesting in that they might shape perceptions of the justices as political actors.

In *Grutter v. Bollinger* (2003) the Court determined that the use of race in student admissions decisions did not violate the Equal Protection Clause of the Fourteenth Amendment, upholding affirmative action in university admissions. Justice Sandra Day O'Connor authored the majority opinion and cited about 8 different amicus curiae, or friend-of-the-Court, briefs 12 times. These references received attention in national newspapers such as the *Washington Post* and the *New York Times*.¹ Much less apparent, was the fact that 37 percent of the opinion was composed of the exact language taken from amicus curiae briefs filed in the case. These two types of uses of amicus curiae briefs are distinct in that one is revealed to the reader and the other is often not. This phenomenon brings to light an interesting puzzle—what types of interest groups are the justices citing and which are they borrowing language from?

Over the past several decades, interest groups have worked to exert their influence over Supreme Court decisions, often by submitting amicus curiae briefs in an attempt to sway the justices' decision making, and scholars have debated how much attention the justices give to these briefs. One noticeable indication of amicus influence is the justices' tendency to cite these briefs in their majority opinions, and while this phenomenon is not extremely common, citations in opinions of all varieties have been increasing over time (Franze & Reeves Anderson 2015; Kearney & Merrill 2000, 758). A less obvious but equally important indicator is the use of amicus provided language in majority opinion content (Collins, Corley, & Hamner 2015).

¹ Greenhouse, Linda. 2003. "The Supreme Court: Affirmative Action; Justices Back Affirmative Action by 5 to 4, but Wider Vote Bans Racial Point System." *New York Times*. (Accessed online 24 March 2018). <https://www.nytimes.com/2003/06/24/us/supreme-court-affirmative-action-justices-back-affirmative-action-5-4-but-wider.html>

Bollinger, Lee C. 2003. "A Resounding Victory for Diversity on Campus." *The Washington Post*. (Accessed online 24 March 2018). https://www.washingtonpost.com/archive/opinions/2003/06/24/a-resounding-victory-for-diversity-on-campus/Off03331-13c6-4906-97de-74a3dac29859/?utm_term=.14d23978d4bb

Information on the case was gathered from Oyez at <https://www.oyez.org/cases/2002/02-241>

The justices' use of amicus provided information is interesting on its own because there is nothing that legally binds or even suggests the justices must rely on these briefs, much less even read them. With other sources of information available to them such as litigant briefs and lower court opinions, coupled with strong legal authorities such as precedent, we wouldn't necessarily expect justices to rely much on amicus briefs in their majority opinions. Further, relying on these interests in their opinions provides direct evidence that the justices are at least reading or considering the arguments provided by these briefs, suggesting that politically motivated interests might have the ability to help shape the content of the Court's policies.²

In this paper I theorize about which interests the justices are more likely to cite and which they are more likely to borrow language from. I argue that citing organized interests in their opinions might highlight agreement with politically motivated actors and might have implications for legitimacy. On the contrary, I argue that since borrowing language is less visible in nature the justices have more leeway with the type of interests they take language from. As such, I hypothesize that justices will be more likely to cite legitimacy-inducing actors, but that they will borrow language from ideologically congruent sources.

I test the implications of this theory by analyzing over 2,000 amicus curiae briefs submitted in a subset of cases from the 1988 – 2008 terms. Using a novel dataset that provides ideal point estimates for 600 organized interests (Hansford, Depaoli, & Canelo w.p.), I am able to assess the role ideology plays in a justice's decision to cite or borrow language from amicus curiae briefs. My preliminary results reveal that the justices are not concerned with the ideological orientation of the organized interests they cite. That is, they are not less likely to cite

² Some have argued that the use of amicus briefs in majority opinions is a function of Supreme Court clerks. However, it can be argued that a justice would not claim authorship of an opinion he or she does not agree with. Further, Supreme Court clerks serve for very short periods of time relative to the justices' extensive tenure on the Court.

briefs filed by ideologically overt interests, nor are they less likely to cite briefs filed by interests that are ideologically distant from their own preferences. However, I find that the justices do borrow more language from briefs filed by interests that are ideologically similar to their own preferences.

Organized Interests and Supreme Court Decisions

Scholars have worked to identify the actual level of influence organized interests have by analyzing the extent to which these interests do (Collins 2007; 2008a; 2008b; Ennis 1984; Hansford 2004; Kearney & Merrill 2000) or do not (Epstein, Segal, & Johnson 1996; Songer & Sheehan 1993) influence outcomes. Most of these studies focus on the decision direction in a particular case, assessing whether or not the justices voted in favor of the party the amici advocated for (Bailey, Kamoie, & Maltzman 2005; Kearney & Merrill 2000), or focusing on the ideological outcome of a case (Collins 2007; 2008), and/or the individual votes of the justices (Box-Steffensmeier, Christenson & Hitt 2013; Collins 2008). However, there has also been an emphasis on understanding how these interests can influence the content of the Supreme Court's majority opinions (Collins, Corley, & Hamner 2015; Epstein & Kobylka 1992; Spriggs & Wahlbeck 1997).

Citations to amicus briefs in Supreme Court opinions is one obvious indicator of the justices' use of these briefs, however, there has not been much scholarly work devoted to understanding this. Kearney & Merrill (2000) reveal that amicus briefs cited in the majority opinion do not enjoy greater success rates than those that remain uncited. Further, Hansford & Johnson (2014) find that citations to amicus briefs in majority opinions leads to an increase in the number of amicus briefs filed in subsequent periods. In other words, when the interests are led to believe their briefs have some level of impact on the Court, they are more likely to continue to

file. Understanding the impact these citations have on amicus curiae success and involvement with the Court is essential and generates a curiosity about which interests the justices choose to cite and why.

Another way organized interests can influence opinion content is through borrowed language, where the justices take the exact language from the amicus briefs and incorporate it directly into their opinions. Corley (2008) introduced the field to the use of plagiarism detection software to detect instances where the justices take the exact language from various sources of information. Collins, Corley, and Hamner (2015) used this method to assess the extent to which the justices borrow the exact language from amicus curiae briefs in their majority opinions. They find that the justices are more likely to incorporate amicus provided information that is of high quality, reiterates arguments from other sources, and is from credible interests such as elite amici (Collins, Corley, & Hamner 2015). This seminal work was essential to furthering our understanding of how organized interests can help shape the actual content of the Supreme Court's opinions. What we still know very little about are the types of interest groups whose briefs the justices rely on and whether they rely on different types of interests based on whether they cite a brief (revealed use) or borrow language from one (a more concealed use).

Citing or Borrowing Language from Amicus Briefs Filed by Particular Interests

In theorizing about the different types of use and which interests the justices cite versus which they borrow language from, I first assume that the justices have policy preferences (Rohde & Spaeth 1976; Segal & Spaeth 1993, 2002)³, an assumption that has been demonstrated empirically (Epstein & Knight 1998; Hansford & Spriggs 2006; Maltzman, Spriggs, & Wahlbeck

³ I am aware that policy preferences are not the only considerations that motivate the justices (Baum 1998; Epstein, Landes, & Posner 2013; Posner 2010). However, this is one of the main motivations that I will be focusing on in this project.

2000). The justices seek to make legal policy that aligns with their personal preferences, however, there are restraints that come with this.

First, I assume as many others have, that the justices have incomplete information (Epstein & Knight 1998, 1999; Hansford & Johnson 2014; Johnson, Wahlbeck & Spriggs 2006; Maltzman, Spriggs, & Wahlbeck 2000; Murphy 1964). This presents a challenge when producing effective majority opinions that garner compliance among external actors. For example, justices are unsure of how a ruling will be received by complying audiences and might have difficulty assessing the consequences or broader implications of a particular policy on those members of society impacted by the decision. In order to produce policy that is implemented as intended, the justices must overcome this challenge. Here is where the amicus curiae briefs come in, as these briefs can provide the justices with information that can help them produce effective opinions.

Second, while other political actors, such as members of Congress and the president, can be open about their policy preferences, the members of the Court do not share this privilege and must work to maintain the Court's legitimacy. As an institution that does not have the means or authority to implement its own decisions, legitimacy is particularly important to the Court. Legitimacy theory asserts that the decisions of legitimate, respected institutions will be complied with even when they are unpopular because the institution is deemed to have the authority to make such decisions.⁴ The Court, has no power over the "sword or the purse." In other words, while they are able to make decisions they themselves cannot enforce them or force others to do so. As such, it is essential that the Court does what it can to ensure these decisions are

⁴ For more information on the different theories of legitimacy see Gibson (2007) and Gibson, Lodge, & Woodson (2014).

implemented accordingly. To do so they must maintain their respect as an institution and legitimize their policy decisions.

One way that the justices maintain institutional legitimacy is by sustaining their image as unbiased, neutral actors whose purpose is to rely on the law to make decisions (Epstein & Knight 1998; Epstein, Landes, & Posner 2013; Posner 2010). This can be done by ensuring the public views the institution as void of partisanship (Hibbing & Theiss-Morse 1995) and guided by law (Baird 2001; Scheb & Lyons 2000), features that can also increase public acceptance of its rulings (Mondak 1990; 1992). This same means of maintaining institutional legitimacy can be used to legitimize policy decisions. For instance, referring to strong legal authorities like the Constitution or precedent and refraining from revealing ideological biases in majority opinions can help justify these rulings.

Majority opinions are essential for the justices to realize their goals, as they use these opinions to align precedent with their policy preferences and to confer or maintain legitimacy. These opinions are the justices' policies. They are the documents lower courts will refer to when determining how to interpret the High Court's ruling and implementing actors will refer to when determining how to enforce the Court's rulings. Further, the majority opinion is the primary channel through which the Court communicates with external actors, including the public⁵, so it is a means for the Court to maintain its legitimacy. In other words, the content of their written opinions, particularly majority opinions as they often receive the most attention, can shape how external audiences view the Court and its members. Research has suggested that the legal justifications used in majority opinions can shape how the Court is perceived (Farganis 2012; Zink, Spriggs, & Scott 2009). Maintaining legitimacy is essential to the justices' initial goal of

⁵ I understand that the average citizen does not read Supreme Court opinions. However, the media tends to cover at least the most salient cases, providing the public with an overview of the decision and the majority opinion.

producing policies that are aligned with their personal preferences. If the Court does not maintain its legitimacy it runs the risk of external actors ignoring its rulings, or more likely, loosely enforcing or implementing them in ways other than intended.

Next, I assume that affiliating with certain political actors can be harmful to legitimacy, while associating with others can aid it. The Court must work to maintain its institutional legitimacy and the legitimacy of its decisions by appearing as void of politics. Citing organized interests in majority opinions might be viewed as highlighting agreement between these actors and the justices. As such, citing ideologically extreme interests, an action that is visible to external audiences, might make the justices appear as biased, politically motivated actors as opposed to more neutral actors who are guided by law. However, others, such as apolitical interests or other government actors can help enhance the Court's credibility and aid with maintaining their image as unbiased actors. Since these actors are not overtly ideological and hold a higher level of credibility, they might help the Court legitimize its decisions.

Unlike citations to interests which are highly visible in the Court's majority opinion, borrowing language from an amicus brief is often discreet in nature and is not readily apparent in the majority opinion. Since this type of use is unlikely to be revealed, I argue that the justices will borrow language from ideologically congruent interests. In this scenario the justices should be less concerned with its impact on legitimacy since external audiences will not notice this. This leads me to have two different types of expectations based on the ways in which the justices are relying on amicus briefs. Conceptually, I expect to find that the Court will be more likely to cite legitimacy-inducing actors and will refrain from citing actors that might harm the Court's legitimacy, but that they will be less concerned with the identity of the organized interests they

borrow language from since this type of use is not revealed. More specifically, I hypothesize the following:

H1: *The more ideologically overt an interest, the less likely the justices will be to cite their amicus curiae brief.*

As previously mentioned, citing polarized, ideologically overt interests might make the justices appear as if they themselves are politically motivated. As such they should avoid citing these actors as this might be harmful to their legitimacy.

H2: *The justices will be more likely to cite interests that take a position contrary to expectation.*

Research in persuasion suggests that contrary position taking is deemed more credible (O'Keefe 2002). I argue that contrary position taking can also be legitimacy-inducing in that it can moderate a decision in appearance. For example, a liberal justice ruling in a liberal direction can help moderate the decision by citing an ideologically conservative interest group that might have filed in the case.

H3: *The justices will be more likely to cite amicus curiae briefs filed by the states, relative to non-state actors.*

I expect to find that the justices will be more likely to cite amicus briefs filed by the states because these actors are more credible and less polarizing than special interest groups. Research has also demonstrated that these actors play an important role as amicus filers (Lynch 2004). While it might be argued that the states have ideological preferences, states of various ideological leanings often co-sign onto briefs together to advocate for the same position. In other words, states are often concerned with issues like federalism that are not always expressly ideological in nature. Citing state filed amicus briefs might be viewed as more legitimacy inducing as the states are important government actors while interest groups are not.

Finally, unlike citing, the use of borrowed language is not readily apparent and should therefore have no bearing on perceptions of the Court. Here, the justices should have more leeway to engage in ideological behavior. As such, I hypothesize the following:

H4: *The more ideologically congruent an interest is to the opinion author's preferences, the more language the justice will borrow from its amicus brief.*

Data and Methods

To test the citations hypotheses (H1-H3), I randomly selected over 330 cases across the 1988-2008 terms. The unit of analysis is the individual amicus brief of which there are approximately 1,760 in the sample. Since I am interested in citations to organized interests I exclude briefs filed by the United States Solicitor General and individual people. In this range of data there were only 46 citations to amicus briefs in the majority opinions. Since these citations are so rare, I collected an over sample of them. To do so I intentionally selected cases where citations were included in the majority opinion and included all amicus briefs filed in the case, whether there was a citation to the brief or not. This produced 621 more briefs into the data, 78 of which included citations. As I am selecting on the dependent variable I use the Zelig package in R as the “relogit” command produces estimates that are corrected for the bias that occurs when events are rare or when the user collects an oversample of rare-events data (Imai, King, & Lau 2019), as described above. This package was used to test the all three citations hypotheses (H1-H3). The dependent variable *Cited* was coded “1” if a brief was cited in the majority opinion and “0” otherwise.⁶ The justices appear to be selective when it comes to citing amicus curiae briefs.

⁶ This variable only includes citations that were considered positive or neutral in nature. See appendix for more information on coding rules.

Out of over 2,381 amicus briefs submitted in 397 cases, only 124 (5%) of them were mentioned in majority opinions in just 96 different cases.⁷

Conceptually, my independent variables for the citation models attempt to measure the credibility (or lack thereof) of particular interests that file amicus curiae briefs. To test whether the justices are less likely to cite ideologically extreme actors (H1) I use a novel dataset that provides ideal point estimates for 600 organized interests that have filed with the United States Supreme Court. To create these estimates, we treat the positions advocated in amicus curiae briefs as “votes” in these cases, allowing us to create ideal point estimates that are in the same policy space as the justices. We then use an item response model that allows for the fact that an organized interest can decide not to “vote” in a case (Hansford, Depaoli, & Canelo w.p.)⁸. I have ideological information for 1,417 out of the 2,381 amicus briefs filed by organized interests. This means in total, there are 72 cited briefs for which I have ideological data for. These 1,417 briefs will be used for the subsequent analyses. For briefs that had more than one co-signer with an ideal point estimate, I took the mean of those available. I create a variable called *Ideological* by taking the absolute value of the ideal point estimate. (This is the absolute value of the mean of available ideal points for briefs with multiple amici). Coding the variable as such makes it so that as the value increases, the more ideological the interest is, regardless of whether it is conservative or liberal. This variable allows me to assess whether the justices are less likely to cite ideologically overt actors.

My second independent variable for the citations hypotheses measures whether a brief advocated for a position contrary to expectation. This was compiled using the United States Supreme Court Database’s (Spaeth et. al. 2016) *Decision Direction* variable and measures of the

⁷ A list of the organized interests that filed can be found in the appendix.

⁸ See the appendix for more details on these measures.

positions taken by the amici. The variable *Contrary* was coded “1” if a liberal interest took a conservative position or if a conservative interest advocated for a liberal position and “0” otherwise. Out of the 1,417 briefs for which there is ideological data, only 64 (4.5%) met this criteria, suggesting contrary position taking is rare.

My third independent variable is a dummy variable coded “1” if the brief was filed by a state or a group of states and “0” otherwise. This will allow me to test my third hypothesis, that the justices will be more likely to cite briefs filed by state governments. Note that the data testing the first two hypotheses pertaining to the ideological orientation of organized interests does not include amicus briefs filed by the states. To test H3, that the justices will be more likely to cite briefs filed by state governments relative to organized interests, I incorporate state filed amicus briefs. In the original random sample of over 300 cases there were 158 state filed amicus briefs. In the oversample collected there were 53 making for a total of 211 state filed amicus briefs out of 2,559 amicus briefs in total.

In testing the citations hypotheses, I control for a variety of important factors in an attempt to eliminate other causal pathways. First, I control for whether the United States Solicitor General (USSG) submitted an amicus brief in the case. Research demonstrates that the USSG is a very influential actor at the Supreme Court (Black & Owens 2012; 2013). While one might argue that the USSG is a credible actor that might help enhance the Court’s legitimacy, I do not hypothesize about this relationship because I cannot causally determine whether the Court is citing the actor for her credibility or because of her access to high quality resources and information. Also, the relationship between the USSG and the Court is a unique one and is much different than the relationship between interest groups and the Court, requiring additional theorizing. Frequent filers of the Court might be deemed as credible by the Court, and as such I

control for this factor. Further, previous work suggests some of these interests are held in high regard by the Court (Lynch 2004). To do so I used a dataset that included all amicus briefs filed from 1953-2008 and determined which interests filed most often. The variable *Frequent Filer* is coded “1” if one of these organized interests was included on the brief and “0” otherwise. The exact list of interests included in this variable can be found in the appendix. I also include controls for the number of cosigners signed onto a brief (*Number of Amici*). It is possible that an extensive number of interests signed on to a brief can signal agreement amongst a variety of different actors which might signal credibility. I also control for the *Number of Amicus Briefs* filed in a case, as the justices might be less inclined to cite a particular brief the more briefs filed in the case.

There are also a few case-level controls that are important to consider. I first control for case salience. The salience of a case can influence which interests file briefs and might also prompt the justices to be more cautious in their opinion writing. When controlling for this, it is important to avoid endogeneity and ensure the opinion issued in a case is not what is making it salient. It is also important to ensure the justices are aware of the case salience as they are writing the opinion. I therefore use Clark et. al.’s (2015) “early salience” measure that captures the salience of a case *before* the decision was announced in order to account for this. I also control for the number of words in the majority opinion (*Opinion Word Count*), whether the Court is reversing the lower courts using measures from the Supreme Court Database (Spaeth et al. 2016), and *Justice Ideology* using the ideal point estimates we’ve produced (Hansford, Depaoli, & Canelo w.p.) I include justice level fixed effects to ensure there are no systematic differences between these actors that are driving my results. These are not reported in the tables for simplicity. Per curiam opinions were used as the baseline.

Citations Results

Figure 1 takes a descriptive look at the ideology of the all of the amici that filed (blue line) relative to the ideology of the amici whose briefs were cited (red line). As evident from the blue line in the figure, there is a wide range of ideological actors that file. The most liberal (-1.91) was a brief filed by 16 women's rights organizations with the American Association of University Women being the most liberal single entity (-2.50). The most conservative was a brief filed by the Knights of Columbus (1.18). While there are a range of actors that file, the justices seem to only cite interests whose ideal points are between -1 and 1. So, at least descriptively, the justices somewhat limit which interests they cite in their briefs and avoid citing more ideologically extreme actors. Next, I look at whether this is significant when modeled.

*** FIGURE 1 HERE ***

Table 1 shows the results from the three separate models. My first hypothesis suggested that the justices would be less likely to cite ideologically extreme interests. As we can see from Model 1, while the coefficient is in the correct direction, it is not statistically significant at conventional levels ($p = .06$, one-tailed) suggesting that the justices do not refrain from citing ideologically overt interests. One important caveat is that while the data I've collected includes an over sample of cited briefs, there are still a limited number of citations to briefs filed by organized interests that also contain ideological information (72 out of 1,417 briefs). This shows how rare citations to amicus briefs actually are and might warrant additional data collection to make stronger inferences about the role of amici ideology in the justices' decision to cite these briefs.

*** TABLE 1 HERE ***

My second hypothesis suggested the justices would be more likely to cite amicus briefs where organized interests took a position contrary to what was expected, since contrary-position taking might signal credibility. An example would be a liberal interest group taking a conservative position or vice versa. Model 2 of Table 1 shows these results. As we can see the sign is actually negative in direction, suggesting the justices are less likely to cite these types of briefs, however, these results are not statistically significant, providing no support for H2.

Hypothesis 3 suggested that the justices would be more likely to cite briefs submitted by the states, since these actors are likely more credible than special interests. The results can be found in Model 3 of Table 1. While in the correct direction (positive), the coefficient is not statistically significant, suggesting there is no support for Hypothesis 3. While state actors might appear as more credible than special interest groups, the justices are not more likely to cite these entities.

Taken as a whole, these results indicate the justices are not concerned with the ideological orientation or legitimacy inducing features of the organized interests they cite. This might suggest that the justices do not think of these citations as having any real bearing on their ability to confer legitimacy. This might prompt one to ask whether the justices are then less likely to cite organized interests who have different ideological preferences from their own. To eliminate this as a possibility I estimated the model using a measure of the *Ideological Distance* between the justices and the organized interests that filed. This was compiled by taking the absolute value of the majority opinion author's ideal point subtracted from the organized interests' ideal point. As previously stated I took the average if there were multiple amici with available ideal points on a single brief. With this set up, we would expect that as the ideological distance between the filing interest and the justice increases, the less like he or she would be to

cite that particular brief in his or her majority opinion. The results of this analysis can be found in Table 2 below. As evidenced in the model, the coefficient is negative in direction, but is not statistically significant. This suggests the justices are not less likely to cite amicus briefs filed by organized interests whose ideological preferences are distant from their own. Taken together, these findings indicate that the ideological orientation of the filing interest does not play an important role in determining whether the justices will cite an amicus brief.

*** TABLE 2 HERE ***

There are also a few interesting observations in the control variables. First, it appears the justices are less likely to cite briefs filed by frequent filers. This was true across all four models. This is interesting in that one might make the argument these frequent filers have more of a reputation with the Court and that this credibility might make their briefs more likely to be cited. However, my findings show the opposite. Also, the more briefs filed in a case, the less likely a justice was to cite a particular brief. This was not the case for the number of amici, as the number of amici signed onto a brief increased, there was no statistically significant difference in the justices' decision to cite the brief. What is perhaps most interesting in assessing the control variables and consistent with my theory is the role salience plays in the justices' decision to cite a brief. In 3 of the 4 models, as the case becomes more salient the justices are less likely to cite briefs. In other words, when external actors are paying especially close attention to the case (and thus will pay closer attention to the majority opinion) the justices are less likely to cite an amicus curiae brief.

Borrowed Language

To test whether the justices were more likely to borrow language from ideologically congruent interests (H4) I use a similar design. The data includes the briefs filed by organized

interests in 330 cases randomly selected across the 1988-2008 terms. The unit of analysis is the individual amicus brief. I created a dependent variable that is the percentage of the majority opinion derived from each individual amicus brief filed in that case. This was acquired using WCopyfind 4.1.5 (Bloomfield 2016) to compare the majority opinion to said briefs. I used the WCopyfind presets consistent with the existing literature. The shortest string of words was set to 6, the minimum percent of matching words to report was set to 80%, the maximum number of imperfections (non-matching words) was set to 2, and the program was set to ignore letter case, outer punctuation, numbers, and non-words (Black & Owens 2012; Corley 2008; Corley, Collins, & Calvin 2011; Collins, Corley, & Hamner 2014; Collins, Corley, & Hamner 2015). For these models I necessarily limit my analyses to only include the briefs for which I have ideological data (N = 1,037). The percentage of the majority opinion language borrowed from an individual brief ranges from 0 to 19 with a mean of 2.82 and a standard deviation of 3.17. I estimate an OLS model due to the continuous nature of this variable.

To test Hypothesis 4, that the justices will borrow more language from ideologically congruent interests I create an *Ideological Congruence* variable similar to the *Ideological Distance* measure previously used however, I multiply this by -1 so that the direction is consistent with the hypothesis that the closer the interest group's ideology is to the justice's the more language they will borrow (rather than distance it is congruence). First, I create a variable that is the *Ideological Congruence with the Opinion Author*. Next, since research suggests that the median of the majority coalition plays an important role in controlling opinion content (Carrubba et al. 2012), I create an *Ideological Congruence with the Median of the Majority Coalition* variable to account for the fact that the opinion author must work to accommodate the preferences of the median of the majority coalition.

I control for the amount of overlap in language between the amicus brief and the litigant the interest was advocating for. In instances where the amicus brief did not express which party they were in support of I took the average overlap from the litigant briefs from each side. This variable, *Litigant Overlap*, is the percentage of the amicus brief derived from language in the respective litigant brief. I also control for the *Opinion Word Count*. Similar to the citations model, I control for whether the United States Solicitor General submitted a brief in the case, as this actor has been shown to be very influential (Black & Owens 2012; 2013). I also control for whether an interest was a frequent filer, the number of amici on a brief, the number of briefs, and the early salience of a case (Clark et. al. 2015). Finally, I include fixed effects for justice and term, to ensure there are no systematic differences between justices or across time that might influence my results. Per curiam opinions and the 1988 term were the respective baselines.

Borrowed Language Results

The results can be found in Table 3 below. These models include only briefs for which I have ideological data (N = 1,037). Model 1 shows Ideological Congruence with the Opinion Author while Model 2 shows Ideological Congruence with the Median of the Majority Coalition. As can be seen in Table 3 Model 1, *Ideological Congruence with the Opinion Author* is positive and statistically significant, suggesting the justices borrow more language from ideologically similar actors, providing support for Hypothesis 4. As shown in Table 3 Model 2, *Ideological Congruence with the Median of the Majority Coalition* is also positive and statistically significant, providing additional support for H4. In other words, Supreme Court justices borrow more language from interests that are ideologically similar to their own preferences. This finding is interesting and consistent with my theory in that the justices engage in ideological behavior when their actions are likely to go unnoticed.

Another interesting finding is that the salience of case was negative but not statistically significant. In other words, the justices are not statistically less likely to borrow less language from a brief when the case is salient—i.e. highly visible to external audiences. This is consistent with my theoretical argument that since borrowing language is discreet in nature, the justices do not need to hinder their use of it when writing their majority opinions since there are limited implications for legitimacy, unlike formally citing the source which is evident to the reader and likely to have implications for legitimacy. Recall that in 3 of the 4 citations models, as the case became more salient the justices were less likely to cite briefs.

Both Models 1 and 2 in Table 3 reveal that the justices borrow more language from interests that are frequent filers. This makes sense as the justices might be more inclined to rely on briefs filed by interests they are more familiar with. However, interestingly in the citations models, the justices were less likely to cite these interests. Further, as the amount of overlap between the amicus and its supported litigant briefs increases the justices borrow more language from the amicus brief. This might serve as evidence that the justices borrow more language from interests whose briefs repeat arguments made in the litigant briefs. Finally, in looking at the fixed effects, which are not reported in the tables for simplicity, there are very few statistically significant differences between terms and justices.⁹ This is interesting given that the citations model showed statistically significant differences between each individual justice.

**** TABLE 3 HERE ****

⁹ The 2008 term was the only term that was statistically significant in both models. In Model 1 the coefficient for Justice Thomas was statistically significant ($p = .042$) and in the median of the majority coalition model the coefficients for Justices Brennan, Thomas, and Ginsburg were significant ($p = .099, .051, \text{ and } .078$, respectively). Graphical representation of the differences in borrowed language amongst the justices in all cases from the 1988 to 2008 terms can be found in the appendix.

Figure 2 shows the ideological locations of the organized interests that filed amicus briefs in my data. The blue line represents the ideological orientations of all of the briefs filed in this dataset. The red line depicts the ideological locations of only those briefs where the justices borrowed 5% or more of its language. As evident in the figure, the justices borrow language from a wide range of actors across the ideological spectrum. Recall Figure 1 showed that the justices cited amici whose ideal points were between -1 and 1. As Figure 2 demonstrates, the justices borrow language from amici whose ideal points are from nearly -1.8 or so to 1. This might suggest that the justices are borrowing more language from ideologically liberal interests. However, note that the blue line suggests there are more liberal interests than conservative.

**** FIGURE 2 HERE ****

Discussion and Next Steps

Judging solely by the descriptive observation that the justices appear to be selective of how often they cite organized interests in their majority opinions (only 37 out of over 300 majority opinions included a citation in the random sample) one might be led to believe that they would also be selective when determining exactly which interests to cite, especially since these citations are visible in the opinion. The findings here appear to indicate that the justices are not concerned with the credibility or ideological orientation of the organized interests they cite in their majority opinions. They do not refrain from citing ideologically overt interests, are not more inclined to cite states over interest groups (the latter of which can be considered more politically motivated), and they are not more inclined to cite actors that take positions contrary to expectation, which is often considered a sign of credibility. Despite this, they do not appear to actively avoid citing briefs filed by interests whose preferences are ideologically distant from their own.

Interestingly, the justices borrow more language from briefs filed by interests that are ideologically congruent with their own preferences. This is consistent with my theory that suggests the justices will engage in more ideological behavior when their actions will go unnoticed by the public. Since borrowed language is discreet in nature and the reader will likely not realize it has occurred, the justices have more leeway in terms of the interests whose briefs they rely on. This finding contributes to the broader literature on whether Supreme Court justices are legal or political actors (or some blend of both) and can shape how the institution is perceived.

I would like to add a few important caveats. First, even more data collection might be necessary. While the data including the oversample on citations contains 2,381 briefs, only 124 (5%) of them were cited in majority opinions. Additionally, 1,417 of these contain ideological data and only 72 of those briefs were cited. Further, this dataset only includes up to the 2008 terms,¹⁰ if citing amicus briefs is becoming a more recent phenomenon as the information environment continues to grow, then one might be able to leverage more on citations by analyzing majority opinions from more recent terms.

Having said that, the results here indicate that the credibility or ideological orientation of the interests does not play an important role in a justices' decision to cite amicus curiae briefs, and one must consider alternative explanations and avenues for future research. One logical explanation is that the justices are mostly concerned with the quality of the legal arguments put forth in the briefs. Technological advances in text analysis can help leverage whether the justices are more likely to cite briefs that are of high quality. Future work can also explore citations and borrowed language in concurring or dissenting opinions, whether the types of interests cited

¹⁰ I ended at the 2008 term because Clark et. al.'s (2015) measure of early salience ends at this term.

differ in these contexts, and whether the justices cite amicus briefs negatively in response to their colleagues.

The results of this paper highlight an important real-world implication. The evidence so far suggests that the justices do not appear to cite legitimacy-inducing interests, or in other words do not expressly avoid citing ideologically overt interests. These actions might have implications for how the Court is perceived by the public. Research suggests that the public is less accepting of opinions that cite briefs filed by ideologically overt interests.¹¹ Thus, if the justices continue this practice, there might be implications for the Court's legitimacy over time. Further, my results suggest the justices are engaging in ideological behavior behind the scenes when their actions are likely to go unnoticed. This might help shape our perception of the justices as political actors. Another implication is that often times the clerks are given credit for "shadow writing" majority opinions, however, this paper reveals that the organized interests that file amicus briefs are playing an important role in influencing the content used in majority opinions, perhaps helping to "shadow write" the opinions themselves.

¹¹ I ran a survey experiment and found that citations to ideologically overt interest decrease support for the Court's decisions, but citations to ideologically moderate interests do not increase support. This paper is in progress.

Table 1. Brief Cited in Majority Opinion

Independent Variable	Model 1	Model 2	Model 3
Ideological Interest	-.733 (.478)		
Contrary Position Taking		-.183 (.739)	
State Filer			.062 (.330)
Frequent Filer	-.757** (.320)	-.808*** (.317)	-.753*** (.301)
United States Solicitor General Filed	.219 (.263)	.170 (.261)	.241 (.191)
Number of Amici	.010 (.017)	.005 (.017)	.004 (.011)
Number of Briefs	-.037** (.016)	-.034** (.016)	-.016** (.008)
Opinion Word Count	.000*** (.000)	.000*** (.000)	.000* (.000)
Salience	-.301 (.190)	-.347* (.188)	-.391*** (.138)
Reversing Lower Court	-.259 (.260)	-.267 (.260)	-.034 (.195)
Justice Ideology	-1930788.7*** (1467.1)	-1928477.8*** (1466.9)	
N	1,413	1,413	2,557

Entries are rare events logit estimates (using the Zelig package in R). * $p \leq 0.10$; ** $p \leq 0.05$; *** $p \leq .01$ (two-tailed test). Includes fixed effects for justice.¹²

¹² The N in these models is different from the overall sample as the justice level fixed effects eliminate some observations due to collinearity.

Table 2. Brief Cited in Majority Opinion

Independent Variable	Model 1
Ideological Distance	-.006 (.339)
Frequent Filer	-.815*** (.317)
United States Solicitor General Filed	.167 (.263)
Number of Amici	.005 (.018)
Number of Briefs	-.034** (.016)
Opinion Word Count	.000*** (.000)
Salience	-.358* (.188)
Reversing Lower Court	-.281 (.259)
N	1,396

Entries are rare events logit estimates (using the Zelig package in R).

* $p \leq 0.10$; ** $p \leq 0.05$; *** $p \leq .01$ (two-tailed test).

Includes fixed effects for justice, not included for simplicity.

Table 3. Percentage of Amicus Brief Borrowed in Majority Opinion

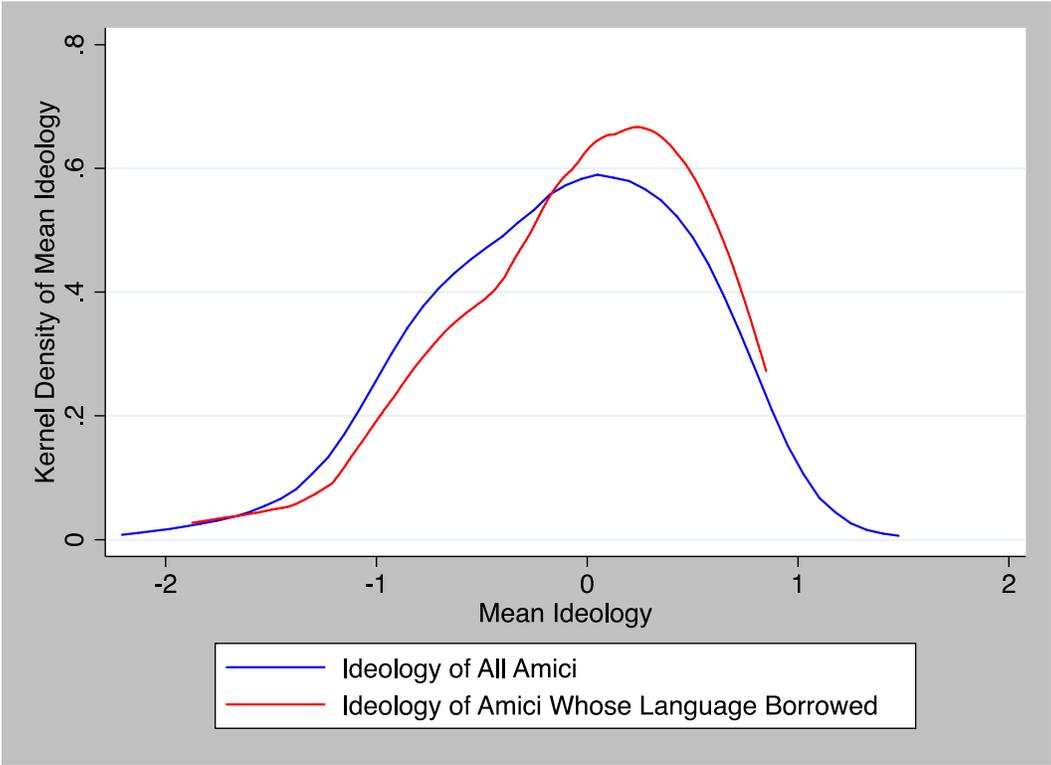
Independent Variable	Model 1	Model 2
Ideological Congruence w/ Opinion Author	.341* (.207)	
Ideological Congruence w/ Median of Majority		.366* (.222)
Frequent Filer	.530*** (.196)	.525*** (.196)
Litigant Overlap	.360*** (.030)	.359*** (.030)
Opinion Word Count	-.000*** (.000)	-.000*** (.000)
United States Solicitor General Filed	.082 (.208)	.084 (.208)
Number of Amici	.018** (.008)	.018** (.008)
Number of Briefs	-.024** (.012)	-.024** (.012)
Salience	-.148 (.146)	-.146 (.146)
Reversing Lower Court	-.412** (.212)	-.406* (.212)
Constant	.933 (.681)	.827 (.666)
N	1,037	1,037
R ²	.33	.33

Entries are OLS estimates. * $p \leq .10$; ** $p \leq 0.05$; *** $p \leq 0.01$ (two-tailed test). Includes fixed effects for justice and term. Robust standard errors used.

Figure 1: Ideology of Amici Whose Briefs Were Cited



Figure 2: Ideology of Amici Whose Briefs Were Borrowed From



Appendix Materials

Coding Citations

This analysis only includes citations that were deemed to be positive or neutral in nature. This means that the Court mentioned the arguments put forth by the amici in a way that did not disparage them. Two additional methods of coding “Weak Negative” and “Negative” were gathered but were not used in this analysis. Citations were coded as “Negative” when the justices blatantly stated their disagreement with the amici, usually using strong language such as, “this argument is flawed”, “we disagree” or “we cannot agree.” Citations were coded “Weak negative” in instances where the Court mentioned the amici in a way that was neither in blatant disagreement nor neutral in nature. The vast majority of these were instances where the justices mentioned a point or legal question mentioned by the brief but stated they were not addressing that issue in this particular case. In total, 87 citations were positive/neutral in nature, 32 were considered negative, and 33 were considered weak negative.

Because the primary question of interest was which particular briefs/interests were cited in the opinion, general references to the amici (statements such as “respondent and her amici...”) that did not include the name of the interest were not included.

Information on Ideal Point Estimates

“Votes” were gathered by looking at all instances where an organized interest filed an amicus brief from the 1953-2013 terms. Unlike the justices, who are required to vote in nearly every case (aside from recusals), organized interests do not file briefs and thus do not “vote” in every case. Traditional Item Response Theory (IRT) models assume that these are missing at random. If these interests’ abstention from filing is not missing at random, then these traditional estimates are biased. The model we use (developed by Rosas, Shomer, and Haptonstahl (2015)) allows us to treat these abstentions as if they are not missing at random. In other words, organized interests will abstain from filing an amicus brief and thus “voting” in a case if it is indifferent to the two possible outcomes (reverse or affirm). For more information, visit amicispace.ucmerced.edu.

Robustness Checks

For the citations model I created a simpler version of measuring whether a group was considered ideological as a robustness check by grouping interests based on the 25th and 75th percentiles of the *Mean Ideology* variable. Interests in the 25th percentile (with an ideal point estimate less than -.533) were coded as “Liberal,” and those in the 75th percentile (with ideal point estimates greater than .381) were coded as “Conservative” while interests with ideal points less than .381 but greater than -.533 were coded as “Moderate.” Then a variable *Ideological2* was coded as “1” for those deemed either “Conservative” or “Liberal” and “0” otherwise. The results remained the same and ideology measured this way did not lead to an increase in the likelihood of a justice citing the brief. The null results also held when breaking interests into groups by the 10th and 90th percentiles.

List of Frequent Filers

AARP

American Civil Liberties Union

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)

United States Chamber of Commerce

Council of State Governments

International City-County Management Association

National Association of Counties

National Association of Criminal Defense Lawyers

National Conference of State Legislators

National League of Cities

Pacific Legal Foundation

U.S. Conference of Mayors

Washington Legal Foundation

Organized Interests Cited

ADVOCATES FOR CHILDREN OF NEW YORK

AMERICAN ACADEMY OF PSYCHIATRY AND TH..

AMERICAN ADVERTISING FEDERATION

AMERICAN BAR ASSOCIATION

AMERICAN BENEFITS COUNCIL

AMERICAN CENTER FOR LAW AND JUSTICE

AMERICAN CHEMISTRY COUNCIL

AMERICAN INSURANCE ASSOCIATION

AMERICAN INTELLECTUAL PROPERTY LAW AS..

AMERICAN PSYCHIATRIC ASSOCIATION

AMERICAN PSYCHOLOGICAL ASSOCIATION

AMERICAN TRUCKING ASSOCIATIONS

AMERICAN UNITY LEGAL DEFENSE FUND

ASSOCIATION OF AMERICAN PUBLISHERS

ASSOCIATION OF GLOBAL AUTOMAKERS

ASSOCIATION OF NATIONAL ADVERTISERS

BLUE CROSS AND BLUE SHIELD ASSOCIATION

CENTER FOR BIOLOGICAL DIVERSITY

CENTER FOR THE COMMUNITY INTEREST

CHAMBER OF COMMERCE OF THE U.S.

CHEVRON CORP.

EQUAL EMPLOYMENT ADVISORY COUNCIL

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

FAMILIES AGAINST MANDATORY MINIMUMS

GENERAL ELECTRIC COMPANY

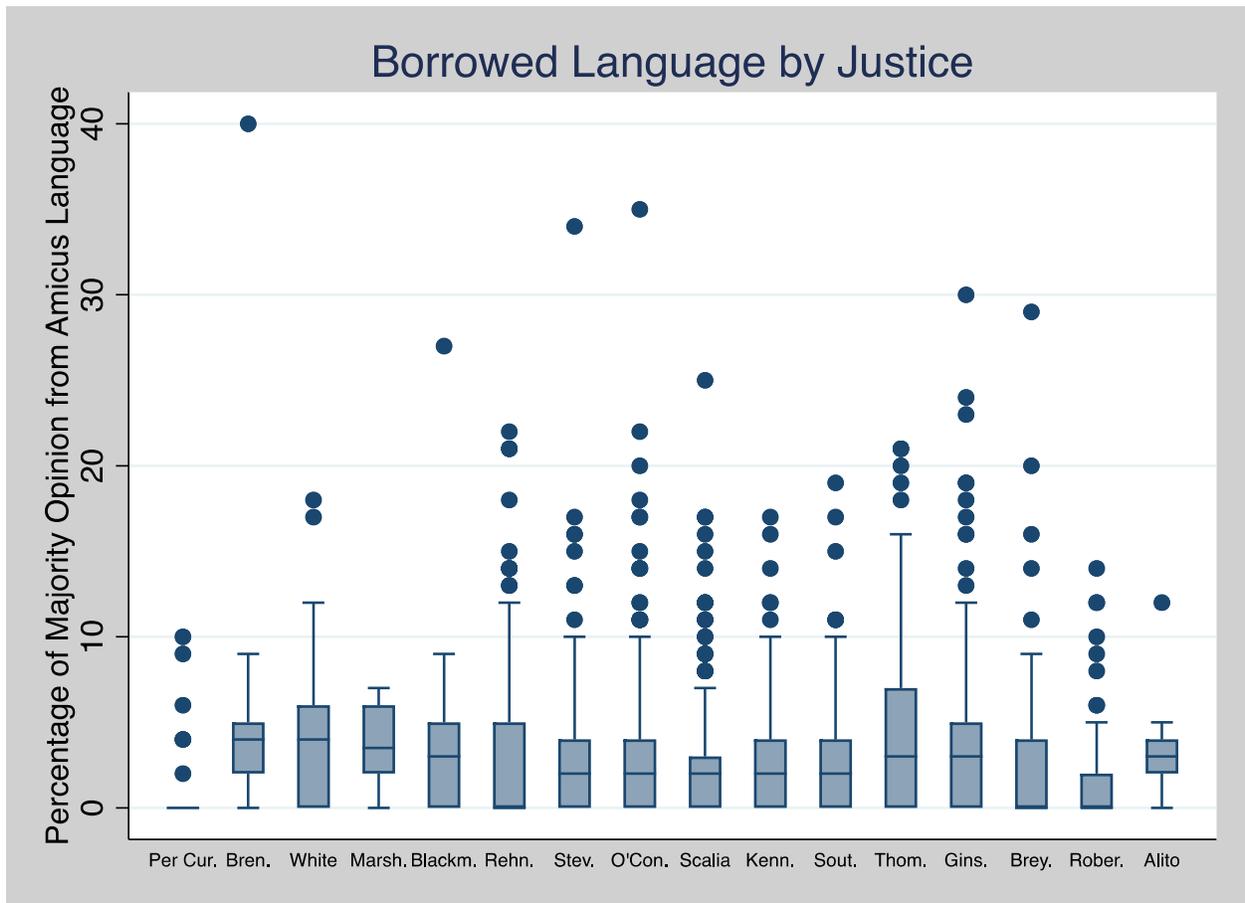
GENERAL MOTORS CORP.

GEORGIA SCHOOL BOARDS ASSOCIATION

HEALTH INSURANCE ASSOCIATION OF AMERICA

HUMAN RIGHTS FIRST
INDEPENDENT BANKERS ASSOCIATION OF AM..
INNOCENCE NETWORK
INSTITUTE FOR JUSTICE
INSTITUTE OF INTERNATIONAL BANKERS
INTERNATIONAL CITY-COUNTY MANAGEMENT ..
INTERNATIONAL COUNCIL OF SHOPPING CEN..
INTERNATIONAL UNION OF POLICE ASSOCIA..
LOUISIANA FOUNDATION AGAINST SEXUAL A..
MEXICAN AMERICAN LEGAL DEFENSE AND ED..
MULTISTATE TAX COMMISSION
NAACP LEGAL DEFENSE AND EDUCATIONAL F..
NATIONAL ASSOCIATION OF CRIMINAL DEFE..
NATIONAL ASSOCIATION OF SOCIAL WORKER..
NATIONAL COORDINATING COMMITTEE FOR M..
NATIONAL GOVERNORS' ASSOCIATION
NATIONAL LEAGUE OF CITIES
NATIONAL TREASURY EMPLOYEES UNION
NATIONAL WOMEN'S LAW CENTER
NEW ENGLAND LEGAL FOUNDATION
NEW MEXICO MEDICAL SOCIETY
NEW YORK CLEARING HOUSE ASSOCIATION
NEW YORK COUNCIL OF DEFENSE LAWYERS
REPUBLICAN NATIONAL COMMITTEE
SECURITIES AND EXCHANGE COMMISSION
TASH
THOMSON NEWSPAPER HOLDINGS, INC.
U.S. CONFERENCE OF MAYORS
WISCONSIN INNOCENCE PROJECT

Figure 1: Borrowed Language by Justice: All Cases from 1988 – 2008 Terms



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