Information, Legitimacy, and the use of Amicus Curiae Briefs in the Supreme Court's Majority Opinions

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Abstract

Supreme Court justices are not legally bound to consider, or even read, amicus curiae briefs. Despite this, we find that they often incorporate language from these briefs and/or cite them in their majority opinions, presenting an interesting puzzle. In this paper I theorize that borrowing language from amicus briefs can help the justices overcome informational needs and that citing the amici can help legitimize their rulings when traditional legal authorities are not apparent—two distinct methods used under different conditions to achieve policy goals. I test the implications of this theory using data from the 1988 to 2008 terms. I find that the justices will borrow more language from amicus briefs when they are in need of information. I also find that when justices alter precedent they cite amicus curiae briefs *less* frequently. While contrary to my expectations, this is interesting nonetheless because it implies the justices might be actively avoiding citations to amici as it might be viewed as detrimental to legitimacy, while relying on them discreetly by borrowing their language.

In 2006, the Supreme Court heard a complex case about state-chartered operating subsidiaries' authority over national banks in *Watters v. Wachovia Bank, N.A*. Fourteen amicus curiae briefs were filed in the case, and 28% of Justice Ginsburg's majority opinion was composed of the precise language used in these briefs. Despite such a high amount of borrowed language in her opinion, she only cited one amicus brief. In 2009, the Court heard *Montejano v. Louisiana*, a case about whether a defendant needed to formally accept the appointment of an attorney in order to secure his or her protections under the Sixth Amendment. The court ruled in favor of the petitioner, overturning precedent of *Michigan v. Jackson*. In Justice Scalia's majority opinion, he cited the amici seven times and referred to three specific briefs. However, only 13% of his majority opinion was composed of the precise language used in the ten amicus briefs filed in the case.

This presents an interesting puzzle; why do justices sometimes borrow language without attribution while at other times they explicitly cite amici while using little of their language? 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 incorporate language from amicus briefs, much less cite them in their majority opinions. Despite this, justices still do and disentangling this use can be telling.

In this paper I theorize about the different ways justices can use amicus briefs to achieve their policy goals. I argue justices can borrow language from amicus briefs in order to overcome informational needs and craft well informed opinions and that they cite amicus curiae briefs as non-legal authorities when traditional legal authorities are not as readily available. I test the

implications of this theory using data from the 1988 to 2008 terms. I find that the justices borrow language when they are in need of information, but do not find support for the theory that the justices will cite amicus curiae briefs when they need to further legitimize their decisions. This finding is interesting in that it reveals how amicus filers, i.e. non-legal actors, can influence policy content behind the scenes by helping to determine the precise language used in majority opinions, and suggests that the justices, while discreetly reliant on these briefs might avoid actively citing them.

The Importance of Language in Majority Opinions

Scholars have identified the constraints the Supreme Court justices must consider when crafting majority opinions that help meet their policy objectives. It has been shown that justices must not only appease their colleagues on the bench (Carruba et. al., 2012; Maltzman, Spriggs, & Wahlbeck 2000), but that they must also consider a range of other audiences (Baum 2006; Canon & Johnson 1999) including, but not limited to, the public (Casillas, Enns & Wohlfarth 2010; Hall 2014; Mishler & Sheehan 1993), Congress (Clark 2009), the president (Black & Owens 2012; Owens 2010), or the lower courts (Hall 2015; Hansford, Spriggs, & Stenger 2013; Songer, Segal & Cameron 1994; Westerland et. al. 2010). This makes the precise language used in majority opinions critical to ensuring policy outcomes unfold as the justices intend.

Technological advances over the past ten to fifteen years have provided scholars the ability to systematically analyze the linguistic attributes of majority opinions via content analysis. This has improved our ability to understand the ways in which opinion language can influence outcomes, particularly compliance with Supreme Court rulings. For example, it has been demonstrated that justices can produce less-readable opinions to avoid Congressional review (Owens, Wedeking, & Wohlfarth 2013), use authoritative language to increase the

likelihood of positive treatment in the lower courts (Corley & Wedeking 2014), and write clearer opinions to enhance compliance among implementing audiences (Black et. al. 2016). An important component to understanding how opinion language can influence outcomes and help circumvent constraints is evaluating the sources of information used to formulate them.

One particularly burdensome challenge for the Court is that of imperfect information (Epstein & Knight 1998, 1999; Hansford & Johnson 2014; Johnson, Wahlbeck & Spriggs 2006; Maltzman, Spriggs, & Wahlbeck 2000; Murphy 1964) and this requires justices to rely on external sources in order to create effective policy with the desired downstream consequences. This need for information provides outside actors the opportunity to influence the law by inadvertently contributing to the specific content of majority opinions. Corley (2008) was the first to systematically explore the use of the parties' briefs in majority opinion content by using plagiarism detection software to determine the exact language "borrowed" from these briefs and incorporated directly into the opinion itself. The study found that brief quality, ideological compatibility, and case salience influence the justices' reliance on party briefs (Corley 2008). This work opened the door to continued systematic evaluation of majority opinion content. Since then, research has demonstrated that the justices also borrow language from lower court opinion content (Corley, Collins, & Calvin 2011), and amicus curiae briefs (Collins, Corley, & Hamner 2015).

This latter work contributes to a broader debate on the influence of amicus provided information, and whether it does (Collins 2007; 2008a; 2008b; Ennis 1984; Hansford 2004; Kearney & Merrill 2000) or does not (Epstein, Segal & Johnson 1996; Songer & Sheehan 1993) influence outcomes. Collins, Corley, & Hamner (2015), using plagiarism detection software to determine the percentage of the majority opinion that is derived from amicus curiae briefs, 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 (Collins, Corley, & Hamner 2015). This, coupled with the same authors' finding that amicus curiae briefs contain novel argumentation that does not overlap with other sources of information (Collins, Corley, & Hamner 2014), provides convincing evidence of amicus curiae influence in Supreme Court policy making.

This paper serves to help scholars systematically understand the different ways Supreme Court justices use amicus provided information. At first glance, using amicus curiae briefs to construct majority opinions might seem like a trivial time saving measure or citation formality, however, I argue these briefs play a much bigger role. In my theory, amicus briefs are mechanisms—used in different ways and under different conditions to achieve policy outcomes through greater compliance. In this paper I propose that while borrowing language is a means of overcoming informational deficiencies, citing the amici directly can be used to legitimize decisions. I argue that while both types of use are ultimately a means of unifying opinion in order to achieve policy goals, they are two different tactics used under different conditions.

Policy Goals and Amicus Curiae Briefs as Mechanisms

In the case *J.E.B. vs. Alabama ex rel. T.B*. (1994) the Court was asked to decide whether the use of peremptory challenges to exclude jurors solely based on gender was a violation of the equal protection clause of the Fourteenth Amendment. In this particular case, the respondent (state of Alabama) used nine of its ten peremptory challenges to remove male jurors, forming a jury composed entirely of females in a case that would determine whether the petitioner would be ordered to pay child support. Twenty five percent of Justice Blackmun's majority opinion was

composed of language borrowed from the set of amicus curiae briefs.[1] Despite this, there was not one reference to the amici curiae (including in the footnotes). Below is a small example of similar language used in an amicus brief filed by the United States and the majority opinion. Note, that much larger swaths of text were taken from the amicus briefs; however, it is too long to put into this paper. Italics depict overlap in exact language.

United States Amicus Curiae Brief	**Justice Blackmun's Majority Opinion**
"Particularly when gender-related issues are prominent in a particular case, the *discriminatory use of peremptory challenges may create* an *impression that the judicial system has acquiesced in suppressing full participation by one gender.*"	"*Discriminatory use of peremptory challenges may create* the *impression that the judicial system has acquiesced in suppressing full participation by one gender* or that the 'deck has been stacked' in favor of one side."

This example demonstrates an instance where the justices borrow the exact language from amicus curiae briefs but do not cite the source of the information. This phenomenon happens in approximately 58% of the cases in my dataset of over 1600 orally argued cases where amicus briefs were submitted from the 1988-2008 terms. I refer to the use of borrowed language (with or without a citation included) as informational use.[2]

Next, consider *Zadvydas v. Davis*[3] (2001), where the Court determined the legality of detaining immigrants that were to be deported past the 90-day removal period. This case demonstrates a different use of amicus curiae briefs. In this case, only 5% of Justice Breyer's majority opinion was composed of language used in the seven amicus curiae briefs filed in the case, most of which were short one to two sentence phrases. However, Breyer cites the

[1] There was an 8% overlap between the amicus briefs and litigant briefs, and only 9% of the majority opinion was borrowed from the litigant briefs.

[2] See online appendix section OA2 for more information on this.

[3] Together with *Ashcroft v. Kim Ho Ma*

Lawyers' Committee for Human Rights, even though he does not adopt much language from this brief. In fact, the portion of the opinion that cites this brief refers to legal argumentation and does not adopt any specific language from the Committee. I refer to this type of use as legitimizing use. In this dataset of 1,618 cases, only 593 (37%) of the majority opinions reference an amicus curiae brief—either a general mention of the "amici" or a specific reference to the organized interest by name. Justices are much more inclined to borrow language from amicus curiae briefs than they are to cite the actual interest filing the brief. So, what determines whether a justice will cite amicus curiae briefs?

In theorizing about the different ways justices use amicus curiae briefs in their majority opinions, I assume justices, like other political actors, have preferences pertaining to social outcomes and they would like to make legal policy that realizes these outcomes (Rohde & Spaeth 1976; Segal & Spaeth 1993, 2002).[4] This assumption is relatively uncontroversial and has been demonstrated empirically (Epstein & Knight 1998; Hansford & Spriggs 2006; Maltzman, Spriggs, & Wahlbeck 2000).

While the justices seek to make legal policy consistent with their preferences, they are not unconstrained actors. The Supreme Court, often referred to as the "weakest branch," does not have the authority to implement or enforce their rulings. In turn, they must rely on external government actors to ensure their policies unfold as intended. When crafting policy, the Court must consider how the lower courts will interpret their rulings, whether Congress will create reactionary legislation, and whether executive agencies will help enforce decisions or attempt to ignore them.

[4] 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 the main motivation that I will be focusing on in this project.

The inability of the Court to enforce its rulings makes majority opinions of the utmost importance. To ensure external audiences implement their rulings as intended, the justices must be cognizant of the language they use in their opinions, as they are the primary guidelines for complying audiences. While there is no doubt a multitude of audiences the justices work to appease or whose preferences they must consider, for the sake of parsimony, I consider the justices' primary audience of interest any of the actors that pay attention to and have some role in complying with Supreme Court decisions.[5] This practice has been employed in prior work (Black et. al. 2016) and allows me to produce a more generalizable theory. I will refer to these relevant actors as "complying" audiences.

Next, I assume, as others have, that 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. Neglecting to do so can result in rulings that are ignored, or more likely, loosely enforced or implemented in ways other than the Court intended.

These primary assumptions, that justices have policy preferences and that they have incomplete information, draw attention to two important components of opinion writing that make for effective policy. The first is that the justices need information to help foster

[5] This includes, but is not limited to, the Executive Branch charged with enforcing Court decisions, Congress who in theory can override or limit the effectiveness of Court rulings, and the public, who can call on their legislators and urge them to react to Supreme Court policies.

compliance. In order to produce opinions that are effective, the justices need to craft opinions that portray them as well informed and credible. The second is that they need to legitimize their decisions to complying audiences. While this is usually done through strong legal authorities such as precedent, there are instances where non-legal authorities can be used to achieve similar goals. The Court's institutional legitimacy is an important component of ensuring its decisions are adhered to, and while legitimacy may be a goal in and of itself, I argue that it is primarily a means to an end (Knight & Epstein 1998) that helps the justices achieve policy objectives.

I theorize that amicus curiae briefs can help the justices with informational needs and can provide legitimizing (albeit non-legal) authorities to help justices craft effective policy. The justices can use these briefs in different ways in order to achieve their policy goals. Borrowing language from amicus briefs can help the justices create policies that are well informed and credible. Citing legitimizing interests that file amicus curiae briefs can help justify decisions to garner support, particularly when typical legal authorities are not as apparent. Ultimately, these are two distinct ways justices can use amicus curiae provided information in different circumstances in order to achieve the same goal of producing policies that are implemented as intended. These two types of uses are detailed in the following sections.

Informational Use: Borrowing Language

As exemplified above, informational use of amicus curiae briefs is when the justices use nearly the exact same language from the brief(s) in their majority opinions. This usually results in a verbatim copying of the text itself—the type of use Collins, Corley, & Hamner (2015) address exclusively. The justices, as we know, are not experts in everything. While there is a basic component to informational need that suggests the justices must be informed on the matter at hand in order to decide a case the justices must also be informed in order to write effective

opinions. For example, a justice writing an opinion on a case about the First Amendment need not rely much on outside information, as the justices are experts in Constitutional law. However, in other instances, most justices are likely not well-versed, such as in technical cases involving telecommunications or pharmaceuticals. Additional information not only helps inform their decision making process by providing a better understanding of the content of the case, but can help them write informed opinions to help guide complying audiences. The need for information is more than simply a time saving endeavor; it helps make effective policy. Thus, I expect to find that the justices will borrow more language from amicus curiae briefs in cases where they have a greater need for information. This leads me to the following hypotheses:

Hypothesis 1*: Justices will borrow more language from amicus briefs when the Court invites an interest to file.*

Hypothesis 2*: Justices will borrow more language from amicus curiae briefs in complex cases.*

Legitimizing Use: Citing Interests

Citing the organized interests that file amicus curiae briefs is different than borrowing the exact language from the brief. While borrowing language is used to make up for informational needs and helps foster compliance by helping the justices appear well versed, I argue that citing interests can help foster compliance by legitimizing decisions. Both can help with obtaining desired policy outcomes; however, these are different measures used in different contexts. When the justices cite the source of their information, they are doing so deliberately, just as they intentionally choose not to cite the amici when they borrow language from the brief.

It can be argued that the justices always need to legitimize their rulings. I do not disagree; I just argue that in some cases legitimizing decisions is a more prevalent concern than in others. For example, most of the time, there are many strong legal authorities such as the

Constitution or precedent that can be cited. However, in other instances, such as when the Court is altering precedent, or when there are a limited number of precedents to refer to, these conventional Constitutional interpretations normally used to legitimize decisions are not available. I argue that in these instances the justices can cite external sources, such as the interests that file amicus curiae briefs, as non-legal authorities that help justify their rulings. Similarly, the justices should be more concerned with legitimizing their decisions and providing additional support for their arguments when they are altering the status quo. This leads me to the following hypotheses:

Hypothesis 3: *Justices will cite amicus curiae briefs more often when they are altering precedent.*

Hypothesis 4: *Justices will cite amicus curiae briefs more often when they are declaring a law to be unconstitutional.*

Hypothesis 5: *Justices will cite amicus curiae briefs more often in cases that are decided by a 5-4 margin.*

Hypothesis 6*: The more precedents the justices cite in a case, the fewer the citations to amicus curiae briefs.*

This last hypothesis (H6) is motivated by the notion that the justices should be less inclined to rely on amicus curiae briefs to legitimize their decisions when they have a wide array of legal justifications to refer to, since these legal justifications should be stronger and more legitimizing than amicus support.

Data and Methods

To test these hypotheses, I gathered all majority opinions, amicus curiae briefs, and litigant briefs from the 1988 to 2008 terms.[6] The dependent variable for the informational use model is the

[6] The dataset ends at 2008 because Clark's (2015) measures of latent salience end with this term. The data includes orally argued cases where at least one amicus brief was filed. Equally divided votes were excluded. Eight cases were removed from the full dataset because at least one litigant brief was missing in both LexisNexis and Westlaw.

percentage of the majority opinion derived from the entire set of amicus briefs filed in that case. This was acquired using WCopyfind 4.1.5 (Bloomfield 2016) to compare the majority opinion to a document that contained the full set of amicus curiae briefs filed in the case. 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). The percentage of the majority opinion language borrowed from the set of amicus briefs ranges from 0 to 51 with a mean of 13.4 and a standard deviation of 8.5.[7]

The independent variable for the borrowed language model, conceptually, is the need for information. I've included two variables that proxy the need for information. The first is an indicator for whether the Court invited an interest to file an amicus curiae brief. The United States Solicitor General (USSG) is most often the one invited, however, in some instances the Court will invite other individuals. Out of the 158 invitations, 144 (91%) were extended to the USSG. The variable is coded "1" if the Court extended such an invitation to any amicus and "0" otherwise. This is a good proxy for informational need because when the justices encourage experts in their field or the USSG, who has access to superior resources, to file an amicus curiae

[7] While WCopyfind is advantageous in that it allows us to systematically analyze large amounts of textual data, there are a few drawbacks. First, the program has no way of determining whether the justices used information from amicus briefs in order to disparage an amicus brief. A small random sample of 25 cases in my data, averaging 15% of borrowed language, showed only two instances where phrases were treated negatively in the text. In addition, other studies have demonstrated that while negative treatment does happen, it is not a common occurrence (Collins, Corley, & Hamner 2015, pg. 921). Second, no software program is entirely flawless in its measurement, and it is likely that WCopyfind is a bit under-inclusive when it comes to locating instances of borrowed language. The disadvantages of WCopyfind, however, do not outweigh the benefits, as this program allows scholars to analyze mass amounts of data in ways not previously possible.

brief it implies they need additional information to make a well-informed decision. To derive a second measure, I looked to the works of justice Stephen Breyer and Kelly Lynch. Breyer (1998) elaborates on the usefulness of amicus curiae briefs in particular types of cases that warrant additional information. For example, he claims amicus briefs can be useful in patent law, torts, and right to die cases. In Lynch's (2004) work, the author surveyed 70 former clerks at the United States Supreme. One of the questions asked when amicus briefs were considered most useful to the Court. Survey respondents provided many answers, and some revealed that amicus briefs were considered especially helpful in ERISA, patent law, statutory, and tax cases. I code these types of cases as being complex and thus instances where the justices need information. To do so I use the "issue" variable and "authorityDecision1" variables in the Spaeth (2016) data to determine whether cases cover these topics and code the variable *InfoNeed* "1" if they do and "0" otherwise. The exact coding rules used to create this measure can be found in section OA5 of the online appendix.

In this model, I control for a number of factors in an attempt to rule out other causal pathways. First, I control for whether the United States Solicitor General filed a brief. Research demonstrates that this actor is very influential at the Supreme Court (Black & Owens 2012; Black & Owens 2013). It is possible that the USSG is more likely to file in these complex cases, or when they suspect the Court needs additional information. This likely helps determine whether the justices rely on these briefs when writing their opinions. Next, I control for the amount of overlap between the set of litigant briefs and the set of amicus briefs. The resulting variable is the percentage of the amicus brief that is composed of language in the litigant briefs. The litigants might alter their brief writing when they know justices need additional information,

and an overlap of information between the litigants and the amici might lead to an increase or decrease in the amount of amici provided information borrowed in the opinion.

I also control for the number of amicus briefs filed in a case. Research suggests organized interests are more likely to file amicus briefs in cases where the justices need information (Hansford 2004), and the number of amicus briefs filed in a case can potentially increase the amount of information the justices derive from the amici. I also control for case salience. Salient cases might influence the information environment by prompting interests to file briefs. Relatedly, the justices, knowing audiences are more likely to pay attention to these particular opinions, might be more attentive to how they craft them. It is important to ensure that the case is salient as the justices are writing their opinions; otherwise it is possible that the opinion itself is what made the case salient, leading to an endogeneity problem. To overcome this, I use Clark et al.'s (2015) "early salience" measure that captures salience before the decision was announced.

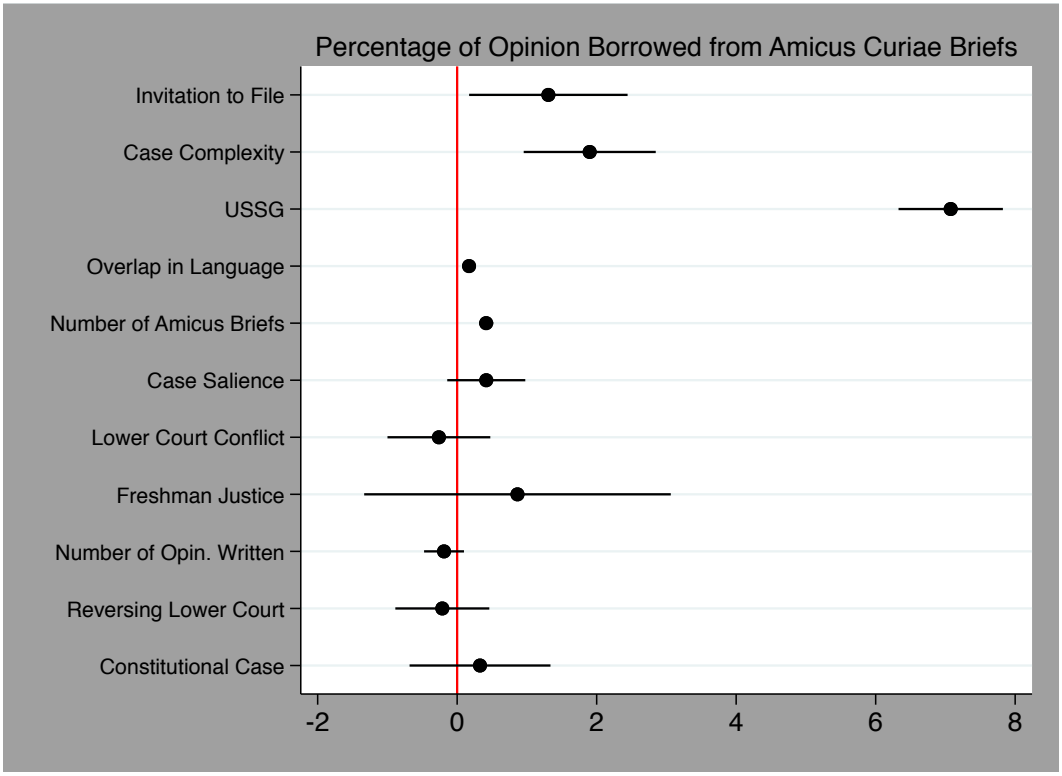
I control for conflict in the lower court, as this might prompt a need for information and also an increase in amicus filings, which can lead to an increase in borrowed language. I also include an indicator of whether the Court is reversing the lower Court. Finally, I include an indicator for whether or not the legal provisions considered pertained to the Constitution. This uses to the Spaeth et. al. (2016) coding of the law type variable and is coded as a "1" for "Constitution" or "Constitutional Amendment" and "0" otherwise. It can be argued that the justices are more familiar with and thus more informed in constitutional cases, and as such will be less likely to borrow language when writing opinions for these cases.

Some might argue that the justices simply borrow language as a short cut or time saving endeavor. I control for whether the justice is considered a "freshman" to account for this

possibility. It is possible that newer justices might have an increased need for information and will be more inclined to borrow language as they adjust to their new position on the Court. Following the lead of Maltzman, Spriggs, and Wahlbeck (2000), I create an indicator variable for whether a justice was in her first two terms. I also include a proxy for workload by accounting for the number of majority opinions that justice wrote per term, as it is possible that justices might be more inclined to borrow language when they have more opinions to write. This count is created using the Spaeth et. al. (2016) data. This measure is not ideal because unlike the measures used in Maltzman, Spriggs, and Wahlbeck (2000), it does not account for the number of dissenting or concurring opinions each justice wrote and also summarizes for the term rather than accounting for the exact workload at the exact point in time the justice had to write a particular opinion. The data on the workload at any given point in time is not available as it would have to originate from the justices' internal memos, and this is simply not available for range of data used in this paper. However, my measure serves as a reasonable proxy.

I use an OLS model for the analysis. This model includes fixed effects by justice to ensure there are no systematic differences influencing my results. For example, certain justices might be considered experts at particular issue areas and thus might be assigned to write more of the opinions in these cases. Opinions written per curiam were left out for reference. Fixed effects for term were also included, with 1988 serving as the reference category. While included in the model, these results are not depicted in the tables for simplicity. The full model with controls can be found in the appendix.

Figure 1: Percentage of the Majority Opinion Borrowed from Amicus Briefs



As evidenced in Figure 1, the justices appear to borrow more language in instances where they are in need of information. First, the justices borrowed more language from the briefs when they invited an interest to file, providing support for Hypothesis 1. In cases where an amicus was invited to file, there was a 1.31 percentage point increase in the amount of language borrowed from amicus briefs. Further, the justices also borrowed more language in complex cases—instances where they were likely in need of information-- providing support for Hypothesis 2. In cases that were deemed complex, there was a 1.9 percent increase in the majority opinion language derived from amicus briefs, relative to cases that were not deemed complex. As expected, the justices borrow much more language from amicus briefs when the Solicitor General files a brief. In fact, in cases where the USSG filed, there was a 7% increase in the amount of majority opinion language derived from the amicus briefs. Further, the justices borrow more language from amicus briefs when the language overlaps with that of the litigants.

This is not surprising as justices might find repetitious information to be more credible and thus more convincing. The number of amicus briefs filed in a case leads to an increase in the amount of language borrowed from said briefs, and the salience of the case, reversing the lower court, and lower court disagreement do not influence the justices' use of language from amicus curiae briefs. It appears that workload and justices writing opinions as freshmen have no bearing on the amount of language borrowed.

Next, I will move to the legitimizing use models. Recall that borrowing language from and citing amicus briefs are conceptually different. Borrowing language is discreet in nature and is unlikely to be revealed to the reader, while citing the brief is evident in the opinion. As such, these two types of use lead to different theoretical expectations. Specifically, I propose that the justices will borrow more language when they need information but that they will cite amicus briefs more often when they need to legitimize their decisions.

As such, the dependent variable for the legitimizing use model is a count of the number of times amicus briefs were cited. This was manually coded by searching "amicus," "amici", and "brief."[8] Any time an amicus was mentioned, either in general or by name, it was added to a variable that includes a citation count.[9] This variable ranged from 0 to 17 with a mean of .98 and a standard deviation of 1.98. To test Hypothesis 3, that justices will cite amicus briefs more often when they are altering precedent, I use the precedent alteration variable in Spaeth's database (2016). This is simply an indicator variable for whether or not the Court altered it's precedent. One issue to note here is that the justices rarely alter precedent. Out of the 1,048 cases in this analysis, the justices only did so in 30. Hypothesis 4 claims that the justices will

[8] While searching the word "brief" most often locates justices' references to the litigants, however, I still searched on this term to capture instances where the justices refer to amici specifically by name.

[9] My theory implies citations to amicus briefs will be positive in nature; however, the justices do cite interests in a negative manner. Please see section OA3 of the online appendix for more on this point.

cite amicus briefs more often when they are declaring unconstitutionality. I account for this using the Spaeth et. al. (2016) coding, and this occurred 113 times in my data. To test Hypothesis 5, I create an indicator variable for whether the decision was split 5 to 4. There were 226 instances of this in the range of data used for the citation model.

Finally, to test Hypothesis 6, that the justices will cite amicus briefs less often in cases where they cite a larger number of precedent I include a variable using data from Fowler and Jeon (2007). The authors' dataset includes cases from the 1988 to 2000 terms and I use the variable *Outward Citations* that is a count of the number of cases cited in this particular case. This is meant to serve as a proxy for the amount of precedent available to refer to. If few precedents are cited, it is possible that it is because the justices lack numerous strong legal authorities to refer to, which might make the justices more likely to cite amicus curiae briefs. However, if there are many precedents cited, it might imply several legal authorities were readily available, and thus citations to amicus briefs were not needed.

In the legitimizing use models, I included the control variables mentioned above with the exception of the amount of overlap of borrowed language with the litigants and workload. Since this model addresses the need to legitimize decisions, the borrowed information is irrelevant since it is not visible in the majority opinion, and because workload cannot influence whether a case is altering the status quo it is not relevant to the model. I control for the presence of an amicus brief filed by the United States Solicitor General. The number of amicus briefs filed is important as amicus participation might increase if the Court is expected to alter a precedent (or lacks many other authorities to refer to) and the number of briefs might help determine whether a justice cites them. I control for case salience, as cases that are particularly important or prominent might prompt justices to alter their precedent and might lead justices to cite prominent

interests that support this position. I control for conflict in the lower courts, whether the Court is reversing the lower court, and whether the case deals with a constitutional issue as in the previous model. I also include a control for the number of words in the majority opinion as shorter opinions might result in fewer citations to precedent and amicus briefs. Similar to the informational use model, this model also includes fixed effects for justice and term, with per curiam opinions and 1988 left out as the respective baselines. While included in the model, these results are not depicted in the table for simplicity. The full models with controls can be found in the appendix.

Figure 2: Number of Citations to Amicus Briefs in the Majority Opinion

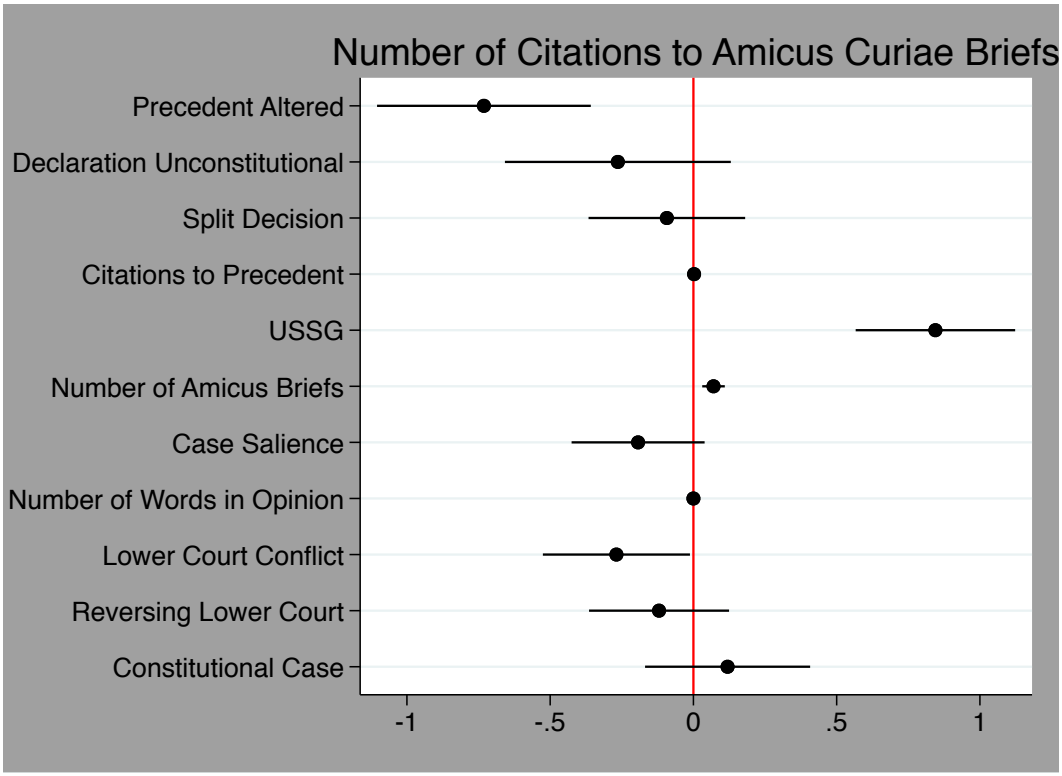


Figure 2 shows the results for this analysis. Altering precedent is negative in direction suggesting that, contrary to my expectations, Supreme Court justices cite amicus curiae briefs *less* if they are altering precedent. When the justices are altering precedent there is a .73 unit decrease in the number of citations to amicus briefs. This might be because there is an increased

need to focus on even stronger legal authorities to justify the alteration of precedent. The coefficients for declaring a law unconstitutional and decisions split 5-4 (Hypotheses 4 and 5) are also negative in direction but are not statistically significant. Finally, the number of citations to precedent appears to have no bearing on the number of citations to amicus curiae briefs. The coefficient is positive in direction but is not statistically significant. As expected, the presence of the United States Solicitor General leads to a statistically significant increase in the number of citations to amicus curiae briefs, as does the number of amicus briefs filed in a case. The coefficients for salience, lower court conflict, and reversing the lower courts are negative in direction but only lower court conflict is statistically significant.

Conclusion and Implications

In analyzing over 1600 Supreme Court cases from the 1988-2008 terms, this paper revealed a trend where Supreme Court justices quite frequently borrow language from amicus curiae briefs, but much less often decide to formally cite these briefs. This presents an interesting puzzle; why do justices sometimes borrow language without attribution while at other times they explicitly cite amici while using little of their language? In this paper, I argued, theoretically, that while borrowing the exact language from briefs helps justices overcome informational needs, citing amicus briefs in these opinions helps legitimize their rulings to external audiences, particularly when conventional legal authorities are not as apparent. I used data ranging from the 1988 to 2008[10] terms to test six implications of this theory.

My results revealed that the justices borrowed more language in instances where they needed information, as proxied by inviting an amicus to file and in complex cases. This reveals that the amicus briefs can help Supreme Court justices with their informational needs. This

[10] The data used for hypotheses 3-6 ranges from 1988-2000.

finding highlights the usefulness of amicus curiae briefs and provides further evidence that the justices, at least to some extent, rely on these briefs. This is particularly intriguing given the justices are not required to even read or consider these briefs when making their decisions. This finding is also interesting in that it shows there is the potential for organized interests, i.e. non-legal sources, to influence policy content, at least in certain contexts. This study revealed that borrowing language from amicus briefs is a fairly common occurrence, suggesting that the amicus filers might have widespread influence on policy content.

My second set of hypotheses sought to test whether the justices referred to amicus briefs as non-legal authorities when conventional interpretations are less prominent or when they are altering the status quo. My findings revealed that, contrary to my expectations, when the Court is altering its precedent, it cites amicus briefs *less* frequently. This lack of citations to amici could mean that if the Court is deviating from its previous interpretations it must provide even stronger legal justifications to do so, making non-legal authorities irrelevant.

Further, declaring a law to be unconstitutional, decisions split 5-4, and the amount of precedent referred had no bearing on citations to amicus briefs. This trend, while contrary to my expectations, is interesting nonetheless as it might imply that the justices are actively refraining from referring to the amici in these scenarios out of concern for legitimacy. Rather than bolstering their arguments, citations to amici might be viewed as detrimental to the Court's image as legal, rather than political actors. However, I caution against making strong inferences about this since the estimates were not statistically significant, and I leave a more thorough investigation for future work.

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Appendix

Table 1. Percentage of the Majority Opinion Borrowed from Amicus Briefs

Independent Variable	Model 1	Model 2	Model 3
Invitation to File	1.46*		1.31*
	(.584)		(.579)
Case Complexity		1.97***	1.90***
		(.483)	(.483)
United States Solicitor General Amicus	7.09***	7.33***	7.08***
	(.383)	(.355)	(.381)
Overlap of Amicus and Litigant Briefs	.188***	.174***	.171***
	(.044)	(.044)	(.044)
Number of Amicus Briefs Filed	.416***	.419***	.416***
	(.052)	(.052)	(.052)
Salience	.397	.391	.417
	(.285)	(.285)	(.285)
Lower Court Conflict	-.295	-.267	-.262
	(.378)	(.376)	(.376)
Freshman	.716	.780	.865
	(1.14)	(1.13)	(1.12)
Number of Opinions Written	-.169	-.185	-.188
	(.147)	(.146)	(.146)
Reversing Lower Court	-.236	-.195	-.213
	(.345)	(.343)	(.343)
Constitutional Case	-1.11**	.270	.328
	(.368)	(.516)	(.515)
Constant	5.16*	4.39*	4.49*
	(2.16)	(2.15)	(2.15)
N	1,610	1,610	1,610
R^2	.42	.43	.43

Entries are OLS estimates. * $p < 0.05$; ** $p < 0.01$; ***$p < .001$ (two-tailed test). Includes fixed effects for justice and term (not reported for simplicity). Includes 1988-2008 terms. Robust standard errors used.

Table 2. Number of Times Amici Cited in Majority Opinion

Independent Variable	Model 1	Model 2	Model 3	Model 4	Model 5
Precedent Altered	-.733***				-.731***
	(.187)				(.190)
Declaration Unconstitutional		-.286			-.264
		(.200)			(.201)
Split Decision			-.010		-.093
			(.135)		(.139)
Citations to Precedent				.000	.002
				(.005)	(.005)
United States Solicitor General Amicus	.854***	.840***	.849***	.848***	.845***
	(.140)	(.140)	(.139)	(.142)	(.142)
Number of Amicus Briefs Filed	.070***	.070***	.070***	.070***	.070***
	(.020)	(.020)	(.020)	(.020)	(.020)
Salience	-.199	-.175	-.185	-.195	-.193
	(.114)	(.114)	(.113)	(.118)	(.118)
Number of Words in the Opinion	.000***	.000***	.000**	.000**	.000**
	(.000)	(.000)	(.000)	(.000)	(.000)
Lower Court Conflict	-.270*	-.253*	-.249	-.250	-.269*
	(.130)	(.129)	(.129)	(.130)	(.131)
Reversing Lower Court	-.110	-.120	-.112	-.107	-.120
	(.121)	(.122)	(.121)	(.123)	(.124)
Constitutional Case	.087	.115	.060	.057	.119
	(.132)	(.141)	(.131)	(.138)	(.147)
Constant	-.009	-.040	-.017	.235	.258
	(.395)	(.393)	(.396)	(.457)	(.449)
N	1,063	1,063	1,063	1,048	1,048
R^2	.17	.16	.16	.16	.16

Entries are OLS estimates. * $p < 0.05$; ** $p < 0.01$; ***$p < .001$ (two-tailed test). Includes fixed effects for justice and term. Includes 1988-2000 terms. Robust standard errors used.

Online Appendix

OA1: Model Information

Heteroskedasticity

A Breusch-Pagan test returned a Chi^2 value of 140.5 for the informational use (borrowed language) model and a Chi^2 of 581.3 for the legitimizing use (citations) model, suggesting heteroskedasticity was a problem in each. I therefore used Robust Standard Errors.

Multicollinearity

To establish whether multicollinearity was an issue in my models, I ran a variance inflation factor test in Stata. The results suggest multicollinearity is not a concern, and the results can be found in the tables below.

VARIABLE	VIF	1/VIF
Invited Amicus	1.19	.842
Complex Case	2.36	.424
USSG	1.19	.840
Overlap in Language with Litigant	1.37	.728
Number of Amicus Briefs	1.63	.614
Early Salience	1.51	.664
Lower Court Disagreement	1.06	.940
Freshman Justice	1.26	.791
Number of Opinions Written in Term	6.59	.152
Reverse Lower Court	1.04	.961
Constitutional Case	2.38	.421

VIF Test for the Informational use Model

VARIABLE	VIF	1/VIF
Precedent Altered	1.08	.928
Declaration Unconstitutional	1.28	.784
Split Decision	1.15	.871
Citations to Precedent	1.87	.535
USSG	1.07	.931
Number of Amicus Briefs	1.53	.654
Early Salience	1.64	.611
Number of Words in Opinion	1.81	.553
Lower Court Disagreement	1.07	.932
Reverse Lower Court	1.05	.954
Constitutional Case	1.38	.724

VIF for the Legitimizing use Model

Fixed Effects

In the informational use model the fixed effects for the every justice except Scalia, Kennedy, Souter, Breyer, and Roberts were statistically significant ($p < .05$). In the term fixed effects only the 1996 and 2007 terms were significant ($p < .05$).

In the legitimizing use model, none of the fixed effects for justice were statistically significant. The only statistically significant term was 2000 ($p < .05$).

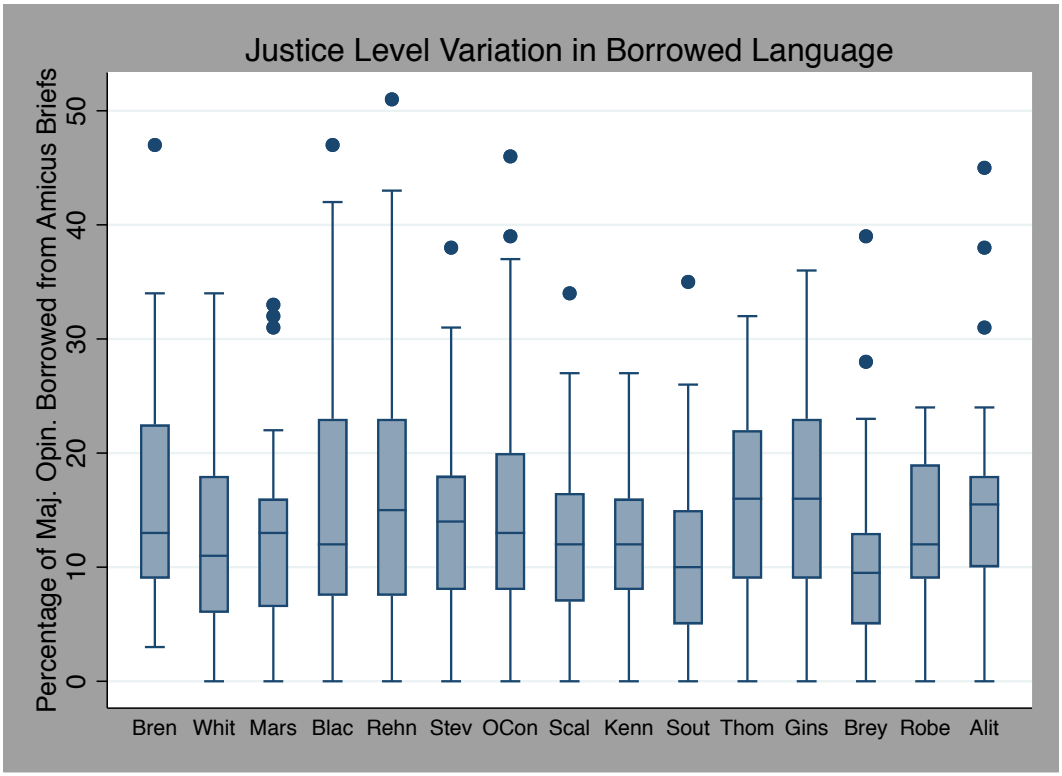
OA2: Strict Cites vs. Borrowed Language

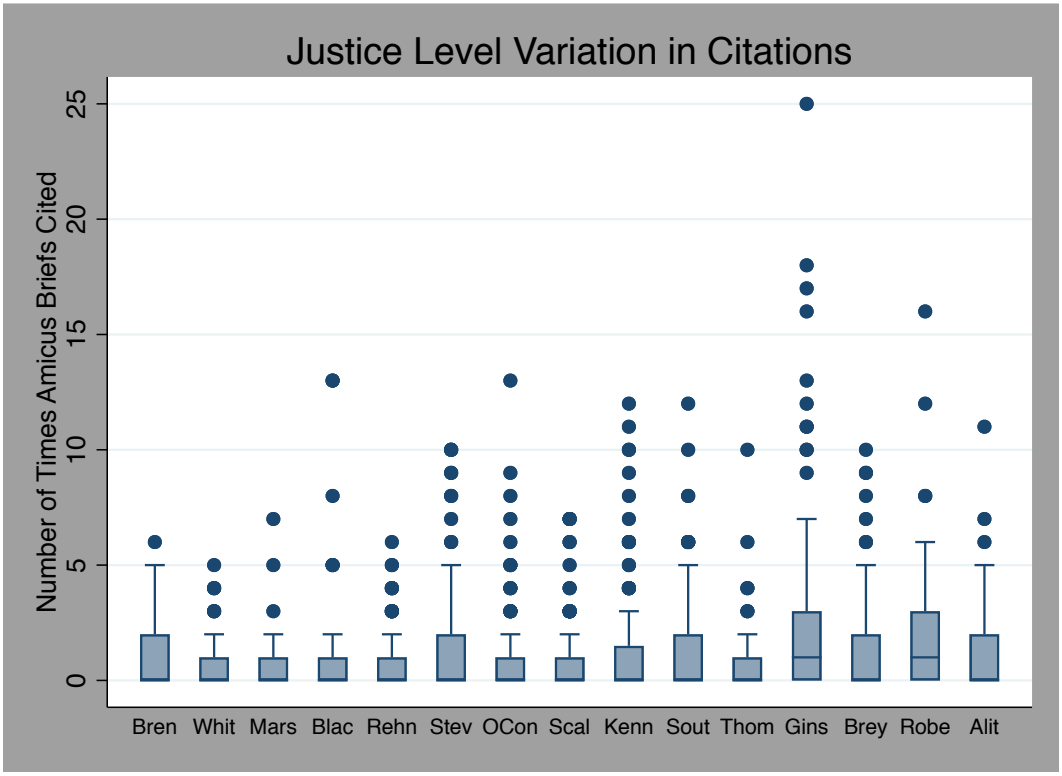
As stated in the paper, the justices borrow language without any citations throughout the entire opinion in about 58% of the cases in this dataset. Out of the entire set of 1,610 cases (from the first model) there were citations in only 593 of these cases. Some have expressed concern about instances where the justices borrow language and also cite the source. I do not claim that borrowing language and citing briefs are mutually exclusive. To assuage concerns, however, I have taken a random sample of 10% of the 593 cases where an amicus brief is cited to assess the amount of "Strict Cites" where the justices only refer to an amici and do not borrow language and "Cited Language" where the justices cite language they borrowed from a brief. I then went through each majority opinion to locate instances where the justices cited a brief and compared it to the WCopyfind output to determine whether the cite was mentioned on its own, or was cited when they justices borrowed language. Out of the 182 citations in these 59 cases, 132 (73%) were strict citations, whereas 50 (27%) were citations that accompanied borrowed language.

OA3: Positive and Negative Citations

To address how common negative citations are, I ran another analysis with the 10% random sample of cited cases mentioned above. This time I identified each citation in the majority opinion and read the surrounding paragraph to determine whether the justices were citing the amici positively, negatively, or "weak negatively." The exacting coding rules can be found in section OA5 below. In this sample of 182 citations in 59 cases, 118 (65%) were deemed positive, 53 (29%) were coded negative, and 11 (6%) were considered "weak negative."

OA4: Justice Level Variation





OA5: Coding Rules

Negative vs. Positive Cites

Negative Citations

Citations are considered "negative" when the justice brings up the interests' argument for the purpose of disparaging it. This includes terms like, 'we disagree', 'argument is flawed', 'we are not persuaded', 'reasoning is defective', etc. This includes language that states the justices rejected arguments in other cases.

Weak Negative Citations

In instances where the justices cite an amicus to state they will not be answering a question addressed by the interest, this is coded as "weak negative."

Positive/Neutral Citations

Citations are considered positive/neutral when they simply mention the interest and/or their legal argument without making disparaging remarks against them. This includes instances where the justices simply mention the arguments or evidence put forth in an amicus brief.

Strict Cites vs. Cited Language

Sometimes justices cite the interests' arguments without borrowing language from them, while other times they cite the source to identify where the direct quote came from. The following citation rules are used to determine whether a justice strictly cited the interest with no borrowed language or whether they cited to identify borrowed language and are housed within the positive/negative citation framework.

Strict Cites

Strict Cites include instances where the citation is mentioned as a standalone citation. In other words, there is no direct quote or borrowed language that warrants the citation. Strict cites that are positive or neutral in nature are included in the variable *PosStrict* while those that are negative in nature are included in the variable *NegStrict*.

Cited Language (Direct Quotes)

Cited Language is coded in instances where the citation is used to indicate language is taken from an amicus brief. This can include a citation preceding the text or following the text. WCopyfind (Bloomfield 2016) was used to determine whether the actual text was borrowed from the amicus brief.

Coding the Need for Information Variables

The purpose of this section is to detail how the variables that captured informational need were created.

Coding Case Complexity to Proxy the Need for Information: Breyer

In Breyer's 1998 article, "The Interdependence of Science and Law" he identified cases that the justices found to be particularly challenging that required additional information and suggested amicus briefs are useful for providing this information. This included cases that were scientific, in patent law, tort law, administrative agency conclusions, and right to die cases.

I created a variable titled, *BreyerNeedIss* to measure case complexity. This coding was completed using the Supreme Court Databases' *issues* variable and are as follows:

Torts: issues 80060 and 140060

Right to die: issue 50030

Patent law: issues 80180, 80190, 80200, 80210

Review of administrative agency: issue 90120

Coding Case Complexity to Proxy the Need for Information: Lynch

In Lynch's 2004 article, "Best Friends?: Supreme Court Law Clerks on Effective Amicus Curiae Briefs" the author asked former Supreme Court clerks which types of cases or areas of law that made amicus briefs especially helpful. Clerks indicated that highly technical cases, statutory cases, and obscure areas of the law. The article further claims, "Some of the most frequently mentioned types of cases were those involving tax, patent, and trademark law, as well as cases relating to the Employment Retirement Income Security Act ("ERISA")"

Patent law: issues 80180, 80190, 80200, 80210

Statutory Construction of Criminal Laws: issues 10380, 10390, 10400, 10410, 10420, 10430, 10440, 10450, 10460, 10470, 10480, 10490, 10500, 10510, 10520, 10530, 10540, 10550, 10560, 10570

Statutory Construction: if the "authorityDecision1" variable in the Supreme Court Database (Spaeth et. al. 2016) was coded as a 4 or 5.

ERISA: issue 70180

Tax: issues: state and local taxes: 80100, federal taxation: 120010, 120020, 120040

InfoNeed is a variable that combines the Breyer and Lynch variables. In other words it is an indicator of whether or not there was an increased need for information based on the coding mentioned above. This variable is dichotomous. This resulted in 865 out of the 1619 cases (53%) being deemed "complex."

OA6: Case Complexity Dummies

The table below reports the results of a regression analysis that uses the Case Complexity issue areas as dummies, as opposed to a combined, dichotomous measure.

Table 1. Percentage of the Majority Opinion Borrowed from Amicus Briefs

Independent Variable	
Invitation to File	1.35*
	(.584)
Torts	.285
	(1.35)
Taxes	-.549
	(.755)
Right to Die	-5.16
	(3.04)
Review of Administrative Agency	-.708
	(.623)
ERISA	-3.19**
	(1.07)
Statutory Construction	1.83***
	(.492)
Patent Law	.195
	(1.50)
Constant	4.36*
	(2.17)
N	1,610
R^2	.43

Entries are OLS estimates. * $p < 0.05$; ** $p < 0.01$; ***$p < .001$ (two-tailed test). Includes fixed effects for justice, and term as well as controls. These are not shown for simplicity. Includes 1988-2008 terms. Robust standard errors used.