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UNIVERSITY OF CALIFORNIA, MERCED

Borrow or Signal? Amicus Curiae Briefs as a Means of Overcoming Information and
Legitimacy Issues

A dissertation submitted in partial satisfaction of the requirements for the degree of
Doctor of Philosophy

in

Political Science

by

Kayla S. Canelo

Committee in charge:

Professor Thomas Hansford, Chair

Professor Nathan Monroe

Professor Stephen Nicholson

2019

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2019

Dedication

To Edward A. Gordon (a.k.a. Papa) for sparking my interest in history and politics and for always encouraging me to pursue my education.

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Coe, Chelsea M., Kayla S. Canelo, Kau Vue, Matthew V. Hibbing, and Stephen P. Nicholson. 2017. “The Physiology of Framing Effects: Threat Sensitivity and the Persuasiveness of Political Arguments.” *The Journal of Politics* 79(4): 1465-1468.

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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. Most of the time justices borrow language without attribution. However, much less often, they decide to formally cite the amici. 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 dissertation I argue that borrowing language from an *amicus* brief and citing it are two distinct uses, done for different reasons, with different implications. Borrowing language is unique in that it is discreet in nature and is unlikely to be revealed to the reader. Therefore, the justices have leeway when it comes to borrowing language as there should be limited influence on perceptions of the Court and its decisions (i.e. the Court’s legitimacy). Citing *amicus curiae* briefs, however, is much different in that it is clearly revealed to the reader. As such, there can be implications for the Court’s legitimacy depending on what types of interests the justices cite.

I test the implications of this theory using data on over 1,600 cases where *amicus* briefs were filed in the 1988-2008 terms. I find that the justices borrow language when they need information, and they borrow from ideologically congruent actors. I also find that the evidence on whether they deliberately avoid citing ideologically extreme interests is mixed. On the one hand, they cite less frequently and are less likely to cite in salient cases, but they do still cite ideologically overt interests. Finally, I implement a survey experiment using a high quality, census balanced sample of 3,000 respondents to test whether citations can influence acceptance of Supreme Court decisions. I find that the public is less accepting of citations to ideologically extreme interests and that they are less accepting of decisions that cite interests that are ideologically incompatible with their own preferences.

Introduction

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.

Supreme Court justices will often times borrow the precise language from amicus curiae briefs and incorporate it directly into their majority opinions without attribution. However, much less often they will formally cite the interest that filed the brief. 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 use of amicus curiae briefs in majority opinions is interesting on its own because there is nothing that legally binds or even suggests the justices must consider these briefs, much less rely on them. With other sources of information, such as litigant briefs and precedent, we wouldn't necessarily expect the justices to incorporate language from amicus briefs, much less formally cite them in their opinions. This dissertation seeks to address this puzzle in order to better understand the different ways Supreme Court justices rely on amicus curiae briefs and for what purposes.

Existing literature on the use of amicus curiae briefs in majority opinions focuses either exclusively on borrowed language (Corley 2008) or exclusively on citations (Franze and Reeves Anderson 2015; Hansford and Johnson 2014). What is missing from this literature is a theory that explains both borrowed language and citing and which type of use is implemented under which contexts. In addition, the existing literature is missing an analysis of whether there is a difference between the types of interests the justices are borrowing language from and the types of interests they are citing and whether ideology plays any role in this. A fundamental difference between borrowing language and citing the source that has been overlooked in the existing scholarship is that one type of use (borrowed language) goes unnoticed to the reader while the other type of use (citing) is evident in the opinion and revealed to the reader. This is an important component to understanding the theoretical differences between the two types of use and the implications that follow. Finally, since citations to amicus curiae briefs in all types of opinions have been increasing over time (Franze and Reeves Anderson 2015; Kearney and Merrill 2000), the field could benefit from understanding what, if any, implications this has for public perceptions of the Court and its decisions. In other words, what utility do the justices gain from incorporating amicus curiae briefs into their majority opinions, and how do external audiences perceive this use?

The first full chapter of my dissertation introduces a theory that seeks to explain the differences between borrowing language from amicus briefs and citing them in

majority opinions and when the justices will employ each type of use. I argue that borrowing language from a brief and citing it are two distinct uses, done for different reasons, with very different implications. Borrowing language is unique in that it is discreet in nature and is unlikely to be revealed to the reader. External audiences are generally unable to determine where a particular swath of text originated without using plagiarism detection software. Therefore, the justices have leeway when it comes to borrowed language as there should be limited influence on perceptions of the Court and its decisions (i.e. the Court's legitimacy), since readers likely do not know this is even occurring. I argue that the justices will borrow language when they need information and that they will borrow from ideologically congruent sources, since this type of ideological or political behavior is unlikely to be revealed. Since the reader will not know the source of the information, the justices are free to borrow from more ideologically extreme interests such as the U.S. Chamber of Commerce or the American Civil Liberties Union.

Citing *amicus curiae* briefs, however, is much different in that it is clearly revealed to the reader. As such, there are implications for the Court's legitimacy depending on what types of organized interests the justices decide to cite. I argue that the justices will cite *amicus curiae* briefs to further legitimize their decisions and that they must be cautious of the types of interests they cite, so as not to harm perceptions of the Court. Specifically, I argue that the justices will refrain from citing sources that are ideologically extreme as this can make the justices appear ideological and biased themselves. Instead, I argue that the justices will opt to cite ideologically moderate organized interests, as these actors should not conjure notions of politicization and ideological bias. For example, ideologically moderate interests, such as professional organizations, should act as credible, non-biased sources of information that serve to strengthen the justices' argument. However, citing more ideologically-charged sources with a clear agenda, such as the National Rifle Association, is likely to make a justice appear biased as highlighting agreement with such an actor can make the justice appear overtly ideological themselves. Since the justices are expected to act as neutral, unbiased actors whose decisions are grounded in law (Epstein and Knight 1998; Epstein, Landes, and Posner 2013; Posner 2010) the justices should refrain from such citations.

In this dissertation, I address three questions central to understanding Supreme Court justices' use of *amicus curiae* briefs in their majority opinions. The first, broadly speaking, is why do the justices borrow language from *amicus* briefs and why do they cite? I start by looking at the case level considerations that might prompt the justices to rely on *amicus* briefs. Theoretically, I argue that the justices will borrow language when they are in need of information, such as in complex cases, but they will cite *amicus* briefs when they need to further legitimize their decisions, such as when they are altering precedent. This question is interesting to address as 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. It also provides further insight into the ways Supreme Court justices use these briefs and the different ways they might potentially rely on them.

I address the case level considerations that prompt justices to rely on *amicus* briefs in this first empirical chapter. I use data from all cases covering the 1988-2008 terms where at least one *amicus curiae* brief was filed. I test the hypotheses that the

justices will borrow more language from briefs when they are in need of information such as in complex or highly technical cases, and that the justices will cite amicus briefs more often when they need to further legitimize their decisions, such as when they are altering precedent or declaring a law to be unconstitutional. I find that the justices do borrow more language when they need information, but that they do not cite more often when they need to legitimize their decisions. In fact, I find that when the justices alter precedent they cite amicus briefs *less* often. 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 through the use of borrowed language. The finding that the justices cite amicus briefs less often when they are altering precedent is interesting in that in this context the justices might be relying on stronger legal authorities to make their case, deeming organized interests, in other words non-legal actors, less relevant.

The second question of interest in this dissertation is what types of interests do the justices borrow language from and which are they choosing to cite? Given that borrowing language from amicus briefs and citing them carry different implications for how the Court is perceived, the identity of the filer should matter more in the context of citing, since this action can influence how external audiences view the Court's decisions. My main objective is to look at the ideological orientation and extremeness of the filing interest to see whether the justices are less likely to cite ideologically extreme interests and whether they borrow more language from interests that are ideologically similar to their own preferences. This helps further our understanding of the justices as political (as well as legal) actors. This is interesting because it can help unravel the view of justices as legal actors on the surface, but more political or ideological actors behind the scenes.

The unit of analysis is the individual amicus brief in this second empirical chapter. I use nearly 400 cases from the 1988-2008 terms, including over 2,300 briefs to test the hypotheses that the justices will be less likely to cite ideologically extreme interests, will be more likely to cite state amicus filers relative to non-state filers, and that the justices will borrow more language from interests that are ideologically congruent with their own preferences. I find that the justices borrow more language from amicus briefs filed by organized interests that are ideologically similar to their own preferences. However, the evidence on whether the justices refrain from citing ideologically extreme interests is somewhat mixed. On the one hand, the justices do not cite amicus briefs very often and are less likely to cite in salient cases, but on the other hand there is no conclusive evidence suggesting they avoid citing ideologically extreme interests. In addition, they are not more likely to cite state filers over organized interests. Another interesting finding is that the justices are less likely to cite briefs filed by frequent filers but they borrow more of their language in their opinions, providing further evidence that citing and borrowing are distinct phenomena. The finding that the justices borrow more language from ideologically congruent sources is interesting in that it sheds light on ideological behavior taking place behind the scenes. While the evidence is mixed on whether the justices deliberately avoid citing ideologically extreme sources, the finding that the justices cite infrequently relative to borrowing and that they cite less often in salient cases shows that they might be selective with the use of citations in a way they are not with borrowed language.

My theory about the justices' decision to borrow language from and/or cite an amicus curiae brief relies on the assumption that citations to interests that file amicus curiae briefs can have implications for the legitimacy of the Court's decisions. In other words, citations to organized interests should shape how the public perceives the Court's decision-making. For example, theoretically, citing ideologically extreme interests might decrease acceptance of decisions and make the justices' decision-making appear biased or political in nature. The third empirical chapter of my dissertation seeks to address whether this assumption holds. More specifically, I address the question of whether citations to amicus briefs filed by certain interests can increase or decrease acceptance of the Supreme Court's decisions. We often think of the Supreme Court justices citing legal sources such as the Constitution or precedent, however, when it comes to citing amicus curiae briefs the justices are citing organized interests that are often political, non-legal actors. As citations to amicus briefs continue to increase over time, it is important to address this question to see whether such citations can influence acceptance of the Supreme Court's decisions or perceptions of the Court's legitimacy. In other words, how does the public feel about the Supreme Court citing ideologically extreme, non-legal interest groups in its majority opinions? Does this make the Court appear politicized and its decisions delegitimized?

In my third and final empirical chapter I use a survey experiment to determine whether these citations have implications for acceptance of the Supreme Court's decisions and whether these citations can alter perceptions of the Court's decision-making. I use a high quality, census balanced sample of 3,000 respondents implemented via Survey Sampling International. I manipulate the decision direction to be either liberal, moderate, or conservative. I then manipulate the organized interest whose brief was cited. I use a liberal interest (the American Civil Liberties Union), a moderate interest (the American Medical Association), and a conservative interest (Focus on the Family). I hypothesize that citations to moderate interests will increase acceptance of the Court's decisions and make them appear less politicized, that citations to ideologically extreme interests will decrease acceptance of the Court's decisions and make them appear more politicized, and that respondents will be more (less) accepting of decisions that cite ideologically compatible (incompatible) interests.

I find that a citation to an ideologically moderate interest does not increase acceptance of the Court's decisions, nor does it make these decisions appear less politicized. I also find that citations to ideologically extreme interests decrease acceptance of the Court's decisions. Taken together these findings suggest that there is little utility to be gained by citing amicus briefs. Interestingly, citations to ideologically overt interests did not make the Court's decisions appear more politicized. This speaks to implicit attitudes toward the Court and the literature suggesting the Court is insulated as an institution in that the public typically does not view it as political in nature. Finally, I find that citations to ideologically incongruent sources decrease support for the Court's decisions, but that citations to ideologically compatible interests do not increase acceptance. This is interesting in that it suggests that, at least in certain contexts, these citations serve as informative cues to help the public make sense of the Supreme Court's policies. These findings are interesting in that they reveal that the justices do not have much to gain by citing amicus briefs.

The overall findings of this dissertation are interesting in that they come with some important real-world implications. The first is that this project highlights the fact that organized interests, that are non-legal actors are influencing the Supreme Court's policies by shaping the language they are composed of and they are doing this quite often. This sheds light on the ways in which politics can infiltrate the legal process at the nation's highest Court.

The second is that this project demonstrates that the justices engage in ideological behavior, particularly when this behavior will go unnoticed, namely in terms of borrowing language. The Supreme Court is said to benefit from "positivity bias" (Gibson 2007; Gibson, Caldeira, and Spence 2003, 2005) and is implicitly seen as less political than other branches of government (Hansford, Intawan, and Nicholson 2018), however, this study suggests the justices are engaging in ideological behavior behind the scenes. Their more public use of amicus curiae briefs (citing) is more restrained in that the justices cite much less often than they borrow, and they are less likely to cite in salient cases, where they know external audiences are more likely to take notice.

Finally, these results show that there is not much to be gained by the justices citing amicus briefs. Citations to ideologically moderate interests do not increase acceptance and citations to ideologically extreme interests only decrease acceptance. However, as prior research has shown, citations to amicus briefs in both majority and dissenting opinions have increased over time (Franze and Reeves Anderson 2015; Kearney and Merrill 2000). This finding, coupled with the fact that the justices rely on amicus briefs (through borrowed language) when they need information, comports with the existing literature which suggests citations to amicus briefs encourage organized interests to file (Hansford and Johnson 2014). Since the justices rely on the information provided by amicus briefs, occasional citations can be a way to keep the information coming by encouraging future amicus filings. However, this puzzle requires further exploration and alternative explanations should be explored. One possibility is that the nature of information borrowed is different from the type of information that is cited. Content analysis might help disentangle this in future work.

In the next chapter I theorize about the justices' use of amicus curiae briefs in their majority opinions then move on to testing the implications of this theory in the three empirical chapters mentioned above.

Theory

A decades long scholarly debate has ensued over whether amicus curiae briefs do (Collins 2007; 2008; 2008a; Ennis 1984; Hansford 2004; Kearney & Merrill 2000) or do not (Epstein, Segal & Johnson 1996; Songer & Sheehan 1993) influence Supreme Court justices in their decision making. Recent technological advances over the past ten years or so have allowed scholars to address this question by assessing whether the justices use these briefs in their majority opinions. Collins, Corley, and Hamner (2015) revealed a phenomenon where the justices use the exact language from amicus curiae briefs and incorporate it directly into their majority opinions (Collins, Corley, and Hamner 2015). This practice of directly incorporating identical language from external sources into majority opinions has been coined “judicial plagiarism” (Posner 2007) and in addition to the incorporation of amicus curiae briefs, scholars have explored this use of litigant briefs (Corley 2008; Feldman 2016b, 2017) and lower court opinion content (Corley, Collins and Calvin 2011). This work uses content analysis performed using plagiarism detection software to locate instances of language taken from one of these sources and put directly into the majority opinion. While insightful and groundbreaking in terms of understanding the sources justices use to craft their opinions, this literature is limited in that scholars treat borrowing and citing as similar concepts or only focus on borrowed language (Collins, Corley, and Hamner 2015; Corley 2008; Corley, Collins, and Calvin 2011; but see Feldman 2016a). I argue that borrowing and citing should be treated as two distinct phenomena employed as different means under different conditions to achieve their policy goals.

In the 2006 term the Supreme Court heard *Microsoft Corp. v. AT&T Corp.*, a complex case regarding patent for software code. AT&T sued for patent infringement when Microsoft copied versions of the software and sold it overseas. Microsoft claimed it was not infringement because the code was not “tangible” and could not be considered a “component.” The Court ultimately ruled in Microsoft's favor. Justice Ginsburg, in her majority opinion, borrowed the exact language from an amicus curiae brief submitted by the United States on behalf of Microsoft. Here, the exact language was taken verbatim from the United States' brief without attribution, and at the end simply stated “See *Deepsouth*, 406 U. S., at 531.” The text in italics in the figure below shows the words directly taken from the United States' brief and incorporated into the majority opinion. However, despite the omission in this particular instance, the justice directly cited the United States in other portions of the opinion.

Figure 1: Borrowed Language

Amicus Brief for the United States

Respondent's contention (Br. in Opp. 25) that petitioner should not be able to "misappropriat[e] another's patented technology," simply misses the point that *foreign law, not United States law, governs the manufacture and sale of components of patented inventions in foreign countries*. If respondent *desires to prevent copying in foreign countries, its remedy lies in obtaining and enforcing foreign patents*, not in attempting to apply United States law to acts occurring abroad. See Pet. App. 12a, 18a-19a (Rader, J., dissenting).

Justice Ginsburg's Majority Opinion

In short, *foreign law alone, not United States law, currently governs the manufacture and sale of components of patented inventions in foreign countries*. If AT&T *desires to prevent the copying in foreign countries, its remedy today lies in obtaining and enforcing foreign patents*. See *Deepsouth*, 406 U.S., at 531.

In 2009 the United States Supreme Court heard *Montejo v. Louisiana*, a case about a man who wrote a letter of apology to the wife of a man he was accused of murdering. This was later used as evidence against him in trial. However, the letter was written at the recommendation of a detective before anyone (including Montejo) knew he had been appointed an attorney. Montejo claimed that because of the circumstances the letter should not be allowed as evidence. In a ruling that overturned the precedent in *Michigan v. Jackson* (1986), the Court ruled in favor of Montejo. Justice Scalia, in his majority opinion, directly cited the arguments of a few amicus curiae briefs, including the National Legal Aid and Defender Association and a brief filed by Larry D. Thompson et. al., former Deputy Attorney General of the U.S., filing on behalf of law enforcement officials.

As evidenced above, these two types of amicus use are distinct in that one type of use is revealed to the reader (citing) while the other it is not (borrowed language). I offer a theory that suggests Supreme Court justices, as constrained actors who are reliant on their legitimacy as an institution, can use amicus briefs in different ways to achieve their desired policy outcomes. Specifically, I propose that the justices will borrow language from amicus briefs when they need information—allowing them to craft more informed opinions, but that they will cite these briefs when they seek to legitimize their decisions. I theorize that the justices will borrow more language from ideologically congruent actors since this type of use is not revealed to the reader and should have limited bearing on perceptions of the Court. However, I argue that the justices will be much more selective with the interests they decide to formally cite and will avoid engaging in such ideological behavior, as citations have implications for legitimacy.

These amicus curiae briefs are invaluable tools at the justices' disposal. Not only do they provide the justices with novel information that is not included in the litigant briefs (Collins 2008; Collins, Corley and Hamner 2014.; Spriggs and Wahlbeck 1997), they also come from a plethora of actors and organized interests with disparate viewpoints who are likely to be affected by the outcome of the case but are not invested litigants in said case. As such, these briefs provide the justices with information and

sources they can draw upon to legitimize their decisions—tools they would not have if these briefs did not exist.

In this chapter I offer a novel theory that explains the different ways the justices incorporate amicus briefs into their majority opinions and for what purposes. I propose two types of use—one for informational purposes and another for legitimizing purposes. Informational use consists of directly borrowing language from an amicus brief. This is often done by “plagiarizing” or taking the exact language from the briefs and incorporating it into their majority opinions. Legitimizing use is when the justices directly cite an amicus curiae brief. At first glance the use of amicus briefs might appear as a mere time saving endeavor or citation formality, however, I argue amicus briefs play a much bigger role. In my theory these briefs are mechanisms—used in different ways under different conditions—to achieve policy outcomes through greater compliance. Borrowing language from briefs allows the justices to overcome informational deficiencies and craft strong, informed majority opinions while formally citing amicus briefs filed by credible interests can help the justices legitimize their decision to external audiences.

Policy Goals, Constraints, and Opinion Writing at the High Court

One of the core assumptions of my theory is that Supreme Court justices, just like other political actors, have preferences pertaining to social outcomes and they seek to make policy that realizes these outcomes (Rohde and Spaeth 1976; Segal and Spaeth 1993, 2002)¹. The assumption that justices have policy preferences and seek to shape legal policy as such has been shown empirically (Epstein and Knight 1998; Hansford and Spriggs 2006; Maltzman, Spriggs, and Wahlbeck 2000) and is relatively uncontroversial. It is also the core assumption of the attitudinal (Segal and Spaeth 1993, 2002) and strategic models of decision making (Epstein and Knight 1988; Wahlbeck, Spriggs and Maltzman 1998).

While the justices have policy preferences, they are not unconstrained actors in the sense that they do not have the authority to implement or enforce the rulings they hand down. As such, the Court must rely on other government actors to ensure their rulings are implemented accordingly. Therefore, 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 when crafting its policies.

The inability of the Court to enforce its rulings makes majority opinions of the utmost importance. The justices want external actors to comply with these policies, and in order for this to happen they must be careful with how they craft these opinions, as they serve as a guide for complying audiences. There is no doubt that there are a multitude of audiences that the justices work to appeal to or whose preferences they must consider when crafting their majority opinions. For example, it has been shown that justices must not only appease their colleagues on the bench (Carruba et. al., 2012;

¹ I am aware that policy preferences are not the only considerations that motivate the justices (Baum 1998; Epstein, Landes, and Posner 2013; Posner 2010). However, this is the main motivation that I will be focusing on in this project.

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). 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 or enforcing Supreme Court decisions. Failing to do so would necessitate an individual theory for each of the varying audiences such as Congress, the public, the states, and the lower courts among others. By including a broad audience as anyone who must implement or comply with these rulings, rather than deriving a separate theory for each actor, I can produce a more generalizable theory. Further, this practice of recognizing that there are numerous complying audiences the justices must appeal to and theorizing about them more broadly has been employed in prior work (Black et. al. 2016a). For the sake of simplicity, I will refer to these relevant audiences as “complying” or “external” audiences. Examples of complying audiences can include the Executive branch, charged with executing Supreme Court decisions, Congress who in theory can attempt to override or reduce the effectiveness of Supreme Court decisions through the introduction of new legislation, and the public who can call on their legislators and urge them to react to Supreme Court policies.

Next, I assume, as others have, that justices have incomplete information (Collins, Corley and Hamner 2015; Epstein and Knight 1998, 1999; Hansford and Johnson 2014; Johnson, Wahlbeck and Spriggs 2006; Maltzman, Spriggs, and Wahlbeck 2000; Murphy 1964). For example, there is uncertainty related to how the ruling will be received by external audiences, particularly those responsible for implementation, and the justices must overcome these uncertainties in order to make effective policy. In addition, it is difficult to assess the consequences or broader implications of a particular ruling for those members of society who are impacted by the decision.

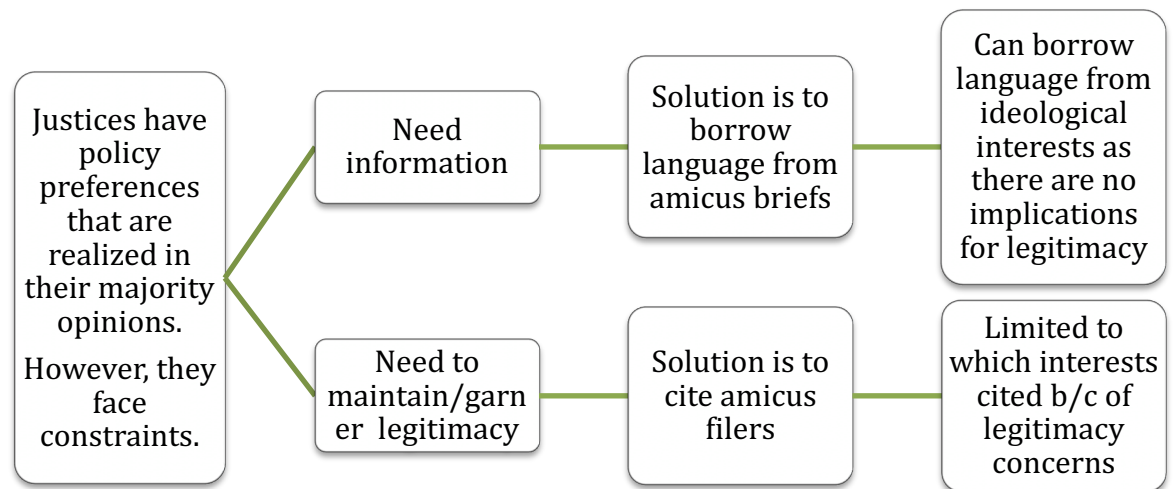
If the Court wishes to have its rulings enforced in a way that leads to its desired policy outcomes, it must produce effective majority opinions that help further these goals. This makes the precise language used in majority opinions critical to ensuring policy outcomes unfold as the justices intend. In order to produce effective majority opinions, the justices must overcome information deficiencies that result in uncertainties regarding the implications and implementation of their decisions, and they must legitimize their decisions to complying audiences in order for their rulings to result in the policy outcomes they desire. Neglecting to do so can result in rulings that are ignored (i.e. policies that are unimplemented), or rulings that are implemented in ways other than the Court intended, leading to different social outcomes than what the Court desired, or outcomes that are not as strong as expected.

The literature on strategic opinion writing demonstrates how the justices can use various linguistic techniques to advance their goals. For example, it has been theorized and/or empirically demonstrated that the justices can alter the vagueness of their opinions to handle policy uncertainty or mask noncompliance among implementing audiences (Staton and Vanberg 2008), incorporate constitutional interpretations to prevent Congress from overturning its decision (King 2007), write less readable opinions to avoid

congressional review (Owens, Wedeking, and Wohlfarth 2013), use authoritative language to increase the likelihood of positive treatment (Corley and Wedeking 2014), and write clearer opinions when their decisions conflict with public sentiment (Black et al 2016) or to enhance compliance among implementing audiences (Black et al 2016a). Recent research even demonstrates the justices will refrain from using “disagreeable rhetoric” in salient cases where the public is expected to disagree with a decision (Wedeking and Zilis 2018). I argue that the justices can borrow language from and cite amicus briefs in their majority opinions to achieve their policy goals, just as they use other linguistic techniques to enhance compliance, as demonstrated above.

The assumptions laid out above produce two broader points. The first is that the justices need information to write effective majority opinions. Second, the justices need to legitimize their decisions in order to foster compliance from external actors. I argue that borrowing language from amicus curiae briefs and citing them directly are two different methods used in the pursuit of policy objectives. I argue that borrowing language is a way for justices to overcome informational needs in order to craft majority opinions that make for more effective policy and that citing amicus briefs can be used to legitimize policy decisions. In the sections below I detail these two phenomena more explicitly and offer propositions derived from my theory.

Figure 2: Visual Summary of Theory



Borrowing Language from Amicus Briefs: Informational Need

Crafting meaningful majority opinions can be difficult due to limited information pertaining to outcomes, so the justices must overcome these information deficiencies. For example, the justices alone cannot always anticipate how implementation will play out, or how complying audiences will react. In addition, they may be unclear on the implications of particular rulings. While Congress can use committees and subcommittees to overcome information uncertainties pertaining to their legislation (Krehbiel 1991), the Supreme Court is not afforded this luxury. Fortunately, amicus

curiae briefs can help the justices overcome these information deficiencies. While organized interests file these briefs in an attempt to influence outcomes, they also serve as a source of useful information that the Court might use to make informed decisions about the broader social implications (Barker 1967; Kearney and Merrill 2000) or importance of a case (Calderia and Wright 1988). This can include but is not limited to, the consequences of particular rulings (Caldeira and Wright 1990 p. 786), even for those who are not litigants in the case (Pacelle 1991), factual information (Ennis 1984), and the preferences of other actors (Epstein and Knight 1999). This information can be useful to the justices because it can signal the preferences of those responsible for implementation, inform of the wider implications of a particular ruling, offer types of legal authority to be used, and can shed light on which legal justifications are defensible, among many other things.

Informational Use

As exemplified in the introduction, 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 word-for-word copying of the text itself. Collins, Corley, and Hamner (2015) address this type of use exclusively. The authors use plagiarism detection software to locate instances of borrowed language and find that factors such as brief quality, language, repetition, and the identity of the filer can influence whether the justices take such language from a brief (Collins, Corley, and Hamner 2015). I argue that this type of use is used to overcome information deficiencies such as the ones described earlier. The justices need to ensure their majority opinions lead to the social outcomes they desire, and borrowing language helps them in this process. When the justices are in need of information, such as in complex, technical cases, they can rely on language from amicus curiae briefs to overcome this and craft stronger majority opinions.

Because the source of the information remains concealed in this use, the justices have some leeway when it comes to which actors they take information from. Here, they might rely on useful cues when making this decision, such as whether the organized interest is ideologically congruent with their own preferences since complying audiences will likely never know about it. My first empirical chapter analyzes the types of cases that would prompt the justices to borrow language from a brief, while my second empirical chapter analyzes the particular attributes of an individual brief that might encourage the justices to borrow language from it. The above theory on informational need leads me to a series of propositions that will yield empirically testable hypotheses.

Borrowing Language Propositions

Often times the justices will encounter scenarios where they need additional information in order to craft majority opinions that lead to more effective policy. For example, this can include cases that are complex in nature or cases that require technical jargon, such as those involving medical considerations. In these situations, the justices need information on processes in which they are not experts in order to make informed decisions and write coherent opinions that demonstrate at least a general understanding. Similarly, in complex cases the justices need information on any implications that might arise from their decisions and the widespread consequences that might follow. This information can

help them address such issues in their majority opinions. I argue that justices will borrow more language from amicus curiae briefs in these situations, as these briefs provide relevant information that can help the justices write more effective policy. Here, there is no need to refer to the interest directly as they are not attempting to legitimize the ruling in this scenario; they are simply trying to become more informed on the intricacies or implications of a case in order to write more effective opinions. This leads me to the following proposition:

Proposition 1a: *Justices will borrow more language from amicus briefs when they are in need of information, such as in complex cases or when they invite amici to file.*

Unlike citing the source of the information, which requires revealing the identity of the amici, borrowing language is more discreet in nature and the filer's identity is not likely to be revealed. This allows justices to have more freedom to borrow language from less neutral sources. For example, in this situation, the justices can use important cues like ideological congruence with the amici to determine which briefs they choose to take information from. Justices are free to borrow language from ideologically congruent actors, sources they are more likely to agree with, because they do not have to worry about hindering their legitimacy by including a citation to the source. This leads to the following proposition:

Proposition 1b: *Justices will borrow more language from briefs filed by interests that are ideologically congruent with their own preferences.*

Citing Amicus Briefs: The Need to Legitimize

While organized interests can be a fruitful source of information through their amicus curiae briefs, they too have their own policy goals and submit these briefs to lobby the Court in order to influence outcomes. Organized interests might also have other goals, but I assume that when it comes to lobbying the Court policy outcomes are their primary objective; an assumption that is not uncommon in the literature on lobbying (Austen-Smith 1993; Austen-Smith and Wright 1994; Hall and Wayman 1990; Hansford 2004, 2011). The justices must discriminate in how they use this information because it is provided by self-interested entities, particularly when they are citing the sources—since this type of use is revealed. As a result, they must be careful to select sources that are deemed credible and reputable to external audiences, unlike when they are borrowing language and can use information from overtly ideological actors whose interests are congruent with their own. While the justices do not need to worry as much about the identity of the filing interest when it comes to borrowing language, this is not the case when it comes to actually citing these sources in their majority opinions. When it comes to citing interests directly, legitimacy becomes a primary concern.

As previously mentioned, the Court does not have the authority to implement its rulings and must rely on external actors to implement and/or comply with its decisions. Because of this, legitimacy is particularly important to the Court as it can foster compliance. One way that justices maintain institutional legitimacy is by maintaining their image as unbiased, neutral actors whose purpose is to rely on the law to make

decisions (Epstein and Knight 1998; Epstein, Landes, and Posner 2013; Posner 2010). This can be done by ensuring the public views the institution as void of partisanship (Hibbing and Theiss-Morse 1995) and guided by law (Baird 2001; Scheb and Lyons 2000), characteristics that can also increase public acceptance of its rulings (Mondak 1990; 1992). It has been shown that the public has a much higher regard for the Supreme Court than it does Congress or the Executive Branch (Easton 1965, 1975) and this legitimacy appears relatively stable (Gibson 2007; Gibson and Nelson 2014; but see Bartels and Johnson 2013). In addition, the Court benefits from a “positivity bias” (Caldeira and Gibson 1992; Gibson 2007; Gibson, Caldeira, and Spence 2003, 2005; Gibson and Caldeira 2009) and policies attributed to the Court are received better than policies attributed to other institutions (Mondak 1990; Stoutenborough, Haider-Markel, and Allen 2006).

However, recent studies have highlighted that the public also uses ideology (Bartels and Johnston 2013; Hetherington and Smith 2007) and/or party cues when evaluating the Court (Clark and Kastellec 2015; Nicholson and Howard 2003) and its decisions (Bodderly and Yates 2014; Nicholson and Hansford 2014). A recent study using an implicit association test finds that the public views the Court as less political than Congress, but more political than other institutions such as traffic court (Hansford, Intawan, and Nicholson 2018). Thus, while the Court can be viewed politically, it is viewed as less political than other branches of government and appears to benefit from this. If the Court fails to maintain this institutional legitimacy by failing to legitimize its rulings, its policies might be easily ignored. In sum, legitimacy (i.e. public perceptions of the Court) is important to the Supreme Court and there are consequences when this legitimacy is diminished. While institutional legitimacy might be a goal in and of itself, I assume here that maintaining institutional legitimacy is a means to an end (Epstein and Knight 1998), as maintaining institutional legitimacy is vital to securing proper implementation of their decisions. In this project I focus on how the justices legitimize their decisions in order to foster compliance.

I assume the same means of maintaining institutional legitimacy can also be used to legitimize policy decisions. For example, referring to strong legal authorities such as the Constitution or precedent in majority opinions can help justices legitimize their rulings. Further, justices should refrain from revealing ideological biases in their opinions as this can make the Court appear as if their decisions are guided by their personal preferences and not the law, thus hindering acceptance of said rulings. Even though justices may allow their personal preferences to guide their decision-making, they do not wish to reveal this in their majority opinions, as they are expected to maintain an image of being unbiased, law oriented actors (Epstein, Landes, and Posner 2013). I argue that if justices portray themselves as ideological actors in their majority opinions, it can harm the legitimacy of their decisions and hinder compliance just as it can make the institution appear more political and less legitimate.

While many decisions are easy to legitimize as they refer to strong legal authorities that easily legitimize rulings, these conventional Constitutional interpretations, such as precedent, are not always readily available. I argue that in these scenarios, the justices can rely on external sources, such as amicus curiae briefs from legitimacy inducing sources, in order to justify their rulings. Prior work has established that the

justices will cite extralegal sources such as the Federalist Papers (Corley, Howard, and Nixon 2005), rhetorical sources (Hume 2006), newspaper articles, magazines, and academic journals (Schauer and Wise 2000) in their majority opinions, especially when attempting to legitimize decisions (Corley, Howard, and Nixon 2005; Hume 2006).

When it comes to relying on *amicus curiae* briefs to do this, as I argue, the justices must be cautious with which actors they choose to cite, as some can be legitimacy inducing and others can be legitimacy depriving. For example, other government actors such as the United States government (as represented by the Solicitor General) or the states can be seen as legitimacy inducing. These external government actors, though political, are not necessarily extreme, are familiar with the law, and are concerned with the preferences of their constituents (the public). They also have a clear, legitimate role in our system of governance. This interplay of various decision makers implies a system of checks and balances considered essential to the functioning of the U.S. government and a fundamental component of democracy.

Further, there are many interest groups, such as professional organizations, that are not overtly ideological and might enhance legitimacy, such as the American Medical Association or the National School Boards Association. However, some actors can threaten legitimacy, such as interest groups like the National Association of Evangelicals or the Feminist Majority Foundation that can be viewed as ideological. If the justices were to cite these actors they might be perceived as biased, partisan actors, which could threaten the legitimacy of the institution and the decisions they hand down, thus hindering compliance. Therefore, when crafting their majority opinions, the justices must be selective in how they use *amicus* provided information.

Legitimizing Use

Recall that legitimizing use is when the justices formally cite an *amicus* brief by name in his or her majority opinion. Here, the justices are directly identifying the source of the information. I argue that in these situations, the justices are using these citations to *amici* as extralegal appeals intended to legitimize their rulings. 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 briefs. I argue that these kinds of appeals will be utilized when the typical strong legal authorities are not readily available, such as in instances where the justices are altering precedent. The justices are concerned with further legitimizing their decisions in order to foster compliance, but when strong legal authorities are not available they must resort to extra legal considerations to accomplish this.

Unlike borrowing language from a source, where the identity of the *amici* is concealed, the justices must be more cautious of the organized interests they directly cite, since the identity of the *amici* is revealed. Here, it is risky for them to cite interests that are overtly ideological as this might erode the legitimacy of the decision rather than enhance it. Instead, the justices should be more inclined to cite legitimacy inducing actors, such as other branches of government, or more publicly acceptable or trusted sources such as ideologically neutral interests, apolitical entities, professional organizations, or *amici* that take positions contrary to expectation.

Legitimizing Use Propositions

I argue that in cases where limited legal authority is available, such as a lack of relevant precedent, or in situations where the justices are altering a precedent, they will turn to extra-legal authorities in order to legitimize their rulings. In these scenarios, the legitimacy inducing sources the justices typically refer to (strong legal authorities) are not available, and therefore, the justices will need to turn to extra-legal appeals to justify their decision making. In such instances, I expect that they would cite legitimacy inducing actors in an attempt to do so. For example, apolitical, ideologically neutral entities such as professional organizations, or other government actors might help them accomplish this. This leads me to the following proposition:

Proposition 2a: *Justices will be more likely to cite amicus briefs when they need to further legitimize their decisions, such as when they are overturning precedent or declaring a law to be unconstitutional.*

The second empirical chapter of my dissertation analyzes the brief level considerations that might prompt the informational or legitimizing use of amicus provided information. In other words, what is it about a particular brief that might influence whether or not the justices use it to craft their majority opinions? As previously mentioned, legitimacy is important to the Court, as it can help foster compliance. I argue that since citing the source of the information can help or hinder efforts to legitimize the decision, contingent on the amici in question, the justices will be particularly selective with whom they choose to cite. For example, some entities, such as the United States Solicitor General and other government actors, such as the states, can be more legitimacy inducing than less moderate interest groups. If the justices wish to maintain their image as unbiased, neutral actors that rely on the law to guide their decisions (Epstein and Knight 1998; Epstein, Landes, and Posner 2013; Posner 2010), then they should avoid appearing as partisan or ideologically biased actors by refraining from citing ideological entities. Instead, they should be more inclined to cite ideologically neutral or apolitical organized interests such as professional organizations like the American Medical Association. This leads me to the following proposition:

Proposition 2b: *Justices will be more (less) likely to cite legitimacy inducing (depriving) actors.*

Finally, my third empirical chapter tests whether these appeals actually work. My theory has rested on the assumption that some actors are more legitimacy inducing than others. Is this true empirically? In this chapter I test whether appeals to legitimacy inducing actors can increase public acceptance of rulings and whether appeals to legitimacy depriving actors can decrease public acceptance of their rulings. Is the public less accepting of decisions that cite interest groups that are ideological? Is it more accepting of extralegal appeals that cite moderate interests?

As mentioned above, the public is a part of the affected audiences that must comply with Supreme Court rulings, and thus the justices must appeal to this audience as well. While the justices are not subject to elections and are thus not constrained in the

sense that members of Congress are, the public does have a role in complying with decisions. For example, if the public is unsatisfied with the outcome of a ruling, they can work to encourage their legislators to introduce legislation that can reduce the effectiveness of these rulings. Research has demonstrated empirically that there is a connection between public support for the Court and how much institutional support Congress provides the Court through resource allocation and discretion (Ura and Wohlfarth 2010), suggesting the public is an important audience for the Court to consider.

A long-standing debate has ensued over whether the Supreme Court is directly responsive to public preferences in its decision making. Several scholars have identified a relationship between public preferences and Supreme Court outcomes (Epstein and Martin 2010; Flemming and Wood 1997; Friedman 2009; McGuire and Stimson 2004; Mishler and Sheehan 1993; Wedeking and Zilis 2018) with some claiming that this effect is only prevalent in salient (Hall 2014; Wedeking and Zilis 2018) or non-salient (Casillas et al 2010) cases. However, others question whether a relationship indeed exists with some suggesting there is no direct, strategic relationship just changes in the ideological composition of the Court (Norpoth and Segal 1994) and preference changes among justices that operate similarly to the formation of public preferences (Giles et al 2008). Even some scholars that offer evidence suggesting there is a relationship between public mood and Supreme Court decisions express caution that the direction of causality is unknown, since the same things that influence public mood can influence the justices (Epstein and Martin 2010; Flemming and Wood 1997).

While this debate remains unsettled, it has been revealed that there is at least some relationship between public opinion and Supreme Court decision making, suggesting the public is an important audience that the Court is aware of. We know the Court benefits from legitimacy, so in that regard, the Court should at least be cognizant of public mood in an effort to maintain this legitimacy. Research suggests the Court's institutional legitimacy can prompt the public to accept rulings it otherwise might disagree with (Gibson, Caldiera, and Baird 1998). If this is the case, then justices can elicit support from the public (making citizens less apt to rally their legislators to respond to decisions) if they maintain their institutional legitimacy by ensuring they legitimize their rulings.

As previously mentioned, it is important for the justices to maintain their image as neutral, unbiased actors whose job is to interpret the law (Epstein and Knight 1998; Epstein, Landes, and Posner 2013; Posner 2010). Even if they do use their policy preferences and ideology to guide decision making as evidence suggests (Segal and Spaeth 1993, 2002), it is important that they maintain their legitimacy in order to enhance compliance among relevant actors. In other words, while they might indeed be ideological actors with policy preferences, they cannot be overt about this as it can be harmful to the Court's reputation. This proposition would lead me to expect that citing organized interests that are ideological, such as the Americans for Effective Law Enforcement or the Feminist Majority Foundation might hinder the legitimacy of the decision, leading to limited compliance. However, citing ideologically neutral or legitimacy inducing actors such as professional organizations like the American Medical

Association can increase legitimacy, therefore fostering compliance among relevant actors. This leads me to my final proposition:

Proposition 3: *The public will be more (less) accepting of decisions that cite legitimacy inducing (depriving) actors.*

Exclusiveness

In this theory I have defined informational and legitimizing use as two distinct concepts to be explored, with separate explanations that warrant each type of use. However, it is entirely plausible that justices might both quote (borrow language from) an amicus curiae brief and actually cite it, suggesting these two acts are not mutually exclusive. In this event, I expect that the justices need to both overcome information deficiencies and legitimize their rulings. I do not anticipate that this is its own distinct phenomenon leading to a separate set of expectations. In other words, I do not expect that citing the amicus curiae briefs and borrowing language from them together is driven by an entirely separate mechanism.

Conclusion

To summarize, the justices have preferences pertaining to social outcomes that they wish to see realized in their policies (i.e. their majority opinions). However, the justices cannot implement their own rulings and thus face two primary constraints they must overcome. First, they lack information on the preferences of other actors and the broader implications of their rulings. Second, the justices must maintain their legitimacy in order to ensure their policies are complied with. This makes the precise language and references used in their majority opinions of the utmost importance.

I argue that amicus curiae briefs can help the justices overcome informational deficiencies and maintain or garner legitimacy. Specifically, I propose that borrowing the exact language from amicus briefs can help the justices write informed, effective opinions while citing certain legitimacy inducing actors can help the justices legitimize their decisions. Since borrowed language is concealed, and not obvious to the reader, the justices will borrow more language from ideologically congruent sources, since there is no impact on the Court's legitimacy. However, since citations are evident to the reader and revealed in the opinion, I theorize that the justices will be more selective in their use of citations and will refrain from citing ideological interests, since there are implications for legitimacy in this context. This novel theory is important in that it helps explain how amicus curiae briefs are used as mechanisms in Supreme Court opinions to help further the justices' policy goals and contributes to our understanding of Supreme Court justices as both legal and political actors.

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

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. 2016a). 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; 2008; 2008a; 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 women 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.² 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.

Figure 1: Borrowed Language

United States Amicus Curiae Brief	Justice Blackmun’s Majority Opinion
“Particularly when gender-related issues are prominent in a particular case, the <i>discriminatory use of peremptory challenges may create an impression that the judicial system has acquiesced in suppressing full participation by one gender.</i> ”	“ <i>Discriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation by one gender</i> 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 1,600 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.³

Next, consider *Zadvydas v. Davis*⁴ (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 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

² 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.

³ See appendix section A3 for more information on this.

⁴ Together with *Ashcroft v. Kim Ho Ma*

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).⁵ 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.

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.⁶ This practice has been employed in prior work (Black et. al. 2016a) 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

⁵ 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.

⁶ 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.

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 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.⁷ The dependent variable for the informational use model is the 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 8.5.⁸

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 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"

⁷ 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.

⁸ 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.

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 A6 of the 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; 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.

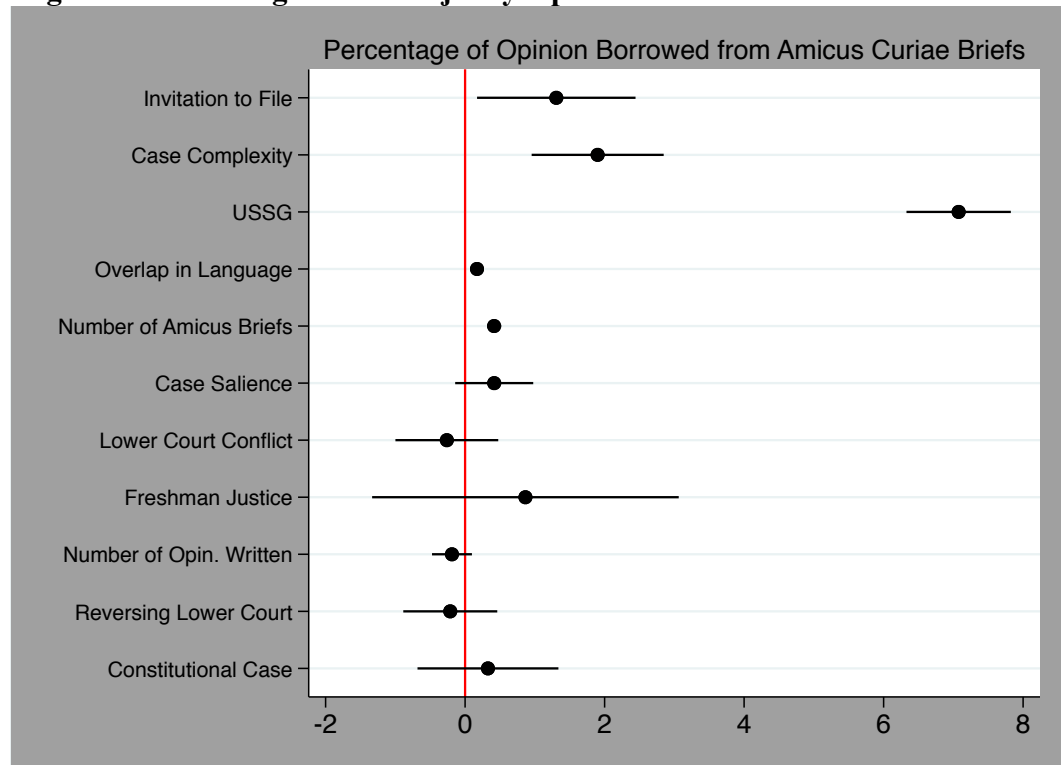
I control for conflict in the lower court, as this might prompt a need for information and also an increase in amicus filings, which can lead to an increase in borrowed language. I also include an indicator of whether the Court is reversing the lower Court. Finally, I include an indicator for whether 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 2: Percentage of the Majority Opinion Borrowed from Amicus Briefs



As evidenced in Figure 2, 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."⁹ Any time an amicus was mentioned, either in general or by name, it was added to a variable that includes a citation count.¹⁰ 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 its 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 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 precedents 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

⁹ 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.

¹⁰ 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 A4 of the appendix for more on this point.

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 3: Number of Citations to Amicus Briefs in the Majority Opinion

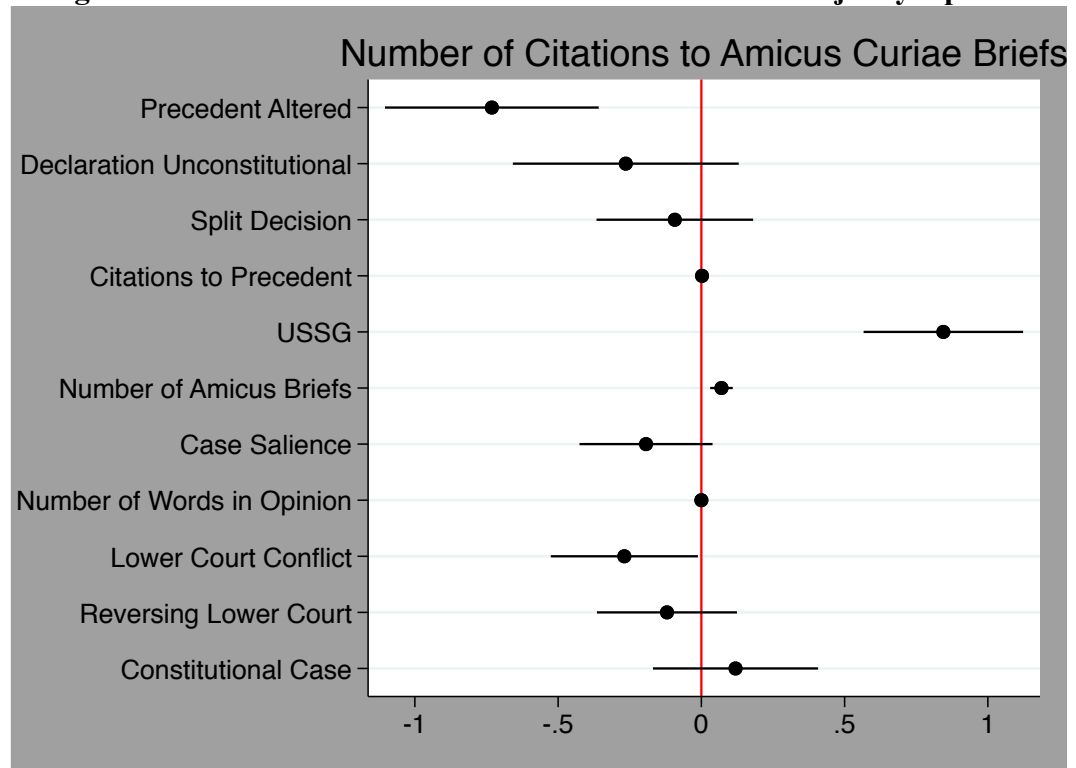


Figure 3 shows the results for this analysis. Altering precedent is negative in direction suggesting that, contrary to my expectations, Supreme Court justices cite amicus curiae briefs *less* if they are altering precedent. When the justices are altering precedent there is a .73 unit decrease in the 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 1,600 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 2008¹¹ 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 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,

¹¹ The data used for hypotheses 3-6 ranges from 1988-2000.

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.

Appendix Materials
Table A1. Percentage of the Majority Opinion Borrowed from Amicus Briefs

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

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

Table A2. Number of Times Amici Cited in Majority Opinion

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

A2: Model Information

Heteroskedasticity

A Breusch-Pagan test returned a χ^2 value of 140.5 for the informational use (borrowed language) model and a χ^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 ($p < .05$).

A3: Strict Cites vs. Borrowed Language

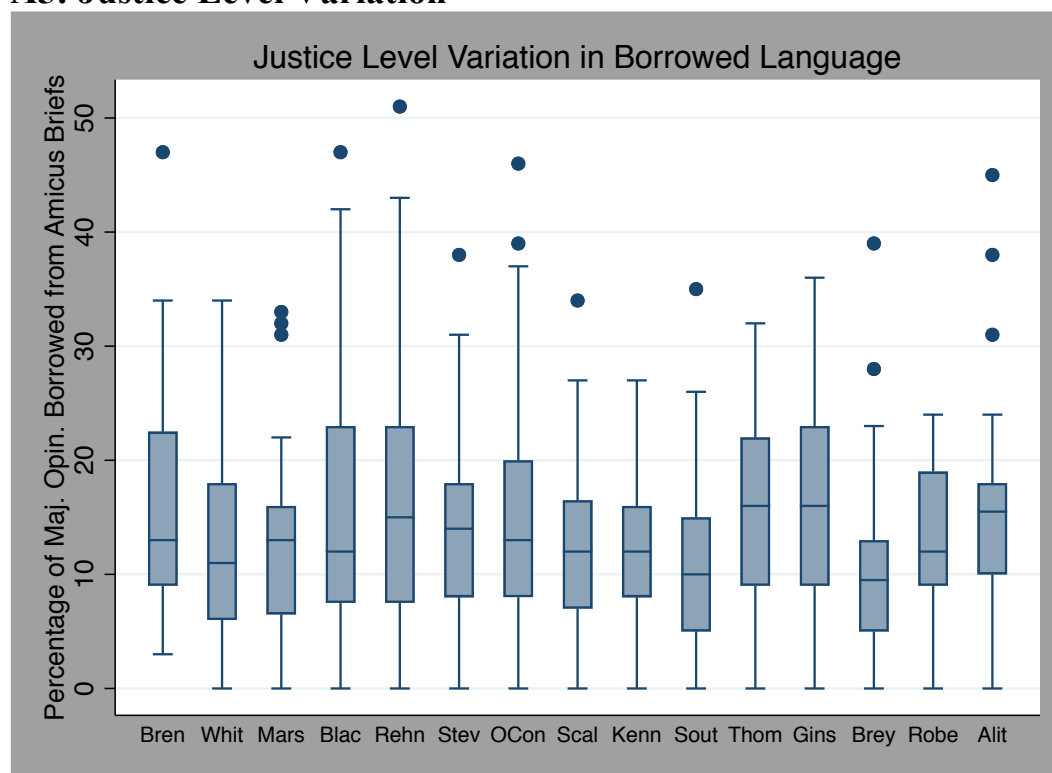
As stated in the paper, the justices borrow language without any citations throughout the entire opinion in about 58% of the cases in this dataset. Out of the entire set of 1,610 cases (from the first model) there were citations in only 593 of these cases. Some have expressed concern about instances 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

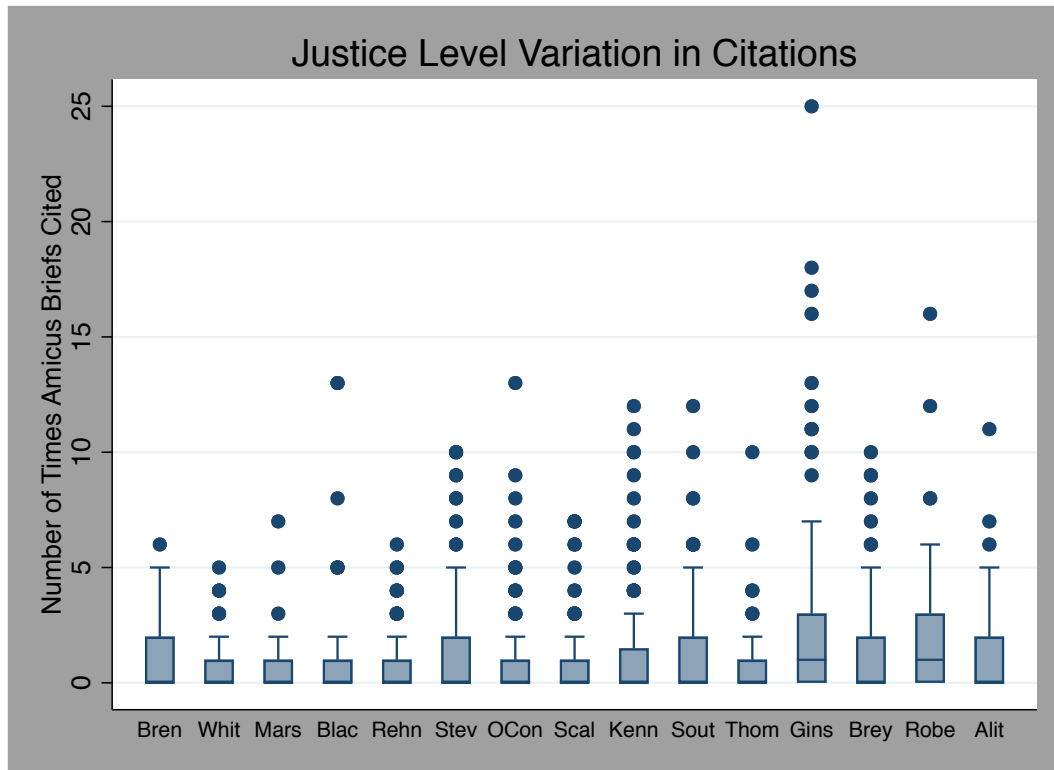
(73%) were strict citations, whereas 50 (27%) were citations that accompanied borrowed language.

A4: 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.”

A5: Justice Level Variation





A6: 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."

A7: 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 A3. 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.

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

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 borrow more 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*.¹² 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).

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.¹³

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

¹² 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/0ff03331-13c6-4906-97de-74a3dac29859/?utm_term=.14d23978d4bb>

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

¹³ 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.

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 more 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 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; 2008; 2008a; 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; 2008a), and/or the individual votes of the justices (Box-Steffensmeier, Christenson & Hitt 2013; Collins 2008a). 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 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)¹⁴, an assumption that has been demonstrated empirically (Epstein & Knight 1998; Hansford & Spriggs 2006; Maltzman, Spriggs, & Wahlbeck 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.¹⁵ 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 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

¹⁴ 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.

¹⁵ For more information on the different theories of legitimacy see Gibson (2007) and Gibson, Lodge, & Woodson (2014).

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 public¹⁶, 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 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 more 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

¹⁶ 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.

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. I collected an oversample of briefs that were cited in majority opinions, as this method is recommended in situations where events are rare (King and Zeng 2001; 2001a). 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.¹⁷ The justices appear to be selective when it comes to citing amicus curiae briefs. 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.¹⁸

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.)¹⁹. 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 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

¹⁷ This variable only includes citations that were considered positive or neutral in nature. See appendix for more information on coding rules.

¹⁸ A list of the organized interests that were cited can be found in the appendix.

¹⁹ See the appendix for more details on these measures.

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.). 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: Ideology of Amici Whose Briefs Were Cited

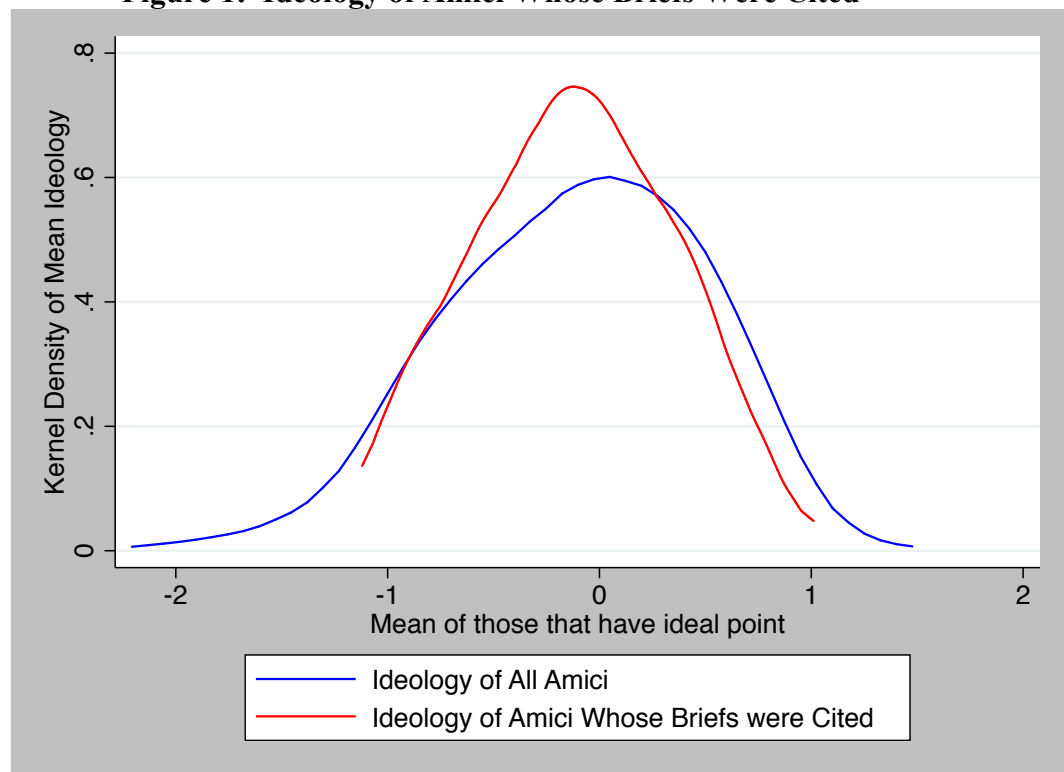


Table 1 shows the results from the three separate models. My first hypothesis suggested that the justices would be less likely to cite ideologically extreme interests. As we can see from Model 1, while the coefficient is in the correct direction, it is not statistically significant at conventional levels ($p = .08$, 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. Brief Cited in Majority Opinion

Independent Variable	Model 1	Model 2	Model 3
Ideological Interest	-.682 (.478)		
Contrary Position Taking		-.160 (.740)	
State Filer			.062 (.330)
Frequent Filer	-.767** (.319)	-.814*** (.316)	-.753*** (.301)
United States Solicitor General Filed	.202 (.258)	.165 (.257)	.241 (.191)
Number of Amici	.012 (.016)	.009 (.017)	.004 (.011)
Number of Briefs	-.041** (.017)	-.039** (.016)	-.016** (.008)
Opinion Word Count	.000*** (.000)	.000*** (.000)	.000* (.000)
Salience	-.313* (.182)	-.364* (.180)	-.391*** (.138)
Reversing Lower Court	-.168 (.254)	-.164 (.254)	-.034 (.195)
Justice Ideology	-.609 (.394)	-.685 (.393)	
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). Model 3 excludes justice ideology but includes fixed effects for justice.

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.

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 all four of the 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.

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. 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.

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.

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.

Another interesting finding is that the salience of case was negative but not statistically significant. In other words, the justices do not borrow less language from a brief when the case is salient—i.e. highly visible to external audiences. This is consistent

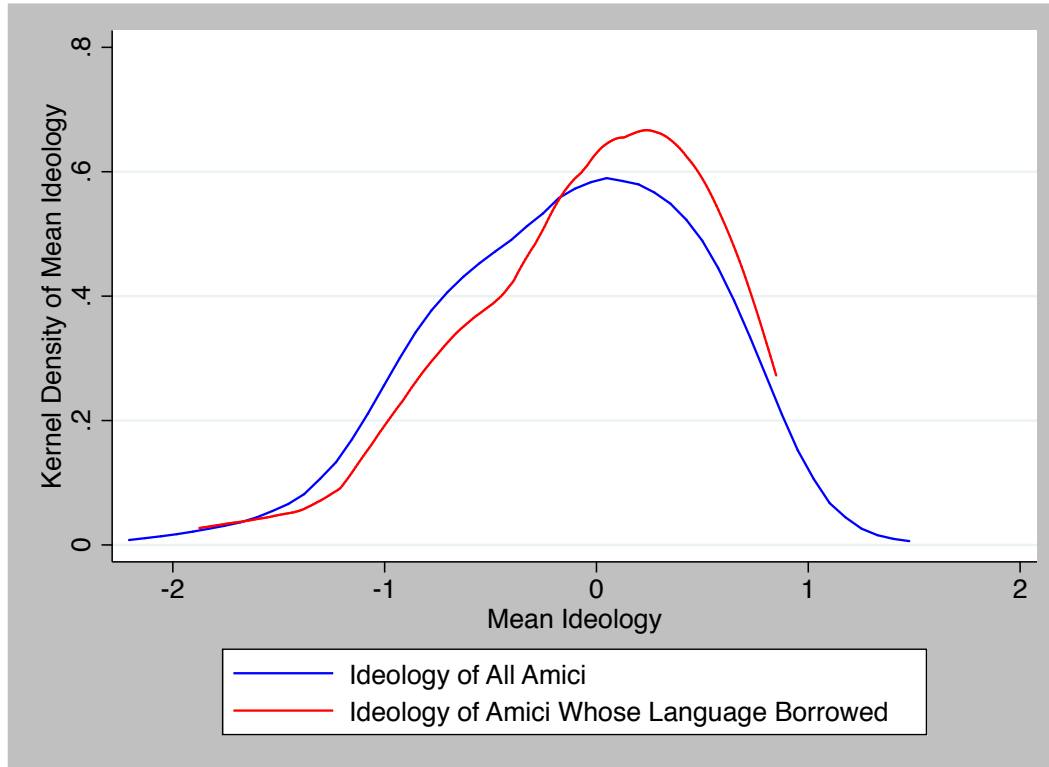
with my theoretical argument that since borrowing language is discreet in nature, the justices do not need to hinder their use of it when writing their majority opinions since there are limited implications for legitimacy, unlike formally citing the source which is evident to the reader and likely to have implications for legitimacy. Recall that in all four of the 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.²⁰

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.

²⁰ 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 ($p = .099$, $.051$, 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: Ideology of Amici Whose Briefs Were Borrowed From



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,²¹ 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 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. 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.

²¹ I ended at the 2008 term because Clark et. al.'s (2015) measure of early salience ends at this term.

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 for the Advancement of Colored People

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

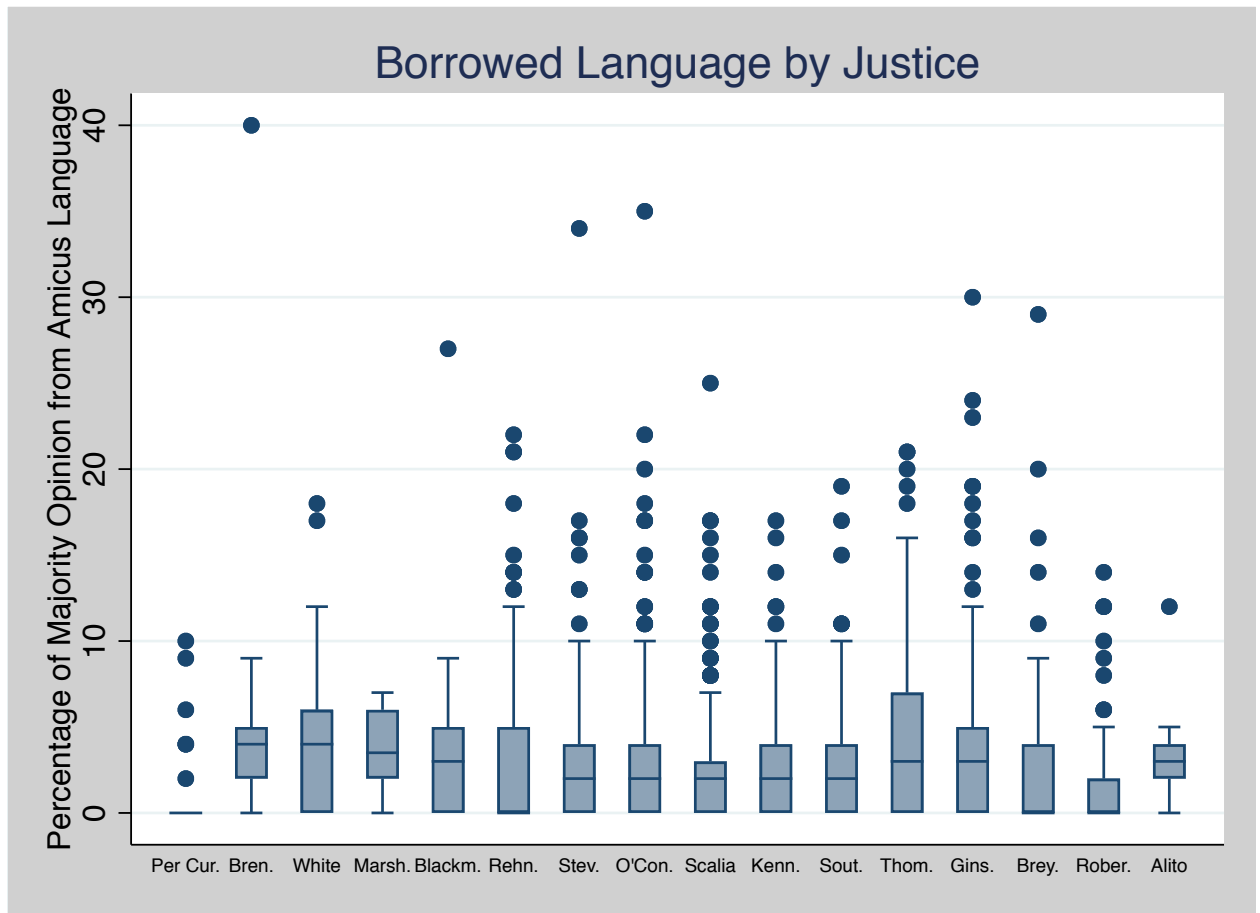
GENERAL MOTORS CORP.

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 A1: Borrowed Language by Justice: All Cases from 1988 – 2008 Terms



Public Perceptions of Supreme Court Decisions that Cite Amicus Curiae Briefs

Abstract

Recent scholarship has identified an increase in citations to amicus curiae (or friend-of-the-Court) briefs in the Supreme Court's opinions over the past several terms; however, we know very little about how the public responds to opinions that cite amicus briefs, particularly whether these citations can influence acceptance of the Court's decisions or whether they can make the Court's decision-making appear more politicized in nature. I use a survey experiment to assess how amicus brief citations can influence the public's perception of Supreme Court decisions using a sample of approximately 3,000 respondents. Participants were asked to read about a Supreme Court ruling where the decision direction and filing interest of the cited brief were manipulated. I find that the public is less accepting of opinions that cite briefs filed by ideologically overt interests while briefs filed by moderate interests have no effect. I also find that citations to briefs filed by ideologically dissimilar groups can polarize opinion. These findings have important implications for how the public makes use of ideological cues as well as for how the justices' use of amicus brief citations can shape the legitimacy of the Court's decisions.

In 2010, Justice Anthony Kennedy issued the majority opinion in *Citizens United v. Federal Election Commission*, a very salient and controversial case in which the Court ruled that corporations and unions could use unlimited funds on political advertisements, and that any laws that restricted such use were a violation of free speech under the First Amendment. Kennedy's opinion was riddled with citations to various amicus curiae briefs filed by a plethora of interests. Although Kennedy referred to points made by less politicized interests, such as the state of Montana and finance scholars, he also cited entities that can be viewed as more politicized or ideologically charged, such as the United States Chamber of Commerce and former officials of the American Civil Liberties Union. What does the public make of these citations? How do citations to amicus curiae briefs filed by ideologically moderate or ideologically overt interest groups shape perceptions of Supreme Court decisions?

Recent work has identified an increase in citations to amicus curiae briefs in Supreme Court opinions over the past few decades (Franze and Reeves Anderson 2015; Kearney and Merrill 2000). While this research informs us of the ways the legal and non-legal justifications used in majority opinions can shape public perceptions of the Court and its decisions, we know nothing about how citations to amicus curiae briefs affect public opinion about the Court's decisions. In other words, we know little about how the public reacts when Supreme Court justices cite organized interests that file amicus curiae briefs in order to justify their decision-making.

In this paper, I examine whether and how citations to amicus curiae briefs filed by organized interests shape acceptance of the Supreme Court's decisions. I theorize that the public will use the identity of the interest whose brief was cited to form attitudes toward the content and politicization of the decision. I expect to find that citations to briefs filed by ideologically moderate interests will increase acceptance of Supreme Court decisions as they can make the decision appear moderate and less political and that citations to briefs filed by more ideologically extreme interests will decrease acceptance as they suggest politicized decision making. I also anticipate a source cue effect in that the public should respond to citations to ideological interest groups based on their own ideological affiliation. In particular, the public should be more accepting of decisions that cite briefs filed by interest groups similar to their own ideological preferences and less accepting of decisions that cite briefs filed by ideologically dissimilar groups.

In a survey experiment featuring nearly 3,000 respondents, I find that ideologically moderate citations do not increase acceptance of Supreme Court decisions but that citations to ideologically overt interests decrease acceptance. I also find that citizens are less accepting of decisions that cite briefs filed by organized interests that are ideologically incompatible with their own ideological affiliation, but they are not more approving of decisions that cite briefs filed by interests that are ideologically compatible with their own preferences. These findings suggest that citations to amicus curiae briefs in majority opinions might serve as useful cues to help the public make sense of the Court's policies in certain contexts and that the justices do not gain much in terms of public support for citing amicus briefs in their majority opinions.

Legality, Politicization, and Perceptions of the Court

Supreme Court opinions play an essential role in shaping both public acceptance of the Court's decisions and how the Court is viewed as an institution. Prior scholarship has identified how various aspects of opinion content can shape perceptions of the Court, often through the different types of authorities used to justify decision-making. For example, research has shown that the public is more supportive of the Court as an institution when legal justifications were used in majority opinions as opposed to public opinion polls or religious justifications (Farganis 2012). Further, the public is more accepting of decisions that adhere to, rather than overturn, precedent (Zink, Spriggs, and Scott 2009) and is disenchanted by news coverage that paints the Court as politically motivated rather than legally motivated (Baird and Gangl 2006).

While there appears to be an expectation of legality, evidence suggests the public also recognizes the Supreme Court as a somewhat political institution (Hansford, Intawan, and Nicholson 2018; Scheb & Lyons 2000) and relies on these political divisions as useful information that can help shape attitudes. For example, when the partisanship of the majority coalition is mentioned, the public responds to the Court's policy outputs as it would with other government actors, using partisan cues to help shape attitudes (Nicholson and Hansford 2014; also see Nicholson and Howard 2003). Further, research shows that individuals rate the Court as less legitimate when they perceive the institution and its policies to be ideologically distant from their personal preferences (Bartels and Johnston 2013).

Another area that might paint the justices as political actors involves their interaction with organized interests. A plethora of groups file *amicus curiae* or "friend of the Court" briefs in an attempt to influence policy outcomes. Scholars have observed an ongoing trend where Supreme Court justices are increasingly citing *amicus curiae* briefs in majority, concurring, and dissenting opinions (Kearney and Merrill 2000; Franze and Reeves Anderson 2015). In doing so the justices directly reference the filing interest or individual by name, typically identifying the first filer in situations where there are many cosigners. While scholars have worked to address the ways in which these citations can influence *amicus* success in terms of outcomes (Kearney and Merrill 2000) or encourage further *amicus* activity (Hansford and Johnson 2014), no research to date has looked at how the public responds to these citations.

In sum, there has been an increase in citations to organized interests' *amicus* briefs in the Supreme Court's majority opinions, and while we know that the legal and extralegal authorities used to justify decision making can influence how the public perceives the Court and its decisions, we know little about how the public views citations to interest groups and the implications this might have. Theoretically, citations to organized interests should have various implications for legitimacy, as this wide array of groups includes some that are apolitical or neutral in nature as well as some that are highly politicized.

Organized Interests and Implications for Legitimacy

While recognizing the Court as a somewhat political institution, the public expects justices to make decisions grounded in legality (Schreb & Lyons 2000) and "procedural fairness" (Baird 2001). Relatedly, if the justices wish to maintain their image

as unbiased, neutral actors who rely on the law to guide their decisions (Epstein and Knight 1998; Epstein, Landes, and Posner 2013; Posner 2010) they should avoid appearing ideological or politically motivated, as this might be harmful to perceptions of the Court and its decisions. This is an important aspect of conferring legitimacy, and as such, it is plausible to expect citations to organized interests to play an important role in this process.

While I do not assume the average citizen reads the Court's opinions, there are numerous ways the public may become aware of citations to amicus briefs. At times, citations are highlighted by national newspapers, and interest groups often advertise citations to their briefs by the Court to their membership to make them aware of their work and "success" as advocates for various causes. For example, in *Grutter v. Bollinger* (2003), a case that upheld affirmative action in university admissions, Justice Sandra Day O'Connor cited briefs filed by American businesses such as 3M and General Motors, which made national headlines. In addition, groups like the American Civil Liberties Union alert their membership when its briefs are cited in the Supreme Court's opinions.²² I want to be clear that I do not assume the average citizen reads the Court's opinions. However, the public is exposed to them through the two-step flow of communication whereby the media and opinion leaders convey information to the masses (Katz and Lazarsfeld 1955). As such those in the attentive public, in other words, those that pay some amount of attention to the what the Court does, should have some minimal awareness of citations.

The types of organized interests that the justices decide to cite can have different consequences for how the public views Supreme Court decision-making. While citations to ideologically overt interest groups can make the Court appear biased and ideological themselves, citations to moderate interest groups will not have this same implication. In fact, citations to ideologically moderate interest groups might work to enhance perceptions of the Court's decisions as they might strengthen the Court's argument.²³ Prior work has established that the justices will cite extralegal sources such as the Federalist Papers (Corley, Howard, and Nixon 2005), rhetorical sources (Hume 2006), newspaper articles, magazines, and academic journals (Schauer and Wise 2000) in their majority opinions, especially when attempting to legitimize decisions (Corley, Howard, and Nixon 2005; Hume 2006). Citing amicus curiae briefs filed by ideologically moderate interests can serve to make the Supreme Court's argument appear more legitimate by highlighting arguments made by more neutral, credible sources. In other

²² Greenhouse, Linda. 2003. "The Supreme Court: Affirmative Action; Justices Back Affirmative Action by 5 to 4, but Wider Vote Bans Racial Point System." In *The New York Times*. (Accessed 1 September 2018). <<https://www.nytimes.com/2003/06/24/us/supreme-court-affirmative-action-justices-back-affirmative-action-5-4-but-wider.html>>

ACLU. 1999. "High Court Limits Out-of-Court Statements" *American Civil Liberties Union Website*. (Accessed 1 September 2018). <<https://www.aclu.org/news/high-court-limits-use-out-court-statements?redirect=content/high-court-limits-use-out-court-statements>>

²³ I am assuming that citations to organized interests highlight agreement with these actors and that these citations are non-negative, or are not used to disparage interests, as negative citations would be received differently.

words, the justices are supporting their points with arguments made by credible sources with no strong ideological agenda. Further, certain types of interests, such as professional organizations, are generally not viewed as ideologically-charged groups.

For example, though they engage in politics occasionally, the American Medical Association and the AARP are not exactly known for being highly controversial interests with strong ideological agendas. On the contrary, highlighting agreement with ideologically extreme interests such as the American Civil Liberties Union or the National Association for Evangelicals in majority opinions might decrease acceptance of Supreme Court decisions due to the more ideologically-charged nature of these groups. Further, citations to interests that are ideologically extreme might make the Court's decision-making appear more biased and political in nature, while citations to more ideologically moderate (or neutral) sources might make the Court's decision-making appear more neutral and less politicized. These assumptions about the public's expectation of the Court as a legal institution whose decisions are unbiased and grounded in the law leads me to two sets of hypotheses:

Legitimizing Hypotheses:

The public will be more accepting of Supreme Court decisions that cite ideologically moderate interests.

The public will view Supreme Court decisions that cite ideologically moderate interests as less politicized.

Politicizing Hypotheses:

The public will be less accepting of Supreme Court decisions that cite ideologically overt interests.

The public will view Supreme Court decisions that cite ideologically overt interests as more politicized.

In assessing public perceptions of citations to organized interests I would be remiss to ignore the extensive literature on the importance of ideology in shaping political attitudes. I assume, that while the public expects Supreme Court decision-making to be grounded in legality (Baird 2001; Schreb and Lyons 2000), it also views the institution as, at least somewhat, politically motivated. Research suggests that the public perceives the Court to be less politicized than Congress, but more politicized than apolitical institutions (Hansford, Intawan, and Nicholson 2018). Further, it's been demonstrated that the public uses ideology (Bartels and Johnston 2013; Hetherington and Smith 2007) and party (Bodderly and Yates 2014; Nicholson and Hansford 2014) to evaluate the Court, and as such should rely on these source cues to help form their attitudes towards the Supreme Court's policies.

The public is generally minimally interested in politics (Delli Carpini and Keeter 1996) and holds attitudes that are relatively unstable (Converse 1964; Zaller 1992). As such, citizens rely heavily on source cues to shape how they respond to their political environment, allowing them to make more informed decisions (Lupia 1994; Lupia and McCubbins 1998; Sniderman, Brody, and Tetlock 1991). The public often relies on

source cues such as political party affiliation (Cohen 2003; Kam 2005), ideology (Brady and Sniderman 1985; Turner 2007), interest groups (Lupia 1994), and political leaders (Mondak 1993) among others, to form policy preferences. Citizens rely more heavily on cues when the information environment is complex, or in other words, when the policies at hand are difficult to understand (Bowler and Donovan 1998; Lupia 1994) and relies less on cues when policies are easier to comprehend (Nicholson 2011).

When it comes to Supreme Court decisions, the public does not have much information to use to evaluate their level of support for these policies. The average citizen does not read through these complex majority opinions and must rely on opinion leaders and the media to help them make sense of Court decisions. These cues of citations to briefs filed by organized interests can be particularly useful when the public is evaluating complex Supreme Court decisions in a low information environment. Research has shown that individuals were able to make informed policy decisions when they were made aware of the insurance industry's positions on ballot initiatives in the state of California (Lupia 1994). Similarly, citizens should be able to form policy preferences based on cues to interest groups in the Court's opinions. For example, knowing where particular interest groups, such as big businesses, stand on certain policies can help cue the public to their own preferences on the policy based on whether they agree or disagree with the general aim of the group.

Further, cues themselves have the ability to polarize support for policies. Research demonstrates that the public doesn't always respond to in-party cues, but that out-party cues can polarize opinion (Nicholson 2012). This logic of polarizing opinion extends to ideology as well, and ideological cues can work in a similar manner to partisan cues. For example, it's been shown that individuals are less accepting of Supreme Court decisions that are authored by an ideologically dissimilar justice (Bodderly and Yates 2014). The public is also attuned to the issue preferences of various groups, including liberals and conservatives (Brady & Sniderman 1985), and as such, I assume individuals should be able to make ample use of cues from ideologically overt interest groups. As such, I propose the following:

Compatibility Hypotheses:

The public will be more (less) accepting of Supreme Court decisions that cite interest groups that are ideologically similar (dissimilar) to their own preferences.

Research Design

To assess whether citations to organized interests can influence acceptance of Supreme Court decisions, I implemented a survey experiment using a Census balanced sample collected through Survey Sampling International which generated responses from 3,003 individuals in early August of 2018. Four respondents were removed for entering invalid responses in the age category, leaving a total of 2,999.

In this study participants were asked to carefully read a brief description about a Supreme Court decision where the Court determined whether employers were required to offer health care insurance that included coverage for the costs of pregnancy and child birth. This hypothetical case was chosen in order to properly manipulate the decision direction, which was altered to be either conservative, liberal, or moderate in direction.

The interest group that was listed as being cited in the majority opinion was also manipulated. The interest was either liberal (the American Civil Liberties Union), conservative (Focus on the Family), or moderate/apolitical (the American Medical Association). Each decision direction also included a control where no interest group was cited, making for a 3 by 4 design with 12 cells in total. An example of the moderate decision direction condition is included below. The full set of treatment and control conditions can be found in the appendix. A pre-test was implemented to see how well individuals could identify the ideological orientation of various interest groups to determine which would be used in this study.²⁴

Figure 1: Sample Treatment Conditions

Moderate Decision Treatment	Moderate Decision Control
<p>The U.S. Supreme Court recently decided that federal law requires some employers to provide health care insurance that includes coverage for pregnancy and childbirth. Referring to arguments made in a brief filed by (the American Medical Association/American Civil Liberties Union/Focus on the Family), the Supreme Court’s majority opinion carefully weighed the economic and health care burdens faced by both employees and employers.</p>	<p>The U.S. Supreme Court recently decided that federal law requires some employers to provide health care insurance that includes coverage for pregnancy and childbirth. The Supreme Court’s majority opinion carefully weighed the economic and health care burdens faced by both employees and employers.</p>

After reading the vignette on the case, respondents were then asked their views of the holding and how the Court came to its decision before being asked to evaluate the Supreme Court more broadly. The primary dependent variable is acceptance of the decision, as derived from Gibson, Caldeira, and Spence (2005). The question asks, “Do you accept or reject the Court’s decision? That is, do you think that the decision ought to be accepted and considered to be the final word on the matter or that there ought to be an

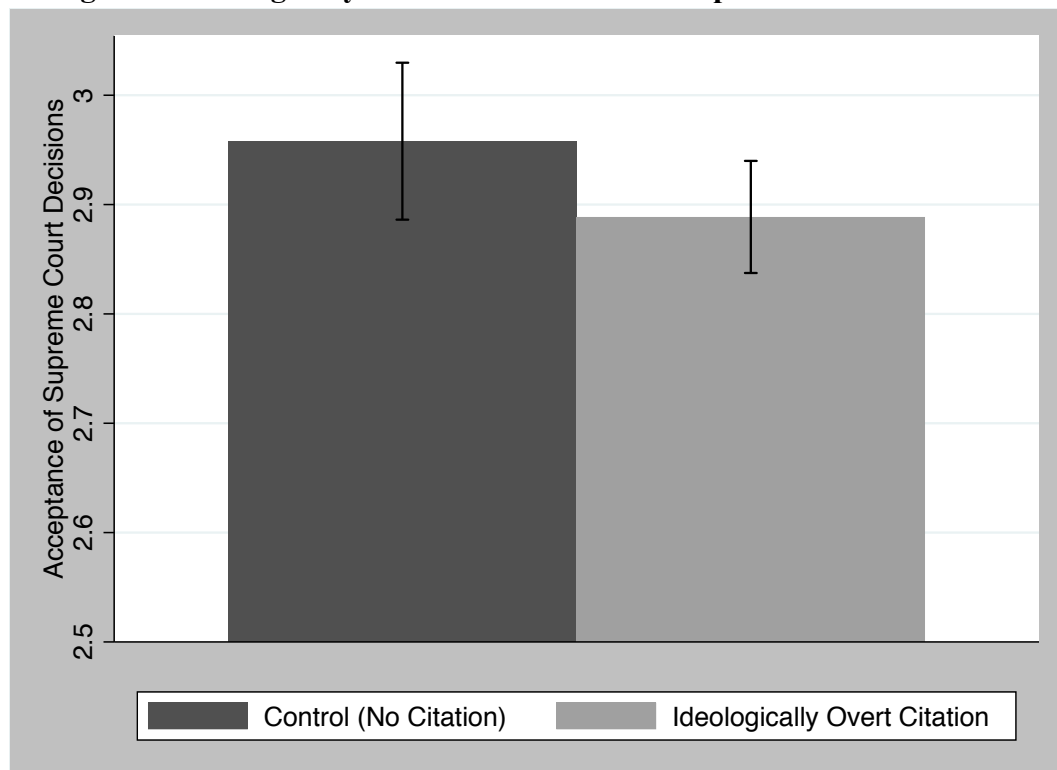
²⁴ To determine which interest groups were used in the study, and to ensure respondents were able to properly identify the ideological orientation of various organized interests, I pretested a list of several groups with student (N=191) and Amazon’s Mechanical Turk (N=323) samples in March of 2018. The above-mentioned interests (the ACLU, Focus on the Family, and the AMA) were chosen based on whether they would conceivably file an amicus brief in this particular type of case and whether respondents were capable of correctly inferring their ideology. More information, including a table with the percentage of respondents that were able to correctly identify or infer the ideological orientation of the group in this pretest can be found in section A1 of the Appendix.

effort to challenge the decision and get it changed?” Responses included four options ranging from “strongly accept” to “strongly reject.” Respondents were also given a manipulation check, a battery of demographic questions, and a few questions on knowledge of the Court.

Citations to Ideologically Moderate and Ideologically Overt Interests in the Aggregate

In order to test the first Politicizing hypothesis, that citations to ideologically overt interests will decrease support for Supreme Court decisions, I start by creating a variable called *Ideologically Overt* coded “1” if an individual received the conservative (Focus on the Family) or liberal (ACLU) citation, regardless of what decision direction they received, and “0” for those in the control of no citation. The dependent variable *Acceptance* was coded as described above. The figure below demonstrates that those who received a citation to an ideologically overt interest were less accepting of the Supreme Court’s decision, however, this borders on statistical significance ($p = .062$, one-tailed). A balance test to determine whether the randomization worked properly determined that there was a slight imbalance in education (see Section A5 of the Appendix). As such, I modeled this relationship to account for this and to compare how the treatment influences acceptance of decisions relative to other demographic variables known to influence political behavior.

Figure 2: Ideologically Overt Citations and Acceptance of SC Decisions



In modeling this, I control for whether the respondent is a *Registered Voter* (coded “1” if the respondent answered “yes” and “0” if they answered “no” or “don’t know”), *Court Knowledge* (the number, out of two, questions respondents got right), *Diffuse Support* for the Court (a factor score based on three questions that measure institutional support for the Court), *Race* (dummy variables), *Age* (in years), *Education* (dummy variables), *Party Identification* (dummy variables for Democrat, Republican (including leaners), and those who did not identify with either party), the *Ideology* of the respondent (a 7-pt scale from extremely liberal to extremely conservative), and whether the respondent was *Female*, since the decision is related to women’s health.²⁵

Table 1 shows the results of the OLS model.²⁶ As evident in the table, the coefficient for Ideologically Overt Citations is negative and statistically significant, suggesting that for those who receive a citation to an ideologically overt interest group there is a decrease in acceptance for the Supreme Court’s decision. This provides support for the first Politicizing Hypothesis. Ideology is negative and statistically significant suggesting that as a respondent becomes more conservative they are less accepting of the Supreme Court’s decisions. There were no statistically significant differences based on race, education, or party identification (those who did not identify as Democrat or Republican were used as the baseline), and women were statistically less likely to support the Court’s decisions. Interestingly, those who were more knowledgeable about the Court were less likely to accept its decisions. However, as diffuse support for the Court increased, so did support for the Court’s decisions. This suggests that the public is less accepting of Supreme Court decisions that cite ideologically extreme interests. Next, I address whether these types of citations make the Court’s decision-making appear more political in nature.

²⁵ In the sample 74 respondents stated they did not know their ideological orientation. So as to not lose 74 additional responses, I coded these individuals as moderate and included a dummy variable in the model that indicated which individuals were in the “don’t know” category. The analyses show there is no statistically significance differences in responses between these individuals and those that provided their ideological orientation.

²⁶ The estimates produced by Ordered Logit and Ordinary Least Squares models are very similar. However, OLS allows for a more straightforward interpretation, makes it easier to handle issues with the model, and is more flexible. In addition, research demonstrates the benefits of using OLS over non-linear models (Angrist and Pischke 2009). The results from the Ordered Logit Model can be found in Section A7 of the Appendix.

Table 1. Acceptance of Supreme Court Decisions
Independent Variable

	Model 1
Citation to Ideologically Overt Interest	-.075* (.044)
Respondent Ideology (Conservativism)	-.052*** (.016)
Registered Voter	-.089 (.070)
Age	-.006*** (.002)
Female	-.118** (.044)
Knowledge of the Court	-.138*** (.032)
Diffuse Support	.237*** (.032)
Constant	3.73*** (.202)
N	2,242
R ²	.05

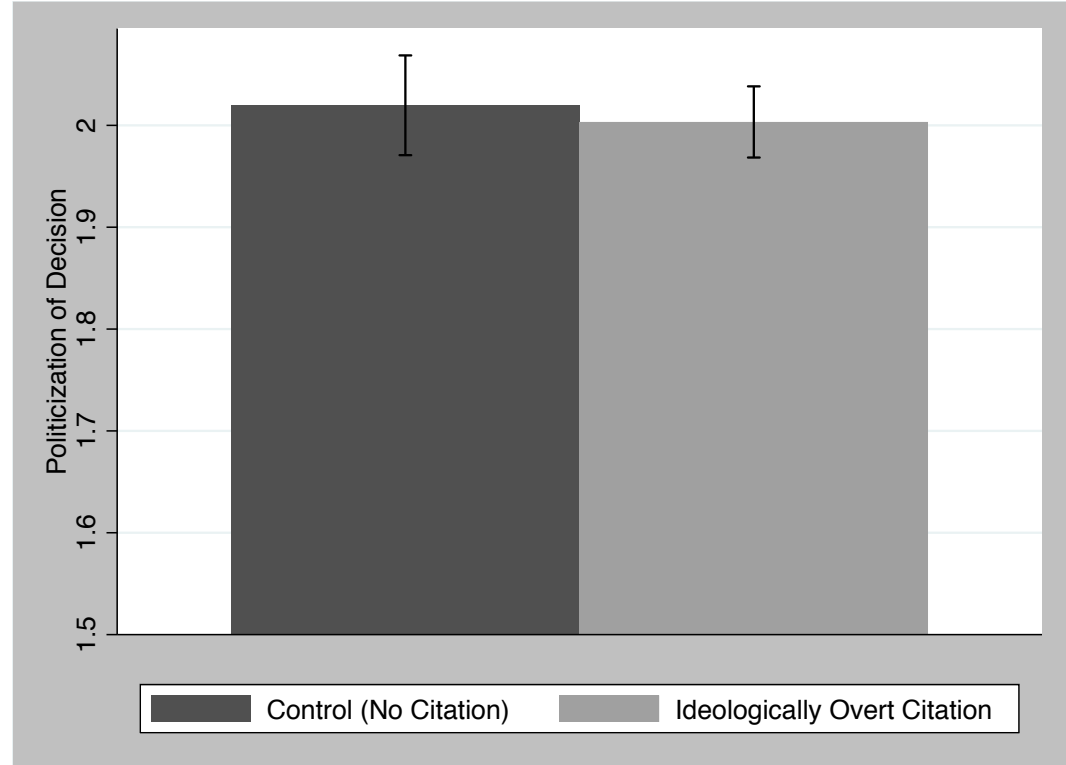
Entries are OLS estimates. Robust standard errors used.

This model includes dummies for race, party affiliation, and education not reported for simplicity. (* $p \leq 0.05$; ** $p \leq 0.01$; *** $p \leq 0.001$ (one-tailed test)).

To test the second Politicizing Hypothesis, that citations to ideologically overt interests will make the Court's decisions appear more politicized, I use the same independent variable (Ideologically Overt) described above but instead my dependent variable captures whether the decision was viewed as politicized. This question asks respondents, "Do you think the Court's decision was based on law or on politics?" Respondents could answer law (1), law and politics (2), or politics (3). To test this hypothesis, I ran a difference of means test which is demonstrated graphically in Figure 3. As evident in the figure there was no statistically significant difference between the treatment of an ideologically overt citation and the control of no citation, suggesting that citations to briefs filed by ideologically overt interests do not make the Court's decisions

appear more politicized.²⁷ This is interesting because while the public reacts negatively to decisions that cite ideologically extreme interests, when asked about it explicitly, they do not claim the Supreme Court’s decision-making was grounded in politics. This speaks to the literature on implicit attitudes towards the Supreme Court (Hansford, Intawan, and Nicholson 2018) and the literature on the Supreme Court as an insulated institution that benefits from high levels of support and “positivity bias” (Gibson 2007; Gibson, Caldeira, and Spence 2003, 2005).

Figure 3: Ideologically Overt Citations and Politicization of SC Decisions

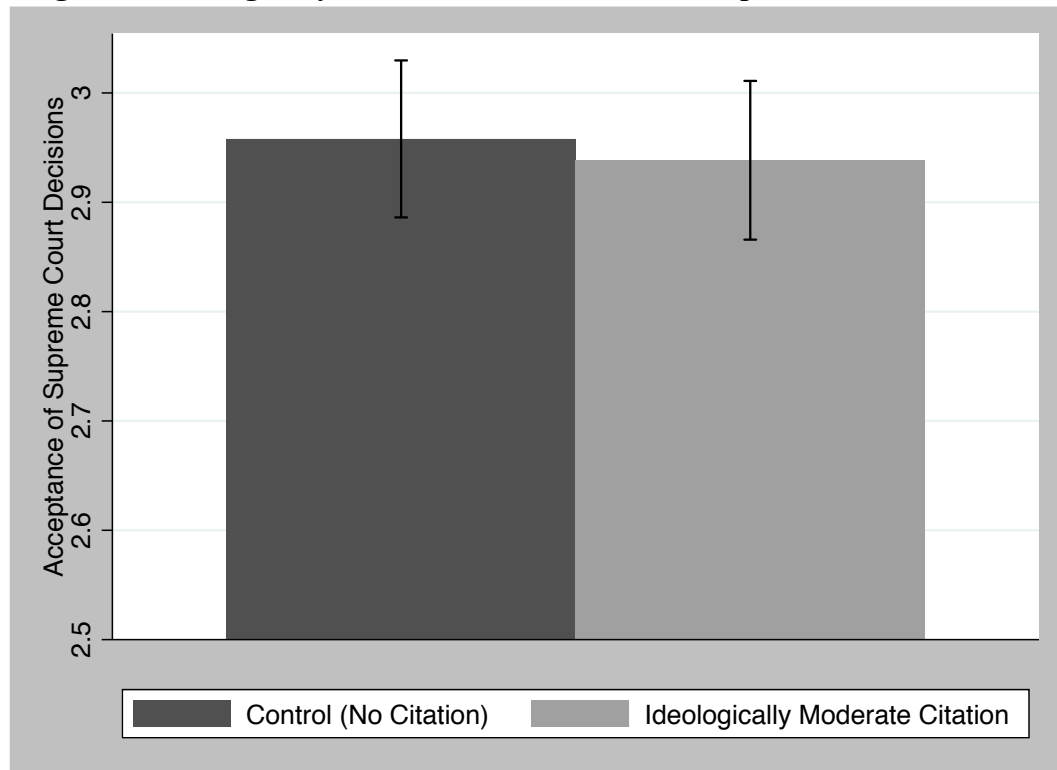


To test the first Legitimizing Hypothesis, that citations to ideologically moderate citations can increase acceptance of Supreme Court decisions, I created a variable called *Ideologically Moderate*, coded “1” if an individual received the American Medical Association as the treatment, regardless of what decision direction they received, and “0” for the control of no citation. A balance test showed that the randomization was effective (the results of this can be found in Section A5 of the Appendix), and as such there are no variables that warrant concerns of balance in the treatment and control groups. Figure 4 below shows the results of this analysis. As evident in the figure there is no statistically significant difference in approval of the Court’s decisions among those who received the treatment of a citation to a moderate interest and those who did not receive a citation. This is evidence that citations to briefs filed by ideologically moderate interest groups

²⁷ These results hold when modeling this relationship controlling for the full demographic variables. This analysis was kept out of the paper for simplicity.

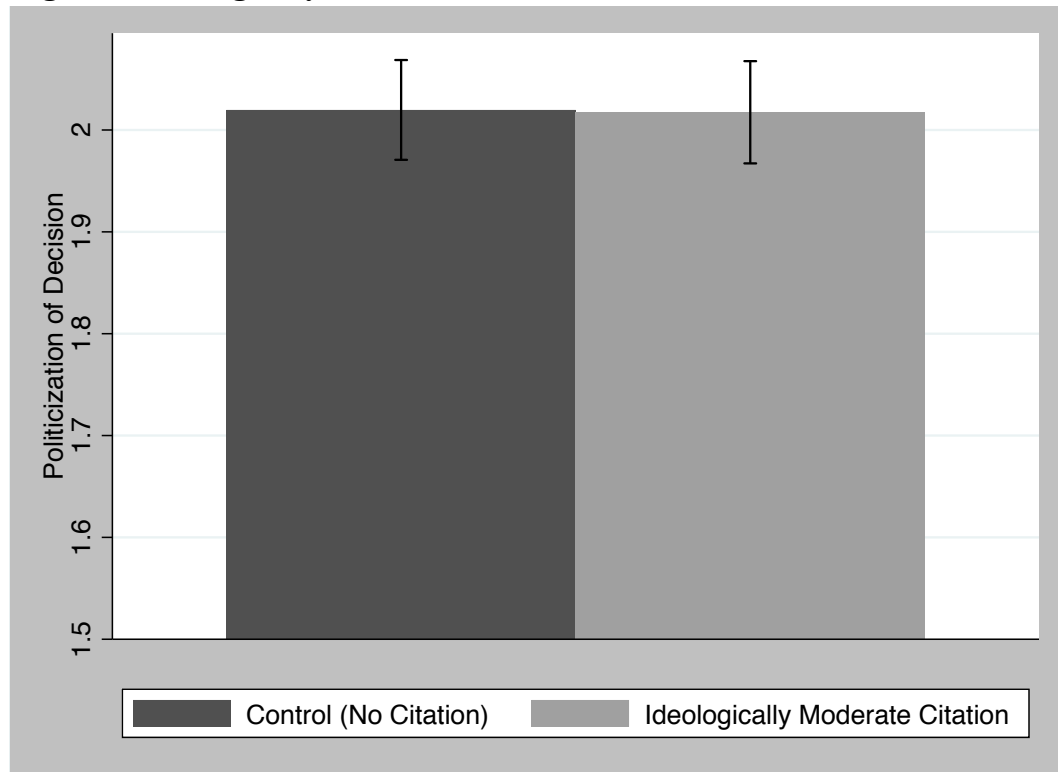
cannot increase support for the Court's decisions. In other words, the justices cannot use citations to moderate interests to confer the legitimacy of its decisions.

Figure 4: Ideologically Moderate Citations and Acceptance of SC Decisions



Next, I test whether decisions that cite briefs filed by ideologically moderate interests can make the Court's decisions appear less politicized (the second Legitimizing Hypothesis). Here I use the same independent variable that compares those who received a citation to the American Medical Association to the control of no citation. The dependent variable is the law or politics question previously described. Figure 5 below shows the results of a difference of means test. As evident in the figure, there is no statistically significant difference between the treatment and control suggesting that citing briefs filed by ideologically moderate interests does not make the Court's decisions appear less politicized. Taken together, these results indicate that there is no utility in citing briefs filed by ideologically moderate interests as they do not increase acceptance of the Court's decisions nor do they make the Court's decision-making appear less political in nature. In other words, these citations do not help the justices garner legitimacy for their decisions.

Figure 5: Ideologically Moderate Citations and Politicization of SC Decisions

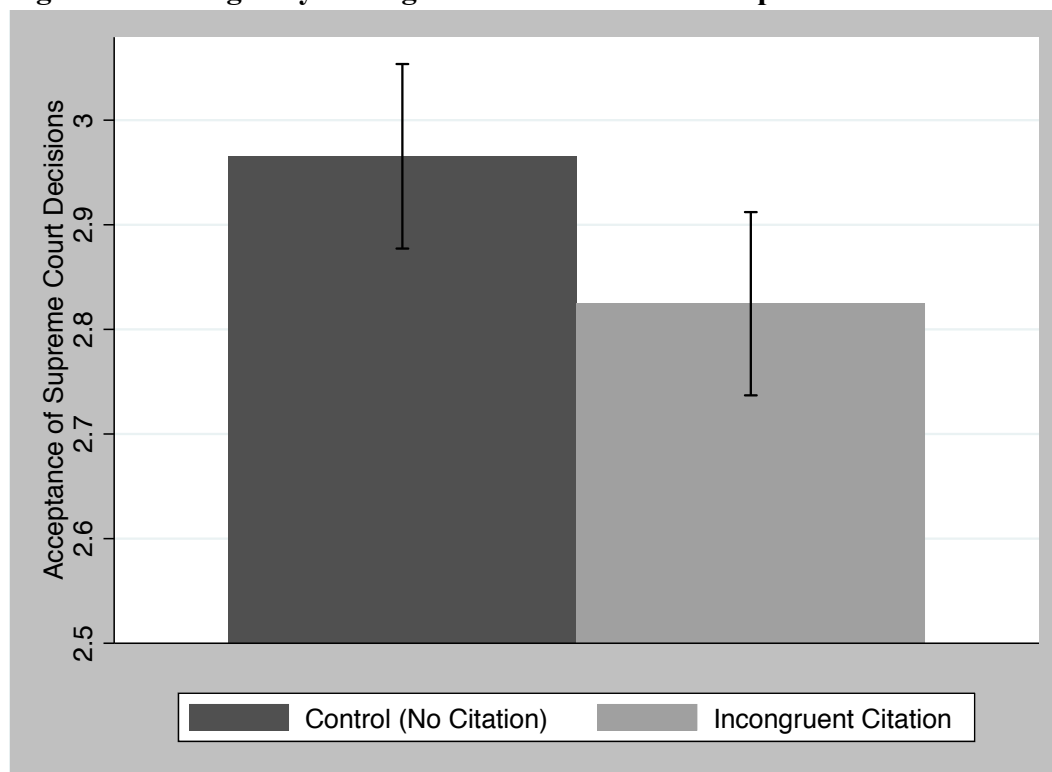


The Role of Citizen Ideology

Next, I test the Compatibility Hypotheses. I first start by testing whether citations to briefs filed by ideologically dissimilar groups can decrease support for the Court's decisions. I start by creating a variable called *Ideologically Incongruent* that is coded "1" if a liberal respondent received a citation to Focus on the Family (the conservative interest) or if a conservative respondent received a citation to the ACLU (the liberal interest) regardless of decision direction and "0" for liberals and conservatives in the control of no citation, regardless of decision direction. Note that this analysis necessarily excludes moderates, as I cannot determine whether the citation was dissimilar from their ideological preferences. The results from a balance test can be found in Section A5 of the Appendix. Figure 6 below shows the results of a difference of means test. As evidenced in the figure, respondents who received a citation to an ideologically incompatible interest were statistically less likely to support the Supreme Court's decision ($p = .012$, one-tailed).²⁸ In other words, for those with ideological preferences, the citation to an interest they disagreed with ideologically was used as a cue to help respondents determine their level of support (or lack thereof) for the policy.

²⁸ These results hold when modeling this relationship controlling for demographic variables. This is left out of the paper for simplicity.

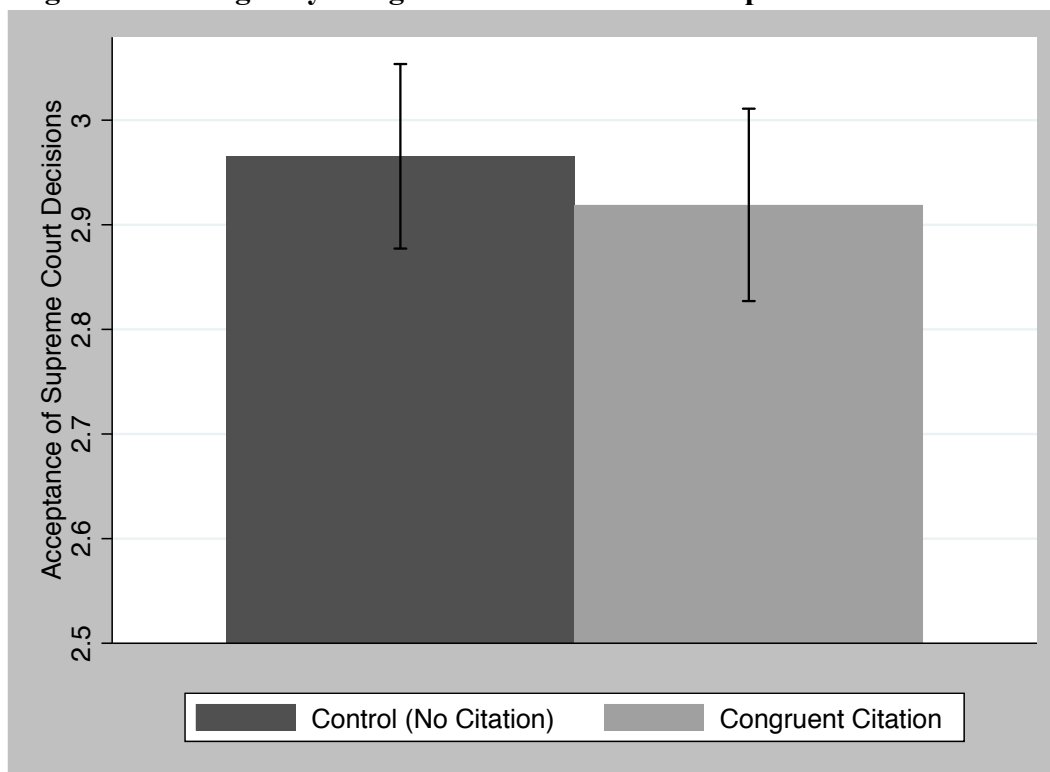
Figure 6: Ideologically Incongruent Citations and Acceptance of SC Decisions



Finally, I test whether citations to briefs filed by ideologically congruent sources can increase support for Supreme Court decisions. I create a variable called *Ideologically Congruent* coded “1” if a liberal respondent received a citation to the ACLU or if a conservative respondent received a citation to Focus on the Family and “0” for liberal and conservative respondents who received the control of no citation. Information on the balance between treatment and control groups can be found in Section A5 of the Appendix.²⁹ Figure 7 graphically portrays a difference of means test. As evident in the figure, there is no statistically significant difference between the treatment and control groups, providing no support for the hypothesis that citations to briefs filed by ideologically compatible interests can increase support for the Court’s decisions.

²⁹ While there is appears to be potential imbalance in the education and diffuse support variables, the results of the subsequent analysis still hold when modeling the relationship and controlling for all demographic variables.

Figure 7: Ideologically Congruent Citations and Acceptance of SC Decisions



Taken together, these results indicate that in certain contexts, the public uses citations to briefs filed by organized interests in Supreme Court opinions as informative source cues. This was primarily the case when respondents were exposed to citations to interests they did not agree with ideologically. These ideological cues help the public make sense of the Supreme Court's complex policies, just as other source cues help them make sense of complex policy decisions in other information environments, such as determining support for ballot propositions (Lupia 1994).

Conclusion

One of the primary objectives of this study was to test whether citations to amicus curiae filers can have implications for public perceptions Supreme Court decisions. Using a survey experiment, I tested whether citations to amicus briefs filed by ideologically moderate interests can increase acceptance of the Supreme Court's decisions (the *Legitimizing Hypotheses*) and whether citations to amicus briefs filed by ideologically overt interests can decrease acceptance (the *Politicizing Hypotheses*). Citations to moderate interests do not appear to increase acceptance of the Supreme Court's decision, nor do these citations make the Court's decisions appear less politicized. My results suggest that while justices might attempt to use extralegal sources to increase acceptance of their decisions, attempts to do so using citations to amicus curiae briefs filed by ideologically moderate interests are not effective.

Citations to briefs filed by ideologically overt interests, however, were shown to decrease support for Supreme Court decisions in the aggregate. However, these types of

citations did not make the Court's decision-making appear more political in nature. This suggests that while the public responds negatively to politics in Supreme Court decisions, the Court maintains its resilience as a non-political entity. This finding is consistent with the existing literature on implicit attitudes towards the Supreme Court. The Court is implicitly viewed as more political than apolitical institutions but less political than Congress (Hansford, Intawan, and Nicholson 2018). In my study, it's possible that the public implicitly responded negatively to decisions that cited ideologically extreme interests (in that they were less accepting of these decisions) but that when asked about it explicitly they did not treat the Court as a political entity.

This study also revealed that the public was less accepting of decisions that cited briefs filed by interests that were ideologically incompatible with their own preferences. This paper brings to light the notion that, in certain contexts, citations to organized interests can work as source cues that shape how the public forms attitudes on these policies and contributes to the existing literature on public perceptions of Supreme Court decisions by analyzing how extralegal justifications can impact support for the Court's policies.

The results of this study hint at some potentially serious real-world implications. One is that the justices might avoid citing briefs filed by ideological interests in situations where they are especially concerned with garnering legitimacy for their decisions, for example, in cases where they are overturning precedent or declaring a law to be unconstitutional. In the same manner, if the Court is deciding a very contentious, salient case and is more closely attuned to public preferences and maintaining its legitimacy, avoiding citations to ideologically overt interests altogether might help garner support for the decision and help protect the justices' image as unbiased, neutral actors.

Another important implication is that while these citations can serve as a useful heuristic for individuals trying to make sense of a particular policy, the public knows very little about organized interests. Using these citations to form policy attitudes can have potentially negative implications if individuals are making incorrect inferences about the ideological affiliation of the group. This can be especially concerning if an interest carries a name that is confusing or perhaps even deceiving in nature. For example, the American Civil Liberties Union is a well-known, ideologically liberal organized interest while the American Civil Rights Union, with a very similar name, is a less-known, ideologically conservative interest. While these citations to briefs filed by organized interests can be useful heuristics, citizens should use caution when inferring the ideological orientation of unfamiliar groups.

Going forward, scholars might also assess whether certain types of amicus filers can confer legitimacy in ways ideologically moderate interests cannot. For example, citations to state or local governments might increase acceptance of Supreme Court decisions. On this same note, given that the U.S. Solicitor General is an incredibly influential filer, and is cited more often than any other interest, scholars could examine whether the public reacts to these citations and whether this varies contingent on the appointing president. In addition, future work can assess how citations to groups can influence acceptance based on non-ideological affiliations and negative affect.

Finally, going forward, scholars can assess whether citations to organized interests in dissenting opinions have any implications for acceptance of the majority

opinion. In other words, can certain citations to information provided by organized interests work to discredit the majority? This past Supreme Court term provided many examples of dissenting opinion authors citing briefs filed by organized interests. For example, Justice Sotomayor referred to a study highlighted in an amicus brief filed by the NAACP to express opposition to the majority's decision to uphold laws that purge voters from the rolls, since these laws disproportionately impact African American voters.³⁰ In addition, Justice Kagan cited an amicus brief filed by the New York City Municipal Labor Committee to show the negative implications the Court's decision in *Janus v. AFSCME* will have on labor negotiations.³¹ As these dissents become more prominent, scholars can determine how citations to briefs filed by organized interests are viewed in this context and the implications this might have on support for the majority opinion.

30 Lopez, German. 2018. "Supreme Court's Conservative Justices Uphold Ohio's Voter Purge System" *Vox*. < <https://www.vox.com/policy-and-politics/2018/6/11/17448742/ohio-voter-purge-supreme-court-ruling> > (Accessed 10 May 2019).

31 Kirby, Jen. 2018. "Elena Kagan's Dissent Trashes Supreme Court as 'black-robed rulers overriding citizens' choices'" *Vox* < <https://www.vox.com/2018/6/27/17510338/supreme-court-kagan-dissent-janus> > (Accessed 10 May 2019).

Appendix Materials

A1: Pretest Information

Participants were randomly assigned to one of two blocks, each containing a total of 12 interests that were also randomly assigned. This included four ideologically conservative interests, four ideologically moderate or apolitical interests, and four ideologically conservative interests. Respondents were shown one interest group at a time and then asked if they had heard of the group, the ideological orientation of the group, and how confident they were in their assessment of the group.

Table A1: Percentage of Respondents That Correctly Identified the Ideological Orientation of the Interest Group

INTEREST NAME	MTurk Sample	Student Sample
<i>American Civil Liberties Union</i>	71.4%	53.3%
AARP	64.3%	65.2%
AFL-CIO	31.6%	27.2%
American Hospital Association	82.6%	89.9%
American Intellectual Property Law Association	75.6%	39.1%
<i>American Medical Association</i>	83.3%	79.4%
American Petroleum Institute	62.5%	40.2%
Americans For Effective Law Enforcement	54.2%	40.2%
Family Research Council	48.8%	13%
Feminist Majority	85.8%	77.8%
<i>Focus on the Family</i>	69%	25.3%
Intellectual Property Owners Association	66.5%	59.6%
NAACP	80%	69.7%
National Assn. of Manufacturers	34%	20.2%
National Assn. of Criminal Defense Lawyers	18.5%	20.7%
National Association of Evangelicals	82.1%	47.8%
National Federation of Independent Businesses	44.5%	44.4%
National League of Cities	77.4%	83.8%
National Organization of Women	72%	76.1%
National School Boards Association	72.6%	59.8%
National Taxpayers Union	47.7%	39.4%
News Media Alliance	52.3%	62.6%
Sierra Club	31.6%	17.2%
Southern Poverty Law Center	56.8%	31.3%

A2: Treatment conditions

Below are the treatment and control conditions used in the study. Treatment conditions only contained one citation. There were 3 decision directions and 4 citation manipulations (including the control of no citation), making for a 3X4 design for a total of 12 cells.

Liberal Decision Direction Treatments:

The U.S. Supreme Court recently decided that federal law requires employers to provide health care insurance that includes coverage for pregnancy and childbirth. Referring to arguments made in a brief filed by the **American Civil Liberties Union/American Medical Association/Focus on the Family**, the Supreme Court's majority opinion carefully weighed the economic and health care burdens faced by employees.

Liberal Decision Direction Control:

The U.S. Supreme Court recently decided that federal law requires employers to provide health care insurance that includes coverage for pregnancy and childbirth. The Supreme Court's majority opinion carefully weighed the economic and health care burdens faced by employees.

Conservative Decision Direction Treatments:

The U.S. Supreme Court recently decided that federal law does not require employers to provide health care insurance that includes coverage for pregnancy and childbirth. Referring to arguments made in a brief filed by **Focus on the Family/American Medical Association/American Civil Liberties Union**, the Supreme Court's majority opinion carefully weighed the economic and health care burdens faced by employers.

Conservative Decision Direction Control:

The U.S. Supreme Court recently decided that federal law does not require employers to provide health care insurance that includes coverage for pregnancy and childbirth. The Supreme Court's majority opinion carefully weighed the economic and health care burdens faced by employers.

Moderate Decision Direction Treatments:

The U.S. Supreme Court recently decided that federal law requires some employers to provide health care insurance that includes coverage for pregnancy and childbirth. Referring to arguments made in a brief filed by the **American Medical Association/American Civil Liberties Union/Focus on the family**, the Supreme Court's majority opinion carefully weighed the economic and health care burdens faced by both employees and employers.

Moderate Decision Direction Control:

The U.S. Supreme Court recently decided that federal law requires some employers to provide health care insurance that includes coverage for pregnancy and childbirth. The Supreme Court's majority opinion carefully weighed the economic and health care burdens faced by both employees and employers.

A3: Descriptive Statistics

Age: Mean of 45.9, Median 48. Ranges from 18 - 83

Race: (n, %)

African American: 390, 13%
Asian/Pacific Islander: 157, 5.24%
Caucasian: 2,062, 68.76%
Hispanic: 304, 10.14%
Native American: 35, 1.2%
Other: 42, 1.4%
Prefer not to say: 9, .3%

Education (n, %)

Did not graduate high school: (46, 1.5%)
High school grad: (660, 22%)
Some College: (731, 24.4%)
AA Degree: (385, 12.8%)
BA Degree: (826, 27.6%)
Post Grad Degree: (350, 11.7%)

Gender (n, %)

Male: (1,466; 48.2%)
Female: (1,549; 52.7%)
Self-Identify: (3, .1%)
Prefer not to say: (1, .03%)

Voter Registration (n, %)

Yes: (2,784; 92.8%)
No: (197, 6.6%)
Don't know: (18, .6%)

Party Identification (includes leaners; n, %)

Republican: (1,214; 40.5%)
Democrat: (1340; 44.7%)
True Independent: (401; 13.4%)
Other: (44; 1.5%)

Political Knowledge (number of questions correct; n, %)

Zero: (226, 7.5%)
One: (333, 11.1%)
Two: (492, 16.4%)
Three: (941, 32.4%)
Four: (1,007; 33.6%)

Ideology (n, %)

Extremely Liberal (216, 7.2%)
Liberal (473, 15.8%)
Slightly Liberal (304, 10.1%)
Moderate (864, 28.8%)
Slightly Conservative (321, 10.7%)
Conservative (513, 17.1%)
Extremely Conservative (234, 7.8%)
Don't know (74, 2.5%)

A4: Question Wording

Dependent Variables:

Acceptance of the Decision

Do you accept or reject the Court's decision? That is, do you think that the decision ought to be accepted and considered to be the final word on the matter or that there ought to be an effort to challenge the decision and get it changed?

Strongly accept
Somewhat accept
Somewhat reject
Strongly reject

Politicization of the Decision

Do you think the Court's decision was based on law or on politics?

Law
Both law and politics
Politics

Questions Measuring Diffuse Support (Gibson, Caldeira, and Spence 2003, 2005):

The right of the Supreme Court to decide certain types of controversial issues should be reduced.

Agree strongly
Agree somewhat
Neither agree nor disagree
Disagree somewhat
Disagree strongly

If the U.S. Supreme Court started making a lot of decisions that most people disagree with, it might be better to do away with the Supreme Court altogether.

Agree strongly
Agree somewhat
Neither agree nor disagree
Disagree somewhat
Disagree strongly

The U.S. Supreme Court should have the right to say what the Constitution means, even when the majority of the people disagree with the Court's decision.

Agree strongly

Agree somewhat

Neither agree nor disagree

Disagree somewhat

Disagree strongly

Knowledge of the Court Questions:

Do you happen to know who the current Supreme Court Chief Justice is?

Mitch McConnell

William Gates

John Roberts

Clarence Thomas

Don't know

How are Supreme Court Justices selected?

Elected by the public every four years

Appointed by a nonpartisan commission on the judiciary

Appointed by the president, with the consent of the Senate

Elected by current federal judges

Don't know

Kennedy Retirement Question:

Do you happen to know which Supreme Court justice recently announced his retirement?

Clarence Thomas

John Roberts

Anthony Kennedy

Neil Gorsuch

Don't know

A5: Balance Tests

Table A2: Balance Test for Ideologically Overt Citations

Variable	P-value
Registered Voter	.414
Age	.427
Race (Asian or Pacific Islander)	.133
Race (Caucasian)	.417
Race (Hispanic)	.102
Race (Native American)	.181
Race (Other)	.947

Education (High School Grad)	.923
Education (Some College, no degree)	.061
Education (Associate/Junior College Degree)	.919
Education (Bachelor's Degree)	.388
Education (Post Graduate Degree)	.243
Female	.946
Ideology	.561
Party (Republican)	.234
Party (Democrat)	.724
Court Knowledge	.520
Diffuse Support	.264

Table A3: Balance Test for Ideologically Moderate Citations

Variable	P-value
Registered Voter	.687
Age	.551
Race (Asian or Pacific Islander)	.558
Race (Caucasian)	.740
Race (Hispanic)	.501
Race (Native American)	.544
Race (Other)	.867
Education (High School Grad)	.625
Education (Some College, no degree)	.456
Education (Associate/Junior College Degree)	.958
Education (Bachelor's Degree)	.840
Education (Post Graduate Degree)	.907
Female	.415
Ideology	.712
Party (Republican)	.290
Party (Democrat)	.827
Court Knowledge	.563
Diffuse Support	.829

Table A4:: Balance Test for Incongruent Citations

Variable	P-value
Registered Voter	.111
Age	.446
Race (Asian or Pacific Islander)	.322
Race (Caucasian)	.716
Race (Hispanic)	.170
Race (Native American)	.350
Race (Other)	.593
Education (High School Grad)	.094
Education (Some College, no degree)	.130
Education (Associate/Junior College Degree)	.698
Education (Bachelor's Degree)	.978
Education (Post Graduate Degree)	.934
Female	.381
Ideology	.529
Party (Republican)	.982
Party (Democrat)	1.00
Court Knowledge	.719
Diffuse Support	.890

Table A5: Balance Test for Congruent Citations

Variable	P-value
Registered Voter	.451
Age	.632
Race (Asian or Pacific Islander)	.422
Race (Caucasian)	.386
Race (Hispanic)	.688
Race (Native American)	.917
Race (Other)	.501
Education (High School Grad)	.865
Education (Some College, no degree)	.065
Education (Associate/Junior College Degree)	.545
Education (Bachelor's Degree)	.987
Education (Post Graduate Degree)	.427
Female	.543
Ideology	.707
Party (Republican)	.657
Party (Democrat)	.606
Court Knowledge	.264
Diffuse Support	.083

A6: Model Specification for Ideologically Overt Citations (Table 1)

Heteroskedasticity

A Breusch-Pagan test returned a χ^2 value of 25.92 for the ideologically overt citations model, suggesting heteroskedasticity was a problem. I therefore used Robust Standard Errors.

Multicollinearity

To establish whether multicollinearity was an issue in this model, 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 table below.

Table A6: Variance Inflation Factor Test

Variable	VIF	1/VIF
Ideologically Overt Cite	1.01	.992
Respondent Ideology	1.70	.589
Registered Voter	1.07	.930
Age	1.27	.789
Female	1.12	.896
Party ID (Republican)	2.48	.403
Party ID (Democrat)	2.60	.385
Knowledge of the Court	1.31	.761
Diffuse Support	1.23	.813

This includes dummies for race and education not listed for simplicity.

A7: Ordered Logit Estimates**Table A7. Acceptance of Supreme Court Decisions**

Independent Variable	Model 1
Citation to Ideologically Overt Interest	-.153* (.082)
Respondent Ideology (Conservatism)	-.117*** (.030)
Registered Voter	-.085 (.149)
Age	-.010** (.003)
Female	-.236** (.082)
Knowledge of the Court	-.249*** (.059)
Diffuse Support	.443*** (.058)
N	2,242
Log Likelihood	-2829

Ordered Logit. This model includes dummies for race, party affiliation, and education not reported for simplicity. (* $p \leq 0.05$; ** $p \leq 0.01$; *** $p \leq 0.001$ (one-tailed test).

A8: General Acceptance of Decisions

Below is a breakdown of acceptance of the three decision directions for those in the control condition. This provides an understanding of perceptions of the decision in the absence of an interest group citation treatment. The model below includes the full set of demographic control variables (indicators for race are included in the model but are left out of the table for simplicity). Note that an increase in conservatism leads to increased support for the conservative condition, and a decrease in support for the liberal condition. In other words, conservatives are more accepting of the conservative decision, while liberals are less accepting, and liberals are more accepting of the liberal decision, while conservatives are less accepting, as anticipated. Respondent ideology does not appear to influence support for the moderate condition.

Due to the recent current events of the Supreme Court vacancy, I asked respondents if they could identify which justice recently announced his retirement from the Court. This was meant to rule out the possibility that external factors were influencing evaluations of the decision in this survey. As evident in the table below, there is no statistically significant difference between those that could identify Kennedy as the retiring justice and those that could not.

Table A8. Acceptance of Supreme Court's Decision

Independent Variable	Moderate Control	Conservative Control	Liberal Control
Education	.070* (.041)	.087 (.056)	.028 (.035)
Female	.179 (.11)	-.521*** (.166)	.000 (.101)
Knowledge of the Court	-.099 (.090)	-.247** (.116)	-.309*** (.082)
Respondent Ideology	-.027 (.041)	.099* (.056)	-.099*** (.033)
Republican (Includes Leaners)	.154 (.159)	.059 (.230)	-.219 (.179)
Democrat (Includes Leaners)	.425** (.173)	-.185 (.238)	-.093 (.172)
Registered Voter	.293 (.223)	.194 (.301)	-.070 (.168)
Aware of Kennedy Retirement	-.018 (.056)	-.008 (.065)	.185 (.114)
Diffuse Support	.142* (.083)	.153 (.111)	.114 (.072)
Constant	2.41*** (.408)	2.05*** (.597)	4.10*** (.343)
N	260	226	274
R ²	.09	.17	.14

Entries are OLS estimates. * p < 0.10; ** p < 0.05; ***p < .01 (two-tailed test).

Conclusion

In this dissertation I identified a puzzle whereby Supreme Court justices often borrow the precise language from amicus curiae briefs in their majority opinions, but much less often decide to formally cite the interests that file. I theorized that borrowing language from an amicus brief and citing it are two distinct uses, done for different reasons, with different implications. Borrowing language is unique in that it is discreet in nature and is unlikely to be revealed to the reader. Therefore, the justices have leeway when it comes to borrowed language as there should be limited influence on perceptions of the Court and its decisions (i.e. the Court's legitimacy). Citing amicus curiae briefs, however, is much different in that it is clearly revealed to the reader. As such, there can be implications for the Court's legitimacy depending on what types of interests the justices cite.

I tested the implications of this theory in three empirical chapters. In the first empirical chapter I addressed the case level considerations that prompt the use of amicus briefs in majority opinions. I hypothesized that the justices would borrow language when in need of information, such as in complex cases, but that they would cite the briefs when they needed to further legitimize their decisions, such as in cases decided by a 5-4 margin. I tested these hypotheses using data on over 1,600 cases from the 1988-2008 terms and found that the justices do borrow more language when they need information but that they do not cite more often when they need to legitimize their decisions.

In the second empirical chapter I sought to address what it was about a particular brief that would prompt the justices to borrow language from or cite it. I hypothesized that the justices would borrow more language from briefs filed by ideologically congruent sources, since this type of use goes unnoticed, but that they would refrain from citing ideological interests since citations are evident in the opinion. I used data from nearly 400 cases from the 1988 to 2008 terms and found that the justices do borrow more language from ideologically congruent interests, but it isn't clear that they explicitly avoid citing briefs filed by ideologically extreme interests.

My theory rests on the assumption that citations to amicus briefs have implications for public perceptions of the Supreme Court's decisions. I confirmed this empirically by implementing a survey experiment with nearly 3,000 respondents. I hypothesized that citations to ideologically moderate interests would increase acceptance of the Court's decisions. I found that this was not the case. I next hypothesized that citations to ideologically extreme interests would decrease acceptance, and this was evident in my findings.

There are three big takeaways that I would like to highlight from this dissertation. The first is that my research revealed that the justices rely on amicus curiae briefs for their informational value and that they quite often rely on their language to craft their majority opinions. As such, the briefs play an essential role in shaping the Supreme Court's policies. While the revelation that the justices rely on amicus briefs to craft their opinions is not new (Corley 2008), this study introduced a theory to explain both borrowed language and formal citations and revealed that the justices borrow language from amicus briefs in cases where they need information and that citations to amicus briefs are not used to further legitimize Supreme Court decisions using data from 20 Supreme Court terms. This reveals just how widespread this amicus influence is, and

when we consider that organized interests are the ones who most commonly file briefs it reflects the serious extent of their influence. For better or worse, non-legal, highly political actors are influencing the law at the nation's highest court.

The second is that this project revealed that Supreme Court justices engage in ideological behavior behind the scenes when it is likely to go unnoticed by external audiences. The justices borrow more language from ideologically congruent interests, since this type of use is not revealed. However, they are not more likely to formally cite ideologically congruent interests, yet they do not avoid citing ideologically overt interests. Further, the justices cite less often in salient cases, but this is not the case when it comes to borrowing language where case salience does not play a role. In addition, the justices borrowed more language from frequent filers but were less likely to formally cite them. This helps to confirm that borrowing language and citing amicus briefs are distinct phenomena and furthers our understanding of the justices as both legal and political actors.

Finally, my survey experiment reveals that, in terms of legitimacy, there is not much to be gained from formally citing amicus curiae briefs. Citations to briefs filed by ideologically moderate interests did not increase acceptance of the Court's decisions. Citations to briefs filed by ideologically extreme interests decreased acceptance of the Supreme Court's decisions and the public was less accepting of citations to ideologically incompatible interests but was not more accepting of citations to ideologically congruent interests. These findings that suggest there is limited utility to citing these briefs, coupled with research that finds citations to amicus curiae briefs have increased over time (Franze and Reeves Anderson 2015; Kearney and Merrill 2000) bring to light a new and interesting puzzle for scholars to explore. If citing is not useful for increasing acceptance among external audiences, why do the justices engage in this behavior? What is to be gained?

Another interesting finding from this survey experiment was that while the public responded negatively to citations to ideologically extreme interests in that they were less accepting of these decisions, when asked about it explicitly they were not more inclined to say the decision was grounded more in politics than law, suggesting that while the public does not take well to politics in Supreme Court decisions, they do not view the justices as political decision-makers. This is comports with the existing literature on implicit attitudes towards the Court that shows the Court is viewed as more political than apolitical institutions but less political than Congress (Hansford, Intawan, Nicholson 2018) and the literature that suggests the Supreme Court benefits from a "positivity bias" (Gibson, Caldeira, and Spence 2003, 2005). Future work can explore public perceptions of borrowed language. It's possible that the public doesn't view Supreme Court decisions that cite amicus briefs as being more politicized because this type of use is evident and straightforward, but if they learned the justices were discreetly borrowing language from ideological briefs without revealing this explicitly they might view the Court as more political in nature.

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