

JUDGES AND FRIENDS: THE INFLUENCE OF AMICI CURIAE ON U.S. COURT OF APPEALS JUDGES*

Paul M. Collins, Jr.
University of North Texas
pmcollins@unt.edu

Wendy L. Martinek
Binghamton University
martinek@binghamton.edu

ABSTRACT

We contribute to the literatures on political psychology, interest groups, and judicial decision making by examining whether ideology mediates the effect of amicus curiae briefs on decision making in the U.S. courts of appeals. We argue that amicus briefs provide judges with information that influences their voting behavior. Using a dataset specifically collected for this project, we find that amicus briefs influence the decision making of appeals court judges, contingent on a judge's ideology. Liberal amicus briefs increase the chances that moderately conservative and conservative judges will cast a liberal vote. Conservative amicus briefs enhance the probability that moderate judges and conservative judges will cast a conservative vote. We conclude that this form of interest group lobbying influences judicial decision making and that understanding the efficacy of this strategy requires an appreciation of how political actors process persuasive information.

PAPER PREPARED FOR DELIVERY AT THE 69TH ANNUAL MEETING OF THE MIDWEST POLITICAL
SCIENCE ASSOCIATION, CHICAGO, ILLINOIS, MARCH 31-APRIL 3, 2011

* We are grateful to Susan Haire, Ashlyn Kuersten, and Steve Wasby, as well as the members of the Comparative-American Workshop at Binghamton University, for their insights regarding this project. Collins thanks the University of North Texas for a research grant that partially funded the data collection effort.

“[T]he authoritative allocation of values for a society” (Easton 1953: 129) is determined through a process of negotiation, bargaining, and (grudging) compromise. Infused throughout that process is the art of persuasion: “Part of politics is convincing people of what they want” (Brysk 1995: 564). The persuasive power of an argument, however, is contingent upon much more than the mere provision of information and evidence. Rhetorical skill matters, too, of course. But regardless of the substance or the style of a political argument, its persuasive value is structured by the cognitive processes of the individual or individuals who are the targets of persuasion. In other words, human beings have well-established cognitive biases that condition their receptiveness to and processing of information and arguments, including those of a political nature (e.g., Nelson and Grant 2005; Taber et al. 2009). It is not merely ordinary citizens who are subject to these cognitive biases; political elites (including judges), too, are subject to them (e.g., Guthrie et al. 2002).¹

With regard to appellate court judges, the most obvious source of (potential or actual) persuasive arguments is the briefs filed by the direct litigants in a case. They are intended, by definition, to provide the most persuasive arguments the appellant and appellees (and their attorneys) can muster to persuade the judges to find in their favor. The *amicus curiae* brief, however, is another key source of persuasive argumentation. Ostensibly filed to provide neutral expertise and information to the courts by third parties, *amicus curiae* briefs are now without question instruments of advocacy (Krislov 1963). Though the extant scholarship devoted to *amici* in the courts is capacious (e.g., Caldeira and Wright 1988; Epstein and Rowland 1991), with rare exceptions (e.g., Collins 2008a), it neglects to consider the cognitive processes that are at play in persuasive argumentation. Here, our purpose is to pay explicit attention to those cognitive processes and, in particular, to the potential mediating effect of ideology on the influence of *amicus curiae* briefs. We

¹ But see Schauer (2010) who argues that – while judges may be subject to the same cognitive liabilities and deficiencies as other humans – understanding the cognitive processes associated with decision making in the legal context requires that attention be paid to the psychology of judging and not simply the psychology of decision making.

do so in the context of the U.S. courts of appeals, the major intermediate appellate courts in the federal system.²

The analysis presented here has three primary motivations. First, it contributes to our understanding of interest group influence on American policy. While scholars have made major inroads into explaining organizational participation and impact in the legislative, executive, and electoral arenas (e.g., Baumgartner et al. 2009; Kollman 1998; McCubbins and Schwartz 1984; Wright 1990), our comprehension of group influence on the judiciary is much more limited. Moreover, when scholars have turned their attention to interest groups and the courts, the most common focus has been on amicus curiae participation in the U.S. Supreme Court (e.g., Caldeira and Wright 1988; Collins 2008a; Hansford 2004).³ While we do not deny the importance of investigating the role of organized interests in the Supreme Court, the virtually myopic focus on that institution has stunted the growth of knowledge regarding this most important form of interest group lobbying.⁴ Moreover, because, in sheer numbers, the majority of amicus participation in the federal judiciary occurs in the U.S. courts of appeals, and not the Supreme Court (Collins and Martinek 2010; Martinek 2006), it is plainly evident that groups view the courts of appeals as significant policy making institutions in their own right.⁵

² The courts of appeals are arranged geographically by circuit, with each circuit encompassing several states and serving in a supervisory capacity over all federal courts within their respective jurisdiction. They are “the appellate workhorses of the federal judiciary” (Martinek 2008).

³ The amicus curiae brief is certainly not the only tool at the disposal of interest groups seeking to influence the judiciary. Groups can and do file test cases as well as sponsor cases initiated by other litigants (Wasby 1995). Further, consistent with Peltason’s observation that “the decision as to who will make the decisions affects what decisions will be made” (1955: 29), groups can and do attempt to influence who ascends to the bench (e.g., Scherer 2005; Scherer, Bartels, and Steigerwalt 2008). Nonetheless, amicus curiae briefs arguably loom largest in the arsenal of interest group tools for influencing the courts.

⁴ In this regard, scholars must choose between the Scylla of easier access to information but about an atypical institution and the Charybdis of more difficult access to information but about institutions from which it is easier to generalize.

⁵ This view is reflected in the increasing engagement with judicial selection politics on the part of interest groups (Scherer 2005) and should not be surprising given the tremendous policy making ability possessed by these courts (see, e.g., Klein 2002).

Second, analyzing the influence of amicus curiae briefs on court of appeals decision making informs our understanding of how information shapes the decisions of political actors. Traditionally, scholars analyzing how political actors respond to persuasive information, such as interest group lobbying, have explored the effect of that information, controlling for an actor's political ideology (e.g., Caldeira and Wright 1988; Collins 2007; Collins and Martinek 2010; Kearney and Merrill 2000; Wright 1990). Here, we take a different approach by investigating how the influence of political information might be mediated by an actor's ideology. More specifically, we seek to determine whether an actor's response to persuasive information is conditional on whether that information is consistent with the actor's ideological orientation. While our empirical test of this possibility is in the judicial arena, this approach has broad implications for our grasp of how political actors process information that advocates for a particular outcome.

Finally, this research contributes to our understanding of both judicial choice and political psychology. While social psychology informed many of the early studies of judicial decision making (e.g., Frank 1930 [1963]; Schubert 1965), this approach fell out of favor as scholars increasingly turned to (non-psychological) strategic theories of judging (e.g., Bailey, Kamoie, and Maltzman 2005; Epstein et al. 2007; George 1999; Giles, Walker, and Zorn 2006; Haire, Lindquist, and Songer 2003; Hettinger, Lindquist, and Martinek 2006). Yet, as recent research involving the psychology of judging reveals, much can be learned about both judicial politics and social psychology by adopting a motivational framework (e.g., Baum 2006; Braman 2009; Collins 2008a; Wrightsman 2006).⁶ We add to this literature by investigating whether court of appeals judges engage in motivated reasoning with respect to the means by which they process information contained in amicus briefs. In so doing, we provide fresh insight into the ability of social psychology to explain the behavior of elite decision makers, while at the same time enhancing our understanding of court of appeals decision making.

⁶ For a consideration of the wide-ranging potential of psychological frameworks for understanding judicial decision making, see the various entries in Klein and Mitchell's (2010) recent edited volume.

THE INFLUENCE OF AMICI CURIAE

A goodly number of studies that take amici curiae as their focus consider the choice of interest groups to file these briefs (e.g., Hansford 2004; Martinek 2006). Another non-trivial number of studies investigate how amici contribute to judicial agenda setting (Caldeira and Wright 1988; McGuire and Caldeira 1993) and yet another subset of the scholarship regarding amicus curiae briefs investigates the content of amicus briefs (e.g., Spriggs and Wahlbeck 1997). However, the bulk of the political science literature devoted to amicus curiae briefs is directed at better understanding the success and failure of amici in achieving their preferred outcomes (e.g., Epstein and Rowland 1991; Kearney and Merrill 2000; Songer and Kuersten 1995; Songer et al. 2000; Songer and Sheehan 1993). This is a sensible focus for two reasons. First, courts (and the political systems of which they are a part) are key to “the authoritative allocation of values” (Easton 1953: 129). That “allocation” virtually necessitates that some parties win while others lose. To be sure, there is considerable nuance with regard to what constitutes winning and losing in the context of a court case.⁷ Nonetheless, there are winners and losers. Hence, determining whether amicus curiae briefs contribute to case outcomes in court is a natural reflection of political scientists’ interests in the policy process. And, second, the extent to which interest groups – through the amicus curiae briefs they file – are able to influence outcomes in the courts has implications for understanding the permeability of the courts to elite versus plural interests (Collins and Solowiej 2007) and democratic influences (e.g., Collins 2008a).

Although the substantive focus on the efficacy of amici curiae in securing their preferred outcomes is understandable, the absence of attention to the mechanism by which amici may

⁷ Further, interest groups participating as amici may well see a “loss” in the instant case as a “win” in terms of a long-term strategy (Tushnet 1987) or as useful for purposes of organizational maintenance (Moe 1985). And, of course, judges and courts have tools they can deploy to blur and soften the sharp edge between black and white (Lindquist, Martinek, and Hettinger 2007).

persuade judges to render favorable decisions is unfortunate. It is unfortunate because it means that, while we can document any empirical regularity (i.e., the extent to which amici are successful or not), an explanation for that empirical regularity eludes us. There is, however, a rich literature in psychology devoted to persuasion that can be of use in this regard. Models of persuasion generally fall into one of two types: systematic information processing or heuristic information processing.⁸ Models of persuasion that rely on systematic information processing see the targets of persuasion as active participants in the receipt and processing of messages. Building directly on the pioneering work of Hovland (e.g., Hovland, Janis, and Kelley 1953) and the Yale Approach,⁹ such models assume “that recipients of persuasive messages engage in a considerable amount of information processing in deciding whether to accept a message’s overall position; that is, people are often assumed to attend to, comprehend, and cognitively elaborate upon persuasive argumentation, and to think in some depth about the issue discussed in the persuasive message” [citations omitted] (Chaiken 1987: 3).¹⁰ A prominent variant of the systematic information processing framework is the motivated reasoning model, in which individuals’ reasoning processes are biased by directional goals (Kunda 1990: 481). As a result: “People are more likely to arrive at those conclusions that they want to arrive at [*sic*]” (Kunda 1990: 27).¹¹

The heuristic information processing model (Chaiken 1980, 1987), in contrast, conceptualizes individuals as being cognitive slackers (or misers) when it comes to evaluating the validity of a persuasive message:

⁸ Generally speaking, this distinction matches the distinction between central and peripheral routes to persuasion (see, e.g., Petty and Cacioppo 1984).

⁹ Carl Hovland led efforts at the Yale Communication and Attitude Change Program to better understand wartime propaganda. His work focused primarily on attitude formation and attitude change as part of a sequence leading from the presentation of a message intended to persuade to action on the part of the target of the message.

¹⁰ Models of persuasion of this type comport with idealized notions of the democratic citizen who carefully assesses candidates, parties, and policies when casting a vote.

¹¹ Alternatively, individuals may also be said to be engaging in motivated reasoning if they are motivated to arrive at accurate conclusions (rather than directional goals) (Kunda 1990: 3-5; Bramen and Nelson 2007: 941-942).

According to [the heuristic persuasion model], people exert little cognitive effort in judging the validity of a persuasive message and, instead, may base their agreement with a message on a rather superficial assessment of a variety of extrinsic persuasion cues such as surface or structural characteristics of the message itself (e.g., its length or *number of arguments*), communicator characteristics (e.g., expertise, likeability, physical attractiveness), and audience characteristics (e.g., positive or negative audience reactions to the message) [emphasis added] (Chaiken 1980: 3).

In short, heuristic models emphasize the reliance on decision rules (i.e., rules of thumb) that permit individuals to make quick assessments of persuasive argumentation rather than requiring detailed and involved processing of that argumentation. In both motivated reasoning and heuristic accounts of persuasion, recipients of persuasive messages want to evaluate the validity of those messages (Chaiken 1980: 752). The difference between the two lies in the mechanism for evaluation, with the former requiring much greater effort than the latter.

In the context of the persuasion by amici curiae, the motivated reasoning and heuristic processing models imply different empirical expectations as to the influence of amicus briefs on judicial voting behavior. The motivated reasoning framework suggests that the effect of amicus briefs should be conditional on the ideology of the judges. In this account, amicus curiae briefs must be evaluated as they relate to the directional goals (read: ideological goals) judges possess. Given this, the expectation is that an increasing number of amicus briefs that mesh with a judge's ideology will enhance the extent to which that judge relies on his or her ideology in voting (e.g., Collins 2008a: 93). Such is the case because ideologically-congruent amicus briefs may motivate judges to develop thoughts, consciously or not, favorable to their ideological orientations. Moreover, in engaging in this type of motivated reasoning, it is expected that judges will accept persuasion that is consistent with their preferences as valid, while discounting or altogether ignoring persuasion inconsistent with

their preferences. Thus, the motivated reasoning hypotheses suggests that conservative [liberal] judges will vote more conservatively [liberally] given an increasing number of conservative [liberal] amicus briefs. Conversely, conservative [liberal] judges should not respond to liberal [conservative] amicus briefs, since this perspective suggests that they will view counter-attitudinal persuasion as weak or inapplicable (e.g., Lord, Ross, and Lepper 1979).

In contrast, the heuristic information processing framework suggests that the effect of amicus briefs should not be mediated by ideology. Rather, the key heuristic is the number of amicus curiae briefs supporting the conservative or liberal positions. When an increasing number of conservative [liberal] amicus briefs are present in a case, the expectation is that the likelihood that a judge will cast a conservative [liberal] vote will increase, regardless of the judge's ideology. Under the heuristic processing model, amicus briefs serve to strengthen the validity of a particular line of argumentation. Cueing off of this simple more-is-better heuristic, judges should be more likely to view the position supported by an increasing number of amicus briefs as especially credible. For example, compared to a situation in which one amicus brief is filed in support of the conservative position, in a situation in which five amicus briefs advocate for the conservative position, a judge should be more likely to cast a conservative vote. To be sure, there is substantial evidence that decision makers employ the more-is-better heuristic, ranging from investigations of the U.S. Supreme Court (e.g., Caldeira and Wright 1988; Collins 2008a) to the analysis of jury trials (e.g., Calder, Insko, and Yandell 1974) to the study of everyday citizens (e.g., Chaiken 1980). Applying these findings to interest groups in the courts of appeals, the heuristic processing model suggests that ideology will not mediate the influence of amicus curiae briefs. Rather, it should be a simple matter of the number of arguments supporting a particular position (represented by the number of amicus curiae briefs) that influence judicial choice. Subsequently, we outline our empirical strategy

for assessing the contrasting empirical expectations associated with the alternative mechanisms of persuasion that underlie the motivated reasoning and heuristic information processing frameworks.

DATA AND METHODS

In order to determine whether and, more importantly, how amicus curiae briefs influence the decision making of court of appeals judges, we began with data from Kuersten and Haire's (2007) *Update to the Appeals Court Data Base (1997–2002)*,¹² coupled with original data on amicus curiae briefs collected specifically for this project. The Kuersten and Haire database contains information on a random sample of 30 published¹³ court of appeals cases per year for each of the courts of appeals, excluding the Federal Circuit.¹⁴ Because we are interested in examining whether amicus briefs shape decision making at the individual level (Giles and Zorn 2000), we transformed this database such that the judge-vote is the unit of analysis, using code developed by Collins (2008b). As a practical matter, this usually meant that each case in the Kuersten and Haire database resulted in three observations: one for each of the judges participating in the three-judge panel that is the standard decision making mechanism employed in the courts of appeals.¹⁵ We excluded the

¹² Kuersten and Haire's (2007) data is an update of *The United States Courts of Appeals Data Base* originally compiled by Donald R. Songer (2008).

¹³ While we acknowledge that the majority of court of appeals opinions are not published, we hasten to note that the exclusive focus on published opinions in this paper is entirely appropriate given that published opinions tend to have wide-ranging policy implications (while the average unpublished opinion does not), thus attracting the attention of organized interests and enhancing the extent to which judges rely on their attitudes in rendering their decisions (e.g., Keele et al. 2009; Wasby 2004).

¹⁴ The U.S. Court of Appeals for the Federal Circuit differs from the other twelve circuits (i.e., the eleven numbered circuits plus the U.S. Court of Appeals for the District of Columbia) in substantively meaningful ways such that its exclusion in the analyses that follow is appropriate. In particular, the Federal Circuit has nationwide jurisdiction over a small subset of very specialized issues, including appeals from the U.S. Court of Federal Claims, the U.S. Court of International Trade, and the U.S. Court of Appeals for Veterans Claims.

¹⁵ With a handful of exceptions, court of appeals cases are adjudicated by rotating three-judge panels (Cohen 2002: 72; Songer et al. 2000: 8). The chief judge in each circuit has the formal responsibility for putting together the panels and the calendar of cases for each panel, though in practice the administrative staff generally handles these tasks (Brown and Lee 2000; Feinberg 1984). Random assignment (of both panelists and cases) is standard – and even a requirement in some circuits – though there are occasional charges of “panel stacking” (Liptak 2003).

1.4% of the observations from the Kuersten and Haire database that corresponded to en banc decisions due to their unique decision making dynamics (George 1999).¹⁶

The dependent variable in our analyses is the ideological direction of the individual judge's vote, coded 0 for a liberal vote and 1 for a conservative vote.¹⁷ For cases involving civil rights or civil liberties, liberal votes support the litigant alleging a violation of his or her rights or liberties, while a conservative vote is the opposite thereof. So, for example, in criminal cases liberal votes favor the criminally accused (or criminally convicted), while conservative votes support the government. In economic cases, liberal votes are, for example, pro-employee, while conservative votes are pro-employer. Given the dichotomous nature of the dependent variable, we use a probit model to estimate influences on court of appeals decision making (Aldrich and Nelson 1984). To control for the fact that judges appear in the data more than once, we estimate the model using robust standard errors, clustered on judge (e.g., Giles and Zorn 2000).¹⁸ We employ the weights reported in Kuersten and Haire (2007) to account for the sampling composition of the data.

To obtain information on amicus curiae participation in the courts of appeals, we began by locating each case in the Kuersten and Haire database identified as including amicus participation. We then used Westlaw¹⁹ and PACER²⁰ to collect information on the positions taken in the amicus

¹⁶ Currently, in all but the Ninth Circuit, en banc review involves the entire complement of court of appeals judges in a given circuit. The size of the Ninth Circuit has led it to adopt a mini-en banc procedure in which fifteen of the court of appeals judges (including the chief judge) serve as the en banc court.

¹⁷ Though conceptualizing judicial ideology in this way is not without its critics, it is standard in the political science community and its utility has been increasingly recognized in the legal academy (Sisk and Heise 2005).

¹⁸ We also estimated an alternative model specification that used robust standard errors clustered on case, the results of which are consistent with those reported herein. In addition, we considered the use of a hierarchical linear modeling (HLM) approach, an alternative to clustering. However, we ultimately rejected that approach because neither clustering nor HLM “is a panacea for the problems related to multilevel data” and clustering “is an easy-to-implement methodology that requires fewer assumptions than the alternative technique” (Primo et al. 2007: 456).

¹⁹ Westlaw is a commercially available source of legal materials, including court of appeals cases.

²⁰ Pacer is the acronym for Public Access to Court Electronic Records, an electronic public access system that provides docket and case information from the federal courts.

briefs.²¹ We operationalize our key independent variables following standard practice in the Supreme Court literature (e.g., Bailey, Kamoie, and Maltzman 2005; Collins 2008a). If the lower court rendered a liberal (conservative) decision, and the amicus brief supports the appellant in the court of appeals, that brief is coded as advocating for a conservative (liberal) outcome. If the lower court rendered a liberal (conservative) decision, and the amicus brief supports the appellee in the court of appeals, that brief is coded as supporting a liberal (conservative) outcome. Thus, the ideological nature of the amicus briefs is coded on the exact same dimension as the ideological direction of the individual judge's votes. *Liberal Amicus Briefs* represents the number of amicus briefs advocating for the liberal position, while *Conservative Amicus Briefs* indicates the number of amicus briefs supporting the conservative position.²² In the cases under analysis here, amicus briefs were filed in 6.6% of disputes. For cases with amicus briefs, there is an average of 1 amicus brief supporting both the liberal and conservative positions (*Liberal Amicus Briefs* range = 0 to 14, *Conservative Amicus Briefs* range = 0 to 7).

To capture individual attitudinal influences on decision making in the courts of appeals – a well-established influence on judicial choice (e.g., Goldman 1966; Hettinger, Lindquist, and Martinek 2006) – we include an *Ideology* variable based on the Giles, Hettinger, and Peppers (2001) scores,²³ which account for the role of senatorial courtesy in the selection of court of appeals judges and

²¹ Though the Federal Rules of Appellate Procedure indicate that the cover of an amicus curiae brief should designate which litigant the brief supports and whether the amicus supports affirmance or reversal, it is not evident in all cases which litigant is, in fact, being supported. We were able to identify the positions taken in 88.1% of the briefs, which is a noted improvement over the 18% of excluded amicus briefs common to studies of the U.S. Supreme Court (e.g., Collins 2008a; Gibson 1997; Kearney and Merrill 2000). We exclude from analysis the 11.9% of amicus briefs in which the amicus did not support either the appellant or appellee.

²² The data on the ideological direction of the lower court decision appears in the Kuersten and Haire (2009) database. As an alternative, we estimated an auxiliary model using a single amicus variable that was created by subtracting the number of liberal amicus briefs from the number of conservative amicus briefs. We obtain substantively similar results using that alternative measurement strategy.

²³ Though the Giles-Hettinger-Peppers scores may not precisely capture judicial ideology in every instance (see, e.g., Scherer and Miller 2009: 374), they are theoretically grounded, empirically robust, and widely used. See Epstein et al. (2007) for a more general discussion of and empirical investigation into the utility of judicial ideology measures based on Poole's (1998) Common Space scores.

designated district court judges serving temporarily on court of appeals panels.²⁴ When both of the home state senators are members of the nominating president’s political party, the judge is assigned the mean of those senators’ Common Space scores (Poole 1998). When only one of the home state senators is a member of the president’s party, the judge is assigned that senator’s Common Space Score. When neither of the home state senators are member of the president’s party, the judge takes on the nominating president’s Common Space score. Since higher values indicate more conservative ideologies, we expect this variable will be positively signed; i.e., the more conservative the judge, the greater the likelihood of a conservative vote by that judge.

To determine if a judge’s ideology mediates the influence of amicus briefs, we include two interaction terms in the model: *Liberal Amicus Briefs* × *Ideology* and *Conservative Amicus Briefs* × *Ideology*. Note that we cannot infer from the direction or significance of the corresponding parameter coefficients whether ideology conditions the influence of amicus briefs (Ai and Norton 2003; Brambor, Clark, and Golder 2006) and, hence, we have no expectations as to either the direction or significance of either. Subsequently, however, we employ the technique developed by Brambor, Clark, and Golder (2006) to evaluate the interactive terms.

Judging in the court of appeals is a context-specific activity in that an individual judge’s decision is nested within a panel. Since court of appeals “decisions are a function of *who* decisionmakers are and *with whom* decisionmakers make their decisions” (Collins and Martinek 2011: 178), it is important to take into account the ability of a judge’s fellow panel members to influence

²⁴ The chief judge of each circuit has the authority to appoint a district court judge – active or on senior status – to serve temporarily as a court of appeals judge. District court judges serving in this capacity are said to be serving by designation and are formally interchangeable with the regular court of appeals judges with whom they serve; i.e., possess the same authority and play the same role in the deliberative process (but see Brudney and Ditslear 2001; Collins and Martinek 2011). District court and court of appeals judges from other circuits may also be appointed to serve by designation but only with the approval of the Chief Justice of the United States. Designated district court judges provide substantial service to the courts of appeals, both in terms of the number of judges so serving and in terms of the number of case participations they provide (Collins and Martinek 2011: 180). Though the use of designated district court judges has been subject to severe criticism (e.g., Saphire and Solimine 1995), rising workloads coupled with lingering vacancies on the court of appeals bench make them a fact of judicial life that is unlikely to change any time soon.

his or her voting behavior (see also Sunstein et al. 2006). To do so, we include an *Ideological Influence* variable. This variable represents the ideology of the other two members of the panel, based on the Giles, Hettinger, and Peppers (2001) scores. As higher values reflect more conservative panel mates, we expect this variable will be positively signed (indicating a greater likelihood of a conservative vote).

We are also cognizant of the need to capture the ability of the circuit as a whole (via en banc review) and the Supreme Court to shape decision making on three-judge panels (e.g., Giles, Walker, and Zorn 2006; Haire, Lindquist, and Songer 2003). Though en banc review is reserved for a small set of select cases in any given circuit in any given year, it is a powerful tool for circuits to “correct errant panels” (Giles, Walker, and Zorn 2006: 864). Moreover, while the circuits vary on a number of dimensions (including size, geographic spread, formal circuit rules, and informal circuit norms), in the judicial hierarchy, they are all subordinate to the Supreme Court. The Court may provide full review to only a hundred (or fewer) appeals each year but the evidence with regard to the certiorari calculus makes clear that the Court’s strategic ability to monitor (and correct) wayward lower courts is non-trivial (see, e.g., Cameron, Segal, and Songer 2000; Lindquist, Haire, and Songer 2007).

Accordingly, we include *Circuit Ideology* and *Supreme Court Ideology* variables. The *Circuit Ideology* variable is measured as the Giles, Hettinger, and Peppers (2001) score for the median member of the circuit. The *Supreme Court Ideology* variable is measured as the Judicial Common Space Score of the median justice on the Supreme Court.²⁵ Because higher scores indicate more conservative circuits and Supreme Courts, respectively, we expect these variables will be positively signed.

The nature of the litigants (and the resources they can bring to bear) must also be taken into account. No matter how contrary to ideals of neutral justice, the evidence remains that resources

²⁵ Their shared derivation from Poole’s Common Space scores means that the *Circuit Ideology* and *Supreme Court Ideology* variables are on the same metric.

matter for understanding court outcomes.²⁶ To provide a proxy for each litigant's level of perceived resources (e.g., Songer, Sheehan, and Haire 1999), we include two variables in the model: *Liberal Litigant Resources* and *Conservative Litigant Resources*. These variables are scored such that individuals = 1, businesses and interest groups = 2, local governments = 3, state governments = 4, and the federal government = 5. Litigants listed as "other" in the Kuersten and Haire database were assigned the mean resource score for liberal or conservative parties, depending upon whether the "other" litigant was seeking a liberal or conservative outcome. We expect that the *Liberal Litigant Resources* variable will be negatively signed, while the *Conservative Litigant Resources* variable will be positively signed.²⁷

Finally, we include two variables to capture the fact that court of appeals panels overwhelmingly affirm lower court decisions, particularly in criminal cases (e.g., Hettinger, Lindquist, and Martinek 2006; Howard 1981). The general propensity of the courts of appeals to affirm lower court decisions stems in large part from their lack of agenda control. "[T]heir mandatory docket eviscerates the ability of the courts of appeals to weed out nonmeritorious appeals ..." (Martinek 2006: 811), making the most likely decision one that concurs with the lower court. This is exacerbated in criminal cases since criminal litigants who do not prevail initially have little to lose by appealing even exceedingly weak cases. Accordingly, *Lower Court Direction* is scored 1 if the lower court rendered a conservative decision, and 0 if it handed down a liberal decision.²⁸ And, *Criminal*

²⁶ The relevant body of work is much too substantial to permit a full accounting here. The seminal work is arguably that of Galanter (1974); a representative selection of recent studies on point appears in Volume 33, Issue 4 of *Law and Society Review*.

²⁷ As an alternative, we estimated a model replacing these variables with dummy variables for each category of litigant, save one. Those results are consistent with those reported below and, accordingly, parsimony led us to rely on the original resource variables.

²⁸ More specifically, if the court of appeals handed down a conservative (liberal) decision that affirmed the lower court, the lower court is assumed to have decided the case in the conservative (liberal) direction. If the court of appeals rendered a liberal (conservative) decision that reversed the lower court, the lower court is assumed to have rendered a conservative (liberal) decision (e.g., Collins and Martinek 2011). Affirmances include those cases that were affirmed; affirmed, vacated (with no mention of reversal), and remanded; and those in which the petition was denied or the appeal was dismissed. Reversals encompass cases that were reversed; reversed and remanded; reversed and vacated; vacated; vacated and remanded; affirmed in part and reversed in part; and those affirmed in part, reversed in part, and remanded.

Case is coded 1 for criminal cases and 0 otherwise. This allows us to account for the expectation that the courts of appeals are especially likely to affirm criminal convictions, which, given the coding of our dependent variable, result in conservative votes. We expect these variables will be positively signed.²⁹

RESULTS

[Table 1 About Here]

Table 1 reports the results of our probit model of influences on the voting behavior of court of appeals judges. The model correctly predicts 68% of votes, for a percent reduction in error of 9%. Turning first to the influence of amicus briefs on decision making in the courts of appeals, Table 1 reports the impact of amicus briefs for a judge whose ideology is at 0 (i.e., a moderate judge). Such a judge is 3% more likely to cast a conservative vote as the number of conservative amicus briefs increases from 0 to 1. However, that judge does not respond to the influence of liberal amicus briefs. While somewhat useful, Table 1 is very limited in that it does not offer insight into the influence of amicus briefs for judges of varying ideologies. This is particularly important information in that no judges in the data have ideology scores equal to 0. Because, as noted earlier, we cannot infer from the sign or significance levels of the interaction terms whether ideology mediates the influence of amicus briefs, we graphically illustrate the marginal effect of liberal and conservative amicus briefs across the range of ideology in Figure 1.

[Figure 1 About Here]

To ensure that our results were not an artifact of treating mixed outcomes (i.e., those cases affirmed in part and reversed in part; affirmed in part, reversed in part, and remanded) as reversals, we recoded this variable such that mixed outcomes were treated as affirmances and reestimated our model. In addition, we estimated a model that excluded mixed outcomes from the data. The results of those models are consonant with Table 1.

²⁹ There is minimal evidence of collinearity in the model. None of the independent variables are correlated higher than 0.62. Moreover, the variance inflation factor does not exceed 2.0 for any of the variables in the model and the tolerance never drops below 0.5.

The solid line in each figure represents the marginal effect of liberal and conservative amicus briefs as a judge becomes more conservative, holding all other variables at their mean or modal values. The dashed lines indicate 95% confidence intervals for these predictions. The effect of amicus briefs is statistically significant whenever the upper and lower bounds of the confidence intervals (represented by the dashed lines) are both above (or below) zero. The upper figures report the marginal effect of a 0-to-1 change in liberal (left graph) and conservative (right graph) amicus briefs, while the bottom figures denote the marginal effect of a 0-to-3 change in liberal (left graph) and conservative (right graph) amicus briefs.

The upper left graph indicates that a change from 0 to 1 in the number of liberal amicus briefs influences judges to vote more liberally, but only for judges whose ideologies exceed 0.3. This corresponds to the 35% of judges under analysis whose ideologies range from 0.30 (moderately conservative) to 0.66 (very conservative). For these judges, an increase from 0 to 1 in the number of liberal briefs increases the chances they will cast a liberal vote by about 3%. The bottom left graph reports a change from 0 to 3 liberal amicus briefs. As before, liberal amicus briefs only influence judges whose ideologies range from 0.3 to 0.66. For these judges, a 0-to-3 increase in liberal amicus briefs enhances their chances of voting liberally by 8% (*Ideology* = 0.3), 10% (*Ideology* = 0.4), 11% (*Ideology* = 0.5), and 12% (*Ideology* = 0.6). Thus, liberal amicus briefs only shape the decision making of moderately conservative and very conservative judges, with very conservative judges more sensitive to the impact of liberal amicus briefs.

The upper right graph plots the influence of a change from 0 to 1 in the number of conservative amicus briefs across the range of judge ideology. An increase in the number of conservative amicus briefs results in more conservative voting behavior for those judges whose ideologies range from -0.1 (moderately liberal) to 0.66 (very conservative). These judges comprise 60% of the observations under analysis. For moderate judges, whose ideologies range from -0.1 to

0.1, a 0-to-1 increase in conservative amicus briefs enhances the likelihood they will cast a conservative vote by about 3%. More conservative judges, whose ideologies are above 0.3, are about 5% more likely to cast a conservative vote in this situation. The bottom right graph reports the influence of a 0-to-3 increase in conservative briefs. Again, only judges whose ideologies range from -0.1 to 0.66 are influenced by conservative amicus briefs. For these judges, a change from 0 to 3 in the number of conservative amicus briefs enhances their chances of voting conservatively by 7% ($Ideology = -0.1$), 8% ($Ideology = 0$), 9% ($Ideology = 0.1$), and 10% ($Ideology > 0.2$). In sum, while we find that more judges are susceptible to the persuasion contained in conservative amicus briefs as compared to liberal amicus briefs, very liberal judges are responsive to neither liberal nor conservative amicus briefs.

Considered in light of our psychological framework, these results suggest that court of appeals judges do not engage in motivated reasoning with regard to the persuasion presented in amicus curiae briefs. If this was the case, we would have expected to see liberal (conservative) amicus briefs influence liberal (conservative) judges to vote more liberally (conservatively), while conservative (liberal) amicus briefs would exhibit minimal, if any, effect on liberal (conservative) judges. Instead, we find that liberal judges respond to neither liberal nor conservative amicus briefs, while conservative judges are susceptible to the persuasion in both liberal and conservative amicus briefs. Given this, conservative judges' reactions to amicus briefs are consistent with a simple heuristic persuasion framework (e.g., Chaiken 1980, 1987), in which a decision maker's attitude does not condition how he or she responds to persuasive communication. According to this theory, actors rely on simple heuristics, rather than complex motivational forces, in evaluating persuasive information. In the context of the current study, this model is supported by our finding that an increasing number of liberal amicus briefs induce conservative judges to cast liberal votes, while an increasing number of conservative amicus briefs induce them to cast conservative votes.

While our results suggest that the heuristic persuasion model explains conservative judges' responses to amicus briefs, our findings indicating that liberal judges are not influenced by amicus briefs, regardless of the briefs' ideological orientation, is consistent with neither motivated reasoning nor heuristic approaches to persuasion. While this is admittedly a post hoc explanation, this difference may be accounted for by the possibility that liberal judges do not view the number of amicus briefs as a useful heuristic in adjudicating disputes. That is, while conservative judges appear to rely on amicus briefs in rendering their decisions, liberal judges may not view the number of amicus briefs as beneficial to their deliberations over case outcomes. To be sure, there are a wide array of heuristics that individuals may rely on in responding to persuasion, including the attractiveness of the argument, the expertise and credibility of the argument's source, and the quality of the argument (e.g., Chaiken 1980). Each of these heuristics calls for a more complex consideration of persuasion than the simpler more-is-better approach to evaluating argumentation. Thus, we may have unearthed evidence of a dichotomy regarding how judges with different ideological orientations approach interest group persuasion in the form of amicus briefs (e.g., Tetlock, Bernzweig, and Gallant 1985).

This explanation finds empirical support in the psychological literature. For example, there is evidence that conservatives tend to engage in less cognitively complex reasoning than liberals (e.g., Hinze, Doster, and Joe 1997; Jost et al. 2003; Tetlock, Bernzweig, and Gallant 1985; cf. Gruenfeld 1995). For example, Tetlock, Bernzweig, and Gallant (1985) find that conservative U.S. Supreme Court justices exhibit less integrative complexity in their opinions than moderate and liberal justices, suggesting that conservative judges "tend to rely on rigid, one-dimensional, evaluative rules in interpreting events, and to make decisions on the basis of only a few salient items of information" (1228). Such a finding has clear application to the current study. That is, if conservative judges tend to rely on simpler evaluative criteria than liberal judges, we would expect the number of amicus

briefs to influence their decision making as “the more arguments the better” is perhaps the simplest reasonable heuristic available (e.g., Petty and Cacioppo 1984: 70). Conversely, liberal judges, who are said to engage in more multifaceted cognitive reasoning, might look to more complex heuristics in evaluating amicus briefs.

Turning now to the control variables, the model provides support for the influence of all of these attributes of judicial choice, save one. With regard to attitudinal factors, we find that a judge’s ideology shapes his or her decision making. In cases without amicus briefs (that is, when the interaction terms are set at zero), a one standard deviation increase in a judge’s ideology, making the judge more conservative, evinces a 9% increase in the probability of a conservative vote. In addition, the ideology of a judge’s fellow panelists shapes that judge’s voting behavior. A one standard deviation increase in the ideology of the panelists serving with a judge increases the chances that the judge will cast a conservative vote by 3%. We also find that court of appeals judges respond to the ideology of the circuit as a whole. A one standard deviation increase in circuit ideology corresponds to a 3% increase in the probability that a judge will cast a conservative vote. However, the model fails to provide evidence that court of appeals judges respond to ideological constraints from the Supreme Court. Thus, while judges do temper their voting behavior depending on the ideological orientation of the circuit, suggesting they are cognizant of the possibility of en banc reversal, they do not respond to the ideological proclivities of the Supreme Court.

The model also indicates that the litigants’ perceived level of resources shape decision making on court of appeals panels. For example, compared to an individual, when a state government argues the liberal position, a judge is 4% more likely to cast a liberal vote. Conversely, relative to an individual, when a state government advances the conservative position, the probability that a judge will cast a conservative vote increases by 7%.

Table 1 also illuminates the reality that court of appeals judges overwhelmingly affirm district court decisions, particularly in criminal cases. Compared to a case in which the lower court rendered a liberal decision, when the lower court hands down a conservative decision, a judge is 15% more likely to cast a conservative vote. This provides evidence that, all else equal, a judge is more likely to cast a conservative (liberal) vote if the lower court rendered a conservative (liberal) decision. In addition, relative to other issue areas, when the case involves a criminal appeal, a judge is 13% more likely to cast a conservative vote.

ENDOGENEITY ANALYSIS

While Table 1 reveals that liberal amicus briefs shape the decision making proclivities of 35% of judges under analysis, while conservative amicus briefs influence the voting behavior of 60% of judges, it is possible that these findings are the result of an endogeneity issue related to why groups target certain disputes (e.g., Collins 2007; Hansford 2004). That is, groups may file amicus briefs in cases they are predisposed towards winning in order to appear efficacious to their members, shareholders, and patrons. If amici behave in such a manner, the results in Table 1 may simply be an artifact of groups' decisions to target cases they are likely to win. To put it differently, groups might not influence the ideological direction of the individual judge's votes. Rather, the likely ideological direction of the individual judge's votes may shape groups' decisions to file amicus briefs (e.g., Collins 2007: 64).

[Table 2 About Here]

To evaluate this possibility, Table 2 reports the results of a regression model in which the dependent variable is the number of liberal amicus briefs subtracted from the number of conservative amicus briefs (e.g., Collins 2007). Because amicus briefs are filed in individual disputes,

the unit of analysis is the case.³⁰ To evaluate whether groups are likely to file amicus briefs in cases they are likely to “win,” we regress each of the non-amicus variables in Table 1 on the difference in the number of liberal and conservative amicus briefs filed in each case. If groups are especially likely to file amicus briefs in cases in which they are expected to emerge victorious, we expect that conservative amicus briefs will outnumber liberal amicus briefs when: 1) the ideology of the panel,³¹ circuit, and Supreme Court is conservative; 2) the liberal litigant ranks low on the resource scale; 3) the conservative litigant ranks high on the resource scale; 4) the lower court decided the case in the conservative direction; and 5) the case is a criminal appeal. In each of these situations, the panel is more likely to render a conservative decision.

As Table 2 reveals, groups do not systematically target cases in which the panel is predisposed toward endorsing the position advanced in the amicus briefs. This is evident by the fact that none of the variables achieve statistical significance and all of the 95% confidence intervals straddle zero (and are, in fact, rather large). Thus, we conclude that the findings regarding the influence of amicus briefs in Table 1 are not a result of an endogeneity issue. Rather, they support the conclusion that amicus briefs are capable of shaping decision making on the courts of appeals.³²

CONCLUSIONS

The analyses presented here are intended to contribute to advancing our theoretical understanding of the mechanism by which amicus curiae briefs influence judicial decision making. In particular, our objective was to shed light on whether the influence of amicus briefs is better understood using a motivated reasoning framework in which their influence is mediated by the

³⁰ We also estimated a model using the judge-vote as the unit of analysis, the results of which corroborate those reported in Table 2.

³¹ *Panel Ideology* is calculated as the mean ideology of the judges serving on the panel using the ideology scores described above. Substituting this variable for the median judge’s ideology yields substantively identical results.

³² To further evaluate the robustness of this finding, we estimated separate negative binomial regression models in which the dependent variables represented the number of liberal and conservative amicus briefs, the results of which support the conclusions drawn above.

judge's ideology or using a heuristic information processing framework in which their influence is unmediated. Our empirical results suggest that a heuristic information processing framework is a better fit as an explanation for the process by which those briefs manifest an effect for moderate and conservative judges. Liberal judges, however, are generally immune to the persuasive powers of amici. So, while there is an ideological component to the effectiveness of amicus briefs, that ideological component pertains to whether or not a judge is influenced by them rather than whether or not a judge's ideology serves to condition their influence.

That our findings suggest a difference in how conservative and liberal judges cognitively process heuristics regarding amicus briefs does not imply that one approach is more desirable than the other (e.g., Tetlock, Bernzweig, and Gallant 1985: 1238). On the one hand, one might interpret conservative judges' susceptibility to the "more arguments the better" approach to conclude a type of shallow or superficial deliberation. On the other hand, others might view this approach as evidence that conservative judges are able to reduce the complex nature of judicial decision making to a few key considerations that get at the heart of the case. As Tetlock, Bernzweig, and Gallant (1985: 1238) cogently argue, "Each of these characterizations may possess a kernel of the truth. On some occasions, integrative simplicity may be more appropriate than complexity; on other occasions, the reverse may hold true." We agree. Further, it is important to note that, while our results suggest that there may exist cognitive differences between liberal and conservative judges, these findings are limited to how judges respond to amicus briefs, which is but one influence on their decision making.

Further, these findings are limited to how judges respond to one aspect of amicus briefs; i.e., the number of amicus briefs filed in support of a particular outcome. There are a host of additional heuristic cues upon which judges could rely in assessing the persuasiveness of amicus curiae briefs. In particular, the quality of the arguments embedded in amicus briefs may matter quite a bit. Certainly amici (and their legal counsel) would hope that was the case. And, more experienced

litigators representing amici (and presumably contributing to higher quality legal arguments) may serve as an easily accessible rule of thumb for court of appeals judges. Careful content analysis of amicus curiae briefs, perhaps combined with data gleaned from interviews with judges, would yield important evidence in this regard, though we leave those endeavors for a future day.

Despite these limitations, this research has made an important contribution to the study of how political actors process persuasive information. While students of political behavior have long been attentive to the effect of persuasion on political choice, the typical approach is to control for ideological concerns, as opposed to explicitly investigating how attitudinal factors might mediate the response to persuasion. Though these studies have certainly contributed to our understanding of political behavior, they often fail to articulate a mechanism by which political actors process persuasive information. In illustrating the utility of adopting approaches from social psychology, we have demonstrated the theoretical leverage offered by such theories for better comprehending the decision making of political actors.

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Table 1. The Influence of Amicus Curiae Briefs on Decision Making in the Courts of Appeals, 1997-2002

Predictor	Parameter Estimate	95% Confidence Interval	Marginal Effect
Liberal Amicus Briefs	-.056 (.051)	(-.155, .043)	-1.2
Conservative Amicus Briefs	.174 (.063)**	(.050, .298)	+3.3**
Ideology	.257 (.071)***	(.117, .398)	+9.4***
Liberal Amicus Briefs × Ideology	-.185 (.122)	(-.423, .054)	see Figure 1
Conservative Amicus Briefs × Ideology	.350 (.175)*	(.007, .693)	see Figure 1
Ideological Influence	.275 (.076)***	(.126, .423)	+2.7***
Circuit Ideology	.355 (.103)**	(.153, .558)	+3.1**
Supreme Court Ideology	.530 (.445)	(-.341, 1.402)	+0.9
Liberal Litigant Resources	-.041 (.020)*	(-.078, -.003)	-1.9*
Conservative Litigant Resources	.066 (.020)**	(.027, .104)	+3.5**
Lower Court Direction	.392 (.055)***	(.285, .499)	+15.2***
Criminal Case	.389 (.053)***	(.284, .493)	+12.8***
Constant	-.244 (.092)**	(-.424, -.063)	
N	5,569		
Wald χ^2	371.86***		
Percent Correctly Predicted	67.95		
Percent Reduction in Error	9.1		

The dependent variable is the ideological direction of the individual judge's vote (1 = conservative, 0 = liberal). Entries are parameter estimates from a probit model. Numbers in parentheses indicate robust standard errors, clustered on judge. Marginal effects were calculated altering the variables of interest from 0 to 1 for dichotomous variables, from the mean to one standard deviation above the mean for continuous variables, and from 0 to 1 for the amicus briefs variables, holding all other variables constant at their mean or modal values. * $p < .05$; ** $p < .01$; *** $p < .001$ (two-tailed tests).

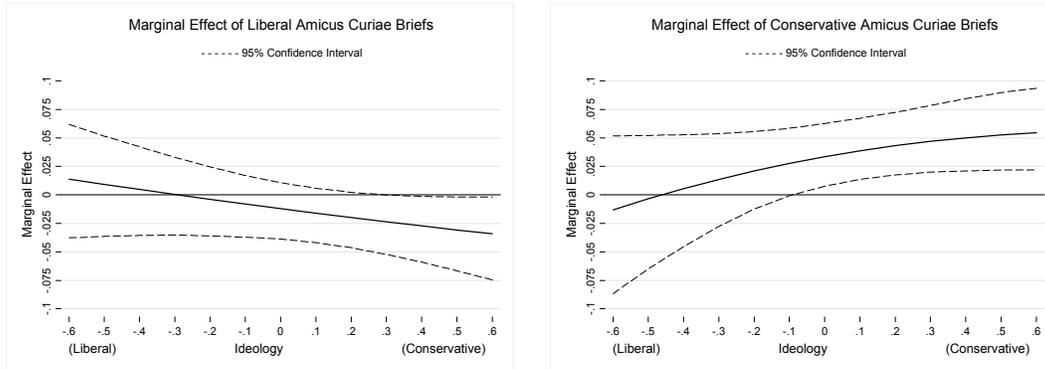
Table 2. The Effect of the Variables in Table 1 on the Difference in Liberal and Conservative Amicus Curiae Briefs, 1997-2002

Predictor	Coefficient	95% Confidence Interval
Panel Ideology	-.042 (.035)	(-.111, .027)
Circuit Ideology	.005 (.037)	(-.068, .079)
Supreme Court Ideology	.094 (.161)	(-.222, .410)
Liberal Litigant Resources	.017 (.021)	(-.024, .058)
Conservative Litigant Resources	-.005 (.009)	(-.024, .013)
Lower Court Direction	-.001 (.043)	(-.087, .084)
Criminal Case	.008 (.021)	(-.033, .050)
Constant	-.020 (.075)	(-.168, .128)
N	1,864	
R ²	.005	

The dependent variable is the number of liberal amicus briefs subtracted from the number of conservative amicus briefs filed in each case. Entries are regression coefficients. Numbers in parentheses indicate robust standard errors. * p < .05; ** p < .01; *** p < .001 (two-tailed tests).

Figure 1. The Marginal Effect of Amicus Curiae Briefs on Decision Making in the Courts of Appeals, 1997-2002

A. Change: 0 to 1 Amicus Curiae Briefs



B. Change: 0 to 3 Amicus Curiae Briefs

