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The Use of Amicus Briefs

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Abstract

Judicial decisions play an important role in shaping public policy. Recognizing this, interest groups and other entities lobby judges in an attempt to translate their policy preferences into law. One of the primary vehicles for doing so is the amicus curiae brief. Through these legal briefs, amici can attempt to influence judicial outcomes while attending to organizational maintenance concerns. This article examines scholarship on the use of amicus briefs pertaining to five main areas: (*a*) why amicus briefs are filed, (*b*) who files amicus briefs and in what venues, (*c*) the content of amicus briefs, (*d*) the influence of amicus briefs, and (*e*) normative issues implicated in the amicus practice. In addition to presenting a critical review of the scholarship in these areas, this article also provides suggestions for future research on amicus briefs.

INTRODUCTION

Amicus curiae ("friend of the court") briefs are a powerful tool that allow interest groups and other entities to participate in litigation when they are not a direct party to the dispute. Through these briefs, amici can present courts with new or alternative legal positions, social scientific and factual information, and perspectives regarding the policy implications of their decisions (Collins 2008a). This is typically done for the purpose of attempting to persuade the courts to endorse a particular outcome in the case (Banner 2003, Harris 2000). Moreover, amicus briefs offer social movements a means to participate in the judiciary, thus potentially increasing its democratic responsiveness (Garcia 2008). Although amicus briefs are most commonly associated with American courts, and the US Supreme Court in particular, they can be found in legal systems across the globe (Collins & McCarthy 2017, Mohan 2010). In fact, the amicus curiae seems to have its origins in Roman law (Angell 1967, Harper & Etherington 1953, Krislov 1963; cf. Covey 1959). This practice of having nonparties to a case provide the court with information was later adopted in English courts and eventually spread to both civil and common law systems (Kochevar 2013, Krislov 1963), as well as international judiciaries (Bartholomeusz 2005, Shelton 1994).

I provide a thorough and critical review of scholarship on amicus curiae briefs. To do this, I have identified what I believe to be the five core areas of research on amicus briefs: (*a*) why amicus briefs are filed, (*b*) who files amicus briefs and in what venues, (*c*) the content of amicus briefs, (*d*) the influence of amicus briefs, and (*e*) normative issues surrounding the amicus practice. Though some of these literatures are more well developed than others, I am confident that organizing scholarship in this manner provides rich insight into what we know and do not know about how amicus briefs are used by the entities that file them and the courts that receive them. I also hope that this review provides useful suggestions for future research in this important area.

WHY FILE AMICUS BRIEFS?

Given that there is a wide array of tactics to influence public policy, why would entities choose to devote their finite resources to the filing of amicus briefs? Scholars have reached a general consensus that amici are motivated by two primary factors in choosing to file amicus briefs: to influence judicial outcomes and to attend to organizational maintenance concerns (Collins & McCarthy 2017; Hansford 2004a,b; Martinek 2006; Perkins 2016; Salzman et al. 2011; Scheppele & Walker 1991; Solberg & Waltenburg 2006; Solowiej & Collins 2009). Research in this area has overwhelmingly taken an observational approach by examining the factors that correlate with the presence, or amount, of amicus briefs filed in a case (Collins & McCarthy 2017; Gleason & Provost 2016; Hansford 2004a,b; Martinek 2006; Salzman et al. 2011; Solowiej & Collins 2009). Moreover, this work focuses primarily on American courts and especially the US Supreme Court (Hansford 2004a,b; Salzman et al. 2011; Solowiej & Collins 2009). However, a small body of research uses interviews or surveys to examine this question (Larsen & Devins 2016, Perkins 2016, Scheppele & Walker 1991, Solberg & Waltenburg 2006, Wasby 1995), and more recent work has expanded this analysis to incorporate a cross-national perspective (Collins & McCarthy 2017).

In terms of influencing judicial outcomes, research reveals that amici are attracted to cases that have the potential for significant policy impact. Among other attributes, cases with larger numbers of amicus briefs tend to involve the exercise of judicial review; implicate important civil rights and liberties questions; and involve constitutional, as opposed to statutory, litigation (Collins & McCarthy 2017, Martinek 2006, Perkins 2018, Salzman et al. 2011, Solowiej & Collins 2009). In addition, in seeking to identify cases that have the potential for maximum policy influence, amici target cases involving disputes in which they believe the courts could use additional information, such as those featuring relatively inexperienced attorneys, low-resource litigants, and complicated

legal questions (Collins 2007, Hansford 2004a, Martinek 2006, Solowiej & Collins 2009). Amici are also sensitive to their opponents' desires to influence judicial policy outcomes and therefore engage in counteractive lobbying by filing amicus briefs to neutralize the advocacy efforts of their opponents (Epstein 1985, Hansford 2011, Solowiej & Collins 2009, Teles 2008).

A second driving motivation for filing amicus curiae briefs involves addressing organizational maintenance concerns (Hansford 2004a,b; Koshner 1998; Solberg & Waltenburg 2006). By filing amicus briefs, membership organizations can highlight to their members and patrons that they are active on significant matters of public policy. Moreover, should their position prevail in the case or should their amicus brief prove influential in some other way, those groups can claim credit for their contributions. For example, Hansford (2004a) demonstrates that membership groups are more likely to file amicus briefs in US Supreme Court cases that attract media attention and those in which the position they support is likely to emerge victorious. This strategy allows membership groups to highlight to their members and patrons that they are actively involved in important cases and to claim credit for the cases' outcomes.

The question of why entities file amicus briefs is a significant one in its own right and also because it often motivates the research techniques used to study the influence of amicus briefs (Collins 2008a). Though scholars have made substantial inroads into understanding this question, there are ample directions for future research. First, it is important to compare why groups file amicus briefs to other strategies, both within and outside of the legal system (Holyoke 2003, Spill 2001). There is a tendency in the current research to explore attributes of cases and amici to decipher why amicus briefs are filed, but this largely misses the reality that the amicus strategy is one of many options available to try to influence public policy. Incorporating that fact into studies of why amicus briefs are filed will bring us closer to a more complete understanding of this lobbying strategy and how groups view it in comparison to other strategies.

Second, researchers should move beyond observational studies of the decision to file amicus briefs and focus more on surveys and interview techniques. To be sure, we have gained a substantial amount of knowledge from these observational studies. However, they have also limited our ability to probe questions that are not as amenable to observational research. For example, scholars have convincingly established that amici seek to influence court outputs. But it is not entirely clear what that means. Nor is it evident whether amici view influencing court outputs in the same way. Some amici may view influence in terms of shaping the ideological direction of the court's decision. Others may view influence in terms of being cited in a court opinion or having their arguments adopted in those opinions. Still other amici may care about generating favorable precedents or media coverage of their cause. Though observational research designs can certainly contribute to this conversation, these types of questions may be better answered through surveys and interviews with the filers of amicus briefs.

Third, scholars should more thoroughly investigate the extent to which the filing of amicus curiae briefs actually attends to organizational maintenance concerns. Although amicus curiae briefs are certainly something that scholars, interest groups, lawyers, and judges think about, I am less sure that amicus briefs are on the radar of the average member of an interest group. Clearly, groups can and do publicize their amicus briefs, but it is less clear whether the amicus strategy is an effective way to show members that a group is active or influential on significant matters of public concern. One way to pursue such research would be to survey members of various organizations, in addition to soliciting the views of group leaders via interviews.

Finally, it will be useful to devote more research to the relative importance of influencing judicial outcomes versus attending to organizational maintenance concerns. At the most basic level is the question of whether nonmembership groups are motivated to file amicus briefs for reasons relating to organizational maintenance. At first blush, one might think they would not

be so motivated, but it is plausible that amici without members in the ordinary sense still care about publicity because it might help them attract patrons and grants. Moreover, corporations who file amicus briefs might be attentive to how the positions they take can affect their consumer base. Beyond this, scholars debate whether organizational maintenance is a goal (Koshner 1998, Solberg & Waltenburg 2006) or a constraint (Collins 2008a; Hansford 2004a,b) that only some groups face. The answer to this question has significant implications for how we design studies of amicus influence because they may encourage researchers to focus more on influence in terms of policy outputs versus media coverage. Moreover, it is entirely plausible that these two motivations, which developed out of the American literature, may not be as applicable outside of the US case. My sense is that these questions will be best approached through survey research and interviews.

WHO FILES AMICUS BRIEFS AND IN WHAT VENUES?

Understanding who files amicus briefs is significant because it speaks directly to bias in the interest group system (Schattschneider 1960). This has potentially profound normative implications because the arguments in amicus briefs reflect the types of entities that file the briefs (Collins & Solowiej 2007). For example, if business interests dominate amicus activity, this suggests that courts rarely hear from the labor side of the debate, which can bias judges' decisions in light of evidence that amicus briefs can be influential. Given this, it should not be surprising that there has been a fair amount of attention to this question.

Most of the research on the types of entities that file amicus briefs focuses on American courts. In the US Supreme Court, studies show that a diverse assortment of entities participate as amici (Caldeira & Wright 1990, Collins 2008a, Collins & Solowiej 2007, Epstein 1993). Amici include individuals, corporations, governments, public advocacy organizations, public interest law firms, trade associations, unions, and peak associations. Though these entities participate at different rates—with trade associations, public advocacy groups, and governmental amici filing the largest number of amicus briefs—the evidence is clear that no single organizational type dominates amicus activity (Collins 2008a, Collins & Solowiej 2007). This differs quite substantially from other forms of lobbying in Washington, DC, which are dominated by institutional groups, including corporations (Hojnacki et al. 2015, Salisbury 1984). Moreover, the ideological positions advocated by amici show a great deal of parity in the US Supreme Court, particularly after the 1960s (Collins 2008a, p. 55; O'Connor & Epstein 1983a). That is, there are roughly an equal number of conservative and liberal amicus briefs filed in the Supreme Court. In addition, amici frequently participate in coalitions by cosigning amicus briefs, thus expanding the diversity of amici (Box-Steffensmeier & Christenson 2014; Caldeira & Wright 1990; Collins 2004; Collins & Solowiej 2007; Gleason 2018; Goelzhauser & Vouvalis 2013, 2015; Hansford 2010; Provost 2011; Solimine 2012; Swenson 2016).

Research on who files amicus briefs in other American courts is sparser. Collins & Martinek (2010a) investigated amicus participation in the US courts of appeals and found that, like the Supreme Court, a diverse assortment of groups participates. Epstein (1994) explored the filing of amicus briefs in 16 state courts of last resort and observed an increase in the diversity of amicus filers over time. For example, in 1965, businesses, governments, religious groups, and civil liberties organizations dominated amicus activity, but in 1990 there was much less business dominance and a wider range of participants.

Outside of the United States, there is more limited research on who participates as amici curiae. Alarie & Green (2010) and Brodie (2002) found that, in the Supreme Court of Canada, a fairly diverse range of entities participated as interveners, the Canadian form of the American amici curiae. One notable difference relative to the US Supreme Court, however, is the very high

participation rates of governmental units (Radmilovic 2013). Van Den Eynde (2013) explored the amicus participation of human rights groups before the European Court of Human Rights and uncovered an increase in amicus briefs over time and a reasonably diverse range of amici in terms of the country of national origin, although most nongovernmental organizations came from the United Kingdom. She also revealed that many human rights interests are represented among the amici, although certain repeat players appear to participate with a great deal of frequency.

Much of the research on the venues in which amicus briefs are filed tracks the volume of amicus briefs filed in particular courts. For example, it is evident that amicus participation in the US Supreme Court has risen quite substantially over time, in terms of both the percentage of cases with amicus briefs and the average number of amicus briefs filed in each case (Bradley & Gardner 1985; Caldeira & Wright 1990; Collins 2004, 2008a; Epstein 1993; Hansford & Johnson 2014; Kearney & Merrill 2000; Puro 1971; O'Connor & Epstein 1981; Owens & Epstein 2005; cf. Hakman 1966). Indeed, today it is the rare case in the Supreme Court that does not have amicus participation. Although they are not as common in the US courts of appeals as compared with the US Supreme Court, Martinek (2006) demonstrated a fairly steady increase in amicus participation over time in those courts. Similar increases have been documented in state courts of last resort (Corbally et al. 2004, Epstein 1994). Outside of the United States, there is evidence that not all courts have been witnessing the proliferation of amicus activity over time. For example, though there has been a growth in amicus (or intervener) participation in the European Court of Human Rights (Cichowski 2016) and the high courts of Canada (Alarie & Green 2010) and South Africa (Jonas 2015), no similar increases have occurred in other high courts, such as those in Botswana (Jonas 2015), India, and the Philippines (Collins & McCarthy 2017).

Explanations for why some courts see more amicus participation than others are varied. There is fairly compelling evidence that the rules governing amicus activity matter (Cichowski 2016, Collins & McCarthy 2017, Immel 2011, Jonas 2015, O'Connor & Epstein 1983b, Viljoen & Abebe 2014; cf. Corbally et al. 2004). For example, courts that have fewer procedural barriers to amicus participation seem to have higher levels of amicus briefs. In addition, courts with relatively large civil rights and liberties dockets tend to attract more amicus briefs because these cases tend to have broad policy implications (Collins & McCarthy 2017, Perkins 2018). Further, courts that have relatively large jurisdictions tend to be particularly attractive because their precedents have large radiating effects (Collins 2013). Collins & McCarthy (2017) also show that high courts operating in common law countries with a bill of rights and the power of judicial review tend to be more attractive venues than common law courts without these features.

Understanding who files amicus briefs and in what venues is important because it speaks to both the types and the volume of information that judges receive from nonparties to a case. Though there have been significant inroads into understanding this question, at least three areas will benefit from additional research. First, this literature focuses overwhelmingly on American courts. This is likely at least in part due to the reality that many amicus brief scholars are located in the United States and study the domestic jurisdictions with which they are most familiar. But, because amicus briefs have been proliferating across the globe (Collins & McCarthy 2017), it will be important to address these questions outside of the American context. In particular, research on who files amicus briefs, the ideological positions taken in those briefs, and the volume of amicus briefs will provide rich insights into amicus activity.

Second, we have only a very basic understanding of how potential amici choose among courts. That is, there is some evidence that groups file amicus briefs in venues that will best allow them to establish favorable precedents (Hansford 2004a), but it is not clear why potential amici choose to file amicus briefs in one court instead of another. For example, a potential amicus in the United States might have the ability to choose between filing an amicus brief in one state relative to

another state, in a state versus federal court, in an intermediate appellate court versus a court of last resort, or in all of the courts mentioned above. Because potential amici face resource constraints, I believe that most amici make such decisions strategically and with an eye toward maximizing their influence in terms of judicial outcomes. Yet, I have little systematic evidence that this is the case.

Finally, it will be important to investigate the timing of amicus participation within a jurisdiction. For example, in a case that reaches the US Supreme Court through the federal court system, amici might participate at the district court level (although that is very rare), the court of appeals level (including in en banc hearings), and/or the Supreme Court level at the certiorari and/or merits stage. Thus, there are at least five points at which an amicus briefs can be filed. There are costs and benefits of engaging in litigation at each of these stages. For instance, there is evidence that filing amicus briefs at the court of appeals level can signal the broad salience of a case and make Supreme Court review more likely (Hagle & Spaeth 2009). Thus, if a potential amicus were interested in getting a case on the Supreme Court's docket, it would make sense to file an amicus brief at the court of appeals level and perhaps also at the certiorari stage at the Supreme Court (Caldeira & Wright 1988, Zuber et al. 2015). One can imagine that the amicus briefs would involve similar arguments, thus reducing the costs of additional legal research. If, however, the potential amicus was primarily interested in attending to organizational maintenance concerns, it might make sense to file only at the Supreme Court merits level because that is such a high-profile institution, and the merits level is covered by the media much more so than the agenda-setting stage. Further, it will be important to understand how amici do or do not coordinate with the party they support in making these decisions (Larsen & Devins 2016). Pairing the goals of potential amici with the ability to achieve those goals at varying levels of a single legal system can go a long way toward informing our understanding of the motivations of amici curiae both in selecting venues and in terms of their potential influence.

THE CONTENT OF AMICUS BRIEFS

Understanding the content of amicus briefs is important because that content is the primary mechanism by which amici attempt to persuade judges (Collins 2004, 2008a). Further, the content of the briefs is one of the means by which groups attend to organizational maintenance concerns, including educating their members and allies (Chang & Wang 2009). Despite this topic's significance, systematic studies of the content of amicus briefs are limited primarily to amicus briefs filed at the US Supreme Court. I believe this is the case owing to access issues. Namely, to study the content of amicus briefs, one must procure the briefs oneself. However, it is often difficult to access amicus briefs outside of the US Supreme Court. For example, recent US Supreme Court amicus briefs are freely accessible on websites like that of the American Bar Association. Older briefs are often available at Westlaw and LexisNexis as part of their basic subscription packages that many colleges and universities have access to. However, briefs in other courts are much harder to come by, owing to either the lack of online availability or the need to purchase expensive subscription packages to obtain the briefs.

Perhaps the central question that motivates studies of the content of amicus briefs is the extent to which amicus briefs add new information or repeat information already available to the court, particularly in the form of litigant briefs (Collins 2008a; Collins et al. 2014, 2015; Comparato 2003; Feldman 2017; Fletcher 2013; Hazelton et al. 2017; Spriggs & Wahlbeck 1997; Wofford 2015). In large part, this research is driven by Supreme Court Rule 37, which urges amici to provide the Court with new information, as well as by the advice of practitioners, judges, and law clerks who stress the need for amicus briefs to avoid repeating the arguments of the party they support

(Ennis 1984, Lynch 2004, O'Connor 1996, Scalia & Garner 2008, Sungaila 1999, Vose 1955). In general, the evidence reveals that amicus briefs do tend to provide courts with unique information, rather than overwhelmingly repeating the arguments advanced by the parties to litigation. For example, Spriggs & Wahlbeck (1997) compared the "Argument" section of amicus briefs filed in the 1992 term with those of litigant briefs and found that approximately 33% of amicus briefs exclusively reiterated arguments made by the litigants, with the remaining exclusively providing new information (25%) or both adding and reiterating information (42%). Collins et al. (2014) used plagiarism detection software to compare the language used in amicus briefs with litigant briefs, lower court opinions, and other amicus briefs. They discovered that amicus briefs rarely directly repeat the language used in these other sources of information and that the amount of repetitive text found in amicus briefs is similar to that found in party briefs, indicating there are "few differences between amicus briefs and party briefs regarding the amount of language they incorporate from other information sources" (Collins et al. 2014, p. 234).

In addition to examining the extent to which amicus briefs provide courts with novel information, scholars have examined other aspects of amicus briefs. For example, there is a small literature focused on the presentation of facts, including social scientific information, in amicus briefs (Hull 2017, Katt 2009, Larsen 2014, Roesch et al. 1991, Rustad & Koenig 1993, Scott 2016). This research tends to take a critical look at the information provided in amicus briefs, including how that information can be misused by both amici and judges, and often offers suggestions for limiting the misuse of information in amicus briefs. Another line of inquiry examines the types of citations found in amicus briefs, such as references to various courts' decisions and secondary legal authorities, thus providing a different perspective on the information contained in amicus briefs (Manz 2002). Finally, a small body of work provides an engaging look at "voices" briefs: those amicus briefs that relay the stories of individuals who are, or have been, affected by the issues in a case (Edwards 2017, Levit 2010, Paltrow 1986). For example, in *Whole Woman's Health v. Hellerstedt* (2016), more than 100 female judges, law professors, and lawyers revealed to the Supreme Court (and the world) that they had had an abortion (Edwards 2017). I find this research particularly exciting as it both humanizes the amici curiae and provides a novel way of thinking about the role of amicus briefs by stressing their narrative functions.

The study of the content of amicus briefs has developed quite substantially in the past 10 years, in part owing to the availability of computer-assisted content analysis techniques. Nonetheless, there are several avenues for future research. Perhaps most obviously, this literature remains focused on the US Supreme Court. Though the easy access to amicus briefs in this institution makes it a prime target for study, it is important to remember that studies of a single institution can get us only so far in understanding the content of amicus briefs. For example, it will be interesting to examine how the content of amicus briefs evolves as cases make their way up the hierarchy of a legal system. In addition, I would like to see more attention devoted to interviewing and/or surveying attorneys for the purpose of shedding light on how arguments in amicus briefs are developed. For example, the American Civil Liberties Union's amicus brief in *Mapp v. Ohio* (1961), which is often cited as the quintessential example of an effective amicus brief (Collins 2008a, Spriggs & Wahlbeck 1997), almost did not address the exclusionary rule (Day 2001). Finally, I am confident that studies of how the content of amicus briefs does and does not change as amici form coalitions will provide significant insights into both the development of the content of amicus briefs and how amici work together in coalitions.

THE INFLUENCE OF AMICUS BRIEFS

Without a doubt, the most common area of amicus scholarship involves ascertaining the influence of amicus briefs. Scholars pursuing this question have taken a variety of approaches and have

studied a fairly diverse assortment of courts relative to other areas of study. Moreover, there is a general consensus that amicus briefs are influential in several regards. To understand the literature on the influence of amicus briefs, it is useful to separate it into measuring influence in terms of (*a*) winners and losers in litigation, (*b*) the ideological direction of court decisions and judges' votes, (*c*) the content and presence of judicial opinions, and (*d*) other means to capture influence.

Examining the influence of amicus briefs in terms of litigation outcomes tends to focus on investigating whether the relative volume of amicus briefs increases one party's chances of winning the lawsuit. For example, it is often argued that the party supported by the largest number of amicus briefs will have an enhanced probability of winning the case because that party's position is buttressed by the amicus briefs. Through these briefs, amici can reinforce arguments made by the party they support, provide the courts with new argumentation, present social scientific evidence, discuss the policy implications of a decision, and provide information on the positions of the other branches of government (Collins 2004, Collins & Martinek 2010b, Epstein & Knight 1998, Kearney & Merrill 2000). Taken as a whole, the evidence indicates that the party supported by the largest number of amicus briefs enjoys a modest advantage in terms of litigation success in the US Supreme Court (Collins 2004, Hassler & O'Connor 1986, Kearney & Merrill 2000, Kim & Vinson 2009, McGuire 1995, Morris 1987, Nicholson-Crotty 2007, O'Connor & Epstein 1982, Puro 1971, Rushin & O'Connor 1987; cf. Songer & Sheehan 1993). Further, this advantage can be quite substantial when a litigant is supported by particular amici, such as the US Solicitor General (Black & Owens 2012, Deen et al. 2003, Nicholson & Collins 2008, O'Connor 1983, Pacelle 2003, Salokar 1992, Segal 1988, Segal & Reedy 1988; cf. McGuire 1998) and high-profile interest groups, such as the American Civil Liberties Union, the American Federation of Labor and Congress of Industrial Organizations, and the Chamber of Commerce (Buckler 2014, Epstein 1993, Ivers & O'Connor 1987, Kearney & Merrill 2000, Lynch 2004, McLauchlan 2005, O'Connor & Epstein 1983c, Puro 1971). Although the literature on other US courts is not nearly as expansive, there is similar evidence that litigants supported by amicus briefs are advantaged in state courts of last resort (e.g., Laroche 2009, Songer & Kuersten 1995, Songer et al. 2000; cf. Comparato 2003) and federal courts of appeals (e.g., Collins & Martinek 2010b). In addition, these findings appear to apply to the Supreme Court of Canada (Morton & Allen 2001, Radmilovic 2013), though the evidence with respect to international judicial bodies is mixed (Shelton 1994, Van den Eynde 2013).

A related way to capture amicus influence regarding litigation success involves focusing on the agenda-setting stage in courts with control over their dockets. As with many other areas, this literature concentrates almost entirely on the US Supreme Court. This research is predicated on the idea that the presence, or amount, of amicus briefs that accompany a petition for a writ of certiorari sends a credible signal to the justices that the case has broad policy implications and is thus worthy of review. Evidence overwhelmingly supports this account, as the existence or volume of amicus briefs is one of the best predictors of granting certiorari at the US Supreme Court (Black & Boyd 2010; Caldeira & Wright 1988; Epstein 1993; Feldman & Kappner 2016; Goelzhauser & Vouvalis 2013, 2015; McGuire & Caldeira 1993; Perry 1991; Wohlfarth 2009).

A second way scholars have conceptualized the influence of amicus briefs involves focusing on the ideological direction of court decisions or judges' votes. The argument for this approach is based on the idea that amici are primarily interested in influencing the ideological direction of court decisions (e.g., their liberal or conservative nature), as opposed to being principally concerned with who wins and who loses, which is an afterthought for most amici (Collins 2007, 2008a). Thus, this dependent variable is argued to more closely reflect the goals of the amici that provide judges with persuasive information advocating for particular policy outcomes. Studies using this approach show that judges are more likely to render decisions in a particular ideological direction as the

number of amicus briefs supporting that position increases in the US Supreme Court (Collins 2007, McGuire 1990) and the Supreme Court of Canada (Alarie & Green 2010).

A related method of detecting amicus influence involves examining the ideological direction of individual judges' votes (Bailey et al. 2005, Box-Steffensmeier et al. 2013, Collins 2008a, Manzi & Hall 2017, Pacelle et al. 2017, Szmer & Humphries Ginn 2014). This research strategy has the benefit of closely matching the policy goals of amici, while also allowing for a consideration that amicus briefs might have differential effects on judges based on attributes like the identity of the amici and the judges' ideologies. Thus, this research tends to take a more nuanced look at judicial outcomes as compared with other approaches.

Collins (2008a) pioneered this method by examining whether the influence of amicus briefs at the US Supreme Court is mediated by the justices' ideologies based on theories of motivated reasoning. For example, Collins posited that liberal amicus briefs would enhance the chances of observing liberal justices casting liberal votes, because liberal justices are predisposed to favor the arguments in those briefs. Conversely, conservative amicus briefs should have little or no influence on liberal justices, because liberal justices are likely to discount or ignore the information in those ideologically discrepant briefs. Interestingly, the evidence indicated that this was not generally the case. Instead, the influence of amicus briefs was, on the whole, fairly uniform across justices with different ideological preferences. Box-Steffensmeier et al. (2013) expanded this research by investigating how Supreme Court justices respond to the relative power of interest groups filing amicus curiae briefs. They find that justices do respond to the relative power of amici and that ideology can moderate the effect of amicus power in certain circumstances. Szmer & Humphries Ginn (2014) further explored this topic, evincing that justices who have expertise in a particular area of the law are less receptive to the arguments made by amici in that area of the law. More recently, Manzi & Hall (2017) expanded a signaling approach to amicus influence originally developed by Bailey et al. (2005) with respect to the solicitor general. This theory posits that, when an interest group that is traditionally aligned with a particular ideological position files an amicus brief that runs counter to that position (e.g., a conservative group files an amicus brief advocating for a liberal outcome), the justices will be especially receptive to this brief because that unexpected signal conveys more noticeable and credible information than when an interest group files an amicus brief consistent with its general ideological orientation. They uncover evidence that these types of unexpected signals influence the ideological direction of the justices' votes, but that expected signals do not. Moreover, they find this effect is enhanced for justices who share the ideological preferences of the amici, suggesting that such justices view these signals as especially credible.

Likely motivated, at least in part, by the nuance that examining amicus influence in terms of the ideological direction of judges' votes provides, this approach has been expanded outside of the US Supreme Court. Collins & Martinek (2015) investigated amicus influence on US courts of appeals judges and found that ideology does mediate the influence of amicus briefs. In particular, moderate and conservative judges respond to the persuasion attempts in amicus briefs, but liberal judges do not. They attribute this finding to possible differences in the cognitive processing styles of judges with varying ideologies. For example, they suggest that conservative judges' positive responses to amicus briefs may be evidence of a heuristic persuasion framework that liberal judges do not engage in with regard to processing the information in amicus briefs. Kane (2017) applied this approach to state courts of last resort. She found that ideology played a limited role in conditioning the effect of amicus briefs and that the method of judicial selection does mediate the influence of amicus briefs, particularly for judges concerned with reelection in product liability cases. Outside of US courts, Alarie & Green (2010) found that the justices on the Supreme Court of Canada are all susceptible to intervener influence and that ideology does not mediate the influence of intervener briefs.

The third method scholars use to investigate the influence of amicus briefs involves looking for evidence of influence in judicial opinions. This literature works from the perspective that a paramount goal of amici is to convince judges to develop policies that are favorable to group interests. One of the primary ways that amici can achieve this goal is by influencing the content of judicial opinions. The main approach to examining amicus influence in judicial opinions has been to compare the language and/or arguments in amicus briefs with the language and/or arguments in judicial opinions.

Scholars have approached this in several ways. One means to accomplish this involves qualitatively investigating whether judges adopt arguments found in amicus briefs (Campbell 2002, Dolidze 2012, Ehrlich 2017, Epstein & Kobylka 1992, Samuels 2004, Vose 1959). This research reveals that amicus briefs have played an important role in many highly significant US Supreme Court cases, with the justices adopting the arguments of amici as the basis for their opinions in many of the cases under analysis. A drawback of this approach is that the focus on a single case, or set of interrelated cases, may limit the generalizability of any findings of amicus influence. To remedy this, Spriggs & Wahlbeck (1997) were the first to systematically compare the arguments advanced in amicus briefs with those appearing in the Court's opinions in a relatively large number of cases. They found that the Court is more likely to favorably incorporate the arguments in amicus briefs into its opinions when those arguments reiterate those of the parties to litigation and when they are advanced by the US Solicitor General. Wofford (2015) compared the legal rules adopted by the Supreme Court with those advanced by amici and corroborated Spriggs & Walbeck's (1997) findings regarding repetition. More recently, scholars have begun adopting computer-assisted content analysis techniques to examine amicus influence on court opinions (Collins et al. 2015, Feldman 2017, Hazelton et al. 2017, Huang & Roemheld 2016). For example, Collins et al. (2015) used plagiarism detection software to compare the language used in amicus briefs with that appearing in judicial opinions. They found that Supreme Court justices adopt more language from amicus briefs that are clearly written, repeat arguments advanced in other sources (such as litigant briefs and lower court opinions), and are filed by high-status public and private amici.

In addition to examining the language, arguments, and rules advanced in amicus briefs and judicial opinions, other scholars have investigated amicus influence on opinions in other ways. For example, some have examined the extent to which judges cite or quote from amicus briefs in judicial opinions (Epstein 1993, Harper & Etherington 1953, Kearney & Merrill 2000). Others have explored whether amicus briefs can increase the chances of observing a dissenting or concurring opinion (Collins 2008a,b; Rebe 2013). This research reveals that judges are more likely to author concurring and dissenting opinions in cases with a relatively large number of amicus briefs, as such briefs signal the importance of a case and provide judges with a foundation for drafting a separate opinion.

In addition to examining amicus influence in terms of litigation success, the ideological direction of decisions and votes, and the content and presence of judicial opinions, a small body of work is devoted to assessing amicus influence in other ways. One such method involves interviewing judges and law clerks regarding their perspectives on the benefits of amicus briefs and what makes for an effective amicus brief (Flango et al. 2006, Lynch 2004, Simard 2008). This work is particularly illuminating, as it sheds light on how amicus briefs are processed by clerks and judges and what they look for in high-quality amicus briefs. Finally, amicus briefs increase media coverage of court cases because they illustrate to the media that the case will affect a broad array of societal interests (Maltzman & Wahlbeck 2003, Sill et al. 2013, Slotnick & Segal 1998). However, there are questions of causality in this research because cases that implicate broad societal interests are likely to attract a greater number of amicus briefs than less salient cases.

Taken as a whole, the literature on the influence of amicus briefs is quite well developed. Of course, there are still useful directions for additional research. First, future scholarship should abandon examining amicus influence in terms of litigation outcomes, unless it can demonstrate that this is a significant goal of amici. My sense is that this approach to amicus influence was advanced because amicus briefs almost always support a given litigant and because it is relatively easy to measure winners and losers in litigation. The problem is that it is not at all evident that amici are primarily interested in a particular litigant winning or losing, independent of other aspects of the decision, like its implications for public policy. Thus, work in this vein would be better off focusing on the ideological direction of decisions and judges' votes, as well as the content of judicial opinions, because these dependent variables more closely align with the goals of amici compared with measures of litigation success. Further, these approaches allow researchers to explore the possibility that amicus briefs do not uniformly influence judges, while more rigorously controlling for other influences on judicial decision making and opinion content. Second, it will be important to devote more attention to what types of amicus briefs are most influential. Though some inroads have been made on this front (Collins et al. 2015, Wofford 2015), I am particularly interested in work that evaluates how judges view and respond to amicus briefs that provide social scientific information, facts, perspectives of other actors in government, and voices of those who might be affected by the ruling. Third, it will be useful to compare various approaches to detecting amicus influence. For example, opinions that specifically cite and/or quote from amicus briefs probably also score high on the adoption of language from amicus briefs based on plagiarism detection techniques that pick up overlapping language even in the absence of citations to amicus briefs. By triangulating among various approaches to amicus influence, we can gain a better comprehension of this significant topic. Finally, it will be important to get a better understanding of the process by which amicus briefs are processed or triaged by law clerks and judges. To be sure, there is evidence that, at least on the Supreme Court, justices do not read all of the amicus briefs (Lynch 2004, Scalia & Garner 2008). Understanding why some amicus briefs are closely scrutinized and others are not will go a long way in informing our understanding of amicus influence.

NORMATIVE CONCERNS ABOUT AMICUS BRIEFS

In addition to addressing the issues related to the amicus practice discussed above, scholars have engaged in normative debates about the use of amicus briefs. Many scholars praise the amicus practice for its potential to improve the quality of judicial decisions (Collins 2008a, Jonas 2015, Larsen & Devins 2016), as a mechanism for democratic input into often politically insulated courts (Edwards 2017, Garcia 2008, Simmons 2009), and for its role in promoting social justice (Chang & Wang 2009). Others criticize the amicus practice for hurting the adversarial process, turning the courts into political institutions, having too much influence on judges' decisions, and presenting courts with unreliable information (Larsen 2014, Rustad & Koenig 1993, Solimine 2016). Importantly, many of the normative concerns regarding the use of amicus briefs can be subjected to empirical scrutiny. Thus, amicus activity represents a key area at the intersection of normative theory and empirical social science. I wish to highlight a few of these normative issues to illustrate how they can be addressed through the empirical study of amicus briefs.

One of the core normative concerns implicated in the study of interest groups at large is the possibility that legal and political actors might favor groups that represent the interests of the elite, such as businesses and corporations (Schattschneider 1960). In this sense, there is a fear that more well-resourced amici might have a greater ability to file amicus briefs and have a disproportionate influence on judicial decisions and opinions. The existing scholarship dispels some of these fears and confirms others. Studies of the types of groups that participate in American courts tend to paint

a picture of a diverse assortment of amici (Caldeira & Wright 1990; Collins & Martinek 2010a; Collins & Solowiej 2007; Epstein 1993, 1994). But we have little knowledge of the variety of groups that participate outside of US courts. Recent scholarship on amicus influence demonstrates that, at least in the US Supreme Court, high-status amici are quite powerful, exerting perhaps undue influence on case outcomes (Box-Steffensmeier et al. 2013) and the content of judicial opinions (Collins et al. 2015), in addition to receiving special attention from law clerks (Lynch 2004). These findings should cause some alarm for those concerned that the amicus practice can be manipulated by powerful interests in an effort to use the courts to create social change. Moreover, these initial findings provide evidence that future research in this area will certainly be worthwhile.

A related area of concern involves the extent to which the amicus practice really does provide democratic input into the judiciary. For example, some low-resource groups that may want to file amicus briefs might be prevented from doing so because of filing and printing fees, the inability to procure appropriate legal counsel, and other barriers related to the rules and procedures that govern amicus filings. Further, there is evidence in the US Supreme Court that amicus briefs are triaged by law clerks, thus indicating that not all (or even most) amicus briefs are read by judges (Lynch 2004, Scalia & Garner 2008). This indicates that, even if potential amici can overcome various barriers to filing amicus briefs, there is no guarantee that their brief will be read, therefore limiting the democratic benefits of the amicus practice in terms of providing a diverse array of viewpoints to judges. Questions related to this can be pursued through interviews with law clerks and judges regarding how amicus briefs are processed and whether there are biases in terms of the types of amicus briefs that make their way from law clerks to the judges deciding cases.

Finally, there are concerns that litigants play too large a role in coordinating with potential amici, which can hurt the adversarial system. This can involve litigants ghostwriting amicus briefs or recruiting amici to their causes in an effort to evade length restrictions in their own briefs. Though some courts have adopted rules that require amici to indicate whether the parties contributed to the brief (Collins 2008a), such rules do not exist in all jurisdictions. Importantly, questions regarding coordination can be addressed in empirical studies. For example, there are content analysis techniques that can detect evidence of ghostwriting (Rosenthal & Yoon 2011, Wahlbeck et al. 2002), and interviews with litigants and amici about their level of coordination, similar to those conducted by Larsen & Devins (2016), can clarify the extent to which these fears are well founded.

CONCLUSIONS

Amicus curiae briefs constitute one of the most common mechanisms that interest groups and other entities use in an attempt to translate their economic, political, and social preferences into law. Moreover, the use of amicus briefs gives rise to numerous normative concerns, ranging from bias in the administration of justice by judges to unethical behavior by litigants, such as ghostwriting amicus briefs. Given this, it is not surprising that scholars have devoted a great deal of attention to understanding the amicus practice. Though this literature has made substantial inroads into furthering our understanding of the use of amicus briefs, this literature is deficient in several regards. In addition to those discussed above, there are other areas that present challenges to scholars studying the amicus practice.

Perhaps most notably, the literature on amicus briefs is overwhelmingly focused on American courts, particularly the US Supreme Court. In some ways, this is understandable. For example, many of the scholars studying amicus briefs come from US institutions and thus examine courts with which they are familiar. In addition, access to amicus briefs in the American legal system, and especially the US Supreme Court, is easier to come by as compared with other judiciaries. However, the relative ease with which studying amicus briefs in the American context can be accomplished

should not outweigh the limitations of focusing primarily on a single country. In particular, the emphasis on American courts has likely limited the generalizability of our understanding of the use of amicus briefs by interest groups and judges. In addition, it may have skewed our understanding of the goals of amici and how law clerks and judges view amicus briefs. As a result, we must continue to expand the study of amicus briefs outside of the American court system.

Another challenge facing scholars of amicus briefs involves more thoroughly connecting the goals of amici and judges, the content of amicus briefs, how amicus briefs are processed, and the research designs used to detect the influence of amicus briefs. As Collins (2008a) notes, many of the early studies of amicus briefs lacked a strong theoretical orientation, leading to some confusion as to whether the methods used to investigate amicus influence matched with the goals of amici and judges. Though recent efforts have more closely connected these goals to research designs, there is still much work to be done. In particular, we need to begin approaching the study of amicus briefs from a more global perspective by developing research designs capable of connecting the goals of amici with the goals of judges, while taking into account the content of amicus briefs and the realities of how amicus briefs are processed by judges and their law clerks. This will likely involve triangulating approaches, including conducting interviews and surveys with amici, law clerks, and perhaps judges, as well as designing careful qualitative and/or quantitative tests to detect amicus influence that are consistent with the results of these interviews and surveys and the content of the amicus briefs under scrutiny.

Finally, much can be gained by more fully integrating the literature on amicus briefs with the broader scholarship on social movement litigation. Though there are some exceptions, it is not hard to get the impression that the literature on amicus briefs developed almost entirely independently from the vast literature on social movement litigation. This is troubling, as social movement litigation scholarship often addresses some of the missing areas in amicus scholarship, such as the goals of social movement actors (Cummings & Eagly 2001), the development and types of arguments used in litigation (Cole 1984, Sarat & Scheingold 2006), and how movements can use litigation to mobilize individuals sympathetic to their causes (McCann 1994). By more thoroughly marrying these two literatures, which have much in common, I am confident that our understanding of the use of amicus briefs will continue to flourish.

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