

The Effect of Ideological Divergence on Agency-Judicial Interactions

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Abstract

The literature on executive-judicial interaction typically focuses on the Supreme Court and the President or the Solicitor General. Bureaucratic interactions with the federal courts, even the Supreme Court, has been given little attention by scholars. This paper examines the effect of ideological distance on the likelihood and volume of bureaucratic amicus brief filings in the Federal Courts of Appeals. The data collected is between 2000-2012 and covers three agencies and two Cabinet departments.

Most research on executive branch and judicial interaction has focused on Supreme Court and Solicitor General interaction, particularly in terms of the President's preferences. Judicial literature lacks systematic examination of the non-Presidential, executive branch influence on the lower federal appellate courts, especially in terms of the bureaucracy. Scholars who do examine bureaucratic-judicial interactions tend to view government agencies as subordinate to the courts, with courts as a sort of additional principle. The most visible piece of literature on this, for example, focuses on bureaucratic compliance with court opinions (Spriggs 1997). Very little, if any, literature focuses on the interaction of the court and the bureaucracy as equals, excepting the Department of Justice's Solicitor General.

The Solicitor General, while technically a member of the bureaucracy, does not occupy the same position as a majority of agencies. The main purpose of the Solicitor General is to represent the executive branch, and in particular, the preferences of the President. Despite the political power the President holds over bureaucratic agencies, it is problematic to assume that the preferences of the agencies and the President are completely congruence. Agencies are allowed a degree of independent from the President and are typically considered the stable portion of the executive branch. This implies that, over time, agencies may develop policy goals that are independent of the current President, and will take initiative to affect policy changes in the desired direction. There is the addition fact that the Solicitor General rarely, if ever, interacts with the lower federal courts. Mainly, the focus of the Solicitor General, and the President by implication, is on the Supreme Court. The Supreme Court is the main venue for large-scale, national policy change, which is generally the goal of the President and thus the goal of the Solicitor General.

The Supreme Court, however, is an unlikely venue for agencies to pursue policy change. The Supreme Court's discretionary jurisdiction ensures that Justices will not hear an overwhelming number of cases, unlike overworked lower appellate courts. The cases heard by the Supreme Court are of unusually high salience and visible to the public in ways lower courts cases are not. The public is aware of the Supreme Court's docket,

and given the potential political repercussions of the opinions, Congress and the President will likely pay more attention to those cases. The political costs of attempting to pursue policy independent of executive or Congressional direction alongside the potential for attracting negative public attention create a high cost environment with a low chance of successfully moving policy. Moreover, there are likely norms preventing government agencies from becoming involved in Supreme Court cases without permission from the President and Department of Justice.

When, then, do government agencies attempt to influence decision-making in the courts? In order to answer this question, I look to the U.S. Courts of Appeals and the filing of amicus briefs filed by agencies. My assertion is that government agencies will weigh the costs against the probability of effectiveness when filing an amicus curiae brief. The agency's perceived probability of success in influencing a judge's decision is impacted by a number of factors, key among them ideology.

Theory

The lynchpin assumption to my theory is that the relationship between the Solicitor General and the Supreme Court is similar to the relationship between the Courts of Appeal circuits and bureaucratic agencies. The Solicitor General, as established above, holds a separate, higher-visibility, higher-salience position than most agencies. As a direct tie to the President, the Solicitor General focuses on national issues and interacts mainly with the Supreme Court. This means that the Solicitor General has more universal policy preferences, while agencies, created in the context of a certain issue, are more particular. Both the Solicitor General and other government agencies, however, possess policy preferences. Unlike the Solicitor General, policy-oriented agencies are limited by resources such as time and money, as well as limits on the scope of policy change. The Solicitor General, as a rule of thumb, retains the right to represent the full executive branch in Supreme Court proceedings. Agencies, therefore, cannot use the highest court in the land to pursue their preferences and must resort to lower courts.

The main similarity between the Solicitor General and other bureaucratic entities, and the reason that their relationship to the judicial system is comparable, lies in their status as official parts of the executive branch. The Solicitor General, as a highly visible player who has enormous Presidential support, is seen by the Supreme Court as a credible source of information, whether that information be Presidential preferences or policy expertise. Bureaucratic agencies, especially those that are farther removed from the President, are likely not seen as credible signals of Presidential preferences. This does not alienate the bureaucracy completely from the President's support, however. Lower federal courts should still perceive the bureaucracy as supported, either implicitly or explicitly, by the President and the rest of the executive branch. Agencies should also be afforded status as a credible source of policy information, even more so than the Solicitor General.

My second assumption is that filing an amicus brief is costly to an agency. Time, capital, and effort must be invested in the process in order to learn case facts and draft the brief. There is also a reputation cost—agencies are generally repeat players in the court system, and so must maintain a professional, credible reputation. When an agency files an excessive number of briefs, that agency may lose credibility and value as an informational source (Beim et al. 2014). This prevents agencies from filing a large number of briefs in a circuit. Moreover, agencies are generally not created as a purely legal organization. The ability of an agency to file briefs and act as a liaison to the courts is constrained by the fact that it is not generally ingrained in an agency to do so. Instead, agencies must go out of their way to file these briefs and influence the courts. Filing amicus briefs is a peripheral task to organizational tasks for most agencies. By diverting resources and investing time and effort into filing briefs, the agency is not able to use those resources and time to complete task more in line with the agency purpose. If the cost of filing a brief is more than the benefit an agency is expecting to gain, then it is not in an agency's best interest to file.

My third and fourth assumptions are intertwined: governmental agencies have policy preferences and file amicus briefs in an attempt to influence court opinions in a way that

pushes policy closer to the agency's preference. The ability of an amicus brief to persuade rests on whether the filing entity has an informational advantage over the circuit. The idea of amicus briefs as information tools for the courts underlies much of the past research on these types of filings (Caldeira and Wright 1990; Spriggs and Wahlbeck 1997). Judges cannot be experts on even a fraction of the topics that they encounter. Circuit judges hear a variety of cases, and the caseload in relation to the number of judges per circuit is too large to reasonably assume judges can adequately learn about every topic without help. Amicus briefs are theoretically capable of solving this information problem. By providing new information and policy knowledge, organizations or individuals can expose judges and their staff to what they consider to be the true state of the world.

Past research, however, has shown contradictory results on the effect interest groups and other non-governmental organizations in influence the court through amicus briefs. Songer and Sheehan (1993) find no support for the hypothesis that amicus briefs increase litigant success. Other work, however, shows that these briefs, filed by an interest group or other entity, do impact changes of litigant success (Collins 2004; Collins, Corley, and Hamner 2015; Kearney and Merrill 2000). The effect of the Solicitor General in influence judicial decision-making through amicus briefs, and even generally litigation presence, is well-documented and less contested, though it is also constrained (Wohlfarth 2009; McGuire 1998; Bailey et al. 2005; Caldeira and Wright 1990; Black and Owens 2012). Part of this influence can be attributed to institutional legitimacy and the support, whether implicit or explicit, of the President. As explained in assumption one, this institutional legitimacy and Presidential support should travel down the executive branch totem pole. Agencies, therefore, are likely viewed by the courts as credible sources of information, which differentiates agencies from non-governmental organizations when filing amicus briefs.

Additionally, unlike the Solicitor General's purpose of representing Presidential and executive branch preferences in court, agencies are created with specific policy goals in mind. This creates policy expertise and allows agencies to have policy preferences that do not merely reflect ideological biases, but instead respond to the state of the world.

This policy expertise, while not technical in nature, reflects the ability of the agency to know the state of the world and formulate an appropriate response. In other words, the agency knows better than the circuit about the optimal policy. Agencies are also in charge of enforcing the policy that the courts are ruling on. When the circuit is an increasing informational disadvantage, agencies with a higher informational advantage should attempt to take advantage of the situation by filing more briefs.

Hypothesis 1: As agency age increases in tandem with increasing judicial workload, the likelihood of an agency to file a brief increases.

My fifth assumption is that agencies perceive the courts as ideological and are aware of the circuit ideology. The ability to accurately place circuits on an ideological spectrum increases as agencies have repeated interactions with the circuit. The more experience an agency gains with a circuit, the better able that agency is in ascertaining the circuit's ideological bent. Furthermore, this increases the agency's ability to calculate the probability the panel chosen from the circuit will be ideologically distance. Under the previous assumptions, when ideological distance increases past a critical point, agencies are likely to see the costs as outweighing the potential for benefit. Moreover, when an agency is reasonably confident that a circuit has a similar, if not completely convergent, ideology, then that agency is also reasonably confident that the circuit shares the desired policy preferences. In other words, if the circuit is already going to reach the decision that the agency would promote due to ideological congruence, there is no reason for the agency to waste resources and file a brief. In this case, when an agency and a circuit decrease in ideological distance past a critical point, then there will be a decreasing likelihood that an agency will file an amicus brief. The agency's confidence in the circuit's similar policy preference implies that agencies view filing a brief as a wasted cost.

Agency experience is gained through repeated interactions, which add to an agency's organizational memory. Altogether, this implies that older agencies are more likely to accurately estimate circuit ideology. Older agencies, therefore, should file fewer briefs in circuits when the ideological distance is extremely small or extremely large. Instead, these agencies are more likely to file briefs in circuits that are at a moderate ideological

distance.

Another effect of increasing ideological distance is the decreasing perception of agency legitimacy by the court. Black and Owens (2013) examine the effect of workload and ideological distance on opinion bargaining between judges in the Courts of Appeals. They find that the greater the ideological divergence between an opinion author and a judge requesting change to the opinion, the less likely the opinion author is to bargain with the ideologically-distant judge. However, when an opinion author is ideologically similar to the judge requesting opinion changes, there is a higher chance of successful bargaining. While the relationship between judges on a panel is vastly different than an agency and the circuit, the underlying principle is applicable. As agencies increase in ideological divergence, there will be a decreasing probability that the circuit will view the information provided by the agency as valid and authentic. The information will be considered purely ideological and polarized rather than a reflection of the state of the world.

Research by Bailey et al. (2005) and Wohlfarth (2009) support my assumption that polarization and ideological divergence decreases the validity of information and thus the influence of an otherwise legitimacy informational source. Wohlfarth (2009) argues that the ideological proximity limitation is present, but enhanced by the perception of the Solicitor General as overly-politicized. When the Solicitor General is perceived as overly-politicized, especially if the ideological distance is large, then the Solicitor General's influence is dramatically limited. Bailey et al. (2005) finds that the ideological proximity of the Solicitor General to the Supreme Court conditions the Solicitor General's impact on the Justices. The farther the ideological distance between the Solicitor General and the justices, the less influential the Solicitor General becomes. A recent study found that ideological divergence diminishes the influence of the Solicitor General (Black and Owens 2013). The research presents evidence that both ideological distance and the degree of politicization attributed to the Solicitor General impacts her interactions with the Supreme Court. When the ideology of the Solicitor General is near the Court's, the Solicitor General has greater influence. As the ideological divergence increases, the Solicitor General's influence diminishes. The relationship between decreasing influence

and increasing ideological divergence is enhanced by the perceived politicization of the Solicitor General: when she is seen as more political in addition to being ideologically divergent, the Court is less likely to be influenced.

Hypothesis 2, Part 1: When the ideological distance between an agency and a circuit is small, an agency will be less likely to file amicus briefs in that circuit. Similarly, when ideological distance is large, filing will also be less likely. Hypothesis 2, Part 2: When ideological distance between an agency and circuit is moderate, the agency will be more likely to file amicus briefs in the circuit.

Further evidence that the perceived legitimacy of information is negatively impacted by ideological divergence can be drawn from behavioral literature (Kuklinksi, Quirk, Jerit, and Rich 2000; Nyhan and Reifler 2010). People have a strong tendency to reject new or more accurate information in favor of older, less thorough knowledge when the information presented. Government organizations, while not people, are made up of people. Thus, one might expect that the collective behavior of agencies and circuits will follow similar principles. This lends support to the possibility that governmental actors will behave in a similar fashion. Applying this same logic to bureaucratic agencies, ideologically distant agencies will be less likely to be effective in a circuit. Agencies, as repeat players with multiple interactions with the circuits, should be aware of this and know that new information via an amicus brief to an ideologically distant circuit will likely be discounted.

Hypothesis 3: As an agency increases in age, so too increases the probability of filing amicus briefs in circuits that are at a moderate ideological difference. The probability an agency files in an extremely divergent or congruent circuit, however, should decrease.

U.S. Courts of Appeals

The U.S. Courts of Appeal are split into thirteen circuits. The first through eleventh circuits and D.C. circuit are divided by geographical area and coincide with the federal district courts. The Federal Circuit Court has nation-wide jurisdiction and hears specialized cases, such as those appealed from the Court of International Trade and the Court of Federal Claims.

The first twelve Courts of Appeal hear cases that are appealed from the lower federal district courts, as well as appeals regarding federal agency decisions. The Courts of Appeal do not hear the facts about the case but instead rule on the constitutionality and correctness of the cases. The judges are partitioned into panels of three, though an *en banc* request can be filed after the panel decision is handed down. Within the paper, I will omit the Federal Circuit Court. The specialized nature of the Federal Circuit Court makes it unlike the other twelve Circuit Courts, and thus subject to different theoretical expectations.

Research Design and Data Collection

Scope of the Data

The data covers 2000-2012 and four government agencies: the EEOC, the FTC, the SEC, the Department of Labor, and the Department of Justice. The cabinet departments were disaggregated to the agencies inside the departments responsible for the actual filings. While the agency ideology scores for the disaggregated cabinet agencies reflect the department as a whole, the polarization scores and the total amici filed are specific to the agencies. In order to test the accuracy of my results, I combine the number of amici filed at the agency level and aggregate the data up to the department level.

The agencies chosen for analysis are partially a result of practicality: the availability of data was a major determinate in the selection process. Records of court brief filings are generally either hard to locate or restricted to cases in which an agency is an appellate or defendant. The Equal Employment Opportunity Commission (EEOC), Consumer

Financial Protection Bureau (CFPB), Department of Labor (DoL), and Department of Justice (DoJ), Federal Trade Commission (FTC), and Securities and Exchange Commission (SEC) all provide seemingly comprehensive records of the amici filed on their websites. The CFPB, however, was not assigned an ideology score by Chen and Johnson (2014) and had a small number of amicus briefs filed over a limited number of years. The SEC and FTC also contained limited numbers of briefs. The FTC also filed eight briefs in the Federal Circuit, which was dropped from the analysis due to its lack of similarity to the other Courts of Appeal.

Another important note about the agencies is the Department of Labor and Department of Justice are split into numerous smaller agencies. The records for brief filings are thus subject to each agency within the department, unless the brief was filed in a Supreme Court case. This means that the total number of briefs filed by an agency in a given circuit during a given year is not representative of the whole Department but rather the agency that houses the division. For some divisions, only one or two briefs were filed during the panel years. Other divisions, however, have a high number of filings over a long stretch of time. This will be addressed later on in the data portion of the paper, but it is worth noting that both a variable for the departments as a whole and a separate variable for each department agency are included in the dataset. Any analysis done must be conducted in such a way that the general Department observations and the inner-department agencies are not being included in the model at the same time.

Amicus Briefs

The number of amicus briefs was collected from agency websites. The websites typically included a PDF copy of the brief, the date it was filed, the court-level it was filed in (state-district, state-appellate, state-supreme, federal, or Supreme Court), and occasionally the purpose of the amicus brief. The circuit and case number were pulled from agency websites when available, but were typically collected from the PDF file of the brief. Most agencies listed briefs filed between the mid-1990s and 2016, and some agencies had duplicate entries due to dialogue with the court or corrections/additions to a

filed brief. Once the dataset was created, all filings not in the Federal Courts of Appeals and between 2000 and 2012 were dropped (the Federal Circuit was also dropped from the usable dataset). The amicus brief data were then aggregated to the agency level for the purpose of this paper.

Ideology Scores

The Chen and Johnson (2014) agency ideology scores are bounded between -1 and 1 and anchored to the DW NOMINATE scale. The data spans over the Clinton administrations, the two George H. W. Bush administrations, and the first Obama administration. Of the 72 agencies included in the dataset, I could only locate amicus data for the Department of Labor, the Department of Justice, the Equal Employment Opportunity Commission, the Federal Trade Commission, and the Securities and Exchanges Commission.

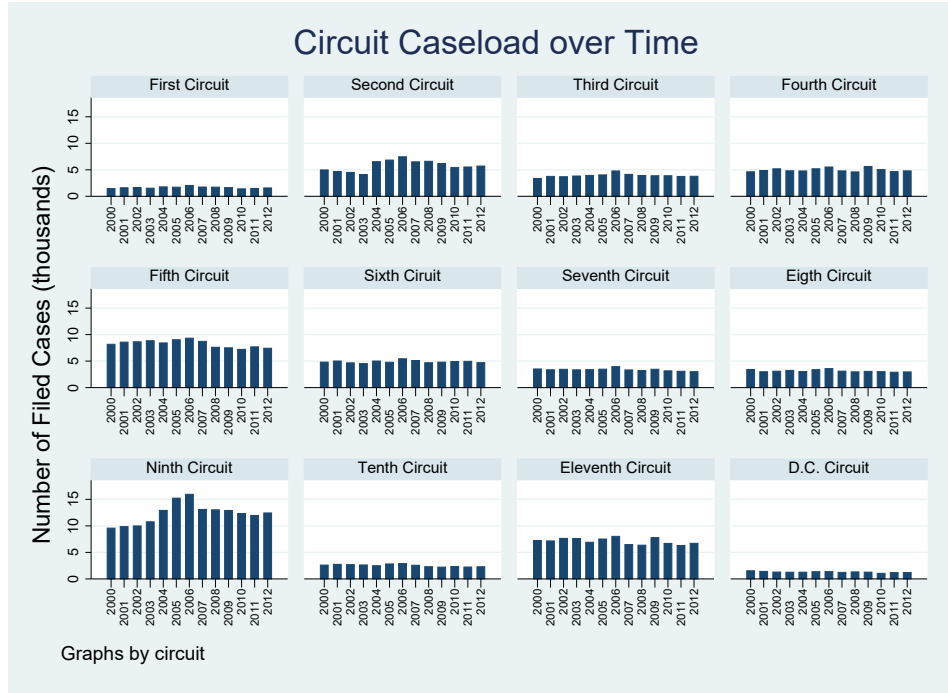
The Judicial Commonsense database includes judicial ideology scores for Supreme Court justices, Courts of Appeal judges, and the medians for the Supreme Court and each circuit on the Courts of Appeal between 1937 and 2014. The data does exclude the Federal Circuit Court, since that particular circuit is unique in function. The scores are a transformation of the Martin-Quinn scores, bounded between -1 and 1 and anchored to the first dimension DW-NOMINATE scale.

Caseload

The number of pending, filed, and terminated cases per year in a circuit were gathered from the Caseload Judicial Management Caseload Statistics (2000-2015) website. The values were then logged in order to ease interpretation and normalize the distribution.

The graph below shows the change in filed cases over time in a given circuit. The Ninth Circuit has the highest volume of cases, while the First and D.C. Circuits receive the least. The case volume is relatively stable over time, though increases and decreases vary over circuit.

Figure 1: Circuit Caseload Changes over Time



Polarization

The polarization scores were calculated using Lewiss (2008) measure: the proportion of appointees to managers in an agency. The total number of employees, managers, and appointees between 2000 and 2005 were gathered from Lewis’s 2008 dataset. The dataset, however, stops after 2005. I extended the data on employees, managers, and all appointees except Senate-confirmed from 2006 to 2012 using the Office of Personnel Management’s raw data files. The data collected is from September of the given year. I was unable to access FedScope, the data source for Lewis’s original data, and could not gather the Senate-confirmed appointee numbers. This forced me to drop the Senate-confirmed appointee number from the calculation of the polarization score. This has potential to affect the models substantially, so I ran the main models for only 2000-2005 and compared the measures for polarization.

Agency Age

The creation year for an agency was gathered from each agency's website. In order to create the age variable, I subtracted each observation year from the creation year.

Agency Level Data

The EEOC (1), FTC (2), and SEC (4) are easily coded. The DoL and DoJ, however, are slightly more difficult given that the dependent variable is measured by agency division, rather than the entire department. The DoL (3) and DoJ (10) are each measured in a general sense, so that the data for the departments reflect all of its divisions. However, the divisions that I specifically gather amicus brief data for are coded separately: the Black Lung and Longshore Legal Services (BL&LLS), Fair Labor Standards (FLS), Occupational Health and Safety (OHS), and Plan Benefits Security (PBS) divisions are each coded to reflect the bureau of the DoL that control it. The OHS, obviously, is housed inside the Occupational Health and Safety Administration. The PBS division provides legal services to the Employee Benefits Security Administration, known as the Pension and Welfare benefits Administration until 2003. The BL&LLS and FLS, however, are somewhat difficult since the administration both divisions were housed in underwent a massive reorganization post-2010. The Employee Standards Administration was split into four agencies: the Office of Federal Contract Compliance Programs, the Office of Labor-Management Standards, the Office of Workers' Compensation Programs, and the Wage and Hour Division. The FLS is now housed in the Wage and Hour Division and the BL&LLS is in the Office of Workers' Compensation. The coding system in my dataset lists the Employee Standards Administration (FLS) as well as the Wage and Hour Division as agency 6, and the Employee Standards Administration (BL&LLS) and Office of Workers' Compensation as 5. The Department of Justice is simpler than the DoL in terms of coding. Only data from the Antitrust (11) and Civil Rights (12) divisions of the DoJ were collected. Both division are under the control of the Associate Attorney General, and thus possess the same politicization, independence, and ideology scores. The FTC and Antitrust as well as the EEOC and Civil Rights agencies pertain to the same

agency mission, which makes discrepancies in amicus filing more theoretically interesting. If the agency mission is similar, what drives differences in filings?

The polarization measurement comes from Lewis (2008). He uses the proportion of managers to employees and relates it to the proportion of Presidential appointees. The data stop after 2005, so I expanded the dataset to 2012. Unfortunately, I could not access FedScope, the source that Lewis used, or contact the Office of Professional Management for the information. The OPM’s website provides raw data that includes, among other things, the number of Schedule A, B, C, and D; Career SES; Non-Career SES; Limited/Temporary SES; manager; and total employees. While the data does seem to vary slightly from the data Lewis collected, the differences are marginal. The only major problem is the raw data from OPM did not include the number of Senate-confirmed appointees. Incidentally, I was forced to drop the PAS variable from my dataset and rely only on non-Senate confirmed appointee proportions.

There are several variables within my data that indicate whether an agency is considered “independent.” All the data regarding the independence indicators are taken from the agency sourcebook from Lewis and Selin (2015). The general independence variable is the main indicator of agency independence in my analysis. If an agency is located outside the EOP and is not an executive department, the agency is considered independent. This is a constant term, which poses a problem if I want to use this as an explanatory variable within the model—it drops out of a fixed effects model.

Independent litigating authority is measured as a time invariant dummy—1 means that an agency has independent litigating authority, while 0 means the agency lacks it. Lacking independent litigating authority does not mean that an agency cannot file amicus briefs, only that the agency must request permission from the Attorney General before the agency can represent itself in court.

Rulemaking and party balancing are two other independence variables in the dataset. However, there is multicollinearity between rulemaking ability, party balancing, and the general independence measure. Every agency within the data collected is either both 1 for rulemaking, party balancing, and general independence, or 0 for all three measures.

Thus, the inclusion for independence in the model allows for both rulemaking and party balancing to be dropped. The last control variable included for at the agency-level is for agency size. Agency size is reflected by the number of employees within the agency. This data was gathered from the OPM’s raw data as well as Lewis’s dataset on agency polarization.

Circuit Variables

General caseload was collected via the Judicial Management Statistics website. The variable “filed_cases” reflects the raw number of cases filed in a court in a given year. The variable “pending_cases” reflects the number of outstanding cases at the end of the circuit-year. The number of terminated (closed) cases is measured with the variable “term_cases.” The number of cases filed is important in that it shows the potential workload of the circuit judges. The cases terminated and pending can be run in auxiliary models, but the main caseload variable of interest is measured with by the number of cases filed.

The importance of caseload is a) that it reflects the size of a circuit in terms of work and b) it provides a way to gauge an agency’s perception of how likely the circuit is to benefit from having supplemental outside information. If a circuit has a high volume of cases, then an agency might see an opportunity to help mitigate the circuit’s information disadvantage by filing an amicus. If a circuit has a fewer number of cases, however, an agency might perceive the circuit as more able to gather information internally and having less of a reliance on agency briefs.

Ideology

Circuit ideology scores are taken from the Judicial Commonsense Scores created by Epstein, Martin, Segal, and Westerland (2007). The scores are transformed Martin-Quinn, through a non-linear method, and anchored to the DW-Nominate scale in order to allow for cross-institutional comparisons. The agency ideology scores are measured by collecting campaign contribution data from agency employees to elected officials. The mean DW-

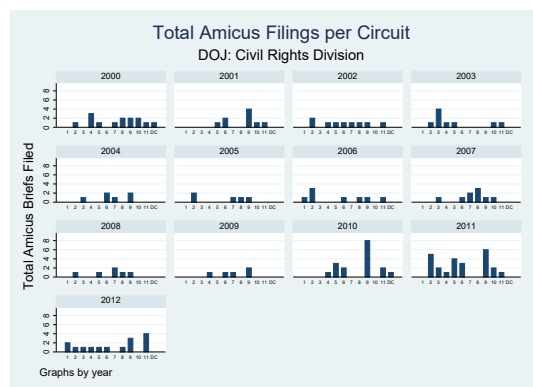
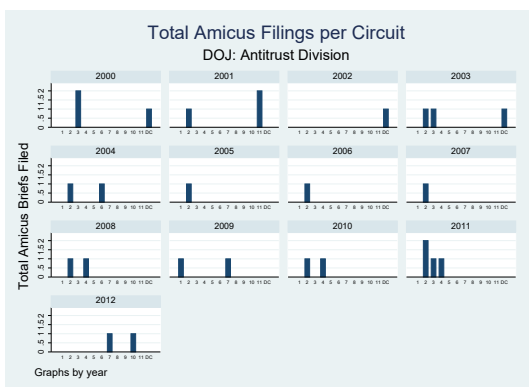
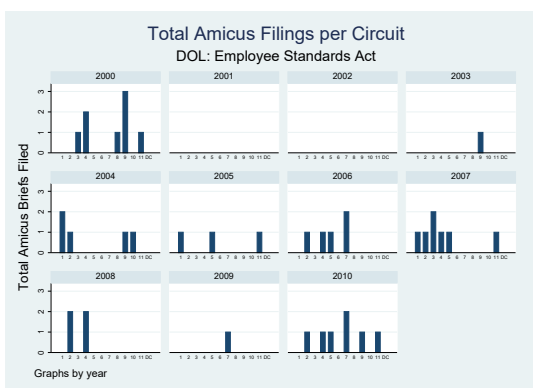
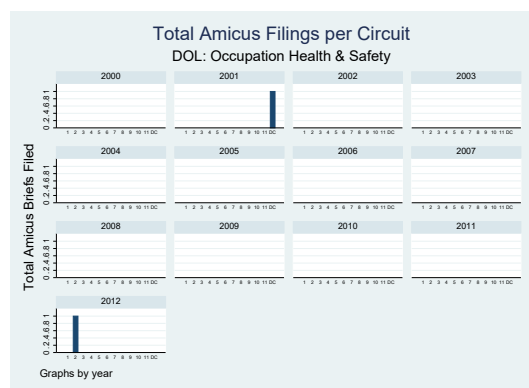
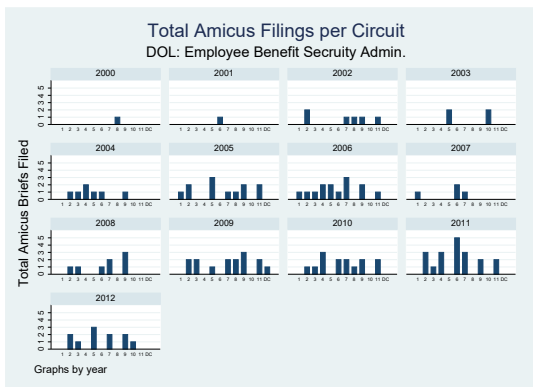
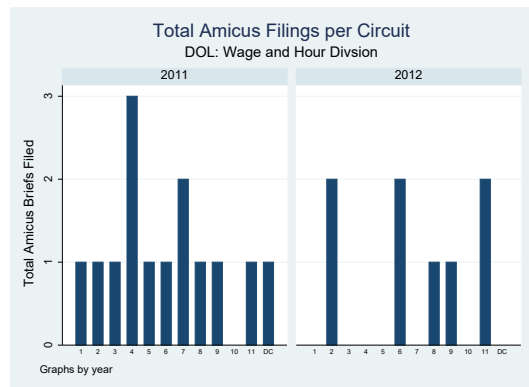
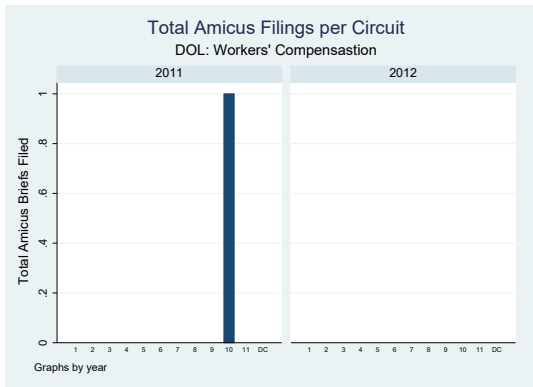
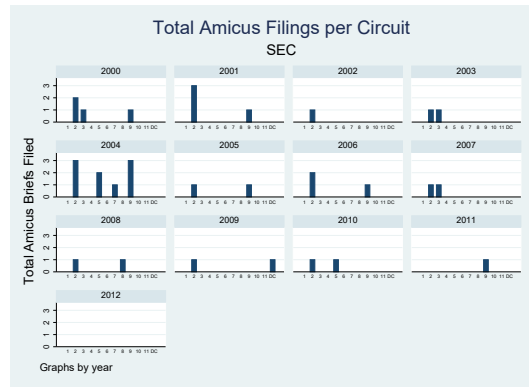
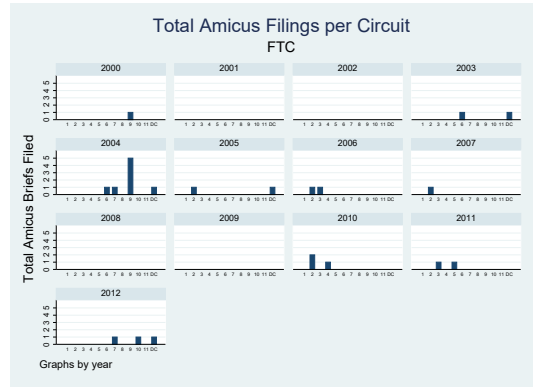
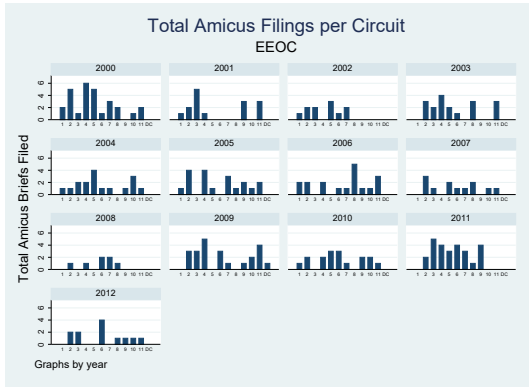
Nominate scores for contribution receivers are calculated and applied to the agency. The two ideology scores are thus anchored to the same Commonsense scale, allowing for comparison. The lower numbers correspond to more liberal ideologies and the higher numbers correlate to more conservative ideologies.

Amicus Briefs Coding

The dependence is a simple count of the total amicus briefs that an agency filed in a circuit during a given year. The agency websites publish the case, circuit, date, and type of brief that is filed. Additionally, most of the agencies provide a photocopy of the filed brief, which allowed me to collect the case numbers and verify the circuit number. The data collected is from the mid-1990s to 2016, spanning across ten different agencies. The maximum number of briefs filed in any circuit by a single agency in a year, however, is eight. The bar graphs below show the distribution of amicus filings across the different agencies.

Of the 1,716 observations, only 557 have a total number of briefs in a circuit-year greater than zero. A visualization of the data shows a heavy concentration of the dependent variable at zero, which creates a problem for analysis.

Figure 2: Agency Filings, by Agency and Year



Data Description

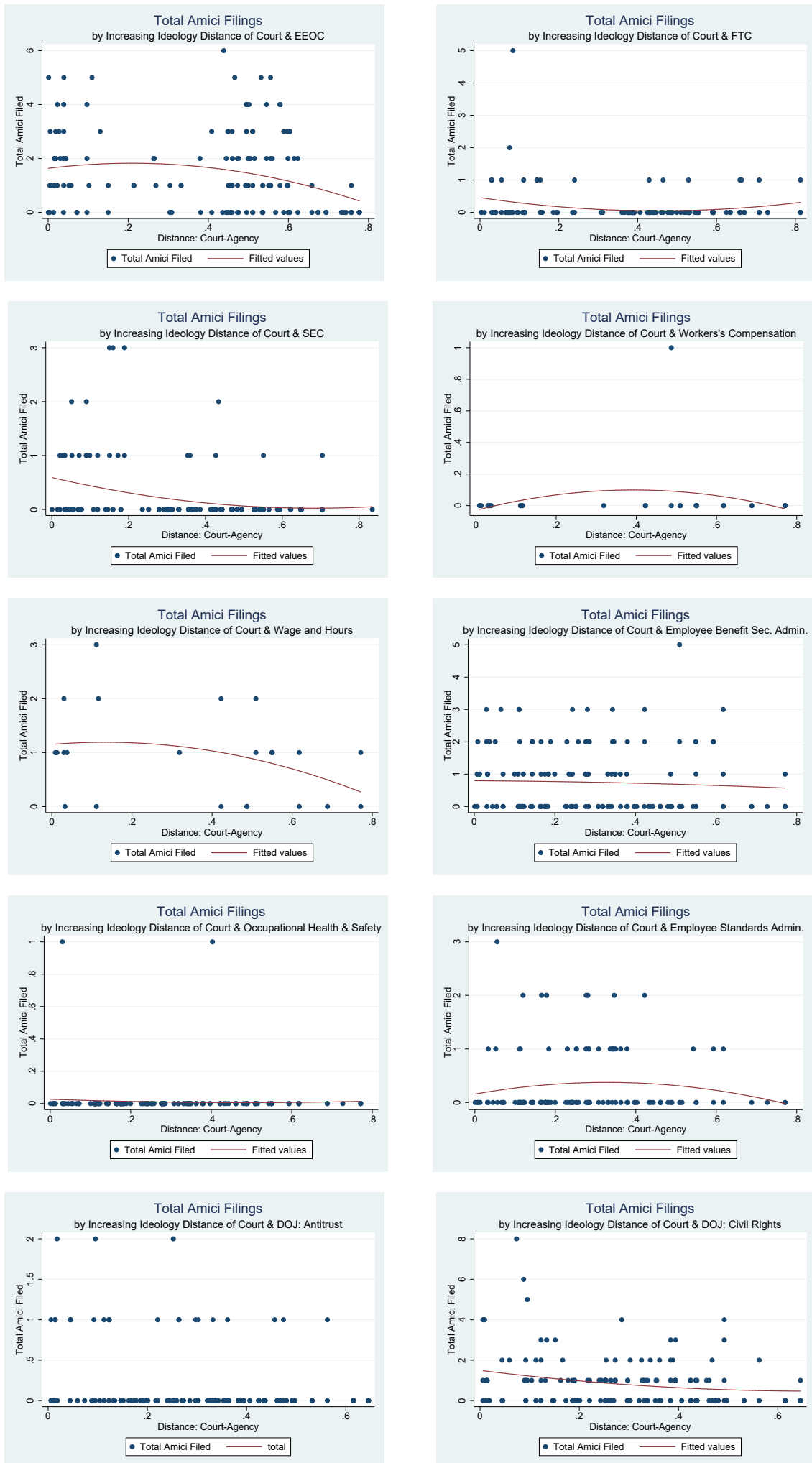
Table 1: Descriptive Statistics

	Polarization (Strict)	Polarization (Loose)	Filed Cases (logged)
Mean	15.35689	-2.548607	8.312538
Standard Deviation	7.527244	18.42889	.6322415
Minimum	9.66608	-41.24016	6.962244
Maximum	83.90929	77.96976	9.677402
Median	14.1257	5.861907	8.371675

	Age of the Agency/Division	Distance: Court-Agency	Total Amici Filed
Mean	52.18868	.3178668	.4921384
Standard Deviation	23.27671	.2008961	.9610517
Minimum	2	.0005802	0
Maximum	98	.8343706	8
Median	45	.3127693	0

Ideological Distance and Agency Filings. Below are the scatterplots that describe the relationship between filings and ideological distance, by agency. The EEOC, Workers’s Compensation, Wage and Hours, and Employment Standards Administration seem to follow the upward quadratic shape, as expected. The DOJ’s Civil Rights division, FTC, and SEC seem to follow opposite. However, there are some agencies where the observations of filing are extremely limited and thus it is hard to truly get a read, even at face value, of the relationship.

Figure 3: Agency Filings in relation to Ideological Distance



Analysis

Main Results

The main analysis is broken down into three models: one for civil rights agencies (the EEOC and the DOJ's Civil Rights Division), one for economic agencies (all other agencies), and one for the combined agencies. In the civil rights model, both distance and squared distance was significant when interacted with agency age. Judicial caseload interacted with age, however, was not significant. The coefficient signs on the ideological distance and ideological distance squared interaction terms are in opposite directions. When interacted with age, squared distance has a negative impact on the probability a filing. When the non-squared distance term is interacted with agency age, it is a positive sign and there is an increase in filing probability. Substantively, as agencies get older, the probability of amicus brief filings increases, at least until a critical point. When the ideological divergence increases to a point at which the agency's chances of persuasion are less than the cost of filing, the likelihood of an agency filing a brief tapers off.

The economic agency model had the same effects and even greater significance in terms of ideological distance and agency age. The greater statistical significance stems from the higher sample size and smaller confidence intervals. It is plausible that if the sample of civil rights agencies was increased, there would be more significance in those results. In economic agencies, however, the magnitude of the marginal effect of ideological distance, both squared and linear, is lower than for civil rights agencies. While the ideological distance at the decreasing level is similar, the effect of ideological distance past the critical point is much smaller.

In the main model, the sign on both ideological distance coefficients interacted with agency age is maintained. Ideological distance at the lower and higher ends results a decreased probability of filing, but there is a higher probability when the ideological distance is moderate. The results from the combined model are the most significant set, but it is still too early to confidently report the effects of ideological distance. The limitations imposed by the data and the small sample size result in extremely large confident

intervals. The coefficient signs and significant imply that ideological distance may have an impact and are encouraging toward future research in this area.

The effect of agency age interacted with the court's workload is only significant in the combined model. The marginal effects of the civil rights model imply that as an agency increases in experience, there is actually an increase in filing probability. The size of the confidence interval increases dramatically, however, at the same point as the probability/age interaction seems to curve into a parabola. Had the confidence intervals been smaller, it would be logical to assume that the results show a quadratic, non-linear, positive relationship between age and filing probability. The increasingly large confidence intervals indicate, though, that this visual relationship could potentially be an artifact of the data. It would be interesting to see if the relationship maintained this shape with the addition of new data, and if so, the theoretical reasons behind it.

The economic agency model has a seemingly normal confidence interval in comparison to the civil rights model. Interestingly enough, the initial effects seem to indicate that age interacted with workload has the opposite effect in economic and civil rights agencies. The results imply that as the judicial workload increases and agency age increases, there is actually a decrease in filing probability. In the context of my theory, this means that as the information advantage of the agency increases, the filing probability actually decreases. The lack of statistical significance and the substantial confidence intervals prevent any real, meaningful results from being derived from the model, but it does hope of future results should the sample size be fine-tuned and increased.

The combined model overall has a pseudo- R^2 of .0719. This means that the model explain very little of the variation in amicus brief filings. The pseudo- R^2 increases, however, when agency type is isolated. For the civil rights model, the pseudo- R^2 increases to .114, and in the economic model, it becomes .0737. This falls in line with expectations. The theory and empirical tests focus on ideology due to data, time, and ability constraints. Ideology can only play so much of a role in these decisions to file, though. Case facts, agency constituencies and resources, the salience issues, case importance, and political context all should impact agency decisions, as well. Ideology plays a part, and

this particular paper can potentially help in determining the large decision to interact with the courts made by agencies. In the end, ideology explains part of the filing decision but only a part, and the pseudo- R^2 reflect this.

For civil rights agencies, the model has more impact, primarily due to ideological distance measures. In the robustness checks included in the appendix, the model run only with additional control and without the age/case interaction returns a similar pseudo- R^2 . For economic agencies, the pseudo- R^2 is actually decreased without the interaction of age and cases filed. The overall model does not experience drastic change when age/filings are dropped. While the models do not explain even a large amount of variance within the dependent variable (as expected) civil rights agencies and economic agencies fall in line with logic. Civil rights, as a more ideological area of the law, is more impacted by the ideological distance between the court and the agency.

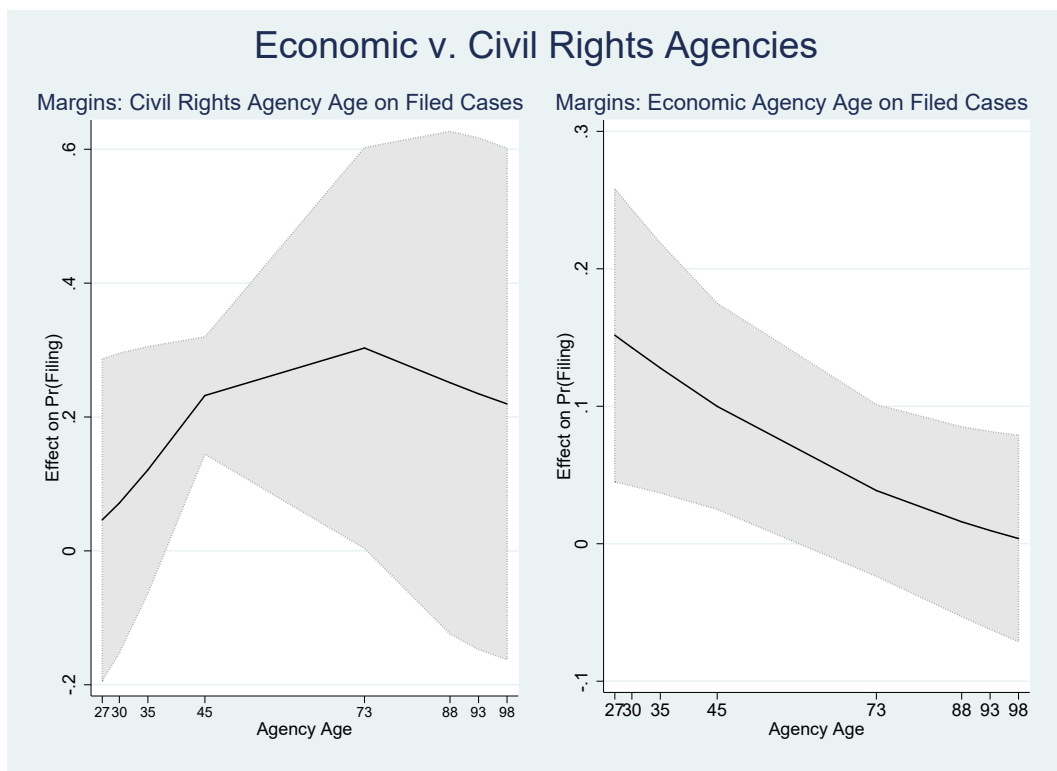
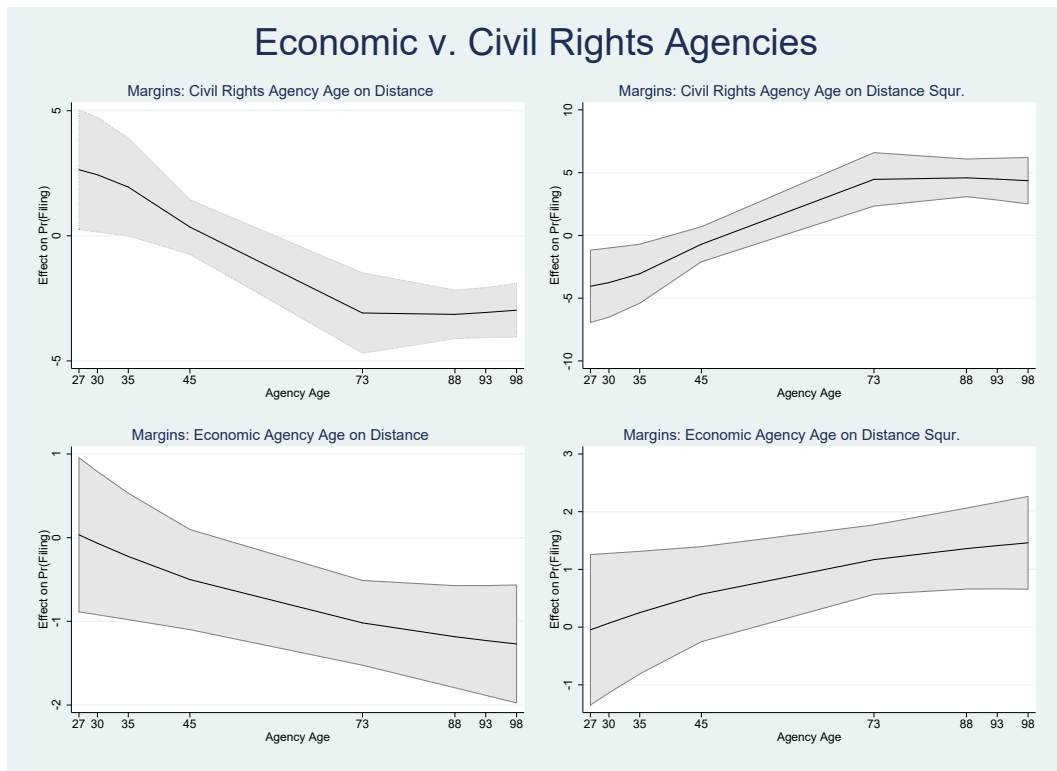
Table 2: Models

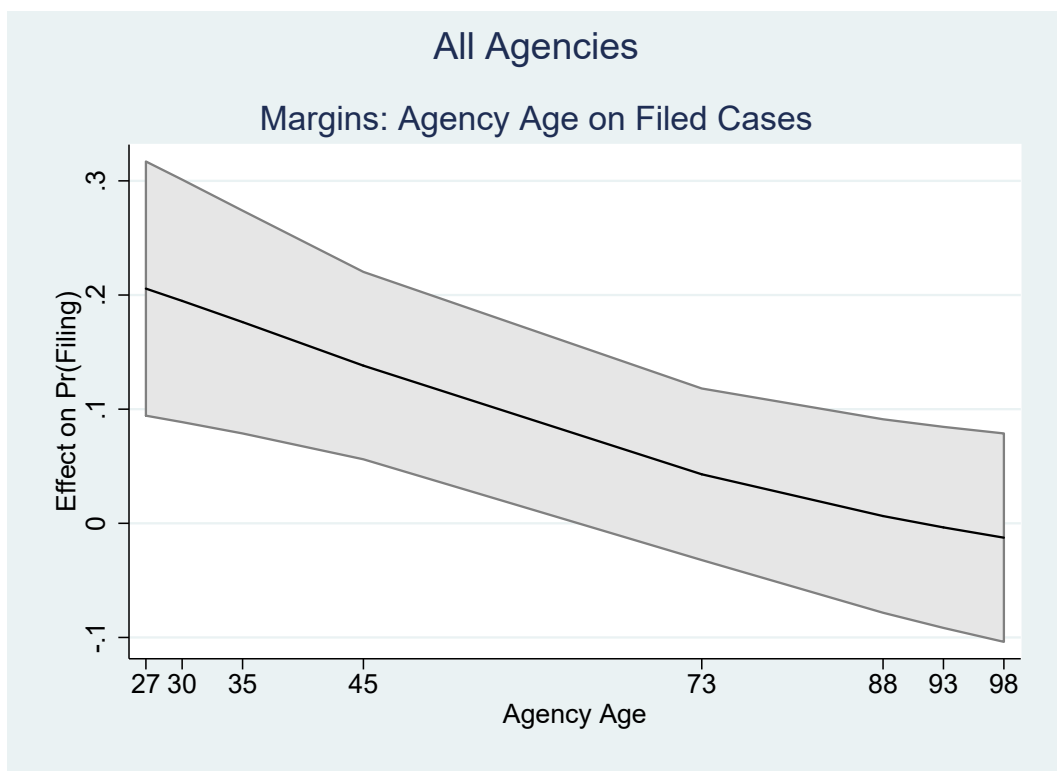
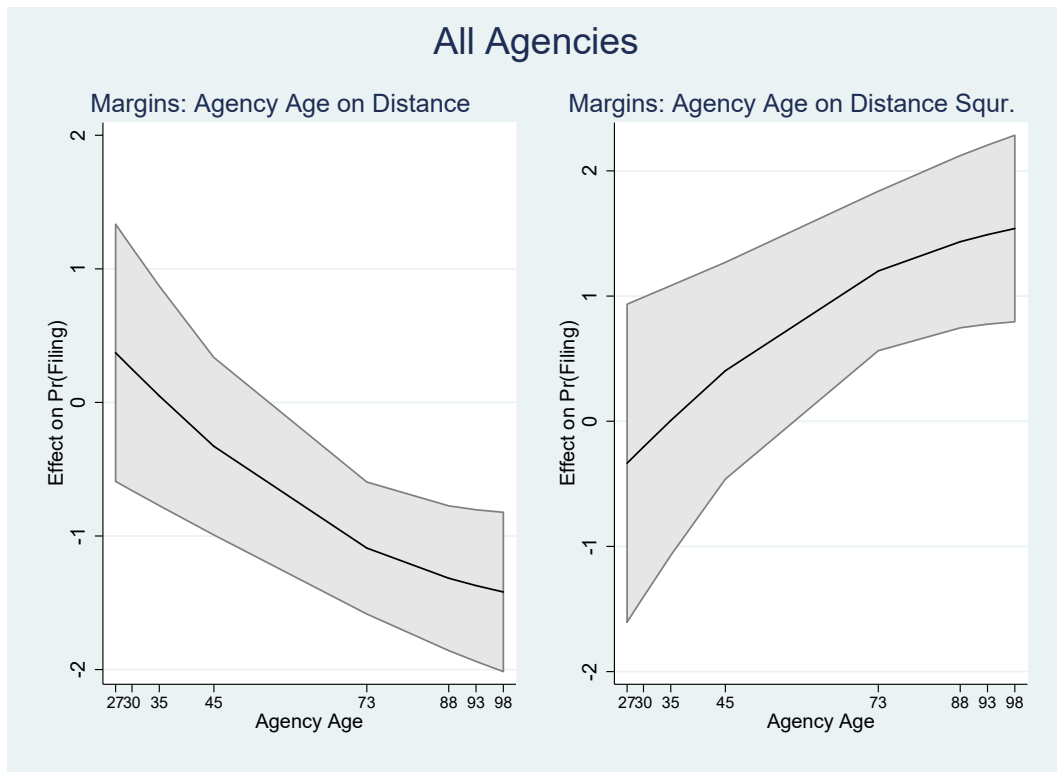
	(1) Civil Rights	(2) Economic	(3) Both
Was a amicus brief filed?			
Agency Age	-0.310 (-0.88)	0.106 (1.70)	0.133* (2.14)
Distance: Court-Agency	42.18* (2.28)	5.219 (1.34)	6.604* (1.98)
Agency Age \times Distance: Court-Agency	-0.900* (-2.26)	-0.186** (-3.13)	-0.182*** (-3.64)
Distance: Court-Agency Sq.	-63.48** (-2.67)	-6.057 (-1.09)	-6.737 (-1.52)
Agency Age \times Distance: Court-Agency Sq.	1.337* (2.57)	0.215** (2.60)	0.193** (2.88)
Filed Cases (logged)	-0.860 (-0.45)	1.135* (2.48)	1.325** (2.94)
Agency Age \times Filed Cases (logged)	0.0435 (1.06)	-0.0112 (-1.52)	-0.0145* (-1.97)
Constant	5.250 (0.32)	-10.94** (-2.87)	-12.18** (-3.22)
Observations	312	804	1272
Pseudo-R2	0.114	0.0737	0.0719

t statistics in parentheses

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Marginal Effects





Limitations, Future Research, and Implications

There are several limitations to the current study. Relying on federal agencies to provide open and complete records regarding amicus brief filings may result in inaccurate

data. Many of the agencies may select specific amici to publicize, especially if the agency in question is particularly constituency-centered. However, accessing court records to verify and gather more information about the agency filings would be both expensive and time-consuming, especially in the circumstance that I have expand the number of agencies within the analysis.

Ideally, a database such as Westlaw, Bloomberg, or PACER could be accessed alongside the agency reports of amici filings in order to verify that the agencies are, in fact, disclosing the true number. This would allow me to look for other bureaucratic agencies and collect data on whether government agencies are “going public” with strategic brief filings. It also solves the problem that agencies are only reporting the amici that they want known. Accessing databases with a more comprehensive list of agency filings would also ease the way in creating a case—by—case amici dataset. By making the unit of analysis the amici itself, the impact of case facts and case salience can be examined. More importantly, if there is overlap in agency amici filings, it would only be visible at the case level. The limited case-by-case dataset that I currently possess shows a few number of cases in which agency filings overlap. While this is a small amount of evidence, it does support the possibility that agencies file in the same cases and potentially in opposite directions. This implies disagreement among the executive branch agencies, and the power balance between those agencies may be a promising and interesting extension of this study.

Expanding the Chen and Johnson (2014) scores to cover more presidential terms and the JCS scores to cover the Federal Circuit and the second dimension of the ideology scores would alleviate some of the concerns regarding ideology measures. However, the more interesting future question is whether agency amicus briefs actually impact judicial decision-making. Research has shown that the Solicitor General is able to influence Supreme Court Justices, though there are limits to such influence (Wohlfarth 2009; McGuire 1998; Bailey et al. 2005; Caldeira and Wright 1990; Black and Owens 2012). It would be interesting to see if the arguments used in agency briefs are different than the arguments presented in appellate and defendant briefs, and if those arguments are

adopted in the opinion. Alternatively, a matching strategy could be adopted on cases within the same circuit—the effect of agency briefs could potentially be teased out from such analysis.

A simpler extension of the paper would be to collect data from a wider range of agencies and years. More variation in the agencies could help solidify any findings regarding the effect of polarization, agency experience and expertise, independence, and ideology on bureaucratic interaction with the court system. This would solve the problem of generalizability that could potentially result the limited number of agencies. The small number of agencies and lack of variation among poses the possibility that any results are only applicable to the agencies examined. However, a potential lack of generalizability does not negate the usefulness of the study.

There has been virtually no research on the courts as a venue of policy change for bureaucratic agencies. While it is widely accepted that both the bureaucracy and the courts can create policy change, studies generally look at internal rulemaking and functions of the bureaucracy as a means of change. There is even less research regarding the Federal Courts of Appeals ability to change policy through interactions with other branches, or how the circuits can be used as a policy-making venue by government entities.

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