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ESSAY

RETOOLING THE AMICUS MACHINE

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INTRODUCTION

THE U.S. Supreme Court's 2015–16 Term may have finished with a diminished number of Justices and a smaller-than-usual docket,¹ but one thing that did not change was the large number of friend of the court, or amicus curiae, briefs filed in some individual cases and for the docket as a whole.² The large number of amicus briefs filed is a continuation of a longer trend. For over twenty years, increasing numbers of amicus briefs have been filed before the Court, at both the certiorari and merits stages. Inevitably, one or more high-profile cases each Term attract an extraordinarily large number of such briefs, but even the lower-

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¹ I of course refer to the death of Justice Antonin Scalia in February 2016. The Court issued only sixty-seven decisions on the merits. Kimberly Strawbridge Robinson, SCOTUS by the Numbers: Odd Votes, New Roles, 84 U.S. L. Wkly. 1938, 1938 (2016).

² For examples of some high-profile cases, see *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (82 amicus briefs filed at merits stage); *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam) (41 amicus briefs filed at merits stage); and *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016) (85 amicus briefs filed at merits stage). For data on these cases and on the Court's docket as a whole, see Anthony J. Franze & R. Reeves Anderson, In Unusual Term, Big Year for Amicus Curiae at the Supreme Court, Nat'l L.J., Sept. 26, 2016 (discussing data from 2011 through 2016 Terms); Adam Feldman, Inferences From Amicus Briefs and How Justice Kennedy Continues to Rule Supreme, Empirical SCOTUS (July 13, 2016), <https://empiricalsctus.com/2016/07/13/inferences-from-amicus-briefs/> [<https://perma.cc/AP52-NGBV>].

profile cases often have a healthy number of briefs filed.³ Amicus briefs have become a ubiquitous presence in the litigation of cases before and the rendering of decisions by the Court,⁴ with frequent references to the briefs in oral arguments and in citations appearing in the Court's decisions.⁵ They are now a familiar feature of the coverage and discussion of the Supreme Court.⁶

For a not-unrepresentative example from the Term, consider *Whole Woman's Health v. Hellerstedt*, where a 5-3 majority held unconstitutional certain restrictions Texas had placed on facilities providing abortions.⁷ The majority opinion by Justice Stephen Breyer observed that in applying the "undue burden" test, the Court would rely "heavily on the District Court's factual findings and the research-based submissions of amici in declaring a portion of the law at issue unconstitutional."⁸ The majority proceeded to do just that, citing and quoting from at least five amicus briefs at some length in the text.⁹ Justice Ruth Bader Ginsburg wrote a brief concurrence which similarly cited and summarized three amicus briefs.¹⁰

³ See Kimberly Strawbridge Robinson, Some Supreme Court 'Friends' Are Better Than Others, 84 U.S. L. Wkly. 1689, 1690 (2016) [hereinafter Robinson, Some Friends] (quoting Adam Feldman that "between 700 and 900 amicus briefs [were filed] in the early years of the Roberts Court," while "1300-1500 briefs [were] filed in the last few years."); Franze & Anderson, *supra* note 2.

⁴ And apparently in lower courts, too; see, for example, Paul M. Collins, Jr. & Wendy L. Martinek, Judges and Friends: The Influence of Amici Curiae on U.S. Court of Appeals Judges, 43 Am. Pol. Res. 255, 257 (2015), though my focus in this Essay will be on the U.S. Supreme Court.

⁵ See *infra* Part I.

⁶ See, e.g., Linda Greenhouse, The Roberts Court's Reality Check, N.Y. Times (June 25, 2015), <http://www.nytimes.com/2015/06/26/opinion/the-roberts-courts-reality-check.html> [https://perma.cc/BV8S-79EF]; Adam Liptak, Study Shows How Much Work It Takes to Be Supreme Court's Friend, N.Y. Times Sidebar (Mar. 7, 2016), <http://www.nytimes.com/2016/03/08/us/politics/study-shows-how-much-work-it-takes-to-be-supreme-courts-friend.html> [https://perma.cc/5XA5-F9M8]; Noah Feldman, The Dark Side of All Those 'Friends' at the Supreme Court, Bloomberg View (Mar. 9, 2016, 9:11 AM), <https://www.bloomberg.com/view/articles/2016-03-09/the-dark-side-of-those-amicus-briefs-at-the-supreme-court> [https://perma.cc/9D6F-HHMM].

⁷ 136 S. Ct. 2292, 2300 (2016).

⁸ *Id.*

⁹ *Id.* at 2312, 2315. The Court also cited an amicus brief of law professors to support its conclusion, earlier in the decision, that the suit was not barred by *res judicata*. *Id.* at 2309.

¹⁰ *Id.* at 2320–21 (Ginsburg, J., concurring). The dissents by Justices Clarence Thomas and Samuel Alito (the latter of which was joined by Chief Justice John Roberts and Justice Thomas) did not cite any amicus briefs.

“Much academic ink has been spilt on the study of amicus curiae in the Supreme Court”¹¹ by law professors and political scientists, exploring the reasons why large numbers of amicus briefs are filed (often by interest groups) and attempting to measure their influence on the Court.¹² In their recent article, Professors Allison Orr Larsen and Neal Devins usefully augment this literature by describing and evaluating what they call “The Amicus Machine.”¹³ Their article adds two important components to the study of the amicus phenomenon. First, they surveyed lawyers who regularly practice before the Court and document that litigants and their attorneys regularly solicit amicus briefs to be filed for their side. Thus, such briefs are not spontaneously filed by individuals and interest groups who might be thought to be coincidentally following the Court, but rather are often the result of an orchestrated campaign by litigants and their agents.¹⁴ Second, they step back and critically evaluate the pros and cons of such briefs for the Court as an institution, and conclude that on balance it is a good thing. Among other things, they contend, the briefs provide useful information to the Court about the importance of cases in which review is sought and aid the Court in deciding cases after certiorari is granted.¹⁵

Larsen and Devins have made an important contribution to the literature on amicus briefs by shedding light on the nonrandom processes that lead to many such briefs being filed in the Supreme Court. They are less convincing, in my view, in their normative and largely positive take on the influence of amicus briefs in general, and orchestrated amicus briefs in particular, on the Court. Like them, I think that the briefs can provide useful information to the Court that for whatever reason the litigants’ own briefs do not, but I find the downside of amicus briefs more problematic. The large number of such briefs, particularly when they are orchestrated, can in some instances influence the Court too much, be det-

¹¹ Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. Rich. L. Rev. 361, 364 (2015).

¹² For a sample of important contributions to the literature on amicus briefs, see, for example, Paul M. Collins, Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (2008) (political scientist); Stephen M. Shapiro et al., *Supreme Court Practice* 749–60 (10th ed. 2013) (Supreme Court practitioners); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743 (2000) (law professors). For a general overview of the literature, see Anderson, *supra* note 11, at 364–65.

¹³ Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L. Rev. 1901 (2016).

¹⁴ *Id.* at 1903–05.

¹⁵ *Id.* at 1906–08.

rimental to the traditional adversarial process, and could also lead some attentive members of the public to conclude that the Court is just another political institution, capable of being lobbied like any other.

This Essay proceeds as follows. Part I summarizes the large number of amicus briefs filed in the Court in the last several decades, their apparent increasing influence on the Justices, and the new research and insights of Larsen and Devins. Part II critically examines the less benign impacts of these briefs generated by the amicus machine, both on and off the Court. Part III suggests several possible ways that the machine might be retooled, such as making it easier for parties to respond to amicus briefs, limiting the numbers of such briefs, permitting the parties to pick such briefs to be filed, and encouraging the Court to modulate deference doctrines when relying on such briefs. Those reforms might allow for the pros identified by Larsen and Devins while limiting the cons.

I. THE POLITICAL ECONOMY OF AMICUS CURIAE BRIEFS

Amicus curiae briefs have been filed in the Supreme Court for many decades, and likewise it has long been recognized that despite the nominal reference to a friend of the *court*, the principal point of almost all such briefs has been to support one of the *parties*.¹⁶ Recent Terms have been characterized by the large and increasing number of such briefs filed at both the certiorari and merits stages. As recently as 1979, only half of the Court's decisions on the merits had at least one amicus brief filed.¹⁷ That percentage steadily rose, and in recent years almost 95% of the cases had at least one (and often many more than that) amicus brief filed.¹⁸ The increase is particularly noticeable given (and perhaps not unrelated to) the Court's steadily diminishing docket over the same period.¹⁹ In past decades, progressive interest groups like the ACLU or the NAACP were prominent in filing amicus briefs. More recently, con-

¹⁶ The classic source documenting the trend is Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 *Yale L.J.* 694 (1963).

¹⁷ See Lee Epstein et al., *The Supreme Court Compendium: Data, Decisions, and Developments* 721 (5th ed. 2012) (providing data from the 1946 to 2001 Terms).

¹⁸ See *id.*; Franze & Anderson, *supra* note 2 (discussing more recent data); Robinson, *Some Friends*, *supra* note 3 (same); Feldman, *supra* note 2 (same).

¹⁹ See Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 *Wm. & Mary L. Rev.* 1219, 1228–29 (2012).

servative groups like the U.S. Chamber of Commerce have frequently filed briefs.²⁰

Of particular note has been the frequent amicus activity of the Solicitor General of the United States (“SG”), and of state attorneys general (“SAG”). Per the Supreme Court’s rules,²¹ the SG and SAGs are the only groups that may file the briefs without the Court’s or the litigants’ permission.²² Since the 1950s the SG has filed briefs in many cases, at both the certiorari and merits stages, including uniquely by invitation of the Court itself.²³ The amicus briefs filed by the SG have come to earn an excellent and by all accounts highly deserved reputation for legal probity and helpfulness. The Court frequently agrees with the SG’s recommendation, usually at the 75% level in any given Term, if not higher.²⁴ In a somewhat parallel fashion, the SAGs have come to enjoy a noticeable presence in amicus briefs, also highly valued by the Court. SAGs often file the briefs in cases involving states and federalism issues, and have found particular, recent success by joining together in large groups that constitute a supermajority of the states.²⁵

Whether and to what extent this amicus activity has had an effect on Supreme Court decision making has been a matter of controversy.²⁶ Some Justices and their clerks suggest that on the whole the briefs are little read and have little effect, with rare exceptions like those filed by

²⁰ Collins, *supra* note 12, at 50–56 (providing analysis of interest groups as amici over several decades); David M. O’Brien, Storm Center: The Supreme Court in American Politics 229–31 (10th ed. 2014) (same).

²¹ Sup. Ct. R. 37.

²² That distinction has come to be without a difference, since with the rarest of exceptions the Court and litigants routinely grant permission for all such briefs to be filed. Shapiro *et al.*, *supra* note 12, at 516–17.

²³ Michael E. Solimine, The Solicitor General Unbound: Amicus Curiae Activism and Deference in the Supreme Court, 45 *Ariz. St. L.J.* 1183, 1186 (2013) [hereinafter Solimine, Solicitor General].

²⁴ See Ryan C. Black & Ryan J. Owens, The Solicitor General and the United States Supreme Court: Executive Branch Influence and Judicial Decisions 24–28 (2012); Solimine, Solicitor General, *supra* note 23, at 1185–94.

²⁵ See generally Margaret H. Lemos & Kevin M. Quinn, Litigating State Interests: Attorneys General as Amici, 90 *N.Y.U. L. Rev.* 1229, 1231–35 (2015) (analyzing partisanship in SAG amicus briefs); Michael E. Solimine, State Amici, Collective Action, and the Development of Federalism Doctrine, 46 *Ga. L. Rev.* 355, 357–62 (2012) [hereinafter Solimine, State Amici] (discussing how much weight the Court should give SAG amicus briefs in various contexts).

²⁶ A.E. Dick Howard, The Changing Face of the Supreme Court, 101 *Va. L. Rev.* 231, 274 (2015).

the SG.²⁷ More recent research, however, undermines this skepticism.²⁸ Subverting the thesis of the modest impact of amicus briefs is not simply based on the apparent success of some amici (again, like the SG) in convincing the Court to reach a particular result. Correlation is not causation, and the causal arrow may run in the other direction; the SG or interest groups may be inclined to file briefs in cases where they predict the Court will rule in what they deem a favorable way. That said, “not all interest groups are equal” when it comes to amicus briefs, and the Court appears to more likely to favor amici that have earned a reputation for submitting briefs of high quality, or groups that collaborate in filing with other groups.²⁹ Individual Justices frequently refer to the arguments of amici in oral arguments, and often cite amicus briefs in their opinions.³⁰ Indeed, Professor Larsen has documented that the Court frequently relies on amicus briefs for supportive facts, referenced in opinions, which are not found in the record.³¹ More than that, political scientists (using plagiarism-detection software) have shown that the Justices often borrow language from amicus briefs, especially from those filed by the SG, SAGs, and such “elite” interest groups like the ACLU and the U.S. Chamber of Commerce.³²

As a general matter, why have so many amicus briefs been filed in recent years? Outside of the Court, it is often said that interest groups have recently engaged in more lobbying (for example, before Congress or the executive branch),³³ and amicus activity may simply be a reflection of

²⁷ *Id.*

²⁸ Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 *Wm. & Mary L. Rev.* 2017, 2066 (2016).

²⁹ Janet M. Box-Steffensmeier, Dino P. Christenson & Matthew P. Hitt, *Quality over Quantity: Amici Influence and Judicial Decision Making*, 107 *Am. Pol. Sci. Rev.* 446, 458 (2013).

³⁰ For examples of references to amicus briefs in oral arguments, see Larsen & Devins, *supra* note 13, at 1954–56. For citation rates, see O’Brien, *supra* note 20, at 230–31.

³¹ Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 *Va. L. Rev.* 1757, 1758–59 (2014) (study of Court decisions from 2008 to 2013 that cited amicus briefs).

³² Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 *Law & Soc’y Rev.* 917, 936–37 (2015). While this study used plagiarism software, it did not attempt to determine how often the borrowed language was or was not accompanied by citations to the briefs. *Id.* at 928 n.5.

³³ See Lawrence Lessig, *Republic, Lost: The Corruption of Equality and the Steps to End It* 104 (2d ed. 2015); Joseph P. Tomain, *Gridlock, Lobbying, and Democracy*, *Wake Forest J.L. & Pol’y* (forthcoming) (manuscript at 10–11) (on file with author); Thomas B. Edsall, *The Lobbying Bonanza*, *N.Y. Times* (June 10, 2015), <http://www.nytimes.com/2015/06/10/opinion/the-lobbying-bonanza> [<https://perma.cc/E6QH-YD9N>].

that.³⁴ Such groups may perceive that Court decisions are particularly consequential, especially in an era of party polarization and relative gridlock in the other branches of the federal government. The relatively smaller docket of the Court may accentuate the perceived importance of the fewer cases that are decided.³⁵ There appear to be synergistic effects between the Court seemingly relying on and citing amicus briefs more often, and interest groups filing those briefs.³⁶ Such groups may also file the briefs to solicit membership and funds, and to justify their existence. The increase may reflect an “arms race” among interest groups.³⁷

In their new article, Larsen and Devins summarize and extend the empirical study of amicus briefs filed in the Supreme Court. They observe that the conventional wisdom was that most amicus briefs were filed in an ad hoc, uncoordinated manner by interest groups and other entities that became aware of a case on the Court’s docket and wanted to press their policy positions before the Court.³⁸ This lobbying was more or less similar to any other lobbying activity by these groups.³⁹ There were only anecdotal accounts of the litigants themselves lobbying interest groups to file amicus briefs in a coordinated way on their behalf.⁴⁰ Larsen and Devins considerably change this picture. Going beyond anecdotal evidence, they interviewed twenty-six lawyers who have collectively argued over 400 cases before the Court, and have written or coordinated the filing of thousands of amicus briefs.⁴¹

³⁴ Cf. Katie Zuber, Udi Summer & Jonathan Parent, *Setting the Agenda of the United States Supreme Court? Organized Interests and the Decision to File an Amicus Curiae Brief at Cert*, 36 *Just. Sys. J.* 119, 130–31 (2015) (finding interest groups are more likely to file amicus briefs at the certiorari stage when the SG has been requested to file an amicus brief, and when the case has received attention in the national media). Amicus briefs are not cheap; some suggest that a typical amicus brief costs about \$50,000. *Id.* at 121.

³⁵ See Owens & Simon, *supra* note 19, at 1228–29.

³⁶ Thomas G. Hansford & Kristen Johnson, *The Supply of Amicus Curiae Briefs in the Market for Information at the U.S. Supreme Court*, 35 *Just. Sys. J.* 362, 363–64 (2014).

³⁷ Howard, *supra* note 26, at 274.

³⁸ Larsen & Devins, *supra* note 13, at 1910–14.

³⁹ *Id.* at 1910–11.

⁴⁰ See, e.g., Kristen E. Eichensehr, *Foreign Sovereigns as Friends of the Court*, 102 *Va. L. Rev.* 289, 304 (2016) (arguing participation by foreign sovereigns as amici “may be the result of recruitment by the parties they support, particularly if such parties are represented by experienced Supreme Court practitioners, who often coordinate amici support for their clients”); Patricia A. Millett, “We’re Your Government and We’re Here to Help”: Obtaining Amicus Support From the Federal Government in Supreme Court Cases, 10 *J. App. Prac. & Process* 209, 222–26 (2009).

⁴¹ Larsen & Devins, *supra* note 13, at 1915.

What accounts for the recent rise⁴² of this amicus machine? The authors point to several factors. One is the rise of an elite Bar, a relatively small group of private lawyers who often argue the smaller number of cases decided each Term by the Court. This smaller, sophisticated group of lawyers has in turn made recruitment of amici a regular part of their practice.⁴³ This is accentuated, as noted before, by the SG and SAGs who separately have regularly appeared as amici. Another factor is “the Court’s new hunger for information outside the record,” with amici helpfully satisfying that hunger.⁴⁴ Finally, the Court “itself embraces the work of the amicus machine,”⁴⁵ since the Court seems to prefer the work of a specialized Bar (for both litigants and amici) that makes it more comfortable in marshaling arguments and facts and “facilitates the declaration of broad legal rules rather than resolving narrow disputes.”⁴⁶

Moving from a descriptive to an evaluative mode, Larsen and Devins argue that the rise of the amicus machine is on balance a good thing. They contend that the machine alters the role of the SG and appropriately dilutes the influence of that office in favor of a larger group of lawyers; assists the Justices (and their clerks) at the certiorari stage by supplying information about the importance and consequential nature (or lack thereof) of cases where review is sought; and helps the Court to take care in pronouncing broad legal principles.⁴⁷ The authors are not oblivious to the potential downsides of the machine. They observe that it is elitist and subject to capture by interest groups, or a specialized Bar.⁴⁸ But on balance they pronounce it a good thing, as it aids the Court to deal rationally with massive amounts of information in deciding what cases to decide, and then deciding (and explaining the rationale for) those cases.⁴⁹

⁴² Larsen and Devins point out earlier cases where there was evidence of amici recruitment by attorneys for the litigants, *id.* at 1904–05 (discussing *Grutter v. Bollinger*, 539 U.S. 306 (2003)), but their main focus is on more recent cases like *King v. Burwell*, 135 S. Ct. 2480 (2015), suggesting that the machine they describe is a relatively recent phenomenon.

⁴³ *Id.* at 1904–05, 1919–31.

⁴⁴ *Id.* at 1906.

⁴⁵ *Id.* at 1907.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1908, 1940–57.

⁴⁸ *Id.* at 1908, 1957–58.

⁴⁹ *Id.* at 1908, 1958–65. The leading treatise for practitioners also approves of the coordination described by Larsen and Devins. After pointing out that the Supreme Court’s rules neither discourage nor require disclosure of the practice, it adds that “[o]ften some form of consultation and communication is both appropriate and essential if the amicus brief is to be

II. THE PROBLEMATIC IMPACT OF THE AMICUS MACHINE

To a degree, evaluating Larsen and Devins's careful embrace of the amicus machine covers well-trod ground. For decades, various observers have defended amicus briefs as providing helpful facts that aid federal judges in making sound decisions, and appropriate democratic input into an unelected branch of government.⁵⁰ In contrast, some critics argue that amicus briefs, especially in large numbers, are inappropriate lobbying tools that improperly undermine the traditional adversarial process.⁵¹ The Justices themselves seem ambivalent, sometimes claiming not to read many of them yet citing them when they seem to be useful.⁵² For example, Chief Justice John Roberts recently remarked that amicus briefs can be "great" if they help the Court understand technological issues, or are devoted to the history of a particular constitutional provision at issue in a case. On the other hand, he continued, such briefs are "less helpful" if they are "me, too," and simply "give you the same legal analysis you get in the party's brief . . . so they can say they won a case when it comes out their way."⁵³

As Larsen and Devins point out, analysis of the proper use by the Court of amicus briefs often begins with an appraisal of the proper role of federal courts in resolving legal controversies.⁵⁴ One contender is the dispute resolution model, which suggests that judges should focus on the resolution of concrete disputes by parties directly affected by the outcome and use traditional arguments and facts assembled by those parties in the record, all to avoid trampling on the prerogatives of the other branches of government. In contrast, the law declaration model posits that federal courts do and should possess the ability to, in the context of

confined, [as Rule 37.1 states], to 'relevant matter not already brought to [the Court's] attention by the parties.'" Shapiro et al., *supra* note 12, at 755 (third alteration in original).

⁵⁰ See, e.g., Anderson, *supra* note 11, at 361–62 (summarizing praise).

⁵¹ See, e.g., *id.* at 365–66 (summarizing criticisms).

⁵² Shapiro et al., *supra* note 12, at 757–58.

⁵³ Chief Justice John Roberts, Remarks at Fourth Circuit Judicial Conference (May 25, 2016), www.c-span.org/video/?409047-2 [<https://perma.cc/46GU-VYFZ>]. In his remarks, Chief Justice Roberts gave as an example of helpful amicus briefs those that explain how to apply the Fourth Amendment to searches of information on iPhones. He was likely alluding to his opinion for the Court in *Riley v. California*, where he cited five amicus briefs. 134 S. Ct. 2473, 2486–90 (2014).

⁵⁴ Larsen & Devins, *supra* note 13, at 1908, 1952–54.

a particular case, announce broad principles of law, and if necessary go outside the strict record prepared by the parties in the case.⁵⁵

To be sure, both models are “stylized and oversimplified” and cannot “capture the full historical or functional complexity of the role of the federal judiciary.”⁵⁶ Larsen and Devins are in my view correct in not finding it necessary to embrace either model, but they are also right in arguing that the Roberts Court’s apparent embrace of the amicus machine is a *de facto* endorsement of the law declaration model (at least on this issue).⁵⁷

Recall that Larsen and Devins are largely not offended by that embrace, and suggest several reasons why on balance it is appropriate for the Court to increasingly rely on the large number of amicus briefs.⁵⁸ They argue that judicial reliance on amicus briefs alters, for the good, the role of the SG as an amicus, aids the Justices (and their clerks) in evaluating large numbers of certiorari petitions, and helps the Court in its law declaration mode.⁵⁹ Their reasons are largely instrumental, to make the Court function better (as they see it) as a judicial institution, as opposed to arguments grounded on political theory, that amicus briefs make federal courts more democratic.

I do not have a deep quarrel with much of their evaluation. Indeed, I particularly agree with their critique of the SG as an amicus. They point out, as many have, the high and deserved reputation of the SG as amicus at both the certiorari and merits stages.⁶⁰ But they argue that many of the

⁵⁵ For overviews and critiques of the models, see Richard H. Fallon, Jr. et al., *Hart & Wechsler’s The Federal Courts and the Federal System* 73–76 (7th ed. 2015); Neal Devins & Saikrishna B. Prakash, *Essay, Reverse Advisory Opinions*, 80 *U. Chi. L. Rev.* 859, 862–63 (2013); Henry Paul Monaghan, *Essay, On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 *Colum. L. Rev.* 665, 665–69 (2012).

⁵⁶ Fallon et al., *supra* note 55, at 75.

⁵⁷ Larsen & Devins, *supra* note 13, at 1953. For similar conclusions, see Anderson, *supra* note 11, at 409–11; Solimine, *Solicitor General*, *supra* note 23, at 1204.

⁵⁸ They are not alone in speaking favorably of the Court’s use of amicus briefs, or even in advocating more use. See, e.g., Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 *Minn. L. Rev.* 1985, 2023–26 (2016) (arguing that the Court should invite organizations representing interests of criminal defendants to file amicus briefs to counter the expertise of the SG); Abbe R. Gluck, *Comment, Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 *Harv. L. Rev.* 62, 101 (2015) (asking whether the Court should give “a heightened role [to] amici” as it is called upon to interpret statutes that are the product of an increasingly complicated and unusual legislative process).

⁵⁹ See *supra* note 47 and accompanying text.

⁶⁰ Larsen & Devins, *supra* note 13, at 1941–42.

practitioners who frequently argue before the Court (and recruit and file amicus briefs themselves) are alumni of the Office of the SG, and have reputational interests to defend. So the Court can be confident in relying on their briefs as much as those filed by the SG.⁶¹ I agree for somewhat different reasons. I too find the SG's amicus briefs to be of high quality and often justifiably relied on by the Court. Where the United States is not a party, but the federal interest is apparent (such as the application of federal statutes that the executive branch also enforces), then the filing of and reliance on SG amicus briefs is appropriate.⁶² But in my view the SG is sometimes *too* influential, and has filed amicus briefs where there is no serious federal (or executive branch) interest to argue for. Where the federal interest is at best attenuated, the SG acting as an amicus is doing little more than making a political statement to the Court on the desirability of a certain result.⁶³ So for these reasons, the dilution of the impact of the SG as amicus, if only at the margins, is a good thing overall.

That said, I wonder if the additional information provided by all amici, touted by Larsen and Devins, is an unalloyed positive. Interestingly, the authors themselves have previously worried about the Court relying

⁶¹ Id. at 1943–44.

⁶² Solimine, Solicitor General, *supra* note 23, at 1198–201.

⁶³ Id. at 1203–08. I have previously argued that for these reasons the SG should not have filed amicus briefs in cases involving state abortion restrictions and state same-sex marriage bans. Id. at 1196–99, 1207–10. In my view, this was true for some recent amicus briefs on those cases by the Obama administration. The putative federal interest, such as it is, can be gleaned from the required “Statement of Interests” section of any amicus brief. Thus, in the same-sex marriage case, the SG’s amicus brief stated little more than that “[t]he United States has a strong interest in the eradication of discrimination on the basis of sexual orientation.” Brief for the United States as Amicus Curiae Supporting Petitioners at 2, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, and 14-574), 2015 WL 1004710, at *2. Similarly, in the abortion case, the SG stated (correctly) that prior SGs had filed amicus briefs in similar cases involving state laws, and that Congress “has enacted laws relating to abortion, and may legislate further in that area.” Brief for the United States as Amicus Curiae Supporting Reversal at 1–2, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274), 2016 WL 67681, at *1–2 (footnote omitted). Keeping in mind that the constitutionality of *state* laws was at issue in these cases, it is very unclear what, precisely, the interest of the federal government or the SG is in the resolution of that question. It is no wonder that such briefs are interpreted as being mere political statements. See Jess Bravin, *Obama Administration Opposes Texas Abortion Restrictions*, Wall St. J.: L. Blog (Jan. 4, 2016, 8:21 PM), <http://www.wsj.com/articles/obama-administration-weighs-in-on-texas-abortion-restrictions-1451956860> [<https://perma.cc/5AYF-PWUT>] (“In a politically charged issue such as abortion, both Republican and Democratic administrations have felt compelled to weigh in, although in opposite directions.”). Interestingly, the SG’s amicus briefs were not cited by any of the opinions in *Obergefell* or *Whole Woman’s Health*.

on amicus briefs for facts outside the record assembled by the parties,⁶⁴ or for other reasons.⁶⁵ They acknowledge their previous reticence in their new article, but suggest that the benefits of the amicus machine, as they see it, can mitigate those concerns.⁶⁶

For several reasons, I am not as confident with that conclusion. First, consider the effect of amicus briefs within the Court. In principle I agree that more information and reasoned arguments is better than less for decision makers, and that the Court can benefit from amicus briefs that supply that information.⁶⁷ This can be particularly true for certain topics where the Court, a tribunal of general jurisdiction, lacks expertise (for example, intellectual property or legal history), or has traditionally deferred to some degree (without abdicating) to the views of the other branches (for example, foreign affairs). The Court itself has acknowledged this in their opinions.⁶⁸ Moreover, it is an overstatement to claim that the Court has been captured by amici. While some amici appear to be more influential than others, the Court overall seems to read (or skim) and evaluate most such briefs with a discerning eye. That is, the Court seems to give more or less weight to amici based on the relative expertise of the attorneys writing the brief;⁶⁹ the composition of a large num-

⁶⁴ Larsen, *supra* note 31, at 1758.

⁶⁵ Devins & Prakash, *supra* note 55, at 885 (arguing that troubling questions are raised by the Court routinely requesting the SG to file amicus briefs giving advice on how the Court should rule on writs of certiorari, and the Court frequently (though not always) following that advice).

⁶⁶ Larsen & Devins, *supra* note 13, at 1944–46.

⁶⁷ See Frederick Schauer, *Our Informationally Disabled Courts*, 143 *Dædalus*, *J. Am. Acad. Arts & Sci.* 105, 105–07 (2014).

⁶⁸ For an example involving both legal history and foreign affairs, see *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015) (“The briefs of the parties and *amici*, which have been of considerable assistance to the Court, give a more complete account of the relevant history . . .”).

⁶⁹ See John Szmer & Martha Humphries Ginn, *Examining the Effects of Information, Attorney Capability, and Amicus Participation on U.S. Supreme Court Decision Making*, 42 *Am. Pol. Res.* 441, 442–43 (2014).

ber of entities that may join in one brief,⁷⁰ or whether the amicus brief is taking a counterintuitive, and thus perhaps a more credible, position.⁷¹

The problem is not one of kind, but of degree. As I have already mentioned, Professor Larsen has demonstrated that the Court's opinions selectively use facts from amici outside the record, and others have shown that the Court frequently borrows language from such briefs. So comfortable are the Justices with amicus briefs that they sometimes openly worry when such briefs *are not* filed.⁷² Maybe they are too comfortable. The Court can be the victim of too much information. At some point the Justices (and no doubt their clerks) are inundated in many cases with so many amicus briefs that they tune out most of the briefs entirely, or rely on reputational signals to pay attention to or credit a few briefs (that is, give particular attention to, say, the SG's amicus briefs). Chief Justice Roberts implied they can easily ignore the "me, too" briefs, but that category may be in the eye of the beholder, and presumably someone (a Justice or a clerk) needs to examine a brief to determine what type it is (helpful or not helpful).⁷³

Next consider the impact of the amicus machine on the public's perception of the Court. Whether and to what extent the Court is or should be a "political" institution has been the subject of innumerable pages of commentary, and is a topic far beyond the scope of this Essay. But it is fair to say, I think, that most observers conclude that the Court (indeed, any court) should so far as is humanly possible not be overtly "political"

⁷⁰ Greg Goelzhauser & Nicole Vouvalis, *Amicus Coalition Heterogeneity and Signaling Credibility in Supreme Court Agenda Setting*, 45 *Publius* 99, 100 (2015) (arguing that the Court is more likely to follow an amicus brief at the certiorari stage that was jointly filed by ideologically different states); Karen Swenson, *Amicus Curiae Briefs and the U.S. Supreme Court: When Liberal and Conservative Groups Support the Same Party*, 37 *Just. Sys. J.* 135, 138 (2016) (arguing that the Court is more likely to follow amicus briefs filed on behalf of both liberal and conservative groups).

⁷¹ Solimine, *State Amici*, *supra* note 25, at 379.

⁷² Consider such recent examples as Justice Elena Kagan asking during one oral argument why a party did not have any amicus briefs filed on its behalf, Transcript of Oral Argument at 53–54, *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686 (2015) (No. 14-116), or Justice Breyer lamenting in a concurring opinion that the SG had not filed an amicus brief in *J. McIntyre Machinery, Ltd. v. Nicaastro*, 564 U.S. 873, 893 (2011) (Breyer, J., concurring in the judgment).

⁷³ Cf. Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, *Me Too? An Investigation of Repetition in U.S. Supreme Court Amicus Briefs*, 97 *Judicature* 228, 234 (2014) (arguing that plagiarism software shows that language in most amicus briefs is not repetitious of language in other information sources, such as lower court opinions, or the briefs of the parties or other amici).

(however you define that term) in its decision making. Most recently, Chief Justice Roberts has argued that it is a mistake to treat the Court as a political institution, like any other.⁷⁴ Even majorities of jaded lawyers in surveys will say that the Court is a legitimate institution, one that is “at least somewhat political and ideological in the manner in which it renders decisions,” but is usually not “activist or as overly influenced by external political actors.”⁷⁵ Perhaps this is a reason that polls usually show the Court has a better reputation and greater legitimacy than the other branches of the federal government.⁷⁶

So far as I know, there are no studies examining whether the increased (or any) number of amicus briefs filed in the Court affects its perception and approval (and legitimacy) by the public in general, or by legal elites in particular. But I wonder and worry, if only to some small degree, that the amicus machine, especially if it sustains its operation and becomes more widely known, would degrade the standing and legitimacy of the Court. If it were widely known that interest groups routinely file many amicus briefs before the Court,⁷⁷ and they seemingly have an impact in (some) cases, it would seem to resemble the sort of lobbying that occurs within the other branches of government.⁷⁸ The Court would then indeed seem to be just another political institution. I imagine many readers of this Essay would find this conclusion entirely unre-

⁷⁴ Robert Barnes, *The Political Wars Damage Public Perception of Supreme Court*, Chief Justice Roberts Says, Wash. Post (Feb. 4, 2016), https://www.washingtonpost.com/politics/courts_law/the-political-wars-damage-public-perception-of-supreme-court-chief-justice-roberts-says/2016/02/04/80e718b6-cb0c-11e5-a7b2-5a2f824b02c9_story.html [<https://perma.cc/D2YY-74F7>]. Lest the reader think that this concern is restricted to Chief Justice Roberts, consider the widespread negative reaction to the comments of Justice Ginsburg, criticizing Donald Trump during the 2016 presidential campaign. Michael D. Shear & Maggie Haberman, *Donald Trump Calls Ruth Bader Ginsburg's Remarks a 'Disgrace to the Court'*, N.Y. Times (July 12, 2016), <http://www.nytimes.com/2016/07/13/us/politics/ruth-bader-ginsburg-donald-trump-criticism.html> [<https://perma.cc/JH8V-Y733>].

⁷⁵ Brandon L. Bartels, Christopher D. Johnston & Alyx Mark, *Lawyers' Perceptions of the U.S. Supreme Court: Is the Court a "Political" Institution?*, 49 *Law & Soc'y Rev.* 761, 789–90 (2015).

⁷⁶ For a summary of the considerable literature on public (that is, non-lawyer) perception of the Court, see *id.* at 761–63.

⁷⁷ Interest groups have not hesitated to tout their amicus filings in the Court on their websites. For examples, see Solimine, *State Amici*, *supra* note 25, at 384 n.132; Zuber *et al.*, *supra* note 34, at 126.

⁷⁸ It is interesting that some lawyers who admit that they assemble amici in support of their clients insist on remaining anonymous. Eichensehr, *supra* note 40, at 304 n.68. Perhaps this is due to their taking part in the arguable violation of anti-lobbying norms for American courts.

markable and might applaud its candor. I am not sure all would, though, and I think (though cannot prove) that sustained, open, and routine lobbying of the Court would sooner or later seriously erode the Court's support and legitimacy both in the public and among legal elites.⁷⁹

III. RETOOLING THE AMICUS MACHINE

Assuming one has at least some concern with the amicus machine what, if anything, should be done about it? Reforming amicus activity in the Supreme Court is also well-trodden ground, and I will summarize some of those ideas and sketch a few of my own. Here the goal is to steer a path between doing nothing and simply banning all or most such briefs.

In previous work, Larsen, focusing on amicus briefs supplying extra-record factual information, has suggested that such briefs be subject to notice and comment requirements.⁸⁰ At least that would to a degree replicate an adversarial proceeding, as compared to the present state where an amicus brief can be filed, with no response, and then relied upon by the Court. Rather than limited to certain categories of briefs, this requirement could apply to *all* amicus briefs. Similarly, the Court could more rigorously enforce requirements that amici disclose their financial backers in their briefs.⁸¹

Another step would be to limit the number of amicus briefs. Again, Larsen has suggested that the parties could be permitted to select a small number of “their” amici, presenting extra-record factual arguments.⁸² Why not extend this to all amicus briefs? Each party (at both the certiorari and merits stages) could be permitted five (or perhaps ten, if five strikes you as too low) amicus briefs to be filed on their behalf. This would prevent the numerous “me, too” briefs from inundating the Court

⁷⁹ In a similar fashion, Professor Devins has previously criticized the Court's practice of calling for the views of the SG via amicus brief, in part because it would be akin to the Court routinely and openly seeking advice from the Chamber of Commerce in business cases or the ACLU in First Amendment cases. Devins & Prakash, *supra* note 55, at 885. Professors Devins and Prakash were focusing on SG amicus briefs requested by the Court, but their concerns are applicable to all amicus briefs, whether requested or not.

⁸⁰ Larsen, *supra* note 31, at 1812–15. For similar proposals, see Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 *Duke L.J.* 1, 68–77 (2011); Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 *Tex. L. Rev.* 1247, 1284–87 (2011).

⁸¹ Anderson, *supra* note 11, at 413.

⁸² Larsen, *supra* note 31, at 1810.

and hijacking the Court's docket for the amici's publicity purposes. (It should go without saying that interest groups and others, excluded by this proposal, could still proclaim their arguments in any manner they wish, outside of litigation.) I would exclude the SG and SAGs from this limit. The Court for decades has excluded them from the need-for-permission requirement, and by and large they have earned the Court's trust by usually filing excellent and helpful briefs.

Finally, the Court could revisit the explicit deference, if any, it gives any amicus brief. The Court has been at best inconsistent in the deference (as revealed by that word or its synonyms in opinions) that it gives to amicus briefs filed by the SG⁸³ or SAGs,⁸⁴ and others. More recently, it seems that the Court has not been explicitly giving deference to any amici as much as in the past, and is treating all amici in opinions on an equal footing (which isn't to gainsay the apparent influence of the large number of amici in general, and the SG in particular). Perhaps this is due to the recent concern of individual Justices, and the Court as a whole, with the deference (if any) due federal agencies on legal issues.⁸⁵ In any event, the Court could confine explicit deference to narrow categories,⁸⁶ or simply not give any deference at all.

⁸³ Solimine, Solicitor General, *supra* note 23, at 1212–14 (giving examples).

⁸⁴ Solimine, State Amici, *supra* note 25, at 359, 367–69, 395 (giving examples).

⁸⁵ See, e.g., *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring) (arguing that the Court should revisit decisions where the Court gives explicit deference to federal agency interpretation of federal statutes or regulations, on the basis that such deference raises separation of powers concerns). For an overview of that debate, see Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 Sup. Ct. Rev. 41, 43. Sometimes the views of a federal agency are revealed in the SG's amicus brief, if the agency is not a party to the suit. Solimine, Solicitor General, *supra* note 23, at 1215–16.

⁸⁶ See Solimine, Solicitor General, *supra* note 23, at 1217–22 (arguing that the Court should only give some deference to SG amicus briefs on foreign relations, and in cases where private parties are seeking to enforce federal law also enforceable by the executive branch). Cf. Eichensehr, *supra* note 40, at 296 (arguing that the Court should give the amici of foreign sovereigns greater weight than the SG on issues of foreign law). While the joining of many SAGs in one amicus brief is an ongoing phenomenon, see *supra* note 25 and accompanying text, I have argued that the Court should only give deference, if at all, to such briefs when they constitute a supermajority of the states, see Solimine, State Amici, *supra* note 25, at 391–93. Somewhat cutting the other way, more recently many such briefs have been characterized by SAGs of the same party joining in one amicus brief, sometimes producing dueling SAG amicus briefs in the same case. See Paul Nolette, *Federalism on Trial: State Attorneys General and National Policymaking in Contemporary America 186–92* (2015). One reaction to this development might be to only give deference (if at all) to amicus briefs joined by significant numbers of SAGs from both political parties. In the 2015–16 Term, a unanimous Court seemed to go out of its way to do so in a high-profile case involv-

CONCLUSION

In their new article, Professors Larsen and Devins add to their prior important contributions to the literature on the increasing filings and apparent influence of amicus curiae briefs in the Supreme Court. Their article documents how the amicus machine is now characterized by the lawyers for many litigants proactively assembling amicus briefs to be filed on their behalf. They provocatively argue that this activity is largely a good thing by providing important information to the Court. In this Essay I have questioned some aspects of their latter conclusion, and instead suggest that the Court limit the large number of filings of such briefs and take greater care in its use of the amicus briefs that are filed. I concede that such restrictions might keep some potentially valuable information and legal arguments from the Court. But that is likely to have a marginal impact since the parties themselves and the remaining amici can provide what is needed. The potential upside of restrictions may dampen the influence of large numbers of amicus briefs, make the Court less politicized, and appropriately refresh the adversarial system.

ing the extent to which federal law defines the bribery of state officials. *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016) (noting that 77 former SAGs filed an amicus brief arguing for a narrow definition of the statute, consisting of “41 Democrats, 35 Republicans and 1 independent”).